Miranda, Secret Questioning, and the Right to Counsel

Geoffrey S. Corn, South Texas College of Law
**MIRANDA, SECRET QUESTIONING, AND THE RIGHT TO COUNSEL**

Geoffrey S. Corn*

I. INTRODUCTION

Since the Supreme Court established what is known as the Edwards/Minnick rule, the consequence of invoking the Miranda right to counsel has become more debilitating on police questioning than any other aspect of the Miranda rule. Not only must questioning cease immediately, but police are categorically prohibited from re-initiating questioning of the suspect. ¹ While *Maryland v. Shatzer* established a proverbial expiration date for this re-initiation prohibition (fourteen days after the suspect is returned to her normal environment)², so long as the Edwards/Minnick protection is in effect a suspect is absolutely unapproachable by police³. Under this protection, even different officers, from different jurisdictions, investigating a different crime than the one resulting in the invocation, would not be allowed to approach the suspect.⁴ Pursuant to these two cases, the presumptive invalidity for any subsequent Miranda waiver elicited by police while the right to counsel invocation remains operative is conclusive and never subject to a totality of the circumstances assessment.⁵ Indeed, in the *Edwards* decision

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* Presidential Research Professor of Law, South Texas College of Law; Lieutenant Colonel (Retired), U.S. Army Judge Advocate General’s Corps. Prior to joining the faculty at South Texas, Professor Corn served in a variety of military assignments, including as the Army's senior law of war advisor, supervisory defense counsel for the Western United States, Chief of International Law for U.S. Army Europe, and as a tactical intelligence officer in Panama. I am especially grateful to my research assistant, Pavel Savinov, whose dedication was instrumental in bringing this article to fruition.

¹ Edwards v. Ariz., 451, U.S. 477, 484-85 (U.S. 1981) (holding that once the accused requests counsel, officials may not reinitiate questioning “until counsel has been made available” to him); Minnick v. Mississippi, 498 U.S. 146, 153 (U.S. 1990) (holding that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney).


³ Id. at 1223-24.


⁵ Id.
itself, Justice Rehnquist’s concurring opinion expressed concern that the waiver invalidation rule announced in that case might evolve into a conclusive presumption, which he rejected as unjustifiable.\textsuperscript{6} His concern was validated by the \textit{Minnick} decision.\textsuperscript{7}

The combined effect of \textit{Edwards}, \textit{Minnick}, and \textit{Shatzer} is today clear: if a suspect subjected to custodial interrogation invokes the Miranda right to counsel, then he may not be approached by any police to re-initiate questioning until fourteen days after release from custody.\textsuperscript{8} The rationale in support of this prophylactic rule seems relatively clear: by invoking the right to counsel, the suspect is indicating her subjective recognition of inequality to deal with police in the questioning process.\textsuperscript{9} Unless, and until counsel is present, the suspect’s expression of inequality and vulnerability to police questioning may not be exploited by police.\textsuperscript{10} Accordingly, even the initiation of contact with the suspect to elicit a subsequent Miranda waiver is in effect an exploitation of this known vulnerability.\textsuperscript{11} Therefore, in order to level the proverbial playing field between the suspect and police, any waiver is invalid unless made with the assistance of counsel.\textsuperscript{12}

\textsuperscript{6} Edwards, 451, U.S. at 489-92 (Powell, J. and Rehnquist, J., concurring).
\textsuperscript{7} Minnick v. Mississippi, 498 U.S. 146, 156 (U.S. 1990).
\textsuperscript{8} Shatzer, 130 S. Ct. at 1226-27.
\textsuperscript{9} See id. at 1219.
\textsuperscript{10} Id. at 1219-20.
\textsuperscript{11} Id.
\textsuperscript{12} See id. at 1219 (explaining that when a suspect tells the authorities that he is incapable of undergoing further custodial questioning without the advice of counsel, any subsequent waiver made at the authorities’ insistence, and not due to the suspect’s own instigation, is “itself the product of the ‘inherently compelling pressures’ and not the purely voluntary choice of the suspect.”); See Dickerson v. United States, 530 U.S. 428, 443(2000) (“If anything, our subsequent cases have reduced the impact of the \textit{Miranda} rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.”); See Geoffrey S. Corn, \textit{The Missing Miranda Warning: Why What You Don’t Know Really Can Hurt You}, \textit{UTAH L. REV.} 761, 774 (2011).
A different strand of Miranda jurisprudence requires the suspect to be aware that he is being questioned by police in order to trigger the warning and waiver requirement.\textsuperscript{13} In \textit{Illinois v. Perkins}, the Court held that Miranda warnings are not required when a suspect is questioned by an undercover police officer, precisely because in such situations there is no such awareness.\textsuperscript{14} Underlying this decision is the core premise of \textit{Miranda} itself: only the unique context of custodial interrogation produces the type of inherent coercion necessitating the neutralizing effect of Miranda warnings to establish that a suspect’s submission to police questioning is voluntary.\textsuperscript{15} Thus, when the suspect is unaware that the questioning is being conducted by a police officer, this special type of inherent coercion is lacking.\textsuperscript{16} Therefore, there is no need for the neutralizing effect of a Miranda warning to establish the voluntariness of the suspect’s answers.\textsuperscript{17} In essence, the Miranda warning acts as a proverbial antacid, but is only prescribed by an especially corrosive acid—the acid produced when a suspect is in custody and aware that he is being subjected to police interrogation. While all questioning may produce some

\textsuperscript{13} See Ill. v Perkins, 496 U.S. 292, 299 (U.S. 1990) (explaining where the suspect does not know that he is speaking to a government agent there is no reason to assume the possibility that the suspect might feel coerced).

\textsuperscript{14} Id. at 294.

\textsuperscript{15} Id. at 297; Miranda v. Ariz., 384 U.S. 436, 444, 455-458 (U.S. 1966) (The Court’s extensive review of police interrogation tactics highlighted the imbalance between police and suspects in this environment, and led the Court to conclude that these tactics routinely resulted in a lack of confidence that confessions and admissions were the result of a meaningful choice on the part of the suspect to cooperate with police. The Court explained custodial interrogation to mean “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” The Court further noted that “the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.” Moreover, “unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”); see also Berkemer v. McCarty, 468 U.S. 420,433 (1984) (“The purpose[] of the safeguards prescribed by Miranda [is] . . . to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary.”); See Floralyynn Einesman, \textit{Confessions and Culture: The Interaction of Miranda and Diversity}, J. CRIM. L. & CRIMINOLOGY 1, 3 (1999) (arguing that Miranda recognized the "inherent coercion of incommunicado police interrogation" and acknowledged that police officers use "sophisticated psychological ploys" to induce a suspect's confession).

\textsuperscript{16} See Perkins, 496 U.S. at 296-98.

\textsuperscript{17} See id.
corrosive acid, unless, and until, the corrosive reaches the potency level produced by custodial interrogation, it is unnecessary to administer the special neutralizing antacid of Miranda.

However, there is an issue of uncertainty when these two strands of Miranda jurisprudence intersect. If a suspect invokes the Miranda right to counsel, may police engage in surreptitious questioning prior to the Edwards/Minnick termination point established by Shatzer? Edwards/Minnick, and indeed Miranda itself, suggest a negative answer to this question: questioning the suspect following invocation of the right to counsel, even surreptitiously, would appear to qualify as a clear violation of Miranda.18 Indeed, Edwards/Minnick would not even be implicated by such a situation. The surreptitious nature of the questioning would prevent the undercover police agent from even attempting to elicit a new Miranda waiver.19 However, what impact should the fact that the suspect is unaware he is being questioned by a police agent have on this analysis? If only the inherent coercion produced by being confronted by a known police officer while in custody triggers the Miranda protections, should police be permitted to utilize such tactics, even following an invocation of the Miranda right to counsel?

This article will seek to answer this question by focusing on the foundation of both of these strands of Miranda jurisprudence. I will argue that while such a tactic may appear to qualify as the type of exploitation of a known vulnerability at the core of the Edwards/Minnick rule, the situation is inapposite to the type of re-initiation prohibited by that rule. Instead, because such a tactic does not implicate the core concern of Miranda, it should be permissible. I will bolster this conclusion by contrasting the protections of the

19 See Shatzer, 130 S. Ct. at 1219-20.
Miranda right to counsel with the Sixth Amendment right to counsel and the Massiah doctrine. This contrast will reveal that while using such a tactic compromises what is at the core of the Massiah doctrine, it does not implicate the concerns at the core of the Miranda rule.

Part II of this article will review the Edwards/Minnick rule and the current scope of protection provided by the rule as the result of Maryland v. Shatzer. Part III will discuss the connection between Edwards/Minnick and the original Miranda decision, emphasizing how Edwards/Minnick manifests the underlying logic of protecting vulnerable suspects from a particular type of police exploitation. Part IV will then review the surreptitious questioning qualification to the Miranda warning and waiver requirement, and how that qualification is consistent with the underlying rationale of Miranda. Part V will then contrast this qualification with the Sixth Amendment right to counsel and the Massiah doctrine, contrasting the underlying objective of that doctrine with Miranda. This will frame Part VI of the article, which will argue why the Edwards/Minnick protection is logically inapplicable to post invocation surreptitious questioning of a suspect in custody.

PART II. Edwards, Minnick, and the Unapproachability Rule

According to the holding of the seminal Supreme Court decision in the consolidated cases known as Miranda, the inherent coercion associated with custodial interrogation results in a conclusive presumption of involuntariness for all responsive statements. Such statements are therefore inadmissible in the prosecution case-in-chief unless police offset the coercive effect of custodial interrogation by issuing the now

ubiquitous Miranda warnings and obtaining a knowing and voluntary waiver of both the right to silence and the right to assistance of counsel during questioning. Because it is the government that creates the inherently coercive environment by subjecting the suspect to custodial interrogation, the burden of proving valid waiver of these rights falls upon the prosecution.

The Miranda Court also established the bright line rule that once a suspect invokes either the right to silence or the right to assistance of counsel, all questioning must cease. Following the Miranda decision, there was no doubt that the continued questioning of a suspect following their invocation of either of these rights violated the Miranda holding and thus necessitated suppression of any statements elicited during such questioning. What was unclear, however, was how this right to cut off questioning impacted the permissibility of police re-initiation of questioning after the passage of some appreciable amount of time.

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21 Miranda, 384 U.S. 475-476 (quoting Carnley v. Cochran, 369 U.S. 506, 516 (1962)) (A waiver is considered valid and voluntary if, after the administration of a suspect’s rights under Miranda, he “intelligently and understandingly” chooses not to exercise those rights); See Paul G. Cassell & Bret S. Hayman, Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda, 43 UCLA L. REV. 839, 843–49 (1996)) (A suspect may waive in one of two ways: “First, he can refuse at the start of an interview to waive his rights (including the right to remain silent and the right to counsel), thus precluding any interview. Second, even if he initially waives his rights, he can assert them at any point in the interview. If a suspect asserts Miranda rights, police questioning must stop.).

22 See id. at 475.

23 Id. at 473-474; The applicability of this bright line rule was later clarified in the following four cases: Smith v. Illinois, 469 U.S. 91, 91 (1984) (concluding that questioning must cease where nothing about the request for counsel or the circumstances leading up to the request is ambiguous); Connecticut v. Barrett, 479 U.S. 523, 529 (1987) (holding that a suspect may give a limited or conditional waiver of Miranda rights); Arizona v. Roberson, 486 U.S. 675, 677-78 (1988) (holding that an invocation of counsel under Edwards was not offense specific); Minnick, 498 U.S. at 153 (holding that when an attorney is requested, then the police must stop their questioning and may not reinitiate it without the suspect’s attorney present, regardless of whether or not the suspect has consulted with her attorney).

24 See Miranda, 384 U.S. at 458 (“Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”); United States v. Rambo, 365 F.3d 906, 911 (10th Cir. Colo. 2004) (confession suppressed because the officer did not honor defendant’s request to remain silent); United States v. Lopez-Diaz, 630 F.2d 661 (9th Cir. Or. 1980) (confession suppressed because officers questioned defendant about an issue he explicitly stated he did not want to talk about during the interrogation); See infra notes 43-49 and accompanying text.
Three subsequent decisions provided the answer to this question. As a result of these decisions, the effect of invocation on permissible re-initiation of questioning would be more restrictive in relation to the right to counsel than the right to silence. This might seem odd considering the Miranda rule was based on the Fifth Amendment privilege against compelled self-incrimination, with the “Fifth Amendment” assistance of counsel aspect of that decision an entirely judicially created rule. Why would invocation of the right to silence, included in the actual text of the Fifth Amendment, be less protective than invocation of the judicially created right to counsel? The answer to this question can only be understood by considering the interests protected by each of these rights and the fundamentally different vulnerability expressed by a suspect through such invocations.

In *Michigan v. Mosley*, the Court addressed the permissibility of police re-initiation of questioning following a suspect’s invocation of the Miranda right to silence. The suspect in that case invoked his right to remain silent when he was initially questioned by police about several robberies. Subsequently, the police immediately terminated their questioning of the suspect and returned him to his holding cell. Shortly thereafter, a homicide detective met with Mosley and brought him upstairs to question him about a homicide that was unrelated to Mosley’s original arrest. Prior to questioning, the detective admonished Mosley about his Miranda rights and had him read the notification both silently and aloud. Mosley then signed a form that indicated he had

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25 *See* discussion *infra* Part II.
26 *See* Miranda, 384 U.S. 469-470; *See* Shatzer, 130 S. Ct. at 1220 (right to counsel is not a constitutional mandate, but a “judicially proscribed prophylaxis.”).
28 *Id.* at 97.
29 *Id.* at 97-98.
30 *Id.*
received and understood his rights. The detective then questioned Mosley for about fifteen minutes. During that time, Mosley made statements which implicated him in the homicide. Throughout the questioning, Mosley never indicated that he wanted to consult with an attorney or that he did not want to talk about the homicide.

Mosley argued that the Miranda waiver he executed when approached by the homicide detective seeking to question him about an unrelated offense was invalid because he had previously stood on his right to silence. The Court rejected this argument and held that the waiver was both knowing and voluntary, and was not invalidated by the fact that police had re-initiated questioning. Thus, the Court rejected a per se prohibition on re-initiation following the invocation of the Miranda right to silence. Instead, the government would bear the burden of proving the validity of the waiver by demonstrating that police had “scrupulously honored” the suspect’s right to control the time, place, and subject matter of questioning. This determination would be based on the totality of the circumstances. Factors such as the time between the initial invocation and the subsequent waiver, different offense, different location of questioning, and whether the questioning was conducted by different officers, would all factor into this analysis. Ultimately, the Court concluded that it would be overbroad to assume that a suspect who invokes the right to silence is expressing unwillingness to speak with any

31 Id.
32 Id.
33 Id.
34 Id. at 97.
35 Id. at 99.
36 Id. at 106-107.
37 Id. at 102-103.
38 Id. at 102-106 (The Court concluded that the “scrupulously honored” test was met on the facts of the case because “the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.”).
39 Id. at 103-105.
officer for any offense at any time.\textsuperscript{40} Instead, it may simply indicate an unwillingness to speak about a particular offense, or with a particular officer, or at a particular time or location.\textsuperscript{41} The more these factors differ from the first invocation to the second waiver, the more it indicates a voluntary decision to submit to questioning.\textsuperscript{42}

Invoking the Miranda right to counsel would, in contrast, produce a very different consequence.\textsuperscript{43} In \textit{Edwards v. Arizona}, the Court confronted the right to counsel analogue to the \textit{Mosley} scenario: police re-initiation of questioning after a suspect cuts off earlier questioning by unequivocally invoking the right to have counsel present during.\textsuperscript{44} Similar to the facts in \textit{Mosley}, the police terminated their questioning of Edwards when he invoked the Miranda right to counsel.\textsuperscript{45} However, during a subsequent questioning session, the police once again advised him of his Miranda rights and then obtained a waiver.\textsuperscript{46} Consequently, Edwards made incriminating statements.\textsuperscript{47} During his trial, he objected to the admission of those statements and argued that the second waiver was invalid because police had failed to fully respect his invocation of the right to assistance of counsel.\textsuperscript{48}

\textsuperscript{40}See id. at 104-106 (explaining that the detective’s subsequent questioning about the homicide did not undercut Mosley's prior decision to not answer questions about the robbery he was arrested for).
\textsuperscript{41}See id. at 103-104.
\textsuperscript{42}See id. at 104-107; See WILLIAM R. LAFAYE ET AL., CRIMINAL PROCEDURE 400 (5TH ED. 2009) (noting that the “scrupulously honored” test is “not met where the police did not honor the original in-custody assertion of the right to remain silent, ignored that assertion and expressed sympathy for defendant’s plight, resumed questioning after a short interval during which custody continued, or made repeated attempts to obtain a waiver.”).
\textsuperscript{43}See Edwards, 451, U.S. at 484 (noting that additional safeguards are necessary when the suspect asks for counsel present during interrogation).
\textsuperscript{44}Id. at 478-479.
\textsuperscript{45}Id. at 479.
\textsuperscript{46}Id.
\textsuperscript{47}Id.
\textsuperscript{48}Id. at 479-480.
Unlike Mosley, the Edwards Court agreed that the second Miranda waiver was invalid because police had re-initiated questioning.\textsuperscript{49} In reaching this conclusion, the Court first emphasized that the Arizona Supreme Court had erred by analyzing the voluntariness of Edwards’ incriminating statement without first analyzing the validity of the Miranda waiver.\textsuperscript{50}

First, the Arizona Supreme Court applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel. . . .

. . . Considering the proceedings in the state courts in the light of this standard, we note that in denying petitioner's motion to suppress, the trial court found the admission to have been "voluntary," App. 3, 95, without separately focusing on whether Edwards had knowingly and intelligently relinquished his right to counsel . . . .

. . . Here, however sound the conclusion of the state courts as to the voluntariness of Edwards' admission may be, neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it. It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked.\textsuperscript{51}

\textsuperscript{49} Id. at 485 (holding that re-interrogating a suspect after he has asserted her right to counsel violates Miranda and its progeny).
\textsuperscript{50} Id. at 481-483.
\textsuperscript{51} Id. at 482-484.
This set the conditions for the true focus of the Court’s opinion: whether re-initiation by police of questioning following invocation of the Miranda right to counsel invalidates what otherwise appears to be a valid Miranda waiver? The Court then provided a clear affirmative answer to this question:

[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

The Court tethered its holding back to Miranda’s admonition that “the assertion of the right to counsel was a significant event and that once exercised by the accused, ‘the interrogation must cease until an attorney is present.’” The Court then drew a bright line distinction between statements obtained following a suspect’s voluntary decision to re-initiate contact with the police, and statements obtained after police were responsible for the re-initiation:

[W]e do not hold or imply that Edwards was powerless to countermand his election . . . Had Edwards initiated the meeting on January 20, nothing in

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52 Id. at 484-485.
53 Id. (footnote omitted).
54 Id. at 485.
the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in Miranda is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver.\textsuperscript{55}

*Edwards* seemed to clearly indicate that even the request to reconsider the invocation of the right to counsel violated the protection provided to a suspect by Miranda.\textsuperscript{56} *Edwards* was certainly an ideal case to use to erect such a protective barrier to re-initiation. Edwards had done nothing to suggest a desire to re-initiate interaction with police following his invocation. On the contrary, the very next day he objected to such interaction when prison guards informed him that police wanted to speak with him.\textsuperscript{57} Furthermore, following his objection, Edwards was informed by the prison guard that he had no choice and was required to meet with the police.\textsuperscript{58} Nonetheless, unlike the approach adopted in its *Mosley* decision,\textsuperscript{59} the Court made no indication that the permissibility of police re-initiation should be analyzed based on the totality of the

\textsuperscript{55} *Id.* at 485-486.
\textsuperscript{56} See *id.* at 484 (“when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights”); See *Shatzer*, 130 S. Ct. at 1219-1220 (explaining that the Edwards rule means “a voluntary Miranda waiver is sufficient at the time of an initial attempted interrogation to protect a suspect’s right to have counsel present, but is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel”); Compare *Mosley*, 423 U.S. at 107-108 (White, J., concurring) (noting that it is proper for the police to re-approach a defendant who has invoked his right to remain silent when they have new information bearing upon that decision) with *Roberson*, 486 U.S. at 677-678 (holding that *Edwards*, rather than *Mosley*, controls even when the later interrogation concerns a wholly unrelated crime).
\textsuperscript{57} Edwards, 451, U.S. at 478-479.
\textsuperscript{58} See *id.* at 479.
\textsuperscript{59} *Mosley*, 423 U.S. 103-105.
circumstances.\textsuperscript{60} Instead, the Court seemed to establish a conclusive waiver invalidation rule whenever the waiver resulted from police re-initiation of questioning of a suspect who had invoked the Miranda right to counsel.\textsuperscript{61}

Justices Powell and Rehnquist expressed concern that the majority had in fact created a new prophylactic rule in their concurring opinion.\textsuperscript{62} For them, the validity of a waiver obtained as the result of police re-initiation following invocation of the Miranda right to counsel was subject to the same totality of the circumstances analysis applied in Mosley.\textsuperscript{63} While they agreed that the totality of the circumstances indicated that Edwards waiver was involuntary and therefore invalid, they did not believe that such a conclusion was required simply because police re-initiated the contact.\textsuperscript{64} Accordingly, they noted:

\textquote{In view of the emphasis placed on "initiation," I find the Court's opinion unclear. If read to create a new per se rule, requiring a threshold inquiry as to precisely who opened any conversation between an accused and state officials, I cannot agree. I would not superimpose a new element of proof on the established doctrine of waiver of counsel.}\textsuperscript{65}

Instead, who “initiated” the renewed contact was, for them, one factor in the totality analysis:

\textquote{In sum, once warnings have been given and the right to counsel has been invoked, the relevant inquiry—whether the suspect now desires to talk to police without counsel—is a question of fact to be determined in

\textsuperscript{60} \textsc{William R. LaFave et al., Criminal Procedure 400 (5th ed. 2009).}
\textsuperscript{61} \textit{Id.}
\textsuperscript{63} \textit{Id.} 490–491.
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.} at 489–490.
light of all of the circumstances. Who "initiated" a conversation may be relevant to the question of waiver, but it is not the \textit{sine qua non} to the inquiry. The ultimate question is whether there was a free and knowing waiver of counsel before interrogation commenced.

If the Court's opinion does nothing more than restate these principles, I am in agreement with it. I hesitate to join the opinion only because of what appears to be an undue, and undefined, emphasis on a single element: "initiation."\footnote{Id. at 491.}

The validity of this hesitation was subsequently confirmed in \textit{Minnick v. Mississippi}.\footnote{Minnick, 498 U.S. at 153 (explaining that “when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney”).} That case involved a very different set of facts related to police re-initiation of questioning with a suspect who had invoked the Miranda right to counsel. In \textit{Minnick}, the suspect was arrested in California under a Mississippi warrant for the burglary of a mobile home and the subsequent murder of the home’s two residents.\footnote{Minnick, 498 U.S. at 148.} Shortly thereafter, two Federal Bureau of Investigation (“FBI”) agents attempted to interview Minnick while he was held in the San Diego jail and read him his Miranda rights; however, Minnick refused to sign a waiver form and told them that he “would not answer very many questions.”\footnote{Id. at 148-149.} Instead, after giving a short statement, Minnick told the agents to come back when he had a lawyer present.\footnote{Id.} A few days later, a Sheriff’s deputy from Mississippi questioned Minnick about the murders, and Minnick was again informed of his Miranda
Once more, Minnick declined to sign a rights waiver form. However, the Sheriff’s deputy continued to question Minnick who then made statements that implicated him in the murders. At trial, Minnick sought to suppress all of his incriminating statements. The trial court suppressed the statements Minnick made to the FBI but allowed those he made to Denham to come in. On appeal, the Mississippi Supreme Court also rejected Minnick’s claim that his confession to Denham was taken in violation of his right to counsel. The United States Supreme Court then granted certiorari.

In theory, Minnick offered the Court an ideal opportunity to qualify the breadth of the Edwards holding by adopting a totality of the circumstances approach to the right to counsel re-initiation situation. Unlike Edwards, who had not yet met with his attorney when police re-initiated their questioning, Minnick spoke with his attorney several times. Moreover, he had been admonished by his counsel not to submit to police questioning. Nonetheless, Minnick, when offered the opportunity to reconsider his invocation, did so, waived his Miranda rights, and made incriminating statements.

This very different factual background suggesting Minnick made a knowing and voluntary waiver of his Miranda rights was ultimately irrelevant for the Court. Instead,

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71 Id. at 149.
72 Id.
73 Id.
74 Id. at 149-150.
75 Id. (noting that the record was not clear as to “whether all of these conferences were in person.”); Edwards, 451 U.S. at 478-479.
77 See 498 U.S. at 154 (Writing for a six Justice majority, Justice Kennedy noted that consultation with an attorney is not always effective in instructing the suspect of her rights. He posited that Minnick, by refusing to sign a formal waiver of rights, may have thought that he could keep his incriminating admissions out of evidence. Continuing his argument, Justice Kennedy explained that “if the authorities had complied with Minnick’s request to have counsel present during interrogation, the attorney could have [either] corrected Minnick’s misunderstanding” or implored him to make no statement at all).
the Court held the waiver was invalid for one reason and one reason only: police had re-initiated the contact with Minnick.\textsuperscript{78} To reach this holding, the Court first rejected the interpretation of Edwards relied on by the Mississippi Supreme Court when it concluded the waiver was valid because Minnick, unlike Edwards, had actually consulted with his attorney prior to the subsequent waiver:

The Mississippi Supreme Court relied on our statement in \textit{Edwards} that an accused who invokes his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him . . . ." We do not interpret this language to mean, as the Mississippi court thought, that the protection of \textit{Edwards} terminates once counsel has consulted with the suspect. In context, the requirement that counsel be "made available" to the accused refers to more than an opportunity to consult with an attorney outside the interrogation room.\textsuperscript{79}

The Court then confirmed the per se waiver invalidation rule Justices Powell and Rehnquist feared Edwards may have created:

In our view, a fair reading of \textit{Edwards} and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not

\textsuperscript{78} See Minnick, 498 U.S. at 150-154 (The Court first referred to \textit{Edwards} where it held that all police interrogations must cease whenever the accused invokes his right to counsel, and that—absent the event where he initiates contact with the police under his own accord—a valid waiver of that right cannot be established by merely showing that he responded to further police initiated questioning. It went on to explain that “preserving the integrity of an accused’s choice to communicate with police only through counsel is the essence of the \textit{Edwards} decision and its progeny.”).

\textsuperscript{79} \textit{Id.} at 151-152.
reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.\textsuperscript{80}

Several decades later the Court would define the duration of this non-approachability consequence of invoking the Miranda right to counsel. In \textit{Maryland v. Shatzer}, the Court held that the Edwards/Minnick protection expires fourteen days after the suspect is returned to his normal non-custodial environment.\textsuperscript{81} However, the core non-approachability Edwards/Minnick rule remained in tact: once a suspect invokes the Miranda right to counsel, a subsequent waiver of that right is per se invalid if police re-initiate the contact.\textsuperscript{82}

Why would the Court impose a more restrictive re-initiation rule resulting from the Miranda right to counsel than for the Miranda right to silence? The answer to this question becomes clear once \textit{Mosley} is compared with \textit{Edwards}, and \textit{Minnick} with \textit{Shatzer}. \textit{Mosley} is based on the premise that invoking the right to silence may be motivated by a range of concerns, and as a result does not indicate an absolute unwillingness to reconsider the invocation at a later date.\textsuperscript{83} A change in time, place, and subject matter of the questioning can support the conclusion that police respected the suspect’s right to control the who, what, where, and when of interrogation.\textsuperscript{84} Thus, a change in these factors supports the conclusion that a subsequent Miranda waiver, even

\textsuperscript{80} \textit{Id.} at 153.
\textsuperscript{81} \textit{Shatzer}, 130 S. Ct. at 1223 (explaining that fourteen days “provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”).
\textsuperscript{82} \textit{Id.} at 1223-1224.
\textsuperscript{83} \textit{See Mosley}, 423 U.S. at 109 n.1 (White, J., concurring).
\textsuperscript{84} \textit{See id.} at 103-104.
when the result of police re-initiation, is not inconsistent with Miranda’s protection of the suspect’s right to silence. 85

The Edwards/Minnick rule is based on a very different premise: that invocation of the Miranda right to counsel indicates the suspect’s desire to deal with police only with the assistance of counsel. 86 While Edwards may have suggested that consultation with counsel sufficiently protected a suspect from police re-initiation (an interpretation relied on by the Mississippi Supreme Court when it concluded that police re-initiation did not invalidate Minnick’s waiver), Minnick categorically rejected that interpretation:

The full sentence relied on by the Mississippi Supreme Court, moreover, says: "We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

Our emphasis on counsel's presence at interrogation is not unique to Edwards. It derives from Miranda, where we said that in the cases before us "[t]he presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the Fifth Amendment privilege. His presence would insure

85 See id. at 107-111 (Justice White criticized the Court for implying that when a suspect invokes his right to remain silent, any subsequent statement obtained within an unspecified time period would always be inadmissible. He expressed his view that it is proper for the police to re-approach a defendant who has invoked his right to silence if they have new information related to that decision. Furthermore, he noted that “there is little support in the law or in common sense for the proposition that an informed waiver of a right may be ineffective even where voluntarily made.” He reasoned that, under Miranda, so long as the suspect “knowingly and intelligently waived” his right to remain silent, the police should be allowed to conduct further questioning.).

86 See Edwards, 451 U.S. at 484-485; See Minnick, 498 U.S. at 147.
that statements made in the government-established atmosphere are not the product of compulsion.” Our cases following Edwards have interpreted the decision to mean that the authorities may not initiate questioning of the accused in counsel's absence.87

Shatzer did limit the temporal scope of the Edwards/Minnick protection.88 However, Shatzer also confirmed the absence of counsel to assist the suspect in the re-initiation confrontation renders any waiver obtained by police invalid:

The rationale of Edwards is that once a suspect indicates that “he is not capable of undergoing [custodial] questioning without advice of counsel,” “any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the ‘inherently compelling pressures’ and not the purely voluntary choice of the suspect.”89

This reference to Edwards cited by the Shatzer Court90 is critical to understanding the distinction between the Mosley rule and the Edwards/Minnick rule.91 Unlike Mosley, Edwards and its progeny focus on a suspect’s stated vulnerability to police questioning92,

87 Minnick, 498 U.S. at 152.
88 Shatzer, 130 S. Ct. at 1223 (the Court reasoned that the Edwards presumption of involuntary waiver should not extend to situations where the suspect has been “released from his pre-trial custody and . . . [then] returned to his normal life for some time before the later attempted interrogation.” As the Court explained, this is because the presumption of police coercion disappears whenever the suspect is returned to his familiar environment where he may seek advice from an attorney, family, or friends. Moreover, the Court reasoned that the suspect would know from his “earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely.” Subsequently, the Court narrowed the scope of Edwards—in those situations where there is a break in custody—when it imposed a period of fourteen days as the duration during which the presumption of involuntary waiver would remain.).
89 Id. at 1219.
90 Id.
91 See supra text accompanying note 89; See supra Part II.
92 See supra notes 43-57, 78 and accompanying text; See Shatzer, 130 S. Ct. at 1226.
and not on a suspect’s right to control the time, place, and subject matter of the questioning. As a result, once a suspect invokes the Miranda right to counsel, police are placed on notice that the suspect does not feel capable of dealing with police on her own. Instead, the suspect is clearly indicating that counsel’s presence is needed to level the proverbial playing field between her and the police. Accordingly, re-initiation is in effect exploitation of the suspect’s stated vulnerability, and therefore any waiver resulting from that re-initiation must be invalidated, even if the suspect has had the opportunity to consult with counsel.

**PART III: HOW EDWARDS/MINNICK REFLECTS THE CORE LOGIC OF MIRANDA**

_Miranda v. Arizona_ created what subsequent Supreme Court decisions labeled as a “prophylactic rule” to protect the free exercise of the privilege against compelled self-incrimination. The warning and waiver requirement that resulted from the decision has become thoroughly engrained in American culture (an aspect of Miranda and its progeny that the Supreme Court noted in _Dickerson v. United States_ when it upheld _Miranda_ in the face of its most significant challenge). But how the Supreme Court subsequently interpreted the meaning of Miranda also generated substantial controversy as to the constitutional validity of the decision. When the Court announced that the

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93 Mosley, 423 U.S. at 102-106; See supra text accompanying note 38.
94 See supra note 15 and accompanying text.
95 See, e.g., Shatzer, 130 S. Ct. at 1219.
97 See, e.g., Shatzer, 130 S. Ct. at 1219.
98 See, e.g., Alameda Cnty. Dist. Attorney’s Office, _Miranda Waivers and Invocations_, POINT OF VIEW, 1 (2006), available at http://le.alcoda.org/publications/files/MIRANDAWAIVERSINVOCATIONS.pdf (“While not as exalted as McDonald’s, Microsoft, or Madonna, _Miranda_ also qualifies as an instantly recognizable name that is safely lodged in contemporary American culture.”). Additionally, television shows such as _C.O.P.S._ and _Dragnet_ have made _Miranda’s_ warnings requirement an easily identifiable part of the detention and arrest process. See, e.g., Todd S. Purdum, _The Nation; Miranda as a Pop Culture Icon_, N.Y. TIMES, July 2, 2000, available at www.nytimes.com/2000/07/02/weekinreview/the-nation-miranda-as-a-pop-culture-icon.html.
99 Dickerson, 530 U.S. at 443 (“_Miranda_ has become embedded in routine police practice to the point where the warnings have become part of our national culture.”)
Miranda rule “sweeps more broadly” than the Fifth Amendment privilege itself, it offered opponents of the decision a clear basis to question its constitutional validity. Nowhere was this better illustrated than in Justice Scalia’s dissenting opinion in Dickerson, where he noted that:

It was once possible to characterize the so-called Miranda rule as resting (however implausibly) upon the proposition that what the statute here before us permits the admission at trial of un-Mirandized confessions—violates the Constitution. That is the fairest reading of the Miranda case itself. The Court began by announcing that the Fifth Amendment privilege against self-incrimination applied in the context of extrajudicial custodial interrogation, itself a doubtful proposition as a matter both of history and precedent . . .

. . .

So understood, Miranda was objectionable for innumerable reasons, not least the fact that cases spanning more than 70 years had rejected its core premise that, absent the warnings and an effective waiver of the right to remain silent and of the (thitherto unknown) right to have an attorney present, a statement obtained pursuant to custodial interrogation was necessarily the product of compulsion .

. . .

As the Court today acknowledges, since Miranda we have explicitly, and repeatedly, interpreted that decision as having announced, not the circumstances in which custodial interrogation runs afoul of the

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100 Corn, supra notes 37-40, at 767-768.
Fifth or Fourteenth Amendment, but rather only “prophylactic” rules that go beyond the right against compelled self-incrimination.

Today’s judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops’ Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance. In imposing its Court-made code upon the States, the original opinion at least *asserted* that it was demanded by the Constitution. Today’s decision does not pretend that it is–and yet *still* asserts the right to impose it against the will of the people’s representatives in Congress.  

Justice Scalia’s criticism of the *Dickerson* majority’s decision to uphold *Miranda* flowed from the fact that *Miranda* created a prophylactic protection for the exercise of the privilege against self-incrimination. That protection is today ubiquitous: once a suspect is taken into police custody and subject to interrogation, all statements made are conclusively involuntary unless the police offset the inherently coercive environment by obtaining a knowing and voluntary waiver of the privilege. Furthermore, the only way to elicit a valid waiver is to inform the suspect of the Miranda rights and demonstrate that the suspect understood those rights and engaged in a course of action indicating waiver of the rights.

No set of facts could rebut the conclusion that statements obtained after failing to issue the warnings and obtain a waiver were involuntary in violation of the

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101 *Dickerson*, 530 U.S. at 447-465 (Scalia, J. dissenting)  
102 See *Corn*, supra note 12 at 768-769 (citing 530 U.S. at 454) (“Justice Scalia condemned the majority for refusing to overrule *Miranda*. Specifically, Scalia criticized the majority for failing to reach the only logical conclusion that could be derived from the prior decisions modifying the original *Miranda* rule: that *Miranda* was not a rule of constitutional law and that the Court had no legitimate authority to sustain its primacy over an inconsistent statute.”).  
103 See id. at 772-773; See *supra* notes 21-24 and accompanying text.  
104 See *supra* note 21.
Fifth Amendment privilege.\textsuperscript{105} Indeed, the 	extit{Miranda} Court acknowledged that its assertion—statements made in the absence of the warning and waiver requirement are involuntary—represented a potentially overbroad presumption when it noted that, “[i]n these cases, we might not find the defendants’ statements to have been involuntary in traditional terms.”\textsuperscript{106}

The breadth of this presumptive rule of involuntariness may have been, as Justice Scalia argued in 	extit{Dickerson}, an exercise in constitutional overreach.\textsuperscript{107} However, the 	extit{Miranda} decision is today firmly rooted in constitutional jurisprudence and police practice. That decision required informing suspects subjected to custodial interrogation of two methods to protect themselves in that environment.\textsuperscript{108} First, the suspect must be informed of the right to remain silent and the consequence of waiver (that anything said can be used against the suspect).\textsuperscript{109} Second, the suspect must be informed of the right to have counsel present during questioning to assist the suspect in dealing with the police.\textsuperscript{110} This latter Miranda “right” was not derived from the text of the Fifth Amendment privilege against self-incrimination.\textsuperscript{111} However, the 	extit{Miranda} Court clearly viewed presence of counsel during interrogation as an effective method to offset the inherently

\begin{footnotesize}
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\item \textsuperscript{105} See supra note 15.
\item \textsuperscript{106} Miranda, 384 U.S. at 457.
\item \textsuperscript{107} Dickerson, 530 U.S. at 465 (Scalia, J. dissenting).
\item \textsuperscript{108} Miranda, 384 U.S. at 478-479.
\item \textsuperscript{109} Miranda, 384 U.S. at 468.
\item \textsuperscript{110} Id. at 471-472.
\item \textsuperscript{111} See Michigan v. Tucker, 417 U.S. 433, 444 (U.S. 1974) (The Supreme Court stated that the Miranda rules are "procedural safeguards [that are] not themselves rights protected by the Constitution but … instead measures to ensure that the right against compulsory self-incrimination was protected."); See also Geoffrey R. Stone, The 	extit{Miranda} Doctrine in the Burger Court, 1977 SUP. CT. REV. 99, 123 ("The implications … of the Tucker opinion are potentially devastating for 	extit{Miranda}. The Court deprived 	extit{Miranda} of a constitutional basis but did not explain what other basis for it there might be."), See Yale Kamisar, The Rise, Decline and Fall (?) of 	extit{Miranda}, 87 WASH. L. REV. 965, 999 (2012) (quoting Oregon v. Elstad, 470 U.S. 298 (1985) (O’Connor, J.) (“The 	extit{Miranda} exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.").
\end{itemize}
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coercive pressures associated with custodial interrogation and thereby ensure any statement made was the product of the suspect’s free will.112

As noted above, Miranda’s subsequent progeny indicates that the protection erected by invoking each of these rights is different in purpose and scope.113 Invoking the right to counsel is a signal to police that the suspect does not feel fully capable of interacting with police, and therefore requires assistance during the interrogation process.114 As a matter of practice, it may be true that when a suspect “lawyers up” by invoking the Miranda right to counsel, police rarely seek to continue the interrogation after providing counsel. This, however, does not mean that attempting to continue the interrogation with counsel present is in any way improper.115 Indeed, informing a suspect—who has made an equivocal indication of a desire for presence of counsel—that police will be unable to “get his side of the story” once counsel is provided is patently erroneous as a common practice. An unequivocal request for counsel during interrogation does require questioning to cease, but only until counsel is present.116 Thus, unlike invoking the right to silence, invoking the right to counsel does not indicate a suspect is categorically unwilling to continue the interrogation. Instead, it indicates the suspect

112 See, e.g., Miranda, 384 U.S. at 469 (“[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . [and to] assure that the individual’s right to choose between silence and speech remains unfettered throughout the interrogation process.”); See Mark A. Godsey, Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings, 90 Minn L. Rev. 781 (“the Court viewed each warning as directly tied to, and stemming from, the Self-Incrimination Clause.”).

113 See supra discussion Part II.

114 See supra note 12 and accompanying text; See also Miranda, 384 U.S. at 470 (“The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.” (citing Crooker v. California, 357 U.S. 433, 443–48 (1958) (Douglas, J., dissenting))).

115 See supra note 115.

116 See supra notes 1, 54, 80 and accompanying text.
recognizes his tactical inequality with the police interrogators, and seeks to level the playing field by dealing with police only after being “reinforced” by an attorney to assist him. 117

The waiver invalidation rule established by Edwards/Minnick is derived from this implicit indication that a suspect who invokes the Miranda right to counsel does not feel equal to police interrogators. 118 This rationale explains why a waiver, obtained after the invocation of the right to counsel, is per se invalid if it is the result of police initiation. Once a suspect indicates his inability to interact with police absent presence of counsel, then the mere act of initiating contact with that suspect—in order to elicit a fresh Miranda waiver—will amount to an exploitation of the acknowledged vulnerability. 119 Justice Scalia explained this equation in Shatzer as follows:

The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion [than the initial police questioning]. That increased risk results not only from the police’s persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated—pressure likely to “increase as custody is prolonged.” ... 120

Shatzer, however, also emphasized another aspect of this bar to re-initiation and waiver invalidation rule: like Miranda itself, it can only be justified when the suspect is

117 See supra discussion Part II.
118 See Shatzer, 130 S. Ct. at 1219.
119 Id.
120 Id. at 1220 (alteration in original) (citation omitted).
impacted by the inherent coercion triggering the warning and waiver requirement.\(^{121}\)

Absent the type of coercion created by the unique confluence of custody plus police interrogation, no justification exists for prohibiting police from re-initiation of questioning.\(^{122}\) In *Shatzer*, the issue was temporal duration of the lingering influence of this inherent coercion, leading to the Court’s fourteen day “expiration” rule.\(^{123}\) However, *Shatzer’s* fourteen day rule assumes the suspect realizes he is being questioned by police during the re-initiation.\(^{124}\) What if the police use surreptitious questioning and the suspect is unaware that he is interacting with an officer?

**PART IV: THE SURREPTITIOUS QUESTIONING QUALIFIER TO MIRANDA INTERROGATION**

*Illinois v. Perkins* involved police questioning of a suspect in custody.\(^{125}\) What was unusual about Perkins was that the police officer doing the questioning was undercover posing as a fellow inmate in prison with Perkins.\(^{126}\) Thus, unlike the situation that led to the *Miranda* decision, Perkins had no idea he was subjected to police interrogation while in custody—although he unquestionably was.\(^{127}\) The trial court granted Perkins’ motion to suppress the incriminating statements he made to the undercover officer, and the Illinois Court of Appeals affirmed.\(^{128}\) Both courts adopted the literal meaning of *Miranda* and concluded that because Perkins was clearly in custody,

\(^{121}\) *Id.* at 1219, 1226.

\(^{122}\) *Id.*

\(^{123}\) See *id.* at 1223, 1226-27.

\(^{124}\) See *id.* at 1219 (focusing on the inherently compelling pressures of custodial interrogations).

\(^{125}\) Perkins, 496 U.S. at 294 (An undercover government agent was placed in the cell with Perkins, who was incarcerated on an unrelated charge, to investigate an unsolved homicide in which Perkins was a suspect).

\(^{126}\) *Id.*

\(^{127}\) *Id.* at 295 (The agent led Perkins to believe that they were planning a jail break and freely responded to the agent’s inquiry of whether he had ever “done anybody.”).

\(^{128}\) *Id.* at 295.
and because his statements were clearly the product of police interrogation, the Miranda warning and waiver requirement had been triggered.129

The Supreme Court reversed and held that Miranda warnings and waiver were not required when a suspect is questioned by an undercover police officer, even when the suspect is in custody, because “[C]onversations between suspects and undercover agents do not implicate the concerns underlying Miranda.”130 In reaching this holding, the Court emphasized that Miranda warning and waiver was required only when the atmosphere generated the type of inherent coercion resulting from a police dominated environment.131

*Miranda*, according to the Court, stood for the proposition that the nature of the coercion in such a situation rises to a level of magnitude as to undermine the confidence in a suspect’s decision to cooperate with police and submit to questioning.132 As a result, the warning and waiver offsets—or neutralizes—how this especially potent and inherent coercion corrodes confidence that a decision to submit to question. This “something more,” as the *Miranda* Court characterized it, provides the proverbial antidote to the influence of the police dominated interrogation situation, and restores confidence that the submission to questioning was the product of a voluntary waiver of the privilege against compelled self-incrimination.133 Accordingly, it is only when the situation can be expected to produce this especially potent inherent coercion that the warning and waiver is required to establish the voluntariness of the suspect’s decision to interact with police.

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129 *Id.* at 297.
130 *Id.* at 296.
131 *Id.* at 296-297.
132 *Id.* at 296-298 (“*Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates.”)
133 *Miranda*, 384 U.S. at 478-479.
and submit to questioning.\textsuperscript{134} In all other situations, the mere act of answering questions implies a voluntary relinquishment of the privilege.\textsuperscript{135}

_Perkins_ provided the Court with the opportunity to re-emphasize that the warning and waiver offset (or antidote) is required only when a situation produces the potent inherent coercion _Miranda_ sought to protect a suspect from. The Court emphasized that the “warning mandated by _Miranda_ was meant to preserve the privilege during "incommunicado interrogation of individuals in a police-dominated atmosphere."\textsuperscript{136} The Court then concluded that if the suspect is unaware that he is being questioned by a police officer, then whatever coercion may result is insufficiently potent to trigger the _Miranda_ warning and waiver requirement.\textsuperscript{137}

The _Perkins_ Court, citing _Berkemer v. McCarty_, emphasized that where a situation generates the type of inherent coercion associated with being confronted by police in a custodial environment, a suspect is absolutely entitled to the protections established in _Miranda_.\textsuperscript{138} However, no justification exists for extending those protections to situations that do not produce that especially potent inherent coercion, situations like that in which _Perkins_ made his incriminating statements: "[F]idelity to the doctrine announced in _Miranda_ requires that it be enforced strictly, but only in those

\textsuperscript{134} See _Perkins_, 496 U.S. at 296-298.
\textsuperscript{135} See id. at 297 (the Court rejected the State’s argument that “Miranda warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent.” It went on to say that when “a suspect does not know that he is conversing with a government agent,” the inherent coercion is not present.).
\textsuperscript{136} Id. at 296.
\textsuperscript{137} Id. (noting that “[t]he essential ingredients of a ‘police-dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate.” Moreover, “when a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere [necessary to trigger _Miranda_] is lacking.”).
\textsuperscript{138} Id. at 296-297 (citing 468 U.S. 420, 442 (1984).
types of situations in which the concerns that powered the decision are implicated.”

Ultimately, because surreptitious police questioning could not, according to the Court, produce the type of coercion necessary to trigger the Miranda warning and waiver requirement, the practice fell outside the scope of Miranda's protective prophylactic rule. According to the Court:

We reject the argument that Miranda warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent . . . . Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist . . . When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners.  

Perkins, therefore, exposed the over-breadth of the assumption that questioning by police whenever a suspect is in custody triggers Miranda. Instead, Miranda is triggered by the coercion it was intended to offset, and that coercion requires something slightly more than police interrogation while the suspect is in custody: it requires the suspect know he is being confronted by police.

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139 Id. at 296.
140 Id. at 297.
141 See id. at 294.
142 Miranda, 384 U.S. at 478-479; See supra notes 138-139 and accompanying text.
The *Perkins* holding seems logical to those suspects who, during police questioning, have never expressed their desire to have counsel present to assist them. However, such suspects become exposed to the risk that they may never be given the opportunity to express that desire if the police resort to the surreptitious questioning option from the outset and bypass any attempt to obtain a valid *Miranda* waiver. In fact, this is precisely the tactic that the police used on Perkins because they anticipated that he would invoke his Miranda rights if formally confronted for questioning.\(^{143}\) Still, if *Miranda* is intended to offset a particular type of inherent coercion—and only that type—then the surreptitious questioning tactic nullifies the necessity for the Miranda warning and waiver antidote because that type of coercion is never generated.\(^{144}\)

What if the suspect expresses his desire for counsel’s assistance by invoking the Miranda right to counsel prior to being surreptitiously questioned by the police or their agent (i.e. jail cell informant)? Because the police in *Perkins* never overtly confronted the suspect, the Supreme Court had no reason to address this possible variant to the surreptitious questioning situation.

This intersection of *Edwards/Minnick, Shatzer, and Perkins* remains an area of uncertainty. *Perkins* suggests the questioning would not implicate Miranda because the suspect is unaware he is dealing with a police agent.\(^{145}\) However, *Edwards* and *Minnick* suggest that a different outcome would be required because, in effect, the police would be exploiting their knowledge that the suspect feels the need for counsel’s assistance during

\(^{143}\) *See* Perkins, 496 U.S. at 294-295.

\(^{144}\) *See supra* notes 15-16 and accompanying text; *See supra* Parts II-III.

\(^{145}\) *See* Perkins, 496 U.S. 299 (explaining where the suspect does not know that he is speaking to a government agent there is no reason to assume the possibility that the suspect might feel coerced); *See supra* notes 131-143 and accompanying text.
questioning. Of course, Edwards/Minnick never contemplated those situations in which surreptitious questioning occurs and clearly addressed instances in which the inherent coercion triggers Miranda. Even more uncertainty is produced once Shatzer is added to the equation. Shatzer’s fourteen day rule was based on the conclusion that the inherent coercion—which triggers the Miranda right to counsel invoked by a suspect—“lingers” for fourteen days after the suspect’s release to his normal environment. Therefore, since Shatzer—like Edwards and Minnick—involves re-initiation by a known police agent, the “lingering effect” conclusion could be read as supporting a similar extension of Edwards/Minnick to surreptitious questioning following the suspect’s invocation of the Miranda right to counsel.

However, there is one situation in which surreptitious questioning would require exclusion of any incriminating response—when it violates the Sixth Amendment right to counsel. According to the seminal decision of Massiah v. United States, police are prohibited from conducting any overt or surreptitious questioning of a suspect—once formal adversarial proceedings have been initiated—unless there is a voluntary waiver or counsel is present. Neither of these conditions could ever be satisfied if police use undercover officers or agents to conduct the questioning. Thus, unlike the Miranda right to counsel, there is simply nothing analogous to the Perkins surreptitious questioning exception. The rationale for these divergent rules derives from the different interest each constitutional provision seeks to protect, and provides the decisive ingredient for resolving the issue which was raised in this article.

146 See Edwards, 451 U.S. at 484-485; Shatzer, 130 S. Ct. at 1226-27; See supra discussion Part II.
147 Shatzer, 130 S. Ct. 1213, 1223.
148 See id. at 1223, 1226-27.
150 See id. at 206-207.
PART V: TWO SIDES OF THE RIGHT TO COUNSEL COIN: CONTRASTING THE SIXTH
AMENDMENT RIGHT TO COUNSEL FROM THE MIRANDA RIGHT TO COUNSEL

Contrasting the Miranda right to counsel with the Sixth Amendment right to counsel provides critical insight into the different interest protected by each distinct rule. Like the Miranda right to counsel, the Sixth Amendment right protects individuals subjected to police interrogation.\(^\text{151}\) However, the trigger for bringing this protection into force is quite different. As noted above, the Miranda right is triggered by the custodial interrogation of any suspect.\(^\text{152}\) In contrast, the Sixth Amendment right comes into force only after formal adversarial proceedings have been initiated against a suspect (normally indicated by indictment, arraignment, or a preliminary hearing, or other formal charge).\(^\text{153}\) Up to this point in time, the individual has not yet been “accused” by the state of any offense, even if suspected of an offense.\(^\text{154}\) As a result, the Sixth Amendment right simply fails to attach whenever police suspect an individual of a crime; it is only when that individual is a “defendant” that he may assert the right to counsel protections of that Amendment.\(^\text{155}\)

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\(^\text{151}\) See id. at 205-207; See Edwards, 451, U.S. at 484-485 (noting that additional safeguards are necessary when the suspect asks for counsel present during interrogation and that interrogating a suspect once he has asked for counsel violates Miranda and its progeny); U.S. CONST. amend. VI.

\(^\text{152}\) See supra note 15.

\(^\text{153}\) United States v. Gouveia, 467 U.S. 180, 187-188 (1984) (“it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him”); See Massiah 377 U.S. at 206; LaFave, supra note 42 at 596-597.

\(^\text{154}\) Cf. LaFave, supra note 42 at 596-597 (“the person arrested prior to being formally charged . . . is not an ‘accused’”).

\(^\text{155}\) See id. (citing Gouveia, 467 U.S. at 187-189) (“a person detained without the filing of charges does not become an accused even if he is detained for a substantial period of time and the government has every intention of filing charges when it completes its investigation.”).
The Sixth Amendment right to counsel protects the defendant throughout all “critical stages” of the adversarial process once it has formally commenced against her. The Supreme Court has held that the deliberate elicitation of a statement from a defendant qualifies as a critical stage and therefore, absent a knowing and voluntary waiver of the assistance of counsel, any statement obtained by police in the absence of counsel is inadmissible.

Absent waiver, the rationale for requiring counsel’s presence during police questioning of a defendant has always been substantially different from the rationale that underlies the Miranda right to counsel. Inherent or subtle police coercion played no role in the Massiah decision. In fact, Massiah involved exactly the type of surreptitious police questioning addressed in this article. Massiah had no idea that the false friend with whom he was speaking with was a police informant wearing a transmitter to allow the police to record the conversation from a concealed location. Thus, Massiah assumed he was speaking with a trusted confidant, and only later learned that his incriminating statements had been recorded and would be offered against him at trial.

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156 See LaFave, supra note 42 at 598-600, for further discussion about the “critical stage” prerequisite.
158 See McNiel v. Wisconsin, 501 U.S. 171 (1991); compare Strickland v. Washington, 466 U.S. 668, 685 (1984) (“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.”), and Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”) with Berkemer, 468 U.S. at 433 (“The purpose[] of the safeguards prescribed by Miranda [is] . . . to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary.”), and Miranda, 384 U.S. at 458 (“Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”).
159 See Massiah, 377 U.S. at 210-213 (White, J., dissenting).
160 Id. at 201-203.
161 Id.
pressures of police interrogation therefore could have played no role in the Court’s holding that the statement was inadmissible due to a violation of the Sixth Amendment.\textsuperscript{162}

The rationale for concluding the surreptitious recording of Massiah’s statements violated the Sixth Amendment instead focused on protecting Massiah’s right to representation by facilitating defense counsel’s ability to effectively represent the client.\textsuperscript{163} The Court emphasized that, as a practical matter, the most critical stage of the adversarial process often occurs outside of the courtroom.\textsuperscript{164} \textit{Massiah} drew from the Court’s earlier decision in \textit{Powell v. Alabama}\textsuperscript{165} and noted that the elicitation of an incriminating statement from a defendant often seals the defendant’s fate at trial, no matter how effective defense counsel may prove in the courtroom.\textsuperscript{166} It is during these encounters—between the defendant and police—that counsel’s presence is essential; after all, if the Sixth Amendment right to be assisted by counsel does not extend to these encounters, then the right to have counsel assist in the courtroom becomes hollow. Accordingly, it is during this out of court encounter that counsel’s presence becomes equally essential. Subsequent decisions which designated out of court corporeal identification proceedings\textsuperscript{167} and preliminary hearings\textsuperscript{168} as critical stages relied on this same logic: a defense counsel’s ability to adequately represent a client at trial will often be irreparably undermined of the government is permitted to subject an accused to these

\textsuperscript{162} See \textit{id.} at 210-213 (White, J., dissenting).
\textsuperscript{163} \textit{Id.} at 204-205.
\textsuperscript{164} See \textit{id.} at 205-207.
\textsuperscript{165} Powell v. Ala., 287 U.S. 45 (U.S. 1932).
\textsuperscript{166} See \textit{Massiah}, 377 U.S. at 205.
encounters without the presence of the defense counsel.\textsuperscript{169} In essence, the critical stage trigger is the Sixth Amendment right to counsel facilitating the Sixth Amendment right to confrontation.

Unsurprisingly, the Supreme Court subsequently held that the Sixth Amendment is violated when jail cell plants are used to surreptitiously question a defendant to elicit incriminating statements about the offense the defendant is charged with. In \textit{United States v. Henry}, the suspect was indicted on armed robbery charges and subsequently placed in jail to await his trial.\textsuperscript{170} Shortly after, FBI agents contacted a paid government informant who was in the same cell block as Henry.\textsuperscript{171} One of the agents instructed the informant to be alert to any statements made by federal prisoners, but specifically told him not to contact or question Henry about the robbery.\textsuperscript{172} The informant was then contacted by the agents after his release from jail, informed them that Henry had made incriminating statements about the robbery, and subsequently testified regarding those statements at Henry’s trial.\textsuperscript{173} As a result, Henry was convicted.\textsuperscript{174} The Supreme Court ruled that the FBI agents violated the defendant’s Sixth Amendment right to counsel when they intentionally created a situation in which the suspect was likely to make incriminating statements without the assistance of counsel.\textsuperscript{175}

\textsuperscript{169} See, e.g., United States v. Wade, 388 U.S. 218 (U.S. 1967) (post indictment lineup was a critical stage); See, e.g, Coleman v. Alabama, 399 U.S. 1 (U.S. 1970) (Sixth Amendment right to counsel extends to the preliminary hearing).

\textsuperscript{170} 447 U.S. 264, 266 (U.S. 1980).

\textsuperscript{171} \textit{Id}.

\textsuperscript{172} \textit{Id}.

\textsuperscript{173} \textit{Id} at 266-268.

\textsuperscript{174} \textit{Id}.

\textsuperscript{175} \textit{Id} at 274.
Because surreptitious questioning of a defendant violates the Sixth Amendment right to counsel does not, however, mean that it also violates the Miranda right to counsel. Indeed, it is precisely because Miranda functions to protect a suspect from inherent police coercion that the Court has permitted such tactics in the *Miranda* context. As noted above, unlike the Sixth Amendment, the purpose of the Miranda right to counsel is not to protect defense counsel’s ability to effectively represent the defendant at trial, but instead offset the inherent coercion of custodial interrogation. Accordingly, the Miranda right to counsel is not triggered by police tactics which undermine the ultimate efficacy of defense representation at trial (which surreptitious questioning of a suspect undoubtedly does) without subjecting the suspect to the type of inherent coercion required to trigger the right (which surreptitious questioning does not). Such tactics would surely violate the Sixth Amendment right to counsel. However, a suspect not yet formally charged or arraigned would not be protected by that right since it only applies to those offenses which have reached the point of formal adversarial process.

These situations present a clearly defined dichotomy between these two assistance of counsel rights—a dichotomy derived from distinct justifications for the Court’s adoption of these protective rules. However, the hypothetical presented in this article straddles the borderline between the two situations and implicates both justifications. On the one hand, since the surreptitious questioning of a suspect not yet formally charged...

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176 Perkins, 496 U.S. 292 (Miranda warnings are not required when a suspect is questioned by an undercover police officer); *See supra* discussion Part IV.
177 *See supra* notes 13 and 138; *See supra* discussion Part IV; *See also* Harry, 447 U.S. at 276 (“Massiah does not prohibit the introduction of spontaneous statements that are not elicited by governmental action.”);
178 *See supra* note 15 and accompanying text.
179 *See supra* note 175.
180 *See* Massiah, 377 U.S. at 206.
181 *See supra* note 154 and accompanying text.
implicates only the Miranda right to counsel,\textsuperscript{182} the suspect’s ignorance that he is being questioned by police would suggest that there is no basis to object to the police tactic.\textsuperscript{183} However, once this same suspect has invoked the Miranda right to counsel, the Edwards/Minnick rule suggests police are restricted from deliberately exploiting his asserted vulnerability,\textsuperscript{184} and use of this tactic would qualify as just such exploitation. Ultimately, the permissibility of surreptitious questioning of a suspect who has invoked the Miranda right to counsel—but is unprotected by the Sixth Amendment right—must turn on which of these two aspects of the Miranda right should be considered predominant.

Protection from the effects of inherent police coercion has, since inception, been the \textit{sine qua non} for triggering Miranda.\textsuperscript{185} Miranda itself was built upon this foundation, and motivated by the Court’s concern that such coercion undermines confidence in the voluntariness of a suspect’s responses to police interrogation.\textsuperscript{186} This concern has been a consistent theme in all subsequent \textit{Miranda} jurisprudence.\textsuperscript{187} For example, when the Court established the public safety exception to \textit{Miranda}, it based its conclusion on the premise that when a police officer questions a suspect in response to an imminent threat—either to the police or the public—the exigent circumstances eliminate any opportunity to engage in those calculated tactics which were the hallmark of the type of coercion which justified Miranda.\textsuperscript{188} This core triggering aspect of \textit{Miranda} is also

\begin{itemize}
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} \textit{See supra} notes 13-15 and accompanying text.
\item \textsuperscript{184} \textit{See supra} note 147.
\item \textsuperscript{185} \textit{See supra} notes 12-15, 113 and accompanying text.
\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} \textit{See supra} notes 49, 99, 152 and accompanying text.
\item \textsuperscript{188} New York v. Quarles, 467 U.S. 649, 656-658 (U.S. 1984) (holding that exigent circumstances require forgoing the constitutional protections of \textit{Miranda} in order to protect police officers and the public at large).
\end{itemize}
reflected in *Shatzer*. Although the Court did indicate that the coercive pressures of police custody linger for up to fourteen days following the suspect’s release, it was the confrontation by police officers within that period which produced the impermissible inherent coercion—rather than just the lingering coercive pressure from having been in custody—that violated the Edwards/Minnick protection.\(^{189}\)

In short, *Miranda* protections have never been extended to suspects who were unaware that they were being confronted by a police officer.\(^{190}\) Without that ingredient, any coercive pressures that may contribute to the suspect’s responses to questioning are insufficient to rise to the level of the type of especially potent presumptive coercion triggering *Miranda*.\(^{191}\) This logic also explains the disparate approach to the permissibility of police re-initiation of questioning after a suspect invokes either the right to silence or the right to counsel. In the right to silence context, the suspect has never expressed an inability to deal with the inherent coercion of custodial interrogation per se, but rather, only a desire to cut off specific questioning on a specific issue at a specific point in time.\(^{192}\) Accordingly, so long as police honor that invocation and obtain a fresh waiver when they reinitiate, the waiver does not run afoul of the suspect’s right to silence. By contrast, the mere act of re-initiation following invocation of the *Miranda* right to counsel exploits the suspect’s asserted inability to individually manage the inherently coercive environment of custodial interrogation. But this presupposes that the suspect’s request for assistance is for the purpose of aiding him in the context of that uniquely problematic coercive environment.

\(^{189}\) See supra notes 124-125 and accompanying text.  
\(^{190}\) See supra notes 14, 16, 138, 146 and accompanying text.  
\(^{191}\) Id.  
\(^{192}\) See supra notes 83-86 and accompanying text.
Nonetheless, while surreptitious questioning appears to fall beyond the protections of *Miranda* due to the suspect’s lack of knowledge of police questioning, the Edwards/Minnick rule creates uncertainty as to the permissibility of this tactic. However, one additional aspect of Miranda jurisprudence strongly suggests that this question should be resolved in favor of permissibility even if it comes down to a proverbial tie. This tie breaking principle is derived from *Dickerson v. United States*, in which the Court upheld *Miranda* despite a direct constitutional challenge.\(^{193}\) The Court, however, emphasized that while it was unwilling to overrule *Miranda*, the warning and waiver requirement must be limited only to those situations in which the core concerns of the original decision are implicated.\(^{194}\)

*Dickerson* involved the most direct challenge to *Miranda* since the Court announced that decision. *Dickerson* grew out of the government’s invocation of a congressional statute which substituted voluntariness as the standard for the admissibility of suspect statements obtained during custodial interrogation.\(^{195}\) Congress enacted this statute in response to the *Miranda* decision in what appeared to be a clear attempt to nullify the holding and revert back to the pre-*Miranda* totality of the circumstances test which was used to determine the admissibility of confessions.\(^{196}\) Although the statute was enacted soon after the Court decided *Miranda*, it was not until *Dickerson* that the United

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\(^{193}\) 530 U.S. 428 (2000).

\(^{194}\) Id.

\(^{195}\) See id. at 432. The “voluntariness test” was borne out of a compulsion to protect a suspect’s Fifth Amendment privilege against self-incrimination and Fourteenth Amendment right to Due Process. The test itself “takes into consideration ‘the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.’” Id. at 434 (citation omitted). The determination “‘depends upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.’” Id. (quoting Stein v. New York, 346 U.S. 156, 185, (1953)).

\(^{196}\) See generally Kamisar, supra note 112 at Parts II-III.
States attempted to rely on the statute as a substitute for compliance with *Miranda* to support the admissibility of a statement obtained during custodial interrogation.\(^{197}\)

Dickerson was questioned by FBI agents because he was suspected of armed bank robbery and other related violations of Title 18 of the United States Code.\(^{198}\) He then made incriminating statements and was indicted as a result.\(^{199}\) Before trial, Dickerson moved to suppress the incriminating statements on the grounds that the FBI agents had not given him a Miranda warning prior to conducting their interrogation.\(^{200}\) The District Court granted the motion, and the government then made an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit which subsequently reversed the suppression order.\(^{201}\)

In support of the Fourth Circuit’s decision, the government invoked the numerous post-*Miranda* Supreme Court decisions that limited the impact of *Miranda* by emphasizing the prophylactic nature of the *Miranda* rule and the Court’s consistent emphasis that the *Miranda* rule swept more broadly than the Fifth Amendment itself.\(^{202}\) Based on these decisions, the government argued that *Miranda* did not involve the interpretation of the Fifth Amendment itself, but was instead merely a ruling establishing one method for protecting the privilege against self-incrimination.\(^{203}\) It reasoned that, because a violation of *Miranda* did not necessarily violate the Fifth Amendment,

\(^{197}\) See generally id. at Part XI.
\(^{198}\) Dickerson, 530 U.S. at 432.
\(^{199}\) Id. (indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence).
\(^{200}\) Id.
\(^{201}\) Id.
\(^{203}\) Id. at 50-51 (quoting Miranda, 384 U.S. at 490) (“[T]he Court invited Congress and the States to develop ‘their own safeguards’ only if they were ‘fully as effective’ as the *Miranda* rules to ‘inform[] accused persons of their right of silence and . . . afford[] a continuous opportunity to exercise it.’”)
Congress was free to adopt an alternate test for ensuring compliance with that constitutional protection.\textsuperscript{204} Accordingly, it argued, the totality of the circumstances test—as enacted by Congress—provided a constitutionally permissible alternative to compliance with the Miranda warning and waiver requirement as long as it ensured conformity with the Fifth Amendment privilege.\textsuperscript{205}

To the surprise of many observers (and the ire of the two dissenting Justices), the Court rejected this argument and upheld \textit{Miranda}.\textsuperscript{206} The Court disagreed with the argument that its prior decisions—which modified the impact of the original \textit{Miranda} rule—indicated that \textit{Miranda} never interpreted the Fifth Amendment and was thus subject to congressional override.\textsuperscript{207} In response, it noted that this simply indicated that no Supreme Court precedent is immutable and that those subsequent rulings “reduced the impact of the \textit{Miranda} rule on legitimate law enforcement [and] reaffirm[ed] the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.”\textsuperscript{208}

The Court’s opinion, written by the Chief Justice, emphasized factors such as \textit{stare decisis}, the original understanding of the basis for the \textit{Miranda} decision, and the fact that \textit{Miranda} had become deeply ingrained in police and public culture.\textsuperscript{209} As a result, the court rejected Congress’ effort to revert back to a totality of the circumstances

\textsuperscript{204} Id.
\textsuperscript{205} See id. at 22-23.
\textsuperscript{206} Id. at 454 (Scalia, J., dissenting) (“The Court today insists that the decision in \textit{Miranda} is a ‘constitutional’ one . . . but what makes a decision ‘constitutional’ . . . is the determination that the Constitution \textit{requires} the result that the decision announces and the statute ignores. By disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people.”); \textit{See also} Corn, supra note 12 at 768-769.
\textsuperscript{207} See Dickerson, 530 U.S. at 442.
\textsuperscript{208} Id. at 443-444.
\textsuperscript{209} Corn, supra note 12 at 768 (citing 530 U.S. at 428, 443-44).
test for admissibility of confessions: “In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively. Following the rule of *stare decisis*, we decline to overrule *Miranda* ourselves.” However, the Court also emphasized that the inherent coercion which results from the isolation and pressure placed on a suspect by police during custodial interrogation was the core concern that provided the motivation for the Miranda opinion:

In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion. Because custodial police interrogation, by its very nature, *isolates and pressures* the individual, we stated that “even without employing brutality, the ‘third degree’ or [other] specific stratagems, … custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.” We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be “accorded his privilege under the Fifth Amendment … not to be compelled to incriminate himself.”

The Court’s decision to uphold *Miranda* in response to a direct attack was, therefore, premised on the assumption that this core concern continues to necessitate the warning and waiver process to protect the Fifth Amendment privilege. Therefore, by implication, *Dickerson* also indicates that where this core concern is not implicated, the justification for extending the *Miranda* protection to a suspect dissipates.

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210 530 U.S. at 442.

211 *Id.* at 435 (citations omitted) (emphasis added).
The surreptitious questioning of a suspect cannot, by its very nature, implicate this core concern. When a suspect is unaware that he is being questioned by a police officer, he is not subject to the sense of isolation at the hands of the police that is central to the type of inherent coercion *Miranda* and its progeny operate to offset.\(^{212}\) Both the Miranda right to counsel and the Miranda right to silence are intended to offset this inherent coercion. Nothing in *Miranda, Edwards, Minnick*, or *Shatzer* suggests a different purpose for providing a suspect subjected to custodial interrogation with a right to counsel.\(^{213}\) Indeed, *Miranda* itself indicated that the right to counsel it created was understood by the Court as a means of offsetting the coercive effects of custodial interrogation: “The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.”\(^{214}\)

*Dickerson*, therefore, strongly supports the conclusion that, absent the type of inherent coercion resulting from isolation by custody and confrontation by a known police officer, there is insufficient justification for application of *Miranda*.\(^{215}\) Extending this to the Edwards/Minnick line of cases indicates that the use of surreptitious police agents to question a suspect who invoked the right to have counsel present during police interrogation is a permissible tactic.\(^{216}\) This tactic will no doubt place these suspects at risk, but only the risk of a voluntary decision to engage in a dialogue with someone they

\(^{212}\) See, e.g., *supra* note 138 and accompanying text.

\(^{213}\) See *supra* discussion Parts II-IV.

\(^{214}\) *Miranda*, 384 U.S. at 466.

\(^{215}\) See, e.g., *supra* notes 16-17, 138.

\(^{216}\) See *supra* discussion Parts II-IV.
have no reason to believe is a police agent. \(^{217}\) This is a risk that always exists outside the context of police interrogation, and *Miranda* was never intended to protect suspects from this risk. Furthermore, unlike the Sixth Amendment right to counsel, the Miranda right to counsel was never intended to facilitate the effectiveness of defense representation of the accused, but only as a mechanism to establish confidence that a suspect’s decision to submit to police interrogation was knowing and voluntary. \(^{218}\) Thus, while this tactic may indeed seal a suspect’s fate prior to trial, this consequence in no way offends the Miranda right to counsel.

**PART VI: CONCLUSION**

Surreptitious police questioning, either through an undercover officer or a prison inmate acting as a government agent, is an often effective method used to exploit a suspect’s erroneous belief that it is safe to make incriminating statements. The Supreme Court has held that use of this tactic does not implicate the *Miranda* rights warning and waiver requirement because the suspect’s ignorance that the false friend is in fact a government agent eliminates an essential element of the custodial interrogation trigger for these rights. However, when the suspect has been formally charged for the offense that is the subject of the questioning, this tactic will violate the Sixth Amendment right to counsel even though the suspect is ignorant he is responding to police questioning.

These different outcomes, which depend on whether the suspect invokes the protection of the Miranda right to counsel or the Sixth Amendment right to counsel, illustrate the fundamentally different objective of each right. The objective of the Sixth

\(^{217}\) See Perkins, 496 U.S. 299 (explaining where the suspect does not know that he is speaking to a government agent there is no reason to assume the possibility that the suspect might feel coerced); See supra notes 131-143 and accompanying text.

\(^{218}\) See supra notes 173-183 and accompanying text.
Amendment right to counsel is to ensure that representation of the accused is not functionally nullified as the result of police investigatory activities prior to trial. Because the Court has held that deliberate elicitation of statements from the accused is a critical stage in the adversarial process, it is a stage where assistance of counsel is essential to give meaning to the right itself. Accordingly, whether or not an accused is aware that he is being questioned by police is irrelevant to effectuating the protection. In either situation, the accused must be assisted by the “guiding hand of counsel” in order to ensure that his fate at trial is not functionally sealed in an out of court encounter in which he was denied counsel’s assistance.219

The objective of the Miranda right to counsel is fundamentally different: to offset the inherent coercion produced when a suspect is held in custody and confronted by police interrogators.220 Because the Miranda Court concluded that presence of counsel in this situation would effectively offset this inherent coercion, the Miranda right is a mechanism to establish that a suspect’s submission to questioning is the product of a knowing and voluntary decision.221 While invoking this right will undoubtedly enhance the efficacy of future defense representation, unlike the Sixth Amendment counterpart, this has never been the rationale for providing this right to suspects.222

In Edwards and Minnick, the Supreme Court recognized that once a suspect invokes the Miranda right to counsel, it indicates the suspect is unable to deal with police

219 See, e.g., Wade, 388 U.S. at 237 (The post-indictment lineup was a critical stage of the proceedings, so the defendant was entitled to have his attorney present); Henry, 447 U.S. at 274 (agents violated the defendant’s Sixth Amendment right to counsel when they intentionally created a situation in which the suspect was likely to make incriminating statements without the assistance of counsel); Edwards, 451 U.S. at 485 (holding that re-interrogating a suspect after he has asserted her right to counsel violates Miranda and its progeny).
220 See, e.g., 451 U.S. at 485.
221 See supra notes 43-69.
222 See supra notes 173-183 and accompanying text.
without the assistance of counsel. As a result, when police re-initiate questioning of such a suspect and obtain a fresh Miranda waiver, the exploitation of the suspect’s vulnerability invalidates the waiver. In short, once a suspect indicates his need to have counsel present when dealing with police during custodial interrogation, the mere request for a new Miranda waiver by the police is inconsistent with this request for assistance. As a result, a suspect who invokes the Miranda right to counsel becomes unapproachable by police for subsequent questioning unless the suspect himself reinitiates the contact. While Maryland v. Shatzer established a bright line expiration date for this protection, the protection remains in effect so long as the suspect remains in custody.

The Court has never, however, addressed the intersection of the Edwards/Minnick “no re-initiation” rule with the surreptitious questioning exception to Miranda. Such questioning of a suspect who has invoked the Miranda right to counsel should be permissible, even though it technically requires police to reinitiate the contact with the suspect. The Miranda right to counsel and the Edwards/Minnick unapproachability rule are both built upon an assumption that the re-initiation of questioning exploits the suspect’s susceptibility to the inherently coercive environment produced by custodial interrogation. In turn, this presupposes that the suspect is aware that he is not only

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223 See Edwards, 451 U.S. at 484-485; See Minnick, 498 U.S. at 147; See supra notes 12, 115 and accompanying text.
224 451 U.S. at 484-485.
225 Id.; See supra discussion Part II-III.
226 See Edwards, 451 U.S. at 484-485; See Minnick, 498 U.S. at 147.
227 Shatzer, 130 S. Ct. at1223-1224.
228 See supra discussion Part II-III.
under the control of police (custody) but is also being questioned in a police dominated environment. 229

When police overtly re-initiate contact with a suspect who has invoked the Miranda right to counsel, they resurrect the exact type of pressure the suspect sought to offset by requesting the presence of counsel. Thus, in this situation, a Miranda waiver is logically invalidated. However, if the suspect is unaware that he is being questioned by police—even if the Miranda right to counsel was already invoked—then the police have done nothing to resurrect the coercive pressures that triggered the right to counsel’s presence during questioning. Accordingly, there is no valid basis to presume the suspect’s responses to the false friend are the product of inherent coercion, and therefore no justification for extending the Miranda and Edwards/Minnick prophylactic protections to a suspect in this situation.

229 Id.; See Ill. v Perkins, 496 U.S. 292, 299 (U.S. 1990) (explaining where the suspect does not know that he is speaking to a government agent there is no reason to assume the possibility that the suspect might feel coerced).