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Legal Limitations on Miranda

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NOTES

LEGAL LIMITATIONS ON MIRANDA

INTRODUCTION*

ONE may note, either with alarm or satisfaction, that the Supreme Court has, in recent years, displayed increasing concern for protecting and expanding the constitutional rights of persons suspected of crime. One of the more controversial decisions reflecting this concern is *Miranda v. Arizona*,[1] which is designed to regulate the interplay between the police and the accused in those situations in which the police seek admissions or confessions. A majority of the Court having become disenchanted with the voluntariness test for determining the admissibility of confessions,[2] the *Miranda* opinion contains a carefully delineated set of prophylactic rules for dealing with future confessions.[3] In moving beyond the factual situations

* This note was at press prior to the enactment of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, title II, § 701 of which in effect overrules *Miranda* in the federal courts.

[1] 384 U.S. 436 (1966). *Miranda* was only one of four cases consolidated in the decision. The other cases involved were *Vignera v. New York*, *Westover v. United States*, and *California v. Stewart*.

[2] The voluntariness test was derived from the common law rule that a confession must be trustworthy before it can be admitted into evidence, and was given constitutional status by the Supreme Court. *See* Brown v. Mississippi, 297 U.S. 278, 287 (1936). The determination of voluntariness was a subjective process, involving a weighing of the circumstances of pressure against the defendant's power of resistance, to determine whether his will was overborne. Stein v. New York, 346 U.S. 156, 185 (1953). For a discussion of the factors considered under this "totality of the circumstances" test, see Miller and Kessel, *The Confession Confusion*, 49 MARQ. L. REV. 715 (1966); Ritz, *Twenty-five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35, 202 (1962); Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313 (1964). For other developments in the area of confessions prior to *Miranda*, *see* Enker & Elsen, *Counsel For the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47 (1964); Traynor, *The Devils of Due Process in Criminal Detection, Detention and Trial*, 33 U. CHI. L. REV. 657 (1966). *See also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft No. 1, 1966).

[3] *Miranda* is not retroactive. In *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Court said its new confession rules apply only to trials which began after June 13, 1966, the date of the *Miranda* decision. The Court did state that the state courts were free to apply *Miranda* to a broader range of cases. *Id.* at 733. In spite of the Court's generosity, no state has felt compelled to deviate from *Johnson*, and only a few courts considered the problem of retroactivity in any detail. For opinions containing a spirited discussion of the issue, see People v. Rollins, 423 P.2d 221, 56 Cal. Rptr. 293 (1967); State v. Rye, 148 N.W.2d 632 (Iowa 1967); People v. McQueen, 18 N.Y.2d 337, 221 N.E.2d 550, 274 N.Y.S.2d 886 (Ct. App. 1966). Most courts simply stated that *Miranda* was not to be applied retroactively, citing *Johnson* as authority. Perhaps the meek obedience of the state courts is summed up by the words of one judge who stated:

> I confess to occasional difficulty in conforming my own views with those of the Supreme Court, in this area of the law; and now that I have found

before it, the Court promised to exclude from evidence all confessions or admissions unless, prior to custodial interrogation, the accused is advised of his fifth and sixth amendment rights and adequately waives them.

Despite its black-letter style, *Miranda* has proved to be only a skeletal framework within which the courts must exercise their own discretion as to how the issues should be resolved.[4] In resolving subsequent factual situations, the various state and federal courts have been far from harmonious in their opinions as to how *Miranda* should be interpreted. The purpose of this Note is to discuss and analyze the major issues arising from *Miranda* and the possible legal limitations which may be placed thereon as the courts strive to obtain a proper balance between the rights of the individual and the public. Included for discussion are the broad issues of custodial interrogation, advisement, and waiver.

Although these are probably the most important of the issues raised by *Miranda,* they by no means circumscribe the areas covered by *Miranda.* Other areas relevant to a *Miranda* situation have, due to space limitations, been omitted. However, it is felt desirable here to identify some of these issues as they are all potential limitations on the scope and effect of *Miranda.* One such area is the application of the so-called "fruits" doctrine to the *Miranda* situation. Is evidence derived from information obtained during an illegal interrogation admissible into evidence, or is it the fruits of illegality, and

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a decision of that tribunal to which I can easily accommodate, I am unwilling to take a contrary position.

People v. McQueen, 18 N.Y.2d 337, 348, 221 N.E.2d 550, 555, 274 N.Y.S.2d 886, 894 (Ct. App. 1966) (concurring opinion).

In spite of the unanimous feeling that *Miranda* is not to be given retroactive application, the majority of the courts, both state and federal, have held that if the defendant can obtain a reversal of his original conviction, even if on a technicality, he will have the benefit of *Miranda* at the retrial, even though it was not available to him on appeal. *See, e.g.,* State v. Brock, 101 Ariz. 168, 416 P.2d 601 (1966); People v. Doherty, 429 P.2d 177, 59 Cal. Rptr. 857 (1967); Creech v. Commonwealth, 412 S.W.2d 245 (Ky. 1967); People v. Vignera, 18 N.Y.2d 723, 220 N.E.2d 801, 274 N.Y.S.2d 161 (Ct. App. 1966); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966); State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458 (1966). Federal cases include Gibson v. United States, 363 F.2d 146 (5th Cir. 1966); United States v. Pinto, 259 F. Supp. 729 (D.N.J. 1966). On the other hand, a few courts see no difference between a trial and retrial insofar as application of *Miranda* is concerned. *See* Jenkins v. State, 230 A.2d 262 (Del. 1967); People v. Worley, 35 Ill. 2d 574, 221 N.E.2d 267 (1966); State v. Vigliano, 47 N.J. 504, 221 A.2d 733 (1966); People v. La Belle, 53 Misc. 2d 111, 277 N.Y.S.2d 847 (Rensselaer County Ct. 1967). *See also* Comment, *The Applicability of Miranda to Retrials,* 116 U. PA. L. REV. 316 (1967). For a searching analysis of the Constitution as a chronological limitation, see Loewy, *The Old Order Changeth — But For Whom?,* 1 SUFFOLK U.L. REV. 1 (1967).

[4] As Justice Harlan said, "the fine points of this scheme are far less clear than the Court admits." Miranda v. Arizona, 384 U.S. 436, 505 (1966) (dissenting opinion).

thus inadmissible?[5] May evidence, inadmissible as direct evidence of guilt because of noncompliance with *Miranda,* be admitted into evidence on a question other than guilt? The main concern would be whether such evidence could be used to impeach the defendant's credibility.[6] Another issue, one of remedy, is, in what tribunals and at what type of hearing may the defendant raise a *Miranda* objection?[7] Also, does the "standing" rule apply to *Miranda* violations? That is, if evidence is obtained from *A* in violation of *A*'s *Miranda* right, does *B* have a right to object to its admission in a prosecution against *B*?[8]

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[5] In *Miranda,* near the close of the opinion, the Court said: "But unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence* obtained as a result of interrogation can be used against him." 384 U.S. at 479 (emphasis added). *See id.* at 500 (Clark, J., dissenting opinion).

By using such broad language, the Court made implicit reference to the "fruits" or "primary taint" doctrine, first expressed in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920): "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." The "fruits" doctrine extends to all evidence, whether it be direct or indirect products of the illegality, or whether it is verbal statements or more tangible evidence. Wong Sun v. United States, 371 U.S. 471, 484-86 (1963). *See* Broeder, *Wong Sun v. United States: A Study in Faith and Hope,* 42 NEB. L. REV. 483, 519-32 (1963).

Subsequent to *Miranda,* the "fruits" doctrine has been applied in a number of interrogation cases to exclude the evidence obtained. United States v. Harrison, 265 F. Supp. 660, 662 (S.D.N.Y. 1967) (policy slips); People v. Dannic, 52 Misc. 2d 1012, 277 N.Y.S.2d 331 (Sup. Ct. 1967) (testimony of witnesses excluded because identity learned through illegal interrogation); People v. Glover, 52 Misc. 2d 520, 526, 276 N.Y.S.2d 461, 468 (Sup. Ct. 1966) (dictum) (marijuana); People v. Reason, 52 Misc. 2d 425, 276 N.Y.S.2d 196 (Sup. Ct. 1966) (stolen goods); *cf.* United States v. Davis, 265 F. Supp. 358 (W.D. Pa. 1967) (illegally obtained statements not part of reasonable cause to search); People v. Spencer, 424 P.2d 715, 57 Cal. Rptr. 163 (1967) (judicial confession excluded because of prior improper admission of extra-judicial confession). *Contra,* Brown v. United States, 375 F.2d 310 (D.C. Cir. 1966). *See generally* George, *The Fruits of Miranda: Scope of the Exclusionary Rule,* 39 U. COLO. L. REV. 478 (1967); Jones, *Fruit of the Poisonous Tree,* 9 SO. TEX. L.J. 17 (1967); Note, *Fruits of the Illegally Obtained Confession,* 4 WILLAMETTE L.J. 269 (1966).

[6] In addition to the impeachment issue, Mr. Justice White has listed other indirect uses of such evidence, the legality of which has not been settled: to secure an indictment; to convince other witnesses to testify; to support parole revocation; to furnish guidance at the sentencing stage. 1 BNA CRIM. L. REP. 2281 (1967). The *Miranda* opinion, however, does contain a reference to impeachment uses:

> In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.

384 U.S. at 477.

Most courts have held that the use of inadmissible statements for impeachment purposes is prohibited by *Miranda.* State v. Brewton, 422 P.2d 581 (Ore.), *cert. denied,* 387 U.S. 943 (1967); Gaertner v. State, 35 Wis. 2d 159, 150 N.W.2d 370 (1967). *See* 19 S.C.L. REV. 281 (1967).

[7] *Cf.* Note, *The Fourth Amendment and the Exclusionary Rule in Civil Cases,* 43 DENVER L.J. 511 (1966).

[8] This issue closely parallels the "standing" requirement in search and seizure cases. In that area, only California refused to recognize a requirement that only the person subjected to the unlawful search has the right to object to the use at trial of the evidence seized. People v. Martin, 45 Cal.2d 755, 290 P.2d 855 (1955). However, in a recent decision the California Supreme Court reversed its position when dealing with a *Miranda* violation. In holding that the "standing" requirement is applicable,

Another area in which *Miranda* may have application is that relating to the police practices of encouragement (or its illegal counterpart, entrapment)[9] and the use of informants.[10] Will *Miranda*

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the court's justification was that the privilege against self-incrimination is not violated until the evidence is offered into evidence in a trial of the person from whom it was taken. However, if the evidence is *coerced* from a person, the court indicated that the standing requirement is inapplicable. People v. Varnum, 427 P.2d 772, 775-76, 59 Cal. Rptr. 108, 112 (1967). For a discussion of this case, see 14 How. L.J. 196 (1968).

[9] Entrapment has been defined as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." Sorrells v. United States, 287 U.S. 435, 454 (1932) (Roberts, J., concurring opinion).
In the past, the Court's treatment of entrapment has been based on statutory construction. *Id.* at 448-50; Sherman v. United States, 356 U.S. 369, 372 (1958). *But see* Banks v. United States, 249 F.2d 672 (9th Cir. 1957). Only recently did the Court analyze this practice in constitutional jargon. In Lewis v. United States, 385 U.S. 206 (1966), the Court upheld a narcotics conviction, rejecting the contention that the fourth amendment had been violated. However, the Court cautioned that each case must be considered on its facts, implying that police deception may at times be constitutionally offensive. For a discussion of this case, and the constitutional status of "encouragement," see Rotenberg, *The Police Detector Practice of Encouragement: Lewis v. United States and Beyond,* 4 HOUSTON L. REV. 609 (1967).

Two main arguments can be advanced against a nexus of the privilege against self-incrimination and the practice of encouragement. First, it can be argued that no compulsion is present, and because the fifth amendment requires its presence, it is not applicable. In discussing the argument, one would have to reassess the *Miranda* requirement of custody. Second, the Court distinguishes between communicative and noncommunicative evidence, holding that the privilege is applicable only as to the former. Schmerber v. California, 384 U.S. 757 (1966). Thus it must be shown that the evidence obtained from police encouragement is "an accused's communications, whatever form they might take." *Id.* at 763-74. It is clear that verbalizations resulting from encouragement are communicative. However, the physical actions of the defendant may not fit the "communicative" test. In a recent decision, the Court held that a person's privilege against self-incrimination is not applicable to a police line-up in which the accused is required to perform acts and utter words for purposes of identification. In so doing, the Court implied that "communicative" was equivalent to the disclosure of knowledge. United States v. Wade, 388 U.S. 218, 222-23 (1967) (held that defendant had right to counsel during line-up). *Accord,* Gilbert v. California, 388 U.S. 263 (1967).

At least one court has predicted that *Miranda* will apply in full force to "encouragement." People v. Johnson, 52 Misc. 2d 1087, 1091-92, 278 N.Y.S.2d 80, 85 (City Ct. 1967) (dictum). *See* Note, *The Defense of Entrapment: A Plea for Constitutional Standards,* 20 U. FLA. L. REV. 63, 72 (1967). For a detailed discussion of this police practice, see Cowen, *The Entrapment Doctrine in the Federal Courts, and Some State Court Comparisons,* 49 J. CRIM. L.C. & P.S. 447 (1959); Orfield, *The Defense of Entrapment in the Federal Courts,* 1967 DUKE L.J. 39 (1967); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution,* 28 FORDHAM L. REV. 399 (1959); Note, *The Serpent Beguiled Me and I Did Eat — The Constitutional Status of the Entrapment Defense,* 74 YALE L.J. 942 (1965); Note, *Entrapment,* 73 HARV. L. REV. 1333 (1960).

[10] If compulsion is a prerequisite to the application of the fifth amendment, then it would appear that *Miranda* will not apply to the government's use of a secret informant to gain evidence. This was the answer supplied by the Supreme Court in Hoffa v. United States, 385 U.S. 293, 303-04 (1966). The fifth amendment was held not to apply because of the absence of any compulsion, either legal or factual. In other words, a misplaced confidence that the informer would not reveal the conversation is no defense. *Cf.* Osborn v. United States, 385 U.S. 323 (1966); Lewis v. United States, 385 U.S. 206 (1966).

The Court did say that although "the use of secret informers is not *per se* unconstitutional" such informer is subject to all relevant constitutional restrictions. 385 U.S. at 311. Thus the Court left itself leeway for future cases in which the facts might be more shocking. The Court has held that the use of a government informer in the *post-indictment* stage may violate the defendant's right to the assistance of counsel. Massiah v. United States, 377 U.S. 201 (1964).

have any limiting effect on these devices? *Miranda* may also forbode that some of the Court's rules in other, nonconfession cases are subject to revision. For example, in light of the Court's concern, as expressed in *Miranda,* for a truly knowledgeable waiver of constitutional rights, will it now require that a person be advised of his right to refuse a request for a warrantless search, before it will hold that a person has truly "consented" to the search and thus validated it?[11]

I. Conditions Precedent to the Application of Miranda

The threshold inquiry in the discussion of *Miranda* centers around a determination of when *Miranda* applies; that is, at what point in time is a person's privilege against self-incrimination jeopardized? If it is decided that, in a particular case, *Miranda* does not apply, there need be no advisement and an accompanying waiver for the person has no rights which may be violated. The resolution of this issue entails a variety of potential limitations on the scope and effect of *Miranda,* and will be a breeding ground for considerable litigation in the years to come.

The Supreme Court indicated that a person is entitled to the *Miranda* safeguards when he is subjected to "custodial interrogation," defined by the Court as "*questioning* initiated by *law enforcement officers* after a person has been taken into *custody or otherwise deprived of his freedom of action in any significant way.*"[12] In a footnote to the sentence the Court added: "This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused."[13]

The Court's definition reveals three significant limitations on the prospective application of *Miranda*: 1) a person must be in custody

[11] Unless a search is conducted pursuant to a search warrant or incidental to a lawful arrest, the police must obtain the person's consent in order to conduct a search which will not be vitiated by the fourth amendment prohibition against unreasonable search and seizures. Judging from the Court's concern for a knowledgeable and intelligent waiver of rights, the *Miranda* rationale may henceforth require that before a consent search is conducted, the person must be advised: 1) that he has the right to refuse a warrantless search and no legal stigma will be attached to his refusal to consent; 2) that if he does consent, any seizable evidence which is revealed by the search may be used in evidence against him. If the person thereafter consents, the search will be valid. Some post-*Miranda* courts have so held. United States v. Nikrasch, 367 F.2d 740, 744 (7th Cir. 1966); United States v. Blalock, 255 F. Supp. 268, 269 (E.D. Pa. 1966). *Contra,* Gorman v. United States, 380 F.2d 158, 164 (1st Cir. 1967); State v. McCarty, 199 Kan. 116, 427 P.2d 616, 619-20 (1967); State v. Forney, 181 Neb. 757, 150 N.W.2d 915 (1967); Weeks v. State, 417 S.W.2d 716, 719 (Tex. Crim. App. 1967). For a good discussion, see Note, *Consent Searches: A Reappraisal After Miranda v. Arizona,* 67 Colum. L. Rev. 130 (1967). *See generally* LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. Ill. L.F. 255. The multiple problems involved in proving consent were discussed in Note, *Effective Consent to Search and Seizure,* 113 U. Pa. L. Rev. 260 (1964).

[12] 384 U.S. at 444 (emphasis added).

[13] *Id.* n.4.

or otherwise effectively detained,[14] and 2) subjected to questioning 3) by law enforcement officers. A fourth limitation which was not discussed in *Miranda* is, for what crime must the person be suspected of committing? Future litigation of the application of *Miranda* to a particular fact situation will revolve around these four potential conditions precedent.

Before discussing these limiting factors and the various alternatives available to the courts within each, it might be profitable to note some general language used by the Court in discussing the application of the fifth amendment privilege to pre-trial situations. Although general statements are never too helpful, they may give some indication of the direction which the Supreme Court will take in the years ahead. The privilege "has always been 'as broad as the mischief against which it seeks to guard.' "[15] Further, "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[16] The Court also said that the privilege against self-incrimination "serves to protect persons *in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[17] In light of the Court's increasing concern for protecting and enhancing individual rights, and because the privilege "has consistently been accorded a liberal construction,"[18] it is clear that the Court will expand the scope of *Miranda* when necessary to prevent abuses resulting from strait-jacketed interpretations.

A. *Custody or Effective Detention.*

The Supreme Court, realizing that the fifth amendment only protects a person from being compelled to incriminate himself,[19] required that the person's freedom of movement be curtailed in some significant way before that person could have the benefit of *Miranda.* Thus, custody or effective detention is, for the present,

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[14] "Effective detention" has been coined to refer to the Court's language: "or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444.

[15] Miranda v. Arizona, 384 U.S. 436, 459-60 (1966).

[16] *Id.* at 460.

[17] *Id.* at 467 (emphasis added).

[18] *Id.* at 461.

[19] The fifth amendment reads in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U. S. CONST. amend. V.

a condition precedent to the application of *Miranda.*[20] However, the precise moment when a person's freedom has been sufficiently restrained was left largely unresolved by *Miranda.* The Court did say that a person is entitled to the benefit of *Miranda* when he is deprived of his freedom of movement in a significant way,[21] which is to say that the investigation has focused on him.[22] Another indication of the scope of *Miranda* is what the Court has deemed to be permissible investigation to which *Miranda* does not apply:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding.[23]

Awaiting further elucidation from the Supreme Court, state and lower federal courts must determine for themselves the situations which can be deemed compelling for purposes of applying *Miranda.* The courts are already in hopeless conflict with one another in resolving this issue. The presence of a police-dominated atmosphere, the formalizing of an arrest, the existence of probable cause to arrest — these and other considerations have emerged as potential limitations on *Miranda.*

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[20] It may be questioned whether custody or effective detention is the exclusive indicator of compulsion. For example, compulsion may be present in "interviews" with persons suspected of white-collar crimes such as tax fraud, even though the person is technically free to leave. When a person is being investigated for possible tax evasion, tax officials will "interview" him. Successful cooperation usually depends upon the "cooperation" of the taxpayer. Thus, the taxpayer's privilege against self-incrimination is in serious jeopardy, though he may refuse to cooperate. However, the courts usually have found that this situation does not fall within the *Miranda* arena, it being limited to custodial situations. *See* cases collected in Frohmann v. United States, 380 F.2d 832, 835-36 (8th Cir. 1967). *See also* United States v. Gower, 271 F. Supp. 655, 659-61 (M.D. Pa. 1967) (court looked for, and found, stage where investigation clearly focused on defendant). For a good discussion advocating the application of *Miranda* to criminal tax investigations, see Lipton, *Constitutional Rights in Criminal Tax Investigations,* 53 A.B.A.J. 517 (1967).

Recently, the Supreme Court handed down its first post-*Miranda* decision interpreting *Miranda.* The facts involved questioning by a revenue agent of a man in prison serving a sentence for a non-tax crime. The Court held this to be custodial interrogation warranting the application of *Miranda.* Though the Court apparently erased any supposed distinction, for purposes of *Miranda,* between the IRS classifications of "civil" and "criminal" investigative stages, the opinion shed little light on the "custody" issue, as the defendant's presence in prison was obviously custodial. Mathis v. United States, 88 S.Ct. 1503 (1968).

[21] 384 U.S. at 444.

[22] *Id.* n.4.

[23] 384 U.S. at 477. For cases involving general on the scene questioning, see Sciberras v. United States, 380 F.2d 732 (10th Cir. 1967); United States v. Essex, 275 F.Supp. 393 (E.D. Tenn. 1967); United States v. Delamarra, 275 F.Supp. 1 (D.D.C. 1967); State v. Phinis, 199 Kan. 472, 430 P.2d 251 (1967).

1. The Place of Questioning.

A perusal of the post-*Miranda* cases indicates that the *place* where the questioning occurs has emerged as a significant limitation on the application of *Miranda.* That is, several courts believe that the questioning must have been conducted in the station house or in some other "police-dominated atmosphere."[24]

The emergence of "place" as a limitation is attributable to the *Miranda* opinion, containing a lengthy discussion of the secret interrogation process which is conducted in an atmosphere which "carries its own badge of intimidation."[25] Because the factual situations in *Miranda* involved station-house interrogations, the Court discussed in detail the various physical and psychological pressures outlined in the police manuals and texts.[26] The Court then concluded that such interrogations were justifiably within the ambit of the fifth and sixth amendment protections.

It is obvious that interrogations conducted within the confines of the police station are governed by *Miranda,* but are these the only situations in which *Miranda* is applicable? Practical considerations suggest that *Miranda* is much broader in scope. The long discussion of the nature of secret interrogations was undoubtedly to justify expanding the scope of the privilege against self-incrimination to include pre-trial situations in which a person may be compelled to incriminate himself. The Court could best accomplish this by dramatizing the potential coerciveness in the factual situations before it. Since ours is a case-by-case system, and because the Court avoids rendering advisory opinions, it could not be expected that interrogation practices outside the police station would be discussed. Nevertheless, the Court, by using language which encompasses far more than station-house interrogations, has indicated its willingness to extend the protection of *Miranda* to a far greater latitude of situations. A broad interpretation receives further justification from what the Court perceives as permissible questioning; that is, *general* questioning of persons *not* under restraint.[27]

Although the place of interrogation may at times be considered, the relevant determination should be, at what point in time does a

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[24] *See, e.g.,* Evans v. United States, 377 F.2d 535 (5th Cir. 1967); United States v. Littlejohn, 260 F.Supp. 278, 282 (E.D.N.Y. 1966); Gaudio v. State, 1 Md. App. 455, 468, 230 A.2d 700, 708 (1967); People v. Gilbert, 8 Mich. App. 393, 154 N.W.2d 800 (1967); *cf.* State v. Norlega, 6 Ariz. App. 428, 433 P.2d 281 (1967). Also, it is apparent from a recent Supreme Court decision that at least three Justices would support the limiting of *Miranda* to these situations. Mathis v. United States, 88 S.Ct. 1503 (1968) (White, Harlan, and Stewart, dissenting).

[25] 384 U.S. at 457.

[26] *Id.* at 448-55.

[27] *Id.* at 477-78.

person feel "compelled" to answer inquiries? Surely, if a person is confronted by a police officer who identifies himself, usually by displaying his badge, and if that person is in fact not free to leave of his own volition, he may feel compelled to answer questions. The *fact* of custody is, by its very nature, compulsive.[28] By considering the place of interrogation controlling, the police would be encouraged to circumvent *Miranda* by conducting all interrogation outside the police station.[29]

2. The Person Under Arrest or Detained on Probable Cause.

If the place of interrogation is not considered controlling, the next logical limitation is to restrict *Miranda* to those cases in which the person was under arrest or in which the evidence gives the police probable cause to arrest. The only significance of an arrest would be to show that the person's freedom of action was clearly restrained. In this context, the lawfulness of the arrest, or whether it was with or without a warrant, is irrelevant.[30] A person detained on reasonable or probable cause is in the same predicament as one who has been arrested, and the *Miranda* safeguards should apply. As concerns the fifth and sixth amendment safeguards, the plight of the accused is no different than for one under arrest, except that no verbalizing of "you are under arrest" has taken place.[31] Although there is nothing magical about these words, some courts appear to worship their existence.[32] Thus, some courts have grafted a limitation on *Miranda* which the Supreme Court never anticipated.

Compulsion, not arrest, triggers the constitutional safeguards provided in *Miranda*. Although the two terms may be related, they are not synonymous. If the Supreme Court had wished to limit *Miranda* to arrest situations, it would have been a simple matter to frame its custody limitation in those words. If interrogation becomes custodial only after the fact of arrest, the *Miranda* opinion may well

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[28] People v. Allen, 50 Misc. 2d 897, 904, 272 N.Y.S.2d 249, 255 (Sup. Ct. 1966), *rev'd*, 28 App. Div. 2d 724, 281 N.Y.S.2d 602 (1967). *See* People v. Glover, 52 Misc. 2d 520, 523, 276 N.Y.S.2d 461, 465 (Sup. Ct 1966). The possibility that, in fact, a given person may not feel compelled to answer questions should be of little importance. *Miranda* is designed to insure that the average person, when confronted with custodial interrogation, will be able to exercise an intelligent choice. Just as the Court said, 384 U.S. at 471-72, that it will not inquire in a particular case whether in fact, a person had previous knowledge of his rights, so also the Court cannot be expected to consider whether in a given case, the defendant in fact did not feel compelled.

[29] People v. Allen, 50 Misc. 2d 897, 901, 272 N.Y.S.2d 249, 253 (Sup. Ct. 1966), *rev'd*, 28 App. Div. 2d 724, 281 N.Y.S.2d 602 (1967).

[30] It makes no difference to the defendant why or how he was arrested. The fact of arrest places him in compelling circumstances.

[31] True, there will be more compulsion if a person is formally placed under arrest, but there is sufficient compulsion absent arrest.

[32] *See, e.g.*, United States v. Davis, 259 F.Supp. 496, 497 (D. Mass. 1966); People v. Nieto, 55 Cal. Rptr. 546, 549 (Ct. App. 1966) (dictum), *cert. denied*, 387 U.S. 911 (1967). *See* 18 W. RES. L. REV. 1777 (1967).

become a verbal exercise in futility because the police need only delay "arrest" until after interrogation is concluded.[33]

Some courts, skirting analysis, have recited that in a particular case, *Miranda* does not apply for there was no arrest, merely a "detention,"[34] or an "accosting."[35] *Duffy v. State*[36] is representative of the cases seemingly substituting semantics for analysis. An officer saw three persons run from the scene of a robbery, in which the victim had been stabbed. Two of them, whom the officer recognized, were later apprehended. From them he gleaned the name of the third and the officer proceeded to where the defendant was sleeping. The officer observed the knife used in the robbery, for it was only partially hidden under the mattress. He then roused the defendant, but instead of saying "you are under arrest" he elicited inculpatory statements in response to his questions. The defendant was then "arrested." In admitting the statements into evidence, the court said:

> [T]he exclusionary principles enunciated in . . . Miranda . . . are not applicable to a confession gleaned from a suspect who is merely accosted by the police, but deal instead with the safeguards which must be provided for an accused who is in police custody.[37]

In another case, *Miranda* was held inapplicable because the defendant was not arrested, merely detained, even though marijuana had been found on his ship and he was confined thereon. His freedom was so severely restricted that when it was necessary for him to go to the restroom, he had an official escort. The last period of interrogation was conducted by an official who had an arrest warrant in his possession.[38] Other cases with similar situations and holdings include: the stopping of the defendant's car, with probable cause;[39] the taking of the defendant to an official's office for questioning;[40] questioning on the street after the officers had probable cause to arrest the defendant for robbery.[41]

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[33] *See* State v. Tellez, 6 Ariz. App. 251, 255, 431 P.2d 691, 695 (1967); People v. Allen, 50 Misc. 2d 897, 901-02, 272 N.Y.S.2d 249, 253 (Sup. Ct. 1966), *rev'd*, 28 App. Div. 2d 724, 281 N.Y.S.2d 602 (1967).

[34] Brown v. United States, 365 F.2d 976, 979 n.4 (D.C. Cir. 1966); United States v. Davis, 259 F. Supp. 496, 497 (D. Mass. 1966); People v. Nieto, 55 Cal. Rptr. 546, 549 (Ct. App. 1966) (dictum), *cert. denied*, 387 U.S. 911 (1967).

[35] Dixon v. State, 1 Md. App. 623, 626, 232 A.2d 538, 540 (1967); Duffy v. State, 243 Md. 425, 431, 221 A.2d 653, 656 (1966).

[36] 243 Md. 425, 221 A.2d 653 (1966).

[37] *Id.* at 431, 221 A.2d at 656.

[38] United States v. Davis, 259 F. Supp. 496, 497-98 (D. Mass. 1966).

[39] United States v. Littlejohn, 260 F.Supp. 278, 282 (E.D.N.Y. 1966).

[40] United States v. Appell, 259 F. Supp. 156, 157 (D. Mass. 1966).

[41] People v. Kenny, 53 Misc. 2d 527, 530, 279 N.Y.S.2d 198, 202 (Sup. Ct. 1966) (the court found significant the absence of a police dominated atmosphere; *accord*, Evans v. United States, 377 F.2d 535, 536 (5th Cir. 1967).

Other courts look to the reality of the defendant's situation. In *People v. Allen*,[42] the defendant was interrogated in his home by officers who had been told by a woman that the defendant had forcibly raped her. In a well-articulated opinion, the judge ruled that the statements were inadmissible.[43] In so holding, he held irrelevant the absence of formal arrest, station-house interrogation, and an interrogation atmosphere and environment.[44] Unfortunately, this decision was reversed on appeal in a rather terse and shallow memorandum opinion.[45] Other courts have shared the views of the trial judge in the *Allen* case.[46] It is submitted that this is the correct view. When the police have probable cause to suspect the detained person of committing a crime, it must be assumed that at some point during the confrontation they will perform their duty and formally arrest the person.[47] In the meantime, the person's freedom of movement has been curtailed.[48]

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[42] 50 Misc. 2d 897, 272 N.Y.S.2d 249 (Sup. Ct. 1966), *rev'd*, 28 App. Div. 2d 724, 281 N.Y.S.2d 602 (1967). For a discussion of this case, see 33 BROOKLYN L. REV. 347 (1967).

[43] 50 Misc. 2d at 900, 272 N.Y.S.2d at 251.

[44] *Id.* at 900, 272 N.Y.S.2d at 252. *See* People v. Vaiza, 244 Cal. App. 2d 121, 52 Cal. Rptr. 733, 737 (1966) (questioning while defendant was in hospital bed).

[45] People v. Allen, 28 App. Div. 2d 724, 281 N.Y.S.2d 602 (1967) (the court used "voluntariness" language).

[46] United States v. Harrison, 265 F. Supp. 660 (S.D.N.Y. 1967); People v. Arnold, 426 P.2d 515, 58 Cal. Rptr. 115 (1967); People v. Golwitzer, 52 Misc. 2d 925, 277 N.Y.S.2d 209 (Sup. Ct. 1966); People v. Glover, 52 Misc. 2d 520, 276 N.Y.S.2d 461 (Sup. Ct.. 1966).

[47] Who would be bold enough to suggest that an officer will walk away from one whom he has probable cause to arrest?

[48] It is possible that instead of approaching the question of custody from the standpoint of analyzing the evidence possessed by the police, courts will establish some kind of "totality of the circumstances" test. Under this test, the court would objectively weigh all the facts and circumstances to determine whether the accused was in fact free to leave. In making this determination, the court would consider the information possessed by the officer, the nature of the questions asked, any expressed intention on the part of the officer to detain, the situation as it would appear to a reasonable person, and any other relevant circumstances. It is also likely that some courts may decide to use a subjective standard which would examine the accused's state of mind to ascertain whether he felt that his freedom of movement was restrained. The court may also inquire into the officer's state of mind to determine the existence of an intention to detain. The courts using the subjective test would be looking for the effect of the facts and circumstances on the minds of the respective parties.

The California Supreme Court has apparently adopted a modification of the subjective and objective tests: "We hold that custody occurs if the suspect is physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived." People v. Arnold, 426 P.2d 515, 521, 58 Cal. Rptr. 115, 121 (1967). This test deserves some comment. The reference to "physically deprived" would seem to connote an arrest or its equivalent. Thus, the fact that a person is a suspect may not be sufficient. One court, in applying this test, has so held. People v. Hazel, 60 Cal. Rptr. 437, 441 n.3 (Ct. App. 1967). If the person is not placed under arrest or taken to the police station, "custody" apparently depends upon what the officer said to the suspect or upon the officer's demeanor, and what compelling effect these words or actions would have on a reasonable person. The fact that the officer had probable cause to arrest the accused and would not have permitted him to leave would be irrelevant unless the officer's subjective views had been communicated to the accused. However, the California court gave some indication that it would still look to all the relevant circumstances before determining the existence of custody. 426 P.2d at 522, 58 Cal. Rptr. at 122.

3. The Person Detained on Police Suspicions.

The discussion up to now has been limited to situations in which the person's freedom of movement has been clearly curtailed. Thus, the custody requirement has been satisfied. However, much police activity centers around the "suspect." For purposes of discussion, if the police feel that a person is involved in the commission of a crime, but there is insufficient evidence to make an arrest, that person is a "suspect." In the search for a test of "custody," the question arises whether the fact that a person is a suspect, without more, qualifies that person for the *Miranda* safeguards. The Supreme Court has, by implication, recognized this possibility.[49]

Custody normally signifies some kind of restraint on the person involved. However, when dealing with a suspect, physical restraint may never be imposed unless the person either attempts to leave or gives the police probable cause for arresting him. Thus, if questioning of a suspect is sufficient to invoke the safeguards of *Miranda,* restraint or detention must be presumed from the presence of police suspicions. The validity of presuming restraint is aided by the *Miranda* opinion in which the Court, after laying out its definition of custodial interrogation, said: "This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused."[50] Later in the opinion, the Court said:

> We have concluded that without proper safeguards the process of in-custody interrogation of persons *suspected or accused* of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.[51]

It was this language which induced one court to find "custody" when an officer approached the defendants after his suspicion had been aroused by seeing them get into a taxi, carrying a phonograph and a portable television set.[52] That court remarked: "The mandated warnings apply to persons *merely suspected* as well as to persons actually accused . . . ."[53]

In another case,[54] a policeman approached the defendant, whom the officer suspected of living in an apartment in which marijuana had earlier been found. In holding subsequent statements inadmissible because of noncompliance with *Miranda*, the court said:

> [W]hatever else Miranda may have intended "custody" to mean,

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[49] *See* Clewis v. Texas, 386 U.S. 707, 711 n.7 (1967) (dictum). *See also* Miranda v. Arizona, 384 U.S. 436, 488 n.59 (1966).

[50] 384 U.S. at 444 n.4.

[51] *Id.* at 467.

[52] People v. Reason, 52 Misc. 2d 425, 276 N.Y.S.2d 196 (Sup. Ct. 1966).

[53] *Id.* at 430, 276 N.Y.S.2d at 202. *But see* People v. Singleton, 63 Cal. Rptr. 324 (Ct. App. 1967).

[54] People v. Glover, 52 Misc. 2d 520, 276 N.Y.S.2d 461 (Sup. Ct. 1966).

> this much is apparent — police questioning of a person, wherever detained, upon whom suspicion has already focused, appears ruled to be "custodial interrogation."[55]

Other courts have found custodial interrogation when officers questioned the defendant about his possible involvement in narcotics violations,[56] when officers entered an apartment wherein they suspected a heroin operation,[57] and when the police were possessed of sufficient facts to arouse in them a suspicion that a mother may have murdered one of her children.[58]

The official policy of the Denver Police Department[59] appears to be that if a person be suspected of having committed a crime, the officer must, prior to any questioning, advise the suspect of his rights, and secure a waiver. The place of interrogation is irrelevant. For example, the *Miranda* procedure would be followed if a detective proceeded to a person's home to question him, his only suspicion being that the person has a criminal record which reveals a method of operation similar to that used in the commission of the crime the detective is investigating. As with most policies, this is subject to occasional abuse by individual officers.[60]

There is another method of approaching the question whether the fact of being a suspect is sufficient. If the person is "deprived of his freedom of action in any *significant* way,"[61] he is entitled to

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[55] *Id.* at 525, 276 N.Y.S.2d at 466.

[56] United States v. Harrison, 265 F. Supp. 660 (S.D.N.Y. 1967).

[57] People v. Terrell, 53 Misc. 2d 32, 277 N.Y.S.2d 926 (Sup. Ct. 1967).

[58] People v. Golwitzer, 52 Misc. 2d 925, 277 N.Y.S.2d 209 (Sup. Ct. 1966). *See* People v. Beasley, 58 Cal. Rptr. 485, 491 (Ct. App. 1967). Some courts have not been so benevolent, most of them holding that a situation involving a suspect was either on the scene or routine questioning. *See* Williams v. United States, 381 F.2d 20, 22 (9th Cir. 1967); United States v. Manni, 270 F. Supp. 103, 106 (D. Mass. 1967); United States v. Kuntz, 265 F. Supp. 543, 547 (N.D.N.Y. 1967); United States v. Appell, 259 F. Supp. 156, 158 (D. Mass. 1966); People v. Hazel, 60 Cal. Rptr. 437, 440 (Ct. App. 1967); White v. United States, 222 A.2d 843, 845 (D.C. Ct. App. 1966); Gaudio v. State, 1 Md. App. 455, 459, 230 A.2d 700, 703 (1967); People v. Johnson, 50 Misc. 2d 1009, 1011-12, 271 N.Y.S.2d 814, 817 (Sup. Ct. 1966). Of course general on the scene questioning is permissible, Miranda v. Arizona, 384 U.S. 436, 477 (1966), but a *Miranda* situation may develop because of the answers given in response. If such answers cause the investigation to focus on the accused, then from that point on the questioning would become custodial in nature and the person would have to be advised of his rights, and a waiver secured, before the interrogation proceeds. People v. Glover, 52 Misc. 2d 520, 524-25, 276 N.Y.S.2d 461, 466 (Sup. Ct. 1966). *See* State v. Tellez, 6 Ariz. App. 251, 256, 431 P.2d 691, 696 (1967) (recognized the "focus" rule, but equated it with probable cause).

[59] As related in an interview with Lloyd Jamerson, Division Chief, Detective Division, Denver Police Department, in Denver, Colorado, Sept. 5, 1967. The department policy is based on an interpretation of *Miranda*.

[60] One example may be given from observations made while riding on patrol. A woman had her purse snatched from her on the streets, and she gave a general description of the two culprits to the officers investigating the incident. Nearby, two suspects fitting the same general description were picked up and brought to the scene for identification. One of the officers practiced deception in an effort to induce the suspects to confess. This proved fruitless, and the suspects were eventually released. At no time were the suspects advised of their rights.

[61] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

the *Miranda* protections. The key word is "significant." Presumably the Court did not intend to equate it with "physical," or it would have so stated. Therefore, if the requisite detention need not be physical, yet must be more than general questioning in a non-accusatory manner,[62] it may be plausibly argued that a suspect is deemed to be significantly restrained, independent of any physical or formal pressures. Thus, regardless of the conduct of the police, if they intend to question a suspect, *Miranda* would be applicable.

If the Supreme Court were to determine that all suspects are placed in a situation sufficiently compelling to justify clothing them with the *Miranda* safeguards, the question arises whether the police suspicions need be reasonable. If, in retrospect, the Court determines that the suspicion was ill-founded and unreasonable, is *Miranda* nevertheless applicable? To resolve this, one need only look to the relative positions of the characters. The effect of the situation on the suspect remains the same, regardless of the reasonableness of the suspicion. Likewise, reasonableness plays no part in determining the conduct of the interrogators. They are still focusing in on the suspect, attempting to substantiate or disprove their suspicions. Thus, the logical conclusion would be that reasonableness plays no part in determining the applicability of *Miranda.*

By applying the *Miranda* proscriptions to suspects, a common police practice known as "field interrogation" would be forced to undergo radical changes. Broadly speaking, this practice consists of stopping and questioning a person whom the officer suspects, but has insufficient grounds for making a legal arrest.[63] It is often codified in a "stop-and-frisk" statute which gives the officer the right to stop a person whom he suspects of committing a crime, and to demand of him an explanation of his actions.[64] The Supreme Court has ruled on some of the issues relating to stopping and ques-

[62] *Id.* at 477-78.

[63] *See* Tiffany, *Field Interrogation: Administrative, Judicial and Legislative Approaches,* 43 DENVER L.J. 389 (1966).

[64] *See, e.g.,* N.Y. CODE CRIM. PROC. § 180-a (1964). The statute also allows the officer to frisk the persons for weapons, if he believes his safety is in danger. *See* Tiffany, *supra* note 63, at 425-36. On the constitutional status of this statute, *see* Kuh, *Reflections on New York's "Stop-and-Frisk" Law and Its Claimed Unconstitutionality,* 56 J. CRIM. L.C. & P.S. 32 (1965); Note, *Police Power to Stop, Frisk, and Question Suspicious Persons,* 65 COLUM. L. REV. 848 (1965); Note, *The Law of Arrest: Constitutionality of Detention and Frisk Acts,* 59 NW. U.L. REV. 641 (1964). It should be noted that the American Law Institute, although not fully complying with *Miranda,* does require that a person be advised of his fifth amendment rights prior to questioning. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.01(2) (Tent. Draft No. 1, 1966). *Cf.* City v. Forrest, 35 U.S.L.W. 2443 (Cleve. Mun. Ct., Ohio, Jan. 4, 1967) (statute making it an offense to give unsatisfactory account of oneself unconstitutional, citing *Miranda*).

tioning suspicious persons,[65] but the Court has yet to evaluate this police practice in light of *Miranda*.[66]

The foregoing discussion raises another interesting issue. Is the *non-suspect* ever entitled to the benefit of *Miranda*? The issue would arise in the situation where the police were questioning an uncooperative witness who, during the course of interrogation, confessed his own guilt. One must bear in mind that the Supreme Court has explicitly excluded general questioning in the fact-finding process from the *Miranda* arena. This appears to eliminate in-the-field questioning of witnesses. But what about the witness who is taken from the field to the station house for questioning? Does physical custody plus questioning equal the requisite compulsion for purposes of the fifth amendment? One can only speculate as to the Supreme Court's feeling on this issue, but it could justifiably be said to be within the protection of *Miranda*.[67]

B. *The Requirement of Questioning.*

1. Acquisition of Verbal Evidence.

Strictly speaking, the suspect in custody need not be advised of his right to remain silent and to seek the assistance of counsel until the police intend to question him. If the police are prepared to observe a vow of silence in their dealings with the person there would seem to be no need for the advisement of rights. This means complete silence. Even the simplest of questions are forbidden without a proper advisement and waiver.[68] For example, the response to the general inquiry "Do you know what else you are under arrest for?" has been held inadmissible.[69]

The general statement that there must be some form of questioning may be too broad. If *Miranda* is to be limited to instances where questioning is present, other non-interrogative police practices may accomplish the same result — securing verbal evidence — without the necessity for first complying with *Miranda*. To accomplish

[65] Terry v. Ohio, 88 S.Ct. 1868 (1968); Sibron v. New York, 88 S.Ct. 1889 (1968). For a discussion of the state of the law prior to these decisions see Tiffany, *supra* note 63, at 398-411.

[66] Terry v. Ohio, 88 S.Ct. 1868 (1968); Sibron v. New York, 88 S.Ct. 1889 (1968). The Supreme Court defined the circumstances under which a stop and frisk would be a reasonable search under the fourth amendment in these two cases; however, *Miranda* was not the basis of the decisions.

[67] *See generally,* LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices,* 1962 WASH. U.L.Q. 331. *Cf.* Reich, *Police Questioning of Law Abiding Citizens,* 75 YALE L. REV. 1161 (1966).

[68] However, one court has held that *Miranda* could not be interpreted to exclude res gestae statements, even though made in response to questions after the accused was taken into custody. Hill v. State, 420 S.W.2d 408, 410-11 (Tex. Crim. App. 1967).

[69] State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458, 468 (1966) (dictum). *See* State v. La Fernier, 155 N.W.2d 93, 99 (Wis. 1967) (whether defendant would submit to a lie detector test).

the intent and purpose of *Miranda,* should not *Miranda* be applicable to any situation in which verbal evidence is acquired by some affirmative action, or unfair inaction, on the part of the police? Such non-verbal conduct may take the form of showing the suspect a piece of tangible evidence. Thus, the showing of a hat by an officer and the defendant's statement of ownership were both excluded by one court.[70] The police conduct may also take the form of deception. The police may tell the suspect that a witness who is certain he can identify him will arrive shortly, when in fact there is no witness, or the witness remembers nothing. The police may follow this up with the statement that it will go easier on the suspect if he confesses now. Although technically there is no questioning, there is an attempt to secure verbal evidence and the Court could hold that custody plus deception equals compulsion and a violation of the suspect's rights.[71] Verbal statements may also be obtained through unethical police inaction, such as incommunicado detention. *Miranda* contains a statement to the effect that incommunicado incarceration without questioning negates a waiver of rights.[72] Thus, limiting *Miranda* to situations involving a question and answer session may prove inadequate protection to the suspect.

2. Volunteered Statements.

The existence of questioning is also important in the classification of what the Court calls "volunteered" statements. These statements may be admitted into evidence without the necessity of proving an advisement and a waiver. To use the Court's language:

> Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. *Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.*[73]

One court has aptly described the admissibility of volunteered statements in poetic style:

> Once an utterance falls from the lips with extemporaneous naturalness, there is no way to declare it non-existent. To order the nullification of such a statement would be like ordering one to re-attach an apple to a limb from which it had fallen, not because

[70] State v. Ross, 269 N.C. 739, 153 S.E.2d 469, 472 (1967).

[71] *See* People v. Watkins, 55 Misc. 2d 168, 284 N.Y.S.2d 365 (Buffalo City Ct. 1967).

[72] 384 U.S. at 476.

[73] *Id.* at 478 (emphasis added).

> of the limb shaking or tree climbing, but in consequence of the fruit's ripeness. . . .[74]
>
> To compel policemen not to listen to volunteered statements while investigating a homicide, is to put stoppers in their ears and require them to snap handcuffs on their wrists.[75]

In one sense, an answer given to routine or other questioning while the person is not in custody or effective detention may be said to fall under the classification of "volunteered statements," in that it is admissible without the advice and consent. However, it would be more correct to say, not that the statement was volunteered, but that it was not the product of compulsion.

Truly "volunteered" statements are those not the product of any questioning. Of these, there are two classifications: those made while not in custody, and those volunteered while in custody. Volunteered statements while not in custody may be donated in two types of situations. First, as the Court indicated, the person may phone the police or walk into the station and blurt out a confession.[76] To illustrate this, in one case the defendant walked into the police station and, approaching the officer on duty, stated that he had stolen a car. Initially, the officer did not believe him so the defendant took the officer outside to view the car. The court correctly held the statement to be volunteered.[77]

In the second noncustodial situation, the statement may be volunteered at the scene of an investigation. This has occurred when an officer, investigating a homicide, asked a person if he knew who shot the deceased. The witness said the defendant shot him and the defendant, standing nearby, said, "yes, I shot him."[78]

If from the time the statement was volunteered, the defendant was no longer free to leave, then the *Miranda* rules would have to be complied with before eliciting further information from the defendant. This would occur if the statement was an acknowledgment of guilt or otherwise focused suspicion on him.

By making the fifth amendment applicable to pre-trial situations, the inception of the duty of advising a person of his rights under that amendment arises when the person is under compulsion,

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[74] Commonwealth v. Eperjesi, 423 Pa. 455, 224 A.2d 216, 220 (1966).

[75] *Id.* at 221.

[76] 384 U.S. at 478. *See* Newhouse v. State, 420 S.W.2d 729 (Tex. Crim. App. 1967); Taylor v. State, 420 S.W.2d 601 (Tex. Crim. App. 1967) (dictum).

[77] Lung v. State, 420 P.2d 158 (Okla. Crim. App. 1966); *accord,* Taylor v. District Court, 418 P.2d 112 (Okla. Crim. App. 1966). If, however, the police question the defendant, *Miranda* may be applicable even though he voluntarily appeared at the station to make a statement. People v. Bryant, 87 Ill. App. 2d 238, 231 N.E.2d 4 (1967).

[78] State v. Oxentine, 270 N.C. 412, 415, 154 S.E.2d 529, 531 (1967). *See* State v. Rudd, 49 N.J. 310, 230 A.2d 129 (1967) (dictum) (statement blurted out when defendant was notified of relative's murder). *See also* People v. Mercer, 64 Cal. Rptr. 861, 864 (Ct. App. 1967).

which generally exists when two factors are present: custody and questioning. Therefore, a person *in custody* may volunteer a statement if it is not in response to a question and it may be used as evidence.[79] This may occur when the person is initially placed in custody,[80] in the police car while on the way to the station,[81] or while within the police station.[82] It has also been held that a question and answer which are merely repetitious of the volunteered statement are not subject to suppression.[83] If, however, the volunteered statement was offered after other incriminating facts had been elicited via unlawful interrogation, the later statement is most likely the product or "fruit" of the prior illegality and thus inadmissible.[84] Although this situation was present in at least one post-*Miranda* case,[85] no court has yet decided this issue in light of *Miranda*.[86]

C. *The Exclusionary Rule and the Non-police Officer.*

In spite of the increasing recognition given by the Supreme Court to individual rights, one pressing problem has been largely, if not wholly, neglected. It is axiomatic that a person has certain rights which protect him from unwarranted *police* practices. If a confession is obtained by the police in violation of *Miranda*, the defendant may have it excluded from evidence. But it is said that if a private person has obtained the confession without compliance with *Miranda,* the defendant has no right to its exclusion in the absence of a showing that the third party was the government's agent.[87] This state-private dichotomy apparently extends to all exclusionary rules.[88]

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[79] In the future, the Court may require that a person be advised of his rights the moment he is placed in custody, but this has not yet been mandated.

[80] Stone v. United States, 385 F.2d 713, 716-17 (10th Cir. 1967); Pitman v. United States, 380 F.2d 368, 370 (9th Cir. 1967); Lamb v. Peyton, 273 F. Supp. 242, 246 (W.D. Va. 1967); People v. Jones, 244 Cal. App. 2d 378, 52 Cal. Rptr. 924, 926 (1966); Carwell v. State, 2 Md. App. 45, 50, 232 A.2d 903, 906 (1967). *See* Balley v. People, 160 Colo. 309, 419 P.2d 446 (1966) (dictum).

[81] Bivens v. State, 242 Ark. 362, 413 S.W.2d 653, 656 (1967); *In re* Orr, 38 Ill. 2d 417, 231 N.E.2d 424, 427 (1967).

[82] People v. Kenny, 53 Misc. 2d 527, 279 N.Y.S.2d 198 (Sup. Ct. 1966); State v. Hill, 422 P.2d 675 (Ore. 1966); *cf.* People v. Petker, 62 Cal. Rptr. 215 (Ct. App. 1967) (confession in response to question by parent in presence of officer).

[83] United States v. Cruz, 265 F. Supp. 15 (W.D. Tex. 1967).

[84] *See* discussion of "fruits," *supra* note 5.

[85] People v. Kenny, 53 Misc. 2d 527, 279 N.Y.S.2d 198 (Sup. Ct. 1966).

[86] *See* Commonwealth v. White, 232 N.E.2d 235 (Mass. 1967) (defendant admitted guilt to friends after police had garnered two inadmissible confessions from him).

[87] *See* Yates v. United States, 384 F.2d 586 (5th Cir. 1967); People v. Wright, 57 Cal. Rptr. 781 (Ct. App. 1967); State v. Masters, 154 N.W.2d 133 (Ia. 1967); Commonwealth v. White, 232 N.E.2d 335 (Mass. 1967); State v. O'Kelly, 181 Neb. 618, 150 N.W.2d 117 (1967); Skinner v. State, 432 P.2d 675 (Nev. 1967); Schaumberg v. State, 432 P.2d 500 (Nev. 1967); People v. Frank, 52 Misc. 2d 266, 275 N.Y.S.2d 570 (Sup. Ct. 1966); People v. Williams, 53 Misc. 2d 1086, 281 N.Y.S. 2d 251 (Syracuse City Ct. 1967).

[88] *See* Burdeau v. McDowell, 256 U.S. 465 (1921) (search and seizure).

The Supreme Court authority for this distinction is *Burdeau v. McDowell*,[89] decided in 1921. McDowell had brought an action in replevin for the return of property unlawfully seized from him by a private person. He alleged that if the property was subsequently used against him in a criminal proceeding, his fourth and fifth amendment rights would be violated. The Court proceeded, with comparable ease, to hold that no constitutional right had been violated. The two-step analysis was: 1) the fourth amendment protects one only against governmental action, as it was intended as a restraint only upon the activities of a sovereign authority; 2) the government was not involved in the seizure of McDowell's property.[90] Two distinguished Justices, Holmes and Brandeis, dissented. The argument of the dissenters sounded of due process: "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common-man's sense of decency and fair play."[91]

The *Burdeau* case has not been overruled, but its present validity, in light of recent court decisions concerning individual rights, may be in doubt. If subsequently overruled, reliance would probably be placed on the due process clause. However, one difficulty is at once confronted: the Constitution reads that no "State" shall deprive a person of liberty without due process of law.[92] Thus the question in confession cases is whether the act of the judge in admitting into evidence the confession, elicited by a private person in a manner illegal if done by a police officer, is *state* action. By analogizing to *Shelley v. Kraemer*,[93] an affirmative answer could be reached. In that case, the state court had enforced a restrictive covenant in a deed which forbade the sale of the property to a Negro. The Supreme Court held that in so doing, the state court had acted in violation of the equal protection clause of the fourteenth amendment. In reaching this result, the Court necessarily had to find "state" action.[94] The action by the court in enforcing the covenant was held sufficient *state* activity to apply the fourteenth amendment.[95] The analogy is clear. When a court admits a confession, regardless of whether it was obtained by a government agent or a private person, the act of admitting it constitutes state action

[89] *Id.*

[90] *Id.* at 475. The fifth amendment contention was dismissed, the Court saying the privilege protects a person only from extorted confessions and compulsory court testimony.

[91] *Id.* at 477.

[92] U.S. CONST. amend. XIV.

[93] 334 U.S. 1 (1948).

[94] *Id.* at 20.

[95] *Id.* at 14.

to which the fourteenth amendment applies. The practical justification for such a ruling has been stated as follows:

> Any searches or statements to be taken can be more effectively accomplished by the professional policemen trained to do these things. I [sic] seems ludricous [sic] to say that a District Attorney in prosecuting a Defendant cannot use evidence obtained by a policeman in derogation of a Defendant's constitutional rights but can use the same evidence obtained by a private person in derogation of a Defendant's constitutional rights which in turn is handed over to a policeman who then hands it over to a District Attorney.[96]

Assuming that the action of a court in admitting a confession is state action,[97] special problems are presented in subjecting the average citizen to the mandates of *Miranda.* The man on the street neither knows, nor can be expected to know, the precise requirements of *Miranda.* On the other hand, there is a class of "private" persons on whom we may justifiably impose the duty of knowing and utilizing proper criminal procedure in their relations with suspects. This class is composed of security guards, store detectives, and others with like vocations.[98] These persons frequently encounter persons suspected of crimes and often obtain evidence from them. A security guard is primarily employed to detect and detain shoplifters and other violators. In view of the rights to be protected, it would seem justifiable to subject them to the same duty as is imposed on other law enforcement officials.

Concerning the duties of private persons under *Miranda*, two alternatives are available. First, it could be said that no confession or admission, whether it be obtained by a police officer *or* by *any* other person, is admissible at trial unless, prior to custodial interro-

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[96] People v. Williams, 53 Misc. 2d 1086, 1091, 281 N.Y.S.2d 251, 256 (Syracuse City Ct. 1967).

[97] Even if the Supreme Court refused to hold that this, by itself, is state action, there is another class of persons, albeit less than the whole of society, whose acts may be termed "acts of the state." By statute, many states have authorized merchants and their employees or agents to detain persons suspected of shoplifting or larceny, and to question and/or search them for the purpose of ascertaining guilt or innocence. Typical of these statutes is that of Colorado, which states that if a person is suspected of committing shoplifting or concealing unpurchased goods,

> the merchant or any employee thereof or any peace or police officer, acting in good faith and upon probable cause based upon reasonable grounds therefore, may question such person in a reasonable manner for the purpose of ascertaining whether or not such person is guilty of shoplifting . . . . Such questioning . . . shall not render such [person] civilly liable for slander, false arrest, false imprisonment, malicious prosecution or unlawful detention.

COLO. REV. STAT. ANN. § 40-5-31 (1963). *See also* N.Y. GEN. BUS. LAW § 218 (McKinney Supp. 1967). For a discussion of similar statutes, see 58 MICH. L. REV. 429 (1960).

Thus, by statute, the state has authorized merchants to conduct interrogations of suspects. A fortiori, there is state action and the merchants must conform their actions with due process. *Cf.* Hajdu v. State, 189 So.2d 230, 233 (Fla. 1966); Thacker v. Commonwealth, 310 Ky. 702, 704, 221 S.W.2d 682, 683 (1949).

[98] Others may have this duty imposed on them by statute. *See* COLO. REV. STAT. ANN. § 40-5-31 (1963); N.Y. GEN. BUS. LAW § 218 (McKinney Supp. 1967).

gation, the person obtaining it advised the detained person of his rights and secured from him an effective waiver. This would undoubtedly result in eliminating from evidence all confessions obtained by the average citizen. Nevertheless, it may be justified by a concern for preserving the rights and dignity of the individual. It is also an unnecessary, and often dangerous, practice for the citizen to play the role of a policeman.[99] If a citizen apprehends an offender he has done his part, and should leave the questioning to the trained policeman. The situation is different when a security guard is involved. He is usually given some training by his employer, and this could easily include instruction in criminal procedure.

If the Supreme Court is unwilling to extend *Miranda's* rules to all citizens, a compromise may be suggested, although it is subject to criticism that it would create different standards of due process depending on the identity of the interrogator. Under this alternative, all citizens would be subject to the "voluntariness" test.[100] If a confession obtained by a citizen is found to be involuntary, it would be excluded from evidence. This is the present rule,[101] derived from the common law and directed at the exclusion of untrustworthy evidence. From the general citizenry, a certain group would be required to comply with *Miranda* in its full strength. In addition to law enforcement officials, this group would also include those persons commonly referred to as security guards or store detectives.[102] To avoid using a label to describe those persons who, in addition to law enforcement officials, would be subject to compliance with *Miranda*, the following test is proposed: a person must fully comply with the constitutional safeguards if as part of his duties of employment, he is required to protect persons and/or property and to detect and apprehend violators of the law.[103] This group may be, and is, broadened by statutes which authorize others to apprehend and interrogate persons suspected of crime. Such authorization effectively makes such persons agents of the government.[104]

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[99] *See* People v. Frank, 52 Misc. 2d 266, 275 N.Y.S.2d 570 (Sup. Ct. 1966); People v. Williams, 53 Misc. 2d 1086, 1090-91, 281 N.Y.S.2d 251, 256 (Syracuse City Ct. 1967).

[100] For a discussion of the "voluntariness" test, see note 2 *supra.*

[101] *See* Commonwealth v. White, 232 N.E.2d 335 (Mass. 1967); Schaumberg v. State, 432 P.2d 500 (Nev. 1967).

[102] *See* People v. Ryff, 28 App. Div. 2d 1112, 284 N.Y.S.2d 953 (1967) (evidence inadmissible where store detective questioned defendant and police officer merely stood by).

[103] One court has made an interesting comment: "Private businesses employ security officers to protect persons and property on their premises, whose guns are just as menacing and whose badges just as shiny as those hired by public agencies, whatever their function may be." People v. Wright, 57 Cal. Rptr. 781, 782 (Ct. App. 1967). It should be noted that the court added the requirement that for *Miranda* to apply the person must be employed by a government agency whose "primary mission is to enforce the law." *Id.*

[104] *See* note 97 *supra.*

D. *What Offenses?*

An important question for future litigation is whether *Miranda* applies to all crimes; if not, to what crimes does it apply? The Court's answer will largely determine the effectiveness of *Miranda.* The only limitation evidenced in *Miranda,* other than the fact that all the cases involved felonies,[105] is that during custodial interrogation, there are "restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime."[106] This is consistent with the language of the fifth amendment,[107] and would seem to include all crimes, regardless of their distinctive label. However, in the federal courts there has developed a class of crimes denoted "petty offenses,"[108] to which the Supreme Court has held that certain constitutional rights do not apply.[109]

This distinction, and its present validity as it relates to whether a person is afforded the constitutional guarantees in a criminal case, is in need of reconsideration. The distinction receives little support in historical fact.[110] And only recently, in *In re Gault,*[111] the Court said:

> [O]ur Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is *threatened with deprivation of his liberty* — a command which this Court has broadly applied and generously implemented in accordance with the teachings of the history of the privilege and its great office in mankind's battle for freedom.[112]

In an earlier circuit case, the court commented on the degree of deprivation required: "[T]he Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."[113]

In light of the fact that no person may be deprived of his liberty without due process of law,[114] which now includes the fifth

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[105] One court has relied on this factual limitation to exclude from *Miranda's* application all misdemeanors. State v. Angelo, 251 La. 250, 203 So.2d 710 (1967).

[106] 384 U.S. at 439 (emphasis added).

[107] U. S. CONST. amend. V: "No person . . . shall be compelled *in any criminal case* to be a witness against himself . . . ." (emphasis added).

[108] *See* 18 U.S.C. § 1(3) (1964), in which, after defining felonies and misdemeanors, it is stated: "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

[109] District of Columbia v. Clawans, 300 U.S. 617, 624 (1937) (no right to jury). *Contra,* District of Columbia v. Colts, 282 U.S. 63 (1930). For a critical discussion of the "petty offense" distinction, see Kaye, *Petty Offenders Have No Peers,* 26 U. CHI. L. REV. 245 (1959).

[110] *See* Kaye, *supra* note 109, at 257-77.

[111] 387 U.S. 1 (1967).

[112] *Id.* at 50 (emphasis added).

[113] Evans v. Rives, 126 F.2d 633, 638 (D.C. Cir. 1942) (held that a misdemeanant has a right to counsel). As to the right of counsel in misdemeanor cases see Note, *The Right to Counsel in Misdemeanor Cases,* 48 CAL. L. REV. 501 (1960).

[114] U.S. CONST. amend. XIV, § 1.

amendment privilege against self-incrimination,[115] a workable test for the application of *Miranda* could be devised: a person is entitled to the safeguards enumerated in *Miranda* if the law which he is suspected of violating provides for imprisonment for any period of time, however short.[116] If the statutory punishment is a fine, the person still may not be imprisoned for inability to pay the fine imposed, if a *Miranda* violation contributed to his conviction.

In applying this test, special mention need be made only of its application to traffic offenses. Some courts seem reluctant to extend *Miranda* to this type of offense.[117] Aside from the "deprivation of liberty" argument, the courts holding *Miranda* inapplicable have said that a traffic offense is not a *crime*.[118] One court stated that although the questioning was "custodial," *Miranda* did not apply because a state statute provided that a traffic violation was not a crime and the punishment therefore was not to be termed "criminal" punishment.[119] *Query*: may a state deprive a person of his constitutional rights merely by attaching a *label* to the punishment it imposes? In light of the *Gault*[120] case, it would seem that the answer is *no*. In speaking of delinquency proceedings, the following language of the Court is relevant:

> [J]uvenile proceedings to determine "delinquency" which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. . . . It is incarceration against one's will whether it is called "criminal" or "civil."[121]

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[115] Malloy v. Hogan, 378 U.S. 1 (1964).

[116] *See* Conway, *Is Criminal or Civil Procedure Proper for Enforcement of Traffic Laws? —Part I*, 1959 WIS. L. REV. 418, 434 (1959); *accord*, Note, *Initial Imprisonment For the Violation of City Ordinances*, 31 IND. L.J. 486 (1956). Some courts have, in the area of traffic offenses, distinguished between those offenses which provide for a term of imprisonment and those which do not, holding that *Miranda* has no application to the latter. State v. Zucconi, 93 N.J. Super. 380, 226 A.2d 16 (1967); Commonwealth v. Renner, 1 BNA CRIM. L. REP. 2344 (Mercer County Ct., Pa. 1967). This distinction leaves itself open to criticism that perhaps situations exist where the mere levy of a substantial *fine* would justify procedural safeguards. The argument may run along these lines: unless the safeguards surrounding a criminal trial are available in a case in which a defendant may be subject to a heavy fine, the defendant is deprived of his *property* without due process of law, as proscribed by the fourteenth amendment. *See* Conway, *Is Criminal or Civil Procedure Proper for Enforcement of Traffic Laws? — Part II*, 1960 WIS. L. REV. 3, 15 (1960).

[117] *See, e.g.*, People v. Bliss, 53 Misc. 2d 472, 474-75, 278 N.Y.S.2d 732, 735-36 (Allegany County Ct. 1967) (court applied "voluntariness" test); City of Columbus v. Hayes, 9 Ohio App. 2d 38, 222 N.E.2d 829, 830 (1967). *Cf.* State v. Angelo, 251 La. 250, 203 So. 2d 410 (1967); People v. Letterio, 16 N.Y.2d 307, 213 N.E.2d 670, 266 N.Y.S.2d 368 (1965), *cert. denied*, 384 U.S. 911 (1966).

[118] In Colorado, a traffic offense is a crime. COLO. REV. STAT. ANN. § 13-5-2 (1963).

[119] People v. Bliss, 53 Misc. 2d 472, 474-76, 278 N.Y.S.2d 732, 735-37 (Allegany County Ct. 1967).

[120] *In re* Gault, 387 U.S. 1 (1967).

[121] *Id.* at 49. *See In re* Narcotic Control Comm'n, 1 BNA CRIM. L. REP. 2307 (N.Y. Sup. Ct. 1967) (commitment of narcotics addict involves loss of freedom so *Miranda* applies).

Most courts have indicated that, assuming the presence of "custody," *Miranda* will apply to traffic violations.[122]

II. THE ADVISEMENT

Once a suspect is to be subjected to custodial interrogation, the fifth amendment privilege against self-incrimination is activated.[123] The government may not thereafter secure evidence against him "by the cruel, simple expedient of compelling it from his own mouth."[124] However, like all constitutional rights, the suspect may make an intelligent waiver of the fifth amendment protection.[125] Inasmuch as a person cannot make an *intelligent* choice to speak unless he is aware that a choice exists,[126] the Supreme Court has said that "the accused must be adequately and effectively apprised of his rights"[127] prior to any questioning.

Although the person may in fact be aware of his rights, the advisement is an "absolute prerequisite to interrogation."[128] The Court "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given."[129] Thus, if no advisement was administered or if it was incomplete,[130] a proclaimed awareness by the suspect will not suffice. There is a conclusive presumption that the person who is not completely advised of his rights is unaware of them.[131]

For an advisement to comply with *Miranda*, it must be (1) adequate in scope, and (2) communicated in a manner as to insure awareness. The scope of the advisement is four fold. In the words of the Court:

> [H]e must first be informed in clear and unequivocal terms that he has the right to remain silent . . . .[132]

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[122] *See* People v. Nieto, 55 Cal. Rptr. 546, 549 (Ct. App. 1966) (dictum), *cert. denied*, 387 U.S. 911 (1967); People v. Schwartz, 53 Misc. 2d 635, 637, 279 N.Y.S.2d 477, 480 (Dist. Ct. 1967); State v. Meunier, 126 Vt. 176, 224 A.2d 922 (1966). *But see* State v. Tellez, 6 Ariz. App. 251, 255-56, 431 P.2d 691, 695-96 (1967) (applicability of *Miranda* depends upon the seriousness of the traffic offense or whether arrest was made); *cf.* Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 515 (1963).

[123] Miranda v. Arizona, 384 U.S. 436, 467-68 (1966).

[124] *Id.* at 460.

[125] *Id.* at 475.

[126] *Id.* at 468.

[127] *Id.* at 467. An additional reason for advising the person of his rights is to overcome the "inherent pressures of the interrogation atmosphere." *Id.* at 468.

[128] *Id.* at 471.

[129] *Id.* at 468.

[130] *See* People v. Powell, 429 P.2d 137, 59 Cal. Rptr. 817 (1967) (dictum).

[131] *See* United States v. Miller, 261 F. Supp. 442, 446 (D. Del. 1966). *But see* State v. Persinger, 433 P.2d 867 (Wash. 1967).

[132] 384 U.S. at 467-68. *See* United States v. Mullings, 364 F.2d 173 (2d Cir. 1966) (advising person he has right not to say anything he feels may incriminate him, held insufficient); *But see* Keegan v. United States, 385 F.2d 260 (9th Cir. 1967) ("You don't have to say anything without the presence of an attorney," held sufficient).

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court.[133]
>
> [He] must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.[134]
>
> [I]t is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent, a lawyer will be appointed to represent him.[135]

It will be noticed that the Court has used the words "clear and unequivocal." Ritualistic compliance in terminology which the person cannot understand will be insufficient. "The purpose . . . is to enable a suspect to intelligently rationalize, for a man unable to understand the warning or the consequences must also be unable to understand what he does in waiving the privilege."[136] Thus, advising the person in a half hearted manner, conveying an indifference which suggests to the defendant that the speaker does not really mean what he is saying, may be fatal to the prosecution's case.[137] The same result will occur if other psychological techniques are utilized to hinder the accused's free exercise of his rights.

No particular wording for the advisement is necessary and the Court will look to substance, not form.[138] There is also no requirement that the advisement be in writing,[139] but such a procedure would facilitate the burden of proving that the person was, in fact, adequately advised.

The Denver Police Department, after several modifications, currently administers a form which states:

> You have a right to remain silent.
>
> Anything you say can be used as evidence against you in court.
>
> You have a right to talk to a lawyer before questioning and have him present during questioning.
>
> If you cannot afford a lawyer, one will be appointed for you before questioning.
>
> Do you understand each of these rights I have read to you?[140]

When the person indicates that he understands his rights and the advising officer is convinced that he does, the person signs the form, indicating his comprehension. If there is doubt that the person

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[133] 384 U.S. at 469.

[134] *Id.* at 471.

[135] *Id.* at 473.

[136] People v. Dumas, 51 Misc. 2d 929, 936, 274 N.Y.S.2d 764, 774 (Sup. Ct. 1966); *accord,* Coyote v. United States, 380 F.2d 305, 308 (10th Cir. 1967) (sufficiency depends upon age, background and intelligence of suspect).

[137] The issue may not arise if the defendant can read and is allowed to read his rights on a printed form. *See* Bell v. United States, 382 F.2d 985 (9th Cir. 1967).

[138] *See* Tucker v. United States, 375 F.2d 363, 369 (8th Cir. 1967).

[139] *Cf.* People v. Hansard, 245 Cal. App. 2d 691, 53 Cal. Rptr. 918 (1966).

[140] Denver Police Department, Form 369, June, 1967.

understands, the advisement procedure will be repeated. This form appears to be sufficient, except for one particular—the advice on the rights of the indigent. It is misleading as it implies the person will be supplied with an attorney without any need of a request. The present language should be supplemented by the addition of "if you wish one."

The procedure to be followed in advising the person of his rights was clearly articulated in *Miranda* and courts have had little difficulty in applying it. Perhaps the issue most encountered is whether a confession must be excluded if the person was not advised of the indigent's right to appointed counsel. There was language in *Miranda* which suggested that if, in fact, the person was not indigent, an advisement incomplete in this respect was harmless error,[141] and the courts are in unanimous agreement.[142] However, if the person was indigent, nonadvisement is reversible error.[143]

As the advisement as it is presently administered poses no substantial difficulty in application, future litigation will undoubtedly focus on the addition of rights heretofore unrequired as part of the advisement. Although the Court's four-part advisement contemplates informing the suspect of the totality of his rights, it is not all-encompassing. The majority opinion contains an additional right which the Court did not specifically require as part of the advisement. The Court mentioned that although a person may initially waive his rights, he is not thereby later estopped from asserting them, during the course of the interrogation.[144] The Court stated: "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."[145] Thus the individual should be advised that he may terminate questioning at any time, even though he originally waives his rights.

The need for such an advisement is evident, since the Court has emphasized that a waiver must be knowingly made,[146] and since many persons may reasonably believe that once they have waived

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[141] 384 U.S. at 473 n.42.

[142] *See, e.g.,* United States v. Lubitsch, 266 F. Supp. 294, 297-98 (S.D.N.Y. 1967); United States v. Hecht, 259 F. Supp 581, 583 (W.D. Pa. 1966); O'Neal v. State, 115 Ga. App. 100, 101, 153 S.E.2d 663, 664 (1967); Commonwealth v. Wilbur, 231 N.E.2d 919, 923 (Mass. 1967); State v. Gray, 268 N.C. 69, 83, 150 S.E.2d 1, 11 (1966). However, to speak in terms of "indigency" is superficially simple. A crucial question is, by what standards does one determine who is, in fact, an "indigent"?

[143] People v. Trumpour, 61 Cal. Rptr. 899 (Ct. App. 1967); Robinson v. State, 1 Md. App. 522, 231 A.2d 920 (1967).

[144] 384 U.S. at 475-77. For a discussion of the language which may be used to indicate a desire to terminate questioning, see Brooks v. State, 229 A.2d 833, 836 (Del. 1967).

[145] 384 U.S. at 473-74 (emphasis added).

[146] *Id.* at 473-75.

their rights they are no longer able to retract the waiver and claim the privilege. The danger becomes more apparent when one realizes that the effect of the waiver varies, depending on whether it is given during trial or at the pre-trial stage. During the trial, an initial waiver prevents a person from refusing to answer questions concerning subjects already broached by his preceding testimony.[147] The Court has presumed that every person is unaware of his right to remain silent and of the effect of waiving it. The same rationale should apply to informing the person of the tentative nature of his waiver.[148]

III. WAIVER

After the person has been meaningfully advised of his fifth and sixth amendment rights, one more procedural step must be taken before any questioning may commence. The person must knowingly and intelligently waive his right to remain silent *and* his right to the assistance of counsel.[149] In the words of the Court:

> Once 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. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.[150]

The question of waiver may prove to be the most difficult and most litigated of the *Miranda* issues. Its resolution requires the court to consider the defendant — his age, intelligence, education

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[147] *See* Rogers v. United States, 340 U.S. 367 (1951). *See also* Miranda v. United States, 384 U.S. 436, 476 n.45 (1966).

[148] The FBI appears to have included it in its advisement form. *See* Elsen and Rosett, *Protections for the Suspect Under Miranda v. Arizona,* 67 COLUM. L. REV. 645, 653 n.36 (1967).

> Another requirement that may be forthcoming is that a person be advised of the nature of the crime involved. *See* United States v. Washington, 341 F.2d 277 (3d Cir. 1965). In many cases, the seriousness of the offense would be relevant to the defendant's decision whether or not to speak. Compliance with such a requirement, however, may be difficult in those situations in which the exact nature of the crime has not been determined. *See* People v. Lara, 432 P.2d 202, 62 Cal. Rptr. 586 (1967) (no advice needed as to elements of crime, possible defenses, or penalty for no crime had yet been charged). One might also ponder whether the advisement should include the statement that the fact of silence or claim of privilege cannot be revealed at trial. Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966). *See* Note, *Tacit Criminal Admissions in Light of the Expanding Privilege Against Self-Incrimination,* 52 CORNELL L. REV. 335 (1967).

[149] 384 U.S. at 473-75.

[150] *Id.* at 473-74 (emphasis added).

and background. Also to be considered is the atmosphere in which the defendant was placed — the demeanor of the interrogation, and the presence, if any, of physical force, threats, psychological coercion, trickery, promises, inducements, lengthy interrogation, or incommunicado detention. Add to this the testimony as to the rights advisement form and the reply of the defendant subsequent to the advisement, and the complexity of the resolution of the waiver issue becomes only more apparent. The limitations on *Miranda* which will develop in the area of waiver will depend on the significance, or lack of it, attached by the courts to each of the above factors.

A. *A Knowing and Intelligent Waiver.*

The initial inquiry in determining "waiver" is, was the advisement given in a manner which the defendant could understand? By definition, a waiver is "an intentional relinquishment or abandonment of a known right . . . ."[151] A man who is unable to understand the advisement or the consequences of speaking must also be unable to understand what he is doing when he makes a waiver. He must make the waiver with complete knowledge, cognition, and awareness of what he is doing when he makes his decision.

A related facet of this is whether the person has the mental competence or the educational background to make an intelligent waiver.[152] Certainly there are situations in which even the mentally dwarfed could make a valid waiver if the advisement procedure was characterized by painstaking simplicity.[153] However, courts should carefully scrutinize the facts, including the evidence which may be offered by the defense, before making a finding of waiver. The government should probably not be required to prove mental competency unless it is placed in issue by defense counsel.[154]

Mental instability or insanity will permit a finding of non-waiver.[155] As one court said:

> Confessions should not be allowed to be used simply because it is *possible* that the defendant confessed during a period of mental competence where there is a *probability* that the defendant was insane.[156]

For example, a person suffering from a form of paranoia or schizo-

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[151] Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis added).

[152] In pre-*Miranda* cases, these factors were regarded as significant in deciding the subsequent admissibility of statements. *See* Mallory v. United States, 354 U.S. 449 (1957); Fikes v. Alabama, 352 U.S. 191 (1957).

[153] *See* Elrod v. State, 202 So. 2d 539, 541-42 (Ala. 1967) (waiver by an illiterate).

[154] *See* People v. Dumas, 51 Misc. 2d 929, 938, 274 N.Y.S.2d 764, 775 (Sup. Ct. 1966).

[155] *See* People v. Golwitzer, 52 Misc. 2d 925, 277 N.Y.S.2d 209 (Sup. Ct. 1966); *cf.* People v. Baksys, 26 App. Div. 2d 648, 272 N.Y.S.2d 488 (1966) (epileptic seizure).

[156] People v. Golwitzer, 52 Misc. 2d 925, 929, 277 N.Y.S.2d 209, 213 (Sup. Ct. 1966).

phrenia may have a distorted picture of the interrogation process, and the practical consequences of waiving his rights. His psychological imbalance negates the requirement that he comprehend what he is doing.

Also, the defendant may not be competent to waive his rights if he was under the influence of alcohol[157] or drugs[158] to such an extent that his reflexes were uncertain or his thinking unclear. The effect of drugs or liquors may so insensitize the accused's cognitive process that he loses awareness of what he is doing, and what the result of his decision will be. This would necessarily be a question of fact, and a difficult one. It is interesting to note that in Denver, the police will attempt to secure a waiver from those who are to be charged with driving under the influence. This would seem to place the police in a paradoxical situation if a statement is obtained: on the one hand, they will argue that the defendant was sober enough to make an intelligent, knowing and voluntary waiver; on the other, he was too intoxicated to drive. Depending on the court's definition of intoxication for purposes of waiver, these two contentions may be internally consistent.[159]

A special problem is also presented when the situation involves waiver by a juvenile of his rights.[160] The younger the accused, the less developed are his intellectual capacities and capabilities. Although it has been doubted whether a juvenile can ever make an effective waiver,[161] the Supreme Court in the *Gault* decision[162] gave no indication of this.[163] The Court did outline some of the issues when it said:

> We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique — but not in principle — depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, juvenile courts and appellate tribunals in administering the

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[157] *See* State v. Clark, 102 Ariz. 550, 434 P.2d 636 (1967) (court held significant the fact that defendant could tell a clever lie); *cf.* Ballay v. People, 160 Colo. 309, 419 P.2d 446 (1966); Peters v. Commonwealth, 403 S.W.2d 686 (Ky. App. 1966).

[158] *Cf.* Townsend v. Sain, 372 U.S. 293 (1963); People v. Waack, 100 Cal. App. 2d 253, 223 P.2d 486 (1950); People v. Townsend, 11 Ill. 2d 30, 141 N.E.2d 729 (1957).

[159] *See* Logner v. North Carolina, 260 F.Supp. 970, 977 (D.N.C. 1966) (held that defendant's waiver, after being arrested for driving under the influence, was ineffectual).

[160] *Miranda* applies to juveniles. *In re* Gault, 387 U.S. 1, 55 (1967). The Court said that "admissions and confessions of juveniles require special caution," but the same was true under the traditional voluntariness test. *Id.* at 45. *See, e.g.*, Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948). *See also* People v. Rodriguez, 64 Cal. Rptr. 253 (Ct. App. 1967).

[161] *See In re* Rust, 53 Misc. 2d 51, 59, 278 N.Y.S.2d 333, 341 (Fam. Ct. 1967).

[162] *In re* Gault, 387 U.S. 1 (1967).

[163] *But see* Gallegos v. Colorado, 370 U.S. 49 (1962).

> privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.[164]

Although there may be situations in which a juvenile by himself may be able to make an effective waiver,[165] the safer and more desirable practice would be to have at least one of his parents present. Although presence of counsel may be required if the juvenile's parents are unavailable, no one seemingly has the right to force an attorney on a juvenile.

The practice in Denver seems both sufficient and desirable, and reflects compliance with the Colorado Children's Code.[166] Juveniles are never interrogated without a parent, guardian, or legal custodian being present, for, by statute, this is a condition to the admissibility of any subsequent statement.[167] Both the juvenile and the parent are given the same advisement as would an adult suspect.[168] Then the juvenile and his parent are left alone to discuss the situation. If the juvenile decides to waive his rights, and the parent approves of that decision, they each sign the form, indicating their respective consent and approval.[169]

B. *The Express or Affirmative Waiver.*

After a person has been advised of his rights, and assuming that he understands them, he must still make an affirmative or express waiver.[170] It is not clear what language will permit a finding of waiver, but the Court has marked the boundaries. The clearly permissible is a statement by the defendant that he is willing to talk to the officer and does not want an attorney.[171] The clearly impermissible is a finding of waiver from the defendant's silence.[172]

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[164] 387 U.S. at 55 (dictum).

[165] *See* People v. Rodriguez, 64 Cal. Rptr. 253, (Ct. App. 1967); *cf.* State v. Gullings, 244 Ore. 173, 416 P.2d 311 (1966); State v. Casey, 244 Ore. 168, 416 P.2d 665 (1966).

[166] COLO. REV. STAT. ANN. §§ 22-1-1 *et seq.* (Supp. 1967).

[167] *Id.* § 22-2-2 (3)(c).

[168] *See* text accompanying note 140, *supra.*

[169] The waiver form in Denver is in the following language:

> THESE RIGHTS HAVE BEEN READ TO US. WE HAVE TALKED TOGETHER ABOUT THESE RIGHTS AND THIS SITUATION. WE UNDERSTAND THESE RIGHTS.
>
> I know what I am doing, I now wish to voluntarily talk to you.
>
> Juvenile: .....
>
> I approve of my.....decision to talk to you.
>
> Adult: .....

[170] Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[171] *Id.*

[172] *Id.*

Of course, any express "claim" of privilege by the person will prevent questioning.[173]

In Denver, the waiver, as expressed on the form, states: "Knowing my rights and knowing what I am doing, I now wish to voluntarily talk to you."[174] This raises the interesting problem of whether the express waiver of the right to remain silent necessarily includes a waiver of the right to counsel. This is probably a valid waiver, because the person has indicated he wishes to talk even though he has been advised that he may consult with an attorney before saying anything.[175]

However, a waiver of the right to counsel in no way implies a waiver of the right to remain silent. A disclaimer of the need for an attorney is perfectly consistent with a desire to remain silent. In the only decision on point, however, the court found a waiver.[176] The court seemed to be looking for an affirmative "claim" of the fifth amendment right, as it found significant the fact that despite his earlier denials of guilt, he in no way indicated a disinclination to continue the question and answer session.[177]

A statement by the defendant that he would talk but would not sign a statement has been held not to constitute a waiver.[178] The court felt that he must have misunderstood the advisement, for the declaration reasonably indicated that he was not willing to make a statement that could be used against him.[179] A statement by the defendant that he was aware of his legal rights has also been said to be inadequate as a waiver,[180] as was the statement: "all right."[181] But a declaration by the defendant that he wished to waive his "rights" has been held sufficient.[182] It is safe to assume that the

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[173] *But see* Farley v. United States, 381 F.2d 357, 359 (5th Cir. 1967). In that case, the defendant told the interrogator to see his attorney. Although finding that defendant had claimed his privilege, the court sanctioned one question and answer for it had only a "remote bearing" on his guilt.

[174] Denver Police Department, Form 369, June, 1967.

[175] Keegan v. United States, 385 F.2d 260, 264 (9th Cir. 1967). *See* United States v. Hayes, 385 F.2d 375, 377 (4th Cir. 1967) (boiler-plate clauses). However, one cannot be overcautious in view of the premium placed on an affirmative waiver by the Court. The advisable procedure would be to include a statement that "I do not wish to talk to an attorney or have one present during questioning." *Cf.* Brisbon v. State, 201 So.2d 832, 833-34 (Fla. 1967).

[176] Tucker v. United States, 375 F.2d 363 (8th Cir. 1967).

[177] *Id.* at 369.

[178] People v. Thiel, 26 App. Div. 2d 897, 274 N.Y.S.2d 417, 418 (1966).

[179] *Id.*

[180] People v. Powell, 429 P.2d 137, 59 Cal. Rptr. 817 (1967) (dictum). *But see* People v. Sainz, 61 Cal. Rptr. 196, 199 (Ct. App. 1967) (dictum) (reply of "yes" he understood his rights, was said to be waiver); State v. Brown, 250 La. 1125, 1140, 202 So. 2d 274, 279 (1967) ("I know all that," held waiver).

[181] United States v. Low, 257 F. Supp. 606, 614 (W.D. Pa. 1966).

[182] United States v. Theriault, 268 F. Supp. 314 (W.D. Ark. 1967).

waiver need not take a precise legal form,[183] but it should encompass a waiver of both the right of counsel and of silence.

C. *Waiver and the Right to Counsel.*

When an attorney is requested by the defendant, several situations may develop which call for careful attention before finding a subsequent waiver. For example, a troublesome question is presented when the defendant has given a statement after indicating a desire to see an attorney but before the attorney is present. In such a situation, a waiver could be found but only if the person clearly articulates his change of mind and his desire to talk to the police.[184] *Miranda* states:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. . . . If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.[185]

If a statement is obtained, the circumstances should be suspect.[186] However, just as the person is not estopped to invoke his privilege after an initial waiver,[187] so the person may expressly retract his earlier claim of privilege and talk to the police.[188]

The circumstances should also be carefully scrutinized before making a finding of waiver when a statement is made after a retained or appointed attorney has said that his client will answer no questions. The Court did say that questioning may be permissible even after the defendant indicates a desire to remain silent, *if* his attorney is present.[189] However, "the exercise of those rights must be fully honored."[190]

What if a statement is obtained in the *absence* of retained or appointed counsel? Even though, as one court has said, "the defendant himself is the final arbiter of the conduct of his defense,"[191]

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[183] Brisbon v. State, 201 So. 2d 832, 834 (Fla. 1967); State v. Yough, 49 N.J. 587, 596-97, 231 A.2d 598, 603 (1967).

[184] *Cf.* United States v. Slaughter, 366 F.2d 833, 843, 846 (4th Cir. 1966) (dictum). *Compare* State v. Rosenberger, 240 Ore. 376, 409 P.2d 684 (1966) *with* People v. Stockman, 63 Cal. 2d 494, 407 P.2d 277, 47 Cal. Rptr. 365 (1965).

[185] 384 U.S. at 474.

[186] However, one court found a waiver when the defendant changed his mind about retaining an attorney after the officer told him that he wished to conduct the investigation in private and without any publicity. State v. LaFernier, 155 N.W.2d 93 (Wis. 1967).

[187] Miranda v. Arizona, 384 U.S. 436, 474 (1966).

[188] *See* Narro v. United States, 370 F.2d 329 (5th Cir. 1966); State v. Sanford, 421 P.2d 988 (Ore. 1966) (dictum). If, however, the attorney arrives and is denied access to his client, there is a violation of the sixth amendment right to counsel. Miranda v. Arizona, 384 U.S. 436, 465 n.35 (1966).

[189] 384 U.S. at 474 n.44. The Denver Police follow this procedure but rarely, if ever, does the attorney allow the defendant to say anything.

[190] *Id.* at 467.

[191] People v. Baker, 28 App. Div. 2d 24, 26, 281 N.Y.S.2d 161, 163 (1967).

a finding of waiver should rarely, if ever, be made unless the defendant volunteers to talk to the police without any prodding on their part, and, unless it appears that the accused deliberately and understandingly chose to forego his rights.[192] Nevertheless, one court has found a waiver in a situation in which an attorney brought his client, wanted for murder, into the police station to surrender, informing the authorities that his client would not say anything.[193] After the attorney left the station, the "inquisition" began with various detectives asking questions which the defendant refused to answer. Later, after the defendant was taken to his cell, a detective went to see him. The defendant asked why a crowd had gathered outside the station. The detective informed the defendant that they were waiting to "see" him, and, sensing the situation, asked the defendant if there was anything he would like to "get off his chest." Whereupon, the defendant began to answer questions.[194] It is submitted that the court, in finding a waiver, was in error.[195]

D. *The Voluntary Waiver.*

Even though the person has articulated an express waiver, made only after a knowledge and understanding of his rights, other factors must be considered before a finding of "waiver" may be made. These factors may be grouped under a "voluntariness" label, making it reminiscent of the pre-*Miranda* test for the admissibility of confessions. Although admissibility is no longer governed solely by the question of the confession's voluntariness, the determination of whether the circumstances indicate that the person was able to make an unfettered and voluntary exercise of his rights will remain an important question for the trial court. Proof of any of these factual criteria strongly militates against the validity of the waiver.

The Court said that notwithstanding police testimony or other evidentiary corroborations, "the fact of *lengthy interrogation* . . . before a statement is made is strong evidence that the accused did not

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[192] One court has indicated it may exercise its federal supervisory powers to exclude a statement made by one who is *not* in custody but who is known to have counsel, retained or appointed, unless he executes an understanding waiver. United States v. Smith, 379 F.2d 628, 633-34 (7th Cir. 1967) (dictum).

[193] People v. Baker, 28 App. Div. 2d 24, 26, 281 N.Y.S.2d 161, 163 (1967).

[194] Chief Jamerson of the Detective Division, Denver Police Department, indicates that often, after his attorney has left, a defendant will send word from the jail that he wants to talk to a detective. He also indicated that there may be situations when the detectives will "offer" the defendant another opportunity to waive his rights after the attorney has gone. Until the court rules otherwise, he feels his department is not bound by even a written directive from the attorney that his client will not submit to any questioning. Interview with Lloyd Jamerson, Division Chief, Detective Division, Denver Police Department, in Denver, Colorado, Sept. 5, 1967.

[195] Even if the defendant had the capacity to make an affirmative waiver, the record showed only that the defendant answered inquiries. *Miranda* reveals that a valid waiver cannot be shown merely from the fact that a confession was obtained. 384 U.S. at 475.

validly waive his rights."[196] This is consistent with earlier language in *Miranda* that an express disclaimer of one's rights *"followed closely* by a statement *could* constitute a waiver."[197] It indicates the Court's belief that if the person has actually waived his rights, he will make a statement in short order. The longer the time span, the less trustworthy the statement will be. Thus, it would seem incumbent upon the interrogators to work swiftly. This would also seem to dispel any doubts that, in a series of interrogations, a waiver must be secured before each interview.[198] By requiring the evidence sought to be used to closely follow an express waiver, the Court seemingly has required that the advisement be repeated and a waiver secured each time the defendant is interrogated.[199]

Incommunicado incarceration without questioning is also strong evidence of nonwaiver.[200] This reflects the Court's belief that a period of isolation will have an adverse effect on the willpower of the accused which interferes with his ability to subsequently make a valid waiver. The police would seemingly encounter no difficulty here if they have provided the defendant with adequate food and sanitary facilities during the interim, and have permitted him free access to friends and relatives.[201]

Another prerequisite to a voluntary waiver is a finding that the police have practiced no deception on the defendant: "[*A*]*ny evidence* that the accused was *threatened, tricked or cajoled* into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."[202] Notice that the Court said *any* evidence of the forbidden tactics will invalidate the waiver. Presumably this means any *credible* evidence, but it need not satisfy any other evidentiary standard. Thus, if the person confesses only after the police state that if he cooperated it would go easier on him, and if he did not, he would go to jail, there would be a finding of involuntary waiver.[203] In fact, any physical violence, threats, psychological pressure or coercion, promises, inducements, artifice, deception, or fraud

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[196] *Id.* at 476 (emphasis added).

[197] *Id.* at 475.

[198] *See* Davis v. State, 204 So. 2d 490, 495 (Ala. 1967).

[199] This is the interpretation of the Denver Police Department. One defendant has been given as many as eight advisements during the course of the investigation. *But see* State v. Jones, 198 Kan. 30, 35, 422 P.2d 888, 892 (1967) (dictum).

[200] Miranda v. Arizona, 384 U.S. 436, 476 (1966).

[201] However, detention simpliciter may be an independent violation of the *McNabb-Mallory* rule. McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957). *See* FED. R. CRIM. P. 5(a).

[202] Miranda v. Arizona, 384 U.S. 436, 476 (1966) (emphasis added). Notice the use of the words, "any evidence." Presumably the Court is referring to any "credible" evidence.

[203] *See* United States v. Low, 257 F. Supp. 606 (W.D. Pa. 1966); *cf.* State v. LaFernier, 155 N.W.2d 93, 99 (Wis. 1967).

on the part of the interrogators will invalidate a subsequent waiver. The concern of the Court is to insure that a knowing and intelligent waiver can be made in an environment that will permit and honor nonwaiver.

E. *Successive Interrogations: The Westover Situation.*

A special waiver problem may be presented when the defendant is subjected to interrogation on more than one occasion. This will occur if the accused does not receive the advisement and execute a waiver before the first interrogation, but is interrogated a second time only after apparent compliance with *Miranda.* The question is whether the waiver preceding the second interrogation is valid, in view of the prior illegal police conduct.

This was the situation presented in *Westover v. United States,*[204] decided with *Miranda.* The defendant had been arrested by local authorities who questioned him for several hours, although the defendant made no confession. After having been in custody for fourteen hours, the defendant was then interrogated by special agents of the FBI about his involvement in other offenses. Two hours later, the defendant confessed. Both interrogations were conducted in the same police station, and defendant was apprised of his rights only once, that being just prior to the second interrogation.

In holding the confession inadmissible, the Court said that although the interrogations were conducted by two distinct law enforcement agencies and different crimes were involved, the impact on the defendant was that of a continuous period of interrogation.[205] The defendant was precluded from making an intelligent waiver because the advisement occurred only after intensive questioning; thus, the federal authorities would have been the "beneficiaries" of the earlier, illegal questioning. The Court was not without advice for law enforcement officials:

> A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them.[206]

After *Westover,* this much is certain: it is irrelevant that the crimes involved are different; there need be no confession given at the first interrogation; prior to the second interrogation, the defendant should be removed both in time and place from his original surroundings. It is apparent that procedurally, the issue falls under the heading of "waiver." Thus, on the issue of waiver, the timeli-

[204] 384 U.S. 436, 494 (1966).

[205] *Id.* at 496. As one court said, the belated waiving was "window dressing" to a great extent. United States v. McCann, 1 BNA CRIM. L. REP. 2263 (N.D.N.Y. 1967).

[206] 384 U.S. at 496.

ness of the advisement may be as important as the administering of the advisement itself.[207]

Although *Westover* involved interrogation by two distinct law enforcement agencies, it seems clear that the *Westover* rationale would apply in a situation where a series of interrogations is conducted by the *same* authority.[208] However, a valid waiver would be more difficult to obtain because the defendant could probably not be entirely removed from his "original surroundings."[209] In one case, a second confession, after proper advisement and obtaining a waiver, was excluded even though three days had elapsed and the scene of the interrogation was changed from a schoolhouse to the police station.[210]

If a confession is made prior to the second confrontation, a subsequent waiver will be more difficult to prove.[211] In such a situation, the second confession would clearly be the "fruits" of the first.[212] Simply removing the person in time and place may not be sufficient. The Supreme Court, in *United States v. Bayer*,[213] has said:

> Of course, after an accused has once let the cat out of the bag, by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.[214]

Nevertheless, the Court in *Bayer* held a second confession admissible, because it was given six months after the first, and was "voluntary" in the traditional sense.[215] In a later case,[216] however, the Court held a second confession inadmissible, because the relation of the confessions was "so close that one must say the facts of one control the character of the other."[217]

Illustrative of this situation is an incident observed while riding patrol with the Denver police. A man was arrested in a bar for carrying a concealed weapon. Before being taken to the station, and prior to being advised of his rights, he was subjected to interro-

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[207] *See* Tucker v. United States, 375 F.2d 363, 366 (8th Cir. 1967).

[208] *See In re* Knox, 53 Misc. 2d 889, 280 N.Y.S.2d 65 (Fam. Ct. 1967).

[209] His interrogators may be different but they would represent the same authority. Also, the interrogation will probably have been conducted within the same building, if not in the identical room.

[210] *In re* Knox, 53 Misc. 2d 889, 280 N.Y.S.2d 65 (Fam. Ct. 1967).

[211] Evans v. United States, 375 F.2d 355, 361 (8th Cir. 1967).

[212] *Cf.* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[213] 331 U.S. 532 (1947).

[214] *Id.* at 540.

[215] *Id.* at 541.

[216] Leyra v. Denno, 347 U.S. 556 (1954).

[217] *Id.* at 561. The quoted language originated in Lyons v. Oklahoma, 322 U.S. 596, 603 (1944).

gation in the squad car. After several inculpatory admissions were elicited, the man was taken to the police station. Before being booked, he repeated his confession, after being advised of his rights and signing a written waiver. Clearly, neither confession will be admissible in court for the second was tainted and infected by the poison of the first confession.[218]

Another way of expressing the applicable principle is that the second confession is inadmissible unless the prosecution can prove that the causative link between the two confessions had been severed. It is suggested that this may be accomplished by removing the defendant as far from the time and place of his original surroundings as is reasonably possible[219] and, after advising the person of his rights, telling him: "Nothing that you may have said or confessed to prior to this time to any law enforcement official may be used against you in any way unless they first told you of your right to remain silent and to talk to an attorney and have him present during questioning, and you then agreed to talk to them. Do you understand?" If the person thereafter executes a waiver, subsequent statements should be admissible.[220]

F. *Burden of Proof.*

The burden of proving a waiver rests with the prosecution.[221] The Court justifies this by saying that interrogations are usually conducted in isolation and the state has the only means of making available corroborated evidence. If the defendant has no attorney present during the interrogation, the government bears the "heavy burden" of showing that he knowingly and intelligently waived his rights.[222] It is thus obvious that there is no presumption of waiver; in fact, a presumption of nonwaiver may be raised in favor of the accused.

It is not clear what quantum of proof is necessary to enable the government to fulfill its "heavy burden." Most courts speak in

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[218] *See* Evans v. United States, 375 F.2d 355, 361 (8th Cir. 1967). *But see* Babson v. State, 201 So. 2d 796 (Fla. 1967).

[219] Space limitations may prove insurmountable. The police may also be unaware of the existence of a prior, illegal interrogation. This will be particularly true in the larger cities, because the interrogators may be different—the first being the arresting officer and the second, a detective. In smaller communities, the arresting officer usually follows the case through to the end.

[220] Chief Jamerson of the Denver Police Department categorically states that after an illegal confession has been obtained, there is *nothing* he can do that would permit a subsequent confession to be admitted into evidence. Thus, he feels the taint of the first confession is perpetually present. Interview with Lloyd Jamerson, Division Chief, Detective Division, Denver Police Department, in Denver, Colorado, Sept. 5, 1967.

[221] Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[222] *Id.* This would necessarily include the burden of proving that the advisement was in fact administered *and* understood. *See* State v. Travis, 49 N.J. 428, 431, 231 A.2d 205, 207 (1967). *See generally* Warden, *Miranda — Some History, Some Observations, and Some Questions,* 20 VAND. L. REV. 39, 53-55 (1966).

terms of "beyond a reasonable doubt"[223] or "unmistakable clarity."[224] Whether these are expressions of a constitutional requirement or merely the court's preference is not certain. Until the Supreme Court clarifies its position, it is safe to assume only that the burden is greater than "by a preponderance," the criterion for civil cases. If an attorney is present, presumably the government would still have the burden of proof, but it would be measured by more lenient standards because the knowledge of the circumstances surrounding the interrogation would be shared by the attorney.[225] The burden may also be lessened when the purported waiver took place in the field, as opposed to the station house.[226] This is because the station house is a more controlled environment, offering the police more evidentiary techniques than in the more spontaneous situations occurring on the street. On the other hand, an initial unwillingness to talk may increase the burden of proving a subsequent waiver.[227]

The prosecution's heavy burden may necessitate proof other than the oral testimony of the officer in charge of the interrogation. Otherwise, a "swearing contest" may result between the officer and the defendant, forcing the judge to determine the credibility of each. This may not be the type of substantial proof *Miranda* dictates.[228] Therefore, other techniques of proof will have to utilized.[229] Perhaps the most common technique is the use of a printed advisement form, setting forth the defendant's rights and a formal waiver. Both the defendant and a witness would then sign it. The police could also utilize tape recorders, video tapes and motion pictures. The interrogation session could also be transcribed by a reporter or stenographer. However, the cost of some of these devices may be prohibitive, particularly for the smaller police departments.

No matter what techniques are utilized, the proof will never be conclusive. Although they all pinpoint an occurrence at a certain time, none will reveal the events taking place prior to the alleged

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[223] *See* People v. Golwitzer, 52 Misc. 2d 925, 277 N.Y.S.2d 209 (Sup. Ct. 1966); People v. Keesler, 53 Misc. 2d 268, 270-71, 278 N.Y.S. 2d 423, 426 (Allegany County Ct. 1967); People v. Johnson, 50 Misc. 2d 1009, 271 N.Y.S.2d 814 (Nassau County Ct. 1966).

[224] Evans v. United States, 375 F.2d 355, 360 (8th Cir. 1967).

[225] For a good discussion of burden of proof, see State v. Yough, 49 N.J. 587, 596-601, 231 A.2d 598, 603-05 (1967).

[226] *See* Kamisar, *A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test,* 65 MICH. L. REV. 59, 61 (1966).

[227] *See* People v. Fioritto, 64 Cal. Rptr. 797, 800 (Ct. App. 1967).

[228] However, the State may be aided by the greater credence given the officer's testimony by the court. *See* Elsen and Rosett, *Protections for the Suspect Under Miranda v. Arizona,* 67 COLUM. L. REV. 645, 658-59 (1967).

[229] For a good discussion of the various techniques, see 19 AM. JUR. PROOF OF FACTS, *Waiver of Rights Under the Miranda Decision* §§ 44-50 (1967). *See* 1966 UTAH L. REV. 687 (1966).

waiver. They also may not show a subsequent retraction of waiver. To allay any thoughts of police abuses would require a video tape of the defendant from the time he was apprehended to when he confessed. Even then, the tape may have been edited. However, in the absence of proof by the defendant of circumstances apart from the prosecution's evidence, a waiver will be provable with less than a complete accounting of the time gap.

CONCLUSION

Although the preceding discussion has focused on some of the potential legal limitations on *Miranda*, practical limitations may in the final analysis be equally as significant in determining the scope and effect of *Miranda*. Thus, some concluding comment on a few practical limitations is justifiable.

The remedy provided in *Miranda* (*i.e.*, exclusion of evidence) becomes significant to the defendant only if he is prosecuted and then only if the evidence is proffered against him. Thus, a person aggrieved by unlawful police practices has no effective remedy unless the "ifs" are present. Even if a man is tried in court, the prosecution often has other sufficient evidence for a conviction and need not utilize his confession. Thus, a wrong may have been committed although the defendant has no remedy.

Miranda's potential effect is largely dependent on the importance of confessions to successful prosecution. There are undoubtedly instances where the presence or absence of a confession is determinative because of the lack of tangible evidence from other sources, but there are differing opinions on the frequency of this type of situation. Undoubtedly, *Miranda* will cause some shift from reliance on confessions to more intensive field investigations and use of science and technology in detecting and solving crimes. It is only in those instances that the increased field investigation is unproductive that *Miranda* can have any effect on the clearance rate. Of course, *Miranda* may have more effect in smaller communities where additional funds to support a more complete scientific investigation are probably unattainable. Even in larger cities, the latest scientific equipment is often either in short supply or is nonexistent because the police department's budget does not afford such a "luxury."

This prompts the final point of this Note: due process costs money. Every decision of the Supreme Court that expands upon or clarifies individual rights necessitates modifications in police or court procedures which almost invariably involve a greater financial burden for the courts and police to operate effectively under the new decision. Several aspects of *Miranda* involve potentially greater monetary burdens: assistance of state-provided counsel for the in-

digent at an earlier stage in the prosecution; more sophisticated evidentiary techniques to preserve proof of an advisement and waiver; a greater portion of the officer's time to prepare the necessary documents and reports; more and better scientific equipment, technicians and trained investigators. If additional money is forthcoming, the individual may be able to enjoy the rights conferred under a liberal or expansive interpretation of *Miranda.* However, without the necessary money, both the courts and police may give *Miranda* a more restrictive and narrow interpretation. This would impose severe limitations on the rights of the individual. *Miranda* might, for example, be limited to cases involving felonies, excluding all misdemeanors, not to mention traffic offenses. The definition of custody or effective detention may be severely restricted, perhaps limited to police station interrogations or those conducted in other "police-dominated" atmospheres. The strict burden of proof of an advisement and waiver may be relaxed. These and many other legal issues may have their resolutions affected by the failure to properly equip the law enforcement agencies and the courts to meet the responsibilities thrust upon them by the Constitution, as interpreted by the Supreme Court.

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