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Richard A. Williamson
William & Mary Law School

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THE VIRTUES (AND LIMITS) OF SHARED VALUES: THE FOURTH AMENDMENT AND *MIRANDA*'S CONCEPT OF CUSTODY

Richard A. Williamson*

Miranda only protects suspects who the police subject to custodial interrogation. The concept of custody is tethered to the Fifth Amendment privilege against self-incrimination; thus, to render a suspect in custody, law enforcement officials must subject the suspect to a compelling environment that tends to undermine that privilege. In this article, Professor Richard A. Williamson examines the application of Miranda to Terry stops. He reviews the impact of the Beheler and Berkemer decisions, which held that suspects who officials stop based on reasonable suspicion, as opposed to suspects who officials arrest, are not entitled to Miranda warnings. Professor Williamson generally approves the Supreme Court's refusal to extend Miranda protections to Terry stops. Yet he observes that the Fourth Amendment values underlying the distinction between stops and arrests are not coextensive with the Fifth Amendment values underlying Miranda. Emphasizing the expansion in recent years of the permissible scope of Terry stops, he concludes that circumstances may arise in which officials must give Miranda warnings to suspects stopped but not arrested.

I. INTRODUCTION

A familiar principle of the law of confessions holds that once a person has been "taken into custody or otherwise deprived of his freedom of action in any significant way," the police may not interrogate that person without complying with the procedural safeguards mandated by *Miranda v. Arizona*.¹ Statements obtained during the period of custodial interrogation without compliance with *Miranda*'s mandate may not be used, whether such statements are exculpatory or inculpatory, or

* Chancellor Professor of Law, College of William and Mary, Marshall-Wythe School of Law. B.A. 1965, Ohio University; J.D. 1968, Ohio State University.

1. 384 U.S. 436, 444 (1966). Examples of the immediate scholarly reaction to *Miranda* include Sheldon H. Elsen & Arthur Rosett, *Protection for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645 (1967); Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Richard H. Kuh, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 233 (1966).

whether they constitute "confessions" or merely "admissions" of part or all of an offense.²

In the years following *Miranda*, the Supreme Court decided numerous cases³ that attempted to clarify and refine the message of *Miranda*, including decisions that informed the meaning of the terms *custody*⁴ and *interrogation*.⁵ The concepts of custody and interrogation are central to the *Miranda* decision. If a person is not in custody when interrogated, the procedural safeguards of *Miranda* do not apply. Likewise, a person in custody but not interrogated receives no protection from the *Miranda* decision. Only when the two concepts are joined—when custodial interrogation occurs—is the *Miranda* decision implicated.⁶

Two Supreme Court decisions, *California v. Beheler*⁷ and *Berkemer v. McCarty*,⁸ now nearly a decade old, forged a link between the Fourth Amendment's concept of *arrest* and *Miranda*'s concept of *custody*. In *Beheler* the Supreme Court stated, in a per curiam opinion written without the benefit of briefs or argument on the merits,⁹ that a suspect is not in custody for *Miranda* purposes until "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."¹⁰ Although that statement arguably was dictum,¹¹ one year later¹² in *Berkemer* the Court applied the *Beheler* standard to a person detained in a routine traffic stop. The Court held that the circumstances of a routine traffic stop are analogous¹³ to a "Terry stop"¹⁴ and that the

2. *Miranda*, 384 U.S. at 444, 476-77 ("No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. . . . Similarly . . . no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'").

3. See, e.g., *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (holding that once *Miranda*'s right to counsel is invoked, the police "may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney"); *Arizona v. Roberson*, 486 U.S. 675, 682-84 (1988) (holding that once *Miranda*'s right to counsel is invoked, the police may not reinitiate interrogation without counsel present, even about an offense unrelated to the subject of the initial interrogation for which the right was invoked); *New York v. Quarles*, 467 U.S. 649, 656 (1984) (declaring that the "doctrinal underpinnings of *Miranda*" do not "require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety"); *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975) (holding that once the defendant has invoked his right to remain silent, further interrogation is permissible so long as the defendant's right to cut off questioning was scrupulously honored); *Michigan v. Tucker*, 417 U.S. 433, 444, 446 (1974) (holding that *Miranda* warnings are "not themselves rights protected by the Constitution" but are, instead, "prophylactic standards" designed to provide "practical reinforcement" for Fifth Amendment rights).

4. See, e.g., *Beckwith v. United States*, 425 U.S. 341 (1976).

5. See, e.g., *Rhode Island v. Innis*, 446 U.S. 291 (1980).

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

7. 463 U.S. 1121 (1983) (per curiam).

8. 468 U.S. 420 (1984).

9. See *Beheler*, 463 U.S. at 1127 (Stevens, J., dissenting).

10. *Beheler*, 463 U.S. at 1125 (per curiam) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

11. See *infra* note 84 and accompanying text.

12. The Court repeated its dictum in *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984), decided prior to *Berkemer*. See *infra* note 85.

13. See *infra* note 101 (discussing the analogy).

individual so detained is not, without more, in custody for *Miranda* purposes;¹⁵ therefore, he or she may be questioned without first receiving the *Miranda* warnings.¹⁶

Beheler and *Berkemer* specifically equated *Miranda*'s concept of custody with the Fourth Amendment concept of arrest. Prior to *Beheler* and *Berkemer*, the relationship between the concepts was uncertain at best.¹⁷ Following *Beheler* and *Berkemer*, a person under arrest or detained under circumstances functionally equivalent to an arrest, as the term *arrest* is defined for Fourth Amendment purposes, is in custody for *Miranda* purposes. Conversely, a person who has been detained, who has suffered restrictions on freedom of movement, and who clearly has been seized for Fourth Amendment purposes, is not in custody for *Miranda* purposes unless formally arrested or subjected to restraints functionally equivalent to an arrest.

The Fifth Amendment protection against compelled self-incrimination, the constitutional predicate for the *Miranda* decision,¹⁸ is not, as *Berkemer* and *Beheler* implicitly recognize, the only constitutional doctrine implicated when a suspect is taken into custody and questioned. The government's action in imposing custodial restraints also constitutes a seizure within the meaning of the Fourth Amendment.¹⁹ Unless the government supports the seizure with information sufficient to constitute "reasonable suspicion" or "probable cause," depending on the nature of the seizure, the Fourth Amendment is violated and the seizure is unlawful.²⁰ Confessions obtained during the period of unlawful detention may be inadmissible even though the confession is otherwise voluntary and obtained in full compliance with the *Miranda* decision.²¹

The procedural safeguards of *Miranda* therefore protect a suspect who lawfully is in custody and interrogated. If the detention is unlawful, the derivative evidence component of the Fourth Amendment's exclusionary rule—not the *Miranda* decision—will require, at least in some

14. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

15. *Id.* at 440.

16. *See id.* at 441-42.

17. *See infra* notes 72-73 and accompanying text.

18. *Miranda v. Arizona*, 384 U.S. 436, 439 (1966) ("[W]e deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."); *see infra* notes 56-61 and accompanying text.

19. *See Terry v. Ohio*, 392 U.S. 1, 16 (1968) ("[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

20. *See Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (plurality opinion); *see also* Wayne R. LaFare, "Seizures" *Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417, 418 (1984).

21. *See, e.g., Taylor v. Alabama*, 457 U.S. 687, 690 (1982) (stating that such confessions "should be excluded unless intervening events break the causal connection between the illegal arrest and the confession"); *Dunaway v. New York*, 442 U.S. 200, 216-17 (1979) (explaining that the Fourth Amendment requirements are distinct from those of the Fifth Amendment).

cases, suppression of the confession.²²

The relationship between the concept of custody, as that term is used in *Miranda*, and the concepts of seizure, stop, and arrest, as those terms are defined for Fourth Amendment purposes, is more complex, however, than the above discussion reveals. During approximately the same period during which the Supreme Court promulgated and refined the *Miranda* doctrine, it also validated under the Fourth Amendment a police investigatory practice known as "stop and frisk."²³ Under the stop and frisk doctrine, the police may undertake a temporary forcible detention of a person and his or her possessions upon "reasonable suspicion" that criminal activity is afoot and may "frisk" the individual if they believe him or her to be armed and dangerous.²⁴ Although the objects and limits of the investigatory techniques permissible during the period of the temporary forcible detention are not defined clearly, decisions interpreting the stop and frisk doctrine, some of which occurred after the Court decided *Beheler* and *Berkemer*,²⁵ have held that the police may pursue various methods of investigation, including questioning the person detained, for the purpose of either confirming or dispelling the suspicion that prompted the detention.²⁶ As *Berkemer* stated, none of the stop and frisk decisions held that *Miranda* warnings must precede investigative questioning during the period of the temporary detention.²⁷

The analytical foundation for the stop and frisk doctrine is well known and has produced what may be appropriately described as a two-tier view of Fourth Amendment protections.²⁸ A person is seized within the meaning of the Fourth Amendment when his or her freedom of movement is restrained.²⁹ This test apparently requires examination of the circumstances surrounding a police-citizen encounter to determine whether, under the circumstances, a reasonable person would have be-

22. A confession obtained in compliance with *Miranda* but following an illegal arrest is inadmissible unless circumstances indicate a break in the causal connection between the unlawful arrest and the confession. The factors that must be considered include whether *Miranda* warnings were given, the "temporal proximity" between the arrest and the confession, the presence of "intervening circumstances," and the "flagrancy of the official misconduct." See, e.g., *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

23. The Supreme Court first used the terms *stop* and *frisk* in *Terry v. Ohio*, 392 U.S. 1, 10 (1968). See generally Wayne R. LaFare, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39 (1968).

24. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

25. See *infra* notes 121-30 and accompanying text.

26. *Berkemer v. McCarty*, 468 U.S. 420, 437-38 (1984); see *infra* note 117.

27. *Berkemer*, 468 U.S. at 439-40.

28. Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest"*, 43 OHIO ST. L.J. 771, 776 (1982). See generally Neil Ackerman, Comment, *Considering the Two-Tier Model of the Fourth Amendment*, 31 AM. U. L. REV. 85 (1981).

29. *Florida v. Bostick*, 111 S. Ct. 2382, 2386 (1991); see *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (stating that a seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen"). For a criticism of *Bostick*, see Bruce A. Green, "Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term, 70 N.C. L. REV. 373, 396-400 (1992).

lieved he or she was not free to leave.³⁰

Not every police-citizen encounter, however, constitutes a seizure within the meaning of the Fourth Amendment.³¹ If the person remains free to disregard the contact with a police officer and walk away, no intrusion on personal liberty has occurred, the Fourth Amendment is not implicated, and the Constitution requires no particularized and objective justification.³² A forcible detention that exceeds what reasonably can be characterized as a "temporary" detention—that is, a detention that lasts longer than is necessary to effectuate the purposes of the seizure³³ or one in which the investigative techniques employed during the detention are not the "least intrusive" means reasonably available to verify or dispel the officers' suspicions in a short period of time—constitutes an arrest and must be supported by probable cause.³⁴ Reasonable suspicion, however, can support a temporary detention; thus, the quantum and quality of information required to support such a detention is less than traditional probable cause.³⁵ All forcible detentions, however, are seizures within the meaning of the Fourth Amendment.³⁶

30. See *infra* note 142; see also *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (embracing the reasonable person standard); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J.) (requiring a show of official authority such that a "reasonable person would have believed that he was not free to leave"). See generally LaFave, *supra* note 20, at 420-26. The test whether a reasonable person would feel "free to leave," however, is applicable only when the factors that allegedly produced the restraint originated in the actions of the government. See *Bostick*, 111 S. Ct. at 2387. Otherwise, the issue is whether a reasonable person in the suspect's position would "feel free to decline the officer's requests or otherwise terminate the encounter." *Id.*

The reasonable person test for determining whether a seizure has occurred has been soundly criticized. See Edwin J. Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437, 439 (1988) ("[I]t is generally accepted that, in fact, citizens almost never feel free to end an encounter initiated by a police officer and walk away.").

31. *Terry*, 392 U.S. at 19 n.16. Street encounters between police officers and citizens are "incredibly rich in diversity." *Id.* at 13.

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion).

32. *California v. Hodari D.*, 111 S. Ct. 1547, 1551 (1991). The Court's nonarrest detention cases have been soundly criticized. See Green, *supra* note 29, at 400-04 ("A portion of the majority opinion [in *Hodari D.*] discussing policy considerations suggests that the *Hodari D.* decision was in fact dictated by a preference for promoting law enforcement"); Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1297 (1990) (stating that the Court has adopted "unrealistic and deceptive standards for deciding when a person has been seized for fourth amendment purposes").

Merely asking someone a question does not constitute a seizure. *INS v. Delgado*, 466 U.S. 210, 216 (1984). Likewise, merely chasing after a suspect to see where he is going does not constitute a seizure. *Michigan v. Chesternut*, 486 U.S. 567, 574-75 (1988).

33. *United States v. Sharpe*, 470 U.S. 675, 685 (1985); see *infra* notes 121-24 and accompanying text.

34. *Royer*, 460 U.S. at 504-06; see *infra* notes 114-20 and accompanying text.

35. See *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (explaining that reasonable suspicion requires a "particularized and objective basis for suspecting the particular person stopped of criminal activity").

36. *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

The intersection and potential conflict between the *Miranda* decision and the stop and frisk doctrine are clear.³⁷ A person is in custody for *Miranda* purposes whenever that person has been deprived of his or her freedom of movement in any "significant way."³⁸ A person is seized within the meaning of the Fourth Amendment whenever the government, by means of physical force or show of authority, restrains the person's freedom of movement.³⁹ Prior to *Beheler* and *Berkemer*, the nearly unanimous view of the lower federal and state courts was that a person "under arrest" was "in custody" for *Miranda* purposes;⁴⁰ thus, he or she could not be interrogated unless the procedural safeguards of *Miranda* were met. However, the pre-*Beheler*/*Berkemer* decisions understandably made no attempt to utilize emerging Fourth Amendment jurisprudence to resolve the *Miranda* custody question, apart from vague, conclusory references to suspects "under arrest."⁴¹

Certainly, courts could have concluded easily that an individual's freedom of movement is restricted in a "significant way" (that is, the person is in custody for *Miranda* purposes) when, but only when, the person is "under arrest" as that term is normally understood. An individual whose freedom of movement is restricted, but only to the extent that the person has been "stopped" within the meaning of the Fourth Amendment, arguably has not suffered the type of "significant" restraints on freedom of movement required by *Miranda*. This mode of analysis assumes that the concepts of custody and seizure are not synonymous; instead, a person is in custody only when the person is "under arrest."

The problems with this proffered analysis are threefold. First, the analysis assumes that all "stops" within the meaning of the Fourth Amendment are insignificant intrusions on personal liberty, hardly a self-evident proposition, particularly because the Supreme Court never specifically has identified the factors by which to measure the intrusiveness of a seizure. Second, it assumes that the Fourth Amendment values that define the differences between "stops" and "arrests" also inform the Fifth Amendment based analytical distinction recognized in *Miranda* between custodial and noncustodial interrogation. Finally, the analysis assumes that all suspects "under arrest" suffer the type of compelling environment that triggers the need for *Miranda* warnings prior to interrogation.

37. "[T]he core meaning both of 'seizure' in the Fourth Amendment sense, and of 'custody' in the *Miranda* sense, appears to be the same: the restraint of a person's 'freedom to walk away' from the police." *United States v. Brunson*, 549 F.2d 348, 357 n.12 (5th Cir.), *cert. denied*, 434 U.S. 842 (1977).

38. 384 U.S. 436, 444 (1966).

39. *Terry*, 392 U.S. at 19 n.16.

40. See, e.g., *United States v. Jimenez*, 602 F.2d 139, 141-43 (7th Cir. 1979) (finding *Miranda* inapplicable because the defendant was not under arrest at the time of the statement); *United States v. Hall*, 421 F.2d 540, 545 (2d Cir. 1969) (stating that "in the absence of actual arrest something must be said or done by the authorities . . . which indicates that they would not have heeded a request to depart"), *cert. denied*, 397 U.S. 990 (1970).

41. See cases cited *supra* note 40.

The use of Fourth Amendment values and theories to define *Miranda's* concept of custody therefore presents substantial analytical problems.

Precisely because the Fourth Amendment jurisprudence that defines and differentiates the concepts of stop and arrest is derived from values seemingly unrelated to the values underlying the *Miranda* decision, presumptive equation of the concepts of "arrest" and "custody" is questionable. A person who is "under arrest" for Fourth Amendment purposes might not suffer the type of compelling environment that serves as the essential predicate for the *Miranda* rules.⁴² Likewise, some individuals subject to investigative detentions who merely have been stopped within the meaning of the Fourth Amendment may in fact need the protections provided by the *Miranda* safeguards because of the compelling circumstances of the detention.⁴³ Following *Beheler* and *Berkemer*, the Court decided several cases⁴⁴ that significantly expanded the nature and scope of permissible activity during a *Terry* stop, thereby indirectly affecting the protections afforded by the *Miranda* decision to suspects temporarily detained. Therefore, unless the Fourth Amendment values that define the concept of arrest and distinguish it from the lesser form of detention known as a stop remain sufficiently sensitive to the factors that inform *Miranda's* concept of custody, *Beheler* and *Berkemer* significantly distort the Fifth Amendment values advanced by the *Miranda* decision.

Arguably, an analysis of the *Beheler* and *Berkemer* decisions that focuses solely on the *Miranda* aspects of the cases is incomplete. The conclusion that the two cases significantly and unjustifiably weaken the analytical foundation of *Miranda* ignores the consequences of the decisions on the investigatory practice known as stop and frisk. One persuasive justification for *Beheler* and *Berkemer* might be simply that the objects of the stop and frisk doctrine would be frustrated if the police were required to administer *Miranda* warnings prior to questioning of suspects temporarily detained for further investigation.⁴⁵ Moreover, full implementation of *Miranda* in nonarrest detentions would be impracticable because of the difficulty in quickly supplying counsel should the suspect invoke his right to counsel.⁴⁶ Thus, perhaps the most compelling rationale for *Beheler* and *Berkemer* is that *Miranda's* requirements must be limited to cases involving a formal arrest or its functional equivalent because to extend the concept of custody to all detentions (i.e., seizures) for questioning would be impracticable and would significantly and unjustifiably undermine the purposes of the legitimate investigative technique known as stop and frisk.

This article analyzes the various doctrines and theories described

42. See *infra* notes 70-72 and accompanying text.

43. See *infra* notes 71-72 and accompanying text.

44. See *infra* notes 121-30 and accompanying text.

45. George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 947.

46. *Id.* at 945-46.

above; its primary focus is on the impact of *Beheler* and *Berkemer* and their use of Fourth Amendment values and theories to define *Miranda*'s concept of custody. The article examines the effect of *Beheler* and *Berkemer* on (and hence, the application of *Miranda* to) the rubric of investigative detentions that constitute stops within the meaning of the Fourth Amendment. Part II briefly traces the history and analytical justification for the application of the *Miranda* safeguards for only those persons in custody when interrogated.⁴⁷ Part III analyzes the developing Fourth Amendment distinction between the concepts of stop and arrest, with particular focus on the constitutional values that inform the distinction between the two concepts.⁴⁸ Finally, Part IV concludes that although the relationship between the articulated values that inform the distinction between the concepts of stop and arrest and the articulated values that inform *Miranda*'s concept of custody are not perfect, substantial fulfillment of the objectives of the *Miranda* decision has been achieved and the function of the stop and frisk doctrine has not been frustrated by the presumptive equation of *Miranda*'s concept of custody with the Fourth Amendment concept of arrest.⁴⁹

The presumption that a person detained in a *Terry* stop is not in custody is defensible, however, only if two conditions are met. First, courts must interpret and apply existing precedent defining the term *arrest* in a manner that gives full recognition to the Fourth Amendment values that are implicated when a seizure occurs. Specifically, courts must recognize that the Fourth Amendment's command that seizures of people be reasonable cannot be implemented fully simply by use of a clock and a yardstick. Qualitative as well as quantitative interests define the nature of our right to be free of unreasonable seizures. The reasonableness of a seizure "depends on not only when [it] is made but also how it is carried out."⁵⁰ Thus, in categorizing a seizure, courts must consider the amount of force applied or threatened. Moreover, although liberty or freedom of movement is a valued right because a right to go when and where we choose is essential to a truly free society, liberty or freedom of movement is a valued right also because it is one means by which we can lawfully avoid the government's evidence gathering techniques.⁵¹ Thus, in categorizing a seizure, courts also must consider both the number and intrusive character of the evidence gathering techniques employed by the police during the detention.

Second, courts must recognize and implement a subtle, yet significant, distinction between Fourth and Fifth Amendment jurisprudence grounded in the values each constitutional provision advances. *Berkemer* holds that the subject of an investigative detention is in cus-

47. See *infra* notes 54-107 and accompanying text.

48. See *infra* notes 108-40 and accompanying text.

49. See *infra* notes 141-50 and accompanying text.

50. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

51. See *infra* note 136 and accompanying text.

tody for *Miranda* purposes whenever, during the period of the detention, a reasonable person would have believed that he or she was "under arrest," even though that fact was not communicated to the suspect prior to questioning.⁵² By contrast, under prevailing Fourth Amendment standards, for purposes of characterizing the detention as a stop or an arrest, a suspect's belief or the belief of a reasonable person in the suspect's position that he or she was "under arrest" is not controlling.⁵³ Instead, the controlling issue is whether the circumstances of the detention were within the permissible range of activities authorized in a *Terry* stop. This subtle yet significant difference in analysis provides the basis for concluding, under appropriate circumstances, that a suspect who has merely been "stopped" for Fourth Amendment purposes nonetheless is "in custody" for *Miranda* purposes.

II. THE CONCEPT OF CUSTODY

A. *The Essential Predicate of the Miranda Decision*

The historical antecedents and fundamental assumptions leading to the promulgation of the *Miranda* decision are well documented elsewhere and will not be repeated herein.⁵⁴ It is instructive, however, to examine one aspect of the *Miranda* decision—the limitation that the required warnings need be given only "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."⁵⁵

In *Miranda*, the Supreme Court sought to provide some method to ensure that individuals subject to police interrogation were accorded their Fifth Amendment right not to be compelled to incriminate themselves.⁵⁶ The Court specifically held that the Fifth Amendment privilege was available outside criminal court proceedings and protected people "in all settings in which their freedom of action [was] curtailed."⁵⁷ The element of compulsion, however, was the key to the *Miranda* decision. The Fifth Amendment does not prohibit the police or other institutions

52. 468 U.S. 420, 442 (1984).

53. See *infra* note 130 and accompanying text.

54. See Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1443-50 (1985); Fred E. Inbau, *Over-reaction—The Mischief of Miranda v. Arizona*, 73 J. CRIM. L. & CRIMINOLOGY 797, 806-08 (1982); Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1837-38 (1987); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 435-53 (1987).

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

56. *Id.* at 439.

57. *Id.* at 467. Justice Harlan disagreed:

Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved Even those who would readily enlarge the privilege must concede some linguistic difficulties since the Fifth Amendment in terms proscribes only compelling any person "in any criminal case to be a witness against himself."

See *id.* at 510-11 (Harlan, J., dissenting) (citing Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1, 25-26 (A.E. Dick Howard ed., 1965)).

of government from asking questions,⁵⁸ nor does it prohibit a suspect from volunteering an incriminating statement.⁵⁹ What the Fifth Amendment does prohibit is the use of any practice or tactic that *compels* a person to incriminate himself or herself. The prohibited element of compulsion is present, according to the *Miranda* decision, in all cases of "in-custody" interrogation.⁶⁰ The inherent compulsion exerted by police during in-custody interrogation arises from the fact that the individual is "swept from familiar surroundings," is "surrounded by antagonistic forces," and is subjected to interrogation techniques, largely psychological, designed to "subjugate the individual to the will of his examiner."⁶¹

Having found compulsion inherent in the process of in-custody interrogation, *Miranda* held that in order to combat these pressures and to permit the full opportunity to exercise the privilege against self-incrimination, the suspect "must be adequately and effectively apprised of his rights" prior to questioning.⁶² Moreover, the *Miranda* decision mandated that a suspect's exercise of those rights be honored fully.⁶³

Miranda therefore proceeds from the assumption that a significant deprivation of freedom of movement—the government's exercise of the right to impose forcible restraints on an individual's freedom of action, together with police-initiated questioning—necessarily generates a form of prohibited compulsion. Cases decided both before⁶⁴ and after⁶⁵ *Mi-*

58. "The Constitution does not forbid the asking of criminative questions." *United States v. Monia*, 317 U.S. 424, 433 (1943); see *Minnesota v. Murphy*, 465 U.S. 420, 427-28 (1984). The privilege against self-incrimination applies only when responses are compelled, see *Fisher v. United States*, 425 U.S. 391, 397 (1976), and when the responses might tend to incriminate. *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

59. See *Murphy*, 465 U.S. at 429.

60. "[W]ithout 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." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

61. *Id.* at 457, 461. The Court described *Miranda* and its companion cases as "shar[ing] salient features—incommunicado interrogation of individuals in a police-dominated atmosphere." *Id.* at 445. In *Miranda* and each of its three companion cases "the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures." *Id.* at 457. The interrogation environment faced by each defendant was "created for no purpose other than to subjugate the individual to the will of his examiner." *Id.*

62. *Id.* at 467. "At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent." *Id.* at 467-68. "The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court." *Id.* at 469. "[A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." *Id.* at 471. "In order to fully apprise a person interrogated of the extent of his rights under this system . . . it is necessary to warn him . . . that if he is indigent a lawyer will be appointed to represent him." *Id.* at 473.

63. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 473-74. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474.

64. See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 285 (1936) (prohibiting compulsion by torture).

65. See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 401-02 (1978) (finding that a seriously wounded suspect's will was overborne during hospital interrogation). See generally Steven J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 878-84 (1981) (reviewing YALE KAMISAR, *POLICE*

rande have held that other prohibited forms of compulsion, physical or psychological, may occur in addition to those flowing from the fact of in-custody questioning. The fact remains, however, that following *Miranda*, a person in custody necessarily and always, regardless of circumstances, is considered subject to prohibited compulsion when interrogated, unless first effectively warned of his or her constitutional rights.

Unfortunately, *Miranda* did not define further the meaning of custody.⁶⁶ Because the decision did not use the familiar term *arrest* to describe what the Court meant by *custody*, one could argue that the Court intended to leave open the possibility that a person not under arrest nonetheless could be in custody. In fact, *Miranda* was decided nearly two years before the Supreme Court first explicitly recognized the species of Fourth Amendment search and seizure activity known as stop and frisk.⁶⁷

On the other hand, the *Miranda* decision, at one point, did equate the concept of custody with an "investigation which had focused on the accused"⁶⁸ and referred several times to questioning that occurred in a "police-dominated atmosphere."⁶⁹ Based upon the language used in the *Miranda* opinion, it is possible to posit that although the concept of custody should not be restricted to interrogation at the station house of a suspect formally arrested and charged, neither should it be construed to include questioning following all forcible detentions outside the station house regardless of the circumstances. Certainly, not all forcible detentions outside the station house produce *ipse dixit* a "police dominated atmosphere,"⁷⁰ nor is the individual who has been detained in a *Terry* stop necessarily and in all cases "swept from familiar surroundings" and "surrounded by antagonistic forces."⁷¹

Although one can argue that the logic of *Miranda* does not require warnings for every suspect detained (i.e., seized), the same argument can be made about station house interrogation of suspects formally arrested—not all suspects formally arrested and subjected to interrogation necessarily subjectively realize the type of compulsion identified by the *Miranda* decision. The problem with *Miranda*, as with any other deci-

INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY (1980) (discussing the effect of *Miranda* on the "voluntariness" test)).

66. Chief Justice Warren stated simply that the custody component of "custodial interrogation" meant "questioning initiated by law enforcement officials after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

67. See *supra* note 23.

68. *Miranda*, 384 U.S. at 444 n.4 ("This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.").

69. See *id.* at 445, 456.

70. "But even if the relentless application of the . . . procedures [described by the majority] could lead to involuntary confessions, it most assuredly does not follow that each and every case will disclose this kind of interrogation or this kind of consequence." *Id.* at 533 (White, J., dissenting).

71. See *supra* note 61 and accompanying text.

sion designed to provide easily administered guidelines, is one of line drawing: How far beyond the situation of station house interrogation of a suspect formally arrested can the factual predicate of *Miranda*—the element of presumed coercion that flows from a deprivation of freedom of movement—be sustained?

Prior to *Beheler* and *Berkemer*, the Supreme Court decided several cases in which the concept of custody was at issue⁷² but no cases that confronted directly the issue of the applicability of *Miranda* to situations involving the questioning of suspects during the period of a temporary

72. The Supreme Court's most significant post-*Miranda* treatment of the concept of custody was in *Orozco v. Texas*, 394 U.S. 324 (1969). In a short, otherwise unilluminating opinion written by Justice Black, the Supreme Court held that questioning of a suspect under arrest in the confines of his boardinghouse room was the type of circumstance that was within the scope of the *Miranda* decision. *Id.* at 326-27. *Orozco* was important for several reasons. First, the decision established that a suspect could be deemed "in custody" even though questioned outside of a police station and in familiar surroundings. *Id.* at 326. Second, a suspect could be deemed "in custody" despite the fact that, prior to the questioning that produced the incriminating responses, the suspect apparently was never informed that he was under arrest. *See id.* at 325. Although one of the officers later admitted that *Orozco* "was not free to go" and was "under arrest," the officers apparently did not tell *Orozco* that at the time of the questioning. *Id.* Finally, *Orozco* is important because, implicit in the decision was the conclusion that a suspect "under arrest" is, without more and regardless of the actual state of affairs as they might bear on the element of compulsion, in custody for *Miranda* purposes. *See id.* at 327 (emphasizing that the defendant was "under arrest and not free to leave"). Although *Orozco* did not purport to limit the concept of custody to the more familiar and well-defined class of suspects who were arrested (formal as well as de facto), the decision did imply that the concept of custody included at least all cases where an arrest, however defined, had occurred.

If *Orozco* represented the inclusive definition of custody, the exclusive definition came in *Beckwith v. United States*, 425 U.S. 341 (1976). *Beckwith* involved questioning by special agents of the Intelligence Division of the Internal Revenue Service in a private home where the defendant occasionally stayed. *Id.* at 342. The agents informed *Beckwith* that they were assigned to investigate his federal tax liability and that one of their functions was to investigate the possibility of criminal tax fraud. *Id.* at 343. Prior to questioning, the agents read *Beckwith* a modified version of the *Miranda* warnings. *Beckwith* acknowledged that he understood his rights and answered questions over a period of nearly three hours. *Id.* at 342-43. At the conclusion of the interview, *Beckwith* and the agents went separately to *Beckwith's* place of employment where he kept certain records. *Id.* at 343-44. Both the district court and the court of appeals concluded that *Beckwith* was not "in custody" during the interview, and the Supreme Court agreed. *Id.* at 344.

Given the absence of words or conduct indicating that *Beckwith's* freedom of movement had been restricted, he argued that the essential predicate of *Miranda*—the element of compulsion—should be extended to noncustodial circumstances after a police investigation had "focused on the suspect." *Id.* at 345. The Court rejected the argument, holding that such an extension would "cut [the *Miranda* decision] completely loose from its own explicitly stated rationale[:] that compulsion . . . 'inherent in custodial surroundings.'" *Id.* at 345-46 (quoting *Miranda*, 384 U.S. at 458). The fact that *Beckwith* was a suspect, that he was the "focus" of the investigation, was, standing alone, insufficient to invoke the protections of *Miranda*. *Id.* at 347. Finally, the Court held that *Beckwith's* circumstances at the time of questioning could not be described as "incommunicado interrogation . . . in a police-dominated atmosphere," *id.* at 346, nor did the officers employ the familiar psychological ploy described in *Miranda* leading to successful interrogation—that of isolating the suspect in unfamiliar surroundings "for no purpose other than to subjugate him to the will of his examiner." *Id.* at 346 n.7 (quoting *Miranda*, 384 U.S. at 457).

Beckwith was significant for two reasons. First, the decision made clear that not every police-citizen encounter involving questions asked by the police constitutes a form of custodial interrogation, even though the police clearly suspect the person of criminal activity and even though the questions asked obviously are designed to elicit incriminating responses. Second, *Beckwith* established that the concept of custody is not entirely metaphysical. Instead, it embodies the requirement of some form of government-initiated restraint on freedom of movement. Although *Beckwith* did not hold that such restraints can only exist if manifested by unambiguous physical conduct or words

detention constituting a stop within the meaning of the Fourth Amendment. Case law treatment of the concept in lower courts was in a state of disarray.⁷³

B. Beheler and Berkemer

Beheler was convicted of aiding and abetting the murder of a drug dealer.⁷⁴ Following the killing, he called the police and informed them that his companion had killed the victim. Police found the murder weapon in Beheler's backyard where it had been hidden, and the search leading to discovery of the gun was undertaken with Beheler's consent. Despite his admitted involvement in the murder, Beheler apparently was not arrested immediately; instead, later the same day, he "voluntarily agreed" to accompany the police to the station house, having been told that he "was not under arrest."⁷⁵ At the station house, without the benefit of *Miranda* warnings, Beheler agreed to talk about the murder. Following an interview that lasted less than thirty minutes, the police allowed Beheler to leave.⁷⁶ Five days later he was arrested and after receiving *Miranda* warnings again confessed.⁷⁷ The intermediate appellate court in California held that the first interview constituted custodial interrogation and thus the statements obtained were inadmissible because

that leave no doubt that the person is not free to leave, some proof of police-imposed restraints is required.

One year after *Beckwith*, the Supreme Court decided *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam), a case that confirmed much of what had been implicit in *Beckwith* and *Orozco*. In *Mathiason*, the defendant voluntarily submitted to questioning at the offices of the state police. *Id.* at 493. When he arrived at the state police offices, he was taken to a room where he was informed he was "not under arrest." *Id.* The office door was closed and the defendant was given a seat at a desk across from the investigating officer. *Id.* The investigating officer told the defendant the police wanted to question him about a burglary and that his truthfulness "would be considered by the district attorney or judge." *Id.* The officer next falsely told the defendant that his fingerprints had been found at the scene of the crime. *Id.* The defendant then confessed. *Id.*

The Supreme Court held that the confession was admissible and that the police are not required to administer *Miranda* warnings to everyone they question. *Id.* at 495. Instead, "*Miranda* warnings are required only where there has been such a restriction on a person's freedom [of movement] as to render him 'in custody.'" *Id.* Additionally, the Court held that the fact that the questioning occurred at the station house or the fact that the person questioned was an actual suspect did not alter the result. *Id.*

73. Many lower court decisions seemingly equated *Miranda*'s concept of custody with the concept of seizure—whether the suspect was free to go. See, e.g., *United States v. McCain*, 556 F.2d 253, 255 (5th Cir. 1977); *United States v. Hall*, 421 F.2d 540, 545 (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970); *People v. Camacho*, 427 N.Y.S.2d 203, 206 (N.Y. Sup. Ct. 1980). Other decisions looked to factors such as whether, at the time of questioning, the police actually possessed probable cause to arrest, although no formal arrest had been made, see *Harris v. State*, 376 So. 2d 773, 774 (Ala. Crim. App.), writ denied, 376 So. 2d 778 (Ala. 1979); *State v. Creach*, 461 P.2d 329, 331-32 (Wash. 1969) (en banc), or whether the police indicated that the person detained was a prime suspect. See *State v. Menne*, 380 So. 2d 14, 17 (La.), cert. denied, 449 U.S. 833 (1980). Finally, some courts examined the circumstances of the detention for indications of coercion. See *United States v. Jones*, 630 F.2d 613, 616 (8th Cir. 1980); *United States v. Jimenez*, 602 F.2d 139, 144 (7th Cir. 1979).

74. *California v. Beheler*, 463 U.S. 1121, 1122 (1983) (per curiam).

75. *Id.*

76. *Id.*

77. *Id.*

the police failed to administer *Miranda* warnings. The intermediate appellate court based its holding on the facts that the questioning took place at the station house, that Beheler at the time was a suspect, and that the interview was designed to produce incriminating responses.⁷⁸

In a per curiam opinion written without the benefit of briefs or argument on the merits,⁷⁹ the Supreme Court reversed. The Court understandably found the case "remarkably similar" to the facts presented in *Oregon v. Mathiason*.⁸⁰ The Court held, quoting *Mathiason*, that "*Miranda* warnings are not required 'simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.'"⁸¹ In a single sentence of arguable dictum, however, the Court suggested that *Miranda*'s concept of custody was more definitive than previously thought. Quoting further from *Mathiason*, the Court stated that the ultimate inquiry is whether there is "a formal arrest or restraint on freedom of movement."⁸² The "ultimate inquiry" described in *Mathiason*, however, was modified in *Beheler* by the addition of the key phrase, "of the degree associated with a formal arrest."⁸³

Because Beheler's detention raised no apparent distinction between stops and arrests,⁸⁴ it is indeed curious that the Court used the *Beheler* opinion as the vehicle for announcement of a more definitive definition of *Miranda*'s concept of custody. Although it is both reasonable and prudent to assume that the Supreme Court chooses its words carefully and deliberately, given the arguably dictum quality of *Beheler*'s specific language defining the concept of custody, how the new standard actually would determine the outcome was unclear until a case arose in which the questioning occurred in the context of a *Terry* stop. That case arose during the next Term in *Berkemer v. McCarty*.⁸⁵

McCarty was stopped by the Ohio State Highway Patrol after an officer observed McCarty's vehicle weaving in and out of traffic. After

78. *Id.* at 1122-23.

79. *See id.* at 1127 (Stevens, J., dissenting).

80. 429 U.S. 492 (1977) (per curiam); *see supra* note 72 (discussing *Mathiason*).

81. *Beheler*, 463 U.S. at 1125 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)).

82. *Id.* (quoting *Mathiason*, 429 U.S. at 495).

83. *Id.* Prior to *Beheler*, because of *Orozco*, a suspect "under arrest" was deemed "in custody" for *Miranda* purposes, apparently without regard to the other circumstances of the detention. *See supra* note 72. But custody was also found in the absence of a formal arrest—when significant restraints on freedom of movement had been imposed. *See supra* note 73.

84. As was the case in *Mathiason*, *see supra* note 72, Beheler had voluntarily accompanied the police to the station for questioning, *see Beheler*, 463 U.S. at 1122; therefore, he had not been seized within the meaning of the Fourth Amendment, and no issue regarding the nature of his detention was presented.

85. 468 U.S. 420 (1984). Prior to the *Berkemer* decision, the Court cited *Beheler*'s dictum in *Minnesota v. Murphy*, 465 U.S. 420 (1984). In *Murphy*, the Court held that a probationer was not in custody for *Miranda* purposes during an interview with his probation officer even though he was required to attend the interview and answer all questions truthfully. *Id.* at 422, 425. The Court, citing *Beheler*, found that "there was no 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.* at 430 (quoting *Beheler*, 463 U.S. at 1125).

the officer asked McCarty to get out of his vehicle, he noticed that McCarty had difficulty standing.⁸⁶ At that point, the officer decided that McCarty would be charged with an offense and thus was not free to leave the scene, but the officer did not immediately communicate this decision to McCarty.⁸⁷ The officer asked McCarty to take a "field sobriety test." McCarty could not perform the test without falling.⁸⁸ The officer then asked McCarty whether he had been using intoxicants. McCarty responded that he "had consumed two beers and had smoked several joints of marijuana a short time before."⁸⁹ The officer then "formally" arrested McCarty and transported him to the county jail.⁹⁰ The Ohio courts refused to suppress the statements despite the lack of *Miranda* warnings, holding that *Miranda* was not applicable to misdemeanor arrests.⁹¹

The Supreme Court held that McCarty's statements made prior to his formal arrest were admissible.⁹² The Court described the issue presented as "whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered 'custodial interrogation.'" ⁹³ In an apparent attempt to reconcile *Miranda*'s phraseology as the beginning point for its analysis, the Court acknowledged that a traffic stop "significantly curtails the 'freedom of action' " of the occupants detained and that "few motorists would feel free either to disobey a directive to pull over or to leave the scene . . . without being told they might do so."⁹⁴ Thus, the Court concluded that a traffic stop is a seizure within the meaning of the Fourth Amendment.⁹⁵

The Court's strict adherence to *Miranda*'s phraseology, however, was short-lived. The Court refused to accord "talismanic power" to *Miranda*'s assertion that custody included cases where the suspect was "deprived of his freedom of action in any significant way" and furthermore held that "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated."⁹⁶ Thus, the perti-

86. *Berkemer*, 468 U.S. at 423.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* At the jail, McCarty was given an "intoxilyzer test" to determine blood alcohol content. *Id.* The test was negative. *Id.* The officer further questioned McCarty, and McCarty again admitted that he had been drinking. *Id.* at 423-24. McCarty denied that he had smoked marijuana treated with chemicals. *Id.* at 424.

91. *See id.* at 424-25.

In federal habeas corpus proceedings, the Sixth Circuit reversed the Ohio courts on the applicability of *Miranda* to misdemeanor arrests, but upheld the admission of at least some of McCarty's statements made prior to his "formal arrest." *Id.* at 425-26. The remainder of the Sixth Circuit's opinion is unclear. The Supreme Court interpreted the holding as "uncertain as to the status of the prearrest confessions." *Id.* at 426.

92. *Id.* at 442.

93. *Id.* at 435.

94. *Id.* at 436.

95. *Id.* at 436-37.

96. *Id.* at 435-37.

ment inquiry was "whether a traffic stop exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination."⁹⁷

For two reasons, the Court concluded that it did not. First, a routine traffic detention is "presumptively temporary and brief."⁹⁸ Second, because the detention is public and, in the normal case, the detained motorist is confronted by one or at most two policemen,⁹⁹ the ordinary traffic stop is "substantially less 'police dominated' than . . . the kinds of interrogation at issue in *Miranda*."¹⁰⁰

The Court then articulated the link between Fourth Amendment principles and *Miranda*'s concept of custody, asserting that the "usual traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest,"¹⁰¹ and that the "comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*."¹⁰² Thus, for the first time, the Court held explicitly that the variety of Fourth Amendment seizures known as *stops* do not require *Miranda* warnings.

The Court went on to acknowledge that the line between *Terry* stops and arrests is uncertain and would continue to cause interpretive

97. *Id.* at 437.

98. *Id.* Writing for the Court, Justice Marshall asserted that "[t]he vast majority of roadside detentions last only a few minutes." According to Justice Marshall:

A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.

Id.

99. *Id.* at 438. Justice Marshall acknowledged that "the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions." *Id.*

100. *Id.* at 439.

101. *Id.* (citation omitted). *Berkemer* causes interpretative problems precisely because the Court analogized the circumstances of a traffic stop to a "*Terry* stop." In reality, most "traffic stops" are not "*Terry* stops" in the true sense of the concept. A motorist detained in a traffic stop normally is detained based on probable cause, not reasonable suspicion, that a traffic infraction has occurred. The issue in many traffic stop cases is whether the officer will issue a notice of violation and summons or effectuate a full custodial arrest, thereby giving the officer the right to search the suspect and his or her automobile. See *New York v. Belton*, 453 U.S. 454, 460 (1981); *United States v. Robinson*, 414 U.S. 218, 235 (1973).

Nonetheless, the fact remains that McCarty apparently was not stopped and detained pursuant to the authority of *Terry*; he was, instead, apparently stopped and detained based upon probable cause to believe he was driving while intoxicated. Justice Marshall did, however, state that nothing "more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*." *Berkemer*, 468 U.S. at 439 n.29. Justice Marshall also specifically stated that nothing in *Berkemer* should be read to limit the authority of the police to engage in activity beyond that authorized by *Terry* so long as the detention is supported by probable cause. *Id.* Presumably, Justice Marshall was referring to the right of the police to make a full custodial arrest and to search incident to arrest. *Berkemer*, thus, is not a case about Fourth Amendment limits on *Terry* stops; it is a case about the application of *Miranda* and the Fifth Amendment to the circumstances of a *Terry* stop. *Berkemer* did not hold that a traffic stop is a *Terry* stop; instead, *Berkemer* held that a routine traffic stop is like a *Terry* stop.

102. *Berkemer*, 468 U.S. at 440.

problems, even in the context of traffic stops.¹⁰³ The Court, however, declined to specify precisely how a court should decide whether freedom of movement was curtailed to the degree of a de facto arrest. At one point in the opinion the Court did say, without further elaboration, that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."¹⁰⁴ McCarty's initial detention, however, was not comparable to a formal arrest. He was detained only a short period before the formal arrest; he was not told that his detention would be other than temporary; he was confronted by a single police officer; and although he was asked to get out of his vehicle, he was asked only a moderate number of questions and asked to perform a simple balancing test, all in view of passing motorists.¹⁰⁵

The *Beheler/Berkemer* linkage of the Fourth Amendment concept of arrest with *Miranda*'s concept of custody has obvious appeal. Apart from the adverse impact required *Miranda* warnings would have on the routine *Terry* stop,¹⁰⁶ use of the frequently litigated Fourth Amendment standard delineating the difference between a stop and an arrest adds an element of certainty and clarity to *Miranda*'s concept of custody that, theretofore, had been missing.¹⁰⁷ Predictability is a virtue, however, only if the test employed bears some relationship to the values advanced by *Miranda*. The issue unaddressed in *Berkemer* was how and why the Fourth Amendment values that distinguish a stop from an arrest are sufficiently sensitive to the *Miranda* distinction between custodial and non-custodial interrogation so that the marriage between the two doctrines is not just one of convenience but one based on shared values.

103. Admittedly, our adherence to the doctrine [that *Miranda* is applicable as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest] . . . will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that *Miranda* applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line.

Id. at 441.

104. *Id.* at 442. At least one lower court has assumed that the reasonable person through whom they view the circumstances is someone neutral to the environment and to the purposes of the investigation. The reasonable person is someone "neither guilty of criminal conduct and thus overly apprehensive nor insensitive to the seriousness of the circumstances." *United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir.) (en banc), cert. denied, 488 U.S. 924 (1988).

The Court in *Berkemer* also addressed the relevance of the state of mind of the police in effectuating the seizure. McCarty argued that the issue in the case was whether *Miranda* warnings are required in a traffic stop when the officer has probable cause to arrest but does not communicate that intent to the suspect prior to questioning. The Court declined to limit its holding to that situation, finding that *Miranda* "has little to do with the strength of an interrogating officer's suspicions" and that such a rule "would be extremely difficult to administer." *Berkemer*, 468 U.S. at 435 n.22. The Court also rejected the argument that to "exempt" the routine traffic stop from *Miranda*, including cases in which there is both probable cause to arrest and an unarticulated intent to do so, would encourage police to circumvent *Miranda* by delaying formal arrest until after questioning. The Court could provide no support for rejecting the proffered scenario other than to say that they were "confident that the state of affairs projected . . . will not come to pass." *Id.* at 440.

105. *Berkemer*, 468 U.S. at 441-42.

106. See *supra* notes 45-46 and accompanying text.

107. See *supra* note 72 and accompanying text.

III. THE CONCEPTS OF STOP AND ARREST

During the past decade, the Supreme Court diligently attempted to clarify the Fourth Amendment distinction between a nonarrest detention (a *Terry* stop) and an arrest. Although implementation of the guidelines remains difficult, the Court has provided at least some fixed reference points.¹⁰⁸ More importantly, the Court has greatly expanded the circumstances under which the stop and frisk doctrine can be invoked,¹⁰⁹ thereby necessarily increasing the likelihood of *Miranda* issues arising during police interrogation of suspects temporarily detained. For example, the Court has held that a nonarrest detention can be made for purposes of investigating a completed crime as well as for crime prevention purposes.¹¹⁰ Although the Court has not authorized *Terry* stops to investigate all past crimes, however serious, it has stated that "if police have a reasonable suspicion . . . that a person . . . was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion."¹¹¹ Thus, the *Terry* stop and frisk doctrine clearly now is applicable to circumstances other than the *Terry* paradigm of a "street encounter" confrontation with a potentially armed and dangerous suspect who is about to commit a crime.

The doctrine also has undergone transformations in other respects. Although the principal limitation on a nonarrest detention remains temporal in nature (at some point, the length of a detention, standing alone, will transform a nonarrest detention into a de facto arrest), the Court has held that the "intrusiveness" of the investigative means employed during the period of the nonarrest detention is a factor that must be considered.¹¹²

Florida v. Royer,¹¹³ decided one year before *Berkemer*, remains one of the Supreme Court's most significant rulings on the limits of nonarrest

108. See *infra* notes 113-30 and accompanying text.

109. The Court has, applying the principles of *Terry*, approved a temporary detention of personal effects based on reasonable suspicion. See *United States v. Place*, 462 U.S. 696, 702 (1983). The Court also has authorized a protective search for weapons in the interior of an automobile during a *Terry* stop. See *Michigan v. Long*, 463 U.S. 1032, 1046 (1983).

110. *United States v. Hensley*, 469 U.S. 221, 229 (1985); see *infra* note 129 and accompanying text.

111. *Hensley*, 469 U.S. at 229.

112. See *infra* note 116 and accompanying text.

113. 460 U.S. 491 (1983) (plurality opinion). State narcotic officers working the Miami airport noticed Royer because he fit their "drug courier profile." The officers approached the boarding area, identified themselves as police officers, and asked if Royer had a "moment" to speak with them." Royer said, "Yes." *Id.* at 494. Royer produced his airline ticket and his driver's license upon request. The ticket and his baggage identification tags carried the name "Holt," whereas his driver's license correctly identified him as "Royer." In response to the officers' inquiry concerning the discrepancy, Royer said that a friend had made the reservation under the name "Holt." According to the officers, Royer became "more nervous." *Id.* At this point, the officers informed Royer that they were narcotics officers and suspected him of transporting narcotics. Without returning Royer's ticket and driver's license, they asked him to accompany them to a room, located approximately 40 feet away. The room was described as a "large storage closet" containing a small desk and two chairs. *Id.* Royer did not respond but followed the officers. Without Royer's consent, using his baggage check stubs, the officers retrieved Royer's luggage and had it brought to the room. Royer

detentions. In *Royer*, the Supreme Court held that the "scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case."¹¹⁴ The detention, however, "must be temporary and last no longer than is necessary to effectuate the purpose of the stop."¹¹⁵ Additionally, *Royer* held that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."¹¹⁶

The *Royer* decision was important because the Court recognized that various investigative techniques—other than frisking or questioning the suspect—could be employed during the period of a *Terry* stop. Although questioning of the suspect undoubtedly remains the primary investigative tool that is permissible during a *Terry* stop, other practices also are legitimate; for example, detention for the purpose of bringing eyewitnesses or other detection devices to the scene.¹¹⁷

Most importantly, however, *Royer* implicitly established that the Fourth Amendment values implicated in nonarrest detentions include interests beyond mere deprivation of the suspect's freedom of movement. Even though a detention will become indistinguishable from an arrest at some point due to the mere passage of time,¹¹⁸ it also may become indistinguishable from an arrest simply because of the intrusive nature of the investigative means employed. *Royer's* detention became indistinguish-

was asked to consent to a search of the baggage. Without responding, *Royer* produced a key and opened one bag in which the police found marijuana. *Id.*

114. *Id.* at 500.

115. *Id.*

116. *Id.* The Court suppressed the evidence obtained as a result of the allegedly consensual search of *Royer's* suitcase, holding that *Royer* was illegally detained at the time he gave the consent. The Court's determination that *Royer* was illegally detained was based on its findings that, "[a]s a practical matter, *Royer* was under arrest" at the time he gave consent, *id.* at 503, and, at that time, the officers lacked probable cause for *Royer's* arrest. *Id.* at 507.

The least intrusive means test has been applied in the context of other Fourth Amendment issues and, arguably, is simply a part of a more general balancing test. See Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1238-42 (1988). Strossen argues that courts do not possess the expertise needed to evaluate the relative intrusiveness of police evidence gathering activities. *Id.* at 1245.

Although problems measuring and comparing the relative intrusiveness of specific conduct certainly do exist and *Royer* is appropriately criticized for introducing the test in the context of detention categorizing, "intrusiveness" can be measured in the first instance only if we know with precision the interests and values advanced by the Fourth Amendment. A particular police practice is intrusive only if it adversely affects interests protected by the Fourth Amendment. *Royer* is significant precisely because the Court held that, in the context of categorizing detentions, Fourth Amendment values include concern for the privacy interests of persons detained.

117. The Court concluded that the officers' interest in *Royer* centered on his luggage. *Royer*, 460 U.S. at 505. The officers' desire to determine whether *Royer* was carrying narcotics could have been confirmed or dispelled, said the Court, without the necessity of detaining *Royer* and isolating him in a small room hoping to get his consent to a search of the luggage by simply using a dog to detect the presence of drugs. *Id.* at 505-06.

Apart from questioning and holding suspects while eyewitnesses are brought to the scene, courts have upheld *Terry* stops for the purposes of checking identification, checking for outstanding warrants, or making a nonsearch examination of the suspect's person, vehicle, or other possessions. See 3 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 9.2(f), at 375-80 (2d ed. 1987 & Supp. 1993).

118. See *United States v. Place*, 462 U.S. 696, 710 (1983).

able from an arrest, not because he was detained for an unreasonable period, but because he was forcibly moved to a private police interrogation room¹¹⁹ and because the object of the detention—to confirm the officers' suspicion that Royer was carrying drugs in his luggage—was not pursued in the most "expeditious way."¹²⁰

Royer was decided prior to *Beheler* and *Berkemer*. After *Beheler* and *Berkemer*, three cases followed in quick succession. In *United States v. Sharpe*,¹²¹ the Court confirmed Royer's assertion that no definitive time limit will be imposed on nonarrest detentions;¹²² instead, a court must examine the reasons why the officers detained the suspect and determine whether the length of time the officers used to "confirm or dispel" their suspicions was reasonable.¹²³ The *Sharpe* decision also

119. Royer's compelled movement to the small room off the concourse was more intrusive than necessary under the circumstances because factors other than safety concerns—the desire to secure his consent to a search of his luggage—prompted the officers' actions. *Royer*, 460 U.S. at 504-05.

120. *Id.* at 505-06.

121. 470 U.S. 675 (1985). A DEA agent, accompanied by a state trooper, stopped two vehicles driven, respectively, by Sharpe and Savage. *Id.* at 677-78. Following a brief chase of the two vehicles, during which Savage took evasive action to avoid the officers, the DEA agent stopped Sharpe, and, some distance away, the state trooper stopped Savage. *Id.* at 678. The DEA agent who stopped Sharpe radioed for assistance and, after other officers arrived, went to the area where the state trooper had detained Savage. *Id.* Prior to the time the DEA agent arrived, the state trooper, with his gun drawn, approached Savage, ordered him to get out of the vehicle and assume a "spread eagle" position, and frisked him. *Id.* In response to the trooper's request for license and registration, Savage produced his own driver's license and a bill of sale for the vehicle bearing the name Pavlovich. In response to the trooper's questions concerning ownership of the vehicle, Savage responded that the vehicle belonged to a friend and that he was taking it to have its shock absorbers fixed. The trooper then informed Savage that he would have to wait for the arrival of the DEA agent and was not free to leave. *Id.* at 678-79. The DEA agent arrived approximately 15 minutes after Savage was stopped. *Id.* at 679. The agent informed Savage that he suspected Savage's vehicle was loaded with marijuana and twice sought Savage's permission to search the vehicle. Savage declined to give permission to search. *Id.* The DEA agent then put his foot on the rear of the vehicle and confirmed that it was heavily loaded. He also put his nose against the rear of the vehicle and concluded that he could smell marijuana. The agent obtained the keys to the vehicle, opened it, and discovered marijuana. *Id.* Savage was then arrested. *Id.* Approximately 20 minutes elapsed between the time Savage was first stopped and the time of his arrest. *See id.* at 683. After placing Savage under arrest, the DEA agent returned to the area where Sharpe was being detained. *Id.* at 679. Approximately 30 to 40 minutes had elapsed from the time Sharpe had first been detained. *Id.* The issue in the case was the legality of Savage's 20-minute detention—the period from the time Savage was stopped until the time when the DEA agent obtained probable cause to search by confirming the overloaded condition of the vehicle and detecting the odor of marijuana. *Id.* at 683.

122. *Id.* at 685. The court of appeals had based its suppression ruling solely on the duration of the detention, finding that the detention "failed to meet the requirement of brevity." *Sharpe v. United States*, 660 F.2d 967, 970 (4th Cir. 1981), *aff'd on reh'g*, 712 F.2d 65 (1983).

123. *Sharpe*, 470 U.S. at 686. The Court found that the officers pursued their investigation in a diligent and reasonable manner. The Court approved the actions of the DEA agent in attempting to get other officers quickly to the scene to control Sharpe while he went to the aid of the state trooper who had stopped Savage and the DEA agent's quick actions in dealing with Savage once he arrived at the location where Savage had been detained. *Id.* at 687. The Court also noted that the state trooper could not be faulted for detaining Savage until the DEA agent arrived because the trooper had neither specific knowledge concerning why the DEA agent was suspicious of Savage's conduct nor general training and experience in dealing with suspected drug traffickers. *Id.* n.5. Finally, the Court stated that Savage was in part responsible for the lengthy delay because he failed to stop when the officers first sought to stop Savage and Sharpe and was finally stopped some distance from where the DEA agent stopped Sharpe. *Id.* at 687-88.

confirmed *Royer*'s requirement that the police pursue the least intrusive means available to confirm or dispel their suspicions, but in deciding whether a less intrusive means was available, a court should not engage in "unrealistic second-guessing" and should invalidate a detention only when the officers unreasonably failed to recognize a more expeditious alternative.¹²⁴

In *Hayes v. Florida*,¹²⁵ the Court reaffirmed its earlier holdings that the forcible movement of the suspect to the station house for further investigation, such as fingerprinting,¹²⁶ exceeds the authority conferred by *Terry*. The Court held that investigative practices during the period of a *Terry* stop can "qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments."¹²⁷

124. *Id.* at 686-87. As the Court said, "[a] creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *Id.* "The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *Id.* at 687. One authority has described *Sharpe* as a case providing evidence that the "Court has little interest in constitutional checks on police discretion." Maclin, *supra* note 32, at 1317.

125. 470 U.S. 811 (1985).

126. Hayes was one of 30 or 40 suspects in a series of burglary-rapes. *Id.* at 812. Fingerprints of the assailant were found at the scene of one of the crimes. For reasons not disclosed on the record, the police went to Hayes's home to obtain his fingerprints. *Id.* They planned to arrest him if he was uncooperative. When Hayes refused to accompany them to the station house, one of the officers explained that they were going to arrest him. At that point, Hayes "blurted out" that he would rather go with them than be arrested. *Id.* Hayes was taken to the police station and fingerprinted. When the police determined that his prints matched those found at the crime scene, Hayes was placed under formal arrest. *Id.* at 813. The Florida District Court of Appeals expressly found that the officers did not have probable cause to arrest Hayes until after they obtained Hayes's fingerprints, but admitted the fingerprint evidence, holding that the process was analogous to a *Terry* stop and was supported by reasonable suspicion. *Id.*

127. *Id.* at 815-16 (emphasis added); see also *INS v. Delgado*, 466 U.S. 210, 215 (1984) ("The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976))).

In *Hayes*, the Court held that the "full protection of the Fourth and Fourteenth Amendments" is applicable and that the "line" between reasonable and unreasonable seizures "is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes." *Hayes*, 470 U.S. at 816. According to the Court, such seizures, at least in the absence of judicial supervision, "are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause." *Id.*

The Court relied heavily on *Davis v. Mississippi*, 394 U.S. 721 (1969), a case remarkably similar on its facts. In *Davis*, without probable cause, the police took the suspect to the station house, where he was fingerprinted and briefly questioned before being released. *Id.* at 722. The Court held that the detention exceeded the permissible limits of a *Terry* stop, even though, as the Court specifically recognized, the intrusion on personal security was minimal. *Id.* at 727-28.

The *Hayes* decision also relied on *Dunaway v. New York*, 442 U.S. 200 (1979), a case in which the police, without probable cause, brought the suspect to the station house for questioning. *Id.* at 203. The Court held that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." *Id.* at 216.

Hayes and *Davis*, read together, suggest that the movement of the suspect, not the investigative objectives pursued, turned the detention into a *de facto* arrest. *Hayes* specifically alluded to the

The most important post-*Beheler/Berkemer* case, however, is *United States v. Hensley*.¹²⁸ In *Hensley*, the Court held that the permissible uses of a *Terry* stop include nonarrest detentions for investigation of completed crimes.¹²⁹ More importantly, however, *Hensley* held that for Fourth Amendment purposes, a detention will be characterized according to the actual circumstances of the detention and without regard to the subjective intent of the police or, apparently, the subjective or reasonable perceptions of the suspect. "[W]hat matters," according to the Court, "is that the stop and detention that occurred were in fact no more intrusive than would have been permitted [in a *Terry* stop]."¹³⁰

possibility that a "brief detention in the field for the purpose of fingerprinting" would be permissible based simply on reasonable suspicion. 470 U.S. at 816-17. The Court's reference, therefore, to Hayes's "privacy interests" is inexplicable. *Dunaway*, on the other hand, emphasized the intrusive nature of the objective pursued—custodial interrogation—as the factor that turned the detention into a de facto arrest. 442 U.S. at 212.

The true basis for *Dunaway* is difficult to discern. In *Michigan v. Summers*, 452 U.S. 692 (1981), the Court sustained the temporary detention of the occupant of a dwelling that was about to be searched under the authority of a warrant, holding that the mere connection of the occupant to the dwelling justified the detention. In *Summers*, although the Court distinguished such a detention from that condemned in *Dunaway* on the ground that the seizure in *Dunaway* was "designed to provide an opportunity for interrogation," whereas in *Summers*, the detention was "not likely to have the coercive aspects likely to induce self-incrimination," *id.* at 702 n.15, the Court also noted that, in *Summers*, "because the detention . . . was in [the suspect's] own residence, it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station." *Id.* at 702.

128. 469 U.S. 221 (1985). *Hensley*, while driving his automobile, was stopped by police officers based on a "wanted flyer" issued by another department. *Id.* at 223-34. The police approached the vehicle with weapons drawn but pointed in the air. *Id.* at 224. *Hensley* and a passenger in the vehicle were ordered to step out of the car. *Id.* The police discovered several guns in the automobile, and *Hensley*, a convicted felon, was convicted of possession of firearms. *Id.* at 224-25. The Sixth Circuit reversed the conviction, finding that the police lacked reasonable suspicion of criminal activity based solely on the "wanted flyer" and that, in any event, *Terry* was confined to investigative stops on less than probable cause in settings involving the investigation of "ongoing crimes." 713 F.2d 220, 225 (6th Cir. 1983).

129. *Hensley*, 469 U.S. at 227. The Court acknowledged that all of its prior *Terry* stop cases involved suspicion that the accused was about to commit a crime, but stressed dicta in several cases suggesting that the *Terry* doctrine could be applied to cases involving the detention of persons suspected of past criminal activity. *Id.* The Court further held that nonarrest detentions for completed crimes could be based on less than probable cause and that the reasonableness of such detentions would be determined by balancing the "nature and quality of the intrusion" against the importance of the law enforcement interests alleged to justify the intrusion. *Id.* at 228. In the balance, the Court recognized that nonarrest detentions for completed crimes do not implicate crime prevention interests, do not involve the same exigencies, do not normally involve the same public safety concerns, and do not normally involve the same limits on choosing the time and circumstances of the detention. *Id.* at 228-29. Nonetheless, the Court also noted that extension of *Terry* to detentions for completed crimes "promotes the strong government interest in solving crimes and bringing offenders to justice." *Id.* at 229. The Court concluded, therefore, that the "law enforcement interests at stake . . . outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes." *Id.* This aspect of *Hensley* has been criticized. See Robert B. Harper, *Has the Replacement of "Probable Cause" with "Reasonable Suspicion" Resulted in the Creation of the Best of All Possible Worlds?*, 22 AKRON L. REV. 13, 33-42 (1988).

130. *Hensley*, 469 U.S. at 234-35. The characterization of the detention in *Hensley* was particularly difficult given the unusual circumstances leading to the stop. *Hensley* was detained initially based on the "wanted flyer" issued by another police department. The "flyer" asked that *Hensley* be detained and held. *Id.* at 235. No arrest warrant, however, had been issued. The Court held that a

The Court's nonarrest detention decisions—*Royer*, *Sharpe*, *Hayes*, and *Hensley*—taken together suggest that the Fourth Amendment values that inform the distinction between stops and arrests include factors other than simply the length of the detention. Clearly the paramount Fourth Amendment value implicated when the government deprives a citizen of his or her freedom of movement—seizes the person—is the length of the detention. The Fourth Amendment limits the government's authority to control the movement of people, including both the power to detain suspects as well as the power to compel their movement. The longer the detention or the greater the compelled movement,¹³¹ the greater the infringement on Fourth Amendment interests. Thus, the mere fact that the suspect is detained other than "temporarily"¹³² or the mere fact that the suspect is forced to move, especially when he or she is moved to an isolated setting,¹³³ invokes the most stringent of Fourth

police officer acts reasonably in making a detention in objective reliance on a flyer or bulletin issued on the basis of articulable facts supporting reasonable suspicion that the accused has committed a crime. *Id.* at 232. Objective reliance on the wanted flyer will support a brief detention to check for identification, to pose questions, or to obtain further information, such as whether an arrest warrant has been issued. *Id.* One authority has described the Court's treatment of the significance of the flyer as a "threat to the warrant requirement." Maclin, *supra* note 32, at 1314.

If the detention is made on objective reliance on the flyer or bulletin, evidence uncovered during the course of the detention will be admissible. *Hensley*, 469 U.S. at 233. In *Hensley*, the Court found that the department issuing the flyer had at least reasonable suspicion of Hensley's involvement in a robbery. *Id.* At the time Hensley was detained, the officers knew only that other departments were checking to determine if a warrant had been issued. *Id.* at 224. "Moments" after the initial detention, the police observed the butt of a revolver protruding from under the passenger's seat. *Id.* The Court concluded that it was irrelevant whether the officers intended to detain Hensley for some longer period or only long enough to determine whether a warrant had been issued. What mattered, said the Court, was that, prior to the time probable cause to arrest arose as a result of sighting the firearm, Hensley was detained only briefly upon reasonable suspicion and the detention was no more intrusive than would have been permitted had the detention been made by the department that issued the flyer. *Id.* at 235-36.

The Court did not mention how Hensley or a reasonable person in Hensley's position might have perceived his circumstances. One authority has suggested that the absence of concern for the perception of the suspect is attributable to the fact that the parties did not address the issue in their briefs. Dix, *supra* note 45, at 935.

131. *But see* *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam). In *Mimms*, the defendant was detained in a routine traffic stop and ordered to get out of his vehicle. *Id.* at 107. When the defendant emerged from the vehicle, the officer noticed a large bulge, frisked the defendant, and found a weapon. *Id.* The Court held that the additional intrusion occasioned by the command to the defendant to get out of the vehicle was "de minimis." *Id.* at 111. The Court further held that the officer's conduct did not constitute a "serious intrusion upon the sanctity of the person" and was not significant enough to rise to the "level of a 'petty indignity.'" *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 17 (1968)).

132. *United States v. Place*, 462 U.S. 696, 709-10 (1983) ("[W]e have never approved a seizure of the person for [a 90-minute period]").

133. The forcible movement of the suspect to a squad car is a factor to weigh in determining whether a detention constitutes a de facto arrest. *See United States v. Manbeck*, 744 F.2d 360, 377 (4th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985); *United States v. Chamberlin*, 644 F.2d 1262, 1266-67 (9th Cir. 1980), *cert. denied*, 453 U.S. 914 (1981); *see also United States v. Carter*, 884 F.2d 368, 371-72 (8th Cir. 1989) (discussing fact that suspect was moved to an isolated setting away from his normal work station); *United States v. Baron*, 860 F.2d 911, 914 (9th Cir. 1988) (examining circumstances in which suspect was moved to a bedroom where the curtains were drawn shut), *cert. denied*, 490 U.S. 1040 (1989). *But see United States v. Bengivenga*, 845 F.2d 593, 599-600 (5th Cir.) (holding that the movement of a suspect from a bus to a building maintained by law enforcement

Amendment protections—the requirement of probable cause.

Freedom of movement in its broadest sense, however, is not the only Fourth Amendment value implicated when a person is seized. The Court's nonarrest detention decisions recognize that a detention may enhance evidence gathering objectives and therefore that the standards governing seizures must reflect concern for the individual's privacy rights.¹³⁴ Nonarrest detentions may become de facto arrests simply because the police engage in numerous and intrusive evidence-gathering activities during the period of a brief detention.¹³⁵

If a nonarrest detention can be transformed into a de facto arrest simply because the investigative techniques employed exceeded those reasonably necessary given the circumstances that prompted the detention or because the police exercised authority to move the suspect, then the Fourth Amendment values implicated by a seizure must include concern for privacy interests. The character of a seizure, therefore, is a factor not just of time and space but also the ability of the government, given its ability to control the suspect's movement, to subject the suspect to intrusive evidence-gathering activities. Although the Fourth Amendment may not directly limit the ability of the government to investigate a suspect, it indirectly affects the nature and scope of investigations by limiting the government's ability to compel a person's physical presence at any particular moment and at any particular location. More importantly, the Fourth Amendment also limits the ability of the government to investigate a suspect on less than probable cause by limiting the investigative techniques that can be employed when a suspect has been detained on less than probable cause.¹³⁶

personnel did not, under the circumstances, transform the detention into a de facto arrest), *cert. denied*, 488 U.S. 924 (1988).

134. In *Michigan v. Summers*, 452 U.S. 692 (1981), the Supreme Court upheld the right of the police to detain the occupants of a dwelling during the period a search warrant is executed, finding that the mere connection of the person to the dwelling is enough to constitute reasonable suspicion for a detention. *Id.* at 703-04. The Court specifically noted that the detention under these circumstances "is not likely to be exploited by the officer or unduly prolonged in order to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention." *Id.* at 701.

135. See *Florida v. Royer*, 460 U.S. 491, 499-500 (1983) (plurality opinion).

136. The range of investigative activities that require physical contact with, and control over, the suspect include, in addition to questioning, fingerprinting, see *Hayes v. Florida*, 470 U.S. 811, 813-14 (1985); *Davis v. Mississippi*, 394 U.S. 721, 727 (1969), lineups or showups, see *United States v. Wade*, 388 U.S. 218, 219-20 (1967), obtaining urine or blood samples, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989); *Schmerber v. California*, 384 U.S. 757, 767 (1966), nail scrapings, see *Cupp v. Murphy*, 412 U.S. 291, 295-96 (1973), or other incriminating evidence from the body, see *Winston v. Lee*, 470 U.S. 753, 766-67 (1985), obtaining voice or handwriting samples, see *United States v. Dionisio*, 410 U.S. 1, 13-14 (1973); *United States v. Mara*, 410 U.S. 19, 22 (1973), and requiring the suspect to move, wear clothing, or speak, see *Pennsylvania v. Muniz*, 496 U.S. 582, 585 (1990); *Holt v. United States*, 218 U.S. 245, 252-53 (1910); *Farmer v. Commonwealth*, 404 S.E.2d 371, 372-73 (Va. Ct. App. 1991) (en banc), or to be photographed, see *United States v. Greene*, 722 F. Supp. 1221, 1224 (E.D. Pa. 1989).

The individual from whom such evidence is sought receives no protection from the Fifth Amendment privilege against self-incrimination. The Fifth Amendment protects an accused only

The stop and frisk decisions also confirm that the “intrusiveness” of the “means” by which a nonarrest detention is effectuated requires consideration of qualitative as well as quantitative factors surrounding the seizure. Assessing the reasonableness of a seizure requires balancing the extent of the intrusion against the need for it, as well as considering the manner in which it is conducted.¹³⁷ Just as killing a fleeing felony suspect under certain conditions may constitute an unreasonable means of seizing a person, so too would the use of excessive force or other debilitating tactics—such as handcuffing¹³⁸—during the period of a nonarrest detention. The Fourth Amendment values inherent in the proscription against unreasonable seizures include concern for personal safety and human dignity. When the police possess probable cause to believe the suspect has committed a crime, the use of reasonable force commensurate with the objective of the seizure—indeterminate loss of freedom—is authorized, and the individual’s interest in liberty or freedom of movement is subordinate and will remain so for an indefinite period. But when the police possess only reasonable suspicion that the suspect has committed a crime, the objective of the seizure—determinate loss of freedom—is limited. Although the Court has held that reasonable force may be used to effectuate a seizure¹³⁹ and that the suspect’s liberty or freedom of movement is subordinate during the period of determinate seizure,¹⁴⁰ the individual so detained still possesses the inchoate right to an immediate restoration of liberty or freedom of movement absent disclosure of additional incriminating information. Because the level of suspicion required to support a *Terry* stop is less than that required to support an arrest and because the range of permissible activity is limited, the tactics and force applied to effectuate a *Terry* stop likewise must be limited.

Terry gave the government the right to make a temporary detention of a suspect on less than probable cause. Its progeny suggest, however, that if either the manner of effectuating the nonarrest detention or the investigative means employed during the period of the nonarrest detention mirror those that lawfully could be employed only if a lawful arrest has occurred, the detention will be treated as a de facto arrest for Fourth Amendment purposes.

from being compelled to provide evidence of a testimonial or communicative nature. *Doe v. United States*, 487 U.S. 201, 215 (1988).

137. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

138. See *United States v. Del Vizo*, 918 F.2d 821, 824-25 (9th Cir. 1990); *United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1295 (9th Cir. 1988); *United States v. Blum*, 614 F.2d 537, 539-40 (6th Cir. 1980); *United States v. Bourassa*, 411 F.2d 69, 71-72 (10th Cir.), *cert. denied*, 396 U.S. 915 (1969); *United States v. Miller*, 722 F. Supp. 1, 5 (W.D.N.Y. 1989); *United States v. Corral-Corral*, 702 F. Supp. 1539, 1544-45 (D. Wyo. 1988); *United States v. Guarino*, 629 F. Supp. 320, 324 (D. Conn. 1986).

139. See *Garner*, 471 U.S. at 7-8. But see *Dix*, *supra* note 45, at 906 (“complete fourth amendment prohibition against the use of deadly force to make investigatory stops may be appropriate”).

140. See *United States v. Hensley*, 469 U.S. 221, 235-36 (1985).

IV. THE LIMITS OF SHARED VALUES

As the above discussion demonstrates, presumptive equation of *Miranda*'s concept of custody with the Fourth Amendment concept of arrest, actual or de facto, has obvious practical and analytical appeal. The Fifth Amendment concept of custody and the Fourth Amendment concept of arrest advance, at least in part, compatible interests. Both are premised, to a greater or lesser extent, on the assumption that significant restraints on freedom of movement implicate constitutional values beyond those inherent in the mere loss of freedom of movement. In the case of the Fifth Amendment, significant custodial restraints produce a form of prohibited compulsion to speak when questioned. In the case of the Fourth Amendment, significant custodial restraints maximize the government's evidence gathering potential.

Although the values that inform the concepts of custody and arrest are closely aligned, the analogy is not perfect. *Miranda*'s concept of custody is predicated upon the belief that significant custodial restraints produce, in the mind of the suspect, a form of prohibited compulsion.¹⁴¹ The suspect's state of mind, real or attributed, provides the factual predicate for the assumption that compulsion exists when a suspect is in custody. *Miranda* makes little sense if, in deciding whether a suspect is in custody, no attempt is made to view the situation as it might appear to a reasonable person.

On the other hand, when the issue is whether a suspect was subjected to a *Terry*-type nonarrest detention or instead was arrested, the real or attributed state of mind of the suspect is not important, given the values that inform the distinction between the two forms of seizure.¹⁴² When a seizure has occurred and the issue is whether the seizure is a nonarrest detention or a de facto arrest, the suspect's state of mind is irrelevant to the advancement of legitimate Fourth Amendment values. The Fourth Amendment, as a check against unlawful arrests, guarantees freedom of movement and the attendant privacy rights accompanying

141. See *supra* notes 56-65 and accompanying text.

142. When the issue is whether the suspect has been seized (as opposed to the type of seizure involved), however, the state of mind of the suspect may be important in advancing Fourth Amendment values. If a suspect could, given the circumstances, reasonably believe he or she was not free to leave, the suspect may decide not to test the government's intent; thus, whether seized or not, the suspect may not attempt to leave, thereby allowing the government the advantage of a de facto seizure based upon a reasonable person's natural inclination to cooperate and not test the limits of government authority. Application of the reasonable person test, however, has been criticized. See Butterfoss, *supra* note 30, at 439 ("[G]iven the reality that citizens virtually never feel free to walk away from an encounter initiated by a police officer, most of the citizens in these 'nonseizure' encounters do not feel free to walk away.").

A seizure occurs, therefore, when, under the circumstances, a reasonable person would have believed he or she was not free to leave, *INS v. Delgado*, 466 U.S. 210, 216 (1984), or not free "to disregard the police and go about his business," *California v. Hodari D.*, 111 S. Ct. 1547, 1552 (1991); see *supra* note 32 and accompanying text.

The reasonable person standard, however, "presupposes an *innocent* person." *Florida v. Bostick*, 111 S. Ct. 2382, 2388 (1991); see also *Florida v. Royer*, 460 U.S. 491, 519 n.4 (1983) (Blackmun, J., dissenting).

the right to control locomotion until such time as the government advances sufficient justification—probable cause—for limiting those freedoms. The Fourth Amendment's guarantee that we will not be arrested in the absence of probable cause, like its guarantee that our papers, houses, and effects will not be searched or seized in the absence of probable cause, operates as a check against unreasonable actions by law enforcement officials; it does not protect against psychic trauma associated with the possibility—unrealized—that our person, papers, houses, and effects might be searched or seized. A search of our papers, houses, and effects occurs when, but only when, the police actually invade our privacy; the Fourth Amendment is not violated simply because we believe, perhaps reasonably so, that our houses, papers, and effects are about to be searched or seized, or both.

Similar reasoning applies to the law of arrests. A lawful *Terry* stop is not rendered unreasonable simply because the suspect believes he or she has been arrested or is uncertain as to his or her fate during the period of the temporary detention. Anxiety—a detained suspect's fear of what might happen following a lawful detention—simply is not a value recognized by the Fourth Amendment. When a suspect has been detained, the only issue is what actually happens to the suspect—the nature and quality of his or her detention.¹⁴³ Objective factors therefore properly inform the issue of whether an arrest has occurred.¹⁴⁴

Because the concepts of custody and arrest are not aligned perfectly, one subtle yet potentially outcome-determinative difference between the two must be recognized and implemented. The determination whether a detention, because of the circumstances, crossed the threshold and became a de facto arrest for *Miranda*, but not for Fourth Amendment purposes, must be made with reference to the likely perception of a reasonable person. *Berkemer's* command that *Miranda* requires such an inquiry¹⁴⁵ must be given full force.

Two examples will demonstrate when the divergence between *Miranda's* concept of custody and the Fourth Amendment's concept of

143. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985). One authority has argued, however, that "experiencing a twenty minute detention may . . . be made substantially more intrusive if the detainee believes throughout this period that the detention is the initial stage of an arrest with its prolonged period of detention and increased risk of prosecution." *Dix, supra* note 45, at 922. A focus on what happens to a suspect, as opposed to what the suspect thought, perhaps reasonably so, might happen, does not mean that subjective concerns are wholly irrelevant. To a greater or lesser extent, intangible concerns, such as fear and surprise, are present in most seizures. See *Michigan Dep't of State Police v. Sitz*, 494 U.S. 444, 452-53 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976). Intangible concerns—fear, surprise, embarrassment, or humiliation—are consequences of a seizure and cannot be eliminated in the absence of a requirement that the police inform everyone, at the outset of a seizure, of the precise nature of the detention.

144. The "post-hoc" mode of analysis has been criticized on two grounds. First, the analysis does not attach a penalty to detentions on less than probable cause when the police fully intend an unlimited detention or intend to utilize impermissible investigative techniques. Second, judicial review will be most meaningful if it is made on the same basis as the actions taken. See *Dix, supra* note 45, at 921-22.

145. 468 U.S. 420, 442 (1984).

arrest could be outcome determinative. In Case One, upon reasonable suspicion a suspect is detained for a brief period in a manner that otherwise clearly would constitute a nonarrest detention for Fourth Amendment purposes, except that the detaining officer informs the suspect that he is "under arrest." Assuming that *Hensley's* post-hoc mode of analysis¹⁴⁶ would not require a finding of a de facto arrest for Fourth Amendment purposes simply because the suspect was told he was "under arrest,"¹⁴⁷ the suspect nonetheless must be deemed in custody for *Miranda* purposes. The *Miranda* decision, grounded as it is in the inherently compelling environment of custodial questioning, virtually compels a finding that the suspect, clearly seized for Fourth Amendment purposes and informed that he is "under arrest," should receive the *Miranda* warnings. Although the mere fact that the suspect was told that he was "under arrest" does not, in itself, implicate Fourth Amendment values beyond those implicated by the very fact of the lawful nonarrest detention, the communication of the fact of arrest would have a profound effect on a reasonable person's view of the circumstances of custodial questioning that might follow. To ignore the consequences of communication of the fact of arrest in such a case would strike adversely at the very predicate for the *Miranda* decision. As the Court stated in *Berkemer*, *Miranda* should be "enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated."¹⁴⁸

In Case Two, a suspect is detained under circumstances that, employing *Hensley's* post-hoc mode of analysis, constitute a valid nonarrest detention. The suspect's vehicle is stopped upon reasonable suspicion that it contains contraband. The stop is achieved when a uniformed officer (in a police car with lights flashing) catches the suspect's speeding vehicle. The officer approaches the vehicle with his revolver drawn and orders the suspect out of the vehicle. The officer further orders the suspect to assume a "spread eagle" position. Following a *Terry* frisk for weapons, the officer asks the suspect for his driver's license and vehicle registration. The suspect produces his own valid license and a bill of sale for the vehicle in the name of another. In response to questions concerning ownership of the vehicle, the suspect states that it belongs to a friend. The officer informs the suspect that he will be detained until the arrival

146. See *supra* notes 128-30, 142-46 and accompanying text.

147. See 3 LAFAVE, *supra* note 117, § 9.2(e), at 373 ("The point is that despite the contemporaneous characterization by the officer, he in fact did no more than he was authorized to do by *Terry* in terms of the length and locale of the seizure and the extent of the incidental search."); LaFave, *supra* note 20, at 427-28 (arguing that the characterization of a detention should be made by examining "what the officer did rather than what he said"); see also *Downs v. State*, 570 A.2d 1142, 1144 (Del. 1990) (stating that "words cannot transform a mere 'stop' into an 'arrest'"); *People v. Stevens*, 517 P.2d 1336, 1339 (Colo. 1973) (en banc) (stating that the fact that police told defendants they were under arrest does not necessarily mean defendants were under arrest for Fourth Amendment purposes).

148. 486 U.S. at 437.

of a narcotics officer. At that point, the suspect becomes nervous, indicates that he wants to leave, and requests the return of his license. The officer tells the suspect that he is not free to leave. Fifteen minutes later, the narcotics officer arrives and informs the suspect that he believes the vehicle contains contraband. The narcotics officer twice asks the suspect for permission to search the vehicle. Both times, the suspect declines. The narcotics officer then steps on the rear of the vehicle and, when it does not move, concludes that it is overloaded. The officer puts his nose against the trunk and states that he smells marijuana. When the suspect is asked directly whether the vehicle contains marijuana, he responds, "It's not mine. I was just carrying it for a friend." The narcotics officer opens the trunk and finds a large quantity of marijuana.

The facts of Case Two are, in essence, the facts of *United States v. Sharpe*,¹⁴⁹ except that in *Sharpe* no questioning of the suspect occurred before the marijuana was discovered. In *Sharpe*, the only issue presented was the legality of the detention prior to the discovery of the drugs. The Supreme Court concluded that the suspect was validly detained upon reasonable suspicion until such point as the narcotics officer detected the odor of marijuana and that the search of the vehicle was, therefore, not a "fruit" of a prior illegal detention.

Assuming *arguendo* that the Fourth Amendment issue presented is properly resolved in the government's favor employing the post-hoc mode of analysis, the issue remains whether the questioning of the suspect is permissible in the absence of *Miranda* warnings. If the issue of custody is determined as *Beheler* commands with reference to the likely state of mind of the suspect, this suspect surely would have felt the type of compelling environment described in *Miranda*. This suspect was forcibly detained by two officers. Firearms were displayed, and the suspect was frisked. He was informed that a narcotics officer had been called to the scene and that he was not free to leave. He was detained under these circumstances for fifteen minutes and, upon the arrival of a narcotics officer, was asked to consent to a search of the vehicle. Finally, he was specifically accused of driving a vehicle that the police suspected—confirmed by the odor—contained marijuana and asked directly whether the vehicle contained marijuana. A more compelling environment outside *Miranda*'s paradigm station house interrogation is difficult to envision.

The use of a test for custody that focuses on the perception of a reasonable suspect under the circumstances is more than a semantic exercise. It is true, of course, that the reasonable perception approach requires a court to place itself in the position of the suspect and attempt to discern how a typical person would view his or her condition. The reality, of course, is that suspects would react differently and that no single state of mind can be attributed to all suspects confronted with similar circumstances. The reasonable person approach, however, is desirable

149. 470 U.S. 675 (1985); see *supra* notes 121-24 and accompanying text.

and defensible not because of its factual accuracy but because it is the approach that most closely approximates the factual and legal predicates for the *Miranda* decision. We evaluate Fourth Amendment stop/arrest issues utilizing a post-hoc mode of analysis because the detained suspect's perception of his status is irrelevant to the full implementation of the Fourth Amendment values implicated by his detention.¹⁵⁰ The characterization of a detention is determined by what happens to the suspect, not what he or she believes might happen. What is important for Fourth Amendment purposes is what actually transpires during the period of the nonarrest detention. Is he or she forcibly subdued and restrained? Is he or she detained for a substantial period of time? Is he or she subjected to extensive and intrusive evidence gathering techniques?

When the issue is, however, whether the detained suspect needs the prophylactic safeguards mandated by *Miranda*, the suspect's actual or presumed state of mind is of critical importance. In fact, *Miranda* makes little sense unless the focus is on the suspect's actual or presumed state of mind. Thus, use of the reasonable perception standard for purposes of determining *Miranda*'s concept of custody is defensible even though the use of that standard may produce cases where the police will be required to administer warnings to a suspect merely detained in a nonarrest situation upon reasonable suspicion of criminal activity.

V. CONCLUSION

The relationship between the Fourth Amendment values that inform the distinction between stops and arrests and the Fifth Amendment values that inform *Miranda*'s concept of custody, although not symbiotic, is such that it is both intellectually defensible and logical to presume that a suspect detained in a routine nonarrest detention—a *Terry* stop—may be questioned without the benefit of *Miranda* warnings. Both constitutional concepts, to a greater or lesser extent, focus on the means used by the police to achieve their objectives, both limit the scope of the government's permissible evidence gathering techniques, and both require characterization of a forcible detention. Moreover, the wholesale injection of *Miranda* based logic into the investigative practice known as stop and frisk significantly would undermine the function of such detentions and well might place demands on the criminal justice system—the need for counsel—that would be impossible to fulfill.¹⁵¹

Reconciliation of *Miranda* with the circumstances attendant to stop and frisk activity is difficult because the constitutional validation of the investigative technique known as stop and frisk occurred after *Miranda* was decided. The *Miranda* decision, therefore, understandably did not address the need for warnings in the context of a nonarrest detention. Accommodation of *Miranda* with the stop and frisk doctrine therefore

150. See *supra* notes 142-44 and accompanying text.

151. See *supra* notes 45-46 and accompanying text.

was a necessary step, and *Berkemer* provided a workable framework for the resolution of the issue. Although *Berkemer* tempts courts to conclude that *Miranda* warnings never are required during the period of a *Terry*-type nonarrest detention, such a categorical reading of *Berkemer* is erroneous and would produce a restrictive and indefensible limitation on *Miranda* that would undermine significantly both the legal and factual predicates for the *Miranda* decision. *Berkemer*'s equation of the concepts of custody and arrest is presumptive only. Moreover, in defining the concept of arrest, whether for Fourth Amendment purposes or for purposes of determining *Miranda*'s concept of custody, courts must be sensitive to the full range of Fourth Amendment values implicated when a person is seized and must not simply look to the spatial and temporal aspects of the detention. Finally, courts must recognize that the standard employed for the resolution of *Miranda*'s custody issue in nonarrest detention cases must be made from the perspective of how a reasonable person under the circumstances would have viewed his or her position at the time of questioning.