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THE THRESHOLD QUESTION IN APPLYING *MIRANDA*: WHAT CONSTITUTES CUSTODIAL INTERROGATION?

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I. INTRODUCTION

To state that *Miranda v. Arizona*[1] opened new problem areas for peace officers, courts, and attorneys would be a gross understatement. Rather than delving deeply into factual situations to determine the voluntariness of statements made to law enforcement officers, courts must now determine whether the statements sought to be introduced at trial are the products of "custodial interrogation." If so, the *Miranda* holding comes into play.

In *Miranda*, the United States Supreme Court held:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[2]

As to the "procedural safeguards" to protect the right against self-incrimination, the Court held that the now famous *Miranda* warnings must be given, "unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it . . . ."[3]

The question of what constitutes custodial interrogation is an

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1. 384 U.S. 436 (1966).
2. *Id.* at 444.
3. *Id.*

extremely broad one, and no attempt will be made to comprehensively develop every detail and peripheral aspect of the problem.[4] The emphasis of the discussion will be on the tests which courts have developed and the application of these tests to the most common categories of factual situations. As a preliminary matter, it will be necessary to mention briefly the meaning of interrogation.[5] The next matter to be considered will be the tests used by the courts, followed by the application of these tests to factual situations. The factual situations include interrogation: 1) "on the scene," 2) at the home or business of the subject, and 3) in a building or a vehicle maintained by the state for purposes of investigation or custody. The conclusion represents an attempt to relate the trends noted to the purposes of the *Miranda* decision.

Before considering the nature of custodial interrogation, it is necessary to develop briefly an overview of the basic purposes of *Miranda*. Only with such purposes in mind can the various issues involved in the application of *Miranda* be intelligently approached. Of course, the basic aim is to "secure the privilege against self-incrimination."[6] This protection may be achieved by the execution of the four general, somewhat overlapping purposes of *Miranda*.

First, in order to protect the privilege against self-incrimination, the Court held that affirmative steps must be taken to overcome "the compelling atmosphere of the interrogation."[7] The theory is that

> [e]ven without employing brutality, the 'third degree' or [other coercive practices], the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.[8]

Thus, even though the individual is not forced to speak, the na-

4. *See generally* Annot., 31 A.L.R.3d 565 (1969). This annotation, one hundred thirty-one pages in length, treats numerous peripheral areas not to be considered in this article. These areas include: testimony before grand juries; interrogation by prison personnel; interrogation by private security guards, detectives or police, business proprietors, or medical personnel; and questioning by relatives, friends, or acquaintances of the subject, as well as by other miscellaneous persons.

5. This should not be taken to mean that the question of interrogation is a simple one. A brief discussion of it will suffice, however, as a background for the central point of this article.

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

7. *Id.* at 465.

8. *Id.* at 455.

ture of the place and circumstances may overbear his will. The natural tendency of most persons is to cooperate with the police; this natural tendency (termed by Professor Graham as "ignorance compulsion") may cause a truly involuntary statement to be elicited without any additional coercion.[9] Given the combination of this natural tendency and an inherently coercive police-dominated atmosphere, the *Miranda* holding can be, in theory at least, effectual in the protection of the right against self-incrimination.

The second purpose of *Miranda* is to overcome the more sophisticated pressures on the individual to speak. Modern law enforcement personnel are well versed in the psychological art of eliciting conversation.[10] In addition to the problems of "ignorance compulsion" and coercive atmosphere, the actual behavior of the interrogators is naturally aimed at the solicitation of evidence. There are, for example, specific ways for an interrogation room to be furnished and arranged; specific personal traits that are highly prized in interrogators; and specific tactics employed to wear away the resistance of the individual. All of these procedures, based on sound psychological data, are highly effective in bringing about desired results.[11] Thus, even without any force or overt trickery, the individual being interrogated is placed at a distinct disadvantage. One of the purposes of *Miranda* was partially to rectify this imbalance of influence upon the individual.

A third purpose of *Miranda* is to eliminate or mitigate real or supposed police abuses in the course of interrogation.[12] The term "abuses" should be taken to mean activity going far beyond the inherently coercive atmosphere and the use of mild psychological ploys. These abuses have ranged from giving false legal advice,[13] to lengthy pre-arraignment interrogation coupled with a denial of the right to counsel,[14] to the hanging and whipping of the subject.[15] These practices, though previously held unconstitu-

9. Graham, *What is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona*, 14 U.C.L.A. L. REV. 59, 79-80 (1967) [hereinafter cited as Graham].

10. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968). This article provides a good discussion of a social science approach to the problem of custodial interrogation.

11. *Id.* at 45.

12. *See* Outletta v. Sarver, 428 F.2d 804 (8th Cir. 1970).

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

14. Escobedo v. Illinois, 378 U.S. 478 (1964).

15. Brown v. Mississippi, 297 U.S. 278 (1936).

tional, are further circumscribed by the necessity of *Miranda* warnings and waiver.

The fourth purpose of *Miranda* is to protect the evidentiary value of confessions or inculpatory statements by insuring their voluntary nature.[16] By proof that an individual knew and voluntarily waived his rights, the statement is at least *prima facie* clear of the taint of coercion and falsehood.

The above discussion, far from being a complete exposition of the purpose of *Miranda*, is only a basic outline. This outline is given only to serve as a standard by which to measure recent interpretations defining "custodial interrogation." To determine whether these interpretations further or frustrate the purposes of *Miranda* is the subject of this article.

II. WHAT CONSTITUTES CUSTODIAL INTERROGATION?

Perhaps the *Miranda* Court was reluctant to define completely "custodial interrogation" before experience revealed the exact scope of the problem with which the definition would be concerned.[17] Whatever its reason, the Court did not define the term sufficiently for the lower federal and state courts to approach it with confidence. Over the years since the landmark decision was rendered, however, the precedents have grown through an enormous number of cases to the point that the matter may now be approached with surety in some areas and at least a growing confidence in others. Most of the case law centers on the question of whether the individual was in custody at the time the statements were made. Before consideration of that problem, however, brief attention to the meaning of "interrogation" in the *Miranda* context is in order. If the statements sought to be admitted are not found to be the product of interrogation, the question of custody should never arise.

A. Interrogation

The term "interrogation" includes the questioning of a subject by police officers with a view to obtaining information related to his guilt or innocence in suspected criminal activity. Beyond that core concept, perhaps interrogation can be best defined by pointing out the major areas which are generally held not to be

16. Lunsford v. Howard, 316 F. Supp. 1125 (E.D. Ky. 1970).
17. *See* Graham, *supra* note 9, at 63.

interrogation: volunteered statements and responses given to administrative questions.

A volunteered statement, made without any attempt by peace officers to solicit it, is not deemed to be the product of custodial interrogation, even though an individual may be in the most severe form of custody.[18] For example, in *Cook v. Cox*,[19] a state prisoner knew that the police were investigating the ownership of an automobile found in his possession. Without any questioning, the prisoner requested to speak with a police sergeant, voluntarily gave him a false registration card, and claimed that he was the true owner of the vehicle. When the attempted exculpatory[20] statement was determined to be false, it was admissible against him on a charge of car theft. The statement, not being the product of interrogation, was admissible without any requirement of *Miranda* warnings. The same reasoning applies to statements blurted out in a squad car immediately after arrest.[21] In *Sellers v. Smith*,[22] the defendant was placed under arrest and put in a squad car to be driven to the station when he started a conversation with the officers by saying, "Well, you all got me."[23] Such a statement is clearly admissible under the language of *Miranda*: "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."[24] The same is true where the defendant believes the police to have sufficient evidence to convict and therefore gives a full voluntary confession without interrogation,[25] or where the defendant's desire to commit a crime remains strong and he verbalizes that desire.[26] For example in *United States v. Compton*,[27] the defendant blurted out after his arrest, "I just want to kill President Nixon!"[27.1] Clearly statements volunteered by an individual, even though he may be in custody, are not the products of "inter-

18. United States v. Littlejohn, 441 F.2d 26 (10th Cir. 1971).

19. 330 F. Supp. 1323 (W.D. Va. 1971).

20. It is clear that exculpatory statements receive the same treatment as other statements. Miranda v. Arizona, 384 U.S. 436, 477 (1966).

21. United States v. Duke, 369 F.2d 355 (7th Cir. 1966).

22. 412 F.2d 1002 (5th Cir. 1969).

23. *Id.* at 1004-05.

24. Miranda v. Arizona, 384 U.S. 436, 478 (1966).

25. United States v. De Bose, 410 F.2d 1273 (6th Cir. 1969), *cert. denied*, 401 U.S. 920 (1971).

26. United States v. Compton, 428 F.2d 18 (2d Cir. 1970), *cert. denied*, 401 U.S. 920 (1971).

27.1. *Id.* at 20.

rogation" as defined by the courts.

An area which is less clear than that of volunteered statements, but generally held not to be interrogation, is the area of administrative questioning. The term "administrative questioning" is used to describe the routine questions asked to all individuals who are "booked" or otherwise processed by officers.[28] *Miranda* does not apply to administrative questioning, as it generally applies only to interrogation designed to elicit admissions of a crime, or to the type questions which "Mr. Justice Frankfurter aptly characterized and proscribed . . . a long time ago in Watts against Indiana as the 'Suction process of interrogation.' "[29] A good example of a situation in which incriminating information was held admissible even though given during administrative questioning is found in *Williams v. United States*.[30] There the defendant was being "mugged" and fingerprinted in the routine way. An officer was asking the usual questions necessary to fill out the police forms as to name, age, residence, and occupation. To the latter question the defendant replied that he was a "pimp." This statement was held admissible even though the defendant was obviously in custody. *Proctor v. United States*,[31] however, reaches a different conclusion on a similar state of facts. In *Proctor* the defendant was asked his occupaton for purposes of filling out a line-up form. His false reply was later used for impeachment purposes at his trial.[32] The court, in an opinion written by Judge Skelly Wright, held that even innocent questions asked in a coercive atmosphere violate the holding of *Miranda*. The coercive atmosphere is the same whether or not the officer intends to obtain incriminating statements. The defendant may well believe that he must answer, and therefore his statement may be involuntary. Moreover the intent of the officer asking the question is irrelevant. Despite the well-reasoned opinion of Judge Wright, this view has not been widely accepted. The Ninth Circuit, for example, rejected that line of reasoning in

28. Clarke v. State, 3 Md. App. 447, 240 A.2d 291 (Ct. Spec. App. 1968).

29. Schwartz & Bator, *Criminal Justice in the Mid-Sixties: Escobedo Revisited*, 42 F.R.D. 463, 467 (1967).

30. 391 F.2d 221 (5th Cir. 1968), *cert. denied*, 393 U.S. 830 (1968).

31. 404 F.2d 819 (D.C. Cir. 1968).

32. *Proctor* was decided before Harris v. New York, 401 U.S. 222 (1971), which permitted statements elicited without *Miranda* warnings to be used for impeachment purposes.

Clark v. United States[33] where an individual underwent routine questioning at a police station as to an automobile accident in which he was involved. His answers provided evidence which was later admitted against him on a charge of automobile theft. Administrative questioning of this type was held not to constitute custodial interrogation even though it took place in a typical police-dominated atmosphere.[34]

A related question is whether an individual may be legally required to identify himself when he is, for example, involved in an automobile accident. The possibility of self-incrimination is clearly present if a person can be forced to identify himself as the driver of a car which is later found to have been driven recklessly. Although a strong argument can be made for the invocation of the constitutional privilege,[35] the Supreme Court has held that a requirement that a driver identify himself does not violate his rights. In *California v. Byers*,[36] the plurality and one concurring justice held that the incidental possibility of self-incrimination from such a requirement is not sufficient to frustrate the purpose of a statute requiring such identification when that purpose is completely divorced from criminal prosecution. Four of the Justices[37] went so far as to hold that self-identification is not testimonial. Although the issue of this case was not custodial interrogation, the reasoning of the Court could well be applied to support the view that administrative questioning for purposes other than soliciting incriminating statements falls outside the purview of *Miranda*.[38]

Although interrogation in its basic sense does include the

33. 400 F.2d 83 (9th Cir. 1968), *cert. denied*, 393 U.S. 1036 (1969). *Clark* was decided before *Proctor* but the same reasoning was argued and rejected.

34. *Editor's note.* It may be that the true distinction between *Proctor* and *Clark* turns on the definition of "custody." In *Proctor* the defendant was under arrest while in *Clark* the defendant had not yet been arrested. Whether emphasis is placed on the term "custodial" is, however, probably more descriptive than analytical. It nonetheless remains clear that *Miranda* warnings may not be required for purely administrative questioning if the nature of the judicial inquiry is in the context of "interrogation."

35. Mansfield, *The Albertson Case: Conflict Between The Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 122 (1966).

36. 402 U.S. 424 (1971).

37. Burger, C.J., Blackmun, White, and Stewart, JJ.

38. A related issue is whether an officer may ask questions in order to keep the flow of information coming or to clarify a volunteered statement. *See generally* Kamisar, *"Custodial Interrogation" within the Meaning of Miranda*, in CRIMINAL LAW AND THE CONSTITUTION, 335, 351-52, 379-82 (Inst. Cont. Leg. Ed. 1968).

normal police initiated questioning, it does not include volunteered statements and usually does not include routine administrative questioning.

B. Custodial

By far the most litigated issue in the field of "custodial interrogation" is whether the defendant was in custody at the time he was interrogated[39] and gave the statements sought to be introduced.[40] The most frequently quoted language determinative of this issue is that of the *Miranda* Court:

> By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[41]

It is clear that the word "significant" in this context has a substantial meaning. The Court inserted this word in three different places between the time the opinion was printed in the advance sheets and its final publication.[42] This demonstrates the error of the view held by Judge Sobel of the New York Supreme Court that *any* deprivation of freedom is inherently coercive.[43] Most cases are in substantial agreement that some restraint on an individual's freedom of action falls within the tolerances left untouched by *Miranda*. The question of how great a restriction may be placed on an individual's freedom without invoking the necessity of *Miranda* warnings must be decided on the facts of each case. *Miranda* clearly applies to police interrogation of a person under arrest at the police station, since this was the factual situation in *Miranda* and its companion cases. In order to decide the more difficult factual issues, courts have attempted to devise tests to determine the point at which the term "custodial" becomes applicable.

1. Which Test is Appropriate?

The tests which courts have discussed may be grouped into

39. Custody and interrogation are two conceptually separate requirements which must each be met before *Miranda* becomes applicable.

40. *See generally* Lynch, *Miranda*, 35 FORD. L. REV. 221, 224-27 (1966).

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

42. *See* 35 TENN. L. REV. 604, 611 (1968).

43. *Id.* at 611.

two general classificatons: 1) the focus test and 2) the objective—subjective test.[44]

a. The Focus Test

When *Miranda* was decided, the courts had generally become familiar with the "focus test" of *Escobedo v. Illinois*.[45] *Escobedo* held that certain rights attach when the "investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect . . . ."[46] Being accustomed to this test, some courts would naturally apply it to cases under *Miranda*. To reinforce this tendency, Chief Justice Warren included in *Miranda* the infamous "obfuscating footnote."[47] Footnoting the passage describing custodial interrogation the Court stated, "[t]his is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused."[48] This footnote has added a great deal to the confusion, misinterpretation, and lack of uniformity in applying *Miranda*.

Later cases have demonstrated that the focus test and the deprivation of "freedom of action in any significant way" language[49] cannot logically be as coextensive as the footnote seems to suggest. In *People v. McKie*[50] the defendant was under investigation for murder. The investigation resulted in insufficient evidence for a conviction for murder, but did produce sufficient evidence to convict the defendant for an unrelated misdemeanor for which he was subsequently sentenced and incarcerated. Following his release on the misdemeanor charge, the defendant was intermittently followed and questioned with regard to the murder. On each occasion, the defendant consulted his attorney, who in turn advised him not to answer any questions and demanded that questioning outside the presence of counsel cease. Finally, fourteen months after the murder, the police followed the defendant to a building. At this point the defendant approached the police and told them that he had killed the victim, that they would never be able to prove it, and that they might as well quit

44. The latter classification actually encompasses two general tests. However, these must be discussed together for the sake of clarity. *See* text, pp. 710-14 *infra*.

45. 378 U.S. 478 (1964).

46. *Id.* at 490-91.

47. Miranda v. Arizona, 384 U.S. 436, 444 n. 4 (1966).

48. *Id.*

49. *Id.* at 444.

50. 25 N.Y.2d 19, 250 N.E.2d 36, 303 N.Y.S.2d 534 (1969).

following him around. The court determined that no restraint was put on the defendant's freedom of action.[51] The holding was clear. There was no custody. But it is likewise clear that the investigation had long since focused on the defendant at least in the *Escobedo* sense, since the only purpose of the ongoing investigation was to convict the defendant.[52]

In spite of the logical inconsistency between the concepts of focus and custody as evidenced by *McKie*, some courts have used focus as the test for the application of *Miranda*.[53] In *Arnold v. United States*,[54] the court held that *Miranda*, like *Escobedo*, does not apply to the questioning of a subject before the process has shifted from the investigatory to the accusatorial stage. In *United States v. Dickerson*,[55] *Miranda* warnings were applied to tax investigations without regard to custody. Once the tax file was transferred to the Intelligence Division for the purpose of a criminal investigation of possible tax fraud, the warnings were required at the first contact with the subject by an agent or special agent. The warnings were not required, however, so long as the investigation was merely civil in nature. *Dickerson* seems completely illogical from a *Miranda* viewpoint. Under the facts of the case, an agent came to the subject's office to make a civil investigation, questioned him, and obtained incriminating evidence. The case was then shifted to the Intelligence Division for a criminal investigation. A special agent returned to the defendant's office and, in the same familiar atmosphere, questioned him. There was no greater coercive pressure on the subject in the latter encounter than in the former. It is highly improbable that a criminal investigation which the subject believes to be a civil investigation could be more coercive than a civil investigation.[56] Despite this fact, the

51. Although this case was decided in terms of the right to counsel, the turning point was the fact that the defendant could be questioned without counsel since he was not in custody. *Quaere*: Is a person who is incessantly followed and questioned not restrained in his freedom of action?

52. For a similar situation, see Hoffa v. United States, 385 U.S. 293 (1966).

53. *See, e.g.*, United States v. Gibson, 392 F.2d 373 (4th Cir. 1968); Windsor v. United States, 389 F.2d 530 (5th Cir. 1968); United States v. Mendoza-Torres, 285 F. Supp. 629 (D. Ariz. 1968); Commonwealth v. Jefferson, 423 Pa. 541, 226 A.2d 765 (1967).

54. 382 F.2d 4 (9th Cir. 1967).

55. 413 F.2d 1111 (7th Cir. 1969). For other cases dealing with the problem of the application of *Miranda* to tax investigations, see: Mathis v. United States, 391 U.S. 1 (1968); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); United States v. Mirani, 422 F.2d 150 (6th Cir. 1970), *cert. denied*, 399 U.S. 910 (1970); United States v. Lackey, 413 F.2d 655 (7th Cir. 1969); United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967).

56. This case could possibly be justified as a measure to curb abuses by the investiga-

focus test was applied to require the warnings.[57]

A much more logical approach to the focus problem is that expressed by Judge Friendly in *United States v. Hall.*[58] In that case, the police, already possessing sufficient evidence for an arrest, went to the subject's home. The questioning took place in an atmosphere familiar to the individual and was found to be non-coercive. Judge Friendly distinguished the *Miranda* custodial test from the *Escobedo* focus reasoning as follows:

> [C]ustody as well as focus and other factors were essential to [the decision in *Escobedo*]. Under *Miranda* custody alone suffices. We fail to perceive how one can reason from those two propositions to a conclusion that "focus" alone is enough to bring *Miranda* into play.
>
> As Professor Kamisar has put it, "*Miranda's* use of 'custodial interrogation' actually marks a *fresh start* in describing the point at which the Constitutional protections begin"—Fifth Amendment protections, that is.[59]

The great majority of cases have, like the Second Circuit, rejected focus as the appropriate test for the application of *Miranda.*[60]

Although Judge Friendly's view seems consistent with the language of *Miranda,* it gives no effect to footnote four. As stated initially in the consideration of focus, this footnote has caused a great many problems in determining the meaning of "custodial." Some writers have attempted to reach an interpretation which gives effect to both the body of the opinion and the footnote. One possible interpretation is that focus is one of three important factors. The first is restraint on freedom of action, thus giving effect to the specific language of *Miranda.* The second factor is the place of the interrogation, which was also clearly important in the factual situations before the *Miranda* Court. The third factor is focus, or the extent to which the police suspect the individual of being the perpetrator of the offense.[61] Although these considerations do not form a rigid test, they have all played an

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tor. *See* text, p. 710 *infra.*

57. *Accord,* United States v. Casias, 306 F. Supp. 166 (D. Colo. 1969) (selective service investigation); United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967) (tax investigation). *But see* Pitman v. United States, 411 F.2d 635 (10th Cir. 1969).

58. 421 F.2d 540 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970).

59. United States v. Hall, 421 F.2d 540, 543 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970).

60. *See* text, pp. 710-14 *infra.*

61. *See* 15 U.C.L.A. L. REV. 1031, 1051 (1968).

important, if often unarticulated, role in the decisions of various courts. Focus may be particularly appropriate, when used in conjunction with these other factors, to curb potential police abuses and deception. It is repugnant to justice, in the eyes of some courts, to allow police to delay arrest or restraint for the sole purpose of obtaining additional evidence without imposing the burden of *Miranda* warnings.[62]

Another view which attempts to correlate the focus and restraint on freedom aspects of custody is that of Professor Kenneth W. Graham, Jr.[63] In his view, focus should be used as a separate point at which warning should be given if it is to be used at all. Thus, if an individual is to be interrogated, he must be given the warnings if: 1) he is in custody or 2) the investigation has focused on him.[64] This view gives continuing vitality to the rights protected by *Escobedo* while not diluting the *Miranda* requirement. Moreover, Professor Graham would require the warnings "whenever the police arrest or have probable cause to arrest the person questioned . . . ."[65] This view would also curb the police abuse of forestalling arrest and custody only to lull the individual into giving evidence against himself while unaware of his rights.

In summary, it is clear that focus alone is not the appropriate test for the application of *Miranda*, despite some authority to the contrary. If used in conjunction with, or in addition to, some other test, the concept of focus may, however, prove a useful tool in protecting the rights of individuals and curbing police deception.

b. The Objective and Subjective Tests

The great majority of courts have rejected focus as the test for determining the point at which *Miranda* should apply. These courts look instead to whether the individual's freedom of action has been significantly restrained. The difficulty arises as to whether this restraint should be measured in an objective sense as to how the various circumstances might affect a reasonable man, or whether a more subjective test should be devised to determine if the particular individual interrogated believed himself to be in custody. Additional aspects include the intent of the

62. *See, e.g.*, Windsor v. United States, 389 F.2d 530 (5th Cir. 1968).
63. *See* Graham, *supra* note 9.
64. *Id.* at 114.
65. *Id.* at 132.

officer, which, if relevant at all, may also be judged by an objective or subjective standard. Although the subjective test is supported by considerable logic, the majority of courts have chosen the objective test, which is more susceptible of proof.

The logic of a subjective test is clear. In the words of Professor LaFave:

> [T]he person who honestly but unreasonably thinks he is under arrest has been subjected to precisely the same custodial pressures as the person whose belief in this regard is reasonable.[66]

Miranda was devised primarily to protect the individual's right against self-incrimination. If the individual is interrogated by police officers and unreasonably believes himself compelled to answer, the statements he makes are nonetheless damaging at trial. An individual who is ignorant of his rights and weak-willed might be coerced by far less pressure than that necessary to achieve the same result with a more informed and steadfast subject. As pointed out by Rothblatt and Pitler,[67] the court should consider the effect of the circumstances on the suspect's mind, taking into account his age, intelligence, experience, and other factors.

> This test is a subjective one because we are concerned with the effect of questioning in the suspect's mind. Compulsion for one may not be compulsion for another. In this context, the policeman's intent to arrest or whether he has sufficient probable cause to arrest is irrelevant.[68]

United States v. Harrison[69] serves as a factual example of a situation in which a subjective test would seem appropriate. In *Harrison* the police came to the home of a parolee and requested that he come to the station for questioning. Normally there is no compulsion in such a situation, and subsequent interrogation without restraint would generally be termed non-custodial. Presumably because of his peculiar situation as a parolee, the court held that the subject actually believed himself compelled to cooperate with the police. As a result the interrogation had the same

66. LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 99 (1968).

67. Rothblatt & Pitler, *Police Interrogation: Warnings and Waivers—Where Do We Go From Here?*, 42 NOTRE DAME LAWYER 479 (1968).

68. *Id.* at 485.

69. 265 F. Supp. 660 (S.D.N.Y. 1967).

coercive effect as if the individual had actually been in custody. The court held his statements inadmissible absent the *Miranda* warnings and waiver.[70] This case seems to be in accord with other decisions which consider the subjective belief of the defendant as evidenced by his conduct and the surrounding circumstances.[71]

As to the intent of the interrogating officer, the courts are in general agreement that an undisclosed intent to arrest cannot transform a non-custodial situation into a custodial one. For example, in *Williams v. United States*,[72] an individual stopped his automobile voluntarily and for his own purposes. Police officers approached him with the intent of arresting him unless he could satisfactorily explain away evidence the police had independently obtained. The court determined that there was no custody during the interrogation and as a result *Miranda* did not apply. The officers' undisclosed, subjective intentions were held to be irrelevant since they had no possible effect on the conduct of the subject. Other courts are in substantial agreement with this view.[73] An exception to this reasoning would appear to be the situation in which an officer, already possessing probable cause to arrest, attempts to forestall the arrest and custody to avoid the requirement of *Miranda* warnings.[74] Consequently, the acts of police officers are generally judged by an objective standard.[75]

The test which has gained the widest approval among the courts is the objective one. In *United States v. Hall*,[76] Judge Friendly rejected the focus test for the objective one. According to this test, the officer must do something evidenced by his manner of approach, the tone of his questions or otherwise, that would objectively indicate that the defendant is not free to leave at will.[77]

The application of this test has generally been in the familiar language of the reasonable man standard. The California Su-

70. For a discussion of this case, see 37 U.M.K.C. L. REV. 260 (1969).

71. Hicks v. United States, 382 F.2d 158 (D.C. Cir. 1967); State v. Lay, 427 S.W.2d 394 (Mo. 1968).

72. 381 F.2d 20 (9th Cir. 1967).

73. *See, e.g.*, United States v. Smith, 441 F.2d 539 (9th Cir. 1971); Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969); Ellington v. Conboy, 333 F. Supp. 1318 (S.D.N.Y. 1971).

74. Windsor v. United States, 389 F.2d 530 (5th Cir. 1968).

75. United States v. Pellegrini, 309 F. Supp. 250 (S.D.N.Y. 1970).

76. 421 F.2d 540 (2d Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

77. *Id.* at 544.

preme Court held in *People v. Arnold*:[78] "[C]ustody occurs if the suspect is physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable man, that he is so deprived."[79] Likewise in *United States v. Bekowies*,[80] the Ninth Circuit held that *Miranda* applies if the actions of the police and the circumstances, fairly construed, would reasonably have led the defendant to believe he could not leave freely. This standard has been widely accepted because, in the words of the New York Court of Appeals:

> This test . . . gives effect to the purpose of the *Miranda* rules; it is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question.[81]

As in many other areas of the law, the courts have found that the workings of an individual mind are too complex to enable the use of a truly subjective standard. Under these conditions the courts have adopted a standard which at least approximates the proper result in the normal case, and one which can be proven with relative accuracy. The courts cannot be expected to decide cases solely on the basis of self-serving statements by the defendant or the interrogating officer. Beyond these factors, the most logical considerations are the circumstances and conduct of the individuals. Without extensive psychological analysis of each defendant, the objective standard is a reasonable, although not optimal, solution to the problem.

The most logical test to determine whether an individual is in custody for purposes of *Miranda* is that suggested in *Hicks v. United States*[82] and *State v. Lay*.[83] These courts would look to the subjective impressions of the defendant and the objective intent of the interrogating officer. This test would properly turn on whether the particular subject felt compelled to incriminate himself, thus providing the logical advantages of the subjective test. Since the officer's subjective intent is irrelevant, it can have no effect on the subject. The only relevance of the officer's intent is

78. 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967).
79. *Id.* at 444, 426 P.2d at 521, 58 Cal. Rptr. at 121.
80. 432 F.2d 8 (9th Cir. 1970).
81. People v. P., 21 N.Y.2d 1, 9, 233 N.E.2d 255, 260, 286 N.Y.S.2d 225, 233 (1967).
82. 382 F.2d 158 (D.C. Cir. 1967).
83. 427 S.W.2d 394 (Mo. 1968).

its outward manifestation and its subsequent effect on the defendant.[84] Despite the logical soundness of this test, it fails to consider the practical problem of proof.

In summary, it would appear that the most logical test for the application of *Miranda* is a subjective one centering on whether the individual believes himself to be in custody. The problems of proof inherent in this test often compel courts to use a more objective standard in determining whether the subject can be said to have reasonably believed himself to be in custody at the time of the questioning. With the foregoing as a basic test, the focus test could, however, be applied in two ways. First, it could be applied to prohibit an officer with probable cause to arrest from intentionally avoiding the use of *Miranda* warnings.[85] Second, focus might be appropriate to determine a separate point in time at which the warnings should be given.[86] If these factors were considered with regard to the various factual situations arising under *Miranda*, the result would be a reasonable compromise between the optimal logical solution and the practical necessities of law enforcement and judicial proof.

2. Factual Situations Arising Under *Miranda*

Although the factual situations arising under *Miranda* are numerous and diverse, the major areas of concern can be categorized by reference to the place of the interrogation. The resulting three major categories are interrogations occurring: 1) "on the scene," 2) at the home or business of the subject, and 3) at a building or vehicle maintained by the state for investigation or custody (typically the police station).

a. On the Scene

> There are many situations where psychologically it is very hard to superimpose the rather formidable and formal kind of exchanges required by *Miranda* onto situations where the overwhelming human response is quickly to say, "Who are you? What is going on? What are you doing here?"[87]

The language of the *Miranda* opinion itself makes clear that

84. *See* 35 TENN. L. REV. 604, 614-15 (1968).
85. Windsor v. United States, 389 F.2d 530 (5th Cir. 1968).
86. *See* Graham, *supra* note 9, at 114.
87. Schwartz & Bator, *supra* note 29, at 474.

the requirements of warnings and waiver do not apply to every contact of police officers with citizens.

> 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. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.[88]

Thus it is clear that some on-the-scene questioning is outside the scope of *Miranda*. The problem of where *Miranda* comes into play, however, is not a simple one.

United States v. Hatchel[89] is a representative case which illustrates a non-custodial situation that may develop into custody. In *Hatchel*, an officer, observing a minor traffic violation, stopped an automobile. At the outset, the officer asked to see the driver's registration card and license. The individual was unable to produce either, but he did give the officer some type of identification and a document purporting to show the car was owned by one of his relatives. As the questioning continued, the subject was unable to respond correctly and began approaching the officer in a suspicious manner. The officer then drew his gun and placed the driver under arrest. The court held that custody began when the pistol was drawn. All questioning preceding that act of forceful restraint was deemed to be general on-the-scene investigation. The incorrect answers were therefore admissible at trial for automobile theft without the requirements of warning or waiver. The more incriminating statements that were elicited as the questioning was continued and before *Miranda* warnings were given, were held inadmissible.

A similar case is *Utsler v. Erickson*,[90] in which an officer stopped a car answering the description of a getaway car in a recent robbery. The officer asked the identity and recent whereabouts of the driver. The answers to these questions were held admissible without the *Miranda* warnings. The court termed the interrogation as general questioning necessary to free quickly the

88. Miranda v. Arizona, 384 U.S. 436, 477-78 (1966).

89. 329 F. Supp. 113 (D. Mass. 1971); *accord*, Ellington v. Conboy, 333 F. Supp. 1318 (S.D.N.Y. 1971).

90. 440 F.2d 140 (8th Cir. 1971), *cert. denied*, 404 U.S. 956 (1971).

innocent and therefore outside the definition of custodial interrogation.

Another good example of the distinction between custodial and non-custodial on-the-scene investigation is *Allen v. United States*.[91] When the officer arrived on the scene, he found a beaten man lying in the back seat of a car. The officer asked the victim who had beaten him, whereupon he mumbled unintelligibly and pointed to another passenger. This man was unable to produce any identification. When asked if he had beaten the victim, he answered that he had. This questioning was held to be on-the-scene fact finding and therefore admissible as the result of non-custodial interrogation. In a later proceeding in the same case,[92] new evidence was introduced to the effect that the questioning had actually lasted ten minutes. On the basis of this evidence, the court reversed its earlier holding. Thus, the length of the interrogation transformed an otherwise non-custodial situation into a custodial one.

Another variation of on-the-scene questioning is evident in *United States v. Miles*.[93] In that case, federal officers were investigating possible liquor law violations. When they arrived at the site of the moonshine operation, the backwoods entrepreneur accosted them with a gun. Before physically subduing Miles and taking his gun, one of the officers asked, "What do you mean—trying to shoot someone?"[93.1] The bootlegger replied, "I thought you were trying to hijack my still!"[93.2] This statement was held admissible in a subsequent prosecution for impeding the investigation. The court was unwilling to require strict adherence to *Miranda* in this type of "emergency" situation, even though the defendant was obviously facing physical restraint.

The general rule that on-the-scene investigation does not constitute custodial interrogation is now universally recognized.[94] An individual may, however, be placed in custody outside the

91. 390 F.2d 476 (D.C. Cir. 1968).

92. Allen v. United States, 404 F.2d 1335 (D.C. Cir. 1968).

93. 440 F.2d 1175 (5th Cir. 1971).

93.1. *Id.* at 1176.

93.2. *Id.*

94. *See, e.g.*, United States v. Edwards, 444 F.2d 122 (4th Cir. 1971), *cert. denied*, 404 U.S. 1060 (1972); United States v. Akin, 435 F.2d 1011 (5th Cir. 1970), *cert. denied*, 401 U.S. 1011 (1971); United States v. Chase, 414 F.2d 780 (9th Cir. 1969), *cert. denied*, 396 U.S. 920 (1969); United States v. Gibson, 392 F.2d 373 (4th Cir. 1968); Arnold v. United States, 382 F.2d 4 (9th Cir. 1967); Williams v. United States, 381 F.2d 20 (9th Cir. 1967); People v. McLean, 6 Cal. App. 3d 300, 85 Cal. Rptr. 683 (1970); Gauido v. State, 1 Md. App. 455, 230 A.2d 700 (Ct. Spec. App. 1967); State v. Watts, 249 S.C. 80, 152 S.E.2d 681 (1967).

station house and interrogation while in such custody is prohibited without the proper warnings. The most obvious situation involving on-the-scene custodial interrogation is illustrated by *Noel v. State*.[95] In that case an officer was conducting an investigation at the scene of a crime and saw the defendant walking nearby. The officer stopped the man at gunpoint, searched him, and questioned him concerning the crime. This man was under severe restraint and the court so held. No statements were admissible without *Miranda* warnings.

Other examples of on-the-scene custodial interrogation are *United States v. De La Cruz*[96] and *People v. Ryff*.[97] In *De La Cruz*, several individuals were taken by four officers to an interrogation room at an airport where they were questioned. The defendant was then separated from the group, frisked and questioned. In *Ryff*, a suspected shoplifter was interrogated at length in a closed room of the department store by a store detective and a police officer. In both cases, the statements obtained from such interrogation were ruled inadmissible, as the freedom of movement of the subjects was severely restricted.[98] Other courts generally agree that where the subject is moved from the place of the initial encounter for the purpose of a more intensive investigation, the subsequent interrogation is likely to be custodial,[99] even if the move is not to a police station.

In situations in which an officer uses a weapon[100] or takes the subject to another area of the "scene" for interrogation,[101] the questioning may be deemed custodial. *Miranda*, however, is not limited to these facts. In *People v. Reason*,[102] the defendants were surrounded on the street by three policemen and questioned. Although no force was used, the court held that the defendants' freedom was sufficiently restricted to justify the requirement of warnings and the statements were held inadmissible. In *People*

95. 274 N.E.2d 245 (Ind. 1971).

96. 420 F.2d 1093 (7th Cir. 1970).

97. 28 App. Div. 2d 1112, 284 N.Y.S.2d 953 (1967).

98. The reasoning of the court in *De La Cruz* suggests a subjective test, emphasizing that the defendant was poor, uneducated, and did not speak English.

99. *See, e.g.*, United States v. Salinas, 439 F.2d 376 (5th Cir. 1971).

100. United States v. Hatchel, 329 F. Supp. 113 (D. Mass. 1971); Noel v. State, 274 N.E.2d 245 (Ind. 1971).

101. United States v. De La Cruz, 420 F.2d 1093 (7th Cir. 1970); People v. Ryff, 28 App. Div. 2d 1112, 284 N.Y.S.2d 953 (1967).

102. 52 Misc. 2d 425, 276 N.Y.S.2d 196 (Sup. Ct. 1966).

v. Abbott,[103] a situation with significantly less restraint was held to be custodial by the California Supreme Court. A police officer had been informed that a certain individual had drugs in his pocket. The officer walked up to the subject in a public park and asked the man what he had in his pocket. After repeating the question, the subject promptly answered and produced the incriminating evidence. The decision seems to be based on the theory that an officer should not be allowed to forestall arrest solely to elicit incriminating statements. This interpretation is reinforced by the remarkably similar case of *People v. McLean*,[104] decided by the same court soon after *Abbott*. In *McLean*, the police officer acted merely on suspicion, whereas the officer in the former case arguably had probable cause. In *McLean*, the statement was held to be admissible. It is clear that a variety of circumstances may cause an otherwise general, non-custodial interrogation at the scene to become custodial.

Although it is impossible to set down any hard and fast rule to determine which types of on-the-scene questioning will be allowed without *Miranda* warnings, some general observations may be made. First, routine questions to determine identity, car ownership, and recent whereabouts are seldom, if ever, custodial. If improper answers are given to these questions, an officer may be justified in asking further questions of a general investigatory nature. If the officer restrains the subject by use of a weapon or if several officers surround him, *Miranda* should apply. Likewise, if the subject, in order to facilitate the questioning, is taken to another place (even though part of the scene of the initial encounter) the warnings should be given. In this area the courts have generally used an objective test to determine whether freedom of action is restricted. The displeasure of courts with the tactic of delaying arrest for the purpose of eliciting self-incriminating statements is also noticeable, although usually unarticulated. It is interesting to note, however, that the courts have been generally unconcerned with the proposition that many individuals believe they must cooperate with the police despite the fact that "ignorance compulsion" may be just as strong on the street as in the station house, even though "coercion compulsion" is not.[105]

103. 3 Cal. App. 3d 966, 84 Cal. Rptr. 40 (1970).
104. 6 Cal. App. 3d 300, 85 Cal. Rptr. 683 (1970).
105. *See* Graham, *supra* note 9, at 83.

b. In the Suspect's Home or Business

The decisions are fairly uniform that, absent formal arrest, no custodial interrogation results from questioning the defendant in his own home.[106] This rule of thumb may be applied to the office or business of a defendant as well. The general theory is that the individual questioned is in familiar surroundings and does not face the same pressures as in the unfamiliar, police-dominated surroundings of the station house.[107]

An extreme example of refusing to find custodial interrogation is *United States v. Davis*.[108] Although this case is not consistent with a subsequent United States Supreme Court decision,[109] it is instructive as to the early interpretation of *Miranda* by many courts. In *Davis*, customs officials boarded a ship on its arrival in a United States port. They searched the room where the defendant was quartered, found a quantity of illegal drugs, and continued the search. When the defendant requested permission to use the restroom, he was allowed to do so only under the close observation of a customs official. In all, the questioning and detention lasted approximately one and one-quarter hours. The investigators went ashore to procure an arrest warrant and returned. Without showing the warrant, the customs officials further questioned the defendant and obtained incriminating statements. After the statements were completed, cautionary warnings were given. The elicited statements were held to be admissible, even though the court recognized the fact that the defendant had been detained. The detention was held to be insufficient for the application of *Miranda*. The court apparently felt that *Miranda* should never be applied to any dwelling quarters of an individual. If this were not the reasoning of the court, it is unclear what type of restraint would suffice to make such interrogation custodial—short of the hanging and whipping that occurred in *Brown v. Mississippi*.[110]

A more recent example of non-custodial interrogation in the suspect's home is *United States v. Lacy*,[111] in which F.B.I. agents

106. 37 U.M.K.C. L. REV. 260, 273 (1969).

107. This theory also applies generally to an individual questioned in the home of a third party. It is obvious, however, that the surroundings of a third party's home might be less familiar and more coercive than those of the defendant's own home. For a discussion of this issue see Annot., 31 A.L.R.3d 565, 606-13 (1969).

108. 259 F. Supp. 496 (D. Mass. 1966). *See also* 18 W. RES. L. REV. 1777 (1967).

109. Orozco v. Texas, 394 U.S. 324 (1969).

110. 297 U.S. 278 (1936).

111. 446 F.2d 511 (5th Cir. 1971).

went to an individual's home to investigate a possible car theft. There was no coercive activity; the subject freely answered all questions as to ownership of the car; and the agents left pleasantly. When the agents found that the information given them was false, the defendant was arrested and brought to trial. The statements were admissible without *Miranda* warnings as the result of non-custodial interrogation. Decisions on similar facts are apparently uniform in their agreement with *Lacy*.[112] The same result has been reached where the accused was living in a hotel room.[113]

Some courts have refused to make a finding of custodial interrogation at the defendant's home even when the police were in fact using considerable force at the time the statements were made. In *United States v. Dunnings*,[114] the verbal exchange took place while the police were breaking down the door of the defendant's home. In *State v. Lane*,[115] four police officers rushed into the home of an armed robbery suspect with drawn revolvers and promptly put him in handcuffs. One officer had begun to inform the suspect of his *Miranda* rights when another interrupted and asked if the defendant had the gun. The incriminating answer that resulted was held to be admissible, since the police had a right to protect themselves from the defendant. Since it is difficult to imagine one man in handcuffs surrounded by four officers with drawn revolvers as being a serious threat to the safety of the officers, it would seem that the *Lane* court did not favor a broad interpretation of custodial interrogation, at least with regard to at-home questioning.

Two cases that appear to be more reasonable in their decision are *People v. Stansberry*[116] and *McMillan v. United States*.[117] In *McMillan*, federal officers went to a man's home and told him they were looking for a liquor still. He replied that the still was not on his property. The statement was admissible as the result of a general investigatory question in a non-coercive atmosphere. The same reasoning was applied in *Stansberry* when police officers entered a student association office with a search warrant.

112. *See, e.g.*, United States v. Hall, 421 F.2d 540 (2d Cir. 1969); McMillan v. United States, 399 F.2d 478 (5th Cir. 1968).

113. United States v. Welsh, 417 F.2d 361 (5th Cir. 1969).

114. 425 F.2d 836 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970).

115. 77 Wash. 2d 860, 467 P.2d 304 (1970).

116. 47 Ill. 2d 541, 268 N.E.2d 431 (1971), *cert. denied*, 404 U.S. 852 (1972).

117. 399 F.2d 478 (5th Cir. 1968).

In answer to a preliminary question as to the ownership of the clothing strewn around the room, the defendant answered that the trenchcoat belonged to him. When drugs were found in the coat, the statement was admissible against the defendant. Courts have generally agreed that *Miranda* was not intended to cover these situations.

It is clear, however, that *Miranda* does apply to some interrogation in the home or business of the suspect. The United States Supreme Court made this point clear in *Orozco v. Texas*.[118] Police officers went to Orozco's house at four a.m. and questioned him about a shooting. The Court concluded that he was not free to leave and that the familiar surroundings of his own room did not purge the questioning of its custodial nature. The Court was emphatic in its holding that *Miranda* was not limited to the station house but applied anywhere the defendant was in custody.[119]

The same reasoning applies to the defendant's place of business. If the questioning there is custodial, *Miranda* warnings are required. In *United States v. Phelps*,[120] police officers questioned a pawnbroker in his own shop. The officers went to the shop already possessing probable cause to arrest. The pawnbroker was aware of that fact. During the course of the questioning, the pawnbroker displayed to the police some incriminating real evidence and made several incriminating statements. These statements were inadmissible because the situation was deemed to be custodial. All parties involved understood from the outset that the defendant was not free to leave. The familiar pawnshop did not transform the interrogation into a non-custodial conversation.

An even more obvious case of custodial interrogation was considered by the New York Court of Appeals in *People v. Paulin*.[121] In that case, the police were summoned to the defendant's home by her son, who suspected that the defendant's husband had been murdered. Upon arriving at the house, the police soon found the decomposed body of the defendant's husband in her closet. After this discovery, the officers questioned the defendant for twenty minutes, and repeated certain questions several times to obtain information. The statements elicited under these conditions were inadmissible due to the failure of the officers to

118. 394 U.S. 324 (1969).

119. For a more thorough examination of *Orozco*, see 21 BAYLOR L. REV. 290 (1969).

120. 443 F.2d 246 (5th Cir. 1971).

121. 25 N.Y.2d 445, 255 N.E.2d 164, 306 N.Y.S.2d 929 (1969).

give warnings. Under any test imaginable, both the officers and defendant believed that she was under arrest, since she was hardly in a position to claim that a rotting body in her closet had not at least drawn her attention to the possibility of foul play.

In *United States v. Bekowies*,[122] the court explicitly held that a man might be held in custody in his own home, if he reasonably believes himself to be in custody. F.B.I. agents had a warrant for the arrest of a fugitive whom they believed to be hiding in the Bekowies' apartment. Mr. Bekowies was aware that the apartment was under continuous surveillance. On the day in question, agents came to the door of the apartment, showed a warrant to Bekowies, informed him of the laws against harboring a fugitive, and asked permission to search the apartment. Permission was granted to search all of the apartment except the bedroom, where Mrs. Bekowies was sick in bed. After persistent questioning, Mr. Bekowies made incriminating statements and allowed the agents to search the bedroom, where the fugitive was found. The statements were held inadmissible due to the fact that no warnings had been given.[123] The defendant had reasonably believed himself to be in custody since he had been under surveillance, had been warned several times of the criminal penalties for harboring fugitives, and had been interrogated at length. Similar reasoning was applied in *Commonwealth v. Sites*,[124] in which the defendant was *taken* to his home for questioning under circumstances which would lead a reasonable man to believe he was in custody.[125]

From the foregoing cases, it is clear that there are many circumstances under which the general rule allowing questioning at the subject's home or business does not apply. Generally, if the circumstances are such as to induce a reasonable man to believe that he is in custody, the warnings must be given. Important factors in this determination include the amount of evidence which the subject knows the officers to have, the force used to detain the subject, and the intensity and specificity of the questioning. It would appear that, absent a strong showing of these factors, many courts would tend to find an absence of custody.

122. 432 F.2d 8 (9th Cir. 1970).

123. The question of whether consenting to a search is within the meaning of *Miranda* is not within the scope of this discussion.

124. 427 Pa. 486, 235 A.2d 387 (1967).

125. For a further analysis of at-home questioning, see Rothblatt & Pitler, *supra* note 67, at 484.

c. At the Police Station[126]

Miranda and its companion cases were concerned with interrogation in the police-dominated atmosphere of the station house. It is clear that this is the place where the greatest danger of coercion exists. In response to this danger, most courts appear more favorably inclined to make a finding of custody in a station house than in any other location. Although several writers have suggested that all police station interrogations are custodial,[127] this view has never been accepted. Professor Graham wrote:

> If one assumes that the interrogation requirement is met, it seems quite likely that all stationhouse [*sic*] interrogations will be held to be custodial in nature whether the suspect came of his own accord, or at the suggestion of a parent, attorney, or military superior.[128]

This opinion, however, was based on the belief that the emphasis of *Miranda* was on the place of questioning—not on the fact of arrest.[129] Professor Graham's forecast of how courts would react to *Miranda* has proved erroneous.

Of course, the general rule is that a suspect arrested and taken to the station for questioning must be given his warnings. Beyond that general proposition, the application of *Miranda* depends in large measure on the manner in which the individual came to the police station. The cases may be divided generally into three categories: a) the suspect comes to the station without any encouragement from the police; b) the suspect is in custody on another charge; and c) the suspect is "invited" by the police or told that he can leave at will. Throughout all of these situations, it should be remembered that administrative questioning, even in severe custody, is not generally deemed to be interrogation and therefore *Miranda* does not apply.[130]

126. As the title of this section, the term "police station" is used in a comprehensive sense to denote any building or vehicle maintained by the state for investigation or custody of those suspected or convicted of criminal activity. The difference in application of *Miranda* to custody at facilities other than the local station house will be noted briefly *infra*.

127. *See, e.g.*, Rothblatt & Pitler, *supra* note 69, at 484; Graham, *supra* note 9, at 82-83.

128. Graham, *supra* note 9, at 82.

129. *Id.* at 82-83.

130. *See* pp. 704-06 *supra*.

i. The individual who comes to the station without any encouragement

In general, questioning which occurs after an individual has come voluntarily to the station and initiated the contact is found to be non-custodial. In *People v. Peterson*,[131] the police seized a car when the driver was arrested for drunken driving. Subsequent investigation disclosed that the automobile had been stolen. At this point, a man unknown to the police walked into the station to claim the automobile. When questioned as to whether he owned the car, the subject gave answers that were admissible against him on a charge of grand theft. The California Supreme Court held that *Miranda* warnings were not necessary in this case because the officer had only questioned the subject generally about a matter which the subject had first mentioned. No custody was found. This decision would seem reasonable, since a man who would walk into a police station to claim a car he had previously stolen certainly would not be coerced by questioning related to his claimed ownership. To require *Miranda* warnings in such a situation would be tantamount to requiring that every person entering the station be given warnings before being allowed to speak. A similar case is that of *Hicks v. United States*,[132] in which a woman contacted the police to report a crime.[133] The police officers, trying to find some indication as to who might have committed the crime, questioned her as a witness only. Suddenly, the woman broke down and confessed. The questioning was held to be non-custodial even though it took place at the station house.

Cases in which questioning at the station was held to be non-custodial are not limited to situations in which the subject makes a gross error of judgment. In *United States v. Austin*,[134] the defendant was aware that the police were investigating a matter concerning him. Apparently trying to clear himself, he went voluntarily to the station taking a friend along for moral support. Under these circumstances, the incriminating statements he gave were admissible without *Miranda* warnings. Similarly, in *Posey*

131. 251 Cal. App. 2d 676, 59 Cal. Rptr. 694 (1967).

132. 382 F.2d 158 (D.C. Cir. 1967).

133. In this case, the woman actually telephoned to report the crime and was requested to come to the station to give a more detailed report. The important point is, however, that contact with the police was freely and voluntarily undertaken by the woman.

134. 448 F.2d 399 (9th Cir. 1971).

v. United States,[135] a Ku Klux Klansman, who was later linked to the murder of three civil rights workers, voluntarily went to the motel room of F.B.I. agents for the purpose of discussing Klan activities in general. Upon his arrival, he was told that he could leave if he wished and that he had a right to remain silent. The Klansman chose to speak and, in the course of the conversation, incriminated himself. The necessity for full *Miranda* warnings was rejected by the court. The subject, although outnumbered by F.B.I. agents and in unfamiliar surroundings, had initiated the contact and had clearly spoken without coercion or custody. The same result was reached when a man initiated proceedings to gain conscientious objector classification from his selective service board and was later charged with draft evasion. The evidence which resulted from his initial contact with the government officials was held admissible without *Miranda* warnings.[136]

For questioning at a police station to become custodial in a situation where the individual has voluntarily come to the police, an extremely strong factual case would have to be established. Although not articulated in the decisions, the equities of the situation are obviously important. When a person, knowing himself to be guilty of a crime, comes to the police station to give information about that crime, it must be assumed that he has made a calculated decision to attempt to mislead the police. He has considered the risk of self-incrimination and deemed it to be less important than the possibility of clearing himself. Under these circumstances, few courts would be solicitous of his rights. Moreover, the courts realize that to require *Miranda* warnings before questioning all witnesses or others who are not the subject of an investigation would inhibit citizen cooperation with the police.

ii. The individual who is in custody on another charge[137]

One of the leading cases in this area is *Mathis v. United States*,[138] in which the subject was a prisoner in a state jail. While in custody, the prisoner was questioned by federal agents as part

135. 416 F.2d 545 (5th Cir. 1969), *cert. denied*, 397 U.S. 946 (1970).

136. United States v. Norman, 413 F.2d 789 (6th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1970).

137. A detailed analysis of the rights of confined persons is beyond the scope of this discussion. Only three cases will be cited to give a general overview of the area. The question of when *Miranda* warnings must be given to inmates in the normal correctional situation will not be considered.

138. 391 U.S. 1 (1968).

of a routine tax investigation. No criminal proceedings had been instituted against him for tax fraud. Although a major portion of the case dealt with whether *Miranda* warnings were appropriate in tax investigations, the government raised an important question as to custody. First, the prisoner was not in unfamiliar surroundings as is typical of a normal police station interrogation. Second, the prisoner was not in custody with reference to the specific tax investigation. The United States Supreme Court rejected both of the government's arguments. The defendant was severely restrained in his freedom of action and was in a completely police-dominated atmosphere. Consequently the statements he made to the agents were inadmissible without *Miranda* warnings.

A case which seems to be inconsistent with *Mathis* is *Gascar v. United States*.[139] In *Gascar*, the court agreed that an individual questioned in a general investigatory way about a crime is not required to hear or waive his rights, even though he is in custody on another charge. The court's decision emphasized the fact that the questioning was in regard to crimes which were still in the investigatory stage. Thus, *Gascar* is vulnerable to attack both as being inconsistent with *Mathis* and also as relying on the discredited focus test.

A recent case involving the rights of individuals in custody is *Inmates of Attica Correctional Facility v. Rockefeller*,[140] which grew out of the widely publicized disturbances in Attica, New York. There were a number of issues involved in the case, but the one with which this discussion is concerned relates to a special rule which attorneys for the inmates sought to fashion in order to protect the inmates' rights.[141] After the disturbance was quelled, a team of state investigators, headed by Deputy Attorney General Robert E. Fischer was sent to investigate all crimes growing out of the riot. The attorneys bringing suit had previously represented several of the inmates and now sought to represent them as a group in connection with the interrogation.

The attorneys requested that all interrogation of prisoners be enjoined, except in the presence of an attorney or after consultation with an attorney. The state maintained that, so long as the inmates were informed of their rights and voluntarily waived

139. 356 F.2d 101 (9th Cir. 1965), *cert. denied*, 385 U.S. 865 (1966).
140. 453 F.2d 12 (2d Cir. 1971).
141. *Id.* at 22.

them, the questioning was completely proper. In response to this argument, the attorneys pointed out that inmates were in an especially precarious position insofar as waiver of rights was concerned:

> [T]heir failure to furnish information in response to inquiries by the state representatives may result in administrative reprisals in the form of denial of parole eligibility, loss of good time, or denial of privileges within Attica.[142]

The court acknowledged a possible danger to the rights of the inmates in the following language:

> In the last analysis, the situation here is unique in that plaintiffs, being prisoners, are at the mercy of their keepers, many of whom, on the testimony below, have already subjected inmates to barbarous abuse and mistreatment.[143]

As demonstrated by the above language, the situation in a correctional facility can impose a special degree of danger on the exercise of fifth amendment rights. Perhaps additional protections, such as consultation with an attorney before waiver, should be required.

The court did not reject this theory lightly. Instead, it emphasized the peculiar facts of the case. The correctional officers were not carrying out the interrogation, thus they would not know which inmates invoked their constitutional rights. Furthermore, the superintendent of the prison gave sworn testimony that there would be no reprisals for the invocation of inmates' rights, and the state parole board had previously demonstrated by affirmative action that no inmate's parole would be affected by his refusal to answer questons. The Deputy Attorney General in charge of the investigation had distributed a written warning of the right to counsel to each inmate well in advance of the interrogation and full *Miranda* warnings were given immediately preceding the questioning of each individual. Finally, the prison authorities had provided attorneys with space to interview approximately twenty inmates per day, despite the limited usable space available in the prison. Thus, the court, rather than finding the theory of the plaintiffs unreasonable, found it unnecessary in this case.

The general rule, as shown by *Mathis*, is that an individual

142. *Id.*
143. *Id.* at 23.

in custody must be given *Miranda* warnings before interrogation, even if the interrogation is unrelated to the charge for which the custody is imposed. *Attica*, while finding against the plaintiffs on the facts of that case, indicates that the extraordinarily coercive atmosphere of a correctional facility may require a higher standard for the waiver of the constitutional rights of the inmate.

iii. The individual who is "invited" to the police station by police officers or is told that he may leave at will

Of all the aspects of the issue of custodial interrogation, the cases in which the subject has been "invited" to the station for questioning are by far the least protective of individual rights. Indeed, some of the decisions in this area are nothing short of amazing. The theory seems to be that if an individual is not compelled to submit to station house interrogation and is physically free to leave, then there can be no custody. A consideration of several cases will demonstrate that this theory does not always hold true.

People v. Burris,[144] is a glaring example of the misapplication of *Miranda*. Here the police were investigating a murder and had a witness who could place Burris at the scene at approximately the time of the murder. Further, the police *found the body of the victim in the defendant's automobile*. Burris, knowing that the police already had this strong evidence against him, "agreed" to go to the station for questioning. No force was used by the officers, presumably because no resistance was offered by Burris. The interrogation at the station house continued until the defendant had incriminated himself, at which time he was informed of his rights, waived them, and went through the now meaningless task of giving a full confession. The statements were held admissible because the defendant's initial confrontation with the police was "voluntary." He had agreed to come to the station for questioning, and therefore the Illinois Supreme Court found that *Miranda* warnings were unnecessary. It is difficult to imagine that any man—reasonable or otherwise—who knows the police can place him at the scene of the crime, and in whose automobile the corpse of the victim was found, would feel that his interrogation is totally voluntary. Burris was interrogated in an unfamiliar, police-dominated station house, regarding a murder in which the

144. 49 Ill. 2d 98, 273 N.E.2d 605 (1971).

state already possessed damning evidence against him, and yet he was found not to be in custody.

A similar case is *Meyer v. Commonwealth*,[145] in which the defendant was likewise "invited" to come to the station house for questioning. The defendant spent *fourteen hours* at the station. He was questioned extensively. He consented to searches of his property and chemical tests on bloodstains found in his automobile. Only after the blood was determined to be that of the victim, was Meyer warned of his rights, whereupon he confessed. Meyer's statements and all evidence stemming from those statements were held to be admissible, as the court found the entire fourteen hour session to be non-custodial.

Both *Burris* and *Meyer* were based in part on dictum by the United States Supreme Court in *Morales v. New York*.[146] In *Morales*, the Court raised the possibility that confessions resulting from interrogations without probable cause to arrest might be admissible at a lower standard. The Court, however, refused to consider the issue on the record of the case before it. This dictum would seem weak grounds on which to legitimate the procedures mentioned above. If the Supreme Court had chosen to recognize such a rule, it has certainly had many opportunities to do so since the *Morales* decision. Further, it is doubtful that such a rule, even if constitutionally permissible, would have applied to the interrogation in *Burris*. The evidence obtained against Burris prior to his questioning would seem to have constituted probable cause for even the most conservative police officer. As for *Meyer*, the circumstances of the fourteen hour station house investigation, complete with searches and chemical tests, would appear to cast grave doubt on the *prima facie* voluntariness of the encounter and especially the contention that Meyer was at all times free to leave.

Unfortunately, *Burris* and *Meyer* do not stand alone as judicial justification of questionable station house interrogation. In *People v. Yukl*,[147] the New York Court of Appeals found at-the-station interrogation lasting from two-thirty or three a.m. until six-thirty a.m. to be non-custodial. The questioning had continued without benefit of *Miranda* warnings until, during the course

145. 472 S.W.2d 479 (Ky. 1971).

146. 396 U.S. 102 (1969).

147. 25 N.Y.2d 585, 256 N.E.2d 172, 307 N.Y.S.2d 857 (1969), *cert. denied*, 400 U.S. 851 (1970).

of an apparent strip search and body examination, the officers found fecal matter on the jockey shorts and genitals of the defendant. At this point, the evidence of rape-murder was quite strong and *Miranda* warnings were given.[148] All questioning before the actual discovery of the real evidence was non-custodial. A similar decision was reached in *Freije v. United States*,[149] on the ground that the defendant was given the choice of being questioned at his home or at the police station.[150]

A more rational decision in which at-the-station interrogation was found to be non-custodial is *United States v. Scully*.[151] In this case, the subject was informed that he was under suspicion and was requested to come to the station for questioning. He was also informed that he was not required to undergo the interrogation and was free to leave at any time. During the course of the encounter, Scully decided to break off the questioning and depart the station, which he was allowed to do freely. The whole tenor of this investigation is set by the fact that he was informed of his right to terminate the interrogation and that he was under suspicion. Such a situation would seem much more conducive to the exercise of fifth amendment rights than the obviously coercive atmosphere in *Burris*. A similar situation was found non-custodial in *United States v. Manglona*[152] where the subject did not choose to break off the questioning, though he had been informed of his right to do so. This would seem consistent with *Miranda*, since the emphasis is on knowledge of rights, not the invocation of them.

There are, of course, decisions in which the "invited" subject has been found to have been in custody. As shown by *People v. Yukl*[153] and *Fisher v. Scafati*,[154] a non-custodial interrogation of an invited subject may become custodial at the point where officers obtain strong evidence against the individual.[155] Beyond this factor, some extraordinary circumstance must be present before

148. *See also* Fisher v. Scafati, 439 F.2d 307 (1st Cir. 1971).

149. 408 F.2d 100 (1st Cir. 1969).

150. The defendant was not offered the option of foregoing the interrogation.

151. 415 F.2d 680 (2d Cir. 1969).

152. 414 F.2d 642 (9th Cir. 1969).

153. 25 N.Y.2d 585, 256 N.E.2d 172, 307 N.Y.S.2d 857 (1969), *cert. denied*, 400 U.S. 851 (1970).

154. 439 F.2d 307 (1st Cir. 1971).

155. This reasoning suggests that the courts are relying on the focus test. Alternatively, the bodily evidence might be regarded as an objective circumstance which would lead the defendant to know his freedom of action would be restrained.

an individual who agrees to "voluntary" questioning will be found to be in custody.

Another circumstance which has led to the finding of custody is that the defendant may have been deceived into submitting to the interrogation. In *Pemberton v. Peyton*,[156] an arrest warrant for the subject was outstanding at the time of the questioning. Without using the warrant, the police asked the man if he would travel sixty-five miles with them to undergo a lie detector test. He agreed. At some point during the trip the officers carried on an interrogation which produced incriminating statements. The court held these statements to be inadmissible absent warnings and waiver, as the defendant was deemed to have been in custody at the time.

Another circumstance in which the statements of an invited suspect are found inadmissible is the situation in which he is asked physically to bring in evidence against himself. This situation is seen most clearly in *United States v. Casias*,[157] where a young man was having difficulties with his draft classification. After prior contacts with the selective service board in an attempt to change his classification, the man was requested to come to the board's office and bring his last classification notice. He did so, and the state attempted to introduce this notice as evidence against him in a criminal prosecution. At the time he was requested to produce the notice, the defendant apparently believed that the board was still considering reclassification. In reality, the only purpose of the request was to prove the defendant's knowledge of his prior classification in order to convict him of violating selective service laws. By relying on the focus test, the court held that *Miranda* warnings were required since the investigation had shifted to an attempt to convict the subject. The same result was reached in *United States v. Pellegrini*[158] by use of the objective test. Police officers requested Pellegrini to go to his home and return with certain evidence for use in his prosecution. This was held to be custodial since Pellegrini acknowledged the evidence to be at his home, was closely followed by the arresting officers, and thus could reasonably believe that he had to cooperate.

In summary, many courts seem willing to afford a great deal

156. 288 F. Supp. 920 (E.D. Va. 1968).

157. 306 F. Supp. 166 (D. Colo. 1969); *see also* 23 VAND. L. REV. 892 (1970).

158. 309 F. Supp. 250 (S.D.N.Y. 1970).

of latitude to the police when dealing with subjects who have been "invited" to the station house for questioning. Although *Miranda* clearly does not apply to the citizen who rushes in off the street to confess,[159] its non-application to this area is less justifiable. An individual "requested" to come to the station is subjected to the same coercive atmosphere and tactics as the person placed under arrest. Further, the refusal of the courts to use the subjective test as to custody allows the police to interrogate some individuals who believe themselves to be under arrest and to subject these persons to the police-dominated atmosphere of the station house —*i.e.*, to the same conditions present in *Miranda* without any warnings whatsoever. Professor Graham's theory of "ignorance compulsion"[160] is especially applicable in this area. The ignorant defendant may see the police request as an order which he cannot refuse, and thus be in custody as effectively as if he were handcuffed. This reasoning led Professor Graham to the conclusion that all who were asked to come to the police station for questioning should be given *Miranda* warnings.[161] This conclusion seems to be justified in the light of *Miranda's* emphasis on the place and circumstances of the interrogation, not the formal requirement of arrest.[162]

III. CONCLUSION

After considering the cases and authorities on the subject as they relate to specific factual situations, perhaps it is appropriate to review and note any trends which may have become apparent. After so doing, the trends should be measured by the purposes of the *Miranda* decision as suggested in the introduction to this article.

First, the trend has been toward a more universal application of the objective test as the measuring test of custodial interrogation. Insofar as this trend has been a rejection of the focus test, it would seem to be a healthy one. There are numerous examples of cases in which the individual is in custody in a very real sense, but where the investigation has not focused on him within the meaning of *Escobedo*. Insofar as the trend is a rejection of the subjective test, it must be deemed a compromise with practical-

159. Miranda v. Arizona, 384 U.S. 436, 478 (1966).
160. Graham, *supra* note 9, at 79-80.
161. *Id.*
162. *Id.* at 82-83.

ity. The subjective test is obviously the most logical way to determine whether a person might be coerced by what he believes to be a custodial situation. It would be an enormous burden, however, to require police officers to foresee the personal frailties and characteristics of each individual whom they question. Nevertheless, the subjective test should be used whenever practical in order to protect better the individual.

As to the various factual situations, the trend in on-the-scene questioning is clearly to admit a great number of statements. This basic pattern is consistent with the language[163] and overall theory of *Miranda*. The atmosphere and necessity for immediate police action on the scene are different from the police station situation. The possibility of on-the-scene coercive measures is less. This is not to say, however, that the coercive nature of a police station cannot be duplicated outside the station. "Ignorance compulsion" may cause an individual to incriminate himself just as quickly on the street as in jail.[164] Similarly, an individual detained by a police officer in a secluded spot may be just as isolated and just as deserving of the *Miranda* warnings as his counterpart in the interrogation room. The place of the interrogation alone cannot be controlling.[165] The place of interrogation has meaning only when considered in the context of the totality of the circumstances. Thus, if a suspect has been deprived of his freedom of action before or during his interrogation, *Miranda* should apply even though the questioning takes place "on the scene."

In cases where a person is interrogated in his own home or business, statements obtained without *Miranda* warnings are inadmissible if the subject was in custody. The United States Supreme Court made this clear in *Orozco*.[166] The custody need not be lengthy, nor must actual force be used. *Orozco* is clear precedent for application to most at-home interrogations. Unfortunately, many lower courts seem intent on raising the standard of *Orozco* or finding exceptions to its rule. The logic behind this approach is not sound. Although the defendant's home is more familiar to him than is the police station, it can quickly become police-dominated by the entry of several police officers. An individual may be held for incommunicado interrogation just as effec-

163. Miranda v. Arizona, 384 U.S. 436, 477-78 (1966).
164. Graham, *supra* note 9, at 76-78.
165. Orozco v. Texas, 394 U.S. 324 (1969).
166. *Id.*

tively in his own home as anywhere else. Additionally, an individual might well fear that the tactics of lower grade officers would be more coercive while outside the view and control of their superiors. There is a wide spectrum of possible situations involving police interrogations at defendants' homes, ranging from a casual exchange on the front lawn to armed entry and interrogation in the dead of night. While a relaxation of *Miranda* may be appropriate in the former, the latter situation should require protections as extensive as any afforded by other contacts with police officers.

At the police station, the law clearly does not require that warnings be given to those who rush in off the street to confess. Conversely, warnings are required when a person is arrested and brought in for questioning. Between these two extremes lies a great mass of *Miranda* litigation. Where a person voluntarily comes to the police and initiates discussion on the subject of a particular crime, he does so without any requirements of warning. This rule, while questionable in theory, is workable in fact. Those guilty of crimes who initiate contact with the police in order to mislead them and clear themselves have practically, if not technically, waived the right against self-incrimination. The coercive atmosphere of the police station is viewed by them as a gauntlet which they have chosen to run in order to retain their freedom. Most courts will gladly let them run it.

As to those in custody on charges other than the one for which they are being interrogated, *Miranda* warnings should be given. The restraints on freedom of action and the coercive nature of the place are not lessened by the fact that the individual has been a prisoner for some time or that he was placed there for some unrelated reason.[167] The reasoning of the Supreme Court on this point in *Mathis*[168] seems completely consistent with the purpose of *Miranda*. Finally, the language, though not the holding, of the Second Circuit in the *Attica* case[169] shows the prospect of a new rule requiring greater protections of the right against self-incrimination for those in custody. Such a rule would seem consistent with the *Miranda* purposes of overcoming the compelling atmosphere and potential police abuses inherent in the station house. The oppressiveness and the opportunities for retaliation

167. *See* Mathis v. United States, 391 U.S. 1 (1968).

168. *Id.*

169. Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971).

which are inherent to a correctional institute are so immensely greater than corresponding dangers at the local station house that a similarly greater degree of protection would seem necessary.

The single area of the law in which the purposes of *Miranda* have been most subverted, if not ignored, is that of the individual who is "invited" to come in for questioning. The pressures on this individual can be, and usually are, just as great as those on his counterpart under arrest. Whether he agrees to the interrogation because of "ignorance compulsion," a mistaken belief that he is under arrest, or because he thinks he can clear himself, his situation is not so dissimilar from that of a person under arrest as to justify the results of the several cases previously discussed. It would appear that the only way a uniform application of *Miranda* will be achieved to protect the rights of these individuals is by a ruling of the United States Supreme Court. It is to be hoped that the Court will consider and clarify this problem in the near future.

The application of *Miranda* by the lower federal and state courts may be viewed as a continuing battle between the rights of the individual and the real or supposed needs of law enforcement. Some would say that *Miranda* struck the balance too far in favor of individual liberties while hamstringing the efforts of the police. Others would assert that the balance was already so heavily weighted in favor of law enforcement that *Miranda* is only a first step in setting the scales right. An overall evaluation of the performance of our courts in applying *Miranda* to the question of custodial interrogation is necessarily influenced by one's personal view of this struggle. The courts, on the whole, have conscientiously interpreted *Miranda* in those cases where it clearly applies, and have extended it only in the most niggardly fashion. Whatever one's subjective evaluation of this performance, all should agree with the view of Rothblatt and Pitler:

> Only through the scrupulous observance of constitutional rights of citizens and the mutual cooperation of law enforcement officials and defense attorneys can our system of criminal justice provide for effective law enforcement and at the same time preserve human rights and dignity.[170]

170. Rothblatt & Pitler, *supra* note 64, at 498.