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“Custodial Interrogation”
Within The Meaning of Miranda

By Yale Kamisar*

Police Station Interrogation vs. “Field Interrogation”

Probably the most difficult and frequently raised question in the wake of Miranda is what constitutes the “in-custody interrogation” or “custodial questioning” which must be preceded by the Miranda warnings. Since the pre-Miranda controversy had centered over what rights the suspect enjoyed after he was brought to the police station, see e.g., Breitel, Criminal Law and Criminal Justice, 1966 UTAH L. REV. 1, 8-9; since the Court had much experience with police station interrogation but had never decided a case considering the application of the Fifth and Sixth Amendments to “on the street” or “on the spot” questioning; and since the four cases it decided in Miranda all involved “incommunicado interrogation of individuals in a police-dominated atmosphere” (384 U.S. at 445), it is hardly surprising that the opinion is not very illuminating as to what is meant by “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way” (id. at 444, emphasis added) or “police interrogation while in custody at the

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station or otherwise deprived of his freedom of action in any significant way" (id. at 477, emphasis added).

In many respects these general definitions are not much more helpful than the terms they define—except that they seem to make fairly plain that the scope of Miranda is not limited to police station interrogation nor even to instances where the suspect is technically or formally under "arrest." It seems that again and again the Court studiously avoided use of the term "arrest" in favor of less technical and more general terms such as "custody" and "significant deprivation of freedom." By including some "field" and "squad car" questioning within its coverage, the Court understandably (albeit gingerly and uncertainly) sought to protect its flanks. If "custodial interrogation" were limited to questioning in a police station or to questioning that occurs after a formal arrest, "the police would need only to delay formal arrest or physical transfer of an accused to the station house in order to circumvent the constitutional safeguards Miranda dictates." Commonwealth v. Stites, 427 Pa. 486, 235 A. 2d 387, 390 (1967). See generally Sobel, The New Confession Standards 56-58 (1966).

The primary conceptual hurdle confronting the Miranda Court was the "legal reasoning" that any and all police interrogation is unaffected by the privilege against self-incrimination because such interrogation does not involve any kind of judicial process for the taking of testimony; inasmuch as police officers have no legal authority to compel statements of any kind, there is no legal obligation, ran the argument, to which a privilege can apply. See, e.g., the discussion and authorities collected in Kamisar, A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test, 65 Mich. L. Rev. 59, 65, 69, 77-83 (1966). In the course of toppling this "legal reasoning" the Court dwelt on the cases before it and many extracts from police interrogation manuals as the most obvious and graphic examples of the unreality, inadequacy and casuistry of the old reasoning. "The current practice of incommunicado interrogation" was so "at odds with" the principle
that "the individual may not be compelled to incriminate himself," pp. 457-58; the coercive pressures generated when a defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures," p. 457; were so substantial, that the only tenable view, according to the *Miranda* majority, was that the privilege *had to* "apply to informal compulsion exerted by law-enforcement officers during in-custody questioning," p. 461, *had to be* "available outside of criminal court proceedings," p. 467. But to limit the impact of *Miranda* to the most poignant examples of the need for the applicability of the privilege to non-judicial, informal confrontations—as some state cases seem to suggest, see, *e.g.*, *State v. Meadows*, 272 N.C. 327, 158 S.E.2d 638, 644 (1968); *Commonwealth v. Eperjesi*, 423 Pa. 455, 224 A. 2d 216, 223 (1966); *Gaudio v. State*, 1 Md. App. 455, 230 A. 2d 700, 707-08 (Ct. Spec. App., Md., 1967); *cf. People v. P. (Anonymous)*, 21 N. Y. 2d 1, 233 N. E. 2d 255, 257-58, 261 (1967)—mistakes, it is submitted, the "advocacy" in the *Miranda* opinion, if you want to call it that, for its scope.

Although the *Miranda* opinion itself may not be read to cover only *police station* interrogation, it is possible, of course, that in the years ahead a majority of the U.S. Supreme Court will so cut down *Miranda*. In *Mathis v. United States*, 88 Sup. Ct. 1503 (1968), the three *Miranda* dissenters still on the Court made it plain that this is one way they would like to narrow the scope of that landmark decision. In *Mathis*, an Internal Revenue agent failed to give petitioner the *Miranda* warnings when questioning him about his prior income tax returns while petitioner was incarcerated in a state jail serving a state sentence. A 5-3 majority, per Justice Black (Marshall, J., not participating), rejected the government's arguments that *Miranda* was inapplicable because (1) the questioning was part of a "routine tax investigation" and (2) petitioner had not been jailed by the interrogating federal officers but was there for an entirely different offense, as "differences . . . too minor and shadowy to justify a departure from the well-considered conclusion of
Miranda with reference to warnings to be given to a person held in custody." However, dissenting Justice White, joined by Harlan and Stewart, J J., maintained that

Miranda rested not on the mere fact of physical restriction but on a conclusion that coercion—pressure to answer questions—usually flows from a certain type of custody, police station interrogation of someone charged with or suspected of a crime. Although petitioner was confined, he was at the time of interrogation in familiar surroundings. . . . The rationale of Miranda has no relevance to inquiries conducted outside the allegedly hostile and forbidding atmosphere surrounding police station interrogation of a criminal suspect. (88 Sup. Ct. at 1506) (Emphasis added.)

"Custody" vs. "Focus"

It is plain that Miranda applies to situations not covered by Escobedo, i.e., to custodial questioning of one not yet the "prime suspect," "central figure," "target" or "focal point" of an investigation. See, e.g., Mathis supra, McFall, supra, Commonwealth v. Banks, — Pa. —, 239 A. 2d 416 (1968) (rejecting

1. See also the pre-Mathis case of People v. McFall, 66 Cal. Rptr. 277 (Ct. App. 1st Dist., Div. 2, 1968) where the court rejected the prosecution's claim that Miranda was inapplicable because when questioned about ownership of the car he was driving defendant was not in custody on any charge relating to the vehicle but was arrested on fraudulent checks and forgery charges. Pointed out the court, at 279:

Granting that the charges upon which defendant was arrested are totally unrelated to the subsequent charge of auto theft and that the questioning as to the car ownership was only investigatory, the rationale and explicit language of the Miranda decision rule out any such limitation on present admissibility requirements . . . [C]onsidering the evil against which Miranda is directed, it is the fact of custodial interrogation rather than its cause or the accusatory nature of the questions asked which necessitates the application of Miranda.

In light of Mathis, People v. Bolinski, 67 Cal. Rptr. 347 (Ct. App. 4th Dist. Div. 2, 1968), which held that a person under "technical arrest" for certain offenses (tampering with gas pumps and a traffic violation) could be questioned about a different offense (auto theft), would seem to have been wrongly decided.
argument that defendant need not have been warned because he was merely being questioned as "a witness"). But are the Miranda warnings required when the converse is true? When the suspect is not in custody or significantly deprived of his freedom, but he is a "prime suspect" or the "focal point" of an investigation? Does Escobedo supplement Miranda or has it been displaced by it?

After defining "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," the Court, as Professor Kenneth Graham aptly put it, Graham, What is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona, 14 U.C.L.A. L. Rev. 59, 114 (1966), "drops an obfuscating footnote": "This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused." (p. 444 n. 4)

Although, as Professor Graham suggests, in his painstaking analysis of this point, footnote 4 may indicate that "custody" and "focus" are to be alternative grounds for requiring the warnings, that "the Court may wish to push the rule to cover situations where there is no custody, in the usual sense of the term, to restrict, for example, deliberate use of informers to elicit evidence, as in Massiah" [377 U.S. 201, 12 L.Ed. 2d 246, 84 S.Ct. 1199 (1964)], or to prohibit any questioning "of persons who . . . could have been arrested" or "are ready to be prosecuted," id. at 115-17, this writer is of the view that, as Professor Graham also suggests, id. at 114-15, Miranda's use of "custodial interrogation" actually marks a fresh start in describing the point at which the Constitutional protections begin. Under this latter view, footnote 4 only amounts to an understandable, but misleading, attempt to maintain some continuity with a recent precedent which, although (perhaps because) it marked an important new chapter in the law of confessions, was a more groping and looser opinion than Miranda. But see Windsor v. United States, 389 F. 2d 530, 534 (5th Cir. 1968) (viewing the "focus" test as alternative ground for requiring Miranda warnings); Common-

Since this very issue was disputed by participants at the conference on Escobedo and Miranda held by the Institute of Continuing Legal Education during the summer of 1966, it may be profitable to quote at length from the pertinent panel evaluation at this 1966 conference, A New Look at Confessions: Escobedo—The Second Round 91-94, 98-102 (George ed. 1967):

“[Dean John W.] REED: . . . I observed that Professor Kamisar said, and I read some of Judge Edwards’ remarks to suggest the same point, that to a large extent Miranda displaces Escobedo. This reminded me of the case of an informal visit to a person’s home by a policeman who says, ‘You are not under any compulsion to admit me or answer questions.’ Since suspicion has focused on that person, and let’s assume it has, he is really being questioned because he is a suspect, and is being interrogated without counsel. Escobedo conceivably would apply to outlaw this practice, or would have applied but for Miranda, but Miranda would not preclude the questioning. I think both these gentlemen are saying in this situation that if there is truly no compulsion on the defendant to speak, and thus no basis to apply Miranda, one may still apply Escobedo.

“Am I foolish in suggesting at this point that Escobedo might still apply, and that the heavy burden on the police

\(^2\) These cases are discussed at length infra, pp. 362-371, 374-378.
in the individual case should be to comply with both rules? Why is Escobedo inapplicable to this kind of case?

"KAMISAR: I think the Supreme Court has made it fairly plain that if a man is not in custody, is not really restrained, no warning has to be given. The function of the Miranda warnings is to dispel the coercion inherent in police custodial surroundings and the interrogation process, to relieve the suspect of anxieties generated when he is torn from a familiar environment and thrust into a police-dominated atmosphere, or to relieve him of the typically lesser but still substantial anxieties created when he is restrained 'on the street' by uniformed officers and questioned there or in the squad car. If a suspect is not being significantly restrained, not being subjected to 'custodial interrogation,' there is no inherent coercion to neutralize, no inherent anxiety to counteract.

"A clear case would be one where an individual is interviewed in the presence of a friend or relative. This situation does not require issuance of the Miranda warnings—even though the police have 'focused' on him, even though he is the 'prime suspect.' I think it is quite legitimate to read Miranda as encouraging the police to engage more extensively in pre-arrest, pre-custody, pre-restraint questioning. Apparently the F.B.I. has done this over the years with considerable success. So it seems have the District of Columbia police as they have felt the brunt of the McNabb-Mallory rule. Ought we not encourage the police to do this? Does this not avoid the stigma of an arrest for a felony as well as the greater coercion generated by an arrest and a forced trip to the police station?

"I realize we quickly run into some very difficult problems, such as exactly when an 'arrest' takes place, and when it is that an individual feels free to move on and when he does not. In many ambiguous situations, it seems to me, the officer must make it clear to the individual that he is 'free' if he wants to establish later that the man was not 'arrested.'
"As I read *Miranda*, it is not simply a bigger and better (or worse, depending upon your viewpoint) *Escobedo*. It is quite different. *Escobedo* assigns primary significance to the amount of evidence of guilt available to the police at the time of questioning; hence there is much talk about 'prime suspects,' 'focal point,' and the 'accusatory' stage. *Miranda*, on the other hand, attaches primary significance to the conditions surrounding or inherent in the interrogation setting; hence it includes much talk of 'police-dominated' or 'government-established atmosphere' that 'carries its own badge of intimidation,' 'compulsion inherent in custodial surroundings,' 'subjugating the individual to the will of his examiner,' 'putting the defendant in such an emotional state as to impair his capacity for rational judgment,' and the like. If the requisite inherent pressures, intimidation and anxieties exist, *Miranda* applies whether in the eyes of the police the subject is a prime suspect or no suspect at all, whether he is plainly the 'accused' or only a 'potential witness.' On the other hand, absent these conditions the person subjected to police questioning is not entitled to the *Miranda* warnings —no matter how much the police have 'focused' on him or to what extent they regard him as the 'prime' suspect, the only suspect or 'the accused.' *Miranda* has broadened and deepened *Escobedo* in some respects, but narrowed it in others. *Miranda* has not enlarged *Escobedo* as much as it has displaced it. . . .

"REED: Doesn't the mere fact of questioning by a uniformed officer rather than a plainclothes detective have a significant deterrent influence on the conduct of the individual? He says, 'Well you are free to go,' but the individual knows or feels that if he starts to go, he may indeed then be arrested. Isn't this the same thing as detention?

"KAMISAR: Of course any questioning anywhere by a police officer generates some pressures and anxieties, but this
is also true of 'general on-the-scene questioning' and of visits by police at one's home or place of business, even in the presence of a relative or friend. In the latter situations, however, the Court tells us that the requisite warnings need not be given (or, at least, need not always be given) because 'the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present' [see 384 U.S. at 478].

"Suppose the officer says: 'Little Miss So-and-So is missing and we are going around the neighborhood checking this out. Can you help us?' It is not at all clear to me that the man who comes to the door of his house will be arrested or feels that he will be arrested if he says: 'I'm busy,' or 'No, I won't cooperate; that's your problem, not mine.' But how often does this really come up? I think very, very few people slam doors in officers' faces when they ask for cooperation. I know I don't, and presumably I am equipped to be tougher than most in such situations. The overwhelming majority of citizens will talk, will cooperate. This is evidenced by the experience of the F.B.I. and the District of Columbia police.

* * *

"[Judge Robert C.] FINLEY: I do not find myself too much in agreement with Professor Kamisar except on the inapplicability of the Miranda requirements to an interview at the home, which is a rather casual sort of inquiry. But I think that even that is not absolute. If the police are pretty well informed that this man is a hot suspect or that he is likely to give some very definite leads or information, we run into the problem of the 'poisonous tree' doctrine. . . .

"Law enforcement people must take a position that where there is reason to think they are really hot on the trail of the fellow who committed a crime or who knows something about it, they must give a reasonable warning at that time. Certainly to stop a man in the street is not to take
him into custody as such, but it is a restraint of the man's freedom when he is stopped. He is under some compulsion at that time. . . .

"KAMISAR: I think we are running into some confusion. I thought I made it clear that when a man is stopped on the street by the police, when a man is restrained by the police, the warnings may be required. On the other hand, even though the police have focused on a man, even if the man has become the 'prime suspect,' the warnings are not required if the authorities have not deprived the suspect of his freedom of action. At least, this is how I read Miranda. This is what I mean when I say that Miranda, in a sense, has displaced, not simply clarified and expanded Escobedo.

"For example, suppose a woman is murdered and everybody in town is convinced that her husband did it. The police are convinced that the husband is the only one who could have done it. The husband is the hottest suspect imaginable. The police pay a call on him. He is sitting in the living room talking to his brother. The police say to him: 'We're not arresting you. You are free to tell us to leave. Your brother can stay here and listen if he wants to do so. But if you are willing, we'd like to talk to you about your wife's death. Maybe we missed something. Maybe you can give us some new leads.' The husband responds, 'O.K. I'll go over it again. Maybe I can help you.' Let's make it easy. He asks his brother to stay and the latter agrees to do so. The husband is not entitled to the Miranda warnings. As I see it, the test is no longer (if it ever was) how much information the police have when they approach a suspect, but how they approach him, whether he is being subjected to inherent or implicit or indirect pressure in a degree that requires the neutralizing, offsetting warnings.

"One way we could test this hypothesis would be in the case of an undercover agent. Suppose a man is a prime suspect and, after consulting with the police, a confederate
of the suspect or a friend agrees to try to draw the suspect out about the crime—without revealing, of course, that he is working for the police, that he is, in effect, a government agent. By hypothesis, there is no coercion at all, not even of the subtle or indirect variety, because the suspect has no idea that he is talking to a government agent. He thinks he is only talking to a confederate or a friend. There is no badge, no uniform, no pressure in the atmosphere. As the law stands right now, I would say that, assuming the suspect has not yet been formally charged, and assuming further that the undisclosed government agent uses no objectionable interrogation tactics and utilizes no trickery or deception other than merely failing to disclose he is working with the police, the Miranda warnings need not be given, so that any resulting incriminating statements obtained without those warnings would be admissible. This would be true, as I see it, regardless of how much the law enforcement authorities may have ‘focused’ on the suspect.

"[Attorney General Thomas C.] LYNCH: I am wondering if there aren't some overtones of Massiah v. United States, 377 U.S. 201 (1964), in the situation Professor Kamisar has just described?

"KAMISAR: I assume that the man has not been indicted or otherwise formally charged. As I read Massiah, it applies only when a man has been formally charged or has retained counsel. Both these factors were present in Massiah. The Supreme Court has not outlawed the use of undercover agents as such. A long line of cases holds or assumes that an apparent friend or acquaintance who is really working with the authorities can engage the suspect in conversation and try to elicit an incriminating statement. The real battle has been over whether the friend or acquaintance may do so when ‘wired for sound.’ Even here, however, a majority of the Court to date has answered in the affirmative. Some
members of the Court have dissented, but their quarrel seems to be with the use of hidden microphones or hidden recorders on the person of the undercover agents, not with the employment of undercover agents as such. . . .

"LYNCH: I think Professor Kamisar oversimplified the undercover agent illustration. He said the only deception that was practiced there was that the person was in plain clothes and that he did not disclose that he was an officer or working with an officer. Obviously in an undercover situation the person has to make some statements to the proposed defendant. For example, he says he is going to buy some narcotics from him. He explains why he has to buy them—either he is a dealer or he needs a shot for himself. How do you reconcile that with the expression of the Court, limited as it is, that you cannot use trickery and cajolery in obtaining the waiver?

"[Judge George] EDWARDS: These refinements of what Miranda means are going to come up in the future to torture prosecuting attorneys and judges in the trial and appellate courts. But I want to suggest something very simple about this whole process as far as the police officer is concerned. He has no need whatever to become involved in this sort of detailed consideration of whether or not a confession under certain circumstances, or a volunteered statement under certain circumstances, will be admissible. It seems to me he needs to keep in mind two specific things, and both of them are simple and relatively easy to apply. First, if he has restrained a man of his liberty in any significant way and is proceeding to question him, he must give the citizen the required warning. Second, whether he has restrained him or not, if he knows that the citizen is the prime suspect in relation to a crime and he plans to interrogate him, he should give the warning.

"As far as I am concerned, these are the two simple means
by which an officer can stay on the safe side of the *Miranda* requirements. If police want us to tell them how fine they can cut it, that is a different question, and on that they will hear all sorts of fancy differences of opinion. But I doubt that anybody is going to contest the idea that to follow these two rules will leave the police safely within the *Miranda* opinion.

"[Chief Vincent W.] PIERSANTE: I wanted to comment on the undercover officer's position because it is very important to law enforcement. Because the pre-arrest investigation is becoming more and more valuable to us, we will engage in more and more undercover operations. In my view the undercover operator is not engaging in interrogation in the sense in which we usually use the term. I want to back up Professor Kamisar's position that an undercover operator has freedom of operation outside of *Miranda*.

"KAMISAR: We ought to deal in terms of what law enforcement men can continue to do in good faith. Reading the cases presently on the books reasonably and fairly, law enforcement officials may continue to engage in undercover work along the lines previously suggested. Now, I may be wrong in the case where the 'target' of the undercover agent is already a 'prime suspect.' It may be that *Escobedo* has not been displaced, as I think it has, and that *Escobedo* and *Miranda* stand alongside each other and furnish the suspect double protection. My position, however, is that law enforcement authorities are entitled to proceed on the assumption that whether or not a man is a prime suspect they can proceed to question him without giving him the requisite warnings if the man is not being restrained or coerced but is really remaining 'voluntarily.'"

A short few months after the aforementioned panel discussion was held, the U.S. Supreme Court came to grips with the work of the undercover agent in light of *Massiah, Escobedo* and *Mir-
anda and, it is submitted, lent considerable support to the view that the "focus" test was scrapped by Miranda. In *Hoffa v. United States*, 385 U.S. 293, 17 L. Ed. 2d 374, 87 S. Ct. 408 (1966) one Partin, whom the Court assumed was a paid government informer, testified to several incriminating statements which he said Hoffa made about endeavoring to bribe the Test Fleet jury, although Hoffa had made these statements after a point in time when the government had sufficient ground for taking him into custody and charging him with this offense. The Court purported to be stunned by Hoffa's argument that since government agents could not have continued to question him without observance of his Sixth Amendment right to counsel *if they had taken him into custody*, evidence of statements made in the presence of Partin after the point in time when government agents *could have taken him into custody* likewise flouted his right to counsel.

Retorted the Court, per Justice Stewart, 385 U.S. at 310:

Nothing in *Massiah*, in *Escobedo*, or in any other case that has come to our attention, even remotely suggests this novel and paradoxical constitutional doctrine, and we decline to adopt it now. There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause . . .

As has been pointed out however, "Hoffa's lawyers had simply chosen inartistic phrasing for an argument substantially drawn from the Court's own opinions," principally *Escobedo's emphasis* on "focus"; "when suspicion had focused on Hoffa the general investigation was functionally complete; at that point, he was the accused and thereby entitled to the absolute protection of the privilege against self-incrimination [and the protection
of counsel]." Note, Judicial Control of Secret Agents, 76 Yale L. J. 994, 1008 (1967).

The Court also made short work of Hoffa's contention that his right under the Fifth Amendment not to "be compelled in any criminal case to be a witness against himself" was violated by the admission of Partin's testimony. Although Hoffa could hardly have been said to have made a "knowing and intelligent waiver" by talking to, and in the presence of, an apparent friend and court retainer in his entourage who was actually a secret government agent, the Court considered it necessary only to deal with "compulsion" or "coercion," id., at 304:

[A]ll have agreed that a necessary element of compulsory self-incrimination is some kind of compulsion. Thus, in the *Miranda case*, dealing with the Fifth Amendment's impact upon police interrogation of persons in custody, the Court predicated its decision upon the conclusion 'that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely ...' 384 U.S., at 467.

In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual. The petitioner's conversations were wholly voluntary.

Since Partin had not actively elicited Hoffa's incriminating statements, another case decided the same day as Hoffa, *Osborn v. United States*, 385 U.S. 323, 17 L. Ed. 2d 394, 87 S. Ct. 429 (1966), affirming the conviction of one of Hoffa's attorneys for endeavoring to bribe a prospective federal juror, seems to pose a stronger case for the applicability of *Escobedo* and/or *Miranda*. For the government spy in *Osborn* who posed as petitioner's "investigator" made at least an overture toward crime by mentioning that he knew some of the prospective jurors, and that one was his cousin, and in subsequent meetings, he told petitioner,
falsely, that he found his cousin "susceptible to money for hanging this jury." Moreover, when, in response to a detailed factual affidavit, the judges of the federal district court authorized federal agents to conceal a recorder on the person of petitioner's "investigator," in order to determine from recordings of future conversations between him and petitioner whether the latter was in fact trying to bribe a prospective juror, it certainly seems that the investigation had "focused" on him. But neither the question of self-incrimination nor the right to counsel is considered in the Osborn opinion although Justice Douglas, the sole dissenter, protested: "Encouraging a person to talk into a concealed 'bug' may not be compulsion within the meaning of the Fifth Amendment. But allowing the transcript to be used against the accused is using the force and power of the law to make a man talk against his will . . ." 385 U.S. at 351-52.

An opportunity to shed further light on the scope of Massiah and/or Escobedo was lost when on the last day of the 1967-68 Term, the Supreme Court, with four Justices dissenting, dismissed the writ of certiorari as improvidently granted, 88 Sup. Ct. — (1968), in People v. Miller, 245 Cal. App. 2d 112, 53 Cal. Rep. 720 (4th Dist., Div. 1, 1966). Petitioner was arrested for murder and was taken to a county jail, where she was booked on that charge and placed in a cell. Not only did she meet with counsel, but in an attempt to prevent questioning of his client, counsel set up a 24-hour-a-day watch of her cell. But an undercover agent was falsely booked into the jail on a fictitious charge and placed in petitioner's cell. Although this occurred prior to any formal charge being filed against petitioner, the agent remained in petitioner's cell, eliciting information after a complaint was formally filed charging petitioner with murder or conversing with petitioner for two more days. In light of Massiah and Escobedo, the California District Court of Appeal viewed the law enforcement activity as "completely indefensible," "most inexcusable" and "almost incredible," but found that the admission of petitioner's statements was not "prejudicial error" and moreover, that objection to it was waived.
Dissenting from the dismissal of the writ and urging reversal, Justice Marshall, joined by the Chief Justice and Justices Douglas and Brennan, indicated that even though petitioner had not yet been formally indicted, once petitioner had been arrested and booked for murder the investigation had "begun to focus on a particular suspect" and Massiah, as expanded by Escobedo, applied. The dissenters maintained, further, that whether or not the undercover agent "interrogated petitioner," "her presence itself was an inducement to speak, and an inducement by a police agent." *Id.* at --. But the dissenters also assigned weight to the fact that "petitioner was in custody without bail, with a consequent lack of freedom to choose her companions"; she was represented by counsel at all times; a formal complaint had been filed before the agent had terminated her work in petitioner's cell; and the agent was more than a mere "listening post"—in various ways she deceived petitioner and subverted her rights. *Id.* at --.

Moreover, the position of the dissenters is further beclouded by the fact that they did not consider the impact, if any, of Miranda on Massiah and Escobedo because, as they specifically noted, p. — n. 14, petitioner's trial was begun more than a year prior to Miranda, thus rendering that decision inapplicable.

"Volunteered" Statements vs. Statements Made in Response to "Interrogation"

The Court pointed out in *Miranda*, 384 U.S. at 478:

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

Among the cases illustrating the points made in the passage just quoted are:

*Parson v. United States*, 387 F. 2d 944 (10th Cir., 1968) (on learning defendants were AWOL, a sheriff held them pending arrival of military authorities; when, in the course of trying to move defendants' car off the street, sheriff discovered the key found in personal effects of one defendant wouldn't work, sheriff claimed he was being given "runaround" about the key, whereupon one defendant made the unresponsive remark that they had stolen the car and the other defendant confirmed this);

*State v. Intogna*, 101 Ariz. 275, 419 P.2d 59 (1966) (on hearing gun shots, officer immediately went to scene where he saw fatally wounded victim on sidewalk; on being told by bystander that a man had run into a nearby house the officer followed only to have defendant open the kitchen door and say: "I am the man you are looking for.");

*People v. Mercer*, 64 Cal. Rptr. 861 (Ct. App. 2d Dist., Div. 1, 1968) (officer pursued and caught up with defendant who was attempting a jail break, but before officer could say anything, defendant volunteered: "I did it. No one else was involved.");

*In re Orr*, 38 Ill. 2d 417, 231 N.E.2d 424 (1967) (assuming arguendo that *Miranda* standards were extended to juveniles by *Gault*, those standards not violated where youth, though handcuffed and removed from his grandmother's apartment to a police squad car by two officers with whom he was seated, stated, without any questioning, on way to police station that this "has been on my chest since it happened. I want to get it off.");

*Carwell v. State*, 2 Md. App. 45, 232 A.2d 903 (Ct. Sp. App. Md., 1967) (responding to call that two men were breaking a storehouse window, officers confronted suspect at scene, showed him their badges and placed him under arrest, whereupon
suspect “blurted out”: “I didn’t break the window, the other boy did it.”);


*Commonwealth v. Eperjesi*, 423 Pa. 455, 224 A.2d 216 (1966) (two days after two small boys were found dead in a refrigerator, the boys’ aunt, who knew investigating officer then visiting apartment, called him into a room, locked the door and told him she had closed door of refrigerator in which boys had perished);


*State v. Miller*, 151 N.W.2d 157 (Sup. Ct. Wisc., 1967) (former law enforcement officer agreed to go down to station; driving his own car on way down, he made incriminating statements, without any questions being asked, to officer who rode with him and whom he knew from former police work together).

In a number of the aforementioned cases, however, the officer followed up the volunteered statements with a “Why did you shoot him?” (*Intogna*, supra; warning required because officer had drawn gun within 3 feet of defendant who was thus “deprived of his freedom in a significant way”) or a “did what?” (*Mercer*, supra; response to this statement also admissible although no warnings given); or “Did you know the boys were in there?” and “Why did you do it?” (*Eperjesi*, supra; answers admissible without warnings). Implicit in *Eperjesi* seems to be the explicit reasoning of *Mercer*: “The question put by the officer clearly followed a statement initiated and made by defendant.” But as natural and understandable as it is for an officer to keep the flow of conversation going and/or to “clear up” some points once the suspect has volunteered an incriminating statement, such “follow-up” questions may well constitute “interrogation” within the meaning of *Miranda*.

*Miranda* does say at one point that “by custodial interrogation
we mean questioning initiated by law enforcement officers after a person has been taken into custody . . ." (384 U.S. at 444; emphasis added), suggesting that police questioning designed simply to clarify or amplify a statement volunteered by the suspect is not "interrogation," but on the same page the opinion also states that "prior to any questioning, the person must be warned . . ." (Emphasis added.) Moreover, the Court points out elsewhere, p. 475-76, that "where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated." In context, however, this may only mean that a defendant who has waived his rights after being given the requisite warnings is free to revoke that waiver at any time.

It may be the line should be drawn between police questions (1) designed to clarify just what the suspect meant to say when he volunteered the statement (e.g. the officer responding "did what?" when the defendant volunteered "I did it" in Mercer) and (2) seeking to enhance defendant's guilt or raise the offense to a higher degree by, for example, getting at the defendant's state of mind as seems to have occurred in Intogna ("Why did you shoot him?") and Eperjesi ("Why did you do it?" and "Did you know the boys were in there?") and that only the category (2) "follow-up" questions should be considered "interrogation." In any event, it is a bit too glib and too loaded to frame the issue, as Justice Musmanno did for the court in Eperjesi, in terms of whether an officer should "refuse to listen" to a person at the scene of the crime he was investigating, 224 A.2d at 220, or whether Miranda was intended "to restrain a policeman from listening when statements are voluntarily made," ibid. The officer in that case did more than just "listen."3

3. When this commentary was already in galleys, the Supreme Court of Ohio handed down a decision, State v. Perry, 14 Ohio St. 2d 256 (1968) which, on the basis of Eperjesi-type reasoning criticized in the text, held that Miranda did not apply to police questions "following up" a volunteered
Assuming _arguendo_ that sometimes, at least, a "follow-up" question of a person who has volunteered a statement is "interrogation," the _Miranda_ warnings would still not be required if the person were not in "custody," as may have been the case in _Eperjesi_ [See the discussion in the next section].

What of a statement made by defendant in response to a question asked of another person at the scene? Generally, this would be a "volunteered" statement, but if the defendant is already in custody the particular facts of a case may lead to a different conclusion. In _Stone v. United States_, 385 F.2d 713 (10th Cir., 1967) state officers stopped defendant and his woman companion, then driving the car, and arrested him for his misuse of an expired gasoline credit card at another town. When first stopped the defendant, referring to his companion, said: "Let her go; she didn't have anything to do with this; she doesn't know anything about it." While taking the couple to a nearby town where the credit card offense occurred, an officer asked the woman if it was her car [although it turned out later that the car was stolen, the arresting officers did not know that then] and the defendant interrupted to say: "No, it's my car. The car was given to me by my ex-wife in Indianapolis." The

statement. Responding to a complaint about suspicious activities at a car wash, officers arrived at the scene, observed three men running from the side of a car wash building, and gave chase.

On being caught, defendant blurted out that he had "never done anything like this before." An officer then asked him what he had done, eliciting the admission that defendant and his friends had decided to break into the car wash. Assuming, _arguendo_, that the officer was merely seeking "clarification of [defendant's] ambiguous, but inculpatory, admission," as the court put it, 14 Ohio St. 2d at 262, when he asked this question—in light of the immediately preceding events it seems the officer should have had a pretty good idea of what defendant meant when he volunteered the statement—the next "follow up" question, _how_ defendant and his friends _planned_ to break into the car wash, certainly seems to constitute "interrogation" within the meaning of _Miranda_. In ruling that _Miranda_ was inapplicable to the instant case, the court noted that "the officer was not required to prevent [defendant] from continuing his explanation of his activities at the scene," _id_. at 262, but it is submitted that the officer did a good deal more than that.
court took the position that *Miranda* does not prohibit such "volunteered" statements, but in light of the fact that defendant had earlier manifested considerable protectiveness toward his companion, it is arguable that subsequent questioning of her about the car in the presence of the defendant was likely, if not designed, to evoke a statement *from him* along the lines actually made. And it is submitted that it is not simply custody plus "questioning," as such, which calls for the *Miranda* safeguards but custody plus police *conduct* calculated to, expected to, or likely to, evoke admissions.

Consider *People v. Torres*, 21 N.Y. 2d 49, 233 N.E. 2d 282 (1967) where the officer presented himself at defendant's apartment with a search warrant (for possession of policy slips), exhibited the warrant and explained what it was. Before the officer said anything else, defendant replied: "The booklets are in the closet in the room, on top. You are going to find them anyway." Although the court conceded it was "arguable" that a defendant who is shown a search warrant covering his apartment and person, is deprived of his freedom in a "significant way," even in his own home, 233 N.E. 2d at 285, it did not decide this issue but rather resolved the matter on the ground that defendant was never "questioned."

Is it not also arguable, however, that exhibiting a search warrant and explaining its purpose is likely, if not calculated, to evoke an admission? Most courts would probably hold not, but suppose the facts are altered. Suppose the police locate and seize the incriminating physical evidence in the presence of defendant, who, realizing "the cat is out of the bag," then makes an incriminating statement? Or suppose, after seizing the evidence, the police simply stare at the defendant? Or flaunt the evidence before him? At *some point* the police *conduct* must be regarded as "interrogation" within the meaning of *Miranda*, must it not?

In *State v. Gallicchio*, 51 N.J. 313, 240 A.2d 166 (1968), three witnesses viewed defendant in a line-up. The first picked out defendant and the second was called to make the identification,
but before he had a chance to do so, defendant said: "You might as well go pick me out because everyone else will." As the court viewed it, defendant "was not being questioned when he made the statement;" rather "he volunteered it." (240 A.2d at 170)

May it be argued that the way the police conducted the line-up procedure made it not improbable or unforeseeable that defendant might make an incriminating statement and that therefore, before calling the three witnesses, the police should have advised defendant that any statement he made in reaction to an identification could be used against him, etc.? Probably few courts, if any, would so hold on Gallicchio-type facts, but Duckett v. State, 240 A.2d 332 (Ct. Spec. App. Md., 1968) dealt with a line-up or confrontation situation presenting a stronger case for the applicability of Miranda. There, although the rape-kidnapping victim and her husband had already identified defendant on three prior occasions as a participant in the crimes, the police arranged still another face to face confrontation between defendant and the victim and her husband, at which time defendant made an incriminating statement. Since the court reversed on other grounds, it did not rule on the admissibility of the statement, but it did manifest puzzlement at the motive and purpose of the police in arranging the fourth confrontation (240 A.2d at 341-42).

Compare Veney v. United States, 344 F.2d 542 (D.C. Cir. 1965) where Judge Wright, concurring in the result, expressed curiosity and concern over the fact that since the court, in a 1959 decision, had held admissible, over a Mallory objection, defendant's statement at a line-up, on the ground that it was made "spontaneously" and not as a result of interrogation, suggestion or instigation of the police, "'spontaneous' apologies by defendants [at other line-ups or confrontations with the complaining witness] have been offered by the Government and received in evidence . . . with unusual frequency—usually supported by testimony that the apologies were not suggested or inspired by the police"—although in the instant case, at least, one complaining witness had testified to the contrary. (344 F.2d at 542-43). It seems fairly clear that
if the statement at the confrontation is suggested or instigated by the police, as appears to have happened in Veney (where the police said to the defendant, "Do you want to say anything to the people [the complaining witnesses]?") and after being met with silence repeated, "Don't you want to say anything?"), any resulting "apology" or other incriminating statement should be inadmissible, absent the Miranda warnings.

What of a statement made by defendant in response to an accusation by another person at the scene? In State v. Oxentine, 270 N.C. 412, 154 S.E. 2d 529 (1967), an officer arrived in defendant's house, observed deceased lying face down beside the kitchen table in the midst of beer cans and asked a crying girl who had shot the deceased. She named the defendant, who, standing back at the doorway of the other room, responded: "Yes, I shot him." The court ruled the statement admissible on two grounds—each of which seems correct—(1) at the time he made the statement, defendant had not been "taken into custody" or "deprived of his freedom" and (2) he was not being "questioned" within the intent and meaning of Miranda. Moreover, it seems unreasonable and unrealistic to expect the officer to interject the Miranda warning in the course of such rapid-fire, on-the-scene conversation. However, if, following the bystander's accusation, the police had taken defendant into custody and "followed up" the accusation, e.g., "You heard the lady; is she right?" or "What about it?" the result would seem to be otherwise. If, after taking defendant into custody, the police had simply stared at defendant—with the bystander's accusation still "ringing in the room"—defendant's incriminating statement might also be inadmissible.

What if defendant makes an incriminating statement while filling out the forms in connection with the "booking procedure" or while otherwise being asked his name or address? Although the question is not entirely free from doubt, it seems that just as the absence of police questioning, as such, does not always preclude a finding of "custodial interrogation" so routine police "questioning" not related to the investigation of the case nor
designed, expected or likely to elicit information relevant to guilt may not amount to "custodial interrogation" within the meaning of Miranda. Reconsider Parson v. United States, discussed supra at p. 352; see Williams v. United States, 391 F.2d 221 (5th Cir. 1968); Clarke v. State, 240 A.2d 291 (Ct. Spec. App. Md., 1968) (defendant gave name, address and place of employment in response to booking officer's request for such information, but if, when asked to supply such routine identification, defendant had unresponsively made incriminating statements, court's reasoning would have permitted use of such statements absent Miranda warnings.) To the same effect are pre-Miranda California cases applying the Escobedo-Dorado rule: People v. Pike, 48 Cal. Rptr. 575, 578 (Dist. Ct. App., 3d Dist., 1966); People v. Propp, 45 Cal. Rptr. 690, 705 (Dist. Ct. App. 1st Dist., 1965).

Police custody, without more, generates certain anxieties and pressures, but as the Mercer, Miller and Orr cases, discussed supra at pp. 352-3 illustrate, and as the language of the Miranda opinion makes fairly clear, "custody," although inherently coercive, is not enough to bring the Miranda warnings into play. Justice White underscores this point in his Miranda dissent, 384 U.S. at 533:

[T]he [majority] says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission.

When a person in custody is "subjected to interrogation" about his guilt, additional pressures are created which increase the need to advise him of his rights because, as the Chief Justice observed in Miranda, id. at 468:

It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a
confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury [noting at this point that Lord Devlin has commented that 'there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not.'].

It is submitted, however, that absent special circumstances such questions as "Where do you live?" or "Do you want us to get you a sandwich?" do not add to the pressures generated by police custody and therefore unresponsive incriminating statements made in reply to such questions should be viewed as equivalent to "blurted out" statements.4

"General On-the-scene Questioning" or "General Questioning of Citizens" vs. "Custodial Interrogation"

The Miranda opinion points out, 384 U.S. at 477-78:

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

4. Cf. Rule II of the English Judge's Rules: "As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offense, he shall caution that person or cause him to be cautioned before putting to him any questions or further questions relating to that offence." (Emphasis added.)

But see Commentary to A.L.I., Model Code of Pre-Arraignment Procedure §A5.08 (Study Draft No. 1, 1968) at pp. 27-28 to the effect that it is not improper for the police to ask "routine questions unrelated to the investigation of the case," but "if such non-investigative questioning does happen to produce an incriminatory statement, it must be excluded from evidence unless the proper warnings were issued and a valid waiver was obtained."
ship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present [noting, at this point, p. 478 n. 46, the observation of a Scottish court that modern police interrogation practices ‘create a situation very unfavourable to the suspect,’ unlike former times, when questioning ‘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.’] (Emphasis added.)

Typical of cases finding “general questioning of citizens in the fact-finding process” are:

*United States v. Messina*, 388 F.2d 393 (2d Cir., 1968) (alternative holdings that (1) warnings given were adequate under *Miranda* and (2) even if not, defendant was “not ‘in custody’—indeed, the interviews were held on a park bench and in a Schrafft’s restaurant;” but this does not necessarily render *Miranda* applicable and a more detailed description of circumstances would seem in order);

*United States v. Essex*, 275 F. Supp. 393, 397-98 (E.D. Tenn., 1967) (defendant invited two federal agents into her living room, pointing out that “she had been expecting a visit from the FBI”; no charge had been made against her and no indictment returned against her until a year after this “investigative interview”);

*Tillery v. State*, 238 A.2d 125 (Ct. Sp. App. Md., 1968) unaware that defendant had been shot attempting a robbery and not suspecting him of any crime, officer questioned defendant in hospital merely as a victim of a shooting);

*People v. Gilbert*, 8 Mich. App. 393, 154 N.W. 2d 800, 801 (Ct. App. Mich., 1967) (defendant questioned about fatal accident in which he was involved as “he freely walked about the hospital corridors and emergency room;” he was “in no way isolated for questioning and the period of interrogation was of short duration;” although the facts given seem to support result, court also suggests *Miranda* should be limited to facts of cases before
Supreme Court when it wrote the opinion, e.g., persons under "formal arrest" and subjected to "general atmosphere of psychological compulsion," which seems to be unduly restrictive reading of *Miranda*;

*Commonwealth v. Barclay*, 240 A.2d 838 (Super. Ct. Pa., 1968) (officer interviewed defendant in his living room, in presence of both his wife and father, informing him that he had a complaint that defendant was involved in a "drag race;" Hoffman, J., dissents, maintaining that officer had "focused" on defendant by the time he went to his home and—what this writer believes is more to the point—that defendant "knew immediately he was the focal point of the investigation.")

What determines whether a person being questioned is "in custody"? (1) The subjective intention of the questioning officer to hold the person or to arrest him? (2) The degree to which the investigation has "focused" on the person or, a variation of the same approach, whether or not the police have "probable cause" to arrest the person? (3) The subjective belief of the person that he is significantly deprived of his freedom? (4) The belief of the person, as "a reasonable man," that his freedom is significantly impaired? It is submitted that approach (4) should be controlling.

*People v. Glover*, 52 Misc., 2d 425, 276 N. Y. S. 2d 461 (Sup. Ct. Bx. Cy., 1966) and *People v. Allen*, 50 Misc. 2d 897, 272 N. Y. S. 2d 249 (Sup. Ct. Kings Cy., 1966), rev'd mem. (3-2), 28 App. Div. 2d 724, 281 N. Y. S. 2d 602 (2d Dep't, 1967) take the view, erroneously, it is submitted, that "custodial interrogation" turns on whether the police have probable cause to arrest the person being questioned or whether their suspicion has "focused" on him. At one point, Justice Chimera states flatly in *Glover*, 276 N. Y. S. 2d at 466: "[W]hatever else *Miranda* may have intended 'custody' to mean, this much is apparent—police questioning of a person wherever detained, upon whom suspicion has already focused, appears ruled to be 'custodial interrogation.'"

In the much-discussed *Allen* case, Justice Sobel also advances the view that the subjective intention of the officer to hold or to
arrest the person being questioned constitutes an independent basis for finding that “custodial questioning” is taking place.

In Allen, police officers accompanied by the complaining witness (defendant's mother-in-law, who claimed he had raped her) and the complaining witness' paramour, went to defendant's house and asked the defendant in the presence of his wife (the alleged victim's daughter) whether he had committed the rape. Justice Sobel found that defendant was “in custody” at the time this question was asked, because the officers had admitted that they went to defendant's house “for the purpose of making an arrest” and because they would not have permitted the defendant to leave before questioning him, 50 Misc. 2d at 899, 272 N.Y.S. 2d at 251.

Justice Sobel was quite correct when he pointed out that “it does not matter that the question was asked in the defendant's home upon 'first' custody rather than in the police station,” but he was in error, it is submitted, when he deemed it conclusive that “quite obviously the defendant in the instant case was 'on target' and was 'not free to go.'” 50 Misc. 2d at 900, 272 N.Y.S. 2d at 252.

Justice Sobel's views on this point have been spelled out in his valuable monograph, The New Confession Standards 60-61 (1966):

Whether his judgment was right or wrong, if [the police officer's] subjective intention was to hold the person, then that particular person was not 'free to go.' He was in 'custody.' [citing the Allen case] In this same regard, the belief of the person detained that he was not 'free to go' is of no consequence. The issue is not 'coercion.' Only the fact of 'custody' is of consequence. If he was in fact 'free to go,' it should not matter that subjectively he believed he was not. One who is 'free to go' is not under legal 'compulsion.' His answers may be used against him.

The 'objective test' is required when the police officer testifies at the admissibility hearings that the person detained was in fact 'free to go.' In such a situation, the officer may
honestly believe that the person detained was ‘free to go.’ His belief is relevant but not by any means controlling.

The prime inquiry is into the existence of probable cause. If indeed the police officer had probable cause to arrest, his protestations that the person detained was ‘free to go’ must be ignored. It must be presumed that a police officer will do his duty; if he has probable cause, he will arrest. The existence of probable cause establishes ‘custody.’

As already indicated in the discussion of “CUSTODY” vs. “FOCUS,” supra, p. 338-50, this writer is of the view (and believes Hoffa and Osborn make clear) that neither the intent to arrest, nor the existence of probable cause, nor the fact that defendant is “on target” establishes “custody” within the meaning of Mirandá. Justice Sobel’s views to the contrary notwithstanding, the “fact of custody” cannot be established without regard to the impressions or beliefs of the person being questioned. If the defendant does feel “free to go” then regardless of the uncommunicated intent of the officers or their possession of “probable cause” to arrest, he is not “in custody;” the pressures and anxieties generated by custodial interrogation are not operating and thus there is no need to give the neutralizing, offsetting Miranda warnings.

Since the trial in Commonwealth v. Jefferson, 423 Pa. 541, 226 A.2d 765 (1967) took place more than a year prior to Miranda, that landmark decision was not applicable, but the Supreme Court of Pennsylvania, per Eagen, J., took footnote 4 in the Miranda opinion, discussed supra at p. 339, too seriously, and seemed to say by way of dictum that once the investigation had “begun to focus” on defendant “as the accused she was ‘in custody,’” apparently within the meaning of Miranda. (226 A.2d at 768).

Investigating a stabbing, an officer went to a hospital and asked “all those present in the accident ward” (including defendant, who had a towel over her forehead and left eye) and “no one in particular”: “What happened?” Defendant made an incriminating statement in reply. It seems clear that neither
under *Escobedo* nor *Miranda* did this question have to be preceded by warnings. This was a general inquiry into an unsolved crime within the meaning of *Escobedo* and "general questioning of citizens in the fact-finding process" within the meaning of *Miranda*.

A second officer arrived at the hospital, however, and after a "briefing" by the first officer, the newly arrived officer entered the ward to ask: "Who did the stabbing?" Again, defendant made an incriminating statement in reply. But at this point, although the *Jefferson* opinion indicates otherwise, the rationales of *Escobedo* and *Miranda* lead to different results. The questioning situation *had changed* from a general inquiry "to one which focused on a particular suspect for the purpose of eliciting a question," 226 A.2d at 768, but it seems that defendant was not yet "in custody." The court suggested, however, that she was, *ibid*: "[A]fter [defendant's] admissions to [the first officer], the investigation had certainly begun to focus on her as the accused; and, she was certainly not free to leave and [was] at least technically 'in custody.'"

It is unclear whether the fact that the investigation had "begun to focus" on defendant and the fact that she was not "free to leave" were *alternative grounds* for concluding that she was in custody, but even in combination, for reasons set forth above, these factors would not seem to amount to "custody" within the meaning of *Miranda*.

*People v. Rodney P.* (Anonymous), 21 N.Y. 2d 1, 233 N.E. 2d 255 (1967) explicitly rejects the reasoning in *Jefferson*, supra, and, by implication, the reasoning in *Allen* and *Glover* as well, but, for reasons discussed below, seems to give *Miranda* an unduly restrictive reading.

In *Rodney P.*, one youth, arrested in connection with a car theft, admitted his involvement and identified defendant as his accomplice. A detective went to the vicinity of defendant's home, asked which of the three youths standing outside was defendant and when the defendant, a 16 year-old, identified himself, the detective asked the other two youths to leave, which they did.
After questioning defendant for some three or four minutes about being with the youth who had already admitted his involvement in the theft (although apparently this was not communicated to defendant), defendant also admitted his involvement.

A 5-2 majority of the New York Court of Appeals, per Keating, J., held that defendant was not subjected to "custodial interrogation," and therefore the Miranda warnings need not have been given, relying heavily on People v. Arnold, 58 Cal. Rptr. 115, 120, 426 P.2d 515, 520 (1967) ("custody occurs if the suspect is physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived") (emphasis added) and People v. Hazel, 60 Cal. Rptr. 437 (Ct. App. 1st Dist., Div. 1, 1967) (to the same effect). Wrote Judge Keating, 233 N.E. at 260-61:

This [the test applied by the California courts] is the test which we hold to be the most reasonable. It gives effect to the purpose of the Miranda rules; it is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question. . . . Applying the rule to the facts in the case at bar, we conclude that the Miranda warnings need not have been given. The police drove up to the front of the defendant's home, a private dwelling. The defendant and two friends were on the side steps of the house. One of the detectives got out of the car, approached the defendant and, quite properly, asked to speak to him privately regarding a matter which might prove to be embarrassing. The defendant was not told that he was under arrest when he responded to the questions outside his home—'in [his own] backyard' to use his counsel's words—nor was he physically restrained in any way. The fact that he might have been restrained, had he attempted to leave, is not controlling. . . . Nor can it be said that the defendant was led 'as a reasonable person' to believe that his freedom was restrained in any significant way.
There is no evidence that the police officer had his gun drawn\(^5\) ... or that the defendant knew or was advised that his accomplice was already in custody and had implicated him. ... '[T]he conversation took ... [n]o more than three or four minutes.'

This kind of questioning is little different from routine police investigation of crimes or suspicious conduct at a person's home, his place of business or on the street—the kind of questioning which has uniformly held not to require the *Miranda* warnings. ... 

The *Rodney P.* majority also dwelt on the fact that *Miranda* had stressed that even the modern police interrogation practice "is predicated upon psychological coercion," 233 N.E. 2d at 257; that in all the cases before the Court in *Miranda* the defendant had been detained and interrogated in police stations, in an "atmosphere" which "carries its own badge of intimidation," *ibid.*; criticized the *Jefferson* case because its reasoning "overlooks the language and purpose of the *Miranda* warnings which is to protect the individual's freedom of choice—to answer or not answer—in situations which are inherently coercive," *id.* at 259; maintained that the determination of "custodial interrogation" "must . . . be based upon a careful examination of the holding of *Miranda*, the purpose of the Supreme Court in requiring the four-fold warning and the evil which the Court resolved to eradicate," *id.* at 257; and concluded, *id.* at 261:

[W]e believe that, in prefacing the word 'restraint' with the adjective 'significant,' the Supreme Court intended that the warnings be given when the questioning takes place under

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5. In *People v. Shivers*, 21 N.Y. 2d 118, 233 N.E. 2d 836 (1967), decided one month after *Rodney P.*, a 4-3 majority of the New York Court of Appeals, per Fuld, C.J., held that even brief questioning of a suspect at the scene by an officer who has drawn his gun is "custodial interrogation," agreeing with the dissent below that "a drawn and pointed revolver has no ambiguity, and its compulsion is manifest. The threat is direct and the need to comply immediate." To similar effect is *State v. Intogna*, 101 Ariz. 275, 419 P.2d 59 (1966). But cf. *Hill v. State*, discussed infra, p. 374.
circumstances which are likely to affect substantially the individual's 'will to resist and compel him to speak where he would not otherwise do so freely.' . . . Such circumstances were not present here.

Burke, J., joined by Fuld, C.J., dissented, contending (233 N.E. 2d at 262-63):

The majority opinion has construed 'the language and purpose of * * * Miranda' to be the protection of the individual's freedom of choice—to answer or not answer—in situations which are inherently coercive. To reduce Miranda to situations where a person feels compelled to respond to an inquiry is, in my opinion, an illogical distortion of the term 'freedom of action.' The 'purpose' behind Miranda notwithstanding, 'freedom of action' is a concept logically independent of 'compulsion to speak.' The Supreme Court, for whatever its reasons, declared that these four-fold warnings must be given when a suspect's freedom of action is 'significantly' impaired. This is all we are called upon to decide here. It is not our task under Miranda to consider whether in laying down this rule the Supreme Court may have in fact laid down a rule broader than was necessary to achieve the purposes for which it was formulated. Our task is only to apply that rule.

The majority itself proposes a rule which I believe accords with the dictates of Miranda, namely, in requiring that the warnings be given whenever a suspect either is in fact or reasonably believes himself to be deprived of his freedom of action in any significant way. In applying this rule to the case at bar, however, the majority introduces the extraneous consideration of whether or not there were, in addition, elements of compulsion to answer the arresting officer's questions. The latter element is not only irrelevant to a determination of whether the Miranda warnings were required, its application generally will require our courts and law enforcement officials to become involved in every case such as this in the extremely difficult process of assessing
whether or not the coercive aspects of the situation were such as to compel the suspect to answer the questions of an arresting officer, not merely whether or not a reasonable man would have felt his freedom of action significantly impaired.

Rejecting this concept of 'purpose' and accepting for the moment the test proposed by the majority, I am of the opinion that the defendant was here deprived of his freedom of action in a significant way at the time that he made these oral admissions. When the detective approached him, it is clear that defendant was the only suspect as far as a possible accomplice was concerned. The 'fact-finding' stage had been concluded. The police investigation had reached the 'accusatorial stage.' Immediately following his meeting with the defendant, the detective directed his two friends to leave them alone. His initial inquiry was whether Rodney P. knew Daniel W., the youth who was arrested and who had implicated him. After an affirmative response, the detective pressed the defendant and succeeded in eliciting the oral admission. This statement strikes me as an admission made by a suspect under circumstances which violate the rule laid down in Miranda. I do not understand how any conclusion can be reached other than that it was reasonable for this 16-year old youth, who had been isolated from his companions and questioned specifically with regard to the commission of a crime, to believe that he would be detained until the question was answered to the satisfaction of the detective. This conclusion is in accord with the Supreme Court's analysis in Miranda. Yet the majority, by applying their test, does not arrive at this result.

* * *

In formulating a purposive interpretation of Miranda, I am in accord with the majority that a subjective approach hinging upon the particular defendant's analysis of a situation would impose an unreasonable burden upon law enforcement agencies, requiring them to anticipate a person's 'frailties or idiosyncrasies.' However, I disagree with their
rejection of the Supreme Court of Pennsylvania’s application of *Miranda* in *Commonwealth v. Jefferson*. . . . There, the defendant was truly a suspect in technical custody. *Miranda*, as I view it requires an answer to the hypothetical ‘If the person had remained silent or expressly refused to answer under privilege of self-incrimination, would the police have permitted him to leave?’

(1) Insofar as Judge Burke criticizes the *Rodney P.* majority for indicating that “custodial interrogation” might be limited to “inherently coercive” circumstances or to those situations which are likely to affect substantially the individual’s “will to resist,” the dissenting opinion’s criticism is well taken. A person significantly deprived of his freedom by an officer who then asks him questions relating to the crime being investigated is entitled to the *Miranda* warnings without regard to whether his plight amounts to, or approaches, the pressures operating on the defendants in the *Miranda* cases or those working on one being subjected to the psychological coercion recommended in police interrogation manuals. See the discussion of POLICE STATION INTERROGATION VS. “FIELD INTERROGATION,” supra at 336-7. To put it another way, when a suspect, who may reasonably conclude that his freedom has been significantly restrained by a police officer, is questioned about his guilt by the officer, it must be conclusively presumed that his “will to resist” has been substantially affected.

(2) Insofar as Judge Burke argues that (a) once the police investigation has “focused on” a suspect or reached the “accusatorial stage” or (b) once the police have made the decision, whether or not communicated, not to let the suspect go, the suspect is “in custody,” it is submitted, for the reasons advanced in the discussion of *Allen, Glover* and *Jefferson*, supra, that he is in error.

(3) Whether or not the suspect in *Rodney P.* could and did reasonably conclude that his liberty was significantly restrained, i.e., that he would not be free to leave unless and until he did answer questions to the satisfaction of the detective, as dissenting
Judge Burke believes, is unclear. (The defendant did not testify at the suppression hearing.) The awareness of the person being questioned by an officer that he has become the “focal point” of the investigation, or that the police already have ample cause to arrest him, may well lead him to conclude, as a reasonable person, that he is not free to leave, that he has been significantly deprived of his freedom, but the Rodney P. majority does not focus on this issue, nor is this point addressed in the Allen, Glover and Jefferson cases.

Windsor v. United States, 389 F.2d 530 (5th Cir. 1968) also fails to consider the extent to which defendant realized that the investigation had focused on him, deeming it controlling that federal agents must have regarded him the “focal point.” The salient facts in Windsor are as follows: Earlier in the day, defendant and his companion had been stopped in an automobile by local police for a traffic violation. When the companion failed to prove ownership of the vehicle, the local police contacted the FBI. Defendant’s companion admitted to federal agents that the car was stolen and that he and defendant had driven it across state lines. The FBI agents then went to defendant’s motel, talked to some persons at the motel for “background information” and upon entering the room belonging to these persons, in the presence of defendant, spotted and seized a gun which defendant identified as his. The agents then told defendant they had the key to the motel room he and his companion shared and asked defendant to accompany him to this room, which he did. Before questioning defendant, one agent then told defendant, inter alia, that he was not under arrest and was not being detained in any way and that he could terminate the interview at any time.

Nevertheless the court ruled inadmissible the incriminating statements obtained from defendant in the motel room absent the full Miranda warning, 389 F.2d at 535:

The focus of the investigation was clearly and unmistakably upon [defendant] while he was being interrogated. In effect he was already being detained and in custody or being
deprived of his freedom in a significant way. . . . [Defendant's companion] had already given the agents sufficient evidence for them to conclude that [defendant] was also involved in the inter-state transportation of the stolen car. There was, therefore, probable cause to arrest him. . . . [Defendant] was definitely the central figure in their investigation [and should have been given the full Miranda warning before the motel room questioning began].

For reasons already discussed at length, the court's test, although responsive to Escobedo, seems unresponsive to Miranda. However, the court might have reached the same result by a different route. Although these aspects of the case are not clear, because the court doesn't address itself to them, defendant probably realized that his companion had already told the federal agents of their involvement in the crime, and had given the agents the key to their room. If so, then despite the agent's words to the contrary, defendant might reasonably have concluded that being the "central figure" in the case he really wasn't "free to go"—at least not very far. The seizure of defendant's gun a short time earlier might reasonably be expected to contribute to this conclusion.

The "focus" test was also applied in People v. Ceccone, 67 Cal. Rptr. 499 (Ct. App. 2d Dist., Div. 3, 1968). After stopping defendant for a traffic violation and in the course of inquiring about defendant's proof of ownership of the car, the officer spotted on the floor of the car capsules, which appeared to him to contain dexedrine, and a wax paper bag, which, when the officer picked it up and opened it, appeared to him to contain marijuana. The officer then showed defendant the capsules and the contents of the bag, asking him whether he knew what they were. Defendant denied knowing what the capsules were, but admitted that the bag contained marijuana.

The court threw out this incriminating statement because the investigation had focused upon defendant, the officer had ample cause to arrest him for narcotics violations (and driving a stolen vehicle) and could not be expected to permit him to leave.
Thus, a permissible general on-the-scene questioning had become "a custodial interrogation." (67 Cal. Rptr. at 503.) This approach has already been criticized at length. The court went on to say, and it is submitted that it was on sounder ground when it did, that at the point when defendant was asked what the bag contained, "the prior questioning could have led defendant, as a reasonable person, to believe that he was not free to depart. Therefore, he was in custody and should have been warned of his rights before being questioned." (Ibid.)

Although the "general on-the-scene questioning" and "general questioning of citizens" language allows the state and lower federal courts a considerable amount of maneuverability in applying Miranda to particular fact situations, some cases seem to have taken excessive liberties with these concepts:

United States v. Delamarra, 275 F. Supp. 1 (D.D.C., 1967) (defendant building custodian went to university to pick up his check when told to report to university safety and security officer, in charge of guards, in guard's briefing room; in this room both security officer and city police sergeant questioned him about recent theft from university safe; when university official left room, sergeant continued to question defendant and when latter implicated a guard, sergeant asked official to return and hear what defendant had said; when official found discrepancies in the accusation, defendant then made incriminating statements; court's view that questioning was "only . . . part of a general investigation," 275 F. Supp. at 4, seems strained, and its observation that "there is no need for Miranda warnings to be given to all who choose to cooperate with law enforcement officers in furtherance of a still general investigation," ibid. (emphasis added), seems far removed from reality of instant case; certainly at point when defendant was asked about discrepancies in his story, if not earlier, he must have realized he was in deep trouble and hardly free to leave);

Duffy v. State, 243 Md. 425, 221 A.2d 653 (Court of Appeals, 1966) (acting on information supplied by two youths who admitted participating in a robbery and stabbing, two officers
went to a bedroom where defendant was sleeping, seized a knife under the mattress of defendant’s bed, then aroused defendant, greeting him with the query, “Is this the knife you used in the fight?”—it turned out that it was—eliciting incriminating statement from defendant; court views Escobedo and Miranda inapplicable to confession gleaned from a suspect “merely accosted by the police,” 221 A.2d at 656; but this seems an unrealistic, euphemistic way of describing circumstances; defendant must have concluded—certainly a reasonable man would have—on being awakened by uniformed officers, one of whom was flaunting the weapon used in the crime, and asking him a pointed question, that officers had a great deal “on him” and that his liberty was significantly curtailed);

_Hill v. State_, 420 S.W. 2d 408 (Ct. Crim. App. Texas, 1967) (after spotting defendant crawling out of bushes covering the broken window of an office building which he had previously observed, officer drew his revolver, bringing defendant to an abrupt halt and leading him to holler, “don’t shoot, don’t shoot;” upon being handcuffed, defendant, “responding to the officer’s questions, denied having a weapon and related that ‘just one’ more man was in the building,” 420 S.W. 2d at 409; but court holds statements admissible, in absence of _Miranda_ warnings, with cryptic comment that _Miranda_ does not apply to “res gestae statements such as the one made under the circumstances here described,” _id._ at 411; but it is not apparent why not);

The difficulties involved in determining precisely at what point “on-the-scene” or “general” questioning becomes “custodial interrogation” are well illustrated by two very recent federal appellate decisions: _Allen v. United States_, 390 F.2d 476 (D.C. Cir., 1968) and _United States v. Gibson_, 392 F.2d 373 (4th Cir., 1968).

In _Allen_, in the early hours of the morning, an officer stopped a car being driven at “an extremely slow speed with headlights off,” intending to issue a traffic citation. The officer asked defendant to produce his driver’s permit and automobile registration, noticing another man (Jeffries) in the car, “slumped over
in the right rear seat, whose ‘face was beyond recognition,' bleeding profusely about the head.” Defendant replied he did not have a permit or registration. The officer then asked defendant who owned the car, where it came from and where he had gotten it, to all of which defendant answered that he did not know.

The officer then asked the injured man in the rear seat whether he owned the car (the reply was mumbled and unintelligible) and whether he had been beaten, and if so, by whom. Again, the response was an unintelligible mumble, but this time it was accompanied by a gesture—the injured man, whom the officer knew had been drinking, raised his hand and pointed to defendant. The officer then turned to defendant and asked him whether he had beaten Jeffries. Defendant replied in the affirmative.

Judge Leventhal's comments, in the course of ruling that the Miranda warnings need not have been given under the circumstances, are quite sound in the abstract and as applied to police questioning of defendant about his driver's permit and car registration, but, it is submitted, questionable as applied to the admissibility of defendant's statement that he had beaten Jeffries. Observed Judge Leventhal (390 F.2d at 478-79):

Whether police have left the channel of 'investigation' and run onto the shoals of 'custodial interrogation' cannot be determined by reference to some chart clearly designating the various lights, bells, buoys and other channel markers. Nor is it possible or desirable to simplify the matter by saying that whenever any officer is prepared to detain an individual he may not ask any questions. Such a rule would venerate form over the substance of sound relations between police and citizens in a large community. We think the relative routineness of an inquiry is a material indicator that the police are still in a state of investigation. The police talk to too many people in the course of a day to make warnings compulsory every time they inquire into a situation. Such a requirement would hamper and perhaps demean
routine police investigation. Indeed excessive admonitions are likely to make cooperative and law-abiding citizens anxious and fearful out of proportion to the need for admonitions in advising prime suspects of their rights.

*Miranda* specifically permits general on-the-street investigation of citizens not under restraint. . . . But obviously citizens are subject to some detention even in that kind of investigation. We think some inquiry can be made as part of an investigation notwithstanding limited and brief restraints by the police in their effort to screen crimes from relatively routine mishaps. It is not uncommon for citizens to forget their permits and registration cards. That this mishap produces incidental detention and restraint while the possibility of a stolen car is checked out, perhaps so brief as to be virtually unappreciated by the person involved, does not produce the kind of custodial situation contemplated by the *Miranda* doctrine.

The question as to the assault on Jeffries is more difficult. Appellant’s counsel artfully dramatizes the situation by saying that Jeffries had already literally pointed the finger at appellant. In context, however, what we see is an officer taking account of a bleeding man. He asks, who beat you?—and gets only a mumble, for the man is drunk. The officer could not know what the beaten man was trying to indicate, or whether he was in a position to make or report any observation. What did the man mean by his finger—that appellant hit him? That appellant knew who did? The police officer thought it was unusual that a man was lying on the right rear seat. But what did it mean? Was the driver taking the man for a hostile ride? Or to the hospital? An assault is a misdemeanor, and not every fracas is an assault. The courts must look to the essence of the situation and it seems to us clear that the essence here was not an officer staging an interrogation that had focused on a subject but an officer reacting to a street scene and trying to run down the facts. There were two men before him, one reflect-
ing signs of a possible assault, and he asked first one and then the other, what happened? We think that when the officer asked appellant if he had beaten Jeffries, he had not yet made a determination to arrest for assault but was rather engaged in sorting out the facts in a type of street investigation. *Miranda* did not require the officer to preface with the several warnings therein outlined the questions put to this appellant.

With all deference, by the time the officer asked defendant whether he had beaten Jeffries, defendant must have concluded—certainly a reasonable man would have—that he was not free to go, that his liberty was significantly restrained. A person caught at 3:30 a.m. driving at an extremely slow speed with his headlights off [doesn’t this eliminate the possibility that he was taking Jeffries to the hospital?] with a back-seat passenger whose face is battered “beyond recognition” is in a “bad spot.” Defendant must have known this and must have realized that the officer knew it, too. Although Jeffries’ gesture was not unambiguous, his raising his hand and pointing to defendant was hardly calculated to relieve any of “the pressure” defendant must have been feeling.

Moreover, after failing to produce either a driver’s permit or registration, and after failing to explain who owned the car, where it came from and where he had gotten it (it turned out defendant was driving a stolen car), defendant must have realized that the officer would not let him go without checking out the ownership of the car. (As *Mathis*, discussed supra at p. 337-8, a case handed down by the United States Supreme Court several months after the instant case was decided, makes plain, a person “in custody” in connection with one offense may not be questioned about an entirely separate offense without being given the *Miranda* warnings.)

Although this writer believes that defendant Allen was being subjected to “custodial interrogation” within the meaning of *Miranda* he shares Judge Leventhal’s view that it is a difficult case. Indeed, he feels obliged to point out that when he asked half a dozen of his colleagues how they would have decided the
case, all but one replied that asking the defendant whether he had beaten Jeffries was so "natural," "understandable" and "spontaneous" under the circumstances that the Miranda warning need not have been given.6

*United States v. Gibson* is another close case, but one which probably falls beyond the pale of *Miranda*, as the court held. West Virginia state troopers began a hunt for a stolen car bearing Indiana license plates and found it outside a beer tavern. Entering the tavern and finding defendant seated at a table, one trooper asked defendant to step outside and engaged him in a brief conversation on the sidewalk about where he lived (Indiana) and whether he owned a car (defendant denied that he did). When the trooper next asked him, "Do you own this white car sitting here?" defendant at first said he did not but almost

6. Compare *Schnepp v. State*, 437 P.2d 84 (Sup. Ct. Nev., 1968)—a case which this writer finds even more troublesome—where a TV set in the front seat, rather than a bloody passenger in the rear, proved defendant's undoing. Investigating the reported burglary of a television set from an unoccupied motel room, an officer stopped defendant's car, moving slowly within a half block of the motel, and the only car on the street. The defendant came running back to the police car, but the officer worked his way up to defendant's car to get a better look and observed a television set partially covered with a sweater on the front seat. The officer then asked defendant two questions, to both of which he replied, "I don't know": (1) to whom did the television set belong; and (2) how did it get into the car? Although the court views both questions as proper "pre-custody" "investigative" inquiries, it seems fairly clear that once defendant gave an incriminating "I don't know" to the first question, the second one should not have been asked without the Miranda warning. The more difficult and more fundamental issue, however, is whether the *first question* should have been asked without regard to Miranda. Arguably, defendant, having unsuccessfully tried to keep the officer away from the car, may have reasonably concluded, once he realized the officer had spotted the TV set, that he was "caught red-handed" and thus significantly deprived of his liberty. But how much did defendant know the officer knew? For example, did the officer just happen to be passing by or was he responding to a reported burglary? Looking at it from the suspect's point of view (the officer had certainly "focused" on Schnepp, but this writer has maintained at length that the "focus" test is no longer controlling), the Schnepp facts seem to merit the "sorting out the facts in a type of street investigation" characterization somewhat more than do the Allen facts.
immediately changed his tune: “Well, there’s no use to lie to you. This is my car.”

Although, in ruling the statement admissible without the *Miranda* warnings, the U.S. Court of Appeals for the Fourth Circuit, per Sobeloff, J., suggests at one point that *Miranda* should be confined to situations akin to incommunicado, menacing station-house interrogation, 392 F.2d at 375-76 (for the view that this is an unduly restrictive reading see the discussion at p. 336-7 supra), and arguably, once the trooper pointed to the stolen car, defendant might have reasonably concluded that the trooper already knew too much about the case to let him go, the court’s contrary conclusion does not seem unwarranted, id. at 376:

[A]t the time of the conversation, [defendant] was not in custody or significantly restrained, or in any other way deprived of his free will. [The trooper] simply asked [him] to step to the sidewalk, and pointing to the car parked in front of the premises, asked him if it was his. At first denying ownership, [defendant] quickly reversed course and, without any pressure from the officer, voluntarily produced the document intended to prove his ownership. It was at this point that [the trooper] noticed the alterations which led him to check further . . .

. . . Significant in the instant case are the short duration of the questioning, which lasted no more than a few minutes; the very casual, reasonable and routine manner in which it was conducted; and the absence of any apparent purpose either to force or to trick the suspect into an admission of guilt.

Just as a situation which begins by a defendant “volunteering” statements may quickly be transformed into one where the “volunteer” is being “interrogated,” as when the officer “follows-up” the initial statement with questions designed to enhance the person’s guilt, such as by getting at the defendant’s “state of mind” at the time he committed the act, see the discussion under “Volunteered Statements vs. Statements Made in Response
to "INTERROGATION," supra p. 380, so "general on-the-scene questioning" or "general questioning of citizens in the fact-finding process" may quickly be converted into "custodial interrogation," as when a "neutral inquiry" such as "What happened?" or "What's the trouble here?" draws an incriminating statement and the officer follows it up by pressing for details. Because they seem to overlook this point, the following cases, it is submitted, wrongly decided the "custodial interrogation" issue:

State v. Taylor, 437 P.2d 853 (Sup. Ct. Ore., 1968) (defendant collided with another car within earshot of an officer who immediately drove to the scene; assuming arguendo that the first few questions were properly asked without the Miranda warning—whether it was defendant's car (yes) and whether he was driving it (yes)—it is questionable whether the officer should have then asked him whether he had been drinking (yes)—and after receiving an affirmative answer it seems fairly clear that the officer should not have pressed him further, as he did, without giving him the Miranda warnings, by asking him what he had been drinking (whiskey and beer), how much he had been drinking (four to five beers and a couple of whiskies), where he had been drinking, whether he was taking insulin, etc.; but the court regards all these questions as "general on-the-scene questioning");

State v. Meadows, 272 N.C. 327, 158 S.E. 2d 638, 643, 645 (1968) (on receiving a call that a shooting had occurred at a certain address, police proceeded to investigate; finding, upon arrival, a man bleeding from a neck wound in defendant's yard, police asked defendant, in the presence of several people, what had happened; after defendant replied, "I shot him," the police then asked him why he had done so and also questioned him about the weapon he had used; court views entire situation as "a general investigation by police officers when called to the scene of a shooting" which is "a far cry from the 'in-custody interrogation' condemned in Miranda");

Tate v. State, 413 S.W. 2d 366, 369 (Sup. Ct. Tenn., 1967) (on arriving at defendant's place of business minutes after shooting
occurred, officers asked a group of people who had done the shooting and defendant replied that he had, whereupon the police asked him "why" and, in response, defendant furnished a motive; although Miranda not applicable because of early date of trial, court rules situation beyond scope of Escobedo and, by implication, Miranda, as well, by characterizing questioning at scene, including the "why" as "about as much of a general inquiry as one would ever find").

Although "follow-up" questions are natural and understandable in a rapid-fire situation, it is hard to believe that when the Supreme Court noted that "general on-the-scene questioning" or "general questioning of citizens in the fact-finding process" was unaffected by Miranda that it meant to say that a person who has already admitted that he shot someone may be questioned further in the absence of the Miranda warnings. Nor is it easy to see how a person who responds to further questioning at this point may be viewed as merely engaging in "an act of responsible citizenship" by giving "whatever information [he] may have to aid in law enforcement," to quote from the sentence in the Miranda opinion immediately following—and apparently illum-

7. Although prima facie an officer asking, "What's the trouble?" upon arriving at the scene of a reported crime would seem to be engaged in "general on-the-scene questioning," an earlier admission to the authorities may convert this prima facie "neutral inquiry" into "custodial interrogation." Consider State v. Billings, 436 P.2d 212 (Sup. Ct. Nev., 1968): A police department radio dispatcher received a telephone request for police aid. When the dispatcher asked, "What's the trouble?" defendant replied, "I just killed my wife." In response to "Who's calling, please?" defendant then gave his right name. (These follow-up questions do not constitute "custodial interrogation" because a person telephoning the police is plainly not in custody.") On arriving at defendant's home, an officer asked, "What's the trouble, Russ?" whereupon defendant made further incriminating statements—which the court categorized as "volunteered" or, alternatively, in response to general on-the-scene questioning. But defendant probably realized—surely a reasonable man would have—that since the dispatcher had passed on his request for police assistance the statement "I just killed my wife" must have been passed on, too, and that therefore the officer who proceeded to his home and asked him what the trouble was already knew that he had shot his wife.
inating—the language about "general on-the-scene questioning." (See p. 360-1 supra). Once a member of a group at the scene steps forward to make a damaging admission, it seems he may reasonably conclude that he is no longer free to leave and that, in effect, he is "in custody."

Lest the forcefulness of some of this writer's assertions and the irreverence of his criticism of some state and lower federal court cases may have deceived or misled the reader, he feels obliged to say—after pondering dozens of cases dealing with the possible application of Miranda to the squad car, the streets, the home and the office—that if Professor Graham exaggerated he did so only slightly when he remarked that "in the case of questioning away from the police station, where there is no arrest or detention, it is all but impossible to decide when Miranda-Escobedo rights arise." What is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona, 14 U.C.L.A. L. Rev. 59, 89 (1966).

A point made at the outset of this commentary bears repeating: As the Court must have been well aware, confining the Miranda rules to station-house proceedings—which would have sufficed to dispose of all the cases before it—would have put enormous pressure on the police to increase "field" and "squad car" questioning. By defining "custodial questioning" to include some situations where a person is not in the police station or even under "formal arrest," the Court was understandably reaching out to protect its flanks—but necessarily most tentatively, gingerly and uncertainly. Thus one can confidently say of the Court's definitions of "custodial interrogation" only that if ever judicial language was fraught with "creative ambiguity," if ever it had "potential for expansion" or for "shrinkage" this language does. This aspect of Miranda will be brought into sharp focus only by new prodding of new fact situations by the United States Supreme Court.
Title II of The Omnibus Crime Control and Safe Streets Act of 1968—Admissibility of Confessions and Eye Witness Testimony

Sec. 701. (a) Chapter 223, title 18, United States Code (relating to witnesses and evidence), is amended by adding at the end thereof the following new sections:

"§ 3501. Admissibility of confessions

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession."
“The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

“(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such commissioner or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such commissioner or other officer.

“(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

“(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

“§ 3502. Admissibility in evidence of eye witness testimony

“The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal
prosecution in any trial court ordained and established under article III of the Constitution of the United States."

(b) The section analysis of that chapter is amended by adding at the end thereof the following new items:

"3501. Admissibility of confessions.
"3502. Admissibility of evidence of eye witness testimony."

Although President Johnson signed the Omnibus Crime Act into law on June 19, 1968, he manifested a lack of enthusiasm about Title II, which purports to "repeal" in federal prosecutions Miranda and other recent Supreme Court cases:

Title II of the legislation deals with certain rules of evidence only in Federal criminal trials—which account for only 7 per cent of the criminal felony prosecutions in this country. The provisions of Title II, vague and ambiguous as they are, can, I am advised by the Attorney General, be interpreted in harmony with the Constitution, and Federal practices in this field will continue to conform to the Constitution.

Under long-standing policies, for example, the Federal Bureau of Investigation and other Federal law enforcement agencies have consistently given suspects full and fair warning, that of Constitutional rights. I have asked the Attorney General and the director of the Federal Bureau of Investigation to assure that these policies will continue.