

CONFIDENTIAL\*

(Not to be sold, offered for sale, or otherwise published)

THE AMERICAN LAW INSTITUTE

A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE

REPORT TO THE COUNCIL FROM THE REPORTERS  
A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE

Submitted to the Members of the Council  
of The American Law Institute  
for Discussion at Its Meeting on  
December 15, 16, and 17, 1966

December 7, 1966

The Executive Office  
The American Law Institute  
101 North 33rd Street  
Philadelphia, Pa. 19104

---

\* This draft is submitted privately and gratuitously to a limited number of selected persons of a particular class for a special purpose. It is preliminary and private; therefore, citations or quotations from it must not be made in any public address or article.

"This material was distributed by the Institute to a limited group of individuals as part of the Institute's process for consideration of drafts prior to publication and distribution to its membership. As such it is not deemed to have had the imprimatur of the Institute. Limited distribution in any Institute project of materials that are drafts usually embraces distribution to and consideration by a group of Advisers or Consultants, or both, and by the Council of the Institute; or may be of material that consists of memoranda prepared by Reporters for consideration by officers of the Institute and others prior to submission to Consultants and Advisers or the Council. These materials are now being made available for historical purposes to such individuals as may find them useful in their research efforts. They may be cited or quoted now only if their character is explicitly stated."

12/5/66

REPORT TO THE COUNCIL FROM THE REPORTERS  
A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE

The purpose of this memorandum is to outline briefly for the Council the status of this project and the direction which the Reporters recommend it should take.

The attached memorandum is an analysis of the effects of the Miranda case on the provisions of Tentative Draft No. 1 of the Model Code of Pre-Arraignment Procedure. It served as the basis for discussions at a meeting held in New York City on October 23, 1966, at which the Director, the Reporters and the following were present:

Richard B. Austin  
Charles D. Breitel  
R. Ammi Cutter  
Henry J. Friendly  
Richard A. Green  
Frank S. Hogan  
Yale Kamisar  
J. Edward Lumbard  
Herbert L. Packer  
Timothy N. Pfeiffer  
Frank J. Remington  
Walter V. Schaefer  
Louis B. Schwartz  
Telford Taylor  
Bernard Weisberg  
Paul A. Wolkin

A number of differing positions were expressed at this meeting. Some thought the project should be discontinued, but a large majority thought it should go forward. There were, however, many points of view as to the form it should take. Some thought only those changes should be made in the present draft which were clearly required by Miranda. Others believed that, at least as one alternative, an attempt should be made to develop a viable system around immediate appearance before a judge with remand for questioning. The view was expressed that work toward a "model" solution should start from the ground up, unconfined by existing constitutional rulings, and should if necessary include proposals for constitutional amendment. And it was strongly urged that the scope of the project should be expanded to deal not only with those police practices which are amenable to testing in court in a particular case, but to the much wider range of practices which now are rarely if ever so tested, thus putting heavy emphasis on issues of administrative controls and sanctions.

On the basis of this discussion and our own work before and since the meeting, the Reporters believe this project should go forward. Our reasons for this view and the form which we believe the project should take are set forth below.

1. Custody and Interrogation

Obviously, the most difficult problem is custody and interrogation -- Articles 4 and 5 of Tentative Draft Number 1. We believe that it would be inappropriate and unwise at this time to revise the interrogation and custody provisions of Tentative Draft No. 1 with nothing more in view than making them consistent with Miranda so that they might be submitted for adoption by the Institute at the earliest opportunity.

This conclusion is derived principally from our sense that, in view of the fundamental changes and uncertainties created by Miranda, we are not presently in a position, and we do not think the Institute is in a position, to assess the probable effect on the law enforcement process of any particular legislative proposal to deal with custody and investigation.

A contrast must be drawn here between Tentative Draft No. 1 in the pre-Miranda context, and any model submitted in the wake of Miranda. Given the latitude we felt was available prior to Miranda, we believed that we had developed a sufficient familiarity with the practices and problems of law enforcement to formulate a system which not only made sense on paper and fairly complied with existing constitutional norms, but which would also meet existing law-enforcement needs with reasonable effectiveness and sense. The serious new

restrictions which Miranda imposes on police questioning have, however, changed that situation. It would, we think, be unsound to propose for Institute adoption a new model in this changed situation until some information had accumulated to give a sense of just how the pre-arraignment system will operate under Miranda and, even more important, what needs are generated by such a system. The work of formulating any model in the context of Miranda should, therefore, be accompanied by a good deal of empirical inquiry into the pre-arraignment process and more specifically into the relationship between questioning of suspects and effective enforcement.

What we do propose is to explore a number of different formulations and to draft provisions to reflect those which appear promising. These would include systems of pre-production screening with various limitations on questioning and methods of providing counsel, and schemes for immediate production before a judicial officer with or without a remand to police custody pending investigation. We would also explore a further specification of the types of crimes and situations of necessity in which different procedures might be appropriate. These drafts would draw upon the results of the empirical work referred to below.

To a considerable extent, development of a comprehensive pre-arraignment code depends on the working out of sound legislative provisions on custody and interrogation. The feasibility of this must in our view be regarded as an open question, depending on the results of the work indicated above.

2. Stop, Arrest and Voluntary Cooperation

We are currently considering new approaches to the stop in the light of the action of the Institute both approving Section 2.02 in principle and also requesting limitations and qualifications on the authority there granted. Several questions must be resolved: what is the proper range of crimes to which the authority should be limited; can the occasions of necessity justifying it be further specified; what kinds of questioning of persons stopped are permissible and desirable after Miranda; and what if any use may be made of the fruits of a frisk pursuant to the stop?

Extensive studies are now in progress of actual police practices and needs in respect to the stop and frisk. The Reporters expect to develop and test alternatives against the conclusions of such studies. The validity of the New York "Stop and Frisk" law is now before the Supreme Court on appeal, and presentation of a draft to the Institute should probably await the result of that litigation.

We also propose to reconsider the other provisions of Articles 2 and 3 in the light of the discussion at the Annual Meeting.

3. Search and Seizure

While we have done considerable research in this area, we have not prepared any drafts. As noted above, provisions relating to the stop depend on developing a satisfactory method for dealing with the search issues related to it. Professor Telford Taylor of Columbia Law School has agreed to work with us on search and seizure, if the Council approves our plans.

We have done only very preliminary work on electronic surveillance. Notwithstanding our view of the importance of legislative regulation of that field, we regard the issue as to whether and when we should attempt to develop legislative drafts in that area as an open question.

Sanctions; More General Regulation of Police Practices

While we have done considerable work, including preparation of preliminary drafts, on sanctions other than exclusion of evidence, to date we have not been sufficiently satisfied with our drafts to take them beyond the Advisory Committee. Closely related is the proposal, noted above, that the scope of this project should be broadened to



deal with the great range of police practices which never get to court. We are clear that this represents one of the major challenges to our society and our legal system. We are less clear at present where work in this area would lead and thus are not prepared to recommend at this time such an expansion of this project. However, as a part of our work we would propose actively to explore this possibility and to make recommendations to the Council on it.

#### Empirical Work

While preparing Tentative Draft No. 1, there were many points on which we wished we had more facts. However, as noted above, we thought we had a good enough feel of the factual situation to judge that the provisions of the draft would make sense. As we look at the alternatives open since Miranda we are simply unsure which of them would make most sense in practice. Furthermore, in recent months there have been many definitive and sweeping statements, by proponents of differing points of view, about the importance of questioning, the effects of Miranda, and what is and is not a sound method of responding to that decision. Our preliminary inquiries lead us to the conclusion that many of these statements are based on superficial and unsound analysis.

In order to permit us to make judgments on the soundness of possible proposals, and because of the independent importance of having available objective analysis of such factual information as can be obtained, we would propose to gather and assess empirical data relating to pre-arraignment procedures. Specifically, we would seek to establish contact with the increasing number of research projects now under way or contemplated, to examine their findings, and in some instances to arrange with law enforcement authorities to collect data on our behalf. In this connection, we might wish to enlist the help, as a consultant, of someone who has hard experience in empirical work. Of course we cannot be sure how much useful information we can develop without organizing major independent empirical research projects of the sort which would be far beyond the scope of what the Institute has done in the past, but we are not now proposing that such projects be undertaken.

\* \* \* \*

Implicit in our recommendation that the Institute proceed as outlined is our belief that further work is warranted by what the Institute has already done, by the importance of the problems, and by the very meagre resources now being allocated to their resolution.

However, a decision to proceed should not be made without consideration of the special problems which Institute work in this area involves. Because of the substantive uncertainties indicated in the attached memorandum -- particularly surrounding custody and interrogation which would be at the core of a comprehensive code -- the perimeters and even the feasibility of such a code are less clear than is the case in a typical Institute project. Furthermore, the United States Supreme Court is likely each year to have before it issues which bear on the work of the project. We know of at least two such cases which are pending this Term.

These considerations do not indicate to us that the project should be dropped. Indeed, they add to its challenges. But they make it impossible to guarantee that a code will result from the work that is done, and thus suggest the desirability of continuing evaluation of the decision that the Institute should continue to play a role in this field. And, in any event, we believe that no later than two years hence the Council and the Reporters should examine what has been accomplished on each part of the project and whether continuation seems promising.

Preliminary Memorandum on the Impact  
of the Miranda Case on the Pre-Arrestment Project

October 14, 1966

The purpose of this memorandum is to assess the situation of the Pre-Arrestment Project in light of the Supreme Court's opinion in Miranda v. Arizona. Part I is an examination of the specific effects of Miranda on Tentative Draft No. 1, and discusses the changes which would have to be made in that draft to meet the new constitutional norms even if the draft were to remain otherwise unaltered. Part II is a broader assessment of the structure and premises of the draft in light of Miranda. Part III outlines alternative systems which a general reformulation might explore.

I. The Specific Effects of Miranda  
On Tentative Draft No. 1.

ARTICLE 1.

No changes called for by Miranda.

ARTICLE 2.

Section 2.01.

1. Questioning of Persons Not in Custody. Miranda appears to deal entirely with the questioning of persons in "custody"; indeed, the "focus on the accused" which Escobedo marked out as crucial is now reinterpreted to be simply the time when one is taken into custody (86 Sup. Ct. at 1612 n.4). Thus the provisions of this section relating to on-the-street questioning of suspects and witnesses not in custody are not formally affected by the Miranda rules. (The provisions of Section 2.01 as they come into play after a "stop" pursuant to Section 2.02 are discussed in connection with the latter section, infra.)

It should be noted that the draft in Section 2.01(2) goes further than Miranda seems to require in providing for a warning to suspects not in custody prior to any sustained interrogation.

2. Definitions of Custody. Does the draft, in light of the significance given by Miranda to the time when "custody" is assumed, adequately deal with the demarcation of that time? The special problem of the "stop" is discussed below. With respect to situations where the police leave the question of custody ambiguous, Section 3.05 now provides that the safeguards attendant on arrest come into play whenever an officer "by specific order or by his conduct indicates" that a person is no longer at liberty. This would seem to meet the requirements of Miranda.

The problem of persons "requested" to appear at a police station continues to be a difficult one. The present draft provides in Section 2.01(3) that such a request must be accompanied by a warning that there is no obligation to comply; a failure so to warn means that the person is deemed to be under arrest for purposes of the Code's protective provisions, see Section 3.05(2). In addition, the Code in Section 5.10 provides that the coercion and access rules of Sections 5.02-5.07 apply to all persons requested to appear at a police station and, in Section 2.01(2), demands a special warning as to rights of access to suspects questioned at the stationhouse during a voluntary appearance there.

Are these provisions acceptable under Miranda? As long as it is clear to a person that he does not have to come to or remain at the police station, it would seem that the full Miranda warning is not required. To strengthen the provisions, however, it may be well to require that any questioning in a stationhouse, at least of a suspect, be prefaced by a repetition of the warning that the person is under no obligation to remain there.

Of course the present draft will have to be carefully re-evaluated to determine whether the full Miranda warning should be given in all the instances where the present draft accords a person the protections granted to an arrested person. It may be that in some such situations there would still not be "custody" as meant in Miranda, and protections short of those required by Miranda should be deemed adequate.

## Section 2.02.

1. Legality of the Stop. Nothing in Miranda would appear to bear on the permissibility of the "stop" itself, that is, on the constitutionality of a brief period of on-the-street detention on less than probable cause. (It should be noted, however, that the Court may have this question before it in New York v. Peters, in which the New York Court of Appeals, on July 7, 1966, upheld the constitutionality of the N. Y. Stop and Frisk Statute.)

2. The Warning Requirement. The central question raised by Miranda in connection with the stop is what warnings are required. Tentative Draft No. 1 requires a warning after a stop only where there is sustained questioning of a suspect, and does not provide for a warning as to the right to counsel. (See Section 2.02(3), referring to Section 2.01.) Thus no warning is required if the person stopped is a witness; and even if a suspect is stopped, the first few "res gestae" type questions, which are likely to arise as spontaneous reactions to an emergency situation, do not have to be preceded by a warning.

Miranda states that its warning requirements apply "where the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way." (86 Sup. Ct. at 1629.) Though "investigation may include inquiry of persons not under restraint," and "general on-the-street questioning as to facts surrounding a crime or other general questioning of citizens" is stated not to be affected by the holding, the rules apply "where an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning." (86 Sup. Ct. at 1629, 1630.)

If the Court's language is accepted as determinative, there can be no doubt that Section 2.02, which certainly does permit the police to deprive a person of his "freedom of action in any way," would have to be substantially revised. Any coercive stop would, if there is to be any questioning, have to be prefaced by a full warning as to the right to silence and the right to counsel, and such questioning would have to be prohibited unless there is an effective waiver of these rights.

Just how such a warning should be phrased is a difficult issue. The chances are that the police would not be able to procure a lawyer on the street, so the warning would simply be false if it indicated that there is actually a right to an "on-the-street" lawyer, that if the suspect does not waive, a lawyer will be provided for him during the period of the stop. The most that could be done is to say, in effect, that "if you wish to consult a lawyer before we ask any questions, or wish to have a lawyer present during any questioning, we will not now ask any questions." (Does such a form of warning itself create an impermissible pressure to waive the right to counsel?)

Further, the question arises how the prosecution will be able to meet its "heavy burden," see 86 Sup. Ct. at 1628, to show that the defendant "knowingly and intelligently waived" his right to silence and his right to retained or appointed counsel. In view of the difficulty of providing for tape-recording or other objective verification on the street, particularly in the confused emergency circumstances often attendant on a stop, will the simple testimony of the officers, if credited by the trial court, be deemed adequate? Should a written form of waiver be used?

Finally, still assuming that the Miranda requirements apply to the stop, it might be argued that a conscientious application of the opinion would require a complete bar to on-the-street questioning of one in custody, on the theory that it is simply impossible to provide the protections needed for the fully informed and intelligent waiver demanded by the Court in the confused atmosphere of on-the-street inquiry.

3. Must Miranda Be Applied to the Stop? None of the cases actually before the Court in Miranda involved brief on-the-street questioning in the circumstances of a stop, and the language of the case insofar as it requires a full warning on being deprived of one's "freedom of action in any way" is plainly dictum. In addition, the bulk of the Court's opinion is evidently concerned with sustained custodial interrogation of an isolated prisoner, and not with the kind of brief, public, on-the-spot inquiry which <sup>the</sup> draft envisages in the context of a stop.

It could thus be argued that it is still open to the Institute to recommend, and to the legislatures to enact, the existing provision, which would not require a warning to non-suspects, and even in the case of suspects would require a warning only before sustained interrogation. (The warning to suspects preceding any sustained questioning could still be expanded to include the Miranda requirements.) It would have to be frankly acknowledged that such provisions were irreconcilable with language contained in Miranda. The justification would be that the issue of the appropriateness and feasibility of a full Miranda warning in the context of a brief emergency on-the-street inquiry should be faced by the Court in the context of a case squarely raising it for decision, and that until such consideration is given to the question the Miranda dictum should not be deemed a final and authoritative answer to it.

Finally, the possibility should be mentioned that even if Miranda requires a full warning prior to any interrogation after a "stop," the requirement may not bar the police from first seeking to obtain the identification of the person stopped, since there is at least a question whether the Fifth Amendment bars such an inquiry.

### ARTICLE 3.

#### Section 3.01.

The Miranda opinion does not directly affect the provisions of Section 3.01. It may, however, be argued that it undercuts the provision of Section 3.01(3) which states that a failure to comply with a "lawful request for cooperation" may be taken into account in the decision whether there is reasonable cause. The Court's emphasis on the value of the untrammelled "right to silence" may indicate that an adverse inference cannot be drawn in case one chooses to exercise that right, even with respect to the arrest decision.

#### Section 3.08.

There can be little doubt that a full-scale arrest constitutes the "custody" spoken of in Miranda, and that the protections demanded by the opinion must be granted in the period between arrest and appearance at the stationhouse.



The present draft requires the caution only "as promptly as is reasonable under the circumstances, and in any event before any sustained questioning." This was intended to safeguard the admissibility of admissions made in the confusion immediately attendant upon arrest, even if made in response to a few spontaneous emergency questions. It is at least doubtful whether the admissibility of such statements can survive Miranda; the opinion literally read would seem to demand that any questioning on arrest, even the briefest preliminary inquiry, be preceded by the warning. Here, however, as in the case of the stop, it could be argued that the Court did not have before it the problem of brief emergency inquiry at the moment of arrest, and that its references to "questioning" were not designed to bar such inquiry.

The warning on arrest, where required to be given, would have to be expanded to meet the Miranda requirements, and post-arrest questioning in the period before arrival at the stationhouse prohibited in the absence of counsel or an effective waiver. Here the discussion above, in connection with questioning after a stop under Section 2.02, as to the nature of the warning and the procedure for waiver, is again relevant. The warning on arrest cannot realistically suggest that counsel will in fact be provided prior to appearance at the stationhouse; the choice which can be given to the arrested person is between questioning without a lawyer and no questioning at all. And hard questions arise as to whether, and under what circumstances, the police should be permitted to obtain waivers for immediate inquiry, and how the effectiveness of any such waivers can be safeguarded.

### Section 3.09.

The bracketed proviso in Section 3.09(1) permits the police to delay taking an arrested person to the stationhouse for the purpose of obtaining an emergency identification. Nothing in Miranda speaks directly to the question whether such identification procedures are permissible in the absence of counsel. In Schmerber v. California (86 Sup. Ct. 1826), the Court held that the Fifth Amendment applies only to testimonial disclosures, and thus does not bar a compelled blood test. This would indicate that Miranda, explicitly put by the Court in terms of protecting Fifth Amendment rights, is

not relevant to objective procedures such as identifications. On the other hand, the Court in Schmerber did not confront the question whether there is any Sixth Amendment right to have counsel present when procedures such as blood tests and identifications are carried out; it appears that Schmerber was in fact represented by counsel and acted on counsel's advice. And it should be noted that the Court last term granted certiorari in Gilbert v. California, see 86 Sup. Ct. 1902, which specifically raises the question whether it violates the Sixth Amendment to compel a defendant to appear in a line-up and to provide a handwriting sample in the absence of counsel. Thus we may receive further guidance on this question in the term to come.

More acute is the question whether damaging admissions made upon any such identification can, under Miranda, be made admissible in evidence. It can plausibly be argued that if an accused incriminates himself under the "pressure" created by a damaging identification, without the advice of counsel or waiver of the right to counsel, this will be deemed by the Court to be the product of the kind of compulsion barred in Miranda. (This question will arise even more acutely with respect to incriminating admissions volunteered in connection with non-testimonial tests and identifications in the stationhouse by one who is not represented by counsel and has not waived counsel.)

#### ARTICLE 4.

##### Section 4.01.

The warning required to be given at the stationhouse to arrested persons must evidently be expanded to meet the Miranda requirements: the arrested person must be informed that he has the "right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning." Again, the question of just how such a warning is to be phrased will have to turn on whether an attorney can in fact be made available speedily. If stationhouse counsel is readily available, the prisoner should be told that fact and that he need not submit to questioning until counsel arrives. But if no lawyer is present or immediately

available, the real import of the warning is simply, that "if you wish to have a lawyer present before talking to us, we will not question you, because there is no lawyer available." Note that it can be argued that such a warning places impermissible pressure on the accused to waive and get things over with. If that argument is accepted, the conclusion would be that waiver is permissible only in those jurisdictions where arrangements are in effect speedily to provide counsel to those who do not waive, and that in those jurisdictions where stationhouse counsel is not available, the police must desist from interrogation without seeking to obtain a waiver.

Sections 4.04, 4.05.

Miranda would not seem to require an abandonment of the Code's provisions which permit the brief detention of an arrested person prior to production before a judicial officer. The case reaffirms Mallory as a supervisory rule applicable to federal prosecutions (86 Sup. Ct. 1622, n.32), and states that the non-constitutional Mallory rule is aimed at accomplishing the same results that the constitutional rule propounded in Miranda seeks to accomplish. But although urged to do so by counsel, the Court refrained from any suggestion that the Constitution itself demands immediate production. Indeed, Miranda seems to assume that there will be post-arrest detention and investigation, and seeks to protect the accused during this very period. Of course the Court could, in its repeated reference to in-custody investigation, be referring to the custody of persons already produced before the magistrate who did not make bail, but this seems a strained construction.

Thus it would seem that Miranda does not require a system of immediate production as a matter of constitutional law, and the disposition provisions of Sections 4.04 and 4.05 are consistent with that opinion.

#### Section 4.09.

Section 4.09 requires the tape-recording of all sustained questioning. The question arises whether such taping (or even more elaborate devices, such as TV tape) could constitute an "alternative" method of protecting the accused's privilege against self-incrimination which would permit questioning to go forward even without counsel or an effective waiver of counsel. The Court in Miranda does speak of "potential alternatives for protecting the privilege" open to Congress and the states, and says that the Constitution does not require "any particular solution." (86 Sup. Ct. at 1624.) Nevertheless, it would seem plain that merely making the conditions of interrogation visible and verifiable is not the kind of "alternative" which the Court would find acceptable. The purpose of the Miranda rules is not simply to make the conditions of interrogation visible and verifiable; it is to protect the accused against the inherent pressure to cooperate which in-custody interrogation, no matter how non-coercive otherwise, is deemed to create. The purpose of counsel is to make sure that the accused is "fully" apprised of his rights. An alternative, to be acceptable, must create "procedures which are at least as effective in apprising accused persons of their right to silence and in assuring a continuous opportunity to exercise it" as the counsel rules laid down by the Court. (86 Sup. Ct. at 1624.) No matter how fully recorded, an inquiry in the absence of counsel, following a caution by the police, does not safeguard the prisoner against self-incrimination as effectively as the advice and presence of an attorney. In other words, "alternative" procedures must be designed not only to give assurance that traditional coercive tactics have not been used, but must be substantively anti-coercive themselves, that is, must be as effective in assuring the prisoner of an atmosphere of unfettered and informed tactical choice as the presence of an attorney would guarantee. (Indeed, if it is assumed that the crucial role of counsel is to instruct the prisoner to say nothing, it is hard to visualize what alternative procedure can produce an equivalent to counsel.)

The taping requirements of Section 4.09 are, of course, entirely permissible as protections in addition to Miranda: i.e., cases where there has been effective waiver of counsel. They may,

further, be useful in providing the prosecution means to carry its "heavy burden of proof" that Miranda has been complied with.

ARTICLE 5.

Section 5.01.

The effects of Miranda on this section insofar as it relates to questioning will be discussed in connection with Sections 5.07 and 5.08, which relate to the right to counsel during preliminary and further screening. It should be noted, however, that this section also authorizes fingerprints, line-ups, reasonable identification procedures, and other "lawful investigation" beyond questioning; and the rest of Article 5 makes clear that these procedures may be resorted to during both preliminary and further screening without counsel being present or waived. Schmerber v. California would seem to make clear that nothing in the Fifth Amendment bars the use of objective investigative procedures which do not lead to testimonial disclosures, but as indicated above in connection with Section 3.09, it is not completely clear that these steps can be taken without counsel or waiver of the right to counsel.

Further, Section 5.01 permits an accused in custody to be "confronted" with the result of identifications, tests, and other evidence, and again it is clear under Sections 5.07 and 5.08 that this may be done during both preliminary and further screening without the necessity of providing counsel or having a waiver of counsel. Miranda would seem to raise an acute question as to the admissibility of any damaging admission made as a result of any such confrontations. Although the Court speaks only about questioning and interrogation, it could be argued that the principle it adopts necessarily extends to any other official action which can be deemed an attempt to induce one in custody to make a testimonial disclosure; and surely the purpose of any "confrontation" is to obtain a testimonial disclosure. Nor would it matter that the purpose may be to obtain an exculpatory rather than an incriminating statement, or that the statement purported to be exculpatory; the Court in Miranda explicitly bars the making of such distinctions. See 86 Sup. Ct. 1629, 1632.

In sum, it is a serious possibility that Miranda requires counsel or waiver not only as a condition of questioning, but also as a condition of procedures such as confrontations with the results of tests or other evidence.

Sections 5.02 - 5.06.

These sections, prohibiting coercive tactics in interrogation, would still be necessary parts of any Code, since Miranda makes clear that the constitutional rules against coercion continue to be operative. They would play a significant role only in those cases, however, where questioning (or other attempts to secure a statement) are carried on in the absence of counsel, presumably pursuant to an effective waiver of the right to have counsel present during interrogation.

Do these sections provide sufficient safeguards in cases where there is interrogation after an effective waiver? One obviously vulnerable provision is Section 5.04(b), which provides that there may be no "persistent questioning" after an arrested person has "made it clear that he is unwilling to make a statement or wishes to consult counsel before making a statement." In Miranda the Court states that if an individual "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him."

This language surely indicates that Section 5.04(b) must be significantly narrowed, to prevent any further questioning, even after a waiver, when there is any indication that the accused wishes to remain silent or consult an attorney.

The more troublesome question is whether Miranda permits any sustained interrogation at all, even following a waiver. Section 5.04 presently prohibits questioning of such "unfair frequency, length or persistence as to constitute harassment." The Reporters have not viewed this language as intended to bar sustained questioning which under the circumstances is not harassing or abusive. In Miranda, although the Court does not explicitly say that sustained questioning is per se coercive and unlawful, it emphasizes

that the duration of questioning will bear heavily on whether the courts will accept the waiver as effective. In discussing waiver, the Court states that "an express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver (emphasis supplied). (86 Sup. Ct. at 1628.) And it states, further, that "whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so." (Id. at 1629.) Further, the Court emphasizes throughout the opinion the need to assure a "continuous opportunity," (Id. at 1624.), to exercise the right to silence and counsel "throughout the interrogation." (Id. at 1630.).

The Court is evidently suggesting that it will not necessarily accept as admissible a statement obtained after sustained interrogation, even if the interrogation was preceded by an effective waiver. It is suggesting that even after an initial effective waiver, the protections created by Miranda cannot be restricted to those who thereafter take the initiative in claiming them; that interrogation (or even just detention) after a waiver can undermine its effectiveness. It could thus readily be supposed that a waiver, followed by two or three or four hours of questioning, at least without further warnings and offers of counsel, could not result in an admissible confession.

If it is agreed that Miranda may bar interrogation during the period of screening on the terms the present draft would permit, even after an initial waiver, and that something must be done to implement the Court's suggestion that a damaging admission must follow closely on a decision to waive, two avenues could be explored. First, one could visualize allowing some sustained interrogation, but providing that such interrogation be frequently interlarded by warnings and offers of counsel, with several waivers conceivably resulting. A second response would be to limit the inquiry allowable even after a waiver, barring all sustained interrogation and limiting questioning to a few brief inquiries. This

would be analogous to the concept presently used in the draft in Section 5.08 in connection with the period of further screening, where questioning is seen as a device ancillary to field investigation, designed basically to clarify or confirm the results of any such investigation, and to clarify statements volunteered by the accused himself. Thus the arrested person who has given a waiver might be asked to make a statement of his position at the beginning of his detention, immediately following the waiver. A few questions to clarify that statement would be permissible. The investigation would then perhaps proceed on the basis of information provided in that statement, with later questions again being clarificatory only.

#### Section 5.05.

As has been indicated above, Schmerber v. California holds that the Fifth Amendment applies only to compelled testimonial disclosures, and not to the results of objective tests. By dictum, however, the Court indicated in Schmerber that "lie detector tests" and other efforts "to determine . . . guilt or innocence on the basis of physiological responses, whether willed or not," may be classified as involving testimonial disclosures. See 86 Sup. Ct. at 1832. It is clear that insofar as Section 5.05 is deemed to result in testimonial disclosures, the Miranda protections would have to apply. It may be advisable, therefore, to provide that the procedures referred to in Section 5.05 be authorized only with the consent of the prisoner's counsel.

#### Section 5.07.

It is clear that the central effect of Miranda on the draft is to preclude Section 5.07 from permitting the police to interrogate during the period of preliminary screening without the presence of counsel or effective waiver of the right to counsel. The section must be revised to provide that no questioning is permitted unless the defendant's lawyer is present or there has been a waiver of the right to have a lawyer present. But evidently this raises a host of further problems. What if, for instance, a non-indigent defend-



ant does not waive and states he wishes to have his lawyer present during any questioning. Is the lawyer free to cut off all questioning by simply not appearing? What if the lawyer is absent or ill? Can a defendant be forced to find or accept a substitute lawyer? Or what if an indigent defendant does not waive, but legal aid cannot immediately be procured: are volunteered statements in the interim admissible? Or will the delay in finding appointed counsel itself be deemed unduly coercive? Once a lawyer has consulted with an arrested person, can that person then waive his rights and subject himself to questioning? Can counsel preclude such a waiver? By telephone?

The Miranda opinion simply does not speak in a determinative way to most of these issues, so that many drafting and policy choices must still be confronted in connection with the counsel rules of Section 5.07.

It should further be noted that in the light of the Miranda rules the liberal access provisions of Section 5.07 with respect to friends and relatives may no longer be necessary bulwarks to the constitutionality of the draft, and should be re-evaluated.

#### Section 5.08.

This Section, dealing with the period of further screening after the first four hours, would have to be revised to eliminate the permission to ask even the few brief questions authorized in the absence of counsel or an effective waiver. Further, as indicated above, there is serious doubt whether, absent counsel or waiver, the confrontations permitted by Section 5.08 can survive.

Further, thought would have to be given whether any qualification must be imposed on the permission to interrogate granted in this Section (and also in Section 5.09) in cases where an arrested person and his counsel consent to questioning. (See the discussion of sustained interrogation after a waiver in connection with Section 5.04.)

## ARTICLES 6-8.

Nothing in Miranda would seem to affect the constitutional permissibility of the procedures elaborated in these articles.

## ARTICLE 9.

### Sections 9.01, 9.03 - 9.07.

These sections declare inadmissible statements obtained in violation of the Code's provisions. They will thus have to be revised to make them consistent with the underlying substantive rules as recast in light of Miranda. (For instance, Section 9.03(2) must be changed to provide that a failure to give the warning will lead to inadmissibility unless the warning was later issued and there was an effective waiver prior to the confession. Further, there is a question whether such a waiver can ever be effective if any incriminating statement was made prior to the warning.)

### Section 9.02.

Miranda does not deal with the so-called Wong Sun problem, that is, statements made after an illegal arrest but otherwise not obtained in violation of law. Thus Section 9.02 can stand. It should, however, be noted that in light of Miranda, the significance of Section 9.02 as an independent deterrent to illegal arrests has been attenuated since it will independently render inadmissible only those statements which are obtained after an effective waiver.

### Section 9.09.

The Court in Miranda does not explicitly address itself to the problem of "fruits." Most of the opinion speaks only about the admissibility of "statements": e.g., the required warnings and waiver are "prerequisites to the admissibility of any statement made by the defendant." (86 Sup. Ct. at 1629.) At one point, however, the Court states that "unless and until such warning and

waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against" the defendant. (Id. at 1630.)

Certainly nothing in Miranda can lead us to suppose that the Code's rules with respect to "fruits" can be more permissive than the present draft. The real question is whether we must tighten this section by eliminating the exception contained in subsection (3) of the revised draft. (See Supplementary Memorandum From the Reporter to Members of the Institute, containing the version approved by the Council in March 1966.) Arguably the use in passing of the word "evidence" in one sentence of the opinion should not be taken to change the pre-existing constitutional situation with respect to "fruits" and thus to prohibit the Institute from recommending the existing draft.

#### Section 9.10.

The Court in Miranda makes clear that where there has been a failure to warn, "we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given," (86 Sup. Ct. at 1625.), and adds that the warning as to counsel is also an "absolute prerequisite," since "no amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead." (Id. at 1626.) It is thus clear that a failure to warn can never be found to be an "insubstantial" violation within the meaning of Section 9.10. It would not, however, appear that the wording of the section would have to be changed (see the last paragraph of the Note to Section 9.10).

#### Section 9.11.

Miranda casts the gravest possible doubt on the continued viability of Section 9.11 as drafted. The warning and waiver rules of Miranda are repeatedly stated as absolute imperatives; they are "prerequisites to the admissibility of any statement," see 86 Sup. Ct. 1629. There is not the slightest hint that a court may take

circumstances of necessity into account and determine whether a failure to warn was, under emergency circumstances, permissible. It would thus seem clear that even in the circumstances of grave necessity envisioned in Section 9.11, if the required warnings and waivers are not proved, incriminating statements must remain inadmissible.

The further question is whether the Code can (as originally proposed by the Reporters) authorize questioning without a warning in circumstances justified by grave necessity, provided that resulting incriminating testimony is excluded? Such an approach would be premised on the theory that it is not questioning in the absence of warning which is, as such, prohibited by the Fifth Amendment, but the use of the results to incriminate the defendant. On an analogy to immunity statutes, then, questioning without a warning could in circumstances of necessity be authorized even without a warning, provided the police are willing to forego using the results against the person questioned.

Such a provision could be challenged, however, in light of the Court's statement that the warnings and waiver are "an absolute prerequisite to interrogation;" some may argue that it would be unseemly, in view of this language, to validate as lawful any interrogation in the absence of warnings, even where the resulting evidence is not used to incriminate the defendant. Arguably, however, the Court's emphasis on the Fifth Amendment indicates that it was not concerned with the lawfulness of questioning which would not result in self-incrimination.

## II. The More General Implications of Miranda

The discussion above has concentrated on the specific effects of Miranda on specific provisions of the draft. This part of our memorandum is a broader assessment of the premises and structure of the draft in light of Miranda.

A. Field Interrogation.

The severe restrictions which Miranda imposes on all custodial interrogation suggests the need to re-evaluate the provisions of the draft with respect to interrogation outside the stationhouse. As already indicated, the draft now provides that even before any custody is assumed, sustained interrogation of a suspect must be preceded by a caution as to the right to silence, though not as to any right to counsel. See Section 2.01. Is that provision justified? The Code's premise is that even in the absence of custody, a sustained examination of a suspect who may not be aware of his rights undercuts the policies of autonomous choice implicit in the privilege against self-incrimination. Certainly nothing in Miranda indicates that the draft is in error on this score. The challenge to the draft would be a more pragmatic one: since it is likely that custodial interrogation will, after Miranda, be much less useful in law enforcement, at least pre-custodial questioning should be made as easy and fruitful as possible. Further, it may be argued that an important purpose of Miranda is to encourage the police to conduct as much of the inquiry as possible before taking any person into custody; police abuses are seen as presenting a much more acute danger once custody commences. Thus it could be argued, the Code should not discourage pre-custody investigation by imposing any restrictions not mandated by existing law.

Certainly these arguments would at least counsel that the caution prior to custody not be expanded to include the full Miranda statement as to the right to counsel. Further, they indicate that so long as no coercive custody is imposed, persons questioned at a police station pursuant to a "voluntary" appearance there should not be accorded a full Miranda warning. This would, of course, be possible only in those cases where a person is really still "at liberty," that is, has been informed that he need not come or remain at the stationhouse.

The great danger, of course, is that a system which makes so much turn on whether or not "custody" has been assumed will create pressures on the police to assimilate all possible cases to the "non-custody" situation. It will be tempting indeed for

the police to continue the present practice in many cities of conducting many interviews prior to a formal "arrest," during a supposedly voluntary appearance at the stationhouse. The question whether that appearance was voluntary would, of course, raise precisely the same difficulties of proof and evidence that now surround the issue of confessions. The draft would help in this in its provision that such an appearance will not be deemed voluntary unless the suspect has been told he need not come to the stationhouse. But whether that caution has been given is itself difficult of proof; and what is now added by Miranda is that much more turns on the question.

The pressures which the crucial nature of the fact of "custody" will put on the system envisioned by the draft is most acute, of course, in connection with the "stop." The question has already been mooted whether Miranda requires a full warning in all instances of the stop. If the answer to that question is "no," the justifications for the draft's stop provisions remain essentially unchanged. Indeed these justifications may carry greater strength: in view of the difficulties now imposed on emergency questioning after a formal arrest, the need for a preliminary checking-out of confused situations becomes even more acute.

On the other hand, on this premise (that is, if the draft were to retain the present stop provision, with only a modified warning, but were to impose a full Miranda warning on arrest), can it not be argued that this will simply mean that in all cases, even where arrest is fully justified, the police will purport to act only on the basis of the "stop," so as to enable them to ask at least a few questions prior to a full warning? And are we not subject, then, to the allegation that we have violated an important principle of Miranda, because in effect we have allowed some twenty minutes of questioning of persons who in fact will surely be arrested, without counsel or waiver of the right to counsel? Of course the point is attenuated if the draft were to require the full Miranda warning in case of any sustained questioning of a suspect after a stop, as well as on all arrests; the attraction of the stop would then be the permission to ask a few "emergency" questions prior to the caution. Nevertheless,

these problems indicate that, even aside from the specific dicta of Miranda, a system which distinguishes significantly, for purposes of required warnings, between a formal arrest and a stop, may be difficult to justify in terms of the principles of that case.

Of course one could simply accept the Miranda dicta and require a full Miranda warning in all cases of the "stop" as well as on arrest. Such a provision would retain some of the justifications of the present provision: it would, even in the absence of probable cause, permit a policeman to "freeze" an emergency situation, prevent the disappearance of a suspect, and permit the policeman to engage in a brief checking out (such as a call to the stationhouse).

However, such a stop provision may have a far more limited usefulness than the present provision. For in many of the emergency situations where we envision the stop being used, it is almost impossible to conceive of a policeman wishing to resort to an authority which would entail the giving of a full-blown Miranda warning. In most cases of a stop, the reason the policeman wants to, or indeed feels he has to, stop a person is so that he can ask the almost automatic urgent questions: who are you? what are you doing here? what's going on? And in many of these cases, it would be almost impossible to expect a policeman to give a formal caution and obtain a waiver of the right to counsel prior to asking these questions -- to do so would simply be hopelessly inappropriate and unresponsive to the needs of the situation. In short, then, the legitimation of the stop would not have helped the policeman to exercise his functions rationally and lawfully, but quite the opposite: he will insist that there was no "stop," no "custody," involved, and that the questions were asked in the context of a purely voluntary interview. But of course it is precisely that pressure -- to pretend that no coercion was involved -- which the "stop" provision was intended to remove.

Further, a requirement that, prior to any custodial questioning on the street, there be a full waiver of the right to counsel, may make the "stop" provision so cumbersome, so

inappropriate in the very context where it would most naturally be used, that its effectiveness in facilitating a quick assessment of a confused emergency situation would have to be re-examined. As we have all learned, the stop provision is one of the most controversial in the Code. The question now is: is it worth creating this controversy in order to confer a power on the police which now even the police will often regard as inappropriate and useless? The stop was envisioned as a flexible intermediate device short of arrest. Can it still play that role if encumbered with the rigidities of the Miranda system of warnings and waivers?

One further problem in connection with pre-stationhouse procedures needs to be raised: how should the draft approach the question of interrogation after formal arrest and prior to appearance at the stationhouse? We could provide for on-the-street waivers of the right to counsel and some questioning (at least short emergency questioning) immediately thereafter. But how does one assure that such waivers really are "intelligent and knowing"? Can these waivers, obtained in highly charged and confused circumstances on the street, immediately after an arrest, ever be the products of the kind of rational, informed and calculated choice which the Court seems to insist on? How does one prove that there was -- or was not -- such a waiver? One could provide for rather elaborate procedures of written waivers, but the more elaborate and careful these procedures are, the more inappropriate they may seem in these typical on-the-street contexts, and the more useless a permission to engage in an emergency questioning of the arrested person may become.

#### B. Stationhouse Procedure.

The most important problem is whether the basic structural provisions of the draft for the "screening" of cases prior to production before a magistrate continue to make sense and are justified in light of Miranda?



1. Cases Where There Is No Waiver. The basic holding of Miranda is that where there is no effective waiver of the right to counsel, there may be no interrogation of the arrested person in the absence of counsel. What should be the procedure in such cases?

(a) Detention and screening for purposes other than interrogation. There will be cases where a period of detention and screening may be justified even on the assumption that there will be no questioning at all during this period. Thus, after an on-the-street arrest, a period of time during which the police can do blood-tests, arrange line-ups, check alibis volunteered by the prisoner or stories of witnesses or complainants, and perform other objective types of investigation, may continue to be useful in permitting the prosecutor to make an informed decision on whether and what to charge. How many such cases are there? Are they frequent enough to justify screening in all cases? Or, if this is to be the sole function of screening, should it be limited to cases where these operations are in fact to be carried out and are reasonably necessary to enable the prosecutor to make a charge decision? Conversely, are cases where these non-interrogative steps can be useful so few that no special provision should be made for them?

Note that if the Court should hold that all or some of these investigative steps must also proceed, absent waiver, in the presence of a lawyer, any independent justification for screening for the carrying out of these steps would be considerably attenuated, for one would then face all the problems attendant upon the immediate production of lawyers which are discussed immediately below in connection with interrogation.

(b) Detention and screening for purposes of interrogation. If an arrested person does not waive the right to counsel, is screening for purposes of interrogation justified? The answer to this rests on two further questions: can lawyers be produced at the stationhouse quickly enough so that the police can question the prisoner within a period of time which would not unacceptably extend the duration of pre-production detention? And even if lawyers could be made available, will such questioning in the presence of a lawyer be sufficiently useful to justify

both the expenditure of resources to procure such lawyers and the period of detention which is entailed by the system?

Evidently one of the most serious questions facing the draft is whether and how to create a system for the speedy provision of stationhouse counsel to those who do not waive this right. In the case of the indigent, the question is of course the crucial and baffling one whether the Code itself should endeavor to draft a system of stationhouse legal aid. But the problem is a difficult one even in the case of the non-indigent. In some of these cases, a call to the lawyer will bring him to the stationhouse within a short period of time, thus permitting interrogation to go forward. But what if the lawyer is unavailable? Or simply refuses to come immediately? How long a period of detention is justified in order to await the arrival of a lawyer so as to permit interrogation?

Of course it may be that in those cases where a lawyer cannot or does not want to appear, he will instruct his client in any case to tell the police that he does not wish to be questioned, which under Miranda would preclude questioning in any event. But this does not dispose of the case where counsel simply cannot be reached immediately. In such cases, is it justified to postpone production in the hope that questioning will be permitted by counsel when he arrives, and will be useful and fruitful?

These difficulties suggest that detention for those who do not waive counsel should be permitted only in those cases where counsel can be reached and agrees to come to the stationhouse to be present for questioning, at least in the absence of other investigatory steps which the police want to undertake.

Ultimately, however, the problem we now face is an even deeper one: will questioning in the presence of a lawyer be sufficiently useful in law enforcement to justify the enormous undertaking entailed by a system which really does attempt to get a lawyer to the stationhouse soon after arrest? Note that the question is a double-edged one: the problem is not only whether we should expend the resources necessary for this task, but also whether the task is sufficiently useful to justify the detention which is entailed if the task is to be undertaken?

Would it not be a plausible judgment that in those cases where the prisoner does not waive his right to counsel, the chances of obtaining useful information from him are so low that efforts at screening are no longer justified, and he should be taken before the magistrate at the earliest possible moment? This would then enable us to bypass the enormous problem of trying to build into the Code itself a system which tried to insure the presence of counsel in the stationhouse immediately after arrest. (Such production could be delayed if the prisoner and his counsel agree that there should be interrogation prior to production, so that in those cases where a lawyer is available and thinks it best for his client, questioning prior to charge could be arranged.)

2. The Permissibility and Conditions of Waiver. We have been discussing the continued viability of a period of screening where the prisoner does not waive. What is to happen where there is a waiver must be preceded by a consideration of what alternatives are open with respect to the waiver itself.

It seems to us that there is an underlying ambiguity in the Miranda opinion with respect to the question of waiver. The Court places heavy emphasis on the notion that the decision of one in custody whether or not to incriminate himself cannot be truly voluntary, in view of the inherent coerciveness of that custody, unless made with the guidance of counsel:

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as amicus curiae, p. 14. Even preliminary advice given to the accused by his own attorney can be

swiftly overcome by the secret interrogation process . . . Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial . . .

But if a choice made with respect to the question of whether or not to cooperate with the police cannot be voluntary if one is confronted with it by the police without the guidance of counsel, how can the choice to dispense with counsel be voluntary in the same circumstances? And won't it be precisely the persons who are most likely to be "compelled" to cooperate by the subtle coercion of custody who will be "compelled" by the same subtle coercion to waive the right to counsel itself? Thus if this tendency of the opinion is extrapolated to its extreme, doesn't it suggest that waiver of counsel by one in police custody should not be permitted at all? Or that at least the decision to waive, if not itself made on the advice of counsel, can be effective only if made before an impartial judicial officer, who can bring home to the accused the seriousness of his decision to waive? Indeed, the reliance by the Court on the analogy of the trial suggests that if there is to be any waiver at all, it must be made before a judge or magistrate, in a setting similar to the decision to waive the right to counsel at trial.

On the other hand, the Court's explicit discussion of waiver, see 86 Sup. Ct. 1628-29, does seem to assume that some waivers obtained during custody will be effective. Thus the Court states unequivocally that "an express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a

waiver;" and in context the Court seems plainly not to be referring to a proceeding before a magistrate.

At the present time, therefore, one would be justified in proposing provisions which permitted an uncounseled prisoner to waive his rights and submit to custodial interrogation in the absence of counsel. But such provisions would be acceptable only if they could provide assurance to the Court that the waiver was not itself obtained under circumstances which were overtly or subtly coercive. And the possibility cannot be excluded -- particularly if cases come before the Court which indicate that all the disputes concerning the voluntariness of confessions have now simply turned into disputes about the voluntariness of waivers -- that the Court will move in the future to preclude the waiver route from becoming a loophole in the model it has created, by holding that waivers cannot validly be obtained in the coercive atmosphere of incommunicado detention. As indicated above, such an extension of Miranda would not be at all illogical, and counsels against the assumption that a system can be premised on wide-scaled interrogation of uncounseled defendants under conditions which have made it easy for the police to obtain waivers.

More particularly, these considerations may point to the advisability -- already referred to in Part I of this Memorandum -- of prohibiting all sustained interrogation, even after an initially effective waiver has been obtained. This is suggested not only by the precarious nature of waivers in general, but by the explicit concern of the Court in Miranda lest a statement, though made after an initial waiver, be the product not of free choice but of the coercive effect of prolonged interrogation or detention after such a waiver was obtained.

3. Detention and Screening in Cases Where There Is a Waiver. It is in light of the various alternatives with respect to waiver that the Code's provisions for detention and screening must be assessed.

The justifications for this period of detention and screening remain unchanged if it is assumed that effective waivers can be obtained in a significant number of cases and such waivers

can be followed by interrogation pretty much on the conditions presently specified in the draft (with, of course, some modification of Section 5.04(b)). Such a system would rest on the narrowest possible reading of Miranda.

Under the widest extrapolation of Miranda, waivers of the right to counsel would not be permitted at all prior to production before the magistrate. For purposes of deciding whether pre-production detention and screening are, on this hypothesis, justified, the discussion above of cases where there hasn't been waiver would then become fully relevant.

An intermediate position would, under carefully controlled conditions (such as taping), permit waiver of the right to counsel, and some questioning, but no sustained interrogation -- perhaps along the lines of present Section 5.08. Would detention and screening be justified under such a system? This would turn on whether there will be a significant number of cases where such a system would substantially aid the police and prosecutor to make an informed charge decision. Available evidence indicates that screening which depends on very limited questioning, but does give the police a limited time to engage in extrinsic investigation, to confront the prisoner with the results of such investigation, and to ask a few clarificatory questions in connection therewith, is a useful device, even without any reliance on sustained examination of the accused. But the question remains whether there would be a sufficient number of cases in which such waivers are obtained to justify building a pre-production screening system on them.

4. The Duration of Screening. It should at least be mentioned -- though no answers can be suggested at present -- that even if the draft were to retain some provision for pre-production screening, the duration of such screening would have to be wholly re-evaluated in light of what now is to happen during that period. It may turn out that there is no longer any justification for a four-hour preliminary period at all: in cases where there is no occasion for extrinsic investigation, production should be much sooner (immediately in cases where there is no waiver; in a very short time where there is a waiver

"followed closely" by a statement); whereas in cases where, with or without a waiver, the need is for extrinsic investigation, the more flexible and longer time will always be necessary.

### III. Outline of Some Alternative Approaches

It may clarify some of the problems discussed above if we outline, in more schematic form, some alternative systems of pre-arraignment procedure which might be explored in light of Miranda. The alternatives presented below do not purport to exhaust all possibilities; indeed, at least with respect to steps to be taken after arrival at the stationhouse, the number of variables and their possible combinations is enormous. Nor are possibilities of constitutional change explored herein.

#### A. Alternatives With Respect to the Stop.

##### 1. The Present Provision.

The warning and interrogation rules with respect to the stop could be left substantially as they now exist, the warning being given only to suspects prior to sustained questioning, and the warning not including a statement as to right to counsel.

##### 2. Expansion of Content of Warning.

The occasions when a warning is to be given could stay the same, but the content of the warning, when required, expanded to include the information that the person stopped has a right to counsel, retained or appointed, prior to further questioning. Further questioning would then be barred unless there is a waiver of the right to counsel.

3. Expansion of Occasions for and Content of Warning.

The stop provision could require that prior to any questioning, a full Miranda warning be given, with no questioning at all if there is no waiver of the right to counsel.

4. Stop With Only a Few Brief Questions or No Questions Permitted.

If the notion of a waiver on the street is deemed too cumbersome or incapable of adequately protecting the defendant, the provision could

- (a) bar all questioning on the stop, or
- (b) bar all questioning except a few brief "res gestae" questions (on the theory that Miranda does not apply to such questions).

5. Restrictions on Occasions for the Stop.

Any of the warning schemes outlined in alternatives 1-4 could be combined with a provision which, in one of a number of ways, drastically restricted the occasions when the stop may be used -- e.g., only in connection with "major" crimes, or crimes of violence, etc.

6. Elimination of the Stop.

Finally, the alternative of eliminating the authorization to stop on less than probable cause should also be considered, on the ground that if the Miranda rules apply, this may render the whole provision too cumbersome and inappropriate.

B. Alternatives With Respect to  
Stationhouse Procedure.

1. A "Minimal" Reaction to Miranda.

One major alternative with respect to stationhouse procedure is to take the major structural provisions of the present



draft as a point of departure, and make only the changes which Miranda, read most narrowly, absolutely requires. This would entail the following:

(a) On arrival at the stationhouse, the warning would be expanded to inform the prisoner that he has a right to counsel, retained or appointed, prior to any questioning.

(b) The authority to detain the prisoner for screening would remain the same.

(c) . If there is no waiver, the authority to ask questions during preliminary or further screening would be eliminated except when counsel is present. Extrinsic investigation, line-ups and tests could go forward even without counsel. (Query as to confrontations with evidence.)

(d) When there is a waiver, questioning during preliminary and further screening would be permitted on the same conditions as permitted by the present draft, except that Section 5.04(b) would be changed to provide that all questioning must cease as soon as the prisoner indicates he wishes to remain silent or consult counsel.

(e) A new provision regulating the waiver would be drafted. The waiver should probably be written and taped. In cases where there is to be detention for further screening, a second waiver could be obtained after four hours.

## 2. Modified Pre-Production Screening for Certain Purposes Only.

A second major line of approach would involve a very different perspective: rather than taking the present structure as a point of departure, it would entail a fundamental re-examination of the utility and feasibility of various possible functions of screening (along the lines suggested by part II of this memorandum), and would eventuate in a reformulation of the screening provisions to accommodate such purposes as were determined to be still permissible and useful in light of Miranda. (Such a reform-

ulation could eventuate in something like the present structure, but would not take it as a "given".) Thus the draft could design its screening provisions to accomplish some or all of the following purposes:

(a) Screening permitted (regardless of waiver) where reasonably necessary to engage in extrinsic investigation (i.e., identifications, tests, checking alibis and evidence) in order to arrive at a charge decision.

(b) Screening permitted to permit the interrogation of prisoners whose counsel is present or for whom counsel can be procured.

(c) Screening permitted for the interrogation of prisoners who have waived the right to counsel. Such a provision could either

(i) permit sustained interrogation in such cases, subject of course to the present restrictions plus an appropriate change in Section 5.04(b); or

(ii) limit interrogation to a few brief questions immediately following the waiver, and to further brief inquiry ancillary to extrinsic investigation.

Notes: 1. Reference should be made to Part II of this memorandum for a survey of some of the considerations bearing on the permissibility and usefulness of providing for screening in each of the enumerated categories of cases.

2. A screening system limited to some or all of the functions enumerated could be further limited by categories of crime -- i.e., felonies only, or major felonies only.]

3. Immediate Production with Remand for Screening.

A third major alternative would be to abandon the proposals authorizing detention for purposes of screening prior to production, but to provide that in cases of necessity the magistrate could authorize a limited period of detention after production to permit the authorities to investigate further in order to determine whether or not to charge.

Such a structure would raise a host of difficult practical problems, as well as major policy and constitutional issues. These can only be briefly sketched in this memorandum.

Arrested persons would presumably still be taken first to a police station for booking, and would receive a caution at that time. They would then be taken to a magistrate as soon as one is available. (Some could still be released on stationhouse bail or citation.) What would be the conditions of custody during periods of unavoidable delay, i.e., when no magistrate is available? Presumably outside investigation could continue, but would investigation involving the prisoner be permitted? Should detention occasioned by unavoidable delay be taken advantage of for carrying out some or all of the screening functions listed under our second alternative?

On presentation to the magistrate, the prisoner would again be cautioned, and the magistrate would pass on the legality of the arrest. In cases where the prosecutor is ready to charge, the procedure would presumably be the conventional one: if there is reasonable cause, the prisoner would be held, on bail or otherwise, to answer the charge, with a preliminary hearing scheduled when appropriate.

What if the prosecutor shows that the arrest was legal, but that further investigation is necessary before a charge decision can be made? Would remand be ordered in all such cases? There will be some cases where the prisoner can be released on bail or citation pending such investigation, since his presence is unnecessary for the investigation and his eventual appearance to answer a charge of crime can be secured. Remand would seem appropriate only where the magistrate determines that the arrested person's presence is necessary for some lawful investigative step.

(such as a line-up) and there is no other way to secure his attendance for such investigation. This suggests that in many cases something like our former "Order to Appear" could often substitute for a remand into custody, with devices such as bail or citation used to secure the attendance of the arrested person for further investigation. Remand would then be resorted to where the prosecutor shows that the arrest was legal, that some investigative step involving the prisoner is needed to facilitate the making of a sound charge decision, and that the attendance of the prisoner for investigation can be secured only through custody.

Would questioning be a proper object of remand? This raises puzzling problems under Miranda. If the arrested person states he doesn't wish to answer questions, remand for questioning would plainly be improper. If he states he wishes to answer questions but does not want to do so while in custody, is there any basis for ordering further custody? Surely not if the arrested person can otherwise provide security for his appearance to answer a charge of crime. On the other hand, a formal remand procedure seems least necessary in those cases where an arrested person seems perfectly willing to cooperate.

May this not suggest that the effect of a "remand" system would be very much like what presently exists under the Mallory rule: custodial screening would be limited (i) to those cases where there is delay in production due to the unavailability of a magistrate, and (ii) to those cases where custody continues after production because the arrested person is unable to furnish security for his subsequent availability? What would be added is that the prosecutor would not in all cases have to file a charge upon production, and that security for appearance would be directed not only at appearance for trial, but also appearance to cooperate in some further investigative steps.

#### 4. Immediate Production With No Provision for Screening.

The final major alternative would be to adopt the "pure" accusatorial model, and abandon the notion that the authorities should have an opportunity for a period of in-custody investigation pending the decision to charge. This would mean that all arrested

persons would be either released (absolutely or on citation or bail), or taken to a magistrate and charged with crime, at the earliest possible moment after arrest. Delay for purposes of questioning or screening would be prohibited; and if the system were to be taken to the limit of its logic, questioning or other investigation involving the arrested person would be prohibited even during periods of unavoidable delay. Such a structure would thus accept at face value the proposition that arrest must occur only when the authorities are prepared to lodge a formal charge of crime.