

# NOT SO LEGITIMATE: WHY COURTS SHOULD REJECT AN ADMINISTRATIVE APPROACH TO THE ROUTINE BOOKING EXCEPTION

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*The routine booking exception permits police officers and agents to ask certain questions—typically biographical inquiries such as an arrestee’s name, age, and address—in the absence of the Miranda warnings. Since its introduction in Pennsylvania v. Muniz, the exception has been inconsistently defined. This Note addresses the various formulations of the routine booking exception and focuses on the increasingly utilized administrative-centric tests. It concludes that a purely administrative approach to routine booking should be rejected.*

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If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse . . . .<sup>1</sup>

INTRODUCTION

On January 29, 2009, Cecil Alford was arrested and taken to Fort Worth Police Headquarters.<sup>2</sup> At the station, the apprehending officers searched the back of the patrol car that had transported Alford and found a plastic bag with pills and a thumb drive.<sup>3</sup> The items, in fact, were touching.<sup>4</sup> While under arrest and inside the jailhouse, but before being read his *Miranda* rights, Alford was asked whether or not he was the owner of the thumb drive.<sup>5</sup> Alford responded to the inquiry and informed the officer that it was his.<sup>6</sup> The answer to this un-Mirandized question was admitted into evidence at Alford’s trial for possession of a controlled substance.<sup>7</sup>

The trial court, the court of appeals, and the Court of Criminal Appeals of Texas (the highest criminal appellate court in Texas) agreed that Alford’s answer need not be suppressed because the officer’s question fell within the routine booking exception to *Miranda*, a category of questions that can be asked even before *Miranda* warnings are delivered.<sup>8</sup> The Court of Criminal Appeals of Texas, moreover, noted that the question came within the exception because it was “reasonably related to a legitimate administrative concern,” namely the “identification and storage of an inmate’s property.”<sup>9</sup> Alford continued to challenge this determination, arguing that admission of the statement in the absence of the *Miranda* warning violated his Fifth Amendment right against self-incrimination; how-

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<sup>1</sup> 4 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2251, at 3007 (1905).

<sup>2</sup> Alford v. State, 358 S.W.3d 647, 650 (Tex. Crim. App.), cert. denied, 133 S. Ct. 122 (2012).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 650–51.

<sup>6</sup> *Id.* at 651.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 651–52, 662.

<sup>9</sup> *Id.* at 661, 662. As will be discussed in Part I.B, this deviates from the two typical constructions of the routine booking test.

ever, at the beginning of its 2012 October Term, the United States Supreme Court denied Alford's petition for a writ of certiorari.<sup>10</sup>

The following Term, however, in a case drawing largely on Fourth Amendment doctrine (rather than Fifth Amendment *Miranda* jurisprudence), the Supreme Court tacitly endorsed an "administrative concerns" standard, commenting that "though the Fifth Amendment's protection against self-incrimination is not, as a general rule, governed by a reasonableness standard, the Court has held that 'questions . . . reasonably related to the police's administrative concerns . . . fall outside the protections of *Miranda* . . . and the answers thereto need not be suppressed.'"<sup>11</sup> As discussed below, this statement is a subtle, but important, departure from Supreme Court jurisprudence that could move Fifth Amendment routine booking law in an inadvisable direction—away from the subjective and objective tests designed to safeguard a defendant's right against self-incrimination, and towards a test that takes no account of an officer's intent and ignores the objective likelihood that a particular question will elicit incriminating statements.

Indeed, the routine booking exception is a rarely examined exception to *Miranda*.<sup>12</sup> This exception permits officers to ask certain questions—most commonly biographical questions—of detained individuals in the absence of *Miranda* warnings.<sup>13</sup> In Part I, I set out the history of the routine booking exception: I discuss the two seminal routine booking cases, *Rhode Island v. Innis*<sup>14</sup> and *Pennsylvania v. Muniz*,<sup>15</sup> and the two associated routine booking tests commonly used by courts. I also reintroduce the third approach: an administrative standard that has been adopted in various forms by the D.C. Circuit Court of Appeals, applied by a number of state courts (including the Texas Court of Criminal Appeals in *Alford*), and seemingly endorsed

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<sup>10</sup> *Alford v. Texas*, 133 S. Ct. 122 (2012).

<sup>11</sup> *Maryland v. King*, 133 S. Ct. 1958, 1975 (2013) (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990) (plurality opinion)).

<sup>12</sup> In a Westlaw search conducted on June 4, 2014, there were only thirty-six "Law Review[ ] and Journal[ ]" articles that contained the phrase "routine booking" five times or more, and that also contain the word "Miranda." *But see* Meghan S. Skelton & James G. Connell, *The Routine Booking Question Exception to Miranda*, 34 U. BALT. L. REV. 55 (2004) (discussing the routine booking exception, but not discussing the administrative-functions test); George C. Thomas III, *Lost in the Fog of Miranda*, 64 HASTINGS L.J. 1501 (2013) (discussing the routine booking exception and advocating for the legitimate-administrative-concerns standard).

<sup>13</sup> *See* Skelton & Connell, *supra* note 12, at 60 ("In the 1970s, courts began recognizing another exception to *Miranda*: admission of statements suspects made while the police were collecting biographical information during the booking process.").

<sup>14</sup> 446 U.S. 291 (1980). However, as will be discussed in Part I, *Innis* has no clearly intended place in routine booking doctrine. *See infra* notes 33–34 and accompanying text.

<sup>15</sup> 496 U.S. 582.

by the Supreme Court in *Maryland v. King*. Part II then identifies the “administrative concerns” courts cite when applying administrative-centric tests: stationhouse organization and storage concerns, compliance with procedural rules and administrative codes, and identification concerns. While many courts credit these concerns as legitimate, Part II challenges this legitimacy. Finally, Part III suggests that courts should step back from the ledge and argues that while “administrative concerns” will always inform the routine booking discussion, a test that hinges solely on the administrative nature of the questions asked creates fertile ground for government abuse and undermines the protections of the Fifth Amendment.

## I

### THE ROUTINE BOOKING EXCEPTION: ORIGINS AND APPLICATION

What is the value of delivering the *Miranda* warnings before interrogation? To start from the beginning, the Framers of the Constitution knew how easily confessions could be obtained, not only through torture, but also through nonphysical “overt coercion,” and how “tempting it was for a government to use such tactics.”<sup>16</sup> Additionally, once a defendant makes a statement during custodial interrogation—be it a full confession or a simple statement—it is essentially regarded as irrefutable evidence against the defendant.<sup>17</sup> Accordingly, the Fifth Amendment afforded a right against compelled self-incrimination.<sup>18</sup> Courts, however, struggled for many years with how

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<sup>16</sup> Sol Wachtler, Op-Ed., *You Have the Right to Remain Constitutional*, N.Y. TIMES, May 13, 2010, at A31; see also Yamil Farid Yunes, Note, *Dictation Method: Do Dictated Handwriting Exemplars Provide for Testimonial Evidence Protected by the Fifth Amendment?*, 34 AM. J. CRIM. L. 433, 437 (2007) (“In drafting and ratifying the Fifth Amendment, the Framers rejected the inquisitorial system’s ‘use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him.’” (quoting *Doe v. United States*, 487 U.S. 201, 212 (1988))).

<sup>17</sup> See Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 772 (2013) (“A suspect’s confession sets in motion a seemingly irrefutable presumption of guilt throughout the criminal justice process.”).

<sup>18</sup> U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”); see also *Miranda v. Arizona*, 384 U.S. 436, 458–61 (1966) (tracing the origins of the privilege against self-incrimination); LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 21–24 (1968) (describing the torture used by the Roman Catholic Church in the mid-thirteenth century in the prosecution of heretics). Today, while *Miranda* cases mostly deal with nonviolent, custodial situations, some violent conduct undoubtedly still takes place. See, e.g., Frances Robles, *As Doubts over Detective Grew, Prosecutors Also Made Missteps*, N.Y. TIMES, Sept. 6, 2013, at A1 (describing how a Brooklyn homicide detective routinely abused defendants and beat them until they confessed).

to protect defendants against their own compelled, involuntary statements.<sup>19</sup>

Enter *Miranda*. The prophylactic *Miranda* warnings (telling detained persons that they have the right to remain silent; that any statement made could be used against them; and that they have the right to the presence of an attorney, retained or appointed) respond to the coercion inherent in custodial interrogation—the feeling that one cannot leave; the presence of government officials; being cut off from the outside world.<sup>20</sup> Custodial interrogation, therefore, is the gatekeeper to the privilege against self-incrimination, and the *Miranda* safeguards are only triggered when a person is in custody and when that person is subject to interrogation.<sup>21</sup> When individuals are subjected to custodial interrogation, however, the *Miranda* Court stated that the warnings were “an absolute prerequisite.”<sup>22</sup>

Since *Miranda* was decided in 1966, certain exceptions to this fundamental formula have been made.<sup>23</sup> For example, when a police officer asks un-Mirandized questions that are driven by a concern for public safety, the answers to those questions can be admitted at trial under the public-safety exception.<sup>24</sup> Statements made in response to un-Mirandized questions may also be used for impeachment purposes.<sup>25</sup> Like these exceptions, routine booking questions are a deviation from the proposition that *Miranda* warnings are an “absolute prerequisite” to custodial interrogation.<sup>26</sup>

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<sup>19</sup> In fact, early cases that concerned compelled, involuntary confessions were dealt with under the Due Process Clause of the Fourteenth Amendment. See *Brown v. Mississippi*, 297 U.S. 278, 281–82, 286–87 (1936) (finding that the defendant’s due-process rights under the Fourteenth Amendment were violated when he confessed after being hung from a tree and whipped); see generally Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2201 (1996) (discussing the complexities and inconsistencies of the pre-*Miranda* due-process cases).

<sup>20</sup> See *Miranda*, 384 U.S. at 457–58 (noting the inherent coercion of custodial interrogation).

<sup>21</sup> *Id.* at 444.

<sup>22</sup> *Id.* at 471.

<sup>23</sup> See, e.g., *New York v. Quarles*, 467 U.S. 649, 655 (1984) (recognizing a “public safety” exception to *Miranda*); *Harris v. New York*, 401 U.S. 222, 226 (1971) (finding that voluntary statements obtained in violation of *Miranda* may be admitted for impeachment purposes); *People v. Swoboda*, 737 N.Y.S.2d 821, 826–27 (Crim. Ct. 2002) (discussing the “rescue doctrine” exception to *Miranda*).

<sup>24</sup> *Quarles*, 467 U.S. at 655, 657–58.

<sup>25</sup> *Harris*, 401 U.S. at 223–26.

<sup>26</sup> *But see* Skelton & Connell, *supra* note 12, at 60–61 (discussing how, while some courts view routine booking questions as an “exception” to *Miranda*, other courts view such questions as falling outside the *Miranda* paradigm altogether, i.e., not constituting interrogation, and therefore not triggering the *Miranda* warnings).

A. *Two Significant Cases: Rhode Island v. Innis & Pennsylvania v. Muniz*

Rightly or wrongly so,<sup>27</sup> most scholarly discussions of the routine booking exception start with *Rhode Island v. Innis*.<sup>28</sup> After advising Thomas Innis of his *Miranda* rights and hearing him request the assistance of counsel,<sup>29</sup> three officers placed Innis in a “caged wagon” and began transporting him to the police station.<sup>30</sup> The officers then engaged in a conversation, expressing concern that a handicapped child would injure herself if she found the weapon that Innis was believed to have hidden.<sup>31</sup> Innis interrupted the officers and directed them back to the scene of his arrest, eventually leading them to a field where the shotgun was located.<sup>32</sup>

Though *Innis* is often employed in routine booking jurisprudence, it is more accurately described as a case about what constitutes interrogation under *Miranda*.<sup>33</sup> That is, the officers did not explicitly ask Innis whether he knew where the weapon was located, yet the state appellate court concluded that Innis was “subjected to ‘subtle coercion’ that was the *equivalent* of ‘interrogation’ within the meaning of the *Miranda* opinion.”<sup>34</sup> According to the appellate court’s reasoning, the officers’ conversation about the handicapped child who could have stumbled upon the shotgun constituted interrogation.<sup>35</sup>

The United States Supreme Court, in dicta, determined that interrogation encompasses both express questions and “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably

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<sup>27</sup> See *infra* note 33 and accompanying text.

<sup>28</sup> 446 U.S. 291 (1980); see, e.g., Skelton & Connell, *supra* note 12, at 62 (beginning a discussion of routine booking with *Rhode Island v. Innis*).

<sup>29</sup> While routine booking cases often address un-Mirandized situations, i.e., where *Miranda* warnings have not been delivered, these cases can arise in a post-warning context as well. That is, once *Miranda* rights are delivered, and the defendant asserts the right to counsel, questioning must cease. *Edwards v. Arizona*, 451 U.S. 477, 482–85 (1981). But if the suspect reinitiates the conversation, the police can engage in interrogation without re-Mirandizing. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983). For the purposes of this Note, two situations will be treated similarly: (1) when a person is un-Mirandized (and cannot be interrogated, absent an exception); and (2) when a person is Mirandized, requests counsel, and does not reinitiate (and cannot be interrogated, absent an exception).

<sup>30</sup> *Innis*, 446 U.S. at 294.

<sup>31</sup> *Id.* at 294–95.

<sup>32</sup> *Id.* at 295.

<sup>33</sup> See *id.* at 297 (“We granted certiorari to address for the first time the meaning of ‘interrogation’ under *Miranda v. Arizona*.”).

<sup>34</sup> *Id.* at 296 (emphasis added).

<sup>35</sup> *Id.*

likely to elicit an incriminating response from the suspect.”<sup>36</sup> In *Innis*’s case, the officers should *not* have known that their discussion was reasonably likely to elicit an incriminating statement and, therefore, *Innis* was not subject to interrogation.<sup>37</sup> The conversation was too brief, consisting of no more than a few passing remarks, to conclude that the officers should have known that *Innis* would respond.<sup>38</sup> Notably, the Court never uttered the phrase “routine booking.”

In *Pennsylvania v. Muniz*, the Supreme Court employed the phrase “routine booking” for the first time in the context of the Fifth Amendment.<sup>39</sup> Inocencio Muniz was arrested for driving under the influence.<sup>40</sup> After being transported to the station, Muniz was videotaped performing a series of sobriety tests (without great success).<sup>41</sup> The officers requested that Muniz submit to a breathalyzer test, but he refused.<sup>42</sup> Muniz was asked a sequence of biographical questions about his name, address, height, weight, eye color, date of birth, and current age, which he stumbled through and answered.<sup>43</sup> Both the audio and visual portions of the videotape were admitted against Muniz at trial, and he was convicted for driving under the influence of alcohol.<sup>44</sup> At no point before these tests or questions was Muniz advised of his *Miranda* rights.<sup>45</sup>

The splintered *Muniz* opinion draws on various threads of Fifth Amendment jurisprudence, some of which are outside the scope of this Note.<sup>46</sup> Two portions of the *Muniz* opinion, however, are relevant to this discussion. First, the Court drew on *Innis*, concluding that the

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<sup>36</sup> *Id.* at 301.

<sup>37</sup> *Id.* at 302–03.

<sup>38</sup> *Id.*

<sup>39</sup> 496 U.S. 582, 601 (1990) (plurality opinion).

<sup>40</sup> *Id.* at 585 (majority opinion).

<sup>41</sup> *See id.* at 585–86 (“[W]hile performing these tests, Muniz ‘attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform.’” (quoting *Commonwealth v. Muniz*, 547 A.2d 419, 423 (1988))).

<sup>42</sup> *Id.* at 586.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 587.

<sup>45</sup> *See id.* at 586 (indicating that Muniz was advised of his *Miranda* rights for the first time after refusing the breath test).

<sup>46</sup> For example, whether or not something is “testimonial” for the purposes of the Fifth Amendment is also central to the *Muniz* opinion but will not be discussed. *Id.* at 589–90. Generally, if evidence is not testimonial, it is not protected under the Fifth Amendment because the privilege does not protect the production of “real or physical evidence.” *See Schmerber v. California*, 384 U.S. 757, 764–65 (1966) (finding results of a blood test admissible under the Fifth Amendment because they implicated neither the defendant’s “testimony nor evidence relating to some communicative act or writing by the [defendant]”). Here, Muniz was asked the date of his “sixth birthday” during booking, and Muniz could not calculate that date. *Muniz*, 496 U.S. at 598–99. The Court found that the answer to that question *was* testimonial and, therefore, inadmissible. *Id.* at 600.

statements made by Muniz in conjunction with the physical sobriety tests and his refusal to submit to the breathalyzer test were admissible.<sup>47</sup> Though not stated explicitly, the Court situated these questions in the *Innis* carve out;<sup>48</sup> the questions regarding whether Muniz understood the physical sobriety tests and breathalyzer instructions, and also whether he would submit to the tests, were attendant to the officer's procedures and exempted under the *Innis* definition of interrogation, which excludes "words or actions . . . normally attendant to arrest and custody."<sup>49</sup>

Second, and more pertinently, the seven questions relating to Muniz's pedigree information were described by a plurality of the Court as "routine booking question[s]."<sup>50</sup> And, while the plurality found that the questions did indeed constitute interrogation, it also found the answers to these questions admissible.<sup>51</sup> The plurality highlighted certain aspects of these seven particular inquiries in making this determination: The questions were "biographical data necessary to complete booking or pretrial services,"<sup>52</sup> and the questions were "'for record-keeping purposes only,' . . . and therefore the questions appear[ed] reasonably related to the police's administrative concerns."<sup>53</sup>

### B. Two Dominant Tests: Subjective and Objective

The language in *Innis* and *Muniz* generates a complex, if not utterly inconsistent, standard for what constitute routine booking questions. Most courts have aligned themselves along two poles, identifying with either a subjective test or an objective test.<sup>54</sup> Though

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<sup>47</sup> *Id.* at 603–05.

<sup>48</sup> *See id.* With respect to the statements Muniz made during the physical sobriety test, the Court noted that "[t]he [police officer's] dialogue . . . contained limited and carefully worded inquiries as to whether Muniz understood those instructions, but these focused inquiries were necessarily 'attendant to' the police procedure held by the court to be legitimate." *Id.* at 603–04. For the breathalyzer, the Court commented that the officer "questioned Muniz only as to whether he understood her instructions and wished to submit to the test, [and that those] limited and focused inquiries were necessarily 'attendant to' the legitimate police procedure and were not likely to be perceived as calling for any incriminating response." *Id.* at 605 (internal citations omitted).

<sup>49</sup> *Id.* at 600–01, 603–05 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

<sup>50</sup> *Id.* at 601.

<sup>51</sup> *Id.* at 601–02.

<sup>52</sup> *Id.* at 601 (quoting Brief for United States as Amicus Curiae Supporting Petitioner at 12, *Muniz*, 496 U.S. 582 (No. 89-213), 1989 WL 1127507, at \*12).

<sup>53</sup> *Id.* at 601–02.

<sup>54</sup> *See* Skelton & Connell, *supra* note 12, at 79–92 (laying out these standards in great detail). Skelton and Connell also point out a minority "hybrid approach" that focuses on "whether an *objective observer* would conclude that the police intended to elicit incriminating information." *Id.* at 92–94 (emphasis added).



scholars have already dissected these standards, they are foundational to any discussion about routine booking jurisprudence. As such, below I explain the two predominant tests and additional factors courts consider when determining whether a question falls into the routine booking category.

Some appellate courts have imported *Innis*'s language into its routine booking jurisprudence to construct an objective test. Recall that in *Innis*, the Court took an objective approach to determining whether or not something constitutes interrogation: Interrogation occurs if the officer "*should know* [that the interaction is] reasonably likely to elicit an incriminating response from the suspect."<sup>55</sup> The officer's knowledge of the suspect, however, may be relevant.<sup>56</sup> Accordingly, the First Circuit Court of Appeals defines routine booking inquiries in a manner that excludes any question as to whether the questioning officer should reasonably have expected the question to elicit an incriminating answer.<sup>57</sup> In *United States v. Reyes*, an INS agent asked the defendant his name, date of birth, and social security number in order to complete a DEA booking form, and the First Circuit found the defendant's answers admissible in a later trial for making false statements to a government agent.<sup>58</sup> The First Circuit found that, where the defendant was being prosecuted for a drug conspiracy, the officer could not have reasonably anticipated incriminatory responses to the identification questions.<sup>59</sup>

The First Circuit did, however, catalogue examples where such a conclusion would indeed be sensible: For an identity-related offense, asking for a defendant's name may be reasonably likely to elicit an incriminatory response; for an underage drinking charge, asking about age would do the same.<sup>60</sup> At least two other federal circuit courts of

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<sup>55</sup> *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (emphasis added). Notably, in Fourth Amendment doctrine, the Supreme Court has assumed a reasonable innocent person. See *Florida v. Bostick*, 501 U.S. 429, 438 (1991) ("[T]he 'reasonable person' test presupposes an *innocent* person."). "Whether the reasonable person in the Fifth Amendment *Miranda* inquiry is similarly innocent seems to be an open question." *United States v. FNU LNU*, 653 F.3d 144, 151 n.6 (2d Cir. 2011).

<sup>56</sup> *Innis*, 446 U.S. at 302 n.8 ("Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect.").

<sup>57</sup> *United States v. Reyes*, 225 F.3d 71, 76–77 (1st Cir. 2000); see also *United States v. Scott*, 270 F.3d 30, 43 n.8 (1st Cir. 2001) ("Cases in which law enforcement officers have reason to know that routine booking questions may indeed produce inculpatory responses, however, form an exception to the exception.").

<sup>58</sup> *Reyes*, 225 F.3d at 73, 77–78.

<sup>59</sup> *Id.* at 77.

<sup>60</sup> *Id.*

appeals take an approach similar to the First Circuit's, using an objective "should have known" standard.<sup>61</sup>

Other courts take a subjective approach, fashioning a test from language in *Muniz*. Quoting the government's amicus brief, the *Muniz* plurality noted that the routine booking exception did not apply to questions "designed to elicit incriminatory admissions."<sup>62</sup> Indeed, the Fourth, Fifth, Tenth, and Eleventh Circuits have drawn on this language, albeit in different ways, in concluding that questions intended to prompt incriminatory answers fall outside the realm of routine booking.<sup>63</sup> For example, in a case involving social security fraud, asking an arrestee for her social security number may be reasonably likely to elicit an incriminating response and render the response inadmissible under the objective test. Under a purely subjective approach, however, absent evidence that the interrogating officer intended to bring out damaging evidence, the answer to that question could be admitted.

Finally, courts incorporate other factors into their determination of whether a question can be asked in the absence of *Miranda* warnings, even while using these tests. Some courts consider where the

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<sup>61</sup> The Ninth Circuit applies an objective test. See *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983) (noting that the test for whether or not a question is a routine booking question is objective and also that the subjective intent of the agent is relevant but not conclusive). The Eighth Circuit uses an objective test that focuses only on whether the question constitutes interrogation. See *United States v. Ochoa-Gonzalez*, 598 F.3d 1033, 1038 (8th Cir. 2010). The Eighth Circuit further narrows the test from whether the officer is likely to know that the inquiry will elicit a *generally* incriminating response, to whether "the government agent should reasonably be aware that the information sought . . . is directly relevant to the *substantive offense charged*." *Id.* (emphasis added) (quoting *United States v. Brown*, 101 F.3d 1272, 1274 (8th Cir. 1996)).

<sup>62</sup> *Pennsylvania v. Muniz*, 496 U.S. 582, 602 n.14 (1990) (plurality opinion) (quoting Brief for United States as Amicus Curiae Supporting Petitioner at 13, *Muniz*, 496 U.S. 582 (No. 89-213), 1989 WL 1127507, at \*13).

<sup>63</sup> See *United States v. Virgen-Moreno*, 265 F.3d 276, 293-94 (5th Cir. 2001) ("[Q]uestions designed to elicit incriminatory admissions are not covered under the routine booking question exception."); *United States v. D'Anjou*, 16 F.3d 604, 608 (4th Cir. 1994) ("[T]his exception does not apply to questions, even during booking, that are designed to elicit incriminatory admissions." (citing *Muniz*, 496 U.S. at 602 n.14 (plurality opinion))); see also *United States v. Brotemarkle*, 449 F. App'x 893, 896-97 (11th Cir. 2011) (per curiam) (outlining an administrative test, but then adding that "a suspect's pre-*Miranda* warning responses to an officer's request for his address [are] admissible when there [is] no evidence that the question was intended to elicit an incriminating response" (citing *United States v. Sweeting*, 933 F.2d 962, 965 (11th Cir. 1991))). The Tenth Circuit seems to view questions designed to elicit incriminating answers as *per se* interrogation outside the routine booking exception. See *United States v. Parra*, 2 F.3d 1058, 1068 (10th Cir. 1993) ("[W]here questions regarding normally routine biographical information are designed to elicit incriminating information, the questioning constitutes interrogation subject to the strictures of *Miranda*.").

interrogation took place as relevant to the routine booking analysis.<sup>64</sup> Others limit routine booking questions to those that are biographical, like in *Muniz*,<sup>65</sup> or focus on whether the questions appear on a standard booking form.<sup>66</sup>

### C. *The Third Alternative Emerges: Administrative Tests*

As state and federal courts across the country struggle with the subjective and objective language in *Innis* and *Muniz*, many adopting permutations that incorporate elements of both,<sup>67</sup> some have set off down a third path, focusing on the administrative nature of the questions asked. Part I.C.1 examines the textual origins of administrative-centric tests. Part I.C.2 examines how the D.C. Circuit Court of Appeals, the only federal appellate court to endorse such a test, has employed the administrative-concerns standard.<sup>68</sup> Part I.C.3 discusses administrative-centric tests adopted by state courts, focusing on the test applied by the Texas Court of Criminal Appeals in *Alford v. State*. Finally, Part I.C.4 describes how the Supreme Court's recent commentary in *Maryland v. King* seemingly endorses this administrative trend.

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<sup>64</sup> See *Brotemarkle*, 449 F. App'x at 897 (suggesting that questions at the "scene of the crime"—for example, those asking how long a person had been there—are not normally routine booking inquiries); *United States v. Pacheco-Lopez*, 531 F.3d 420, 425 (6th Cir. 2008) ("In the majority of cases where we have applied the booking exception, we have done so for questioning that occurred at the police station." (citation omitted)).

<sup>65</sup> See, e.g., *Franks v. State*, 486 S.E.2d 594, 597 (Ga. 1997) ("Georgia courts have confined the booking exception to requests for basic biographical data . . .").

<sup>66</sup> See, e.g., *United States v. Reyes*, 225 F.3d 71, 77 (1st Cir. 2000) ("We think it significant that [the officer] asked only those questions indicated on the standard DEA booking form . . ."); *People v. Gomez*, 121 Cal. Rptr. 3d 475, 495 (Ct. App. 2011) (finding answers to an officer's inquiry admissible and noting that the question was asked "pursuant to a standard booking form").

<sup>67</sup> See, e.g., *Gomez*, 121 Cal. Rptr. 3d at 491–94 (examining whether the question was designed to elicit an incriminating response, but also analyzing whether there appeared to be a legitimate administrative purpose for the question). Courts in the Second Circuit have also used elements of both objective and subjective standards. Compare *Scott v. Strack*, No. 97-2554, 1998 WL 636989, at \*2 (2d Cir. Apr. 6, 1998) (using an objective "reasonably likely" standard (quoting *Muniz*, 496 U.S. at 601 (plurality opinion))), and *United States v. Nogueira*, No. 08-CR-876 (JG), 2009 WL 3242087, at \*2 (E.D.N.Y. Oct. 6, 2009) ("The intent of the officer when asking the defendant for 'basic identifying data' pursuant to routine booking procedures is irrelevant."), with *United States v. Razmara*, No. 96-1472, 1997 WL 280081, at \*2 (2d Cir. May 23, 1997) (employing a subjective "designed to" standard).

<sup>68</sup> The Sixth Circuit, while focusing on both objective and subjective elements in certain cases, has embraced what can only be described as an administratively driven test in others. See *United States v. Brewer*, No. 92-3871, 1993 WL 428817, at \*3 (6th Cir. Oct. 21, 1993) ("As the Supreme Court recently held, questions to secure the biographical data necessary for routine booking procedures fall outside the coverage of *Miranda*." (citing *Muniz*, 496 U.S. at 601 (plurality opinion))).

### 1. *The Origins of Administrative-Centric Tests*

Lower courts have not simply pulled administrative-centric tests out of thin air. The Supreme Court supplied the fodder in both *Innis* and *Muniz* by gesturing to the administrative aspects of interrogation and routine booking questions. To begin, *Innis* drew on the administrative nature of certain police processes. Recall that the Court defined interrogation as express questions and “any words or actions on the part of the police (*other than those normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”<sup>69</sup> There was also an administrative flavor to *Muniz*: The plurality indicated that the administrative nature of the seven biographical questions asked of Inocencio Muniz was relevant to whether the answers were admissible in the absence of *Miranda* warnings.<sup>70</sup>

While neither of these cases advocate a wholly administrative standard,<sup>71</sup> lower courts have stretched this language to construct tests that elevate the administrative nature of the questions above the objective likelihood of eliciting an incriminating response and the subjective intent of the questioning officer. Some courts have even fashioned tests that abandon the objective and subjective safeguards

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<sup>69</sup> *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (emphasis added).

<sup>70</sup> *Muniz*, 496 U.S. at 601–02 (plurality opinion).

<sup>71</sup> Neither *Innis* nor *Muniz* provides textual support for a wholly administrative standard. Remember that in *Innis* the Court was grappling with what constituted interrogation, not defining a category of routine booking questions. See *supra* notes 33–38 and accompanying text (describing the Court’s logic in *Innis*). Indeed, there were no express questions asked of Thomas Innis by the transporting officers. *Innis*, 446 U.S. at 302. Moreover, the modifier “other than those normally attendant to arrest and custody”—the *Innis* language that some courts import into their routine booking jurisprudence—modifies “words and actions,” not “express questioning,” which would more aptly describe routine booking inquiries. *Id.* at 301.

As for *Muniz*, recall that a plurality in that case noted that the lower court had “found that the first seven questions [asked of Muniz] were ‘requested for record-keeping purposes only,’ and therefore the questions appear[ed] reasonably related to the police’s administrative concerns.” *Muniz*, 496 U.S. at 601–02 (plurality opinion) (citation omitted). But just because the administrative nature of these questions was *relevant* to determining whether they were part of a routine booking does not mean that a question’s administrative nature is *sufficient* to convert it into a booking-related inquiry. The *Muniz* plurality cited an Eighth Circuit case for the proposition that administrative questions form an exception to *Miranda*, *United States v. Horton*, 873 F.2d 180 (8th Cir. 1989) (*per curiam*), cited in *Muniz*, 496 U.S. at 601 (plurality opinion), but even this case does not establish such a categorical rule. In *Horton*, the Eighth Circuit stated in a footnote that “[i]t is well established that *Miranda* does not apply to biographical data necessary to complete booking or pretrial services.” *Id.* at 181 n.2. But again, nothing in *Horton* stands for the proposition that the administrative nature of a question alone transforms it into a booking question. More precisely, the *Horton* court found that a question’s administrative purpose, along with its biographical nature, is taken into consideration when determining whether a question falls into the routine booking category. *Id.*

completely and analyze only the administrative utility of the questions asked. This shift unmoors the exception (routine booking) from the rule (*Miranda* as an absolute prerequisite). Parts I.C.2 and I.C.3 examine this trend.

## 2. D.C. Circuit Court of Appeals

The D.C. Circuit has honed in on the administrative language in *Innis* and *Muniz* to construct an administrative-concerns test.<sup>72</sup> Unlike the objective and subjective tests, which respectively focus on the likelihood of an incriminating response or the intent of the officer, the administrative-concerns approach examines the link between the question asked and the administrative purpose served, demanding only that the query posed to the defendant be “reasonably related” to an administrative purpose to escape the protections of *Miranda*.<sup>73</sup>

The most cited D.C. Circuit case to apply this test is *United States v. Gaston*.<sup>74</sup> There, officers searching a row house found James Gaston on the second floor, handcuffed him, took him down to the first floor, and began questioning him without giving him a *Miranda* warning.<sup>75</sup> Firearms, narcotics, and money were found in the bedroom of the searched residence.<sup>76</sup> An officer asked Gaston to provide his name, date of birth, social security number, and address.<sup>77</sup> When Gaston provided the current location as his address, the officer proceeded to ask if Gaston owned the home.<sup>78</sup> Gaston identified himself as a co-owner, and the government introduced this statement at Gaston’s trial for possession of heroin with intent to distribute, possession of a firearm during a drug trafficking offense, and unlawful possession of a firearm by a felon.<sup>79</sup>

*Gaston* laid the groundwork for the D.C. Circuit’s administrative-concerns test by describing *Muniz* as a case holding that “officers asking routine booking questions ‘reasonably related to the police’s

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<sup>72</sup> See *United States v. Gaston*, 357 F.3d 77, 82 (D.C. Cir. 2004) (describing the administrative-concerns test); *United States v. Gorrell*, 360 F. Supp. 2d 48, 53 n.3 (D.D.C. 2004) (“The Supreme Court expressly recognized a narrow exception to *Miranda* for routine booking information needed by the government to facilitate the administrative processing of an arrestee.”).

<sup>73</sup> *Gaston*, 357 F.3d at 82 (characterizing *Muniz* as establishing that “officers asking routine booking questions ‘reasonably related to the police’s administrative concerns’ are not engaged in interrogation within *Miranda*’s meaning and therefore do not have to give *Miranda* warnings” (quoting *Muniz*, 496 U.S. at 601–02)).

<sup>74</sup> *Id.* at 77.

<sup>75</sup> *Id.* at 81–82.

<sup>76</sup> *Id.* at 82–83.

<sup>77</sup> *Id.* at 81.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 79, 81.

administrative concerns' are not engaged in interrogation within *Miranda*'s meaning and therefore do not have to give *Miranda* warnings."<sup>80</sup> In part because the officers in *Gaston* had to comply with Federal Rule of Criminal Procedure 41—which requires an officer to give a receipt for seized property “to the person from whom, or from whose premises, the property was taken”<sup>81</sup>—the court found that the question posed to *Gaston* served an administrative purpose similar to the questions in *Muniz*.<sup>82</sup>

The same standard has been applied in other D.C. Circuit cases.<sup>83</sup> In *United States v. Peterson*, the district court found that questions posed to the defendant about ownership of an apartment fell within the booking exception because they reasonably related to an administrative concern, while questions as to which bedroom belonged to the defendant did not.<sup>84</sup> The court was not willing to grant that the latter question served the administrative concern of keeping track of evidence, given that this interest could easily be served by recording the location from which evidence was taken.<sup>85</sup> As I will discuss in Part II, exactly how urgent an administrative concern must be is one of the questions raised by any administrative-centric test.

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<sup>80</sup> *Id.* at 82 (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990)). This is an inaccurate reading of *Muniz*: A plurality of the *Muniz* Court in fact found that the officers asking routine booking questions *were* engaged in interrogation, but that the biographical questions were exempt from *Miranda*. See *Muniz*, 496 U.S. at 601 (plurality opinion) (“We disagree with the Commonwealth’s contention that Officer Hosterman’s first seven questions . . . do not qualify as custodial interrogation as we defined the term in *Innis* . . .”). Moreover, the Court never stated that an administrative concern was sufficient to move a question into the routine booking category. The Court underscored the biographical nature of the questions, that the questions were asked for recordkeeping only, and that the questions appeared reasonably related to the police’s administrative concerns. *Id.* at 601–02. “In this context,” the answers were admissible under the routine booking exception. *Id.* at 602.

<sup>81</sup> FED. R. CRIM. P. 41(f)(1)(C).

<sup>82</sup> See *Gaston*, 357 F.3d at 82 (“The questions dealt as much with record-keeping as the similar booking questions asked in *Muniz*.”).

<sup>83</sup> See, e.g., *United States v. Williams*, 878 F. Supp. 2d 190, 210 (D.D.C. 2012) (finding that “asking [the defendant] how he had arrived at the police station falls outside the routine identifying questions contemplated by the booking question exception” because it does not reasonably relate to administrative concerns); *United States v. Peterson*, 506 F. Supp. 2d 21, 25 (D.D.C. 2007) (deciding which questions fell within the routine booking exception based solely on their relationship to administrative concerns).

<sup>84</sup> 506 F. Supp. 2d at 25.

<sup>85</sup> *Id.* (refusing to recognize an “administrative interest in keeping track of all the evidence recovered in an apartment occupied by two people” when “such an interest could be served easily simply by identifying which pieces of evidence came from which room, without identifying the bedroom’s occupant”).

### 3. State Courts & Alford

Before the D.C. Circuit Court of Appeals cases and even before *Alford*, state courts had begun formulating administrative-centric tests.<sup>86</sup> This section examines three of those administrative standards, culminating with a discussion of the test that is the least protective of defendants' Fifth Amendment rights—the *Alford* legitimate-administrative-concerns test.

Certain states—notably, Georgia—have cobbled together administrative tests that acknowledge the managerial or logistical aspects of policing but limit the exception to biographical information.<sup>87</sup> In Georgia, courts recognize an exemption from *Miranda* partially because the inquiries “serve a legitimate administrative need.”<sup>88</sup> Georgia courts, however, draw a line between those questions that are biographical and those that are not.<sup>89</sup> Questions that fall outside the biographical framework are examined differently<sup>90</sup>: The court evaluates the likelihood that a nonbiographical question would elicit an incriminating response, i.e., whether or not the question constitutes interrogation.<sup>91</sup> When boiled down to its component parts, the Georgia test reserves the routine booking exception for biographical questions and examines all other inquiries under the standard interrogation analysis.<sup>92</sup> Thus, in *Franks v. State*, while an officer could ask a defendant for his name, age, address, and educational background, asking that defendant why he had a bandage on his arm constituted

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<sup>86</sup> See, e.g., *Franks v. State*, 486 S.E.2d 594, 597 (Ga. 1997) (recognizing a *Miranda* exception for basic biographical questions because they serve an administrative purpose). Other states have explicitly rejected this approach. See, e.g., *People v. Rodney*, 648 N.E.2d 471, 474 (N.Y. 1995) (“[T]he mere claim by the People that an admission was made in response to a question posed solely as an administrative concern does not automatically qualify that admission for the pedigree exception to *Miranda* . . .”).

<sup>87</sup> See, e.g., *Merritt v. State*, 653 S.E.2d 368, 374 (Ga. Ct. App. 2007) (“[T]he booking exemption is not intended to be broad, and *questioning outside the scope of basic biographical data* must be examined on a case-by-case basis, considering the context of the questioning, the officer’s intent, and the relationship of the question to the crime.” (emphasis added)).

<sup>88</sup> *Franks*, 486 S.E.2d at 597.

<sup>89</sup> See *State v. Nash*, 619 S.E.2d 684, 687 (Ga. 2005) (“Georgia courts have confined the booking exception to requests for basic biographical data . . .” (internal quotation marks omitted)).

<sup>90</sup> See *Franks*, 486 S.E.2d at 597 (“Police questioning during booking not requesting basic biographical data essential to the booking process must therefore be scrutinized on a case-by-case basis.”).

<sup>91</sup> See *id.* (“Our inquiry must extend further, to the determination of whether under the totality of the circumstances the question was equivalent to ‘custodial interrogation.’ Relevant factors include the context in which the question was asked, the officer’s intention in asking the question, and the relationship of the question to the crime.”).

<sup>92</sup> See *id.* (explaining that “Georgia courts have confined the booking exception to requests for basic biographical data” like name, age, and educational background).

interrogation.<sup>93</sup> The answer—that the bandage covered a stab wound—was therefore suppressed.<sup>94</sup>

California courts have also taken an administrative tack. In *People v. Gomez*, a California court of appeal noted that the booking-question exception applies “to questions ‘reasonably related to the police’s administrative concerns.’”<sup>95</sup> Unlike the Georgia court, it drew little distinction between biographical and nonbiographical inquiries.<sup>96</sup> Indeed, the court ultimately determined that prewarning questions about Gomez’s gang affiliation fell within the exception, but only after finding that the inquiries were not designed to elicit incriminatory responses:

The questions appear to have been asked in a legitimate booking context, by a booking officer uninvolved with the arrest or investigation of the crimes, pursuant to a standard booking form. As noted above, the questions were asked for legitimate, noninvestigatory purposes related to the administration of the jail and concerns for the security of the inmates and staff. Significantly, there is no evidence that [the questioning officer] had any knowledge of the crimes for which defendant was arrested or was suspected of committing.<sup>97</sup>

Admittedly, the *Gomez* court noted that “[w]hether the administrative purpose is a mere guise or pretext for questions actually designed to elicit incriminating responses is a close question.”<sup>98</sup> Citing *Gomez*, the California Supreme Court has also described this inquiry as a totality-of-the-circumstances test.<sup>99</sup>

Unlike these double-layered approaches, the routine booking test adopted by the Texas Court of Criminal Appeals in *Alford* only requires the court to determine “whether the question reasonably relates to a legitimate administrative concern, applying an objective standard.”<sup>100</sup> The *Miranda* exception therefore applies regardless of what the officer should have known.<sup>101</sup>

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<sup>93</sup> *Id.* at 596, 598.

<sup>94</sup> *Id.* at 598.

<sup>95</sup> 121 Cal. Rptr. 3d 475, 494 (Ct. App. 2011) (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990) (plurality opinion)).

<sup>96</sup> *See id.* (concluding that the exception applies to both biographical data and other administrative questions).

<sup>97</sup> *Id.* at 495.

<sup>98</sup> *Id.*

<sup>99</sup> *See People v. Williams*, 294 P.3d 1005, 1021–22 (Cal. 2013), *cert. denied*, 134 S. Ct. 823 (2013) (describing the factors that go into a routine booking analysis).

<sup>100</sup> *Alford v. State*, 358 S.W.3d 647, 659–60 (Tex. Crim. App.), *cert. denied*, 133 S. Ct. 122 (2012).

<sup>101</sup> *Id.* at 659.



The court highlighted two (in its estimation) laudable aspects of this test. First, applying the competing, objective, should-have-known standard would render the routine booking exception a nullity.<sup>102</sup> And second, this particular formulation of the routine booking exception promoted administrative efficiency and safety: Restricting the test to “determining whether a question is, objectively, reasonably related to a legitimate administrative concern ha[d] the added benefit of affording law-enforcement personnel a sphere in which to quickly and consistently administer booking procedures without having to analyze each question to determine if it is likely to elicit an incriminating response.”<sup>103</sup> In other words, officers no longer have to stop and think about the questions they ask during booking procedures. This test also relieves the courts from having to analyze what officers should have known (for the objective test) or whether officers designed particular inquiries to elicit an incriminating response (for the subjective test) when defendants challenge a statement’s admissibility.

Given these seemingly bright lines, the *Alford* test differs from both the Georgia and the California tests in significant ways. Unlike the test used by the Georgia Supreme Court in *Franks*, the *Alford* approach draws no distinction between biographical and nonbiographical questions. Indeed, the *Alford* court ultimately found that

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<sup>102</sup> *Id.* at 660. The reasoning goes something like this: *Innis* defines interrogation to include both (a) express questions and (b) “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Focusing only on the second prong, it is futile to read the parenthetical phrase to exempt only those routine booking questions that are *not* reasonably likely to elicit incriminating responses, since under that prong these words would not constitute interrogation in the first place. Stated otherwise, the *Innis* Court had wanted to allow the police to speak or take certain “words or actions” attendant to arrest or custody that might be reasonably likely to elicit incriminating responses, and it created the routine booking exception to account for these “words or actions.” See *Alford*, 358 S.W.3d at 660 (“That language gave rise to the booking-question exception by indicating that routine administrative questions necessary for booking processing do not constitute interrogation, regardless of whether police should know that such questions are reasonably likely to elicit incriminating information.”).

This argument ignores the obvious: Routine booking questions are express *questions* that fall squarely within the first prong of the *Innis* definition of interrogation. It is coherent to say that all express questions require delivery of the *Miranda* warnings and that a category of routine booking questions are exempt from this equation, but only so long as such inquiries are not reasonably likely to elicit incriminating responses. In fairness, *Innis* did not dictate this test either, since the concept of routine booking was not at issue; however, this formulation at least starts with the correct jurisprudential foundation.

<sup>103</sup> *Alford*, 358 S.W.3d at 661; see also Thomas, *supra* note 12, at 1516–17 (discussing the *Alford* court’s reasoning).

even a nonbiographical question about ownership of a thumb drive qualified as a valid booking inquiry.<sup>104</sup>

The *Alford* test is also distinguishable from the standard used by the California court in *Gomez*. Though the *Gomez* test highlighted the administrative aspects of gang-related questions, it also included a second layer of analysis, citing the *Muniz* “designed to” language in demanding that the questioning officer not probe for inculpatory information.<sup>105</sup>

Despite the lack of protection that the *Alford* test affords defendants, the Supreme Court tacitly endorsed this approach soon thereafter.

#### 4. Tacit Supreme Court Endorsement

In ways similar to *Innis*, *Maryland v. King*<sup>106</sup> has no clearly intended place in routine booking jurisprudence. *King*, like *Innis*, was not a case that hinged on express routine booking questions asked of a defendant. *King*, like *Innis*, was not a case about acquiring simple, booking-form information from a detained person. But *King*, like *Innis*, will likely be imported into routine booking jurisprudence in ways that further complicate this area of law.

After being arrested in 2009, Alonzo King was processed through a Maryland facility where, as part of booking procedure for serious offenses, his DNA was taken pursuant to the Maryland DNA Collection Act.<sup>107</sup> Three months later, this information was uploaded into the Maryland DNA database; three weeks following that, the DNA sample was matched with DNA found in a 2003 rape case.<sup>108</sup> King was convicted of rape, but the Maryland Court of Appeals set aside his conviction, finding the Maryland statute unconstitutional insofar as it authorized collecting DNA from those arrested, but not convicted, on

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<sup>104</sup> *Alford*, 358 S.W.3d at 662. This nuance in the Georgia test was omitted in the Texas District Attorney’s opposition to a petition for certiorari in *Alford*, which misleadingly described *Franks* as a case that outright adopted the administrative-concerns test. See Brief in Opposition to Petition for a Writ of Certiorari at 6, *Alford v. Texas*, 133 S. Ct. 122 (2012) (No. 11-1318), 2012 WL 2883834, at \*6 (“*Franks v. State* adopts the legitimate administrative function test.” (citation omitted)). *Franks* does indeed adopt an administrative test, but not the same, broad test advocated by the district attorney. See *supra* notes 86–94 and accompanying text (explaining the Georgia test and its different analysis based on whether a question is biographical).

<sup>105</sup> See *People v. Gomez*, 121 Cal. Rptr. 3d 475, 495 (Ct. App. 2011) (assessing whether the administrative purpose underlying a booking question was merely a pretext for eliciting an incriminating response).

<sup>106</sup> 133 S. Ct. 1958 (2013).

<sup>107</sup> *Id.* at 1965–66.

<sup>108</sup> *Id.* at 1966.

felony charges.<sup>109</sup> The United States Supreme Court disagreed and held that DNA identification of arrestees was a reasonable routine booking procedure under the Fourth Amendment.<sup>110</sup>

While not integral to the opinion, the Court underscored the importance of proper inmate processing and mentioned the leeway the Court had afforded police officers in conducting booking searches.<sup>111</sup> In a fleeting sentence, the Court also cited *Muniz* and drew in Fifth Amendment routine booking law: “[T]hrough the Fifth Amendment’s protection against self-incrimination is not, as a general rule, governed by a reasonableness standard, the Court has held that ‘questions . . . reasonably related to the police’s administrative concerns . . . fall outside the protections of *Miranda* and the answers thereto need not be suppressed.’”<sup>112</sup>

The Court’s offhand remark seemingly legitimized the (until then) imprecisely formulated routine booking tests that focused solely on the administrative nature of the questions posed. It was a subtle textual change,<sup>113</sup> but a meaningful one for lower courts. It gives trial courts precedential ammunition—a succinct articulation of the law that recognizes a purely administrative standard for routine booking

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1980.

<sup>111</sup> *See id.* at 1974 (“[T]he Court has recognized that the ‘governmental interests underlying a station-house search of the arrestee’s person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest.’” (quoting *Illinois v. Lafayette*, 462 U.S. 640, 645 (1983))).

<sup>112</sup> *Id.* at 1975 (ellipses in original) (citation omitted) (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990) (plurality opinion)).

<sup>113</sup> In *Muniz*, the plurality said:

Muniz’s answers to these first seven questions are . . . admissible because the questions fall within a “routine booking question” exception which exempts from *Miranda*’s coverage questions to secure the “‘biographical data necessary to complete booking or pretrial services.’” The state court found that the first seven questions were “requested for record-keeping purposes only,” and therefore the *questions* appear *reasonably related to the police’s administrative concerns*. In this context, therefore, the first seven questions asked at the booking center *fall outside the protections of Miranda and the answers thereto need not be suppressed*.

496 U.S. at 601–02 (plurality opinion) (emphasis added) (internal citations omitted). Compare that language with the Court’s altered version in *King*: “[T]he Court has held that ‘*questions . . . reasonably related to the police’s administrative concerns . . . fall outside the protections of Miranda and the answers thereto need not be suppressed.*’” 133 S. Ct. at 1975 (ellipses in original) (emphasis added) (citation omitted) (quoting *Muniz*, 496 U.S. at 601–02 (plurality opinion)). I propose that this is, at best, an incomplete use of *Muniz*. The Supreme Court itself has taken issue with much smaller textual alterations. *See United States v. Williams*, 504 U.S. 36, 44 (1992) (“The dissent describes the Government as having ‘expressly acknowledged [in the Court of Appeals] *the responsibilities described in Page.*’ It did no such thing. Rather, the Government acknowledged ‘*that it has certain responsibilities under . . . Page.*’” (alterations in original) (citations omitted)).

inquiries, while making no mention of the subjective or objective elements of either *Muniz* or *Innis*.<sup>114</sup> Indeed, the third edition of Texas Jurisprudence already cites to *King* in a section entitled “When Warnings Are Necessary” for this proposition.<sup>115</sup> Though it is yet to be seen whether an even stronger trend of adopting the administrative-concerns test will occur in lower courts, the complexity surrounding the subjective and objective standards coupled with the Court’s blessing in *King* makes this a real possibility.

## II

### STATED ADMINISTRATIVE CONCERNS

So here we are. Three tests, two pivotal cases, and one brief Supreme Court remark later. In short, we have explored the how, and now we must explore the why: *Why have some courts gravitated to the administrative standard?* In formulating administrative tests, courts have not simply misread these foundational—albeit complex—cases. Courts have knowingly cut and pasted, moving towards a standard that seemingly responds to three oft-repeated administrative concerns: stationhouse organization and storage, administrative compli-

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<sup>114</sup> Despite *Maryland v. King*, Supreme Court dicta in other cases tend to support a nonadministrative standard. In 2004, the Court found that an officer could approach Larry Hiibel and ask him his name without a *Miranda* warning, not because it was a routine booking inquiry, but because, at the time, there was no reasonable belief that the name could be used against him. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 190–91 (2004). Nevada’s “stop and identify” statute required Hiibel to provide his name, NEV. REV. STAT. ANN. § 171.123 (LexisNexis 2013), so his failure to do so could be used against him in a prosecution for “willfully resist[ing], delay[ing] or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office.” *Hiibel*, 542 U.S. at 181–82 (quoting § 199.280). The Court also noted, however, that “a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense.” *Hiibel*, 542 U.S. at 191 (emphasis added). It went on to comment that, “[i]n that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated what remedy must follow.” *Id.* This last portion accurately describes many of the situations explored in this Note: Providing an address that is a necessary link in a separate firearms possession charge; providing a citizenship status that is a necessary link in a separate deportation proceeding; or providing a statement of ownership that is a necessary link in a separate charge for possession of MDMA. Though *Hiibel* is troubling for the broad authority it appears to grant states to pass laws that criminalize information retention, it reinforces the principle that there is an indispensable link between an officer’s authority to ask a question in the absence of *Miranda* warnings and the likelihood that the question will reveal incriminating evidence, a link that is forgotten when courts shift to a policy-based administrative approach to routine booking.

<sup>115</sup> 21 TEX. JUR. 3d *Criminal Law: Rights of the Accused* § 12 (Supp. 2013) (“Though the Fifth Amendment’s protection against self-incrimination is not, as a general rule, governed by a reasonableness standard, questions reasonably related to the police’s administrative concerns fall outside the protections of *Miranda* and the answers thereto need not be suppressed.” (citing *King*, 133 S. Ct. 1958)).

ance, and identification. Part II identifies these concerns and argues that they are not sufficiently persuasive.

### A. *Stationhouse Organization and Storage Concerns*

Law enforcement agents must complete certain administrative functions in order to maintain institutional organization. In the context of the Fourth Amendment, this has led to the inventory-search doctrine, which permits officers to search and inventory an arrestee's property at booking.<sup>116</sup> Two oft-cited justifications for inventory searches are the protection of the owner's property and the protection of the police against claims of lost or stolen property<sup>117</sup>: A standardized procedure for inventorying an arrestee's property has the potential to prevent theft by police officers and also to reduce the number of false claims by defendants.<sup>118</sup>

Courts have been quick to draw analogies between the Fourth Amendment and the Fifth Amendment in this area. For example, the *Alford* court determined that the government had a legitimate interest in the identification of Alford's thumb drive (and therefore asking him un-Mirandized questions) partially because "in the Fourth Amendment context, . . . 'it is reasonable for police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police stationhouse incident to booking and jailing the suspect.'"<sup>119</sup> In *King*, the Supreme Court also referenced the inventory-search doctrine in the same breath as the routine booking exception.<sup>120</sup>

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<sup>116</sup> See, e.g., *Colorado v. Bertine*, 479 U.S. 367, 381 (1987); Emile F. Short, *Lawfulness of "Inventory Search" of Motor Vehicle Impounded by Police*, 48 A.L.R.3d 537 (2013).

<sup>117</sup> See *Warrantless Searches and Seizures*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 43, 112 (2010) (describing the first two purposes of the inventory-search doctrine as "protecting the owner's property while it is in police custody" and "protecting the police against claims of lost or stolen property"); William E. Ringel, *SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS* § 12:19 (2d ed. 2004) (same).

<sup>118</sup> *Illinois v. Lafayette*, 462 U.S. 640, 646 (1983). For an example of implementation, see SEATTLE POLICE DEP'T, SEATTLE POLICE MANUAL § 6.181 (2012), available at [http://www.seattle.gov/police/publications/manual/06\\_181\\_Performing\\_Inventory\\_Searches.html](http://www.seattle.gov/police/publications/manual/06_181_Performing_Inventory_Searches.html).

<sup>119</sup> *Alford v. State*, 358 S.W.3d 647, 661 (Tex. Crim. App.), cert. denied, 133 S. Ct. 122 (2012) (quoting *Lafayette*, 462 U.S. at 643). The State also made this argument in its brief opposing certiorari. See Brief in Opposition to Petition for a Writ of Certiorari at 21, *supra* note 104, at 22, 2012 WL 2883834, at \*21 ("The booking exception is directly analogous to the Fourth Amendment's inventory search doctrine . . .").

<sup>120</sup> See *Maryland v. King*, 133 S. Ct. 1958, 1974–75 (2013) (connecting the governmental interest in a stationhouse search of an arrestee's person and the governmental interest in questions that are reasonably related to the police's administrative concerns during booking). More generally, this weak analogy between inventory searches (discussed under the rubric of the Fourth Amendment) and routine booking questions (discussed under the Fifth) ignores the doctrinal nuances of Fourth and Fifth Amendment jurisprudence. Since inventory searches happen in the absence of probable cause, they are permissible on

This comparison is only compelling, though, if the purposes served by Fourth Amendment inventory searches are also served by jettisoning the *Miranda* warnings. Stepping back for a moment, arguments for Fourth Amendment inventory searches proceed as follows: With respect to the first purpose—protecting an arrestee’s property from theft—it is conceivably easier for an arrestee to successfully assert a stolen-property claim if inventory manifests are created. In essence, without the receipt it would be the arrestee’s word against the officer’s. And the second purpose, protecting officers against false claims, is a corollary to the first: If a manifest creates a record to enable arrestees to bring valid stolen-property claims, it also creates a clearer record for purposes of disproving false stolen-property claims.<sup>121</sup>

However one views the Fourth Amendment inventory-search doctrine,<sup>122</sup> these two rationales do not transfer to Fifth Amendment routine booking jurisprudence.<sup>123</sup> Whether or not an arrestee owns property found in her pocket, purse, or car is irrelevant to whether that property should or could be inventoried under her name. If an

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generality grounds. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 59 MINN. L. REV. 349, 418 (1974) (indicating that inventory searches of impounded vehicles and other routine inspections have been exempted from the requirements of probable cause). Stated otherwise, searches are generally permitted under the Fourth Amendment only upon a finding of cause: A certain level of cause (generally, probable cause) serves as the safeguard against the government’s intrusion into a person’s life. Contrary to this formula, inventory searches happen in the *absence* of probable cause. And since the safeguard is not some form of cause, the protection is generality—inventory searches are constitutionally permissible because they are done to all arrestees. The same generality check does not apply to Fifth Amendment jurisprudence because the Fifth Amendment does not contain a sliding scale of reasonability and justifiability. Rather, it contains an outright prohibition against compelled self-incrimination: “No person . . . shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. The Supreme Court itself referenced this distinction in *King*. See 133 S. Ct. at 1975 (“[T]he Fifth Amendment’s protection against self-incrimination is not, as a general rule, governed by a reasonableness standard . . .”).

<sup>121</sup> See *Lafayette*, 462 U.S. at 646 (“A standardized procedure for making a list or inventory as soon as reasonable after reaching the station house not only deters false claims but also inhibits theft or careless handling of articles taken from the arrested person.”).

<sup>122</sup> In support of inventory searches, the Court supplies that “[i]t is not unheard of for persons employed in police activities to steal property taken from arrested persons.” *Lafayette*, 462 U.S. at 646. But if an officer was prepared to steal property, it is unclear why that officer would simply *not* record it on an inventory sheet.

<sup>123</sup> It is also difficult to see how questions about property serve the third oft-cited justification for inventory searches: safety. Arrested persons may be known to injure themselves or others with items on their person. *Id.* at 646. And, “[d]angerous instrumentalities—such as razor blades, bombs, or weapons—can be concealed in innocent-looking articles taken from the arrestee’s possession.” *Id.* But, once again, while an inventory search may uncover harmful instruments, *inquiries* about these instruments cannot be linked to such concerns.

overdue copy of the New York Public Library's *The Catcher in the Rye* is found in an arrestee's car, for example, it makes no difference whether she owns that copy or whether it belongs to the library—she should receive it when she leaves. If the police instead found, say, MDMA, the ownership question would make even less sense given that officers do not return contraband to arrestees.<sup>124</sup>

In a rare case like *Alford*, where the property is found in a patrol car, asking an ownership question may serve the purpose of linking the thumb drive to Alford to facilitate its safe return. Police departments, however, already have procedures that preclude the need to ask such questions. Indeed, the Texas Court of Criminal Appeals noted that, upon arriving at Fort Worth Police Headquarters, the officers escorted Alford out of the back seat of the car and, “*pursuant to department procedure*, searched the back seat.”<sup>125</sup> Other departments have similar policies for conducting a sweep of the passenger compartment upon arrival at the stationhouse.<sup>126</sup> If these procedures are executed routinely, they supplant the need to ask questions regarding the property, especially potentially incriminating un-Mirandized questions.

And even if these sweep procedures are only capable of linking defendants to their possessions in ninety-nine out of one hundred situations, it stretches the “legitimacy” component of a “legitimate administrative concern” to base an exception from the *Miranda* paradigm on this chance happening.

### B. Compliance with Procedural Rules and Administrative Codes

Courts are also uncomfortable requiring *Miranda* warnings when administering them would seemingly conflict with procedural rules and administrative codes. This is for good reason. The rules of criminal procedure, for example, attempt to assure due process to those charged with the commission of crimes,<sup>127</sup> and administrative codes purport to have the force of law over the economic and social transac-

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<sup>124</sup> See FED. R. CRIM. P. 41 advisory committee's notes (“[C]ontraband . . . even if seized illegally, is not to be returned.”).

<sup>125</sup> *Alford*, 358 S.W.3d at 650 (emphasis added).

<sup>126</sup> See SEATTLE POLICE DEP'T, SEATTLE POLICE MANUAL § 11.020 (2012), available at [http://www.seattle.gov/police/publications/manual/11\\_020\\_transportation\\_detainees.html](http://www.seattle.gov/police/publications/manual/11_020_transportation_detainees.html) (“Officers Will Search the Transport Vehicle at the Beginning and on the Completion of a Transport.”).

<sup>127</sup> *United States v. Thomas*, 724 F.3d 632, 642 (5th Cir. 2013) (noting the relationship between due-process rights and the Federal Rules of Criminal Procedure), *cert. denied*, 134 S. Ct. 1040 (2014).

tions of millions of citizens.<sup>128</sup> The urge to create coherence between standard police practices, these collections of laws, and the requirements of the Constitution is understandable.

With this close in mind, recall that the *Gaston* court permitted the state to admit the defendant's answers to un-Mirandized questions about his address and ownership of a home.<sup>129</sup> The questions related to administrative concerns since the police officers had to comply with Federal Rule of Criminal Procedure 41, which the court described as requiring the "officer executing the warrant [to] . . . give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken."<sup>130</sup>

The administrative concern identified in that instance, however, is deceptive at best. Following an ellipsis in the portion of Rule 41 cited in *Gaston*, the Rule provides that the warrant-executing officer *also* has the option of leaving "a copy of the warrant and receipt at the place where the officer took the property."<sup>131</sup> The officer in *Gaston* did not need to ask any questions in order to comply with the Rule; he just as well could have left the receipt at the residence, without eliciting incriminating statements.<sup>132</sup> And if the administrative purpose (compliance with Rule 41) could have been achieved in an arguably easier manner (simply leaving the receipt at the premises), it begins to look as if administrative concerns are not as concerning as they might have appeared at first blush. While the *Peterson* case may assuage fears that courts are willing to let officers elicit incriminating statements wholesale about ownership in the absence of *Miranda* warnings,<sup>133</sup> the *Peterson* court still held that questions regarding the

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<sup>128</sup> See Phyllis E. Bernard, *From "Good Ol' Boys" to "Good Young Law": The Significance of the Oklahoma Administrative Code*, 18 OKLA. CITY U. L. REV. 267, 270 (1993) (noting how the Oklahoma Administrative Code purports to have "the force and effect of law over so many aspects of economic and social transactions").

<sup>129</sup> *United States v. Gaston*, 357 F.3d 77, 82 (D.C. Cir. 2004).

<sup>130</sup> *Id.* (ellipsis in original) (quoting FED. R. CRIM. P. 41(f)(3)(A) (#200) (current version at FED. R. CRIM. P. 41(f)(1)(C))).

<sup>131</sup> FED. R. CRIM. P. 41(f)(1)(C).

<sup>132</sup> Some states also permit leaving the receipt with the person whom the police believe to have apparent control over the premises. *See, e.g.*, N.C. GEN. STAT. ANN. § 15A-254 (West 2012) ("If items are taken from a place or vehicle, the receipt must be given to the owner, or person in apparent control of the premises or vehicle if the person is present . . ."). An apparent-authority standard would also not require that the officer pose questions to the defendant.

<sup>133</sup> Recall that the *Peterson* court found that questions relating to which bedroom belonged to the defendant did not fall within the routine booking exception. *United States v. Peterson*, 506 F. Supp. 2d 21, 24–25 (D.D.C. 2007).



ownership of the apartment came within the exception, also citing to Rule 41's mandate.<sup>134</sup>

Returning to the case of Cecil Alford, the Texas court also fixated upon administrative mandates. Officer Ramirez was permitted to ask Alford whether he owned the thumb drive in part because the Texas Administrative Code requires officers to create a file on each inmate. The file is to include an "inmate property inventory,"<sup>135</sup> on which the receiving officer carefully records the inmate's belongings.<sup>136</sup> The administrative code goes on to set out a scheme whereby the officer fills out a property receipt.<sup>137</sup> And, should the inmate refuse to sign the receipt, the receiving officer, in the presence of a witness, simply notes the refusal and signs the receipt herself.<sup>138</sup> Therefore, much like in *Gaston*, the goals of the administrative code can be achieved through alternative means: by having the receiving officer sign the receipt and store the property without asking incriminating questions.<sup>139</sup>

Finally, it is troubling that mere appearance in an administrative code transforms something—anything—into fair questioning territory. Take, for example, the section of the Texas Administrative Code referenced in *Alford*. Alongside "inmate property inventory," the same section requires an arrestee's file to include any "previous criminal record."<sup>140</sup> Should it be assumed that officers can question inmates at length about prior convictions and pending charges under the guise that such questions serve an administrative purpose?

Similar logic has been used elsewhere. In *King*, the Supreme Court found that the United States Code and Maryland Code—which instruct judicial officers to consider the danger a defendant poses to others when determining the conditions of release—form a government interest in taking an arrestee's DNA.<sup>141</sup> This is because taking DNA aids a court in identifying the defendant and, therefore, deter-

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<sup>134</sup> *Id.* (citing FED. R. CRIM. P. 41(f)(3) (current version at FED. R. CRIM. P. 41(f)(1)(C))).

<sup>135</sup> *Alford v. State*, 358 S.W.3d 647, 661 (Tex. Crim. App.), *cert. denied*, 133 S. Ct. 122 (2012) (quoting 37 TEX. ADMIN. CODE § 265.4(a)(11)).

<sup>136</sup> *Id.* (citing 37 TEX. ADMIN. CODE § 265.10).

<sup>137</sup> 37 TEX. ADMIN. CODE § 265.10.

<sup>138</sup> *Id.*

<sup>139</sup> Note, however, that Federal Rule of Criminal Procedure 41 outlines an alternative route for compliance, whereas under the Texas Administrative Code it is arguable that the officer should *try* to obtain the inmate's signature to comply with the Code.

<sup>140</sup> *Id.* § 265.4(a)(9), (11).

<sup>141</sup> See *Maryland v. King*, 133 S. Ct. 1958, 1973 (2013) (citing MD. R. 4-216(f)(1)(G) and 18 U.S.C. § 3142 (2006 ed. & Supp. V 2008)).

mining whether he should be released on bail.<sup>142</sup> As soon as this interest is recast as “administrative,” it becomes increasingly likely that un-Mirandized questions will be used to gather all information bearing on a bail package.<sup>143</sup> The Maryland Code would then permit questions pertaining to “the nature of the evidence against the defendant,” the defendant’s “character and mental condition,” or questions about the defendant’s prior “flight to avoid prosecution.”<sup>144</sup>

All of these questions facilitate compliance with an administrative code and, therefore, could serve a “legitimate” administrative function. If the administrative-concern-as-supported-by-appearance-in-an-administrative-code argument is accepted, it is difficult to imagine how these questions would not be permissible within the routine booking exception.

### C. Identification Concerns

Officers must identify individuals being held under their supervision. In thousands of cases each day, officers need to book suspects.<sup>145</sup> Many courts struggle with the notion that defendants may purposely withhold their name, age, or date of birth if advised of their *Miranda* rights to remain silent and to have a lawyer present. What would follow then? Viewed in this way, the routine booking exception provides a way for police officers to quickly gather pertinent information, unadorned by the trappings of *Miranda*. While facially attractive, this argument is flawed in one way and alarming in another.

First, there is little reason to believe that the average arrestee will withhold biographical information purely to frustrate police officers. This argument fails to acknowledge that defendants also have an interest—arguably a greater interest than officers—in speedy booking

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<sup>142</sup> *Id.* The validity of this justification in King’s case is questionable at best. *See id.* at 1984 (Scalia, J. dissenting) (describing how the results of King’s DNA sample were not entered into Maryland’s DNA database until months after King’s arrest, after “bail had been set, King had engaged in discovery, and he had requested a speedy trial—presumably not a trial of John Doe”).

<sup>143</sup> At least with respect to asking for a suspect’s name and other identifying information, this link has already been made. *See United States ex rel. Hines v. LaVallee*, 521 F.2d 1109, 1112 (2d Cir. 1975) (“[I]nformation as to a suspect’s identity is required immediately to enable the police to book and arraign the suspect and to permit the magistrate to determine the amount of bail to be fixed and whether persons claiming to be relatives should be allowed to confer with the suspect.”).

<sup>144</sup> MD. R. 4–216(f)(1)(A)–(C).

<sup>145</sup> *See* Steven Nelson, *Police Made One Marijuana Arrest Every 42 Seconds in 2012*, U.S. NEWS & WORLD REP. (Sept. 16, 2013) <http://www.usnews.com/news/articles/2013/09/16/police-made-one-marijuana-arrest-every-42-seconds-in-2012> (discussing the number of arrests in 2012).

procedures.<sup>146</sup> The vast majority of those arrested are charged with misdemeanor drug offenses (some 82% for possession charges)<sup>147</sup> and are not held for multiple days.<sup>148</sup> Withholding booking information would elongate an already demoralizing and unpleasant process and, realistically, there are not many arrestees—the majority of whom are under arrest for petty offenses—who would strategically submit to additional detention.<sup>149</sup>

Second, the concept of identity has recently taken on new dimensions. That is, *King* redefined “identity” in a way that folded in many nontraditional elements of personhood. In a post-*King* world, identification now includes an arrestee’s criminal history, her “public persona,” and records of her actions that are available to the police.<sup>150</sup> Expanding the definition of identity in this way infuses Fifth Amendment routine booking law with a whole new set of issues. On the one hand, if an administrative concern in the identification of an arrestee is the litmus test for what comes within the category of routine booking questions, this reimagining of “identity” expands that concern (and, therefore, this category) considerably. On the other hand, if DNA suffices to identify an arrestee and taking an arrestee’s DNA is now permissible under the Fourth Amendment, there is very little value left to asking these questions under an exception to the rights afforded under the Fifth Amendment: There is little an officer could ask an arrestee about his or her identity that the officer could not glean from swabbing the inside of the arrestee’s cheek.

These issues demonstrate the problematic territory courts will be entering if the routine booking exception is reduced to an examination of whether a question serves an identification concern.

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<sup>146</sup> Cf. DETENTION WATCH NETWORK ET AL., DEPORTATION 101: A COMMUNITY RESOURCE ON ANTI-DEPORTATION EDUCATION AND ORGANIZING 62 (2010), available at <http://immigrantdefenseproject.org/wp-content/uploads/2011/02/Deportation101-1-11HiRes.pdf> (warning defendants that if they do not answer questions during booking, the police may not release them from jail).

<sup>147</sup> Nicole Flatow, *Police Made More Arrests for Drug Violations than Anything Else in 2012*, THINKPROGRESS.ORG (Sept. 17, 2013, 2:41 PM), <http://thinkprogress.org/justice/2013/09/17/2627601/people-arrested-drug-abuse-violations-2012/>; Uniform Crime Reports: Persons Arrested, FBI.GOV, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested> (last visited Aug. 16, 2014).

<sup>148</sup> In New York, most arrestees can expect to be arraigned within eighteen to twenty-four hours. *What Can I Expect if I Am Arrested?*, LEGAL AID SOC’Y, <http://www.legal-aid.org/en/ineedhelp/ineedhelp/criminalproblem/faq/whatcaniexpectifiamarrested.aspx> (last visited Aug. 14, 2014).

<sup>149</sup> See Brandt J. Goldstein, *Panhandlers at Yale: A Case Study in the Limits of Law*, 27 IND. L. REV. 295, 350 n.202 (1993) (describing the process of being arrested as an “unpleasant experience”).

<sup>150</sup> *Maryland v. King*, 133 S. Ct. 1958, 1964 (2013).

## III

## WALKING AWAY FROM ADMINISTRATIVE-CENTRIC TESTS

Part II examined the legitimacy of the administrative concerns often articulated to justify the withholding of *Miranda* rights in routine booking situations. Part III completes the discussion by proposing that an administrative-centric approach to routine booking is unwarranted and impermissibly excises the constitutional protections that are inherent in the subjective and objective approaches. Part III.A begins by distinguishing routine booking from another *Miranda* exception (the public-safety exception) that has been justified by policy and administrative concerns; it argues that there are significant differences between the two. Part III.B notes that, as a purely logical matter, even if specific administrative concerns are not always compelling enough to withhold *Miranda* warnings, an administrative-centric test is not necessarily “wrong.” However, this Subpart argues that courts are not willing to delve into the individual administrative concerns they employ (à la Part II) or consider how this omission imperils defendants. Finally, Part III.C proposes that, while administrative considerations may always form a part of the routine booking exception, administrative-centric tests should be abandoned.

A. *Miranda Exceptions in Comparison*

From a jurisprudential standpoint, it is understandable that courts have headed in an administrative direction in formulating routine booking tests. As mentioned previously, other exceptions from *Miranda* are justified on policy grounds; when some articulable concern outweighs the need for defendants to be informed of their *Miranda* rights, we depart from the paradigm. For example, in *New York v. Quarles*, the Supreme Court determined that “the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.”<sup>151</sup> In exigent situations, the government does not hesitate to invoke the public-safety exception, as it did during its interrogation of Dzhokhar Tsarnaev after the Boston bombing in 2013.<sup>152</sup> This makes the trend towards an administrative, policy-driven test explainable in the context of other *Miranda* exceptions, such as routine booking.

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<sup>151</sup> 467 U.S. 649, 657 (1984).

<sup>152</sup> See Pete Yost, *Miranda Rights Won’t Be Read for Boston Bombing Suspect: Justice Official*, HUFFINGTON POST (Apr. 19, 2013, 10:31 PM), [http://www.huffingtonpost.com/2013/04/19/miranda-rights-boston-bombing-suspect\\_n\\_3120333.html](http://www.huffingtonpost.com/2013/04/19/miranda-rights-boston-bombing-suspect_n_3120333.html) (“A Justice Department official says the Boston Marathon bombing suspect will not be read his *Miranda* rights because the government is invoking a public safety exception.”).

As discussed in Part II, however, the same severity of concern that has been articulated in favor of the public-safety exception to *Miranda* is simply not present in the routine booking context. Stationhouse organization concerns are minimal at best, perhaps only articulable when property is found somewhere other than on the defendant's person.<sup>153</sup> And even in that scenario, an officer will likely only have to pose a question to the defendant if the officer does not follow the postremoval sweep procedures of the patrol car, i.e., when the officer is not able to link the property to the defendant by immediately searching the backseat of the patrol car upon arrival at the station.<sup>154</sup> The concern that government officials cannot comply with administrative and procedural obligations if required to administer the *Miranda* warnings is often exaggerated.<sup>155</sup> Identification concerns—that police officers will be unable to obtain a defendant's name, age, and relevant identification information if forced to deliver *Miranda* warnings—are also specious.<sup>156</sup> Arguments based on identification presuppose that defendants are not invested in quick booking procedures and that officers have no other ways to identify defendants, such as swabbing the inside of their cheek.<sup>157</sup>

A much larger criticism lurks in the background. It is not clear why *any* policy exception to *Miranda* justifies introducing incriminating, un-Mirandized statements against the defendant at trial. Even if delivering the *Miranda* warnings would interfere with public safety (or implicate storage, administrative compliance, or identification concerns), and even if this justifies withholding the *Miranda* warnings in certain settings, it does not immediately follow that the statements obtained from these settings should then be introduced against a defendant. Addressing this point, however, the *Quarles* Court noted that the eventual suppression of these un-Mirandized statements would put the officer in the untenable position of having to weigh—“often in a matter of seconds”—giving the warnings and possibly damaging officers’ “ability to obtain [the] evidence and neutralize the volatile situation confronting them” against “ask[ing] the necessary

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<sup>153</sup> See *supra* Part II.A (highlighting cases like *Alford* where a thumb drive was found in the back of a patrol car).

<sup>154</sup> *Supra* Part II.A.

<sup>155</sup> See *supra* Part II.B (arguing that administrative requirements can be fulfilled through other means).

<sup>156</sup> See *supra* Part II.C (arguing that there is little reason to believe that an arrestee will withhold biographical information in order to frustrate police officers).

<sup>157</sup> *Supra* Part II.C.

questions without the *Miranda* warnings and render[ing] whatever probative evidence they uncover inadmissible.”<sup>158</sup>

This volatility and matter-of-seconds thinking simply does not extend to booking situations. Therefore, to the extent that any officer weighs (a) giving the warnings to the chagrin of storage, administrative compliance, or identification concerns, against (b) asking the booking questions without the *Miranda* warnings and perhaps having to suppress statements, the “routine” environment (as opposed to the volatile nature of public-safety scenarios) might just be the proper setting for that calculation to take place.

### B. Unwillingness to Engage

Just because the administrative concerns cited by courts are not always compelling, it does not necessarily follow that an administrative-centric test is an inappropriate formulation of the law. In fact, the discussion to this point only demonstrates that courts applying a purely administrative standard for routine booking are less than demanding with their definition of what constitutes a “legitimate” concern.<sup>159</sup> A purely administrative test that includes a rigorous examination of whether or not an administrative concern is legitimate might actually function to ferret out those situations where government officials were simply probing for incriminating information under the guise of an administrative concern.

Take the case of Cecil Alford. The Texas Court of Criminal Appeals spent less than eight sentences analyzing whether the question asked of Alford about the thumb drive served an administrative purpose.<sup>160</sup> It simply cited to the section of the Texas Administrative Code that requires officers to make an inmate property inventory and concluded that the question was reasonably related to a legitimate administrative concern.<sup>161</sup> There was no discussion of why the officer

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<sup>158</sup> *New York v. Quarles*, 467 U.S. 649, 657–58 (1984); see also Andrew T. Winkler, *Quarreling over Quarles: Limiting the Extension of the Public Safety Exception*, 16 RICH. J.L. & PUB. INT. 349, 360 (2013) (describing the *Quarles* Court’s reasoning).

<sup>159</sup> A counterexample may be *United States v. Peterson*, where the court refused to recognize an “administrative interest in keeping track of all the evidence recovered in an apartment occupied by two people,” when “such an interest could be served easily simply by identifying which pieces of evidence came from which room, without identifying the bedroom’s occupant.” 506 F. Supp. 2d 21, 25 (D.D.C. 2007); see also *United States v. Hicks*, 546 F. Supp. 2d 1378, 1383 (N.D. Ga. 2008) (finding that no administrative function was served by inquiries regarding the defendant’s gun permits, but also noting that the government did not even try to offer an administrative function). This scrutiny appears to be the exception, rather than the rule, though, under a purely administrative standard.

<sup>160</sup> See *Alford v. State*, 358 S.W.3d 647, 661–62 (Tex. Crim. App.), cert. denied, 133 S. Ct. 122 (2012).

<sup>161</sup> *Id.*

could not have inventoried the thumb drive (again, the thumb drive the officer recovered from the patrol car's backseat, sitting with a bag of MDMA, upon returning to the police station with Alford) under Alford's name, and then asked Alford about it after reading him his *Miranda* rights. In sum, there was no willingness to engage with the administrative standard at all.<sup>162</sup>

This unwillingness to engage could be a response to the complexity of the objective and subjective routine booking tests that have beguiled many courts for decades. That is, an administrative-centric test has the capability to be the bright-line rule that many courts desire,<sup>163</sup> and infusing it with a scrutinizing examination of what constitutes a legitimate administrative function would jeopardize this simplicity. But restricting judges to this type of detached analysis is not supported in other areas of Fifth Amendment jurisprudence. To determine whether a defendant is in custody, for example, courts examine how an objectively reasonable person in the defendant's position would feel.<sup>164</sup> More recently, the Court also indicated that an officer's subjective state of mind bears on whether a person is in custody; courts are permitted to take a defendant's age—and a reasonable officer's perception of that age—into consideration when making a custody determination.<sup>165</sup> Since judges use subjective and objective analyses in other areas of Fifth Amendment law, it would be a curious departure to limit courts to a cursory analysis of whether a question is

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<sup>162</sup> See also *United States v. Toumasian*, No. 1:10-cr-291-TCB-3, 2011 WL 3738980, at \*4-5 (N.D. Ga. Aug. 22, 2011) (taking at face value, on facts similar to *Gaston*, that Federal Rule of Criminal Procedure 41 leads to the conclusion that “[t]he detective’s question to Toumasian as to whether he lived in the apartment was part of the routine procedure employed in executing search warrants” and therefore “the detective’s question to Toumasian did not constitute an interrogation”).

<sup>163</sup> See Andrew McLetchie, *The Case for Bright-Line Rules in Fourth Amendment Jurisprudence: Adopting the Tenth Circuit’s Bright-Line Test for Determining the Voluntariness of Consent*, 30 HOFSTRA L. REV. 225, 228 (2001) (“[A]dvocates of bright-line rules essentially believe that the rules provide easy to follow guidelines for law enforcement, defense lawyers, prosecutors, and judges alike.”).

<sup>164</sup> A suspect is generally considered to be in custody when a reasonable person would not feel free to leave. See *Yarborough v. Alvarado*, 541 U.S. 652, 664-65 (2004) (describing the custody standard as whether “a reasonable person would . . . [feel] free to terminate the interview and leave”); *Oregon v. Mathiason*, 429 U.S. 492, 496 (1977) (Marshall, J., dissenting) (“If respondent entertained an objectively reasonable belief that he was not free to leave during the questioning, then he was ‘deprived of his freedom of action in a significant way.’”). *But see* *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (examining how the objectively reasonable person would feel—“the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation”—but not limiting the inquiry to whether or not the suspect was free to leave).

<sup>165</sup> See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011) (arguing that age should be part of a custody analysis, “[s]o long as the child’s age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer”).

reasonably related to legitimate administrative concerns in the routine booking context.

### C. *Abandoning Administrative-Centric Tests*

While the subjective and the objective tests are complex, either one is preferable to an administrative-centric test. The existence of an administrative purpose behind any inquiry will continue to serve as a threshold matter for courts, but it cannot—and should not—be the sole determinant in routine booking jurisprudence. The *Alford* court unknowingly made this point itself when, in an effort to assuage fears that an administrative-centric test would render admissible the answers to many un-Mirandized questions, it asserted that “courts have held that questions that do not reasonably relate to a legitimate administrative concern are not ‘booking questions’ within the exception.”<sup>166</sup> Yet each case cited by the court for this proposition, in actuality, also included an examination of whether the officer’s inquiries were reasonably likely to elicit incriminating responses or whether the questions were designed to bring about incriminating responses.<sup>167</sup> In sum, having an administrative purpose is an ingredient of, but not the sole defining feature of, routine booking questions.

An administrative-centric standard would also undermine the rights that *Miranda* is meant to protect. Take *Franks v. State*, in which the court determined that answers to un-Mirandized questions about how a suspect received a bandage and an injury were inadmissible given the likelihood that they would “identify Franks as the perpetrator of the offenses which the agents suspected he committed.”<sup>168</sup> Given “the inherently coercive environment created by the custodial

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<sup>166</sup> *Alford*, 358 S.W.3d at 655.

<sup>167</sup> See *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983) (“If . . . the questions are reasonably likely to elicit an incriminating response in a particular situation, the exception does not apply.”), cited in *Alford*, 358 S.W.3d at 655 n.14; *United States v. Downing*, 665 F.2d 404, 407 (1st Cir. 1981) (“[W]e think the questions about appellee’s keys and airplane were ‘reasonably likely to elicit an incriminating response.’”), cited in *Alford*, 358 S.W.3d at 655 n.14; *United States v. Guess*, 756 F. Supp. 2d 730, 741 (E.D. Va. 2010) (“[A]n officer investigating the robbery should have known that asking an individual if he is the owner of a car used in the robbery is reasonably likely to lead to an incriminating response.”), cited in *Alford*, 358 S.W.3d at 655 n.14; *Hughes v. State*, 695 A.2d 132, 140 (Md. 1997) (“Even if a question appears innocuous on its face . . . it may be beyond the scope of the routine booking question exception if the officer knows or should know that the question is reasonably likely to elicit an incriminating response.”), cited in *Alford*, 358 S.W.3d at 655 n.14; *Sims v. State*, 735 S.W.2d 913, 918 (Tex. App. 1987) (“While, ordinarily, questions such as ‘when did you last eat’ and ‘what did you eat’ might not reasonably be expected to elicit an incriminating response, in the prosecution of an offense for driving while intoxicated such factors may become relevant . . . in attempting to prove the case . . . .”), cited in *Alford*, 358 S.W.3d at 655 n.14.

<sup>168</sup> *Franks v. State*, 486 S.E.2d 594, 598 (Ga. 1997).



interrogation precluded the option of remaining silent,' Franks was confronted with the choice of incriminating himself or lying to the agents," a dilemma against which the Fifth Amendment protects.<sup>169</sup> Under an administrative-centric test, however, it is easy to articulate how these questions reasonably relate to the medical condition of a detained person, and should therefore be admissible.<sup>170</sup>

Turning back to Alford one last time, applying either the subjective or the objective test would have demanded that the court examine, on the one hand, whether the questioning officer was intentionally probing Alford for incriminating information, or on the other, whether it is reasonably likely that asking a defendant about the possession of a thumb drive that was discovered alongside drugs would elicit incriminating statements. Of course, neither analysis occurred, and this was the outcome:

At trial, in response to questions from the State's attorney, [the questioning officer] related [Alford]'s answers to his question about owning the thumb drive, providing the only testimony directly linking [Alford] to the illegal drugs. The State then relied on [Alford]'s admission when making its closing argument, directing the jury to recall that the police found "the thumb drive of the Defendant right underneath the drugs." The jury found [Alford] guilty of possessing the drugs.<sup>171</sup>

## CONCLUSION

Routine booking questions are delivered by thousands of officers each day in the absence of *Miranda* warnings. A test that defines the contours of this exception only by reference to a purported (and often illegitimate) administrative concern jeopardizes the rights of defendants. It also signals that there is a much broader exemption to the rule that defendants must be told that they have the right to remain silent; that any statement made could be used against them; and that they have the right to the presence of an attorney, retained or appointed. While the subjective and objective tests are complex and often entangled, much of this complexity is endemic to custodial-interrogation jurisprudence of a higher order. And this complexity—as frustrating as it might be for judges and police officers—is also a safe-

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<sup>169</sup> *Id.* (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 599 (1990)).

<sup>170</sup> See *Sims v. State*, 735 S.W.2d 913, 917–18 (Tex. App. 1987) (“[Q]uestions concerning appellant’s physical condition . . . and whether appellant had any physical disabilities or impairments, are questions of legitimate concern . . . because the police will be responsible, to some degree, for the arrested person’s care and physical well-being.”).

<sup>171</sup> Petition for Writ of Certiorari at 5–6, *Alford v. Texas*, 133 S. Ct. 122 (2012) (No. 11-1318), 2012 WL 1561119, at \*5–6.

guard of a defendant's right against self-incrimination. An administrative-centric test that strips routine booking doctrine of this nuance and reduces the analysis to "whether a question reasonably relates to a legitimate administrative concern" is as misguided as it is regrettable.