Hastings Law Journal

Volume 64 | Issue 5 Article 5

6-2013

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Recommended Citation

George C. Thomas III, *Lost in the Fog of Miranda*, 64 Hastings L.J. 1501 (2013).
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Lost in the Fog of *Miranda*

GEORGE C. THOMAS III*

For over two centuries, Anglo-American law used a test of "voluntariness" to determine the admissibility of confessions. The twentieth century saw increasing skepticism that law can determine which conscious utterances are "voluntary" and which are not. Suspects who speak to police do so because they choose to speak rather than the alternative. If the alternative is torture, that feels involuntary. But if it is merely a lengthy interrogation, who can "prove" that the choice to answer is involuntary? Miranda v. Arizona *was, in part, the Court's response to this skepticism. If judges cannot tell which utterances are voluntary, why not give control of the interrogation over to the suspect? By telling the suspect that he has a right to silence and a right to consult with counsel, police provide the suspect with choices beyond answering or not answering questions. Thus, any subsequent choice to talk to police is likely voluntary. But* Miranda*'s apparently elegant "free choice" principle has metastasized into a dizzying array of formalistic doctrines and sub-doctrines. This Essay documents the lower court confusion over one of the sub-doctrines—the exception for so-called "booking questions."*

* Rutgers University Board of Governors Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar. I benefitted greatly from editorial assistance and an excellent memorandum on the circuit split on this issue by Lauren Garcia, Rutgers School of Law—Newark, Class of 2013.

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Introduction

The Supreme Court has identified a "booking question" exception to the *Miranda v. Arizona*[1] warning and waiver regime.[2] The notion is that police should not have to give warnings before asking an arrestee his name and address. The Court, however, has never defined what it means by "booking questions."

This Essay will discuss a circuit split on that issue. Three approaches to defining the exception have arisen. I will argue that, oddly enough, the approach that has been adopted by only one circuit is far superior to the other two approaches that have been widely adopted. I will attempt to explain why the circuits that have adopted the other two approaches have become lost in the fog of *Miranda*.

I. Setting the Scene: Our Old Friend *Miranda*

The Warren Court undoubtedly had multiple goals in mind when deciding *Miranda*, its most sweeping—and probably most controversial—criminal procedure case. Chief Justice Warren's opinion for the Court is replete with references to the uneven, and hence unfair, playing field of the police interrogation room. Early in the opinion, the Court accuses the police in the cases before the Court of "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights."[3]

Warren gives many examples from the Inbau-Reid police interrogation manual of techniques that police can use to move suspects to

1. 384 U.S. 436 (1966).
2. *See* Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).
3. *Miranda*, 384 U.S. at 445.

confess when they might otherwise have chosen to remain silent.[4] These include trickery, relentless interrogation, pretending sympathy, and offering legal excuses that turn out not to be valid. A favorite example of trickery is to have fictitious eyewitnesses pick the suspect out of a lineup involving other, more serious offenses.[5] One of the police manuals explains: "It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations."[6]

Warren also describes two of the four appellants in ways intended to evoke sympathy from the reader: "The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade."[7]

The opinion also resoundingly embraces notions of autonomy and freedom from state power. Tracing the Fifth Amendment Self-Incrimination Clause back to John Lilburn and the Whigs, the Court notes:

> We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times. Perhaps the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. He resisted the oath and declaimed the proceedings, stating:
>
> > "Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so."
>
> On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber . . . . We cannot depart from this noble heritage.[8]

But beyond its embrace of autonomy, fairness, and individual liberty, the Court must have intended its comprehensive re-writing of Anglo-American interrogation law to provide more clarity and certainty than the hoary "voluntariness" doctrine that had been around since the 1600s. The notion underlying that doctrine, which appears in a rudimentary form in a 1295 English case,[9] is that confessions that are not

4. *Id.* at 449–55.

5. *See id.* at 453.

6. *Id.*

7. *Id.* at 457.

8. *Id.* at 458–60 (footnote omitted) (citations omitted).

9. Y.B. 23 Edw. 1, fol. RS 543–45, pl. App. II [23] (1295) (Eng.), *available at* http://www.bu.edu/phpbin/lawyearbooks/display.php?id=1171 (Seipp No. 1295.023rs). Richard Leo and I discuss this case

the product of the will of the defendant should not be used to convict him. While the underlying intuition is attractive, the concept is ultimately unsound, if not incoherent. As Wigmore pointed out over a century ago, confessions entail a conscious choice, and thus all confessions "are and must be voluntary."[10] Or, more colorfully, "between the rack and a false confession, the latter would usually be considered the less disagreeable; but it is none the less voluntarily chosen."[11] Aristotle recognized the problem in identifying involuntary human acts when humans choose a disagreeable option: "Such acts, therefore, are voluntary; but in the abstract perhaps involuntary, for no one would choose any such act in itself."[12]

Justice Frankfurter, one of the Court's deepest thinkers, tried to save the Supreme Court's voluntariness doctrine from incoherence. As Louis Seidman has noted, throughout Frankfurter's "long and brilliant career" he "returned to the confession problem with obsessive regularity. The story of his ultimate, utterly abject and deeply personal failure to make sense of the area poignantly embodies all of the difficulties" in the voluntariness inquiry.[13]

In 1961, Frankfurter made a last, valiant effort in *Culombe v. Connecticut*, writing a lengthy, scholarly opinion that sought to create a jurisprudential framework within which the suspect's internal psychological state could be inferred from "external, 'phenomenological' occurrences and events."[14] It was a spectacular failure. Though Frankfurter announced the judgment of the Court, which meant he had been assigned the "majority" opinion, only Justice Stewart joined Frankfurter's opinion.

Chief Justice Warren agreed that the confessions were inadmissible, but refused to join Frankfurter's opinion because it "has not been the custom of the Court . . . to write lengthy and abstract dissertations" when deciding cases.[15] Justices Douglas, Black, and Brennan agreed that the confessions were inadmissible and also refused to join Frankfurter's opinion.[16] Perhaps even more devastating to Frankfurter's attempt to

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in GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND 24–26 (2012).

10. 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 824, at 145 (2d ed. 1923).

11. *Id.*

12. 2 THE COMPLETE WORKS OF ARISTOTLE, bk. III, § 1, at 1752–53 (Jonathan Barnes ed., 1984).

13. *See* Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 729–30 (1992) (footnote omitted).

14. 367 U.S. 568, 603 (1961).

15. *Id.* at 635–36 (Warren, C.J., concurring).

16. *See id.* at 637 (Douglas, J., concurring); *id.* at 641 (Brennan, J., concurring). The opinions of Chief Justice Warren and Justice Douglas are labeled as "concurring" opinions, but they both make clear that they are not joining Frankfurter's opinion. *Id.* at 636, 639–41.

bring clarity to the confessions problem, Justices Harlan, Clark, and Whittaker *accepted* his analytical structure and reached precisely the opposite conclusion—that the confession was voluntary: "The Justices who concurred on an analytical framework for resolving the problem disagreed on the result . . . while the Justices who concurred on the result disagreed on the analytic framework producing that result. In short, the *Culombe* opinion was a total disaster."[17] If Aristotle, Wigmore, and Frankfurter could not make sense of the voluntary/involuntary distinction when it came to conscious choices, no one was going to succeed.

Miranda was the new broom that sweeps clean. The Court admitted that in "these cases, we might not find the defendants' statements to have been involuntary in traditional terms,"[18] and it explicitly replaced the voluntariness test with an elaborate requirement to ensure that suspects chose to answer police questions in an exercise of their will. Thus the Court required police, prior to custodial interrogation, to provide the now-famous warnings of the right to remain silent and the right to counsel. At one level, *Miranda* succeeded brilliantly. In the vast majority of cases, police give the warnings, the suspect waives the rights, and the resulting statements are introduced without an argument about whether they were voluntary.[19] Simplicity and clarity are achieved.

Where *Miranda* has failed to achieve simplicity and clarity, however, is in the vast doctrinal web that the Supreme Court has spun over the last half century while working out the details of the *Miranda* regime. "Custody" and "interrogation" had to be defined in a series of cases.[20] Waiver has, until recently, proved to be a doctrinally thorny problem.[21] We learned that the failure to give warnings did not usually poison later statements after warnings were belatedly given.[22] We learned that

17. Seidman, *supra* note 13, at 733.

18. Miranda v. Arizona, 384 U.S. 436, 457 (1966).

19. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 858–62 (1996); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 282–83 (1996); George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1962–74 (2004).

20. *See generally* Howes v. Fields, 132 S. Ct. 1181 (2012) (custody); J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (custody); Maryland v. Shatzer, 559 U.S. 98 (2010) (custody); Berkemer v. McCarty, 468 U.S. 420 (1984) (custody); South Dakota v. Neville, 459 U.S. 553 (1983) (interrogation); Rhode Island v. Innis, 446 U.S. 291 (1980) (interrogation); Oregon v. Mathiason, 429 U.S. 492 (1977) (custody).

21. *See generally Shatzer*, 559 U.S. 98; United States v. Patane, 542 U.S. 630 (2004); Davis v. United States, 512 U.S. 452 (1994); Minnick v. Mississippi, 498 U.S. 146 (1990); Colorado v. Spring, 479 U.S. 564 (1987); Moran v. Burbine, 475 U.S. 412 (1986); Oregon v. Bradshaw, 462 U.S. 1039 (1983); Edwards v. Arizona, 451 U.S. 477 (1981); North Carolina v. Butler, 441 U.S. 369 (1979); Michigan v. Mosley, 423 U.S. 96 (1975). *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), has largely solved the doctrinal problem by holding that the State proves waiver when a suspect is given warnings, there is no evidence that he does not understand the warnings, and he answers police questions.

22. *See* Oregon v. Elstad, 470 U.S. 298 (1985).

physical evidence is admissible even if found by virtue of statements made without warnings.[23] We learned that there is an exception for situations where public safety is threatened; no warnings are necessary in those situations.[24] I turn now to the booking question exception.

II. Establishing, and Complicating, an Exception to *Miranda*

The Court told us in dicta in 1980, and in a later plurality opinion, that there is an exception to the *Miranda* requirement of warnings and waiver for "booking questions."[25] My thesis is that the *Miranda* doctrinal web has become so complex that most courts have lost sight of the reason that there is a booking question exception in the first place. If courts cannot reason their way through the relatively simple notion of a booking question exception, one wonders how well they are applying the other complex doctrines and sub-doctrines of *Miranda*. This raises the possibility that while *Miranda* can be judged a success at the pragmatic, day-to-day level, it might be as much a doctrinal failure as the voluntariness test that it replaced.

A. The Exception Emerges

To understand the booking question exception, it helps to begin with *Miranda*. Warnings are not required for every interaction between police and potential suspects, but are only required when the police conduct custodial interrogation. It is custodial interrogation that the Court identified as the cause of the inherent compulsion that potentially deprives suspects of the "free choice" to decide whether to answer police questions. Custody is generally going to be present in every case where a suspect is asked booking questions after being arrested, so the issue becomes whether booking questions constitute "interrogation" for purposes of *Miranda*.

The Court defined "interrogation" in *Rhode Island v. Innis* as not only "express questioning" but also "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[26] That leaves open the issue of how to determine whether questions are considered "normally attendant to arrest and custody" and thus exempt from the *Innis* definition of interrogation.

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23. *See generally Patane*, 542 U.S. 630.
24. *See generally* New York v. Quarles, 467 U.S. 649 (1984); *Innis*, 446 U.S. 291.
25. *See generally* Pennsylvania v. Muniz, 496 U.S. 582 (1990); *Innis*, 446 U.S. 291.
26. *Innis*, 446 U.S. at 301.

B. THE EXCEPTION CLOUDS: *PENNSYLVANIA V. MUNIZ*

Part of the complexity results from *Pennsylvania v. Muniz*,[27] a badly split 1990 opinion that failed to clarify the scope of the "booking question" category. Eight members of the Court agreed that the answers to seven routine booking questions—questions that elicited answers about the suspect's name, address, height, weight, eye color, date of birth, and current age—were admissible.[28] But the Court split 4–4 as to why (Justice Marshall dissented).

Justice Brennan, who announced the opinion of the Court, would have held that the answers were admissible because they "fall within a 'routine booking question' exception which exempts from *Miranda*'s coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.'"[29] The plurality also embraced the view of the state court "that the first seven questions were 'requested for record-keeping purposes only,' and therefore the questions appear reasonably related to the police's administrative concerns."[30] This rationale seems consistent with the language from *Innis* suggesting an exception to the "should-have-known" rule for questions "normally attendant to arrest and custody." But five members of the Court rejected the plurality's view.

Justice Marshall, writing alone, said the booking question exception

> would necessitate difficult, time-consuming litigation over whether particular questions asked during booking are "routine," whether they are necessary to secure biographical information, whether that information is itself necessary for recordkeeping purposes, and whether the questions are—despite their routine nature—designed to elicit incriminating testimony.[31]

Instead, Marshall would have opted for a rule that was faithful to "*Miranda*'s fundamental principle that the doctrine should be clear so that it can be easily applied by both police and courts."[32] Thus, the "far better course would be to maintain the clarity of the doctrine by requiring police to preface all direct questioning of a suspect with *Miranda* warnings if they want his responses to be admissible at trial."[33]

But Marshall wrote alone. Chief Justice Rehnquist, like Brennan writing for four members of the Court, raised more complex objections to the plurality's booking question exception. Rehnquist argued that answers to questions seeking information do not expose the suspect to

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27. 496 U.S. 592.

28. *See id.* at 590–92.

29. *Id.* at 601 (citing Brief for the United States as Amicus Curiae Supporting Petitioner at 12, *Muniz*, 496 U.S. 592 (No. 89-213)).

30. *Id.* at 601–02 (citation omitted).

31. *Id.* at 610 (Marshall, J., concurring in part and dissenting in part).

32. *Id.* at 609.

33. *Id.* at 610.

the classic "trilemma" that the Fifth Amendment privilege is supposed to avoid.[34] In a classic privilege situation, the witness who is under oath is asked a question that might require an incriminating response. As the Court observed in *Murphy v. Waterfront Commission of New York Harbor*,[35] this witness can tell the truth and incriminate himself, testify falsely and commit perjury, or remain silent and face contempt of court. The Fifth Amendment privilege protects the latter option and thus avoids the trilemma.

Rehnquist said that suspects asked informational questions are not subject to this trilemma. In his view, the suspect will not be compelled to state a falsehood about his age or name: "Muniz would no more have felt compelled to fabricate a false [answer] than one who cannot read the letters on an eye chart feels compelled to fabricate false letters; nor does a wrong guess call into question a speaker's veracity."[36] In sum, "the potential for giving a bad guess does not subject the suspect to the truth-falsity-silence predicament that renders a response testimonial and, therefore, within the scope of the Fifth Amendment privilege."[37] Because asking routine questions does not, in the view of four members of the *Muniz* Court, subject a suspect to a threat of compelled self-incrimination, "it is unnecessary to determine whether the questions fall within the 'routine booking question' exception to *Miranda* Justice Brennan recognizes."[38]

The Rehnquist opinion is a puzzle. The aspects of routine questioning that led him to find that it does not threaten compulsory self-incrimination are the same aspects that presumably led Justice Brennan to conclude that routine booking questions are an exception to *Miranda*, yet Rehnquist, speaking for four justices, refused to join the booking question part of Brennan's opinion. Thus, there is technically no majority opinion on Brennan's routine booking question exception, but eight members of the Court recognized that routine questions do not threaten the Fifth Amendment privilege. I think it is fair to say that there is a "holding" that routine questions do not trigger Fifth Amendment privilege protections.

So as of the Court's last word on routine questions and the Fifth Amendment privilege, here is where we stand: The Court suggested in dicta in *Innis* that questions "normally attendant to arrest and custody" do not fall within *Miranda*, while eight members of the Court in *Muniz*

34. *Id.* at 606 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

35. 378 U.S. 52, 55 (1964).

36. *Muniz*, 496 U.S. at 606 (Rehnquist, C.J., concurring in part, concurring in the result in part, and dissenting in part).

37. *Id.* at 608.

38. *Id.*

held that routine questions do not implicate the Fifth Amendment privilege. The reason is that suspects do not feel the same pressure to answer routine booking questions as questions targeted to whether they have committed crime. It is a sensible exception to *Miranda* and the Fifth Amendment privilege.

And how have lower courts responded to this sensible doctrinal move on the part of the Supreme Court? Like a child lost in the fog.

C. Divergent Approaches Ensue: *Alford v. Texas*

The circuit courts of appeals have used three different approaches to resolve that issue in the "booking questions" context. To illustrate these divergent approaches—and the issues that they raise—consider a case where the Supreme Court recently denied certiorari, *Alford v. Texas*.[39]

During the evening of January 29, 2009, police observed Cecil Alford getting out of a vehicle with an open container of beer in his hand.[40] Police approached Alford and asked him if he had any narcotics on him. He denied having any drugs or weapons on his person but began to back away. Police then informed Alford that he was being detained and was not free to leave. When Alford attempted to flee, the officers arrested him for evading arrest and drove him to the police station.[41]

One of the officers noticed Alford squirming in the back seat. Alford claimed it was because his side hurt. After taking Alford out of the patrol car, the officers searched the back seat, pursuant to departmental procedure, and discovered a computer thumb drive ("flash drive") directly beneath a clear plastic bag containing pills.[42]

The officers then escorted Alford to the booking area. While Alford was being searched by facility personnel, an officer held up the flash drive and, without providing *Miranda* warnings, asked what it was and whether it belonged to him.[43] Alford responded that it was a memory drive and that it belonged to him. The flash drive was not identified as evidence. Rather, it was placed with Alford's other personal property. The pills, however, were identified as evidence, sent away for analysis, and revealed to be more than four grams of ecstasy.[44]

Alford filed a pretrial motion to exclude his responses to the questions regarding the flash drive on the grounds that the questioning constituted custodial interrogation and that the failure to provide *Miranda*

39. Alford v. Texas, 133 S. Ct. 122 (2012).
40. Alford v. State, 358 S.W.3d 647, 650 (Tex. Crim. App. 2012).
41. *Id.*
42. *Id.*
43. *Id.* at 650–51.
44. *Id.* at 651.

warnings made his responses inadmissible.[45] The trial court denied the motion and admitted his responses, emphasizing that the flash drive was never identified as evidence and concluding that the officer was asking routine questions to process Alford's personal property.[46] At trial, the prosecution introduced Alford's statements regarding the flash drive to establish his possession of the bag of ecstasy, and the jury convicted him of possession of a controlled substance.[47] On appeal, the court of appeals concluded that the trial court had not abused its discretion by admitting Alford's statements because they were made during normal, administrative processing.[48]

The Texas Court of Criminal Appeals—the highest court for criminal appeals in Texas—affirmed, holding that the test is "whether the question reasonably relates to a legitimate administrative concern, applying an objective standard."[49] It further held that if a question lacks a legitimate administrative concern, then the trial court should determine the admissibility of the statement "under the general should-have-known test for custodial interrogation" from *Innis*.[50]

The Texas court acknowledged that other courts had taken different approaches that could be grouped into two categories.[51] First, some courts apply the basic definition of interrogation from *Innis*: "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[52] This is essentially an objective test, though *Innis* conceded that the officer's subjective intent could be relevant to the objective question.[53] Second, some courts apply a subjective test that turns on whether the officer intended to evoke an incriminating response.[54]

Almost all courts follow either the basic *Innis* test or the intent test when identifying when questions are subject to the booking question exception. As I will seek to show in the rest of this Essay, I believe that these courts have simply gotten lost in the fog of the ultra-complex *Miranda* doctrine.

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45. *Id*.
46. *Id.* at 652; *see id.* at 652 n.7.
47. *Id.* at 652.
48. *Id.*
49. *Id.* at 659–60.
50. *Id.* at 661.
51. *Id.* at 658–59.
52. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).
53. *Id.* at 301 n.7.
54. *Alford*, 358 S.W.3d at 658–59.

III. Comparing the Tests

As the Texas Court of Criminal Appeals explained in *Alford*, the courts have fractured into three approaches.[55] Some define the exception from an objective point of view—that is, whether the officer asking the booking question should have known it was likely to elicit an incriminating response.[56] Other courts consider the particular officer's subjective intent, asking whether he or she intended to draw out an incriminating response from the suspect.[57] Finally, and least common, is the approach of the D.C. Circuit Court of Appeals.[58] That court, like the *Alford* court in Texas, asks simply whether the *question* was reasonably related to a "legitimate administrative concern."[59] As discussed below, this last, least-followed approach logically—and most accurately—flows from Supreme Court precedent and provides the simplest path out of this confused corner of *Miranda*.

A. Objective Should-Have-Known Test

In his petition for certiorari, Alford characterized the objective test from *Innis* as the appropriate standard and also the majority approach. Five U.S. courts of appeals[60] and twelve state high courts[61] have adopted the standard. The formulation itself is straight out of *Innis*: "[T]he inquiry into whether the booking exception is thus inapplicable is actually an objective one: whether the questions and circumstances were such that the officer should reasonably have expected the question to elicit an incriminating response."[62] The Eighth Circuit explained:

> A request for routine information necessary for basic identification purposes is not interrogation under *Miranda*, even if the information turns out to be incriminating. Only if the government agent should reasonably be aware that the information sought, while merely for basic identification purposes in the usual case, is directly relevant to the substantive offense charged, will the question be subject to scrutiny.[63]

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55. *Id.* at 658.

56. *Id.* at 655.

57. *See id.* at 655–56.

58. *See id.* at 658.

59. *Id.* at 657.

60. Including the First, Second, Sixth, Eighth, and Ninth Circuit courts of appeals. *See* Petition for a Writ of Certiorari at 10–11, *Alford*, 358 S.W.3d 647 (No. 11-1318).

61. Including Delaware, Georgia, Indiana, Iowa, Maine, Maryland, Massachusetts, New York, North Carolina, Tennessee, Vermont, and Wisconsin. *Id.*

62. United States v. Reyes, 225 F.3d 71, 76–77 (1st Cir. 2000) (citing United States v. Doe, 878 F.2d 1546, 1551 (1st Cir. 1989)).

63. United States v. Brown, 101 F.3d 1272, 1274 (8th Cir. 1996) (citing United States v. McLaughlin, 777 F.2d 388, 391–92 (8th Cir. 1985)).

The First Circuit provided three examples of when an officer asking a routine booking question might be charged with the knowledge that it might elicit incriminating evidence:

> For example, asking a person's name might reasonably be expected to elicit an incriminating response if the individual were under arrest for impersonating a law enforcement officer or for some comparable offense focused on identity; likewise, asking an individual's date of birth might be expected to elicit an incriminating response if the individual were in custody on charges of underage drinking; and questions about an individual's Social Security number might be likely to elicit an incriminating response where the person is charged with Social Security fraud. In such scenarios, the requested information is so clearly and directly linked to the suspected offense that we would expect a reasonable officer to foresee that his questions might elicit an incriminating response from the individual being questioned.[64]

In *United States v. Mata-Abundiz*,[65] the defendant was arrested and charged with possession of a firearm by an alien.[66] After serving ten days in jail, the defendant was questioned by an Immigration and Naturalization Services ("INS") criminal investigator who was aware of the charges but did not provide a *Miranda* warning.[67] The investigator asked the defendant about his citizenship, and the defendant replied that he was a citizen of Mexico.[68] The Ninth Circuit determined that the booking exception did not apply because the investigator's questioning was reasonably likely to elicit an incriminating response—given that the defendant's alienage constituted an essential element of the crime for which he was charged.[69] The court also emphasized the fact that the questioning took place ten days *after* the suspect arrived at the jail and, therefore, did not resemble a routine booking procedure.[70]

In *United States v. Brown*,[71] by comparison, asking the suspect his name at the scene of the arrest was held not to be interrogation. The Eighth Circuit noted that the asking for "routine biographical data" is not interrogation but then embraced what it had written in an earlier case: "Only if the government agent should reasonably be aware that the information sought, while merely for basic identification purposes in the usual case, is directly relevant to the substantive offense charged, will the questioning be subject to scrutiny."[72] Thus the booking question exception,

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64. *See Reyes*, 225 F.3d at 77.
65. 717 F.2d 1277 (9th Cir. 1983).
66. *Id.* at 1278.
67. *Id.*
68. *Id.*
69. *Id.* at 1280.
70. *Id.*
71. 101 F.3d 1272 (8th Cir. 1996).
72. *Id.* at 1274 (quoting United States v. McLaughlin, 777 F.2d 388, 391–92 (8th Cir. 1985)).

as understood by the Eighth Circuit, is that requests for routine biographical data qualify unless the officer "should reasonably be aware" that the answers might be incriminating. In effect, this makes the *Innis* test the only one that matters. If the defense can show that the officer should have known that a routine question would produce an incriminating response, then the routine nature of the question does not matter.

The reader might wonder what is wrong with applying the *Innis* objective test in the booking context. The results in *McLaughlin* and *Mata-Abundiz* seem intuitively appealing. The doctrinal problem is that applying *Innis* renders incoherent the dicta in *Innis* that stated the standard for determining when questions constituted interrogation. Recall that the Court said that interrogation consisted of "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[73] If the *Innis* test will do for all questioning, then the parenthetical is unnecessary. More importantly, courts that apply the *Innis* objective test to routine booking questions are ignoring the holding in *Muniz*. Whatever the full scope of the overlap between the plurality and the opinion concurring in the result, the overlap necessarily exempts routine questions from *Miranda* and the Fifth Amendment privilege. If the question is a routine one, under the combined opinions in *Muniz*, then *Innis* does not apply.[74] To subject those questions to *Innis* is, well, to be lost in a fog.

The pragmatic problem with applying *Innis* to these routine questions is that it does not work very well. In *United States v. Reyes*,[75] Reyes was interviewed by an INS agent—assigned to work with the Drug Enforcement Administration ("DEA")—for the purpose of booking him on drug charges.[76] The INS agent asked Reyes a series of questions directly from a DEA personal history form, including his name, where he was born, and his social security number.[77] Reyes provided the agent with false information for each question, was subsequently convicted of making a false statement to a government agent, and sought to have his false responses suppressed on *Miranda* grounds.[78] The First Circuit found that the questions fell within the ambit of the *Miranda* booking exception

73. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

74. To be sure, there is a troubling footnote in the plurality opinion, which exempts from the routine questioning exception questions "that are designed to elicit incriminatory admissions." *See* Pennsylvania v. Muniz, 496 U.S. 582, 602 n.14 (1990). This has no effect on the holding that the *Innis* test is inappropriate in the booking question context, and I will discuss it in Part III.B, which deals with the subjective intent test.

75. 225 F.3d 71 (1st Cir. 2000).

76. *Id.* at 74.

77. *Id.*

78. *Id.* at 75.

because the questions came directly from the DEA booking form and because the questions could not "reasonably be expected to elicit an incriminating response."[79] The First Circuit was untroubled by the agent's admission that he suspected the defendant might not be a citizen.[80]

Since the INS agent was reading booking questions from an official form, a court can easily hold that these questions do not implicate the Fifth Amendment privilege. One gets there either from the plurality in *Muniz* or Rehnquist's opinion concurring in the result in *Muniz*. But to get that result under *Innis* requires a sleight of hand. A good marker for what an officer should have known about whether his question was likely to elicit an incriminating response, the *Innis* test, is whether he believes that the suspect will provide a false answer. Just what would an INS agent expect a suspect to do when the agent believes he is not a citizen and then asks where he was born? To pretend that this question does not violate the *Innis* standard is disingenuous. And it is unnecessary because *Muniz* settles the issue by avoiding the *Innis* standard entirely.

But if the courts that apply *Innis* are missing how *Muniz* clarifies *Innis*, the courts that apply the subjective intent test are missing the plurality status of *Muniz*.

B. Subjective Intent Test

As an alternative standard, Alford identified the subjective standard known as the intent test adopted by four U.S. courts of appeals[81] and five state high courts.[82] The standard itself is derived from footnote fourteen in the *Muniz* decision, which stated that the booking exception does not allow police to "ask questions, even during booking, that are designed to elicit incriminatory admissions."[83] Both the Fifth and the Tenth circuit courts have cited directly to the *Muniz* footnote to preface their subjective intent analysis.[84]

In *United States v. Virgen-Moreno*, the Fifth Circuit found that the questions asked were designed to elicit incriminatory admissions and therefore did not fall within the *Miranda* routine booking exception.[85]

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79. *Id.* at 77.

80. *Id.*; *see* United States v. Brown, 101 F.3d 1272 (8th Cir. 1996) (holding that the *Miranda* booking exception applied where the arresting officer asked the defendant his name and the defendant provided a fake name, because the defendant's name was not directly relevant to the substantive drug crime charged).

81. Including the Fourth, Fifth, Tenth, and Eleventh Circuit Courts of Appeals. *See* Petition for a Writ of Certiorari, *supra* note 60, at 12–13.

82. Including Florida, Illinois, Kentucky, New Hampshire, and Oklahoma. *See id.*

83. *See* Pennsylvania v. Muniz, 496 U.S. 582, 602 n.14 (1990).

84. *See* United States v. Virgen-Moreno, 265 F.3d 276, 293–94 (5th Cir. 2001); *see also* United States v. Parra, 2 F.3d 1058, 1068 (10th Cir. 1993).

85. *Virgen-Moreno*, 265 F.3d at 294.

The defendant divulged incriminating information about his past residences during an interview to obtain information required by a 202 Personal Background Form.[86] The court concluded that the agents subjectively intended to elicit incriminating information from the defendant because they repeatedly asked the defendant whether he lived at certain addresses—one of which was later linked to the charged conspiracy—and once the agents were able to get the defendant to admit that he lived at one of the addresses, they asked him several additional questions to determine how long he had lived there.[87] The Fifth Circuit explicitly based its holding on *Muniz* footnote fourteen, even though as the citation reveals, the court knew that it was a plurality opinion.[88]

The Tenth Circuit also cited to the *Muniz* footnote fourteen in its booking exception analysis in *United States v. Parra*, but it confused the analysis by citing a Ninth Circuit decision which adopted the should-have-known standard.[89] As a result, it is unclear whether the court employed a strict subjective intent standard, an objective should-have-known standard, or a combination of the two. The facts satisfy either standard because the INS agent admitted that he intended to elicit an incriminating response when he asked the defendant his real name, which he knew to be linked to an incriminating immigration file.[90] Consequently, the court did not have to engage in any factual analysis as to whether the agent subjectively intended to elicit the incriminating response or should have known it was reasonably likely to do so. And so it remains unclear whether the Tenth Circuit has actually adopted the subjective intent standard.

While these courts are reading footnote fourteen properly, they ignore that there is nothing in *Muniz* to suggest that there is a majority supporting footnote fourteen. Indeed, there is quite the opposite. For Rehnquist, the key to the admissibility of answers to routine questions is that the suspect would not feel the compulsive pressure of the trilemma that the privilege is designed to avoid. But this suspect-centered lens has nothing at all to do with the intent of the person asking the question. Because the Court in *Innis* made clear that the intent of the interrogator was, at best, marginally relevant to the definition of interrogation, it is remarkable that lower courts use a footnote in a later plurality opinion to

86. *Id.* at 293. A 202 Personal Background Form is a standard two-page form completed by Drug Enforcement Administration agents at the time of an arrest, which identifies the person being arrested and sets forth the actions being taken against them. Butler v. U.S. Dep't of Justice, 368 F. Supp. 2d 776, 786 (E.D. Mich. 2005).

87. *Virgen-Moreno*, 265 F.3d at 294.

88. *Id.*

89. *See Parra*, 2 F.3d at 1068.

90. *Id.* at 1067.

deviate from that clarity. After *Innis* formulated the "reasonably likely to elicit an incriminating response from the suspect" definition, the Court said:

> The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police.[91]

It is difficult to be much clearer than that. That some lower courts apparently believe a footnote in a plurality opinion is sufficient to ignore the clear language of *Innis* raises a jurisprudential question. Can a clear statement in a plurality opinion somehow "overrule" clear dicta in an earlier majority opinion? I think the answer to that is no. The statement in the plurality opinion is dicta, and I would think that dicta endorsed by six members of the Court in *Innis* should be given more weight than dicta endorsed by only four justices.

If subjective intent is not the right standard, and if *Innis* suggests that the should-have-known test is inappropriate for routine booking questions, then what approach is left? The Texas Court of Criminal Appeals wins my prize for the best analysis.

C. Legitimate Administrative Concern Standard

To determine whether a statement is admissible under the *Miranda* booking exception, the Texas Court of Criminal Appeals held that "a trial court must determine whether the question reasonably relates to a legitimate administrative concern, applying an objective standard."[92] The court provided four main reasons for adopting the legitimate administrative concern standard, as opposed to the general should-have-known standard.

First, the court noted that imposing the alternative should-have-known standard would render the *Miranda* booking exception a nullity.[93] It would require courts to analyze booking questions precisely the same way that they would analyze any other question. Second, the court reasoned that applying the should-have-known test ignores the express language set forth in *Innis*, which excluded questions that are "normally attendant to arrest and custody" from the meaning of custodial interrogation, giving rise to the *Miranda* booking exception.[94]

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91. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).
92. Alford v. State, 358 S.W.3d 647, 659–60 (Tex. Crim. App. 2012).
93. *Id.* at 660.
94. *Id.* (quoting *Innis*, 446 U.S. at 301).

Third, the court addressed the contents of footnote fourteen in the *Muniz* plurality opinion and determined it could not possibly be interpreted as requiring courts to employ a should-have-known standard to routine booking questions because that reading would negate all of the booking exception analysis set forth in the text of the plurality opinion itself.[95] Lastly, the court pointed out that the applicable "legitimate administrative concern" standard affords law enforcement administrative efficiency; it allows them "to quickly and consistently administer booking procedures" and to "ensure the safety of facility personnel and other inmates, as well as the suspect."[96] By contrast, the should-have-known standard would have a burdensome effect on law enforcement because they would be required to analyze every single booking question before asking it in order to determine whether it is likely to elicit an incriminating response.[97]

Applying the "legitimate administrative concern" standard to the underlying facts of the case, the court found "that the totality of the circumstances objectively show that [the officer's] questions were reasonably related to a legitimate administrative concern."[98] As a result, Alford's responses to those questions were properly admissible against him. The court emphasized that law enforcement has a legitimate interest in the identification and storage of an inmate's property, as the Texas Administrative Code requires inmate property to be inventoried, recorded, and stored upon intake.[99] Here, the relevant question pertained to whether the non-contraband item found in the back seat of the patrol car belonged to Alford.[100] The court emphasized that the officer asked Alford the questions *while* booking him into jail, as well as the fact that after he confirmed that the flash drive belonged to Alford, it was immediately placed with his personal property for safekeeping by facility personnel.[101] Additionally, the court noted that, in the Fourth Amendment context, the Supreme Court has determined that it is reasonable for police to search a person's personal effects during booking and jailing as part of routine administrative procedure.[102]

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95. *Id.*

96. *Id.* at 661.

97. *Id.* Alford never asserted that the officer subjectively intended to elicit an incriminating statement from him when he asked whether the flash drive belonged to him. *Id.* at 660 n.27. The Texas court thus did not consider the subjective intent standard—whether there is an additional limit to the *Miranda* booking exception when a questioning officer actually intends to use a routine question to elicit an incriminating response. *Id.*

98. *Id.* at 662.

99. *Id.* at 661.

100. *Id.* at 662.

101. *Id.*

102. *Id.* at 661 (citing Illinois v. Lafayette, 462 U.S. 640, 643 (1983)).

The "legitimate administrative concern" standard avoids the doctrinal embarrassments of the other two standards. And it does so at no cost. It seems to reach the same result in the cases applying the other two approaches.

In *United States v. Mata-Abundiz*, the Ninth Circuit rejected the government's booking-exception argument after applying the objective, should-have-known test.[103] But the court emphasized the fact that the questioning took place ten days *after* the suspect arrived at the jail and, therefore, did not bear the semblance of a routine booking procedure.[104] That is enough to show that the questioning did not sufficiently relate to a legitimate administrative concern; there is no need to apply the should-have-known standard to rule that the answer was inadmissible as a booking question.

In *United States v. Reyes*, the agent asked Reyes a series of questions directly from a DEA personal history form for the purpose of booking him.[105] That is enough to bring the questions within the "legitimate administrative concern" standard, and there is no need to worry about the fact that the agent suspected that Reyes might not be a citizen.

The key facts in *United States v. Virgen-Moreno* were that the interview was conducted after the defendant was booked and that the agents repeatedly challenged his answers when he did not initially give an address that would have incriminated him.[106] The Fifth Circuit found that the questions asked were designed to elicit incriminatory admissions and therefore did not fall within the *Miranda* routine booking exception.[107] True enough, but why not just say that questioning that is post-booking and has an adversarial quality is not related to a legitimate administrative concern? Similarly, in *United States v. Parra*, the agent questioned a suspect, not while he was being booked, but prior to his making bond.[108] The agent admitted that he tricked the suspect into confessing that he had given a false name when initially booked.[109] The Tenth Circuit seemed to hold that this intent took the questions out of the booking exception, but it is much easier to say that questioning a suspect after booking and before he makes bond does not relate to a legitimate administrative concern.

Thus the Texas approach to the booking question exception seems to me far superior to the other approaches, both as a doctrinal and as a

103. 717 F.2d 1277, 1280 (9th Cir. 1983).
104. *Id.*
105. 225 F.3d 71, 74 (1st Cir. 2000).
106. 265 F.3d 276, 294 (5th Cir. 2001).
107. *Id.* at 293–94.
108. 2 F.3d 1058, 1067 (10th Cir. 1993).
109. *Id.*

policy matter. Yet it has been adopted only by the D.C. Circuit Court of Appeals.[110] Only one of two explanations is possible. First, I might be wrong. The reader can make that judgment for herself. But if I am right, then it must be that the other circuits have simply lost their way in the *Miranda* fog that the Court has created. The circuit courts adopting either the subjective or objective test have lost sight of the reason to have a booking exception in the first place: to permit police to ask questions required for the administrative task of booking the suspect. Since that is the reason, then why would anyone care about either the objective or subjective intent of the officer asking the question?

The fault might not lie with the courts of appeals. In its effort to replace the failed voluntariness test, the Supreme Court has created a complex universe. Indeed, the Court itself has sometimes lost its way in the universe of its creation. Recall that *Miranda*'s avowed purpose was to negate the inherent compulsion that is created by custodial police interrogation. Yet in *Innis*, the Court conceded that the police tactics created "subtle compulsion" and then proceeded to hold that *Miranda* was not violated because the police tactic did not rise to the level of interrogation *as defined by Miranda*.[111] In effect, *Innis* replaced the language of the Fifth Amendment (no person "shall be compelled in any criminal case to be a witness against himself")[112] with the language in *Miranda* interpreting the Fifth Amendment. Consider the following—remarkable—passage from *Innis*:

> [I]t may be said, as the Rhode Island Supreme Court did say, that the respondent was subjected to "subtle compulsion." But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response.[113]

Thus, if *Miranda* is not violated, the use of compulsion is not a Fifth Amendment violation.

The Court's confusion in *Innis* and the confusion surrounding the booking question exception that this Essay has detailed are a vindication of a view that Justice Thomas expressed in a dissent in a double jeopardy case in 1992:

> Our constitutional law has become ever more complex in recent decades. That is, in itself, a regrettable development, for the law draws force from the clarity of its command and the certainty of its application. As the complexity of legal doctrines increases, moreover, so too does the danger that their foundational principles will become

110. *See generally* United States v. Gaston, 357 F.3d 77 (D.C. Cir. 2004).

111. Rhode Island v. Innis, 466 U.S. 291, 292 (1980).

112. U.S. CONST. amend. V.

113. *Innis*, 446 U.S. at 303.

> obscured. I fear that danger has been realized here. So engrossed is the Court in applying the multifactor balancing test set forth in *Barker* that it loses sight of the nature and purpose of the speedy trial guarantee set forth in the Sixth Amendment.[114]

CONCLUSION

The lower courts on the booking question exception have, I think, lost sight of the reason the Court recognized an exception in the first place. The exception exists because that process, by definition, does not pose the same risk of compulsion as police interrogation. Once we are clear about the goal, once we clear away a bit of the *Miranda* fog, we can see that the Texas approach is the right one.

I agree with the implicit assumption of the Court in *Miranda* that the voluntariness test was not doing a satisfactory job identifying statements that should be suppressed because of police compulsion. I think, for all its faults, *Miranda* probably does a better job ensuring that most statements made to police are not the product of compulsion. To be sure, many scholars have documented some spectacular failures of *Miranda*,[115] but in the ordinary, run-of-the-mill case, I think it is better suited for the compulsion task than the voluntariness test (although this may well be damning with faint praise). What has been lost is the explicit focus on the goal of keeping compelled statements from being used against the accused. Innis was subjected to "subtle compulsion," but his statements were admitted anyway. The Court has achieved (relative) precision at the cost of confused thinking.

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114. Doggett v. United States, 505 U.S. 647, 669 (1992) (Thomas, J., dissenting) (referring to Barker v. Wingo, 407 U.S. 514, 530 (1972)).

115. To save space, I cite only my favorite example, *Chavez v. State*, 832 So. 2d 730 (Fla. 2002), uncovered and brilliantly analyzed in Alfredo Garcia, *Is* Miranda *Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461 (1998).