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Brewer v. Williams, Massiah and Miranda: What Is 'Interrogation'? When Does It Matter?

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Yale Kamisar*

I didn't even know what those words ["psychological coercion"] meant, until I looked them up in the dictionary after I was accused of using it. . . .

Shucks, I was just being a good old-fashioned cop, the only kind I know how to be. . . .

I have never seen a prisoner physically abused, though I heard about those things in the early days. . . . That type of questioning just doesn't work. They'll just resist harder.

You have to butter 'em up, sweet talk 'em, use that—what's the word?—"psychological coercion."

—Captain Learning, reminiscing about his "Christian burial speech" nine years later.1

On Christmas Eve, 1968, a ten-year-old girl, Pamela Powers, disappeared while with her family in Des Moines, Iowa.2 Defendant Williams, an escapee from a mental institution and a deeply religious person,3 was suspected of murdering her, and a warrant was issued for his arrest.4 Williams telephoned a Des Moines lawyer, McKnight, and on his advice surrendered himself to the Davenport, Iowa, police.5

Captain Learning and another Des Moines police officer arranged to drive the 160 miles to Davenport, pick up Williams, and return him directly to Des

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As usual, I am greatly indebted to my colleague, Jerold H. Israel, for the many hours he has spent with me discussing various aspects of this article. As usual, too, we have not always agreed. I am also indebted to Welsh S. White, Visiting Professor of Law, University of Pennsylvania and Professor of Law, University of Pittsburgh, for comments on an earlier draft of portions of this article and for permitting me to read, and profit by, a draft of his forthcoming article on police trickery in inducing confessions. Finally, I am indebted to Mitchell L. Chyette and Ethan Falk, presently third-year law students at the University of Michigan, for their valuable research assistance.

1. Lamberto, Learning's "Speech": "I'd do it again," Des Moines Register, April 7, 1977, § B, at 1, col. 1.


3. 430 U.S. at 412 (Powell, J., concurring).

4. Id. at 390.

5. Id.
Moines. Both the trial court and the federal district court found that defense attorney McKnight and the Des Moines police agreed that Williams would not be "questioned" until after he returned to Des Moines and conferred with his lawyer. Before being driven back to Des Moines, Williams was advised of his rights many times—by McKnight over the phone, by Kelly (his Davenport attorney), by the Davenport judge who arraigned him on the warrant, by a Davenport police officer, and by Leaming himself.

More important, Williams asserted his rights many times. He retained counsel in both Des Moines and Davenport. He requested and was granted a private meeting with the Davenport judge. After Leaming arrived and advised him of his rights, Williams requested and was granted two private meetings with attorney Kelly. Kelly, furthermore, told Leaming that Williams was not to be questioned until he met with McKnight. Kelly also requested, but was refused, permission to ride back with his client. Finally, on the trip back, Williams told Leaming several times that he would tell him "the whole story" after he saw McKnight in Des Moines.

The Court's reading of the record, and the best reading, is that not long after Captain Leaming and his prisoner left Davenport and entered the freeway, the captain delivered his now famous "Christian burial speech." Although there are two significantly different versions of "the speech," I shall proceed, as did the Supreme Court and lower federal courts, on the assumption that there was only one. According to the Court's opinion, the detective addressed Williams as "Reverend" and continued:

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

Williams asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl’s body, and Leaming responded that he knew the body was in the area of Mitchellville—a town they would be passing on the way to Des Moines. . . . Leaming then stated: “I do not want you to answer me. I don’t want to discuss it any further. Just think about it as we’re riding down the road.”

I. WAS THE “CHRISTIAN BURIAL SPEECH” “INTERROGATION” WITHIN THE MEANING OF Miranda—OR “COMPULSION” WITHIN THE MEANING OF THE PRIVILEGE?

Once the Williams Court chose the Massiah route over a Miranda one, once it decided to resolve the case on “Sixth Amendment-Massiah,”23 not “Fifth Amendment-Miranda,”24 grounds,25 there was no longer any need to

22. 430 U.S. at 392-93.
25. 430 U.S. at 397-99. In granting habeas corpus relief, the federal district court in Williams v. Brewer relied on three independent grounds—that Williams’ disclosures were involuntary, that they were obtained in violation of Miranda, and that they were secured in violation of his sixth amendment-Massiah rights. 375 F. Supp. at 185. The United States Court of Appeals for the Eighth Circuit appears to have affirmed on the second and third grounds. Williams v. Brewer, 509 F.2d 227, 233-34 (8th Cir. 1975). The Supreme Court, in an opinion by Justice Stewart, saw “no need . . . in this case” to review the Miranda doctrine, “designed to secure the constitutional privilege against self-incrimination,” or to evaluate the district court ruling that Williams’ statements were involuntarily made because, inasmuch as judicial proceedings had been initiated against Williams before the start of his return trip to Des Moines, “it is clear that the judgment before us must in any event be affirmed upon the ground that Williams was deprived of a different constitutional right—the right to the assistance of counsel.” 430 U.S. at 397-99. The Court then found “the circumstances of this case . . . constitutionally indistinguishable from those presented in Massiah v. United States [377 U.S. 201 (1964)]” 430 U.S. at 400. The Massiah case is discussed extensively in the text at notes 272-86 infra. In brief, after Massiah had been indicted, had retained a lawyer, and had been released on bail, his codefendant, Colson, invited him to discuss the pending case. Unaware that Colson had decided to cooperate with government agents, Massiah talked freely to him and made several damaging admissions that were overheard by a nearby agent equipped with a receiving device. 377 U.S. at 202-03. The Massiah Court held, in an opinion authored by Justice Stewart, that the use of these admissions, “which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel,” violated petitioner’s sixth amendment right to counsel. Id. at 206. According to the Williams Court, “that the incriminating statements were elicited surreptitiously in the Massiah case, and otherwise here, is constitutionally irrelevant.” 430 U.S. at 400. The Williams dissents sharply disagreed. See text at notes 272-86 infra.
consider whether “the speech” constituted police “interrogation” (as that term is normally used). At that point, whether “the speech” constituted “interrogation” became, or should have become, constitutionally irrelevant. Nevertheless, the Williams majority evidently thought it desirable, if not necessary, to classify the “Christian burial speech” as a form of interrogation or “tantamount to interrogation”—and all four dissenting Justices insisted it was not. To the latter, Captain Learning’s remarks were merely “observations and comments” or only “travel conversation” or simply a “statement . . . accompanied by a request that respondent not respond to it.”

26. See text at notes 272-86 infra.
27. See 430 U.S. at 399-400. Writing for the Court, Justice Stewart pointed out several factors indicating that interrogation did in fact take place: (1) Learning “deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him”; (2) the Iowa courts “proceeded upon the hypothesis that . . . [the] ‘speech’ had been tantamount to interrogation”; (3) they “recognized that Williams had been entitled to the assistance of counsel at the time he had made the incriminating statements,” “[yet] no such constitutional protection would have come into play if there had been no interrogation”; and (4) in the Supreme Court oral argument the State of Iowa had “acknowledged that the ‘Christian burial speech’ was tantamount to interrogation.” Id. at 399-400 & 399 n.6.

The lawyers for the State of Iowa arguably acknowledged four or five times that Captain Learning’s “speech” was tantamount to interrogation (depending, of course, on one’s definition of “interrogation”). Although he refused to call it “interrogation,” Iowa’s Assistant Attorney General Winders, who spoke for the first seven minutes of the Supreme Court oral argument, agreed with a statement made by one Justice that when Learning delivered his speech it would “be correct to say that he wanted the defendant to reveal the whereabouts of the child.” Transcript of Oral Argument at 9, Brewer v. Williams, 430 U.S. 387 (1977) (copy on file at the Georgetown Law Journal). In the opening minutes of his presentation, Attorney General Turner acknowledged that Learning made his “Christian burial” remarks—and “even called” Williams “Reverend”—“to induce [Williams] to tell him where Pamela Powers’ body was.” Id. at 11. Then, the Attorney General agreed with Justice Powell’s comments that Learning made the statement for the “purpose” of “leading Williams into stating where the body was located,” and that “a lawyer would consider that [Learning was] pursuing interrogation,” but insisted that this interrogation “was very brief.” Id. at 16-17.

In his concurring opinion, Justice Powell “join[ed] the opinion of the Court which . . . finds that the efforts of Detective Learning ‘to elicit information from Williams,’ as conceded by counsel for [Iowa] at oral argument, . . . were a skillful and effective form of interrogation.” 430 U.S. at 412. “Moreover,” added Powell, “the entire setting was conducive to the psychological coercion that was successfully exploited.” Id.

It is possible that the Williams majority only considered the “Christian burial speech,” and only deemed it important to consider it, “interrogation” within the meaning of Massiah, not Miranda. In context, however, I think this highly unlikely. Moreover, considering the facts of Massiah, see text at notes 216-22, 243-59, 272-86 infra, to talk about “interrogating” a person within the meaning of Massiah is to stretch the normal meaning of words to the breaking point. Such peculiar use of language seems no more helpful and no less misleading than to talk about, for example, “interviewing” a person within the meaning of Ashcroft v. Tennessee, 322 U.S. 143 (1944), a case involving thirty-six hours of “relay” interrogation. See Kamisar, Fred E. Inbau: “The Importance of Being Guilty,” 68 J. CRIM. L. & CRIMINOLOGY 182, 186-87 n.24 (1977) (discussion of pejorative and euphemistic terms to characterize police interrogation).

29. 430 U.S. at 439 (Blackmun, J., with White & Rehnquist, JJ., dissenting). In deeming it “clear [that] there was no interrogation,” Justice Blackmun also noted that “[i]n this respect, I am in full accord with Judge Webster in his vigorous dissent.” Id. at 440. Judge (now FBI Director) Webster described Learning’s speech as an “observation about the weather” and an “expression[ ] of hope that Williams would agree to stop and locate the body.” Williams v. Brewer, 509 F.2d 227, 235 (8th Cir. 1974).
30. “[I]t was [Williams] who started the travel conversation and brought up the subject of the criminal investigation.” 430 U.S. at 440 (Blackmun, J., with White & Rehnquist, JJ., dissenting).
31. Id. at 434 (White, J., with Blackmun & Rehnquist, JJ., dissenting). Justice White also noted that
I find the dissenters' begrudging view of "interrogation" so disturbing that for purposes of discussion I shall assume that Williams is a straight Miranda case. This entails the triple assumption that, at the time of Leaming's speech, no judicial proceedings had been initiated against Williams, no agreement had been made between the defense attorney and the police, and no lawyer had been retained by, or appointed for, Williams.32

JUSTICE BLACKMUN'S DISSENT

In his dissent, Justice Blackmun, joined by Justices White and Rehnquist, deemed it "clear there was no interrogation,"33 but whether he meant simply no interrogation within the meaning of Miranda or no interrogation within the meaning of Massiah as well is not readily apparent. If Justice Blackmun meant that "not every attempt to elicit information should be regarded as 'tantamount to interrogation'"34 for Miranda purposes he is plainly right when— unlike the situation in Williams—the suspect is unaware that he is in the presence of a government agent. Hoffa v. United States,35 decided only six months after Miranda, illustrates this point.

Hoffa incriminated himself by talking to an apparent friend who was actually a paid government informer.36 Because Hoffa did not know that his court retainer was a secret government agent,37 he could not claim that his

Leaming's speech "was delivered hours before respondent decided to make any statement." Id. But this point is only relevant to the issue whether Williams' disclosure was a "product" of Leaming's speech, not to whether the speech was "interrogation" when made. On what might be called the causation issue, Justice White's point about the substantial time lapse between Leaming's speech and Williams' disclosure would have been more impressive if Leaming had not ended his speech by telling Williams to "[j]ust think about it [stopping and locating the body on the way into Des Moines] as we're riding down the road" and Williams had not made the disclosure while they were still "riding down the road." See text at notes 71-74 infra.

32. In both Massiah and Williams the challenged statements were obtained at a time when judicial proceedings had been initiated against the accused and he had already obtained counsel. It is fairly clear, however, that the commencement of adversary proceedings alone activates the right to counsel. See text at notes 511-36 infra. Whether representation by counsel without more triggers the right to counsel is a good deal less clear, but New York's Donovan-Arthur-Hobson rule operates on this premise. See notes 504-09 infra. The Supreme Court is likely to so hold, at least when law enforcement officials treat the defense lawyer deceitfully or disdainfully. See text at notes 537-43 infra.

33. See note 29 supra.
34. 430 U.S. at 439 (Blackmun, J., with White & Rehnquist, JJ., dissenting).
36. Id. at 296-98.
37. Id. at 319 (Warren, C.J., dissenting) (Partin had "worm[ed] his way into Hoffa's hotel suite and [had become] part and parcel of Hoffa's entourage"). At the time Hoffa made the incriminating statements he had not yet been charged with, or even arrested for, endeavoring to bribe members of the Test Fleet jury. Thus, he was compelled to argue that his Massiah-Escobedo rights should have come into play once the government had "sufficient ground for taking the petitioner into custody and charging him with endeavors to tamper with the Test Fleet jury." Id. at 309 (emphasis added). The Court purported to be stunned by this argument: "Nothing in Massiah, in Escobedo, or in any other case . . . even remotely suggests this novel and paradoxical constitutional doctrine . . . . There is no constitutional right to be arrested." Id. at 310. The Court did note, however, that if the government had taken Hoffa into custody and charged him with attempts to tamper with the Test Fleet jury "it could not have continued to question [him] without observance of his Sixth Amendment right to counsel." Id. at 309 (citing Massiah v. United States, 377 U.S. 201 (1964), and Escobedo v. Illinois, 378 U.S. 478 (1964)).
incriminating statements were the product of legal or factual coercion. The facts of Massiah would have provided a similar illustration if judicial proceedings had not been initiated against the defendant and if he had not been represented by counsel when he met with his codefendant, Colson.

It is considerably more difficult to envision instances in which, once judicial proceedings have been initiated, successful attempts to elicit information would not be tantamount to a Massiah interrogation or, more accurately, “deliberate elicitation” of incriminating statements. But consider the following hypothetical: Suppose Captain Leaming had admitted that one of the reasons he had decided to drive his prisoner back to Des Moines during daylight hours rather than at night was that he wanted Williams to get a good look at either the filling station where he had hidden the child’s shoes or the turnoff he had taken to bury the body. Suppose Leaming also admitted that he had hoped and prayed that on passing these spots Williams would make “spontaneous” incriminating disclosures. Suppose further that in the long drive back Leaming and Williams discussed nothing bearing even remotely on the murder case, but that Williams did make the hoped-for “spontaneous” disclosures at the filling station or the turnoff. Most courts in this case would surely excuse Leaming’s course of action as neither “tantamount to interrogation” nor an “attempt to elicit” incriminating statements.

This hypothetical seems to support Justice Blackmun’s contention that no interrogation occurred in Williams. I think, however, that the disclosure would be admissible not because it was the product of a permissible attempt to elicit information but because no “attempt” occurred at all. A police officer who returns a prisoner by the most feasible route does not, it seems to me, “attempt to elicit information” merely because he is aware of the possibility that passing some spot along the way might inspire his prisoner to confess. A

38. Id. at 304. It seems fairly clear that the result would have been the same even if the secret government agent had asked questions of Hoffa or otherwise actively elicited incriminating statements from him. Such conduct by an apparent friend still would not have been “coercive,” inherently or otherwise. Cf. Osborn v. United States, 385 U.S. 323 (1966). The Court in Osborn affirmed the conviction of one of Hoffa’s attorneys for attempting to bribe a prospective federal juror, even though the informer in this case made at least an overture toward crime by mentioning that one of the prospective jurors was his cousin and falsely telling the attorney that he had visited his cousin and found him “susceptible to money for hanging this jury.” See id. at 326.

39. In fact, Colson had also held separate meetings in his “bugged” car with two of Massiah’s confederates, Anfield and Maxwell, prior to their eventual arrest and indictment. These conversations, too, had been tape-recorded and “broadcasted” to Agent Murphy. Anfield was tried together with Massiah; although indicted the same day as Massiah and Anfield, Maxwell and other coconspirators were brought to trial five years later. See United States v. Maxwell, 383 F.2d 437, 441 (2d Cir. 1967); Brief for United States at 6, 8, Massiah v. United States, 377 U.S. 201 (1964).

40. This is a relatively easy hypothetical because the captain also had perfectly good reasons for driving back during daylight hours. For one thing, he was supposed to bring Williams back as soon as possible. For another, weather conditions, bad enough in daylight (freezing rain, slippery roads, poor visibility), might have made nighttime driving all but impossible. Finally, a heavy snow storm was predicted for that night. See 430 U.S. at 392. Even if an “ulterior motive” theoretically undermines an otherwise justified course of police conduct, an impermissible motive test would probably prove to be unworkable.

Suppose, on the other hand, that Captain Leaming had theorized that Williams had hidden the body in some desolate area unapproachable from the freeway and had driven his prisoner many miles over the back road in order to come as near as possible to this out-of-the-way spot. Such a circuitous return trip, taken for the reason stated, would, I think, be an impermissible “attempt to elicit information,” and any incriminating disclosures it produced should be excluded on sixth amendment-Massiah grounds.
police officer need not refrain from detaining a traffic offender and from running a license check on the car, as he normally would do under the circumstances, because he hopes and prays that such routine procedures will prompt an admission that the car was stolen. Nor, when he takes a person into custody, need he decline to ask routine questions unrelated to the investigation of the case, such as where the arrestee lives and how he spells his last name, because he harbors the secret desire that such standard “booking procedure” will evoke incriminating statements.41

These hypotheticals, however, are a far cry from the Williams case. Captain Leaiming did not simply decline to depart from standard operating procedure. He did not simply harbor the secret desire that Williams would be moved to reveal the location of the body on the return trip to Des Moines. Captain Leaiming relied on more than a hope and a prayer. He invoked the trickery, deception, and “psychology” recommended in the “how-to-do-it interrogation manuals”42 that so aroused the ire of the Miranda majority.43 He appealed in the name of religion to someone he knew to be deeply religious.44 In effect, he challenged Williams to display some evidence of honor and decency.45 He addressed Williams as “Reverend” admittedly to win his friendship and confidence46 and also probably because someone like Williams would be more vulnerable to such flattery than persons of high social or professional status.47 In his “speech,” Leaiming assumed that the girl was dead and that Williams knew where the body was.48 And he falsely told Williams that he “knew” the girl’s body was in the Mitchellville area.49

These are all standard interrogation techniques.50 They are tantamount to “straight questioning” because they generate similar pressures, anxieties, and intimidation. They are not only calculated to, but likely to, evoke incriminating statements. They “endanger the privilege against self-incrimination”51 no less than does more readily identifiable “interrogation.”52


42. Graham, supra note 41, at 106.

43. See 384 U.S. at 448-55.

44. Kamisar, supra note 2, at 221-23; see notes 45-48 infra.

45. Kamisar, supra note 2, at 228 n.80.

46. Id. at 223.

47. Id. at 221-22 & n.57.

48. Id. at 224-25 & n.69.

49. The federal district court so found, 375 F. Supp. at 175, and members of the Supreme Court proceeded on the same assumption, 430 U.S. at 393, but Leaiming’s testimony on this matter was inconsistent. At one point Leaiming testified that he had said that he “knew” where the body was, and at another that he told Williams that he had “theorized” (which was true) or had “an idea” (which was also true) that the body was in the Mitchellville area. See Kamisar, supra note 2, at 236.

50. See generally Kamisar, supra note 2, at 221-22 & nn.56-60, 225-28 & nn.69-80.

51. Graham, supra note 41, at 104.

52. See generally Rothblatt & Piller, Police Interrogation: Warnings and Waivers—Where Do We Go...
In determining that no interrogation took place in Williams, Justice Blackmun pointed out that although Williams was repeatedly advised of his rights, "it was he who started the travel conversations and brought up the subject of the criminal investigation." There are several responses to Justice Blackmun's contention. First, "interrogation is a social situation, and suspects respond according to the normal rules of social interaction in such a situation." It was highly likely, almost inevitable, that sitting close together in the back seat of a car for hours, Learning and Williams would "visit." Indeed, just before they started out on their journey, the captain told his prisoner they would be "visiting" on the long ride back to Des Moines. It is not readily apparent why a suspect who "desire[s] to appear courteous and not to offend," as many persons do even when they are involved in much less "psychologically close" encounters with the police, should somehow "waive" or be deprived of his constitutional protection against police questioning or against police "psychological ploys" that amount to the same thing.

Second, although the record indicates that Williams did start the travel conversation, his opening question was whether the captain "hated him" and "wanted to kill him" or whether some other police officer was desirous of doing so. This question enabled Learning to get right to work. He responded that he himself "had had religious training and background as a child" and that he "would probably come more near praying for" Williams than abusing or striking him. Thus, it was Learning who first brought up the subject of religion and who suggested in their very first conversation that he was aware of Williams' moral and religious obligations under the circumstances.

Although, along with "a great deal of conversation not related to the case," Williams did ask a few questions about the progress of the murder investigation—is that surprising?—he neither provided any information about the

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53. 430 U.S. at 440 (Blackmun, J., with White & Rehnquist, JJ., dissenting).
55. See Kamisar, supra note 2, at 209, 215 & n.34.
56. See Griffiths & Ayres, supra note 54, at 315.
57. See Driver, Confessions and the Social Psychology of Coercion, 82 Harv. L. Rev. 42, 44-46 (1968) ("To be physically close is to be psychologically close. The situation has a structure emphasizing to the persons involved the immediacy of their contact . . . . When the norm governing spatial distance is violated, a person's instantaneous and automatic response is to back up, again and again. The suspect, unable to escape, will become even more anxious and unsure.").
58. The Iowa Attorney General told the Supreme Court:

Learning . . . did not really ask any questions. He made this Christian burial statement, and he said "I don't want you to answer me." Now, that may be considered to be—that is going to be a question for this Court to decide, whether that constituted interrogation or a psychological ploy.

Transcript of Oral Argument at 16 (copy on file at the Georgetown Law Journal) (emphasis added). He later admitted, however, that Leaming's statement was an interrogation, but that "it was very brief." Id. at 17.
59. Brief for Petitioner, Joint App. at 79, 94-95.
60. Id. at 80.
61. Id. at 56.
case in the conversation preceding the “Christian burial speech” nor indicated in any way that he was going to do so. Nor had there been any previous mention of the body when Leaming launched “the speech.” Justice Blackmun further maintained that “Leaming’s purpose was not solely to obtain incriminating evidence”; he was also “hoping to find out where that little girl was,” but such motivation does not equate with an intention to evade the Sixth Amendment. It seems to me, as it did to Professor Graham a dozen years ago, that so long as the police conduct is likely to elicit incriminating statements and thus endanger the privilege, it is police “interrogation” regardless of its primary purpose or motivation, and that if it otherwise qualifies as “interrogation,” it does not become something else because the interrogator’s main purpose is the saving of a life rather than the procuring of incriminating statements, even though self-incrimination may be foreseen as a windfall.

Justice Blackmun may have had something else in mind. He may have been seeking to invoke the so-called “rescue” or “emergency” doctrine. If, when he delivered “the speech,” Captain Learning had believed the little girl might still be alive and had been motivated by a desire to find her before she froze to death, I venture to say that one or more members of the 5-4 Williams majority would have switched their votes. But in light of the factual circumstances in Williams, the “rescue” or “emergency” doctrine could not have been properly applied.

When pressed on cross-examination by defense attorney McKnight about whether he was trying to get as much information from Williams as he could before they returned to Des Moines, Leaming did say that he “was sure hoping to find out where that little girl was.” In light of the entire record, however, it appears that he probably meant the girl’s body, not the girl. For only a moment or two earlier, during the same cross-examination by McKnight, the following exchange occurred:

Q. Didn’t you [make the “Christian burial speech”] to him to induce him to show you where the body was?
A. I was hoping he would. . . .

62. Id. at 79-81.
63. 430 U.S. at 439 (Blackmun, J., with White & Rehnquist, JJ., dissenting). Justice Blackmun’s “hoping to find out where that little girl was” quotation is taken from the majority opinion, id. at 399, which refers to Leaming’s testimony in Brief for Petitioner, Joint App. at 95.
64. Graham, supra note 41, at 104-06, 126-29.
66. See Brief for Petitioner, Joint App. at 95 (emphasis added).
Q. Well, I said wasn't [the “Christian burial speech”] for the purposes of getting Mr. Williams to talk?
A. Well, I was hoping he would tell me where the body was, Mr. McKnight, absolutely.67

This admission, by itself, might not be conclusive. Indeed, one problem with the “rescue” doctrine is that the record almost never establishes that the investigators knew for sure, or even that they assumed, that the victim was dead—and the temptation to attribute a lifesaving purpose to the interrogation, at least in retrospect, is great.68 The record in Brewer v. Williams, however, does demonstrate Learning’s knowledge of the girl’s death. Immediately after this cross-examination of Learning, the following occurred:

Redirect Examination

Q. Captain, when Mr. McKnight was in your office [the morning he talked to Williams long-distance], what conversation did you hear from him when he was on the telephone?
A. Well, I heard him say [to Williams] that, “You have to tell the officers where the body is,” and he repeated a second time, “You have got to tell them where she is.” . . . “When you get back here, you tell me and I’ll tell them . . . .”69

Recross Examination [by McKnight]

Q. Say, officer . . . we didn’t know whether the girl was dead or alive when you left here, did we?
A. You [McKnight] told me she was dead.
Q. You want to say that I told you that?
A. Yes, sir. You said that Williams told you that . . . .

. . . .

You said he said she was dead when he left the YMCA with her.70

67. Id. at 92-93 (emphasis added).
68. Thus, nine years after the event, although nothing in the record substantiates the view that a lifesaving purpose motivated his “Christian burial” statement, see note 70 infra and accompanying text, Captain Learning defended his action on the ground that “[i]f we had found that girl alive, with even a breath of life remaining because of what Williams told us, I doubt if anyone would have said anything about anything being illegal.” Lamberto, supra note 1.
69. Brief for Petitioner, Joint App. at 96 (emphasis added).
70. Id. at 96-97 (emphasis added). Evidently McKnight thought that revealing to Captain Learning and Chief Nichols (who was also present) that Williams had told him that the little girl was dead was a foolish thing for Williams’ lawyer to have done. Thus, McKnight endeavored on cross-examination and recross to get Nichols as well as Learning to back down on this point. Although Nichols finally conceded that he was unsure whether McKnight actually said Williams said that the girl was dead, id. at 108, he did not retract his testimony that McKnight reported the girl was dead after his phone conversation with Williams, id. at 108-09.

The important point is that Captain Learning was convinced McKnight had told him that the girl was dead and that the captain never doubted this was so. At least nothing in the record indicates that he had any doubt. Indeed, Learning “figured” that Williams
JUSTICE WHITE’S DISSENT

Justice White, who was joined in his dissent by Justices Blackmun and Rehnquist, suggested another reason why Williams was “not questioned”: the “Christian burial speech” “was accompanied by a request by [Leaming] that the accused make no response.” 71 Not quite. The “speech” was in fact accompanied by the remark: “I do not want you to answer me. I don’t want to discuss it any further. Just think about it as we’re riding down the road.” 72

had probably got rid of the body as soon as he possibly could after he left Des Moines. I felt that it wasn’t in the Grinnell area [where a search had turned up the girl’s clothing, but no body], it wasn’t in the Newton area [where a search had produced nothing]. So I then thought probably as quick as he could get out of Des Moines [Williams] would dispose of the body . . . . [S]o I figured Mitchellville.

Id. at 65 (emphasis added).
71. 430 U.S. at 434.
72. Id. at 392-93 (emphasis added).

Captain Leaming’s closing remark seems to illustrate what one interrogation expert, Lt. C.H. Van Meter, has called, in his chapter on “closing,” a “‘soft’-type closing” or “closing with the door open.” C. VAN METER, PRINCIPLES OF POLICE INTERROGATION 100-01 (1973). The first two “samples” of this technique offered by Lt. Van Meter are:

INTERROGATOR: Karl, I want you to know that I don’t feel that this whole problem has been straightened out. I want you to think things over and we can get together later, and maybe go over this whole thing again.

or

INTERROGATOR: Karl, why don’t you kick this thing around in your mind awhile and think over what we have been talking about. All you have to do is let your conscience be your guide in all of this, and then, if you need me to talk over anything, just give a whistle.

Id. at 100. Adds Van Meter:

In all phases of your interrogation, you must make yourself available to receive the confession, and this holds true at the termination of the interrogation as well. By leaving yourself and the suspect an opening to renew your conversation, you’ll quite often give yourself a confession that you would not otherwise have gotten. Make yourself available to the suspect and give yourself the break of being able to easily renew any further contact you might have with him.

Id.

When the police car neared the Mitchellville exit, Williams did announce, according to Captain Leaming, that he was going to show the police where the body was. But one cannot help wondering whether, had Williams not done so, Leaming would have renewed the discussion at this point. Consider the following comments by Van Meter regarding the continuing effectiveness of this “closing” technique:

[By “closing with the door open”] we left ourselves plenty of room to start anew at a later date if necessary, and also we made our interrogator “available” should the suspect feel that he wants to talk. We tried for the confession and thereby reinforced in the suspect’s mind the fact that we are not convinced that he is innocent as he has stated; further, we gave him a number of good reasons to think about as to why he should confess. By leaving the door open to him, we can renew our conversation anytime by just saying, “Well, Karl, did you think over what we talked about last time?”

Id. at 103.
Think about what? Think about the fact that “you [Williams] are the only person that knows where this little girl’s body is”; that you are the only one who can fulfill the desire and the right of the girl’s parents to give their daughter a Christian burial; that, because of the predicted snowstorm, even you may be unable to bring about a Christian burial if you do not locate the body before we get back to Des Moines; and that we will be going right past the area on the way into Des Moines.

Leaming was not just asking Williams to think about it. He was setting a time limit on how long Williams had to think about it. He was “asking” Williams, it seems plain to me, to think about telling him, or showing him, where the body was by the time they reached the turnoff to the area where the body was buried. What else could Leaming have meant? That was the whole point of his “Christian burial speech.” Certainly that was the way the third man in the police car, Detective Nelson, heard it. When Nelson was asked whether he or Leaming had asked Williams anything on the drive back to Des Moines, he replied that they had not, except that “when we left Davenport, Captain Leaming asked him to think about telling us where the body is.”

That under the circumstances Leaming’s request that Williams not “answer” him or “discuss it any further” is an insignificant factor may be demonstrated, I think, by modifying the facts in the famous Spano case.74 The actual facts were as follows: Spano called his childhood friend, Bruno, then a fledgling police officer, and told him that he had shot a man when still dazed by the man’s blows and unaware of what he was doing, and that he intended to get a lawyer and give himself up. Bruno relayed this information to his superiors. The next day Spano, accompanied by counsel, did surrender himself to the authorities. His attorney left him in the custody of the police, who subjected him to intensive questioning. But Spano persisted in his refusal to incriminate himself.

At this point Bruno’s superiors instructed him to tell Spano that the latter’s phone call “had gotten him ‘in a lot of trouble’ and that he should seek to extract sympathy from [Spano] for Bruno’s pregnant wife and three children.”76 Bruno “played [the] part of a worried father, harried by his superiors, in not one but four different acts”77 before Spano “succumbed to his friend’s prevarications and agreed to make a statement.”78

Suppose Bruno had had only one session with Spano and in that session he had delivered the following “pregnant wife and three children speech”:

Spano, old buddy, I don’t mind telling you that your phone call has gotten me into a lot of trouble. A friend of mine told me this morning he heard Lieutenant Gannon is going to see to it that I lose my job. I have an appointment to see the lieutenant in two hours. I’m probably going to get the bad news then.

What a time to lose a job! Three children and a fourth on the way. I don’t know how we’re going to survive. Mary is a wonderful

73. Brief for Petitioner, Joint App. at 104 (emphasis added).
75. Id. at 317-18.
76. Id. at 319.
77. Id. at 323.
78. Id. at 319.
wife. She's entitled to a husband with a decent job. The three kids are darlings. They're entitled to a father with a decent job. You're my only hope. You're the only one who can prevent this disaster from happening. If you agree to make a statement I'm sure Lieutenant Gannon will calm down. But considering the mood Gannon is in, if you don't do so this afternoon, not even you may be able to help me. I'm so upset I can't work. I'm just going to sit right outside your door and try to read a magazine until the time for my appointment with Gannon. I don't want you to answer me. I don't want to discuss it any further. Just think about it as I'm sitting outside trying to read a magazine.

Suppose further that an hour and a half later Spano had made a statement. Would anyone doubt that Bruno's "speech" constituted "interrogation" or was "tantamount to interrogation"? How is Captain Leaming's "speech" different?

CHIEF JUSTICE BURGER'S DISSENT

In a third dissenting opinion, Chief Justice Burger suggested that Justice Powell had asserted "that the result in this case turns on whether Detective Leaming's remarks constituted 'interrogation,' as [Justice Powell] views them, or whether they were 'statements' intended to prick the conscience of the accused." But Justice Powell neither made nor suggested any such distinction in his concurring opinion. Quite the contrary. Justice Powell seems to be saying—and rightly so—that "'statements' intended to prick the conscience of the accused," in the words of the Chief Justice, at least when they are likely to persuade the accused to incriminate himself, can be, as they were in the Williams case, as "skillful and effective" a "form of interrogation" as any set of direct questions.

If a distinction between "questioning" for the purpose of eliciting information and the use of "psychological ploys," such as appeals to conscience, to achieve the same purpose, emerged anywhere in the Williams case, such a distinction was drawn only by the Iowa Attorney General or by the Chief Justice himself. Neither the opinion of the Court nor any of the concurring opinions made that distinction. Nor is it to be found in any of the interrogation manuals. Indeed, appeals to conscience and other "psychological ploys" are the very stuff of which "interrogation" is made. On this point,

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79. 430 U.S. at 419 (Burger, C.J., dissenting).
80. See note 26 supra.
81. See note 58 supra.
82. See, e.g., C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 102-03 (1st ed. 1956). This manual was quoted extensively by the Court in Miranda v. Arizona, 384 U.S. at 453. See note 102 infra. The first two "categories" described by O'Hara when he set forth "some of the techniques practiced by experienced investigators" are: "Emotional Appeals" (subdivisions include "Sympathetic Approach" and "Kindness") and "Friendliness" (subdivisions include "The Helpful Advisor" and "The Sympathetic Brother," each capitalizing on the subject's need "to square things with his own conscience"). C. O'HARA, supra, at 102.
a page from the "how-to-do-it" and the "how-we-have-done-it-ourselves" manuals is worth a volume of semantics. \(^8\)

The Chief Justice also observed that he found "it most remarkable that a murder case should turn on judicial interpretation that a statement becomes a question simply because it is followed by an incriminating disclosure from the suspect." \(^8\) That would indeed have been a startling contention—if anyone had made it. No one did, however.

No one suggested that if Captain Leaming had said, "Let's pull off at the next Holiday Inn and get something to eat," or "I hope we can get back to Des Moines without sliding off these icy roads," or had made some other remark neither calculated nor likely to elicit an incriminating disclosure that any such remark would have become "interrogation" if Williams were to have chosen that occasion to announce: "I'm going to show you where the body is." The "Christian burial speech" did not become "interrogation" because it was followed by an incriminating disclosure; it constituted "interrogation" or its equivalent when first delivered because its purpose and its tendency were to elicit an incriminating disclosure.

**A QUESTION BY ANY OTHER NAME**

What may have struck Chief Justice Burger as "remarkable" is the notion that a "statement" or "speech" containing no question marks should be regarded as "questioning" or "interrogation." But how could it be otherwise? The techniques that police interrogators are able to use—and for generations have used—are so many and varied that, unless Miranda and the privilege against self-incrimination it is designed to effectuate were to become empty gestures in custodial surroundings, the Court could not have intended to limit their applicability to only one form of official "interrogation" or "compulsion"—verbal conduct ending in question marks. Indeed, as I hope to convince the reader, Miranda and the privilege against self-incrimination cannot be limited to situations in which the police directly address a suspect or even to those occasions on which they engage in verbal conduct. \(^8\)

\(^{83}\) Cf. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J., dissenting) ("a page of history is worth a volume of logic").

\(^{84}\) 430 U.S. at 419-20 (Burger, C.J., dissenting).

\(^{85}\) Because the custody issue has arisen more frequently and has generally been regarded as a more difficult one, a good deal more attention has been paid to what constitutes custodial interrogation than to what constitutes custodial interrogation. So far as I have been able to ascertain, however, most, if not all, commentators who have addressed the issue have recognized that “[p]olice conduct, though not verbal, may nevertheless be tantamount to interrogation for purposes of requiring Miranda warnings.” 3 J. WIGMORE, EVIDENCE § 826a, at 383 n.23 (J. Chadbourn rev. ed. 1970). See also C. MCCORMICK, EVIDENCE 330 (E. Cleary 2d ed. 1972); Graham, supra note 41, at 107; Rothblatt & Piltz, supra note 52, at 486.

J.V. Smith does not define "interrogation," but rather points out "the major areas which are generally held not to be interrogation: volunteered statements and responses given to administrative questions" (the routine questions asked of all arrestees who are "booked" or otherwise processed). Smith, supra note 41, at 702-03. It seems fairly clear that, although pressuring, persuading, or prompting a suspect to confess by showing him incriminating physical evidence, such as a ballistics report or a bank surveillance photograph, or by confronting him with an accusatory accomplice, see note 115 infra, need involve no verbal conduct, such tactics fit neither of the noninterrogation categories discussed by Smith.

Professor Charles Alan Wright's reading of the Miranda opinion differs from mine, but it is plain that
Eighty years ago, in the famous *Bram* case, the Court held that when a murder suspect was informed by the police that a cosuspect had charged him with the crime, this information “produce[d] upon his mind the fear if he remained silent it could be considered an admission of guilt” and thus under the circumstances rendered the resulting incriminating statement a violation of the privilege. But the only one who asked a question in the course of the *Bram* “interrogation” was the suspect himself:

Detective Power: Bram, we are trying to unravel this horrible mystery [the murder of the captain of Bram’s ship]. Your position is rather an awkward one. I have had [Seaman] Brown in this office and he made a statement that he saw you do the murder [which was true].

Bram: He could not have seen me; where was he?

Power: He states he was at the wheel.

...he is unhappy with his reading. Although “not clear,” “the breadth of the exception for volunteered statements,” he observes, “seems to include . . . the statement of a person who has not been given the benefits of warnings and counsel so long as he is not interrogated. If so, the police, so long as they ask no questions, could deliberately hold a person in custody without giving him the Miranda warnings, and confront him with the victim of the crime, or perhaps other evidence of it, in the hope that he would then spontaneously say something incriminating. If this is what the Court intended to permit, it has left a large gap in the protections otherwise provided by Miranda . . . .” 1 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE (CRIMINAL)* § 76, at 112-13 (1969). I cannot believe that the *Miranda* Court did leave such a “large gap” in the protections it otherwise provided that would permit the police, without giving the requisite warnings or having given the warnings after a suspect has asserted his rights, to resort to tactics and techniques that generate pressure, tension, and anxiety above and beyond that inherent in normal arrest and detention. See note 112 infra. To call a statement prodded or prompted by police revelation of damaging evidence or by police arrangement of a confrontation with the victim (or with an accusatory accomplice) a “volunteered” or “spontaneous” statement strikes me as a peculiar use of language. “Volunteered” connotes offering something on one’s own initiative (the Court in *Miranda* seems to define “volunteered” as produced “without any compelling influences,” not merely without verbal conduct, 384 U.S. at 478); “spontaneous” is usually defined as self-generated, happening without apparent external cause.


[T]oday the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897, when, in *Bram* v. United States, 168 U.S. at 532, the Court held that “[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by” [the fifth amendment privilege against self-incrimination].

378 U.S. at 7. See also *Miranda* v. Arizona, 384 U.S. at 461 (quoting same *Bram* language with approval). Although “[t]he old *Bram* case might well have furnished a steppingstone to the standard advanced in *Malloy*, . . . until Escobedo, at any rate, it only amounted to an early excursion from the prevailing multifactor approach.” Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in Y. KAMISAR, F. INBAU & T. ARNOLD, CRIMINAL JUSTICE IN OUR TIME 1,47 (A. Howard ed. 1965); see Escobedo v. Illinois, 378 U.S. 478 (1964) (decided same Term as *Bram*).

87. *Bram* v. United States, 168 U.S. at 562. Moreover, added the Court, “it cannot be conceived that the converse impression could not also have naturally arisen that by denying [the cosuspect’s accusation] there was hope of removing the suspicion from himself.” *Id.*

88. *Id.* at 562-64. Bram was confronted with this communication while stripped or being stripped by the police. *Id.* at 538, 561, 563.
Bram: Well, he could not see me from there.  

Escobedo did not “crack” until confronted with an alleged accomplice who claimed that Escobedo had fired the fatal shots. In the presence of the police, Escobedo called his accomplice a liar—“I didn’t shoot Manuel, you did it” and “[i]n this way . . . for the first time, admitted to some knowledge of the crime.” Ashcraft did not admit that he had hired Ware to kill his wife until a copy of Ware’s confession was given or read to Ashcraft. Neither in Escobedo nor in Ashcraft did any Justice suggest that the police conduct described above constituted something other than “interrogation” because it was accomplished without any questions being asked. Indeed, in each case the “interrogation” might have been carried out without the police engaging in any “verbal conduct.”  

In Rogers v. Richmond, when petitioner persisted in his refusal to admit involvement in a felony-murder, “Chief Eagan pretended, in petitioner’s hearing, to place a telephone call to police officers, directing them to stand in readiness to bring in petitioner’s wife [who suffered from arthritis] for questioning.” Petitioner continued to hold out until the chief indicated that he was about to have petitioner’s wife taken into custody. If the feigned phone call had immediately produced the desired result, however, I doubt that the State would have had the audacity to argue that this psychological ploy was not “interrogation” at all because it was not a “question” or because the statements were not addressed to petitioner.  

Only once in his opinion for the Court in Rogers did Justice Frankfurter label Eagan’s remarks “questioning” or “interrogation.” Both in his general discussion of the standard demanded by fourteenth-amendment due process for determining the admissibility of confessions and in his application of the standard to the particular facts of the case, Justice Frankfurter employed such terminology as the following: “confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand”; “confessions obtained by impermissible methods”; subjecting a defendant “to pressures to which, under our accusatorial system, an accused should not be

89. Id. at 539, 562.  
91. Id.  
92. Ashcraft v. Tennessee, 322 U.S. 143, 151 (1944). The Court, in an opinion by Justice Black, stated that Ware’s confession “was read to Ashcraft.” Id. The dissenters stated that it “was given” to him. Id. at 166 (Jackson, J., with Roberts & Frankfurter, JJ., dissenting). Whether Ware’s confession was read to Ashcraft or whether the latter read it himself in the presence of the police or, for that matter, whether Ware directly confronted and accused Ashcraft in the presence of the police strikes me as an insignificant distinction. The result should not turn on whether the police asked a question or even whether they engaged in “verbal conduct”; in all three situations the purpose of the police and effect on the suspect are essentially the same. See text at notes 115-16, 133-36 infra.  
94. Id. at 535.  
95. Id. at 535-36.  
96. Id. at 548 (“[W]e need not, on this record, consider whether the circumstances of the interrogation and the manner in which it was pressed barred admissibility of the confession as a matter of federal law.”).  
97. Id. at 540 (emphasis added).  
98. Id. at 541 (emphasis added).
subjected”; 99 “whether the behavior of the State’s law enforcement officials was such as [to] bring about confessions not freely self-determined.” 100

It is true that Miranda contains much talk about “custodial police interrogation,” “in-custody interrogation,” “questioning initiated by law enforcement officers,” and about the warnings that must be given “prior to any questioning.” But it also contains strong criticism and apparent condemnation of (1) many standard interrogation techniques that need not take the form of “questions,” such as “posing” the guilt of the subject as a fact,” “minimizing the moral seriousness of the offense,” and “casting blame on the victim or on society,” 101 and (2) various stratagems that do not require any “verbal conduct” on the part of the police at all, such as the “false line-up” and the “reverse line-up.” 102

It was argued long ago that in-custody interrogation without more impermissibly compels a person to incriminate himself. 103 But the courts put that issue aside for many years. It was hard enough to prevent the police from resorting to physical violence, “relay questioning,” and other crude and

99. Id. (emphasis added).

100. Id. at 544 (emphasis added). Consider also the observation in the last of the pre-Escobedo-Miranda cases, Haynes v. Washington, 373 U.S. 503 (1963), that “[t]he line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused.” Id. at 515 (Goldberg, J.) (emphasis added).

101. 384 U.S. at 450.

102. Id. at 453. In the “false lineup” ploy, “[t]he witness or complainant (previously coached, if necessary) studies the lineup and confidently points out the subject as the guilty party.” Id. at 453 (quoting C. O’HARA, supra note 82, at 106). Thus, no police officer himself need say anything. In the “reverse lineup” variation, the suspect is again placed in a lineup, “but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations.” Id. (quoting C. O’HARA, supra note 82, at 106).

Among the other techniques discussed in this edition of the O’Hara manual is a variation of the “bluff on a split pair”: A, a cosuspect, is seated in an outer office also occupied by a busy stenographer. B, a cosuspect, is taken into the interrogation room and the stenographer is then ordered to come in, too—with pencil and notebook. “After an appropriate period of time, the stenographer returns and begins to type from his notes [and in various ways suggests that he is typing up B’s confession]. Subsequently, A is returned to the interrogation room, which B has now left. He is viewed with a grave silence. The interrogator opens up with: ‘I don’t think we’ll need any confession from you, but if you want to clear up a few points . . . .’ ” C. O’HARA, supra note 82, at 106. The interesting thing about this “interrogation technique” for purposes of present discussion is that it may well pressure or persuade A to incriminate himself while he is watching the stenographer type up “B’s confession” or while he is being returned to the interrogation room or when he is “viewed with a grave silence” on his return. If A were to make an incriminating statement at any one of these points, the “interrogation technique” would have “worked” without A having been asked a single question—or without anyone even speaking to him.

The first edition of the O’Hara manual was not revised until 1970 (two years after Captain Leaming “visited” with Williams), but post-Miranda editions have recognized that the techniques described above and similar tactics spelled out in the first edition may “conflict with the spirit of the Miranda ruling” and that “although such techniques may have been accepted as legal, their misapplication or misinterpretation might serve to produce or intensify the inherent pressures of the interrogation atmosphere that the Supreme Court’s ruling was designed to overcome.” C. O’HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 121 (4th ed. 1976) (emphasis added).

103. See E. HOPKINS, OUR LAWLESS POLICE 193-95 (1931). According to Professor Zechariah Chafee, Ernest Hopkins, an official investigator for the Wickersham Commission, showed “notable skill and enterprise in breaking through the barriers of silence which surround official lawlessness.” Id. at vii (preface).
After three decades and thirty-odd “coerced confession” cases that saw “the overall gauge... steadily changing, usually in the direction of restricting admissibility,” the Court in *Miranda* finally held that “[e]ven without employing brutality, the ‘third degree’ or the specific stratagems described [in the interrogation manuals, from which it had quoted at length earlier in the opinion], the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals.” Thus, the Court stated:

We are satisfied that all the principles embodied in the privilege [against self-incrimination] apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described [in the interrogation manuals quoted] above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

The whole point of applying the privilege to custodial surroundings was that it imposed “more exacting restrictions than [did] the Fourteenth Amendment’s voluntariness test.” It would be standing *Miranda* on its head to say that because the Court was “concern[ed]... primarily with [the] interrogation atmosphere and the evils it can bring,” it somehow managed to lift restrictions against other forms of compulsion, persuasion, trickery, and cajolery. The aim of the *Miranda* rules, as the dissenters well understood, was to “reinforce the nervous or ignorant suspect” and to “negate all pressures” above and beyond the coercion of arrest and detention itself—“to offset [the] minor pressures and disadvantages intrinsic to any

104. Chafee, *Remedies for the Third Degree*, ATLANTIC MONTHLY, Nov. 1931, at 621. "It is hard enough to prevent policemen from using physical violence on suspects; it would be far harder to prevent them from asking a few questions. We had better get rid of the rubber hose and twenty-four hour grillings before we undertake to compel or persuade the police to give up questioning altogether." *Id.* at 626. Professor Chafee coauthored the famous report to the Wickersham Commission on the “third degree.”
106. *Id.* at 455 (emphasis added).
107. *Id.* at 461 (emphasis added).
108. *Id.* at 511 (Harlan, J., with Stewart & White, JJ., dissenting). The *Miranda* opinion may contain some overstatements, but surely the observation that “[i]n these cases, we might not find the defendants’ statements to have been involuntary in traditional terms” is not one of them. *Id.* at 457.
109. *Id.* at 456.
110. *Id.* at 505 (Harlan, J., with Stewart & White, JJ., dissenting).
111. *Id.*
112. “Zero-value pressure condition[s]” are not required by *Miranda*, nor are they possible in custodial surroundings. Cf. C. O’HARA, *supra* note 82, at 121. The *Miranda* Court might have held that the inherent and unavoidable pressures produced by arrest and detention without more are substantial enough to require “neutralizing” warnings, but it did not do so. Thus, in the absence of “questionings,” or some other form of prodding or persuasion, the “compulsion” inherent in arrest and detention does not rise to the level of “compulsion” within the meaning of the privilege. As Justice White correctly pointed out in his *Miranda* dissent, a suspect “may blurt out [an admissible] confession despite the fact that he is alone and in custody,
kind of police interrogation” previously allowable under due process precedents that “exert[ed] a tug on the suspect to confess.” How, then, can it be said that the “Christian burial speech” was not “interrogation” within the meaning of Miranda? 

I think it is plain that the “Christian burial speech” was in fact a form of “interrogation.” It had the same purpose and effect as a question, “[t]he question was implied if not spoken,” and “[e]verything was there but a question mark.” More generally, “it simply is not enough to mechanically

without any showing that he had any notion of his right to remain silent or of the consequences of his admission.” 384 U.S. at 533 (White, J., with Harlan & Stewart, JJ., dissenting). But see A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.8 (Official Draft 1975) [hereinafter cited as MODEL CODE]; UNIFORM RULES OF CRIMINAL PROCEDURE 212, 241 (Approved Draft 1974) (recommending that in order to relieve some of pressure, confusion, and anxiety likely to be generated by arrest and arrival at police station, suspect should be given certain advice at these stages whether or not any questioning is attempted).

At some point, however, prolonged detention (albeit in complete silence) for the purpose and with the likely effect of pressuring or prodding a suspect to confess will supply the “something more” that transforms “custody” into custodial interrogation within the meaning of Miranda. See Rothblatt & Pitter, supra note 52, at 486. To put it another way, an extended period of detention raises the pressure and anxiety generated by normal arrest and detention to the level of “compulsion” within the meaning of the privilege. See text accompanying notes 122, 125-36 infra.

113. 384 U.S. at 516 (Harlan, J., with Stewart & White, JJ., dissenting).

114. Id. at 515.

115. See Combs v. Wingo, 465 F.2d 96, 97-99 (6th Cir. 1972). In Combs a murder suspect who had been given Miranda warnings asserted his right to counsel. The officer responded: “[A]ll right. I want to read you something.” He then read the incriminating ballistics report, whereupon the accused broke down and confessed. Id. at 97-98. The state appellate court, in Combs v. Commonwealth, 438 S.W.2d 82 (Ky. 1969), held that the reading of the report (the dissenters referred to the “showing” of the report) did not amount to “interrogation” within the meaning of Miranda, but merely constituted “furnishing” defendant “information the police had already acquired by their [independent] investigation.” Id. at 85. Judge Palmore, joined by Judge Milliken, wrote a strong dissent. In a federal habeas corpus proceeding, the Sixth Circuit, in an opinion written by Judge (now Solicitor General) McCree, agreed with the dissenters in the Kentucky Court of Appeals decision:

The purpose of a question is to get an answer. Anything else that has the same purpose falls in the same category and is susceptible of the same abuses Miranda seeks to prevent. The only possible object of showing the ballistics report to the appellant in this case was to break him down and elicit a confession from him. The question was implied if not spoken. Everything was there but a question mark. It was a form of question and got the desired result.

465 F.2d at 99 (quoting 438 S.W.2d at 86 (Palmore, J., with Milliken, J., dissenting)).

Both state and federal courts are split on whether confronting a suspect with physical evidence or with an accomplice who has confessed constitutes interrogation within the meaning of Miranda. See NAT'L DIST. ATT'YS ASS'N, CONFESSIONS AND INTERROGATIONS AFTER MIRANDA 34-35 (J. Zagel 5th rev. ed. 1975) (collection of state and federal cases). It is fairly clear, for example, that the Ninth Circuit would have admitted the ballistics report-prompted confession held inadmissible in Combs. See United States v. Pheaster, 544 F.2d 353, 365, 366-68 (9th Cir. 1976) (after asserting right to counsel, suspect told that fingerprint found on kidnappers’ note had been positively identified as his; resulting confession admissible); United States v. Davis, 527 F.2d 1110, 1111 (9th Cir. 1976) (after asserting right to remain silent, suspect shown surveillance photograph of himself participating in bank robbery and asked to reconsider his position; subsequent waiver deemed valid).

The Pheaster case might well have fallen within the “rescue” or “emergency” exception to Miranda. See note 5 supra. As written, however, the opinion seems fatally defective on several counts, including its reliance on Michigan v. Mosley, 423 U.S. 96 (1975). See 544 F.2d at 367.

The Supreme Court in Michigan v. Mosley held admissible incriminating statements obtained from a suspect during a second “interrogation session,” even though he had asserted his right to remain silent at an earlier session. 423 U.S. at 104-06; see notes 409-61 infra and accompanying text (full discussion of
attempt to ascertain what ‘interrogation’ means without considering the rationales behind Miranda and the fifth and sixth amendments . . . . The Mosley. The Court deemed it particularly significant that the suspect had been given “full and complete Miranda warnings at the outset of the second interrogation,” that the second interrogation was “restricted . . . to a crime that had not been the subject of the earlier interrogation,” and that the questioning was resumed by a different officer. 423 U.S. at 104-06. None of these factors was present in Pheaster. Whether or not the disclosure to Pheaster that his fingerprint implicated him in the kidnapping constituted “interrogation” (though I think it plain that it did), it was undeniably a police effort to convince Pheaster to change his mind. Under the circumstances, it would be unreasonable to assert that Pheaster’s “right to cut off questioning” was “scrupulously honored” or “fully respected.” See id. at 104. Nor can a renewed effort by the same police to persuade Pheaster to talk about the same crime that had been the subject of the earlier interrogation, without giving him a fresh set of warnings, be viewed as “quite consistent with a reasonable interpretation of [the suspect’s] earlier refusal to answer any questions about the [kidnapping].” See id. at 105.

Moreover, whereas Mosley only dealt with a suspect who invoked his right to remain silent, Pheaster involved a suspect who twice asserted his right to counsel, the first time before the warnings were given and the second time while they were being given. See 544 F.2d at 364-65. Both the majority opinion in Mosley and Justice White's concurring opinion recognize that the Miranda Court apparently created a per se rule against further interrogation (which presumably includes “nonverbal” police efforts to persuade a suspect to reconsider his position) that is effective after assertion of the right to counsel until an attorney is present, but not after a mere claim of the right to remain silent. See 423 U.S. at 104 n.10 (quoting Miranda v. Arizona, 384 U.S. at 474); id. at 109-10 (White, J., concurring). See also notes 430-46 infra.

Putting aside the Miranda-Mosley point, the Pheaster court’s view that no “interrogation” followed the suspect’s assertion of his right to counsel represents a triumph of semantics over reality. Once Pheaster was placed in a car, the agent in charge “engaged [him] in a ‘firm’ ‘one-way conversation.’” 544 F.2d at 365. How is this different from “interrogation”? Much, if not most, “interrogation,” constitutes a “one-way conversation.” The court noted a “key distinction between questioning [a suspect] and presenting the evidence against him.” Id. at 366. This distinction is not found in Miranda. The sole authority cited by the Pheaster court in support of this distinction was Davis v. United States, which is even harder to digest than Pheaster.

In Davis, after asserting his desire not to talk to an investigating agent, the suspect was shown a bank surveillance photograph of himself participating in the robbery and then asked, “Are you sure you don't want to reconsider?” 527 F.2d at 1111. Confronted with this evidence, the suspect concluded, that he did want to reconsider after all (or, I think it fair to say, that he might as well), and the court called this a valid “waiver.” Id. Davis seems to say that, after a person asserts his rights, the police may pressure or persuade him to change his position as long as they restrict their efforts to the presentation or recitation of evidence against him, and that any question based on such evidence is not “interrogation,” either because it is “cured by” or “auxiliary to” the presentation or recitation of the evidence.

To those who wish Miranda were overruled, the Pheaster-Davis approach represents the next best thing. It allows police interrogators to do what they have long been advised to do—“display an air of confidence in the suspect’s guilt,” “point out” some of the “circumstantial evidence indicative of a subject’s guilt,” and “point out the futility of resistance to telling the truth.” F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 26, 31, 77 (2d ed. 1967). The Pheaster-Davis approach permits a police interrogator, as long as he confines his efforts to presentation or recitation of the incriminating evidence against the suspect, and apparently as long as he asks not more than one or two subsidiary questions, to “talk [a suspect] out of [his] refusal to talk” or “his desire for a lawyer.” Id. at 4. Not even the authors of the leading interrogation manual thought such questioning possible after Miranda. See id.

Furthermore, if these tactics may be resorted to after a suspect has asserted his rights, it would seem to follow that they are permissible a fortiori before he has asserted them. To put it another way, if these tactics do not amount to “interrogation” within the meaning of Miranda, then why can they not be employed to “talk a suspect into confessing” without ever advising him of his Miranda rights?

The Ninth Circuit seems to be under the impression that as long as a police recitation of the evidence against a suspect is “objective” and “undistorted,” it does not constitute “interrogation” within the meaning of Miranda or “compulsion” within the meaning of the privilege. See United States v. Pheaster, 544 F.2d at 368 & n.9. Putting aside the notion that the weight and quality of the government’s evidence should be appraised by the defense attorney and not by the suspect, the objectivity with which that evidence is presented raises another issue—trickery.

The police “presured” Escobedo by telling him that an alleged accomplice claimed that he had fired the fatal shots. It is unclear whether the accomplice actually made such an accusation. See text at notes 90-91
requirement of ‘interrogation’ is designed to permit the use by the prosecution of a confession that is given by an accused without any prompting. . . .”116

Admittedly, “as long as the matter to be considered is debated in artificial terms,”117 there is the danger that a judge will take the words “questioning” and “interrogation” and the dictionary and be “led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied.”118 But “the logic of words” need not, and should not, “yield to the logic of realities.”119 If we “think things not words,”120 as we must, if we “constantly translate our words

supra. If the information were true, Escobedo was not “tricked,” but he was still “pressured.” Similarly, the police persuaded Combs that further resistance was futile by showing him a ballistics report implicating him in the murder. If the ballistics report were authentic, Combs was not “tricked,” but he was still convinced of the “hopelessness of his situation” and thereby “encourage[d] . . . to confess immediately.” See C. MCCORMICK, supra note 85, at 330 (discussion of Kentucky Court of Appeals decision). Miranda does not ban unfair “custodial interrogation”; it bans any “custodial interrogation.” The fifth amendment prohibition is not limited to deceitful “compulsion”; it applies to aboveboard “compulsion” as well. Indeed, the latter is sometimes the most compelling kind.

The Supreme Court of Pennsylvania has been especially alert on the “interrogation” front. In my judgment, with one exception—Commonwealth v. Franklin, 438 Pa. 411, 265 A.2d 361 (1970) (police statement to appellant that statement from him unnecessary because witnesses had already identified him but that they would like to hear his side of story held not to be “interrogation”; strong dissent by Roberts, J.)—the Pennsylvania Court has properly classified various forms of official prompting and prodding as interrogation within the meaning of Miranda. In the Simala case itself an official’s statement to the suspect, “you look kind of down in the dumps . . . if you want to talk, talk,” was viewed as “interrogation”; the court perceived “no difference for constitutional purposes between questioning an accused outright and more subtly suggesting that he incriminate himself without being asked specific questions.” 434 Pa. at 226, 252 A.2d at 579. In Commonwealth v. Learning, 432 Pa. 326, 247 A.2d 590 (1968), a police officer told appellant that his alleged accomplice had been apprehended and was likely to talk, and that if appellant wished to make a statement this was the time to do so because he was liable to end up a “patsy” otherwise. Id. at 335, 247 A.2d at 595. This “advice” was held to be “interrogation.” Id. at 337, 247 A.2d at 596. In Commonwealth v. Hamilton, 445 Pa. 292, 285 A.2d 172 (1971), appellant was confronted, in the presence of several police officers, with an alleged coconspirator who accused him of being the “triggerman” in the crime. Id. at 297, 285 A.2d at 174. In regarding the confrontation as a “form” of “interrogation,” the court noted that the coconspirator was admittedly “being used in an attempt to pry an incriminating statement from appellant” and that to permit this technique “would be to place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of Miranda . . . .” Id. at 297, 285 A.2d at 175. In Commonwealth v. Mercier, 451 Pa. 211, 302 A.2d 337 (1973), the reading to appellant of a statement by an alleged accomplice implicating him in the crime was held to be “interrogation”; the court refused “to distinguish between confronting the appellant directly with those who implicate him and reading their statement to him, both have the same effect—both are a form of official interrogation.” Id. at 214-15, 302 A.2d at 340.

The view, reflected in the Pennsylvania cases, that any police conduct designed to or likely to elicit an incriminating statement should be considered “Miranda interrogation” assumes, of course, that the suspect realizes that he is talking with or being talked to by a law enforcement official, or that he is aware that a confrontation is taking place in the presence of police. None of the aforementioned Pennsylvania cases involved the use of undercover agents or police informants. As to this issue, see text at notes 288-399 infra.

118. Id.
120. O.W. HOLMES, Law In Science and Science In Law, in COLLECTED LEGAL PAPERS 224, 238 (1920).
into the facts for which they stand," as we must, the words "questioning" and "interrogation" will prove to be no insurmountable barrier.

I must add that one need not work with the words "questioning" and "interrogation" at all. The courts' extension of first amendment protections to conduct furnishes a useful analogy. Because the Constitution protects freedom of "speech," the terms "symbolic speech" and "symbolic conduct" have evolved to embrace conduct, such as flag desecration and the wearing of black armbands, that, to employ one suggested definition, "is intended as expression," "in fact . . . communicates," and in context "becomes a comprehensible form of expression." If the Constitution had furnished protection only against "questioning" or "interrogation," the courts would have developed the concept of "symbolic interrogation" or "symbolic questioning" to encompass various kinds of police "remarks," "observations," and "nonverbal" techniques that imply a question or convey a message and are likely to be so understood by a suspect.

Unlike the conduct protected by the "freedom of speech" clause, however, the governmental conduct prohibited by the very language of the self-incrimination clause commonly connotes far more than the mere "wagging the tongue or wielding a pen." The latter clause protects one from being "compelled" to incriminate himself without limiting the forms or character of the "compulsion." Thus, there is no need to consider whether placing a pan of the victim's bones in a suspect's lap, or directing police officers disguised as witnesses to identify the suspect in a lineup, or pretending to bring in a suspect's ailing spouse for questioning, or confronting a suspect with his

121. Id.
125. Cf. Henkin, supra note 124, at 79.
126. See Lyons v. Oklahoma, 322 U.S. 596, 599, 604 (1944). As late as 1930, forcing a murder suspect to view the grisly remains of his alleged victim was not an uncommon method of inducing the suspect to talk. See E. Hopkins, supra note 103, at 243, 254, 257-58, 260.
127. See Caminito v. Murphy, 222 F.2d 698, 700-01 (2d Cir.), cert. denied, 350 U.S. 896 (1955). See also note 102 supra.
128. See text at notes 93-95 supra.
effusive accomplice, or showing him an incriminating ballistics report or a bank surveillance photograph of himself, in the belief that after such a vacuum has been created "he who speaks first is the loser," or delivering a "Christian burial speech" constitutes or is tantamount to "interrogation"—"implicit," "constructive," "symbolic," or otherwise.

It has been said that "there are a thousand forms of compulsion" and that "our police show great ingenuity in the variety employed." But "a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion." If the police conduct is designed and likely to pressure or persuade, or even "to exert a tug on," a suspect to incriminate himself—the obvious purpose and likely effect of the "Christian burial speech"—then that conduct is "compulsion" as Miranda defines the self-incrimination clause. Then it augments or intensifies the tolerable level of stress, confusion, and anxiety generated by unadulterated arrest and detention to the impermissible level of "compulsion." Then any resulting statement is

129. In Commonwealth v. Hamilton, 445 Pa. 292, 285 A.2d 172 (1971), as in the Escobedo case, see text at notes 90-91, the defendant, confronted in the presence of police by another arrestee who accused him of being the "triggerman," denied the charge, but in the process admitted involvement in the crime. 445 Pa. at 295, 285 A.2d at 174; see note 116 supra. A Philadelphia police officer disclosed on cross-examination in this case that "such a technique [police arranging confrontations between suspects for the purpose of obtaining incriminating statements] has been used in 'hundreds' of other cases." 445 Pa. at 296, 285 A.2d at 174.

130. See Combs v. Wingo, 565 F.2d 96, 97-98 (6th Cir. 1972); note 115 supra.

131. See United States v. Davis, 527 F.2d 1110, 1111 (9th Cir. 1975); note 115 supra.

132. See R. ROYAL & S. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION 145-46 (1976). Among the techniques that the authors have found to be successful in eliciting admissions are the following:

- Once the various buy signs appear, how does the investigator capitalize on them? There are two very popular methods: One is by citing all the facts in summary form and diverting the subject's attention from a breakthrough admission by seeking motive. For example: "I know how you did 'X,' 'Y,' and 'Z'—perhaps it would be in your best interest to tell me why." The other method is to create a verbal vacuum: "I know that you did this, and I will not allow you to put yourself in the awkward position of lying to me;—If you are not willing to be completely truthful with me, then I advise you to say absolutely nothing." This will be followed by what may seem to be an eternity of silence. The rule is that after a verbal vacuum has been created, usually he who speaks first is the loser. Wait your subject out, and he will probably say: "Okay, what do you want to know?"

Id. (emphasis in original).

The Royal-Schutt "professional manual and guide" amply illustrates why a court that takes what an interrogator says literally may, no less than the suspect, be led astray. See id. at 147 (telling suspect you "don't want" him "to be nervous about what I am going to say" "in effect, produces the very nervousness [you have] denied wanting to produce"); id. at 144-45 (suspect induced to confess by being told initially, "Just sit there and be quiet; I don't believe that you participated in this highjacking anyhow;" and then, at "appropriate intervals": "You could not have done it," "You are too stupid to have done it," etc.) (actual "interrogation" conducted by one of authors).

133. E. HOPKINS, supra note 103, at 194.

134. Wan v. United States, 266 U.S. 1, 14-15 (1924) (Brandeis, J.) (sick man's statements made after being subject to "interrogation" for seven days inadmissible).

135. See note 114 supra and accompanying text.

136. See note 112 supra. Note also the quotation from the O'Hara manual in the last paragraph of note 102 supra.
not "volunteered"137 or the product of "the unfettered exercise of [the suspect's] own will."138 Then it is the kind of police conduct that ought to be and was meant to be forbidden in the absence of waiver, and certainly after assertion, of one's Miranda rights.139 

One may, "by way of convenient shorthand,"140 call such police conduct "interrogation"—and it is, within the meaning of Miranda—but one need not do so. One need only call it, and it may be more helpful simply to call it "compulsion" within the meaning of the privilege.

II. Massiah, Williams, and Variations Thereon

Until the "Christian burial speech" case was decided a year ago, lasting fame had eluded Massiah v. United States.141 It was apparently lost in the shuffle of fast-moving events that reshaped constitutional-criminal procedure in the 1960's. Massiah "extend[ed] the constitutional role of counsel from the traditional function of preparing for and participating in a trial or trial type proceeding to the representation and counseling of persons under police investigation where they are under indictment . . . ."142 But that same Term, a scant five weeks later, Escobedo v. Illinois143 further extended the constitutional role of counsel to the preindictment stage, that is, "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a

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137. See Miranda v. Arizona, 384 U.S. at 478. ("Any statement given freely and voluntarily without any compelling influences [other than those inherent in a normal arrest and detention] is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated . . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.").
139. Cf. Graham, supra note 41, at 92-93.
141. 337 U.S. 201 (1964). Massiah is discussed at length in text at notes 216-86 infra.

The "retroactivity" of the Massiah decision is a wholly spurious issue. For Massiah marked no new departure in the law. It upset no accepted prosecutorial practice . . . . In no case before Massiah had this Court, at least since Powell v. Alabama, ever countenanced the kind of post-indictment police interrogation there involved, let alone ever specifically upheld the constitutionality of any such interrogation. . . . [T]he rule in [Massiah] has been settled law ever since Powell v. Alabama.

Id. at 381-82 (1972) (Stewart, J., with Douglas, Brennan & Marshall, JJ., dissenting) (lower federal courts had declined to apply Massiah retroactively; majority of the Court held that any error in admitting postindictment confession was harmless and thus did not reach retroactivity issue).
confession”144—or when the process so shifts and one or more of the limiting facts in Escobedo are also present.145

In constitutional-criminal procedure circles, 1964 was the year of Escobedo, and Massiah was understandably neglected in the hue and cry raised over the Illinois case. To the extent that Massiah was remembered at all, it was not so much for its own sake but as a steppingstone to Escobedo146 and as a case in which Justice Stewart (author of the Court’s opinion in Massiah, but a dissenter in Escobedo), by drawing the line at “the institution of formal, meaningful judicial proceedings, by way of indictment, information, or arraignment,”147 had painted himself into a corner . . . from which

144. Id. at 492.
145. The factors present in Escobedo that could place limitations on subsequent applications of that case include situations in which: (1) the investigation has begun to focus on a particular defendant and is no longer a general inquiry into an unsolved crime; (2) the suspect is in police custody; (3) interrogation by the police is aimed at eliciting incriminating statements; (4) the suspect has requested and been denied an opportunity to secure advice from counsel; and (5) the police fail to warn the suspect effectively of his constitutional rights to remain silent. See id. at 490-91. It was unclear whether all these factors would have to be present in a later case in which the rule of Escobedo would be applicable and, as a result, commentators disagreed widely over the probable meaning of the case and what it ought to mean. See W. Schaefer, The Suspect and Society 19-23 (1967) (written before Miranda; comparison of Escobedo and Massiah could lead to conclusion that no one on whom suspicion has focused can be interrogated without having or intelligently waiving assistance of counsel); Enker & Elsen, supra note 142, at 58-79 (Escobedo transformed investigatory process into adversary one; extension of right to counsel to curb police abuses not least drastic available means); Friendly, supra note 65, at 950-52 (Escobedo right to counsel may apply only when suspect’s case is “ripe for presentation to a magistrate”); Herman, supra note 86, at 471-81, 485-500 (Escobedo restricts admissible confessions to those obtained voluntarily and under circumstances consistent with waiver of effectively conveyed privilege against self-incrimination); Kamisar, supra note 86, at 50-95 (right to counsel during interrogation exists regardless of suspect’s request; only individual aware of this right can waive privilege against self-incrimination); Murphy, The Problem of Compliance by Police Departments, 44 Texas L. Rev. 939, 950-52 (1966) (federal circuit courts apply Escobedo differently with respect to when assistance of counsel applies); Robinson, Massiah, Escobedo, and Rationales for the Exclusion of Confessions, 55 J. Crim. L.C. & P.S. 412 (1965) (author evaluates rationales that broaden trend toward exclusion of confessions, including deterrence of undesirable police practices, and suggests alternative means to this end); Traynor, supra note 65, at 668-80 (to determine when focus on individual should require application of Escobedo rule, one should balance suspect’s privilege to remain silent against community’s right to legitimate police investigation). All this speculation ended when Miranda and its companion cases were decided. See also note 537 infra.
146. Thus, on the eve of Miranda, Chief Justice Roger Traynor referred to “the recent constellation of cases that include the limelighted Escobedo case extending the right to counsel to the pretrial stage,” and noted that it was against the “background” of Gideon and Massiah that the Escobedo Court “announced a right to counsel before indictment, and held inadmissible a suspect’s damaging statement elicited by police interrogation in the absence of counsel.” Traynor, supra note 65, at 657-58, 668; see W. Schaefer, supra note 145, at 22 (discussion of possible scope of Escobedo through comparison with Massiah); Breitel, Criminal Law and Equal Justice, 1966 Utah L. Rev. 1 (speech concerning problem of confessions when counsel is absent; not even mentioning Massiah). But see Robinson, supra note 145, at 427 (includes Massiah in discussion of confession cases).

That Breitel, Schaefer, and Traynor, three of our greatest state judges, would all take to the lecture podium the same month (April 1966, two months before Miranda) to grapple with the cluster of problems relating to police interrogation and confessions is striking evidence of the “raging controversial process” of reevaluating constitutional-criminal procedure, Breitel, supra, at 1, in which we were then engaged.
147. Dissenting in Escobedo v. Illinois, 378 U.S. 478 (1964), Justice Stewart so described the basis for the decision, and his opinion, in Massiah. Id. at 493. See also Justice Stewart’s opinion for the Court in Williams:

Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth
he could extricate himself only by a highly formalistic reading of the sixth amendment.”148

It was the kind of a reading that the Escobedo majority was not about to give the sixth amendment. The interrogation of Escobedo had taken place before “judicial” or “adversary” proceedings had commenced against him,149 but, as Justice Stewart characterized the majority's reasoning, “[t]he Court disregards this basic difference between the present case and Massiah's, with the bland assertion that ‘that fact should make no difference.”150

Escobedo may have seized the spotlight from Massiah, but Escobedo was soon shoved offstage by that blockbuster, Miranda v. Arizona.151 Although Miranda did not overrule Escobedo as some had feared and others had hoped, it did not simply reaffirm it either. Miranda was “not simply a bigger and better (or worse, depending upon your viewpoint) Escobedo.”152 By shifting from the “prime suspect”-“focal point”-“accusatory state” test or tests of Escobedo to a “custodial interrogation” standard153 or, to characterize it another way, by moving from a right to counsel base in Escobedo to a self-incrimination base, “Miranda [did] not [enlarge] Escobedo as much as it... displaced it.”154

Assuming that Escobedo had not already done so, did Miranda also displace Massiah? After Miranda, was the institution of judicial proceedings, by way of indictment or otherwise, no more constitutionally relevant than Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—“whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” Kirby v. Illinois, 406 U.S. 682, 689 (1973) [plurality opinion by Stewart, J].

430 U.S. at 398.
148. Herman, supra note 86, at 491.
149. Dissenting in Escobedo v. Illinois, 378 U.S. 478 (1964), Justice Stewart observed;

Under our system of criminal justice the institution of formal, meaningful judicial proceedings, by way of indictment, information, or arraignment, marks the point at which a criminal investigation has ended and adversary proceedings have commenced. It is at this point that the constitutional guarantees attach which pertain to a criminal trial.

Id. at 493-94.
150. Id. at 493.
153. The custodial interrogation standard attached primary significance to the conditions surrounding or inherent in the interrogation, not to the evidence of guilt available to the police at the time of questioning.
154. Kamisar, supra note 152, at 93. See Beckwith v. United States, 425 U.S. 341, 344-48 (1976) (Miranda implicitly redefined “focus” test as individual taken into custody or deprived of liberty in significant way). Although Beckwith is sometimes criticized as one of the Burger Court decisions undermining Miranda, “the Warren Court might well have accepted [it].” Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 MICH. L. REV. 1320, 1375 n.246 (1977). Indeed, in holding that Miranda abandoned the “focus” test (as it had generally been understood at the time of Escobedo) and that its use of “custodial interrogation” marked a fresh start in describing the point at which a suspect's constitutional protections begin, the Beckwith Court adopted the view of no less staunch a Miranda supporter than Chief Judge Bazelon, who authored the lower court opinion in Beckwith. See 425 U.S. at 348.
whether the investigation had "begun to focus on a particular suspect"? After *Miranda*, did formal indictment or other adversary litigative proceedings no longer "absolutize constitutional rights or inexorably rigidify adversary postures"?\(^5\) Or, regardless of the circumstances surrounding the interrogation—indeed, regardless of whether police efforts to elicit incriminating statements constituted "interrogation" at all—did indictment, or the initiation of other judicial proceedings, remain an "absolute point at which the right to counsel attaches"?\(^5\)

If one searches the *Miranda* opinion for answers to these questions, he discovers that *Massiah* is never mentioned—not once in Chief Justice Warren’s sixty-page opinion for the Court, nor in any of the three dissenting opinions, which total another forty-six pages.\(^5\) Yet, *very little else* even remotely bearing on the general subject is left out. There are quotations from or references to scores of confession cases, including such oldtimers as *Wan v. United States*,\(^1\) *Bram v. United States*,\(^1\) and *Hopt v. Utah*.\(^1\) There are, to give but a few other examples, discussions of law pertaining to police

\(^{5}\)See United States v. Crisp, 435 F.2d 354, 358-59 (7th Cir. 1971) (failure of agents to notify defendant's counsel before interviewing defendant does not require reversal when defendant fully warned of rights). In *Crisp* the court commented:

*Massiah* . . . must be read in light of . . . *Miranda*, which expressly recognized the validity of a knowing and voluntary waiver of rights during the "critical stage" of custodial interrogation . . . . As *Miranda* and *Escobedo* clearly indicate, formal indictment is no longer the determinative event upon which constitutional safeguards hinge. By the same token, formal indictment does not absolutize constitutional rights or inexorably rigidify adversary postures.

\(^{155}\)Id. at 358.

\(^{156}\)The amicus curiae brief of the ACLU in *Miranda* and its companion cases (written by Professors Anthony Amsterdam and Paul Mishkin and, in my judgment, indispensable reading for a full understanding of *Miranda*), pointed out that a "straight right to counsel approach," one "directed to an inquiry as to when such right attaches," may "go both too far and not far enough." Brief for Amici Curiae ACLU at 8 n.2, 10-11. It "may require the provision of counsel under circumstances where counsel is not necessary to the effectuation of a person's right not to be compelled to incriminate himself" and, on the other hand, "may result in not providing adequate protection when it is found that the point in time at which the right to counsel attaches has not yet been reached, although the danger of compelled self-incrimination looms large." Id. at 10-11. Thus, the ACLU advocated an approach that would make the providing of counsel "dependent upon the circumstances of interrogation" and would frame the issue not in right to counsel terms but in terms of "the effectuation, during the interrogation, of the Fifth Amendment right." Id. at ll.

The ACLU brief noted, however, that "[Massiah] apparently holds that indictment is an absolute point at which the right to counsel attaches" and that such a view is "supportable on the basis of the theory of an indictment: that the government has prior to that time completed its investigation and made its basic case. Moreover, the accused's need for trial preparation—and the assistance of counsel therein—has then become established." Id. at n.4.

\(^{157}\)Justice Harlan, joined by Justices Stewart and White, filed a long dissenting opinion in *Miranda*. 384 U.S. at 504. Justice White, joined by Justices Harlan and Stewart, wrote a separate long dissent. Id. at 526. Justice Clark wrote a third dissenting opinion, although he concurred in the result in one companion case to *Miranda*. Id. at 499.

\(^{158}\)266 U.S. 1, 14 (1924) (that confession not induced by promise or threat does not by itself make it voluntary in law; it must be voluntary in fact, given under no compulsion, to be admissible), quoted in 384 U.S. at 462.

\(^{159}\) - 168 U.S. 532 (1897) (discussed in text at notes 86-89 supra), quoted in 384 U.S. at 461-62.

\(^{160}\) 110 U.S. 574 (1894) (confession must be viewed in context made to see if voluntary), cited in 384 U.S. at 490.
interrogation and confessions in England, Scotland, India, and Ceylon; quotations from the seventeenth century trial of John Lilburn; and references to Maimonides and other thirteenth century commentators who "found an analogue" to the privilege against self-incrimination "grounded in the Bible." But there is not a single reference to the then two-year-old Massiah case.

Similarly, there is no mention of Massiah in the lengthy opinion of the Iowa Supreme Court upholding the admissibility of Williams' post-"initiation of judicial adversary proceedings" and "Christian burial speech"-prompted statements. Nor, and this seems still more startling, is there any mention of Massiah in Justice Stuart's "soul searching" dissent. It is only in the federal district court, on habeas corpus, that Massiah is first remembered and held to be an alternative and independent ground for granting Williams a new trial.

WHY DID THE WILLIAMS COURT CHOOSE THE MASSIAH ROUTE OVER A MIRANDA ONE?

A majority of the Supreme Court in Williams saw "no need" to consider the applicability of Miranda and affirmed solely on the basis of Massiah. Evidently Massiah offered a clearer path to affirmance than Miranda. But why?

If the "Christian burial speech" delivered to Williams during the drive back to Des Moines amounted to "custodial interrogation," then the Miranda route to affirmance would seem no less inviting than the one Massiah provided. Under the circumstances of the case—Williams asserted both his right to remain silent and his right to counsel many times earlier that day and the "Christian burial speech" was not concerned with another crime nor made by a different officer nor preceded by a new set of warnings—"the speech," if it can be considered "interrogation," seems to have been delivered in clear violation of Miranda as clarified, or qualified, by Michigan v. Mosley.

Yet, was "the speech" a "form of interrogation" or tantamount to "interrogation"? A major attraction of the Massiah route, as I shall dwell upon below, seems to be that it provided a means of bypassing the "interrogation" issue completely. Another advantage offered by the Massiah approach was the application of a higher standard of waiver: the Williams Court might have held, as had some lower courts, that a "Massiah right to counsel" could not be waived in the absence of counsel or without the consent

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161. See 384 U.S. at 478 n.46, 486-90 & n.64.
162. See id. at 459 (Lilburn asserted right to remain silent about self in criminal matters before 1637 inquisitorial court, the Star Chamber).
163. See id. at 458 n.27.
164. State v. Williams, 182 N.W.2d 396 (Iowa 1971) (5-4 decision).
165. Id. at 406 (Stuart, J., with Mason & Becker, JJ., dissenting).
166. See note 25 supra. It was at this stage of the proceedings that Professor Robert D. Bartels of the University of Iowa College of Law, Williams' court-appointed counsel, entered the picture.
167. See note 25 supra.
168. Id.
169. 423 U.S. 96 (1975) (discussed at notes 409-61 infra and accompanying text). See also discussion at note 115 supra.
of counsel—whether it could was still a debatable question—or, alternatively, it might have been held that a waiver of Massiah rights "require[d] the clearest and most explicit explanation and understanding of what is being given up." Yet it appears that the Williams Court chose the Massiah route without capitalizing on either of the advantages offered by this approach.

Justice Powell, concurring in Williams, maintained that "the opinion of the Court is explicitly clear that the [Massiah] right to assistance of counsel may be waived, after it had attached, without notice to or consultation with counsel." In fact, however, the opinion of the Court was not quite so clear. It may be interpreted as holding only that Williams did not waive his "Massiah right to counsel" even assuming that one in his situation could do so without notice to or consultation with counsel. In any event, for the State to establish a waiver of the "Massiah right to counsel" it is incumbent upon [it, according to Johnson v. Zerbst] to prove 'an intentional relinquishment or abandonment of a known right or privilege . . .,' and "judged by [this standard] the record in this case falls far short of sustaining [the State's] burden." But Williams had asserted his "Miranda right to counsel" numerous times. Was not an alleged waiver of this right to be judged by the same standard?

According to Miranda, a waiver cannot be presumed because a suspect fails to request a lawyer, and an effective waiver of the right to counsel during interrogation can only be recognized after the warnings are given. Even when the suspect does not assert his right to counsel, Miranda tells us that "a heavy burden rests on the government to demonstrate that the defendant

171. Id. at 1054; see United States v. Satterfield, 417 F. Supp. 293 (S.D.N.Y. 1976) (Knapp, J.), aff'd, 558 F.2d 655 (2d Cir. 1977). In Satterfield Judge Knapp stated: "Under our interpretation of Massiah, after indictment the advice of counsel can be waived only after such warnings and explanations as would justify a court in permitting a defendant to proceed pro se at trial." Id. at 296. See also United States v. Miller, 432 F. Supp. 382, 387-88 (E.D.N.Y. 1977) (adopting strict Satterfield waiver standard when suspect has retained counsel and indicated that he wished to consult with him prior to answering questions).

172. 430 U.S. at 413 (Powell, J., concurring).
173. See id. at 405-06. "The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams could not, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not." Id. (emphasis in original).
174. This is my phrase, not the Court's. The Williams Court announced in its opinion that it was putting the Miranda doctrine aside and affirming "the judgment before us" on Massiah grounds. Id. at 397-98. In light of this statement, its discussion of waiver seems on its face to be a discussion of waiver of Massiah rights. But see text at notes 186-210 infra.
175. 304 U.S. 458 (1938).
176. 430 U.S. at 404 (quoting from Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
177. Id.
178. 384 U.S. at 470.
knowingly and intelligently waived . . . his right to retained or appointed counsel . . . This Court has always set high standards of proof for the waiver of constitutional rights, . . . and we re-assert these standards as applied to in-custody interrogation.”\textsuperscript{179} Once a suspect has asserted his right to counsel, as Williams did, the strict Johnson v. Zerbst standard of waiver would seem to apply a fortiori; indeed, the Miranda opinion notes that once “the individual states that he wants an attorney, the interrogation must cease until an attorney is present.”\textsuperscript{180}

It may be that the Williams Court did operate on the premise that a heavier burden rests on the Government to establish a waiver of a “Massiah right to counsel” than a waiver of Miranda rights,\textsuperscript{181} but it never said so. Dissenting Justice White invited it to do so by maintaining that “[t]he issue in this case is whether [Williams]—who was entitled not to make any statements to the police without consultation with and/or presence of counsel—validly waived [his] rights”\textsuperscript{182} and by adding in a footnote that “[i]t does not matter whether the right not to make statements in the absence of counsel stems from [Massiah] or [Miranda]. In either case the question is one of waiver.”\textsuperscript{183}

If it did matter whether the right at stake was based on Massiah or Miranda, one would think that the Williams majority would have so indicated. But the majority met Justice White’s contention only with silence.

The jettisoning of Miranda by the Williams majority and its reliance on Massiah becomes even more puzzling when one examines the portion of the Court’s opinion that addresses the issue whether Williams waived his right to counsel in the course of the drive back to Des Moines.\textsuperscript{184} In light of the earlier discussion by the Williams Court,\textsuperscript{185} this section of the opinion seems to say the following: (1) The Iowa courts erred when, relying largely on Williams’ failure to express any desire for the aid of counsel immediately before or at the time of his disclosures, they held that he had waived his “Massiah right to counsel”;\textsuperscript{186} (2) the federal district court rightly pointed out “that it is the government which bears a heavy burden [on the waiver issue]. . . . but that is the burden which explicitly was placed on [Williams] by the state courts”;\textsuperscript{187} (3) both the district court and the court of appeals were correct in their understanding of the proper standard to be applied (the Johnson v. Zerbst standard);\textsuperscript{188} and (4) judged by this standard the Government did not meet its burden of showing waiver because it failed to establish “not merely comprehension but relinquishment” of the right to counsel.\textsuperscript{189} When one studies the language of the Iowa courts and the lower federal courts quoted by

\textsuperscript{179} Id. at 475.
\textsuperscript{180} Id. at 474; see notes 430-61 infra and accompanying text.
\textsuperscript{181} See Israel, supra note 154, at 1385-86 & n.281 (discussion of waiver aspect of Miranda and how much lighter burden could be placed on Government without overturning Miranda).
\textsuperscript{182} 430 U.S. at 430 (White, J., with Blackmun & Rehnquist, JJ., dissenting).
\textsuperscript{183} Id. at 430 n.1.
\textsuperscript{184} See 430 U.S. at 401-06.
\textsuperscript{185} See text at notes 167-68, 174 supra.
\textsuperscript{186} See 430 U.S. at 401-02.
\textsuperscript{187} Id. at 402 (quoting from Williams v. Brewer, 375 F. Supp. 170, 182 (S.D. Iowa 1974)) (emphasis added by district court).
\textsuperscript{188} 430 U.S. at 404; see text at note 176 supra.
\textsuperscript{189} Id. (referring to Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
the Williams majority in its original context, however, one discovers that all of it was addressed to the issue whether Williams had waived his Miranda rights, not his "Massiah right to counsel."

The Iowa Supreme Court saw itself as performing its "duty . . . to see that . . . none of the strict rules of proof set out in Miranda were violated by the trial court in passing on . . . the issue as to whether the accused waived his right to remain silent and to have the present assistance of counsel."\textsuperscript{190} Because it agreed with the trial court that Williams had voluntarily "change[d] his mind about talking to the officers" on the return trip,\textsuperscript{191} it concluded that, in finding a valid waiver, the trial court had "followed the approved test for determining compliance with the Miranda mandates."\textsuperscript{192} Justice Stuart, who wrote the principal dissent from the Iowa Supreme Court's decision, "personally believe[d] there is nothing morally or legally wrong in permitting police officers"\textsuperscript{193} to do what Captain Learning had done in the instant case, but reluctantly concluded that Miranda had held otherwise\textsuperscript{194} and that "the spirit, if not the letter of Miranda and subsequent decisions has been violated here."\textsuperscript{195} As noted earlier,\textsuperscript{196} neither the Iowa Supreme Court opinion nor the dissenting opinions ever referred to Massiah; nor had the Iowa trial court.

Thus, when the federal district court ruled that the Iowa courts had "applied the wrong constitutional standards" in finding a waiver,\textsuperscript{197} it must have meant, and it is plain that it did mean, that the Iowa courts misunderstood and misapplied Miranda. Moreover, unlike the Eighth Circuit and the United States Supreme Court,\textsuperscript{198} the district court adhered to the view that "given the factual context of this case, . . . [Williams] could not effectively waive his right to counsel for purposes of interrogation in the absence of counsel (or at least notice to his counsel of the interrogation)."\textsuperscript{199} The portion of the district court opinion devoted to waiver,\textsuperscript{200} the same portion from which the Williams majority quoted at length with approval,\textsuperscript{201} therefore deals only with the waiver of Miranda rights. The "heavy burden rest[ing] on the government to demonstrate that the defendant knowingly and intelligently waived" his rights,\textsuperscript{202} which the Iowa courts overlooked and the State failed to satisfy, is plainly the "heavy burden" imposed by Miranda.

Similarly, the section of the Eighth Circuit's opinion in Williams entitled "Waiver of Constitutional Rights,"\textsuperscript{203} which the Supreme Court also referred

\textsuperscript{190} State v. Williams, 182 N.W.2d 396, 401 (Iowa 1971).
\textsuperscript{191} Id. at 402.
\textsuperscript{192} Id.
\textsuperscript{193} Id. at 406 (Stuart, J., with Mason & Becker, JJ., dissenting).
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} See text at notes 164-65 supra.
\textsuperscript{198} 430 U.S. at 413; see note 173 supra and accompanying text.
\textsuperscript{199} 375 F. Supp. at 178; see id. at 181.
\textsuperscript{200} Id. at 181-83 (part V).
\textsuperscript{201} See 430 U.S. at 402-03.
\textsuperscript{202} 375 F. Supp. at 182 (quoting from Miranda v. Arizona, 384 U.S. at 475).
\textsuperscript{203} Williams v. Brewer, 509 F.2d 227, 231-34 (8th Cir. 1974).
to and quoted with approval, deals almost entirely with Miranda rights. Sharing the district court’s view that the record “discloses no facts to support the conclusion of the state court that [Williams] had waived his constitutional rights other than that [he] had made incriminating statements,” the court of appeals noted, referring to Miranda, that “waiver of one’s rights may not be presumed from a silent record.” A moment later, after recalling that Williams had repeatedly asserted his rights, the court of appeals emphasized the following sentence from Miranda: “If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.”

Why the Williams opinion, to borrow a phrase from its author, performed such a remarkable job of plastic surgery on the language of the lower federal courts it quoted with approval—omitting all their references to Miranda and to the self-incrimination clause—is unclear. The courts below proceeded on the basis that the “Christian burial speech” constituted “interrogation” within the meaning of Miranda. Thus, the transformation of

204. See 430 U.S. at 403.
205. The Eighth Circuit seemed to concede that an individual “can voluntarily, knowingly, and intelligently waive his right to have counsel present [even] after counsel has been appointed,” but quickly added that it agreed with the district court that the state had failed to show such a waiver. 509 F.2d at 233.
206. Id.
207. Id.
208. Id. (quoting from Miranda v. Arizona, 384 U.S. at 473) (emphasis added by court of appeals).
210. Thus, in Williams the Supreme Court noted with approval that “[t]he [district] court held ‘that it is the government which bears a heavy burden [on the waiver issue] . . .’ “ 430 U.S. at 402 (emphasis in original). But the Court omitted the first part of the district court’s sentence, which stated that “Miranda makes it clear that it is the government which bears a heavy burden . . .” 375 F. Supp. at 182. Similarly, the Court in Williams noted with approval that “the District Court concluded [that] ‘[t]here is no affirmative indication . . . that [Williams] did waive his rights . . .’ “ 430 U.S. at 402. But once again the Supreme Court omitted a key phrase from the district court’s opinion, which read: “As noted in the preceding paragraph, there is no affirmative indication . . . that [Williams] did waive his rights.” 375 F. Supp. at 182. The “preceding paragraph,” indeed the two preceding paragraphs, both quote the same language from Miranda, 384 U.S. at 475: “a valid waiver will not be presumed simply from the silence of the accused after warnings are given.” In the “preceding paragraph” the district court pointed out that the state trial court’s “heavy emphasis . . . on the absence . . . of any assertion of [Williams’] right to desire not to give information absent the presence of his attorney’ conflicts directly” with the aforementioned Miranda language. 375 F. Supp. at 182. The Williams opinion also quoted with approval the district court’s conclusion that “it cannot be said that the State has met its ‘heavy burden’ of showing a knowing and intelligent waiver of Fifth and Sixth Amendment rights.” 430 U.S. at 403. But the district court’s comment in full read: “[It cannot be said that the State has met its ‘heavy burden’ of showing a knowing and intelligent waiver of Fifth and Sixth Amendment rights.” 375 F. Supp. at 183. Moreover, although the district court had earlier quoted the “heavy burden” language from Miranda, indeed put it in italics, id. at 182, the Williams opinion does not indicate that the source of the “heavy burden” language is Miranda.

The Williams opinion also quoted with approval from the court of appeals decision: “A review of the record here . . . discloses no facts to support the conclusion of the state court that [Williams] had waived his constitutional rights other than that [he] had made incriminating statements . . . “ 430 U.S. at 403 (quoting from 509 F.2d at 233). The Williams Court then skipped two sentences from the court of appeals opinion and resumed: “The District Court here properly concluded that an incorrect constitutional standard had been applied by the state court in determining the issue of waiver . . . “ Id. The two sentences omitted by the Supreme Court are: “Although oral or written expression of waiver is not required, waiver of one’s rights may not be presumed from a silent record. Miranda v. Arizona . . . , 384 U.S. at 475; Carnley v. Cochran, 369 U.S. 506, 516 (1962).” 509 F.2d at 233.
Williams from a Miranda case to a Massiah one would have been a good deal more understandable if the Williams Court found not only “no need to review” the Miranda doctrine but no need to consider whether “the speech” constituted “interrogation” either. Yet the Court chose the Massiah route and apparently still proceeded to decide (or at least left little doubt that it was ready and willing to decide) that “the speech” did constitute, or was tantamount to, “interrogation.”

“The clear rule of Massiah,” announced Justice Stewart for the Williams majority, “is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.” This is the clear rule of Miranda when, as was Williams, the individual being interrogated is in “custody”—regardless of whether adversary proceedings have commenced—and especially when, as did Williams, the individual asserts his right to counsel. The clear rule of Massiah, as I shall discuss below, is that once adversary proceedings have commenced against an individual, he has a right to legal representation whether or not the government “interrogates” him. Dissenting Chief Justice Burger compounded the confusion, I venture to say, by contending that “this is a far cry from Massiah” and that “[h]ere there was no interrogation of Williams in the sense that term was used in Massiah, Escobedo or Miranda.” But it is plain that there was no interrogation of Massiah in the sense that term was used in Escobedo or Miranda. Indeed, Massiah involved no police “interrogation” at all (as that term is normally used)—certainly none of its “compelling influences,” inherent, informal, atmospheric, or otherwise.

A CLOSE LOOK AT MASSIAH

The various opinions in Williams cannot be intelligently appraised, nor can the implication of the case be fully explored, without a firm grasp of the underlying circumstances of, and the Court’s reasoning in, Massiah. After he had been indicted for federal narcotics violations, Massiah retained a lawyer, pleaded not guilty, and was released on bail. A codefendant, Colson, invited him to discuss the pending case in Colson’s car, parked on a city street. Unknown to Massiah, the indictment against Colson, “as is not infrequently the case,” “induced” him to cooperate with government agents in their continuing investigation of the case. A radio transmitter was installed under the front seat of Colson’s car to enable a nearby agent, equipped with a receiving device, to overhear the Massiah-Colson conversation. As expected, Massiah made several damaging admissions.
At the district court level, the judge and lawyers alike thought they were
dealing with a not-too-unusual fourth amendment—"electronic eavesdropping"
case, but it turned out to be an oddball sixth amendment—"confession"
case. Too odd to suit a 2-1 majority of the Second Circuit, which could
not bring itself to exclude statements obtained from someone who, at the time,
was "speaking freely and without restraint of any kind." Aberrant though
the Massiah facts may have been for a "confession" case, the Court's
holding—that defendant was denied the right to assistance of counsel when
his own incriminating statements, "which federal agents had deliberately
elicited from him after he had been indicted and in the absence of his
counsel," were used against him—was not. Indeed, it had been anticipated
for some time.

Five years earlier, the Court seemed on the verge of handing down what, by
way of convenient shorthand, may be called the "indictment rule." In two
concurring opinions by Justices Douglas and Stewart in Spano v. New York,
four members of the Court advanced the view that once a person is formally
charged or adversary proceedings have otherwise been initiated against him,
his right to the assistance of counsel has "begun" or "attached," that is, unless
the person voluntarily and knowingly waives that right, the absence of
counsel under such circumstances is alone sufficient to exclude any resulting
incriminating statements. This view was promptly adopted by the New
York courts, and there was reason to think it would soon command—indeed, already commanded—a majority of the Supreme Court. Although a
majority of the Spano Court did not reach this question, preferring to exclude
the confession on straight "coerced confession" grounds, Chief Justice
Warren, who wrote the majority opinion, had previously expressed the view
that the right to counsel should begin at an even earlier point. It was almost

221. Enker & Elsen, supra note 142, at 56-57 n.32. The authors point out that Massiah's right to counsel
contentions were not even raised at the trial. Id. Judge (now Chief Judge) J. Skelly Wright once spontaneously confessed at a conference on confessions: "I happened to be the trial judge in Massiah and the [electronic eavesdropping] was objected to on On Lee grounds. I admitted this tape because under On Lee it was admissible. Then, when Massiah went to the Court of Appeals, other objections were made with reference to counsel, which were not even in the record." A NEW LOOK AT CONFESSIONS: Escobedo—THE SECOND ROUND 239 (B.J. George ed. 1967). See also On Lee v. United States, 343 U.S. 747 (1952) (testimony of police eavesdropping on conversations of defendant and acquaintance wired for sound that took place in public part of defendant's business held admissible).

223. 377 U.S. at 206.
225. Id. at 324 (Douglas, J., with Black & Brennan, JJ., concurring); id. at 326 (Stewart, J., with
Douglas & Brennan, JJ., concurring).
not confine the opinion to these grounds. He also noted that petitioner was already indicted on a charge of first-degree murder and thus the police were not "merely trying to solve a crime, or even absolve a suspect." Id.
Brennan, JJ., dissenting).
inconceivable that, when the occasion arose, Chief Justice Warren would disagree with Justice Stewart and others that what is true of the trial itself for an accused's right to a lawyer's help is true of the postindictment proceedings as well. For but a year earlier the Chief Justice had joined in Justice Douglas' view that:

[W]hat is true of the trial [for an accused's right to a lawyer's help] is true of the preparation for trial and of the period commencing with the arrest of the accused... 

...The demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest.229

A 6-3 majority, consisting of the four concurring Justices in Spano, Chief Justice Warren, and newly appointed Justice Goldberg, chose Massiah as the appropriate occasion to announce the new rule. It is hardly surprising, however, that the dissenters deemed the Massiah facts a "peculiarly inappropriate" setting for a major breakthrough on the "police interrogation"-"confession" front.230

The view advanced by the concurring Justices in Spano and adopted by the Court in Massiah grew out of the needs to restrain "the coercive power of the police,"231 to minimize both the "temptation" and the "opportunity" to obtain confessions by coercive means,232 and to bypass the "seldom helpful" (at least from the defendant's viewpoint) "trial of the issue of coercion."233 Yet, the government elicited incriminating statements from Massiah without resorting to coercive measures.234 Massiah had no idea that he was being "interrogated" by the police; he assumed that he was simply talking to a friend, his partner in crime, who had also been indicted. Nor was there any dispute as to what was said and done at the Massiah-Colson meeting,235 only

229. Id. at 446, 448 (emphasis added).
230. 377 U.S. at 211 (White, J., with Clark & Harlan, JJ., dissenting).
232. This was also the main thrust of earlier attempts to grapple with the confession problem—the McNabb-Mallory rule and the "inherently coercive" approach to protracted questioning adopted in Ashcraft. In federal courts the McNabb-Mallory rule excluded confessions obtained during a period of unnecessary delay in bringing a defendant before a judicial officer. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). The Ashcraft rule was promulgated to deal with those situations under which confessions are obtained that are "inherently coercive" because of such factors as length or type of questioning. Ashcraft v. Tennessee, 322 U.S. 143 (1944). See generally Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 ILL. L. REV. 1, 28-29 & n.86 (1950); Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U. L. REV. 785, 806-08 (1970); Douglas, The Means and the End, 1959 WASH. U.L.Q. 103, 107, 113-14, 120; Kamisar, supra note 140, at 739-40; Comment, Prearraignment Interrogation and the McNabb-Mallory Miasma: A Proposed Amendment to the Federal Rules of Criminal Procedure, 68 YALE L.J. 1003, 1006, 1037 (1959).
234. 377 U.S. at 211 (White, J., with Clark & Harlan, JJ., dissenting).
235. Cf. In re Groban, 352 U.S. 330, 340 (1957) (Black, J., with Warren, C.J., Douglas & Brennan, JJ., dissenting) ("The witness has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition.").
as to whether it was permissible for a government agent to do and say what Colson had under the circumstances.

Why the Supreme Court did not wait for a more normal "police interrogation" case than Massiah to promulgate the "indictment rule" is unclear. Perhaps it was stung by the Second Circuit opinion, which brushed off Spano as just another "coerced confession" case and did not even mention the Spano concurring opinions.236 Perhaps it was impressed by, and moved to vindicate, Judge Hays' dissent, which gave considerable weight to the Spano concurring opinions237 and quoted at length from a New York Court of Appeals case that had adopted the "indictment rule."238 Perhaps the Court was moved to act by the sharp disagreement that had already broken out among the federal courts as to the significance of the Spano concurring opinions.239

Whatever the reason or reasons, the Court was determined to wait no longer to promulgate the "indictment rule," the peculiar facts of Massiah notwithstanding. That the case did not involve typical police interrogation, as did Spano and all the post-Spano New York Court of Appeals cases,240 that Massiah had not even been aware that he was being "interrogated," was of no great moment to the Massiah Court. The decisive factor was that the government had been bent on, and had succeeded in, getting incriminating statements from a person after he was indicted and in the absence of counsel. It did not matter that in Spano

the defendant was interrogated in a police station, while [in Massiah] the damaging testimony was elicited from the defendant

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236. 307 F.2d at 66.
237. Id. at 72.
238. Id. (quoting from People v. Waterman, 9 N.Y.2d 561, 566, 175 N.E.2d 445, 448, 216 N.Y.S.2d 70, 75 (1961) (rule excluding statements obtained from indicted defendant when not made in presence of counsel)).
239. In Lee v. United States, 322 F.2d 770 (5th Cir. 1963), Judge Wisdom, writing for the majority, "read Spano as the New York Court of Appeals [read] Spano: the Constitution gives a defendant the absolute right to counsel, starting no later than after indictment." Id. at 778. He was referring to the line of cases adopting the indictment rule for the New York courts. See People v. Meyer, 11 N.Y.2d. 162, 164-65, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 428 (1962) (holding inadmissible any statement made after arraignment in absence of counsel); People v. Waterman, 9 N.Y.2d 561, 565-66, 175 N.E.2d 445, 447-48, 216 N.Y.S.2d 70, 74-75 (1961) (accused has absolute right to counsel after indictment). The Wisdom opinion in Lee evoked a bitter dissent from Judge Hutcherson who characterized the Spano concurring opinions as "separate opinions presenting differing personal views of individual judges," and felt compelled to "emphatically condemn and reject the majority's view." See 322 F.2d at 780.
240. One lower court New York case did involve a "jail cell plant" who elicited incriminating statements from defendant after the initiation of judicial proceedings and at a time when he was represented by counsel. See People v. Robinson, 16 A. D.2d 184, 224 N.Y.2d 705 (1962). In his Massiah oral argument, Solicitor General Cox argued that Robinson "was not in keeping with anything the New York Court of Appeals has held" and that the "philosophy" of that court "does not go beyond formal interrogation." Transcript of Oral Argument for United States at 28-29 (copy on file at the Georgetown Law Journal) [hereinafter cited as Massiah Oral Argument].
without his knowledge while he was free on bail. . . . [A]s Judge Hays pointed out in his dissent in the Court of Appeals, "if [the rule advocated by the concurring Justices in Spano and adopted by the New York courts] is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent."[241]

Massiah's statements were held to be inadmissible, not because, as the dissenters in Brewer v. Williams were to suggest,[242] he was unaware that a government agent was talking to him, but despite that fact. The Court had to overcome Solicitor General Archibald Cox's persuasive argument for the Government that even if the Spano concurring opinions represented the prevailing view, Massiah's incriminating statements should still be admissible because at the time he made them he was neither in "custody," not even in the loosest sense, nor undergoing "police interrogation." Massiah was under no "official pressure"[243] to answer questions or even to engage in conversation; indeed, his conversation with Colson "was not affected by even that degree of constraint which may result from a suspect's knowledge that he is talking to a law enforcement officer."[244] Furthermore, Colson, a layman unskilled in the art of interrogation, did not and probably could not utilize any of the standard techniques to persuade or otherwise induce Massiah to incriminate himself. As the Government stressed in its brief:

[T]he Justices who would have gone beyond the majority [in Spano and Crooker][245] reasoned that a confession obtained in the absence of counsel was inadmissible without a showing of actual coercion because [such] interrogation so frequently involves coercion . . . [246]

. . . Whatever the problems incident to interrogation by the police, that kind of interrogation is not involved here. This case does not involve either coercion or the potentiality of coercion . . . [Massiah] was not questioned by anyone who even appeared to be a government agent; rather, his "interrogator" was his own partner in crime, to whom he talked freely. [Massiah] was, of course, under no police control or restraint at the time and was free to come and go as he pleased.[247]

241. 377 U.S. at 206.
242. See 430 U.S. at 440 n.3 (Blackmun, J., with White & Rehnquist, JJ., dissenting) (disagreeing with majority's view that Massiah regards it as constitutionally irrelevant that statements in that case were surreptitiously obtained and regarding Massiah as case in which defendant was worse off than typical confession defendant because he was not even aware that he was under police interrogation); id. at 426 n.8 (Burger, C.J., dissenting) (instant case "far cry from Massiah," in part because "Massiah was unaware that he was being interrogated by ruse").
243. Massiah Oral Argument, supra note 240, at 30; see text at notes 247, 250 infra.
244. Brief for United States at 34.
245. See notes 225, 228 supra.
246. Brief for United States at 29.
247. Id. at 30.
And in oral argument Cox emphasized:

[T]his is clearly not a problem of police interrogation in the usual sense . . . . This plainly isn’t Spano . . . . [T]here is [no] problem of physical or psychological compulsion or the threat of coercion; . . . indeed, and perhaps most important of all, the defendant was not in custody, . . . not . . . even in the loose and inaccurate sense in which one may be in custody when he’s in the district attorney’s office being questioned even though he’s not under arrest.248 He was free to come and go as he chose . . . .

. . . . [T]here was no official questioning, no pressure of any kind either to stay there or to engage in the conversation or answer questions; nor could it be said in any sense to be an interrogation by an expert interrogator. . . .250

. . . . [T]he agent was cooperating with the Government. But I shouldn’t think this was material where the informer is simply a layman, someone who is inside the ring and is reporting what goes on. I would distinguish it very sharply from the case where the prosecutor himself, say, in some kind of disguise,251 was drawing out the defendant . . . . [T]his isn’t likely to be or fairly thought of as a problem of the expert on one side questioning [a layman] on the other, and I think that’s another difference from what I understand to be . . . . the true theory of the New York cases. Here, this is very similar to the situation that might develop if the Government were investigating an espionage ring, and somebody had been infiltrated into the ring . . . . [The defendant] later goes back to attend meetings with the ring—must the Government now withdraw its counter-espionage agent?. . . .252

250. Id. at 31.
251. See text at note 287 infra and following hypothetical questions.
252. Massiah Oral Argument, supra note 240, at 36-37. Solicitor General Cox devoted a considerable part of his oral argument to a point touched upon in the text above—the use of Colson was not “obviously addressed to extracting evidence,” not necessarily or even primarily focused upon obtaining evidence against the particular defendant,” and not “centered on ferreting information out against this man.” Id. at 32, 44. Rather, he argued, it was part of a continuing investigation of what appeared to be an ongoing conspiracy:

[T]he return of an indictment against one member of what may be a conspiracy in the case of organized crime doesn’t terminate the need to press forward the investigation. We’re not dealing here, and I think it’s important to bear this in mind, with a single crime of violence, a murder . . . . That’s been the case which has frequently come before the Court and there any questioning . . . is obviously addressed to extracting evidence. That is not typically true in the kind of case that we’re dealing with. There is the rest of the ring to be uncovered; indeed here Aiken, the big man, was identified and found after this took place. Frequently the defendant himself, while out on bail, resumes or continues his criminal activities . . . .

. . . .

If [the Government] is gathering evidence against this man, if that’s the center of what it’s doing, then it ought to be treated under the [indictment] rule of the New York cases. Whereas, if the Government is proceeding in normal fashion, as it had been before [the
... [Spano was] quizzed for the purpose ... simply of getting evidence against him (there was no further investigation because that was a crime of violence) [and he was quizzed] by experts. ... [But Massiah] was not in custody; he was not being interrogated in the same sense that lawyers or detectives would interrogate, and I would think, therefore, that our position here was consistent with the views expressed in the concurring opinions in Spano.\(^{253}\)

That Massiah, unlike Spano and the defendants in the various New York cases,\(^{254}\) was unaware that he was dealing with a government agent was a distinction without a difference to the Massiah Court. Although Massiah was less seriously imposed upon than the defendant in the ordinary "confession" case \textit{in one respect}—he was not even subjected to the "potentiality of coercion"\(^{255}\)—the decisive feature of his case was that after he had been indicted, "and therefore at a time when he was clearly entitled to a lawyer's help"\(^{256}\) and at a time when he was awaiting trial "in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law,"\(^{257}\) he had been subjected to an extrajudicial, police-orchestrated proceeding\(^{258}\) designed to obtain incriminating statements from him. Besides, if in one respect—the lack of an inherently or potentially "coercive atmosphere"—Massiah had been less seriously imposed upon than the average "confession" defendant, he was more seriously imposed upon in another respect—he did not, and could not be expected to, keep his guard up "because he did not even know that he was under indictment], to carry out an investigation ... [and] if this testimony comes along, then it should be admissible like any other testimony that comes along.

\textit{Id.} at 31-32, 39.

In this respect, too, the case for admitting the statements in Massiah was stronger than the case for doing so in \textit{Williams}. Williams was suspected of committing—and completing—a single crime of violence. The sole purpose of the "visit" in the car was to gather evidence against Williams. There was no ongoing criminal activity about which to worry. There were no confederates to uncover.

\textit{If} the Des Moines police had had reason to believe Williams' victim were still alive, then they might have argued that their efforts were not "centered on ferreting information out against this man." There is nothing in the record, however, to indicate that they doubted Williams' lawyer's report that the child was dead when Williams left the YMCA building. Indeed, they were proceeding on the assumption that Williams had disposed of the body as soon as he possibly could after he left Des Moines. See text at notes 67-70 \textit{supra}; note 70 \textit{supra}.

The Massiah Court's response to the Solicitor General's argument was not to "question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted." 377 U.S. at 207. Instead, the Court responded: "All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial." \textit{Id.} (emphasis in original).

253. \textit{Massiah} \textit{Oral Argument, supra} note 240, at 41-42.
254. See notes 226, 243 \textit{supra}.
255. See text at note 247 \textit{supra}.
256. 377 U.S. at 204.
257. \textit{Id}.
258. \textit{Id}.
interrogation by a government agent." This was a nice point (or counterpoint), but it was hardly the decisive one.

Massiah did not discard the Spano mold; it enlarged its original form or, if you like, produced a companion mold. The "indictment rule" would not be, and was not meant to be, limited to cases of "indirect and surreptitious interrogations" because, as the dissenters in Williams were to suggest, these happened to be the Massiah facts. Rather, the "indictment rule" was to apply even though the "interrogation" was "indirect and surreptitious" ("unapprehended" or "unbeknownst" might be better descriptions).

Any doubts that the Massiah doctrine applies whether or not the suspect was aware that he was talking to the police—and it is hard to see how anyone who studies the briefs or oral arguments in the case can entertain any doubts on this score—were resolved a year later in McLeod v. Ohio. In that case the Ohio courts admitted into evidence statements obtained from a defendant a week after he was indicted. The Supreme Court of the United States vacated the judgment and remanded the cause "for consideration in light of Massiah." Nevertheless, the Supreme Court of Ohio adhered to its original position, distinguishing Massiah on the ground, inter alia, that, unlike Massiah, who "had no knowledge that the conversation was being overheard by a government agent," McLeod made statements "in the known presence of public officers." As two members of the state court warned their brethren would happen, the Supreme Court reversed per curiam.

Massiah would have been an easier case—and as it turns out a less significant one—if, after he had been indicted, Massiah had simply been questioned by police in "an atmosphere of official coercion." Under these facts Massiah might have been completely displaced by Miranda, as I think Escobedo was, instead of becoming a case that furnishes protection separate and distinct from Miranda. If Massiah had been a normal "interrogation" case, it would not represent the "pure" or "straight" right to counsel

259. See text at note 241 supra.
260. Id.
261. See note 242 supra.
262. The Massiah Court quoted with approval from Judge Hay's dissenting opinion: if the rule advanced by the Spano concurring Justices and adopted by the New York courts "is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse." See text at note 241 supra (emphasis added). It is clear in context that "interrogations . . . conducted in the jailhouse" means interrogations in the known presence of the police. See id.
263. 381 U.S. 356 (1965) (per curiam).
264. See State v. McLeod, 1 Ohio St. 2d 60, 60, 203 N.E.2d 349, 351 (1964) (state supreme court's summary of lower court's findings).
266. 1 Ohio St. 2d at 61, 203 N.E.2d at 351.
267. Id. The Ohio Supreme Court also attempted to distinguish Massiah on the ground that at the time McLeod incriminated himself he "was not then represented by counsel and had not even requested counsel." Id. That the Ohio court was unsuccessful here, too, is demonstrated by the Supreme Court's reversal. See notes 527-28 infra and accompanying text.
268. 1 Ohio St. 2d at 63, 203 N.E. 2d at 352 (Gibson, J., with O'Neill, J., dissenting).
269. 381 U.S. at 356.
270. See notes 152-54 supra and accompanying text.
approach that it does;\textsuperscript{271} it might have become, as I think Escobedo did, no more than a point on an unfinished and probably never-to-be-finished highway.

But Massiah was not a typical "confession" case. The questioning in that case did not occur in an "atmosphere of official coercion." And it seems no more profitable to wonder what the law of confessions would mean today—and how Williams would have been decided—if Colson had been a uniformed police interrogator rather than an undercover agent than it is to speculate about how American history would have been affected if the Mississippi River had flowed northwest instead of south.

THE CONSTITUTIONAL IRRELEVANCE OF "INTERROGATION" FOR MASSIAH PURPOSES

Taking the Massiah facts as we find them and reading the Court's opinion the way it was written, nothing turns on whether Massiah was "interrogated"—surreptitiously or otherwise. Indeed, there is no indication that Colson did "question" him, surreptitiously or otherwise,\textsuperscript{272} or that he was directed to do so.

Colson's instructions, we are told by Chief Judge Lumbard, writing for a majority of the Second Circuit, "were apparently no more than to induce Massiah to talk."\textsuperscript{273} Colson's assignment, as described by Judge Hays, dissenting from this decision, was to permit a transmitter to be installed in his car and "to invite Massiah to take a ride with him in the car and to engage Massiah in conversation relating to the alleged crimes."\textsuperscript{274} Massiah's contention, as summarized by Chief Judge Lumbard, was that inasmuch as he was already indicted and represented by counsel he "could not legally be approached by persons acting on behalf of the government in the absence of his counsel."\textsuperscript{275} Dissenting Judge Hays, relying heavily on the Spano concurring opinions, would have honored Massiah's claim for the reason that "federal officers must deal through and not around an attorney retained by a defendant under indictment."\textsuperscript{276}

Similarly, the Supreme Court, in an opinion authored by Justice Stewart, described the Massiah case as one in which the government "succeeded by surreptitious means in listening to incriminating statements"\textsuperscript{277} made by an indicted defendant in the absence of his retained counsel. After disclosing at the outset that it was going to put fourth amendment problems to one side and only decide whether Massiah's constitutional rights were violated "by the

\textsuperscript{271} See note 156 supra.

\textsuperscript{272} We do not even know, and evidently the Supreme Court did not care, what Colson said or how he said it. Colson did not testify himself and the agent who overheard the Colson-Massiah conversation was not permitted to testify to anything Colson said, apparently on the basis of the best evidence rule. Brief for Petitioner at 19 (App. A); Brief for United States at 7, 22 n.11. Thus, the record only contained Massiah's half of the conversation.

\textsuperscript{273} 307 F.2d at 66 (emphasis added).

\textsuperscript{274} Id. at 72 (emphasis added).

\textsuperscript{275} Id. at 64 (emphasis added).

\textsuperscript{276} Id. at 72 (emphasis added).

\textsuperscript{277} 377 U.S. at 201 (emphasis added).
use in evidence against him of incriminating statements which government agents had *deliberately elicited* from him"278 under these circumstances, the Court went on to hold—employing almost identical language—that Massiah was denied the right to counsel when there was used against him “his own inculminating words, which federal agents had *deliberately elicited* from him after he had been indicted and in the absence of his counsel.”279 The use of the term “deliberately elicited” seems to be quite intentional.

It takes no great stretch of the imagination to see that a government agent, whether a “secret agent,” as in *Massiah*, or a known police officer, as in *Williams*, can “deal around” rather than “through” an attorney retained by a defendant under indictment,280 or “induce” him to talk281 or “deliberately elicit” statements from him282 without asking a single question283—indeed, without saying anything. Consider the following hypotheticals:

- Suppose federal agents had told Colson to arrange a meeting with Massiah, but warned him to be sure not to broach the subject of the pending case against them. Suppose they had given him the following instructions:

  When Massiah arrives, don’t talk about the case. What’s more, *don’t say anything*. Just look very sad and depressed.

278. *Id.* at 204 (emphasis added).
279. *Id.* at 206 (emphasis added).
280. 307 F.2d at 72 (Hays, J., dissenting).
281. *Id.* at 66.
282. 377 U.S. at 204.
283. To the contrary is Wilson v. Henderson, No. 78-2015 (2d Cir. Sept. 20, 1978), a decision handed down when this article was in galleys. After Wilson, a murder suspect, had asserted his *Miranda* rights, been appointed counsel, and apparently been formally charged, he was removed to a detention cell. There he engaged in a number of conversations with his “cellmate” (who had previously agreed to act as a police informant). At first Wilson minimized his involvement in the crime, but his “cellmate” told him that his story did not sound too good. By the end of the third day, Wilson changed his story and admitted his complicity in the murder. Because the “cellmate” had been specifically instructed not to inquire or question, but to “just keep [his] ears open,” and had not in fact “interrogated” Wilson, a 2-1 majority held—over a powerful dissent by Judge Oakes—that Wilson’s statements to his “cellmate” were not barred by the *Massiah-Williams* rule.

I submit that the facts in *Wilson* are constitutionally indistinguishable from those presented in *Massiah*. There was no finding or any indication that Colson “interrogated” Massiah or asked him a single question. But the *Massiah* Court did not seem to think this mattered at all. See note 272 supra. What did matter was that in *Massiah* (and in *Williams*)—and equally so in *Wilson*—the government “deliberately and designedly set out to elicit information,” Brewer v. Williams, 430 U.S. at 399, from one who was then “entitled to the help of a lawyer,” *id.* at 398, and “succeeded by surreptitious means in listening to inculminating statements made by him,” *id.* at 400. See generally text at notes 272-79 supra.

Because the lower federal courts had relied so heavily on *Miranda* in holding the “Christian burial speech” inadmissible and because various members of the Supreme Court could not resist discussing whether “the speech” constituted or was tantamount to “interrogation,” *Williams* did generate a certain amount of confusion—one factor that led me to write this article. But Justice Stewart wrote the opinions for the Court in both *Massiah* and *Williams.* I think he would be startled to learn that, although when he authored the *Williams* opinion he evidently thought he was revivifying and expanding *Massiah*, he was actually restricting its scope—or so the *Wilson* majority seems to tell us. It is hard to believe that if a fact situation identical to *Massiah* arose today, the outcome would be different because a secret agent may now induce inculminating statements from one who is formally charged and represented by counsel—so long as he does so by “making conversation,” not by asking questions. Yet this is what the *Wilson* majority seems to say; this is how it seems to think the *Williams* case qualifies *Massiah*. 
Massiah will undoubtedly do one of two things: He will either try to cheer you up by assuring you that your chances are better than you think (or remind you that things could be a lot worse), and in the process mention some incriminating evidence the Government doesn't know about; or he will share in your pessimism, making some reference to the strong case the Government will present, and along the way say something that will strengthen our hand. However Massiah reacts, he is bound to make some damaging admissions—and Agent Murphy will be listening. So remember, just don’t say anything.

Suppose further that when Massiah arrived, Colson, following instructions, covered his face with his hands and shook his head in anguish, or, better yet, burst into tears. Suppose finally that in the course of trying to console his friend and fellow defendant, Massiah had made some damaging admissions. Assuming that these hypothetical facts were the Massiah facts, and that the defense could establish that they had occurred (which is no small feat), is there any doubt that the result in Massiah would have been the same?

Colson was a busier undercover agent than is generally realized. Pursuant to government instructions, he held other separate meetings in his specially equipped car with two of Massiah’s coconspirators, Anfield and Maxwell, and these conversations, too, had been “broadcasted” to Agent Murphy. Suppose Colson’s instructions were to arrange one meeting in his “bugged” car with both Massiah and Anfield. Suppose government agents had told him:

We have reason to believe that Anfield and Massiah are blaming each other for the mess they’re in. If we can bring them face-to-face, they will undoubtedly do one of two things—either continue to quarrel with each other or try to patch things up. In either event, damaging admissions are bound to be made, and Agent Murphy will be listening. It’s conceivable, but not very likely, that Massiah and Anfield won’t start talking about the case. In that unlikely event, Colson, you’ll have to prod them. But we really don’t think that will become necessary. We think that once those two birds are brought together, they’ll just naturally, almost inevitably, get to talking about the case.

Suppose further that as soon as Massiah entered Colson’s car and spotted Anfield, already sitting in the back seat, he became conciliatory, admitted that he made some mistakes (for example, that after sealing the cocaine packages with tape, to prevent the contents from evaporation, he should have gotten rid of what was left of the roll of tape), gently reminded Anfield that he had also made some mistakes, and then urged Anfield to stop fighting with him so that they could start working

284. See note 39 supra.
together to win the case. On these facts, too, I think the result in Massiah would have been the same.

If the Massiah facts had been those hypothesized above, the government would still have succeeded by surreptitious means in overhearing incriminating statements made in counsel's absence by one already indicted and represented by, or entitled to, counsel. Even if Colson and Massiah had never addressed each other directly, even if the conversation had taken place entirely between Massiah and Anfield, the government would still have induced Massiah to talk about the case by setting up a meeting in circumstances in which damaging admissions were reasonably expected and highly likely to occur.

285. This is close to what Massiah actually told Colson when they met in the latter's car. Brief for Petitioner at 20-21 (App. A); Brief for United States at 7-8.

286. In both hypotheticals, and in Massiah itself, the idea of the meeting, at which the defendant made incriminating statements, originated with the government. A forceful argument could be made that if the meeting is suggested by the defendant himself—especially if the defendant's purpose is to "coach" a witness or codefendant, who, unknown to the defendant, is a government agent, or to threaten him with harm if he appears at the trial at all—that the secret agent's willingness to attend the meeting does not constitute inducing or encouraging a defendant to talk or engaging him in conversation within the meaning of Massiah. But the Supreme Court's summary reversal of Beatty v. United States, 377 F.2d 181 (5th Cir.), rev'd per curiam, 389 U.S. 45 (1967), indicates that Massiah reaches even this far.

In Beatty a 2-1 majority, in an opinion authored by Judge Gewin, distinguished Massiah on the ground that the meeting there was "government sponsored" in its entirety whereas in Beatty the government agents had not instructed Sirles, a government informer who purchased a machine gun from defendant, to engage Beatty in conversation or even to associate with him. 377 F.2d at 190. Defendant had contacted Sirles, requested a meeting, and proposed the time and place of the meeting. Sirles agreed to attend the meeting when a government agent, McGinnis, told him to do so. The meeting was held in Sirles' automobile, in which McGinnis hid himself in the trunk. Although McGinnis' tape-recording device failed to work, he did manage to overhear the entire conversation, during which defendant threatened to kill Sirles if the machine gun turned up in court or if Sirles appeared against him.

The majority maintained that Massiah "only renders inadmissible those statements made as a result of the acts of a secret informer [when such informer] . . . actively and deliberately induced the accused to make such admissions," and that "sanctioning the presence of an informer at a meeting called by the accused and even sending an agent to listen in on the conversation cannot be equated with procuring or deliberately eliciting information from an accused." Id. at 190-91. Dissenting Judge Ainsworth argued that Massiah required exclusion of defendant's statements even though he had originated the idea of the meeting:

Agent McGinnis' presence secretly in the trunk compartment of Sirles' vehicle was not mere chance or accident. Though appellant is said to have initiated the meeting with Sirles, the secret eavesdropping setup was the result of deliberate prearrangement by McGinnis with the secret informer Sirles for possible use at appellant's trial. . . . To deny [apellant his sixth amendment right] by secret post-indictment and before-trial eavesdropping of conversations with a secret informer, and then recount the prejudicial incriminating statements of appellant at his trial, is to deprive [him] of the effective assistance of counsel at a stage when such advice would have helped him . . . . [O]nce a person is indicted in a criminal case he has a right to counsel before and during the trial and his voluntary conversations and admissions made out of court to secret Government informers, overheard surreptitiously by Government agents, are inadmissible in evidence in the absence of an express waiver by the defendant.

Id. at 193-94.

Evidently the Supreme Court agreed with dissenting Judge Ainsworth; it summarily reversed on the authority of Massiah. 389 U.S. 45 (1967) (per curiam). The Fifth Circuit now apparently agrees with this interpretation of the Supreme Court reversal. In a footnote it recently recalled that it "drew another irrelevant distinction in Beatty" when "[i]t declined to apply Massiah on the ground that the defendant had
Despite the obvious similarities between Massiah and Miranda, that each case is "a law unto itself" may be seen, I think, by varying the actual facts in Brewer v. Williams so that it becomes only a Miranda case, and a simple Miranda case at that. Suppose that no adversary proceedings had been initiated against Williams and no defense lawyer had entered the picture. Suppose further that Williams had neither asserted nor even been advised of his right to counsel or his right to remain silent. Then suppose one of the following alternative hypothetical fact situations occurred:

- The "Mother Powers" Ploy. Williams voluntarily surrenders to the Davenport police. A police lieutenant takes Williams into his office, leaves him there alone, and posts a guard outside the door. After a few minutes, the lieutenant reappears and tells Williams:

  I've been trying to phone Captain Leaming of the Des Moines police to inform him that you've turned yourself in, but so far I have been unable to contact him (which is true). In the meantime I have learned that Mrs. Powers, the mother of the missing little girl, Pamela, is in the building (which is untrue) and is desirous of having a brief private meeting with you. It seems that she drove down here when she heard reports that your car was spotted in this area. Would you mind sparing Mrs. Powers a few minutes while I get back on the phone and try to contact Captain Leaming again?

  Williams agrees, without much enthusiasm, to meet briefly with "Mother Powers" (who is actually a policewoman, about the same age as Pamela's mother, equipped with a tape recorder). No sooner are they alone than "Mother Powers" delivers the following "Christian burial speech":

  Deep down in my bones, I feel that my little girl is dead. All I want to do for her now is give her a good, decent Christian burial. I don't think that's too much to ask for your daughter, when she was taken away from you on Christmas Eve. I feel that you know where my little girl's body is. But they are predicting that a lot of snow will fall tonight, and I'm afraid that when it snows not even you will be able to locate the body . . . .

287. Cf. Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) ("The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.").
At the end of "the speech," Williams tells a tear-stained "Mrs. Powers" that Pamela's body is located not far from the Mitchellville exit and assures her that he will show Captain Leaming where it is on the drive back to Des Moines.

- The "Weather Forecaster" Play. The operator of a service station located a hundred miles from Des Moines phones Captain Leaming and reports that a man just walked into his station and told him that he is the one the police are looking for in connection with the disappearance of the little Powers girl, that his car has broken down, that he's "tired of running and hiding," that he's afraid that somebody might kill him, and that he wants to surrender to the police. Captain Leaming and Detective Nelson drive immediately to the service station, followed by a second car, occupied by state agents who have been brought in on the case.

Captain Leaming talks to Williams only long enough for Williams to identify himself, and Leaming then orders him into the police car. Leaming and his prisoner head back toward Des Moines. After a few minutes of "small talk" about matters unrelated to the case, Williams reveals that he is very fond of the music broadcasted over a certain radio station and that he listens to that station as often as possible. Leaming responds: "It's a hard, slow drive back to Des Moines in terrible weather. There's no reason why we can't make you as comfortable as possible. We'll let you listen to that station on the drive back."

Leaming's car then stops at a service station to check the oil. Learning walks back to the state agents' car and tells the agent in charge:

As you know, my theory is that Williams disposed of the body somewhere in the Mitchellville area. The roads are so slippery and the visibility is so poor that we won't reach the Mitchellville exit for another two and a half hours or so. Now here's what I want you to do. Call this radio station and instruct the weather forecaster to make this weather report two hours from now. [He hands the agent a piece of paper containing the "Christian burial speech," which the weatherman is supposed to "work into" his report.] Don't worry, we'll be tuned in on that station all the way back to Des Moines.

Some two hours later, as Leaming and his prisoner near the Mitchellville exit, still listening to Williams' favorite station, they hear the following "weather report":

The weather is bad and getting worse, friends. It's twenty-one degrees above zero at the moment, but the temperature is expected to fall five degrees an hour until it drops to zero. The rain and sleet we're getting right now is bad enough, but three to four inches of snow are predicted for tonight. This is bad news for all of us—but especially for Mrs. Powers, the mother of the missing nine-year-old girl, Pamela Powers.

According to law enforcement authorities, Mother Powers has given up all hope that little Pamela is still alive. Her only wish now, and it is surely a modest one, is that she will be able to
give her little girl—snatched away from her on Christmas Eve—a good Christian burial. But she is afraid, and the authorities share her fears, that once the predicted heavy snow falls not even the person who knows where poor Pamela is will be able to find her.

At this point a grim-faced Williams turns to an impassive Leaming and murmurs: “Turn off at the next exit; I’m going to show you where the body is.”

**The “Waitress” Ploy.** Assume the same facts as in the previous situation with these changes:

After a few minutes of “small talk” about matters unrelated to the case, Williams asks Leaming whether they can stop “for a bite” before they get back to Des Moines. Leaming promises Williams that they will stop at a “nice place” near the Mitchellville exit. Leaming’s car then stops at a service station to replace the windshield wipers. Leaming walks back to the state agents’ car and tells the agent in charge:

We’re going to be stopping at Jimmy’s Restaurant just before we get to the Mitchellville exit. I want the “waitress” who takes Williams’ order to be Jennie Jordan, a Des Moines policewoman who used to be a waitress. I want Jennie to engage in some “small talk” with Williams about the weather and work in these comments. [He hands the agent a piece of paper.] Get Jennie on the police radio. She’s a lot closer to Jimmy’s Restaurant now than we are. She ought to be able to get into a waitress’ uniform and do a little “brushing up” before we get there.

Some two hours later, Captain Leaming spots Jimmy’s Restaurant and announces to Williams:

Detective Nelson and I are pretty well-known in these parts. And everybody knows we’ve been busting our behinds trying to find the kidnapper of the little Powers girl. If either one of us accompanies you into the restaurant, people are liable to figure out who you are. And then there’s no telling what might happen. So we’re going to give you a break, Williams. We’re going to take off your handcuffs, give you five bucks to eat anything you want, and let you go in alone. There’s only one exit, and we’ll be watching it. We’ll also be watching you through those big windows. Don’t disappoint us. Don’t try anything foolish.

When the “waitress” brings Williams his order, she follows instructions and launches into her version of the “Christian burial speech”:

Gee, Mister, I feel sorry for guys like you who have to be out on the road on a night like this. It’s sleeting and freezing and the roads must be slippery as hell. But I tell you who I really feel sorry for tonight—the mother of that little Powers girl.
Y'know I got a daughter myself—about the same age as Pamela Powers. Imagine having a little girl like that snatched away from you on Christmas Eve—and not even being able to give her a decent Christian burial. If the searching party doesn't find Pamela's body in the next few hours, nobody will be able to find it for a month—if ever. The weatherman's predicting three to four inches of snow tonight, and once that big snow falls, not even the guy who knows where poor Pamela's body is will be able to find her. . . .

Without finishing his meal, Williams rushes out of the restaurant and back to the police car, shouting: "Start the car! I'm going to show you where the body is!"

In all three hypotheticals, it is plain that the police "deliberately elicited"\textsuperscript{288} incriminating disclosures from Williams and therefore that if judicial proceedings had been initiated against him (by hypothesis they had not), the use of the disclosures would have been barred by Massiah. I submit, however, that at least in two of the hypotheticals (the "Mother Powers" and "waitress" ploys) no "custodial police interrogation" occurred within the meaning of Miranda.\textsuperscript{289} If I am right, then the disclosures evoked in at least these two hypotheticals would be admissible despite the absence of Miranda warnings.

Unlike the Massiah doctrine, which operates to prevent the government from "deliberately eliciting" incriminating statements from a suspect or an accused, the privilege against self-incrimination erects no such legal barrier. There is no "right not to confess except knowingly and with the tactical assistance of counsel";\textsuperscript{290} there is only a right not to be compelled to confess. Massiah, to be sure, raised some doubts about the proposition,\textsuperscript{291} but these doubts were soon laid to rest by the Hoffa case.\textsuperscript{292}

\textsuperscript{288} See text at notes 272-79 supra.
\textsuperscript{289} The Miranda opinion begins:

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence. . . . More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege . . . not to be compelled to incriminate himself.

\textsuperscript{290} Cf. Enker & Eisen, supra note 142, at 60-61 (suggesting Escobedo Court created just such a right).
\textsuperscript{291} See id. at 57, 60-61, 69, 83 (suggesting real issue in Massiah was protection of defendant from governmental deceit, not right to counsel).
\textsuperscript{292} See notes 35-38 supra and accompanying text. See also Osborn v. United States, 385 U.S. 323 (1966) (discussed at note 38 supra).

Miranda also confirmed Justice White's observation, dissenting in Escobedo, that a suspect or an accused has no "constitutional right not to incriminate himself by making voluntary disclosures." Escobedo v. Illinois, 378 U.S. 478, 497 (1964) (White, J., dissenting). That Miranda leaves the police free to hear and act upon volunteered confessions even though the "volunteer" neither knows nor is informed of his rights is clear from the Miranda Court's opinion. See 384 U.S. 436, 478 (1966). But cf: Graham, supra note 41, at 76-77; Thompson, Detention After Arrest and In-Custody Investigation: Some Exclusionary
Hoffa argued that his privilege against self-incrimination had somehow been violated when he unwittingly incriminated himself in the presence of one Partin, whom Hoffa had thought to be a friend, but who was actually a government informer. The Court, however, dismissed this contention almost peremptorily:

[S]ince at least as long ago as 1807 ... all have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion. Thus, in the Miranda case, ... the Court predicated its decision upon the conclusion "that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely ... ."

In the present case no claim has been or could be made that ... [Hoffa's] incriminating statements were the product of any sort of coercion, legal or factual.293

By the time United States v. White294 was decided in 1971, the self-incrimination issue lurking in Massiah—"whether law-enforcement officials may seek evidence from an accused's own mouth when [he] does not realize that he is talking to such officials and providing them with evidence that will help to convict him"295—was so well-settled that it no longer called for discussion. Only respondent's fourth amendment claims were considered, and rejected.296

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Principles, 1966 U. ILL. L.F. 390, 422 (by allowing volunteered confessions Court fails to take account of fact that such a statement may be made in ignorance of both privilege and "consequences of foregoing it").

Miranda also allows the police to conduct "[g]eneral on-the-scene questioning" or "other general questioning of citizens," even though the citizen is neither informed nor aware of his rights. 384 U.S. at 477.

294. 401 U.S. 745 (1971) (plurality opinion). On numerous occasions a government informer, carrying a concealed radio transmitter, engaged defendant in conversations that were electronically overheard by federal narcotics agents. See id. at 746-47. The admissibility of the eavesdropping agents' testimony was upheld despite fourth amendment challenge. See id. at 734. There was no opinion of the Court, only a plurality opinion written by Justice White, joined by Chief Justice Burger and Justices Stewart and Blackmun. Id. at 746. The dissenters' fourth amendment objection went not to the fact that the government had used an apparent colleague or friend to elicit incriminating statements from a suspect, but to the fact that the secret agent was equipped with an electronic device. See id. at 756 (Douglas, J., dissenting), 768 (Harlan, J., dissenting), 795 (Marshall, J., dissenting). Concurring Justice Brennan and dissenting Justices Harlan and Marshall seemed to have no quarrel with Hoffa, in which the government informer operated without any electronic equipment. See id. at 755, 768, 795.
295. Enker & Elsen, supra note 142, at 57.
296. See 401 U.S. at 753. In the principal opinion Justice White observed:

[H]e who strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities . . . .

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights . . . . For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant,
Recognizing that "the Fifth Amendment does not forbid the taking of statements from a suspect, [but only forbids] compelling them," the *Miranda* Court, as one of its leading critics put it, "endeavored to supply the missing link in its logic by a conclusive presumption": an individual subjected to custodial police interrogation "cannot be otherwise than under a compulsion to speak." One may quarrel with this conclusion and protest, as has Judge Friendly, that "[a] social scientist or logician would never dream of asserting that any such universal could be inductively proved by reciting the facts in four confession cases . . . even when these were supplemented by copious extracts from police manuals." But *Miranda* does recognize that the fifth amendment only protects against some kind of compulsion—and not the kind produced by custody alone. In the absence of police interrogation, the coercion of arrest and detention does not rise to the level of "compulsion" within the meaning of the privilege and thus does not give rise to the need for the *Miranda* warnings.

either (1) simultaneously records them with electronic equipment which he is carrying on his person . . . (2) or carries radio equipment which simultaneously transmits the conversations . . . .

*Id.* at 749, 751.


298. *Id.*


In recent years, the concept of compulsion or coercion has been further refined to delineate circumstances where even absent active, outward forces of coercion, the mere presence of certain conditions gives rise to constructive forces capable of negating the voluntariness of a given utterance.

Thus, *Miranda* has created a presumption of coercion by the mere presence of the dual factors of a police-initiated interrogation and the defendant's being in custody . . . . This presumption . . . may be rebutted by the simple expedients of the defendant's having counsel present or perfecting a knowledgeable and intelligent waiver of [his rights] . . . .

[In the instant case, there] is no proof that the admittedly in-custody statement resulted from any police "interrogation" or "questioning" as contemplated by the Court in *Miranda* . . . .

[It] is inconceivable that the defendant could have experienced the coercion-born type of fear and intimidation set forth in *Miranda*, because when he volunteered this incriminatory statement, he thought that he was conversing with a fellow partner in crime, not a policeman.

*Id.* at 412, 413.


301. As Justice White pointed out in his *Miranda* dissent:

Although in the Court's view in-custody interrogation is inherently coercive, the Court says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. [A suspect] may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission.

384 U.S. at 533 (White, J., with Harlan & Stewart, JJ., dissenting). *See note 299 supra* (quotation from *Fioravanti*).
It is the suspect’s awareness that he is talking with, and being talked to by, the police that generates the “inherently compelling pressures” of in-custody interrogation that the *Miranda* warnings are supposed to dispel. But in the “Mother Powers” and “waitress” hypotheticals, Williams was unaware that he was dealing with the police.

The *Miranda* warnings are also designed to correct the widespread misconception that “you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not.” More generally, the warnings are supposed to relieve the suspect’s uncertainty and confusion as to what limits his captors are prepared to go to in order to obtain a confession, and his anxiety that his detention will last until he confesses. But these anxieties and misconceptions do not operate—and thus need not be dispelled by the warnings—when the suspect is unaware that the police are talking to him.

The “weather forecaster” ploy is the hardest case of the three. For, although no police officer said anything, Williams listened to and thought about the “weather report” in the presence of the police. Furthermore, Williams must have known, or assumed, that the police shared the view that the person who knew where Pamela’s body was (and Williams knew the police were convinced he was that person) should disclose this information to the authorities before the imminent snowfall so that Pamela’s parents would be able to give her a good Christian burial.

In a sense the weather forecaster’s remarks constituted a challenge for Williams “to display some evidence of decency and honor.” Williams knew it, and he must have known, or assumed, that Captain Leaming also knew it. A failure on Williams’ part to meet the challenge might incur the wrath of  

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302. See 384 U.S. at 467. The majority opinion in *Miranda* stated:

> [W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

*Id.* Earlier in its opinion the Court noted:

> The entire thrust of police interrogation [in *Escobedo*], as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. . . . *In [Escobedo], as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation.*

*Id.* at 465.


304. See 384 U.S. at 467-68. “It is not just the subnormal or woefully ignorant who succumb to the interrogator’s imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.” *Id.* at 468; see Einker & Elsen, supra note 142, at 84-85 (written before *Miranda*) (“So far as the defendant [who is subjected to custodial police interrogation] is aware . . . the fear of indefinite detention can be dispelled only by giving the police what they want.”).

Captain Leaming, who, up to that point, had been nice to him. A forceful argument can be made, therefore, that under the circumstances postulated the weather forecaster’s remarks were tantamount to “police interrogation,” but not many courts are likely to agree. Indeed, most of the courts addressing the issue have even held that the response of an arrestee to a question put to another person in his presence (often the arrestee’s wife or a female companion whom he is trying to protect) is not the product of “interrogation,” but is a “volunteered” remark.306

The “Mother Powers” ploy is an easier case for admissibility because not only is Williams unaware that he is talking to the police, he does not even realize the police are listening. To be sure, Williams is being subjected to considerable pressure, but it is not “police blue” pressure. It cannot even be argued, as it could in the “weather forecaster” hypothetical, that the pressure generated by the speech takes on the color of “police blue” from Captain Leaming, who was in the suspect’s immediate proximity when the “weather report” was broadcasted and who, the suspect must have sensed, was waiting for an appropriate response.

Williams’ position in the “Mother Powers” hypothetical is indeed an uncomfortable one, but for purposes of ascertaining whether there exists a compelling atmosphere within the meaning of Miranda, as I understand the case, the situation is the same as if the policewoman were Mother Powers. Moreover, and more important, for purposes of establishing whether the conditions surrounding the interrogation are coercive, the situation is the same as if the real Mother Powers, who Williams thinks she is, were making the same “Christian burial speech” without any instructions from or prompting by the police.307


307. When the private citizen—whether friend or relative of the victim, friend or relative of the suspect, partner in crime or fellow prison inmate—is not an agent of the government, that is, not an undercover officer or someone who has agreed to act on behalf of or in cooperation with the authorities, the resulting statements would seem to be admissible as long as they pass the “voluntariness” test, which operates, inter alia, to bar statements whose trustworthiness is suspect. See Procunier v. Atchley, 400 U.S. 446 (1971) (defendant’s statement to insurance agent held admissible; agent not cooperating with government when defendant first gave statement); Milan v. Pate, 425 F.2d 6 (7th Cir. 1970) (prison inmate); Paroutian v. United States, 370 F.2d 631 (2d Cir. 1967) (prison inmate); Stowers v. United States, 351 F.2d 301 (9th Cir. 1965) (confederate and prison inmate); State v. Jensen, 111 Ariz. 408, 531 P.2d 531 (1975) (prison inmate); State v. Miranda, 104 Ariz. 174, 450 P.2d 364 (1969) (retrial and reconviction of Miranda) (woman with whom defendant was living); People v. Price, 63 Cal. 2d 370, 406 P.2d 55, 46 Cal. Rptr. 775 (1965) (TV news reporter); People v. Holzer, 25 Cal. App. 3d 456, 102 Cal. Rptr. 11 (2d Dist. 1972) (victim himself); Anglin v. State, 259 So. 2d 752 (Fla. 1972) (mother of defendant); State v. O’Kelly, 181 Neb. 618, 150 N.W.2d 117 (1967) (criminology professor pursuing his own professional interest in murder case); People v. Cardona, 41 N.Y.2d 333, 360 N.E.2d 1306, 392 N.Y.S.2d 606 (1977) (prison inmate); People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965) (airline stewardess); State v. Perry, 276 N.C. 339, 172 S.E.2d 541 (1970) (prison inmate); State v. Knox, 111 R.I. 241, 302 A.2d 64 (1975) (mother of defendant).

When the private citizen is not a “government agent,” Massiah, no more than Miranda, bars the resulting statements, even though adversary judicial proceedings have already commenced. As Justice White observed in his Massiah dissent:

Had there been no prior arrangements between Colson and the police, had Colson simply gone to the police after the conversation had occurred, his testimony relating Massiah’s statements would be readily admissible at the trial, as would a recording which he might have made of the conversation. In such event, it would simply be said that Massiah risked talking
To be sure, a relative of the victim may exert strong pressure on a suspect to confess; but so may a close friend or parent of the suspect. Yet this is not “official” pressure or persuasion, not the kind the Miranda warnings are designed to combat. Whether or not the friend or business associate or relative who tries to induce the suspect to confess is doing so on his own initiative or at the instigation of the police, the pressure on the suspect is the same. And Miranda focuses on the impact of the “surroundings” and “atmosphere” on the suspect. Again, whether or not the mother of the victim is making a spontaneous, unrehearsed appeal or following instructions—or whether or not she really is the mother—the effects on the suspect are the same.

The “waitress” ploy is the easiest case of the three hypotheticals for admissibility. The use of a “waitress” as a police instrumentality will strike most as a good deal less offensive than the use of the victim’s “mother,” real or pretended. Furthermore, the “Christian burial” remarks undoubtedly generate less pressure, albeit unofficial pressure, when they come from the mouth of an apparently disinterested waitress rather than from an apparently grief-stricken mother. Unlike the “Mother Powers” ploy, Williams has no reason to think that the “waitress” suspects he had anything to do with the disappearance of Pamela Powers. From Williams’ vantage point, the waitress’ remarks are not focused on him at all, but spoken to the world at large.

Moreover, in the “Mother Powers” hypothetical, Williams might worry that his failure to oblige the “mother” might be reported by her to the police and cause them to think less of him or become angry with him. In the “waitress” hypothetical, however, Williams has no reason to think that the officers waiting for him outside Jimmy’s Restaurant have any inkling, or will ever find out, that the waitress who took his order made some “Christian burial” remarks in his presence.

377 U.S. at 211 (White, J., with Clark & Harlan, JJ., dissenting).

Whether or not an “agency relationship” with the government does exist, however, is often a difficult question. See, e.g., Milani v. Pate, 425 F.2d 6 (7th Cir. 1970); Stowers v. United States, 351 F.2d 301 (9th Cir. 1965); State v. Ferrari, 122 Ariz. 324, 541 P.2d 921 (1975); People v. Holtzer, 25 Cal. App. 3d 456, 102 Cal. Rptr. 11 (2d Dist. 1972); People v. Cardona, 41 N.Y.2d 333, 360 N.E.2d 1306, 392 N.Y.S.2d 606 (1977).

308. Sometimes the same “government agent” may be both a parent or close relative of the suspect and a parent or close relative of the victim. See People v. Hughes, 203 Cal. App. 2d 598, 21 Cal. Rptr. 668 (1962) (defendant accused of incest with daughter; wife and daughter talked with him in room they knew was “bugged”); Commonwealth v. Bordner, 432 Pa. 405, 427 A.2d 612 (1980) (oldest child set fire to family house, killing seven brothers and sisters; both parents used as “police instrumentalities” in interrogation).

309. An even easier case for admissibility under Miranda—and an even more graphic illustration of how Massiah and Miranda is each “a law unto itself”—would be presented by shifting the “weather forecaster” ploy from the police car to Jimmy’s Restaurant. Suppose that, as in the case of the “waitress” ploy, Williams was permitted to enter the restaurant alone and that when he did so he heard his favorite radio station being played. Suppose further that while Williams was quietly eating his meal the weather forecaster, acting pursuant to Leaming’s instructions, broadcasted his “Christian burial” weather report. Under these circumstances, any resulting incriminating disclosures would surely be admissible under Miranda. Yet, because the “weather forecaster” had been acting as a “police instrumentalities” when he made the broadcast, any resulting disclosures would still be barred by Massiah—although admittedly this would be carrying the doctrine a long way—if at the time Williams heard the weather report adversary judicial proceedings had already commenced against him.
I do not say that, aside from the trickery or deception inherent in “undercover” work, a “secret agent” is more free to resort to trickery or deception than is any other government agent. Nor do I mean to suggest that an undercover officer or government informer is more free to oppress or coerce a suspect or otherwise employ objectionable tactics than any other government agent. Nor do I deny that some police impersonations may be unduly offensive. If, for example, a suspect asks for a priest, the authorities should not be permitted to dispatch a policeman masquerading as a priest. Nor, if a suspect asks to place a call to his mother or sister, should a policewoman impersonating the mother or sister be allowed to take the call (no doubt complaining about a bad connection in order to explain why her voice sounds so different).

Moreover, there are undoubtedly limits on the amount and kinds of pressure the government may exert on a dear friend or close relative of the suspect who is reluctant to serve as a secret agent, but who may be persuaded to do so, say, by threats to lodge serious charges or by promises to drop existing charges against him. Indeed, the courts may well find it “shocking” for the government to use son against father, brother against brother, even in the absence of a showing that the close relative was pressed into service as a secret agent.

My submission is only that the use of secret agents against one “in custody” is not per se violative of the privilege against self-incrimination. It does not without more constitute “compulsion” within the meaning of the privilege (“inherent,” “constructive,” “conclusively presumed,” or otherwise), and thus no Miranda warnings need be employed to dispel this compulsion. I also submit that neither confinement, nor the “subtle influences” this condition may produce, evokes the Massiah doctrine. It is plain that once adversary judicial proceedings have commenced, the Massiah doctrine shields an accused from undercover activity designed to obtain incriminating statements from him, regardless of whether he is “in custody” or subjected to “police interrogation” in the Miranda sense (and perhaps the


312. See Kamisar, supra note 140, at 747 (though voluntary, confession to officer impersonating priest constitutionally impermissible). See generally Dix, supra note 286, at 211-12.

313. Professor Dix would prohibit the government from soliciting relatives of the suspect to serve as undercover agents. Dix, supra note 286, at 224. “Relatives include parents, grandparents, children, grandchildren, siblings, and spouses.” Id. See generally Note, Eavesdropping, Informers, and the Right of Privacy: A Judicial Tightrope, 52 CORNELL L.Q 975, 994-96 (1967) (need for, but difficulty of, imposing some due process limitation on use of informers, based on “degree of closeness between the informer and the informed-upon”).
Massiah doctrine, or a related one, affords a suspect the same protection when he is represented by counsel or when he has asserted his right to counsel. Nevertheless, when none of these events has occurred (and none did in the "Mother Powers," "waitress," and "weather forecaster" hypotheticals), then there is either a "Miranda right to counsel" or no right to counsel at all. If the conditions surrounding or inherent in police efforts to obtain incriminating statements from a suspect do not put his privilege against compelled self-incrimination in jeopardy—and the Court has told us that the mere fact that the suspect is in custody does not do so—then there is no right to counsel at all.

III. MORE ON THE USE OF "JAIL PLANTS" AND OTHER "SECRET AGENTS" AGAINST THOSE "IN CUSTODY"

The "custody"-"surreptitious interrogation" issues are not free from difficulty, and they have not been cleanly resolved by the Supreme Court.314 Some support, but not a great deal, for the view that "custody" per se does not trigger the Massiah doctrine may be gleaned from Procunier v. Atchley.315 The second time he paid respondent a visit in jail, an insurance agent seemed to be acting as a secret government agent by agreeing to the deputy sheriff's request that the conversation be electronically recorded. But the Court, in an opinion by Justice Stewart, dismissed what was arguably a Massiah issue with a brief footnote—"No charges had been filed against the respondent at the time of these conversations. Cf. Massiah."316—and proceeded to judge the admissibility of respondent's statements by the due process standard of "voluntariness."317

314. An opportunity to shed further light on the use of jail "plants" was lost when, on the last day of the 1967 Term, the Court, with four Justices dissenting, dismissed the writ of certiorari as improvidently granted in People v. Miller, 245 Cal. App. 2d 112, 53 Cal. Rptr. 720 (4th Dist. 1966). Miller v. California, 392 U.S. 616, 616 (1968) (per curiam). Petitioner was arrested for murder, booked on that charge, and placed in a cell. Id. at 616-17 (Marshall, J., with Warren, C.J., Douglas & Brennan, JJ., dissenting from dismissal of certiorari). Not only did defense counsel meet with his client, but in an effort to prevent her from being questioned, he set up a 24-hour-a-day watch of her cell. Id. at 617. Nevertheless, an undercover agent was booked into the jail on a fictitious charge and placed in petitioner's cell. Id. Although this occurred before any formal charges were filed against petitioner, the undercover agent remained in petitioner's cell, eliciting information from her, for two days after a complaint was filed formally charging her with murder and on which petitioner was later arraigned. Id. The state court viewed the government's action as "completely indefensible" and "most inexcusable," but concluded that the admission of petitioner's statements was "harmless error" and that, in any event, objection to it had not been made. 245 Cal. App. 2d at 144, 53 Cal. Rptr. at 740. See also Milton v. Wainwright, 407 U.S. 371 (1972) (holding that any error in admitting postindictment confession to jail "plant" was "harmless error"; merits of petitioner's claim not reached). In Milton Justice Stewart wrote a forceful dissent, urging that the judgment be reversed. Id. (Stewart, J., with Douglas, Brennan & Marshall, JJ., dissenting). But the underlying issue was an easy one, once it was reached, for the officer who entered petitioner's cell, posing as a fellow prisoner, did so only after petitioner had been indicted and had retained counsel.

315. 400 U.S. 446 (1971).

316. Id. at 447 n.1.

317. As Justice Stewart, writing for the Court, pointed out, respondent's trial had taken place several years before Escobedo and Miranda, and those decisions had not been given retroactive effect. Id. at 452-52. But Massiah could not be disposed of so easily. The Court had not held, and Justice Stewart did not suggest, that Massiah was not to be applied retroactively. Indeed, the following Term, protesting the
On the other hand, there is, or at least at first blush there appears to be, some lower court authority for the view that government efforts to elicit incriminating statements from one "in custody" do bring Massiah or Miranda into play. When these "custody"-"surreptitious interrogation" cases are read closely, however, none of them needs to be viewed as requiring the exclusion of the statements obtained in the "Mother Powers" and "waitress" hypotheticals, or in the "jail plant" situations; all these cases can be distinguished or explained away.318

Several opinions of the lower California courts can be read to stand for the proposition that the right to counsel or the privilege against self-incrimination or both protect one in custody from undercover investigation, regardless of whether adversary judicial proceedings have commenced against him or regardless of whether he is represented by, or has even requested, counsel.319 But these cases were decided before Miranda and they are not on the Miranda "track." Rather, they are on a Massiah-Escobedo-Dorado320 "track," one that the Miranda Court largely abandoned.321 The underlying premise of these California cases taken together seems to be that the Massiah and Escobedo cases prohibit any "surreptitious interrogation" of a person once he is

318. See notes 319-27 infra and accompanying text (discussion of California cases); notes 376, 396-97 infra and accompanying text (cases in other jurisdictions).


320. In People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965), the court held, at a time when many other state courts were giving Escobedo a begrudging reception, that the failure of a suspect to retain or request counsel does not justify the application of a rule different from that established in Escobedo:

The accused's request for counsel indicates no more than that he, himself, at that point . . . perceived the need of legal assistance. The request merely constitutes evidence that the accused finds himself in an accusatory predicament. Escobedo did not treat the request for counsel as the reason for the establishment of the right; it points out that the right had previously crystallized in the accusatory stage.

Id. at 349, 398 P.2d at 368, 42 Cal. Rptr. at 176.

Quite understandably, Dorado relied very heavily on Escobedo, then the dominant United States Supreme Court confession case, and viewed Escobedo as extending Massiah to critical situations arising before the initiation of adversary judicial proceedings. In concluding that the facts of the instant case brought it within the rule of Escobedo, the Dorado court mentioned, without any elaboration, that defendant was "in custody," but it stressed that the investigation "had ceased to be a general inquiry into an 'unsolved crime' and had begun to focus on defendant"; that the weight of the evidence available to the officers "provided reasonable grounds for focusing upon defendant as the particular suspect"; that the officers "did not merely engage in general questioning but subjected defendant to a process of interrogations that lent itself to obtaining incriminating statements"; and that defendant had never been warned of "his 'absolute constitutional right to remain silent.'" Id. at 347, 398 P.2d at 367, 42 Cal. Rptr. at 175.

321. See notes 152-56, 290-304 supra and accompanying text.
formally charged or arrested. This reading of Massiah and Escobedo was tenable before Miranda, but not afterwards.

Although these California cases happen to involve "custodial" situations, they do not really seem to turn on "custody" at all, but rather on the fact, if it can be called a fact, that "the process [had] shift[ed] from investigatory to accusatory" and "its focus [was] on the accused." That is to say, they seem to proceed on the basis that—whether or not the suspect is "in custody"—once the investigation has ceased to be "a general inquiry of an unsolved crime [and] has begun to focus on a particular suspect," constitutional rights come into play.

322. See People v. Bowman, 240 Cal. App. 2d 358, 370-72, 49 Cal. Rptr. 772, 780-82 (1st Dist. 1966). In Bowman the court stated:

The court [below] . . . did not presage the adoption of the principle enunciated in People v. Dorado, [62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965)] that where an investigation has progressed to the accusatory stage, statements elicited from an accused without informing him of his [rights] . . . should not be admitted against him without proof of waiver of these rights.

. . . [It is clear from Massiah that once a defendant is formally charged and has counsel, statements which are thereafter surreptitiously obtained may not be used against him. . . .]


325. Id. at 490.

327. See People v. Flores, 236 Cal. App. 2d 807, 811, 49 Cal. Rptr. 412, 414 (2d Dist. 1965) ("Except for the absence of an indictment, we have here a defendant under arrest, on whom the suspicion of the police had already fastened . . ."). cert. denied, 384 U.S. 1010 (1966); People v. Ludlum, 236 Cal. App. 2d 813, 815, 46 Cal. Rptr. 375, 376 (2d Dist. 1965) ("defendant was under arrest for the crime herein involved; clearly suspicion had 'focused' on him, not only because he had been arrested, but because [the police] knew, of their own knowledge, that defendant had been in possession of [narcotics]"). See also note 322 supra.

Similar "focal point"—"accusatory stage" language appears in Justice Marshall's dissent from the dismissal of certiorari in Miller v. California, 392 U.S. 616, 624-25 (1968) (Marshall, J., with Warren, C.J., Douglas & Brennan, J.J., dissenting from dismissal of certiorari) (discussed at note 314 supra). But this language "does not distinguish focused preindictment investigations concerning subjects not in custody." Dix, supra note 286, at 231. On its facts Miller can be readily distinguished from typical "surreptitious interrogation" cases because petitioner had retained and met with counsel before being placed in a cell and...
That a court would proceed on such a basis during the turbulent and unstable post-Massiah-Escobedo and pre-Miranda era (when these California cases were decided) is understandable. But as far as federal constitutional law is concerned, it has since become clear that nothing turns on whether the suspect has "become the accused" or whether the investigation has "begun to focus" on him.

The Miranda warnings were designed to combat the coercive conditions surrounding or inherent in "custodial police interrogation" and the mere fact that one has become the "prime suspect" or "focal point" does not necessarily have any effect on the conditions surrounding police interrogations. The Hoffa Court did not care whether petitioner had already been the "focal point" when he incriminated himself in the presence of his apparent friend, Partin. For even if the investigation had already "focused" on Hoffa, this would not have rendered his statements any less voluntary.

It is hard to believe that the result in Hoffa would have been any different, nor is it easy to see why it should be, if (1) petitioner and Partin had been arrested together and petitioner had made incriminating statements to his "friend" while in a police vehicle on the way to the stationhouse or while sharing the same cell with him; or if (2) Hoffa alone had been arrested and Partin had then visited him in his jail cell, at which time Hoffa had incriminated himself. In these hypothetical variations on the actual case, Hoffa would still have been "relying upon his misplaced confidence that Partin would not reveal his wrongdoing," even though he would have done so in a police vehicle or a jail cell rather than in his hotel suite.

328. Here, as elsewhere, state courts, in construing a state constitutional provision more expansively than the Supreme Court has interpreted a parallel or even a textually identical provision of the federal Bill of Rights, may afford the accused greater protection under state law than that said to be required by the federal Constitution. See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977); Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L. Rev. 873 (1976); Wilkes, More on the New Federalism in Criminal Procedure, 63 Ky. L.J. 873 (1975); Wilkes, The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court, 62 Ky. L.J. 421 (1974); see also Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 2-5 (4th ed. Supp. 1978) (collecting cases).

329. See notes 35-38, 292-93 supra and accompanying text.

In Osborn v. United States, 385 U.S. 323 (1966), it is plain that the investigation had "focused" on petitioner by the time two federal judges authorized a tape recorder to be concealed on the undercover agent's person for his November 11 meeting with petitioner. Id. at 326. The possibility of bribing a juror had been considered at a November 7 meeting. Id. The same may be said of the investigation in United States v. White, 401 U.S. 745 (1971) (plurality opinion), at least by the second or third time defendant's conversations with a government informer were electronically overheard by federal narcotics agents. Id. at 746-47.


333. As Professor Dix points out, "insofar as Massiah rests on the subject's interest in privacy, it would seem to have less applicability to the custody situation. The state of prison confinement clearly reduces a person's reasonable expectation of privacy." Dix, supra note 286, at 230. On the other hand, the use of an
be said in these hypothetical variations on Hoffa, no more than it could in the actual case. I submit, that "petitioner's incriminating statements were the product of any sort of coercion, legal or factual."  

Professor Dix would surely quarrel with my conclusion. "The subjects' confinement," he has observed, "is likely to bring into play subtle influences that will make them particularly susceptible to undercover investigators' ploys."  

"Arguably," he concluded, "these dangers would justify imposing a Massiah-like barrier on all undercover activity directed at an incarcerated subject."  

I hesitate to disagree with one who has made a most useful, massive study of the use of undercover investigations, but I must—and on two fronts.  

First, as I have already indicated, in the absence of additional factors, such as the initiation of adversary judicial proceedings and perhaps representation by counsel, I do not think Massiah has any bearing on the "custody"—"surreptitious interrogation" problem. As Professor Dix seems to agree, the special dangers involved when secret agents seek incriminating statements from incarcerated subjects, rather than from suspects at large, are "compelled self-incrimination" dangers. If these dangers justify imposing a barrier (fourth amendment considerations aside), it would be a "Miranda-like," not a "Massiah-like," barrier.  

Some support for Professor Dix's position may be found in the language of Supreme Court opinions. In United States v. Ash, for example, the Court viewed Massiah as a case in which "counsel could have advised his client of the benefits of the Fifth Amendment" and "sheltered him from the over-reaching of the prosecution," and as one in which "the accused was confronted by prosecuting authorities who obtained, by ruse and in the absence of defense counsel, incriminating statements." In the landmark lineup case, United States v. Wade, the Court suggested that the sixth amendment guarantee applies to any "critical" pretrial "confrontation" with the government "where the results might well settle the accused's fate and reduce the trial itself to a mere formality."  

"old friend" as a secret agent, rather than a mere stranger who happens to share a cell with the defendant, involves a deeper invasion of the defendant's personal privacy. Id. at 221.

335. Dix, supra note 286, at 230.
336. Id.
337. Id. In his discussion of the "jail plant" problem, Professor Dix uses this very phrase, which makes his primary reliance on Massiah, rather than Miranda, all the more puzzling.
339. Id. at 312. But was Massiah entitled to fifth amendment protection? Was he compelled to speak? How would counsel's presence at the Massiah-Colson meeting in Colson's car have provided Massiah with "assistance" at the "confrontation" with the government unless counsel were aware that Colson was a secret agent? And if counsel were so aware, wouldn't he have prevented the confrontation from taking place? See Grano, Kirby, Bigger$ and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent? 72 Mich. L. Rev. 717, 762 & n.285 (1974).
342. See id. at 224 ("T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings.").
It is plain, however, that such language cannot be read literally. Hoffa’s meeting with Partin was a “critical confrontation” with a government agent that “settled his fate.” One of Hoffa’s own lawyers, Osborn, was himself involved in a “critical confrontation” with a government agent, even though he did not realize it at the time, when he conferred with one Vick, whom he had hired as an investigator but who was actually working for and reporting back to federal authorities. Moreover, in United States v. White, a government informer, carrying a concealed radio transmitter, “confronted” the accused on numerous “critical” occasions, repeatedly enabling “eavesdropping” federal agents to obtain incriminating statements “by ruse and in the absence of defense counsel.”

The constitutionally significant difference between the Massiah case and the Hoffa, Osborn, and White cases cannot be the critical nature of the confrontation between the defendant and the government. Nor can it be the measure of the need for the assistance of counsel. The need for a lawyer, at least one with the wit to realize that his client’s meeting with an apparent friend or associate might turn out to be a confrontation with a secret government agent, was equally great in all the cases. The critical nature of the confrontations was also equally great in all the cases, at least from the perspective of their impact on each defendant’s fate. But one is not entitled to a lawyer’s assistance whenever a lawyer “could have sheltered him” from government agents bent on obtaining evidence against him or whenever a government confrontation is “critical.” Self-incrimination considerations aside, one only has a right to counsel “at any ‘critical stage of the prosecution.’ ” And as Justice Stewart has expressed it:

The requirement that there be a “prosecution,” means that this constitutional “right to counsel attaches only at or after the time that the adversary judicial proceedings have been initiated against [an accused] . . .” “It is this point . . . that marks the commencement of the ‘criminal prosecutions’ to which alone the explicit guarantees of the Sixth Amendment are applicable.”

The only constitutionally significant difference between Massiah and the other “secret agent” cases letting in the surreptitiously obtained statement

345. Id. at 746-47.
346. See note 342 supra.
347. Kirby v. Illinois, 405 U.S. 682, 690 (1972) (plurality opinion) (Stewart, J., with Burger, C.J., Blackmun & Rehnquist, JJ.) (emphasis in original). In Kirby the Court declined to apply the right to counsel to identification procedures conducted prior to the start of adversary judicial proceedings. Justice Powell noted simply that he “would not extend” the “per se exclusionary rule” of the original lineup cases. See id. at 691 (Powell, J., concurring). See also United States v. Ash, 413 U.S. 300, 321 (1973) (Stewart, J., concurring) (“a defendant is entitled to the assistance of counsel not only at the trial itself, but at all ‘critical stages’ of his ‘prosecution’”).
must be that in Massiah, unlike the other cases, the meeting with the agent took place after the initiation of adversary criminal proceedings, and thus "the explicit guarantees of the Sixth Amendment" had "attached." In the other cases, it may be said, the Court declined to "import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings." These other cases may be said to stand for the proposition that, when a person has not been formally charged with a criminal offense, Miranda—and Miranda alone—strikes the appropriate constitutional balance. If and when the conditions surrounding or inherent in a "pre-formal charge" confrontation are sufficiently coercive, then the "Miranda right to counsel" comes into play. The right to counsel as such, what might be called the "Massiah right to counsel," does not. At the "pre-charge" stage, at least when the suspect neither has nor has expressed a desire for counsel, the right to counsel is triggered by, and dependent on, forces that "jeopardize" the privilege against compelled self-incrimination: it has no life it can call its own.

Even if I am correct in thinking that the influences at work when a person shares a jail cell with an undercover agent do not, without more, bring the Massiah doctrine into play, do they nevertheless evoke the protection of Miranda? This, I think, is the appropriate question; but again, I would answer it in the negative.

To be sure, in a sense the mere presence of an undercover agent in the same cell with an accused, or in an adjoining one, is "itself . . . an inducement to speak, and an inducement by a police agent." But so is the mere presence of one or more uniformed police officers while a person is arrested or transported to the stationhouse or brought to the "booking officer." I would be the last to deny that police custody, without more, generates certain anxieties and pressures. But how can it be maintained that these anxieties and pressures are greater when a suspect or an accused is in the presence of a fellow prisoner than when he is in the midst of the police? Yet, as I have discussed, police custody without more is not enough to bring the Miranda warnings into play.

Again, I do not deny that the anxieties generated by mere confinement may lead a person "to seek discourse with others to relieve this anxiety." But it is by no means self-evident that he is less likely to do so when these others are police officers rather than fellow prisoners. After all, who will a suspect assume knows more about "the law" and "the system" in general—and his predicament in particular—someone who is sharing his cell or the officer who arrested (or is "booking") him?

I do not deny that one in custody is likely to feel considerable pressure to blurt out protests of innocence in the presence of his captors; or, without any

350. Cf. id.
352. See Miranda v. Arizona, 384 U.S. at 478 (privilege against self-incrimination jeopardized when individual in custody or deprived of freedom in significant way and questioned). See also id. at 439, 457-58, 461, 465-67; note 156 supra (discussion of Brief of Amicus Curiae ACLU in Miranda).
354. See notes 297-304 supra and accompanying text.
355. Dix, supra note 286, at 230.
prompting, to depict his role in the best possible light; or to protect dear ones; or to seek information and advice from the arresting or “booking” officer—and in the process to incriminate himself unwittingly. (“What’s going to happen to me?” “I’ve never done anything like this before.” “My girl friend had nothing to do with this case.” “I did it; my brother wasn’t involved.” “I didn’t rob that man; he owed me the money.” “Did you find the weapon (or the body)?” “Who put the finger on me?”) The temptation to find out more about one’s plight, or how the system works generally, is likely to be even stronger when, as often occurs, the police, in the course of transporting or “booking” the suspect, have already engaged him in friendly conversation about matters unrelated to his case. Yet Miranda does not protect one “in custody” who turns to an officer for information, advice, or relief—and in the process incriminates himself unwittingly—simply because he was “in custody” when he did so.

In one respect (but not, of course, in several others), the “jail plant” confession poses a stronger case for exclusion than Massiah: “unlike the defendant there, who had been released on bail, petitioner [in a “jail plant” confession situation is] in custody without bail, with a consequent lack of freedom to choose [his] companions.” Again, however, this argument proves too much. One who is arrested, transported, and “booked” usually lacks freedom to choose his companions—at least during the pressure-packed, anxiety-ridden first few hours.

In the long drive back to Des Moines, Williams was no doubt “seek[ing] discourse with others” to relieve his anxiety. But the only persons with whom he could seek discourse during that five or six hour trip were Captain Leaming and Detective Nelson. Yet if Williams and the companions he did not choose had ridden in complete silence for fifty or one hundred miles and then Williams had blurted out: “Look, I know where the body is, and I’m going to show it to you—but I didn’t kill her; she was already dead when I found her in my room”—or even if Williams had said that he did kill —

356. See Kamisar, supra note 41 at 355, 352-56 (illustrative cases decided within two years after Miranda).

Whether, once an arrestee volunteers a statement, the officer may ask some questions in order to clear up some points, or whether such follow-up questions constitute “interrogation” within the meaning of Miranda, is a difficult issue. I think follow-up questions seeking to enhance defendant's guilt or raise the offense to a higher degree (for example, by getting at the defendant's state of mind, “why did you do it?” or “how long did you think about it?”) do constitute “interrogation,” but follow-up questions merely designed to clarify just what the defendant said or meant to say may well not be. Compare People v. Sunday, 275 Cal. App. 2d 473, 481, 79 Cal. Rptr. 752, 756 (1969) (original assertion of rights by defendant does not require permanent application of no-interrogation rule when defendant volunteers statement) with People v. Mathews, 264 Cal. App. 2d 557, 566, 70 Cal. Rptr. 756, 764 (1968) (interrogation exists when police officer begins questioning). See generally Kamisar, supra note 41, at 351-54, 379-82.


358. Because of the freezing rain, slippery roads, and various stops along the way, the trip took this long—and the drive to the Mitchelleville area, where the body was buried, probably took three or four hours. See Kamisar, supra note 2, at 210 n.4.

359. In fact this turned out to be Williams' contention, at least at his second trial. See Kamisar, supra note 2, at 210 n.4.
her—it can hardly be doubted that these statements would have been admissible.\textsuperscript{360} Nor would the admissibility of any incriminating statements by Williams have posed any serious problem if they had been preceded by conversation—as long as the topics had been limited to “intelligence of other people . . . , organizing youth groups, singing . . . , playing an organ, and this sort of thing.”\textsuperscript{361}

\textbf{THE IMPORTANCE OF THE “INTERPLAY” BETWEEN “POLICE CUSTODY” AND “POLICE INTERROGATION”}

As \textit{Massiah} itself illustrates better than any other case, the sixth amendment guarantee prevents the government from eliciting or inducing incriminating statements from one against whom adversary judicial proceedings have commenced, whether or not he is in custody and whether or not he is aware that he is dealing with a government agent. As I have argued at length, however, even though a person is in custody, “surreptitious interrogation” is insufficient to bring \textit{Miranda} into play. For unless a person realizes he is dealing with the police, their efforts to elicit incriminating statements from him do not constitute “police interrogation” within the meaning of \textit{Miranda}. But perhaps the manner in which I have proceeded, up to this point, has been too “one-dimensional.” Perhaps I can state my position more effectively, and concomitantly summarize that position, by dwelling on the \textit{interplay} between the two dimensions of \textit{Miranda}—“police custody” \textit{and} “police interrogation.”

The inherent or potential impact of government activity on the mind or “will” of the suspect has nothing to do with the application of \textit{Massiah}, but has everything to do with the invocation of \textit{Miranda}. It is the impact on the suspect’s mind of the \textit{interplay} between police interrogation and police custody—each condition reinforcing the pressures and anxieties produced by the other—that, as the \textit{Miranda} Court correctly discerned, makes “custodial police interrogation” so devastating. It is the suspect’s realization that the \textit{same persons} who have cut him off from the outside world, and have him in their power and control, want him to confess, and are determined to get him to do so, that makes the “interrogation” more menacing than it would be without the custody and the “custody” more intimidating than it would be without the interrogation.

It is this \textit{combination} of “custody” and “interrogation” that creates—and, in the absence of “adequate protective devices,”\textsuperscript{362} enables the police to exploit—an “interrogation environment” designed to “subjugate the individual to the will of his examiner.”\textsuperscript{363} It is this \textit{combination}—more awesome, because of the interplay, than the mere sum of the “custody” and “interroga-

\textsuperscript{360} In response to a specific question along these lines by one of the Justices, Williams’ able court-appointed counsel, Professor Robert D. Bartels of the University of Iowa College of Law, conceded as much. See Transcript of Oral Argument at 35 (copy on file at the \textit{Georgetown Law Journal}).

\textsuperscript{361} Kamisar, supra note 2, at 215. According to Captain Leaming’s testimony, these in fact were most of the topics covered—before he launched into his famous “Christian burial speech.” Id.

\textsuperscript{362} See Miranda v. Arizona, 384 U.S. at 458, 465 (adequate protective devices dispel compulsion inherent in police custodial questioning).

\textsuperscript{363} Id. at 457.
tion” components—that produces the “interrogation atmosphere,”364 “interrogation . . . in a police dominated atmosphere,”365 that “carries its own badge of intimidation,”366 that “exacts a heavy toll in individual liberty and trades on the weakness of individuals,”367 and that is so “at odds” with the privilege against compelled self-incrimination.368

In the “jail plant” or other “undercover” situations, however, there is no integration of “custody” and “interrogation,” no interplay between the two, at least none where it counts—in the suspect’s mind. So far as the suspect is aware, he is not “surrounded by antagonistic forces”;369 “[t]he presence of an attorney, and the warnings delivered to the individual” are not needed to “enable [him] under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process.”370 He simply is not in the “compelling circumstances” that require Miranda warnings to be given; he is not being subjected to the “interrogation process.”

So far as the suspect is aware, his fellow prisoner neither controls his fate nor has a professional interest in his case. So far as the suspect is aware, his fellow prisoner does not care whether he confesses, and thus has little cause to become abusive by trying to “bully” him if he does not.371 Moreover, even if the fellow prisoner did care, and cared a great deal, there is no reason to think that he possesses the power over the suspect or the necessary skills and training to press demands and to weary the suspect with contradictions of his assertions until the case “is brought to a definite conclusion.”372

A fellow prisoner may, of course, communicate his determination to get answers to his questions by wielding a knife or clenching his fist, but that is a different case. There is nothing inherently compelling about talking with, or being talked to by, a prisoner in the same or an adjoining cell. For the suspect thinks he is dealing with an equal, not with his captors.

Why would the suspect doubt that he could end the conversation, or at least change the subject, whenever he pleased? Why would he fear that his companion would not let him end the “interrogation”? Why would he worry, if he does not answer all questions put to him by his companion, that “it will be the worse for him”?373

364. Id. at 456.
365. Id. at 445 (emphasis added). See also id. at 456, 465.
366. Id. at 457.
367. Id. at 455.
368. Id. at 457-58.
369. Id. at 461.
370. Id. at 466.
372. See Hearings Before Subcomm. No. 2 of the House Comm. on the Judiciary, 78th Cong., 1st Sess. 6 (1943) (hearings on bill to repeal McNabb rule) (testimony of Major Edward T. Kelly, then Superintendent of Police of the District of Columbia) (“I believe that every person should be guaranteed [his constitutional rights], but at the same time I believe, and I am confident, that when a person is charged with the commission of a serious crime, there should not be any interference with the police or detectives until such case is brought to a definite conclusion.”).
373. See text at note 303 supra.
When a suspect is arrested and brought downtown for police questioning, at least in the case of a major felony, he will often be in "a crisis-laden situation. The stakes for him are high—often his freedom for a few or many years—and his prospects hinge on decisions that must be quickly made: to cooperate and hope for leniency, to try and talk his way out, to stand adamantly on his rights." But why, when he thinks he is merely conversing with a fellow prisoner, when he has no notion that he is confronting the police, would a suspect worry about "how much leniency cooperation may earn, how likely fast talk is to succeed, and how much a steadfast refusal to talk may contribute to a decision by the police, prosecutor or judge to 'throw the book' at him"?

One can deliberately elicit incriminating statements from a person without having him realize it—that is what happened in Massiah. But how can one envelop someone in a "police-dominated atmosphere" without having him realize it? How can one produce an "interrogation environment" well-calculated to "subjugate the individual to the will of his examiner" when the individual is not even aware that he is in the presence of "his examiner"? That is why, I submit, whatever may lurk in the heart or mind of the fellow prisoner (or apparent friend or colleague), if it is not "custodial police interrogation" in the eye of the beholder, then it is not such interrogation within the meaning of Miranda.

CAn the government do indirectly what it may not do directly?

I can already hear the howls of protests: "What you are saying is that the government can do indirectly what it may not do directly!" Am I? What exactly is it that the government may not do directly?

375. See id. at 1614.
376. See State v. Smith, 107 Ariz. 100, 102, 104, 482 P.2d 863, 865, 867 (1971) ("What the State may not do directly, it cannot do indirectly.") (but when defendant made incriminating disclosures to "jail plant" he had already been appointed counsel); State v. Daugherty, 221 Kan. 612, 618, 623, 562 P.2d 42, 47, 50 (1977) (McCorgary statement, infra, quoted with approval and applied) (but "bugged" conversation between defendant and codefendant, cooperating with the prosecution, occurred two days before trial and when defendant represented by counsel); State v. McCorgary, 218 Kan. 358, 359, 363, 543 P.2d 952, 955-56, 958 (1975) ("The whole purpose of the state in using a secret informer is to avoid that which is required of a police officer informing an in-custody suspect of his rights and not proceeding without a valid waiver. What the state may not do directly to secure evidence, it cannot do indirectly.") (but "jail plant" obtained incriminating statements from defendant after he had appeared before a magistrate and been appointed counsel); State v. Travis, 116 R.I. 678, 679-83, 360 A.2d 548, 549, 551 (1976) ("The police were not allowed to interrogate defendant directly. There is no authority in these circumstances for the police to do indirectly what they may not do directly.") (but the undercover agent became defendant's "cellmate" shortly after defendant had expressed a desire to consult with a lawyer and refused to say anything until he did). See also United States v. Brown, 466 F.2d 493, 494, 495 (10th Cir. 1972) (pointing out that when defendant's friend visited him in his cell, with police "permission," and obtained incriminating statements from him, as the police had "requested" him to do, "he was functioning as an instrument of the police" and "doing that which the police themselves could not do.") (but defendant had told the police earlier, when given his Miranda warnings, that he did not wish to make any statements and that he did want an attorney).
What Massiah Allows. Massiah, as clarified by Williams, makes clear that once adversary proceedings have commenced against an individual, government efforts to elicit incriminating statements, whether done openly in the police station or “indirectly and surreptitiously,” violate the individual’s right to counsel. But when the government attempts to elicit incriminating statements from an individual before adversary proceedings have commenced against him, it is not necessarily violating his right to counsel. For in the absence of other factors, such as an inherently compelling interrogation environment, an individual is not entitled to counsel whenever he is subjected to an “interrogation,” but only when such interrogations take place at or after the commencement of adversary proceedings.

As I have discussed, Colson deceived not only Massiah, but his codefendant, Anfield, as well. He deceived Anfield in the same way—by arranging a meeting in the same specially equipped car, which enabled the same narcotics agent to overhear the conversation. As far as I am aware, nobody argued that Anfield’s right to counsel had been violated; nor would such an argument have much prospect for success. For the electronically overheard Colson-Anfield meeting, occurred before adversary proceedings had been initiated against Anfield. Thus, it could not be said, as it could in Massiah, that the government’s efforts to elicit incriminating statements violated Anfield’s right to counsel.

377. See note 262 supra.
378. See Brewer v. Williams, 430 U.S. at 401; Massiah v. United States, 377 U.S. at 204-05; cf. United States v. Hayles, 471 F.2d 788, 791 (5th Cir. 1973). In Hayles the court stated:

[In one important respect [Massiah] retains its vitality and stands as a supplement to Miranda; Massiah teaches that . . . after [a defendant] has been indicted [or, more generally, adversary proceedings have been initiated against him], [the government] may not nullify the protection Miranda affords a defendant by using trickery to extract incriminating statements from him that otherwise could not be obtained without first giving him the required warnings. Today Massiah simply means that after indictment [or the commencement of judicial proceedings] and [or] counsel has been retained the Fifth Amendment [the Sixth Amendment] prevents law enforcement authorities from deliberately eliciting incriminating statements from a defendant by the surreptitious methods used in that case.

Id. (emphasis added).

The initiation of judicial proceedings without more probably activates the “Massiah right to counsel.” See text at notes 511-36 infra. Whether representation by counsel without more does so as well is a more difficult question. See notes 537-43 infra and accompanying text.

379. See text at note 284 supra; note 39 supra.
380. When the Massiah case reached the Second Circuit, all three judges agreed that evidence obtained from the Anfield-Colson meeting was admissible against Anfield; dissenting Judge Hays argued only that the eavesdrop evidence obtained from Massiah should be barred. See United States v. Massiah, 307 F.2d 62, 69 (2d Cir. 1962). But Anfield’s conviction was reversed on other grounds. See id. at 64.

Five years after Anfield and Massiah were tried, other coindictees, including one Maxwell, were brought to trial. Maxwell had also made the mistake of talking with Colson in the latter’s “bugged” car, but did so before judicial proceedings had commenced against him. See note 39 supra. On appeal, as the Second Circuit noted, Maxwell did not press his claim that the recording and broadcasting of his conversation with Colson violated his right to counsel. United States v. Maxwell, 383 F.2d 437, 442 (2d Cir. 1967). “In any event,” added the court, this point “is meritless.” Id. The court cited Molinas v. Mancusi, 370 F.2d 601 (2d Cir.), cert. denied, 386 U.S. 984 (1967), in which defendant’s claim that his constitutional rights were violated when a secretly tape-recorded conversation between him and a coconspirator, who was cooperating with the government, was rejected on the ground, inter alia, that at the time the conversation took place an indictment had not yet been returned against defendant. Id. at 603. “Although the state may have had sufficient evidence to indict Molinas, that is immaterial.” Id.
government had “indirectly” violated Anfield’s right to counsel. Anfield was not yet “entitled to a lawyer’s help.” He had no “Massiah right to counsel” that could be violated. No more than did Messrs. Hoffa, Osborn, and White.

**What Miranda Allows.** Miranda makes clear that the privilege applies both to “informal compulsion” exerted during custodial interrogation and to the more formal variety meted out in court proceedings. But when the government employs an undercover agent, rather than a readily identifiable police officer, it is not doing indirectly what Miranda forbids it to do. It is not compelling an individual to incriminate himself—informally, inherently, or indirectly. It is not dealing with a prisoner under circumstances in which (in the absence of warnings designed to clarify a confusing situation that the police too often have exploited) a person is likely to assume or be led to believe that there is a legal, or at least an extralegal, sanction for contumacy.

When the government employs a secret agent posing as a fellow prisoner, the suspect does not feel “at the mercy of . . . custodians who have strong incentives for seeking a quick solution . . . by pressing him to acknowledge his guilt.” Rather, the suspect thinks he is dealing only with someone “in the same boat,” as well as the same cell. The government agent’s words do not “take on color from [his] uniform, badge, gun and demeanor” when the agent carries neither badge nor gun and wears not “police blue,” but the same prison gray as the defendant.

Under Miranda, the government may not rely on an “interrogation environment,” which “carries its own badge of intimidation” and is “created for no purpose other than to subjugate the individual to the will of his examiner.” But when a government agent conceals his true identity—in deed, because he does—the government is not relying on an “interrogation environment” at all. Rather, it is relying on the suspect’s “misplaced
confidence that [his companion will] not reveal his wrongdoing. Under such circumstances, the government is deceiving the suspect—as "Agent" Partin deceived Hoffa and as "Agent" Vick deceived Osborn—but such deception "[does] not tend to show either actual coercion or a potentially coercive setting.

When the government utilizes a "secret agent" to induce a prisoner to incriminate himself, it does not necessarily "trick" him into "waiving" his constitutional rights: findings of "trickery" and "waiver" depend on the particular circumstances and the particular constitutional right. When adversary judicial criminal proceedings have already commenced, then, under Massiah, the government cannot send an "undercover agent" against the defendant. But the Massiah doctrine does not turn on the existence of a "police-dominated atmosphere" or an "interrogation environment." Perhaps when the suspect has already retained counsel, or perhaps even when he has simply asserted his Miranda rights, I think that the government may not be permitted to approach him, directly or indirectly—under Massiah and perhaps under Miranda as well. But when adversary proceedings have not yet commenced and the suspect is not yet represented by counsel, and has not even asserted his Miranda rights, then—unless and until he is subjected to "custodial police interrogation," that is, interrogation under inherently compelling circumstances—he has no fifth or sixth amendment rights to "waive": those rights have not yet come into play.

When an arrestee volunteers his version of the events, and the police, well aware that the arrestee is unwittingly incriminating himself, let him talk, they do not thereby violate the person's Miranda rights or "trick" him into "waiving" them because, under the circumstances, the person does not have any Miranda rights. Miranda tells us, in effect, that "a statement may be volunteered in ignorance of the privilege against self-incrimination and 'of the consequences of foregoing it.'" Similarly, when the police interview a person in his home or office, especially when they do so in the presence of a relative or friend, and the questioning takes place in a context that does not restrict the person's freedom to terminate the meeting, the police are not doing indirectly what they may not do directly. Rather, they are doing what Miranda permits them to do—indeed, one might say, recommends that they do. They are dealing with the suspect in a situation that lacks "the indicia of coercion that motivated the Miranda scrutiny" of in-custody interrogations.

387. See text at note 332 supra.
389. See notes 453-61, 504-08, 537-43 infra and accompanying text.
390. See text at notes 453-61 infra; note 461 infra.
391. See Miranda v. Arizona, 384 U.S. at 478 (rights apply to one taken into custody, deprived of freedom in significant way, and questioned).
392. Thompson, supra note 292, at 422 (Professor (now Governor) Thompson criticizes Miranda Court for failing to take account of this fact). But see Kamisar, Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article, 73 Mich. L. Rev. 15, 30-31 n.59 (1974).
393. See Miranda v. Arizona, 384 U.S. at 477-78 & n.46 (police may visit suspect at home or office, but may not subject him to "custodial interrogation").
tion and that lacks "the elements which the Miranda Court found so inherently coercive as to require its holding." The same may be said, I submit, for the "pure" "jail plant" case, that is, one in which an apparent fellow prisoner induces his cellmate to confess when adversary judicial proceedings have not yet been initiated against the individual, when he is not yet represented by counsel, and when he has not even asserted his Miranda rights. Except for the California cases, I have found no case excluding statements obtained from a prisoner by a "jail plant" that did not include one or more of the above factors. These factors aside, I submit that in the "jail plant" situation the government has not "create[d] the kind of atmosphere that . . . triggers Miranda."

To be sure, if the suspect had known his cellmate was a government agent, he would not have talked freely in his presence. But then neither would Hoffa, Osborn, or White, if they had realized they were dealing with undercover agents. In this sense, the government can do "indirectly" what it would be unable to do "directly" (as a practical matter, not as a matter of law). Put another way, by concealing its agents' true identities the government can gather evidence that it would not be able to acquire if these agents had to go unmasked. But this will necessarily be the case as long as "[a] law enforcement officer performing his official duties cannot be required always to be in uniform or to wear his badge of authority on the lapel of his civilian clothing" or "to proclaim himself an arm of the law."

IV. SOME FINAL THOUGHTS

Inspector Gregory: Is there any other point to which you wish to draw my attention?
Sherlock Holmes: To the curious incident of the dog in the night-time.
The Inspector: The dog did nothing in the night-time.
Holmes: That was the curious incident. . . .

—Silver Blaze

The curious thing about the treatment of Miranda in Brewer v. Williams is that neither Justice Stewart, who wrote the majority opinion, nor Justices

396. See notes 319-27 supra and accompanying text.
397. See cases discussed in note 376 supra. See also United States v. Holmes, 452 F.2d 249, 269 (7th Cir. 1971) (statement, unilluminated by any discussion that Massiah's rationale applies to postarrest, as well as postindictment, surveillance, but at time statements obtained defendant represented by counsel and released on bond); People v. Robinson, 16 A.D.2d 184, 224 N.Y.S.2d 705 (1962) (discussed at note 240 supra).
398. See United States v. Hall, 421 F.2d 540, 545 (2d Cir. 1969) (Friendly, J.).
400. A.C. DOYLE, Silver Blaze, in THE MEMOIRS OF SHERLOCK HOLMES 1, 24 (1894).
Marshall, Powell, and Stevens, who filed concurring opinions, made any use of it. Unlike most Miranda cases, the issue in Williams was neither the adequacy of the warnings nor the effectiveness of the suspect’s alleged waiver in immediate response to the warnings. Rather, Williams involved “second level” Miranda safeguards, those “procedures [Miranda] had indicated should be followed when a defendant asserts his rights.” It is because these “second level” rights seem to have been so utterly disregarded in Williams—especially if the “Christian burial speech” is viewed as “interrogation”—that the Court’s avoidance of Miranda is at least puzzling and at worst (for supporters of Miranda, at any rate) downright ominous.

If the issue in Williams had been simply whether, after being advised of his Miranda rights, the defendant had effectively waived them before or at the time he revealed the whereabouts of the body, the considerable pains the Court took to treat Williams as a Massiah, and not as a Miranda, case would have been more understandable. In that event, the Williams case could be viewed as one in which the Court chose the Massiah, rather than a Miranda, route because it was ready and willing to “[adopt] a rather rigorous view of waiver as applied to a defendant’s sixth amendment right to counsel,” but inclined to “grant the prosecution more leeway in establishing waiver of the privilege against self-incrimination.”

The trouble with this explanation is that when Williams’ alleged waiver occurred he had already asserted his right to counsel numerous times. It may be my shortcoming, but I fail to see why an alleged waiver of a specifically and repeatedly asserted “Miranda right to counsel” should not be judged by the same strict Johnson v. Zerbst standards applicable to a “Massiah right to counsel.” Indeed, if one must choose, a right to counsel designed to meet a specific need—“dispel[ling] the compelling atmosphere of the interrogation”—would seem more deserving of protection than the

402. See text at notes 184-215 supra.
403. See Israel, supra note 154, at 1386 n.281. See also id. at 1381-82 n.268; note 171 supra and accompanying text (discussion of lower court cases that have adopted very strict standard for effective waiver of “Massiah right to counsel”).
404. See text at notes 11-17 supra.
405. At one point in its opinion, the Miranda Court commented:

[In Escobedo], as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation. . . . The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege.

384 U.S. at 465-66. The Court later added:

Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. . . . Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to any questioning, but also to have counsel present during any questioning if the defendant so desires.

Id. at 470.
more abstract Massiah right, which applies whether or not "the privilege against [compelled] self-incrimination is jeopardized."

If, as the Williams Court apparently recognized—and considered the State of Iowa to have in effect conceded—Captain Leaming's speech constituted, or was tantamount to, Miranda "interrogation," then Williams emerges as a relatively easy Miranda case. This, I think, may be seen by contrasting the Williams facts with those in Michigan v. Mosley.

Although language in Miranda—that once an in-custody suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease"—could be read as creating a per se rule against any further questioning of one who has invoked his "right to silence," Mosley held that interrogation may be resumed at least in the following circumstances: (1) The original interrogation is promptly terminated; (2) the questioning is resumed only "after the passage of a significant period of time"; (3) the suspect is given "full and complete Miranda warnings at the outset of the second interrogation"; (4) a different officer resumes the questioning; and (5) the second interrogation is "restricted...to a crime that had not been the subject of the earlier interrogation."

406. Id. at 478 ("when an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized").

Massiah applies whether or not an individual is deprived of his freedom and whether or not he is subjected to the inherently coercive police questioning that must be preceded by Miranda warnings. Moreover, although the "Miranda right to counsel" was specifically invoked in Williams, the "Massiah right" need not be. See McLeod v. Ohio, 1 Ohio St.2d 60, 62, 203 N.E.2d 349, 351 (1964), rev'd per curiam, 381 U.S. 356 (1965); notes 263-69 supra and accompanying text.

407. See note 27 supra.

408. See id.


410. 384 U.S. at 473-74.


412. Id. at 104, 106.

413. Id. at 106.

414. Id. at 104; see id. at 106.

415. Id. at 104-05; see note 416 infra.

416. Id. at 106. The Mosley Court offered the following reasons for allowing a resumption of questioning in the fifth situation:

The subsequent questioning [by Detective Hill] did not undercut Mosley's previous decision not to answer Detective Cowie's inquiries [at the first interrogation session]. Detective Hill did not resume the interrogation about [the two robberies that were the subject of the earlier interrogation], but instead focused exclusively on the Leroy Williams homicide [a homicide that had occurred in the course of a third robbery], a crime different in nature and in time and place of occurrence from the robberies for which Mosley had been arrested and interrogated by Detective Cowie. . . . [Hill's] questioning of Mosley about an unrelated homicide was quite consistent with Mosley's earlier refusal to answer any questions about the robberies.

Id. at 105.

I am operating on the premise that the Mosley facts were as the Supreme Court perceived them to be; but there is reason to doubt that this is so. Professor Geoffrey Stone, who has studied the Mosley record, indicates that the police testimony provides only shaky support for the view that after declining to discuss certain robberies at the initial interrogation Mosley was subsequently questioned about "an unrelated" robbery-murder. See Stone, The Miranda Doctrine in the Burger Court, 1977 SUP. CT. REV. 99, 134. He
The Mosley Court seems to have assigned considerable weight to the fact that the second interrogation was restricted to a separate and "unrelated" crime, one "different in nature and in time and place of occurrence from the robberies for which Mosley had been . . . [earlier] interrogated." Indeed, it has been argued that "this fact seems critical, for in its absence one is left only with a renewed effort to question by a different member of the same police force, in a different room in the same building, only two hours after Mosley's assertion of his right not to be questioned." Of course, this fact, significant if not critical in Mosley, is missing in Williams.

Doubts have been raised whether, once a suspect has asserted his Miranda rights, "a fresh set of warnings" at the outset of the second session is "sufficient to dissipate the coercion inherent in the continuing custody and the renewed questioning." But surely under such circumstances a fresh set of warnings is a minimal requirement for the resumption of questioning. Yet nothing resembling a fresh set of Miranda warnings was given between the time Williams last exercised his Miranda rights and the time Captain Leaming delivered his "Christian burial speech." Upon arriving in Davenport to bring Williams back to Des Moines, Captain Leaming advised Williams of his rights—and Williams asserted them. He asked, and was allowed, to meet alone with his Davenport lawyer. When Leaming was about to handcuff him and start the journey back, Williams again asserted his rights. Again he asked (this time on his own initiative), and was permitted, to confer alone with his lawyer. Less than an hour later, apparently only a short time after they had left the Davenport area and entered the freeway, Leaming launched into his now famous speech. At no point between Williams' last meeting with his lawyer and the time he became the recipient of Leaming's remarks on "Christian burials" can it even be argued that Williams was "reminded again that he could remain silent and consult with a lawyer."

also points out that the Michigan courts never found—indeed, the Michigan Court of Appeals voiced skepticism—that the initial interrogation did not concern the robbery-murder. Id.


418. Stone, supra note 416, at 134. But see Note, Fifth Amendment, Confessions, Self-Incrimination—Does a Request for Counsel Prohibit a Subsequent Waiver of Miranda Prior to the Presence of Counsel? 23 WAYNE L. REV. 1231, 1333-34 (1977). The Supreme Court of California recently held that assuming arguendo that the "circumstances" relied on by the Mosley Court "are essentially the same as those of the [instant case]," they are "inadequate to protect defendant's privilege against self-incrimination under the California Constitution." People v. Pettingill, 21 Cal. 3d 231, —, 578 P.2d 108, 117-18, 145 Cal. Rptr. 861, 870-871 (1978).


420. Brief for Petitioner, Joint App. at 75 (testimony of Captain Leaming).

421. Id. at 76 (testimony of Captain Leaming).

422. See id. at 55, 63, 74-76, 104 (testimony of Captain Leaming and Detective Nelson). But cf. id. at 81 (testimony of Captain Leaming) (discussed at note 437 infra).

423. Cf. Michigan v. Mosley, 423 U.S. 96, 104-05 (1975). The Mosley Court described the facts in that case as follows:

A review of the circumstances leading to Mosley's confession reveals that his "right to cut off questioning" was fully respected in this case. . . . When Mosley stated [at the first
Assuming arguendo that the "Christian burial speech" did not amount to "interrogation," Miranda would still seem to prohibit Leaming's tactics. For whether or not the captain engaged in "interrogation," he surely engaged in efforts "calculated to persuade [one who had earlier asserted his Miranda rights] to reconsider his position,"424 and such persuasion is seemingly forbidden by Miranda and Mosley.425 Moreover, and more generally, even if the "Christian burial speech" did not amount to "interrogation" within the meaning of Miranda, how can it be said that a detective who "deliberately and designedly set[s] out to elicit information"426 from one who has exercised his Miranda rights is "fully respect[ing]"427 or "scrupulously honor[ing]"428 those rights? And if the claim is made that, although Williams had earlier asserted his rights, he somehow waived them somewhere on the road to Des Moines, how can it be maintained that the "Christian burial speech" does not constitute "any evidence" that he was "tricked or cajoled into a waiver"?429

There remains, of course, one significant, or at least potentially significant, distinction between Mosley and Williams: Mosley only invoked his right to silence, but Williams repeatedly asserted his right to counsel as well. And, as both Justice Stewart, who wrote the majority opinion in Mosley,430 and Justice

interrogation session] that he did not want to discuss the robberies, Detective Cowie immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position. . . . [Mosley] was given full and complete Miranda warnings at the outset of the second interrogation. He was thus reminded again that he could remain silent and could consult with a lawyer, and was carefully given a full and fair opportunity to exercise these options.

Id.


425. Forbidden, that is, at least when, as in Williams, the persuasion is: (1) resorted to by the same officer before whom the suspect had earlier asserted his rights; (2) neither accompanied nor preceded by a fresh set of warnings; and (3) not restricted to a crime "different in nature" or "in time and place of occurrence" from the crime or crimes for which the suspect had been arrested or earlier interrogated. See Michigan v. Mosley, 423 U.S. 96, 105 (1975).

426. See Brewer v. Williams, 430 U.S. at 399.


428. Id. 103-04 ("A reasonable and faithful interpretation of the Miranda opinion must rest on the [Miranda Court's intention] to adopt 'fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored. . . .' . . . [T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.'") (quoting from Miranda v. Arizona, 384 U.S. at 479). See also 384 U.S. at 467 ("In order to combat [the inherently compelling pressures of in-custody interrogation] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.").

429. See Miranda v. Arizona, 384 U.S. at 476.

430. Rejecting the dissenters' argument that Miranda established a requirement that once a suspect has asserted his right to remain silent, questioning may be resumed only when counsel is present, Justice Stewart observed:

But clearly the Court in Miranda imposed no such requirement, for it distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that "the interrogation must cease until an attorney is present" only "[i]f the
White, who concurred in the result in that case, recognized, by providing that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present," \(431\) \(384\) \(U.S.,\) \(474\) \(at\) \(474\) \(requiring\) \(interrogation\) \(to\) \(cease\) \(after\) \(assertion\) \(of\) \(a\) \(right,\) \(it\) \(knew\) \(how\) \(to\) \(do\) \(so\) \(referring\) \(to\) \(the\) \(assertion\) \(of\) \(the\) \(right\) \(to\) \(counsel\). Justice White's observation in Mosley that "when [the \(Miranda\) Court] wanted to create a per se rule against further interrogation after assertion of a right, it knew how to do so" \(433\) (referring to the assertion of the right to counsel) came back to haunt him in Williams. He offered two reasons for the inapplicability of the "rigid prophylactic \(Miranda\) rule" \(434\) (with respect to the assertion of the right to counsel) to theWilliams case. The first seems quite strained:

\[\text{[A]t no time did respondent indicate a desire not to be asked questions outside the presence of his counsel—notwithstanding the fact that he was told that he and the officers would be ‘visiting in the car’ . . . [Williams] did [assert his right to counsel], but he never, himself, asserted a right not to be questioned in the absence of counsel.}\]  

\(435\)

\(\text{Michigan v. Mosley, 423 U.S. 96, 104 n.10 (1975).}\)

The lower courts are split over whether an in-custody suspect's request for counsel imposes a per se rule prohibiting the resumption of police questioning until an attorney is present. See People v. Grant, 45 N.Y.2d 366, 375 n.1, 380 N.E.2d 257, 262 n.1, 408 N.Y.S.2d 429, 434 n.1 (1978) (collecting cases).

\(431\) Justice White agreed with the Mosley majority that "the statement in \(Miranda,\) \(384\) \(U.S.,\) \(at\) \(474\) \(requiring\) \(interrogation\) \(to\) \(cease\) \(after\) \(an\) \(assertion\) \(of\) \(the\) \('right\) \(to\) \(silence' \) \(tells\) \(us\) \(nothing\) \(because\) \(it\) \(does\) \(not\) \(indicate\) \(how\) \(soon\) \(this\) \(interrogation\) \(may\) \(resume.'\) Michigan v. Mosley, 423 U.S. 96, 109 (1975) (White, J., concurring). Justice White added:

\[\text{The \[Miranda\] Court showed in the very next paragraph, moreover, that when it wanted to create a per se rule against further interrogation after assertion of a right, it knew how to do so. The court there said ‘[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present.'}\]  

\(\text{Id. at 109-10 (quoting from 384 U.S. at 474) (emphasis added by Justice White). Justice White then added in a footnote:}\)

\[\text{The question of the proper procedure following expression by an individual of his desire to consult counsel is not presented in this case. It is sufficient to note that the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.}\]  

\(\text{Id. at 110 n.2.}\)

\(432\) See note 431 supra.

\(433\) Id.

\(434\) 430 U.S. at 436 n.6 (White, J., with Blackmun & Rehnquist, JJ., dissenting).

\(435\) Id. Justice White's reference to Captain Leaming's disclosure that he and Williams would be "visiting" on the return trip to Des Moines is baffling. There is no reason to think that Williams had any idea that "visiting" is a "term of art" for a low-keyed "interrogation." Presumably he thought Leaming meant that they would engage in "small talk" unrelated to the case. If so, what would Justice White have...
Although here, as elsewhere, the police testimony is not as clear as it ought to be, the most plausible reading of the record is that shortly after Captain Leaming and his prisoner had begun the return trip to Des Moines—and shortly before the rendering of the “Christian burial speech”—Williams informed the captain that he would tell him “the whole story” after he got back to Des Moines and met with his lawyer. This was a clear expression by Williams himself that he did not wish to be questioned outside the presence of his Des Moines lawyer, or at least not until he had conferred with him. But this point is not crucial. Assuming arguendo that Williams made no statement immediately prior to the “Christian burial speech,” the record is clear that after Leaming announced that they would be “visiting” during the ride back

had Williams do? Reject Leaming’s invitation to visit, which he might well have interpreted as an invitation to be nice to him? Insist that they spend the four or five hours driving back in stony silence? Exact a promise from Leaming that while they were “visiting” he would not try to trick Williams into incriminating himself? Williams was in no mood to displease or irritate Leaming. The first thing he asked the captain on the drive back was whether Leaming “hated him” and “wished to kill him.”

See generally Kamisar, supra note 2.

437. Detective Nelson, who drove the car on the drive back to Des Moines, testified that the “Christian burial speech” was delivered only a short time after they left the Davenport area and entered the freeway. Brief for Petitioner, Joint App. at 104. At one point, Captain Leaming testified to the same effect. Id. at 63 (testimony of Captain Leaming). But at another point, when Leaming testified more extensively on this subject, he stated that “eventually”—after considerable talk on various topics, such as religion, organizing youth groups, playing an organ, intelligence of other people, police procedures—“as we were travelling along there,” he delivered the “Christian burial speech.” Id. at 80-81. The first time Williams told Leaming he would reveal “the whole story” after he conferred with his Des Moines lawyer was “not too long after we got on the freeway, after we had gassed up and started—gotten on the freeway and started toward Des Moines.” Id. at 65-66.

Moreover, Leaming conceded at another point that even though Williams had stated that he would tell him “the whole story after I see [Des Moines lawyer] McKnight,” he “kept getting” what he “could get” from Williams before they got back to Des Moines. Id. at 60-61. As Williams’ able court-appointed counsel, Professor Robert D. Bartels of the University of Iowa College of Law, put it, either this effort by Leaming

to get as much information as he could before they reached Des Moines . . . included the “Christian burial” speech, or Detective Leaming engaged in further efforts to acquire information that he did not divulge in detail during his testimony. Although the former alternative is the more likely one, for purposes of this case it does not matter which is true.

Brief for Respondent at 17 n.9.

The federal district court did not specifically find that Leaming delivered “the speech” before the first time Williams told Leaming that he would talk to the captain after he consulted with his Des Moines lawyer. The court, however, did find:

Petitioner indicated that he did not wish to talk on the trip by stating that he would talk after he got back to Des Moines and spoke with Mr. McKnight. . . . Detective Leaming carried on a conversation with Petitioner during the trip concerning religion . . . and various other topics, including . . . the intelligence of other people, police procedures, organizing youth groups . . . .

See Williams v. Brewer, 375 F. Supp. 170, 174 (S.D. Iowa 1974) (finding of fact number 14). As I have discussed, according to Leaming the discussion of these topics preceded the “Christian burial speech.”
to Des Moines, Williams requested, and was permitted, to confer with his Davenport lawyer two more times.\(^{439}\) And the Davenport lawyer, presumably with the concurrence, if not at the urging, of his client, (1) advised Learning that "it was his understanding that [Williams] was not to be questioned until he got to Des Moines,"\(^{440}\) and (upon Learning’s expression of some reservations) "stated that that understanding should be carried out";\(^{441}\) and (2) requested, but was refused permission, to ride along with his client on the trip back to Des Moines.\(^{442}\) Presumably the Davenport lawyer made the request to accompany his client on the return trip in Williams’ presence. In any event, Williams soon knew that his lawyer’s request had been denied.

It is true that Williams himself did not—in so many words—assert "a right not to be questioned in the absence of counsel."\(^{443}\) What of it? Earlier in the same Miranda passage that arguably creates a per se rule against further "interrogation" after assertion of the right to counsel, the Miranda Court observed: "If the individual indicates in any manner . . . that he wishes to remain silent, the interrogation must cease."\(^{444}\) It is hard to believe that Miranda requires that the right to counsel be asserted with a greater degree of clarity than the right to silence, especially when Miranda elsewhere states that if an individual "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."\(^{445}\) As the Supreme Court of California has observed:

To strictly limit the manner in which a suspect may assert [his Miranda rights], or to demand that it be invoked with unmistakable clarity (resolving any ambiguity against the defendant) would subvert Miranda’s prophylactic intent. Moreover, it would benefit, if anyone, only the experienced criminal who, while most adept at learning effective methods of coping with the police, is least likely to find incarceration and police interrogation unnerving.\(^{446}\)

Moreover, why does it matter, as Justice White evidently thinks it does, that Williams himself, as opposed to his lawyers, did not specifically assert a right not to be questioned in the absence of counsel?\(^{447}\) "Williams had effectively asserted his right to counsel by having secured attorneys at both ends of the automobile trip, both of whom, acting as his agents, had made clear to the police that no interrogation was to occur during the journey."\(^{448}\)

\(^{439}\) Brief for Petitioner, Joint App. at 75-76 (testimony of Captain Learning).

\(^{440}\) 375 F. Supp. at 173; see id. at 176.

\(^{441}\) Id. at 173.

\(^{442}\) Id.; see id. at 176.

\(^{443}\) 430 U.S. at 436 n.6 (White, J., with Blackmun & Rehnquist, JJ., dissenting); see note 435 supra.

\(^{444}\) 384 U.S. at 473-74 (emphasis added).

\(^{445}\) Id. at 444-45 (emphasis added).

\(^{446}\) People v. Randall, 1 Cal. 3d 948, 955, 464 P.2d 114, 118, 83 Cal. Rptr. 658, 662 (1970) (in absence of compelling evidence to contrary, suspect's phone call to his attorney during "booking process" tantamount to assertion of Miranda rights); see People v. Buxton, 44 N.Y.2d 33, 37, 374 N.E.2d 384, 386, 403 N.Y.S.2d 487, 489 (1978) (it would be "an absurd formality" to hold that defendant's request, in presence of police, that his employer call his lawyer did not sufficiently indicate to police his desire for counsel).

\(^{447}\) 430 U.S. at 436 n.6 (White, J., with Blackmun & Rehnquist, JJ., dissenting); see note 435 supra.

\(^{448}\) 430 U.S. at 405.
Isn't that enough? Why, after retaining two lawyers, and while isolated from them, should an obviously frightened murder suspect—Williams expressed fear on the return trip that the police might kill him—be required to assert his rights himself, and in a particular manner to boot? Wasn't Williams entitled to assume that his lawyers were more adept at asserting legal rights and dealing with the police than he was? Wasn't that why he hired them?

The second reason Justice White gave for not applying the “rigid prophylactic [Miranda] rule” concerning assertion of the right to counsel was that Williams had not been “questioned.” I have maintained at considerable length that the “Christian burial speech” should be viewed as “interrogation” within the meaning of Miranda, and have pointed out that the Williams majority apparently so regarded it. Nevertheless, Williams need not have prevailed on this issue to have had his incriminating disclosures excluded on Miranda grounds. Once the suspect has exercised his right to counsel, and thus brought the “second level” Miranda safeguards into play, the issue is no longer simply whether “interrogation” then occurred, but whether “the exercise of the right” was “scrupulously honored.” When Leaming delivered the “Christian burial speech” he was admittedly “playing upon Williams’ religious conscience.” More generally, he was disregarding Williams’

449. See note 435 supra. Williams was also an escapee from a mental hospital, black, and a resident of the state for only a few months.

450. 430 U.S. at 436 n.6 (White, J., with Blackmun & Rehnquist, JJ., dissenting).

451. See text at notes 42-140 supra.

452. See note 27 supra.

453. See text at notes 401-02 supra.

454. See Miranda v. Arizona, 384 U.S. at 479. That Leaming “honored” Williams’ exercise of his right earlier, by permitting him to confer with his Davenport lawyer, is insufficient. In Miranda the Court observed:

Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process . . . Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

Id. at 470.

Assuming arguendo that Williams did not reiterate, just before the “Christian burial speech,” that he would tell the police “the whole story” after he met with his Des Moines lawyer, “[a]t no time during the trip”—certainly at no time prior to the delivery of the speech—“did Williams express a willingness to be interrogated in the absence of an attorney.” 430 U.S. at 392. But see note 437 supra and accompanying text (most plausible reading of record indicates that Williams reiterated his intent to tell police everything after meeting with his lawyer). Moreover, after “Williams had effectively asserted his right to counsel by having secured attorneys at both ends of the automobile trip,” Leaming “made no effort at all to ascertain whether Williams wished to relinquish that right.” Id. at 405. Finally, although he need not have done so to preserve this right, Williams specifically asserted his right to have counsel present during the return trip; his Davenport attorney, acting as his agent, sought but was denied permission to accompany him on the return trip. See note 442 supra and accompanying text.

455. Brief for Petitioner at 13.
decision to remain silent\(^\text{456}\) and trying to "\(^\text{457}\) or "sweet talk"\(^\text{458}\) him into changing his position. Whether or not Leaming's efforts to get as much information as he could from his prisoner before they reached Des Moines\(^\text{459}\) amounted to "interrogation," such tactics surely "did not honor, scrupulously or otherwise,"\(^\text{460}\) Williams' exercise of his right to counsel and his right to cut off questioning.\(^\text{461}\)

If the Williams Court did not bury Miranda, as some had feared and others had hoped, it surely did not honor it either. Indeed, by "studiously avoiding reliance on Miranda"\(^\text{462}\) in Williams, the Court maintained its record of not holding "a single item of evidence inadmissible on the authority of Miranda" since the present Chief Justice assumed his post in June of 1969.\(^\text{463}\) But the

\(^{456}\) See Miranda v. Arizona, 384 U.S. at 474 (if suspect "indicates that he wants" counsel "before speaking to the police, they must respect his decision to remain silent").

\(^{457}\) See Bator & Vorenberg, supra note 140, at 73 ("Deception in police interrogation . . . may consist of 'conniving'—seeking to offset the suspect's reluctance to incriminate himself by displays of apparent sympathy, friendship, or moral indignation.").

\(^{458}\) Leaming admitted that Williams as "Reverend" to win his friendship and confidence. Brief for Petitioner at 13. Leaming also led Williams to believe that he was Williams' protector and sympathizer, indicated that he (Leaming) was a sensitive, religious person, and suggested (not very subtly) to Williams that the only decent and honorable thing for him to do was to reveal the whereabouts of the body on the way back to Des Moines. See Kamisar, supra note 2, at 218-19, 228 (discussion of Williams record).

\(^{459}\) See text at note 1 supra.

\(^{460}\) See note 437 supra.

\(^{461}\) Brief for Respondent at 39.

\(^{462}\) A forceful argument can be made that once a suspect has specifically asserted his "Miranda right to counsel" he is essentially in the same position as one whose "Massiah right to counsel" has attached. For even though attempts to "induce" a suspect to talk or to "elicit" statements from him may not amount to "interrogation" within the meaning of Miranda, they may nevertheless constitute a failure to "respect" or "honor" the exercise of Miranda rights—or amount to "trick[ing]" or "cajol[ing]" one who has asserted his rights into waiving them. See Miranda v. Arizona, 384 U.S. at 476. Thus, the argument would run, once a suspect has asserted his right to counsel, the "second level" Miranda safeguards shield him from "secret agent" activity designed to obtain incriminating statements from him, such as the "jail plant," "Mother Powers," and "waitress" ploys, just as much as the Massiah doctrine does once adversary judicial proceedings have commenced against a suspect. See United States v. Brown, 466 F.2d 493 (10th Cir. 1972) (discussed in note 376 supra); State v. Travis, 116 R.I. 678, 360 A.2d 548 (1976) (same).

Whether this is so is a nice question, but the Court need not have reached it to have held Williams' incriminating disclosures inadmissible on Miranda grounds. Even if we assume arguendo that some compulsion, subtle or otherwise, must be exerted on a suspect before it may be said that the exercise of his rights was not honored or respected, and that such compulsion is lacking when a suspect is unaware that he is dealing with a government agent, these were not the factual circumstances in Williams. For Williams knew full well that Leaming was a police captain, and Leaming did exert pressure. As previously mentioned, there is ample reason to believe Williams feared that physical harm might come to him before he ever got back to Des Moines. See note 435 supra. Furthermore, Leaming led his prisoner to believe that he was Williams' protector and sympathizer. See note 457 supra. Under the circumstances, Williams would not take lightly the captain's desires and preferences, which the captain expressed quite emphatically: "I feel that you yourself are the only person that knows where this little girl's body is . . . . I feel . . . . that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve. . . . I feel we should stop and locate it on the way. . . ." 430 U.S. at 392-93 (emphasis added).

\(^{463}\) The Court, in the years since Warren Burger assumed the role of Chief Justice, has handed down eleven decisions concerning the scope and application of Miranda. In ten of these cases, the Court interpreted Miranda so as not to exclude the challenged evidence. In the remaining
Court did reaffirm and revivify Massiah, which has now emerged as the other major decision by the Warren Court in the area. Should the defendant-minded, disappointed and troubled by the diminution of Miranda’s vigor and significance, take comfort from the fact that Massiah “is ‘alive and well’”?466

Today, no doubt, the defendant-minded are a good deal more tolerant of—one might even say, grateful for—the Massiah doctrine than they used to be. It was easy in the mid-1960’s for the defendant-minded to criticize the Massiah doctrine as too “formalistic” or “formulistic.”467 Then the momentum was on their side; then “the doctrines converging upon the institution of police interrogation [were] threatening to push on to their logical conclusion—to the point where no questioning of suspects will be permitted.”468
Although it was unclear just how far the Court’s momentum would carry, most commentators recognized that Massiah and Escobedo were only steps along the way to the final destination. But the winds of change have shifted sharply. “Miranda has fallen into disfavor with the present majority of the Court” and is in danger of being “dismantled piecemeal”—or worse. Under these circumstances, the defendant-minded are understandably reluctant to find fault with Massiah, as resurrected and expanded by Williams. For an invigorated Massiah doctrine could become the major doctrine—even the only one—standing in the way of a return to the loosely defined and largely illusory “voluntariness”-“totality of the circumstances” test.

Nevertheless, the shortcomings of Massiah have not disappeared with the passage of time. If, as Justice Stewart pointed out in Massiah, the failure to vouchsafe the aid of counsel to “an indicted defendant under interrogation by the police in a completely extrajudicial proceeding . . . might deny [him] ‘effective representation by counsel at the only stage when legal aid and advice would help him,’” how or why is this less true of the unindicted prisoner? Or one against whom judicial proceedings have not yet been initiated? Under our system of justice, an arrest—no less than an indictment or a first appearance before a magistrate—is supposed to be “followed by a trial, ‘in an orderly courtroom, presided over by a judge, open to the public . . . ,’” and not by a secret extrajudicial proceeding, presided over by the police. Why is a “kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction [and thus] in effect deny [an individual] effective representation by counsel” any less a “kangaroo court procedure” because the judicial proceedings have not yet commenced against the individual?

469. See note 468 supra and authorities cited therein.
470. See, e.g., Allen, The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases, 1975 U. ILL. L.F. 518, 538-39; Amsterdam, supra note 232, at 801-03; Chase, supra note 419, at 518-19, 594-95. Both Professors Allen and Amsterdam indicate that the Court’s loss of impetus in the criminal procedure field would have occurred without any change in its personnel.
471. Stone, supra note 416, at 100.
472. Id. at 169.
473. Some foresee the overruling of Miranda. See F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, CASES AND COMMENTS ON CRIMINAL PROCEDURE 355 (1974). Others, whose view I share, suggest that this is unlikely to occur. See Israel, supra note 154, at 1383-87; Stone, supra note 416, at 169. The Court has demonstrated its ability to “shrink” and “chip away” at Miranda and will probably be quite content to continue to do so.
475. 377 U.S. at 204.
476. Cf. id. “Under our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, ‘in an orderly courtroom, presided over by a judge, open to the public . . . .’” Id. See also Spano v. New York, 360 U.S. 315, 327 (1959) (Stewart, J., with Douglas & Brennan, JJ., concurring) (“Under our system of justice an indictment is supposed to be followed by an arraignment and a trial.”).
477. Id. at 325 (Douglas, J., with Black & Brennan, JJ., concurring).
The right to counsel should not “turn on a moment arbitrarily fixed as the beginning of judicial proceedings,” a point that can often be manipulated by law enforcement authorities. Rather, it should accommodate both the government’s need for evidence and a suspect’s need for “a lawyer’s help,” which may be as great, or greater, before the commencement of judicial proceedings as afterwards. It should concern itself with the “overall fairness” of the “interrogation” and the inherent coercion or potential for coercion in the situation. The Massiah-Williams doctrine is not substantially related to these needs and concerns; it provides only “an unduly tenuous fit.” As Justice Traynor said of the Massiah doctrine, even before it had acquired its name:

“It is a formalistic assumption that indictment is the point when a defendant particularly needs the advice and protection of counsel. Often a defendant is arrested under highly suspicious circumstances and from the time he is apprehended his guilt is a foregone conclusion in the minds of the police. . . . In some cases the evidence against the accused may be stronger at the moment of arrest than it may be in other cases when the indictment is returned [or, to update this rule in light of Brewer v. . . .]

478. Traynor, supra note 65, at 673.
479. In People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961), Judge Fuld noted:

Since the finding of the indictment presumably imports that the People have legally sufficient evidence of the defendant’s guilt of the crime charged, the necessities of appropriate police investigation “to solve a crime, or even to absolve a suspect” cannot be urged as justification for any subsequent questioning of the defendant.

Id. at 565, 175 N.E.2d at 447-48, 216 N.Y.S.2d at 74-75. This is not always so. See text at note 484 infra. But to the extent that it usually is, the “indictment rule” is subject to the criticism that it is tilted too heavily in favor of the government and would have little practical impact on police interrogation practices. See Herman, supra note 86, at 484-85. See also Developments in the Law—Confessions, supra note 467, at 1011 (view that sixth amendment protection comes into play only after crime is “solved” in sense of amassing enough admissible evidence to convict “would trivialize Escobedo by bringing its safeguards into play only after conviction had been assured”). Brewer v. Williams, however, reemphasizes the Massiah rule; the initiation of judicial proceedings—“whether by way of formal charge, preliminary hearing, indictment, information, or arraignment”—now triggers the right to counsel. 430 U.S. at 398 (quoting from Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)). Depending on just when judicial proceedings are now deemed to be initiated, the rule may be less responsive to the government’s needs.

Brewer v. Williams itself is a good illustration of the problem. Apparently because he surrendered in Davenport and awaited the arrival of the Des Moines police to bring him back, Williams was “arraigned” on the arrest warrant before a Davenport judge and committed by that judge to confinement in a Davenport jail. These proceedings were unrelated to the need of the Des Moines police for information.

480. Under the Massiah-Williams rule, a suspect is “entitled to a lawyer’s help” when judicial proceedings have been initiated against him. See Brewer v. Williams, 430 U.S. at 398-401; Massiah v. United States, 377 U.S. at 204. There is, however, a very weak congruence, if any, between the initiation of judicial proceedings and a suspect’s need for a lawyer’s help. Not only may there be as strong a need for a lawyer’s help before the commencement of judicial proceedings as afterwards, but it may be too late for a lawyer’s help afterwards.

481. Traynor, supra note 65, at 673.
483. See note 467 supra.
Williams, judicial proceedings have commenced]. It is hardly realistic to assume that a defendant is less in need of counsel an hour before indictment [or the initiation of judicial proceedings] than he is an hour after. . . .

It may be argued that if [the rule] is adopted, the police will still have time to interrogate and encourage confessions before an indictment is returned [or judicial proceedings have commenced]. In some cases, however, as in [Spano and Di Biasi], an indictment may be returned in advance of the defendant's apprehension. In such cases there could be no interrogation of the suspect at all, except in the presence of his attorney [or a waiver meeting the rigorous Johnson v. Zerbst standards]. Moreover, if the suspect is in custody before indictment [or the initiation of judicial proceedings], the police could easily frustrate the rule by delaying the indictment [or the commencement of judicial proceedings]. Thus, the rule would operate only occasionally and arbitrarily.484

The Massiah doctrine and its New York counterpart do reflect the view that " 'to maintain the integrity of the judicial process in its use of evidence of criminal guilt'. . . 'congruence' must be maintained throughout the course of a formally instituted criminal action. . ."485 But why not maintain "congruence" "between the judicial and the non-judicial, pre-trial pro-

485. People v. Waterman, 9 N.Y.2d 561, 567, 175 N.E.2d 445, 448, 216 N.Y.S.2d 70, 76 (1961). Because the defendant confessed under police questioning during the period between the return of the indictment and his arraignment thereon, there was no need for the court to establish "congruence" beyond the course of a formally instituted prosecution, but the court did observe, with apparent approval: "It has been urged that, 'To maintain the integrity of the judicial process in its use of evidence of criminal guilt, congruence must be maintained between the judicial process and the non-judicial, pretrial processes with respect to the methods by which evidence of criminal guilt is secured.' " Id. (quoting from A. Beisel, supra note 474, at 102) (emphasis added). It is plain that Professor Beisel had urged that congruence be maintained between the proceedings in the courtroom and those in the police station—regardless of whether a "criminal prosecution" has begun. Thus, in the very next paragraph following the one quoted in part in Waterman, Professor Beisel continues:

Should not, therefore, the privilege against self-incrimination control police and prosecutive officers in securing confessions or other incriminating statements at the police station? Should not an accused, or a witness under proper circumstances, have a right to privilege of silence at the police station? Under the principle of congruence which was just explained, the answer would have to be in the affirmative, since there is no accepted principle which would justifiably demarcate the police or prosecutor from other executive or administrative officials to whom the privilege does apply. . . . Since the doctrine of waiver is interpreted in a manner which gives an accused real protection for his right of silence in the courtroom, should not the Supreme Court maintain congruence between standards of judicial waiver and those which are applied at the police station, so that an accused can have real protection for his right to silence at the police station? Unless the doctrine of waiver at the police station is made congruent with that of the courtroom, extension of the privilege against self-incrimination into the police station loses most of its practical significance . . . .

Id. at 102-14.
It is difficult to avoid the conclusion that those judges unmoved by "kangaroo court" proceedings in the nonjudicial, pretrial stages, but stirred to action when these same proceedings are held after the formal institution of a criminal action, are responding chiefly to a violation of the symbol of a fair trial and conveying "symbolic reassurance." When the issue is forced into the open, it seems that the rule of law prevails. Then the "psychological need for the appearance of justice" is satisfied and the importance of the right to counsel is dramatized. This is all to the good as far as it goes, but it does not go nearly far enough.

More than a decade ago, Justice Traynor saw "[t]he logical corollary [to the Massiah doctrine], to forestall evasion of the rule, . . . just around the corner. The right to counsel should now logically materialize whenever the accused was not, but should have been, brought before a judicial officer." However logical this development may seem to some, and it does to me, it is not likely to occur. The Court has extended the sixth amendment right to counsel, as opposed to the Miranda right, backwards from the trial through the indictment to the initiation of judicial proceedings, presumably the first appearance before a judicial officer. But, as Justice Stewart's fierce resistance to the application of Massiah to the Escobedo facts demonstrates, the Court is unlikely to extend the right any further.

486. See note 485 supra.
487. Cf. T. Arnold, The Symbols of Government 130 (Harbinger Books ed. 1962) (criminal trial overshadows all other ceremonies as dramatization of values of our spiritual government). "[T]he cultural value of the ideal of a fair trial is advanced as much by its failure as it is by its success. Any violation of the symbol of a ceremonial trial rouses persons who would be left unmoved by an ordinary nonceremonial injustice." Id. at 142.
489. See Arnold, The Criminal Trial as a Symbol of Public Morality, in Y. Kamisar, F. Inbau & T. Arnold, Criminal Justice in Our Time 140 (A. Howard ed. 1965) ("[Procedural] restrictions are unquestionably handicaps in the enforcement of the law . . . . Nevertheless, there is a tremendous psychological need for the appearance of justice which a fair trial creates in the public mind.").
490. Cf. T. Arnold, supra note 65, at 128-30, 156.
491. Traynor, supra note 65, at 673; cf. Friendly, supra note 65, at 950 (Escobedo "can well be read as requiring the assistance of counsel only when the police elicit a confession at the station house from a suspect, already long detained, whose case is ripe for presentation to a magistrate—in other words, that the police, by unduly deferring such presentation, may not postpone the assistance of counsel that would then become available.").
492. The Court in Escobedo v. Illinois, 378 U.S. 478 (1964), in an opinion by Justice Goldberg, maintained that because petitioner had, at the time of interrogation, "for all practical purposes already been charged with murder," "it would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at [this time] the authorities had secured a formal indictment." Id. at 486. Thus, the "fact [that] . . . the interrogation here was conducted before petitioner was formally indicted . . . should make no difference." Id. at 485. But dissenting Justice Stewart insisted that "'that fact' . . . makes all the difference." Id. at 493. Justice Stewart continued:

[T]he vital fact remains that this case does not involve the deliberate interrogation of a defendant after the initiation of judicial proceedings against him. The Court disregards this basic difference between the present case and Massiah's . . . .

[T]he court today converts a routine police investigation of an unsolved murder into a distorted analogue of a judicial trial. It imports into this investigation constitutional concepts historically applicable only after the onset of formal prosecutorial proceedings. By doing so, it perverts those precious constitutional guarantees, and frustrates the vital interests of society in preserving the legitimate and proper function of honest and purposeful police
Moreover, Justice Traynor’s “logical corollary” smacks too much of the *McNabb-Mallory* rule⁴⁹³ to have much prospect. That rule, fashioned “[q]uite apart from the Constitution”⁴⁹⁴ and in the exercise of the Court’s “supervisory authority over the administration of [federal] criminal justice,”⁴⁹⁵ operated to exclude from federal prosecutions all incriminating statements obtained during prolonged, and hence illegal, prearraignment detention. Even before congressional dissatisfaction with the rule culminated in legislation that badly crippled it,⁴⁹⁶ the rule met a hostile reception in the lower federal courts.⁴⁹⁷ Nor was it warmly received by the states. Although “the need for something like a *McNabb-Mallory* rule to govern state [confession] cases was appar-

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*Id.* at 493-94 (emphasis added); see notes 147-50 supra and accompanying text.

In *Kirby v. Illinois*, 406 U.S. 682 (1972) (plurality opinion), in which the Court held that a suspect is not entitled to counsel at a showup conducted before the initiation of adversary criminal proceedings, Justice Stewart observed:

> In a line of constitutional cases in this Court stemming back to . . . Powell v. Alabama, . . . it has been firmly established that a person’s . . . right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him . . . .

> . . .

> The only seeming deviation from this long line of constitutional decisions was *Escobedo* . . . [which] is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the “prime purpose” of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, “to guarantee full effectuation of the privilege against self-incrimination . . . .” Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts . . . .

*Id.* at 688-89. *But see Grano, supra note 339, at 726-30 (powerful criticism of Justice Stewart’s views in *Kirby*, especially his retrospective view of *Escobedo*).


⁴⁹⁵ *Id.*

⁴⁹⁶ Title II of the Omnibus Crime Control and Safe Streets Act of 1968 provides that a confession "shall not be inadmissible solely because of delay" in bringing an arrestee before a commissioner if such confession is "made voluntarily," if the weight to be given it is left to the jury and if it "was made or given . . . within six hours immediately following [the defendant’s] arrest or other detention." 18 U.S.C. § 3501(c) (1976). In *Johnson v. State*, 282 Md. 314, 384 A.2d 709 (1978), Chief Judge Murphy observed:

> While it is possible to construe this legislation as restricting the *McNabb-Mallory* rule to delays in excess of six hours, the federal courts have generally construed the statute in a more liberal manner, rejecting *McNabb-Mallory* completely, and holding that a delay in arraignment greater than six hours "merely constitutes another factor to be considered by the trial judge in determining voluntariness" . . . .

*Id.* at —, 384 A.2d at 726 (Murphy, C.J., with Smith & Orth, JJ., dissenting). *See also United States v. Gaines*, 555 F.2d 618, 623 (7th Cir. 1977) (that defendant held 46 hours by city officials before being turned over to federal officials and presented did not invalidate involuntary admission because no evidence of collusive arrangement between federal and city officials); 53 NOTRE DAME LAW. 545 (1978) (criticism of *Gaines*).

"INTERROGATION" AFTER Brewer v. Williams

ent—bypassing conflicts over the nature of the secret interrogation and minimizing both the "temptation" and the "opportunity" to obtain confessions by impermissible means—the Court never imposed such a rule on the states and only a handful of states adopted it or its equivalent on their own initiative. The chance, in the foreseeable future, of the Court traveling down this road again—by finding something akin to this much-criticized and much-resisted rule of procedure for federal courts mandated by the "minimal historical safeguards... summarized as 'due process of law'"—appears to be quite small.

498. Amsterdam, supra note 232, at 808; see Broder, Wong Sun v. United States: A Study in Faith and Hope, 42 Neb. L. Rev. 483, 564-94 (1963) (McNabb-Mallory rests, or should be regarded as resting, on constitutional grounds).


500. Justice Frankfurter, the author of the McNabb and Mallory opinions, took note of this in Culombe v. Connecticut, 367 U.S. 568 (1961), by calling the McNabb case an "innovation which derived from our concern and responsibility for fair modes of criminal proceeding in the federal courts." Id. at 600-01.


502. McNabb v. United States, 318 U.S. 332, 340 (1943) ("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reasons which are summarized as 'due process of law'... ").

503. In Gerstein v. Pugh, 420 U.S. 103 (1975), the Court held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest [without a warrant]." Id. at 114. Nevertheless, the majority held that this determination can be and "traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony." Id. at 120. Although many states are likely to incorporate the "probable cause" determination into some existing procedures, such as the procedure for setting bail or advising a suspect of his right to counsel, the constitutional need for such a postarrest judicial determination of probable cause could be satisfied, it seems, without the presence of the arrestee—as it is when a magistrate issues a warrant on the basis of a complaint or an officer's affidavit. Moreover, it is unclear whether the government must obtain a judicial determination of probable cause as quickly as some courts required the police to bring an arrestee before a judicial officer to satisfy the McNabb-Mallory rule. Nor is it clear whether and under what circumstances a failure to comply with the Gerstein v. Pugh requirement will lead to the exclusion of an otherwise admissible confession.

The Gerstein v. Pugh holding that neither the appointment of counsel nor other "adversary safeguards"
The odds are better, if the Supreme Court is inclined to supplement or to complement the Massiah doctrine, that it will be attracted to a rule related to but distinct from Massiah—New York's Donovan-Arthur-Hobson rule,\(^5\) which, regardless of whether judicial proceedings have yet commenced, bars virtually all police interrogation once a defense attorney enters the picture. Judge Scileppi, writing for the New York Court of Appeals in Arthur, explained the protection this rule affords the attorney-client relationship:

> [I]n Donovan . . . Judge Fuld, speaking for the court, stated [that] " . . . quite apart from [the federal Constitution], this State's constitutional and statutory provisions pertaining to the privilege against self-incrimination and the right to counsel . . . , not to

are required for the probable cause determination strongly implies that this judicial determination, like the issuance of an arrest warrant, does not mark the initiation of adversary judicial proceedings. See id. at 120, 122. There is, however, some authority for the view that the filing of a complaint or the issuance of an arrest warrant does mark the commencement of judicial proceedings within the meaning of Kirby v. Illinois, 406 U.S. 682 (1971) (plurality opinion). See Burton v. Cuyler, 439 F. Supp. 1173, 1181 (E.D. Pa. 1977) (issuance of arrest warrant along with circumstances surrounding lineup indicates initiation of judicial proceedings); Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351, 353 (1974) (initiation of judicial proceedings in Pennsylvania at arrest). But Richman relied in part on the views of a divided panel in Robinson v. Zelker, 468 F.2d 159, 163 (2d Cir. 1972) (arrest warrant initiates judicial proceedings), which was later repudiated by another, unanimous panel of the same court in United States v. Duvall, 537 F.2d 15, 22 (2d Cir.), cert. denied, 426 U.S. 950 (1976). Indeed, Richman goes so far as to say that a warrantless arrest marks the initiation of judicial proceedings, an untenable interpretation of Kirby in my view, but a position that a state court may take as a matter of state law (and that some members of the Richman court explicitly did take). 458 Pa. at 172, 320 A.2d at 353. The views of the federal district court in Burton v. Cuyler seem to conflict with two opinions of its own court of appeals. See Government of the Virgin Islands v. Navarro, 513 F.2d 11, 18 (3d Cir. 1975) (dictum) (lineup after arrest not initiation of judicial proceedings); United States v. Coedes, 468 F.2d 1061, 1063 (3d Cir. 1972) (preliminary hearing initiates judicial proceedings). But the result in Burton is quite understandable on its facts. The challenged lineup was not held until three positive photographic identifications had been made, and by the time the lineup was conducted it seemed plain that the government was committed to prosecuting and was simply amassing further evidence for that purpose.

I think it is no accident that in Burton, Richman, and Robinson, all of which indicate that judicial proceedings are initiated by an arrest warrant, the issue arose in a pretrial identification—not a police interrogation—context. Although the Supreme Court and courts generally seem to have treated the question of when judicial proceedings commence within the meaning of (1) Massiah and (2) Kirby as the same question, the different procedural contexts may have at least a strong subliminal impact on some courts. As a policy matter, it seems considerably more difficult to resist the presence of counsel at a lineup than in the interrogation room. When he can do so, a defense lawyer will usually prevent all police questioning, but he is unlikely—in fact, not empowered—to disrupt pretrial identification proceedings. Moreover, unlike the Warren Court "confession" cases, which arguably "furthered societal values not usually related to guilt or innocence," the Warren Court pretrial identification cases "explicitly sought to protect the innocent from wrongful conviction." Grano, supra note 339, at 722.

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."

... [In Gunner] . . . it was argued that Donovan . . . [was] not applicable because Gunner's attorney had not physically appeared at the police station and asked to see his client as had Donovan's [but had simply phoned the police chief to advise him that he had been retained by defendant's parents to represent him and "didn't want any statements taken from [him]"]. The court rejected this contention holding . . . that a defendant's right to counsel is not dependent upon "mechanical" and "arbitrary" requirements. Thus, the principle which may be derived from [the New York] cases is that, once 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.

Nor is it significant that [the defense attorney] did not, immediately upon his arrival at Police Headquarters, instruct the police not to take any statements from the defendant. . . . 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.

506. People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965). The defense lawyer phoned the Nassau County Chief of Police. There was no point in his physically appearing at the Nassau County police station for at the time his client was in custody thousands of miles away in Los Angeles. The court barred all statements made by the defendant after his lawyer's phone call to the Nassau County police, including two he made during the plane flight back to New York. Id. at 230-31, 205 N.E.2d at 853-54, 257 N.Y.S.2d at 926-27.
507. More recently, a lawyer's phoning the police department central switchboard and informing the civilian operators that he wished to speak to his client and did not want him questioned has been held sufficient to invoke the Donovan rule. People v. Pinzon, 44 N.Y.2d 458, 464, 377 N.E.2d 721, 725, 406 N.Y.S.2d 268, 271 (1978). In Pinzon the defense attorney was misinformed (but apparently unintentionally) that the police department did not "have" his client, and none of his calls were put through to the police. Id. at 460, 462, 377 N.E.2d at 722, 723, 406 N.Y.S.2d at 268, 269.

[The rule of the Arthur case is not absolute. Thus, the fact that a defendant is represented by counsel in a proceeding unrelated to the charges under investigation is not sufficient to invoke the rule . . . . The rule applies only to a defendant who is in custody . . . . Moreover, the rule . . . does not render inadmissible a defendant's spontaneously volunteered statement.

Id. at 483, 348 N.E.2d at 897, 384 N.Y.S.2d at 421-22.
Unlike the New York courts, which have developed two discrete extra-

Miranda rules—(1) the “postarraignment, postindictment” rule which pre-

saged the Massiah doctrine, and (2) the Donovan-Arthur-Hobson rule, which

“prohibit[s] the State from interfering with the attorney-client relationship”

by questioning the client in the absence of counsel “with respect to matters

encompassed by the representation”509—the Supreme Court has not isolated

the “initiation of judicial proceedings” and “attorney-client relationship”

components and dwelt on their independent significance. In Spano, which

evoked the influential concurring opinions that ultimately prevailed, as well

as in Massiah and Williams, at the time the challenged statements were

obtained the defendant had already retained counsel and judicial proceedings

had already been initiated against him.510

There is ample cause to believe, however, that the commencement of

adversary judicial proceedings without more is decisive and that what counts

is not whether the confession was elicited at a time when the suspect was

already represented by counsel, but whether the confession was obtained “at a

time when he was clearly entitled to a lawyer’s help.”511 Noting that “[e]ver

since this Court’s decision in the Spano case, the New York courts have

unequivocally followed [the] constitutional rule” advocated by the concurring

Justices in Spano,512 the Massiah Court then quoted with approval from

People v. Waterman,513 an early post-Spano New York case: “Any secret

interrogation of the defendant, from and after the finding of the indictment,

without the protection afforded by the presence of counsel, contravenes the

basic dictates of fairness in the conduct of criminal causes and the fundamen-
tal rights of persons charged with crime.”514 First, this statement of the rule

tends to support the view that it is the right to counsel, not actual

representation by counsel, that is decisive. Second, and even more important,

Waterman had not yet retained or been appointed counsel when the

challenged statements were obtained from him,515 and the New York court

had held that this did not matter: the right to counsel is actuated by “the

formal commencement of the criminal action”; it is not “limited . . . to the

situation where the defendant already has an attorney.”516 Third, the Massiah

Court also cited with approval another New York case, People v. Meyer,517 in

which the suspect neither had nor, when informed of his rights, had he


(1976) (Jasen, J., dissenting) (excellent exposition of reasoning behind New York rule with which Ramos
majority would agree; dissent disagreed with majority on application of rule to facts of case).


511. Massiah v. United States, 377 U.S. at 204 ("Four" concurring Justices pointed out [in Spano] that
the Constitution required reversal of the conviction upon the sole and specific ground that the confession
had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time
when he was clearly entitled to a lawyer's help.")(emphasis added); see Brewer v. Williams, 430 U.S. at 398
(“The right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the
time that judicial proceedings have been initiated against him . . . .") (emphasis added).

512. 377 U.S. at 204-05.


514. 377 U.S. at 205 (quoting from People v. Waterman, 9 N.Y.2d 561, 565, 175 N.E.2d 445, 448, 216
N.Y.S.2d 70, 75 (1961)) (emphasis added).


516. Id.

517. Id.

requested any counsel. This, the New York court held, did not matter either: “While an accused may waive a fundamental right, he did not do so here, nor is he estopped because he had made no request when informed of his rights. . . . Any statement made by an accused after arraignment not in the presence of counsel as in Spano . . . and Waterman is inadmissible.”

The Massiah Court then stated that the view expressed in People v. Waterman “no more than reflects a constitutional principle established as long ago as Powell v. Alabama . . . where the Court noted that ‘. . . from the time of their arraignment until the beginning of their trial, . . . the defendants . . . [were] as much entitled to such aid [of counsel] during that period as at the trial itself.’” Since Spano, added the Court, “the same basic constitutional principle has been broadly reaffirmed . . . [in] Hamilton v. Alabama [and] White v. Maryland.” But in Powell, “from the time of their arraignment until the beginning of their trial, . . . the defendants did not have the aid of counsel in any real sense.” Nor, of course, did the petitioners in Hamilton and White have counsel (in any sense at all) at arraignment or the preliminary hearing. Evidentiary use at trial of the guilty plea White entered at the preliminary hearing but subsequently changed—“a problem not greatly different from the use at trial of [a] . . . confession given to the police rather than to a judge”—was barred because he was entitled to, but had not yet procured or been appointed, counsel at the time of the preliminary hearing. If Massiah and Williams “no more than reflect a constitutional principle established . . . [in] Powell” and applied in Hamilton and White, if Massiah and Williams only move the time when the right to counsel accrues back from arraignment or preliminary hearing to the initiation of judicial proceedings, then the establishment of (and interference with) an attorney-client relationship would seem to be constitutionally irrelevant.

We need not limit ourselves, however, to close analyses of Massiah and earlier Supreme Court precedents. We can do better than speculate about whether Massiah and Williams would have been decided the same way if the defendants had not been represented by counsel, or whether Gideon and the

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518. Id. at 162, 182 N.E.2d at 104, 227 N.Y.S.2d at 428.
519. Id.
520. 377 U.S. at 205 (quoting from Powell v. Alabama, 287 U.S. 45, 57 (1932)) (emphasis added). The same passage from Powell is quoted with approval in Brewer v. Williams, 430 U.S. at 398.
521. 377 U.S. at 205 (referring to Hamilton v. Alabama, 368 U.S. 52 (1961), and White v. Maryland, 373 U.S. 59 (1963)).
524. Enker & Eslin, supra note 142, at 51.
Griffin-Douglas "equality" principle\(^{526}\) would have required the same result if they had not been. We can turn to McLeod v. Ohio.\(^{527}\)

At the time McLeod voluntarily confessed to law enforcement authorities riding with him in a police vehicle, he was under indictment for murder, but he was not represented by, nor had he even requested, counsel.\(^{528}\) McLeod's confession was admitted into evidence, and he was convicted.\(^{529}\) The state supreme court dismissed his appeal because it could find "no debatable constitutional question" presented.\(^{530}\) But the United States Supreme Court, invoking the newly decided Massiah case for the first time, vacated the judgment and remanded the cause "for consideration in light of Massiah."\(^{531}\)

On remand, the state supreme court did not take the hint, although two dissenting judges urged it to do so.\(^{532}\) Instead, the court reaffirmed its judgment, distinguishing the facts in McLeod from those in Massiah. It pointed out, inter alia, that McLeod, unlike Massiah, had confessed before he had procured or been appointed or "even requested counsel."\(^{533}\) This distinction failed to impress the two dissenting state judges. They recognized the "possibility" of a waiver of the Massiah right to counsel in some postindictment cases, but not in this one because McLeod had never been advised of his right to counsel.\(^{534}\) In their view, the concurring justices in Spano would have reversed and Massiah required reversal

on the sole and specific ground that the confession had been deliberately elicited by the police after the defendant had been indicted, and therefore at a time when he was clearly entitled to a lawyer's help. True, in Massiah the defendant had counsel who was absent when defendant made statements against his interest. But if the use of such statements after indictment of an accused whose counsel is absent is, under the Constitution, prohibited, as Massiah

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527. 381 U.S. 356 (1965) (per curiam) (summary reversal of State v. McLeod, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964), on authority of Massiah); see text at notes 263-69 supra (discussion of other aspects of case).

528. State v. McLeod, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964).

529. Id. at 60, 203 N.E.2d at 350.


532. 1 Ohio St. 2d at 64, 203 N.E.2d at 353 (Gibson, J., with O'Neill, J., dissenting).

533. Id. at 62, 203 N.E.2d at 351 (per curiam).

534. Id. at 65, 203 N.E.2d at 353.
Evidently the Supreme Court of the United States agreed with the dissenting state judges. Certiorari was again granted, and this time the Supreme Court summarily reversed on the authority of Massiah.536

Although I deem it clear that the “beginning” of a “criminal prosecution” activates the right to counsel, regardless of whether the suspect is represented by counsel at the time, the converse—the legal effect of representation by counsel when the criminal prosecution has not yet begun—is much less clear.537 But if I am correct in my belief that the Massiah doctrine is in no

535. Id. (emphasis supplied by dissent).

536. See note 527 supra. See also Hancock v. White, 378 F.2d 479 (1st Cir. 1967) (holding, on the basis of McLeod, that Massiah doctrine required exclusion of statements taken from defendant during automobile trip with New Hampshire officers, which followed indictment and extradition proceedings in Vermont, even though defendant did not have, and had not requested, counsel in criminal proceeding pending against him in New Hampshire).

537. After recalling that by denying Escobedo’s request for counsel “the police did not relieve [him] of the anxieties which they had created in the interrogation rooms,” the Miranda Court dropped a footnote: “The police also prevented [Escobedo’s] attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake. See People v. Donovan. . . .” 384 U.S. at 465, 465-66 n.35.

It has been forcefully argued that this footnote means literally what it says. See Breitel, supra note 146, at 13 & n.25; Rothblatt & Piller, supra note 52, at 492-96. See also MODEL CODE, supra note 112, § 140.7(1); id. at 363-66, 365 n.3 (commentary to § 140.7). I cannot agree. It is hard to believe that in the course of writing a sixty-page opinion based on the premise that police-issued warnings can adequately protect a suspect’s rights the Court would say in the next breath that such warnings are insufficient when, but only when, a suspect’s lawyer is not allowed to consult with him—that even though a suspect has been emphatically and unequivocally advised of his rights and insists on talking, what he says is inadmissible when, as in Donovan and several post-Donovan cases, a lawyer whose services he has not requested has, unbeknownst to him, entered the picture. See notes 556-57 infra and accompanying text. Moreover, as the Donovan dissenters noted, the Donovan rule, which the Miranda Court is said to have adopted in footnote 35 of its opinion, “hold[s] that a defendant with a lawyer has greater rights than one not so favored,” People v. Donovan, 13 N.Y.2d 148, 158, 193 N.E.2d 628, 633, 243 N.Y.S.2d 841, 849 (1963) (Burke, J., dissenting), and typically operates “only in the cases where the suspect, or his family, have means to employ counsel,” id. at 162, 193 N.E.2d at 636, 243 N.Y.S.2d at 852 (Foster, J., dissenting). Such a rule seems hard to square with “the equal protection argument, a ground bass that resounds throughout the Miranda opinion.” Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. CHI. L. REV. 671, 711 (1968).

Although the police did not advise Escobedo of any of his rights, “he repeatedly asked to speak to his lawyer.” Escobedo v. Illinois, 378 U.S. 478, 481 (1964). At one point the Escobedo opinion states that “when petitioner requested, and was denied an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of an unsolved crime [and] petitioner had become the accused.” Id. at 485. Indeed, the opinion begins: “The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner’s request to consult with his lawyer during the course of an interrogation constitutes a denial of ‘the Assistance of Counsel’. . . .” Id. at 479. At another point the opinion suggests that the decisive factor may be simply whether the investigation has “focused” on the suspect or, put another way, whether he has “for all practical purposes” become the “accused” (although this test is anything but simple in application). Id. at 486. At still other points the opinion indicates that some combination of factors (such as police failure to advise the suspect of his right to remain silent, “a process of interrogation that lends itself to eliciting incriminating statements”) may activate the right to counsel, but a lawyer’s attempt, or police denial of that attempt, to confer with his client is not listed as one of these factors. See id. at 490-91, 492.
small part a “symbolic response” to the violation of the symbol of a fair trial, then the Court is likely to respond similarly to police interferences with the attorney-client relationship. I do not claim that the Court will adopt the *Donovan* rule “bag and baggage,”538 but I do believe that it will adopt the basic concept of the rule. I think that it, too, will be struck by the “incongruity” of permitting the state’s attorney or the state’s “badged and uniformed representative[s]”539 “to extract a confession from the accused while his own lawyer, seeking to speak with him, [is] kept from him by the police.”540

Thus, although the *Escobedo* opinion does quote from *Donovan* at one point, the refusal of the police to allow petitioner’s lawyer to meet with him seems to have no bearing on *Escobedo’s* rationale. If this factor has any relevance, it is only because *Escobedo* became aware of the fact that the police were preventing his lawyer from talking to him, and this realization may well have underscored the police dominance of the situation and the gravity of his plight. See id. at 450 & n.1, 481-82. *E* *s* *c* *o* *b* *e* *d* *o* had unsuccessfully argued in the Illinois Supreme Court that his conviction should be reversed on the ground, **inter alia**, that the trial judge had improperly excluded evidence of the effect on him of seeing his lawyer turned away at the police station. See Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1003 n.3 (1964).

I do not deny that at least some members of the *Escobedo* majority may have been greatly offended by the fact that for several hours, and at least on five separate occasions, various police officers denied *E* *s* *c* *o* *b* *e* *d* *o’s* lawyer permission to see his client. See id. at 480-81. Nor do I discount the possibility that even if *Escobedo* had not asked to see his lawyer, the persistent and systematic way in which the police rebuffed his lawyer may have led the Supreme Court to reverse for that reason alone. Indeed, one thrust of this part of the article is that the Court is likely to do just that if presented with such a question in the near future. I contend only that the issue cannot be regarded as settled either by *Escobedo*, especially when it seems to have been stripped of its sixth amendment dimension, see the extract from *Kirby* in note 492 supra, or by a brief footnote to a discussion of *Escobedo* in the *Miranda* opinion, especially when the footnote refers to a New York case that explicitly declined to rely on the federal Constitution, see the extract from *Donovan* in text at note 505 supra.

I must add, however, that in *Mathies v. United States*, 374 F.2d 312 (D.C. Cir. 1967), after expressing concern over police questioning of a suspect who was represented by counsel without notifying the lawyer, “not[ing] that in other cases the United States Attorney has stated a policy to have counsel for accused persons advised of all interrogation sessions,” and “assum[ing] that the episode will not arise again in the future,” Judge (now Chief Justice) Burger observed for a unanimous panel: “The prospective application of [Miranda] plainly will require that such interviews can be conducted only after counsel has been given an opportunity to be present.” Id. at 316 & n.3 (Judge Burger referred to no page or footnote in *Miranda* opinion).


The Court is even more likely to be offended when law enforcement officials treat the defense lawyer deceitfully or disdainfully, such as when they send an undercover agent against the suspect after his lawyer has done his best to prevent him from talking;\textsuperscript{544} mislead the defense lawyer as to where his client is being detained or about to be questioned;\textsuperscript{545} or "assure" the lawyer, or "agree" with him, that his client will not be questioned, but then do so "under deceptive auspices."\textsuperscript{546} Such police tactics are likely to rouse many members in Escobedo v. Illinois, 378 U.S. 478, 487 (1964).

Even those courts that have permitted it, finding no violation of the sixth amendment, "have denounced the 'practice of talking to a represented defendant behind his attorney's back' as 'suspect,' "not commendable," and a source of 'anxiety' that threatens 'erosion' of the 'relationship between lawyer and client.' \textsuperscript{547} "Note, supra note 539, at 313. See also Vorenberg, supra note 468, at 432-33. In the wake of Escobedo, Professor Vorenberg commented:

I suggest that even the strongest critics of this decision must feel somewhat uneasy at the contrast between the protections with which we surround a defendant in court and the situation in which Danny Escobedo found himself when he made his statement.

... I think it is hard indeed to justify keeping a lawyer engaged from talking to his client, because we are afraid that he will impress on him his right not to talk if that should be in his best interests.

\textit{Id.} 541. See note 376 supra (Smith, Daugherty, and McComb cases). People v. Miller, 245 Cal. App. 2d 112, 53 Cal. Rptr. 720 (4th Dist. 1966), is as shocking a case of "jail plant" interference with the attorney-client relationship as one is ever likely to come across. See note 314 supra. I cannot believe the conviction in that case would have been affirmed if the Supreme Court had reached the merits. See also Milton v. Wainwright, 407 U.S. 371, 407 U.S. 371 (1972) (discussed in note 314 supra).


The misleading answer given by the Chief of Detectives [when contacted by a law clerk from the firm retained to represent defendant] that there was nothing wrong and no need for a lawyer threw defense counsel off guard, and the consequence is the same as though the police had been instructed by an attorney for defendant that he was not to be interrogated in the absence of counsel.

\textit{Id.} at 178, 216 N.E.2d at 583-84, 269 N.Y.S.2d at 415.

Consider, too, People v. Pinzon, 44 N.Y.2d 458, 377 N.E.2d 721, 406 N.Y.S.2d 268 (1978), in which police department central switchboard operators misinformed the defense lawyer (but apparently unintentionally) that the department did not "have" his client. \textit{Id.} at 460, 377 N.E.2d at 722, 406 N.Y.S.2d at 268. The \textit{Donovan} rule applied, held the \textit{Pinzon} court, even though the lawyer had not spoken to any police officers. \textit{Id.} at 465, 377 N.E.2d at 725, 406 N.Y.S.2d at 271. "[C]onfusion or lack of communication within the law enforcement agencies cannot impair the defendant's rights." \textit{Id.}

543. See United States v. Wedra, 345 F. Supp. 1183, 1184, 1188 (S.D.N.Y. 1972) (Weinfeld, J.); cf. State v. Wedron, 342 So. 2d 642, 644 (La. 1977) (relying on assurance that client would not be questioned about crime during booking procedure, counsel instructed client that he could answer any questions); State v. Johns, 185 Neb. 590, 596, 177 N.W.2d 580, 584 (1970) (county attorney failed to convey promptly defense attorney's request that client not be questioned in his absence). "If it is offensive to permit police to defy attorney instructions, it is even more so to permit them to break an agreement not to question." \textit{Note, supra note 539, at 320 n.42.}

Although the record in \textit{Williams} is shaky on this point, the Iowa trial court found (and the other courts passing on the case assumed) that the Des Moines police and Williams' Des Moines attorney had "agreed" that Williams would not be questioned on the return trip. See 430 U.S. at 394; Kamisar, supra note 2, at 212 n.23. As the Supreme Court's opinion is written, there is no reason to think that \textit{Williams} would have been decided differently (nor should it have been) if there had been no "broken agreement." Nevertheless.
of the bench and bar who are normally complacent about stationhouse goings on—not unlike the way the destruction of the Redwoods and the Everglades would stir those with only a passing interest in protecting the environment.

Does the Donovan-Arthur-Hobson rule, or something like it, go to the heart of the “police interrogation”-“confession” problem? Or is it more appearance than substance? Are the lines it draws too fine, too mechanical? Does the rule have too much “the quality of a chess tournament”\(^5\) to it?

The defendant-minded are, understandably, inclined to throw bouquets at the New York Court of Appeals. For even “‘in the best of times’\(^3\)”\(^4\) (for defense lawyers and many criminal law professors, at any rate)—at a time when the Warren Court strove “to alter significantly the nature of American criminal justice in the interest of a larger realization of the constitutional ideal of liberty under the law”\(^5\)\(^\text{a}\)—the New York Court of Appeals “led the way”\(^5\)\(^\text{b}\) in protecting suspects’ rights.\(^4\)\(^7\) And after the “revolution” in criminal procedure had lost its impetus, the New York court (along with several other state courts on this and other fronts) demonstrated by its resurrection of the Donovan rule\(^5\)\(^8\) “a determination to keep alive the Warren Court’s philosophical commitment to protection of the criminal suspect.”\(^5\)\(^9\) Nevertheless, criticize the Donovan rule I must.

In the Gunner and Arthur cases, the New York Court of Appeals refused to confine Donovan to its facts and emphasized the “mechanical and arbitrar-

545. Cf. Amsterdam, supra note 232, at 810.
546. Allen, supra note 470, at 525.
547. See Vorenberg, supra note 468, at 430 (Donovan first clear and authoritative decision barring confession from defendant denied opportunity to confer with counsel); Uviller, supra note 504, at 716 (Donovan foretold reasoning of Miranda “with uncanny clairvoyance”); 5 Fordham U.B. L.J. 401, 405 (1977) (Donovan preceded in time and exceeded in scope Escobedo and Miranda holdings).
nature of a rule that would turn on “the existence of a formal retainer” or on whether an attorney “presents himself at the place where the suspect is in physical custody and expressly requests the opportunity to consult with him.” Consequently, all an attorney need do to invoke Donovan is to apprise the police that he has “enter[ed] the proceeding.” I fail to see how this makes the Donovan rule in essence any less mechanical or less arbitrary than it was before Gunner and Arthur were handed down.

There is not even a weak congruence—indeed, there is no congruence at all—between a defense lawyer's entry into the proceeding and a suspect's need for “a lawyer's help” or the government's need for evidence. Whatever its symbolic value, a rule that turns on how soon a defense lawyer appears at the police station or how quickly he “spring[s] to the telephone” hardly seems a rational way of reconciling the interests of the accused with those of society.

The Donovan rule might be more understandable, although still vulnerable to criticism, if it turned on a suspect's request for counsel. But it does not. Even if a suspect asks, and is allowed to contact a lawyer, he may not be able to locate one quickly enough, or for one reason or another his lawyer may not win the race to the station or to the phone. On the other hand, a suspect's failure to ask for a lawyer need not prove fatal. A lawyer who previously represented the client may learn of his former client’s plight and come to the rescue on his own initiative. Or a suspect's family may retain a lawyer on his behalf, without his knowledge or even his request for a lawyer, and this lawyer may “enter the proceeding” in the nick of time.

To the extent that this rule favors the suspects who, or whose families, have the money and the connections to bring a lawyer swiftly into the fray, it “runs counter to society's efforts to accord the indigent the same rights and privileges as the affluent.” At worst, such a rule would seem to favor the


554. Uviller, supra note 504, at 718.

555. As pointed out several months before Miranda, one possible argument for limiting Escobedo to instances in which the suspect has explicitly asked for an attorney was that “such a request may be regarded as a symptom of psychological distress,” a condition that would be “heightened” by a denial of the request. See Developments in the Law—Confessions, supra note 467, at 1002. “But the factual premise behind this analysis is questionable: a request for a lawyer probably indicates intelligence and presence of mind; the failure to ask for one may be due to ignorance, confusion or intimidation. Besides, to interpret the significance of a request and its denial in terms of intimidation appears to be a reworking of the voluntariness test . . . .” Id. at 1002-03.


558. Rothblatt, supra note 65, at 51. See also Paulsen, supra note 504, at 305-06 (“[The Donovan rule] puts the man of means and the experienced criminal with access to legal assistance in a much better position than the poor and the inexperienced. It may be that we ought not to model out a system of criminal justice on the privileges of the wealthy or on the advantages enjoyed by the professional criminal. Yet we are not long likely to tolerate a system which gives advantages to those least in need of protection."

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"professional criminal" most of all. At best, it seems "a fortuitous standard upon which to build an exclusionary rule."560

Chief Judge Breitel has made a forceful defense of the rule, and in the process launched a strong attack on Miranda (or at least on Miranda as it has come to be applied):

Notwithstanding that warnings alone might suffice to protect the privilege against self-incrimination, the presence of counsel is a more effective safeguard against an involuntary waiver of counsel than a mere written or oral warning in the absence of counsel. . . .

and which fails to extend protection to the most vulnerable.

Of course, a year later the Court handed down Miranda, which did seek to "extend protection to the most vulnerable," but, as no one has articulated better than the defenders of the Donovan rule, Miranda, at least as it has been generally applied, falls far short of the protection furnished by Donovan. See text at notes 561-66 infra.

One may try to defend the Donovan rule on the ground that "when the police bar consultation between a suspect and his lawyer they are taking positive action designed solely to increase the likelihood of a confession, in contravention of their constitutional duty to adopt a 'neutral' stance. . . ." Developments In the Law—Confessions, supra note 467, at 1002 (describing argument made by Judge Friendly). As the Miranda Court saw it, however, the government must do more than "carve the universe at a natural joint." Cf. Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341, 344-53 (1949). When the government exerts its powers in the criminal area, stated the Miranda Court:

its obligation is surely no less than that of taking reasonable measures to eliminate those factors [such as poverty] that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty.

While the government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice.

384 U.S. at 472-73 n.41 (quoting with approval from ATTORNEY GENERAL'S COMM., REPORT ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 9 (1963) (Allen Report)). "Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in [Gideon] and [Douglas]." Id. at 472-73.

Moreover, it is hard to see how confronting an individual "often ignorant and uneducated, and always in fear" and "unadvised by anyone who has his interests at heart," see text at note 561 infra, "with the coercive police power of the State" can be called "adopting a neutral stance," cf. Developments In the Law—Confessions, supra note 467, at 1002 ("very process of skillful interrogation is designed to, and does, increase the likelihood that a confession will be obtained").

559. The author of a pioneering study observed, a generation ago, that "it is not uncommon in some cities for a 'mouthpiece' to appear at precinct headquarters before [a 'professional criminal' or 'syndicate representative'] is brought in." W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 207 (1955). A decade later, the author of a major study on police practices reported that generally it is only the professional criminal "whose counsel is likely to know when his arrest takes place." W. LAFAVE, ARREST 407 (F. Remington ed. 1965). See also id. at 393-94, 398.

Before ascending to the New York Court of Appeals, where he has since reaffirmed and revivified the Donovan rule, Justice (now Chief Judge) Breitel defended the rule as "a practical accommodation." Breitel, supra note 146, at 9-10. He conceded, however, that:

It is an accepted fact that in almost all cases the most effective protection for the individual is the advice of counsel from the time of initial arrest or interrogation. Accepted also is the fact that, except for the affluent or sophisticated criminal, it is the rare defendant who has a lawyer available on call.

Id. at 14.

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. . . .

[The Donovan rule] protect[s] the individual, often ignorant and uneducated, and always in fear, when faced with the coercive police power of the State. The right to the continued advice of a lawyer, already retained or assigned, is his real protection against an abuse of power by the organized State. It is more important than the preinterrogation warnings given to defendants in custody. These warnings often provide only a feeble opportunity to obtain a lawyer, because the suspect or accused is required to determine his need, unadvised by anyone who has his interests at heart. The danger is not only the risk of unwise waivers . . ., but the more significant risk of inaccurate, sometimes false, and inevitably incomplete descriptions of the events described.561

This argument proves too much. If all the unkind things Chief Judge Breitel and other defenders of the Donovan rule 562 have said about the Miranda warnings are true (and there is reason to think they are),563 the Donovan rule is not a sufficient answer. If the Miranda warnings often provide only a "feeble opportunity" for the assertion of constitutional rights, if they do not furnish adequate protection against the "risk of inaccurate, sometimes false, and inevitably incomplete descriptions of the events described," if a warning "inevitably invites avoidance"564 and "can easily become a meaningless ritual,"565 if the warnings will not dispel "[i]nherent intimidation . . . because the usual suspect, especially the illiterate or non-English speaking individual is so frightened and confused that he cannot fully comprehend [them],"566 then why are these warnings good enough for the suspect who has not, or whose family or friends have not, contacted a lawyer or whose lawyer has not managed to win the race to the stationhouse or telephone? If "life" must be "breathed" into the Miranda warnings (and I
agree that it must), why should it be done haphazardly, as the Donovan rule seems to do? Why not do it across the board?

If the Miranda safeguards have turned out to be as feeble in practice as defenders of the Donovan rule and as others believe, why not establish a system enabling a member of the public defender’s staff to inform the police, as soon as a suspect is brought to the stationhouse, that he represents the individual, at least at this preliminary stage, and that he wishes to advise the individual, at least at this preliminary stage, and that he wishes to advise the individual of his rights or—more bluntly—that he does not want the individual questioned? Such an extension of the Donovan rule, I realize,

567. But see Breitel, supra note 146, at 14 (on eve of Miranda). Justice (now Chief Judge) Breitel commented:

The argument is . . . made by increasingly large numbers of people that the state or voluntary organizations should provide the lawyer at the inception of the process if “inequality” in treatment is to be avoided. The enormity of lawyer resources that such a proposal would entail is only barely conceivable. It may suggest further problems as to how adequate representation would be spread so far and so thinly. But beyond these practical considerations, the proposal poses a serious question of whether this would be an acceptable disposition of social resources . . . .

Id.

It may well be that I have spent too much time on “the high Alpine meadows” and too little “in the dust of the marketplace,” cf. H. Friendl, BENCHMARKS I (1967), but the logistical problems do not strike me as that staggering, at least not in large urban centers—especially in light of the apparent holding by the New York Court of Appeals that a law clerk, presumably a law student, may trigger the Donovan rule (whose invocation hardly requires three full years of law school training). See People v. Ressler, 17 N.Y.2d 174, 178, 216 N.E.2d 582, 583-84, 260 N.Y.S.2d 414, 415 (1966) (discussed at note 542 supra).

No doubt, it would be argued that, unlike the case of the suspect who has retained counsel, or whose family or friends have done so for him, the indigent suspect is not yet the “client” of the public or voluntary defender who takes it upon himself to instruct the police. This argument is hardly overwhelming when, as the New York Court of Appeals held in People v. Arthur, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968), the Donovan rule “is not dependent upon the existence of a formal retainer” but may be invoked by a lawyer (at least on behalf of his former client) on his own initiative. Id. at 327, 329, 239 N.E.2d at 538, 539, 292 N.Y.S.2d at 664, 666; see text following note 507 supra; note 67 supra and accompanying text.

No doubt, it would also be argued that the proposal I have suggested would give the indigent suspect an advantage over his somewhat wealthier but less than affluent counterpart, for the latter would not often command the services of retained counsel as swiftly as the former would gain the protection of the defender’s office. The answer to this may be that a goodly number of persons who are financially capable of retaining counsel at later stages of the criminal process may not be at the immediate postarrest stage and thus should be regarded as indigent at, but only at, this early point. See ATTORNEY GENERAL’S COMM., supra note 558, at 7-8 (“[P]overty must be viewed as a relative concept with the consequence that [it] must be measured in each case by reference to the particular need or service under consideration . . . . A problem of poverty arises for the system of criminal justice when at any stage . . . lack of means in the accused substantially inhibits or prevents the proper assertion of a right or a claim of right.”).

Although the mechanical difficulties raised by this proposal are not insubstantial, neither, it seems, are they insurmountable. A member of the defender’s staff might be permitted to communicate immediately with any person brought down to the police station to determine whether that person has counsel and, if not and if he desires the defender’s office to represent him, to determine initially whether he is “indigent” at this stage of the process. See, e.g., COLO. REV. STAT. § 16-3-402(3) (1973) (determination of indigency shall be made by public defender subject to review by court). Under this procedure, or under a procedure whereby all suspects are simply assumed to be indigent at the immediate postarrest stage, if it subsequently develops (say, at the first appearance) that the suspect was not indigent, reimbursement could be made to the government (or voluntary organization) for the defender’s services. See Kamisar & Choper, supra note 526, at 53-54; cf. L. Katz, JUSTICE IS THE CRIME 129-30 (1972) (booking officer should be required to appoint counsel for indigent being held; spurious claims of indigency can be handled later).

Of course, extending the protection of the Donovan rule to the generality of suspects would not
might strain it to the breaking point, but what does this say about the rule itself? Or, alternatively, why not require that an explanation of the nature and importance of the constitutional rights at stake be given by a judicial officer rather than a police officer and that waiver be made under judicial supervision? Or, at least, why not require that an in-custody suspect be promptly brought before a judicial officer so that "the typically perfunctory reading of *Miranda* warnings by police" can be swiftly reinforced by the "follow-up advice of... a neutral officer of the court"? Or, at the very least, why not require that at the stationhouse, and wherever else feasible, all police conversations and "waiver transactions" be electronically recorded for future judicial scrutiny?

Contribute to the goal of finding "an acceptable solution for the intermediate area of post-arrest, pre-station house interrogation." Friendly, *supra* note 537, at 716. But neither does the *Donovan* rule in its present form. Wider application of the *Donovan* rule might well lead the police to engage in more "on the street" questioning and "to slow down or make more circuitous the ride to headquarters." Cf. Kamisar, *supra* note 300, at 60-61. But in most cases the courts should be able to cope with such attempts at evasion, and the capacity of the police to send resourceful and skillful interrogators "into the field" would seem to be quite limited. Although "by defining 'custodial questioning' to cover 'field' and 'squad car' questioning," *Miranda* understandably sought to "protect its flanks;" *id.* at 61 n.8, police station interrogation was "the evil to which [Miranda] was primarily addressed." Friendly, *supra,* at 712.

568. Although many might voice opposition to such an extension of the *Donovan* rule on grounds of logistics and mechanics, see *note 567 supra,* their underlying objection is probably concern about the adverse impact of such an extension on prevalent police practices—a concern that does not loom large when, as now, the rule is (and can only be) invoked infrequently and sporadically. An expanded *Donovan* rule would, it cannot be denied, upset the "compromise" worked out by *Miranda,* but only in the same respect, if not the same degree, that the rule does now.

569. *See Developments in the Law—Confessions,* *supra* note 467, at 1007. Another alternative to the *Miranda* model is the Kauper-Schaefer-Friendly proposal, under which a person taken into custody may be questioned only in the presence of and under the supervision of a judicial officer. In addition to being advised of his rights, the suspect is informed that if he is subsequently prosecuted his refusal to answer any questions will be disclosed at the trial. See Kamisar, *supra* note 392, at 23-37 (discussion of Kauper-Schaefer-Friendly proposal providing for judicial warnings, judicial supervision over interrogation, and recording of entire proceeding).

570. Johnson v. State, 282 Md. 314, ____ , 384 A.2d 709, 719 (1978). In Johnson the court indicated:

[O]ne important function of the initial appearance is to advise an arrestee of his right to counsel; to this extent there is a partial overlap with *Miranda.* Even so, it has been convincingly argued that the typically perfunctory reading of *Miranda* warnings by police at the time of arrest may be insufficient to provide the accused with adequate notice of his constitutional rights; and that a need exists for follow-up advice of the basic right to counsel by a neutral officer of the court, such as is provided by [Maryland rules].

*Id. See also* Enker & Elen, *supra* note 142, at 85-88 (advocating extension of *McNabb-Mallory* rule to states and recording of interrogation); 51 *Cornell L.Q.* 356, 366-68 (1966) (suggesting right to counsel integrated with provisions for prompt arraignment as substitute for *Gunner*; all confessions following unduly delayed arraignment would be excluded).

571. *See Model Code,* *supra* note 112, § 130.4 (requires tape recordings of warnings and waiver procedures at police station); *Uniform Rule of Criminal Procedure* 243 (Approved Draft 1974) (requires that "the information of rights, any waiver thereof, and any questioning shall be [electronically recorded] whenever feasible and in any case where questioning occurs at a place of detention"). *See also* Enker & Elen, *supra* note 142, at 85-87 (record to include statement of time during which police interview began and ended and could be required that record be deposited with the court under seal at time defendant appears for preliminary arraignment); Kamisar, *supra* note 2, at 233-43 (incomplete, contradictory record in *Williams* case underscores need to utilize tape recordings); Weisberg, *supra* note 564, at 179-80 (classic statement of need to strip police interrogation of its "most unique feature"—"secrecy"—which is not the
Miranda has weaknesses. The principal cluster of its weaknesses (from the suspect’s perspective, at any rate) is that it permits the police to obtain waivers of constitutional rights without the advice or presence of counsel, without the advice or presence of a judicial officer, and without any objective recording of the proceedings.572 But these weaknesses, as I have indicated, are not irremediable.

Whatever its shortcomings, Miranda tried to take the “police interrogation”-“confession” problem by the throat. Massiah does not. Nor does its first cousin, New York’s Donovan rule. The Massiah doctrine and the Donovan rule turn on nice distinctions that often will have no more relationship to the suspect’s plight than “the kind of electronic equipment employed”577 had to the protection against unreasonable search and seizure. The distinctions drawn by Massiah are also conducive to manipulation by law enforcers.

The danger is that the Court will let Miranda wither, placing increasing reliance instead on Massiah and perhaps on the Donovan rule as well (or some variation of it). There is a certain neat logic to these rules. They also strike responsive chords and are readily rationalized.574

The danger is that only when the incongruity between the pretrial proceedings and the ideal of a fair trial is flaunted, when an arraignment or indictment is followed by a “kangaroo court” proceeding or a defense lawyer is spurned or deceived by the police, will the constitutional symbols prevail.

The added danger posed by the Donovan rule or some variation of it is that by accommodating defense lawyers who insist on claiming their client’s rights,

same thing as “privacy,” but the power of police “to prevent objective recordation of the facts”).

572. There is language in Miranda—although the state courts and lower federal courts have disregarded it—strongly suggesting that, at least when feasible, the police must stenographically or electronically record the warnings given to the suspect, as well as his response. See 384 U.S. at 475 (“heavy burden rests on the government to demonstrate” valid waiver of Miranda rights; Court reasserted “high standards of proof for the waiver of constitutional rights” “as applied to in-custody interrogation”; “since the State is responsible for establishing the isolated circumstances” of interrogation and “has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders”); Thompson, supra note 292, at 421 (language of Miranda pointed out by Professor (now Governor) Thompson). Several months before Miranda was handed down, one commentator suggested that “[a] determined Supreme Court might attempt to surmount the [secrecy] problem” by declaring that a defendant's claim of involuntariness “must be accepted as true... unless the police can produce some reliable evidence such as a tape-recording of the interrogation to refute it,” but then suggested why the Court might stop short of promulgating such a doctrine: “[A] rule that in effect required a tape-recording as a precondition of a confession’s admissibility might be thought too naked an exercise of control by the Court over state police practices.” Developments in the Law—Confessions, supra note 467, at 1021.

573. Silverman v. United States, 365 U.S. 505, 513 (1961) (Douglas, J., concurring) (“[T]he command of the Fourth Amendment” should not “be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be whether the privacy of the home was invaded.”); see Katz v. United States, 389 U.S. 347 (1967) (Justice Douglas’ view prevailed).

574. The Donovan rule is said to have had “deep roots” in actual practice “for the longest time.” Breitel, supra note 146, at 9. Lawyers, no less than other persons, “are likely to claim as a right what they desire, especially if they are accustomed to having it.” Cf. R. PERRY, CHARACTERISTICALLY AMERICAN 153 (1949) (talking generally about Americans). See also Note, Reaffirmation of Confessions Inadmissible Under McNabb-Mallory, 72 YALE L.J. 1434, 1454-55 n.106 (1963) (indicating on basis of letters from various United States attorneys in the spring of 1963 that, if suspect has retained or appointed counsel, United States attorney attempts to direct law enforcement agents to question suspect “either in the presence of counsel or, at least, with his consent”).
law enforcers may gain a freer hand over those who, or whose families, lack the means to summon a lawyer swiftly. To paraphrase Justice Jackson: There is no more effective practical guaranty against police overreaching than to require that the poor and bewildered be subjected to police interrogation in no greater measure than the affluent and sophisticated. Conversely, nothing opens the door to abuse so effectively as to allow the police to pick and choose only the less fortunate to be the subjects of secret interrogation and thus to escape the outcry from the bar (if not the public) that might be visited upon them if all segments of society were so affected.\footnote{575}

It is not enough to vindicate the prestige of the lawyer when he has entered the proceedings, but otherwise to vindicate the prestige of the police officer. Nor, to return to \textit{Massiah}, is it enough to dramatize the ideal of the adversary system when the issue is forced into the open by the commencement of judicial proceedings, but otherwise to look away when in-custody interrogation takes place under conditions undermining a suspect’s constitutional rights.

Symbols are important, but more is needed. “[I]t is not sufficient to save the Redwoods [and] the Everglades . . .; it is equally essential to protect the esthetic quality of farmlands and to improve Coney Island.” \footnote{576}
