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### When Is Police Interrogation Really Police Interrogation? A Look at the Application of the Miranda Mandate

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# WHEN IS POLICE INTERROGATION REALLY POLICE INTERROGATION? A LOOK AT THE APPLICATION OF THE *MIRANDA* MANDATE\*

*Paul Marcus*<sup>+</sup>

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It seemed so clear a half-century ago. After years of frustration reviewing the voluntariness of confessions on a case-by-case basis,<sup>1</sup> a Supreme Court majority

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\* © Paul Marcus, 2020. A version of this paper was presented in October 2019 at The Catholic University of America, Columbus School of Law.

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1. This line of cases was decided under the Due Process Clause. In each of its many cases in the 1950s and 1960s, the Court felt obliged to review the record in its entirety to determine whether the police engaged in coercive behavior. The leading case remains *Spano v. New York*, 360 U.S. 315 (1959). There, in finding the confession involuntary, the Court relied upon more than a dozen factors. They included, among others, that the defendant:

- was foreign born
- had no prior experience in the criminal justice system
- was a high school dropout
- was emotionally unstable
- was questioned for eight hours
- did not give a narrative statement
- was pressured into speaking by a friend of his who was directed by the police

*Id.* at 321–23. The record number of relied-upon factors I and my research team could find is 17 (yes, 17!) in *United States v. Jacques*, 744 F.3d 804 (1st Cir. 2014). *See generally*, Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U.L. REV. 601, 640–42 (2006) (discussing the factors considered in finding a confession to be involuntary as a matter of law).

in *Miranda v. Arizona* held that incriminating statements resulting from interrogation while in custody would not be admissible at trial to prove guilt unless warnings were given to advise a suspect of rights of silence and an attorney.<sup>2</sup> It is disappointing to report that if anything has been established over the past 50 years, it is that this mandate isn't clear at all. It turns out that police officers do not necessarily give exactly the warnings suggested by Chief Justice Warren back then.<sup>3</sup> Although a person formally under arrest is no doubt in custody, many other individuals questioned by uniformed and armed law enforcement officers may not be viewed as being in custody.<sup>4</sup>

This article looks at the confusion created by the direction that restrictions imposed by the Supreme Court apply only when a suspect in custody is being interrogated. The notion of *interrogation* has become muddled and has been applied inconsistently. This short piece is not aimed at the broad policy concerns regarding *Miranda*,<sup>5</sup> nor whether the definition found in the case itself, as written

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2. 384 U.S. 436, 440 (1966). Statements taken in violation of *Miranda* can be used to impeach the in-court testimony of the suspect if she takes the stand and denies the commission of the charged offense. *Harris v. New York*, 401 U.S. 222, 226 (1971).

3. The Supreme Court on several occasions has allowed warnings which appeared to offer somewhat less information than that which appear to be required under *Miranda*. *See*:

- *Florida v. Powell*, 559 U.S. 50, 53–54 (2010)—officers told suspect of “the right to talk to a lawyer before answering any of [the officers’] questions,” and that the defendant would “have the right to use any of these rights at any time [he] want[ed] during [the] interview.”
- *Duckworth v. Eagan*, 492 U.S. 195, 197 (1989)—“Before confessing, respondent was given warnings by the police, which included the advice that a lawyer would be appointed ‘if and when you go to court.’”
- *California v. Prysock*, 453 U.S. 355, 358–59 (1981)—[R]espondent was indisputably informed that he had “the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning,” and further informed that he had “the right to have a lawyer appointed to represent you at no cost to yourself,” . . . [but] was not explicitly informed of his right to have an attorney appointed before further questioning.

*Id.* In each case there was a sharp dissent questioning whether the warnings given satisfied the Fifth Amendment mandate.

4. There has been a tremendous amount of litigation concerning non-arrest custody questions. The fact patterns here are limited only by one’s imagination, as the custody determination may relate to questioning in a variety of locations. *See* *Howes v. Fields*, 565 U.S. 499 (in a prison setting); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (in a police station where the suspect was invited to come in order to speak with officers); *Orozco v. Texas*, 394 U.S. 324 (1969) (in the suspect’s home); *United States v. Kim*, 292 F.3d 969 (9th Cir. 2002) (in the suspect’s office or business); *Lineberger v. Conway*, 2007 U.S. Dist. LEXIS 104430 (S.D.N.Y. 2007) (on the street where the suspect is stopped by an officer); *Commonwealth v. Coleman*, 204 A.3d 1003 (Pa. Super. Ct. 2019) (in a police station where the suspect was invited to come in order to speak with officers); *Commonwealth v. Cooley*, 118 A.3d 370 (Pa. 2015) (in connection with a parole or probation interview). For a recent discussion, *see* Paul Marcus, *The Miranda Custody Requirement and Juveniles*, 85 TENN. L. REV. 251 (2017).

5. There is a rich body of excellent scholarship analyzing *Miranda*. For a small sampling of recent scholarly work, *see* Paul Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of Miranda’s Harmful Effects on Law Enforcement*, 97 B.U.L.

back in 1967, is misleading. Rather, the key consideration here goes to how the concept of *interrogation* is working on the ground; that is, are law enforcement officers and courts using this term in any sort of uniform and understandable fashion?<sup>6</sup>

### I. THE BEGINNING

Let us start with the principal discussion of *interrogation* by the Supreme Court in *Rhode Island v. Innis*.<sup>7</sup> There, the Court found that *interrogation* meant words or actions by an officer that were reasonably likely to elicit an incriminating response. *Innis* left no doubt that the police initiative does not have to be in the form of *questions* as such; *actions* likely to elicit a response could constitute interrogation. As explained seven years after *Innis*: “[T]he goals of the *Miranda* safeguards could be effectuated if those safeguards extended not only to express questioning, but also to ‘its functional equivalent.’”<sup>8</sup>

Trying to figure out the “functional equivalent” of *interrogation* has turned out to be no easy task. Does one consider the officer’s state of mind in engaging the suspect? Or, rather, do we look at what the suspect believed was happening? Or is it an entirely objective standard? All of the above, it appears, as we are trying to determine whether “words or actions on the part of police [were such] that the police should know [they were] reasonably likely to elicit an incriminating response.”<sup>9</sup> The *Innis* Court wrote that judges must especially evaluate whether the police had “knowledge . . . concerning the unusual susceptibility of a defendant to a particular form of persuasion. . . .”<sup>10</sup> This awkward standard has led to the federal and state cases being all over the map regarding the proper application of the term *interrogation*.

To be sure, the Court itself in *Innis* had difficulty deciding if the actions and words of the police officers constituted interrogation. Let us reflect on what took place in that case. *Innis* was arrested and charged with murder. As he was being driven to the police station, two officers in the car began talking to each

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REV. 685 (2017); Roscoe C. Howard Jr. & Lisa A. Rich, *A History of Miranda and Why It Remains Vital Today*, 40 VAL. L. REV. 685 (2006); Yale Kamisar, *The Miranda Case Fifty Years Later*, 97 B.U.L. REV. 1293 (2017); Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965 (2012); Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1 (2015); George C. Thomas III, *Miranda’s Spider Web*, 97 B.U.L. REV. 1215 (2017); Tracey Maclin, *A Comprehensive Analysis of the History of Interrogation Law, with Some Shots Directed at Miranda v. Arizona*, 95 B.U.L. REV. 1387 (2015) (book review).

6. Reviewing the reported state and federal decisions which define and apply the term *interrogation* was a massive undertaking. To complete this article, it was necessary to read well over one thousand decisions handed down in just the last 10–15 years.

7. 446 U.S. 291 (1980).

8. *Arizona v. Mauro*, 481 U.S. 520, 526 (1987).

9. *Innis*, 446 U.S. at 301.

10. *Id.* at 302, n.8.

other about a missing murder weapon and the harm that could befall little children.

While in route to the central station, Patrolman Gleckman initiated a conversation with Patrolman McKenna concerning the missing shotgun. As Patrolman Gleckman later testified:

“A. At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and [that because a school for handicapped children is located nearby,] there’s a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.”

Patrolman McKenna apparently shared his fellow officer’s concern:

“A. I more or less concurred with him [Gleckman] that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it.”

While Patrolman Williams said nothing, he overheard the conversation between the two officers:

“A. He [Gleckman] said it would be too bad if the little—I believe he said a girl—would pick up the gun, maybe kill herself.”

[Innis] then interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located.<sup>11</sup>

The defense argued strenuously that this conversation amounted to interrogation in violation of *Miranda*. The contention was that the officers’ back-and-forth conversation was intended to result in an incriminating statement and it should have been no surprise to the officers when the conversation did just that. Justice Marshall, joined by Justice Brennan, agreed and found this exchange to be interrogation:

The Court attempts to characterize Gleckman’s statements as “no more than a few offhand remarks” which could not reasonably have been expected to elicit a response. If the statements had been addressed to respondent, it would be impossible to draw such a conclusion. The simple message of the “talking back and forth” between Gleckman and McKenna was that they had to find the shotgun to avert a child’s death.

One can scarcely imagine a stronger appeal to the conscience of a suspect—*any* suspect—than the assertion that if the weapon is not found an innocent person will be hurt or killed. And not just any innocent person, but an innocent child—a little girl—a helpless,

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11. *Id.* at 294–95 (citations omitted).

handicapped little girl on her way to school. The notion that such an appeal could not be expected to have any effect unless the suspect were known to have some special interest in handicapped children verges on the ludicrous. As a matter of fact, the appeal to a suspect to confess for the sake of others, to “display some evidence of decency and honor,” is a classic interrogation technique.<sup>12</sup>

The majority of the Court took a very different view:

Moreover, it cannot be fairly concluded that the respondent was subjected to the “functional equivalent” of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.

The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few offhand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond.<sup>13</sup>

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12. *Id.* at 306 (Marshall, J., dissenting) (citation omitted).

13. *Id.* at 302–03. There are many cases, following *Innis*, which do not find interrogation so long as the comments of one officer are directed to another officer. Two state decisions make the point. In *Snow v. State*, 800 So. 2d 472, 499 (Miss. 2001), two police officers were standing outside of an interrogation room roughly two feet away from the defendant who was suspected of murder. One police officer asked the other whether the defendant’s clothes had been found yet. *Id.* at 498–99. The defendant heard this and informed the officers that he could tell them the location of his clothes. *Id.* at 499. Held, no interrogation—the officer’s comments were not the functional equivalent of interrogation as “they were not directed toward [the defendant] . . .” *Id.* at 500. In another case, *Smith v. State*, 995 A.2d 685 (Md. 2010), an officer found narcotics while conducting a search. He announced loudly that he was going to arrest everyone in the apartment. *Id.* at 688. The defendant was in the apartment and heard this. *Id.* He contended that this statement was meant to elicit an incriminating statement. *Id.* at 690. The court held that there was no interrogation because the officer testified that his comment was directed to other officers in the room rather than to the defendant. *Id.* at 691. The court explained, “[t]he corporal’s actions did not demonstrate conduct calculated to elicit an incriminating statement.” *Id.* 690–91. The federal courts travel a similar path, as seen in *United States v. Gordon*, No. 1:14-cr-312-WSD, 2015 WL 4164757 (N.D. Ga. July 9, 2015). There the defendant overheard a conversation between the two investigating officers talking about deploying a dog to sniff outside of the defendant’s apartment. *Id.* at \*1. After hearing of the officers’ plan, the defendant made incriminating remarks. *Id.* He asserted that the police action was in violation of *Innis*. *Id.* at \*3. The court disagreed.

Defendant simply overheard a discussion between two officers about an investigative step that they intended to pursue through the use of a drug dog. The discussion was not

How complicated. Even the Justices couldn't agree on whether the Patrolmen had interrogated Innis.

Is *Innis* an unusual case? Maybe. Is it an oddly fact-specific holding? Perhaps. Still, it is the key decision followed throughout the nation. It is a ruling that has led to a very serious problem in application. To put the matter directly, there is no consistent application of the *Innis* standard, whether in state or federal courts. To support that conclusion, one must examine the four major categories of reported decisions on point with judges attempting to decide whether police actions or words fall within the prescribed behavior:

1. Direct questioning not seen as interrogation
2. Direct questioning deemed to be interrogation
3. Statements or actions—but not questions—not found to be interrogation
4. Statements or actions—but not questions—held to be interrogation

## II. THE APPLICATION

### A. *Direct questioning not seen as interrogation*

#### 1. *The booking exception*

No astute criminal justice observer would contend that *any* routine sort of question directed to an individual constitutes interrogation. It could hardly be the law that when asking the suspect if she wished decaffeinated coffee an incriminating response would be excluded at trial (“decaffeinated, oh yes—not the high octane stuff since Wednesday when I robbed the store, no more caffeine for me . . .”). Indeed, very damaging statements during the booking process are normally admitted, as explained by the Ninth Circuit: “[T]he ‘routine gathering of background biographical information, such as identity, age, and address, usually does not constitute interrogation.’ What is called the ‘booking exception,’ then, is in fact an ‘exemp[tion] from *Miranda*’s coverage’ for questions posed ‘to secure the biographical data necessary to complete booking or pretrial services.’”<sup>14</sup> It is an exemption because such questions “do not, by

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directed at Defendant. Having overheard the plan to use the drug dog, Defendant chose voluntarily to offer the information about his marijuana use and that there was marijuana in the apartment.

*Id.* Of course, in *Innis* the Supreme Court actually held that the officer's design was not the key factor. It was to be an objective standard. *Innis*, 446 U.S. at 301. For a thoughtful treatment of these and other issues involved with *Innis*, see Michael J. Zydney Mannheimer, *The Two Mirandas*, 43 N. KY. L. REV. 317, 345–47 (2016).

14. *United States v. Zapien*, 861 F.3d 971, 975 (9th Cir. 2017) (quoting *United States v. Williams*, 842 F.3d 1143, 1147 (9th Cir. 2016)) (citation omitted). The judges, however, cautioned against too broad an application of this exception.

Nonetheless, we have “recognize[d] the potential for abuse by law enforcement officers who might, under the guise of seeking ‘objective’ or ‘neutral’ information, deliberately elicit an incriminating statement from a suspect.” To account for this risk, we apply an

their very nature, involve the psychological intimidation that *Miranda* is designed to prevent.”<sup>15</sup>

The Supreme Court first applied the doctrine thirty years ago.

The Commonwealth argues that the seven questions asked by Officer Hosterman just prior to the sixth birthday question—regarding Muniz’s name, address, height, weight, eye color, date of birth, and current age—did not constitute custodial interrogation as we have defined the term in *Miranda* and subsequent cases. In *Miranda*, the Court referred to “interrogation” as actual “questioning initiated by law enforcement officers.” . . . Thus, custodial interrogation for purposes of *Miranda* includes both express questioning, and also words or actions that, given the officer’s knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to “have . . . the force of a question on the accused,” and therefore be reasonably likely to elicit an incriminating response.

We disagree with the Commonwealth’s contention that Officer Hosterman’s first seven questions regarding Muniz’s name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation as we defined the term in *Innis*, merely because the questions were not intended to elicit information for investigatory purposes. As explained above, the *Innis* test focuses primarily upon “the perspective of the suspect.” . . . Muniz’s answers to these first seven questions are nonetheless admissible because the questions 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.” . . . [T]he first seven questions were “requested for record-

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“objective” test to determine whether the questioning constituted interrogation. Seemingly routine biographical questions can constitute interrogation if, in light of all the circumstances, the officers should have known that their words or actions were reasonably likely to elicit an incriminating response. In making this determination, “the focus is upon the defendant’s perceptions.”

*Id.* (citations omitted). For a good overview of the various approaches to the booking exception, see Julie A. Simeone, Note, *Not So Legitimate: Why Courts Should Reject an Administrative Approach to the Routine Booking Exception*, 89 N.Y.U.L. REV. 1454, 1461 (2014) (“The language in *Innis* and *Muniz* generates a complex, if not utterly inconsistent, standard for what constitutes routine booking questions.”). The author there indicates that most courts use one of three approaches with the analysis: subjective, objective or administrative function. *Id.* at 1461, 1484. These recent cases reference such approaches: *United States v. Arellano-Banuelos*, 912 F.3d 862, 866 (5th Cir. 2019); *Rivera v. Thompson*, 879 F.3d 7, 15 (1st Cir. 2018); *People v. Villa-Gomez*, 215 Cal. Rptr. 3d 161, 168 (Cal. Ct. App. 2017); *Toler v. United States*, 198 A.3d 767, 770 (D.C. 2018); *Tobiassen v. State*, 213 So. 3d 1045, 1049 (Fla. Dist. Ct. App. 2017); *Hughes v. State*, No. 123, 2018 Md. App. LEXIS 1152, at \*30 (Md. Ct. Spec. App. Dec. 19, 2018); *State v. Boyd*, 380 P.3d 941, 949 (Or. 2016).

15. *United States v. Doe*, 878 F.2d 1546, 1551 (1st Cir. 1989) (quoting *United States v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981)).



keeping purposes only,” and therefore the questions appear reasonably related to the police’s administrative concerns. In this context, therefore, the first seven questions asked at the booking center fall outside the protections of *Miranda* and the answers thereto need not be suppressed.<sup>16</sup>

The booking process exception seems straightforward enough. Run-of-the-mill questions in the booking process attempting to garner the most basic information surely cannot be found to be disfavored interrogation. “Booking process,” alas, is hardly a precise term of art. As noted by the Court of Criminal Appeals of Texas, “booking exception cases around the country are confusing and conflicting.”<sup>17</sup> Consider, for instance, these two cases involving the interrogation issue arising during booking. The Texas case mentioned here had defendant arrested for evading arrest.<sup>18</sup> As personal belongings were being taken from his car—but before *Miranda* warnings were given—the arresting officer “took the thumb drive that was located in the back seat and held it up and . . . asked [the defendant] what it was.”<sup>19</sup> The defendant “responded, ‘It’s a memory drive.’”<sup>20</sup> The officer followed up by asking to whom the thumb drive belonged. The defendant told the officer that it belonged to the defendant. These two statements were to be used against the defendant in building the state’s case. The defendant moved to suppress claiming that he:

- was in custody at the time of the exchange
- was not given warnings
- was asked a series of questions
- gave incriminating answers to those questions

Thus, he contended, the statements could not be admitted in evidence, being in violation of both *Miranda* and *Innis*.<sup>21</sup> The Texas judges rejected this contention

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16. *Pennsylvania v. Muniz*, 496 U.S. 582, 600–02 (1990) (citations omitted). While the most common exception under the interrogation doctrine, booking is not the only one. Also noteworthy is the so-called public safety exception announced initially in *New York v. Quarles*, 467 U.S. 649, 655 (1984). If the purpose of the interrogation of the suspect in custody relates to the safety of the public or the officers, *Miranda* does not apply. *Id.* For discussions of this exception, see Bruce Ching, *Mirandizing Terrorism Suspects? The Public Safety Exception, the Rescue Doctrine, and Implicit Analogies to Self-Defense, Defense of Others, and Battered Woman Syndrome*, 64 CATH. U.L. REV. 613 (2015); Rorie A. Norton, Note, *Matters of Public Safety and the Current Quarrel over the Scope of the Quarles Exception to Miranda*, 78 FORDHAM L. REV. 1931 (2010); Joanna Wright, Note, *Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception*, 111 COLUM. L. REV. 1296 (2011).

17. *Alford v. State*, 358 S.W.3d 647, 656 (Tex. Crim. App. 2012). For a good overview, see Elizabeth Parrish, Comment, *In Need of Clarification: A Call to Define the Scope of the Routine Booking Exception by Adopting the Legitimate Administrative Function Test*, 62 CATH. U.L. REV. 1087 (2013).

18. *Alford*, 358 S.W.3d at 650.

19. *Id.*

20. *Id.*

21. *Id.* at 651, 653.

and, taking an objective view of the circumstances, found the routine booking exception present.

A range of governmental interests supports an inventory process. It is not unheard of for persons employed in police activities to steal property taken from arrested persons; similarly, arrested persons have been known to make false claims regarding what was taken from their possession at the station house. A standardized procedure for making a list or inventory as soon as reasonable after reaching the station house not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person

In this case, the record undisputedly shows that, as appellant was being booked into the jail, Officer Ramirez asked appellant if the non-contraband item discovered in the patrol car belonged to him. Upon confirming that it did, Officer Ramirez gave the item to facility personnel, who placed it with appellant's personal property for safekeeping. Based on our *de novo* review of the record, we find that the totality of the circumstances objectively show that Officer Ramirez's questions were reasonably related to a legitimate administrative concern.<sup>22</sup>

Do you accept this argument, or are you skeptical? Asking about ownership of personal property with an arrest for illegal drugs? Were those questions "reasonably related to a legitimate administrative interest?" It is hard to understand that position, especially when contrasted with many other decisions in this area relating to drug prosecutions. Here is one, coming from the United States Court of Appeals for the Sixth Circuit.<sup>23</sup> In it, the defendant was asked—before receiving warnings—"where he was from, how he had arrived at the house, and when he had arrived."<sup>24</sup> He made an incriminating statement in response. Using the broad view of the routine booking exception as applied in the Texas case, one could easily find these questions to be "reasonably related to a legitimate administrative interest." Perhaps the officers were just trying to figure out the particulars about the individual, where he resided, etc. If so, there would be no improper interrogation, no *Miranda* violation.<sup>25</sup> This court, however, took a very different view:

[A]sking questions about when and how Lopez arrived at a household ostensibly linked to a drug sale, as well as his origin, are relevant to an investigation and cannot be described as related only to securing the house or identifying the defendant. Furthermore, the officers immediately ascertained that Lopez did not speak English and learned shortly thereafter that he was from Mexico, factors making him

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22. *Id.* at 661 n.28, 662.

23. *United States v. Pacheco-Lopez*, 531 F.3d 420 (6th Cir. 2008).

24. *Id.* at 424.

25. *Id.*

“particularly susceptible” to questioning before *Miranda* warnings. These facts implicate *Miranda*’s concern about the danger of coercion resulting from “the interaction of custody and official interrogation.”

The location, the nature of the questioning and the failure to take notes or document the defendant’s identity also support our conclusion that the booking exception is not applicable in this case.<sup>26</sup>

These two cases are offered as illustrations to show how genuinely difficult it may be to determine if *Miranda* warnings are needed in connection with those presumably run-of-the-mill questions asked upon arrest or at the police station. Still, it is fair to note that most such questions are deemed to fall within the exception as construed by both federal and state judges. There are many such cases. Here are a few examples:

- Upon his arrest, officers asked the suspect for his name, where he was from, his address, and similar information.<sup>27</sup> Improbably, the suspect then made an incriminating statement. Held, the exception applied, as the officers “had no indication whatsoever that asking Grant about his living arrangements or where he was from might elicit an incriminating response.”<sup>28</sup>
- After the defendant was arrested, the officer asked a series of standard questions such as date of birth, weight, height, and job.<sup>29</sup> The defendant responded that he was “a drug dealer” when asked about his job.<sup>30</sup> The officer’s questions were appropriate interrogation, as the questions were central to booking.<sup>31</sup>
- During the booking procedure, the officer asked defendant if he had any nicknames and the defendant answered “Slim.”<sup>32</sup> The officer had been told that this “was the nickname by which the victims knew the former coworker whom they accused of robbing them.”<sup>33</sup> Not unacceptable interrogation, even if the officer knew that the defendant’s nickname was

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26. *Id.* at 424–25 (citation omitted).

27. *State v. Grant*, 876 N.W.2d 639, 650 (Neb. 2016).

28. *Id.* at 655–56.

29. *United States v. Sanchez*, 817 F.3d 38, 41 (1st Cir. 2016).

30. *Id.*

31. *Id.* The case was an easy one for the judges:

And when Toledo asked him whether he was employed, Sanchez matter-of-factly answered that he was “a drug dealer.” By the way, Toledo played no part in the Sanchez investigation—other than knowing the booking charges, Toledo knew nothing about the case against Sanchez. Also, Toledo had no info suggesting that his asking these standard booking questions might cause Sanchez to incriminate himself. What is more, Toledo did not ask the questions to further the investigation. And he did not ask Sanchez any follow-up questions tied to the “drug dealer” comment—a comment Toledo shared with Templeman after booking.

*Id.*

32. *People v. Alleyne*, 828 N.Y.S.2d 2, 3 (N.Y. App. Div. 2006).

33. *Id.*

relevant to the question of identity. The court found that “the officer was simply asking the questions set forth on the booking sheet, and that none of his questions was ‘designed to elicit incriminatory admissions’ or ‘a disguised attempt at investigatory interrogation[.]’”<sup>34</sup>

- During booking, the officer asked the defendant what his real hair color was.<sup>35</sup> The defendant responded, “[b]rown,” and said that he had just dyed it one day earlier.<sup>36</sup> This statement helped to convict the defendant of robbery, and there was no 5th Amendment problem. The police in this case did not violate *Innis* because the actual hair color was reasonably related to administrative concerns and the question was neither intended nor likely to elicit an incriminating response.<sup>37</sup>
- After arresting the defendant, the officer asked if the defendant was on probation, how much time the defendant had over his head, and if he was working.<sup>38</sup> The defendant later made an incriminating comment. This fell within the booking exception, as the defendant knew the justice system and was calm.<sup>39</sup>

These several cases may seem to involve questions that are innocuous, but that may be deceptive. In each case an incriminating statement was made in immediate response to the question. And, the many, many cases exploring the routine booking exception demonstrate just how uncertain and inconsistent the rulings are in this area.<sup>40</sup>

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34. *Id.* (citation omitted).

35. *Rosa v. McCray*, 396 F.3d 210, 213 (2d Cir. 2005).

36. *Id.*

37. *Id.* at 221–22. The court explained:

Proper completion of the booking form in this case required the officer to complete the relevant portions of the form by filling in the correct information pertaining to the various elements that comprise the basic personal physical characteristics, including hair color. Moreover, if the officer perceives—either through direct observation or otherwise—that a specific piece of information provided by the arrestee is patently incorrect, then it is not only reasonable, but arguably the officer’s duty, to inquire further.

*Id.*

38. *United States v. Davis*, 773 F.3d 334, 337 (1st Cir. 2014).

39. *Id.* at 339. The court found that “nothing in the record suggests a reasonable officer under these circumstances would have understood that general questions directed at Defendant’s status prior to his arrest would elicit Defendant’s comment regarding his anger towards Hicks for failing to remove the rifles from the home.” *Id.*

40. One can readily find a rather remarkably large number of just such decisions. For a good overview of the judicial applications of the doctrine in recent times (in addition to the cases cited in *supra* note 13), see *Coronel v. Biter*, No. EDCV 12-974 SVW (LAL), 2014 WL 10503883 (C.D. Cal. Nov. 19, 2014); *United States v. Corey*, 861 F. Supp. 2d 1341 (S.D. Fla. 2012); *People v. Madriz*, No. H044665, 2018 WL 5292079 (Cal. Ct. App. Oct. 25, 2018); *Senser v. State*, 243 So.3d 1003 (Fla. Dist. Ct. App. 2018); *Commonwealth v. Caswell*, 123 N.E.3d 80 (Mass. App. Ct. 2019) (unpublished table decision); *State v. Perez*, No. A16-0242, 2017 WL 958471 (Mn. Ct. App. May 30, 2017) (unpublished table decision); *State v. Gillispie*, 436 P.3d 65 (Or. Ct. App. 2019); *Martinez-Hernandez v. State*, 468 S.W.3d 748 (Tex. App. 2015); *Commonwealth v. Malick*, No. 1739-15-1, 2016 WL 1105078 (Va. Ct. App. Mar. 22, 2016).

## 2. Other direct questioning not seen as interrogation

Even if it does not take place during booking, is it possible that directly questioning a suspect who is in custody does not constitute interrogation under *Innis*? Not only is it possible, but it is extremely common. And, I am referring here not to very mundane sorts of questions, but those truly related to the crime for which the suspect will be charged. Not convinced? Here is a small sampling of such decisions:

- The defendant was arrested, and an officer asked if the defendant was the person against whom there was a personal protection order issued.<sup>41</sup> Not interrogation, as the officer was trying to determine the suspect's identity and the question concerned a "purely civil matter."<sup>42</sup>
- The defendant was arrested and then stated, "I can help you out, I don't want to go back to jail, I've got information for you."<sup>43</sup> The officer followed up by asking, "what do you mean?"<sup>44</sup> Not interrogation, as the "query would reasonably be expected to elicit information incriminating someone else" and not the defendant.<sup>45</sup>
- During trial, the constable asked the defendant if his attorney wanted him to wear a bulletproof vest.<sup>46</sup> The inquiry could not have been reasonably expected to elicit an inculpatory statement because "[the] inquiry was simply a security-related question made in the ordinary course of the administration of justice."<sup>47</sup>
- Defendant was in a car accident.<sup>48</sup> When the tow truck driver arrived, he noticed a strong odor coming from the trunk of defendant's car. The tow truck driver saw defendant stuff marijuana from the trunk into her black bag. The truck driver told the officer, and the officer asked the defendant

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41. United States v. Evans, 581 F.3d 333, 337 (6th Cir. 2009).

42. *Id.* at 343.

43. United States v. Johnson, 734 F.3d 270, 272 (4th Cir. 2013).

44. *Id.*

45. *Id.* at 277. The court continued:

Johnson argues that, his professed motivations notwithstanding, Detective Mackensen should have known that to ask "what do you mean?" could at least possibly have elicited an incriminating response. But this sets the bar too low. It is possible, of course, that a suspect in custody could implicate himself in a criminal act in response to any question or action no matter how innocuous. If possibility were the standard, therefore, an officer would risk suppression whenever he spoke within earshot of an unwarned suspect. But *Miranda* was intended to protect suspects from coercive police practices, not render officers mute.

*Id.*

46. Laird v. Horn, 159 F. Supp. 2d 58, 94 (E.D. Pa. 2001).

47. *Id.* at 95.

48. United States v. Zuber, 485 Fed. App'x 921, 922 (10th Cir. 2012).

about the smell. The defendant made an incriminating statement. Not interrogation, as the statement was made voluntarily.<sup>49</sup>

- FBI agents were at the defendant's hotel to execute an arrest warrant, but the defendant had booked his room under a different name.<sup>50</sup> The FBI agents saw the defendant and asked about his identification, the name he was registered under, and the room he was actually in. Not violative of *Innis*, as these questions were the sort "normally attendant to arrest and custody."<sup>51</sup>
- An officer pulled over the defendant for speeding.<sup>52</sup> The officer called for backup to arrest the defendant, patted down the defendant, and felt a lump in the defendant's pocket. The officer then asked the defendant, "What is in your pocket?"<sup>53</sup> This was not an interrogation, as the officer's question was merely an inquiry normally attendant to arrest and custody.<sup>54</sup>
- The defendant was "generally asked: 1) how he was doing, 2) basic identifying information, such as his name, age and address, 3) how long he had been on the base, 4) his educational background and, 5) the languages he spoke."<sup>55</sup> He then made an incriminating statement.<sup>56</sup> The court found no interrogation.<sup>57</sup>
- A personal favorite is a widely discussed case in which a detective walked by the arrested defendant in the police station and asked, "What's up

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49. *Id.* at 923. The officer "did not ask her about ownership or possession of the bag . . . her statement was spontaneous and unsolicited . . . and *Miranda* allows the admission of volunteered statements not made in response to police questioning." *Id.*

50. *United States v. Durst*, 138 F. Supp. 3d 741, 745 (E.D. La. 2015).

51. *Id.* at 753. These "generic questions for identification purposes are not calculated to elicit incriminating responses and therefore do not trigger *Miranda*." *Id.*

52. *United States v. Woods*, 711 F.3d 737, 739 (6th Cir. 2013).

53. *Id.*

54. *Id.* at 741. "'What is in your pocket' was not investigatory or otherwise calculated to elicit an incriminating response, but rather a natural and automatic response to the unfolding events during the normal course of an arrest." *Id.*

55. *United States v. Hitselberger*, 991 F. Supp. 2d 130, 138 (D.D.C. 2014).

56. *Id.* at 137.

57. *Id.* at 138.

It is further clear that the conversation between the agents and Mr. Hitselberger was conversational, and that Mr. Hitselberger was overly forthcoming with information, especially regarding his relationship with his co-workers and his educational background . . . [T]here was no "interrogation" during the 35 minute pre-*Miranda* interview because: 1) the agents asked only standard questions which were unlikely to elicit incriminating responses, and 2) the agents had no additional knowledge that Mr. Hitselberger was unusually susceptible to their standard questions.

*Id.*

Maurice?”<sup>58</sup> The defendant then made an incriminating statement. No interrogation. The exchange was part of a casual conversation.<sup>59</sup>

These cases all involve quite direct questioning of the suspect, and they are hardly—without doubt—benign sorts of inquiries as to the time of day or choices for lunch. Yet, with such questions of the in-custody defendant, the courts had little difficulty concluding there was no interrogation. Highly incriminating responses were given in each of the cases, yet in none of these decisions is there even an extended discussion of *Innis* and its reasonable police officer standard.

### B. Direct questioning deemed to be interrogation

In this section we consider a number of cases with direct questioning, but they involve the sorts of conversations which can hardly be viewed as purposely attempting to squeeze out incriminating admissions. Still, the courts in these cases find such questioning to be interrogation in stark contrast to those decisions in the previous section. Once again, let us look at a small sample of such decisions.

- During a routine patrol, officers saw a gun in the defendant’s vest.<sup>60</sup> As they chased the defendant, the gun fell out of his vest, which he discarded in an unseen location. Once the defendant was captured, the officers asked the defendant questions about his age, criminal history, and the vest. The court found that the questions about the defendant’s criminal history and the vest were reasonably likely to elicit an incriminating response.<sup>61</sup>

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58. *Prioleau v. State*, 984 A.2d 851, 854 (Md. 2009).

59. As the court pointed out, “it is very well settled that not every question constitutes ‘interrogation’ of a suspect who is in custody when the question is asked.” *Id.* at 857. “[T]he phrase ‘what’s up?’ is generally understood to be a greeting . . . .” *Id.* at 860 (quoting *Prioleau v. State*, 943 A.2d 696, 702–03 (Md. Ct. Spec. App. 2008)).

60. *United States v. Phillips*, 146 F. Supp. 3d 837, 840 (E.D. Mich. 2015), *aff’d*, 677 Fed. App’x 294 (6th Cir. 2017).

61. *Id.* at 847–48. The court explained:

Here the Court finds the officers crossed the line by asking questions of an investigatory nature as opposed to questions merely involving the processing of an arrest. Based on the facts presently before the Court, questions about the Defendant’s criminal history and the location of evidence mandated a *Miranda* warning because these questions were “reasonably likely to elicit an incriminating response[.]”

Questioning a defendant about the location of evidence constitutes interrogation under *Miranda*.

Similarly, the Court finds questioning the defendant about his criminal history also constitutes interrogation, because there is a distinction between asking about a defendant’s personal history—which the Court would agree is a routine innocuous booking question—and a defendant’s criminal history.

Looking at the facts here, the officers knew that the Defendant was at one point wearing a vest and questioned him about the location of that evidence. Asking questions about the location of the vest was relevant to the officer’s investigation, and cannot be described as related to the booking process. This fact alone, implicates *Miranda*’s concern about the danger of coercion resulting from “the interaction of custody and official interrogation.”

- The officers patted down the defendant and then asked him what the lump in his pants was.<sup>62</sup> The court held that this constituted interrogation in light of the officer's suspicion as to the criminal nature of the lump.<sup>63</sup>
- After arresting the defendant, one officer asked him: "Do you know why you are here?"<sup>64</sup> Held to be interrogation, the officer should have known it would likely "evoke a declaration from [the] defendant."<sup>65</sup>
- Officers handcuffed the defendant, placed him in a police car, and then transported him to his residence, which the police were preparing to search.<sup>66</sup> One officer asked the defendant, in reference to an unusual car in front of his house, who owned the car. This was interrogation, as the officer asked the question to confirm a suspicion about illegal behavior.<sup>67</sup>
- The defendant invoked his right to remain silent as an officer read him his *Miranda* rights.<sup>68</sup> The officer finished reading the warnings and then immediately asked, "Do you even know why you're under arrest?"<sup>69</sup> The court held that the officer's question reasonably required the defendant to discuss his substantive offense and so was interrogation.<sup>70</sup>
- The defendant was arrested after being seen smoking a blunt (a cigar that has been opened, emptied of tobacco, and then filled with marijuana).<sup>71</sup> The defendant then mentioned he had a gun on him and that he had found it after cleaning out his dead grandmother's house. During the interrogation, the officer asked when the defendant's grandmother passed

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*Id.*

62. *United States v. Milikan*, 404 F. Supp. 2d 924, 929–30 (E.D. Tex. 2005).

63. *Id.* at 930. As the court explained, "Lt. Lowrie specifically asked Milikan what the lump was and how much it was. The court [found that] these were questions intended to elicit an incriminating response." *Id.*

64. *People v. Thomas*, 27 N.Y.S.3d 815, 820 (N.Y. Cty. Ct. 2016).

65. *Id.* at 820 (alteration in original) (quoting *People v. Ackerman*, 528 N.Y.S.2d 216, 217–18 (N.Y. App. Div. 1990)).

Here, Investigator Hickey was involved in the investigation of the stabbing two days prior, had spoken to the officers who had taken defendant into custody at 93 Prince Street, and so was aware that the victim Reed had positively identified the defendant. While "Do you know why you are here" is perhaps a question routinely posed to suspects being interviewed by law enforcement, the Court finds that based on the specific facts presented here, the defendant was entitled to be advised of his *Miranda* rights before being asked that question and the pre-*Miranda* statements are suppressed.

*Id.* at 820–21.

66. *United States v. Olivarria*, 781 F. Supp. 2d 387, 395 (N.D. Miss. 2011).

67. *Id.* at 393.

68. *United States v. Abdallah*, 911 F.3d 201, 207 (4th Cir. 2018).

69. *Id.*

70. *Id.* at 214 (stating "[o]ne can expect that criminal defendants who are asked 'Do you know why you are under arrest?' will respond with a variety of incriminating, speculative statements about their substantive offenses").

71. *United States v. Coates*, 457 F. Supp. 2d 563, 565–66 (W.D. Pa. 2006).



away, and the court found that “it should have appeared reasonably likely [to the officer] that his question could elicit an inculpatory response[.]”<sup>72</sup>

- The defendant’s house was raided by the FBI in search of child pornography.<sup>73</sup> The agents asked for the defendant’s help with the investigation, and the defendant agreed, ultimately incriminating himself. His aid was found to be a result of the interrogation.<sup>74</sup>

In none of these cases is there an obvious, nefarious attempt to have the defendant give damaging information against her will. Nevertheless, the courts here recognized that such questions—even if not directly calling for an incriminating answer—may raise just the kind of concerns which were central to the Supreme Court’s decisions in *Miranda* and *Innis*.

*C. Statements or actions—but not questions—not found to be interrogation*

Police officers may offer items of evidence to a suspect in custody. They may even make comments about the coming prosecution to that person. What is the legal response if that offer, or that statement, elicits an incriminating comment from the defendant? Does that necessarily demonstrate interrogation under *Innis*? The problem is not easy to resolve, as can be shown in one recent state decision from Michigan.<sup>75</sup>

There, the defendant was in custody when an officer spoke with him: “The only thing that I can tell you is this, and I’m not asking you questions I’m just telling you. I hope that the gun is in a place where nobody can get a hold of it and nobody else can get hurt by it, okay, all right.”<sup>76</sup> Three judges decided it was not interrogation: “The officer’s comment . . . was not a question because it did not ask for an answer or invite a response. It was a mere expression of hope and concern.”<sup>77</sup> However, one judge wrote that it was interrogation: “[The officer’s] comments were made in a police interrogation room and were expressly directed to the defendant, who was the only other person present when the statements were made.”<sup>78</sup> The fifth judge found interrogation as she focused on the suspect’s youth: “Because juveniles often lack the wherewithal to resist police pressures, they thus become uniquely susceptible to police interrogation efforts including subtly compulsive techniques, and should be expected to

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72. *Id.* at 570. This was so “because the answer to such a question would make [the defendant’s] stated reason for carrying the handgun more or less credible, depending on the content of that answer.” *Id.*

73. *United States v. Familetti*, 878 F.3d 53, 56 (2d Cir. 2017).

74. *Id.* at 59. “After invading [the defendant]’s apartment to serve a search warrant, the agents informed him that they were looking for perpetrators of child pornography, and asked him for information. They left no doubt that [the defendant] was suspected of criminal involvement, and his response would more than likely confirm as much.” *Id.*

75. *See People v. White*, 828 N.W.2d 329 (Mich. 2013).

76. *Id.* at 331.

77. *Id.* at 335.

78. *Id.* at 345–46 (Cavanagh, J., dissenting).

respond to those efforts.”<sup>79</sup> So, which is it? Do we look at the officer’s intent? Do we instead evaluate the suspect’s understanding? Or, do we apply some sort of reasonable person standard? This is difficult to answer, as the Michigan judges seemed to use all these approaches.

Quite a number of judges appear to concur with the majority Michigan judges and conclude that statements or actions that appear to be digging for harmful responses from the suspect do not constitute interrogation. These illustrative decisions show this:

- Defendant said he wanted to speak to his attorney.<sup>80</sup> The officers called for a jailer, and while waiting, one officer said to the defendant, “We don’t need to talk to you anyway, our case is made.”<sup>81</sup> The defendant then incriminated himself. No interrogation, as “[t]he officer’s statement and surrounding circumstances in this case are no more (and arguably are less) evocative than those in *Innis* . . . .”<sup>82</sup>
- The defendant was in jail when two officers asked to speak with him.<sup>83</sup> The defendant stated that he would not answer questions about firearms trafficking because he was a convicted felon. One officer “advised defendant that ‘we’ve got good information on you.’”<sup>84</sup> Not interrogation because the statement had “no compulsive element suggesting a Fifth Amendment violation” and it was unrelated to the specific subject the defendant said he would not discuss.<sup>85</sup>
- An officer asked the defendant to join him in his office to “get some air.”<sup>86</sup> Once they were in the office, the officer informed the defendant about the seriousness of his crime and the effect it would have on his employment. The court ruled that the officer did not interrogate the defendant because the officer did not reference specific evidence or particular aspects of the case.<sup>87</sup>
- The investigating officer played tapes to the defendant which implicated the defendant in the crime.<sup>88</sup> Playing the tapes did not constitute interrogation because “[b]riefly reciting to a suspect in custody the basis

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79. *Id.* at 353 (Kelly, J., dissenting).

80. *State v. Atchison*, 258 S.W.3d 914, 916 (Mo. Ct. App. 2008).

81. *Id.*

82. *Id.* at 917.

83. *United States v. Hurst*, 228 F.3d 751, 758–59 (6th Cir. 2000).

84. *Id.* at 759.

85. *Id.* at 760. The court further stated, “[T]here is nothing in the nature of defendant’s statement to suggest it was the product of coercion or compulsion.” *Id.*

86. *United States v. Ardines*, 293 F.R.D. 117, 121 (E.D.N.Y. 2013).

87. *Id.* at 124–25. “The magistrate judge’s ruling, that [the officer’s] comment amounted to a declaratory statement, is not clearly erroneous. [The officer] did not reference the evidence or any specific aspects of the case. No functional equivalent of an interrogation occurred; nor did a statement that would elicit an incriminating response.” *Id.* at 125 (citations omitted).

88. *United States v. Vallar*, 635 F.3d 271, 284 (7th Cir. 2011).

for holding him, without more, cannot be the functional equivalent of interrogation.”<sup>89</sup>

- After searching the defendant’s car, an officer found a gun under the front passenger seat.<sup>90</sup> The officer pulled the defendant and the passenger out of the car and asked who owned the gun. The defendant and the passenger said they did not know anything and the officer said that both of them would be charged. No interrogation, as the officer relayed a “factually accurate statement about” the officer’s next step.<sup>91</sup>
- The police searched the defendant’s home and found heroin packets.<sup>92</sup> An officer approached the defendant, showed him the seized items and said, “We’ve got a problem here.”<sup>93</sup> The officer’s statement did not constitute interrogation because the statement was a “preliminary comment intended to get [the defendant’s] attention . . . .”<sup>94</sup>
- Officers executed a search warrant and found an illegal shotgun in the defendant’s presence.<sup>95</sup> One officer then showed the other officer the gun, who measured it, also in the defendant’s presence. Examining and measuring the gun in front of the defendant was not interrogation; neither officer acknowledged the defendant and so did not interrogate him.<sup>96</sup>
- After the defendant invoked his right to counsel, an officer said, “I don’t mind laying my cards on the table. I asked him not to say anything but listen to what I had to say. I told him that I had already talked to his partner Rowe, and Rowe [had implicated him in the robbery].”<sup>97</sup> The officer had not interrogated the defendant because the officer said not to respond and because the officer left immediately after speaking.<sup>98</sup>

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89. *Id.* at 285 (quoting *Enoch v. Gramley*, 70 F.3d 1490, 1500 (7th Cir. 1995)). See also this broad statement in *State v. Aguilar-Benitez*:

Under Louisiana law, it is permissible for an officer, even after a suspect invokes his right to counsel and his privilege against self-incrimination, to inform the suspect of the evidence linking the suspect to the crime. Without more, the disclosure of evidence does not rise to the functional equivalent of direct questioning . . . .

260 So. 3d 1247, 1259–60 (La. Ct. App. 2018).

90. *United States v. Collins*, 683 F.3d 697, 700 (6th Cir. 2012).

91. *Id.* at 703 (“[V]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected’ by the holding in *Miranda*.”).

92. *United States v. Genao*, 281 F.3d 305, 307 (1st Cir. 2002).

93. *Id.* at 308.

94. *Id.* at 311. As the court explained, “the remark was brief, was not worded in a particularly confrontational manner, and did not directly accuse Genao of any crime or seek to inflame his conscience.” *Id.*

95. *United States v. McCarty*, 475 F.3d 39, 42 (1st Cir. 2007).

96. *Id.* at 45. The suspect “blurted out” a comment, telling “the officers, unprompted, that the gun was his.” *Id.*

97. *Shaneberger v. Jones*, 615 F.3d 448, 451 (6th Cir. 2010) (alteration in original).

98. *Id.* at 454. The court did write that the officer’s “actions tread near the line between what is acceptable and what violates Shaneberger’s right to counsel . . . [it is] a close question . . . .” *Id.*

Are you surprised that in none of these cases did the court find interrogation when the suspect immediately replied and gave an incriminating remark? The motive of the officers in at least some of these cases seems clear: they were engaging the suspect precisely because they wished to obtain incriminating evidence they could use against him. And, in at least some of these cases, any neutral observer could see that the actions would likely elicit a response. Why then did the courts refuse to find interrogation? Are these statements and actions not designed to circumvent *Miranda* and elicit a response? If not, what are these statements and actions intended to achieve? Are they unlikely to get a response? If not, why do the police do or say these things? All significant questions for which there simply are no ready answers given by judges across the nation.

*D. Statements or actions—but not questions—held to be interrogation*

We all understand that under *Innis* and the later Supreme Court decisions, interrogation is not necessarily synonymous with questioning. To be sure, as noted in the numerous cases laid out above, questions can be asked directly of the suspect—resulting in incriminating responses—yet judges may decide that she was not interrogated. It is also true that if the police do not ask questions but take actions or make statements aimed at the suspect those may well be found to be interrogation. The most prominent example here is the famous so-called Christian burial speech case, *Brewer v. Williams*.<sup>99</sup> Though the analysis ultimately was under the 6th Amendment right to counsel, as opposed to the 5th Amendment privilege against self-incrimination, the holding of the Supreme Court as to interrogation has been followed with both sorts of cases.<sup>100</sup> There

99. 430 U.S. 387 (1977).

100. *Id.* at 404. Justice Stewart, author of the majority opinions in *Brewer* and *Innis*, sought to separate the two holdings:

There is language in the opinion of the Rhode Island Supreme Court in this case suggesting that the definition of “interrogation” under *Miranda* is informed by this Court’s decision in *Brewer v. Williams*. This suggestion is erroneous. Our decision in *Brewer* rested solely on the Sixth and Fourteenth Amendment right to counsel. That right, as we held in *Massiah v. United States*, prohibits law enforcement officers from “deliberately [eliciting]” incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed. Custody in such a case is not controlling; indeed, the petitioner in *Massiah* was not in custody. By contrast, the right to counsel at issue in the present case is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and Fourteenth Amendments as interpreted in the *Miranda* opinion. The definitions of “interrogation” under the Fifth and Sixth Amendments, if indeed the term “interrogation” is even apt in the Sixth Amendments context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct.

*Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980). Justice Stewart never did explain how the term *interrogation* would differ in the two contexts. In fact, numerous judges have indeed referenced both decisions in deciding whether, under *Miranda*, interrogation has taken place. *See, e.g., United States v. Voice*, 627 F.2d 138, 144–45 (8th Cir. 1980); *March v. Sexton*, No. 3:12-cv-272, 2013 U.S. Dist. LEXIS 86932 at \*87–88 (M.D. Tenn. June 19, 2013); *Steverson v. Crosby*, No. 8:03-cv-654-T-27MAP, 2006 U.S. Dist. LEXIS 37049 at \*43–49 (M.D. Fla. June 5, 2006);

the defendant in a murder case had been charged and been assigned counsel. Police officers in driving the suspect across the state for judicial proceedings promised both the suspect and his attorney that there would be no questioning. One principal issue in the case was whether the following statement, given to a suspect who had delusions regarding his prominence in the religious community, constituted interrogation. Addressing Williams as “Reverend,” one of the detectives said:

I want to give you something to think about while we’re traveling down the road. . . . Number one, I want you to observe the weather conditions, it’s raining, it’s sleeting, it’s freezing, driving is very treacherous, visibility is poor, it’s going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl’s body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I felt that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in, rather than waiting until morning and trying to come back out after a snow storm, and possibly not being able to find it at all.<sup>101</sup>

The suspect immediately made an incriminating statement. The majority of the Court decided these remarks, directed to the suspect, constituted interrogation.

There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him. Detective Leaming was fully aware before departing for Des Moines that Williams was being represented in Davenport by Kelly and in Des Moines by McKnight. Yet he purposely sought during Williams’ isolation from his lawyers to obtain as much incriminating information as possible. Indeed, Detective Leaming conceded as much when he testified at Williams’ trial:

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Jones v. Smith, 244 F. Supp. 2d 801, 810–12 (E.D. Mich. 2003); Stahl v. State, 426 So.2d 909, 916 (Ala. Crim. App. 1982); People v. Ferro, 472 N.E.2d 13, 17 (N.Y. 1984) (Jason, J., dissenting); Nelson v. State, 463 S.W.3d 123, 130 (Tex. Ct. App. 2015). As noted by one court, “Though *Brewer v. Williams* was decided on Sixth and Fourteenth Amendment grounds, the analysis of the ‘basic contours’ of the right to counsel is the same as that undertaken in Fifth Amendment cases such as *Rhode Island v. Innis*.” *Commonwealth v. Hunter*, No. 00-1334(1-5), 2001 Mass. Super. LEXIS 376, at \*16 n.5 (Mass. Super. Ct. Apr. 23, 2001).

101. *Brewer*, 430 U.S. at 392–93.

“Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren’t you?”

“A. I was sure hoping to find out where that little girl was, yes, sir.

.....

“Q. Well, I’ll put it this way: You was [*sic*] hoping to get all the information you could before Williams got back to McKnight, weren’t you?”

“A. Yes, sir.”<sup>102</sup>

The judges in the cases discussed in the previous section found no interrogation even with actions and words directed to the suspects. With other cases, however, we see very different results with the emphasis often looking to the Christian burial speech decision, as reflected in the following cases:

- After the defendant invoked the right to remain silent, the officer told the defendant he and his co-defendants would be “charge[d] . . . with murder and that this was his ‘last chance.’”<sup>103</sup> The court held that the experienced officer, “clearly ‘should know’ that his statement, combined with his actions, was ‘reasonably likely to evoke an incriminating response.’”<sup>104</sup>
- The officers provided updated information three different times while the defendant was in custody.<sup>105</sup> The officers could not offer any explanation why it was necessary to give the defendant such additional information on

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102. *Id.* at 399 (alterations in original). To be sure, the Iowa Attorney General at oral argument also appeared to concede the point.

Counsel for petitioner, in the course of oral argument in this Court, acknowledged that the “Christian burial speech” was tantamount to interrogation:

“Q: But isn’t the point, really, Mr. Attorney General, what you indicated earlier, and that is that the officer wanted to elicit information from Williams

“A: Yes, sir.

“Q: by whatever techniques he used, I would suppose a lawyer would consider that he were pursuing interrogation.

“A: It is, but it was very brief.”

*Id.* at 399, n.6. Justice Blackmun, in dissent, was not convinced.

[N]ot every attempt to elicit information should be regarded as “tantamount to interrogation[.]” I am not persuaded that Leaming’s observations and comments, made as the police car traversed the snowy and slippery miles between Davenport and Des Moines that winter afternoon, were an interrogation, direct or subtle, of Williams . . . Williams, after all, was counseled by lawyers, and warned by the arraigning judge in Davenport and by the police, and yet it was he who started the travel conversations and brought up the subject of the criminal investigation . . . Persons in custody frequently volunteer statements in response to stimuli other than interrogation . . . When there is no interrogation, such statements should be admissible as long as they are truly voluntary.

*Id.* at 439–40.

103. *United States v. Rosario-Cintrón*, 194 F. Supp. 3d 161, 166 (D.P.R. 2016).

104. *Id.* at 175.

105. *State v. Wright*, 133 A.3d 656, 667 (N.J. Super. App. Div. 2016).

the investigation. The court held that the officers' actions constituted interrogation.<sup>106</sup>

- After the defendant was arrested, agents played him a recording of his wiretapped statements.<sup>107</sup> This action was found to be interrogation because it was clear what the agents were attempting to achieve.<sup>108</sup>
- The officer promised to tell the suspect what an alibi witness was saying.<sup>109</sup> The court found this to be interrogation, it was an attempt to induce the defendant to speak.<sup>110</sup>

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106. *Id.* at 668. The court explained:

It is precisely because defendant's response is so readily understandable that we find the officer should surely have known that his meting out of the information in the way he did was reasonably likely to evoke an incriminating response, and thus that it amounted to an interrogation.

To be clear, like the trial judge, we see no objection to the officers' initial statements to defendant about why he was being detained. If defendant had at that point blurted out that he had the cell phone, we would not hold the officers accountable for such an unforeseeable result.

Here, however, Officer Andrek continued well beyond his initial communication informing defendant of the reasons for his detention. The officer's actions in continuing to engage defendant by providing him updates on the progress of the investigation were unnecessary, and the officer should have known they would be likely to elicit an incriminating response, either exculpatory or inculpatory.

*Id.* (citations omitted).

107. *United States v. Mark*, 48 V.I. 769, 780 (D.V.I. 2007), *aff'd* 284 Fed. App'x 946 (3d Cir. 2008).

108. *Id.* at 976. As the court explained:

Here, Francois was under arrest at the time he made the statements in question. Therefore, he was clearly in police custody when the statements were made. Furthermore, after Francois was arrested but before he was given *Miranda* warnings, the agents played him a tape of his allegedly incriminating conversations intercepted through the wiretap. Accordingly, Francois was subjected to custodial interrogation before he was advised of his rights under *Miranda*.

*Id.*

109. *Shelly v. State*, 262 So.3d 1, 7 (Fla. 2018).

110. *Id.* at 16. As the court explained:

Detective Consalo's actions can be likened to the proverbial carrot-and-stick—using reward and punishment to induce Shelly to acquiesce to continued interrogation. There can be no doubt these statements induced Shelly to continue engaging with Detective Consalo, even though he had clearly previously invoked his right to silence numerous times.

When, as in this case, a detective persists in attempting to coax a suspect to continue the interrogation after the suspect has unequivocally invoked his right to silence, the detective is not asking harmless clarifying questions; he is violating the suspect's *Miranda* rights.

*Id.* at 16–17. For a striking recent opinion involving the police having another person approach the defendant, see *State ex rel. A.A.*, 222 A.3d 681 (N.J. 2020). There, the fifteen-year-old defendant was arrested for aggravated assault. His mother was allowed to go back to the holding cell and speak to her son in an open area. Officers allowed this because they wanted to make sure that the minor defendant understood his right to have a parent present, as required under the New Jersey

- Officers removed the defendant from a holding cell in a courthouse where he was detained for an unrelated offense. They then put him into a room with no pens, paper, or recording devices.<sup>111</sup> The officers physically showed the defendant the rifle involved in the crime, but also told the defendant not to say anything. Because they knew of the defendant's susceptibility to seeing evidence, how central the rifle was in the case, and the effect of having the weapon reappear, the officers should have known that their conduct was reasonably likely to result in incriminating statements.<sup>112</sup>
- Officers arrested the defendant after he hit another car while driving erratically.<sup>113</sup> An officer asked the defendant what happened, and the defendant did not answer. The officer then stated, "It smells like you have been drinking[.]"<sup>114</sup> This was held to be the functional equivalent of interrogation.<sup>115</sup>

What is it about these cases which led the judges involved to find *Miranda* violations? Certainly it was not any sort of prolonged, focused words or actions which somehow compelled these defendants to incriminate themselves. Still, there was enough police activity in each of the cases to demonstrate that an interrogation process was at play.

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law. The officers did not explain to the mother that they would be listening to the conversation with her son and that anything her son said could be used against him. Also, they did not tell the defendant his rights in front of his mother before the two began to speak. The New Jersey Supreme Court ruled that the defendant's incriminating statements were not admissible.

Under the circumstances, it was hardly a surprise that A.A. and his mother spoke about the crime for which A.A. had been arrested. The police should have known it was reasonably likely that A.A.'s mother would elicit incriminating responses from him. Although we find no evidence of bad faith on the part of the police, their words and actions set in motion A.A.'s incriminating statements to his mother. Under *Immis*, therefore, A.A. was subjected to the "functional equivalent" of express questioning while in custody. His statements, obtained without the benefit of any *Miranda* warnings, are thus inadmissible.

*Id.* at 691 (citations omitted).

111. *United States v. Lovell*, 317 F. Supp. 2d 663, 665 (W.D. Va. 2004).

112. *Id.* at 669 ("An interrogation for *Miranda* purposes may be direct questioning or its functional equivalent . . . The impact of these words or actions is to be assessed from the suspect's viewpoint rather than based on the officer's intent.").

113. *Congelosi v. Miller*, 611 F. Supp. 2d 274, 285 (W.D.N.Y. 2008).

114. *Id.* at 288.

115. *Id.* at 293. The court explained:

[The officer conceded] at trial that when he made the comment, he was attempting to determine whether Congelosi had been drinking. Added to that is the fact Officer Fenton had unsuccessfully tried to get Congelosi to tell him what had happened just prior to his making the comment about smelling alcohol on Congelosi, who apparently was displaying the physical signs of a bellicose drunk. Under these specific circumstances, I tend to agree with Congelosi that Officer Fenton should have known that his comment was at least "reasonably likely to elicit an incriminating response."

*Id.*



### III. THE NEXT STEP?

What we have seen in reviewing cases from the last two decades are judicial applications—both state and federal—of the crucial term *interrogation* that are inconsistent, confusing, and often not at all faithful to the spirit of the Supreme Court in *Miranda*. In virtually identical fact situations, one can find courts which decide that interrogation has taken place, while other courts decide that interrogation has not occurred. The reader can easily turn back to cases involving the so-called booking exception, or cases in which officers show items of evidence to suspects, to confirm this conclusion.

One must ask, then, is the problem with the definition the Supreme Court gave us back in *Innis*, four decades ago? The definition certainly is straightforward enough. As noted earlier, it is interrogation if “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.”<sup>116</sup> It is an objective standard, looking to the police officer. Justice Stevens, in dissent, believed the standard should be objective, but looking instead to the suspect: “[A]ny police conduct or statements that would appear to a reasonable person in the suspect’s position to call for a response must be considered ‘interrogation.’”<sup>117</sup>

These two possible definitions of *interrogation* were offered to—and considered by—the Court, along with the rather obvious suggestion that interrogation occurs when the words or actions are designed to elicit an incriminating response.<sup>118</sup> Still, one must wonder—looking at the many judicial applications of the Supreme Court’s actual definition—whether with a different standard the results would truly have been any different in the bulk of cases. Let us return to Justice Marshall’s dissenting opinion in *Innis*, where he took the majority to task for using the objective standard and finding no interrogation. Consider, once again, the facts in *Innis* as stated by Justice Marshall:

I am utterly at a loss, however, to understand how this objective standard as applied to the facts before us can rationally lead to the conclusion that there was no interrogation. *Innis* was arrested at 4:30

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116. *Rhode Island v. Innis*, 446 U.S. 291, 303 (1980).

117. *Id.* at 311 (Stevens, J., dissenting). He made a powerful argument: “From the suspect’s point of view, the effectiveness of the warnings depends on whether it appears that the police are scrupulously honoring his rights.” *Id.*

118. Long ago, I wrote of these three approaches:

*Interrogation*. The current definition is a fair one, covering any actions by the police reasonably likely to elicit a response. My suggestion is that this definition be supplemented by including two other situations: cases in which the officers intended to elicit an incriminating response and cases in which the suspect believed he was undergoing interrogation.

Paul Marcus, *A Return to the “Bright Line Rule” of Miranda*, 35 WM. & MARY L. REV. 93, 145 (1993).

a.m., handcuffed, searched, advised of his rights, and placed in the back seat of a patrol car. Within a short time he had been twice more advised of his rights and driven away in a four-door sedan with three police officers. Two officers sat in the front seat and one sat beside Innis in the back seat. Since the car traveled no more than a mile before Innis agreed to point out the location of the murder weapon, Officer Gleckman must have begun almost immediately to talk about the search for the shotgun.

The Court attempts to characterize Gleckman's statements as "no more than a few offhand remarks" which could not reasonably have been expected to elicit a response. If the statements had been addressed to respondent, it would be impossible to draw such a conclusion. The simple message of the "talking back and forth" between Gleckman and McKenna was that they had to find the shotgun to avert a child's death.

One can scarcely imagine a stronger appeal to the conscience of a suspect—*any* suspect—than the assertion that if the weapon is not found an innocent person will be hurt or killed. And not just any innocent person, but an innocent child—a little girl—a helpless, handicapped little girl on her way to school. The notion that such an appeal could not be expected to have any effect unless the suspect were known to have some special interest in handicapped children verges on the ludicrous. As a matter of fact, the appeal to a suspect to confess for the sake of others, to "display some evidence of decency and honor," is a classic interrogation technique.

Gleckman's remarks would obviously have constituted interrogation if they had been explicitly directed to respondent, and the result should not be different because they were nominally addressed to McKenna. This is not a case where police officers speaking among themselves are accidentally overheard by a suspect. These officers were "talking back and forth" in close quarters with the handcuffed suspect, traveling past the very place where they believed the weapon was located. They knew respondent would hear and attend to their conversation, and they are chargeable with knowledge of and responsibility for the pressures to speak which they created.<sup>119</sup>

Justice Marshall was correct in that, under any of the three definitions, the words of the officers constituted *interrogation*. And, yet, the majority disagreed. That application—and the many rulings by lower courts since 1980—has not been true to the *Miranda* holding. Such an application does not help to insure that the suspect's desire to remain silent was—as stated by the Chief Justice in *Miranda*—"scrupulously honored," or that no one in custody is

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119. *Innis*, 446 U.S. at 305–07 (Marshall, J., dissenting).

questioned without being given a statement of his constitutional rights.<sup>120</sup> No, regardless of the three approaches that could be used, I believe it is fair to conclude that the results in the cases discussed above would not differ greatly and that defendants' wishes to remain silent or have a lawyer would not have been followed in many of these prosecutions.<sup>121</sup> What, then, is to be done to reinvigorate this aspect of *Miranda*?

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120. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

121. For this writer, perhaps the most troubling cases are those laid out earlier in which the police show (or tell about) the evidence against the defendant and she then makes an incriminating statement. They are troubling precisely because one might well conclude that this demonstration or comment by the police is truly designed to get an incriminating statement and would be reasonably likely to do so. Yet, as we have seen, courts are split as to whether such actions constitute interrogation. The United States Supreme Court, however, has been silent on this point. The closest the Court got to it was more than thirty years ago in a case from Florida potentially raising the issue. The Court, however, denied *certiorari*. Only Justice White appeared bothered by the judicial responses to these police actions and remarks. He dissented from the denial of *certiorari*:

[P]etitioner, once in custody, was given *Miranda* warnings and immediately invoked his right to remain silent. The police did not try to question him, but instead took him to a room where he was shown a videotape of the robbery, which also included footage of the shooting of the attendant. While viewing the videotape, petitioner made several incriminating statements to an officer . . . Petitioner argued that being confronted with evidence of this nature is the "functional equivalent" of express questioning, which is impermissible once a person in custody has invoked his right to remain silent, but the Florida Court of Appeal disagreed.

We have stated that "interrogation" under *Miranda* does include conditions that are its "functional equivalent," that is, "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. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." We also have observed that a "psychological ploy" of any significance would also be treated as the "functional equivalent" of interrogation.

Whether police may confront a suspect with evidence against him, outside the range of normal arrest and charging procedures, without engaging in the "functional equivalent" of interrogation is a substantial question in light of *Innis*. In addition, the federal and state courts disagree over the issue. Some courts, for example, have found an interrogation to have occurred when the police, in booking a suspect, merely advised him of the charges and then described the evidence against him in some detail . . . On the other side of the issue, moreover, some courts have treated more adventurous police practices, which are in no sense any part of the formal arrest or charging procedures, as the "functional equivalent" of interrogation . . . I would grant *certiorari* to consider the construction of *Innis* rendered by the court below and to resolve the significant disagreement on this general issue among the state and federal courts, which has led those courts both to handicap the police in pursuing some apparently legitimate law-enforcement practices and to approve the use of other ploys that have nothing to do with the usual and accepted procedures for arresting and charging a suspect.

*Lewis v. Florida*, 486 U.S. 1036, 1037–38 (1988) (citations omitted). A close second as to troubling actions could be found in the many cases in which a suspect makes an incriminating statement after hearing one officer tell another officer of concerns about the suspect, the evidence, or safety issues. See *supra* note 13.

#### IV. CONCLUSION

Is there a better way? I suggest that there is. The guiding principle should simply be that any words or actions which actually lead to incriminating statements qualify as *interrogation*. Basically, I am promoting the standard but-for, actual cause test from the first year Criminal Law class. This is, of course, considerably broader than what the Supreme Court discussed in *Innis* and *Muniz*. It would mean that in almost all the cases reviewed in this article, interrogations should have been found. This is necessary because the applications in the case law in favor of the government go well beyond what could properly be seen as police actions not designed or likely to elicit an incriminating response.

There may be situations in which a defendant shouts out something damaging in response to a truly neutral sort of question or action. In that case there should certainly be some relief for the government. Let us suppose we have our defendant from the start of this article, who blurts out an incriminating comment in response to the question of whether she wanted regular or decaf coffee. There we can properly conclude that the government's comment or action was genuinely not designed or likely to elicit an incriminating response. If the prosecution could show this by clear and convincing evidence—and the burden would be on the prosecution—no interrogation would be found. That, though, is a far distance from what we see today with courts inappropriately stretching the interrogation doctrine to admit incriminating statements that—with little doubt—result from less than neutral concern about caffeine preferences.

If my proposed solution is not palatable, let us consider the possibility that the Supreme Court continue to use its *Innis* definition of *interrogation*, but send the message (through some decided cases) that judges are to be realistic in applying the term. That is, when we see an officer showing a video to a suspect, asking how all is going with that person, or loudly expressing concern over the safety of a victim, we should require the judge to ask the obvious question: What was it that this officer was really doing with these words or actions? And, in many of these cases we know the answer to that question. The officer was trying to get incriminating information and knew such an approach might well be effective. That would and should be seen as *interrogation* necessitating *Miranda* warnings.