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CRIMINAL PROCEDURE—SEARCHING FOR THE PROPER BALANCE IN DEFINING A *MIRANDA* INTERROGATION: THREE PERSPECTIVES ON *RHODE ISLAND V. INNIS*, 446 U.S. 291 (1980).

I. INTRODUCTION

In *Miranda v. Arizona*,[1] the United States Supreme Court held that "the 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."[2] The Court also stated in dictum,[3] "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present."[4] Recently, in *Rhode Island v. Innis*,[5] the United States Supreme Court held that the "term interrogation under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[6] The Court defined "interrogation" from the viewpoint of the police rather than from the perspective of the suspect or of a reasonable person in the position of the suspect. *Innis* joins other Burger Court decisions in a "fundamental rejection of the premises of *Miranda* . . . ."[7] *Innis* also rejects an approach advanced by Justice

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1. 384 U.S. 436 (1966).

2. *Id.* at 444. The procedural safeguards include warning the defendant 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." *Id.*

3. The directive is dictum because none of the cases before the Court in *Miranda* involved a defendant who asked to consult with counsel. A technical reading of *Miranda* thus would enable the Court in Rhode Island v. Innis, 446 U.S. 291 (1980), to label the *Miranda* directive as not controlling. The Court has not used this approach in dealing with subsequent *Miranda* issues since Harris v. New York, 401 U.S. 222 (1971). *See* Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 107-08 (1977). Notably, the *Innis* Court refused to utilize the dictum approach. Instead, the Court phrased the issue as "whether the respondent was 'interrogated' by the police officers in violation of the respondent's undisputed right under *Miranda* to remain silent until he had consulted with a lawyer." 446 U.S. 291, 298 (1980).

4. 384 U.S. at 474.

5. 446 U.S. 291 (1980).

6. *Id.* at 301.

7. Stone, *supra* note 3, at 168. For a discussion of the Burger Court treatment of

Stevens that more faithfully adheres to the concerns underlying *Miranda.*[8]

On January 17, 1975 at about 4:30 a.m.,[9] Thomas Innis was arrested at gunpoint[10] by a Providence police officer on a public street for the kidnapping, robbery, and murder of a cab driver that had occurred a few days earlier.[11] Although all three crimes had been committed with a shotgun, Innis did not have the gun when arrested.[12] The arresting officer promptly handcuffed Innis[13] and, pursuant to *Miranda*,[14] advised him of his constitutional rights, including the right to speak to an attorney.[15] When two other officers repeated the warnings,[16] Innis stated that he wanted to see an attorney.[17] The police then ceased interrogation[18] and placed Innis in a car for the ride to headquarters.[19] The officer in charge instructed the three patrolmen accompanying Innis not to question or coerce the latter in any way during the ride.[20] En route to the station one of the officers stated, " '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.' "[21] Innis, who clearly was able to hear the conversation, asked the police to return to the scene of the arrest so that he could show them where the shotgun was hidden.[22] The patrol wagon returned to the scene of the arrest where Innis again was warned of his rights. He acknowledged that he understood them

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Miranda, *see* note 191 *infra*.

8. *See* 446 U.S. at 307-17 (Stevens, J., dissenting). Justice Stevens' dissent is discussed in text accompanying notes 195-206 *infra*.

9. *Id.* at 293-94.

10. Brief of the Respondent Innis at 4, Rhode Island v. Innis, 446 U.S. at 291.

11. *Id.* at 295.

12. *Id.* at 294.

13. Brief of the Respondent Innis at 4, Rhode Island v. Innis, *id.* at 291.

14. *Id.*

15. For a full discussion of the *Miranda* rights and the procedures that must be followed once the rights are invoked, *see* text accompanying notes 67-72 *infra*.

16. 446 U.S. at 294.

17. *Id.*

18. 391 A.2d 1158, 1169 (1978) (Kelleher, J., dissenting), *vacated*, 446 U.S. at 291.

19. *Id.* at 294.

20. *Id.*

21. *Id.* at 294-95. Two other versions of the conversation were related by the other police officers in the car. According to one version, the police officer said, " '[I]t would be too bad if the little . . . girl—would pick up the gun, maybe kill herself.' " *Id.* at 295. See also White, Rhode Island v. Innis: *The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53 n.7 (1979).

22. 446 U.S. at 295.

and then led the police to the hidden shotgun.[23] At the time Innis indicated that the officers should turn back, the car had traveled no more than a mile from the scene of the arrest and only a few minutes had elapsed.[24]

At the murder trial the judge assumed, without deciding, that the police conversation constituted an interrogation.[25] Although *Miranda* prohibits police interrogation of a custodial suspect after the suspect has invoked his right to an attorney,[26] the trial judge held that Innis' *Miranda* rights had not been violated. The judge concluded that, although Innis had invoked his *Miranda* right to an attorney, he had waived his rights by leading the police to the buried gun[27] before consulting with counsel. Without determining whether the police had interrogated Innis, the court allowed the gun to be admitted into evidence. The jury returned verdicts of guilty on all charges.[28]

On appeal, the Rhode Island Supreme Court reversed the murder conviction, holding that the "handicapped child conversation" amounted to an interrogation at a time when interrogation was prohibited by *Miranda*.[29] The court also held that Innis had not waived his *Miranda* rights; thus, the shotgun should not have been admitted into evidence.[30]

The United States Supreme Court held that the contested conversation was not an interrogation within the meaning of *Miranda*. According to the Court, the term "interrogation" under *Miranda* refers both to express questioning and to anything reasonably likely to elicit an incriminating response from a suspect.[31] Justice White concurred, preferring to reverse the judgment for the reasons stated in his dissenting opinion in *Brewer v. Williams*.[32] The court refused to adopt his *Brewer* views and Jus-

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23. *Id.*
24. *Id.*
25. *Id.* at 308 (Stevens, J., dissenting).
26. 384 U.S. at 444-45.
27. 446 U.S. at 308 (Stevens, J., dissenting).
28. *Id.* at 296.
29. 391 A.2d at 1162.
30. *Id.* at 1164.
31. 446 U.S. at 301.
32. 430 U.S. 387 (1977). As discussed more fully in the text accompanying notes 97-106 *infra*, defendant Williams was indicted on abduction charges and then was accompanied by police officers on a 160-mile ride back to Des Moines where his arrest warrant had been issued. *Id.* at 392. Prior to the trip, Williams was advised by a local attorney not to make any statements about the abduction until he had consulted with a Des Moines attorney. *Id.* at 391. During the ride, however,

tice White joined the *Innis* opinion in order to reverse the state court decision. Chief Justice Burger also concurred in the judgment.[33] He felt the *Innis* result was "not inconsistent with *Miranda* . . . ."[34] Although the Chief Justice concurred in the decision, he expressed fear that the Court's test would introduce new elements of uncertainty in establishing the boundaries of *Miranda*.[35] Justices Marshall and Brennan dissented on the ground that the Court had misapplied its own test. They were in substantial agreement with the majority's definition of interrogation.[36] They understood the majority opinion to require "an objective inquiry into the likely effect of police conduct on a typical individual, taking into account any special susceptibility of the suspect to certain kinds of pressure of which the police know or have reason to know."[37] Justices Marshall and Brennan were "utterly at a loss, however, to understand how this objective standard as applied to the [*Innis*] facts . . . can rationally lead to the conclusion that there was no interrogation. . . ."[38] They continued, "the notion that such an appeal [by the police officer to the conscience of Innis] could not be expected to have any effect unless the suspect were known to have some special interest in handicapped children verges on the ludicrous."[39]

Justice Stevens dissented to the new definition of interrogation and advanced an alternative. Under his definition any statement "that would normally be understood by the average listener as call-

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Williams made incriminating statements after one of the officers delivered the infamous "Christian burial speech." *Id.* at 393. In a 5 to 4 decision, the United States Supreme Court ruled that Williams' sixth amendment right to counsel had been violated at the time he made the incriminating remarks and that no waiver of that right had occurred. *Id.* at 406. Justice White dissented on the ground that Williams had made a knowing and intentional waiver of his sixth amendment right when he chose to make the incriminating statements in the absence of his attorney. *Id.* at 435. Justice White felt that implicit in the majority's holding was the suggestion that the sixth amendment creates a right not to be asked any questions in counsel's absence rather than a right not to answer any questions in counsel's absence and that the right not to be asked questions must be waived before the questions are asked. In Justice White's view, "Absent coercion . . . an accused is amply protected by a rule requiring waiver before or simultaneously with the giving by him of an answer or the making by him of a statement." *Id.* at 436-37.

33. 446 U.S. at 304 (Burger, C.J., concurring).
34. *Id.*
35. *Id.*
36. *Id.* at 305. (Marshall, J., with Brennan, J., dissenting).
37. *Id.*
38. *Id.*
39. *Id.* at 305.

ing for a response[40] . . . as well as those [statements] that are designed to do so, should be considered interrogation."[41] Justice Stevens also dissented to the application of the new majority test to *Innis'* facts. In his view, the trial record was incomplete because the trial judge had assumed, but failed to decide, whether an interrogation had occurred. Justice Stevens felt that the proper procedure would be to remand the case to the trial court for findings directed at the new standard.[42]

This note maintains that the Rhode Island Supreme Court's finding of interrogation was based upon an inapposite United States Supreme Court case, an improper subjective standard, and an incomplete analysis of the circumstances under which the interrogation occurred. Despite these shortcomings, the final conclusion of the Rhode Island Supreme Court can be supported by an objective, reasonable person standard.[43] Under this standard the court would fully analyze the atmosphere of coercion created by the police and determine whether a reasonable person in Innis' position would feel compelled to retrieve the missing shotgun following the police conversation. The objective, reasonable person approach is the best test for interrogation analysis because it adheres to the underlying rationale of *Miranda*. It continues to provide the custodial suspect with meaningful protection against compelled self-incrimination induced by police pressures. The United States Supreme Court majority's treatment of the *Innis* interrogation issue represents a significant departure from the foundations of *Miranda* and should be reconsidered.

II. *MIRANDA* AND ITS BACKGROUND

A. *Pre-*Miranda *Treatment of the Fifth Amendment*

The fifth amendment provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself . . . ."[44] The Supreme Court has interpreted the amendment to prohibit the prosecution[45] from compelling self-incriminating an-

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40. *Id.* at 309 (Stevens, J., dissenting).

41. *Id.* at 311.

42. *Id.* at 314.

43. This test has been used by numerous lower courts in analyzing the custodial issue. *See* Hunter v. State, 590 P.2d 888 (Alaska 1979) (collecting cases). The same test should be used in analyzing the interrogation issue. *See* footnote 187 *infra*.

44. U.S. CONST. amend. V.

45. In Malloy v. Hogan, 378 U.S. 1 (1964), the Court held that the fifth amendment privilege applied to the states and that the standards underlying the privilege applied to state court proceedings. *Id.* at 6.

swers in civil or criminal proceedings, whether judicial or extrajudicial, if such answers might be used against the individual in a criminal trial.[46] The amendment prohibits only *compelled* self-incrimination. Thus, in the absence of official coercion, self-incriminating statements do not conflict with the constitutional guarantee.[47]

Prior to *Miranda*, the Court struggled to articulate a standard against which to judge the admissibility of confessions obtained through police interrogation. The Court had long recognized the importance of confessions to law enforcement efforts.[48] The Court had become increasingly disturbed with gross violations of constitutional rights by overzealous police officers. For example, in *Brown v. Mississippi*,[49] a state homicide conviction was based upon a confession obtained through physical torture.[50] The Court found the whole procedure "revolting to the sense of justice" and ruled it in violation of the fourteenth amendment due process clause.[51] In 1931, a congressional commission studying law enforcement confirmed the Court's fears that unrestricted custodial police interrogations resulted in untrustworthy confessions and loss of public confidence in the criminal justice system. In the words of the commission:

> [n]ot only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. . . . "If you use your fists, you are not so likely to use your wits." . . . "The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public."[52]

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46. *See, e.g.*, McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (privilege upheld in bankruptcy proceeding) in which the Court stated, "The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." *See also* Quinn v. United States, 349 U.S. 155, 163 (1955) (Congressional inquiry).

47. United States v. Washington, 431 U.S. 181, 187 (1977).

48. Culombe v. Connecticut, 367 U.S. 568, 578-80 (1961) (Frankfurter, J., writing the majority opinion in which Stewart, J., joined).

49. 297 U.S. 278 (1936).

50. *Id.* at 284.

51. *Id.* at 286.

52. IV National Comm'n on Law Observance & Enforcement, Rep. on Lawlessness in Law Enforcement 5 (1931) (Wickersham Report).

During the thirty years following *Brown*, the Court developed a test requiring examination of the "totality of the circumstances" to determine the voluntariness of a confession obtained through police interrogation.[53] The voluntariness test "proved to be highly subtle and elusive."[54] The courts had to examine numerous variables in order to balance police behavior in obtaining the confession against the ability of the accused to decide freely whether to admit, to deny, or to refuse to answer.[55] The courts considered such factors as: Duration and nature of the incommunicado custody; presence or absence of advice concerning the defendant's constitutional rights; and granting or refusing requests to communicate with lawyers, relatives, or friends.[56] Many state courts used the ambiguity of the "totality of the circumstances" concept to uphold confessions that, if not clearly unconstitutional, were of questionable validity.[57] For example, in *Davis v. North Carolina*,[58] the North Carolina Superior and Supreme Courts held a confession to be voluntary, despite police notations on the arrest sheet stating, "Do not allow anyone to see Davis. Or allow him to use the telephone . . .";[59] and despite the fact that no one but the police spoke to Davis during the sixteen days of detention and interrogation that preceded his confession.[60]

It thus appeared inevitable that the Court would seek "some automatic device by which the potential evils of incommunicado interrogation [could] be controlled."[61] The Court took a major step toward this goal by holding in *Massiah v. United States*[62] that a post-indictment interrogation was a "critical stage" of the prosecution to which the sixth amendment right to counsel attached.[63] Thus, incriminating statements elicited from the accused after he had been indicted but before he had consulted with counsel were

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53. Stone, *supra* note 3, at 102.
54. *Id.*
55. Miranda v. Arizona, 384 U.S. at 534 (White, J., with Harlan & Stewart, JJ., dissenting).
56. *Id.*
57. Stone, *supra* note 3, at 102.
58. 221 F. Supp. 494 (E.D.N.C. 1963), *aff'd*, 339 F.2d 770 (4th Cir. 1964), *rev'd*, 384 U.S. 737 (1966).
59. *Id.* at 744.
60. *Id.* at 745.
61. Stone, *supra* note 3, at 103 n.21.
62. 377 U.S. 201 (1964).
63. *Id.* at 205-06.

excluded.[64] One month later, the Court in *Escobedo v. Illinois*[65] seemed to extend the reach of the sixth amendment right to counsel to pre-indictment interrogations. The precise scope of *Escobedo* was left unclear because the Court expressly limited its holding to the facts at hand.[66]

B. Miranda

Two years after issuing *Escobedo*, the United States Supreme Court shifted its focus from the sixth to the fifth amendment and issued *Miranda*. The Court felt compelled to "apply more exacting restrictions than [that employed by] the Fourteenth Amendment's voluntariness test" in determining the admissibility of confessions resulting from police interrogation.[67] The Court was concerned with the "inherently compelling pressures which . . . undermine the individual's will to resist and . . . [which] compel him to speak where he would not otherwise do so freely [during custodial interrogation.]"[68] The Court concluded that, to offset the coercive pressures inherent in custodial interrogation and to safeguard the fifth amendment right against the "potentiality for compulsion," the prosecution in a criminal case could not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the suspect unless it demonstrated the use of procedures effective to protect the fifth amendment privilege.[69] These procedures

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64. *Id.* at 206. As discussed more fully at text accompanying notes 129-135 *infra*, the sixth amendment ensures that after a certain point the accused must be shielded from the state by an attorney. This shield requires the state to establish guilt by evidence independently and freely secured. The State may not prove its charge against the accused by coercing statements from him. It thus becomes important for sixth amendment purposes to determine at what point of the prosecution an accused is constitutionally entitled to have an attorney present during his meeting with the state.

65. 378 U.S. 478 (1964).

66. Stone, *supra* note 3, at 103. The *Escobedo* Court held that

> where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution . . . .

378 U.S. at 490-91.

67. 384 U.S. at 511 (Harlan, J., with Stewart & White, JJ., dissenting).

68. *Id.* at 467.

69. *Id.* at 444.

included warning the individual prior to questioning that he had a right to remain silent, that any statement he made could be used as evidence against him, and that he had a right to the assistance of counsel, retained or appointed.[70] The suspect could waive these rights if the waiver was made voluntarily, knowingly, and intelligently.[71] If the individual indicated in any manner at any stage of the process that he wished either to consult an attorney or not to be questioned, the interrogation had to cease.[72]

The aim of the *Miranda* safeguards was to eliminate all pressures beyond those inherent in arrest and detention.[73] The coercive pressures produced solely by arrest and detention were not found to be substantial enough to require *Miranda's* "protective" warnings.[74] Instead, the Court believed that the level of compulsion that would jeopardize exercise of the privilege against compelled self-incrimination was reached when both custody and interrogation were present. The Court recognized that the interplay between police interrogation and police custody, each condition reinforcing the pressures and anxieties produced by the other, made custodial police interrogation devastating for the suspect.[75] The Court stated, "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described cannot be otherwise than under compulsion to speak."[76]

If one of the components, interrogation or custody, is missing there is no custodial interrogation. Statements made to the police in such circumstances are admissible regardless of whether *Miranda* warnings were given. Thus, volunteered statements of any kind are not barred by the fifth amendment and are not affected by the *Miranda* holding.[77] They do not result from an interrogation because police-induced pressures have not impaired the capacity of the defendant to decide rationally whether to speak to

70. The *Miranda* Court recognized that the Constitution does not require any particular solution to the problem of ensuring compliance with the fifth amendment. The Court thus declared that other procedures can be used which are at least as effective in apprising the accused of his fifth amendment rights. 384 U.S. at 467.

71. *Id.* at 444.

72. *Id.*

73. Kamisar, Brewer v. Williams, Massiah and Miranda: *What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1, 18 (1978).

74. *Id.* at 18 n.112.

75. *Id.* at 63.

76. 384 U.S. at 461.

77. *Id.* at 478.

the police.[78] Similarly, statements obtained through police interviews conducted in the home of the suspect, where the suspect is free to terminate the meeting, are not affected by the decision. There is no custody because the suspect has not been cut off from the outside world and subjected to compulsion within the meaning of *Miranda*.[79]

Miranda defined custodial interrogation as questioning initiated by law enforcement officers after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way.[80] Through this definition and the safeguards outlined above, *Miranda* sought to harmonize the public interest in discovery and punishment of criminal offenders with the individual interest in freedom from compulsory self-incrimination. Dissatisfaction with the balance struck by *Miranda*, however, was clearly evident. Dissenting, Justice White wrote, "Even if the new concept can be said to have advantages of some sort over the present law, they are far outweighed by its likely undesirable impact on other very relevant and important interests."[81]

C. *Application of* Miranda

Tension between law enforcement needs, fifth amendment interests, and confusion over the proper definition of "custodial interrogation" exists today as in 1966 when *Miranda* was decided.[82]

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78. *Id.* at 465.

79. *See* Kamisar, *supra* note 73, at 68.

80. 384 U.S. at 444.

81. *Id.* at 539 (White, J., with Harlan & Stewart, JJ., dissenting). According to Justice White, the *Miranda* decision would have several undesirable consequences. First, with loss of protection of the criminal law, people would engage in violent self-help, employing guns, knives, and the help of sympathetic neighbors. Second, the decision would have a corrosive effect on the criminal law as an effective device to prevent crime: "[t]he easier it is to get away with rape and murder, the less the deterrent effect on those who are inclined to attempt it." *Id.* at 543. Third, release of a defendant who has confessed or would do so in response to noncoercive questioning might constitute a callous disregard for his welfare because no attempt would be made to help him following his confession. Fourth, the decision might delay release of the innocent because an individual arrested on probable cause would no longer be able to extricate himself quickly by listening to the circumstances of his arrest and explaining his own actions. These acts would have to await the hiring or appointment of an attorney, consultations with counsel, and a session with the police. Finally, the decision would slow down the investigation and apprehension of confederates in cases where time is of the essence, particularly those involving national security or organized crime. *Id.* at 542-44.

82. *See generally* Annot., 31 A.L.R.3d 565 (1970) for lengthy treatment of "custodial" cases. *See Criminal Procedure—Interrogation in Violation of Miranda*—State

Courts have differed in their treatment of the interrogation issue. For example, jurisdictions disagree over whether the reading of a ballistic report to a defendant constitutes an interrogation. In *Combs v. Wingo*,[83] the Sixth Circuit held that such a reading was an implied question, hence an interrogation.[84] The opposite conclusion was reached by the Kentucky Court of Appeals in *Combs v. Commonwealth*.[85] Similarly, courts disagree over the significance of a confrontation between codefendants. In *People v. Doss*,[86] the court ruled that no interrogation occurred when defendant was brought into the presence of codefendant who told defendant to reveal the location of the weapon.[87] In *Commonwealth v. Hamilton*,[88] however, the court held that an interrogation took place when the police arranged a confrontation between defendant and the accomplice at which the accomplice accused defendant of the crime.[89]

Innis required the Rhode Island Supreme Court to clarify the meaning of interrogation, left unresolved by *Miranda*. The factual setting in which Innis' interrogation took place demonstrates the need for continued judicial review of the balance *Miranda* struck between law enforcement needs and fifth amendment protections. In light of the difficulty that courts have had in striking the perfect balance between these two interests, *Innis* presented the Rhode Island Supreme Court with a challenging task.

III. RHODE ISLAND SUPREME COURT DECISION

The Rhode Island Supreme Court began its treatment of *Innis* by finding that defendant was in custody at the time of the police-initiated "handicapped child conversation."[90] Thus, the first prong of the *Miranda* custodial interrogation test was met. The court then determined that an interrogation violating *Miranda* had occurred.[91] The violation was predicated on two factors. First, the

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v. Innis, 13 SUFFOLK L. REV. 591 (1979) for compilation of federal and state court treatment of "interrogation" cases.

83. 465 F.2d 96 (6th Cir. 1972).

84. *Id.* at 99.

85. 438 S.W.2d 82, 84-85 (Ky. 1969).

86. 44 Ill. 2d 541, 256 N.E.2d 753 (1970).

87. *Id.* at 544-45, 256 N.E.2d at 755-56.

88. 445 Pa. 292, 285 A.2d 172 (1971).

89. *Id.* at 297, 285 A.2d at 175.

90. 391 A.2d at 1161.

91. As noted in text accompanying note 72 *supra*, *Miranda* prohibits further interrogation if an individual indicates that he wishes to consult with an attorney in

court was persuaded by the factual similarities between *Innis* and *Brewer v. Williams*.[92] Second, a subjective evaluation of the circumstances under which the police conversation took place, as viewed by the present defendant, indicated that Innis had been interrogated.

A. *Reliance on* Brewer

The Rhode Island Supreme Court's holding is assailable on several grounds, even though its conclusion can be supported by the application of a different test.[93] First, the state court emphasized that the United States Supreme Court had upheld a finding of interrogation in *Williams* in a factual setting that differed from *Innis* in "constitutionally insignificant [ways]."[94] Although the cases were similar in several respects, the United States Supreme Court decided *Williams* on sixth and not fifth amendment grounds and the discussion of interrogation was considered "constitutionally irrelevant."[95] The *Williams* Court, however, seemed to confuse the fifth and sixth amendments.[96] The Rhode Island Supreme Court's use of *Williams* as support for its finding of an interrogation in *Innis*, therefore, is understandable.

In *Williams*, defendant was arraigned on abduction charges in Davenport, Iowa and accompanied by two police officers on a 160-mile ride to Des Moines, where the abduction arrest warrant had been issued.[97] Prior to the drive, Williams spoke with a Des Moines attorney. The attorney instructed Williams not to discuss the abduction with the police. The lawyer also obtained a promise from Detective Leaming that the latter would not interrogate Williams on the trip to Des Moines.[98] En route, Detective Leaming, who believed that the abducted girl was dead and who

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the course of a custodial interrogation. This safeguard exists in addition to the warning about the right to counsel that must be given before the police begin a custodial interrogation. Innis requested counsel but had not yet seen an attorney when the handicapped child conversation occurred. The Rhode Island Supreme Court held that the conversation constituted an interrogation which had occurred before the police complied with Innis' request for counsel. 391 A.2d at 1162.

92. 430 U.S. at 387.

93. *See* text accompanying notes 193-206 *infra*.

94. 391 A.2d at 1162.

95. Kamisar, *supra* note 73, at 4.

96. *Id.* at 33.

97. 430 U.S. at 391-92.

98. *Id.* at 401 n.8. *But see* Kamisar, *Foreword*: Brewer v. Williams—*A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 212 n.23 (1977), in which the author maintains that the record does not indicate that such an agreement was made.

knew that Williams was deeply religious and a former mental patient, delivered the infamous "Christian burial speech."[99] Addressing Williams as "Reverend," Leaming stressed that the parents of the abducted child were entitled to have a Christian burial for their daughter.[100] Williams was told not to answer but to "think about it."[101] As the car approached Des Moines, Williams indicated that he would take the police to the body.[102] At the murder trial, the judge admitted evidence related to statements Williams had made in the car on the ground that Williams had waived his sixth amendment right to counsel.[103]

The United States Supreme Court held that Williams was deprived of his sixth and fourteenth amendment rights to counsel.[104] The sixth amendment states, "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[105] The Court found no waiver by Williams of these rights.[106] The Court also stated that there was no need to review the doctrine of *Miranda*, designed to secure the fifth amendment right against compulsory self-incrimination, because of the sixth amendment violation in the case.[107]

In *Williams*, the Supreme Court said that the sixth amendment case of *Massiah v. United States*[108] gives an individual the right to legal representation during interrogation once adversary proceedings against him have commenced.[109] The Court found that judicial proceedings against Williams had commenced before the start of the ride to Des Moines because an arrest warrant had been issued upon which Williams had been arraigned.[110] The Court then found that the Christian burial speech was "tantamount to interrogation" and that no sixth amendment right would have attached "if there had been no interrogation."[111]

The sixth amendment rule of *Massiah* was enunciated incor-

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99. 430 U.S. at 392.
100. *Id.* at 393.
101. *Id.*
102. *Id.*
103. *Id.* at 394.
104. *Id.* at 397-98.
105. U.S. CONST. amend. VI.
106. 430 U.S. at 404.
107. *Id.* at 397.
108. 377 U.S. at 201.
109. 430 U.S. at 401.
110. *Id.* at 399.
111. *Id.* at 400.

rectly by the *Williams* Court.[112] *Massiah* held that, once adversary proceedings have commenced against an individual, he has a right to legal representation whether or not the government interrogates him.[113] *Massiah* involved no police "interrogation" as the term is normally used because there were no compelling influences present.[114] Instead, *Massiah* involved a defendant who, after being indicted and released on bail, made incriminating statements while talking with his codefendant in a car owned by the latter.[115] A radio transmitter had been installed in the car to enable federal agents, with whom codefendant was cooperating, to overhear the conversation.[116] The Court held that defendant was denied his sixth amendment right to assistance of counsel when "there was used against him at his trial evidence 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."[117]

The *Massiah* Court relied upon language in *Spano v. United States*.[118] The *Spano* Court struck a confession based upon the totality of the circumstances under which the confession had been obtained.[119] The police obtained the Spano confession through a jailhouse interrogation that occurred after indictment and in the absence of counsel. Four concurring Justices in *Spano* advanced the view that the right to assistance of counsel attaches once a person is formally charged, or once adversary proceedings otherwise have been initiated against him.[120] Unless the right to assistance of counsel is waived, any incriminating statements made in the absence of counsel in such circumstances will be excluded.[121] The views of the *Spano* concurring Justices appeared to form the basis of *Massiah*.[122]

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112. *See* Kamisar, *supra* note 73, at 33.

113. *Id.*

114. *Id.*

115. 377 U.S. at 202-03.

116. *Id.*

117. *Id.* at 206.

118. *Id.* at 204-06 (relying on Spano v. United States, 360 U.S. 315 (1959)).

119. *Id.* at 323.

120. *Id.* at 324 (Douglas, J., with Black & Brennan, JJ., concurring); *id.* at 326 (Stewart, J., with Douglas & Brennan, JJ., concurring).

121. *Id.* at 324 (Douglas, J., with Black & Brennan, JJ., concurring); *id.* at 326 (Stewart, J., with Douglas & Brennan, JJ., concurring).

122. The *Massiah* Court noted that the *Spano* opinion rested upon the totality of the circumstances under which the confession had been obtained. The *Massiah* majority then quoted considerable portions of the *Spano* concurrences and stated that the view of concurring Justices reflected a constitutional principle that had been broadly reaffirmed by the Court since *Spano*. 377 U.S. at 205.

It was immaterial to the *Massiah* Court whether the incriminating statements were elicited in a coercive or noncoercive setting.[123] The Court found it irrelevant that in *Spano*:

> The defendant was interrogated in a police station, while here [in *Massiah*] the damaging testimony was elicited from the defendant without his knowledge . . ."if such a rule [the rule advocated by the concurring justices in *Spano*] is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse . . . ."[124]

The *timing* of the governmental efforts to obtain incriminating statements was significant to the *Massiah* Court. To stress its concern over the element of timing, the Court cited language from *Powell v. Alabama*:[125] "during . . . the most critical period of the proceedings . . . that is to say, from . . . arraignment until the beginning of their trial, when consultation, . . . investigation and preparation [are] vitally important, the defendants . . . [are] . . . entitled to such aid [of counsel] during that period as at the trial itself."[126] Thus, in *Massiah* the indicted defendant clearly was entitled to the assistance of counsel at the time of the surreptitious police activity. The absence of counsel at this time led the Court to exclude defendant's incriminating statements.

Massiah demonstrates that the presence of a fifth amendment kind of interrogation[127] is immaterial in sixth amendment cases. The United States Supreme Court in *Innis* made a similar observation. The Court indicated that the Rhode Island Supreme Court erred in looking to *Brewer* for guidance in defining a *Miranda* interrogation. The Court stated that "[t]he definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct."[128]

This statement becomes clearer when the underlying rationales for the fifth and sixth amendments are examined. The sixth

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123. *See* Kamisar, *supra* note 73, at 41.

124. 377 U.S. at 206.

125. 287 U.S. 45 (1932).

126. 377 U.S. at 205 (quoting language from Powell v. Alabama, *id*).

127. For fifth amendment purposes, interrogation is defined as police-induced pressures which impair the defendant's capacity to decide rationally whether to speak to the police about the alleged offense. *See* text accompanying notes 68 & 78 *supra*.

128. 446 U.S. at 300 n.4.

amendment ensures that the defendant has legal assistance in any critical confrontation with the state after judicial proceedings have begun.[129] Counsel helps the defendant to make wise decisions in preparing his case and shields him from state efforts to obtain self-incriminating evidence.[130] The amendment thus can be read to imply that, after a certain point, a criminal proceeding becomes accusatorial rather than inquisitorial.[131] In *Rogers v. Richmond*[132] it was held that, under the accusatorial system, "the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."[133] While our system has inquisitorial attributes, such as police interrogation, investigative grand juries, and undercover surveillance, the sixth amendment has been read to prohibit these activities after the accusatorial process has begun.[134]

To summarize, if police talk with the defendant after the beginning of judicial proceedings, it is the timing of the conversation that brings the sixth amendment into play. Once the sixth amendment attaches it prohibits all police efforts, if they are "tantamount to interrogation," to obtain self-incriminating evidence from the defendant.[135]

Even if the sixth amendment is not applicable to a factual setting because judicial proceedings have not yet begun, the fifth amendment right against compelled self-incrimination might apply. In contrast to the sixth amendment, which is concerned with the timing of police conversations with the accused, the fifth amendment is concerned solely with coercion in a confrontation between the police and the accused.[136] Fifth amendment analysis differs from sixth amendment analysis because the fifth prohibits only compelled self-incrimination, regardless of when it occurs. Thus,

129. Grano, Rhode Island v. Innis: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 16 (1979).

130. *Id.* at 9-10.

131. *Id.* at 23.

132. 365 U.S. 534 (1961).

133. *Id.* at 541 (1961).

134. Grano, *supra* note 129, at 24. Language from *Massiah* supports this view:

> [i]t was pointed out [in *Spano*] that under our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, "in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law."

377 U.S. at 204.

135. Grano, *supra* note 129, at 10.

136. *See* text accompanying notes 44-47 *supra*.

the question of interrogation need not be resolved identically for fifth and sixth amendment purposes. Fifth amendment interrogation includes only police conduct exerting a compelling influence on the accused that impairs the accused's capacity to determine whether to remain silent.[137] Interrogation for the sixth amendment includes all police conduct likely to elicit incriminating evidence from the defendant that occurs after judicial proceedings have begun.[138]

It is clear, therefore, that the *Williams* Court's characterization of the Christian burial speech as "tantamount to interrogation" was dicta since it had no relevance to the sixth amendment holding of the case.[139] The *Williams* majority decision failed to rest its holding on the coercive setting under which the speech took place. A coercive setting is necessary for a finding of interrogation within the meaning of the fifth amendment. Accordingly, the "tantamount to interrogation" language should have no precedential value for *Innis* or for other fifth amendment cases.[140]

Even if the *Williams* interrogation language initially provides guidance for fifth amendment cases, two further considerations counsel against placing primary reliance upon it. First, four Justices dissented vigorously to the *Williams* majority's classification of the Christian burial speech as tantamount to interrogation.[141] The views of interrogation taken by the dissenting Justices are "disturbing" to one noted commentator.[142] Their opinions show deep

137. *See* text accompanying notes 68 & 78 *supra*.

138. Grano, *supra* note 114, at 41 n.260.

139. This assertion presumes that the *Williams* majority considered the "Christian burial speech" to be an interrogation within the meaning of *Miranda* but not *Massiah*. Although it is possible that the *Williams* majority viewed the "burial" speech as a *Massiah* interrogation, this conclusion appears unlikely given the context in which the reference appeared. For example, prior to its "tantamount to interrogation" language, the *Williams* Court stated "that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as . . . if he had formally interrogated him." 430 U.S. at 399. This language suggests concern over the *Miranda* concept of a coercive setting where police pressures affect the accused's ability to make rational decisions, rather than the *Massiah* concept of the timing of the conversation. *See* Kamisar, *supra* note 73, at 4 n.27. Thus, it is fair to conclude that the interrogation language related to fifth amendment concerns and was constitutionally irrelevant to the final sixth amendment holding of the *Williams* case.

140. If *Williams* were analyzed as a *Miranda* fifth amendment case, strong arguments could be made that the police conduct violated the protection against compelled self-incrimination. *See* Kamisar, *supra* note 73, at 23. A comparison of *Innis* with *Williams* would then be persuasive.

141. 430 U.S. at 419 (Burger, C.J., dissenting); *id.* at 439 (Blackmun, J., with White & Rehnquist, JJ., dissenting).

142. *See* Kamisar, *supra* note 73, at 5-24.

division within the Court on the interrogation issue. Given the strong wording of the dissents and the cursory treatment given by the majority to the interrogation issue, *Williams* is not conclusive authority for fifth amendment interrogation issues. Second, if the subjective police officer standard, implicitly used by the *Williams* majority to determine whether an interrogation had occurred, were employed in fifth amendment cases the protections created by *Miranda* would be eroded. The *Williams* Court stated, "Detective Leaming *deliberately* and *designedly* set out to elicit information from Williams."[143] This language suggests that the test for an interrogation must focus on the subjective intentions of the police. As discussed below,[144] this test, standing alone, does not secure the amount of protection envisioned by *Miranda* for custodial suspects facing police-induced pressure to discuss the alleged crime.

The Rhode Island Supreme Court should have placed little reliance on *Williams'* "tantamount to interrogation" language in determining whether an impermissible interrogation of Innis occurred. The Rhode Island court should have focused on whether the requisite degree of compulsion existed at the time Innis made his incriminating statement. *Miranda* requires such compulsion before an interrogation within the meaning of the fifth amendment will be found to have occurred.

B. *Rhode Island Supreme Court Analysis of Compulsion*

The Rhode Island Supreme Court did address the "potential for compulsion" existing at the time of the police conversation in *Innis*. The court, however, did not employ the most workable standard in its evaluation of the conversation. In addition, its analysis was incomplete.

In analyzing the coercion aspect, the state supreme court rejected the state's key argument. The state maintained that the officer who made the handicapped child remarks was expressing concern for public safety and not intentionally eliciting incriminating statements from Innis. The state argued that, since the police had not intended to coerce defendant, no interrogation occurred.[145] In rejecting this analysis, the state court did not focus upon the undisclosed, subjective intention of the police during the conversation. Instead, the court looked to the subjective impressions of de-

143. 430 U.S. at 399 (emphasis added).
144. *See* text accompanying notes 184-90 *infra*.
145. 391 A.2d at 1162.

fendant upon hearing the conversation: "the defendant, alone in a police wagon with three officers at 4 a.m., underwent the same psychological pressures which moved Williams [the defendant in *Brewer v. Williams*] to lead police to the body of his victim."[146] The test used by the court represents a better application of the *Miranda* rationale than the standard it rejected. The court's test is more harmonious with *Miranda* because *Miranda* was designed to provide the defendant with the means to resist the pressures of custodial interrogation, regardless of the inner motives of the police in conducting the session. As developed more fully below,[147] police intent is an inadequate gauge for determining the presence of an interrogation.

The state court test, which examines the subjective impressions of the defendant, however, creates problems of proof. Determining how each person views his situation "would require a prescience which neither the police nor anyone else possesses."[148] A more workable test is the objective, reasonable person standard discussed below.[149]

Another factor contributing to the weakness of the Rhode Island decision was the incomplete discussion of the "potential for compulsion" upon which the impermissible interrogation was based. *Miranda* was premised upon the presence of the potential for compelled self-incriminating statements.[150] The *Miranda* Court examined the physical surroundings and the atmosphere of police-dominated settings and their impact upon the defendant to determine if the potential for compelled self-incrimination existed. Interrogation within *Miranda* was described in terms of police-created compulsion that impaired the capacity of the defendant to decide rationally whether to talk with the police.[151] To determine if *Miranda* extended to the nonstationhouse setting of *Innis*, the state court should have asked, under the most workable test, if there were sufficiently compelling circumstances to prevent a reasonable person in the position of Innis from deciding rationally whether to talk to the police. Factors to consider would have included the amount of contact between Innis and the police, the

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146. *Id.*

147. *See* text accompanying notes 184-90 *infra*.

148. United States v. Hall, 421 F.2d 540, 544 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

149. *See* text accompanying notes 193-206 *infra*.

150. 384 U.S. at 461.

151. *Id.* at 465, 467.

content of the conversation, a comparison of the police car setting with the stationhouse setting found sufficiently compelling in *Miranda*, the time of day, the number, demeanor, and rank of the police involved, and any other important factors influencing compulsion. The state court only focused on the time of the conversation, its location, and the number of individuals present.[152]

In conclusion, the Rhode Island Supreme Court based its finding of a fifth amendment interrogation upon a sixth amendment case and upon a subjective custodial defendant standard that involves difficult problems of proof. Nevertheless, the result reached by the state court is supportable under a fully developed, reasonable person test.[153]

IV. BURGER COURT MAJORITY DECISION

After reviewing the *Innis* interrogation issue, the United States Supreme Court held:

> the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.[154]

Although there are laudable aspects to the decision,[155] it significantly reduces the protections *Miranda* provided for the custodial suspect subjected to compelling police pressures to talk about the alleged crime. The decision must also be read to reject an approach that more faithfully adheres to the underlying goals of *Miranda*.[156]

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152. 391 A.2d at 1162.

153. *See* text accompanying notes 193-206 *infra*.

154. 446 U.S. at 300-01.

155. In defining interrogation, the Court did not limit itself to express questioning, but included certain "words or actions on the part of the police." *Id.* at 298-99. This view reflects a reasoned understanding of *Miranda* which dealt with the interrogation environment created by a variety of stationhouse custodial interrogation practices. As one commentator observed, "unless *Miranda* and the privilege against self-incrimination it is designed to effectuate were to become empty gestures in custodial surroundings, the Court could not have intended to limit their applicability to only . . . verbal conduct ending in question marks." Kamisar, *supra* note 73, at 14.

156. *See* text following note 194 *infra*.

The test enunciated by the Court is primarily an objective, reasonable police officer standard. The Court also included a subjective police test as one factor to consider in arriving at a final conclusion. This note analyzes both tests and the problems inherent in each.

A. *Objective, Reasonable Police Officer Test*

Examination of the Court's definition of interrogation reveals an objective, reasonable police officer test. The Court held that an interrogation occurs either through express police questioning or through any police words or actions that the police should know are reasonably likely to elicit an incriminating response from the suspect.[157] This test should be rejected for numerous reasons. First, it is a substantial departure from the foundations of *Miranda*. *Miranda* was designed to alert the suspect in custodial interrogation settings of his right to remain silent.[158] The warnings were created to ensure that the suspect was made aware of his rights at a time when he was confused and uncertain as to the tactics his captors were prepared to employ in order to obtain a confession.[159] Ideally, *Miranda* calls for evaluation of the "potential for compulsion" needed to find an interrogation from the viewpoint of each suspect placed in a police-dominated setting. This test would be difficult to apply, however, because the workings of an individual mind are too complex for a truly subjective standard. Further, courts cannot be expected to decide cases solely on the basis of self-serving statements by defendants.[160]

The *Innis* Court's objective police officer standard, however, erodes the protections created by *Miranda* in viewing interrogation through the eyes of the police. The decision enables the police to devise interrogation techniques and then forces the courts to judge the acceptability of the tactics according to the standards of the creator. The erosion is particularly significant because many of the protections envisioned by *Miranda* for the custodial suspect have not materialized. One commentator found that the police are likely to use any interrogation tactic that has not been expressly prohibited by the courts.[161] Moreover, in analyzing the circumstances

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157. 446 U.S. at 301.

158. 384 U.S. at 467.

159. Kamisar, *supra* note 78, at 51. *See also* 384 U.S. at 467.

160. Smith, *The Threshold Question in Applying* Miranda: *What Constitutes Custodial Interrogation?*, 25 S.C. L. REV. 699, 713 (1974).

161. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 598 (1979).

surrounding an interrogation, many trial judges are tempted to defer to the judgment of the police.[162] When the new Court test is superimposed upon these realities, the protection of the custodial suspect is further jeopardized.

A second objection to the objective police officer test is the failure of the Court to anticipate problems of proof that surely will develop. In footnote eight, the Court stated, "any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect."[163] The Court did not indicate how obvious the special susceptibility must be before the police will be held to have known about the reasonably likely effect of their words or actions. As Chief Justice Burger observed in his concurring opinion, "few . . . police officers are competent to make the kind of evaluation . . . contemplated; even a psychiatrist . . . would . . . employ extensive . . . observation to make the judgment now charged to police officers."[164]

The substance of footnote eight is also objectionable because it focuses attention on one defendant in one setting. Courts are not asked to evaluate the coerciveness of specific police tactics upon a reasonable person in the position of the suspect. Thus, the limited amount of protection provided by the footnote is available only on a case-by-case basis. The Court did not compensate for the limitations of footnote eight in any other manner. If the Court had also employed the objective, reasonable person test in conjunction with footnote eight, then defendants with "normal" susceptibilities, as well as defendants with "unusual" susceptibilities, would be protected. But the Court rejected the reasonable person test in favor of the objective police officer standard. Thus, a decision in one case will provide little or no guidance in another case involving a different defendant with different susceptibilities. The consequences of such a pure case-by-case approach have been aptly described. Former United States Supreme Court Justice Clark stated that, by use of the case-by-case approach, "we do not shape the conduct of local police one whit; unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of the police and

162. *Id.*

163. 446 U.S. at 302 n.8.

164. *Id.* at 304 (Burger, C.J., concurring).

prosecutors who may be intent on racking up a high percentage of successful prosecutions."[165] Similarly, since the courts and police will receive little guidance from prior cases in applying the new *Innis* test, the danger that the police will conduct their interrogations without regard for the constitutional rights of the suspect increases.[166]

The problems inherent in the Court's objective police officer standard become apparent upon application of the test to the *Innis* facts. The Court examined the subject matter of the police officer's remarks, the length of the police-suspect conversation, the demeanor of the suspect, and the number of police present during the conversation.

Analysis of the content of the conversation is an important factor that deserves considerable weight. Trickery and deceit are staples of current police interrogation practices[167] and often successfully produce confessions. For example, one widely read manual outlines specific techniques to be used in interrogating a suspect. Most of the techniques involve some form of deception because the officer is required to make statements that he knows are untrue or to play a role that is inconsistent with his actual feelings.[168] The Supreme Court did not find the police comments about handicapped children to be "particularly evocative" under the objective police officer test.[169] The dissents strongly disagreed with this conclusion. Their belief that the comments were highly evocative presents the better view, either because they realistically applied the objective police officer test[170] or because a reasonable person in the place of Innis would have responded to the comments just as Innis reacted.[171]

In applying the objective police officer test the Court examined several factors contributing to the atmosphere in which the police-suspect exchange occurred. These factors demand considerable weight because together they describe the level of coercion present during the exchange. The *Miranda* safeguards were de-

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165. Irvine v. California, 347 U.S. 128, 138-39 (1954) (Clark, J., concurring) (evaluating the case-by-case voluntariness approach used prior to *Miranda*).

166. White, *supra* note 161, at 597.

167. *Id.* at 581.

168. *Id.* at 582.

169. 446 U.S. at 303.

170. Justices Marshall and Brennan applied the objective police officer standard in a realistic manner and could "scarcely imagine a stronger appeal to the conscience of a suspect." *Id.* at 306 (Marshall, J., with Brennan, J., dissenting).

171. *See* text accompanying notes 201-06 *infra*.

signed to protect a custodial suspect from police-induced pressures that might impair his ability to determine freely whether to talk with the police. Thus, careful analysis of the surrounding circumstances is crucial to *Miranda*. The *Innis* Court looked at the length of the police-suspect exchange and noted that it was brief.[172] The Court also considered defendant's demeanor. The Court found nothing in the record to suggest that the police knew that Innis was unusually disoriented or upset at the time of his arrest.[173] The Court also mentioned that the handicapped children remarks were exchanged between two police officers.[174] The Court was impressed that the police neither invited a response from Innis[175] nor carried on a lengthy harangue in his presence.[176] These factors were not impressive to the dissenters. Justices Marshall and Brennan stated that, "Gleckman's remarks would obviously have constituted interrogation if they had been explicitly directed to respondent, and the result should not be different because they were nominally addressed to [Officer] McKenna."[177] Justice Stevens found that the majority had turned *Miranda*'s unequivocal rule against any interrogation at all into a trap in which unwary suspects might be caught by police deception. According to Justice Stevens, "if a suspect does not appear to be susceptible to a particular type of psychological pressure, the police are apparently free to exert that pressure on him despite his request for counsel, so long as they are careful not to punctuate their statements with question marks."[178] The dissents present the better view since *Miranda* was concerned with the impact of police pressures upon the custodial suspect.[179] Thus, it is immaterial whether the police remarks were directed to Innis or to a fellow police officer. The crucial fact remains that the police remarks created an atmosphere of coercion that caused Innis to respond by incriminating himself.[180]

In its examination of the surrounding circumstances under the objective police officer test, the majority failed to consider the police car setting in which the conversation occurred. This factor demands the most analysis and its resolution merits the most weight

172. 446 U.S. at 30.
173. *Id.* at 302-03.
174. *Id.* at 302.
175. *Id.*
176. *Id.* at 303.
177. *Id.* at 306 (Marshall, J., with Brennan, J., dissenting).
178. *Id.* at 313 (Stevens, J., dissenting).
179. *See* text accompanying notes 68-76 *supra*.
180. This result would have been foreseeable under the reasonable person test, discussed in text accompanying notes 193-206 *infra*.

in the overall interrogation decision because *Miranda* focused on the potential for compulsion created by the police-dominated environment in which a custodial interrogation took place.[181] Removing the defendant from the psychological support of friends, relatives, and familiar surroundings can create significant pressures that impair the defendant's capacity to decide rationally whether to talk to the police. It is thus noteworthy that the Court made no mention of the police car setting in which the conversation occurred. The omission is even more glaring because many lower courts have found the existence of a custodial interrogation when the police-suspect exchange occurred in or near a police vehicle.[182] These

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181. *See* text accompanying notes 73-79 *supra*.

182. In United States v. Brown, 557 F.2d 541 (6th Cir. 1977) the Court described the coerciveness of the police car setting:

> [t]he prisoner and police officers are in close contact within a confined area. Often, the inside door handles are removed and the front and back seats are separated by wire mesh . . . Invariably, the prisoner is handcuffed. He is effectively cut off from the world outside the patrol car. As a practical matter, he has no access to friends or counsel. If the prisoner has just been arrested, he may still be disoriented and apprehensive in an often hostile and alien setting. In short, the back seat of a patrol car as the setting for a confession conforms in all respect(s) to the "incommunicado, police-dominated" atmosphere which led the Supreme Court in *Miranda* . . . to recognize the need for special procedures to minimize the inherent coerciveness of custodial interrogation.

Id. at 551. In Myers v. State, 3 Md. App. 534, 240 A.2d 288 (1968), defendant, who was the prime suspect in a murder investigation, was located by police, placed in a police car with two officers, and interrogated as the car moved to police headquarters. The court held that defendant had been subjected to custodial interrogation. The court found that the atmosphere created at the time of the questioning carried "its own badge of intimidation." *Id.* at 538, 240 A.2d at 291. The court appeared to use an objective, reasonable person test. It cited language from People v. Hazel, 252 Cal. App. 2d 412, 60 Cal. Rptr. 437 (1967) which stated that the custodial requirement of *Miranda* depended on the reasonable belief of the suspect that his freedom of movement or action is restricted by the interrogation. *Id.* at 537, 240 A.2d at 290. Although the *Myers* court addressed the custodial and not the interrogation issue, the tests for both issues should be identical. *See* note 187 *infra*. In United States v. Kennedy, 573 F.2d 657 (9th Cir. 1978), defendant was confined to the back seat of a Federal Bureau of Investigation [hereinafter referred to as the FBI] vehicle with one agent. A second agent sat in the front seat during questioning which lasted forty-five minutes. The court used an objective, reasonable person test because it asked if a reasonable person would have believed himself to be in custody. *Id.* at 660. Although the *Kennedy* court addressed the custodial issue, the test for custody and interrogation should be the same. *See* note 187 *infra*. The *Kennedy* court found that the totality of the circumstances supported the reasonable belief that defendant was in custody. 573 F.2d at 660. No custodial interrogation was found to have occurred in State v. Inman, 350 A.2d 582 (Me. 1976), when defendant was questioned by detectives in a police car en route to the police station. Defendant had not been arrested, the investigation had not focused on him, he was in control of the situation, and he was free from physical restraint. Hence, no coercive police atmosphere existed. The

lower court cases suggest that, even under the objective police officer test, Innis could have been subjected to considerable compulsion to incriminate himself.

The Court also failed to discuss the time of day during which the arrest and conversation took place. Lower courts have included this factor in their analyses of the custodial interrogation issue.[183] This factor, in conjunction with others, conceivably could have created sufficient compulsion to justify a finding of interrogation even under the objective police officer test. These analytical omissions show that the Court failed to examine the *Innis* facts in sufficient scope or depth to support its conclusion that no interrogation occurred under the objective police officer test. The Court also failed to indicate whether the overall interrogation decision rested primarily upon the conclusion that the police statement was not "particularly evocative" or upon the absence of sufficiently compelling surrounding circumstances. This failure to specify precisely what factors were crucial to the final decision hinders identification of generally objectionable interrogation tactics that should be illegal per se. The courts, therefore, have not been told how to apply the new *Innis* standard consistently.

B. *Subjective Police Officer Factor*

In footnote seven, the United States Supreme Court stated that the

court used an objective, reasonable person test in concluding that no reasonable person in defendant's position could have considered himself to be in custody at the time. *Id.* at 598-99. Similarly, no custodial interrogation was found to have occurred in United States v. Akin, 435 F.2d 1011 (5th Cir. 1970), *cert. denied*, 401 U.S. 1011 (1971), when FBI agents questioned defendant in a Bureau car but used no force, made no promises to induce defendant to give information, and left defendant free to go at all times. The court appeared to use an objective, reasonable person test based upon the factors it considered controlling: Lack of restraint, lack of promises to induce the suspect to talk, and lack of force in questioning. *Id.* at 1013. *But see* McCrary v. State, 529 S.W.2d 467 (Mo. App. 1975), in which the court found no custodial interrogation when police handcuffed and searched defendant after the latter approached the police car and made suspicious movements toward his back pocket. The court found no "compelling police atmosphere." *Id.* at 475. The court examined the surrounding circumstances including the subjective intent of the police officer to reach its decision. *Id.* For additional cases dealing with questioning in or near a police vehicle, *see* Annot., 31 A.L.R.3d 565 § 14 (1970).

183. For example, in Commonwealth v. O'Shea, 456 Pa. 288, 318 A.2d 713, *cert. denied*, 419 U.S. 1092 (1974), the court held that defendant was subjected to custodial interrogation when he was questioned in the middle of the night in a private room of the police building after the investigation had focused on him. The court concluded that the police were not involved in an innocent attempt to gather information. The court used a multiprong test because it stated that the *Miranda* safeguards were required when there is custody plus police conduct calculated to, expected to, or likely to evoke admissions. *Id.* at 292-93, 318 A.2d at 715.

> intent of the police . . . may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response . . . it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.[184]

By including the subjective element of police intent within the overall objective police officer test, the Court probably meant to ensure the broadest possible protection of the right against compelled self-incrimination. In those cases where the police clearly intended to elicit an incriminating response from a custodial suspect in violation of the *Miranda* procedures, a court presumably would have little difficulty satisfying the objective, reasonable police officer test upon which the Court places primary reliance. The subjective police intent factor is unreliable in several respects, however, so its inclusion does little to improve the objectionable features of the Court's principal standard, the objective police officer test. This leaves the majority with two tests, neither of which is totally reliable standing alone or in conjunction with the other. The Court failed to correct this problem because it did not include an objective, reasonable person test for those cases where the objective or subjective police officer tests fail to provide reliable answers.

Among the problems inherent in a subjective police officer test is the matter of proof. A sophisticated officer, aware that his or her intent will determine the admissibility of vital evidence, might not testify candidly about the motivation for talking to or near the suspect.[185] A second problem hampering the effectiveness of the subjective police standard is its focus upon the undisclosed intentions of the police. *Miranda* was designed to protect the fifth amendment rights of the suspect in coercive custodial settings regardless of the inner motivations of the participating police. Finally, most courts judge the issue of custody without regard to the subjective intentions of the police.[186] A similar approach should be taken regarding the interrogation issue.[187]

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184. 446 U.S. at 301-02 n.7.

185. White, *supra* note 21, at 66.

186. Most lower courts which have expressly considered the issue of custody have adopted an objective reasonable person test. *See* Hunter v. State, 590 P.2d 888 (Alaska 1979) (collecting cases).

187. *Miranda* was designed to vest the custodial suspect with protections against compelled self-incrimination. 384 U.S. at 461. The protections do not apply unless both custody and interrogation are present. *Id.* at 445. Since both custody and

In applying the subjective factor to the *Innis* facts, the Court observed that the record in no way suggested that the officers' remarks were designed to elicit a response.[188] Justice Stevens disagreed. He noted that the officers probably were aware that the chances of a handicapped child finding the missing weapon at a time when the police were not present were relatively slim.[189] Further, the officer responding to the initial handicapped children remark did not suggest that they cordon off the area or notify school officials. Instead, he emphasized that the police had to find the weapon to avert a child's death.[190] Thus, the true purpose of the conversation was probably not to voice genuine concern for the welfare of the handicapped children.

C. *Summary of Supreme Court Majority Test*

In summary, the objective and subjective police officer tests set out by the United States Supreme Court majority to determine the existence of a *Miranda* interrogation erode the underlying premises of *Miranda*. *Miranda* sought to create a balance between the interests of the police in obtaining confessions and the interests of the custodial suspect in exercising his right against compelled self-incrimination. *Innis* tips the scale in favor of the police by using unreliable tests for the determination of an interrogation. The *Innis* tests focus only on the objective or subjective actions of the police and fail to consider how a reasonable person in the suspect's position would react to the police actions. The Court's omission of the reasonable person standard leaves the suspect unprotected in those cases where problems of proof hamper the reliability of either *Innis* test. The Court's unwillingness to explain its rejection of the balance established by *Miranda* and its restrictive conclusion itself, however, are consistent with the approach taken by the Burger Court in recent years in dealing with other *Miranda* issues.[191]

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interrogation involve the impact of police behavior on the defendant, the same analytical test should be used to determine their presence.

188. 446 U.S. at 303 n.9.

189. *Id.* at 316 n.19 (Stevens, J., dissenting), quoting White, *supra* note 21, at 68.

190. Brief of the Respondent Innis at 24, Rhode Island v. Innis, 446 U.S. at 291.

191. *See* Stone, *supra* note 3, at 169. The Burger Court has been dismantling *Miranda* in a piecemeal fashion by manipulating fringe issues yet leaving its core intact. *Id.* Evidence elicited from an individual through custodial interrogation when he has not been warned properly of his rights is still inadmissible for use in the

prosecution's case in chief. At the same time, however, the Court has allowed renewed interrogation of an individual who previously asserted his right to remain silent. *See* discussion below of Michigan v. Mosley, 423 U.S. 96 (1975). The Court has also defined the concept "custodial" narrowly. *See* discussion below of Oregon v. Mathiason, 429 U.S. 492 (1977). Further, the majority has not excluded evidence solely on *Miranda* grounds in the last ten years. *See* Stone, *supra* note 3, at 101. *See also* Grano, *supra* note 129, at 3 n.17. The sole exception occurred in Tagne v. Louisiana, 444 U.S. 469 (1980). The Court ruled that an inculpatory statement made by the suspect to a police officer was inadmissible because there was no evidence proving that the suspect knowingly and intelligently waived his *Miranda* rights before making the statement. *Id.* at 471. In New Jersey v. Portash, 440 U.S. 450, the Court held that "a person's testimony before a grand jury under a grant of immunity cannot constitutionally be used to impeach him when he is a defendant in a later criminal trial." *Id.* at 459-60. The Court based its ruling on the fifth and fourteenth amendments, *id.* at 459, and not on *Miranda*. The *Innis* result clearly fits within this established pattern. *Innis* also employs the multi-variable analysis used by the Court to decide if *Miranda* protections apply.

Comparison of *Innis* with two other Supreme Court decisions demonstrates numerous analytical similarities. In Michigan v. Mosely, 423 U.S. 96 (1975), the Court held that the *Miranda* dicta requiring all interrogation to cease once an individual indicates a desire to remain silent, did not create a per se rule against all further interrogation. The *Mosley* Court noted that its decision did not deal with the procedures to be followed after a suspect asserted his right to counsel. *Id.* at 101 n.7. The decision only concerned the procedures to be followed after assertion of the right to remain silent. The right to counsel issue was present in *Innis* but was not addressed by any of the courts. They dealt only with the definition of interrogation. The *Mosley* Court upheld the admissibility of statements obtained in a later interrogation on the ground that the initial assertion of *Miranda* rights "had been scrupulously honored." *Id.* at 103 (quoting 384 U.S. at 479). As in *Innis*, the *Mosley* Court examined a variety of factors including the different location of the second interrogation, use of a different interrogator, a lapse of two hours between the two sessions, a new set of warnings that preceded the second interrogation, and the allegedly different subject matter covered in each meeting. *Id.* at 104. The Court failed to indicate which factors it considered essential to meet its announced standard and thus the decision provides ambiguous protection for the suspect due to its unpredictable application. Stone, *supra* note 3, at 135. The same can be said of *Innis*. *See* text accompanying note 166 *supra*.

In Oregon v. Mathiason, 429 U.S. 492 (1977), the Court took a restrictive view of the meaning of "custody." The Court held that defendant was not subjected to custodial interrogation, even though while on parole he was asked to go to police headquarters for questioning, was told that the police believed he was involved in a crime, and was falsely informed that his fingerprints had been found at the scene of the crime. *Id.* at 493-95. The Court again failed to indicate which of the many factors discussed were crucial to the decision. Stone, *supra* note 3, at 153. Undoubtedly, the decision will have the same unpredictable results discussed above. The Court also appeared to focus on the subjective intentions of the police officer; it did not use a reasonable person test. Stone, *supra* note 3, at 153. Professor Stone argues that the *Mathiason* court used the subjective police officer test due to the factors deemed controlling by the majority: Mathiason went voluntarily to the police station, was advised he was not under arrest, and left the police station without hindrance. The Court thought it irrelevant that Mathiason was on parole at the time, that the questioning occurred behind closed doors, that the police implied that a prosecution was likely and that they indicated that they had substantial evidence of Mathiason's guilt. *Id.* The *Innis* Court also used a subjective police officer intent test in reaching its decision. *See* text accompanying notes 184-90 *supra*.

D. *Return to Voluntariness Standard*

The analysis used by the Burger Court in its treatment of *Innis* and other *Miranda* cases suggests a rejection of a wooden, "prophylactic" application of *Miranda* and a return to the multifactor voluntariness standard used prior to *Miranda*.[192] Although it is beyond the scope of this note to comment on the merits of the multifactor test, the Court could still achieve a "principled" application of *Miranda* by employing an objective, reasonable person standard against which to judge the many factors present in each case, rather than the tests used in *Innis* and earlier cases. Under the reasonable person standard, the Rhode Island Supreme Court finding of an "interrogation" would be affirmed.

V. INNIS VIEWED FROM A REASONABLE PERSON PERSPECTIVE

Justice Stevens dissented to the *Innis* definition of interrogation and advanced an alternative. Under his definition, "any police conduct or statements that would appear to a reasonable person in the suspect's position to call for a response must be considered 'interrogation' . . . as well as those [statements] that are designed to do so."[193] The entire test has merit. First, the objective, reasonable person standard avoids the problems of proof inherent in any subjective test. As Judge Friendly wrote regarding the custodial issue:

> the [*Miranda*] Court could scarcely have intended the issue . . . to be decided by swearing contests in which officers would regularly maintain their lack of intention to assert power over a suspect save when the circumstances would make such a claim absurd, and defendants would assert with equal regularity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire of them.[194]

The comment is equally valid when a subjective test is used to determine the presence of an interrogation.

A second reason to utilize the reasonable person test is its preservation of the balance envisioned by *Miranda*. The test provides the defendant with adequate protection from the potential of police coercion, as viewed by a reasonable person in the place of the defendant. The test does not, however, completely tie the

192. *See* Stone, *supra* note 3 at 168.

193. 446 U.S. at 311 (Stevens, J., dissenting).

194. United States v. Hall, 421 F.2d 540, 544 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

hands of the police. It does not require the police to anticipate the frailties or idiosyncrasies of every person with whom they interact or speak.

Third, the test enables the courts to identify those tactics that are objectionable in any factual setting. The test focuses on the response of a reasonable person in a coercive setting, not on the response of one particular suspect. This approach would provide the police and the courts with more direction and certainty in interpreting the law. Thus, though *Miranda* would be applied on a case-by-case basis, there would be continuity to the decisions. As a consequence, protection of the fifth amendment interests of the custodial suspect would be increased.

Finally, inclusion of the subjective police officer portion of the definition, in addition to the objective, reasonable person segment, assures the broadest possible protection of the right to be free from interrogation once the suspect is in custody and in a police-dominated environment. When the police clearly intended to elicit an incriminating response from a custodial suspect in violation of *Miranda*, an illegal interrogation would be found, without inquiry as to whether the reasonable person test was satisfied. While problems of proof remain unresolved in the subjective portion of Justice Stevens' test,[195] their significance is reduced since this is not the sole standard under which an interrogation would be analyzed. Justice Stevens also included the reasonable person test within his definition. In contrast, the *Innis* majority failed to include an objective, reasonable person standard within its definition of interrogation. This omission magnifies the problems of proof inherent in the majority's subjective police officer standard. The majority thus relies on two tests, the objective police officer test and the subjective police officer test, both lacking in complete reliability, to determine the presence of an interrogation.

When *Innis* is analyzed under an objective, reasonable person test, the potential for coercion that must exist for a *Miranda* interrogation clearly is present. The police conversation generated pressures and anxieties that a reasonable person would find compelling. First, the content of the conversation challenged Innis to display some evidence of honor and decency. Police manuals indicate that criminal suspects are susceptible to such challenges and list them as a standard and often successful interrogation tactic.[196] As aptly phrased by dissenting Justices Marshall and Brennan, "one can scarcely imagine a stronger appeal to the conscience of a suspect

195. *See* text accompanying note 185 *supra*.

196. *See* White, *supra* note 161, at 581.

. . . than the assertion that if the weapon is not found an . . . innocent person will be hurt . . . a helpless, handicapped little girl."[197] It is likely that a reasonable person in Innis' position would find such a challenge so compelling as to demand the response given by Innis. This factor deserves considerable weight.[198]

The setting in which the conversation occurred was highly coercive from the perspective of a reasonable person in the position of Innis. The "handicap" remarks took place in a police car where Innis sat handcuffed with three uniformed officers[199] after he had been arrested at gunpoint.[200] Many courts have found that custodial interrogations occurred under an objective, reasonable person test when a police officer spoke with an accused in a police vehicle.[201] Other courts have carefully examined the effect that handcuffs, a drawn gun, and the presence of several uniformed police officers have on the demeanor of the accused and have found that custodial interrogations transpired under the objective, reasonable person test or a subjective test.[202] Further, one commentator has found that, in custodial settings where the norm governing spatial distance is violated, a person's instantaneous response is to back up, again and again. When unable to escape, the person becomes more anxious and unsure.[203] Additionally, although the length of the police conversation was brief, it occurred at 4:30 a.m. Other courts have found an interrogation to have occurred at such an hour under similar circumstances using an objective, reasonable person test.[204] Finally, the remarks themselves were compelling in that they appeared to call for a response from a reasonable person

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197. 446 U.S. at 306 (Marshall, J., with Brennan, J., dissenting).

198. *See* text accompanying notes 167-69 *supra*.

199. 446 U.S. at 306 (Marshall, J., with Brennan, J., dissenting).

200. Brief of the Respondent Innis at 4, Rhode Island v. Innis, *id.*

201. *See* cases cited in note 182 *supra*.

202. For example, in State v. Paz, 31 Or. App. 851, 572 P.2d 1036 (1977), the court found that defendant was subjected to custodial interrogation after he was handcuffed at gunpoint, taken into custody, transported in the back seat of a police car to the police station, and informed that he was a suspect. The Court used an objective, reasonable person test. *Id.* at 859, 572 P.2d at 1041. In People v. Shivers, 21 N.Y.2d 118, 233 N.E.2d 836, 286 N.Y.S.2d 827 (1967), the court found that compulsion was manifest when defendant was questioned on the street by police at gunpoint about his activities. The court used two subjective tests. It stated that the officer had no intention of letting defendant escape and that defendant could have reached no different conclusion. *Id.* at 122, 233 N.E.2d at 839, 286 N.Y.S.2d at 830.

203. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 44-46 (1968).

204. *See* Commonwealth v. O'Shea, 456 Pa. 288, 318 A.2d 713, *cert. denied*, 419 U.S. 109 (1974).

in the place of Innis. As noted by Justice Stevens, the conversation indicated that the police had a strong desire to learn the location of the shotgun. Any person with knowledge of the weapon's location would be likely to believe that the officers wanted him to disclose that site. Thus, an individual would believe that the officers were seeking to solicit precisely the type of response given by Innis.[205]

It is clear that the setting in which Innis made his incriminating statements was highly coercive as viewed from a reasonable person standard. This conclusion is the most important factor in the interrogation analysis because the *Miranda* protections were designed to dispel the atmosphere of coercion that accompanies custodial interrogations.[206]

In summary, by employing the same multivariable analysis used by the Burger Court in previous *Miranda* cases, but by using an objective, reasonable person standard to assess the importance of each variable, it is clear that there was sufficient compulsion at the time of the *Innis* police conversation to endanger defendant's fifth amendment right. The compulsion exceeded that which would have existed in mere arrest and detention. Thus, Innis was interrogated within the meaning of *Miranda*.

VI. CONCLUSION

Miranda sought to create a balance between the right of the suspect to exercise his fifth amendment privilege against compelled self-incrimination and the interests of the police in obtaining confessions. *Miranda* requires the police to issue certain warnings to the custodial suspect and lays out specific procedures once a suspect is subjected to "custodial interrogation." Courts have struggled with this balance since *Miranda* by trying to refine the meanings of "custodial" and "interrogation." The United States Supreme Court has unnecessarily tipped the balance in favor of the police by its restrictive definition of "interrogation" in *Innis*. The *Innis* Court has created two tests to evaluate the potential for compulsion which must exist prior to a finding of an interrogation. The tests focus solely upon the viewpoint of the police, without any reference to the viewpoint of a reasonable person in the suspect's position. The Court has failed to preserve the balance envisioned by *Miranda*. It remains to be seen whether the lower courts will enthusiastically adopt the *Innis* standards.

Jane Schussler

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205. 446 U.S. at 312-13 n.12 (Stevens, J., dissenting) (quoting White, *supra* note 218, at 68).

206. *Id.* at 310 (Stevens, J., dissenting).