SHERRY COLB, *MASSIAH*, AND *MIRANDA*

George C. Thomas III†

I dislike subtitles but if I were to use one for this Article, it would be "Facing *Miranda*'s Consequences." It is one kind of judicial act to decide that suspects should know that they do not have to answer police questions posed during custodial interrogation; this led the Supreme Court to require *Miranda* warnings.[1] It is a very different kind of judicial act to stay true to that doctrine when faced with a truly horrific crime that could go unpunished if *Miranda* were slavishly followed. Recall Justice White's dark prediction in his *Miranda* dissent: "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him."[2]

A case of the type predicted by Justice White arose in Des Moines, Iowa on Christmas Eve, 1968, only two years after *Miranda* was decided. A ten-year-old girl, Pamela Powers, was abducted while in public with her parents.[3] She was repeatedly raped; semen was found in her mouth, her vagina, and her rectum.[4] She was strangled to death.[5] When the case

---

† Rutgers University Board of Governors Professor of Law & Judge Alexander P. Waugh, Sr. Distinguished Scholar. Sherry Colb was a wonderful colleague for many years, a brilliant scholar, and a very close friend. This Article is dedicated to her.

I thank Michael Dorf and all the Cornell Law Review and Rutgers School of Law organizers of the Symposium in Honor of Professor Sherry Colb for the invitation to participate. I also thank all those in attendance for their comments on the Article. I thank my long-time friend and co-author, Joshua Dressler for his comments on an earlier draft. And of course, I thank Robert Bartels for choosing me to work on the habeas appeal of Robert Williams in 1974, for comments on a draft of this Article, and for recently providing me with notes about the Williams case and a transcript of the 1969 trial.

1 *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), requires that statements made during custodial interrogation be suppressed unless police warn the suspect of a right to remain silent and to have an attorney, and then secure a waiver of those rights.

2 *Miranda*, 384 U.S. at 542–43 (White, J., dissenting)

3 Brief for Petitioner at 4, Brewer v. Williams, 430 U.S. 387 (1977) (No. 74-1263), 1976 WL 181163, at *4.

4 *Id.*

5 *Id.*

reached the Supreme Court in 1976, it gave the Court a chance to reaffirm its support for *Miranda*. But staring in the face of the most dreadful consequences of its *Miranda* decision, the Court in *Brewer v. Williams*[6] blinked and decided to reverse the conviction by expanding *Massiah v. United States*[7] beyond its original scope. *Miranda* could be safely ignored.

Massiah was a Sixth Amendment right-to-counsel case of limited scope that *Brewer* caused to overflow its banks like a raging river. Sherry Colb recognized, in a FindLaw column in 2001, that *Massiah* had escaped its banks and called for the Court to put it back where it belonged.[8] In 2009, the Court obliged.[9]

Massiah was decided in 1964, *Miranda* in 1966. In *Massiah*, the Court held that the Sixth Amendment right to counsel was violated when an undercover federal agent elicited incriminating statements from an indicted defendant in the absence of his lawyer. Because the agent's elicitation of Massiah's statement was surreptitious, it provided protection beyond what *Miranda* provided two years later. *Miranda* requires that suspects experience custodial interrogation before warnings are necessary.[10] Thus, *Massiah* and *Miranda* could be viewed as complementary protections when law enforcement officers seek incriminating statements. *Massiah* prohibited undercover officers from seeking statements from indicted defendants while *Miranda* provided protection when police engaged in custodial interrogation of suspects. It was a logical, neat package.

But then came Christmas Eve, 1968, in Des Moines, Iowa.

---

6 *Brewer*, 430 U.S. 387 (1977).

7 Massiah v. United States, 377 U.S. 201 (1964).

8 Sherry F. Colb, *Why the Supreme Court Should Overrule the* Massiah *Doctrine and Permit* Miranda *Alone to Govern Interrogations*, FINDLAW (May 9, 2001), https://supreme.findlaw.com/legal-commentary/why-the-supreme-court-should-overrule-the.html [https://perma.cc/BX96-2JSU].

9 *See infra* notes 136–74 and accompanying text.

10 *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

I
The Crime

Pamela Powers was with her parents at the Des Moines YMCA to watch her brother wrestle in a ninth-grade tournament.[11] Pamela bought a candy bar and then remembered she had been playing with her puppy before leaving home.[12] She "asked her mother if she could go wash her hands. She was never seen alive again by any known witness except her murderer."[13]

Two individuals saw Robert Williams carrying a large bundle wrapped in a blanket as he left the YMCA.[14] The physical director of the YMCA[15] told the desk clerk to check the bundle that Williams was carrying; the YMCA had lost some TVs and clothes from the residence area.[16] "[W]e thought maybe he was stealing something out of the Y."[17] After Williams threw the bundle into his car, the desk clerk approached the car and tried to question him, but Williams pushed him away.[18] The physical director tried to open the car door, but it was locked.[19] Williams drove away.

Another resident of the YMCA, who saw Williams drive away, called the police.[20] When the police arrived, a search for Pamela was already underway.[21] An arrest warrant issued for Williams; the charge was child abduction.[22]

Two days earlier, Robert Williams had preached the sermon at the Maple Grove Baptist Church.[23]

---

11 Transcript of Record at 4, State v. Williams, 182 N.W.2d 396 (Iowa 1970) (No. 53743) (testimony of Nelda Powers, mother of Pamela Powers).

12 *Id.* at 6–7 (testimony of Nelda Powers).

13 Brief for Petitioner, *supra* note 3, at 4.

14 Transcript of Record, *supra* note 11, at 19–21 (testimony of Donald Hanna, physical director of the YMCA).

15 *Id.* at 16 (testimony of Donald Hanna).

16 *Id.* at 21 (testimony of Donald Hanna).

17 *Id.* at 24 (testimony of Donald Hanna).

18 *Id.* at 23 (testimony of Donald Hanna).

19 *Id.* at 24 (testimony of Donald Hanna).

20 *Id.* at 91 (testimony of John Knapp).

21 *Id.* at 11–12 (testimony of Merlin Powers, father of Pamela Powers).

22 Brewer v. Williams, 430 U.S. 387, 390 (1977).

23 Mike Kilen, *Christmas Eve Tragedy Still Haunts Downtown YMCA*, Des Moines Register, https://www.desmoinesregister.com/story/life/2014/12/18/pamela-powers-kidnapped-urbandale-girl-murder-tragedy-christmas-eve/20566385/ [https://perma.cc/WTY6-7XT3] (last updated Dec. 18, 2014).

The day after Christmas, a lawyer named Henry McKnight went to the Des Moines police station and told police that Robert Williams was his client, that he was currently in Davenport, Iowa, and that McKnight had advised him to turn himself in to the Davenport police.[24] McKnight obtained an agreement with the Des Moines police that they would not question Williams when they drove him back from Davenport.[25]

Williams surrendered to the Davenport police, he was arrested on the child abduction charge, and police gave him *Miranda* warnings.[26] A judge in Davenport arraigned Williams on the outstanding charge, gave him *Miranda* warnings, and jailed him.[27] A Des Moines police detective named Leaming and a fellow officer were dispatched to Davenport to bring Williams back to Des Moines,[28] a trip of 160 miles.[29] Williams conferred in Davenport with a public defender named Kelly, who told him not to make any statements until he got back to Des Moines and consulted with McKnight.[30]

The police car headed back to Des Moines on Interstate 80 in bad weather—it was raining and sleeting; several inches of snow were predicted.[31] Leaming engaged Williams in a conversation about many topics, including religion.[32] Detective Leaming knew that Williams was a former mental patient. He perhaps did not know that Williams had been arrested for raping a 7-year-old girl in Missouri and committed to a mental institution for that crime.[33] He "walked away from [the institution] the summer before, only to end up in Des Moines."[34]

Leaming knew that Williams was "deeply religious;"[35] he addressed him as "Reverend"[36] before giving what became known as the "Christian burial speech," part of which follows:

> [S]ince 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

---

24 *Id.*

25 *Brewer*, 430 U.S. at 391.

26 *Id.* at 390.

27 *Id.* at 391.

28 *Id.*

29 *Id.* at 430 (White, J., dissenting).

30 *Id.* at 391 (majority opinion).

31 *Id.* at 392 (from Leaming's conversation with Williams).

32 *Id.*

33 Kilen, *supra* note 23.

34 *Id.*

35 *Brewer*, 430 U.S. at 392.

36 *Id.*

> the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. 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.[37]

Williams asked how Leaming knew they would be going past the location of the body, and Leaming responded: "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."[38]

When the police car approached a town close to Des Moines, at least two hours after the Christian burial speech[39] and "without any prompting on the part of any state official,"[40] Williams said, "I am going to show you where the body is."[41] According to the State's brief, the body was "clad only in her undershirt" and had been "sexually ravaged."[42]

That horrific crime forced the courts to face the consequences of the Supreme Court's *Miranda* decision. This was the very case that Justice White predicted in that dark passage from his dissent, the rapist whom "the Court's rule will return . . . to the streets . . . to repeat his crime whenever it pleases him."[43] The final sentence in that paragraph is haunting: "There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case."[44]

Now, two years after *Miranda*, we had one of those cases.

At Williams's murder trial, the judge admitted the evidence that Williams led the police to the body.[45] His conviction was affirmed 5-4 by the Iowa Supreme Court.[46] The Iowa court saw the issue as whether Williams had waived his rights under *Miranda* and the Sixth Amendment.[47] The focus was on *Miranda* and the agreement between McKnight and the police; *Massiah* was not mentioned. The holding was that he had waived his

---

37 *Id.* at 392–93.

38 *Id.* at 393.

39 Brief for Petitioner, *supra* note 3, at 10.

40 *Brewer*, 430 U.S. at 433 (White, J., dissenting).

41 Brief for Petitioner, *supra* note 3, at 11.

42 *Id.* at 4.

43 Miranda v. Arizona, 384 U.S. 436, 542 (1966) (White, J., dissenting).

44 *Id.* at 542–43.

45 *Brewer*, 430 U.S. at 393–94.

46 State v. Williams, 182 N.W.2d 396, 398 (Iowa 1970).

47 *See id.* at 401 (finding waiver); *id.* at 406 (Stuart, J., dissenting) (finding no waiver).

rights by volunteering to lead the police to the body.[48] The four dissenters argued that the State had failed to show a "knowing and intelligent waiver."[49]

From the Fort Madison, Iowa state penitentiary, Williams wrote the University of Iowa College of Law seeking help in filing a federal habeas corpus petition.

II
The Habeas Corpus Case

Robert Bartels, a newly-minted law professor, was assigned the task of developing a legal clinic at the University of Iowa College of Law. Bartels found the Williams letter in a stack awaiting him when he joined the law faculty in 1971.[50] He filed a habeas corpus petition on Williams's behalf in the federal district court, and the district court judge held that the police had violated both *Miranda* and *Massiah*.[51]

A second-year law student, I was assigned the task of writing the first draft of our brief to defend the district court's judgment in the Eighth Circuit Court of Appeals. *Massiah* seemed out of place to me. What Williams faced was *Miranda*-style custodial interrogation, I argued, not surreptitious eavesdropping. But what Bartels realized was that this was a most unappetizing case in which to affirm *Miranda*,[52] then only eight years old and a frequent target of attacks from those, including two candidates for president in 1968, who thought the Warren Court had gone too far in giving suspects *Miranda* rights.[53]

Two of the *Miranda* dissenters were still on the Court–Justice Stewart along with Justice White. If they stayed true to their original position, it would take only three more votes to overrule *Miranda*, and there were four likely Nixon-appointed suspects: Chief Justice Burger and Justices Blackmun,

---

48 *Id.* at 405 (majority opinion).

49 *Id.* at 406 (Stuart, J., dissenting).

50 Robert Bartels, *The Christian Burial Speech* 1 (unpublished manuscript) (on file with author).

51 Williams v. Brewer, 375 F. Supp. 170, 176 (S.D. Iowa 1974), *aff'd* 509 F.2d 227 (8th Cir. 1974), *judgment aff'd*, 430 U.S. 387 (1977). The judge also ruled that the statement leading police to the body was involuntary under the Court's due process cases. As Bartels recognized, this was an unlikely claim, and he dropped it for the appeals in the federal system.

52 Bartels, *supra* note 50, at 6–7.

53 *See, e.g.*, Liva Baker, Miranda: Crime, Law, and Politics 243–45 (1983) (noting statements of Richard Nixon and George Wallace, candidates for president in 1968, promising changes in *Miranda* if elected); 114 Cong. Rec. 13846–47 (1968) (noting statements highly critical of *Miranda* from Senator John McClellan).

Powell, and Rehnquist. The vote to overrule could have been 6-3 (Brennan, Marshall, and Stevens could be counted on to vote to affirm *Miranda*). The thought of overruling *Miranda* seems almost fanciful today—there were only two votes to overrule it when that issue was finally presented to the Court in 2000[54]—but in 1974 it was a real possibility.[55]

Bartels agreed that *Miranda* should win the case for Williams.[56] But to give his client a better chance at prevailing, Bartels chose to emphasize *Massiah* rather than *Miranda*.[57] The theory was that *Massiah*'s reliance on the Sixth Amendment right to counsel was more morally attractive than *Miranda*'s reliance on the Self-Incrimination Clause. Williams had been arraigned in Davenport on the child abduction charge and thus had the protection of the Sixth Amendment. The text of the Sixth Amendment specifies a right to counsel in criminal prosecutions. *Miranda*, on the other hand, is not in the Constitution's text and has to be inferred from the Fifth Amendment Self-Incrimination Clause.

And there was another, more pragmatic reason to emphasize *Massiah*. Justice Stewart, who had dissented in *Miranda*, was likely to dissent if the issue in *Brewer* was limited to *Miranda*. But Stewart had "discovered" the *Massiah* theory in a 1959 concurring opinion.[58] Five years later, he was the author of the majority opinion in *Massiah*. He was not likely to disavow his own handiwork. If Stewart could be persuaded that Williams did not waive his *Massiah* rights, he would be a fourth vote to affirm the Eighth Circuit. That elusive fifth vote would likely be easier to obtain if the issue was phrased as a violation of Williams's right to counsel.

I revised the brief; Bartels improved it; and the district court's grant of Williams's habeas corpus petition was affirmed by the Eighth Circuit by a 2-1 vote.[59] The Eighth Circuit affirmed on *Miranda* grounds, though the court did add a "cf."

---

54 *See* Dickerson v. United States, 530 U.S. 428, 445 (2000) (Scalia, J., dissenting).

55 Bartels, *supra* note 50, at 7.

56 *Id.* at 6–7.

57 *Id.* at 8.

58 *See* Spano v New York, 360 U.S. 315, 326 (1959) (Stewart, J., concurring).

59 Williams v. Brewer, 509 F.2d 227, 228 (8th Cir. 1974) *judgment aff'd*, 430 U.S. 387 (1977). The dissent was written by William Webster, who was later director of the FBI and, after that, director of the CIA.

cite to *Massiah*.[60] The stage was set for the Supreme Court if it wanted to grant certiorari. It did. Certiorari requires four votes, but the votes are secret. We will never know how that vote went. The most likely four votes came from the four justices who wound up dissenting in *Brewer*; they probably saw the case as a chance to overrule or limit *Miranda*. The *Brewer* facts cried out for admission of the statements leading police to Pamela's body. Even the justice in the Iowa Supreme Court who wrote the dissent said he would reverse Williams's conviction "reluctantly."

> After more 'soul searching' than should be necessary in an appellate decision, I reluctantly dissent from the majority opinion. This conclusion was made doubly difficult because the evidence so clearly connects defendant with this most reprehensible crime and because I personally believe there is nothing morally or legally wrong in permitting police officers to use psychology to secure incriminating statements from a defendant without counsel.[61]

If the anti-*Miranda* justices could not get a fifth vote to overrule *Miranda* in *Brewer*, the case would at least serve as a reminder of the damage that it could cause. A man arrested for child rape and placed in a mental hospital escapes from that hospital and later is convicted of rape and murder of a ten-year old on Christmas Eve. Would it not be a stinging condemnation of *Miranda* if Williams's conviction were overturned because Detective Leaming wanted a Christian burial for the child? My speculation is that the four who ultimately dissented in *Brewer* saw this as a win-win proposition. We get rid of, or limit, *Miranda*. Or we show the world the harm that *Miranda* causes.

But history was not to be written that way. Given *Massiah*, there could be no doubt that Williams had a right to counsel after the Davenport judge arraigned him on the child abduction charge. This is true even if *Miranda* did not exist. Indeed, the oral argument reads as if both parties thought *Miranda* was an afterthought. Much of the argument was consumed trying to decide whether the lower courts had found as a fact that there was an agreement between Williams's lawyers and the Des Moines police and, if so, what the constitutional consequences of violating that agreement would be.

---

60 *Id.* at 234 (citing Massiah v. United States, 377 U.S. 201, 284 (1964)). The *cf.* cite followed the statement of fact that the police "violated an agreement" with McKnight. *Id.*

61 State v. Williams, 182 N.W.2d 396, 406 (Iowa 1970) (Stuart, J., dissenting).

Upon reflection, that issue is beside the point. Whether *Miranda* existed or not, whether an agreement existed or not, *Massiah* compels the baseline that Williams had a right to counsel. The only *Massiah* issue is whether the police engaged in deliberate elicitation of the statements leading the police to the body and, if so, whether Williams waived his right to counsel. On the elicitation issue, the State took the position that because Leaming did not ask Williams anything, there was no deliberate elicitation.[62] Justice Powell hit the State's weak spot here. Isn't it true, he asked the state attorney general, Richard Turner, that "the officer wanted to elicit information from Williams."[63] "Yes sir," Turner responded.[64]

On the waiver issue, the State argued that Williams waived by volunteering to lead police to the body some two hours after the Christian burial speech. Chief Justice Burger helped the State there: "He waives that [right] by talking, is that what you are telling us[?]"[65] Turner responded: "I think the cases hold that no express statement of the waiver is required[,] that he can simply waive it by proceeding and without his counsel."[66]

In an exchange with Chief Justice Burger, Bartels conceded that Williams could have waived his right to counsel by making statements leading the police to the body if Leaming had not plied Williams with the Christian burial speech.[67] Justice Brennan helped Bartels out: "Had they ridden 120 miles in complete silence and suddenly the defendant had said . . . [']I know where the body is, I am going to show you,[']" that would be permissible, Brennan asked.[68] Bartels agreed.[69]

Justice Stewart sought to wall off the *Miranda* issue: "your argument has not relied on the [*Miranda*] case" but "rather on the [*Massiah*] and [*Escobedo*][70] [cases] and basically on the

---

62 Oral Argument at 19:21, Brewer v. Williams, 430 US 387 (1976) (No. 74-1263), https://www.oyez.org/cases/1976/74-1263 [https://perma.cc/RS2P-DK8X].

63 *Id.* at 19:43.

64 *Id.* at 19:49

65 *Id.* at 24:57.

66 *Id.* at 25:07.

67 *Id.* at 38:21.

68 *Id.* at 39:34.

69 *Id.* at 39:39.

70 *Escobedo v. Illinois*, 378 U.S. 478 (1964), was decided shortly after *Massiah*. The Court held that a suspect who had retained counsel and repeatedly

Sixth and Fourteenth Amendments."[71] Bartels agreed though he went on to make the point that the argument for Williams works equally well under *Miranda*.[72]

By the time the opinions were written, the justices focused on the real issue: waiver. The dissents essentially abandoned the argument that the Christian burial speech was not elicitation. And both the majority and Justice Blackmun's dissent agreed that this was not the case to re-examine *Miranda*.[73]

Justice Stewart saw the case the way Bartels had hoped.[74] Stewart wrote the majority opinion in *Brewer* in which the Court held, 5-4, that Williams did not waive his *Massiah* right to counsel.[75] Justice Powell provided the key fifth vote to affirm the Eighth Circuit.

Chief Justice Burger's dissent was particularly angry.

> The result in this case ought to be intolerable in any society which purports to call itself an organized society. It continues the Court—by the narrowest margin—on the much-criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing. It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross police misconduct or honest human error.[76]

Looking back on *Brewer v. Williams*, it is difficult, I think, to avoid two conclusions. First, a bare majority of the Court felt that a combination of factors created an unfair atmosphere for Robert Williams in the police car in the rain and sleet on Interstate 80 on the way from Davenport to Des Moines.[77] While there was no enforceable agreement between his lawyers and the police, Detective Leaming had agreed not to question Williams on the trip back to Des Moines.[78] Leaming knew that Williams was religious and

---

asked to consult with counsel was denied his Sixth Amendment right to counsel even though no charges had been filed. *Id.* at 490.

71 Oral Argument, *supra* note 62, at 53:03.

72 *Id.* at 53:17.

73 Brewer v. Williams, 430 U.S. 387, 397 (1977); *id.* at 438 (Blackmun, J., dissenting).

74 Bartels, *supra* note 50, at 25.

75 *Brewer*, 430 U.S. at 404–06.

76 *Id.* at 415–16 (Burger, C.J., dissenting).

77 *Id.* at 402–03 (majority opinion) (quoting Williams v. Brewer, 375 F. Supp. 170, 182–83 (S.D. Iowa 1974), *aff'd* 509 F.2d 227 (8th Cir. 1974), *judgment aff'd*, 430 U.S. 387 (1977)).

78 *Id.* at 391, 399.

he preyed on his religious nature with the Christian burial speech; he admitted at trial that he was trying to get Williams to lead him to the child's body.[79] All in all, for five members of the Court, Williams faced an atmosphere that was not conducive to an exercise of his free will.[80] On this view of the case, Williams crumbled because his counsel was not present to advise him.

For those five members of the Court, there was a choice. Reaffirm *Miranda* to the consternation of its many critics (in those days) or expand *Massiah* outside the context of surreptitious elicitation of statements. The latter choice must have looked appealing. The right to counsel is a critical protection that is in the Bill of Rights, unlike *Miranda*'s somewhat gauzy protection derived indirectly from the Self-Incrimination Clause. Denying a defendant his counsel was surely more likely to strike the public as inappropriate than would finding a *Miranda* violation. Thus, in my view, *Massiah* was expanded because the Court could not face using *Miranda* to overturn a conviction of a man found guilty of repeatedly raping and then murdering a child. *Massiah* flourished because *Miranda* had weakened over time.[81]

Once *Massiah* was launched by *Brewer v. Williams* as a parallel track from which to evaluate police interrogation/elicitation of defendants, the task was how to differentiate it from *Miranda*. As the rest of this Article will show, that task ultimately led the Court to accept Sherry's recommendation that the *Massiah* adjunct to *Miranda* be overruled.

---

79 *Id.* at 399; *id.* at 402–03 (quoting *Williams*, 375 F. Supp. at 182–83).

80 *Id.* at 405. The dissents did not of course view the case this way. *See, e.g.*, *id.* at 418 (Burger, C.J., dissenting). At oral argument, when Bartels said it was "particularly offensive" to "play on the defendant's known religious background," Justice Rehnquist asked, "What is the matter with that?" Bartels seemed surprised by the question but deflected it into a discussion of "psychological weakness." Oral Argument, *supra* note 62, at 41:02.

81 My friend Joshua Dressler will tell me when he reads this Article that *Miranda* weakened largely because of the Nixon appointees. Maybe. But given the Warren Court's refusal to apply a broad Fourth Amendment exclusionary rule in *Alderman v. United States*, 394 U.S. 165 (1969), and its 8-1 embrace of stop and frisk on less than probable cause in *Terry v. Ohio*, 392 U.S. 1 (1968), I wonder whether even that Court would have applied *Miranda* to overturn the conviction of Robert Williams. Joshua and I have published (friendly) dueling essays on the question of how big a role the Nixon appointees had in the retreat from the Warren Court criminal procedure. *See* Joshua Dressler, *Reflections on the Warren Court's Criminal Justice Legacy, Fifty Years Later: What the Wings of a Butterfly and a Yiddish Proverb Teach Me*, 51 U. PAC. L. REV. 727 (2020); George C. Thomas III, *The Warren Court, Idealism, and the 1960s*, 51 U. PAC. L. REV. 843 (2020).

III
MASSIAH: WHERE DID YOU COME FROM?

On January 22, 1957, Vincent Joseph Spano made a fateful decision.[82] Drinking in a New York City establishment, Spano saw a man take some of his money from the bar; he followed the man outside "to recover" his money.[83] Spano almost certainly did not know that the man he confronted was a former professional boxer.[84] Dazed from the beating he took, Spano went home, got his gun, found the boxer, and shot and killed him.[85]

Before he was arrested, Spano was indicted for first-degree murder.[86] He hired a lawyer and, accompanied by his lawyer, surrendered to the police.[87] He was taken to the office of an assistant district attorney and questioned for several hours.[88] The police ignored his many refusals to speak with them without consulting his lawyer.[89] The *Spano* Court held that his confession was involuntary.[90] Critical to its reasoning was that the police ignored his requests to consult his lawyer and that police played a trick on Spano to increase the pressure on him to confess.[91]

The case reached the Supreme Court in 1959.[92] The Court had, since 1936, tried to supply state courts with guidance on when a confession was involuntary and thus inadmissible.[93] The Court had by 1959 become frustrated with its work product. The very first line in *Spano* reveals that frustration: "This is another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment."[94]

The problem is essentially unsolvable as long as the terminology "involuntary" is used. Every conscious utterance is a

---

82 Spano v. New York, 360 U.S. 315, 316 (1959).

83 *Id.*

84 *See id.*

85 *Id.*

86 *Id.*

87 *Id.* at 317.

88 *Id.* at 317–18.

89 *Id.* at 318.

90 *Id.* at 324.

91 *Id.* at 323–24.

92 *Id.* at 315.

93 *See* Brown v. Mississippi, 297 U.S. 278 (1936) (holding that a coerced confession could not be used in a criminal trial).

94 *Spano*, 360 U.S. at 315.

choice made by the speaker. As John Henry Wigmore famously remarked, "[a]s between the rack and a false confession, the latter would usually be considered the less disagreeable; but it is none the less voluntarily chosen."[95]

Perhaps because of the unsatisfactory nature of the voluntariness doctrine, a new theory appears in two concurring opinions in *Spano*. Justice Stewart wrote one concurring opinion, Justice Douglas the other; Justices Black and Brennan joined one or both of the concurring opinions; these Justices would have decided the case on Sixth Amendment grounds.[96] Spano had, after all, been indicted. Justice Stewart wrote in his concurring opinion:

> Under our system of justice an indictment is supposed to be followed by an arraignment and a trial. At every stage in those proceedings the accused has an absolute right to a lawyer's help . . . . Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station.[97]

In 1964, the Court turned the *Spano* concurring justices' theory into holding. *Massiah v. United States*[98] did not add much, anything really, to the concurring opinions in *Spano*. Justice Stewart for the majority held that Massiah "was denied the basic protections of that [Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[99]

Justice Stewart's concurring opinion in *Spano* referred to Sixth Amendment protection "in the squad room of a police station."[100] Massiah's statements were elicited without his knowledge that law enforcement was involved.[101] Presumably, in the years 1964–1966, *Massiah* applied both to covert police

---

95 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 824, at 145 (2d ed. 1923).

96 *See Spano*, 360 U.S. at 326 (Stewart, J. concurring) (joined by Justice Douglas and Justice Brennan); *id.* at 324–25 (Douglas, J., concurring) (joined by Justice Black and Justice Brennan).

97 *Id.* at 327 (Stewart, J., concurring).

98 Massiah v. United States, 377 U.S. 201 (1964).

99 *Id.* at 206.

100 *Spano*, 360 U.S. at 327 (Stewart, J., concurring).

101 *Massiah*, 377 U.S. at 206.

elicitation and "squad room" interrogation,[102] subject of course to concerns about retroactivity.[103] But in 1966, *Miranda v. Arizona* appeared.[104] Did it render *Massiah* superfluous in "squad room" interrogations?

IV
MASSIAH AND *MIRANDA*: HOW DID THEY COEXIST?

From the time *Massiah* escaped its banks in *Brewer v. Williams*, it was not clear how its protection differed from that offered by *Miranda* when police sought to question a defendant against whom adversarial judicial proceedings had begun.

Justice Stevens argued in two powerful dissents, joined by three other justices, that indictment should create an absolute bar to police or prosecutors approaching a defendant without counsel present.[105] If this view had prevailed, it would have created an obviously different and more powerful protection than *Miranda* offers, but Stevens's view never achieved a majority.

Less obvious differences in the two doctrines could perhaps be found. One could read *Brewer* as suggesting that the *Massiah* trigger of deliberate elicitation covered a broader spectrum of police conduct than the *Miranda* trigger of custodial interrogation. Or it could be true that a waiver of the *Massiah* right was more difficult for the State to show than waiver of *Miranda*.

Both explanations can find support in *Brewer*. Detective Leaming did not ask Williams a question in the squad car; instead, he made the "Christian burial speech." Moreover, Leaming cautioned Williams not to respond to him: He "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.'"[106] *Brewer* held that the "Christian burial speech" constituted deliberate elicitation.[107] Would it also constitute interrogation under *Miranda*?

---

102 *See, e.g.*, State v. Green, 215 A.2d 546 (N.J. 1965) (holding inadmissible on *Massiah* grounds statements made to police during interrogation after indictment).

103 *See, e.g.*, United States *ex rel.* Allison v. New Jersey, 418 F.2d 332 (3d Cir. 1969); United States *ex rel.* Long v. Pate, 418 F.2d 1028 (7th Cir. 1969).

104 Miranda v. Arizona, 384 U.S. 436 (1966).

105 *See* Montejo v. Louisiana, 556 U.S. 778, 801, 813 (2009) (Stevens, J., dissenting); Patterson v. Illinois, 487 U.S. 285, 301–02 (1988) (Stevens, J., dissenting).

106 Brewer v. Williams, 430 U.S. 387, 432 (1977) (White, J., dissenting).

107 *Id.* at 399.

Sherry argued in her FindLaw column that the 1980 case of *Rhode Island v. Innis*[108] shows that the two doctrines might very well have different triggers.[109] *Innis* was a *Miranda* case; he had not yet been charged with a crime, but he was in custody and had invoked his right to counsel, which meant he could not be interrogated in the absence of counsel.[110] The police officers taking him to jail wanted to find the shotgun that they believed he had used in a murder. They had a conversation, ostensibly among themselves, in which they expressed a fear that the shotgun might be found by a child from a nearby school for handicapped children. One officer said it would be "too bad" if a little girl "would pick up the gun, maybe kill herself."[111]

The *Innis* Court held that this was not interrogation for purposes of *Miranda*, on the ground that "[i]t cannot be said" that the officers "should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent."[112] Sherry argued that the "Christian burial speech" and the "handicapped child speech" created the same level of pressure on the suspect.[113] Thus, except for a distinction between "elicitation" and "interrogation," the outcomes should be the same. They were not the same. The Sixth Amendment appeared to cover a broader range of police conduct.

Why would that be true? As Sherry pointed out, there is nothing magic about arraignment or indictment that makes a defendant more willing to talk to police and thus more in need of constitutional protection.[114] Indeed, the incentives should be just the opposite. The indictment or arraignment should make the defendant less likely to cooperate with the police since the defendant knows that he is the target of the prosecution and "therefore ought to exercise discretion."[115] Thus, nothing explains why deliberate elicitation under *Massiah* should cover a broader range of police probing than custodial interrogation covers under *Miranda*. But that is a permissible inference when *Innis* and *Brewer* are put together.

---

108 Rhode Island v. Innis, 446 U.S. 291 (1980).

109 Colb, *supra* note 8.

110 Miranda v. Arizona, 384 U.S. 436, 474 (1966) ("If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.").

111 *Innis*, 446 U.S. at 295.

112 *Id.* at 302.

113 Colb, *supra* note 8.

114 *Id.*

115 *Id.*

The same argument holds for waiver. Why should waiver of *Massiah* be more difficult to show than waiver of *Miranda*? The suspect given *Miranda* warnings might, probably does, hope that what he says will deflect suspicion and avoid criminal charges. That is a temptation to speak without carefully considering the consequences. Indicted or arraigned defendants, on the other hand. should know that the consequences of waiving their right to counsel and speaking to police will be evidence admissible in the criminal case against them. When they choose to speak, it perhaps represents a knowing and intelligent waiver of *Massiah*. But *Brewer* suggests that a *Massiah* waiver is harder to show.

Williams had been advised by *Miranda* warnings on three separate occasions, including by a judge, that he had a right to remain silent. He had been told by two lawyers not to answer police questions. He said nothing for two hours after the Christian burial speech. Then he chose to lead the police to the child's body. Today, as I will show shortly, this would clearly be a waiver of *Miranda*, and I suspect that would also have been true in the 1970s.[116] But the Court found no waiver of *Massiah*.[117]

Three cases from the 1980s returned to *Massiah*'s original narrow compass. All three involved surreptitious elicitation of statements from a defendant against whom adversary judicial proceedings had begun. In *Maine v. Moulton*,[118] the Court rejected a "good faith" exception to *Massiah*.[119] The police sought statements about offenses that had not yet been charged;[120] thus, *Massiah* would not render those statements inadmissible. During the course of that conversation, Moulton also made incriminating statements about offenses for which he had been

---

116 *North Carolina v. Butler*, 441 U.S. 369, 373 (1979), held that an explicit waiver of *Miranda* was not necessary. It follows that Williams's decision to lead police to the body two hours after the Christian burial speech could have been considered a *Miranda* waiver even in the mid-1970s.

117 To be sure, one can construct an argument that *Massiah* waiver should be more difficult for the State to show. Suspects who have not been indicted or arraigned have a choice created by *Miranda* warnings whether to avail themselves of the assistance of counsel. The defendant who has been indicted or arraigned, on the other hand, comes equipped with a Sixth Amendment right to counsel. Perhaps police efforts to evade the Sixth Amendment right to counsel should be more closely scrutinized than a suspect's decision to forego the *Miranda* right to counsel. The Court, however, has rejected that argument. *See* Montejo v. Louisiana, 556 U.S. 778 (2009); Patterson v. Illinois, 487 U.S. 285 (1988).

118 Maine v. Moulton, 474 U.S. 159 (1985).

119 *Id.* at 192 (Burger, C.J., dissenting).

120 *Id.* at 163–64 (majority opinion).

indicted.[121] The dissent (four justices) argued for admission of the statements about indicted crimes because they "were recorded as part of a good-faith investigation of entirely separate crimes."[122] But the majority held that the statements about the indicted crimes were deliberately elicited even though beyond the intent of the police who set up the meeting.[123]

In *United States v. Henry*,[124] Chief Justice Burger, who dissented in *Brewer*, wrote the majority opinion holding that an undercover officer's mere conversations with the indicted defendant constituted deliberate elicitation.[125] The government's brief argued that *Brewer* had limited "deliberate elicitation" to situations comparable to interrogation.[126] The Court rejected that reading of *Brewer*,[127] content to rest a *Massiah* violation on elicitation that was much more subtle. Thus, whatever change *Brewer* wrought in the meaning of deliberate elicitation when a defendant was subjected to what looked like interrogation, it made no change in the original meaning when the elicitation was surreptitious.[128]

The Court returned to the issue of *Massiah* as a limit on police interrogation in *Michigan v. Jackson*.[129] Jackson[130] requested counsel at his arraignment. Before he had consulted with counsel, police obtained a waiver of *Miranda*, and Jackson made incriminating statements after the waiver. In an opinion by Justice Stevens, the Court held that the *Miranda* waiver did not waive *Massiah*.

In *Jackson*, the Court borrowed a prophylactic *Miranda* rule created in *Edwards v. Arizona*.[131] The *Edwards* rule was that a suspect who requested counsel during custodial interrogation could not be re-approached later and interrogated or

---

121 *Id.* at 165–66.

122 *Id.* at 181 (Burger, C.J., dissenting).

123 *Id.* at 180 (majority opinion).

124 United States v. Henry, 447 U.S. 264, 274 (1980).

125 *Id.* at 274.

126 Brief for Petitioner, *id.* (No. 79-121), 1979 WL 199592, at *22.

127 *Henry*, 447 U.S. at 271.

128 The third case from the 1980s, *Kuhlmann v. Wilson*, 477 U.S. 436, 460–61 (1986), is really more about the deference due state court findings of fact when a federal court entertains a habeas corpus petition (holding that the Court of Appeals did not pay proper deference to the state court finding of no deliberate elicitation).

129 Michigan v. Jackson, 475 U.S. 625 (1986).

130 There were two cases under review in *Jackson*. For the sake of simplicity, I will discuss only Jackson's case.

131 Edwards v. Arizona, 451 U.S. 477 (1981).

even asked to waive *Miranda* unless the suspect initiated further conversation about the crime under investigation[132] The Court in *Jackson* decided a similar bar was created when a defendant requested counsel at an early judicial proceeding.[133] Thus, defendants who never asserted their right to counsel during police interrogation nonetheless were shielded from police interrogators if they had asked for counsel at arraignment. These defendants in effect were powerless to waive *Massiah* by waiving *Miranda*.

This robust understanding of *Massiah* began to crumble two years after *Jackson* in *Patterson v. Illinois*.[134] Patterson was under indictment but not yet arraigned; thus, he had had no opportunity to request counsel in a judicial setting; he had not retained a lawyer, and no lawyer had been appointed to represent him. If *Massiah* and *Jackson* created a right to counsel "wall" by virtue of the beginnings of an adversarial judicial process, then Patterson should be in the same situation as Jackson. The counsel "wall" should prevent police from seeking a *Miranda* waiver. That was Patterson's argument. Justice Stevens accepted that argument and wrote a dissent, essentially representing the views of four justices.[135]

The *Patterson* five-justice majority, in a decision that a later dissent would term "dubious,"[136] held that what created the *Jackson* Sixth Amendment "wall" was a request by a defendant for counsel at the judicial proceeding.[137] Because Patterson did not request counsel, he could not benefit from the *Jackson* "wall." Thus, Patterson could waive *Massiah*. He twice waived *Miranda* in writing after his rights had been explained in detail.[138] That, *Patterson* held, was sufficient to waive both *Miranda* and *Massiah*.[139]

After *Patterson*, *Massiah* could be distinguished from *Miranda* in two contexts in cases that occur after judicial

---

132 *Id.* at 484–85.

133 *Jackson*, 475 U.S. at 626, 636.

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

135 *Id.* at 302 (Stevens, J., dissenting). Justice Blackmun dissented separately, *id.* at 300 (Blackmun, J., dissenting), stating at one point, "I agree with most of what J[ustice] S[tevens] says in his dissenting opinion," *id.* at 300.

136 Montejo v. Louisiana, 556 U.S. 778, 812 (2009) (Stevens, J., dissenting). Scalia responded in the majority opinion: "The Court in *Patterson* did not consider the result dubious, nor does the Court today." *Id.* at 799 (majority opinion). I often wonder why dissenting justices left themselves open to Scalia's ripostes.

137 *Patterson*, 487 U.S. at 291.

138 *Id.* at 292–93.

139 *Id.*

proceedings have begun. It applied when *Miranda* would not because there was no custodial interrogation, typically when the defendant did not realize he was the target of police deliberate elicitation. Second, a request for counsel at a judicial proceeding created a bar to seeking a *Miranda* waiver under *Jackson*.

Patterson was the first *Massiah* retrenchment. It would not be the last. The Court first limited *Massiah* to the offense for which judicial proceedings had begun. In *McNeil v. Wisconsin*,[140] McNeil was arrested for an armed robbery that occurred in West Allis.[141] He requested counsel at an initial appearance on the armed robbery charge.[142] He was later questioned about a murder, attempted murder, and armed burglary that took place in Caledonia.[143] He made incriminating statements about those offenses after waiving *Miranda*.[144]

McNeil argued that his request for counsel at the initial appearance for armed robbery triggered Fifth Amendment protection under *Edwards v. Arizona* and Sixth Amendment protection under *Jackson*.[145] The Court rejected both arguments.[146] As for the *Edwards* argument, the Court noted that if a request for counsel at a judicial proceeding triggered *Edwards*, there would have been no reason for *Jackson* to reach the issue of whether that request triggered *Massiah*.[147] Therefore, *Jackson* "implicitly rejects any equivalence in fact between invocation of the Sixth Amendment right to counsel and the expression necessary to trigger *Edwards*."[148]

As for the *Jackson* argument, the Court held that the Sixth Amendment is "offense specific."[149] The text of the Sixth Amendment, after all, begins "[i]n all criminal prosecutions."[150] No prosecution had begun for the Caledonia offenses.[151] Thus, the request for counsel after the initial appearance on the armed robbery charge had no bearing on the offenses of murder,

---

140 McNeil v. Wisconsin, 501 U.S. 171 (1991).

141 *Id.* at 173.

142 *Id.* at 175.

143 *Id.* at 173.

144 *Id.* at 174.

145 *Id.* at 177.

146 *Id.*

147 *Id.* at 179–80.

148 *Id.* at 179.

149 *Id.* at 175.

150 U.S. CONST. amend. VI.

151 *McNeil*, 501 U.S. at 173–74.

attempted murder, and burglary. The latter offenses took place in a different location at a later time.[152] This much, as the Court recognized, followed from *Maine v. Moulton*.[153] Moulton could suppress the statements he made about offenses for which he had been indicted; he could not suppress statements made about offenses for which he had not been charged.[154]

Both *Moulton* and *McNeil* involved offenses distant in place and time from the ones for which the defendant had been charged. But what if the charges were "factually related"? The Court answered that question in *Texas v. Cobb*.[155] Cobb was indicted for burglary, and a judge appointed a lawyer for him.[156] A woman and her young child who lived in the burglarized house were missing.[157] Later, out on bail for the burglary, Cobb confessed to his father that he had killed the woman and her child in the process of committing the burglary.[158] The father contacted the authorities and told them that his son had confessed to the murders.[159] They arrested Cobb, who waived *Miranda* and confessed to the murder of the woman and the gruesome, unnecessary, killing of the infant.[160]

Cobb noted that, under *Jackson*, the indictment for the burglary prevented questioning about the burglary. If the murders were the same offense as burglary under the Sixth Amendment, *Jackson* would prevent police from questioning him about the murders.[161] The Texas Court of Appeals held that the offenses

---

152 *Id.* at 173.

153 *Id.* at 175–76.

154 *Id.*

155 Texas v. Cobb, 532 U.S. 162 (2001).

156 *Id.* at 165.

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.* at 165–66. The mother was already dead when Cobb found the young child asleep in the house. For unstated reasons, he took the child out to where her dead mother was. *Id.* at 166. He dug a hole between the dead woman and her child. *Id.* The child awoke and started crawling toward her mother. *Id.* She fell in the hole. *Id.* He put the mother's corpse in the hole and he filled in the makeshift grave, suffocating the child. *Id.* Cobb was convicted of capital murder and sentenced to death. *Id. Roper v. Simmons* later forbade the State from executing him. Roper v. Simmons, 543 U.S. 551, 578 (2005). He is currently being held on a 99-year sentence. *Raymond Levi Cobb*, INSIDE PRISON, https://www.insideprison.com/state-inmate-search.asp?county=runnels&state=TX&id=22481&lnam=cobb&fnam=raymond%20lev [https://perma.cc/7JDV-Z7F6] (last visited Feb. 29, 2024).

161 *Cobb*, 532 U.S. at166.

were the same because they occurred as part of a unitary criminal transaction and thus were "factually related."[162]

But the Supreme Court held that the offenses were not the same under the Sixth Amendment because they were not the same under the test the Court uses to determine when offenses are the same for purposes of the Double Jeopardy Clause.[163] Under the *McNeil* principle, *Massiah* thus did not bar police questioning about the murders. If *Massiah* did not apply, Cobb had only *Miranda* to protect him from police interrogation. He had waived *Miranda*. His confession was admissible. Of course, if an explicit waiver of *Miranda* was always a waiver of *Massiah*, there would have been no need to go through the "same offense" analysis.[164] The Court explicitly reserved that question.[165]

The question would be answered in 2009. Justice Stevens in his *Patterson* dissent asked, why treat Patterson differently from Jackson? Both had a *Massiah* right to counsel. Should not the cases be decided the same way?[166] The answer turned out to be yes but not in a way that pleased the *Patterson* dissenters.

V
MASSIAH: RETURNED TO ITS BANKS

When Sherry wrote her FindLaw column calling for *Massiah* to be overruled in the context of custodial police interrogation, the *Massiah* doctrine featured *Patterson*'s holding that, absent a request for counsel at arraignment, a waiver of *Miranda* was a waiver of *Massiah*. It also featured *Michigan v. Jackson*'s holding that police cannot seek a waiver of *Massiah* from a defendant to question him about an offense for which he has requested counsel at a judicial proceeding.

---

162 *Id.* at 164, 167.

163 *Id.* at 174. The Court reasoned that murder did not require proof of burglary and, obviously, burglary did not require proof of murder. *Id.* Thus, under the *Blockburger* test used to measure "same offense" for purposes of the Fifth Amendment Double Jeopardy Clause, these offenses are not the same. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932). Four justices dissented in *Cobb*, essentially arguing that the purposes of the Sixth Amendment right to counsel are different from the purpose of the Double Jeopardy Clause and thus require a broader test of "same offense." *See Cobb*, 532 U.S. at 179–88 (Breyer, J., dissenting).

164 *See* Patterson v. Illinois, 487 U.S. 285, 290–91 (1988) (holding that a waiver of *Miranda* waived *Massiah* when the indicted defendant had not requested or been appointed counsel).

165 *Cobb*, 532 U.S. at 167.

166 *See Patterson*, 487 U.S. at 301–02 (Stevens, J., dissenting).

But *Patterson* was on a collision course with *Jackson*, as Justice Stevens recognized in his *Patterson* dissent.[167] Sherry's *Massiah* column appeared in 2001. Eight years later, the Court overruled *Jackson* and essentially returned *Massiah* to its original purpose: to forbid law enforcement from surreptitious attempts to elicit incriminating statements from indicted defendants.

In *Montejo v. Louisiana*,[168] the Court was presented with a procedural *Massiah* context that it had yet to face. Jackson was given the opportunity to request counsel at his arraignment, and he did. Patterson did not have an opportunity to request counsel, and no counsel was appointed. In *Montejo*, Louisiana law required the judge at an early hearing to appoint counsel for indigent defendants who were entitled to counsel.[169] Thus, unlike Patterson, Montejo had been appointed counsel. But unlike Jackson, Montejo made no request for counsel. The issue was whether *Jackson* prohibited police from seeking a *Miranda* waiver from Montejo when it did not forbid police from seeking a *Miranda* waiver from Patterson.

Justice Scalia, writing for a five-justice majority, pointed out that there was no fair way to square the *Jackson* circle given that states had different approaches to the appointment of counsel at early judicial proceedings. Some states require indigent defendants to request counsel at the early proceedings or no counsel is appointed.[170] Some states automatically appoint counsel for indigent defendants.[171] Some states permit defendants to request counsel but also authorize the judge to appoint counsel if there is no request.[172]

If the Court ruled that a request for counsel was required to trigger *Jackson*, then Montejo could not prevail even though he had been appointed counsel. In states that automatically appointed counsel, defendants could never benefit from *Jackson* because they would never request counsel. If the presence of counsel after adversary proceedings had begun is the key to *Jackson*, then all defendants who have counsel, by request or appointment, should be treated the same. Montejo should win even though Patterson lost. But that goes contrary to the

---

167 *See id.*

168 Montejo v. Louisiana, 556 U.S. 778, 786–87 (2009).

169 *See* LA. CODE CRIM. PROC. ANN. art. 230.1 (2023).

170 That was the Michigan approach that led to the *Jackson* holding. *Montejo*, 556 U.S. at 783.

171 *Id.*

172 *Id.* at 784.

Edwards-Jackson principle that it is the request for counsel that forbids police from seeking a *Miranda* waiver.

If the *Jackson* rule cannot be squared to be both logical and fair, what to do? The Court's answer: overrule *Jackson*! Defendants who did not want to talk to police could request counsel or invoke the right to silence when given *Miranda* warnings. Why layer on an *Edwards*-type prophylactic rule?

> Under the [*Miranda* and *Edwards*] . . . line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached. And if so, then *Jackson* is simply superfluous.[173]

But notice: once *Jackson* is overruled, *Massiah* is waived when *Miranda* is waived, and *Massiah* is no longer a second track by which to measure whether police have complied with constitutional standards when conducting custodial interrogation after judicial proceedings have begun.[174] This might not be the best way to understand the Sixth Amendment right to counsel, but it is simpler than the world that existed after *Jackson* and *Patterson*. Post-judicial proceedings, when a defendant explicitly waives *Miranda* and speaks to police without counsel present, *Massiah* is satisfied.

VI
BREWER V. *WILLIAMS*: TODAY

Though there is some doubt that Williams was guilty of the crime committed on Christmas Eve in 1968,[175] there is no

---

173 *Id.* at 794–95 (citation omitted) (quoting Texas v. Cobb, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring)).

174 An explicit waiver of *Miranda* waives *Massiah*. *Montejo* settles this much. It is possible that an implicit waiver of *Massiah* might be more difficult for the State to show than an implicit waiver of *Miranda*, as I noted in the discussion of *Brewer*. But given the retreat from *Jackson*, I think the chance the Court will read *Massiah* this broadly is close to zero.

175 The case for his innocence was that the victim was killed by a janitor at the YMCA who then hid the body in Williams's room. *See* Williams v. Nix, 700 F.2d 1164, 1168 (8th Cir. 1983). Upon discovering the body, and fearing the inevitable inference, Williams "panicked, fled, and hid the body" where it was ultimately found. *Id.* According to the Eighth Circuit, the defense theory of innocence "is

doubt that the crime was heinous and that the perpetrator deserved conviction. And there is no doubt that if the Constitution permitted police to learn the location of the body from Williams, that fact should be admitted into evidence. Today, the Constitution is more forgiving of police attempts to obtain incriminating statements.

In a hypothetical Williams case, 2024, note first that *Massiah* would not even apply to interrogation about the murder of Pamela Powers. Murder is a different offense from child abduction, and Williams today would have a *Massiah* right to counsel that might suppress statements only in a prosecution for child abduction. His murder conviction would be affirmed.[176]

Moreover, today courts would likely find a waiver of *Miranda* and thus of *Massiah* even in the child abduction prosecution. In *Berghuis v. Thompkins*,[177] the police gave *Miranda* warnings and then questioned the suspect for about three hours.[178] He made no meaningful response.[179] Then police officer Helgert preyed upon his belief in God:

> About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away.[180]

The Court held that his statement in the absence of coercion was a waiver of *Miranda*.[181] In *Brewer*, two hours elapsed between the Christian burial speech and Williams directing the police to the child's body. If a response directly after a plea to

---

not so far-fetched as it sounds." *Id* . Some evidence in Williams's favor: A witness heard the sounds of a struggle coming from the janitor's room shortly after the victim's disappearance, and the janitor made what one witness called "furtive preparations to depart" shortly after the crime occurred. Phillip E. Johnson, *The Return of the "Christian Burial Speech" Case*, 32 EMORY L.J. 349, 359 (1983). Moreover, according to defense lawyers, the janitor had a history of child molestation. *Williams Trial Is Delayed*, CEDAR RAPIDS GAZETTE, June 15, 1977, at 1A. He could not be located for the first trial; by the time of the second trial, he had been killed in an auto accident. Johnson, *supra* note 175, at 359. For details on the retrial, see *id.*

176 *See Cobb*, 532 U.S. at 184 (Breyer, J., dissenting).

177 Berghuis v. Thompkins, 560 U.S. 370 (2010).

178 *Id.* at 375.

179 *Id.* at 375–76.

180 *Id.* at 376 (citations omitted).

181 *Id.* at 388–89.

the suspect's religious nature was a waiver, then a response two hours after a similar plea to the suspect would be a waiver.

Key to the Court's reasoning in *Berghuis* is the majority's view that the suspect understood his *Miranda* rights and chose to talk.[182] Those factors are even more clear in *Brewer*. Williams had been given *Miranda* warnings three times, once by the police when he was arrested in Davenport, once by the arraignment judge, and once by Leaming. In addition, he had been advised by Kelly, the public defender in Davenport, to make no statements until he had consulted with McKnight.[183]

Moreover, Williams said to Leaming "several times that '[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story.'"[184] He obviously knew he could remain silent and yet chose to lead the police to the body. Yes, he was almost certainly influenced by Leaming's Christian burial speech, but the suspect in *Berghuis* was influenced by the officer's appeal to his religious nature. In 2024, Williams would likely lose any *Massiah* claim because he had waived *Miranda*.[185]

VII
Brewer v. *Williams*: The Epilogue

The *Brewer* Court broadly hinted that a retrial of Williams using the body as evidence was possible. In footnote 12, the Court said that it was not deciding whether the body was admissible as evidence in a retrial and then noted that "evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams."[186]

Williams was retried. The body was introduced in evidence, along with the testimony of the young man who saw legs that were "skinny and white" protruding from the blanket when he helped Williams get into his car at the Des Moines YMCA on December 24, 1968.[187] He was convicted again.

---

182 *Id.*

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

184 *Id.* at 392 (alteration in original).

185 For an argument that an implicit waiver of *Miranda* might not waive *Massiah*, see *supra* note 174.

186 *Brewer*, 430 U.S. at 407 n.12 (citing Killough v. United States, 336 F.2d 229 (D.C. Cir. 1964)).

187 *Id.* at 390.

In *Nix v. Williams*,[188] the Court recognized an inevitable discovery exception to the exclusionary rule and rejected Williams's argument that the State failed to meet its burden to show that the body would have been inevitably discovered.[189] The Williams case thus changed constitutional criminal procedure doctrine in two ways. First, it dragged *Massiah* from its roots as a prohibition of surreptitious police elicitation to become an adjunct to *Miranda* in the custodial interrogation context. Second, it created one more exception to the exclusionary rule. As Tracey Maclin has demonstrated in his book on the Fourth Amendment exclusionary rule, even the Warren Court began to have doubts about an automatic exclusion of reliable evidence of guilt.[190] The Williams case created another way for courts to admit evidence seized in violation of the Fourth Amendment.[191]

As the evolution of constitutional criminal procedure makes plain, exclusion of reliable evidence of guilt is emotionally difficult for many judges when the crime is a horrific one.[192] Most of the judges who had a role in the Williams case believed that the jury should hear the evidence that he led police to the body. All nine Iowa state supreme court justices believed that was the morally or legally just outcome.[193] The Supreme Court dissenters in *Brewer v. Williams* believed that was the best legal outcome. Even the Supreme Court majority seemed to feel that a retrial should occur with the jury hearing evidence about the body.

---

188 Nix v. Williams, 467 U.S. 431 (1984).

189 *Id.* at 443–44.

190 *See generally* TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE (2013).

191 *Nix* of course involved only the question whether the Sixth Amendment would exclude evidence. But the Court now recognizes it in the context of the Fourth Amendment as well. *See* Murray v. United States, 487 U.S. 533, 537 (1988).

192 For example, *Mapp v. Ohio*, 367 U.S. 643, 657 (1961), appeared to hold in 1961 that a "prosecutor may make no use of evidence illegally seized" by violating the Fourth Amendment. By the time the Court gets to 2009, however, it would suggest that exclusion is appropriate only when the police conduct that produced the evidence was "deliberate, reckless, or grossly negligent." *See* Herring v. United States, 555 U.S. 135, 144 (2009).

193 I am assuming here that the dissenting judge's reluctance to vote to suppress the evidence was shared by the three judges who joined the dissent.

Robert Williams died in the Fort Madison, Iowa penitentiary of natural causes on December 20, 2017,[194] almost exactly 48 years after Pamela Powers was abducted, raped, and murdered.

VIII
POST-SCRIPT

In her 2001 FindLaw column, Sherry said that "[t]here is an historical answer" to the question of why there was a parallel *Massiah* track that ran alongside *Miranda*.[195] She located the relevant history in *Massiah* arising two years before *Miranda* as a partial response to the hopeless indeterminacy of the common-law voluntariness standard by which confessions are judged admissible or not.

As I hope this Article has shown, the historical reason is also rooted in the Court's reluctance to use *Miranda* to overturn a conviction for the rape and murder of a child on Christmas Eve in 1968 in Des Moines, Iowa. Law is not science or math. There are real human beings deciding whether to suppress evidence of horrific crimes.

It took three decades for the Court to sort out the *Massiah* doctrinal mess caused by *Brewer v. Williams*. But *Montejo* finally got the job done.

To my knowledge, Sherry never commented on *Montejo* but it, in effect, adopted her position. She was prescient in 2001 when she called for *Massiah* to be overruled as a constitutional limitation on custodial police interrogation. That deed is now done. *Miranda* is now the only constitutional limitation on custodial interrogation (other than due process).[196] *Massiah* still applies to surreptitious elicitation of statements and thus fills a gap in the protection offered by *Miranda*. The two rights are now complementary instead of being in competition with each other. Coherence has been restored.

---

194 William Petroski, *Des Moines Child Killer Robert Anthony Williams Dies in Prison*, DES MOINES REGISTER (Dec. 21, 2017), https://www.desmoinesregister.com/story/news/politics/2017/12/20/des-moines-child-killer-robert-anthony-williams-dead-73/971490001/ [https://perma.cc/9PHY-VNNL].

195 Colb, *supra* note 8.

196 For an argument that *Massiah* might still have a role to play in the custodial interrogation context, see *supra* note 174.