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Rhode Island v. Innis: A Heavy Blow to the Rights of a Suspect in Custody; and No "Christian Burial" to Ease the Passage

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tion with the first amendment,[57] or of simply abandoning the action[58] as one that is incompatible with first amendment guarantees.[59]

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Rhode Island v. Innis: A HEAVY BLOW TO THE RIGHTS OF A SUSPECT IN CUSTODY; AND NO "CHRISTIAN BURIAL" TO EASE THE PASSAGE

Defendant, Thomas J. Innis, was arrested on January 17, 1975, in connection with an armed robbery that had occurred earlier the same morning. He immediately was advised of his *Miranda* rights[1] by the arresting officer and was given the same warnings a few moments later when other policemen arrived on the scene. The defendant indicated that he wished to have a lawyer, was placed in a car with three police officers, and was en route to the station house when the officers began conversing among themselves: "there's a lot of handicapped children running around in this area,

57. Bloustein argues persuasively that the Meikeljohn theory, which was the basis for the Supreme Court's holding in *New York Times v. Sullivan*, and which the Court misapplied in *Time, Inc. v. Hill*, is the solution to the problem of balancing the right to privacy with the right to free speech. The Meikeljohn theory, as explained by Bloustein, provides that the right to free speech under the first amendment only attaches to matters which contribute to the public's understanding essential to self-government. In other words, the only issues of legitimate public interest are those with which the voters must deal. Were the courts to apply this theory in deciding what is newsworthy, there would be protection for the press and room for the right against public disclosure of private facts as well. *See* Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 624-28 (1968). *See generally* Comment, *supra* note 30; Comment, *supra* note 33.

58. Some have argued that this may be the proper course of action. Compare Kalven, *supra* note 49, *with* Bloustein, *supra* note 57.

59. Despite the *Campbell* decision, there may still be a right to privacy when the publisher of the private facts is not a member of the "institutional press." In *Norris v. King*, 355 So. 2d 21 (La. App. 3d Cir. 1978), *cert. denied*, 439 U.S. 995, *rehearing denied*, 439 U.S. 1122 (1978), the court awarded damages when a laundromat owner posted posters of plaintiff, who had stolen from defendant's coke machines, in an attempt to warn others that they would be caught if they repeated plaintiff's actions. The court did not address itself to the line of cases which have been interpreted as requiring a public interest privilege. Instead, the court merely found that those cases were not applicable, since defendant was not a member of the news media. 355 So. 2d at 24-25. However, it has been argued that the distinction between members of the institutional press and ordinary citizens for the purpose of application of the public interest privilege may be invalid. *See* Note, *supra* note 7, at 1221-22.

1. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

and God forbid one of them might find a weapon with shells and they might hurt themselves."[2] Defendant thereupon told the officers to turn the car around and said that he would lead them to the missing shotgun. The gun was introduced into evidence at a later trial in which Innis was convicted of robbery, kidnapping, and the murder of another taxicab driver. *Held*: Defendant was not "interrogated" after having invoked his right to counsel. "Interrogation" under *Miranda* refers "not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[3] *Rhode Island v. Innis*, 100 S. Ct. 1682 (1980).

The Bill of Rights of the United States Constitution imposes on the federal government the obligation to ensure that "[n]o person . . . be compelled in any criminal case to be a witness against himself"[4] and that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[5] These rights, the fifth amendment privilege against self-incrimination and the sixth amendment right to the assistance of counsel, were made applicable to the states through the fourteenth amendment.[6] Despite this clear constitutional mandate to the federal government and the corresponding judicial mandate to state governments, there were many instances of abuse, both physical and mental, in obtaining incriminating remarks from suspects in police-dominated atmospheres.[7] Initially, concern centered on the possible unreliability of the resulting evidence,[8] and it was exluded on the grounds of involuntariness.[9] As cases arose in

2. Rhode Island v. Innis, 100 S. Ct. 1682, 1685 (1980).

3. *Id.* at 1689.

4. U.S. CONST. amend. V.

5. U.S. CONST. amend. VI.

6. *See* Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment made applicable to the states); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment made applicable to the states).

7. *See* Spano v. New York, 360 U.S. 315 (1959); Stein v. New York, 346 U.S. 156 (1953); Lyons v. Oklahoma, 322 U.S. 596 (1944); Ashcroft v. Tennessee, 322 U.S. 143 (1944); Ward v. Texas, 316 U.S. 547 (1942); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936). *See also Developments in the Law—Confessions*, 79 HARV. L. REV. 938 (1966).

8. Stein v. New York, 346 U.S. 156, 192 (1953): "[R]eliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence."

9. Ziang Sung Wan v. United States, 266 U.S. 1, 14 (1924): "[T]he requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made."

which the evidence was clearly reliable, however, the Court shifted from this view and focused partially on the idea that "[t]he aim of the rule that a confession is inadmissible unless it was *voluntarily* made is to exclude *false* evidence . . . . The aim of the requirement of *due process* is not to exclude presumptively false evidence, but to prevent *fundamental unfairness* in the use of evidence whether true or false."[10] The focus on due process imposed on the states the obligation to conduct their criminal investigations and their contacts with potential defendants in a "fair" manner.[11] The Supreme Court applied a "totality of the circumstances" test to determine voluntariness in given circumstances;[12] but, excepting isolated rules limited to specific factual situations, there were no clear guidelines for the states to follow.

In 1964, the Supreme Court decided *Massiah v. United States*,[13] holding that evidence may not be introduced at defendant's trial "of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[14] Defendants were thus granted the right to have a lawyer present during "interrogation" after "judicial proceedings" had been commenced against them. *Massiah's* reliance on the sixth amendment right to counsel was extended even further that year by the landmark decision of *Escobedo v. Illinois*.[15] The import of this startling case was its extension of the right to the presence of counsel to a point in time considerably in advance of the commencement of "judicial proceedings."[16] In reaching this decision, the Court

10. Lisenba v. California, 314 U.S. 219, 236 (1941) (emphasis added). *Accord*, Rogers v. Richmond, 365 U.S. 534, 540-41 (1961); Rochin v. California, 342 U.S. 165, 172 (1952).

11. Spano v. New York, 360 U.S. 315, 320 (1959): "[T]he police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

12. Fikes v. Alabama, 352 U.S. 191, 197 (1957).

13. 377 U.S. 201 (1964).

14. *Id.* at 206. This case, momentous as it may have been, was "lost in the shuffle" as a consequence of the outcry over a case decided very shortly afterward, *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Massiah* was to have a far-reaching effect, however, when later used by the Court in *Escobedo* and *Brewer v. Williams*, 430 U.S. 387 (1977).

15. 378 U.S. 478 (1964). In *Escobedo*, the suspect had not been indicted, but was in police custody and was denied the right to see or speak with his retained counsel. He was interrogated at length and held incommunicado, despite repeated demands by both himself and his attorney that they be allowed to confer. The resulting incriminating remarks were held by the United States Supreme Court to be inadmissible at trial.

16. This is a questionable proposition in light of the fact that the sixth amendment right to counsel traditionally has been regarded as a trial right. It has been ex-

relied on the sixth amendment and *Massiah*, concluding that the fact of indictment, or lack thereof, "should make no difference."[17] In addition, the Court appeared to recognize a link between the sixth amendment right to counsel and the fifth amendment privilege against compelled self-incrimination: "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused *to be advised by his lawyer of his privilege against self-incrimination.*"[18] A great deal of criticism was generated by the *Escobedo* decision;[19] though it later was limited strictly to its facts, *Escobedo* gave some indication of the direction in which the Court was leaning.

Two years after *Escobedo v. Illinois*, the Supreme Court decided *Miranda v. Arizona*.[20] That case finally established concrete guidelines for the states to follow in their attempts to balance constitutional rights against enforcement needs. "Procedural safeguards" were implemented by the Court which were designed to protect a suspect's fifth amendment privilege against compelled self-incrimination while he was being subjected to "custodial interroga-

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tended by the Court to encompass critical stages once judicial proceedings have begun, but never so far as in *Escobedo*. This is recognized by Justice Stewart, who in his dissent stated:

> The Court disregards this basic difference between the present case and Massiah's with the bland assertion that "that fact should make no difference." *Ante*, p. 485.
>
> It is "that fact," I submit, which makes all the difference. Under our system of criminal justice the institution of formal, meaningful judicial proceedings, by way of indictment, information, or arraignment, marks the point at which . . . constitutional guarantees attach which pertain to a criminal trial. Among those . . . is the guarantee of the assistance of counsel.

378 U.S. at 493 (Stewart, J., dissenting). *See also* Massiah v. United States, 377 U.S. 201, 205 (1964), *quoting* Powell v. Alabama, 287 U.S. 45, 57 (1932):

> [D]uring perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself.

17. 378 U.S. at 485.

18. *Id.* at 488 (emphasis added). *See* Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 N.W.L. REV. 506, 506 (1966): "Under *Escobedo v. Illinois* it is the fifth amendment privilege against self-incrimination that gives rise to the right to counsel during police interrogation . . . ."

19. Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47 (1964); Comment, *Constitutional Law—Right of Counsel—State and Lower Federal Court Interpretations of Escobedo*, 44 N.C. L. REV. 161 (1965); Note, *Escobedo in the Courts: May Anything You Say Be Held Against You*, 19 RUTGERS L. REV. 111 (1964).

20. 384 U.S. 436 (1966).

tion."[21] Among the "safeguards" were included the right to counsel and the right to be free from interrogation once the right to counsel was invoked.[22] The Court stated in *Miranda* that it was reaffirming *Escobedo v. Illinois*,[23] and the Court again recognized the link between the right to the presence of counsel and the privilege against compelled self-incrimination.[24] The Court redefined this link, however, in such a way as practically to negate the *Escobedo* rationale: The *Miranda* Court relied almost exclusively on the fifth amendment right against compelled self-incrimination, rather than on the sixth amendment right to counsel upon which *Escobedo* was based.

> [T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. . . . Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today.[25]

Thus in *Miranda*, the Supreme Court modified the stand it had taken earlier in *Escobedo*.[26] Later cases show that the fifth amend-

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21. *Id.* at 444:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. 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 . . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

22. *Id.*

23. *Id.* at 442.

24. *Id.* at 471.

25. *Id.*

26. *See* Schwartz, *Proceedings of the Twenty-Ninth Annual Judicial Conference Third Judicial Circuit of the United States, Criminal Justice in the Mid-Sixties: Escobedo Revisited*, 42 F.R.D. 437, 465 (1966): "I think it is worth emphasizing that [*Miranda*] is not a right to counsel case. A lot of the precedent, as one of the dissents points out, comes from the right to counsel cases. But it is a self-incrimination case."

ment, as interpreted by the philosophy of *Miranda*, became increasingly more important, even as the sixth amendment privilege, as interpreted in *Escobedo*, receded with that case into disuse.

The rules established in *Miranda* were to be applied strictly and construed strictly. Any incriminating statement elicited from a suspect in violation of those rules was to be inadmissible at trial.[27] The passage of time and a changing Court, however, gave rise to exceptions. While holding to the basic premise of the *Miranda* decision, the Court, in a series of important decisions, began to narrow the scope of the applicable rules.[28] In general, these post-*Miranda* cases tend to limit the *Miranda* decision and to illustrate that much of the difficulty that lower courts encountered in dealing with *Miranda* was the result of the lack of a clear definition of the term "interrogation."[29]

The Supreme Court was given an opportunity to clarify this issue in *Brewer v. Williams*[30] but declined to do so. The facts in *Brewer* are very similar to those in the instant case; they should, therefore, be examined in some detail.

Defendant Williams, known to be a mental patient and deeply religious, was arrested and arraigned on a charge of murder. After consulting with two lawyers, he declared that he wished to speak with his retained counsel before speaking to the police. While en route to another town in a police car, the defendant was given the now-famous "Christian Burial Speech"[31] which resulted in his leading the police to

27. 384 U.S. at 476-77.

28. Oregon v. Mathiason, 429 U.S. 492 (1977) (questioning of a suspect who comes to police station at request of an officer, is not formally arrested, is falsely told of evidence against him, and is led to believe that his truthfulness will be considered by the judge, is not "custodial interrogation" under *Miranda* and does not require the giving of *Miranda* warnings); Beckwith v. United States, 425 U.S. 341 (1976) (questioning of a suspect in his home by Internal Revenue Service investigators after he has become the "focus" of criminal investigations is not "custodial interrogation" under *Miranda* and does not require the giving of *Miranda* warnings); Michigan v. Mosely, 423 U.S. 96 (1975) (*Miranda* requires that defendant's right to stop questioning during interrogation be "scrupulously honored"; statements elicited from a defendant after he has asked that questioning be stopped are admissible when he is again questioned an hour later); Oregon v. Hass, 420 U.S. 714 (1975) (statements obtained from a suspect in violation of these rules are admissible in court for impeachment purposes); Michigan v. Tucker, 417 U.S. 433 (1974) (testimony of prosecution witness whose name was elicited from defendant in violation of *Miranda* is admissible); Harris v. New York, 401 U.S. 222 (1971).

29. *See* Note, *Criminal Procedure—Defining "Custodial Interrogation" for Purposes of Miranda: Oregon v. Mathiason*, 57 ORE. L. REV. 184 (1977).

30. 430 U.S. 387 (1977).

31. *Id.* at 392-93:

I want to give you something to think about while we're traveling down the

the body of the victim. No express questions were asked by the police officer, but there was a clear appeal to the defendant's moral and religious beliefs that the Court accepted as being "tantamount to interrogation."[32] However, the Court, instead of clarifying the "interrogation" issue, decided the case entirely on sixth amendment grounds. Because "judicial proceedings," *i.e.*, arraignment, had begun, and because the officer had "deliberately and designedly set out to elicit information from [the defendant],"[33] the facts in *Brewer* were considered to be "constitutionally indistinguishable from those presented in *Massiah v. United States*."[34] The Court, therefore, avoided the difficulties inherent in reconsidering or reformulating *Miranda*'s definitions and decided *Brewer* solely on the basis of *Massiah* and the sixth amendment right to counsel. In doing so, however, the Court compounded the preexisting confusion. Whereas fifth and sixth amendment rights had, to a considerable extent, been merged in *Miranda*, these rights were once again distinguished in *Brewer*. Furthermore, the Court described the "Christian Burial Speech" as "tantamount to interrogation," thus alluding to, but only partially addressing, the "interrogation" issue.[35] The Court utilized the "deliberately elicited" test as used in *Massiah*,[36] and in doing so, focused on the *intent* of the police officer in his dealings with the suspect. The focus on intent created a test separate and apart from that which would be utilized in *Rhode Island v. Innis*.[37]

In *Innis*, a taxi driver disappeared on January 12, 1975. His body was discovered a few days later buried in a shallow grave, his death having resulted from a shotgun blast to the back of his head. On January 17, 1975, another taxi driver phoned the police station, stating that he had just been robbed by a man carrying a sawed-off shotgun. The police arrested the defendant shortly thereafter in the

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road . . . . Number one, I want you to observe the weather conditions . . . . 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 . . . . And, since we will be going right past the area . . . , I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered . . . . 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.

32. *Id.* at 400-01.

33. *Id.* at 399.

34. *Id.* at 400.

35. *See* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?*, 67 GEORGETOWN L.J. 1 (1978).

36. 377 U.S. at 204.

37. 100 S. Ct. 1682 (1980).

area where the taxi driver had deposited his "fare." The arresting officer immediately advised Innis of his *Miranda* rights. A few moments later, two of the arresting officer's superiors arrived and repeated the *Miranda* warnings to Innis, who responded by indicating that he understood his rights and that he wished to speak with a lawyer. While a search for the shotgun was begun in the area of the arrest, three officers were dispatched to take Innis to the police station.[38] The record reflects that each of those officers was told not to question the suspect, but within seconds, the officers began talking among themselves: "[t]here'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."[39] Innis interrupted the conversation, telling the officers to turn the car around; he would lead them to the shotgun. Once back at the scene of the arrest, Innis was again advised of his *Miranda* rights. He said he understood them and still wished to disclose the whereabouts of the gun because he "wanted to get the gun out of the way because of the kids in the area in the school."[40] Later, at trial, the gun was admitted into evidence over objection, and Innis was convicted of robbery, kidnapping, and the murder of the first taxi driver.

The trial court, without finding that Innis had been "interrogated," determined that he had waived his *Miranda* right to silence.[41] On appeal to the Rhode Island Supreme Court, the conviction was reversed.[42] The court, relying in part on *Brewer*, found that even though Innis had not been addressed personally, he had invoked his *Miranda* right to counsel and, contrary to the *Miranda* mandate that all custodial interrogation then cease, he had been "subjected to 'subtle coercion,' that was the equivalent of 'interrogation' within the meaning of the *Miranda* opinion."[43] The court additionally held that the record did not support a finding of waiver.[44]

Reversing in a 6-3 decision written by Justice Stewart,[45] the

38. On the way to the station two of the three officers were in the front seat, and one was in the back seat with Innis. Only two of them participated in the conversation. It is unclear whether the policeman seated next to Innis was one of the two officers participating in the dialogue. If so, the argument that the conversation was meant to be heard by Innis, and therefore meant to elicit a response, would be strengthened.

39. *Id.* at 1686.

40. *Id.* at 1687.

41. *Id.*

42. State v. Innis, 391 A.2d 1158 (1978).

43. 100 S. Ct. at 1687.

44. 391 A.2d at 1163.

45. It is interesting to note that Justice Stewart dissented in *Escobedo* and *Miranda*, yet wrote the majority opinions for the Court in *Massiah*, *Brewer* and *Innis*.

United States Supreme Court found that there had been no "interrogation":

> "Interrogation," as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself. . . . [T]he term "interrogation" . . . . under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police other than those normally attendant to arrest and custody that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.[46]

The Court found that the officers' remarks were not *designed* to elicit an incriminating response, nor were they such remarks as the policemen should have known were reasonably likely to elicit such a response. In reaching this conclusion, the Court conceded that Innis had been subjected to "subtle compulsion."[47] This finding, however, was "not the end of the inquiry. It must also be established that a . . . response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response."[48]

The Court found that *Brewer v. Williams* was not applicable in the *Innis* case.[49] By acknowledging the continued existence of the *Brewer* rationale, however, and by utilizing a test in *Innis* different from that applied in *Brewer*, the Court creates a substantial dichotomy. The right to counsel in each of these two cases is based on different amendments—the fifth in *Innis* and the sixth in *Brewer*.[50] By clarifying this differentiation, the Court has established the existence of two distinct tests. If "adversary judicial proceedings" have begun, then the "deliberately elicited" test, as applied by the *Brewer* court, will be applicable. If, however, there has been no commencement of "judicial proceedings," then the fifth amendment *Innis* test will be applied, *i.e.*, "words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response."[51] Thus, under substantially similar factual situations, the

46. 100 S. Ct. at 1689-90.

47. *Id.* at 1691.

48. *Id.*

49. *Id.* at 1689 n.4. *See* Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1 (1979); White, *Rhode Island v. Innis: The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53 (1979).

50. 100 S. Ct. at 1689 n.4.

51. *Id.* at 1691.

test that will be applied will depend upon where the line is drawn between the fifth and sixth amendments. That line is not very clear, because the point at which "judicial proceedings" commence never has been clearly defined.[52] In addition, the fifth amendment privilege against compelled self-incrimination never has been held to cease at the time when the sixth amendment right to counsel becomes applicable. It is difficult then, to imagine a justification for applying two distinct tests to the right to counsel, when that right, whether based on the fifth or sixth amendment, is designed to protect a suspect in his confrontations with the authorities.

The definition of "interrogation" formulated by the *Innis* Court *could* be used effectively to protect the individual, as was envisioned by the *Miranda* Court. Included in the phraseology of the definition is a focus on the perceptions of the suspect,[53] thus providing a subjective perspective and providing the suspect with a measure of "personal protection." Included also is an objective inquiry into the mind of the policeman[54]—an inquiry whether a reasonable policeman should have known that his words or actions were likely to elicit an incriminating response. Though there is no focus on the actual *intent* of the policeman in eliciting such a response, the Court states that this intent, if found, will not be "irrelevant."[55] If properly utilized, this definition could go far in protecting an individual from the dangers inherent in a police-dominated atmosphere. Its application in the instant case, however, seems contrary to the concept of that protection. Whereas the Court previously had stated that "a confession obtained by compulsion must be excluded *whatever* may have been the character of the compulsion,"[56] the *Innis* Court acknowledged that "subtle compulsion" was utilized, but condoned its use.[57] Whereas the *Miranda* Court had attempted to eliminate various methods of psychological coercion that were taught by police interrogation manuals,[58] the *Innis* Court accepts as uncoercive the statements by the officers that were of the type described in those manuals.[59] Further-

52. *See* Brewer v. Williams, 430 U.S. 387 (1977); Kirby v. Illinois, 406 U.S. 682 (1972).

53. 100 S. Ct. at 1689-90.

54. *Id.*

55. *Id.* at 1690 n.7.

56. Wan v. United States, 266 U.S. 1, 14-15 (1924).

57. 100 S. Ct. at 1691.

58. INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956); ROYAL & SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION (1976).

59. The officers in the car with Innis would appear to have used a technique recommended in pre-*Miranda* interrogation manuals—they appealed to the moral element of the suspect's character. They called forth images of an innocent little han-

more, the *Innis* Court gives little guidance to lower courts; if these statements by the police are not such as would create the reasonable likelihood that a response will be elicited, one must question what remarks or actions *will* be such as to meet this test. The Court, in a rather poorly developed factual analysis, concludes that the words were "nothing more than a dialogue between the two officers to which no response . . . was invited,"[60] that there was no " 'functional equivalent' of questioning,"[61] that they were "no more than a few offhand remarks,"[62] and that the record did not suggest "that the officers' remarks were *designed* to elicit a response."[63]

By deciding that Innis had not been "interrogated," the Court avoided the difficult question of waiver. The *Miranda* decision provided that a "defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."[64] The waiver issue has become the subject of much question and debate[65] as to what is required for a defendant to waive his right to counsel once it has been invoked and whether the right can be waived after a suspect has been "interrogated" in violation of the *Miranda* decision. Both the trial court and the Rhode Island Supreme Court in the instant case addressed the issue, the former finding a waiver, and the latter not. The United States Supreme Court, however, apparently chose not to confront the question. The Court stated in a footnote: "Since we conclude that the respondent was not 'interrogated' . . . , we do not reach the question whether the respondent waived his right . . . ."[66] Perhaps the Court decided that this was not the proper case in which to decide the delicate and important waiver issue.

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dicapped girl being injured or killed by the suspect's own weapon. The *Miranda* decision had gone to great lengths in trying to condemn these techniques. It recognized that there are many subtle ways in which compulsion can be exerted that may have psychological effect on a suspect and which, when compounded with seemingly innocent words, will bring forth a *desired* confession. This decision, therefore, opens the door for police officers; *Innis* encourages all forms of subtle compulsion, subject always to the claim by the officer that, intended or not, the words or actions were not such as would be reasonably likely to elicit an incriminating response.

60. 100 S. Ct. at 1690.

61. *Id.*

62. *Id.* at 1691.

63. *Id.* at 1690 n.9.

64. 384 U.S. at 444.

65. *See* Note, *Fifth Amendment, Confessions, Self-Incrimination—Does a Request for Counsel Prohibit a Subsequent Waiver of Miranda Prior to the Presence of Counsel?*, 23 WAYNE L. REV. 1321 (1977); Note, *Criminal Law—Right to Counsel—Custodial Criminal Defendant May Not Waive Right to Counsel in the Absence of His Court-Appointed Attorney*, 5 FORDHAM URB. L.J. 401 (1977); Note, *Constitutional Law: No Clear Standard for the Waiver of an Asserted Right to Counsel*, 29 U. FLA. L. REV. 778 (1977).

66. 100 S. Ct. at 1688 n.2.

What may prove to be another important aspect of the *Innis* decision is that the Court appears to be placing considerable emphasis on the lower courts' determination of the interrogation question. The Court found it to be "significant" that the trial judge had considered the officers' remarks to be "entirely understandable."[67] Deference to the trial courts' determinations may prove to be a threat to a defendant's rights, for it weakens much of the benefit of appellate review. It is submitted that lower courts may attempt to avoid the more difficult questions of waiver, voluntariness, and psychological coercion by merely citing *Rhode Island v. Innis* and by concluding that the words or actions are not such as to meet the *Innis* definition of "interrogation." Appellate courts may then bow to the factual determination of trial courts, and the defendant will effectively have been denied a fair determination of the issue. This concern may have been partially realized in recent decisions handed down after *Innis*.[68]

Rhode Island v. Innis should be of particular interest in Louisiana, for this state is not constrained by the federal limitations on the *Miranda* opinion and, indeed, has indicated that it intends not to be so constrained.[69] Louisiana Revised Statutes 15:451 states that a confession must be shown to be voluntary "and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises."[70] Section 452 provides that "[n]o person under arrest shall be subjected to any treatment designed by effect on body or mind to compel a confession of crime."[71] These articles seem to indicate, and the Louisiana jurisprudence is in accord,[72] that

67. *Id.* at 1690 n.9.

68. *See* United States v. Henry, 100 S. Ct. at 2192 (1980), (Blackman, J., dissenting) (*Innis* cited as "reaffirming the 'deliberately elicited' criterion"); State v. Mulalley, 614 P.2d 820 (Ariz. 1980) (court finds incriminating answers admissible in response to direct questions asked of defendant who has invoked his *Miranda* rights); People v. Albert, 165 Cal. Rptr. 212, 214 (1980) (statement made to juvenile in custody concerning his bad character and the crime he was suspected of: "That was a cold thing you did . . . , selling him that hot car." The court found this to be "just conversation," and "not intended to have a question mark at the end in a 'question type fashion' "; the juvenile's statements were admitted in evidence); State v. Jones, 386 So. 2d 1363 (La. 1980). (statements of "condolence" made to a murder suspect; his responses were admissible); State v. Castillo, 389 So. 2d 1307 (La. 1980) (questions asked of the defendant before the giving of *Miranda* warnings and his incriminating statements were held to be admissible).

69. *See In re* Dino, 359 So. 2d 586, 590 (La. 1978).

70. LA. R.S. 15:451 (1950).

71. LA. R.S. 15:452 (1950).

72. *See, e.g.*, State v. Sims, 310 So. 2d 587 (La. 1975); State v. Jugger, 217 La. 687, 47 So. 2d 46 (1950); State v. Green, 210 La. 157, 26 So. 2d 487 (1946); State v. Graffam, 202 La. 869, 13 So. 2d 249 (1943); State v. Canton, 131 La. 255, 59 So. 202 (1912); State v. Young, 52 La. Ann. 478, 27 So. 50 (1899).

Louisiana is aware of the psychological pressure that can be brought to bear on a suspect and is interested in preventing such compulsion. Article I, section 16 of the Louisiana Constitution of 1974 provides, as does the United States Constitution, that "[n]o person shall be compelled to give evidence against himself."[73] Article I, section 13 provides a set of procedural safeguards similar to those found in *Miranda* to ensure the protection of the rights of the suspect in custody.[74] There is, in addition, some indication that the framers of these constitutional articles intended to go *beyond* the confines of the federal constitution and jurisprudence by providing even greater protection for potential defendants. In 1978, the Louisiana Supreme Court decided *In re Dino*.[75] In that case, the court dealt with *Miranda* as modified by *Oregon v. Mathiason*.[76] The court stated:

> [I]f *Mathiason* represents a constriction of the *Miranda* definition of significant deprivation of freedom of action, its holding clearly does not govern our interpretation of Article I, § 13 of the 1974 Louisiana Constitution whose framers intended to adopt the *Miranda* edicts *full-blown and unfettered.* Finally, it appears that, in fact, there was an intention by the convention to go beyond *Miranda* and to require more of the State . . . .[77]

Though *Dino* deals with a different aspect of *Miranda* than does the instant case, *i.e.*, "custody" as opposed to "interrogation," the argument could be extended in order to modify the *Innis* decision to protect better the rights of an individual in custody. There is some indication, however, that the Louisiana Supreme Court has adopted the *Innis* decision "full-blown and unfettered." There have been two decisions recently handed down in which *Innis* was cited. In the first of these, *State v. Jones*,[78] there appeared to be some hesitancy in adopting the *Innis* test as the court ruled on the admissibility of three incriminating statements made by a suspect in custody. Each statement was held to have been admissible, but in dealing with the third statement, one which was received under circumstances very similar to those in *Innis*, the court found a "closer question."[79] Even though the court ultimately endorsed the admission of the statement

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73. LA. CONST. art. I, § 16.

74. LA. CONST. art. I, § 13.

75. 359 So. 2d 586 (La. 1978). *See* Note, *A Cautious Step Foward*, 39 LA. L. REV. 278 (1978).

76. 429 U.S. 492 (1977).

77. 359 So. 2d at 590. *See* Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1 (1974).

78. 386 So. 2d 1363 (La. 1980).

79. *Id.* at 1366-67.

into evidence, the court assumed that the statement was *not* admissible in order to find that, even if it had been improperly introduced, it had been harmless error. This hesitancy, however, was overborne in *State v. Castillo*.[80] The *Castillo* court, with no reluctance, cited *Innis* and approved the admission of defendant's incriminating statement into evidence.

It is submitted that the majority's definition of "interrogation" in *Rhode Island v. Innis* leaves too many questions unanswered. The reader is left without knowing what "subtle compulsion" is or how and when it may be used. He is left confused concerning the rationale behind the fifth and sixth amendment dichotomy; it is unclear why two distinct tests are applied to essentially similar factual situations. No guidance is provided in the opinion as to what words or actions *will* meet the *Innis* test of "interrogation." This writer suggests that the dictates, reasoning, and purposes of *Miranda* would be served more effectively by adoption of the definition of interrogation offered by Justice Stevens in his dissenting opinion: "In my view any statement that would normally be understood by the average listener as calling for a response is the functional equivalent of a direct question, whether or not it is punctuated by a question mark."[81] By focusing on the perceptions of the "average listener," Justice Stevens' definition makes a "reasonable man" of the trier of fact, rather than requiring that he determine what a reasonable *policeman* should know. Applying this test to the instant case, one perhaps would reach a different result from that reached by the majority, a result more consistent with the dictates of *Miranda*.

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LOUISIANA'S ALIMONY PROVISIONS: A MOVE TOWARD SEXUAL EQUALITY

In a divorce proceeding the trial court ordered the husband to pay alimony to his wife. He appealed, contending that Civil Code article 148, the basis for alimony pendente lite, was unnecessarily gender-based and, therefore, unconstitutional under article I, section 3 of the Louisiana Constitution and under section 1 of the fourteenth amendment to the United States Constitution. The First Circuit

80. 389 So. 2d 1307 (La. 1980).

81. 100 S. Ct. at 1694 (Stevens, J., dissenting).