COMMENT

RHODE ISLAND v. INNIS

CRIMINAL PROCEDURE—Fifth Amendment—Interrogation in violation of Miranda includes not only direct questioning but also conduct police officers knew or should have known would elicit an incriminating response. 446 U.S. 291 (1980).

In Rhode Island v. Innis,¹ the Supreme Court explored the meaning, left unresolved by Miranda v. Arizona,² of what constitutes interrogation in a custodial setting. By defining interrogation not merely as express police questioning, but as “words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response,”³ the Court in Innis has afforded a suspect considerably more protection than had previously been given in a majority of jurisdictions.⁴ Moreover, Rhode Island v. Innis may mark a deviation from the Burger Court’s recent trend of restricting the scope of the fifth amendment privilege against self-incrimination.⁵

3. 446 U.S. at 302 (emphasis in original) (footnote omitted).
4. See notes 53-57 infra and accompanying text.
5. See, e.g., Burger, The Unprivileged Status of the Fifth Amendment Privilege, 15 Am. Crim. L. Rev. 9 (1978); Chase, The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections, 52 N.Y.U. L. Rev. 518 (1977); Stone, The Miranda Doctrine in the Burger Court, 1977 Sup. Ct. Rev. 99. Recognizing the Burger Court’s dramatic shift in the field of criminal procedure, Professor Chase maintains that the Court has been concerned with convicting the “factually guilty” at the expense of protecting the individual from improper police conduct. After reviewing post-Miranda cases, a pattern of constitutional analysis emerges:

[I]f reliable evidence in a criminal case establishes the probability that the defendant has committed the act with which he is charged, constitutional rules that operate to exclude the evidence, or to taint it, will be strictly construed or narrowed, and constitutional rules that operate to preserve the evidence will be liberally construed or expanded.

Regarded by many as the Warren Court's most important criminal procedure decision, 6 Miranda ushered in a new era in the law of confessions by guaranteeing a suspect in custody the right to remain silent and consult with counsel before being questioned by police. 7 The Supreme Court's decisions after Miranda defined and clarified such issues as what constitutes waiver of Miranda rights 8 and the custodial situation which Miranda safeguards. 9 However, the most important and troublesome issue that the Miranda decision left unresolved—what constitutes interrogation in a custodial setting—did not receive Supreme Court attention for fourteen years. When certiorari was granted in Rhode Island v. Innis, 10 the Supreme Court had an opportunity to define fully interrogation within the meaning of Miranda. 11

This Comment analyzes the Supreme Court's decision in Rhode Island v. Innis. The first section reviews the law prior to Innis, with particular emphasis on lower court decisions which defined interrogation in the absence of a Supreme Court standard. The second section's analysis of Innis itself focuses upon the Court's definition of what types of police conduct constitute custo-
dial interrogation and criticizes that definition on the ground that the test as adopted may be an unworkable standard. The last section suggests an alternative approach by clarifying the definition of custodial interrogation and constructing workable criteria for lower court guidance. In addition, it proposes a standard for police procedure which may alleviate the difficulties inherent in a custodial-interrogation setting.

**MIRANDA TO INNIS: WHAT IS CUSTODIAL INTERROGATION?**

In *Miranda*, the Court extended the fifth amendment privilege against self-incrimination beyond judicial proceedings to in-custody police questioning.\(^\text{12}\) To insure that the fifth amendment

---


The traditional common law theory was based on evidentiary principles and excluded coerced confessions as unreliable and untrustworthy. *See*, *e.g.*, 3 J. Wigmore, *supra*, § 822, at 330. Prior to *Miranda*, with the exception of *Brams v. United States*, 168 U.S. 532 (1897), the fifth amendment’s self-incrimination clause was not applied to invalidate coerced confessions; rather, a due process voluntariness standard was utilized. *See*, *e.g.*, M. Berger, *Taking the Fifth* 99-126 (1980). Thus, until *Miranda* was decided in 1966, a defendant’s privilege against self-incrimination was fully protected at trial but had not yet been applied to in-custody police interrogation prior to trial. *Id.* at 126. The following observation was made:

Those who generations from now set out to write the history of our legal institutions will puzzle over a framework of criminal justice, which, during a public trial before an impartial judge with defense counsel present to give aid, will not suffer the defendant to be asked a single question without his consent. And yet that same legal system will condone the relentless questioning in secret at all hours of the day and night of that same defendant with only those whose duty it is to ensnare him to determine where the line between fair and foul is to be drawn. This is a tragic indictment of contemporary society. The preaching of one thing and the practicing of another is often one of the first warnings of social decay.


our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates “a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load” . . . ; our respect for the in-
privilege is fully protected, the Court established procedural safeguards to alleviate the coercive atmosphere inherent in custodial interrogation. Thus, the Court ordered that, prior to any questioning, a suspect "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Any incriminating statements that are not preceded by *Miranda* warnings and are a product of in-custody police questioning are inadmissible in the prosecution's direct case.


13. The coercive atmosphere inherent in custodial interrogation exerts pressure on a suspect to utter incriminating statements and thus endanger his or her fifth amendment privilege against self-incrimination. 384 U.S. at 461. "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion...cannot be otherwise than under compulsion to speak." Id. The reading of the *Miranda* warnings was intended to dispel the compulsion inherent in a police-dominated atmosphere. Id. at 469. Whether these procedures have in fact had this effect has been the subject of intense debate. See authorities cited note 6 supra.

14. 384 U.S. at 444.

15. Incriminating statements, whether inculpatory or exculpatory, are inadmissible in the prosecution's direct case. The Court stated in *Miranda*:

No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. *Id.* at 476-77. *But see* Michigan v. Tucker, 417 U.S. 433 (1974) (statements by witness discovered as result of statements by defendant obtained in violation of *Miranda* are admissible).

16. 384 U.S. at 444; *see* Harris v. New York, 401 U.S. 222 (1971) (incriminating statements made in violation of *Miranda* may be used to impeach testimony of defendant).
Once the *Miranda* warnings are given, a suspect may waive these rights, provided the waiver is made voluntarily, knowingly, and intelligently.\textsuperscript{17} However, if the suspect asserts "in any manner and at any stage of the process"\textsuperscript{18} his or her right to remain silent or requests that an attorney be present during questioning, "the interrogation must cease until an attorney is present."\textsuperscript{19}

*Miranda*’s underlying concern is the effect of custody and interrogation on the will of a suspect:\textsuperscript{20}

It is this combination of "custody" and "interrogation" that creates—and, in the absence of "adequate protective devices," enables the police to exploit—an "interrogation environment" designed to "subjugate the individual to the will of his examiner." It is this combination—more awesome, because of the interplay, than the mere sum of the "custody" and "interrogation" components—that produces the "interrogation atmosphere," "interrogation . . . in a police dominated atmosphere," that "carries its own badge of intimidation," that "exacts a heavy toll in individual liberty and trades on the weakness of individuals," and that is so "at odds" with the privilege against compelled self-incrimination.\textsuperscript{21}

\textsuperscript{17} 384 U.S. at 475; see Michigan v. Mosley, 423 U.S. 96 (1975); Johnson v. Zerbst, 304 U.S. 458 (1938); note 79 infra.
\textsuperscript{18} 384 U.S. at 444-45.
\textsuperscript{19} Id. at 474. The fifth amendment *Miranda* right to counsel is different and distinct from the sixth amendment right to counsel. The *Miranda* right to counsel was also intended to dispel the coercive atmosphere inherent in custodial interrogation. The Court observed in *Miranda*:

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.

384 U.S. at 469. The *Miranda* right to counsel serves other "significant subsidiary functions" such as:

If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

Id. at 470 (citation omitted).
\textsuperscript{20} 384 U.S. at 461.
\textsuperscript{21} Kamisar, Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?, 67 GEO. L.J. 1, 63-64 (1978) (emphasis in original) (footnotes omitted) (quoting 384 U.S. at 445, 455-58, 465 (emphasis mainly in original)).
Thus, where a suspect is not in custody, the coercive atmosphere is not sufficient to require Miranda safeguards. At the same time, even though a suspect is in custody, “[a]ny statement given freely and voluntarily without any compelling influence is . . . admissible in evidence.”

Miranda defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” While Miranda did recognize that methods other than direct questioning, such as psychological ploys and police

22. See, e.g., Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam); Beckwith v. United States, 425 U.S. 341 (1976). The question of whether a suspect is in custody for Miranda purposes is the “most litigated issue in the field of custodial interrogation.” Smith, The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?, 25 S.C. L. REV. 699, 706 (1974), and courts have adopted various tests. Under the “focus test” derived from Escobedo v. Illinois, 378 U.S. 478 (1964), an individual is in custody when the “investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect . . .” Id. at 490. Most jurisdictions, however, have rejected the focus test and define custody in terms of whether the “individual’s freedom of action has been significantly restrained.” Smith, supra, at 710. In making this determination, courts have adopted both subjective and objective tests. The subjective test focuses on the perceptions of the suspect and examines whether the “individual interrogated believed himself to be in custody.” Id. The objective test focuses on whether, in view of all the circumstances, a reasonable man would believe he is deprived of his freedom of action at the time of police questioning. Id. at 712-14; see United States v. Kennedy, 573 F.2d 657, 660 (9th Cir. 1978); United States v. Curtis, 568 F.2d 643, 646 (9th Cir. 1978).

Some jurisdictions have combined the above tests in determining whether an individual is in custody and analyze whether the investigation has focused on the suspect, whether the suspect believed he was in custody, and whether the police subjectively intended the individual to be in custody. See, e.g., United States v. Martinez, 565 F.2d 911 (5th Cir. 1978); United States v. Nash, 563 F.2d 1166, 1168 (5th Cir. 1977). Most jurisdictions, however, have adopted the objective test. Smith, supra, at 712.

23. 384 U.S. at 478. The relevant language is:

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Id. (footnote omitted).

24. Id. at 444 (footnote omitted).
trickery, may constitute interrogation, the Court did not construct a test to determine what kinds of police conduct are the equivalent of interrogation. Decisions in the wake of Miranda clarified and finetuned the definitions of custody and waiver but did not do so for interrogation. As a result, federal and state courts attempting to determine if a suspect's Miranda rights had been violated often reached confusing and sometimes contradictory conclusions as to what conduct constitutes police interrogation in a custodial situation.

This confusion was not alleviated and may have been heightened by the Court's decision in Brewer v. Williams. In Brewer, the defendant, after having been arraigned and advised by his lawyer not to speak without the lawyer present, made incriminating statements in response to what is now known as the "Christian burial speech," a police monologue where the defendant was told

25. See id. at 448-52, where the Court reviews the numerous methods employed by police to induce a confession. See generally White, Police Trickery in Inducing Confessions, 127 U. Pa. L. Rev. 581 (1979).

26. Why the Miranda Court failed to define interrogation fully has been the subject of some speculation. Smith argues that "[p]erhaps the Miranda Court was reluctant to define completely 'custodial interrogation' before experience revealed the exact scope of the problem with which the definition would be concerned." Smith, supra note 22, at 702 (footnote omitted).


31. Williams, the defendant, was arrested and arraigned in Davenport, Iowa, for kidnapping a 10-year-old girl in Des Moines. Id. at 390-91. After turning himself in, the defendant was advised by his lawyer not to talk to the police about the kidnapped girl. Id. at 391. On the return trip to Des Moines, the detective began a conversation with the defendant and delivered the now famous Christian burial speech. Id. at 392. The detective, knowing that Williams was a deeply religious escapee from a mental institution, addressed him as "Reverend" and said:

"I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's
that the victim's body had to be found before the snow covered it. The court held that the defendant's statements directing the police to the body were inadmissible because the police remarks, although not phrased as a question, deliberately sought to elicit an incriminating response.\footnote{32} Many jurisdictions, looking for guidance as to what constitutes interrogation within the meaning of \textit{Miranda}, cited \textit{Brewer} as the standard.\footnote{33} \textit{Brewer}, however, did not involve the fifth amendment privilege protected by \textit{Miranda}; rather, \textit{Brewer} was decided on the ground that the police cannot deliberately elicit incriminating information in the absence of an attorney after the defendant's sixth amendment right to counsel has attached,\footnote{34} that is, once judicial proceedings have commenced.\footnote{35}

\textit{Id.} at 392-93 (ellipsis in original) (brackets in original). As they approached Des Moines, Williams directed the police to the body of the young girl. \textit{Id.} at 393. The Court determined that, in light of \textit{Massiah v. United States}, 377 \textit{U.S.} 201 (1964), Williams' sixth amendment right to counsel had attached at arraignment. 430 \textit{U.S.} at 399. The Court held that the incriminating statements were inadmissible because the police deliberately sought to elicit an incriminating response after Williams' sixth amendment right to counsel had attached. \textit{Id.} at 399-401. \textit{See generally Kamisar, Foreword: Brewer v. Williams—A Hard Look at the Discomfitting Record, 66 Geo. L.J. 209 (1977).}

32. 430 \textit{U.S.} at 400.
33. \textit{E.g.}, State v. Innis, 391 A.2d 1158 (R.I. 1978), \textit{vacated and remanded sub nom.}, Rhode Island v. Innis, 446 U.S. 291 (1980); United States v. Jordan, 557 F.2d 1081, 1084-85 (5th Cir. 1977) (statement by police officer that he was informed that defendant is carrying sawed-off shotgun constitutes interrogation); United States v. McCain, 556 F.2d 253, 256 (5th Cir. 1977) (statement by customs agent that defendant's life in danger if drugs inside body cavity constitutes interrogation).
34. 430 \textit{U.S.} at 400.
35. The Court has held consistently that the sixth amendment right to counsel does not attach until the moment formal judicial proceedings are instituted. \textit{E.g.}, Kirby v. Illinois, 406 U.S. 682 (1972) (no right to counsel at lineup before arraignment); Gilbert v. California, 388 U.S. 263 (1967) (no right to counsel at taking of writing samples after arrest but prior to indictment); United States v. Wade, 388 U.S. 218 (1967) (right to counsel attaches at post-indictment lineup); \textit{Massiah v. United States}, 377 U.S. 201 (1964) (right to counsel violated when government agents deliberately elicited incriminating information after indictment).
There are fundamental differences between the protection afforded by the sixth amendment and that provided by the procedures outlined in *Miranda*. The sixth amendment right to counsel, the right with which *Brewer* was concerned, prohibits the police from interrogating a defendant once formal judicial proceedings have commenced "whether or not he is in custody and whether or not he is aware that he is dealing with a government agent." *Miranda* procedures, on the other hand, are designed to protect a suspect before judicial proceedings are instituted, in those custodial situations where the compulsion to confess may be present. Questioning which would violate the sixth amendment because formal judicial proceedings have begun is not a violation of the fifth amendment right to counsel if the suspect is not in custody. Thus, the fact that the police statements in *Brewer* were held to be a violation of the defendant's sixth amendment right did not necessarily mean that the same statements would be interrogation in violation of *Miranda*.

Nevertheless, without noting that *Brewer*'s holding had specifically involved the sixth amendment, more than one court used *Brewer* as the standard in deciding whether a custodial suspect had been interrogated in violation of the fifth amendment. For example, in *United States v. McCain*, the Fifth Circuit adopted *Brewer*'s "deliberately elicited" test and applied it to a fifth amendment *Miranda* case. In that case, McCain was taken to a search room after the customs inspector had observed her and determined that she fit a drug courier profile. A strip search was conducted by two female customs inspectors but failed to produce narcotics. After the search, Agent Korzeniowski handed the defendant a booklet containing newspaper clippings which reported the tragedies of people who had attempted to hide narcotics in their body.

38. 384 U.S. at 461.
39. 430 U.S. at 397-98.
40. See cases cited note 33 *supra*.
41. 556 F.2d 253 (5th Cir. 1977).
42. Id. at 254. The "drug courier profile" consists of seven primary and four secondary characteristics the U.S. Drug Enforcement Administration believes are common among drug couriers. United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979).
43. Id.
cavities. Furthermore, Agent Korzeniowski told the defendant that "these were very serious matters, that she could harm herself seriously, perhaps even cause her death, if she were in fact carrying contraband in her body and if any of these containers ruptured and this narcotic substance was in immediate contact with her body or her internal organs." McCain responded that she was carrying narcotics in her body and removed them.

Relying in part on Brewer, the court of appeals stated that unless police conduct evidences a deliberate attempt to elicit an incriminating response, it is not interrogation within the meaning of Miranda. Applying this test to the case at bar, the court held that even though the agent was acting out of concern for the health and safety of the defendant, the agent's remarks were a deliberate attempt to elicit an admission that she had narcotics within her body and thus were tantamount to an interrogation under Miranda. The Fifth Circuit, in utilizing the Brewer deliberately elicited test, was applying a sixth amendment right-to-counsel standard to a fifth amendment custodial-interrogation case without noting that the rights involved in the two situations are not always identical.

Further evidence of the difficulties caused by the Supreme Court's failure to formulate a definition of what constitutes interrogation in a Miranda setting is found in the variety of standards used by federal and state courts. A minority of jurisdictions have adopted a test which does not rely on the intentions of the police, but on the likely result of police conduct. Thus, "any question likely to or expected to elicit a confession constitutes 'interrogation,'" and any statements elicited will not be admissible in the prosecution's direct case. In these jurisdictions, arranging a confrontation between co-defendants, or reading to the defendant a confession made by a co-defendant is the equivalent of interrogation because it is conduct that is likely to or expected to elicit an incriminating response. Other jurisdictions have adopted a "tech-

44. Id.
45. Id.
46. Id.
47. Id. at 256.
48. Id.
49. Id.
CUSTODIAL INTERROGATION REDEFINED

The Supreme Court's failure to define interrogation has resulted in lower court confusion in determining what constitutes interrogation. Consequently, Rhode Island v. Innis provided the Court with an opportunity to fully define interrogation within the meaning of Miranda.

RHODE ISLAND V. INNIS: INTERROGATION DEFINED

On January 17, 1975, Thomas Innis was arrested for the robbery and shotgun murder of a taxicab driver near a school for handicapped children in Providence, Rhode Island. Innis, who was unarmed at the time of his arrest, was advised of his Miranda rights by the arresting officer. Within minutes, a police sergeant and a captain arrived at the scene and each advised Innis of his rights under Miranda. In response to the last set of Miranda warnings, Innis requested to speak with an attorney.

53. Kamisar, supra note 21, at 21.
54. E.g., United States v. Davis, 527 F.2d 1110 (9th Cir. 1975), cert. denied, 425 U.S. 953 (1976).
58. State v. Innis, 391 A.2d 1158, 1160 (R.I. 1978), vacated and remanded sub nom. Rhode Island v. Innis, 446 U.S. 291 (1980). Innis was picked up by a taxi on January 12, 1975, in Providence, Rhode Island. The body of the cabdriver was found on January 16, 1975, and the cause of death was a shotgun blast to the back of the head. Id. On January 16, 1975, another cabdriver informed the police that he had been robbed by a man with a sawed-off shotgun. Id. at 1168 (Kelleher, J., dissenting, joined by Joslin, J.). While at the police station, the cabdriver identified his assailant from a picture posted on the wall which subsequently led to Innis’ apprehension in the early morning of January 17, 1975. Id. at 1171 (Kelleher, J., dissenting, joined by Joslin, J.).
59. 446 U.S. at 294.
60. Id. Innis was arrested at gunpoint. Brief of the Respondent at 4, Rhode Island v. Innis, 446 U.S. 291 (1980) [hereinafter cited as Brief].
61. 446 U.S. at 294.
62. Id. Innis was advised of his Miranda rights a total of three times prior to requesting an attorney. Id.
The captain directed that Innis be placed in a police wagon and taken to headquarters by Police Officers Gleckman, McKenna, and Williams. The captain further ordered the police officers not to question or coerce Innis in any way.

While enroute to headquarters, Officers Gleckman and McKenna began a conversation concerning the missing shotgun. Officer Gleckman testified, "'At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and there's a lot of handicapped children running around this area, and God forbid one of them might hurt themselves.'" Officer McKenna agreed with Officer Gleckman, stating that he "'more or less concurred with . . . [Gleckman] that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it.'" Officer Williams did not participate in the conversation but testified that "'[Gleckman] said it would be too bad if the little girl—I believe he said little girl—would pick up the gun, maybe kill herself.'" Upon hearing the conversation, Innis told the officers that he would show them where the shotgun was hidden. The police returned to the scene of the arrest where a search for the shotgun was being conducted and, once again, advised Innis of his Miranda rights. Innis led the police to the location of the shotgun.

At trial, the court found the incriminating statement by Innis to be a valid waiver of his Miranda rights and therefore admissible, without determining whether the weapons conversation constituted

---

63. Id. A police wagon is indistinguishable from a patrol car except that it has a wire mesh screen dividing the front seat from the rear. Brief, supra note 60, at 5 n.2.

64. 391 A.2d at 1160. This procedure was somewhat unusual. See notes 124-125 infra and accompanying text.

65. Apparently, this warning was not heard by Innis because he was already seated in the police wagon. Brief, supra note 60, at 16 (citing App. Rec. at 35, 46).

66. There was conflicting testimony by the officers concerning the exact seating arrangement in the police wagon. 446 U.S. at 294 n.1; 391 A.2d at 1160 n.2; Brief, supra note 60, at 5 n.3.

67. Brief, supra note 60, at 5-6 (quoting App. Rec. at 43-44 (quoting Officer Gleckman)).

68. Id. at 6 (brackets in original) (quoting App. Rec. at 53 (quoting Officer McKenna)).

69. Id. (brackets in original) (quoting App. Rec. at 59 (quoting Officer Williams)).

70. 391 A.2d at 1160.

71. Id. at 1161.

72. Id.
interrogation within the meaning of *Miranda.* The shotgun and incriminating statements were subsequently admitted at trial, and Innis was convicted of murder, robbery, and kidnapping.

On appeal, the Rhode Island Supreme Court set aside the conviction and ordered a new trial. Relying in part on *Brewer v. Williams,* the court held that Innis was subjected to "subtle compulsion" which is the equivalent of interrogation and therefore a violation of *Miranda.* The court reasoned that "[p]olice officers in such a situation must not be permitted to achieve indirectly, by

---

73. 446 U.S. at 296. The trial judge said:

"In the automobile, driving along Chalkstone Avenue, we have three officers who are out at four in the morning, or later, and have been prowling around searching for a weapon which they had reason to believe was there. The weapon was either loaded or with shells. It is in the area of a school where when daylight arrives handicapped and retarded children will be coming to the area. I think it is entirely understandable that they would voice their concern to each other. And I have to say that I commend the defendant for responding to the danger which, more than likely, he did not know of up until that time. There is no reason for me to believe, and no evidence on which I should conclude, that he was familiar with the area and the type of facilities that were there. So the defendant responded out of a very commendable concern to a situation that he became acquainted with. I commend him for it. He responded and then said: 'Turn around, take me back and I will show you where the weapon is.'

"It was a waiver, clearly, and on the basis of the evidence that I have heard, an intelligent waiver, of his right to remain silent. And for whatever reason, whatever motivates people, as long as it is not the result of threat or coercion, it is a waiver for all purposes, and the weapon was found."


74. 391 A.2d at 1167.

75. Id.

76. The Rhode Island Supreme Court incorrectly relied on *Brewer v. Williams* in determining whether the weapons conversation was tantamount to interrogation. 446 U.S. at 300 n.4. This incorrect application of *Brewer* is understandable because jurisdictions utilizing the deliberately elicited test in defining interrogation had relied on *Brewer,* see text accompanying notes 39-49 supra, and the facts of *Innis* are remarkably similar to the facts of *Brewer:*

Both Williams and Innis were informed of their right to the assistance of counsel. Moreover, both defendants revealed the location of a critical piece of evidence while being transported in a police vehicle; and both statements were elicited not by direct police questioning but rather by conversation which apparently convinced each defendant that for humanitarian reasons the evidence in question should be revealed.

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) (footnotes omitted). There are significant differences between *Brewer's* sixth amendment right to counsel and *Miranda's* fifth amendment privilege against self-incrimination. See text accompanying notes 36-38 supra.

77. 391 A.2d at 1162.
talking with one another, a result which the Supreme Court has said they may not achieve directly by talking to a suspect who has been ordered not to respond. The same ‘subtle compulsion’ exists.”

Although the court did not expressly adopt a standard to judge whether or not the weapons conversation was tantamount to interrogation under *Miranda*, it relied in part on *Brewer* and held that the weapons conversation was intended to elicit an incriminating response, thus suggesting they adopted the *Brewer* deliberately elicited test.

For the first time since *Miranda* was decided in 1966, the United States Supreme Court in *Rhode Island v. Innis* was confronted with the opportunity of fully defining what kinds of police conduct constitute interrogation. Writing for the Court, Justice

---

78. *Id.*

79. *Id.* at 1161-62. The court held that once Innis had been subjected to interrogation he did not waive his *Miranda* rights by making an incriminating statement. *Id.* at 1163-64.

Under *Miranda*, the prosecution bears the burden of proving 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. Moreover, after *Miranda* warnings are given, a waiver will not be presumed merely from the silence of the suspect or because a confession was elicited, *id.*; rather, “[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver.” *Id.*

In *Innis*, the court of appeals concluded that Innis’ request to see an attorney prior to questioning was inconsistent with the finding of a valid waiver. 391 A.2d at 1163. Furthermore, Innis did not expressly waive his *Miranda* rights nor did he retract his initial request for counsel. *Id.* at 1163-64. Having found that Innis was subjected to interrogation and that he had not waived his *Miranda* rights in the police wagon, the court held that the evidence was tainted by the initial illegality despite the fact that Innis was warned of his *Miranda* rights prior to disclosing the location of the shotgun. *Id.* at 1164. But see Judge Kelleher’s conclusion that the *Miranda* warnings given after the weapons conversation purged the primary taint of the illegal interrogation. *Id.* at 1172 (Kelleher, J., dissenting, joined by Joslin, J.). The Supreme Court did not address the issue of waiver in *Rhode Island v. Innis* because the Court found that Innis had not been interrogated. 446 U.S. at 298 n.2.

80. 446 U.S. at 297. “We granted certiorari to address for the first time the meaning of ‘interrogation’ under *Miranda v. Arizona.*” *Id.*

81. In defining interrogation the majority adopted an objective test qualified by subjective factors, *id.* at 300-02, and held that the conversation between the police officers in Innis’ presence was not interrogation. *Id.* at 302-04. Justice White concurred by concluding that Innis had waived his rights. *Id.* at 304 (White, J., concurring). Chief Justice Burger concurred in the judgment, but rejected the test adopted by the majority on the ground that it will confuse, rather than clarify, what is permissible police conduct. *Id.* (Burger, C.J., concurring in the judgment).

Justice Marshall, joined by Justice Brennan in dissent, agreed with the majority’s definition of interrogation, but refused to accept the majority’s application of the test.
Stewart concluded that Innis had not been subjected to interrogation within the meaning of *Miranda* and reversed the Supreme Court of Rhode Island. After reviewing the policies underlying *Miranda*, the majority set out to define interrogation. Recognizing that there are numerous techniques of persuasion in addition to express questioning, the Court held that *Miranda* safeguards are activated whenever a suspect "in custody is subjected to either express questioning or its functional equivalent." The Court further defined the functional equivalent of interrogation as "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response."

Applying the test to the facts of the case, the Court found that the conversation in the police car consisted of "offhand remarks" to the facts of the case. In the dissenters' opinion, Innis was subjected to interrogation as defined by the majority. *Id.* at 305-06 (Marshall, J., dissenting, joined by Brennan, J.).

Justice Stevens dissented by rejecting the majority definition of interrogation as too narrow and argued that interrogation includes any police statement or conduct "that has the same purpose or effect as a direct question. Statements that appear to call for a response from the suspect, as well as those that are designed to do so, should be considered interrogation." *Id.* at 311 (Stevens, J., dissenting).

82. The majority expressly rejected the Rhode Island Supreme Court's reliance on *Brewer* in determining whether Innis had been subjected to custodial interrogation:

> There is language in the opinion of the Rhode Island Supreme Court in this case suggesting that the definition of "interrogation" under *Miranda* is informed by this Court's decision in *Brewer v. Williams*. . . This suggestion is erroneous. Our decision in *Brewer* rested solely on the Sixth and Fourteenth Amendment right to counsel . . . . That right, as we held in *Massiah v. United States*, . . . prohibits 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. Custody in such a case is not controlling; indeed, the petitioner in *Massiah* was not in custody. By contrast, the right to counsel at issue in the present case is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and Fourteenth Amendments as interpreted in the *Miranda* opinion. The definitions of "interrogation" under the Fifth and Sixth Amendments, if indeed the term "interrogation" is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct.

*Id.* at 300 n.4 (brackets in original) (citations omitted) (citing Kamisar, *supra* note 21, at 41-55). The majority adopted Professor Kamisar's analysis of the differences between the sixth amendment right to counsel and *Miranda's* fifth amendment privilege against self-incrimination. *Id.*

83. 446 U.S. at 297-300.
84. 446 U.S. at 298-99.
85. 446 U.S. at 300-01.
86. 446 U.S. at 302 (emphasis in original) (footnote omitted).
not directed to Innis and therefore did not amount to express questioning.\(^8\) Furthermore, since Innis was not distraught, nor was there any indication that Innis was “peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children,”\(^8\) the confession cannot be said to have been the product of “words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.”\(^9\) Therefore, the weapons conversation between the two police officers did not amount to interrogation within the meaning of \textit{Miranda}.

\textbf{The Innis Test}

The \textit{Innis} Court’s definition of interrogation is guided by an objective test that also focuses in part on the perceptions of the suspect.\(^9\) A court applying the \textit{Innis} test must follow a three-step analysis. The initial inquiry is whether the suspect has been subjected to express questioning.\(^9\) If a court finds that to be the case, the remainder of the test does not apply. Thus, after a suspect who is in custody is given his \textit{Miranda} warnings, any express questioning by police is a violation of \textit{Miranda}\(^9\) and absent a valid waiver, any incriminating statements will be inadmissible in the prosecution’s direct case.\(^9\) If police conduct does not amount to express questioning, the next step consists of applying an objective test which also encompasses subjective factors.\(^9\)

The \textit{Innis} Court defined the functional equivalent of interrogation as “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.”\(^9\) This part of the test entails a two-part analysis. The language “words or actions . . . that the police should know are reasonably likely to elicit an incriminating response”\(^9\) implies an objective foreseeability test. Courts applying this

\begin{footnotesize}
\begin{itemize}
\item \(^8\) \textit{Id.} at 303.
\item \(^8\) \textit{Id.}
\item \(^8\) \textit{Id.} at 302 (emphasis in original) (footnote omitted).
\item \(^9\) \textit{Id.} at 301-02.
\item \(^9\) \textit{Id.} at 300-01.
\item \(^9\) \textit{Id.}
\item \(^9\) \textit{Id.} at 302.
\item \(^9\) \textit{Id.}
\item \(^9\) \textit{Id.}
\item \(^9\) \textit{Id.} at 301 (footnotes omitted).
\item \(^9\) \textit{Id.} (footnote omitted).
\end{itemize}
\end{footnotesize}
standard must determine if it was foreseeable that police words or actions would elicit an incriminating response.\textsuperscript{97} If a court finds that the police should have known that their conduct would elicit an incriminating response, the conduct constitutes interrogation within the meaning of \textit{Miranda}.\textsuperscript{98} Absent a valid waiver by the suspect, any incriminating statements will be inadmissible in the prosecution's direct case.\textsuperscript{99}

The Court qualified the foreseeability standard by stating that "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect."\textsuperscript{100} A court applying the \textit{Innis} test must determine if the police had any specific knowledge concerning the susceptibility or suggestibility of a particular suspect to a given form of conduct or persuasion.\textsuperscript{101} Such specific knowledge may indicate that the police should have known their conduct would elicit an incriminating response.\textsuperscript{102} For example, if in \textit{Innis} the police had known that Innis would be susceptible to an appeal to save the life of a handicapped child, it

\textsuperscript{97} \textit{Id.} at 301-02.

\textsuperscript{98} For criticism of the jurisdictions that have adopted the deliberately elicited test and technical approach in defining interrogation and have advocated an objective test almost identical to the \textit{Innis} reasonably-likely-to-elicit test, see \textit{Graham, What is "Custodial Interrogation?": California's Anticipatory Application of \textit{Miranda} v. Arizona}, 14 U.C.L.A. L. Rev. 59, 104 (1966); Kamisar, \textit{supra} note 21, at 83; Rothblatt and Pitler, \textit{Police Interrogation: Warnings and Waiver—Where Do We Go From Here?}, 42 \textit{NOTRE DAME LAW.} 479, 486-87 n.42 (1967) (citing Remarks of Yale Kamisar at \textit{Escobedo—The Second Round Conference}, Ann Arbor, Michigan, July 23, 1966).

\textsuperscript{99} 446 U.S. at 301-02.

\textsuperscript{100} \textit{Id.} at 302 n.8.

\textsuperscript{101} \textit{Id.}

\textsuperscript{102} This part of the \textit{Innis} test focuses on the perceptions of the suspect, \textit{Id.} at 301, and encompasses any factors that would render a particular suspect susceptible to a given form of persuasion. \textit{Id.} at 302 n.8. This part of the test is also consistent with the views of those scholars who have suggested that the perceptions of a suspect are an important consideration in determining whether police conduct compelled an incriminating response. \textit{See, e.g., United States v. Hall}, 421 F.2d 540, 544 (2d Cir. 1969), \textit{cert. denied}, 397 U.S. 990 (1970); Kamisar, \textit{supra} note 21, at 63; \textit{White}, \textit{supra} note 76, at 62.

However, a test that relies solely on a particular suspect's perceptions to determine whether police conduct compelled an incriminating response would render most, if not all, confessions inadmissible at trial.
would have been foreseeable that the weapons conversation would elicit an incriminating response.103

The Innis Test: An Unworkable Standard

The definition of interrogation in Innis overrules the majority of jurisdictions that have defined interrogation solely in terms of intentional police conduct104 or direct questioning of a suspect.105 As a consequence, the Innis test will most likely be welcomed by those who have criticized the Burger Court's narrowing of Miranda in the last decade.106 However, while the test appears to provide a broad definition of interrogation, the vagueness of the standards set forth to guide police conduct may serve to increase the confusion and ambiguities in custodial-interrogation settings. The application of the test to the facts of Innis itself exemplifies this problem.

In Rhode Island v. Innis the Supreme Court attempted to construct a test that would ease the difficulties lower courts have had in determining what types of police conduct constitute interrogation. Instead of articulating a simple definition guided by clear standards, what emerged is a test which may be unworkable in actual practice. One weakness of the Innis test is the Court's failure to enumerate the specific factors that may have a bearing on a particular suspect's susceptibility to a given form of persuasion. While the Court did state that Innis was not "unusually disoriented or upset at the time of his arrest,"107 indicating that one factor may be the emotional state of a suspect at the time of arrest, the opinion is silent as to any additional subjective factors.

Furthermore, the Court did not enumerate the factors to be examined in determining whether the police should have known that their words or actions would elicit an incriminating response. While the Court did state that "the entire conversation appears to have consisted of no more than a few offhand remarks"108 and that "[t]his is not a case where the police carried on a lengthy harangue in the presence of the suspect,"109 indicating that one factor may be the length of the conversation between the officers in the pres-

103. 446 U.S. at 302.
104. See notes 39-49 supra and accompanying text.
105. See notes 53-57 supra and accompanying text.
106. See note 5 supra.
107. 446 U.S. at 302-03.
108. Id. at 303.
109. Id.
ence of a suspect, the majority opinion is silent as to any additional factors.

The Supreme Court’s failure to elaborate on which factors a court should examine in applying the *Innis* test will result in lower court confusion in determining whether the police should have known that their conduct would elicit an incriminating response. Since the *Innis* decision, lower courts applying the test have held that showing a suspect a police report,\(^\text{110}\) confronting a defendant with a co-defendant’s confession,\(^\text{111}\) or informing a suspect that this story cannot possibly be true\(^\text{112}\) is conduct the police should have known was reasonably likely to elicit an incriminating response. In these situations, where police conduct is intentional and direct, lower courts have had little difficulty in applying the *Innis* test.

However, lower courts have not as yet been confronted with difficult situations such as those where police confront a suspect indirectly\(^\text{113}\) or where a police officer initiates a conversation with another officer in a suspect’s presence. In these situations of indirect contact, the *Innis* test is unworkable because the definition of interrogation is not guided by clear standards. How is a court to determine whether the police should have known that their conduct was reasonably likely to elicit an incriminating response? The objective foreseeability standard qualified by subjective factors is a fact-sensitive test which requires for its correct and consistent application an accurate re-creation of the custodial confrontation between a suspect and police.\(^\text{114}\) Inherent in custodial situations,

\(^{110}\) *In re* Durand, 406 Neb. 415, 293 N.W.2d 383 (1980).


\(^{112}\) People v. Bodner, 75 A.D.2d 440, 430 N.Y.S.2d 433 (4th Dep’t 1980).

\(^{113}\) An example of indirect contact would be where police do not expressly question or confront a suspect but rather use ambiguous words or actions. In such a situation it is difficult to ascertain whether a reasonable police officer should have known his or her conduct would elicit a response.

\(^{114}\) For a determination of whether the police should have known that their words or actions would reasonably elicit an incriminating response, there must be an accurate and detailed re-creation of the custodial confrontation. There were a number of discrepancies in the re-creation in *Innis* which could have been significant to the outcome of the case. See notes 136, 146 infra. Moreover, for the subjective part of the *Innis* test to work, a court must delve into the particular suspect’s traits to determine whether he or she would be susceptible to a given form of conduct or persuasion. 446 U.S. at 302 n.8. Without a detailed and accurate re-creation at trial of the custodial confrontation between a suspect and police, the *Innis* test will be factually untrustworthy and difficult to apply correctly.
however, are factors which make accurate re-creations difficult, if not impossible, since in most cases the only witnesses are the individuals involved: the police officer and the suspect.

For example, in Innis, the Supreme Court of Rhode Island thought the police conduct was a deliberate attempt to elicit an incriminating response.115 Yet, the United States Supreme Court held that the police could not have known that their conduct was reasonably likely to elicit an incriminating response.116 Although both courts examined the trial record, they disagreed as to the intentions of the police concerning the weapons conversation.117

The United States Supreme Court held that the police could not have reasonably known that their conversation was likely to elicit an incriminating response from Innis.118 The Court relied on two factors: First, at the time of arrest, Innis was not distraught or “unusually disoriented;”119 second, the police could not reasonably have known that Innis would be susceptible to a moral appeal “concerning the safety of handicapped children.”120 As the dissenters point out, however, it “verges on the ridiculous” for the majority to believe that an appeal to save the life of a handicapped child could not be expected to elicit an incriminating response unless the police knew that Innis was susceptible to such an appeal:121 “One can scarcely imagine a stronger appeal to the conscience of a suspect—any suspect—that the assertion that if the weapon is not found . . . an innocent child—a little girl—a helpless, handicapped little girl on her way to school” will be killed.122

115. 391 A.2d at 1162.
116. 446 U.S. at 302-03.
117. Lower courts applying the Innis test to similar factual circumstances will also come to different and therefore inconsistent results. Furthermore, Innis failed to enumerate the specific factors that may have a bearing on a particular suspect’s susceptibility to a given form of persuasion, leaving lower courts without a standard.
118. 446 U.S. at 302-03.
119. Id.
120. Id. at 302.
121. Id. at 306 (Marshall, J., dissenting, joined by Brennan, J.). Justice Marshall, joined by Brennan, readily adopts the majority’s definition of interrogation, but is “utterly at a loss” to understand the application of the test to the facts of the case. “I firmly believe that this case is simply an aberration, and that in future cases the Court will apply the standard adopted today in accordance with its plain meaning.” Id. at 307 (Marshall, J., dissenting, joined by Brennan, J.); accord, id. at 314-16 (Stevens, J., dissenting).
122. Id. at 306 (Marshall, J., dissenting, joined by Brennan, J.) (emphasis in original). Police deception in inducing a confession has had a long history and has been addressed by the courts in various ways. For a review of the case law, see 3 J. Wigmore, supra note 11, § 841.
Examination of the record could lead one to conclude that the police conduct was a deliberate attempt to elicit an incriminating response from Innis. Gleckman, the officer who initiated the weapons conversation, was directed by Captain Leyden to assist Officers McKenna and Williams in accompanying Innis back to police headquarters. Officer McKenna testified at trial, however, that the usual procedure is to assign two officers to a police wagon. Why did Captain Leyden assign a third officer, Gleckman, to accompany a handcuffed, unarmed, and subdued Innis back to headquarters? The Rhode Island Supreme Court held that this was part of a deliberate attempt to elicit an incriminating response from Innis, through an appeal to his conscience. Another issue, beyond the scope of this paper, is raised by the Model Code of Pre-Arraignment Procedure, where the reporter expressly left the issue of police deception to the courts. A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, PROPOSED OFFICIAL DRAFT, Commentary § 140.4, at 356 (1975). However, “[t]he one exception is that . . . deception which undermines the warning issued to an arrested person that he is not obligated to make a statement is explicitly barred.” Id. That exception states that “[n]o law enforcement officer shall attempt to induce an arrested person to make a statement by indication that such a person is legally obliged to do so,” id. § 140.2, so that “any [form of] conduct tending to create an implication that the arrested person has a duty to cooperate would be proscribed, and would result in exclusion.” Id. Commentary § 140.2, at 351-52 (emphasis added).

123. 391 A.2d at 1162; accord, White, supra note 76, at 68. But see 446 U.S. at 303 n.9.
124. 446 U.S. at 294.
125. Id. at 316 n.17 (Stevens, J., dissenting). Officer McKenna testified: “If I remember correctly, the vehicle—Innis was placed in it and the vehicle door was closed, and we were waiting for instructions from Captain Leyden. . . . At that point, Captain Leyden instructed Patrolman Gleckman to accompany us. There’s usually two men assigned to the wagon, but in this particular case he wanted a third man to accompany us, and Gleckman got in the rear seat. In other words, the door was closed. Gleckman opened the door and got in the vehicle with the subject. Myself, I went over to the other side and got in the passenger’s side in the front.” Id. (Stevens, J., dissenting) (ellipsis in original) (quoting Appellate Record at 55-56).
126. Innis did not resist arrest.
127. 391 A.2d at 1162-63. Justice Marshall observed:

Gleckman’s remarks would obviously have constituted interrogation if they had been explicitly directed to respondent, and the result should not be different because they were nominally addressed to McKenna. This is not a case where police officers speaking among themselves are accidentally overheard by a suspect. These officers were “talking back and forth” in close quarters with the handcuffed suspect, traveling past the very place where they believed the weapon was located. They knew respondent would hear and attend to their conversation, and they are chargeable with knowledge of and responsibility for the pressures to speak which they created.

The Rhode Island Supreme Court also found that the content of the weapons conversation furnished support for the proposition that the police intended to elicit an incriminating response from Innis:128 The "police officers in the wagon chose not to discuss sports or weather but the crime for which [the] defendant was arrested."129 Furthermore, the selection of words used by Officer Gleckman, such as "God forbid" and "little girl,"130 are "phrases [which] seem ideally suited to an emotional appeal to a suspect's humanitarian impulses."131

It is also arguable that the reason given for the conversation, concern for the safety of the handicapped children, had no basis in fact. The chances of injury were remote at best, because the Providence police were in the process of conducting a search for the missing shotgun.132 Even if the search would not have produced the shotgun, the Providence police had a series of options available. They could have warned the residents of the area about the danger concerning the missing shotgun, cancelled school for the handicapped children, cordoned off the vacant field where the search was being conducted, or assigned extra police to the area under search.133

128. 391 A.2d at 1162. Professor White relies on three factors which indicate that the police intended to elicit an incriminating response: (1) the reasons why the Rhode Island Supreme Court found that they intended to do so; (2) a genuine concern for the safety of the handicapped children was unfounded because the area was already under search by the Providence police; and (3) the words actually used by Officer Gleckman do not sound like the typical language used by officers in general conversation, but rather like words used to appeal to the conscience of a suspect:

When one considers that the leading police interrogation manual includes "Appeals to Altruism" as one of the standard interrogation techniques, everything seems to fit together; the officers' conversation (including the use of emotionally charged terms) was used for the specific purpose of inducing the defendant to disclose the location of the shotgun.

White, supra note 76, at 68-69 (footnote omitted) (citing F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 60 (2d ed. 1967)).

129. 391 A.2d at 1162, quoted in White, supra note 76, at 68.

130. Brief, supra note 60, at 6 (quoting App. Rec. at 43-44, 59); White, supra note 76, at 68.

131. White, supra note 76, at 68.

132. 446 U.S. at 316 n.19 (Stevens, J., dissenting) (citing White, supra note 76, at 68).

133. It has also been suggested that

Innis did not have to choose between incriminating himself and disclosing the weapon's location. There was a third alternative, which Innis almost surely did not perceive on his own and which he was not apprised of by the police. Innis could have disclosed the location of the weapon to his counsel who, under the guise of the attorney-client privilege, could in turn commu-
The differences in the courts' interpretations of the same facts in the Innis case serve to illustrate the questions left unanswered as to the appropriate police conduct in these difficult factual settings, as well as the problems inherent in attempts to re-create them after the fact. More often than not, "[interrogation takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room." As a result, an accurate re-creation at trial of a conversation between a suspect and police is often sketchy at best, and can never reflect the "subtle messages that can be communicated through changes in vocal inflection and nonverbal communication." Moreover, to accurately re-create the coercive

---

134. Professor Kamisar examined the inconsistencies and contradictions in Brewer v. Williams' trial record, and concluded that "any trial of the issue of waiver, no less than that of coercion—waged by the crude, clumsy method of examination, cross-examination, and redirect—is almost bound to be unsatisfactory," Kamisar, supra note 31, at 234-35 (footnotes omitted), and that Brewer "illuminate[s] the problem posed by the typical confession case—secret proceedings absent any objective recordation of the facts." Id. at 233 (footnote omitted). He proposes that all conversations between a suspect and police be electronically recorded. Id.

The Miranda Court was also particularly sensitive to the secrecy surrounding a custodial confrontation. The Court stated that "the difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado." 384 U.S. at 448; see Traynor, The Devils of Due Process in Criminal Detection, Detention and Trial, 16 CATH. U.L. REV. 1, 8 (1966).

135. 384 U.S. at 448.

136. Counsel for Innis argued that the record is incomplete as to the following facts: (1) the length of the conversation in the police car, Brief, supra note 60, at 18; (2) the actual words used by the police officers, 446 U.S. at 308 n.1 (Stevens, J., dissenting) (citing Appellate Record at 59); Brief, supra, at 18; and (3) the officers did not testify at trial that the weapons conversation was not intended to elicit an incriminating response. Brief, supra, at 24-25.

137. White, supra note 25, at 586. Professor Driver observed the following in connection with the psychological atmosphere in a custodial interrogation environment:

[T]o be physically close is to be psychologically close. The situation has a structure emphasizing to the persons involved the immediacy of their contact: in an encounter there is an opportunity for uninterrupted verbal communication, a strong awareness of expressive nonverbal signs, the maintenance of poise and a sense of roles, engrossment in the activity at hand, and an allocation of spatial position.

atmosphere present in a custodial confrontation borders on the impossible;\textsuperscript{138} yet, for the \textit{Innis} test to work, these facts are of crucial importance.\textsuperscript{139}

In addition to the difficulty of applying the \textit{Innis} standard to indirect police conduct, the \textit{Innis} test does not provide objective guidelines for proper police conduct.\textsuperscript{140} Even assuming that practicing lawyers and judges will master the factual intricacies of the foreseeability standard, the test does not translate into ascertainable rules which police can easily follow.\textsuperscript{141}

Chief Justice Burger, while concurring in the judgment, readily understood the practical difficulties for police:

> It may introduce new elements of uncertainty; under the Court's test, a police officer in the brief time available, apparently must evaluate the suggestibility and susceptibility of an accused... Few, if any, police officers are competent to make the kind of evaluation seemingly contemplated; even a psychiatrist asked to express an expert opinion on these aspects of a suspect in cus-

\textsuperscript{138} See note 134 supra.

\textsuperscript{139} See note 114 supra and accompanying text. In United States v. Brown, 557 F.2d 541 (6th Cir. 1977), Justice Celebrezze described the frightening ordeal of being "taken for a ride" and stated:

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

\textit{Id.} at 551 (citation omitted).

\textsuperscript{140} "[A] rule that requires [a police officer] to predict how a court may later rule on the question of causation is not very useful." Graham, \textit{supra} note 98, at 110. In discussing the impact of \textit{Miranda} in 1966, Professor Graham observed:

> [T]he police may continue to use their ears as they go about their work, but... their own conduct toward persons arrested is circumscribed by the fifth amendment to those steps necessary to begin the operation of the criminal process. In short, an understandable set of rules for the police officer can easily be drafted around the principle that once an officer is justified in making an arrest, he may no longer use the accused as a source of information and should restrict his conduct to such matters as the law allows in restraining the accused so that his case is presented to the court.

\textit{Id.}

\textsuperscript{141} \textit{Id.}
tody would very likely employ extensive questioning and observation to make the judgement now charged to police officers.

Trial judges have enough difficulty discerning the boundaries and nuances flowing from post-Miranda opinions, and we do not clarify that situation today.142

In Innis, three courts differed as to whether the weapons conversation was an attempt to elicit an incriminating response.143 The courts’ dilemma is in itself evidence that a police officer acting in good faith may have difficulty in applying the Innis test in day-to-day police work where there is seldom time to stop and ponder what may be permissible conduct in a custodial confrontation with a suspect.

TOWARD A WORKABLE STANDARD

The Innis Court’s failure to construct guidelines and enumerate the specific factors which have a bearing on foreseeability of police conduct or the susceptibility of a particular suspect to a given form of persuasion renders the Innis test ambiguous and difficult to apply. This section will attempt to clarify this ambiguity by constructing criteria for lower court guidance.

The United States Supreme Court in Innis did not enumerate the factors to rely upon in determining whether the police should have known that their conduct would elicit an incriminating re-

142. 446 U.S. at 304-05 (Burger, C.J., concurring in the judgment) (citation omitted) (footnote omitted).
143. The judge at the suppression hearing thought the weapons conversation was not an attempt to elicit an incriminating response, but concluded that it was “entirely understandable that [the officers] would voice their concern [for the safety of the handicapped children] to each other.” 446 U.S. at 303 n.9 (brackets in original) (quoting Shea, J., of Del. Super. Ct.).

The Rhode Island Supreme Court thought the weapons conversation was a deliberate attempt to elicit a response by the use of subtle compulsion. 391 A.2d at 1162. The majority of the United States Supreme Court thought that although subtle compulsion did exist, the police could not have known that their conduct would elicit an incriminating response. 446 U.S. at 302-03.

Justices Marshall and Brennan thought that the police officers should have known that Innis would respond to the weapons conversation. Id. at 305-06 (Marshall, J., dissenting, joined by Brennan, J.). Justice Stevens concluded that “there is evidence in the record to support the view that Officer Gleckman’s statement was intended to elicit a response from Innis.” Id. at 315 (Stevens, J., dissenting). Given the differing opinions of the United States Supreme Court and lower court justices as to whether the police should have known that their conversation would elicit an incriminating response, it is hardly realistic to expect the police to make this determination amidst the confusion accompanying an arrest.
sponse. While the Court did suggest that one factor may be the length of the conversation between the police and a suspect, the opinion is silent as to any additional factors. Other criteria may include the content of the conversation or the nature of the police conduct with particular emphasis on whether the conversation or conduct by police concerns the alleged crime. For example, in Innis it is arguable that the content of the conversation between the officers is the most reliable indicator of whether they should have known that their conduct would elicit an incriminating response. Not only did the weapons conversation concern the alleged crime, but it placed Innis in the position of having to make an incriminating statement in order to avert what the police were describing as a threat to handicapped children. Although the Court found that it was not foreseeable that this conversation would elicit an incriminating response, courts should examine the content of any police conversation concerning the crime, or the circumstances surrounding the crime, to determine if the police should have known that their conduct would elicit such a response. The location of the police officers vis-a-vis the suspect is another factor which should be considered. For example, if police officers initiate a conversation among themselves which is inadvertently overheard by a suspect, any incriminating response could not be a foreseeable result of police conduct. However, if the conversation occurs in close proximity to the suspect, it is arguable that it was intended that the suspect hear the conversation and react.

Another weakness of the Innis test is the Court's failure to enumerate the specific factors which may have a bearing on a particular suspect's susceptibility or suggestibility to a given form of persuasion. While the Court did state that Innis was not "unusually disoriented or upset at the time of his arrest," indicating that

144. See 446 U.S. at 303; text accompanying notes 108-109 supra.
145. See 446 U.S. at 306 (Marshall, J., dissenting, joined by Brennan, J.); id. at 312-14 (Stevens, J., dissenting).
146. The majority did not attach any significance to the fact that there was some dispute as to the exact seating arrangements. 446 U.S. at 294 n.1. Apparently, there was conflicting testimony at the suppression hearing as to where Officer Gleckman sat. 391 A.2d at 1160 n.2. Officer McKenna testified that Gleckman sat in the back with Innis. Id. If in fact Gleckman did, the weapons conversation can hardly be characterized as "offhand remarks," 446 U.S. at 303, because Innis would have been sitting right next to Gleckman, the officer who initiated the weapons conversation. Id. at 306 n. (Marshall, J., dissenting) (citing App. Rec. at 50, 52, 56).
147. 446 U.S. at 302-03.
one factor may be the emotional state of a suspect at the time of arrest, the opinion is silent as to any additional subjective factors. In determining whether the police should have known that a particular suspect would be susceptible to a given form of persuasion, courts should at least consider the suspect's age,\textsuperscript{148} education,\textsuperscript{149} emotional or mental deficiencies,\textsuperscript{150} religious convictions,\textsuperscript{151} and emotional state at the time of arrest.\textsuperscript{152}

\textit{Innis} creates a gap in situations where a suspect may perceive he or she is under compulsion to confess and in fact does confess, although the confession was an unforeseeable result of police conduct.\textsuperscript{153} Under \textit{Innis}, any incriminating statements thus obtained will be inadmissible in the prosecution's direct case. To illustrate this point, consider the following hypothetical: Assume that the \textit{Innis} Court applied the test correctly\textsuperscript{154} and that \textit{Innis} has a young handicapped daughter. Assume further that the Providence police do not know that \textit{Innis} had any children. While in the police wagon, the officers begin a conversation concerning the safety of the handicapped children. Upon hearing the weapons conversation, visions of a handicapped little girl picking up the shotgun and killing herself flash through \textit{Innis}' mind. He responds to the moral ploy by telling the officers that he will show them where the shotgun is located.

\begin{footnotes}
\item[149] See \textit{id.}
\item[150] See \textit{id.} But see \textit{United States v. Voice}, 627 F.2d 138, 145 (8th Cir. 1980) (court did not consider that defendant was American Indian with "dull-normal" I.Q. and fifth-grade education).
\item[151] See \textit{Brewer v. Williams}, 430 U.S. at 392-93 (court considered fact that defendant was deeply religious); Kamisar, \textit{supra} note 31, at 221-24.
\item[152] See 446 U.S. at 302-03; text accompanying note 147 \textit{supra}.
\item[153] See 446 U.S. at 303. The majority explained:

The Rhode Island Supreme Court erred . . . in equating "subtle compulsion" with interrogation. That the officers' comments struck a responsive chord is readily apparent. Thus, it may be said, as the Rhode Island Supreme Court said, that the respondent was subjected to "subtle compulsion." But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was the product of words or actions on the part of police that \textit{they} should have known were reasonably likely to elicit an incriminating response.

\textit{Id.} (emphasis added) (footnote omitted).
\item[154] For the argument that this result is not based on an accurate re-creation of the custodial confrontation between the Providence police and \textit{Innis} and therefore subject to criticism, see notes 118-141 \textit{supra} and accompanying text.
\end{footnotes}
Although the police do not know of Innis' susceptibility to a moral appeal to save the life of a handicapped child, for Innis the weapons conversation produces the same compulsion as direct police questioning: visions of Innis' little handicapped girl picking up the shotgun and killing herself compel an incriminating response. Since the police and society at large should not be held accountable for the unforeseeable results of police conduct, Innis correctly held that an admission produced by unforeseeable police conduct should be admissible at trial.

Moreover, the foreseeability standard is consistent with the underlying rationale of Miranda. In Miranda, the Court established safeguards to alleviate the coercive atmosphere inherent in custodial interrogation. The Court was concerned that the coercive atmosphere created by the combination of custody and interrogation would threaten the privilege against self-incrimination. Miranda, however, was a response to coercive and deceptive forms of police interrogation used to induce confessions. Nowhere in Miranda did the Court state or even allude to the proposition that police and society should be held accountable for the unforeseeable results of police conduct. To hold them accountable would put the courts in a position where a confession in response to a police officer's statement such as "What is your name?" may be held inadmissible because a suspect perceived that he was being compelled to confess.

**Avoiding the Innis Problem:**

**Suggestions for Police Procedure**

While the Innis test is consistent with the underlying rationale of Miranda, it is unworkable in situations where the police con-

---

155. See note 13 supra.
156. See notes 20-23 supra and accompanying text.
158. The Court made a similar point in Innis:

By way of example, if the police had done no more than drive past the site of the concealed weapon while taking the most direct route to the police station, and if the respondent, upon noticing for the first time the proximity of the school for handicapped children, had blurted out that he would show the officers where the gun was located, it could not seriously be argued that this "subtle compulsion" would have constituted "interrogation" within the meaning of the Miranda opinion.

446 U.S. at 303-04 n.10.

This is consistent with cases holding that routine administrative questions incident to arrest and booking do not constitute interrogation. E.g., Hines v. LaValle, 521 F.2d 1109 (2d Cir. 1975), cert. denied, 423 U.S. 1090 (1976).
front a suspect indirectly or where a police officer initiates, in the suspect's presence, a conversation with another officer. Formulation of criteria that courts should consider in determining whether police conduct constitutes interrogation may serve to clarify Innis' ambiguities. However, the difficulties inherent in ascertaining the precise nature of a police-suspect confrontation make it unlikely that a comprehensive list can be formulated.

To alleviate this difficulty, Professor Kamisar proposes that all conversations between a suspect and police be electronically recorded. If a judge is provided with an objective record of a police-suspect confrontation, the Innis test becomes a workable standard for determining whether police conduct constitutes interrogation. However, while recording is feasible in stationhouse or police-car settings, it is impractical to require police to carry re-

159. See notes 106-143 supra and accompanying text.
160. See notes 134-138 supra and accompanying text.
161. Kamisar, supra note 31, at 233. Other scholars have agreed with his proposal. See, e.g., Traynor, supra note 134, at 20. The Model Code of Pre-Arraignment Procedure's reporter acknowledges "a concern about the danger of police abuse which cannot subsequently be established in court." A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, PROPOSED OFFICIAL DRAFT, Commentary § 130.4, at 341 (1975). Section 130.4 provides in pertinent part:

(3) Sound Recordings. The regulations relating to sound recordings shall establish procedures to provide a sound recording of

(a) the warning to arrested persons pursuant to Subsection 130.1(2);
(b) the warning required by, and any waiver of the right to counsel pursuant to, Section 140.8; and
(c) any questioning of the arrested person and any statement he makes in response thereto.

Id.

The full § 130.4 requires that law enforcement agencies make full written records and sound recordings to aid the resolution of factual disputes which may subsequently arise concerning what happened to an arrested person in custody. Such a provision is central to the Code's attempt to provide clear and enforceable rules governing the period between arrest and judicial appearance. The keeping of such records will assist in a subsequent reconstruction of what took place.

Id. § 130.4, Note, at 39 (emphasis added).


For other proposals, see W. SCHAEFER, THE SUSPECT IN SOCIETY (1967); Friendly, supra note 11; Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich. L. Rev. 1224 (1932). For a discussion of the Kauper-Schaefer-Friendly proposal providing for warnings and questioning by a judicial officer, see Kamisar, Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article, 73 MICH. L. REV. 15 (1974).
corders and tape all conversations during and immediately following each arrest. Moreover, while additional criteria may clarify the Innis test\textsuperscript{162} and objective recording when possible may solve the difficulties inherent in ascertaining the precise nature of a police-suspect confrontation,\textsuperscript{163} the Innis test still does not translate into rules of conduct that police can easily follow.\textsuperscript{164}

A per se rule prohibiting the police from making any comments concerning the alleged crime once the suspect has asserted either his or her right to remain silent or right to counsel would provide police with an easy standard to follow in custodial situations and would satisfy the dual goals advocated in Miranda and Innis of protecting the suspect’s fifth amendment rights while at the same time not impeding the efficient investigation of crime. This standard not only would give greater assurance that the suspect’s Miranda rights are protected, but also would remedy the problem now faced by lower courts burdened with the difficulty of applying the Innis test to indirect or ambiguous police conversations. All that would be required is a determination of whether the conversation was related to the alleged crime. It would not be necessary for the court to make a case-by-case determination of what the police should or should not have known. In addition a per se rule would deter ambiguous police conduct that might or might not constitute interrogation under the Innis test, while not in fact hampering legal police activity in any significant manner. It is arguable that there is no reason for the police to discuss an alleged crime in the suspect’s presence unless they hope to elicit some incriminating response,\textsuperscript{165} a goal which is in violation of the foreseeability

\textsuperscript{162} See notes 144-152 supra and accompanying text.

\textsuperscript{163} See note 161 supra and accompanying text.

\textsuperscript{164} See text accompanying notes 140-143 supra.

\textsuperscript{165} Captain Leaming reminisced about his Brewer v. Williams Christian burial speech nine years after the event:

“’I didn’t even know what those words [‘psychological coercion’] meant, until I looked them up in the dictionary after I was accused of using it. . . .

Shucks, I was just being a good old-fashioned cop, the only kind I know how to be. . . .

. . . .

I have never seen a prisoner physically abused, though I heard about those things in the early days. . . .

That type of questioning just doesn’t work. They’ll just resist harder.

You have to butter ’em up, sweet talk ’em, use that—what’s the word?—’psychological coercion.’””

Kamisar, supra note 21, at 1 (brackets in original) (reprinting in part Lamberto,
standard of *Innis*. Thus, requiring the police to refrain from discussing the alleged crime until the suspect waives his or her *Miranda* rights, or has an attorney present, would not place undue hardship on legitimate police investigative methods. Such a rule would eliminate the risk and uncertainty that a police officer faces in attempting to comply with the foreseeability standard of *Innis*: all conversation relating to the alleged crime would be prohibited.

This proposal is also consistent with the *Miranda* standard that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present" or "[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." In further defining the permissible scope of police conduct once a suspect has asserted his or her right to remain silent, the Supreme Court in *Michigan v. Mosely* stated that the admissibility of incriminating statements thus obtained "depends . . . on

---

*Learning*'s "Speech": "I'd do it again," Des Moines Reg., Apr. 7, 1977, § B, at 1, col. 1 (quoting Captain Learning)).

166. For a brief discussion of the issue of waiver, see note 79 *supra*. Alternatively, a court can adopt the New York waiver rule articulated in *People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980) (once a suspect requests the assistance of counsel, he cannot waive this right without counsel present).

167. A major risk faced by police officers attempting to comply with the foreseeability standard is that valuable evidence may be suppressed if a court finds that the evidence was the result of a conversation the police should have known would elicit an incriminating response.

168. 384 U.S. at 474.
169. *Id.* at 473-74.
170. 423 U.S. 96 (1975). Mosley was arrested for two robberies and asserted his *Miranda* rights. *Id.* at 97. A few hours later he was warned and questioned by another detective concerning a different crime. *Id.* at 98. Mosley waived his rights, and, as a result of the second interrogation, a confession was obtained. *Id.* At issue was the interpretation of a passage in *Miranda* which states that "[o]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 100-01 (quoting 384 U.S. at 473-74).

*Mosley* interpreted this passage as *not* precluding "a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent," *id.* at 103-03 (emphasis in original) (footnote omitted), and held that the initial request to stop the interrogation was "scrupulously honored" since the first police officer immediately ceased interrogating Mosley. *Id.* at 104 (footnote omitted). Furthermore, the second interrogation commenced only after a few hours had passed and new warnings had been given, and was restricted to a different crime. *Id.* at 106. Thus, the confession was admissible because the procedures outlined in *Miranda* were followed. *Id.* at 107.
whether his ‘right to cut off questioning’ was ‘scrupulously hon-
ored.’ 171 A rule prohibiting the police from making any com-
ments related to the alleged crime once a suspect has asserted his or her Miranda rights would be consistent with the “scrupulously honored” requirements of Mosely and Miranda.

There is precedent for the argument that a per se standard to which the police can easily adhere should replace Innis’ case-by-case foreseeability approach. In Gideon v. Wainwright, 172 the Supreme Court, addressing the sixth amendment right to counsel, shifted from a case-by-case approach to a per se rule that an indigent defendant is entitled to appointed counsel. 173 Prior to Gideon the Court had used a “fundamental fairness” standard 174 where, under a totality-of-circumstances approach, judges determined whether the defendant would be deprived of a fair hearing if he or she did not have an attorney present. 175

Courts found the totality-of-circumstances test “substantially unworkable” 176 because the standard did not establish a definite set of rules for state courts whereby they could know whether in any given case refusal to appoint counsel would be held to be a denial of due process by the Supreme Court. The only guidance was that a defendant must be given a fair trial, thus leaving the standard “impossibly vague and unpredictable.” 177

Analogously, courts applying the Innis foreseeability standard will not be able to ascertain whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response. Furthermore, Innis’ failure to enumerate specific factors that may have a bearing on a particular suspect’s susceptibility adds further confusion to a standard that could also be called vague and unpredictable. 178

171. Id. at 104 (footnote omitted).
173. Id. Gideon extended the right to counsel to non-capital offenses. Id. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court further extended the sixth amendment right to counsel to all prosecutions that could result in imprisonment.
174. This approach was adopted in Betts v. Brady, 316 U.S. 455, 473 (1942).
175. See id.
178. See text accompanying notes 134-143 supra.
In *Gideon*, the Supreme Court abandoned the totality-of-circumstances test and adopted a clear and simple rule requiring that all indigent defendants have counsel appointed.179 Similarly, the *Innis* foreseeability standard should be replaced by a clear and simple rule prohibiting the police from making any comments related to the alleged crime until the suspect either waives his or her *Miranda* rights or has an attorney present during questioning.

**CONCLUSION**

In holding that conduct the police knew or should have known was reasonably likely to elicit an incriminating response constitutes interrogation in violation of a suspect’s *Miranda* rights, the United States Supreme Court in *Innis* apparently provided custodial suspects with an objective standard of protection. However, the Court’s failure to enunciate the factors a court should examine to determine whether the police knew or should have known that their conduct would elicit an incriminating response will make it difficult for the courts to apply the standard uniformly and for the police to tailor their conduct so as to avoid the exclusion of evidence resulting from unintentional *Miranda* violations. Unless workable criteria can be established to provide guidance for the courts and law enforcement officers, the adoption of a per se rule that all police conversations concerning the alleged crime or the circumstances surrounding the crime are prohibited after a suspect has asserted his or her right to remain silent or right to an attorney would provide a standard which would be easy for the police and the courts to follow. At the same time, it would advance the goal of *Miranda* and *Innis* that a suspect not be intimidated into incriminating himself in a custodial setting—without hampering legitimate police investigation.

*Alan M. Schutzman*

---

179. See notes 172-177 *supra* and accompanying text.