Miranda, Secret Questioning, and the Right to Counsel

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I. INTRODUCTION

Since the United States Supreme Court established what is known as the Edwards-Minnick rule,1 Miranda’s right to counsel has debilitated police questioning more than any other aspect of the Miranda rule. When a suspect invokes the Miranda right to counsel, not only must police immediately cease questioning, but they also are categorically prohibited from reinitiating questioning of the suspect.2 Although Maryland v. Shatzer established a proverbial expiration date for this reinitiation prohibition—fourteen days after the suspect returns to his normal environment3—police may not approach a suspect so long as the Edwards-Minnick protection is in effect.4 This protection even bars different officers—who may be from different jurisdictions or investigating different crimes than the one resulting in the invocation—from approaching the suspect.5 Pursuant to Edwards and Minnick, a suspect's

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2. Minnick, 498 U.S. at 153 (“[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.”); Edwards, 451 U.S. at 484-85 (holding that once the accused requests counsel, officials may not reinitiate questioning “until counsel has been made available to him”).
4. See id. at 111-12.
5. Id. at 109 (citing Minnick, 498 U.S. 146; Arizona v. Roberson, 486 U.S. 675 (1988)); see Eugene L. Shapiro, Thinking the Unthinkable: Recasting the
Miranda waiver elicited by police after the suspect invokes his right to counsel is conclusively invalid and never subject to a totality-of-the-circumstances assessment. Indeed, in Edwards, Justice Powell’s concurring opinion expressed concern that the waiver-invalidation rule announced in that case might evolve into a conclusive presumption of invalidity, which he rejected as unjustifiable. The Minnick decision validated this concern.

The combined effect of Edwards, Minnick, and Shatzer is clear: if police subject a suspect to custodial interrogation, and that suspect then invokes his Miranda right to counsel, the police may not approach him to reinitiate questioning until fourteen days after his release from custody. The rationale of this prophylactic rule seems relatively clear: by invoking the right to counsel, a suspect indicates his subjective recognition of the inequality in the police-questioning process. Unless and until counsel is present, the police may not exploit the suspect’s vulnerability. Accordingly, police contacting a suspect to elicit a subsequent Miranda waiver effectively exploits this expressed vulnerability. Therefore, to level the playing field between a suspect and police, the Court deems any waiver invalid unless the suspect makes it with the assistance of counsel.

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7. See Edwards, 451 U.S. at 489-90, 492 (Powell, J., concurring).
8. Minnick, 498 U.S. at 156.
10. See id. at 104-05 (quoting Roberson, 486 U.S. at 681).
11. See id.
12. Id.
13. See id. (“The rationale of Edwards is that once a suspect indicates that ‘he is not capable of undergoing [custodial] questioning without advice of counsel,’ ‘any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the ‘inherently compelling pressures’ and not the purely voluntary choice of the suspect.’” (quoting Roberson, 486 U.S. at 681)); Dickerson v. United States, 530 U.S. 428, 443-44 (2000) (“If anything, our subsequent cases have reduced the impact of the Miranda rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.”); Geoffrey S. Corn,
A different strand of *Miranda* jurisprudence requires a suspect to be aware police are questioning him for the suspect to trigger the warning and waiver requirements.\(^{14}\) In *Illinois v. Perkins*, the United States Supreme Court held that *Miranda* warnings are not required when an undercover police officer questions a suspect because, in such situations, the suspect lacks awareness that police are questioning him.\(^{15}\) Underlying *Perkins* is the core premise of *Miranda*—only the unique context of custodial interrogations inherently coerces a suspect and, thereby, necessitates the neutralizing effect of *Miranda* warnings to establish the voluntariness of a suspect’s submission to police questioning.\(^{16}\) Thus, when a suspect is unaware that a police officer is questioning him, this special type of inherent coercion is lacking.\(^{17}\) Therefore, the neutralizing effect of a *Miranda* warning is unnecessary to establish that the suspect’s answers were voluntary.\(^{18}\) In essence, the *Miranda* warning acts as a proverbial antacid, but one only

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\(^{14}\) See *Illinois v. Perkins*, 496 U.S. 292, 299 (1990) (“Where the suspect does not know that he is speaking to a government agent there is no reason to assume the possibility that the suspect might feel coerced.”).

\(^{15}\) *Id.* at 294.

\(^{16}\) See *id.* at 297; *Miranda* v. *Arizona*, 384 U.S. 436, 444, 455-58 (1966); see also *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984) (“The purpose[] of the safeguards prescribed by *Miranda* [is] . . . to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary.”); Floralynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. Crim. L. & Criminology 1, 3 (1999) (arguing that *Miranda* recognized the “inherent coercion of incommunicado police interrogation” and acknowledged that police officers use “sophisticated psychological ploys” to induce a suspect’s confession). The *Miranda* Court’s extensive review of police interrogation tactics highlighted the imbalance between police and suspects in this environment and led the Court to conclude that these tactics routinely resulted in a lack of confidence that confessions and admissions were the result of a meaningful choice on the part of the suspect to cooperate with police. *Miranda*, 384 U.S. at 455-58. The *Miranda* Court defined custodial interrogations as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* at 444. The Court further noted that “the very fact of custodial interrogation exerts a heavy toll on individual liberty and trades on the weakness of individuals.” *Id.* at 455. Moreover, “[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.” *Id.* at 458.

\(^{17}\) See *Perkins*, 496 U.S. at 296-98.

\(^{18}\) *See id.*
prescribed by an especially corrosive acid produced when a suspect is in custody and aware that police are interrogating him. Although all questioning may produce some corrosive acid, unless and until the corrosion reaches the potency level of custodial interrogation, the special neutralizing antacid of *Miranda* is unnecessary.

Nonetheless, an issue of uncertainty forms when these two strands of *Miranda* jurisprudence intersect. If a suspect invokes his *Miranda* right to counsel, may police engage in surreptitious questioning prior to the *Edwards-Minnick* termination point established by *Shatzer*? *Edwards*, *Minnick*, and *Miranda* itself suggest a negative answer: questioning a suspect following an invocation of his right to counsel, even surreptitiously, would clearly violate *Miranda*. Indeed, such a situation would not even implicate *Edwards* and *Minnick*. The surreptitious nature of the questioning would prevent an undercover police agent from even attempting to elicit a new *Miranda* waiver. However, what impact should a suspect’s unawareness that a police agent is questioning him have on this analysis? If only the inherent coercion of a known police officer confronting a suspect who is in custody triggers the *Miranda* protections, should police be permitted to use such tactics following an invocation of the *Miranda* right to counsel?

This article answers this question by focusing on the foundations of the two strands of *Miranda* jurisprudence. It argues that, while surreptitious questioning appears to be the type of exploitation of a suspect’s known vulnerability that is at the core of the *Edwards-Minnick* rule, the situation is inapposite to the type of reinitiation of questioning prohibited by that rule. Instead, such a tactic should be permissible because it does not implicate the core concern of *Miranda*. Bolstering this conclusion, this article contrasts the protections of the *Miranda* right to counsel with the Sixth Amendment right to counsel and the

20. See *Shatzer*, 559 U.S. at 106.
21. See generally U.S. CONST. amend VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”).
This contrast reveals that, although surreptitious police questioning compromises the core principle of the Massiah doctrine, it does not implicate the core concerns of Miranda.

Part II of this article reviews the Edwards-Minnick rule and the current scope of protection this rule provides as a result of Maryland v. Shatzer. Part III discusses the connection between the Edwards-Minnick rule and the Miranda decision, emphasizing how Edwards and Minnick manifest the underlying logic of Miranda—protecting vulnerable suspects from a particular type of police exploitation. Part IV then reviews the surreptitious-questioning exceptions to Miranda’s warning and waiver requirements and analyzes how that exception is consistent with the rationale behind Miranda. Part V contrasts Miranda with the Sixth Amendment right to counsel and the Massiah doctrine, distinguishing the objective of that doctrine from that of Miranda. This contrast frames the argument that the Edwards-Minnick protection logically does not apply to a police officer’s post-invocation, surreptitious questioning of a suspect who is in custody. Part VI concludes.

II. EDWARDS, MINNICK, AND THE UNAPPROACHABILITY RULE

According to the Supreme Court’s holding in Miranda’s seminal decision, the inherent coercion of custodial interrogation results in a conclusive presumption that a suspect’s responsive statements were involuntary. Such statements are, therefore, inadmissible in the prosecution’s case-in-chief unless police offset the coercive effect of custodial interrogation by issuing the now ubiquitous Miranda warnings and obtaining a knowing and

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22. See generally Massiah v. United States, 377 U.S. 201 (1964) (prohibiting police from overtly or surreptitiously questioning a suspect once the government has commenced formal adversarial proceedings unless the suspect waives this right or counsel is present).

23. See Miranda, 384 U.S. at 457-58; see also United States v. Patane, 542 U.S. 630, 639 (2004) (“[T]he Miranda rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution’s case in chief.”); Corn, supra note 13, at 771 (noting that Miranda created a presumption-based exclusionary rule).
voluntary waiver of both the right to silence and the right to assistance of counsel during questioning. Because the government creates the inherently coercive environment through custodial interrogation of a suspect, the prosecution bears the burden of proving that the suspect validly waived these rights.

The *Miranda* Court also established a bright-line rule—once a suspect invokes either his right to silence or his right to assistance of counsel, police must cease all questioning. Following *Miranda*, no one doubted that continued interrogation of a suspect after he invokes either of these rights violates the *Miranda* holding and, thus, necessitates suppression of statements elicited during the questioning. What remained unclear, however, was how a suspect’s right to cut off questioning impacts police officers’ ability to reinitiate interrogation after an appreciable amount of time passes.

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26. *Id.* at 473-74; see also *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (holding that when a suspect requests an attorney, the police must stop their questioning and may not reinitiate it without the suspect’s attorney present, regardless of whether or not the suspect has consulted with counsel); *Arizona v. Roberson*, 486 U.S. 675, 677-78 (1988) (holding that suspect’s invocation of counsel under *Edwards* was not offense specific); *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (holding that a suspect may give a limited or conditional waiver of his *Miranda* rights); *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam) (concluding that questioning must cease where suspect’s request for counsel or the circumstances leading up to the request are unambiguous).

27. *See, e.g.*, *Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (holding that police violated *Miranda* by reinitiating interrogation after suspect invoked his right to counsel); *United States v. Rambo*, 365 F.3d 906, 911 (10th Cir. 2004) (suppressing confession because officer did not honor defendant’s request to remain silent); *United States v. Lopez-Diaz*, 630 F.2d 661, 667 (9th Cir. 1980) (suppressing confession because officers questioned defendant about an issue he explicitly stated he did not want to discuss during the interrogation).
Three subsequent decisions provided the answer to this question.28 As a result of these decisions, a suspect’s invocation of his right to counsel restricts police from reinitiating interrogation more so than a suspect’s invocation of his right to silence. This result seems odd because the Court based the Miranda rule on the Fifth Amendment privilege against compelled self-incrimination; the “Fifth Amendment” assistance-of-counsel aspect of Miranda was a judicially created rule.29 Why would invocation of the right to silence—included in the actual text of the Fifth Amendment—be less protective than invocation of the judicially created right to counsel? One can understand the answer to this question only by considering the interests that each of these rights protects and the fundamentally different vulnerabilities that a suspect expresses through these invocations.

In Michigan v. Mosley, the Court addressed the permissibility of police reinitiating questioning after a suspect invokes his Miranda right to silence.30 The suspect, Mosley, invoked his right to remain silent after police initially questioned him about several robberies.31 The police immediately stopped questioning the suspect and returned him to his holding cell.32 Shortly thereafter, a homicide detective met with Mosley and took him upstairs to question him about a homicide unrelated to Mosley’s original arrest.33 Prior to this questioning, the detective advised Mosley about his Miranda rights and had him read a Miranda notification silently and aloud.34 Mosley signed a form indicating he had received and understood his rights.35 The detective then questioned Mosley for about fifteen minutes.36 During that time, Mosley made a statement

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29. See Miranda, 384 U.S. at 469-70.
30. 423 U.S. 96, 100 (1975).
31. Id. at 97.
32. Id.
33. Id. at 97-98.
34. Id. at 98.
35. Mosley, 423 U.S. at 98.
36. Id.
implicating himself in the homicide. Throughout this questioning, Mosley never indicated that he wanted to consult with an attorney or that he did not want to discuss the homicide.

Mosley sought to suppress his incriminating statement before trial, arguing that *Miranda* prohibited the homicide detective from questioning him about an unrelated offense because Mosley had previously invoked his right to silence. The Supreme Court ultimately rejected this argument, holding that Mosley knowingly and voluntarily waived his right to silence and that the reinitiated questioning did not invalidate the waiver. Thus, the Court rejected a per se prohibition on police reinitiating interrogation after a suspect invokes his *Miranda* right to silence. Instead, the Court held that the government bore the burden of proving the waiver’s validity by demonstrating that police “scrupulously honored” the suspect’s right to control the time, place, and subject matter of questioning. The Court based this determination on the totality of the circumstances. Factors for this test included: (1) the amount of time between a suspect’s initial invocation of his rights and the subsequent waiver; (2) whether the later questioning concerned different offenses or occurred at different locations; and (3) whether different officers conducted the questionings. The Court concluded it could not assume that a suspect who invokes his right to silence expresses an unwillingness to speak with any officer.

37. *Id.*
38. *Id.*
39. *Id.* at 98-99.
41. *Id.* at 102-03.
42. See *id.* at 102-06 (concluding that the Government met *Miranda’s* "‘scrupulously honored’" test on the facts of the case because “the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation”).
43. See *id.* at 103-05 (“A review of the circumstances leading to Mosley’s confession reveals that his ‘right to cut off questioning’ was fully respected in this case.”).
44. See *id.*
for any offense at any time.\textsuperscript{45} Instead, such invocation of one’s right to silence may simply indicate an unwillingness to speak about a particular offense, with a particular officer, or at a particular time or location.\textsuperscript{46} The more these factors differ from the first \textit{Miranda} invocation to the second waiver, the more they indicate a suspect made a voluntary decision to submit to questioning.\textsuperscript{47}

Invoking the \textit{Miranda} right to counsel—in contrast to the right to silence—would produce a very different result.\textsuperscript{48} In \textit{Edwards v. Arizona}, the Court confronted the right-to-counsel analogue to the \textit{Mosley} scenario—police reinitiating interrogation of a suspect after the suspect cut off earlier questioning by unequivocally invoking his right to have counsel present.\textsuperscript{49} The police in \textit{Edwards} stopped questioning the suspect when he invoked his \textit{Miranda} right to counsel.\textsuperscript{50} However, during a subsequent questioning session, the police once again advised Edwards of his \textit{Miranda} rights and obtained a waiver of these rights from Edwards because he was “willing to talk.”\textsuperscript{51} Subsequently, Edwards confessed to the crime.\textsuperscript{52} Before trial, Edwards objected to the admission of these statements, arguing that the waiver was invalid because the police failed to respect his prior invocation of his right to assistance of counsel.\textsuperscript{53}

Unlike \textit{Mosley}, the \textit{Edwards} Court deemed the \textit{Miranda} waiver invalid because the police had reinitiated

\textsuperscript{45} See \textit{Mosley}, 443 U.S. at 104-06 (explaining that the detective’s subsequent questioning about the homicide did not undercut Mosley’s prior decision to not answer questions about the robbery for which police arrested him).

\textsuperscript{46} See \textit{id.} at 103-04.

\textsuperscript{47} See \textit{id.} at 104-07; see also \textit{WILLIAM R. LAFAVE ET AL., CRIMINAL PROCEDURE} § 6.9(f), at 399-400 (5th ed. 2009) (explaining that the government does not satisfy the “scrupulously honored” test “where the police did not honor the original in-custody assertion of the right to remain silent, ignored that assertion and expressed sympathy for defendant’s plight, resumed questioning after a short interval during which custody continued, or made repeated attempts to obtain a waiver”).


\textsuperscript{49} See \textit{id.} at 478-79.

\textsuperscript{50} \textit{Id.} at 479.

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} See \textit{Edwards}, 451 U.S. at 479.
questioning. In reaching this conclusion, the Court first emphasized that the Arizona Supreme Court erred by analyzing the voluntariness of Edwards’s incriminating statement without first analyzing the validity of his *Miranda* waiver:

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

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

... Here, however sound the conclusion of the state courts as to the voluntariness of Edwards’ admission may be, neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it. It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked.55

The Arizona Supreme Court’s error set the conditions for the true focus of *Edwards*: whether police reinitiating questioning after a suspect invokes his *Miranda* right to counsel invalidates what otherwise appears to be a valid *Miranda* waiver.56 The *Edwards* Court then provided a clear affirmative answer to this question:

[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that

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54. *Id.* at 485 (holding that reinterrogating a suspect after he has asserted his right to counsel violates *Miranda* and its progeny).
55. *Id.* at 482-84 (citation omitted).
56. *See id.* at 484-85.
an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.\footnote{Id. at 484-85 (footnote omitted).}

The Court tethered its holding back to \textit{Miranda}'s admonition that “the assertion of the right to counsel was a significant event and that once exercised by the accused, ‘the interrogation must cease until an attorney is present.’”\footnote{Edwards, 451 U.S. at 485 (quoting \textit{Miranda v. Arizona}, 384 U.S. 436, 474 (1966)).} The Court then drew a bright-line distinction between statements obtained following a suspect’s voluntary decision to reinitiate contact with the police and statements obtained after police reinitiated contact:

\[\text{[W]e do not hold or imply that Edwards was powerless to countermand his election. . . . Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in \textit{Miranda} is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver.}\]\

\textit{Edwards} indicates that even a police request for a suspect to reconsider his invocation of the right to counsel violates \textit{Miranda}'s protection of a suspect.\footnote{Id. at 485-86.} \textit{Edwards} was
an ideal case to barricade such reinitiation. The suspect did not suggest a desire to reinitiate interaction with police after his *Miranda* invocation. To the contrary, on the very next day after Edward’s invocation, he objected to such interaction when prison guards informed him that police wanted to speak with him. Following this objection, the prison guard informed Edwards that “he had” to meet with the police. Nonetheless, unlike the approach adopted in *Mosley*, the *Edwards* Court did not indicate that lower courts should analyze the permissibility of police reinitiation based on the totality of the circumstances. Instead, *Edwards* seemed to establish a conclusive waiver-invalidation rule whenever a waiver results from police reinitiating interrogation of a suspect who previously invoked his *Miranda* right to counsel.

In his concurring opinion, Justice Powell expressed concern that the majority had created a new, prophylactic rule. He argued that the validity of a waiver obtained as the result of police reinitiating interrogation after a suspect invokes his *Miranda* right to counsel is subject to the same totality-of-the-circumstances analysis applied in *Mosley*. Although Justice Powell believed the totality of the circumstances indicated that Edward’s waiver was involuntary and, therefore, invalid, he did not believe the

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62. *Id.*
63. *See id.* at 479.
64. *See Mosley*, 423 U.S. at 103-05 (majority opinion) (performing a totality-of-the-circumstances analysis).
65. *See Edwards*, 451 U.S. at 485-86 (suggesting a per se rule “that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel”); LAFAVE ET AL., *supra* note 47, § 6.9(f), at 400. The *Edwards* court distinguished between cases where a suspect initiates reinterrogation, which would require a totality-of-the-circumstances determination over a waiver’s validity, and cases where, like *Edwards*, the police reinitiated the questioning. *See Edwards*, 451 U.S. at 485-87, 486 n.9.
68. *Id.* 490-91.
69. *Id.* at 490.
officers’ reinitiation of contact—by itself—required such a conclusion. Accordingly, he noted:

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

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

In sum, once warnings have been given and the right to counsel has been invoked, the relevant inquiry—whether the suspect now desires to talk to police without counsel—is a question of fact to be determined in light of all of the circumstances. Who “initiated” a conversation may be relevant to the question of waiver, but it is not the sine qua non to the inquiry. The ultimate question is whether there was a free and knowing waiver of counsel before interrogation commenced.

If the Court’s opinion does nothing more than restate these principles, I am in agreement with it. I hesitate to join the opinion only because of what appears to be an undue, and undefined, emphasis on a single element: “initiation.”

The Supreme Court subsequently confirmed the validity of Justice Powell’s hesitation in Minnick v. Mississippi. Minnick involved very different facts related to police reinitiating questioning of a suspect who previously invoked his Miranda right to counsel. Police arrested Minnick in California, under a Mississippi warrant, for the burglary of a mobile home and the subsequent

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70. Id. at 491 (“Who ‘initiated’ a conversation may be relevant to the question of waiver, but it is not the sine qua non to the inquiry.”).
71. Id. at 489-90 (citation omitted).
73. 498 U.S. 146, 153 (1990) (“[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.”).
74. See id. at 148-49.
murder of two individuals. Shortly thereafter, two Federal Bureau of Investigation (FBI) agents attempted to interview Minnick in the San Diego jail; the agents read Minnick his *Miranda* rights, but Minnick refused to sign a waiver form and told them that he “would not answer ‘very many’ questions.” After giving a short statement, Minnick told the agents to come back when he had a lawyer present. A few days later, a sheriff’s deputy from Mississippi came to the San Diego jail and questioned Minnick about the murders. The sheriff’s deputy informed Minnick of his *Miranda* rights, and once more, Minnick declined to sign a rights-waiver form. But the sheriff’s deputy continued to question Minnick, who then made statements implicating himself in the murders. At trial, Minnick sought to suppress all of his incriminating statements. The trial court suppressed the statements Minnick made to the FBI, but it admitted those he made to the sheriff’s deputy. On appeal, the Mississippi Supreme Court rejected Minnick’s claim that the sheriff’s deputy took his confession in violation of Minnick’s right to counsel. The United States Supreme Court then granted certiorari.

In theory, *Minnick* offered the Court an ideal opportunity to qualify the breadth of the *Edwards* holding by adopting a totality-of-the-circumstances approach for situations involving a suspect’s invocation of his right to counsel and police reinitiating interrogation. Unlike the suspect in *Edwards*—who had not met with his attorney when police reinitiated their questioning—Minnick spoke with his attorney several times prior to the reinitiated

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75. *Id.* at 148.
76. *Id.*
77. *Id.* at 148-49.
78. *Minnick*, 498 U.S. at 149.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Minnick*, 498 U.S. at 149.
84. *Id.* at 150.
questioning. Moreover, Minnick’s counsel admonished him not to submit to police questioning. Nonetheless, Minnick, when offered the opportunity to reconsider his Miranda invocation, waived his Miranda rights and made incriminating statements.

The facts suggesting that Minnick knowingly and voluntarily waived his Miranda rights—very different from the facts of Edwards—were ultimately irrelevant for the Court. Instead of noting the distinction, the Minnick Court held the waiver invalid for one reason and one reason only: the police reinitiated the contact with Minnick. To reach this holding, the Court first rejected the Mississippi Supreme Court’s interpretation of Edwards. The Mississippi Supreme Court found the waiver valid because Minnick, unlike the suspect in Edwards, actually consulted with his attorney prior to the Miranda waiver:

The Mississippi Supreme Court relied on our statement in Edwards that an accused who invokes his right to counsel “is not subject to further interrogation by the authorities until counsel has been made available to him . . . .” We do not interpret this language to mean, as the Mississippi court thought, that the protection of Edwards terminates once counsel has consulted with the suspect. In context, the requirement that counsel be “made available” to the

86. Minnick, 498 U.S. at 149 (noting that the record was unclear as to “whether all of these conferences were in person”).
88. See Minnick, 498 U.S. at 149. Writing for a six-Justice majority, Justice Kennedy noted “that consultation with an attorney is not always effective in instructing the suspect of his rights.” Id. at 154. He posited that Minnick, by refusing to sign a formal waiver of his rights, may have “thought he could keep his admissions out of evidence.” Id. Justice Kennedy explained that “[i]f the authorities had complied with Minnick’s request to have counsel present during interrogation, the attorney could have [either] corrected Minnick’s misunderstanding” or implored him to make no statement at all. Id.
89. See id. The Court first referred to Edwards, which held that all police interrogations must cease whenever the accused invokes his right to counsel and that, absent the accused initiating contact with the police on his own accord, the government cannot establish a valid waiver of that right by merely showing the accused responded to further police-initiated questioning. Minnick, 498 U.S. at 150 (citing Edwards, 451 U.S. at 484-85). The Minnick Court explained “that ‘[p]reserving the integrity of an accused’s choice to communicate with police only through counsel is the essence of the Edwards decision and its progeny.’” Id. at 153 (quoting Patterson v. Illinois, 487 U.S. 285, 291 (1988)).
accused refers to more than an opportunity to consult with an attorney outside the interrogation room.  

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

In our view, a fair reading of Edwards and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.  

Several decades later, the Court, in Maryland v. Shatzer, specified how long authorities must refrain from approaching a suspect who has invoked his Miranda right to counsel.  

The Shatzer Court held that the Edwards-Minnick protection expires fourteen days after the suspect returns to his normal, noncustodial environment. However, the core non-approachability principle of the Edwards-Minnick rule remained intact—once a suspect invokes his Miranda right to counsel, a subsequent waiver of that right is per se invalid if police reinitiate the contact.  

These cases beg the question: why did the Court impose a more restrictive reinitiation rule concerning a suspect’s Miranda right to counsel than it did for the Miranda right to silence? The answer to this question becomes clear when one compares Mosley with Edwards and Minnick with Shatzer. The Mosley majority based its holding on the premise that a range of concerns may motivate a suspect’s invocation of his right to silence and, as a result, the suspect does not indicate an absolute
A police officer’s change in time, place, and subject matter of a suspect’s interrogation may show that police respected the suspect’s right to control the who, what, where, and when of his interrogation. Thus, a change in these factors from one interrogation to the next will allow a suspect’s Miranda waiver—even when it results from police reinitiation—to stand under Miranda’s protection of the suspect’s right to silence.

The Court based the Edwards-Minnick rule on a very different premise: when a suspect invokes his Miranda right to counsel, he indicates his desire to deal with police only with the assistance of counsel. Although Edwards may have suggested that a suspect’s consultation with counsel sufficiently protects the suspect from police reinitiation—an interpretation relied on by the Mississippi Supreme Court when it concluded that police reinitiation did not invalidate Minnick’s waiver—Minnick categorically rejected that interpretation:

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

96. See id. at 103-04 (majority opinion).
97. See id. at 107-108 (White, J., concurring) (criticizing the Court for implying that when a suspect invokes his right to remain silent, any subsequent statement obtained within an unspecified time period would always be inadmissible). In Mosley, Justice White expressed his view that the police may reapproach a defendant who has invoked his right to silence if they have new information related to that decision. See id. at 111. Furthermore, he noted that “[t]here is little support in the law or in common sense for the proposition that an informed waiver of a right may be ineffective even where voluntarily made.” Id. at 108. Justice White reasoned that, under Miranda, so long as the suspect “knowingly and intelligently waived” his right to remain silent, the police should be allowed to conduct further questioning. Mosley, 423 U.S. at 108.
Our emphasis on counsel’s presence at interrogation is not unique to Edwards. It derives from Miranda, where we said that in the cases before us “[t]he presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the [Fifth Amendment] privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.” Our cases following Edwards have interpreted the decision to mean that the authorities may not initiate questioning of the accused in counsel’s absence.\(^{100}\)

Although Shatzer limited the temporal scope of the Edwards-Minnick protection,\(^{101}\) it confirmed that the absence of counsel to assist a suspect during a police reinitiation of questioning renders any waiver of the suspect’s right to counsel invalid:

The rationale of Edwards is that once a suspect indicates that “he is not capable of undergoing [custodial] questioning without advice of counsel,” “any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the ‘inherently compelling pressures’ and not the purely voluntary choice of the suspect.”\(^{102}\)

Shatzer’s reference to Edwards is critical to understanding the distinction between the Mosley right-to-silence rule and the Edwards-Minnick right-to-counsel rule.

\(^{100}\) Id. at 152 (citations omitted).

\(^{101}\) Maryland v. Shatzer, 559 U.S. 98, 107 (2010). The Shatzer Court concluded that the Edwards presumption of involuntary waiver should not extend to situations where police “released [the suspect] from his pretrial custody and [he] has returned to his normal life for some time before the later attempted interrogation.” Id. The Court limited Edwards because the presumption of police coercion disappears whenever the suspect returns to his familiar environment where he may “seek advice from an attorney, family members, and friends.” Id. Moreover, the Court reasoned that the suspect would “know[] from his earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely.” Id. at 107-08. Thus, Shatzer narrowed the scope of Edwards in situations involving a break in custody by imposing a fourteen-day ceiling on the involuntary-waiver presumption. Id. at 110.

\(^{102}\) Shatzer, 559 U.S. at 104-05 (quoting Arizona v. Roberson, 486 U.S. 675, 681 (1988)).
Unlike Mosley—which focuses on a suspect’s right to control the time, place, and subject matter of the questioning—Edwards and its progeny focus on a suspect’s professed vulnerability to police questioning. Consequently, once a suspect invokes his Miranda right to counsel, police are placed on notice that the suspect does not feel capable of dealing with police on his own. Rather, a suspect’s invocation clearly indicates that he needs counsel present to level the playing field between himself and the police. Police reinitiation exploits a suspect’s stated vulnerability; therefore, any waiver resulting from that reinitiation is invalid—even if the suspect had an opportunity to consult with counsel.

III. HOW EDWARDS AND MINNICK REFLECT THE CORE LOGIC OF MIRANDA

Miranda v. Arizona created what subsequent Supreme Court decisions have labeled as a “prophylactic” rule to protect the free exercise of one’s privilege against compelled self-incrimination. The warning and waiver requirements that resulted from the decision have become thoroughly ingrained in American culture. But how the Supreme Court subsequently interpreted the meaning of Miranda also generated substantial controversy as to the

103. See supra notes 49-60, 89 and accompanying text; see also Shatzer, 559 U.S. at 115 (“The ‘concer[n] that motivated the Edwards line of cases’ is that the suspect will be coerced into saying yes. That concern guides our decision today.’” (citation omitted)).


105. See sources cited supra note 13.

106. See sources cited supra note 13.


108. See, e.g., Shatzer, 559 U.S. at 103 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).

109. See, e.g., Miranda Waivers and Invocations, POINT OF VIEW, 2006, at 1, 1, available at http://le.alcoda.org/publications/files/MIRANDAWAIVERSINVOCATIONS.pdf (“While not as exalted as McDonald’s, Microsoft, or Madonna, Miranda also qualifies as an instantly recognizable name that is safely lodged in contemporary American culture.”). Additionally, television shows such as Dragnet have made Miranda’s warning requirement an easily identifiable part of the detention and arrest process. Todd S. Purdum, Miranda as a Pop Culture Icon, N.Y. TIMES, July 2, 2000, at 4, available at http://www.nytimes.com/2000/07/02/weekinreview/the-nation-miranda-as-a-pop-culture-icon.html.
constitutional validity of the decision. When the Court announced that the Miranda rule “sweeps more broadly” than the Fifth Amendment privilege itself, it offered opponents of the decision a clear basis to question its constitutional validity. Nowhere was this better illustrated than in Justice Scalia’s dissenting opinion in Dickerson v. United States, where he noted:

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

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

As the Court today acknowledges, since Miranda we have explicitly, and repeatedly, interpreted that decision as having announced, not the circumstances in which custodial interrogation runs afoul of the Fifth or Fourteenth Amendment, but rather only “prophylactic” rules that go beyond the right against compelled self-incrimination.

Today’s judgment converts Miranda from a milestone of judicial overreaching into the very Cheops’ Pyramid (or perhaps the Sphinx would be a

better analogue) of judicial arrogance. In imposing its Court-made code upon the States, the original opinion at least **asserted** that it was demanded by the Constitution. Today’s decision does not pretend that it is—and yet **still** asserts the right to impose it against the will of the people’s representatives in Congress.\textsuperscript{111}

Justice Scalia’s criticism of the *Dickerson* majority’s decision to uphold *Miranda* flowed from *Miranda*’s creation of a prophylactic protection for suspects to exercise the privilege against self-incrimination.\textsuperscript{112} Today, *Miranda*’s protection is ubiquitous—once police take a suspect into custody and subject him to interrogation, all statements the suspect makes are conclusively involuntary unless the police offset the inherently coercive environment by obtaining a knowing and voluntary waiver of the privilege.\textsuperscript{113} Furthermore, the only way for authorities to elicit a valid waiver is to inform the suspect of his *Miranda* rights and to demonstrate that the suspect understood his rights and engaged in a course of action indicating his waiver of those rights.\textsuperscript{114} No set of facts can rebut the conclusion that a suspect’s statements are involuntary if police obtain them after failing to issue warnings and obtain a waiver in violation of the Fifth Amendment privilege.\textsuperscript{115} Indeed, the *Miranda* Court acknowledged its assertion—that statements made in the absence of the warning and waiver requirements are involuntary—represented a potentially overbroad presumption when it noted: “In these cases, we might not find the defendants’ statements to have been involuntary in traditional terms.”\textsuperscript{116}

The breadth of this presumptive rule of involuntariness may have been, as Justice Scalia argued in *Dickerson*, an

\begin{itemize}
\item \textsuperscript{111} 530 U.S. 428, 447-48, 450, 465 (2000) (Scalia, J., dissenting) (citations omitted).
\item \textsuperscript{112} See Corn, *supra* note 13, at 768-69 (‘Justice Scalia condemned the majority for refusing to overrule *Miranda*. Specifically, Scalia criticized the majority for failing to reach the only logical conclusion that could be derived from the prior decisions modifying the original *Miranda* rule: that *Miranda* was not a rule of constitutional law and that the Court had no legitimate authority to sustain its primacy over an inconsistent statute.’).
\item \textsuperscript{113} See id. at 772-73; *supra* notes 24-27 and accompanying text.
\item \textsuperscript{114} See Edwards v. Arizona, 451 U.S. 477, 482-84 (1981).
\item \textsuperscript{115} See *supra* note 16 and accompanying text.
\item \textsuperscript{116} *Miranda* v. Arizona, 384 U.S. 436, 457 (1966).
\end{itemize}
exercise of constitutional overreach. Nevertheless, today, the *Miranda* decision is firmly rooted in constitutional jurisprudence and police practice. *Miranda* requires police to inform suspects who are under custodial interrogation of two methods to protect themselves in that environment. First, authorities must inform a suspect of his right to remain silent and the consequence of waiving this right—that anything the suspect says may be used against him. Second, authorities must inform a suspect of his right to have counsel present to assist the suspect in dealing with the police. The Court did not derive this latter *Miranda* “right” from the text of the Fifth Amendment privilege against self-incrimination. Nonetheless, the *Miranda* Court clearly viewed the presence of counsel during interrogation as an effective method of offsetting the inherently coercive pressures associated with custodial interrogation and, thereby, ensuring any statement made by a suspect is the product of his free will.

As previously noted, *Miranda’s* progeny indicates that the respective protections each of these rights provides

118. See supra notes 26-27 and accompanying text.
120. Id. at 468.
121. Id. at 471-72.
122. See Michigan v. Tucker, 417 U.S. 433, 444 (1974) (recognizing that the *Miranda* rules are “procedural safeguards [that are] not themselves rights protected by the Constitution but . . . instead [are] measures to insure that the right against compulsory self-incrimination was protected”); see also Yale Kamisar, *The Rise, Decline and Fall (?) of Miranda*, 87 WASH. L. REV. 965, 999 (2012) (“The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.” (quoting Oregon v. Elstad, 470 U.S. 298, 306 (1985))); Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 123 (“The implications . . . of the *Tucker* opinion are potentially devastating for *Miranda*. The Court deprived *Miranda* of a constitutional basis but did not explain what other basis for it there might be.”).
123. See, e.g., *Miranda*, 384 U.S. at 469 (“[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . [and to] assure that the individual’s right to choose between silence and speech remains unfettered throughout the interrogation process.”); see also Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 789 (“[T]he Court viewed each warning as directly tied to, and stemming from, the Self-Incrimination Clause.”).
suspects are different in purpose and scope.  

By invoking the right to counsel, a suspect signals to police that he does not feel capable of interacting with police and, therefore, requires assistance during the interrogation process. As a matter of practice, police may rarely continue interrogating a suspect after the suspect “lawyers up” by invoking his Miranda right to counsel. This practice, however, does not mean that continuing the interrogation with counsel present is in any way improper. Indeed, informing a suspect—who has made an unequivocal indication of a desire for the presence of counsel—that police will be unable to “get his side of the story” once counsel is present is patently erroneous as a common practice. An unequivocal request for counsel during interrogation requires questioning to cease, but only until counsel is present. Thus, unlike invoking the right to silence, invoking the right to counsel does not indicate a suspect is categorically unwilling to continue an interrogation. Instead, it indicates the suspect recognizes his tactical inequality with police interrogators and seeks to level the playing field by dealing with police only after being “reinforced” by an attorney.

The waiver-invalidation rule established by Edwards and Minnick derives from this implicit indication that a suspect who invokes the Miranda right to counsel does not feel equal to police interrogators. This rationale explains

124. See supra Part II.
125. See supra note 13. Furthermore, the Miranda Court stated:

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

Miranda, 384 U.S. at 470 (citing Crooker v. California, 357 U.S. 433, 443-48 (1958) (Douglas, J., dissenting)).

126. See sources cited supra note 16 and accompanying text.
127. See Minnick v. Mississippi, 498 U.S. 146, 153 (1990); supra notes 1, 49, 91 and accompanying text.
128. See supra Part II.
why a waiver obtained after a suspect’s invocation of his right to counsel is per se invalid if it results from police initiation.130 Once a suspect indicates his inability to interact with police absent the presence of counsel, the mere act by police of initiating contact with that suspect—in order to elicit a fresh *Miranda* waiver—will exploit the acknowledged vulnerability.131 Justice Scalia explained this equation in *Shatzer*:

The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion [than the initial police questioning]. That increased risk results not only from the police’s persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated—pressure likely to “increase as custody is prolonged.”132

*Shatzer*, however, also emphasized another aspect of this bar to the police-reinitiation and waiver invalidation rule: like *Miranda* itself, the rule can only be justified when the suspect is impacted by the inherent coercion of custodial interrogation, which triggers the warning and waiver requirements.133 Absent the type of coercion created by the unique confluence of custody and police interrogation, nothing justifies prohibiting police from reinitiating questioning.134 In *Shatzer*, the issue was how long the lingering influence of this inherent coercion could last, leading to the Court’s fourteen-day “expiration” rule.135 However, *Shatzer*’s fourteen-day rule assumes the suspect realizes that police are questioning him during the reinitiation.136 This assumption begs the question: what if the police use surreptitious questioning and the suspect is unaware that he is interacting with an officer?

130. *Id.* at 111-12.
132. *Id.* at 105 (quoting *Minnick*, 498 U.S. at 153).
133. *See id.* at 104-05, 115-16.
135. *See id.* at 110-11, 116-17.
IV. THE SURREPTITIOUS-QUESTIONING EXCEPTION TO MIRANDA INTERROGATIONS

_Illinois v. Perkins_ involved police questioning of a suspect in custody.\(^{137}\) _Perkins_ was unusual because the questioning officer was undercover, posing as an inmate with Perkins.\(^{138}\) Thus, unlike the situation in _Miranda_, the suspect in _Perkins_ was unaware that he was undergoing police interrogation while in custody.\(^{139}\) The trial court granted Perkins’s motion to suppress the incriminating statements he made to the undercover officer, and the Illinois Appellate Court affirmed.\(^{140}\) Both courts adopted the literal meaning of _Miranda_, concluding that, because Perkins was clearly in custody and because his statements were clearly the product of police interrogation, the police questioning triggered the _Miranda_ warning and waiver requirements.\(^{141}\)

The United States Supreme Court reversed and held that a _Miranda_ warning and waiver are not required when an undercover police officer questions a suspect—even when the suspect is in custody—because “[c]onversations between suspects and undercover agents do not implicate the concerns underlying _Miranda_.”\(^{142}\) In reaching this holding, the Court emphasized that a _Miranda_ warning and waiver are required only when the atmosphere surrounding a suspect generates the type of inherent coercion resulting from a “‘police-dominated’” environment.\(^{143}\) _Miranda_, according to the _Perkins_ Court, underscored that the nature of the coercion in police-dominated situations rises to a magnitude that undermines the confidence in a suspect’s decision to cooperate with police and submit to

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138. Id. at 294-95.
139. See id. at 295. The officer led Perkins to believe that they were planning a jailbreak, and Perkins freely responded to the officer’s inquiry of whether he had ever “‘done’ anybody.” Id.
140. Id.
141. _Perkins_, 496 U.S. at 295.
142. Id. at 296.
143. Id. at 296-97 (quoting _Miranda_ v. Arizona, 384 U.S. 436, 445 (1966)).
questioning. As a result, the warning and waiver offset, or neutralize, how this especially potent and inherent coercion corrodes confidence in a suspect’s decision to submit to questioning. This “something more,” as *Miranda* requires, provides the antidote to the police-dominated interrogation situation and restores confidence that a suspect’s submission to questioning was the product of a voluntary waiver of the privilege against compelled self-incrimination. Accordingly, only when one can expect a situation to produce this inherent coercion are a warning and waiver required to establish that the suspect’s decision to submit to questioning was voluntary. In all other situations, the mere act of answering questions implies a voluntary relinquishment of the privilege.

*Perkins* provided the Supreme Court with the opportunity to reemphasize that the warning-and-waiver offset (or antidote) is required only when a situation produces the potent, inherent coercion from which *Miranda* sought to protect suspects. The Court emphasized that the “warning mandated by *Miranda* was meant to preserve the privilege during ‘incommunicado interrogation of individuals in a police-dominated atmosphere.’” The Court then concluded that if a suspect was unaware that a police officer was questioning him, then whatever coercion may result was insufficient to trigger the *Miranda* warning and waiver requirements.

The *Perkins* Court, citing *Berkemer v. McCarty*, emphasized that where a situation generates the type of

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144. See id. at 296-98 (“*Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates.”).

145. See *Miranda*, 384 U.S. at 478-79.

146. See *Perkins*, 496 U.S. at 296-98.

147. See id. at 297 (rejecting the State’s argument that “*Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent,” and noting that inherent coercion is not present when “a suspect does not know that he is conversing with a government agent”).

148. Id. at 296 (quoting *Miranda*, 384 U.S. at 445).

149. Id. (“The essential ingredients of a ‘police-dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. . . . When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere [necessary to trigger *Miranda*] is lacking.” (citing *Miranda*, 384 U.S. at 445)).
inherent coercion of police confrontation in a custodial environment, a suspect is absolutely entitled to the protections established in *Miranda*. 150 However, no justification exists for extending *Miranda*’s protections to situations that do not produce potent coercion—like the situation in which *Perkins* made his incriminating statements. “Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.” 151 Ultimately, because the *Perkins* Court believed surreptitious police questioning could not produce the type of coercion necessary to trigger the *Miranda* warning and waiver requirements, the practice fell outside the scope of *Miranda*’s protective, prophylactic rule. 152 According to the Court:

> We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent. Questioning by captors, who appear to control the suspect’s fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect’s will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist. . . . When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners. 153

*Perkins*, therefore, exposed the overbreadth of the assumption that any custodial interrogation triggers *Miranda*. 154 Instead, *Miranda* is triggered by the coercion it was intended to offset, and that coercion requires something slightly more than custodial interrogation; it requires the suspect to know police are confronting him. 155

150. Id. at 296-97 (citing 468 U.S. 420, 442 (1984)).
152. Id.
153. Id. at 297.
154. See id. at 294.
The *Perkins* holding seems logical for those suspects who, during police questioning, never expressed their desire to have counsel present to assist them. However, such suspects may never have the opportunity to express that desire if the police resort to surreptitious-questioning from the outset and bypass any attempt to obtain a valid *Miranda* waiver. In fact, this tactic is precisely what the police used on Perkins because they anticipated that he would invoke his *Miranda* rights if they formally confronted him for questioning.\(^{156}\) Still, if *Miranda* is intended to offset a particular type of inherent coercion—and only that type—then the surreptitious-questioning tactic nullifies the necessity for the *Miranda* warning-and-waiver antidote because that type of coercion never occurs.\(^{157}\)

But what if the suspect expresses his desire for counsel’s assistance by invoking the *Miranda* right to counsel prior to police, or their agents, surreptitiously questioning him? Because the police in *Perkins* never overtly confronted the suspect, the Supreme Court had no reason to address this possible variant to the surreptitious-questioning situation.

The intersection of *Edwards*, *Minnick*, *Shatzer*, and *Perkins* remains an area of uncertainty. *Perkins* suggests the questioning in this hypothetical would not implicate *Miranda* because the suspect would be unaware that he is dealing with a police agent.\(^{158}\) However, *Edwards* and *Minnick* suggest a different outcome because, in effect, the police would be exploiting their knowledge that the suspect feels the need for counsel’s assistance during questioning.\(^{159}\) Of course, *Edwards* and *Minnick* never contemplated situations in which surreptitious questioning would occur, and they clearly addressed instances in which inherent coercion triggers *Miranda*. *Shatzer* adds more uncertainty. The *Shatzer* Court based its fourteen-day rule on the conclusion that the inherent coercion of custodial

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\(^{156}\) *See Perkins*, 496 U.S. at 294-95.

\(^{157}\) *See supra* notes 15-16 and accompanying text; *see also supra* Parts II-III.

\(^{158}\) *See Perkins*, 496 U.S. at 299 (explaining that where the suspect does not know that he is speaking to a government agent, no reason exists to assume the suspect might feel coerced).

interrogation—which triggers the *Miranda* right to counsel—lingers for fourteen days after the suspect’s release to his normal environment.\(^{160}\) Therefore, because *Shatzer*—like *Edwards* and *Minnick*—involved reinitiation by a known police agent, the “lingering effect” conclusion\(^ {161}\) could support a similar extension of *Edwards* and *Minnick* to surreptitious questioning following a suspect’s invocation of his *Miranda* right to counsel.

However, one situation exists where surreptitious questioning would require exclusion of any incriminating response—when it violates the Sixth Amendment right to counsel.\(^ {162}\) According to the seminal decision of *Massiah v. United States*, police are prohibited from conducting any overt or surreptitious questioning of a suspect once the government has initiated formal adversarial proceedings unless the suspect voluntarily waives the right or counsel is present.\(^ {163}\) Neither of these conditions could occur if police use undercover officers or agents to conduct questioning. Thus, unlike the *Miranda* right to counsel, the *Perkins* surreptitious-questioning exception has no analogue. The respective rationales for these divergent rules derive from the different interests each constitutional provision protects and provide the decisive ingredient for resolving the issue that this article raises.

V. TWO SIDES OF ONE COIN: CONTRASTING THE SIXTH AMENDMENT RIGHT TO COUNSEL WITH THE *MIRANDA* RIGHT TO COUNSEL

Contrasting the *Miranda* right to counsel with the Sixth Amendment right to counsel exposes the different interests that each rule protects. Like the *Miranda* right to counsel, the Sixth Amendment right protects individuals subjected to police interrogation.\(^ {164}\) However, the trigger for the

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161. See id. at 110-11, 115, 117.
163. See id. at 206-07.
164. See id. at 205-07 (holding that using incriminating evidence against the defendant at trial, which federal agents obtained from him in the absence of counsel, denied defendant the protection of the Sixth Amendment); see also U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”); *Edwards*, 451 U.S. at 484-485
Sixth Amendment protection is quite different. As noted above, the custodial interrogation of any suspect triggers the *Miranda* right.¹⁶⁵ In contrast, the Sixth Amendment right comes into force only after authorities initiate formal, adversarial proceedings against a suspect—normally an indictment, arraignment, preliminary hearing, or other formal charge.¹⁶⁶ Until formal proceedings occur, the state has not yet “accused” an individual of any offense, even if police suspect him of an offense.¹⁶⁷ Thus, the Sixth Amendment right does not apply whenever police suspect an individual of a crime; only when an individual is a “defendant” may he assert the right-to-counsel protections of the Sixth Amendment.¹⁶⁸

The Sixth Amendment right to counsel protects a defendant throughout all “critical stages” of the adversarial process once the government formally commences the process.¹⁶⁹ The Supreme Court has held that the deliberate elicitation of a statement from a defendant qualifies as a “critical stage”; therefore, absent a defendant’s knowing and voluntary waiver of his right to assistance of counsel, any statement the police obtain in the absence of counsel is inadmissible.¹⁷⁰

Absent waiver, the rationale for requiring counsel’s presence during police questioning of a defendant has

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¹⁶⁵. See supra note 16 and accompanying text.
¹⁶⁶. United States v. Gouveia, 467 U.S. 180, 187-88 (1984) (“[I]t has been firmly established that a person’s Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.” (quoting Kirby v. Illinois, 406 U.S. 682, 688 (1972))); see Massiah, 377 U.S. at 206; see also LAFAVE ET AL., supra note 47, § 11.2(b), at 596 (“[T]he Sixth Amendment speaks of the right of an ‘accused’ in a ‘criminal prosecution.’ The right attaches at the point the individual becomes the accused and carries forward through the prosecution until the individual loses that status.”).
¹⁶⁷. See LAFAVE ET AL., supra note 47, § 11.2(b), at 597 (“[T]he person arrested prior to being formally charged . . . is not an ‘accused.’”).
¹⁶⁸. See id. (“[A] person detained without the filing of charges does not become an accused even if he is detained for a substantial period of time and the government has every intention of filing charges when it completes its investigation.” (citing Gouveia, 467 U.S. at 187-89)).
¹⁶⁹. See id. § 11.2, at 598-600 (discussing the “critical stage’ prerequisite”).
always differed substantially from the rationale underlying the *Miranda* right to counsel.\(^{171}\) Inherent or subtle police coercion did not play a role in the *Massiah* decision.\(^{172}\) In fact, *Massiah* involved exactly the type of surreptitious police questioning addressed in this article. In *Massiah*, the defendant was unaware that the false friend with whom he was speaking was a police informant wearing a transmitter that allowed the police to record the conversation from a concealed location.\(^{173}\) Thus, *Massiah* assumed he was speaking with a trusted confidant, and he only later learned that authorities recorded his incriminating statements and would offer them against him at trial.\(^{174}\) Therefore, the coercive pressures of police interrogation did not factor into the Court's holding that the statement was inadmissible due to a violation of the Sixth Amendment.\(^{175}\)

The Court's rationale for concluding that the surreptitious recording of *Massiah*'s statements violated the Sixth Amendment was that protecting *Massiah*'s right to representation facilitated counsel's effective representation of the defendant.\(^{176}\) The Court emphasized that, as a practical matter, the most critical stage of the adversarial process often occurs outside of the courtroom.\(^{177}\) *Massiah* drew from the Court's earlier decision in *Powell v. Alabama*.\(^{178}\)

\(^{171}\) See McNeil v. Wisconsin, 501 U.S. 171, 178-79 (1991). Compare Strickland v. Washington, 466 U.S. 668, 685 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results."), and Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."), with Berkemer v. McCarty, 468 U.S. 420, 433 (1984) ("The purpose of the safeguards prescribed by *Miranda* [is] . . . to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary."), and Miranda v. Arizona, 384 U.S. 436, 458 (1966) ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

\(^{172}\) See Massiah v. United States, 377 U.S. 201, 210-13 (1964) (White, J., dissenting) ("The Court presents no facts, no objective, no reasons to warrant scrapping the voluntary-involuntary test for admissibility in this area.").

\(^{173}\) Id. at 201-03 (majority opinion).

\(^{174}\) Id.

\(^{175}\) See id. at 210-13 (White, J., dissenting).

\(^{176}\) See id. at 204-05 (majority opinion).

\(^{177}\) Massiah, 377 U.S. at 205 (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932)).
Alabama, noting that a defendant’s incriminating statement to police prior to trial often seals the defendant’s fate, no matter how effective defense counsel may prove in the courtroom.178 If the Sixth Amendment right to counsel did not extend to these encounters, then the right to have counsel assist in the courtroom would become hollow. Accordingly, counsel’s presence is essential during these out-of-court encounters. Subsequent decisions that designated out-of-court, corporeal-identification proceedings and preliminary hearings as “critical stages” relied on this same logic: a court will undermine a defense counsel’s ability to represent a client adequately at trial if it permits the government to subject an accused to these encounters without the presence of defense counsel.179 In essence, the critical-stage trigger is the Sixth Amendment right to counsel, which facilitates the Sixth Amendment right to confrontation.

Unsurprisingly, the Supreme Court subsequently held that authorities violate the Sixth Amendment when they use undercover, jail-cell “plants” to question a defendant surreptitiously to elicit incriminating statements from the defendant about the charged offense.180 In United States v. Henry, the suspect was indicted on armed robbery charges and subsequently placed in jail to await his trial.181 Shortly thereafter, FBI agents contacted a paid government informant who was in the same cellblock as Henry.182 One of the agents instructed the informant to be alert to any statements made by federal prisoners, but the agent specifically told him not to contact or question Henry about the robbery.183 The agents then contacted the informant after his release from jail; he informed them that Henry made incriminating statements about the robbery and the informant subsequently testified regarding those statements.

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178. See id. (quoting Powell, 287 U.S. at 57).
181. Id. at 265-66.
182. Id. at 266.
183. Id.
at Henry’s trial. \textsuperscript{184} As a result, the jury convicted Henry. \textsuperscript{185} The Supreme Court ruled that the FBI agents violated the defendant’s Sixth Amendment right to counsel when they intentionally created a situation in which the suspect was likely to make incriminating statements without the assistance of counsel. \textsuperscript{186}

Even though surreptitious questioning violates a defendant’s Sixth Amendment right to counsel, this does not mean that it also violates a suspect’s \textit{Miranda} right to counsel. \textsuperscript{187} Indeed, the Court permits such tactics in the \textit{Miranda} context precisely because \textit{Miranda} functions to protect a suspect from inherent police coercion. \textsuperscript{188} As noted, unlike the Sixth Amendment, the purpose of the \textit{Miranda} right to counsel is not to protect defense counsel’s ability to represent the defendant at trial; instead, it is to offset the inherent coercion of custodial interrogation. \textsuperscript{189} Accordingly, police tactics undermining the effectiveness of defense representation at trial—which surreptitious questioning of a suspect undoubtedly does—do not trigger the \textit{Miranda} right to counsel unless they subject the suspect to the requisite level of inherent coercion, which surreptitious questioning does not. \textsuperscript{190} Such tactics surely violate the Sixth Amendment right to counsel. \textsuperscript{191} But the Sixth Amendment right does not protect a suspect who is not yet formally charged or arraigned because it only applies to those offenses that have reached the formal adversarial process. \textsuperscript{192}

A clearly defined dichotomy exists between these two assistance-of-counsel rights—derived from the Court’s mutually distinctive justifications for adopting these

\textsuperscript{184} Id. at 266-67.
\textsuperscript{185} \textit{Henry}, 447 U.S. at 267.
\textsuperscript{186} Id. at 274.
\textsuperscript{187} See \textit{Illinois v. Perkins}, 496 U.S. 202, 294 (1990) (holding that \textit{Miranda} warnings are not required when an undercover police officer questions a suspect); \textit{supra} Part IV.
\textsuperscript{188} See \textit{Perkins}, 496 U.S. at 296-97; \textit{Henry}, 447 U.S. at 276 (“\textit{Massiah} does not prohibit the introduction of spontaneous statements that are not elicited by governmental action.”); \textit{supra} Part IV.
\textsuperscript{189} See \textit{supra} note 16 and accompanying text.
\textsuperscript{190} \textit{Henry}, 447 U.S. at 274.
\textsuperscript{191} See \textit{Massiah}, 377 U.S. at 206.
\textsuperscript{192} See \textit{supra} notes 165-67 and accompanying text.
respective rules. The undercover-questioning hypothetical presented in this article straddles the two situations and implicates both rules’ justifications. On the one hand, since the surreptitious questioning of a suspect not yet formally charged implicates only the *Miranda* right to counsel, the suspect’s ignorance that police are questioning him suggests he has no basis to object to the police tactic. However, once this same suspect invokes his *Miranda* right to counsel, the *Edwards-Minnick* rule restricts police from deliberately exploiting his asserted vulnerability. Use of this secret-questioning tactic would qualify as such exploitation. Ultimately, the permissibility of surreptitious questioning of a suspect who has invoked his *Miranda* right to counsel, but who is unprotected by the Sixth Amendment right, must turn on which of these two aspects of the *Miranda* right predominates—requiring knowledge of police confrontation or protecting a suspect’s invocation.

Protection from the effects of inherent police coercion has, since its inception, been the *sine qua non* for triggering *Miranda*. The Court built *Miranda* upon this foundation, and this decision reflects the Court’s concern that such coercion undermines confidence in the voluntariness of a suspect’s responses to police interrogation. This concern has been a consistent theme in all subsequent *Miranda* jurisprudence. For example, when the Court established the public-safety exception to *Miranda*, it concluded that when a police officer questions a suspect in response to an imminent threat—to either the police or the public—exigent circumstances override the need to protect a suspect against calculated tactics and the inherent coercion that justifies the *Miranda* requirements. *Shatzer* also

193. *See supra* notes 165-67 and accompanying text.
194. *See supra* notes 14-16 and accompanying text.
196. *See supra* notes 13-16 and accompanying text; *supra* Part II.
197. *See supra* notes 13-16, 114 and accompanying text.
reflects this core triggering aspect of *Miranda*. Although the Court indicated that the coercive pressures of police custody linger for up to fourteen days following a suspect’s release, confrontation by police officers within fourteen days—rather than the lingering coercive pressure of custody—produced the impermissible coercion that violated the *Edwards-Minnick* protection.

In short, the Court has never extended *Miranda* protections to suspects who were unaware that police were confronting them. Without a suspect’s awareness of police confrontation, any coercive pressures by the police over a suspect will not be sufficiently coercive to trigger *Miranda*. This logic also explains the disparity between allowing, in some instances, police to reinitiate questioning after a suspect invokes his right to silence but not after he invokes his right to counsel. In the right-to-silence context, a suspect will not have expressed an inability to deal with the coercion of custodial interrogation per se but, rather, will have only expressed a desire to cut off specific questioning on a specific issue at a specific point in time. Accordingly, so long as police honor a suspect’s invocation and obtain a new waiver when they reinitiate questioning, the waiver will not run afoul of the suspect’s right to silence. By contrast, the mere act of reinitiating interrogation after a suspect invokes his *Miranda* right to counsel exploits the suspect's asserted inability to manage the inherently coercive environment of custodial interrogation. But the latter situation presupposes that a suspect requests for assistance of counsel for the purpose of protecting himself from that uniquely problematic, coercive environment.

Although surreptitious questioning appears to fall beyond the protections of *Miranda* due to a suspect’s lack of knowledge of the police questioning, the *Edwards-Minnick* rule creates uncertainty as to the permissibility of this tactic. However, another aspect of *Miranda*

200. See *Shatzer*, 559 U.S. at 110-11.
201. *Id.*
202. See *supra* notes 15, 17, 150-52, 159 and accompanying text.
203. See *supra* notes 15, 17, 150-52, 159 and accompanying text.
204. See *supra* notes 95-98 and accompanying text.
jurisprudence strongly suggests the Court should resolve this question in favor of allowing secret questioning tactics—even if other considerations point to a tie on the issue. This tie-breaking principle derives from Dickerson v. United States, where the Court upheld Miranda over a direct constitutional challenge to that decision. The Dickerson Court was unwilling to overrule Miranda, but it limited the warning and waiver requirements to situations implicating the core concerns of the Miranda decision.

Dickerson involved the most direct challenge to Miranda since the Court announced that decision. Dickerson grew out of a congressional statute that made voluntariness the standard for admitting a suspect’s statements obtained during custodial interrogation. Congress enacted this statute in response to the Miranda decision, appearing to nullify the holding and revert back to the pre-Miranda, totality-of-the-circumstances test for admitting confessions. Although Congress enacted the statute soon after Miranda, not until Dickerson did the government rely on the statute—rather than Miranda—to support the admissibility of a statement obtained during custodial interrogation.

In Dickerson, FBI agents questioned the suspect because they suspected him of armed bank robbery and other related violations of Title 18 of the United States Code. The suspect, Dickerson, then made incriminating statements, which resulted in an indictment. Before trial, Dickerson moved to suppress the incriminating statements,

206. Id.
207. See id. at 432. Congress created the “voluntariness test” to protect a suspect’s Fifth Amendment privilege against self-incrimination and Fourteenth Amendment right to due process. See id. The test “takes into consideration the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” Id. at 434 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)). “The determination ‘depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.’” Id. (quoting Stein v. New York, 346 U.S. 156, 185 (1953)).
208. See generally Kamisar, supra note 122, at 970-74.
209. See id. at 1002.
211. See id. Dickerson was indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence. Id.
arguing that the FBI agents had not given him a *Miranda* warning prior to the interrogation.  

The district court granted the motion, and the government filed an interlocutory appeal to the Court of Appeals for the Fourth Circuit, which subsequently reversed the suppression order.

In support of the Fourth Circuit’s decision before the Supreme Court, the Government emphasized the numerous post-*Miranda* Supreme Court decisions that limited *Miranda* by noting its prophylactic nature and that consistently declared the *Miranda* rule swept more broadly than the Fifth Amendment. Based on these decisions, the Government argued that *Miranda* did not involve an interpretation of the Fifth Amendment but, instead, merely established one method for protecting a suspect’s privilege against self-incrimination. The Government reasoned that, because a violation of *Miranda* did not necessarily violate the Fifth Amendment, Congress was free to adopt an alternative test for ensuring compliance with that constitutional protection. Accordingly, the Government argued that the totality-of-the-circumstances test—as enacted by Congress—provided a constitutionally permissible alternative to the *Miranda* warning and waiver requirements so long as the test ensured conformity with the Fifth Amendment privilege.

To the surprise of many observers and to the ire of the two dissenting Justices, the Court rejected the Government’s argument and upheld *Miranda*. The Court

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212. *Id.*

213. *Id.*


215. *Id.* at 27 (“[T]he Court invited Congress and the States to develop ‘their own safeguards’ only if they were ‘fully as effective’ as the *Miranda* rules to ‘inform[] accused persons of their right of silence and . . . afford[] a continuous opportunity to exercise it.’” (quoting *Miranda* v. Arizona, 384 U.S. 436, 490 (1966))).

216. *Id.*

217. *See* id. at 8-9.

218. *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting) (“The Court today insists that the decision in *Miranda* is a ‘constitutional’ one . . . but what makes a decision ‘constitutional’ . . . is the determination that the Constitution requires the result that the decision announces and the statute ignores. By disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to
disagreed with the argument that its prior decisions—which modified *Miranda*’s impact—indicated *Miranda* did not interpret the Fifth Amendment and was, thus, subject to congressional override.\textsuperscript{219} The Court noted that Supreme Court precedent is not immutable and that those rulings following *Miranda* “reduced the impact of the *Miranda* rule on legitimate law enforcement [and] reaffirm[ed] the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.”\textsuperscript{220}

The *Dickerson* majority opinion, authored by Chief Justice Rehnquist, emphasized factors such as stare decisis, the Court’s original understanding of the basis for the *Miranda* decision, and the fact that *Miranda* had become deeply ingrained in police and public culture.\textsuperscript{221} As a result, the Court rejected Congress’s effort to revert back to a totality-of-the-circumstances test for admitting confessions: “In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively. Following the rule of *stare decisis*, we decline to overrule *Miranda* ourselves.”\textsuperscript{222} However, the Court also emphasized that the inherent coercion resulting from custodial interrogation was the core concern that motivated the *Miranda* opinion:

In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion. Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that “[e]ven without employing brutality, the ‘third degree’ or [other] specific stratagems, . . . custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.” We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that

\textsuperscript{219} See *Dickerson*, 530 U.S. at 442-44 (majority opinion).
\textsuperscript{220} \textit{Id.} at 443-44.
\textsuperscript{221} Corn, supra note 13, at 768 (citing *Dickerson*, 530 U.S. at 428, 443-44).
\textsuperscript{222} *Dickerson*, 530 U.S. at 442-44.
an individual will not be “accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.”

Thus, the Court’s decision to uphold *Miranda* in response to a direct attack assumed that the concern over coercion continues to necessitate the warning and waiver process to protect the Fifth Amendment privilege. Therefore, by implication, *Dickerson* indicates that the justification for extending the *Miranda* protection dissipates where the questioning does not implicate this core concern.

The surreptitious questioning of a suspect cannot, by its very nature, implicate this core concern. When a suspect is unaware that a police officer is questioning him, he is not subject to the sense of isolation at the hands of police that is central to the inherent coercion *Miranda* and its progeny offset. Both the *Miranda* right to counsel and the *Miranda* right to silence are intended to offset this inherent coercion. Nothing in *Miranda*, *Edwards*, *Minnick*, or *Shatzer* suggests a different purpose for providing the right to counsel to a suspect under custodial interrogation. Indeed, *Miranda* itself indicated that the right to counsel it created was a means of offsetting the coercive effects of custodial interrogation:

> The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

*Dickerson*, therefore, strongly supports the conclusion that, absent the type of inherent coercion resulting from isolation by custody and confrontation by a known police officer, *Miranda* should not apply. Extending this conclusion to the *Edwards-Minnick* line of cases indicates that surreptitious police questioning of a suspect who has invoked his right to have counsel present during police

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223. *Id.* at 434-35 (emphasis added) (footnote omitted) (citations omitted).
226. *See*, e.g., *Perkins*, 496 U.S. at 296-98.
interrogation is a permissible tactic. This tactic will undoubtedly place these suspects at risk—but only at risk of their own voluntary decisions to engage in dialogue with people they have no reason to believe are police agents. 227 This risk always exists outside the context of police interrogation, and Miranda never intended to protect suspects from this risk. Furthermore, unlike the Sixth Amendment right to counsel, the Court never intended the Miranda right to counsel to facilitate the effectiveness of an accused’s representation; the Court meant only for this right to be a mechanism for ensuring that a suspect’s decision to submit to police interrogation is knowing and voluntary. 228 Although this tactic may seal a suspect’s fate prior to trial, this consequence in no way offends the Miranda right to counsel.

VI. CONCLUSION

Surreptitious police questioning—either through an undercover officer or a prison inmate acting as a government agent—is often an effective method for exploiting a suspect’s erroneous belief that he is safe to make incriminating statements. The Supreme Court has held that the use of this tactic does not implicate the Miranda warning and waiver requirements because the suspect’s ignorance that a “false friend” is, in fact, a government agent eliminates an essential element of the custodial-interrogation trigger of these rights. However, when the government formally charges a suspect for an offense that is the subject of questioning, surreptitious questioning will violate the Sixth Amendment right to counsel even though the suspect is unaware that police are asking the questions.

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

227. See Perkins, 496 U.S. at 299 (explaining that where a suspect does not know that he is speaking to a government agent, no reason exists to assume that the suspect might feel coerced); supra notes 143-58 and accompanying text.
228. See supra notes 186-94 and accompanying text.
objective of the Sixth Amendment right to counsel is to prevent police investigatory activities prior to trial from nullifying the effectiveness of representation. Because the Court has held that authorities’ deliberate elicitation of statements from an accused is a critical stage in the adversarial process, a suspect’s assistance of counsel during interrogation is necessary to give meaning to this right. Accordingly, whether an accused is aware that police are questioning him is irrelevant to applying the protection. The “guiding hand of counsel” must assist the accused to ensure that his fate at trial is not functionally sealed in an out-of-court encounter in which police denied him counsel’s assistance.229

The objective of the *Miranda* right to counsel is fundamentally different—its purpose is to offset the inherent coercion produced when police hold a suspect in custody and confront him with interrogators.230 Because the *Miranda* Court concluded that the presence of counsel offsets the inherent coercion in this situation, the *Miranda* right has become a mechanism for establishing that a suspect knowingly and voluntarily submitted to questioning. This right will undoubtedly enhance future defense representation but, unlike its Sixth Amendment counterpart, providing effective representation has never been the rationale for this right.

In *Edwards* and *Minnick*, the Supreme Court recognized that once a suspect invokes his *Miranda* right to counsel, the suspect indicates he is unable to deal with police without the assistance of counsel.231 As a result, when police reinitiate questioning of such a suspect and obtain a new *Miranda* waiver, the exploitation of the suspect’s

229. See, e.g., *Edwards* v. Arizona, 451 U.S. 477, 485 (1981) (holding that reinterrogating a suspect after he has asserted his right to counsel violates *Miranda* and its progeny); *United States* v. *Henry*, 447 U.S. 264, 274 (1980) (holding that agents violated the defendant’s Sixth Amendment right to counsel when they intentionally created a situation in which the suspect was likely to make incriminating statements without the assistance of counsel); *United States* v. *Wade*, 388 U.S. 218, 237 (1967) (explaining that the post-indictment lineup was a critical stage of the proceedings and, therefore, the defendant was entitled to have his attorney present).


vulnerability invalidates the waiver.\textsuperscript{232} In short, once a suspect indicates his need to have counsel present during custodial interrogation, an officer’s mere request for the suspect to give a new \textit{Miranda} waiver is inconsistent with the \textit{Miranda} right to counsel.\textsuperscript{233} Consequently, a suspect who invokes the \textit{Miranda} right to counsel becomes unapproachable by police for subsequent questioning unless the suspect himself reinitiates the contact.\textsuperscript{234} Although \textit{Maryland v. Shatzer} established a bright-line expiration date for this protection,\textsuperscript{235} the protection remains effective so long as the suspect remains in custody.

However, the Court has never addressed the intersection of the \textit{Edwards-Minnick} “no reinitiation” rule with the surreptitious-questioning exception to \textit{Miranda}. Such secret questioning of a suspect who has invoked his \textit{Miranda} right to counsel should be permissible, even though it technically requires police to reinitiate contact with the suspect. The \textit{Miranda} right to counsel and the \textit{Edwards-Minnick} unapproachability rule both assume that police reinitiation of questioning exploits a suspect’s vulnerability in custodial interrogation. In turn, these rules presuppose that a suspect is aware that he is under the control of police (in custody) and is being questioned in a police-dominated environment.\textsuperscript{236}

When police overtly reinitiate contact with a suspect who has invoked his \textit{Miranda} right to counsel, they resurrect the exact type of pressure the suspect sought to offset by requesting the presence of counsel. Thus, in this situation, a \textit{Miranda} waiver is logically invalidated. However, if a suspect is unaware that police are questioning him—even if he already invoked his \textit{Miranda} right to counsel—then the police have not resurrected the coercive pressures that triggered the suspect’s right to counsel during the first questioning. Accordingly, no valid basis exists to presume that a suspect’s responses to a “false

\textsuperscript{232} \textit{Edwards}, 451 U.S. at 484-85.
\textsuperscript{233} \textit{Id.}
\textsuperscript{234} \textit{See Minnick}, 498 U.S. at 147; \textit{Edwards}, 451 U.S. at 484-85.
\textsuperscript{236} \textit{See Illinois v. Perkins}, 496 U.S. 292, 299 (1990) (explaining that “where the suspect does not know that he is speaking to a government agent there is no reason to assume the possibility that the suspect might feel coerced”).
friend” are the product of inherent coercion; therefore, no justification exists for extending the *Miranda* and *Edwards-Minnick* prophylactic protections to a suspect in secret-questioning situations.