BEYOND *BING*: THE *ARTHUR* RULE LIVES ON AS THE TOUCHSTONE FOR THE NEW YORK STATE RIGHT TO COUNSEL

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INTRODUCTION

We are all familiar with the oft-repeated refrain: "You have the right to remain silent . . . . You have the right to an attorney."[1] What many people may not know, however, is exactly how and when these rights apply in the course of a criminal investigation. This unawareness assumes particular significance in a jurisdiction like New York, which provides enhanced construction of criminal suspects' pre-arrest right to

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[1] Commonly understood as the right to remain silent, "*Miranda* rights" actually entail a bundle of rights based on the constitutional protections against self-incrimination and the right to counsel in a criminal proceeding. Miranda v. Arizona, 384 U.S. 436, 467, 470–71 (1966).

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries.

Id. at 444–45. There are some who posit that even when *Miranda* warnings are administered, up to one-third of defendants misunderstand those rights in a way that significantly impacts the voluntary nature of the waiver. Press Release, Am. Psychological Ass'n, Right to Remain Silent Not Understood by Many Suspects (Aug. 5, 2011), http://www.apa.org/news/press/releases/2011/08/remain-silent.aspx ("More than 800 different versions of Miranda warnings are used by police agencies across the United States, and the warnings vary in reading level from second grade to a post-college level . . . . Defendants often assume they know their rights so they don't listen, and the warnings aren't explained well by police . . . . As a result, defendants often wrongly believe their silence *can* be used against them in court." (emphasis added)). Of course, the Supreme Court's recent decision in *Salinas v. Texas*, 133 S. Ct. 2174, 2178 (2013), requiring suspects to verbally declare their desire to remain silent pre-*Miranda* warning in order to prevent their silence from being used against them at trial, is not likely to broaden common understanding of *Miranda* rights.

counsel through its state constitution. Indeed, in light of the New York State Court of Appeals' adamant safeguarding of this right for decades,[2] the New York State Constitution has been widely acknowledged[3] as providing broader right-to-counsel protection than the Federal Constitution.[4] However, certain developments in the case law have clouded New York's right to counsel jurisprudence, leading to inconsistent application and the lack of a reliable, defined standard for both police and attorney behavior.[5]

In New York, three events cause a person's right to counsel to "attach": (1) the commencement of "formal proceedings"[6] against a defendant, (2) the entry of counsel[7] on a criminal matter being investigated, and (3) a criminal suspect's clear and unequivocal request, during a custodial police interrogation, for counsel.[8] The problem with the "entry of counsel" rule is that defining the precise moment at which

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2 *See, e.g.*, People v. Rogers, 397 N.E.2d 709 (N.Y. 1979).

3 Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992) ("New York constitutional law has been enormously supportive of right to counsel claims . . . . The New York Court of Appeals has consistently interpreted the right to counsel under the New York Constitution more broadly than the Supreme Court has interpreted the federal right to counsel. As the Court of Appeals declared, '[s]o valued is the right to counsel in this State, it has developed independent of its Federal counterpart. Thus, we have extended the protections afforded by our State Constitution beyond those of the Federal-well before certain Federal rights were recognized.'" (quoting People v. Settles, 46 N.Y.2d 154, 161 (1978) (citations omitted))); *see also* People v. Harris, 77 N.Y.2d 434, 439 (1991) ("Manifestly, protection of the right to counsel has become a matter of singular concern in New York . . . .").

4 *See Rogers*, 397 N.E.2d 709; *see also* Tara Laterza, Note, *The Sanctity of the Attorney-Client Relationship—Undermined by the Federal Interpretation of the Right to Counsel Supreme Court of New York Appellate Division, Second Department*, 28 TOURO L. REV. 1093, 1093–94 (2012) ("New York's interpretation of the Sixth Amendment right to counsel goes well beyond that of the federal courts.").

5 As Judge Graffeo stated in the majority opinion in *People v. Lopez*, 947 N.E.2d 1155, 1162 (N.Y. 2011), "[t]he path we have taken in right to counsel cases may have been bumpy at times . . . ." Some might deem the phrase "bumpy at times" as a rather generous characterization. *See, e.g.*, Ofer Raban, *The Embarrassing Saga of New York's Derivative Right to Counsel: The Right to Counsel of Defendants Suspected of Two Unrelated Crimes*, 80 ST. JOHN'S L. REV. 389, 389 (2006) ("The story is, at best, one of recurring bungles . . . .").

6 *See, e.g.*, People v. Bing, 558 N.E.2d 1011, 1015 (N.Y. 1990). "Formal Proceedings" is generally defined as the "filing of an accusatory instrument." 33 JOHN A. GEBAUER ET AL., CARMODY-WAIT 2D: NEW YORK PRACTICE WITH FORMS § 184.5 (West 2013); *see also* People v. Grice, 794 N.E.2d 9, 10 (N.Y. 2003); People v. Brown, 847 N.Y.S.2d 729, 731 (App. Div. 2007). Contrary to federal rules, New York State criminal procedure provides that an arrest warrant may not issue until an accusatory instrument has been filed (N.Y. CRIM. PROC. LAW § 120.20 (McKinney 2013)); accordingly, issuance of an arrest warrant by a New York state court will trigger the suspect's right to counsel, as the warrant is an indication that formal proceedings have begun. People v. Harris, 570 N.E.2d 1051, 1054 (N.Y. 1991). Whether an arrest warrant issued by a federal judge without the precondition of an accusatory instrument would trigger the New York state right to counsel for a suspect arrested in New York is not addressed in this Note.

7 *See, e.g.*, *Rogers*, 397 N.E.2d at 710–11.

8 GEBAUER ET AL., *supra* note 6, § 184.5; *see also* People v. Ramos, 780 N.E.2d 506, 511 (N.Y. 2002); *Brown*, 847 N.Y.S.2d at 731.

an attorney sufficiently "enters the proceeding,"[9] to attach the client's right to counsel has proved to be a challenging and nuanced task. In fact, the question of when and whether an attorney has validly entered a case on a client's behalf is one that New York courts have answered inconsistently, sometimes relying on fine factual distinctions over broader legal principles.[10]

One of the key sources of confusion over the "entry of counsel" rule was the New York State Court of Appeals' 1981 creation of a special "derivative right"[11] to counsel in *People v. Bartolomeo*,[12] and its subsequent overruling of *Bartolomeo* and elimination of the derivative right in the 1990 decision *People v. Bing*.[13] Essentially, some New York state lower courts have misread *Bing* as narrowing the right to counsel much more than it actually did.[14] Prior to *Bing*, it had long been accepted that when an attorney communicates with the police on behalf of a suspect in custody, that suspect's right to counsel attaches at the moment of communication.[15] Post-*Bing*, however, some courts retreated from this bright-line rule, in favor of holding that the right to counsel does *not* always attach at the attorney's communication with police.[16] This Note will trace the history of New York's right to counsel rules in order to provide some clarity and guidance regarding the proper view of this right today.

It is undeniably important for citizens to know the exact moment when the right to counsel attaches under New York law. While the average law-abiding New Yorker may want to write off this issue as relevant only to the lives of criminals, it is key to note that in New York, the right to counsel applies even in the investigative phase of police activity[17]—in other words, *before any crime has been formally accused or charged*.[18] Thus, the right to counsel is properly viewed as far-reaching

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9 *Rogers*, 397 N.E.2d at 710 (stating that the right to counsel attaches "once an attorney . . . enter[s] the proceeding").

10 "The subtle distinction between *Pacquette* and the Court's prior decision in *Ramos*, as well as a similarly fine distinction between *Lewie* and *Townsend*, suggest that the Court is willing to limit prior cases to their facts . . . ." John Castellano, *Castellano on* People v. Pacquette*,* People v. Lopez*,* People v. Gibson*, and* People v. Lewie*: The Limits of New York's Indelible Right to Counsel*, 2011 EMERGING ISSUES 5910, Sept. 21, 2011, at *4. For further discussion of *People v. Paquette*, see *infra* Part IV.

11 While the right was created in *People v. Bartolomeo*, 423 N.E.2d 371 (N.Y. 1981), *overruled by Bing*, 558 N.E.2d 1011, it was not specifically termed the "derivative right" until referred to by subsequent cases. *See, e.g.*, *Bing*, 558 N.E.2d at 1017–18.

12 423 N.E.2d 371 (N.Y. 1981). The derivative right will be explained *infra* Part II.D.

13 558 N.E.2d 1011 (N.Y. 1990).

14 *See, e.g.*, People v. Rice, 874 N.Y.S.2d 769 (Sup. Ct. 2009); People v. Taylor, Nos. 1845/2000, 1012/2001, 2002 WL 465094 (N.Y. Sup. Ct. Mar. 20, 2002); People v. Lennon, 662 N.Y.S.2d 821 (App. Div. 1997).

15 *See, e.g.*, People v. Rogers, 397 N.E.2d 709 (N.Y. 1979).

16 *See, e.g.*, *Lennon*, 662 N.Y.S.2d at 823.

17 GEBAUER ET AL., *supra* note 6, § 184:5.

18 *Id.*

and crucial to the lives of every New Yorker, whether a "criminal" or not.[19]

Furthermore, since the vast majority of criminal cases never proceed to the trial phase,[20] pre-trial proceedings like interrogations can significantly impact case dispositions.[21] As such, a person in a custodial police interrogation is making decisions that will bear significantly on his eventual likelihood of conviction, the severity of his potential future sentence, and the leverage he will have in negotiating a more favorable plea agreement.[22] Considering the approximately five million adult felony arrests that took place in New York state in the last decade[23]—and the approximately three million adult misdemeanor arrests[24]—a clear rule on when suspects are afforded the right to counsel is critical to the proper functioning of the New York state criminal justice system and the safeguarding of cherished constitutional rights.[25]

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19 The Court of Appeals has stated this idea most eloquently:

> It cannot be overemphasized that our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence. The constitutional and statutory safeguards provided for one accused of crime are to be applied in all cases. The worst criminal, the most culpable individual, is as much entitled to the benefit of a rule of law as the most blameless member of society. To disregard violation of the rule because there is proof in the record to persuade us of a defendant's guilt would but lead to erosion of the rule and endanger the rights of even those who are innocent.

People v. Donovan, 193 N.E.2d 628, 631 (N.Y. 1963).

20 In 1980, of the 34,966 criminal cases in New York State Supreme and County courts that reached disposition, fewer than 10% proceeded to trial, compared with nearly 75% that were settled by a guilty plea (the remaining 15% were dismissed). NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1980, at 365 (1984), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/sccs80.pdf. As low as this number seems, it is nearly double the national average of 6% of state felony cases that went to trial in the year 2000. UNIV. AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 450, *available at* http://www.albany.edu/sourcebook/pdf/t546.pdf; *see also* Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) ("[N]inety-four percent of state convictions are the result of guilty pleas.").

21 Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." (quoting *Lafler*, 132 S. Ct. at 1376)); *see also* People v. Claudio, 447 N.Y.S.2d 972, 979 (App. Div. 1982) (stating that affording suspects the right to counsel during a custodial interrogation serves the "need to protect suspects from prearraignment and preindictment police abuse"), *aff'd*, 453 N.E.2d 500 (N.Y. 1983).

22 For example, a suspect without counsel who makes a confession during an investigation rather than requesting a lawyer first may have an uphill battle to fight at the later plea-bargaining process, particularly given the prosecutorial discretion in levying charges with widely differing sentences. Richard A. Oppel, Jr., *Sentencing Shift Gives New Clout to Prosecutors*, N.Y. TIMES, Sept. 26, 2011, at A1.

23 N.Y. State Div. of Criminal Justice Servs., *Adult Arrests 2003–2012* http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYorkState.pdf (last updated Mar. 20, 2013).

24 *Id.*

25 To put these arrest numbers in perspective, compare the eight million adults affected by the right to counsel during that ten-year period with the total state population of New York in

This Note will examine several landmark New York State Court of Appeals decisions regarding the right to counsel, explore the underlying motivations for these case holdings, and consider how some lower courts have, in the opinion of the author, misinterpreted the guidelines set forth by the Court of Appeals. The Note will then apply the Court of Appeals' jurisprudential concerns and a close analysis of the cases to suggest that the simple, unifying, bright-line test for the entry of counsel espoused in the 1968 case of *People v. Arthur*[26] continues to be the rule today. Specifically, this Note asserts that in New York State, the right to counsel attaches as soon as an attorney[27] communicates to the police the existence of an attorney-client relationship with a person in police custody.

Part I of this Note will illustrate the inconsistency and confusion caused by the present right to counsel jurisprudence as applied to a hypothetical case. It will then examine the textual underpinnings of New York's right to counsel, drawing a comparison to its federal counterpart in order to glean the intent behind New York's expansively protective rule. Part II will discuss the critical Court of Appeals decisions that have shaped the entry of counsel rules, delineating key practical, social, and ethical concerns that guided the Court's decisions, and how they evolved over time. Part III will propose a reading of the case law that establishes a bright-line rule, and explain how this rule was forged from previous decisions. It will also identify and analyze the root of the confusion displayed in recent decisions. Part IV will address and allay concerns and counter-arguments to the suggested rule, and Part V will briefly recap.

I. BACKGROUND

A. *An Illustrative Example*

Open scene: a suspect, pre-arraignment, is seated in a straight-backed chair in a small, dimly-lit police interrogation room. After providing the suspect with *Miranda* warnings,[28] two persistent police

2010: just over nineteen million. Empire State Development, *2010 Census: Public Law 94-171 Data*, http://www.empire.state.ny.us/NYSDataCenter/Data/Census2010/PL2010Tab3NY.pdf.

26 239 N.E.2d 537 (N.Y. 1968).

27 Per *People v. Grice*, 794 N.E.2d 9, 11–12 (N.Y. 2003), the right also attaches when a business associate of the attorney contacts the police to notify them of the representation. "'[E]ntry' is premised on the actual appearance or communication by an attorney . . . or the attorney's professional associate." *Id.* (citations omitted).

28 For a fascinating critical discussion of the effects of *Miranda* rights on criminal cases, see George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona*: "Embedded" in Our National Culture?*, 29 CRIME & JUST. 203, 203 (2002) ("Two generations of empirical

officers, playing "good cop/bad cop,"[29] alternately engage the suspect in an effort to extract information about a murder. The suspect consistently refuses to answer the officers' questions or sign a waiver of his *Miranda* rights; this goes on for hours. After numerous attempts to gain the suspect's trust, or psychologically browbeat him, one of the officers discovers the suspect's emotional Achilles' heel[30]—his deeply held religious beliefs—and intently exploits that weakness through his questioning. Finally, tears in his eyes, the suspect breaks down and confesses. The suspect is arrested, formally charged, and his confession is proffered as evidence against him at trial.[31]

Considering the overwhelming likelihood that a criminal case will be resolved via a plea agreement rather than a trial,[32] the admissibility of this suspect's confession is going to be crucial to the disposition of his case—especially if there is little to no other evidence against him—as it will serve as a critical bargaining chip in the plea bargaining process.[33]

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scholarship on *Miranda* suggest that the *Miranda* requirements have exerted a negligible effect on the ability of the police to elicit confessions and on the ability of prosecutors to win convictions."). For a more general exploration of *Miranda* and its meaning, see Mark Berger, *Compromise and Continuity:* Miranda *Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007 (1988); *see also* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397 (1999).

29 Also known as "friend and foe," this technique entails one police officer (the "bad cop") acting particularly aggressive towards the suspect, while the other (the "good cop") portrays a gentle sympathizer. The idea is for the "good cop" to gain the suspect's trust and elicit information. *See* CTR. INTELLIGENCE AGENCY, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL, K-10 (1983), *available at* http://www.gwu.edu/%7Ensarchiv/NSAEBB/NSAEBB122/CIA%20Human%20Res%20Exploit%20H0-L17.pdf.

30 "A seemingly small but actually mortal weakness [From Achilles being vulnerable only in the heel]." THE AMERICAN HERITAGE COLLEGE DICTIONARY 11 (3d ed. 1993).

31 While this seems like a scene ripped from just about any standard crime show on television, it is actually a moderately dramatized version of the fact pattern from the Supreme Court case *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010). In that case, Thompkins's conviction was upheld, the Court ruling that his refusal to sign a waiver of his *Miranda* rights did not amount to an invocation of those rights, and that his decision to eventually speak to the police constituted an implied waiver. *Id.* Thompkins confessed after the police gave a version of the "Christian burial speech," a term coined in *Brewer v. Williams*, 430 U.S. 387 (1977). *Thompkins*, 130 S. Ct. at 2257. For a detailed account of the *Williams* case and an examination of the constitutionality of the Christian burial speech as a method of post-*Miranda* warning interrogation, see Phillip E. Johnson, *The Return of the Christian Burial Speech Case*, 32 EMORY L.J. 349 (1983).

32 *See supra* note 20.

33 "Historically, confessions of guilt have been the 'best evidence in the whole world.'" Stephen C. Thaman, Miranda *in Comparative Law*, 45 ST. LOUIS U. L.J. 581, 581 (2001) (quoting SAMUEL KUCHEROV, THE ORGANS OF SOVIET ADMINISTRATION OF JUSTICE: THEIR HISTORY AND OPERATION 610 (1970)). "[T]he confession was proof 'par excellence'[;] '[o]f all the proofs which can be had in criminal cases, the accused's confession is the strongest and most certain . . . . Such a confession is the most complete proof that could be wished for.'" *Id.* at 581 n.3 (quoting ADHEMAR ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE WITH SPECIAL REFERENCE TO FRANCE 262 (1913)); *see also* PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE 9 (2000) ("Confession has for centuries been regarded as the 'queen of proofs' in the law: it is a statement from the lips of the person who

1. Distinguishing New York State and Federal Law

In accordance with the federal right to counsel, a court hearing this defendant's motion to suppress his confession would hold that although the defendant's right to counsel attached when he was given the *Miranda* warnings, he (impliedly) waived that right by making statements to the police subsequent to his receipt of the warnings.[34] The defendant's implied waiver of his right to counsel would be valid, and his confession would be admissible against him at trial.[35]

In a New York state court, the issue is more complicated. This is because under the New York State Constitution, when the right to counsel attaches, it does so "indelibly"[36]—meaning that once the right attaches, a suspect *cannot* effectively waive this right, either impliedly or overtly, outside the presence of an attorney.[37] Any statements made by a suspect to police after his right to counsel has attached, in the absence of a *counseled* waiver, are presumptively involuntary and subject to suppression.[38] Thus, in a New York state court, our hypothetical suspect's confession would be inadmissible, leaving the prosecution to rely on other evidence to meet its burden of proving guilt beyond a reasonable doubt.

However, this is not the end of the story. One of the problems with the New York state right to counsel rule is that the attachment of the right to counsel is a much less concrete event than it seems. The following factual twists on our original scenario will help to exemplify the confusion that stems from the current right to counsel jurisprudence.

2. Under New York State Law, Subtle Facts Lead to Critically Different Outcomes

Resetting the previously posed scene, imagine that a few minutes after the suspect is taken to the police station, the suspect's mother

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should know best."); Talia Fisher & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 CARDOZO L. REV. 871, 872 (2008) ("[T]he confession has justly earned its title 'the queen of evidence.'"); Boaz Sangero, Miranda *is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession*, 28 CARDOZO L. REV. 2791, 2794 (2007) ("[T]he confession has been crowned the 'queen of evidence.'").

34 This is the argument advanced by the government, and adopted by the Court, in *Thompkins*, 130 S. Ct. 2250 (2010).

35 *Id.*

36 People v. Settles, 385 N.E.2d 612, 618 (N.Y. 1978).

37 *Id.* The notion of needing counsel in order to waive counsel can seem circuitous, and will be explained further in Part I.B, *infra*.

38 N.Y. CRIM. PROC. LAW § 60.45(1) (McKinney 2013); *see also* People v. Skinner, 417 N.E.2d 501, 503 (N.Y. 1980); People v. Huntley, 204 N.E.2d 179, 183 (N.Y. 1965).

quickly hires a lawyer to represent him, and asks the lawyer to intervene in the interrogation. The lawyer calls the police, asserts that she represents the suspect, and directs the police not to question her client. Ignoring this request, the police continue the interrogation without informing the suspect of the lawyer's phone call. The suspect confesses as before, tears and all. In this situation, New York State case law would dictate that the suspect's right to counsel was unconstitutionally violated by the police's continued post-call interrogation, despite the fact that the suspect *never personally hired the attorney or asserted that he wanted an attorney present*.[39]

Changing the facts once more, now imagine that when the police pick up the suspect, he is in the New York County courthouse, being arraigned on an unrelated burglary charge. Immediately after the arraignment, the police walk the suspect out of the courthouse to interrogate him about the murder. As they do so, the lawyer represents the suspect on the burglary case tells the client, within earshot of the police officers, not to answer any of their questions. The lawyer then tells the police officers not to question the suspect. The police ignore this request, conduct the interrogation at the stationhouse, and the suspect confesses.

Here, as in the prior scene, an attorney has directly instructed the police not to interrogate a suspect in custody. However, the key factor that will determine whether or not the suspect's right to counsel attached when the attorney spoke to the police on his behalf—and accordingly, whether the suspect's subsequent confession will be admissible—is whether the statements made by the attorney to the police were "on the record" for the burglary arraignment,[40] or were purely a private interaction.[41] The powerful effect of this ostensibly arbitrary factor exemplifies the confused state of affairs surrounding the right to counsel rules today.

Why do these seemingly similar situations yield such disparate results? All involve a suspect subjected to a custodial interrogation and a lawyer attempting to interpose herself between the police and the suspect. And yet, the scenario where the suspect personally hired the lawyer—and potentially relied on the lawyer's statements to the police—

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39 *See, e.g.*, People v. Garofolo, 389 N.E.2d 123 (N.Y. 1979); People v. Pinzon, 377 N.E.2d 721 (N.Y. 1978); People v. Donovan, 193 N.E.2d 628 (N.Y. 1963).

40 "On the record" refers to all statements transcribed by the Court Reporter during the arraignment proceeding, which become part of the case record.

41 *Compare* People v. Pacquette, 950 N.E.2d 489, 494 (N.Y. 2011) ("We have never held that an attorney may unilaterally create an attorney-client relationship in a criminal proceeding in this fashion, and decline to do so now."), *with* People v. Ramos, 357 N.E.2d 955 (N.Y. 1976) (holding that attorney's statement on the record, in open court, directing police not to question his client was sufficient to trigger the right to counsel, despite the lawyer not having actually been retained to represent the defendant on that matter at the time the statement was made).

seems to afford him *less* protection than when the lawyer was hired by someone else and spoke to police without the suspect's knowledge. If one of the goals of the criminal justice system is to create a logical, predictable standard of behavior,[42] these cases do exactly the opposite for both the citizenry and the police. To resolve this conflict, a close reading of the case law and the history of New York's indelible right to counsel is critical; only through careful analysis of the evolution of the law can we begin to glean what expectations the court is—or should be—truly seeking to set. Certainly, no analysis of a constitutional right can begin without delving into the textual foundation of the right, and this Note will proceed accordingly.

B. *Constitutional Foundations*

Because every state in the United States has its own constitution, the protections defined by the Federal Constitution and interpreted by the Supreme Court do not necessarily control the outcomes of state court cases; states may set their own constitutional standards which afford significantly stronger and broader protections than those set out by the Federal Constitution.[43] Accordingly, New York's volume of case law defining the right to counsel operates independently from the federal standards.[44]

According to the New York State Constitution, "[i]n any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel."[45] Compare this with the right to counsel provision of the Federal Constitution: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]."[46] From a strictly textual approach, the two do not appear substantially different; both seem to guarantee that once a person has been formally charged with a crime, he has the right to have an attorney assist in his defense. And yet, notwithstanding their textual similarity, these two provisions have been interpreted to provide notably different levels of protection.[47]

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42 "'[C]larity of . . . command' and 'certainty of . . . application' are crucial in rules that govern law enforcement . . . ." Montejo v. Louisiana, 556 U.S. 778, 785 (2009) (alteration in original) (quoting Minnick v. Mississippi, 498 U.S. 146, 151 (1990)).

43 "Federal constitutional law provides a 'floor' for individual rights that state courts may not go below. It does not provide a 'ceiling' that state courts may not go above." PA. BAR ASS'N, UNDERSTANDING THE FEDERAL AND STATE COURTS (2005), *available at* http://www.pabar.org/pdf/UnderstandingCourts.pdf.

44 *Id.*

45 N.Y. CONST. art. I, § 6.

46 U.S. CONST. amend. VI.

47 *See* Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992).

While the United States Supreme Court has long recognized a federal right to counsel upon the commencement of adversarial proceedings,[48] the Court has been hesitant to expand that right to a pre-adversarial posture, such as a custodial interrogation. Analyzing the Supreme Court's interpretation of the federal right in the seminal case *Moran v. Burbine*,[49] one can see a clear doctrinal difference between the New York state and federal rights to counsel.[50]

The question before the Supreme Court in *Burbine* was whether the failure to inform a suspect in custody about a phone call from an attorney claiming to represent him violated the suspect's right to counsel under the Federal Constitution. The defendant, Burbine, argued that the police interference with his attorney's communications rendered his later *Miranda* waivers invalid, because they were not fully "knowing[] and intelligent[]."[51] The Court ruled against Burbine, holding that the waivers were valid and his confessions were admissible.[52] The Court found that the failure of the police to inform Burbine about his lawyer's phone call had no logical bearing on his subsequent decision to waive, because had no phone call occurred, Burbine would clearly have been found to have validly waived his rights.[53] Thus, the Court reasoned, the possible existence of the

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48 Eugene L. Shapiro, *Waiver of a State Constitutional Right to Counsel During Post-Attachment Interrogation*, 30 VAL. U. L. REV. 581, 583 (1996) ("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.'" (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984))).

49 475 U.S. 412 (1986). In *Burbine*, the defendant, Burbine, had been arrested on a breaking and entering charge. While in police custody for the break-in, the police discovered that he was also wanted in connection with a homicide. In the meantime, unbeknownst to Burbine, his sister had hired a lawyer to represent him on the break-in; she was not aware of the budding homicide investigation. A work associate of the defense attorney then called the police and informed them that the attorney represented Burbine and that she wanted to be present for any questioning or line-up activity; police informed her that Burbine would not be questioned until the next day. The police never informed the attorney or her associate about the homicide investigation, though the attorney's associate also never specified that her representation was limited to the break-in charge. Less than an hour after the attorney's phone call, the police read Burbine his *Miranda* warnings, which he waived, and questioned him about the murder. Burbine ended up writing three confessions, each preceded by a written *Miranda* waiver. *Id.* at 416–18. Burbine challenged the admissibility of the waivers, asserting that the police's failure to tell him of the attorney's phone call violated his right to counsel. *Id.* at 428–29.

50 Of course, the Fifth Amendment to the Federal Constitution also provides that a suspect may invoke his right against self-incrimination by unequivocally requesting an attorney; however, this Note examines the difference between the state and federal rights to counsel when the suspect takes no such action.

51 *Id.* at 421. Essentially, his argument was that had he known about the attorney's attempt to enter the case, he would not have spoken to the police without her present. *Id.*

52 *Id.* at 413.

53 "No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Id.* at 422.

attorney's phone call was not a dispositive factor in Burbine's decision to waive.

This careful cabining of the federal right to counsel[54] is not just out of step with the New York judiciary's treatment of the parallel state constitutional right; it is antithetical to it. In cases almost identical to *Burbine*, the Court of Appeals has reached the opposite conclusion, refusing to require a positive assertion of the right to counsel by the defendant, holding instead that incommunicado interrogation of a suspect after his attorney's phone call is a constitutional violation.[55]

Curiously, since the New York State Constitution grants the right to counsel "[i]n any trial,"[56] while the Federal Constitution uses the broader category of "criminal prosecution[],"[57] the New York right to counsel, on its face, seems *narrower* than its federal counterpart, guaranteeing the right only upon the commencement of the trial phase. However, the Court of Appeals has interpreted the New York State Constitution to grant the right to counsel not only at trial, but even as early as pre-indictment proceedings (under certain circumstances).[58] Furthermore, once the right to counsel attaches in New York, it "indelibly attache[s] to the extent that it can *only be waived in the presence of a lawyer*."[59] Clearly, then, there is a missing step between the bare textual guarantee of counsel at trial, and the judicially recognized *indelible* right to counsel pre-trial. If not derived from the text of the state constitution, and clearly not influenced by the federal constitutional readings, from where does this expanded right derive?

One explanation is that New York's pre-trial indelible right to counsel is not based on the constitutional right to counsel language alone; rather, it is created by reading the right to counsel in conjunction with the right against self-incrimination[60] and the guarantee of due process.[61] In essence, the principle is that by requiring a counseled

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54 *See, e.g.*, Berghuis v. Thompkins, 130 S. Ct. 2250 (2010).

55 *See, e.g.*, People v. Garofolo, 389 N.E.2d 123 (N.Y. 1979); People v. Pinzon, 377 N.E.2d 721 (N.Y. 1978).

56 N.Y. CONST. art. I, § 6.

57 U.S. CONST. amend. VI.

58 *See, e.g.*, People v. Ramos, 780 N.E.2d 506 (N.Y. 2002); People v. Rogers, 397 N.E.2d 709 (N.Y. 1979).

59 People v. Settles, 385 N.E.2d 612, 618 (N.Y. 1978) (emphasis added); *cf.* Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (under the Federal Constitution, "[t]he defendant may waive the right [to counsel] whether or not he is already represented by counsel; the decision to waive need not itself be counseled." (citing Michigan v. Harvey, 494 U. S. 344, 352–53 (1990))).

60 N.Y. CONST. art. I, § 6 ("nor shall he or she be compelled in any criminal case to be a witness against himself or herself").

61 *Id.* ("No person shall be deprived of life, liberty or property without due process of law."); *see also* People v. Hobson, 348 N.E.2d 894, 897 (N.Y. 1976) (the indelible right to counsel once an attorney "enters the proceeding" is "a rule grounded in this State's constitutional and statutory guarantees of the privilege against self incrimination, the right to the assistance of counsel, and due process of law"); People v. Donovan, 193 N.E.2d 628, 629 (N.Y. 1963) ("[T]his

waiver of even the right to counsel itself, the state ensures that a citizen's waiver of his whole bundle of constitutional rights is both knowing and voluntary.[62] Such a reading results not from a single declarative statement by the state constitutional founders, but rather, from the gradual evolution of judicial decisions. For a fuller understanding of New York's uniquely protective right to counsel, then, it is critical to analyze the development of the state's conception of this right through the case history.

II. (NOT SO) STEADY AS WE GO: THE JUDICIAL EVOLUTION OF THE RIGHT TO COUNSEL

A. People v. Donovan*: The Right to Counsel Applies in Pre-Indictment Proceedings*

In *People v. Donovan*,[63] one of the earliest significant decisions addressing the right to counsel, the New York State Court of Appeals held that a suspect's right to counsel may attach even before a formal instrument has been filed against him.[64] The philosophical foundation for this decision is that, although the state constitution only explicitly requires access to an attorney at *trial*, the realities of the criminal justice system and the impact that pre-trial proceedings have on case outcomes[65] direct that, for the right to counsel at trial to have any real

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State's constitutional and statutory provisions pertaining to the privilege against self incrimination and the right to counsel . . . , not to mention our own guarantee of due process . . . , require the exclusion of a confession taken from a defendant, during a period of detention, after his attorney had requested and been denied access to him." (citations omitted)).

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> 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.

Hobson, 348 N.E.2d at 898 (citations omitted). Requiring counsel to waive one's rights may help to protect against potential misunderstanding or misinterpretation of those rights, a phenomenon that some believe is more prevalent than would be expected. *See* Press Release, Am. Psychological Ass'n, *supra* note 1.

63 193 N.E.2d 628 (N.Y. 1963). This decision was three years prior to the Supreme Court's ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966).

64 "[O]ne of the most important protections which counsel can confer while his client is being detained by the authorities is to preserve his client's privilege against self incrimination and prevent the deprivation of that and other rights which may ensue from such detention." *Donovan*, 193 N.E.2d at 629.

65 Though this decision was written in 1963, the concerns it laid out are impressively prescient about current state of affairs. *See supra* Introduction.

meaning, counsel may need to be afforded at an earlier stage—here, a pre-indictment investigative interrogation.[66]

In *Donovan*, the defendant was taken into police custody as part of a homicide investigation.[67] At the time of the interrogation, Donovan had neither been indicted nor arraigned for any crime.[68] When Donovan's family members heard about the interrogation, they hired a lawyer to represent him. The lawyer then went to the police station asserting an attorney-client relationship with Donovan, and asking to speak with him. The police denied the attorney access and refused even to tell Donovan about his attempted contact.[69] The Court of Appeals held that, despite Donovan's failure to request or hire the attorney himself, his state constitutional right to counsel was violated by the police's continued incommunicado interrogation after the attorney (hired by his family) had requested to see him.[70]

The *Donovan* court aptly identified the key competing interests that would remain in tension throughout the subsequent right to counsel cases: the need to protect citizens from the coercive power of the state, and the need to support effective mechanisms for law enforcement and public safety.[71] In *Donovan*, the scales tipped towards the former concern, but that would later prove not always to be the case.[72]

One important consideration raised by the *Donovan* decision is whether police activity, irrespective of the defendant's acts, may have a bearing on whether and when the defendant's right to counsel attaches. In *Donovan*, the defendant made no affirmative indication that he wanted counsel present; he did not hire the lawyer himself, nor did he request counsel during the interrogation.[73] It was Donovan's family who hired the attorney, and the attorney contacted the police without

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66 "The need for a lawyer is surely as great [during investigatory stages] as at any other time; . . . 'The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination.'" *Donovan*, 193 N.E.2d at 630 (quoting *In re* Groban, 352 U.S. 330, 344 (Black, J., dissenting)).

67 *Id.* at 628–29.

68 *Id.* at 630.

69 *Id.* at 629.

70 *Id.* at 630 ("[H]ere we condemn continued incommunicado interrogation of an accused after he or the lawyer retained by him or his family has requested that they be allowed to confer together.").

71 "We are thus again confronted with the problem of achieving 'a balance between the competing interests of society in the protection of cherished individual rights . . . and in effective law enforcement and investigation of crime'." *Id.* at 628 (alteration in original) (quoting People v. Waterman, 175 N.E.2d 445, 447 (N.Y. 1961)). Certainly, these two concerns are coextensive to the point that they both entail safeguarding the people as an overarching goal. It might be more precise to consider these as competing values in the methodology of keeping the public safe, rather than mutually exclusive or diametrically opposed imperatives.

72 *See* People v. Bing, 558 N.E.2d 1011 (N.Y. 1990).

73 *Donovan*, 193 N.E.2d at 635 (Van Voorhis, J., dissenting).

Donovan's knowledge.[74] Yet, in spite of Donovan's passivity, the court held that by denying the attorney access to Donovan, the police had violated Donovan's rights.[75] Since the right to counsel does *not* attach simply at the instigation of all custodial interrogations,[76] it is crucial to pinpoint the precise moment when the right attached in *Donovan*.

Logically, the police cannot violate a right unless it has already attached. Since the denial of access in *Donovan* can only be meaningful once the right to counsel is taken for granted, it must be inferred that the right to counsel attached either at the moment of the attorney's request to confer with the defendant, or at the moment when Donovan's family hired the attorney. While not explicitly laid out by the *Donovan* court, common sense (and subsequent case law) dictates that the only reasonable option is that the right to counsel attached at the moment of the attorney's communication to the police.[77]

B. People v. Arthur*: An Attorney Does Not Need to Be Hired Specifically by the Defendant in Order for an Attorney-Client Relationship to Exist*

The next significant expansion of the right to counsel came in 1968, when the Court of Appeals decided *People v. Arthur*.[78] *Arthur* took the *Donovan* rule one step further by proclaiming that communication of representation by an attorney to the police serves to attach a suspect's right to counsel even when there are arguable ambiguities in the nature of the attorney retainer.[79] In doing so, the court emphasized its dedication to cautiously safeguarding the "fundamental constitutional right" to counsel.[80] When faced with the competing societal interests of individual rights and effective policing, the court in *Arthur* ruled in favor of stronger defendant protections over wider leeway for police investigations.

In *Arthur*, the defendant had been brought to the police precinct for questioning about an incident where he allegedly dropped or threw

74 *Id.* at 629 (majority opinion).

75 "[W]e condemn continued incommunicado interrogation of an accused after he or the lawyer retained by him or his family has requested that they be allowed to confer together." *Id.* at 630.

76 GEBAUER ET AL., *supra* note 6, § 184:5.

77 Indeed, to hold that Donovan's right to counsel attached at the moment that his family hired the attorney, *before* the attorney communicated with the police, would make the police responsible for respecting an attorney-client relationship they could not possibly have known existed. This would be an untenable and unreasonable rule. *See infra* Parts II.E, III.B.1, discussing the unworkable nature of applying the right to counsel where police have no reasonable notice of representation.

78 239 N.E.2d 537 (N.Y. 1968).

79 *Id.* at 539.

80 *Id.*

his infant son into the Genesee River.[81] A friend of Arthur's—a lawyer who had represented him on matters in the past—heard about Arthur's arrest on the evening news, and decided to head down to the police station to check on him.[82] At the station, the friend "identified himself [to the police] as an attorney representing the defendant"[83] and asked to speak with Arthur.[84] The police officer told the attorney that they were just wrapping up some questioning, and that he could talk to Arthur when they were done.[85] Meanwhile, in the interrogation room, Arthur was making inculpatory statements to the police.[86] After the lawyer was finally allowed contact with Arthur, he noted that Arthur seemed intoxicated and incoherent, so he told the police officers not to question Arthur any further.[87] The police complied, and sent Arthur home for the night.[88] The next day, without contacting Arthur's attorney, the police picked up Arthur for another interrogation, where he made more self-incriminating statements.[89] At trial, both the statements made at the station while the lawyer was waiting to see Arthur and the statements of the following morning were admitted into evidence. Arthur was found guilty of attempted murder in the second degree.[90]

At the suppression hearing and on appeal, one of the prosecution's primary arguments was that Arthur's right to counsel had not attached at the time he made the first stationhouse confession, because when the lawyer told the police that there was an attorney-client relationship, he had not actually been hired by anyone yet.[91] As such, the prosecution claimed, the police's continued interrogation after the lawyer requested to see Arthur did not entail a right to counsel violation like the one found in *Donovan*.[92] In fact, the lawyer's plain acknowledgment, on the record, that he went down to the police station on his own accord and had not been retained by the defendant or anyone else, seemed to support this position.[93]

Despite these arguments, the Court of Appeals held explicitly that Arthur's right to counsel attached upon direct communication from the attorney to the police proclaiming an attorney-client relationship,

81 *Id.* at 537.
82 *Id.* at 538.
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.* at 537–38.
87 *Id.* at 538.
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.* at 538–39.
93 *Id.* at 538 ("Mr. Stern testified that he had not been asked by anyone to go to Police Headquarters and that he went there on his own because he felt he had an obligation to the defendant.").

regardless of the technicalities of the hiring or even the absence altogether of a formal retainer.[94] Because the attorney in this case went to the police—irrespective of his reason—and proclaimed himself to be Arthur's lawyer, Arthur's right to counsel attached at that moment, and the continued interrogation after that point was a constitutional violation per the *Donovan* rule.[95]

In addition, the court even went so far as to hold Arthur's statements made to the police the next day inadmissible, despite defense counsel's failure to move to suppress those specific statements.[96] In so doing, the court expounded upon the importance of protecting defendants' constitutional rights over the limits of procedural formalities.[97] This willingness to suppress a statement absent a suppression motion by the defense attorney exemplifies the extent to which the Court of Appeals was willing to preserve the right to counsel and apply the proper exclusionary sanctions when that right is violated.[98] While *Arthur* may appear to be an extreme case, this is precisely what makes it a perfect example of the vehemence with which the Court of Appeals has continually defended a criminal suspect's right to counsel.

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94 The court emphatically and unequivocally laid out the rule which this Note argues is still good law, and must be acknowledged as the "entry of counsel" rule to date:

> [A] defendant's right to counsel is not dependent upon "mechanical" and "arbitrary" requirements. . . . [O]nce the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the accused's right to counsel attaches; and this right is not dependent upon the existence of a formal retainer. . . . Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, *in the presence of the attorney*, of the defendant's right to counsel. There is no requirement that the attorney or the defendant request the police to respect this right of the defendant.

Id. at 539 (emphasis added) (citations omitted).

95 *Id.* at 538–39.

96 *Id.* at 539.

97 *Id.*

98 It is worth noting that in the *Arthur* decision, the Court of Appeals essentially acknowledged that Arthur was guilty of the crime, stating matter-of-factly that "[a]t approximately 5:30 P.M. on July 24, 1963, the defendant, while walking across the Clarissa Street Bridge in the City of Rochester, either dropped or threw his two-year-old son into the Genesee River." *Id.* at 537. This less-than-subtle acknowledgment of the horrific acts of the defendant serves to underscore the extent and power of constitutional protections provided by the New York State Constitution. If ever there were a case to subtly push back or pin down the limits of the right to counsel, surely this would be it. And yet, even with a defendant acknowledged as guilty, of an abhorrent act, with a lawyer who stated in open court that he had not been formally retained, the court stood firm in its stance that notice of representation from the lawyer to the police—absent anything further—is sufficient to trigger the right to counsel. As will be discussed in Part III, *infra*, the entry of counsel trigger outlined in *Arthur* has never been overruled.

C. People v. Rogers*: Police May Not Interrogate a Represented Suspect in Custody, Regarding Any Matter, Once His Attorney Has Instructed the Police Not to Question the Suspect*

The trend of right to counsel expansions initiated by *Donovon* and furthered by *Arthur* continued with the 1979 case of *People v. Rogers*.[99] Prior to *Rogers*, New York courts had generally held that if a defendant was represented by counsel on one matter, the police could still question the defendant on unrelated matters in the absence of his attorney.[100] *Rogers* turned that rule around, holding that the police may not exploit custody over a defendant in order to interrogate him on any matter in the absence of counsel, even if the police or district attorney believed that the matter was entirely unrelated to the represented charge.[101] (Some speculate that the *Rogers* holding laid the foundation[102] for what would later become the highly divisive and problematic[103] "derivative right" to counsel, discussed *infra*).

In *Rogers*, the defendant was in police custody after having been arrested for a robbery, for which he retained a lawyer.[104] Two hours after the arrest, Rogers's lawyer called the police station and instructed the police not to question his client.[105] The police agreed, but then proceeded to interrogate Rogers on matters unrelated to the robbery for nearly four hours, throughout which Rogers remained in handcuffs.[106] Eventually, Rogers made an inculpatory statement regarding the robbery.[107]

The issue in *Rogers* was whether the police violated Rogers's right to counsel in continuing to question him after his attorney had directed them not to, albeit on matters irrelevant to the robbery.[108] The court

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99 397 N.E.2d 709 (N.Y. 1979).

100 *Id.* at 712.

101 *Id.* at 710–11.

102 Judge Kaye, in her dissent in *People v. Bing*, characterized the derivative right as "an outgrowth and application of th[e *Rogers*] principles." People v. Bing, 558 N.E.2d 1011, 1025 (N.Y. 1990) (Kaye, J., dissenting).

103 The *Bing* court noted:

> [The derivative right]'s effect on our jurisprudence is . . . troublesome. Even now, after nine years, the Judges considering these cases are sharply divided not merely about how to apply the [] rule but about the more fundamental question of whether the facts presented are even encompassed within it. . . . Manifestly, our many decisions in this area have failed to achieve the efficiency, consistency and uniformity in the application of the law which the doctrine of stare decisis seeks to promote.

Id. at 1021 (majority opinion).

104 People v. Rogers, 397 N.E.2d 709 (N.Y. 1979).

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

discussed the real-world impracticability of the preexisting rule allowing questioning on "unrelated matters," given the difficulty in determining exactly what matters are "unrelated" to the charge for which the defendant has representation.[109] Further, the court questioned the advisability of essentially allowing the police to decide what is "related" to the represented charge for the purposes of investigation;[110] the court felt this was a determination better made by the defendant's lawyer.[111] This decision echoes the practical and ethical concerns of those that came before it, with the court exhibiting a healthy skepticism regarding methods of police investigation and a preference for securing defendants' rights. The *Rogers* court thus set out that, when a defendant is in police custody for a matter on which he has counsel, the police may not question him regarding any matter in the absence of counsel;[112] to do so will result in a violation of the client's constitutional rights and suppression of any statements made in the absence of counsel.

It is important to note that in *Rogers*, at the time the defendant made the inculpatory statements, he was in police custody specifically for the matter on which he had representation. As such, the police interrogation on other matters was seen as a form of police exploitation of their lawful custody of him to extract information about a separate incident,[113] as well as a manifestation of their disregard for the attorney-client relationship.[114] This is a key distinction from the derivative right cases that followed, where defendants in custodial interrogation for new matters, who happened to have had representation in an ongoing, unrelated case at that time, invoked the *Rogers* protection against unrelated-matter interrogations.[115]

D. People v. Bartolomeo*: The Birth of the "Derivative Right" to Counsel and the Height of the Right to Counsel Expansions*

While there are numerous cases that refined and expanded the *Arthur-Donovan* and *Rogers* lines of cases,[116] the most dramatic

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109 *Id.* at 712 ("[I]t has been difficult to define the precise reach of the limitation concerning unrelated charges.").

110 *Id.* at 712–14.

111 *Id.*

112 "We may not blithely override the importance of the attorney's entry by permitting interrogation of an accused with respect to matters which some may perceive to be unrelated." *Id.* at 711.

113 People v. Bing, 558 N.E.2d 1011, 1016 (N.Y. 1990).

114 *Rogers*, 397 N.E.2d at 711.

115 *See, e.g.*, People v. Bartolomeo, 423 N.E.2d 371 (N.Y. 1981), *overruled by Bing*, 558 N.E.2d 1011.

116 *See, e.g.*, People v. Davis, 553 N.E.2d 1008 (N.Y. 1990); People v. Samuels, 400 N.E.2d 1344 (N.Y. 1980); People v. Ramos, 357 N.E.2d 955 (N.Y. 1976); People v. Hobson, 348 N.E.2d 894 (N.Y. 1976).

expansion of the right to counsel came with the creation of the "derivative right" to counsel in *People v. Bartolomeo*.[117] Essentially, *Bartolomeo* held that a person's representation on any open criminal matter indelibly attached his right to counsel on any *new* investigations, whether related to the prior represented charge or not.[118] Hence the moniker "derivative right": The right to counsel on the new charge is purely *derived from* the existence of a prior representation.[119] It is for this reason that some have identified the derivative right as creating a "fictional"[120] attorney-client relationship on the new charge.

In *Bartolomeo*, the defendant was arraigned on an arson charge, for which he hired a lawyer.[121] He was released and, nine days later, apprehended by the same police department in connection with a murder entirely unrelated to the activities surrounding the arson.[122] Throughout the murder interrogation, Bartolomeo never mentioned that he had a lawyer on the arson charge, nor did he request the presence of his counsel; in fact, he told the police that he did not want an attorney and would speak with them freely.[123] The police then placed Bartolomeo under arrest, and he confessed to the murder.[124] About forty-five minutes after the interrogation began, Bartolomeo's attorney from the arson charge called the police station claiming to represent Bartolomeo and demanding that the police stop questioning his client; the police complied, but the statements made prior to the attorney's phone call were admitted against Bartolomeo at trial, and he was found guilty.[125]

On appeal, the Court of Appeals held that Bartolomeo's statements should have been suppressed.[126] Extrapolating the *Rogers* rule, the court stated that police awareness that a suspect had hired an attorney, albeit on a "separate, unrelated charge,"[127] prohibits interrogation on a new charge in the absence of that attorney—even though the suspect was brought into custody on the new charge, not the represented one.[128] The reasoning behind this rule was that if the police have knowledge that a defendant has chosen to interpose an attorney between himself and the

117 423 N.E.2d 371, *overruled by Bing*, 558 N.E.2d 1011.

118 *Id.*

119 *Bing*, 558 N.E.2d at 1018.

120 "[Bartolomeo] rests on a fictional attorney-client relationship derived from a prior charge and premised on the belief that a lawyer would not refuse to aid his newly charged client." *Id.* at 1021.

121 *Bartolomeo*, 423 N.E.2d 371.

122 *Id.*

123 *Id.* at 374.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

state, that decision must be respected in all subsequent interactions with the defendant.[129] Thus, any incommunicado questioning would violate the defendant's right to counsel, and any waiver of that right outside of counsel's presence would be invalid.[130] Further, despite the court's acceptance of the police officers' claim in this case that they lacked actual knowledge of Bartolomeo's prior representation, the court went so far as to charge the interrogating officers with constructive knowledge of Bartolomeo's prior representation, because they knew of his prior arrest and failed to make an inquiry into whether he had retained a lawyer on that charge.[131]

In a dissenting opinion, Judge Solomon Wachtler acknowledged the policy reasons behind *Rogers*[132] but questioned the majority for stretching *Rogers* too thin, operating contrary to principles of justice, and creating a rule that favored repeat offenders.[133] Wachtler pointed out the irony that under the new rule, a suspect with no criminal record who is taken in for questioning does not automatically have the right to counsel, while a suspect with a prior offense still pending is insulated from any new interrogations—even if no lawyer has stepped forward on the new investigation and the suspect has not requested counsel on that matter. Presciently, the arguments set forth in Judge Wachtler's dissent provide much of the reasoning for the later overruling of *Bartolomeo*, in *People v. Bing*.[134]

E. People v. Bing*: The Court of Appeals Bursts* Bartolomeo*'s Bubble*

In the nine years after *Bartolomeo* was decided, the New York courts dealt with a myriad of derivative right cases, but could not find a way to read and apply the rule consistently.[135] In 1990, the Court of Appeals took the opportunity to reconsider *Bartolomeo* when it was presented with three new derivative right cases—*People v. Cawley*,

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129 *Id.* at 377–78.

130 *Id.* at 378.

131 *Id.* at 377–78.

132 "[W]here a defendant by a request for counsel expresses a personal inability to deal with the power of the State the right to that counsel can [n]ever be disregarded." *Id.* at 378 (Wachtler, J., dissenting).

133 *Id.*

134 558 N.E.2d 1011, 1022 (N.Y. 1990).

135 For example, the appellate divisions could not agree on whether *Bartolomeo* applied when the prior charge was pending in an out-of-state jurisdiction. *Compare* People v. Torres, 519 N.Y.S.2d 613 (Sup. Ct. 1987), *rev'd*, 560 N.Y.S.2d 281 (App. Div. 1990), *and* People v. Mehan, 490 N.Y.S.2d 897 (App. Div. 1985), *with* People v. Bing, 540 N.Y.S.2d 247 (App. Div. 1989), *aff'd*, 558 N.E.2d 1011 (N.Y. 1990). There was also conflict between the lower courts and the Court of Appeals about the effect of a defendant telling the police that he did not have counsel for the prior charge. *Compare* People v. Lucarano, 460 N.E.2d 1328 (N.Y. 1984), *with* People v. Medina, 541 N.Y.S.2d 355 (App. Div. 1989).

People v. Medina, and *People v. Bing*—consolidated into one appeal under the name *People v. Bing*.[136] For those who had opposed the derivative right since its inception,[137] the *Bing* cases were a perfect example of the inherent inadequacies of the *Bartolomeo* rule, as well as the inefficiency and inconsistency created by its attempted application to factually dissimilar cases.[138]

In *People v. Bing*, the defendant had an outstanding warrant from Ohio on a burglary charge, for which he had been assigned an attorney.[139] Bing was later apprehended in New York for a burglary in Nassau County, and the police, unaware of Bing's representation on the Ohio case, had him sign a *Miranda* waiver and took statements implicating him in the Nassau County crime.[140] In *People v. Cawley*, the defendant absconded after being arraigned in New York on a robbery charge, for which he had retained counsel.[141] Six months later, Cawley was arrested for murder, and the police, unaware of the prior representation, had Cawley sign a *Miranda* waiver, interrogated him, and extracted a confession about the murder as well as the robbery.[142] In *People v. Medina*, the defendant had been jailed on an assault charge for which he obtained representation.[143] After being released, he was picked up by police for a homicide investigation, waived his *Miranda* rights at the police station, and made inculpatory statements about the homicide.[144]

The critical fact common to each of the *Bing* cases was that the defendants were all asserting a right to counsel on a new charge based solely on the existence of a prior representation; there was never any actual communication from the previously retained attorneys to the police asserting a relationship with the defendants on the new charges.[145] In all three cases, the defendants sought suppression of their inculpatory statements, claiming that, in accordance with *Bartolomeo*, their respective prior representations prevented the police from being able to interrogate them on new matters.[146]

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136 558 N.E.2d 1011.

137 A 1992 Pace Law Review Article referred to *Bartolomeo* as a "problem-riddled and exception-tattered rule." Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review, 1990*, 12 PACE L. REV. 1, 7 (1992).

138 As the Court of Appeals put it: "Since the rule was announced nine years ago, scarcely a term of court has passed without a *Bartolomeo* issue being presented to us in one form or another." *Bing*, 558 N.E.2d. at 1012.

139 *Id.*

140 *Id.* at 1012–13.

141 *Id.* at 1013.

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.* at 1012–13.

In each case, the prosecution sought a unique exception to the *Bartolomeo* rule in order to make the defendant's statements admissible.[147] The *Bing* prosecutor suggested that the *Bartolomeo* rule should be subject to jurisdictional limits such that Bing's prior representation did not trigger the rule because it was an out-of-state case.[148] The *Cawley* prosecutor argued that the defendant "relinquished his attorney-client relationship on the pending charge"[149] when he absconded and lost touch with his lawyer.[150] The *Medina* prosecutor sought a form of "good-faith" exception, because the defendant had made statements that led the police reasonably to believe that his represented case had been dismissed.[151]

Squarely facing a litany of new exceptions to what had already been a hotly contested rule,[152] the Court of Appeals decided it was time to rethink *Bartolomeo*.[153] Through a measured and thoughtful analysis of stare decisis, the *Bing* court weighed the objectives of the right to counsel—protecting the individual from the imbalance of power and the coercive influence of the State[154]—against the public safety imperatives of law enforcement.[155] Recalling Judge Wachtler's dissent in *Bartolomeo*, the court noted that a rule that prevented interrogation of a suspect based purely on the happenstance of his having a lawyer on an open case was not ideologically sound, did not have substantial support in the case law, was difficult to apply in different fact patterns, and actually benefitted career criminals.[156] With that, *Bartolomeo* was formally overruled.[157]

Bing is perhaps most notable as one of the only major right to counsel cases that tipped the scales in favor of the imperatives of criminal investigation and public safety—based on freer police investigation tactics—over the more defendant-friendly due process, constitutional protection, and fundamental fairness factors espoused in cases like *Donovan* and *Arthur*.[158] To understand the *Bing* decision, it

147 *Id.* at 1013–14.

148 *Id.* at 1013.

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.* at 1017 ("Its application became uneven, introducing uncertainty into the rule itself and destabilizing the law on the right to counsel in general.").

153 *Id.* at 1014.

154 *Id.* at 1015.

155 *Id.* at 1017–18.

156 *Id.* at 1022 (stating that the *Bartolomeo* rule "is not firmly grounded on prior case law, cannot be applied uniformly, favors recidivists over first-time arrestees, and exacts such a heavy cost from the public").

157 *Id.*

158 *See also* People v. West, 615 N.E.2d 968, 972 (N.Y. 1993) (noting that a suspect has a "constitutional right to interpose an attorney between himself and the overwhelming power of the State"); People v. Rogers, 397 N.E.2d 709, 713 (N.Y. 1979) ("[T]he attorney's presence

helps to see the social context in which it took place: by 1990, violent crime rates in New York had been steadily increasing for thirty years,[159] and in New York City specifically, the violent crime rate had increased approximately 17% in the previous decade alone.[160] In fact, to this day, New York's 1990 violent crime rate remains its highest on record.[161] Thus, while the *Bing* court's general reasoning of the "unworkable"[162] nature of the *Bartolomeo* rule is perfectly rational on its own, and is certainly exemplified by the three cases comprising the *Bing* appeal, the decision to shift some leverage back to the state after decades of ruling in favor of the defendant was not made in a sociological void. The Court of Appeals' decision in *Bing* represents the coalescence of a close scrutiny of the case law, a practical consideration of the increasing crime problem in New York, and a desire for well-defined rules of conduct.

III. PROPOSAL: THE *ARTHUR* RULE LIVES

A. *The* Arthur *Rule Recap*

The entry of counsel trigger outlined in *Arthur*—that direct communication by an attorney to the police asserting a relationship with a suspect in custody triggers the indelible right to counsel, regardless of the details of retainer[163]—has never been subsequently overruled by the Court of Appeals; in fact, it has been reaffirmed numerous times.[164] Yet, there are cases in which New York appellate[165]

serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming. That the rule diminishes the likelihood of a waiver or self incriminating statements is immaterial to our system of justice."); People v. Hobson, 348 N.E.2d 894, 898 (N.Y. 1976) ("[A]n attempt to secure a waiver of the right of counsel in a criminal proceeding in the absence of a lawyer, already retained or assigned, would constitute a breach of professional ethics . . . ."); People v. Waterman, 175 N.E.2d 445, 447 (N.Y. 1961) (seeking "a balance between the competing interests of society in the protection of cherished individual rights . . . and in effective law enforcement and investigation of crime").

159 U.S. Dep't of Justice, UNIFORM CRIME REPORTING STATISTICS, http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm (last visited Oct. 2, 2013) (select "New York" in column a, "Violent crime rates" in column b, and "1965–2012" in column c, then click on "Get Table").

160 *Uniform Crime Reports and Index of Crime in New York*, DISASTER CENTER, http://www.disastercenter.com/newyork/crime/9004.htm (last visited Nov. 24, 2013).

161 U.S. Dep't of Justice, *supra* note 159. These records date back to 1960.

162 *Bing*, 558 N.E.2d at 1014.

163 People v. Arthur, 239 N.E.2d 537, 539 (N.Y. 1968).

164 *See, e.g.*, People v. Grice, 794 N.E.2d 9, 10–12 (N.Y. 2003); People v. Marrero, 409 N.E.2d 980, 981 (N.Y. 1980) ("Once an attorney has appeared on the defendant's behalf we have refused to allow the police to rely on arguable ambiguities in the attorney-client relationship in order to justify police questioning of the defendant without the attorney being present."); People v. Hobson, 348 N.E.2d 894, 896 (N.Y. 1976).

165 *See, e.g.*, People v. Lennon, 662 N.Y.S.2d 821 (App. Div. 1997).

and trial courts[166] assert that the circumstances of the attorney hiring may in fact impact the attachment of the indelible right—despite the explicit instructions to the contrary in *Arthur*.[167] The consistent reaffirmation of *Arthur* by the Court of Appeals is a clear indication that the *Arthur* rule is still valid to this day, and in fact, much of the current confusion over the entry of counsel rule is due to a misreading of *Bing*.

B. *(Mis)Understanding* Bing*: How Overly Broad Readings of* Bing *Caused Confusion in the Lower Courts*

While *Bing* is a fairly lengthy and manifestly well-reasoned decision, lower courts[168] have misread some of its dicta to interpret *Bing* as abrogating a much broader swath of the right to counsel jurisprudence than it actually did. As a result, these courts have asserted that an attorney communication to the police announcing an attorney-client relationship with a suspect in custody does *not* trigger the "entry of counsel" rule, as long as the suspect is informed of the attorney's attempted contact and then repudiates the representation.[169] This sudden clash with long-standing entry of counsel doctrine stems from misreading the phrasing in *Bing* that "[t]he decision to retain counsel rests with the [defendant],"[170] and the right to counsel "is personal and may be waived by [the] defendant."[171]

This confusion is precisely why right to counsel jurisprudence in New York appears to be in flux.[172] However, a closer look at *Bing*, followed by an analysis of how the lower courts have misread it, reveals that the right to counsel is still guided by the bright-line *Arthur* rule.

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166 *See, e.g.*, People v. Rice, 874 N.Y.S.2d 769 (Sup. Ct. 2009); People v. Taylor, Nos. 1845/2000, 1012/2001, 2002 WL 465094 (N.Y. Sup. Ct. Mar. 20, 2002).

167 *Arthur*, 239 N.E.2d 537; *see supra* text accompanying note 94.

168 *See, e.g.*, *Rice*, 874 N.Y.S.2d 769; *Taylor*, 2002 WL 465094; People v. Pulliam, 738 N.Y.S.2d 593 (App. Div. 2002); *Lennon*, 662 N.Y.S.2d 821.

169 *See, e.g.*, *Lennon*, 662 N.Y.S.2d 821; *see also Rice*, 874 N.Y.S.2d 769; *Taylor*, 2002 WL 465094.

170 People v. Bing, 558 N.E.2d 1011, 1021 (N.Y. 1990).

171 *Id.* at 1022.

172 *Compare Lennon*, 662 N.Y.S.2d 821 (attorney phone call to police claiming representation of suspect in custody did not trigger indelible right to counsel), *and Taylor*, 2002 WL 465094 (defendant's lawyer from prior charge calling and faxing police station to assert attorney-client relationship did not trigger indelible right to counsel), *with* People v. Borukhova, 931 N.Y.S.2d 349 (App. Div. 2011) (defendant's statement that she "did not know" attorney hired by sister was not valid waiver of counsel; right to counsel attached at moment of attorney communication with police).

1. Revisiting *Bing*: A Closer Look at What Exactly It Did and Did Not Overrule

To be sure, *Bing* overruled the derivative right to counsel spawned in *Bartolomeo*.[173] The "unworkable"[174] standard from *Bartolomeo* entailed an active police inquiry into the suspect's criminal history to determine whether he was involved in any open criminal case, and whether he had representation on that matter, prior to commencing a valid interrogation. In *Bartolomeo*, though, remember that the statements at issue in the suppression motion were those made by Bartolomeo prior to the phone call from his lawyer to the police seeking to assert Bartolomeo's right to silence.[175] There was never any question that Bartolomeo's right to counsel attached after his attorney contacted the police—even though Bartolomeo had not formally retained the attorney for the new charge at that time.[176] The singular issue in *Bartolomeo* was the admissibility of the incriminating statements made *prior to* the attorney's phone call, when defendant had not yet asserted representation or asked for a lawyer.[177]

For this reason, the *Bing* court quite reasonably overruled *Bartolomeo*, noting that inferring an attorney-client relationship based on a prior, unrelated charge, *before* the lawyer made any contact with the police on the new charge, essentially created a fictional attorney-client relationship on the new charge.[178] Crucially, though, *Bing* explicitly reaffirmed the *Rogers* case from which the *Bartolomeo* rule allegedly derived,[179] and implicitly reaffirmed all of the other pre-*Bartolomeo* Court of Appeals cases, seeking to carefully excise only *Bartolomeo*'s "derivative right" from the overall right to counsel jurisprudence.[180] That *Bing* involved only a surgical extraction of the derivative right from the case law is strengthened by the *Bing* court's thorough and deferential analysis of the importance of stare decisis,[181] as well as its painstaking efforts to distinguish *Bartolomeo* from prior cases

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173 423 N.E.2d 371 (N.Y. 1981).

174 *Bing*, 558 N.E.2d at 1014.

175 *Bartolomeo*, 423 N.E.2d at 374.

176 *Id.*

177 *Id.*

178 "[T]here is little to be said for a rule which is not firmly grounded on prior case law, cannot be applied uniformly, favors recidivists over first-time arrestees, and exacts such a heavy cost from the public." *Bing*, 558 N.E.2d at 1022.

179 *Id.* ("We emphasize in closing that although *Rogers* and *Bartolomeo* are frequently linked in legal literature and *Rogers* was the only case cited to support the new rule adopted in *Bartolomeo*, the two holdings are quite different. . . . We find the *Bartolomeo* rule unworkable, and therefore overrule it, but our decision today should not be understood as retreating from the stated holding of *Rogers*.").

180 *Id.*

181 *Id.* at 1014.

both on its facts and its reasoning.[182] Moving forward from *Bing*, then, we must understand that the *Arthur* rule is still alive and well.

2. Examples of Lower Courts Misreading *Bing*

While the *Bing* decision did not in any direct sense impact the entry of counsel rule that existed before the derivative right, the subsequent disagreement among lower New York courts regarding the entry of counsel trigger[183] was undeniably set into motion by *Bing*. A perfect example of how courts have misinterpreted *Bing* is the 1997 Second Department case, *People v. Lennon*.[184]

In *Lennon*, the defendant had voluntarily agreed to go to the police station for questioning regarding her husband's murder.[185] When Lennon's father found out about the interrogation, he contacted an attorney who had represented Lennon on several prior occasions, and asked him to represent her in this new matter.[186] The attorney then called the police station to alert the police of his relationship with Lennon, let them know that he was on his way over, and instruct the police not to speak with his client pending his arrival.[187] The police informed Lennon that the attorney was on his way and asked if she wanted him to represent her.[188] She responded in inarguably unflattering language that she did not like that attorney, and that she did not want him.[189] Shortly thereafter, the attorney arrived at the police station, was told by police that Lennon had refused his services, and was prevented from seeing her.[190] The police then questioned Lennon for over seven hours, until she eventually confessed to the murder.[191]

Pre-trial, Lennon moved to suppress her confession as obtained in violation of her right to counsel. The trial court denied her motion and the Appellate Division affirmed.[192] In doing so, the appellate court parroted the statement from *Bing* that "[t]he decision to retain counsel rests with the defendant,"[193] and swiftly concluded that as such, Lennon's right to counsel did not indelibly attach at the moment of the attorney's phone call, because Lennon was given the opportunity to

182 *Id.* at 1022.
183 *See supra* note 172.
184 662 N.Y.S.2d 821 (App. Div. 1997).
185 *Id.* at 822.
186 *Id.* at 825.
187 *Id.* at 826.
188 *Id.*
189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.* at 822.
193 *Id.* at 823.

accept the representation hired by her father, and chose not to do so.[194] However, this decision flies in the face of both *Arthur* and *Donovan*, where the court held that the right to counsel indelibly attached at the moment of the attorney's communications to the police[195]—*not* at the moment that a formal retainer agreement was created between the defendant and the attorney.

Similarly, a 2002 Queens County Supreme Court case that followed *Lennon*, *People v. Taylor*,[196] cited the *Lennon* decision to justify its refusal to suppress a defendant's inculpatory statements made after an attorney contacted the police on the defendant's behalf.[197] In *Taylor*, the defendant was a suspect in police custody on a murder charge, when an attorney who had represented him on charges in the past contacted the police station, asked to speak with the defendant, and told the police not to question him in her absence.[198] However, the attorney also told the police unequivocally that she was presuming her representation of the defendant based on her prior representation of him in other matters, and that she had not been hired by the defendant or his family on this new charge.[199] The police did not tell Taylor that the attorney called on his behalf or that she claimed to represent him on the new charge, but they did ask Taylor if he wanted to talk to that attorney before speaking with them. Taylor elected to speak with the police without counsel present,[200] and subsequently confessed.[201] In denying Taylor's motion to suppress his statements, the *Taylor* court echoed *Lennon* and further cited the *Bing* dicta regarding the defendant's right to waive representation.[202] Essentially, *Taylor* took *Lennon* as a cue that the right to counsel in New York no longer indelibly attached with the attorney's

194 *Id.*

195 People v. Arthur, 239 N.E.2d 537 (N.Y. 1968); People v. Donovan, 193 N.E.2d 628 (N.Y. 1963).

196 People v. Taylor, Nos. 1845/2000, 1012/2001, 2002 WL 465094 (N.Y. Sup. Ct. Mar. 20, 2002).

197 *Id.* at *22.

198 *Id.* at *6.

199 *Id.* (The attorney "told the Lieutenant that she considered herself the defendant's attorney in the case by virtue of her representation of him on the prior robbery case even though she had not been retained by the family or appointed by the court.").

200 *Id.* at *7.

201 *Id.* at *8–9.

202 "[T]he right to counsel is personal and may be waived by a defendant." People v. Bing, 558 N.E.2d 1011, 1022 (N.Y. 1990). This was the language cited by the *Taylor* court. *Taylor*, 2002 WL 465094, at *21. *Taylor* also seems to draw support from *Lennon* for the proposition that "[a]n attorney, who is a stranger to a suspect and to the matter under investigation and who has not been invited to do so either by the suspect or someone acting on his behalf, cannot enter the proceedings by simply declaring himself to be the suspect's lawyer . . . ." *Id.* Not only is this entirely out of sync with the *Arthur* rule, it is also a misreading of *Lennon*, as *Lennon* held that even contact by an attorney actually hired by someone acting on defendant's behalf (in that case, her father) does not trigger the right to counsel. People v. Lennon, 662 N.Y.S.2d 821, 822–23 (App. Div. 1997).

communication to police, and that a defendant may now validly waive the attorney's representation outside the presence of counsel.[203]

The *Taylor* court incorrectly relied on *Lennon*—and accordingly, *Lennon*'s misreading of *Bing*—to support its holding. At best, Taylor's statements may have reasonably been deemed admissible because the facts of *Taylor* make it look more like *Bing* than *Arthur*, and not because *Arthur* is no longer good law.[204] It is true that, like *Arthur*, the attorney in *Taylor* was not hired by the defendant or anyone acting on his behalf to represent the defendant on the new charge.[205] It is also true that, like *Arthur* and unlike *Bing*, the attorney communicated directly with police to assert representation on the new charge. However, an argument can be made that, pursuant to the logical underpinnings of *Bing*, in the event that the attorney claiming representation unequivocally states that she is only involved based on her work on an unrelated, prior charge, then the police may continue to interrogate the suspect without the attorney present; essentially, the attorney is telling the police that no attorney-client relationship exists *yet*, but she is hoping for one. If the purpose of halting police interrogation at the moment of an attorney's communication centers on the police having notice that an attorney-client relationship exists, and the purpose of *Bing* was to release police from liability in situations where they had no feasible notice of such a relationship (or, no relationship existed in fact), then explicit notification by the attorney that a formal relationship does *not* exist on the new charge may serve to prevent attachment of the defendant's right to counsel. By proclaiming to the police that there is not an attorney-client relationship yet, the entry of counsel is defective, and the defendant's right does not attach. However, absent such a clear caveat by the attorney, the police are still bound, under *Arthur*, to respect an asserted attorney-client relationship.

The fatal flaw in cases like *Lennon* and *Taylor* is that they misread *Bing* essentially to repeal not only the *Arthur* rule, but also the entire concept of an indelible right to counsel—which it simply does not do. The language in *Bing* regarding a defendant's right to waive counsel reads in full: "Since the right to counsel is personal and may be waived by a defendant, the court had to create an indelible right, a right that defendant could *not* waive in the absence of counsel . . . ."[206] Undoubtedly, the *Bing* court was not, in a single statement, fashioning a

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203 *Taylor*, 2002 WL 465094, at *22–23.

204 It is worth noting that *Taylor* is a trial court decision, and not from the Court of Appeals. As such, even if the *Taylor* court were attempting to outright reject *Arthur*, that would not mean that *Arthur* is no longer good law; it would mean that the court wrongly failed to follow Court of Appeals' binding precedent. Rather than impute such a misstep to the court, however, this Note offers a reading of the case that harmonizes *Arthur*, *Bing*, and *Taylor*.

205 *Taylor*, 2002 WL 465094, at *6.

206 *Bing*, 558 N.E.2d at 1022 (emphasis added) (citation omitted).

new bright-line rule that the right to counsel may always be validly waived by defendant, simply because "[t]he decision to retain counsel rests with"[207] him—to do so would be such a dramatic retraction of New York's historically strong protection of the right to counsel[208] that even the most ingenious analysis of the failings of stare decisis would not support it. Rather, the *Bing* court was simply explaining the impetus behind the creation of New York's indelible right, and the reason for its original extension to derivative right cases such as *Bartolomeo*.[209] While *Bing* followed up this explanation with the conclusion that the derivative right was now overruled, it certainly did not seek to overrule the notion of the indelible right to counsel altogether.[210]

Furthermore, there is simply no logic in a jurisprudence that would hold the right to counsel indelibly attached when a defendant is not informed about an attorney's phone call,[211] yet perfectly waivable if he is;[212] it is pedagogically problematic to say that the defendant's right attaches only if police keep him in the dark. As discussed in Part II.A, *supra*, the police cannot violate the right to counsel unless it has already attached. As such, the police's decision to hold a defendant incommunicado cannot define whether the defendant's right to counsel attaches.

One may argue, in the vein of *Taylor*,[213] that perhaps all that matters is that the police are on notice of an existing attorney-client relationship, and that if a defendant repudiates such a relationship after an attempted entry by an attorney, then the defendant's right should not attach. This is certainly a cogent argument; however, the problem with that line of reasoning is that it allows police to intervene between the attorney asserting the relationship and the defendant—something the Court of Appeals has adamantly sought to prevent.[214]

In *Taylor*, the police were directly informed by the attorney that no genuine attorney-client relationship existed yet, and so the case law could support a finding that Taylor's right to counsel had not yet attached (albeit not for the reasons cited by the *Taylor* court). In *Lennon*, however, the police were put on notice of a present relationship and yet took it upon themselves to verify the relationship with the

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207 People v. Lennon, 662 N.Y.S.2d 821, 823 (App. Div. 1997).

208 *People v. Waterman*, 175 N.E.2d 445, 447 (N.Y. 1961), termed the right to counsel a "cherished individual right[]."

209 *Bing*, 558 N.E.2d at 1022.

210 *Id.* at 1022–23.

211 *E.g.*, People v. Donovan, 193 N.E.2d 628 (N.Y. 1963).

212 This is essentially the holding in both *Lennon*, 662 N.Y.S.2d 821 and *People v. Taylor*, Nos. 1845/2000, 1012/2001, 2002 WL 465094 (N.Y. Sup. Ct. Mar. 20, 2002).

213 Though, again, *Taylor* is far from binding precedent in the state of New York.

214 "[I]f the police are uncertain as to the scope of the attorney's representation, the defendant should not be questioned." People v. Marrero, 409 N.E.2d 980, 981 (N.Y. 1980) (citing People v. Coleman, 369 N.E.2d 742 (N.Y. 1977)).

defendant.[215] Allowing the police to question the client—even about the veracity of an attorney-client relationship—after representation has been unequivocally asserted by an attorney would motivate police tactics such as convincing the defendant that the attorney will only get in the way, and that it would be better for him to speak to the police without representation. This is precisely the sort of coercive power that New York's right to counsel jurisprudence consistently rebukes.[216]

In the interest of efficiency and articulable standards for police behavior, the indelible right must either attach or not attach at the moment of the attorney's communication, and the Court of Appeals has already resoundingly established that it does.[217] The only rationally consistent conclusion is that a suspect subjected to a custodial interrogation *cannot*, outside the presence of counsel, validly waive his right to counsel after an attorney has contacted the police on his behalf and affirmatively asserted a contemporaneous professional relationship with the defendant on the matter under investigation. As such, cases like *Lennon* are simply not in keeping with the guidelines set by the Court of Appeals.

IV. COUNTER-ARGUMENTS

A. *An Attorney Cannot "Unilaterally" Create an Attorney-Client Relationship*

In 2011, the Court of Appeals decided another right to counsel case, *People v. Pacquette*,[218] which has been cited for the proposition that an attorney cannot "unilaterally" create an attorney-client relationship simply by directing police not to question a suspect.[219] Since then, there

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215 *Lennon*, 662 N.Y.S.2d at 822.

216 Indeed, this was one of the arguments set forth by the dissenting judge in *Lennon*:

> In our system of justice, the right to counsel is so fundamental that the law has created various safeguards to ensure its protection. These include . . . the rule that counsel who has declared that he represents a suspect in custody cannot be rejected by his client unless he is in her presence. . . . Moreover, retained counsel must be present when his services are being waived for the simple reason that otherwise the police could invariably represent that the suspect has elected to confess without benefit of counsel—even as counsel is beating at the station house door.

Id. at 826–27 (Friedmann, J., dissenting).

217 *See, e.g.*, *Marrero*, 409 N.E.2d 980; People v. Donovan, 193 N.E.2d 628, 630 (N.Y. 1963); People v. Borukhova, 931 N.Y.S.2d 349, 364 (App. Div. 2011) ("Court of Appeals jurisprudence establishes that the issue of whether an attorney has entered a case is not dependent upon whether that attorney has been personally retained by the defendant, or has instead been retained by a member of the defendant's family . . . .").

218 950 N.E.2d 489 (N.Y. 2011).

219 *Unilateral Triggering of Indelible Right to Counsel? COA Says No.*, N.Y. CRIM. L. & PROC.

has been speculation as to whether this decision shrinks the scope of the right to counsel.[220] However, a close reading of the majority opinion in *Pacquette* shows that the court was *not* seeking to unravel the long history of jurisprudence establishing that direct contact between an attorney and the police is sufficient to trigger the right to counsel.[221]

In *Pacquette*, Brooklyn police identified the defendant as a potential murder suspect.[222] Looking into Pacquette's whereabouts, they discovered that he was in police custody in Manhattan, awaiting arraignment on drug charges.[223] Two Brooklyn police detectives accompanied Pacquette to his Manhattan arraignment, and arranged with the Manhattan prosecutor to have him released on his own recognizance so that the Brooklyn police could then take him into custody for questioning on the homicide.[224] Pacquette was assigned an attorney for his Manhattan drug charges, with whom he spoke at the courthouse in plain view of the Brooklyn police officers.[225] The attorney testified at Pacquette's suppression hearing that he told the Brooklyn detectives not to question his client.[226] The detectives testified that they overheard the attorney tell Pacquette that he did not and would not represent him on the murder charge.[227] After the Brooklyn police took Pacquette into custody, he was Mirandized and made a confession.[228] He later sought to suppress the confession under the premise that the Manhattan attorney's statement to the Brooklyn detectives in the courthouse constituted entry of counsel on the Brooklyn case.[229] The trial court rejected this argument, and held Pacquette's confession admissible.[230]

Now, if the *Pacquette* court's intent was truly to do away with the *Arthur* rule, it could simply have accepted the defendant's claim that his attorney communicated directly with the police on his behalf, and then proclaimed it insufficient to trigger the right to counsel because Paquette had not formally retained the attorney for the murder charge

(June 14, 2011), http://www.nycrimblog.com/nycrim/2011/07/unilateral-triggering-of-indelible-right-to-counsel-coa-says-no.html.

220 "On the broadest level, the Court's . . . new decision[] indicate[s] a willingness on the part of its members not only to limit any expansion of the state constitutional right but to reverse the tide." Castellano, *supra* note 10.

221 *See, e.g.*, *Marrero*, 409 N.E.2d at 981; *Donovan*, 193 N.E.2d at 630.

222 *Pacquette*, 950 N.E.2d at 490.

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.* at 491.

227 *Id.* at 490–91.

228 *Id.* at 492–93.

229 *Id.* at 493–94. Pacquette was essentially relying on *People v. Ramos*, 357 N.E.2d 955 (N.Y. 1976) (attorney's statement to police, on the record at an arraignment hearing, asserting representation of the client on a new charge, served to attach the defendant's right to counsel).

230 *Pacquette*, 950 N.E.2d at 493.

at that time. Instead, while acknowledging that the attorney and the detectives gave conflicting testimony, the court went out of its way to make a factual finding that Pacquette's Manhattan attorney did *not* actually inform the police that he represented Pacquette on the Brooklyn homicide charge.[231] Thus, when the court announced that an attorney cannot trigger a defendant's right to counsel by "unilaterally"[232] asserting a relationship, it was referring specifically to an attorney who was not hired by anyone to represent defendant *and* who had not communicated any representation directly to the police.[233] In this respect, the *Pacquette* decision is not the watershed case some have made it out to be; it essentially just reiterates the *Bing* renunciation of the derivative right to counsel.[234]

B. *Requiring the Police to Respect a Potentially Invalid Attorney-Client Relationship is an Undue Burden on Law Enforcement*

One could argue that a rule requiring police to give deference to a potentially flawed attorney-client relationship simply upon notice by the attorney is an overly burdensome impediment to law enforcement; indeed, this very argument surfaces throughout the right to counsel jurisprudence.[235] However, the New York State Court of Appeals has repeatedly met this concern with skepticism and, in any case, has held it to be less pressing than the due process imperatives that would be threatened by allowing police to question the attorney-client relationship.[236]

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231 *Id.* at 491–93.

232 *Id.* at 494.

233 *Id.*

234 To be sure, there is a worthy philosophical debate about the viability of attorneys "unilaterally" asserting professional relationships with clients in the more general sense. However, this Note focuses not on the broad ability of attorneys to forge professional relationships, but rather, on what kind of activities must be taken for granted by police as constituting attorney-client relationships, for the limited purpose of securing an uncounseled waiver or statement from a suspect in custody. While the legislature and the courts are certainly within their respective rights to make specific judgments as to the necessities of an attorney-client relationship, such judgments are explicitly outside the scope of law enforcement. As such, police officers must rely on an attorney's affirmative and unequivocal assertion of a relationship with a suspect in custody as sufficient to establish representation.

235 "It has . . . been urged that to permit a suspect . . . to confer with an attorney before talking to the police would preclude effective police interrogation and would in many instances impair their ability to solve difficult cases." People v. Donovan, 193 N.E.2d 628, 630 (N.Y. 1963).

236 *See, e.g.*, People v. Rogers, 397 N.E.2d 709, 713 (N.Y. 1979) (footnote omitted) (citations omitted):

> The presence of counsel confers no undue advantage to the accused. Rather, the attorney's presence serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming.

In terms of preferred outcomes, the worst-case scenario of requiring a suspect to confer with counsel who asserts a relationship to police, but may not have been formally hired, is that a defendant who may otherwise have spoken to police without a lawyer would instead accept the lawyer's representation and decide to exercise his right to remain silent, rather than confessing.[237] The argument follows that the defendant's decision not to speak to the police, sparked by a potentially invalid attorney-client relationship, risks putting a "dangerous criminal" back onto the streets and impedes the prosecutor's ability to build a case. On the other hand, allowing police to question a defendant in custody about an asserted representation risks providing an opportunity for police to keep a suspect in incommunicado interrogation and later claim that she rejected the attorney's asserted representation (or, to trick the suspect into repudiating a genuinely valid representation, in direct contradiction to the purposes of the indelible right). The latter option exemplifies the exact imbalance of power and coercive pressure that the entire right to counsel jurisprudence is founded on avoiding; indeed, when directly addressing these competing considerations, the Court of Appeals has made clear that constitutional rights trump police investigatory tactics.[238]

By explicitly and repeatedly holding that attorney notice to police is sufficient to trigger the indelible right to counsel, the Court of Appeals directs that the determination of the "actual" existence of an underlying attorney-client relationship—to wit, the details or existence of a formal retainer—is a matter outside the scope of police duties. From a viewpoint of protecting the citizenry from the "overwhelming power of the State,"[239] this is a sensible solution. If our goal is to ensure that police do not exploit their custody over a suspect in order to limit his rights,[240]

> That the rule diminishes the likelihood of a waiver of self incriminating statements is immaterial to our system of justice . . . . Although the State has a significant interest in investigating and prosecuting criminal conduct, that interest cannot override the fundamental right to an attorney guaranteed by our State Constitution. Available are means other than subjecting a person represented by an attorney to interrogation in the absence of counsel.

237 Or, less drastically, a suspect may simply speak to the attorney, make a counseled waiver, and speak to police anyway.

238 *See* People v. Burdo, 690 N.E.2d 854, 855–56 (N.Y. 1997) ("[T]he attorney's presence serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming. That the rule diminishes the likelihood of a waiver or self incriminating statements is immaterial to our system of justice . . . ." (quoting People v. Rogers, 397 N.E.2d 709, 713 (N.Y. 1979))).

239 People v. West, 615 N.E.2d 968, 972 (N.Y. 1993) (quoting People v. Skinner, 417 N.E.2d 501, 505 (N.Y. 1980)).

240 The Court of Appeals, in *People v. Bing*, 558 N.E.2d 1011 (N.Y. 1990), explained that the primary motivation for the holdings in cases like *Rogers*, 397 N.E.2d 709 was to prevent police from "exploiting" their custody of the defendant and thus affecting the voluntary nature of his statements. *Id.* at 1016. The court's acknowledgment of the need for protection from police

then giving police the discretion to determine whether an attorney has sufficiently "proven" his relationship with the suspect before respecting said relationship would be counter-productive.[241] The logical conclusion, then, is that even when the "actual" existence or scope of the attorney-client relationship is questionable, that question is not to be answered by the police; they must assume the affirmative and act accordingly.[242]

V. CONCLUSION

The New York state judiciary has long protected criminal defendants' state constitutional right to counsel in a significantly more expansive and comprehensive way than has the United States Supreme Court for the federal right to counsel.[243] The Court of Appeals' perception of the need to protect citizens from the "awesome,"[244] "coercive,"[245] and "overwhelming"[246] power of the state has guided a history of decisions affording criminal suspects the "utmost"[247] protection when it comes to the attorney-client relationship.[248] Prosecutors and police may not rely on limited scope retainers[249] or

exploitation within an opinion that has arguably restricted the right to counsel more than any other single decision in the Court of Appeals history is proof-positive that protection of the citizenry continues to be an overriding concern in the right to counsel jurisprudence.

241 Indeed, it is exactly this type of discretion that would lead to more cases like *People v. Borukhova*, 931 N.Y.S.2d 349 (App. Div. 2011). In *Borukhova*, an attorney hired by the defendant's sister, while the defendant was in custody, contacted the police to assert Borukhova's rights and to put a stop to all questioning. *Id.* at 358. Rather than respecting this communication, the police then asked Borukhova if she knew the attorney, to which she replied (truthfully) that she did not. *Id.* The police took this to be a repudiation of the attorney's alleged representation, and continued their interrogation, eventually extracting a confession. *Id.* at 358–59. If we accept the rule in *Lennon*, then we allow police to craft these sorts of clever questions to avoid attorney access to defendants and to exploit inconsistencies in order to question suspects outside of counsel. The right to counsel jurisprudence to date simply does not support such a policy.

242 The dissent in *People v. Lennon*, 662 N.Y.S.2d 821, 827 (App. Div. 1997) (Friedmann, J., dissenting) (alterations in original) (citation omitted) astutely noted:

> The ambiguity of the lawyer's statement or the manner in which the defendant's attorney went about representing his client cannot be seized by [State officials] as a license to play fast and loose with this precious right. A defendant's right to counsel cannot be made to depend on whether in the sole judgment of the [police] there has been sufficient activity and conduct of a proper character so as to compel a conclusion that the lawyer has entered the proceedings . . . .

243 Claudio v. Scully, 982 F.2d 798, 803 (2d Cir. 1992).

244 People v. Bing, 558 N.E.2d 1011, 1023 (N.Y. 1990) (Kaye, J., concurring).

245 *Rogers*, 397 N.E.2d at 713.

246 People v. West, 615 N.E.2d 968, 972 (N.Y. 1993).

247 People v. Lopez, 947 N.E.2d 1155, 1158 (N.Y. 2011).

248 *Id.* ("New York has long viewed the right to counsel as a cherished and valuable protection that must be guarded with the utmost vigilance.").

249 People v. Ramos, 357 N.E.2d 955 (N.Y. 1976).

technicalities of who exactly hired the attorney[250] in order to limit a suspect's access to counsel. Likewise, the determination of a sufficiently proven attorney-client relationship is not at the discretion of the police as part of a continued interrogation, after an attorney has requested that the suspect be left alone.[251] While there was a brief period of time when the right to counsel may have expanded too far,[252] the Court of Appeals reigned in the unreasonably broad "derivative right" rule, while carefully leaving intact all of the thoughtful and deliberate jurisprudence that came before it.[253] As such, the rule espoused in *People v. Arthur*,[254] and repeated many times thereafter,[255] remains good law in the State of New York.

250 People v. Borukhova, 931 N.Y.S.2d 349, 364 (App. Div. 2011) ("Court of Appeals jurisprudence establishes that the issue of whether an attorney has entered a case is *not* dependent upon whether that attorney has been personally retained by the defendant, or has instead been retained by a member of the defendant's family." (emphasis added)); *see also* People v. Garofolo, 389 N.E.2d 123 (N.Y. 1979); People v. Pinzon, 377 N.E.2d 721 (N.Y. 1978).

251 *Borukhova*, 931 N.Y.S.2d 349.

252 The Court of Appeals itself acknowledged that the *Bartolomeo* decision was too broad of an expansion of the right to counsel. People v. Bing, 558 N.E.2d 1011, 1022 (N.Y. 1990).

253 *Id.*

254 239 N.E.2d 537 (N.Y. 1968).

255 *See, e.g.*, People v. Grice, 794 N.E.2d 9, 11 (N.Y. 2003) ("[A] telephonic communication between a defendant's attorney and the police suffices to establish counsel's entry into a case, at which point the police are required to cease all questioning . . . . In the 35 years since *Arthur* was decided . . . we have not altered the rule that assures the reliability of the representation regarding the retention of counsel by requiring the personal involvement of an attorney or law firm." (citations omitted)); *see also* People v. Marrero, 409 N.E.2d 980, 981 (N.Y. 1980); People v. Hobson, 348 N.E.2d 894 (N.Y. 1976).