Rethinking Custodial Interrogation

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RETHINKING CUSTODIAL INTERROGATION

Daniel Yeager*

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INTRODUCTION

Ernesto Miranda's surname has become a convenient shorthand for the proposition that "procedure matters."! Miranda's story2 spawned an ongoing controversy familiar to anyone who has watched a television "cop" throw a television criminal against a studio wall and read...

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2. For an account of Miranda’s life as a Phoenix hoodlum, see L. BAKER, MIRANDA: LAW & POLITICS 9-12, 408-09 (1985). Baker’s thoroughly researched book properly ascribes to Miranda a critical role in this country’s social, political and legal struggle to come to grips with authority. Professor Kamisar gave the book high marks, although he had some difficulty with Baker’s treatment of the post-Miranda confessions cases. Kamisar, Miranda: The Case, the Man and the Players (Book Review), 82 MICH. L. REV. 1074, 1083-88 (1984) [hereinafter Miranda].
four well-known warnings from a card while handcuffing the "bad guy" for the trip downtown. The so-called Miranda rights are the only legal doctrine accessible through an intellectual diet limited to prime-time television. Few cases have triggered as expansive a collection of case law and scholarly commentary, not to mention barroom,

3. Cf. L.A. Law (NBC television broadcast, Feb. 21, 1990) ("It's a very sad day when a murderer's conviction is overturned on a technicality. But I assure the People this Office is committed to keeping that man in prison.") (prosecutor's statement to media after fictional California Supreme Court ordered new trial for convicted murderer); Miami Vice: Yankee Dollar (NBC television broadcast, Feb. 26, 1986) ("This isn't justice. You guys are changin' the rules; you're changin' the rules.") (apprehended drug dealer's statement as vice officers, who had guaranteed him immunity from prosecution in exchange for cooperation, arrested him for murder). Television may be the most prolific method by which the laity familiarizes itself with criminal procedure, but other popular media like newspapers serve a similar "educational" function. See, e.g., Leach, Better Ways for Justice than Boycotts, Nashville Banner, April 19, 1990, at A17, col. 1 ("I was angry on behalf of the law enforcement officers who are tired of putting their lives on the line every day and being told they have to take their sweet time to give every possible assassin the benefit of every possible doubt."). As two commentators have observed, see Rosenberg & Rosenberg, A Modest Proposal for the Abolition of Custodial Confessions, 68 N.C.L. Rev. 69, 79-71 (1989), even the cartoon superhero the amazing Spiderman has encountered the problem. See Houston Chron., Jan. 12, 1989, at D10, Jan. 13, 1989, at E8, Jan. 14, 1989, at E5, Jan. 16, 1989, at D8, Jan. 17, 1989, at D8 (when Spiderman crashed through store window, rescued robbery hostage from gunman in view of officers and television cameras, and turned perpetrator over to authorities, officers' failure to administer warnings freed suspect on "technicality," which, although designed "for society's protection," in Spiderman/Peter Parker's view, "protect[ed] the criminal and endanger[ed] society!"). Below I have cited only a portion of the literature, which represents equally charges both that Miranda went too far and that it did not go far enough. See generally F. INBAU, J. REID & J. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986); Allen, The Judicial Quest for Penal Justice: The Warren Court & the Criminal Cases, 1975 U. ILL. L.F. 518; Caplan, Questioning Miranda, 38 Vand. L. Rev. 1417 (1985); Dripps, Foreword: Against Police Interrogation — And the Privilege Against Self-Incrimation, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988); Frey, Modern Police Interrogation Law: The Wrong Road Taken, 42 U. Pitt. L. Rev. 731 (1981); Gangi, The Inbau-Kamisar Debate: Time for Round 2?, 12 Western St. U.L. Rev. 117 (1984); Goldberg, Escobedo and Miranda Revisited, 18 Akron L. Rev. 177 (1984); Grano, Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer, 55 U. Chi. L. Rev. 174 (1988); Grano, Miranda v. Arizona and the Legal Mind: Formalism's Triumph over Substance and Reason, 24 Am. CRIM. L. Rev. 243 (1987); Grano, Selling the Idea To Tell the Truth: The Professional Interrogator and Modern Confessions Law, 84 Mich. L. Rev. 662, 676 (1986); Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 NW U.L. Rev. 100 (1985); Inbau, Over-reaction - The Mischief of Miranda v. Arizona, 73 J. CRIM. L. & CRIMINOLOGY 797 (1982); Ingber, Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control, 56 B.U.L. Rev. 266 (1976); Israel, Criminal Procedure, the Burger Court and the Legacy of the Warren Court, 75 Mich. L. Rev. 1320 (1977); Ogletree, Are
streetcorner, and living-room discourse.⁶

Despite this outpouring of commentary, neither the Court nor its critics has accounted adequately for one critical component of Miranda's holding: whether police interrogation of a suspect who is “in custody” “or otherwise deprived of his freedom in any significant way” is subject to its dictates.⁷ This italicized language has been lost through a basic misunderstanding of the synergistic nature of the custodial interrogation dynamic, and, perhaps as well, through “subversive interpretation,”⁸ driven by a perceived need to improve protection for persons and their property.⁹

This Article attempts to resurrect a concept crucial to the Supreme Court lexicon. It is not, however, a police manual.¹⁰ This Article con-
cerns itself solely with questions surrounding the admissibility of confessions, and in so doing, attempts to show that only a reconsideration of custodial interrogation can restore the "significant deprivations" language to the status granted it in *Miranda v. Arizona.*

Part I canvasses the Court's six decisions that expressly or tacitly initiated, advanced, or altered the sweep of significant deprivations of freedom for purposes of *Miranda.* Part II examines the problems that plague the interrogation prong of the *Miranda* Court's two-part custodial interrogation inquiry. Analysis of the interrogation prong is integral to this Article's theory that much of what makes the *Miranda* doctrine "slippery," "murky," and "difficult" is traceable to a basic misunderstanding of the synergistic relationship of custody and interrogation. With this in mind, Part III proposes a custodial interrogation model sensitive to the way this synergy impacts the two otherwise separate concepts of custody and interrogation. The Article's emphasis on synergy revives and augments the Court's lost admonition that it is the "interplay of custody and interrogation that 'subjugates a suspect to the will of his examiner.'"

Although the word "interplay" did not appear in *Miranda,* the concept was gleaned from it in *Rhode Island v. Innis,* presumably after the justices or their law clerks read Professor Kamisar's 1978 article on interrogation, where the term first appeared.

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4. 446 U.S. 291, 299 (1980) ("[t]he concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege of self-incrimination") (quoting *Miranda v. Arizona,* 384 U.S. at 457-58).
5. Y. Kamisar, *Brewer v. Williams, Massiah and Miranda: What Is "Interrogation"? When Does It Matter?*, in Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 139 (1980) [hereinafter KAMISAR ESSAYS]. The source of the term, still undeveloped and unapplied in both cases and literature, is the following:

It is the impact on the suspect's mind of the *interplay* between police interrogation and police custody — each condition reinforcing the pressures and anxieties produced...
By reading custody and interrogation together rather than separately, and by attempting roughly to quantify their impact on the reasonable perceptions of suspects, the proposed model advances that, despite Miranda's presumption of compulsion, the applicability of that presumption is nonetheless a matter of degree. In determining the degree of compulsion, courts must evaluate the level of compulsion created by one component through the prism of the other.16

I. "SIGNIFICANT DEPRIVATIONS" IN THE SUPREME COURT

A. Background

Before Miranda, the prosecution could admit only "voluntary" confessions at trial.17 Because the interrogation procedure was considered part of the conviction process, it was subject to fourteenth amendment due process requirements. As a rule, police tactics confined to subtle psychological coercion yielded voluntary confessions, while those derived from the "third degree" or physical torture were deemed involuntary and therefore unreliable.18 In deciding whether to admit confessions under the flexible "voluntariness" standard, the Court seemed to regard everything as relevant but nothing as decisive.19 Plainly the adversary system was ill-equipped to recapture what occurred at the stationhouse.20

16. Absent any verifiably accurate method of measuring compulsion, any such attempt must presume that differences in degree of compulsion occasioned by various police tactics and custodial settings are discernible from the accounts rendered in appellate opinions.

17. See Brown v. Mississippi, 297 U.S. 278, 285 (1935) (states may impose penalties for witness's failure to testify in court, but may not ignore that aspect of privilege that protects suspects from compulsion of rack and thumbscrew). At common law, however, suspects were not so lucky. They were sworn by oath to answer truthfully any question put to them. L. Levy, supra note 5, at 43-82; Benner, supra note 5, at 68-72; Helmholz, supra note 5, at 965.


19. Caplan, supra note 5, at 1432.

20. White, Defending Miranda: A Reply to Professor Caplan, 39 Vand. L. Rev. 1, 7-8 (1986); see Dripps, supra note 5, at 706 (in addition to inherent proof problems of credibility contests between prosecution and defense, post-hoc suppression hearings were ill-suited to rigorous task of determining what impact police tactics had on mental processes of criminal suspects).
Miranda was the peak of the Court's gradual shift in focus from the unreliability of involuntary confessions to notions such as autonomy, dignity, fair play, and decency. Ultimately, the Court's inability to define "voluntariness," coupled with the inconsistencies of case-by-case review and an emerging sensitivity to the plight of criminal suspects led to the Warren Court's sweeping rulemaking in Miranda. Miranda established a per se rule excluding from trial incriminating statements elicited during custodial interrogation not preceded by police warnings and the suspect's waiver of fifth amendment rights. These rights, Miranda held, flowed from the fifth amendment privilege against self-incrimination.


22. See Allen, supra note 5, at 535-37 (discussing vulnerability of exclusionary rule as tool of deterrence); see also Developments in the Law - Confessions, 79 HARV. L. REV. 935, 954-84 (1966) (describing difficulty in distinguishing voluntary from involuntary confessions).

23. Miranda v. Arizona, 384 U.S. at 476-77. Absent "other fully effective means" to protect the suspect's fifth amendment privilege, before interrogation, police must inform the suspect of his right to remain silent and that anything he says may be used against him. Police must also inform the suspect of the right to counsel, to have counsel present during interrogation, and to have the court appoint counsel if the suspect is indigent. Id. at 444. In effect, Miranda has three holdings: 1) pressure unsupported by a legal sanction can constitute compulsion; 2) informal compulsion pervades any custodial questioning, however brief; and 3) warnings dispel the compelling pressures. Schulhofer, supra note 1, at 436.

The mere fact that Miranda signed a form indicating that he knew his legal rights fell short of the "heavy burden" required of a voluntary, knowing, and intelligent waiver of constitutional rights. Miranda v. Arizona, 384 U.S. at 475, 492. The waiver aspect of Miranda has elicited a continuous flow of scholarly response, much of which elaborates on Justice Stewart's point in oral argument, later reappearing in Justice White's dissent, that Miranda was problematic because it allowed a criminal suspect in an inherently coercive environment to waive important constitutional rights. See, e.g., Allen, supra note 5, at 537 (curiously tentative posture of opinion itself with respect to waiver and assistance of counsel reduces decision's impact on law enforcement practices); Ingber, supra note 5, at 280-95 (rhetoric and ceremony of Miranda placated blacks, indigents, liberals, and academics but waiver provision took away its bite); Ogletree, supra note 5, at 1830-31 (only flat ban on all interrogations held outside presence of attorney will give content to Miranda requirement of voluntary, knowing, and intelligent waiver). Cf. Schulhofer, supra note 1, at 456 (projected impact of Miranda weakened by police lies, suspects' attempts to talk their way out of trouble, and convictions obtained without confessions).

24. Neither the Supreme Court nor the attorneys representing Miranda were certain which amendment — the fifth or the sixth — should guide the admissibility of Miranda's confession. Kamisar, Miranda, supra note 2, at 1074, 1079 & nn.24-26. The fifth amendment basis for excluding coerced confessions actually is nothing new. See Bram v. United States, 168 U.S. 532, 542 (1897) (whether a confession is incompetent because not voluntary, is "controlled by [the] . . . Fifth Amendment"). The Court ignored the constitutional underpinnings of Bram in subsequent decisions, although in Miranda, the Court found it reliable. Miranda v. Arizona, 384 U.S. at 461-62.
The new rule replaced the due process standard, which by then had lost much of its force, with a more defendant-minded approach. That approach favored the ills of overbreadth to those of case by case "voluntariness" review. The Court articulated a two-part inquiry to determine whether the procedural safeguards had attached: first, whether the suspect was in custody or otherwise deprived of his freedom in any significant way; and second, whether police interrogated the suspect. The meaning of "custody" poses few problems. A suspect who is under arrest or its equivalent is in custody for purposes of Miranda. Although the lengthy Miranda opinion never defined "interrogation," the Court fleshed out the concept fourteen years later as express questioning or its functional equivalent.

In contrast, the Court in Miranda never defined a "significant deprivation" of freedom. Because so much of the fifty-four-page opinion focused on the investigative ploys and good cop/bad cop routines mentioned in police interrogation manuals of that era, the Court now claims to have intended only to reach circumstances endemic to the police-dominated atmosphere of the stationhouse. The Court's crabbed interpretation of the significant deprivation language misreads Miranda for two reasons. First, the Court used the term five times in its opinion, illustrating its integral role in the Court's rationale. Second, if the Court had meant only to protect suspects in the stationhouse then it could have explicitly said so. The Court clearly envisioned alternative opportunities for police abuse. Otherwise, police could avoid Miranda's...

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25. Cf. R. Dworkin, Taking Rights Seriously 110-23 (1978) (discussing "gravitational" and "enactment" forces that rule exerts); Moffat, Judicial Decision as Paradigm: Case Studies of Morality and Law in Interaction, 37 U. Fla. L. Rev. 297, 326 (1985) ("As long as satisfaction with the application of accepted values to the situation continues, the paradigm remains useful. But when other factors introduce themselves, the persuasive power of the old paradigm begins to erode. The search for an alternative begins.").


27. Despite footnote 4 in Miranda, in which the Court claimed only to be interpreting the "focus" test presented in Escobedo v. Illinois, 378 U.S. 478 (1964), it has been suggested that Miranda merged custody and focus, while Escobedo viewed the two concepts as distinct. I W. Lafave & J. Israel, Criminal Procedure § 6.6, at 489 (1984). The short-lived Escobedo doctrine triggered the right to counsel at the amorphous point where a suspect becomes the focus of an investigation.

28. See Rhode Island v. Innis, 446 U.S. at 295-96 (any words or actions that police should know are reasonably likely to elicit incriminating response constitute interrogation).

29. The idea has been attributed to Justice Black, who near the end of two days of oral argument declared, "[t]he words of the Amendment are very simple, and they've been construed as meaning that the Government mustn't compel a man to give evidence against himself anywhere, at any time." L. Baker, supra note 2, at 169.


strictures simply by shifting the locale of interrogations to squad cars, sidewalks, back alleys, or hotel rooms.32

Courts and critics thus have agreed that Miranda applies in some non-stationhouse settings. The dilemma lies in ascertaining which settings. The Miranda Court stated that “[g]eneral 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.”33 Although this language has become a slogan of prosecution devotees, it fails to define exactly which scenarios fall within Miranda. Defense attorneys, in turn, have seized (although less frequently and less successfully) upon a footnote in the majority’s opinion that recognizes the general belief among citizens that “you must answer all the questions put to you by a policeman, or at least that it will be the worse for you if you do not.”34 These rather bare, conflicting observations demonstrate that the specific meaning of significant deprivations of freedom cannot be found in Miranda itself. Nor does an adequate answer lie in Miranda’s successors.

The Court’s pertinent decisions indicate that before the warnings requirements are triggered, significant deprivations of freedom must feature the same degree of compulsion that prompted the Miranda decision.35 The circumstances that satisfy this standard, however, are easier to describe than to capture. Had the Court selected among the four cases it reviewed in Miranda, at least one case featuring non-stationhouse interrogation, then it may have mitigated the confusion to some extent. Instead, Miranda has generated a body of case law in

32. 1 W. LAFAVE & J. ISRAEL, supra note 27, § 6.6, at 291.
33. Miranda v. Arizona, 384 U.S. at 477. It has been suggested that questioning of “citizens” was not affected, but questioning of “suspects” was. Pilcher, The Law and Practice in Field Interrogation, 58 J. CRIM. L.C. & P.S. 465, 486 (1967).
34. Miranda v. Arizona, 384 U.S. at 468 n.37 (quoting P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 32 (1958)).
35. The Court chose Miranda and its three companion cases for their shared “salient features.” Id. at 445. None of the four defendants received a “full and effective warning of his rights” before questioning, although the statements were admitted into evidence at all four trials. Id. Each defendant was “thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.” Id. at 456-57. Because Miranda himself was an indigent Mexican defendant, “seriously disturbed ... with pronounced sexual fantasies,” “the potentiality for compulsion [was] forcefully apparent.” Id. Further, in each case officials had conducted interrogations ranging up to five days in duration, “despite the presence through standard investigating practices of considerable evidence against each defendant.” Id. In the Court’s view, the need for confessions in these cases was overstated.

Some evidence belies the Court’s assertions, at least with regard to Miranda. See Miranda: Carroll Cooley Videotape (on file with Police Training Institute, Support Services Division, University of Illinois at Urbana-Champaign) (arresting officer states that interrogation of Miranda consisted only of falsely telling suspect that he had been identified in line-up, and stating that no evidence other than confession was available to police).
which the reach of significant deprivations of freedom has waxed and waned.\textsuperscript{36}

\section*{B. The Early Cases}

At the outset, \textit{Miranda} appeared openly to favor suspects. In the first two tests of its great new experiment, \textit{Mathis v. United States}\textsuperscript{37} and \textit{Orozco v. Texas},\textsuperscript{38} the Court reversed the convictions of two defendants, both of whom had incriminated themselves in non-stationhouse settings.\textsuperscript{39} Mathis was in a Florida prison on an unrelated charge when an IRS agent questioned him briefly pursuant to a "routine tax

\begin{footnotesize}
\begin{enumerate}
\item Without specific reference to the significant deprivations aspect of \textit{Miranda}, some observers attribute any reductions in \textit{Miranda}'s force to a concerted anti-constitutional philosophy of legal decisionmaking. See, e.g., L. Levy, \textit{Against The Law} 439, 441 (1974) (with Nixon Court, increasing number of Warren Court opinions are for all practical purposes dead); Stephens, \textit{The Burger Court: New Dimensions in Criminal Justice}, 60 Geo. L.J. 249, 277 (1971) ("major expansions of procedural rights have been slowed or halted completely"). This popular theory is not without strong opposition. To some critics, many post-Miranda opinions lend themselves to interpretations that protect \textit{Miranda} as much as threaten it. See, e.g., Israel, \textit{ supra} note 5, at 1425 ("Many civil libertarians might be well advised to examine the [Burger] Court's record carefully and to push aside the fact that Richard Nixon appointed four members of that Court."); Kamisar, \textit{The Warren Court (Was It Really So Defense-Minded?)}, \textit{The Burger Court (Is It Really So Prosecution-Oriented?)}, and \textit{Police Investigatory Practices, in The Burger Court: The Counter-Revolution That Wasn't 82-90} (V. Blasi ed. 1983) [hereinafter \textit{The Burger Court}] (defending some of Burger Court's decisions as arguably defense-minded and dividing Chief Justice Burger's tenure into two periods, pre-1980, or anti-Miranda period, and post-1980, or pro-Miranda period); Sonenshein, \textit{Miranda and the Burger Court: Trends and Countertrends}, 13 Loy. U. Chi. L.J. 405, 407-08 (1982) (same); Goldberg, \textit{The Burger Court 1971 Term: One Step Forward Two Steps Backward?}, 63 J. Crim. L.C. & P.S. 463, 463 (1972) (Burger Court confounded both camps with ideologically mixed bag of decisions).
\item 391 U.S. 1 (1968).
\item 394 U.S. 324 (1969).
\item In a footnote, the Court in \textit{Miranda} disclosed its views that nonstationhouse questioning is less threatening to suspects:
\begin{quote}
In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavourable to the suspect.
\end{quote}  
Miranda v. Arizona, 384 U.S. at 478 n.46 (citing a Scottish court's opinion in Chalmers v. H.M. Advocate, [1954] Sess. Cas. 66, 78 (J.C.)). On the other hand, it has been argued that the source of the confession, not just the locale, makes little difference in the final analysis:
\begin{quote}
[T]his is hard upon a man to be obliged to criminate himself. Hard it is upon a man ... to do anything that he does not like ... Suppose in both cases, conviction to be the result: does it matter to a man, would he give a pin to choose, whether it is out of his mouth ... or out of another's?
\end{quote}  
\end{enumerate}
\end{footnotesize}
Once Mathis incriminated himself in his prison cell, the government converted the investigation into a tax-fraud prosecution. The defendant in Orozco, on the other hand, challenged the admissibility of his confession to a murder on the ground that, absent warnings, four officers' brief questioning of him in his bedroom at 4:00 a.m. violated his privilege against self-incrimination. His interrogation, conducted several hours after a murder at the cafe El Farleto, consisted of four questions, and took less than a half hour from arrival to departure of police.

Justice Black's opinions for the Court in both cases were quite terse, probably because he read *Miranda* on a literal level. In *Mathis*, Justices White, Harlan, and Stewart — three of the four *Miranda* dissenters — stayed true to their colors and admonished their colleagues for embarking on a "deeply troubling" extension of the "so-called *Miranda* warnings" to "familiar surroundings" far removed from stationhouse interrogation. Justice Harlan concurred reluctantly in *Orozco*, regretting *Mathis* but going along only out of respect for stare decisis. *Mathis* has escaped critical attention, largely because no restriction on freedom is more significant than incarceration, regardless

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41. *Id.* at 3.
42. Officers asked him: 1) his name; 2) whether he had been at the El Farleto; 3) whether he owned a pistol; and 4) where the pistol was located. *Orozco* v. Texas, 394 U.S. at 330 (White, J., dissenting). Actually they asked five questions — they repeated question number four when Orozco hesitated to answer. *Id.* at 325.
43. See G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 404-05 (1977) ("[o]n freedom from self-incrimination [Black] was perhaps even more literalist as he concurred with the Court in *Miranda* v. Arizona that the privilege — with an affirmative statement of its availability and nature — was demanded from the first moment of police custody"). Terse opinions tend to augment the significance of every word to relevant if not dispositive status. In that sense, they are held perhaps to a higher standard of precision than a longer opinion, where questionable assertions are more easily written off as dicta.
44. The fourth *Miranda* dissenter, Justice Clark, retired from the Court in the months between *Miranda* and *Mathis*. President Johnson filled his vacancy with Justice Marshall, who did not participate in *Mathis*.
45. *Mathis* v. United States, 391 U.S. at 6-8 (White, J., dissenting). In *Orozco*, Justice White again dissented, this time lamenting the Court's extension of *Miranda* into "territory where even what rationale there originally was disappears." *Orozco* v. Texas, 394 U.S. at 328-31 (White, J., dissenting). His view still is popular today. It looks to the factors that powered the *Miranda* decision: prolonged interrogation carried out in isolation, resulting in physical or psychological coercion to confess. By suppressing the "terse remarks of a man who has been caught, almost in the act," Justice White feared that the Court had paved the way for a requirement that "police arrest a man, bring him to the police station, and provide a lawyer, just to discover his name." *Id.* at 331 (White, J., dissenting). These two dissents are largely duplicative of Justice White's *Miranda* dissent, to which *Miranda* opponents have added little in 24 years.
of whether the incarceration is based on a charge related to the questioning. The only criticisms of Mathis are by those who remain determined to limit Miranda to its facts.

Unlike Mathis, Orozco generated some debate. The debate centered on whether the level of deprivation should be viewed from the police or the suspect's perspective. In the course of his opinion in Orozco, Justice Black relied on the arresting officer's testimonial evidence to show that the defendant was in custody.\textsuperscript{47} This reliance on subjective evidence has been criticized for, \textit{inter alia}, allowing the anomalous suppression of confessions when a suspect honestly but mistakenly believed he was free to go.\textsuperscript{48} Orozco's apparent reliance on the subjective perceptions of police has since been discounted as aberrational.\textsuperscript{49} In its place is an objective test, applied from the suspect's perspective, used to determine whether a defendant suffered a significant deprivation of freedom.\textsuperscript{50}

The potentially anomalous result of a subjective test is, however, overstated. Nothing in the opinion suggests that Justice Black viewed police admissions at trial as controlling in every instance. Rather, his allusion to a police officer's statement against interest is credible to show that police, by their own admission, had created an atmosphere that Orozco would likely find coercive. Officers' subjective motives would in most cases be revealed in their objective conduct. An officer's subjective intent, therefore, was (and still is by today's standard) useful only as an indicia of the suspect's probable perceptions.\textsuperscript{51}

Only by removing the officer's testimony would we know whether Justice Black would have shifted his focus to the suspect's perspective, and whether he nonetheless would have found that Orozco was in custody. His brief opinion in Mathis may provide a clue. There, he reached the same result without any reference to the subjective intent of the IRS agent.\textsuperscript{52}

\textsuperscript{47} \textit{Id.} at 327.

\textsuperscript{48} See, e.g., W. LAFAVE & J. ISRAEL, supra note 27, \S 6.6, at 491-94 (discussing when interrogation is custodial); see also Berkemer v. McCarty, 468 U.S. at 442-43 (rejecting subjective-motivations-of-police test); Beckwith v. United States, 425 U.S. 341, 346-47 (1976) (same); Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 585-86 n.e. (6th ed. 1986) (discussing approaches used by courts in determining when interrogation becomes custodial).

\textsuperscript{49} Supra note 48.

\textsuperscript{50} Y. KAMISAR, W. LAFAVE & J. ISRAEL, supra note 48, at 585-86.

\textsuperscript{51} In the interrogation context, it now is the law that an officer's subjective perceptions are relevant to the objective inquiry into whether the officer should have known that his words or conduct would elicit an incriminating response. Rhode Island v. Innis, 446 U.S. at 302 n.7.

\textsuperscript{52} Mathis v. United States, 391 U.S. at 1.
C. The Middle Years

After seven years of inaction,\(^{53}\) the significant deprivations issue next arose in *Beckwith v. United States*,\(^{54}\) in which the Court held that *Miranda* permitted IRS agents to interrogate a suspect in a private home. Although *Beckwith* generally is considered a retreat from *Mathis* and *Orozco*, the better view interprets all three cases as logically consistent and equally deferential to the principles of *Miranda*.

Unlike *Mathis*, who answered questions in an 8' x 10' cell, *Beckwith* spoke with agents before going to work one morning while house-sitting for a friend in suburban Washington, D.C.\(^ {55}\) Similarly, although *Orozco* clearly stated that *Miranda* could reach at-home questioning, "could" is the operative term. *Orozco* was roused from bed at 4:00 a.m. by four officers who forcibly entered his room. Not only did *Beckwith* face police at a more reasonable hour and in a less volatile setting, he also received a nearly full panoply of warnings.\(^ {56}\) These warnings were deficient only in that they failed to apprise *Beckwith*, who held a white-collar job, of an indigent's right to appointed counsel.

Three years before *Beckwith*,\(^ {57}\) and repeatedly since,\(^ {58}\) the Court has held that "technical" *Miranda* violations do not offend the Constitu-

\(^{53}\) While the significant deprivations issue lay dormant, *Miranda* meanwhile was taking a beating in other areas, particularly with regard to the use of illegally obtained evidence for impeachment purposes. See *Oregon v. Hass*, 420 U.S. 714, 721-23 (1975) (statements obtained after suspect asserted right to remain silent inadmissible in case in chief but admissible for impeachment purposes); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (statements preceded by defective warnings inadmissible in case in chief but admissible to impeach defendant).

\(^{54}\) 425 U.S. 341 (1976).

\(^{55}\) Id. at 342.

\(^{56}\) An agent administered the following warning before questioning *Beckwith*:

As a special agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue laws, and related offenses.

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

*Id.* at 348-49 (Marshall, J., concurring).


\(^{57}\) *See Michigan v. Tucker*, 417 U.S. at 441 (although police failed to advise defendant of his right to counsel, defendant's statements were not involuntary and thus he was not deprived of his privilege against self-incrimination).

tion.59 Proponents of this principle trace it to a passage in *Miranda* in which the Court required the four well-known warnings "unless we are shown other procedures which are at least as effective in apprising accused persons of their right to silence and in assuring a continuous opportunity to exercise it."60 The IRS agent's warnings to Beckwith were sufficiently equivalent to *Miranda* warnings to alert him to his rights.61

Regrettably, the majority anchored its opinion solely in the generally noncompelling nature of the encounter. Thus, it ascribed no significance to the fact that Beckwith was substantially or at least "constructively" warned. This doctrinal error will be considered fully in Part III, where *Beckwith* is reconsidered under a more integrative approach to custodial interrogation.

In an effort to simplify the test for whether a suspect has suffered a significant deprivation of freedom, the Court later issued two per curiam opinions that dispelled any suspicion, or hope, that all station-house questioning is presumptively coercive. In the first, *Oregon v. Mathiason*,62 police were investigating an unsolved theft when they happened upon Mathiason — a parolee and friend of the complainant's son. After an officer left his card at Mathiason's apartment, Mathiason dutifully returned the call and arranged to meet the officer at the state patrol office only two blocks away.63 Five minutes into the half-hour "interview" Mathiason confessed after police falsely reported that they had found his fingerprints at the scene of the crime.64 Because police told him he was not under arrest, and the entire encounter spanned only thirty minutes in a mutually satisfactory locale, the Court reversed the Oregon Supreme Court's decision to suppress the confession.65 New York v. Quarles, 467 U.S. 649, 657 (1984); Edwards v. Arizona, 451 U.S. 477, 492 (1981) (Powell, J., concurring).

59. See Y. KAMISAR, W. LAFAYE & J. ISRAEL, BASIC CRIMINAL PROCEDURE 576-77 (6th ed. 1986) (discussing whether violations of *Miranda* are necessarily constitutional violations); Public Safety Exception, supra note 5, at 995-96 and accompanying authorities (same). Because the Court did not create a "constitutional straightjacket" in *Miranda*, the Court has suggested in dicta that states are free to ignore *Miranda*'s strictures. Supra notes 56-58.


63. *Id.* at 493. The officer tried to contact Mathiason several times before leaving his card and note which read, "I'd like to discuss something with you." *Id.*

64. *Id.* The officer advised Mathiason that his honesty could be considered by a judge or prosecutor should his case progress so far. *Id.* Police trickery, the Court wrote, "has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule." *Id.* at 495-96.

65. Justice Marshall dissented on the ground that Mathiason's freedom had been deprived in a significant way. *Id.* at 496-99 (Marshall, J., dissenting). Justice Stevens also dissented, objecting to the summary disposition of a case containing the important question of how Mathiason's parolee
ther his parolee status nor the inherent pressures of a closed-door stationhouse interrogation sufficed to weight the Court's *Miranda* analysis in favor of the cooperative Mathiason.66

If *Miranda* rights are not necessarily compulsory even on police turf, *Miranda* literalists would argue, then they mean less than they once did and still should.67 If one is willing to accept a theory of home-field advantage, then the unsportsmanlike nature of forcing a suspect to choose a course of action in the backyard of such a formidable rival as the State cuts against admitting the suspect's confession at trial.68 But such a view ignores that Mathiason was a watered-down version of stationhouse interrogation. The disparity in coerciveness between Mathiason and *Miranda* is as vast as that between the IRS cases of Mathis and Beckwith. The officer's polite business-card introduction, followed by Mathiason's return phone call and a pre-arranged half-hour meeting to which Mathiason came unescorted, are a far cry from the shared "salient features"69 of the cases that comprised the *Miranda* decision.70 Stationhouse interrogation, traditionally associated with incommunicado detention and intimidating police tactics, has long been the triggering point for the warnings requirements. However, despite

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66. See Oregon v. Mathiason, 429 U.S. at 499-500 (Stevens, J., dissenting) (discussing Mathiason's parolee status); id. at 497-98 (Marshall, J., dissenting) (discussing inherent pressures).
67. See Kamisar, *The Burger Court*, supra note 36, at 84-85 (calling Mathiason "a formalistic, crabbed reading of *Miranda*").
68. Concepts like home-field advantage arguably reduce justice to values that have more force in a fox-hunt than in a legal system. Professor Caplan describes his view of the sporting theory of justice as follows:

> [Miranda] accentuated just those features of our system that manifest the least regard for truthseeking, that imagine the criminal trial as a game of chance in which the offender should always have some prospect of victory, and that ultimately reflect doubt on the rectitude of our laws and institutions.

69. Supra note 35.
70. *Miranda* never said that an unwarned suspect cannot confess at the stationhouse. The Court meant to admit not only confessions obtained through general on-the-scene questioning, see supra note 33 and accompanying text, but also from "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 . . . ." *Miranda v. Arizona*, 384 U.S. at 478 (footnote omitted). Mathiason fell under neither category; his confession was police-initiated. Whether he was in custodial interrogation, however, is not so clear.
the inherent proof problems endemic to stationhouse events, there is no reason why a noncoercive stationhouse meeting should automatically yield inadmissible evidence based solely on its locale.\textsuperscript{71} As a result, \textit{Mathiason} is a close case, occurring in a presumptively coercive setting under arguably uncoercive circumstances.

As close as it may be, \textit{Mathiason} depicts the Court's fidelity to \textit{Miranda}'s facts but not its holding. The \textit{Mathiason} Court announced its unconditional intent to give significant deprivations of freedom a restrictive meaning. It recognized that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it,"\textsuperscript{72} but those coercive aspects would not rise to the level of a significant deprivation of freedom. "[P]olice officers," the Court continued, "are not required to administer \textit{Miranda} warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect."\textsuperscript{73} In an attempt to give content to this statement, the Court, rather than delineate who deserves \textit{Miranda} warnings, explained who does not.\textsuperscript{74} The ill-fated Mathiason fell into the latter category.

Definitions stated in the negative are inherently imprecise. In most cases, they cannot, at least in their incipient stages, specifically exclude enough to be of much use.\textsuperscript{75} In its next breath, the Court attempted an affirmative definition, but did so in bare, conclusory language. \textit{Miranda} warnings, said the Court, "are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'"\textsuperscript{76} With this tautology, the Court broke new ground in \textit{Miranda} analysis, collapsing the separate concepts of custody and significant deprivations of freedom.

Reducing significant deprivations to "'custody'" or its functional equivalent says nothing about which deprivations would merit this elevated status. What is the functional equivalent of custody? Does it involve a greater degree of compulsion than a reasonable suspect's

\textsuperscript{71} Some, however, have suggested a per se ban of all unwarned statements obtained at the stationhouse. Graham, \textit{supra} note 10, at 82-83; Rosenberg & Rosenberg, \textit{supra} note 3, at 69; Smith, \textit{supra} note 5, at 723.

\textsuperscript{72} Oregon v. Mathiason, 429 U.S. at 495.

\textsuperscript{73} \textit{Id}.

\textsuperscript{74} \textit{Id}.

\textsuperscript{75} Courts decide only the cases before them and should not hypothesize about future litigation, but when dealing with definitions, especially definitions that have proven to be uncertain, an eye toward prospective application should lead courts to clarify fuzzy concepts whenever possible.

\textsuperscript{76} \textit{Id}.
perception that he or she is not free to go? Does it require a particular length or degree of restraint or intrusiveness of questioning?

Notwithstanding the looseness of the definition, the Court’s intention must have been to narrow suspects’ protections under Miranda, which clearly separated custody from significant deprivations. To say these concepts are the same is to blur a distinction designed to establish a class of police-suspect encounters that would fall short of actual custody but still command Miranda warnings. This definitional merger would seem to limit the circumstances that could qualify as significant deprivations of freedom. As grim as this conflation of custody and significant deprivations may be, without more meat on this bare-bones definition there is no way to tell which encounters meet the definition and which do not.

Six years later in California v. Beheler, the Court rendered the second of two theoretically linked per curiam opinions. Beheler’s case arose ostensibly out of his sense of civic duty. He called police to report that a woman from whom he and others had tried to steal hashish had been fatally shot, and that his confederates had buried the murder weapon in Beheler’s backyard. After a consent search of the yard uncovered the weapon, Beheler acquiesced to officers’ suggestion that he accompany them to the stationhouse for questioning. Police advised him that he was not under arrest, then obtained his confession during a half-hour “interview.” Five days later police arrested and warned Beheler, who waived his rights and again confessed, vowing that his previous confession was voluntary.

Beheler contains three pertinent propositions. First, it emphasizes that while Mathiason went under his own power to the police station

77. Cf. Berkemer v. McCarty, 468 U.S. at 436-37 (declining to establish class of restraint that qualifies as seizure for fourth amendment purposes but not as significant deprivation for fifth amendment purposes).

78. Eight years after Mathiason, Justice Brennan wrote that there really is no riddle in the overwhelming number of cases. Oregon v. Elstad, 470 U.S. at 359 & n.41 (Brennan, J., dissenting) (citing Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 879 (1981)).


80. Id. at 1122.

81. Id.

82. Id. Both here and in Mathiason, just how important this admonition was to the Court’s holding is unclear. A “you are not under arrest” admonition says nothing of the consequences of that condition, nor does it seem to place any limits on police conduct. An officer could utter the admonition, then proceed with impunity to subject the suspect to coercive interrogation tactics.

83. Beheler confessed to being at the scene of the crime when his half-brother, Dannie Williams, fatally shot Peggy Dean in the parking lot of a liquor store. People v. Beheler, 200 Cal. Rptr. 195, 196-98 (Cal. Ct. App. 1984).


85. Beheler also raised an unsuccessful “independent state ground” argument. Id. at 1123 n.1; id. at 1126-28 (Stevens, J., dissenting).
and Beheler accompanied police; Beheler's ordeal, although somewhat more compelling than Mathiason's, was still outside *Miranda*. Second, *Beheler* parrots *Mathiason*'s notion of significant deprivations of freedom. In these two respects the case is unspectacular. The final proposition, however, is noteworthy. In an effort to make the flinty significant deprivations inquiry more manageable, the Court downplayed the dissenting justices' juxtaposition of facts surrounding the interrogations of Mathiason and Beheler. For instance, the Court excluded many possibly relevant factors from its decision whether to protect a suspect under *Miranda*: whether the period from committing the crime to arrest is short (several hours in *Beheler*) or long (three weeks in *Mathiason*); whether the suspect is drunk and vulnerable (*Beheler*) or sober (*Mathiason*); and whether the suspect is a parolee (*Mathiason*) or is not (*Beheler*). Perhaps interested in developing a finite list of in-custody factors, the Court, as in *Mathiason*, eliminated from consideration numerous potentially relevant facts from a necessarily fact-based judgment about the level of constraint.

**D. The Later Cases**

The cases that followed *Beheler* became increasingly complex. Since the early cases, the Court has continually upheld convictions that rested on incriminating statements or the fruits thereof. Unlike the middle-years' cases, however, which merged custody and significant deprivations, the later cases are viewed as exceptions to the *Miranda* doc-
trine. After the middle years, only one decision — Berkemer v. McCarty — confronts the admissibility consequences of confessions obtained from a suspect whose freedom has been deprived in any significant way.

In Berkemer, the Court granted certiorari to clarify Miranda’s applicability to interrogations involving minor offenses, and to the questioning of motorists pursuant to routine traffic stops. Berkemer shows the Court in a unique posture. In many of its holdings in the area of constitutional criminal procedure, the Court has pronounced broad rules seemingly fashioned to protect the rights of an accused who challenged the admissibility of his confession, then subjected the accused to a narrow application of the rule formulated precisely for his benefit. Here, however, the Court went out of its way to trim suspects’ protections in certain settings, but upheld the reversal of McCarty’s conviction.

McCarty encountered police while swerving down an Ohio interstate highway. After a trooper pulled him over and, without issuing warnings, asked a few questions about his level of sobriety, McCarty gave incriminating answers, then flunked a roadside balancing test. The of-

90. See Oregon v. Elstad, 470 U.S. at 312 (second confession preceded by Miranda warnings and valid waiver not excludable as “fruit” of earlier Miranda violation unless earlier violation extracted by “physical violence or other deliberate means to break the suspect’s will”); New York v. Quarles, 467 U.S. at 658 n.7 (absent “actual coercion,” need for answers to questions in situation posing threat to public safety outweighs need for prophylactic rule protecting privilege).

91. Id. at 422-23. This is how Justice Marshall framed the issue in his opinion for the unanimous Court. As Justice Stevens pointed out in his concurring opinion, however, the question presented in the petition for certiorari was much narrower. Infra note 97.

92. As with the ultimate outcome in Miranda’s travails on remand, see L. Baker, supra note 2, at 9-12, 408-09, the Court’s decisions often are more meaningful for posterity than for those whose circumstances led to the breakthrough decisions. Like Ernesto Miranda, the prison gates did not automatically swing open for the three defendants who successfully appealed their convictions in companion cases heard in conjunction with Miranda. Miranda v. Arizona (No. 759). Michael Vignera pleaded guilty to a lesser charge, received seven to ten years, and was released only because the trial court credited him for time served. Vignera v. New York (No. 760). Carl Calvin Westover was tried again and convicted. Westover v. United States (No. 761). Roy Allen Stewart’s litigation dragged on for years, ending in reconviction for first-degree murder and robbery. California v. Stewart (No. 584). L. Baker, supra note 2, at 191-92; see W. Murphy & C. Pritchett, Courts, Judges, & Politics 329 (4th ed. 1986) (“[s]everal studies have shown that less than half of those people who won in the Supreme Court but whose cases required further litigation in state courts actually won when the final decision was reached”). In addition, defendants in the key decisions Edwards v. Arizona, 451 U.S. 477 (1981) (all questioning must cease once suspect invokes right to counsel unless suspect initiates communication), and Brewer v. Williams, 430 U.S. 387 (1977) (officer’s “Christian burial speech,” an emotional appeal to suspect’s conscience, violated sixth amendment right to counsel), obtained short-lived victories in the Supreme Court despite having been the glad recipients of judicial rulemaking designed to prevent police from committing future constitutional errors.

93. Berkemer v. McCarty, 468 U.S. at 423. He told the officer he had just drank two beers and had smoked several joints. This may have explained why he fell down during the balancing test. Id.
CUSTODIAL INTERROGATION

officer arrested and took McCarty downtown, where he further incriminated himself in response to additional questioning, again without the benefit of Miranda warnings. After pleading no contest to drunk driving, McCarty sought post-conviction relief in the Ohio courts and on habeas corpus until obtaining his writ from the Sixth Circuit. Unsatisfied with the Sixth Circuit's failure to clearly delineate whether the pre-arrest statements would be admissible on retrial, the Court bifurcated its analysis into a consideration of McCarty's pre- and post-arrest statements. The latter clearly were inadmissible under any view of Miranda. The former, however, were another story.

The Court first rejected the State's suggestion that the Court carve out an exception to Miranda in cases involving misdemeanor traffic offenses. The Court also expressly declined to cure the Ohio trial court's admission of the post-arrest statements through harmless error analysis. Sandwiched between these gestures of fidelity to Miranda was a presumption of admissibility for the brief, pre-arrest, Terry-like, public questioning of motorists. The key to the opinion rests in the distinction between traffic stops—a familiar police-citizen ritual—and the impermissible types of compelling influences at work in Miranda.

95. Id. Berkemer "guessed" he was "barely" under the influence of alcohol. Id. at 424.
96. Id. at 425-26 (citing McCarty v. Herdman, 716 F.2d 361, 363 (6th Cir. 1983)).
97. Justice Stevens chastised his colleagues for rewriting the petition for certiorari to suit their interests, which in this case were broader than the issue presented to the Court. Only the applicability of Miranda to misdemeanor traffic offenses was ripe for review, said Justice Stevens, not the question of whether roadside questioning pursuant to a traffic stop constitutes custodial interrogation. Berkemer v. McCarty 468 U.S. at 445-46 (Stevens, J., concurring in part and concurring in the judgment). The Court could have answered the first question without the second, but the existence of both pre- and post-arrest statements necessitated a judicial inquiry that went beyond Justice Stevens's and the Sixth Circuit's approach. While good arguments support both sides on the outcome of this case, it is difficult to fault the Court for fleshing out the more difficult issue that drove the entire litigation. Furthermore, the Supreme Court rules permit as much:

The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Court.

98. Berkemer v. McCarty, 468 U.S. at 429. Citing chapter and verse of Miranda, the Court emphasized the need to respect the "simplicity and clarity" of Miranda, and to recognize the "inherently compelling pressures" of the custodial setting which "undermine the individual's will to resist." Id. at 432-33 (quoting Miranda v. Arizona, 384 U.S. at 467). In the next section of its opinion, the Court imposed its own limits on those areas of the Miranda doctrine that are neither simple nor clear. Id. at 435-42.
99. Id. at 443-45.
100. See Terry v. Ohio, 392 U.S. 1, 27 (1968) (fourth amendment permits an officer to detain person briefly for questioning and pat-down search on reasonable suspicion of involvement in criminal activity).
The unanimous decision in Berkemer, authored by Justice Marshall, shows an unusual solidarity among the justices in the custodial interrogation arena. Because the Court had settled some years earlier that a brief automobile detention is a "seizure" within the meaning of the fourth amendment, the justices declined to hold that a person may be seized in a fourth amendment sense, yet may not be significantly deprived of his freedom for fifth amendment purposes. The Court thus announced that not all significant deprivations of freedom are subject to the strictures of Miranda. By potentially stripping from Miranda's ambit all significant deprivations of freedom short of actual custody or those that lack sufficient factual identity with Miranda, the Court went further than necessary to achieve its desired result.

The Court instead could have reached the same result had it classified the restraint on McCarty as "insignificant." In fact, the Court supplied the rationale for this very conclusion. First, the customary brevity of traffic stops alerts drivers that the flashing lights in their rear-view mirrors will cause them only temporary inconvenience. The brevity and spontaneity of traffic stops mitigate the possibility that police will have the time to engage in trickery carefully planned to elicit confessions. Second, detained motorists usually are confronted by only one or two officers in a somewhat public setting. As a result,

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102. According to the Court:

It must be acknowledged at the outset that a traffic stop significantly curtails the "freedom of action" of the driver and the passengers, if any, of the detained vehicle.... Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so....

However, we decline to accord talismanic power to the phrase in the Miranda opinion emphasized by [McCarty]. Fidelity to the doctrine announced in Miranda requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated. Thus, we must decide whether a traffic stop exerts upon a detained person pressures that significantly impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.

Id. at 436-37. Significant deprivations of freedom had been supplanted by "sufficient ... impair[ments] [of the suspect's] free exercise of his privilege against self-incrimination...." Id. at 437.

103. Id.; cf. C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 16.05, at 369 (2d ed. 1986) (Miranda triggered only by interrogations conducted in atmosphere "akin to arrest," which is determined by "purpose, location, and length of detention").
105. Id. at 438 n.27.
motorists arguably do not feel "completely at the mercy of police," as did the suspects in the early *Miranda* cases. At this point, the Court likened traffic stops to *Terry* stops, which permit officers on reasonable suspicion short of probable cause to confirm or dispel their suspicion through a few questions and a pat-down search. If *Terry* stops exceed the grasp of *Miranda*, reasoned the Court, then so should their roadside analogues. Brief, public ques-

106. Id. at 438. The Court's reliance on citizens' familiarity with traffic stops and its perception of citizens' expectations in those settings may assume too much. Do citizens really believe questioning will be brief? Furthermore, duration of questioning in traffic stops is in many instances an unreliable index to coercion. Officers could ask many questions, all of them innocuous, thus adding nothing coercive to the encounter. Similarly, the right question asked at the right time by the right officer could create a coercive environment in a matter of seconds.

107. Id. at 439 n.28. According to the Court, *Orozco* and *Mathis* were archetypically police-dominated settings of custodial interrogation. Recall, however, that *Orozco* involved brief bedroom questioning, not patently distinguishable from brief roadside questioning. *Orozco* v. *Texas*, 394 U.S. at 325.


109. Because *Terry* permits officers to ask an undefined set of pertinent questions in order to confirm or dispel their suspicions that "criminal activity may be afoot," *Terry*’s questioning component overlaps with *Miranda*. *Terry v. Ohio*, 392 U.S. at 30. The *Terry* Court gave this strand of questioning the watered-down label "field interrogation," apparently not to be confused with "custodial interrogation." *Id.* at 1, 11, 19 & nn. 16 & 34. Unless courts carefully limit questioning under *Terry*, police may lawfully manipulate a valid *Terry* stop to obtain testimonial evidence. See also United States v. *Brady*, 819 F.2d 884, 887 n.2 (9th Cir. 1987) ("[q]uestioning can be more intrusive than a search because it can evoke an incriminating response in a situation where a lawful search would uncover nothing"), *cert. denied*, 484 U.S. 1068 (1988).

For the few who have travelled between these two cases, the trek has been brief, usually ending in tautology: *Terry* stops are not subject to the strictures of *Miranda* because the former are not settings of custodial interrogation. Consequently, police avoidance and abuse of *Miranda* under the guise of *Terry* will continue to confute an otherwise bright line between the fourth and fifth amendments. So long as officers seek testimonial evidence, their actions must be governed by the fifth amendment. Questioning is a fifth amendment tool for eliciting testimonial evidence; searches, in turn, are a fourth amendment vehicle for obtaining tangible evidence. Once an officer opens his or her mouth, the words uttered must satisfy *Miranda*, not *Terry*. This is not to say that the government cannot seek testimonial evidence through means other than questioning without implicating the fifth amendment. See, e.g., *Silverman v. United States*, 365 U.S. 505, 511-512 (1961) (admissibility of testimony obtained through electronic listening device is guided by fourth amendment). It means only that police cannot interrogate the suspect without regard for *Miranda*.

Professor LaFave looked at *Miranda* in the *Terry* setting, and advised that *Miranda*’s reference to the "potentiality for compulsion" be the benchmark:

> [T]he only distinction to be made is between those instances in which a general inquiry (for example, "What happened?") is made to witnesses, and those in which an individual is called on to inculpate or exculpate himself (for example, "What are you doing here?") or "Where did you get that property?"). In the latter instances the warnings should be required whether or not there is "custody," a "seizure," or an "arrest."

LaFave, "*Street Encounters* and the Constitution: *Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 40, 100 (1969). By not requiring "custody, a seizure, or an arrest," Professor LaFave’s
tioning precluding one or two officers from trickery in a non-threaten-
ing setting that insulates suspects from feeling "at the mercy of
police," the Court wrote, is outside the purview of Miranda.\textsuperscript{110}

Despite its arsenal of mitigating factors, the Court bypassed the
chance to hold simply that brief traffic stops constitute an insignificant
deprivation of freedom. To so hold, the Court would have been re-
quired to reason that a fourth amendment "seizure" is not always a fifth amendment "significant deprivation of freedom." This interpre-
tation would have been tricky,\textsuperscript{111} but preferable to the Court's creation
of a presumption of non-coercion, rebuttable only by evidence of ac-
tual arrest or its functional equivalent.\textsuperscript{112} Identifying the point at which
police behavior becomes the functional equivalent of arrest is admit-
tedly difficult for the Court. Nevertheless, the Court believed that this
approach was the only alternative to an over- or under-protective appli-
cation of Miranda.\textsuperscript{113} The Court failed to mention, however, that the
prosecution had argued this point unsuccessfully in Miranda.\textsuperscript{114}

reading of Miranda was broader than the Court's. Since then only Professor Dix has attempted
seriously to add contemporary flavor to LaFave's study. See Dix, Nonarrest Investigatory Deten-
tions in Search and Seizure Law, 1985 DUKE L.J. 849, 945-51 (some police-suspect encounters
demand modified warnings sufficient to alert suspects to rights, but not so rigid to hamstring
police in noncoercive settings); cf. Mongiardo, The Terry Exception to Miranda, 10 SEARCH AND
SEIZURE LAW REPORT 165 (1983) (pre-Quarles discussion of emergency-based exception to Mir-
anda); Comment, Miranda Rights in a Terry Stop: The Implications of People v. Johnson, 63 DEN.


111. The Court's definition of "seizure" sounds a lot like that of custody: "[A] person has
been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circum-
stances surrounding the incident, a reasonable person would have believed that he was not free to


113. The Court regretted the all-or-none dilemma that Miranda posed in traffic stops. If Mir-
anda were applicable in all stops, argued the Court, it would impede the enforcement of traffic
laws while doing little to protect suspects' fifth amendment rights. Insulating all traffic stops from
Miranda, on the other hand, would give police license to circumvent the clear dictates of Mir-
anda. Id. at 441.

114. The Court in Miranda said:

A recurrent argument made in these cases is that society's need for interrogation
outweighs the privilege. This argument is not unfamiliar to our Court. The whole
thrust of our foregoing discussion demonstrates that the Constitution has prescribed
the rights of the individual when confronted with the power of government when it
provided in the Fifth Amendment that an individual cannot be compelled to be a
witness against himself. That right cannot be abridged.

Miranda v. Arizona, 384 U.S. at 479.

Ultimately, however, the Court left undisturbed the Sixth Circuit's issuance of Berkemer's writ
of habeas corpus. For two reasons, the Court refused to subject to harmless error analysis the
Ohio trial court's admission of Berkemer's post-arrest statements. First, those statements were
E. Summary

Significant deprivations of freedom have endured a convoluted history in the Supreme Court. At the outset, the Court read the concept literally, evidenced by Justice Black's terse opinions in the early cases, which applied Miranda to non-stationhouse settings. Of the significant cases of the middle years, only one, Beckwith, retained Miranda's original understanding of significant deprivations. In other decisions of this period, the Court made euphemistic references to half-hour "interviews," which until then had been called "interrogations." Those cases treated significant deprivations and custody, although clearly distinct in Miranda, as functionally identical. Regrettably, the Court did not define "the functional equivalent of arrest." Thus, these middle-years cases offer conclusive authority on what is not a significant deprivation, but are uninstructive as to what one is.

The most recent decision in this area may bode more favorably for the suspect than for subsequent motorists similarly situated. Berkemer began by trimming suspects' protection with the overzealous declaration that not all significant deprivations of freedom deserve Miranda's safe-

more incriminating than those he made at roadside. Only after being arrested did McCarty admit to being under the influence of an intoxicant, an essential element of the crime for which he was convicted. Berkemer v. McCarty, 468 U.S. at 443-44. This fact took on added importance when considered in light of his breathalyzer test, which evaluated McCarty as legally sober. Id. at 444. Second, his no-contest plea, motivated in part by his knowledge that all his statements would be admitted at trial, foreclosed him from adducing his own or challenging the state's evidence. A jury, reasoned the Court, may have been interested in hearing McCarty's arguments. For instance, his performance on the balancing test was allegedly attributable to a back injury. Id. In short, the Court presumed that McCarty's decision as to how to proceed might have been different had the judge decided at the suppression hearing to admit only the pre-arrest statements at trial. Id. This ruling much more closely than usual reflects the cautious inquiry that harmless error analysis properly commands.

Harmless error is "the notion that a criminal conviction need not be reversed even though mistakes of law or procedure were admittedly made at the trial." Allen, A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review, 70 Iowa L. Rev. 311, 329 (1984). The principle is traceable to Chapman v. California, 386 U.S. 18 (1967), which established that errors leading to a finding of guilt can avoid reversal only if they are harmless beyond a reasonable doubt. The problem is the justices' flexible understanding of reasonable doubt. One member of the Court has cautioned that

[a]n automatic application of harmless error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever present and always powerful interest in obtaining a conviction in a particular case. It is particularly striking to compare the Court's apparent willingness to forgive constitutional errors that redound to the prosecutor's benefit with the Court's determination to give conclusive effect to trivial errors that obstruct a defendant's ability to raise meritorious constitutional arguments.

guards; however, it upheld the lower court's reversal of McCarty's conviction. Announced as either an exception to or a partial overruling of the significant deprivations language, Berkemer is exotic. The possibility exists, however, that the Court's depreciation of significant deprivations of freedom will re-emerge in another setting, and further restrict the application of Miranda to police-suspect encounters.

Read together, the relevant cases stand for the proposition that Miranda attaches in any setting of custody or its amorphous functional equivalent. The Court, though, has given with one hand and taken away with the other. It has been generous with locale, but strict on the threshold level of compulsion necessary to trigger Miranda. Given the Court's stated belief that Miranda was designed to curb the practices endemic to stationhouse interrogation, the temptation seems strong to hold police to a lower standard of care in non-stationhouse settings, perhaps even a sliding scale — sliding according to the suspect's level of familiarity with his surroundings. Miranda, however, contemplated no such distinction. Before proposing an alternative method of custodial interrogation analysis, this Article first analyzes the interrogation prong of the Court's two-step inquiry.

II. INTERROGATION

A. Background

Since Chief Justice Warren's bare observation in Miranda that "interrogation" means "questioning initiated by law enforcement officers," the Court has tried to add content to that term. Other passages in Miranda, each confirmed by subsequent decisions, belie any intent to construe the concept so simply. The Court looks for

116. Several of the Court's concerns about the coercive effect of the "interrogation environment" on a suspect's will, see id. at 457-58, did not include express questioning. For example, coached witnesses would "identify" the suspect in a lineup in order to infuse the interrogation with the air of presumed guilt. Id. at 453. False accusations for fictitious crimes, directed to elicit a confession to the crime for which police suspected the suspect, were also addressed in Miranda. Id. Finally, the Court recognized that "psychological ploys," which imputed guilt, soft-pedaled the seriousness of the offense, and shifted blame to the victim or to society, were viewed as tantamount to interrogation. Id. at 450; Arizona v. Mauro, 481 U.S. 520, 526 (1987); Rhode Island v. Innis, 446 U.S. at 299; Y. Kamisar, Kamisar Essays, supra note 15, at 152-53. The idea that police conduct other than express questioning can lead to the exclusion of a confession is an old one. From Bram v. United States, 168 U.S. 532, 539 (1897) (suspect confessed when told that co-suspect had "fingered him"), to Ashcraft v. Tennessee, 322 U.S. 143, 151 (1944) (suspect confessed when confession of contract killer read to him), to Escobedo v. Illinois, 378 U.S. 478, 482-83 (1964) (suspect "cracked" when confronted with alleged accomplice who said Escobedo was trigger man), the Court has repeatedly struck down confessions despite the absence of express questioning. Miranda meant to stop practices that "exert[ed] a tug on the suspect to confess," previously allowable under due process precedents, regardless of what form they take. Y. Kamisar, Kamisar Essays, supra note 15, at 155.
constructive questioning as well, including within "interrogation" the "functional equivalent of express questioning." Given its difficulties in defining the "functional equivalent of custody," it is unsurprising that the Court has focused on the "functional equivalent" part of the phrase, and has resisted defining "express questioning." The Court has recognized that some express questioning is not guided by Miranda, particularly "[g]eneral on-the-scene questioning as to facts surrounding a crime," or questioning that is part of the charging and booking process. As a result, express questioning is viewed as either clearly within or beyond Miranda; the close cases involving express questioning for some reason have escaped Supreme Court review. In fact, interrogation cases in general have received only limited play in the Supreme Court. And even then, the Court's penchant for

117. Rhode Island v. Innis, 446 U.S. at 301; see 1 W. LAFAVE & J. ISRAEL, supra note 27, § 6.7, at 501. The words "questioning" and "interrogation" are better viewed as interpretive constructs than as conceptual straightjackets. Rather than be constrained by the term "interrogation," Professor Kamisar has referred to the concept as "compulsion within the meaning of the privilege." Y. KAMISAR, KAMISAR ESSAYS, supra note 15, at 158-60.


119. Last term the Court announced a "routine booking question" exception for "biographical data necessary to complete booking or pretrial services." Pennsylvania v. Muniz, 110 S. Ct. 2638, 2650 (1990) (citation omitted). Questions about a drunk driver's "name, address, height, weight, eye color, date of birth, and current age" fall within the exception. Id. After considering whether quizzing the suspect about the year of his sixth birthday asked for physiological rather than testimonial evidence under Schmerber v. California, 384 U.S. 757, 761 (1966) (privilege does not protect suspect against compulsion to produce "real or physical evidence"), the Court held that it did not, and excluded the videotaped response to the illegal question on Miranda grounds. Justices White, Blackmun, and Stevens agreed with Chief Justice Rehnquist, who insisted that the suppressed answer was non-testimonial, although it involved "the use of the human voice." Pennsylvania v. Muniz, 110 S. Ct. at 2653 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part). Justice Marshall had tired of the Court's exceptions, and would have suppressed the entire videotaped questioning. Id. at 2654-58 (Marshall, J., concurring in part, and dissenting in part).

Other permissible questioning includes questions asked for purpose of identification outside the booking process, such as street encounters involving innocuous questions like "what happened?" or "what's going on here?" that may lead to surprise results. Clearly, Quarles-type questions are immunized, as is some questioning incident to arrest and to the execution of a search warrant. 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.7, at 504-06 (1984 & Supp. 1989). Although typically brief, street encounters quickly can escalate into settings of police abuse. Nonetheless, they are infrequently challenged, and none has reached the Supreme Court on the interrogation issue.


121. The dearth of interrogation cases in the Supreme Court is not for lack of opportunity. See, e.g., Lewis v. Florida, 486 U.S. 1036, 1037 (1988) (White, J., dissenting from denial of certiorari). There, after the suspect was warned and claimed his right to silence, officers took him to a room and showed him a videotape of the robbery-murder he had committed. During the
“waiver”122 and “initiation”123 questions has subordinated the threshold question of whether police interrogated a suspect in favor of whether the suspect subsequently, by his own initiative, rid police conduct of exclusionary consequences.

viewing, the suspect made incriminating statements, which he later tried without success to suppress in the Florida courts. Justice White framed the issue as “[w]hether police may confront a suspect with evidence against him, outside the range of normal arrest and charging procedures, without engaging in the ‘functional equivalent’ of interrogation . . . .” Id. (White, J., dissenting).

122. Chief Justice Rehnquist’s Court has been busy rendering sharply divided decisions that seem unmindful of the “heavy burden” on officials to demonstrate that a suspect’s waiver was “voluntary, knowing, and intelligent.” See, e.g., Patterson v. Illinois, 487 U.S. 285, 292-92 (1988) (defendant never indicated that he wanted assistance of counsel); Colorado v. Spring, 479 U.S. 564, 573-74 (1987) (waivers are voluntary absent evidence of police coercion); Connecticut v. Barrett, 479 U.S. 523, 527-29 (1987) (waiver was voluntary where there was no evidence that defendant was threatened, tricked or cajoled); Colorado v. Connelly, 479 U.S. 157, 167 (1986) (no evidence of coercive police activity so mentally retarded suspect’s waiver was voluntary). But see Arizona v. Roberson, 486 U.S. 675, 685-87 (1988) (once defendant has requested representation, subsequent waiver during questioning for separate investigation is presumptively coerced).

The same can be seen in the Court’s selection and denial of petitions for certiorari. In Henderson v. Florida, 473 U.S. 916 (1985), the Court denied certiorari to a suspect-petitioner who had invoked his right to counsel, then, after a five-hour drive in the back of a squad car, agreed to sign a waiver form. He waived after police, who said the suspect had a “look on his face” indicating “his conscience was bothering him,” asked him “if there was anything he would like to tell the[m].” Id. at 917-18 (Marshall, J., dissenting from denial of certiorari). Justice Marshall rejected the conclusion of the Florida courts that the suspect’s “subtle hints” constituted “initiation” within the meaning of Edwards v. Arizona, 451 U.S. 477 (1981). Henderson v. Florida, 473 U.S. at 919 (Marshall, J., dissenting from denial of certiorari); Watkins v. Virginia, 475 U.S. 1099, 1100-02 (1986) (Marshall, J., dissenting from denial of certiorari) (after invoking right to counsel, petitioner was not furnished attorney but nonetheless held by Virginia courts to have validly waived his rights by confessing after repeated warnings and “nagging” led him to sign waiver form).

123. In 1981, the Court purported to guarantee that police honor a suspect’s decision to deal with the authorities only through a lawyer. See Edwards v. Arizona, 451 U.S. at 484-85 (accused who has requested counsel cannot be subject to custodial interrogation unless and until accused initiates further discussion relating to investigation and validly waives right to counsel). Edwards has been interpreted in conjunction with Michigan v. Mosley, 423 U.S. 96 (1975), holding that once a suspect asserts his right to cut off questioning, that is, asserts his right to silence, police may “scrupulously honor” that right by “immediately ceas[ing] the interrogation, resum[ing] questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restrict[ing] the second interrogation to a crime that had not been a subject of the earlier interrogation.” Id. at 106. After Edwards, however, Justice White’s concurring opinion in Mosley, arguing that the right to silence carries less protection than the right to counsel, id. at 109-11 (White, J., concurring in the result), became necessary to the Court’s holding in Arizona v. Roberson, 486 U.S. 675, 685-87 (1988). There, the Court held that Edwards bars police-initiated interrogation (preceded by warnings) following a suspect’s request for counsel in the context of a separate investigation. Apparently, suspects, presumed to be too unsophisticated to deal with authorities without the guiding hand of counsel, must know that there are serious consequences riding on their choice of which right (silence or counsel) they claim. A recent decision may have confirmed that the rights to silence and counsel are afforded different legal significance. See Minnick v. Mississippi, 111 S. Ct. 486, 490-91 (1990) (invalidating state practice that allowed interrogation after suspect had opportunity to consult with attorney).
The Court’s failure to appreciate the complex relationship between custody and interrogation demeans the combined effect of these two aspects of police restraint. Only by viewing interrogation techniques through the prism of custody can the effect of police restraint upon a suspect begin to be measured. A look at the cases that attempt to set the boundaries of interrogation reveals the Court’s myopic tendency to focus on only one aspect of restraint — either custody or interrogation — and thus to ignore the augmented impact that these compelling elements, operating together, exert on a suspect. To some extent the Court’s myopia may be blamed on the phrasing of questions preserved for review in petitions for certiorari. But that phrasing should not, according to the Supreme Court Rules, preclude the Court from answering other questions necessary to properly address the questions raised by the petitioner.

**B. The Sixth Amendment Cases**

The Court discusses “interrogation” in both fifth and sixth amendment cases. For two reasons, however, the sixth amendment cases offer little guidance as to the meaning of the term in the fifth amendment context. First, the Court interprets the rights under the sixth amendment to be more powerful. Second, the language of the two amendments is different; the sixth amendment refers to assistance of counsel in criminal proceedings while the fifth amendment speaks of compulsion.

Once formal proceedings in the form of indictment, information, or arraignment have commenced against an individual, the fifth amendment gives way to the sixth amendment, where, for better or worse, the Court reads the Constitution to circumscribe police practices more closely than with the fifth amendment. This “formalistic” triggering point is most commonly associated with *Brewer v. Williams*, which

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124. The pertinent rule on petitions for certiorari states:

> The statement of a question presented will be deemed to comprise every subsidiary question fairly included within. Only the questions set forth in the petition or fairly included therein will be considered by the Court.


125. See Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 Osso Sr. L.J. 449, 490-91 (1964) (commenting that in Escobedo v. Illinois, 378 U.S. 478 (1964), Justice Stewart’s dissenting opinion that there was no right to counsel prior to indictment was based on “highly formalistic reading of the sixth amendment”).

borrowed the doctrine from a then-dormant precedent, Massiah v. United States.127 Massiah held that once the state initiates formal proceedings against a defendant, the sixth amendment protects him from extrajudicial, police-orchestrated proceedings designed to "deliberately elicit" incriminating statements in the absence of counsel.128 The fifth amendment, on the other hand, applies only to encounters occurring before formal proceedings have begun.

Despite this clear line between the two amendments, the Court is unsure whether "interrogation" is relevant to sixth amendment cases. In Brewer, for instance, both the majority and the four dissenters tested the officer's statements under their understanding of "interrogation,"129 perhaps because of a passage in Massiah stating that the sixth amendment "must apply to indirect and surreptitious interrogations," particularly to an accused like Massiah, who "did not even know that he was under interrogation by a government agent."130 That Massiah was surreptitiously interrogated and Williams was not made no difference to the Court,131 which interpreted the Massiah rule as: "[O]nce adversary

127. 377 U.S. 201 (1964). Massiah had been indicted and released on bail following his not-guilty plea to federal narcotics charges. The Court held that the police, by obtaining damning admissions from Massiah through electronically eavesdropping on a conversation they had staged between him and co-defendant Colson, violated Massiah's sixth amendment right to counsel. Although Massiah was under no formal compulsion to speak, the Court relied heavily on the fact that formal proceedings (in that case, an indictment) had been initiated against him. Indictment, a critical stage in the proceedings against Massiah, "clearly entitled [him] to a lawyer's help" before facing the adversarial test of an orderly, open, judicially-sponsored trial. Id. at 204.

128. Id. at 206.


130. Massiah v. United States, 377 U.S. at 206 (quoting United States v. Massiah, 307 F.2d 62, 72-73 (2d Cir. 1962)).

131. Any notion that Massiah stood for the proposition that the sixth amendment erects a constitutional barrier to governmental deceit seems to have been foreclosed by Hoffa v. United States, 385 U.S. 293 (1966). Hoffa could not successfully claim that his incriminating statements to a "friend"-informer were coerced, even though the informer had "worm[ed] his way into Hoffa's . . . entourage." Id. at 319 (Warren, C.J., dissenting). Hoffa illustrates how Massiah and Miranda direct the same interrogation scenario to different outcomes. Unlike a Massiah-type case, in which the sixth amendment is triggered by formal proceedings followed by deliberate elicitations but not by police pressure, Hoffa, a pre-formal proceedings case, demonstrates that in a fifth amendment analysis, in which compulsion is the index to admissibility, a suspect's "reliance" upon his misplaced confidence that [the plant] would not reveal his wrongdoing" is bad luck, not compulsion. Id. at 302. See Y. KAMISAR, KAMISAR ESSAYS, supra note 15, at 143 ("[b]ecause Hoffa did not know that his court retainer was a secret government agent, he could not claim that his incriminating statements were the product of legal or factual coercion") (footnotes omitted); 1 W. LAFAYE & J. ISRAEL, supra note 27, § 6.7, at 512-13 ("though Hoffa was fooled he at least had the choice of his companions, but when the suspect's ability to select people with whom he can confide is completely within their control, the police have a unique opportunity to exploit the suspect's vulnerability") (quoting White, Police Trickery in Inducing Confessions, 127 U. Pa. L. Rev. 581, 605 (1979)) (emphasis in original). What you don't know won't hurt you, it seems
CUSTODIAL INTERROGATION

proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.' The notion that timing is everything had become so deeply entrenched that neither the majority nor the dissenters bothered to explain whether the "interrogation" of which they spoke was the same type that appeared in Miranda. Three years later, in United States v. Henry, the Court reiterated its fidelity to its bright-line distinction between the fifth and sixth amendments. This time the Court offered a one-line explanation, stating that the basis of the distinction is that the fifth amendment contains a compulsion requirement whereas the sixth amendment does not. Beyond that observation, however, which no doubt is an important one, neither Henry, its predecessors, nor its critics offers a viable defense of why the absence of a compulsion requirement in the sixth amendment should dictate such potentially disparate results from an admissibility standpoint. Rather, Henry accepts without explanation that

the pressures and anxieties of custodial interrogation are conspicuously absent when a suspect is unaware that police are talking to him. Because Hoffa was not in custody when he confessed, the precedential value of his litigation was unclear until the Court decided Illinois v. Perkins, 110 S. Ct. 2394 (1990), where an in-custody suspect whose severely misplaced confidence in a cellmate/informant led to his murder conviction. See infra notes 220-51 and accompanying text (discussing Supreme Court's recent decision in Perkins, advocating compulsion-based standard in interrogation analysis).

133. Cf. United States v. Henry, 447 U.S. 264, 287 (1980) (Blackmun, J., dissenting) ("Although the Court in Innis emphasized that the Massiah and Miranda rules are distinct, I have some difficulty in identifying a material difference between these formulations.") (citation omitted). The difference in outcome commanded by the two tests is illustrated by comparing Brewer to Rhode Island v. Innis, 446 U.S. 291 (1980), the latter of which would invariably have led to the exclusion of the suspect's incriminating statements had formal proceedings commenced. If not for the officers' knowledge of Williams's peculiar susceptibility to appeals to his Christian decency, then even Brewer might have come out differently were it a pre-arraignment case. Nonetheless, the Innis Court's attempt to distinguish Brewer was half-hearted. See Rhode Island v. Innis, 446 U.S. at 300 n.4 ("The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct.").
135. Id. at 273 (cautioning against "infusing] Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel."); see id. at 282 n.6 (Blackmun, J., dissenting) ("in Miranda cases, the degree of compulsion is critical . . . Massiah, in contrast to Miranda, is not rooted in the Fifth Amendment privilege against self-incrimination"); see also Illinois v. Perkins, 110 S. Ct. at 2397-98 (imposing compulsion requirement when undercover jail plant interrogates incarcerated suspect).
136. At least one scholarly rationale has been offered, although it seems to do little to avoid the circularity of the fifth-sixth distinction:

The fifth amendment protects a personal right that is violated when police act against an individual . . . . The Miranda warnings, by reducing perceived compulsion
the fifth amendment permits police to exert a certain measure of pressure on an unindicted suspect in a compelling custodial setting, but the sixth amendment prohibits law enforcement officers from engaging in any tactics — compelling or not — in a noncustodial setting.¹³⁷

In his dissent, Justice Blackmun, beyond noting the fifth amendment’s compulsion requirement, had “some difficulty in identifying a material difference between” the Massiah and Miranda rules.¹³⁸ Ultimately, Brewer and Henry are better suited to fueling the debate over the Court’s distinction between the right to counsel under the fifth and sixth amendments than to creating a working definition of “interrogation” for purposes of Miranda.¹³⁹ Because the sixth amendment requires formal proceedings and the fifth amendment requires custody and interrogation, and the former refers to a suspect’s right “to have the Assistance of Counsel for his defence”¹⁴⁰ and not to “be[ing] compelled ... to be a witness against himself,”¹⁴¹ the two doctrines have gone their separate ways. While the significant sixth amendment cases recognize that interrogation is relevant in determining whether the government has violated a suspect’s right to counsel, their reliance on police attempts to “deliberately elicit” incriminating responses has relieved the Court of the burden of defining “interrogation.”¹³⁶

¹³⁶ can thus eliminate fifth amendment violations at the moment they might otherwise occur. The sixth amendment is more procedural, protecting the fairness of the adversary process. The fairness of that process becomes an issue only after the commencement of adversary proceedings.

Note, Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the Innis Definition of Interrogation, 87 Mich. L. Rev. 1073, 1088-89 (1989) [hereinafter Confusing the Fifth]. Not only is it unclear why a suspect’s right to counsel is any less “personal” than his right not to be compelled to be a witness against himself, but the above personal/systemic dichotomy ascribes to “formal proceedings” a magical quality that ignores the crucial role that police play in the adversarial process. For a compelling presentation of police as players in the adversarial process, see Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Y. Kamisar, F. Inbau & T. Arnold, Criminal Justice in Our Time 3 (A. Howard ed. 1965).

The Court in Henry offered an explanation as well. Unlike noncustodial sixth amendment settings, fifth amendment encounters place suspects on the firm footing of an “arm’s length” adversarial context in which a suspect “is typically aware that his statements may be used against him.” United States v. Henry, 447 U.S. at 273. The majority’s contract-law analogy was a low point for Miranda, which has not changed so much that its very premise — that suspects unrepresented by counsel typically are not aware that their statements may be used against them — should have been forgotten.

¹³⁷ See supra note 133.
¹³⁸ United States v. Henry, 447 U.S. at 287 (Blackmun, J., dissenting) (citation omitted).
¹³⁹ In many ways, Brewer was an exaggerated, post-indictment version of Rhode Island v. Innis, 446 U.S. 291 (1980). Police ploys in both cases involved indirect or “functional equivalent” questioning which led to incriminating responses and murder convictions. See supra note 133.
¹⁴⁰ U.S. Const. Amend. VI.
¹⁴¹ U.S. Const. Amend. V.
C. The Fifth Amendment Cases

1. Rhode Island v. Innis

The Court has since said that its approach to post-formal proceedings cases is "not necessarily interchangeable" with Miranda's pre-formal proceedings approach. The Court provided more guidance for defining interrogation under the fifth amendment in Rhode Island v. Innis.143

Five days after a Providence taxicab driver was killed by a fare wielding a sawed-off shotgun, another driver told police he had just been held up by a man, also with a sawed-off shotgun.144 The robbery victim identified Innis from a police photo, and directed them to where he had dropped off his assailant. Police found Innis there, arrested him and issued Miranda warnings. After claiming his right to counsel, three officers drove him to the stationhouse.145 On the way, Officers Gleckman and McKenna, in the company of Officer Williams, discussed the missing shotgun:

At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and [that because a school for handicapped children is located nearby], there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.146

Innis then interrupted the officers and instructed them to turn around so he could show them where the gun was.147 Innis was given Miranda warnings again at the scene of his arrest, but he insisted he "wanted to get the gun out of the way because of the kids in the area in the school."148 He then led police to a nearby field where the gun was hidden.149

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142. Rhode Island v. Innis, 446 U.S. at 300 n.4.
143. 446 U.S. 291 (1980).
144. Id. at 293.
145. Id. at 294. Police Captain Leyden told the officers not to "question . . . intimidate or coerce [Innis] in any way." Id. (citation omitted).
146. Id. at 294-95.
147. At that point, they had travelled only a mile in the few minutes they had ridden together. Id. at 295. This fact was relevant to Justice Marshall, who inferred that the questioning must have commenced almost immediately after the officers and the suspect entered the car, thus adding to the pressures on the suspect to speak. Id. at 305-06 (Marshall, J., dissenting). There is some evidence that Officer Gleckman rode beside Innis in the back seat. Id. at 315-16 n.16 (Stevens, J., dissenting).
148. Id. at 295.
149. Id. Police found the deceased driver buried in a shallow grave in Coventry, Rhode Island. He died from a shotgun blast to the back of the head. Id. at 293.
The trial court denied his motion to suppress the statements, but the Rhode Island Supreme Court, relying on Brewer, set aside his conviction because police had interrogated him without first obtaining a waiver of rights.\textsuperscript{150} The Supreme Court granted certiorari to define "interrogation" within the meaning of Miranda.

The divided Court, through Justice Stewart, reversed. The Court rejected any notion that Miranda applies only to express questioning of defendants in custody. Rather, it was the "interrogation environment," "created by the interplay of interrogation and custody," noted the Innis Court, that constituted "interrogation."\textsuperscript{151} Citing Miranda's reliance on psychological ploys meant to elicit confessions, as well as its reference to rigged lineups and other tactics short of express questioning, the Court structured a broad definition of "interrogation," excluding from its definition only statements given "freely and voluntarily."\textsuperscript{152}

More than in any other case since Miranda, the Court in Innis emphasized the nexus between interrogation and custody, but still failed to take that relationship into account in the case before it. After alluding to the way in which "the interplay of interrogation and custody ... undermine the privilege," Justice Stewart wrote that custody "without more" is insufficient to trigger Miranda.\textsuperscript{153} Instead, interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself."\textsuperscript{154} That measure of compulsion arises under express custodial questioning or its functional equivalent, which includes "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."\textsuperscript{155}

The Court stated that the likelihood of incrimination should be assessed under an objective test, evaluated from the suspect's perspective.\textsuperscript{156} In this respect, it departed from the sixth amendment cases, which looked to the subjective intent of police. Under Innis, police intent serves as an informative but not dispositive index to whether police should have known a particular practice was likely to elicit an incriminating response. Accordingly, any police practice designed to

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\item \textsuperscript{150} The state supreme court found that police, however interested in the well-being of children, and however deftly they avoided engaging in direct questioning, subjected Innis to "subtle coercion" equivalent to "interrogation" within the meaning of Miranda. The court suppressed the shotgun and the testimony relating to its discovery, and ordered a new trial. \textit{Id.} at 296-97.
\item \textsuperscript{151} \textit{Id.} at 299 (citing Miranda v. Arizona, 384 U.S. at 457-58).
\item \textsuperscript{152} \textit{Id.} at 299-300 (citing Miranda v. Arizona, 384 U.S. at 478).
\item \textsuperscript{153} \textit{Id.}
\item \textsuperscript{154} \textit{Id.} at 300.
\item \textsuperscript{155} \textit{Id.} at 301.
\item \textsuperscript{156} \textit{Id.}
\end{itemize}
elicit an incriminating response would "likely" be one that police should have anticipated would do so.\textsuperscript{157} The Court completed its new rule with a provision that made police "[un]accountable for the unforeseeable results of their words or actions,"\textsuperscript{158} yet held them answerable for "any knowledge [they] may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion."\textsuperscript{159}

Applying this standard, the Court classified the officers’ conversation as less than express questioning.\textsuperscript{160} Yet because nothing in the record suggested that Innis was "peculiarly susceptible"\textsuperscript{161} to the plight of handicapped children, or that he was "unusually disoriented or upset,"\textsuperscript{162} the Court found that the officers neither fashioned their remarks to elicit an incriminating response, nor should they have expected such a result.\textsuperscript{163} "[A] few offhand remarks," neither "evocative" nor "lengthy," may have "struck a responsive chord" in Innis, but constituted only "subtle compulsion"\textsuperscript{164} no greater than if Innis had unexpectedly confessed while being driven by police "past the site of the concealed weapon while taking the most direct route to the police station."\textsuperscript{165} Although merely driving past the site is a far cry from what the officers actually did, the Court nevertheless held that police did not interrogate Innis within the meaning of \textit{Miranda}.

Four justices wrote separate opinions. Justice White’s one-page concurring opinion held fast to his position in \textit{Brewer}, concluding that

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\textsuperscript{157} In this sense, the subjective intent of officers retained some significance in the majority’s approach:

This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

\textit{Id.} at 301-02 n.7.

\textsuperscript{158} \textit{Id.} at 301-02.

\textsuperscript{159} \textit{Id.} at 302 n.8. That knowledge "might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect." \textit{Id.}

\textsuperscript{160} \textit{Id.} at 302.

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{Id.} at 303. Three years after \textit{Innis}, in California v. Beheler, 463 U.S. 1121 (1983) (per curiam), the Court determined that the drunken, emotionally distraught condition of the suspect was irrelevant to whether he was in police custody. The Court made no attempt to explain the incongruity of \textit{Innis} and \textit{Beheler}.

\textsuperscript{163} The Court thought it natural (and therefore constitutional) for the officers to express their concern for the child’s welfare. Rhode Island v. Innis, 446 U.S. at 303 n.9.

\textsuperscript{164} \textit{Id.} at 303.

\textsuperscript{165} \textit{Id.} at 303 n.10.

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questions without coercion are constitutionally permissible.\footnote{166} Chief Justice Burger concurred in the judgment that Innis had not been interrogated, but rejected the majority’s definition.\footnote{167} Psychiatrists, he wrote, much less police officers, cannot reasonably be expected to spontaneously evaluate the “suggestibility and susceptibility” of an accused.\footnote{168} As a result, he disagreed with that portion of the Court’s holding.

Justice Marshall, on the other hand, while accepting the Court’s definition, rejected only the “ludicrous” result. He noted that Innis endured a 4:30 a.m. arrest, followed by handcuffs, a search, warnings, and a trip in a caged wagon accompanied by three officers.\footnote{169} Those officers, by “‘talking back and forth’ in close quarters with the suspect [and] traveling past the very place where they believed the weapon was located,” became aware of and responsible “for the pressures . . . they created.”\footnote{170} Indeed, the police portrait in which preserving the life of a handicapped “little girl”\footnote{171} turns on recovering a missing weapon would fail to stir only the most callous of suspects.\footnote{172}

Justice Stevens’s dissent challenged not only the Court’s holding, but also its definition of “interrogation.” He offered an alternative definition which contained both an objective and a subjective component.\footnote{173}

\footnote{166} Id. at 304 (White, J., concurring) (citing Brewer v. Williams, 430 U.S. at 429-38) (White, J., dissenting).

\footnote{167} Id. at 304-05 (Burger, C.J., concurring in the judgment).

\footnote{168} Id. (Burger, C.J., concurring in the judgment) (citing id. at 302 n.8).

\footnote{169} Id. at 305-06 (Marshall, J., dissenting).

\footnote{170} Id. (Marshall, J., dissenting).

\footnote{171} Patrolman Williams, one of the three officers who transported Innis from Davenport to Des Moines, said nothing along the way but heard Officer Gleckman say “it would be too bad if the little . . . girl — would pick up the gun, maybe kill herself.” Id. at 295 (citation omitted).

\footnote{172} The common morality play theme that conditions the return to virtue on the expulsion of vice is illustrated in the mid-15th century play “Mankind.” MEDIEVAL DRAMA 901 (D. Bevington ed. 1975). In the officers’ morality play, the return to virtue (the triumph of law and order) was conditioned on saving a handicapped schoolgirl’s life. The expulsion of the vice (the apprehension, prosecution, conviction, and punishment of the wrongdoer), on the other hand, involved finding and removing the gun. Cf. Collins & Welsh, Miranda’s Fate in the Burger Court, THE CENTER MAGAZINE 43, 44-45 (Sept./Oct. 1980) (“defendant was made an unwitting participant in a police-directed morality play.”).

For Justice Marshall, not only was it “ludicrous” to expect such an obvious ploy to be dismissed as idle banter, but appeals to “‘decency and honor’ [are] a classic interrogation technique.” Rhode Island v. Innis, 446 U.S. at 306 (Marshall, J., dissenting) (citing F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 60-62 (2d ed. 1967)). But see Frey, supra note 5, at 732 (Deputy Solicitor General finding it “extraordinary that three members of the United States Supreme Court . . . discern in the Constitution . . . a principle that prohibits police from appealing to the conscience of a person suspected of having committed a serious crime.”).

\footnote{173} In cases where the suspect invokes his rights, “[s]tatements that appear to call for a response from the suspect, as well as those that are designed to do so, should be considered interrogation.” Rhode Island v. Innis, 446 U.S. at 311 (Stevens, J., dissenting).
Under the objective component, "any statement that would normally be understood by the average listener as calling for a response is the functional equivalent of a direct question, whether or not it is punctuated by a question mark." That component was intended to shift the majority’s prohibition of "interrogation that is likely to be successful" to a flat ban against "any interrogation at all." Under the subjective component, once a suspect exercises his right to cut off questioning, police "are prohibited from making deliberate attempts to elicit statements from the suspect."

His adaptation of the subjective test to pre-formal proceedings called on the work of Professor Yale Kamisar, whose article furnished the rationale for treating fifth and sixth amendment interrogation identically once a suspect invokes the right to counsel. In insisting on the subjective approach, Justice Stevens rejected the majority’s conclusion that his test was likely to be coextensive with theirs. In his view, police often conduct interrogations fully expecting failure. As a result, he strongly disapproved of a test that would admit into evidence the fruits of every longshot police tactic and that would exclude only those statements actually phrased as questions.

Justice Stevens failed to explain how an officer’s undisclosed intentions are relevant when the suspect is unaware of the interrogation en-
vironment. But his lack of concern for the problems with relying on officers’ undisclosed intentions is lessened somewhat by design. The subjective element of Justice Stevens’ approach applies only when the suspect invokes the right to counsel. In those cases, the police-suspect encounter begins to resemble a post-indictment case; invocation of the right to counsel arguably moves the case one step closer to the sixth amendment, one step closer to a “critical stage” of the trial episode. At that point, as the sixth amendment cases make clear, protections are greater; even noncompelling tactics are impermissible. Although a view that merges fifth and sixth amendment standards for suspects who invoke their rights has much to recommend it, the Court has held otherwise.

181. For example, it would hardly pass the straight-face test to argue that officers created an interrogation environment merely by driving past the site where the evidence was hidden, secretly desiring that the suspect would be provoked into incriminating himself. See 1 W. LAFAVÉ & J. ISRAEL, supra note 119, § 6.7, at 499-503 (discussing Innis and the Supreme Court’s “functional equivalent” test for determining when interrogation has occurred). The outcome would be different, however, if police went out of their way in order to bring the suspect to the site. The test case for whether protections should be extended to suspects who are unaware of the interrogation environment is Illinois v. Perkins, 110 S. Ct. 2394 (1990), discussed infra notes 220-51 and accompanying text.


183. At the very least, Justice Stevens’s “intent of the officer” test successfully relieves police of the impossible task of evaluating with precision the “likelihood” that a suspect will offer an incriminating response. According to one commentator, at least two views other than Justice Stevens’s have been presented in the academic community. See Note, Confusing the Fifth, supra note 136, at 1084-87 (discussing scholarly comment on Innis’s “reasonably likely to elicit” standard). The first view, Professor Welsh White’s, is designed to preserve both the objective approach and a close correlation between the officer’s purpose and the Court’s “reasonably likely” standard. White, Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry, 78 MICh. L. REv. 1209, 1225-31 (1980). Professors LaFaye and Israel have endorsed White’s test, which states that Innis should be interpreted to turn on the objective purpose manifested by police. 1 W. LAFAVÉ & J. ISRAEL, supra note 119, § 6.7, at 502-03. An officer should know his actions are reasonably likely to elicit an incriminating response when he knows that the suspect will view them as designed to achieve that purpose. If, therefore, an objective observer possessing the same knowledge of the suspect as does the officer would, on hearing the officer’s remarks, infer that they were designed to elicit an incriminating response, then the remarks are “interrogation.” Professor Kamisar’s view, on the other hand, relies on the level of “coerciveness” of police conduct, not the likelihood of success or the government’s purpose. KAMISAR REMARKS, supra note 182, at 37.

184. See Edwards v. Arizona, 451 U.S. at 484-85 (protecting suspects who have claimed right only from continued “interrogation”).
2. *Arizona v. Mauro*

*Arizona v. Mauro*\(^{185}\) enters where *Innis* broke down, the point at which police have the responsibility of predicting how likely a particular practice is to induce an incriminating response. William Mauro entered a K mart store claiming to have murdered his son.\(^{186}\) After police arrived, he led them to the child's body, and, like his counterpart *Innis*, invoked his right to counsel after receiving proper *Miranda* warnings.\(^{187}\) Lacking a secure place to detain Mauro, police put him in the office of Flagstaff Police Captain Latham. Meanwhile, a Detective Manson was in another room questioning Mauro's wife, who had made "insistent demands" to speak to her husband.\(^{188}\) Manson consulted with his sergeant, and then told the couple they could speak together only in his presence. He brought Mrs. Mauro to the captain's office and seated himself at the desk, placing a tape recorder on top.\(^{189}\) In the Mauros' brief conversation, Mrs. Mauro expressed regret that they neglected to put their battered son in the hospital, and worried whether they could afford to bury the boy.\(^{190}\) Mr. Mauro admonished her to "shut up" until receiving "rights of attorney."\(^{191}\)

Relying at trial on an insanity defense, Mauro moved on *Innis* grounds to suppress the tape, which the prosecution presented as evidence of his sanity on the day of the crime.\(^{192}\) The trial court denied the motion, concluding that because police were motivated by "safety," "security," and the possibility that the Mauros "might cook up a lie," the procedure was proper.\(^{193}\) Mauro was convicted of murder and child abuse, and sentenced to death.\(^{194}\)

\(^{185}\) 481 U.S. 520 (1987).

\(^{186}\) Arizona v. Mauro, 481 U.S. at 521.

\(^{187}\) *Id.* at 522.

\(^{188}\) *Id.* at 522, 528. The trial court found that officers had tried to discourage her from talking to her husband. *Id.* at 528.

\(^{189}\) *Id.* at 522. It was undisputed that Detective Manson placed the tape recorder in "plain sight." *Id.*

\(^{190}\) *Id.* at 522 n.1.

\(^{191}\) *Id.*

\(^{192}\) *Id.* at 523. *Mauro* dispels the myth that *Miranda* violations are used by defense lawyers only in the guilt phase of criminal prosecutions. See *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1094-1100 (6th Cir. 1990) (en banc) (*Miranda* error harmless in neither guilt phase of case nor in sentencing phase).

\(^{193}\) Arizona v. Mauro, 481 U.S. at 523.

\(^{194}\) *Id.* at 524. On remand, the state court upheld the convictions for first degree murder and child abuse, but found that the defendant's mental instability was a mitigating factor in justifying the reduction of the death penalty to life imprisonment. *State v. Mauro*, 159 Ariz. 186, 209, 766 P.2d 59, 82 (1988).
The Arizona Supreme Court accepted Mauro's *Innis* argument and reversed the trial court's admission of the tape.195 The sergeant's admission that it was "possible" the conversation would yield incriminating statements led the state's highest court to conclude that "possible" was "likely" enough to satisfy *Innis*, and therefore held that the police "interrogated" Mauro.196 The United States Supreme Court granted the State's petition for certiorari to correct the Arizona Supreme Court's misconstruction of *Innis*.197

After reviewing *Miranda* and *Innis*, the five-justice majority, through Justice Powell,198 concluded that Flagstaff police did not subject Mauro to "compelling influences, psychological ploys, or direct questioning,"199 or interrogation by any other name. *Mauro* highlights the two significant flaws of *Innis*. First, even though the suspect in both cases was warned and invoked his right to counsel, in order to "scrupulously honor" an invocation of rights, police need only avoid doing what the law proscribes them from doing before the suspect invoked the right. By failing to give greater breadth to "scrupulously honor," the Court perpetuated the practice, begun in *Innis*, of collapsing second-level (post-warnings) into first-level (pre-warnings) *Miranda* analysis.200 The result is similar to that obtained in significant deprivations analysis where, by collapsing significant deprivations and custody standards, the Court vitiates protections offered by the former by subsuming them in the less protective safeguards of the latter. Here, however, the result may be more nefarious. It makes plain that suspects who claim their constitutional rights receive no greater protections from coercive police tactics than those who do not.201

As in *Innis*, the Court considered only whether Mauro was interrogated, and in so doing, relied most heavily on *Innis's* problematical mathematics of self-incrimination. Accepting the Arizona Supreme

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196. Id. at 524-25 & n.2.
197. Id. at 525.
198. Justice Powell was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia.
199. Id. at 529. During the brief conversation, Manson asked two questions, both apparently directed at Mrs. Mauro: "Do you know a reverend or a priest or someone you can talk to — take care of David?" and "Did you want to talk to your husband any more?" Id. at 523 n.1. As the majority noted, "Detective Manson asked [Mr.] Mauro no questions about the crime or his conduct." Id. at 527.
200. Professor Kamisar challenged the way the Court framed the issue raised in the petition. Given that Mauro received warnings and invoked his right to counsel, the precise issue under *Miranda* was not the first-level question of whether police interrogated Mauro, but the second-level question of whether they had scrupulously honored his claimed rights. KAMISAR REMARKS, supra note 182, at 34-36.
Court's reasoning, but not its holding, the Court noted that the officers were aware that Mauro possibly would incriminate himself if permitted to speak with his wife.\textsuperscript{202} The state court thus expanded "possible" into "likely." The Supreme Court, however, reasoned that "likely" here was not as likely as the "subtle compulsion" found permissible in \textit{Innis}, and thus not "likely" enough to warrant exclusion of the statements under \textit{Innis}.\textsuperscript{203} As "volunteered statements" within the meaning of \textit{Miranda}, the Court found that police had not attempted to capitalize on "the coercive nature of confinement" in order to extract a confession. Rather, the Court said, in permitting the Mauros to confer, but refusing to allow them to do so privately, police "acted reasonably and lawfully."\textsuperscript{204}

Justice Stevens wrote for the four dissenting Justices, measuring interrogation, as he did in \textit{Innis}, from the subjective intentions of police in cases where the suspect has invoked the right to counsel.\textsuperscript{203} A conspicuous lack of advance warning that the conversation would be taped, he argued, helped police convert Mrs. Mauro's wish to speak to her husband into a "powerful psychological ploy" amounting to "interrogation."\textsuperscript{206} Moreover, Detective Manson,\textsuperscript{207} Sergeant Allen,\textsuperscript{208} and Captain Latham\textsuperscript{209} each testified at trial that they viewed the Mauros' conversation as a potential source of incriminating evidence. With this in mind, Justice Stevens tried his own hand at mathematics. For him, the orchestrated conversation made incriminating statements "not only likely, but highly probable."\textsuperscript{210}

The mitigating factors cited by the majority were, in Justice Stevens's view, unpersuasive.\textsuperscript{211} That police could lay claim to a legitimate security-based motive for witnessing and recording the conversation should

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\textsuperscript{202} Arizona v. Mauro, 481 U.S. at 528-29 & n.6.
\textsuperscript{203} \textit{Id.} Just how Sergeant Allen's testimony that he "knew it was possible that [Mauro] might make incriminating statements," permitted the Arizona Supreme Court to conclude that police knew "incriminating statements were likely to be made," did not seem to concern the Supreme Court. \textit{Id.} at 524 n.2 (emphasis added).
\textsuperscript{204} \textit{Id.} at 530.
\textsuperscript{205} \textit{Id.} at 532 (Stevens, J., dissenting); see also 1 W. LAFAVE \& J. ISRAEL, CRIMINAL PROCEDURE § 6:7, at 94-95 (Supp. 1990) (stating that in majority's view, neither subjective intent of police nor their actual perception of scenario is controlling); Note, Criminal Procedure, 19 Tex. Tech. L. Rev. 1195, 1204-05 (1988) (Mauro flouts \textit{Innis}'s recognition of relevance of police motivations).
\textsuperscript{206} Arizona v. Mauro, 481 U.S. at 530-31 & n.2 (Stevens, J., dissenting). His advance-warning argument, however, suffers from a record that can be read as easily to the contrary. \textit{Id.} at 527-28 n.5.
\textsuperscript{207} \textit{Id.} at 530-31 n.1 (Stevens, J., dissenting).
\textsuperscript{208} \textit{Id.} at 524 n.2.
\textsuperscript{209} \textit{Id.} at 535 (Stevens, J., dissenting).
\textsuperscript{210} \textit{Id.} at 536 (Stevens, J., dissenting).
\textsuperscript{211} \textit{Id.} (Stevens, J., dissenting).
\end{footnotesize}
not avoid the consequences of an illegitimate motive. And even though Mrs. Mauro insisted on seeing her husband, the time, place, and manner of the meeting were subject to police exploitation. Justice Stevens saw no need to answer the majority’s claim that police did not “compel or even encourage” Mauro to speak with his wife or to incriminate himself. As he argued in Innis, once a suspect invokes his right to counsel, police admissions of their subjective intent are enough without resort to an objective approach.

Like Innis, Mauro leads reviewing courts to attempt measurements of the “likelihood” of incrimination. Because such attempts invariably lead to inaccuracies, a shift in focus in the interrogation inquiry may be in order. The majority suggested, if only indirectly, that the inquiry be infused with the core essence of the fifth amendment privilege — a threshold requirement of at least some measure of compulsion before Miranda attaches. That way, the fact that it was Mrs. Mauro’s idea to speak with her husband — a fact of questionable materiality under Innis — becomes highly relevant. How a conversation, even if staged, witnessed, and recorded, which is held at the parties’ (or at least one party’s) request, or, as in this case “insistence,” can “compel” is difficult to conceptualize. No one who wishes to remain silent would insist on speaking, certainly not to authorities. Yet by insisting on

212. Id. (Stevens, J., dissenting). It has been said that so long as the police conduct is likely to elicit incriminating statements and thus endanger the privilege, it is police ‘interrogation’ regardless of its primary purpose or motivation, and that if it otherwise qualifies as ‘interrogation,’ it does not become something else because the interrogator[] has another purpose] rather than the procuring of incriminating statements. . . .

Y. Kamisar, Kamisar Essays, supra note 15, at 146 (citing Graham, supra note 10, at 104-06, 126-29). This definition of “interrogation” is close to the one the Court subsequently adopted for use in fifth amendment settings. See Rhode Island v. Innis, 446 U.S. at 301 (holding that “interrogation” refers to any words or actions by police that they should know are reasonably likely to elicit incriminating response from suspect).


214. Id. (Stevens, J., dissenting).

215. Id. at 534 (Stevens, J., dissenting).

216. “Mauro was not subjected to compelling influences, psychological ploys, or direct questioning.” Id. at 529. Nor did police use “the coercive nature of confinement to extract [a] confession.” Id. at 530.

217. See Kamisar Remarks, supra note 182, at 37-48. Professors LaFave and Israel, however, seem to disagree with this observation. In their view, Mauro’s keepers, by arranging the meeting to be conducted in their presence, made it clear to Mauro (and any objective observer for that matter) that the setting called for a response. 1 W. LaFave & J. Israel, Criminal Procedure § 6.7, at 80 (Supp. 1989). Whether it mattered that the meeting was suspect-initiated, they did not address. Furthermore, discomfort with the Flagstaff officers’ conduct may flow from a perceived sanctity about the marital relationship that cannot be captured by Byzantine tests about “likelihood” or “compulsion.” How many of Mauro’s opponents would hold fast if the couple had been unmarried suspects whose only relationship was as partners in crime?
speaking to a co-suspect and not to authorities, Mrs. Mauro handed police an unenviable trilemma: 1) paternalistically save the couple from their impulses to incriminate themselves by prohibiting the conversation; 2) permit the conversation to take place in private despite the security risks (assuming the risks are real); or 3) gladly accept the windfall testimony offered by the couple, either by taping or simply witnessing the conversation. The third option, the one police chose, lacks the paternalism underlying the first option, but does not by itself contain a degree of compulsion sufficient to implicate the privilege.

This result shows the poverty of the Innis standard, if taken literally.218 "Reasonably likely" is broad enough to exclude evidence obtained without a trace of compulsion. Thus, the justices are forced to resort, as they were here, to the familiar tools of legal reasoning needed to temper Innis. Perhaps, then, in cases involving first-level Miranda rights, the better view would be to amend Innis to include any words or actions that create an atmosphere of compulsion sufficient to elicit an incriminating response. That way, the foundation of the privilege would make its way into the calculus, thereby preventing zero-pressure tactics from resulting in the exclusion of confessions, while doing so in a forthright manner. In cases involving second-level rights, a stricter restriction on police conduct is in order. In those cases, where the suspect’s invocation of rights pushes the case closer to the critical stages of the accusatorial process, police conduct need not be compelling enough to constitute "interrogation" in order to be "unscrupulous" enough to demand exclusion. As Justice Stevens and Professor Kamisar have suggested, rather than require compulsion in second-level rights cases, "scrupulous" respect of a suspect's invocation of rights should mirror the more suspect-minded sixth amendment standard.

3. Illinois v. Perkins

More than any of its predecessors, the Court's pronouncement in Illinois v. Perkins220 openly advocates the need for such a compulsion-

218. The very result in Innis demonstrates that the Court intended that the definition not be taken at its word. A literal application of the standard articulated in that case would invalidate confessions obtained from police communication to the suspect about the strength of the prosecution's case against him, or when an undercover jail plant extracts a confession from an unwitting, incarcerated suspect. 1 W. LaFave & J. Israel, supra note 27, §6.7, at 511-14. E.g., Lewis v. Florida, 486 U.S. 1036, 1037 (1986) (White, J., dissenting from denial of certiorari). But see Perkins v. Illinois, 110 S. Ct. at 2397 (jail plant interrogation of unwarned suspect permitted under Miranda); infra notes 220-51 and accompanying text (discussing Perkins).


based standard in interrogation analysis. In *Perkins*, the Court held that incriminating statements obtained through undercover jail plants whose official identities were hidden from an unwarned suspect were permissible under *Miranda*. While Perkins was being held in an Illinois county jail on aggravated battery charges, a government informant, Charlton, masquerading as a confidant, together with Parisi, an undercover police officer, elicited a confession from him. Charlton and Parisi extracted the confession through "casual conversation" pursuant to a government ruse designed to hoodwink Perkins into disclosing his role in the unsolved East St. Louis murder of a man named Stephenson.

Earlier, Charlton had been a co-inmate of Perkins in an Illinois penitentiary where Perkins told him about a contract felony-murder he had committed. Motivated by his belief that "[p]eople shouldn't kill people," Charlton revealed to police facts about the unsolved murder that only a perpetrator could have known. Police subsequently traced the recently released Perkins to the county jail, where Parisi and Charlton, placed in a cell with Perkins, suggested that the three of them attempt a "break-out." Parisi told Perkins that the escape might involve some killing, and then asked Perkins whether he had ever "‘done’" anybody. In response, Perkins launched into a diatribe on the details of the Stephenson murder. After the appellate court affirmed on *Miranda* grounds the trial court's suppression of the jailhouse confession, the Supreme Court granted certiorari to answer

221. *Id.* at 2397. Neither Justice Kennedy, writing for the Court, nor Justices Brennan or Marshall, writing separately, characterized *Perkins* as an "interrogation" case, although it would make little sense to call it anything else.

222. *Id.* at 2396.

223. *Id.*

224. *Id.* Perkins's account of the tale is detailed. He had been paid $5,000 by a man who wanted Stephenson (the victim) maimed because Stephenson owed the man money for drugs and was having an affair with the man's wife. After casing Stephenson's house for about a week, Perkins, armed with a .12 gauge shotgun, approached his victim, asked him to step into the garage, asked him whether his name was "Steve," then shot him in the right leg. The blast severed Stephenson's femoral artery; he bled to death in 30 seconds. Perkins escaped with two confederates by car. BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER at 4-5 n.2, Illinois v. Perkins, 110 S. Ct. 2394 (1990) (No. 88-1972).

225. PETITIONER'S BRIEF, supra note 224, at 2.

226. Illinois v. Perkins, 110 S. Ct. at 2396. Parisi told Perkins that he "‘wasn’t going to do any more time,’” and suggested that the three of them escape. Perkins believed that the three men (with the help of his girlfriend, who allegedly could smuggle a pistol into them) could "break out" of the "‘rinky-dink’" county jail. *Id.*

227. *Id.*

228. *Id.*

whether undercover agents must issue incarcerated suspects *Miranda* warnings before interrogating them.

With the future of all undercover investigations of incarcerated suspects at stake, Justice Kennedy began the Court's opinion by observing that the paradigmatic compulsion of police-dominated settings is absent when a suspect "freely" speaks to someone donning prison grays rather than police blues.230 *Innis*, stated the Court, stands for the proposition that "[c]oercion is determined from the perspective of the suspect."231 He went so far as to allude to *Miranda*’s "interplay" language,222 but declined to discuss how that interplay of custody and interrogation played upon Perkins’s will. After conceding that Perkins was "in custody in a technical sense,"233 the Court, presumably addressing the interrogation component, concluded that "*Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates."234

Because even the most restrictive reading of *Innis* would recognize Parisi’s direct questioning ("Have you ever ‘done’ anybody?") as "reasonably likely to elicit an incriminating response,"235 the Court’s decision to decide the interrogation question against Perkins is explainable only by the unique facts of the case. When a suspect is unaware that he is dealing with government authorities, *Innis*’s interrogation standard drops out. Thus, the Court’s attempt to distinguish *Mathis*, a prison-cell interrogation held to violate *Miranda*, centered on Mathis’s awareness that he was dealing with officials, not on the fact that Mathis was "interrogated" and Perkins was not.236 If Perkins admittedly was in custody, and officers clearly interrogated him within the meaning of *Innis*, then the question arises: on what basis could the Court avoid the dictates of *Miranda*?

At this point, *Berkemer* comes to mind. *Berkemer* did not expressly pronounce an exception to *Miranda*, perhaps because it was reluctant


231. Id. (citing Rhode Island v. Innis, 446 U.S. at 301). There are two problems with this observation. First, *Innis* said "interrogation" — not "coercion" — is judged from a suspect’s perspective. Rhode Island v. Innis, 446 U.S. at 300. Second, the Court seems to have forgotten its own recognition in *Innis* that police motives are relevant to whether a suspect is interrogated within the meaning of *Miranda*. Id. at 301-02 n.7.


233. Id.

234. Id. at 2398.

235. Rhode Island v. Innis, 446 U.S. at 301, 303.

236. Illinois v. Perkins, 110 S. Ct. at 2398. In neither *Mathis* nor *Perkins* did the Court take seriously the government’s claim that incarceration on an unrelated charge is somehow less restrictive than "custody" or is less than a significant deprivation of freedom.
to do so only three weeks after it had announced another exception, Quarles's "public safety" exception. However, the holdings of both Berkemer and Perkins are exceptions of a sort. While Berkemer avoided the literal language of Miranda by concluding that not all significant deprivations of freedom deserve warnings, Perkins did so by concluding that in an interrogation context some measure of compulsion must be present before Miranda will attach. When juxtaposed to Berkemer, the Perkins exception seems benign. In the former, the Court "decline[d] to accord talismanic power" to Miranda's protection of significant deprivations, even though "a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers." In other words, the Court in Berkemer dodged Miranda, fully aware that custodial restraint always is compelling. Interrogation by undercover agents, however, is not.

Not only is the Perkins exception harmlessly narrow, but it was also made easier by the existence of a case already decided. In Hoffa v. United States, decided the term after Miranda, a jailbird-turned-informant "worm[ed] his way into Hoffa's hotel suite ... and ... entourage," and gave the government (in exchange for very favorable treatment) information about Jimmy Hoffa's attempt to bribe jurors in Hoffa's Taft-Hartley Act trial. Hoffa's lawyers fired constitutional claims at the Court, from fourth, fifth, and sixth amendment arguments to due process and amorphous privacy claims. Over a forceful dissent in which Chief Justice Warren decried the self-serving testimony

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237. See New York v. Quarles, 467 U.S. at 655 (public safety exception to Miranda requirements). Exceptions seem to come in pairs. Perkins was accompanied by a "routine booking question" exception. See Pennsylvania v. Muniz, 110 S. Ct. 2638, 2650 (1990) (declaring this exception); see also supra note 119 (discussing Muniz).

238. Illinois v. Perkins, 110 S. Ct. at 2397. "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within Miranda's concerns." Id. (citing Oregon v. Mathiason, 429 U.S. at 495) (officer's false statement to unwarned suspect that suspect's fingerprints had been found at crime scene had "nothing to do with whether respondent was in custody").


240. Id. at 436.

241. A liberal perspective would view Perkins as a missed opportunity to retreat from the bright line of Massiah, thus granting the same protections that benefitted "formal proceedings" suspects like Massiah, Brewer, and Henry to in-custody suspects like Perkins. Such an expansive view of constitutional protections, reminiscent of Escobedo's "focus" test, is no longer viable.


243. Id. at 319 (Warren, C.J., dissenting).

244. Although Justice Douglas voted to dismiss the writ of certiorari in Hoffa, he wrote in Osborn v. United States, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting) (decided the same day) that Hoffa, Osborn, and Lewis v. United States, 385 U.S. 206 (1966) (also decided the same day) each involved "aggressive breaches of privacy by the Government," breaches of the "aura of
that the government had purchased at a price too high for any jailbird to resist, the Court, reaching back to Chief Justice Marshall’s review of the 1807 trial of Aaron Burr, wrote that “a necessary element of compulsory self-incrimination is some kind of compulsion.” Thus, Perkins, it seems, had been settled years ago.

For dissenting Justice Marshall, however, Hoffa lacked a critical element that distinguished it from Perkins: Hoffa was not incarcerated when he incriminated himself. Showing a certain measure of sensitivity to the synergistic relationship of custody and interrogation, Justice Marshall refused to extend to the government the privilege to treat incarcerated and unincarcerated suspects identically. The pressures unique to custody, he argued, increase the likelihood of jailhouse bravado and hence, of confessions. Despite Justice Marshall’s protest, to say that an incarcerated suspect (like Perkins) deserves no greater protection from surreptitious government deceit than does a suspect temporarily free on bail (like Hoffa) is no great leap. In both cases the suspect’s compulsion level was at or near zero.

Justice Brennan, in his concurring opinion, observed that the basis of exclusion in undercover pre-indictment interrogations of incarcerated suspects is the due process clause, not the privilege. In Brennan’s view, if after Perkins the government assumes disguises, from friend or family to priest or defense lawyer, relaxing the limits on the intrusive indignities of criminal investigations, such deception still may be subject to exclusion. As long as the undercover agent’s role is hidden from the suspect, however, the privilege is not implicated.

Justice Brennan’s analysis stopped short of considering what would happen if the undercover agents went beyond mere conversation in their attempt to obtain a confession. If “an undercover police officer beats a confession out of a suspect,” and the confession is held at trial to be admissible because “the suspect thought the officer was another...
prisoner," the suspect still may get some relief from the privilege. In that scenario, the suspect properly would perceive he was being compelled to incriminate himself; his ignorance of his assailant's identity in that instance would be irrelevant. Absent such obvious indicia of compulsion, however, the basis of exclusion, if any, would be the due process clause, not the privilege.

D. Summary

Considering the frequency with which the significant deprivations element of Miranda's two-step analysis has been litigated, the interrogation element has played a comparatively subordinate role in Supreme Court jurisprudence. Although the Miranda majority seemed amenable to including the functional equivalent of express questioning within its protective ambit, the number of cases selected for Supreme Court review has been conspicuously few. As a result, the Court's definition of interrogation has had little chance to develop through repeated litigation.

In this context, Miranda's legacy is limited to Innis, Mauro, and Perkins. Collectively, these cases reveal that even a presumption of coercion requires at least some coercion before the presumption attaches in a given police-suspect encounter. Innis, still considered the

249. Id. at 2404 (Marshall, J., dissenting). Justice Marshall raised but did not answer the question. Id. (Marshall, J., dissenting). Perkins has been promptly felt in the lower courts. In Alexander v. Connecticut, 876 F.2d 277 (2d Cir. 1989), a prisoner, serving a term for arson, confessed to a visitor that he had committed a murder to keep the arson a secret. The visitor, angered by the fact that the murder to which the prisoner confessed was of a long-time friend of his, went to authorities. On a second visit, this time as a government agent, the visitor obtained a second confession, replete with directions to the decomposing body. On habeas, the Second Circuit excluded the second confession. Alexander v. Connecticut, 876 F.2d at 283. On certiorari, the Supreme Court vacated and remanded to that court for reconsideration under Perkins. Meachum v. Alexander, 110 S. Ct. 2607, 2607 (1990); Alexander v. Connecticut, 917 F.2d 747 (2d Cir. 1990) (on remand) (denying petitioner's writ for habeas corpus on Perkins grounds).

250. Conversation with Donald Dripps, Professor of Law, University of Illinois (Dec. 27, 1990).

251. Due Process claims face an imposing legal standard. Police conduct must be "so offensive as to deprive [the suspect] of . . . fundamental fairness," must be "violative of canons fundamental to the traditions and conscience of our people," Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), and must be so "egregious," that it "so shocks the sensibilities of civilized society as to warrant a federal intrusion on the criminal processes of the States." Moran v. Burbine, 475 U.S. 412, 433-34 (1986).

252. Whatever educational value Brewer and Henry might otherwise have had was vitiated by their failure to delve into the meaning of "interrogation," as neither case made any effort to elaborate on the Court's cryptic statement in Innis that "the definitions of 'interrogation' under the Fifth and Sixth Amendments . . . are not necessarily interchangeable." Rhode Island v. Innis, 446 U.S. at 300 n.4. Cf. Y. Kamisar, Kamisar Essays, supra note 15 (treating Brewer as if Christian burial speech had occurred pre-arraignment); While, Interrogation Without Questions, supra note 182 (same).
primary "interrogation" case, seemed at first to have broad implications, initially debunking the myth that police interrogation comes in only one strand, then going so far as proscribing any words or actions likely to elicit an incriminating response. The Court's own standard seemingly would encompass the very tactics resorted to in that case. But it did not, perhaps because one justice's "likelihood" is another's "improbability." With the vagaries of police evaluations of the likelihood of self-incrimination serving as a safety valve through which the Court restricted its otherwise broad definition of interrogation, Innis's major contribution to Miranda's notion of interrogation may be its admonition that interrogation requires "a measure of compulsion above and beyond that inherent in custody itself."²⁵³ Although that observation properly alluded to the fifth amendment's compulsion requirement, it offered no guidance as to how reviewing courts, prosecutors, or defendants should prospectively distinguish the precise measure of compulsion which implicates Miranda from the "subtle coercion"²⁵⁴ that does not.

Mauro is the corner into which the Court painted itself in Innis. It is highlighted by a debate among majority and dissenting justices that pitted "possibility" against "reasonably likely" or even "highly probable," and the "subtle compulsion" of Innis against the even milder compulsion found in Mauro, combined as well with the struggle to weight the importance of police admissions of their subjective intentions. Like Innis, Mauro's only contribution may be its reference to the lack of "compelling influences,"²⁵⁵ or police exploitation of "the coercive nature of confinement to extract [a] confession."²⁵⁶ The usefulness of those decisions, therefore, may lie not in the unworkable likelihood standard, but in their move toward insinuating the text of the privilege — a proscription against compelled confessions — into Miranda.

That move is obvious in Perkins, where the application problems of a "likelihood of incrimination" standard yielded to a test cognizant of the principles underlying the privilege. Adherence to those principles would prohibit only those practices that create an environment of compulsion, not those practices dependent on police officers' "reasonable calculations" and on-the-spot evaluations of the "unusual susceptibilities" of suspects. But because of its unique facts, Perkins will have only negligible influence on Innis and Mauro. Its compulsion-based standard, which Innis and Mauro anticipated, commands a narrow ap-

²⁵³. Rhode Island v. Innis, 446 U.S. at 300.
²⁵⁴. Id. at 303.
²⁵⁶. Id. at 530.
plication limited to undercover jail-plant interrogations. Thus, it remains to be seen whether the Court openly will infuse a compulsion element into its analysis or will seek the same result by continuing its parsimonious application of the Innis standard.

III. A SYNERGISTIC MODEL OF CUSTODIAL INTERROGATION

A. Three Approaches: Exclusivity, Interplay & Synergy

Given the difficulties of the distinct custody and interrogation inquiries, the margin of error in judicial decisionmaking only worsens when, as Miranda requires, both elements are evaluated in every instance. Regrettably, the "functional equivalent of arrest"257 standard reviewed in Part I, and Innis's "functional equivalent of interrogation"258 test reviewed in Part II confuse more than enlighten. Aside from their deficiencies as standards for admissibility, neither obeys the need to view custody and interrogation together. The result has been some questionable decisions. This Article suggests a new sensitivity to and revision of Professor Kamisar's observation259 — subsequently endorsed by the Court260 — that it is "the interplay of custody and interrogation"261 that "subjugate[s] [a suspect] to the will of his examiner."262 With the effects of interplay in mind, this Article attempts to offer a rough method of measuring and illustrating those effects.263

When Justice Stewart wrote in Innis that "'interrogation' . . . must reflect a measure of compulsion above and beyond that inherent in custody itself;" he recognized how custody and interrogation work together to undermine a suspect's will to resist police pressures.264 The Court's holdings, however, before, after and in Innis itself, say otherwise. A more accurate description of the Court's approach posits custody and interrogation as independent elements of police restraint, each with its own requirements and variables, yet neither dependent on or even influenced by the other.

257. See supra note 27 and accompanying text (suspect who is under arrest or its equivalent is in custody for purposes of Miranda).
258. See supra note 116 and accompanying text (discussing "interrogation").
259. See supra note 15 (discussing Kamisar's coining of term "interplay").
260. Rhode Island v. Innis, 446 U.S. at 299.
261. Id.
263. Absent any verifiably accurate method of measuring compulsion, any such attempt must presume, as this Article does, that differences in degree of compulsion occasioned by various police tactics and custodial settings are discernible from the accounts rendered in appellate opinions.
264. Rhode Island v. Innis, 446 U.S. at 300.
CUSTODIAL INTERROGATION

If viewed separately, as illustrated by the right-angled line on the graph below, both elements must in each case reach a certain threshold of compulsion before *Miranda* attaches. This describes the Court's actual practice, notwithstanding Justice Stewart's gesture in *Innis* quoted above.\[265\] To illustrate the Court's view, under which custody and interrogation are considered as independent of one another, assume that on the vertical axis, "10" represents the quantum of pressure that an interrogation technique must exert on a suspect before the *Innis* standard is met. Assume also that on the horizontal axis, "10" represents the level of restraint necessary before a suspect can be said to be in custody or to have suffered a significant deprivation of freedom. The area below the right-angled line illustrates the Court's field of legitimate police practices, while all practices falling on or above the line are per se illegal.

Without accounting for the effect of custody and interrogation on each other, the Court ignores that its own reference in *Innis* to "interplay" was a recognition of how both elements must be read together. "Interplay" may mean that a high level of interrogation must be considered in evaluating the legal consequences of an otherwise low level of custody, and that a high level of custody should inform the Court's evaluation of an otherwise low level of interrogation. For example, in a setting where one component is by itself insufficient to warrant *Miranda* warnings but the other is highly compelling, the higher component may compensate for the "shortcomings" of the component that features a lower level of compulsion. *Miranda*, then, attaches whenever both elements aggregately exert on a suspect a certain level of compulsion (in this case "20"), even if one element standing alone is below that threshold. The three-sided line below illustrates such an integrated or interplay theory, under which one highly compelling element is viewed as capable of compensating for its co-element, which may be lower than the Court would require when both elements are viewed independently. The admissibility results of an interplay perspective are shown below, where points "A" and "B" represent lopsided encounters in which high-pressure police tactics on one axis are accompanied by low-pressure tactics on the other. Both points illustrate scenarios that would lead to statements admissible under the Court's view, but inadmissible under an interplay approach.

It is just as possible, however, that rather than an interactive relationship, the Court's allusion to "interplay" may actually have envisioned a synergistic relationship. "Synergy" describes how two forces,
acting together, create a whole system in which each element acts in a manner unpredicted by the behavior of its parts taken separately.\textsuperscript{266} It has been defined as "the combined action of two or more agents (as drugs) that is greater than the sum of the action of one of the agents used alone,"\textsuperscript{267} and describes, for example, how metals such as chrome-nickel-steel have a tensile strength that well exceeds the cumulative strength of its three links.\textsuperscript{268}

Accordingly, the curved line depicts the synergy theory, positing not only that one component can compensate for its lower-level analogue, but that in some instances, both elements work together to coerce a suspect even though, if represented graphically, both elements would fall below the Court's threshold. A synergy view, unlike an interplay perspective, views each element as augmenting the other, rather than merely being added to the other. The grated area between the synergy and interplay lines, therefore, like the grated area between interplay and the Court's actual practice, represents the settings in which police practices that would be impermissible under the former would be allowable under the latter.\textsuperscript{269} Under both those views, police, when imposing a severe level of custodial restraint on a suspect, excite in the suspect a heightened sensitivity to whatever interrogation techniques are used. In contrast, a low level of custodial restraint affords police greater leeway in interrogating a suspect before \textit{Miranda} warnings become necessary.\textsuperscript{270}

At least three views therefore might characterize the custodial interrogation dynamic: synergy, interplay, and exclusivity. These three perspectives are illustrated below.

\textsuperscript{266} See R.B. Fuller, \textit{Synergetics: Exploration in the Geometry of Thinking} 3 (1975) (defining "synergy").

\textsuperscript{267} Webster's International Dictionary Unabridged 2320 (3d ed. 1961) (defining "synergism").

\textsuperscript{268} R.B. Fuller, \textit{supra} note 266, at 6.

\textsuperscript{269} It may be important to note that the lines on both axes where the synergy curve and interplay line intersect never touch the axes. This is because there must always be at least some level of compulsion exerted by both components, custody and interrogation. There comes a point, however, where one component, if ridiculously severe enough, would make analysis of the other component unnecessary. For example, a custodial restraint in the form of severe beating and torture eventually would moot any inquiries into whether the suspect had also been interrogated.

\textsuperscript{270} Of course, the converse also is true. High or low levels of interrogation also inform the amount (or lack) of leeway afforded to police on the custody component.
In reconsidering the cases analyzed in Parts I and II, all facts relevant to either component of police restraint take on aggravating or mitigating characteristics. For instance, a brief encounter tends to mitigate the level of compulsion exerted on a suspect, while a prolonged encounter would have the opposite effect. Other mitigating or aggravating factors turn on the number of officers present, the time of day at which the encounter occurs, and whether the suspect is alone or with his entourage, or visible or isolated from public view.

The relative weight accorded to each of these factors admittedly is difficult to assign. For example, if 4:00 a.m. is compelling (Orozco), then what about midnight? 10:00 p.m.? 8:00 a.m.? (Beckwith)? Is it ever non-compelling to be questioned by police? How many officers does it take to overwhelm a suspect's will? How about an army of

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271. See Orozco v. Texas, 394 U.S. at 325 (concluding that suspect was in custody when police questioned him in his bedroom at 4:00 a.m.).
272. See Beckwith v. United States, 425 U.S. at 342 (concluding that unwarned suspect not in custody when IRS agents interrogated him at 8:00 a.m. in private home).
polite officers intent on observing the suspect’s constitutional rights? Conversely, could not one Dirty Harry overcome a reasonable person’s will to remain silent or, at a minimum, cloud that person’s decision as to how to proceed? How many family members, friends, or passersby does it take to create a protective shield for the average suspect? Passersby range from concerned citizens troubled by police abuse to uneasy citizens interested primarily in avoiding that which does not concern them. Should defendants be permitted to produce stopwatches at trial in order to buttress their claims that officers wore down their will? Officers could ask many questions, all of them innocuous, thus adding nothing coercive to the encounter. Similarly, brevity is not necessarily the soul of noncustodial questioning. The right question (“Hey, wait a minute you — did you steal that property?”) asked at the right time by the right officer could create a coercive environment in a matter of seconds.

In evaluating the aggravating or mitigating impact of a given fact, judges must choose which element — custody, interrogation, or both — is affected. Again, the duration of an encounter portrays the type of classification choice necessary under the synergy model. Duration is relevant to both custody and interrogation. Through protracted interrogation, police convey to the suspect that they are intent on “making him talk.” So too, through a lengthy deprivation of freedom, police employ a form of physical intimidation that increases the suspect’s anxiety and thus makes his cooperation more likely. Although in the synergy model duration is relevant to both elements, most facts are less versatile and therefore are more easily attributable to one component or the other.

In some instances, application of the synergy theory becomes more difficult due to the Court’s customary practice of giving short shrift to one of the two elements of custodial interrogation. In Innis, for example, the Court, in its effort to give content to “interrogation,” glossed over the effects that custody may have had on the suspect. In Mathiasen, the Court’s preoccupation with the custody issue crowded out any consideration of what interrogation techniques were used. This difficulty notwithstanding, this Article assumes that neither component is necessarily a greater source of compulsion than the other. There is some evidence, however, that the cases that have reached the Court challenge this presumption of parity. In no case have police exposed a suspect to the type of lengthy interrogation typical of pre-Miranda practices. With the exception of Beckwith, where IRS agents lingered

273. See, e.g., Ashcraft v. Tennessee, 322 U.S. at 149 (Court, on due process grounds, reversed
at the suspect's house for over three hours, the lengthiest encounter spanned a half hour. As a result, the tug exerted solely by police interrogation is relatively mild in virtually every case, at least when compared with historical practice. This asymmetry, however, is due more to the fortuity of the facts raised in petitions for certiorari than in any notion that physical restraint is more compelling than pesky badgering.

The trick, as may already be apparent, is in measuring the impact of synergy. What level of custodial restraint is necessary to escalate an otherwise mild interrogation to Miranda's threshold? Which mitigating factors outweigh which aggravating factors? These questions raise legitimate concerns, and reveal that the synergy model cannot realistically supply more than a rough substitute for a necessarily nontechnical judicial determination. Yet these criticisms overestimate the intended scope of the synergy model, which aspires only to a more integrative inquiry than that recognized in Supreme Court opinions, opinions in which the Court cannot in any event escape from weighing the relative importance of competing facts relevant to the issue of custodial interrogation.

This approach may recall the fact-specific subjectivity of the old voluntariness doctrine, under which courts assessed whether under the "totality of the circumstances" a confession was voluntary. By proposing an atavistic approach to confessions law, however, I do not suggest that repackaging an abandoned test would simplify the difficult Miranda doctrine. Such an approach would, however, do explicitly what the Court's gestalt method does implicitly, that is, weigh the relevant facts in determining whether police subjected a suspect to custodial interrogation.

Because a reviewing court's assessment of whether a suspect is entitled to Miranda's presumption of compulsion requires the presence of some uncertain measure of compulsion before the presumption attaches, a judicial decision as to inclusion, exclusion, and the relative weight of each fact is necessary. Just as some facts are relevant to that assessment and others are not, some facts tend to increase compulsion while

state court conviction of defendant who, "from Saturday evening at seven o'clock until Monday morning at approximately nine-thirty never left the homicide room on the fifth floor"). Operating in rotating teams in order to avoid exhausting the interrogators, police managed to perpetuate a nonstop, two-day interrogation that afforded Ashcraft a total of five minutes rest. Id.

274. See Beckwith v. United States, 425 U.S. at 342-43 (agents arrived at private residence at 8:00 a.m. and left about 11:00 a.m.).

275. See Oregon v. Mathiason, 429 U.S. at 495 (police questioning elicited confession in first five minutes of 30-minute encounter).
others tend to dissipate it. The Court's method avoids the vagaries of measuring compulsion only by papering over it. The synergy approach simply unpacks the otherwise invisible measurement of compulsion.

For police, on the other hand, synergy requires that they warn more suspects. If intimidating custodial settings make all words or actions compelling, and all lengthy or menacing interrogations make any level of custodial restraing appear intimidating, then police should warn anyone whose freedom they have restrained and about whose apparently criminal conduct police would like to inquire or comment. If this sounds no easier to apply than the Court's current test, then to avoid exclusion, self-interested police should over- rather than underinclusively issue warnings. For every suspect who is subject to only a gentle nudge from police but chooses to remain silent only after police alert him that he need not slice his throat with his own tongue, is a suspect whom police coerced but who would have waived and confessed had he received warnings. Thus police gain as much as they lose through more generously issuing warnings.

The Court's practice of looking at only one element of the custodial interrogation dynamic at a time comes at the expense of accuracy. Of the nine fifth amendment cases considered in this Article, only the first three — Mathis, Orozco, and Beckwith — were decided correctly. In Mathis and Orozco, the confessions were viewed as inadmissible even without reference to the interactive nature of custody and interrogation. In Beckwith, on the other hand, the Court also reached the correct result, but for the wrong reasons. Two later cases — Berkemer and Perkins — purport to be aberrational, thus cannot fairly be evaluated in terms of their fidelity to strict Miranda doctrine (except to whatever extent all exceptions betray some infidelity to the doctrine from which they deviate). And finally, four cases — Mathiason, Beheler, Innis, and Mauro — all decided erroneously, would in each case have been decided differently had the Court considered the synergistic relationship of custody and interrogation. This section of the Article reconsiders the cases presented in Parts I and II, this time suggesting a method of analysis that could in some instances have led the Court to results different than those actually achieved. Graphic depiction of how three different approaches — the Court's exclusivity view, interplay, and synergy — would influence the nine cases analyzed in this Article appears in the Appendix.

B. The Early Cases

What follows is a critique, fashioned in light of the proposed model, of the significant Miranda cases reviewed above. Only in the early
cases, *Mathis* and *Orozco*, did the Court invalidate police methods of obtaining incriminating evidence. Although the Court secretly may have had interplay or something like it in mind, the absence in both terse opinions of any reference to interplay or its equivalent weakens any such argument. Instead, the better view is that the custody and interrogation elements, taken separately, reached the threshold requirement of *Miranda*. Further, *Mathis* and *Orozco* comprise the Court’s immediate, post-*Miranda* approach to confessions, an approach that deferred to *Miranda*’s strictures in a literal sense. After *Mathis* and *Orozco*, however, *Miranda*’s literalism was supplanted by a standard that demands that the case have a certain *Miranda*-like quality before *Miranda*’s protections kick in.

The IRS agent in *Mathis* asked the suspect only two questions in each of two encounters some four months apart. This, however, does not immunize the questioning from being classified as “interrogation,” even though only one question in each instance — whether Mathis had prepared and signed his tax return — was potentially incriminating. The interrogation bore little resemblance to the prolonged, incessant grilling that concerned the Court in *Miranda*. But brevity does not by itself render police tactics noncoercive. With one properly fashioned question, police can call for an incriminating response without resorting to gradually wearing down the will of the interrogatee. Nevertheless, for purposes of illustrating the custodial interrogation dynamic, brief questioning is considered a mitigating factor. No doubt the IRS agent could have increased the level of compulsion on Mathis through more persistent questioning. But persistent questioning was unnecessary. One question obviously calling for an incriminating response still is sufficient to satisfy the *Miranda* interrogation standard.

Because incarceration is an extremely compelling type of restraint, the custody level also was high in *Mathis*. This observation, however, is not without its opponents. It has been argued that as an inmate in the Florida State Penitentiary, Mathis was not “swept from familiar surroundings into police custody.” He was not “swept” anywhere. For the time being, Mathis was “at home” in prison and arguably deserved no greater protection than would an unconvicted citizen ques-

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277. The other question in both interviews — whether Mathis would voluntarily extend the statute of limitations for any cause of action that the IRS may have against him — did not call for an incriminating response. *Id.* at 6 n.1 (White, J., dissenting); see *Mathis* v. United States, 376 F.2d 595, 596 (5th Cir. 1967) (defendant agreed to sign Form 872 extending limitations period), rev’d, 391 U.S. 1 (1968).
tioned by IRS agents at home. Sitting in a cell, answering two questions from one IRS agent evokes an image different in kind and degree from stock *Miranda* scenarios. Mathis's familiarity with prison surroundings, however, was a fact "too minor and shadowy" to have swayed the majority.279

As a result, Mathis endured a significant deprivation of freedom.280 Confined to a small cell, there was nothing he could do to avoid the "antagonistic forces" that the federal agents represented.281 Moreover, a prisoner in Mathis's shoes might perceive (or misperceive) that his cooperation or resistance would affect his inmate status, thus compelling him to cooperate with authorities.282 If so, then any familiarity that an inmate experiences is offset by his perceived need to comply. Accordingly, the Court properly entitled Mathis to the presumption that being interrogated in a prison cell compromised his will to resist the pressures to incriminate himself.

From law enforcement's viewpoint, *Mathis* was a no-win situation. If incarceration is presumptively coercive, then the agents were precluded from asking Mathis anything without first issuing him *Miranda* warnings. In custodial settings, officers are on thin ice and are precluded from using techniques of persuasion that might be acceptable elsewhere. The IRS agents, merely by showing up at the Florida State Penitentiary, were required to warn Mathis before questioning him.283 Thus, a theory of exclusivity, under which both custody and interrogation separately reached the minimum threshold necessary to satisfy *Miranda*, explains the result in *Mathis*.284

279. *Mathis* v. United States, 391 U.S. at 4. Incarceration on an unrelated charge thus creates a perpetual state of custody, even though the questioning officers did nothing to create that condition.

280. In light of all the penalties, stated and unstated, endemic to prison life, to view a prisoner in a perpetual custodial state does not seem to ask much of the law. As a fiction, it is easily justified; as a benefit, its value is only marginal to the suspect.


282. Once Mathis figured out what was going on, his desire to avoid self-incrimination became clear. In a third interview, three months after the second, the agent returned, this time with an agent of the IRS Intelligence Division. United States v. Mathis, 376 F.2d at 596. The purpose of the visit was to interview Mathis about the pending criminal investigation. After being advised of his constitutional rights, Mathis "refused to cooperate further." *Id.* Although the Supreme Court redacted the third interview from its opinion, Mathis's invocation of rights proves that he would not have incriminated himself had he been apprised earlier of his constitutional rights. This fact, however, says nothing about the level of compulsion created by the officers in the earlier interviews.

283. See *Beckwith* v. United States, 425 U.S. at 348-49 (Marshall, J., concurring) (almost complete warnings saved IRS agents from what may otherwise have been *Miranda* violation).

284. If it were determined that incarceration on an unrelated charge was not "too minor and shadowy" to make a difference to the Court, synergy certainly would require warnings. The fact
Orozco, too, is explainable by viewing each component independently. On the custody side, the sudden appearance of four uniformed officers at 4:00 a.m. in his bedroom justifiably led Orozco to believe he was not free to go. Yet it is unclear why a suspect who is being questioned at home would want to go anywhere. In the context of nonstationhouse interrogation, particularly at-home interrogation, the significant deprivation of freedom well may take the form of a prohibition on the suspect's freedom to expel the meddling officers rather than the freedom to banish himself from his own castle. Although the mere aura of blue uniforms "without more" is insufficient to satisfy Miranda, four uniformed officers barging into Orozco's one-room apartment instantly converted his dwelling place into a mini-stationhouse, placing on him the same police-dominated influences that so concerned the Miranda Court.

The late hour also aggravated the level of restraint on Orozco. Police cannot plan the time of day that criminals violate the law, but they are answerable for the increased anxiety that the timing of their visits causes. Together, these aggravating factors were not offset by the brevity of the encounter (several minutes from start to finish), home-field advantage, and absence of indicia of actual custody, e.g., drawn weapons, handcuffing, or other forms of physical intimidation.

The interrogation axis also reflects questioning well above the required minimum for Miranda. Three of the four questions asked for highly incriminating evidence — only the first question ("What's your name?") did not. As a result, with each component taken separately, Orozco falls slightly above the minimum amount of compulsion necessary to require Miranda warnings. The interrogation resembled that in Mathis — brief but to the point. Assuming Orozco was correctly decided, then there, as in Mathis, both the level of questioning and custodial restraint were sufficient to reach Miranda's threshold, even without resorting to synergy.

that they subjected him to direct questioning, albeit brief, in a restrictive yet familiar setting, heightened the level of custodial restraint upon the suspect. In an atmosphere that already featured some level of restriction, the combination of that condition with direct questioning under Innis put Mathis over the edge of permissible police practices.


286. See Oregon v. Mathiason, 429 U.S. at 495 ("[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it," but "police officers are not required to administer Miranda warnings to everyone whom they question").

287. Police testified that they were admitted to Orozco's roominghouse by a lady who answered their knock at the door and "invited" them in. Orozco v. State, 428 S.W.2d 666, 671-72 (Tex. Crim. App. 1967). This was a mitigating factor in the state's view, but not in the Supreme Court's view, who did not even mention that fact in their opinion.

288. See supra note 42 and accompanying text (detailing the questions police asked Orozco).
C. The Middle Years

In the middle years, the Court correctly decided *Beckwith* (but for the wrong reasons), and erred in *Mathiason* and *Beheler* for failure to appreciate the forces of synergy in those cases. The level of compulsion in *Beckwith* was measurably lower than in its predecessors. The Court's holding, however, which affirmed the federal district court's admission into evidence of the suspect's incriminating statements, ignored the most relevant fact in the case.

On the custody axis, the mitigating factor most crucial to the Court's holding was the at-home locale of the encounter. Other mitigating factors were: the neither too early nor too late 8:00 a.m. hour (meant to avoid embarrassing Beckwith at work), the "friendly and relaxed" atmosphere of a dining-room "interview," and the fact that only two plainclothes IRS agents conducted the interrogation. The sole aggravating factor on the custody axis was the duration of the questioning; the agents stayed for three hours.

The interrogation level also was mitigated by the "friendly and relaxed" atmosphere, and aggravated by the prolonged questioning. But the warnings, which seem to be the most obvious mitigating factor and which go to both custody and interrogation, played no role whatsoever in the majority's opinion. The agents issued Beckwith a nearly full panoply of warnings, omitting only an indigent's right to appointed counsel. Those warnings, although technically imperfect, largely dispelled the pull that both the questioning and the restraint of freedom exerted on the suspect. Absent the warnings, *Beckwith* becomes difficult to distinguish from *Orozco*, unless, that is, concededly irrelevant factors such as the suspect's level of sophistication or the seriousness.

289. That Beckwith was at a private home "where [he] occasionally stayed," rather than at his own home, is a distinction without a difference. Beckwith v. United States, 425 U.S. at 349 (Marshall, J., concurring in the judgment).

290. *Id.* at 342. Having police visit one at work can be the source of great anxiety, and nowhere is that anxiety better portrayed than in Kafka's *The Trial*, in which Josef K.'s status and reputation as chief clerk of a bank is seriously compromised when his co-workers witness his public dealings with police. F. Kafka, *The Trial* (W. Muir & E. Muir trans. 1968).

291. The majority pointed out that the polite agents formally introduced themselves to Beckwith before questioning him. Beckwith v. United States, 425 U.S. at 342-43.

292. *Id.* at 342.

293. *Id.* at 341.

294. *Id.*

295. It did, however, play a critical role in Justice Marshall's brief concurring opinion, *id.* at 349 (Marshall, J., concurring in the judgment), and in Judge Bazelon's opinion in United States v. Beckwith, 510 F.2d 741, 742 (D.C. Cir. 1975).


297. See *Miranda v. Arizona*, 384 U.S. at 469 (level of suspect's sophistication irrelevant to applicability of prophylactic warnings).
of the offense\textsuperscript{298} are considered in the calculus. Had the agents failed to warn Beckwith, distinguishing \textit{Orozco} from \textit{Beckwith} would require pitting a 4:00 a.m., brief, at-home interrogation, conducted by four uniformed officers against an 8:00 a.m., lengthy, at-home interrogation conducted by two friendly plainclothes federal agents. Such a distinction is too close to draw intelligently. As a result, the Court’s failure to acknowledge the warnings that were present in \textit{Beckwith} but absent in \textit{Orozco} indicates that in the former, the Court may have reached the correct result, but for the wrong reasons.

The need for the synergy theory is most apparent in \textit{Oregon v. Mathiason}.\textsuperscript{299} There, the Court addressed only the custody element, holding that it fell short of \textit{Miranda}’s threshold.\textsuperscript{300} The Court’s conclusion that Mathiason’s freedom had not been deprived in any significant way is difficult to defend.

Mathiason encountered police behind closed doors in a state highway patrol office, where the police radio played audibly from another room.\textsuperscript{301} These aggravating factors are mitigated somewhat by the relatively nonconfrontational manner in which police arranged the meeting, including the fact that Mathiason drove himself to the stationhouse. The Supreme Court seemed persuaded by the officer’s admonition, “you’re not under arrest,”\textsuperscript{302} but those words, however meaningful to a lawyer, are, without some explanation, meaningless to most suspects and thus are irrelevant to the level of police restraint. The Court’s willingness to credit the officer’s hollow admonition, and its refusal to weight Mathiason’s parolee status, were unreasonable. Accepting these choices \textit{arguendo}, however, this Article acknowledges the mitigating influence of the admonition, and ignores Mathiason’s status as a parolee who arguably lived in a perpetual state of custody.\textsuperscript{303}

Addressing the interrogation element, both the Oregon and United States reporters described the encounter as functional-equivalent interrogation rather than express questioning. The officer’s statements in \textit{Mathiason} contained “everything but a question mark.”\textsuperscript{304} He opened by expressing his wish “to talk about a burglary,” about which he falsely

\textsuperscript{298} See Berkemer v. McCarty, 468 U.S. at 429-35 (misdemeanor no less than felony offenses deserve \textit{Miranda} warnings when police interrogate suspect in custodial setting).

\textsuperscript{299} 429 U.S. 492 (1977).

\textsuperscript{300} Id. at 495.

\textsuperscript{301} Id. at 493.

\textsuperscript{302} Id.

\textsuperscript{303} But see Minnesota v. Murphy, 465 U.S. at 429-34 (rejecting Murphy’s claim that probationer is subject to “restrictive conditions governing various aspects of his life” equivalent to “custody”); see also supra note 89 (discussing \textit{Murphy}).

\textsuperscript{304} Rhode Island v. Innis, 446 U.S. at 311 (Stevens, J., dissenting).
claimed to have proof of Mathiason's involvement, then offered that Mathiason's truthfulness would be considered favorably by authorities.\textsuperscript{305} Not surprisingly, Mathiason broke down and confessed within five minutes.\textsuperscript{307} The mitigating effect of the brevity of the interrogation is substantial, but should not take the case out of the reach of \textit{Miranda}.

Had the Court considered the interplay of custody and interrogation, it would have held the confession inadmissible. Police placed Mathiason in an untenable position. The officer's polite introduction — telephoning the suspect and leaving his business card — meant nothing once he closed the door to the small room and seated himself across a desk from the suspect.\textsuperscript{308} That setting is facially distinguishable from a comparatively modest at-home encounter. The interrogation took place in the very place that concerned the \textit{Miranda} Court most.\textsuperscript{309} The officer summoned Mathiason to the police station, not to a local restaurant or other less threatening environment, sequestered him, and told him that police knew he had committed a burglary.\textsuperscript{310} Even if one were to accept that neither component taken separately violated \textit{Miranda}, the officer's statements must be assessed in light of the pre-questioning deprivation of freedom he had imposed on Mathiason.

When confronted with the officer's apparent knowledge that he had committed a burglary, Mathiason was alone, seated in a small room in a police station. Just as the officer's statements were enhanced by their locale, the statements themselves exerted pressure on Mathiason above and beyond the custodial restraint.\textsuperscript{311} Nothing in the encounter, including admonitions based on technical terms of art such as "arrest" or "not under arrest," dispelled the compulsion caused by the dual restraint that Mathiason endured. The impact of custody and interroga-

\textsuperscript{305} Oregon v. Mathiason, 429 U.S. at 493. As Justice Marshall noted in his dissent, the majority ignored the \textit{Miranda} Court's express disapproval of these types of "deceptive stratagems." Id. at 496 (Marshall, J., dissenting) (quoting Miranda v. Arizona, 384 U.S. at 455).

\textsuperscript{306} See Miranda v. Arizona, 384 U.S. at 468 n.37 (quoting P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 32 (1958)) (noting that people generally believe that they must answer all questions officer asks); see also supra note 34 and accompanying text (same).

\textsuperscript{307} Oregon v. Mathiason, 429 U.S. at 493.

\textsuperscript{308} Id.

\textsuperscript{309} See Miranda v. Arizona, 384 U.S. at 455 (noting that compulsion to speak in isolated setting of police station is much greater than in other settings).

\textsuperscript{310} Oregon v. Mathiason, 429 U.S. at 493.

\textsuperscript{311} See Rhode Island v. Innis, 446 U.S. at 300 (holding that interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself."). Yet, because a custodial setting "carries its own badge of intimidation," custody should alert police to the presence of compulsion even before any interrogation practices are invoked. Miranda v. Arizona, 384 U.S. at 457.
tion, operating together, would have been mitigated in a less compelling locale, or if the officer had been less overtly accusatory. As it was, however, the officer’s failure to administer *Miranda* warnings to Mathiason was error.

For essentially the same reasons, the next case, *California v. Beheler*, 312 also missed the mark. *Beheler* contains a different set of aggravating and mitigating circumstances that the Court likewise dismissed as irrelevant. For example, the Court believed it unimportant that Beheler was in a drunken, emotionally distraught condition.313 Yet only three years earlier in *Innis*, Justice Stewart had considered the same “irrelevant” indicia of the suspect’s state of mind as relevant to the Court’s holding.314 In assessing whether Innis was “particularly susceptible” to the handicapped-children ploy, Justice Stewart said there was no indication to police that Innis was “unusually disoriented or upset.”315

If being “unusually disoriented” is in fact relevant, then Beheler’s drunken stupor — he “drank a couple of cases of beer during the day” in addition to the quarts purchased and imbibed after “four or five” trips to the liquor store that night — certainly should qualify.316 As for being unusually upset, even the Supreme Court’s watered-down version of the California Court of Appeal’s description of Beheler’s condition concedes that he was “emotionally distraught.”317 What was relevant to whether the police conduct in *Innis* was interrogation had become irrelevant to whether the suspect was in custody in *Beheler*. Whether a suspect is disoriented or upset should be relevant to both *Miranda* inquiries.

On the custody issue, mitigating factors pervade *Beheler*. Initial police-suspect contact occurred in a nonconfrontational manner. Unlike Mathiason, who drove himself to meet the police, Beheler initiated contact with the police when he called to report the incident. If *Mathiason* remains good law, then under the Court’s approach the custody level in *Beheler* would not command *Miranda* warnings.

The Court implied that Beheler waived a certain level of protection by initiating contact with the police. That is, because Beheler called the police to tell them that his half-brother had committed a murder, he

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313. Id. at 1124-25.
314. Rhode Island v Innis, 446 U.S. at 302-03.
315. Id. at 303.
demonstrated his desire to be taken to the stationhouse for a half-hour interrogation leading to his confession to having been an accomplice.\textsuperscript{318} By asserting that after he heard he “was not under arrest,” Beheler “voluntarily agreed to accompany police to the station house,” the Court subtly constructed a waiver theory.\textsuperscript{319} If Beheler really wanted constitutional protection, the argument goes, he would have volunteered no information to police. Instead, he would have forced them to find him out through standard investigative techniques. By initiating contact, he betrayed a willingness to confess, which required only a dose of custodial interrogation to coax out of him.

The half-hour “interview” presumably was interrogation under any view of \textit{Miranda} or \textit{Innis}. Although the reporters are silent on the tenor of police questioning, little could go on in a half-hour “interview” that would not offend \textit{Innis} or \textit{Miranda}’s notions of interrogation. Had there not been interrogation, the Court surely would have seized the opportunity to say so. If the presence of interrogation is a given in \textit{Beheler}, then arguing even under the Court’s test that Beheler was not in custody demands that one accept the Court’s implication that the suspect somehow waived his rights.

The Court’s waiver theory is unsound. Beheler volunteered to tell police that \textit{someone else} had committed a crime and had hidden the weapon. He never said, as \textit{Miranda} clearly permits, that he wished to confess to a crime. Any sense of Beheler’s desire to implicate himself surfaced only after a police-initiated trip to the stationhouse. Accordingly, Beheler’s “waiver” existed more in the minds of the police and the six Justices comprising the majority than in the facts themselves.

Even for those who may be persuaded that Beheler’s phone call to police mitigated the level of compulsion that he suffered, the effects of synergy reveal that the subsequent stationhouse interrogation offset whatever mitigating effect Beheler’s phone call may have had. The Court’s opinion failed to ascribe any legal significance to the half-hour stationhouse interrogation that Beheler endured. A classic, \textit{Miranda}-like encounter with an intoxicated, emotionally distraught suspect does not become a benign setting or a volunteered confession simply because of how police happened upon the suspect.

At this point, crime-control theorists might ask whether the police realistically had any alternative in \textit{Beheler}. Their alternative was to re-

\textsuperscript{318} Beheler’s half-brother, Dannie Willbanks, was the trigger man. Beheler called police from a neighbor’s house hours after the crime occurred. People v. Beheler, 200 Cal. Rptr. at 196, 198.

\textsuperscript{319} California v. Beheler, 463 U.S. at 1122. In essence, it resembles the Court’s reasoning in \textit{Mathiason}, where the suspect surrendered a certain measure of protection by driving himself to a “convenient” “interview” at the local highway patrol office. Oregon v. Mathiason, 429 U.S. at 493 (quoting People v. Mathiason, 275 Or. 1, 3-4, 549 P.2d 673, 674 (1976)).
spect the inherently coercive nature of stationhouse encounters. *Any* stationhouse interaction with a suspect should automatically alert police to carefully circumscribe their interrogation practices. The notion that Beheler had voluntarily placed himself in the charge of police would be much more convincing had he confessed at home or, for that matter, anywhere other than the stationhouse. Once the police, at their request, took the suspect to the stationhouse, *anything* they said or did would enhance the level of compulsion exerted on him. Compulsion is presumed to be an unavoidable consequence of that particular locale. Despite the passive role of the police in the events initially leading them to Beheler, the synergistic effect of a stationhouse setting coupled with a half-hour interrogation increased the level of compulsion to a point of requiring the police to administer *Miranda* warnings.

**D. The Later Cases**

*Berkemer*, a unanimous decision, is best understood by inferring a subtext in which police, in order to fulfill their publicly mandated mission to clean up our highways, must be afforded an exception to the bright line *Miranda* rule. Like the public safety exception decided the same term in *New York v. Quarles*, it apparently constituted only a modest departure from accepted practice for the Court to delineate an exception for traffic stops.

The Court was quite candid about its intent to deviate from strict *Miranda* doctrine. Rather than argue that the suspect was not subjected to custodial interrogation, the Court reasoned that a common-sense exception to *Miranda* was appropriate, presumably in order to pursue legitimate law enforcement goals and to avoid the absurd results that blind-faith adherence to technical rules can cause. All licensed drivers know that roadside traffic stops are brief encounters typically ending with the driver going on his or her way with a ticket or a warning. That knowledge dispels a great deal of the anxiety endemic to encounters with authorities. The familiarity of the process, however, says nothing about a motorist's perception of encounters that can and do lead to full-fledged arrest. In those cases, where the suspect has committed an offense that calls for a prolonged encounter — the Court's rationale erodes. The brevity of the encounter, therefore, is a function  

321. This is particularly so since the groundwork had already been laid in an analogous fourth amendment context in *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968) (permitting pat-down search on less than probable cause to insure police safety), which later was extended to automobile stops in *Michigan v. Long*, 463 U.S. 1032 (1983).
of the basis of the encounter. Hit-and-run or drunk drivers harbor no realistic expectation of brief encounters with police.

Yet the Court seemed unconcerned with potentially lengthy roadside stops leading to full-blown arrests. Only when the encounter shifts to an arrest-equivalent does the motorist receive *Miranda*’s protections. Even the Court admitted that with this invisible triggering point, “police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody.”323 Thus, the new roadside traffic stop exception was intentionally overbroad, its overbreadth a necessary cost of obtaining and preserving confessions from drunk drivers. The Court admitted that McCarty had suffered a significant deprivation of freedom. Similarly, the questioning that occurred after his arrest, which was nearly identical to the roadside questioning, was held to be interrogation. The Court therefore confirmed the presence of *Miranda*’s two components but held that *Miranda* was not important in this limited class of cases. In so holding, the Court mooted analysis under either model, exclusivity or synergy. In essence, the Court admitted to altering strict *Miranda* doctrine.

*Innis*, more than any other decision, demonstrates the Court’s one-component-at-a-time approach. Although Justice Stewart noted that compulsion can result from the interplay of custody and interrogation, his majority opinion nevertheless ignored what effect, if any, the fact of custody had in concert with the handicapped-children ploy on a suspect who had no choice but to listen to the officers’ conversation while handcuffed in the back of a caged police wagon.

The officers’ dialogue clearly “reflect[ed] a measure of compulsion above and beyond that inherent in custody itself.”324 That “measure,” however, was insufficient to meet the Court’s standard. The Court could not have so concluded if it also considered the natural anxieties and pressures attendant to a 4:30 a.m. post-arrest police escort. An on-the-street handicapped-children dialogue, absent the handcuffs, where Innis would have been less the captive and more the casual listener, still would have significantly restricted Innis’s freedom, but not to the same extent. Even with the forces of synergy at work, an on-the-street restraint, coupled with the officers’ interrogation tactics, might have evaded the reach of *Miranda*. As it was, however, an extremely compelling custodial restraint colored the officers’ conversation in a way that aggravated the level of compulsion, and reached *Miranda*’s threshold.

323. *Id.* at 441.
324. Rhode Island v. Innis, 446 U.S. at 300.
Innis's successor, Arizona v. Mauro,\textsuperscript{325} likewise discounted the synergistic relationship between custody and interrogation. Because Detective Manson's presence, made slightly more compelling by his tape-recorder, exerted only a gentle nudge, not a tug, on Mr. Mauro, the Court held that Miranda's threshold was not met.\textsuperscript{326} From a synergy perspective, the critical question was whether the fact of custody escalated the voyeuristic officer's conduct to the point of interrogation.

While holding Mr. and Mrs. Mauro in custody inside the stationhouse, the Flagstaff Police Department was constrained at a heightened level from engaging in any conduct that might be construed as interrogation. Thus, even accepting the Court's holding that the orchestrated, tape-recorded, police-witnessed conversation between two distraught co-suspects was permissible under Innis, an element crucial to the Court's interrogation inquiry — the fact of custody — was afforded no weight.

Assume, for instance, that the officers had visited the Mauros at home rather than in jail. Even in the unlikely event that a tape-recorded conversation would occur in such a setting, the compulsion to speak would lessen considerably. The discrepancy in compulsion from jailhouse to living room flows from the officers' diminished control over their captives. At the stationhouse, the suspects' vulnerability increases because of their isolation and uncertainty about what might happen to them. The setting itself "carries its own badge of intimidation."\textsuperscript{327} In a more relaxed setting, where the officers' possible courses of action seem less threatening, and the pangs of sequestration are conspicuously absent, the couple's perceived need to confer at that moment, even if recorded and witnessed by police, is reduced. Synergy recognizes such a distinction as a mitigating factor. As it was, however, the officers conducted themselves with little respect for their locale. As benign as the tape-recorder ploy was in the view of the five Justices of the majority, it was nothing of the sort when viewed together with the forces of custody that played upon the suspects' wills to remain silent.

Application of the synergy theory to Illinois v. Perkins\textsuperscript{328} leads to two possible explanations of the outcome in that case. First, Perkins could stand for the proposition that in all cases Miranda's two-step inquiry now includes a third step — an inquiry into the compulsion level created by police. Such a departure from Miranda's presumption is unlikely, even under the present composition of the Court. The second rationale, that the compulsion-based approach is limited to the interro-

\textsuperscript{325} 481 U.S. 520 (1987).
\textsuperscript{326} Id. at 527.
\textsuperscript{327} Miranda v. Arizona, 384 U.S. at 457.
\textsuperscript{328} 110 S. Ct. 2394 (1990).
gation element in reviewing confessions obtained in undercover jail-plant interrogations of incarcerated suspects, is more likely the reading of Perkins that will result. In this sense, Perkins, like Berkemer and Quarles before it, is an exception to Miranda, whether couched as such or not.

Perkins clearly was in custody, even though the Solicitor General argued to the contrary. The mitigating effect of the familiar surroundings is more pronounced in the living room of a suspect surrounded by his entourage than in an 8' x 10' cell, surrounded by prison hacks. Similarly, in Perkins police conducted one of the most direct interrogations ever reviewed in the post-Miranda era. Because in Perkins the custody and interrogation levels undoubtedly call for warnings under a strict reading of Miranda, only through an exception to Miranda, in this case a noncompulsion-based exception to the interrogation component, could the Court's determination that warnings were unnecessary be justified.

E. Summary

In the initial stages of application, the Court's approach proceeded without unjust results. In Mathis and Orozco, officials exposed the suspects to qualifying levels of compulsion on the custody and interrogation axes. The first case decided after Mathis and Orozco also reached the correct result. In Beckwith, it is difficult to conceive how the Court got there, considering that no credence was given to the mitigating effect of the almost-complete warnings that the IRS agent administered to Beckwith before questioning him. Thus, in that case Miranda had not attached despite the forces of synergy. From that point on, however, the cost of the Court's exclusivity approach became evident.

Whereas Mathis, Orozco, and Beckwith were correctly decided despite shortcomings in the Court's approach, in the subsequent cases the exclusivity approach led to the admission of otherwise inadmissible evidence. First came Mathiason and Beheler, in which the Court heavily weighted various factors relevant to the level of compulsion while subordinating others that it previously had viewed as relevant. The Court consequently denigrated the custodial restraint in those cases to a sub-

329. Solicitor General Starr raised the argument that Perkins, as a prisoner serving out an unrelated sentence, endured a sub-threshold level of restraint. Petitioner's Brief, supra note 224, at 10-14 (citation omitted). The Court did not even address the argument, perhaps because it had soundly rejected the same proposal in Mathis.

330. But see Oregon v. Elstad, 470 U.S. at 305-06 (two officers' questioning of teenager, conducted in parents' living room with parents present, conceded by state and left undisturbed by Court as Miranda violation).
threshold level. In neither "significant deprivations" case did the Court credit the pull that police interrogation exerted on the suspect.

The next decision, Berkemer, was aberrational. Absent the elusive indicia of full-fledged "arrest," traffic stops evade Miranda's reach. But because the Court conceded that its holding deviated from Miranda's protection of significant deprivations of freedom, the decision should be read as an exception to Miranda, if not as a partial overruling of that portion of Miranda's holding. Perhaps the Court perceived that it had no option but to flout Miranda, which would have called for exclusion under any integrative understanding of custodial interrogation.331

In contrast, Innis and Mauro did not purport to deviate from Miranda. Those cases illustrate the obstacles that any suspect who hopes to suppress "functional equivalent" interrogation faces. In Innis, the Court's preoccupation with discerning the true meaning of the handicapped-children dialogue led it to ignore that while the officers conversed beside the suspect, Innis rode handcuffed in the back of a caged police wagon at 4:30 a.m. through the streets of Providence without any inkling as to what would happen next (or when). Mauro featured the same shortsighted approach on the Court's part, but on closer facts. Like Innis, Mauro involved a suspect under undisputedly severe custodial restraint. Police tactics played upon different sensibilities than in Innis, however. In Mauro, it was Mrs. Mauro's understandable panic and dismay that facilitated the Flagstaff Police Department's fortuitous extraction of statements that enabled the prosecution to attack Mr. Mauro's insanity defense. Given that an inanimate, passive tape-recorder was less able to compel than was the police-directed play upon Innis's guilt, synergy shows the difference between the two cases to be one of degree and not of kind. In both cases, synergy would call for suppression of the incriminating statements.

Finally, in Perkins, the relevance of synergy was lost for the same reasons as in Berkemer. On its face, the case cried out for Miranda warnings, even when both components are viewed separately. Even without considering the synergistic relationship of custody and interrogation, Perkins clearly was in custody and subjected to interrogation. Rather than turn on the Court's insensitivity to the interactive nature of custody and interrogation, the facts of Perkins tested the fringes of Miranda, where mechanistic application of the two-step analysis was inappropriate.

331. The same can be said of Quarles, where the Court was more forthright about its articulation of a new exception to Miranda. See New York v. Quarles, 467 U.S. at 655 (articulating "public safety" exception to requirement that Miranda warnings be given before suspect's statements can be admitted into evidence).
CONCLUSION

Were the Court to recognize the effects of synergy, more confessions would be suppressed than under the Court's current approach. To be sure, when juxtaposed against the current approach, the synergy model looks like a one-way street: it is generally not a tool for preserving confessions for trial. In addition to its role (whether positive or negative) in increasing the volume of suppressed confessions, the synergy theory may alert judges and lawyers to the application problems endemic to the "functional equivalent" tests currently plaguing judicial review of what constitutes a "significant deprivation of freedom" and "interrogation."

In the case of significant deprivations of freedom, the poverty of the functional-equivalent (of arrest) test goes beyond application difficulties: the test borders on subversive interpretation. The disjunctive use of the word "or" in *Miranda* demonstrates the Court's intent to create two types of restraint in which questioning by police leading to a confession would be presumed compelled if unattended by warnings and a valid waiver: "[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way." This provision was not inserted into the *Miranda* opinion cavalierly; five separate references to the two types of custodial restraint appear. Despite this disjunctive construction, significant deprivations now require the characteristics of something which clearly they are not — settings of custody. In order to return this distinct class of circumstances to the field of constitutional protection, something must change. Synergy is a way both to bring back judicial respect for significant deprivations of freedom and, on the interrogation side, to obviate the intractable "likelihood" problems that plague inquiries into whether police conduct was the functional equivalent of direct questioning.

The synergy model also is sensitive to the commonsense need, illustrated in *Perkins*, to avoid extracting from *Miranda* more than it has to give. In cases in which police conduct clearly is outside *Miranda*'s intended scope, if not its literal language, synergy, like any other approach, can be averted by exception. *Perkins* is such an example. But as convincing as *Perkins* may be, exceptions are not always so easy to digest. In *Berkemer*, the Court's only proof that *Miranda* should be

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334. *Id.* at 444, 445, 467, 477, 478.
335. See also *Pennsylvania v. Muniz*, 110 S. Ct. 2638, 2650 (1990) (announcing "'routine booking question'" exception); supra note 119 (discussing *Muniz*).
avoided was the justices’ unsubstantiated belief that drivers are familiar with roadside traffic stops. If exceptions like Berkemer continue to emerge, soon they could work their way in from Miranda’s fringes to its core. Exceptions could arise where warnings requirements are held to be inapplicable to, for example, sophisticated suspects (who certainly know their rights) or, worse, mentally incompetent suspects (who certainly do not). At the end of this slope, short of outright overruling, is an emasculated Miranda rule, reduced to its facts.

Equally possible is that the exceptions to Miranda are less pernicious than that. What once was the Court’s great new experiment — the exclusionary rule — emerged in response to pre-incorporation police practices that paid little respect to criminal suspects. In its early stages, the exclusionary rule may have been overprotective. Neither extreme, pre-incorporation practices nor zealous application of the exclusionary rule, properly assessed the scope of the penalty of exclusion. At some point, a more measured evaluation of exclusion had to emerge.336

A commonsense middle ground, however, is unattainable. Pressure to weigh realistically the cost of forcing the government to ignore a suspect’s confession and to ferret out, perhaps in vain, other less convincing evidence in order to secure a conviction, is counterbalanced by constitutional guarantees, their integrity maintained only through strict observance. Why, when, and against whom should government prevail despite existing legal barriers to admissibility? How could a middle ground avoid taking on a predictable accordion-like quality, expanding and contracting according to extralegal considerations? For those who propose to relieve the tension between law enforcement and individual rights, I suggest that the burden of proof rests on any party who seeks to narrow the breadth of constitutional guarantees.

Even for some who favor individual rights to more convictions, the overbreadth of Miranda’s presumption has lost much of its luster. Concededly, where it applies the presumption is absolute. Yet in determining its applicability, the presumption is a matter of degree, even under a bright-line index. Whether or not the Court adheres to its current approach or expands its view to an in pari materia reading of both components leaves this observation unchanged. Under any view, the threshold decision of whether Miranda warnings are required is a judicial measurement of compulsion. Given that some method of measurement is inevitable, the proper method must consider custody and interrogation together, not separately. When, as a matter of degree, those two components, read together, collectively reach Miranda’s

336. See generally Allen, supra note 5, at 535-37.
threshold compulsion level, then absent a reasoned exception, the social cost of exclusion is simply the unavoidable compliment that law-abiding citizens, through their Constitution, pay to themselves — the potential targets of future criminal investigations.
APPENDIX

Custody

Interrogation

Court's Approach

Beckwith • Mathieson

Orozco • Berkemer • Mathis

Perkins •

Synergy

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0 1 2 4 6 8 10 12 14 16