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## Interrogation Without Questions: *Rhode Island v. Innis* and *United States v. Henry*

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**INTERROGATION WITHOUT QUESTIONS:  
RHODE ISLAND V. INNIS AND UNITED  
STATES V. HENRY**

*Welsh S. White\**

*And thus do we of wisdom and of reach, . . .  
By indirections find directions out.*

Hamlet, II, i, 61-63

The term interrogation traditionally connoted a situation in which police subject a suspect to something resembling the third degree.<sup>1</sup> Confined in a small room,<sup>2</sup> the suspect would be confronted by a number of police officers who would question him for long periods of time and, if necessary, seek by intimidation to wear down his resistance.<sup>3</sup> A series of cases presenting this scenario caused the Supreme Court to develop constitutional principles designed to curb coercive interrogation practices.<sup>4</sup>

Prior to the mid-sixties, the Court used the "voluntariness" test to achieve this end. Under this test, the Court determined the constitutional admissibility of defendants' confessions by evaluating the "to-

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1. See, e.g., *Developments in the Law — Confessions*, 79 HARV. L. REV. 935, 938 (1966) [hereinafter cited as *Developments*] (noting that "[p]olice interrogation for the purpose of obtaining confessions . . . has been a subject of special concern in this country" at least since the Wickersham Commission published its report on police abuses in 1931).

2. A detailed description of the type of room which should be "ideally" used in "interrogating" suspects is contained in the leading police manual. See F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 10-13 (2d ed. 1967) [hereinafter cited as F. INBAU & J. REID].

3. See, e.g., *Malinski v. New York*, 324 U.S. 401 (1945) (stripping clothes from suspect); *Lyons v. Oklahoma*, 322 U.S. 526 (1944) (placing a pan of the victim's bones in the suspect's lap); *Ward v. Texas*, 316 U.S. 547 (1942) (suspect slapped by officer who questioned him).

4. See note 3 *supra*. See generally *Developments, supra* note 1, at 969-83. The extent to which police should be allowed to question criminal suspects is the subject of prolonged, and continuing, dispute. Critics of police questioning rely on the accusatorial nature of our system. "[S]ociety carries the burden of proving its charge against the accused not out of his own mouth. . . but by evidence independently secured through skillful investigation." *Watts v. Indiana*, 338 U.S. 49, 54 (1949). Those who have sought to limit police interrogation believe that interrogation, often carried out in secret, involves coercion, and often yields false confessions.

tality of circumstances.”<sup>5</sup> The voluntariness test was inherently subjective; it failed to provide adequate safeguards for defendants’ constitutional rights and forced courts to employ an elaborate and difficult case-by-case analysis.<sup>6</sup> Not surprisingly, the Court sought to institute constitutional rules which would provide “some automatic device by which the potential evils of incommunicado interrogation [could] be controlled.”<sup>7</sup> Thus, in the 1964 *Massiah v. United States*<sup>8</sup> decision, the Court held that the sixth amendment right to counsel applies to all post-indictment “interrogations,” including those conducted “surreptitiously,”<sup>9</sup> and therefore, that the prosecution may not use incriminating statements “deliberately elicited” from an indicted defendant in the absence of his counsel.<sup>10</sup> And in *Miranda v. Arizona*,<sup>11</sup> decided in 1966, the Court held that the “prosecution may not use statements . . . stemming from custodial *interrogation* of the defendant” unless it demonstrates that the defendant has waived the rights specified in *Miranda* and guaranteed to him by the fifth amendment.<sup>12</sup> These decisions afforded suspects significant protection against overtly coercive techniques of interrogation.

More recently, police interrogation tactics have become less overtly coercive. In part, this change may be attributed to the increasingly stringent constitutional limitations developed by the Court.<sup>13</sup> But perhaps more importantly, the change has occurred be-

5. See, e.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Spano v. New York*, 360 U.S. 315 (1959).

6. See generally 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), reprinted in Y. KAMISAR, *POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY* 41-76 (1980) [hereinafter cited without cross-reference as KAMISAR ESSAYS]; Kamisar, *What is an Involuntary Confession? Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963), reprinted in KAMISAR ESSAYS 1-40; *Developments, supra* note 1.

7. W. SCHAFFER, *THE SUSPECT AND SOCIETY* 10 (1967).

8. 377 U.S. 201 (1964).

9. 377 U.S. at 206. In formulating the issue in *Massiah*, the Court did not use the term “interrogation” but rather asked whether the “deliberate elicitation” of statements violated the defendant’s fifth and sixth amendment rights. 377 U.S. at 204. However, in resolving that issue the Court did use the term “interrogation” to characterize the type of police conduct prohibited by the *Massiah* rule. 377 U.S. at 206 (quoting the lower courts dissenting opinion of Judge Hays, 307 F.2d 62, 72-73). For an illuminating discussion of the relationship (or lack of it) between “interrogation” under *Miranda* and the rule developed by the Court in *Massiah*, see Kamisar, Brewer v. Williams, *Massiah*, and *Miranda*: *What is “Interrogation”?* *When Does it Matter?*, 67 GEO. L.J. 1, 41-44 (1978), reprinted in KAMISAR ESSAYS 175-78.

10. 377 U.S. at 206.

11. 384 U.S. 436 (1966).

12. 384 U.S. at 444 (emphasis added).

13. Aside from the protections developed in *Miranda* and *Massiah*, the Court’s post-1960 “voluntariness” test was undoubtedly more protective of suspects’ rights than the Court’s earlier version of the same test. Compare, e.g., *Haynes v. Washington*, 373 U.S. 503 (1963) (ex-

cause police are becoming increasingly sophisticated in their approaches to interrogation. Leading police manuals today reflect an awareness that the high-pressure browbeating practices of the past are less likely to be effective than subtler, more psychologically oriented tactics,<sup>14</sup> including some that involve no direct questioning of the suspect at all.<sup>15</sup>

Because of this change in police strategy, developing a definition of "interrogation" assumes particular importance. During this past term, the Supreme Court specifically addressed this problem by defining "interrogation" in the two contexts where, for constitutional purposes, that definition is crucial. In *Rhode Island v. Innis*,<sup>16</sup> the Court defined "interrogation" within the meaning of *Miranda*; and in *United States v. Henry*,<sup>17</sup> it defined "deliberate elicitation" within the meaning of *Massiah*. This article explores the implications of *Innis* and *Henry*, suggests readings of the new tests consistent with their purposes, and applies the tests to several situations where the scope of the fifth and sixth amendment protections remains unclear.

### I. AN INTRODUCTION TO *INNIS* AND *HENRY*

Although in one sense *Innis* and *Henry* are refinements of *Miranda* and *Massiah*, respectively, the more immediate progenitor of both decisions is *Brewer v. Williams*.<sup>18</sup> Although the 1977 *Williams* decision did not purport to define interrogation, the Supreme Court's analysis raised troubling questions about the definition of interrogation under both *Miranda* and *Massiah*.<sup>19</sup> In deciding both *Innis* and *Henry* in a single term, the Court achieved an unusual symmetry in its interrogation opinions by addressing both of the troubling issues raised but not resolved in *Williams*. Since *Innis* and *Henry* may be

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press threat of incommunicado detention and conditioning communication with family upon signing confession violates defendant's due process rights) with *Cicenia v. LaGay*, 357 U.S. 504 (1958) (state denial of a defendant's request to confer with counsel during police questioning does not violate defendant's due process rights). See generally *Developments, supra* note 1, at 938.

14. See, e.g., R. ROYAL & S. SCHUTT, GENTLE ART OF INTERVIEWING AND INTERROGATION 61-62 (1976) (emphasizing that to lower the suspect's resistance to disclosing incriminating information, police should "[e]stablish confidence and friendliness by talking for a period about everyday subjects"); F. INBAU AND J. REID, *supra* note 2, at 20 (emphasizing the importance of treating the suspect with "decency and respect" in order to establish a better rapport).

15. See, e.g., the "Christian burial speech" utilized by Detective Leaming in *Brewer v. Williams*, 430 U.S. 387 (1977). For a discussion of the *Williams* case, see text at notes 21-45 *infra*.

16. 100 S. Ct. 1682 (1980).

17. 100 S. Ct. 2183 (1980).

18. 430 U.S. 387 (1977).

19. For a thorough discussion of these questions, see KAMISAR ESSAYS at 140-88.

viewed as the immediate offspring of *Williams*, an attempt to evaluate their significance must begin with a brief review of the *Williams* case.<sup>20</sup>

#### A. Brewer v. Williams

On Christmas Eve, 1968, a ten-year-old girl disappeared while attending a wrestling tournament with her family in Des Moines, Iowa.<sup>21</sup> Robert Williams, a deeply religious person<sup>22</sup> who had recently escaped from a mental hospital, was suspected of her abduction and murder. A warrant was issued for his arrest. After a telephone conversation with his attorney, Williams surrendered to officers in Davenport, Iowa, 160 miles east of Des Moines.<sup>23</sup>

After Williams was arraigned before a judge in Davenport, Captain Leaming and another Des Moines officer arrived to transport the suspect by police car to Des Moines.<sup>24</sup> Before this trip began, Williams was advised of his *Miranda* rights by both the judge and Captain Leaming. Williams asserted his right to counsel,<sup>25</sup> and a Davenport attorney and the Des Moines police entered into an agreement that the police "would not question him during the trip."<sup>26</sup> Shortly after the trip began, Captain Leaming delivered the now famous "Christian burial speech,"<sup>27</sup> in which, as recounted by the Supreme Court, he began by addressing Williams as "Reverend" and continued:

I want to give you something to think about while we're traveling down the road . . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on

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20. Professor Kamisar's penetrating analysis of both the *Williams* record, see Kamisar, *Foreword: Brewer v. Williams — A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209 (1977), reprinted in KAMISAR ESSAYS 113-37, and the Court's opinions, see KAMISAR ESSAYS 139-224, makes it unnecessary to discuss the case at length here.

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

22. 430 U.S. at 412 (Powell, J., concurring).

23. 430 U.S. at 390.

24. 430 U.S. at 391.

25. Williams retained counsel in both Des Moines and Davenport and consulted with both attorneys. During the trip back to Des Moines, Williams told Detective Leaming that he would reveal the whole story *after* he consulted with his attorney in Des Moines. 430 U.S. at 390-92 (emphasis added). See generally KAMISAR ESSAYS at 140.

26. 430 U.S. at 391.

27. Professor Kamisar's examination of the *Williams* record shows that Detective Leaming testified to two different versions of the "Christian burial speech." See KAMISAR ESSAYS at 117-19.

top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.<sup>28</sup>

Williams asked the detective why he thought their route to Des Moines would take them past the girl's body, and Leaming responded that he knew the body was near Mitchellville — a town they would be passing on the way to Des Moines. Leaming then stated, "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road."<sup>29</sup> When the car reached Mitchellville, Williams directed the officers to the girl's body.<sup>30</sup>

The Supreme Court held that Williams's statements in response to the "Christian burial speech" were constitutionally inadmissible.<sup>31</sup> The basis for the Court's decision was in itself significant. Although both lower courts that ruled in the defendant's favor had rested their decision<sup>32</sup> on a holding that defendant's statements were obtained in violation of fifth amendment rights guaranteed by *Miranda v. Arizona*,<sup>33</sup> the Supreme Court found it unnecessary to apply *Miranda*.<sup>34</sup> Instead, it found that Williams's statements were obtained in violation of his sixth amendment right to an attorney.<sup>35</sup> Following established precedent,<sup>36</sup> the majority found that the sixth amendment right was applicable because formal charges had been initiated against the defendant.<sup>37</sup> However, the Court went on to emphasize that no sixth amendment "protection would come into play if there had been no interrogation."<sup>38</sup> After carefully analyzing Detective Leaming's "Christian burial speech," the Court concluded that the "speech" was "tantamount to interrogation" because it was clear that in making it, the Detective "deliberately and designedly set out to

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28. 430 U.S. at 392-93.

29. 430 U.S. at 392-93.

30. 430 U.S. at 393.

31. 430 U.S. at 406.

32. For a discussion of the lower court opinions, see KAMISAR ESSAYS at 166-69.

33. 384 U.S. 436 (1966).

34. 430 U.S. at 397.

35. 430 U.S. at 397-98.

36. See, e.g., Kirby v. Illinois, 406 U.S. 682, 689 (1972).

37. 430 U.S. at 398-99.

38. 430 U.S. at 400.

elicit information from Williams just as surely as — perhaps more effectively than — if he had formally interrogated him.”<sup>39</sup> The Court thus justified its conclusion that the defendant’s sixth amendment right to counsel was violated.<sup>40</sup>

Despite this result, the *Williams* analysis raised troubling questions for those who believe police interrogation practices should be curbed by strict constitutional rules. First, the Court’s refusal to ground its decision on *Miranda*, despite the fact that both lower courts had done so, raised questions as to the continued scope, and perhaps even the continued vitality, of *Miranda*.<sup>41</sup> Moreover, the Court’s intimation that the defendant’s sixth amendment right precluded only “interrogation,” together with its detailed explanation of why the “Christian burial speech” constituted “interrogation,” suggested that the *Williams* definition of the sixth amendment right was narrower than that recognized by *Massiah*.<sup>42</sup> In addition, the four dissenting Justices vehemently argued for an even more restrictive interpretation of the defendant’s constitutional protections;<sup>43</sup> and at least one of the concurring justices<sup>44</sup> intimated that his decision to join the majority decision and opinion may have been influenced by his conclusion that the state had “dishonored” a promise made by it to the defendant’s attorney.<sup>45</sup> Thus, as a result of *Williams*, the scope of both fifth amendment *Miranda* rights and a defendant’s sixth amendment right to an attorney under *Massiah* were thrown into question. The two cases decided last term shed light on both of these important issues.

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39. 430 U.S. at 399 & n.6.

40. 430 U.S. at 400.

41. See KAMISAR ESSAYS at 201-02: “[T]he Court’s avoidance of *Miranda* is at least puzzling and at worst (for supporters of *Miranda*, at any rate) downright ominous.”

42. See text at notes 38-39 *supra*. In *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977), the Ninth Circuit Court of Appeals implicitly accepted this position, holding that the *Williams* gloss upon *Massiah* precludes a finding that *Massiah* is violated by “deliberate secret listening on the part of the government.” In concluding that defendant’s statements, monitored and recorded by electronic surveillance, were not obtained in violation of the sixth amendment, the court emphasized that “under *Massiah*, as interpreted by *Brewer*, there was no violation of appellant’s sixth amendment right. . . because there was no interrogation of her — either formally or surreptitiously — by the government.” 563 F.2d at 1348.

43. See *Brewer v. Williams*, 430 U.S. 387, 415 (1977) (Burger, C.J., dissenting); 430 U.S. at 429 (White, J., dissenting); 430 U.S. at 438 (Blackmun, J., dissenting). For a discussion of some of the issues raised by these opinions, see KAMISAR ESSAYS at 142-51.

44. While joining the majority’s opinion, three justices also wrote separate concurring opinions. See 430 U.S. at 406 (Marshall, J., concurring); 430 U.S. at 409 (Powell, J., concurring); 430 U.S. at 414 (Stevens, J., concurring).

45. 430 U.S. at 415 (Stevens, J., concurring).

## B. Rhode Island v. Innis

On January 16, 1975, authorities discovered the body of John Mulvaney, a Providence, Rhode Island, taxicab driver who had been killed by a shotgun blast to the back of his head.<sup>46</sup> On January 17, just after midnight, another taxicab driver reported that he had just been robbed by a man wielding a sawed-off shotgun and that he had dropped the man off in the Mount Pleasant area of Providence. At 4:30 that morning, Thomas Innis was arrested in the Mount Pleasant area. At the time of his arrest, Innis was unarmed.<sup>47</sup>

Within a few minutes, a large number of police officers converged on the scene. At least three different officers testified that they gave Innis his *Miranda* warnings.<sup>48</sup> When Captain Leyden, who was apparently in charge of the investigation, informed him of his rights under *Miranda*, Innis responded that "he understood those rights and wanted to speak with a lawyer."<sup>49</sup> Captain Leyden then directed that Innis be placed in a "caged wagon" (a four-door police car with a wire screen mesh between the front and rear seats) and driven to the central police station. Captain Leyden assigned three officers — Patrolmen Gleckman, Williams, and McKenna — to accompany Innis in the wagon; he instructed the officers not to question, intimidate, or coerce Innis during the ride to headquarters.<sup>50</sup>

The officers in the wagon did not directly question the defendant; however, soon after they left the scene of the arrest, Officer Gleckman engaged in a conversation with Officer McKenna, during which he stated that "there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves."<sup>51</sup> Upon overhearing this conversation, the defendant said to the officers, "Stop, turn around, I'll show you where it is."<sup>52</sup> The caged wagon then returned to the scene of the arrest where, after having been warned once again of his constitutional rights, the defendant directed the police to the location of the murder weapon.<sup>53</sup> Innis's incriminating statements and the

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46. Rhode Island v. Innis, 100 S. Ct. 1682, 1686 (1980).

47. 100 S. Ct. at 1686.

48. 100 S. Ct. at 1686.

49. 100 S. Ct. at 1686.

50. 100 S. Ct. at 1686.

51. 100 S. Ct. at 1686. Officer Williams's recollection of the conversation was similar to, but not exactly the same as, Officer Gleckman's. Williams apparently recalled Gleckman also stating, "It would be too bad if the little . . . girl . . . would pick up the gun, maybe kill herself." 100 S. Ct. at 1686.

52. 100 S. Ct. at 1687.

53. 100 S. Ct. at 1687.



murder weapon were introduced as evidence at his trial on murder, kidnapping, and robbery charges. He was convicted on all three counts.

In reversing Innis's murder conviction, the Rhode Island Supreme Court held that his *Miranda* rights had been violated because the officers' "dangerous weapon conversation" constituted "interrogation" of Innis at the time when "interrogation" was prohibited.<sup>54</sup> The court did not articulate any clear definition of "interrogation"; however, it rejected the prosecutor's claims that the conversation was not "interrogation" either because it was prompted by a legitimate concern for public safety or because Innis was not personally addressed by the officers. The essence of the lower court's analysis was that, as a result of the conversation, Innis "underwent the same psychological pressures which moved Williams to lead police to the body of his victim."<sup>55</sup> In the court's view, Innis was interrogated within the meaning of *Miranda* because

police officers in such a situation must not be permitted to achieve indirectly, by talking with one another, a result which the Supreme Court has said they may not achieve directly by talking to a suspect who has been ordered not to respond. The same "subtle compulsion" exists.<sup>56</sup>

Thus, the lower court essentially reasoned that police practices which are "tantamount to interrogation" within the meaning of *Brewer v. Williams* will also constitute "interrogation" within the meaning of *Miranda*. Accordingly, the court held that the defendant's statements and the shotgun found as a result of the statements were inadmissible.<sup>57</sup>

The United States Supreme Court reversed. Justice Stewart's opinion began by identifying the issue in the case as "whether [Innis] was 'interrogated' by the police officers in violation of [his] undisputed right under *Miranda* to remain silent until he had consulted with a lawyer."<sup>58</sup> The Court then proceeded to define "interrogation" within the meaning of *Miranda*. While conceding that portions of the *Miranda* opinion appeared to equate "interrogation" with direct "questioning," the Court found that *Miranda*'s concern with the coercive effect of police tactics not involving direct questioning necessitated a finding that "the *Miranda* safeguards come

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54. See *State v. Innis*, — R.I. —, 391 A.2d 1158 (1978).

55. — R.I. at —, 391 A.2d at 1162.

56. — R.I. at —, 391 A.2d at 1162.

57. See — R.I. at —, 391 A.2d at 1164. In excluding the evidence, the Court also held that despite the additional warning to Innis of his constitutional rights, see text at note 60 *supra*, Innis did not validly waive his rights under *Miranda*. — R.I. at —, 391 A.2d at 1163-64.

58. *Rhode Island v. Innis*, 100 S. Ct. 1682, 1688 (1980).

into play whenever a person in custody is subjected to either express questioning or its functional equivalent."<sup>59</sup> The Court refined this analysis in the following rule:

"[I]nterrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.<sup>60</sup>

Before applying this test to the facts of *Innis*, the Court dropped a footnote which added that even though the rule's focus is not on the "underlying intent of the police,"<sup>61</sup> the intent of the police will be relevant because "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."<sup>62</sup>

The Court then succinctly applied its test to the facts of *Innis*. Justice Stewart emphasized that, to the police, *Innis* did not appear to have any special characteristics. Thus, nothing in the record would suggest that the officers "were aware that [*Innis*] was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children," or that they "knew that [he] was unusually disoriented or upset at the time of his arrest."<sup>63</sup> Justice Stewart also noted that the conversation was short, and not particularly "evocative";<sup>64</sup> in a footnote, he added that there was no basis for concluding that "the officers' remarks were *designed* to elicit a response."<sup>65</sup> On the basis of this analysis, the Court concluded that the "dangerous weapon conversation" did not constitute "interrogation" within the meaning of *Miranda*. It found that while *Innis* may have been subjected to "subtle coercion" in the sense that the "officers' comments struck a responsive chord" which produced an incriminating response, the response was not a product of words or conduct that the police "should have known were reasonably likely to elicit an incriminating response."<sup>66</sup>

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59. 100 S. Ct. at 1688-89.

60. 100 S. Ct. at 1689 (footnotes omitted).

61. 100 S. Ct. at 1690.

62. 100 S. Ct. at 1690 n.7.

63. 100 S. Ct. at 1690 (footnote omitted).

64. 100 S. Ct. at 1691.

65. 100 S. Ct. at 1690 n.9 (emphasis in original).

66. 100 S. Ct. at 1691.

## C. United States v. Henry

After his indictment on a federal bank robbery charge, Billy Gale Henry was incarcerated in the Norfolk City Jail.<sup>67</sup> Shortly thereafter, Edward Nichols, a prisoner who had been a paid informant of the Federal Bureau of Investigation for over a year, informed an FBI agent that he was in the same cell-block as Henry. The agent told Nichols to be alert to any statements Henry made but also warned him that he should not "initiate conversation with or question Henry" about the bank robbery.<sup>68</sup> Nichols later reported that Henry had engaged him in conversation and made incriminating statements concerning how the robbery had occurred.<sup>69</sup> The FBI paid Nichols for furnishing this information.<sup>70</sup> At Henry's trial, Nichols testified to Henry's incriminating statements.<sup>71</sup> Henry was convicted and sentenced to twenty-five years in prison.

On appeal, the Fourth Circuit held that the use of Nichols's testimony violated Henry's sixth amendment right to counsel.<sup>72</sup> The court assumed that Nichols obeyed the FBI agent's instructions not to question Henry about the bank robbery, but nevertheless held that Nichols's act of "engaging the defendant in a general conversation" would constitute "interrogation" within the meaning of *Massiah* and *Brewer v. Williams*.<sup>73</sup> Accordingly, Henry's admissions to Nichols were ruled constitutionally inadmissible.

The Supreme Court affirmed the Fourth Circuit decision. In an opinion authored by Chief Justice Burger, the Court refused the government's invitation to reconsider the vitality of the *Massiah* doctrine.<sup>74</sup> Instead, it identified the issue before it as "whether under the facts of this case, a government agent 'deliberately elicited' incriminating statements from Henry within the meaning of *Massiah*."<sup>75</sup> In

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67. *United States v. Henry*, 100 S. Ct. 2183, 2184 (1980).

68. 100 S. Ct. at 2184.

69. 100 S. Ct. at 2183-84, 2184 n.2.

70. 100 S. Ct. at 2185. An affidavit submitted by the FBI agent further disclosed that "Nichols had been paid by the FBI for expenses and services in connection with information he had provided" as an informant for over a year. 100 S. Ct. at 2187 n.7. From this affidavit, Chief Justice Burger deduced that the "arrangement between Nichols and the agent was on a contingent fee basis." However, this finding, disputed by the dissent, 100 S. Ct. at 2193-95 (Blackmun, J., dissenting), did not appear central to the Court's analysis.

71. 100 S. Ct. at 2184. Although affidavits relating to the instructions given by the FBI to Nichols were filed in the district court, 100 S. Ct. at 2185-86, neither Nichols nor Henry ever testified about how the conversations in which Henry's incriminating statements occurred developed. 100 S. Ct. at 2187 n.8.

72. *United States v. Henry*, 590 F.2d 544 (4th Cir. 1978).

73. 590 F.2d at 547.

74. *United States v. Henry*, 100 S. Ct. 2183, 2187-88 (1980).

75. 100 S. Ct. at 2186.

support of its affirmative conclusion, the Court emphasized first that Nichols was a government agent<sup>76</sup> who appeared to Henry to be a fellow prisoner and second that Henry was in custody during the conversation.<sup>77</sup> The Court expressed the view that both Nichols's failure to disclose his true identity and Henry's confinement in prison increased the likelihood of an incriminating statement. The government's deceit makes the defendant unaware "that his statements may be used against him";<sup>78</sup> and the defendant's "confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover governmental agents."<sup>79</sup>

Nevertheless, the Court did not hold that the combination of these factors was in itself sufficient to preclude Nichols from testifying as to any statements made by Henry while in prison. Rather, in a footnote, the Chief Justice reserved judgment on the "situation where an informant is placed in close proximity but makes no effort to stimulate conversations about the crime charged."<sup>80</sup> As Justice Blackmun noted in his dissent,<sup>81</sup> distinguishing this situation from *Henry* is difficult because in *Henry* no determination was ever made as to how the conversation between the informer and the defendant developed.<sup>82</sup> For all that appears in the record, Henry could have initiated the conversation, and he may have made some of his incriminating statements before Nichols had commented at all upon criminal activity.<sup>83</sup> Although the majority's treatment of this aspect of the case was not entirely clear,<sup>84</sup> its conclusion that Nichols's conduct was sufficient to trigger the sixth amendment protection<sup>85</sup> was apparently based on findings that Henry's incriminating statements

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76. 100 S. Ct. at 2186-87.

77. 100 S. Ct. at 2186.

78. 100 S. Ct. at 2188.

79. 100 S. Ct. at 2188.

80. 100 S. Ct. at 2187 n.9. In the same footnote, the Court also reserved judgment on the case where "an inanimate electronic device" or electronic listening post is used to record an indicted suspect's incriminating statements.

81. 100 S. Ct. at 2190 (Blackmun, J., dissenting).

82. 100 S. Ct. at 2195-96. See note 71 *supra*.

83. 100 S. Ct. at 2195 (Blackmun, J., dissenting): "[i]t may well be that Henry first let the cat out of the bag, either by volunteering statements or by inadvertently discussing the crime with someone else within ear-shot of Nichols."

84. Some of the confusion results because the majority does not clarify the extent to which the government will be accountable for conduct by Nichols which was neither expressly nor impliedly authorized by it. See 100 S. Ct. at 2193 n.8. For further discussion of this issue, see note 182 *infra*.

85. By reserving judgment on the "listening post" cases, see note 80 *supra* and accompanying text, the Court indicated that some type of affirmative conduct by Nichols was necessary to its holding. See also 100 S. Ct. at 2190 (Powell, J., concurring): "I could not join the Court's

were "the product" of his conversations with Nichols and that Henry's later request that Nichols assist in escape plans demonstrated that during the critical conversations "Nichols had managed to gain the confidence of Henry."<sup>86</sup> Accordingly, based on its analysis of the relevant facts, the Court concluded that the government violated Henry's sixth amendment right to counsel because it "intentionally creat[ed] a situation likely to induce Henry to make incriminating statements without the assistance of counsel."<sup>87</sup>

#### D. *The Immediate Impact of Innis and Henry*

Measured against the negative expectations created by *Brewer v. Williams*,<sup>88</sup> the *Henry* decision has properly been viewed as surprisingly supportive of defendants' sixth amendment rights.<sup>89</sup> And while *Innis* has been criticized by some commentators,<sup>90</sup> it can be interpreted as supporting the fundamental goals of *Miranda*.

In some respects, the *Henry* decision was more liberal, and more surprising, than *Innis*. Despite *Williams*'s intimation that *Massiah*'s applicability might be narrowed,<sup>91</sup> *Henry* not only reaffirmed *Massiah*<sup>92</sup> but extended it to some degree by applying it to a situation where there was no showing that a government agent did anything designed to elicit incriminating remarks.<sup>93</sup> Moreover, Chief Justice Burger's switch from an apparently outraged dissenter in *Williams*<sup>94</sup>

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opinion if it held that the mere presence or incidental conversation of an informant in a jail cell would violate *Massiah*."

86. 100 S. Ct. at 2189.

87. 100 S. Ct. at 2189.

88. See text at notes 41-45 *supra*.

89. See N.Y. Times, June 22, 1980, § 4 (The Week in Review), at 8, col. 4 (quoting commentators characterizing the *Henry* result as "remarkable").

The result was evidently described as "remarkable" for several reasons. After the Supreme Court's decision in *Miranda*, the *Massiah* holding was in eclipse. But the combination of *Brewer v. Williams* and the *Henry* decision reinvigorated the *Massiah* doctrine. Notably, in the *Henry* decision, the Court declined to attempt to limit *Massiah* to its facts. And the Court in *Henry* also passed up an opportunity to distinguish *Henry* from *Massiah* on the ground that no counsel had been appointed for Henry at the time incriminating statements were elicited from him. Thus the revival of *Massiah*, and Chief Justice Burger's surprising authorship of the majority opinion in *Henry*, contribute to the "remarkable" nature of this decision.

90. Two articles published soon after *Innis* was handed down question whether the Court's introduction of language that looks to the apparent probability that police speech will elicit an incriminating response undercuts the efforts to limit surreptitious police interrogation. See, e.g., Welsh and Collins, *A Two-Faced Approach to Miranda*, Natl. L.J., June 16, 1980, at 15, col. 1; Klement, *Miranda Loophole Seen in Supreme Court Ruling*, Natl. L.J., May 26, 1980, at 11, col. 1.

91. See text at note 42 *supra*.

92. The Court specifically rejected the government's contention that *Williams* "modified *Massiah*'s 'deliberately elicited' test." *United States v. Henry*, 100 S. Ct. 2183, 2187 (1980).

93. For further elaboration of this point, see text at notes 171-76 *infra*.

94. See, e.g., *Brewer v. Williams*, 430 U.S. 387, 415 (1977) ("[t]he result in this case ought

to the author of the majority opinion in *Henry* seems especially puzzling. Granted, the *Henry* case differed from *Williams* in that it involved clear government deceit.<sup>95</sup> Nevertheless, it is strange that the Justice who found it "most remarkable" that the "Christian burial speech" could violate *Massiah* "simply because it [was] followed by an incriminating disclosure"<sup>96</sup> was willing to find that Nichols's "conversations" with Henry violated *Massiah* merely because Nichols "managed to gain the confidence" of the defendant.<sup>97</sup> The result in *Henry*, the Chief Justice's surprising shift from *Williams*, and the extension of *Massiah* all mark the *Henry* decision as strengthening defendants' sixth amendment rights.

The immediate holding in *Innis* appears somewhat less favorable to *Miranda* rights than *Henry* was to *Massiah* rights. Yet despite its result, the *Innis* case should provide considerable comfort for supporters of *Miranda*. First, it is noteworthy that the vehement challenges of the four dissenting Justices in *Williams* were never broached in *Innis*.<sup>98</sup> Perhaps most significantly, the Court's unhap-

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to be intolerable in any society which purports to call itself an organized society"); 430 U.S. at 416-17 ("the Court regresses to playing a grisly game of 'hide and seek,' once more exalting the sporting theory of criminal justice"); 430 U.S. at 417 ("I categorically reject the remarkable notion that the police in this case were guilty of unconstitutional conduct or any conduct justifying the bizarre result reached by the Court").

95. The element of deceit eliminates the argument which was elaborated by Justice White in his *Williams* dissent. See note 101 *infra*. Since the suspect is not aware that he is dealing with a government agent, it is impossible to argue that the suspect is waiving his sixth amendment rights by voluntarily disclosing information at a time when he knows or should know that the effect of this disclosure will be a relinquishment of his constitutional protection. See *United States v. Henry*, 100 S. Ct. 2183, 2188 (1980).

96. *Brewer v. Williams*, 430 U.S. 387, 419-20 (1977).

97. *United States v. Henry*, 100 S. Ct. 2183, 2189 (1980).

98. In addition, drawing upon views expressed in a previous dissent authored by Justice White and joined by Justice Stewart, the *Innis* majority could have held that *Miranda* does not apply when the defendant is in a police car because the custodial atmosphere present at the police station is lacking. *Miranda*'s express definition of the term "custody" would include a situation where an arrested defendant is confined in a police car. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("By custodial interrogation, we mean 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") (footnote omitted). However, in explaining the coercion produced by "custodial interrogation," *Miranda* focused exclusively upon the effect of police questioning and of tactics utilized at the station-house. As Professor Grano has noted, "[t]he station-house is unique not only in its isolation of the defendant but also in the interrogation procedures it permits." Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 46-47 (1979). Of course, in the 1969 decision of *Orozco v. Texas*, 394 U.S. 324 (1969), the Warren Court applied *Miranda* to exclude a defendant's statement in a situation where he was arrested and interrogated in his own home; however, in dissent, Justice White joined by Justice Stewart protested that the ruling "ignores the purpose of *Miranda* to guard against what was thought to be the corrosive influence of practices which station-house interrogation makes feasible." 394 U.S. at 329 (White, J., dissenting). The *Innis* majority's failure to refer to the point raised by the *Orozco* dissent indicates that the application of *Miranda* cannot be confined to the station-house.

piness with the *Miranda* exclusionary rule appears to have subsided. Even Chief Justice Burger, who strongly urged in his *Williams* dissent that the exclusionary rule should never be applied to exclude voluntary confessions obtained as a result of "non-egregious police conduct,"<sup>99</sup> was content to say that he "would neither overrule *Miranda*, disparage it, nor extend it at this late date."<sup>100</sup> For the moment at least, it appears that the *Miranda* decision is here to stay.<sup>101</sup>

Moreover, in at least some respects, the *Innis* majority's analysis constitutes a surprisingly broad construction of *Miranda*. One possible reading of the Court's failure to apply *Miranda* to the facts of *Williams* was that "interrogation" within the meaning of *Miranda* was defined so narrowly that it would not include tactics like the "Christian burial speech."<sup>102</sup> But under the facts of *Williams*, this could only mean that the Court was prepared to construe *Miranda* "interrogation" quite narrowly indeed. The *Williams* majority recognized that in using the "Christian burial speech," "Detective

99. *Brewer v. Williams*, 430 U.S. 387, 420 (1977) (Burger, C.J., dissenting).

100. *Rhode Island v. Innis*, 100 S. Ct. 1682, 1691 (1980) (Burger, C.J., concurring).

101. Two other approaches suggested by dissenting Justices in *Williams* were also apparently abandoned in *Innis*. Based on Justice White's dissent in *Brewer*, *Innis* could have been decided in the government's favor on the ground that, whether or not the "dangerous weapon conversation" constituted "interrogation," the defendant waived his rights under *Miranda*. After having been given the *Miranda* warnings prior to the conversation, it could be argued, the suspect was certainly aware that he was relinquishing his right to remain silent when he disclosed the location of the shotgun. The premise of this analysis is that "the right involved in *Miranda* . . . [is] a right not to answer any questions" as opposed to "a right not to be asked any questions" in the absence of a waiver given "before the questions are asked." *Brewer v. Williams*, 430 U.S. 387, 436 (1977) (White, J., dissenting) (emphasis in original). While noting his preference for this line of analysis, Justice White nevertheless stated that as a result of the decision and opinion in *Williams*, he was joining the *Innis* majority opinion. Justice White's conclusion that *Williams* precluded his preferred line of analysis in a case involving a *Miranda* issue is somewhat curious because in *Williams* he wrote that the majority was rejecting his analysis because the case involved a sixth amendment issue rather than a *Miranda* one, 430 U.S. at 436 (White, J., dissenting).

In addition, *Innis* could have been decided in favor of the government because police statements or questions prompted by a legitimate concern for protecting public safety cannot constitute "interrogation" within the meaning of *Miranda*. The seeds for such a rationale were planted in Justice Blackmun's *Williams* dissent when he suggested that Detective Leaming's "Christian burial speech" did not violate the sixth amendment because "Leaming's purpose was not solely to obtain incriminating evidence." 430 U.S. at 439 (Blackmun, J., dissenting). However, the *Innis* majority, which included Justice Blackmun and the two other Justices who joined his dissent in *Williams*, specifically eschewed an approach which would determine whether the police complied with *Miranda* solely on the basis of an inquiry into their purpose or intent. Thus, despite lower case authority to the contrary, *see, e.g.*, cases cited in notes 154 & 155 *infra*, the majority's analysis appears to validate Professor Kamisar's conclusion that police statements which otherwise qualify as interrogation do not become something else solely because the interrogator's primary purpose was something other than the procuring of incriminating statements. *See* KAMISAR ESSAYS at 146. For further discussion of the bearing police purpose will have in determining whether their statements or conduct constitute "interrogation," *see* text at notes 142-65 *infra*.

102. *See* KAMISAR ESSAYS at 204-09.

Leaming deliberately and designedly set out to elicit information just as surely as — and perhaps more effectively than — if he had formally interrogated him.”<sup>103</sup> Thus, if the “Christian burial speech” would not constitute “interrogation” within the meaning of *Miranda*, the definition of such “interrogation” would almost inevitably be limited to situations in which police directly question defendants.

In *Innis* the Court explicitly disavowed this limited definition of “interrogation”<sup>104</sup> and ruled instead that in view of the purposes of *Miranda*,<sup>105</sup> “interrogation” must be construed to include words or conduct that are the “functional equivalent” of direct questioning. This broad construction of *Miranda* affords suspects greater protection than that granted by some lower courts before *Innis* because it is now clear that “interrogation” can take place even when the police speech is not punctuated by a question mark,<sup>106</sup> nor directly addressed to the suspect. Moreover, it is also clear that “interrogation” now includes police tactics which do not even involve speech. Nevertheless, despite the Court’s seemingly broad reading of *Miranda*, the *Innis* test is ambiguous. Under one interpretation, the test contains a flaw which could lead to expanded use of coercive tactics by the police. The next section of this Article examines the inexact language of the *Innis* decision and suggests interpretations of both *Innis* and *Henry* that are consistent with the Court’s apparent intentions.

## II. A CLOSER LOOK AT THE *INNIS* AND *HENRY* TESTS

To gauge the protections afforded by *Innis* and *Henry* accurately, it is necessary to inquire into the precise meaning of the two tests articulated by the Court. Part of this inquiry must delve into the “rigidity” or clarity of the tests. As Justice Rehnquist has stated, in establishing rules relating to police efforts to elicit incriminating statements, “rigidity” is a “core virtue.”<sup>107</sup> Thus, the *Miranda* “decision’s rigidity has afforded police clear guidance on the acceptable

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103. 430 U.S. at 399.

104. *Rhode Island v. Innis*, 100 S. Ct. 1682, 1688 (1980).

105. 100 S. Ct. at 1688, 1689.

106. Prior to *Innis*, several lower court cases implicitly held that “interrogation” cannot occur in the absence of direct police questioning. See, e.g., *Phillips v. Attorney General*, 594 F.2d 1288, 1290-91 (9th Cir. 1979) (defendant’s inculpatory statement made after police indicated they suspected him of transporting marijuana held admissible because volunteered on defendant’s own initiative and not in response to police interrogation); *United States v. Rieves*, 584 F.2d 740, 745 (5th Cir. 1978) (agent’s comment to suspect that he would inform court of any cooperation on suspect’s part did not constitute interrogation). See generally *Project: Ninth Annual Review of Criminal Procedure*, 68 GEO. L.J. 279, 364 n.673 (1979).

107. *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, J., on application for stay) (calling “rigidity” of *Miranda* its “core virtue”).



manner of questioning an accused. It has allowed courts to avoid the intractable factual determinations that the former totality of the circumstances approach often entailed."<sup>108</sup> Accordingly, in determining whether the tests articulated by *Innis* and *Henry* are consistent with the *Miranda* and *Massiah* doctrines from which they spring, this Article will evaluate the extent to which the tests provide clear guidance for the police and lower courts.<sup>109</sup>

#### A. *Innis's "Reasonably Likely to Elicit" Test*

In *Innis*, the Supreme Court defined interrogation as including police tactics "that the police should know are reasonably likely to evoke an incriminating response from a suspect."<sup>110</sup> This new definition of "interrogation" is not free of ambiguity. While the focus of the inquiry is objective, looking to the situation as it would be viewed by an objective observer in the position of the officer rather than as it actually appeared to either the officer or the suspect,<sup>111</sup> the test articulated by the Court does not in itself define a clear substantive standard. At least two important issues need clarification. How likely is "reasonably likely?" And what factors should be weighed in determining whether the requisite degree of "likelihood" is present? The extent to which differing answers to these questions may alter the majority's rule — and the clarity of guidance it affords police — is illustrated by the widely divergent views of the rule expressed by the dissenting opinions of Justices Stevens and Marshall.

Justice Stevens's view of the *Innis* majority's test seems to be that it looks to the apparent probability that police speech or conduct will elicit an incriminating response.<sup>112</sup> If this interpretation of the majority's rule is accurate, *Innis* will result in a new form of balancing test under which courts would weigh all the circumstances known to the police to determine whether the apparent probability of an in-

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108. *Harryman v. Estelle*, 616 F.2d 870 (5th Cir. 1980).

109. *Cf. Stone, The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 136-37 (criticizing the "scrupulously honor" test developed by the Court in *Michigan v. Mosley*, 423 U.S. 96 (1975), on the ground that it "offers only ambiguous protection to the accused and virtually no guidance to the police or the courts who must live with the rule").

110. *Rhode Island v. Innis*, 100 S. Ct. 1682, 1690 (1980).

111. Of course, the objective observer must take into account any special characteristics of the suspect which are known to the police. *See Rhode Island v. Innis*, 100 S. Ct. at 1690. This type of objective focus seems appropriate if only because it is impossible to ascertain the actual state of mind of either the officer or the suspect. For an elaboration of this point, *see White, Rhode Island v. Innis: The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53, 66-67 (1979).

112. *See* 100 S. Ct. at 1695 n.8 (Stevens, J., dissenting) (expressing the view that the Court's definition will not apply to situations in which police attempt to elicit incriminating statements but have little "reason to believe their efforts are likely to be successful").

criminating response is high enough to be characterized as "reasonably likely." Interpreted in this way, the *Innis* test would fail miserably in serving its function of providing adequate guidance to police and lower courts. Aside from the problem of deciding what degree of likelihood is "reasonably likely," the amorphousness of this interpretation of the *Innis* standard results from the difficulty of determining the weight to be given factors arguably related to the suspect's likelihood of resistance. Moreover, courts could easily apply the standard so as to allow rather wide leeway to the police. In *Innis* itself, for example, a court properly could consider that Innis appeared to be a cold-blooded killer,<sup>113</sup> that he knew he was under arrest for a serious crime,<sup>114</sup> that he had been informed several times that his statements made could be used against him, and that he had indicated that he did not want to divulge information unless an attorney was present.<sup>115</sup> Taking all of these factors into account, a court applying the Stevens interpretation of the majority's test could justify the result in *Innis* on the ground that a cold-blooded killer who apparently knew that any information he gave the police would enhance the chances of his conviction would be *unlikely* to respond to the type of appeal to conscience contained in Officer Gleckman's remarks.

Indeed, if the *Innis* test is interpreted as focusing on apparent probabilities, the result in *Innis* itself seems relatively straightforward. If such an interpretation prevails, the government will be in a position to argue for admission of statements resulting from far more insidious police practices than those involved in *Innis*. Two hypothetical variations of the *Williams* case will illustrate. It will be recalled that in *Williams* itself the police knew that the defendant was mentally ill (he had escaped from a mental institution) and deeply religious. In addition, the defendant had been advised of his *Miranda* rights many times,<sup>116</sup> had asserted them on numerous occasions,<sup>117</sup> and was represented by two attorneys while he was being transported from Davenport to Des Moines.<sup>118</sup> Finally, the defen-

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113. At least, the police knew that Innis was the likely recent possessor of a shotgun used to kill a taxicab driver by shooting him in the back of the head. See text at notes 46-47 *supra*.

114. The number of officers converging on the scene of the arrest, see text at note 48 *supra*, would in itself have put Innis on notice of the seriousness of the charges against him. Whether Innis was informed that he was under arrest for robbery, murder, or both is not clear from the record.

115. See text at note 49 *supra*.

116. See KAMISAR ESSAYS at 139-40.

117. See *id.* at 140.

118. See *id.* at 139-40.

dant had been arraigned prior to the trip.<sup>119</sup> In the first variation of *Williams* considered below, the facts are identical to those in the actual *Williams* case except that the defendant is not arraigned or represented by counsel before the trip to Des Moines. The facts of the second variation are identical to those of the first except that there is no indication in the record that the defendant has any mental problems, any special anxieties,<sup>120</sup> or any particular inclination toward religion.

The first variation differs from the actual *Williams* case only in that, because judicial proceedings have not commenced before the trip and the sixth amendment is not applicable,<sup>121</sup> the case must be decided on the basis of *Miranda*.<sup>122</sup> In this situation, a court would have to decide an issue side-stepped in *Williams* — whether the “Christian burial speech” constituted “interrogation” within the meaning of *Miranda*.<sup>123</sup> Even if the *Innis* test is read as focusing upon the “apparent probability” of the defendant’s response, the defendant has a strong argument in favor of characterizing the “Christian burial speech” as “interrogation.” Because Detective Leaming knew that Williams was religious, he should have known — and in fact did know — that the speech’s initial reference to Williams as “Reverend” as well as its emphasis upon the need for a Christian burial were likely to play upon Williams’s religious conscience.<sup>124</sup> Moreover, in contrast to *Innis*, the police were aware that the suspect was “unusually disoriented or upset,” at least in the sense that he was mentally ill and that he might be one who would shrink “from the prospect of flustering, displeasing, or irritating his captor.”<sup>125</sup> When one further considers the sophistication and effectiveness of the *Williams* appeal,<sup>126</sup> a firm basis emerges for concluding that,

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119. See text at note 24 *supra*.

120. Thus, in the second variation, Captain Leaming’s testimony that Williams expressed fear that “Leaming . . . ‘wanted to kill him,’” and “that the state officers following them in another car might want to kill him,” KAMISAR ESSAYS at 120 n.10, would be eliminated.

121. Williams held only that the defendant’s sixth amendment right attaches “at least . . . at or after the time that judicial proceedings have been initiated against him.” 430 U.S. at 398. However, *Innis* appears to confirm Professor Kamisar’s conclusion that the sixth amendment right will not come into effect until after formal judicial procedures have commenced or the defendant is represented by an attorney. See KAMISAR ESSAYS at 216-18.

122. Another possible issue would be whether Williams’s statement to Captain Leaming was “voluntary.”

123. See KAMISAR ESSAYS at 140-60.

124. As Professor Kamisar notes, the Iowa Attorney General stated in his brief that Captain Leaming admitted he was “playing upon Williams’s religious conscience” when he made the “Christian burial speech.” See KAMISAR ESSAYS at 122.

125. KAMISAR ESSAYS at 120 (footnote omitted).

126. See text at notes 128-31 *infra*.

from the police perspective, the appeal contained in the "Christian burial speech" was "reasonably likely" to be successful.<sup>127</sup>

The second variation is more problematic. Since the defendant has no known susceptibilities, the effect of the "Christian burial speech" on an average suspect must be evaluated. The speech would undoubtedly present a powerful appeal to anyone's emotions. The highly dramatic picture painted with the aid of such emotive terms as "little girl's body," "Christian burial," and "Christmas [E]ve," culminates with the detective's direct statement of the course of conduct that he believes appropriate:

And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.<sup>128</sup>

Even to a non-religious suspect, the likely message conveyed by these words is that "[t]he only decent and honorable thing for you to do is to show us where that body is on the way back to Des Moines."<sup>129</sup> Moreover, the force of this appeal to honor is likely to be enhanced not only by the confines in which it is delivered,<sup>130</sup> but also by the tendency for the pressure on the suspect produced by the appeal to build during the substantial period of time between the conclusion of the speech and the approach to the Mitchellville exit where the body was located.<sup>131</sup>

Nevertheless, if the suspect in *Williams* were not religious, the force of the "challenge to his honor" would be considerably dissipated because the appeal would not specifically relate to a matter of special importance to him.<sup>132</sup> If the suspect did not care about religion, he might be relatively unimpressed by an assertion that the child deserved a "Christian burial." Moreover, it is not clear that even a strong appeal to honor is "reasonably likely" to produce an

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127. However, a court could conceivably reach the opposite result. By emphasizing that "[o]n several occasions during the trip, [defendant] told the officers that he would tell them the whole story when he got to Des Moines and saw Mr. McKnight," *Brewer v. Williams*, 430 U.S. 387, 432 (1977) (White, J., dissenting), a court could conclude that, from the police perspective, the "Christian burial speech" was an effort to obtain evidence that appeared unlikely to succeed, because of the defendant's manifest resistance.

128. 430 U.S. at 393.

129. KAMISAR ESSAYS at 125.

130. The defendant was seated next to Captain Leaming in the back seat of a police car, a position which he would occupy for the next several hours. Brief for Petitioner at 55, 71, 77, *Brewer v. Williams*, 430 U.S. 387 (1977);

131. See KAMISAR ESSAYS at 123.

132. The leading manual on police interrogation asserts that a "challenge to [the suspect's] Honor" will be most effective when the challenge relates to something to which the suspect has some special relationship or interest. KAMISAR ESSAYS at 122, quoting F. INBAU & J. REID, *supra* note 2, at 76.

incriminating response from suspects in all situations. If the suspect in *Williams* had no special mental problems or anxieties, he would almost certainly realize the importance of not revealing that he knew the location of the child's body. That the police had informed him many times that "anything he said could be used against him" could be taken as evidence that, when the suspect later listened to Detective Leaming's speech, he had a reasonable understanding of the stakes involved. And the suspect's assertion of his right to an attorney on more than one occasion might also suggest that he had no intention of revealing information to the police unless counsel was present. Weighing these factors, a court could very plausibly find that the apparent probability of an incriminating response to the "Christian burial speech" would not meet the "reasonably likely" standard articulated in *Innis*.<sup>133</sup>

These illustrations demonstrate the dangers of interpreting the *Innis* test as turning upon apparent probability that an incriminating response will in fact be "elicited." Obviously, all of the subjectivity and uncertainty generated by the traditional voluntariness test would reappear.<sup>134</sup> In the hands of lower courts unsympathetic to defendants' rights, Justice Stevens's prediction that the "new definition will almost certainly exclude every statement that is not punctuated with a question mark from the concept of 'interrogation'"<sup>135</sup> could prove to be very nearly accurate. This would open a gaping hole in the fifth amendment protections afforded by *Miranda*. As interpreted by Justice Stevens, the *Innis* rule would contrast sharply with the Court's treatment of direct interrogation, where no inquiry is made into whether the police thought their questions likely to yield incriminating responses. In effect, the police would be offered an opportunity to avoid the strictures of *Miranda* by engaging in indirect practices. Such a result seems inconsistent with the majority's professed aim of defining "interrogation" in a manner consistent with *Miranda*'s underlying policy of prohibiting all speech or conduct

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133. On the other hand, such a finding might appear inconsistent with the substantial empirical evidence suggesting that, in a custodial setting, even normal suspects who are fully aware of their rights will feel very considerable pressure to respond to the police when the police indicate that they want or expect a response. See Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968); Griffith & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300 (1967); Project — *Interrogation in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

134. For cases applying the "voluntariness" test, see, e.g., *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Spano v. New York*, 360 U.S. 315 (1959). For discussions of the "voluntariness" test which illustrate some of the problems generated by the standard, see KAMISAR ES-SAYS at 41-77; *Developments, supra* note 1.

135. *Rhode Island v. Innis*, 100 S. Ct. 1682, 1695 (1980) (Stevens, J., dissenting).

which is the "functional equivalent" of direct questioning.<sup>136</sup> Thus, to interpret the *Innis* test in this way would be inconsistent with the core of the majority's analysis.<sup>137</sup>

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136. See text at note 59 *supra*.

137. This interpretation also seems inconsistent with the way courts and commentators applied the "reasonably likely" standard before *Innis*. In none of the discussion of the "likely" or "reasonably likely" standard before *Innis* did anyone propose an interrogator's apparent probability of success as the determining factor for whether interrogation had taken place. Rather, the standard's purpose was to include within the definition of "interrogation" any police conduct which would have an obvious tendency to induce an incriminating response from the suspect.

Variations of the "reasonably likely to elicit" test were articulated as early as July 23, 1966, at a conference in Ann Arbor, Michigan. It was stated at the conference that "any police conduct, verbal or otherwise calculated to, expected to, or likely to stimulate incriminating statements from one in custody would seem to fall within the term 'custodial interrogation,'" Rothblatt & Pitler, *Police Interrogation: Warnings and Waivers — Where Do We Go From Here*, 42 NOTRE DAME LAW. 479, 486-87 n.42 (1967) (emphasis added). See also C. McCORMICK, EVIDENCE 330 (E. Cleary ed. 1972) (defining interrogation to include "any police action that is either calculated or reasonably likely to evoke an incriminating testimonial response from the accused") (emphasis added); Kamisar, *Custodial Interrogation*, in INSTITUTE OF CONTINUING LEGAL EDUCATION, CRIMINAL LAW AND THE CONSTITUTION — SOURCES AND COMMENTATORS 355-56 (1968) ("It is submitted that it is not simply custody plus 'questioning,' as such, which calls for the *Miranda* safeguards but custody plus police conduct calculated to, expected to, or likely to, evoke admissions"); Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1 (1978), reprinted in KAMISAR ESSAYS 139, 158-60 (providing various tests, based on the facts of different cases, for impermissible interrogation, including "obvious purpose and likely effect," "augments or intensifies the tolerable level of stress," and "not volunteered").

These articulations of the likelihood test, however, should be considered only in the context in which they were presented. The commentators in each instance were criticizing narrow court definitions of interrogation, within the factual framework of a given case. Their definitions of the appropriate test should be limited to the cases they discussed, rather than extended to delimit the outer boundaries of police interrogation.

The Pennsylvania Supreme Court has held that any police conduct "likely to or expected to elicit a confession" should be considered "interrogation" within the meaning of *Miranda*. See *Commonwealth v. Mercier*, 451 Pa. 211, 214, 302 A.2d 337, 339 (1973); *Commonwealth v. Hamilton*, 445 Pa. 292, 296, 285 A.2d 172, 175 (1971). In *Hamilton*, appellant was confronted with an alleged coconspirator who accused him of being the "trigger man" in the crime. In discussing confrontation as a form of interrogation, the court noted that the coconspirator was "being used in an attempt to pry an incriminating statement from appellant" and that to permit this technique "would be to place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda* . . ." 445 Pa. at 297, 285 A.2d at 175. Significantly, the *Hamilton* court's assertion of the need to "implement the plain mandate of *Miranda*" was cited with explicit approval in *Innis*, thus indicating both the Court's awareness of the Pennsylvania variation of the "reasonably likely" test and its apparent approval of the Pennsylvania Supreme Court's underlying rationale.

Taken together, the Pennsylvania Supreme Court's application of the likelihood test, and the context in which the prior variations of the test were articulated, indicate that courts and commentators did not intend that the "likely" or "reasonably likely" standard refer to an interrogator's apparent probability of success to determine whether interrogation had taken place. See *Commonwealth v. Mercier*, 451 Pa. 211, 302 A.2d 337 (1973), (reading statement of third party implicating defendant held interrogation); *Commonwealth v. Hamilton*, 445 Pa. 292, 285 A.2d 172 (1971) (confronting suspect with accomplice who accused him of being the trigger man held interrogation). See also Rothblatt & Pitler, *supra*, at 487 n.42 (examples of interrogation include "showing the murder weapon, placing evidence of the crime in front of the suspect, or playing a tape of an accomplice implicating the suspect").

At the opposite extreme, the *Innis* majority's test could be interpreted as essentially similar to a different test articulated by Justice Stevens in his dissent. Justice Stevens suggested that interrogation in this context should be defined to include speech or conduct which would "appear to call for a[n] [incriminating] response." Yet, as applied by Justice Marshall in his *Innis* dissent, there is little or no difference between the *Innis* majority's test and the Stevens alternative. Justice Marshall found that because Officer Gleckman's remarks would carry a strong appeal to "any suspect's" conscience, the majority's test would always be met;<sup>138</sup> that is, the officer's remarks would always be "reasonably likely" to elicit an incriminating response. But this analysis is correct only if the conversation's effect on the suspect is evaluated without regard to any countervailing considerations which might make him hesitant to respond. Thus, in applying the majority's test, Justice Marshall appears to view the suspect as an average person, without considering any special circumstances which might make the suspect *less* likely to respond. If this is the proper focus of the inquiry, there is no apparent difference between the majority and the Stevens tests. Obviously, if an officer's statement or conduct would "appear to call for a response," an average suspect would be "reasonably likely" to respond in the absence of special considerations directing him to the contrary.

However, while Justice Marshall's interpretation of the *Innis* test is not necessarily inconsistent with the majority's analysis,<sup>139</sup> it is certainly inconsistent with the majority's result. As both dissents indicate, Officer Gleckman's words effectively convey the message that the police very much want to know the location of the shotgun.<sup>140</sup> Accordingly, any person with knowledge of the shotgun's location would be likely to believe that the police wanted him to disclose its location. In the absence of circumstances directing him to the contrary, a person would be likely to give the desired response. Indeed, if the "reasonably likely" test is meant to be applied as Justice Marshall interpreted it, then, as he states,<sup>141</sup> the majority's result "verges on the ludicrous." Accordingly, the result in *Innis* indicates that Jus-

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138. See *Rhode Island v. Innis*, 100 S. Ct. 1682, 1692 (1980) (Marshall, J., dissenting).

139. In applying its test, the majority mentioned certain relevant factors, such as the fact that the suspect was not unusually disoriented or upset and that the officers' comments were short and not particularly evocative, 100 S. Ct. at 1691. However, the majority did not make clear to what extent, if any, factors relating to the suspect's likelihood of resistance should be taken into account.

140. See 100 S. Ct. at 1692 (Marshall, J., dissenting); 100 S. Ct. at 1697 (Stevens, J., dissenting).

141. 100 S. Ct. at 1692 (Marshall, J., dissenting).

tice Marshall's interpretation of the *Innis* test cannot be accepted as definitive. Thus, neither Justice Stevens's nor Justice Marshall's reading of the majority's test appears correct.

There is an alternative interpretation of *Innis* which more closely fits both the majority's result and its analysis. Although the majority indicated that its inquiry is not directed toward determining whether the police *actually* intended to elicit an incriminating response, it dropped a footnote that stated that when "a police practice is designed to elicit an incriminating response," it is "unlikely" that the "reasonably likely" test will not be met.<sup>142</sup> If the majority were dealing strictly with probabilities, then, as Justice Stevens pointed out,<sup>143</sup> this observation is patently incorrect because there are undoubtedly many cases in which police do attempt to elicit incriminating disclosures from suspects even though they know that a particular attempt will have only a small probability of success.<sup>144</sup> A better reading of this footnote is that it represents an effort to add some substantive content to the *Innis* test by establishing a close correlation between an officer's purpose to elicit an incriminating response and the "reasonably likely" standard. However, since the majority specifically eschewed the approach of ferreting out the officer's actual purpose,<sup>145</sup> this correlation cannot be exact.<sup>146</sup>

In order to preserve both the majority's objective approach and a close correlation between the officer's purpose and the "reasonably likely" standard, the best reading of the *Innis* test is that it turns upon the *objective* purpose *manifested* by the police. Thus, an officer "should know" that his speech or conduct will be "reasonably likely

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142. 100 S. Ct. at 1690 n.7. To underline the significance of this aspect of its analysis, the Court added another footnote which, in partially justifying the result reached in *Innis*, emphasized that "[t]he record in no way suggests that the officer's remarks were designed to elicit a response." 100 S. Ct. at 1690 n.9.

143. 100 S. Ct. at 1695 n.8 (Stevens, J., dissenting).

144. As the leading manual suggests, a successful "interrogation" will generally require considerable time. See F. INBAU & J. REID, *supra* note 2, at 13-23. Therefore, many attempts to elicit incriminating information may be perceived as unlikely to be successful. Such attempts may be made not only because of the slim chance that they may strike paydirt, but also because of the cumulative effect they may have in wearing down the suspect's resistance. See, e.g., *id.* at 62-64 (describing one version of the "Mutt and Jeff" routine).

145. See 100 S. Ct. at 1690.

146. As an example of police conduct that would not constitute "interrogation," the Court noted a hypothetical variation of *Innis* where the police did "no more than . . . drive past the site of the concealed weapon while taking the most direct route to the police station." 100 S. Ct. at 1691 n.10. This hypothetical demonstrates the validity of the Court's refusal to focus upon the actual "design" of the police. No one could argue that the result in this hypothetical should be different even if the police admitted that their "purpose" in driving by this site was to "elicit an incriminating response." For further discussion of cases similar to this hypothetical, see KAMISAR ESSAYS at 144 & 144 n.10.



to elicit an incriminating response” when he should realize that the speech or conduct will probably be viewed by the suspect as designed to achieve this purpose. To ensure that the inquiry is entirely *objective*, the proposed test could be framed as follows: 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.”

Other parts of the Court’s opinion also support this reading of the majority’s test. Drawing from the language of a Pennsylvania Supreme Court case, the Court stated in a footnote that “[to] limit the ambit of *Miranda* to express questioning would ‘place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than implement the plain mandate of *Miranda*.’”<sup>147</sup> By suggesting that *Miranda*’s prohibition against “interrogation” must not be thwarted by the “ingenuity of the police,” the Court implies that “interrogation” within the meaning of *Miranda* should be defined to include, at the least, all situations where the police are plainly seeking to elicit incriminating evidence.<sup>148</sup> Moreover, immediately after stating its test, the Court emphasized that the focus of the latter part of its definition is “primarily upon the perceptions of the suspect.”<sup>149</sup> While this statement is in itself ambiguous,<sup>150</sup> when considered in conjunction with the Court’s basic premise — that “interrogation” should be defined to include speech or conduct which is the “functional equivalent” of a direct questioning<sup>151</sup> — it suggests

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147. 100 S. Ct. at 1689 n.3, quoting *Commonwealth v. Hamilton*, 445 Pa. 292, 297, 285 A.2d 172, 175 (1971).

148. This interpretation of the *Innis* test would complement the approach developed by the Pennsylvania Supreme Court. As previously noted, that court has held that any police conduct “likely to or expected to elicit” an incriminating statement should be considered interrogation within the meaning of *Miranda*. See note 137 *supra*. In order to make the “reasonably likely” standard fulfill substantially the same function as the “likely to or expected to” standard, it is appropriate to interpret the test to include at least all situations in which a police “design” to elicit plainly appears. Moreover, as Justice Stevens’s dissent points out, any other interpretation of *Innis* appears inconsistent with the rule developed by the Court in *Michigan v. Mosley*, 423 U.S. 96 (1975). 100 S. Ct. at 1694 (Stevens, J., dissenting). The rule articulated in *Mosley* was that any statement elicited after the suspect has elected to remain silent must be excluded unless the suspect’s assertion of his right was “scrupulously honored.” 423 U.S. at 103, 104. When the police engage in conduct plainly designed to elicit an incriminating response, it should be apparent that they are not “scrupulously honoring” the suspect’s assertion of his right.

149. 100 S. Ct. at 1690.

150. The focus upon the “perception of the suspect” could simply mean that the “perception” must be evaluated to determine whether, from the police perspective, the officer’s speech or conduct will have a significant probability of inducing an incriminating response. This would fit with the “apparent probability” reading of the test discussed above. See text at notes 112-33 *supra*.

151. 100 S. Ct. at 1689.

that the test is directed toward ascertaining whether the officer's speech or conduct "could reasonably have had the force of a question on the accused,"<sup>152</sup> an end best achieved by the proposed interpretation. When an objective observer would infer that the officer's speech or conduct was "designed to elicit a response," he will perceive it as at least an implicit demand for information. If, as will generally be the case,<sup>153</sup> the suspect shares this view of the police activity, he will experience the "functional equivalent" of direct questioning.

Viewed in this light, the "reasonably likely to elicit" test gains a substantial measure of clarity. The test will be met — and the fruits of the police conduct excluded from evidence — *at least* in situations where an objective observer (with the same knowledge of the suspect as the police officer) would infer that the officer's speech or conduct was designed to elicit an incriminating response. In other situations — that is, in situations where the objective observer would not infer the requisite purpose — application of the test would be more difficult; but presumably, in the absence of unusual circumstances,<sup>154</sup> the

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152. *Harryman v. Estelle*, 616 F.2d 870 (5th Cir. 1980).

153. As long as the police knowledge of the suspect is accurate, the suspect will view the police activity in the same way as the objective observer because the observer must take into account any special characteristics of the suspect known to the police. *But see* note 162 *infra*.

154. Of course, the touchstone in applying the test should be an inquiry into whether the policeman's speech or conduct "could reasonably have had the force of a question on the accused." One type of case which might fall within this category is when the police should know that the suspect is so disturbed or sensitive that he is likely to divulge incriminating information at the slightest provocation. In such a case the police should be held to know that even conduct not intended to elicit a response would be "reasonably likely" to have that effect because of the suspect's special susceptibility.

Another type of situation in which police speech or conduct should be held to meet the "reasonably likely to elicit" test despite the absence of a finding of an objective "purpose to elicit" is exemplified by *United States v. McCain*, 556 F.2d 253 (5th Cir. 1977). In that case, the defendant, who was suspected of drug smuggling, was detained in an airport and held for several minutes in a supervisor's office while a customs inspector talked to her. The trial court found that the inspector talked to the suspect as a "father might talk to a daughter," telling her that she could seriously harm or kill herself by carrying narcotics in her body. 556 F.2d at 256. While the Fifth Circuit found that the inspector's "whole purpose . . . was to persuade the defendant to confess" (and thus found it to be "interrogation" on that basis), 556 F.2d at 255, a trial or appellate court could conceivably find that the purpose of the inspector's talk was solely to warn the suspect "of the risk she was running by carrying drugs internally." 556 F.2d at 256 (Gee, J., dissenting) and therefore that an objective observer would not perceive the talk as "designed to elicit an incriminating response." Even if this finding were made, the "talk" should still constitute "interrogation" under the *Innis* test. The difference between *McCain* and *Innis* is that unlike the *Innis* "remarks," the *McCain* "talk" has the effect of directly communicating to the suspect the message that disclosure of evidence (which is in fact incriminating) is necessary to avert the possibility of serious harm to herself.

Where an objective observer would perceive that the officer's conduct has the effect of communicating to the defendant that a response (which is in fact incriminating) is highly important to the defendant, the "reasonably likely to elicit" test should be met because the "tug" on the suspect to disclose incriminating evidence will be likely to be at least equivalent to that

“reasonably likely to elicit” test would not be met.<sup>155</sup>

This reading of the *Innis* test explains the *Innis* result if one accepts the majority’s conclusion that “[t]he record in no way suggests that the officers’ remarks were *designed* to elicit a response.”<sup>156</sup> At the same time, such a reading would be true to the spirit of *Miranda* in that police tactics such as reading a ballistics report to the suspect,<sup>157</sup> showing him incriminating evidence,<sup>158</sup> and stating in his presence that another individual accused him of the crime<sup>159</sup> would almost inevitably be characterized as “interrogation.”<sup>160</sup> The critical difference between these cases and *Innis* is that in *Innis* there is a

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produced when an objective observer would view the officer’s conduct as designed to elicit an incriminating response.

155. In determining whether the objective observer would infer the requisite prohibited purpose, the officer’s *motive* for obtaining the incriminating response should not ordinarily be at issue. Thus, if it appears that the officer is seeking an incriminating response, the fact that his motive is to effect the “rescue” of a victim, *see, e.g.*, *People v. Modesto*, 62 Cal. 2d 436, 398 P.2d 753, 42 Cal. Rptr. 417 (1965); *People v. Dean*, 39 Cal. App. 3d 875, 114 Cal. Rptr. 555 (1974), rather than to obtain evidence to be used against the suspect at trial, should be irrelevant. In either case, the “tug” on the suspect to produce incriminating evidence is identical, and the *Innis* test is formulated to focus on the degree of “tug” exerted on the suspect, not to require an inquiry into the police motives. *See note 74 supra*.

However, one caveat must be added. In formulating its rule, the Court in *Innis* expressly excepted “words or action on the part of the police” that are “normally attendant to arrest and custody.” *Rhode Island v. Innis*, 100 S. Ct. 1682, 1689 (1980). Presumably, this exception means that, when the police are arresting a suspect or otherwise taking him into custody, their speech or conduct which is appropriate to this end will not constitute “interrogation” even though it may clearly appear designed to elicit an incriminating response. *Cf. State v. Lane*, 77 Wash. 2d 860, 862, 467 P.2d 304, 306 (1970) (excepting from the definition of “interrogation” police questions which are “strictly limited to protecting the[ir] immediate physical safety”).

156. 100 S. Ct. at 1690 n.9 (emphasis in original). But the majority’s conclusion may be difficult to accept. As Justice Stevens’s dissent points out, 100 S. Ct. at 1694 (Stevens, J., dissenting) there is certainly “evidence in the record to support the view that Officer Gleckman’s statement was intended to elicit a response from Innis.” The assignment of Officer Gleckman to ride with Innis to the police station was itself unusual because Gleckman was not ordinarily assigned to the caged wagon. Moreover, the emotionally charged words spoken by Gleckman (“God forbid” that a “little girl” should find the gun and “hurt herself”) appear expressly designed to appeal to the conscience of a suspect. Since the officers were probably aware that the chance of a handicapped child hurting herself with the gun was in fact relatively slim, it seems unlikely that the true purpose of the conversation was to voice a genuine concern about the children’s welfare. As Justice Stevens stated, at the least, the Rhode Island courts should have been “given an opportunity to apply the new standard to the facts of this case.” 100 S. Ct. at 1698 (Stevens, J., dissenting).

157. *See Combs v. Wingo*, 465 F.2d 96 (6th Cir. 1972); KAMISAR ESSAYS at 156 n.21.

158. *See, e.g.*, *United States v. Pheaster*, 544 F.2d 353 (9th Cir.), *cert. denied*, 429 U.S. 1099 (1977) (showing to defendant identification of his fingerprint on one of the ransom notes sent in kidnapping case).

159. *See, e.g.*, *Escobedo v. Illinois*, 378 U.S. 478, 479 (1964) (telling “defendant that [another individual] had named him as the one who shot [the victim]”); *Commonwealth v. Mercier*, 451 Pa. 211, 302 A.2d 337 (1973) (reading to defendant the statement of another implicating him). *Cf. Commonwealth v. Hamilton*, 445 Pa. 292, 285 A.2d 172 (1971) (confronting defendant with confessed accomplices who identified him as the triggerman).

160. Similarly, the “Christian burial speech” in *Williams* would ineluctably be characterized as “interrogation.” By its own terms, the speech makes it clear that a disclosure of incriminating evidence is desired. *See text at note 28 supra*. Thus, an objective observer, whether or

basis for concluding that the officer's remarks were made for some purpose *other* than that of obtaining evidence from the suspect. An objective listener could plausibly conclude that the policemen's remarks in *Innis* were made solely to express their genuine concern about the danger posed by the hidden shotgun.<sup>161</sup> This distinction is legally significant because when an impartial observer perceives the officer's purpose to be something other than eliciting information from the suspect, the suspect is likely to view the officer's purpose in the same way.<sup>162</sup> If the suspect takes such a view, he would differentiate the speech or conduct from a "direct question" because he would not see it as a demand for information. Accordingly, the of-

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not he was informed of the suspect's special characteristics, would view the policeman's speech as "designed to elicit an incriminating response."

161. The trial court's apparent finding to this effect, *see Rhode Island v. Innis*, 100 S. Ct. 1682, 1690 n.9 (1980) (noting that the "trial judge . . . concluded that it was 'entirely understandable that [the officers] would voice their concern [for the safety of the handicapped children] to each other'"), gains some support from the unusual facts presented in *Innis*. Unlike most confession cases considered by the Court, *Innis* involved a situation in which the police officers were ordinary patrolmen, not detectives specifically trained in the art of interrogation. *See text at note 50 supra*. In addition, the patrolmen's only assignment was to transport the suspect. Indeed, they had specific instructions not to question the suspect during the trip to headquarters. *See text at note 50 supra*. Based on these factors, the case could certainly be differentiated from one in which the same comments were made under circumstances in which the probability of interrogation tactics being used would seem more apparent. If, for example, the remarks were made by homicide detectives at police headquarters, there would be a substantial basis for concluding that the police wanted to discover the location of the weapon through a tactic now recognized as standard by at least one leading police manual. *See A. AUBREY & R. CAPUTO, CRIMINAL INTERROGATION 289 (3d ed. 1980)*.

162. However, two caveats should be added. In exceptional cases like *Innis*, the extent to which the objective observer will perceive the police conduct as designed to elicit an incriminating response may depend upon the extent of his knowledge of police interrogation tactics. For example, if Officer Gleckman were a detective (a skilled and experienced interrogator assigned to investigate the *Innis* case) a knowledgeable objective observer (especially one who had read A. AUBREY & R. CAPUTO, *supra* note 161) would be likely to perceive the detective's remarks as designed to elicit an incriminating response even though a less knowledgeable person (and presumably the suspect) would not necessarily view them in the same way. Thus, in applying the proposed test, the question arises whether the objective observer should be invested with merely normal acuity or with a special knowledge of the art of police interrogation. If the goal is simply to protect the suspect from tactics which have the "force of a question," there is no reason to invest the observer with faculties not likely to be shared by the suspect. As long as the suspect does not view the police tactic as an implicit demand for incriminating information, there is no reason to characterize the tactic as "interrogation." On the other hand, if the court means to adhere to the *Mosley* rule requiring that the police "scrupulously honor" a defendant's assertion of his *Miranda* rights, the police should then be prohibited from any conduct, whether the conduct has the "force of a question" or not, which appears designed to cause a relinquishment of those rights. If this view is adopted, then the impartial observer should be vested with a complete knowledge of interrogation practices. As a result, in exceptional cases like *Innis* where the purpose of the police conduct in question is not immediately apparent, familiarity with the contents of police manuals may be indispensable to effective advocacy on behalf of the defendant.

A second caveat is that when the suspect has peculiar characteristics that the police apparently do not know about, the suspect may view the police speech or conduct differently than the hypothetical objective observer would. However, because the test is an objective one, the suspect's differing view would have to be considered irrelevant.

ficer's speech or conduct would not be the "functional equivalent" of "direct questioning" because the "measure of compulsion above and beyond that inherent in custody itself"<sup>163</sup> would be lacking.<sup>164</sup>

If this reading of *Innis* is correct,<sup>165</sup> then, despite its holding, *Innis* reinvigorates *Miranda* because it provides a test which is fully responsive to the concerns of the *Miranda* decision. Moreover, in most situations the test will not be difficult to apply. "Interrogation" will be defined to include, in addition to direct questioning, at least any police speech or conduct which an objective observer would perceive as "designed" to elicit an incriminating response. This test will be difficult to apply only in the exceptional situation where the police have elicited an incriminating response by engaging in activity for some purpose other than eliciting a response. Thus, if properly applied, the *Innis* test will afford suspects the type of protection from police tactics that was contemplated by *Miranda*.

### B. Henry's Test

The test applied by the Court in *Henry* is neither as far-reaching nor as definitive as the *Innis* test. Whereas the *Innis* test defined "interrogation" within the meaning of *Miranda*, *Henry* did not purport to define "deliberate elicitation" within the meaning of *Mas-siah*. The Court merely held that "deliberate elicitation" within the

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163. *Rhode Island v. Innis*, 100 S. Ct. 1682, 1690 (1980).

164. In that situation the police activity should not be deemed "interrogation" unless the "tug" on the suspect to disclose incriminating evidence would *appear to be* at least as strong as that produced by activity which would *appear to be* "designed to elicit an incriminating response." See note 154 *supra*.

165. The first lower courts to apply the *Innis* test employed approaches that are apparently consistent with the one advocated in this Article. In *State v. Durand*, 27 CRIM. L. REP. (BNA) 2327 (1980) (Neb. Sup. Ct., June 10, 1980), the Nebraska Supreme Court held that showing the defendant police reports of other crimes was "interrogation" within the meaning of *Miranda*. In applying *Innis*'s "reasonably likely to elicit" test, the court found that the police conduct was the "functional equivalent of questioning" because it implied "the threat of other prosecutions for other crimes." Thus, the court did not focus upon the apparent probability of the tactic's success, but rather appeared concerned with the apparent police purpose in utilizing it. In *State v. Jones*, 27 CRIM. L. REP. (BNA) 2342 (La. Sup. Ct., June 23, 1980), the Louisiana Supreme Court held that stating to a defendant accused of murdering his small son that "God takes care of little babies" and that "the baby was already in heaven" was not "interrogation" because "the statement was more in the nature of consolation." As in *Innis*, the statement is apparently condoned because there is a plausible basis for concluding that it was made for a purpose other than that of eliciting an incriminating response.

In a third recent case, a New York appellate court also interpreted interrogation in a manner consistent with the Court's holding in *Innis*. In *People v. Bodner*, 27 CRIM. L. REP. (BNA) 2414 (N.Y. Sup. Ct., App. Div., 4th Dept., July 10, 1980), the court held that a police detective's pre-*Miranda* warning statement to a prime suspect in an arson case that an alternate suspect's alibi indicated that the prime suspect was lying constituted interrogation within the meaning of *Miranda*. The court held that the policeman's sudden confrontation of the suspect was unquestionably conduct "reasonably likely to elicit an incriminating response."

meaning of *Massiah* will be present when the police “intentionally create a situation [that is] likely to induce . . . incriminating statements.”<sup>166</sup> Further, the Court structured its analysis so as to limit the ramifications of this test. By emphasizing the significance of the government’s deception and the defendant’s confinement in custody, the Court indicated that the analysis applied in *Henry* could well be limited to the post-arraignment<sup>167</sup> “jail-plant” situation — that is, to situations in which suspects, after being arraigned and confined in custody, make incriminating statements to agents or informants who fail to disclose their true identity.

However, in addressing this area of law, the Court’s analysis constituted a significant refinement of *Massiah*. In *Massiah* the Court encountered a situation where the government’s objective was to obtain incriminating statements from the suspect. The government pursued that objective by executing a scheme calculated to elicit incriminating statements at a specific point in time. Thus, after *Massiah* and his confederate Colson were indicted and released on bail, Colson, who without *Massiah*’s knowledge had agreed to cooperate with the government,<sup>168</sup> invited *Massiah* to discuss their case in Colson’s car while it was parked on a city street. A radio transmitter was installed in the car to enable a nearby federal agent, equipped with a receiving device, to overhear the conversation. As expected, *Massiah* made several incriminating statements.<sup>169</sup> The Court held that use of these statements against *Massiah* at his trial violated his sixth amendment rights because the statements were “deliberately elicited” in the absence of counsel.<sup>170</sup>

Professor Kamisar’s analysis of *Massiah* demonstrates that its result should not turn upon whether Colson asked *Massiah* any questions<sup>171</sup> or even upon whether the two engaged in any conversation at all.<sup>172</sup> Moreover, the Supreme Court’s 1967 per curiam decision in *Beatty v. United States*<sup>173</sup> indicates that *Massiah*’s result would not be altered even if *Massiah* had initially requested the meeting

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166. *United States v. Henry*, 100 S. Ct. 2183, 2189 (1980).

167. In *Henry*, the Court specified that it was dealing with a “post-indictment” confrontation “between government agents and the accused.” 100 S. Ct. at 2186. However, in view of *Williams*’s holding that the sixth amendment right comes into effect when the defendant is arraigned, *see* text at note 37 *supra*, the decision in *Henry* cannot turn on the fact that the defendant had been indicted rather than arraigned.

168. 377 U.S. 201, 202 (1964).

169. 377 U.S. at 202-03.

170. 377 U.S. at 206.

171. KAMISAR ESSAYS at 175.

172. *Id.* at 42-43.

173. 389 U.S. 45 (1967).

with Colson, as long as the government played some part in setting the meeting up.<sup>174</sup> Nevertheless, based on the holding and analysis of *Massiah*, the "deliberate elicitation" test could have been limited to apply only to situations in which the government executed a scheme expressly designed to elicit incriminating statements from the defendant<sup>175</sup> at a particular moment in time.<sup>176</sup> Accordingly, a case like *Henry* could have been distinguished because there was no showing that the government at any time developed or executed any specific plan designed to elicit incriminating statements from the defendant. At most, the government in *Henry* created a situation in which it hoped to obtain incriminating statements at some point. Thus, the Court's decision in *Henry* extends *Massiah* by holding that, at least in the "jail-plant" context, the government may violate the sixth amendment even though it lacked a specific purpose to elicit incriminating statements at the time they were elicited.

This is not to say that the Court's approach in *Henry* is entirely "objective."<sup>177</sup> In *Henry* the government did intend to elicit incrimi-

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174. In *Beatty*, an undercover government agent named Sirles purchased a machine gun from the defendant. After the defendant's indictment, he contacted Sirles, requested a meeting, and proposed the time and place of the meeting. Sirles agreed to attend the meeting after another government agent, McGinnis, instructed him to do so. The meeting was held in Sirles's automobile, with McGinnis hidden in the trunk. As expected, the defendant made incriminating statements. The Fifth Circuit held the statements admissible, distinguishing *Massiah* on the ground that the meeting in *Massiah* was "government sponsored" while the one in *Beatty* was initiated by the defendant. *Beatty v. United States*, 377 F.2d 181, 190 (5th Cir. 1967). However, the Supreme Court reversed in a per curiam decision. 389 U.S. 45 (1967). For further discussion of *Beatty*, see KAMISAR ESSAYS at 178-79 n.42; Dix, *Undercover Investigations and Police Rulemaking*, 53 TEXAS L. REV. 203, 232-34 (1975).

175. This "government sponsored" test is clearly met in *Beatty* as well as *Massiah*. Even though the meeting in *Beatty* was not initiated by the government, the government used the available circumstances to execute a plan for eliciting incriminating statements. This conclusion is supported by the fact that, at the time of the meeting between the defendant and Sirles, agent McGinnis was hidden in the trunk of Sirles's auto, equipped with a tape-recording device. See 377 F.2d at 184.

176. *Accord*, *Wilson v. Henderson*, 584 F.2d 1185 (2d Cir. 1978), cert. denied, 442 U.S. 945 (1979). In *Wilson*, the defendant's cell-mate, Benny Lee, had previously agreed to act as an undercover informant. Government agents "instructed [Lee] not to inquire or question, but to keep his ears open for information which could lead to the apprehension of [Wilson's] accomplices." Wilson and Lee engaged in a number of conversations. At first, Wilson merely stated that he had witnessed the crime but was not personally involved. Lee's only response was that "the story did not sound too good." By the end of the third day in the cell with Lee, Wilson admitted to Lee his complicity in the crimes charged against him. 584 F.2d at 1187. The Fourth Circuit held that Wilson's admissions were not "deliberately elicited" within the meaning of *Massiah*, 584 F.2d at 1191. Professor Kamisar argues that the *Wilson* case is indistinguishable from *Massiah* because in *Massiah* there was no "indication that Colson 'interrogated' *Massiah* or asked him a single question." KAMISAR ESSAYS at 176 n.39. However, at least prior to *Henry*, *Massiah* could be distinguished because in *Wilson* it was not clear that Lee ever "attempt[ed] to . . . elicit incriminating remarks," 584 F.2d at 1191, while in *Massiah* the government executed a scheme clearly designed to have this effect.

177. *United States v. Henry*, 100 S. Ct. at 2183, 2191 (1980) (Blackmun, J., dissenting) (criticizing the Court's "new objective approach").

nating statements in the sense that its underlying objective was to obtain them from the suspect. The Court's analysis emphasizes this factor<sup>178</sup> but does not indicate whether its presence is indispensable to *Henry's* holding. Thus, the Court's statement of the basis for *Henry's* result is ambiguous. The Court states that a *Massiah* violation occurs when the government "intentionally creat[es] a situation likely to induce" the suspect to make incriminating statements.<sup>179</sup> However, it is not clear whether this test requires (1) that the government *know* that incriminating statements are likely to be induced by the situation it created,<sup>180</sup> or (2) that the government *should have known* of this possibility,<sup>181</sup> or (3) only that the government "intentionally create a situation" which *in fact* is likely to induce incriminating statements.<sup>182</sup>

The "likely to induce" component of the *Henry* test is also somewhat ambiguous. As with the *Innis* likelihood test, one possible interpretation of this aspect of *Henry* is that it focuses upon the apparent probability that the tactics of an undercover informant will elicit an incriminating response. Justice Blackmun adopted this view of the *Henry* test. In his dissenting opinion, Justice Blackmun argued that the test was not met — and the incriminating evidence was admissible — because the lack of a prior relationship between Nichols and Henry and the natural circumspection with which a prison

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178. *See, e.g.*, 100 S. Ct. at 2187 n.8 (noting that Nichols's instructions "singled out Henry as the inmate in whom the agent had a special interest" and directed Nichols to the desirability of obtaining incriminating information).

179. 100 S. Ct. at 2189.

180. The Court indicated that on the facts of *Henry* the government "must have known" of the possibility. 100 S. Ct. at 2187.

181. Placing this gloss on the *Henry* test might appear consistent with the Court's formulation of the *Innis* test. For an argument that the two tests need not be consistent in this respect, *see* text at notes 215-17 *infra*.

182. A further difficulty in applying any of these tests arises because in some situations it may be unclear to what extent conduct of the undercover informant will be attributed to the government. The Court implied that even if Nichols's conduct in relation to Henry were exactly the same, the result in *Henry* might have been different if Nichols had had different instructions from the FBI. Thus, the Court intimated that Nichols might be acting as a government agent for some purposes but not for others. The problem with this approach is that it could lead to attempts to circumvent *Massiah* through disingenuous word games. *Cf. State v. Smith*, 107 Ariz. 100, 102, 482 P.2d 863, 865 (1971) (when defendant's cell-mate asked what information police needed, the response was, "I can't tell you anything, what we need or what we are interested in getting as far as evidence on the man because . . . if we told you 'we need this, go get it,' and you did . . . you would be acting as an agent for us"). In any event, the approach appears misdirected. The correct approach, and one which apparently has been utilized by the Court in the past, is to hold that once it is determined that an individual is in fact a government agent, his conduct should be attributed to the government regardless of whether it was expressly or implicitly authorized by his instructions. *See, e.g., Hoffa v. United States*, 385 U.S. 293 (1966) (determining the validity of the government's conduct solely on the basis of an examination of the undercover agent's conduct).



detainee would be likely to act indicated that "there was little reason to believe that even the most aggressive efforts by Nichols would lead to disclosures by Henry."<sup>183</sup> While Justice Blackmun's reading of the test is not necessarily inconsistent with the majority's analysis,<sup>184</sup> it certainly is inappropriate in view of the underlying constitutional interests at stake. If Justice Blackmun's approach were adopted, the government could narrow the scope of sixth amendment protection by merely publicizing its intention to employ undercover agents in a wide variety of situations.<sup>185</sup> But as Chief Justice Burger stated in *Henry*, the *Massiah* rule is designed to prevent "impermissible interference with the right to the assistance of counsel."<sup>186</sup> Certainly, the extent of governmental interference permitted should not be subject to manipulation by the government. Therefore, Justice Blackmun's interpretation of the *Henry* "likely to induce" test cannot be accepted.

On the other hand, neither can we plug the reading of the *Innis* test proposed in this Article into the *Henry* "likely to induce" standard. The precise significance of *Henry* is that it extends *Massiah* by holding that sixth amendment violations may occur even when the government manifests no specific purpose to elicit incriminating statements at the time the statements are obtained.<sup>187</sup> Accordingly, it would be inappropriate to hold that the "likely to induce" test will generally be met only when an objective observer (with the government's knowledge of the suspect) would conclude that the government was engaging in conduct "designed to elicit an incriminating response." Clearly, a lesser standard is intended.<sup>188</sup>

Perhaps the best reading of the "likely to induce" test is that, at least in the "jail-plant" context, the test will be met when the government's deceptive conduct increases the defendant's predisposition toward making an incriminating response. This approach is consistent

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183. 100 S. Ct. at 2195 (Blackmun, J., dissenting).

184. Beyond discussing the impact of custody on all suspects' powers of resistance, *see* 100 S. Ct. at 2188, the Court does not refer to any factors bearing on the powers of resistance of either *Henry* or suspects in general.

185. *Cf.* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974) ("[a]n actual, subjective expectation of privacy obviously has no place in . . . a theory of what the fourth amendment protects [because if it did] . . . the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television . . . that we were all forthwith being placed under comprehensive electronic surveillance").

186. 100 S. Ct. at 2188.

187. *See* text following note 176 *supra*.

188. A further indication that the *Innis* and *Henry* tests are not to be read in the same way appears when the Court in *Innis* emphasizes the differences between the fifth and sixth amendment tests. *See Rhode Island v. Innis*, 100 S. Ct. 1682, 1689 n.4 (1980).

with the Court's result in *Henry*. While the Court stopped short of holding that all statements made to "jail-plant" informants must be suppressed,<sup>189</sup> it indicated that the government engages in sufficient "affirmative conduct" to meet the test when the undercover agent does anything to "gain the confidence" of the defendant.<sup>190</sup> Thus, the only distinction between *Henry* and the "listening post" cases on which the Court reserved judgment is that in *Henry* the agent's conduct increased the likelihood that the defendant would make an incriminating disclosure. In other words, before arraignment a suspect like Innis is protected from the government's "tug"<sup>191</sup> to respond only when that tug is the functional equivalent of a question. After arraignment, a defendant in the *Henry* "jail-plant" context is protected from any "tug" which will have a tendency to elicit incriminating information.<sup>192</sup>

### III. BEYOND *INNIS* AND *HENRY*: THREE REMAINING ISSUES

The analysis in *Innis* and *Henry* may be extrapolated so as to provide some further guidance, albeit speculative, in dealing with other aspects of indirect or surreptitious questioning. Without hazarding any firm predictions as to the decisions' eventual impact, this Article will conclude by briefly examining three issues that are closely related to those decided by the Court in *Innis* and *Henry*. These issues involve when to exclude (1) incriminating statements

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189. During the oral argument in *Henry*, Justice Stevens suggested the Court could solve the problem of drawing the line between an informer's "conversation" and "interrogation" by ruling that "all post-indictment statements made to informers will be suppressed." 26 CRIM. L. REP. (BNA) 4174 (1980).

190. See text at note 86 *supra*.

191. The concept of the Court's constitutional rules prohibiting a "tug" on the suspect to confess was first articulated by one of the *Miranda* dissents. See 384 U.S. at 512 (Harlan, J., dissenting).

192. As has been noted, see text at note 80 *supra*, the *Henry* Court reserves judgment on the case in which no "tug" is produced because the informer is a "passive" listener or one who "makes no effort to stimulate conversations about the crime charged." 100 S. Ct. at 2187 n.9. However, at least in the "jail-plant" context, any effort to make a practical distinction between the active informant (who produces a "tug") and the "passive" one (who merely hears incriminating statements) seems doomed to failure. First, since the informer and the defendant would probably be in prison together over a substantial period of time, it would be virtually impossible for either of them to re-create at trial the precise context in which the defendant's incriminating disclosure arose. Even with respect to a specific conversation, the defendant would be unlikely to recall whether the agent was a "passive" listener or one who stimulated conversation about the crime because, at the time of the conversation, the defendant would have no reason to know that the conversation might assume legal significance. On the other hand, the informer's obvious incentive to obtain legally admissible incriminating statements might lead him to distort details of the conversation to the advantage of the government. Second, even if a defendant makes incriminating statements during a conversation with an apparently "passive" informant, he may be responding to "tugs" by the informant that occurred hours or days earlier.

made by a suspect to police officers in a post-arraignment context; (2) statements made to a "jail-plant" informant in the pre-arraignment context;<sup>193</sup> and (3) statements made to an undercover agent by an indicted suspect who is free on bail.<sup>194</sup>

A. *Incriminating Post-Arraignment Statements to Police Officers*

In order to evaluate the sixth amendment protection afforded suspects after they have been arraigned, it is helpful to consider how a case like *Innis* would be decided if the suspect had been arraigned or indicted before he was placed in the police car. Since the suspect's sixth amendment right to counsel would then be applicable,<sup>195</sup> Justice Stewart's footnote in *Innis* at least raises the possibility of a different result.<sup>196</sup> Moreover, if this version of the *Innis* case is compared with the facts of *Henry*, the defendant has a strong argument that the "tug" on him to produce an incriminating statement is sufficient to invoke the sixth amendment protection. "Custody" is present in this case just as it was in *Henry*; and since Officer Gleckman's remarks appear to call for an incriminating response,<sup>197</sup> the pressure to respond appears to be at least as great as that produced by an undercover agent's act of gaining a suspect's confidence.

Nevertheless, drawing from Chief Justice Burger's analysis in *Henry*, the government could present several arguments against affording the sixth amendment right to counsel in this context. The weakest of these arguments is that the defendant's voluntary disclosure that he would tell the police where the shotgun was located<sup>198</sup> constituted a waiver of his sixth amendment rights. The possibility of waiver is suggested by Chief Justice Burger's statement that "waiver" could not apply in *Henry* because the suspect was "unaware" that he was dealing with "a government agent expressly commissioned to secure evidence."<sup>199</sup> Citing this language, the government could argue that because the defendant knew that he was dealing with government agents and was aware of his constitu-

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193. For a discussion of this issue, see KAMISAR ESSAYS at 188-201.

194. For discussions of this issue, see KAMISAR ESSAYS at 175-79; Dix, *supra* note 174, at 232-34.

195. See text at note 167 *supra*.

196. See *Rhode Island v. Innis*, 100 S. Ct. at 1689 n.4.

197. See text at notes 138-41 *supra*.

198. I here refer to Innis's statement "that the officers should turn the car around so he could show them where the gun was located." *Rhode Island v. Innis*, 100 S. Ct. 1682, 1687 (1980). In *Innis*, the Court did not decide whether Innis had waived his rights under *Miranda* before making this statement.

199. 100 S. Ct. at 2188.

tional rights, his decision to respond to Gleckman's remark with an obviously incriminating statement waived his sixth amendment rights. But while this concept of waiver has been endorsed by Justice White,<sup>200</sup> the Court expressly rejected it in *Williams*, emphasizing that "waiver requires not merely comprehension but relinquishment."<sup>201</sup> Like the defendant in *Williams*, the defendant in this variation of *Innis* asserted his right to counsel and neither expressly nor implicitly indicated a willingness to forego that right.<sup>202</sup> Accordingly, the "relinquishment" necessary to a finding of waiver is not present in this case.

Based on other language in *Henry*,<sup>203</sup> the government could also argue that the sixth amendment protection afforded the defendant when he is dealing with "'arms length' adversaries"<sup>204</sup> need not be so great because of his increased powers of resistance. Thus, when a defendant knows he is dealing with government agents, a very slight "tug" on him to confess should not be sufficient to meet *Henry*'s "likely to induce" test. Agreement with this position need not lead one to interpret the "likely to induce" test to require consideration of all factors bearing upon the suspect's powers of resistance.<sup>205</sup> The point is merely that, while the government's deceit does not increase the pressure on a defendant to respond, it undoubtedly enhances the efficacy of certain tactics.<sup>206</sup> Thus, a tactic employed without deceit may not be equated with one which is used against a suspect who is unaware that he is dealing with the government. For example, while *Henry* holds that government deceit plus the gaining of the suspect's confidence while he is in custody violates his sixth amendment

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200. See note 101 *supra*.

201. 430 U.S. at 404. Drawing upon principles expressed in Judge Friendly's dissent in *United States v. Massimo*, 432 F.2d 324 (2d Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971), the Second Circuit recently held that the standards applicable for an indicted defendant's waiver of his sixth amendment rights are higher than the requirements for a waiver of a suspect's *Miranda* rights. *United States v. Mohabir*, 624 F.2d 1140 (2d Cir. 1980). While the Supreme Court has indicated that standards of "waiver" are variable, depending upon the nature of the constitutional issue at stake, see *Schneckothe v. Bustamonte*, 412 U.S. 218, 242-46 (1973), it has never intimated that it would accept the Second Circuit's position on this issue.

202. Of course, after receiving additional warnings from Captain Leyden, *Innis* did indicate that he was willing to forego his constitutional rights, see text at note 53 *supra*. However, *Innis*'s first statement was clearly incriminating because it indicated his knowledge of the murder weapon's location. If the first statement was improperly obtained, its close proximity in time to *Innis*'s later disclosure of the shotgun's location would likely render the latter inadmissible as well. See, e.g., *Leyra v. Denno*, 347 U.S. 556, 561 (1954) ("subsequent confessions excluded because so closely related to coerced first confession that facts of one control character of others").

203. See 100 S. Ct. 2183, 2188 (1980).

204. 100 S. Ct. at 2188.

205. For a criticism of this approach, see text at notes 184-86 *supra*.

206. See 100 S. Ct. at 2188.

rights, it does not follow that, in the absence of any deceit, a police officer's act of gaining a defendant's confidence would in itself be sufficient to vitiate a defendant's incriminating response. Turning back to the *Williams* case, if after Captain Leaming told Williams that he "had had religious training and background as a child, and that [he] would probably come more near praying for him than [he] would to abuse him or strike him,"<sup>207</sup> Williams had immediately responded with an incriminating statement, nothing in *Williams*,<sup>208</sup> *Henry*, or any other case suggests that the statement would be held inadmissible.<sup>209</sup>

Nevertheless, even granting that absence of governmental deceit affects the constitutionality of police conduct, remarks like those of Officer Gleckman in *Innis* should constitute a sufficient "tug" on the defendant to invoke the protection of the sixth amendment. The rationale that appears to underlie the Court's sixth amendment cases is that the defendant's right to counsel attaches when adversary proceedings commence because the "criminal investigation has ended,"<sup>210</sup> and, at least with respect to government elicitation of incriminating statements, the defendant is entitled to substantially the same type of protection as he would have at trial.<sup>211</sup> Thus, while comparing the "tug" in *Innis* with the "tug" in *Henry* amounts to a weighing of imponderables, it should be sufficient that remarks like those of Officer Gleckman, that appear to be "calling for a response,"<sup>212</sup> produce a tangible "tug" on the defendant. Where the defendant is subjected to a "tug" of this magnitude, he is entitled to the protection of the sixth amendment to preserve the adversary balance between himself and the government.

Finally, the government could argue that the defendant's sixth amendment right in this variation of *Innis* was not violated because

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207. Brief for Petitioner, Joint App. at 80, *quoted in* KAMISAR ESSAYS at 119 n.6.

208. In *Williams* the Court emphasized that some type of "interrogation" is necessary before a sixth amendment violation can be established. *See* text at note 38 *supra*.

209. *Cf.*, *United States v. Gaynor*, 472 F.2d 899 (2d Cir. 1973) (holding unsolicited incriminating statements made by defendant to postal inspector who had previously interrogated him not in violation of *Massiah* because no "interrogation" occurred at the time statement obtained).

210. *Escobedo v. Illinois*, 378 U.S. 478, 493-94 (1964) (Stewart, J., dissenting). In defining the point at which sixth amendment rights attach, the Court appears to have accepted the view expressed in Justice Stewart's *Escobedo* dissent. *See, e.g.*, *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). *See generally* Grano, *supra* note 98, at 6-7.

211. *See, e.g.*, *Escobedo v. Illinois*, 378 U.S. 478, 494 (1964) (Stewart, J., dissenting) (once "adversary proceedings have commenced, . . . the constitutional guarantees attach which pertain to a criminal trial, . . ."; included among these is "the guarantee of the assistance of counsel"). *See generally* Grano, *supra* note 98, at 20.

212. Compare *Rhode Island v. Innis*, 100 S. Ct. 1682, 1694 (1980) (Stevens, J., dissenting).

Officer Gleckman's remarks were not "designed to elicit an incriminating response."<sup>213</sup> This argument raises the question whether any governmental purpose to "elicit" incriminating statements is prerequisite to a *Massiah* violation. As previously noted,<sup>214</sup> *Henry* is ambiguous on this issue. The *Henry* test could imply that the government violates the sixth amendment whenever it "intentionally" engages in conduct "likely to induce" an incriminating response, regardless of its underlying purpose in engaging in the conduct; or the test could be read to require that the government "intend" (or be aware) that its conduct would be "likely to induce" an incriminating response before it can violate the sixth amendment. Finally, an intermediate position would require an objective inquiry into the government's purpose, with the test met if the inquiry reveals that the government *should have known* that its conduct would be "likely to induce" an incriminating response.

Because the Court opted for an objective focus on the officer's knowledge in *Innis*,<sup>215</sup> it is plausible to predict that it will employ the same approach to the *Henry* test. Nevertheless, there are sixth amendment grounds for eschewing any inquiry into governmental purpose. As has already been noted,<sup>216</sup> the policy underlying the defendant's sixth amendment right is to maintain a proper adversary balance between the defendant and the government. Any governmental action that improperly tilts the balance to the detriment of the defendant should be prohibited. Accordingly, once it is determined that governmental conduct produces a "tug" of sufficient magnitude to interfere with the defendant's right to counsel, it is irrelevant whether the government intended to produce this "tug" or even whether it should have foreseen the likelihood of its occurrence; so long as the "tug" is in fact produced, the effect on the defendant is the same: as a result of governmental action, he has been subjected to an impermissible degree of pressure to make incriminating statements.<sup>217</sup> This analysis<sup>218</sup> leads one to conclude that, in this hypo-

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213. See 100 S. Ct. at 1690 n.9 (emphasis in original).

214. See text at notes 177-82 *supra*.

215. See 100 S. Ct. at 1687.

216. See text at note 211 *supra*.

217. As Professor Dix notes, cases dealing with "involuntary" confessions provide some additional support for this view. See, e.g., *Townsend v. Sain*, 372 U.S. 293, 308 (1963) (statement that was result of "truth serum" qualities of a drug would be inadmissible as involuntary even if police officers were unaware of its truth-inducing qualities and administered it only to alleviate subject's withdrawal symptoms). See Dix, *supra* note 174, at 234 and n.75.

218. The analysis runs counter to *Innis*'s dicta stating that "the police surely cannot be held accountable for the unforeseeable results of their words or actions." 100 S. Ct. at 1687. However, this dicta occurs in a context where the Court is defining "interrogation" within the

thetical variation of *Innis*, the defendant's incriminating disclosures would have been obtained in violation of *Massiah* even if Officer Gleckman's purpose in making his remarks was solely to express his genuine concern about the safety of the children and even if the officer should not have foreseen that his remarks would be "likely to induce" an incriminating response.<sup>219</sup>

### B. *Incriminating Pre-Arrest Statements to "Jail-Plant" Informants*

In exploring this area, it is helpful to consider how a case like *Henry* would have been decided if the defendant had been placed in jail with an informant before being arraigned. Consider this case: After a defendant like Henry is arrested, an FBI agent gives him the warnings required by *Miranda*, and the defendant asserts his right to an attorney. The agent then tells the defendant that an attorney will be appointed after arraignment, and places him in a cell with an informer like Nichols. The informant has been told that he will be rewarded if he can elicit incriminating statements from the defendant, but he has also been warned to refrain from questioning the defendant about the charges against him. The informant initiates a conversation with the defendant and proceeds to describe his own legal problems to the defendant. In response, the defendant makes damaging admissions.

By its own terms, the *Henry* decision would not apply to this case because the hypothetical defendant has been neither indicted nor arraigned.<sup>220</sup> Moreover, *Innis* makes clear that the sixth amendment right to an attorney does not attach merely because the police have arrested the defendant, informed him of his right to an attorney, or heard him assert that right.<sup>221</sup> Accordingly, the hypothetical defend-

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meaning of *Miranda*. Since the policies underlying *Miranda* and the defendant's sixth amendment protection "are quite distinct," 100 S. Ct. at 1687 n.4, it is not inconceivable that the police could be held accountable for "unforeseeable results" in the latter context.

219. *Innis*'s conclusion that Officer Gleckman should not have foreseen that his remarks were "reasonably likely to elicit an incriminating response" does not negate the possibility that the officer should have foreseen that the remarks were "likely to induce" an incriminating response within the meaning of *Henry*. The latter standard is clearly more stringent than the former. See text at note 196 *supra*.

220. See text at note 167 *supra*.

221. In *Innis*, all these events had taken place. Nevertheless, the Court unequivocally held that the case must be decided on the basis of *Miranda* rather than *Massiah*. See 100 S. Ct. at 1687 n.4. Justice Stevens's dissent cogently argued that *Innis*'s assertion of his right to counsel should invoke his sixth amendment rights under *Massiah-Williams* because, once the right was asserted, "the police had an unqualified obligation to refrain from trying to elicit a response from the suspect in the absence of his attorney." 100 S. Ct. at 1694 n.7. However, the majority never addressed this matter.

The Stevens dissent also raises the related question of whether, under *Miranda*, a suspect

ant would be unable to invoke his rights under *Massiah*.<sup>222</sup>

Although the Supreme Court has never clearly resolved the issue, it appears that the hypothetical defendant would also be unable to invoke *Miranda*. Professor Kamisar has persuasively demonstrated that “[i]t is the impact on the suspect’s mind of the *interplay* between police interrogation and police custody — each condition *reinforcing* the pressures and anxieties produced by the other” which creates “custodial interrogation” within the meaning of *Miranda*.<sup>223</sup> Since the hypothetical defendant is unaware that he is speaking to a government agent, the necessary “interplay” cannot be present. The Supreme Court apparently confirmed the validity of this analysis by implying that in a case like *Henry*, *Miranda* could not be applied because it is “limited to custodial police interrogation.”<sup>224</sup>

Thus, in this hypothetical, the defendant’s only way to persuade a court to exclude the incriminating admissions to the informer would lie in an argument that his admissions were involuntary. By invoking the Court’s decision in *Spano v. New York*,<sup>225</sup> the defendant could argue that, when he is in custody, the government’s use of this type of deceit renders a resulting confession involuntary because it “unfairly impairs [the defendant’s] capacity to make a rational choice.”<sup>226</sup> The essence of this argument is that custody in itself cre-

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should be entitled to greater protection after he asserts his rights than before asserting them. As Justice Stevens indicates, the Court’s decision in *Mosley* suggests a basis for distinguishing the two situations. See 100 S. Ct. at 1694 (Stevens, J., dissenting). Before the suspect asserts his rights, the police are merely precluded from “interrogating” him; however, after he asserts his rights, they are required to “strictly honor” his assertion, a requirement which would appear to mandate more than simply a prohibition of “interrogation.” See note 162 *supra*.

222. Neither *Henry* nor *Innis* defines the precise point at which the suspect’s right to an attorney will attach. Based on *Williams*, it appears that at least the “beginning” of the “criminal prosecution” activates the suspect’s sixth amendment right. See *Brewer v. Williams*, 430 U.S. 387, 398 (1977). For a discussion of the New York cases holding that the suspect’s sixth amendment right will also be invoked as soon as he is represented by an attorney, see KAMISAR ESSAYS at 213-14.

223. KAMISAR ESSAYS at 195.

224. *United States v. Henry*, 100 S. Ct. 2183, 2188 (1980).

225. 360 U.S. 315 (1959). In *Spano*, the defendant adamantly resisted police efforts to obtain an incriminating statement until he was confronted by Bruno, a fledgling officer who was also the defendant’s childhood friend, and who by telephone had persuaded Spano to surrender to the police. Under orders from his police superiors, Bruno falsely told the defendant that his “telephone call had gotten him [Bruno] into trouble, that his job was in jeopardy, and that the loss of his job would be disastrous to his three children, his wife and his unborn child.” 360 U.S. at 323. After Bruno repeated this story four times within an hour, the deception successfully elicited a confession. Although the Court held that the confession was involuntary based on the totality of the circumstances, the majority opinion’s marked distaste for Bruno’s conduct indicated that the use of such a stratagem might in itself invalidate the resulting confession.

226. See *Miranda v. Arizona*, 384 U.S. 436, 507 n.4 (1966) (Harlan, J., dissenting) (quoting Bator & Vorenberg, *Arrest, Detention, Interrogation and Rights to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 73-74 (1966)).



ates considerable pressure on the suspect to incriminate himself<sup>227</sup> and that “the trickery of the ‘jail-plant’ ploy affords the suspect no opportunity to apply his powers of resistance because the peril of speaking is hidden from him.”<sup>228</sup> The Court’s opinion in *Henry* may lend some support to this argument when it emphasizes that the “mere fact of custody imposes pressure on the accused.”<sup>229</sup> However, since the Court does not purport to speak to the issue of “involuntariness,” that issue remains unresolved.<sup>230</sup>

### C. *Incriminating Statements to Undercover Agents While Free on Bail*

In *Henry*, the Court took pains to limit its holding to cases in which the defendant is in custody. Nevertheless, the gloss placed on *Massiah*’s “deliberately elicited” test was not limited to this situation; it would also necessarily apply to situations where an undercover agent seeks to testify to incriminating statements made by an arraigned or indicted defendant while free on bail. To evaluate the impact of *Henry*’s “likely to induce” test in this context, it is appropriate to consider two additional hypothetical variations of *Henry*. In the first variation, an informer like Nichols, although indicted for a federal offense, is free on bail and working as a government agent. His superior has recently given him the following blanket instructions: “Naturally, we want any information you can get; but when you meet with someone who is indicted or arraigned, you should not question him about the charges against him or even initiate conversation relating to that subject.” The informer happens to meet a defendant free on bail whom he knew casually at prison, and he initiates a conversation about some of their mutual acquaintances. This leads into a discussion of these individuals’ skill or lack of skill as criminals. During the course of the conversation, the informer says, “You know, I think the toughest crime to pull off is bank robbery. There’s just so much planning that goes into that and so many things that can go wrong.” The defendant agrees and then, as if to illustrate Nichols’s point, recounts the details of the bank robbery

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227. See KAMISAR ESSAYS at 194; Dix, *supra* note 174, at 230.

228. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 606 (1979).

229. *United States v. Henry*, 100 S. Ct. 2183, 2188 (1980).

230. In view of the *Spano* decision, the precise circumstances under which the informant obtained the incriminating statements might be relevant to a resolution of the voluntariness issue. Thus, if the informant exploited a previously existing friendship or directly questioned the suspect about the charges against him, rather than merely engaging in conversation calculated to evoke an incriminating response, the force of the suspect’s involuntariness argument might be enhanced.

which he has recently committed. In the second variation, the facts are the same as in the first except that the informer makes no comments about bank robbery. The defendant brings up that subject, and without any prompting from the informer, proceeds to make incriminating admissions.

Based on any reasonable reading of the "likely to induce" test, the informer's conduct in the first variation should be found to violate *Massiah*. In *Henry*, the Court indicated that in the "jail-plant" context any deceptive tactic which produces a "tug" on the suspect to disclose incriminating information will be sufficient to meet the "likely to induce" test. *Henry* is distinguishable from the present hypothetical because the defendant is not in custody. However, based on *Henry's* analysis, the significance of the defendant's confinement is simply that it renders the suspect more likely to "reach for aid," thereby increasing the likelihood of an incriminating response. Certainly, when the undercover agent's tactic in fact "calls for" an incriminating response (in the sense that such a response is a natural one) this should more than make up for the absence of the supposed psychological effect of confinement. In the present hypothetical, when the informer comments upon bank robberies, one natural response from the defendant is to disclose some facts concerning the robbery with which he is charged. Whether or not the informant's comment was calculated to induce an incriminating response,<sup>231</sup> it certainly calls for one. Thus, where he is unaware that he is dealing with a government agent, the defendant is subject to a palpably tangible "tug" to disclose incriminating evidence. Unquestionably, this should be sufficient to invoke the sixth amendment.<sup>232</sup>

The government's position is stronger in the second variation. Although the informant's conduct in this variation exerted no less pressure than his conduct in *Henry*, *Henry* could be distinguished on the ground that there the defendant was in custody and thus, according to the Court, more "susceptible to the ploys of government agents."<sup>233</sup> *Henry* could be interpreted to mean that when the defendant is in custody, the psychological inducements to confess are

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231. Unless the informer was unaware of the charges against the defendant, the conclusion that the remarks were calculated to achieve this end appears inescapable.

232. The argument for a *Massiah* violation is much stronger in this case than it would be in the hypothetical variation of *Innis* discussed at notes 195-212 *supra*, because unlike that case, the suspect is unaware that he is dealing with a government agent. With regard to producing a "tug" on the suspect to speak, this factor more than outweighs the consideration that the suspect in the present hypothetical was not in custody. *See Massiah v. United States*, 377 U.S. 201, 206 (1964) (suspect "more seriously imposed upon" because he did not "know that he was under interrogation by a government agent").

233. *United States v. Henry*, 100 S. Ct. 2183, 2188 (1980).

so strong that any government tactic that gains the defendant's confidence will in effect "call for" an incriminating response. The argument could then be made that *Henry* should be limited to police speech or conduct which "calls for" an incriminating response, and that the speech involved in the second variation does not meet this test because the defendant's incriminating response was neither natural nor expected. Thus, while the government may have hoped to obtain such a response, the response was essentially "spontaneous" and therefore cannot be characterized as "deliberately elicited."

While this interpretation of *Henry* is plausible, its implications are troubling. First, it would severely complicate criminal litigation. Whether the agent's speech or conduct "called for" an incriminating response from the defendant would depend on nuances<sup>234</sup> that the traditional litigation process is poorly equipped to examine.<sup>235</sup> Moreover, to decide cases on this basis would seem to undercut the policy underlying the Court's sixth amendment decisions. As previously noted,<sup>236</sup> the apparent premise of these decisions is that when adversary proceedings commence, the defendant is entitled to substantially the same protection from governmental *efforts* to elicit incriminating statements as he would have at trial.<sup>237</sup> Thus, once the sixth amendment right to counsel attaches, the government should be precluded from all efforts to elicit incriminating statements from the defendant in the absence of his attorney. When undercover agents engage indicted defendants in conversation, almost inevitably their objective is to obtain incriminating statements. To put it another way, they almost always hope to hear something which will tilt the balance to the advantage of the government in the coming prosecution. Since this is precisely the type of imbalance that the sixth amendment is designed to prevent, the most appropriate rule for the Court to adopt is that "all post-[arraignment] statements made to informers will be suppressed."<sup>238</sup> Should it adopt this position in a

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234. The conceivably relevant considerations include the extent of the prior relationship between the agent and suspect, the agent's non-verbal communications (including his tone of voice), and the precise words used in the conversation.

235. See generally KAMISAR ESSAYS at 132-37 (arguing that because the litigation process is often incapable of determining the constitutionally relevant facts in confession cases, the government should be required to record its efforts to elicit incriminating responses from the suspect).

236. See text at notes 210-11 *supra*.

237. See note 230 *supra*.

238. 27 CRIM. L. REP. (BNA) 4174 (suggestion of Stevens, J., made during the oral argument in *Henry*). Adoption of this rule should lead to the conclusion that incriminating statements overheard by a "passive" informant who did not participate in the conversation would also be excluded. If the government is to be prevented from improperly tilting the adversary balance to its own advantage, it should not matter whether the conduct which causes the im-

future case, the Court will go beyond *Henry's* holding but not be unfaithful to its articulated policy of thwarting governmental "interfere[nce] with the [sixth amendment] right to counsel of the accused."<sup>239</sup>

#### CONCLUSION

*Innis* and *Henry* are significant not only because they revitalize the doctrines of *Miranda* and *Massiah*, but also because they constitute a significant first step toward resolving the difficult issues raised by indirect and surreptitious police efforts to elicit incriminating statements. While the rules the Court applied in *Innis* and *Henry* are somewhat ambiguous, each rule may be appropriately interpreted so as to provide predictable guidance for the police and significant protection for suspects in custody who are dealing with either overt or undercover government agents. But even if the Court embraces the interpretations of the *Innis* and *Henry* rules advocated in this Article, cases requiring further refinement of its definition of "interrogation" are likely to arise in the not-so-distant future. By anticipating three of those cases, this Article helps to trace the still hazy limits of interrogation without questions.

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proper tilt is active or passive. In either case, the government has interfered with the sixth amendment right of the accused. In any event, in the absence of unusual circumstances, it is implausible that the litigation process can distinguish between "passive" and "active" informants. See notes 192 and 235 *supra*.

239. *United States v. Henry*, 100 S. Ct. 2183, 2188 (1980).