NEW FIFTH AMENDMENT INTERROGATION DEFINITION ALLOWS SUBTLE COMPULSION

RHODE ISLAND V. INNIS, 446 U.S. 291 (1980)

In *Rhode Island v. Innis*[1] the Supreme Court fashioned a problematic definition of "interrogation"[2]—incompatible with *Miranda*[3] fifth amendment[4] safeguards—that offers little guidance to lower courts[5] and police[6] and amplifies the existing tension between fifth and sixth amendment[7] right to counsel cases.[8]

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1. 446 U.S. 291 (1980).

2. *Id.* at 300-01. The Court held:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Id. (footnotes omitted).

3. Miranda v. Arizona, 384 U.S. 436 (1966). "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444.

Although incompatible with the *Miranda* opinion, the *Innis* holding is not inconsistent with the Court's gradual erosion of the principles underlying *Miranda. See* Chase, *The Burger Court, the Individual and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518, 555 (1977); Israel, *Criminal Procedure, the Burger Court and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1322-23 (1977); Scholl, *Self-Incrimination*, 16 AM. CRIM. L. REV. 37, 42 (1978); Schrock, Welsh & Collins, *Interrogational Rights: Reflections on* Miranda v. Arizona, 52 S. CAL. L. REV. 1, 2 (1978).

4. U.S. CONST. amend. V. The fifth amendment provides, in part: "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself . . . ."

5. 446 U.S. at 310 (Stevens, J., dissenting). Justice Stevens notes that the majority's holding marks a "plain departure from the principles set forth in *Miranda*," particularly in its effect on the "scrupulously honored" standard announced in Michigan v. Mosley, 423 U.S. 96, 107 (1975) (White, J., concurring). The *Mosley* standard governed police conduct after an accused's decision to exercise his right to cut-off questioning.

6. 446 U.S. at 304 (Burger, C.J., concurring). The Chief Justice expressed doubt that police officers are competent to "evaluate the suggestibility and susceptibility" of in-custody suspects to words or actions by the police that might prompt incriminating responses. *Id.*

7. U.S. CONST. amend. VI. The sixth amendment states in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

8. 446 U.S. at 304 (Burger, C.J., concurring). *See, e.g.,* Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964). *See generally* Kamisar, Brewer v. Williams, *Massiah, and Miranda: What is "Interrogation"?: When Does it Matter?*, 67 GEO. L.J. 1 (1978); Comment, *The Right to Counsel in Police Interrogation Cases: Miranda and Williams*, 12 U. MICH. J.L. REF. 112 (1978); Comment, Brewer v. Williams: *The End of Post-Charging Interrogation*, 10 SW. U.L. REV. 331 (1978). *See also* Keefe, *Confessions, Admissions and the Recent Curtailment of the Fifth Amendment Protection*, 51 CONN. B.J. 266 (1977).

Police officers arrested Thomas J. Innis after receiving a complaint that implicated him in separate robbery and murder incidents.[9] The unarmed suspect, upon hearing his *Miranda* rights,[10] acknowledged comprehension and asked to confer with a lawyer.[11] Three officers transported the suspect in a squad car to a police station.[12] En route, one of the patrolmen conversed with another officer and voiced concern regarding the whereabouts of a shotgun used in the alleged crimes.[13] The shotgun presumably was secreted near a school for

9. Shortly after midnight on Jan. 12, 1975, a taxicab driver identified Innis as the shotgun-wielding assailant who robbed him earlier in the evening. Five days earlier another Providence, Rhode Island, cab driver had been murdered by a shotgun blast to the head. The police commenced a search of the area for Innis after the identification. 446 U.S. at 293.

10. At 4:30 a.m. Innis was located and arrested. Approximately twelve officers responded to the scene of the arrest. Three of the officers were in direct contact with the suspect and all three advised Innis of his constitutional rights. Brief for Respondent at 5, Rhode Island v. Innis, 446 U.S. 291 (1980).

11. 446 U.S. at 294.

12. The ranking officer at the scene of the arrest directed three officers to transport the suspect to a police station without questioning, intimidating, or coercing him in any manner. Testimony about the seating arrangements in the car conflicted, although it is clear that all occupants heard the conversation. *Id.* at 294 n.1; State v. Innis, __ R.I. __, __, 391 A.2d 1158, 1160 (1978). The majority paid scant attention to the seating arrangements. Professor Grano, however, has argued that the positioning of the officers was relevant to show the intent of the police "to provoke a response and the degree of pressure experienced by Innis." *See* Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 2 n.8 (1979).

13. 446 U.S. at 294 n.1; State v. Innis, __ R.I. __, __, 391 A.2d 1158, 1160 (1978). Testimony at trial characterized the conversation in the police car as follows:

A. [Officer Gleckman] At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and there's 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.
Q. Who were you talking to?
A. Patrolman McKenna.
Q. Did you say anything to the suspect Innis?
A. No, I didn't.
Q. Had anybody said anything to him?
A. No.
Q. And you were talking to Patrolman McKenna?
A. Right.
Q. And what happened next?
A. At that point, as I was saying, there is kids running around there, as it is a handicapped school, and he says, you know, back and forth with Patrolman McKenna, he [Innis] at this point said: "Stop, turn around, I'll show you where it is." At this point, Patrolman McKenna got on the mike and told the captain: "We're returning to the scene of the crime, or where the weapon might be, and the subject is going to show us where it will be."

Record at 41, 43-44, Rhode Island v. Innis, __ R.I. __, 391 A.2d 1158 (1978). Officer McKenna corroborated officer Gleckman's account:

handicapped children and posed a threat to the children's safety. Innis, immediately following the officer's remarks, agreed to lead police to the weapon.[14] The trial court admitted into evidence the shotgun and the suspect's statements to the police.[15] The court convicted Innis of kidnapping, robbery, and murder.[16] The Rhode Island Supreme Court set aside the conviction, finding an "interrogation" of the defendant without a valid waiver of his fifth amendment right to counsel.[17] The Supreme Court vacated the judgment and *held*: Under the *Miranda* doctrine the term "interrogation" refers only to a police officer's words or actions that are reasonably likely to elicit an incriminating response from the suspect.[18]

The defendant's privilege against self-incrimination developed during the eighteenth century,[19] and finally resulted in adoption of the fifth amendment self-incrimination clause.[20] As accusatorial systems of criminal justice ascended over prior inquisatorial models, courts re-

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A. [Officer McKenna] I more or less concurred with him [Gleckman] that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it.

Id. at 53. The third officer in the car heard the conversation but did not speak:

A. He [Gleckman] said it would be too bad if the little—I believe he said girl—would pick up the gun, maybe kill herself.

Id. at 59.

14. 446 U.S. at 295. Innis' response clearly was the product of Officer Gleckman's statements. Before leading the police to where he had hidden the shotgun Innis was again apprised of his rights. He stated that he understood his rights and "wanted to get the gun out of the way because of the kids in the area of the school." *Id.*

15. *Id.* at 296. The trial court ruled that Innis had made an intelligent waiver of his *Miranda* rights without considering whether he had been subjected to interrogation.

16. *Id.*

17. *Id.* The opinion of the Supreme Court of Rhode Island is reported at __ R.I. __, 391 A.2d 1158 (1978). Innis' assignment of error on appeal was the failure of the trial court to suppress evidence—the shotgun, some shells, and his statements related to their discovery—obtained in violation of the fifth amendment. 391 A.2d at 1160.

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

19. Two common-law maxims—*nemo tenetur prodere seipsum* (no one is bound to betray himself) and *nemo esse testes in propria causa* (no man should be a witness in his own case)—illustrate the philosophy behind the privilege against self-incrimination. *See* P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 18 (1958); L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 423 (1968). *See also* Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the old "Voluntariness" Test*, 65 MICH. L. REV. 59, 66 (1966); Spring, *The Nebulous Nexus: Escobedo, Miranda, and the New Fifth Amendment*, 6 WASHBURN L.J. 428, 434-35 (1967).

20. The inequities of ecclesiastical inquisitions and oppressiveness of the notorious Star Chamber proceedings in seventeenth century England prompted the framers to adopt the privilege against compulsory incrimination in the fifth amendment. *See* Brown v. Walker, 161 U.S. 591, 596-97 (1896); Spring, *supra* note 19, at 434-35.

garded confessions as unreliable evidence of guilt.[21] Courts admitted confessions into evidence only if the statement[22] was deemed "voluntary."[23] Courts thereafter considered a combination of factors under a "totality of circumstances" test, to determine whether an admission was voluntary.[24] The lack of a requirement that the police forewarn sus-

21. The King v. Warrickshall, 1 Leach C.C. 262, 168 E.R. 234 (K.B. 1783). Confessions elicited under pressure were subject to "a fair risk of falsity." *See* 3 J. WIGMORE, EVIDENCE §§ 822-826 (Chadbourn rev. ed. 1970); Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 452-54 (1964).

22. A statement did not have to be a complete confession to warrant exclusion from trial as an involuntary admission. *See* Wilson v. United States, 162 U.S. 613, 621 (1896). *But see* Stein v. New York, 346 U.S. 156, 190 (1953).

23. *See* Bram v. United States, 168 U.S. 532, 549-61 (1897); Pierce v. United States, 160 U.S. 355, 357 (1896); Hopt v. Utah, 110 U.S. 574, 584 (1884). The early voluntariness approach, first adopted in 1884 by the Supreme Court, incorporated notions of reliability:

> [T]he presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an *untrue statement*, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession *voluntary* within the meaning of the law.

Hopt v. Utah, 110 U.S. 574, 585 (1884) (emphasis added).

In Bram v. United States, 168 U.S. 532 (1897), a self-incrimination theory was used to exclude a compelled confession from evidence. This approach, however, lay dormant until Malloy v. Hogan, 378 U.S. 1 (1964), discussed *infra* at notes 36 and 37. The dominant test of confession admissibility from 1884 through 1940 remained "whether the confession was obtained in reliability-impairing circumstances." *See* Herman, *supra* note 21, at 453 (citing Brown v. Mississippi, 297 U.S. 278, 286 (1936) and Ziang Sun Wan v. United States, 266 U.S. 1, 14 (1924)).

24. Physical abuse and threats of harm rendered confessions involuntary and consequently inadmissible into evidence. *See, e.g.,* Payne v. Arkansas, 356 U.S. 560 (1958) (denial of food); Malinski v. New York, 324 U.S. 401 (1945) (suspect stripped and denied clothes for extended period of time); Ward v. Texas, 316 U.S. 547 (1942) (threats of mob violence); White v. Texas, 310 U.S. 530 (1940) (accused repeatedly interrogated in woods at night); Brown v. Mississippi, 297 U.S. 278 (1936) (suspect stripped, whipped, and beaten before signing confession).

The Court also recognized the propensity of psychological ploys to overbear the will of an accused. *See, e.g.,* Lynumn v. Illinois, 372 U.S. 528 (1963) (offer of leniency's effect on will to resist); Rogers v. Richmond, 365 U.S. 534 (1961) (police threat to arrest spouse precipitated confession); Spano v. New York, 360 U.S. 315 (1959) (police officer played upon former relationship with accused to elicit confession); Leyra v. Denno, 347 U.S. 556 (1954) (trained psychiatrist interrogated suspect, induced confession); Watts v. Indiana, 338 U.S. 49 (1949) (extended solitary confinement).

The Court eventually expanded the concept into a "totality of circumstances" test and applied a multitude of factors cumulatively. *See, e.g.,* Haynes v. Washington, 373 U.S. 503 (1963) (lack of warnings, incommunicado detention, conditioned promise to allow phone call to spouse); Fikes v. Alabama, 352 U.S. 191 (1957) (lack of education, low mentality, susceptibility to psychological pressure, incommunicado detention, violation of state prompt arraignment statute); Haley v. Ohio, 332 U.S. 596 (1948) (suspect's age [15], time of night interrogation occurred, duration of

pects of their privilege not to speak, however, partially emasculated the early "voluntariness" approach.[25]

Increasingly, courts began to evaluate police methods for eliciting confessions.[26] Even if a confession is "voluntary," the statement becomes inadmissible into evidence if obtained by illegal police methods.[27]

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interrogation, absence and denial of counsel, callous attitude of police). *But cf.* Lisenba v. California, 314 U.S. 219 (1941) (unfair procedures must actually coerce a confession to render it involuntary).

The Court utilized the due process clause of the fourteenth amendment to apply federal confession standards to the states to curb abuses in state courts. The fourteenth amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. *See, e.g.*, Lisenba v. California, 314 U.S. 219, 236 (1941); Brown v. Mississippi, 297 U.S. 278, 286 (1936). *See generally* Gangi, *A Critical View of the Modern Confession Rule: Some Observations on Key Confession Cases*, 28 ARK. L. REV. 1 (1974). *See also* People v. Doran, 246 N.Y. 409, 159 N.E. 379 (1927).

25. *See* Powers v. United States, 223 U.S. 303 (1912). *See also Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 978 (1966).

26. *See* Harris v. South Carolina, 338 U.S. 68, 71 (1949); Turner v. Pennsylvania, 338 U.S. 62, 63 (1949); Upshaw v. United States, 335 U.S. 410, 414 (1948); Ashcraft v. Tennessee, 322 U.S. 143, 149 (1944).

27. Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 315 (1959); Kamisar, *What is an Involuntary Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confession*, 17 RUTGERS L. REV. 728, 754-55 (1963). The *Spano* Court reasoned:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must *obey the law* while enforcing the law; that in the end life and liberty can be as much endangered from *illegal methods* used to convict those thought to be criminals as from the actual criminals themselves.

360 U.S. at 320-21 (emphasis added).

An adjunct to the police methods and voluntariness-reliability approaches was the *McNabb-Mallory* rule. *See* Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). The rule declared admissions following a period of unnecessary delay in arraignment inadmissible into evidence. The cases held that violations of Rule 5(a) of the Federal Rules of Criminal Procedure barred admissions made during the unnecessary delay. Rule 5(a) states:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.

18 U.S.C. § 5(a) (1976). The lower federal courts effectively nullified *McNabb* by requiring a causal connection between the confession and detention. State courts ignored it. *See generally* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 803-10 (1970); Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958). Congress purported to overrule the *McNabb-Mallory* rule in favor of a "voluntariness" standard by enacting the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 3501 (1976).

In *Crooker v. California*[28] the Supreme Court, in a 5-4 decision, held that the due process clause did not require all interrogation of a suspect to cease after a request for counsel.[29] The following year, however, the dissenting justices in *Crooker* forcefully reasserted their views in a concurring opinion in *Spano v. New York*.[30] The *Spano* concurrence recognized that after imposition of a formal charge or indictment an accused's right to assistance of counsel attached.[31] This aspect of *Spano* is limited, however, because the Court relied on the coercion of the suspect and carefully circumvented the right to counsel issue.[32] Nevertheless, courts followed the minority view.[33]

In the early 1960's the due process-voluntariness test still controlled the admissibility of a statement, despite pointed criticism of its effectiveness as a safeguard of suspects' rights.[34] The Court regarded denials of requests for counsel by subjects of police interrogation as part of the "totality of circumstances" governing the voluntariness of a statement.[35]

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28. 357 U.S. 433 (1958), *rev'd*, 384 U.S. 436, 479 n.48 (1966).

29. 357 U.S. 438-41. *See also* Cicencia v. Lagey, 357 U.S. 504 (1958), *rev'd*, 384 U.S. 436, 479 n.48 (1966).

30. 360 U.S. 315, 324-27 (1959) (Douglas & Stewart, J.J., concurring).

31. *Id.*

32. The Court did not reach the question of whether any confession obtained in the absence of counsel could be used without violating the fourteenth amendment. *Id.* at 320.

33. *See* Massiah v. United States, 377 U.S. 201, 204-05 (1964) (collecting cases).

34. *See* Reck v. Pate, 367 U.S. 433, 455 (1961) (Clark, J., dissenting). Justice Clark in dissent described the voluntariness approach as an "elusive, measureless standard of psychological coercion heretofore developed in this Court by accretion on almost an ad hoc, case-by-case basis . . . ." *Id. See generally* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 786-88, 803-10 (1970) (removal, workload, lack of legislative attention, limited effect of decisions, inherent inability of the judicial system to control abusive practices at lowest levels undermine case-by-case approach); Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956) (same); White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 586 (1979) (traditional litigation process not suited to gauge pressure on suspects). *See also* Culombe v. Connecticut, 367 U.S. 568 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960).

Professor Kamisar expresses concern that the "remoteness" of the Supreme Court as the reviewing body in a case-by-case approach inadequately protects suspects' rights. As support for this criticism he observed that in a thirty year period following *Brown v. Mississippi* the Court granted certiorari to only one-third of the petitioners seeking review of confessions. Of these, two-thirds were capital murder cases. Kamisar, *supra* note 19, at 102-03.

35. Haynes v. Washington, 373 U.S. 503, 516-17 (1963); Culombe v. Connecticut, 367 U.S. 568, 602 n.54 (1961). The "totality of circumstances-voluntariness" test retains vitality in the federal courts as a result of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501 (1976). *See* United States v. Bear Killer, 534 F.2d 1253, 1257 (8th Cir.), *cert. denied*, 429 U.S. 846 (1976); United States v. Vigo, 487 F.2d 295, 299 (2d Cir. 1973). *See also* United States v.

In *Malloy v. Hogan*[36] the Court revived the fifth amendment as the constitutional embodiment of the right against self-incrimination in police interrogations.[37] Thereafter, in *Miranda v. Arizona*[38] the Court established universally applicable guidelines for custodial interrogation to protect fifth amendment privileges.[39] The *Miranda* Court embraced the principle that the fifth amendment proscribes compulsion in any custodial setting,[40] but does not prohibit the taking of statements from

Smith, 608 F.2d 1011, 1012 (4th Cir. 1979); United States v. Hines, 605 F.2d 132, 134 (4th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980); United States *ex rel.* Pugach v. Mancusi, 441 F.2d 1073, 1075 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971).

Some states have followed Congress' approach as well. *See, e.g.,* People v. Simmons, 60 Ill. 2d 173, 179, 326 N.E.2d 383, 386 (1975); Montes v. State, 263 Ind. 390, 399, 332 N.E.2d 786, 792 (1975); State v. Franks, 239 N.W.2d 588, 591 (Iowa 1976); State v. Colin, 214 Kan. 193, 195, 519 P.2d 629, 631 (1974); State v. Riedel, 211 Kan. 872, 876, 508 P.2d 878, 882 (1973). *See generally* note 24 *supra* and accompanying text.

36. 378 U.S. 1 (1964).

37. Incorporation of the fifth amendment through the fourteenth amendment allowed the Court to make the fifth amendment privilege against compulsory self-incrimination the applicable constitutional standard in state criminal prosecutions. *Id.* at 8. *See* Herman, *supra* note 21, at 463.

38. 384 U.S. 436 (1966).

39. *Id.* at 444. The Court provided:

> As for procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently.

Id.

40. The Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id. See* Annot., 31 A.L.R.3d 565 (1970) (collecting cases defining custodial interrogation under *Miranda*).

The *Miranda* opinion did not limit custodial interrogation to those conducted in the stationhouse. 384 U.S. at 461. Nevertheless, subsequent decisions evidence the Court's restrictive view of the ambiguous "custodial setting" concept as a guide to the scope of *Miranda. See* United States v. Washington, 431 U.S. 181 (1977) (*Miranda* not applicable to grand jury hearings); United States v. Wong, 431 U.S. 174 (1977) (same); Oregon v. Mathiason, 429 U.S. 492, 494-95 (1977) (no custodial interrogation when suspect voluntarily submitted to police request for a meeting at the stationhouse); United States v. Mandujano, 425 U.S. 564 (1976) (grand jury hearings); Baxter v. Palmigiano, 425 U.S. 308 (1976) (*Miranda* not applicable to noncriminal proceedings). *But see* United States v. Brown, 557 F.2d 541, 548 (6th Cir. 1977) (inherent coerciveness of backseat of police car). *See generally* Note, *Custodial Interrogation After Oregon v. Mathiason*, 1978 DUKE L.J. 1497, 1502; Comment, *Custodial Interrogation*, 35 TENN. L. REV. 604 (1968); 57 OR. L. REV. 184 (1977). *See also* Beckwith v. United States, 425 U.S. 341, 344-45 (1976); Orozco v. Texas, 394 U.S. 324, 326 (1969); Mathis v. United States, 391 U.S. 1, 4 (1968).

a suspect.[41] The majority demonstrated cognizance of both the valuable role confessions play in law enforcement and the need to safeguard the privilege against self-incrimination from the inherent compulsion of custodial interrogation.[42] The Court required the police to administer informative warnings[43] and cease "custodial interrogation" if suspects invoked[44] their privilege. *Miranda*, furthermore, reinforced the

41. 384 U.S. at 478. The Court explained:

> Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege [against self-incrimination] while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.

Id.

42. An individual subjected to custodial interrogation "cannot be otherwise than under a compulsion to speak." *Id.* at 461. Justice White was critical of this conclusive presumption in his *Miranda* dissent:

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

Id. at 533 (White, J., with Harlan & Stewart, J.J., dissenting). *See* A.L.I., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 120 (Tent. Draft No. 6, 1974); A.L.I., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 39-40 (Study Draft No. 1, 1968); H. FRIENDLY, *A Postscript on Miranda*, BENCHMARKS 226, 271 (1967); Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 70-73 (1966). Bator and Vorenberg suggest:

> More basic is the point that the policy of privilege against self-incrimination is to prevent compulsion, and not self-incrimination in the absence of compulsion. Its policy [fifth amendment] is to give people a choice whether to make incriminating statements or not, and this policy is effectuated by safeguarding conditions for the exercise of responsible choice, and does not require a system which, by barring all questioning, insures that the exercise of this choice will always go in one direction—that of silence.

Id. at 70. *See also* Kamisar, *supra* note 8, at 50.

43. 384 U.S. at 471, 473:

> Accordingly we hold that an individual held for interrogation must be clearly informed that he has a right to consult with a lawyer and to have a lawyer with him during interrogation. . . . As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation.
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> . . . .
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> In order to fully apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also if he is indigent a lawyer will be appointed to represent him.

Id.

44. The Court prohibited interrogation after suspects indicate in any manner at any stage during custody their desire to remain silent or confer with an attorney, even if the subjects had previously volunteered statements. 384 U.S. at 473-74. The Court explicitly outlined the procedure:

> Once warnings have been given, the subsequent procedure is clear. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is

Court's disapproval of patent psychological ploys—verbal or nonverbal—designed to elicit incriminating responses.[45]

The Court, in *Michigan v. Tucker*,[46] narrowly construed the *Miranda* doctrine.[47] In *Tucker* the Court upheld the admission into evidence of a statement not preceded by full warnings. The Court distinguished between actual violation of the fifth amendment and violation of the prophylactic rules developed to protect fifth amendment rights.[48] When violations of the prophylactic guidelines occur, *Miranda*[49] no longer automatically precludes the admissibility of arguably involuntary statements.[50]

In *Michigan v. Mosley*[51] the Court again demonstrated its reluctance to construe *Miranda* strictly by allowing the resumption of interroga-

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present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent.

Id. at 474.

45. *See* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 50-51 (1968); Comment, *Deceptive Interrogation Techniques & the Relinquishment of Constitutional Rights*, 10 RUT.-CAM. L.J. 109, 147 (1977). *See also* C. MCCORMICK, EVIDENCE 330 (E. Cleary 2d ed. 1972); J. WIGMORE, EVIDENCE § 826a, at 383 n.23 (J. Chadbourn rev. ed. 1970).

The *Miranda* majority discussed at length psychological ploys taught to police officers for the express purpose of maximizing the effectiveness of police confession elicitation. 384 U.S. at 436. *See* F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 60-61 (2d ed. 1967); C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 102-03 (1st ed. 1956).

46. 417 U.S. 433 (1974). One court intimated that *Tucker* overruled *Miranda* and reinstated the traditional voluntariness test. United States v. Crocker, 510 F.2d 1129, 1137 (10th Cir. 1975).

47. *See* Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 100-01. Professor Stone noted:

> [T]he Court, in the years since Warren Burger assumed the role of Chief Justice, has handed down eleven decisions concerning the scope and application of *Miranda*. In ten of these cases, the Court interpreted *Miranda* so as not to exclude the challenged evidence. In the remaining case [Doyle v. Ohio, 426 U.S. 610 (1976)], the Court avoided a direct ruling on the *Miranda* issue holding the evidence inadmissible on other grounds.

Id. at 100.

48. 417 U.S. at 450.

49. 384 U.S. at 474. *See* note 44 *supra* and accompanying text.

50. 417 U.S. at 451. Courts must apply a balancing test, weighing the interest of allowing the jury to consider reliable evidence of guilt against the desire to control unauthorized police conduct. *Id.* at 450-51. *See also* Comment, *Michigan v. Mosley: A Further Erosion of Miranda*, 13 SAN DIEGO L. REV. 861, 865 (1976). The Court did conclude that statements elicited in violation of *Miranda* were inadmissible in a subsequent trial, relying on the "fruits of the poisonous tree" doctrine. *See* United States v. Mandujano, 425 U.S. 564, 576 (1976); Kastigar v. United States, 406 U.S. 441, 444-45 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); Counselman v. Hitchcock, 142 U.S. 547, 584-86 (1892).

51. 423 U.S. 96 (1975).

tion of a suspect who had invoked the fifth amendment, but who had never asked to consult with an attorney.[52] Lower courts, nevertheless, remain divided over whether in-custody suspects' requests for counsel prohibit the resumption of police questioning until counsel is present.[53] The Court in *Mosley* required only that police officers "fully respect"[54] or "scrupulously honor"[55] a suspect's rights.[56]

Concurrent with the evolution of the fifth amendment right to counsel, the Court grappled with the question of when to apply the sixth amendment right to counsel.[57] In *White v. Maryland*[58] the Court concluded that the right to assistance of counsel attached at "critical stage[s]"[59] of the judicial process.[60] The majority in *White* deemed the preliminary hearing one such "critical period."[61] One year later, in *Massiah v. United States*,[62] the Court held that the formal indictment was a "critical stage" to which the sixth amendment right to counsel

52. *Id.* at 104-06. *Mosley* held that interrogation could be resumed if: (1) The original interrogation is promptly terminated; (2) a significant period of time passes between interrogations; (3) full warnings are repeated at the outset of each interrogation; (4) a different officer conducts the second interrogation; and (5) the second interrogation covers a different crime. *Id.*

Some states, notably California, have rejected *Mosley* as inconsistent with state constitutional provisions against self-incrimination. People v. Pettingill, 21 Cal. 3d 231, 246-47, 578 P.2d 108, 117-18, 145 Cal. Rptr. 861, 870-71 (1978). *See also* Chase, *supra* note 3, at 559; Kamisar, *supra* note 8, at 71-73.

53. *See* North Carolina v. Butler, 441 U.S. 369, 371 (1979); People v. Grant, 45 N.Y.2d 366, 375, 380 N.E.2d 257, 262, 408 N.Y.S.2d 429, 434 (1978). *See generally*, White, *Rhode Island v. Innis: The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53 (1979).

54. 423 U.S. at 105.

55. *Id.* at 103-04. *See* Kamisar, *supra* note 8, at 73 n.428.

56. The "scrupulously honor[ed]" standard of police conduct has been widely followed. *See, e.g.,* United States v. Smith, 608 F.2d 1011 (4th Cir. 1979); United States v. Hines, 605 F.2d 132 (4th Cir. 1979), *cert. denied*, 444 U.S. 1046 (1980); United States v. Henry, 604 F.2d 908 (5th Cir. 1979); United States v. Hernandez, 574 F.2d 1362 (5th Cir. 1978); United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978); State v. Sauve, 112 Ariz. 576, 544 P.2d 1091 (1976); People v. Traubert, ___ Colo. ___, 608 P.2d 342 (1980); People v. James, 82 Ill. App. 3d 551, 402 N.E.2d 936 (1980); State v. Greene, 92 N.M. 347, 588 P.2d 548 (1978); People v. Wander, 47 N.Y.2d 724, 390 N.E.2d 1169, 417 N.Y.S.2d 245 (1979); State v. Roquette, 290 N.W.2d 260 (N.D. 1980); Wentela v. State, 95 Wis. 2d 283, 290 N.W.2d 312 (1980).

57. *See* Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1032-33 (1964).

58. 373 U.S. 59 (1963).

59. *Id.* at 60.

60. This approach marked the Court's departure from previously employed due process-fundamental fairness standards. *See* Powell v. Alabama, 287 U.S. 45 (1932).

61. 373 U.S. at 60.

62. 377 U.S. 201 (1964).

applied.[63] The Court expressly reaffirmed the *Massiah* doctrine[64] in *McLeod v. Ohio*.[65]

In *Escobedo v. Illinois*[66] the Court specifically held for the first time that the sixth amendment applies to custodial interrogation.[67] Justice Goldberg asserted that it would "exalt form over substance" to deny the right to counsel during interrogation, which could vitiate the value of a lawyer's assistance at trial.[68] In *Kirby v. Illinois*[69] the Court maintained, however, that the sixth amendment does not apply before the "initiation of adversary judicial proceedings"[70] and characterized *Escobedo* as a misplaced effectuation of the fifth amendment privilege.[71]

In 1977 the Court decided *Brewer v. Williams*.[72] The *Williams* ma-

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63. *Id.* at 204-06.

64. In *Massiah* government officers secured the assistance of one of defendant's confederates to enable them to hear his damaging statements. The defendant was free on bail after indictment and had retained counsel when he made compromising admissions in the confederate's automobile which was wired for sound. *Id.* at 203.

65. 381 U.S. 356 (1965) (per curiam). *McLeod* reversed a state court decision limiting application of *Massiah* to circumstances of surreptitious interrogation or police trickery. 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964), *rev'd*, 381 U.S. 356 (1965).

66. 378 U.S. 478 (1964).

67. The *Escobedo* majority constructed the five-part "focus" test to determine whether the sixth amendment right to counsel applies:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

Id. at 490-91.

68. *Id.* at 486.

69. 406 U.S. 682 (1972).

70. *Id.* at 688. Justice Stewart explained:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

Id. at 689. *See also* Gideon v. Wainwright, 372 U.S. 335 (1963).

71. 406 U.S. at 689. *Accord,* Beckwith v. United States, 425 U.S. 341, 347 (1976).

72. 430 U.S. 387 (1977). Williams was arrested and arraigned for the abduction of a ten-year-old girl in Davenport, Iowa. At the time the police transported the defendant to Des Moines, where the abduction took place, the police had not located the child. One of the police officers, aware that the defendant was a former mental patient and deeply religious, delivered the now famous "Christian burial speech." He intimated that the defendant should assist the police in

jority concluded that police conduct "tantamount to interrogation"[73] rendered inadmissible inculpatory statements elicited from a suspect after arraignment. The Supreme Court based its decision[74] solely on sixth amendment grounds.[75] As in *Massiah*, the "deliberate elicitation" of incriminating statements after Williams' arraignment and in the absence of counsel violated the petitioner's sixth amendment right to counsel.[76] Significantly, the Court ruled that to show waiver of the sixth amendment right to counsel the state must bear the heavy burden of proving "an intentional relinquishment or abandonment of a known right or privilege."[77] The waiver standard under *Miranda* for the fifth amendment privilege may no longer be as stringent.[78]

The Supreme Court in *Rhode Island v. Innis*[79] treated the suspect's assertion of right to counsel as an invocation of fifth amendment rights, governed exclusively by *Miranda*.[80] Recognizing that the police repeatedly apprised Innis of his *Miranda* rights, that Innis invoked his right to counsel, and that Innis was in custody at the time he made the damaging admissions, the Court narrowed the issue to whether any "interrogation" took place at all. If there was no interrogation, the majority reasoned, then the suspect's right to remain silent and his right to

locating the girl's body because her parents were entitled to a Christian burial for the girl. The defendant eventually directed the police to the girl's body. *Id.* at 390-93.

73. *Id.* at 399-400. The four dissenters insisted the police conduct was not interrogation. *Id.* at 435, 440 (Burger, C.J., Blackmun, White & Rehnquist, J.J., dissenting).

74. The federal district court granted petitioner habeas corpus relief on three independent grounds: (1) That Williams' disclosures were involuntary; (2) that they were obtained in violation of *Miranda*; and (3) that they were secured in violation of his sixth amendment rights. Williams v. Brewer, 375 F. Supp. 170, 185 (S.D. Iowa 1974), *aff'd*, 509 F.2d 227, 233-34 (8th Cir. 1975) (second and third grounds), *aff'd*, 430 U.S. 387 (1977). *See generally* Kamisar, *Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209 (1977).

75. 430 U.S. at 397-400.

76. *Id.* at 400; 377 U.S. at 206.

77. 430 U.S. at 404. The source of the constitutional right waiver standard is Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

78. *See* North Carolina v. Butler, 441 U.S. 369, 372 (1979) (North Dakota's refusal to recognize implied waiver of *Miranda* rights held too inflexible). *But see* United States v. Satterfield, 417 F. Supp. 293 (S.D.N.Y. 1976), *aff'd* 558 F.2d 655 (2d Cir. 1977); Lopez v. Zelker, 344 F. Supp. 1050, 1054 (S.D.N.Y.), *aff'd mem.* 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1049 (1972). *See also* Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1385-86 (1977); Kamisar, *supra* note 8, at 28; 56 N.D.L. REV. 259, 267-68 (1980).

79. 446 U.S. 291 (1980).

80. *Id.* at 297, 300 n.4. The Court reviewed the "controlling" principles of *Miranda* with regard to the right of presence of counsel. *See* notes 3, 39-41, 43, 44 *supra* and accompanying text.

confer with counsel were not impinged.[81]

The Court noted that *Miranda*'s definition of custodial interrogation[82] could not be limited to direct questioning in order to enforce that decision's policy of dispelling the inherent compulsion of the "interrogation environment."[83] The *Innis* majority stressed that custody would not trigger the fifth amendment protections without the additional compulsion produced by interrogation.[84] The Court concluded that the *Miranda* procedural safeguards operate "whenever a person in custody is subjected to express questioning or its functional equivalent."[85] Interrogation under *Miranda* now includes "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[86] Courts must apply the test objectively primarily from the defendant's vantage

81. 446 U.S. at 298. This mode of analysis avoids, or at least delays, the consideration of any waiver issue. *Id.* at 298 n.2.

82. 384 U.S. at 444. *See* note 40 *supra* and accompanying text.

83. 446 U.S. at 298 n.2; 384 U.S. at 457-58. *See also* Commonwealth v. Hamilton, 445 Pa. 292, 297, 285 A.2d 172, 175 (1971). It "place[s] a premium on the ingenuity of the police to devise methods of indirect interrogation" to limit *Miranda* to direct questioning. *Id. Compare* United States v. McCain, 556 F.2d 253 (5th Cir. 1978) *with* United States v. Carpenter, 611 F.2d 113 (5th Cir.), *cert. denied*, 100 S. Ct. 3013 (1980). In *McCain* statements by a customs inspector about the dangers of carrying drugs internally prompted a suspect to relinquish incriminating evidence. *Carpenter* sustained the admissibility of a suspect's admission proffered in a police car after he overheard a conversation between officers about another matter. The court implied that if the conversation in the vehicle had been related to defendant's case it would have constituted an interrogation. 611 F.2d at 116. *Cf.* Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968) (innocent questions in inherently compelling atmosphere of stationhouse may create in suspect the impression that he must answer).

Whether provocative declarative statements, actions or artifices constitute interrogation has been decided on a case-by-case basis. *See, e.g.,* Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980); United States v. Carpenter, 611 F.2d 113 (5th Cir.), *cert. denied*, 100 S. Ct. 3013 (1980); Walker v. Wilmot, 603 F.2d 1038 (2d Cir. 1979); Taylor v. Riddle, 563 F.2d 133 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978); United States v. Davis, 527 F.2d 1110 (9th Cir. 1975), *cert. denied*, 425 U.S. 953 (1976); United States v. Williams, 526 F.2d 1000 (6th Cir. 1975); United States v. Menichino, 497 F.2d 935 (5th Cir. 1974); United States v. Castellana, 488 F.2d 65 (5th Cir. 1974); Combs v. Wingo, 465 F.2d 96 (6th Cir. 1972); United States v. Barnes, 432 F.2d 89 (9th Cir. 1970); Milani v. Pate, 425 F.2d 6 (7th Cir.), *cert. denied*, 400 U.S. 877 (1970).

84. 446 U.S. at 299-300 (quoting 384 U.S. at 478).

85. *Id.* at 300-01.

86. *Id.* at 301 (footnotes omitted). The focus on police intentions is not unprecedented. *See, e.g.,* Commonwealth v. Shepherd, __ Pa. Super. Ct __, 409 A.2d 894 (1979) (if no expectation of admission and police conduct is not attempt to obtain admission, no interrogation); People v. Faison, 78 Ill. App. 3d 911, 397 N.E.2d 1233 (1979) (interrogation encompasses any remarks, psychological tactics or patient maneuvering designed to elicit a response).

point.[87] Admissions made by defendants after the police do or say something that reasonably should not induce incriminating responses remain unforeseeable and are potentially admissible into evidence.[88]

Justice Stewart, applying the "new" standard[89] to the *Innis* facts, found no interrogation because there was no "express questioning," as Innis was merely exposed to a dialogue between police officers. Furthermore, the officers did not subject Innis to the "functional equivalent" of direct questioning because the officers had no reason to know "that their conversation was reasonably likely to elicit an incriminating response . . . ."[90] The Court conceded that the police subjected Innis to "subtle compulsion," but declined to equate "subtle compulsion" with "interrogation."[91]

Justices Marshall and Brennan, in dissent, agreed with the Court's "interrogation" formulation.[92] They did not concur, however, in the majority's application of the interrogation definition to the facts.[93] In the two Justices' view, the Court's attempt to characterize the exchange

87. 446 U.S. at 301-02.

88. *Id.*

89. *Id.* at 302. In substance, the "objective" test propounded in *Innis* is not altogether new. *See* United States v. Williams, 526 F.2d 1000, 1003 (6th Cir. 1975); United States v. Vasquez, 476 F.2d 730, 732 (5th Cir. 1973); United States v. Lewis, 425 F. Supp. 1166, 1176 (D. Conn. 1977); Santos v. Bayley, 400 F. Supp. 784, 795 (M.D. Pa. 1975); People v. Arguello, 65 Cal. 2d 768, 775, 423 P.2d 202, 206, 56 Cal. Rptr. 274, 278 (1967); Commonwealth v. Simala, 434 Pa. 219, 226, 252 A.2d 575, 578 (1975).

90. 446 U.S. at 302. Three dissenting justices insisted that Innis was subjected to the functional equivalent of interrogation. *Id.* at 305 (Marshall & Brennan, J.J., dissenting); *id.* at 307 (Stevens, J., dissenting).

Justice Stewart offered the following factors for judicial consideration when gauging the reasonableness of police conduct: (1) Knowledge by the police of a particular suspect's susceptibility to an appeal to his conscience; (2) a suspect's disorientation at the time of arrest; (3) the use of intrinsically evocative words; and (4) the span of time in which the police conduct was carried out. *Id.* at 302-03.

91. *Id.* at 303. This conclusion contravened the Supreme Court of Rhode Island's determination that "subtle compulsion" and "interrogation" are indistinguishable. __ R.I. at __, 391 A.2d at 1162.

92. 446 U.S. at 305 (Marshall & Brennan, J.J., dissenting). Justice White and Chief Justice Burger filed separate concurring opinions. Justice White would have reversed the decision of the Rhode Island Supreme Court, employing the reasons he stated in dissent in *Brewer v. Williams*. Justice White would examine the fairness of the police conduct to the defendant and the societal risk involved in allowing the particular police conduct to continue. *Id.* at 304 (White, J., concurring).

Chief Justice Burger feared that *Innis* would introduce "new elements of uncertainty" to the application of *Williams* but concurred because the result was not inconsistent with *Miranda*. *Id.* at 304-05 (Burger, C.J., concurring). *See also* note 6 *supra* and accompanying text.

93. 446 U.S. at 305 (Marshall & Brennan, J.J., dissenting).

between the officers as "a few off-hand remarks" not addressed to the subject was inapposite.[94] The Justices contended that the remarks constituted a patent appeal to the conscience.[95] Because the conversation was not directed to the accused did not reduce the compulsion on the defendant to speak.[96]

Justice Stevens, in a separate dissenting opinion, admonished the Court's neglect of the "scrupulously honor[ed]" standard.[97] Faithful adherence to that doctrine, he surmised, should require proscription of deliberate attempts to elicit incriminating responses after suspects request assistance of counsel.[98] He found that the majority rule would not always adequately protect the accused.[99] Alternatively, Justice Ste-

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94. *Id.* at 306 (Marshall & Brennan, J.J., dissenting). Justice Marshall reasoned: "If the statements had been addressed to petitioner, it would be impossible to draw such a conclusion. The simple message of the 'talking back and forth' between Gleckman and McKenna was that they had to find the shotgun to avert a child's death." *Id.*

95. *Id.* (Marshall & Brennan, J.J., dissenting). Justice Marshall argued:

> One can scarcely imagine a stronger appeal to the conscience of a suspect—any suspect—than the assertion that if the weapon is not found an innocent person will be hurt or killed. And not just any innocent person, but an innocent child—a little girl—a helpless, handicapped little girl on her way to school.

Id. Justice Marshall also noted that this sort of ploy is a classic interrogation technique. *See* note 45 *supra* and accompanying text.

96. 446 U.S. at 306 (Marshall & Brennan, J.J., dissenting). Justice Marshall concludes: "They knew petitioner would hear and attend to their conversation, and they are chargeable with knowledge of and responsibility for the pressures to speak which they created." *Id.* at 306-07.

97. *Id.* at 310 (Stevens, J., dissenting); Michigan v. Mosley, 423 U.S. 96, 104 (1975). *See* notes 51-56 *supra* and accompanying text.

98. 446 U.S. at 310 (Stevens, J., dissenting). Justice Stevens' approach strongly resembles the *Massiah—Brewer* "deliberate elicitation" test. *Id.* at 310 n.7. The majority believed that the interrogation standard they promulgated would proscribe deliberate attempts to elicit incriminating responses by the police. *Id.* at 301-02 n.7. Justices Marshall and Brennan agreed with the majority in the formulation of the standard but dissented in its application to the particular facts. *Id.* at 305.

99. *Id.* at 312 (Stevens, J., dissenting). By way of example, Justice Stevens poses three hypotheticals illustrating distinct ways the police officer could have conveyed his concern about the threat to the children's safety posed by the shotgun:

> He could have:
> (1) directly asked Innis:
> Will you please tell me where the shotgun is so we can protect handicapped school children from danger?
> (2) announced to other officers in the wagon:
> If the man sitting in the back seat with me should decide to tell us where the gun is, we can protect handicapped children from danger.
> (3) or stated to the officers:
> It would be too bad if a little handicapped girl would pick up the gun that this man left in the area and maybe kill herself.

Id. Reasoning that all three appear bent on eliciting a response; Justice Stevens noted that the majority's test would only prohibit the first; the second not being likely to elicit an incriminating

vens recommended modification of the definition of "interrogation" to include any statement or conduct by the police "that [objectively] has the same purpose or effect as a direct question."[100]

The Court's narrow fifth amendment analysis presents two related difficulties. First, the new interrogation definition represents a diminution of *Miranda*'s procedural safeguards. Second, the strict reliance on the fifth amendment perpetuates artificial divisions between the applicability of the fifth and sixth amendments. The degree of protection that an assertion of right to counsel affords a suspect now may depend exclusively on a judicially contrived point in time entirely within the control of the police.[101]

Justice Stevens' dissent amply demonstrates that courts will not prohibit all deliberate attempts to elicit information.[102] The majority recognized that their test allows police to extract statements subtly.[103] This simply ignores the thrust of the *Miranda* opinion[104] and casts doubt on the efficacy of the "scrupulously honor[ed]" standard of

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response; and the third not excludable from evidence because the officers had no knowledge of Innis' particular susceptibility to this type of appeal. *Id.* at 312-13. *See* White, *supra* note 53, at 68 (viewed objectively the remarks were designed to elicit a response).

100. 446 U.S. at 311 (Stevens, J., dissenting).

101. *See* People v. Garner, 57 Cal. 2d 135, 160, 367 P.2d 680, 695, 18 Cal. Rptr. 40, 55 (1961) (Traynor, J., concurring), *cert. denied*, 370 U.S. 929 (1962); Kamisar, *supra* note 8, at 81-82. Of course, prompt arraignment statutes may provide an outside limit. *See* 18 U.S.C. § 5(a) (1976).

102. *See* note 99 *supra* and accompanying text. The analysis contemplates a new threshold question—whether there was or was not an interrogation—that is answerable by a multifactor test. This approach is reminiscent of the voluntariness-totality of circumstances formula that previously was considered inadequate to protect suspects' rights. *See* Amsterdam, *supra* note 34, at 786-88, 809; Bator & Vorenberg, *supra* note 42, at 72-73; Kamisar, *supra* note 19, at 102-03; Stone, *supra* note 47, at 124; White, *supra* note 34, at 586. *See also* A. BEISEL, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 70-107 (1955).

One might profitably reflect on what effect this test will have on the exclusionary rule or other devices employed to deter police misconduct. Presumably, if the police attempt to interrogate a suspect after an assertion of his rights either the information elicited will be excluded because the police should have known their conduct was likely to induce the incriminating response or it will be admissible. If the police, however, make no such attempt they may never get the information into evidence. Thus, there may no longer be a reason for the police to refrain. *See generally* Smith, *The Threshold Question Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S.C. L. REV. 699 (1974); Yarbrough, *The Flexible Exclusionary Rule and the Crime Rate*, 6 AM. J. CRIM. L. 1 (1978); Note, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137 (1976).

103. 446 U.S. at 303.

104. 384 U.S. at 467. "In order to combat [the inherently compelling pressures of in-custody interrogation] and to permit full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.*

police conduct.[105]

If the police formally indicted or arraigned Innis, his fate would be markedly different.[106] The Court explained in a footnote that the new meaning of interrogation probably would not apply to a person after the institution of formal judicial proceedings.[107] *Massiah* holds that the police may not "deliberately elicit" statements from an indicted suspect in the absence of counsel without violating the sixth amendment.[108] As Justice Stevens perceptively recognized in *Innis*, the police may deliberately elicit responses without interrogating, thereby avoiding contravention of fifth amendment privileges.[109] The majority justifies the different treatment in terms of the disparate policies behind the fifth and sixth amendments.[110] The operational effect of the amendments, however, is the exclusion from evidence of statements extracted from an arrestee or charged defendant in custody in the absence of counsel. An indicted suspect may have a heightened awareness of the seriousness of his predicament and the need to guard his words. Nevertheless, there is absolutely no reason to suppose that a person's remarks somehow will be less damaging at trial because the police did not formally indict the individual.[111] Furthermore, waiver of essentially the same constitutional right now may be easier in the fifth

105. 423 U.S. at 103-04. "A reasonable and faithful interpretation of the *Miranda* opinion must rest on the [*Miranda* Court's intention] to adopt 'fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . .'" *Id.* (quoting Miranda v. Arizona, 384 U.S. at 479).

106. *See* Brewer v. Williams, 430 U.S. 387 (1977) (defendant arraigned—sixth amendment right to counsel attached).

107. 446 U.S. at 300 n.4.

108. 377 U.S. at 204.

109. 446 U.S. at 313 (Stevens, J., dissenting).

110. The basic policy underlying the sixth amendment right to assistance of counsel is, simply stated: The framers intended to offset the grave disadvantage faced by defendants who were forced to stand alone at trial against the state. *See* Hamilton v. Alabama, 368 U.S. 52, 55 (1961); note 70 *supra* and accompanying text. *See generally* W. BEANEY, RIGHT TO COUNSEL IN AMERICAN COURTS 24 (1955); P. LEWIS & K. PEOPLES, CONSTITUTIONAL RIGHTS OF THE ACCUSED 549-51 (1979); Note, *supra* note 57, at 1033.

The policy underlying the fifth amendment privilege against self-incrimination is the desire to proscribe compulsory self-incrimination. *But see* Comment, *The Right to Counsel in Police Interrogation Cases: Miranda and Williams*, 12 U. MICH. J.L. REF. 112, 114 (1977) (criticizing separation of policies underlying fifth and sixth amendments). *See generally* notes 19-21 *supra* and accompanying text.

111. *See* Kamisar, *supra* note 8, at 78 n.461, 80-81. *See also* Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 673 (1966).

amendment context.[112]

Innis should be constitutionally indistinguishable from *Brewer v. Williams*.[113] In *Williams*, as in *Innis*, members of the Court sharply disagreed whether the police conduct constituted interrogation.[114] The majority in *Williams*, however, found that the police violated the suspect's sixth amendment rights. In *Innis* the Court based its decision solely on the fifth amendment, and dismissed potential sixth amendment considerations. The only meaningful distinction was the defendant's arraignment in *Williams*.[115] The petitioner's saving grace in *Williams*, therefore, was the mere fortuitous circumstance that he had been arraigned before the "interrogation" took place.

The police now may shape the applicability of constitutional safeguards by regulating the hour of indictment. The Court should have employed *Innis* to develop a unitary theory of application of the fifth and sixth amendments. Regardless of the subject's status the theory should prevent "deliberate elicitation" of incriminating responses and should "scrupulously honor" an accused's right to counsel. Subtle compulsion, whether intended or not, should be impermissible under this objective standard. Any definition of interrogation should apply coextensively to both amendments.

So long as the Court continues to retrench on *Miranda*'s protection of fifth amendment principles and to perpetuate the unsupported disassociation of fifth and sixth amendment safeguards, *Rhode Island v. Innis* will remain significant. Unless persons in the equally compromising positions of arrest and formal charge are allowed equal protection from potentially abusive police practices, glaring injustices will surely result from the furtherance in *Innis* of technical, arbitrary,

112. *See* notes 77-78 *supra* and accompanying text.

113. 446 U.S. at 310 n.7 (Stevens, J., dissenting).

114. Subtle fact finding problems do not disappear. The inflection of a voice and the individual's degree of sensitivity to particular practices are but two of the variables that courts have difficulty measuring. This consideration points to the need for general, simple guidelines for the police and courts to follow. *See* White, *supra* note 34, at 586 (proposing formulation of per se rules proscribing unacceptable police conduct).

115. Other ostensible distinctions could be that Williams' retained counsel, that the police entered a pre-transportation agreement with Williams not to interrogate during the 160 mile journey from Davenport to Des Moines, that the police had prior knowledge of Williams' susceptibility to an emotional religious appeal and that the conversation was directed at Williams. The case, however, did not turn on these considerations. The Court found the circumstances in *Williams* indistinguishable from *Massiah*, and focused on the deliberate elicitation of information from the defendant without the constitutionally mandated assistance of counsel. 430 U.S. at 397-401.

and formalistic distinctions governing the time at which each amendment attaches.