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The *Miranda* Prohibition: A Narrowing Standard to Control Police Conduct: *Rhode Island v. Innis*, 100 S. Ct. 1682 (1980)

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Note

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Rhode Island v. Innis, 100 S. Ct. 1682 (1980).

I. INTRODUCTION

The admissibility of the product of police interrogation of a suspect after his arrest and prior to his arraignment is one of the most controversial issues in American criminal procedure.[1] In *Miranda v. Arizona*,[2] the United States Supreme Court observed that custodial interrogation contains "inherently compelling pressures" which undermine the individual's will and which may force him to speak when he would not do so otherwise.[3] Therefore, the Court in *Miranda* held that any suspect in custody[4] facing interrogation must be informed of his constitutional rights,[5] including the right against self-incrimination[6] and the right to counsel.[7] If the suspect

1. Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 67 (1966).
2. 384 U.S. 436 (1966).
3. *Id.* at 467.
4. For a discussion of the various tests for determining custody, see LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 40, 100-06 (1968). *See also* Smith, *The Threshold Question in Applying* Miranda: *What Constitutes Custodial Interrogation?*, 25 S.C.L. REV. 699, 706-35 (1974).
5. Prior to any interrogation, the suspect must be warned that: he has the right to remain silent; any statement he does make may be used against him in a court of law; he has a right to an attorney; and if he cannot afford an attorney, one will be appointed for him. Miranda v. Arizona, 384 U.S. at 479.
6. The fifth amendment states that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The fifth amendment was held applicable to the states through the due process clause of the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1, 8 (1964).
7. The sixth amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The sixth amendment was held applicable to the

invokes his fifth amendment right to remain silent, the interrogation must cease at once.[8] If he invokes his sixth amendment right to counsel, the interrogation must cease until an attorney is present.[9]

Recently, in *Rhode Island v. Innis*,[10] the United States Supreme Court faced the difficult problem of distinguishing between voluntary confessions, which are admissible in court, and coerced confessions, which are inadmissible due to improper custodial interrogation. The decision in *Innis* provided a long-awaited[11] guideline for determining when police conduct falls within the *Miranda* prohibition.[12] The Court's test included an objective inquiry into the likely effect of police conduct on a typical person in the suspect's position,[13] and a subjective inquiry as to whether the police should have known of any special characteristics of the suspect which would make him susceptible to their conduct.[14]

The purpose of this note is to probe the rationale used in *Innis* for determining when police conduct in obtaining a confession is classified as an "interrogation" within the prohibitions of *Miranda*. First, the history of the "interrogation" issue will be examined, with emphasis upon the current trend in Supreme Court rulings on the admissibility of confessions. Second, the *Innis* decision itself will be reviewed. Finally, the protections afforded by the fifth and sixth amendments and the problem of determining when these protections attach will be considered.[15]

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states through the due process clause of the fourteenth amendment. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

8. Miranda v. Arizona, 384 U.S. at 473-74.
9. *Id.* at 474.
10. 100 S. Ct. 1682 (1980).
11. For a general discussion of the need for standardized guidelines in determining whether police action is "interrogation," see Bator & Vorenberg, *supra* note 1 (calling for legislative guidelines), and White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979) (calling for judicial guidelines).
12. There are exceptions to this general prohibition. After the required warnings have been given, the suspect may "knowingly and intelligently waive these rights . . . ." Miranda v. Arizona, 384 U.S. at 479. There are also some specific, judicially-created exceptions to *Miranda*. *See generally* Chavez-Martinez v. United States, 407 F.2d 535 (9th Cir. 1969) (international border customs procedures); F.J. Buckner Corp. v. NLRB, 401 F.2d 910 (9th Cir. 1968) (license revocation proceedings); North v. Koch, 169 Colo. 508, 457 P.2d 915 (1969) (extradition proceedings); County of Dade v. Callahan, 259 So. 2d 504 (Fla. 1971) (drunken driving situations); State v. Graves, 60 N.J. 441, 291 A.2d 2 (1972) (welfare investigations). *See also* Note, Michigan v. Mosley: *A Further Erosion of* Miranda*?*, 13 SAN DIEGO L. REV. 861, 875 (1976).
13. For an analysis of the Court's test, see notes 71-134 & accompanying text *infra*.
14. *Id.*
15. It is "not enough to mechanically attempt to ascertain what 'interrogation' means without considering the rationales behind *Miranda* and the fifth and

II. THE HISTORY OF THE INTERROGATION PROBLEM

In the landmark case of *Brown v. Mississippi*,[16] the United States Supreme Court held that evidence obtained through torture was inadmissible. Since then, the Court often has faced the problem of confessions extracted by police coercion. Although rarely admitted into evidence, in the past confessions have been obtained by means of such physical atrocities as whipping,[17] beating,[18] and hanging by the neck.[19] The modern trend in police tactics for obtaining confessions has been to replace such physical interrogations with psychological techniques.[20] The Supreme Court has recognized that coercion can be mental as well as physical[21] and has held that psychologically oriented interrogation techniques can render a confession inadmissible even in the complete absence of physical abuse.[22] However, the continued prevalence of the use of police trickery to induce confessions is evidenced both by recent Supreme Court cases[23] and by police interrogation manuals.[24]

The admissibility of confessions has been determined upon the rationale of either the fifth amendment right to silence or the sixth amendment right to counsel. Until 1964, the admissibility of a confession in a fifth amendment case was based upon a "voluntariness" test,[25] which in turn was determined by examining the "totality of the circumstances."[26] The "totality of the circum-

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sixth amendments." Commonwealth v. Simala, 434 Pa. 219, 226, 252 A.2d 575, 578 (1969).

16. 297 U.S. 278 (1936).
17. Williams v. State, 88 Tex. Crim. Rep. 87, 225 S.W. 177 (1920).
18. People v. Rogers, 303 Ill. 578, 136 N.E. 470 (1922).
19. Edmonson v. State, 72 Ark. 585, 82 S.W. 203 (1904).
20. Miranda v. Arizona, 384 U.S. at 448.
21. Blackburn v. Alabama, 361 U.S. 199, 206 (1960).
22. Ashcraft v. Tennessee, 322 U.S. 143 (1944).
23. *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977) (confession obtained after suspect was told falsely that his fingerprints were "found at the scene of the crime"); Michigan v. Mosley, 423 U.S. 96 (1975) (confession obtained after suspect was informed falsely that he was named as the gunman by another suspect).
24. *See generally* White, *supra* note 11, at 582 n.2 (citing F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1967); C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (4th ed. 1978); R. ROYAL & S. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION (1976); C. VAN METER, PRINCIPLES OF POLICE INTERROGATION (1973)).
25. Culombe v. Connecticut, 367 U.S. 568 (1961). For a general discussion of the "voluntariness" test, see C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 147-50 (2d ed. 1972).
26. Frazier v. Cupp, 394 U.S. 731 (1969); Greenwald v. Wisconsin, 390 U.S. 519 (1968); Darwin v. Connecticut, 391 U.S. 346 (1968); Clewis v. Texas, 386 U.S. 707 (1967).

stances" included such factors as age, sex, race, physical disability, psychological abnormality, intoxication, education, and experience with police procedures.[27]

In 1964, the Supreme Court, in *Escobedo v. Illinois*,[28] replaced the "totality of the circumstances" test with a relatively definite per se rule.[29] The Court held that if the police failed to inform a suspect of his constitutional rights to remain silent and to counsel, any statements made by the suspect while in custody would be inadmissible.[30] This movement toward a per se analysis was advanced further in *Miranda*, when the Court held that failure to warn a suspect of four specific rights would render any subsequent confessions inadmissible[31] and that all interrogation must cease immediately if the suspect invokes his rights to silence or counsel.[32]

The shift to more concrete guidelines probably reflected a desire to relieve the federal courts of the burdensome case-by-case review of the subjective "voluntariness" test, and a dissatisfaction with that test's inability to adequately protect against increasingly sophisticated methods of circumventing the privilege against compulsory self-incrimination.[33] *Miranda* expressed concern about the prevalence of such interrogation techniques as questioning the suspect in private in order to prevent distractions and deprive him of any outside support.[34] Other techniques used to induce confessions involved discounting the seriousness of the offense, blaming either the victim or society,[35] or offering the suspect legal excuses for his actions.[36]

However, the Supreme Court's decisions in the post-*Miranda* era have revealed a substantial shift in judicial control over police interrogation in fifth amendment cases. In essence, the Court has moved away from the per se rationale of *Miranda* and toward the pre-*Miranda* standard of voluntariness.[37]

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27. *See* C. MCCORMICK, *supra* note 25, § 149, at 319-20.
28. 378 U.S. 478 (1964) (defendant was taken into custody and interrogated prior to his indictment. He was not informed of his right to remain silent, and his request to consult with an attorney was denied).
29. The Supreme Court had rejected a per se analysis in earlier cases. *See, e.g.*, Spano v. New York, 360 U.S. 315, 320 (1959); Cicencia v. Lagay, 357 U.S. 504, 509-10 (1958); Crooker v. California, 357 U.S. 433, 440-41 (1958).
30. 378 U.S. at 490-91.
31. Miranda v. Arizona, 384 U.S. at 479. *See* note 5 *supra*.
32. 384 U.S. at 473-74. *See* notes 8-9 & accompanying text *supra*.
33. C. MCCORMICK, *supra* note 25, § 151, at 326-27.
34. 384 U.S. at 455.
35. *Id.* at 450.
36. *Id.*
37. *See generally* George, *Future Trends in the Administration of Criminal Jus-*

The trend began in 1971 with *Harris v. New York*.[38] In *Harris*, the police questioned the defendant while he was in custody without advising him of his right to counsel.[39] The defendant later was indicted for selling heroin and subsequently testified in his own behalf at the trial.[40] After his testimony, his prior inconsistent statements to the police during custody were admitted to impeach his credibility.[41] The Supreme Court held that incriminating remarks made by a suspect were admissible for impeachment purposes despite the defective *Miranda* warnings.[42]

The trend continued in *Michigan v. Tucker*,[43] where the Court, while recognizing that the suspect should be free from compulsion, held that, if only the *Miranda* procedural guidelines had been violated, then in the absence of any compulsion the per se rule would be replaced by a balancing test. This test would weigh the need to deter undesirable police conduct against the court's need for "all concededly relevant and trustworthy evidence which either party seeks to adduce."[44]

In 1975, the Court further eroded the impact of *Miranda* by sanctioning renewed questioning of a suspect only two hours after he had invoked his right to silence.[45] In *Michigan v. Mosley*,[46] the Court held that the suspect's right to silence is not violated by renewed interogation if: (1) performed by a different police officer; (2) preceded by a fresh set of *Miranda* warnings; and (3) restricted to a crime which is different in nature, place, or time.[47] Thus, the tendency of the Burger Court[48] (and many lower federal and state courts[49]) has been to erode *Miranda* by slowly cutting away at its per se guidelines.

The admissibility of confessions has not been determined solely upon fifth amendment grounds. Recently in *Brewer v. Williams*,[50] the Supreme Court established that, in addition to the protections afforded by *Miranda*, some suspects have an independent sixth amendment right to the presence of counsel dur-

tice, 69 MIL. L. REV. 1 (1975) (attributes the shift to the contrasting policies of the Warren and Burger Courts).

38. 401 U.S. 222 (1971).
39. *Id.* at 224.
40. *Id.* at 223.
41. *Id.*
42. *Id.* at 225-26.
43. 417 U.S. 433 (1974).
44. *Id.* at 450.
45. Michigan v. Mosley, 423 U.S. 96, 107 (1975).
46. 423 U.S. 96 (1975).
47. *Id.* at 104-07.
48. *See* George, *supra* note 37, *passim*.
49. *See* note 12 *supra*.
50. 430 U.S. 387 (1977).

ing interrogation.[51] In *Williams*, the defendant had been arraigned in Davenport, Iowa, for the abduction of a ten-year-old girl in Des Moines, Iowa. The police officers assigned to transport the defendant to Des Moines had agreed, upon request of the defendant's Davenport attorney, not to question the suspect during the trip.[52] However, during the trip one of the officers intentionally sought to learn the location of the girl's body.[53] Knowing that the defendant was deeply religious and that he had a history of mental illness,[54] the officer made what is now known as the "Christian Burial Speech,"[55] thereby persuading the defendant to disclose the location of the body without actually "questioning" him.[56] The Supreme Court held that the defendant's incriminating remarks were inadmissible because his sixth amendment right to counsel had been violated:[57] the police officer's "Christian Burial Speech" was tantamount to interrogation, and the defendant was entitled to

51. "[T]here is no need to review in this case the doctrine of *Miranda v. Arizona*, a doctrine designed to secure the constitutional privilege against compulsory self-incrimination. . . . [I]t is clear that . . . Williams was deprived of a different constitutional right—the right to the assistance of counsel." *Id.* at 397-98.

52. *Id.* at 391-92.

53. The police officer admitted at Williams's trial that he had deliberately set out to elicit all the information he could before Williams consulted with his attorney. *Id.* at 399.

54. *Id.*

55. The "interrogating" officer addressed his suspect as "Reverend" and said:

> I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's 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 snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [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.

Id. at 392-93.

56. After making his "Christian Burial Speech," the police officer said to the suspect: "I do not want you to answer me. I don't want to discuss it further. Just think about it as we're riding down the road." *Id.* at 393.

57. Williams actually challenged the admissibility of his incriminating statements on both fifth amendment *Miranda* grounds and sixth amendment right-to-counsel grounds. State v. Williams, 182 N.W.2d 396, 399 (Iowa 1970). However, the United States Supreme Court found that the statements were inadmissible on sixth amendment grounds and did not consider the application of the *Miranda* doctrine. Brewer v. Williams, 430 U.S. at 397-98.

the assistance of counsel when the speech was made.[58]

In essence, *Williams* reaffirmed *Massiah v. United States*,[59] which had held that "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."[60] Although *Williams* revived the application of sixth amendment protections to suspects, its holding left the law concerning confessions unclear; as in every pre-1980 Supreme Court case dealing with the admissibility of confessions, the *Williams* Court had failed to define with any degree of certainty what constitutes "interrogation." The stage was set for *Innis*.

III. THE FACTS OF *INNIS*

In the early morning hours of January 17, 1975, a man carrying a sawed-off shotgun robbed a Providence, Rhode Island taxi driver. The driver was able to identify a picture of Thomas J. Innis as that of his assailant. At approximately 4:30 a.m. the same morning, Innis was arrested and advised of his rights, as required by *Miranda*. He did not have the shotgun in his possession then. When more officers arrived at the scene of the arrest, he was advised of his *Miranda* rights twice more. After stating that he understood his rights and that he wished to see a lawyer, Innis was placed in a police car with three officers, who were instructed specifically by their captain not to question, intimidate, or coerce their suspect in any way.[61]

While en route to the police station, Patrolman Gleckman began talking with Patrolman McKenna about the location of the missing shotgun, stating that there were "a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves."[62] The suspect interrupted the conversation and told the officers to "turn the car around so he could show them where the gun was located."[63] At that point they had traveled no more than one mile in the police car.[64] When they returned to the scene of the arrest, the defendant was given his *Miranda* rights for the fourth

58. Brewer v. Williams, 430 U.S. at 397-98.
59. 377 U.S. 201 (1964). *Massiah* also held that "custody" was irrelevant for sixth amendment purposes. *See generally* LaFave, *supra* note 4; Smith, *supra* note 4. *But cf.* Miranda v. Arizona, 384 U.S. at 477-78 (establishing "custody" as a requirement for fifth amendment protections).
60. Brewer v. Williams, 430 U.S. at 401.
61. 100 S. Ct. at 1686.
62. *Id.*
63. *Id.* at 1687.
64. *Id.*

time, and he replied that he understood.[65] He then led the police to the hidden gun, because, he said, he "wanted to get the gun out of the way because of the kids in the area in the school."[66]

Despite the defendant's objections, the trial judge allowed both the shotgun and testimony concerning the defendant's connection to it into evidence on the ground that the defendant had knowingly and intelligently waived his *Miranda* rights when he helped the police find the gun.[67] Innis then was convicted of kidnapping, robbing and murdering a different cab driver.[68] On appeal the Rhode Island Supreme Court reversed and remanded the decision on the ground that Officer Gleckman's statement was an impermissible "interrogation."[69] The court also held that the defendant had not waived his *Miranda* rights.[70]

IV. THE HOLDING OF *INNIS*

The United States Supreme Court[71] identified the sole issue of *Innis* as whether the defendant had been "interrogated" in violation of his fifth amendment right to remain silent.[72] The Court held that "interrogation," for *Miranda* purposes,[73] included police conduct which is either "express questioning or its functional equivalent."[74] The first prong of this definition was quickly found to be inapplicable: the Court felt that the conversation between Pa-

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* The defendant was convicted of the murder of a cab driver killed January 12, 1975. *See id.* at 1686-87. None of the charges related to the robbery of the cab driver whose identification led to Innis's subsequent arrest. *See id.*
69. State v. Innis, 391 A.2d 1158 (R.I. 1978).
70. *Id.* at 1163-64.
71. Justice Stewart delivered the opinion of the Court, in which Justices White, Blackmun, Powell, and Rehnquist joined. Rhode Island v. Innis, 100 S. Ct. at 1686. Chief Justice Burger concurred in the judgment only. *Id.* at 1691. Justice Marshall filed a dissenting opinion, in which Justice Brennan joined. *Id.* at 1692. Justice Stevens filed a dissenting opinion, in which he proposed a more objective test based solely on the effect of the police conduct. *Id.* at 1693-98.
72. *Id.* at 1688. Because the Court decided that Innis had not been "interrogated" for *Miranda* purposes, it found no need to reach the question of whether Innis had waived his *Miranda* rights. *Id.* at 1688 n.2. For an analysis of waiver of a suspect's *Miranda* rights, see Brewer v. Williams, 430 U.S. 387 (1977). *See also* Note, *The Right to Counsel and the Strict Waiver Standard*, 57 NEB. L. REV. 543 (1978).
73. The definition of "interrogation" in *Innis* is based upon fifth amendment *Miranda* principles. The Court noted that because of differing underlying policies, the definitions of "interrogation" under the fifth and sixth amendments are "not necessarily interchangeable." 100 S. Ct. at 1689 n.4. *See* notes 102-34 & accompanying text *infra*.
74. 100 S. Ct. at 1689.

trolmen Gleckman and McKenna contained no express questioning and was "nothing more than a dialogue between the two officers, to which no response from the respondent was invited."[75] The second prong—"interrogation" can be found in police conduct which is the "functional equivalent" of a direct question—consumed the rest of the decision.

The Court defined the "functional equivalent" of express questioning as "words or actions on the part of the police officers that they *should have known* were reasonably likely to elicit an incriminating response."[76] In deciding whether the police officer should have known that his conduct was likely to elicit an incriminating response, the Court focused on the suspect's perceptions, taking into consideration any peculiar characteristics of the particular suspect known to the police officer.[77] Applying the "functionally equivalent" portion of the two-pronged test to the facts of *Innis*, the Court held that Innis was not "interrogated" in violation of *Miranda* because it had not been established that the police officers knew that Innis was peculiarly susceptible to a "few off-hand remarks."[78]

V. ANALYSIS

A. A Fifth Or A Sixth Amendment Case?

The Court in *Innis* noted that the definitions of "interrogation" under the fifth and sixth amendments are "not necessarily interchangeable."[79] In fact, the sixth amendment definition encompasses a wider spectrum of conduct than does the fifth amendment definition.[80] As a result, incriminating information resulting from similar police conduct in two different cases may produce conflicting outcomes. The information obtained by the police may be admissible in a fifth amendment right-to-remain-silent case and inadmissible in a sixth amendment right-to-counsel case.

The factual situation of *Innis*, decided on fifth amendment

75. *Id.* at 1690. *But see* Respondent's Brief Opposing Certiorari at 6 ("Mr. Innis contends, as he has always contended, that Officer Gleckman's comments were a deliberate attempt to elicit incriminating information from an exhausted suspect.").

76. 100 S. Ct. at 1690 (emphasis in original). An "incriminating response" is any inculpatory or exculpatory response that the prosecution may seek to introduce at trial. *Id.* at 1689 n.5.

77. *Id.* at 1689-91.

78. *Id.* at 1690 & n.8, 1691.

79. *Id.* at 1689 n.4.

80. *See* notes 102-07 & accompanying text *infra*.

grounds,[81] is so similar to that of *Williams*, a sixth amendment case,[82] that a plausible argument can be made that *Innis* should have turned upon the same reasoning as used in *Williams*.[83] The cases shared several factors: (1) both defendants were informed of their right to counsel before they made incriminating statements; (2) both defendants revealed the location of incriminating evidence while being escorted in police custody; and (3) both defendants made incriminating statements for humanitarian reasons and not in response to direct questioning.

However, two important differences distinguish the two cases. First, the police officer spoke directly to Williams, while the police officer in *Innis* was speaking to another officer and was overheard by the defendant.[84] Second, Williams had been formally arraigned and had been represented by counsel before the incriminating remarks were made,[85] while Innis had not yet been arraigned and was not yet represented by counsel.[86] It is this second difference which makes *Williams* a sixth amendment case.[87]

According to *Innis*, the lack of a formal charge against the defendant will prohibit the application of the sixth amendment.[88] However, many commentators believe that the sixth amendment right to counsel should be triggered when the police give *Miranda* warnings to a suspect and when he subsequently invokes his right

81. 100 S. Ct. at 1689 n.4.

82. *See* note 51 *supra*.

83. *See* State v. Innis, 391 A.2d 1158 (R.I. 1978). While the Rhode Island Supreme Court did not base its decision on the sixth amendment right to counsel, it did adopt the reasoning on interrogation found in *Williams*. *See also* White, Rhode Island v. Innis: *The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53 (1979) (suggests a resolution of *Innis* based upon sixth amendment grounds).

The United States Supreme Court, however, based its decision upon the rationale of *Miranda* and the fifth amendment right against compulsory self-incrimination. Rhode Island v. Innis, 100 S. Ct. at 1689 n.4.

84. Whether the police officers deliberately intended to elicit incriminating statements from the suspect is unclear. *See* note 75 & accompanying text *supra*.

85. "The sixth amendment would not have applied [in *Williams*] had the Davenport police not arraigned Williams." Grano, Rhode Island v. Innis: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 9 (1979). *See also* notes 88-101 & accompanying text *infra*.

86. A third difference lies in the fact that Innis was warned again of his *Miranda* rights before actually disclosing the location of the gun, while Williams did not receive such additional warnings. The extra set of warnings gives rise to the argument that even if the suspect had been improperly interrogated for either fifth or sixth amendment purposes, he validly waived his rights after receiving the extra set of warnings. The waiver issue is beyond the scope of this note. *See* note 72 *supra*.

87. 100 S. Ct. at 1689 n.4.

88. *Id.*

to counsel.[89] In *Escobedo v. Illinois*,[90] the Court applied the sixth amendment to at least some instances of custodial interrogation.[91] The Court stated that the right to counsel attached as soon as "the process shifts from investigatory to accusatory."[92] This would seem to include the giving of the *Miranda* warnings, because police generally view the suspect as a "prospective defendant" rather than as a participant in a continuing investigation once the warnings are given.[93]

There are certain advantages to attaching sixth amendment protections to the suspect when the *Miranda* warnings are given. Law enforcement authorities can manipulate the commencement of formal proceedings in order to delay attachment of the defendant's right to counsel.[94] Furthermore, police objectives and tactics are likely to be the same at both the time of arraignment and of arrest,[95] because it is likely that police will be as firmly committed to prosecution when the arrest is made as they are when charges are formally instituted.[96] Also, neither a suspect's perception of his relationship with the state nor his actual need for an attorney will necessarily turn upon whether formal proceedings have commenced.[97] When an arrested suspect invokes his right to counsel, he expresses his "own view that he is not competent to deal with the authorities without legal advice."[98] Such a view indicates that, from the suspect's vantage point, adversary proceedings against him actually have commenced.[99]

By refusing to apply the sixth amendment in *Innis*, the Court has reaffirmed that *Escobedo* is no longer good case law.[100] *Innis*

89. *See* Enker & Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47, 84-85 (1964); Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 490-91 (1964); Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is Interrogation? When Does It Matter?*, 67 GEO. L.J. 1, 79-83 (1978); Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 673 (1966); White, *supra* note 11, at 590-93; *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 1006 (1966); Note, *The Right to Counsel During Police Interrogation: The Aftermath of* Escobedo, 53 CAL. L. REV. 337, 349 n.66 (1965).

90. 378 U.S. 478 (1964).

91. *See also* Hoffa v. United States, 385 U.S. 293 (1966); Spano v. New York, 360 U.S. 315 (1959).

92. Escobedo v. Illinois, 378 U.S. at 492.

93. White, *supra* note 83, at 59.

94. Kamisar, *supra* note 89, at 81.

95. White, *supra* note 11, at 591.

96. *Id.*

97. White, *supra* note 83, at 59.

98. Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring).

99. White, *supra* note 83, at 59-60.

100. *See* Kirby v. Illinois, 406 U.S. 682 (1972) (plurality opinion). In *Kirby*, Justice

demonstrated that the sixth amendment right to counsel will not attach at any point before the suspect has been formally charged. As a result, a defendant such as Innis, who wishes to exclude from evidence incriminating remarks made before he has been formally charged, must rely solely on the fifth amendment. This works to the defendant's disadvantage because improper police interrogation is defined more narrowly for fifth amendment purposes than for sixth amendment purposes.[101]

B. The Interrogation Issue

Innis clearly indicated that the process of determining whether police conduct constitutes prohibited "interrogation" depends on whether the particular case is based on the fifth or the sixth amendment.[102] The definitions of "interrogation" differ for fifth and sixth amendment purposes because the policies underlying the two separate constitutional protections are distinct.[103] Because the fifth amendment is concerned with compulsion,[104] "interrogation" for fifth amendment purposes encompasses conduct which is so compelling that it forces the suspect to make incriminating remarks which otherwise he would not have made.[105] For sixth amendment purposes, "interrogation" is defined more broadly as conduct which is *likely* to elicit an incriminating response.[106] This definition follows sixth amendment policy: interrogation techniques which are inconsistent with the accusatorial process should be prohibited.[107]

1. "Interrogation"—The Fifth Amendment Definition

The fifth amendment privilege against compulsory self-incrimination applies to any suspect who is both in "custody" and the subject of "interrogation."[108] Although the requirement of "custody" has not sparked much controversy,[109] the "interrogation" issue has

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Stewart, writing for the plurality, referred to *Escobedo* as a "deviation" from a long line of sixth amendment precedent. *Id.* at 689. The Court observed that it has come to view *Escobedo*, in retrospect, as a fifth amendment case rather than as a sixth amendment right-to-counsel case. *Id.*

101. Kamisar, *supra* note 89, at 41-55 (cited with approval in Rhode Island v. Innis, 100 S. Ct. at 1689 n.4).
102. 100 S. Ct. at 1689 n.4.
103. *Id.*
104. Kamisar, *supra* note 89, at 41-55. *See* note 101 *supra*.
105. 100 S. Ct. at 1689 n.4.
106. *Id.*
107. *Id.*
108. Miranda v. Arizona, 384 U.S. at 477-78.
109. *See* note 4 *supra*.

caused extensive debate.[110] *Innis* attempted to settle the debate by holding that "interrogation" occurs when the suspect is subjected to either direct questioning or its "functional equivalent."[111] The Court defined the "functional equivalent" of direct questioning as "words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."[112] The "should have known" language allows for a degree of subjectivity in the test.[113]

The Court's test presents two serious problems. The policy behind the subjective "should have known" standard is to prevent a guilty suspect from avoiding prosecution simply because he is unusually responsive to remarks *casually* made by a police officer. But, in establishing this standard, the Court has sacrificed control over the officer who *intentionally* attempts to elicit an incriminating response by appealing to any characteristics to which the suspect may be unusually susceptible, but of which the officer has no knowledge.[114] This possibility is not unlikely: officials may consider interrogation techniques which are not expressly prohibited to be legitimate [115] and will interpret, apply, and push to the limit the constitutional doctrines expounded by the Supreme Court.[116]

The Court's test, which in essence allows the police to take unlikely "longshots" in the hope of obtaining incriminating information,[117] is a continuation of the current trend to erode the base of black-letter *Miranda*[118] and is certainly a departure from the *Mosley* rule of "scrupulously honor[ing]"[119] the suspect's rights to silence and counsel.

Innis's definition of "interrogation" should be qualified, so that

110. *See generally* Bator & Vorenberg, *supra* note 1; White, *supra* note 11.
111. 100 S. Ct. at 1689.
112. *Id.* at 1690 (emphasis in original).
113. The courts traditionally have declined to use a totally subjective test for *Miranda* purposes. *See* United States v. Hall, 421 F.2d 540, 544 (2d Cir. 1969) ("[A]ny formulation making the need for *Miranda* warnings depend upon how each individual being questioned perceived his situation would require a prescience neither the police nor anyone else possesses."). *See generally* White, *supra* note 11, at 596-97.
114. 100 S. Ct. at 1695-96 (Stevens, J., dissenting). However, the majority opinion assumed that "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Id.* at 1690 n.7 (majority opinion). The majority's assumption fails to consider the possibility of an aggressive police officer. *See* notes 115-19 & accompanying text *infra*.
115. White, *supra* note 11, at 581-98. *See also id.* at 598 n.112.
116. Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).
117. *See* 100 S. Ct. at 1696 (Stevens, J., dissenting).
118. *See generally* notes 37-60 & accompanying text *supra*.
119. 423 U.S. at 104. *See* note 47 & accompanying text *supra*.

its test would conform more closely with the fifth amendment's concern over compulsion. The subjective "should have been known" portion of the Court's test should be used to exclude the suspect's incriminating remarks when the police officer had reason to know that his conduct was reasonably likely to elicit a response. However, the "should have known" standard should not be used to allow incriminating remarks into evidence when the police officer has no reason to know that the suspect would be susceptible to his conduct, but gambles that he might be, although that is the clear implication of the Court's language.

To better understand this qualification of the Court's definition of "interrogation," assume a hypothetical case which is factually similar to *Williams*, except that the suspect has not spoken to counsel and has not been arraigned (thus shifting the focus from the sixth amendment to the fifth). In such an example, the *Innis* rationale would hold that "interrogation" has occured because the officer giving the "Christian Burial Speech" "should have known" that he was appealing to the susceptible beliefs of the deeply religious suspect. Now, to these facts add the assumption that the police do not know of the suspect's deep religious beliefs or of his history of mental illness, the hypothetical officer delivers a "Christian Burial Speech" to the suspect with the intent of obtaining an incriminating response, and, as in *Williams*, the deeply religious suspect incriminates himself. Under *Innis*, the Supreme Court would focus on the perceptions of the suspect, taking into consideration any peculiar characteristics of the particular suspect's personality which are known to the police. Because the officer had no reason to know of the suspect's deep religious convictions, the Court will not consider them. Thus, nothing shows that the officer should have known his words were reasonably likely to elicit the incriminating response from the suspect (who outwardly appears typical), and the remarks will be admissible in court. The police officer's gamble was successful, because his suspect had a lower resistance to the compulsion than would a typical suspect.

Another problem with the Court's test is that of its willingness to use the police officer's intent to determine whether he "should have known" that his conduct was reasonably likely to elicit an incriminating response.[120] In order to apply this standard, the courts will be required to discern the police officer's perception of the situation. For litigation purposes, determining a police officer's subjective intent is a very difficult task.[121] In cases involving the

120. Under the Court's test, the significance of the officer's intent is not clear. The Court merely states that the officer's intent is not irrelevant. Rhode Island v. Innis, 100 S. Ct. at 1690 n.7.

121. *See generally* Alderman v. United States, 394 U.S. 165, 188 n.1 (1968) (Harlan,

Miranda warnings, the courts have been reluctant to focus upon the suspect's subjective perceptions;[122] focusing upon the police officer's actual intent would be equally difficult.[123] Furthermore, focusing on the subjective intentions of the police fails to recognize that *Miranda* was concerned with compulsion from the viewpoint of the suspect.[124]

2. *"Interrogation"—The Sixth Amendment Definition*

The Supreme Court has never formulated a precise test for discerning violations of the sixth amendment right to counsel.[125] Although *Innis* based its decision on fifth amendment principles, the decision does provide some insight into this question. Apparently, the *Innis* Court approved of Professor Kamisar's theory that a fifth amendment violation occurs when police conduct exerts a compelling influence on the suspect and that a sixth amendment violation occurs when the police conduct is *likely* to elicit an incriminating response.[126] It follows that the type of conduct which violates the sixth amendment right to counsel is a broader category than the type of conduct which violates the fifth amendment right against compulsory self-incrimination.

The sixth amendment protections, as established in *Massiah v. United States*,[127] apply whenever police officers, without the presence of counsel, "deliberately elicit" incriminating information from a suspect after he has been charged formally.[128] Kamisar argues that "interrogation" is irrelevant for sixth amendment purposes; after commencement of formal judicial proceedings,[129] it is necessary only that the suspect "*be approached* by persons acting on behalf of the government in the absence of counsel."[130]

Kamisar's theory seems to be consistent with that of the

J., concurring and dissenting) (inquiry into police knowledge and motivation entails "substantial administrative difficulties").

122. *See* note 113 *supra*.

123. White, *supra* note 83, at 66-67.

124. United States v. Hall, 421 F.2d 540, 544 (2d Cir. 1969) ("[A] standard hinging on the inner intentions of the police would fail to recognize *Miranda*'s concern with the coercive effect of the 'atmosphere' from the point of view of the person being questioned.").

125. White, *supra* note 83, at 66.

126. 100 S. Ct. at 1689 n.4.

127. 377 U.S. 201 (1964). *Massiah* also held that "custody" was irrelevant for sixth amendment purposes. *See generally* note 4 *supra*. *But cf.* Miranda v. Arizona, 384 U.S. at 477-78 (establishing "custody" as a requirement for fifth amendment protections).

128. Massiah v. United States, 377 U.S. at 204.

129. 100 S. Ct. at 1689 n.4.

130. Kamisar, *supra* note 89, at 41 (emphasis in original).

Supreme Court. In a recent case, *United States v. Henry*,[131] a paid informant was placed in a jail cell with the defendant.[132] The informant was instructed not to initiate any conversations with the defendant concerning the bank robbery charges against him, but if the defendant initiated such conversations the informant was to listen.[133] The Court held that the defendant's sixth amendment right to counsel had been violated, because the government deliberately had *planned* an impermissible interference with that right.[134] Such a holding, in effect, establishes a "hands-off" policy in a sixth amendment case as soon as formal proceedings have begun.

VI. CONCLUSION

Innis represents the continuing trend of the Burger Court to erode the per se prohibitions of *Miranda*. As a result of *Innis*, a defendant who attempts to exclude from evidence any incriminating remarks made before he is formally charged must now rely solely on the fifth amendment. From the suspect's point of view, he is now at a greater disadvantage because the scope of improper police conduct is defined narrowly for fifth amendment purposes. The broader sixth amendment protections are no longer available until formal charges have been filed.

The Burger Court opinions, however, are not unwarranted. Today, the public seems to be more concerned with controlling crime than with preserving the rights of suspects.[135] Polls indicate that the public favors stronger measures to reduce the crime rate—even at the expense of limiting the rights of an accused.[136] Before *Williams* was decided, attorneys general from twenty-one states urged the Court to overrule its procedural ruling in *Miranda*.[137] Had the Warren Court been deliberating in today's more conservative atmosphere, it is unlikely that it would have created the rigid, per se procedural prohibitions of *Miranda*.

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131. 100 S. Ct. at 2183 (1980).
132. *Id.* at 2184-85.
133. *Id.* at 2185-86.
134. *Id.* at 2189.
135. Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1424-25 (1979).
136. *Id.* at 1425.
137. Brewer v. Williams, 430 U.S. at 438 (Blackmun, J., dissenting).