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NOTES

Pretrial Rights to Counsel Under the Fifth and Sixth Amendments: A Distinction Without a Difference

In *Brewer v. Williams*,¹ the United States Supreme Court ruled inadmissible incriminating statements made by a murder suspect after a detective's exhortation that the ten-year-old murder victim deserved a "Christian burial."² Three years later, however, in *Rhode Island v. Innis*,³ the Court ruled admissible incriminating statements made by a murder suspect after a policeman apprehensively commented that a handicapped child might find and be injured by the sawed-off shotgun used in the crime.⁴ Although the results in these two cases, which share a "strikingly similar"⁵ fact pattern, and which were decided by a Court with an unchanged membership,⁶ seem inconsistent upon initial examination, closer

1. 430 U.S. 387 (1977).

2. *Id.* at 392-93. The defendant had surrendered to Dubuque police on an arrest warrant issued in Des Moines. While enroute by auto from Dubuque to Des Moines, a police detective advised the defendant: "And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered." *Id.*

3. 100 S. Ct. 1682 (1980).

4. *Id.* at 1691. The defendant had been arrested for robbery, although the police also suspected him of murder. While being transported to the police station, one police officer testified that he observed to another "[that because a school for handicapped children is located nearby,] 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." *Id.* at 1686-87.

5. White, *Rhode Island v. Innis: The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53, 54 (1979) [hereinafter cited as White].

6. The members of the Supreme Court at the time both decisions were handed down were Chief Justice Burger, and Justices Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, and Stevens. The majority opinions in both *Brewer* and *Innis* were authored by Justice Stewart. *Brewer v. Williams*, 430 U.S. at 389; *Rhode Island v. Innis*, 100 S. Ct. at 4507. In *Brewer*, Justices Marshall, Powell, and Stevens joined Justice Stewart, and each justice also filed a concurring opinion. 430 U.S. at 406 (Marshall, J.); *id.* at 409 (Powell, J.); *id.* at 414 (Stevens, J.). Chief Justice Burger dissented, *id.* at 415; Justice White filed a dissenting opinion in which Justices Blackmun and Rehnquist joined, *id.* at 429; and Justice Blackmun filed a dissenting opinion in which Justices White and Rehnquist joined, *id.* at

scrutiny reveals that the two are reconcilable. In *Brewer*, the Court held the evidence inadmissible because the defendant was interrogated in violation of his sixth amendment right to counsel.⁷ In *Innis*, the Court found that the defendant had not been interrogated and therefore his statements were not elicited in violation of his fifth amendment right to counsel. Thus, the evidence in *Innis* was ruled admissible.⁸ Reconciling the two cases based upon the pres-

438. In *Innis*, Justices White, Blackmun, Powell, and Rehnquist joined in Justice Stewart's opinion for the majority, 100 S. Ct. at 1686. Justice White filed a separate concurrence, *id.* at 1691, as did Chief Justice Burger, *id.* at 1691. Justice Marshall, joined by Justice Brennan, dissented, *id.* at 1692. Justice Stevens also dissented in a separate opinion, *id.* at 1693.

7. *Brewer v. Williams*, 430 U.S. at 399. The sixth amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

The sixth amendment right to counsel has been the focus of a considerable amount of scholarly comment, particularly after the Court's controversial decision in *Escobedo v. Illinois*, 378 U.S. 478 (1964). In *Escobedo*, the Court greatly broadened the sixth amendment right to counsel by holding that the privilege attached when a police investigation focused upon a particular suspect. See notes 33-42 and accompanying text *infra*, for a fuller discussion of *Escobedo*.

For a general overview of the sixth amendment right to counsel and the controversy provoked by *Escobedo*, see Adam, *The Right of an Accused to Counsel*, 54 ILL. B.J. 308 (1965); Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62 (1966); Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure*, 56 J. CRIM. L.C. & P.S. 143 (1965); English, *Lawyers in the Station House?*, 57 J. CRIM. L.C. & P.S. 283 (1966); Milledge, *Escobedo — Toward Eliminating Coerced Confessions*, 19 U. MIAMI L. REV. 415 (1965); Miller & Kessel, *The Confession Confusion*, 49 MARQ. L. REV. 715 (1966); Mishkin, *The Supreme Court, 1964 Term, Foreword: The High Court, the Great Writ and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); Northrop, *The Supreme Court and Criminal Procedure*, 26 MD. L. REV. 1 (1966); Robinson, *Massiah, Escobedo and Rationales for the Exclusion of Confessions*, 56 J. CRIM. L.C. & P.S. 412 (1965); Rothblatt, *Police Interrogation and the Right to Counsel, Post Escobedo v. Illinois: Application v. Emasculation*, 17 HASTINGS L. J. 41 (1965); Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21 (1965); Taylor, *The Supreme Court, the Individual and the Criminal Process*, 1 GA. L. REV. 386 (1967); Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 B.U. L. REV. 423 (1964); Symposium: *Administration of Criminal Justice, Some Aspects of the Right to Counsel*, 26 LA. L. REV. 666 (1966); Note, *The Right to Counsel During Police Interrogation: The Aftermath of Escobedo*, 53 CALIF. L. REV. 337 (1965); Note, *The Coming of Massiah: A Demand for Absolute Right to Counsel*, 52 GEO. L.J. 825 (1964); Note, *The Right to Counsel During Police Interrogation*, 25 MD. L. REV. 165 (1965); Note, *Right to Counsel During Police Investigation*, 1964 U. ILL. L.F. 804. For other authorities, see notes 15, 24 and 37 *infra*.

8. *Rhode Island v. Innis*, 100 S. Ct. at 1691. The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966), that the presence of an attorney is required during interrogation, if requested by the defendant in response to the *Miranda* warnings, to effectuate the fifth amendment privilege against self-incrimination. *Id.* at 466.

Miranda provoked a enormous quantity of comment, notably in the three year period

ence or absence of interrogation, however, does not resolve the problems raised by the cases. The Burger Court has established in *Innis* and *Brewer* separate analytical rationales for the rights to

following announcement of the opinion. See, e.g., Arthur, *Questioning by the Police Since Miranda*, 4 WILLAMETTE L.J. 105 (1966); Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645 (1967); Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRIM. L.C. & P.S. 160 (1967); Harris, *Miranda v. Arizona, Is It Being Applied?*, 3 CRIM. L. BULL. 135 (1967); Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320 (1977); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Rogge, *Proof by Confession*, 12 VILL. L. REV. 1 (1966); Rothblatt & Pitler, *Police Interrogation: Warnings and Waivers — Where Do We Go From Here?*, 42 NOTRE DAME L. REV. 479 (1967); Spring, *The Nebulous Nexus: Escobedo, Miranda, and the New Fifth Amendment*, 6 WASHBURN L.J. 428 (1967); Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978); Warden, *Miranda — Some History, Some Observations, and Some Questions*, 20 VAND. L. REV. 39 (1966); Symposium, *Interrogation of Criminal Defendants — Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 169 (1966); Note, *Criminal Procedure — Miranda: The Application of the Fifth Amendment Right Against Self-Incrimination to Confessions — A Change in Approach*, 16 BUFFALO L. REV. 439 (1967); Note, *Miranda v. Arizona: In-Custody Interrogation: An Examination of the New Rules Further Defining the Suspect's Rights*, 71 DICK. L. REV. 116 (1966); Note, *Interrogation of Criminal Suspects*, 59 NW. U.L. REV. 660 (1964); Note, *Criminal Law — Confessions — The Restraints Society Must Observe Consistent With the Federal Constitution in Interrogating Suspects*, 18 S.C. L. REV. 853 (1966); Note, *The New Definition: A Fifth Amendment Right to Counsel*, 14 U.C.L.A. L. REV. 604 (1967); Note, *Custodial Statements of Criminal Suspects*, 4 WILLAMETTE L.J. 189 (1966); Note, *Miranda and Waiver*, 4 WILLAMETTE L.J. 205 (1966); Comment, *Miranda v. State of Arizona — The Fifth Amendment Enters the Police Station*, 16 DE PAUL L. REV. 138 (1966); Comment, *The New Right — Fifth Amendment Right to Counsel*, 20 U. MIAMI L. REV. 893 (1966).

Later commentary focused upon the Burger Court's gradual restrictions of the scope of the right to counsel (see, e.g., Kirby v. Illinois, 406 U.S. 682 (1972)) and of the fifth amendment privilege against self-incrimination (see, e.g., Harris v. New York, 401 U.S. 222 (1971)). For later commentary, see Gangi, *Confessions: Historical Perspective and a Proposal*, 10 HOUSTON L. REV. 1087 (1973); Gorecki, *Miranda and Beyond — The Fifth Amendment Reconsidered*, 1975 U. ILL. L.F. 295; Grano, Kirby, Biggers, and Ash: *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717 (1974); Steele, *Developments in the Law of Interrogations and Confessions*, 1 NATL. J. CRIM. DEFENSE 111 (1975); Note, *Confessions By the Accused—Does Miranda Relate to Reality?*, 62 KEN. L.J. 794 (1974); Note, *Criminal Procedure — Michigan v. Mosley: A New Constitutional Procedure*, 54 N.C. L. REV. 695 (1976); Note, *Constitutional Law—Fifth Amendment — Suspect's Confusion About Miranda Rights*, 36 OHIO ST. L.J. 220 (1975); Note, *Michigan v. Mosley: A Further Erosion of Miranda?*, 13 SAN DIEGO L. REV. 861 (1976); Note, *Constitutional Law: Another Limitation on the Mandate of Miranda v. Arizona and Further Erosion of the Exclusionary Rule*, 27 U. FLA. L. REV. 302 (1974); Note, *United States v. Wade and On the Spot Identifications: Russell v. United States*, 30 U. PITT. L. REV. 517 (1969); Note, *Right to Counsel at the Pretrial Hearing for Probable Cause*, 3 W. ST. U.L. REV. 134 (1975); Note, *Lawyers and Lineups*, 77 YALE L.J. 390 (1967); Comment, *Custodial Interrogation and the Fifth Amendment — A Passing Shadow?*, 12 CAL. W.L. REV. 512 (1976); Comment, *Right to Counsel at Photographic Lineups — People v. Lawrence*, 1972 UTAH L. REV. 100.

counsel under the fifth and sixth amendments.⁹ When *Brewer* and *Innis* are examined in conjunction with another case decided the same term as *Innis*, *United States v. Henry*,¹⁰ this dichotomy becomes apparent.¹¹ In consequence, the Court has overlaid the law of confessions with a complexity which the Chief Justice himself believes is likely to result in confusion for both the lower courts and law enforcement officers in determining the constitutionality of police conduct.¹²

Various rationales for the rights to counsel under the fifth and sixth amendments, articulated in cases which preceded *Brewer*, *Innis*, and *Henry*, are set forth in this article. These theories provide a basis for discussion of *Innis* and *Brewer* in light of *Henry*. As this discussion illustrates, despite the emergence of separate rationales for the rights to counsel under the fifth and sixth amendments, the same results might have been achieved through application of a single test.¹³ Recognition by the Court of the practicality of a single test would eliminate judicial and police confusion resulting from continued application of separate analyses for the rights to counsel under the fifth and sixth amendments.

THE SIXTH AMENDMENT RIGHT TO COUNSEL

The right to counsel guaranteed by the sixth amendment¹⁴ origi-

9. See text accompanying notes 129-132 *infra*.

10. 100 S. Ct. 2183 (1980).

11. See text accompanying notes 129-30 *infra*.

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

13. See note 158 and accompanying text *infra*, and note 131 *infra*.

14. See note 7 *supra*. Historically, the amendment is rooted in the abhorrence felt in the American colonies for the anomalous rule in Great Britain under which counsel was provided in misdemeanors but not in felonies. *Powell v. Alabama*, 287 U.S. 45, 60-61 (1932). Prior to the adoption of the United States Constitution, twelve of the thirteen colonies had enacted statutory or constitutional provisions guaranteeing the right to counsel, at least for serious crimes. *Id.* at 64. See generally Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 *YALE L.J.* 1000 (1964) [hereinafter cited as *Historical Argument*].

The Court appears, however, to have taken a step toward reversing England's historic rule by restricting the right to counsel in misdemeanor cases. In *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court ruled that an indigent defendant, absent waiver, may not be imprisoned if convicted of a felony or misdemeanor without counsel. In *Scott v. Illinois*, 440 U.S. 367 (1979), the Court ruled, however, that the sixth amendment privilege does not attach to a defendant who has been convicted of a misdemeanor, as long as the defendant is not actually imprisoned. For a critical review of the *Scott* decision, see Herman & Thompson, *Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 *AM. CRIM. L. REV.* 71 (1979).

nally applied only to matters directly pertaining to trial.¹⁵ In *Powell v. Alabama*,¹⁶ the Supreme Court extended the right to counsel to pretrial preparation as well as the trial itself,¹⁷ relying upon the due process clause,¹⁸ rather than the right to counsel under the sixth amendment. A line of cases derived from *Powell* established that the right to counsel is to be measured in terms of whether the "skill and knowledge"¹⁹ and "guiding hand"²⁰ of counsel are required in order to prevent the trial from becoming a "mere formality."²¹ Based upon the theory that counsel could assist the suspect at an earlier stage in the proceedings, the post-*Powell* cases placed the right to counsel earlier on the prosecutorial continuum, first at arraignment,²² then at the preliminary hearing,²³ and then earlier

15. Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 50 (1964) [hereinafter cited as Enker & Elsen]; Note, *Developments in the Law — Confessions*, 79 HARV. L. REV. 935, 997 (1966) [hereinafter cited as *Confessions*].

Limitation of the right to counsel to the trial setting derives from a strict reading of the sixth amendment, a position taken by Chief Justice Burger: "If the Constitution provided that counsel be furnished for every 'critical event in the progress of a criminal case,' that would be another story, but it does not . . . [T]he Sixth Amendment states with laudable precision that: 'In all *criminal prosecutions*, the accused shall . . . have the Assistance of Counsel.'" *Coleman v. Alabama*, 399 U.S. 1, 23 (1970) (Burger, C.J., dissenting)(emphasis in the original). See also *Kirby v. Illinois*, 406 U.S. 682, 691 (1972)(Burger, C.J., concurring).

The limitation also derives from the fact that when the sixth amendment was enacted "there were no organized police forces as we know them today." *United States v. Wade*, 388 U.S. 218, 224 (1967). At the time of the amendment's enactment, the primary confrontation of the accused with the prosecution and the evidence against him was at the trial itself. In contrast, modern police methods and judicial procedures have established pretrial proceedings which frequently are dispositive of the issue of guilt or innocence. *Id.*

16. 287 U.S. 45 (1932).

17. *Id.* at 58. In *Powell*, the defendants, black youths, were convicted of raping two white women. The trial was held moments after counsel was appointed. The Court held that the defendants were denied the assistance of counsel "in any substantial sense." *Id.* "Even the intelligent and educated layman has small and sometimes no skill in the science of law He requires the guiding hand of counsel at every step in the proceedings against him." *Id.* at 69.

18. The due process clause of the fourteenth amendment provides in pertinent part that "no State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the sixth amendment right to counsel was held to be a fundamental right applicable to the states through the fourteenth amendment. In so ruling, the Court held that counsel must be appointed to effectuate the sixth amendment rights of indigent defendants. The Court thereby overruled *Betts v. Brady*, 316 U.S. 455 (1942), which held that due process requirements could be met without the appointment of counsel.

19. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

20. *Id.*

21. *United States v. Wade*, 388 U.S. 218, 224 (1967).

22. *Hamilton v. Alabama*, 368 U.S. 52 (1961). The procedure for arraignment is statu-

still at the initial appearance.²⁴

The Court later retreated from the post-*Powell* expansion of the suspect's pretrial right to counsel, holding that an unindicted suspect was not necessarily entitled to counsel during interrogation.²⁵ In its opinions, the Court employed a "voluntariness" analysis to determine whether or not the suspect needed a lawyer based upon age, education, and the circumstances under which questioning had been conducted by the police.²⁶ In addition to the voluntari-

tory. In Illinois, the arraignment takes place following the institution of formal charges by way of indictment or information. ILL. REV. STAT. ch. 38, § 111-2 (1979). At the arraignment, formal charges are presented to which the defendant is required to plead. *Id.* at § 113-1.

23. *Coleman v. Alabama*, 399 U.S. 1 (1970). Like the procedure for arraignment, see note 22 *supra*, the provisions for the preliminary hearing are also statutory. In Illinois, the judge during a preliminary hearing is to determine whether or not probable cause exists to bind the defendant over for trial. ILL. REV. STAT. ch. 38, § 109-3 (1979).

24. *White v. Maryland*, 373 U.S. 59 (1963). The procedure for the initial appearance is similarly statutory. See notes 22-23 *supra*. In Illinois, the initial appearance is to be held as soon as practicable after the arrest of the suspect. ILL. REV. STAT. ch. 38, § 109-1 (1979). At the hearing, the defendant is informed of the charges against him, of his right to counsel and of his right to bail. *Id.*

In *Hamilton v. Alabama*, 368 U.S. 52 (1961), *Coleman v. Alabama*, 399 U.S. 1 (1970), and *White v. Maryland*, 373 U.S. 59 (1963), the Court applied what has been described by a student commentator as a "functional" analysis, measuring the suspect's right to counsel by whether the attorney's presence was necessary to assist the defendant at trial. Note, *The Pretrial Right to Counsel*, 26 *Stanford L. Rev.* 399, 399 (1974) [hereinafter cited as *Pretrial Right*].

The sixth amendment has also been described as serving a "shield" function by protecting the defendant from the unrestricted exercise of government power. Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 *AM. CRIM. L. REV.* 1, 10 (1979) [hereinafter cited as Grano]. Grano points out that sixth amendment rights are based upon the accusatorial, rather than inquisitorial, nature of the American criminal justice system. *Id.* at 22-23. Thus, Grano states, the sixth amendment guarantees the right to a speedy and public trial by jury, notice of the charges, the right to confront witnesses, and compulsory process, in addition to the right to assistance of counsel. Grano notes that this array of privileges has been described by Chief Justice Burger as "the sporting theory of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 417 (1977) (Burger, C.J., dissenting). In Grano's view, however, the "sporting theory" is inapplicable prior to the initiation of formal judicial proceedings. Until formal proceedings have begun, the system does have inquisitorial features, including police interrogation and the grand jury. *Id.* at 23-24. *Accord*, *United States v. Henry*, 100 S. Ct. 2183 (1980). Historically, the inquisitorial and accusatorial modes date to Anglo-Saxon law at the time of the Norman Conquest. M. BERGER, *TAKING THE FIFTH* 3-14 (1980) [hereinafter cited as BERGER]. The inquisitorial mode declined in favor only because of the desire of the English monarchy to wrest power from the Church. *Id.* at 39.

25. *Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. LaGay*, 357 U.S. 504 (1958).

26. *Crooker* advanced the argument that the right to counsel should be based on "the sum total of the circumstances." *Crooker v. California*, 357 U.S. 433, 440 (1958). The defendant in that case had completed one year of law school during which he had studied criminal law. The Court therefore held that the denial of counsel was not fundamentally unfair. *Id.* The Court has also employed the voluntariness analysis in a fifth amendment context.

ness analysis, the Court also gradually advanced a second rationale supporting the right to counsel: the need to deter unlawful police conduct.²⁷ Whereas earlier cases focused upon the need to preserve the accused's rights at trial, the Court began to articulate the position that involuntary confessions are abhorrent not only because they are inherently unreliable, but also because of "the deep-rooted feeling that the police must obey the law."²⁸

The Court in *United States v. Massiah*²⁹ relied upon this police deterrence rationale, as well as the suspect's pretrial need for counsel, in holding that the sixth amendment precludes the surreptitious elicitation of incriminating statements from a defendant who has been indicted and who has retained a lawyer.³⁰ *Massiah's* greatest significance, however, lies in its establishment of a point at

See notes 57-63 and accompanying text *infra*.

27. *Spano v. New York*, 360 U.S. 315, 320-21 (1959). The defendant in *Spano* was a 25-year-old immigrant with a junior high school education. Accompanied by counsel, he surrendered to police after his indictment for murder. After his lawyer left the police station, he was questioned almost continuously for eight hours by as many as fifteen police officers and county prosecutors who ignored his requests for counsel. 360 U.S. at 315-19. He confessed after his friend Bruno, a rookie officer, falsely stated that he, Bruno, would lose his job unless Spano confessed. The Court held that these circumstances rendered the confession involuntary. *Id.* at 317. The Court in *Spano* declined to overrule *Crooker v. California*, 357 U.S. 433 (1958) and *Cicenia v. LaGay*, 357 U.S. 503 (1958), noting that the police in *Spano* dealt with an indicted defendant, while *Crooker* dealt only with a suspect. 360 U.S. at 323. The Court in *Escobedo v. Illinois*, 378 U.S. 478 (1964), however, specifically overruled *Crooker* and *Cicenia* to the extent that these two cases preclude attachment of the right to counsel prior to indictment. *Id.* at 492. *Escobedo*, however, was substantially undercut by the Court in *Kirby v. Illinois*, 406 U.S. 682 (1972). See notes 33-42 and accompanying text *infra*.

28. *Spano v. New York*, 360 U.S. 315, 320 (1959). The Court's analysis in *Spano* is an example of the interrelationship of "legal" and "factual" guilt. Under the doctrine of legal guilt, certain threshold requirements must be met by the judicial system before it may proceed to a determination of the defendant's factual guilt. Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518, 520-21 (1977). Thus, a defendant cannot be legally guilty (though there may be little doubt about his factual guilt) if his conviction resulted from unconstitutional police conduct. *Id.* Chase concludes that the Burger Court is preoccupied with factual guilt and is therefore unwilling to reverse the convictions of defendants who are factually guilty, despite government behavior which renders them legally innocent. *Id.* at 588.

29. 377 U.S. 201 (1964).

30. *Id.* at 206. Although the *Massiah* Court limited the right to counsel to post-indictment interrogation, Justice White in his *Massiah* dissent correctly predicted the expansion of the right which came in *Escobedo v. Illinois*, 378 U.S. 478 (1964). "[T]oday's rule promises to have wide application well beyond the facts of this case . . . whether there has been an indictment or not." *Id.* at 208 (White, J., dissenting). In *Massiah*, the government hired an informer to engage the defendant, who had been indicted, in a conversation upon which government agents eavesdropped through a hidden transmitter. The defendant's counsel was not present. *Id.* at 202.

which the sixth amendment right to counsel is automatically triggered: the initiation of formal judicial proceedings.³¹ Once proceedings are initiated by the defendant's appearance in court, the doctrine of *Massiah* requires that no interrogation take place in the absence of counsel, based upon the dual rationales of deterrence of law enforcement misconduct and the need of the suspect for the assistance of an attorney.³²

Massiah's holding that the right to counsel attaches only after formal charges are filed has survived despite a temporary departure from that rule in *Escobedo v. Illinois*.³³ In *Escobedo*, the Court applied both the police deterrence³⁴ and the suspect's need for counsel³⁵ rationales and held that the sixth amendment requires that the police honor the request for counsel of a suspect upon whom police suspicion has focused, whether or not an indictment has been procured.³⁶ The "focus test"³⁷ for attachment of the

31. *Id.* at 206.

32. *Id.*

33. 378 U.S. 478 (1964).

34. See *Pretrial Right*, *supra* note 24. The Court relied upon language in *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *United States v. Massiah*, 377 U.S. 201, 204 (1964); and *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961). The Court continued that "[i]t would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment." 378 U.S. at 486. Failure to provide counsel at the suspect's request prior to indictment or arrest "would make the trial no more than an appeal from the interrogation." *Id.* at 486-87. The Court cited with approval the language in *In re Groban*, 352 U.S. 330, 344 (1957) (Black, J., dissenting) which stated that permitting counsel only after the onset of formal proceedings would render a trial a "hollow thing. . . [since] the conviction is already assured by pretrial examination." *Id.*

35. Danny Escobedo had been held by police and interrogated despite persistent requests for his retained counsel and despite repeated efforts by that attorney to breach police-imposed barriers to consult with his client. 378 U.S. at 479-81. Escobedo made an incriminating statement concerning the murder he was suspected of committing ("I didn't shoot Manuel, you did it," spoken to another suspect). *Id.* at 482-83. In ruling that statement inadmissible, the Court relied not only upon Escobedo's need for an attorney, but also upon the need to deter police misconduct. "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." *Id.* at 488-89.

36. *Id.*

37. During its brief life, *Escobedo* caused considerable controversy. See, e.g., Enker & Elsen, *supra* note 15; Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449 (1964); Comment, *The Curious Confusion Surrounding Escobedo v. Illinois*, 32 U. CHI. L. REV. 560 (1965); Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657 (1966) [hereinafter cited as Traynor]. See also note 7 *supra*.

sixth amendment right to counsel was short-lived.³⁸ By 1972, the Court in *Kirby v. Illinois*³⁹ limited the application of the right to counsel to suspects against whom formal prosecutorial proceedings have begun,⁴⁰ thus returning to the rule of *Massiah*.⁴¹ *Escobedo* was characterized in *Kirby* as a fifth amendment case in which the right to counsel was necessary to effectuate the defendant's privilege against self-incrimination. The *Kirby* Court also limited *Escobedo* to its facts.⁴² Thus, *Massiah's* holding that the right to counsel attaches only at the onset of formal prosecutorial proceedings remains intact.

FIFTH AMENDMENT RIGHT TO COUNSEL

Because there is considerable overlap between the sixth amendment right to counsel and the fifth amendment right to counsel, a discussion of the fifth amendment⁴³ is fundamental to consideration of recent developments in both areas of the law.⁴⁴ Until the landmark decision of *Miranda v. Arizona*,⁴⁵ the suspect's right to counsel was predicated entirely upon the sixth amendment. The fifth amendment right to counsel found by the Court in *Miranda* fostered considerable overlap of the rights to counsel under both amendments.⁴⁶ After *Miranda*, the previously-established standards for excluding confessions based upon their untrustworthi-

38. *Escobedo* was cited as precedent for a pre-arraignment right to counsel in a police line-up case. *United States v. Wade*, 388 U.S. 218 (1967). *But see Kirby v. Illinois*, 406 U.S. 682 (1972). *See also Pretrial Right, supra* note 24, at 407.

39. 406 U.S. 682 (1972).

40. *Id.* at 690-91. The Court's labelling of *Escobedo* as a "seeming deviation from this long line of constitutional decisions," *id.* at 689, has been criticized in a student note as an unduly narrow reading of *Johnson v. New Jersey*, 384 U.S. 719 (1966). *Pretrial Right, supra* note 24, at 411.

41. Prior to the Court's decision in *Brewer*, "lasting fame had eluded" *Massiah*. Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1, 24 (1978) [hereinafter cited as Kamisar]. The impact of the opinion was lost in the controversy over *Escobedo* and *Miranda*, Kamisar observes. *Massiah*, until *Brewer*, was viewed simply as a steppingstone to *Escobedo*. *Id.* at 25. In *United States v. Henry*, 100 S. Ct. 2183 (1980), however, the Court emphasized the importance of *Massiah* in sixth amendment right to counsel analysis. *See text accompanying note 123 infra.*

42. 406 U.S. 682 at 689. The continued validity of *Escobedo* is questionable. *Escobedo's* demise is underscored by the Court's failure to include a single reference to it in the Court's most recent sixth amendment case, *United States v. Henry*, 100 S. Ct. 2183 (1980). *See notes 121-28 and accompanying text infra*, for a discussion of the *Henry* case.

43. *See note 8 supra.*

44. *See text accompanying notes 73-128 infra.*

45. 384 U.S. 436 (1966).

46. *See text accompanying notes 64-72 infra.*

ness⁴⁷ and involuntariness⁴⁸ have been viewed as having only historical significance.⁴⁹ They will be examined here in some depth, however, since the Burger Court appears to be returning to these standards.⁵⁰

1. Pre-Miranda Standards

As early as 1884, the Supreme Court used the word "voluntary" in considering whether or not a confession was admissible.⁵¹ A confession not induced by proffered benefits or threats was held to be reliable and trustworthy and therefore admissible.⁵² In 1897, the Court linked the law of voluntary confessions with the constitutional privilege against self-incrimination.⁵³ Whereas the voluntariness rule was aimed at excluding false confessions, the Court viewed the due process requirement as designed "to prevent fundamental unfairness in the use of evidence, whether true or false."⁵⁴ Although the Court later indicated that it was not certain whether

47. See text accompanying notes 51-62 *infra*.

48. *Id.*

49. See *Confessions*, *supra* note 15, at 954-96; and BERGER, *supra* note 24, at 1-24, for a detailed treatment of the evolution of these standards.

50. See note 164 and accompanying text *infra*.

51. *Hopt v. Utah*, 110 U.S. 574, 585 (1884).

52. *Id.* at 585. Confessions were accepted and even encouraged as permissible methods of obtaining convictions in early common law, despite the fact that certain of them may have been extracted by torture. The notion that such confessions might be unreliable was not raised in Great Britain until 1783. BERGER, *supra* note 24, at 6.

The infamous oath *ex officio*, under which the accused was required to respond truthfully to questions put to him, was introduced in England in 1236 by a French cardinal. *Id.* It was abolished by Parliament in 1662 only after a controversial 400 years of use. *Id.* at 21. Berger discusses the sedition trial of John Lilburne, a crusader against the oath, in which Lilburne described his objections to it. "I am not willing to answer you to any more of these questions, because I see you go about by this Examination to ensnare me." Trial of John Lilburne (sic) and John Wharton, for Printing and Publishing Seditious Books, 3 HOWELL'S STATE TRIALS 1315, 1318 (1637), as cited in BERGER, *supra* note 24, at 15-16. Predictably, the treatment of the privilege in the American colonies in the 1600's was a reflection of the uncertain state of the privilege in England, but the British use of inquisitorial techniques in the colonies led to inclusion of the fifth amendment in the Bill of Rights. In contrast, the colonies were unified in their early statutory and constitutional provisions for the right to counsel under the sixth amendment. See note 14 *supra*. Torture and even death were the penalties for those who refused to incriminate themselves in the Salem witch trials of 1692. BERGER, *supra* note 24, at 21.

53. *Bram v. United States*, 168 U.S. 532 (1897). A student commentator has described the *Bram* Court's injection of constitutional standards into the law of confessions as "puzzling," *Confessions*, *supra* note 15, at 960, since the Court assumes an historical connection in earlier cases between the constitutional privilege and the confessions rule which does not necessarily exist. *Id.*

54. *Lisenba v. California*, 314 U.S. 219, 236 (1941).

involuntary confessions were to be excluded because they violated the fifth amendment or because they were untrustworthy,⁵⁵ it seems apparent that the Court viewed due process as requiring a fact-finding process based upon reliable, accurate information.⁵⁶

Deterrence of improper police methods became an additional factor in the Court's treatment of alleged violations of the suspect's fifth amendment privilege against self-incrimination.⁵⁷ In a 1961 case, for example, the Court said that confessions are necessary but that consideration must also be given to the "basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it."⁵⁸

Although the goals of the voluntariness test were expressed with sufficient clarity by the Court, the elements of the test remained unclear.⁵⁹ A somewhat abstract amalgamation of factors for evaluation of police conduct and the perceptions of the suspect emerged.⁶⁰ Among those factors were the conditions of detention, the attitude of police toward the suspect, the physical and mental state of the suspect, and the "diverse pressures which sap or sustain (the suspect's) powers of resistance and self-control."⁶¹ The

55. *United States v. Carignan*, 342 U.S. 36, 41 (1951).

56. *Confessions*, *supra* note 15, at 960. "There was, however, no conception that the interrogation that yielded the confession should conform to a standard of procedural regularity, or that institutional safeguards had to be provided during interrogation as they were at trial, or that the extent to which such regularity or safeguards were lacking bore directly on the admissibility of a confession." *Id.* at 962. *But see* *Brown v. Mississippi*, 297 U.S. 278 (1936), in which the Court excluded a confession extracted by torture. Kamisar views this case as possibly based upon the Court's desire to protect the integrity of the fact-finding system. Y. KAMISAR, W. LAFAVE, J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 511 (4th ed. 1974) [hereinafter cited as *KAMISAR & LAFAVE*]. The case can also be viewed as based upon due process requirements of a fair trial. See Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 805-6 (1970).

57. *Confessions*, *supra* note 15, at 969. *See also* Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 454 (1964).

58. *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961). *See* note 27 *supra* for the methods the police used to extract a confession in *Spano v. New York*, 360 U.S. 315 (1959). *See also* *Haynes v. Washington*, 373 U.S. 503 (1963) (defendant held incommunicado for sixteen hours; confession excluded); and *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (confession excluded when defendant detained and continuously interrogated for 36 hours).

59. For commentaries critical of the voluntariness test, *see, e.g.*, Kamisar, *What is an "Involuntary" Confession?*, 17 RUT. L. REV. 728 (1963); Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 102-3 (1977) [hereinafter cited as *Stone*]; Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U.L.Q. 275.

60. *Culombe v. Connecticut*, 367 U.S. 568 (1961).

61. *Id.* at 602. "No single litmus-paper test for constitutionally impermissible interrogation has been evolved." *Id.* at 601. In *Culombe*, the Court ruled inadmissible the confession of a mentally deficient suspect who was held five days and questioned intermittently.

ambiguity of the voluntariness test, as evidenced by these factors, required a case-by-case analysis of whether or not police interrogation had exceeded permissible bounds, thus placing an increased workload on the courts.⁶² Not until the Court granted certiorari in *Miranda* was it able "to give concrete constitutional guidelines for law enforcement agencies and courts to follow."⁶³

2. The Impact of *Miranda* on the Right to Counsel

The *Miranda* decision was squarely based on the fifth amendment.⁶⁴ The Court, however, merged the fifth and sixth amendment rights to counsel in its analysis. The Court stated that the right attached at the initiation of police interrogation to insure

62. Stone, *supra* note 59, at 103; BERGER, *supra* note 24, at 110. Berger illustrates the extent of the scrutiny required under the voluntariness test with two cases. In *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), the Court ruled inadmissible a confession obtained after 36 hours of interrogation. In *Watts v. Indiana*, 338 U.S. 49 (1949), the confession was excluded when the defendant had been held and interrogated for a week with insufficient food and sleep. Yet in *Gallegos v. Nebraska*, 342 U.S. 55 (1951), the Court ruled voluntary a confession obtained from an illiterate Mexican farm hand detained for four days. See BERGER, *supra* note 24, at 110-11.

A source of confusion with the voluntariness concept, Berger notes, is the word itself, which seems to connote a degree of spontaneity and lack of coercion which would preclude any interrogation whatsoever by police. *Id.* at 111-12. That the Court has been unwilling to apply such a literal definition is illustrated by Frankfurter's opinion for the majority in *Culombe v. Connecticut*, 367 U.S. 568 (1961): "such questioning is often indispensable to crime detection." *Id.* at 571. The confusion of the state courts, and their tendency to apply the vague voluntariness test to admit confessions later ruled unconstitutional by the Court led to the increased workload. Stone, *supra* note 59, at 102-3.

63. 384 U.S. 436, 441-42 (1966). It is interesting to note that the first two occasions upon which, prior to *Miranda*, the Court began to resolve the ambiguities of the voluntariness test were in sixth amendment settings, in which the Court ruled that the right to counsel precluded police interrogation and required exclusion of the resulting confessions. The Court ruled in *United States v. Massiah*, 377 U.S. 201 (1964), that police interrogation was impermissible when an indicted defendant had retained an attorney. And in *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Court established the focus test. See notes 33-42 and accompanying text *supra*.

Prior to *Miranda*, the Court had imposed somewhat stricter standards upon federal courts than those imposed upon state courts by the voluntariness test. The Court in *McNabb v. United States*, 318 U.S. 332 (1943), ruled that a suspect must be taken before a magistrate for an initial appearance without unnecessary delay. A confession obtained during such a delay is inadmissible. The Court took a tentative step toward a *per se* rule in *Mallory v. United States*, 354 U.S. 449 (1957), by holding that a seven-hour delay was sufficient, under Rule 5(a) of the Federal Rules of Criminal Procedure, to require exclusion of the confession. When *Mallory* is read with *McNabb*, it is clear that the Court was engaged in an exercise of its federal supervisory power over the federal courts to impose stricter standards for police interrogation. These standards, however, also lacked certainty. BERGER, *supra* note 24, at 115. For a general discussion of the *McNabb-Mallory* rule, see Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958).

64. 384 U.S. 436, 442 (1966).

that police conduct comported with the suspect's privilege against self-incrimination.⁶⁵ Furthermore, the Court stated that the presence of counsel during police interrogation was necessary to effectuate the protection of the suspect's rights at trial.⁶⁶

Under *Miranda*, arresting police officers are required to inform the suspect of his rights, including the right to counsel during interrogation, prior to beginning any interrogation.⁶⁷ After advising the suspect, police must then adhere to two seemingly strict procedures.⁶⁸ First, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."⁶⁹ Once the suspect indicates an intent to exercise the fifth amendment privilege, any subsequent statement without counsel present or without subsequent waiver of the privilege is necessarily coerced.⁷⁰ The second procedure which police must follow, once *Miranda* warnings have been given, is that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning."⁷¹ This procedure is based upon a sixth amendment rationale, and again, police must comply with this procedure, unless waiver of counsel can be shown.⁷²

65. *Id.* at 466.

"The denial of the (Escobedo) defendant's request for his attorney thus undermined his ability to exercise the privilege — to remain silent if he chose or to speak without intimidation, blatant or subtle. *The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence [counsel's] would insure that statements made in the government-established atmosphere are not the product of compulsion.*" *Id.* (emphasis added).

66. *Id.* at 470. "[T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." *Id.*

67. Prior to any interrogation, the accused must be warned of his right to remain silent; that any statement may be used as evidence against him; that he has a right to have counsel present during interrogation; and that if he is indigent, appointed counsel will be provided if interrogation takes place. 384 U.S. 436, at 445.

68. The Court ruled in *Innis* that the police officers' dialogue did not constitute interrogation. The Court's narrow definition, Justice Stevens argued in his dissent in *Innis*, undercuts the spirit of *Miranda* which requires a broad definition of "interrogation." 100 S. Ct. at 1693-94 (Stevens, J., dissenting). See notes 147-50 and accompanying text *infra*.

69. 384 U.S. at 473-74.

70. *Id.* at 474.

71. *Id.*

72. *Id.* at 475. The issue of whether or not waiver should be more difficult under the sixth amendment than it is under the fifth amendment is unresolved. See note 120 *infra*.

THE *Brewer-Innis-Henry* TRILOGY1. *Brewer v. Williams*

A violation of the defendant's self-incrimination privilege under *Miranda* was the first of three grounds cited by the District Court when it granted habeas corpus to the defendant in *Brewer v. Williams*.⁷³ The District Court also found that Williams had been denied his right to counsel under the sixth amendment.⁷⁴ Finally, the District Court observed that there had been no waiver by Williams of the sixth amendment right to counsel.⁷⁵ Therefore, the court concluded that involuntary statements had been impermissibly introduced into evidence against him.⁷⁶ The Eighth Circuit affirmed on fifth and sixth amendment grounds.⁷⁷ The Supreme Court declined to consider the fifth amendment and involuntariness claims, and upheld the Court of Appeals solely on sixth amendment grounds.⁷⁸

In *Brewer*, a warrant was issued for defendant Williams, a mental hospital escapee, following the disappearance of a ten-year-old girl from the Des Moines YMCA where Williams was then living.⁷⁹ Williams surrendered to police in Davenport, Iowa, after consulting with a Des Moines attorney. Williams then was arraigned, and after the arraignment was advised by a Davenport attorney.⁸⁰

73. 375 F. Supp. 170, 180 (S.D. Iowa 1974).

74. *Id.* at 177.

75. *Id.* at 181.

76. *Id.* at 178.

77. 509 F.2d 227 (1975).

78. 430 U.S. 387 (1977). Kamisar finds the Court's choice of the sixth amendment route inexplicable. Kamisar, *supra* note 41, at 4-5. He notes that selection of a fifth amendment basis for the *Brewer* decision would have eliminated the necessity for consideration of whether or not the Christian burial speech constituted interrogation. *Id.* Kamisar believes, however, that there is a right to counsel under *Massiah* regardless of whether or not interrogation has been initiated. *Id.* Professor Grano, who is at odds with Kamisar on numerous issues, agrees with him on this point. Grano, *supra* note 24, at 32-33. *Brewer*, however, rejects this position. "[N]o such constitutional protection would have come into play if there had been no interrogation." 430 U.S. at 400.

Although the Court upheld the reversal of the defendant's conviction, it gave the prosecution a broad hint as to a more successful theory on retrial. While Williams' statement directing the police to the location of the body must be excluded, the Court said the evidence may be admissible under the theory that police would eventually have discovered it, even without guidance from Williams. *Id.* at 406-7, n. 12. On retrial, Williams was convicted following the trial court ruling that the evidence should be admitted under the theory recommended by the Court. (unpublished opinion), KAMISAR & LAFAYE, *supra* note 56, 1980 supplement at 226.

79. 430 U.S. at 390-91.

80. *Id.* at 391.

Both lawyers counselled him against making any statements to police, and the police promised that Williams would not be interrogated during the 160-mile auto trip from Davenport to Des Moines.⁸¹ Detective Leaming, one of the police officers who accompanied Williams on the trip, knew that Williams was a former mental patient and knew that Williams was deeply religious.⁸² Shortly after leaving Davenport, Leaming, addressing Williams as Reverend, gave the "Christian burial" speech.⁸³ Cautioning the defendant not to answer, Leaming urged him nonetheless to "think about" the fact that an impending snowstorm might prevent discovery of the girl's body and that her parents were entitled to a Christian burial of the child, who disappeared on Christmas Eve.⁸⁴ Williams then directed police to the body.⁸⁵ He was indicted on murder charges and convicted by a jury.⁸⁶

The Supreme Court reversed the conviction on three grounds, based on a sixth amendment analysis. First, the Court stated that Williams had a sixth amendment right to counsel, which attached when judicial proceedings were initiated with the defendant's arraignment.⁸⁷ Williams clearly exercised that right by consulting two attorneys prior to his ill-fated drive to Des Moines. Second, the Court found that although not one sentence of the Christian burial speech was punctuated with a question mark, "Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as — and perhaps more effectively than — if he had formally interrogated him."⁸⁸ Thus, the speech constituted interrogation after the sixth amendment privilege had

81. *Id.*

82. *Id.* at 390-92.

83. While enroute by auto from Dubuque to Des Moines, a police detective advised the defendant: "And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered." *Id.* at 392-93.

84. *Id.*

85. *Id.* at 393.

86. *Id.* at 392-94.

87. *Id.* at 398. See note 78 *supra*.

88. *Id.* at 399. The issue of whether interrogation is possible without express questioning appears to be raised and answered in the negative by Chief Justice Burger in his *Brewer* dissent. *Id.* at 419-20 (Burger, C.J., dissenting). Kamisar offers *Bram v. United States*, 168 U.S. 532 (1897) and *Rogers v. Richmond*, 365 U.S. 534 (1961) *inter alia*, as examples of interrogation without the use of questions punctuated with question marks. Kamisar, *supra* note 41, at 15-16. In any case, *Innis* apparently settles the matter. See notes 106-11 and accompanying text *infra*.

been invoked. Finally, the Court held that the government had not met its "heavy burden"⁸⁹ of showing waiver. The standard to be applied, the Court stated, was whether the government could show the "intentional relinquishment or abandonment of a known right or privilege."⁹⁰

2. *Innis v. Rhode Island*

The facts in *Innis v. Rhode Island*⁹¹ closely parallel those of *Brewer*.⁹² Nevertheless, the *Innis* Court ruled the suspect's incriminating statements admissible.⁹³ In *Innis*, the defendant was arrested by Providence, Rhode Island police as a suspect in a shotgun robbery of a taxicab driver. After *Miranda* warnings were administered, Innis said that he understood his rights and wanted a lawyer.⁹⁴ Enroute to the police station, the two police officers accompanying Innis testified that they had the following conversation:

Patrolman Gleckman: At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and [that because a school for handicapped children is located nearby,] 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.

Patrolman McKenna: I more or less concurred with him (Gleckman) that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it.⁹⁵

Immediately thereafter, Innis told the officers to return to the scene of the arrest, promising that once there he would tell them

89. 430 U.S. at 402.

90. *Id.* at 404. This standard was first announced in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

Chief Justice Burger in his *Brewer* dissent raises an issue which lurks unresolved in the background of many of the Court's decisions, and which the Court has yet to address squarely: whether a suspect who invokes the right to counsel may waive that right in the absence of counsel. 430 U.S. at 418-19 (Burger, C.J., dissenting). See also *Kirby v. United States*, 406 U.S. 682 (1972), and *Massiah v. United States*, 377 U.S. 201 (1964). Burger contends in *Brewer* that the right is a personal one and that Williams clearly waived it. 430 U.S. at 417-18.

There is some indication that the Court views the sixth amendment right to counsel as more difficult to waive than the fifth amendment right to counsel. See note 120 *infra*.

91. 100 S. Ct. 1682 (1980).

92. See *White*, *supra* note 5.

93. 100 S. Ct. at 1691 (1980).

94. *Id.* at 1686.

95. *Id.* at 1686-87.

the location of the shotgun.⁹⁶ At the scene, Innis was again advised of his *Miranda* rights, but said he wished to show the officers the location of the gun immediately because of the handicapped children.⁹⁷ Innis guided police to the gun, and this evidence and his statements were used to convict him on charges of kidnapping, robbery, and the shotgun murder of another taxicab driver.⁹⁸

The Rhode Island Supreme Court, relying upon *Brewer*, reversed the conviction and ordered a new trial, finding that the defendant had invoked his right to counsel under *Miranda*, that the police officers' statements constituted interrogation, and that *Miranda* required that all interrogation cease until an attorney was present.⁹⁹ The United States Supreme Court granted certiorari "to address for the first time the meaning of 'interrogation' under *Miranda v. Arizona*."¹⁰⁰

Initially, the Supreme Court observed that the procedural safeguards detailed in *Miranda* apply in the context of "custodial interrogation,"¹⁰¹ and that once the right to counsel is invoked, all questioning must cease until an attorney is present. It was undisputed that the defendant in *Innis* was fully informed of those *Miranda* rights, was in custody, and had invoked his right to counsel. Simply, the issue was whether the respondent had been "interrogated."¹⁰²

Although the Court in *Innis* stated that the *Miranda* Court's definition of interrogation as "questioning" could be construed to preclude only "express questioning," it declined to employ this restrictive definition.¹⁰³ The Court added that in so holding, it was

96. *Id.* at 1687.

97. *Id.*

98. *Id.*

99. *Innis v. Rhode Island*, 391 A.2d 1158, 1161-62 (1978).

100. *Innis v. Rhode Island*, 100 S. Ct. 1682, 1687 (1980).

101. *Id.* at 1688. The question is generally settled that interrogation in the absence of custody does not require the administration of *Miranda* warnings. See *Beckwith v. United States*, 425 U.S. 341 (1976) (no *Miranda* warnings required when agents of the Internal Revenue Service interview suspect in his home); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (no *Miranda* warnings required when burglary suspect, who is also a parolee, comes voluntarily to the police station for questioning). Several commentators believe that a suspect such as the one in *Mathiason* is entitled to counsel. See Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation*, 25 S.C. L. Rev. 699 (1974); Graham, *What is "Custodial Interrogation"?: California's Anticipatory Application of Miranda v. Arizona*, 14 U.C.L.A. L. Rev. 59 (1967).

102. 100 S. Ct. at 1688.

103. *Id.* While the Court explicitly refused to interpret *Miranda* as barring only express questioning, Justice Stevens in his dissent argues that the test formulated by the Court, accomplishes precisely that result. 100 S. Ct. at 1696 (Stevens, J., dissenting). See text ac-

not indicating that all statements made to police by a defendant in custody were necessarily the product of interrogation.¹⁰⁴ Rather, in order to be considered interrogation, the police behavior "must reflect a measure of compulsion above and beyond that inherent in custody itself."¹⁰⁵

The Court then announced the new test for determining if police conduct constitutes interrogation: "*Miranda* safeguards come into play whenever a person in custody is subjected to either *express questioning or its functional equivalent*."¹⁰⁶ The functional equivalent of express questioning constitutes "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."¹⁰⁷ Therefore, the focus becomes the "perceptions of the suspect, rather than the intent of the police."¹⁰⁸ Notwithstanding the Court's insistence upon the primacy of the suspect's perceptions, the Court in effect imposed an intent requirement upon police con-

companying notes 106-11 *infra*.

104. 100 S. Ct. at 1688. The Court's holding in *Innis* that volunteered statements are admissible is analogous to rulings in two circuits that statements made by a suspect in response to questions asked of a third person in the presence of the suspect are voluntary. See *Haire v. Sarver*, 437 F.2d 1262 (8th Cir. 1971), and *Stone v. United States*, 385 F.2d 713 (10th Cir. 1967). *But see* *Kamisar*, *supra* note 41, at 51-52.

105. 100 S. Ct. at 1689. Custodial interrogation was defined in *Miranda* as police questioning "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The rule of *Miranda*, thus, was that one in custody is in an inherently coercive setting and no further examination of coerciveness is necessary. *Stone*, *supra* note 59, at 136.

The Court's ruling in *Innis*, that custody is not inherently coercive, is not unprecedented. In *Beckwith v. United States*, 425 U.S. 341 (1976), the Court ruled that agents of the Internal Revenue Service who visit a person's home in a preliminary tax evasion investigation are not required to issue *Miranda* warnings. In his opinion for the Court, Chief Justice Burger emphasized that *Miranda* concerns custodial interrogation, not inherently coercive settings. *Id.* at 347-48. See *Stone*, *supra* note 59, at 149-50.

106. 100 S. Ct. at 1689 (emphasis added).

107. *Id.* In *Brewer*, Chief Justice Burger, dissenting, stated this test in somewhat different terms, but in a conceptually similar manner, arguing that the exclusionary rule should apply only when police conduct is egregious. 430 U.S. 387 at 422. See also *Brown v. Illinois*, 422 U.S. 590 (1975) (Powell, J., concurring in part). Still another version of this test was expressed in the majority opinion in *Michigan v. Tucker*, 417 U.S. 433 (1974), holding that the exclusionary rule should not apply in a fifth amendment context if no evidence in the record shows that the police acted in bad faith.

108. 100 S. Ct. at 1690. The Court's exposition of the suspect's perception as a primary barometer of impermissible police conduct stands as a clear indication of the abandonment of the *per se* test for admissibility of incriminating statements. See White, *Police Trickery in Inducing Confessions*, 127 U. PENN. L. REV. 581 (1979). White argues that the Court's focus has not been upon the specific defendant but upon the police methods, "irrespective of the likelihood that they did or could produce a false confession and irrespective of their effect on the actual defendant before the court." *Id.* at 583-84 (emphasis in original).

duct by stating that police are not accountable for "the unforeseeable results of their words or actions," but only for "words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."¹⁰⁹ Thus, the test set out by the Court involves a complex two-prong interrelationship: a subjective prong, taking into account the susceptibility of a particular defendant,¹¹⁰ and an objective prong, determining whether a reasonable police officer should have known his words or actions would elicit an incriminating response.¹¹¹

Applying this test to the facts of *Innis*, the Court found that the functional equivalent of interrogation did not exist.¹¹² Instead, the conversation between the two patrolmen represented "nothing more than a dialogue between the two officers to which no response from the respondent was invited."¹¹³ The Court added that *Innis* had not been subjected to the functional equivalent of questioning because it could not be said that the officers "should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent."¹¹⁴

By finding that there was no interrogation under the facts in *Innis*, the Court avoided addressing the question of whether or not the police violated *Innis*' right to counsel under the fifth amendment. Thus, *Innis* stands within the letter, if not the spirit, of *Miranda*, which provided only that all interrogation must cease if an attorney is requested, not that an attorney must be present even if there is no interrogation.¹¹⁵

109. 100 S. Ct. at 1690 (emphasis in original).

110. *Id.*

111. *Id.*

112. *Id.* Grano, in an article analyzing the state court decision in *Innis*, applies in a sixth amendment context a test substantially similar to that devised by the Court in *Innis* in a fifth amendment setting. Grano concludes that the officer should have known his remarks would elicit an incriminating response. Grano, *supra* note 24, at 33.

113. 100 S. Ct. at 1690. It is perhaps noteworthy that Detective Leaming in his Christian burial speech in *Brewer* specifically told the defendant not to respond. *Brewer v. Williams*, 430 U.S. 387, 392-93 (1977). Yet the Court had no difficulty in finding that Leaming set out deliberately to elicit incriminating information. *Id.* at 399. In his dissent in *Innis*, Stevens concludes that the fact that Officer Gleckman was assigned to share the back seat of the police wagon with *Innis* can be viewed as indicative of an intent to elicit an incriminating statement, especially since that procedure deviated from the usual police practice. *Rhode Island v. Innis*, 100 S. Ct. 1682, 1697 (1980).

114. *Id.* at 1690. The Court also stated that the record showed no evidence that the defendant "was peculiarly susceptible to an appeal to his conscience . . . unusually disoriented or upset at the time of his arrest." *Id.* In contrast, the police officer in *Brewer* knew that the defendant was a former mental patient and highly religious. 430 U.S. at 390-92.

115. 384 U.S. at 474.

In a footnote in *Innis*, the Court indicated that the Rhode Island Supreme Court's reliance upon *Brewer* had been misplaced.¹¹⁶ The Court pointed out that *Brewer* involved the sixth amendment right to counsel, which bars law enforcement officers from " 'deliberately elicit[ing]' incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed."¹¹⁷ *Innis*, on the other hand, involved the right to counsel under the fifth amendment, which is triggered only by the initiation of police interrogation.¹¹⁸ Moreover, the Court stated that the definitions of interrogation under the fifth and sixth amendments "are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct."¹¹⁹ The Court failed, however, to elaborate what those distinct policies are or what the noninterchangeable definitions of interrogation are.¹²⁰

116. 100 S. Ct. at 1689 n.4.

117. *Id.* Grano views the sixth amendment right to counsel as prohibiting any attempt to elicit information from an uncounseled defendant. Thus, he believes that under a sixth amendment rationale, *Innis* would be not guilty. Grano, *supra* note 24, at 35. Grano's article, however, was published prior to the Supreme Court opinion in *United States v. Henry*, 100 S. Ct. 2183 (1980). Under the new sixth amendment test announced in *Henry*, it is arguable whether or not *Innis* would win. See note 131 *infra*.

118. 100 S. Ct. at 1689 n.4.

119. *Id.* The footnote cites *Kamisar*, *supra* note 41, at 41-55, for the proposition that custody alone is not sufficiently coercive to trigger the right to counsel under the fifth amendment; there must also be compulsion. In an uncited portion of that article, however, *Kamisar* argues that the compulsion necessary to trigger the fifth amendment right to counsel can be slight. *Id.* at 23. *Kamisar* also argues strenuously that the defendant, especially if he is indigent, is in need of greater protection in the post-arrest, pre-indictment period than is afforded when interrogation has not begun. *Kamisar* also believes the sixth amendment right to counsel is an active one even prior to interrogation. *Id.* at 99-101. See note 143 *infra*.

Chief Justice Burger, concurring in the *Innis* judgement, questioned whether the footnote in the majority decision provided sufficient clarification between the opinions in *Innis* and *Brewer*. 100 S. Ct. at 1691 (Burger, C.J., concurring).

120. A question not raised in *Innis*, since the Court found that there was no interrogation, was whether or not the defendant waived his fifth amendment right to counsel. Thus, it remains unclear if a higher standard is required for waiver under the sixth amendment than is required under the fifth amendment. In *Brewer*, the waiver standard imposed under the sixth amendment is that of the voluntary relinquishment of a known right. 430 U.S. at 404.

In *North Carolina v. Butler*, 441 U.S. 369 (1979), the Court ruled that the question of waiver is determined by inquiring whether or not the defendant "knowingly and voluntarily waived the rights" under *Miranda*. *Id.* at 373. Waiver is to be determined, the Court said, by the facts and circumstances of the case. *Id.* at 374. Immediately following that statement is a citation to *Johnson v. Zerbst*, 304 U.S. 458 (1938), which stated the test used in *Brewer*. 304 U.S. at 464. In a concurring opinion in *Butler*, Justice Blackmun seemed to hint that the test articulated by the majority was not that of *Johnson v. Zerbst*, but a less strict one. 441 U.S. at 376-77. *Kamisar*, *supra* note 41, at 70. Grano believes waiver should be more

3. *United States v. Henry*

Although *Innis* failed to clearly explain why a fifth amendment analysis was used in that case as opposed to the sixth amendment analysis of *Brewer*, a decision announced five weeks after *Innis* provides some guidance. In *United States v. Henry*,¹²¹ the issue before the Court was whether the government impermissibly interfered with an indicted defendant's sixth amendment right to counsel when it retained as an informer another prisoner who occupied the same cell block as the defendant. The Court, in an opinion by Chief Justice Burger, held inadmissible incriminating statements made by the defendant to the informant.¹²² Applying the test originally set forth in *Massiah*, and later in *Brewer*, the Court in *Henry* measured a violation of the defendant's sixth amendment right to counsel on the basis of deliberate police elicitation of incriminating statements.¹²³ The Court added an additional element to the *Brewer-Massiah* test, however, by stating that deliberate elicitation occurs when police intentionally create a situation likely to induce the defendant to make incriminating statements in the ab-

difficult under the sixth amendment than it is under the fifth amendment. Grano, *supra* note 24, at 35 n.215.

An inquiry that the Court in *Innis* could have made, however, is whether or not the police scrupulously honored the rights of the defendant under *Miranda*. See *Michigan v. Mosley*, 423 U.S. 96, 103 (1975). *Mosley* established this test to measure if statements taken after *Miranda* warnings have been given are admissible. The suspect in *Mosley* had been arrested for robbery. After warnings were administered, he declined to answer any questions. Two hours later, he was rewarned by another police officer and questioned about a murder to which he then confessed. *Id.* at 97-98. Refusing to apply a strict reading of *Miranda*, which would have precluded admission of the confession, the Court defined the proper test as whether or not the police scrupulously honored the suspect's rights under *Miranda*. *Id.* at 103. Stone views *Mosley* as adopting a balancing approach which he views as inconsistent with *Miranda* and the effort of the Court in that case to create a *per se* rule. Stone, *supra* note 59, at 135. Kamisar points out that a similar analysis could have been made in *Brewer*. Kamisar, *supra* note 41, at 73. Stevens, in his dissent in *Innis*, argues that the *Mosley* test of whether police scrupulously honored *Innis*' rights should have been applied. Under this test, *Innis*' statements should have been excluded. 100 S. Ct. at 1694-95.

121. 100 S. Ct. 2183 (1980).

122. *Id.* at 2189. Only defendants who have been indicted and whose sixth amendment right to counsel has consequently attached are protected from the surreptitious elicitation of information by government informers. *Id.* at 2188. The *Henry* Court stated that suspects who have not been charged and who claim protection under the fourth or fifth amendment are entitled to no protection against the elicitation of information by undercover agents. In so holding, the Court explicitly upheld *United States v. Hoffa*, 385 U.S. 293 (1966) (fourth amendment not violated by use of evidence obtained by a government informer who masqueraded as a friend of an unindicted suspect).

123. 100 S. Ct. at 2186.

sence of counsel.¹²⁴ The Court held that the government in *Henry* had created such a situation and that incriminating statements had been deliberately elicited from Henry in violation of his sixth amendment right to counsel.¹²⁵

Although the majority opinion clearly established the continued vitality of *Massiah*, Justice Blackmun's dissent asserted that the majority, while seeming to retain the *Massiah-Brewer* deliberate elicitation test, actually established a new test.¹²⁶ Blackmun stated that the majority's introduction of the words "likely to induce" deprived the word "deliberately" of all significance.¹²⁷ He added that the majority's extension of *Massiah* would cover "even a 'negligent' triggering of events resulting in the elicitation of incriminating disclosures."¹²⁸

Brewer, Henry, and Innis: A Distinction Without a Difference

The Court's choice of the fifth amendment *Miranda* rationale in *Innis* and the sixth amendment *Massiah* rationale in *Brewer* and *Henry* plainly signifies that the Court views the two privileges as distinct. Two separate tests have been formulated for measuring the permissibility of police activity. According to the *Innis* test, interrogation for fifth amendment purposes occurs when the police engage in either express questioning or its functional equivalent, measured by the perception of the suspect and the intent of the police.¹²⁹ Pursuant to *Brewer* as modified by *Henry*, a sixth amendment violation occurs when in the absence of counsel police deliberately elicit incriminating statements by intentionally creating a situation likely to induce such statements.¹³⁰ The tests themselves, however, are substantially the same, although couched in different language.¹³¹ The Court's application of the tests reveals

124. *Id.* at 2189 (White, J., concurring).

125. *Id.*

126. *Id.* at 2191.

127. *Id.*

128. *Id.*

129. 100 S. Ct. 1682, 1690 (1980).

130. 100 S. Ct. 2183, 2189 (1980).

131. Justice Blackmun observed in his dissent in *Henry* that he was unable to discern "a material difference between [the two] formulations." *Id.* at 2195 (Blackmun, J., dissenting). Even though the language of the two tests differs, their similarity can be demonstrated by cross-application of the fifth and sixth amendment tests.

The *Innis* test for determining if police conduct is impermissible is whether the officer should have known that his actions were reasonably likely to evoke an incriminating response based upon the intent of the police officer and the mental state of the suspect. 100 S. Ct. at 1689-90. In *Brewer*, the Court specifically found that the police detective who accom-

that the difference lies not in the tests but in the level of police quasi-interrogation that the Court is likely to permit before finding a violation of the suspect's rights. Given the same set of facts, the Court is more likely to hold that the constitutional rights of a suspect are violated when it finds that a sixth amendment, rather than a fifth amendment, right to counsel has attached.¹³²

In rejecting a sixth amendment analysis, the Court in *Innis* observed somewhat cryptically that it did so because distinct policies underly the two rights.¹³³ Because the Court found it unnecessary to explain this statement, it appears that the Court believes the distinction is obvious from the historical background of the two rights and from the cases applying them.

panied Williams to Des Moines made the Christian burial speech with the intent to evoke a response from Williams. 430 U.S. at 399. In addition, the Court found that Williams, a deeply religious man and a former mental patient, was likely to be especially vulnerable to appeals to his conscience. The Court found further that police were aware of the defendant's vulnerability. *Id.* at 392. Thus, application of the *Innis* test to the facts in *Brewer* would result in the exclusion of the incriminating statements made by Williams.

Similarly, in *Henry*, the incriminating statements evoked by the informant would also be inadmissible under the *Innis* test. The Court in *Henry* found the requisite intent, particularly since the informant was to be paid only if he actually produced incriminating statements. 100 S. Ct. at 2187. The Court also found that Henry, as a jailed prisoner, was especially susceptible to offers of friendship to relieve the strain of imprisonment, and thus vulnerable to overtures from the informant. *Id.* at 2188. Consequently, the statements elicited by the government, through the informant, would be inadmissible under the *Innis* test.

The *Brewer-Henry* test for impermissible police conduct involves the deliberate elicitation of incriminating information by police who intentionally create a situation likely to induce the prisoner to make incriminating statements. *Id.* at 2189. Although the *Innis* dissenters, 100 S. Ct. at 1692-98, and the Rhode Island Supreme Court, 391 A.2d at 1162, found the requisite intent under the facts of *Innis*, it is arguable that the police in *Innis* did not intend to create through their conversation a situation likely to induce the incriminating statements. Thus, application of the *Brewer-Henry* test in *Innis* would result in finding the statement admissible.

132. See notes 144-57 and accompanying test *infra*. Blackmun also pointed out in his *Henry* dissent that the behavior of the police in *Innis* was more directly calculated to elicit a response than was the police action in *Henry*. 100 S. Ct. at 2195. In *Henry*, government agents retained a jailed informant to be alert to statements made on the cellblock by other prisoners but not to initiate any conversations or ask any questions. *Id.* at 2194-95. Yet the majority found the requisite deliberate elicitation. *Id.* at 2189.

Blackmun found the police behavior in *Innis* more egregious, yet he concurred with the *Innis* majority that the statements were admissible. In *Henry*, he stated that in *Innis* the defendant had "just been arrested at 4:30 a.m.; he was handcuffed and confined in a 'caged wagon'; and the three police officers accompanying him triggered his confession by conversing about the danger that a 'little girl' attending a nearby school for the handicapped would 'maybe kill herself' upon finding a gun he supposedly had hidden Against the backdrop of *Innis*, I cannot fathom how the Court can conclude that [the government agent's] actions rendered Henry's disclosures 'likely.'" *Id.* at 2195.

133. 100 S. Ct. at 1689 n.4.

Admittedly, the historical background of the rights to counsel under the fifth and sixth amendments indicates that the two privileges initially served different purposes.¹³⁴ The sixth amendment was at first applied to safeguard the rights of an accused at trial because the legally untrained defendant was not equipped to stand alone, without counsel, against the state.¹³⁵ Although early decisions confined applicability of the right to the trial itself, the right was later expanded to pretrial proceedings.¹³⁶ The fifth amendment right, in contrast, was traditionally broader in scope. It was based upon the fundamental unfairness of compelling an accused to be a witness against himself. The presence of an attorney during interrogation, if requested by the accused, was viewed as necessary to effectuate that right.¹³⁷

Despite their separate sources, the fifth and sixth amendment rights to counsel in modern criminal procedure serve a similar purpose: to protect the defendant from unfair and deceptive law enforcement methods.¹³⁸ The common purpose which both amendments serve today therefore mandates that the analysis in cases involving either the fifth or sixth amendment right to counsel should be uniform.

The Court's continued differentiation between the rights to counsel under the fifth and sixth amendments is more likely due to its perception of the institution of formal judicial proceedings as the critical stage at which the sixth amendment right to counsel attaches.¹³⁹ Formal judicial proceedings begin with a court appearance for arraignment or formal charging.¹⁴⁰ Although the Court in *Massiah*, *Kirby*, and *Henry* clearly focuses upon this critical stage factor under a sixth amendment rationale,¹⁴¹ the Court has failed to articulate similar criteria in the context of the fifth amendment

134. See note 14 and note 52 *supra*.

135. See note 15 and accompanying text *supra*.

136. See notes 16-18 and accompanying text *supra*.

137. See notes 51-58 and 69-71 and accompanying text *supra*.

138. *Confessions*, *supra* note 15, at 1016. See also notes 27-32 and 57-72 and accompanying text *supra*.

139. See text accompanying note 32 *supra*. In *Kirby v. Illinois*, 406 U.S. 682 (1972), the Court ruled that there is no right to counsel in a pre-indictment police line-up. In so holding, the Court cited *Powell v. Alabama*, 287 U.S. 45 (1932), and a series of right-to-counsel cases. "[A]ll of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." 406 U.S. at 689 (emphasis in original).

140. See notes 22-24 *supra*.

141. See text accompanying notes 33-42 *supra*.

right to counsel. Despite the lack of criteria, it would appear from *Innis* that prior to indictment the suspect can claim only a fifth amendment right to counsel. *Innis* implies that this fifth amendment right to counsel is activated only by the initiation of custodial police interrogation. Absent interrogation, the suspect has no fifth amendment right to counsel at all, even if the suspect requests the presence of an attorney.¹⁴²

The right to counsel under the sixth amendment is similarly triggered only by the institution of custodial interrogation.¹⁴³ In *Brewer*, the Court found that the Christian burial speech constituted interrogation; the defendant's sixth amendment right to counsel consequently attached to bar admission into evidence of statements made by the defendant in the absence of counsel.¹⁴⁴ In contrast, the Court found in *Innis* that the handicapped child dialogue was not the functional equivalent of interrogation. Therefore, the defendant had no fifth amendment right to counsel and the statements elicited by police were admissible.¹⁴⁵ Yet the differences between the police behavior in *Brewer* and in *Innis* seem too slight to justify freeing the defendant in *Brewer* and convicting the defendant in *Innis*.

Although the Court found otherwise in *Innis*, it is difficult to view the dialogue between the two officers as motivated by anything else but the intention of eliciting an incriminating admission, just as the Court found the detective in *Brewer* intended to obtain a response to his Christian burial speech.¹⁴⁶ Both defendants were

142. See text accompanying notes 116-20 *supra*.

143. The concept that the rights to counsel under the fifth and sixth amendments are triggered by police interrogation was suggested to the author by Professor Charles R. Purcell of Loyola University of Chicago School of Law. The right to counsel under the fifth amendment attaches at arrest, although police need not heed a request for counsel until custodial interrogation begins. *Miranda v. Arizona*, 364 U.S. 436, 466 (1966). Similarly, the right to counsel under the sixth amendment attaches at the onset of formal judicial proceedings against the defendant, but is triggered only by interrogation. *United States v. Massiah*, 377 U.S. 201, 206 (1964). *Brewer*, *Innis*, and *Henry*, however, demonstrate that the rights to counsel under both amendments have little practical significance until interrogation is initiated. See text accompanying notes 88, 112-15 and 123-25. *But see* Kamisar, *supra* note 42, at 41-44. Kamisar argues that the sixth amendment right to counsel is an active one even prior to interrogation.

144. See text accompanying notes 87-88 *supra*.

145. See notes 106-14 and accompanying text *supra*.

146. In their *Innis* dissents, Marshall and Stevens argue convincingly that the police specifically intended to elicit incriminating information from *Innis*. Marshall, joined by Brennan, states that "[o]ne can scarcely imagine a stronger appeal to the conscience of a suspect — any suspect — than the assertion that if the weapon is not found an innocent person will be hurt or killed. And not just any innocent person, but an innocent child — a

confined in a police vehicle accompanied only by two police officers. The police speech in each case was designed to appeal to the conscience of the defendant, thereby inducing an incriminating statement. Furthermore, each defendant had requested the presence of an attorney.

There are differences, to be sure, between the police conduct in *Innis* and that in *Brewer*. The police speech in *Brewer* was directed at the defendant, whereas the speech in *Innis* was a conversation between the two police officers. The duration of confinement, moreover, was shorter in *Innis* than in *Brewer*.¹⁴⁷ Neither of these factual distinctions, however, appears to have influenced the Court. The factual distinction which appears to have been viewed by the Court as controlling is the initiation of formal judicial proceedings against the defendant in *Brewer* but not against the suspect in *Innis*.¹⁴⁸ Because of the initiation of formal proceedings, the *Brewer* defendant was entitled under the sixth amendment to the presence of an attorney during interrogation.¹⁴⁹ The *Innis* defendant, in contrast, had merely been arrested, an occurrence which in the Court's view did not mark the initiation of formal judicial proceedings.¹⁵⁰ No sixth amendment right to counsel, therefore, had attached. The defendant was entitled only to privileges under the fifth amendment. The fact that the defendant in *Brewer* had a right to counsel under the sixth amendment, whereas *Innis* had a right to counsel under the fifth amendment, should result in an equal level of protection for the defendants, since the rights under each amendment are similar and are triggered by custodial interrogation.¹⁵¹ *Brewer*, *Henry*, and *Innis* indicate, however,

little girl — a helpless, handicapped little girl on her way to school. The notion that such an appeal 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." 100 S. Ct. at 1692 (emphasis in original).

Justice Stevens also agreed with this conclusion. "The Court's assumption that criminal suspects are not susceptible to appeals to conscience is directly contrary to the teachings of police interrogation manuals, which recommend appealing to a suspect's sense of morality as a standard and often successful interrogation technique." 100 S. Ct. at 1697.

147. In *Innis*, the defendant was arrested and transported to the police station almost immediately. After the police wagon had travelled approximately one mile, the incriminating statement was made. 100 S. Ct. at 1686-87. In *Brewer*, the police had progressed about 100 miles on a 160-mile trip when the "Christian burial" speech was made and the admissions obtained. 430 U.S. at 392-93.

148. See note 87 and accompanying text *supra*.

149. See text accompanying note 87 *supra*.

150. See text accompanying notes 110-13 *supra*.

151. See note 143 *supra*.

that a defendant with a fifth amendment right to counsel receives less protection from police misconduct than a defendant with a sixth amendment right to counsel.¹⁵²

Since one primary goal of the rights to counsel under the fifth and sixth amendments is deterrence of improper police conduct,¹⁵³ the differentiation between the point at which the right to counsel attaches under each amendment, as exemplified by *Brewer* and *Innis*, is artificial, illogical, and contrary to the teaching of *Miranda*. The genesis for the Court's analysis in *Miranda* was the belief that obtaining confessions by police trickery is reprehensible.¹⁵⁴ The logical extension of *Miranda* is that police trickery is equally reprehensible whether it occurs before or after the artificial point of a court appearance. The methods employed by the police and condoned by the Court in *Innis* resemble those which *Miranda* condemned.¹⁵⁵ These methods also resemble the police conduct which the Court in *Brewer* found constitutionally impermissible.¹⁵⁶ While the Court ratified the police conduct in *Innis* because the suspect had only a fifth amendment right to counsel, it denounced the police conduct in *Brewer* because the defendant had made a brief court appearance for arraignment. Because the rights to counsel under both amendments are intended to deter impermissible police conduct, however, both rights should attach at the time of arrest.¹⁵⁷

Once the right to counsel attaches, the use of separate tests for determining when interrogation occurs under the fifth and sixth amendments will result in needless confusion for law enforcement

152. See note 142 *supra*.

153. Kauper has suggested that police abuses could be abolished by permitting interrogation only in open court. Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932), reprinted in 73 MICH. L. REV. 39 (1974). For a discussion of Kauper's foresightedness, see Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later — Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15 (1974).

154. The Court, referring to confessions obtained by beating, whipping, and other forms of brutality, said the limits upon custodial interrogation delineated in its *Miranda* opinion, are necessary to eradicate mental as well as physical coercion. *Miranda v. Arizona*, 384 U.S. 436, 446-48, 453-55 (1966).

155. *Id.* at 451-52.

156. See text accompanying notes 87-88 *supra*.

157. Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in Y. KAMISAR, F. INBAU, AND T. ARNOLD, *CRIMINAL JUSTICE IN OUR TIME*, 44-45 (A. Howard ed. 1965); Enker & Elsen, *supra* note 15, at 84-85; Herman, *supra* note 38, at 490-91; Traynor, *supra* note 37, at 673; *Confessions*, *supra* note 15, at 1006, 1009; *Pretrial Right*, *supra* note 24, at 413 n.81; Chafee, *Documents on Fundamental Human Rights*, Pamphlet 2 (1951-52), at 541; White, *supra* note 5, at 58. *But see* Grano, *supra* note 24, at 2.

agencies and the lower courts. A more practical approach by the Court would be the formulation of a single objective test to be applied in the context of both the fifth and sixth amendments. Such a test should be based upon whether or not a reasonable person in the position of the suspect would believe he had been interrogated.¹⁵⁸ This rule, in conjunction with recognition of the right to counsel upon arrest, would insure an even-handed approach by the courts and law enforcement personnel. At a minimum, however, the analysis of what constitutes interrogation should not be predicated on whether the fifth or sixth amendment is the matrix of analysis.

CONCLUSION

In the wake of *Innis* and *Henry*, it is apparent that the present state of the rights to counsel under the fifth and sixth amendments is uncertain. The Court's distinction between the fifth and sixth amendment rights to counsel can be established only inferentially; neither *Innis* nor *Henry* explicitly discusses the differences between the two rights.¹⁵⁹ Consequently, although it is clear that the Court views the rights as distinct, it is less clear why that distinction exists. Since the right to counsel under each amendment is aimed at eliminating impermissible police conduct,¹⁶⁰ a similar analysis should be applied, and similar kinds of police activity tolerated, in each context.

Furthermore, while *Innis* appears to reaffirm *Miranda*,¹⁶¹ and

158. This test was suggested by Justice Stevens in his *Innis* dissent. 100 S. Ct. at 1695. A similar objective test has been framed by Stone, although advanced as a test for custody. Stone, *supra* note 59, at 152-53. Factors urged by Stone to guide application of the test include police behavior, the setting, the extent to which police had focused the investigation on the individual, and the knowledge the suspect had of the evidence compiled by police. *Id.* "This approach seems generally consistent with the underlying concerns of *Miranda* and at the same time it avoids reliance upon self-serving statements of the police or the defendant, eliminates the difficulties of determining states of mind, and does not hold the police responsible for the idiosyncrasies of particular defendants." *Id.* Stone believes that a subjective test which focuses upon the intent of the officers, the test proposed in *Innis*, contradicts the spirit of *Miranda*. *Id.* at 153.

159. See text accompanying notes 115-28 *supra*.

160. *Confessions*, *supra* note 15, at 1016. See notes 27-32 and 57-72 and accompanying text *supra*.

161. Burger said in his *Innis* dissent that he would "neither overrule *Miranda*, disparage it, nor extend it at this late date." 100 S. Ct. at 1691.

However, the Burger Court has to some extent diluted *Miranda* through such decisions as *Harris v. New York*, 401 U.S. 222 (1971) (prior inconsistent statements admissible for impeachment purposes when *Miranda* warnings defectively administered); and *Oregon v. Hass*, 420 U.S. 714 (1975) (prior inconsistent statements admissible when police continue interro-

Henry relies upon *Massiah*,¹⁶² both decisions actually formulate new tests based upon the mental state of the suspect and the intent of the police.¹⁶³ The practical effect of these subjective tests may be to revive the voluntariness test previously abandoned in *Miranda*. That is, these tests may restore the necessity for a case-by-case consideration of the permissibility of police conduct, thus causing confusion among law enforcement agencies and lower courts by undercutting the certainty which had been supplied by *Miranda*.¹⁶⁴ The Court could restore certainty by extending the right to counsel to the post-arrest, pre-arraignment period. This single analytical mode would comport with the goal of both the fifth and sixth amendments of deterring police misconduct. Even if

gation and fail to honor the suspect's request for counsel). See Dershowitz & Ely, *Harris v. New York, Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1218-21 (1971); Kent, *Harris v. New York: The Death Knell of Miranda and Walder?*, 38 BROOKLYN L. REV. 357, 360-61 (1971); Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 51-52 (1971).

The Court also recently permitted the use of prearrest silence for impeachment purposes. In *Doyle v. Ohio*, 426 U.S. 610 (1976), the Court ruled that a defendant's silence immediately after issuance of the *Miranda* warnings could not be used to impeach the defendant's testimony at trial that he had been framed. Without overruling *Doyle*, the Court in *Jenkins v. Anderson*, 100 S. Ct. 2124 (1980), ruled that the defendant's silence for two weeks, the period prior to his surrender on murder charges, could be used to impeach his assertion of self-defense. *Id.* at 4696.

Given the prominence of *Miranda*, the Court may feel that to directly overrule it would call into question the integrity of the American judicial system based upon precedent. Instead, the Court may have chosen the slow process of indirectly overruling *Miranda*. See Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 218-19.

Stone views the present membership of the Court as anti-*Miranda*. Stone, *supra* note 59, at 100. Other commentators agree. See, e.g., Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383, 430-31 (1977); Note, *Michigan v. Tucker: A Warning about Miranda*, 17 ARIZ. L. REV. 188, 213 (1975).

162. 100 S. Ct. at 2186.

163. See text accompanying notes 129-30 *supra*.

164. See note 62 *supra* for a description of the difficulties and inconsistent results in the courts with the voluntariness analysis. Even Grano, who urges a return to the voluntariness test, concedes that a *per se* rule eliminates the need for case-by-case analysis. Grano, *supra* note 24, at 46.

Stone views *Michigan v. Tucker*, 417 U.S. 433 (1974), as signalling the return to the voluntariness test through its balancing test. Stone, *supra* note 59, at 118. In *Tucker*, the defendant had been given *Miranda* warnings but had not been told counsel would be appointed if he was indigent. Evidence obtained as a result of his statements following that incomplete warning was admissible, the Court said, because the incomplete warning did not deprive him of his privilege under the fifth amendment, but only of the procedural safeguards of *Miranda*. *Id.* at 444. Police conduct was inadvertent, and the information obtained was reliable. *Id.* at 444-45. The Court's description of *Miranda* rights as mere procedural safeguards seems inconsistent, Stone observes, with the declaration in that case that the warnings are fundamental to the fifth amendment privilege. Stone, *supra* note 59, at 119.

the Court is unwilling to adopt a uniform rationale, the confusion would be mitigated, if not entirely eliminated, by the Court's recognition that the separate fifth and sixth amendment tests, as set forth in *Innis* and *Henry*, should be resolved into a single test which could be employed in the context of both the fifth and sixth amendment rights to counsel.

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