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Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the *Innis* Definition of Interrogation

INTRODUCTION

For centuries, Anglo-American law enforcement has relied on confessions to prosecute individuals accused of crimes.¹ At common law, any confession, even one obtained by physical torture, could be entered into evidence against a defendant.² But beginning in the eighteenth and nineteenth centuries, courts started to establish rules that limited the excesses of police practices.³ Since that time there has been tremendous debate as to what constitutes improper "police interrogation." In this century, scholars and jurists continue to disagree over the role and significance of confessions in criminal investigation and prosecution.⁴ Some have contended that interrogation is a necessary component of modern law enforcement,⁵ while others have suggested that it is not indispensable.⁶ Still others have concluded that dependence on confessions is dangerous to a free society.⁷

Despite these disagreements, most will concede that modern interrogation no longer relies on the use of physical force to the extent that was once common. Rather, police employ more subtle forms of interrogation comprised of psychological ploys and techniques.⁸ Such practices, however, are equally susceptible to abuse,⁹ and commenta-

1. See generally W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.2(a) (1985).

2. *Id.*

3. *Id.*; Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 518 (6th ed. 1986) [hereinafter MODERN CRIMINAL PROCEDURE]; see also *The King v. Warickshall*, 168 Eng. Rep. 234, L. Leach Cr. Cases 263 (K.B. 1783) (first stated formal rule of exclusion for improper confessions).

4. See generally W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.1(a).

5. See, e.g., Inbau, *Police Interrogation — A Practical Necessity*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 16 (1961) (suggesting the importance of interrogating suspects in order to solve crimes); *Grano, Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1 (1979) (suggesting that police interrogation is not only desirable, but essential to successful law enforcement).

6. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

7. See, e.g., *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964) ("We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.") (footnotes omitted).

8. Inbau, *supra* note 5, at 16; see also W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.1(b) ("[T]here does seem to be general agreement that forms of illegality have become less extreme."); O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 5-6 (1973) ("The use of overt physical violence has largely given way to the employment of more subtle kinds of pressure.").

9. W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.1(b).

tors continue to debate the propriety of these methods.¹⁰

The Supreme Court struggled with the problems posed by interrogation beginning in the mid-1930s¹¹ and culminating with *Miranda v. Arizona*,¹² which set down rules designed to limit the excesses of police practices. The *Miranda* Court quoted at length from police interrogation manuals, but it never said flatly that any of the practices were banned by the Constitution or that their use alone would render a confession inadmissible. Rather, the Court held that absent the now familiar warnings, confessions obtained by means of "custodial interrogation" would be inadmissible.¹³

It was not until 1980, in *Rhode Island v. Innis*,¹⁴ that the Court provided much guidance as to what it meant by "interrogation." In *Innis*, the Court made it plain that conduct other than direct questioning could constitute interrogation. Writing for a divided Court, Justice Stewart defined interrogation as "words or actions on the part of 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."¹⁵

Numerous subsequent cases have applied the *Innis* standard. Although lower courts have utilized this standard on a case-by-case basis, this Note groups cases according to six fact patterns. Such classification reveals common methods of reasoning and demonstrates what the *Innis* standard has come to mean in practice.

The first group of cases involves situations in which the presence of friends or relatives helps produce incriminating statements.¹⁶ A second group of cases considers volunteered statements and follow-up questions.¹⁷ Such statements typically occur after a suspect makes a harmless, voluntary statement, and the police respond with a follow-up question that produces an incriminating response. A third category of cases focuses on the exception *Innis* carved out for procedures

10. Compare Inbau, *supra* note 5, at 16 (contending that most crimes can be solved only through the use of admissions and confessions, and that suspects will not admit their guilt unless questioned) and Grano, Book Review, 84 MICH. L. REV. 662, 690 (1986) (reviewing F. INBAU, J. REID & J. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986)) (arguing that reasonable interrogation designed to convince a suspect to tell the truth is completely consistent with a free, civilized, and just society) with Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 21, 46 (1961) (contending that any pre-judicial interrogation is irreconcilable with the privilege against self-incrimination and the right to counsel) and White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979) (arguing that effective protection of constitutional rights can be achieved only through the development of per se rules prohibiting certain forms of police trickery).

11. See W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.1(c).

12. 384 U.S. 436 (1966).

13. 384 U.S. at 444-45.

14. 446 U.S. 291 (1980).

15. 446 U.S. at 301 (footnote omitted).

16. See *infra* Part II.A.

17. See *infra* Part II.B.

that are "normally attendant to arrest and custody."¹⁸ These cases consider the permissibility of procedures and questions that are part of police processing. Still another group involves "subtle compulsion" — those acts directed toward a suspect or words spoken among others in the presence of the suspect that produce an incriminating response.¹⁹ A fifth class of decisions has also applied the *Innis* test to the common police practice of using a "jail plant" to acquire incriminating information from an incarcerated defendant.²⁰ The sixth and final group of cases concerns "implied questioning" — police statements that are not questions but where arguably "[e]verything [is] there but a question mark."²¹ These cases can involve casual conversations between police officers and a suspect that, though unrelated to the crime, eventually produce incriminating statements. They also embrace situations in which spontaneous remarks of shock or surprise by police officers induce damaging responses.

Lower courts disagree over how to apply the *Innis* standard for interrogation in these various common fact patterns. This Note examines how these courts have applied or misapplied *Innis*, and concludes that, while many of these decisions are consistent with *Miranda* and *Innis*, too many others are not.

In order to evaluate these cases, it is first necessary to understand the meaning and significance of *Innis*. Part I thus considers *Innis* and its background. Part II then examines lower court decisions applying the *Innis* test, dividing these decisions into six groups based on the most common factual scenarios. Because the cases deal with factually specific police practices, this method constitutes the most useful way to analyze the impact of the *Innis* definition of interrogation. Part III proposes a reading of the *Innis* test that avoids the difficulties encountered by lower courts and that is consistent with the dictates of *Miranda* and *Innis*. The Note concludes by considering how lower courts applying *Innis* have confused fifth and sixth amendment methods of analysis.

I. BACKGROUND: *RHODE ISLAND V. INNIS* AND INTERROGATION

In *Miranda* and *Innis* the Supreme Court demonstrated a concern about police practices that compel a suspect to make incriminating statements. These decisions mandate that lower courts analyzing interrogation assess a suspect's perception of the coerciveness of police behavior. For the Court, the suspect's *perceptions*, and not the intent

18. 446 U.S. at 301; see *infra* Part II.C.

19. See *infra* Part II.D.

20. See *infra* Part II.E.

21. *Combs v. Commonwealth*, 438 S.W.2d 82, 86 (Ky. 1969) (Palmore, J., dissenting); see *infra* Part II.F.

of the officers, are dispositive.²²

A. *Massiah v. United States and the Right to Counsel*

In *Massiah v. United States*,²³ the Supreme Court considered the significance of what is sometimes, but misleadingly, called interrogation in the context of the sixth amendment right to counsel.²⁴ It is necessary to consider the Court's approach to police practices in the context of the sixth amendment to understand how the focus of *Innis* is different. *Innis*, a fifth amendment case, is concerned with compulsion and the perceptions of the suspect. Sixth amendment analysis, under *Massiah*, turns on police intent.

Massiah concerned a defendant who was released on bail after having been indicted. His co-defendant, in cooperation with the government, invited *Massiah* to discuss the case in a car equipped with a radio transmitter. Federal agents overheard the transmitted conversation and used *Massiah's* statements against him at trial. The Supreme Court found these statements inadmissible as defendant had been subjected to extrajudicial, police-orchestrated proceedings designed to elicit an incriminating response.²⁵ The *Massiah* decision established that once a defendant is indicted, "the suspect" becomes "the accused" and the right to counsel attaches. *Massiah's* incriminating words were inadmissible as they "had been deliberately elicited from him after he had been indicted and in the absence of his retained counsel."²⁶

22. *Innis*, 446 U.S. at 301 ("The latter portion of [the *Innis*] definition [of interrogation] focuses primarily upon the perceptions of the suspect, rather than the intent of the police.")

23. 377 U.S. 201 (1964).

24. What is sometimes labelled "interrogation" in the context of sixth amendment or *Massiah* doctrine is not really "interrogation" at all, as that term is used in the *Miranda* context. Confusion results from the fact that in *Brewer v. Williams*, 430 U.S. 387 (1977), the Court, per Justice Stewart, said: "[T]he clear rule of *Massiah* is that once adversary proceedings have [begun, a person] has a right to legal representation when the government *interrogates* him." 430 U.S. at 401 (emphasis added) (footnote omitted).

Professor Yale Kamisar criticized Justice Stewart for using the term "interrogation," pointing out that there was nothing resembling *Miranda*-type "interrogation" in the *Massiah* case itself. Kamisar, *Brewer v. Williams, Massiah and Miranda: What is "Interrogation"?* *When Does it Matter?*, 67 GEO. L.J. 1, 33 (1978) (suggesting that compulsion is required before something constitutes interrogation) [hereinafter Kamisar, *What is Interrogation?*]; see also W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.4(d). Rather, all that is needed for *Massiah* to apply, as Stewart recognized at other places in *Williams*, is for the government to *deliberately elicit* statements from a person after he has been indicted. 430 U.S. at 387. In *Rhode Island v. Innis*, 446 U.S. 291 (1980), an opinion also written by Stewart, the Court apparently recognized that the term "interrogation" may not be appropriate in the sixth amendment context. 446 U.S. at 300 n.4. Stewart's *Innis* opinion stated that the term "interrogation" is not "necessarily interchangeable" in the *Miranda* and *Massiah* contexts since the policies underlying these doctrines are "quite distinct." Seemingly acknowledging his earlier error, Stewart explicitly referred to the Kamisar article that criticized his misuse of the term "interrogation" in *Williams*, 446 U.S. at 300 n.4.

25. *Massiah*, 377 U.S. at 204.

26. 377 U.S. at 204.

The *Massiah* doctrine protects the right of individuals to receive the aid of counsel through each step of the adversary process. *Massiah* provides protection by preventing the government from deliberately eliciting or inducing incriminating statements — an analysis which turns on the government's purpose.²⁷ If the government's actions are intended to produce an incriminating response, *Massiah* holds that the sixth amendment rights of the suspect have been violated.²⁸

Under *Massiah*, the perceptions of the suspect are not significant. Indeed, it makes no difference whether or not the individual is aware that she is dealing with a government agent.²⁹ The police violate that right by intentionally or deliberately eliciting statements from a person without counsel after adversary proceedings have commenced.

For a time, the Court considered extending *Massiah* protections to the pre-indictment period.³⁰ This prospect worried many critics of the Court who were somewhat relieved when the *Miranda* Court turned

27. See *Brewer v. Williams*, 430 U.S. 387 (1977). *Williams* is credited with having revitalized the *Massiah* approach after *Miranda* had cast doubt on its continued significance. See W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.4(d). *Williams*, in *Massiah* type reasoning, focused on the fact that the "detective deliberately and designedly set out to elicit information" from the defendant. 430 U.S. at 399. The Court, in *United States v. Henry*, 447 U.S. 264 (1980), a more recent case in the *Massiah* line, "refined" *Massiah* in the same way that *Innis* clarified *Miranda*. See White, *Interrogation Without Question: Rhode Island v. Innis and United States v. Henry*, 78 MICH. L. REV. 1209 (1980). Professor White suggests that *Henry* extended *Massiah* by "applying it to a situation where there was no showing that a government agent did anything designed to elicit incriminating remarks." *Id.* at 1220. But see Kamisar, *Police Interrogation and Confessions*, in J. CHOPER, Y. KAMISAR & L. TRIBE, 2 THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1979-1980, at 83, 104 (1981) [hereinafter TRENDS] (remarks of Professor Kamisar) (although the *Henry* majority's analysis lacked precision, *Henry* appears to be viewed by the majority as a genuine 'deliberately elicited' type of case). In other words, after *Henry* it is still true that *Massiah* turns solely on the underlying intent of the government's agents. *Id.*

28. 377 U.S. at 205-06.

29. 377 U.S. at 206 ("Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.") (quoting *U.S. v. Massiah*, 307 F.2d 62, 72-73 (2d Cir. 1962)(Hays, J., dissenting).

30. In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Court seemingly applied *Massiah* to the admissibility of incriminating statements made by an individual before the commencement of adversary proceedings. *Escobedo* had been arrested on suspicion of murder after being accused by his accomplice. While in custody, *Escobedo* repeatedly asked to speak to his lawyer but was denied the opportunity. Instead, the police set up a confrontation between *Escobedo* and his accomplice. At this point, *Escobedo* denied his guilt and charged his accuser with firing the murder shots, thus implicating himself in the murder plot. At trial, these statements were admitted into evidence and *Escobedo* was convicted of murder. The Supreme Court reversed the conviction and criticized police on the use of confessions. 378 U.S. at 484, 488-90. By suggesting that there was "no meaningful distinction . . . between interrogation of an accused before and after formal indictment," 378 U.S. at 486, the *Escobedo* Court appeared to move the sixth amendment right to counsel protections to the pre-indictment period and thus into the police station. See 378 U.S. at 490-91. Henceforth, it seemed that lower courts would be required to apply *Massiah*'s "deliberately elicited" standard to all police "interrogation."

Language in *Escobedo* threatened to eliminate completely the use of confessions. Confessions would cease because most attorneys would advise their clients to remain silent. This prospect led critics of the Court's approach to protest that an individual does not have a right not to confess; rather, the critics argue, the individual only has a right not to be compelled to confess. See Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 60-61 (1964); Kamisar, *What is Interrogation?*, *supra* note 24, at 48.

from *Massiah's* sixth amendment approach to a focus on the fifth amendment privilege against self-incrimination.³¹ Interrogation prior to indictment has become the primary concern of the fifth rather than the sixth amendment,³² and while *Massiah* remains good law, it is relevant only to the post-indictment stage. During this stage, *Massiah* protects the right to counsel through each step of the adversary process. Impermissible police interference with that right includes all actions that attempt to "deliberately elicit" incriminating responses.

Miranda and *Innis*, however, were fifth amendment cases and *Innis's* definition of interrogation in the fifth amendment context rested upon and was shaped by a different premise.³³ In *Innis*, intent was of only limited significance.³⁴

B. *Miranda v. Arizona and the Right Against Self-Incrimination*

As noted above, the *Massiah* holding rested on the sixth amendment right to counsel. The *Miranda* decision shifted that focus and developed an interrogation doctrine based on the fifth amendment.³⁵ The *Miranda* Court held that the privilege against self-incrimination

31. See MODERN CRIMINAL PROCEDURE, *supra* note 3, at 535-37.

32. See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (stating that *Escobedo* is now limited in its "holding . . . to its own facts."). In *Kirby*, the Supreme Court declined to extend sixth amendment pre-adversary proceeding protections to the line-up context. See also *infra* note 45 and accompanying text (sixth amendment rights and the *Massiah* doctrine apply only after the initiation of formal charges). *Escobedo* is now viewed as a "false start" toward protections that later would be the province of *Miranda*. W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.4(c).

33. See *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) ("The definitions of 'interrogation' under the Fifth and Sixth Amendment . . . are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct."); Kamisar, *What is "Interrogation"?*, *supra* note 24 at 41-55.

34. See *Innis*, 446 U.S. at 303.

35. *Escobedo's* potential to eliminate even voluntary confessions, see *supra* note 30 and accompanying text, accounts in part for the shift to the fifth amendment's protection against self-incrimination in subsequent cases. See MODERN CRIMINAL PROCEDURE, *supra* note 3, at 535. The privilege against self-incrimination had not been used before because many believed it was only relevant to cases of *legal* compulsion. Because police do not have *legal* power to force someone to answer a question, police interrogation was not thought to violate the fifth amendment. *Id.* at 536; see also L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 82-83, 223-32 (1959); W. SCHAEFER, THE SUSPECT AND SOCIETY, 16-18 (1967).

In fact, it has been argued that police often act as if, and give suspects the impression that, they have such authority. Generally, suspects answer police questions because they are misled into believing that they must. Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, (1966). Consequently, the station house, or the "gatehouse of American Criminal Procedure," represents an inherently compulsive environment. Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in Y. KAMISAR, F. INBAU & T. ARNOLD, CRIMINAL JUSTICE IN OUR TIME 19-36 (Howard ed. 1965); see also Weisberg, *supra* note 10, at 21.

In his study, Magistrate Weisberg examined police interrogation practices through a study of police interrogation manuals, and concluded that effective police interrogation was essentially unfair and inherently coercive. *But see* Grano, *supra* note 5, at 26 (suggesting that "application of even the fifth amendment protection against compulsory self-incrimination beyond the judicial context . . . is dubious.").

"is fully applicable during a period of custodial interrogation."³⁶ After considering common police practices, the Court noted that "we concern ourselves primarily with this interrogation atmosphere and the evils it can bring."³⁷ The Court conceded that "we might not find the defendant's statements to have been involuntary in traditional terms." It insisted, however, that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."³⁸ *Miranda* thus held that evidence obtained by interrogation was inadmissible if the *means* of interrogation violated the procedural requirements of the Constitution.³⁹

Several limits on the use of confessions follow from this conclusion. First, *Miranda* bars evidence obtained by interrogation prior to the giving of the "Miranda warnings." Second, if an individual indicates that he or she wishes to remain silent, interrogation must cease. Third, if the individual requests an attorney, no further interrogation is permitted until an attorney is present.⁴⁰

36. 384 U.S. 436, 460-61 (1966). The Supreme Court has also rejected the view that *Miranda* applies only to questioning of a suspect who is in custody in connection with the case under investigation, *Mathis v. United States* 391 U.S. 1 (1968). Other cases find that it makes no difference whether the police consider the defendant a suspect or a witness; custodial interrogation can take place even though the police contend that the individual being questioned was a witness. See, e.g., *People v. Lee*, 630 P.2d 583 (Colo. 1981) (en banc), *cert. denied*, 454 U.S. 1162 (1982).

37. 384 U.S. at 456.

38. 384 U.S. at 457-58.

39. 384 U.S. at 457-58.

40. 384 U.S. at 467-70. The *Miranda* doctrine might be thought to afford two levels of protection. "First level" protections exist before a suspect is given the *Miranda* warnings and before she invokes the right to counsel. Courts that consider "first level" protections should evaluate whether police action rose to the level of interrogation. "Second level" protections exist once a suspect invokes the right to remain silent or asks for a lawyer. See Y. Kamisar, "Police Interrogation and Confessions," Prepared Remarks at the U.S. Law Week's Constitutional Law Conference 32-34 (Sept. 12, 1987) (on file with Professor Kamisar) [hereinafter Kamisar, U.S. Law Week Remarks]. Once the right to remain silent has been asserted, the issue is whether the police "scrupulously honored" the suspect's assertion of the right or whether they impermissibly prompted the suspect to change her mind. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). When the suspect asserts her right to counsel, the analysis is different. In such a case, the police may no longer interrogate the suspect until counsel has been made available or the accused herself initiates further communication. See *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (stating that once a suspect invokes his right to counsel, a "waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights;" the suspect cannot be "subject to further interrogation . . . until counsel has been made available to him, unless the [suspect] himself initiates further communication . . . with the police."). See also W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.9(g) (making clear that there is a different approach for questioning after the right to remain silent is invoked than after the defendant requests a lawyer).

This distinction between the right to counsel and the right to remain silent was reinforced by *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), where the Court suggested a two-step analysis to determine the admissibility of a confession after the right to counsel has been invoked. Step one asks whether the defendant "initiated" further conversation; step two asks whether "the purported waiver was knowing and intelligent." 462 U.S. at 1046 (quoting *Edwards v. Arizona*, 451 U.S. 477, 486 n.9 (1981)). See also *Arizona v. Roberson*, 108 S. Ct. 2093, 2099 (1988) (distinguishing

It is important to note that the *Miranda* decision requires courts to examine whether or not the police attempted to compel⁴¹ an incriminating response⁴² and that the doctrine protects suspects *prior* to the commencement of adversary proceedings.⁴³ *Miranda* is thus distinct from *Massiah*,⁴⁴ which applies whether or not the authorities compelled incriminating statements and does not furnish protection *before* adversary proceedings have begun.⁴⁵

Miranda's focus on compulsion arises from the fact that its rationale rests on the fifth amendment. The fifth amendment provides that no person "shall be *compelled* in any criminal case to be a witness against himself."⁴⁶ As a result, commentators have suggested that there is no right *not* to confess; there is only a right not to be compelled to confess.⁴⁷ The language of *Miranda* itself supports this prop-

guishing *Mosley* because "a suspect's decision to cut off questioning, unlike his request for counsel, does not raise the presumption that he is unable to proceed without a lawyer's advice" (citations omitted). *But see* TRENDS, *supra* note 27, at 153-57 (remarks of Professor Kamisar) (suggesting that the standard should be the same if police questioning resumes after either the right to counsel or the right to remain silent has been invoked).

However, the Supreme Court appears to have blurred the distinction between first and second level protections. In *Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987), the Court took the position that the police "scrupulously honor" a suspect's assertion of her rights as long as they do not engage in "interrogation" after those rights have been invoked.

41. *See* Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 440-46 (1987). Schulhofer discusses the apparent confusion regarding the meaning of the term "compulsion." He makes clear that "compulsion" under *Miranda* is analytically distinct from "coercion" and "involuntariness" under the due process standard. The voluntariness due process standard has been extensively criticized and many have considered it unworkable. *See, e.g.*, sources cited *infra* note 164. For Schulhofer, voluntariness analysis considers whether police actions "break the suspect's will." Schulhofer, *supra* at 446 (footnote omitted). The *Miranda* Court did not create so stringent a test when it considered "compulsion" within the meaning of the fifth amendment. On the contrary, behavior that falls far short of "breaking the suspect's will" may constitute "compulsion." Compulsion extends to all governmental efforts intended to pressure an unwilling individual to assist as a witness in his own prosecution. "Custodial interrogation brings psychological pressure to bear for the specific purpose of overcoming the suspect's unwillingness to talk, and it is therefore inherently compelling within the meaning of the fifth amendment." *Id.*

42. "Incriminating response" refers to any response the prosecution may seek to introduce at trial. *See* *Schmerber v. California*, 384 U.S. 757, 761 (1966).

43. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (footnote omitted) The *Miranda* Court dealt with "custodial interrogation," meaning "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." *See supra* notes 32-34 and accompanying text. For discussion of when *Miranda* protections come into play, see Kamisar, "Custodial Interrogation" *Within the Meaning of Miranda*, in CRIMINAL LAW AND THE CONSTITUTION — SOURCES AND COMMENTARIES 335, 338-51 (1968); Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S. C.L. REV. 699, 707-10 (1974); Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 149.

44. *Massiah v. United States*, 377 U.S. 201 (1964). *See supra* text accompanying notes 28-30.

45. *Moran v. Burbine*, 475 U.S. 412 (1986) ("[T]he Sixth Amendment right to counsel does not attach until after the initiation of formal charges."); *see* *Maine v. Moulton*, 464 U.S. 159, 170 (1985) (looking to the initiation of adversary judicial proceedings is fundamental to the proper application of the sixth amendment right to counsel).

46. U.S. CONST. amend. V (emphasis added).

47. *See, e.g.*, H. FRIENDLY, BENCHMARKS 271 (1967); Enker & Elsen, *supra* note 30, at 60; Kamisar, *What Is Interrogation?*, *supra* note 24, at 48.

osition. The purpose of *Miranda's* protective devices was to "dispel the *compulsion* inherent in custodial surroundings."⁴⁸ After discussing various police interrogation tactics, the Court expressed concern with situations in which "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under *compulsion* to speak."⁴⁹ In effect, this approach constituted a rejection of *Massiah's* sixth amendment approach to interrogation;⁵⁰ the Court's *Miranda* opinion did not even mention *Massiah*. Under *Miranda*, instead of considering whether police conduct "deliberately elicited" incriminating statements, courts had to determine whether police conduct *compelled* them.⁵¹

More recent decisions have not changed the significance of *compulsion* to the issue of interrogation.⁵² For police action to rise to the level of interrogation under the fifth amendment, it must involve the requisite degree of *compulsion*.⁵³

48. *Miranda*, 384 U.S. at 458 (emphasis added).

49. 384 U.S. at 461 (emphasis added). The Court also noted that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently *compelling* pressures which work to undermine the individual's will to resist and to *compel* him to speak where he would not otherwise do so freely." 384 U.S. at 467 (emphasis added).

50. Some have suggested that interrogation is irrelevant to *Massiah*. See *supra* note 24.

51. See *supra* notes 39-42 and accompanying text. Evidence of the shift in focus can be found in *Hoffa v. United States*, 385 U.S. 293, 303-04 (1966), where the Court considered facts similar to the *Massiah* case. In *Hoffa*, a government informer elicited incriminating information from a defendant who had been released from jail. But *Hoffa*, unlike *Massiah*, had not been indicted and so the court did not use *Massiah's* deliberately elicited standard. Rather, it applied *Miranda* and found the government's behavior permissible because there had been no *compulsion*. Since *Hoffa* did not know he was dealing with a government agent there was no pressure on him (inherent, informal or otherwise) to make incriminating statements and his right against self-incrimination had not been violated. It was the suspect's perspective that was significant. See also Kamisar, *What Is Interrogation?*, *supra* note 24, at 63-65 ("[I]f it is not 'custodial police interrogation' in the eye of the beholder, then it is not such interrogation within the meaning of *Miranda*.") (emphasis in the original). But compare *White*, *supra*, note 10, at 602-05 (favoring a per se prohibition against deceiving a suspect about whether an interrogation is taking place, even during the period before indictment).

52. In *Beckwith v. United States*, 425 U.S. 341 (1976), and *Oregon v. Mathiason*, 429 U.S. 492 (1977), the Burger Court limited *Miranda* to situations involving "coercive environments" similar to those considered by the *Miranda* Court itself. In *Mathiason*, the Court stated that "[i]t was that sort of *coercive* environment to which *Miranda* by its terms was made applicable, and to which it is limited." 492 U.S. at 495. Despite this limitation, *compulsion*, and not police intent, is still dispositive to fifth amendment analysis.

53. But see Grano, *supra* note 10, at 683-89. Even Grano, a critic of *Miranda*, concedes that under *Miranda* a suspect cannot be *compelled* to make self-incriminating statements. Given this fact, he directs attention to "the task of defining *compulsion* in the context of police interrogation." *Id.* at 684. Only the requisite degree of *compulsion* is a constitutional violation. He criticizes those who overlook the fact "that distinguishing degrees is inherent in the process of defining the concept of *compulsion*," *Id.* at 688. For Grano, the point at which the degree of *compulsion* becomes "undue" should be a matter of policy, reflecting "society's desire, on the one hand, for successful police interrogation and society's revulsion, on the other hand, of certain offensive police methods." *Id.* at 687. Grano favors a return to the voluntariness test and due process approach to interrogation by incorporating these concepts into the meaning of "*compulsion*." See *infra* note 164 (discussing voluntariness test). Thus, he would find improper *compul-*

C. *The Innis Test for Interrogation and Subsequent Commentary*

1. *The Decision Itself*

Despite *Miranda*'s direction to consider the level of compulsion, lower courts remained confused as to what constituted interrogation. Some courts took a narrow view, finding that only direct questions constituted interrogation.⁵⁴ Other jurists suggested that there were many police practices that had "everything . . . but a question mark" and that these methods generated the same pressures to confess that the *Miranda* warnings were designed to mitigate.⁵⁵

In *Rhode Island v. Innis*,⁵⁶ the Court clarified the issue and defined what it had meant by "interrogation." The case arose when Thomas Innis was arrested on suspicion of murder, received *Miranda* warnings, and asked to speak to an attorney. He was placed in the back seat of a police car for transport to the police station. While en route, two of the officers in the front seat, knowing that they could be overheard, engaged in a conversation regarding the missing murder weapon. One officer stated that there were many handicapped children in the area and "God forbid one of them might find a weapon with shells and they might hurt themselves."⁵⁷ Upon hearing the conversation, defendant asked that the car be turned around so he could lead the police to the weapon.⁵⁸ His attorneys later sought to suppress evidence of both the weapon and his statements in connection with its discovery.

Noting that many of the police methods criticized in *Miranda* did not involve direct questioning, the *Innis* Court observed that "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent."⁵⁹ Justice Stewart then wrote: "'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

sion only after considering the "totality of the circumstances" and only if the "free will of the witness was overborne." Grano, *supra* note 10, at 688 (quoting *United States v. Washington*, 431 U.S. 181, 188 (1987)). However, Grano concedes that his approach is inconsistent with *Miranda*, which protected against "the inherent pressure of custodial interrogation." *Id.* at 689. See also *supra* note 41 (discussing the meaning of compulsion under *Miranda* and how it is distinct from involuntariness) and note 51 and accompanying text.

A more appropriate reading of *Miranda* is that it prohibits compulsion that goes beyond the pressures inherent in custody. As *Innis* itself states, "[i]nterrogation," as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (footnote omitted).

54. W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.7(a).

55. See, e.g., *Combs v. Commonwealth*, 438 S.W.2d 82, 86 (Ky. 1969) (Palmore, J., dissenting).

56. 446 U.S. 291 (1980).

57. 446 U.S. at 294-95.

58. 446 U.S. at 295-96.

59. 446 U.S. at 300-01.

custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."⁶⁰ The Court explicitly stated that the focus of the test, which reflects the purposes of *Miranda*, was on the *perceptions* of the suspect rather than on the intent of the police.⁶¹ The *Innis* Court's references to *Miranda* also reinforce the significance of perceived *compulsion* in the context of the fifth amendment. As Justice Stewart's *Innis* opinion pointed out, *Miranda* was concerned that the " 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against *compulsory* self-incrimination."⁶² Yet interrogation still had to "reflect a measure of compulsion above and beyond that inherent in custody itself."⁶³

In a footnote, the Court discussed the limited relevance of police intent and distinguished *Massiah* by rejecting the "deliberately elicited" approach of sixth amendment analysis.⁶⁴ Nothing in the record of the case indicated that the officer's remarks "were *designed* to elicit a response."⁶⁵ For the Court, intent was significant only to the extent that it reflected whether the police knew, or should have known, that their words or actions were reasonably likely to evoke an incriminating response.⁶⁶ Consideration of intent in these terms means only that police cannot be held accountable for the unforeseeable results of their words or actions.⁶⁷ Police action has to be judged in terms of what the officers knew or should have known. In practice this means that if something about a suspect makes him peculiarly susceptible to a particular police action, interrogation occurs only if police should have known of this peculiarity. Intent becomes relevant only to the issue of foreseeability.⁶⁸ The Court thus made clear that important distinc-

60. 446 U.S. at 301 (footnotes omitted).

61. 446 U.S. at 301 ("The latter portion of this definition focuses primarily on the perceptions of the suspect, rather than the intent of the police.").

62. 446 U.S. at 299 (quoting *Miranda*, 440 U.S. at 457-58) (emphasis added).

63. 446 U.S. at 300 (footnote omitted).

64. 446 U.S. at 300 n.4; see *generally supra* notes 23-34 & 50-51 and accompanying text (discussing *Massiah*).

65. 446 U.S. at 303 n.9 (emphasis in original); see *TRENDS, supra* note 27, at 88.

66. 446 U.S. at 302 n.7. See W. LAFAYE & J. ISRAEL, *supra* note 1, at § 6.7(a) ("[I]t surely does not make sense to conclude that under *Miranda* the existence of 'interrogation' . . . depends upon the undisclosed intentions of the officer. *Miranda* is grounded in the notion that custody plus interrogation produces a coercive atmosphere, which makes sense only when the suspect is aware of both custody and the interrogation."); see also *MODERN CRIMINAL PROCEDURE, supra* note 3, at 595; *infra* notes 83-88 and accompanying text (discussing dangers of intent analysis).

67. *Innis*, 446 U.S. at 301-02 ("But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.") (emphasis in original) (footnote omitted).

68. The *Innis* Court's "reasonably likely" language may have been intended to convey *foreseeability*, the likelihood that an officer would know the practice was wrong, rather than the probability of success of the practice. Such a reading is endorsed by the majority opinion which

tions exist between the definitions of interrogation under the fifth and sixth amendments (if the latter even involved the term "interrogation").⁶⁹

The Court went on to hold *Innis*' confession admissible because the "dangerous weapon conversation" did not constitute interrogation.⁷⁰ The Court found that although the defendant may have been subjected to "subtle coercion," his response was not the product of conduct that the police should have known was reasonably likely to elicit an incriminating response.⁷¹

2. *Subsequent Commentary*

Innis' "reasonably likely to elicit" test is ambiguous on its face and is made even more confused by a result that the dissenters charged, with some reason, "verges on the ludicrous."⁷² According to the dissenters, the officer's strong appeal to *Innis*' conscience seemed more than reasonably likely to elicit some response.⁷³ Although all but one Justice agreed with the "reasonably likely to elicit" test in the abstract, the Court failed to articulate a clear, substantive definition.⁷⁴ Commentators and jurists have struggled to determine the meaning of *Innis* by attempting to square the result with the test as it was articulated by the majority.⁷⁵

Three different interpretations of *Innis* are worthy of note. The first concerns the attempt by dissenting Justice Stevens to reconcile the majority's result with the articulated test. Justice Stevens criticized the majority's test because, as he read it, it turned on the *apparent probability* that police speech or conduct would elicit an incriminating response.⁷⁶ Under such a reading, the Court would prohibit only po-

appears to contrast likelihood and unforeseeability. 446 U.S. at 301-02. *See also* TRENDS, *supra* note 27, at 91-94 (remarks by Professor Kamisar) (suggesting that "reasonably likely" should be read to convey foreseeability and finding interrogation where police speech or conduct "foreseeably might elicit an incriminating statement or . . . that would normally be understood as calling for a response about the merits of the case.") (emphasis in original).

69. 446 U.S. at 300 n.4 ("The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct.") (citation omitted).

70. 446 U.S. at 302-03.

71. 446 U.S. at 303.

72. 446 U.S. at 306 (Marshall, J., dissenting).

73. 446 U.S. at 307.

74. W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.7(a). Interestingly, both the state and the defendant proposed the test adopted by the Court though they argued that it should be applied differently. *See* Brief for Petitioner at 21, 25 & n.12, *Rhode Island v. Innis*, 446 U.S. 291 (1980) (No. 78-1076); Brief for Respondent at 24-25, *Rhode Island v. Innis*, 446 U.S. 291 (1980) (No. 78-1076). As a result, the Court may have been less alert to the problems the test would subsequently create.

75. W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.7(a); White, *supra* note 27, at 1224-36.

76. *See* W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.7(a); White, *supra* note 27, at 1224-25.

lice conduct that was "apparently likely to be successful" in eliciting incriminating statements.⁷⁷ What level of probability was "high enough," however, remained unclear. Consequently, such an interpretation of the test might permit lower courts to consider too many factors and to apply their subjective preferences.⁷⁸

Other commentators have taken a different interpretation. Professor Welsh White believes that the Court meant to create an "objective observer" test. Under this approach, the issue becomes whether an objective observer, with the same knowledge of the suspect as the police, would infer upon hearing the officer's remarks that the police action was "designed" to elicit incriminating information.⁷⁹ This interpretation clears up a good deal of the confusion created by the majority's discussion of intent.⁸⁰ The test requires examination only of the "objective purpose manifested by the police."⁸¹ If an objective observer could conclude that the officer's action was not designed to induce a statement, then the suspect would probably view the officer's purpose in the same way.⁸² Thus, the perceptions of the suspect, which should be the focus of *Innis*, are of significant relevance.

The role of intent in the *Innis* definition is probably the test's most confusing aspect. Intent can be considered, but it is of limited significance.⁸³ To confound matters further, the *Innis* Court concluded that officers can be held responsible only for what they knew or should have known.⁸⁴ Professor White properly appreciated that, while phrased in terms of intent, the *Innis* standard is primarily concerned with a suspect's perceptions.⁸⁵ Again, his reading of the test focuses on an objective observer's perceptions of what was intended. But be-

It should be noted that Stevens, in addition to characterizing the majority's view, created his own definition of interrogation encompassing "any police statement or conduct that has the same purpose or effect as a direct question [including s]tatements that call for a response from the suspect, as well as those that are designed to do so." *Innis*, 446 U.S. at 311 (Stevens, J., dissenting).

77. *TRENDS*, *supra* note 27, at 91 (remarks by Professor Kamisar). Under the probability approach, courts would consider "all the circumstances known to the police to determine whether the apparent probability of an incriminating response is high enough to be characterized as 'reasonably likely.'" White, *supra* note 27, at 1224-25.

78. Such a test, which allows courts to consider many factors, is reminiscent of the voluntariness approach and would likewise raise all of the same difficulties. See *infra* note 164 (discussing voluntariness test).

79. White, *supra* note 27, at 1232 ("If an objective observer (with the same knowledge of the suspect as the police officer) would, on the sole basis of hearing the officer's remarks, infer that the remarks were designed to elicit an incriminating response, then the remarks should constitute 'interrogation.'").

80. See *supra* text accompanying notes 23-34 & 66 (suggesting the limited significance of police intent in the *Innis* context).

81. White, *supra* note 27, at 1231 (emphasis in original).

82. *Id.* at 1231-33.

83. See *supra* notes 64-69 and accompanying text.

84. See *supra* notes 66-68 and accompanying text.

85. See White, *supra* note 27, at 1232-33.

cause police cannot reasonably be expected to know all of a suspect's peculiarities, White's objective observer has the same knowledge of the suspect as the police.⁸⁶ Unless the police should know something unique about a suspect, interrogation depends on the effect of police conduct on the *average* suspect. The test becomes an examination of whether an average person in the suspect's position would believe that police intended him to make an incriminating response.

Although White's analysis of the suspect's perceptions and what the police "should have known" appears correct, by phrasing his test in terms of intent, he risks the same problems produced by the *Innis* Court's language. Intent becomes too central to the analysis. Admittedly, White's approach is within the bounds of *Innis* because he focuses on an objective observer's perceptions of intent rather than the officers' actual intent.⁸⁷ In most cases attention to perceptions of what the police "designed" will not prove a problem. Difficulties arise, however, in cases such as *Innis*, in which police have evoked incriminating statements by conduct that can be deemed to have some purpose other than to elicit a response. In *Innis*, there is a plausible argument that an objective observer could conclude that the officer's remarks were made out of genuine concern for the risks posed by the hidden weapon.⁸⁸ The dangers of intent analysis in the interrogation context are that courts sympathetic to police interrogation can always find some other purpose for an officer's actions. By finding that the police did not intend to produce incriminating responses, courts could permit police practices that compel incriminating statements in violation of *Miranda*.

A third interpretation of the *Innis* Court's language, advanced by Professor Yale Kamisar, avoids the pitfalls of intent analysis. Kamisar believes that the majority was focusing on the compelling nature of the practice and not on the probability of its success.⁸⁹ He notes that the words "reasonably likely" cannot be taken literally;⁹⁰ after all, if the police directly question a suspect, their likelihood of success is irrelevant. If police conduct prods a suspect to make an incriminating statement, it is the equivalent of interrogation regardless of the probability of success. Kamisar was concerned with "coercive" conduct by the police, "which is equivalent to 'express questioning' *in terms of its coerciveness*."⁹¹ This focus on compulsion, rather than on the government's purpose or design, properly recognizes that *Innis* is a

86. See *supra* text accompanying note 79.

87. See White, *supra* note 27, at 1232.

88. See TRENDS, *supra* note 27, at 96.

89. Kamisar, U.S. Law Week Remarks, *supra* note 40, at 37.

90. *Id.*

91. *Id.* at 37-38 (emphasis in original).

Miranda fifth amendment case.⁹² Because adversary proceedings against *Innis* had not begun, the *Massiah* and government purpose analyses are inapplicable.⁹³

Kamisar was also troubled by the *Innis* Court's "reasonably likely" language because the probability of success should not matter if a practice is not *police* interrogation. Interrogation, within the meaning of *Miranda*, requires that the compulsion be *official* compulsion.⁹⁴ Unfortunately, the truth of this observation is not readily apparent from the *Innis* opinion. *Innis* assumed both police involvement and the suspect's awareness of that involvement.⁹⁵ Nevertheless, all of the practices considered by *Miranda*⁹⁶ and *Innis*⁹⁷ involved obvious *police* action. The *Miranda* Court refers to the "police" component of interrogation throughout⁹⁸ and states explicitly "[b]y custodial interrogation, we mean questioning initiated by *law enforcement officers*."⁹⁹ The *Innis* test considers "words or actions on the part of *police* officers."¹⁰⁰ In effect, the requirement of *official* compulsion and the importance of the suspect's perceptions mean that if the suspect is unaware of *police* involvement, then there is no interrogation within the meaning of *Miranda*.

This discussion of the critiques of *Innis* should reinforce several key features of the decision. First, Stevens' reading of the majority test suggests the dangers of treating the "reasonably likely" language as support for probability analysis. Such a literal analysis gives courts too much room to apply subjective preferences. White's objective ob-

92. See *supra* text accompanying notes 41-43 & 49-51.

93. See *supra* notes 23-34 & 42-45 and accompanying text.

94. See Kamisar, *What is Interrogation?*, *supra* note 24, at 53; Kamisar, U.S. Law Week Remarks, *supra* note 40, at 41-48.

95. The *Innis* Court did not consider a situation in which a suspect was unaware of police participation. *Innis* himself overheard officers talking among themselves.

96. In each of the cases before the *Miranda* Court, defendant was questioned by police officers, detectives, or a prosecuting attorney. 384 U.S. at 436-57. While a prosecuting attorney is not literally a police officer, she still enjoys state police powers and exercises *official* compulsion. For other forms of official compulsions, see *Miranda*, 384 U.S. at 450 (considering police interrogation manuals and practices discussed therein, all of which involve a suspect's awareness of police participation); 384 U.S. at 452 (considering "Mutt and Jeff" act, where police presence is clear); 384 U.S. at 453 (considering line-ups in which coached witnesses pick defendant as perpetrator or identify suspect as perpetrator of fictitious crimes; line-ups involve known police participation).

97. See *Innis*, 446 U.S. at 300. *Innis* reviewed some of the police practices discussed in *Miranda*, all of which involved obvious police participation. These included the use of line-ups with coached witnesses and psychological ploys where officers would "'posi[t] 'the guilt of the subject,' to 'minimize the moral seriousness of the offense,' and to 'cast blame on the victim or society.'" 446 U.S. at 299.

98. 384 U.S. at 445 ("interrogation . . . in a police dominated atmosphere"), 456 & 465.

99. 384 U.S. at 444 (emphasis added). The Court also stated: "We are satisfied that all the principles embodied in the privilege [against self-incrimination] apply to informal compulsion exerted by *law-enforcement* officers during in-custody questioning." 384 U.S. at 461 (emphasis added).

100. *Innis*, 446 U.S. at 302 (emphasis added).

server approach is useful for other reasons. His approach indicates the importance of the suspect's perceptions at the same time that it holds police only to what they should have known. By considering an objective observer's view of what the officer intended, courts can appreciate how an average suspect would view the conduct. Because such a test is entirely objective, courts need not analyze the suspect's actual perceptions or the officer's actual intent. Courts need only consider how facts known to the police about the actual suspect would affect the perceptions of an average suspect. Unfortunately, White's test places too much emphasis on intent. A consideration of Kamisar's analysis helps to redirect attention to the central concern of *Miranda* — that is, *police* compulsion.

The limited relevance of police intent to *Miranda* analysis rests on the distinction between *Massiah* sixth amendment rights and *Miranda* fifth amendment protections. The distinction is partly formalistic. When the Supreme Court refused to extend *Massiah* to the pre-indictment stage, it shifted to the fifth amendment in part because of concerns that use of sixth amendment analysis would eliminate the use of confessions.¹⁰¹ A new and *different* test for the pre-indictment period helped reduce these fears.

In addition, constitutional language lends force to the distinction. The fifth amendment specifies that no person "shall be compelled in any criminal case to be a witness against himself."¹⁰² The sixth amendment sets out the right to counsel more generally, stating only that the "accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."¹⁰³ The language of the fifth amendment protects an individual's right to be free from undue compulsion. The subjective nature of the concept of compulsion suggests that a violation only occurs when an individual senses compulsion. Even if the government intends to produce an incriminating statement, a suspect's ignorance of government action keeps her free from the anxiety flowing from official compulsion. Finally, as a practical matter, the fifth and sixth amendments involve different types of rights.¹⁰⁴ The fifth amendment protects a *personal* right that is violated when police act against an individual. It does not matter what police intend if the acts cause the individual to be aware of unconstitutional pressures. At the moment those pressures occur the right is violated. *Miranda* created rules designed to dispel such compulsion. The *Miranda* warnings, by reducing perceived compulsion, can thus eliminate fifth amendment

101. See *supra* notes 30-32 and accompanying text.

102. U.S. CONST. amend. V.

103. U.S. CONST. amend. VI.

104. See Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 928 (1989) (discussing the difference between the fifth and sixth amendments).

violations at the moment they might otherwise occur. The sixth amendment is more procedural, protecting the fairness of the adversary process. The fairness of that process becomes an issue only after the commencement of adversary proceedings. At that point, government acts designed to interfere with the process, to upset the adversary balance, violate the constitution regardless of the suspect's awareness of the violation. It is the government's action, rather than the suspect's perceptions of compulsion, that constitutes the violation. Thus, while fifth amendment *Miranda* analysis functions to dispel compulsion, sixth amendment doctrine is concerned with preserving the integrity of the courts through deterring police misconduct. Consequently, sixth amendment analysis focuses on acts intended to produce incriminating responses.

Taken together, this discussion and these critiques suggest a reading of *Innis* that is consistent with *Miranda*. Courts should consider whether an objective observer, knowing only what police should have known, would find that the suspect perceived *official compulsion* — above and beyond the pressure inherent in custody — to make an incriminating statement.

II. THE SUBSEQUENT APPLICATION OF *INNIS* IN THE LOWER COURTS

Because cases implementing *Innis* deal with factually specific police practices, grouping cases according to certain fact patterns constitutes the most helpful way to analyze the impact of the *Innis* decision. Such classification reveals common methods of reasoning and demonstrates what *Innis* has come to mean in practice. This section will look at those applications, dividing the cases based on similarities of fact patterns.

A. *Friends and Relatives*

A number of cases consider the role of friends and relatives in eliciting incriminating responses from suspects in custody. Such a situation usually arises when either a relative asks to speak to the defendant¹⁰⁵ or the suspect seeks to converse with the relative¹⁰⁶ (although in some cases the police bring about the meeting¹⁰⁷). Even when the police arrange the meeting, however, most courts find that involving friends or relatives does not constitute interrogation. Unfortunately, these courts appear to reach this conclusion for the wrong reasons.

105. See, e.g., *Arizona v. Mauro*, 481 U.S. 520 (1987); *United States ex. rel. Church v. DeRobertis*, 771 F.2d 1015, 1017 (7th Cir. 1985).

106. See, e.g., *People v. Wojtkowski*, 167 Cal. App. 3d 1077, 213 Cal. Rptr. 846 (1985).

107. See, e.g., *State v. Loyd*, 425 So. 2d 710, 713 (La. 1983).

The *Innis* test, read literally, requires courts to consider what the police believe to be reasonably likely to elicit an incriminating response. In cases where friends or relatives are involved, this reading directs courts to examine whether it was *likely* that the presence of friends or relatives would produce incriminating statements. But as Justice Stevens anticipated, the language of probability gives courts discretion to consider police intent — the officers' good-faith judgment as to what was likely to occur.¹⁰⁸ Indeed, in applying the *Innis* test, lower courts have shifted attention to police intent. If the police did not intend to get an incriminating response, then the lower courts are much less likely to find that an incriminating response was reasonably likely.

This emphasis on intent indicates confusion between fifth amendment analysis under *Miranda* and sixth amendment analysis under *Massiah*. Under *Innis* and *Miranda* the focus should be on the perception of the suspect regarding police compulsion.¹⁰⁹ However, the Supreme Court itself appears to have condoned the focus on intent and considerably confused the law of interrogation in *Arizona v. Mauro*.¹¹⁰ There, the Court upheld the admission of a recording made when police permitted defendant's wife to speak with her husband.¹¹¹ The prosecution used the tape to rebut respondent's insanity defense. The Court admitted that police "knew it was 'possible' that [defendant] might make incriminating statements if he saw his wife."¹¹² Nevertheless, the Court found that the practice was not one that police knew was "reasonably likely" to elicit an incriminating response. For the Court, it was significant that although the officers knew of the "possibility," they did not send Mrs. Mauro to see her husband for the purpose of producing such evidence.¹¹³ Consequently, the opinion seemed to imply that there was no interrogation because Mrs. Mauro was not a government agent.¹¹⁴

This approach is incorrect because the government's purpose is an

108. *Innis*, 446 U.S. at 314 & n.13 (Stevens, J. dissenting) ("If a suspect does not appear to be susceptible to a particular type of psychological pressure, the police are apparently free to exert that pressure on him despite his request for counsel, so long as they are careful not to punctuate their statements with question marks Under these circumstances, courts might well find themselves deferring to what appeared to be good-faith judgments on the part of police.").

109. See *supra* notes 61-69 and accompanying text.

110. 481 U.S. 520 (1987).

111. Although a police officer was present during the meeting, the officer did not speak. 481 U.S. at 527.

112. 481 U.S. at 524.

113. 481 U.S. at 522. In fact, it was Mrs. Mauro who requested the opportunity to speak to her husband.

114. The Court emphasized facts that led it to conclude that Mrs. Mauro was not a government agent. At several points, the opinion states that the police were reluctant to allow the meeting, 481 U.S. at 522; 481 U.S. at 528 (tried to discourage her from talking to her husband). In addition, the Court found that the meeting was not desired by police as a means to get a confession, but was Mrs. Mauro's idea, 481 U.S. at 523-24.

issue in a *Massiah*-type case, but it is not an issue under an *Innis* analysis. Because *Mauro* was an *Innis* case (*Mauro* had not yet been indicted), it should have made no difference what the government intended. Rather, the issue in *Mauro* should have been whether defendant was subjected to official compulsion to confess. The Court should have considered *Mauro's* perception of pressure flowing from the police.¹¹⁵ Because *Mauro's* wife could not exert such *official* pressure, her discussion with him should not have constituted *police* interrogation¹¹⁶ within the meaning of *Miranda*.¹¹⁷ Moreover, it is irrelevant whether Mrs. *Mauro* was a government agent if *Mauro* did not view his wife as possessing official authority to compel his confession. Justice Powell's opinion failed to take advantage of an easy solution: without the police there is no *police* interrogation.¹¹⁸ The Court reached the correct result but the emphasis of its analysis confused the issues.¹¹⁹

Other courts have also given undue weight to the government's purpose. The Seventh Circuit, in *United States ex rel. Church v. DeRobertis*,¹²⁰ applied a similar "intent" analysis. The *DeRobertis*

115. See *Kamisar*, U.S. Law Week Remarks, *supra* note 40, at 36-48; *supra* notes 61-69 and accompanying text.

116. The fact that *Mauro* was in custody, while certainly producing anxiety, could not turn the wife's discussions with him into interrogation. *Innis* requires a measure of compulsion above that inherent in custody. See *supra* notes 62-63 and accompanying text. In some circumstances, the wife could take on the air of authority such that her actions would constitute interrogation. See *Kamisar*, U.S. Law Week Remarks, *supra* note 40, at 47-48. If the wife had urged or begged *Mauro* to confess in front of the officer her actions may have taken on "the color of 'police blue.'" *Id.* at 47. *Mauro* would have perceived such a challenge, to display honor and decency by confessing, as coming from his wife *and* the officer. Also, the wife might have told *Mauro* that she was a government agent sent to get his confession. Under these circumstances, the wife's actions would become *official* compulsion, making her behavior interrogation.

117. See *supra* notes 94-100 and accompanying text.

118. The *Mauro* case is considerably complicated by the fact that an officer was present during the meeting between *Mauro* and his wife. As noted above, the presence of the officer and the tape recorder could have caused Mrs. *Mauro's* remarks to take on the "color of blue" and become interrogation. *Supra* note 116. In addition, interrogation would have occurred if the officer's participation had functioned to compel a confession — for example, if the officer had asked *Mauro* direct questions about the crime during the meeting. The Court, however, downplayed the importance of the officer's role, 481 U.S. at 523-24 (stressing that the officer was only there to insure the wife's safety and to maintain legitimate security concerns); 481 U.S. at 527 & 527 n.4 (stressing that the officer spoke to the wife and asked no questions about the crime or *Mauro's* conduct). It is fairly clear that the officer did not produce official compulsion above the level inherent in custody. For this reason, discussion has focused on the consequences of the wife's actions alone. For purposes of analysis, and apparently from the Supreme Court's point of view, it is as if the wife spoke to the suspect *alone*.

119. The Court's *Mauro* opinion, while preoccupied with intent, can be read consistently with an analysis that properly considers the suspect's perceptions of official compulsion. The Court did discuss the *coerciveness* of the "interrogation environment." The majority also mentioned the relevance of defendant's viewpoint when told that his wife wanted to speak with him. The opinion suggests that *Mauro* could not have felt that he was being "coerced" by such a meeting and may have found no interrogation on this ground. 481 U.S. at 528-29. Unfortunately, the Court's emphasis on intent distorted this otherwise correct analysis.

120. 771 F.2d 1015 (7th Cir. 1985).

court held that detectives did not "interrogate" the defendant by putting his older brother in the cell, although they knew that the older brother would urge the defendant to confess.¹²¹ The court did not find the incriminating statements "reasonably likely," though the results were foreseeable, because the police did not intend or designedly set out to achieve such results.¹²² The Seventh Circuit justified its focus on intent by stating that the court in *Innis* was concerned with official trickery. It noted that the detectives in *DeRobertis* did not plant in the brother's mind the desire to elicit the incriminating response and did not initiate the idea of consultation.¹²³ Thus, there was neither improper intent nor official trickery. Although the court used the language of probability, the analysis centered on intent.

Rather than considering purpose, the Seventh Circuit should have examined defendant's perception of official pressure. Under such an approach, if the suspect did not know that he was dealing with a government agent, there would be no *police* pressure, inherent, informal or otherwise.¹²⁴ The decision indicates the weakness of *Innis*' "reasonably likely" language. Even if the brother's actions were extremely "likely" to produce an incriminating statement, there would still be no *police* interrogation within the meaning of *Miranda* because the suspect was unaware of *official* pressure.¹²⁵

The focus on police intent in the friends and relatives area would permit the admission of almost all confessions. Courts can always find innocent motives when the police permit (or in the case of minors require) a friend or relative to speak with the defendant. Such analysis will encourage the police to use the practice to get damaging information and will not limit use of the practice to cases where official compulsion is absent.

Some decisions, however, emphasize a suspect's perceptions of compulsion, appearing to follow more closely the meaning of *Miranda* and *Innis*. The main concern of these decisions is whether the situation involves police conduct "which is equivalent to express questioning *in terms of its coerciveness*."¹²⁶ They only find interrogation where there is compulsion — where the appeal of a friend or relative takes on the "color of 'police blue'"¹²⁷ through the circumstances or presence of an officer of the law.¹²⁸

121. 771 F.2d at 1018-19.

122. 771 F.2d at 1019.

123. 771 F.2d at 1019.

124. See *Hoffa v. United States*, 385 U.S. 293 (1966); *supra* note 51 (discussing *Hoffa*). The case is like *Hoffa* in that the suspect did not know he was dealing with the police.

125. See *supra* notes 94-100 and accompanying text.

126. Kamisar, U.S. Law Week Remarks, *supra* note 40, at 38 (emphasis in original); see also *supra* notes 91-93 and accompanying text; Kamisar, *What is Interrogation?*, *supra* note 24, at 67.

127. Kamisar, U.S. Law Week Remarks, *supra* note 40, at 47.

128. *Id.* at 36-48.

Several state courts have correctly focused on the presence or absence of official compulsion, and not on police "intent." In *People v. Wojtkowski*,¹²⁹ the court held that an individual who was unaware of government involvement could not be thought to experience the pressures of interrogation. The California Court of Appeals admitted recorded telephone conversations between a defendant and his wife (after defendant was arrested for raping her) because defendant did not know he was dealing with an agent of the government.¹³⁰ *Wojtkowski* highlights the distinctions between *Miranda* and *Massiah*-type cases — the court itself distinguished *Massiah*. *Massiah* had involved a defendant who did not know that he was dealing with the government;¹³¹ but because *Massiah* protections only arise after the beginning of adversary proceedings, they were not relevant to *Wojtkowski*.¹³² *Wojtkowski*, a *Miranda* case, turned on the presence or absence of compulsion and properly found no constitutional violation where there was no official pressure.¹³³ Similarly, in *State v. Loyd*,¹³⁴ the Louisiana Supreme Court found no interrogation where the mother of defendant spoke to him outside the presence of police officers. The court noted that she was neither an officer nor agent of the law; thus, she could not imply that it would be so much the worse for him if he did not cooperate.¹³⁵ Because the defendant did not know that he was dealing directly with the police he could not have felt undue official compulsion.¹³⁶ These decisions suggest that the use of

129. 167 Cal. App. 3d 1077, 213 Cal. Rptr. 846 (1985).

130. 167 Cal. App. 3d at 1081, 231 Cal. Rptr. at 849.

131. See *supra* text accompanying notes 23-34.

132. 167 Cal. App. 3d at 1082, 213 Cal. Rptr. at 849. In discussing *Massiah*, the court noted that *Massiah* was premised on the accused's need to know that he or she was dealing with a government agent. Only by knowing that one was dealing with an adversary could a defendant appreciate that statements made could be used against him. However, in *Wojtkowski*, the defendant's wife was also the victim; thus, her adversarial status put the defendant on notice that the statements could be used against him. See 167 Cal. App. 3d at 1082, 213 Cal. Rptr. at 849.

133. The court in *Wojtkowski* rested its decision primarily on the absence of official pressure from the viewpoint of defendant. However, the court also noted that the police had not intentionally created a situation where it was likely that the defendant would make incriminating statements. 167 Cal. App. 3d at 1082, 213 Cal. Rptr. at 849. The court did not find the statements "reasonably likely," in part because the police did not intentionally set out to achieve such results. See 167 Cal. App. 3d at 1082, 213 Cal. Rptr. at 849. Thus, even courts that properly concentrate on the suspect's perceptions of compulsion can give too much significance to intent.

134. 425 So. 2d 710 (La. 1983).

135. 425 So. 2d at 717. Defendant had no reason to believe that his right to control or cut off questioning was limited. For the court, the mere fact of custody did not make his mother's presence menacing. The same observation about custody can be made in the jail plant cases. The mere fact of custody does not make a jail plant's presence menacing. See *infra* section II.E.

136. Similar reasoning can be found in *State v. Pierce*, 347 N.W.2d 829 (Minn. Ct. App. 1984). The *Pierce* court considered compulsive pressure when it found that the absence of a police officer during father-son discussions made the son's subsequent confession admissible. An officer had informed defendant's father of the extensive evidence against his son and that it would be better for defendant if he confessed. Apparently, the father, influenced by these remarks, convinced the son to confess. (Although the father's influence on defendant's behavior is unclear from the opinion, the *Pierce* court appears to have assumed that it contributed to the confession.)

friends or relatives to elicit incriminating information will be allowed so long as there are not other factors that would make the discussions coercive.¹³⁷

Other courts, while correct in their attention to official compulsion, fail to evaluate the suspect's perceptions of that compulsion. In *People v. Miller*,¹³⁸ the mother of the defendant questioned him regarding his involvement in a robbery and felony murder. Though defendant was in his mother's apartment, police officers were present when he made two incriminating statements.¹³⁹ The New York court determined admissibility by asking if the mother were acting as an "agent . . . of the government"¹⁴⁰ with respect to each question. The first statement had been made in response to the mother's unprompted inquiry. Because at that time the mother was not an *agent* of the government, the statement had not been obtained as a result of improper "compulsion."¹⁴¹

The defendant's second statement, however, occurred when the detectives, who had overheard the first response, asked the mother if the guns were in the apartment. When the mother relayed the question to her son, defendant made an incriminating statement.¹⁴² Here, defendant's mother had become an agent, her conduct becoming "'so pervaded by governmental involvement that it los[t] its character as' " private conduct.¹⁴³

The *Miller* court, while alert to the need for official pressure, failed to appreciate that the suspect must be aware of this official pressure. The court's discussion of government "agents" fails to appreciate the importance of the suspect's perceptions of official compulsion.¹⁴⁴ It

347 N.W.2d at 832-33.) The court noted that the policeman's action was a less "disingenuous technique" than the one used in *Innis* because it did not involve *direct contact* between the officer and the defendant. 347 N.W.2d at 833. *Pierce* appropriately found no compulsion because no officer was present to give the father's actions the "color of blue."

137. *See supra* notes 126-28 and accompanying text. These other factors include the presence or threats of police or statements by the relative that increase the suspect's perceptions of official compulsion. For example, interrogation might have occurred in *Loyd* if the mother had said to her son: "The Sergeant told me that if you do not cooperate, you are going to be in serious trouble." Such a statement increases the suspect's perceptions of pressure, flowing not directly from the relative, but from police.

138. 137 A.D.2d 626, 524 N.Y.S.2d 727 (1988).

139. 137 A.D.2d at 627, 524 N.Y.S.2d at 728.

140. 137 A.D.2d at 628, 524 N.Y.S.2d at 729 (emphasis added). The opinion correctly stated that the protections against self-incrimination did not apply to "confessions elicited by private individuals." 137 A.D.2d at 628, 524 N.Y.S.2d at 729. Constitutional concerns would exist when private individuals act as "*agents of the government*" or when government officials participate in those actions." 137 A.D.2d at 628, 524 N.Y.S.2d at 729 (emphasis added) (citations omitted).

141. 137 A.D.2d at 629, 524 N.Y.S.2d at 729.

142. 137 A.D.2d at 627, 524 N.Y.S.2d at 728.

143. 137 A.D.2d at 629, 524 N.Y.S.2d at 730 (quoting *People v. Ray*, 65 N.Y.2d 282, 284, 480 N.E.2d 1065, 1067, 491 N.Y.S.2d 283, 285 (1985)).

144. The *Innis* test itself states that interrogation includes "words or acts on the *part of the*

does not matter that the mother was a government agent if the son could not view her conduct as official compulsion. If a mother's behavior is not *police* interrogation "*in the eye of the beholder*," it is not interrogation under *Innis*.¹⁴⁵ Because what a defendant does not know cannot affect his perceptions, the mother's status as an "agent" should have no bearing on the question of interrogation.¹⁴⁶ Rather than considering whether the mother had become a government agent, the court should have asked whether the mother's act of relaying the detective's question caused the son to view the question as the equivalent of a direct question from the detectives.¹⁴⁷ He could, after all, hear the officers asking the mother whether the guns were in the house. When his mother directly relayed the question, Miller might have considered it as coming from the officers and felt that they, not his mother, were demanding an answer. If he had seen her question in this way, interrogation would have occurred regardless of the mother's status as an agent and the *Miller* court's result would have been correct.¹⁴⁸ Unfortunately, by emphasizing the mother's status as government agent, the court overlooked that *Miranda* turns on the suspect's perceptions and distorted the meaning of *Innis*.

The errors of other courts are more basic in their failure to evaluate the existence of compulsion. These courts improperly tolerate police compulsion in the form of threats to a suspect's friends. For example, in *United States v. Thierman*,¹⁴⁹ police detectives threatened to interrogate the defendant's girlfriend if he did not cooperate.¹⁵⁰ One officer later testified that he had looked at defendant while speaking of interrogating the girlfriend and that he "guessed" he was trying to get defendant to respond.¹⁵¹ Nevertheless, the court found "nothing in the record to compel a finding that the police conversation was

police," 446 U.S. at 302 (emphasis added). See *supra* note 35 (under *Miranda* concern is with pressure that police officers can bring to bear on a suspect); *supra* notes 116 & 124 and accompanying text (importance of official compulsion).

145. See *supra* note 61 and accompanying text (focus of *Innis* on the perceptions of the suspect).

146. Kamisar, U.S. Law Week Remarks, *supra* note 40, at 41.

147. Cf. *Moran v. Burbine*, 475 U.S. 412, 423 (1986) (no violation of *Miranda* where suspect did not know attorney was trying to see him; "even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident"). Compare *Escobedo v. Illinois*, 378 U.S. 478, 481 (1964) (confession excluded where police told the suspect that his attorney did not want to see him).

148. TRENDS, *supra* note 27, at 92-93 (*Innis* test should be reformulated to consider police conduct having the "same force and effect as a direct question").

149. 678 F.2d 1331 (9th Cir. 1982).

150. When the defendant insisted on his lawyer's presence, one of the detectives left for the girlfriend's residence. The officers who remained discussed, in the presence of the defendant, the need to contact defendant's friends and family, and one officer commented that it was "too bad" that the girlfriend had to be involved. 678 F.2d at 1332-33.

151. 678 F.2d at 1336.

more evocative than the one at issue in *Innis*.”¹⁵²

The *Thierman* court failed to ask whether the police action was the equivalent of telling the suspect directly: “Unless you cooperate we will ‘work on’ your girlfriend.” Clearly, any suspect would perceive this statement as official pressure, and conduct that affects a suspect in the same way should be deemed to be interrogation. Thus, the *Thierman* court ignored the dictates of *Miranda* and *Innis*.

Courts that consider the role of friends and relatives in eliciting incriminating statements make several common errors. Some improperly focus on police intent, which is the issue under *Massiah*, but not under *Miranda* and *Innis*. Others concentrate on whether the relative is an “agent” of the police, thereby disregarding the importance of the suspect’s perceptions. Different courts erroneously permit police to threaten directly a suspect’s friends in order to induce confessions. Such analysis is contrary to *Innis*’ dictate that official compulsion be dispositive. In most circumstances, friends and relatives do not exert official compulsion and confessions that follow should be allowed. Only in rare cases will private behavior take on the “color of blue” and rise to the level of interrogation.

B. *Volunteered Statements and Follow-Up Questions*

Another line of cases that considers the meaning of interrogation under *Innis* involves police questions following a voluntary statement by the suspect. When these “follow-up” questions prompt incriminating responses, suspects have argued that the questions themselves constitute impermissible police conduct. However, although direct questions are usually considered interrogation, the *Innis* Court stated that voluntary statements are admissible. Justice Stewart’s opinion repeated *Miranda*’s finding that “[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.”¹⁵³

Unfortunately, *Innis* does not reveal how statements made in response to police follow-up questions should be regarded. Logically, if a follow-up question and the subsequent response are viewed as part of the initial voluntary statement — as one event — they would fall under *Innis*’ concession for “volunteered statements.” If, however, the

152. 678 F.2d at 1336. The opinion stated that fear of the involvement of family and friends does not create peculiar susceptibilities because such concerns are common to all, and given defendant’s education and shrewdness, it was unlikely that he was susceptible to such pressures. 678 F.2d at 1337.

153. 446 U.S. at 300 (quoting *Miranda*, 384 U.S. at 478); see also, *Miranda*, 384 U.S. at 533 (White, J., dissenting) (“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.”). Again, the problem of taking the *Innis* language literally should be obvious. Voluntary statements, which Stewart finds always admissible, will often be the result of police behavior that was “reasonably likely” to elicit the incriminating statement.

follow-up question is analytically distinct from the initial statement, it should be treated as an independent direct question, the most obvious form of interrogation.

Apparently guided by such logic, some commentators have asserted that responses to follow-up questions should be allowed if the questions are a "continuation" of the initial volunteered statement because they represent "neutral efforts" to clarify what has already been said.¹⁵⁴ Once, however, the questioner attempts to enhance a suspect's guilt, police behavior becomes interrogation and the response is inadmissible.¹⁵⁵ This approach implicitly recognizes the suspect's perceptions of compulsion. A suspect should not perceive official pressure when a question merely clarifies a voluntary statement. When, however, the examiner begins to hone in on the suspect's guilt, the level of intimidation increases, thus impermissibly compelling an individual to confess.

Several cases that have admitted incriminating statements appear to follow this analysis. For example, in *United States v. Egan*,¹⁵⁶ the court allowed incriminating statements which were the product of "idle conversation" initiated by the defendant.¹⁵⁷ At trial, the statements were admitted into evidence after the court found that police follow-up was not interrogation. The opinion noted that there had been no "subtle compulsion" designed to produce an incriminating response. In particular, the court noted that the officer's questions did not even relate to defendant's alleged crime; rather, the officer had merely participated in a conversation on an unrelated subject.¹⁵⁸

Other cases suggest that courts will not find interrogation where "the officer simply requested clarification"¹⁵⁹ or explanation of something said voluntarily.¹⁶⁰ Typically, courts hold that the police officer merely "continued the flow" of a conversation initiated by the defend-

154. W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.7(d).

155. *Id.*

156. 501 F. Supp. 1252 (S.D.N.Y. 1980).

157. 501 F. Supp. at 1268.

158. 501 F.Supp. at 1267-68. The conversation involved defendant's restoration of a house, his work in the trucking business, and his home in Massachusetts. Defendant eventually commented that his parents would be ashamed of him, which was, by implication, a confession.

159. *State v. Lamb*, 213 Neb. 498, 503, 330 N.W.2d 462, 466 (1983). In *Lamb*, the defendant, while in custody, asked a police officer, "How would you like it?" When the officer responded, "What do you mean by that?," the defendant answered "I have to do the cooking, washing, the laundry. And I got tired of it . . . so I shot her." 213 Neb. at 501, 330 N.W.2d at 465. The officer's question was not considered interrogation because it simply requested a clarification of the defendant's initial statement. *Lamb*, 213 Neb. at 503, 330 N.W.2d at 466.

160. *See, e.g., State v. Porter*, 303 N.C. 680, 692, 281 S.E.2d 377, 385 (1981). In *Porter*, the arresting officer radioed his supervisor to inform him of defendant's apprehension. The supervisor asked if the officer had recovered the stolen bank bag. The defendant overheard the question and stated "The bank bag is in the car." When the officer asked "What bank bag?", defendant replied "The bag from the robbery." *Porter*, 303 N.C. at 683, 281 S.E.2d at 385. Since the officer's question only sought clarification, it was not interrogation.

ant. Such decisions recognize the logical significance of the fact that defendant began the conversation. Discussions initiated by defendants normally do not produce pressure above the level that is inherent in arrest and custody,¹⁶¹ despite limited police participation.¹⁶² A suspect who initiates discussion with police is less likely to feel official compulsion because he is likely to sense greater (albeit still limited) personal control over the exchange.

At some point, however, an officer's follow-up question will begin to exert pressure above that inherent in arrest and custody. Courts using "continue the flow" analysis should find follow-up questions that increase a suspect's anxiety above this level to be interrogation. Thus, interrogation should be found when questions of clarification become direct accusations, made to confirm a defendant's guilt.¹⁶³

Other courts fail to consider the suspect's perceptions and concentrate incorrectly on the officer's intent.¹⁶⁴ Courts sympathetic to interrogation can always posit a permissible police intention. The task of

161. See *supra* note 63 and accompanying text.

162. See, e.g., *Hill v. State*, 470 N.E.2d 1332 (Ind. 1984). In *Hill*, the Indiana Supreme Court found that because the suspect had started the discussion, his subsequent incriminating statement was voluntarily and freely made. There had been no "compelling influence" and the "statement was uncoerced." 470 N.E.2d at 1335.

163. See, e.g., *People v. Bodner*, 27 Crim. L. Rep. (BNA) 2414 (July 10, 1980). In *Bodner*, the defendant came to the police and told them that his cousin had committed the crime. After speaking to the cousin, a police officer informed the defendant that he believed the cousin's version of the facts and defendant confessed. The court found the confession inadmissible as the officer's statements constituted interrogation. Rather than a "neutral effort" to clarify what had been said, the policeman's statement was considered a "confrontation" — an accusation of lying — designed to close in on the suspect. 27 Crim. L. Rep. (BNA) at 2415. Since the suspect could sense increased government pressure, the conduct became interrogation. As both *Miranda* and *Innis* stated, to posit the guilt of the suspect is a form of interrogation. See *Innis*, 446 U.S. at 299 (quoting *Miranda*, 384 U.S. at 450).

164. Some of these courts incorporate intent as part of an "objective observer" approach. *People v. Papile*, 113 A.D.2d 776, 776-78, 493 N.Y.S.2d 366, 367-68 (1985). See *supra* note 79 and accompanying text for a discussion of the "objective observer" approach. They consider whether an objective observer would view the officer's response as an unhesitating reply not intended to produce an incriminating response. Other courts consider intent as one of the factors in a "totality of circumstances" analysis. *State v. Lamb*, 213 Neb. 498, 505, 330 N.W.2d 462, 466 (1983).

The "totality of circumstances" approach was part of the "voluntariness" standard used to consider confessions prior to *Miranda*. While the test appeared to turn on the meaning of voluntary — was the confession "voluntarily" made? — it in fact rested on a complex set of values that grew from conceptions of due process. The test barred admission of confessions that were (1) unreliable because of the police methods used to obtain them, (2) produced by offensive methods even though they were reliable, and (3) made by persons whose voluntary power was seriously impaired, though the confessions were trustworthy and not the product of conscious police wrongdoing. *W. LAFAVE & J. ISRAEL, supra* note 1, at § 6.2. *But see Colorado v. Connelly*, 479 U.S. 157 (1986), where Justice Rehnquist's majority opinion recast *Townsend v. Sain*, 372 U.S. 293 (1963), by holding that involuntary confessions are only those procured through police misconduct and that unreliability is not a matter of constitutional significance. It considered the "totality of circumstances" and scrutinized all surrounding circumstances, for no case turned on the presence or absence of a single criterion.

As might be expected, the test was "inherently subjective," for it provided no adequate safeguards for defendants or sufficient guidelines for the police or lower courts. Because judges could look at the totality of particular circumstances, they had unchecked discretion to consider their

characterizing follow-up as innocently intended is aided by the fact that such questions are often spontaneous replies to voluntary statements by the defendant. Courts focusing on intent often consider the circumstances that prevented the formulation of impermissible design. Some courts reason that interrogation only occurs when the officers have had time to form such intent. Thus, where the question was a *spontaneous* response, the officer could not have had the opportunity to acquire the design or motivation to elicit incriminating statements.¹⁶⁵ Whatever the result, intent analysis confuses the *Miranda* and *Massiah* doctrines and ignores the importance of the suspect's perceptions.

Follow-up situations pose severe difficulties for a defendant seeking to suppress a confession. A problem arises because a defendant's claim of police compulsion is weakened by the fact that defendant initiated discussion. In most cases, a follow-up question that merely clarifies the defendant's voluntary statement does not exert undue pressure and should not be considered interrogation.¹⁶⁶ However, such questions become interrogation when they increase a suspect's anxiety by positing or attempting to establish a suspect's guilt. This

subjective preferences. The vagueness of the term "voluntary" contributed to this difficulty. In the end, lower courts tended to resolve such disputes in favor of law enforcement.

For discussion and criticism of the "voluntariness" test and consideration of "totality of circumstances" analysis, see generally MODERN CRIMINAL PROCEDURE, *supra* note 3 at 518-24; Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS 1-25, 73-75 (1980) (calling voluntariness test "unworkable"); O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT, 71-119 (1973); Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745-55 (1987) (discussing "the involuntary confession rule"); Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869 (1981) (standard left police without guidance); Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62 (1966) (term voluntariness provided inadequate guidance).

165. See, e.g., *State v. Porter*, 303 N.C. 680, 694, 281 S.E.2d 377, 386-87 (1981) (emphasis added) (noting that there was no "opportunity to reflect or consider whether his query was reasonably likely to elicit an inculpatory remark"); *People v. Papile*, 113 A.D.2d 776, 776-78, 493 N.Y.S.2d 366, 367-68 (1985) (emphasis added) (In an "unhesitating reply" to defendant's proposal of a deal, the officer asked "What kind of a deal?" and "What are you talking about?"). Other courts will find interrogation did occur when the passage of time gave the officer the chance to form intent. See, e.g., *People v. Bodner*, 27 Crim. L. Rep. (BNA) 2414 (July 10, 1980) (Almost three hours passed between the time when defendant initiated contact with the police and the officer accused defendant of the crime. During that time, the defendant had been sent home and the officer had checked out the defendant's story and determined that it was false.).

166. In *Colorado v. Connelly*, 479 U.S. 157 (1986), Justice Rehnquist considered when a confession is "voluntary" within the meaning of the Due Process clause, and in the process rewrote the history of confessions. The Court found admissible the confession of a mentally ill person who had approached an officer and volunteered the information that he had killed someone. Justice Rehnquist stated that the critical element in confession cases, for "over . . . 50 years," was the occurrence of police misconduct. 479 U.S. at 163. Voluntariness could not turn, he contended, on courts divining "a defendant's motivation for speaking or acting as he did even though there [had been] no claim that governmental conduct coerced his decision." 479 U.S. at 165-66. However, see Justice Brennan's dissent which found the holding "inconsistent with the Court's historical insistence that only confessions reflecting an exercise of free will be admitted into evidence." 479 U.S. at 181 (Brennan, J., dissenting). Brennan's account seems a more accurate portrayal of history, see *supra* note 164 and sources cited.

conclusion appropriately recognizes the significance of the suspect's perceptions of official compulsion. Unfortunately, some courts underestimate the defendant's perspective and focus on the officer's intent.

C. "Normally Attendant to Arrest and Custody"

While *Innis* does not speak directly to whether all questions constitute interrogation,¹⁶⁷ and no court has adopted such an absolute rule,¹⁶⁸ *Innis* does provide an exception for words and actions that are "normally attendant to arrest and custody."¹⁶⁹ This section will begin by discussing questions normally attendant to custody and suggesting that routine booking questions are not interrogation in most circumstances. It will then consider common arrest procedures and conclude that while police arrest practices might be due some deference, when those practices further not arrest but investigation, they are outside the *Innis* exception for actions attendant to arrest.

While some courts consider nearly any questioning to be interrogation,¹⁷⁰ the prevailing view is that questions that comprise part of the "booking process" are permitted.¹⁷¹ The latter position makes considerably greater sense, for it would be absurd to suggest that every harmless question is interrogation. An officer cannot be thought to interrogate a suspect when, during booking, he asks: "Do you want a sandwich?" Consequently, some decisions appropriately note that *Mi-*

167. See *United States v. Foskey*, 636 F.2d 517, 522, n.3 (D.C. Cir. 1980) (referring to *Innis*' lack of guidance).

168. See W. LAFAYE & J. ISRAEL, *supra* note 1, at § 6.7(b). Under any interpretation of the *Innis* test, it would appear that some questions will be exempt from *Miranda*'s limits. This is true for each of the three readings of *Innis* considered earlier in this Note. Under a "probability of success approach," not all questions are equally likely to produce incriminating responses. Indeed, many would seem unlikely to produce such evidence, see *supra* text accompanying notes 54-60; *infra* text accompanying note 172. Under White's objective observer test, it is possible that an objective observer could find that some questions were not designed to produce damaging statements, see *supra* text accompanying note 61. In addition, certain kinds of questions, particularly for routine booking information, are not likely to generate compulsive pressure, see *supra* text accompanying note 62.

169. 446 U.S. at 301.

170. In *United States v. Downing*, 665 F.2d 404 (1st Cir. 1981), for example, police asked a defendant, who had requested an attorney, to empty his pockets as part of police processing. After a question regarding his keys, the subject made an incriminating statement. The court found the question constituted interrogation, stating that once a suspect expresses a wish to remain silent, any statement taken cannot be otherwise than a product of compulsion. 665 F.2d at 406. The court suggested that the exception for action normally attendant to arrest does not apply to express questioning but only to its functional equivalent, 665 F.2d at 407.

The Sixth Circuit, in *United States v. Avery*, 717 F.2d 1020, 1025 n.1 (6th Cir. 1983), criticized the First Circuit, stating that the First Circuit has "apparently taken the position that any form of direct questioning of a suspect in custody constitutes 'interrogation' under *Miranda*." For discussion of the view that once a suspect invokes the right to silence or counsel the police may not have any conversation in the defendant's presence that relates to the criminal activity in question, see Sonenshein, *Miranda and the Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L.J. 405 (1982).

171. W. LAFAYE & J. ISRAEL, *supra* note 1, at § 6.7(b).

rand was concerned with questioning that *enhances* the pressures inherent in custody, which routine booking does not do. While booking questions may be unpleasant, they do not increase the compulsion perceived by a suspect above the level inherent in custody. As a result, courts should not find interrogation in questions that are part of a routine procedure to secure biographical data.

Some courts recognize this. A few reason that *Miranda* protects against interrogation of an investigative nature rather than against the obtaining of basic identifying data required for booking.¹⁷² Other courts consider a variety of factors which might bear upon a suspect's perceptions of official compulsion. These courts find it relevant that the booking questions do not relate to the criminal activity and that the defendant was not particularly susceptible to the questions.¹⁷³

In some circumstances, even if police practices go beyond the request for biographical information, they may be allowed if they appear as a necessary or routine part of police processing and custody. Thus, no interrogation was found when, in an effort to determine how much an apparently confused suspect understood, an officer asked defendant if he knew why he had been arrested. In particular, the officer sought to establish that defendant understood his rights.¹⁷⁴

Some courts examine the particular procedure to determine if it is, in fact, part of normal booking practice. Questions that are not routine should be considered interrogation because they increase a suspect's anxiety and perceptions of compulsion. In *Lornitis v. State*,¹⁷⁵ for example, a police officer instructed several defendants to identify any personal items in a truck where police had discovered bales of marijuana. The court found interrogation because there was no evidence that the identification of personal belongings in seized vehicles was part of the normal booking or inventory process.¹⁷⁶ Similarly, a "sham" claim that a particular procedure was normally incident to arrest and custody ought not to immunize police behavior from *Innis'* requirements.¹⁷⁷

The perception of compulsion should also increase if questioning

172. See, e.g., *United States v. Regilio*, 669 F.2d 1169 (7th Cir. 1981).

173. See 717 F.2d at 1024. The *Avery* court included police intent as one factor in its analysis. Thus, the court found it relevant that the police did not use the booking procedures in order deliberately to elicit an incriminating response. As has been stated throughout, intent analysis confuses the *Miranda* and *Massiah* doctrines. See *supra* notes 164-65 and accompanying text.

174. *Colbert v. State*, 654 P.2d 624 (Okla. Crim. App. 1982).

175. 394 So. 2d 455 (Fla. Dist. Ct. App. 1981).

176. 394 So. 2d at 458.

177. Under this view, *People v. Reyes*, 133 Misc. 2d 174, 506 N.Y.S.2d 541 (1986), was wrongly decided. In that case, the police successfully circumvented *Miranda* by calling their behavior a request for "routine identifying information." Police had prodded defendant for his identity over an extended period of time, challenging his assertions and investigating the proof that defendant offered as to his identity. The lengthy interview went beyond routine booking, and thus rose to the level of interrogation.

functions to investigate a suspect's guilt rather than merely identify the individual for processing. Police practices of this sort should be considered interrogation. Thus, in *United States v. Poole*,¹⁷⁸ the court found interrogation where questioning, although related to biographical data, worked to determine defendant's guilt. During the interview, FBI agents accused defendant of certain robberies and the response of a false name should have been foreseen.¹⁷⁹ The court considered police intent relevant to its analysis. "[I]n light of the investigatory purpose of the interview," the court refused to separate the improper interrogation from the questions regarding identity.¹⁸⁰ The decision properly recognized that investigative questioning is not a routine aspect of processing, but a component of interrogation.

Legitimate routine practices may become interrogation due to peculiar circumstances. It is fairly common for courts in these instances to apply a "totality of the circumstances" analysis, reminiscent of the voluntariness test.¹⁸¹ These courts examine (1) the susceptibility of a particular suspect; (2) the officer's knowledge of that suspect; and (3) the particular crime at issue.¹⁸² Thus, where an officer knew that a defendant's driver's license was in police custody, a state supreme court properly found that the only reason to ask defendant to locate his license was to elicit an incriminating response.¹⁸³

Although courts must look to the suspect's perception of compulsion, police intent is relevant to the extent that it sheds light on what police knew or should have known.¹⁸⁴ *Innis* does not hold officers accountable for unique susceptibilities of which they could not possibly have known.¹⁸⁵ Officers are only responsible for what they should

178. 794 F.2d 462 (9th Cir. 1986).

179. 794 F.2d at 467. Poole had given a false name when FBI agents demanded his identity, date of birth and place of birth. The request for biographical data was part of an interview that included showing defendant surveillance photos of the crime and asking about defendant's accomplices.

180. 794 F.2d at 466.

181. See *supra* note 164 for discussion of voluntariness test. Some courts even use the language of the "voluntariness test." In *State v. Nelson*, 459 So. 2d 510 (La. 1984), *cert. denied*, 471 U.S. 1030 (1985), police questioned a defendant, in custody for driving while intoxicated, about the ownership of the car. The defendant responded that he had killed someone. The court found the statement admissible as it was "unresponsive" to the question asked, and "as voluntary as if he had walked into the police station and announced his guilt." 459 So. 2d at 514. Cases such as *Nelson* appear to consider the foreseeability of the response under the peculiar facts.

182. See, e.g., *United States v. Avery*, 717 F.2d 1020, 1025 (6th Cir. 1983).

183. *State v. Ladd*, 308 N.C. 272, 287, 302 S.E. 2d 164, 174 (1983). See also *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986) (where an officer knew that large amounts of cash and cocaine had been found at a certain apartment, asking defendant his residence was deemed interrogation).

184. See *supra* notes 66-69 and accompanying text; *infra* notes 233-52 and accompanying text.

185. *Innis* suggests that police are not responsible for unknown peculiarities. Justice Stewart stated: "[S]ince the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part

have known about a suspect. For example, if officers could not possibly have known about drugs stored at a defendant's house, there would be no interrogation when they asked the defendant where he lived. An objective observer knowing only what police should have known would not perceive such a question as excessive compulsion. Despite these considerations, it should not be forgotten that intent is of only *limited* relevance. Once a court concludes that police should have known about the drugs and that an objective observer with this knowledge would view a question about the defendant's address as compulsion to reveal incriminating information, it would be wrong to find no interrogation because police intended only to determine the defendant's residence. Where an officer is *aware* of a suspect's peculiarities *and* those peculiarities make the question more compulsive, routine booking practices should be considered interrogation. Such an approach respects a suspect's perceptions and only holds officers to what they should have known. In this way police are not crippled in prosecuting arrestees and are able to ask routine questions that usually do not exert undue pressure.

When arrests are involved, courts also respond to the added concern of danger to the safety of police officers. For example, in *United States v. Bennett*,¹⁸⁶ a policeman noted with some surprise the presence of a gun in the suspect's car. Though an incriminating response followed,¹⁸⁷ the Fifth Circuit found no interrogation. The court stated that the officer would have been derelict in his duty had he not warned others of the weapon. To call such action interrogation would "put absurd restrictions on the police."¹⁸⁸ For the court, words or acts "necessary or appropriate to inform fellow officers of a potential threat to their own safety and that of others during the course of an arrest or custody, are 'normally attendant.'"¹⁸⁹ While the officer's exclamation might have evoked a confession, it did not increase the level of pressure above that inherent in arrest. As a result, the statement might be deemed appropriately within the *Innis* exception.¹⁹⁰

of police officers that they *should have known* were reasonably likely to elicit an incriminating response." 446 U.S. at 301-02 (emphasis added). However, in a footnote, the Court stated that any knowledge the police did have concerning a suspect's "unusual susceptibility . . . to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response . . ." 446 U.S. at 302 n.8. See also White, *supra* note 27, at 1233-1236, 1233 n.154 & 1235 n.162 (suggesting that peculiar susceptibilities unknown to police are irrelevant); cf. TRENDS, *supra* note 27, at 93 (remarks of Professor Kamisar) (suggests finding interrogation only when incriminating response is *foreseeable*).

186. 626 F.2d 1309 (5th Cir. 1980).

187. As the officer pulled the gun from the car Bennett stated: "Yes, he had a damn gun and he was going deer hunting with it and there wasn't no law against him having a gun to go deer hunting . . ." 626 F.2d at 1311.

188. 626 F.2d at 1312.

189. 626 F.2d at 1313.

190. *Bennett* might also be characterized as a case involving police words of shock or sur-

Courts appear equally tolerant of another common arrest scenario, in that they allow officers the opportunity to evaluate the nature of the situation they confront. Thus, in *People v. Reyes*,¹⁹¹ an officer responding to a domestic dispute asked the parties, "What's going on here? It's pretty late."¹⁹² Though an incriminating response followed, the court found no interrogation. Rather, the court noted that *Miranda* only prohibits confessions "genuinely compelled, namely, the result of coercion or overbearing of the will of the accused."¹⁹³ Here the officer's actions were investigative rather than custodial, "designed to clarify the nature of the situation confronted."¹⁹⁴

Bennett and *Reyes* suggest that where police safety or the ability of officers to deal with an arrest is at stake, courts will find no interrogation. In most circumstances, the questions involved pose no difficulties because they create no compulsion above the level inherent in arrest. Courts that permit such practices appear to be in line with the dictates of *Innis*.

But some courts improperly equate the immediate needs of arrest with the needs of an investigation. These decisions can completely undermine *Innis* because the purpose of interrogation is to investigate crime. If the "needs of investigation" will permit practices that compel confessions, *Miranda* and *Innis* become meaningless.

The First Circuit appeared to make this mistake in *United States v. Timpani*¹⁹⁵. There, the court found no interrogation when FBI agents refused to allow the defendant to call his lawyer and insisted that he remain while they searched his apartment. The opinion conceded that the likely discovery of evidence during the search might produce incriminating statements. Nevertheless, the FBI action was necessary to an area-wide, coordinated search of loan-sharking operations. The court recognized as a valid concern the fear that defendant might warn others of the raid and prevent successful arrests.¹⁹⁶

Unfortunately, the court failed to recognize that the suspect's per-

prise. The situations in which these words prompt incriminating responses are considered below. See *infra* text accompanying notes 278-303. *Bennett* appears to fall into both categories because the record is silent as to whether the remark was made to the other officers, to defendant, or to no one. 626 F.2d at 1310 n.4. If aimed at the officers, the statement can be seen as a warning normally attendant to arrest. If directed to no one, it can be viewed as a statement of shock or surprise. Since the court appears to analyze both of these possibilities, *Bennett* relates both to this section and section II.F. See *infra* text accompanying notes 300-03.

191. 133 Misc. 2d 174, 506 N.Y.S.2d 541 (N.Y. Sup. Ct. 1986).

192. 133 Misc. 2d at 177, 506 N.Y.S.2d at 543.

193. 133 Misc. 2d at 176, 506 N.Y.S.2d at 543.

194. 133 Misc. 2d at 177, 506 N.Y.S.2d at 543. See also *United States v. Castro*, 723 F.2d 1527 (11th Cir. 1984). In *Castro* an arresting officer smelling marijuana asked "What in the world is going on here?" 723 F.2d at 1529. Defendant responded with the offer of a bribe. The court found the statement admissible as it was totally unresponsive and thus volunteered.

195. 665 F.2d 1 (1st Cir. 1981).

196. 665 F.2d at 3.

ceptions of official compulsion was produced, not by custody alone, but by an investigation. Forcing the defendant to wait while his apartment is searched for incriminating evidence is similar to the common police interrogation tactic of confronting defendant with evidence against him.¹⁹⁷ Both practices are likely to compel confessions. The *Timpani* court permitted the action under the view that it was a procedure necessary to arrest. There were, however, other ways for police to have assured arrest of defendant's conspirators. Defendant's presence did enhance the success of an investigation and functioned to increase the level of compulsion above the level necessary to arrest. As a result, the officer's behavior was interrogation, not a practice "normally attendant to arrest."

The *Innis* exception for questions normally attendant to arrest and custody rests on recognition of the practical necessities of police activity. Routine booking questions are essential to custody. Such questions, as long as they are in fact routine, normally do not produce significant official compulsion above and beyond that inherent in arrest and detention. When, however, questions go beyond the scope of normal practice, they do increase the pressure above the level inherent in custody and should be viewed as proscribed interrogation. Courts should also be aware that a suspect's peculiar susceptibilities can cause the individual to perceive routine questions as official pressure to confess. Because an officer cannot be aware of every peculiarity, interrogation should only be found if the officer *knows* of these unique factors.

Police safety and the conduct essential to arrest may dictate some deference to police procedure. When, however, the practice furthers not arrest but investigation, it falls outside the *Innis* exception and should be evaluated according to standard *Innis* analysis. If the action increases a suspect's perceptions of compulsion, it should be deemed proscribed interrogation.

D. "Subtle Compulsion"

Another group of cases involves police practices that can be described as "subtle compulsion."¹⁹⁸ *Innis* itself falls into this category as do other cases involving conversations between police officers in the presence of the defendant. Tactics of "subtle compulsion" also include situations where police confront defendant with incriminating evidence.

197. See *infra* text accompanying notes 210-25.

198. These are cases where it cannot be argued that the practice was normally attendant to arrest or custody. See *supra* Section II.C. These practices cannot be characterized as routine booking procedures because either they are not in fact routine or they are totally unrelated to booking. They are also practices which cannot be deemed necessary to arrest of the suspect. This is because either the suspect is already in custody, or arrest can be easily achieved without employing the questionable conduct.

Prior to *Innis*, there had been some confusion as to whether conduct in addition to direct questioning could constitute interrogation.¹⁹⁹ *Innis* made clear that tactics and methods that are the "functional equivalent" of direct questioning can be interrogation.²⁰⁰ It does not follow, however, that all prompting is *per se* illegal,²⁰¹ and courts have had considerable difficulty in this area.

Because the *Innis* Court itself considered police methods of "subtle compulsion," the decision provides the most direct guide to analyzing these cases. The *Innis* decision suggests that the degree of "prompting" is relevant to a determination of interrogation. Interrogation should be found when the suspect perceives prompting as the functional equivalent of express questioning.

Thus, although *Innis* had been subjected to "subtle compulsion," this finding did not end the inquiry. The Court had to determine whether the damaging response was the product of words or acts reasonably likely to elicit that response.²⁰² Words or acts do not become undue compulsion, noted the Court, when "the entire conversation appears to have consisted of no more than a few offhand remarks."²⁰³ However, there might be interrogation if the police carry "on a lengthy harangue" in front of defendant and the comments become particularly evocative.²⁰⁴ Apparently, a direct appeal to a suspect's conscience is only "subtle compulsion" and not sufficiently coercive to be deemed the functional equivalent of express questioning.²⁰⁵

1. *Situations Involving Conversations Between Police Officers in the Presence of Defendants*

Analyzing how other courts have considered the use of conversations between officers in front of the suspect illustrates how the tactic can produce undue compulsion. For example, in *People v. Jumper*,²⁰⁶ an officer entered the police booking room where another officer asked the first if he knew the defendant. The first officer responded that de-

199. W. LAFAYE & J. ISRAEL, *supra* note 1, at § 6.7(c).

200. 446 U.S. at 300-01.

201. See *Edwards v. Arizona*, 451 U.S. 477, 488 (1980) (Burger, C.J., concurring) (citing *Rhode Island v. Innis*, 446 U.S. 291 (1979)); *Stahl v. State*, 426 So. 2d 909, 916 (Ala. Crim. App. 1982), *cert. denied*, 463 U.S. 1210 (1983).

202. 446 U.S. at 303.

203. 446 U.S. at 303.

204. 446 U.S. at 303.

205. One can certainly take issue with the Court's ultimate finding on the facts of *Innis*. The officer's "appeal to conscience" could be viewed as the equivalent of asking the suspect to "display some evidence of decency and honor" — a classic interrogation technique. See *Innis*, 446 U.S. at 306 (Marshall, J., dissenting). However, one might accept the Court's characterization of the statements as a few offhand remarks. A few such remarks might not constitute an excessive degree of prompting. In any event, it should be clear that interrogation occurs when such remarks produce compulsion and thus become the functional equivalent of direct questioning.

206. 113 Ill. App. 3d 346, 447 N.E.2d 531 (1983).

defendant was the individual who had attacked him earlier. The defendant made an incriminating response that was later admitted.²⁰⁷

The *Jumper* court made much of the fact that here, as in *Innis*, there was a conversation between officers to which no response was invited.²⁰⁸ If that were true, then *Jumper's* response would, in fact, be nothing more than a voluntary statement and would be completely admissible. Unfortunately, the court failed to appreciate that the officer's remarks were significantly more compulsive than those considered in *Innis*. *Jumper* overheard not merely "offhand remarks," but direct accusations of his guilt.²⁰⁹ From the suspect's perception, the officer's statement constituted the equivalent of the officer saying, "You did it. Now do you want to talk about it?" Clearly, such a statement would compel a confession.

2. *Confronting Defendants with Incriminating Evidence*

Another tactic considered by lower courts under *Innis* involves confronting a defendant with incriminating evidence. These cases should be relatively easy. Both *Miranda* and *Innis* state that to posit the guilt of the suspect is a form of interrogation.²¹⁰ Because showing a defendant damaging evidence functions to accuse him of guilt, the practice obviously adds to the pressure to talk. Such conduct is the equivalent of saying, "We have found the following incriminating evidence. Now do you want to talk about the crime?" It follows that police interrogate a suspect any time they confront that suspect with incriminating evidence.

Several decisions have recognized that these practices constitute interrogation. These courts recognize that the level of compulsion increases when a police practice shifts from "inquisitorial" action to "accusatorial" behavior. Thus, confronting a defendant with discrepancies in his story was found to be interrogation.²¹¹

Similarly, courts have correctly found interrogation where police presented defendant with "apparently overwhelming inculpatory evidence in the form of written witnesses' statements and oral explanations."²¹² Others have found interrogation after officers showed the defendant various police reports, implying the threat of prosecution.²¹³ These cases correctly find interrogation in such circumstances because

207. 113 Ill. App. 3d at 349, 447 N.E.2d at 533.

208. 113 Ill. App. 3d at 350, 447 N.E.2d at 534.

209. This is significant in other contexts, see *supra* text accompanying notes 155, 163 (discussing positing the guilt of the suspect as a form of interrogation). See also *infra* text accompanying note 211.

210. *Innis*, 446 U.S. at 299 (quoting *Miranda*, 384 U.S. at 450).

211. *People v. Savory*, 105 Ill. App. 3d 1023, 435 N.E.2d 226 (1982).

212. *State v. Uganiza*, 702 P.2d 1352, 1355 (Haw. 1985).

213. *In re Interest of Durand*, 206 Neb. 415, 421-22, 293 N.W.2d 383, 387 (1980). The concurrence in *Durand* appears to have applied the voluntariness approach finding interrogation

the conduct posits the guilt of the suspect and undoubtedly increases the perception of pressure.²¹⁴

As with other fact patterns discussed in this Note, courts should consider whether an objective observer with same knowledge of a suspect as police would view a police practice as compelling an incriminating response. Thus, *Lewis v. State*,²¹⁵ a Florida case where the Court of Appeals considered a defendant's familiarity with police techniques in finding no compulsion, was wrongly decided. Under a totality of circumstances analysis,²¹⁶ the court found that because of defendant's long felony record, he could not have perceived that he was being coerced by police when they showed him incriminating information.²¹⁷ Admittedly, the *Lewis* court's analysis did, to a degree, resemble the proper approach. The court considered the suspect's perceptions²¹⁸ of official compulsion,²¹⁹ in light of what was known about Lewis' prior record and familiarity with police techniques. But the court underestimated the degree of compulsion and overestimated the suspect's ability to withstand police pressure. A practice is not any less compulsive because a suspect is familiar with it. To conclude otherwise is to suggest that any suspect with a prior record can be interrogated because familiarity breeds a strengthened resolve to resist. Despite his prior record, Lewis was still confronted with police acts that communicated, "We know you're guilty. Want to talk about it?" The fact that Lewis made incriminating statements indicates that he could not resist official pressure. Both *Miranda* and *Innis* made clear that positing the guilt of the suspect is interrogation.²²⁰ Consequently, anytime police confront a defendant with incriminating evidence, interrogation occurs. *Lewis* should be no exception.

because the responses were "involuntary." See 206 Neb. at 415, 293 N.W.2d at 387 (Boslaugh, J., concurring); *supra* note 164 (discussing voluntariness test).

214. Similar opportunities for abuse exist when a polygraph is involved. In one case, the Fifth Circuit held that telling defendant that he had failed a lie detector test was interrogation. At the time of the statement, the test was not yet completed. The court properly appreciated that it is a common psychological ploy, which *Innis* itself recognized, 446 U.S. at 300, to "posit the guilt of the subject." *Henry v. Dees*, 658 F.2d 406, 410 (5th Cir. 1981). See also Weisberg, *supra* note 10, at 21-24.

215. 509 So. 2d 1236 (Fla. Dist. Ct. App. 1987), *cert. denied*, 108 S. Ct. 2025 (1988).

216. The court found that a robbery and attempted murder suspect was not interrogated when police showed him a video tape of the robbery which included footage of the shooting. Since the suspect had a long and serious felony record, was familiar with police techniques and had engaged in levity during the showing, the court concluded that Lewis had not been coerced to confess. 509 So. 2d at 1237.

217. The decision indicates the problem with totality of circumstances analysis. By incorporating a broad range of factors, a court can justify a coercive practice on the grounds that a suspect has the ability to endure police compulsion. See *supra* note 164 (discussing totality of circumstances analysis).

218. 509 So. 2d at 1237.

219. 509 So. 2d at 1237.

220. *Innis*, 446 U.S. at 299 (quoting *Miranda*, 384 U.S. at 450).

Other courts err by completely failing to appreciate the significance of the suspect's perception of compulsion. They improperly focus on the intent of the police, which should be of only limited relevance.²²¹ These courts fail to find interrogation where the officer did not intend an incriminating response.

But the officer's desire to "inform" a defendant has no bearing on the suspect's perceptions of official compulsion. Courts will always be able to justify tactics which function to improperly compel confessions as efforts to aid the suspect's decision to cooperate. A whole line of cases permit such practices on the ground that the defendant has the right to know the charges he faces or the strength of the case against him.²²² These courts often argue that such information will permit a suspect to make an intelligent decision as to whether to remain silent.²²³

The problem with this argument is that it permits a coercive practice under the guise of aiding a defendant's informed decision.²²⁴ Presuring a suspect to cooperate is the functional equivalent of interrogation and is no less coercive because the officers did not intend to produce an incriminating response. Rather, interrogation should be found when "informing the defendant" would be perceived as an argument by the officer that defendant should confess.²²⁵

Other decisions more clearly demonstrate the absurdity of this focus on police intent and the degree to which some courts go to admit confessions. Under an intent analysis, they allow police to inform defendant of the procedural developments of his case. In one case where use of the "tough-guy, soft-guy"²²⁶ routine was alleged, the court found no interrogation when a detective stopped by defendant's cell on

221. See *supra* notes 61-69 and accompanying text.

222. See, e.g., *United States v. Guido*, 704 F.2d 675 (2d Cir. 1983); *Hawkins v. United States*, 461 A.2d 1025 (D.C. 1983), *cert. denied*, 463 U.S. 1052 (1984); *Stahl v. State*, 426 So. 2d 909 (Ala. Crim. App.), *cert. denied*, 463 U.S. 1210 (1982).

223. See, e.g., *Guido*, 704 F.2d at 675; *Hawkins*, 461 A.2d at 1031; *People v. Ferro*, 63 N.Y.2d 316, 472 N.E.2d 13, 19; 482 N.Y.S.2d 237, 243 (1984) (Jasen, J., dissenting), *cert. denied*, 472 U.S. 1007 (1985) (describing placing stolen furs in front of defendant's cell as "little more than simple disclosure of information which might, in fact, contribute to an intelligent exercise of his judgment").

224. See, e.g., *Guido*, 704 F.2d 675 which aptly demonstrates the notion that such "information" can produce a "decision to cooperate." In *Guido*, officers were discussing the benefits of cooperation with the defendant. In the course of the discussion the officers "merely supplied . . . information regarding the crime he was suspected of committing, in response to [defendant's] own questions." 704 F.2d at 677. The court found no interrogation, pointing out that the discussion was not "designed to elicit" incriminating information and there was no evidence that Guido was peculiarly susceptible to the appeal. 704 F.2d at 677.

225. Other courts make the same mistake even though they recognize that informing a defendant of the charges against him can be the equivalent of positing the suspect's guilt. Such courts allow this well established interrogation technique because the officer had an innocent intent. *Hawkins*, 461 A.2d at 1030.

226. See Weisberg, *supra* note 10, at 24 (describing the " 'friend and enemy' act in which two interrogators alternate, one sympathetic and the other unfriendly").

his way out to tell defendant that he intended to extradite him for murder.²²⁷ The court noted that the officer's only motive was his belief that defendant had the right to know he would be extradited.²²⁸ The decision underestimated the fact that the officer used the opportunity to increase the suspect's anxiety. In the course of their brief meeting, he told the defendant that in the state where he would be tried the death penalty was a possibility.²²⁹ While the statement might be thought merely to inform defendant of his status, it obviously increased the pressures inherent in custody.

This is not to say that *all* efforts to alert defendant to procedural developments should be or have been considered interrogation. In some circumstances, the information might be considered a routine and necessary part of custody. Thus in *Tally v. State*,²³⁰ the court found that merely telling the defendant that another police department wanted to question him about a theft was not interrogation.²³¹ The result was correct because while such information increases a suspect's anxiety, *Innis* requires a measure of compulsion above that inherent in custody.²³² Circumstances of custody may often require transferring suspects between various institutions and police departments and police behavior associated with that legitimate practice can be considered inherent to custody. When, however, an officer suggests that defendant could get the death penalty, the officer improperly adds to the pressures of custody. As a result, that practice should be considered interrogation.

3. *Alternative Uses of Intent in Subtle Compulsion Cases*

While intent should be of limited significance, *Innis* does not completely prohibit consideration of police design. *Innis* stated that intent might have "bearing on whether police should have known that their words or actions were reasonably likely to evoke an incriminating response."²³³ Some cases follow this direction and incorporate intent in a way that is closer to the dictates of *Innis*. These cases appear to employ Professor White's "objective observer" approach.²³⁴

227. *Stahl v. State*, 426 So. 2d 909, 913 (Ala. Crim. App. 1982).

228. 426 So. 2d at 915.

229. 426 So. 2d at 913.

230. 455 So. 2d 186 (Ala. Crim. App. 1984).

231. 455 So. 2d at 188.

232. 446 U.S. at 301.

233. *Innis*, 446 U.S. at 301-302 n.7 ("This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, 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.").

234. See *supra* note 79 and accompanying text.

One such court, in *Commonwealth v. Brant*,²³⁵ found interrogation when, after a suspect refused to answer questions, an officer interjected that his co-defendant had already made a statement.²³⁶ Although the court considered the fact that the officer's acts were *designed* to evoke an incriminating response,²³⁷ the opinion made clear that the test was "objective."²³⁸ Apparently, the court considered an objective observer's perception of what the officer intended. At the same time, the decision acknowledged that while intent may be relevant, it is by no means "conclusive."²³⁹

Under this "objective" approach, the suspect's perspective is not lost because, if an objective observer would view the police action as designed to compel a confession, a suspect would sense undue police pressure. Thus, the officer's intent becomes important only to the extent that it sheds light on the likelihood that the suspect would perceive compulsion.

In most circumstances, analysis of objective intent, which might be considered an "objective policeman" standard, will not cause difficulties. One can easily find that the remarks of the officer in *Brant* were designed to evoke an incriminating response.²⁴⁰ Difficulties will arise, however, in cases where police have induced incriminating statements by conduct which can be deemed to have some purpose other than to produce a response.²⁴¹ For example, in *Brant*, it is not impossible to argue that the officer intended only to alert the suspect to developments in his case and not to get an incriminating statement. A court which accepted this argument would permit a practice which clearly compelled a confession on the grounds of this innocent intention.

In light of these difficulties, how then is one to make sense of the *Innis* Court's discussion of intent? The answer lies in appreciating the Court's instruction to use intent to get at what the police knew or should have known. *Innis* makes clear that police cannot be "held accountable for the unforeseeable results of their words or actions."²⁴² Thus, a court should consider whether an objective observer *knowing only what the police should have known* would view police action as official compulsion to confess. In practice, this means that courts must evaluate not what the officers literally intended,²⁴³ but what they

235. 380 Mass. 876, 406 N.E.2d 1021 (1980), *cert. denied*, 449 U.S. 1004 (1980). The opinion came down shortly after *Innis*.

236. 380 Mass. at 882, 406 N.E.2d at 1025-26.

237. 380 Mass. at 883, 406 N.E.2d at 1026.

238. 380 Mass. at 883-85, 406 N.E.2d at 1026-27.

239. 380 Mass. at 883, 406 N.E.2d at 1026.

240. 380 Mass. at 883, 406 N.E.2d at 1026.

241. *See supra* note 88 and accompanying text.

242. 446 U.S. at 303.

243. These cases can be confusing because courts that use "intent" correctly and those that

knew or should have known about the suspect.

Such analysis has significant ramifications when the defendant has peculiar susceptibilities. If an officer could not have known that the suspect's personality made him susceptible to a particular pressure, then no interrogation can occur when the officer's actions produce an incriminating response. Accordingly, some courts consider only the susceptibilities known to the police.²⁴⁴ Thus, in *Hawkins v. United States*,²⁴⁵ the fact that the defendant was mentally ill was irrelevant because the officer did not know that this made the defendant particularly susceptible.²⁴⁶

The *Hawkins* decision demonstrates the proper use of intent because it focuses on what the officer should have known about the suspect. Such an approach asks whether an objective observer who knew what police should have known would view the practice as official compulsion to confess. The observer's viewpoint would in most cases reflect the suspect's perception of the police action.

Some suspects, however, do not share the objective observer's view of the police action because of their unusual susceptibilities. Typically, these individuals would feel undue compulsion because from their point of view, the officer intends them to talk. Under *Innis*, however, officers are not responsible for peculiar susceptibilities of which they are unaware.²⁴⁷ Thus, the *Hawkins* court properly decided the case of the mentally ill defendant. Although that defendant perceived official compulsion, most individuals would not.²⁴⁸

Sometimes, however, courts use this analysis when the suspect's susceptibilities are not unusual. They focus on the officer's perceptions

do not both employ the language of "intent." The distinction is that correct decisions, while discussing intent, are really analyzing what the officer knew or should have known.

244. See, e.g., *Hawkins v. United States*, 461 A.2d 1025 (D.C. 1983); *State v. Stahl*, 426 So. 2d 909 (Ala. Crim. App. 1982), cert. denied, 463 U.S. 1210 (1983); *People v. Benjamin*, 101 Mich. App. 637, 300 N.W.2d 661 (1980).

245. 461 A.2d 1025.

246. 461 A.2d at 1031. Cf. *Colorado v. Connelly*, 479 U.S. 157 (1986) (admitting statement made by mentally ill person as "voluntary" because there had been no police misconduct).

247. But see *Brewer v. Williams*, 430 U.S. 387 (1977), a *Massiah* case, where the Detective who gave the now famous "Christian Burial Speech" knew that defendant was a former mental patient and knew also that he was deeply religious. Since *Williams* was a *Massiah* case, see *supra* notes 23-34 and accompanying text, it turned on whether the officer "deliberately and designedly set out to elicit information." 430 U.S. at 399-401. *Williams* focused on the officer's intent directly and considered the manner in which the officer used knowledge of the suspect's susceptibilities to produce a confession. But since *Innis* is a *Miranda* case, intent is of more limited relevance. Once it is clear that an officer knew or should have known of a peculiar susceptibility, analysis must concentrate on the suspect's perceptions. Courts must consider how a suspect with those qualities would respond to the police action at issue.

248. The *Innis* Court stated: "Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 302 n.8. Nevertheless, police are not responsible for the "unforeseeable" results of their acts. 446 U.S. at 303.

of the suspect's condition and ignore the perceptions of an average suspect. They seem to allow a coercive practice because an officer felt that this suspect could "handle it." For example, in *People v. Reyes*,²⁴⁹ the New York Court of Appeals considered the officer's knowledge concerning the suspect. Defendant had been arrested after a domestic dispute and at the time of arrest had appeared fairly agitated. In the station house, police walked the defendant in handcuffs past his wife, causing him to make an incriminating statement.²⁵⁰ The court found the statement admissible despite the defendant's contention that the police had deliberately created a confrontational situation. The opinion emphasized that the suspect "no longer appeared to be in an excited or agitated state."²⁵¹ The court ignored consideration of the potentially compulsive nature of the confrontation. Because the suspect "looked calm" the officer could not have anticipated the result and thus could not have intended to produce an incriminating response.

A focus on the officer's appraisal of the suspect thus becomes another way courts examine the officer's subjective intent. Such appraisals of "calmness" can be used to justify what might otherwise be coercive behavior. The court might have considered whether an objective observer *with the same knowledge of the suspect as police* would view the officer's acts as official compulsion to confess. Such analysis gets at the average suspect's perceptions, but only holds officers to what they *should have known*. *Reyes*, however, involved not unknown peculiarities, but the response of an average suspect to a potentially evocative confrontation.²⁵² Because officers *should know* how average suspects respond, the fact that the suspect looked calm should be irrelevant.

Unfortunately, the *Reyes* court emphasized that because the suspect looked calm, the police could not have intended to produce an incriminating response. This kind of analysis will allow many coercive tactics under the claim that the suspect appeared to the officer able to endure the pressure. Thus, the *Reyes* court should have considered the suspect's perception of the confrontation rather than the officer's intention.

249. 133 Misc. 2d 174, 506 N.Y.S.2d 541 (1986).

250. As defendant passed his wife, he declared, "I'll be out tomorrow. They can't do anything to me because I'm your legal husband. When I get out tomorrow, I'll finish what I started, and you'll get one right between the eyes." 133 Misc. 2d at 176, 506 N.Y.S.2d at 543.

251. 133 Misc. 2d at 177, 506 N.Y.S.2d at 543-44.

252. Admittedly, the confrontation in *Reyes* might not have produced undue official confrontation. The wife was not a government official and her presence alone is not enough to produce interrogation. This Note takes greater issue with the analysis than the result.

4. *Distinguishing Between First and Second Level Miranda Protections*

Some of the "subtle compulsion" cases may suggest a way to give content to the distinction between first and second level *Miranda* protections following the Supreme Court's blurring of those distinctions in *Arizona v. Mauro*.²⁵³ As noted, first level protections exist *before* a suspect is given *Miranda* warnings and before he invokes the right to counsel, whereas second level protections begin once a suspect invokes these rights. Analysis under the two levels should differ. Under the first level, the question should be whether the police interrogated the suspect. Conversely, under the second level, the issue should be whether the police "scrupulously honored" the rights asserted.²⁵⁴ In *Mauro*, the Supreme Court blurred this distinction by finding that the police do scrupulously honor the rights of the suspect when they do not engage in interrogation.²⁵⁵

Some lower courts applying *Innis* appear to have presaged the analytic confusion of the *Mauro* ruling.²⁵⁶ However, courts may be able to continue recognizing some distinction between the two levels of protection through a heightened sensitivity to the presence of compulsion in instances where *Miranda* rights have been asserted by a defendant. An example of how this might work is provided by two decisions — *People v. Ferro*²⁵⁷ and *United States v. Gay*.²⁵⁸

In *Ferro*, the court held that the police interrogated defendant when they placed stolen furs, confiscated from a co-defendant, in front of defendant's cell.²⁵⁹ When it considered the need to scrupulously honor a suspect's rights once invoked,²⁶⁰ the opinion found that the police did not "scrupulously honor" defendant's rights when they engaged in interrogation.²⁶¹

253. 481 U.S. 520 (1987).

254. See *supra* note 40 and sources cited therein (discussing first and second level *Miranda* protections).

255. See *supra* note 40. Some critics have taken issue with the Court's failure to recognize the importance of the distinction. See, e.g., Kamisar, U.S. Law Week Remarks, *supra* note 40, at 31-36. However, since this Note focuses on lower court decisions, a fuller critique of *Mauro* is beyond its scope. The Note can only suggest how lower courts might evaluate first and second level protections since *Mauro* is valid law.

256. See, e.g., *State v. Uganiza*, 702 P.2d 1352, 1354-55 (Haw. 1985) (finding that the police "scrupulously honored" defendant's right where they did not engage in interrogation).

257. 63 N.Y.2d 316, 472 N.E.2d 13, 482 N.Y.S.2d 237 (1984), *cert. denied*, 472 U.S. 1007 (1985).

258. 774 F.2d 368 (10th Cir. 1985).

259. 63 N.Y.2d at 319, 472 N.E.2d at 14, 482 N.Y.S.2d at 238. The court commented that the *Miranda* rule was designed to counteract the coercive pressures of the custodial setting. Rejecting the relevance of intent, the court stated that an objective observer possessing the same knowledge of the suspect as the police would have concluded that the action was reasonably likely to elicit an incriminating response. *Id.*

260. 63 N.Y.2d at 322, 472 N.E.2d at 16, 482 N.Y.S.2d at 240.

261. 63 N.Y.2d at 324, 472 N.E.2d at 17, 482 N.Y.S.2d at 241. Critics of *Mauro* should also

In *Gay*, the police also confronted defendant with physical evidence when they held up a tin and defendant responded, "That's cocaine too."²⁶² However, the *Gay* court distinguished *Ferro* and found no interrogation. The difference between the two situations was that *Gay*, unlike *Ferro*, had not invoked his rights before being confronted with the evidence.²⁶³

Although *Gay* involved first level *Miranda* protections and *Ferro* involved second level protections, both cases asked the same question — was the suspect interrogated under *Innis*? While *Gay* mentioned the "scrupulously honored" language, it incorporated those considerations into the definition of interrogation. As noted, it found interrogation when the police did not scrupulously honor defendant's rights. Consequently, *Gay* might appear to restate the *Mauro* approach.

But *Gay* and *Ferro* illustrate that some lower courts — while not asking a different question — do alter their approach to finding interrogation when second level *Miranda* protections are at stake. Thus, both the *Ferro* and *Gay* courts asked whether the police action rose to the level of interrogation. However, where second level protections were at issue — where the defendant had invoked his or her rights — the *Ferro* court may be more willing to find that police practices constitute interrogation.

The courts in *Ferro* and *Gay* asked the same question, but analyzed the results differently. Critics of *Mauro* would take issue with this approach, and would contend that when second level protections are at stake, interrogation is not the issue.²⁶⁴ But given that *Mauro* is (for now) good law, courts must give the distinction between first and second level *Miranda* protections continued vitality through other means. The pragmatic approach suggested by *Ferro* and *Gay* may provide one method.

Overall, an analysis of the tactics of "subtle compulsion" must consider the level of compulsion involved in police behavior. Police practices become interrogation when a suspect would perceive official pressure above the degree inherent in custody. When "prompting" becomes the functional equivalent of express questioning, any response that follows should be inadmissible.

object to the *Ferro* opinion. Following the pre-*Mauro* approach, the issue should have been whether the police conduct was the equivalent of saying: "We have recovered the stolen furs from one of your accomplices. So you still want to remain silent in light of that development?" Cf. Kamisar, U.S. Law Week Remarks, *supra* note 40, at 31-36. Such analysis would have recognized that officers must "scrupulously honor" rights that have been asserted.

262. 774 F.2d at 371.

263. The court also distinguished *Ferro* because the police confronted *Gay* at his car and not in a cell. Further, the police may not have known what was in the tin, whereas in *Ferro* they knew the items were stolen. But these two distinctions do not appear as important to the court as the fact that the defendant had not invoked his rights. 774 F.2d at 379, n.23.

264. See Kamisar, U.S. Law Week Remarks, *supra* note 40, at 31-36.

Intent may be of limited significance when the suspect has unusual susceptibilities. By considering an objective observer's perception of the officer's intent, a court holds the officer responsible only for what he should have known. However, in most cases, any examination of police intent confuses *Massiah* and *Miranda* analysis. Such an approach typically permits improper official compulsion under the guise of the officer's innocent intent.

E. Use of the "Jail Plant"

Another common police tactic that courts have examined under *Innis* is the "jail plant." Typically, police place an undercover agent in the defendant's cell in an effort to elicit incriminating responses. Courts that consider this tactic interrogation err because neither *Miranda* nor *Innis* should apply to the undercover agent situation.

Innis extended *Miranda* to police methods that are equivalent to express questions "in terms of [their] coerciveness."²⁶⁵ However, interrogation turns not on the mere existence of pressure, but on the suspect's *perceptions of official compulsion*. Because a suspect is unaware of an undercover agent's identity, a jail plant produces no inherent or informal police compulsion. For this reason, no "police interrogation" should be found within the meaning of *Miranda*. One commentator has correctly observed: "[I]f it is not 'custodial police interrogation' *in the eye of the beholder*, then it is not such interrogation within the meaning of *Miranda*."²⁶⁶

Unfortunately, *Innis*' "reasonably likely to elicit" standard, if read literally, would reach the undercover plant,²⁶⁷ and lower courts have acted accordingly. Several state courts have erroneously found the use of the jail plant to be interrogation. For example, in *State v. McMullan*,²⁶⁸ the court reached this result by focusing on whether it was *reasonably likely* that such an agent would produce incriminating information. In his concurrence, Judge Smith objected that the jail plant tactic should be allowed because it involved no "police coercion." A court, he argued, should not find interrogation merely because a defendant "ignore[s] [his] counsel's advice through cupidity, stupidity, boastfulness, or remorse."²⁶⁹ Nevertheless, Judge Smith felt bound by precedent (the language of *Innis* in particular) to view the jail plant as a form of interrogation.²⁷⁰

Other state courts, while correctly realizing that the degree of com-

265. *Id.* at 41 (emphasis in original). The *Innis* Court referred to *Miranda* throughout its opinion. See, e.g., *Innis*, 446 U.S. at 300-01.

266. Kamisar, *What is "Interrogation?"* *supra* note 24 at 65.

267. W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.7(c).

268. 713 S.W.2d 881 (Mo. Ct. App. 1986).

269. 713 S.W.2d at 884 (Smith, J., concurring).

270. 713 S.W.2d at 884 (Smith, J., concurring).

pulsion is dispositive, have erred in their analysis of the *kind* of compulsion that *Miranda* prohibits. In *Holyfield v. State*,²⁷¹ the Nevada Supreme Court began by applying *Innis* literally, stating that the police should know that use of a jail plant is reasonably likely to elicit an incriminating response. However, the opinion went on to address the issue of coercion, stating that while coercion was the concern of *Miranda*, the presence of an authority figure was not necessary for a situation to constitute coercion. The court found that mere confinement can produce a coercive atmosphere, increasing a suspect's anxiety.²⁷² The environment of custody itself made defendant more "likely to seek discourse with others to relieve [t]his anxiety."²⁷³ Because police could control and select a suspect's companions, they could exploit opportunities to elicit unfairly incriminating information.²⁷⁴ Consequently, the court deemed the use of the jail plant to be interrogation in all circumstances.

However, as the dissent pointed out, this reasoning ignores that *Innis* requires "a measure of compulsion above and beyond that inherent in custody itself."²⁷⁵ Where a suspect does not know that the plant is a government agent, the *added level* of compulsion is missing and interrogation should not be found. A literal reading of the *Innis* test does require courts to view jail plant tactics as interrogation. A jail plant can always be considered "reasonably likely to elicit" incriminating information. But reading *Innis* literally is inappropriate when analyzing a situation beyond the scope of the *Innis* Court's reasoning. *Innis* assumed awareness of police presence without which undue *official* compulsion cannot exist from the suspect's perspective.²⁷⁶ The suspect's perceptions are critical.²⁷⁷ Because a defendant is unaware of a jail plant's identity, the tactic must be deemed outside the scope of *Innis* and should not be considered interrogation.

F. *Implied Questioning and Exclamations*

Another line of cases involves police statements that are not direct questions, but concern casual conversations between the police and the defendant. On their face, many appear to involve "innocuous" remarks and *Innis* itself makes clear that the "police surely cannot be held accountable for the unforeseeable results of their words or ac-

271. 101 Nev. 793, 711 P.2d 834 (1985).

272. 101 Nev. at 801, 711 P.2d at 839.

273. 101 Nev. at 801, 711 P.2d at 845-46 (quoting White, *supra* note 10, at 604-05 (quoting Dix, *Undercover Investigations and Police Rulemaking*, 53 TEXAS L. REV. 203, 230 (1975))).

274. 101 Nev. at 801, 711 P.2d at 839 (citing White, *supra* note 10, at 605).

275. 101 Nev. at 811, 711 P.2d at 848 (Steffen, J., dissenting) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980) (*Holyfield's* emphasis omitted)).

276. See *supra* notes 94-100 and accompanying text.

277. See *supra* notes 61, 109 & 115-19 and accompanying text.

tions."²⁷⁸ Nevertheless, some of these innocuous remarks can lead to incriminating evidence and rise to the level of interrogation.

An accusatorial statement is one form of indirect questioning that courts recognize can potentially constitute interrogation.²⁷⁹ However, many police statements are not as direct or are buried in pleasantries and their evocative nature is less apparent. Only by recognizing the compulsive nature of any accusation by a police officer can courts appreciate the extent to which such statements constitute interrogation.

Some courts do appear to have reached this conclusion. In *Matter of Albert R.*, the California Court of Appeals found that telling a defendant: "That was sure a cold thing you did . . . , selling him that hot car," represented the functional equivalent of interrogation.²⁸⁰ The court noted that *Innis* prohibited not only express questioning but "implied questioning." Once defendant had invoked the right to remain silent, further conversation concerning his arrest or charges should have ceased.²⁸¹ The court made clear that it was irrelevant that the officer had not intended to obtain such a response. The casual remark was seen as a "flagrantly accusatorial" statement.²⁸²

Other courts agree that where casual remarks turn to accusations, they rise to the level of interrogation. In *People v. Burson*,²⁸³ the Illinois Court of Appeals considered a case in which an officer, who was a friend of the suspect, said: "Now, Jerry, you know better than to drive that car."²⁸⁴ The statement produced an incriminating response.²⁸⁵ Although spoken in a friendly manner, the officer's words posited defendant's guilt and attempted to elicit comment from defendant as to why he had committed the act.²⁸⁶

Both the *Albert R.* and the *Burson* courts properly recognize that accusations by an officer can be interrogation despite the friendly nature of the exchange. These decisions are especially appropriate in light of the fact that a friendly and concerned attitude in questioning suspects is a common method of police interrogation. By pretending to sympathize with a suspect, police are often able to elicit incriminating statements.²⁸⁷

The effectiveness of this technique would appear to be enhanced

278. 446 U.S. at 301-02.

279. See *supra* notes 155 & 161 and accompanying text.

280. *Matter of Albert R.*, 112 Cal. App. 3d 780, 783, 169 Cal. Rptr. 553, 555 (1980).

281. 112 Cal. App. 3d. at 790, 169 Cal. Rptr. at 556.

282. 112 Cal. App. 3d. at 793, 169 Cal. Rptr. at 558.

283. 90 Ill. App. 3d 206, 412 N.E.2d 1160 (1980).

284. 90 Ill. App. 3d at 208, 412 N.E.2d at 1162.

285. Defendant had replied, "Yes, I know but can't you give me a break?" 90 Ill. App. 3d at 208, 412 N.E.2d at 1162.

286. 90 Ill. App. 3d at 210, 412 N.E.2d at 1163.

287. See *Inbau*, *supra* note 5, at 19; *Weisberg*, *supra* note 10, at 23-24.

when the officer and defendant are friends. Consider, however, *State v. Ikaika*,²⁸⁸ where an officer who was an old friend of the defendant said: "What's happening? Must be heavy stuff for two detectives to bring you down here?"²⁸⁹ The court admitted the incriminating response that followed, reasoning that the response was unexpected because the officer's statement was merely a "pleasantry" or "greeting."²⁹⁰

The court failed to appreciate that although the officer was a friend, his statement represented an accusation and direct question from an official source that was likely to increase the suspect's anxiety. The decision reflects the common error of allowing direct questions by police, which function to compel confessions, because of the friendly nature of the situation.

In other situations, courts will not find expressions of sympathy to rise to the level of interrogation. Thus, in *United States v. Voice*,²⁹¹ two separate expressions of concern for the suspect, only remotely connected with the crime, were held not to constitute interrogation. In both instances it appeared that expressions of concern were not part of a series of additional questions, but rather were isolated incidents.²⁹² The court noted that the "verbal conduct more resembled the 'offhand remarks' the *Innis* Court condoned than the 'lengthy harangue' the Court censured."²⁹³

Some courts consider these cases through a "totality of circumstances" analysis.²⁹⁴ In *United States v. Hackley*,²⁹⁵ the court held that a confession made in response to the direct question of "what he was going to do in relation to this offense"²⁹⁶ was admissible. There had been no interrogation, concluded the court, because the statement followed a casual conversation about defendant's cousin.²⁹⁷ The court stated that it "must look to the totality of the circumstances" to determine if the admission was "made voluntarily."²⁹⁸ According to the court, in the "context and setting" in which it was asked, defendant's response exceeded the answer that the question anticipated.²⁹⁹

288. 698 P.2d 281 (Haw. 1985).

289. 698 P.2d at 283.

290. 698 P.2d at 284-85.

291. 627 F.2d 138 (8th Cir. 1980).

292. In one incident, the officer noticed that the suspect appeared upset and sought to console him by telling him that "everything would be alright." In another incident, an officer asked the defendant why he was not taking his epilepsy medication. 627 F.2d at 144.

293. 627 F.2d at 145.

294. See *supra* note 164.

295. 636 F.2d 493 (D.C. Cir. 1980).

296. 636 F.2d at 497.

297. 636 F.2d at 498.

298. 636 F.2d at 499.

299. 636 F.2d at 499. See also *State v. Jackson*, 351 N.W.2d 352 (Minn. 1984), considering a

Thus, a direct question concerning the crime at issue did not constitute interrogation in the context of a casual friendly conversation. Such an approach appears to raise many of the problems of the voluntariness analysis.³⁰⁰ As a friendly attitude will rarely be found an objectionable practice, incriminating reactions will usually be found admissible.³⁰¹ This would seem to encourage creative police trickery.

Other situations in which police words do not involve questions concern exclamations by police officers that produce incriminating responses. In one case a court found admissible voluntary statements made in response to a policeman's statement of surprise: "There is a gun in the car."³⁰² The court noted that the statement was not designed to elicit an incriminating response but was an exclamation — a natural reaction — which the officer could not have considered reasonably likely to elicit an incriminating response.³⁰³

The court's analysis shifted the focus from the suspect's perceptions of coercion to the officer's intent — what the officer designed. The court suggested that shock or surprise prevented an officer from forming an improper intent. As a result, the dispositive question became one of characterizing the remark. A determination that the remark was one of surprise ended the inquiry.³⁰⁴ But by finding no interrogation in these circumstances, courts ignore the perceptions of the suspect and focus on the state of mind of the officer. Courts should instead consider how the suspect perceived an officer's exclamation.³⁰⁵ If Bennett could view the officer's statement as directed at

conversation between an officer and a jailed defendant who were watching television together. The officer told defendant to change the channel and the two then watched a news story on the crime of another inmate. Defendant suggested that the inmate should receive the death penalty for such a crime. The officer responded that if defendant had committed the crime of which he was accused he could be executed. 351 N.W.2d 352. The confession that followed was ruled admissible. The *Jackson* court used what it called a "totality-of-the-circumstances" test. 351 N.W.2d at 355. Here, the officer was not looking for an answer. The remark had been spontaneously made and not in connection with interrogation.

300. See *supra* note 164.

301. For discussion of concern over the offensiveness of the practice as a goal of the voluntariness approach, see *supra* note 164.

302. *United States v. Bennett*, 626 F.2d 1309,1310 (5th Cir. 1980) (footnote omitted).

303. 626 F.2d at 1312.

304. *But see* *Harryman v. Estelle*, 616 F.2d 870 (5th Cir. 1980) (en banc), a pre-*Innis* case refusing to undertake the characterization exercise. That court noted that the rigidity of *Miranda* was its strong point. 616 F.2d at 873. It stated that the *Miranda* Court thought it necessary to avoid the factual difficulties inherent in an inquiry as to whether a police question was asked in an attempt to elicit incriminating statements or asked out of shock or surprise. 616 F.2d at 874.

305. For purposes of analysis, the discussion in this section assumes that the officer's exclamation was not normally attendant to arrest. See *supra* notes 186-94 and accompanying text (discussing concerns of police safety during arrest). As noted earlier, because the facts surrounding the remark were not fully set out in the opinion, it is difficult to classify the officer's statement. See *supra* note 190. If the statement functioned to warn other officers of the weapon and was necessary to the officer's safety during the arrest, then the statement would be normally attendant to arrest and excepted from the *Innis* definition of interrogation. See *supra* notes 186-

him and the equivalent of a forceful demand: "Is there a gun in your car?" then interrogation would have occurred. Conversely, an objective observer might conclude that there is no way to perceive the statement as calling for an answer. While the latter might have been the case and consequently the *Bennett* result may have been correct, a focus on police intent distorted proper *Innis* analysis.

Cases involving indirect questions and police exclamations indicate the failure on the part of many courts to consider the suspect's perceptions of official compulsion. Indirect questions are often permitted because of the friendliness of the exchange, regardless of the suspect's view of the officer's statement. In the case of police exclamations, courts focus almost exclusively on the officer — his intent or state of mind. In both situations, courts would do better to concentrate on the suspect's perceptions of official compulsion. The officer's supposed kindness or intent should be irrelevant.

III. RECONCILING *INNIS* AND *MIRANDA* WITH THE SIX FACT SITUATIONS

Miranda was concerned with the inherent compulsion of police interrogation of those in custody.³⁰⁶ In clarifying the meaning of interrogation, *Innis* focused on the perceptions of the suspect.³⁰⁷ While the language of *Innis* is ambiguous, courts should apply the test consistently with the spirit of *Miranda*. The impact of the police conduct on the suspect's mind should be the focus. Thus, courts must consider whether the police behavior is such that an individual will feel the authority of the state pressuring him or her to reveal incriminating information.³⁰⁸ Courts should consider whether an objective observer, knowing only what police should have known, would find that the suspect perceived *official compulsion* — above and beyond the pressure inherent in custody — to make an incriminating statement.

Such an analysis would not require police to be accountable for the unforeseeable results of their words or acts.³⁰⁹ The approach would also be consistent with *Innis*' language. If an objective observer would view the practice as significantly adding to the pressure, the police should also realize that the act is reasonably likely to elicit an incriminating response. The analysis can be applied to each of the six fact patterns considered in this Note.

94 and accompanying text. Alternatively, if it was just an excited utterance, unrelated to police arrest procedures, or was directed at Bennett, then it was outside the exception for procedures normally attendant to arrest and should be considered under standard *Innis* analysis. While the former was assumed, *supra* section II.C, this section assumes the latter.

306. See *supra* text accompanying notes 41-53.

307. 446 U.S. at 301-02.

308. See *Miranda v. Arizona*, 384 U.S. 436, 476-78 (1966); Kamisar, U.S. Law Week Remarks, *supra* note 40, at 41.

309. See *Innis*, 446 U.S. at 301-02.

In cases involving friends and relatives, the approach addresses the common error of courts misdirecting their evaluation of compulsion.³¹⁰ Courts tend to examine these practices in terms of the pressure exerted by the relative alone. This problem results from the language of *Innis*, which asks what the police should know is reasonably likely. For this reason, courts seeking to address pressure from relatives, while still staying within the language of *Innis*, ask whether the police intended that the relative would elicit an incriminating response.³¹¹

But *Miranda* and *Innis* are concerned with official pressure — “police blue” pressure³¹² — and not the pressure of the relative alone. Thus, courts must consider whether a relative’s plea takes on the air of authority such that a suspect would feel the official compulsion.³¹³ This is consistent with *Miranda* and the language of *Innis* because it gets at the suspect’s perceptions of official pressure. At the same time it avoids the analysis of intent which is relevant to *Massiah* but not to fifth amendment cases.³¹⁴

Volunteered statements and follow-up questions should also be analyzed under an approach which focuses on the suspect’s perceptions of official compulsion.³¹⁵ In practice, this requires courts to allow questions that are a continuation of the initial volunteered statement and represent neutral efforts to clarify what has been said. Questions that attempt to enhance defendant’s guilt, however, should be prohibited.³¹⁶

This approach is consistent with an examination of the suspect’s perception of compulsion. When an officer’s questions go from “continuing the flow” to “closing in on the suspect’s guilt” (pinning down the defendant; knocking out possible defenses; or raising the degree of guilt) the officer’s questions become the functional equivalent of interrogation in the mind of the suspect. The analysis thus allows totally volunteered statements at the same time that it gets at the compulsion of police action that is the focus of *Miranda*.

The “normal-to-arrest-and-custody” exception should call on courts to determine whether the practice truly is routine and necessary.³¹⁷ Routine requests for biographical data, while unsettling, will probably not add significantly to the pressure generated by custody.

310. See *supra* text accompanying notes 105-128.

311. See *supra* text accompanying notes 108-125.

312. Kamisar, U.S. Law Week Remarks, *supra* note 40, at 47.

313. See *id.* at 40-48. Only in rare instances will private behavior take on the “color of blue” and rise to the level of interrogation. See *supra* note 116.

314. See *supra* notes 28-34 and accompanying text.

315. See *supra* text accompanying notes 153-91; W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.7(d) (suggesting the outlines of this approach in the follow-up situation).

316. W. LAFAVE & J. ISRAEL, *supra* note 1, at § 6.7(d).

317. See *supra* text accompanying notes 167-73.

However, excessive behavior has been allowed under the guise of this exception.³¹⁸

Moreover, under certain specific circumstances, routine procedures may produce undue compulsion. Thus, courts should carefully consider police knowledge of the suspect's particular situation.³¹⁹ Interrogation should be found where an observer, knowing what the police knew about the suspect, would be aware that defendant would view the question as official compulsion. A court must make certain that the police practices do not "reflect a measure of compulsion above and beyond that inherent in custody itself."³²⁰

Again, in the subtle compulsion area³²¹ courts will do best to consider an objective observer's perception of official compulsion. Where police conversations in front of the defendant produce incriminating responses, courts must be sensitive to the pressures exerted on the suspect. Clearly, when the subject of the officer's discussion is the defendant's guilt, an observer would perceive official compulsion. Confronting the defendant with incriminating evidence should almost always be considered interrogation, because it functions to posit the suspect's guilt. In all subtle compulsion cases, courts should direct analysis away from the intent of the police that has tended to dominate lower court decisions. Intent should only be used to get at what police knew or should have known.

The use of the jail plant should not even be considered under *Innis*.³²² *Innis* focused on the perceptions of the suspect of *official compulsion*. Because a suspect is unaware of a jail plant's identity, the jail plant exerts no such *official* pressure. As a result, an objective observer, while aware of some prodding, could not find that a jail plant produces the *kind* of pressure that was the concern of *Innis*.

Finally, in cases involving implied questions and exclamations³²³ courts should consider, not the officer's intention or demeanor, but the suspect's perceptions. They should examine whether an objective observer could find that the officer's words called for an answer. Direct accusations are a typical form of interrogation and should not be permitted because the officer assumed a friendly attitude. An objective observer would sense the need to respond to police expressions of kindness and sympathy. In addition, statements of shock or surprise can be interrogation, even though the officer did not have the opportunity to form impermissible intent. If an objective observer could con-

318. See *supra* text accompanying notes 175-80.

319. See *supra* text accompanying notes 181-85.

320. *Innis*, 446 U.S. at 300 (footnote omitted).

321. See *supra* section II.D.

322. See *supra* section II.E.

323. See *supra* section II.F.

clude that the statement was directed at the suspect and demanded a response, interrogation should be found.

One error common to each of these six categories is a preoccupation by lower courts with police intent. Many decisions dealing with the question of what constitutes "interrogation" shift analysis from the perceptions of the suspect to the intent of the officer. This misdirection may result from the fact that the test is phrased in terms of likelihood of success, and from the *Innis* Court's concession that intent is relevant to likelihood. Thus, lower courts often look at an officer's intent by considering his or her perceptions of the likelihood of damaging responses.

Unfortunately, courts often consider intent not as only one factor but as the central feature of their analysis. When such a court first finds that an officer did not intend to induce an incriminating statement, it then easily finds that the officer did not know that his actions were reasonably likely to elicit an incriminating response. Courts thus can use the likelihood language to justify decisions that often turn on whether the police practice was "designed" or "intended" to produce an incriminating response.

Because intent is of only limited relevance under *Innis* and *Miranda*, these courts are confusing *Miranda* fifth amendment analysis with *Massiah* sixth amendment analysis. Under the *Massiah* approach, analysis turns on the police officer's intent. But *Massiah* comes into play only *after* judicial or adversary proceedings have begun.³²⁴ *Innis* and *Miranda* are concerned with the period *before* the commencement of these proceedings. Courts err by considering *Innis*-type cases under a *Massiah*-type analysis. As a result, they often permit police compulsion that should be interrogation under *Miranda*.

This is not to say that all courts misapply the standard. But while many reach proper results for the right reason, many come to the wrong result or to the proper result through incorrect analysis. An approach that looks to an objective observer's perceptions of the impact of the practice on the suspect would help produce results that are consistent with the spirit of *Miranda*, with the language of *Innis*, and with each other.

IV. CONCLUSION

This Note has treated lower court decisions on the basis of the factual scenarios they present because *Innis* demands a case-by-case analysis. Such a grouping is useful because common concerns emerge within each group. But while the method of analysis should be different in each type of case, in all cases courts should concentrate on the *suspect's* perception of official compulsion. Courts should avoid too

324. See *supra* notes 26-34 and accompanying text.

great a focus on intent that, while central to sixth amendment analysis, is of only limited significance under *Innis* fifth amendment doctrine. Under any factual scenario, such an approach will lead to more consistent and less subjective resolutions, which more closely reflect the spirit of *Miranda* and avoid the problems this Note has discussed.

— *Jonathan L. Marks*