The Right to Counsel in Police Interrogation Cases: *Miranda* and *Williams*

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THE RIGHT TO COUNSEL IN POLICE INTERROGATION CASES: Miranda and Williams*

The cases involving police elicitation of confessions from a suspect have been a source of great public concern.1 One recent case, Brewer v. Williams,2 is significant because it rejuvenated a theory of constitutional protection for suspects which had been dormant since the Supreme Court's decision in Escobedo v. Illinois.3 It is also significant because to most observers the case appeared to concern issues of police interrogations under Miranda v. Arizona.4 Yet, the Court determined that Miranda was inapposite and stated that Williams rested on the sixth amendment's guarantee of the right to the assistance of counsel5 rather than on Miranda and the fifth amendment's privilege against compelled self-incrimination.6

This article will consider some of the theoretical and practical ramifications of the Williams decision and compare its protections to the protections offered by Miranda. The article, focussing on the right to counsel, discusses the nature of the police conduct which is prohibited by each decision, the time at which the protections involved become effective, and the standard by which a waiver of the rights will be measured. The article concludes that there may be significant differences in the application of the two cases and that a uniform rule based on the sixth amendment may be superior to the present approach.

To understand the decision in Williams, it is important to be familiar with the facts7 of the case. Pamela Powers was abducted

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1 Kamisar, Foreward: Brewer v. Williams - A Hard Look at a Discomfitting Record, 66 GEO. L.J. 209, 209 (1977) [hereinafter cited as Kamisar, Williams-Record] ("In recent decades few matters have split the Supreme Court, troubled the legal profession, and agitated the public as much as the police interrogation-confession cases.").
4 384 U.S. 436 (1966). Interestingly, the Iowa state courts had considered only the Miranda question. See State v. Williams, 182 N.W.2d 396 (Iowa 1970).
5 The pertinent section of the sixth amendment provides: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.
6 The fifth amendment reads in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.
7 This article will refer to the facts as reported by the Supreme Court. The actual facts are different in several important aspects. See Kamisar, Williams-Record, supra note 1.
from a YMCA in Des Moines, Iowa on December 24, 1968. On December 26, Henry McKnight, an attorney in Des Moines, received a telephone call from Williams, then in Davenport, Iowa, who confessed to involvement in the Powers case and asked for advice. McKnight told Williams to surrender to the Davenport police, which he did. The Davenport police read Williams his Miranda rights and informed the Des Moines police of the surrender. Detective Leaming and a fellow officer were dispatched to bring Williams back to Des Moines. While still in Davenport, Williams was arraigned. He consulted at that time with an attorney named Kelly. When Detective Leaming arrived, he repeated the Miranda warnings and told Williams, "I want you to remember this [the warnings] because we will be visiting between here and Des Moines." Kelly requested, but was refused, permission to ride with Williams. Kelly then reminded Detective Leaming of an agreement Leaming had made with McKnight not to interrogate Williams until their arrival in Des Moines. During the 160-mile trip Williams stated several times that "[w]hen I get to Des Moines and see McKnight I am going to tell you the whole story." Leaming and Williams had a wide-ranging discussion which culminated in Leaming's delivery of the so-called Christian Burial Speech in which Leaming lamented the fact that they would be passing the place where the body was hidden but that the snow fall would soon cover the body so that she would never be found and her parents would be denied the opportunity to give her a decent Christian burial. Williams asked why Leaming believed they would be passing the location of the body on the way back to Des Moines. Leaming responded that he knew the body was in the area of Mitchellville. This was a guess. Leaming closed the conversation by stating, "I don't want to discuss it further. Just think about it as we're riding

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8 Miranda v. Arizona, 384 U.S. 436 (1966), requires that a suspect be warned of his right to remain silent and his right to retained or appointed counsel.
9 Brewer v. Williams, 430 U.S. at 391.
10 Id. at 392.
11 Detective Leaming is reported to have made the following speech:

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 sleetiing, 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 unable to find it. And, since we will be going right past the area on the way to 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 Eve 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.

Id. at 392-93.
As the car approached Mitchellville, Williams directed the officers to the body. Williams never confessed to the murder in any way other than by his action of locating the body, but such an action is treated by the courts as confession. The Court stated that Williams was protected by his right to counsel and the speech was tantamount to an interrogation, thus violating that right. The Court disagreed with the Iowa state courts, and upheld the federal court view that Williams had not waived his right to counsel.

I. PROHIBITED POLICE CONDUCT

Both *Miranda* and *Williams* have the same ultimate effect — the exclusion of self-incriminating remarks from the suspect's trial. Each accomplishes the task based on a different notion of what the police have done wrong. Thus, the two approaches may reach different results in different circumstances.

Before discussing the theories of each case it is helpful to review the possible forms of police conduct which may be called into question. The court often refers to the prohibited police conduct as "interrogation." That word, however, may cover a broad range of activities. This article instead will refer to questioning, inducement (or interrogation), and elicitation. Questioning is the asking of questions designed to produce self-incriminating responses. Inducement is police conduct which includes not only questioning but also other forms of conduct which have the effect of coercing or compelling the suspect to incriminate himself. This conduct may be as horrifying as dropping a basin of the deceased's bones into the lap of the suspect, or as subtle as giving the suspect a pamphlet describing the dangers of carrying narcotics within one's body. To determine whether there has been inducement, the courts look for the presence of coercion. Because *Miranda* has had such an overwhelming impact in the confession area, and because the *Miranda* Court referred to the coercive police conduct as "custodial interrogation," the word "interrogation" has come to be associated with inducement. By contrast, elicitation encompass-
ses a broader range of activities. It includes conduct that may or may not be coercive, but that is nevertheless calculated to produce a self-incriminating response. Custody, however, can add a coercive aspect to any form of police conduct.  

_Massiah v. United States_ provides an example of the distinction between inducement and elicitation, and of the confusion surrounding these terms. Mr. Massiah had been indicted for smuggling narcotics into the country. Unbeknownst to him, his accomplice, Colson, agreed to assist the prosecution. Colson arranged a meeting with Massiah which was recorded by federal agents. The comments made by Massiah were excluded from his trial, as a violation of the sixth amendment. Although the Court referred to the police conduct as ""surreptitious interrogation,"" there was no evidence of an interrogation in that there was no coercion. Massiah spoke of his own free will. It would be more accurate to describe the conduct as deliberate elicitation, since it evoked a self-incriminatory response without coercion.

_A. Brewer v. Williams_

It is difficult to determine the breadth of the proscribed conduct in _Williams_, since the Court's opinion established an interrogation requirement, and then determined the constitutional violation based on precedent which related to deliberate elicitation, not interrogation. Specifically, the Court stated it would have found ""no such constitutional protection [under the sixth amendment] . . . if there had been no interrogation."" On the other hand, the Court relied on the decision in _Massiah_ which prohibited any deliberate elicitation of remarks by a federal officer after the suspect's indictment. It is possible that the Court meant to describe the same conduct with the terms ""interrogation"" and ""deliberate elicitation."" But, as noted, they have come to be differentiated by the presence of coercion. Thus, one question posed by _Williams_ is the role coercion plays in the application of the sixth amendment.

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22 _Id._ at 206.
23 _Id._ The reference to ""surreptitious interrogation"" may be explained by the fact that the court of appeals decision in _Massiah_, 307 F.2d 62 (2d Cir. 1962), dealt with the application of _Spano v. New York_, 360 U.S. 315 (1959). _Spano_ involved an interrogation in that there was coercion. The majority in _Massiah_ quoted Judge Hays' dissent from the Second Circuit decision. It was Judge Hays, not the Supreme Court majority, who first used the phrase ""surreptitious interrogation."" 307 F.2d at 69.
24 430 U.S. at 400 (emphasis added).
25 _Id._ at 400-01.
26 See generally Kamisar, Brewer v. Williams, Massiah and Miranda: What Is ""Interro-
A review of the history of the application of the sixth amendment to self-incrimination cases reveals the source of the confusion. The sixth amendment’s application has rested on two interrelated analyses. The first is based on the view that police actions constitute a critical stage of pre-trial proceedings and that the suspect is protected by the right to counsel. In line with this analysis, the Court has frequently stated that without the presence of counsel to investigate and prepare the accused’s case, and to provide needed legal advice in the early, “critical” stages of a criminal prosecution, the right to counsel at trial is meaningless.\(^{27}\) Although the Court has used such reasoning to apply the right to counsel primarily to judicial pre-trial proceedings, the theory could be extended to police actions as well, since the results of police activity can be as critical to the eventual trial as other activities.\(^{28}\) Under this theory, coercion is not particularly important. Voluntary but uncounseled statements made at pre-trial judicial proceedings can be excluded from use at the trial.\(^{29}\) Whether this holds true for police proceedings will be explored below.\(^{30}\)

The second basis for the application of the right to counsel to police interrogation cases is to resolve the problems of coercion associated with police interrogations. These problems relate to conduct that threatens the suspect’s fifth amendment rights, although it was not until \textit{Miranda} that the fifth amendment was declared applicable to police conduct.\(^{31}\) Prior to \textit{Miranda}, the Court had relied on the voluntariness test to determine the admissibility of confession.\(^{32}\) See, e.g., Powell v. Alabama, 287 U.S. 45, 57 (1932), in which the Court stated:

\begin{quote}
[During the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.]
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\end{quote}


\(^{29}\) See, e.g., \textit{White v. Maryland}, 373 U.S. 59 (1963). Professor Kamisar has suggested a helpful way to think of this. If the prosecutor were attempting to discover information from a defendant during the trial and did so by trickery, such information would probably be excluded even if it were voluntarily given. Interview with Yale Kamisar, Law Professor at University of Michigan, in Ann Arbor, Michigan (Feb. 19, 1979).

\(^{30}\) See notes 53-69 and accompanying text infra.

\(^{31}\) The Court previously had held that the compulsion proscribed by the fifth amendment referred to judicial compulsion (that is, compulsion exercised by the force of law) and not police compulsion, because the police had no right to punish a person who did not speak. Bram v. United States, 168 U.S. 532 (1897); Kamisar, \textit{A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test}, 65 \textit{Mich. L. Rev.} 59, 65, 77-83 (1966).
sions.\textsuperscript{32} This test was criticized because the Court could not be sure of the facts since the cases often presented swearing contests between the police and the suspect.\textsuperscript{33} Even if the facts could be determined, the test was also criticized as too illusive. No one was sure what "voluntary" meant.\textsuperscript{34}

The application of the sixth amendment's right to counsel to police interrogations was seen by some members of the Court as a device to resolve the problems with the voluntariness test. The right was thought applicable because the production of a confession has such an enormous impact on the eventual trial.\textsuperscript{35} More importantly, the right to counsel was believed capable of improving the conditions of the police interrogations. Counsel could inform a suspect of his rights, deter the police from engaging in nefarious conduct, and provide an independent source of facts.\textsuperscript{36} Although several justices desired to impose limitations on police conduct through the sixth amendment, \textit{Miranda}, a case in which both fifth and sixth amendment interests culminated, suggests that the primary concern of the Court was defendant's fifth amendment interest— the right to be free from compelled self-incrimination.\textsuperscript{37} Thus, the presence of coercion or compulsion plays an important role in the application of the right to counsel under this analysis of the sixth amendment.

The view that the presence of counsel in police interrogations was desirable gained majority acceptance in 1964 in \textit{Massiah}\textsuperscript{38} and

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\textsuperscript{32} See Brown v. Mississippi, 297 U.S. 278 (1936). In determining whether a confession was voluntary, the Court took into consideration possible violations of fifth amendment interests. Malloy v. Hogan, 378 U.S. 1, 7 (1964).


\textsuperscript{34} Culombe v. Connecticut, 367 U.S. 568 (1961), is a good example of the problem with the voluntariness test. Justice Frankfurter's 67 page plurality opinion describes in great detail the factors to be used in measuring voluntariness. Three other Justices agreed with the standards set forth but reached the opposite result. See generally Kamisar, A Dissent from the Miranda Dissents, supra note 31; Kamisar, What is an Involutary Confession?, 17 RUTGERS L. REV. 728 (1963).

\textsuperscript{35} See Miranda v. Arizona, 384 U.S. at 466 (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961)): Without the protections flowing from... the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."


\textsuperscript{37} Miranda v. Arizona, 384 U.S. at 439: We deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

\textsuperscript{38} 377 U.S. 201 (1964).
\end{flushleft}
Escobedo v. Illinois. These two cases, however, demonstrate the differences in the two justifications for the application of the sixth amendment. Voluntariness and the fifth amendment were not at issue in Massiah, since the suspect spoke of his own free will. Massiah is, therefore, best analyzed as an application to police procedures of a traditional sixth amendment theory of the right to counsel. The Court held that just as the suspect cannot be denied the right to counsel during critical stages when he most needs the right, so can the police be proscribed from purposefully circumventing the right once the right has commenced.

By contrast, Escobedo involved the use of coercive psychological ploys to produce a confession. Escobedo knew his attorney was outside the interrogation room and requested to speak with him, but his request was denied. The police engaged in a long, secret interrogation which culminated with their bringing an accomplice into the interrogation room and Escobedo claiming that it was the accomplice, rather than himself, who pulled the trigger. The Court analyzed the case in terms of the right to counsel and held

40 See text accompanying notes 21-23 supra.
41 See United States v. Ash, 413 U.S. 300, 312 (1973); Milton v. Wainwright, 407 U.S. 371, 381-82 (1972) (Stewart, J., dissenting) ("Massiah marked no new departure in the law. It upset no accepted prosecutorial practice . . . . In no case before Massiah had this Court, at least since Powell v. Alabama, ever countenanced the kind of post-indictment police interrogation there involved, let alone ever specifically upheld the constitutionality of any such interrogation . . . ."). When Massiah was decided, several commentators believed it dealt with the meaning of compulsion under the fifth amendment and not with the right to counsel. Enker & Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 MINN. L. REV. 47, 57 (1964); The Supreme Court, 1963 Term, 78 HARV. L. REV. 143, 221 (1964). Enker and Elsen questioned the right to counsel reasoning in Massiah by noting that if Colson had volunteered to help the state after he had his conversation, the right presumably would not have arisen. Enker & Elsen, supra at 56-57. Thus, they argue, the real meaning of Massiah is that the state somehow drew a confession out of Massiah and such activity is more closely related to the fifth amendment. Williams, however, clearly rejects the fifth amendment analysis of Massiah. 430 U.S. at 397. The Court in Massiah could be understood to assume that after a given point the suspect requires the assistance of an attorney in his interactions with the state. Since Massiah had passed that point, it was his right to have his attorney advise him as to any communications made with the state. In turn, the state was proscribed from engaging in such conversation by surreptitious means. Massiah did not have a right to advice concerning all possible conversation, but was protected against state action that initiates or gathers information.

42 The Court viewed indirect interrogations as posing a greater threat to constitutional rights than secretive police practices:

It is true that in the Spano case [Spano v. New York, 360 U.S. 315 (1959)] the defendant was interrogated in a police station, while here the damaging testimony was elicited from the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, "if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jail house. In this case, Massiah was more seriously imposed upon . . . . because he did not even know that he was under interrogation by a government agent."

43 Escobedo v. Illinois, 378 U.S. at 482-83. Escobedo was held for murder under the Illinois felony-murder rule.
that once the police had focused their investigation on a suspect, that suspect was entitled to the protections of the right to counsel. Nevertheless, the true concern of the Court appeared to be the protection of the suspect from the compulsion of police interrogation. In *Miranda* the Court analyzed *Escobedo* as a case designed to protect fifth amendment rights, and later cases have completely stripped *Escobedo* of any sixth amendment value.

A review of the cases indicates the difficulty in analyzing *Williams*. While the decision claims to rely on *Massiah*, the facts are more similar to *Escobedo*. Moreover, the justices discuss in the opinion the coercive impact of the Christian Burial "interrogation," despite the seeming irrelevance of coercion under *Massiah*. The best interpretation of *Williams* is as a traditional sixth amendment case. This is apparent by noting that the case could have been decided under *Miranda* but was not. *Williams* was clearly in custody and the Court found the Christian Burial Speech to be tantamount to an interrogation. The Court could, accordingly, have found under *Miranda* that Williams was improperly subjected to custodial interrogation. The fact that the Court specifically rejected *Miranda* and appeared to draw a line between the fifth and sixth amendment interests indicates that *Williams* does not rely on the *Miranda* theory of interrogation, but on the sixth amendment analysis of *Massiah*. The overriding concern of *Miranda* is the element of compulsion inherent in custodial interrogation. In contrast, the *Massiah* doctrine affects police conduct which is often, but need not be, coercive. Thus, if the Court was primarily concerned with the application of *Massiah* rather than *Miranda* to the facts in *Williams*, the decision proscribes deliberate elicitations and the use of the world "interrogation" is misleading.

The presence of coercion should, therefore, have little direct

44 *Id.* at 490-91.
45 See Enker & Elsen, *supra* note 41, at 61.
47 Kirby v. Illinois, 406 U.S. 682, 689 (1972) ("[T]he Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination . . .'. "). See also *Beckwith* v. United States, 425 U.S. 341 (1976).
48 See note 13 *supra*.
49 See notes 8-14 *supra*.
50 What the result would have been had it been a *Miranda* case is an open question. Compare *Israel*, *Criminal Procedure, the Burger Court, and the Legacy of Warren Court*, 75 Mich. L. Rev. 1320, 1385-86 (1977) (the confession would be admissible under *Miranda*) with Kamisar, *What Is Interrogation?*, *supra* note 26, at 72-74 (the confession would be inadmissible under *Miranda*).
51 See note 37 *supra*.
52 See Kamisar, *What Is Interrogation?*, *supra* note 26, at 33-34. One could argue that "interrogation" has a different meaning when applied to the sixth amendment, as opposed to the fifth amendment. There is, however, no reason to engage in such semantic confusion.
impact on the determination that the right to counsel has been denied.

The broadest interpretation of "deliberate elicitation" suggests that any statement by the suspect to the state is inadmissible. This interpretation is based on the idea that there is an analogy between police and judicial pre-trial proceedings. The voluntariness of a statement made at a pre-trial judicial proceeding would, under this interpretation, not be relevant; if the right to counsel were not extended during such a proceeding, the statement could not be used. Some courts have so interpreted Massiah. The breadth of such a conclusion is troubling to some. It suggests, for example, that a statement which is merely overheard might be excluded on the basis of the suspect's sixth amendment right. Furthermore, such a conclusion is in conflict with the statement in Miranda that voluntary statements are not to be excluded. These concerns may have troubled the Court and they therefore required that the police must take some action that interferes with the suspect's ability to use his right to counsel. The police may approach the suspect only through his attorney or in a manner consistent with the suspect's right to invoke the sixth

when the phrase "deliberate elicitation" more accurately describes the proscribed conduct under Miranda.

54 Shortly after Massiah was decided, the Court decided McLeod v. Ohio, 301 U.S. 356 (1964). McLeod was a one sentence reversal of an Ohio Supreme Court opinion which had held that Massiah did not apply to a voluntary confession made in a face to face confrontation. State v. McLeod, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964). Several courts relied on Massiah and McLeod to hold that, after indictment, even voluntary statements which were not elicited by the police could be excluded in the absence of a waiver of the right to counsel. United States ex rel. O'Connor v. New Jersey, 405 F.2d 632 (3rd Cir. 1969), cert. denied sub. nom. Yeagerv.O'Connor, 395 U.S. 923 (1968); Hancock v. White, 378 F.2d 479 (1st Cir. 1967).
55 One court has held that overheard statements are admissible. See United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978) (rejecting a claim by Patty Hearst that the introduction of a tape recording made of a discussion between Hearst and a friend via an intercom system at the jail was a violation of Williams), discussed in note 69 infra.
56 Miranda v. Arizona, 384 U.S. at 478. Other courts share this interpretation by holding that Massiah must be read in the light of Miranda, which allows voluntary statements to be admitted. See United States v. Crisp, 435 F.2d 354 (7th Cir. 1970), cert. denied, 402 U.S. 947 (1971); State v. Blizzard, 278 Md. 556, 366 A.2d 1026 (1976) (collecting cases). The effect of such a reading is to completely subsume Massiah into the Miranda analysis. See United States v. Mandley, 502 F.2d 1103 (9th Cir. 1974); Blizzard, 278 Md. at 568, 366 A.2d at 1032 ("An overwhelming majority of the courts in this country have been restrictive in their application of Massiah and McLeod."). This appeared to be the predominant theory of Massiah's status until Williams distinguished Massiah from Miranda.
57 See Brewer v. Williams, 430 U.S. at 415 (Stevens, J., concurring) ("[T]he lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen.").
The nature of the interference depends upon the circumstances of police involvement. In *Massiah* the police had interfered because they subjected Massiah to an attempt to get information in which his ability to assert his right to counsel was rendered meaningless by the secrecy of elicitation. In *Williams*, however, the suspect realized he was confronting the police. The Court found that the right had been circumvented because the Christian Burial Speech had such an impact on the psyche of Williams that he was rendered incapable of rationally deciding when he should interpose his right to counsel. The dissenters disagreed and argued that the Speech was not coercive and that the past assertions by Williams indicated his ability to cut himself off from the police. Thus, contrary to the notion that deliberate elicitations do not depend on the presence of coercion, the Court may be indicating that in face to face confrontations with the police, a suspect’s right to counsel is circumvented only by coercive police conduct. This is the narrowest possible interpretation that can reconcile the Court’s conflicting notions of the need for “interrogation” and its reliance on *Massiah*. Deliberate elicitation refers broadly to deceptive actions by police, but would reach no further than interrogation when the suspect recognizes who he is confronting. This narrow interpretation is troubling, however, because, as noted above, in the circumstances of *Williams* it is not appreciably different from the protection against compulsion already provided by *Miranda*.

A middle ground can be established for interpreting *Williams*, in which all statements are not excluded but where the exclusion is broader than *Miranda*. It is certainly possible, for example, that an interrogation which was undertaken while the suspect was not in custody would constitute a violation of the right to counsel but

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58 See United States v. Crisp, 435 F.2d 354, 358 (7th Cir. 1970), cert. denied, 402 U.S. 947 (1971) (“[T]he crucial feature of both *Massiah* and *McLeod* was the deliberate acquisition of information by police from a suspect under circumstances preventing his effective exercise or waiver of his right to counsel . . . .”).

59 430 U.S. at 408 (Marshall, J., concurring) (“The detective demonstrated once again that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion.”).

60 430 U.S. at 418 (Burger, J., dissenting); 430 U.S. at 433-37 (White, J., dissenting); 430 U.S. at 439-41 (Blackmun, J., dissenting).

61 One might argue that the presence of compulsion in *Williams* serves a different purpose than it does in *Miranda*. The argument thus far has been that the compulsion in *Williams* has the effect of rendering a suspect incapable of asserting his right to counsel. One could argue that such coercion is different from the coercion necessary to compel a self-incriminating remark. This is certainly true where the suspect does not realize he is speaking to a state agent, as in *Massiah*. As to face to face confrontations, the argument is meaningless. First, the police pressure which creates a confession also creates a pressure to refrain from asserting one’s right. Second, *Miranda* is not limited to combatting the police pressure to confess. It also refers to the pressure to relinquish one’s right. See Miranda v. Arizona, 384 U.S. at 467 (“In order to combat these pressures *and to permit a full opportunity to exercise the
would not trigger *Miranda*. It is also possible that *Williams* means to include a broader range of activities under the rubric of "deliberate elicitation" when the suspect is in custody than is covered by *Miranda*. Both of these examples raise the issue, which remains unresolved in *Williams*, as to how much the police must do before their activity becomes an elicitation. The different descriptions of proscribed conduct reflect the differences in focus between the *Miranda* and *Williams* decisions. Under *Miranda* the focus is on the presence of compulsion which violates the fifth amendment. Coercion is a necessary condition for such a proscription but not a sufficient condition because there must also be custody. Under *Williams* the focus is on the interference with the right of the suspect to interpose his attorney between himself and the state. A wider set of activities falls under this proscription and coercion is a sufficient condition, but not a necessary condition.

The application of *Miranda* in custodial circumstances was based on the assumption that the inherently coercive pressures of custodial interrogation may cause many suspects to relinquish their rights. The notion that the police can render a suspect incapable of interposing his right to counsel in face to face confrontations without coercion appears to rest on an assumption that the suspect does not always act in his own best interest. A contrary assumption

*privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of these rights must be fully honored.") (emphasis added).

62 See United States *ex rel.* Chabonian v. Liek, 366 F. Supp. 72 (E.D. Wis. 1973). *Miranda* relies on the synergistic effects of both custody and interrogation which create an inherently coercive situation. The difficulty posed regarding *Williams* is whether the Court will require proof of coercion in fact or whether the mere asking of a question will constitute a deliberate elicitation.

The Supreme Court case which came closest to reaching this issue is *Hoffa* v. United States, 385 U.S. 293 (1966). Hoffa was overheard by a government agent planning the bribery of the Test Fleet jury. Hoffa argued his right to counsel had attached because, under *Escobedo*, the police had focussed the investigation on him. Once the right attached, he argued, the statements overheard by the agent were inadmissible under *Massiah*. The Court argued in rejecting Hoffa's *Miranda* claim that there was no inherent coercion. The Court rejected the right to counsel argument, but appeared to do so on the theory that the right had not attached and not on the grounds that no right to counsel argument was available. In a footnote the Court commented that had Hoffa been indicted for bribery, the decision would have been more difficult.

Any police action which was not preceded by a warning of the right to counsel, even if not in custodial surrounding, should, of course, constitute deliberate elicitation, since the police would be taking advantage of the ignorance of a suspect and thus rendering him incapable of effectively using his right. *McLeod* was held to mean the police must warn a suspect of his right to counsel. See note 54 supra.

63 Compare text accompanying note 65 infra with text accompanying notes 86-90 infra.

64 This is not an unreasonable assumption. The basis of the right to counsel is, presumably, to assure the suspect that he will be represented in the best possible way. See *Johnson v. Zerbst*, 304 U.S. 458, 462-63 ("[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to
suggests that so long as the suspect is informed that he has a right he will know how to use it in the absence of compelling pressures to relinquish the right. How completely the Court accepts this assumption will have an effect on which police activities it will classify as deliberate elicitations and what actions will constitute a waiver of the right to counsel.

A significant example of the breadth of Williams and of the confusion over the word "interrogation" is provided by the situation in which a suspect is placed in a jail cell with a "jail cell plant." The Massiah-Williams rule proscribes, once the adversary proceedings have commenced, the use of incriminating evidence gathered by the jail cell plant since Massiah, the precedent Williams relied upon, excluded the information that had been gathered for all practical purposes by a jail cell plant. The fact that the secret agent in Massiah operated in an automobile, not a jail cell, makes no difference. Nevertheless, the Second Circuit in a recent case held that the presence of a jail cell plant was not a violation of Williams because use of a jail plant did not constitute an interrogation. The Fourth Circuit has disagreed and overruled the use of an admission in such a circumstance. The presence of a jail plant is a deliberate elicitation of information because it places the suspect in a situation in which the police can take advantage of normal social pressures to speak to a person inclose proximity and simultaneously render the suspect incapable of interposing his attorney between himself and the state.

The requirement that the elicitation be "deliberate" may limit the scope of Williams. The majority seemed troubled that Detec-
tive Leaming knew Williams had retained an attorney but nevertheless attempted to compel a statement by removing him from the presence of the attorneys.\textsuperscript{70} Justice Blackmun, in dissent, argued that the no-passenger rule was reasonable and therefore the isolation was not deliberate.\textsuperscript{71} This suggests that the Court will have to resolve whether deliberateness means specific intent to gather the information or a general intent to commit an act which has a reasonable likelihood of producing a confession whether or not the police officer recognizes such a likelihood.\textsuperscript{72}

The foregoing discussion interprets Williams as adopting the right to counsel approach to problems of self-incrimination. This

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\textsuperscript{70} Williams' Davenport attorney, Kelly, asked to ride back to Des Moines with Williams. This offer was refused. The Court noted that this allowed Leaming to act upon Williams in isolation. 430 U.S. at 399. Isolation is generally accepted as a critical element in an effective interrogation. See Miranda v. Arizona, 384 U.S. at 449. The Court also noted that Leaming had agreed with both attorneys not to interrogate Williams. Although the Court did not give the agreement the force of a contract, it did note that the agreement reinforced the deliberateness of Leaming's conduct. 430 U.S. at 401 n.8.

\textsuperscript{71} Brewer v. Williams, 430 U.S. at 438-39. See also United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976), cert. denied, 429 U.S. 980 (1977) (no violation of Massiah found where state officers questioned suspect and responses were overheard by federal agents because the state officers were unaware of the federal indictment).

\textsuperscript{72} See Kamisar, \textit{What Is Interrogation?}, supra note 26, at 9 ("It seems to me . . . that so long as the police conduct is likely to elicit incriminating statements and thus endanger the privilege, it is police 'interrogation' regardless of its primary purpose or motivation . . . ."); Beatty v. United States, 389 U.S. 45 (1967) (reversing a lower court holding that if the suspect arranges to meet with the government agent it is not a deliberate elicitation).
approach proscribes any deliberate elicitation of remarks by the police once the right has attached. Deliberate elicitation appears to mean actions which interfere with the suspect's right to interpose his attorney between himself and the state. When the suspect is unaware that he is communicating to a state agent he is robbed of this right. If the suspect is aware that he is addressing a state agent, the Court must decide what forms of police activity will constitute deliberate elicitation. The decision will be affected by whether a suspect in such circumstances is capable of acting in his own best interests and asserting his right to counsel or whether a suspect will be presumed to need an attorney's assistance.

B. Miranda v. Arizona

Miranda held that suspects subjected to custodial interrogations must be given certain warnings.\(^73\) The prohibited conduct, in the absence of warnings, is the custodial interrogation.\(^74\) The Court observed that such interrogations were inherently coercive and warnings were therefore necessary to assure the suspect the ability to assert his rights.\(^75\) Since the custody issue has been considered extensively,\(^76\) the focus of the present discussion is upon the interrogation factor.

By narrowly construing the interrogation requirement, some courts have limited the application of Miranda.\(^77\) For example, one

\(^73\) Miranda v. Arizona, 384 U.S. at 444.

\(^74\) After a person has asserted one of his rights under Miranda the protection may be broader. The Court stated in Miranda that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege," 384 U.S. at 476. If the defendant does not voluntarily waive, any resulting confession is inadmissible.

\(^75\) See note 37 supra.


\(^77\) See, e.g., United States v. Davis, 527 F.2d 1110 (9th Cir. 1975); United States v. Hodge, 487 F.2d 945 (5th Cir. 1973). See also United States v. Burgard, 551 F.2d 190 (8th Cir. 1977); United States v. Springer, 460 F.2d 1344 (7th Cir.), cert. denied, 409 U.S. 873 (1972). C. Wright, Federal Practice & Procedure (Criminal) § 76, at 113 (1969), explains the limitations in terms of an expansive definition of voluntary statement:

[T]he breadth of the exception for volunteered statements . . . seems to include . . . the statement of a person who has not been given the benefits of warnings and counsel so long as he is not interrogated. If so, the police, so long as they ask no questions, could deliberately hold a person in custody without giving him the Miranda warning, and confront him with the victim of the crime, or perhaps other evidence of it, in the hope that he would spontaneously say something incriminating.

But see Kamisar, What Is Interrogation?, supra note 26, at 14 n.85 (arguing that Professor Wright's view is too limited).
court held that telling a suspect that the fingerprints found on the dead body matched his fingerprints was not an interrogation but a "firm one-way conversation."\textsuperscript{78} This holding suggests that "interrogation" under \textit{Miranda} is limited to police questioning. However, this limitation ignores the intent, if not the letter, of \textit{Miranda}. The Court adopted the \textit{Miranda} rule not to halt police questioning \textit{per se}, but to dispel the "badge of intimidation" inherent in the police dominated atmosphere of custodial interrogations.\textsuperscript{79} The Court was concerned with any coercive conduct which renders the suspect incapable of asserting his rights. Indeed, several of the interrogative techniques described by the Court in \textit{Miranda} do not involve the question/answer process.\textsuperscript{80} By focussing on the interrogation issue, the \textit{Williams} decision supports the view that \textit{Miranda} covers more than questioning. The dissenters in \textit{Williams} argued that the Christian Burial Speech was not a question and therefore not an interrogation.\textsuperscript{81} By finding the Speech to be an interrogation, the majority buries the myth that such acts are not "interrogations."\textsuperscript{82}

Another apparent limitation on the scope of \textit{Miranda} concerns the source of the coercion. \textit{Miranda} clearly applies when the coercion stems from dealing with a known police officer.\textsuperscript{83} When the coercion is from sources other than the police, however, the applicability of \textit{Miranda} is less clear. One court, for example, held that asking the father of a suspect to convince the suspect to con-
fess constituted illegal interrogation under *Miranda*. By contrast, another court held that asking questions of a suspect's wife in the presence of the suspect, which the suspect answered, was not an interrogation of the suspect.

Courts have also split on the question whether the use of a jail cell plant violates *Miranda*. It should be recalled that under the better interpretation of *Williams*, the use of the jail cell plant violates the sixth amendment. This conclusion follows because the focus of the right to counsel is on the ability of the suspect to use his right once he has it. The focus of *Miranda*, however, may be somewhat different and therefore its application to this situation is uncertain. *Miranda* has been viewed as no more than a prophylactic device to protect the fifth amendment's privilege against compelled self-incrimination. Under such an assumption one commentator has argued that *Miranda* does not cover the jail cell plant situation because *Miranda* was designed to combat the inherent compulsion of inducements engaged in by recognized police officials. Specifically, the references to inherent compulsion in *Miranda* go to the belief of most suspects that they must answer the police or that the police can do them much harm if they do not answer. These basic instincts, combined with the means to emphasize them through the interrogation devices described in *Miranda*, give the police significant albeit inherent powers of compulsion. These pressures are absent in the situation in which the suspect does not recognize the interrogator as a police officer.

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85 Haire v. Sarver, 437 F.2d 1262 (8th Cir. 1971). The decisions on this issue often turn on whether the interrogator was an agent of the police. See United States v. Gugliaro, 501 F.2d 68 (2d Cir. 1974); United States v. Brown, 466 F.2d 493 (10th Cir. 1972); State v. O'Kelley, 181 Neb. 618, 150 N.W.2d 117 (1967).
87 See note 61 supra.
This is not to suggest that the fifth amendment does not apply as well. If the undercover agent beats a confession out of the suspect it will be viewed as compelled self-incrimination. An interesting and unresolved question is how the Court might treat the use of the interrogation techniques referred to in *Miranda* by an undercover agent.
90 The interrelationship of this issue with the above issue of *Miranda*'s application when a suspect is questioned by someone other than a police officer is clear. If the jail cell plant is not a violation of *Miranda* because the suspect is unaware of the presence of the police, then it follows that if the suspect is questioned by his father, or a murder victim's mother, then the lack of "police blue" means such techniques are not violations of *Miranda*. Professor Kamisar has taken such a view. Kamisar, *What Is Interrogation?*, supra note 26, at 45, 48.
This article will eventually suggest that *Miranda* be viewed not solely as a prophylactic device but as an application of the sixth amendment for the limited purpose of protecting
The limitations on *Miranda* described above, along with the requirement that the interrogation must be custodial, suggest that *Williams* involves a broader proscription of police conduct. The focus in *Williams* upon the capacity of the suspect to interpose counsel, rather than upon the compelling nature of the police conduct, suggests that conduct which is arguably not coercive may nevertheless constitute the sort of trickery which is protected against by the right to counsel. If one accepts the broader view of interrogation under *Miranda*, there appears to be little difference between *Miranda* and *Williams* in face to face confrontation under custodial circumstances. The differences are more strongly evident in surreptitious or non-custodial circumstances, where *Miranda* protection may not apply, but where the *Williams* protections may.

II. TIME OF COMMENCEMENT

The differences in the scope of protection offered by *Williams* and *Miranda* become relevant only after the protections are operative. Yet, *Miranda* and *Williams* apparently operate on different timetables.

A. Brewer v. Williams

The question of when the right to counsel attaches was not a critical issue in *Williams* because the state conceded that the right had already attached at the time in question.91 The Court, nevertheless, stated the rule that the right to counsel attaches at or after the time that judicial proceedings have been initiated.92 Linking the right to counsel to the initiation of judicial proceedings finds support in the cases that apply the right to counsel theory to pre-trial proceedings. In *Powell v. Alabama*,93 the Court held that the right to counsel should apply during any "critical period" when investigation and consultation were essential to protect the fairness of the trial. In these cases, however, the Court was not concerned with police conduct. Rather, the Court's concern was with the imbalance created in the judicial system by the absence of an effective advo-

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91 Brewer v. Williams, 430 U.S. at 399.
92 Id. at 398.
93 287 U.S. 45 (1932).
cate for the suspect during the early stages of the case, and the danger of rendering meaningless the right to counsel at trial.94

The Court has extended its time of attachment rule to certain cases involving police conduct. For example, in United States v. Wade,95 the Court held that the right to counsel applied to a corporeal lineup. In Kirby v. Illinois,96 however, the Court limited the Wade decision to lineups occurring after the accused had been indicted. Indictment was the judicial proceeding which triggered the sixth amendment right to counsel.97

Arguably the "critical period" language of Powell is inappropriate in the self-incrimination cases, since the elicitation of a confession before judicial proceedings have begun is as harmful to the suspect as a confession obtained afterwards. The Kirby decision, however, suggests that only after judicial proceedings have commenced has the prosecutor committed himself to prosecute.98 This commitment, according to Kirby, is what the sixth amendment focusses on in guaranteeing the right to counsel in all "criminal prosecutions."99 The difficulty with this reasoning is that it does not go far enough in analyzing the threat which the prosecutor can pose to the suspect. To the prosecutor, the prosecution may begin long before judicial proceedings commence. The prosecutor could decide to develop the evidence for his case before he begins any judicial proceedings,100 and take advantage of the inherently coercive power of custodial interrogations. Kirby further suggests that the aid of an attorney is not necessary before judicial proceedings have commenced because at that point the suspect does not face the "intricacies" of the criminal law.101 This reasoning, how-

94 Id.
95 388 U.S. 218 (1967).
97 Id. at 689. The Court stated:

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689-90 (footnote omitted).
98 Id.
99 See note 5 supra. Kirby does not consider why criminal "prosecutions" under the language of the sixth amendment commence when judicial proceedings have begun, while criminal "cases" under the language of the fifth amendment begin with custodial police interrogations.
100 In United States v. Mandujano, 425 U.S. 564 (1976), for example, the suspect argued that the prosecutor purposefully delayed his indictment to take advantage of the suspect's lesser rights at the pre-indictment stage.
101 See note 97 supra.
ever, does not and should not apply to police interrogations. In *Massiah*, for example, the suspect was not confronted with any intricacies of law, but was held to be protected by the right to counsel. To the suspect, the prosecution no doubt commences once he believes the prosecutor desires to imprison him.\(^\text{102}\)

If the expressed reasoning of *Kirby* does not explain the rule it adopts, perhaps the Court felt that it had to place some limitation on the right to counsel, but felt it could not state its decision in such terms.\(^\text{103}\) Similarly, the commencement of judicial proceedings may have been perceived by the *Kirby* Court as a point of public focus on the judicial system and, therefore, the rule laid down gave the appearance of being just.\(^\text{104}\) Due to its arbitrariness, the *Kirby*

\(^{102}\) Cf. *Miranda v. Arizona*, 384 U.S. at 477 ("It is at this point [of custodial interrogations] that our adversary system of criminal proceedings commences . . . .")

\(^{103}\) Grano, *Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717, 732-33 (1974), suggests the Court felt constrained by practical consideration:

At most, therefore, *Kirby*, if limited to pure sixth amendment analysis, might have adopted the custody approach [requiring an attorney if the suspect is in custody] . . . . [T]his approach would have posed a serious threat to the present police practice of conducting prompt on-the-scene identifications. It can reasonably be assumed that the Supreme Court was not prepared to deprive the police of the flexibility. *Kirby*’s reinterpretation of the sixth amendment may, therefore, have been dictated by the impractical consequences that would have followed a custody approach.

One must ask, however, if this reasoning is readily applicable to the *Williams* situation. Arguably the police should be free to question a suspect in the absence of counsel to make a quick determination whether the suspect would be pursued as a potentially guilty party. That freedom is already restricted by the *Miranda* decision. Thus, the applicability of the *Kirby* rule to *Williams* turns on the mechanical application of the sixth amendment rule rather than on an analysis of the purpose the protection fulfills in police interrogations.

\(^{104}\) Kamisar, *What Is Interrogation?*, supra note 26, at 82-83.

There are alternatives to the *Kirby* rule. In *Escobedo* the Court held that the right to counsel commenced when the investigation first focussed on the suspect. 378 U.S. at 490-91. That standard was short-lived. *Miranda* reinterpreted *Escobedo* as involving the fifth amendment and stated that "focus" meant custodial interrogation. 384 U.S. at 444 n.4. In *Hoffa* v. United States, 385 U.S. 293 (1966), the Court summarily rejected an argument by Hoffa that his right to counsel had been violated when an undercover agent overheard a conversation between Hoffa and his lawyer. Hoffa argued that the right to counsel commenced when the investigation focussed on him. The final nail in the coffin for *Escobedo* was *Beckwith v. United States*, 425 U.S. 341 (1976), which explicitly rejected the "focus" test.

Another alternative is the so-called New York rule. In New York the right to counsel commences once an attorney enters the proceedings. People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976). This rule has some federal support in a footnote in *Miranda*, which stated that Escobedo’s sixth amendment rights were violated when the police refused to allow Escobedo’s attorney to speak with him despite the request. *Miranda v. Arizona*, 384 U.S. at 465 n.35. See Rothblatt & Pitler, *Police Interrogation: Warnings and Waiver – Where Do We Go from Here?*, 42 NOTRE DAME LAW. 479, 494-96 (1967). The approach has, however, been rejected by lower federal courts. See United States v. Masullo, 489 F.2d 217 (2d Cir. 1973); United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973); Davis v. Burke, 408 F.2d 779 (7th Cir.), cert. denied, 396 U.S. 856 (1969).

One commentator has argued against the use of the New York rule. Kamisar, *What Is Interrogation?*, supra note 26, at 86-91. The objection to the New York rule is that it gives added protection to a person wealthy enough to afford a lawyer or fortunate enough to have others obtain a lawyer for him. The court in *Masullo* stated that this would be an impetus for organized criminals to appoint "house counsel." One means of reducing the impact of such
rule may be both too broad and too narrow in the police interrogation context. It is too narrow because it leaves the police free to act before judicial proceedings have begun and to use the fruits of such actions at trial.\textsuperscript{105} It is too broad because once judicial proceedings have begun the rule may eliminate the possibility of police action to elicit a confession even if the actions do not coerce the suspect.

In \textit{Williams}, the Court noted that Williams’ right to counsel had commenced because a warrant had been issued for his arrest and he had been arraigned.\textsuperscript{106} While there is little question that arraignment is sufficiently judicial to trigger the right to counsel,\textsuperscript{107} some courts have suggested that an arrest warrant alone may be sufficient.\textsuperscript{108} In considering an earlier point in time, such as the time of a warrantless arrest, problems of delineating limits arise. If police action alone were sufficient to trigger the right to counsel, arguably the Court should return to a rule which focusses on the nature of the police conduct, such as the custodial interrogation test or “focus” test.\textsuperscript{109} Since these tests have been rejected by the Court and are contrary to the \textit{Kirby} rule, the Court is unlikely to adopt one of these tests.

The right to counsel under \textit{Williams} is triggered once judicial proceedings have commenced against the suspect. These proceedings may take the form of an indictment or possibly an arrest warrant. There seems to be little justification for this rule except for the desire of the court to limit the potency of the right to counsel.

\textbf{B. Miranda v. Arizona}

\textit{Miranda} becomes operative when the suspect is subjected to custodial interrogation.\textsuperscript{110} This can occur either before or after the

\textsuperscript{105} See United States v. Maxwell, 383 F.2d 437, 441 (2d Cir. 1967), cert. denied, 389 U.S. 1057 (1968). The government agent who gathered the incriminating statements in \textit{Massiah} carried on similar activities against the other co-conspirators. The Second Circuit noted, however, that since these other co-conspirators were not under indictment at the time the agent met them, they were not protected by \textit{Massiah}.

\textsuperscript{106} Brewer v. Williams, 430 U.S. at 399.


\textsuperscript{108} See Patler v. Slayton, 503 F.2d 472 (4th Cir. 1974); State v. McCorgary, 218 Kan. 358, 543 P.2d 952 (1975), cert. denied, 429 U.S. 867 (1976); People v. Flores, 236 Cal. App. 2d 807, 46 Cal. Rptr. 412 (1965), cert. denied, 384 U.S. 1010 (1966). See also Terry v. Ohio, 392 U.S. 1, 26 (1968) ("An arrest is the initial stage of criminal prosecution. It is intended to vindicate society’s interest in having its laws obeyed . . . ."). \textit{But see} Gerstein v. Pugh, 420 U.S. 103 (1975) (a determination of probable cause after detention is not a critical state requiring the presence of counsel); Kamisar, \textit{What Is Interrogation?}, supra note 26, at 85 n.503.

\textsuperscript{109} If the Court did not rely on a test which focussed on function rather than procedure, it would create an arbitrary inequality among suspects and might discourage the use of a warrant. See United States v. Duvall, 537 F.2d 15 (2d Cir.), cert. denied, 426 U.S. 950 (1976).

\textsuperscript{110} Miranda v. Arizona, 384 U.S. at 444.
initiation of judicial proceedings. If it occurs afterwards, then presumably the *Williams* doctrine would also apply and the suspect could choose whichever approach best served his needs.

The custodial interrogation standard raises a theoretical problem. The *Miranda* decision mandates a right to counsel warning. Yet, according to *Williams*, there can be no right to counsel before judicial proceedings have commenced. The co-existence of these different standards might be attributed to the Court's interpretation of *Miranda* as a fifth amendment case rather than as an application of the sixth amendment. Thus, *Miranda* could be read to provide for a right to counsel but not the right to counsel.

One can argue that this position is too narrow a reading of *Miranda*. It is true that *Miranda's* primary purpose appears to be the development of a prophylactic rule which will protect fifth amendment rights. But that does not mean the sixth amendment is uninvolved. *Massiah*, for example, reflects a history of using the sixth amendment to protect fifth amendment rights. The mere fact that only one right is involved — self-incrimination — rather than the larger spectrum of rights typically associated with the need for counsel, does not mean that the right to counsel is therefore limited to that one right. For example, the right to counsel in corporeal lineup cases protects the due process right to a fair trial. The right to counsel in these cases, however, is not considered to be a prophylactic rule protecting due process rights, but rather a right unto its own.

It is more reasonable to recognize *Miranda* as an application of the sixth amendment for the limited purpose of counteracting the threat which a compelled confession could have on the eventual trial. This view would avoid much of the theoretical confusion created by the conflict between the *Williams* and *Miranda* rules as to when the right to counsel attaches. The *Williams-Kirby* rhetoric, requiring judicial proceedings to have commenced, would have to give way to allow the right to counsel to commence at custodial interrogations — a point at which the suspect, probably believes the prosecution has commenced. The purpose of the limitation to judicial proceedings, that is, not overexpanding the right to counsel, is served by allowing the right to exist only in those circumstances where there exists an inherent threat to fifth amendment interests.

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111 Id.
115 The *Kirby* decision itself would have to be re-thought. The desirability of limiting the
In the present state of the law, there appears to be two different approaches to determining when the right to counsel commences. Under *Williams*, the right to counsel attaches once judicial proceedings have commenced. Under *Miranda*, the "right to counsel" commences during custodial interrogations and such activities may occur before or after judicial proceedings have been initiated.

III. Waiver

The ease with which an accused may waive his rights is a measure of the strength of that right. Generally, the standard for waiver reflects the amount and force of evidence which the Court will require before it will find that a waiver occurred. In *Johnson v. Zerbst* the Court declared that a waiver of a constitutional right must be a knowing and intelligent relinquishment of a known right. Nevertheless, the standard for waiver may differ in different circumstances.

A. Brewer v. Williams

The waiver issue is the critical issue in *Williams*. The state argued that Williams was aware of his right to counsel and therefore his voluntary actions constituted a waiver of the right. The Court rejected this reasoning and held that the state courts had unconstitutionally placed the burden of proof on Williams rather than on the prosecution. If the only difficulty were the burden of proof, *Williams* would have been a simple case. But the Court went further to describe what standard of waiver should be applied by the lower courts. The precise standard is difficult to ascertain. On the one hand, the court stated that the standard for waiver before trial was the same as that at trial. On the other hand the Court described the proscribed conduct in a manner which suggested a lesser standard.

The strictest standard for waiver which the Court in *Williams* might have adopted requires the presence of an attorney to waive

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right to counsel may be justified on the basis of the importance of on-the-scene identifications and the availability of alternative means of proof of the accuracy of the identification technique for the defense. See Note, Pretrial Right to Counsel, 26 Stan. L. Rev. 399 (1974).

The hybrid approach suggested here has the salutary effect of directing the courts' attention to the hazards of police conduct rather than to the abstractions of the need for counsel after judicial proceedings have commenced. See Kamisar, What Is Interrogation?, supra note 26, at 81.

116 People v. Hobson, 39 N.Y.2d 479, 484, 384 N.Y.S. 2d 419, 422, 348 N.E.2d 894, 898 (1976) ("Indeed, it may be said that a right too easily waived is no right at all.").

117 304 U.S. 458, 464 (1938).

118 Brewer v. Williams, 430 U.S. at 401-02.

119 Id. at 404.

120 Id.

121 Id. at 405.
the sixth amendment right. In his dissent, Chief Justice Burger argued that the logic of the majority opinion dictated this result.\textsuperscript{122} The majority responded that they need not reach that issue since they could find the absence of a waiver regardless of the presence of an attorney.\textsuperscript{123} Nevertheless, the idea of requiring presence of counsel warrants consideration.

There are two bases for the argument that an attorney must be present before right to counsel can be waived. First, it has been argued that \textit{Williams} should be interpreted to mean that after a given point the suspect is presumed to need the assistance of counsel in any interaction with the state, as a protection against all deliberate elicitations.\textsuperscript{124} If this is true, it is reasonable that the decision to waive the right to counsel should also only be made after consultation with an attorney. A person who is incapable of directing his own affairs in interactions with the state must certainly be incapable of independently deciding whether he could use the assistance of counsel.\textsuperscript{125}

Second, the majority opinion in \textit{Williams} suggests that the standard for waiver before trial is the same as the standard at trial.\textsuperscript{126} In \textit{Faretta v. California},\textsuperscript{127} the Court stated the standard to be that the defendant must be "made aware of the dangers and disadvantages of self-representation, so that 'he knows what he is doing and his choice is made with eyes open.' "\textsuperscript{128} Arguably this standard will never be met by someone acting alone outside of the presence of a judicial officer. During a judicial proceeding an independent judicial officer can explain the dangers and disadvantages to the defendant. During a police interrogation only the police and an attorney are realistically available to make such explanations. The presence of an attorney is necessary, for it would be unreasonable to rely on the police to explain the very means by which the suspect may avoid their inquiries.\textsuperscript{129}

\footnotesize{\textsuperscript{122} 430 U.S. at 419 (Burger, C.J., dissenting).
\textsuperscript{123} Id. at 405-06.
\textsuperscript{124} See notes 65-70 and accompanying text \textit{supra}.
\textsuperscript{126} 430 U.S. at 404 ("[I]t was incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege' . . . . This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings.'").
\textsuperscript{127} 422 U.S. 806 (1975).
\textsuperscript{128} Id. at 835.
\textsuperscript{129} Kamisar, \textit{Kauper's Judicial Examination of the Accused Forty Years Later-Some Comments on a Remarkable Article}, 73 Mich. L. Rev. 15, 25 (1974) ("Chief Judge Bazelon has put it less kindly: 'A system that places reliance on police warnings places[s] a mouse under the protective custody of the cat.' ").}
Chief Justice Burger argued that this requirement is inconsistent with the *Faretta* holding. It is not inconsistent, however, if *Faretta* is limited to the at-trial situation or if one interprets *Faretta* as allowing a person to dismiss his attorney after a first consultation in the police interrogation situation. The Chief Justice also objected to the requirement of consultation before waiver because it "operates to 'imprison a man in his privileges,' . . . It denigrates an individual to a nonperson whose free will has become hostage to a lawyer." 130 It is difficult to understand how consultation would subject a suspect to the desires of his attorney if the suspect retains the ability to dismiss his attorney. Perhaps the Chief Justice believes an attorney has an undue control over his client. If so, the issue in *Williams* would appear to be whether the Court prefers the control of the suspect's attorney over the control the police can exert. That the police can exercise such control was acknowledged by the Court in *Miranda*. Moreover, the requirement of an attorney's presence is not unreasonable. The New York courts have recently reaffirmed their commitment to such a rule. 131

The majority in *Williams* indicates, however, that the Court does not intend to require the presence of counsel before a valid waiver will be found. The Court suggests, in its description of what Detective Leaming did wrong, that a lesser standard of waiver may operate in interrogations:

Despite Williams' express and implicit assertion of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams. Leaming did not

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A third argument can be made for the presence of an attorney before a waiver. The Code of Professional Responsibility states that:

During the course of his representation of a client a lawyer shall not . . . communicate or cause another to communicate on the subject of representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or by law is authorized to do so.

ABA, CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule 7-104(1) (1977). By viewing the prosecutor as a lawyer, some have argued that once a suspect is represented it is unethical to approach him in the absence of his attorney. United States v. Thomas, 474 F.2d 110 (10th Cir.), cert. denied, 412 U.S. 932 (1973); United States v. Springer, 460 F.2d 1344 (7th Cir. 1972) (Stevens, J., dissenting). Others have stated that this is no more than an administrative rule which they refuse to apply. Springer, id. (majority opinion).

130 Brewer v. Williams, 430 U.S. at 419.

131 People v. Hobson, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894 (1976). See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §153, at 334 (E. Cleary ed. 1972) ("The New York rule seems more appropriate. While it is in theory possible for an accused to form the mental state required for a waiver without consultation with an attorney who is already in the case, the danger of interrogators using this as a means of encouraging waivers for impermissible purposes seems sufficient to justify a general rule requiring that if an accused is represented by counsel, he may not thereafter be interrogated without counsel's presence unless he waives this right after consultation with counsel and in counsel's presence.").
preface this effort by telling Williams that he had a right to
the presence of a lawyer, and made no effort at all to ascer­
tain whether Williams wished to relinquish that right. The
circumstances of record in this case thus provide no rea­
sonable basis for finding that Williams waived his right to
the assistance of counsel. 132

This language suggests that a waiver might have been possible if
Leaming had given Williams an additional warning of his sixth
amendment right and had asked if Williams wished to relinquish
that right. Such activities, however, certainly do not amount to an
explanation of the disadvantages of proceeding pro se. Furth­
more, given the impact of the interrogative device used, the Chris­
tian Burial Speech, such additional comments would probably have
had little impact on Williams’ state of mind. 133 An express request
for a waiver would be a helpful standard because the Court would
not have to assume the suspect’s intent. But in Williams even an
express waiver would have been tainted by the coercive impact of
the interrogation.

It remains uncertain whether the majority intended their descrip­
tion to constitute a minimal requirement for a waiver, or merely a
statement that they could find no waiver despite the absence of
counsel. If the Court shares the fears of Chief Justice Burger, it
may refuse to require the presence of an attorney. Perhaps the
Court will accept evidence that the suspect could determine his
own best interests but set a demanding standard for such evidence
in the face of coercive techniques employed by the police. The evi­
dence should be more than the mere presence of a warning and
perhaps even more than an express waiver. 134

The issue of the extent to which a suspect must be aware of his
own best interests divided the majority and dissent in Williams.
The dissenters suggested that, as long as the suspect knew that he
had the right to counsel and was able to assert the right, any sub­
sequent confession represents a waiver of the right. 135 Justice
White noted that Williams had asserted his right several times be­
fore the Christian Burial Speech and was no less capable of re­

132 430 U.S. at 405.
133 See Kamisar, Williams-Record, supra note 1. Professor Kamisar argues that there
was not a single speech but a series of questions and pleas by Detective Leaming. There is
some evidence of this in the majority opinion’s notation that Williams asserted his right sev­
eral times. See text accompanying notes 8-14 supra. A single additional warning at any one
point probably would have had little effect.
134 Id.
135 Brewer v. Williams, 430 U.S. at 418 (Burger, C.J., dissenting); id. at 433 (White, J.,
dissenting).
asserting his right thereafter. This viewpoint is suggestive of the voluntariness test: if the suspect knows his rights, the Court need only ask if the confession was voluntary. A more meaningful interpretation of the requisite knowledge for waiver is that the suspect must understand not only that he has a right but also the potential benefits which the presence of counsel could provide. This interpretation is consistent with the standard of waiver expressed in *Faretta* — that the suspect (defendant) will be allowed to proceed *pro se* only if he is aware of the dangers. This interpretation also avoids the pitfalls of the voluntariness rule.

This division over the issue of the standard for waiver is also reflected in the scope of proscribed conduct suggested by the majority and dissent. The dissenters' interpretation of the standard for waiver would allow a broad range of police conduct. Only coercive conduct that threatened to produce an involuntary confession would be proscribed. As noted above, the dissenters did not believe that the Christian Burial Speech was coercive. To the majority, however, it appears that the critical determination was whether Williams understood the potential benefits of counsel. Any police conduct that interfered with the suspect's assessment

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136 *Id.*

137 It is interesting to note, however, that Chief Justice Burger distinguished the voluntariness test, quoting from *Shnecklothe v. Bustamonte*, 412 U.S. 218, 238 n.25 (1973):

> [T]he question whether a person has acted "voluntarily" is quite distinct from the question whether he has "waived" a trial right. The former question, as we made clear in *Brady v. United States*, 397 U.S. [742,] 749, can be answered only by examining all the relevant circumstances to determine if he has been coerced. The latter question turns entirely on the extent of his knowledge.

430 U.S. at 418.

Chief Justice Burger believed this standard was fulfilled because Williams knew he had the right to counsel, the Court did not question his mental competence, and Williams knew that leading the police to the body would incriminate himself. None of these facts, however, indicate a knowledge of the benefits which the presence of counsel might provide. This is presumably the "knowledge" to which *Shnecklothe* referred. Furthermore, the Court clearly does suggest a limitation of Williams' mental competence by finding that the Christian Burial Speech was an interrogation. To accept Chief Justice Burger's dissent and also accept the fact that the Speech was an interrogation is to suggest that the Court need only ask if the suspect's mental competence was retained after the inducement by the police. As noted in the text, this is no different from the voluntariness test. Chief Justice Burger then argues that no interrogation was proven "simply because it [the Speech] was followed by an incriminating disclosure." 430 U.S. at 419-20. This states the view that if the confession were not the result of the Speech it would therefore be admissible. This viewpoint is no different than the view that the confession was voluntary. Furthermore, it is difficult to believe that the Speech was not intended to elicit the confession (and not merely a chance precursor), because the majority quotes Detective Learning's testimony admitting his intent. *Id.* at 339. The issue in *Williams* was not the presence of a confession, but the manner in which the police produced the confession. See *id.* at 408 (Marshall, J., concurring) ("It is this intentional police misconduct -not good police practice — that the Court rightly condemns.").

138 *See* note 112 *supra.*

139 *See* notes 32-34 *supra.*

140 *See* note 60 and accompanying text *supra.*
of those benefits will constitute an elicitation in violation of the right. A suggestion by the police, for example, that it would be more “decent” if the suspect confessed, while not necessarily coercive, is a recommendation by the police that the suspect not assert the right to counsel. Such a suggestion should constitute an elicitation, and, therefore, proscribed conduct.

B. Miranda v. Arizona

The primary impact of Miranda was to require the police to warn a suspect of his rights and obtain a waiver of those rights before subjecting him to custodial interrogation. There is, however, a second level Miranda right that controls the possibility of waiver after the right to silence or the right to counsel have been asserted.

Under Miranda, an assertion of the right to silence or to counsel affects the standard for waiver, at least according to lower court interpretations of that decision. If the right is never asserted, a court may find that there was an implied waiver of the right — that is, that the actions of the accused effectuated a waiver of his rights without an express statement. Once a right is asserted under Miranda, however, the courts may apply a stricter standard. If the suspect asserts his right to silence, under Michigan v. Mosley the police may interrogate the suspect as long as the police scrupulously observe the suspect’s right to cut off questioning. Mosley suggests that by answering subsequent questions the suspect waives his right to silence. Although this is an implied waiver, it will be carefully scrutinized by the courts to assure the freedom of the suspect to reassert his desire to stop the questioning.

141 It is conceivable that the statements by the police have no effect upon the judgement of the suspect and are, therefore, not proscribed. It should be the state’s burden to prove this. The Court may have an occasion to consider such proof in Rhode Island v. Innis (R.I. Aug. 9 1978), cert. granted, 47 U.S.L.W. 3566 (Feb. 20, 1979) (No. 78-1076). In that case the suspect asserted his right to counsel under Miranda and during the ride to the police station after an arrest passed a school for handicapped children. An arresting officer commented, “God forbid one of them [the children] might find a weapon with shells and they might hurt themselves.” See N.Y. Times, Feb. 27, 1979, at B7, col. 1. The case does not, apparently, involve the right to counsel under Williams, but the issue is the same. Once the right to counsel began the police should have been proscribed from activity which deliberately suggested that the suspect not assert his right. See Kamisar, What Is Interrogation?, supra note 26, at 78 n.461 (“A forceful argument can be made that once a suspect asserts his Miranda right to counsel he is essentially in the same position as one whose Massiah right to counsel has attached.”).


143 423 U.S. 96 (1975).
If a suspect asserts his right to counsel, the standard of waiver to be applied is less certain. *Miranda* stated that “[i]f an individual states that he wants an attorney, the interrogation must cease until an attorney is present.” If the police claim that the suspect consulted his attorney but later made a confession, the Court noted that “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain or appoint counsel.” The lower courts have split over whether the burden is so heavy as to require the presence of an attorney before waiver.

If the Supreme Court considers the issue, it seems unlikely that it will require the presence of an attorney for a waiver under *Miranda*. It could have decided the issue under *Williams*, but suggested a lesser standard. Therefore, if the right to counsel does not require the presence of an attorney for a waiver, it is improbable that the Court would find that the prophylactic rule of *Miranda* requires such a presence.

In his dissent to *Williams*, Justice White argued that a waiver under *Williams* should be no different than a waiver under *Miranda* and that the latter could be found by implication from the actions of the accused. From this he argued that Williams had waived his right to counsel. This implied waiver standard for *Miranda* is troubling. First, the implied waiver standard ignores the impact of police action in custodial surroundings. The right to counsel allows the suspect to intelligently choose his course of action. Once the suspect asserts the right to counsel under *Miranda*, or once the judicial system presumes that the suspect is incapable of proceeding

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144 384 U.S. at 474.
145 Id. at 475.
146 The Fifth Circuit has held that the heavy burden is impossible to meet unless counsel is present. Nash v. Estelle, 560 F.2d 652 (5th Cir. 1977). See also United States v. Blair, 470 F.2d 331 (5th Cir. 1972); United States v. Massey, 550 F.2d 300 (5th Cir. 1977); United States v. Priest, 409 F.2d 491 (5th Cir. 1969). The Ninth Circuit has held that the right to counsel may be waived under the *Mosely* standard. U.S. v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir.), cert. denied, 98 S. Ct. 2266 (1978). Other cases have decided the issue without considering it as directly as these cases. See United States v. Charlton, 565 F.2d 86 (6th Cir. 1977), cert. denied, 434 U.S. 1070 (1978); United States v. Massey, 550 F.2d 300 (5th Cir. 1977); United States v. Boston, 508 F.2d 1171 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975); United States v. Mandleb, 502 F.2d 1103 (9th Cir. 1974); United States v. Tucker, 435 F.2d 1017 (9th Cir. 1970), cert. denied, 401 U.S. 976 (1971).
147 See notes 132-33 and accompanying text supra.
148 430 U.S. at 435-36. The cases cited by Justice White for the proposition are cited at note 142 supra. These cases do indicate that a waiver may be implied by acts, but none of them suggest such a conclusion after the suspect has once asserted his right to counsel.
149 Miranda v. Arizona, 384 U.S. at 469 (“The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual’s right to choose between silence and speech remains unfettered . . . .”).
under the Williams-Kirby doctrine, one cannot thereafter assume that the suspect's actions are intelligent. The request for counsel constitutes an open expression of inability on the part of the suspect to protect his own interests. This inability is compounded by the reality that the only source of information available to the suspect is from the government agent. Thus, there is no way to assume that after the suspect says he lacks the capability to choose he has somehow regained that capability. The Court must either provide an attorney or possibly measure the waiver by the at-trial standard and ask if the suspect has the intelligence to decide in fact.

A second troubling aspect of this implied waiver standard is that it establishes a dichotomy between Miranda and Williams. Williams rejects the argument that a suspect can impliedly waive his

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150 Such a presumption arises, for example, where the suspect is faced with the "intricacies" of criminal law. See note 97 supra.

151 Justice White, concurring in the result in Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1975), explains:

[T]he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.

This statement haunted Justice White in Williams. He argued it was inapplicable for two reasons. First, Williams did not indicate a desire to be free of questions outside the presence of counsel. But Williams' statement that he would tell all after he consulted with his Des Moines attorney was an indication that he did not wish to speak to Leaming. Furthermore, Justice White's argument suggests that a suspect must not only assert his desire for counsel but also ask that in counsel's absence no questions be asked of him. Yet Miranda states that the right to counsel assertion alone must stop the interrogation. See note 144 supra. Second, Justice White argued that the Christian Burial Speech was not an interrogation. This argument is relevant only if one accepts his assumption that the case should be decided on Miranda grounds. Williams does not require interrogation. Even if it were a Miranda case, the argument is unpersuasive, for Miranda stated: "Any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." 384 U.S. at 476.

Justice White observed in his dissent that the only basis for the majority decision is that it distinguishes between being asked a question (the right to counsel) and being protected from answering a question (Miranda). This he described as a "wafer-thin distinction" which cannot determine whether a guilty murderer should go free. 430 U.S. at 436. Clearly, however, the asking of the question is the means by which the police both interfere with the right to counsel and compel a response in violation of the fifth amendment. The answer is merely the intended result. Whether the distinction can withstand the attack that it frees a guilty murderer depends both upon the importance one attaches to the right to counsel and the importance one attaches to any other procedural limitation upon the police.

152 This dichotomy has been recognized by several courts which have relied upon the Massiah doctrine when Miranda appeared to provide less protection. See United States v. Miller, 432 F. Supp. 382, 387-88 (E.D.N.Y. 1977), aff'd without opinion, 573 F.2d 1297 (3d Cir. 1978); United States v. Satterfield, 417 F. Supp. 293 (S.D.N.Y. 1976); United States ex rel. Lopez v. Zelker, 344 F. Supp. 1050, 1054 (S.D.N.Y.), aff'd without opinion, 465 F.2d 1405 (2d Cir.), cert. denied, 409 U.S. 1049 (1972); United States v. Massimo, 432 F.2d 324, 327 (2d Cir. 1970) (Friendly, C.J., dissenting).
right to counsel. The difference may be explained by stating that *Williams* protects sixth amendment rights, whereas *Miranda* protects fifth amendment rights. It is better, however, to view *Miranda* as giving the suspect the freedom to decide. This is the same purpose the sixth amendment fulfills for all other rights, and the waiver of its protections should be measured as it is in other sixth amendment situations.\(^{153}\) Justice White is correct in noting that there should be no difference in the standard for waiver between *Miranda* and *Williams* — but the standard chosen should be that of *Williams* and not implied waiver.\(^ {154}\)

### IV. Toward a Unified Theory of the Right to Counsel

Throughout the article it has been suggested that *Miranda* and *Williams* are closely related doctrines. Where differences in application have occurred they have been due to the view that *Miranda*'s focus is on compulsion whereas *Williams*' focus is on the ability of the suspect to assert his right to counsel. It is suggested that a unified theory can be constructed.

It is essential to a unified theory that *Miranda* be re-analysed. It has been viewed by the Court as a mechanism to protect fifth amendment rights alone. Since the key to the fifth amendment is compulsion, the Court could apply its protections earlier in the criminal process than the right to counsel and rely on a less strict standard for waiver. There is, however, a sixth amendment side to *Miranda* which is not tied to the presence of compulsion. In referring to the need for counsel the Court noted that the attorney's presence was necessary to allow the suspect freedom to choose whether to speak to the police.\(^ {155}\) This concept appears to be no different than the view expressed that the freedom to interpose counsel was protected by *Massiah*. It can be argued, therefore, that *Miranda* applies the sixth amendment for the more limited purpose of protecting the suspect's ability to cut off questioning.\(^ {156}\) The focus is not on the compulsion but on the ability to assert the right.

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\(^{154}\) It is interesting to note that in *Williams* the Court's discussion of the proper standard for waiver quotes from the lower court's discussion of *Miranda*. This suggests that whatever standard is eventually established, it should be the same under either doctrine.

\(^{155}\) 384 U.S. at 469 ("Therefore, the right to have counsel present at the interrogation is indispensible to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remain unfettered ...") (emphasis added).

\(^{156}\) There are several other aspects of *Miranda* which suggest its reliance on the sixth amendment. First, the decision notes that custodial interrogation was what the Court meant
This focus is an important factor in strengthening Miranda. The Miranda warnings are not suggestions of rights which can be used by the suspect, they are descriptions of rights the suspect already has and of which he may choose to remind the police.\textsuperscript{157} Thus, the presence of compulsion may be important in deciding whether the Miranda doctrine applies. Once applicable, the focus of decision shifts to grounds closely related to sixth amendment decision — whether the suspect had the ability to use his rights as a barrier.

Taking this view, the difficulties which arise in the interaction between Miranda and Williams can be more easily resolved. Once a suspect is in custody, the term "interrogation" in Miranda should be read as broadly as it is meant in Massiah or Williams. Custody creates the potential for compulsion because the police are in control and any \textit{post-facto} judgments must rely on their version of the facts. The custody factor still distinguishes the doctrines but it is the only distinguishing characteristic. The time at which the right to counsel attaches is at custodial interrogation or, in the absence of custodial interrogation, at the initiation of judicial proceedings. The Court may still wish to assume that the prosecution represents a greater threat to the suspect after judicial proceedings have begun and on that basis apply a proscription to non-custodial conduct. The right to counsel may be waived only under the strict standard of Williams. The doctrine of implied waiver, based on the absence of compulsion, is inapplicable. The potential for compulsion signals the availability of the right, and, once available, the waiver of the right to counsel under Miranda is theoretically no different than a waiver under Williams. The fact that a suspect "asserts" his right to counsel should make no legal difference, but it presents an important factual distinction. Once the right is asserted, the Court should not thereafter assume that a suspect can

\textsuperscript{157} See, e.g., Miranda v Arizona, 384 U.S. at 471 ("In \textit{Carnley v. Cochran} ... we stated: '[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on request.' This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation ... . Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer ... ").
regain the necessary intelligence to decide what is in his own best interests and should require the presence of an attorney before a waiver will be accepted.

**Conclusion**

At present there are two sets of protections available to the accused who has made self-incriminating remarks: those under *Miranda* and those under *Williams*. A study of these protections suggests that they are theoretically very close. Nevertheless, there are differences in the applicability of either set of protections. *Williams* proscribes all deliberate elicitations, while *Miranda* strikes out at the narrower range of police conduct involving interrogations. The latter requires the presence of coercion, the former requires only an interference with the ability of the suspect to interpose his attorney between himself and the state.

*Williams* declared that the right to counsel commences when judicial proceedings such as arraignment or a warrant for arrest have been initiated. *Miranda* rights may attach before that. These differences are perhaps reconciled by interpreting *Miranda* as nothing more than a fifth amendment case. But they may be better reconciled by recognizing *Miranda* as a “limited purpose” sixth amendment rule.

*Williams* adopts a strict standard for waiver, although it may not be so strict as to require the presence of counsel before a waiver can be accepted. *Williams* suggests that a waiver must be express and it will not be found after an interrogation unless there are further warnings. Some have argued that there is a lesser standard for waiver under *Miranda*, but there is no reason that the two standards of waiver should not be the same.

To avoid the theoretical and practical confusion which *Williams* and *Miranda* may create, this article has proposed a unified rule. Under that approach, *Miranda* is to be viewed as an application of the sixth amendment, but applicable only where fifth amendment rights are threatened.

—Mitchell Leibson Chyette