

Separate But Equal: Miranda's Right to Silence and Counsel

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

STEVEN P. GROSSMAN*

*Three decades ago, the Supreme Court created a dubious distinction between the rights accorded to suspects in custody who invoke their right to silence and who invoke their right to counsel. This distinction significantly disadvantages those who do not have the good sense or good fortune to specify they want an attorney when they invoke their right to remain silent. This article argues that this distinction was flawed at its genesis and that it has led to judicial decisions that are inconsistent, make little sense, and permit police behavior that substantially diminishes the right to silence as described in *Miranda v. Arizona*. The article does so by demonstrating that the distinction is unsupportable either theoretically or pragmatically. It then shows that two recent holdings of the Court have paved the way for abolishing the distinction and developing an approach that both reflects the reality of custodial interrogation and is consistent with the principles behind the Fifth Amendment and the holding in *Miranda*.*

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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 decision to invoke his right to counsel. In *Michigan v. Mosley*,¹ the Court held that the police may resume questioning a suspect after he invokes his right to silence, if three elements are met: First, the police must "scrupulously honor" this invocation by cutting off questioning; second, the police must wait a reasonable time and then administer the *Miranda* warnings again, and; third, the suspect once again must waive 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 in *Edwards* that because a defendant who invokes his right to counsel is indicating his refusal to answer questions in a custodial environment without the presence of a lawyer, he cannot be reinterrogated 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 right to counsel and the right to silence higher. With its holding in *Arizona v. Roberson*,⁶ the Court extended the *Edwards* "initiation protection" to situations in which the suspect is being interrogated about a different crime than the one for which he invoked his right to counsel.⁷ In *Minnick v. Mississippi*,⁸ the Court decided that even when the suspect actually speaks with his counsel after invoking his right to counsel, the police cannot question the suspect after a subsequent waiver unless the suspect initiates the questioning or counsel is present during the questioning.⁹

This article will argue that the distinction the Court drew between invocation of the right to silence and the right to counsel was highly questionable from its genesis in *Mosley* and *Edwards*.¹⁰ This distinction

1. *Michigan v. Mosley*, 423 U.S. 96 (1975).

2. *Id.* at 104–07.

3. *Edwards v. Arizona*, 451 U.S. 477 (1981).

4. *Id.* at 484.

5. *Id.* at 484–85.

6. *Arizona v. Roberson*, 486 U.S. 675 (1988).

7. *Id.* at 686–87.

8. *Minnick v. Mississippi*, 498 U.S. 146 (1990).

9. *Id.* at 153.

10. *See infra* Part II.

has led to significantly different judicial treatment of suspects who invoke their right to counsel and those who invoke their right to silence, a difference unsupported by either theoretical or pragmatic justifications.¹¹ The result of this differential treatment has been that suspects who invoke their right to silence receive far less protection from their Fifth Amendment rights than do suspects who invoke their right to counsel.¹² This differential treatment afforded by courts often leads to decisions regarding the admissibility of statements that make no sense and can lead to unjust results. Enhancing the impact of this dubious distinction in cases such as *Roberson* and *Minnick* has made a bad situation worse.

Recently, however, in a series of cases culminating in its 2010 decision, *Maryland v. Shatzer*,¹³ the Court paved the way for the abolition of this unfairly differential treatment afforded to suspects who invoke the right to silence. This has been achieved by decisions that undercut the distinction in several ways. First, the Court clearly identified and described the risk that is present when police seek to reinterrogate a suspect after he invokes the rights protected by *Miranda*.¹⁴ 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.¹⁵ This danger exists regardless of whether the suspect invoked his right to silence or his right to counsel. Second, the Court treated other aspects of the invocation of the rights to silence and counsel in the same manner,¹⁶ leaving the impact on reinterrogation 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.¹⁷ Before *Shatzer*, when a suspect invoked his right to counsel, he was apparently forever protected from reinterrogation while in custody unless he initiated questioning or had counsel present. *Shatzer* put a time limit on the duration of the *Edwards* initiation protection.¹⁸ Thus, the Court closed the distance regarding

11. See *infra* Part II.

12. See *infra* Part II.

13. *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010).

14. *Id.* at 1219–20.

15. *Id.* at 1220.

16. See *infra* Part V.C.

17. See *infra* Part V.C (discussing *Shatzer*).

18. See *Shatzer*, 130 S. Ct. at 1227 (concluding that a two week break between attempts

permissible reinterrogation of suspects who invoke the right to silence and those who invoke the right of counsel.¹⁹ It now makes more sense than ever for the Court to adopt an approach to reinterrogation after the invocation of the right to silence that precisely matches the one applied to the invocation of the right to counsel. The reasoning used by the Court in *Shatzer* regarding what is needed to prevent badgering stemming from reinterrogation is the same regardless of which right the suspect invokes. With such an approach, the police could seek to reinterrogate a suspect in custody if he initiated the questioning, or after the passage of fourteen days—during which the suspect had a break from custody. In either case, as the police do now, they would first need to rewarn the suspect of his rights and obtain a waiver of those rights.

Part II of this Article will demonstrate that the Supreme Court, through its holdings in *Mosley* and *Edwards*, created the distinction for permissible reinterrogation between suspects who invoke their right to silence and those who invoke their right to counsel. 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*.²⁰ Part III will show that the approach taken in *Edwards* and *Mosley* led to subsequent decisions that expand and stretch the distinction and make a bad situation worse. Part IV will explore the theoretical and pragmatic assumptions that undergird the Court's support of the idea that invocations of the right to silence and invocations of the right to counsel should be treated differently. This Part IV will also 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 Court's recent approach to issues surrounding the protections afforded by the *Miranda* decision.

II. THE SUPREME COURT CREATES THE DISTINCTION BETWEEN SILENCE AND COUNSEL

A. *Miranda and the Fifth Amendment*

In its landmark 1966 holding, *Miranda v. Arizona*,²¹ the Supreme

to question terminated the *Edwards* protection).

19. *Id.* at 1227.

20. See *Miranda v. Arizona*, 384 U.S. 436 (1966); *infra* Part II.

21. *Miranda*, 384 U.S. 436.

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 they will be provided an attorney if they cannot afford one.²² In most ways, the *Miranda* Court treated the rights to silence and counsel in the same manner. Each right had to be given and each right had to be waived before any interrogation could begin.²³ Failure to obtain a waiver of either right would prevent the prosecution from subsequently using the suspect's statement at his trial.²⁴ Either right could be invoked even after the suspect started to speak, and should the suspect invoke either right, the questioning must stop immediately.²⁵ 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, "[a]t the outset . . . [that] he must first be informed . . . that he has the right to remain silent."²⁶

No right to counsel appears in the text of the Fifth Amendment.²⁷ The textual constitutional right to counsel in criminal cases stems from the Sixth Amendment.²⁸ 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 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 ensure the protection of the right to silence during the inherently coercive

22. *Id.* at 444.

23. *Id.* at 479.

24. *Id.*

25. *Id.* at 473–75.

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.”).

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 [S]ixth [A]mendment 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 governmental conduct that pose cognizable risks to the goal of adversarial equality.”).

atmosphere that attends custodial interrogations.³¹ Under the Fifth Amendment, as interpreted by the Court in *Miranda*, the right to silence 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 himself or herself.³³ In other words, the person can choose to remain silent.³⁴ It was hardly surprising, therefore, that the *Miranda* discussion of the rights to be afforded suspects begins with the right to remain silent.³⁵

B. The Court Distinguishes the Rights to Silence and Counsel

In two cases, decided nine and fifteen years after *Miranda*, the Court addressed whether a defendant who invokes his right to silence and one who invokes his right to counsel can be reinterrogated while in custody.³⁶ The holdings in these two cases—*Michigan v. Mosley*³⁷ and *Edwards v. Arizona*³⁸—created substantially different protections regarding reinterrogation of such suspects.³⁹ It is important to understand why and how the Court embarked on different paths when considering the silence and counsel protections created by *Miranda*.

31. *Id.* at 989. 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. (footnotes omitted).

32. Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 402 (2001); Donald A. Dripps, *Miranda After 25 Years: Alive and Well?*, TRIAL, Mar. 1991, at 13.

33. *Miranda*, 348 U.S. at 479.

34. *Id.* at 469.

35. *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.”).

36. Under *Miranda*, a suspect can invoke either or both rights. See *Miranda*, 348 U.S. at 444–45.

37. *Michigan v. Mosley*, 423 U.S. 96, 106–07 (1975).

38. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981).

39. *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).

Mosley was arrested for his participation in a robbery.⁴⁰ When given his *Miranda* rights, Mosley said he did not wish to speak with the police, and the detective immediately ceased questioning him.⁴¹ Two hours later, another detective questioned Mosley in a different part of the police station about an unrelated homicide case.⁴² Mosley was again given his *Miranda* rights, but this time agreed to talk.⁴³ The statement he made to the second detective was introduced by the government at his trial.⁴⁴

Mosley challenged the introduction of his statement, claiming his invocation of the right to silence barred the police from reinterrogating him.⁴⁵ The Court held that such an invocation of the right to silence is not eternal and that under certain conditions the suspect could be reinterrogated while in custody.⁴⁶ In the *Mosley* case, the Court found it significant that the detective had “scrupulously honored”⁴⁷ the defendant’s right to silence by immediately cutting off questioning, waiting a reasonable time before reinterrogating him, and providing the defendant with a fresh set of *Miranda* warnings (which he waived).⁴⁸ 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, also, that the questioning involved a different case from the one in which the defendant had previously invoked his right to silence.⁴⁹

40. *Mosley*, 423 U.S. at 97.

41. *Id.*

42. *Id.* at 97–98.

43. *Id.* at 98.

44. *Id.* at 99.

45. *Id.* at 98–99.

46. *Id.* at 102–03.

47. *Id.* at 103 (citing *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)).

48. *Id.* at 104–05.

49. *Id.* 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 reinterrogation, and providing a fresh set of *Miranda* warnings. *See, e.g.,* Barton, *supra* note 39, at 483 (discussing how cases after *Mosley* have deemphasized whether the reinterrogation 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:

Reinterrogation in different custody or by a different interrogating agency would

In assessing whether a defendant who invokes his right to silence can be reinterrogated, 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 that 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.⁵⁰

The *Mosley* Court acknowledged that this passage “does not state under what circumstances, if any, a resumption of questioning is permissible.”⁵¹ It offered three possible literal interpretations of the passage. One interpretation would mean the defendant could never be reinterrogated once he invokes his right to silence.⁵² A second would regard any subsequent statement as involuntary no matter how voluntary it actually was.⁵³ The third would allow the police to reinterrogate after a short stoppage of the interrogation.⁵⁴ The *Mosley* Court found all of these interpretations to be “absurd.”⁵⁵ 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.”⁵⁶ The Court expressed concern that the third literal interpretation could lead to the type of police badgering prohibited by

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.

Maryland v. Shatzer, 130 S. Ct. 1213, 1222 n.5 (2010). There is no reason why this observation should not apply to reinterrogation after invocation of the right to silence as well.

50. *Mosley*, 423 U.S. at 100–01 (citing *Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966)).

51. *Id.* at 101.

52. *Id.* at 101–02.

53. *Id.* at 102.

54. *Id.*

55. *Id.*

56. *Id.*

Miranda.⁵⁷ 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.⁵⁸ It is worth noting that, in dicta, both the *Mosley* majority⁵⁹ and the concurring opinion of Justice White⁶⁰ interpreted the language of *Miranda* speaking to what happens after a defendant invokes his right to counsel to be significantly different than what happens after a defendant invokes his right to silence. This difference is what presaged the holding six years later in *Edwards v. Arizona*.⁶¹

In *Edwards*, Robert Edwards was arrested for robbery and murder.⁶² After being given his *Miranda* rights and waiving them, Edwards made an exculpatory statement.⁶³ He then indicated he wished to have an attorney to help him make a deal.⁶⁴ The questioning stopped at this point.⁶⁵ The next day, after a “guard told him that ‘he had’ to talk” to the police, Edwards met with detectives and was again given his *Miranda* rights.⁶⁶ He waived those rights and made a statement inculcating himself in the crime.⁶⁷ The Supreme Court held that Edwards’ inculpatory statement violated his Fifth Amendment right to counsel identified in *Miranda*.⁶⁸ The Court ruled that after a suspect invokes his right to counsel during custodial interrogation, he cannot be reinterrogated while in custody unless his attorney is present or he initiates the questioning.⁶⁹ The *Edwards* Court said that the issue was decided by the language in *Miranda* that once a suspect invokes his right to counsel, “the interrogation must cease until an attorney is present.”⁷⁰

Apparently the *Edwards* Court, unlike the Court in *Mosley*, was not troubled by applying what it considered to be a literal interpretation to

57. *Id.*

58. *Id.* at 104.

59. *Id.* at 104 n.10 (citing *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

60. *Id.* at 109–10 (White, J., concurring).

61. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981).

62. *Id.* at 478.

63. *Id.* at 479 (recounting that Edwards “denied involvement and gave a taped statement presenting an alibi defense”).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 480.

69. *Id.* at 484–85.

70. *Id.* at 485 (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

the words of the *Miranda* holding prohibiting any custodial questioning once a *Miranda* right is invoked.⁷¹ Unlike the Court in *Mosley*, the *Edwards* Court seemed to have little concern for the “absurd” 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 to ever initiate a reinterrogation of the defendant (unless counsel was present).⁷² Another apparent change in concern from *Mosley* to *Edwards* is seen by comparing the concurring opinion of Justice White in *Mosley* to his majority opinion 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.⁷³ To Justice White, all that mattered regarding the admissibility of such a statement was whether the defendant’s waiver of his rights was voluntary.⁷⁴ 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

71. As one commentator wrote:

The Court has attempted to justify this distinction in several ways. First, it points to the language in *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 *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 *Edwards*? Unless we read into the passage that an attorney being present is not only a *sufficient* condition for terminating *Edwards* rights and permitting reinterrogation, 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 *Mosley*. In fact, the Court has held that the presence of counsel is not a necessary condition for requestioning since a suspect’s initiation allows the police to seek a valid waiver and commence interrogation even in the absence of counsel.

Marcy Strauss, *Reinterrogation*, 22 HASTINGS CONST. L.Q. 359, 384 (1995) (footnotes omitted) (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

72. *Michigan v. Mosley*, 423 U.S. 96, 102 (1975).

73. *Id.* at 110–11 (White, J., concurring).

74. *See id.* at 111.

eyes.⁷⁵ However, his majority opinion in *Edwards* seems to adopt the very “paternalistic” approach he warned against in *Mosley*. This difference in approaches is justified presumably because, by invoking his right to counsel, “[the] accused has . . . expressed his desire to deal with the police only through counsel.”⁷⁶ 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.⁷⁷

In *Edwards*, the concurring opinions of Chief Justice Burger⁷⁸ and Justice Powell⁷⁹ would have limited the decision to the facts of the case, most prominently that the police guard had told Edwards he had to talk to the police.⁸⁰ Burger and Powell both believed that a suspect has the right to change his mind after an invocation of a *Miranda* right as long as the waiver accompanying that change of mind is voluntary.⁸¹ While it could be argued that once a right has been invoked a change of mind can never be truly voluntary in the coercive environment of custodial interrogation,⁸² it is hard to understand why a knowing waiver regarding reinterrogation (without initiation by the suspect) can be voluntary after an invocation of the right to silence but not after an invocation of the right to counsel.⁸³

III. MAKING A BAD DISTINCTION WORSE

A. *Extending the Edwards Protection to Interrogation about a Different Case*

Having created a substantial distinction between the power of the police to reinterrogate a suspect who invoked his right to silence and one who invoked his right to counsel, the Court then handed down a

75. *Id.* at 109.

76. *Edwards v. Arizona*, 451 U.S. 477, 484 (1981).

77. *See* Barton, *supra* note 39, at 483; *see also infra* note 140 (citing cases where the duration between the time of invocation and permissible reinterrogation was two hours or less).

78. *Edwards*, 451 U.S. at 487–88 (Burger, C.J., concurring).

79. *Id.* at 489–92 (Powell, J., concurring).

80. *Id.* at 488 (Burger, C.J., concurring); *id.* at 490 (Powell, J., concurring).

81. *Id.* at 488 (Burger, C.J., concurring); *id.* at 490 (Powell, J., concurring).

82. *See* *Michigan v. Mosley*, 423 U.S. 96, 100–02 (1975) (citing *Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966)).

83. Nelson G. Wolff, Note, *Minnick v. Mississippi: The Supreme Court Reinforces a Suspect's Right to Have Counsel Present During Custodial Interrogation*, 56 MO. L. REV. 1157, 1180 (1991); Dripps, *supra* note 32, at 16.

number of decisions that both expanded and stretched this distinction. In *Arizona v. Roberson*,⁸⁴ the Court held that once a suspect invokes his right to counsel during custodial interrogation, he cannot be reinterrogated about *any* crime (including the crime for which he was arrested), unless he initiates the questioning or he has his attorney present during the questioning.⁸⁵ The reinterrogation in *Roberson* occurred three days after Roberson's invocation of his right to counsel; whereas, Mosley was reinterrogated only two hours after his invocation of the right to silence.⁸⁶ 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.⁸⁷ However, the fact that Roberson's reinterrogation involved a crime also different in time and location from the original one for which he invoked his right to counsel seemed unimportant to the *Roberson* Court.⁸⁸ 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.⁸⁹

Taken together then, the Court's holdings in *Mosley*, *Edwards*, and *Roberson* maintain the seeming anomaly that a defendant who invokes his right to silence is not being badgered when police reinterrogate him two hours later about a different crime, while one who invokes his right to counsel is being badgered when reinterrogated the next day—or three days later—even if, the reinterrogation concerns a different crime. The Court in *Roberson* put no time limit on the duration of this notion of badgering regarding reinterrogation after invocation of the right to counsel.⁹⁰ So, presumably, a defendant who is interrogated years after his invocation of the right to counsel in one case cannot be interrogated

84. *Arizona v. Roberson*, 486 U.S. 675 (1988).

85. *Id.* at 686–87.

86. *Id.* at 678; *Mosley*, 423 U.S. at 104.

87. *Mosley*, 423 U.S. at 104–05.

88. *See Roberson*, 486 U.S. at 687–88 (noting that the need to determine whether the suspect has requested counsel exists regardless of whether reinterrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second investigation).

89. *Id.*

90. *See Roberson*, 486 U.S. at 677–78.

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.⁹¹ 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 five months later.⁹² The appellate court held this would still be regarded as badgering under *Edwards*.⁹³ 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,”⁹⁴ and he is “not competent to deal with the authorities without legal advice.”⁹⁵ 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.⁹⁶ In fact, the benefits of a specific bright-line rule are so important, both to the government and the defendant, that they outweigh the consequences of the inability to present to the fact-finder what the Court called “highly probative evidence” of an otherwise voluntary statement by the accused.⁹⁷ Apparently, the benefits of such a bright-line rule are not relevant to what the government may do after a defendant invokes his right to silence as a defendant may be reinterrogated after a “reasonable time” during which his rights are scrupulously honored.⁹⁸

91. *United States v. Green*, 592 A.2d 985, 989–90 (D.C. Cir. 1991), *cert. granted*, 504 U.S. 908 (1992), *vacated as moot*, 507 U.S. 545 (1993). The Court granted certiorari, but when the defendant died, the appeal was vacated as moot. *Green*, 507 U.S. at 545.

92. *Id.* at 985–86.

93. *Id.* at 989.

94. *Roberson*, 486 U.S. at 681.

95. *Id.* at 681 (adopting Justice White's concurring view from *Michigan v. Mosley*, 423 U.S. 96, 110 n.2 (1975)).

96. *Id.* at 681–82.

97. *Id.* at (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)).

98. For a discussion of “reasonable time” see *infra* note 140 and accompanying text. What constitutes the scrupulous honoring of a suspect's rights after he invokes 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 355

In *Roberson*, the government argued that the issue was similar to that which confronted the Court the previous year in *Connecticut v. Barrett*.⁹⁹ In *Barrett*, 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.¹⁰⁰ 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.¹⁰¹ Similarly, in *Roberson*, the government argued that the defendant made a limited waiver—one that was limited only to questioning involving the drug case.¹⁰² However, 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.”¹⁰³ The Court went on to hold that *Roberson* was also distinguishable as a matter of law.¹⁰⁴ Implicitly then, even if *Roberson* had said he wanted counsel just for the drug case, the police still would be barred from initiating questioning about the murder case because that too would be seen as yielding to the pressure of the custodial setting. This suggests that, a defendant can still be reinterrogated after his unconditional statement that he wants to remain silent, but a defendant who imposes at least some conditions on the exercise of his right to counsel cannot be reinterrogated—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 the Court offered 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 reinterrogation of the defendant after he had previously invoked his right to counsel would “‘reassure’ a suspect . . . that his rights have remained untrammelled.”¹⁰⁵ It reasoned that the defendant had been

(setting forth cases showing inconsistency regarding the application of the *Mosley* factors).

99. See *Roberson*, 486 U.S. at 683; *Connecticut v. Barrett*, 479 U.S. 523 (1987).

100. *Barrett*, 479 U.S. at 525.

101. *Id.* at 529.

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

103. *Id.*

104. *Id.* (“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.”).

105. *Id.* at 686.

denied his request for counsel for three days, hardly an environment designed to reassure him that his rights were being honored.¹⁰⁶ While this reason seems to apply primarily to invocation of the counsel,¹⁰⁷ what the Court said immediately after should apply to invocation of the right to silence as well. The Court wrote, “[T]here is a serious risk that the mere repetition of the *Miranda* warnings would not overcome the presumption of coercion that is created by prolonged police custody.”¹⁰⁸ In *Mosley*, however, the Court held that the repetition of *Miranda* warnings even after prolonged custody—apparently the more prolonged the better to prevent badgering¹⁰⁹—plays a role in ensuring that the reinterrogation of a defendant after he invokes his right to silence is not coercive.¹¹⁰

B. Applying the Edwards Protection even After the Suspect is Permitted to Consult with Counsel

Now fully invested in the distinction it created between reinterrogation of the suspect who invokes his right to counsel and the suspect who invokes his right to silence, the Court went all-in with its decision in *Minnick v. Mississippi*.¹¹¹ In *Minnick*, the Court held— notwithstanding the fact that after requesting counsel the police allowed Minnick to speak with his lawyer on two or three occasions—that the subsequent statement was still not compliant with *Edwards*.¹¹²

The facts of *Minnick* are interesting because, unlike those of *Edwards* and *Roberson*, they seem to demonstrate a situation in which

106. *Id.*

107. *See id.* One could argue, however, that any police attempt to reinterrogate 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.

108. *Id.* at 686 (footnote omitted).

109. *See Michigan v. Mosley*, 423 U.S. 96, 102 (1975). This is because in *Mosley*, the Court held that the longer the period of time between when the suspect invokes his right to silence and when the police attempt to reinterrogate him, the more the suspect's rights were scrupulously honored. *See id.* However, it is arguable that the longer the 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, *Minnick v. Mississippi: Rationale of Right to Counsel Necessitates Reversal of Michigan v. Mosley's Right to Silence Ruling*, 27 TULSA L.J. 181, 197–98 (1991); *see also* Strauss, *supra* note 71, at 401 (discussing how in the right to counsel context, a longer period of custody may increase the coercion on the suspect).

110. *Mosley*, 423 U.S. at 105–06.

111. *Minnick v. Mississippi*, 498 U.S. 146 (1990).

112. *Id.* at 149–50.

the police affirmatively honored the defendant's request for counsel. After making certain admissions regarding a murder case, Minnick told the FBI interrogators to "[c]ome back Monday when I have a lawyer" and that he "would make a more complete statement then with his lawyer present."¹¹³ A lawyer was appointed for Minnick, and he spoke with the lawyer on several occasions.¹¹⁴ On the Monday referred to by Minnick above, three days after the invocation of his right to counsel, a local sheriff questioned Minnick and obtained a confession.¹¹⁵ Minnick challenged the admission of this latter confession, claiming his right to be free from police-initiated reinterrogation after invocation of his right to counsel had been violated.¹¹⁶ 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 reinterrogations.¹¹⁷

As it did with the language of *Miranda* in *Mosley* and *Edwards*, the Court in *Minnick* made an interesting choice of which words from previous opinions to take literally and which to view more expansively. At the outset of its opinion in *Minnick*, the Court referred to the holding in *Edwards*, which stated that after an invocation of the right to counsel, police may not initiate reinterrogation of the suspect "until counsel has been made available to him."¹¹⁸ Counsel had not only been "made available" to Minnick, but Minnick exercised this right by speaking with his lawyer on two or three occasions.¹¹⁹ According to Mississippi's highest court, *Edwards* had been complied with.¹²⁰ The Supreme Court, however, interpreted language it had written both before and after *Edwards* as indicating that the language cited above from *Edwards* apparently did not mean what it said. It selectively quoted from *Miranda*'s prohibition on reinterrogating a suspect who has invoked his right to counsel "until an attorney is *present*,"¹²¹ selective, because the Court neglected to point out that two paragraphs later, the *Miranda* Court stated, "If the interrogation continues without . . . an attorney[,] . . . a heavy burden rests on the government to demonstrate

113. *Id.* at 148–49.

114. *Id.* at 149.

115. *Id.*

116. *Id.*

117. *Id.* at 153.

118. *Id.* at 149–50 (quoting *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981)).

119. *See id.*

120. *Id.* at 150.

121. *Id.* at 152 (emphasis added) (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”¹²² Thus, rather than prohibiting reinterrogation without an attorney, the *Miranda* Court envisioned the possibility of reinterrogation of a defendant who invokes his right to counsel but required the government to meet a heavy burden in showing his change of mind was valid.¹²³

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 reinterrogation following invocation of the right to counsel.¹²⁴ 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*.¹²⁵ 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*.¹²⁶ Still, the Court conceded that until its decision in *Minnick*, there were “ambiguities” on this point in its previous decisions.¹²⁷ 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.¹²⁸

The first evidence that the *Miranda* protection was violated in this case, according to the Court, was that Minnick testified that, although he resisted, his jailers told him not once, but twice, that he had to speak to the government interrogators.¹²⁹ If the defendant’s testimony was

122. *Miranda*, 384 U.S. at 475 (citing *Escobedo v. Illinois*, 378 U.S. 478, 490 n.14 (1964)).

123. *See id.*

124. *Minnick*, 498 U.S. at 152–53.

125. *Id.* at 149, 152–53 (citing *Arizona v. Roberson*, 486 U.S. 675, 680 (1988); *Shea v. Louisiana*, 470 U.S. 51, 52 (1985); *Oregon v. Bradshaw*, 462 U.S. 1039, 1043 (1983)). 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.

126. *Minnick*, 498 U.S. at 161–62 (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).

127. *Id.* at 153 (majority opinion).

128. *Id.*

129. *Id.* at 148–49. On two different occasions, *Minnick* was told that he would “have to go down [to the interview] or else” and that he would “have to talk” to law enforcement

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 *Miranda* without having to stretch the *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.¹³⁰ 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.¹³¹ 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.¹³² In fact, any attorney not offering such advice in Minnick's situation would be incompetent.¹³³ Thus, Minnick likely received the type of protection, from counsel, envisioned in *Edwards*.

The Court found additional justification for its holding in *Minnick* from the need to keep application of the *Edwards* protection "clear and unequivocal."¹³⁴ In this regard, the Court noted that even if the *Edwards* protection was 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.¹³⁵ According to the Court, this would cause the *Edwards* protection to "pass in and out of existence multiple times."¹³⁶ The Court then asserted that "[v]agaries of this sort spread confusion through the justice system and lead to a

officials. *Id.*

130. *Id.* at 153–54.

131. *Id.* at 154.

132. *Id.* at 157 (Scalia, J., dissenting) (citing Joint App. at 46–47, *Minnick v. Mississippi*, 498 U.S. 196 (1990)) (noting that, in fact, Minnick testified that his attorney did advise him "to not talk to nobody and not tell nobody nothing and to not sign no waivers").

133. *Id.* at 162. 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, *supra* note 39, at 487 (quoting *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964); *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring)). Barton also noted that "the very first thing any lawyer summoned to a police station by a *Miranda* request will do is find out what the client has already said and strongly advise the client to say nothing further." Barton, *supra* note 39, at 487.

134. *Minnick*, 498 U.S. at 154–55.

135. *Id.* at 154.

136. *Id.*

consequent loss of respect for the underlying constitutional principle.”¹³⁷

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 reinterrogated if their right to silence is scrupulously honored, it is also undisputed that at any time during the reinterrogation the defendant could again invoke his right to silence and the questioning would have to cease.¹³⁸ This would lead to precisely the same situation criticized so severely by the Court above.¹³⁹ 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, waiting a reasonable time (itself a vague standard)¹⁴⁰ and issuing a fresh set of *Miranda* warnings. The police then reinterrogate the defendant as permitted under *Mosley*. The defendant begins responding and again asserts his right to silence.¹⁴¹ Once again, the police must honor the invocation but can adhere to the *Mosley* requirements and come back yet again to reinterrogate the defendant. This would lead the *Mosley* protection to “pass in and out of existence multiple times”¹⁴² and warrants the same type of criticism from a consistent Supreme Court.

The Court in *Minnick* reasoned that the confusion it described above is heightened by the imprecise meaning of consultation.¹⁴³ One example it offered related to the length of time the consultation would have to be in order to satisfy the standard that the government proposed.¹⁴⁴ Would a “hurried interchange”¹⁴⁵ between counsel and client be deemed

137. *Id.* at 155.

138. See *Michigan v. Mosley*, 423 U.S. 96, 106–07 (1975).

139. See *supra* notes 134–37 and accompanying text.

140. See *Mosley*, 423 U.S. at 106–07; see also *Robinson v. Attorney Gen. of Kan.*, 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 thirty minutes was a reasonable period of time, after which law enforcement officers could reinterrogate the defendant); *United States v. Udey*, 748 F.2d 1231, 1242 (8th Cir. 1984) (holding that six hours was a reasonable period of time under *Mosley*).

141. See *Mosley*, 423 U.S. at 106–07.

142. See *Minnick v. Mississippi*, 498 U.S. 146, 154–55 (1990).

143. *Id.* at 155.

144. *Id.*

145. *Id.*

sufficient or would there have to be a “lengthy in-person conference”?¹⁴⁶ Again, this is a fair question, and again the parallel to a *Mosley* situation is inescapable. How much time must pass after invocation of the right to silence before the police may come back and reinterrogate the defendant while still being said to have “scrupulously” observed his right? In *Mosley* that time period was two hours.¹⁴⁷ In subsequent cases, time periods as short as ten or thirty minutes have been found to be acceptable.¹⁴⁸ How many times may the police come back after the defendant’s assertion and reassertion of his right to silence?¹⁴⁹ The confusion and ambiguities identified by the Court regarding the *Edwards* standard of sufficiency of consultation with counsel are also present in the *Mosley* standard of sufficiency of invocation of the right to silence.

Justice Scalia’s dissent in *Minnick* 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 reinterrogation.¹⁵⁰ Because Scalia has been a harsh critic of the holdings in *Edwards* and even *Miranda*,¹⁵¹ it is

146. *Id.*

147. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975).

148. *See United States v. Thompson*, 866 F.2d 268, 271–72 (8th Cir. 1989) (holding defendant’s Fifth Amendment rights were not violated when law enforcement officer resumed questioning approximately thirty minutes after defendant had invoked his right to remain silent); *United States v. Hsu*, 852 F.2d 407, 411–12 (9th Cir. 1988) (holding same); *Lanosa v. Frank*, No. 07-00115, 2007 WL 2746839, at *7 (D. Haw. Sept. 17, 2007) (holding police attempt to reinterrogate the defendant ten minutes after he had invoked his right to silence did not violate Fifth Amendment), *aff’d*, 304 F.App’x. 565, 566 (9th Cir. 2008); *Stock v. Alaska*, 191 P.3d 153, 155–56, 161 (Alaska Ct. App. 2008) (holding defendant’s Fifth Amendment rights were not violated when law enforcement officer resumed questioning approximately thirty minutes after defendant had invoked his right to remain silent).

149. *See, e.g., infra* notes 223–35 (discussing *Grant v. Warden*, 616 F.3d 72 (1st Cir. 2010), *cert. denied sub nom. Grant v. Barnhart*, 131 S. Ct. 948 (2011)).

150. *Minnick v. Mississippi*, 498 U.S. 146, 161–62 (1990) (Scalia, J., dissenting).

151. *Dickerson v. United States*, 530 U.S. 428, 448 (2000) (Scalia, J., dissenting) (referring to the *Miranda* decision as “objectionable” and “preposterous”); *Minnick*, 498 U.S. at 165 (Scalia, J., dissenting). In *Minnick*, Justice Scalia stated:

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

noteworthy to see Scalia's agreement with Yale Kamisar—a staunch defender of *Miranda*—when it comes to the distinction between application of the right to silence and the right to counsel.¹⁵² 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.¹⁵³

C. What the Court Giveth on One Hand

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*¹⁵⁴ and *Davis v. United States*,¹⁵⁵ the Court set up significant barriers to defendants seeking to suppress statements they claimed resulted from violations of *Edwards*.¹⁵⁶ Both of these five-person majority opinions drew strong opposition from four Justices on the Court and substantial criticism from commentators.¹⁵⁷

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 “inconsisten[cy] 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 (quoting *id.* at 154 (majority opinion)).

152. *Minnick*, 498 U.S. at 164 (Scalia, J., dissenting) (offering Yale Kamisar's statement that “either *Mosley* was wrongly decided or *Edwards* was” (quoting Yale Kamisar, *The Edwards and Bradshaw Cases: The Court Giveth and the Court Taketh Away*, in 5 SUPREME COURT: TRENDS AND DEVELOPMENTS 153, 157 (J. Choper et al. eds. 1984))).

153. *Minnick*, 498 U.S. at 164 (Scalia, J., dissenting) (emphasis added).

154. *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

155. *Davis v. United States*, 512 U.S. 452 (1994).

156. *Edwards v. Arizona*, 451 U.S. 477 (1981); *Davis*, 512 U.S. at 459; *Bradshaw*, 462 U.S. at 1045–46.

157. See, e.g., Jane M. Faulkner, Note, *So You Kinda, Sorta, Think You Might Need a Lawyer?: Ambiguous Requests for Counsel After Davis v. United States*, 49 ARK. L. REV. 275, 277–78 (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); Kit Kinports, *The Supreme Court's Love–Hate Relationship*

After police gave Bradshaw his *Miranda* rights in connection with the investigation of a homicide, Bradshaw denied active involvement in the crime and then invoked his right to counsel.¹⁵⁸ 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?”¹⁵⁹ After some further discussion between the two, Bradshaw agreed to take a polygraph.¹⁶⁰ Upon being told that he had failed the polygraph, Bradshaw made an inculpatory statement.¹⁶¹ Bradshaw challenged the admission of that statement, claiming it was elicited in violation of his right to counsel as enumerated in *Miranda* and *Edwards*.¹⁶²

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*.¹⁶³ The Oregon Court of Appeals held that Bradshaw’s comment—which came only minutes after he 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.”¹⁶⁴ In other words, Bradshaw wanted to know where he was headed and had

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.”); Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda*, 17 WM. & MARY BILL RTS. J. 773, 775, 794 (2009) (criticizing *Davis* and arguing “[j]udges have gone to extraordinary lengths to classify even seemingly clear invocations as ambiguous invocations which can be ignored by the police.”); Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. 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).

158. *Bradshaw*, 462 U.S. at 1041–42.

159. *Id.* at 1042.

160. *Id.*

161. *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.*

162. *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.*

163. *Id.* at 1041.

164. *State v. Bradshaw*, 636 P.2d 1011, 1013 (Or. Ct. App. 1981).

not intended to initiate a discussion, even generally, about his involvement in the crime. The Supreme 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 therefore, constituted an initiation under *Edwards*.¹⁶⁵

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 to initiate such a discussion of his crime.¹⁶⁶ Marshall wrote,

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.¹⁶⁷

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.¹⁶⁸

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.¹⁶⁹ Apparently, the Court chose not to interpret this ambiguity in favor of the defendant.¹⁷⁰ In terms of interpreting ambiguity against the defendant when it comes to gaining access to the protections of *Edwards*, however, it is the Court's opinion in *Davis v. United States* that is most noteworthy.

In *Davis*, naval investigators took Davis into custody and gave him

165. *Bradshaw*, 462 U.S. at 1045–46.

166. *Id.* at 1055 (Marshall, J., dissenting).

167. *Id.*

168. *Id.* at 1056 (noting that "[t]he very essence of custody is the loss of control over one's freedom of movement" and that Bradshaw's question was a natural response to his being in custody).

169. *Id.* at 1045–46 (majority opinion).

170. *Id.* ("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.").

the military equivalent of his *Miranda* rights, after which he agreed to talk to the officers.¹⁷¹ Ninety minutes into the questioning, Davis said, “Maybe I should talk to a lawyer.”¹⁷² The investigators then attempted to clarify whether Davis was invoking his right to counsel.¹⁷³ 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.¹⁷⁴ At that point, Davis said he did not want a lawyer.¹⁷⁵ The officers then took a short break and re-advised the defendant of both his right to remain silent and right to counsel before questioning him again.¹⁷⁶ Davis later argued that all statements he made after what he claimed was an invocation of his right to counsel should be suppressed under *Edwards*.¹⁷⁷ The U.S. Court of Military Appeals denied the defendant’s appeal, holding that the naval investigators did what they should have in the face of an ambiguous request for counsel.¹⁷⁸ The investigators asked narrow questions designed to clarify whether Davis’s statement was an invocation of the right to counsel.¹⁷⁹

In assessing whether suspects’ words in custodial interrogation environments constituted invocation of the right to counsel and thereby engaged the protection of *Edwards*, the Court took an all-or-nothing approach. The Court held that only an unambiguous request for an attorney invoked the protections of *Edwards*.¹⁸⁰ Thus, the police need not stop questioning such a suspect because he *might* have requested counsel, rather the police must stop only if he actually makes such a request.¹⁸¹ Numerous commentators have observed that those who are

171. *Davis v. United States*, 512 U.S. 452, 454 (1994) (“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.”).

172. *Id.* at 455.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *United States v. Davis*, 36 M.J. 337, 341 (C.M.A. 1993), *aff’d*, *Davis*, 512 U.S. at 459.

179. *Davis*, 36 M.J. at 342.

180. *Davis*, 512 U.S. 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, *supra* note 30, at 1011.

181. *Davis*, 512 U.S. at 459.

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.¹⁸² When such people are under the extreme pressures that attend custodial interrogation, it is even less likely that requests for counsel will be expressed with absolute certainty.¹⁸³ The Court anticipated such criticism by conceding that such suspects may genuinely want counsel but may not express their desires with sufficient clarity to require ending the interrogation, after this decision.¹⁸⁴ 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 *Edwards*, the defendant has to assert that right unambiguously.¹⁸⁵ 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" that the bright-line *Edwards* rule created.¹⁸⁶

Stating that 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 him or her unlikely to do so with the definitiveness required by the Court in *Davis*. As to the

182. See, e.g., Richard Rogers et. al., "Everyone Knows Their Miranda Rights": *Implicit Assumptions and Countervailing Evidence*, 16 PSYCHOL. PUB. POL'Y & L. 300, 306-07 (2010) (noting that in a study of 149 previously arrested defendants, 69.1% of defendants stated that they believed that "I want a lawyer" meant the same thing as saying "I might want a lawyer"); Marcy Strauss, *Understanding Davis v. United States*, 40 LOY. L.A. L. REV. 1011, 1012 (2006) (concluding that *Davis* will eviscerate the *Miranda* guarantees, particularly for women and minorities who tend not to speak in clear, declarative terms); Weisselberg, *supra* note 157, at 1570 (noting that mentally disabled subjects in a study understood only about 20% of the critical words comprising the *Miranda* vocabulary and that their ability to understand the *Miranda* warnings was likewise severely impaired).

183. In this regard, one commentator wrote:

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 decisions that are essential to *Miranda* and *Massiah* protections. Such treatment of potential invocations could undermine *Miranda*'s goal of dissipating compulsion by permitting refuge in counsel.

Tomkovicz, *supra* note 30, at 1012.

184. *Davis*, 512 U.S. at 460.

185. *Id.* at 460-61.

186. *Id.* at 461.

Court's second response, cases subsequent to *Davis* show that the approach the *Davis* Court adopted hardly created clarity or ease of application with respect to whether a suspect is invoking the right to counsel.¹⁸⁷

Whatever one thinks of the Court's conclusion about the significance of a suspect's unambiguous invocation of the right to counsel, it is far harder to justify the Court's cursory response to the requirements of police once a defendant makes an ambiguous request for counsel. In *Davis*, the investigators stopped questioning about the crime until they clarified Davis's ambiguous request.¹⁸⁸ 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.¹⁸⁹ It was the investigators' clarification of Davis's initial request for counsel that led the United States Court of Military Appeals to affirm the denial of Davis's motion to suppress his statement.¹⁹⁰ While referring to this clarification of an ambiguous

187. *Compare, e.g.*, Lord v. Duckworth, 29 F.3d 1216, 1220–21 (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), and Kapocsi v. Oklahoma, 668 P.2d 1157, 1159–60 (Okla. Crim. App. 1983) (holding that the statement "I'm thinking I will need a lawyer" was not a request for counsel), *cert. denied*, 464 U.S. 1070 (1984), Clausen v. Texas, 682 S.W.2d 328, 330–31 (Tex. Ct. App. 1984) (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), *cert. denied*, 475 U.S. 1021 (1986), with Abela v. Martin, 380 F.3d 915, 926 (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), 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), and McDaniel v. Virginia, 506 S.E.2d 21, 23 (Va. Ct. App. 1998) (holding "I think I would rather have an attorney here to speak for me," was an unambiguous invocation of the right to counsel), *aff'd en banc*, 518 S.E.2d 851, 853 (Va. App. 1999).

188. *Davis*, 512 U.S. at 455. After Davis stated "Maybe I should talk to a lawyer[.]" the interview then 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.

United States v. Davis, 36 M.J. 337, 339–40 (C.M.A. 1993).

189. *Davis*, 36 M.J. at 340.

190. *Id.* at 341.

request for counsel by the investigators as “good police practice,” the Supreme Court held that such a clarification is unnecessary.¹⁹¹ The Court gave no reason for this other than there was no requirement for such a clarification.¹⁹² 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.¹⁹³

The failure of the Court in *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.¹⁹⁴ 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 “‘rigid’ prophylactic rule of *Edwards*.”¹⁹⁵ Whether the Court would have rendered a decision like the one in *Davis* had it not embarked on the path it had begun with *Edwards* and continued with *Roberson* and *Minnick* toward what it came to regard as a “rigid prophylactic rule” is, of course, speculation. It is fair to ask, however, if faced with the extreme reach of the *Edwards* protections, the Court in *Bradshaw* and *Davis* was determined to make it difficult for defendants to grasp onto such extensive protections.¹⁹⁶ One commentator noted the effect of *Edwards* and its progeny by saying:

[T]he breathtaking scope of the *Edwards* presumption, extending

191. *Davis*, 512 U.S. at 461.

192. *Id.*

193. 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.

194. *Davis*, 512 U.S. at 467 (Souter, J., concurring).

195. *Id.* at 458 (majority opinion) (emphasis added) (quoting *Smith v. Illinois*, 469 U.S. 91, 95 (1984); *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)).

196. While *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983), was decided before the Court’s decisions in *Arizona v. Roberson*, 486 U.S. 675 (1988), and *Minnick v. Mississippi*, 498 U.S. 146 (1990), it still followed creation of the special initiation protection in *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981), and the characterization of it as rigid in *Fare*, 442 U.S. 707, 718 (1979). *Davis*, 512 U.S. 452 (1994) was handed down after the Court expanded the *Edwards* protection in *Roberson* and *Minnick*.

When considering the series of cases after *Miranda* in which the Court diminished the *Miranda* protections by referring to them as “prophylactic,” *see, e.g.*, *New York v. Quarles*, 467 U.S. 649, 653 (1984); *United States v. Dickerson*, 166 F.3d 667, 689 (4th Cir. 1999), *rev’d*, 530 U.S. 428, 437–38 (2000), one commentator characterized the holding in *Edwards* as “striden[t],” Barton, *supra* note 39, at 485. In *Maryland v. Shatzer*, the Court referred to the same holding as the “*Edwards*’ super-prophylactic rule.” 130 S. Ct. 1213, 1221 n.3 (2010).

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.¹⁹⁷

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.

A. *The Distinction Between the Rights to Silence and Counsel Does Not Honor the Suspect's Choice*

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.¹⁹⁸ In cases subsequent to *Miranda*, the Court held that when a suspect invokes his right to counsel the suspect is indicating he is utterly helpless to respond to police questioning ever without the presence of counsel.¹⁹⁹ Invoking the right to silence—according to the Court—means only that the suspect wishes not to answer questions at that particular point in time.²⁰⁰ 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”²⁰¹ or if his invocation of the right to silence is, “I

197. Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona*, 53 OKLA. L. REV. 11, 18 (2000).

198. *Miranda v. Arizona*, 384 U.S. 436, 465, 471 (1966).

199. See, e.g., *Arizona v. Roberson*, 486 U.S. 675, 681 (1988) (noting that a suspect invokes his right to counsel if he “believes that he is not capable of undergoing . . . questioning without advice of counsel”).

200. See Strauss, *supra* note 71, at 385.

201. See, e.g., *Minnick v. Mississippi*, 498 U.S. 146, 165 (1990).

don't ever want to speak with the police."²⁰² Given this, it is hard to maintain that the distinction drawn by the Court is merely an attempt to honor the defendant's choice.²⁰³

202. See, e.g., *Williams v. Texas*, 257 S.W.3d 426, 433–34 (Tex. Ct. App. 2008) (holding that law enforcement officers could reinterrogate the defendant even after he invoked his right to silence by stating: “I want to terminate *everything*.” (emphasis added)).

203. 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. See *Miranda*, 384 U.S. at 458. The dichotomy is said to honor that purpose. See *Michigan v. Mosley*, 423 U.S. 99, 109–10 (1975). It would seem that the Court could have honored the suspect's choice 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 his right to counsel unless the suspect initiates reinterrogation. *Miranda*, 384 U.S. at 473–74. This position presumes that a suspect who has invoked one of his *Miranda* rights and then changes his mind about speaking when reapproached by the police is doing so not as a matter of free choice, but instead in response to the coercive environment of custodial interrogation. *Mosley*, 423 U.S. at 102. 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. *Id.* at 106. 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. *Id.* at 103–04.

The Court chose neither of these paths. *Id.* at 102. Instead it distinguished invocation of the right to silence from the right to counsel because the latter 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 all future times. *Id.* at 103–04; *Miranda*, 384 U.S. at 471. The suspect's request for silence has been honored when the police stopped questioning, so they may later resume the questioning without having denied the suspect the choice he made when invoking his right to silence. *Mosley*, 423 U.S. at 106. 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. *Id.* at 109–10. In summing up this position as to why invocations of silence and counsel are different one commentator observed,

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, *The Effects of Miranda v. Arizona: “Embedded” in Our National Culture?*, 29 CRIME & JUST. 203, 228 (Michael Tonry ed., 2002).

This explanation for the assertion that application of the *Mosley-Edwards* dichotomy to reinterrogation respects the suspect's choice to invoke silence or counsel is highly debatable for several reasons. Regarding invocation of the right to counsel, the holding in *Davis*—which permitted government agents to ignore ambiguous invocations of the right to counsel and therefore does not require the agents clarify the suspect's actual choice regarding whether he wanted counsel present—suggests that honoring the suspect's choice is not at the heart of the *Edwards* protection. *Davis v. United States*, 512 U.S. 452, 459 (1994). Regarding invocation of the right to silence, the fact that a suspect's expressed or implied choice not to speak with the police—invocation of the right to silence—can be overcome by application of the factors enumerated in *Mosley* suggests the same lack of concern for the suspect's choice.

It is important then to understand what, if any, real difference exists when the custodial suspect invokes the right to counsel, rather than the right to 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.²⁰⁴ 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.²⁰⁵

The *Edwards* principle, as described in *Roberson*, is that a suspect who invokes his right to counsel is manifesting his inability to ever deal with police questioning without an attorney being present.²⁰⁶ This, according to the Court, is a different and more permanent helplessness than that manifested by the suspect who invokes his right to silence.²⁰⁷ The Court offers no support for the characterization it places on the words of such a suspect. It is incumbent, therefore, to examine whether support for the attachment of these meanings to the suspect's invocation of the two rights exists.

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 the right to silence than when he invokes the right to counsel.²⁰⁸ Either

See Mosley, 423 U.S. at 110 n.2 (White, J., concurring). Perhaps most profoundly, the interpretations of *Mosley* by lower courts—which have legitimated police tactics of reapproaching suspects in manners that clearly demonstrate badgering and therefore nullify free choice—are further evidence that real freedom of choice is not served by the dichotomy. *See infra* notes 222–35 and accompanying text; *see also* Strauss, *supra* note 71, at 385 (observing that if preserving choice is the goal, “the results in *Mosley* and *Edwards* are likely irreconcilable”).

204. *See* *Maryland v. Shatzer*, 130 S. Ct. 1213, 1219 (2010) (quoting *Miranda*, 384 U.S. at 456–57, 467 (1966)) (referring to the “‘inherently compelling pressures’ of custodial interrogation,” the “‘incommunicado interrogation’ in an ‘unfamiliar,’ ‘police-dominated atmosphere,’” and discussing “pressures ‘which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely’”).

205. *See Miranda*, 384 U.S. at 473–74.

206. *See* *Edwards v. Arizona*, 451 U.S. 477, 480 (1981); *Arizona v. Roberson*, 486 U.S. 675, 686 (1988).

207. *See Edwards*, 451 U.S. at 484.

208. *But see* Strauss, *supra* note 71, at 385 (“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

of these invocations 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.²⁰⁹ Thus, he probably 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 that a suspect in custodial interrogation means something different when invoking his right to counsel as opposed to his right to silence given his likely understanding that either will achieve his goal of preventing subsequent questioning.²¹⁰ 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, in other words, those who know that questioning will in fact cease if they invoke either right.

It is useful to bear in mind that the legal ramifications of the 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.²¹¹ The right to counsel protected under the Fifth Amendment, as identified in *Miranda*, deals only with the right to counsel in situations of custodial interrogation.²¹² Perhaps more important is that the suspect generally understands this reality (that the right to counsel here pertains to the police questioning) even though he is unlikely to know the legal reason why. Some incarnations of the *Miranda* warnings explicitly say that the suspect has the right to counsel both before and during police questioning, while others imply it in one

insisting he will not speak as when he declines to speak without his attorney.”)

209. *Miranda*, 384 U.S. at 444–45.

210. See Kamisar, *supra* note 152, at 157; see also Thrutchley, *supra* note 109, at 197. As Yale Kamisar says:

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 wishes 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.

Kamisar, *supra* note 152, at 157 (emphasis omitted).

211. U.S. CONST. amend. VI.

212. See *supra* text accompanying notes 27–34; Barton, *supra* note 39, at 485 (citing *Edwards v. Arizona*, 451 U.S. 477, 485–86 (1981)).

way or another.²¹³ 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, lies 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 reinterrogated after he invokes silence, but cannot be reinterrogated after invoking counsel except if he initiates discussion of the crime.²¹⁴ Unlike the *Miranda* requirement that a suspect in custody be told that 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 reinterrogation 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

213. While the warnings must contain the four essentials enumerated in *Miranda*, the Court has permitted nuanced, different wordings of the warnings. See, e.g., *Duckworth v. Eagan*, 492 U.S. 195, 202–03 (1989) (holding that *Miranda* advisement need not be given in the exact form described in the *Miranda* decision and that it is enough that the advisement reasonably conveys the *Miranda* rights to a suspect); *California v. Prysock*, 453 U.S. 355, 355–57 (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). Accordingly, different law enforcement authorities have used slightly different versions of the warnings. An example of many such versions is:

You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.

Duckworth, 492 U.S. at 198 (emphasis omitted). To examine how versions may differ, compare *Duckworth*, 492 U.S. at 198, with *Prysock*, 453 U.S. at 356–57.

214. This would require the suspect to have knowledge of the *Mosley–Edwards* dichotomy with respect to the different requirements for reinterrogation of suspects who invoke the right to silence and those invoking their counsel right, and perhaps, depending on the custodial situation involved, also the extensions of the *Edwards* protection in *Roberson* (to different crimes) and *Minnick* (even after the suspect has met with counsel). It states the obvious to say that this is highly unlikely. See *Kamisar*, *supra* note 152, at 157; *Strauss*, *supra* note 71, at 385; *Thrutchley*, *supra* note 109, at 197.

the suspect regarding his submission to later reinterrogation.²¹⁵

B. Invocations of the Rights to Silence and Counsel are Equally Threatened by Police Badgering

If the distinction the Court draws between invocations of the right to silence and the right to 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 reinitiate questioning of him in the absence of counsel, but is not being badgered if he is reinterrogated after invoking his right to silence. In several post-*Edwards* decisions, the Court made clear that the Court's intent in *Edwards* was to prohibit badgering arising from uncounseled, police-initiated reinterrogations.²¹⁶ In *Michigan v. Harvey*,²¹⁷ the Court wrote, "*Edwards* thus established another prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."²¹⁸ In *Minnick*, the Court quoted this language approvingly and added, "The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures."²¹⁹ 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,"²²⁰ and that postinvocation questioning, even three days later about a separate crime, "will surely exacerbate whatever compulsion to speak the suspect may be feeling."²²¹

It may very well be true that postinvocation questioning of suspects who invoke their right to counsel exacerbates compulsion, 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.²²² A review of cases illustrates that suspects can be badgered

215. See *supra* note 203 and accompanying text.

216. *Michigan v. Harvey*, 494 U.S. 344 (1990); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988).

217. *Harvey*, 494 U.S. 344.

218. *Id.* at 350.

219. *Minnick*, 498 U.S. at 151.

220. *Roberson*, 486 U.S. at 681 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

221. *Id.* at 686.

222. Thomas, *supra* note 203, at 228 (arguing that the risk of compulsion is the same

into waiving their previously invoked right to silence and that the holding in *Mosley* does little to avoid this badgering.

In *Grant v. Warden*,²²³ the defendant was taken to the hospital for surgery.²²⁴ “The first interview began at 4:26 a.m., just after [the] surgery. . . . Detectives [told Grant] that they wanted to talk with [him] about his mother-in-law and attempted to advise [him] of his [*Miranda*] rights,” but ended the interview because Grant “was not coherent.”²²⁵ When a second interview was “attempted at 9:51 a.m., another detective . . . explained [to Grant] that he was investigating the . . . case and advised Grant of his *Miranda* rights.”²²⁶ Next, Grant stated that “his throat was sore” and “he did not want to talk.”²²⁷ At 11:45 a.m., one of the detectives returned and again advised the defendant of his *Miranda* rights.²²⁸ 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.”²²⁹ Again, at 1:42 p.m., the detective returned and readvised Grant of his *Miranda* rights.²³⁰ 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?

regardless of whether the defendant invokes the right to silence or the right to counsel); Wolff, *supra* note 83, 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).

223. *Grant v. Warden*, 616 F.3d 72 (1st Cir. 2010), *cert. denied sub nom. Grant v. Barnhart*, 131 S. Ct. 948 (2011).

224. *Id.* at 73.

225. *Id.* at 73–74.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

Grant: No.²³¹

The next morning, at 9:03 a.m., “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.²³² The Court of Appeals for the First Circuit upheld the state supreme court’s finding that the officers scrupulously honored the defendant’s right to silence.²³³

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.”²³⁴ Grant argued that the detective badgered him into waiving his right to remain silent.²³⁵ 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.²³⁶

231. *Id.*

232. *Id.*

233. *Id.* at 78, 80.

234. *Id.* at 74.

235. *See id.* at 78.

236. *State v. Grant*, 939 A.2d 93, 106 (Me. 2008).

In *Jackson v. Dugger*,²³⁷ “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.”²³⁸ Forty-five minutes to an hour later, another detective arrived and readvised Jackson of his *Miranda* rights.²³⁹ Three hours later, Jackson was again advised of his *Miranda* rights and again asserted his right to remain silent.²⁴⁰ In total, Dade County officials advised Jackson of his rights four more times over the next six hours.²⁴¹ At 6:15 p.m., Jackson made a statement giving the location of the victim’s body.²⁴² Jackson then indicated that he desired counsel, but law enforcement officials did not provide him with an attorney.²⁴³ Subsequently, Jackson gave a formal written confession.²⁴⁴ The state trial court concluded that the formal written confession was inadmissible but allowed all statements made prior to Jackson’s request for counsel.²⁴⁵ On appeal, the Court of Appeals for the Eleventh Circuit also found that Jackson’s right to silence was scrupulously honored.²⁴⁶ 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.²⁴⁷ 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.²⁴⁸

In *Lanosa v. Frank*,²⁴⁹ the defendant was sitting in a stolen car when he was arrested.²⁵⁰ At 7:30 a.m. the next morning, Detective Silva advised Lanosa of his rights and gave him a *Miranda* waiver form.²⁵¹ At

237. *Jackson v. Dugger*, 837 F.2d 1469 (11th Cir. 1988).

238. *Id.* at 1471.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 1472.

248. *Id.*

249. *Lanosa v. Frank*, No. 07-00115, 2007 WL 2746839 (D. Haw. Sept. 17, 2007), *aff’d*, 304 F.App’x. 565 (9th Cir. 2008).

250. *Id.* at *4.

251. *Id.*

7:50 a.m., Lanosa indicated on the form that he understood his rights, but said that “he did not want to talk,” at which point the interrogation ended.²⁵² When the Detective stepped out of the room, he overheard another detective, Detective Lee, “discussing a separate investigation.”²⁵³ Upon hearing this discussion, Silva told Lee that Lanosa “might fit the description of the suspect he was looking for in connection with various sexual assaults and burglaries.”²⁵⁴ A mere ten minutes later, at 8:00 a.m., “Lee moved [Lanosa] to another room and started an interrogation about the sexual assaults and burglaries,” with Detective Silva present.²⁵⁵ Before the second interrogation, Lanosa was given a new copy of the *Miranda* waiver form and readvised of his *Miranda* rights by Lee.²⁵⁶ Within twelve minutes, Lanosa again indicated that he understood his rights by signing the appropriate portion of the waiver form. At 8:40 a.m., Lanosa signed the portion of the waiver form indicating that he waived his rights; however, he did not make a statement “and asked if he could return to his cell to think.”²⁵⁷ The court regarded this request as another invocation of Lanosa’s right to silence.²⁵⁸ Upon Lanosa’s request, the interrogation was ended and he was returned to his cell.²⁵⁹ Two hours later, at 10:40 a.m., a third detective, Detective Holokai, retrieved Lanosa from his cell to question him about an unrelated burglary.²⁶⁰ Before Detective Holokai had a chance to begin the interrogation, Detective Lee interrupted “and initiated a third interrogation.”²⁶¹ At that time Lee again advised Lanosa of his *Miranda* rights, presented him a copy of the *Miranda* waiver, which he had signed during the prior interrogation with Detective Lee, and asked Lanosa if was willing to talk.²⁶² At 10:50 a.m., Lanosa filled out a voluntary statement form and made incriminating statements in response to Lee’s questions about the sexual assaults and burglaries.²⁶³

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at *6.

259. *Id.* at *4.

260. *Id.* at *5.

261. *Id.*

262. *Id.*

263. *Id.*

The Court held that Lanosa's right to silence was scrupulously honored based primarily on the fact that Lanosa was given fresh *Miranda* warnings before each interrogation.²⁶⁴ While Lanosa contended that the ten minutes between the first two interrogations was not a reasonable amount of time under *Mosley*, the court stated that the time between the interrogations must be taken as a whole, and thus the 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.²⁶⁵ It is thus apparent that the effects of police badgering are every bit as significant for suspects who invoke their right to silence as for those who invoke their right to counsel. All of the assumptions that have been or could be used by the Court to support the distinction it has drawn between reinterrogating suspects in custody who invoke their right to silence and those who invoke 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 *Mosley*, *Edwards*, and subsequent holdings in this area.

V. TOWARDS AN APPROACH THAT IS BOTH SIMPLER AND FAIRER

In the previous Parts, this article argued that the differential treatment surrounding the reinterrogation of suspects in custody who invoke their right to silence and those who invoke their right to counsel is unsupportable both theoretically and pragmatically. This Section examines two recent decisions of the Supreme Court that 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.

264. *Id.* at *7.

265. *Id.* For more examples of badgering permitted under *Mosley*, see *Jackson v. Wyrick*, 730 F.2d 1177, 1178, 1180 (8th Cir. 1984) (holding that defendant's right to silence was scrupulously honored when he was questioned four times over a two day period); *State v. Lewingdon*, No. C-790488, 1980 WL 352986, at *3, *11-12 (Ohio Ct. App. Dec. 24, 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, 96-97 (Okla. Crim. App. 1977) (holding the defendant's statement admissible when he was interrogated four times within a twelve hour time period and given nothing to eat during that time).

In *Berghuis v. Thompkins*²⁶⁶ and *Maryland v. Shatzer*,²⁶⁷ both decided in 2010, the Supreme Court pointed the way towards a means of ending this unwarranted *Mosley/Edwards* distinction. Neither the *Thompkins* nor the *Shatzer* Court actually addressed the propriety of the distinction between reinterrogation between suspects who invoke right to silence and who invoke their right to counsel.²⁶⁸ 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.²⁶⁹ 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.²⁷⁰ Then, in *Shatzer*, the Court developed a new approach for dealing with reinterrogation of suspects in custody who invoke the right to counsel that works equally well for suspects in custody who invoke the right to silence.²⁷¹

A. *Berghuis v. Thompkins*

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*.²⁷² The second issue concerned whether *Thompkins* waived his right to silence by answering police questions without ever directly acknowledging he understood his *Miranda* rights.²⁷³ After being given his *Miranda* rights, *Thompkins* never expressly invoked them nor did he ever directly waive them.²⁷⁴ In fact, *Thompkins* remained largely silent during a three-hour interrogation by the police regarding his participation in a murder.²⁷⁵ About two hours and forty-five minutes

266. *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010).

267. *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010).

268. See *Thompkins*, 130 S. Ct. at 2259–60, 2263–64; *Shatzer*, 130 S. Ct. at 1223.

269. See *Thompkins*, 130 S. Ct. at 2260 (dealing with what constitutes invocation of the right to silence; *Shatzer*, 130 S. Ct. at 1217 (addressing whether the *Edwards* protection was eternal).

270. *Thompkins*, 130 S. Ct. at 2260; *Shatzer*, 130 S. Ct. at 1219–20.

271. *Shatzer*, 130 S. Ct. at 1223.

272. *Thompkins*, 130 S. Ct. at 2259.

273. *Id.* at 2260.

274. *Id.* at 2262.

275. *Id.* at 2256. During the interrogation *Thompkins* gave “a few limited verbal responses, however, such as ‘yeah,’ ‘no,’ or ‘I don’t know[.]’ [a]nd on occasion he

into the interrogation, Thompkins was asked if he believed in God and whether he prayed to God to forgive him for the shooting.²⁷⁶ He answered, “yes” to both questions, and these words were admitted against Thompkins at his trial.²⁷⁷ Thompkins argued to the Supreme Court that the admission of these statements at trial violated his right to silence.²⁷⁸

The Court ruled both that Thompkins never invoked his right to silence, and that he affirmatively waived his rights under *Miranda*.²⁷⁹ 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.²⁸⁰ It concluded that Thompkins’ silence was not an unambiguous manifestation.²⁸¹ 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.²⁸² The Court rejected Thompkins’ argument, holding that a waiver need not be express in order to satisfy the requirements emanating from *Miranda*.²⁸³ As long as the waiver is knowing and voluntary, it satisfies the requirements of the Fifth Amendment and *Miranda*, according to the Court.²⁸⁴ 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 right to remain silent.²⁸⁵ 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 had waived his rights.²⁸⁶ Speaking for four Justices in dissent, Justice Sotomayor expressed it

communicated by nodding his head.” *Id.* at 2256–57.

276. *Id.* at 2257.

277. *Id.*

278. *Id.* at 2259.

279. *Id.* at 2260, 2262.

280. *Id.* at 2259–60.

281. *Id.* at 2260.

282. *See id.*

283. *Id.* at 2261.

284. *Id.* at 2260.

285. *Id.* at 2262–63.

286. *Id.* at 2262. The Court noted that Thompkins read the warnings, and “read aloud the fifth warning, which stated that ‘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. *Id.*

strange that one has to speak in order to assert his right not to speak.²⁸⁷ Additionally, she maintained that the majority opinion ignored previous decisions that held that silence plus a statement about the crime does not constitute a waiver, and that holding otherwise violates the explicit language of *Miranda* requiring the government to meet a “heavy burden” to show a waiver of the *Miranda* protections.²⁸⁸

B. Maryland v. Shatzer

Maryland v. Shatzer addressed the issue of whether the protection conferred upon suspects who invoke their right to counsel during custodial interrogation is interminable.²⁸⁹ As discussed above, the Court held in *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.²⁹⁰ In *Shatzer*, the Court confronted a situation in which the authorities interrogated the defendant about the sexual abuse of his son—2 1/2 years after he invoked his right to counsel when first questioned about the incident.²⁹¹ The Court ruled that the 2 1/2 year break in custody between the two interrogations was sufficient to obviate the need for the *Edwards* initiation protection to continue to exist.²⁹²

There were several notable aspects to the Court’s decision in *Shatzer*. First, the Court considered whether the fact that Shatzer spent 2 1/2 years between interrogations as a prisoner in the state correctional system constituted a break in custody.²⁹³ The Court held that because being part of a general prison population did not produce the same coercive police pressures as custodial interrogation, Shatzer’s time in prison could be viewed as a break in custody for purposes of determining whether the protections of *Edwards* were applicable.²⁹⁴

287. *Id.* at 2266 (Sotomayor, J., dissenting).

288. *See id.* at 2269.

289. *See Maryland v. Shatzer*, 130 S. Ct. 1213, 1217 (2010); *see also supra* note 91 and accompanying text.

290. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

291. *Shatzer*, 130 S. Ct. at 1217–18.

292. *Id.* at 1223.

293. *Id.* at 1224.

294. *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 be entitled to the protections of *Miranda*), even when the questioning goes on for hours and is conducted in an interrogation room. 132 S. Ct. 1181, 1190–92 (2012).

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 accompany custodial interrogations.²⁹⁵ 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.²⁹⁶ Having reached this conclusion, the Court next considered how to determine when such a break in custody obviates the need for the *Edwards* protection.²⁹⁷ The Court chose to come up with a fixed period of fourteen days, as the minimum period of time for which the break in custody will permit the government to initiate the reinterrogation of an uncounseled defendant now back in custody.²⁹⁸

C. Undercutting the Distinction Between the Rights to Silence and Counsel

In both the *Thompkins* and *Shatzer* decisions, the Court drew several conclusions that significantly undercut the distinction between the requirements for reinterrogating a suspect who invokes his right to silence during custodial interrogation and a suspect who invokes his right to counsel.²⁹⁹ In *Davis v. United States*, the Court held that to invoke one's right to counsel, the invocation must be unambiguous.³⁰⁰ Prior to the decision in *Thompkins*, the Court had never applied that same principle to the invocation of the right to silence.³⁰¹ In doing so the *Thompkins* Court wrote, "[T]here is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel."³⁰² In elucidating its reasons for treating the two invocations the same way, the Court made clear that the similarities between the invocations of the two rights go beyond that one issue.³⁰³ The Court quoted approvingly from what it wrote twenty-six years earlier in another case: "[M]uch of

295. *Shatzer*, 130 S. Ct. at 1221.

296. *Id.*

297. *Id.* at 1222.

298. *Id.* at 1227.

299. *See id.* at 1219–20; *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

300. *Davis v. United States*, 512 U.S. 452, 459 (1994).

301. *See Thompkins*, 130 S. Ct. at 2260.

302. *Id.*

303. *Id.*

the logic and language of [*Mosley*],’ which discussed the *Miranda* right to remain silent, ‘could be applied to the invocation of the [*Miranda* right to counsel].’³⁰⁴ 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.³⁰⁵

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.³⁰⁶ The decision in *Thompkins* speaks to how *Miranda* rights can be validly waived implicitly as well as explicitly.³⁰⁷ At one point the Court observed 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.”³⁰⁸ The fact that the Court here is not distinguishing between the right to silence and 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 might revoke his or her waiver at any time.³⁰⁹ 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.”³¹⁰

An important thread woven through the *Shatzer* opinion relates to the impact of continued custody on the suspect regarding reinterrogation and the importance of his being able to make an uncoerced choice as to whether he wishes to respond to police questions.³¹¹ In referring to suspects in custody who invoke their right to

304. *Id.* (quoting *Solem v. Stumes*, 465 U.S. 638, 648 (1984)).

305. *Id.* (citing *Michigan v. Mosley*, 423 U.S. 96, 103 (1975); *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)).

306. *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).

307. *Id.* at 2261.

308. *Id.* at 2262 (citation omitted).

309. *Id.* at 2263.

310. *Id.* at 2263–64.

311. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1220 (2010); *see also Thompkins*, 130 S. Ct. at 2264. The Court noted in *Thompkins*:

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

counsel, the *Shatzer* Court noted that requests to reinterrogate such suspects “pose a significantly greater risk of coercion” than does the initial attempt to interrogate those suspects.³¹² Although the Court in *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 reinterrogation 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.’”³¹³ The Court later refers to the “mounting coercive pressures” of continued police custody.³¹⁴ It seems beyond dispute that regardless of whether one invokes his right to silence or counsel, the risks of prolonged custody, described by the Court above, pertain.³¹⁵

The Court in *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.³¹⁶ Referring to the right to counsel that was invoked in *Shatzer*, the Court spoke of how a suspect could be badgered into changing his mind about speaking with the police during continued uninterrupted custody.³¹⁷ The Court quoted *Miranda* regarding how a suspect in custody is separated from friends and family,

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.

Thompkins, 130 S. Ct. at 2264.

312. *Shatzer*, 130 S. Ct. at 1220.

313. *Id.* (quoting *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990)).

314. *Id.*

315. Before the holding in *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. See, e.g., Barton, *supra* note 39, at 487; Dripps, *supra* note 32, at 16; Thomas, *supra* note 203, at 228; Wolff, *supra* note 83, at 1180.

316. *Shatzer*, 130 S. Ct. at 1222–23 (discussing different lengths of time sufficient to relieve a suspect of the inherent coercion of being in custody and concluding that fourteen days suffices to eliminate its coercive effects as well as deter police abuse of the break-in-custody rule).

317. *Id.* at 1220.

isolated and placed in an unfamiliar environment controlled totally by the police.³¹⁸ Such pressures are undoubtedly present for the suspect in custody who has invoked the right to silence as well as for the suspect who has invoked his right to counsel.³¹⁹

The *Shatzer* Court then discussed *Edwards*, *Roberson*, and *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 *Edwards*, three days in *Roberson*, and two days in *Minnick*) and in which the suspect was still in custody to attempt to reinterrogate him.³²⁰ Even with the extended period of time between when questioning was cut off and when it was resumed in those cases, the Court in *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."³²¹ In other words, no matter how long the police wait to reinterrogate 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 *Miranda*.³²² Surely Mosley was not able to regain his sense of "control or normalcy"³²³ during the much briefer two hours he spent in uninterrupted police custody after he invoked his right to silence.³²⁴ This is even more obvious for other defendants whose statements have been allowed into evidence based on an interrogation conducted after as few as ten minutes following invocation of the same Fifth Amendment protection.³²⁵ Even if one credits the dubious distinction between invocation of the right to silence and the right to counsel the Court created in the *Mosley-Edwards* line of cases, the coercive pressures of prolonged custody and subsequent interrogation discussed above are

318. *Id.*

319. *Id.* (noting that to counteract the coercive nature of custody, defendants must be informed of their rights to both silence and counsel); *id.* at 1229 (Stevens, J., concurring) (noting that police may coerce a suspect into abandoning his right to silence or his right to counsel).

320. *Id.* at 1221 (majority opinion).

321. *Id.*

322. *Id.* at 1220–21.

323. *Id.*

324. *See Michigan v. Mosley*, 423 U.S. 96, 104 (1975). 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.

325. *See, e.g., Lanosa v. Frank*, No. 07-00115, 2007 WL 2746839, at *7 (D. Haw. Sept. 17, 2007), *aff'd*, 304 F. App'x. 565, 566 (9th Cir. 2008).

similar regardless of which right is invoked.

With respect to invocations of the right to counsel, the solution to the problems discussed above is to prohibit further police custodial interrogation unless the suspect initiates or has counsel present.³²⁶ The Supreme Court had never before 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.³²⁷ Similarly, the Court had never before held 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 reinterrogate the suspect.³²⁸ Both of these alternatives to the interminable nature of the *Edwards* protection were before the Court in *Shatzer*.³²⁹ The Court in *Shatzer* chose the first alternative, holding that a break in custody of sufficient 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.³³⁰

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 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 demonstrates quite clearly why and how the approach to what type of interrogation is permitted after invocation of *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

326. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981). For examples of the application of *Edwards*, see *Van Hook v. Anderson*, 488 F.3d 411, 425–26 (6th Cir. 2007) (allowing reinterrogation after the invocation of the right to counsel where defendant initiated the conversation); *People v. Wright*, 651 N.E.2d 758, 764 (Ill. App. Ct. 1995) (holding same); *Osburn v. State*, 326 S.W.3d 771, 781–82 (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).

327. See *Shatzer*, 130 S. Ct. at 1223.

328. *Id.* at 1223.

329. *Id.* at 1222 & 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).

330. *Shatzer*, 130 S. Ct. at 1223.

protections enumerated in *Miranda* and subsequent cases.³³¹ As the Court in *Shatzer* pointed out, the suspect is free to speak with friends, family or an attorney as he wishes.³³² 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.³³³ 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, "His change of

331. See *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"); *Dunkins v. Thigpen*, 854 F.2d 394, 397 & n.6 (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 of any subsequent statements, and noting that there was no argument that the break in custody was contrived or pretextual); *Kochutin v. State*, 875 P.2d 778, 780 (Alaska Ct. App. 1994) (holding that a break in custody weighs against presumption of coercion that exists in situations of custodial interrogation); *In re Bonnie H.*, 65 Cal. Rptr. 2d 513, 526 (Cal. Ct. App. 1997) ("[A] suspect's request for counsel during police 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."); *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 (July 11, 1991) ("[R]elease 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 appellee's release from custody was a mere ploy in order to seek another waiver"); *Clark v. Maryland*, 781 A.2d 913, 947 (Md. Ct. Spec. 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); *Commonwealth v. Galford*, 597 N.E.2d 410, 414 & n.9 (Mass. 1992) (following the reasoning of *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117 (7th Cir. 1987)), *cert. denied sub nom. Galford v. Massachusetts*, 506 U.S. 1065 (1993); *Willie v. Mississippi*, 585 So. 2d 660, 667 (Miss. 1991) (noting the contrived or pretextual exception, the rationale regarding a defendant's reasonable opportunity to contact an attorney, but noting that "[i]his is not to say that in some cases custody may be of such short duration that the *Edwards* or *Roberson* protection does not dissipate"); *Pennsylvania v. Wyatt*, 688 A.2d 710, 713 (Pa. Super. Ct. 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"); *Tennessee v. Furlough*, 797 S.W.2d 631, 638 (Tenn. Crim. App. 1990) (noting that the defendant had a break from custody and "had the opportunity to contact an attorney"); *Tennessee 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).

332. *Shatzer*, 130 S. Ct. at 1221.

333. See *id.*

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.”³³⁴ 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 influenced by the result of coercion than if the custody had been continuous from the point of time 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.³³⁵

Having determined that a break in custody can cause the pressures of custody to dissipate substantially, and thus allow the police to reinterrogate 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 fourteen days as the minimum length of time for the break in custody to allow reinterrogation of such a suspect, the Court rejected the view of Justice Stevens that fourteen days was often not long enough to achieve its ends, and that in any event, is an entirely arbitrary number.³³⁶ Justice Stevens (concurring) apparently favored a case-by-case determination of whether the duration of the break in custody was long enough.³³⁷ The Court concluded that fourteen days was sufficient time “for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”³³⁸ Regarding the contention that fourteen days was an arbitrary number, the Court acknowledged that it was unusual for it to set such precise time limits regarding police procedures.³³⁹ The Court noted, however, that 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

334. *Id.*

335. *Id.* at 1223.

336. *Id.* at 1226 (noting that Stevens argues that fourteen days does nothing to eliminate the rationale for the *Edwards* rule, and that the majority gives no good basis for its fourteen-day rule).

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

338. *Id.* at 1223 (majority opinion).

339. *Id.*

holdings.³⁴⁰ That is precisely the situation when considering how to treat invocations of *Miranda* rights. Weighing in favor of such a definite time, according to the Court, was the benefit to be achieved by this relatively bright-line rule that officers will know with certainty when reinterrogation is permitted after the defendant has been returned to custody.³⁴¹ The Court viewed Justice Stevens' apparent case-by-case approach to be "less helpful, but not at all less arbitrary."³⁴²

The *Shatzer* Court's responses to both of the questions posed above regarding the need for and length required of a break in custody requirement for custodial suspects invoking their right to counsel apply with equal force to suspects who invoke their right to silence.³⁴³ 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.³⁴⁴ As discussed above, the suspect who invokes his right to silence in custody suffers the same pressures to change his mind—due to the custodial environment—as does one who invokes his right to counsel.³⁴⁵ During a break from custody, the silence-invoking suspect, as is the counsel-invoking suspect, is free from the isolation and domination of police custody.³⁴⁶ He can use this time to consult with friends, family, and counsel about how he should proceed next.³⁴⁷ 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 surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest."³⁴⁸

The current standard for whether a suspect who has invoked his right to silence while in custody may be reinterrogated depends on

340. *Id.* The Court noted that in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), it specified forty-eight hours as the time within which the police must comply with the requirement of *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), that a person arrested without a warrant be brought before a magistrate to establish probable cause for continued detention.

341. *Shatzer*, 130 S. Ct. at 1222–23.

342. *Id.* at 1226.

343. *Id.* at 1223.

344. *See id.* at 1222 (describing the same need for invocations of the right to counsel).

345. *See supra* Part II (discussing *Mosley*); *supra* note 315 and accompanying text.

346. *See Shatzer*, 130 S. Ct. at 1221.

347. *See, e.g., United States v. Harris*, 221 F.3d 1048, 1053 (8th Cir. 2000) (noting that during a break in custody a suspect can consult with friends, family, or an attorney).

348. *Shatzer*, 130 S. Ct. at 1221.

whether this right has been scrupulously honored by the police.³⁴⁹ Such a standard is far from the bright-line the Court implemented in *Shatzer* for reinterrogation of a suspect who invokes counsel.³⁵⁰ The phrase itself offers no clear guidance to the police for when they may reinterrogate such a suspect, and time required—a primary factor created by the Court in *Mosley* for determining whether silence has been scrupulously honored—also defies any bright-line application.³⁵¹ The Court in *Mosley* spoke about the time between invocation of the right to silence and reinterrogation of the suspect as being a key factor in determining whether his right to silence has been honored.³⁵² The Court's position here was the longer the better.³⁵³ Unlike in *Shatzer*, however, no specific time period was required.³⁵⁴ 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.³⁵⁵ Accordingly, police are not given clear guidance as to how long they must wait before reinterrogating a suspect who invokes his right to silence. The need for a bright-line time period in determining when police can reinterrogate a suspect who invokes his right to silence is no less necessary than for determining when a defendant who invokes his right to counsel may be

349. *Michigan v. Mosley*, 423 U.S. 96, 103 (1975) (quoting *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)).

350. *See Shatzer*, 130 S. Ct. at 1223 (noting that a fourteen-day break in custody is the bright-line rule for reinterrogation of an individual who has invoked his right to counsel).

351. *See supra* note 109.

352. *Mosley*, 423 U.S. at 104.

353. *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.”).

354. *Id.* at 104 (noting that the key inquiry was that a reasonable amount of time elapse between interrogations and holding that two hours was reasonable).

355. *See United States v. Thompson*, 866 F.2d 268, 271–72 (8th Cir. 1989) (holding defendant's Fifth Amendment rights were not violated when law enforcement officers resumed questioning approximately thirty minutes after defendant had invoked his right to remain silent); *United States v. Hsu*, 852 F.2d 407, 411–12 (9th Cir. 1988) (holding same); *Stock v. State*, 191 P.3d 153, 155–56, 161 (Alaska Ct. App. 2008) (holding same). *But see United States v. Samuel*, No. 09-CR-128A(Sr), 2010 WL 3091934, at *4 (W.D.N.Y. July 14, 2010) (“[T]here can be no dispute that the thirty to forty-five minute interval of time in the instant case does not constitute a sufficient break in custody for *Miranda* purposes.”), *report and recommendation adopted*, No. 09-CR-128, 2010 WL 3091704, at *1 (W.D.N.Y. Aug. 5, 2010); *Commonwealth v. Jackson*, 386 N.E.2d 15, 19 (Mass. 1979) (defendant's right to silence not scrupulously honored when there was only thirty minutes between interrogations and other *Mosley* factors); *Commonwealth v. Callender*, 960 N.E.2d 910, 914, 916 (Mass. App. Ct. 2012) (invocation of the right to silence not scrupulously honored when only thirty-five minutes passed between interrogations).

reinterrogated.³⁵⁶

The Court thus laid the groundwork for finally doing away with the distinction that has existed since *Mosley* and *Edwards*. Because the coercive pressures of custodial reinterrogation are the same whether a suspect invokes his right to counsel or his right to 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 reinterrogate a suspect who invokes his right to silence and remains in police custody any more than they are allowed to reinterrogate one who invokes his right to 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 reinterrogate such a suspect,³⁵⁷ the fourteen-day break-in-custody period required by the Court in *Shatzer* regarding counsel invocations should apply as well to police reinterrogation of suspects who have invoked their right to silence.

VI. CONCLUSION

This article explored the differential treatment the Supreme Court has accorded to the reinterrogation of suspects in custody who have invoked their rights to silence and counsel. It found this differential

356. 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 reinterrogated him, Donald Dripps wrote, “[T]he 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.

357. 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 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 71, at 377 (footnotes omitted).

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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 nonsensical. 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 invocation of these rights differently. Whether a suspect in custody invokes his right to silence or to counsel, custodial reinterrogation without counsel initiated by the police should be permitted only after a fourteen-day break in custody. This break in custody allows the suspect time to consult family, friends, and counsel, and thus, reduces the likelihood that his reinterrogation once back in custody would be the product of the very coercion that the Fifth Amendment and *Miranda* were designed to prevent.