

THE UNTOLD STORY OF *RHODE ISLAND V. INNIS*:  
JUSTICE POTTER STEWART AND THE DEVELOPMENT  
OF MODERN SELF-INCRIMINATION DOCTRINE

*Jesse C. Stewart*\*

INTRODUCTION

JUSTICE John Paul Stevens announced his retirement from the Supreme Court on April 9, 2010.<sup>1</sup> While commentators focused on the significance of Stevens's retirement for the demographic and ideological make-up of the Court,<sup>2</sup> his announcement was significant from an historical perspective as well: as the last sitting Justice to have served with Associate Justice Potter Stewart, his retirement triggered access to Justice Stewart's Supreme Court papers for the first time.<sup>3</sup> Known for the legal axiom that "hard-core pornography" is hard to define, but "I know it when I see it,"<sup>4</sup> Justice Stewart left his mark on many doctrines of constitutional law, not least of which is the body of law regulating a criminal defendant's privilege against self-incrimination. During his twenty-three years on the Court, Justice Stewart authored more than ten opinions (majority, plurality, concurring, and dissenting combined) to

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\* J.D./M.A. expected December 2011, University of Virginia School of Law. I would like to thank Professor Charles McCurdy for his guidance in researching and writing this Note. I would also like to thank the students of the American Legal History Seminar for their thoughtful contributions and the members of the Virginia Law Review for their tireless editing. Finally, I would like to thank my dad, a Stewart distinguished in his own right. The author is not related in any way to Justice Stewart.

<sup>1</sup> Letter from John Paul Stevens, U.S. Sup. Ct. Assoc. J., to Barack Obama, U.S. President, (Apr. 9, 2010), available at <http://graphics8.nytimes.com/packages/pdf/us/20100409-JohnPaulStevens-Letter.pdf>.

<sup>2</sup> See, e.g., Adam Liptak, Stevens, the One and Only. . . , N.Y. Times, Apr. 9, 2010, at WK1; Sheryl Gay Stolberg & Charlie Savage, Justice Stevens Retiring, Giving Obama a 2nd Pick, N.Y. Times, Apr. 10, 2010, at A1.

<sup>3</sup> Justice Stewart gave his papers to the Yale University Library. According to the deed of the gift, "[Justice Stewart's] Supreme Court files, including opinions, petitions for certiorari, and docket records are closed to research until such time as all Supreme Court justices who served with Justice Stewart have retired from the Court." Email from Cynthia Ostroff, Manager, Yale University Library Manuscripts and Archives, to Author (Mar. 15, 2010) (on file with author). Justice Stevens was the last remaining Justice to have served with Justice Stewart.

<sup>4</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

the effect that the Sixth Amendment<sup>5</sup> is better suited than the Fifth<sup>6</sup> for striking the balance between a defendant's constitutional rights and the government's investigative interests at the pre-trial stage.<sup>7</sup>

Throughout his career, Justice Stewart was emphatic that the Sixth Amendment sufficiently protected a defendant's privilege against self-incrimination by guaranteeing him access to counsel at the "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."<sup>8</sup> Writing for the majority in *Massiah v. United States*,<sup>9</sup> Justice Stewart defined the doctrine when he stated that "[the defendant] was denied the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."<sup>10</sup> Justice Stewart was equally emphatic that neither the Sixth nor the Fifth Amendment should protect the defendant from self-incriminating statements made prior to the initiation of formal judicial proceedings.<sup>11</sup>

Yet, a mere fourteen years after joining the dissent in *Miranda v. Arizona*<sup>12</sup>—the Warren Court's paradigmatic statement of a suspect's Fifth Amendment privilege in the face of hostile government

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<sup>5</sup> U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

<sup>6</sup> U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself.").

<sup>7</sup> See *Rhode Island v. Innis*, 446 U.S. 291 (1980); *Brewer v. Williams*, 430 U.S. 387 (1977); *United States v. Mandujano*, 425 U.S. 564, 609 (1976) (Stewart, J., concurring); *Ohio v. Gallagher*, 425 U.S. 257, 260 (1976) (Stewart, J., dissenting); *Michigan v. Mosely*, 423 U.S. 96 (1975); *Michigan v. Tucker*, 417 U.S. 433, 453 (1974) (Stewart, J., concurring); *Kirby v. Illinois*, 406 U.S. 682 (1972); *Procunier v. Atchley*, 400 U.S. 446 (1971); *Hoffa v. United States*, 385 U.S. 293 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 493 (1964) (Stewart, J., dissenting); *Massiah v. United States*, 377 U.S. 201 (1964); *Spano v. New York*, 360 U.S. 315, 326 (1959) (Stewart, J., concurring).

<sup>8</sup> *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

<sup>9</sup> 377 U.S. 201 (1964).

<sup>10</sup> *Id.* at 206.

<sup>11</sup> For Justice Stewart's views on the Sixth Amendment at the stage prior to an official charge, see *Escobedo v. Illinois*, 378 U.S. 478, 493 (1964) (Stewart, J., dissenting); for his views on the Fifth Amendment at the pre-trial stage, see generally *infra* Subsection III.A.2.

<sup>12</sup> 384 U.S. 436 (1966).

questioning—Justice Stewart wrote for the majority in *Rhode Island v. Innis*,<sup>13</sup> the Burger Court’s unexpectedly strong endorsement of *Miranda* following a decade of relentless attack on the *Miranda* doctrine. *Innis* held that interrogation included not only “express questioning,” but also “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.”<sup>14</sup> This articulation of “the meaning of ‘interrogation’ under *Miranda*”<sup>15</sup> went well beyond what legal scholars predicted, given the Supreme Court’s miserly treatment of the *Miranda* doctrine in the preceding decade, and was even more significant for the fact that the two remaining *Miranda* dissenters (Justices Stewart and White) and the four Nixon appointees (Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist)—that is, the six most conservative Justices on the Court—comprised the majority. Significantly, the Burger Court’s holding in *Innis* virtually eliminated the possibility that the Court would thereafter overrule *Miranda*. Professor Kamisar, Fifth Amendment scholar and *Miranda* advocate, summarized *Innis* as follows: “In *Innis* the process of qualifying, limiting, and shrinking *Miranda* came to a halt. Indeed, it seems fair to say that in *Miranda*’s hour of peril the *Innis* Court rose to its defense.”<sup>16</sup>

Justice Potter Stewart did not simply change his mind on the “right to remain silent” in the fourteen years between *Miranda* and *Innis*. The release of his files makes this clear. The release of Justice Stewart’s files also makes it possible, for the first time, to reconcile his majority opinion in *Innis* with the balance of his self-incrimination jurisprudence. Drawing from Justice Stewart’s previously unreleased Supreme Court files, this Note explains why Justice Stewart, a dyed-in-the-wool *Miranda* critic, wrote the opinion that settled the issue of whether *Miranda* would be overruled.

Traditional accounts pin *Innis* on a circuit court split regarding the definition of “interrogation” under *Miranda* and a need to re-

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<sup>13</sup> 446 U.S. 291 (1980).

<sup>14</sup> *Id.* at 301 (emphasis added).

<sup>15</sup> *Id.* at 297.

<sup>16</sup> Yale Kamisar, Police Interrogations and Confessions, in 4 *Encyclopedia of the American Constitution 1922, 1928* (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

solve issues left outstanding by *Brewer v. Williams*,<sup>17</sup> a previous Sixth Amendment right-to-counsel case that also implicated the Fifth Amendment privilege against self-incrimination. While crediting such accounts as partially correct, this Note argues that two additional factors, previously overlooked, make *Innis*'s result understandable, predictable, and more significant than previously acknowledged. Those two factors are (1) Justice Potter Stewart, whose legacy in Sixth Amendment jurisprudence gained considerably from an expansive Fifth Amendment ruling in *Innis*, and (2) stare decisis, which garnered *Miranda* begrudging respect from the Court's conservatives.

This Note justifies each of these new explanations by drawing heavily on previously unavailable primary source material from Justice Stewart's files, as well as Supreme Court cases, briefs, oral arguments, and law literature contemporaneous to *Innis*. It also draws from the Supreme Court files of selected colleagues of Justice Stewart: Associate Justices Brennan, Marshall, Blackmun, and Powell. These sources, particularly the primary source materials, make a convincing case that Justice Potter Stewart did everything he could in *Innis* to push through a strong endorsement of *Miranda* so as to secure the flank of the *Massiah* doctrine. Moreover, they indicate that, by 1980, the principle of stare decisis had set the Burger Court firmly against overruling *Miranda*. By making it clear that Justice Stewart's motivation in *Innis* was actually to shore up the Sixth Amendment right to counsel under *Massiah* and not the Fifth Amendment privilege against self-incrimination under *Miranda*, we can better understand why, in the wake of *Innis*, *Massiah*'s constitutionality is beyond reproach, whereas *Miranda*'s remains in doubt.

The rest of this Note explores these new explanations for the Court's affirmation of *Miranda* in *Innis*. Part I lays the foundation by detailing *Innis*'s facts and procedural history. Part II discusses the common explanations for why the Supreme Court decided *Innis* the way it did and then explores the weaknesses in these views. Part III reexamines what motivated the Court in *Innis* and argues that Justice Potter Stewart and stare decisis were controlling factors in its outcome. Part IV questions whether an alternative ex-

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<sup>17</sup> 430 U.S. 387 (1977).

planation might account for the majority opinion. Part V reassesses *Innis*'s effect on the general landscape of self-incrimination doctrine and attempts to demonstrate that its effect on the Fifth Amendment privilege against self-incrimination under *Miranda* was ambiguous, but its effect on the Sixth Amendment right to counsel under *Massiah* was decisive. Finally, the conclusion questions whether the ongoing debate regarding the extent to which a defendant's privilege against self-incrimination is protected could be settled by returning to the first principles laid out by Justice Stewart two years prior to *Miranda*, in *Massiah v. United States*.

#### I. *RHODE ISLAND V. INNIS*: A SHOTGUN, A "CAGED WAGON," AND "SUBTLE COMPULSION"

Shortly after midnight on January 16, 1975, Providence police received a call from Gerald Aubin, a cab driver, reporting that he had been robbed by a man carrying a sawed-off shotgun.<sup>18</sup> Police picked up Aubin and transported him downtown, where he gave a statement and picked Thomas Innis's photo out of a lineup.<sup>19</sup> Thereafter, Providence police began searching for Innis.<sup>20</sup>

Later that day, police found the body of John Mulvaney, also a cab driver, in a shallow grave seventeen miles southwest of Providence. Mulvaney had disappeared four nights prior, after being dispatched to pick up a customer.<sup>21</sup> His cause of death was a shotgun blast to the back of the head.<sup>22</sup>

Early in the morning of January 17, Patrolman Lovell, on the lookout for Innis, spotted him while cruising the Mount Pleasant neighborhood.<sup>23</sup> Lovell stopped his car, called for back-up, drew his gun, and placed Innis under arrest.<sup>24</sup> Innis was unarmed, and Lovell advised him of his *Miranda* rights. Thereafter, the two waited together in the cruiser for backup to arrive.<sup>25</sup>

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<sup>18</sup> Brief of the Petitioner at 4–5, *Rhode Island v. Innis*, 446 U.S. 291 (1980) (No. 78-1076) [hereinafter *Innis* Petitioner's Brief].

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.*

<sup>23</sup> *Rhode Island v. Innis*, 446 U.S. 291, 293–94 (1980).

<sup>24</sup> Brief of the Respondent at 4–5, *Rhode Island v. Innis*, 446 U.S. 291 (1980) (No. 78-1076) [hereinafter *Innis* Respondent's Brief].

<sup>25</sup> *Innis*, 446 U.S. at 294.

Within minutes, the scene was flooded with police. Sergeant Sears, the first to report, climbed in the back of the cruiser and, sitting beside Innis, reread him his *Miranda* rights.<sup>26</sup> Then Captain Leyden, the supervising officer, arrived, accompanied by Patrolmen Gleckman, McKenna, and Williams. Leyden also repeated the *Miranda* warnings.<sup>27</sup> Surrounded by police, Innis acknowledged his rights and requested an attorney.<sup>28</sup> Leyden then directed McKenna, Gleckman, and Williams to put Innis in a “caged wagon”<sup>29</sup> and to drive him downtown.<sup>30</sup> Before they left, Leyden instructed the officers not to question, intimidate, or coerce Innis in any way.<sup>31</sup>

The officers got in the car, two in the front and one in the back.<sup>32</sup> Within minutes of their departure, Patrolman Gleckman initiated a conversation, saying “there’s a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.”<sup>33</sup> McKenna responded, acknowledging that “safety [is a] factor and . . . we should, you know, continue to search for the weapon and try to find it.”<sup>34</sup> Gleckman agreed, saying that “it would be too bad if [a little girl] would pick up the gun, maybe kill herself.”<sup>35</sup> Thereafter Innis interrupted, stating that the officers should turn the car around so he could show them where the gun was located.<sup>36</sup> The officers complied and after one final rendition of the *Miranda* rights (delivered by Leyden), Innis led police to a nearby field where the shotgun was hidden.<sup>37</sup>

Innis was convicted of murder, kidnapping, and robbery in Rhode Island Superior Court.<sup>38</sup> Over his objection, the trial judge allowed the shotgun and the testimony related to its discovery into

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<sup>26</sup> *Innis* Respondent’s Brief, *supra* note 24, at 5.

<sup>27</sup> *Innis*, 446 U.S. at 294.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* A caged wagon is “a four-door police car with a wire screen mesh between the front and rear seats.” *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *State v. Innis*, 391 A.2d 1158, 1160 n.2 (R.I. 1978).

<sup>33</sup> *Rhode Island v. Innis*, 446 U.S. 291, 294–95 (1980).

<sup>34</sup> *Id.* at 295.

<sup>35</sup> *Id.*

<sup>36</sup> *Innis* Petitioner’s Brief, *supra* note 18, at 6.

<sup>37</sup> *Id.* at 7.

<sup>38</sup> *State v. Innis*, 391 A.2d 1158, 1160 (R.I. 1978).

evidence and ruled that Innis had been “repeatedly and completely advised of his *Miranda* rights,” and that Innis's decision to inform police of the shotgun's location was a clear and intelligent waiver of his right to remain silent.<sup>39</sup> Innis appealed and a closely divided Rhode Island Supreme Court set aside his conviction.<sup>40</sup> Relying on *Brewer v. Williams*, a then-recent United States Supreme Court case with superficially similar factual circumstances, the Rhode Island court concluded that Innis had invoked his right to silence and that, contrary to *Miranda*'s mandate that in the absence of counsel all custodial interrogation must cease, he was subjected to “subtle compulsion,” the equivalent of “interrogation” under *Miranda*.<sup>41</sup> Moreover, the evidence was insufficient to support a finding of waiver.<sup>42</sup> Concluding that both the shotgun and testimony relating to its discovery were unlawfully obtained, the Rhode Island Supreme Court granted a new trial.<sup>43</sup> The State appealed, and the Supreme Court “granted certiorari to address for the first time the meaning of ‘interrogation’ under *Miranda v. Arizona*.”<sup>44</sup>

The Supreme Court voted to hear *Rhode Island v. Innis* on February 23, 1979.<sup>45</sup> In the months preceding oral argument, consensus was that the case did not bode well for the *Miranda* doctrine, particularly in light of the Burger Court's demonstrated antipathy towards the iconic Warren Court opinion.<sup>46</sup> Two years prior, Professor Geoffrey Stone wrote that “*Miranda* has fallen into disfavor with the present majority”;<sup>47</sup> a year after that Professor Kamisar lamented that the Burger Court might allow *Miranda* to “wither.”<sup>48</sup>

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<sup>39</sup> *Rhode Island v. Innis*, 446 U.S. 291, 296 (1980).

<sup>40</sup> *Id.*

<sup>41</sup> *State v. Innis*, 391 A.2d at 1162.

<sup>42</sup> *Id.* at 1163.

<sup>43</sup> *Id.* at 1164.

<sup>44</sup> *Innis*, 446 U.S. at 297.

<sup>45</sup> Certiorari Vote Notes, *Rhode Island v. Innis*, No. 78-1076 (Feb. 23, 1979) [hereinafter Powell, *Innis* Cert Vote Notes] (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., on file with author).

<sup>46</sup> Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 100 (1977) (“That *Miranda* has fallen into disfavor with the present majority of the Court is reflected both in its substantive decisions and in the manner in which it has exercised [the granting of certiorari. . . . From 1973 to 1977] the [Burger] Court [consistently] interpreted *Miranda* so as not to exclude the challenged evidence.”).

<sup>47</sup> *Id.*

<sup>48</sup> Yale Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is “Interrogation”? When Does it Matter?*, 67 Geo. L.J. 1, 100 (1978).

Indeed, just months before oral arguments, a pair of articles appeared in the *American Criminal Law Review*, each prognosticating the Court's direction in *Innis*. Neither predicted a strong affirmation of *Miranda*. Professor Welsh White, ostensibly playing the role of *Miranda*'s advocate, argued that because *Miranda* made the Burger Court "extremely uncomfortable," the *Innis* majority should avoid a Fifth Amendment inquiry altogether.<sup>49</sup> Instead, White favored deciding the case on grounds of the Sixth Amendment right to counsel so as to "begin developing a viable alternative to *Miranda*."<sup>50</sup> In response, Professor Joseph Grano, foreshadowing an argument he would make in a longer law review article to follow,<sup>51</sup> stated bluntly that "*Miranda* has no warrant in the Constitution"<sup>52</sup> and that a return to Fifth Amendment principles suggested that both the Rhode Island Supreme Court's decision and *Miranda* be overturned.<sup>53</sup>

*Innis*'s certiorari vote implied that Professor Grano was on the mark. President Richard Nixon's four appointees, joined by Justice Stewart, voted to consider the case.<sup>54</sup> Among them, none had previously "cast even a single vote to exclude evidence because of a violation of *Miranda*."<sup>55</sup> Moreover, conference notes taken by Justice Powell indicated that *Innis* would be decided squarely on *Miranda* grounds.<sup>56</sup> With three of five cert voters indicating their intent to reverse the ruling below,<sup>57</sup> there was reason to fear that the Burger Court would, finally, deliver *Miranda*'s death blow.<sup>58</sup>

The Court, however, did not overturn *Miranda*. In fact, it interpreted *Miranda* expansively. Writing for a 6-3 majority, Justice Stewart summarily rejected the idea of defining interrogation "nar-

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<sup>49</sup> Welsh S. White, *Rhode Island v. Innis: The Significance of a Suspect's Assertion of His Right to Counsel*, 17 Am. Crim. L. Rev. 53, 69-70 (1979).

<sup>50</sup> Id. at 70.

<sup>51</sup> See Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 Va. L. Rev. 859 (1979).

<sup>52</sup> Joseph D. Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1, 5 (1979).

<sup>53</sup> Id. at 51.

<sup>54</sup> Powell, *Innis* Cert Vote Notes, supra note 45.

<sup>55</sup> Stone, supra note 46, at 101.

<sup>56</sup> Powell, *Innis* Cert Vote Notes, supra note 45 ("[N]ot a *Brewer v. Wms* case. *Brewer* went on *Messiah* [sic]. This is a *Miranda* case.").

<sup>57</sup> Id.

<sup>58</sup> See generally Grano, supra note 52.



rowly”<sup>59</sup> and then proceeded to list a number of police tactics *other than* direct questioning that “in a custodial setting . . . amount to interrogation.”<sup>60</sup> He concluded that “*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.”<sup>61</sup>

Justice Stewart’s new interrogation test, however, contained one caveat: “[S]ince the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.”<sup>62</sup> This limitation was sufficient to vacate the judgment of the Rhode Island Supreme Court. On the facts, *Innis* simply was not interrogated. Even though “the officers’ comments struck a responsive chord,”<sup>63</sup> his statements were not “the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response.”<sup>64</sup>

*Innis*, then, surprised everyone. *Miranda*’s critics agreed with *Innis*’s disposition—the vacating of the Rhode Island Supreme Court’s judgment—but were incredulous that it came hand-in-hand with an articulation of “interrogation” that embraced tactics other than police “speech.”<sup>65</sup> *Miranda*’s supporters were equally incredulous, but for a different reason. As stated by Justice Marshall in his dissenting opinion, it was simply “an aberration” that the Court majority could deliver such an expansive definition of interrogation while at the same time interpreting it to cut against Thomas *Innis*.<sup>66</sup>

Ultimately, however, *Innis*’s holding was more advantageous to *Miranda*’s supporters than its critics. As indicated by Professor Kamisar six years after the decision, “considering the various ways in which the *Innis* Court might have given *Miranda* a grudging interpretation, its generous definition of ‘interrogation’ seems much more significant than its questionable application of the definition

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<sup>59</sup> *Innis*, 446 U.S. at 298–99.

<sup>60</sup> *Id.* at 299.

<sup>61</sup> *Id.* at 300–01.

<sup>62</sup> *Id.* at 301–02 (emphasis in original).

<sup>63</sup> *Id.* at 303.

<sup>64</sup> *Id.*

<sup>65</sup> Kamisar, *supra* note 16, at 1928.

<sup>66</sup> *Innis*, 446 U.S. at 305–07 (Marshall, J., dissenting).

to the particular facts of the case.”<sup>67</sup> Indeed, given *Miranda*’s trajectory prior to *Innis*, the holding was a significant victory.

## II. EXPLAINING *INNIS*: THE TRADITIONAL ACCOUNT

It is one thing to observe that “the *Innis* Court rose to [*Miranda*’s] defense.”<sup>68</sup> It is quite another, however, to explain *why* it did so. After all, *Innis* followed a decade of cases portending *Miranda*’s demise.<sup>69</sup> Six years earlier, writing for a 6-3 majority in *Michigan v. Tucker*, Justice Rehnquist had gone so far as to say that *Miranda*’s “prophylactic rules”<sup>70</sup> were merely “procedural safeguards . . . not themselves rights protected by the Constitution.”<sup>71</sup> Having thus relegated *Miranda* to sub-constitutional status, it was certainly conceivable that the Burger Court would overrule it altogether. That it did not—indeed, that the Court seemed to make an about-face on *Miranda*—is a puzzle that the existing literature fails to explain.

Traditional accounts explain the *Innis* decision as an attempt by the Court to resolve two issues: (1) a circuit split on the definition of “interrogation” under *Miranda* and (2) confusion as to where to place confession doctrine in the wake of *Brewer v. Williams*, which conflated the Sixth Amendment right to counsel with the Fifth Amendment privilege against self-incrimination.<sup>72</sup> Although each

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<sup>67</sup> Kamisar, *supra* note 16, at 1928.

<sup>68</sup> *Id.*

<sup>69</sup> See *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (extending *Beckwith v. United States*, *infra*, to hold that at the time of his confession, defendant was not in custody or deprived of freedom even when he made his confession behind closed doors at a police station because defendant came to the station “voluntarily”); *Baxter v. Palmigiano*, 425 U.S. 308, 315 (1976) (holding that *Miranda* does not have any bearing on whether counsel must be provided at prison disciplinary hearings); *Beckwith v. United States*, 425 U.S. 341, 344–46 (1976) (holding that *Miranda* does not govern noncustodial situations); *Oregon v. Hass*, 420 U.S. 714, 722–23 (1975) (extending *Harris v. New York*, *infra*, to review of state court decisions); *Michigan v. Tucker*, 417 U.S. 433, 450–51 (1974) (holding that inculpatory evidence discovered as a result of statements taken in violation of *Miranda* might be admissible at trial if defendant’s original statement was given voluntarily); *Harris v. New York*, 401 U.S. 222, 224 (1971) (holding that evidence obtained in violation of *Miranda* may be used to impeach defendant at trial).

<sup>70</sup> *Tucker*, 417 U.S. at 439.

<sup>71</sup> *Id.* at 444.

<sup>72</sup> See David M. Bates, *Supreme Court Review, Fifth Amendment—The Meaning of Interrogation Under Miranda*, 71 *J. Crim. L. & Criminology* 466, 473 (1980); Elaine

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explanation has merit, in sum they fail to account for *Miranda*'s abrupt change of fortune in *Innis*.

#### A. Circuit Split

*Miranda* held that the act of depriving a defendant of freedom “in any significant way,” when accompanied by questioning, jeopardizes his Fifth Amendment privilege against self-incrimination.<sup>73</sup> *Miranda*'s implications were significant. To ensure that a defendant was aware of “his right of silence and to assure that the exercise of the right [would] be scrupulously honored,”<sup>74</sup> police intending to question a suspect in custody would thereafter have to provide him with the now familiar warning:

[T]hat he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.<sup>75</sup>

Furthermore, if the police failed to inform a suspect of these rights or if, after informing him, the police failed to obtain a knowing and intelligent waiver, “no evidence obtained as a result of interrogation” could be used against the defendant at trial.<sup>76</sup>

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Charlson Bredehoft, *Wilson v. United States: The Narrow Line Between Innis and Edwards*, 32 Cath. U. L. Rev. 1001 (1983); Kingsley R. Browne, *Rhode Island v. Innis: “Offhand Comments” or “Interrogation”?*, 58 Denv. L.J. 637 (1981); Deborah L. Fletcher, *Rhode Island v. Innis: A Workable Definition of “Interrogation”?*, 15 U. Rich. L. Rev. 385 (1981); Andrew L. Frey, *Modern Police Interrogation Law: The Wrong Road Taken*, 42 U. Pitt. L. Rev. 731 (1981); Grano, *supra* note 52; Janice L. Jennings, *Casenote, Rhode Island v. Innis*, 12 St. Mary's L.J. 544 (1980); Jane Schussler, *Searching for the Proper Balance in Defining a Miranda Interrogation: Three Perspectives on Rhode Island v. Innis*, 3 W. New Eng. L. Rev. 787 (1981); Welsh S. White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 Mich. L. Rev. 1209 (1980); White, *supra* note 49; see also Alexander S. Helderman, *Revisiting Rhode Island v. Innis: Offering a New Interpretation of the Interrogation Test*, 33 Creighton L. Rev. 729 (2000); Jonathan L. Marks, *Note, Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the Innis Definition of Interrogation*, 87 Mich. L. Rev. 1073 (1989).

<sup>73</sup> *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

<sup>74</sup> *Id.* at 479.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

*Miranda*'s basic principle—that the Fifth Amendment's privilege against self-incrimination "is fully applicable during a period of custodial interrogation"<sup>77</sup>—was clear, but lower courts remained uncertain about its application. By its language, *Miranda* focused the judicial inquiry on whether, in a custodial situation, police compelled a defendant to incriminate himself.<sup>78</sup> Traditionally, compulsion was the product of physical, psychological, or emotional coercion. *Miranda*, however, expanded its definition by holding that compulsion was "inherent in custodial surroundings."<sup>79</sup> Thus the need for preemptive *Miranda* warnings—to dispel the coercive atmosphere by reminding the defendant of his "right of silence."

*Miranda* protects the Fifth Amendment privilege against self-incrimination in situations of "custodial interrogation." Thus, by definition, there must be "custody," as well as "interrogation," for *Miranda*'s protection to attach. The result of these two conditions, plus the possibility that a defendant can waive his *Miranda* rights, creates a multi-level judicial inquiry when a *Miranda* challenge arises. First, the court must determine whether the suspect was in "custody." If yes, only then will it inquire into whether he was "interrogated." If the suspect was interrogated, and questioning began before *Miranda* warnings were given, then the suspect's constitutional rights were violated. If, however, questioning began after *Miranda* warnings, then either the suspect did or did not voluntarily and knowingly "waive" his right to counsel. If he did not, then the suspect's constitutional rights were violated.

The multitude of factors under consideration by a court reviewing for a *Miranda* violation makes for a complicated inquiry even where the fact pattern is straightforward. But in situations similar to *Innis*, where the suspect, obviously in custody but not obviously "interrogated," blurts out incriminating statements, trial courts were likely to go in different directions absent explicit guidance. Indeed they did: "Some courts took a narrow view, finding that only direct questions constituted interrogation. Other jurists suggested that there were many police practices that had 'everything . . . but a question mark' and that these methods generated

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<sup>77</sup> Id. at 460.

<sup>78</sup> Id. at 458.

<sup>79</sup> Id.

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the same pressures to confess that the *Miranda* warnings were designed to mitigate.”<sup>80</sup> The range of views expressed by lower courts on the meaning of “interrogation” under *Miranda* certainly created an incentive for the Supreme Court to standardize the term.

*B. Resolution of Issues Left Outstanding by Brewer v. Williams*

Moreover, it is beyond doubt that the Court felt pressure to resolve issues left outstanding in *Brewer v. Williams*,<sup>81</sup> a case decided three years prior to *Innis*. In *Brewer*, the Supreme Court affirmed an Eighth Circuit ruling that suppressed a defendant’s statements regarding the murder of a ten-year-old girl. *Brewer* generated considerable consternation in Supreme Court chambers and in legal and popular culture because of its grisly facts: a mental hospital escapee all but admitted to brutally murdering the fourth-grader on Christmas Eve.<sup>82</sup> Nonetheless, substantial legal issues were involved: police knowingly and effectively induced the accused to incriminate himself absent the presence of counsel despite the fact that formal charges were filed and the accused had requested counsel’s assistance.<sup>83</sup>

It was impossible for the Supreme Court to decide *Brewer* in a way that appeased both sides. If, on the one hand, the Court vacated the Eighth Circuit’s decision, it would deliver a heavy blow to the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. On the other hand, affirmation would invite public outrage. The Court’s particular approach, however, infuriated everyone.

*Brewer*’s facts were undisputed.<sup>84</sup> On Christmas Eve, 1968, Robert Williams kidnapped Pamela Powers from the Des Moines, Iowa YMCA.<sup>85</sup> Two days later, Pamela’s frozen body was found off

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<sup>80</sup> Marks, *supra* note 72, at 1082 (citations omitted); accord Bates, *supra* note 72, at 469 (“In the absence of guidance from the Supreme Court, lower courts have defined the scope of *Miranda* in the context of interrogation.”) (citations omitted).

<sup>81</sup> 430 U.S. 387 (1977).

<sup>82</sup> *Id.* at 390–93.

<sup>83</sup> *Id.* at 392–93.

<sup>84</sup> *Id.* at 394.

<sup>85</sup> Brief of the Petitioner at 4, *Brewer v. Williams*, 430 U.S. 387 (1977) (No. 74-1263) [hereinafter *Brewer* Petitioner’s Brief].

a country road just east of town. She had been sexually assaulted and strangled to death.<sup>86</sup>

Based on eyewitness accounts at the YMCA, Des Moines police issued a warrant for Williams on charges of abduction.<sup>87</sup> The day after Christmas, on a lawyer's advice, Williams surrendered to police in Davenport. He was arrested, booked, and read his *Miranda* rights.<sup>88</sup> Thereafter, a Davenport judge arraigned Williams on the outstanding kidnapping warrant and committed him to jail.<sup>89</sup>

Des Moines Police Detective Cleatus Leaming was assigned to return Williams from Davenport to Des Moines.<sup>90</sup> There was no doubt that when Detective Leaming left to pick up Williams he knew he was not to question him.<sup>91</sup> Williams's lawyer had spoken with Leaming, as well as the Des Moines police chief, prior to Williams's transport and was emphatic that Williams not make any statements en route; Williams's lawyer was equally clear that Leaming not ask Williams any questions.<sup>92</sup> The proscription against questioning was reiterated to Leaming by another lawyer in Davenport.

Nonetheless, within the first few miles of their 160-mile return trip, Detective Leaming delivered what became known as the "Christian burial speech." Playing on Williams's peculiar religiosity—Leaming addressed him as "Reverend"—he launched into the following soliloquy:

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 raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be

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<sup>86</sup> *Id.*

<sup>87</sup> *Brewer*, 430 U.S. at 390.

<sup>88</sup> *Brewer* Petitioner's Brief, *supra* note 85, at 5.

<sup>89</sup> *Brewer*, 430 U.S. at 391.

<sup>90</sup> Brief of the Respondent at 6, *Brewer v. Williams*, 430 U.S. 387 (1977) (No. 74-1263) [hereinafter *Brewer* Respondent's Brief].

<sup>91</sup> *Brewer*, 430 U.S. at 391-92.

<sup>92</sup> *Brewer* Respondent's Brief, *supra* note 90, at 5-6.

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unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.<sup>93</sup>

Thereafter, as the squad car approached Mitchellville, Williams said, “I am going to show you where the body is.”<sup>94</sup> Williams then took Leaming to the exact spot where he left Pamela Powers.<sup>95</sup>

*Brewer's* facts gave the Court a choice of constitutional doctrines upon which to base its holding. Williams was arrested and arraigned prior to his statements. Moreover, he had asserted his right to counsel and, indeed, conferred with counsel in both Davenport and Des Moines. Thus, the facts easily fit a Sixth Amendment right to counsel analysis under *Massiah*.<sup>96</sup> Alternatively, *Brewer* could have been considered a Fifth Amendment privilege against self-incrimination case under *Miranda*. Because *Miranda's* first requirement—custody—was met, the Court was free to address the definition of “interrogation” for the first time.

Ultimately, Justice Stewart, writing for a sharply divided 5-4 majority, officially went with *Massiah* and affirmed the Eighth Circuit’s decision. The public was outraged<sup>97</sup> but, as a straight *Massiah* ruling, at least *Brewer's* meaning would have been clear: the Sixth Amendment right to counsel attaches as soon as a defendant is officially charged and police cannot thereafter deliberately elicit information from him in any way absent counsel. The *Brewer* majority, however, went beyond *Massiah's* requirements. For reasons unexplained, it equated the “Christian Burial Speech” with “inter-

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<sup>93</sup> *Brewer*, 430 U.S. at 392–93.

<sup>94</sup> *Brewer* Petitioner’s Brief, *supra* note 85, at 11.

<sup>95</sup> *Brewer*, 430 U.S. at 393.

<sup>96</sup> *Massiah v. United States*, 377 U.S. 201 (1964) (holding that once the Sixth Amendment right to counsel “attached” at arraignment, police could not thereafter deliberately elicit information from the defendant without counsel’s presence).

<sup>97</sup> Patrick J. Buchanan, Op-Ed., Freeing the Guilty Mocks Justice, *Chi. Trib.*, Apr. 5, 1977, at B3; George F. Will, Op-Ed., Guilty But Free? Court’s Ruling Defies Reason, *Sarasota Herald-Trib.*, Mar. 27, 1977, at 2-F.

rogation” even though *Massiah* placed no such conditions on an arraigned defendant’s right to counsel.<sup>98</sup> The doctrinal problems that ensued from Justice Stewart’s decision to overreach were considerable:

“[T]he clear rule of *Massiah*,” announced Justice Stewart for the [*Brewer*] majority, “is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government *interrogates* him.” This, [however], is the clear rule of *Miranda* when, as was Williams, the individual being interrogated is in “custody”—regardless of whether adversary proceedings have commenced—and especially when, as did Williams, the individual asserts his right to counsel. The clear rule of *Massiah* . . . is that once adversary proceedings have commenced against an individual, he has a right to legal representation *whether or not* the government “interrogates” him.<sup>99</sup>

In short, not only did *Brewer* subject the Court to intense public criticism, but it invited equally intense legal criticism by muddying the waters of the self-incrimination doctrine.

On this view, if not an ideal chance to appease the public, *Innis* nonetheless presented a fortuitous “opportunity to clarify the scope of [*Massiah*’s and *Miranda*’s] constitutional rules.”<sup>100</sup> As Professor White explained:

Viewed as a *Miranda* case, *Innis* provide[d] an opportunity to clarify the meaning of “custodial interrogation” and to define the scope of the police obligation to honor the suspect’s assertion of his right to remain silent and his right to an attorney.

. . . .

Viewed as a *Massiah* case, *Innis* present[ed] the Court with an opportunity to articulate the proper test to be applied in determining when incriminating statements are obtained in violation of the [S]ixth [A]mendment.<sup>101</sup>

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<sup>98</sup> Kamisar, *supra* note 48, at 33.

<sup>99</sup> *Id.*

<sup>100</sup> White, *supra* note 49, at 69.

<sup>101</sup> *Id.* at 69–70.



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That the *Innis* Court felt a need to resolve the doctrinal tension in *Brewer*'s wake is reflected in Justice Powell's personal notes taken at the *Innis* cert vote: "[Chief Justice] says is not a *Brewer v. Wms* case. *Brewer* went on *Messiah* [sic]. This is a *Miranda* case. See Kasimar's [sic] article on *Brewer*."<sup>102</sup> Justice Powell was undoubtedly referring to Professor Kamisar's article, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?*, which attempted to sort through *Brewer*'s doctrinal hodgepodge.<sup>103</sup> Indeed, the article made an impression on the *Innis* Court—the majority and the dissent each cited it specifically in their opinions.<sup>104</sup>

In its explicit attempt to define "'interrogation' under *Miranda*," the *Innis* Court undoubtedly sought to resolve the circuit split regarding the term.<sup>105</sup> Moreover, in issuing an opinion that made clear the distinction between the rights involved in *Brewer* and the rights involved in *Innis*—the Sixth Amendment and the Fifth Amendment, respectively<sup>106</sup>—the Court clarified the contours of self-incrimination doctrine. In sum, traditional explanations for *Innis* take the case at face value: a determined effort to define "interrogation" within the meaning of *Miranda*.

Certainly these explanations have merit. The dispute over the meaning of interrogation produced hydraulic pressure that was likely enough, in and of itself, to force the Court's hand. Moreover, they account for the fact that there were narrower grounds on which the Court could have applied *Miranda* to reach the same result while avoiding the issue of defining "interrogation."<sup>107</sup>

These explanations, however, fail to account for the fact that there were multiple narrower definitions of interrogation that the

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<sup>102</sup> Powell, *Innis* Cert Vote Notes, supra note 45.

<sup>103</sup> Kamisar, supra note 48.

<sup>104</sup> *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980); *Id.* at 310 n.7 (Stevens, J., dissenting).

<sup>105</sup> *Id.* at 297.

<sup>106</sup> See *id.* at 300 n.4.

<sup>107</sup> In his *Innis* concurrence, Justice White stated: "I would prefer to reverse the judgment for the reasons stated in my dissenting opinion in *Brewer v. Williams*." 446 U.S. at 304 (citation omitted). In *Brewer*, Justice White vigorously argued that the contested evidence was rightly admitted at trial because Williams intentionally waived his constitutional right to counsel. 430 U.S. at 433–34 (White, J., dissenting). While a plausible approach, to base the *Innis* decision on whether Innis waived his *Miranda* rights would, of course, kick the "interrogation" question down the road.

*Innis* Court could have chosen.<sup>108</sup> Even more fundamentally, there existed other plausible constitutional doctrines (that is, doctrines other than the Fifth Amendment under *Miranda*) upon which the Court could have ruled. Thus, it is odd that the Justices unanimously agreed that *Miranda* controlled in *Innis* and stranger still that they defined “interrogation” as expansively as they did. When properly understood, however, *Innis*’s true implications for self-incrimination doctrine are made clear.

### III. WHAT REALLY HAPPENED TO *MIRANDA* IN THE BACK OF THE “CAGED WAGON”: REASSESSING WHY THE *INNIS* COURT RULED THE WAY IT DID

In addition to its desire to resolve the circuit split and to clarify the distinction between the Sixth Amendment right to counsel and the Fifth Amendment privilege against self-incrimination, two factors significantly shaped the Court’s approach in *Innis*. First, the personal interest of Justice Stewart factored heavily into the decision to define “interrogation” expansively, rather than narrowly. Second, an established sense that *stare decisis* entitled *Miranda* to constitutional respect compelled the Court’s conservative wing to decide the case on *Miranda*, rather than other constitutionally viable doctrines.

#### A. Justice Stewart’s Legacy Threatened: *Innis* in Light of *Massiah*

Two related observations (and attendant hypotheses) suggest that Justice Stewart’s motivation in *Innis* was more than just a desire to resolve a circuit split or to clarify *Brewer*’s confusion: first, he was one foot out the door and into retirement (and thus legitimately worried about his legacy); second, he realized that in order

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<sup>108</sup> Justices Blackmun, White, and Burger each intimated alternative definitions of “interrogation” in their *Brewer* dissents. Blackmun, although failing to explain his views, found it “clear there was no interrogation” in *Brewer*, notwithstanding Leaming’s “Christian Burial Speech.” 430 U.S. at 440 (Blackmun, J., dissenting). Likewise, Justice White found that no interrogation occurred in *Brewer* because the “Christian Burial Speech” was “accompanied by a request by [Leaming] that the accused make no response.” *Id.* at 437 n.6 (White, J., dissenting). Finally, Justice Burger drew a distinction between whether Leaming’s remarks “constituted ‘interrogation,’ . . . or whether they were ‘statements’ intended to prick the conscience of the accused.” *Id.* at 419 (Burger, C.J., dissenting).

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to properly substantiate the right to counsel under the Sixth Amendment, a doctrine he had long championed, he had to put as much distance as possible between his majority opinions in *Massiah* and *Brewer* (which required an endorsement of *Miranda* in *Innis*). Each observation is discussed in turn.

### 1. *One Foot Out the Door*

Justice Stewart voted to grant certiorari to *Rhode Island v. Innis* in February 1979.<sup>109</sup> Though he did not retire from the Court until July 1981, available evidence suggests that the Justice had his eye on greener pastures when he agreed to hear the case. During his twenty-three year tenure, Justice Stewart authored more than 300 majority opinions.<sup>110</sup> His productivity, however, had dropped significantly by the year *Innis* was decided.<sup>111</sup> Moreover, while in his prime Justice Stewart hired up to four law clerks per term, in each of his last three terms on the Court, he hired only three clerks.<sup>112</sup> Case and staff reductions are generally accurate indicators of impending retirement from the Court. Taken at face value, these observations make it more likely than not that when *Innis* came up, Justice Stewart was looking forward to life beyond Supreme Court chambers. Thus, *Innis* was a fortuitous opportunity to set the record straight on *Massiah*.

### 2. *Innis as a Clarification of Massiah*

Given his disposition towards *Miranda*, it is odd that Justice Stewart drafted the Fifth Amendment opinion he did in *Innis*.

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<sup>109</sup> Powell, *Innis* Cert Vote Notes, supra note 45.

<sup>110</sup> In total, Justice Stewart authored 314 opinions for the Court. The Supreme Court Compendium 644-51, Tables 6-16 to 6-19 (Lee Epstein et al. eds., 4th ed. 2006). Justice Brennan, the only Justice to serve with Justice Stewart throughout Justice Stewart's entire career on the Court, authored only 297 majority opinions in the same span. *Id.*

<sup>111</sup> Justice Stewart's peak performance years were from 1971–1975, when he drafted an average of nearly seventeen opinions per term. *Id.* In the second half of the 1970s—that is, the five years immediately preceding Justice Stewart's retirement during which time *Innis* was decided—he averaged fifteen opinions per term, a reduction of twelve percent. *Id.*

<sup>112</sup> Memorandum from Melissa Kreiling, Librarian, Supreme Court of the United States, to Author (Jan. 27, 2010) (on file with author).

Odd, that is, unless considered in conjunction with his views on the Sixth Amendment right to counsel—views considerably confused by *Brewer*.

Prior to the 1960s, “voluntariness doctrine” governed self-incrimination law.<sup>113</sup> Beginning in the 1930s, the Supreme Court proscribed interrogation procedures “revolting to the sense of justice”<sup>114</sup> as violations of the Fourteenth Amendment Due Process Clause. Over the next thirty years, however, the Court’s “inability to articulate a clear and predictable definition of ‘voluntariness,’” and the “persistence of state courts . . . to validate confessions of doubtful constitutionality,”<sup>115</sup> made it inevitable that “the Court would seek ‘some automatic device by which the potential evils of incommunicado interrogation [could] be controlled.’”<sup>116</sup>

When the Fourteenth Amendment voluntariness test proved unworkable, the Court had two options for protecting a defendant’s pre-trial due process rights: extending back either the Fifth Amendment privilege against self-incrimination or the Sixth Amendment right to counsel. The problem with either option was striking the balance: that is, how to extend Fifth or Sixth Amendment constitutional protections far enough so as to rein in abusive police interrogation tactics but not so far as to stymie legitimate investigative efforts.

Justice Stewart dissented in *Miranda*, but that is not to say he lacked concern for due process rights of the accused. In fact, Justice Stewart was an early and consistent advocate of extending pre-trial due process rights.<sup>117</sup> His particular interest, however, was the point at which the Sixth Amendment right to counsel attached. In Justice Stewart’s mind, initiation of formal adversary proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment—marked the point at which the rights of the accused should be protected against the interests of the state, and he never wavered in his opinion that the accused

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<sup>113</sup> Stone, *supra* note 46, at 101–02.

<sup>114</sup> *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

<sup>115</sup> Stone, *supra* note 46, at 102.

<sup>116</sup> *Id.* at 103 (citations omitted).

<sup>117</sup> See *Spano v. New York*, 360 U.S. 315, 326 (1959) (Stewart, J., concurring) (stating, in pertinent part, his view that “the absence of counsel when [the defendant’s] confession was elicited was alone enough to render it inadmissible”).

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must be afforded counsel as soon as such formalities occurred. He consistently hedged, however, on the question of whether the Fifth Amendment privilege against self-incrimination protected a suspect prior to the initiation of formal proceedings. This hedging put him at odds with *Miranda*.

Justice Stewart's views on the superiority of the Sixth Amendment to the Fifth for controlling confession issues are succinctly summarized in a pre-*Miranda* memo written to Justice Hugo Black in advance of Justice Stewart's majority opinion in *Massiah*. The pertinent facts of *Massiah* are as follows:

[*Massiah*] was indicted for violating the federal narcotics laws. He retained a lawyer, pleaded not guilty, and was released on bail. While he was free on bail a federal agent succeeded by surreptitious means in listening to incriminating statements made by him. Evidence of these statements was introduced against [*Massiah*] at his trial over his objection. He was convicted, and the Court of Appeals affirmed.<sup>118</sup>

Justice Black entreated Justice Stewart to decide *Massiah* on both Fifth and Sixth Amendment grounds.<sup>119</sup> Justice Stewart, however, was wary of such an approach:

Dear Hugo, Thanks for your memorandum. I think that the specific guarantee of the Sixth Amendment directly controls the result in [*Massiah*] . . . I do remember that you also mentioned [in conference] the self-incrimination provision of the Fifth Amendment. My difficulty with that ground is that *I do not see how it could be limited to post-indictment statements*. I should think that if this guarantee of the Fifth Amendment is applicable, every confession, admission, or statement against interest made by a defendant, no matter how voluntary the circumstances, and no matter whether or not his counsel was present, would be excludable if he objected at trial. Sincerely Yours, P.S.<sup>120</sup>

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<sup>118</sup> *Massiah v. United States*, 377 U.S. 201, 201 (1964).

<sup>119</sup> Memorandum from Hugo Black, Assoc. J., U.S. Sup. Ct., to Justice Potter Stewart, Assoc. J., U.S. Sup. Ct. (Apr. 11, 1964) (Case Files of Justice Potter Stewart, Assoc. J., U.S. Sup. Ct., *Massiah v. United States*, No. 199, on file with author).

<sup>120</sup> Memorandum from Justice Potter Stewart, Assoc. J., U.S. Sup. Ct., to Hugo Black, Assoc. J., U.S. Sup. Ct. (Apr. 13, 1964) (Case Files of Justice Potter Stewart,

These views are consistent with a concurring opinion Justice Stewart authored five years earlier in *Spano v. New York*, where, during Justice Stewart's first full Term on the Court, the majority applied the Fourteenth Amendment voluntariness test to bar admission of the defendant's confession to Bronx police.<sup>121</sup> Justice Stewart concurred but wrote separately to state that "it is my view that the absence of counsel when [Spano's] confession was elicited was alone enough to render it inadmissible."<sup>122</sup> Thus Justice Stewart articulated for the first time in the Court reporter that:

[O]nce a person is formally charged or adversary proceedings have otherwise been initiated against him, his right to the assistance of counsel has "begun" or "attached," [and] unless the person voluntarily and knowingly waives that right, the absence of counsel under such circumstances is alone sufficient to exclude any resulting incriminating statements.<sup>123</sup>

Justice Stewart did not have the majority in *Spano*, but he did in *Massiah*. In reaching the conclusion that Massiah's Sixth Amendment right was violated the moment police "deliberately elicited" incriminating statements from him, the *Massiah* Court rejected voluntariness analysis for the first time. By minimizing "both the 'temptation' and the 'opportunity' to obtain confessions by coercive means," *Massiah*'s exclusionary rule restrained "the coercive power of the police."<sup>124</sup> It also set the stage for *Miranda*, where the Court extended the Fifth Amendment to protect the rights of an uncharged criminal suspect, a prospect Justice Stewart vehemently opposed.

Justice Stewart's concurrence in *Spano*, his memo to Justice Black, and his majority opinion in *Massiah* combine to elucidate why he so vigorously promoted a defendant's automatic right to counsel under the Sixth Amendment once formal proceedings had begun. Legitimately concerned about police abuses that undermined due process, he favored a prophylactic barrier to "vouch-

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Assoc. J., U.S. Sup. Ct., *Massiah v. United States*, No. 199, on file with author) (emphasis added).

<sup>121</sup> 360 U.S. 315 (1959).

<sup>122</sup> *Id.* at 326 (Stewart, J., concurring).

<sup>123</sup> Kamisar, *supra* note 48, at 34.

<sup>124</sup> *Id.* at 35 (citations omitted).

safe” the constitutional guarantee of a fair trial from “midnight inquisition in the squad room of a police station.”<sup>125</sup> At the same time he intended to leave room for legitimate police work, which included the collection of incriminating statements by suspected criminals. Justice Stewart's scathing dissent in *Escobedo v. Illinois*<sup>126</sup>—the Court's awkward, pre-*Miranda* attempt to protect defendants from abusive interrogation tactics by extending back the Sixth Amendment right to counsel to the point at which an investigation had “begun to focus on a particular suspect”<sup>127</sup>—demonstrates why, in the same breath, he vigorously opposed a defendant's right to counsel prior to an official criminal charge.

In *Escobedo*, police interrogated the suspect extensively and in the absence of counsel before he finally made incriminating statements.<sup>128</sup> The statements were used against Escobedo at trial, and he was convicted of murder.<sup>129</sup> In holding that the statements were improperly admitted in contradiction of the Sixth Amendment right to counsel, the *Escobedo* majority cited *Massiah* repeatedly for the proposition that, because confessions are often obtained prior to the initiation of formal proceedings, the investigative stage is “critical”; that is, a time when “‘legal aid and advice’ are surely needed.”<sup>130</sup> Justice Stewart, however, was adamant that the rationale underlying *Massiah* did not support extending the Sixth Amendment to protect a person in Escobedo's position. His dissent is worth quoting at length:

*Massiah v. United States* is not in point here. In that case a federal grand jury had indicted Massiah . . . and thereafter agents of the Federal Government deliberately elicited incriminating statements from him in the absence of his lawyer. . . . [T]his case does not involve the deliberate interrogation of a defendant *after* the initiation of judicial proceedings against him. The Court disregards this basic difference between the present case and *Massiah's*, with the bland assertion that “that fact should make no difference.”

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<sup>125</sup> *Spano*, 360 U.S. at 327 (Stewart, J., concurring).

<sup>126</sup> 378 U.S. 478 (1964).

<sup>127</sup> *Id.* at 490.

<sup>128</sup> *Id.* at 479–83.

<sup>129</sup> *Id.* at 480.

<sup>130</sup> *Id.* at 488 (citations omitted).

It is “that fact,” I submit, which makes all the difference. Under our system of criminal justice *the institution of formal, meaningful judicial proceedings, by way of indictment, information, or arraignment, marks the point at which a criminal investigation has ended and adversary proceedings have commenced.* It is at this point that the constitutional guarantees attach which pertain to a criminal trial. Among those guarantees . . . is the guarantee of the assistance of counsel.

The confession which the Court today holds inadmissible was a voluntary one. It was given during the course of a perfectly legitimate police investigation of an unsolved murder.<sup>131</sup>

His *Escobedo* dissent makes clear that Justice Stewart recognized the value to police of confessions obtained voluntarily from a suspect. Thus, at the stage prior to an official charge, he favored avoiding per se rules and continuing to apply the voluntariness test to determine the admissibility of a defendant’s statements. Only after the initiation of judicial proceedings, when the suspect becomes the *accused*, did Justice Stewart favor an automatic right to counsel and an exclusionary rule when it was violated.

Given his thoughts on the issue of when the defendant’s right to counsel attached, elucidated in *Spano*, developed in *Massiah*, and fully matured in *Escobedo*, it is unsurprising that Justice Stewart dissented in *Miranda*. It is also unsurprising that he did not pen his own dissent: between *Spano*, *Massiah*, and *Escobedo*, he had said all he needed to say. On his record, however, it is surprising that he drafted a ringing endorsement of *Miranda* in *Innis*. Surprising, that is, unless after *Brewer v. Williams* he worried that the *Massiah* doctrine was endangered.

We can forgive Justice Potter Stewart if he was frustrated by *Brewer*. Not only did he fight to avoid considering the case,<sup>132</sup> but also when, in conference, Justice White defected to the dissent and

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<sup>131</sup> Id. at 493–94. (Stewart, J., dissenting) (emphasis added).

<sup>132</sup> Justice Stewart voted not once but twice to deny certiorari to *Brewer*. See Certiorari Vote Notes, *Brewer v. Williams*, No. 74-1263 (Dec. 12, 1975) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., on file with author); Certiorari Vote Notes, *Brewer v. Williams*, No. 74-1263 (May 23, 1975) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., on file with author).



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Justice Brennan insisted that *Brewer* be decided on *Miranda*<sup>133</sup>—a position that could not hold together a vote to affirm—by order of seniority it fell to Justice Stewart to write the opinion.<sup>134</sup> Although *Brewer*'s grisly details tested his resolve, Justice Stewart's unwavering view on the Sixth Amendment left him no choice but to employ *Massiah* to exclude Williams's statements.

The facts were gut-wrenching in *Brewer*, but the law was simple: under *Massiah*, the point at which Detective Leaming solicited incriminating information from Robert Williams was the exact point at which Leaming violated Williams's Sixth Amendment right to counsel. Why, then, after observing that "the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him,"<sup>135</sup> did Justice Stewart embark on a discussion of whether the "Christian Burial Speech" was "interrogation" and whether Williams waived his right to counsel? Available evidence points to one explanation: he had no choice. Needing to cobble together a majority in the face of overwhelming internal and external pressures, he bolstered his *Brewer* opinion by tacking on a "voluntariness" inquiry to what should have been a cleanly cut *Massiah* analysis.

Justice Stewart had good reason to bolster. Entirely overlooked by literature criticizing his *Brewer* opinion is the fact that, as confused as it was, had the Court gone the other way it would have been *Massiah*'s death knell. That is, in a situation such as Williams's, where it was uncontested that formal charges were filed, where the police admitted at trial that they thereafter purposely sought the accused's isolation from lawyers so as to obtain incriminating evidence from him, and where the accused provided abso-

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<sup>133</sup> Conference Vote Notes, *Brewer v. Williams*, No. 74-1263 (Oct. 6, 1976) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., on file with author) [hereinafter, Powell, *Brewer* Conference Vote Notes]; Conference Vote Notes, *Brewer v. Williams*, No. 74-1263 (Oct. 6, 1976) (Case Files of Harry Blackmun, Assoc. J., U.S. Sup. Ct., on file with author) [hereinafter Blackmun, *Brewer* Conference Notes].

<sup>134</sup> Memorandum from Justice William Brennan, Assoc. J., U.S. Sup. Ct., to Warren Burger, C.J., U.S. Sup. Ct., (Oct. 6, 1976) (Case Files of Thurgood Marshall, Assoc. J., U.S. Sup. Ct., *Brewer v. Williams*, No. 74-1263, on file with author) ("Dear Chief: I have asked Potter to accept the assignment of the opinion for the Court [in *Brewer v. Williams*]. Sincerely, Bill.").

<sup>135</sup> *Brewer*, 430 U.S. at 398.

lutely no positive indication that he waived his right to counsel, a decision admitting damning statements would equal *Massiah*'s demise. Under what circumstances would the doctrine apply if not in Williams's?

Thus, as progenitor and unqualified supporter of the *Massiah* doctrine, Justice Stewart was willing to write whatever it took in *Brewer* to save *Massiah* for another day, even if the effect was to confuse its meaning. Simply put, Justice Stewart sacrificed doctrinal integrity to secure five votes. Of course, he need not have worried about the liberals on the Court: Justices Brennan, Marshall, and Stevens were each advocates of a strong *Massiah* doctrine and a strong *Miranda* doctrine and would have affirmed on more tenuous grounds than Justice Stewart was proposing.<sup>136</sup> But to lure the fifth vote from the conference's conservative wing, Justice Stewart had to offer a carrot.

Justice Lewis Powell was the deciding vote in *Brewer* and, as the only Nixon appointee willing to affirm the Eighth Circuit's decision, he faced considerable pressure to jump ship. But Justice Powell was unlikely to align himself with Justice Stewart for another reason: he opposed the creation and application of per se exclusionary rules, particularly under the Sixth Amendment. Preceding his vote in *Kirby v. Illinois*,<sup>137</sup> a 1972 case involving the issue of whether a robbery suspect's pre-indictment, pre-arraignment identification in the absence of counsel, later admitted into evidence at trial, was a violation of the Sixth Amendment, Justice Powell dictated the following:

I am ~~opposed to~~ reluctant to create "per se exclusionary rules" for the purpose of disciplining police officers unless the Constitu-

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<sup>136</sup> Their respective *Innis* dissents provide a representative sampling of Justice Brennan's, Marshall's, and Stevens's more liberal views on self-incrimination jurisprudence. See *Innis*, 446 U.S. at 306–07 (Marshall, J., dissenting, joined by Justice Brennan) (arguing that "[o]ne can scarcely imagine a stronger appeal to the conscience of a suspect . . . than the assertion that if [a] weapon is not found an innocent person will be hurt or killed" and that, accordingly, the majority's test for custodial interrogation, while properly defined, is applied incorrectly); *id.* at 309 (Stevens, J., dissenting) (arguing that the majority's definition of "interrogation" within the meaning of *Miranda* is too narrowly construed and that "*Miranda v. Arizona* makes it clear that, once [a suspect] request[s] an attorney, he [has] an absolute right to have any type of interrogation cease until an attorney [is] present") (citations omitted).

<sup>137</sup> 406 U.S. 682 (1972).

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tion clearly mandates them. The Constitution does require the right to counsel, but only “in criminal prosecutions.” I do not think it can be said that every identification of a suspect, or even of a person indicted, is part of “a criminal prosecution.”

We have already encrusted the criminal trial with a number of “per se exclusionary rules.” No other country has imposed such a straight-jacket on its criminal system and on law enforcement.<sup>138</sup>

Thereafter, Justice Powell provided the *Kirby* plurality with the fifth vote it needed to rule that the Sixth Amendment did not bar the admission of Kirby’s identification, but he did so under duress. Justice Powell concurred specially with a single, cryptic line: “As I would not extend the . . . *per se* exclusionary rule, I concur in the result reached by the Court.”<sup>139</sup>

Justice Powell’s files reveal the impetus behind his *Kirby* concurrence: he did not join the majority opinion because it maddened him to reject the creation of a new per se rule (that the Sixth Amendment right to counsel automatically attaches at a pre-indictment lineup) by substantiating another (that the Sixth Amendment right to counsel automatically attaches at initiation of formalized judicial proceedings).<sup>140</sup> Justice Powell did not go on the record to generally oppose per se rules governing the attachment of the Sixth Amendment in *Kirby*; he did just that, however, in *Argersinger v. Hamlin*,<sup>141</sup> decided five days later. In *Argersinger*, the Court extended the Sixth Amendment right to counsel to any case where punishment included the possibility of incarceration. Justice Powell, again concurring in the result, wrote separately to protest the “mechanistic application” of prophylactic rules derived from

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<sup>138</sup> Tentative Impressions, *Kirby v. Illinois*, No. 70-5061, 2–3 (Mar. 21, 1972) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., on file with author) (strike through and emphasis in original). Justice Powell reiterated these views in a subsequent memo to his law clerk. Memorandum from Lewis Powell, Assoc. J., U.S. Sup. Ct., to Larry Hammond, Law Clerk (May 8, 1972) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., *Kirby v. Illinois*, No. 70-5061, on file with author) (“Unfortunately, as I view it, the Court over the years has converted our Constitution from a great document of principle into an inflexible criminal code. This was never intended, and is contrary to the basic concept of an enduring constitution.”).

<sup>139</sup> *Kirby*, 406 U.S. at 691 (Powell, J., concurring in the result).

<sup>140</sup> *Id.* at 689.

<sup>141</sup> 407 U.S. 25 (1972).

the Sixth Amendment.<sup>142</sup> Such rules could have “a seriously adverse impact upon the day-to-day functioning of the criminal justice system.”<sup>143</sup> For Justice Powell it was better that due process “embod[y] principles of fairness rather than immutable line drawing.”<sup>144</sup>

With Justice Powell on the record as an avowed critic of Sixth Amendment per se rules, it would cut against the grain for him to join a *Brewer* opinion adhering to a strict interpretation of *Massiah*. Thus, to win Justice Powell over, Justice Stewart resorted to instrumentalism: first, he affirmed the Eighth Circuit on straight *Massiah* grounds, and then he bolstered his argument with a discussion of whether Williams’s statements were voluntary—the very issue that prompted Justice Powell’s initial willingness to affirm the result below.

Voluntariness was Justice Powell’s initial concern in *Brewer*.<sup>145</sup> Even if Justice Powell’s concerns about voluntariness and waiver were unknown to Justice Stewart prior to the Court’s conference vote on *Brewer*, Justice Powell made them clear at that point. Justice Powell recorded his contribution to the conference conversation as follows: “Affirm . . . [The Eighth Circuit’s] opinion seemed to lay down a per se rule as to waiver. On facts in this case, I think there was no waiver. *Massiah* and *Escobedo* both relevant.”<sup>146</sup> His

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<sup>142</sup> Id. at 49 (Powell, J., concurring in the result).

<sup>143</sup> Id. at 52.

<sup>144</sup> Id. at 49.

<sup>145</sup> Gene Comey, Justice Powell’s clerk at the time, articulated the Justice’s interest in *Brewer*, in the context of the case’s primary issues, as follows:

This case presents primarily two issues. First, should [the Supreme] Court’s landmark decision in *Miranda v. Arizona* be modified or overruled. The second issue is whether on the facts of this case the defendant waived his right to counsel. Your “aid to memory” memorandum indicates that you are not interested in modifying or overruling *Miranda v. Arizona*, and for that reason I have devoted no attention to the contentions of the parties on that question. The second issue is fact-specific, and from the split among the judges in both the state and federal courts one would get the impression that it is a close question.

Bench Memo from Gene Comey, Law Clerk, to Lewis Powell, Assoc. J., U.S. Sup. Ct., at 1 (Sept. 2, 1976) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., *Brewer v. Williams*, No. 74-1263, on file with author). Likewise, Justice Powell wrote in a note taken during oral arguments that “[t]he ‘voluntariness issue’ was clearly presented [and] litigated in [the Eighth Circuit]. It was, however, mentioned only by [Judge] Webster in dissent.” Oral Argument Notes, *Brewer v. Williams*, No. 74-1263 (Oct. 4, 1976) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., on file with author).

<sup>146</sup> Powell, *Brewer* Conference Vote Notes, supra note 133; Blackmun, *Brewer* Conference Notes, supra note 133.

reference to the Eighth Circuit's "per se rule" almost surely regarded the state of Iowa's interpretation of the opinion below. In its brief, Iowa characterized the Eighth Circuit's opinion as creating just the kind of per se rule that Justice Powell deplored: "Once an accused has counsel, he cannot effectively waive his right to counsel for purposes of interrogation, absent presence of (or notice to) counsel."<sup>147</sup> Justice Powell's reaction to such a muzzling rule, whether intended or not by the Eighth Circuit, was to nip it in the bud.

Thus, believing (1) that Williams had not waived his right to counsel, and (2) that the Court must quash any interpretation, intended or not, that once the Sixth Amendment attached it muzzled the accused, Justice Powell sought an opinion that affirmed the result below but suggested that voluntariness controlled whether a defendant's post-arraignment statement to police was admissible at trial. Justice Stewart's majority opinion in *Brewer* delivered exactly that.

Following the narrow conference vote to affirm the Eighth Circuit's ruling, Justice Powell communicated his thoughts on *Brewer* to Justice Stewart through a series of private correspondences dating shortly after oral argument right up to the publication of the opinion.<sup>148</sup> As would be expected, these correspondences are reflected in the wording of *Brewer*'s final draft.<sup>149</sup> For the purposes of this argument, it is significant that none of the changes made by Justice Stewart at Justice Powell's behest alter Justice Stewart's ini-

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<sup>147</sup> *Brewer* Petitioner's Brief, supra note 85, at 35.

<sup>148</sup> See infra note 149.

<sup>149</sup> See Draft Opinion (1st Draft), *Brewer v. Williams*, No. 74-1263 (Nov. 24, 1976) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., on file with author). ("Join subject to raising couple of points with P.S.") (emphasis in original); Letter from Potter Stewart, Assoc. J., U.S. Sup. Ct., to Lewis Powell, Assoc. J., U.S. Sup. Ct. (Nov. 30, 1976) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., *Brewer v. Williams*, No. 74-1263, on file with author) ("Dear Lewis, The changes indicated on pages 12, 16, and 17 are in response to your suggestions. Please let me know at your convenience if they satisfactorily meet your concerns. If so, I shall recirculate the opinion with these changes made by the printer with the hope that those who have already joined the opinion will find the changes acceptable. Sincerely Yours, P.S."); Letter from Lewis Powell, Assoc. J., U.S. Sup. Ct., to Potter Stewart, Assoc. J., U.S. Sup. Ct. (Dec. 1, 1976) (Case Files of Potter Stewart, Assoc. J., U.S. Sup. Ct., *Brewer v. Williams*, No. 74-1263, on file with author) ("Dear Potter: The changes accompanying your note of 11/30 do meet my concerns. Many thanks. Sincerely, L.F.P., Jr.").

tial *Massiah* analysis, which comes to its conclusion midway through the opinion.<sup>150</sup> Instead, Justice Powell's input goes to the bolstering section, where Justice Stewart questions whether Williams knowingly and voluntarily waived his right to counsel.<sup>151</sup> There is a strong inference that Justice Stewart gave Justice Powell what he wanted in order to convince Justice Powell to join the majority precisely because Justice Powell only asked for something that tended to confuse, but not obliterate, *Massiah*'s main thrust.

This inference is further supported by the fact that Justice Stewart made one more substantial adjustment to *Brewer* before it went to print: he added footnote twelve, clarifying that the exclusionary rule applied by the Court did not necessarily prohibit the introduction of Pamela Powers's body into evidence at re-trial.<sup>152</sup> Five days before the addition of this footnote, Chief Justice Burger had circulated a memo excoriating the *Brewer* majority for the "utter irrationality of . . . carry[ing] the Suppression Rule to the absurd extent of suppressing evidence of a murder victim's body."<sup>153</sup> Knowing Justice Powell's wariness of Sixth Amendment exclusionary rules, Justice Stewart sent the first draft of footnote twelve exclusively to Justice Powell with the following note: "Dear Lewis, I have in mind adding the enclosed footnote at an appropriate place in this opinion. Before sending it to the printer, however, I would be interested in your views. Sincerely yours, P.S."<sup>154</sup> Evidently the footnote was met with Justice Powell's approval—it was inserted in the opinion with the addition of one sentence.<sup>155</sup> The timing and the

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<sup>150</sup> *Brewer*, 430 U.S. at 401 (concluding "[i]t thus requires no wooden or technical application of the *Massiah* doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments").

<sup>151</sup> See *id.* at 401–06.

<sup>152</sup> *Id.* at 406 n.12.

<sup>153</sup> Memorandum from Warren E. Burger, C.J., U.S. Sup. Ct., to the Conference (Dec. 29, 1976) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., *Brewer v. Williams*, No. 74-1263, on file with author).

<sup>154</sup> Letter from Potter Stewart, Assoc. J., U.S. Sup. Ct., to Lewis Powell, Assoc. J., U.S. Sup. Ct. (Jan. 3, 1977) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., *Brewer v. Williams*, No. 74-1263, on file with author).

<sup>155</sup> As initially written, footnote twelve lacked its penultimate sentence. See *id.*; *Brewer*, 320 U.S. at 406 n.12 ("While neither Williams' incriminating statements themselves nor any testimony describing his having led the police to the victim's body can constitutionally be admitted into evidence, evidence of where the body was found and of its condition might well be admissible on the theory that the body would have

content of footnote twelve strongly suggest that Justice Stewart feared Justice Powell's cold feet; indeed, the footnote may have been the key to keeping Justice Powell aboard.<sup>156</sup>

The foregoing analysis suggests the following. First, Justice Stewart had no option in *Brewer* but to employ *Massiah's* exclusionary rule. To do otherwise would mean the end of a doctrine he worked for twenty years to define. Second, Justice Stewart knew what *Massiah* meant and that its application to *Brewer*, strictly speaking, did not require a voluntariness inquiry. His previous Sixth Amendment opinions—from *Spano*, through *Escobedo* and *Massiah*, to *Kirby*<sup>157</sup>—and the first two parts of his *Brewer* opinion are fully consistent with this proposition. Third, to carry the day in *Brewer*, Justice Stewart drafted an instrumentalist opinion. His superfluous discussion of the voluntariness of Williams's statements paints a more vivid picture of the constitutional violation that occurred en route from Davenport to Des Moines.<sup>158</sup> Finally, Justice Stewart's instrumentalism was targeted. Justice Powell, a consistent opponent of per se rules, was in the awkward position of endorsing an established per se rule (*Massiah's*) so as to avoid the development of another that he considered even more abhorrent. In sum, for *Massiah* to survive, it had to withstand *Brewer*; to withstand

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been discovered in any event, even had incriminating statements not been elicited from Williams.”).

<sup>156</sup> In fact, Chief Justice Burger badgered Justice Powell to defect up to the eleventh hour. Letter from Warren E. Burger, C.J., U.S. Sup. Ct., to Lewis Powell, Assoc. J., U.S. Sup. Ct. (Feb. 10, 1977) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., *Brewer v. Williams*, No. 74-1263, on file with author) (“Dear Lewis: . . . As you know, Byron, Harry, and Bill Rehnquist are on record as favoring a remand for reconsideration in light of the voluntariness issue, which the Court of Appeals did not reach. Your concurrence prompts me to say that if five would agree, we ought to dispose of the case with a per curiam order vacating the judgment below and remanding the case for reconsideration both of the voluntariness issue and the Stone v. Powell exclusionary question. For me that would be infinitely preferable to the present proposed disposition of the case, which is inconclusive. Regards, WEB”). Justice Powell responded courteously, but did not budge. See Letter from Lewis Powell, Assoc. J., U.S. Sup. Ct., to Warren Burger, C.J., U.S. Sup. Ct. (Feb. 11, 1977) (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., *Brewer v. Williams*, No. 74-1263, on file with author).

<sup>157</sup> See *Kirby*, 406 U.S. at 689 (reiterating that the Sixth Amendment right to counsel attaches “at or after the initiation of adversary judicial criminal proceedings”).

<sup>158</sup> See generally Kamisar, *supra* note 48, at 45–55 (discussing in various hypotheticals the effect of more and less coercive statements made by police to a defendant in Williams's position).

*Brewer*, it had to win over Justice Powell; to win over Justice Powell, it had to incorporate elements of “voluntariness.” The conclusion that Justice Stewart “bolstered” *Massiah* to magnify the salience of his argument and keep together a fragile coalition follows from these observations.

Of course, on this view, Justice Stewart’s opinion in *Brewer* was a leap of faith. That is, if Justice Stewart intentionally obfuscated *Massiah* to keep the doctrine alive, he risked not being on the Court to set the record straight when the issue came back around. Perhaps Justice Stewart did not appreciate the full extent to which *Brewer* would muddy the *Massiah* doctrine.<sup>159</sup> It is also plausible, though unlikely, that he was already anticipating another bite at the apple in *Innis*.<sup>160</sup> Regardless, it is telling that at the first possible opportunity, in *Rhode Island v. Innis*, Justice Stewart cleared the air.

### 3. Setting the Record Straight

In *Innis*, Justice Stewart set the record straight on *Massiah* in two ways: first, he defined clearly what *Massiah* is and what *Massiah* is not; second, he defined interrogation expansively under *Miranda*. Jurists tend to focus their critique of *Innis* almost entirely on the implication of the interplay between these two definitions for the *Miranda* doctrine, but the *Massiah* doctrine is that which derives the greatest benefit from their juxtaposition. Given the advantage of hindsight (and insight into Justice Potter Stewart’s motivations), it is fair to say that although *Innis* was a significant endorsement of *Miranda*’s constitutionality, it was *Massiah*’s Trojan Horse.

The fact patterns in *Brewer* and *Innis* were superficially similar: each involved otherwise innocuous police tactics that may have in-

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<sup>159</sup> This is plausible. At no point prior to *Brewer* did Justice Stewart suggest that police were categorically prohibited from taking a statement from a charged defendant. His view was only that police could not deliberately elicit such a statement. In a hypothetical situation where Williams, absent any attempt to elicit information, spontaneously volunteered to lead Detective Leaming to the body, perhaps Justice Stewart would want some kind of voluntariness inquiry to attend the basic *Massiah* inquiry to ensure that Williams was not indeed coerced.

<sup>160</sup> Thomas *Innis*’s case was not disposed by the Rhode Island Supreme Court until December 21, 1978, the year after the Supreme Court decided *Brewer*.



duced the accused to make incriminating statements. In one critical aspect, however, the fact patterns diverged. The defendant in *Brewer* was formally charged; the defendant in *Innis* was not. In *Innis*, Justice Stewart exploited this distinction to clarify the boundaries of *Massiah* by including the following in footnote four:

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.<sup>161</sup>

Apart from acknowledging the Rhode Island Supreme Court’s reliance on *Brewer* in reaching its decision, this footnote is the only mention of *Brewer* in the entirety of Justice Stewart’s *Innis* opinion.<sup>162</sup> Given the factual similarities between the two cases, *Innis*’s silence on *Brewer*, in conjunction with footnote four, clarifies any doubt as to whether a voluntariness inquiry is attendant to scenarios where police “deliberately elicit” statements from a formally charged defendant; in such situations, *Massiah* is categorical and the question of voluntariness is ancillary. Thus, Justice Stewart silenced *Brewer*’s critics and at the same time strengthened the *Massiah* doctrine.

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<sup>161</sup> Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (emphasis added) (citations omitted).

<sup>162</sup> See id. at 293–304.

Justice Stewart's second move also reinforced *Massiah*, albeit indirectly. By delivering a strong, unexpected endorsement of *Miranda* in *Innis* (by defining "interrogation" expansively), Justice Stewart obviated the possibility that *Miranda* would subsequently be overruled. Significantly, were the Court to overrule *Miranda* it would, in all likelihood, create pressure to disinter *Escobedo*—that is, to afford the Sixth Amendment right to counsel to suspects at the investigative stage. Justice Stewart fiercely opposed this proposition in *Escobedo* and continued to oppose it throughout his Supreme Court tenure.<sup>163</sup> By interpreting "interrogation" expansively in *Innis*, Justice Stewart reduced the likelihood that *Miranda* would be overruled, thereby increasing the likelihood that *Escobedo* would remain but an odd outlier to *Massiah*'s general rule that Sixth Amendment protections attach only at the initiation of formal proceedings.<sup>164</sup>

### B. *Stare Decisis: Miranda Commands Begrudging Respect*

It is one thing to understand why Justice Stewart wrote the opinion he did in *Innis*. It is another to understand how he managed to get away with it. Not only did he push through the Burger Court's strongest endorsement of *Miranda* to date, he obliged the five most conservative Justices on the Court to join his opinion,<sup>165</sup> convinced six of the eight remaining Justices to agree on an expansive definition of "interrogation,"<sup>166</sup> and compelled all eight remaining Justices to agree on the deeper issue that *Miranda* controlled.<sup>167</sup>

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<sup>163</sup> *Kirby*, 406 U.S. at 689; *Massiah v. United States*, 377 U.S. 201, 205 (1964).

<sup>164</sup> This final claim, that Justice Stewart intentionally interpreted *Miranda* expansively in *Innis* so as to obviate any future expansion or displacement of *Massiah*, is reinforced by considering the alternatives available to Justice Stewart when he drafted *Innis*. Were he to reach the same result by way of a narrower definition of "interrogation," he might still have clarified *Massiah* but would have, at the same time, continued the Burger Court's maltreatment of *Miranda*, thereby promulgating its backslide and increasing the possibility it would be overruled, thus creating pressure to revive *Escobedo*.

<sup>165</sup> Justices White, Blackmun, Powell, and Rehnquist joined the *Innis* majority opinion. Chief Justice Burger concurred in the judgment.

<sup>166</sup> Although dissenting to the application of Justice Stewart's "interrogation" test to the facts in *Innis*, Justices Marshall and Brennan expressed their "substantial[] agreement" with the Court's definition of "interrogation." *Innis*, 446 U.S. at 305 (Marshall, J., dissenting).

<sup>167</sup> See *Innis*, 446 U.S. at 291.

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Stare decisis was the controlling factor that allowed Justice Stewart to manipulate *Miranda* for the benefit of *Massiah*. Though “not an inexorable command, particularly when . . . interpreting the Constitution, . . . [stare decisis] carries such persuasive force that [the Supreme Court has] always required a departure from precedent to be supported by some ‘special justification.’”<sup>168</sup> Put differently, stare decisis is not equivalent to, but creates a strong presumption in favor of, constitutionality, and the Supreme Court will go to great lengths to preserve the appearance of upholding precedent, even when the precedent in question is odious to the Court’s majority.

Two observations suggest stare decisis was the factor controlling the *Innis* Court’s choice to rest its decision on *Miranda*. First, despite alternative constitutional doctrines that could have supplied a framework to achieve the same disposition reached in *Innis*, the Justices unanimously agreed that *Miranda* controlled. Second, despite the fact that the *Innis* majority opinion, as written, lacked any textual prompt, Chief Justice Burger drafted a concurring opinion stating explicitly that “at this late date,” he would neither “overrule,” “disparage,” nor “extend” the *Miranda* doctrine.<sup>169</sup> Each observation is discussed in turn.

### 1. Unanimity on *Miranda*

Prior to *Innis*, the Supreme Court reporter contained only one reference to stare decisis as justification for excluding evidence on *Miranda* grounds. Concurring with the majority in *Orozco v. Texas*—where the Supreme Court expanded *Miranda*’s protections to anywhere that police “[deprive the accused] of his freedom of action in any significant way”<sup>170</sup>—Justice Harlan openly expressed his disdain for *Miranda*’s precedent:

The passage of time has not made [*Miranda*] any more palatable to me than it was when the case was decided.

Yet, despite my strong inclination to join in the dissent . . . I can find no acceptable avenue of escape from *Miranda* in judging

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<sup>168</sup> *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (citations omitted).

<sup>169</sup> *Innis*, 446 U.S. at 304 (Burger, C.J., concurring) (citations omitted).

<sup>170</sup> 394 U.S. 324, 327 (1969) (quoting *Miranda v. Arizona*, 384 U.S. 436, 477 (1966)).

this case . . . . Therefore, and purely out of respect for *stare decisis*, I reluctantly feel compelled to acquiesce in today's decision of the Court, at the same time observing that the constitutional condemnation of this perfectly understandable, sensible, proper, and indeed commendable piece of police work highlights the unsoundness of *Miranda*.<sup>171</sup>

Nonetheless, despite the paucity of published textual evidence (let alone textual evidence with positive connotation), and despite the suggestion by many noted *Miranda* scholars that the *Innis* majority considered overruling *Miranda*, it is clear from internal Court records that *stare decisis* controlled the *Innis* Court's determination to decide on *Miranda* grounds.

As stated, previously, other doctrinal options were available to the Justices as they debated *Innis* following oral argument. A particularly salient option was to altogether divorce pre-trial self-incrimination doctrine from the Fifth Amendment. Advocates of this view, led by Professor Grano, distinguished "*Miranda*'s black-letter holding" from the underlying purpose of the Fifth Amendment privilege against self-incrimination (to protect a defendant from being forced to incriminate himself at trial), and asserted that *Miranda* should be overruled in favor of a return to the Fourteenth Amendment voluntariness standard.<sup>172</sup> At oral argument, Dennis Roberts, on behalf of Rhode Island, stated this position point-blank: "[I]f the Court wished to pursue something like . . . a voluntariness test . . . it's a perfectly valid . . . grounds for decision."<sup>173</sup>

In this context, the Court's conservative wing—consisting of the two remaining *Miranda* dissenters and the four Nixon appointees—should have seriously considered overruling *Miranda*. Inter-

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<sup>171</sup> Id. at 327–28 (Harlan, J., concurring) (citations omitted).

<sup>172</sup> Grano, *supra* note 52, at 51. The Justices were well versed in Professor Grano's argument. Justice White elicited a laugh from his brethren when, in a colloquy with Dennis Roberts at oral argument, he referred to Grano's position as "the overruling approach to *Miranda*." Transcript of Oral Argument, *Innis*, 446 U.S. 291 (1980) (No. 78-1076), available at [http://www.oyez.org/cases/1970-1979/1979/1979\\_78\\_S\\_1076/argument](http://www.oyez.org/cases/1970-1979/1979/1979_78_S_1076/argument) [hereinafter *Innis* Oral Argument].

<sup>173</sup> *Innis* Oral Argument. Roberts's statement emphasized the final argument in Rhode Island's brief, where the state asserted that "a mere *Miranda* violation does not reach . . . a constitutional dimension," and, thus, that the Rhode Island Supreme Court "erred in attributing immutable, independent constitutional status to the *Miranda* safeguards." *Innis* Petitioner's Brief, *supra* note 18, at 40, 43.

nal court documents are clear, however, that they did not. Rather, the conservatives followed the lead of Justice Stewart, whose fully developed analysis at conference stuck squarely to the issue of whether Innis was interrogated within the meaning of *Miranda*<sup>174</sup> and still managed to arrive at their preferred disposition: Thomas Innis's conviction stood, and he would not get a new trial because he was not actually "interrogated" in the back of the caged wagon.

The conservative Justices' doctrinal preferences raise the question: Why were they solidly against overturning *Miranda*? Two plausible answers emerge. Either they were "sensitive to what would be the inescapably political overtones of a direct reversal [of *Miranda*],"<sup>175</sup> or they recognized *Miranda* as settled law and were beginning to afford it full (albeit begrudging) respect. Either way, negative or neutral, stare decisis factored against overruling *Miranda* in *Innis*, notwithstanding the conservatives' long-held and thinly veiled contempt for the *Miranda* doctrine.

Moreover, the primary source evidence from Supreme Court files is dispositive that Justice Stewart knew of his conservative brethren's preferences on *Miranda* well before he articulated his views on the *Innis* case at conference. Three years prior to *Innis*, in the buildup to *Brewer*, the pressure to overrule *Miranda* was even greater. First, there was the salience of the crime: a small-town Midwestern girl sexually assaulted and brutally murdered on Christmas Eve inspired public outcry far louder than the killing of a cabbie in a large, gritty, Northeastern city. Second, there was the trend of *Miranda* jurisprudence leading up to the respective cases: *Brewer* followed a decade of *Miranda*'s retrenchment, whereas *Innis* followed *Brewer*, which stood at least for the proposition that when given the opportunity, the Court did not overrule *Miranda*. Despite the contentious atmosphere at the time it was considered,

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<sup>174</sup> At Conference, Justice Stewart stated that "[t]here was 'custody' and this is inherently coercive. But there must be interrogation. *Miranda* didn't define interrogation. Here there was none." Conference Notes, *Rhode Island v. Innis*, No. 78-1076 (Nov. 2, 1979) [hereinafter Powell, *Innis* Conference Notes] (Case Files of Lewis Powell, Assoc. J., U.S. Sup. Ct., on file with author). To clarify, Justice Stewart further indicated that the Court need not consider the "waiver issue," and that there was "no *Massiah* issue." *Id.* Accord Conference Notes, *Rhode Island v. Innis*, No. 78-1076 (Nov. 2, 1979) [hereinafter Blackmun, *Innis* Conference Notes] (Case Files of Harry Blackmun, Assoc. J., U.S. Sup. Ct., on file with author).

<sup>175</sup> Stone, *supra* note 46, at 169.

however, not one Justice suggested overruling *Miranda* at *Brewer*'s conference.<sup>176</sup> In fact, three of the four Nixon appointees—Justices Burger, Powell, and Blackmun—stated explicitly that they were not in favor of overruling *Miranda* then or ever.<sup>177</sup> Justices Stewart and White, the two remaining *Miranda* dissenters, each preferred to avoid *Miranda*, *Brewer* being a *Massiah* case instead.<sup>178</sup>

Clearly, then, by the time he wrote *Innis*, Justice Stewart knew that the weight of precedent factored heavily into the Burger Court conservatives' calculus of *Miranda*. Indeed, he was already adept at manipulating this calculus, having done so to his advantage on at least one prior occasion.<sup>179</sup> Given the opportunity to do so once again, Justice Stewart seized the moment to craft an *Innis* opinion acceptable to his conservative brethren in its treatment of *Miranda* in order to achieve his goal of clarifying *Massiah*.

## 2. Burger's Concurring Opinion

Also persuasive that *stare decisis* factored into the *Innis* Court's decision is Chief Justice Burger's concurring opinion, stating that "[t]he meaning of *Miranda* has become reasonably clear . . . I would neither overrule *Miranda*, disparage it, nor extend it at this late date."<sup>180</sup> In context, Burger's concurrence is extemporaneous: nothing in the majority opinion prompts this earnest avowal. Instead, the majority's concern is the status quo—"the meaning of

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<sup>176</sup> See Powell, *Brewer* Conference Vote Notes, supra note 133; accord Blackmun, *Brewer* Conference Notes, supra note 133.

<sup>177</sup> Chief Justice Burger favored reversing the Eighth Circuit's decision in *Brewer* but "would not [have] overrule[d] *Miranda* and [did] not favor overruling." Powell, *Brewer* Conference Vote Notes, supra note 133. Justice Blackmun was more cryptic, stating that he felt "no need to overrule *Miranda*." *Id.* Justice Powell's own opinion, however, was emphatic: "No thought of reversing *Miranda*." *Id.* Justice Rehnquist, the last Nixon appointee, stated only that an inquiry into the voluntariness of Williams's statements should control. *Id.*; accord Blackmun, *Brewer* Conference Vote Notes, supra note 133.

<sup>178</sup> Powell, *Brewer* Conference Vote Notes, supra note 133.

<sup>179</sup> See *Michigan v. Mosely*, 423 U.S. 96, 104 (1975) (refusing to apply *Miranda*'s exclusionary rule but holding that under *Miranda* the admissibility of statements obtained after a defendant in custody has exercised his right to remain silent depends on whether his "right to cut off questioning" was "scrupulously honored") (internal citation omitted). The same five-member conservative bloc that joined Justice Stewart's *Innis* opinion also joined his opinion in *Mosely*.

<sup>180</sup> *Innis*, 446 U.S. at 304 (Burger, C.J., concurring).

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‘interrogation’ *under Miranda*.’<sup>181</sup> What, then, justified Burger’s remarks?

In light of the Burger Court’s record on *Miranda*, it is tempting to attribute the Chief Justice’s statement to subterfuge.<sup>182</sup> This explanation, however, is mistaken. If subterfuge was the goal, then Burger would surely have drafted an opinion without any reference to *Miranda*, instead saying only that he agreed with the disposition of the case but would reach it on different grounds. Put differently, if Burger’s intent was to undermine *Miranda* in the context of a majority opinion reinforcing *Miranda*’s constitutionality, it was self-defeating to include an all but explicit statement that stare decisis weighed in favor of *Miranda*’s continued vitality.

On this view, Burger’s concurrence was neither extemporaneous nor duplicitous. Instead, it was the explication of his opposition to overturning *Miranda*, articulated in skeletal form three years earlier at the *Brewer* conference discussions, and provides additional evidence that stare decisis factored heavily into the *Innis* decision.<sup>183</sup>

In sum, Justice Stewart knew where his Supreme Court brethren stood regarding stare decisis and *Miranda*’s precedential value. Aware of the conservatives’ reticence to take the bold step of overturning a Warren Court icon, he subtly manipulated their preferences to produce an opinion that at once revitalized the *Miranda* doctrine and clarified the *Massiah* doctrine, but did not go so far as to vindicate Thomas Innis—a result that likely would have cost him his solid majority. The implications of the balancing act Justice Stewart achieved with *Innis*, for both *Miranda* and *Massiah*, are discussed in Part V. First, however, an alternative explanation for *Innis* is considered and rejected.

#### IV. AN ALTERNATIVE VIEW DISMISSED

An alternative explanation for Justice Stewart’s majority opinion in *Innis* is that he simply changed his views on *Miranda*. Hereto-

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<sup>181</sup> Id. at 297 (emphasis added) (internal citation omitted).

<sup>182</sup> See Stone, *supra* note 46, at 169 (“In its unyielding determination to reach the desired result, the [Burger] Court has too often resorted to distortion of the record, disregard of the precedents, and an unwillingness honestly to explain or to justify its conclusions.”).

<sup>183</sup> See *supra* note 182 and accompanying text.

fore this analysis has not suggested that Justice Stewart's views on the Fifth Amendment remained static between his dissenting posture in *Miranda* and his majority opinion in *Innis*. It is possible, perhaps, that Justice Stewart's esteem for *Miranda* grew as he reached the end of his career and that this growth was what motivated his expansive definition of interrogation in *Innis*. At least some support for this proposition is drawn from the observation that, on at least one occasion prior to *Innis*, when Justice Stewart drafted a majority opinion on *Miranda*, he treated the doctrine evenhandedly.<sup>184</sup>

On balance, however, such an explanation for *Innis* is unlikely. First, open access to Justice Stewart's Supreme Court files reveals no primary source evidence to corroborate an inference that he changed his mind about *Miranda*. Second, Justice Stewart consistently took a dissenting position in post-*Miranda* Warren Court decisions that extended *Miranda*'s protections beyond the confines of station house interrogation.<sup>185</sup> Third, even though Justice Stewart tended to apply a more even hand to *Miranda* than his more conservative colleagues on the Burger Court, his majority opinions dealing with *Miranda* issues nonetheless consistently refused to apply its exclusionary rule.<sup>186</sup> Moreover, even when he did not write the majority opinion, he always voted with the Burger Court majority on holdings that had the effect of limiting *Miranda*'s application.<sup>187</sup> Fourth, even in *Innis*, where Justice Stewart announced a

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<sup>184</sup> See, e.g., *Michigan v. Mosely*, 423 U.S. 96, 104 (1975) (refusing to apply *Miranda*'s exclusionary rule but nonetheless imposing a significant burden on the state by holding that, under *Miranda*, the admissibility of statements obtained after a defendant in custody has exercised his right to remain silent depends on whether the defendant's "right to cut off questioning" was "scrupulously honored") (internal citations omitted).

<sup>185</sup> See *Orozco v. Texas*, 394 U.S. 324, 328 (1969) (holding that *Miranda* warnings should have been given prior to police questioning in defendant's bedroom because the defendant was "in custody . . . or otherwise deprived of his freedom") (internal citation omitted); *Mathis v. United States*, 391 U.S. 1, 5 (1968) (holding that *Miranda* warnings must be given any time "an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning . . .") (internal citation omitted). Justice Stewart joined the dissent in each case.

<sup>186</sup> See *Rhode Island v. Innis*, 446 U.S. 291, 303 (1980); *Michigan v. Mosely*, 423 U.S. 96, 106-07 (1975); *Procurner v. Atchley*, 400 U.S. 446, 453 (1971); *Hoffa v. United States*, 385 U.S. 293, 304 (1966).

<sup>187</sup> See cases cited *supra* note 69.



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*Miranda*-friendly definition of interrogation, he refused to exclude the suspect's statements. Justices Marshall and Brennan, both unabashed *Miranda* supporters, agreed with *Innis*'s definition of interrogation but would have applied that definition to reach the opposite result.<sup>188</sup> If Justice Stewart were "reformed" on *Miranda*, he would have joined the Marshall and Brennan position.

In sum, then, something other than a new esteem for *Miranda* motivated Justice Stewart's *Innis* opinion. On this view, it is even more likely that stare decisis and Justice Stewart's own interests coalesced in *Innis* to produce an unexpected, unprecedented endorsement of the Fifth Amendment privilege against self-incrimination under *Miranda*. Properly understood, this endorsement was an instrumentalist one, designed to clarify and reinforce the Sixth Amendment right to counsel under *Massiah*.

#### V. REASSESSING *INNIS* IN LIGHT OF THESE FACTORS

Regardless of whether Justice Stewart's views on *Miranda* evolved during his career, an evaluation of how the *Massiah* and *Miranda* doctrines have each withstood the test of time since *Innis* proves that he was more successful at shoring up the former than the latter with his *Innis* opinion. Justice Stewart stayed on the Court just long enough to decide two more cases, the combined effect of which was to allay any residual concerns that *Massiah*'s rule was unclear or its constitutional status unsound. The first case, *United States v. Henry*,<sup>189</sup> was a Sixth Amendment *Massiah* inquiry wherein the majority made explicit Justice Stewart's long-held position that under *Massiah*, voluntariness is irrelevant for the admissibility of a statement where police deliberately create a situation likely to induce the accused to talk *after* a formal charge is on the books. In such cases, *Massiah* requires categorical exclusion of any statement obtained from the defendant.<sup>190</sup> The second case, *Edwards v. Arizona*,<sup>191</sup> was a Fifth Amendment *Miranda* inquiry wherein the Burger Court voted unanimously and for the first time

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<sup>188</sup> *Innis*, 446 U.S. at 305 (Marshall, J., dissenting).

<sup>189</sup> 447 U.S. 264 (1980).

<sup>190</sup> *Id.* at 274 ("By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel.").

<sup>191</sup> 451 U.S. 477 (1981).

to overturn a state court conviction by applying the exclusionary rule to statements elicited from a defendant in violation of *Miranda*.<sup>192</sup>

Justice Stewart was in the majority for both *Henry* and *Edwards*. He retired two months after *Edwards* came down. The combined effect of *Innis*, *Henry*, and *Edwards* strengthened *Massiah* immeasurably. Not only was *Massiah*'s rule crystal clear in light of *Innis* and *Henry*, but it was also virtually impossible in light of *Innis* and *Edwards* that *Miranda* would be overruled and *Escobedo* disinterred. Thus Justice Stewart, having labored twenty-three years to substantiate his view that the Sixth Amendment right to counsel properly balanced the accused's due process rights with the government's investigative interests, confidently relinquished his seat to Justice O'Connor on July 3, 1981.

Indeed, Justice Stewart's confidence was well-founded, as subsequent Supreme Court holdings have unfailingly honored the balance Justice Stewart struck in *Massiah*.<sup>193</sup> But whereas for the *Massiah* doctrine *Innis*, *Henry*, and *Edwards* amounted to a treble defense, for *Miranda* their effect was ambiguous. While *Innis* may have implied that *Miranda* was a constitutional ruling and *Edwards* may have seemed to confirm as much, it took twenty years to make that point explicit.<sup>194</sup> Meanwhile, the Burger Court, and the Rehnquist Court thereafter, adopted a miserly stance toward

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<sup>192</sup> Id. at 485 (“[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.”).

<sup>193</sup> See *Texas v. Cobb*, 532 U.S. 162, 172 (2001) (“[T]he Sixth Amendment right to counsel attaches only to charged offenses . . .”); *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (“The Sixth Amendment right . . . does not attach until a prosecution is commenced.”); *Illinois v. Perkins*, 496 U.S. 292, 299 (1990) (“After charges have been filed, the Sixth Amendment prevents the government from interfering with the accused's right to counsel.”); *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) (“[T]he Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached . . . Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.”); *Maine v. Moulton*, 474 U.S. 159, 180 (1985) (“[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities.”).

<sup>194</sup> See *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

*Miranda*'s exclusionary rule and developed explicit exceptions to its application.<sup>195</sup> And while the *Miranda* doctrine took another unexpected turn for the better in *Dickerson v. United States*<sup>196</sup>—where the Rehnquist Court stated explicitly that “*Miranda* announced a constitutional rule”<sup>197</sup>—a close reading of *Dickerson* reveals that even as the seven-member majority rejected a facial challenge to *Miranda*, it “stopped short of declaring that a violation of *Miranda* is a violation of the Constitution.”<sup>198</sup> Indeed, four years after *Dickerson* in *Missouri v. Seibert*<sup>199</sup> and *United States v. Patane*,<sup>200</sup> the Rehnquist Court returned to the status quo, ruling in each to delimit *Miranda*. All indications from the Roberts Court are that it intends to treat *Miranda* with equal disregard.<sup>201</sup> Thus, despite a

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<sup>195</sup> See *Davis v. United States*, 512 U.S. 452, 459 (1994) (holding that the subject of custodial interrogation “must unambiguously request counsel” in order for *Miranda*'s protections to apply and that once consent to questioning is given, law enforcement officers may continue with questioning even when the suspect “makes a reference to an attorney”); *Stansbury v. California*, 511 U.S. 318, 319 (1994) (per curiam) (holding that a police officer's subjective and undisclosed view concerning whether a defendant being interrogated is a “suspect” is irrelevant to assessment of whether that defendant is in custody for *Miranda* purposes); *Duckworth v. Eagan*, 492 U.S. 195, 202–05 (1988) (holding that substantial deviations from standard language of *Miranda* warnings do not render a confession resulting from custodial police interrogation inadmissible so long as the warnings “touch[] all of the bases required by *Miranda*”); *Moran v. Burbine*, 475 U.S. 412, 420–32 (1986) (holding that failure by police to inform a defendant of efforts by the defendant's attorney to reach him did not deprive him of his right to counsel or vitiate waiver of his *Miranda* rights); *Oregon v. Elstad*, 470 U.S. 298, 304 (1985) (rejecting the argument that “failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as ‘fruit of the poisonous tree’”) (citation omitted); *New York v. Quarles*, 467 U.S. 649, 657 (1984) (holding that “the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination”); *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (holding that *Miranda* warnings were not required where defendant, although a suspect, came voluntarily to police station, gave a brief interview, and was allowed to leave unhindered thereafter).

<sup>196</sup> 530 U.S. 428 (2000).

<sup>197</sup> *Id.* at 444.

<sup>198</sup> Charles D. Weisselberg, *Mourning Miranda*, 96 Cal. L. Rev. 1519, 1549 (2008).

<sup>199</sup> 542 U.S. 600, 604 (2004) (plurality) (failing to command a majority holding that *Miranda* warnings given mid-interrogation, after defendant gave unwarned confession, were ineffective).

<sup>200</sup> 542 U.S. 630, 633–34 (2004) (holding that failure to give *Miranda* warnings does not require suppression of physical fruits of suspect's voluntary statements).

<sup>201</sup> See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010) (holding that police are not required to obtain a waiver of defendant's right to remain silent under *Miranda*

strong showing in *Innis* and again in *Dickerson*, *Miranda*'s scope and meaning remain in doubt.

#### CONCLUSION

Justice Stewart's views on the constitutional privilege against self-incrimination were consistent throughout his Supreme Court career. He believed that once a defendant was formally charged, his right to counsel was inviolate and, necessarily, the state could not deliberately elicit information from him absent counsel or a preemptive waiver. This much is clear from his opinions. It is also clear from his files that he was willing to do whatever it took to ensure that this interpretation of the Sixth Amendment outlived his tenure on the Court. The test of time has vindicated Justice Stewart's interpretation, first elucidated in *Spano* and adopted as doctrine in *Massiah*.

Likewise, it is fair to say that Justice Stewart did not have a radical change of opinion on *Miranda* as he neared retirement, notwithstanding his endorsements in *Innis* and again in *Edwards*. There is simply no evidence available to support the proposition that he changed his mind. Rather, his expansive interpretation of *Miranda* in *Innis* and his decision to join the *Edwards* majority were each designed to rehabilitate and reinforce, respectively, a *Massiah* doctrine badly battered by *Brewer*.

Thus explained, what relevance does the backstory on Justice Stewart's opinion in *Innis* have for the contemporary debate over *Miranda*? Advocates for defendants' rights and judicial reform love *Miranda*'s symbolic value. But to quote Professor Kamisar, "[s]ymbols are important, but more is needed."<sup>202</sup> As *Miranda*'s straightforward principle becomes increasingly burdened with caveats and qualifications, even the most passionate defendants' rights advocate must concede that, in application, *Miranda* fails to

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before commencing interrogation and that to invoke his protections under *Miranda*, a defendant must explicitly state his right to remain silent); *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223–25 (2010) (holding that a suspect that has invoked his right to counsel may nonetheless be re-interrogated absent the presence of counsel if a break in custody lasting fourteen days has occurred); *Hairston v. United States*, 552 U.S. 994 (2007) (denying petition for writ of certiorari, thereby declining opportunity to clarify *Missouri v. Seibert*).

<sup>202</sup> Kamisar, *supra* note 48, at 101.

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accomplish what it was designed to do. Police still ask questions, criminal suspects still give incriminating answers, and the Supreme Court finds ways around the exclusionary rule when *Miranda* issues arise. That an increasingly conservative Court consistently avoids enforcing *Miranda*'s exclusionary rule, while at the same time purporting to uphold its underlying thrust, smacks of intellectual dishonesty.

Intellectual dishonesty in any form, even if it espouses a strong endorsement of due process, is hardly good for the law. Thus, at bottom, *Miranda*'s critics and advocates must agree that the doctrine is critically flawed. If *Innis* saved *Miranda*,<sup>203</sup> the question remains: "To what end?" *Miranda* lived to fight another day, but with the exceptions of *Edwards* and *Dickerson*, it has been soundly beaten each time it has taken the battlefield since.

Indeed, thirty years after its resuscitation in *Innis*, perhaps *Miranda* is finally dead. In that case, we should "mourn [its passing.] . . . learn from [its] experiment[,] . . . acknowledge its failures, and move forward."<sup>204</sup>

If the doctrine is jettisoned, the starting point for the debate over the proper scope of protections due the criminally accused might be the original debate between Justices Stewart and Black in *Spano*: back to the proper placement of a defendant's right to silence and right to counsel; back to the choice between the Fifth and Sixth Amendments. Perhaps this time, however, with nearly forty-five years' experience under *Miranda*, we would all agree that except to proscribe egregious abuses of police power—Justice Stewart's "midnight inquisition[s] in the squad room of a police station"<sup>205</sup>—the Sixth Amendment is better suited than the Fifth to strike the balance between the rights of the criminally accused and the interests of the state prior to trial. Whereas a Fifth Amendment rule under *Miranda* is pure in principle but muddled in practice, a Sixth Amendment rule under *Massiah* is clean, consistent, and relatively impervious to obfuscation: the right to counsel attaches at the initiation of formal judicial proceedings, at which point police may not deliberately elicit the statements of any criminal defen-

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<sup>203</sup> See Kamisar, *supra* note 16, at 1928.

<sup>204</sup> Weisselberg, *supra* note 198, at 1600.

<sup>205</sup> *Spano v. New York*, 360 U.S. 315, 327 (1959) (Stewart, J., concurring).

dant absent the presence of counsel. Prior to formal judicial proceedings, however, police may question a defendant in their investigatory role, within acceptably humane bounds.

Momentum for further changes to *Miranda* continues to build. Most recently, Attorney General Eric Holder even suggested that Congress establish explicit limitations to *Miranda*'s constitutional protections for United States citizens accused of terrorism.<sup>206</sup> The trend suggests, perhaps, that after all these years Justice Stewart will be vindicated and the right to counsel and right to silence will be put together under the Sixth Amendment and attach at initiation of a formal charge. The result could be a clear, consistent rule with no room for obfuscation or dishonesty.

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<sup>206</sup> Charlie Savage, Holder Backing Law to Restrict *Miranda* Rules, N.Y. Times, May 10, 2010, at A1.