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Asking the Scary Question: What Is the Correct Understanding of "Interrogation" Under Rhode Island v. Innis?

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COMMENTS

ASKING THE SCARY QUESTION: WHAT IS THE CORRECT UNDERSTANDING OF "INTERROGATION" UNDER *RHODE ISLAND V. INNIS*?

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I. INTRODUCTION

> "If my answers frighten you, Vincent, then you should cease asking scary questions." — Jules Winnfield[1]

A police interrogation can be an unnerving and unsettling experience—one that often produces frightening answers. Imagine you are "swept from familiar surroundings into police custody, surrounded by antagonistic forces,"[2] deprived of the comforts of your home, cut off from the support of loved ones,[3] and locked with a stranger in a depressing, windowless room[4] for hours at a time[5] while

1. PULP FICTION (Miramax Films 1994). In the scene, Jules Winnfield (Samuel L. Jackson) is speaking at a diner booth with Vincent Vega (John Travolta).

2. Miranda v. Arizona, 384 U.S. 436, 461 (1966).

3. *See, e.g.*, *id.* at 449-50 ("'In [the suspect's] own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support.'" (quoting CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1956))).

4. *See, e.g.*, United States v. Broughton, No. 13-CR-164 (KAM), 2013 WL 5744473, at *2 (E.D.N.Y. Oct. 23, 2013) ("[The officer and suspect] moved to a private examination area, a ten foot by ten foot room, with one door, no windows, a desk, chair and bench."); People v. White, 828 N.W.2d 329, 347 n.4 (Mich. 2013) (Cavanagh, J., dissenting) ("I believe that it is far more realistic and reasonable to conclude that most people would not perceive a one-on-one 'discussion' with a

the stranger wages a war of attrition with your psyche using "psychological ploys."[6] Other strangers come and go, some wearing suits and others with uniforms, guns, badges, and handcuffs.[7] These unfamiliar people assure you, promise even, that you will feel better[8] if you just admit that you "did it."[9]

Later, a uniformed man places a gun on the table in front of you, claiming your fingerprints are all over it[10] and that your "partner"

homicide detective in a windowless police interrogation room to be a completely civil conversation.").

5. *See, e.g.*, *Miranda*, 384 U.S. at 495-96 (interrogating a suspect over at least a sixteen-hour period in custody before warnings is unconstitutional), *rev'g* Westover v. United States, 342 F.2d 684 (9th Cir. 1965); Hill v. United States, 858 A.2d 435, 439 (D.C. 2004) (holding suspect for approximately three and a half hours before speaking with him); *see also Miranda*, 384 U.S. at 451 ("[The investigator] should interrogate for a spell of several hours . . . . In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination." (quoting O'HARA, *supra* note 3, at 112)).

6. *See Miranda*, 384 U.S. at 451, 457 ("'[The investigator] must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth.'" (quoting O'HARA, *supra* note 3, at 112)).

7. *See id.* at 457 ("This [interrogation] atmosphere carries its own badge of intimidation.").

8. *See, e.g.*, State v. Tucker, 692 N.E.2d 171, 176 (Ohio 1998) ("engag[ing the defendant] in casual conversation" deemed "simply looking out for Tucker's well-being" and not interrogation); Baker v. State, 956 S.W.2d 19, at 21 (Tex. Crim. App. 1997) (asking suspect if he was sure he didn't want to get "this thing . . . . off his chest" (internal quotation marks omitted)); State v. Sargent, 762 P.2d 1127, 1128 (Wash. 1988) (telling suspect that he would only benefit from mental counseling if he "c[a]me to the truth with himself" (internal quotation marks omitted)).

9. *See, e.g.*, *In re* K.A., 60 A.3d 442, 445 (D.C. 2013) ("According to [one suspect], the officers 'started making rude comments towards us saying . . . . one of you obviously did it.'"); State v. Guayante, 663 P.2d 784, 785-86 (Or. Ct. App. 1983) ("[The officer] testified that he told defendant, 'Look, we already know you did it. Here is the stuff you took from him.' Defendant said, 'Yes, I did it.'").

10. *See, e.g.*, United States v. Rodgers, 186 F. Supp. 2d 971, 973 (E.D. Wis. 2002) ("The detective also told defendant that his fingerprints had been found on the firearm and the cocaine. This statement was false."); People v. Haley, 96 P.3d 170, 183 (Cal. 2004) ("[D]etective told defendant, in effect, that 'he knew he did it because his fingerprint was found at the scene.'").

already "fingered you as the triggerman."[11] Is he lying?[12] The man then places a duffel bag of cash, the apparent loot from the robbery, on the table mere inches from you.[13] How are they so sure that you are the right person?[14] Your head aches, your eyes hurt from the infernal fluorescent lights, you are drained of energy, and sapped of the will to resist. The closest thing to a meal you had since morning was a candy bar, a cigarette, and a can of soda.[15] The gun and money lie motionless, taunting you, whispering, "Did you do it? You did it, didn't you?" Desperate, hopeless, and terrified, you cave in if for no other reason than to put an end to the elaborate ruse: "Ok, ok. I did it."

And with that short admission, you seal your fate. With the confession, you become the most damning possible witness against yourself.

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11. *See, e.g.*, United States v. Blake, 571 F.3d 331, 340 (4th Cir. 2009) (informing defendant that another suspect had "named [defendant] as the triggerman" was not interrogation); People v. Kowalksi, 584 N.W.2d 613, 621 (Mich. Ct. App. 1998) ("informing defendant that codefendant . . . had given a statement did not constitute interrogation").

12. *See, e.g.*, Shedelblower v. Estelle, 885 F.2d 570, 572-73 (9th Cir. 1989) (informing suspect that his accomplice had been arrested and that the victim had identified the suspect—even though that latter statement was untrue—held not to be interrogation).

13. *See, e.g.*, Drury v. State, 793 A.2d 567, 571 (Md. 2002) (placing a tire iron and a garbage bag of stolen magazines obtained from robbery investigation in front of suspect).

14. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 450 (1966) ("[T]actics [used in custody] are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged."); *see also* Michael Lewis, *Did Goldman Sachs Overstep in Criminally Charging Its Ex-Programmer?*, VANITY FAIR (Sept., 2013), *available at* http://www.vanityfair.com/business/2013/09/michael-lewis-goldman-sachs-programmer ("'It appeared [the officers] had a very strong bias from the very beginning. They had goals they wanted to fulfill. The goal was to obtain an immediate confession.'") (quoting Sergey Aleynikov, a computer programmer interrogated by the FBI for taking source code from Goldman Sachs).

15. *See, e.g.*, *Rodgers*, 186 F. Supp. 2d at 972 (giving suspect a candy bar and a soda after suspect said "he was hungry"); Hill v. United States, 858 A.2d 435, 439 (D.C. 2004) (offering suspect a soda); State v. Tucker, 692 N.E.2d 171, 174 (Ohio 1998) (giving defendant "a cigarette and a soft drink, in an effort to calm him down").

"A defendant's confession is probably the most probative and damaging evidence that can be admitted against him, so damaging that a jury should not be expected to ignore it even if told to do so."[16] For this reason, the law of confessions is one of the most important and controversial areas of American law.[17] Police habitually push legal boundaries to obtain confessions, perhaps rightly so.[18] Accordingly, police, attorneys, and judges should yearn to know with some certainty the lawfulness of the psychological ploys depicted in the preceding dramatization.

The Fifth Amendment guarantees individuals the right to be free from self-incrimination.[19] The Supreme Court delineated the extent of this powerful privilege in *Miranda v. Arizona*,[20] one of the Court's

16. Arizona v. Fulminante, 499 U.S. 279, 292 (1991) (White, J., dissenting) (citation omitted) (quoting Cruz v. New York, 481 U.S. 186, 195 (1987) (White, J., dissenting)) (internal quotation marks omitted).

17. *See* discussion *infra* Part II.A. Law enforcement officials' handling of the Boston terror bombing suspect in early 2013 showed how the extent of suspects' rights under *Miranda* strikes a chord with the media and the public. *See* Adam Goodman, *How the Media Have Misunderstood Dzhokhar Tsarnaev's* Miranda *Rights*, THE ATLANTIC, Apr. 22, 2013, http://www.theatlantic.com/national/archive/2013/04/how-the-media-have-misunderstood-dzhokhar-tsarnaevs-i-miranda-i-rights/275189/; Charlie Savage, *Debate Over Delaying of* Miranda *Warning*, N.Y. TIMES, Apr. 20, 2013, http://www.nytimes.com/2013/04/21/us/a-debate-over-delaying-suspects-miranda-rights.html. In the end, authorities questioned the arrestee for sixteen hours before reading him his *Miranda* rights, invoking the "public safety exception" under *New York v. Quarles*, 467 U.S. 649 (1984). Mark Sherman, *Dzhokhar Tsarnaev* Miranda *Rights Timing Sparks Legal Questions*, THE HUFFINGTON POST, Apr. 25, 2013, http://www.huffingtonpost.com/2013/04/25/dzhokhar-tsarnaev-miranda_n_3159287.html.

18. *See* United States v. Washington, 431 U.S. 181, 187-88 (1977) ("Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable."); Laura Hoffman Roppe, Comment, *True Blue? Should Police Be Allowed to use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729, 761 n.154 (1994) ("Some pressure in interrogation is, of course, necessary to achieve the desired result."); *see also* Lewis v. Florida, 486 U.S. 1036, 1036 (White, J., dissenting from denial of certiorari).

19. "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

20. Miranda v. Arizona, 384 U.S. 436, 439-42 (1966) ("We granted certiorari in these cases in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." (citations omitted)).

most well-known decisions.[21] *Miranda* ruled that statements obtained from "custodial interrogation" are inadmissible without prior warnings apprising a suspect of his or her rights and a subsequent waiver of those rights.[22]

The Supreme Court addressed the "interrogation" part of "custodial interrogation" for the first time in *Rhode Island v. Innis*.[23] In *Innis*, the Supreme Court officially extended the prohibition against confessions obtained from interrogation by express questioning[24] to those obtained by the "functional equivalent of interrogation": "words or actions on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[25] However, *Innis* also suggested that *Miranda*'s concept of "'[i]nterrogation' . . . must reflect a measure of compulsion above and

21. *See* Richard L. Budden, Comment, *All in All,* Miranda *Loses Another Brick From Its Wall: The U.S. Supreme Court Swings Its Hammer in* Berghuis v. Thompkins, *Dealing a Crushing Blow to the Right to Remain Silent*, 50 WASHBURN L.J. 483, 488 (2011) ("The *Miranda* case is well known in criminal procedure as the leading source of rules pertaining to police interrogation."); Russell Dean Covey, Miranda *and the Media: Tracing the Cultural Evolution of a Constitutional Revolution*, 10 CHAP. L. REV. 761, 761 (2007) ("Not only did television make the *Miranda* warnings famous, its adoption of *Miranda* as an icon of criminal procedure may be the main reason *Miranda* is good law today.") (footnote omitted); *see also* Daniel Yeager, *Rethinking Custodial Interrogation*, 28 AM. CRIM. L. REV. 1, 2-3 (1990) ("Few cases have triggered as expansive a collection of case law and scholarly commentary, not to mention barroom, streetcorner, and living-room discourse."); discussion *infra* Part II.B.

22. *Miranda*, 384 U.S. at 444. Notably, the *Miranda* prohibition only applies to the use of statements in the prosecution's case-in-chief. *Id.* The implication is that such statements are admissible for other purposes. *Id.*

23. Rhode Island v. Innis, 446 U.S. 291, 293-97 (1980). Police arrested Innis as a suspected sawed-off shotgun-toting assailant of taxicab drivers. *Id.* While transporting Innis to the station, the officers conversed about the dangers the missing gun may have posed to handicapped children who went to school in the area (were it hidden nearby). *Id.* Innis spoke up and took the officers back to the shotgun. *Id.* The Rhode Island Supreme Court concluded that the officers had interrogated Innis in violation of his rights under *Miranda*. *Id.* at 296-97 (referring to State v. Innis, 391 A.2d 1158 (R.I. 1978)).

24. *Id*. at 300; *infra* note 90 and accompanying text.

25. *Innis*, 446 U.S. at 301 (footnotes omitted). *Innis* also provided an exception for "words or actions . . . normally attendant to arrest and custody." *Id*. *See also* discussion *infra* Part II.B.

beyond that inherent in custody itself."[26] It was unclear whether this utterance amended an *additional* coercive element to interrogation,[27] or merely contrasted statements obtained via interrogation with completely "[v]olunteered statements."[28]

Whatever the purpose of the remark, the *Innis* opinion produced a perplexing result in light of the Court's incipient definition: police officers did not interrogate Innis when they discussed the danger that his missing shotgun posed to nearby handicapped schoolchildren.[29] With this seemingly innocuous "above and beyond" dictum and the peculiar result, the Supreme Court clouded any clarity that may have been gleaned from *Innis* regarding the limits to the "functional equivalent of interrogation."[30]

Going forward, *Innis* launched the debate over interrogation on two different trajectories: one forbidding apparently benign police conduct because it is the functional equivalent of interrogation; and another accepting police tactics that appear to prompt incriminating responses yet lack a measure of compulsion beyond custody itself.[31] On one side are the adherents of the Court's purported rule in *Innis*, the "likely to elicit" definition.[32] On the other side are courts that follow substantially the same definition but with an additional element drawn from the "above and beyond" dictum of *Innis*.[33] This note

26. *Innis*, 446 U.S. at 300.

27. *See id.* at 300 ("Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." (quoting *Miranda*, 384 U.S. at 478)); *Miranda*, 384 U.S. at 545 (White, J., dissenting) ("Today's decision leaves open such questions as . . . whether [the accused's] statements were spontaneous or the product of interrogation . . . ."). *See also infra* note 131.

28. *Miranda*, 384 U.S at 478.

29. *Innis*, 446 U.S. at 302-04; *see also* discussion *infra* Part II.B.

30. *See* Yeager, *supra* note 21, at 47 ("The Court's own standard seemingly would encompass the very tactics resorted to in that case. . . . [*Innis*] offered no guidance as to how reviewing courts, prosecutors, or defenders should prospectively distinguish the precise measure of compulsion which implicates *Miranda* from the subtle coercion that does not.") (footnotes and internal quotation marks omitted).

31. *See* discussion *infra* Parts III-IV.

32. *See infra* note 133 and accompanying text.

33. *See Innis*, 446 U.S. at 300. Not every court interpreting the law in a manner that is incompatible with the "likely to elicit" definition explicitly credits the "above and beyond" language, but these results are nonetheless attributable to the

labels the latter interpretation the "custody plus" definition, because it requires custody *plus* an additional measure of compulsion not inherent in custody itself.[34]

These contrasting interpretations produced rampant uncertainty in lower courts,[35] prompting Justice White to write a dissent from denial of certiorari in *Lewis v. Florida* that illustrated the confusion and division.[36] Since *Lewis*, inconsistency has persisted over the legality of law enforcement's more exotic practices.[37] Despite the disparate results, the Supreme Court has been hesitant to revisit *Innis* and assist courts and police by resolving the dispute, leaving the question of interrogation as an exceptionally "slippery" fish in the "murky" swamp of *Miranda*.[38]

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history of courts interpreting *Innis* in accordance with either the "likely to elicit" or "custody plus" paradigm. *See* discussion *infra* Part III.B.

34. *See* Lewis v. State, 509 So. 2d 1236 (Fla. Dist. Ct. App. 1987). Therefore, it is easier for police to show that a defendant voluntarily relinquished information in compliance with *Miranda* when a court uses the "custody plus" interpretation of *Innis*.

35. *See* discussion *infra* Parts III-IV.

36.

> 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, 1036 (1988) (White, J., dissenting from denial of certiorari to *Lewis v. State*, 509 So. 2d 1236 (Fla. Dist. Ct. App. 1987)).

37. *See* discussion *infra* Part IV. "Law enforcement" is "society's formal attempt to obtain compliance with the established rules, regulations, and laws of that society . . . . The concept . . . encompasses all levels (federal, state, and local) of the executive branch of government." JAMES CONSER, REBECCA PAYNICH, & TERRY GINGERICH, LAW ENFORCEMENT IN THE UNITED STATES 1-3 (3d ed. 2013). This note refers to those responsible for law enforcement—and thus subject to *Miranda*—generally as "police," "law enforcement officials," and "officers," or, when appropriate, "detectives," "agents," "park rangers," or whatever state actor term is appropriate in context. *See id.* at 3.

38. Oregon v. Elstad, 470 U.S. 298, 309, 316 (1985) (describing the question of "custody" as "slippery" and *Miranda* in general as "murky"). *But see id.* at 359 (Brennan, J., dissenting) (arguing that *Miranda* is only "slippery" and "murky"

Because the two contrasting definitions extractable from *Innis* have created a baffling trail of cases in American state and federal courts,[39] the Supreme Court's repeated refusal to consider cases contemplating the issue is puzzling. Could endorsing either the "likely to elicit" or the "custody plus" definition of interrogation have severe consequences on the law of confessions and day-to-day police work? Would reaffirmation of the "likely to elicit" definition prohibit many uncoercive police tactics accepted in numerous U.S. jurisdictions? Does the "custody plus" definition greatly undermine the policies behind *Miranda*? The questions raised by interrogation under *Innis* may be scary, but over thirty years after *Innis* it is the *lack* of answers that is more frightening.

Part II traces the growth of "interrogation" from generic "questioning" to the broader definition espoused in *Rhode Island v. Innis*. This background discusses *Miranda v. Arizona*, whose deep roots provide the formidable constitutional foundation for "express questioning and its functional equivalent." Part III describes the two conflicting interpretations of "interrogation" *Rhode Island v. Innis* produced: the "likely to elicit" definition and the "custody plus" definition, described in Justice White's dissenting opinion in *Lewis v. Florida*. Part IV outlines how these opposing interpretations have produced discrepancies in lower courts over which psychological ploys by police qualify as "interrogation." Finally, Part V argues that the "likely to elicit" definition of interrogation should displace the "custody plus" definition because the latter diverges from "compulsion" as understood in *Miranda*. Part V urges the Supreme Court to revisit *Innis* and hold that "interrogation" is "express questioning . . . [and] any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response."[40]

"because the Court's opinion [in *Elstad*] threaten[ed] to become a self-fulfilling prophecy").

39. *See* discussion *infra* Part IV.

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

II. *MIRANDA* AND *INNIS*: THE ORIGINS OF "INTERROGATION" AND ITS "FUNCTIONAL EQUIVALENT"

A. Miranda v. Arizona *transformed the law of confessions while discussing the types of interrogation tactics that were objectionable to the Supreme Court*

One could scarcely imagine a more persuasive piece of evidence positing a defendant's guilt than his or her own confession. A full confession along the lines of, "I did it and this is how," is one of the most complete and nearly insurmountable suggestions of guilt.[41] But skeptics who lack compassion for the accused may overlook that the term "confession" includes *any* incriminating response,[42] which in the hands of a skilled prosecutor is virtually any statement from a suspect.[43]

The law of confessions implicates two very strong competing values: catching bad guys (and gals) on the one hand and loyalty to the privilege against self-incrimination on the other.[44] It is easy to

41. *See supra* note 16. Probably the only piece of evidence more convincing than a complete confession is a videotape of the suspect committing the crime. *See, e.g.*, *Lewis*, 509 So. 2d at 1236. But in *Lewis*, the police officers were apparently uncomfortable relying on a videotape without a confession, as they used a videotape of the suspect committing the crime *to obtain* a confession. *Id.*

42. *Innis*, 446 U.S. at 300-01 ("We conclude that the *Miranda* safeguards come into play whenever . . . . the police should know [they] are reasonably likely to elicit an incriminating response . . . ." (citation omitted)).

43. *Id.* at 301 n.5 ("By 'incriminating response' we refer to any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial."); *see also* Miranda v. Arizona, 384 U.S. 436, 476-77 (1966) ("[N]o distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement."). Because the prosecution may seek to introduce any incriminating response, and both inculpatory and exculpatory statements are incriminating in any meaningful sense, it necessarily follows that a "confession" is practically any response in custody.

44. U.S. CONST. amend. V. "[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence

have an almost overwhelming indifference to the plight of criminals, a sect of society that does little to garner sympathy or compassion. But the right to be free from compelled self-incrimination is one of the nation's "most cherished principles."[45] Lest we forget, the Bill of Rights protects the rights of both the accused and the guilty, and to think the former is synonymous with the latter is an affront to the American notion of justice.[46]

But the ability to interrogate a suspect by way of express questions or other tactics is an essential element of criminal investigation.[47] Consequently, the law of confessions has become a vast and ubiquitous aspect of the criminal justice system, one regulated in great part by the Fifth Amendment.[48] Unenviably, the

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against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda*, 384 U.S. at 460 (citing Chambers v. Florida, 309 U.S. 227, 235-38 (1940)); *see also id.* at 537 (White, J., dissenting) ("More than the human dignity of the accused is involved [in our system of criminal justice] . . . . [S]ociety's interest in the general security is of equal weight.").

45. *Miranda*, 384 U.S. at 458.

46.

> The determination [of a confession's voluntariness] must not be influenced by an irrelevant feeling of certitude that the accused is guilty of the crime to which he confessed. Above all, it must not be influenced by knowledge, however it may have revealed itself, that the accused is a bad man with a long criminal record. All this, not out of tenderness for the accused but because we have reached a certain stage of civilization.

Stein v. New York, 346 U.S. 156, 200 (1953) (Frankfurter, J., dissenting), *overruled in part by* Jackson v. Denno, 378 U.S. 368 (1964).

47. Haynes v. Washington, 373 U.S. 503, 514-15 (1963) ("[S]ecret and incommunicado detention and interrogation . . . are devices adapted and used to extort confessions from suspects. . . . Such questioning is undoubtedly an essential tool in effective law enforcement."); *see also* Spano v. New York, 360 U.S. 315, 325 (1959) (Douglas, J., concurring) (describing a confession as "the vital evidence . . . which is useful or necessary to obtain a conviction"); Montejo v. Louisiana, 556 U.S. 778, 796 (2009) ("Without . . . confessions, crimes go unsolved and criminals unpunished."). *But see Miranda*, 384 U.S. at 481 ("Although confessions may play an important role in some convictions, the cases here before us present graphic examples of the overstatement of the 'need' for confessions.").

48. Confessions are supplementally regulated by the Sixth Amendment's right to counsel, the Due Process Clause of the Fifth and Fourteenth Amendments, and rules of evidence. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 159 (1986) (state rules of evidence); Miller v. Fenton, 474 U.S. 104, 109 (1985) (Due Process Clause of the Fourteenth Amendment); Massiah v. United States, 377 U.S. 201, 205 (1964) (Sixth Amendment).

Supreme Court faces the challenging task of interpreting the Fifth Amendment and writing the rules in the high stakes game of confessions.

The literature expounding *Miranda v. Arizona* is plentiful and voluminous,[49] and the decision itself is on any list of classic Supreme Court cases.[50] For better or worse, *Miranda* revolutionized the law of confessions[51] and set the stage for any subsequent discussion of confessions. Prior to *Miranda*, courts used a voluntariness analysis to determine whether confessions were admissible.[52] To dispense with this custom, Chief Justice Warren found it "essential" to examine the "nature and setting" of custodial interrogation and how it threatened

49. *See* Yeager, *supra* note 21, at 2; *e.g.*, Joseph D. Grano, Miranda v. Arizona *and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243 (1987); Stephen Allen Saltzburg, Miranda v. Arizona *Revisited: Constitutional Law or Judicial Fiat?*, 26 WASHBURN L.J. 1 (1986); Yale Kamisar, Brewer v. Williams, Massiah *and* Miranda: *What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1 (1980).

50. *See* JETHRO K. LIEBERMAN, MILESTONES: 200 YEARS OF AMERICAN LAW vii (1976) (selecting *Miranda* as the fourth most important moment in U.S. legal history). Other examples include Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Bush v. Gore, 531 U.S. 98 (2000); Roe v. Wade, 410 U.S. 113 (1973); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Gideon v. Wainwright, 372 U.S. 335 (1963); Brown v. Bd. of Educ., 347 U.S. 483 (1954); McCulloch v. Maryland, 17 U.S. 316 (1819); and Marbury v. Madison, 5 U.S. 137 (1803).

51. *See* L. BAKER, MIRANDA: CRIME, LAW & POLITICS (1985); Covey, *supra* note 21; Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125, 1151 (2000) (quoting Yale Kamisar, *The* Miranda *Warning Takes a Body Blow*, L.A. TIMES, Feb. 17, 1999, at B7); Mark Tushnet, *Observations on the New Revolution in Constitutional Criminal Procedure*, 94 GEO. L.J. 1627, 1627 (2006). *But see* Carol S. Steicker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996); George C. Thomas III, *"Truth Machines" and Confessions Law in the Year 2046*, 5 OHIO ST. J. CRIM. L. 215, 218 (2007) (arguing "*Miranda* was not a revolution. It was a compromise"); George C. Thomas III, *Through a Glass Darkly: Seeing the Real Warren Court Criminal Justice Legacy*, 3 OHIO ST. J. CRIM. L. 1 (2005).

52. Under the voluntariness doctrine, confessions were admissible as long as the suspect made them voluntarily, as determined by the totality of the circumstances. *See, e.g.*, *Miranda*, 384 U.S. at 462-65; *id.* at 503-04 (Clark, J., dissenting); Escobedo v. Illinois, 378 U.S. 478 (1964); *see also* Ashcraft v. Tennessee, 322 U.S. 143 (1944); Lyons v. Oklahoma, 322 U.S. 596 (1944); Welsh S. White, *Interrogation Without Questions*: Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209, 1209-10 (1980).

the protection against compelled self-incrimination.[53] The Court was not exclusively focused on physical brutality, police violence, or other tactics of the "third degree."[54] Rather, the Court "stress[ed] that the modern practice of in-custody interrogation is psychologically, rather than physically, oriented."[55]

The *Miranda* majority emphasized the importance police placed on using psychological domination to extract confessions.[56] Contemporary police manuals taught psychological stratagems and praised their effectiveness against suspects.[57] These police tactics were sophisticated and thoughtfully crafted to obtain a confession from a suspect through psychological domination. Moreover, these psychological tactics were taught in interrogation *manuals*.[58] By way of these psychological "ploys" and "tricks," investigators were able to "induce the subject to talk without resorting to duress or coercion."[59] The manuals touted isolation as the "principal psychological factor contributing to a successful interrogation"[60] and encouraged exploiting suspects' vulnerabilities and weaknesses.[61] Now familiar

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53. *Miranda*, 384 U.S. at 445.

54. *See id.* at 445-448. Specifically, Chief Justice Warren mentioned "beating, hanging, [and] whipping." *Id.* at 446.

> Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, "It is a short cut and makes the police lazy and unenterprising."

Id. at 447 (quoting IV NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 5 (1931)).

55. *Id.* at 448.

56. *Id.* at 448-61.

57. *See id.* at 448-50. "The subject should be deprived of every psychological advantage. . . . In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law." *Id.* at 449-50 (quoting O'HARA, *supra* note 3, at 99).

58. *See, e.g.*, FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001) (1962); O'HARA, *supra* note 3; HAROLD MULBAR, INTERROGATION (1951); WORTH R. KIDD, POLICE INTERROGATION (1940).

59. *Miranda*, 384 U.S. at 451-52.

60. *Id.* at 449 (quoting INBAU ET AL., *supra* note 58, at 1).

61.

to cable or movie viewers of police procedurals, the Court alluded to the "Good Cop-Bad Cop," "friendly-unfriendly," or "Mutt and Jeff" routine.[62] Chief Justice Warren described tactics such as coached line-ups[63] and reverse line-ups,[64] remarking that "interrogators sometimes are instructed to induce a confession out of trickery."[65]

It was in this vein that Chief Justice Warren discussed "the evils [interrogation] can bring."[66] He concluded that police safeguards taken prior to a confession were insufficient to "insure that the statements were truly the product of free choice."[67] In Chief Justice Warren's view, compulsion encompassed any type of deception used in custody.[68] The atmosphere created by the incommunicado, carefully-constructed, psychologically-manipulated environment "carrie[d] its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity."[69]

> Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty.

Id. at 450 (footnotes omitted).

62. *Id.* at 452.

63. "The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party." *Id.* at 453 (quoting O'HARA, *supra* note 3, at 105-06).

64. The accused is identified in a reverse line-up by "'fictitious witnesses'" for crimes different from the offense under investigation in the hope that he or she will "'become desperate and confess to the offense under investigation in order to escape from the false accusations.'" *Id.* at 453 (quoting O'HARA, *supra* note 3, at 106).

65. *Id.* Chief Justice Warren discussed several other psychological devices to demonstrate their pervasiveness, such as offering the suspect legal excuses for his actions, using circumstantial evidence to negate a suspect's self-defense explanation, pointing out the incriminating significance of the suspect's refusal to talk, persuading the suspect out of exercising his or her constitutional rights, and humiliating a suspect by undressing him. *Id.* at 451-55, 452 n.17.

66. *Id.* at 456.

67. *Id.* at 457.

68. *See id.* at 456-58.

69. *Id.* at 457.

Concluding that these devious maneuvers in custody "commence[d]" "our adversary system,"[70] the majority banned the use of statements obtained from custodial interrogation without police first giving warnings and receiving a waiver.[71] Despite elaborating on several custodial taboos, the Court neglected to define "interrogation" within the grammar of "custodial interrogation."[72] In its rule, the Court referred only to "questioning" and "interrogation" generically without defining with any precision what these terms incorporated.[73] In his dissenting opinion, Justice White drew attention to this and other shortcomings of the Court's ruling, anticipating that the

70. *Id*. at 478.

71. This is the *Miranda* rule. *Id*. at 444. "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to presence of an attorney, either retained or appointed." *Id.* at 444. The suspect's right to remain silent has to be scrupulously honored once the suspect properly invokes this right, which means halting interrogation. *Id*. at 478. Any further interrogation is charmingly known as "badgering." Michigan v. Harvey, 494 U.S. 344, 350 (1990); *see also* Edwards v. Arizona, 451 U.S. 477, 484 (1981).

72. *See Miranda*, 384 U.S. at 436-99; *see also* Rhode Island v. Innis, 446 U.S. 291, 298-99 (1980) ("[R]eferences throughout the opinion to 'questioning' might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody. We do not, however, construe the *Miranda* opinion so narrowly.").

73. *See, e.g.*, *Miranda*, 384 U.S. at 473-74 ("If the individual indicates in any manner, at any time prior to or during *questioning*, that he wishes to remain silent, the *interrogation* must cease." (emphasis added)); *id.* at 474 ("Without the right to cut off *questioning*, the setting of in-custody interrogation operates on the individual to overcome free choice." (emphasis added)); *id.* ("[Police] may refrain from [providing counsel] without violating the person's Fifth Amendment privilege so long as they do not *question* him during that time." (emphasis added)); *id.* at 477 ("The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police *interrogation* while in custody at the station or otherwise deprived of his freedom of action in any significant way." (emphasis added)); *id.* at 478 ("To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to *questioning*, the privilege against self-incrimination is jeopardized." (emphasis added)); *id.* at 483 ("Over the years the Federal Bureau of Investigation has . . . advis[ed] any suspect or arrested person, at the outset of an *interview*, that he is not required to make a statement . . . ." (emphasis added)).

supposed "bright line" rule created by *Miranda* would inspire a counterproductive amount of confusion and uncertainty.[74]

Summarily, the *Miranda* majority found the interrogation setting comparable to an overwhelming home field advantage in sports. American justice is a game, and when police and criminal suspects are opponents what inevitably follows are winners and losers.[75] According to *Miranda*, the advantage is so one-sided on law enforcement's home field that even facing the opponent on this turf violates the spirit of the game.[76] To offset the lack of competitive

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> At the same time, the Court's per se approach may not be justified on the ground that it provides a "bright line" [rule] . . . . Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution.

Id. at 544-45 (White, J., dissenting).

75. The adversarial nature of the American legal system demands that police engage in the "the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948). This "competitive enterprise" pits police officers against suspects much like opponents in a sporting event. *See also* Montejo v. Louisiana 556 U.S. 778, 806 (2009) (Stevens, J., dissenting) ("[T]he purpose of the Sixth Amendment is to protec[t] the unaided layman at critical confrontations with his adversary . . . ." (second alteration in original) (quoting Michigan v. Jackson, 475 U.S. 625, 631 (1986)) (internal quotation marks omitted)); McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) (obtaining uncoerced confessions is an "unmitigated good," and if courts excluded them "society would be the loser"); Colorado v. Connelly, 479 U.S. 157, 182 (1986) ("Our distrust for reliance on confessions is due, in part, to their decisive impact upon the adversarial process."); Minnesota v. Murphy, 465 U.S. 420, 459 (1984) (Marshall, J., dissenting) (mentioning the "the inherently adversarial relationship between a suspect and a policeman"). *See generally* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 3 (A. Howard ed. 1965).

76. *See Miranda*, 384 U.S. at 457-58 ("The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself.").

balance, police must remind the opponent of the rules.[77] Otherwise, the home team cannot start the game.[78] Suspects may choose to strap up and kick off the contest after being made aware of the rules.[79] But only after suspects voluntarily say "game on" may the final score be counted against them in the win-loss column.[80] It is with this understanding that the Court created the categorical rule against incriminating statements obtained without prior warnings "to dispel the compulsion inherent in custodial surroundings."[81] It is only these warnings that restore the competitive balance suspects lack[82] on law enforcement's home field: the "interrogation environment."[83]

B. The Supreme Court formally addressed the "interrogation" prong of "custodial interrogation" for the first time in Rhode Island v. Innis, *finally defining interrogation as understood in* Miranda

As lawyers and judges are inclined to do, they quickly put the seemingly simple *Miranda* rule through the rigors of intense legal scrutiny.[84] Because the Supreme Court failed to outline what

77. *See id*. at 467 ("In order to combat these pressures [inherent in custody] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights . . . .").

78. *See id*. at 479 ("But unless and until . . . warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the individual].").

79. *See id*.

80. *See id*.

81. *Id*. at 458. There are exceptions where the *Miranda* rule does not forbid the use of evidence obtained via custodial interrogation, but these exceptions should not (but sometimes do) change the analysis of whether "interrogation" occurred in the first place. *See, e.g.*, Illinois v. Perkins, 496 U.S. 292 (1990) (confidential informant); Pennsylvania v. Muniz, 496 U.S. 582 (1990) (routine-booking exception); New York v. Quarles, 467 U.S. 649 (1984) (public safety exception).

82. *See supra* note 71.

83. *Miranda*, 384 U.S. at 457 ("It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner.").

84. *See, e.g.*, Commonwealth v. Mercier 302 A.2d 337 (Pa. 1973); State v. Cunningham, 379 A.2d 860 (N.J. Super. Ct. App. Div. 1976); State v. Travis, 360 A.2d 548 (R.I. 1976). The Rhode Island Supreme Court "erroneous[ly]" relied on the Supreme Court's decision in a right to counsel case to determine if police had interrogated Innis. Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980) (referring to

constituted "interrogation" in *Miranda*—and the cases decided in the opinion focused on the lack of procedural safeguards rather than what qualified as interrogation—lower courts had no illuminating insights from which to draw a coherent definition of interrogation.[85] Following *Miranda*, the Court's jurisprudence on the "custody" prong of custodial interrogation rapidly expanded to help explain that half of the analysis.[86] But it was not until 1980 that the Supreme Court finally decided the meaning of "interrogation" in *Rhode Island v. Innis*.[87]

The dispute in *Innis* stemmed from comments the defendant made in response to a conversation between two officers while they transported him to the police station.[88] Before it could analyze whether police violated Innis' right to be from compelled self-incrimination, the Court had to "first define the term 'interrogation' under *Miranda*."[89] The Court noted *Miranda*'s bare references to "questioning" in its definition of custodial interrogation, but refused to find that the *Miranda* safeguards applied only to instances of express questioning.[90] The litany of police practices referenced in *Miranda*

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the court's reliance in State v. Innis, 391 A.2d 1158, 1161-62 (R.I. 1978), on Brewer v. Williams, 430 U.S. 387 (1977)); *see also* cases cited *infra* note 85.

85. *See Miranda*, 384 U.S. at 491-93 (Ernesto Miranda was "questioned by two police officers" in an interrogation room), *rev'g* State v. Miranda, 401 P.2d 721 (Ariz. 1965); *id.* at 493-94 ("[A] detective questioned Vignera" about a robbery at squad headquarters), *rev'g* People v. Vignera, 207 N.E.2d 527 (N.Y. 1965); *id.* at 494-97 (FBI agents "began questioning Westover . . . [after] he had been in custody for over 14 hours and had been interrogated at length during that period [by Kansas City police]."), *rev'g* Westover v. United States, 342 F.2d 684 (9th Cir. 1965); *id.* at 497-99 (Police "interrogated" Stewart nine times over five days, including once where "he was confronted with an accusing witness."), *aff'g* People v. Stewart, 400 P.2d 97 (Cal. 1965).

86. *See, e.g.*, Mathis v. United States, 391 U.S. 1, 3-6 (1968); Orozco v. Texas, 394 U.S. 324, 326-37 (1969); Beckwith v. United States, 425 U.S. 341, 347 (1976); Oregon v. Mathiason, 429 U.S. 492, 494-95 (1977).

87. *Innis*, 446 U.S. at 297 ("We granted certiorari to address for the first time the meaning of 'interrogation' under *Miranda v. Arizona*.").

88. *Id*. at 293-97; *see also* discussion *infra* Part II.C.

89. *Innis*, 446 U.S. at 298.

90. According to the Court in *Innis*:

> [T]he [*Miranda*] Court observed that "[b]y custodial interrogation, we mean *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in

demonstrated that the Court's sole worry was not statements punctuated with question marks.[91] Rather, the Court's concern was "that the interrogation environment created by the interplay of interrogation and custody would subjugate the individual to the will of his examiner and thereby undermine the privilege against compulsory self-incrimination."[92] The Court reasoned, "it is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation."[93] In this light, the Court concluded:

> [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.[94]

At last, here was a workable definition to determine "whether [the accused's] statements were spontaneous[95] or the product of interrogation."[96] Justice Stewart reiterated that the objective analysis will depend on what officers should have known would be the result

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> any significant way." This passage and other references throughout the opinion to "questioning" might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody.
>
> We do not, however, construe the *Miranda* opinion so narrowly.

Id. at 298-99 (emphasis and third alteration in original) (citations omitted).

91. *See supra* Part II.A.

92. *Innis*, 446 U.S. at 299 (quoting *Miranda*, 384 U.S. at 457-58) (internal quotation marks omitted).

93. *Id.*

94. *Id.* at 300-01. Hereinafter, the term "interrogation" signifies "express questioning or its functional equivalent," as is the proper understanding of "interrogation" in *Innis*. Therefore, "interrogated the suspect" will suffice for the long-winded "subjected the suspect to express questioning or the functional equivalent of interrogation."

95. *But see Miranda*, 384 U.S. at 533 (White, J., dissenting) ("Although in the Court's view in-custody interrogation is inherently coercive, the Court [illogically] says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary.").

96. *Id.* at 545.

of their actions, accounting for suspects' perceptions and known susceptibilities.[97] Application of the new interrogation definition would undoubtedly be a painstaking and onerous task for lower courts, but it was a definition nonetheless.[98]

C. Though the Supreme Court finally produced a working definition of interrogation in Innis*, the Court's application of this definition produced a perplexing result that compromised its clarity*

As with many important constitutional questions—particularly those in the realm of criminal procedure—no one expected a mechanistic, straightforward answer to the "interrogation" inquiry.[99] The outcome in *Innis* did not disappoint, leaving prosecutors and defense attorneys with a muddled result.

In January 1975, Providence police were searching for a man they had good reason to believe committed a series of taxicab crimes involving a sawed-off shotgun.[100] Shortly after midnight on January 17, one of the taxicab drivers and robbery victims identified the assailant as Thomas Innis.[101] Police arrested Innis within hours of the driver's identification.[102] Police Mirandized[103] Innis at least twice,

97. *Innis*, 446 U.S. at 301-02.

98. *See, e.g.*, *infra* Parts III-IV; *see also* Withrow v. Williams, 507 U.S. 680, 711 (1993) (O'Connor, J., concurring in part and dissenting in part) ("*Miranda*, for all its alleged brightness, is not without its difficulties. . . . And the supposedly 'bright' lines that separate interrogation from spontaneous declaration . . . turned out to be rather dim and ill defined." (citing *Innis*, 446 U.S. at 291)); *Miranda*, 384 U.S. at 544-45 (White, J., dissenting) ("Nor can it be claimed that judicial time and effort . . . will be conserved because of the ease of application of the new rule. Today's decision leaves open such questions as . . . whether [the accused's] statements were spontaneous or the product of interrogation, . . . all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution.").

99. *See, e.g.*, White, *supra* note 52, at 1251 ("But even if the Court embraces the interpretations of the *Innis* and *Henry* rules advocated in this Article, cases requiring further refinement of its definition of 'interrogation' are likely to arise in the not-so-distant future.").

100. *Innis*, 446 U.S. at 293-94. One of these run-ins resulted in the death of a driver. *Id.* at 293.

101. *Id.* at 293.

102. *Id.* at 293-94 (Patrolman Lovell spotted and arrested Innis at approximately 4:30 a.m.).

after which he invoked his right to an attorney.[104] The captain directed officers to place Innis in a "caged wagon" and drive him to the police station without questioning, intimidating, or coercing him in any way.[105]

Not long after their journey began, two of the officers struck up a casual conversation about their proximity to a handicapped school.[106] Because of the handicapped children frequenting and "'running around [the] area,'" the two officers agreed that it was in everybody's best interest to find the missing shotgun believed to belong to Innis because, if found by the children, it could result in the death of a little girl.[107] Perhaps no more than a mile into their journey,[108] Innis

103. Mirandize: to give or advise a suspect of his "so-called *Miranda* rights." *See, e.g.*, *id.* at 294 (referring to the rights described in Miranda v. Arizona, 384 U.S. 436, 444 (1966)); *Miranda*, 384 U.S. at 444 ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

104. *Innis*, 446 U.S. at 294. Police must scrupulously honor this right once it has been invoked by ceasing interrogation or providing an attorney, and without seeking a waiver in the meantime (what is known as "badgering"). *Miranda*, 384 U.S. at 444-45 ("If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.").

105. *Innis*, 446 U.S. at 294. The "caged wagon" was a "four-door police car with a wire screen mesh between the front and rear seats." *Id.* Though it is unclear, it is probable that one of the officers sat alongside Innis in the back of the wagon. The testimony of two officers suggested that Officer Gleckman sat in the front seat with the driver, while the captain and another officer testified that he sat in the back. *Id.* at 315 n.16 (Stevens, J., dissenting); *see also id.* at 305 (Marshall, J., dissenting) ("Two officers sat in the front seat and one sat beside Innis in the back seat.").

106. *Id.* at 294.

107. *Id.* at 295 ("'He [Officer Gleckman] said it would be too bad if the little—I believe he said a girl—would pick up the gun, maybe kill herself.'" (quoting Patrolman Williams' testimony, who was driving and did not participate in the conversation)); *see also id.* at 294-95 ("'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.'" (alteration in original) (quoting Patrolman Gleckman's testimony)).

interrupted the conversation to take the officers to the shotgun, which was hidden "under some rocks by the side of the road."[109] Innis informed the captain, after being re-read his rights, that he "'wanted to get the gun out of the way because of the kids in the area in the school.'"[110]

A jury subsequently convicted Innis of the kidnapping, robbery, and murder of the deceased taxicab driver.[111] The Rhode Island Supreme Court determined that the police officers interrogated Innis, and in doing so had failed to scrupulously honor the invocation of his right to an attorney.[112] Applying its newly-crafted definition of "interrogation,"[113] the Supreme Court disagreed.[114] The Court found that the officers neither questioned Innis nor subjected him to the functional equivalent of interrogation.[115]

The majority reasoned that because the officers' "off hand remarks" amounted to "nothing more than a dialogue," they should not have expected that their conversation would elicit an incriminating response.[116] The officers' conversation was not a "lengthy harangue" comprised of "particularly evocative" comments.[117] Furthermore, there was nothing to suggest that Innis "was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children," or that he was "unusually disoriented or upset at the time of his arrest."[118] Defying *Miranda*, the Court explained that the "subtle compulsion" did not equate to interrogation.[119]

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108. *Id.* at 295 ("At the time the respondent indicated that the officers should turn back, they had traveled no more than a mile, a trip encompassing only a few minutes.").

109. *Id.*

110. *Id.*

111. *Id.* at 295-96.

112. *Id.* at 296.

113. *See* discussion *supra* Part II.C.

114. *Innis*, 446 U.S. at 302.

115. *Id.*

116. *Id.* at 302-03.

117. *Id.* at 303.

118. *Id.* at 302-03. *But see, e.g.*, Brewer v. Williams, 430 U.S. 387 (1977) (holding a violation of Sixth Amendment right to counsel when detective gave "Christian Burial Speech" to defendant when he "knew that Williams was a former mental patient, and knew also that he was deeply religious"); Townsend v. Sain, 372

This outcome was irksome and puzzling even to contemporaries, who predicted the opposite outcome would be the "obvious" result.[120] After going on at length about "psychological ploys"[121] and how "limit[ing] . . . *Miranda* to express questioning would 'place a premium on the ingenuity of the police,'"[122] the Court appeared to have done just that. In his dissent, Justice Marshall was "substantially in agreement with the Court's definition of 'interrogation'" but "utterly at a loss" to understand how its application led "to the conclusion that there was no interrogation."[123] Though Innis may have had no particular sensitivity to the well-being of handicapped children, Justice Marshall wrote, "[o]ne can scarcely imagine a stronger appeal to the conscience of a suspect."[124] Furthermore, appealing to a suspect's decency or honor is "a classic interrogation technique."[125] These facts culminated in a result that "verge[d] on the ludicrous."[126] Similarly, Justice Stevens found the holding represented "a plain departure from the principles set forth in *Miranda*."[127]

U.S. 293 (1963) (holding that confession was involuntary when officers knowingly exploited a suspect who police physicians had given a drug with truth-serum properties).

119. *Innis*, 446 U.S. at. 303 ("The Rhode Island Supreme Court erred, in short, in equating 'subtle compulsion' with interrogation."). *But see Miranda*, 384 U.S. at 474 ("[A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.").

120. *Innis*, 446 U.S. at 312 n.12 (Stevens, J., dissenting) ("'Under the proposed objective standard, the result is obvious. Since the conversation indicates a strong desire to know the location of the shotgun, any person with knowledge of the weapon's location would be likely to believe that the officers wanted him to disclose its location. Thus, a reasonable person in Innis' position would believe that the officers were seeking to solicit precisely the type of response that was given.'" (quoting Welsh White, Rhode Island v. Innis: *The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53, 68 (1979) (proposing the same test adopted in *Innis* and applying it to the facts of the case))).

121. *Id.* at 299.

122. *Id.* at 299 n.3 (quoting Commonwealth v. Hamilton, 285 A.2d 172, 175 (Pa. 1971)).

123. *Id.* at 305 (Marshall, J., dissenting).

124. *Id.* at 306.

125. *Id.*

126. *Id.*

127. *Id.* at 309 (Stevens, J., dissenting).

III. INTERROGATION SINCE *INNIS*: GENERATING MORE QUESTIONS THAN ANSWERS

A. Following Innis*, the "likely to elicit" and "custody plus" definitions of interrogation emerged to produce divergent results, which Justice White discussed in his dissent from denial of certiorari in* Lewis v. Florida

If interrogation as imagined in *Innis* had a rocky start, its jurisprudence was no smoother in the following years.[128] *Innis* was hardly an "aberration,"[129] but foreshadowed chaotic outcomes in cases where interrogation was the principal issue. To further complicate matters, the result in *Innis* encouraged strained readings of the "above and beyond" language[130] that may have merely rephrased the principle that "volunteered statements" or "spontaneous" utterances made in custody were admissible.[131] The *Miranda* majority suggested that, given the inherent compulsion in custody, any police conduct legitimized by a plausible response from a suspect would qualify as interrogation.[132] Instead, some courts have dwelled on the "above and beyond" language, causing two different post-*Innis* interrogation regimes to emerge: one adhering to the "likely to elicit" definition[133]—the espoused rule of *Innis*—and another following a

128. *See* Lewis v. Florida, 486 U.S. 1036, 1036 (1988) (White, J., dissenting from denial of certiorari); *infra* notes 139-43 and accompanying text.

129. *Innis*, 446 U.S. at 307 (Marshall, J., dissenting).

130. *Id.* at 300 ("'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself."). *See also supra* note 26.

131. *Innis*, 446 U.S. at 299-300 ("'Any statement given freely and voluntarily without *any* compelling influences is, of course, admissible in evidence. . . . Volunteered statements of any kind are not barred by the Fifth Amendment.'" (emphasis added) (quoting *Miranda*, 384 U.S. at 478)). The proximity of this passage from *Miranda* to the "above and beyond" language, *see supra* text accompanying note 26, hints that the "above and beyond" language simply reiterated the concept that completely volunteered statements are not barred. The dictum has not been interpreted so by many lower courts, though. *See infra* Parts III.B-IV.

132. *See Miranda*, 384 U.S. at 458; *id.* at 532 (White, J., dissenting).

133. The "likely to elicit" definition of interrogation is literally the rule established in *Innis*: "'[I]nterrogation' under *Miranda* refers not only to express questioning, but also to 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

"custody plus" definition that derives an additional element of compulsion from the "above and beyond" dictum in *Innis*.[134]

In 1988, the Supreme Court denied certiorari to a Florida case, passing on an opportunity to resolve the main discrepancy among lower courts over what constitutes "interrogation" under *Miranda*. In *Lewis v. State*,[135] Robert Lee Lewis invoked his right to remain silent after receiving his *Miranda* warnings in connection with his arrest for armed robbery.[136] Despite the rules from *Miranda* and *Innis*, police presented Lewis with a private screening of a video of the robbery.[137] As the video played, Lewis provided his own artistic criticism with comments such as, "'Man, he took it like a man. I should have hit him a couple more times.'"[138] After the trial court denied his motion to suppress the statements and the Florida Fourth District Court of Appeal affirmed his conviction, Lewis unsuccessfully petitioned the Supreme Court for certiorari.[139]

Justice White dissented from the denial of certiorari, observing the "significant disagreement . . . among the state and federal courts" on the proper construction of *Innis*.[140] Depending on which of the two interpretations is proper, the wildly inconsistent results necessarily handicapped "legitimate law enforcement practices" in some jurisdictions and approved of inappropriate psychological ploys in others.[141] Petitioning the Supreme Court for certiorari, Lewis argued

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reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 301 (footnotes omitted).

134. The "custody plus" definition is substantially the same as the "likely to elicit" definition, but also requires an additional "measure of compulsion above and beyond that inherent in custody itself" where that measure of compulsion is not identical to "words or actions on the part of police . . . reasonably like to elicit an incriminating response." *Id.* at 300-01.

135. Lewis v. State, 509 So. 2d 1236 (Fla. Dist. Ct. App. 1987).

136. *Id.*

137. *Id.*

138. *Id.*

139. Lewis v. Florida, 486 U.S. 1036 (1988) (denying petition for certiorari).

140. *Id.* (White, J., dissenting from denial of certiorari).

141. *Id.* at 1036. *See also, e.g.*, United States v. Gay, 774 F.2d 368, 371 (10th Cir. 1985) (holding that suspect's statement "'That's cocaine, too!'" was admissible as officer examined contents of suspect's pockets, as was statement, "'[n]o if [you] look in there, I'll be in real trouble,'" when asked for permission to search trunk); United States v. Bennett, 626 F.2d 1309 (5th Cir. 1980) (holding that officer's

that confronting a suspect with evidence is the functional equivalent of interrogation.[142] "[I]n light of *Innis*," Justice White considered "[w]hether police may confront a suspect with evidence against him . . . without engaging in the 'functional equivalent' of interrogation [to be] a substantial question."[143] Nevertheless, the Supreme Court denied certiorari and the Florida court's decision remained undisturbed.

B. Discussed in Justice White's opinion in Lewis v. Florida, Lewis v. State *and* People v. Ferro *are microcosms of the warring interpretations of* Innis

While pointing to a multitude of cases to demonstrate the "significant disagreement" over the interpretation of *Innis*,[144] Justice White's dissent from the denial of certiorari in *Lewis v. Florida* discussed the details of only two such cases: *Lewis v. State* and *People v. Ferro*.[145] The contrary results in these cases, and the contrasting reasoning by their courts, illuminate the "likely to elicit" and "custody plus" interpretations of *Innis* and how they conflict with one another.

In *Lewis*,[146] the Fourth District Court of Appeal of Florida voiced support for the "custody plus" interpretation of *Innis*,[147] finding that

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statement at scene of arrest that "'[t]here is a gun in the car'" and seizing the gun to check and see if it was loaded did not constitute an interrogation within meaning of *Miranda*); State v. Benjamin, 300 N.W.2d 661, 667 (Mich. Ct. App. 1980) (holding that shoplifting suspect's statements in response to being shown knives obtained from her purse merely the "unforeseeable result of a brief, unembellished gesture" by the deputy); State v. Gibson, 422 N.W.2d 570, 577 (Neb. 1988) (conceding it may be on the "on the cutting edge of immeasurable imprudence," yet finding no interrogation where officer said, "'Oh, look what I found'" after discovering loaded revolver in the defendant's presence).

142. Lewis v. State, 509 So. 2d 1236, 1236 (Fla. Dist. Ct. App. 1987).

143. *Lewis*, 486 U.S. at 1036 (White, J., dissenting from denial of certiorari).

144. *See infra* note 153.

145. *Id*. (referring to *Lewis*, 509 So. 2d at 1236, and *Ferro*, 472 N.E. 2d at 14).

146. *See supra* notes 135-39 and accompanying text.

147. Again, the "likely to elicit" definition of interrogation is the rule the Supreme Court fashioned in *Innis*, while the "custody plus" definition is the unofficial tendency of courts to look for an additional "measure of compulsion above and beyond that inherent in custody itself." *See supra* notes 133-34. Any "support" for one interpretation or the other is implicit from the language and interpretive clues discussed in this Part.

the "police procedure did not impinge upon [Lewis'] will in a coercive manner."[148] The court conceded that perhaps "the police should have known that showing [Lewis] the evidence against him would be likely to elicit an incriminating response," which would be an interrogation under the "likely to elicit" rule from *Innis*.[149] Instead, the court found it was "unlikely that the appellant was *compelled* to incriminate himself by viewing a video of the robbery."[150] To defend its position, the court referenced Lewis' familiarity with the justice system and appearance of levity during the video as evidence belying any contention that the "interrogation environment" coerced him into speaking.[151] Though unsuccessful, Lewis had a strong premise: parading evidence in front of a suspect ought to be considered interrogation, as other jurisdictions had concluded.[152]

In contrast, the majority of the New York Court of Appeals demonstrated its loyalty to the "likely to elicit" definition of interrogation in *People v. Ferro*.[153] Police arrested Ferro and took him to the precinct station while investigating a murder that occurred during a residential robbery.[154] After receiving his *Miranda* warnings, Ferro elected not to answer any questions and asked a precinct detective if he could speak with a district attorney.[155] The detective declined the request and left Ferro in his cell, returning with a pile of stolen furs that had belonged to the now-deceased robbery victim.[156] The detective strategically plopped the furs "right in front of the cell a foot away from [Ferro]. Ferro then grabbed ahold of the wire mesh

148. *Lewis v. State*, 509 So. 2d at 1237.

149. *Id*. at 1237.

150. *Id.* (emphasis added).

151. *Id.*

152. *See* Wainwright v. State, 504 A.2d 1096 (Del. 1986) (verbal recitation of evidence); State v. Quinn, 498 A.2d 676, 679 (Md. Ct. Spec. App. 1985) (informing suspect in print that co-defendants had implicated him effectively told suspect, "'Look and see for yourself what I have against you. Now what do you have to say'?"); Koza v. State, 718 P.2d 671 (Nev. 1986) (informing defendant of charges and evidence against her); *see also infra* Part IV.

153. People v. Ferro, 472 N.E.2d 13, 14 (N.Y. 1984).

154. *Id.*

155. *Id.* at 14.

156. *Id.* at 15.

with both hands and said 'Hey, I got to talk to you.'"[157] Over the course of the ensuing conversation, "which began as soon as the furs were placed on the floor in front of the cell," Ferro asked to speak with an Italian detective, to whom he made several statements which the prosecution used against Ferro.[158]

The New York Court of Appeals recited that, under *Innis*, "the test is not whether the detectives in fact intended to interrogate defendant but whether an objective observer would conclude that the conduct of the detectives was reasonably likely to elicit a response from defendant."[159] The majority discerned no difficulty in concluding that the detective and his companion interrogated Ferro. The court found "no other inference that could be drawn from the undisputed facts than that the police should have known that defendant was reasonably likely to respond to the placing of the furs before him by making a statement."[160] Because the majority applied the *Innis* definition of interrogation in its most literal, straightforward sense, there was "no other conclusion . . . possible."[161] The majority even stressed, "the *only* possible object of the police action in revealing evidence to a defendant is to elicit a statement from him,"[162] a result directly contradicting *Lewis*.[163]

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157. *Id.* at 15 (alteration in original) (quoting Detective Hudson's recollection of Ferro's comment) (internal quotation marks omitted). *See id.* ("Hudson testified that there was one continuous conversation.").

158. *Id.* ("Ferro recounted [to Detective Cassi] that he had been told by a woman who was decedent's next-door neighbor that decedent was giving her a great deal of trouble for which she wanted decedent robbed as a means of revenge, that he had told the neighbor he was not interested, and in response to her question whether he could get somebody to do so, had responded only that he would think about it.").

159. *Id.* at 15-17 (discussing *Innis*).

160. *Id.* at 16.

161. *Id.* at 17.

162. *Id.* at 17 (emphasis added). This statement suggests that the New York Court of Appeals categorically considered revealing evidence to a suspect to be the functional equivalent of interrogation.

163. On the other hand, the dissent in *Ferro* opposed the majority's plain understanding of *Innis*, subscribing instead to the "custody plus" interpretation of interrogation. *Id.* at 17. The dissent accused the majority of "interpret[ing] the 'likely to elicit' test too literally and mechanically." *Id.* (Jasen, J., dissenting) (citation omitted). The dissent found the placement of the furs to be "noncoercive police conduct" as Ferro simply "change[d] his mind," apparently on a whim, when he decided to speak with police. *Id.* at 21. The dissenting opinion contained a

With *Lewis* and *Ferro* providing the backdrop, one can see why Justice White thought it necessary to reconsider *Innis* and resolve the significant disagreement over interrogation. Both cases dealt with situations in which police exposed damning evidence to criminal suspects. The opposite outcomes, based on strikingly similar facts, demonstrate the two opposing interpretations of *Innis* that have blossomed and clashed unabated since 1980.

IV. THE "LIKELY TO ELICIT" AND "CUSTODY PLUS" INTERPRETATIONS OF *INNIS*: PRODUCING VASTLY DIFFERENT RESULTS

The Supreme Court has considered a handful of cases implicating the *Innis* definition of interrogation without resolving the discord recognized by Justice White in *Lewis*.[164] In 1987, the Supreme Court reaffirmed the illegality of using confessions obtained by psychological ploys in *Arizona v. Mauro*.[165] The Supreme Court dealt with another psychological ploy in *Pennsylvania v. Muniz*, although the propriety of the officer's trick question dodged *Innis* scrutiny

variation of the word coercion or compulsion fourteen times, compared with the majority's use of such words only twice. *See id.* at 14-21. Although this term counting is an unscientific method, repetition of such words (coercion, uncoerced, uncoercive, compelled, compulsory, compulsion) is symptomatic of an opinion obeying the "custody plus" definition of interrogation.

164. *See supra* Part III.A.

165. Arizona v. Mauro, 481 U.S. 520 (1987). In *Mauro*, police arrested a man that walked into a Kmart store professing that he had killed his son. *Id.* at 521-22. After being advised of his *Miranda* rights a second time, Mauro invoked his right to have an attorney. *Id.* at 522. While Mauro remained in the police captain's office, a detective questioned Mauro's wife, who insisted on speaking with her husband. *Id.* The detective relented and allowed Mauro and his wife to chat while the detective ensconced himself and a tape recorder at a nearby desk. *Id.* The 5-4 majority had no difficulty concluding that the detective did not interrogate Mauro under *Miranda* and *Innis*. *Mauro*, 481 U.S. at 527. While reaffirming that "psychological ploy[s]" may be the functional equivalent of interrogation, *id*., the Court ruled that the police had not "*us[ed]* the coercive nature of confinement to extract [the] confessions." *Id.* at 530 (emphasis added). *Mauro* is very instructive in circumstances where family members or significant others meet with a suspect, but did little to clarify *Innis* beyond such narrow circumstances. Justice White remained dissatisfied with any steps *Mauro* took to resolve the major questions remaining after *Innis*, as *Mauro* was decided in the year before Justice White's dissent in *Lewis v. Florida*. *See* Lewis v. Florida, 486 U.S. 1036 (White, J., dissenting from denial to certiorari).

because it was an express question.[166] Since *Mauro* and *Muniz*, the Supreme Court has cited *Innis* only in passing,[167] sidestepping a protracted discussion of the case that still provides the only recognized definition of "interrogation." Unaided by the result in *Innis* and the Court's shirking of cases such as *Lewis*, the significant disagreement over the proper interpretation of *Innis* persists as lower courts settle for one theory or the other to determine the legality of law enforcement's more mischievous methods of obtaining incriminating statements.[168]

In opinions similar to *Ferro*, the drama of the different interrogation camps occasionally unfolds through divided courts.[169] Argumentative opinions by divided courts provide a stage for the dispute between the "likely to elicit" and "custody plus" interpretations, splaying their inherent tension and friction in the spotlight. In 2002, the Court of Appeals of Maryland held that an officer's production of physical evidence before a suspect constituted the functional equivalent of interrogation.[170] In *Drury*, police brought

166. Pennsylvania v. Muniz, 496 U.S. 582 (1990). In *Muniz*, a Pennsylvania officer arrested a man for drunken-driving in the wee morning hours of November 30, 1986, following a roadside urination incident. *Id.* at 584-86. During booking, the "officer . . . asked Muniz, 'Do you know what the date was of your sixth birthday?'" which stumped the slurring, uncoordinated Muniz. *Id.* at 586. The Court nonchalantly concluded that the sixth birthday question was custodial interrogation once it determined that the express question "required a testimonial response." *Id.* at 600. This is unfortunate, because the sixth birthday question is precisely the type of psychological ploy worthy of an *Innis* analysis that could benefit lower courts struggling with "more adventurous" police practices. *Lewis*, 486 U.S. at 1036 (White, J., dissenting from denial of certiorari).

167. *See, e.g.*, Michigan v. Bryant, 131 S.Ct. 1143, 1156 n.7 (2011); Florida v. Powell, 559 U.S. 50, 60 (2010); Davis v. Washington, 547 U.S. 813, 839 n.4 (2006) (Thomas, J., concurring); Crawford v. Washington, 541 U.S. 36, 53 n.4 (2004); Illinois v. Perkins, 462 U.S. 292, 296 (1990) ("The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate.").

168. *See* Part IV.

169. *See, e.g.*, United States v. Thierman, 678 F.2d 1331 (9th Cir. 1982); State v. Tucker, 692 N.E.2d 171 (Ohio 1998); Thai Ngoc Nguyen v. State, 292 S.W.3d 671, 684 (Tex. Crim. App. 2009) (Johnson, J., dissenting) ("This is not the sort of interrogation contemplated by *Miranda.*").

170. Drury v. State, 793 A.2d 567, 571 (Md. 2002).

the suspect to the station "for questioning,"[171] when the officer placed a tire iron and a garbage bag of magazines on the desk in front of the suspect.[172] Applying the "likely to elicit" definition of interrogation,[173] the majority reasoned that "[t]he only plausible explanation for the officer's conduct is that he expected to elicit a statement from [the suspect]."[174]

The dissent in *Drury* took issue with the majority's reasoning, relying instead on the "custody plus" definition of interrogation. The dissent argued that the officer's conduct did not "rise to the level of coercion or compulsion contemplated in *Innis* as being the functional equivalent of an interrogation."[175] Though conceding that the officer may have been acting "deceptive,"[176] the dissent found the suspect had merely "blurted out an explanation" independent of any police conduct.[177] Fittingly, the majority opinion cited *Ferro* and the dissent cited *State v. Lewis* as supporting authority for interrogation as each perceived it.

Post-*Lewis*, the most significant unanswered question remains whether confronting suspects with evidence of a crime is interrogation. Because of this lingering question, police in some jurisdictions have the freedom to engage in quirkier, more provocative behavior, while others are prohibited from eliciting confessions through suggestive behavior that may be lawful under *Innis*.[178]

The Supreme Court of Wisconsin came to a different conclusion than the *Ferro* court when applying the "likely to elicit" test.[179] In

171. *Id.* at 569; *see also id.* at 571 ("[T]he officer . . . told petitioner that he was being brought in for questioning.").

172. *Id.* at 569.

173. *See id.* at 570.

174. *Id.* at 571.

175. *Id.* at 577 (Battaglia, J., dissenting).

176. *Id.* at 578.

177. *Id.* at 575-78.

178. *See* Lewis v. Florida, 486 U.S. 1036, 1037 (1988) (White, J., dissenting from denial of certiorari).

179.

> [T]he *Innis* test reflects both an objective foreseeability standard and the police officer's specific knowledge of the suspect. The *Innis* test can be stated as follows: if an objective observer (with the same knowledge of the suspect as the police officer) could, on the sole basis of hearing the

Cunningham, the court held that although confronting a defendant with physical evidence *may* be the functional equivalent of interrogation, confronting the arrestee with a revolver obtained from his bedroom was not.[180] Following an altercation between the police and the defendant during the execution of a warrant, an officer found a loaded revolver under the mattress in the defendant's bedroom.[181] One officer presented the revolver to the defendant and quipped, "'This was apparently what Mr. Cunningham was running into the bedroom for,'" at which point the defendant provided a justification for owning the weapon.[182] Upholding the admissibility of the defendant's statement, the court found that the police had not "'*us[ed] the coercive nature* of confinement to extract confessions that would not be given in an unrestrained environment.'"[183]

Although the courts in *Cunningham* and *Ferro* used the "likely to elicit" definition to reach different conclusions, the cases are distinguishable. In *Cunningham*, the defendant was in custody for resisting officers after a struggle in which the defendant apparently attempted to destroy evidence or obtain his firearm.[184] The defendant

> officer's remarks or observing the officer's conduct, conclude that the officer's conduct or words would be likely to elicit an incriminating response, that is, could reasonably have had the *force of a question* on the suspect, then the conduct or words would constitute interrogation.

State v. Cunningham, 423 N.W.2d 862, 864 (Wis. 1988) (emphasis added). This recitation of the *Innis* test is one of the most succinct and instructive articulations of the "likely to elicit" test in existing case law interpreting interrogation. *Cunningham* is still the law in Wisconsin. *See* State v. Hambly, 745 N.W.2d 48, 61-62 (Wis. 2008).

180. *Cunningham*, 423 N.W. 2d at 866 ("While we acknowledge that the presentation of evidence may in some cases be the functional equivalent of express questioning, the facts of this case do not compel such a determination.").

181. *Id.* at 863.

182. *Id.* ("[T]he defendant stated something to the effect that it was his bedroom and that he had a right to have a gun.").

183. *Id.* at 865-66 (emphasis added) (quoting Arizona v. Mauro, 481 U.S. 520, 530 (1987)).

184. *Id.* at 863 ("When the officers entered the apartment, the defendant ran into the bedroom in an attempt to grab or discard items near the head of the bed. In the course of a struggle with the officers, the defendant scattered cocaine around the room. The officers subdued the defendant, handcuffed him, and placed him under arrest for resisting an officer. The officers did not read him any *Miranda* warnings.").

was still in his home when the officers arrested him and continued their lawful search of the home.[185] Additionally, the officer's conduct and words in *Cunningham* "were not as provocative as the officer's comments in *Innis*."[186] In *Ferro*, on the other hand, the defendant was in a cell when police obtained the fur coats from the co-defendant's apartment as part of an ongoing investigation.[187] Therefore, presenting the coats to the defendant served no logical purpose other than to excite the defendant and stir his anxieties.[188]

In short, *Cunningham* did not deal with the same brand of deceitful police behaviors rebuked in *Miranda*. Decided just days after Justice White's *Lewis* opinion, *Cunningham* provides a sensible interpretation of *Innis* that could help resolve the confusion over interrogation.[189]

Most jurisdictions have declined to adopt categorical rules that allow or forbid confronting a suspect with physical evidence.[190] Instead, these cases have been decided on the facts specific to each situation.[191] Sometimes, interactions with the suspect occur outside the typical "interrogation environment" where the suspect is nonetheless in custody, such as at the scene of arrest.[192] In these

185. *Id.* at 863.

186. *Id.* at 866.

187. People v. Ferro, 472 N.E.2d 13, 14 (N.Y. 1984).

188. *Id.* at 17.

189. Justice White's *Lewis* dissent was issued on May 31, 1988, and the Supreme Court of Wisconsin decided *Cunningham* on June 2, 1988.

190. *See, e.g.*, State v. Gibson, 422 N.W.2d 570, 577 (Neb. 1988) ("Mere display of the discovered revolver cannot be categorically characterized as [a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect." (alteration in original) (internal quotation marks omitted)); State v. Cunningham, 423 N.W.2d 862, 866 (Wis. 1988). *But see Ferro*, 472 NE.2d at 17.

191. *See, e.g.*, *Cunningham*, 423 N.W.2d at 862-63 ("Applying the *Innis* test, we conclude that a police officer's confronting the accused with physical evidence of a crime may be, but is not necessarily, the functional equivalent of express questioning. Each case must be considered upon its own facts.").

192. *See, e.g.*, United States v. Genao, 281 F.3d 305, 311 (1st Cir. 2002) (excusing officer's statement that "'We've got a problem here.'" while showing arrestee heroin and handguns "as a preliminary comment intended to get Genao's attention before reading him his rights and explaining that he was under arrest" and because "the remark was brief, was not worded in a particularly confrontational

cases, police conduct is often a defensible part of ongoing Fourth Amendment activity such as an apparently lawful search or seizure.[193] The cases with such ongoing investigative activities frequently lack the orchestrated, oppressive atmosphere associated with incommunicado interrogation.[194]

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manner, and did not directly accuse Genao of any crime or seek to inflame his conscience"); Smith v. State, 995 A.2d 685, 690 (Md. 2010) (holding that officer's brandishing of crack cocaine at defendant was not interrogation because defendant "was not removed from his home for the express purpose of questioning . . . . was not subject to police confrontation, implicit questioning, or a purposeful technique calculated to obtain incriminating evidence" (internal quotation marks omitted)). *But see* Commonwealth v. Rubio, 540 N.E.2d 189, 193-94 (Mass. App. Ct. 1989) (showing cocaine in pocketbook to suspect sitting in his kitchen chair surrounded by officers was "clearly confrontational and had the force of an implicit question: 'Is this yours?'").

193. United States v. Broughton, No. 13–CR–164, 2013 WL 5744473, at *7 (E.D.N.Y. Oct. 23, 2013) ("The defendant relies on [*Ferro*]. . . . [T]his case is readily distinguishable. Officer Aronica merely continued a process of examining Broughton's bag for contraband. This ongoing search is not the type of activity that was likely to elicit an incriminating response." (citation omitted) (internal quotation marks omitted)).

194. Statements obtained during ongoing Fourth Amendment activity or outside the interrogation environment are typically better decided on "custody" grounds as opposed to "interrogation" grounds. But circumstances may create custody via a de facto arrest. So, Fourth Amendment activity should be a relevant factor in an interrogation analysis to prevent *Miranda* excluding statements where the custody in-fact was merely incidental to the search or seizure. *See* California v. Beheler, 463 U.S. 1121, 1125 (1983) ("Although the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving of *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977))); Michigan v. Summers, 452 U.S. 692, 705 (1981) ("Thus, for Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." (footnote omitted)). Oddly enough, police cannot argue that a suspect has not been "formally arrested" once they have read the suspect his or her *Miranda* warnings. Reading a suspect his or her rights is basically a way of saying "you're under arrest, you may now invoke your rights if you wish." This peculiarity—that an overly cautious officer unnecessarily warning a suspect of his rights makes the suspect "in custody" for *Miranda* purposes—strengthens the case for those advocating the "interplay" theory of "custodial interrogation." *See infra* note 255 and accompanying text.

Although the two situations are undeniably different, courts have handled cases where the police verbally recount evidence against suspects—truthfully or dishonestly—in a similar fashion as those where police parade physical evidence in front of suspects.[195] Lower courts have also dealt with instances in which suspects respond to actual or threatened charges against them.[196] Comparably, other

195. *See, e.g.*, United States v. McKenzie, 132 F. App'x. 788 (11th Cir. 2005) (telling suspect that the police found marijuana and cocaine in his room during arrest not interrogation); United States v. Brown, 737 A.2d 1016 (D.C. 1999) (telling suspect the reason for his arrest not interrogation, and Brown's argument "exaggerate[d] the coercive effect of . . . events"); Shedelblower v. Estelle, 885 F.2d 570, 572-73 (9th Cir. 1989) (informing suspect that his accomplice had been arrested and that the victim had identified the suspect, even though that latter statement was untrue, not interrogation); People v. Haley, 96 P.3d 170, 182 (Cal. 2004) (telling suspect that detective "knew" he committed the murder due to the discovery of his fingerprints not interrogation); State v. Hambly, 745 N.W.2d 48, 64 (Wis. 2008) (holding no interrogation where officer informed arrestee that he had sold cocaine to an informant in response to arrestee's statement that he did not understand why he was under arrest). *But see* Nelson v. Fulcomer, 911 F.2d 928, 935 (3d Cir. 1990) ("[C]onfronting a suspect with his alleged partner in crime and the fact that the partner has confessed is precisely the kind of psychological ploy that *Innis*' definition of interrogation was designed to prohibit."); Hill v. United States, 858 A.2d 435, 447 (D.C. 2004) (telling suspect that he was being charged with second degree murder and that his friend "told police what happened . . . resembles the kind of mental games that largely generated the *Miranda* decision itself" (quoting *Brown*, 737 A.2d at 1021)); United States v. Orso, 266 F.3d 1030, 1033 (9th Cir. 2001) (engaging suspect in "several minutes of detailed discussion regarding the evidence against her" and "even [going] so far as to make up some of the evidence" was interrogation); Commonwealth v. DeJesus, 787 A.2d 394, 401 (Pa. 2001) (telling defendant that he had been implicated in two shootings statements from two witnesses was interrogation).

196. *See, e.g.*, McGlothen v. State, 556 F.3d 698, 702 (8th Cir. 2009) ("[T]he officer's words indicating that McGlothen was to be charged with possession of a firearm were statements of fact, not the functional equivalent of an interrogation."), *cert. denied*, 557 U.S. 913 (2009); State v. Conover, 537 A.2d 1165, 1171-72 (Md. 1988) (reading and giving suspect charging form in compliance with Maryland rules, where court could "infer no sinister motive"); *see also* Patterson v. Illinois, 487 U.S. 285, 288 (1988) (mentioning that officer "told [defendant] that because he had been indicted he was being transferred to the Cook County jail," but not discussing *Innis* despite defendant's incriminating responses prompted by this information). *But see* Blake v. State, 849 A.2d 410, 420 (Md. 2004) ("[O]fficer's statement ["I bet you want to talk now, huh!"] . . . could only be interpreted as designed to induce petitioner to talk and it was improper" when accompanying charging document with false statement of law with respect to the death penalty.).

courts have analyzed whether hinting at the benefits of cooperating with police in conjunction with potential charges qualify as interrogation.[197]

Foreshadowed by the result in *Innis*, courts struggle to consistently classify statements instigated by evocative comments as "volunteered" or "the product of interrogation."[198] It is also common for courts seeking an additional measure of compulsion to characterize persuasive police conduct as in the suspect's best interest. Instances

197. *See, e.g.*, Easley v. Frey, 433 F.3d 969, 974 (7th Cir. 2006) (informing suspect of evidence and the possible consequences of charges did not constitute interrogation); People v. Clark, 857 P.2d 1099, 1118 (Cal. 1993) (responding to suspect's comment "'[w]hat can someone get for something like this, thirty years?'" by telling him that he had never seen anyone serve more than seven and a half years unless the person was a "'mass murderer'"). *But see* United States v. Gomez, 927 F.2d 1530 (11th Cir. 1991) (holding that agents' comments about the possible benefits of cooperating with the government were interrogation when accompanying document with incorrect information about charges); People v. Jackson, 959 N.Y.S.2d 540, 543 (N.Y. App. Div. 2013) ("When the arresting officer told the defendant that, unless someone confessed to ownership of the gun, all three occupants of the car would be charged with its possession, he was engaging in the functional equivalent of interrogation . . . .").

198. *See, e.g.*, United States v. Kane, 726 F.2d 344, 349 (7th Cir. 1984) (asking suspect how he was doing and telling him "'only you can help yourself'" was not interrogation); State v. Lebron, 979 So. 2d 1093 (Fla. Dist. Ct. App. 2008) (asking defendant if he knew "'how much trouble [he was] in'" constituted interrogation); Prioleau v. State, 984 A.2d 851, 853 (Md. 2009) (holding that officer should not have known saying "'What's up, Maurice?'" would produce an incriminating response); Williams v. State, 679 A.2d 1106, 1125 (Md. 1996) (saying "'[t]his is going to work'" and reiterating to suspect his potential double murder charge were innocuous comments that "simply advised [suspect] that police had evidence they believed established [his] guilt in a double homicide"); Murray v. State, 864 S.W.2d 111 (Tex. App. 1993) (saying "'Happy Birthday'" to a suspect in an interrogation room did not constitute interrogation). *But see* Blake v. State, 849 A.2d 410, 420 (Md. 2004) ("[O]fficer's statement ["I bet you want to talk now, huh!"] . . . could only be interpreted as designed to induce petitioner to talk and it was improper" when accompanying charging document with false statement of law with respect to the death penalty.); Thai Ngoc Nguyen v. State, No. 05–07–00030–CR, 2008 WL 726218, at *5 (Tex. App. Mar. 19, 2008) (holding that officer's comment "'If you want to tell me that that's your meth, then tell me that's your stuff'" was interrogation), *aff'd*, 292 S.W.3d 671 (Tex. Crim. App. 2009); Commonwealth v. Quarles, 720 S.E.2d 84, 86-89 (Va. 2012) (holding that officer's comment "'that's fine if he doesn't want to talk to me. I was not the person that robbed a white lady and hit her in the head with a brick,'" was only compulsion "of the subtle variety approved . . . under *Innis*").

of "casual conversation" have produced results similar to *Innis*,[199] while other officers have lawfully suggested to suspects that it is in their best interest to cooperate with police investigations.[200]

A court applying the black letter definition of the "functional equivalent of interrogation" would "inevitably" forbid the preceding practices in most circumstances.[201] The recurring post-*Lewis* cases where police confront a suspect with physical evidence have produced inconsistent results, though courts find that no interrogation occurred more often than not. Courts employing the "likely to elicit" definition from *Innis* have decided the "brandishing evidence" issue either way,

199. *See, e.g.*, Minor v. Davis, No. 08–cv–13122, 2013 WL 2371766, at *9 (E.D. Mich. May 30, 2013) (accusing suspect of lying about where he was shot was merely part of "casual conversation to pass the time"); People v. Gamache, 227 P.3d 342, 387-88 (Cal. 2010) (holding that "small talk is permitted" under *Miranda* and *Innis*). *But see, e.g.*, State v. Flack, 860 P.2d 89, 92-93 (Mont. 1993) (holding that five to ten minute speech about how suspect "'couldn't get out of it'" and "'might as well just go ahead and hang it up,'" "[u]nlike the officer's statement in *Innis*, . . . cannot be characterized as a few overheard, offhand remarks"); State v. Tucker, 692 N.E.2d 171, 174-76 (Ohio 1998) (taking defendant whose trial was pending to a side room of prison to hold impromptu therapy session not interrogation but "casual conversation" where guards were "simply looking out for Tucker's well-being").

200. *See, e.g.*, State v. Grant, 944 A.2d 947, 967 (Conn. 2008) ("Rovella's comment to the defendant that his blood had been found at the scene of the crime did not constitute an interrogation under *Innis*. . . . [H]e was merely . . . providing information to the defendant that was necessary for 'an intelligent exercise of his judgment' . . . ." (quoting United States v. Crisco, 725 F.2d 1228, 1232 (9th Cir. 1984))); State v. Guysinger, No. 11CA3251, 2012 WL 4021058, at *5 (Ohio Ct. App. Sept. 7, 2012) (saying to suspect that it was "'likely in his best interest to start thinking about the situation and how things were going, and basically, just be honest about the situation'" (alterations omitted)). *But see, e.g.*, United States v. Gomez, 927 F.2d 1530, 1538 (11th Cir. 1991) (emphasizing to suspect "the benefits of cooperation . . . . is precisely the type of psychological ploy *Innis* and *Miranda* sought to prevent"); State v. Sargent, 762 P.2d 1127, 1132 (Wash. 1988) (stating something "to the effect that Sargent should 'come to the truth' with himself and that Sargent could not benefit from mental health counseling unless he did so . . . . is just the sort of psychological coercion inherent in custodial situations which *Miranda* recognizes as the basis of its custodial interrogation standard"); State v. Martin, 816 N.W.2d 270, 284 (Wis. 2012) (telling suspect that police "did not want Martin to say it was his revolver if it was not, but he should be a 'stand-up guy' and admit the revolver was his if it was").

201. White, *supra* note 52, at 1234.

as seen in *Ferro* and *Cunningham*.[202] On the other hand, decisions by courts implementing the "custody plus" definition of interrogation, as in *State v. Lewis*, are irreconcilable with the "likely to elicit" understanding of *Innis*.[203] Though the outcomes are not necessarily different, if a court requires an additional measure of mystery compulsion beyond custody itself, the outcome is scripted to end in "no interrogation."[204]

202. *See, e.g.*, United States v. Green, 541 F.3d 176, 187 (3d Cir.) ("[W]e can hardly imagine a more prototypical example of the 'functional equivalent' of interrogation than when a suspect is shown a video in which he is depicted as engaging in a criminal act"), *vacated*, 340 F. App'x. 981 (3rd Cir. 2008); Young v. Sirmons, No. 00-CV-00310-JHP-PJC, 2007 WL 2248158, at *29 (N.D. Okla. Aug. 2, 2007) (conversing during inspection of suspect's shoes not "the kind of psychological ploy that could be treated as the functional equivalent of interrogation" when suspect told officers that it was fish blood that covered his shoes); Gonzalez v. State, 626 S.E.2d 569 (Ga. Ct. App. 2006) (picking up defendant's shoes while saying "'Does that look like blood to you?'" to fellow officer was not interrogation of Spanish-speaking defendant); State v. Nixon, 599 A.2d 66, 67 (Me. 1991) (peering at diagram of crime scene and pushing it toward suspect, saying, "'You might find this interesting.'" was "reasonably likely to elicit an incriminating response"). *But see* State v. Gibson, 422 N.W.2d 570, 577 (Neb. 1988); State v. Cunningham, 423 N.W.2d 862 (Wis. 1988).

203. *Compare supra* discussion accompanying notes 147-53, *with supra* discussion accompanying notes 154-64.

204. *See, e.g.*, United States v. Broughton, No. 13–CR–164, 2013 WL 5744473, at *5 (E.D.N.Y. Oct. 23, 2013) (searching bags for cocaine in presence of suspect in custody did not "produce psychological pressures that . . . subject the individual to the 'will' of [her] examiner" (quoting United States v. Rodriguez, 356 F.3d 254, 258 (2d Cir. 2004))); Kennedy v. State, 540 S.E.2d 229, 230-31 (Ga. Ct. App. 2000) (officer's picking up and inspection of two slabs of crack cocaine after suspect invoked his right to remain silent at police station did not amount to "the type of tricks or psychological ploys" feared by the Supreme Court); State v. Moody 974 N.E.2d 1273 (Ohio Ct. App. 2012) (sharing result of field test for crack cocaine with other officer not interrogation); State v. Bragg, 48 A.3d 769, 773 (Me. 2012) (informing suspect that her blood-alcohol level was over the state limit was "a matter-of-fact communication" of the evidence); State v. Marrero, No. 10CA009867, 2011 WL 3273582, at *4 (Ohio Ct. App. Aug. 1, 2011) (remarking about the amount of cocaine in suspect's duffel bag while executing search warrant not interrogation as suspect was "not compelled to speak" by comment); State v. Smiley, No. 23815, 2008 WL 1808380, at *3 (Ohio Ct. App. Apr. 23, 2008) (remarking that cocaine looked to weigh "about an ounce" was not interrogation when defendant corrected officer in response).

V. ASKING THE SCARY QUESTION: REVISITING *INNIS* TO SETTLE THE DISAGREEMENT BETWEEN THE "LIKELY TO ELICIT" AND "CUSTODY PLUS" INTERROGATION CAMPS

A. The Supreme Court should revisit "interrogation" as defined by Innis *to resolve the significant disagreement in lower courts, though it could have severe consequences for* Miranda*'s place in American law*

The cases discussed in the preceding sections show that the questions raised by "interrogation" between *Innis* and *Lewis* remain unanswered. Given the persisting disagreement over the limits of "more adventurous police practices,"[205] why would the Supreme Court not revisit *Innis* to clarify what is fair and foul to secure the "most compelling possible evidence of guilt"?[206]

The reluctance to tackle interrogation head-on again may be due to the potential consequences for the *Miranda* doctrine as a whole. The Court's recent decisions on implied waiver and due process indicate a gradual distancing from the principles of *Miranda*.[207]

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205. Lewis v. Florida, 486 U.S. 1036, 1036 (1988) (White, J., dissenting from denial of certiorari).

206. Miranda v. Arizona, 384 U.S. 436, 466 (1966) (quoting Mapp v. Ohio, 367 U.S. 643, 685 (Harlan, J., dissenting)).

207. *See, e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) ("Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent."); Dickerson v. United States, 530 U.S. 428, 443-44 (2000) ("If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief."); Withrow v. Williams, 507 U.S. 680, 712, (1993) (O'Connor, J., concurring in part and dissenting in part) ("By dispensing with . . . [*Miranda*'s] difficulty of producing a yes-or-no answer to questions that are often better answered in shades and degrees, the voluntariness inquiry often can make judicial decisionmaking easier rather than more onerous."); Oregon v. Elstad, 470 U.S. 298, 318 (1985) ("[T]here is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made."). *But see, e.g.*, Missouri v. Seibert, 542 U.S. 600, 617 (2004) ("Strategists dedicated to draining the substance out of *Miranda* cannot accomplish [this] by training instructions."); *id.* at 617 n.8 ("Because we find that the warnings were inadequate, there is no need to assess the actual voluntariness of the statement."). *See generally* Budden, *supra* note 21; Yale Kamisar, *On The Fourtieth Anniversary of the* Miranda

Taking a stance on "cutting edge"[208] police ploys could signal a full-blown retreat from *Miranda* or, inversely, rejuvenate *Miranda* at the expense of police investigations. The outcome would depend on whether the Court supported the "custody plus" or "likely to elicit" interpretation of *Innis*. Consequently, revisiting *Innis* could be a knockout blow to the *Miranda* doctrine, which has sustained several body blows in recent history. If "What is 'interrogation'?" is the scary question, the frightening answer is the "custody-plus" definition.[209]

The Supreme Court has recently recognized *Innis*' failure to "brighten" interrogation with well-defined boundaries.[210] Dreams of perfect clarity under *Miranda* were probably doomed from the start, but this futility has not discouraged the Court from tending to the custodial half of "custodial interrogation" within the past decade.[211] The failure to decide a case whose chief issue focuses on the definition of interrogation is not for a lack of opportunity.[212] The

Case: Why We Needed It, How We Got It–and What Happened to It, 5 OHIO ST. J. CRIM. L. 163 (2007); Michael L. Vander Giessen, Comment, Berghuis v. Thompkins: *The Continued Erosion of* Miranda*'s Protections*, 46 GONZ. L. REV. 189 (2011); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998).

208. State v. Gibson, 422 N.W.2d 570, 577 (Neb. 1988) ("Although Gibson's statement in response to the discovered and displayed revolver may be on the cutting edge of immeasurable imprudence, Gibson's statement was not the product of interrogation within the meaning of *Miranda*.").

209. *See supra* note 1.

210. "And the supposedly 'bright' line[] that separate[s] interrogation from spontaneous declaration . . . [has] turned out to be rather dim and ill defined." *Withrow*, 507 U.S. at 711 (O'Connor, concurring in part and dissenting in part) (citing Rhode Island v. Innis, 446 U.S. 291 (1980)). Justice O'Connor's criticism of *Miranda*'s "alleged brightness" was not limited to its notion of "interrogation," but also to its conceptions of custody, waiver, invocation, and adequacy of warnings. *Id.*

211. *See*, *e.g.*, Howes v. Fields, 132 S. Ct. 1181 (2012); J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011); Maryland v. Shatzer, 559 U.S. 98 (2010).

212. *See*, *e.g.*, United States v. Johnson, 680 F.3d 966 (7th Cir. 2012) (reading warrant aloud to suspect, "'*even if* its weight might move a suspect to speak,'" was not impermissible psychological ploy (emphasis added) (quoting Easley v. Frey, 433 F.3d 969, 974 (7th Cir. 2006))), *cert. denied*, 133 S. Ct. 672 (2012); Alford v. State, 358 S.W.3d 647 (Tex. Crim. App. 2012) (questioning during booking of suspect about ownership of computer flash drive found in car qualified for routine-booking exception to *Miranda*), *cert. denied*, 133 S. Ct. 122 (2012); United States v. Blake, 571 F.3d 331 (4th Cir. 2009) (informing suspect that the death penalty was possible and commenting "'I bet you want to talk now, huh?'" did not amount to

Court's inclination to punt at every chance to revisit *Innis* is puzzling given its importance in criminal law and the inconsistency engendered by the confusion over *Innis*.[213]

But why revisit interrogation now? The privilege against self-incrimination is ubiquitous; it applies to suspected crimes of all sizes, and influences everyday interactions between police and those who "never imagined [themselves] as the sort of person who might commit a crime."[214] There is scarcely a shred of evidence more significant than a suspect's full confession. As such, police are eager to substitute a confession for the laborious, time-consuming process of building a case.[215] Unchecked obscurity over the bounds of

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interrogation), *cert. denied*, 558 U.S. 1132 (2010); State v. Grant, 944 A.2d 947 (Conn. 2008) (informing arrestee that "his blood had been found at the scene of the crime did not constitute interrogation under *Innis*"), *cert. denied*, 555 U.S. 916 (2008); Jones v. United States, 779 A.2d 277 (D.C. 2001) (picking up drugs and asking suspect his name did not constitute interrogation), *cert. denied*, 535 U.S. 906 (2002); Plazinich v. Lynaugh, 843 F.2d 836 (5th Cir. 1988) (informing the charged that his co-defendant had attempted to commit suicide by slashing her wrists was not tantamount to interrogation), *cert. denied*, 488 U.S. 1031 (1989).

213. *See supra* Part IV.

214. Lewis, *supra* note 14 (quoting Sergey Aleynikov, a computer programmer interrogated by the FBI for taking source code from Goldman Sachs).

215. Miranda v. Arizona, 384 U.S. 436, 447 (1966) (using the "third degree" to obtain confessions "is a short cut and makes the police lazy and unenterprising") (quoting IV NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, *supra* note 54); *id.* at 460 ("[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." (citation omitted) (citing Chambers v. Florida, 309 U.S. 227, 235-38 (1940))); *see also* Escobedo v. Illinois, 378 U.S. 478, 489 (1964) ("[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources." (alteration in original) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE 309 (3d ed. 1940))); Stein v. New York, 346 U.S. 156, 203-04 (1953) (Douglas, J., dissenting) ("Heretofore constitutional rights have . . . constituted guarantees that are inviolable. They have been a bulwark against overzealous investigators, inhuman police, and unscrupulous prosecutors. . . . But now it is said that if . . . there was enough evidence to convict regardless of the invasion of the citizen's constitutional right, the judgment of conviction must stand and the defendant sent to his death. In taking that course the Court chooses a short-cut which does violence to our constitutional scheme."); Covey, *supra* note 21, at 765-66 ("The legal system's overwhelming reliance on

permissible psychological ploys impedes both law enforcement and suspects' access to their rights.[216] Resolution of the unbridled and "significant disagreement" observed by Justice White is long overdue.[217] Yet arguments to the Supreme Court that interrogation cases are "confusing and conflicting" have been unavailing.[218]

The ideal case for review would be similar to *Ferro* or *Lewis* that involves the direct brandishing of evidence at a suspect. Unfortunately, there have been no perfect cases ripe for review in the past year where the interpretation of *Innis* is the principal controversy.[219] The Fourth Circuit's *United States v. Johnson* was an

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guilty pleas to resolve criminal charges, moreover, further elevates the importance of confession, since confession serves as a substitute for objective evidence of guilt.").

216. *See* Rhode Island v. Innis, 446 U.S. 291, 304-05 (1980) (Burger, C.J., concurring in the judgment) ("[Parts of *Innis*] may introduce new elements of uncertainty; under the Court's test, a police officer, in the brief time available, apparently must evaluate the suggestibility and susceptibility of an accused. Few, if any, police officers are competent to make the kind of evaluation seemingly contemplated . . . . Trial judges have enough difficulty discerning the boundaries and nuances flowing from post-*Miranda* opinions, and we do not clarify that situation today."); *Miranda*, 384 U.S. 436, 545 (White, J., dissenting) ("Today's decision leaves open [several] questions . . . all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution.").

217. Lewis v. Florida, 486 U.S. 1036, 1036 (1988) (White, J., dissenting from denial of certiorari).

218. Brief for Petitioner at 3, Alford v. Texas, 133 S. Ct. 122 (2012) (No. 11-1318), 2012 WL 1561119, at *3 ("State and federal courts throughout the Nation thus recognize a booking exception but disagree sharply and widely regarding its scope, producing booking exception cases around the country [that] are confusing and conflicting." (quoting Alford v. State, 358 S.W.3d 647, 656 (Tex. Crim. App. 2012)) (internal quotation marks omitted)), *cert. denied*, 133 S. Ct. 122 (2012) (mem.).

219. *But see* United States v. Morgan, 738 F.3d 1002, 1005 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1569 (2014) ("re-advising [the suspect] of the *Miranda* rights, processing the drugs seized from her vehicle in her presence, and taking her photograph standing behind the seized drugs"); United States v. Woods, 711 F.3d 737 (6th Cir. 2013) (saying "'What's in your pocket?'" during lawful patdown); United States v. Hunter, 708 F.3d 938 (7th Cir. 2013) (saying "'What do you want me to tell these people?'" to arrested suspect who had been shot and handcuffed to hospital gurney). The most factually juicy case from 2013 was from California, but is unpublished and not on appeal to the California Supreme Court. *See* Rubio v. City of Hawthorne, No. B239259, 2013 WL 5762085 (Cal. Ct. App. Oct. 24, 2013). *Rubio* is remarkably similar to *Lewis*, *supra* Part III, and involves a videotape shown

intriguing case, but the Court predictably denied its petition for certiorari in June 2014.[220] But it will not be long before a "physical brandishing" case materializes in a state high court or federal circuit court. Given the significance of this issue and the bewilderment that has persisted since *Innis*, it is a deserving issue that the Supreme Court should revisit to resolve whether the "likely to elicit" or "custody plus" understanding of interrogation is proper.[221]

B. The "likely to elicit" interpretation of interrogation should prevail because the teachings of Miranda *are no less valuable today, and the "custody plus" interpretation of* Innis *diverges from "compulsion" as understood in* Miranda

Although Chief Justice Warren noted that "volunteered statements of any kind are not barred" by *Miranda*,[222] he subscribed to an incredibly broad view of in-custody compulsion forbidden by the privilege against self-incrimination.[223] Basically, unless a suspect

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by an officer to, ironically enough, another officer in custody who was suspected by his supervisor of using excessive force. *Id.* at *1-2.

220. United States v. Johnson, 734 F.3d 270 (4th Cir. 2013), *cert. denied*, 82 U.S.L.W. 3695 (U.S. June 2, 2014) (No. 13-8401). Johnson was handcuffed and seated in the back of a police car, when a police detective asked, "'What do you mean?'" after Johnson proffered, "'I can help you out, I don't want to go back to jail, I've got information for you.'" *Id.* at 275-77. "Given the purpose of the suggested bargain, a follow-up inquiry 'what do you mean?' would not have seemed reasonably likely to elicit self-incriminating information . . . . The query would reasonably be expected to elicit information incriminating someone else. But incriminate himself is exactly what Johnson did." *Id.* at 277.

221. At the very least, the Court should classify individual tactics within the arsenal of psychological ploys available to police. If *Innis* remains the definitive case for whether a series of provocative comments and an ongoing, question-free dialogue are the "functional equivalent" of interrogation, the Court should consider brandishing physical evidence before a suspect, verbally reciting truthful or fabricated evidence against a suspect, notifying the suspect of charges, and suggesting the benefits of cooperating with police. *See* discussion *supra* Part IV.

222. Miranda v. Arizona, 384 U.S. 436, 478 (1966).

223. *Id.* at 478 ("Any statement given freely and voluntarily without *any* compelling influence is, of course, admissible in evidence." (emphasis added)); *see also id.* at 463 ("[A] confession obtained by compulsion must be excluded whatever may have been the character of the compulsion . . . ." (quoting Bram v. United States, 168 U.S. 532 (1897))); *id.* at 513 (Harlan, J., dissenting) ("[T]he Court's unspoken assumption that *any* pressure violates the privilege is not supported by the

would have made the same confession to his or her own shadow, the confession is "compelled" if obtained in "the interrogation environment."[224] This is why *Miranda* required warnings and a waiver to restore the competitive balance in custody—where police have an overwhelming home field advantage.

Chief Justice Warren's obsession with the use of "psychological ploys" and trickery[225] to extract confessions in the "police-dominated atmosphere" has been lost in many post-*Innis* cases discussing interrogation.[226] Courts using the "custody plus" definition of interrogation desire an added "measure of compulsion" before excluding statements, yet rarely indicate what types of behavior go "above and beyond that inherent in custody itself."[227] Is it torture? Is it "browbeating, violence, threats or intimidation"?[228] Is it saying, "'Happy Birthday'"?[229] This extrinsic requirement is completely at odds with compulsion as understood in *Miranda*: any "police conduct . . . designed and likely to pressure or persuade, or even 'to exert a tug on,' a suspect to incriminate himself."[230]

Even if its application is inescapably complicated, the "likely to elicit definition" created in *Innis* is not: "interrogation" is "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response."[231] This definition works in tandem with the inherent pressures faced by suspects in custody and seemingly forbids a whole range of devious police practices.[232] Once police officers are actively building a case

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precedents and it has failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits." (emphasis added)); *id.* at 532 (White, J., dissenting) (arguing that the majority found "*no* statement obtained from [a] defendant [in custody] can truly be the product of his free choice" (alteration in original) (emphasis added) (internal quotation marks omitted)).

224. *Miranda*, 384 U.S. at 457.

225. *See id.* at 454-61.

226. *See* discussion *supra* Part IV.

227. Rhode Island v. Innis, 446 U.S. 291, 300 (1980).

228. People v. Ferro, 472 N.E. 2d 13, 17 (N.Y. 1984) (Jasen, J., dissenting).

229. Murray v. State, 864 S.W.2d 111, 113 (Tex. Ct. App. 1993).

230. Kamisar, *supra* note 49, at 23 (footnote omitted) (quoting *Miranda*, 384 U.S. at 515 (Harlan, J., dissenting)).

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

232. Miranda v. Arizona, 384 U.S. 436, 445-74 (1966).

against a suspect, it becomes outlandish to argue that they should not have known any suggestive action would produce an incriminating response. At that point, police words and actions likely have an agenda to produce such an incriminating response.

Virtually any suggestive conduct performed by police in view of a suspect in custody is likely to generate *some* response, which would mean that all but the most uninitiated or improbable reactions by suspects are inadmissible. When the custodial suspect has an "impair[ed] capacity for rational judgment" and is desperate to explain him or herself,[233] nearly any police comments concerning the crime are likely to produce a response. This tendency prevails whether those comments are inflammatory, provocative, or ordinarily innocuous. The same is true for the brandishing of physical evidence or communication of verbal evidence. But the result in *Innis* is at odds with this notion, and seems to be at odds with its own definition. As a result, courts regularly shrug their shoulders and find that interrogation has not occurred simply because the alternative would be so incompatible with the result in *Innis*.[234]

The *Ferro*/*Cunningham* paradigm demonstrates the elasticity of the "likely to elicit" definition in assessing the permissible bounds of interrogation.[235] A low bar for interrogation preserves the "prophylactic" nature of *Miranda*'s protections.[236] Meanwhile, the rigid "custody plus" definition clashes with the "likely to elicit"

233. *See, e.g.*, Rubio v. City of Hawthorne, No. B239259, 2013 WL 5762085, at *7 (Cal. Ct. App. Oct. 24, 2013) ("[Officer] Catano made Rubio repeatedly watch the surveillance video in his presence, and Rubio testified he felt he needed to explain his actions in light of Catano's stated disapproval of them.").

234. *See, e.g.*, Commonwealth v. Quarles, 720 S.E.2d 84, 89 (Va. 2012) ("Even assuming, arguendo, some measure of compulsion, at best it was of the subtle variety approved by the United States Supreme Court and therefore acceptable under *Innis*."); State v. Tucker, 692 N.E.2d 171, 176 (Ohio 1998) ("The concept of 'functional equivalent of questioning' compulsion would have to be extended beyond its recognized boundaries as explained in *Innis* in order that 'functional equivalent' compulsion sufficient to invoke the *Miranda* principles be found on the facts of this case.").

235. People v. Ferro, 472 N.E.2d 13 (N.Y. 1984); State v. Cunningham, 423 N.W.2d 862 (1988). *See supra* notes 154-65 (*Ferro*), 180-89 (*Cunningham*) and accompanying text.

236. Withrow v. Williams, 507 U.S. 680, 690 (1993) ("[W]e have sometimes called the *Miranda* safeguards 'prophylactic' in nature.").

definition's adaptability to the circumstances. If a court is searching for a "measure of compulsion above and beyond that inherent in custody itself,"[237] it is unlikely to find anything. It is almost like looking for chocolate on the inside of a candy bar: there may be no more than nougat, caramel, and peanuts inside the chocolaty exterior, but the bar itself is already dripping in chocolate. The *Miranda* Court found that the pressures surrounding custody *itself* were enough to sufficiently undermine a suspect's willpower.[238]

To add an extra coercion-based element that occurs inside that custody comes perilously close to collapsing "interrogation" into the voluntariness regime that the majority repudiated in *Miranda*[239] and prominent scholars criticized as "inherently subjective."[240] Under

237. Rhode Island v. Innis, 446 U.S. 291, 300 (1980).

238. Miranda v. Arizona, 384 U.S. 436, 458 (1966) ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, *no statement* obtained from the defendant can truly be the product of his free choice." (emphasis added)).

239. *See id.* at 458-67.

240. White, *supra* note 52, at 1210. Under the voluntariness doctrine, a confession was admissible as long as the suspect made it voluntarily, as determined by the totality of the circumstances. *See Miranda*, 384 U.S. at 462-65. If interrogation requires custody plus "a measure of compulsion above and beyond that inherent in custody itself," *Innis*, 446 U.S. at 300, then courts must look at the circumstances beyond that of custody. Considering custody would likely accompany an involuntary confession by default, looking at the circumstances of custody for an additional measure of compulsion is no different than looking at the totality of the circumstances surrounding a confession (which is identical to voluntariness). Unsurprisingly, opinions adhering to the custody plus definition of interrogation are reminiscent of pre-*Miranda* voluntariness opinions. *Compare* State v. Miranda, 401 P.2d 721, 733 (Ariz. 1965), *overruled by Miranda*, 384 U.S. at 436 ("The facts and circumstances in the instant case show that the statement was voluntary, made by defendant of his own free will, that no threats or use of force or coercion or promise of immunity were made; and that he understood his legal right and the statement might be used against him."), *and* Lewis v. State, 509 So. 2d 1236, 1237 (Fla. Dist. Ct. App. 1987) ("It may be that the police should have known that showing the appellant the evidence against him would be likely to elicit an incriminating response. However, *the circumstances* of this case support the conclusion that from the appellant's perspective such police procedure *did not impinge upon his will in a coercive manner*." (emphasis added)), *with* People v. Ferro, 472 N.E.2d 13, 17 (N.Y. 1984) ("Bearing in mind the placing of the furs before Ferro, the absence of further warnings to him and the relatively short time elapsed between his refusal to answer questions and the placing of the furs, we

Miranda, "interrogation" ought to be understood as any "technique . . . of persuasion" in custody.[241] The entire import of the "custody prong" is that it is improper to *use* that custody to obtain confessions. This policy sufficiently explains the "above and beyond" language in *Innis*, not that "interrogation" requires a sort of "super-custodial" state. For these reasons, the Supreme Court should revisit interrogation as understood in *Innis* and affirm the "likely to elicit" definition of interrogation.

At the same time it re-adopts the "likely to elicit" understanding of interrogation, the Court should outline factors for the "likely to elicit" analysis. In the time since *Innis*, an ocean of case law percolated to help the Court select these factors.[242] With care not to infuse subjectivity into the inquiry, the officer's objective intent should be a factor in an interrogation analysis.[243] If a technique is purposefully calculated or devised as in *Ferro*, there is no reason to

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conclude that *Ferro's right to cut off questioning was not scrupulously honored*." (emphasis added)).

241. *Miranda*, 384 U.S. at 461 ("An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described [in *Miranda*] *cannot be otherwise than under compulsion* to speak." (emphasis added)).

242. *See supra* Part IV.

243. The stressed importance of officer intent is partially inspired by Justice Stevens' dissent in *Innis*, and Professor Welsh White's view that the officer's purpose should play a role in the objective determination of "reasonably likely." *See Innis*, 446 U.S. at 309-17 (Stevens, J., dissenting) ("Apparent attempts to elicit information from a suspect after he has invoked his right to cut off questioning necessarily demean that right and tend to reinstate the imbalance between police and suspect that the *Miranda* warnings are designed to correct."); White, *supra* note 52, at 1225-31; *see also Innis*, 446 U.S. at 301 n.7 ("This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."). The proposed factor would not be unlike other aspects of criminal law where the officer's objective purpose or intent is relevant. *See, e.g.*, Florida v. Jardines, 133 S. Ct. 1409, 1416-17 (2013) ("[T]he question before the court is precisely *whether* the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search . . . .").

ignore officers' apparent manipulation of captivity to obtain confessions.[244] Location is undoubtedly an important factor, as suspects are less susceptible to custodial pressures at home than in the confines of the police station.[245] Additional factors should include: the length of the police interaction;[246] any known susceptibility of the defendant;[247] whether the suspect was brought in "for questioning";[248] what safeguards police took to prevent an incriminating response (including *Miranda* warnings);[249] the prevalence of a technique within law enforcement or its renown as an interrogation technique;[250] and any other factors the Court deems important. If police are involved in ongoing lawful Fourth Amendment activity while a suspect is custody, it should disfavor a finding of interrogation.[251] Summarily, the Court should emphasize that the functional equivalent of interrogation

244. *See, e.g.*, Commonwealth v. Rubio, 540 N.E.2d 189, 193 (Mass. App. Ct. 1989) (Defendant's statement to officers who showed him cocaine while seated in kitchen chair surrounded by officers was not "spontaneous," but a "verbal response to a purposeful technique calculated to obtain information that could be used against the defendant."). *But see* Kennedy v. State, 540 S.E.2d 229, 230-31 (Ga. Ct. App. 2000) (officer's picking up and inspection of two pieces of crack cocaine at police station did not amount to "the type of tricks or psychological ploys" cited by the Supreme Court in *Innis*).

245. Most significantly, wide latitude should be granted to general on-the-scene questioning performed as a routine part of officer duties, both pre- and post-arrest. *Miranda*, 384 U.S. at 477 ("General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding.").

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

247. *Id.*

248. Or, generally, what was the apparent justification for the interaction. Striking up a conversation in transit is different than chatting with an incarcerated suspect from his cell to an interrogation room. If the purpose of the entire interaction between police and the suspect is "for questioning," it's already a contrived setting where it is difficult to argue that an incriminating response is unlikely. *See, e.g.*, Drury v. State, 793 A.2d 567, 569 (Md. 2002).

249. *See, e.g.*, Hill v. United States, 858 A.2d 435, 447 (D.C. 2004) ("The detective's instruction that '[n]obody [is] to advise him of his rights until I do' underscores the plan to intimidate appellant by purposely withholding the advisement of rights meant to counteract the pressure inherent in custodial interrogation required by the Supreme Court in *Miranda*." (alterations in original)).

250. *See, e.g.*, *id.* at 444 ("The tripartite approach evident here combines classic interrogation techniques.").

251. *See, e.g.*, State v. Moody, 974 N.E.2d 1273, 1278 (Ohio Ct. App. 2012).

occurs whenever more factors of deception are present, thus construing the Fifth Amendment to be as "broad as the mischief against which it seeks to guard."[252]

These factors accommodate the credible and popular "interplay" theory of custodial interrogation[253] while preserving the distinct inquiries into custody and interrogation, and sufficiently account for the psychological ploys feared by the *Miranda* majority.[254] Most importantly, this approach to interrogation embraces the spirit of *Miranda* and placates its chief concern: "that the 'interrogation environment' created by the interplay of interrogation and custody" would undermine the privilege against compulsory self-incrimination by "subjugat[ing] the individual to the will of his examiner."[255] By endorsing the "likely to elicit" definition of "interrogation," the Supreme Court would reaffirm that the *Miranda* safeguards function to prevent "using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment."[256] Though imperfect, a Court-sanctioned interpretation

252. Miranda v. Arizona, 384 U.S. 436, 459-60 (1966).

253. The "interplay" school of custody originates from language in *Innis* and Yale Kamisar's article discussing the "interplay" theory. *See Innis*, 446 U.S. at 299 ("The concern of the Court in *Miranda* was that the "interrogation environment" created by the interplay of interrogation and custody would 'subjugate the individual to the will of the examiner' and thereby undermine the privilege against compulsory self-incrimination."); Yale Kamisar, *supra* note 49, at 63-65; *see also* Yeager, *supra* note 21, at 49-50 ("'Synergy' describes how two forces, acting together, create a whole system in which each element acts in a manner unpredicted by the behavior of its parts taken separately.").

254. There is an argument to be made that the interplay approach is better reasoned than distinct inquiries into custody and interrogation. But a more carefully crafted approach to interrogation can accomplish substantially the same objectives in a less holistic, abstract manner, with the added benefit of having pre-existing case law. Rehabilitating "interrogation and its functional equivalent" can establish the desired uniformity across jurisdictions while maintaining the binary analyses of custody and interrogation.

255. *Innis*, 446 U.S. at 299 (quoting *Miranda*, 384 U.S. at 457-58).

256. Arizona v. Mauro, 481 U.S. 520, 529-30 (1987). *See also* Drury v. State, 793 A.2d 567, 571 (Md. 2002) ("It appears to us that the only reasonable conclusion that can be drawn from the foregoing facts is that the officer should have known, in light of his having told petitioner that he was being brought in *for questioning*, that putting the evidence before petitioner and telling him that the items were going to be fingerprinted was reasonably likely to evoke an incriminating response from him. The only plausible explanation for the officer's conduct is that he expected to elicit a

of *Innis* would greatly improve consistency in lower courts and help resolve the "significant disagreement" observed by Justice White in *Lewis*, without demolishing *Miranda*'s foundation for modern criminal procedure.[257]

VI. CONCLUSION

Chief among the rights granted to the accused is the right to be free from compelled self-incrimination.[258] Criminal investigations frequently wrestle with this privilege because of a confession's weight and importance as "the most compelling possible evidence of guilt."[259] Yet the Supreme Court has permitted the "significant disagreement"[260] created by the "likely to elicit" and "custody plus" interpretations[261] of *Innis* to propagate unabated.[262] Instead of giving a frightening answer, the Supreme Court has declined to answer the scary question: What is "interrogation," anyway?

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statement from petitioner." (emphasis added)); State v. Cunningham, 423 N.W.2d 862, 865 (Wis. 1988) ("*Miranda* procedures are designed to protect a suspect in custodial situations where the compulsion to confess may be present.").

257. What is more difficult, perhaps, is accounting for the elephant in the interrogation room: that *Innis*' result still seems inconsistent with the definition it institutes. This could be deftly done by emphasizing the especially unusual circumstances in *Innis*, specifically that the officers were voicing their concerns while they were actually in the neighborhood where the gun was located, making it "entirely understandable that [the officers] would voice their concern [for the safety of the handicapped children] to each other." *Innis*, 446 U.S. at 303 n.9 (alterations in original). Basically, the officers' comments were less deceptive and less demanding of a response because they came in an unusually appropriate setting at an unusually appropriate time. *Innis*' circumstances—a suspect in transit who police arrested at large in a neighborhood where the gun was believed to be—are exceptionally rare and make the officers' comments more excusable. In this way, the Court could affirm the *Innis* definition while diminishing the precedential value of its holding to a very narrow scenario.

258. U.S. CONST. amend. V.

259. *Miranda*, 384 U.S. at 466; *see also supra* Part II.A.

260. Lewis v. Florida, 486 U.S. 1036, 1036 (1988) (White, J., dissenting from denial to certiorari).

261. The "custody plus" definition is a creature of case law observed in this note. These terms are defined in Part III.A. *See supra* notes 132-33.

262. *See supra* Part IV.

Despite the potentially severe consequences for the present state of the law,[263] the Supreme Court must answer this "substantial question"[264] of criminal procedure to settle important issues, such as whether presenting a suspect with physical evidence of a crime is a lawful police practice.[265] The fundamental significance of *Miranda v. Arizona* is that custodial interrogation is "at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself."[266] Unlike miracles or acts of God, American laws should be judged on their merit,[267] and *Miranda*'s constitutional merit endures in the face of eroding support. "For the strength of our system lies in how durable it is, even for our most heinous citizens."[268]

263. *See supra* Part V.A.

264. *Lewis*, 486 U.S. at 1036 (1988) (White, J., dissenting from denial to certiorari).

265. *See supra* Part IV.

266. Miranda v. Arizona, 384 U.S. 436, 457-58 (1966).

267. PULP FICTION, *supra* note 1 ("You don't judge . . . this based on merit. Now whether or not what we experienced was, an according-to-Hoyle 'miracle,' is insignificant. But what is significant is that I felt the 'touch of God'—God got involved.").

268. *The Daily Show with Jon Stewart* (Comedy Central television broadcast Apr. 24, 2013), *available at* http://www.thedailyshow.com/watch/wed-april-24-2013/weak-constitution (at 1:10). *See also* Miranda v. Arizona, 384 U.S. 436, 480 (1966) ("'The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law.'" (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARVARD L. REV. 1, 26 (1956))); Andre Mathis, Comment, *Criminal Law*—State v. Sawyer, *Tennessee Supreme Court Holds That a Police Officer Cannot Read an Affidavit to a Person in Custody Without Giving* Miranda *Warnings*, 36 U. MEM. L. REV. 1171, 1183 (2006) ("The purpose of the Bill of Rights was, and still is, to protect the rights of the people; and courts should continue to expand individual rights, as the court did in *Sawyer*, rather than narrow individual rights."). *But see* Stephen B. Segal, Note, *The Law Court's Proper Application of* Miranda *in* State v. Bragg*: A "Matter-of-Fact Communication" to the Defendant Regarding Evidence Against Him Will not Typically Constitute "Interrogation,"* 65 ME. L. REV. 823, 836 (2013) ("The *Bragg* holding—that a police officer's statement conveying only 'matter-of-fact communication of evidence' to a defendant will not trigger a *Miranda* warning—is a continuation of the Law Court's tradition of striking the proper balance between investigative needs and rights of defendants.") (referring to State v. Bragg, 48 A.3d 769 (2012)).

The "custody plus" interpretation of *Innis* is at odds with compulsion as understood in *Miranda*. In *Miranda*, Chief Justice Warren spoke forebodingly of "tricks" and "ploys" wielded by police to forge a "psychological advantage."[269] Through this lens, the Court viewed "compulsion" in custody as a virtually unlimited notion that includes any police conduct with a modicum of persuasion (even the "subtle" variety).[270] Tricks and games on law enforcement's home field are not an acceptable substitute for justice, but a "short cut" for the potentially decisive evidence.[271]

Amending an additional compulsion-based element "above and beyond" custody to interrogation grants police the liberty to engage in the sorts of shenanigans of which the *Miranda* Court would have disapproved.[272] This supplemental "measure of compulsion" remains judicially undefined, so that a court employing the "custody plus" definition of interrogation would likely admit the proffered evidence barring a sort of super-custodial state, or the use of flagrantly coercive tactics.[273] The fuzzy notion of "custody plus" comes perilously close to the voluntariness inquiry repudiated in *Miranda*.[274]

The "likely to elicit" definition, on the other hand, honors the tradition followed in *Miranda* that the privilege against self-incrimination "has always been 'as broad as the mischief against which it seeks to guard.'"[275] It defies common sense to suggest that asking, "Where were you on the night of the fifteenth?" would offend the Constitution, but showing a video of what occurred that same night would not.[276] Nor should the lack of a question mark obviate

269. *Miranda*, 384 U.S. at 448-57; *see also supra* Part V.

270. *Id.* at 474.

271. *Id.* at 447 ("'[The use of third degree tactics] is a short cut and makes the police lazy and unenterprising.'" (quoting IV NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, *supra* note 54)).

272. *See supra* notes 56-70 and accompanying text; Part V.B.

273. *See supra* text accompanying notes 239-44.

274. *Miranda*, 384 U.S. at 462-68.

275. *Id.* at 459-60 (quoting Counselman v. Hitchcock, 142 U.S. 547 (1892)).

276. *See, e.g.*, Lewis v. State, 509 So. 2d 1236 (Fla. Dist. Ct. App. 1987); *see also* People v. Ferro, 472 N.E.2d 13, 17 ("Where . . . the only possible object of the police action in revealing evidence to a defendant is to elicit a statement from him, it does no violence to logic to conclude that the police should have known that it would do so." (citations omitted)).

interrogation by way of a crafty manipulation of punctuation.[277] Because the "custody plus" definition of interrogation derived from *Innis* is inconsistent with the Fifth Amendment as understood in *Miranda*,[278] it should be abandoned in favor of the "likely to elicit" definition ostensibly created in *Rhode Island v. Innis*.[279]

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277. People v. White, 828 N.W.2d 329, 342 ("[Certain] statements do not magically transform what would otherwise be an express question into a constitutionally benign comment. For example, the statement 'I'm not asking you a question, I'm just telling you I want to know why you killed those people' would clearly be an express question under *Miranda* and *Innis* because it invites a response, regardless of the interrogator's use of a lead-in statement.").

278. "The current practice of incommunicado interrogation is at odds with [the principle] . . . that the individual may not be compelled to incriminate himself." *Miranda*, 384 U.S. at 457-58. *But see id*. at 526 (White, J., dissenting) ("The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment.").

279. While restoring the spirit of the "likely to elicit" definition, the Court should take care to distance itself from the "above and beyond" dicta, which distinguished statements obtained via interrogation from totally volunteered statements, and the Court should also provide a set of factors to aid future courts in applying the "likely to elicit" definition of interrogation as proposed in Part V. *See supra* Part V.

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