BOOK REVIEWS

POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY. By Yale Kamisar. Michigan: Michigan Press, 1980. Pp. xx, 323. Price $17.50.

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Over the past two decades, Yale Kamisar has been one of the true giants in the field of criminal procedure. As the essays by Kamisar collected in his recent book, *Police Interrogation and Confessions*,[1] demonstrate, his most powerful writing has been in the area of police interrogation and confessions. Perhaps no other legal scholar's writings have ever played so great a part in formulating the relevant questions, in providing insight into the critical issues, and, ultimately, in shaping the constitutional doctrine established by the Supreme Court as have Kamisar's in this area.

Kamisar's continuing influence can be attributed to a variety of considerations. Undoubtedly, his power as a writer enables him to dramatize issues, giving them a visibility and a meaning they would otherwise lack. For example, his discussion[2] of the police interrogation techniques described in the Inbau & Reid interrogation manual[3] transformed the informed lawyer's image of a police interrogation from one in which the suspect is "interviewed" by the police[4] to one in which the police extort information through a series of psychologically effective techniques.[5] Similarly, the essay "Equal Justice in the Gatehouses and Mansions of American Criminal Procedure"[6] exposed the disparity between a criminal

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[1] Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS (1980).

[2] *Id.* 1-6.

[3] F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962).

[4] For example, Kamisar notes that in State v. Biron, 266 Minn. 272, 123 N.W.2d 392 (1963), a case in which the 18-year-old suspect was subjected to police interrogation techniques for six hours, the Court repeatedly refers to the police interrogation as "interviews." Y. KAMISAR, *supra* note 1, at 99 n.3.

[5] The ultimate fruit of Kamisar's efforts can be perceived in the nine pages of the *Miranda* majority opinion that support the view that police interrogation is inherently coercive by recounting at length the interrogation techniques described in the police manuals. Miranda v. Arizona, 384 U.S. 436, 448-56 (1966).

[6] Y. KAMISAR, *supra* note 1, at 27-40.

defendant's rights at the pretrial and trial stages to public view by expressing it in an exceptionally vivid metaphor:

> The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? Ah, there's the rub. Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.
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> In this "gatehouse" of American criminal procedure —through which most defendants journey and beyond which many never get—the enemy of the state is a depersonalized "subject" to be "sized up" and subjected to "interrogation tactics and techniques most appropriate for the occasion"; he is "game" to be stalked and cornered. Here ideals are checked at the door, "realities" faced, and the prestige of law enforcement vindicated. Once he leaves the "gatehouse" and enters the "mansion"—if he ever gets there—the enemy of the state is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated.[7]

As this language demonstrates, Kamisar is similar to his arch-rival Fred Inbau in one respect: both of these law professors are able to write in a way that captures the imagination of a lay audience.[8] Kamisar has other abilities, however, that distinguish him from other, merely articulate authors. First, he is a formidable scholar. Indeed, the depth of his scholarship—in terms of his knowledge of relevant authorities, including Supreme Court cases, lower court authorities, and historical antecedents—is so exceptional that it is almost unparallelled. Moreover, he is able to channel his expertise so that it bears directly on the critical legal issues currently confronting the Supreme Court. Combining scholarship with a high order of legal craftsmanship, these essays focus on the central legal issues relating to police interrogation and analyze these issues with extraordinary precision and clarity.

Kamisar's unique talents are never more in evidence than in his two essays on the Supreme Court's decision in *Brewer v. Williams*.[9] The first of these essays[10] incisively probes the one im-

[7] *Id.* 31-32.

[8] In his 1977 tribute to Inbau, Kamisar voices his respect for Inbau's ability to reach a broad lay audience. *Id.* 103.

[9] 430 U.S. 387 (1977).

[10] Y. KAMISAR, *supra* note 1, at 113-37.

portant aspect of the police interrogation cases that the Supreme Court has never really confronted; the second,[11] by illuminating legal issues that were somewhat obscured by the Court's analysis in *Williams,* has apparently led the Court to accept the essay's analysis of these issues as the framework within which future related constitutional issues will be decided.

Brewer v. Williams was a murder case in which police detective Leaming delivered the now-famous "Christian burial speech" to the defendant Williams while Williams was being transported by police car from Davenport, Iowa to stand trial for murder in Des Moines, Iowa.[12] As recounted by the Supreme Court, Detective Leaming began his speech by addressing the defendant (who was very religious) as Reverend, and continued as follows:

> I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched way from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.[13]

Shortly after hearing this speech, Williams disclosed incriminating evidence, including the location of the victim's body.[14] The Court held that these incriminating disclosures were obtained in violation of the defendant's sixth amendment right to counsel and were therefore inadmissible.[15]

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[11] *Id.* 139-224.

[12] For a detailed discussion of the facts in *Williams,* see *id.* 113-17.

[13] 430 U.S. at 392-93.

[14] *Id.* 393.

[15] *Id.* 406.

By closely scrutinizing the record in the *Williams* case, Kamisar's first essay demonstrates that Detective Leaming actually testified to two significantly different versions of the "Christian burial speech." [16] Kamisar provides a skillful and interesting analysis of the implications of these variations, discussing the significance of the discrepancies within the context of the *Williams* litigation. His ultimate point, however, is that the very presence of such discrepancies reveals the inadequacy of the existing method of litigating issues relating to police interrogation. The facts relevant to such questions generally are developed solely by testimony of police officers and the defendant. In the likely case of a conflict in credibility between the defendant and the officers, the latter almost always will be believed.[17] Thus, in most cases, the facts relevant to the critical constitutional issues will be provided by the officers' characterization of the pertinent events.

In *Williams,* for example, Detective Leaming could quite conceivably have described his "speech" to Williams as merely a comment "that the weather was beginning to turn bad and that discovery of the body and a decent burial for the child might be delayed by snow covering the body." [18] This characterization, though not inaccurate, would almost certainly alter judicial perceptions of Leaming's speech. The dissent's description of the speech as mere conversation [19] would be less questionable, and the majority's conclusion that the detective "designedly set out to elicit information" [20] would be less firmly supported.

To improve the efficacy of the litigation process, Kamisar proposes that, whenever feasible, conversations between suspects and law enforcement officials or their agents should be tape recorded.[21] The purpose, of course, is to guarantee that an objective, reliable account of the relevant facts be available in court. As Kamisar

[16] Y. KAMISAR, *supra* note 1, at 117-19.

[17] The *Williams* case was unusual in that there were conflicts in testimony between not only the defendant and the police but also between the police and defendant's two attorneys. Kamisar points out that when conflicts occurred between Williams and Detective Leaming, Leaming's version was accepted, *id.* 116, but when the attorneys' testimony was at variance with Leaming's, "the federal district court disbelieved Leaming all three times," *id.* 117.

[18] This was how the speech was characterized in the state of Iowa's petition for a writ of certiorari. *See id.* 136. As Kamisar notes, Detective Leaming originally described the speech as "quite a discussion relative to religion." *Id.* 131. The content of the speech was disclosed only on cross examination and only when Leaming voluntarily disclosed it. *Id.*

[19] 430 U.S. at 439-40 (Blackmun, J., dissenting).

[20] *Id.* 399.

[21] Y. KAMISAR, *supra* note 1, at 133.

emphasizes,[22] the proposal for recording verbal exchanges between police and suspects is not innovative; similar procedures have been recommended by others over the past several decades.[23] But Kamisar's incisive analysis of the implications of the *Williams* record lends special credence to his concluding observations about the glaring problems with our present system. If no change is made in the litigation process, he asserts that, in the area of police interrogation, it may not matter "whether new stories are added to the temples of constitutional law or old ones removed. For any time an officer unimpeded by any objective record distorts, misinterprets, or overlooks one or more critical events, the temple may fall. For it will be a house built upon sand." [24]

Kamisar's final essay shifts to an analysis of the legal issues raised by the majority and dissenting opinions in *Williams*. Justice Stewart's majority opinion concluded that Detective Leaming's "Christian burial speech" violated the defendant's sixth amendment right to counsel because the speech constituted "interrogation" of the defendant [25] at a time when his sixth amendment right was in effect and had not been waived. Although not disputing that the defendant's sixth amendment right was in effect, the dissenting opinions argued either that the right was waived [26] or that the "Christian burial speech" was not violative of the sixth amendment because the speech was not "interrogation." [27]

Kamisar begins his analysis by focusing on the "interrogation" issue. After examining *Miranda* and its antecedents, he convincingly demonstrates that the "Christian burial speech" constitutes "interrogation" within the meaning of the *Miranda* case.[28] He subsequently notes, however, that because the defendant's sixth amendment right is at stake, the issue whether there is "interrogation" within the meaning of *Miranda* should be constitutionally irrelevant. In *Massiah v. United States*,[29] the decision on which the *Williams* majority relies, the Court held that when the sixth amendment right to counsel is in effect, the prohibition imposed on

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[22] *Id.* 135.

[23] *See, e.g.*, Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. CRIMINOLOGY & POL. SCI. 1014, 1017 (1934).

[24] Y. KAMISAR, *supra* note 1, at 137.

[25] 430 U.S. at 400. At one point, the majority characterizes the speech as "tantamount to interrogation." It then goes on to specify that no sixth amendment protection "would have come into play if there had been no interrogation." *Id.* 400.

[26] *Id.* 435 (White, J., dissenting).

[27] *Id.* 440 (Blackmun, J., dissenting).

[28] Y. KAMISAR, *supra* note 1, at 151-60.

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

the government is that they may not "deliberately elicit" incriminating disclosures from the defendant. By using a series of aptly constructed hypotheticals,[30] Kamisar develops the distinctions between "interrogation" within the meaning of *Miranda* and "deliberate elicitation" within the meaning of *Massiah,* demonstrating that the protection afforded by *Massiah* is considerably broader than that afforded by *Miranda.*

Thus, Kamisar's essay seeks to establish two principal theses. First, *Miranda* type "interrogation" must include something more than direct questioning by the police; specifically, "interrogation" occurs whenever the police engage in conduct that constitutes "compulsion" within the meaning of the privilege against self-incrimination.[31] Second, the protection afforded defendants by *Miranda* is both different and less broad than the protection afforded by the sixth amendment right to counsel; the former protects defendants from government "interrogation" whereas the latter safeguards suspects against "deliberate elicitation" of incriminating disclosures by the government.

Despite its intimations to the contrary in *Williams,* the Court essentially adopted these twin theses in two cases decided last term. *Rhode Island v. Innis*[32] established that "interrogation" includes not only direct questioning, but also all speech or conduct that is its "functional equivalent";[33] *Innis* and *United States v. Henry*[34] made it clear that the *Miranda* and sixth amendment protections are distinct constitutional safeguards,[35] and the *Henry* Court followed *Massiah* (and Kamisar) by holding that the sixth amendment right to counsel prohibits "deliberate elicitation" of incriminating statements by the government.[36]

There are, of course, important issues that must be addressed within this constitutional framework. One such issue concerns the triggering of the sixth amendment right to counsel. Because so much turns on whether that right is in effect, defining the precise circumstances under which the right becomes operative is par-

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30 Y. KAMISAR, *supra* note 1, at 175-88.

31 *Id.* 160.

32 100 S. Ct. 1682 (1980).

33 *Id.* 1689.

34 100 S. Ct. 2183 (1980).

35 Thus, in *Innis,* the Court dropped a footnote that cited Kamisar's second *Williams* essay and specified that the protections afforded by the fifth and sixth amendments "are not necesarily interchangeable, since the policies underlying the two constitutional protections are quite distinct." 100 S. Ct. at 1689 n.4. *See also* United States v. Henry, 100 S. Ct. at 2187.

36 100 S. Ct. at 2186-87.

ticularly important. In *Williams,* the Court said that the defendant's sixth amendment right comes into effect "at or after the time that judicial proceedings have been initiated against him." [37] Kamisar's essay predicts that the Court eventually will adopt some variation of the New York rule,[38] and hold that the defendant's sixth amendment right will be invoked when it is clear to the police that a defendant in custody is represented by counsel.[39]

Neither of these rules, however, appears well-designed to safeguard the individual interests involved.[40] A notion that the defendant is entitled to the protection of counsel as soon as adversary proceedings against him have begun appeared to undergird the original sixth amendment decisions.[41] Obviously, the commencement of adversary proceedings cannot be determined by reference to whether the defendant happens to be represented by counsel. In addition, to draw the line solely on the basis of the occurrence of a preliminary arraignment is unduly formalistic: not only is the timing of the preliminary arraignment generally within the exclusive control of the police,[42] but also the arraignment itself will not generally signal any real change in the degree of adversary relationship between the police and the defendant.

Since *Williams,* the Court has not expressly articulated any additional criteria for determining when the defendant's sixth amendment right will be invoked. In *Rhode Island v. Innis,* however, the Court implicitly rejected several approaches that appear more promising than a strict focus on whether the defendant's preliminary arraignment has taken place. After *Innis,* it is clear that neither the focus of the investigation on the defendant,[43] nor the defendant's arrest,[44] nor even the defendant's assertion of his right

[37] 430 U.S. at 398.

[38] *See, e.g.,* People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

[39] Y. KAMISAR, *supra* note 1, at 214.

[40] For the expression of a similar view, see *id.* 211-12, 220.

[41] *See* Escobedo v. Illinois, 378 U.S. 478, 493-94 (1964) (Stewart, J., dissenting). With respect to defining the point at which the sixth amendment attaches, the Court appears to have accepted the view expressed in Justice Stewart's *Escobedo* dissent. *See, e.g.,* Kirby v. Illinois, 406 U.S. 682, 689 (1972). *See generally* Grano, Rhode Island v. Innis: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions,* 17 AM. CRIM. L. REV. 1, 6-7 (1979).

[42] *See* Y. KAMISAR, *supra* note 1, at 212.

[43] This line was suggested by the majority opinion in *Escobedo. See* 378 U.S. at 490.

[44] In one form or another, this line has been suggested by a number of commentators. *See, e.g.,* White, *Police Trickery in Inducing Confessions,* 127 U. PA. L. REV. 581, 591-92 (1979).

to an attorney in response to *Miranda* warnings[45] will be sufficient to implicate the sixth amendment right to counsel.[46]

One as yet unconsidered approach that appears to be superior to an exclusive focus on whether the defendant has been formally arraigned would be to hold that a defendant's sixth amendment right will come into effect as soon as an arrested defendant has been formally arraigned *or* as soon as there has been "unnecessary delay"[47] by the police in bringing an arrested defendant to arraignment. This rule would arguably strike a reasonable accommodation between the competing interests involved. From the police perspective, defining the commencement of the adversary proceedings will inevitably be arbitrary because, as Judge Friendly has noted,[48] when the police attempt to elicit information from a suspect in custody, they might be concerned both with general investigation and with strengthening the specific case against the suspect. It may therefore be unduly burdensome from the police perspective to hold that the adversary process begins at the point of arrest.

On the other hand, although it is obviously impossible to define the precise moment at which the investigatory phase shifts into the adversary one, it does not appear unreasonable to presume that this point has been reached if the suspect has been held so long that the police could have reasonably brought formal charges against him. This rule will not preclude attempts to elicit information from the suspect at the stationhouse, but it will provide some additional protection for individuals in that the potential legitimate

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[45] In his dissenting opinion in *Innis*, Justice Stevens took the position that when, in response to the *Miranda* warnings, the defendant asserted his right to an attorney, this should be sufficient to trigger the defendant's sixth amendment right to counsel. *See* 100 S. Ct. at 1694 n.7 (Stevens, J., dissenting).

[46] In *Innis*, all of these events had taken place prior to the defendant's disclosure of incriminating evidence. Nevertheless, the Court took pains to emphasize that the admissibility of the incriminating disclosures was not to be determined on the basis of the sixth amendment decisions. *See id.* 1689 n.4.

[47] "Unnecessary delay" was defined by the Supreme Court in administering the *McNabb-Mallory* rule. The Court held that, pursuant to the Court's supervisory power over the federal courts, statements obtained by federal agents after an "unnecessary delay" in bringing the defendant to the nearest available magistrate would be inadmissible in the federal courts. *See* Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). *See generally* Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958). Recently, state supreme courts have adopted similar rules. *See, e.g.*, Commonwealth v. Davenport, 471 Pa. 278, 286, 370 A.2d 301, 306 (1977). Unlike the proposed rule, the *McNabb-Mallory* standard stems from the Court's supervisory power rather than the Constitution. Nevertheless, if the proposed rule were to be adopted, it would not be inappropriate to use the *McNabb-Mallory* decisions as a starting point towards defining the concept of "unnecessary delay."

[48] Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 948-50 (1965).

duration of such attempts will at least be reduced.[49] Most importantly, adoption of the rule would remove the anomaly of allowing the police to avoid the prohibitions of the sixth amendment by the simple expedient of delaying the initiation of formal proceedings against the defendant. Thus, this extension of *Williams* would at least limit the extent to which the triggering of the defendant's sixth amendment right would be subject to manipulation by the police.

The extent of the protection provided by the sixth amendment right to counsel is also problematic. In *Henry,* the Court refined the sixth amendment test by holding that "deliberate elicitation" within the meaning of *Massiah* occurs when the government "intentionally creat[es] a situation likely to induce . . . incriminating statements without the assistance of counsel." [50] The meaning of this test, however, is far from clear.[51] Moreover, in *Henry* itself, the majority took pains to confine its analysis narrowly, suggesting that its rationale would extend only to situations involving the surreptitious elicitation of incriminating statements by an undercover government agent from an indicted defendant in custody.[52] Nevertheless, the Court dropped a footnote intimating that once the defendant's sixth amendment right is in effect, the government will ordinarily be prohibited from any attempts to elicit incriminating statements from unrepresented defendants.[53]

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[49] Of course, the extent of additional protection provided by the proposed rule will depend on at least two additional issues: (1) the degree to which the sixth amendment right affords protection beyond that afforded by *Miranda;* and (2) the standard to be used in determining when the sixth amendment right may be waived. With respect to the second issue, it should be noted that the Second Circuit has recently held that the standards for waiver of sixth amendment rights will be stricter than those that must be met to establish a waiver of the *Miranda* rights. *See* United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980). *See also* text accompanying notes 55-71 *infra.*

[50] 100 S. Ct. at 2189.

[51] For a discussion of the meaning of the *Henry* test, see White, *Interrogation Without Questions*: Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209 (1980).

[52] *See* 100 S. Ct. at 2186.

[53] *See id.* 2189 n.14 (quoting Disciplinary Rule 7-104(A)(1) of the ABA CODE OF PROFESSIONAL RESPONSIBILITY which prohibits a lawyer from "[c]ommunicat[ing] or caus[ing] another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer of such other party or is authorized by law to do so."). Although the Court stated that the rule did not "bear on the constitutional issue" involved, its quotation of the rule would appear to suggest that, in this context, the Court views actions of all government agents as equivalent to action by the prosecution (that is, the government attorney). Thus, if the disciplinary rule were to apply, the prohibition imposed by the rule on government attorneys would apply equally to the police. Moreover, though the disciplinary rule by its terms applies only to situations in which the defendant is represented by counsel, the Court has apparently

Such a prohibition is consistent with the purposes of the sixth amendment. The Court's sixth amendment decisions are premised on the assumption that, at least with respect to government efforts to elicit incriminating statements, the defendant is entitled to substantially the same type of protection he would have at trial.[54] As Kamisar's "Gatehouses" essay points out,[55] no one would dream of suggesting that the prosecuting attorney could question the defendant at trial in the absence of his attorney. Once the defendant's sixth amendment right attaches, therefore, at least in the absence of a valid waiver of the right, the government should be precluded from all efforts to elicit incriminating statements in the absence of counsel.

The issue of waiver also merits further consideration. As Kamisar suggested in his "Gatehouses" essay, if the defendant's fifth or sixth amendment rights are easily waived, then the rights are of relatively little value.[56] In *Miranda,* the Court articulated a high standard of waiver, holding that the strict *Johnson v. Zerbst*[57] "standards of proof" are applicable[58] and suggesting that, in order to sustain its burden of proof on this issue, the government might be required to adduce specific types of evidence.[59]

Nevertheless, in practice, the police have had little difficulty in establishing waiver of *Miranda* rights.[60] Moreover, the Court has evidenced a strong inclination towards weakening, rather than strengthening, the standards of waiver articulated by the Warren Court.[61] Most significantly, perhaps, Justice White in his *Williams*

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made it clear that the defendant's sixth amendment right will be implicated in situations in which the defendant is not represented by counsel. *See* Brewer v. Williams, 430 U.S. at 398-99 (dictum). Thus, if the disciplinary rule is intended to sketch the possible boundaries of the defendant's sixth amendment right, the rule cannot be limited to situations in which the defendant is actually represented by counsel.

[54] *See, e.g.,* Escobedo v. Illinois, 378 U.S. at 494 (Stewart, J., dissenting) (once "adversary proceedings have commenced, . . . the constitutional guarantees attach which pertain to a criminal trial"; included among these is "the guarantee of the assistance of counsel"). *See generally* Grano, *supra* note 41, at 20.

[55] Y. KAMISAR, *supra* note 1, at 28-29.

[56] *Id.* 38.

[57] 304 U.S. 458 (1938).

[58] 384 U.S. at 475.

[59] *Id.*

[60] *See generally* Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347 (1968); Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967).

[61] *See, e.g.,* North Carolina v. Butler, 441 U.S. 369 (1979) (holding an express written or oral statement of waiver of *Miranda* rights not a prerequisite to a valid waiver).

dissent[62] expressed the view that the waiver issue turns exclusively on whether the defendant is aware of his constitutional rights at the time he makes an incriminating statement.[63] Acceptance of this view, of course, would mean that so long as police warn the defendant of his constitutional rights, they will be free to try to elicit incriminating statements; that the defendant asserts his right to remain silent need not stop the police interrogation,[64] though it may slow it.[65] If the defendant divulges incriminating statements in response to police interrogation efforts, he will be doing so with awareness of his constitutional rights and, therefore, in the absence of visibly coercive circumstances (such as repeated rounds of interrogation), he will be deemed to have waived those rights.

The above view of waiver, which was narrowly rejected by the Court in *Williams*,[66] might have been resurrected in *Henry* when the Court asserted that the case before it involved no waiver because the defendant was "unaware that [the informer] was an undercover agent exressly commissioned to secure evidence."[67] Although it would be unduly speculative to draw negative implications from so brief a discussion, the Court's articulated basis for rejecting a finding of waiver in *Henry* at least leaves open the possibility that it will accept a modified version of Justice White's view of waiver. The argument would run that when a defendant who has been warned of his constitutional rights knows that he is dealing with an agent of the government, his voluntary (that is not induced by threats or other forms of undue pressure) disclosure of incriminating information to the agent constitutes a waiver because the defendant has incriminated himself with knowledge that he has a right to refrain from doing so.

From the perspective of safeguarding individual rights, adoption of this position would be disastrous. First, Justice White's

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[62] 430 U.S. at 429 (White, J., dissenting). Justice White's dissent was explicitly joined by two other Justices and at least implicitly by the fourth dissenting Justice. *See id.* 417 (Burger, C.J., dissenting).

[63] *Id.* 433-36 (White, J., dissenting).

[64] *See* Michigan v. Mosley, 423 U.S. 96, 111 (1975) (White, J., concurring) ("no reason . . . to rob the accused of the choice to answer questions voluntarily for some unspecified period of time following his own previous contrary decision").

[65] *Id.* 111 ("'repeated rounds' of questioning following an assertion of the privilege would [under some circumstances] count heavily against the state in a determination of voluntariness"). For an incisive analysis of the concurring and majority opinions in *Mosley*, see Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 S. Ct. Rev. 99, 134-36.

[66] 430 U.S. at 404.

[67] 100 S. Ct. at 2188.

doctrine of waiver is contrary to the *Johnson v. Zerbst*[68] formulation that "waiver requires not merely comprehension but relinquishment,"[69] a standard that mandates an express waiver on the part of the defendant. Second, Justice White's approach negates the premise underlying the *Miranda* and *Massiah* doctrines because it assumes that a defendant confronted with police interrogation will be able to take continuing account of a warning given at the commencement of the interrogation. But this ignores the psychological realities of a police interrogation. As the Court in *Miranda* recognized, and as Kamisar's writings vividly illustrate,[70] an officer's warning of constitutional rights will likely be obliterated if, after issuing the warnings, the officer is permitted to use the standard interrogation techniques designed to elicit incriminating statements.[71]

Thus, the *Miranda* and *Massiah* protections will be meaningful only if they are viewed as prohibitions on government conduct. When *Miranda* applies, the police should not be permitted to interrogate the suspect; similarly, when *Massiah* in in effect, they should not attempt to elicit incriminating statements from him. If the police violate these principles, the waiver issue is not germane. The police have violated constitutional restrictions and any resulting incriminating statements should be inadmissible.

Undoubtedly, the debate concerning the permissible scope of police interrogation will continue. As Kamisar's preface suggests,[72] when questions of such magnitude and controversy are at stake, there is never any final outcome. Some issues remain to be decided and others may be subject to reconsideration. In this continuing debate, it is comforting to know that Professor Kamisar's voice will continue to be heard and, if past history is any guide, will continue to have an important effect on the outcome.

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[68] 304 U.S. 458 (1938).

[69] *See Williams*, 430 U.S. at 404. *See generally* Grano, *supra* note 41, at 34.

[70] *See, e.g.*, Y. KAMISAR, *supra* note 1, at 1-6.

[71] Indeed, as Kamisar notes, in some cases police manuals provide that the suspect should be informed of his rights in order to increase the effectiveness of the interrogation technique. He cites the following example: "Joe, you have a right to remain silent. That's your privilege. . . . But let me ask you this. Suppose you were in my shoes and I were in yours . . . and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide. . . ." *Id.* 3 (quoting F. INBAU & J. REID, *supra* note 3, at 111).

[72] *Id.* xx.