

1977


## Foreword: Brewer v. Williams--A Hard Look at a Discomfiting Record

Yale Kamisar

*University of Michigan Law School, ykaminsar@umich.edu*

Available at: <https://repository.law.umich.edu/articles/289>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Constitutional Law Commons](#), [Criminal Procedure Commons](#), [Evidence Commons](#), [Litigation Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Kamisar, Yale. "Foreword: Brewer v. Williams--A Hard Look at a Discomfiting Record." *Geo. L. J.* 66 (1977): 209-43.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## FOREWORD: *BREWER V. WILLIAMS*—A HARD LOOK AT A DISCOMFITING RECORD\*

YALE KAMISAR\*\*

Resistance to the disclosure of [incriminating] information is considerably increased . . . if something is not done to establish a friendly and trusting attitude on the part of the subject. Once rapport is established, you have begun the “yes” attitude. The following devices are recommended: . . . Establish confidence and friendliness by talking for a period about everyday subjects. In other words, have a “friendly visit.”

—*The Gentle Art of Interviewing and Interrogation*<sup>1</sup>

I told [Mr. Williams his rights]. I further added [that] you and I both know that you are represented by counsel here [in Davenport and] in Des Moines. . . .

I then further advised him that I wanted him to be sure to remember what I had just told him because it was a long ride back to Des Moines and he and I would be visiting.

—Captain Leaming, chief  
of detectives, Des Moines  
Police Department<sup>2</sup>

In recent decades, few matters have split the Supreme Court, troubled the legal profession, and agitated the public as much as the

---

\*This article turned out to be entirely different from the one that I had planned to write. I was about halfway through the article I originally intended to write, one appraising the various opinions in *Brewer v. Williams*, 430 U.S. 387 (1977), in light of *Massiah v. United States*, 377 U.S. 201 (1964), *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Michigan v. Mosley*, 423 U.S. 96 (1975), when I dipped into the record to clarify one point. I never got back out. I found the record contradictory, bewildering, and at times nothing less than flabbergasting. This article is the result. It more or less “wrote itself,” but any mistakes are mine.

The writing of this article was greatly aided by the excellent Supreme Court brief written by respondent Williams’ court appointed counsel, Professor Robert D. Bartels of the University of Iowa College of Law. It should be emphasized that Professor Bartels did not try the case. He did not enter the picture until Williams sought federal habeas corpus relief.

\*\*Professor of Law, University of Michigan; A.B. 1950, New York University; LL.B. 1954, Columbia University.

1. F. ROYAL & S. SCHUTT, *GENTLE ART OF INTERVIEWING AND INTERROGATION* 61-62 (1976).
2. Brief for Petitioner, Joint App. at 75, *Brewer v. Williams*, 430 U.S. 387 (1977).

police interrogation-confession cases. The recent case of *Brewer v. Williams*<sup>3</sup> is as provocative as any, because the Supreme Court there reversed the defendant's conviction for the "savage murder of a small child" even though no Justice denied his guilt,<sup>4</sup> he was warned of his rights no fewer than five times,<sup>5</sup> and any "interrogation" that might have occurred seemed quite mild.<sup>6</sup>

On Christmas Eve, 1968, a ten-year-old girl, Pamela Powers, disappeared while with her family at the Des Moines, Iowa, YMCA.<sup>7</sup> It later turned out, as feared, that she had been raped and murdered.<sup>8</sup> Suspicion soon focused on defendant Williams, an escapee from a mental institution and a deeply religious person or, to put it more

---

3. 430 U.S. 387 (1977). Although *Williams* raises questions that will long be debated, one issue has already been resolved. Chief Justice Burger doubted that a successful retrial of Williams "is realistically possible." *Id.* at 416 n.1 (Burger, C.J., dissenting). On the other hand, Justice Marshall "doubted very much that there is any chance a dangerous criminal will be loosed on the streets, the bloodcurdling cries of the dissents notwithstanding." *Id.* at 408-09 (Marshall, J., concurring). Williams has since been retried and reconvicted of first-degree murder. Des Moines Register, July 16, 1977, §A, at 1, col. 1. He was resentenced to life imprisonment. *Id.*, Aug. 20, 1977, §B, at 12, col. 4. In a ruling prior to Williams' second trial, the court held that evidence of the discovery of the girl's body was admissible because of the likelihood that the body would have been discovered even without Williams' statements. Y. KAMISAR, W. LAFAYE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 170 (Supp. 1977).

4. *Brewer v. Williams*, 430 U.S. 387, 416 (1977) (Burger, C.J., dissenting). Williams never confessed to the sexual molestation or slaying of the child. Des Moines Register, July 6, 1977, §A, at 4, col. 1. At his second trial the defense admitted that Williams had carried the body out of the YMCA building and had disposed of it but contended that the child had been sexually assaulted and killed by someone else before being placed in Williams' room in the YMCA. *Id.*, §A, at 1, col. 3. The defense claimed that because Williams was an escapee from a mental institution and had previously molested children, he panicked when he found the body in his room and decided to get rid of it immediately, hoping not to be implicated. *Id.*, July 10, 1977, §A, at 2, col. 1.

Because discovery rules had been liberalized since the first trial, defense lawyers received all investigative reports on the murder, some of which indicated that the police had considered the possibility that the rapist-killer was sterile because the medical examiner who performed the autopsy found semen, but no sperm, in the girl's body. *Id.*, July 14, 1977, §A, at 3, col. 1. These police reports had not been available to the defense at the first trial. *Id.* The defense maintained that Williams was not sterile and that the child's killer had been, but medical experts disagreed sharply over whether the frozen state of the little girl's body would have preserved any sperm present in the body at the time of the murder. *Id.*, July 12, 1977, §A, at 4, col. 5-6.

Although never mentioning his name at the trial (perhaps because the defense could produce no evidence that he was sterile), *id.*, July 9, 1977, §A, at 3, col. 3, the defense raised questions concerning the possibility that the killer might have been Albert Bowers, a former janitor of the building assigned to clean the YMCA washrooms on the day the child apparently was abducted from a washroom. Bowers was killed in a car accident some three years after the first trial and six years before the second. *Id.*, July 6, 1977, §A, at 11, col. 3. According to the defense, Bowers had a history of sexual molestations.

5. *Brewer v. Williams*, 430 U.S. 384, 416 (1977) (Burger, C.J., dissenting).

6. See text accompanying notes 41-42 *infra*.

7. 430 U.S. at 390.

8. Brief for Petitioner at 4, *Brewer v. Williams*, 430 U.S. 387 (1977).

aply, “a young man with quixotic religious convictions.”<sup>9</sup> A warrant was issued for his arrest on a charge of “child-stealing.”<sup>10</sup> Williams, who had fled the state, telephoned a Des Moines lawyer named McKnight and on the attorney’s advice surrendered himself to the Davenport, Iowa, police.

Two Des Moines detectives—Captain Leaming, chief of detectives and a nineteen-year veteran of the Des Moines Police Department, and Detective Nelson, a member of the homicide squad and a fifteen-year veteran of the force—arranged to drive the 160 miles to Davenport, pick up Williams, and return him directly to Des Moines.<sup>11</sup> Before being driven back to Des Moines, Williams was advised of his right to remain silent many times: by a Davenport police officer, Lieutenant Ackerman; by the Davenport judge who arraigned him on the child-stealing warrant; by McKnight; by Captain Leaming himself; and by a local Davenport attorney named Kelly.<sup>12</sup> Williams also asserted his rights many times: he requested and was granted a “private audience” with the Davenport judge;<sup>13</sup> after his first meeting with his Davenport lawyer, the lawyer informed the Davenport police that his client did not want to talk to the police until he met with his Des Moines lawyer;<sup>14</sup> after Leaming advised him of his rights, Williams asked to meet alone with the Davenport lawyer and was allowed to do so;<sup>15</sup> when Leaming was about to put handcuffs on him and start the journey back, Williams again asked to confer alone with his lawyer and again his request was granted;<sup>16</sup> and on the trip back to Des Moines he told Captain Leaming several times that he would tell him “the whole story *after* I see McKnight” back in Des Moines.<sup>17</sup>

---

9. 430 U.S. at 412 (Powell, J., concurring).

10. Brief for Petitioner, Joint App. at 24-25.

11. *Id.* at 25, 37-38, 53, 60, 97.

12. *See id.* at 42 (Lieutenant Ackerman testifying that Williams was warned of his rights when arrested); *id.* at 45 (Lieutenant Ackerman testifying that Williams conferred with Kelly, his Davenport lawyer); *id.* at 47 (Williams testifying that McKnight told him over the phone not to answer any questions until he was in McKnight’s presence); *id.* at 49-51 (Williams testifying that he was advised of his rights by Lieutenant Ackerman and Judge Metcalf and that he conferred with Kelly on several occasions); *id.* at 52 (Williams testifying that Kelly advised him to do his talking when he got to his lawyer in Des Moines); *id.* at 75 (Captain Leaming testifying that he advised Williams of his rights).

13. *Id.* at 50.

14. *Id.* at 44, 73.

15. *Id.* at 75 (testimony of Captain Leaming).

16. *Id.* at 76 (testimony of Captain Leaming).

17. *Id.* at 58, 61 (emphasis added) (testimony of Captain Leaming); *see id.* at 60, 65 (same).

Captain Leaming “theorized”<sup>18</sup> that the child’s body was buried in the Mitchellville area, a suburb of Des Moines that he and his prisoner would pass on the drive back. Because of bad weather and various stops, the return trip to Des Moines took between five and six hours,<sup>19</sup> and given the freezing rain, slippery roads, and some stops along the way, the drive to the Mitchellville area probably took three or four hours—plenty of time for a skilled interrogator to obtain a confession.<sup>20</sup>

Both the trial court<sup>21</sup> and the federal district court<sup>22</sup> found, despite Captain Leaming’s testimony to the contrary, 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.<sup>23</sup> The federal district court found, also over Leaming’s

---

18. Captain Leaming knew that Williams had headed east and that some of the little girl’s clothing had been found in the Grinnell area about 50 miles east of Des Moines. The captain “figured” that Williams “had probably got rid of the body as soon as he possibly could after he left Des Moines.” *Id.* at 65. That made Mitchellville, a town 10-15 miles east of Des Moines, a strong possibility. Moreover, a search party had examined both the entire Grinnell area and the Newton area (30 miles east of Des Moines) without finding the girl’s body. So the captain “theorized” or “figured Mitchellville.” *Id.* at 61, 65, 93-94.

19. *Id.* at 48, 56, 93, 98.

20. This point is graphically illustrated by the 1963 congressional testimony of David Acheson, then United States attorney for the District of Columbia:

[I]n some very high percentage of the cases a confession is made if it is going to be made at all, within an hour or two, perhaps 3 hours after arrest. In the great majority of cases a confession is made fairly promptly after arrest. . . . At the present time for all practical purposes if [a suspect] can hold out for 2 hours, 2½ hours, he is pretty well in the clear, but very few of them do.

*Hearings on H.R. 7525 and S. 486 Before the Senate Comm. on the District of Columbia*, 88th Cong., 1st Sess. 443 (1963).

21. Brief for Petitioner, Joint App. at 1-2.

22. *Williams v. Brewer*, 375 F. Supp. 170, 173, 176 (S.D. Iowa 1974). In the federal district court both sides agreed that the case would be submitted on the trial court record without the taking of further testimony. *Id.* at 172. The federal court, however, made many more findings of fact than had the state court.

23. Brief for Petitioner, Joint App. at 54, 78, 90. According to the record, in the course of a long-distance phone conversation with Williams, McKnight told his client, in the presence of Leaming and his superior, Chief Nichols, that Williams would not be questioned about, and should not reveal anything about, the case until he returned to Des Moines and conferred with his lawyer. *Id.* at 38-40. Apparently both the trial court and federal district court concluded that *by their silence* the Des Moines police “agreed” to “go along” with McKnight on this matter. The *Williams* majority opinion, however, states that “[a]s a result of these [phone] conversations, it was agreed between McKnight and the Des Moines police officials that Detective[s] Leaming and [Nelson]. . . would not question [Williams] during the trip [back to Des Moines].” 430 U.S. at 391. But there is no indication in the record that after McKnight concluded his phone conversation with Williams *anything* was said by McKnight or by the Des Moines police about not questioning Williams on the return trip. The record does not show an explicit agreement or even that McKnight directly instructed Chief Nichols or Captain Leaming that Williams was not to be questioned on the return trip. *See also* note 88 *infra*.

Captain Leaming not only denied that there was any agreement, he also denied *hearing McKnight tell* Williams that he would not be questioned on the return trip. Brief for Petitioner,

denial,<sup>24</sup> that Kelly requested and was refused permission to ride along on the trip back to Des Moines<sup>25</sup> and that Kelly told the captain that it was his understanding that Williams was not to be questioned about the case until he met with his Des Moines lawyer.<sup>26</sup>

Whether Leaming “questioned” Williams on the long drive back to Des Moines, whether Williams waived his rights, and what other critical events occurred on that long drive turns on the captain’s

---

Joint App. at 78, 90. Chief Nichols, however, who listened to McKnight’s end of the phone conversation along with Leaming, did testify that he heard McKnight tell Williams that he would not be questioned on the return trip and that Williams should not disclose anything about the case until after he conferred with his lawyer back in Des Moines. *Id.* at 38-40. Presumably, this conflict between the chief and the captain led the trial judge to observe that he was “not entirely convinced” that Captain Leaming “testified with complete candor . . . regarding the ‘agreement’ with Defendant’s attorney.” *Id.* at 2. The best interpretation of the record, I believe, is that the chief simply expected or supposed or assumed that Captain Leaming would not try to elicit incriminating information from Williams on the return trip—or that Williams would be so “fortified” by advice from both his Davenport and Des Moines lawyers that there would be no point in trying to do so. *Id.* at 40-41.

Kelly, Williams’ Davenport lawyer, testified that he told the captain that “it was my understanding that Mr. Williams was to be returned to . . . Des Moines and after his return . . . that [McKnight] would talk to Williams in Leaming’s office, and at that time he would reveal where the body [child?] was.” *Id.* at 107. According to Kelly, Leaming replied, “This isn’t quite the way I understand it,” and Kelly retorted that he thought *his* understanding of the arrangements “should be carried out.” *Id.* There is no indication in Kelly’s testimony that Leaming made any response. *Id.* Because there is no indication in the record that Kelly had any communication with McKnight, whatever Kelly knew about the agreement presumably came from Williams. Thus, if any agreement had been struck between McKnight and the police after the Williams-McKnight phone conversation, Kelly would have known no more about it than Williams.

Dissenting from the Eighth Circuit’s ruling that Williams was entitled to a new trial, Judge Webster commented, “I cannot but assume that the alleged ‘broken promise’ of Captain Leaming is at the root of the result reached in this case.” *Williams v. Brewer*, 509 F.2d 227, 237 (8th Cir. 1974). But “whatever its subliminal influence on the majority, the [Supreme Court’s] decision in *Williams* did not seem to turn on the police agreement.” Y. KAMISAR, J. GRANO, & J. HADDAD, *CRIMINAL PROCEDURE* §6.4550 (1977). Rather, it seemed to turn on the following: Before Williams started for Des Moines, judicial proceedings had been initiated against him and his right to the assistance of counsel had attached; he repeatedly asserted and exercised this right and the Government failed to establish that he intentionally relinquished it during the drive. 430 U.S. at 401, 404-06.

In his separate concurrence, however, Justice Stevens talked about the defendant “plac[ing] his trust” in a lawyer who “in turn trusted the Iowa law enforcement authorities to honor a commitment made during negotiations which led to the apprehension of a potentially dangerous person,” and stressed that “if in the long run, we are seriously concerned about the individual’s effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.” *Id.* at 415. Assuming that the facts were as the state trial court and federal district court findings evidently led Justice Stevens to believe, his viewpoint would be most forceful.

24. See Brief for Petitioners, Joint App. at 55 (Leaming denying that Kelly requested permission to ride with him to Des Moines); *id.* at 61, 78, 90 (Leaming denying that Kelly told him not to question Williams during the ride back to Des Moines).

25. 375 F. Supp. at 173, 176.

26. *Id.*

largely uncorroborated testimony.<sup>27</sup> Williams sharply disputed the captain on many points but, as might be expected, none of the courts that passed on the case paid any attention to what he had to say.<sup>28</sup> Yet when the captain got into a controversy with Williams' Des Moines attorney and into two more disputes with Williams' Davenport lawyer, the federal district court disbelieved Leaming all three times.

To ask whether the disclosure made by Williams on the long drive back should have been excluded is to ask not one question, but a range of questions about *Massiah v. United States*,<sup>29</sup> *Miranda v. Arizona*,<sup>30</sup> and even the hoary "voluntariness" test. Yet none of these questions can be answered without a careful examination of the record

---

27. Detective Nelson, who drove the car on the return trip to Des Moines while Leaming and Williams "visited" in the back seat, was unable to make out "much of the conversation" because Williams "spoke so low." Brief for Petitioner, Joint App. at 101. He did, however, sharply contradict Leaming on one important point. Sometime before Williams announced that he was going to reveal where the little girl's body was, Williams asked the captain whether the police had found "a girl's shoes" or "her shoes." *Id.* at 58, 81. When the captain replied that he did not know, Williams (according to Leaming) pointed to a Skelly station that could be seen from the expressway and said that he had put the shoes there. *Id.* at 58-59, 82. Judge Webster, dissenting from the Eighth Circuit's decision that Williams' disclosures should have been excluded, maintained that Williams' question about the shoes was "triggered . . . by something [he] saw . . . a filling station." *Williams v. Brewer*, 509 F.2d 227, 237 (8th Cir. 1974); see *Brewer v. Williams*, 430 U.S. 387, 433 (White, J., dissenting) (Williams asked about victim's clothing because he saw gas station where he had concealed her shoes).

According to Detective Nelson, however, when Williams raised the question of the girl's shoes, the filling station just off the Grinnell exit was not yet in view: "We hadn't come to Grinnell. We were quite a ways away yet at that time." And "we asked Williams if the boots were with the other articles and he stated no, they were behind a filling station . . . just off the exit to Grinnell." Brief for Petitioner, Joint App. at 100. According to Nelson, he then asked Williams which Grinnell exit to take and when Williams told him and they came upon two filling stations, he then asked Williams which station was the one where he had put the shoes. *Id.* When Williams told him, according to Nelson, he asked Williams where the boots would be if they were there. *Id.* The filling station owner also testified that when Williams and the two detectives drove into his station, one of the detectives asked Williams, "Now where did you put the boots at?" *Id.* at 72.

In short, according to Leaming—whose version seems to have been regarded by the courts as the only version—Williams saw the filling station as they were driving along the freeway and led the police from the freeway to the trash receptacle behind the filling station *without being asked a single question*; Williams just "nodded his head, that station right over there as we were coming along the freeway and at that time you could see it up there." *Id.* at 59. According to Nelson, however, there was no station "right over there," and when Williams brought up the subject of the shoes, the police asked at least *four questions* before Williams looked in the receptacle behind the filling station.

28. But the Model Code of Pre-Arrest Procedure "directs the court to give weight to the defendant's account in any factual dispute if it finds that the police department has not set up procedures [full written records and sound recordings] to insure compliance with the Code or has not diligently and in good faith sought to comply with the recordkeeping provisions." A MODEL CODE OF PRE-ARREST PROCEDURE § 130.4, Commentary at 343 (Official Draft, 1975) [hereinafter cited as MODEL CODE].

29. 377 U.S. 201 (1964).

30. 384 U.S. 436 (1966).

in *Brewer*. Much attention has been devoted to the so-called "Christian burial speech" that Captain Leaming delivered on the return trip,<sup>31</sup> but this approach focuses attention on a single snapshot rather than a mural. The speech took no more than a minute or two. What happened the rest of the time? What preceded the speech? What did Leaming tell Williams and how often and at what points along the way? How did Williams respond? When? What did Williams ask Leaming? When? How did Leaming respond, if at all? And if he did, when? Everything hangs on the captain's version of the events.

#### THE RECORD EXAMINED

Captain Leaming's testimony is less clear than it ought to be as to just when he rendered his now famous Christian burial speech.<sup>32</sup> The best reading of the record, and one confirmed by the testimony of Detective Nelson,<sup>33</sup> who drove the car while Leaming and Williams "visited" in the back,<sup>34</sup> is that it occurred only a short time after they left the Davenport area and entered the freeway. By that time, according to Leaming, he and his prisoner had already "discussed religion . . . intelligence of other people . . . police procedures, organizing youth groups, singing . . . playing an organ, and this sort of thing."<sup>35</sup> According to Leaming, Williams "was very talkative"<sup>36</sup> and "a real good talker."<sup>37</sup> He must have also been a fast one to have touched upon so many topics in the relatively few minutes that elapsed between the time the Leaming party left Davenport and the time Leaming made the speech.

And now to the Christian burial speech itself. The United States Supreme Court and four other courts pondered and dissected this speech,<sup>38</sup> yet, curiously, none of them discussed the fact that Captain

---

31. See text accompanying notes 41-42 *infra*.

32. Compare Brief for Petitioner, Joint App. at 63 (not very far out of Davenport on the way to Des Moines) with *id.* at 81 (much discussion preceded the speech).

33. See *id.* at 104 (Nelson testifying that immediately after they got on the freeway, Leaming asked Williams to think about revealing the location of the body).

34. See *id.* at 55, 75 (Captain Leaming testifying that he reminded Williams of his *Miranda* rights and that he was represented by counsel "because we'll be visiting between here and Des Moines").

35. *Id.* at 81.

36. *Id.*

37. *Id.* at 87.

38. See *Brewer v. Williams*, 430 U.S. 387, 392-93 (1977) (quoting only from second version without acknowledging that there is another version); *id.* at 431-32 (White, J., with Blackmun & Rehnquist, JJ., dissenting) (same); *Williams v. Brewer*, 509 F.2d 227, 230 (8th Cir. 1974) (same); *id.* at 235 (Webster, J., dissenting) (same); *Williams v. Brewer*, 375 F. Supp. 170, 174-75 (S.D. Iowa 1974) (same); *State v. Williams*, 182 N.W.2d 396, 403 (Iowa 1971) (quoting briefly



Leaming offered two—and, in my judgment, two significantly different—versions of it. The captain's first version was given on April 2, 1969, at a pretrial hearing to suppress evidence;<sup>39</sup> his second version, which was the only one quoted and discussed by the Supreme Court and lower federal courts, was given at the trial held four weeks later.<sup>40</sup> Evidently, nobody noticed at the trial that the version Leaming then gave differed in several respects from his earlier version. He was not asked to explain any inconsistencies and did not do so. The two versions, with related testimony, are set out below:

First Version

I said to Mr. Williams, I said, "Reverend, I'm going to tell you something. I don't want you to answer me, but I want you to think about it when we're driving down the road." I said, "I want you to observe the weather. It's raining and it's sleeting and it's freezing. Visibility is very poor. They are predicting snow for tonight. I think that we're going to be going right past where that body is, and if we should stop and find out where it is on the way in, her parents are going to be able to have a good Christian burial for their little daughter. If we don't and it does snow and if you're the only person that knows where this is and if you have only been there once, it's very possible that with snow on the ground you might not be able to find it. Now I just want you to think about that when we're

Second Version

Eventually, as we were traveling along there, I said to Mr. Williams that, "I want to give you something to think about while we're traveling down the road." I said, "Number one, I want you to observe the weather conditions, it's raining, it's sleeting, 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

---

from first version without acknowledging that there is another version); *id.* at 407 (Stuart, J., dissenting) (quoting from second version without acknowledging that he is quoting from different version than majority used).

39. Brief for Petitioner, Joint App. at 63.

40. *Id.* at 66, 81, 84.

First Version

driving down the road." That's all I said.

Q. About where were you when you said that?

A. Well, not very far out of Davenport. This is on the free-way.

Q. And now when you got to Mitchellville [the Mitchellville turnoff was about 145 miles from Davenport and about 10 to 15 miles outside of Des Moines], did you ask him had he thought about it?

A. No. As we were coming towards Mitchellville, we'd still be east of Mitchellville a ways, he said to me, "How do [did?] you know that [the body] would be at Mitchellville?" And I said, "Well, I'm an investigator. This is my job, and I just figured it out." I said, "I don't know exactly where, but I do know it's somewhere in that area." He said, "You're right, and I'm going to show you where it is."<sup>41</sup>

Second Version

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."

At that point Mr. Williams asked me why I should feel that we would be going right by it. I told him that I knew it was somewhere in the Mitchellville area and I didn't know exactly where, but I did know that it was somewhere in the Mitchellville area, and I felt that we should stop and look.

I stated further, "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." [After testifying that they stopped and got out to look for the child's shoes (when Williams asked whether they had been found) and stopped again to look for the blanket in which the child had been wrapped (when Williams asked whether it had been found), Captain Leaming continued:]

A. Well, we had further discussions about people and religion and intelligence and friends of his, and what people's opinion

---

41. *Id.* at 63.

### Second Version

was of him and so forth. And, oh, some distance still east of the Mitchellville turn-off he said, "I am going to show you where the body is." He said, "How did you know that it was by Mitchellville?" I told him that this was our job to find out such things and I just knew that it was in that area.<sup>42</sup>

Each version of the Christian burial speech has aspects that are more damaging to the prosecution than the other. For example, in the first version Captain Leaming only says: "*I think* that we're going to be going right past where that body is, and *if we should stop* and find out where it is on the way in, her parents *are going to be able* to have a good Christian burial for their little daughter. If we don't and it does snow and *if you [are]* the only person that knows where this is . . . " (emphasis added). The second version, however, is a good deal more powerful and emotional. This time the captain expresses his desires and preference much more emphatically, and puts a heavier burden on Williams: "*I feel that you yourself are* the only person that knows where this little girl's body is . . . . And, since *we will* be going right past the area . . . *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 . . . " (emphasis added).

What on their face are merely words expressing a strong preference for a certain course of action take on vivid color from the captain's rank, badge, gun, and demeanor,<sup>43</sup> from his standing as "a fine man" (Williams' lawyer told him so)<sup>44</sup> and as a sensitive, religious person

---

42. *Id.* at 81-84.

43. Cf. Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, in POLICE POWER AND INDIVIDUAL FREEDOM 29, 30 (C. Sowle ed. 1962) (discussing on-the-street questioning by investigative officers). Professor Foote only deals with a situation in which an officer stops a person on the street and questions him as to his identity and reason for being where he is, a confrontation that falls short of a full-fledged arrest. But Williams was plainly under arrest, plainly in custody, and thus experiencing additional coercion and anxiety.

44. Brief for Petitioner, Joint App. at 96 (testimony of Captain Leaming).

(Leaming himself told him so),<sup>45</sup> and from Williams' probable perception of Leaming as his protector and sympathizer.<sup>46</sup> Williams was Leaming's prisoner and so far Leaming had been nice to him. Williams would want very much to be nice to Leaming.<sup>47</sup> Under the second version of the speech on which all members of the Court relied, Captain Leaming had made his feelings perfectly clear to

45. Leaming testified that shortly after they entered the freeway, he advised Williams that "I myself had had religious training and background as a child, and that I would probably come more near praying for him than I would to abuse him or strike him." *Id.* at 80.

46. Attorney McKnight, who had accepted Leaming's offer to bring Williams back personally, tried to reassure an obviously frightened Williams over the phone that Leaming was a "fine man" who "won't let any harm come to you." *Id.* at 96. On the trip back, Williams expressed fear that Leaming wanted to kill him, and also that the state agents, who were following in a second car in case the first vehicle slid off the icy roads, might want to kill him, too. *Id.* at 66, 80 (testimony of Captain Leaming). Leaming assured Williams that he had no intentions of injuring him in any way or "allowing anyone else to molest or abuse him in any manner while he was in [his] custody." *Id.* at 80.

47. Even persons involved in much milder encounters with the police usually "desire to appear courteous and not to offend. [I]nterrogation is a social situation, and suspects respond according to the normal rules of social interaction in such a situation." Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 YALE L.J. 300, 315 (1967). This study was based on detailed interviews with 21 Yale faculty, staff members, and students who turned in their draft cards as part of an antiwar protest and were then questioned by FBI agents. When word spread that some students had been interrogated, a meeting was organized (the Monday meeting) and members of the Yale Law Faculty "spoke on the legal rights of persons being questioned . . . explained some of the workings of the criminal process, and discussed the possible objectives of the questioning;" the sense of the meeting was "that talking to the FBI could serve no useful purpose and might conceivably be harmful." *Id.* at 303. Nevertheless,

[E]ven after the Monday meeting, in which the nature of the interrogator's job—and in particular the fact that it *is* a job—was discussed, the suspects remained largely unable to treat their encounter as an early stage in a formal, adversary legal process. Instead, they tended to see the interview in personal terms, almost as if they were talking to a new acquaintance. . . .

....

The feeling of being socially obliged to answer *some* questions was mentioned to us by a sizable number of those questioned after Monday. . . . [E]ven with that background [the Monday meeting], many of them reported feeling rude when they repeatedly told the agents that they refused to answer. . . .

. . . [I]n the social situation we have described above, a question demands an answer (*Miranda* states legal, not social, rules). The suspect is thus in a position of having to *decide* whether to answer each question. In making each such decision, he is subject to [various stresses and incapacities], and above all to the disability of ignorance and the pressure of politeness.

*Id.* at 315-17 (emphasis in original).

A "social situation" had been established in the Des Moines police car by the time Captain Leaming delivered his speech. He and Williams had already engaged in considerable "small talk"—had been "visiting," to use Leaming's term—and Leaming had already emphasized that he had no personal feelings against his prisoner. See notes 45-46 *supra* and accompanying text.

Williams, and the latter—undoubtedly nervous,<sup>48</sup> possibly terrified,<sup>49</sup> probably ashamed, hands cuffed behind his back,<sup>50</sup> physically close to Leaming<sup>51</sup>—would have shrunk from the prospect of flustering, displeasing, or irritating his captor.<sup>52</sup>

Even when he had been in the more spacious and less coercive confines of the Davenport courthouse and Lieutenant Ackerman had asked him where the little girl was and whether she was safe—an admission by the lieutenant that was never followed up at the trial nor mentioned by any of the courts that passed on the case<sup>53</sup>—Williams

48. Even those questioned under the much milder conditions described in note 47 *supra* “were very nervous, on the whole. . . . The stakes were high and became more immediate by the very fact of interrogation. More important, they were confronting authority directly; as one suspect put it: ‘Well, it *was* the FBI, you know.’” Griffiths & Ayres, *supra* note 47, at 314-15. Well, it *was* a police captain, it was the chief of detectives of the Des Moines police force, you know.

49. When Williams phoned his Des Moines lawyer from Davenport, he expressed fear that somebody was “going to hit him in the head.” Brief for Petitioner, Joint App. at 96. On the drive back to Des Moines the first thing Williams asked Leaming was whether the captain “hated him” and “wanted to kill him.” *Id.* at 94-95, 79-80 (testimony of Captain Leaming). He also voiced concern that the state officers following them in another car might want to kill him. *See* note 46 *supra*.

50. Brief for Petitioner, Joint App. at 76, 83 (testimony of Captain Leaming).

51. Leaming and Williams had been sitting close together in the back seat, no objects intruding between them, and Williams knew they would be so positioned for the rest of the long trip. *See id.* at 55, 71, 77, 83, 98.

[T]o be physically close is to be psychologically close. The situation has a structure emphasizing to the persons involved the immediacy of their contact: in an encounter [defined by social scientists, the author noted earlier, as a “type of social arrangement that occurs when persons are in one another’s immediate physical presence”] there is opportunity for uninterrupted verbal communication, a strong awareness of expressive nonverbal signs, the maintenance of poise and a sense of roles, engrossment in the activity at hand, and an allocation of spatial position. . . .

. . . . 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.

Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 44-46 (1968) (footnotes omitted).

52. *See* note 47 *supra*.

53. At the pretrial hearing, Lieutenant Ackerman stated emphatically and repeatedly that he made no effort to question Williams and that the latter said nothing to him at all. Brief for Petitioner, Joint App. at 44-45. At the trial, however, when the lieutenant was cross-examined by Williams’ attorney, the following colloquy took place:

Q. Now didn’t you yourself want to question this defendant?

A. Yes, sir, I did.

Q. What did he say to you?

A. I only asked him one question, where was the little girl and was she safe. I told him that we were worried about the safety and the health of the little girl, and if she was alive and if she was in the area, we would like to know so that we could get help to her.

Q. Did he tell you that you ask my lawyer anything you want to know?

A. No, sir, he did not.

had been careful not to offend, not to refuse firmly to discuss the matter.<sup>54</sup> It is hard to believe that he would have done so on the long ride back to Des Moines. But Captain Leaming made it easy for Williams—for the moment. He told him just to *think about it*. The pressure would build, however, as they approached the Mitchellville turnoff.

The first thing that strikes one about the earlier version of the Christian burial speech is the very first word—"Reverend." *Why* did Leaming call Williams that? *How many times* did he do so on the drive back to Des Moines? These questions were never asked. *No* questions about Williams being addressed as Reverend were ever asked.

When Leaming began his Christian burial speech, he and his prisoner had been discussing religion in the back seat.<sup>55</sup> Had Williams just said something to the effect that he regarded himself as a man of God or someone dedicated to God?<sup>56</sup> Is that why Leaming chose this moment to launch the Christian burial speech? Or did Leaming call his prisoner Reverend simply because it is a standard interrogation technique, "when interrogating persons of low social status," to

Q. What did he say?

A. He said, "Don't you know."

Q. Then what did he say?

A. I says, "Know what?" And, "My lawyer knows."

Q. He said his lawyer knows?

A. His lawyer knows, and that's all that was said.

...

Q. Now let's forget about this violation of the constitutional rights. Let me ask you this [moving on to another topic].

*Id.* at 72-73.

It is hard to believe that when he headed home with Williams, Captain Leaming had not conferred with Lieutenant Ackerman and learned about the latter's attempt to elicit information from Williams and how Williams had responded. There is every indication that Leaming was a competent officer and it would seem that, as such, he would want to compare notes with the lieutenant who had placed Williams under arrest, booked him, and put him in a cell. *Id.* at 42; see F. ROYAL & S. SCHUTT, *supra* note 1, at 53 (before conducting interview or interrogation, officer should talk to any other investigators who may have preceded him on case). After Leaming arrived in Davenport, his prisoner-to-be was granted two more private meetings with his Davenport lawyer. Brief for Petitioner, Joint App. at 75-76. These two meetings took a total of 30-35 minutes, according to Leaming. *Id.* During this time, Leaming probably conferred with Lieutenant Ackerman. The record is silent on this point, as it is on too many others, but Leaming did state that after Williams' first meeting with his lawyer, which lasted some 20 minutes, he, Detective Nelson, and Lieutenant Ackerman reentered the room together. *Id.* at 76.

54. See note 53 *supra*.

55. Brief for Petitioner, Joint App. at 81.

56. Cf. F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 75 (2d ed. 1967) (suggesting that the interrogator appeal to suspect's pride; for example, by complimenting a clergyman accused of taking indecent liberties with a child for his dedication to God and sacrifices as a man of God).

address them by some title rather than by their first name?<sup>57</sup> Or did he do so simply because he was aware that “[t]he uneducated and underprivileged are more vulnerable to flattery than the educated person or the person in favorable financial or social circumstances”?<sup>58</sup>

The “Reverend” ploy would seem to reinforce another standard interrogation technique that is well illustrated in both versions of Leaming’s speech—the appeal to Williams as a religious person, a good Christian. Indeed, the leading manual on the subject discusses both stratagems under the same subheading: “Appeal to the Subject’s Pride by Well-Selected Flattery or by a Challenge to His Honor.”<sup>59</sup> Under that subheading, the manual points out:

It is occasionally helpful to appeal to the subject’s loyalty to a group of persons or to an organization whose reputation and honor has been jeopardized by the subject’s unlawful behavior. For instance, an appeal may be made in the name of the subject’s church, or any other organization or group toward which the subject appears to have some loyalty or allegiance.<sup>60</sup>

The federal district court did not find that Captain Leaming called Williams “Reverend,” and Leaming at the trial never said that he did. The attorney general of Iowa, however, did not deny it. Even though he contended that there was “little support *in the record*” for the federal district court’s finding “that Williams’ statements were obtained only after Detective Leaming’s use of psychology on a person whom he knew to be deeply religious and an escapee from a

---

57. *Id.* Interrogators are told that it is usually better to address persons of high social or professional status “by their first name, or by their last name without attaching the ‘Mr.,’ ‘Mrs.,’ or ‘Miss,’ ” in order to dispel their “usual feeling of superiority and independence,” but they are advised to address those of low status as “ ‘Mr.,’ ‘Mrs.,’ or ‘Miss,’ rather than by their first name.” *Id.* Addressing an escapee from a mental hospital who is black and who had only been a resident of the state for a few months as Reverend would seem to be applying this advice with a vengeance. “The person of low social status is flattered and acquires a feeling of satisfaction and dignity from such unaccustomed courtesy. By according this subject this consideration the interrogator enhances the effectiveness of whatever he says or does thereafter.” *Id.*

58. *Id.*

59. *Id.* at 73.

60. *Id.* at 76. Captain Leaming may have buttressed his appeal to Williams in the name of Christianity in still another way. In their very first conversation he told Williams that he himself “had had religious training and background as a child” and would “come nearer to praying for him than to abusing him.” See note 45 *supra* and accompanying text. This, in effect, informed Williams that Leaming knew and appreciated what Williams’ moral or religious obligations were under the circumstances.

mental hospital,"<sup>61</sup> he recognized that the "Reverend" stratagem constituted some support for the court's finding. Conceding that Leaming suspected that Williams was religious, the attorney general continued: "While Leaming's notions are *outside the record*, he admits he was in fact playing upon Williams' religious conscience when he made the statements which are of record. And when he addressed Williams as 'Reverend' he says he did so to win his friendship and confidence."<sup>62</sup>

In his opinion for the Court, Justice Stewart describes the Christian burial speech as follows: "Addressing Williams as 'Reverend,' the Detective said . . ."<sup>63</sup> Justice Stewart then gives the second version of the speech and related testimony in its entirety.<sup>64</sup> But Leaming did not address Williams as Reverend in the second version, only in the first.

The attorney general of Iowa was sufficiently troubled by the "Reverend" ploy to go outside the record to explain why Leaming employed it. Justice Stewart also was sufficiently impressed by the significance of the "Reverend" address to call attention to it. But why did Leaming delete it from his trial testimony? Did similar factors move Leaming to leave out other items as well? Or add others? Why is the earlier version, which Leaming more or less volunteered to tell,<sup>65</sup> ignored except for the very first word? Why does the second version become the official version?

The very first word of the first version of the Christian burial speech may be jarring, but the most striking thing to me about the first version, when read in its entirety, is that *something has to be missing*. Captain Leaming tells his prisoner that he thinks "we're going to be going right past where the body is," but does not tell him *where* he thinks it is. An hour or two later, as the car approached the

61. Brief for Petitioner at 12 (quoting *Williams v. Brewer*, 375 F. Supp. 170, 183 (S.D. Iowa 1974)) (emphasis in original).

62. *Id.* at 13 (emphasis in original).

63. 430 U.S. at 392.

64. *Id.* at 392-93.

65. When Captain Leaming was cross-examined at the pretrial hearing, the following colloquy occurred:

Q. You didn't ask Williams any questions?

A. No, sir, I told him some things.

Q. You told him some things?

A. Yes, sir. Would you like to hear it?

A. Yes.

A. All right. I said to Mr. Williams, I said, "Reverend, I'm going to tell you something.

Brief for Petitioner, Joint App. at 62-63.



Mitchellville turnoff, Leaming tells us that Williams asked him: "How do [did?] you know that it would be *at Mitchellville?*" (emphasis added). Sometime after he delivered the speech and sometime before Williams asked him how he knew the body was in Mitchellville, Leaming must have told Williams that he knew it was buried there. But when? Just before they approached the Mitchellville area? Immediately after Leaming delivered the speech? Somewhere in between? These questions were never asked at the pretrial hearing.<sup>66</sup>

Moreover, the first version begins "I don't want you to answer me" and ends "I just want you to think about that when we're driving down the road." In the second version, *the order is reversed*. The second time around Leaming did fill the gap—he said that he told Williams he "knew" the body "was somewhere in the Mitchellville area" immediately after delivering the speech. Moreover, in the second version Leaming said that he quickly added: "I don't want to discuss it any further." The first time he testified, however, Leaming never said that he told Williams he didn't want to discuss it any further.

The first version of the speech is considerably less solicitous of Williams' rights than the second. According to the first version, Leaming prefaced his remarks with "I don't want you to answer me," then jolted, or tried to jolt or at least to agitate Williams with the news that the police knew or thought they knew where the body was. If this is how Leaming made the statement, whatever the captain told Williams by way of introduction to the speech was probably dissipated by the main thrust of the speech. After all, Leaming made a strong pitch, and evidently a psychologically sound one. He appealed to someone he knew to be deeply religious in the name of religion. He did not ask Williams *whether* the little girl was alive or dead (as had Lieutenant Ackerman earlier in the day).<sup>67</sup> Nor did he ask Williams *whether* he knew where the body was (as had Ackerman).<sup>68</sup> Rather, Leaming's statement under either version *assumed* that the girl was

---

66. Although the gap in Leaming's testimony passed unnoticed by the defense, it did not escape the prosecutor. His first question on redirect examination was: "Captain Leaming, prior to the defendant showing you where the body was, had you told him you thought it was in the Mitchellville area?" Leaming's answer was, "Yes, Sir"—that's all. *Id.* at 65. He did not tell the prosecutor, and he was not asked, *when* he told this to Williams.

67. See note 53 *supra* and accompanying text.

68. *Id.*

dead and *assumed*, too, that Williams knew where the body was.<sup>69</sup> Moreover, Leaming's statement did more than merely *imply* that the police knew, or had a pretty good idea, where the body was.

If Leaming delivered the Christian burial speech the way he testified he did at the pretrial hearing, then by the time Leaming finished the speech the prefatory remark "I don't want you to answer" was surely no longer uppermost in Williams' mind, if it were still in his mind at all. But then, still according to the first version, Leaming left Williams hanging: "I just want you to think about that when we're driving down the road."

What does that mean? I just want you to think about that when we're driving down the road *toward the place where the girl is buried*? I just want you to think about that while we're driving down the road *and I want you to decide whether or not you want to show us the body by the time we reach the turnoff to the area where the body is*? That is what Leaming *wanted*, isn't it? It would not be unreasonable for his addressee to so interpret his closing remark, would it?

Why, according to the first version, did the captain preface his speech with "I don't want you to answer me"? Perhaps he did so because Williams already had asserted his rights many times that day.<sup>70</sup> Indeed, the most plausible interpretation of the record is that Williams had already asserted his rights on the drive back to Des Moines; he had informed Leaming, at least for the first time, that he

---

69. See text accompanying notes 41-42 *supra*. This is another suggested interrogation technique:

[W]hen the interrogator has reason to believe that the subject possesses or knows the whereabouts of an instrument or article which might have some connection with the crime, instead of merely asking, "Do you have such-and-such?" or "Do you know where such-and-such is?", it is *much better to assume* in the question that the subject does have, or does know the location of, the object being sought. . . .

[After discussing a case where the interrogator successfully elicited a confession by *assuming* in his question that an alleged sex deviate kept a diary, the manual continues:] There is every reason to believe that in the foregoing case, if the issue of the diary had been brought up in any way other than by the question, "Where is your diary?" the subject probably would not have divulged its existence or its whereabouts . . . Had the interrogator merely asked, "Do you have a diary?" the subject probably would have inferred that its existence was not already known and therefore denied that he had one. With the question phrased in such a way *as to imply a certainty of its existence*, however, it became difficult for the subject to make a denial—because *for all he knew the interrogator* or other investigators *might already be aware of its existence* or actually have it in their possession.

F. INBAU & J. REID, *supra* note 56, at 83-84 (emphasis added).

True, the manual talks about "questions" by the interrogator that assume the existence of certain information, not "statements" by the interrogator, but the "psychology" is essentially the same.

70. See notes 13-17 *supra* and accompanying text.

would tell him “the whole story” when he got back to Des Moines and met with his lawyer.<sup>71</sup> Finally, Leaming probably knew that his Davenport counterpart previously had asked Williams where the little girl was and had come up emptyhanded.<sup>72</sup> Under the circumstances, was Leaming’s prefatory remark about not wanting Williams to answer him a way of pretending to concede to him his rights? This, we are told by the experts, “usually has a very undermining effect” on someone who asserts, or has asserted, his rights.<sup>73</sup>

Did Leaming’s prefatory remark enhance, or was it designed to enhance, the effectiveness of the main body of Leaming’s speech by impressing Williams at the outset with his captor’s apparent fairness?<sup>74</sup> Was this more evidence of Leaming’s sympathy and integrity? A further effort to project an image that matched Williams’ concept of the “respected figure”?<sup>75</sup>

---

71. Although the record is not as clear as it ought to be on this point, according to Leaming the first time Williams made this statement was “not too long after we got on the freeway, after we had gassed up [in Davenport] and started—got on the highway and started toward Des Moines. He told me that the first time.” Brief for Petitioner, Joint App. at 65-66. This almost certainly must have occurred before the Christian burial speech, which was preceded by a considerable amount of conversation. See Brief for the Respondent, at 17 n.9 (elaborate analysis of the record reaching same conclusion).

72. See note 53 *supra* and accompanying text. Unfortunately, this point was never explored at the trial.

73. F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 111 (1st ed. 1962). Specifically, the authors state:

The most effective way to deal with a subject who refuses to discuss the matter under investigation is to concede him the right to remain silent. This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator.

*Id.* True, Williams had not refused to talk about the case at all. He had asked some questions about fingerprints and police procedures. But he had not yet supplied the police with any information. He had not yet said anything about the little girl’s whereabouts, and had refused to do so when Lieutenant Ackerman asked him about that. In this setting, pretending to concede to Williams his rights would seem to amount to essentially the same “psychological conditioning” as discussed above.

74. See note 73 *supra*.

75. Cf. F. ROYAL & S. SCHUTT, *supra* note 1, at 122, 134 (suggesting methods of interrogation). Specifically, the authors state:

When a person desires to confide his troubles voluntarily, he does not go to an enemy or confederate, but rather to a parent, clergyman, medical doctor, lawyer, close friend, or some other respected person who he feels will understand, console, and advise him. When a criminal violator confesses, he, in reality, surrenders his very being and his own free will and destiny into the hands of the interrogator, etc. He will find it much easier to submit if he believes in the interrogator’s integrity and is sympathetic to his position. He must believe that the interrogator is neither prosecutor, judge, nor jury.

. . . .  
 . . . [W]hen the interviewer projects an image that matches the subject’s concept of the “respected figure,” the subject’s defenses are reduced and deterrents to

Up to this point, I have dwelt primarily on what Captain Leaming might have *said*. But the more significant question, I submit, is what Williams might reasonably have *understood* the captain to say. Why did Williams disclose the location of the body? Was he motivated by the Christian burial speech? Or did he spontaneously offer to find the body?

That Williams probably told the captain at least once after the Christian burial speech that he would reveal “the whole story” when he returned to Des Moines and met with his lawyer<sup>76</sup> was deemed significant by both the Supreme Court majority and by dissenting Justice White.<sup>77</sup> I think it more significant, however, that Williams probably told Leaming the same thing at least once before, and apparently just before, the speech was delivered.<sup>78</sup> If so, then Williams might well have viewed Leaming’s Christian burial speech as a response to his offer to cooperate by revealing the whole story *after* they returned to Des Moines. And Leaming’s speech would have sounded like an expression of dissatisfaction with Williams’ limited offer to cooperate. If I am right, then what Williams *probably heard* when Leaming delivered the speech, and what any reasonable person sitting in the back seat of the Des Moines car could well have heard was something like this:

Your offer to tell us or show us where the body is *after* we get back to Des Moines (or have your lawyer or you and your lawyer do so) isn’t good enough. For one thing, the way the snow is coming down you might not be able to show us where the body is if we wait that long. I want you to think

---

deception are established. The subject’s concept of the “respected figure” image is obtainable by studying his subjective needs and conscious desires. The subject’s concept, once assessed, is then assumed or projected back at him through the interviewer’s acting-out process.

*Id.*

Recall that the captain had already told Williams that he himself “had had religious training and background as a child” and would probably come nearer to “praying for” Williams than injuring him. *See* note 45 *supra* and accompanying text. That doesn’t sound like the prosecutor, judge, or jury talking.

76. *See* Brief for Petitioner, Joint App. at 58, 60 (Williams told Leaming several times during trip that he would tell the whole story in Des Moines); *id.* at 65-66 (first time Williams said he would tell the whole story later was not too long after car got on freeway leaving Davenport).

77. *Compare* *Brewer v. Williams*, 430 U.S. 387, 405 (1977) (Williams’ statements that he would tell the whole story *after* seeing McKnight were clear expressions that he desired the presence of an attorney before being interrogated) *with id.* at 432 (White, J., with Blackmun & Rehnquist, JJ., dissenting) (Williams’ statement that he would tell the whole story after seeing McKnight indicated his knowledge of his right to have counsel present before being interrogated).

78. *See* note 71 *supra* and accompanying text.

about telling us or showing us where the body is *before* we get back.

Of course, the captain not only told his prisoner what he wanted him to do, but why—to enable the parents to give their little girl a good Christian burial. What did that mean? What was the point of that? What any reasonable listener would hear, even if he weren't religious, even if it weren't the day after Christmas,<sup>79</sup> was: "The only decent and honorable thing for you to do is to show us where that body is on the way back to Des Moines."<sup>80</sup>

The impact on Williams of the Christian burial speech and the surrounding circumstances was probably so profound that at the very least it cast a shadow over anything Leaming *might* have said about not answering him or not wanting to discuss the matter. If Williams had known any Emerson, been calm enough to recall it, and bold enough to recite it, he might have responded: "What you are stands over you the while, and thunders so that I cannot hear what you say to the contrary."<sup>81</sup>

We need not limit ourselves to speculation about what the hypothetical listener would have heard or apprehended Captain Leaming as saying when he gave his now famous speech. We can do a little better than that. There was another listener in the Des Moines police car—Detective Nelson. Although this point was not pursued at trial nor picked up in any of the courts that passed on the case, the following colloquy occurred when Nelson was cross-examined:

Q. [Y]ou weren't interrogating?

A. No.

79. Justice Powell, concurring in *Williams*, recognized the importance of the totality of circumstances surrounding the speech:

[T]he entire setting was conducive to the psychological coercion that was successfully exploited. Williams was known by the police to be a young man with quixotic religious convictions and a history of mental disorders. The date was the day after Christmas, the weather was ominous, and the setting appropriate for Detective Leaming's talk of snow concealing the body and preventing a "Christian burial."

430 U.S. at 412.

80. Although he did not say it in so many words, what Leaming did, in effect, was to use another recommended interrogation technique: "The expression, 'It's the only decent and honorable thing to do,' appears to constitute somewhat of a challenge for the offender to display some evidence of decency and honor." F. INBAU & J. REID, *supra* note 56, at 61. It was a challenge, Leaming must have figured, that Williams would find hard to resist.

81. R.W. EMERSON, *LETTERS AND SOCIAL AIMS* 86 (1876).

Q. So everything you testified to, Williams just started talking?

A. He did a lot of talking, yes, sir.

Q. Without anybody asking him anything?

A. Yes, *other than* . . . when we left Davenport, Captain Leaming *asked him to think about telling us* where the body is.<sup>82</sup>

Williams himself, when he testified, complained repeatedly that Leaming told him that he might as well reveal where the body was on the trip back to Des Moines because after Williams got back, he and his lawyer would show the police where the body was anyway;<sup>83</sup> that it “would be a waste of time to go all the way to Des Moines to get [McKnight] and come back, and that’s what [they] would have to do, [and if they did they would] probably be on the road all hours of the night”;<sup>84</sup> and that McKnight “had already instructed [the police that] as soon as . . . [Williams] got to Des Moines [they] would come back and show [the police] where the body was.”<sup>85</sup> Williams’ version of what was said is significantly stronger than either version given by Leaming. There is nothing in the record to indicate whether Williams’ testimony is merely *his understanding* of what Leaming admitted to having said or whether Leaming really said more. Although Leaming testified twice, nobody asked him whether he told Williams any of these things.<sup>86</sup> Yet Williams insisted that these were the things that influenced him to show the police where the body was.<sup>87</sup> Putting aside all of Williams’ testimony, we are still left with this: Leaming and Chief Nichols both swore under oath that McKnight told Williams over the phone in their presence that Williams or McKnight would reveal the location of the body after Williams returned to Des Moines.<sup>88</sup> Thus,

---

82. Brief for Petitioner, Joint App. at 104 (emphasis added).

83. *Id.* at 53.

84. *Id.* at 48.

85. *Id.* at 71.

86. At one point the prosecuting attorney asked Leaming, “Did you at any time tell Mr. Williams that Mr. McKnight told you to tell Williams that he was to tell you the whole story on the way back from Davenport?” Leaming denied it. *Id.* at 58. That was all.

87. *Id.* at 71.

88. The long-distance phone conversation between Williams and McKnight is one of the most mystifying features of the record. *See* note 23 *supra*. Shortly after Williams surrendered to the Davenport police, they allowed him to phone McKnight, who took the call in Captain Leaming’s office. Williams’ lawyer then permitted both Leaming and the Des Moines police chief Nichols to hear his end of the conversation. Brief for Petitioner, Joint App. at 37-38, 40-43, 54, 64, 88-90, 96.

McKnight did not testify himself as to what he said, but both Captain Leaming and Chief Nichols did. Leaming said that he heard McKnight say to Williams: “‘You have to tell the officers where the body is,’ and he repeated a second time, ‘You have got to tell them where she

when Leaming told Williams in the course of rendering his Christian burial speech that he felt they should locate the body on the way to Des Moines rather than on the following morning, he made a powerful argument. Williams had no reason to doubt the captain's implicit assumption that these were his only two options. It reasonably appeared to him that this was indeed the case.

Even if Leaming told Williams no more than the second version indicates, in light of the earlier phone conversation with McKnight what Williams might well have heard Leaming say, and what any *reasonable person* in Williams' plight might well have heard, is what Williams testified *he did hear*—because his only alternative would be to go all the way to Des Moines, get his lawyer, and come back to the same spot later and under more adverse weather conditions, it would be a waste of time not to show the police where the body was now.<sup>89</sup>

I do not deny that Williams also told the captain one or more times *after* he had heard the famous speech that he would tell him the whole story when he got back to Des Moines and saw his lawyer. But *why*? Did Williams just say it out of the blue, which seems unlikely, or did somebody or something prompt him to say it?

---

is.' . . . He then said, 'When you get back here, you tell me and I'll tell them. I am going to tell them the whole story.'" *Id.* at 96.

Chief Nichols more or less supported Leaming. He testified that McKnight told Williams, "We will talk when you get here." *Id.* at 40. When asked by the prosecutor whether McKnight told Williams that he was going to have to tell the police "everything" or "where she is" or "something of that nature," he replied: "Something of that nature." *Id.* at 41.

Finally, Williams' lawyer in Davenport, Kelly, testified that he told Captain Leaming upon his arrival that it was his "understanding" that when Williams was returned to Des Moines, "You [McKnight] would talk to Williams in Leaming's office and at that time he [Williams] would reveal where the body was." *Id.* at 107.

What McKnight had in mind when he spoke to Williams is unclear. Conceivably, he was trying to pacify the police officials he knew were listening to his end of the conversation. Perhaps McKnight thought that by instructing Williams, in earshot of the police officers, that he would have to turn up the body after he returned to Des Moines, he would be removing any incentive on the officers' part to question Williams on the way back. But Williams, of course, would not have known that was his lawyer's motivation.

Quite possibly, as concurring Justice Marshall assumed, McKnight's plan was to learn the whereabouts of the body from his client and then to lead the police to the body himself. 430 U.S. at 408. In this way, as Justice Marshall observed, Williams "would thereby be protected by the attorney-client privilege from incriminating himself by directly demonstrating his knowledge of the body's location, and the unfortunate Powers child could be given a 'Christian burial.'" *Id.* If this were McKnight's plan, however, there is no indication in the record that he explained it, clearly or otherwise, to his client.

In any event, the crucial question is not what McKnight meant, or even what he said, but what his client *understood* him as saying. If the chief of police and the chief of detectives misunderstood McKnight, and if Williams' lawyer in Davenport misunderstood the arrangements, then surely it is reasonable and probable that Williams misunderstood, too.

89. None of the courts that passed on the case discussed this point.

There is nothing in the record about *why* Williams made these statements or *how* Leaming responded when he did. Ignoring, as everyone does, Williams' testimony that the captain "questioned me periodically concerning where the body was . . . [not] in rapid succession . . . [but] as we travelled a few miles, at a time,"<sup>90</sup> the most plausible alternative explanation is that the speech had such a powerful impact on Williams that long after it had been delivered he could still "hear" it. And it may well have sounded louder and louder as the Mitchellville turnoff loomed nearer.

If so, then Williams' postspeech statement(s) that he would tell the whole story *after* they completed the trip may not have been, as Justice White suggested in his dissent, "an indication that he knew he was entitled to wait until counsel was present before talking to the police."<sup>91</sup> Nor was it necessarily, as the majority suggests, "the clearest expression . . . that he desired the presence of an attorney before an interrogation took place."<sup>92</sup> Williams' insistence that he would tell the whole story later more likely was a manifestation of the continuing, and perhaps mounting, pressure he felt as the car approached Mitchellville. If so, Williams' postspeech statements were not simply an acknowledgement that he was aware of his rights or an assertion of his right to counsel, but rather a reiteration—in the face of the captain's counterproposal—of his original position. Which inference you draw, however, is dependent upon which version of the facts you believe. Williams' version? Leaming's first version? Leaming's second version?

The foregoing reading of the record is consistent with Captain Leaming's original description of how Williams finally announced that he was going to show the police where the body was, but finds considerably less support in the version Leaming gave at trial. According to the latter, Williams with no warning and without any preliminary discussion or questions about the body simply blurted out that he was going to show Leaming where the body was.<sup>93</sup> If so, one can hardly blame the captain for not covering his ears—or Williams' mouth. Moreover, according to the second version it is only *after* Williams made this long-awaited announcement and while he was already in the process of guiding the police to the dead girl's clothing

---

90. Brief for Petitioner, Joint App. at 47-48.

91. 430 U.S. at 432 (White, J., with Blackmun & Rehnquist, JJ., dissenting).

92. *Id.* at 405.

93. Brief for Petitioner, Joint App. at 84. This was, however, after Williams had led Leaming to where he had hidden the girl's boots and the blanket he used to carry her, although neither was found. *Id.* at 83-84.



that he asked Leaming how he knew the body was in the Mitchellville area.<sup>94</sup>

In the original version, however, the order is reversed. According to this version, Williams *led up* to the disclosure of the body by asking the captain how he knew it would be in the Mitchellville area.<sup>95</sup> If so, this indicates that Williams had been thinking about the speech quite a bit, perhaps all the time they were travelling down the road, and that when Mitchellville was only minutes away he began wobbling.

According to the original version, just before making the crucial disclosure Williams alerted the captain that he was about to do so. Of course, in light of the many times he had asserted his rights that day, both before and after the group had started on the return trip back to Des Moines, Williams was also alerting the captain that he might be assuming "contradictory positions"<sup>96</sup>—that his apparent change of mind might not be a waiver of his rights, but rather the product of the anxiety and confusion generated by the speech and the imminence of the Mitchellville turnoff—or that he might be laboring under the misapprehension that once he got back to Des Moines he would have to show the police where the body was anyway.<sup>97</sup>

The captain, however, did nothing to clear up any possible misunderstanding. Nor at this high pressure point in the return trip did he advise Williams, as he had done just before they left Davenport, that he wanted him to remember what he told him about his rights. Nor did he say, as he claimed to have when he gave the speech, that he didn't want Williams to answer him or to discuss the matter (if he ever told him that). Quite the contrary. Leaming *did* discuss the matter. He sensed that his patience was about to pay off and he moved in for the kill. At this point, he was more firm and more

---

94. *Id.* at 84.

95. *Id.* at 63.

96. See *United States v. Springer*, 460 F.2d 1344, 1349-50 (7th Cir. 1972) (police not required to make further inquiry into waiver because no contradictory positions maintained when suspect surrendered to authorities to exculpate himself, waived his rights, and subsequently implicated himself); *United States v. Hopkins*, 433 F.2d 1041, 1044 (5th Cir. 1970) (suspect did not manifest inconsistent conduct because of confusion when he refused to sign waiver form but then volunteered further statements when agent ceased questioning and began to leave); *Frazier v. United States (Frazier I)*, 419 F.2d 1161, 1168-69 (D.C. Cir. 1969) (no valid waiver of fifth amendment rights when suspect signed waiver form but then evidenced confusion by asking agent not to record confession); *United States v. Nielson*, 392 F.2d 849, 853 (7th Cir. 1968) (police should have inquired further to determine if waiver valid when suspect assumed contradictory positions by refusing to sign waiver form but then immediately offering to continue responding to questions). See generally, Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 574-77 (4th ed. 1974).

97. See notes 83-89 *supra* and accompanying text.

emphatic about his knowledge of the body's location: "I'm an investigator. This is my job, and I just figured it out."<sup>98</sup>

All this, of course, is based on the events that led up to Williams' disclosure as they appear in Leaming's original testimony. These events find no counterpart in what the state of Iowa called the "essentially" similar second version.<sup>99</sup>

#### SOME FINAL THOUGHTS

*Williams* raises some nice questions about the meaning, scope of, and interplay between the *Massiah* and *Miranda* principles. But that is the subject of another article. This one is designed to raise some painful questions about the practical application of those principles—or for that matter about the administration of any rules governing the admissibility of confessions. As I trust those who have come this far with me will agree, the various opinions in *Williams* totter on an incomplete, contradictory, and recalcitrant record. The Supreme Court—and all our courts—deserve better and should demand more.

This case does involve some unusual features. Its peculiarities, however, do not detract from but only illuminate the problem posed by the typical confession case—secret proceedings absent any objective recordation of the facts.<sup>100</sup> If either one of Captain Leaming's two versions of the critical events on the drive back to Des Moines had been his only version, it would have been treated, as an officer's testimony usually is, as the gospel truth. But the case happens to involve an "interrogator" (or should we call him an "elicitor") who testified twice and significantly differently each time. So questions are raised.

If Leaming's only antagonist had been Williams, no doubts about the captain's credibility would have surfaced. But this case happens

---

98. Brief for Petitioner, Joint App. at 63. If this does not amount to "play[ing] the role of the expert," said to be a "common method of building amplification of guilt as it relates to insecurity," it at least constitutes "speak[ing] with an aura of positive knowledge," a method said to renew "the insecurity process the subject formerly experienced." F. ROYAL & S. SCHUTT, *supra* note 1, at 137.

99. Brief for Petitioner at 9 n.1.

100. See Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo To . . .*, in Y. KAMISAR, F. INBAU & T. ARNOLD, *CRIMINAL JUSTICE IN OUR TIME* 84-88 (A. Howard ed. 1965) (no statute, court rule, or court decision will suffice until police interrogation is stripped of its secrecy); Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L.C. & P.S. 21, 44-45 (1961), reprinted in *POLICE POWER AND INDIVIDUAL FREEDOM* 153, 179-80 (C. Sowlé ed. 1962) (most unique feature of police station questioning is its characteristic secrecy).

to involve an officer who got into swearing contests with the defense lawyers themselves, as well as with a criminal suspect. Because the captain lost every time he tangled with one of the lawyers,<sup>101</sup> some doubts are raised, or ought to be raised, about the swearing contest that he won when he disputed Williams.

Although the special features of the *Williams* case constitute alerting circumstances, any trial of the issue of waiver,<sup>102</sup> no less than that of coercion<sup>103</sup>—waged by the crude, clumsy method of

101. See notes 21-28 *supra* and accompanying text.

102. See MODEL CODE, *supra* note 28, §130.4, Commentary at 341-42.

Much of the opposition to stationhouse interrogation and to making the right to counsel during questioning waivable reflects concern about the danger of police abuse which cannot subsequently be established in court, a concern which has in no way been lessened by the *Miranda* decision. . . . Although [specified procedures] should help prevent misconduct based on uncertainty about the rules, the risk of abuse from a deliberate or careless violation remains. Therefore, the Code requires the making of written records and sound recordings to help a court to reconstruct what took place while an individual is under police control.

*Id.*; see *id.* §130.4 note, at 39.

Subsection (3) [requiring the establishment of procedures providing for a sound recording of the *Miranda* warnings and any subsequent waiver] is designed to help eliminate factual disputes concerning what was said to the arrested person and what prompted any incriminating statements. . . .

In view of the indications in *Miranda* that the prosecution has a heavy burden of proof to show the validity of any waiver it would seem clear that the obligation to tape should include any such waivers.

*Id.* The recent case of *Michigan v. Mosley*, 423 U.S. 96 (1975), no less than *Williams*, underscores the need for sound recordings to help the courts determine whether a valid waiver actually occurred. In *Mosley* the Court held that police may renew the questioning of a suspect who has exercised his right to remain silent at an earlier interrogation session, provided the suspect's right to cut off the questioning is "fully respected" or "scrupulously honored." *Id.* at 103-05. The Court apparently deemed it critical, certainly highly significant, that after declining to discuss certain robberies at an initial interrogation Mosley was subsequently questioned about "an unrelated holdup murder." *Id.* at 104. But it is not at all clear that this was so. Professor Geoffrey Stone has pointed out that the Michigan courts never found—indeed the Michigan Court of Appeals expressed skepticism about the contention—that the subject of the robbery-murder was never brought up at the initial interrogation session. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 130. Professor Stone, who has studied the *Mosley* record (I have not), notes that "Detective Cowie initially testified that he discussed 'several robberies' with Mosley, [but] then *changed his testimony*, and insisted that he questioned Mosley only about the White Tower Restaurant robbery. According to Cowie, however, Mosley declined to say anything 'about the robberies.'" *Id.* at 134 (emphasis added). It seems almost incredible that in the 1970's a *murder* suspect such as Mosley could twice be questioned—the second time after the exercise of his right of silence—in the *departmental headquarters building* (not in a car or on the street) without any police effort to make an objective record of either interrogation session, and that no court passing on the case would so much as raise questions about the need or obligation of the police to make such a record.

103. See *Crooker v. California*, 357 U.S. 433, 443-44, 444 n.2 (1958) (Douglas, J., dissenting) (the issue of coercion is difficult to resolve at trial when the defendant has been interrogated out of the presence of counsel and conflicting accounts are given of what took place); *In re Groban*, 352 U.S. 330, 340 (1957) (Black, J., dissenting) (one who has been privately interrogated has little hope of challenging the testimony of his interrogator as to what was said and done).

examination, cross-examination, and redirect—is almost bound to be unsatisfactory. The *Williams* record illustrates this all too painfully.

The record tells us that several times during the long drive back to Des Moines, Williams told Captain Leaming that he would tell him “the whole story” after he returned to Des Moines and conferred with his lawyer.<sup>104</sup> That’s about all. Although all sorts of inferences may be drawn from the record, and admittedly I have drawn a few, we do not really know *how often* Williams said it or *when* he said it. Nor do we really know *why* he said it or *how* the captain responded, if at all, any of the times he said it.

The first time Captain Leaming testified, all he said on direct examination about the Christian burial speech was that shortly after they got on the expressway, he and Williams had “had quite a discussion relative to religion.”<sup>105</sup> *That’s all*. Only on cross-examination did Leaming reveal for the first time—and he more or less volunteered it<sup>106</sup>—that he had made a Christian burial statement. Williams, who had preceded the captain to the witness stand, had never alluded to anything resembling the Christian burial statement.<sup>107</sup> If it had not happened to pop out on Leaming’s cross-examination—and it came out more or less accidentally—there never would have been a “Christian burial speech case.”

Which of the two versions is the real speech? Is it some combination of the two? Or is it a third and never-to-be-known version? Is it possible that there was more than one Christian burial speech? Recall that Leaming initially described the Christian burial speech simply as “quite a discussion relative to religion.” At the other end of the trip, just before Williams announced that he was going to tell the police where the body was, there were, Leaming testified on direct examination, “further discussions about people and religion.”<sup>108</sup> What kinds of discussions? About Christian burials? About confession being good for the soul? We will never know. Nobody ever asked.

---

104. Brief for Petitioner, Joint App. at 58, 61, 65-66.

105. *Id.* at 56.

106. Q. You didn’t ask Williams any questions?

A. No, sir, I told him some things.

Q. You told him some things?

A. Yes, sir. Would you like to hear it?

*Id.* at 62.

107. Williams did recall a statement by Leaming that he had “an idea” or “knowledge” that the body was buried in the Mitchellville area, and this *was* one of the points made in connection with the Christian burial statement. See notes 112-14 *infra* and accompanying text. But Williams never mentioned that the captain had told him that the parents deserved, ought to have, or were entitled to a Christian burial for their little girl, or anything to that effect.

108. *Williams v. Brewer*, 375 F. Supp. 170, 175 (S.D. Iowa 1974); Brief for Petitioner, Joint App. at 84.

The federal district court found,<sup>109</sup> and members of the Supreme Court operated on the premise,<sup>110</sup> that the captain had told Williams that he “knew” the little girl’s body was in the Mitchellville area (which was untrue). But the first time Williams testified on the subject he recalled variously that the captain had told him that the police had “some speculation that the body was near Mitchellville”<sup>111</sup> (which was true); that “we have an idea it’s near Mitchellville”<sup>112</sup> (which was also true); and that the police had “knowledge or good reason to believe” that the body was in Mitchellville<sup>113</sup> (the second half of which was very close to the truth). Moreover, the first time Leaming broached the subject, he said in response to a question by McKnight that “yes, sir,” he did tell Williams: “I theorize that the body is at Mitchellville”<sup>114</sup> (which was the precise truth). And the second time he brought up the subject, the captain said he told Williams: “I think that we’re going to be going right past where that body is.”<sup>115</sup> Finally, Detective Nelson, who drove the car back to Des Moines, maintained that Captain Leaming did not tell Williams that “he knew” the body was in the Mitchellville area, but “that he presumed the body was in the area.”<sup>116</sup> How much longer can we go on like this?

I do not share the view of the *Williams* dissenters that analytically *Williams* “is a far cry from *Massiah*,”<sup>117</sup> but in one sense it is. In *Massiah* the critical conversation between petitioner and “secret” agent Colson, who was *Massiah*’s “friend” and partner in crime, also took place in a car. But the conversation not only was transmitted to a nearby agent by means of a radio transmitter hidden under the front seat of the car, it also was tape-recorded over a minifon device

109. *Williams v. Brewer*, 375 F. Supp. 170, 175 (S.D. Iowa 1974).

110. See 430 U.S. at 393 (Leaming told Williams that he knew the body was in the Mitchellville area); *id.* at 432 (White, J., with Blackmun & Rehnquist, JJ., dissenting) (same).

111. Brief for Petitioner, Joint App. at 47-48 (emphasis added).

112. *Id.* at 53 (emphasis added).

113. *Id.* at 52 (emphasis added).

114. *Id.* at 61 (emphasis added).

115. *Id.* at 63 (emphasis added). Of course, Leaming also testified that he told Williams that he had “figured it out” and “knew” that the body was somewhere in the Mitchellville area. *Id.* at 63, 84.

116. *Id.* at 104 (emphasis added).

117. See 430 U.S. at 426 n.8 (Burger, C.J., dissenting) (in contrast to admissions made by Williams, *Massiah*’s statements were obtained surreptitiously, without prior warnings, and could not be independently verified as reliable); *id.* at 430 n.1 (White, J., with Blackmun & Rehnquist, JJ., dissenting) (although issue in *Williams* is defendant’s waiver of rights, question of waiver never addressed in *Massiah*, as defendant in that case was unaware both of right to counsel and of informant’s identity); *id.* at 440 & n.3 (Blackmun, J., with White & Rehnquist, JJ., dissenting) (statements made by Williams, unlike those of *Massiah*, were the product neither of a ruse nor of an “interrogation”). My reasons for disagreeing with the dissenters will be discussed at length in a future article to be published in the *Georgetown Law Journal*.

concealed in the glove compartment.<sup>118</sup> In arguing for the admissibility of the recording,<sup>119</sup> then Solicitor General Archibald Cox observed:

No less important than its utility in helping law enforcement is the fact that [the recording of such conversations] safeguards defendants from distorted testimony and aids the administration of justice. . . . Even slight nuances in describing a conversation may be of crucial importance. . . . Surely, it is preferable that these crucial facts be established by a recording of the conversation itself. . . . The recording of the conversation in this case (which we have filed with the Clerk) would have given assurance that the agent had correctly testified that petitioner had actually admitted his guilt to Colson, and that he was neither coerced nor improperly induced to make the admissions.<sup>120</sup>

Whatever the objections to a government informer or undercover agent secretly recording a conversation between himself and a suspect or instantaneously transmitting such a conversation to other agents equipped with radio receivers,<sup>121</sup> they are of little force when applied to a situation in which police, known to be such, have isolated a person from the protection of his lawyer for the purpose of "persuading" or "inducing" him to furnish incriminating evidence.<sup>122</sup>

---

118. Brief for United States at 8, *Massiah v. United States*, 377 U.S. 201 (1964).

119. In the district court *Massiah* successfully objected to admitting these tapes on the grounds that they contained statements relating to other defendants and to privileged matters. *Id.* The Government, however, filed the recording with the Clerk and maintained that the recording confirmed the testimony of its agent that Colson "did not coerce petitioner into making any incriminating statements or even induce him by appeals to talk in the guise of friendship." *Id.* at 21, 27.

120. *Id.* at 20-21.

121. See *United States v. White*, 401 U.S. 745, 787-89 (1971) (Harlan, J., dissenting) (warrantless third-party bugging undermines the confidence and sense of security of individual relationships and might smother the spontaneity that liberates daily life); *Lopez v. United States*, 373 U.S. 427, 465-66, 470-71 (1963) (Brennan, J., with Douglas & Goldberg, JJ., dissenting) (electronic surveillance gives rise to police omniscience, one of the most effective tools of tyranny, strikes at freedom of communication, and destroys privacy).

122. "Courts which have considered the question have held that secret recording of police interrogation does not, in itself, affect the admissibility of statements." MODEL CODE, *supra* note 28, §130.4(2), Commentary at 349.

The Model Code does provide that an arrestee be informed that a sound recording is being made, but recognizes that this requirement "raises a difficult question." *Id.* at 348. Such a requirement does minimize the possibility that an arrestee will be misled about the seriousness of his situation, but knowledge that they are being recorded may make many reluctant to speak, even those who would not be inhibited by the knowledge that what they were saying was being

The short answer to the objection that it is not always feasible to utilize tape recordings is that it should only be required when it is. Certainly, the Des Moines police, or the Davenport police, or the State Bureau of Criminal Investigation agents, some of whom followed Leaming and Williams all the way back, could have come up with a recording device. An objective, reliable record of the proceedings in the car not only seems to have been feasible, but also highly advisable.<sup>123</sup> After all, *Williams* was one of the biggest murder cases in the state's history. In all likelihood the use of a recording device, a tiny administrative and financial burden, would have spared the state the need to contest the admissibility of Williams' disclosures in five courts for eight years.

It is hard to see why the judges, upon whom these "*Finnegans Wake* records" are inflicted, are so apathetic about the apparent unwillingness of police interrogators to use tape recordings.<sup>124</sup> A veteran

---

reduced to writing (although it could lead *some* to talk more freely, secure in the knowledge that they would not be misquoted). *See id.* at 348-49.

Informing the arrestee that what he may say will be recorded is probably preferable, but I do not feel strongly about it. The important thing is that wherever feasible all conversation between the police and a person in custody be tape recorded, whether or not the person is informed that this is taking place. If the price for a system requiring sound recordings of the warnings, any waivers or other responses, and any subsequent conversation is that the suspect need not be told that a sound recording is being made, I would be quite willing to pay it.

123. The same may be said for Lieutenant Ackerman's dealings with Williams in the Davenport courthouse. The lieutenant, it will be recalled, first denied, then admitted, that he had questioned Williams about the girl's whereabouts.

124. The problem may not be the unwillingness of the police to *use* tape recordings as much as the reluctance to *offer the tapes in evidence*. In an unknown but considerable number of cases the police may tape record an interrogation for their own purposes, but with no intent to offer it in evidence (as opposed to the resulting confession itself) and with no expectation that it will ever get beyond the confines of the stationhouse. C.E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 154 (4th ed. 1976) recommends that "the room set apart for interrogations or for interviews in the offices of the law enforcement agency should be equipped with a permanent recording installation," pointing out that there may be several purposes in recording an interrogation other than offering it in evidence: if a suspect contradicts himself or falls into inconsistencies, by playing the interrogation back to him "he may be brought to appreciate the futility of deception," *id.* at 155; if a suspect implicates associates or accomplices, "the record can later be played for the associates for the purposes of inducing them to confess," *id.* at 156; if the interrogator is unable to spot weaknesses in the suspect's story or if the interrogation is interrupted, the officer can listen to the tape, "analyze it for consistency and credibility," and, "after determining the weak points, he can then plan the strategy and tactics to be employed in the next interrogation session." *Id.*

In *State v. Biron*, 266 Minn. 272, 123 N.W.2d 392 (1963), one of the very few reported cases where a tape recording of the entire interrogation—right from the first question asked—became part of the record, the police decision to make a recording was based on the expectation that Biron would confess or make damaging admissions in a relatively short time and that the playing of his taped remarks to his accomplices would cause them to do likewise. But Biron "held out" a good deal longer than expected, and one or more of the five detectives who took turns questioning him were unaware that they were being taped. The tape did wind up in evidence—and it was disastrous

criminal investigator and leading authority on investigative methods and technology tells us:

One of the characteristics of modern criminal investigation is the extensive use of recording devices for the production of a transcript of interviews and interrogations. Obviously, the best evidence of an interview is the recorded voice. The words themselves are there; the tones and inflection provide the true meaning; . . .

. . . .

. . . Sensitive interviews and interrogations should always be recorded in important cases. . . . If the interview must take place in a room, *automobile*, or restaurant without previous technical preparation, a pocket recorder can be used or one which is concealed in a briefcase. The investigator can be *wired* for the occasion, i.e., a microphone and small recorder can be attached to his person and concealed beneath his clothes.<sup>125</sup>

It was good of Captain Leaming to tell Williams, as they were about to leave Davenport, to be sure to remember what the captain had told him about his rights and about being represented by counsel,<sup>126</sup> but it would have been even better if procedures had been in effect that would have enabled *the captain* to remember what he had told Williams about his rights. Lengthy police car "visits" with isolated prisoners, such as occurred in *Williams*, should not be permitted unless all the proceedings, both in the car and during stops along the way, are tape recorded.<sup>127</sup>

---

for the prosecution when it did—but the police didn't plan it that way. See Kamisar, *Fred E. Inbau: "The Importance of Being Guilty,"* 68 J. CRIM. L. & C. 182, 185 n.20 (1977) (representative sampling of police questions). According to Biron's lawyer, Gerald M. Singer, somebody in the police department "tipped him off" that a tape of his client's interrogation existed, he so informed the trial judge, the judge asked a police witness about this, and the officer admitted that this was so. Interview with Gerald M. Singer, University of Minnesota Law School (March 1962).

125. C.E. O'HARA, *supra* note 124, at 146-48 (first emphasis added).

126. Brief for Petitioner, Joint App. at 55, 75.

127. There would be little point in requiring all conversation in the car to be tape recorded if the police officers were free to engage in unrecorded talks with their prisoners outside the vehicle during various stops along the way. Thus, on extended car "visits," such as occurred in *Williams*, police officers should be equipped with pocket recorders or other devices when they and their prisoners leave the vehicle. See text accompanying note 125 *supra*. In the instant case, Leaming and Nelson need only have been equipped with microphones that broadcast to the state agents in the Bureau of Criminal Investigation car that followed their car all the way back to Des Moines. See Brief for Petitioner, Joint App. at 66, 80. The state agents could have used equipment in their car to record all out-of-vehicle conversations.



True, a recording can be tampered with, but "it is doubtful that many officers would dare tamper with [such] physical evidence [and in any event] it could be required that the record be [promptly] deposited with the court under seal."<sup>128</sup> Of course, the defendant would have the right to cross-examine the officer testifying to its authenticity. "The fact that it is conceivable that an agent may perjure himself, no more makes a recording inherently unreliable and inadmissible than any other evidence which likewise may be fabricated."<sup>129</sup>

Although its need and advisability are graphically illustrated by the gaps, inconsistencies, and confusion pervading the *Williams* record, there is nothing new about this proposal. Even before the advent of tape recordings, Roscoe Pound proposed "legal examination" of suspects before a magistrate and "provision . . . for taking down the evidence so as to guarantee accuracy," in large measure because "it is not the least of the abuses of the system of extralegal interrogation that there is a constant conflict of evidence as to what the accused said and as to the circumstances under which he said or was coerced into saying it."<sup>130</sup> But tape recordings have been available for some time now. More than twenty years ago, the author of a well-known investigation manual pointed out: "Important interrogations [and presumably important "visits" as well] and confessions should be recorded."<sup>131</sup>

To aid the resolution of (and hopefully to avoid altogether) disputes about what happened to someone in custody, the use of sound recording devices is required by both the American Law Institute<sup>132</sup>

128. Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 87 (1964).

129. Brief for United States at 21 n.10, *Massiah v. United States*, 377 U.S. 201 (1964).

130. Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L.C. & P.S. 1014, 1017 (1934); see Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 27-32 (1974) (proposal for complete taped record of judicial examination, including information of rights, any answer of them, and any questioning; Kauper would have recommended audio or video tape recording of interrogations if techniques had been available when he wrote); Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1240, 1248 (1932) (proposal for "prompt interrogation by magistrate supported by the threat of comment on failure to answer" with a complete record kept of the interrogation).

131. C.E. O'HARA, *FUNDAMENTALS OF CRIMINAL INVESTIGATION* 101 (1st ed. 1956).

132. MODEL CODE. *supra* note 28, § 130.4 note at 39. The Model Code requires tape recordings of the warning and waiver procedures at the police station, noting that "mandatory recording of all casual encounters cannot be required without providing that the prisoner remain throughout custody in a room where sound equipment is available or providing for mobile recording units to accompany each person in custody." *Id.* § 130.4, Commentary at 345.

I submit, however, that if the Reporters-Draftsmen of the Model Code had anticipated a *Williams* fact situation, they would have required tape recordings of the proceedings in the

and by the National Conference of Commissioners on Uniform State Laws.<sup>133</sup> These procedures are deemed central to the Model Code's "attempt to provide clear and enforceable rules governing the period between arrest and judicial appearance."<sup>134</sup> The Court should deem them central to its mission as well.

The Model Code procedures are designed to effectuate a suspect's rights *before* the time that adversary judicial proceedings have begun. But the case for providing clear and enforceable rules governing the period *following* the initiation of judicial proceedings against a person is still stronger. In such a case, and *Williams* is such a case, "the casual and relatively perfunctory invitation to a *Miranda*-style waiver is [or ought to be] insufficient."<sup>135</sup> At the very least, no claim that a

police car. A three- or four-hour secret session, albeit in a moving vehicle, with the prime suspect—indeed, the only suspect—in a murder case is hardly a "casual encounter."

Of course, if the Model Code provisions had governed the disposition of the *Williams* case, it would have been resolved in defendant's favor without ever reaching the question whether the proceedings in the car had to be tape recorded. The Model Code "provides that once a suspect invokes his right to remain silent or to meet with counsel"—and *Williams* did both several times—"no law enforcement officer shall seek a waiver or interrogate the suspect in any way until the suspect meets with counsel." *Id.* § 140.8(2)(d), Commentary at 371. *But see* *Michigan v. Mosley*, 423 U.S. 96, 103-05 (1975) (police may renew questioning of suspect who has exercised his right to remain silent provided the suspect's right to cut off questioning is scrupulously honored).

133. UNIFORM RULES OF CRIMINAL PROCEDURE Rule 243 (Approved Draft 1974) ("the information of rights, any waiver thereof, and any questioning shall be recorded upon a sound recording device *whenever feasible* and in any case where questioning occurs at a place of detention") (emphasis added).

134. MODEL CODE. *supra* note 28, § 130.4 note, at 39.

135. *Lopez v. Zelker*, 344 F. Supp. 1050, 1054 (S.D.N.Y.), *aff'd without opinion*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1049 (1972). In *Lopez* Judge Frankel noted that after formal judicial proceedings have been initiated, thus

[r]iveting tightly the critical right to counsel, a waiver of that right requires the clearest and most explicit explanation and understanding of what is being given up. There is no longer the possibility—and the law enforcement justification—that a mere suspect may win his freedom on the spot by "clearing up a few things." Even in the courtroom, where an impartial judicial officer is presumably impelled by no purpose but fairness, that officer must counsel with care and advise against the likely folly of a layman's proceeding without the aid of a lawyer. We cannot settle for less where the waiver has been proposed by a law enforcement officer whose goals are clearly hostile to the interests of the already indicted person in custody.

*Id.* at 1054; *see* *People v. Lopez*, 28 N.Y.2d 23, 28-29, 268 N.E.2d 628, 631, 319 N.Y.S.2d 825, 829 (Breitel, J., with Fuld, C.J., & Burke, J., dissenting) (postarrestment or postindictment interrogation "is no longer a general inquiry into an unsolved crime but rather a form of pretrial discovery"; "the preparation for [defendant's] trial has begun"), *cert. denied*, 404 U.S. 840 (1971).

The Uniform Rules of Criminal Procedure provide that after the initial appearance before a magistrate (*Williams*, it will be recalled, was arraigned before a judge in Davenport on the outstanding arrest warrant, advised of his rights by the judge, and committed by him to jail), no law enforcement officer or his agent may question a defendant "unless the defendant's lawyer consents or is present at the questioning, or the defendant has waived counsel under Rule 711 [which is the rule for accepting a waiver at or during *the trial*]." UNIFORM RULES OF CRIMINAL PROCEDURE rule 331 (Approved Draft 1974).

waiver has been obtained should be accepted unless all proceedings subsequent to the initiation of judicial proceedings have been tape recorded.

I do not think that in the bulk of the post-*Massiah*, post-*Miranda* cases the problem is "lying" as that word is normally used—a false statement deliberately presented as being true, a statement meant to deceive.<sup>136</sup> Rather, I think it is "lying" in the sense that lawyers, poets, and historians often "lie"—they do not "reproduce reality" but "illumine some aspect of reality, and it always makes for deceit to pretend that what is thus illumined is the whole of reality."<sup>137</sup> That is why, not too uncommonly, when a neutral observer reads the petitioner's statement of the case and then the respondent's—or the majority and dissenting opinions in the case—he is compelled to wonder whether they are talking about the same case.

What would it be like to argue a case on appeal or to hand down opinions in such a case without any objective, reliable record—with nothing to rest on but each lawyer's own recollection and interpretation of the critical events at the trial?<sup>138</sup>

It is worth noting that the "Statement of the Case" in Iowa's petition for a writ of certiorari summarily describes the Christian burial speech as follows: "While en route to Des Moines one of the officers commented that the weather was beginning to turn bad and that discovery of the body and a decent burial for the child might be delayed by snow covering the body."<sup>139</sup> Has something been lost in the summary of the captain's testimony? One can demonstrate, or at least forcefully argue, that *much* has—much of the tone, color, and meaning of "the speech"—but one can do so only because how the captain described the speech is a matter of record. What, however, if *the captain* had described the speech the way the Iowa attorney general described it in the petition for certiorari? The captain's word would have been the last word. There would have been no place else to turn.

It is not because a police officer is more dishonest than the rest of us that we should demand an objective recordation of the critical

---

136. Although I believe that Captain Leaming's original version of the Christian burial speech is overall more damaging to the prosecution than his second version, the second is clearly more damaging in several respects. This is strong evidence that the second time the captain testified on the subject he was not "lying," as that term is usually defined.

137. Cohen, *Field Theory and Judicial Logic*, 59 *YALE L.J.* 238, 242 (1950).

138. This question probably understates the criminal defendant's problem by a considerable margin. The more apt analogy would seem to be a situation where no trial transcripts are made, but the appellate courts almost invariably adopt the government lawyer's version of what occurred below.

139. *Petition for Certiorari* at 4-6.

events. Rather, it is because we are entitled to assume that he is no less human—no less inclined to reconstruct and interpret past events in a light most favorable to himself—that we should not permit him to be “a judge of his own cause.”<sup>140</sup>

In one of his early opinions on the Supreme Court, an opinion that undoubtedly drew upon his rich background as a trial lawyer and state court judge,<sup>141</sup> Justice Brennan pointed out:

To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.<sup>142</sup>

This theme should dominate our thinking about the confession problem. Otherwise, decades of experience will surely have been wasted. Otherwise, it will be of no great moment whether new stories are added to the temples of constitutional law or old ones removed.<sup>143</sup> For any time an officer unimpeded by any objective record distorts, misinterprets, or overlooks one or more critical events, the temple may fall. For it will be a house built upon sand.

---

140. See Cohen, *supra* note 137, at 242 (maxim that no man should be judge of his own cause derives from recognition that a person's values influence his perceptions of fact and law).

141. See Freund, *William J. Brennan, Jr.*, 86 YALE L.J. 1015, 1016-17 (1977) (Brennan's apprehension of substantive rights in terms of procedural variant is perhaps product of his experience as trial lawyer and state court judge).

142. *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958); see *Michigan v. Mosley*, 423 U.S. 96, 113 (1975) (Brennan, J., dissenting) (concrete procedural guidelines necessary to assure voluntariness of statements obtained from defendant in custody).

143. *Cf. Miranda v. Arizona*, 384 U.S. 436, 526 (1966) (Harlan, J., dissenting) (Court is forever adding new stories to the temples of constitutional law and temples have a way of collapsing when one story too many has been added) (citing *Douglas v. Jeanette*, 319 U.S. 151, 181 (1943) (Jackson, J., concurring in the result)).