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Holding Yourself Captive: Perceptions of Custody During Interviews and Interrogations

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Police custody activates important legal safeguards. To determine custody, courts examine objective conditions and ask whether a “reasonable person” would feel free to leave while being questioned. In Study 1, student participants were either interviewed or interrogated about a staged theft they believed to be real. Interviews and interrogations embodied specific factors considered noncustodial or custodial, respectively. Observers then watched videos of these sessions. Participants in interviews did not feel significantly freer to leave than those in interrogations, though observers did make this distinction. In Study 2, some participants were explicitly pre-advised of their freedom to leave. The advisement induced participants to report they were free to leave as an objective matter but did not significantly affect their subjective feelings of freedom. In both studies, the actor–observer divergence vanished when observers imagined themselves from the actor’s perspective. These results challenge legal assumptions about custody and suggest lines of future research.

General Audience Summary

When police interrogate someone about a crime in an effort to get a confession, they must inform that person of his or her *Miranda* rights to remain silent and have a lawyer present. But this right comes into play only when the person being questioned is “in custody.” But what it means to be in custody, and not feel free to leave, has never been empirically examined. In this article, we report the results of two experiments in which Phase 1 laboratory participants were interviewed as witnesses or interrogated as suspects about an alleged theft that occurred in their presence; Phase 2 neutral observers then watched videotapes of these prior sessions. Overall, results showed that most Phase 1 participants—even those questioned in a non-accusatory manner, as witnesses—felt as if they were in custody and were not free to leave. In contrast, Phase 2 observers differentiated between the two types of sessions, perceiving participants as free to leave while being interviewed but not when interrogated as suspects. Interestingly, however, when observers were asked to imagine *themselves* in the participant’s situation, the majority reported that they would not have felt free to leave—even from the “noncustodial” interview. Also interesting is that an explicit “You are free to leave at any time” advisement did not significantly increase subjective perceptions of freedom, as assumed by law. These studies thus contradict assumptions made by U.S. courts about custody and, therefore, the protections that are supposed to be activated.

Keywords: Police custody, Interview, Interrogation, Perception of freedom

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In the landmark case of *Miranda v. Arizona* (1966), the U.S. Supreme Court ruled for the first time that police must inform all suspects in custody of their constitutional rights to silence and to counsel—and that any statement taken without a knowing, intelligent, and voluntary waiver would not be admissible at trial. Over the years, a number of researchers have questioned the protective effectiveness of *Miranda* (for an overview, see Smalarz, Scherr, & Kassin, 2016). In light of numerous DNA exonerations, many of which involved false confessions, recent reform efforts have focused on the requirement that all interrogations be video recorded in their entirety (e.g., see Kassin et al., 2010). At last count, approximately half of all states now mandate on a statewide basis the video recording of interrogations (Sullivan, 2016).

Both *Miranda* and video recording have in common that the procedural requirement is triggered by “custody.” But what conditions define custody in operational terms? What dispositional and situational factors lead individuals questioned by police to perceive themselves as free, or not free, to leave? Over the years, U.S. courts have struggled to define this all-important construct. In *Miranda*, the Court defined a custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way” (p. 445). Elsewhere in that opinion, the Court cited several indicia of a custodial interrogation such as intimidation, trickery, a restriction of personal liberty, an unfamiliar environment, and hostility from law enforcement.

Over the years, the courts have sought to create an objective test by which judges would determine custody. It is clear that formal arrest triggers custody and all subsequent protections (Orozco v. Texas, 1969). Often, however, police question individuals who have not been arrested. In these more ambiguous cases, the situation may be considered custodial if police restrict an individual’s freedom of action in a significant way. Hence, in *Stansbury v. California* (1994), the U.S. Supreme Court ruled that custody depends on “the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned” (p. 323). Although no comprehensive list of factors exists, the courts have variously cited as relevant whether police informed the suspect that he or she was free to leave, whether the suspect’s freedom of movement was restrained (e.g., was the suspect at home, in public, or in a police station; was he or she in handcuffs and held in an open or locked room; were his or her shoes, clothing, cell phone, or car keys taken?), and whether coercive interrogation techniques were used (e.g., who initiated contact; how many police officers were present; were friends or family members present; how long did the session last; did police make accusations and threaten physical force?).

In considering these questions, it is interesting that the Court staked out a behaviorist stimulus-response position by which a state of freedom or custody—and the decision to leave or stay—are determined by strictly objective parameters, not by the individual’s cognitive representation of the situation and anticipated consequences of a particular response (D. Reisberg, personal communication, August 2, 2017). Indeed, the Court asserted that it will not defer to an individual suspect’s or police

officer’s reported perceptions. Instead it advocated a “reasonable person standard,” the central question being whether the situation would lead a reasonable person to feel a significant restriction on his or her freedom of action (*Stansbury v. California*, 1994; for historical origins of the “reasonable person” standard, dating back to Adolphe Quetelet’s nineteenth century writings, see Beirne, 1987). Put another way, “Would a reasonable person. . . have felt free simply to get up and walk out of the. . . room. . . at will?” (*Yarborough v. Alvarado*, 2005, p. 670).

Among the objective criteria that a “reasonable person” would consider, the context and manner in which police question a suspect looms large. During a criminal investigation, police conduct interviews and interrogations. Within the framework of the Reid Technique, first published by Inbau and Reid (1962), cited by the *Miranda* court, and now in its fifth edition (Inbau, Reid, Buckley, & Jayne, 2013), an interview is a non-accusatory form of questioning designed to gather information and determine if the individual is being truthful or deceptive. If the latter judgment is made, that individual is identified as a suspect and subjected to interrogation—an accusatory, guilt-presumptive process of influence in which trickery and deception are used to elicit a confession. Although these processes may overlap, the distinction serves as a proxy for the factors that constitute custodial and noncustodial questioning.

Despite the pivotal nature of this psychological construct, no empirical research has examined people’s perceptions of custody. Of direct relevance to this inquiry, however, are classic studies of actor–observer differences in attribution, particularly with regard to attributions of freedom. Beginning with Heider’s (1958) Gestalt-inspired hypothesis that “behavior. . . has such salient properties that it tends to engulf the field” (p. 54), attribution theorists have found that observers tend to focus on the actor and overlook contextual factors. As a result of this attentional bias, people routinely commit the fundamental attribution error, or correspondence bias, making dispositional attributions for others’ behavior while underestimating the role of situational factors (Gilbert & Malone, 1995; Jones, 1990; Ross, 1977). In contrast, studies of self-perception indicated that actors focus outward, on aspects of the environment that impinge on their behavior, which leads them to make situational attributions. This divergence in perceptions is known as the actor–observer effect (Jones & Nisbett, 1972; Watson, 1982).

Harvey, Harris, and Barnes (1975) examined the actor–observer effect with specific regard to perceptions of freedom. Their study utilized a “Milgramesque” teacher–learner shock paradigm to test how participants in different roles attribute responsibility and freedom for actions that produce consequences of varying severity. In each session, two participants were randomly assigned to the teacher or observer role, while a confederate, ostensibly in an adjacent room, played the learner. By random assignment, the learner exhibited either moderate or severe distress. At the end of each session, the teacher and observer answered questions about the experience. Results showed that when the learner exhibited more distress, observers attributed more freedom and responsibility to the teacher who, in turn, attributed less freedom and responsibility to themselves.

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