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Rhode Island v. Innis: "Offhand Comments" or "Interrogation"?

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INTRODUCTION

In the past fourteen years, the Supreme Court has had several opportunities to add gloss to the controversial standards set forth in *Miranda v. Arizona*.[1] That decision required that any person subjected to "custodial interrogation" be apprised of his right to remain silent, of the fact that any statement could be used against him, and of his right to counsel, retained or appointed.[2]

In the years immediately following *Miranda*, the Warren Court read these requirements liberally, and in borderline cases tended to find confessions inadmissible.[3] With the Burger Court came a reluctance to extend *Miranda* principles beyond those set forth by the Warren Court. Although the Burger Court repeatedly has been criticized for retreating from the principles articulated in *Miranda*,[4] many of the criticized decisions have reflected more a reluctance to extend the *Miranda* principles than a retreat from them.[5]

Many of the post-*Miranda* decisions have been aimed at determining the definition of "custodial interrogation," for *Miranda* applies only to such interrogation. Prior to *Rhode Island v. Innis*,[6] all fifth amendment cases had been concerned with the question of "custody."[7] *Innis* is the first Supreme Court case to address itself to the definition of "interrogation" for *Miranda* purposes. The definition of "interrogation" that the Court formulated includes either express questioning or its "functional equivalent."[8] The purpose of this comment is to examine both the context out of which the decision in *Innis* arose and the implications of the decision for the future.

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

2. *Id.* at 444.

3. *See, e.g.*, Orozco v. Texas, 394 U.S. 324 (1969); Mathis v. United States, 391 U.S. 1 (1968).

4. *See generally* Keefe, *Confessions, Admissions, and the Recent Curtailment of Fifth Amendment Protection*, 51 CONN. B.J. 266 (1977); Picou, Miranda *and* Escobedo: *Warren v. Burger Court Decisions on Fifth Amendment Rights*, 4 S.U.L. REV. 175 (1978); Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99. *But see* Sunderland, *Self-Incrimination and Constitutional Principle*: Miranda v. Arizona *and Beyond*, 15 WAKE FOREST L. REV. 171 (1979).

5. *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam) (warnings not necessary for questioning in police station when suspect had come voluntarily and was free to leave); Beckwith v. United States, 425 U.S. 341 (1976) (IRS agent who gave inadequate warnings held not to have violated suspect's rights during questioning in a private residence).

6. 100 S. Ct. 1682 (1980).

7. *E.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam); Beckwith v. United States, 425 U.S. 341 (1976).

8. 100 S. Ct. at 1689.

I. BACKGROUND

A. *Development of the Privilege*

The fifth amendment to the United States Constitution provides that "[N]o person . . . shall be compelled in any criminal case to be a witness against himself."[9] This "privilege against self-incrimination" had its origins in opposition to the oath *ex officio* used by the English ecclesiastical courts, the Court of the Star Chamber, and the Court of the High Commission.[10] This oath allowed officials to cause an individual to be brought before the court and made to respond to any questions put to him. One who refused to be sworn, or, having been sworn, refused to testify, was declared *pro confesso*—the legal equivalent of having confessed and been convicted.

A landmark case in the development of the privilege was the trial of John Lilburn, who refused to take the oath or to answer against himself.[11] In 1645, the House of Lords ordered his sentence vacated as "illegal, most unjust, and against the liberty of the subject and law of the land, and Magna Charta, and unfit to continue upon record."[12] Within five years of this decision, the privilege was established in the New England states and in Virginia.[13] It evolved through colonial history as a privilege against physical compulsion and against the moral compulsion that an oath to one's God commands.[14] Upon independence, seven of the new states incorporated the privilege into their constitutions.[15] In all of the debates on the federal constitution there were few allusions to the privilege, but when it was mentioned, it was in reference to confessions exacted by torture.[16]

It is not clear whether the privilege originally extended beyond protecting a defendant in his own criminal trial. In 1892, however, the Supreme Court, in *Counselman v. Hitchcock*,[17] made it clear that the privilege extended to grand jury proceedings and suggested that it might extend even further.[18]

Until 1964, the fifth amendment privilege was not binding on the

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9. U.S. CONST. amend. V.

10. Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

11. *Id.* at 770.

12. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 9 (1949).

13. Pittman, *supra* note 10, at 781.

14. *Id.* at 783.

15. *Id.* at 764-65.

16. *Id.* at 788.

17. 142 U.S. 547 (1892).

18. The Court stated:

> It is impossible that the meaning of the constitutional privilege can only be, that a person shall not be compelled to be a witness against himself. . . . It would doubtless cover such cases, but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

Id. at 562.

Judge Friendly argues that once the phrase, "in any criminal case," has been read out of the amendment, it has been all too tempting to take equal liberties with the term "compelled." Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CINN. L. REV. 671 (1968).

states.[19] Convictions in state courts based on confessions were invalidated only if they were obtained under such conditions as to violate principles of due process under the fourteenth amendment.[20] This standard changed, however, when the Supreme Court, in *Malloy v. Hogan*,[21] decided that the fourteenth amendment "secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement."[22]

Given this brief background of the development of the privilege, the question arises of precisely what is protected by the privilege. The language and history of the amendment provide some answers. For example, it is clear that the privilege protects a defendant from being called to the witness stand by the prosecution and being subjected under oath to questions designed to incriminate him. It also protects him against being forced by torture to confess. Beyond this, the language and history give little aid in determining the scope of the privilege and we must turn to the interpretations of it by the Supreme Court.

B. *The* Miranda *Rule*

Prior to the decision in *Miranda*, the critical question in determining whether a confession was obtained in violation of the Constitution was whether it was "voluntary."[23] This determination was made by an examination of the "totality of the circumstances."[24] The voluntariness test necessitated an *ad hoc* inquiry into the facts of each case, resulting in a rather subjective determination, as well as providing only very amorphous guidelines for police interrogators as to what conduct was permissible.

In *Miranda*, the court fashioned a *per se* rule to be applied in the determination of the validity of confessions. Concluding that the process of custodial interrogation is "inherently compelling," the Court held that a suspect must be "adequately and effectively" apprised of his rights,[25] and that the

19. Cohen v. Hurley, 366 U.S. 117 (1961); Twining v. New Jersey, 211 U.S. 78 (1908).

20. *E.g.*, Brown v. Mississippi, 297 U.S. 278 (1936).

21. 378 U.S. 1 (1964).

22. *Id.* at 7-8. Despite the Court's trend of expanding the scope of the fifth amendment, some commentators, including Wigmore, Corwin, Pound, and Morgan have actually called for the curtailment or elimination of the privilege. Friendly, *supra* note 18, at 672. McCormick expressed his hope that:

> as [the courts] become more conversant with the history of the privilege [they] will see that it is a survival that has outlived the context that gave it meaning, and that its application today is not to be extended under the influence of a vague sentimentality but is to be kept within the limits of realism and common sense.

McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 277 (1946).

Judge Friendly questions why it is more cruel to compel a man to testify against himself in a misdemeanor trial than it is to compel him to testify against his mother on trial for her life. Friendly, *supra* note 18, at 680.

This is not to suggest that these opinions in any way represent the majority view, only that there is not unanimity among authorities about the scope and importance of the privilege.

23. *E.g.*, Haynes v. Washington, 373 U.S. 503 (1963).

24. *Id.* at 514.

25. This is true regardless of whether the suspect in fact knew his rights. The Court stated:

> [W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with the authorities, can never be more than speculation; a warning is a clearcut fact.

exercise of those rights must be fully honored.[26] *Miranda* requires that the suspect be informed of his right to remain silent and that anything he says can and will be used against him in court.[27] Further, the suspect must be advised that he has the right to consult an attorney prior to questioning and also to have counsel present during questioning.[28] The suspect must also be advised that if he is indigent he has the right to an appointed attorney.[29] These protections are applicable once an individual is in custody at the police station or "otherwise deprived of his freedom of action in any significant way."[30] After the warnings have been given, if the suspect indicates either prior to or during questioning that he wishes to remain silent, the interrogation must end.[31] The Court concluded that any statement taken after the invocation of the privilege "cannot be other than the product of compulsion, subtle or otherwise."[32]

One of the principal questions presented by *Miranda* is under what circumstances must the warnings be given. It is clear that a suspect who has been arrested and is in custody is entitled to the warnings.[33] The application of the privilege, however, to one who has been "deprived of his freedom of action in any significant way" has created a great deal of uncertainty. All of the Supreme Court cases that have dealt with the definition of custodial interrogation prior to *Innis* have involved the definition of "custody" rather than of "interrogation."[34] While some lower courts have addressed the issue, they have reached inconsistent results.[35]

II. FACTS OF *RHODE ISLAND V. INNIS*

On the night of January 16, 1975, the body of John Mulvaney, a Providence, Rhode Island, cab driver, was discovered in a shallow grave four days after he disappeared. He had been shot in the back of the head with a shotgun. On January 17, shortly after midnigh*, Gerald Aubin, also a taxi driver, reported to police that he had just been robbed by a man carrying a sawed-off shotgun, and had dropped the man off in the Mount Pleasant area

384 U.S. at 468-69. It is not clear why every man is presumed to know the law, but presumed not to know his rights.

26. *Id.* at 467.
27. *Id.* at 469.
28. *Id.* at 470.
29. *Id.* at 473.
30. *Id.* at 477.
31. *Id.* at 473-74.
32. *Id.* at 474.
33. *Id.* at 444.
34. In Mathis v. United States, 391 U.S. 1 (1968), the Court held that the subject of a routine investigation should have been given *Miranda* warnings because at the time of the questioning he was in jail for an unrelated crime. In Orozco v. Texas, 394 U.S. 324 (1969), the Court held *Miranda* applicable to questioning which took place in the accused's bedroom, because although no actual arrest had occurred, the accused was not free to leave. In Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam), *Miranda* warnings were held not to be necessary for questioning that took place in a police station when the suspect had come in voluntarily and was free to go at any time. In Beckwith v. United States, 425 U.S. 341 (1976), an IRS agent who gave warnings that would have been inadequate under *Miranda* was held not to have violated a suspect's rights when the questioning took place in a private residence.
35. *See* notes 81-85 *infra* and accompanying text.

of Providence. While at the police station, Aubin noticed a picture of his assailant on a bulletin board and notified one of the police officers.

At approximately 4:30 a.m., a cruising patrolman spotted Innis, who was arrested and advised of his rights. At that time, Innis was unarmed. Within a few minutes a police sergeant arrived at the scene and once again advised Innis of his rights. Immediately thereafter, Captain Leyden arrived with other police officers. Captain Leyden also gave Innis the *Miranda* warnings. At this point, Innis stated that he wished to speak to an attorney.[36] Captain Leyden then ordered Innis to be taken to the police station and assigned Patrolmen Gleckman, Williams, and McKenna to accompany Innis to the station.[37] Captain Leyden instructed the officers not to interrogate Innis or to intimidate him in any way.

Apparently, almost immediately after the patrol car left the scene of the arrest, Patrolman Gleckman began to talk with Patrolman McKenna about the missing shotgun. Gleckman stated that there was a school for retarded children in the area where they suspected that the shotgun was hidden, and that "God forbid one of them might find a weapon with shells and they might hurt themselves."[38]

At this point, Innis interrupted the officers, telling them that they should turn the car around and he would show them where the gun was located. The police car returned to the scene of the arrest where a search for the shotgun was underway. Once again, Captain Leyden advised Innis of his rights. Innis stated that he understood his rights but that he wanted to help find the gun because of his concern for the children. He then led the police to where he had hidden the shotgun.

On March 20, 1976, Innis was indicted for kidnapping, robbery, and murder. Prior to the trial, Innis' attorney moved to suppress the shotgun and the statements made to the police. Finding that Innis had been "repeatedly and completely advised of his *Miranda* rights," the judge concluded that Innis' decision to lead the police to the shotgun was an intelligent waiver of his rights. The trial judge did not address the question of whether Innis had in fact been "interrogated." Innis was convicted on all counts.

The Rhode Island Supreme Court, in a 5-2 decision, set aside the conviction,[39] holding that Innis had invoked his right to counsel and that, contrary to the mandate of *Miranda*,[40] the police had continued to interrogate him without a valid waiver of his rights. The Rhode Island Supreme Court found that Innis was subjected to "subtle coercion" that was the equivalent of interrogation, and also that the state had not carried its burden of establishing that there had been a waiver.[41]

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36. 100 S. Ct. at 1686.

37. This was apparently an unusual procedure. Generally only two patrolmen would accompany a prisoner. *Id.* at 1697 n.17 (Stevens, J., dissenting).

38. *Id.* at 1686. The precise wording is unclear. Patrolman Williams testified that it would be too bad if "a little girl" should hurt herself. *Id.* at 1687.

39. 391 A.2d 1158 (R.I. 1978).

40. The Court in *Miranda* stated: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 474.

41. 391 A.2d at 1162-63. The *Miranda* Court stated that "[i]f the interrogation continues

III. SUPREME COURT'S HOLDING

In a 6-3 decision,[42] the United States Supreme Court reversed the judgment of the Rhode Island Supreme Court. Recognizing that "interrogation" under *Miranda* covers more than express questioning, the Court nonetheless held that Innis had not been interrogated for *Miranda* purposes. The Court held that "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent."[43] The functional equivalent of questioning includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[44] The Court observed that any knowledge on the part of police of a defendant's unusual susceptibility to a particular form of conduct might be an important factor in determining whether the police should have known that their conduct was likely to elicit a response.[45]

The Court held that the circumstances of this case did not suggest that Innis was subjected to the "functional equivalent" of questioning. The Court found nothing in the record to suggest that the police knew that the defendant was peculiarly susceptible to appeals to his conscience, nor was there anything to suggest that they knew he was unusually disoriented or upset. Furthermore, the Court held that the "offhand comments" were not the sort of lengthy harangue calculated to overbear the will of a suspect. The Court concluded that "[t]he Rhode Island Supreme Court erred . . . in equating 'subtle compulsion' with interrogation."[46]

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without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. at 475.

42. Justice Stewart wrote the opinion of the Court, in which Justices Blackmun, Powell, Rehnquist, and White joined. Justice White filed a concurring opinion stating that Innis had waived his rights. Chief Justice Burger filed an opinion concurring in the judgment. Justice Marshall filed a dissenting opinion in which Justice Brennan joined. Justice Stevens filed a separate dissent.

43. 100 S. Ct. at 1689.

44. *Id.* (footnotes omitted).

45. *Id.* at 1690 n.8.

46. *Id.* at 1691. Had the Court decided that Innis had been interrogated, the question of waiver would have arisen. In light of the fact that Innis invoked his rights and the police continued to interrogate him, the Court would probably not have found that Innis had voluntarily waived his rights, because such a situation would have amounted to a refusal of the police to honor Innis' request to terminate the questioning.

The question of waiver is beyond the scope of this comment, but it does raise some interesting issues. For example, precisely what is being waived? Waiver is generally spoken of as a waiver of the right to remain silent, or of the right to counsel. Yet if custodial interrogation is inherently coercive, and if appeals to one's conscience are a form of "subtle compulsion," a waiver in such cases must be a waiver of the right not to be compelled to testify against oneself. This reasoning is escapable only if one accepts the proposition that the giving of *Miranda* warnings completely dispels the compulsion of custodial interrogation. It is difficult to see, however, how the recital of a thirty second warning can burst the bubble of coercion assertedly associated with all such interrogation.

Professor Jerold Israel has pointed out that if the Court feels the need to respond to the arguments of those who urge a limitation on the exclusion of evidence under *Miranda*, it could most effectively meet that need by enlarging its concept of "waiver." Thus, a waiver would not necessarily be rendered invalid by the police's urging the suspect to confess, explaining the evidence against him, or asking him to reconsider his decision to remain silent. This concept

Chief Justice Burger, concurring in the judgment only,[47] stated his unwillingness to overrule, disparage, or expand *Miranda*. He did, however, express concern that the Court's test required a police officer to evaluate the suggestibility and susceptibility of an accused. In addition to his concern that police officers are not trained to make such judgments, he expressed his feeling that the Court's test puts an additional burden on trial judges.[48]

Justice Marshall's dissent agreed that the majority had correctly defined "interrogation," but disagreed with its application of the test to the facts.[49] He found Officer Gleckman's statements concerning the possibility of the death of a helpless, handicapped girl to be a strong appeal to the conscience, and stated that policemen are "chargeable with knowledge of and responsibility for the pressures to speak which they [create]."[50] Although nominally concurring with the test of the majority, this last statement seems to put more responsibility on the police because it makes the police responsible for any conduct which in fact evokes a statement, whether or not the police "should have known" that it would.

In this respect, Justice Marshall's dissent parallels that of Justice Stevens who argued for a broader definition of "functional equivalent of interrogation." Taking issue with the majority's view that makes a finding of interrogation dependent upon whether the police should have known that what they were saying was likely to elicit a response, Justice Stevens argued that the test should be whether a statement would normally be understood by the average listener as calling for a response.[51] Therefore, he argues, any police conduct or statements that would appear to a reasonable person in the suspect's position as calling for a response must be considered "interrogation." Justice Stevens appears to go even further by stating that the definition of interrogation must include police conduct or statements that have the same "purpose or effect" as a direct question.[52]

In the case below,[53] the Rhode Island Supreme Court relied on standards set forth in *Brewer v. Williams*,[54] a 1977 case with facts superficially similar to those in *Innis*. *Brewer* involved a suspect who had been arrested and arraigned in Davenport, Iowa, for the abduction, rape, and murder of a ten-year-old girl. After his lawyer told police that Williams was not to be interrogated, Williams was driven back to Des Moines. During the trip back, one of the policemen made an appeal to Williams' conscience by what has come to be known as the "Christian Burial Speech,"[55] after which, Wil-

would allow the Court to meet many of the objections of prosecutors, yet there would be no need to modify most of the procedural safeguards announced in *Miranda*. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1386 (1977).

47. 100 S. Ct. at 1691 (Burger, C.J., concurring).
48. *Id.* (Burger, C.J., concurring).
49. *Id.* at 1692 (Marshall, J., dissenting).
50. *Id.* (Marshall, J., dissenting).
51. *Id.* at 1694 (Stevens, J., dissenting).
52. *Id.* at 1695 (Stevens, J., dissenting).
53. State v. Innis, 391 A.2d 1158 (R.I. 1978).
54. 430 U.S. 387 (1977).
55. Detective Learning said:

I want to give you something to think about while we're travelling down the road. . . . I want you to observe the weather conditions. . . . They are predicting

liams led the police to the girl's body. The Supreme Court ruled that Williams' sixth amendment right to counsel had been violated because the detective had deliberately elicited the statement from Williams outside the presence of counsel after adversary proceedings had begun.

In *Innis*, the Supreme Court rejected the Rhode Island court's reliance on *Brewer*, stating that since judicial proceedings had not been initiated against Innis, the protection of the sixth amendment had not attached. Furthermore, the Court stated that because of the different policies underlying the fifth and sixth amendments, the definitions of interrogation under the two amendments are different, if in fact the term "interrogation" has any meaning at all in the sixth amendment context.[56]

IV. *MIRANDA, INNIS,* AND THE FIFTH AMENDMENT

Undoubtedly, much ink will be spilled decrying the result in *Innis* and characterizing it as one more instance of the Burger Court's trampling on individual rights. Before we resign ourselves to a police state and prepare ourselves for a revival of the Star Chamber, however, we should try dispassionately to examine precisely what has happened: A man unquestionably guilty of murder was convicted, based at least in part on a confession which is difficult to describe as anything but voluntary, using the ordinary meaning of the word. Unfortunately, however, the Court used some rather strained logic in its first application of the test announced.

Even conceding that the reason behind Patrolman Gleckman's statement was a faint hope that such an appeal to Innis' conscience would yield a confession, it is difficult to argue that such a statement was "compelled" in the fifth amendment sense of the word. Innis was not tortured, threatened, intimidated, tricked, or in any way made to feel that a refusal to talk would produce adverse consequences. Although not overruling or even expressly limiting *Miranda*, this case may reflect a feeling by some members of the Court that the varnish of *Miranda* and its progeny has obscured the underlying grain of the fifth amendment.

It seems to be a closer question whether Innis' *Miranda* rights were violated than whether he was compelled to testify against himself. The *Miranda* Court stated that custodial interrogation "contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," and that in order to combat those pressures he must be advised of his rights and the exercise of those rights must be honored.[57]

Since one of the rationales for the *Miranda* holding was that custodial

several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is . . . and if you get a snow on top of it you yourself may be unable to find it. . . . [T]he 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. Leaming then stated "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're driving down the road." *Id.*

56. 100 S. Ct. at 1689 n.4.

57. 384 U.S. at 467.

interrogation in the absence of adequate warnings or a valid waiver is inherently coercive, it might be relevant to inquire into the pressures on the suspect to speak to determine whether he was interrogated. That is, if all such custodial interrogation is coercive, if it is found that the subject was not coerced, he could not have been interrogated in violation of his rights.

In the instant case, it is likely that Innis felt less pressure on himself to speak than did those suspects in *Miranda* and its companion cases who were subjected to long periods of incommunicado interrogation. It is also reasonable to assume that a suspect feels less pressure to speak when confronted with indirect, rather than direct, appeals. The difficulty lies in deciding whether the pressure is diminished to such an extent that it no longer constitutes compulsion.

One difficulty in defining "interrogation" in terms of compulsion is that the definition being sought is in turn dependent upon another term difficult to define—"compulsion." "Compulsion" could be defined strictly as physical force or the threat thereof, or it could include more "subtle compulsion," even compulsion so subtle that it might more accurately be described as "encouragement." In fact, for some supporters of the *Miranda* decision, the definition of "compulsion" actually does include "encouragement."[58] Undoubtedly, Innis received encouragement to speak, at least from his perspective, but it is more difficult to argue that he was compelled to speak. The Court's decision in *Innis* may reflect a reluctance to read the fifth amendment as stating that: "No person shall be encouraged to testify against himself."

A further factor that the Court might have considered was that Innis had been advised of his *Miranda* rights four times before he showed the police where the shotgun was hidden. Although technically irrelevant because if no interrogation took place it does not matter whether he was given the warnings, the fact that he was given repeated warnings may be viewed as putting Innis under less pressure to talk.

That the question of a violation of *Miranda* may be more difficult to determine than the question of a violation of the fifth amendment, suggests that *Miranda* may, at least in part, be predicated on grounds other than the fifth amendment.[59] There is language in *Miranda* and in more recent decisions to support this proposition. In *Miranda*, the Court stated that "we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a straitjacket which will handicap sound efforts at reform, nor is it intended to have this

58. Professor Kamisar states:

> If the police conduct is designed and likely to pressure or persuade, or even "to exert a tug on," a suspect to incriminate himself . . . then that conduct is "compulsion" as *Miranda* defines the self-incrimination clause. Then it *augments* or *intensifies* the tolerable level of stress, confusion, and anxiety generated by unadulterated arrest and detention to the impermissible level of "compulsion."

Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1, 23 (1978) (footnotes omitted) (emphasis in original).

59. *See* Sunderland, *supra* note 4, at 204.

effect."[60]

Further support for at least a partial nonconstitutional basis for *Miranda* is found in the conclusive presumption that the Court created that, in any given instance, if a defendant was not given warnings, he was not aware of his rights.[61] If the fifth amendment requires that a suspect have an opportunity to exercise his rights in a knowing fashion, surely the critical question should be whether he fully understands those rights, rather than whether a particular formality was observed. This position is supported by cases holding that even if *Miranda* warnings were given, they are defective unless they were understood.[62]

In *Michigan v. Tucker*,[63] the Court was presented with the question of whether the testimony of a witness in a rape trial should be excluded because police had learned the identity of the witness by questioning the suspect when he had not been given the full *Miranda* warnings.[64] In an opinion by Justice Rehnquist, the Court stated, "We will therefore first consider whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination *or whether it instead violated only the prophylactic rules developed to protect that right*."[65] The *Tucker* Court further characterized the *Miranda* rules as "recommended 'procedural safeguards,' "[66] and went on to say "The [*Miranda*] Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."[67]

The question of whether verbatim *Miranda* warnings are actually mandated by the Constitution is of great significance. If these warnings are not themselves constitutionally required, then federal courts may not reverse state court judgments on the ground that the *Miranda* warnings were not given or were in some way deficient; the federal courts may only inquire whether the right against compulsory self-incrimination was violated.[68]

Moreover, the point has recently been made that even the supervisory powers of the federal courts over federal prosecutions may be limited. In oral arguments before the Supreme Court in the search-and-seizure case of *United States v. Payner*,[69] Solicitor General Wade H. McCree, Jr., argued that Federal Rule of Evidence 402[70] places stringent limits on the federal courts'

60. 384 U.S. at 467.

61. *See* note 25 *supra*. As a result of this rule, if Chief Justice Warren, the author of the *Miranda* opinion, had been arrested and not given the warnings, there would have been a conclusive presumption that he was unaware of them.

62. *See, e.g.*, Wainwright v. Sykes, 528 F.2d 522 (5th Cir. 1976) (statements made by intoxicated suspect inadmissible), *rev'd on other grounds*, 433 U.S. 72 (1977).

63. 417 U.S. 433 (1974).

64. Tucker had been advised of all his rights except that he would be furnished counsel free of charge if he could not afford to pay for assistance himself. *Id.* at 436.

65. *Id.* at 439 (emphasis added).

66. *Id.* at 443.

67. *Id.* at 444.

68. Argersinger v. Hamlin, 407 U.S. 25, 38 (1972).

69. 100 S. Ct. 2439 (1980).

70. FED. R. EVID. 402 states:

All relevant evidence is admissible, except as otherwise provided by the Constitution

exercise of their supervisory powers to suppress relevant evidence.[71] Therefore, he argued, in the absence of some statutory or constitutional provision permitting it, the federal courts may not exclude relevant evidence.[72] Finding that the lower court had violated the already established rule that a court may not exclude evidence under the fourth amendment unless the defendant's own constitutional rights were violated,[73] the Court apparently found it unnecessary to address the rule 402 argument. This does point up, however, the significant consequences of finding that *Miranda* is based upon the supervisory power rather than the constitution.

V. ANALYTICAL PROBLEMS WITH THE *INNIS* TEST

The preceding discussion was intended to explore some possible reasons for the Court's holding in *Innis*. It is now pertinent to discuss some problems associated with the test formulated by the Court.

While the particular result in *Innis* may appear to be an aberration in terms of the application of the test to the facts,[74] the test laid down in the opinion seems to be a sound compromise between the rights of the suspect and the need for effective police work. There are some ironies involved, however. By defining interrogation as express questioning or "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,"[75] the Court is implicitly condoning the use of techniques that the police reasonably believe are unlikely to evoke an incriminating response. In other words, it is permissible for the police to take a long shot, but not for them to use techniques with a reasonable probability of success. Intent on the part of the police to elicit a statement, though not irrelevant, is not determinative.[76] The Court does state, however, that intent might have a bearing on whether the police should have known that their words or actions were likely to elicit a response.[77]

As Chief Justice Burger pointed out in his concurrence, the Court's test may introduce a new element of uncertainty into police work because the police must evaluate the susceptibility of an accused. This is a very real concern since it is not necessary that the police knew that their conduct was likely to elicit a response; it is enough that they should have known. This test seems to mean that if the police had stopped to think, it would have

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of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

71. 26 CRIM. L. REP. (BNA) 4212 (1980).

72. In response to a question by Justice Stevens asking if Solicitor General McCree was asking the Court to overrule *Miranda*, McCree replied in the negative because of his belief that *Miranda* seems to have some fifth amendment underpinning. *Id.* at 4213.

73. United States v. Payner, 100 S. Ct. 2439, 2442 (1980).

74. 100 S. Ct. at 1692 (Marshall, J., dissenting).

75. *Id.* at 1689 (footnotes omitted).

76. *Id.* at 1690 n.7.

77. It is likely that a practice which is designed to elicit a response will be one which the police should have known was likely to have that effect. *Id.*

occurred to them. It is not always possible, however, for police to stop to think.

The Court added even more confusion when it stated that the definition of interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police."[78] It is not clear precisely what this means. It appears to mean that if the suspect perceives that the police should have known that their conduct was reasonably likely to elicit an incriminating response, then the police conduct constitutes interrogation. This is not an easy test to apply. The difficulty with this standard can be illustrated by slightly varying the facts of the *Innis* case. Suppose Innis had a mentally retarded daughter at the school for handicapped children in the neighborhood where the gun was hidden, and he erroneously assumed that the police had found out about her during their investigation. It would probably appear to Innis that the police should have known that their statements were likely to elicit a response; yet, the police would have no way of knowing that this was a situation any different from the actual facts of *Innis*. In light of the Court's view that deterrence of illegal police conduct is the major reason for *Miranda*,[79] it seems somewhat anomalous to base a decision whether a confession should be excluded on factors over which the police have no control and which they have no way of assessing.

VI. THE IMPACT OF *INNIS* ON THE FUTURE

Since *Miranda* also condemned the use of psychological ploys that do not amount to direct questioning,[80] it might seem, at first glance, that *Innis* adds little to the law of confessions. There is one line of confession cases, however, on which the decision in *Innis* may have a significant impact. These are cases where the suspect is shown evidence against him, either prior to *Miranda* warnings or after he has invoked his right to remain silent. Although the Supreme Court has never addressed this question, a number of lower courts have, with varying results.

In *Combs v. Wingo*,[81] after the defendant was arrested for murder and his *Miranda* rights were explained to him, he told police that he wanted to make a statement, but wanted to talk to an attorney first. The policeman agreed, but immediately read the ballistics report to Combs, who then began to talk. The court held that Combs' rights had been violated.

A similar result was reached in *Commonwealth v. Hamilton*,[82] in which the defendant made incriminating statements after being confronted with the confession of a co-conspirator. The court held that the relevant inquiry in determining whether there had been interrogation was whether a confession was expected or reasonably likely to be elicited. The court held the statements inadmissible.

Contrary results have been reached in other cases. In *United States v.*

78. *Id.* at 1689-90.
79. *E.g.*, Oregon v. Hass, 420 U.S. 714 (1975).
80. 384 U.S. at 450.
81. 465 F.2d 96 (6th Cir. 1972).
82. 445 Pa. 292, 285 A.2d 172 (1971).

Hodge,[83] the suspect was arrested for armed robbery on a military base. After Hodge invoked his rights, the investigator terminated the interview and then informed Hodge of the military procedure to obtain counsel and explained the charges and the evidence against him. Hodge then changed his mind and volunteered a statement. The court held that his subsequent statements were admissible.

In *United States v. Davis*,[84] the suspect in a bank robbery invoked his right to remain silent. An F.B.I. agent then showed Davis a picture of Davis at the bank during the robbery and asked "Are you sure you don't want to reconsider?" Davis studied the picture and then said, "Well, I guess you've got me." His subsequent statements were ruled admissible, the court holding that the F.B.I. agent merely asked Davis if he wanted to reconsider his decision, and that the interrogation did not resume until after Davis had voluntarily agreed that it should.

In *United States v. Pheaster*,[85] the court similarly held that statements evoked by an objective, undistorted presentation of the evidence were not products of interrogation.

Given the test announced in *Innis*, it seems fairly clear that all statements elicited by a presentation to a suspect of the evidence against him should be considered the product of interrogation. The police should know that showing a suspect the evidence against him is likely to elicit an incriminating response, and in fact, that is probably their reason for doing so. Whether such action involves actual compulsion is another matter. Certainly it is an encouragement to speak, but it is not as clear that the suspect's will is overborne to such an extent that his decision to speak is a product of compulsion.

At this writing, two state courts have applied the *Innis* test to such cases and have held that the statements elicited were the products of interrogation.[86] In *Nebraska v. Durand*,[87] the defendant was arrested and given the *Miranda* warnings. When asked whether he would like to make a statement, he replied in the negative. He was then shown police reports of other crimes of which he was suspected and again advised of his rights. The statement he then gave was held inadmissible under *Innis*, because it was elicited by the "functional equivalent" of interrogation, and the police should have known that showing Durand the police reports was likely to evoke an incriminating response.

In *People v. Bodner*,[88] the Appellate Division of the New York Supreme

83. 487 F.2d 945 (5th Cir. 1973).

84. 527 F.2d 1110 (9th Cir. 1975), *cert. denied*, 425 U.S. 953 (1976).

85. 544 F.2d 353 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977).

86. A third case has been decided based upon *Innis*, but the facts in that case are somewhat different. In State v. Jones, 27 CRIM. L. REP. (BNA) 2342 (June 23, 1980), the Louisiana Supreme Court held that the comments by a policeman to a man suspected of killing his child to the effect that "God takes care of little babies" and that "the baby was already in heaven" were more in the nature of consolation than interrogation. Moreover, the court held that even if the comments were interrogation, the admission of the statements elicited constituted harmless error.

87. 406 Neb. 415, 293 N.W.2d 383 (1980).

88. 27 CRIM. L. REP. (BNA) 2414 (July 10, 1980).

Court reached a similar result. In that case, a seventeen-year-old mentally retarded youth named Dwayne voluntarily went to the police station and told a detective whom he knew well that his cousin had intentionally started a series of fires. Dwayne took the detective around and showed him where and how his cousin had supposedly set the fires. The detective told Dwayne to go home and then went to interview the cousin. The interview convinced the detective that the cousin was innocent, so the detective summoned Dwayne and one of his parents back to the police station. The detective told Dwayne, "We checked out your cousin's alibi, and he was telling the truth." Dwayne responded, "I did. I lied to you." At that point he was given *Miranda* warnings, and shortly thereafter he signed a full confession.[89]

The court applied *Innis* and held that the policeman's statement was reasonably likely to elicit an incriminating response, and since the court found that the "interrogation" had occurred in a custodial setting, it should have been preceded by the *Miranda* warnings. The court stated that telling Dwayne that his cousin could not have set the fires was the same as telling Dwayne that he knew Dwayne was lying and had set the fires himself.[90]

Although lower courts have heretofore differed on the admissibility of statements elicited by the disclosure to suspects of incriminating evidence, the *Innis* opinion will probably result in a general exclusion of statements so obtained.[91] There can be little doubt about the motives of the police in disclosing the evidence and they should know that disclosure is reasonably likely to evoke an incriminating response.

CONCLUSION

The result in *Innis* may be illustrative of a disenchantment of a majority of the Court with the *Miranda* rules and the Court's reluctance to rule inadmissible statements obtained in the absence of actual coercion or highly improper police techniques. *Innis* reflects the Court's movement toward a "voluntariness-totality of the circumstances" test in situations that do not fall squarely within the ambit of the *Miranda* decision.

Although the test in *Innis* may be quite reasonable, the application of the test to the facts is less so. Despite the fact that the Court found that Patrolman Gleckman's statement consisted merely of a few "offhand remarks," it defies credibility to assert that he had not considered the possible impact of his statement on Innis. Although the result in this case may have squared with the fifth amendment, it is difficult to reconcile the result in the case with the test announced by the Court.

Constitutionally, there appears to be no reason not to abandon *Miranda*, and look in each case to the totality of the circumstances to determine whether a suspect was actually compelled to be a witness against himself. Practically, however, this would likely have the effect of increasing the bur-

89. *Id.*

90. Arguably, under the rationale of Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam), Dwayne was not in custody.

91. Unless, of course, the Court is willing to expand its definition of "waiver." See note 46 *supra*.

den on federal courts by requiring an inquiry into the specific facts of each case.[92] Yet, it is questionable whether administrative convenience is sufficient justification for the intrusion on state sovereignty that adherence to *Miranda* in state court proceedings entails.

The primary impact of *Innis* will likely be in those cases in which the police present incriminating evidence to the suspect either prior to the *Miranda* warnings being given, or after an invocation by the suspect of his rights. A reasoned application of the test announced in *Innis* will result in exclusion of evidence so obtained. In a sense, it is ironic that the primary impact of this decision—a decision which will almost certainly be heavily criticized by civil libertarians—will probably be to afford suspects a greater measure of protection while they are in police custody than they previously enjoyed.

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92. It should be borne in mind, however, that *Miranda* does not completely abolish the need to look into the totality of the circumstances; it merely prescribes one element that must be present in order to hold a confession admissible. *See, e.g.*, Brown v. Illinois, 422 U.S. 590 (1975).