SEPARATE BUT EQUAL: MIRANDA’S RIGHTS TO SILENCE AND COUNSEL

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I. INTRODUCTION

With two cases decided in 1975 and 1981, the Supreme Court created a significant distinction between the impact of a custodial suspect’s decision to invoke his right to silence and his invocation of the right to counsel. In *Michigan v. Mosley*¹, the Court held that when such a suspect invokes his right to silence, if the police “scrupulously honor” this invocation by cutting off questioning, wait a reasonable time and then administer the Miranda warnings again, they may resume questioning the suspect if he now waives his rights.² In *Edwards v. Arizona*³, the Court took an entirely different approach to subsequent interrogation of a suspect who invokes his right to counsel.⁴ The Court reasoned there that because a defendant who invokes his right to counsel is indicating his helplessness to answer questions in a custodial environment without the presence of a lawyer, he cannot be re-interrogated without counsel present unless the suspect initiates the questioning himself.⁵

In a series of cases based on the holding in *Edwards*, the Court built the wall separating the impact of invoking the rights to counsel and silence even higher. With its holding in *Arizona v Roberson*⁶, the Court extended the Edwards “initiation protection”

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¹ 423 U.S. 96 (1975).
² *Id.*
⁴ *Id.*
⁵ *Id.* at 484-84.
to situations in which the suspect is being interrogated about a different crime than the one for which he invoked his right to counsel.\textsuperscript{7} In \textit{Mississippi v. Minnick}\textsuperscript{8}, the Court decided that even when the suspect actually speaks with his counsel after invoking that right and then subsequently waives this right, the police still cannot question him unless he initiates or counsel is present during the questioning.\textsuperscript{9}

This article will argue that the distinction the Court drew between invocation of the rights to silence and counsel was highly questionable from its genesis in \textit{Mosley} and \textit{Edwards}.\textsuperscript{10} This distinction has led to significantly different judicial treatment of suspects who invoke counsel and those invoking their right to silence, a difference unsupported by either theoretical or pragmatic justifications.\textsuperscript{11} The result of this differential treatment has been that suspects who invoke their right to silence receive far less protection for their Fifth Amendment rights than do suspects who invoke silence.\textsuperscript{12} This different treatment afforded by courts often leads to decisions regarding the admissibility of statements which make no sense and can lead to unjust results. Enhancing the impact of this dubious distinction in cases such as \textit{Roberson} and \textit{Minnick} has made a bad situation worse.

Recently, however, in a series of cases culminating in its 2010 decision in \textit{Maryland v. Shatzer}\textsuperscript{13}, the Court has paved the way for the abolition of the unfairly differential treatment afforded suspects who invoke the right to counsel and those invoking the right

\textsuperscript{7} \textit{Id.}
\textsuperscript{8} 498 U.S. 146 (1990).
\textsuperscript{9} \textit{Id.}
\textsuperscript{10} \textit{See infra} Part II.
\textsuperscript{11} \textit{See infra} Part II.
\textsuperscript{12} \textit{See infra} Part II.
\textsuperscript{13} 130 S. Ct. 1213 (2010).
to silence. This has been achieved by decisions that undercut the distinction in several ways. First, the Court has now clearly identified and described the risk that is present when police seek to re-interrogate a suspect after he invokes the rights protected by Miranda. The risk posed in such situations is that if the suspect ultimately waives his Miranda rights, the waiver may be the product of impermissible police badgering. This danger exists regardless of whether the suspect invoked his right to silence or counsel. Second, the Court has treated other aspects of the invocation of the rights to silence and counsel in the same manner, leaving only the impact on re-interrogation of invoking one right as opposed to the other as the sole difference between the two rights. Third, in *Shatzer* the Court dispensed with the all or nothing approach it had taken regarding invocation of the right to counsel. Before *Shatzer*, when a suspect invoked his right to counsel, he was apparently protected from re-interrogation while in custody forever unless he initiated questioning or had counsel present. *Shatzer* put a time limit on the duration of the *Edwards* initiation protection.\(^{14}\) Thus the Court closed the distance regarding permissible re-interrogation of suspects who invoke the right to silence and those requesting counsel.\(^{15}\) Now it makes more sense than ever for the Court to adopt an approach to re-interrogation after the invocation of the right to silence that matches precisely the one applied to invocation of the counsel right. The reasoning used by the Court in *Shatzer* regarding what is needed to prevent badgering stemming from re-interrogation is the same regardless of which right the suspect invokes. With such an approach, the police could seek to re-interrogate a suspect in custody if he initiated the questioning, or after the passing of 14 days during which the suspect had a break from

\(^{14}\) See generally *Shatzer*, 130 S. Ct. 1213 (2010).

\(^{15}\) *Id.*
custody. In either case, as the police do now, they would first need to re-warn the suspect of his rights and obtain a waiver of those rights.

Section II of this Article will demonstrate that the Supreme Court, through its holdings in *Michigan v. Mosley* and *Edwards v. Arizona*, created the distinction for permissible re-interrogation between suspects who invoke their right to silence and those invoking the right to counsel.\(^{16}\) It will argue that the distinction is a flawed one that has no support in either the Fifth Amendment or in the Court’s foundational holding in *Miranda v. Arizona*.\(^ {17}\) Section III will show how the approach taken in *Edwards* and *Mosley* led to subsequent decisions that expand and stretch the distinction and make a bad situation worse.\(^ {18}\) Section IV will explore the theoretical and pragmatic assumptions that undergird the Court’s support of the idea that invocations of the rights to silence and counsel should be treated differently.\(^ {19}\) This Section will demonstrate that each of these assumptions is incorrect and will offer a solution to the problem. The proposed solution would remedy the unfairness created by the distinction and be consistent with the approach the Court has taken recently to issues surrounding the protections afforded by the Miranda decision.\(^ {20}\)

\(^{16}\) See infra Part II.
\(^{17}\) See infra Part II; Miranda v. Arizona, 384 U.S. 436 (1966).
\(^{18}\) See infra Part III.
\(^{19}\) See infra Part IV.
\(^{20}\) See infra Part IV.
II. THE SUPREME COURT CREATES THE DISTINCTION BETWEEN SILENCE AND COUNSEL

In its landmark 1966 holding in *Miranda v. Arizona*, the Supreme Court held that all suspects being interrogated while in custody must be advised of their right to remain silent, that any statement they make can be used against them, that they have the right to counsel and that an attorney will be provided for them if they cannot afford one. In most ways, the Court treated the rights to silence and counsel in the same manner. Each right had to be given and each had to be waived before any interrogation could begin. Failure to obtain a waiver of either right would prevent the prosecution from using the suspect’s statement at his trial. Either right could be invoked even after the suspect has begun to speak, and should the suspect invoke either right, the questioning must stop immediately. In fact, if any significance is given to primacy, it is worth noting that the Miranda court’s first mention of a right to be afforded to suspects in custodial interrogation was, “at the outset . . . he must be informed that he has the right to remain silent.”

No right to counsel appears in the Fifth Amendment. The constitutional right to counsel in criminal cases stems from the Sixth Amendment. The Court in *Miranda*, however, determined that the only way to protect the right to be free from compulsory self-incrimination, a Fifth Amendment protection, is to afford the defendant the right to

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22 *Id.*
23 *Id.* at 475-76.
24 *Id.* at 477.
25 *Id.* at 504-05.
26 *Id.* at 467-68.
27 U.S. CONST. amend. V.
28 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”).
counsel in what it held is a Fifth Amendment setting, custodial interrogation. 29 This Fifth Amendment right to counsel, unlike the right to counsel in the Sixth Amendment, was not designed to protect the defendant in the adversarial phase of a criminal prosecution. 30 Its purpose now, among other things, is to insure the protection of the right to silence during the inherently coercive atmosphere that attends custodial interrogations. 31 Under the Fifth Amendment as interpreted by the Court in Miranda, the right to silence then is the basic right and the right to counsel exists only to protect the right to silence. 32 This makes sense because the rights identified by the Court in Miranda derive from the Fifth Amendment guarantee that no person shall be compelled to be a witness against him or herself. In other words, the person can choose to remain silent. 33 It was hardly surprising, therefore, that the discussion in the Miranda opinion of the rights to be afforded suspects begins with the right to silence. 34

In two cases decided nine and 15 years after Miranda, the Court addressed whether a defendant who invokes his right to silence and one who invokes his right to

29 *Miranda*, 384 U.S. at 470.
30 James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L.REV. 975, 987 (1986) (“[T]he Sixth Amendment grants the assistance of counsel only when the government has decided, as a general matter, to become an adversary, and it extends that assistance only to instances of government conduct that pose cognizable risks to the goal of adversarial equality.”).
31 *Id.* at 990. Tomkovicz argues:

The origins of and rationale for *Miranda* counsel suggest a role different than that of the sixth amendment assistant. In essence, *Miranda* counsel is a buffer against the power of a state tempted to force incriminating statements from an unwilling suspect. Fifth amendment counsel’s primary function, therefore, is to provide a means and opportunity to prevent undue pressure to confess guilt. The promise of legal assistance is intended to counter compulsion and ensure that information surrendered is the product of an unfettered choice. *Id.*

33 *Miranda*, 348 U.S. at 469.
34 *Id.* at 467-68. (“At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent.”).
counsel can be re-interrogated while in custody. The holdings in these two cases, *Michigan v. Mosley* and *Edwards v. Arizona*, created substantially different protections regarding re-interrogation of such suspects. It is important to understand why and how the Court embarked on different paths when considering the silence and counsel protections created by Miranda.

Mosley was arrested for his participation in a robbery case. When given his Miranda rights, Mosley said he did not wish to speak with the police. The detective immediately ceased questioning Mosley. Two hours later another detective questioned Mosley in a different part of the police station about an unrelated homicide case. Mosley was again given his Miranda rights, but this time agreed to talk. The statement he made was introduced by the government at his trial.

Mosley challenged the introduction of his statement, claiming his invocation of the right to silence barred the police from re-interrogating him. The Court held that such an invocation of the right to silence is not eternal, and that under certain conditions the suspect could be re-interrogated while in custody. In the *Mosley* case, the Court found it significant that the detective had “scrupulously honored” the defendant’s right to silence by immediately cutting off questioning, waiting a reasonable time before re-

35 Under *Miranda*, a suspect can invoke either or both rights.
38 *Mosley* was the first Supreme Court decision to distinguish invocation of the right to silence from the right to counsel. Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 Ala. L. Rev. 453, 484 (2008).
40 Id. at 97-98.
41 Id. at 98.
42 Id. at 99.
43 Id. at 99.
44 Id. at 102-03.
45 Id. at 103.
interrogating him and providing the defendant with a fresh set of *Miranda* warnings (which he waived). The Court also seemed to find some significance in the fact that the questioning was done by a different detective in a different location at the police station, and the questioning involved a different case from the one in which the defendant had previously invoked his right to silence.

In assessing whether a defendant who invokes his right to silence can be re-interrogated, the Court appropriately looked to the holding in *Miranda* for guidance. The passage in *Miranda* that addresses this issue says,

> If the individual indicates in any manner . . . that he wishes to remain silent, the interrogation must cease. At this point he has shown he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

The *Mosley* Court acknowledged that this passage “does not state under what circumstances, if any, a resumption of questioning is permissible.” It offered three

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46 *Id.* at 104-05.

47 *Id.* at 105. These factors no longer appear to be important to an analysis under *Mosley* of whether a Defendant's invocation of the right to silence was scrupulously honored. Instead, subsequent cases have focused on the immediate cessation of questioning, waiting a reasonable time before re-interrogation, and providing a fresh set of *Miranda* warnings. See, e.g., Barton, *supra* note 38, at 483 (discussing how cases after *Mosley* have de-emphasized whether the re-interrogation after invocation of the right to silence deals with a different crime).

It is interesting to note that although discussing invocation of the right to counsel, the Court, in a recent opinion, made this observation about questioning in a different location by a different law enforcement official,

> [r]e-interrogation in different custody or by a different interrogating agency would seem, if anything, less likely than termination of custody to reduce coercive pressures. At the original site, and with respect to the original interrogating agency, the suspect has already experienced cessation of interrogation when he demands counsel—which he may have no reason to expect elsewhere.

*Shatzer*, 130 S.Ct. 1213, 1230 n.5 (2010). There is no reason why this observation should not apply to re-interrogation after invocation of the right to silence as well.


49 *Id.* at 101-02.
possible literal interpretations of the passage. One interpretation would mean the defendant could never be re-interrogated once he invokes his right to silence. A second would regard any subsequent statement as involuntary no matter how voluntary it actually was. The third interpretation would allow the police to re-interrogate after a short stoppage of the interrogation. The Court found all of these interpretations to be “absurd.” It said that the first two interpretations would “transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.” The Court expressed concern that the third literal interpretation could lead to the type of police badgering prohibited by *Miranda*. Thus, the Court held that questioning of a custodial suspect who invokes the right to silence could be renewed once the safeguards referred to above were honored. It is worth noting that in dicta, both the Mosley majority and the concurring opinion of Justice White interpreted the language of Miranda speaking to what happens after a defendant invokes his right to counsel to be significantly different. This difference is what presaged the holding six years later in *Edwards v. Arizona*.

Robert Edwards was arrested for robbery and murder. After being given his *Miranda* rights and waiving them, Edwards made an exculpatory statement. He then indicated he wished to have an attorney to help him make a deal. The questioning

50 Id. at 101-02.
51 Id.
52 Id. at n.10 (citing *Miranda*, 384 U.S. at 474).
53 Id. at 109-10 (White, J. concurring).
56 Id. at 479.
stopped at this point.\textsuperscript{57} The next day, after being told by a police guard that “he had” to talk to the police, Edwards met with detectives and was again given his \textit{Miranda} rights. He waived those rights and made a statement inculpating himself in the crime. The Supreme Court held that Edwards’ inculpatory statement violated the Fifth Amendment right to counsel identified in \textit{Miranda}. The Court ruled that after a suspect invokes his right to counsel during custodial interrogation, he cannot be re-interrogated in custody unless his attorney is present or he initiates the questioning.\textsuperscript{58} The \textit{Edwards} Court said that the issue was decided by the language in \textit{Miranda} requiring that once a suspect invokes his right to counsel, “the interrogation must cease until an attorney is present.”\textsuperscript{59}

Apparently the \textit{Edwards} Court, unlike the Court in \textit{Mosley}, was not troubled by applying what it considered to be a literal interpretation to the words of the \textit{Miranda} holding prohibiting any custodial questioning once a \textit{Miranda} right is invoked.\textsuperscript{60} Unlike the Court in \textit{Mosley}, the \textit{Edwards} court seemed to have little concern for the “absurd”

\textsuperscript{57} Id.
\textsuperscript{58} Id. at 484-85.
\textsuperscript{59} Id. at 485 (citing \textit{Miranda}, 384 U.S. at 474).
\textsuperscript{60} As one commentator has written:

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The Court has attempted to justify this distinction in several ways. First, it points to the language in \textit{Miranda} as supporting the difference between the treatment of the right to silence and that of the right to counsel. That language, however, is at best equivocal. The effect of the two rights is at times described interchangeably in \textit{Miranda}: when either is invoked, the police must “cease” the interrogation. In other passages, the Court modified this by adding that when the right to counsel is invoked, interrogation must cease “until an attorney is present.” But if the former statement -- that interrogation “must cease” -- is not taken literally to mean that all police-initiated interrogation must stop for all time and in all circumstances, why is the latter viewed as absolute? In other words, why should the fact that the ending point is specified -- when counsel is present -- be read to mean that event is the only possible breaking point in \textit{Edwards}? Unless we read into the passage that an attorney being present is not only a sufficient condition for terminating Edwards rights and permitting re-interrogation, but also a necessary one, there is no reason to view the rights differently. Both could potentially be ended by myriad factors, as the Court recognized in \textit{Mosley}. In fact, the Court has held that the presence of counsel is not a necessary condition for re-questioning since a suspect's initiation allows the police to seek a valid waiver and commence interrogation even in the absence of counsel.

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result “that would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests” due to the inability of the police ever to initiate a re-interrogation of the defendant (unless counsel was present).61

Another apparent change in concern from *Mosley* to *Edwards* can be seen by comparing the concurring opinion of Justice White in *Mosley* to the majority opinion the same Justice wrote in *Edwards*. In his concurring opinion in *Mosley*, Justice White had criticized the majority for seeming to impose a time limit after invocation of the right to silence before questioning could begin again.62 To Justice White all that mattered regarding the admissibility of such a statement was whether the defendant’s waiver of his rights was voluntary.63 For a court to suppress a statement when the defendant had knowingly and voluntarily waived his rights, even if he had previously invoked them, was “paternalistic” in Justice White’s eyes.64 However, his opinion in *Edwards* seems to adopt the very “paternalistic” approach Justice White warned against in *Mosley*. This difference in approaches is apparently because by invoking his right to counsel, “the accused has expressed his desire to deal with the police only through counsel.”65 When he invokes his right to silence however, apparently the suspect means only that he does not wish to speak for an hour or two.66

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61 *Mosley*, 423 U.S. at 102.
62 *Id.* at 110-11 (White, J. concurring).
63 See *id*.
64 *Id.* at 109.
65 *Edwards*, 451 U.S. at 484.
66 See Barton, *supra* note 38, at 483; see also note 129 (citing cases where the duration between the time of invocation and permissible re-interrogation was two hours or less).
The concurring opinions of Chief Justice Burger\(^67\) and Justice Powell\(^68\) in *Edwards* would have limited the decision to suppress the statement to the facts of the case, most prominently that the police guard had told Edwards he had to talk to the police. Burger and Powell both believed that a suspect has the right to change his mind after invocation of a Miranda right as long as the waiver accompanying that change of mind is voluntary.\(^69\) While it could be argued that once a right has been invoked, such a change of mind can never be truly voluntary in the coercive environment of custodial interrogation\(^70\), it is hard to understand why a knowing waiver regarding re-interrogation (without initiation by the suspect) can be voluntary after an invocation of the right to silence but not after the right to counsel.\(^71\)

III. \textbf{MAKING A BAD DISTINCTION WORSE}

Having created a substantial distinction between the power of the police to re-interrogate a suspect who has invoked his right to silence and one who invokes his right to counsel, the Court then handed down a number of decisions which both expanded and stretched this distinction. In *Arizona v. Roberson*,\(^72\) the Court held that once a suspect invokes his right to counsel during custodial interrogation, he cannot be re-interrogated about the crime for which he was arrested or \textit{any} crime unless he initiates


\(^{68}\) Id. at 489-92 (Powell, J. concurring).

\(^{69}\) Id. at 488, 491.

\(^{70}\) See Mosley, 423 U.S. at 100-102 (discussing the inherently coercive nature of being in custody and stating "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise."


\(^{72}\) *Roberson*, 486 U.S. 675.
the questioning or has his attorney is present during the questioning.\textsuperscript{73} The re-interrogation here occurred 3 days after Roberson’s invocation of his counsel right, whereas \textit{Mosley} was re-questioned only 2 hours after his invocation of the right to silence.\textsuperscript{74} Moreover, in concluding that Mosley’s right to silence was “fully respected” after his invocation of the right, the Court found it significant that the questioning involved a crime “different in nature and in time and place of occurrence” from the crimes for which Mosley originally invoked the right. That Roberson’s re-interrogation involved a crime also different in time and location from the original one for which he invoked his right to counsel seemed not to matter to the Court.\textsuperscript{75} Instead, the Court focused on the idea that the bright line rule of Edwards should not be disregarded merely because the suspect while still in custody was being interrogated about a crime different than the one for which he invoked his right to counsel.

Taken together then, the Court’s holdings in \textit{Mosley}, \textit{Edwards}, and \textit{Roberson} maintain the seeming anomaly that a defendant who invokes his right to silence is not being badgered when police re-interrogate him two hours later about a different crime, but one who invokes his right to counsel is being badgered when re-interrogated the next day or 3 days later, also about a different crime. The Court in \textit{Roberson} put no time limit on the duration of this notion of badgering regarding re-interrogation after invocation of the right to counsel.\textsuperscript{76} So, presumably, a defendant who is interrogated years after his invocation of the right to counsel in one case cannot be interrogated

\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.} at 678; Mosley; 432 U.S. at 98.
\textsuperscript{75} \textit{Roberson}, 486 U.S. at 687-88. (noting that the need to determine whether the suspect has requested counsel exists regardless of whether re-interrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second investigation).
\textsuperscript{76} \textit{See generally Roberson}, 486 U.S. 675. The Court did not address any time limits with regard to re-interrogation after a suspect invokes the right to counsel. \textit{Id.}
about another case while in custody, even as to a totally different crime. The District of Columbia Court of Appeals applied this very reasoning in suppressing a statement made five months after the defendant’s invocation of the right to counsel. 77 In fact, in *United States v. Green*, the defendant had already pled guilty in the drug case in which he had invoked his right to counsel before making a statement in a totally unconnected murder case. 78 The court held this too would be regarded as badgering under *Edwards*. 79 It is important, therefore, to see the justification the Court provides in *Roberson* for taking such a position.

According to the Court in *Roberson*, when a defendant invokes his right to counsel in custodial interrogation, he is expressing the belief that he is, “not capable of undergoing such questioning without advice of counsel,” 80 and he is “not competent to deal with the authorities without legal advice.” 81 The *Roberson* Court also exalted the benefits to law enforcement and the courts of providing a “bright-line rule” that provides “clear and unequivocal guidelines” of what action can and cannot be taken after a defendant invokes his right to counsel. 82 In fact these benefits of a specific bright line rule are so important both to the government and the defendant that they outweigh the inability to present to the fact-finder what the Court called highly probative evidence of an otherwise voluntary statement by the accused. 83 Apparently the benefits of such a


78 *Id.* at 986.

79 *Id.* at 988-89.

80 *Roberson*, 486 U.S. at 683.

81 *Id.* at 681 (adopting Justice White’s concurrence in *Mosley*, 423 U.S. at 110).

82 *Id.* at 681.

83 *Id.* at 681-82 (quoting Fare v. Michael C., 442 U.S. 707, 719 (1979)).
bright-line rule are not relevant to what the government may do after a defendant invokes his right to silence as a defendant there may be re-interrogated after a "reasonable time" during which his rights are "scrupulously" honored.  

In Roberson, the government argued that the issue was similar to that which confronted the Court the previous year in Connecticut v. Barrett. There the defendant, after being given his Miranda rights while in custody, indicated he would speak to the police but would not give a written statement without counsel. The Barrett Court held that the defendant's oral statement was admissible because he had the right to make a limited waiver of his right to counsel. The government argued in Roberson that the defendant in that case also made a limited waiver, this time to questioning involving only the drug case. The Court held that, as a matter of fact, the case was distinguishable from Barrett because Roberson said he "wanted a lawyer before answering any questions." That may be, but the Court went on to hold that Barrett was distinguishable as a matter of law as well. Implicitly then, even if Roberson had said he wanted counsel just for the drug case, the police still would be barred from initiating questioning of him about the murder case because that too would be seen as yielding to

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84 What constitutes the scrupulous honoring of a suspect's rights after he invoked his Miranda right to remain silent is far from a bright line. As Justice Sotomayor wrote recently, "as we have previously recognized, Mosley itself does not offer clear guidance to police about when and how interrogation may continue after a suspect invokes his rights." Berghuis v. Thompkins, 130 S. Ct. 2250, 2276 (2010) (Sotomayor, J., dissenting); see also infra note 294 (setting forth cases showing inconsistency regarding the application of the Mosley factors).
85 Id. at 683; Conn. v. Barrett, 479 U.S. 523 (1986).
86 Barrett, 479 U.S. at 525.
87 Id. at 529.
88 Roberson, 486 U.S. at 683.
89 Id.
90 Id. (stating that, as a matter of law, "the presumption raised by a suspect's request for counsel—that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance—does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation.").
the pressure of the custodial setting. This suggests that while a defendant who says unconditionally that he wants to remain silent can be re-interrogated, one who imposes at least some conditions on the exercise of his right to counsel cannot be re-interrogated even if those conditions are met by the police. To avoid such an anomaly, the invocation of either right should be treated in the same manner.

The other reason offered by the Court in support of its decision in Roberson regarding invocation of the right to counsel also invites application to invocation of the right to silence. The Court rejected the government’s argument that a fresh set of Miranda warnings before the re-interrogation of the defendant after he had previously invoked his right to counsel would “‘reassure’ the suspect that his rights have remained untrammeled.”\(^91\) It reasoned that the defendant had been denied his request for counsel for three days, hardly an environment designed to reassure him that his rights were being honored.\(^92\) While this reason seems to apply primarily to invocation of the counsel,\(^93\) what the Court said immediately thereafter should apply to invocation of the right to silence as well. The Court wrote, “there is a serious risk that mere repetition of Miranda warnings would not overcome the presumption of coercion that is created by prolonged police custody.”\(^94\) In Mosley, however, the Court held that the repetition of Miranda warnings after even prolonged custody (apparently the more prolonged the

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\(^91\) Id. at 686.
\(^92\) Id.
\(^93\) See id. One could argue, however, that any police attempt to re-interrogate a suspect in custody who has previously insisted on her right to remain silent is hardly designed to assure the suspect that her rights are being honored either.
\(^94\) Roberson, 486 U.S. at 686.
better to prevent badgering\textsuperscript{95}), plays a role in assuring that the re-interrogation of a defendant after he invokes his right to silence is not coercive.\textsuperscript{96}

Now fully invested in the in the distinction it created regarding re-interrogation of the suspect who invokes counsel as opposed to the one who invokes silence, the Court went all in with its decision in \textit{Minnick v. Mississippi}.\textsuperscript{97} In \textit{Minnick}, the Court held that the fact that after he requested counsel, the police allowed Minnick to speak with his lawyer and that he did so on “two or three occasions” was not enough to make his subsequent statement compliant with \textit{Edwards}.\textsuperscript{98}

The facts of Minnick are interesting because, unlike those of Edwards and Roberson, they seem to demonstrate a situation in which the police affirmatively honored the defendant’s request for counsel. After making certain admissions regarding a murder case, Minnick told the FBI interrogators to “come back Monday when I have a lawyer” and that he would make a more complete statement when his lawyer was present.\textsuperscript{99} A lawyer was appointed for Minnick and he spoke with the lawyer on several occasions.\textsuperscript{100} On the Monday referred to by Minnick above, 3 days after the invocation of his right to counsel, a local sheriff questioned Minnick and obtained a confession. Minnick challenged the admission of this latter confession, claiming his right

\textsuperscript{95} \textit{See Mosley}, 423 U.S. at 102. This is because in \textit{Mosley}, the Court held that the longer the period of time between when the suspect invokes his right to silence and the attempt by the police to re-interrogate him, the more the suspect’s rights were scrupulously honored. \textit{See Id}. However, it is arguable that the longer time the suspect remains in police custody, isolated from friends and family, the more susceptible he will be to having his resistance to speaking with the police worn down. Christopher S. Thrutchley, \textit{Minnick v. Mississippi: Rationale of Right to Counsel Necessitates Reversal of Michigan v. Mosley’s Right to Silence Ruling}, 27 TULSA L.J. 181 (1991); \textit{see also Strauss, supra note 60}, at 401 (discussing how in the right to counsel context, a longer period of custody may increase the coercion on the suspect).

\textsuperscript{96} \textit{Mosley}, 423 U.S. at 106.

\textsuperscript{97} \textit{Minnick}, 498 U.S. 146.

\textsuperscript{98} \textit{Id}.

\textsuperscript{99} \textit{Id}. at 148-49.

\textsuperscript{100} \textit{Id}. at 149.
to be free from police initiated re-interrogation after invocation of his right to counsel had been violated. The Court ruled in his favor, concluding that even speaking with counsel does not free the government of the requirement that counsel be present during such re-interrogations.\footnote{101}

As it had done with the language of \textit{Miranda} in \textit{Mosley} and \textit{Edwards}, the Court in \textit{Minnick} made an interesting choice of what words from previous opinions to take literally and which to view more expansively. At the outset of its opinion in \textit{Minnick}, the Court referred to the holding in \textit{Edwards} that after an invocation of the right to counsel, police may not initiate re-interrogation of the suspect “until counsel has been made available to him.”\footnote{102} Counsel had not only been “made available” to Minnick, but Minnick had exercised this right by speaking with his lawyer on two or three occasions.\footnote{103} Thus, according to Mississippi’s highest court, \textit{Edwards} had been complied with.\footnote{104} The Supreme Court, however, interpreted language it had written before \textit{Edwards} and after \textit{Edwards} as indicating that the language cited above from \textit{Edwards} apparently did not mean what it said. It quoted from \textit{Miranda}’s prohibition on re-interrogating a suspect who has invoked his right to counsel “until an attorney is present.”\footnote{105} The Court, however, neglected to point out that two paragraphs later, the \textit{Miranda} Court stated, “if the interrogation continues without an attorney, a heavy burden rests on the government to demonstrate the defendant knowingly and intelligently waives his privilege against self incrimination and his right to retained or appointed counsel.”\footnote{106}

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\textsuperscript{101} \textit{Id.} at 153.
\textsuperscript{102} \textit{Id.} at 148.
\textsuperscript{103} \textit{See id.} at 149.
\textsuperscript{104} \textit{Id.} at 150.
\textsuperscript{105} \textit{Id.} at 152 (quoting \textit{Miranda}, 384 U.S. at 474).
\textsuperscript{106} \textit{Miranda}, 384 U.S. at 475.
Thus the *Miranda* Court envisioned possible police re-interrogation of a defendant who invokes his right to counsel, although requiring the government to meet a heavy burden in showing his change of mind was valid.

The *Minnick* Court then quoted from three of its post-*Edwards* opinions in which the Court had referred to the protection of *Edwards* as existing unless counsel is present during re-interrogation following invocation of the right to counsel.\(^{107}\) In none of those three cases, however, had counsel been appointed for the defendants nor had they consulted with counsel, as had happened in *Minnick*.\(^ {108}\) In fact those three cases had nothing to do with the issue of whether consulting with counsel satisfied the *Edwards* requirement, so it is questionable whether the Court’s description of that aspect of the previous holdings should be used to negate the clear language of *Edwards*.\(^ {109}\) Still the Court conceded that until its decision in *Minnick*, there were “ambiguities” on this point in the previous decisions of the Court.\(^ {110}\) Given these ambiguities, the *Minnick* Court rightly looked to the pragmatic meaning of the *Edwards* protection to determine if its requirement protecting suspects was honored in this case.

The first evidence that the *Miranda* protection was violated in this case according to the Court was that Minnick had testified that although he resisted, his jailers told him

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\(^{107}\) *Minnick*, 498 U.S. at 152-53.

\(^{108}\) Id. at 152-53. (citing Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983); Roberson, 486 U.S. at 680; Shea v. Louisiana, 470 U.S. 51, 52 (1985)). The significance of Minnick’s having actually conferred with his counsel should be to “reinforce the suspect” in his decision not to speak and therefore make the risk of coercion no greater for Minnick than for a suspect who invokes his right to remain silent. Dripps *supra* note 32, at 16.

\(^{109}\) *Minnick*, 498 U.S. at 496 (Scalia, J., dissenting) (stating that the purpose of the *Edwards* protection is to ensure that the Defendant can consult with his attorney and therefore be aware of his rights after requesting counsel as he did here).

\(^{110}\) Id. at 153.
not once, but twice, he had to speak to the government interrogators.\textsuperscript{111} If this testimony of the defendant were deemed credible and it was combined with Minnick’s refusal to sign a waiver form, it could have formed the basis for an opinion that Minnick’s confession violated \textit{Miranda} without having to stretch the \textit{Edwards} language to get there. Instead the Court said this was an example of why mere consultation with counsel was inadequate to protect defendants who had previously invoked their right to counsel.\textsuperscript{112} The Court speculated that the actions above might show that Minnick was confused about the admissibility of any statements he would make to the police, and the presence of counsel during questioning could have clarified any such confusion.\textsuperscript{113} If the Court wished to speculate here, a far more likely scenario would be that during the several conversations Minnick had with his attorney after invoking his right to counsel, his attorney informed him quite definitively of his right not to answer any questions.\textsuperscript{114} In fact, it could reasonably be said that any attorney not offering such advice in Minnick’s situation would be incompetent.\textsuperscript{115} Thus it was likely that Minnick received the type of protection from counsel envisioned in \textit{Edwards}.

\textsuperscript{111} \textit{Id.} at 148-49. On two different occasions, Minnick was told that he “had to go [to the interview] or else” and that he would “have to talk” to law enforcement officials. \textit{Id.}

\textsuperscript{112} \textit{Id.} at 153-54.

\textsuperscript{113} \textit{Id.} at 154.

\textsuperscript{114} \textit{Id.} at 157 (Scalia, J., dissenting) (citing App.46-7) (noting that, in fact, Minnick testified that his attorney did advise him “not to talk to nobody and not to say no waivers.”).

\textsuperscript{115} \textit{Id.} at 156 (Scalia, J., dissenting). In fact, Minnick testified that his attorney did advise him of his right not to answer any questions. \textit{Id.} In the words of one commentator, “[a]s the Court has repeatedly noted ‘any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.’” Barton, \textit{supra} note 38, at 487, n.292 (quoting Escobedo v. Illinois, 378 U.S. 478, 488 (1964); Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring)); \textit{see also} Moran v. Burbine, 475 U.S. 412, 436 n.5 (1986) (Stevens, J., dissenting) (quoting same)). Barton also noted that the very first thing any lawyer summoned to a police station by a \textit{Miranda} request will do is find out what the client has already said and strongly advise the client to say nothing further. “ Barton, \textit{supra} note 38, n.292.
The Court found additional justification for its holding in *Minnick* from the need to keep application of the *Edwards* protection “clear and unequivocal.” In this regard, the Court noted that even if the *Edwards* protection was said to have been satisfied by the kinds of consultation with counsel that occurred here, it was undisputed that the protection would arise anew should the defendant again invoke his right to counsel. According to the Court, this would cause the *Edwards* protection “to pass in and out of existence multiple times.” The Court then asserted that “vagaries of this sort spread confusion through the justice system and lead to a consequent loss of respect for the underlying constitutional principle.”

This assertion by the Court is well taken and begs the question of why the same principle is not applied when the defendant invokes his right to silence. Although *Mosley* made clear that such defendants can be re-interrogated if their right to silence is scrupulously honored, it is undisputed in that situation as well that at any time during the re-interrogation the defendant could again invoke his right to silence and the questioning would have to cease. This would lead to precisely the same situation criticized so severely by the Court above. The *Mosley* protection in such a situation could pass in and out of existence multiple times. Take a situation in which a defendant in a custodial interrogation environment invokes his right to silence. The police scrupulously honor the right by immediately ceasing their questioning, wait a reasonable

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116 *Id.* at 146.
117 *Id.* at 154.
118 *Id. At 146.*
119 *Id.* at 154-55.
120 See *Mosley*, 423 U.S. at 106-07.
121 See supra notes 116-19 and accompanying text.
time (itself a vague standard) and issue a fresh set of *Miranda* warnings.\textsuperscript{122} The police then re-interrogate the defendant as permitted under *Mosley*. The defendant begins responding and then again asserts his right to silence.\textsuperscript{123} Once again the police must honor the invocation but can adhere to the *Mosley* requirements and come back yet again to re-interrogate the defendant. This would lead the *Mosley* protection “to pass in and out of existence many times” and warrant the same type of criticism from a consistent Supreme Court.\textsuperscript{124}

The Court in *Minnick* reasoned that the confusion it described above is heightened by the imprecise meaning of consultation itself.\textsuperscript{125} One example it offered related to the length of time the consultation would have to be to satisfy the standard that the government proposed. Would a “hurried interchange”\textsuperscript{126} between counsel and client be deemed sufficient or would there have to be a “lengthy in-person conference.”\textsuperscript{127} Again, this is a fair question to ask, and again the parallel to a *Mosley* situation is inescapable. How much time after invocation of the right to silence may the police come back and re-interrogate the defendant while still being said to have “scrupulously” observed his right? In *Mosley* that time period was two hours.\textsuperscript{128} In

\begin{footnotes}
\item[122] See *Mosley*, 423 U.S. at 106-07; see also Robinson v. Attorney Gen. of State of Kansas, 28 F. App’x. 849, 853 (10th Cir. 2001) (holding that a break of one hour between the invocation of the right to silence and the subsequent interrogation was sufficient); United States v. Thompson, 866 F.2d 268, 271-72 (8th Cir. 1989) (holding that a break of 30 minutes was a reasonable period of time, after which law enforcement officers could re-interrogate the Defendant); United States v. Udey, 748 F.2d 1231, 1241-42 (8th Cir. 1984) (holding that six hours was a reasonable period of time under *Mosley*).
\item[123] Id. at 107.
\item[124] See *Minnick*, 498 U.S. at 146.
\item[125] Id. at 155.
\item[126] Id.
\item[127] Id.
\item[128] *Mosley*, 423 U.S. 96.
\end{footnotes}
subsequent cases time periods as short as 10 or 30 minutes\textsuperscript{129} have been found to be acceptable. How many times may the police come back after the defendant’s assertion and reassertion of his right to silence?\textsuperscript{130} The same types of confusion and ambiguities that would be present according to the Court if consultation with counsel was deemed sufficient to satisfy the \textit{Edwards} protection are present as well in the approach the Court adopted in \textit{Mosley} regarding re-interrogation after invocation of the right to silence.

Justice Scalia’s dissent takes the position that there is no significant distinction either constitutional or practical between the protection the defendant receives from consultation with counsel and having counsel present during the re-interrogation.\textsuperscript{131}

While he has been a harsh critic of the holdings in \textit{Edwards} and even \textit{Miranda} for some reasons that many take issue with,\textsuperscript{132} it is noteworthy to see Scalia’s agreement with

\textsuperscript{129} See \textit{Lanosa v. Frank}, 2007 WL 2746839 (D. Haw. Sept. 17, 2007) \textit{affd}, 304 F. App’x. 565 (9th Cir. 2008) (holding police attempt to re-interrogate the Defendant 10 minutes after he had invoked his right to silence did not violate Fifth Amendment); \textit{United States v. Hsu}, 852 F.2d 407 (9th Cir. 1988) (holding Defendant’s Fifth Amendment rights were not violated when law enforcement officer resumed questioning approximately 30 minutes after defendant had invoked his right to remain silent); \textit{United States v. Thompson}, 866 F.2d 268, 271-72 (8th Cir. 1989) (holding same); \textit{Stock v. State}, 191 P.3d 153, 161 (Alaska Ct. App. 2008) (holding same).

\textsuperscript{130} See, e.g., \textit{infra} notes 197-205 (discussing Grant).

\textsuperscript{131} \textit{Minnick}, 498 U.S. at 156-67 (Scalia, J., dissenting).


Justice Scalia stated,

\textbf{The Edwards rule is premised on an (already tenuous) assumption about the suspect's psychological state, and when the event of consultation renders that assumption invalid the rule should no longer apply. One searching for ironies in the state of our law should consider, first, the irony created by Edwards itself: The suspect in custody who says categorically "I do not wish to discuss this matter" can be asked to change his mind; but if he should say, more tentatively, "I do not think I should discuss this matter without my attorney present" he can no longer be approached.…. Today's extension of the Edwards prohibition is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement. This newest tower, according to the Court, is needed to avoid "inconsistency with [the] purpose" of Edwards' prophylactic rule, which was needed to protect Miranda's prophylactic right to have counsel present, which was needed to protect the right against compelled self-incrimination found (at last!) in the Constitution. Id. at 165-66 (emphasis in original).}
such a staunch defender of *Miranda* as Yale Kamisar when it comes to the distinction between application of the rights to silence and counsel. In his dissent in *Minnick*, Justice Scalia writes:

> Drawing a distinction between police-initiated inquiry before consultation with counsel and police-initiated inquiry after consultation with counsel is assuredly more reasonable than other distinctions Edwards has already led us into-*such as the distinction between police-initiated inquiry after assertion of the Miranda right to remain silent, and police-initiated inquiry after assertion of the Miranda right to counsel.*

While on one hand the Court created and strengthened the protection defendants receive once they have invoked the right to counsel during custodial interrogation, on the other hand the Court made it difficult for defendants to take advantage of the *Edwards* protection. In both *Oregon v. Bradshaw* and *Davis v. United States*, the Court set up significant barriers to defendants seeking to suppress statements they claimed resulted from violations of *Edwards*. Each of these five-person majority opinions drew strong opposition from four justices on the court and substantial criticism from commentators.

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134 *Minnick*, 498 U.S. at 164 (Scalia, J., dissenting (offering Yale Kamisar’s statement, “[E]ither Mosley was wrongly decided or Edwards was”) (emphasis added).
137 See, e.g., Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, 17 WM. & MARY BILL RTS. J. 773, 794 (2009) (criticizing *Davis* and arguing “[i]t is the Court’s obligation to clarify the limits of the Miranda right to silence so that even ambiguous invocations of the right can be understood as well as possible by the police.”); Jane M. Faulkner, *So You Kinda, Sorta, Think You Might Need A Lawyer?: Ambiguous Requests for Counsel After Davis v. United States*, 49 ARK. L. REV.
After being given his Miranda rights concerning the investigation of a homicide investigation, Bradshaw denied active involvement in the crime and then invoked his right to counsel. As he was about to be transported from the police station to the local jail, Bradshaw asked a police officer, “Well, what is going to happen to me now?” After some further discussion between the two, Bradshaw agreed to take a polygraph. Upon being told that he had failed the polygraph, Bradshaw made an inculpatory statement. Bradshaw challenged that statement, claiming it was elicited in violation of his right to counsel as enumerated in Miranda and Edwards.

The issue before the Supreme Court was whether Bradshaw’s comment to the officer inquiring what would happen to him constituted an initiation and, therefore, allowed the police to interrogate him under Edwards. The Court, in overturning the opinion of the Oregon Court of Appeals, held that Bradshaw’s comment “evinced a willingness and a desire for a generalized discussion about the investigation” and

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275 (1996) (concluding that the Davis decision left open the issue of ambiguity and will result in a flood of litigation focusing on the exact language and actions a defendant must use to invoke the right to counsel); Charles D. Weisselberg, Mourning Miranda, 96 CAL. L. REV. 1519, 1588 (2008) (arguing that Davis undermines the assumption in Miranda that questioning will only take place with suspects who have decided they are willing to speak, or that suspects can easily stop questioning once it has started); Kit Kinports, The Supreme Court’s Love-Hate Relationship with Miranda, 101 J. CRIM. L. & CRIMINOLOGY 375, 430 (2011) (“Bradshaw’s support for the notion that Miranda created three classifications of suspects cannot be reconciled with Thompkins's concept of pre-waiver interrogation.”); Allen F. Loucks, Initiation: The Emperor’s New Test, 53 GEO. WASH. L. REV. 608, 609 (1985) (“Adoption of the Bradshaw plurality’s reasoning by a majority of the Court would overrule Edwards sub silentio and present the spectacle, perhaps unique in the law of criminal procedure, of the Court creating rights devoid of substance.”).

138 Bradshaw, 462 U.S. at 1041-42.
139 Id. at 1042.
140 Id.
141 Id. Bradshaw recanted his earlier story and admitted that he had been driving the vehicle in which the victim was killed, that he had consumed a considerable amount of alcohol, and that he had passed out while driving. Id.
142 Id. at 1042-43. Bradshaw’s motion to suppress the statement was denied during a bench trial, but the Oregon Court of Appeals reversed, holding that the statements had been obtained in violation of Bradshaw’s Fifth Amendment rights, and relying on the decision in Edwards. Id.
143 Id. at 1041.
therefore constituted an initiation under *Edwards*. The Oregon court had held that Bradshaw’s comment, which came only minutes after he had asked for an attorney, was “a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination.” In other words, Bradshaw wanted to know where he was headed and had not intended to initiate a discussion, even generally, about his involvement in the crime.

Speaking for the four justices in dissent, Justice Marshall took no issue with the majority’s definition of initiation but thought it extremely unlikely that Bradshaw was looking for such a discussion of his crime. Marshall wrote that, “If respondent’s question had been posed by Jean-Paul Sartre before a class of philosophy students, it might well have evinced a desire for a ‘generalized’ discussion. But under the circumstances of this case, it is plain that respondent’s only ‘desire’ was to find out where the police were going to take him.” Justice Marshall then noted that custody deprives one of control over his surroundings, so it is especially likely that a question such as the one posed by Bradshaw would relate to the immediate change of those surroundings.

It is interesting to note that in rendering its decision that Bradshaw’s question to the officer constituted an initiation under *Edwards*, the Court conceded that the question itself was ambiguous. Apparently the Court chose not to interpret this ambiguity in

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144 Id. at 1045-46.
147 Id.
148 Id. (stating that the “very essence of custody is loss of control over one’s freedom of movement” and that Bradshaw’s question was a natural response to his being in custody).
149 Id. at 1045.
favor of the defendant.\textsuperscript{150} In terms of interpreting ambiguity against the defendant when it comes to gaining access to the protections of \textit{Edwards} however, it is the Court’s opinion in \textit{Davis v. United States} that is most noteworthy.

Davis was taken into custody by naval investigators, given the military equivalent of his \textit{Miranda} rights and agreed to talk to the officers.\textsuperscript{151} Ninety minutes into the questioning, Davis said, “Maybe I should talk to a lawyer.”\textsuperscript{152} The investigators then attempted to clarify whether Davis was invoking his right to counsel.\textsuperscript{153} They told Davis that if he wanted a lawyer they would stop the questioning and not continue unless they could clarify whether he was invoking his right.\textsuperscript{154} At that point, Davis said he did not want a lawyer.\textsuperscript{155} The officers then took a short break and re-advised the defendant of his right to remain silent and right to counsel before questioning him again.\textsuperscript{156} Davis later argued that all statements he made after what he claimed was invocation of his right to counsel should be suppressed under \textit{Edwards}.

The U.S. Court of Military Appeals had denied the defendant’s appeal, holding that the naval investigators did what they should have in the face of an ambiguous request for counsel.\textsuperscript{157}

\textsuperscript{150} Id. at 1045-46 (“Although ambiguous, the respondent’s question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship.”).
\textsuperscript{151} Davis, 512 U.S. at 454-55 (“As required by military law, the agents advised [Davis] that he was a suspect in the killing, that he was not required to make a statement, that any statement could be used against him at a trial by court-martial, and that he was entitled to speak with an attorney and have an attorney present during questioning.”).
\textsuperscript{152} Id. at 455.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
investigators asked narrow questions designed to clarify whether what Davis said was an invocation of the right to counsel.\textsuperscript{159}

In assessing whether words used by suspects in custodial interrogation environments constituted invocation of the right to counsel and thereby engaged the protection of \textit{Edwards}, the Court took an all-or-nothing approach. The Court held that only an unambiguous request for an attorney invoked the protections of \textit{Edwards}.\textsuperscript{160} The police need not stop questioning such a suspect because he might have requested counsel, but only if he actually made such a request.\textsuperscript{161} Numerous commentators have observed that those who are young, inexperienced with the criminal justice system, less educated or inarticulate are severely disadvantaged by requiring that invocation of the right to counsel be unambiguous.\textsuperscript{162} When such people are under the extreme pressures that attend custodial interrogation, it is even more likely that requests for counsel may not be expressed with absolute certainty.\textsuperscript{163} The Court anticipated such

\begin{itemize}
\item \textsuperscript{159} \textit{Id.} at 341-42.
\item \textsuperscript{160} \textit{Id.} at 459. But, as one commentator observed, “[F]ailure to accord invocation status to any but the clearest claims to counsel seems equally misguided. Too strict a standard would probably exclude many instances of conduct meant to be counsel assertions and, consequently, would risk constitutional losses in many cases that merit heightened protection.” Tomkovicz, \textit{supra} note 30 at 1011.
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{See e.g.}, Richard Rogers, Jill E. Rogstad, Nathan D. Gillard et. al., “\textit{Everyone Knows Their Miranda Rights”: Implicit Assumptions and Countervailing Evidence,} 16 PSYCHOL. PUB. POL’Y & L. 300, 315-16 (2010) (noting that in a study of 149 previously arrested defendants, 69.1% of defendants stated that they believed that “I want a lawyer” means the same thing as saying “I might want a lawyer.”); Marcy Strauss, \textit{Understanding Davis v. United States,} 40 Loy. L.A. L. Rev. 1011, 1012-13 (2007) (concluding that \textit{Davis} will eviscerate the Miranda guarantees, particularly for women and minorities who tend not to speak in clear, declarative terms); Charles D. Weisselberg, \textit{Mourning Miranda,} 96 Cal. L. Rev. 1519, 1570 (2008) (Noting that mentally disabled subjects in a study understood only about 20% of the critical words comprising the \textit{Miranda} vocabulary and that their ability to understand the \textit{Miranda} warnings was likewise severely impaired).
\item \textsuperscript{163} In this regard, one commentator wrote:
\end{itemize}
criticism by conceding that such suspects may genuinely want counsel but after this
decision may not be expressing it with sufficient clarity to end the interrogation.\textsuperscript{164} The
Court’s response to this was twofold. First it said that the Miranda warnings themselves
provide the primary means of assuring that any statement of the defendant is not
violative of his rights, and that to avail themselves of the extra protection of \textit{Edwards},
the defendant has to assert that right unambiguously.\textsuperscript{165} Second, the Court reasoned
that allowing an ambiguous request for counsel to trigger the protection of Edwards
would take away from the “clarity and ease of application” of the bright line \textit{Edwards}
rule.\textsuperscript{166}

Whether the warnings themselves are the primary protection for suspects facing
custodial interrogation hardly responds to the assertion that it is profoundly unfair to
take advantage of a suspect who may want to assert her right to counsel but whose lack
of education, language skills or some other impediment makes her unlikely to do so with
the definitiveness required by the Court in \textit{Davis}. As to the Court’s second response,
cases subsequent to \textit{Davis} show how the approach the Court adopted there hardly

\begin{quote}
Equivocal assertions often indicate some susceptibility to the pressure of custodial
interrogation or some interest in securing an advocate. An approach that demands clarity
and ignores anything less would deprive individuals of the adequate opportunities for
decision that are essential to \textit{Miranda} and \textit{Massiah} protections. Such treatment of
potential invocations could undermine \textit{Miranda}’s goal of dissipating compulsion by
permitting refuge in counsel.
\end{quote}

\textsuperscript{164} \textit{Davis}, 512 U.S. at 460.
\textsuperscript{165} \textit{Id}. at 461.
\textsuperscript{166} \textit{Id}.
created clarity or ease of application with respect to whether a suspect is invoking the right to counsel.\textsuperscript{167}

Whatever one thinks of the Court's conclusion about the significance of a suspect's ambiguous invocation of the right to counsel, it is far harder to justify the Court's cursory response to what the police have to do once a defendant makes an ambiguous request for counsel. In \textit{Davis}, the investigators stopped questioning about the crime until they clarified Davis' ambiguous request.\textsuperscript{168} Only after they reminded Davis that if he wanted an attorney they would stop the questioning and Davis replied affirmatively that he did not want a lawyer did the investigators continue questioning him.\textsuperscript{169} It was the investigators' clarification of Davis' initial request for counsel that led the United States Court of Military Appeals to affirm the denial of Davis' motion to

\textsuperscript{167} See, \textit{e.g.} Kapoci v. State, 668 P.2d 1157, 1159 (Okla. Crim. App. 1983), \textit{cert. denied}, 464 U.S. 1070 (1984) (holding that the statement "I'm thinking I will need a lawyer" was not a request for counsel); Clausen v. State, 682 S.W.2d 328, 330-31 (Tex. App. 1984), \textit{cert. denied}, 475 U.S. 1021 (1986) (holding that appellant's statement to interrogating officer that he was trying to contact an attorney was not an invocation of the right to counsel); Lord v. Duckworth, 29 F.3d 1216 (7th Cir. 1994) (holding that Defendant's statement during questioning that "I can't afford a lawyer but is there anyway I can get one?" was not a "clear request" for counsel which would have required immediate cessation of questioning); \textit{contra} United States v. Alamilla-Hernandez, 654 F. Supp. 2d 1004, 1010 (D. Neb. 2009) (holding that the Defendant's statement "I cannot afford an attorney" was a clear invocation of his right to counsel); \textit{Abela v. Martin}, 380 F.3d 915, 919 (6th Cir. 2004) (holding that Defendant's statement, "maybe I should talk to an attorney by the name of William Evans" was sufficient to invoke his right to counsel); McDaniel v. Com., 506 S.E.2d 21 (Va. App. 1998) \textit{on reh'g en banc}, 30 Va. App. 602, 518 S.E.2d 851 (1999) (holding "I think I would rather have an attorney here to speak for me," was an unambiguous invocation of the right to counsel).

\textsuperscript{168} \textit{Davis}, 512 U.S. at 455. After Davis stated "Maybe I should talk to a lawyer," the interview proceeded as follows:

[We] made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, "No, I'm not asking for a lawyer," and then he continued on, and said, "No, I don't want a lawyer," and then he said he didn't kill the guy and he said that he was the type of person that if he did kill the guy, he'd have to tell someone about it."


\textsuperscript{169} \textit{Id.}
suppress his statement.\textsuperscript{170} While referring to this clarification of an ambiguous request for counsel by the investigators as “good police practice,” the Supreme Court held that such a clarification is unnecessary.\textsuperscript{171} The Court gave no reason for this other than there was no requirement for such a clarification. In other words, when a suspect in custody says, “I might want an attorney” or something similar, the police may completely ignore these words and continue with their questioning.\textsuperscript{172}

The failure of the Court in \textit{Davis} to require the “good police practice” of clarifying an ambiguous request for counsel before the police may resume questioning a suspect in custody is, as Justice Souter said in his concurring opinion, unfair as well as unwise.\textsuperscript{173} While the reason why the Court would render such a harsh decision can never be totally known, it is worth observing that the Court chose to refer, as it had in previous cases, to the “\textit{rigid} prophylactic rule” of \textit{Edwards}.\textsuperscript{174} Would the Court have rendered a decision like the one in \textit{Davis} had it not embarked on the path it had begun with \textit{Edwards} and continued with \textit{Roberson} and \textit{Minnick} toward what it came to regard as a “\textit{rigid} prophylactic rule” is, of course, speculation. It is fair to ask, however, if faced with the extreme reach of the \textit{Edwards} protections, whether the Court in \textit{Bradshaw} and \textit{Davis} determined to make it difficult for defendants to grasp onto such extensive protections.\textsuperscript{175} As one commentator noted about the effect of Edwards and its progeny,

\begin{itemize}
  \item \textsuperscript{170} United States v. Davis, 36 M.J. at 342.
  \item \textsuperscript{171} \textit{Davis}, 512 U.S. at 461.
  \item \textsuperscript{172} Commenting on such a situation, Professor James Tomkovicz wrote that, “an approach that allows agents to disregard completely every unclear assertion seems both unnecessarily rigid and oblivious to the reality that decision making is not always an instantaneous, all-or-nothing process.” Tomkovicz, supra note 30 at 1011-12.
  \item \textsuperscript{173} \textit{Davis}, 512 U.S. at 466-67 (Souter, J., dissenting).
  \item \textsuperscript{174} \textit{Id.} at 458 (citing \textit{Smith v. Illinois}, 469 U.S. 91, 95 (1984); \textit{Fare v. Michael C.}, 442 U.S. 707, 719 (1979) (emphasis added).
  \item \textsuperscript{175} While \textit{Bradshaw} (1983) was decided before the Court’s decisions in \textit{Roberson} (1988), and \textit{Minnick} (1990), it still followed creation of the special initiation protection in \textit{Edwards} and the characterization of it
“the breathtaking scope of the Edwards presumption, extending to questioning by other jurisdictions, encompassing the discussion of unrelated matters, and possessing no articulated durational limitation, threatens to pressure courts to discharge the mandate of Edwards in a begrudging and potentially undermining manner. A defendant may be more likely to be seen as having insufficiently invoked his right to counsel during custodial interrogation.”

176

IV. THE MEANING OF A SUSPECT’S INVOCATION OF MIRANDA RIGHTS

The previous sections examined the Supreme Court’s tortured interpretation of Miranda’s landmark Fifth Amendment holding regarding the distinction between a suspect’s invocation of her right to silence and her right to counsel during custodial interrogation. In those sections I disputed the legal basis for the distinction drawn by the Court’s interpretation of Miranda and the Fifth Amendment itself. This section will address the likelihood that a suspect in custody means something different when he invokes one right as opposed to the other.

The police are required to inform suspects in custodial interrogation of their rights to silence and counsel because, as the Court in Miranda held, it is the only way to break the coercive atmosphere that attends such questioning. The Court in cases subsequent to Miranda has held that when a suspect invokes his right to counsel, he is indicating he as rigid in Fare. Davis (1995) was handed down after the Court expanded the Edwards protection in Roberson and Minnick.

is utterly helpless to respond to police questioning ever without the presence of counsel.\textsuperscript{177} Invoking the right to silence, according to the Court, means only that he wishes not to answer questions at that particular point in time.\textsuperscript{178} Apparently this is true even if the suspect’s invocation of counsel is, “I don’t wish to talk until after I consult with counsel”\textsuperscript{179} or if his invocation of the right to silence is, “I don’t ever want to speak with the police.”\textsuperscript{180} Given this, it is hard to maintain that the distinction drawn by the Court is merely an attempt to honor the defendant’s choice.\textsuperscript{181}

\begin{flushright}
\textsuperscript{177} See, e.g., Roberson, 486 U.S. at 681 (noting that a suspect invokes his right to counsel if he believes that he is not capable of undergoing questioning without advice of counsel)
\textsuperscript{178} See Strauss, supra note 60, at 385.
\textsuperscript{179} Minnick, 498 U.S. at 148-49.
\textsuperscript{180} Williams v. State, 257 S.W.3d 426, 433 (Tex. App. 2008) (holding that law enforcement officers could re-interrogate the Defendant even after he invoked his right to silence by stating “I want to terminate everything right now.”) (emphasis added).
\textsuperscript{181} One of the defenses of the dichotomy created between invocations of the right to silence and the right to counsel revolves around the idea that one purpose of Miranda was to give the suspect the choice as to whether to participate in custodial interrogation. \textit{See Miranda}, 384 U.S. at 458. The dichotomy is said to honor that purpose. Regarding honoring the suspect’s choice, it would seem that the Court could have it one of two ways. On one hand, the Court could hold that the police must discontinue all questioning of a suspect who invokes either his right to silence or counsel unless the suspect initiates re-interrogation. This position presumes that a suspect who has invoked one of his Miranda rights and then changes his mind about speaking when re-approached by the police is doing so not as a matter of free choice, but instead in response to the coercive environment of custodial interrogation. In the alternative, the Court could decide that if the police wait enough time after the suspect invokes a Miranda protection so as not to badger him, the police may attempt to interrogate him again. In such a situation, if the suspect changes his mind, the Court could view this as honoring his choice and allow such a statement to be used at the suspect’s trial.

The Court chose neither of these paths. Instead it distinguished invocation of the right to silence from the right to counsel because the later demonstrates the helplessness of the suspect to handle himself without the protection of counsel, whereas choosing to remain silent does not mean the suspect will choose to remain silent at future times. The suspect’s request for silence has been honored when the police stopped questioning, so they later may resume the questioning without having denied the suspect the choice he made when invoking his right to silence. The suspect saying he wanted an attorney, however, has not had his invocation honored or his choice respected if the police approach him again absent his having counsel. In summing up this position as to why invocations of silence and counsel are different one commentator observed that, “The request for a lawyer is different because it admits a structural disadvantage, the very disadvantage at the heart of Miranda’s desire for a level playing field that permits free choices in the interrogation room. In short, the suspect’s autonomy is undermined more when the right to counsel is ignored.” George C. Thomas III & Richard A. Leo, \textit{The Effects of Miranda v. Arizona: “Embedded” in Our National Culture?}, 29 CRIME & JUST. 203 (2002).

This explanation for why the application of Mosley/Edwards dichotomy to re-interrogation respects the suspect’s choice whether he invokes silence or counsel is highly debatable for several reasons. Regarding invocation of the right to counsel, the holding in \textit{Davis}, which permitted government agents to ignore ambiguous invocations of the right to counsel and therefore not have to clarify what the
It is important then to understand what, if any, real difference exists when the
custodial suspect invokes counsel rather than silence. It is the domination that
accompanies being removed from friends and family and placed in complete police
control, combined with the pressure placed on suspects to respond to police
questioning, that provides the compulsion necessary to trigger the protections of the
Fifth Amendment. In such a coercive situation, according to the Court, the suspect is
expressing a desire for completely different treatment when he invokes his right to
counsel than when he invokes his right to silence.

The Court asserts in Edwards and again in Roberson that a suspect who invokes
his right to counsel is manifesting his inability to deal with police questioning ever
without an attorney being present. This, according to the Court, is a different and
more permanent helplessness than that manifested by the suspect who invokes his
right to silence. The Court offers no support for the characterization it places on the
words of such a suspect. It is incumbent therefore to examine if such support exists
regarding the meaning of a suspect's invocation of the two rights.

suspect's actual choice was respecting whether he wanted counsel present, suggests that honoring the
suspect's choice is not at the heart of the Edwards protection. Regarding invocation of the right to silence,
that a suspect's expressed or implied choice not to speak with the police for longer than just the moment
that he invokes the right can be overcome by application of the factors enumerated in Mosley suggests
the same lack of concern for the suspect's choice here as well. Perhaps most profoundly, the
interpretations of Mosley by lower courts that have legitimated police re-approaching suspects in manners
that clearly demonstrate badgering and therefore nullify free choice is yet further evidence that real
freedom of choice is not served by the dichotomy. See infra notes 197-216 and accompanying text.
See also Strauss, supra note 60 at 385, wherein the author observes that if preserving choice is the goal,
"the results in Mosley and Edwards are likely irreconcilable."

182 See Shatzer, 130 S. Ct. at 1219 (citing Miranda, 384 U.S. at 456-67 (referring to the "inherently
compelling pressures" of custodial interrogation, the "incommunicado interrogation" in an "unfamiliar,"
"police-dominated atmosphere," and discussing psychological pressures "which work to undermine the
individual's will to resist and compel him to speak where he would not otherwise to so freely.").

183 Edwards, 451 U.S. 477; Roberson, 486 U.S. 675.
184 See generally id.
Several assumptions undergird the distinction the Court created here. The first assumption is that the suspect in this coercive environment is intending to say something different when he invokes silence than when he invokes counsel. Either invocation requires the police to stop their questioning. The defendant is aware of this because he is told that the questioning will resume only if he waives both rights. Thus he knows by claiming either right, he will achieve his immediate end which is to stop the questioning. It requires a leap of faith to believe a suspect in custodial interrogation means something different when invoking counsel as opposed to silence given his likely understanding that either will achieve his goal of preventing subsequent questioning. This is true for both the first time arrestee who may not be aware of his ability to stop questioning until he receives his warnings and for those more experienced with the criminal justice system who know that questioning will in fact cease if they invoke either right.

185 But see Strauss, supra note 60 at 385, wherein the author writes:

In essence, the justification for permitting reinterrogation when the suspect invokes the right to remain silent, but not when he invokes the right to counsel, is weak at best. In both cases, the subject is telling the police that he chooses not to cooperate or assist in the investigation. The accused is as emphatic when insisting he will not speak as when he declines to speak without his attorney.  

186 But, as Yale Kamisar has argued:

The average person has no idea that different procedural safeguards are triggered by saying “I want to see a lawyer,” (or “I don't want to say anything until I see a lawyer”) rather than “I don't want to say anything,” (or “I don't want to talk to you.”) If, after being advised both of his right to remain silent and his right to counsel, a suspect replies that he wants to remain silent, he may really be saying that he wants to remain silent until he sees a lawyer. Indeed, I would argue that if, immediately after being informed of his right to remain silent and his right to counsel, the suspect responds “I don't want to say anything,” he is invoking both rights.

It is useful to bear in mind that the legal ramifications of this invocation of the right to counsel have nothing to do with the defendant’s representation by counsel at trial or during other aspects of the adversarial process. That right is protected by the Sixth Amendment. The right to counsel protected under the Fifth Amendment, as identified in *Miranda*, deals only with custodial interrogation.\(^{187}\) Perhaps more important is that the suspect generally understands this reality (that is that the counsel right here pertains to the police questioning) even though he is unlikely to know the legal reason why. Some incarnations of the Miranda warnings say exactly that the suspect has the right to counsel before and during police questioning, others imply it in one way or another.\(^{188}\) With this knowledge in hand, the defendant likely knows that the invocation of either right will stop the questioning.

What the defendant is very unlikely to know, however, is at the heart of the second assumption that supports differential treatment of invocation of the rights to silence and counsel. Few suspects will know that an uncounseled suspect can be re-interrogated after he invokes silence and cannot be re-interrogated after invoking

\(^{187}\) See supra text accompanying notes 27-33; Barton, *supra* note 38, at 486.

\(^{188}\) While the warnings must contain the four essentials enumerated in Miranda, the Court has permitted nuanced different wordings of the warnings. See, e.g., California v. Prysock, 453 U.S. 355, 355-56 (1981) (holding that while the warnings must contain the four essential elements set forth in *Miranda*, the warnings need not be a virtual incantation of the precise language in *Miranda*, and different wordings of the warnings are permitted); *Duckworth v. Eagan*, 492 U.S. 195, 202-03 (1989) (holding that *Miranda* advisement need not be given in exact form described in *Miranda* decision and that it is enough that advisement reasonably conveys the *Miranda* rights to a suspect). Accordingly, different law enforcement authorities have used slightly different versions of the warnings. An example typical of many such versions is: “You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to be speak to an attorney, and to have an attorney present during any questioning. If you cannot afford a lawyer, one will be provided for you at government expense.” Charles Montado, *Miranda Warning, Reading Suspects Their Rights*, ABOUT.COM, http://crime.about.com/od/police/a/miranda_warning.htm.
counsel except if he initiates discussion of the crime. Unlike the Miranda requirement that a suspect in custody be told he has the right to stop all questioning by invoking silence or counsel, there is no requirement that a suspect be told the difference in invoking the two rights created by the holdings in Mosley and Edwards. It stretches credulity to think that a suspect is ever told of this distinction by the police. Without such knowledge, it is clear that the suspect’s decision regarding which Miranda right to invoke is not based on his desire to avoid re-interrogation in one instance and permit it later in the other. This realization leads to the conclusion that the Mosley/Edwards distinction does not exist to preserve the choice of the suspect regarding his submitting to later re-interrogation.

If the distinction the Court draws between invocations of the right to silence and counsel cannot be supported by the notion of honoring the choice of a suspect, what remains in support of this distinction is the idea that the suspect who invokes counsel is being badgered if the police initiate questioning of him again in the absence of counsel, but not being badgered if he is re-interrogated after invoking his right to silence. That it was the intent of Edwards to prohibit the badgering arising from uncounseled re-interrogation of suspects initiated by the police was made clear by the Court in several post-Edwards decisions. In Michigan v. Harvey, the Court wrote, “Edwards thus established another prophylactic rule designed to prevent police from badgering a
defendant into waiving his previously asserted *Miranda* rights.”¹⁹² In *Minnick*, the Court quoted this language approvingly and added, “The rule insures than any statement made in subsequent interrogation is not the result of coercive pressures.”¹⁹³ In *Roberson*, the Court asserted that once a suspect invokes his right to counsel, it is presumed that any subsequent waiver is the product of “inherently compelling pressures,”¹⁹⁴ and that post-invocation questioning, even 3 days later about a separate crime, “will surely exacerbate whatever compulsion to speak the suspect may be feeling.”¹⁹⁵

This may very well be true, but if so, there is no reason why that is not equally true of the suspect who has invoked his right to silence. Several commentators have noted that the risk of coercion for a suspect who invokes his right to silence while in custody is every bit as substantial as one who invokes the right to counsel.¹⁹⁶ A review of cases illustrates how suspects can be badgered into waiving their previously invoked right to silence and how the holding in Mosley does little to avoid this badgering.

In *Grant v. Warden*¹⁹⁷, the defendant was taken to the hospital for surgery.¹⁹⁸ The first interview began at 4:26 a.m., just after the surgery.¹⁹⁹ Detectives told Grant that they wanted to talk with him about his mother-in-law and attempted to advise the

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¹⁹² *Id.* at 350.
¹⁹⁴ *Roberson*, 486 U.S. at 681.
¹⁹⁵ *Id.* at 686.
¹⁹⁶ Wolfe, *supra* note 71, at 1180 (calling the distinction “illogical” and asserting that the risk of coercion is equal for both the right to silence and the right to counsel; Thomas, *supra* note 181 at 228 (arguing that the risk of compulsion is the same regardless of whether the defendant invokes the right to silence or the right to counsel).
¹⁹⁸ *Id.* at 73.
¹⁹⁹ *Id.* at 73-74.
defendant of his *Miranda* rights, but ended the interview because Grant was not coherent.\textsuperscript{200} When a second interview was attempted at 9:51 a.m., another detective explained to the Grant that he was investigating the case and advised Grant of his *Miranda* rights.\textsuperscript{201} Grant stated that his throat was sore and he did not want to talk. At 11:45 a.m., one of the detectives returned and again advised the defendant of his *Miranda* rights. Again, Grant responded that he did not want to talk because his throat was sore and indicated that he could not write because his hands were sore. The same detective returned at 1:42 p.m. that same day and administered a new set of *Miranda* warnings. The Defendant acknowledged his rights and the following conversation took place:

Detective: Okay. Now, having all those rights which I just explained to you in mind, do you wish to answer questions at this time?

Grant: No.

Detective: What's that?

Grant: No.

Detective: No?

Grant: (inaudible) answer any questions.

Detective: What's that?

Grant: I don't want to answer any questions.

Detective: You don't want to answer any questions?

Grant: No.

At 9:03 the next morning, after learning from Grant’s nurses that he had not been given pain medication since the previous afternoon, the detective again advised Grant of his rights, and this time Grant agreed to talk. The Court of Appeals for the First Circuit

\textsuperscript{200} *Id.* at 74.

\textsuperscript{201} *Id.*
upheld the state supreme court’s finding that the officers scrupulously honored the defendant’s right to silence. 202

After Grant expressed doubts about whether to continue the questioning during the 9:03 am interview, the Detective stated, “I'm not here twisting your arm or anything. You know there are certain things that we obviously . . . we obviously know . . . . You know that this is what we do for a living.” 203 Grant argued that the detective badgered him into waiving his right to remain silent. 204 In rejecting this argument, the First Circuit adopted the reasoning of the court below with respect to badgering:

In the matter before us, the record establishes that the police immediately ceased their questioning of Grant when he invoked his Miranda right to remain silent during the 1:42 p.m. interrogation. They did not speak to him through the remainder of the afternoon and evening, and did not return until 9:03 a.m. the following day. It is also clear that, when questioning did resume, Grant was given fresh Miranda warnings, which he acknowledged that he understood. The subject matter of the police questioning at 9:03 a.m. on the day after Grant invoked his Miranda right to remain silent was the same as it had been the previous day. Given these facts, we have no difficulty saying that two of the four factors militate in favor of a conclusion that Grant's invocation of his right to remain silent was scrupulously honored: (1) questioning ceased as soon as Grant invoked his right to remain silent without further badgering or pressure to speak, and (2) Grant was given fresh warnings before being questioned again. 205

In Jackson v. Dugger, 206 Jackson was arrested by the Florida Highway Patrol at 11:39 a.m. and invoked his right to remain silent after being given his Miranda warnings. 207 Forty-five minutes to an hour later, another detective arrived and advised

202 Id. at 80.
203 Id. at 74.
204 See id. at 76.
206 837 F.2d 1469 (11th Cir. 1988).
207 Id. at 1471.
Jackson of his *Miranda* rights.\(^{208}\) Three hours later, Jackson was again advised of his *Miranda* rights and again asserted his right to remain silent.\(^{209}\) In total, Dade County officials advised Jackson of his rights four more times over the next six hours. At 6:15 p.m., Jackson made a statement giving the location of the victim’s body. Jackson then indicated that he desired counsel, but law enforcement officials did not provide him with an attorney. Subsequently, Jackson gave a formal written confession. The state trial court concluded that the formal written confession was inadmissible but allowed all statements made prior to Jackson’s request for counsel. On appeal, the Court of Appeals for the Eleventh Circuit also found that Jackson’s right to silence was scrupulously honored.\(^{210}\) The court reasoned that because a significant period of time (six hours) passed between the first invocation of the right to remain silent and the time of the confession, Jackson’s right to silence was scrupulously honored.\(^{211}\) The court also noted that the repeated advisement of *Miranda* rights merely showed that the police were diligent in informing Jackson of his rights, not that the police were attempting to coerce Jackson into confessing.\(^{212}\)

In *Lanosa v. Frank*,\(^{213}\) the defendant was arrested while sitting in a stolen car. At 7:30 am the next morning, Lanosa was advised of his rights and given a *Miranda* waiver form. At 7:50 am Lanosa indicated on the form that he understood his rights, but said that he did not want to talk, and the interrogation was ended. After the Detective, Silva, stepped out of the room, he overheard Detective Lee discussing a separate

\(^{208}\) Id.
\(^{209}\) Id.
\(^{210}\) Id.
\(^{211}\) Id. at 1472.
\(^{212}\) Id.
investigation. Silva told Lee that Lanosa might fit the description of the suspect he was looking for related to multiple burglaries and sexual assaults.\textsuperscript{214} At 8:00 A.M., a mere ten minutes after the first interrogation, during which Lanosa invoked his right to silence, Lee moved Lanosa to another room and proceeded to interrogate him about the sexual assaults and burglaries. Detective Silva was also present during the second interrogation. Lee gave Lanos a new copy of the \textit{Miranda} waiver form and informed him of his \textit{Miranda} rights. At 8:12 A.M., Petitioner signed the second section indicating that he understood his rights, and at 8:40 A.M., Lanosa signed the waiver portion of the form. After he waived his rights at 8:40 A.M., Lanosa asked if he could return to his cell to think. The court regarded this request as another invocation of Lanosa’s right to silence. Lee granted that request and ended the second interrogation. At 10:40 A.M., a Detective Holokai brought Lanosa out of his cell in order to question him about another burglary. Before Holokai could begin questioning, Lee found the defendant and initiated a third interrogation. Lee showed Lanosa the copy of \textit{Miranda} rights form that he had signed and waived at 8:40 A.M., informed Lanosa of his \textit{Miranda} rights again, and asked if he was willing to talk. At 10:50 A.M., Lanosa made incriminating statements in response to Lee’s questions about the sexual assaults and burglaries.\textsuperscript{215}

The Court held that defendant’s right to silence had been scrupulously honored based primarily on the fact that Lanosa was given fresh \textit{Miranda} warnings before each interrogation. While Lanosa contended that the 10 minutes between the first two interrogations was not a reasonable amount of time under \textit{Mosley}, the court stated that the time periods between the interrogations must be taken as a whole, and thus the

\textsuperscript{214} \textit{Id.}
\textsuperscript{215} \textit{Id.}
total of two hours and ten minutes between the three interrogations was sufficient to show that Lanosa's invocation of his right to silence had been scrupulously honored.\textsuperscript{216}

All of the assumptions that have been or could be used by the Court to support the distinction it has drawn between re-interrogating suspects in custody who invoke their right to silence and those invoking their right to counsel are unsupportable. Similarly, the jurisprudential and constitutional justifications offered by the Court in cases that have drawn the same distinction are equally flawed. It is time now to consider how the Court can extricate itself from the situation it created by establishing and developing this distinction in \textit{Mosley}, \textit{Edwards}, and subsequent holdings in this area.

V. TOWARDS AN APPROACH THAT IS BOTH SIMPLER AND FAIRER

In the previous Sections, this article has argued that the different treatment regarding the re-interrogation of suspects in custody who invoke their right to silence and those who invoke their right to counsel is unsupportable either theoretically or pragmatically. This Section will examine two recent decisions of the Supreme Court which have paved the way towards abandoning this problematic distinction. It will then offer and defend an approach for dealing with custodial suspects who invoke their right to silence that is consistent with the Court's new approach regarding suspects who request counsel.

\textsuperscript{216} \textit{Id.} For more examples of badgering permitted under \textit{Mosley}, see State v. Lewingdon, 1980 WL 352986 (Ohio Ct. App. 1980) (holding that the defendant's right to silence had been scrupulously honored after three interrogation sessions, with the defendant confessing less than half an hour after his last invocation of the right to silence); Dennis v. State, 561 P.2d 88 (Okla. Crim. App. 1977) (holding the defendant's statement admissible when he was interrogated four times within a 12 hour time period and given nothing to eat during that time); Jackson v. Wyrick, 730 F.2d 1177, 1178 (8th Cir. 1984) (holding that defendant's right to silence was scrupulously honored when he was questioned four times over a two day period).
In *Berghuis v. Thompkins*\(^{217}\) and *Maryland v. Shatzer*\(^{218}\), both decided in 2010, the Supreme Court pointed the way towards a means of ending this unwarranted distinction. In neither *Thompkins* nor *Shatzer* did the Court actually address the propriety of the distinction regarding re-interrogation between suspects who invoke silence and those invoking their right to counsel.\(^{219}\) In both decisions, however, this distinction was not relevant to the outcome of the case before the Court, so there is no reason to expect that the distinction would have been addressed.\(^{220}\) Significantly though, in both *Thompkins* and *Shatzer* the Court enumerated several ways in which invocations of the right to silence deserve similar treatment to invocations of the right to counsel and identified the purposes behind these rights that also apply to both invocations. Then in *Shatzer*, the Court developed a new approach for dealing with re-interrogation of suspects in custody who invoke counsel that works equally well for those invoking silence.

Two related but analytically severable issues were before the Court in *Thompkins*. The first was whether the defendant’s silence during the interrogation served as an invocation of his right to silence under *Miranda*.\(^{221}\) The second issue concerned whether Thompkins waived his right to silence by answering police questions without ever directly acknowledging he understood his Miranda rights.\(^{222}\) After being given his Miranda rights, Thompkins never expressly invoked them nor did he ever

\(^{217}\) *Berghuis v. Thompkins*, 130 S. Ct. 2250 (U.S. 2010).


\(^{219}\) See generally id.; *Thompkins*, 130 S. Ct. 2250.

\(^{220}\) *Thompkins* dealt with what constitutes invocation of the right to silence and *Shatzer* with whether the *Edwards* protection was eternal.

\(^{221}\) *Thompkins*, 130 S.C.t at 2259.

\(^{222}\) *Id.* at 2261-62.
directly waive them.\textsuperscript{223} In fact, Thompkins remained largely silent during his three-hour interrogation by the police regarding his participation in a murder.\textsuperscript{224} About two hours and 45 minutes into the interrogation, Thompkins was asked if he believed in God and whether he prayed to God to forgive him for the shooting.\textsuperscript{225} He answered “yes” to both questions, and these words were admitted against Thompkins at his trial. Thompkins argued to the Supreme Court that admission of this statement at trial violated his right to silence.\textsuperscript{226}

The Court ruled both that Thompkins never invoked his right to silence, and that he affirmatively waived his rights under \textit{Miranda}.\textsuperscript{227} Regarding the first issue, the Court held that to invoke one’s right to silence during custodial interrogation, the defendant must make an unambiguous manifestation of his intent.\textsuperscript{228} It concluded that Thompkins’ silence here was not such an unambiguous manifestation. On the waiver issue, Thompkins argued that previous cases had made clear that silence plus a statement regarding the crime does not constitute a waiver of one’s Miranda rights.\textsuperscript{229} The Court rejected Thompkins’ argument, holding that a waiver need not be express in order to satisfy the requirements emanating from \textit{Miranda}.\textsuperscript{230} As long as the waiver is knowing and voluntary, it satisfies the requirements of the Fifth Amendment and \textit{Miranda}, according to the Court. The Court said that in this case, Thompkins’ statement was not the product of police coercion and was made only after he had full knowledge of his

\begin{itemize}
  \item Id. at 2262.
  \item Id. During the interrogation Thompkins gave a few limited verbal responses such as “yeah,” “no,” “I don’t know” or nodded his head. Id. at 2257.
  \item Id. at 2257.
  \item Id.
  \item Id. At 2264.
  \item Id. at 2260.
  \item Id. at 2259-60.
  \item Id. at 2262.
\end{itemize}
right to remain silent. In so holding, the Court maintained that the absence of any indication that Thompkins did not understand his rights after having them administered, in combination with his voluntary choice to respond to a police question demonstrated that he’d waived his rights.\textsuperscript{231} Speaking for four justices in dissent, Justice Sotomayor thought it strange that one has to speak in order to assert his right not to speak.\textsuperscript{232} Additionally, she maintained that the majority opinion ignored previous decisions which held that silence plus a statement about the crime does not constitute a waiver, and that holding otherwise violates the explicit language of \textit{Miranda} requiring the government to meet a “heavy burden” to show a waiver of the \textit{Miranda} protections.\textsuperscript{233}

\textit{Maryland v. Shatzer} addressed the issue of whether the protection conferred upon suspects who invoke their right to counsel during custodial interrogation is interminable.\textsuperscript{234} As discussed above, the Court had held in \textit{Edwards} that once a suspect requests counsel during custodial interrogation, he cannot be questioned again about the crime while in custody unless counsel is present or the defendant initiates the questioning.\textsuperscript{235} In \textit{Shatzer}, the Court confronted a situation in which the defendant was interrogated about the sexual abuse of his son two and one-half years after he had invoked his right to counsel when first questioned about the incident.\textsuperscript{236} The Court ruled

\textsuperscript{231} \textit{Id.} The Court noted that Thompkins read the warnings, and read aloud the fifth warning, which stated “you have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned,” and therefore was aware that police would have to honor his right to silence and to counsel during the whole course of the interrogation. \textit{Id.}

\textsuperscript{232} \textit{Id.} at 2266 (Sotomayor, J., dissenting).

\textsuperscript{233} \textit{Id.} at 2269.

\textsuperscript{234} \textit{See Shatzer}, 130 S.Ct. at 1217; \textit{see also} discussion of \textit{Green}, supra notes 77-79 and accompanying text.

\textsuperscript{235} \textit{Edwards}, 451 U.S. at 484-85.

\textsuperscript{236} \textit{Shatzer}, 130 S.Ct. at 1217-18.
that the two and one-half year break in custody between the two interrogations was
sufficient to obviate the need for the Edwards initiation protection to continue to exist.\textsuperscript{237}

There were several notable aspects to the decision the Court reached in Shatzer.
First, the Court considered whether the fact that Shatzer spent two and one-half years
between interrogations as a prisoner in the state correctional system constituted a break
in custody.\textsuperscript{238} The Court held that because being part of a general prison population did
not provide the same coercive police pressures as custodial interrogation, Shatzer's
time in prison could be viewed as a break in custody in determining whether the
protections of Edwards were applicable here.\textsuperscript{239} Next, the Court reasoned that when a
suspect is no longer in custody, he has the opportunity to consult with family, friends,
and counsel in an atmosphere far different than the pressures that attend custodial
interrogations.\textsuperscript{240} After such a break in custody, the Court held, a defendant's change of
mind regarding speaking with the police without counsel while in custody is less likely to
be attributable to the police badgering that Edwards was designed to prevent.\textsuperscript{241} Having
reached this conclusion, the Court next considered how to determine when such a
break in custody obviates the need for the Edwards protection. The Court chose to
come up with a fixed period, 14 days, as the minimum period of time for which the break

\textsuperscript{237} Id. at 1234.
\textsuperscript{238} Id. at 1224.
\textsuperscript{239} Id. at 1224-25. In Howes v. Field, the Court made it even more difficult for a suspect already in prison
to have his interrogation determined to be custodial (and therefore entitled to the protections of Miranda)
even when the questioning goes on for hours and is conducted in an interrogation room. No. 10-680, slip
\textsuperscript{240} Id. at 1224.
\textsuperscript{241} Id. at 1225.
in custody will permit the government to initiate the re-interrogation of an uncounseled defendant now back in custody.\textsuperscript{242}

In both the \textit{Thompkins} and \textit{Shatzer} decisions, the Court drew several conclusions that significantly undercut the distinction between the requirements for re-interrogating a suspect who invokes his right to silence during custodial interrogation and one invoking his right to counsel. In \textit{Davis v. United States}, the Court had held that to invoke one’s right to counsel, the invocation must be unambiguous.\textsuperscript{243} Prior to the decision in \textit{Thompkins}, the Court had never applied that same principle to the invocation of the right to silence as well.\textsuperscript{244} In doing so in \textit{Thompkins}, the Court wrote, “there is no principled reason to adopt different standards for determining when an accused has invoked the \textit{Miranda} right to remain silent and the \textit{Miranda} right to counsel.”\textsuperscript{245} In elucidating its reasons for treating the two invocations the same way, the Court made clear that the similarities between invocations of the two rights go beyond that one issue.\textsuperscript{246} The Court quoted approvingly from what it had written 26 years earlier in another case that, “‘much of the logic and language of [\textit{Mosley},]’ which discussed the \textit{Miranda} right to remain silent, ‘could be applied to the invocation of the [\textit{Miranda} right to counsel].’”\textsuperscript{247} The Court then noted another similarity between invocation of the two rights—that in protecting the Fifth Amendment right against compulsory self-incrimination, an invocation of either right compels the police to end an interrogation.\textsuperscript{248}

\begin{flushleft}
\textsuperscript{242} \textit{Id.} at 1227.
\textsuperscript{243} \textit{Davis}, 512 U.S. at 461.
\textsuperscript{244} \textit{Thompkins}, 130 S.Ct. at 2260.
\textsuperscript{245} \textit{Id.}
\textsuperscript{246} \textit{Id.}
\textsuperscript{247} \textit{Id.} (citing Solem v. Stumes, 465 U.S. 638, 648 (1984)).
\textsuperscript{248} \textit{Id.} (citing \textit{Mosley}, 423 U.S. at 103; \textit{Fare v. Michael C.}, 442 U.S. 707, 719 (1979)).
\end{flushleft}
Not only are the standards for invocation of the *Miranda* rights to silence and counsel the same, but so too, according to the Court, are the requirements to show that each right has been waived.\textsuperscript{249} The decision in *Thompkins* speaks to how *Miranda* rights can be validly waived implicitly as well as explicitly.\textsuperscript{250} At one point the Court observes that, “*Miranda* rights can therefore be waived through means less formal than a typical waiver on the record in a courtroom…given the practical constraints and necessities of interrogation and the fact that Miranda’s main protection lies in advising defendants of their rights.”\textsuperscript{251} That the Court here is not distinguishing the right to silence from the right to counsel is clear from the words themselves as well as the fact that it cites to *Davis*, a case addressing the right to counsel. Similarly, the Court in *Thompkins* noted that a suspect in custody may revoke his or her waiver at any time.\textsuperscript{252} In such a circumstance, “[i]f the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.”\textsuperscript{253}

An important thread weaved through the *Shatzer* opinion relates to the impact of continued custody on the suspect regarding re-interrogation and the importance of his being able to make an uncoerced choice as to whether he wishes to respond to police questions.\textsuperscript{254} In referring to suspects in custody who invoke their right to counsel, the *Shatzer* Court noted that requests to re-interrogate such suspects “pose a significantly

\textsuperscript{249} Id. (noting that waiver of *Miranda* rights must be both voluntary and made with awareness of the nature of the right and the consequences of waiver).
\textsuperscript{250} Id. at 2261 (underlining added).
\textsuperscript{251} Id. at 2262.
\textsuperscript{252} Id. at 2263.
\textsuperscript{253} Id. at 2263-64.
\textsuperscript{254} *Shatzer*, 130 S.Ct. at 1226; see also *Thompkins*, 130 S.Ct. at 2264 (“Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that *Miranda* rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests.”).
greater risk of coercion” than does the initial attempt to interrogate those suspects.\textsuperscript{255} Although the Court in \textit{Shatzer} was dealing with, and therefore referring to, a defendant who had invoked his right to counsel, the risk of greater coercion it was referring to certainly should apply in a similar manner to the re-interrogation of suspects who invoke their right to silence. This is clear from the Court’s explanation of the greater risk. “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.’”\textsuperscript{256} The Court later refers to the “mounting coercive pressures” of continued police custody.\textsuperscript{257} It seems beyond dispute that regardless of whether one invokes his right to silence or counsel, the risks or prolonged custody described by the Court above pertain.\textsuperscript{258}

The Court in \textit{Shatzer} returned to familiar themes concerning the precise nature of the coercion referred to above that attends custodial interrogation and particularly the time between when questioning is cut off and the next interrogation.\textsuperscript{259} Referring to the right to counsel that was invoked in \textit{Shatzer}, the Court spoke of how a suspect could be badgered into changing his mind about speaking with the police during continued uninterrupted custody.\textsuperscript{260} It quoted from \textit{Miranda} about a how suspect in custody is

\begin{footnotes}
\textsuperscript{255} \textit{Shatzer}, 130 S.Ct. at 1220.
\textsuperscript{256} \textit{Id.} (citing \textit{Minnick}, 498 U.S. at 153).
\textsuperscript{257} \textit{Id.} (citing \textit{Roberson}, 486 U.S. at 686).
\textsuperscript{258} Before the holding in \textit{Shatzer}, several commentators had already asserted that any statement made after a custodial suspect invokes his right to silence is just as likely to be the product of impermissible police coercion as a statement from the suspect who asks for counsel. \textit{See, e.g.}, Dripps, \textit{supra} note 32, at 16; Wolfe, \textit{supra} note 71 at 1180; Thomas, \textit{supra} note 181 at 228; Barton, \textit{supra} note 38 at 487.
\textsuperscript{259} \textit{Id.} at 2264 (discussing different lengths of time sufficient to relieve a suspect of the inherent coercion of being in custody and concluding that 14 days suffices to eliminate its coercive effects as well as deter police abuse of the break-in-custody rule).
\textsuperscript{260} \textit{Id.} at 1219-20.
\end{footnotes}
separated from friends and family, isolated and placed in an unfamiliar environment controlled totally by the police.\textsuperscript{261} Such pressures undoubtedly are present for the suspect in custody who has invoked silence as well as the one invoking counsel.\textsuperscript{262} 

The \textit{Shatzer} Court then discussed \textit{Edwards}, \textit{Roberson}, and \textit{Minnick}, three cases in which the police waited a substantial period of time after the suspect’s invocation of his right to counsel (overnight in \textit{Edwards}, three days in \textit{Roberson}, and two days in \textit{Minnick}) and while he was still in custody to attempt to re-interrogate him.\textsuperscript{263} Even with the extended period of time between when questioning was cut off and when it was resumed in those cases, the Court in \textit{Shatzer} concluded that, “[n]one of these suspects regained a sense of control or normalcy after they were initially taken into custody for the crime under investigation.”\textsuperscript{264} In other words, no matter how long the police wait to re-interrogate a suspect who had invoked his right to counsel, his continued uninterrupted custody makes any future response the likely result of the coercive custodial environment and, thus, inadmissible under \textit{Miranda}. Surely Mosley was not able to regain his sense of “control or normalcy” during the much briefer two hours he spent in uninterrupted police custody after he invoked his right to silence.\textsuperscript{265} This is even more obvious for other defendants whose statements have been allowed into evidence based on an interrogation conducted after as few as 10 minutes following

\textsuperscript{261} \textit{Id.} at 1219 (citations and quotations omitted).
\textsuperscript{262} \textit{Id.} (noting that to counteract the coercive nature of custody, defendants must be informed of their rights to both silence and counsel); \textit{Id.} at 1228-29 (Stevens, J., concurring) (noting that police may coerce a suspect into abandoning his right to silence or his right to counsel).
\textsuperscript{263} \textit{Id.} at 1219-21.
\textsuperscript{264} \textit{Id.} at 1221.
\textsuperscript{265} \textit{See Mosley}, 423 U.S. at 104. At any rate, it is disingenuous to pretend that the longer amount of time a suspect spends in custody, regardless of how much time elapses between interrogations, the less pressure he will feel to speak.
invocation of the same Fifth Amendment protection.\textsuperscript{266} Even if one credits the dubious distinction between invocation of the rights to silence and counsel the Court created in the \textit{Mosley/Edwards} line of cases, the coercive pressures of prolonged custody and subsequent interrogation discussed above are similar regardless of which right is invoked.

With respect to invocations of the right to counsel, the solution to the problems discussed above had been to prohibit further police custodial interrogation unless the suspect initiated or had counsel present.\textsuperscript{267} The Supreme Court had never held that a break in custody before resuming custodial interrogation could permit a second attempt at uncounseled questioning of a suspect who invokes his right to counsel.\textsuperscript{268} Similarly the Court had never held that that there was a period of time between invocation of the right to counsel and a second attempt at uncounseled custodial interrogation (regardless of whether the suspect remained in custody), which if long enough, would allow the police to re-interrogate the suspect.\textsuperscript{269} Both of these alternatives to the interminable nature of the \textit{Edwards} protection were before the Court in \textit{Shatzer}.\textsuperscript{270} The Court in \textit{Shatzer} chose the first alternative, holding that a break in custody of sufficient


\textsuperscript{267} \textit{Edwards} 441 U.S. at 484-5. \textit{And see e.g} applications of \textit{Edwards} in, Van Hook v. Anderson, 488 F.3d 411, 426 (6th Cir. 2007) (allowing re-interrogation after the invocation of the right to counsel where Defendant initiated the conversation); People v. Wright, 651 N.E.2d 758, 764 (Ill. App. 1995) (holding same); Osburn v. State, 326 S.W.3d 771 (Ark. 2009) (suppressing Defendant’s statement made after invocation of the right to counsel when counsel was not present and Defendant did not initiate the conversation);

\textsuperscript{268} \textit{See generally Shatzer}, 130 S.Ct. 1213.

\textsuperscript{269} \textit{Id.}

\textsuperscript{270} \textit{Id.} at 1224 n.4 (referring to the second argument and noting that there was no need to address it because the government prevailed on the first argument).
length reduces the risk that any interrogation of the suspect made once he is back in custody is likely to be the product of the coercion.\textsuperscript{271}

In adopting this new approach to permissible police activity once a suspect invokes his right to counsel during custodial interrogation, the Court had two basic questions it had to answer. First, why does a break in custody obviate the need for the Edwards protections and second, what is the minimum amount of time necessary for the break between invocation and subsequent custodial interrogation? The Court’s responses to these questions demonstrate quite clearly why and how the approach to what is permitted after invocation of \textit{Miranda}'s right to silence needs to be changed as well.

When a suspect is freed from custody, he no longer suffers from the isolation and police dominated atmosphere that warrants the protections enumerated in Miranda and subsequent cases.\textsuperscript{272} As the Court in \textit{Shatzer} pointed out, the suspect is free to speak

\textsuperscript{271} \textit{Shatzer}, 130 S.Ct. at 1227.

\textsuperscript{272} See, e.g., People v. Trujillo, 773 P.2d 1086, 1092 (Colo. 1989) (holding that the break in custody ends the need for the Edwards protections, but noting that "this analysis will not apply if there is any indication that the release of the defendant was contrived, pretextual or done in bad faith"); Delaware v. Brotman, CR.A. Nos. IN90-12-1622, IN90-12-1623, 1991 Del. Super. LEXIS 277 at *24 (Del. Super. Ct. July 11, 1991) (holding "release from . . . initial custody . . . provided substantial opportunity to speak with those [the defendant] wished to consult"); State v. Bymes, 375 S.E.2d 41, 42 (Ga. 1989) (noting length of break and that "there was no indication defendant's release from custody was a mere ploy in order to seek another waiver"); Commonwealth v. Galford, 597 N.E.2d 410, 414 & n.9 (Mass. 1992), cert. denied. 113 S. Ct. 1010 (1993) (following reasoning of Fairman, but adding that there was "no contention that the break was contrived or pretextual"); Willie v. State, 585 So. 2d 660, 666-67 (Miss. 1991) (noting the contrived or pretextual exception, the rationale regarding a defendant's reasonable opportunity to contact an attorney, and that "in some cases custody may be of such short duration that the Edwards or Roberson protection does not dissipate"); State v. Furlough, 797 S.W.2d 631, 638 (Tenn. Crim. App. 1990) (noting "defendant had the opportunity to contact an attorney"); State v. Kyger, 787 S.W.2d 13, 25 & n.5 (Tenn. Crim. App. 1989) (stating that defendant's release from custody provided him with "substantial opportunity to consult with counsel" before the next custodial interrogation, and also noting that this was not a contrived or pretextual break); Clark v. State, 781 A.2d 913, 947 (Md. App. 2001) (stating that once a defendant is released from police custody into incarceration the restraints of incarceration are no longer coercive and the Edwards protection dissipates); Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988) (stating that if the police release the defendant, and the defendant has a reasonable opportunity to contact his attorney, there is no reason why Edwards should bar the admission
with friends, family or an attorney as he wishes. Therefore, the coercion produced by keeping the suspect in the isolated atmosphere of custody, especially if that custody is prolonged, has likely been dissipated when he was released. It follows then that if returned to custody after his release, any waiver of Miranda rights that precedes a new attempt at interrogation is less likely to be the product of the police having worn down the suspect's resistance. In the Court's words, "[h]is change of heart is less likely attributable to 'badgering' than it is to the fact that further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest." While the Court's conclusion about why such a suspect is choosing to speak with the police is speculative and questionable, it is fair to say that the break in custody would seem to make the decision to speak less likely the result of coercion than had the custody been continuous after the suspect invoked his right. If this is correct, the police, as the Court holds, should be able to seek a waiver of the suspect's Miranda rights once he's back in custody and upon obtaining one, be permitted to interrogate the suspect.

of any subsequent statements, and noting that it there was not argument that the break in custody was contrived or pretextual); Com. v. Wyatt, 688 A.2d 710, 713 (Pa. Super. 1997) (stating that release from police custody provides the defendant "a substantial opportunity to consult with an attorney before any further contact with the police"); United States v. Harris, 221 F.3d 1048, 1053 (8th Cir.2000) (holding that a three-hour break in custody was sufficient because defendant "had ample opportunity to consult his family, friends, or a lawyer."); In re Bonnie H., 65 Cal. Rptr. 2d 513, 526 (Cal. App. 1997) (holding that a suspect's request for counsel during custodial interrogation followed by a termination of questioning and a good faith release of custody, one that is not contrived or pretextual on the part of the police, does not prohibit subsequent police-initiated interrogation); Kochutin v. State, 875 P.2d 778, 780 (Alaska Ct. App. 1994) (A break in custody weighs against presumption of coercion that exists in situations of custodial interrogation).

273 Shatzer, 130 S.Ct. at 1219-1224.
274 See id. at 1224-25.
275 Id. at 1221.
276 Id. at 1227.
Having determined that a break in custody can cause the pressures of custody to dissipate substantially thus allowing the police to re-interrogate a suspect who had previously invoked his right to counsel, the Court then had to determine how long this break in custody had to last to achieve this desired effect. In coming up with a period of 14 days as the minimum length of time for the break in custody to allow re-interrogation of such a suspect, the Court rejected the view of Justice Stevens that 14 days was often not long enough to achieve its ends and in any event was an entirely arbitrary number. Justice Stevens apparently favored a case-by-case determination of whether the duration of the break in custody was long enough. The Court concluded that 14 days was sufficient time “for the suspect to get reacclimatized to his normal life, to consult with friends and counsel, and to shake off any residual effects of his prior custody.”

Regarding the contention that 14 days was an arbitrary number, the Court acknowledged that it was unusual for it to set such precise time limits regarding police procedures. The Court noted, however, it had set such precise limits before, and went on to say that setting such time limits was especially appropriate where a police procedure was required not by statute but by Supreme Court holdings. That is precisely the situation when considering how to treat invocations of Miranda rights.

Arguing in favor of such a definite time period, according to the Court, was the benefit to

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277 Id. at 1225 (arguing that 14 days does nothing to eliminate the rationale for the Edwards rule, and that the majority gives no good basis for its 14-day rule).

278 Id. at 1230 (Stevens, J., dissenting) (“The Court never explains why its rule cannot depend on, in addition to a break in custody or passage of time, a concrete event to state of affairs, such as the police having honored their commitment to provide counsel.”).

279 Id. at 1223.

280 Id.

281 Id. The Court noted that in County of Riverside v. McLaughlin, 500 U.S. 44 (1991), it specified 48 hours as the time within which the police must comply with the requirement of Gerstein v. Pugh, 420 U.S. 103 (1975), that a person arrested without a warrant be brought before a magistrate to establish probable cause for continued detention.
be achieved by this relatively bright-line rule - that officers will know with certainty when re-interrogation is permitted after the defendant has been returned to custody.\textsuperscript{282} The Court viewed Justice Stevens’ apparent case-by-case approach to be “less helpful, but not at all less arbitrary.”\textsuperscript{283}

The Shatzer Court’s responses to both of the questions posed above regarding the need for and the length of a break in custody requirement for custodial suspects invoking their right to counsel applies with equal force to suspects who invoke their right to counsel. First, the break in custody is needed to dissipate the likelihood that any statement made after invoking one’s right to silence has been achieved through the coercive effect of continued custody.\textsuperscript{284} As discussed above, the suspect who invokes silence in custody suffers the same pressures to change his mind due to the custodial environment as does one who invokes silence.\textsuperscript{285} During a break from custody, the silence invoking suspect, as the counsel invoking suspect, is free from the isolation and domination of police custody. He can use this time to consult with friends, family, and counsel about how next he should proceed.\textsuperscript{286} Should he change his mind and decide to respond to police interrogation once back in custody, this change is “less likely attributable to ‘badgering’ than it is to the fact that further deliberation in familiar

\textsuperscript{282} Id. at 1223.
\textsuperscript{283} Id. at 1226.
\textsuperscript{284} See id. at 1222 (regarding the Court in Shatzer describing the same need for invocations of the right to counsel).
\textsuperscript{285} See supra Part II (discussing Mosley) and supra note 258 and accompanying text..
\textsuperscript{286} See, e.g., Harris, 221 F.3d at 1053 (noting that during a break in custody a suspect can consult with friends, family, or an attorney).
surroundings has caused him to believe (rightly or wrongly) that cooperating with the
investigation is in his interest.\textsuperscript{287}

The standard for whether a suspect who has invoked his right to silence while in
custody may be re-interrogated depends on whether this right has been “scrupulously
honored” by the police.\textsuperscript{288} Such a standard is far from the bright-line the Court
implemented in \textit{Shatzer} for re-interrogation of a suspect who invokes counsel.\textsuperscript{289} The
phrase itself offers no clear guidance to the police for when they may re-interrogate
such a suspect, and a primary factor created by the Court in \textit{Mosley} for determining
whether silence has been scrupulously honored also defies any bright line
application.\textsuperscript{290} The Court in \textit{Mosley} spoke about the time between invocation of the right
to silence and re-interrogation of the suspect as being a key factor in determining
whether his right to silence has been honored.\textsuperscript{291} The longer the better was the Court’s
position here.\textsuperscript{292} Unlike in \textit{Shatzer}, however, no specific time period was required.\textsuperscript{293}
Therefore it is hardly surprising that the opinions of lower courts on the amount of time
necessary to scrupulously honor the right to silence are inconsistent.\textsuperscript{294} Accordingly,

\textsuperscript{287} \textit{Shatzer}, 130 S. Ct. at 1221.
\textsuperscript{288} \textit{Mosley}, 423 U.S. at 103.
\textsuperscript{289} \textit{See Shatzer}, 130 S.Ct. at 1227 (noting that a 14-day break in custody is the bright-line rule for re-
interrogation of an individual who has invoked his right to counsel).
\textsuperscript{290} \textit{See supra} note 97.
\textsuperscript{291} \textit{Mosley}, 423 U.S. at 104.
\textsuperscript{292} \textit{See id.} at 102 (“To permit the continuation of custodial interrogation after a momentary cessation
would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine
the will of the person being questioned.”).
\textsuperscript{293} \textit{Mosley}, 423 U.S. at 104 (noting that the key inquiry was that a reasonable amount of time elapse
between interrogations and holding that two hours was reasonable).
\textsuperscript{294} \textit{United States v. Hsu}, 852 F.2d 407 (9th Cir. 1988) (holding defendant’s Fifth Amendment rights were
not violated when law enforcement officer resumed questioning approximately 30 minutes after defendant
had invoked his right to remain silent); \textit{United States v. Thompson}, 866 F.2d 268, 271-72 (8th Cir. 1989)
(holding same); \textit{Stock v. State}, 191 P.3d 153, 161 (Alaska Ct. App. 2008) (holding same); \textit{but see
scrupulously honored when there was only thirty minutes between interrogations and other \textit{Mosley}
police are not given clear guidance as to how long they must wait before re-interrogating a suspect who invokes his right to silence. The need for a bright line time period in determining when police can re-interrogate a suspect who invokes his right to silence is no less than for determining the same thing with respect to a defendant who invokes his right to counsel.295

The Court has thus laid the groundwork for finally doing away with the distinction that has existed since Mosley and Edwards were decided. Because the coercive pressures of custodial re-interrogation are the same whether a suspect invokes his right to counsel or silence (as are many other aspects of the two invocations), the ability of the police to question the suspect regardless of which right he claimed should be the same as well. The police should not be permitted to re-interrogate a suspect who invokes his right to silence and remains in police custody any more than they are allowed to re-interrogate one who invokes counsel. If the suspect is freed from custody for sufficient time, then the effects of the original custody, which led the suspect to invoke his Miranda protection, could be said to have dissipated. As it is important to give the police clear guidance as to when they can re-interrogate such a suspect296, the 14-

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295 In fact, in certain situations, the need for a bright line rule may be greater when the suspect invokes his right to silence. Comparing an invocation of the right to silence with the events that occurred in Minnick where the suspect actually spoke with his attorney after invoking his right to counsel before the police re-interrogated him, Donald Dripps wrote, “the need for a bright-line rule seems stronger in the case of the right to silence, again because the absence of defense counsel expands the practical latitude enjoyed by the police. Dripps, supra note 32, at 16.

296 One commentator enumerated the benefits of such a bright line as follows:

Obviously clear rules serve many useful purposes. They provide guidance to the police in determining the constitutionality of interrogations. Specific guidelines are particularly useful in the area of interrogation where vague, general guidance may give the police
day break-in-custody period required by the Court in *Shatzer* regarding counsel invocations should apply as well to police re-interrogation of suspects who have invoked their right to silence.

VI. CONCLUSION

This article has explored the differential treatment the Supreme Court has accorded to the re-interrogation of suspects in custody who have invoked their rights to silence and counsel. It has found this different treatment to be unsupported by the Fifth Amendment, the decision in *Miranda* or the pragmatic assumptions upon which the distinction was created and expanded.

This differential treatment has led to judicial opinions that are inconsistent, unjust and often make little sense. In two recent holdings, the Court has articulated principles behind the *Miranda* protections that apply to invocations of the rights to silence and counsel equally. These principles point the way out of the problems created by treating the rights differently. Whether a suspect in custody invokes his right to silence or to counsel, custodial re-interrogation without counsel initiated by the police should be permitted only after a 14-day break in custody. This break in custody allows the suspect to consult family, friends and counsel, and thus reduce the likelihood that his re-

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significant leeway to wear down the accused and persuade him to incriminate himself. Moreover, precise and defined rules help inform the courts in determining when statements obtained during police interrogations may be properly suppressed. Judicial resources which would otherwise be expended making difficult assessments concerning the admissibility of confessions are thus conserved. Accordingly, specificity in rules benefit the accused and the state alike.

*Strauss, supra* note 60 at 377.
interrogation once back in custody would be the product of the very coercion that the Fifth Amendment and Miranda were designed to prevent.