Taxpayer Rights in Noncustodial IRS Investigations after *Beckwith v. United States*

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TAXPAYER RIGHTS IN NONCUSTODIAL IRS INVESTIGATIONS AFTER BECKWITH v. UNITED STATES

It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.

Justice Robert Jackson

In 1975 the Internal Revenue Service conducted 812,336 field audits; 355,000 resulted in the assessment of a civil tax deficiency. Criminal tax fraud investigations, on the other hand, occur at a rate of only one percent of the field audit total. In their early stages,

<table>
<thead>
<tr>
<th>Year</th>
<th>FY76</th>
<th>FY75</th>
<th>FY74</th>
<th>FY73</th>
<th>FY72</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Number of returns examined by Audit</td>
<td>2,358,941</td>
<td>2,265,425</td>
<td>2,107,664</td>
<td>1,770,971</td>
<td>1,695,848</td>
</tr>
<tr>
<td>2. Number of cases referred by Audit to Intelligence</td>
<td>8,909</td>
<td>8,310</td>
<td>7,065</td>
<td>7,140</td>
<td>7,373</td>
</tr>
<tr>
<td>3. Number of cases referred by Audit to Intelligence but not accepted by Intelligence</td>
<td>5,354</td>
<td>5,036</td>
<td>4,147</td>
<td>4,417</td>
<td>4,665</td>
</tr>
<tr>
<td>4. Number of cases (investigations) completed by the Intelligence Division</td>
<td>8,797</td>
<td>8,731</td>
<td>7,215⁴</td>
<td>8,601</td>
<td>8,962</td>
</tr>
<tr>
<td>5. Number of Information Items referred by Intelligence to Audit, Collection and Service Centers</td>
<td>39,474⁵</td>
<td>71,858</td>
<td>55,182</td>
<td>53,668</td>
<td>54,747</td>
</tr>
</tbody>
</table>

² IRS ANN. REP., Table 16, at 140 (1975) [hereinafter cited as 1975 ANN. REP.]. In fiscal 1975 the IRS Intelligence Division recommended 2,760 prosecutions and conducted only 8,731 criminal investigations. Id. Investigations performed are not comparable with Audit Division statistics because an investigation may encompass more than a single year and consequently more than one tax return of a taxpayer. Letter from Donald C. Alexander, Commissioner of the Internal Revenue Service, to Sam M. Gibbons, Chairman, House Subcomm. on Oversight, Comm. on Ways and Means, Feb. 22, 1977 (on file with the U. MICH. J.L. REF.).

⁴ The reason for the FY74 fall-off is disputed. Commissioner Alexander maintains that the FY73 recommendation of a then-record number of prosecutions caused an attendant drain on manpower to prepare for and testify at trials during FY73. Letter from Donald C. Alexander to Sam M. Gibbons (Feb. 22, 1977). Chairman Sam M. Gibbons of the Subcomm-
tax investigations are usually noncustodial in that no arrest is contemplated with their focus on the determination of whether any crime has been committed. Even though a civil audit may lead to a criminal investigation, if the investigating IRS agents develop suspicions of criminal tax fraud, a taxpayer may be unaware of the potential criminal prosecution which inheres in civil tax investigations, and may not realize that evidence discovered in the course of a civil tax investigation may be used against him in a criminal prosecution. Indeed, even after civil audit has led to a criminal investigation, a taxpayer may be unaware of such a development. Accordingly, the circumstances under which IRS agents may discover incriminating evidence involve serious fourth and fifth amendment issues. Suppression of evidence incriminating the tax-

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mittee on Oversight, House Committee on Ways and Means, maintains, first, that the FY73 investigations-completed figure actually represents the FY72 total, and, second, that FY74 was the first full year that Commissioner Alexander was in control, and that "[t]he only apparent reason for the fall-off in completions is the change in the administration of IRS." Letter from Sam M. Gibbons to the author (Mar. 24, 1977) (on file with the U. MICH. J.L. Ref.).

b The IRS explains the variance of FY75 and FY76 from the norm as being the result of its change from a manual to a computerized reporting system. Thus, FY75 includes information items which, but for the changeover, would have appeared in FY76, and FY76 shows a complementary decline. The average for the two years is approximately 55,000, a number consistent with FY72-FY74. Letter from Donald C. Alexander to Sam M. Gibbons (Feb. 22, 1977).

See, e.g., United States v. Leahey, 434 F.2d 7, 8 (1st Cir. 1970). See notes 15-16, 19 infra.

c Two Internal Revenue Service divisions are primarily responsible for income tax investigations. The Audit Division is comprised of revenue agents who perform civil tax audits in order to determine the amount of tax deficiency which the taxpayer owes the government. Criminal investigations are conducted by the special agents of the Intelligence Division. Their primary duty is the investigation of alleged criminal violations of the tax laws. If, in the course of a routine civil audit, a revenue agent finds evidence of criminal tax fraud, he must immediately cease his audit and call in the Intelligence Division to uncover evidence for a criminal prosecution. In fiscal 1976, 8,909 cases were referred by Audit to Intelligence which accepted 3,555 for investigation. A degree of crossfertilization exists: the Intelligence Division, in turn, forwarded approximately 39,500 information items to civil divisions including Audit. Note, however, that cases are not identical with information items. Letter from Donald C. Alexander to Sam M. Gibbons (Feb. 22, 1977).

It is arguable that revenue agents have an incentive not to immediately report indications of criminal tax fraud since they are evaluated in terms of the number of audits completed per year and the dollar amount of total deficiencies assessed. 1975 ANN. REP., supra note 2, Table 3, at 128, Tables 13 & 15, at 139; W. SURFACE, INSIDE INTERNAL REVENUE 70-71 (1967). If a revenue agent reports a case of suspected tax fraud, he may be temporarily diverted from his usual work since the special agent conducting the criminal investigation will frequently request his assistance in determining the exact amount of the tax deficiency. Accordingly, a revenue agent may uncover substantial incriminating evidence before turning the case over to the Intelligence Division. See generally Donaldson v. United States, 400 U.S. 517, 535 (1971); Cohen v. United States, 405 F.2d 34, 35 n.3 (8th Cir. 1968), cert. denied, 394 U.S. 943 (1969); United States v. Ruggeiro, 300 F. Supp. 968, 975 (C.D. Cal. 1969); INT. REV. MAN. (CCH) §§ 1118.4, 1118.6, 4200, 9110 (1967).

payer 6 has been based on three theories: the fifth amendment guarantees embodied in *Miranda v. Arizona*; 7 the "News Release" doctrine, which is derived from administrative warnings published by the IRS as News Releases IR-897 and IR-949; 8 and the fourth amendment ground that consent to search records has been obtained through deception or misrepresentation by IRS agents. 9

The recent Supreme Court decision in *Beckwith v. United States*, 10 holding that *Miranda* does not extend to noncustodial tax investigations, 11 has important implications with respect to the News Release doctrine and the involuntary consent grounds considered in motions to suppress evidence. This article will examine *Beckwith* and its potential significance with respect to these other doctrines, discussing the factors which the IRS and the courts

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8 The current warning was promulgated in News Release IR-949 (Nov. 26, 1968), 7 STAND. FED. TAX REP. (CCH) ¶ 6946 (1968):

At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding.

IR-949 expanded the provisions of News Release IR-897 (Oct. 3, 1967), 7 STAND. FED. TAX REP. (CCH) ¶ 6832 (1968): "On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: 'As a special agent, I have the function of investigating the possibility of criminal tax fraud.'" IR-897 further required special agents to advise taxpayers of their constitutional rights to remain silent and to retain counsel if the "initial contact" produces the need for further inquiries. The News Release, moreover, explained that it was a response to numerous taxpayer inquiries and that the "recently adopted procedures insure uniformity in protecting the constitutional rights of all persons." See notes 63-67 and accompanying text infra.

9 See notes 111-38 and accompanying text infra.


11 See notes 39-54 and accompanying text infra.
should consider in order to assure fair treatment of taxpayers during investigations.

I. BECKWITH v. UNITED STATES:
A LIMITATION OF MIRANDA

In *Miranda v. Arizona*, the Supreme Court held that law enforcement officers must specifically warn an individual of his constitutional rights when he is subjected to questioning while in custody or while otherwise deprived of his freedom of action in any significant way. A significant element in the decision reached was a judicial concern over the inherently coercive nature of station house interrogations. Nonetheless, the Court did not limit its holding to station house interrogations; the holding embraces the broad spectrum of circumstances ranging from police station interrogations to interviews conducted at a suspect's home. The Court left unresolved the meaning of custody or of deprivation of freedom of action in any significant way. The *Miranda* Court did not indicate whether warnings were required in noncustodial interviews; however, more recent Supreme Court decisions have stressed that warnings are required when a suspect is in custody.

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13 *Id.* at 478-79. In the Court's language:

> [A]n individual . . . taken into custody or otherwise deprived of his freedom . . . in any significant way and . . . subjected to questioning . . . must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

16 *Miranda v. Arizona*, 384 U.S. 436, 444 n.4 (1966). This famous footnote professes to explain the "focus" of Escobedo v. Illinois, 378 U.S. 478 (1964), in terms of a suspect having been taken into custody or otherwise significantly deprived of his freedom. Subsequent commentary suggests that "custody" and "focus" are not alternative grounds for requiring the warnings, but that "custodial interrogation" in *Miranda* "actually marks a fresh start in describing the point at which the Constitutional protections begin." Kamisar, *supra* note 15, at 339 (emphasis in the original). Judge Friendly has stated that "focus" is but one factor in an objective test of whether an interview was in-custody and that "in the absence of actual arrest something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so." United States v. Hall, 421 F.2d 540, 545 (2d Cir. 1969).
17 *Orozco v. Texas*, 394 U.S. 324 (1969); Mathis v. United States, 391 U.S. 1 (1968). *See 1976 ANN. SURVEY AM. L. 165.* In *Orozco*, a murder suspect was held to have been deprived of his freedom of action when several police officers awakened him from his bed, placed him under arrest, and interrogated him in the isolation of his boarding house room. The Court applied *Miranda* and suppressed the incriminating evidence the petitioner had
and have held that *Miranda* does not apply to noncustodial questioning.\(^{18}\)

The Internal Revenue Service does not require its agents to give the *Miranda* warnings unless a suspect taxpayer has been taken into custody or has otherwise been deprived of his freedom by the authorities.\(^{19}\) Accordingly, indicted taxpayers have had little success in relying upon *Miranda* to suppress incriminating statements made during interviews with IRS agents. Prior to *Beckwith v. United States*,\(^ {20}\) the Supreme Court had considered *Miranda*’s application to IRS investigations in only one case, *Mathis v. United States*,\(^ {21}\) which, unlike most tax cases, undeniably involved a custodial interview. Revenue agents interviewed Mathis concerning a suspected civil deficiency while he was imprisoned for an unrelated conviction. Seeking to suppress the evidence obtained during the civil interview, Mathis relied on the requirement that *Miranda* warnings be given whenever a suspect is interviewed in the inherently coercive atmosphere of a prison or station house. The government contended that *Miranda* warnings were not required in routine civil tax investigations where no criminal prosecution was anticipated at the time of the interview. The Court noted that a civil tax investigation might be initiated for the purpose of a civil action, but held that warnings are required because possible criminal prosecution might stem from the investigation. In the Court’s view, a contrary decision would undermine *Miranda*’s protection of the fifth amendment rights of persons in custody.\(^ {22}\)

Because *Mathis* involved an undeniably custodial interview, it does not apply to most tax investigations. IRS interviews, whether civil or criminal in character, are usually noncustodial, taking place in the homes or offices of taxpayers rather than in station houses or prisons. Nonetheless, the setting of the interview does not deter-

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\(^{18}\) See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), where the Court stated that *Miranda* "did not reach investigative questioning of a person not in custody ..., and it assuredly did not indicate that such questioning ought to be deemed inherently coercive." *Id.* at 247.

\(^{19}\) INT. REV. SERV., HANDBOOK FOR SPECIAL AGENTS, reprinted in INT. REV. MAN. (CCH) § 242.133 (Extra Ed. No. 44, Mar. 12, 1975); CCH INT. REV. MAN. (CCH) § 9447.3(3) (1974). The IRS has separate procedures for custodial and noncustodial interviews. Agents must know the IRS definition of "custody" to perform their duties. Noncustodial procedures are covered by INT. REV. MAN. (CCH) § 9384.2, which refers all custodial interrogation cases to § 9440, entitled "Arrests."


\(^{21}\) 391 U.S. 1 (1968).

\(^{22}\) *Id.* at 4-5.
mine whether the *Miranda* warnings should be given.\textsuperscript{23} Typically the taxpayer and agent will engage in a friendly conversation, during which the taxpayer’s freedom of movement is unrestricted.\textsuperscript{24} In such interviews agents rarely resort to threats or other intimidating tactics.\textsuperscript{25} Occasionally the taxpayer will be interviewed at an IRS office. Although the setting of an IRS office more nearly resembles the station house environment, the taxpayer arrives without the compulsion of judicial process, the interviews are conducted in a courteous atmosphere, and the taxpayer is free to leave at any time. In the absence of an arrest, the courts have held that office interviews are noncustodial.\textsuperscript{26}

While interviews either at the taxpayer’s home or at an IRS office might be viewed as constituting a substantial deprivation of the freedom to act,\textsuperscript{27} even prior to *Beckwith*, the overwhelming majority of courts refused to extend the requirements of *Miranda* to taxpayers in noncustodial situations.\textsuperscript{28} This limitation of *Miranda* has been justified on several grounds. Some courts have suggested that it would be administratively burdensome to require IRS agents to issue *Miranda* warnings at the beginning of each interview and that it would be too costly for the IRS to supply every indigent with an attorney upon request.\textsuperscript{29} Moreover, it has been suggested that suspect taxpayers who are interviewed in

\textsuperscript{23} See notes 15-16 and accompanying text supra.


\textsuperscript{26} See, e.g., United States v. Brevik, 422 F.2d 449 (8th Cir.), cert. denied, 398 U.S. 943 (1970) (where the taxpayer voluntarily visited an agent’s office, was not restricted as to his freedom of movement, and received partial warnings). Cf. Oregon v. Mathiason, 45 U.S.L.W. 3505 (S. Ct. Jan. 25, 1977) (per curiam) (where the Court found no custody or other deprivation of freedom of action when a suspect came to a police station at the request of an officer, was told that he was not under arrest, and there was no indication that the suspect’s freedom to depart was restricted in any way). But cf. United States v. Oliver, 505 F.2d 301 (7th Cir. 1974) (where a taxpayer voluntarily visited an IRS office upon invitation, but was denied contact with a messenger from his attorney).


\textsuperscript{29} E.g., United States v. Mackiewicz, 401 F.2d 219, 222-23 (2d Cir.), cert. denied, 393 U.S. 923 (1968); United States v. Squeri, 398 F.2d 785, 789 (2d Cir. 1968).
noncustodial situations "must be prepared to look after themselves." Of greater significance are the distinctions which courts have perceived between *Miranda* and the IRS cases. Courts have emphasized the *Miranda* requirement of coercive circumstances during an interview, and have rejected taxpayer's arguments that warnings are required once the government suspects that a taxpayer has committed criminal tax fraud.\(^{31}\) Noting that the inherently coercive nature of a custodial interrogation constitutes the psychological foundation necessary for application of the *Miranda* doctrine, courts have been unpersuaded that taxpayers not in physical custody when interviewed by IRS agents would feel compelled to incriminate themselves.\(^{32}\)

In contrast to the majority view, the Seventh Circuit concluded that, while "custody" connoted physical arrest or restraint, deprivation of the suspect's freedom of action in any significant way was sufficient to invoke the requirements of *Miranda*.\(^{33}\) In *United States v. Dickerson*,\(^{34}\) the court held that IRS agents must give *Miranda* warnings upon their first contact with a taxpayer after the Intelligence Division has opened a criminal file on the case. A Revenue Agent discovered that a third party had made unreported payments to Dickerson. The latter admitted to the agent that he had not filed returns for certain years, whereupon the agent referred the case to the Intelligence Division for criminal investigation. Subsequently Dickerson was interviewed by a special agent who neglected to advise him either of the criminal nature of the investigation or of his constitutional rights.\(^{35}\) Contending that his misapprehensions with respect to his obligations and rights significantly deprived him of his freedom of action, Dickerson sought to suppress incriminating evidence divulged during the interview. Although the government accurately maintained that *Miranda* was limited to custodial interrogations, the *Dickerson* court refused to

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30 United States v. Squeri, 398 F.2d 785, 789 (2d Cir. 1968); Morgan v. United States, 377 F.2d 507, 508 (1st Cir. 1967).


32 The court in *United States v. Bland*, 458 F.2d 1, 9 n.7 (5th Cir. 1972), stated that admissions made in circumstances of "manifest discomfort" might be the equivalent of an in-custody interrogation. At least one court seemed to recognize the possibility of psychological custody apart from physical custody. United States v. Jaskiewicz, 433 F.2d 415, 419 (3d Cir. 1970). For a discussion of this aspect of *Miranda*, see notes 12-16 and accompanying text *supra*.

33 United States v. Oliver, 505 F.2d 301, 304-05 (7th Cir. 1974); United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969). *See also* United States v. Habig, 413 F.2d 1108 (7th Cir. 1969); United States v. Lackey, 413 F.2d 655 (7th Cir. 1969).

34 413 F.2d 1111 (7th Cir. 1969).

35 *Id.* at 1112.
adopt a narrow definition of "custody" and did not interpret *Miranda* restrictively. In the court's view, the IRS violated Dickerson's constitutional protections when it elicited incriminating statements "in reliance upon the taxpayer's misapprehension as to the nature of the inquiry, his obligation to respond, and the possible consequences of doing so." 36 According to the Seventh Circuit, *Miranda* warnings were required because of the objective circumstances of adversarial confrontations between taxpayers and the government; the subjective state of mind of individual taxpayers was not relevant to the determination. 37 Thus, Dickerson held that the concept of inherent coercion was applicable to noncustodial taxpayer interviews as well as to station house interrogations. Subsequent Seventh Circuit decisions also applied *Miranda* in noncustodial taxpayer cases. 38

In *Beckwith v. United States*, 39 the Supreme Court rejected the Seventh Circuit approach and held that *Miranda* did not apply to noncustodial IRS investigations. Two special agents interviewed Beckwith, first at the home of a friend and, later the same day, at his place of business. At the outset of the initial interview, the agents informed Beckwith that they were special agents responsible for criminal tax fraud investigations. The agents further informed him of the tax years which the IRS wished to investigate. Although they did not give Beckwith the *Miranda* warnings, they gave him the administratively mandated News Release IR-949 warnings. 40 Before the second interview, the agents advised Beckwith that he was not required to release his books or other records for their inspection. Throughout the interviews Beckwith was not in the custody of the agents, nor was he significantly restrained of his liberty; on the contrary, he was free to leave the interview at any time, and was out of the sight of the agents more

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36 *Id.* at 1116.
37 *Id.* at 1117. The court indicated that the adversary process began when the Intelligence Division formally entered the case with the intention of gathering evidence for the eventual prosecution of a specified taxpayer.
38 For instance, in *United States v. Oliver*, 505 F.2d 301 (7th Cir. 1974) (per Stevens, J.), the Seventh Circuit specified the equation which brought taxpayers who were not in custody within the *Miranda* doctrine. The court stated that the practical effect of the taxpayer's misapprehensions during questioning compelled incriminating admissions in a manner similar to the psychological compulsion inherent in a situation in which the suspect is under physical restraint. The *Oliver* court found that the misapprehensions were tantamount to a significant deprivation of a suspect's freedom of action. *Id.* at 305.
than once, including his driving alone to his office for the second interview. Indeed, Beckwith testified that the agents did not even press him for answers to their questions. Nevertheless, in the course of the interviews, Beckwith not only made incriminating statements, but also produced incriminating records.

In attempting to suppress the incriminating evidence, Beckwith argued that three factors created psychological restraints which severely limited his freedom of action during the interviews. First, the government had "focused" a criminal tax fraud investigation upon him when the investigation became accusatory with the goal of obtaining a confession. Beckwith relied upon the Dickerson court's conclusion that the investigation becomes accusatory when the Intelligence Division is called into the case. He contended that Miranda extends to situations where the Intelligence Division has taken over the case in seeking evidence of criminal tax fraud. The second factor relied upon by Beckwith was his misapprehensions due to the complexity of the tax system and his confusion and fear with respect to the consequences of non-cooperation. Finally, noting that the agents did not inform him that he might have counsel present during the interviews or that he might remain wholly silent, Beckwith maintained that the IRS intentionally sought to discourage the exercise of his constitutional rights. The combination of these factors, argued Beckwith, placed him under "psychological restraints" which were the "functional, and, therefore, the legal, equivalent of custody."

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41 Id. at 342-44, 344 n.4. Beckwith originally did claim that the agents had misled him as to the purpose of the interview. The Court of Appeals found that he was not misled, and Beckwith did not raise the issue before the Supreme Court. United States v. Beckwith, 510 F.2d 741, 743 (D.C. Cir. 1975).
42 Beckwith did not claim that his consent to the release of his records had been involuntary. Beckwith v. United States, 425 U.S. 341, 344 (1976).
45 See note 37 supra.
46 In these respects Beckwith contended that the News Release IR-949 warnings, which he was given, were inadequate. See United States v. Oliver, 505 F.2d 301, 304 n.6 (7th Cir. 1974), and note 60 infra.
47 Beckwith v. United States, 425 U.S. 341, 345 (1976). This argument had been accepted at neither the district court nor circuit court levels. Judge Bazelon, in United States v. Beckwith, 510 F.2d 741 (D.C. Cir. 1975), aff'd, 425 U.S. 341 (1976), stated that the interview had none of the indicia of coercion that prompted the Miranda analysis so that one could not conclude that the taxpayer was compelled to answer questions. Noting with approval that Beckwith was given warnings which did provide some notice that his statements might be used against him, Judge Bazelon isolated Beckwith's error as a confusion of the requisites of compulsion with the requisites of waiver.

The fact that a statement might be made in such a manner as to raise doubts that it constitutes a voluntary and intelligent waiver of the right to counsel and the right to
The Supreme Court did not accept Beckwith's characterization of the IRS interviews. In the Court's view, the central question was whether an IRS special agent, investigating potential criminal tax violations, must give the *Miranda* warnings before conducting a noncustodial interview of a taxpayer.\(^{48}\) Observing that Beckwith had been neither arrested nor involuntarily detained, the Court characterized the interviews as noncustodial and held that the IRS was not required to deliver the *Miranda* warnings to taxpayers in such situations.\(^{49}\) While conceding that Beckwith had probably been the "focus" of a criminal investigation, the Court rejected the argument that the interview conducted by the IRS agents was functionally equivalent to a custodial interrogation. The Court noted that *Miranda* had defined "focus" in terms of police questioning initiated after a person has been taken into custody or significantly deprived of his freedom of action.\(^{50}\) It was unpersuaded, however, by the argument that merely being the target of the government's suspicions requires use of the *Miranda* warnings in the absence of compulsion. Acceptance of the "functional equivalent" equation would have been incompatible with the Court's view that the inherently coercive nature of in-custody police interrogations was the crux of the *Miranda* decision.\(^{51}\) In categorically remain silent does not necessarily mean that it was coerced or compelled within the intendment of the Self-Incrimination clause.

\(^{48}\) Beckwith v. United States, 425 U.S. 341, 342-43 (1976). The question of the sufficiency or necessity of the News Release warnings was not presented in *Beckwith*.

\(^{49}\) Id. at 344. See note 16 supra for Judge Friendly's objective test for an in-custody interrogation. Beckwith, being free to leave at any time, did not present the crucial element of custody under that test. The Government in *Beckwith* unsuccessfully asked the Court to further hold that the IRS might adopt a "uniform policy dispensing with the [IR-949] warning" if it so wished. Reasoning that the warnings were promulgated "out of an abundance of caution" for the sake of uniformity in administration and to avoid jeopardy in the courts, the Government argued that the reasons for the News Release warnings would be vitiated if *Miranda* was held inapplicable to IRS interviews. Brief for Respondent at 34-35, Beckwith v. United States, 425 U.S. 341 (1976). See also notes 93-95 and accompanying text infra.

Justice Marshall concurred in the judgment because he believed that in administering the News Release IR-949 warning to Beckwith the agents had under the circumstances satisfied the requirements of the fifth amendment. Beckwith v. United States, 425 U.S. 341, 348-49 (1976). By implication, Justice Marshall accepted the majority's holding that Beckwith's situation failed to require *Miranda* warnings.


\(^{51}\) Beckwith v. United States, 425 U.S. 341, 346 (1976), quoting *Miranda* v. Arizona, 384 U.S. 436, 445 (1966). Moreover, the Court interpreted its post-*Miranda* decisions as specifically stressing that the *Miranda* warnings were only required when interrogations were custodial in nature. Id. at 346, 347. See also Orozco v. Texas, 394 U.S. 324 (1969); Mathis v. United States, 391 U.S. 1 (1968). *Mathis* was cited as support for the proposition that "the *Miranda* requirements are applicable to interviews with Internal Revenue agents concerning tax liability, when the subject is in custody..." Beckwith v. United States, 425 U.S. 341, 347 (1976) (emphasis supplied by the Court). See text at notes 21-22 supra. The *Beckwith* Court found support in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). See note 18 supra.
rejecting the "functional equivalent" argument, the Court did not specifically discuss Beckwith's argument that taxpayer confusion is inherent in IRS interviews.

Significantly, the *Beckwith* Court conceded that "noncustodial interrogation might possibly in some situations, by virtue of some special circumstances," produce involuntary confessions attributable to the overbearing conduct of law enforcement officials. The scope of this limitation is uncertain since the Court did not specify what would constitute "special circumstances." Although physical brutality or threats of physical violence would seem to be "special circumstances," such factors are unlikely to be present in IRS investigations. Violations of IRS regulations, subterfuge, and deception by IRS agents might also satisfy the Court's limiting language. Finally, the individual characteristics of the taxpayer, including the presence of physical, mental, or emotional infirmities, should also be a relevant consideration.

Nevertheless, the Court's language is so qualified that few taxpayers in noncustodial situations will be protected by the "special circumstances" standard.

Although the *Beckwith* majority rejected the Seventh Circuit approach, Justice Brennan, in dissent, maintained that the noncustodial setting in *Beckwith* was not determinative of whether IRS agents were required to give the *Miranda* warnings. In his view the misapprehensions of the taxpayer produced "practical compulsion" which was "comparable to the psychological pressures described in *Miranda*." Consequently, even a noncustodial interview could lead to the involuntary release of incriminating information. Justice Brennan, relying upon the Seventh Circuit's approach, concluded that Beckwith's conviction should be reversed.

In sum, the decision in *Beckwith v. United States* virtually precludes reliance on *Miranda* as a basis for suppressing evidence obtained through noncustodial IRS interviews. Few local courts have had the opportunity to consider the scope of *Beckwith*, and

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53 This possibility is enhanced by the Court's citation of a case which, although custodial in setting, involved deception used to obtain a confession. *Rogers v. Richmond*, 365 U.S. 534 (1961) (where a confession was elicited by the use of a sham telephone conversation to convince an imprisoned suspect that his arthritic wife would be jailed if he refused to speak).
54 Cf. *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969), where the taxpayer clearly was emotionally disturbed. *Heffner* was decided under the News Release doctrine. See notes 76-77 and accompanying text infra.
56 Id. at 350-51, relying on *United States v. Oliver*, 505 F.2d 301, 304-05 (7th Cir. 1974).
57 The impact of *Beckwith* is evident in *United States v. Dreske*, 536 F.2d 188 (7th Cir. 1976), where the defendant unsuccessfully asserted the "functional equivalent" and
none have as of yet discussed the "special circumstances" exception. Nevertheless, Beckwith limits the utility of the fifth amendment to defendants in tax fraud cases. Thus, it seems likely that taxpayers seeking to suppress evidence gathered through IRS investigations will increasingly rely upon the protections embodied in the News Release doctrine and the fourth amendment.

II. THE NEWS RELEASE DOCTRINE

The News Release doctrine provides that special agents of the Internal Revenue Service must advise taxpayers of certain rights as well as the criminal nature of the investigation pursuant initially to IRS News Release IR-897, and now to its successor, IR-949. Under the doctrine, incriminating evidence obtained in violation of the warnings may be suppressed. The News Release warnings are administratively imposed, and apply to the noncustodial interviews characteristic of IRS investigations. Promulgated after the Miranda decision, they are similar in many respects to the Miranda warnings. News Release IR-897 required only that a taxpayer be initially warned of the criminal character of the investigation.

"psychological compulsion" theories rejected in Beckwith. Although the Seventh Circuit distinguished Dreske from its earlier holdings, it conceded that "Beckwith ... has undermined the vitality of Dickerson and Oliver." Id. at 195. See note 37 supra. Similarly, United States v. Venditti, 533 F.2d 217 (5th Cir. 1976), followed Beckwith in holding that statements made by a taxpayer to an IRS civil agent during the course of a "noncustodial, noncoercive interview" were not to be suppressed. Id. in United States v. Vander Linden, Crim. No. 76-29 (S.D. Iowa July 6, 1976) (order granting motion to suppress), however, the court viewed Beckwith only as indicating that the Constitution did not require the extraconstitutional protection provided to taxpayers by the IRS News Releases. Id. at 6-7. See also United States v. Mullens, 536 F.2d 997, 1000 (2d Cir. 1976); United States v. Nash, 414 F. Supp. 1213, 1217 (S.D. Tex. 1976).

58 United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); United States v. Heffner, 420 F.2d 809 (4th Cir. 1969). See note 8 supra for texts of the releases.


60 One incentive of the News Releases was the concern of the IRS about possible court reversals under Miranda. See note 49 supra; Note, supra note 59, at 714-15 n.120 (citing letter from the Chief Counsel of the IRS). See generally United States v. Jobin, 76-1 T.C. ¶ 9433 (1st Cir. 1976).

IR-949 essentially follows the text of the Miranda warnings, except for the notice of the availability of government-appointed counsel for indigents. In United States v. Oliver, 505 F.2d 301 (7th Cir. 1974), the court criticized IR-949 for its failure to expressly tell the taxpayer that he has the right to remain silent and to have an attorney present during an interview. The court noted that the News Release might convey the impression that the taxpayer must answer every question, except those which might tend to incriminate him. Id. at 304 n.6.
Warnings resembling the *Miranda* warnings were required only if the Intelligence Division decided to continue investigating after the initial interview. News Release IR-949, which superseded IR-897, requires that all of the warnings be delivered at the first meeting a special agent has with a taxpayer after the investigation becomes criminal. The ostensible purpose of the News Release warnings was to insure that the constitutional rights of taxpayers are uniformly protected because the concern of special agents for the constitutional rights of taxpayers under investigation varied widely.

Courts which have accepted the News Release doctrine have advanced several reasons for binding the Internal Revenue Service to its warning procedure. Some courts have noted that the constitutional principle established in *Miranda* was the incentive for the administrative warnings, and have suggested that in view of this impetus, judicial enforcement of the warning procedure should not be considered burdensome to the IRS. The News Release doctrine has also been justified on the grounds that enforcement of the administrative warnings would protect the constitutional rights of taxpayers, and encourage uniformity in practice among IRS agents. One court expressed concern that judicial failure to enforce the warnings would not only erode the faith of the citizenry in the evenhanded administration of justice, but would also leave the IRS without an incentive to enforce the procedure.

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61 See note 8 supra. The News Releases were directed to special agents without any mention of revenue agents. Thus, revenue agents acting as criminal investigators are not expressly required to deliver the News Release IR-949 warnings to suspect taxpayers. The issue of deception or misrepresentation may be raised when the purpose of the investigation is other than what the taxpayer believes it is. See notes 112-15 and accompanying text infra. News Release IR-949 was promulgated although numerous reviewing courts had already stated that *Miranda* was not applicable in noncustodial situations. See, e.g., Hensley v. United States, 406 F.2d 481 (10th Cir. 1968); United States v. Mackiewicz, 401 F.2d 219 (2d Cir.), cert. denied, 393 U.S. 923 (1968); United States v. Bagdasian, 398 F.2d 771 (4th Cir. 1968); United States v. Squeri, 398 F.2d 785 (2d Cir. 1968); Tagliani v. United States, 398 F.2d 558 (1st Cir.), aff'd on other grounds, 394 U.S. 316 (1968); White v. United States, 395 F.2d 710 (8th Cir. 1968) (liquor violation). Mathis v. United States, 391 U.S. 1 (1968), held that a civil interview conducted in a prison setting met the custodial prerequisites of *Miranda*. A district court had earlier held that *Miranda* warnings must be given once the “focus” of a criminal investigation centered on the suspect taxpayer. United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967). This result was followed in United States v. Wainwright, 284 F. Supp. 129, 132 (D. Colo. 1968), but was rejected by the Supreme Court in United States v. Beckwith, 425 U.S. 341 (1976). See text at note 50 supra.

62 See note 8 supra.

63 United States v. Jobin, 76-1 T.C. ¶ 9433 (1st Cir. 1975); United States v. Sourapas, 515 F.2d 295 (9th Cir. 1976). See also United States v. Dawson, 486 F.2d 1326 (5th Cir. 1973); United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); United States v. Heffner, 420 F.2d 809 (4th Cir. 1969).

64 See, e.g., United States v. Jobin, 76-1 T.C. ¶ 9433 (1st Cir. 1976); United States v. Leahey, 434 F.2d 7, 10 (1st Cir. 1970).

65 See, e.g., United States v. Jobin, 76-1 T.C. ¶ 9433 (1st Cir. 1976); United States v. Leahey, 434 F.2d 7, 10 (1st Cir. 1970).

66 United States v. Leahey, 434 F.2d 7, 10 (1st Cir. 1970).
convincing argument in favor of the News Release doctrine, however, is that taxpayers may reasonably be expected to rely upon a procedure which the IRS has publicly announced.\(^67\) Because the IRS chose to publish the warnings in response to concern about the effects of the *Miranda* decision on IRS investigatory procedure, courts should refuse to permit the IRS to take advantage of possible taxpayer reliance.

Despite these arguments, the News Release doctrine has been accepted in only three circuits.\(^68\) While most courts have not yet decided the question, considerable resistance to the suppression of evidence exists where agents have failed to comply with the administrative warnings procedure.\(^69\) Two considerations against binding the IRS to its warning procedure have been predominant. First, the courts are reluctant to bind the IRS to a procedure which extends taxpayer rights beyond the constitutional minima specified in *Miranda* and its progeny.\(^70\) Thus, even while conceding that the News Releases enhance the fair treatment of taxpayers and that their enforcement is not administratively burdensome to the IRS, courts have refused to suppress evidence unless a taxpayer could demonstrate coercion or misrepresentation which would raise doubts about the voluntariness of an interview. Under this approach, compliance with the News Release warnings has merely been considered evidence of voluntariness.\(^71\)

Courts have also rejected the News Release doctrine because of their concern that strict application of the warnings would lead to the suppression of evidence where there were only slight errors in the delivery of the warnings.\(^72\) Thus, one court denounced the notion that evidence obtained from taxpayers who fully comprehend their criminality might be suppressed because an agent did

\(^67\) *Id.*: United States v. Jobin. 76-1 T.C. ¶ 9433 (1st Cir. 1976); United States v. Sourapas. 515 F.2d 295 (9th Cir. 1975).

\(^68\) See note 63 *supra*.


\(^71\) Beckwith v. United States. 425 U.S. 341, 348 (1976) (where the Court stated that warnings were relevant to whether interviews were coercive); *Cohen v. United States*, 405 F.2d 34, 39 (8th Cir. 1968), *cert. denied*, 394 U.S. 943 (1969) (where the court stated that it would consider evidence of warnings in response to allegations of deception).

not "recite every syllable of a mumbo-jumbo formula." This line of criticism, however, may misinterpret the practical implications of the News Release doctrine, which does not require a perfect rendition of the warnings, provided that their substance and spirit is conveyed. A few courts, unwilling to completely reject the doctrine, have read News Release IR-949 as narrowly as possible in order to avoid applying it.

Courts, which have adopted the News Release doctrine, have disagreed with respect to the appropriate standard for determining whether an agent has violated the warnings. In United States v. Heffner, although the taxpayer was warned of his right to be free from compulsory self-incrimination, he was not informed at the initial interview by special agents that they were criminal investigators. The Fourth Circuit held that the agents had failed to "scrupulously observe" the procedure of News Release IR-897, and ordered the suppression of the evidence they had obtained. A subsequent First Circuit case, United States v. Leahey, involved a taxpayer who, in an interview with special agents, received no warnings whatsoever before making incriminating statements. The court found support in Heffner for suppressing this evidence, but it did not adopt the ""scrupulous observance"" standard set forth in Heffner. Instead, the Leahey court concluded that IRS investigators must "conform" to the News Release IR-897 warning procedure. Although the Leahey standard would appear to be less demanding than the Heffner requirement, some courts have interpreted both Heffner and Leahey as requiring agents to give the warnings with complete accuracy.

In United States v. Bembridge, the First Circuit considered

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74 See notes 76-86 and accompanying text infra.
75 United States v. Leonard, 524 F.2d 1076, 1089 (2d Cir. 1975), cert. denied. 44 U.S.L.W. 3624 (May 3, 1976); United States v. Vander Linden, Crim. No. 76-29, 6-7 (S.D. Iowa July 6, 1976) (order granting motion to suppress). The Leonard court stated that the taxpayer would still lose, even if it were persuaded by the decision in Heffner because the News Releases are addressed to special agents, and there was no evidence that the IRS consistently assigns revenue agents to criminal investigations in order to dodge the News Release Doctrine. 524 F.2d at 1089. Both the Leonard and Vander Linden courts were reluctant to bind the IRS to procedures which granted greater protections than the Constitution required.
76 420 F.2d 809 (4th Cir. 1969).
77 Id. at 811-12. The phrase, ""scrupulously observe,"" was derived from Accardi v. Shaughnessy. 347 U.S. 260 (1954).
78 United States v. Leahey. 434 F.2d 7 (1st Cir. 1970).
79 Id. at 11.
81 458 F.2d 1262 (1st Cir. 1972).
this interpretation of its earlier decision in *Leahey*. Prior to an interview Bembridge received an abbreviated *Miranda* warning and was informed by a special agent that the investigation was criminal in nature. Although the agent acted in good faith and in accordance with the Internal Revenue Manual, he did not know the text of News Release IR-949 which had been issued only a few days prior to the interview. The court refused to suppress the evidence, suggesting that *Leahey* and the News Release doctrine should be interpreted as requiring substantial, but not absolute, conformity with the News Release procedures.\(^82\) Subsequent courts have generally followed this standard in considering the adequacy of the warnings given.\(^83\) If agents have committed a technical error when giving warnings, courts, which have adopted the substantial compliance theory, will not suppress the evidence. The further question of the exact nature of a disqualifying non-compliance remains without a comprehensive answer.\(^84\)

In reconciling *Heffner* and *Leahey* with subsequent cases, it should be noted that both cases were decided under News Release IR-897 which required a single, initial warning.\(^85\) Clearly, a special agent’s failure to give that warning would be noncompliance. Thus, the special agent’s failure was encompassed not only by the “substantial compliance” standard, but also by the stricter “scrupulous observance” and “conformity” terminology used in *Heffner* and *Leahey* respectively. Since the promulgation of News Release IR-949, the substantial compliance standard has become the accepted interpretation among courts applying the News Release doctrine.\(^86\)

Nevertheless, under News Release IR-949, courts have continued to emphasize the importance of clearly informing taxpayers that they are the targets of criminal investigations. In *United States v. Sourapas*,\(^87\) for example, a special agent interviewing a taxpayer failed to advise the suspect that the investigation was criminal in

\(^{82}\) *Id.* at 1264. The Court in *Accardi* held that the Bureau of Immigration Appeals was bound by the adjudicatory rules and procedures it had established for itself when judging the status of aliens in the United States. *Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954).

\(^{83}\) *United States v. Jobin*, 76-1 T.C. ¶ 9433 (1st Cir. 1976); *United States v. Sourapas*, 515 F.2d 295 (9th Cir. 1975); *United States v. Morse*, 491 F.2d 149, 156 (1st Cir. 1974).

\(^{84}\) Failures in the accurate delivery of the *Miranda* warnings also do not automatically result in suppressions of evidence. As to the right to counsel, compare *Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972), with *Massimo v. United States*, 463 F.2d 1171 (2d Cir. 1972). As to the self-incrimination warning, see, e.g., *Davis v. United States*, 425 F.2d 673 (9th Cir. 1970); *United States v. Grady*, 425 F.2d 1091 (5th Cir. 1970); *United States v. Sanchez*, 422 F.2d 1198 (2d Cir. 1970). *Commonwealth v. Singleton*, 439 Pa. 185, 266 A.2d 753 (1970), is a holding against one version of the self-incrimination warning.

\(^{85}\) See note 8 and the text at note 61 *supra*.

\(^{86}\) *United States v. Jobin*, 76-1 T.C. ¶ 9433 (1st Cir. 1976); *United States v. Sourapas*, 515 F.2d 295 (9th Cir. 1975).

\(^{87}\) 515 F.2d 295 (9th Cir. 1975).
nature, although he gave the remainder of the News Release IR-949
warnings. Having incriminated himself in the course of the inter­
view, the taxpayer sought to suppress the evidence under the
News Release doctrine, citing the omission of an entire clause
from the required warnings. The Sourapas court approved the
reasoning in Heffner and Leahey of binding the IRS to its own
procedure, and suppressed the evidence on the ground that the
agent did not substantially comply with either of the News Re­
leases. \(^{88}\) No case has involved warnings which convey notice that
the investigation was criminal in nature but which were deficient in
other particulars. It is uncertain whether this notice is necessary
for substantial compliance. Arguably, however, a taxpayer is more
likely to make a critical mistake if his true situation remains un­
known to him. \(^{89}\)

The courts which follow the News Release doctrine require only
that the warnings actually given must comply with the substance
and spirit of the News Release procedure. \(^{90}\) In order to fail the
substantial compliance test, an agent must egregiously depart from
the requirement, either by wholly omitting one of the warnings or
by delivering a warning in such a form that its meaning would not
be readily comprehensible. The potential prejudice to a taxpayer is
evident, especially if he has relied on the requirement of the warn­
ings as notice of a criminal investigation. \(^{91}\) The fact that the ad­
ministrative warnings are applicable to noncustodial situations,
where the Miranda doctrine is generally inapplicable, should not
justify administrative breaches of a published procedure.

Even in the absence of the Miranda incentive, the ostensible
reason for the News Releases—ensuring uniform IRS practice in
order to protect the rights of taxpayers \(^{92}\)—remains. Despite the
Beckwith decision, the IRS has not yet altered or revoked News
Release IR-949, and taxpayers may continue to rely upon it in the
jurisdictions accepting the doctrine. \(^{93}\) Moreover, at least two

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\(^{88}\) *Id.* at 298. See also United States v. Jobin, 76-1 T.C. § 9433 (1st Cir. 1976) (where an agent failed to advise the taxpayer of his right to counsel in addition to not informing him of the criminal character of the investigation).

\(^{89}\) The court in United States v. Jobin, 76-1 T.C. § 9433 (1st Cir. 1976), stated that a taxpayer might logically waive his right to remain silent during a presumably civil investiga­tion for fear that the invocation of the fifth amendment would provoke a criminal investiga­tion. *Id.* at 84.151.

\(^{90}\) United States v. Jobin, 76-1 T.C. § 9433 (1st Cir. 1976); United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975).

\(^{91}\) Nevertheless, incomplete warnings hinting of possible criminal liability in the setting of the investigation arguably put taxpayers on notice of their potential jeopardy. See note 100 and accompanying text infra. But see United States v. Jobin, 76-1 T.C. § 9433 (1st Cir. 1976) (note 89 supra).

\(^{92}\) See note 63-67 and accompanying text supra.

\(^{93}\) It is not clear that the IRS may revoke the warning procedure unilaterally. See Brief for Respondent at 35, Beckwith v. United States, 425 U.S. 341 (1976) (where the government
courts\textsuperscript{94} have stated that the warnings are relevant to the question of coercion or deception on the part of agents seeking to obtain incriminating information from taxpayers.\textsuperscript{95}

\section*{III. Taxpayer Consent to IRS Investigations}

In addition to involving the fifth amendment, IRS investigations may involve fourth amendment questions with respect to searches of taxpayers' records.\textsuperscript{96} Although access to such documents may be obtained through formal process,\textsuperscript{97} agents, without relying on this process, often seek and receive consent for an examination of a taxpayer's records.\textsuperscript{98} Taxpayers are especially likely to consent to such searches by revenue agents conducting civil investigations. Where IRS agents searching the files of a taxpayer discover incriminating information which is subsequently offered at a criminal tax fraud trial, the defendant may seek to suppress the evidence on the ground that consent was invalidly obtained through deception or misrepresentation.\textsuperscript{99}

The fourth amendment protects a person's reasonable expecta-
tion of privacy, but this protection does not extend to evidence which a person voluntarily makes available to law enforcement officers. The fourth amendment requires that searches be conducted pursuant to a warrant unless a search falls within an exception to the warrant requirement. Consent searches constitute one of the most significant exceptions to the warrant requirement. An individual may consent to a search by law enforcement officers, thereby permitting official intrusions which would otherwise be impermissible without a warrant. With respect to noncustodial consent searches the government must demonstrate that "the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." In this context the courts lack an objective standard with which to measure the voluntariness of consent. Rather, in Schneckloth v. Bustamonte, the Supreme Court held that the voluntariness of a consent to search is "to be determined from the totality of all the circumstances."

Before Schneckloth, the consent doctrine was assumed to be based on the traditional test of waiver, "an intentional relinquishment or abandonment of a known right or privilege." The Schneckloth Court noted that such a test was applicable only to those constitutional rights which, unlike the fourth amendment right, are intended to protect the fair determination of truth at a trial. Balancing the requirement of assuring that consent to a


103 Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973). The defendant himself does not necessarily have to give consent. United States v. Matlock, 415 U.S. 164, 170 (1974). Notably, in practice, consents obtained in the course of income tax investigations are received from the principals, not from third parties such as wives or employees. In this respect, however, it should be mentioned that IRS agents need not obtain consent to examine financial records maintained by a taxpayer's accountant. Fisher v. United States, 425 U.S. 391 (1976).


105 412 U.S. 218 (1973). In Schneckloth, a highway patrolman requested and received permission to search a vehicle. The search resulted in the discovery of stolen checks hidden under one of the seats. Arguing that his fourth amendment rights were violated because he was not informed by the officer that he could withhold consent, the defendant sought to suppress the incriminating evidence. The Supreme Court rejected the proposition that a Miranda-type warning, based on knowledge and willingness, should be created for consent search situations. Id. at 229.

106 Id. at 248.

search was not the product of coercion against a "legitimate need for such searches."\textsuperscript{108} The Court rejected an analogy to \textit{Miranda} by not requiring law enforcement officers to warn persons of their rights whenever they sought consent to a search. Since the voluntariness of consent was a question of fact to be determined by a consideration of all of the circumstances of a case, the Court viewed the knowledge of the right to withhold consent as only one factor for courts to consider in determining voluntariness.\textsuperscript{109} According to the \textit{Schneckloth} Court, other factors, including the intelligence and education of a defendant, were also germane to assessing the voluntariness of a consent search.\textsuperscript{110}

Under the standard articulated in \textit{Schneckloth}, a defendant may have difficulty proving that his consent was involuntary,\textsuperscript{111} unless he can demonstrate that the government obtained consent by coercion or deception.\textsuperscript{112} Although a taxpayer will almost never be subjected to physical coercion, he may seek to challenge his alleged consent to an IRS examination of his records by claiming that consent was obtained by deception.\textsuperscript{113} The question in such cases is whether, in view of all the circumstances, a taxpayer's consent will be adjudged involuntary because of deception or misrepresentation on the part of the investigating agents. Two situations recur. First, a taxpayer may consent to a civil investigation of his records which leads to a subsequent criminal inquiry.\textsuperscript{114} This raises a question with respect to the continuing validity of the consent. Second, a taxpayer may consent to what he believes is an investigation into his civil liability when, in fact, an investigation of his criminal liability is already in progress.\textsuperscript{115}


\textsuperscript{109} \textit{Id.} at 241-43, 248.

\textsuperscript{110} \textit{Id.} at 248. An additional factor would be the failure to advise a suspect of his rights. \textit{Id.} at 227. Other courts have stated that the giving of warnings would be relevant evidence with respect to questions of coercion and fraud. \textit{Beckwith} v. United States, 425 U.S. 341, 348 (1976); \textit{Cohen} v. United States, 405 F.2d 34, 39 (8th Cir. 1968), \textit{cert. denied}, 394 U.S. 943, (1969).

\textsuperscript{111} \textit{Weinreb}, \textit{supra} note 100, at 56-57. \textit{But see} Comment, \textit{Schneckloth} v. \textit{Bustamonte Examined}, \textit{supra} note 104.


\textsuperscript{115} This complaint frequently arises from joint investigations conducted by special and revenue agents. See, e.g., United States v. \textit{Stamp}, 458 F.2d 759 (D.C. Cir. 1971); \textit{Cohen} v.
Where taxpayers have been the victims of blatant deception, courts have found consent to be invalid.116 In United States v. Vander Linden,117 the taxpayer, a pharmacist suspected of illegal drug sales, consented to a civil audit of his records by a revenue agent. Vander Linden was unaware that the agent was connected with the Drug Abuse Law Enforcement (DALE) program, a project aimed at drug traffickers and supervised by the Intelligence Division of the IRS.118 After an audit of the year in question revealed no evidence of tax fraud, the revenue agent received approval from the Audit and Intelligence Divisions to audit earlier years even though the usual procedure would have been to terminate the investigation. Evidence of possible tax fraud was discovered during this audit resulting in the indictment of Vander Linden. In suppressing the evidence, the court held that the civil audit was merely a disguise for a criminal investigation. In the court’s view, when the taxpayer consented to the inspection of his records for the purported civil tax audit, his consent was obtained under false pretenses and was therefore involuntary.119

Similarly, a taxpayer may be able to show that his consent was invalid if an agent explicitly assured him that the sole purpose of an investigation was to ascertain the amount of a civil liability without indicating that an investigation may result in a criminal prosecu-
tion. In *United States v. Robson*, the court stated that special or revenue agents must not affirmatively mislead a taxpayer into believing that an investigation is exclusively civil, and will not lead to criminal charges. The *Robson* court refused to order a suppression, however, because the agent involved did not use the word "civil" when explaining the audit to the taxpayer.

Most defendant taxpayers, however, cannot aver actual deception or misrepresentation on the part of IRS agents. Rather, taxpayers are more likely to challenge the validity of consent on the grounds that investigating agents did not explain the inherent jeopardy of tax investigations. The voluntariness of consent may be affected by an individual's ignorance and misimpressions concerning tax investigations, particularly by the belief that only civil liability is at stake. The most common misconceptions, however, are the beliefs that the IRS can obtain by other means any information which is not willingly provided, and that cooperation buys the good will of the investigating agents. Moreover, a meeting with an IRS agent may not manifest the possibility of criminal prosecution as clearly as a confrontation with a police officer. Arguably, therefore, the taxpayer cases are atypical fourth amendment situations and may be distinguished from *Schneckloth v. Bustamonte* on that basis. The taxpayer is at such a disadvantage vis-a-vis the IRS when compared with typical situations involving police searches that there would seem to be a greater need for a taxpayer to be informed of his right to refuse permission for a search and of the possible consequences of a search. Nevertheless, courts have required clear and convincing evidence of material affirmative misrepresentations by IRS agents in order to invalidate a consent

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120 See, e.g., United States v. Robson, 477 F.2d 13, 18 (9th Cir. 1973); Cohen v. United States, 405 F.2d 34, 36 (8th Cir.), cert. denied, 394 U.S. 943 (1968); United States v. Wheeler, 149 F. Supp. 445, 446 (W.D. Pa. 1957). Cf. United States v. Maciel, 351 F. Supp. 817, 819 (D.R.I. 1972) (where a special agent told the taxpayer that he did not need to hire a lawyer—advice that was not only wrong, but which contradicted a warning given by an earlier special agent to the taxpayer).

121 477 F.2d 13 (9th Cir. 1973.) See also United States v. Prudden, 424 F.2d 1021 (5th Cir.), cert. denied, 400 U.S. 831 (1970); Cohen v. United States, 405 F.2d 34 (8th Cir. 1968), cert. denied, 394 U.S. 943 (1969).

122 *Id.* at 18.


125 See notes 103-10 and accompanying text supra.
search.\textsuperscript{126} Courts have generally refused to hold that an agent’s silence as to the possible or actual criminal purpose of an investigation is affirmative misrepresentation, unless a taxpayer has specifically inquired about the scope of the investigation.\textsuperscript{127} In \textit{United States v. Bland},\textsuperscript{128} for example, the court stated that while it might be misrepresentation for a special agent to fail to identify his office, the taxpayer, who was unaware of the difference between revenue agents and special agents, was not misled with respect to the nature of the investigation.\textsuperscript{129} Since the misrepresentation did not have a material impact on the voluntariness of the consent, the \textit{Bland} court upheld the search.

Under the totality of circumstances test articulated in \textit{Schneckloth v. Bustamonte},\textsuperscript{130} affirmative misrepresentation is only one factor to be considered in deciding whether valid consent given at the civil stage of an investigation carries over to the criminal stage. Other elements include the relative sophistication of taxpayers,\textsuperscript{131} the inherently admonitory nature of an investigation,\textsuperscript{132} and the demeanor of investigating agents.\textsuperscript{133} \textit{United States v. Stamp},\textsuperscript{134} which arose from a complex joint investigation into

\begin{footnotesize}
\textsuperscript{127} \textit{United States v. Robson}, 477 F.2d 13 (9th Cir. 1973); \textit{United States v. Prudden}, 424 F.2d 1021, 1032 (5th Cir.), \textit{cert. denied}, 400 U.S. 831 (1970). \textit{But cf. United States v. Tonahill}, 430 F.2d 1042, 1044-45 (5th Cir. 1970) (where revenue and special agents received several inquiries from suspect taxpayers as to the nature of the investigation and the reason for its lengthy duration, but were held not to have misrepresented their criminal investigation because the agents never affirmatively stated that they were only interested in civil liability).
\textsuperscript{128} 458 F.2d 1 (5th Cir. 1972).
\textsuperscript{129} Id. at 8. The \textit{Bland} court referred to News Release IR-949 in noting that, had the facts arisen under the News Release Doctrine, the special agent would have been obligated to identify his office and his function. \textit{Id.} at 9 n.7.
\textsuperscript{130} 412 U.S. 218 (1973).

A “routine” tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government’s agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful evasion. \textit{Id.} at 414-15.

\textsuperscript{133} Perhaps the weakest argument a taxpayer can make is that he was misled by the friendliness and cordiality of agents, or that he interpreted an agent’s activities as indicating the closing of the investigation without criminal consequences. See, e.g., \textit{United States v. Marra}, 481 F.2d 1196 (6th Cir. 1973), \textit{cert. denied}, 414 U.S. 1004 (1973); \textit{United States v. Prudden}, 424 F.2d 1021 (5th Cir.), \textit{cert. denied}, 400 U.S. 831 (1970).
\textsuperscript{134} 458 F.2d 759 (D.C. Cir. 1971).
\end{footnotesize}
the affairs of several public officials, involved a taxpayer who had consented to a civil audit, but had not been notified that the investigation had criminal implications. Stamp contended that an agent had told him that the audit was "routine" and that his consent was limited to the calculation of his civil deficiency. The court considered the totality of the circumstances before deciding the "close question" in favor of the government. Noting that all tax investigations have misleading features which would not alone justify suppressing evidence, the Stamp court conceded that taxpayers might show that a search had exceeded the scope of the consent given. The sophistication of the taxpayer proved to be the decisive factor in the Stamp case. With a background in finance, taxation, and law, Stamp was presumed to know that a civil tax audit could develop into a criminal tax fraud investigation, espe-

135 Several revenue agents and special agents were involved in the investigations. Although the Revenue Agents did not inform the suspect taxpayer of possible criminal liabilities when obtaining consent for the audits, the Stamp court found that the revenue agents had not exceeded the scope of routine civil audits, and, therefore, had not misrepresented their own duties. Id. at 778-79.

136 Id. at 775-77, 779-80. The investigation in Stamp was a joint investigation; it was partially civil and partially criminal from its inception. Nevertheless, the Stamp court considered prior cases involving the continuing effectiveness of a consent to search after an originally civil investigation has become criminal. The majority view was that IRS agents were under no duty to disclose the changing nature of an investigation to suspect taxpayers; a valid consent to a civil investigation would continue to be valid after the investigation changed complexion. Provided a taxpayer was not affirmatively misled at the time of his consent, the warning inherent in the nature of an investigation was considered adequate to protect his interests. United States v. Scalfani, 265 F.2d 408, 415 (2d Cir.), cert. denied, 360 U.S. 918 (1959); Turner v. United States, 222 F.2d 926 (4th Cir. 1955); United States v. Burdick, 214 F.2d 768 (3d Cir. 1954). The Stamp court rejected the Scalfani court's view that keeping taxpayers advised of the changing character of the investigation would be burdensome for the IRS, but the Stamp court did not hold that the IRS had to inform taxpayers if their status changed. 458 F.2d at 776. See Grant v. United States, 291 F.2d 227, 229 (2d Cir. 1961), where the court indicated that such warnings would be preferable in order to protect constitutional rights and to reduce the number of motions to suppress.

A second approach is characterized by United States v. Guerrina, 112 F. Supp. 126 (E.D. Pa. 1953), where the court refused to allow the government to use evidence obtained during the criminal stage of an investigation because the taxpayer had intended to consent only to a search for evidence of civil liability. This case, however, may be explained as one involving affirmative misrepresentation and subterfuge because a special agent got access to the taxpayer's records via an appointment made for him by a revenue agent, who was conducting a civil audit. Id. at 128-29. Application of Bodkin, 165 F. Supp. 25 (E.D.N.Y. 1958), which involved a secret joint investigation, may be similarly explained.

The position of the Stamp court is most nearly in accord with that of a third judicial theory, illustrated by two cases. United States v. Lipshitz, 132 F. Supp. 519 (E.D.N.Y. 1955), and United States v. Wolrich, 129 F. Supp. 528 (S.D.N.Y. 1955). These courts considered the specific facts of the cases to determine whether there were any misleading elements in addition to those inherent in complex tax investigations. This approach approximates that of the Supreme Court in Schneckloth v. Bustamonte, 442 U.S. 218 (1973), in that the validity of continuing a consent to the criminal stage of investigation depended on the totality of the circumstances. It should be noted that the Stamp court was able to reconcile the Scalfani and Lipshitz positions because each first considered the initial voluntariness of the consent. The Scalfani court found the taxpayer's consent to be voluntary, while the Lipshitz and Wolrich courts determined that investigating agents had from the beginning conducted investigations which were broader than a proper civil tax audit. 458 F.2d at 776.
cially since he was aware of his own culpability. The court further stated that such a taxpayer would not have been misled by the use of the agent’s statement that the search was “routine.” The Stamp court indicated, however, that the decision might have gone the other way if the defendant had been a less sophisticated taxpayer.

While an unsophisticated taxpayer would seldom be the object of a Stamp-type investigation, the implication of the case and its application of a totality-of-the-circumstances test for the IRS is apparent; the Service may lose evidence on grounds of fraudulently induced consent, unless it can demonstrate that suspect taxpayers knew of their actual or potential jeopardy at the time consent was given. The Stamp court indicated that it would not be impractical for the IRS to keep taxpayers informed of the status of investigations. Moreover, if special agents are involved, the News Release IR-949 warnings clearly reveal that a criminal investigation is underway. The IRS not only does not have to meet the requirements of a prophylactic rule, but it seems likely that the courts will not decide in favor of taxpayers whose claims of involuntary consent lack credibility. Nevertheless, even if a taxpayer cannot demonstrate actual deception or misrepresentation by an agent, he may be able to show his consent was involuntary because it was given without knowledge of the possible consequences of a tax investigation.

IV. Conclusion

Recent decisions have limited the grounds upon which taxpayers facing criminal prosecution may seek to suppress incriminating evidence. The decision in Beckwith v. United States virtually eliminates the availability of the Miranda doctrine to the subjects of criminal tax fraud investigations by defining custody so as to exclude instances wherein the subject is not under arrest and is free to depart at will. For the Miranda doctrine to be available the taxpayer would need to satisfy the “special circumstances” exception to the custody requirement. There may also be grounds to suppress incriminating evidence if IRS special agents have failed to

137 458 F.2d at 779-80.
138 Id.
139 Id. at 776. See note 138 supra.
accurately give the News Release IR-949 warnings. This may occur if the jurisdiction accepts the News Release doctrine, and if the taxpayer is able to convince the court that the agent did not substantially comply with the warning procedure. Finally, taxpayers may be able to suppress evidence on the fourth amendment ground that their consent to an IRS search was involuntary. The involuntariness of consent is determined from the totality of the circumstances, although courts heavily weigh evidence that a taxpayer knew of his potential criminal jeopardy when he gave his consent. While a taxpayer, compared with the subjects of typical fourth amendment searches and seizures, is less likely to recognize the full extent of his jeopardy in the absence of warnings, only in cases of actual deception or misrepresentation by IRS agents is suppression on fourth amendment grounds likely.

—Curtis L. Christensen