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Miranda v. Arizona: The Emerging Pattern

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COMMENTS

MIRANDA v. ARIZONA: THE EMERGING PATTERN

In *Miranda v. Arizona*,[1] the United States Supreme Court set forth a series of specific guidelines to determine the admissibility at trial of statements elicited during police interrogation of a criminal suspect. Since 1971,[2] the Burger Court has whittled away at the mandates of *Miranda*. It is possible that one major factor underlies this erosion process: the very frustrating reality that, in many situations, an obviously guilty party is allowed to go free because "the constable has blundered."[3]

Miranda's concrete guidelines were dedicated to preserving individual liberties and were based upon the sound notion that one cannot fairly be deemed to have waived rights of which he may have had no knowledge.[4] It

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1. 384 U.S. 436 (1966). Briefly stated, *Miranda* held:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

Id., at 444.

For a general discussion of *Miranda*, see Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645 (1967); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Rothblatt & Pitler, *Police Interrogation: Warnings and Waivers—Where Do We Go From Here?* 42 NOTRE DAME LAW. 479 (1967). For the viewpoints of several commentators on the Miranda decision and its implications, see essays collected in *Interrogation of Criminal Defendants—Some Views of Miranda v. Arizona*, 35 FORDHAM L. REV. 169 (1966).

2. In 1971, Harris v. New York, 401 U.S. 222 (1971), was handed down. *See* note 11 *infra*, and accompanying text.

3. People v. Defore, 242 N.Y. 13, ____, 150 N.E. 585, 587 (1926) (Cardozo, J.).

4. 384 U.S. at 468-69. The Court further pointed out that "[a]ssessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or

further seeks to safeguard the criminal suspect from having his will overborne, whether by actual abuse[5] or by subtle psychological pressure,[6] to the point that he confesses to a crime against what would normally be his better judgment. In many ways, *Miranda* qualifies as the proverbial hard case that makes bad law. As ever, when an inflexible guideline is established, there has been a subsequent straining toward a greater flexibility which would permit the weighing of other meritorious considerations. For one thing, the government has a duty to secure the individual and his possessions from the depredations of crime.[7] This declared objective is utterly frustrated when a decision results in the loosing upon society of one who, with the introduction of his confession, has been found beyond a reasonable doubt to be guilty of a criminal act.[8] The *Miranda* court appar-

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prior contact with authorities, can never be more than speculation; a warning is a clearcut fact." *Id.* (footnotes omitted).

The natural tendency to cooperate with the police may cause a suspect to make an uncoerced statement which, had he any idea what his rights were, he would not have made voluntarily. This proclivity is what has been termed "ignorance compulsion." Graham, *What Is "Custodial Interrogation?"-California's Anticipatory Application of Miranda v. Arizona*, 14 U.C.L.A. L. REV. 59, 76 (1966) [hereinafter cited as Graham].

5. Haynes v. Washington, 373 U.S. 503 (1963) (defendant held incommunicado for sixteen hours and was told he could not call his wife until he signed a confession); Reck v. Pate, 367 U.S. 433 (1961) (sick and poorly fed defendant held incommunicado and interrogated intermittently for four days); Watts v. Indiana, 338 U.S. 49 (1949) (defendant held almost a week in solitary confinement in a cell with no place to sit or sleep, and interrogated by relays of police far into the night); Chambers v. Florida, 309 U.S. 227 (1940) (black defendants questioned by relays of white officers all week and all of one night); Brown v. Mississippi, 297 U.S. 278 (1936) (defendant beaten until he confessed).

6. Lynumn v. Illinois, 372 U.S. 528 (1963) (defendant threatened with deprivation of financial aid for her minor children, and told that they would be taken away from her); Spano v. New York, 360 U.S. 315 (1959) (foreign-born defendant persistently questioned for eight hours by prosecutor and police despite repeated requests for counsel); Leyra v. Denno, 347 U.S. 556 (1954) (defendant, complaining of a sinus headache, examined by psychiatrist, who elicited confession).

7. The most basic function of any government is to provide for the security of the individual and of his property. These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.

Miranda v. Arizona, 384 U.S. 436, 539 (1966) (White, J., dissenting) (citation omitted).

8. I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection

ently considered this to be the necessary price for preserving constitutional rights. It is understandable that there arises pressure for a result which would be fair to all. Since the means of accomplishing such a result was so readily accessible, in some situations, under the pre-*Miranda* voluntariness test,[9] there has been a tendency toward its re-adoption in areas where a fundamentally fair result would better be achieved under its rationale.[10]

The Burger Court's decision in *Harris v. New York*[11] was the first indica-

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and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

Id. at 542-43 (White, J., dissenting).

9. [W]ith over 25 years of precedent the Court has developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions. It is "judicial" in its treatment of one case at a time, flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts. Of course, strict certainty is not obtained in this developing process, but this is often so with constitutional principles, and disagreement is usually confined to that borderland of close cases where it matters least.

Id. at 508-09 (Harlan, J., dissenting) (citation omitted).

For articles dealing with the shortcomings of the voluntariness test, see Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645 (1967); Kamisar, *A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test.* 65 MICH. L. REV. 59, 94-104 (1966); PYE, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 169, 213 (1966). For an interesting insight into the psychology of the confession and how it correlates with the due process voluntariness test and Miranda's concept of compulsion, see Warden, *Miranda—Some History, Some Observations, and Some Questions*, 20 VAND. L. REV. 39, 48-53 (1966).

10. 18 U.S.C. §3501 (1970), enacted in 1968, was intended to offset the harmful effects Congress thought the Miranda decision would precipitate. The statute provides in part that failure to comply with *Miranda* is merely one in the "totality of circumstances" determining the admissibility of evidence in a federal criminal prosecution. *See* Kuh, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 169, 234 (1966). Mr. Kuh feels that few indeed will be the occasions when a confession can be found admissible under the Miranda decision. If the defendant asserts his right to counsel or to silence, there will be no confession at all. On the other hand, if he waives his right, the waiver, because it allows the police access to damaging information, must have been "stupidly made," since no one acts against his own best interest. Therefore, the waiver would be invalid as not being "intelligent." Mr. Kuh, noting that the Court might just as well have forbidden the use of confessions altogether, commented that while this would have resulted in more adverse public reaction, had the Supreme Court done this, it would at least have been intellectually honest, and there would be clarity. *Id.* at 235.

11. 401 U.S. 222, 226 (1971). For an evaluation of the *Harris* opinion, see Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971). Oregon v. Hass, 420 U.S. 714 (1975), reinforced and refined the Harris decision. In *Hass*, it was held that a statement taken in the absence of an attorney, after the accused had requested one, was admissible for the limited purpose of impeachment. 420 U.S. at 723-24.

tion that "voluntary" statements, taken in violation of *Miranda*, might be admissible. There, the Court construed *Miranda* as saying that a defendant's statement, taken in violation of *Miranda*, could be used to impeach him after he elected to testify in his own defense. However, the statement could not be used by the prosecution in proving its case-in-chief.

A second broadening of the admissibility of "voluntary", though custodial,[12] confessions came in *Lego v. Twomey*.[13] There, the Supreme Court rejected "beyond a reasonable doubt" as the State's burden of proof on the issue of voluntariness, adopting instead the "preponderance of evidence" standard.

The third and major departure from the spirit of *Miranda* came in *Michigan v. Tucker*,[14] where the police neglected to advise the defendant that an attorney would be appointed for him if he was indigent, though the other warnings were given. Afterwards, the accused stated, as an alibi, that he had been with his friend Henderson at the time in question. Henderson's testimony, however, implicated Tucker.

In its analysis, the Court split the issue to be determined into two parts: (i) whether the failure to give warnings directly infringed upon defendant's right against self-incrimination, or (ii) whether it instead violated only the "prophylactic rules" set up by *Miranda* to protect that right.[15] Under *Tucker*, if the right itself were violated, the statement would be excluded; but if only the procedures were violated, the question remained as to whether any evidence so derived should be excluded.[16] For the first time, *Miranda's* procedural directives were relegated to the position of "prophylactic rules" and were divorced from the right against self-incrimination as such.[17] The Court determined, using the due process

12. *See* note 67 *infra*, and accompanying text.

13. 404 U.S. 477, 486-87 (1972).

14. 417 U.S. 433 (1974). For a more detailed discussion of *Tucker*, see Note, *Michigan v. Tucker: A Warning About Miranda*, 17 ARIZ. L. REV. 188 (1975); Note, *Michigan v. Tucker: A Reevaluation of Miranda*, 27 ME. L. REV. 365 (1975).

15. 417 U.S. at 439.

16. *Id.* at 447.

17. 54 N.C.L. REV. 695, 700-01 (1976). One early indication that the Court viewed *Miranda*'s requirements as "prophylactic rules" came in Michigan v. Payne, 412 U.S. 47 (1973), which considered the retroactive applicability of the due process limitations upon imposition of a more severe sentence upon re-trial set out in North Carolina v. Pearce, 395 U.S. 711 (1969). Writing for the majority, Mr. Justice Powell drew an analogy between the *Pearce* and *Miranda* sets of "prophylactic rules," noting that they were similar in that each was designed to preserve the integrity of the criminal process. "While each created a protective umbrella serving to enhance a constitutional guarantee, neither conferred a constitutional right that had not existed prior to those decisions." *Id.* at 54. Following through with

"voluntariness" standard, that Tucker's rights had not been infringed and that the derivative evidence was admissible.[18]

It is in *Michigan v. Tucker* that some scholars feel they detect a return to the pre-*Miranda* voluntariness test.[19] However, although the language of due process voluntariness does pervade the opinion,[20] these writers may be premature in using *Michigan v. Tucker* to conclude that *Miranda* has effectively been, or is about to be, overruled[21] altogether. It must be remembered that the heart of *Miranda* is a concern that one cannot freely waive rights of which he is unaware.[22] There is an important policy at work in the warnings requirement of *Miranda*—that of making sure that the suspect is at least aware of such rights as he does possess, or of reinforcing his knowledge of them at such a time as he may be prey to all the pressures and panic which attend being "up to his neck" in trouble with the law. It is this "educational" purpose of *Miranda* on which the Burger Court has shown little desire to turn its back.[23] After all, were the Court hostile toward this laudable object, it could resort to the simple expedient of broadening its "harmless error" doctrine.[24] The Court has not, however, operated significantly in this area.[25]

Where the suspect is either (i) made aware of his rights, or (ii) not up to

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the analogy, the Court held *Pearce* nonretroactive on the example of Johnson v. New Jersey, 384 U.S. 719 (1966), establishing *Miranda*'s non-retroactivity.

18. 417 U.S. at 448-50.

19. *See,e.g.*, Note, *Michigan v. Tucker: A Warning about Miranda*, 17 ARIZ. L. REV. 188 (1975); Note, *Michigan v. Tucker: A Reevaluation of Miranda*, 27 ME. L. REV., 365 (1975). This view of *Tucker* also underlies the holding in United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975). There, the court noted that since the Supreme Court had not addressed the constitutionality of 18 U.S.C. § 3501 (1970), *Tucker* could be construed as an implicit revival of the totality of circumstances test, in which compliance with *Miranda* would be only one factor. 510 F.2d at 1136-38.

20. 417 U.S. at 445-50 .

21. The Supreme Court was asked to abandon *Miranda* during the briefing and arguing stages of Brewer v. Williams, 97 S. Ct. 1232 (1977). The case was, however, decided entirely on sixth amendment grounds.

22. *See* note 4 *supra*.

23. In *Tucker*, there was no question that the exculpatory statement was itself inadmissible, although the voluntariness test was applied with reference to the derivative evidence. 417 U.S. at 438-39, 445.

24. *See* Note, *Miranda Warnings and the Harmless Error Doctrine: Comments on the Indiana Approach*, 47 IND. L. J. 331 (1972); Note, *Criminal Procedure-Self-Incrimination-Harmless Error-Application of the Harmless Error Doctrine to Violations of Miranda: The California Experience*, 69 MICH. L. REV. 941 (1971). *See also* Chapman v. California, 386 U.S. 18, *rehearing denied*, 386 U.S. 987 (1967).

25. *But see* Pennsylvania v. Romberger, 417 U.S. 964 (1974) (Supreme Court vacated and remanded for consideration in the light of *Tucker* the state court's finding of error in admission of a signed confession obtained without full warnings).

his neck in trouble with the law, and the strict adherence to the letter of *Miranda* would still operate to bar his confession, the Court has apparently had some problem reconciling that sort of result with its awareness of society's interest in the effective apprehension of criminals.[26] Since late 1975,[27] there have been significant narrowings in the areas of involuntariness upon re-interrogation, and in determining what constitutes "custody," the setting which would operate to negate voluntariness.

The reintroduction[28] of a more flexible "voluntariness" based test in place of *Miranda's* inflexible strictures has become apparent in the area of "re-interrogation"—questioning a suspect after he has asserted either his right to remain silent or his right to the presence of counsel. The relevant portions of *Miranda* provide that "[o]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[29] Similarly, when counsel is requested, *Miranda* says "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present."[30]

Most of the federal and state courts which have had an opportunity to consider the matter have rejected the contention that *Miranda* created a *per se* proscription of further interrogation once these rights were invoked.[31] However, defendants have occasionally argued, with some success, that *Miranda* mandates a blanket prohibition against the taking of "voluntary statements", regardless of the circumstances.[32] Under this reasoning, some results could be reached which offend both the commonsense[33] and precedent.[34]

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26. For an indication of how two of the current members of the Supreme Court have viewed the problem, see notes 7 and 9 *supra*.

27. In December of 1975, Michigan v. Mosley, 423 U.S. 96 (1975), was handed down. *See* note 35 *infra*, and accompanying text.

28. The test in use prior to *Miranda* determined voluntariness from the totality of circumstances. *E.g.*, Payne v. Arkansas, 356 U.S. 560 (1958). The test was also used to decide whether the admission of confessions taken after a suspect had ended the interrogation by asserting one of his rights was violative of due process. *E.g.*, United States v. Slaughter, 366 F.2d 833 (4th Cir. 1966).

29. 384 U.S. at 473-74.

30. *Id.* at 474.

31. For articles collecting and categorizing cases with reference to such considerations as which right was invoked, whether interrogation pertained to same crime, etc., see Comment, *Michigan v. Mosley: A Further Erosion of Miranda*, 13 SAN DIEGO L. REV. 861 (1976).

32. Strickland v. Garrison, No. 76-1683 (4th Cir., June 28, 1976). *See* note 31 *supra*.

33. [A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.

Michigan v. Mosley, 423 U.S. 96, 102 (1975).

34. *Id.* at 108 (White, J., concurring), *citing* Tollett v. Henderson, 411 U.S. 258 (1973);

In *Michigan v. Mosley*,[35] the United States Supreme Court determined that the fruits of questioning a suspect after he expressed a desire to remain silent were admissible evidence so long as it was shown that the police had "scrupulously honored"[36] the right of the accused to cut off questioning. The defendant Mosley, after having been arrested and given his *Miranda* warnings, stated that he did not want to answer any questions about the robberies with which he was charged. The officer ceased questioning, but some two hours later a different officer led Mosley into an interrogation room, and again read him his rights. Mosley then waived his rights and, during the ensuing conversation, he confessed.[37]

At trial, Mosley contended that the second interrogation constituted a violation of his right against self-incrimination in that his desire to remain silent was not respected.[38] Interpreting the passage from *Miranda* which states that interrogation must cease once the accused asserts his right to silence,[39] Justice Stewart, writing for the majority, rejected the notion that "this passage or any other in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon further questioning."[40] Speaking of the right to cut off questioning as a "critical safeguard,"[41] he concluded that the admissibility under *Miranda* of statements obtained after the assertion of this right hinged upon whether the assertion was "scrupulously honored." The Court provided no enlightenment as to exactly what "scrupulously honored" was to mean, but it did find that the officer's conduct in *Mosley* passed muster.[42]

In reaching this conclusion, the court weighed several different factors: the meticulous administration of the warnings prior to each interrogation

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Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); and Parker v. North Carolina, 397 U.S. 790 (1970).

Justice White goes on to express his reluctance to conclude that *Miranda* stands for the proposition that a man may be imprisoned in his own privileges, stating that to do so would be to disregard that respect for the individual which is the lifeblood of the law. He points out that the Court has, in the past, rejected any "paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case." 423 U.S. at 109, *citing* Faretta v. California, 422 U.S. 806 (1975). *Faretta* held that a state may not constitutionally force a defendant in a criminal trial to accept the assistance of counsel, when he voluntarily and intelligently elects to proceed without it. 422 U.S. at 835-36.

35. 423 U.S. 96 (1975).

36. *Id.* at 104 (footnote omitted).

37. *Id.* at 97-98.

38. *Id.* at 98-99.

39. Miranda v. Arizona, 384 U.S. 436, 473-74 (1966).

40. 423 U.S. at 102-03.

41. *Id.* at 103-04.

42. *Id.* at 104-06.

session, Mosley's understanding of his rights, the immediate cessation of questioning following the first exercise of the right to remain silent, the "significant" time period between Mosley's assertion of the right and the re-interrogation,[43] the different locations and officers, the difference in the subject matter of each inquiry, and the absence of any attempt to wear down Mosley's resistance.[44]

Justice White, in his concurring opinion,[45] interpreted the Court's reliance upon the particular facts of *Mosley* as a step toward the reacceptance of the "totality of circumstances" test used prior to *Miranda* to determine voluntariness.[46] Noting that the trend was established, Justice White advocated an immediate return to the voluntariness test.[47] The difference, however, is merely one of orientation. While the Court's "scrupulously honored" test addresses the activities of the government agents themselves, the voluntariness approach is defendant-oriented. Perhaps the adoption of the government-oriented standard aims at avoiding a possible recurrence of the pre-*Miranda* ambiguity in the area of self-incriminations which attended factual findings of voluntariness,[48] especially since temptation to introduce elements of the subjective is strong.[49]

The holding of *Michigan v. Mosley* has not, however, been applied to achieve any consistency of reasoning among cases which involve interrogations of a suspect after he has asserted his right to counsel. The *Mosley* Court itself points out that it does not purport to deal with the procedures to be followed in such a situation.[50] It can be contended, too, that the procedures to be followed when the right to counsel is invoked[51] are set forth with greater clarity and rigidity than those to be followed when the

43. About two hours had elapsed. *But see* Westover v. United States, 384 U.S. 436, 496 (1966) (re-interrogation deemed to be part of same interrogation); United States v. Clark, 499 F.2d 802, 807 (4th Cir. 1974) (four hours not a "significant period").

44. 423 U.S. 96, 105-07 (1975).

45. "I suspect that in the final analysis the majority will adopt voluntariness as the standard by which to judge the waiver of the right to silence by a properly informed defendant. I think the Court should say so now." 423 U.S. at 108. Justice White's chief objection to the majority's test is, that in some cases, an entirely voluntary confession could be excluded because of the questionable actions of law enforcement officers. *Id.* at 107.

46. *See* Haynes v. Washington, 373 U.S. 503 (1963).

47. *See* note 45 *supra*.

48. 54 N.C. L. REV. 695, 704 n.64 (1976). As a practical matter the case load on appeal would be lessened under the "scrupulously honored" test, for factual findings in the trial court that the standard has been met would be difficult to overturn. *Id.*

49. *See* Hicks v. United States 382 F.2d 158 (D.C. Cir. 1967). *See generally* LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 100 (1968).

50. 423 U.S. at 101 n.7.

51. *See* note 29 *supra*, and accompanying text.

right to silence is asserted.[52] The former more nearly resembles a *per se* proscription against further interrogation.[53] Re-interrogation after an assertion of the right to counsel is further complicated by Sixth Amendment considerations. Some fact situations could indicate that the interrogating officer, while holding the suspect apart from counsel, for the length of time necessary to conduct the re-interrogation, is in effect depriving him of his right to the presence of counsel without a valid waiver of that right.[54] The distinction, however, does not foreclose the possibility that *Mosley* may influence the way in which lower courts interpret *Miranda* in cases where counsel has been demanded. Again, the movement would be away from the more rigid procedural rules and toward the "totality of circumstances" treatment tacitly endorsed in *Mosley*.

Mosley's influence may underlie the recent 4th Circuit decision in *United States v. Grant*.[55] Defendant Grant was taken into custody by police in Loris, South Carolina, in connection with a local bank robbery. An FBI agent advised Grant of his rights and received a written waiver of them before an interrogation session regarding the Loris bank robbery. Afterwards, the agent learned that Grant was charged in connection with a Richmond bank robbery. He again visited Grant advising him that he was also under arrest for the Richmond robbery. When Grant denied any involvement, he was read his *Miranda* warnings, with careful explanation

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52. *See* note 30 *supra*, and accompanying text.

53. The Court showed . . . that when it wanted to create a *per se* rule against further interrogation after assertion of a right, it knew how to do so. The Court there said "[i]f the individual indicates that he wants an attorney, the interrogation must cease *until an attorney is present*." However, when the individual indicates that *he* will decide unaided by counsel whether or not to assert his "rights to silence" the situation is different.

Michigan v. Mosley, 423 U.S. 96, 109-10 (1975) (White, J., dissenting) (citation omitted).

54. Brewer v. Williams, 96 S. Ct. 1232 (1977) presents a clear example of such a situation. After turning himself in, defendant Williams was to be driven from Davenport, Iowa to Des Moines, a distance of 160 miles. Williams had already consulted by telephone with McKnight, his lawyer in Des Moines, and while in Davenport was represented by Kelly. McKnight and Kelly reached an agreement with the police that Williams was not to be questioned until he arrived in Des Moines and had an opportunity to confer further with McKnight. Both lawyers also cautioned Williams not to discuss the crime during the trip. However, the police denied Kelly permission to ride back to Des Moines with Williams. Once underway, they initiated a line of conversation designed to extract incriminating statements and conduct from Williams. Writing for the majority, Justice Stewart expressly declined to review *Miranda*, confining the opinion entirely to the sixth amendment issue. Viewing the conduct of the police as a calculated bad faith attempt to isolate the vulnerable defendant from his attorneys, the Court found that the right to counsel had not been waived and affirmed the Eighth Circuit's order for a new trial, excluding the statements and behavior of the defendant on the return trip.

55. 549 F.2d 942 (4th Cir. 1977).

of certain words and phrases, and Grant executed a written waiver. When asked about the Richmond robbery, Grant replied that he had nothing to do with it, and requested a lawyer. At that point, the interrogation about the robbery ceased, and standard identification information was sought from him. When this information was given, Grant began asking what would happen to him, and whether he would be taken back to Richmond. It was explained that he would be taken before a magistrate who would appoint counsel for him and fix bond. Grant continued to ask whether he would be taken to Richmond, what would be the proceedings there, and "what was going on in Richmond." He was told briefly that four people were being held in connection with the Richmond robbery. As the agents prepared to leave, Grant suddenly said "it is all true." The agents again advised Grant of his rights, and reminded him that he had asked for a lawyer. Grant said he was aware of his rights, but that he wanted to make a statement to the agents at that time. Thereupon, he gave a full account of the circumstances of the robbery.

The *Grant* court noted that *Miranda* imposed upon the investigating officers a duty to cease questioning the accused about the crime under investigation once the right to councel had been asserted. However, the court seemed to focus—not on defining the officers' duty and determining whether or not they had carried it out—but on whether the waiver of the previously asserted right to counsel had been voluntary. The behavior of the FBI agents was only one factor, albeit an important one, in determining that voluntariness.[56] The *Grant* court's attempt to reconcile its reasoning with *Miranda's* procedural orientation seems interestingly at odds with the true basis of its decision, which was a judgment that, in the light of all the circumstances, Grant waived his right to counsel voluntarily and in the exercise of his informed and unfettered judgment. The court pointed out that *Miranda*, rather than erecting a *per se* bar against any conversation with an accused after a request for counsel, only inhibits interrogation related to the crime itself. In the *Grant* court's words, *Miranda* was concerned only "with protecting the suspect against interrogation of an investigative nature rather than the obtaining of basic identifying data required for booking and arraignment."[57] But *Grant* makes no attempt to reconcile the permissibility of the ensuing crime-related conversation with

56. *Id.* at 946, *citing* United States v. Crisp, 435 F.2d 354, 357 (7th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971).

57. 549 F.2d at 946, *quoting* United States *ex rel.* Hines v. LaVallee, 521 F.2d 1109, 1113 (2nd Cir. 1975), *cert. denied sub. nom.* Hines v. Bombard, 423 U.S. 1090 (1976). *Accord*, United States v. Menichino, 497 F.2d 935 (5th Cir. 1974) (statement made during taking of biographical data); United States v. La Monica, 472 F.2d 580 (9th Cir. 1972) (statements made with reference to personal items, which were being inventoried).

Miranda's imperatives,[58] and it was during *that* conversation, rather than during the booking procedures, that the confession occured. It appears, then, that the accent in *Grant* is not on the letter of *Miranda* but on whether a voluntary waiver of a previously asserted right could be found by the totality of circumstances. *Grant* is consistent with the results in two earlier 4th Circuit cases, *United States v. Slaughter*,[59] decided on pre-*Miranda* principles, and *United States v. Clark*,[60] in that it indicates that in a determination of voluntariness great weight is to be placed upon who initiated the conversation leading to the confession. It should be noted that, in the earlier cases, the heavy burden of establishing the voluntariness of the waiver had not been met. The holding in *Grant* represents an especially significant departure from *Miranda*'s procedural orientation in its recurrence to a voluntariness formula in the context of a direct exchange between officer and suspect concerning the crime.

The influence of *Mosley's* "totality of circumstances" philosophy on *Grant* emerges more clearly when it is compared with an earlier decision involving somewhat similar facts. In *Strickland v. Garrison*,[61] the defendant, after being appraised of his rights and invited to make a statement, replied that he wanted a lawyer. Interrogation ceased. Six hours later, the agent re-appeared, again read Strickland his rights, and asked if he wanted to make a statement. This time the defendant, acknowledging his understanding of the rights, confessed. No lawyer was present. Staunchly adhering to the letter of *Miranda*, the Fourth Circuit held:

> Once a suspect in custody has expressed his wish to be represented by counsel, the police must deal with him as if he is thus represented. Thereafter, it is improper for the police to initiate any communication with the suspect other than through his legal representative, even for the limited purpose of

58. The fact that the crime-related conversation was not interrogatory in nature is probably irrelevant. So sophisticated are the psychologically compelling techniques used by police that the bar does not operate only upon that which is grammatically structured as a question. *See* United States v. Grant, 549 F.2d 942, 949-50 (4th Cir. 1977) (Winter, J., concurring and dissenting); Commonwealth v. Richard, 233 Pa. Super 254, ____, 336 A.2d 423, 428 (1975), *cert. denied*, 423 U.S. 1017 (1975). *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

59. 366 F.2d 833 (4th Cir. 1966).

60. 499 F.2d 802 (4th Cir. 1974). Both *Clark* and *Slaughter*, see note 59 *supra*, were decided with reference to a voluntariness standard. In both, the urging to forego counsel was more adamant and for that reason, the waiver of counsel upon re-interrogation was found invalid.

It is interesting to note that the method for determining voluntariness under *Clark* bears some resemblance to *Mosley*'s police-oriented "scrupulously honored" test. "The standard of voluntariness is not whether the accused was coerced in traditional terms, but whether appropriate safeguards were taken to safeguard his rights and to insure that his statements were the product of free choice." 499 F.2d at 906.

61. No. 76-1683 (4th Cir., June 28, 1976).

> seeking to persuade him to reconsider his decision to insist on the presence of counsel.[62]

The *Strickland* court did observe that a suspect might subsequently elect to proceed without counsel, but insisted that such a change of heart must be communicated on the suspect's initiative.[63]

The degree of prodding, and who started the conversation are, of course, obvious factual differences between *Grant* and *Strickland*. But the important distinction is the underlying rationale of each case. Under the *Strickland* approach, which emphasizes *Miranda*'s rigid procedural safeguards, the relatively innocuous activities of the agents in *Grant* would have likely sufficed to render the confession inadmissible.[64] Whether the *Strickland* waiver would have been found acceptable under the *Grant* approach is less certain. Even if *Mosley* applied, a "scrupulous honoring"[65] might not be found. What is significant is that under the *Grant* test, a fact situation could arise in which such a consideration as who began the conversation is outweighed by other factors pointing toward voluntariness.

What amounts to such "custody" as would cause the giving of warnings to become a prerequisite to interrogation[66] is a very broad issue.[67] *Miranda* itself affords little assistance in determinating the exact parameters of the concept of custody.[68] In *Miranda* it was held: "[b]y custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[69] All that is certain about the scope of "custodial" is that one actually under arrest at a police station is certainly

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62. *Id.*

63. *Id.* To support this point, the *Strickland* court cited United States v. Tafoya, 459 F.2d 424 (10th Cir. 1972).

64. *See* No. 76-1683 (4th Cir., June 28, 1976) (Winter, J., concurring and dissenting).

65. 423 U.S. 96, 104 (1975).

66. What constitutes interrogation is an entire issue unto itself, for if a statement is not the product of interrogation, whether or not it was made "in custody" is irrelevant. See Smith, *The Threshhold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S.C. L. REV. 699, 702-6 (1974) [hereinafter cited as Smith].

67. *See generally* Annot., 31 A.L.R. 3d 565 (1970). This lengthy annotation collects cases treating the concept of custody as applied to every imaginable setting.

68. *Miranda* and its companion cases all involved incommunicado interrogation in a police-dominated atmosphere. Since these settings easily qualified as custody, no detailed analysis of being deprived of one's freedom of action in a significant way was necessary. Comment, *Custodial Interrogation*, 35 TENN. L. REV. 604, 605 (1968). It has been theorized that the Court may have been reluctant to define "custodial interrogation" completely until experience could reveal the exact scope of the problem with which the definition would be concerned. Graham, note 4 *supra*, at 63.

69. 384 U.S. 436, 444 (1966) (footnote omitted).

in a custodial situation.[70] It is the phrase "deprived of his freedom of action in any significant way"[71] which has precipitated the problems.

Some early cases took the position that any deprivation of freedom presented the danger of inherent coerciveness.[72] So broad a reading of *Miranda* is clearly inaccurate, for the Court intended *Miranda* to apply only to "*significant*" deprivations.[73]

Other state and federal courts have, rather mechanically, applied the fact situations of *Miranda* and its companion cases as the touchstone for determining what is "custodial." Finding no comparable atmosphere, they have ruled *Miranda* inapplicable.[74]

Generally, the trend has been in the direction of an objective definition of "custodial."[75] Like the "scrupulously honored" test, the objective test concerns itself with the actions or words of law enforcement officers. Under this test, something the officer does or says must cause the defendant reasonably to believe that he is not free to go.[76]

The importance of the notion of custody lies only in its relation to the voluntariness of a waiver of rights. The idea is that the custodial situation, being inherently coercive, is psychologically operative in overcoming the will of the suspect.[77] Consistent with its tendancy to broaden the horizons

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70. Smith, note 66 *supra*, at 706.

71. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

72. *E.g.*, People v. Allen, 50 Misc.2d 897, 272 N.Y.S.2d 249 (Sup. Ct. 1966) (Sobel, J.), *rev'd*, 281 N.Y.S.2d 602 (1967).

73. The Court changed its opinion in three places between the printing of the advance sheets and the final form, so that the phrase "in any significant way" would always modify the deprivation of freedom of action." Comment, *Custodial Interrogation*, 35 TENN. L. REV. 604, 610 (1968).

74. See Comment, *Custodial Interrogation*, 35 TENN. L. REV. 604, 606-7 (1968) and cases cited therein.

75. Smith, note 66 *supra*, at 732.

76. United States v. Hall, 421 F.2d 540, 544-45 (2nd Cir. 1969), *cert. denied*, 397 U.S. 990 (1970); United States v. Bekowies, 432 F.2d 8, 12 (9th. Cir. 1970). The test is often phrased in terms of the "reasonable man." Lowe v. United States, 407 F.2d 1391, 1397 (9th Cir. 1969). In applying its "reasonable man, innocent of any crime" test, the New York Court noted that the test provided an advantage in that it disregarded all the extraordinary frailties and sensitivities of the individual. People v. P., 21 N.Y.2d 1, 233 N.E.2d 255, 286 N.Y.S.2d 225 (1967).

77. United States v. Gibson, 392 F.2d 373, 375 (4th Cir. 1968). In *Gibson*, an officer saw a car matching the description of one he knew to have been stolen sitting in front of a bar. Going inside, he approached the defendant, whose identity was known to him and asked him to come outside. The officer asked the defendant (i) where he lived, (ii) how long he had been in town, (iii) whether he owned the car, (iv) how he had gotten into town, (v) whether he was employed, and (vi) whether he owned the car in question. Despite the absence of *Miranda*

of "voluntariness", the Burger Court has begun to narrow the idea of what constitutes a custodial setting in which voluntariness is impossible.

The Supreme Court read *Miranda* more narrowly in *Oregon v. Mathiason*.[78] There the defendant, a parolee, was the only person the victim could think of who might have committed the burglary. About twenty-five days after the burglary, after having tried without success to contact the defendant, the officer who was conducting the investigation, finally left his card with a note asking defendant to call him to "discuss something." The defendant called, and agreed to meet with the officer at the State Patrol Office an hour and a half later. When the defendant arrived, he was told that he was not under arrest, but that the police believed that he was involved in the burglary. The officer added, falsely, that the defendant's fingerprints were found at the scene. The defendant then admitted taking the property, whereupon he was advised of his rights and a taped confession was taken. The officer then told the defendant that he was not under arrest at that time, and, after a half hour, the defendant departed.

The Oregon Supreme Court held the confession to have been the product of custodial interrogation. For that reason *Miranda* warnings were required regardless of the fact that the defendant came to the office in response to a mere request, and despite his understanding that he was not under arrest.[79]

The United States Supreme Court reversed in a *per curiam* opinion, pointing out that a "custodial" situation within the meaning of *Miranda* is not created merely because the questioning took place in the normally coercive environment of a station house.[80] In light of the absence of a formal arrest or any restraint on freedom of movement, the traditional "coerciveness" of such a place was lacking.

Justice Marshall, dissenting, accused the Court of making its determination that "custodial interrogation" was not present on the basis of the "formality" that Mathiason was not under arrest at the time. At the very least, Marshall insisted, *Miranda* called for an objective determination of the reasonableness of the defendant's believing, in such a situation, that he was free to go.[81]

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warnings, the statements were held admissible: "In the complete absence of the element of coercion, actual or potential, or police dominance of the individual's will, the mild police activity shown here should not prevent the introduction of statements freely made. The evils with which the Court was concerned in *Miranda* are not present here." *Id.* at 376.

78. 97 S. Ct. 711 (1977).

79. State v. Mathiason, 275 Or. 1, 549 P.2d 673 (1976).

80. 97 S. Ct. 711 (1977). *Accord*, United States v. Weston, 417 F.2d 181, 186-87 (4th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

81. 97 S. Ct. at 714-15.

While it is not clear from the *per curiam* opinion exactly what underlay the Court's decision, Marshall's fear of a purely mechanical "no arrest, ergo, no custody" formula seems unjustified. Had the Court intended such a holding, it could simply have said as much. Actually, the Court weighed the voluntariness of the defendant's presence, the fact that he did leave freely and the irrelevance of the false statement regarding the fingerprints to any determination of how coercive the environment was. Apparently, the Court merely applied the objective test to determine whether the setting was custodial, but did not draw the line in as protective a fashion as did the dissent.

Another narrowing of the concept of custody was evident in *Beckwith v. United States*[82] in which the viability of the "focus" test of custodial interrogation was finally laid to rest. The "focus test", which had its inception in *Escobedo v. Illinois*,[83] held that certain rights accrued when an "investigation is no longer a general inquiry into an unsolved crime, but has begun to focus on a particular suspect."[84] Because of the familiarity of the test at the time *Miranda* came out some courts inferred that it should be employed to fix the point at which the necessity for *Miranda* warnings accrued.[85] The *Miranda* Court contributed to this proclivity by the insertion, after the definition of custodial interrogation, of the famous "obfuscating footnote":[86] "This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused."[87]

This footnote is apparently intended to render coextensive the situations in which *Escobedo*'s right to counsel and *Miranda*'s right to warnings accrue. Thus for the purpose of the opinion either focus means custody, or custody means focus.[88] The question then arises as to which concept provides the controlling definition, since from a logical standpoint, it does not seem that the focus test and deprivation of "freedom of action in any significant way"[89] can be squared.[90]

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82. 425 U.S. 341 (1976).

83. 378 U.S. 478 (1964).

84. *Id.* at 490.

85. *See* Windsor v. United States, 389 F.2d 530 (5th Cir. 1968); Commonwealth v. Sites, 427 Pa. 486, 235 A.2d 387 (1967).

86. So-described by Professor Graham, note 4 *supra*, at 114.

87. 384 U.S. at 444 n.4.

88. *See* Hall v. United States, 421 F.2d 540 (2nd Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

89. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

90. Smith, note 66 *supra*, at 707. The incongruity is especially significant when an investigation has begun to zero in on a defendant who had not been taken into custody. In People v. McKie, 25 N.Y.2d 19, 250 N.E.2d 36, 302 N.Y.S.2d 534 (1969), for example, defendant had been investigated for a murder, but sufficient evidence had not been found. During the

The alternative construction has been to recognize that custody and focus cover separate, although overlapping areas. When both custody and focus exist, or where neither exists, there has been no trouble determining the applicability of *Miranda*. Similarly, when custody exists, but not focus, the plain dictate of *Miranda* governs. Only where an investigation has focused on a suspect not in a "custodial setting" does the "obfuscating footnote" cause difficulty. In this situation, most state and lower federal courts have declined to apply *Miranda*.[91]

United States v. Hall[92] sets forth a moderate position on this issue. There, Judge Friendly pointed out that custody as well as focus were essential elements of *Escobedo*, while custody alone was clearly sufficient to invoke the need for warnings under *Miranda*. Since it could not see any sensible way to conclude that "focus" alone would be enough to bring *Miranda* into play, the court decided that "focus means custody, not that custody means focus." Under the *Hall* analysis, however, the degree of focus bears upon whether the interrogation has taken on an investigatory or accusatory character.[93] Focus, then, would be one factor aiding in a determination of whether or not there has been a significant deprivation of freedom of action.[94]

In *Beckwith v. United States*[95] the Supreme Court settled the focus-

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subsequent fourteen months, police would follow the defendant from time to time. Finally, the defendant approached the police and told them that he had killed the victim but that they might as well stop following him around because they would never be able to prove it. The court found no custody, because there was no deprivation of the suspect's freedom of action; but clearly he was the "focus" of investigations of that particular crime.

91. Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969); Jordan v. Commonwealth, 216 Va. 768, 222 S.E.2d 573 (1976). The leading case rejecting the focus test is Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969). There, it was held that the court's decision in *Miranda* "clearly abandoned" focus of investigation as a test to determine when rights attach in confession cases. *Id.* at 1396. The *Lowe* opinion made it clear that what the officer knew about the defendant's guilt, or whether the officer intended to take defendant into custody was irrelevant to a determination of whether the defendant reasonably perceived himself as being "in custody." *Id.* at 1397. In effect, the *Lowe* court applied an objective test to determine custody. On the other hand, some courts have accepted the focus test as determinative. *See* Windsor v. United States, 389 F.2d 530 (5th Cir. 1968).

92. 421 F.2d 540 (2nd Cir. 1969), *cert. denied*, 397 U.S. 990 (1970). In *Hall*, the defendant willingly let FBI agents into his apartment for questioning. The agents' only connection with the defendant was the reported presence of his automobile at the victim bank the morning of the robbery. The *Hall* court, objectively found that there was no custody.

93. *Id.* at 543.

94. *Cf.* Brown v. Beto, 468 F.2d 1284, 1286 (5th Cir. 1972); United States v. Phelps, 443 F.2d 246, 247-48 (5th Cir. 1971) (the Fifth Circuit approach, the so-called "focus-plus" test, recognizes the degree of focus as the single most significant factor in determining whether a defendant is in custody).

95. 425 U.S. 341 (1976).

custody dilemma, making "custody", as defined in *Miranda*,[96] the sole determinant of when the right to receive warnings accrues.[97] The opinion, however, apparently did not embrace Judge Friendly's approach whereby "focus" was one factor in determining custody by an objective standard. In fact, *Beckwith* might even be construed to presage the discreditation of the objective test of custody altogether, in favor of expanded parameters of voluntariness. In *Beckwith*, IRS agents[98] came to the home of petitioner's friend and advised petitioner that they were investigating his federal income tax liability for certain years. Though they gave no full *Miranda* warnings, they did apprise petitioner of some of his rights, reading to him from a printed card.[99] Testimony indicated that the conversation was friendly and relaxed, and that petitioner was not pressed for information.[100]

In compliance with the request of one of the agents to see petitioner's records, petitioner met the agents at his place of employment some 45 minutes later. Although petitioner was advised that he was not required to furnish any books or records, he supplied the books to the agents.

Prior to his trial for attempting to evade or defeat federal income tax, the petitioner moved to suppress the statements he made to the agents and any evidence derived from those statements on the grounds that he had not been given *Miranda* warnings.[101] The petitioner, in a two-pronged appoach, claimed that his confession fell within the ambit of *Miranda*.

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96. 384 U.S. at 444.

97. 425 U.S. at 344-48. This result is consistent with the only previous clue as to the Supreme Court's view of the focus-custody controversy. In Hoffa v. United States, 385 U.S. 293, 309-10 (1966), the Court indicated that whether the police have probable cause to arrest has no relation to when the suspect's right to receive warnings attaches.

98. Because agents of the IRS have both civil and criminal investigative functions, and because such investigations seldom result in custody, some decisions, notably those of the 7th Circuit, have applied the "focus" test of custody to IRS situations. However, even the 7th Circuit has expressly limited the rule to the IRS context. *See* United States v. Sicilia, 475 F. 2d 308, 310-11 (7th Cir.), *cert. denied*, 414 U.S. 865 (1973).

99. Under the Fifth Amendment to the Constitution of the United States, I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding.

425 U.S. 341, 344, (1976).

100. The court noted that Beckwith did not challenge the holding of the Court of Appeals (United States v. Beckwith, 510 F.2d 741, 743 (1975)) that, aside from the *Miranda* question, the "entire interview was free of coercion." 425 U.S. at 344 n.4.

101. 425 U.S. at 344.

First, petitioner argued that, since cases are only assigned to the Intelligence Division of the IRS when there is an indication of criminal fraud, he was clearly the "focus" of investigation at the time of the interview. The Supreme Court, rejecting this contention, construed *Miranda* to say that, for its purposes, "focus" meant "questioning initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[102] This, of course, is the definition the *Miranda* court gives custody.[103] Thus, like Judge Friendly in *Hall*,[104] the Supreme Court concluded that focus means custody for *Miranda* purposes. Unlike *Hall*, there is no mention of whether focus, as defined in *Escobedo*[105] should be a factor weighed in determining whether a setting is custodial.

The court's response to petitioner's second contention is particularly indicative of the trend to constrict the applicability of *Miranda* and to expand the parameters of the pre-*Miranda* "totality-of-circumstances" test for voluntariness.

Petitioner contended that, given the complexity of the tax structure, and the fact that tax offenders are rarely placed in pretrial custody, the "psychological restraints" attendant upon his situation constituted the functional, and therefore legal, equivalent of custody. Thus, his situation mandated *Miranda* warnings.[106]

In making this argument, the petitioner put forth the same sort of reasoning apparent in some lower court holdings.[107] This rationale is rooted in *Miranda's* stated policy, that its special safeguards were designed to counterbalance the coercion inherent in a custodial setting.[108] Since coercion is the evil with which *Miranda* sought to grapple, the requirement of warnings in settings where a suspect could reasonably feel coerced, although not literally deprived of his freedom of action, would be consistent with the spirit of *Miranda*. Thus, the emphasis should be on the coercive, rather than the custodial, nature of the setting.[109] By accepting this argument, the Court could have kept such situations as petitioner's within the

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102. *Id.* at 347.

103. *See* note 69, *supra*.

104. *See* note 92 and accompanying text, *supra*.

105. *See* note 83, *supra*.

106. 425 U.S. at 345.

107. *E.g.*, United States v. Caiello, 420 F.2d 471, 473 (2d Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); People v. Arnold, 66 Cal.2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967).

108. 384 U.S. at 458. *See* Nail v. Slayton, 353 F. Supp. 1013, 1017-18 (W.D. Va. 1972) (dictum).

109. *See, e.g.*, United States v. Harrison, 265 F. Supp. 660 (S.D.N.Y. 1967).

circumference of *Miranda* while adopting the majority stance with regard to "focus." However, the *Beckwith* Court made it clear that non-custodial settings fall within the province of due-process determination under the voluntariness test. In its broader sense, then, *Beckwith* could be interpreted as an indication that in many of the cases where the psychological, rather than the physical sort of retraint was held to justify invoking *Miranda*, the proper determination with regard to the admissibility of the confession should have been made through the voluntariness test rather than by inquiring for "custodial" interrogation under *Miranda*. The impact of this *dictum* may be felt in future determinations of custody by an objective test.

Placed in context with *Michigan v. Mosley* and *Oregon v. Mathiason*, *Beckwith* exemplifies the emerging pattern of the Supreme Court's curtailment of *Miranda's* protective procedures. *Miranda* was designed to maximize an individual's right to exercise free and informed judgment while in the frightening position of being suspected of criminal conduct. To accomplish its goal, *Miranda* set forth concrete guidelines which, when given only moderately strict construction, became absolutely definitive of the admissibility or inadmissibility of confessions, incriminating utterances, or other crime-related statements to prove the government's case. The inflexibility of these guidelines renders it entirely possible that truly "voluntary" waivers could be excluded from evidence or lead to reversal of the convictions. Ultimately, it has become clear that, in certain areas, strict adherance to *Miranda* has accomplished little genuine benefit to the rights of the suspect, while adding greatly to the burdens of law enforcement officers. It is in these areas that the Burger Court has acted to erode *Miranda*.

Miranda's major departure from the due process voluntariness standard lay in its recognition that only when one is aware of his rights can he fairly be deemed capable of waiving them. For the properly informed suspect, however, the "totality of circumstances" test affords sufficient assurance that a waiver is voluntary. It is difficult to see what more is accomplished by erecting an absolute bar to questioning of one who understands his rights, and in fact, has asserted one of them. Undue pressure from government agents to induce him to change his mind would still run afoul of due process. From a law enforcement officer's point of view, the requirement of immediate cessation is a procedural quagmire toward which he must continually bend a wary eye. The individual suspect gains nothing from such procedural niceties. Understandably, the Burger Court, in *Michigan v. Mosley*, has cut back on the strictures of *Miranda* in this area.

Similarly, when a suspect is not significantly under government control, the responsibility for assuring that he is educated as to his rights should

not, in fairness, rest so heavily on the shoulders of law enforcement officers. To impose so high a penalty upon their failure to give warnings would seriously impair their progress in solving and preventing crime. *Oregon v. Mathiason* and *Beckwith v. United States* have operated to relieve officers of their "educational" responsibility in such situations by assuming that "custody" bears a more direct correlation to physical control and involves less guesswork as to when the subject may reasonably feel coerced.

Miranda, like everything else, is most assailable at its weak points; the heart of *Miranda*, which is its strength, remains unimpaired. Ultimately, *Miranda's* exclusionary rule has three major purposes: to assert the logical position that a suspect cannot waive rights of which he has no knowledge; to deter police misconduct; and to assure that a suspect is not coerced into incriminating himself falsely. Of these three purposes, two are adequately served by the due process voluntariness test. Only the "educational" benefits of *Miranda* would be lost by reducing the warnings to merely one among a totality of circumstances to be weighed in finding voluntariness. But the "educational" function of the warnings, has continuing merit and vitality. Lacking an adequate substitute therefor, it is difficult to imagine that the Burger Court would venture to rescind *Miranda*—and thus turn its back on the genuine benefits of ten years of this "educational" requirement—without much soul-searching.

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