ARTICLES

Reinterrogation

By MARCY STRAUSS*

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In *Miranda v. Arizona*,[1] the United States Supreme Court announced rules to assure that a criminal suspect's Fifth Amendment right against self-incrimination[2] is honored in the context of police interrogation. The Supreme Court held that in order to dispel the compulsion inherent in custodial surroundings,[3] a criminal suspect in custody must be informed of certain constitutional rights before he is

* Professor of Law, Loyola Law School. J.D. 1981, Georgetown University Law Center; B.S. 1978, Northwestern University. I am grateful to Erwin Chemerinsky for reading and critiquing this manuscript and to John Krings for his research assistance.

1. 384 U.S. 436 (1966).

2. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. For a general discussion of the Fifth Amendment, *see* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self Incrimination,* 92 MICH. L. REV. 1086 (1994).

3. *Miranda*, 384 U.S. at 458.

subject to interrogation.[4] Specifically, the police must warn the suspect that he has the right to remain silent and the right to have an attorney present during questioning.[5] If the suspect exercises either right, any interrogation must "cease."[6] Moreover, any waiver of these rights must be made knowingly and intelligently.[7]

Since *Miranda,* the Court has been struggling with the precise reach of the right to remain silent and the right to counsel. Although many aspects of the holding remain controversial,[8] one of the recurring questions under *Miranda* is the issue of reinterrogation. What restrictions, if any, exist on subsequent attempts by the police to re-question a suspect once that person has invoked his right to remain silent or his right to counsel?

Almost ten years after *Miranda*, the Court first visited that issue. In *Michigan v. Mosley*,[9] the Court re-examined the right to remain silent and declared that the police may reinterrogate a suspect who exercises this right, but only if the authorities "scrupulously honor" that right.[10] In *Mosley*, the Court determined that the police scrupulously honored the suspect's right to remain silent despite the reinitiation of police interrogation because the police immediately ceased the initial interrogation, waited a sufficient period of time, and restricted subsequent interrogations to different crimes than that involved in the initial questioning.[11] In other words, the Court in *Mosley* interpreted *Miranda* to permit further questioning in certain circumstances following a suspect's request to remain silent. Thus, the Court in *Mosley*

4. There must be both custody and interrogation in order for *Miranda* to apply. "Therefore, the police are not under an obligation to give warnings to a suspect whom they take into custody but do not question or whom they question but do not take into custody." Joseph D. Grano, Miranda v. Arizona *and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV 243, 254 (1986) [hereinafter Grano, Miranda v. Arizona *and the Legal Mind*].

5. *Miranda*, 384 U.S. at 473-74.

6. *See infra* notes 31-43 and accompanying text.

7. *Miranda*, 384 U.S. at 475. Some legal scholars have criticized the assumption that suspects can ever waive their rights voluntarily given the inherently coercive atmosphere of custodial interrogation. *See* Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions,* 68 N.C. L. REV. 69, 105 (1989).

8. The controversy surrounding *Miranda* in the last few decades is probably only surpassed by that engendered by *Roe v. Wade.* It has sparked significant political debate and a tremendous flurry of academic articles. *See* Stephen J. Schulhofer, *Confessions and the Court,* 79 MICH. L. REV. 865 (1981); Welsh S. White, *Defending* Miranda: *A Reply to Professor Caplan*, 31 VAND. L. REV. 1 (1986); Stephen J. Markman, *Miranda v. Arizona: A Historical Perspective*, 24 AM. CRIM. L. REV. 193 (1986).

9. 423 U.S. 96 (1975).

10. *Id.* at 103.

11. *Id.* at 104.

said that a suspect's invocation of the right to remain silent does not create a "blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation."[12]

When a suspect invokes the right to counsel[13] rather than the right to remain silent, however, the Court has imposed a per se prohibition of police initiated interrogation. In *Edwards v. Arizona*,[14] the Supreme Court held that an accused who requests to deal with the police only through counsel may not be subject to further interrogation outside the presence of counsel unless the accused himself initiates such conversation with the authorities.[15] Thus, *Edwards* created a bright-line rule: if a defendant asserts the right to counsel during custodial interrogation, no police initiated interrogation may occur outside the presence of counsel. There is no opportunity to consider whether the police scrupulously honored the defendant's request.[16]

Yet this seemingly clear, bright-line rule has proven remarkably blurry. For instance, one unresolved issue concerns the duration of *Edwards*' protection: how long does the bar on police-initiated interrogation last? Does the rule last in perpetuity—*i.e.*, once a suspect invokes the right to counsel, can the police ever reapproach him? If not, what event or events should trigger the cessation of this protection? Since *Miranda* and *Edwards* are tied to custodial interrogation, does a break in custody signal an end to the *Edwards* protection? If so, what prevents the police from temporarily releasing and later rearresting a suspect in order to try to obtain a confession? Do *Edwards* rights persist past the conviction and sentencing on the offense for which the suspect initially invoked his right to counsel? What about after the defendant pleads guilty but before sentencing? Additionally, how does one factor in the simple passage of time? If a defendant asserts his *Edwards* rights and this assertion is honored, may the police reapproach him weeks later to see if he has changed his mind? Would the answer be different if the time between interrogations were

12. *Id.* at 102.

13. Unlike the Sixth Amendment right to counsel, which attaches automatically upon the initiation of judicial proceedings, Brewer v. Williams, 430 U.S. 387, 404 (1977), the Fifth Amendment right to counsel must be explicitly asserted. *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993) (discussing the various tests for determining when counsel has been invoked under Edwards v. Arizona, 451 U.S. 477 (1981)). *See also* Davis v. United States, 114 S. Ct. 2350 (1994) (establishing that there must be a *clear* assertion of the right to counsel).

14. 451 U.S. 477 (1981).

15. *Id.* at 484-85.

16. The Court in *Edwards* specifically distinguished its approach from that taken in *Mosley*. *Id.* at 485. *See also infra* notes 43-50 and accompanying text.

months—or even years—after the initial assertion of the right to counsel?

Any attempt to delineate the point at which once-asserted *Edwards* rights should cease to exist raises fundamental questions about the nature of the right to counsel during custodial interrogation. It poses the same conflicting issues that the Court has been balancing from *Miranda* to the present: the desire to protect an individual from police badgering to ensure a "voluntary" confession versus society's legitimate interest in fighting crime and the perceived importance confessions play in that process. Obviously, a rule providing that a defendant who requests the presence of counsel maintains that protection throughout any future attempt by police to question him at whatever time and for whatever crime prevents police badgering. Such a policy, however, would almost certainly be viewed as having too great a cost for society. Where do we strike the appropriate balance?

The Supreme Court has yet to provide definitive answers to these questions. It appeared that the Supreme Court might answer these questions in *United States v. Green*:[17] certiorari was granted on a case—which was briefed and argued as well—posing the issue of whether law enforcement personnel should be allowed to initiate interrogation of a suspect who had invoked his right to counsel five months previously in connection with an unrelated offense and where the suspect had pled guilty to the unrelated offense prior to the interrogation.[18] Unfortunately, the defendant in that case, Lowell Green, died before a decision was rendered, and the Supreme Court dismissed the case.[19]

The questions posed can be answered by considering the possible breaking points for *Edwards* rights, and measuring these possibilities against the goals of *Miranda* and *Edwards*. One of the difficulties in answering these questions, however, is the lack of consistency and precision on the part of the courts in deciding what the *Edwards* rule is meant to accomplish, and in evaluating the proper role for confessions

17. 112 S. Ct. 1935 (1992), *cert. dismissed*, 113 S. Ct. 1835 (1993).

18. 592 A.2d 985, 988 (D.C. 1991), *cert. granted*, 112 S. Ct. 1935 (1992), *vacated and cert. dismissed*, 113 S. Ct. 1835 (1993).

19. Lowell Green was murdered about two blocks away from the Supreme Court building on March 24, 1993. *See* Linda Greenhouse, *Supreme Court Roundup*, N.Y. TIMES, April 6, 1993, at A18. *See generally* Jeffrey E. Richardson, Note, *It's Not Easy Being Green: The Scope of the Fifth Amendment Right to Counsel*, 31 AM. CRIM. L. REV. 145 (1993).

in our system of justice. Case law is often contradictory and unclear even while the Court is lauding the existence of "bright-line rules."

Section I of this Article describes the background of the right to counsel during custodial interrogation by examining *Miranda* and the cases attempting to more precisely define the nature of the right to remain silent and the right to counsel set forth in *Miranda*. The Court's decisions in *Mosley, Edwards,* and several other cases are considered in assessing how the *Miranda* rule has evolved. Finally, Section I describes the facts of *Green* to illustrate how the question of reinterrogation may arise.

Section II sets forth the goals of *Miranda* and *Edwards* as a way of assessing the wisdom of any possible breaking point. These goals include: ensuring voluntary, non-coerced confessions; maintaining the bright-line nature of *Miranda* rights; enhancing the societal interest in crime control; and fidelity to precedent.

Section III proposes and evaluates several possible "ending points" for the assertion of the right to counsel in light of the goals earlier delineated. The ending points considered are a break in custody; resolution of the offense for which the suspect invoked his right to counsel; passage of time; and a totality-of-circumstances test. Considered individually, however, none of the suggested breaking points justify ending *Edwards'* presumption that the defendant wishes to deal with the authorities only through counsel. None of the breaking points adequately protect the paramount interest expressed in *Miranda*, and enforced through *Edwards'* prophylactic rule,[20] of protecting a suspect's Fifth Amendment rights. A combination of two "significant events"—a break in custody and a significant passage of time—should suffice to permit the police to approach a defendant, provide new *Miranda* warnings, and seek a possible waiver of rights. If custody is narrowly defined, and the specific passage of time required between the initial invocation and any subsequent interrogation is both delineated specifically, and sufficiently lengthy, the suspect's rights will be adequately protected and the interests of law enforcement will be served as well.

20. The *Edwards* rule is prophylactic because it can be violated by police conduct in ways that do not actually compel the suspect to incriminate himself. In other words, the rule may be violated even if the underlying interest on which the rule is based is not compromised. George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis,* 1993 U. ILL. L. REV. 207, 230 (1993).

I. The Right to Counsel During Custodial Interrogation

Before *Miranda*, the law of confessions was governed largely by the doctrine of voluntariness under the Due Process Clause.[21] Considering the totality of circumstances, courts excluded evidence obtained as a result of police coercion which rose to the level of a Due Process violation.[22] While this approach would condemn police practices of severe physical abuse,[23] it left largely uncontrolled a myriad of other practices that did not reflect physical abuse but operated to coerce a suspect into making a statement. Police interrogation was still a practice conducted totally under police control, with the suspect not only isolated from external sources of support but also subjected to police tactics to "persuade, trick or cajole" a confession.[24]

In *Miranda v. Arizona,* the Supreme Court dramatically altered the rules governing custodial interrogation.[25] The Court, after surveying the long history of physical abuse and psychological tactics designed to trick and intimidate suspects into confession, concluded that suspects could not meaningfully exercise their right against self-incrimination in such circumstances. Thus, the Court held that the Fifth Amendment required the police to inform suspects of their constitutional rights and to obtain waivers of these rights before conducting custodial interrogation.[26]

The now familiar *Miranda* warnings[27] provide that the suspect must be told that she has a right to remain silent and that anything she says can be used against her. Moreover, the suspect must be informed

21. *See generally,* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985); Anne E. Link, Note, *Fifth Amendment—the Constitutionality of Custodial Confessions*, 82 J. CRIM. L. & CRIMINOLOGY 878 (1992).

22. *See* Rogers v. Richmond, 365 U.S. 534, 541 (1961); Joseph D. Grano, *Voluntariness, Free Will and the Law of Confessions,* 5 VA. L. REV. 859, 864 (1979).

23. *See, e.g.,* Brown v. Mississippi, 297 U.S. 278 (1936) (confessions which were made only after the police whipped and nearly hung the defendants were excluded).

24. *Miranda,* 384 U.S. at 455.

25. *Id.* at 499. For a critical discussion of the Court's extrapolation of the rules from the Fifth Amendment, *see* Grano, Miranda v. Arizona *and the Legal Mind, supra* note 4.

26. *Miranda,* 384 U.S. at 440. There were four cases comprising this decision; the title case arose from Ernesto Miranda's conviction for the kidnapping and rape of a woman. Miranda's conviction was based on a confession made during custodial interrogation; during that interrogation he made no request to speak to an attorney and was never advised by police that he had a right to do so. The Court, by a five to four vote, overturned the conviction because the police failed to comply with a set of rules governing interrogation set forth in the decision. Only by following such regulations could the police negate the inherently compulsive nature of custodial police interrogations.

27. Even my seven and nine-year-old sons can recite the warnings, virtually verbatim, from memory.

that she has a right to have counsel present during the interrogation, and that counsel will be appointed if she cannot afford it.[28] The police cannot interrogate a suspect unless she makes a voluntary, knowing, and intelligent waiver of these rights. And, most importantly for purposes of this article, if a suspect indicates at any time that she wishes to remain silent, or that she wants an attorney present during interrogation, the questioning must cease immediately. Although the Court did not address the topic of reinterrogation in any depth, Justice Warren, in dicta,[29] described the procedures following an invocation of rights as follows:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.[30]

Despite the exhaustive, sixty page majority opinion, questions soon arose concerning the scope of these newly established rights. *Miranda* required that after a suspect invokes her rights, the questions must cease; how stringently is this to be enforced? A decade after announcing the *Miranda* rights, the Supreme Court began to address this question—a quest that is still continuing. In *Michigan v. Mosley,*[31] the Court considered whether police questioning of a suspect can resume after the assertion of the right to remain silent. In *Mosley,* the defendant was arrested for several robberies and given his *Miranda* warnings. The questioning ceased after Mosley stated he did not want to discuss the robberies. However, two hours later different detectives

28. This right to counsel derives from the Fifth Amendment; it is seen as a way to implement the right against self-incrimination. *See* William H. Erickson, *The Unfulfilled Promise of* Miranda v. Arizona, 24 AM. CRIM. L. REV. 291, 296 (1986). A lawyer's presence decreases the possibility of police coercion and ensures an accurate recording of the statement and surrounding events. *Miranda,* 384 U.S. at 470.

29. It is dicta because no rights were invoked in any of the cases.

30. *Miranda,* 384 U.S. at 473-74.

31. 423 U.S. 96 (1975).

approached Mosley, issued new *Miranda* warnings and, when he agreed to talk, questioned him about a murder that was unrelated to the robberies. Mosley then proceeded to make a number of inculpatory statements. Mosley's incriminating statements were admitted at trial, and he was convicted of murder. On appeal, Mosley argued that because he initially had asserted his right to remain silent, the government had violated his Fifth Amendment rights by reinterrogating him.

The Court disagreed. While recognizing the danger that repeated rounds of questioning in the face of a decision to remain silent will nearly always undermine a suspect's free will,[32] it found that *Miranda's* admonition that "interrogation must cease" upon assertion of the right to silence cannot "sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject."[33] Nothing in *Miranda* requires a blanket prohibition of further interrogation, regardless of the circumstances.

The Court stated that such a reading would "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity."[34] Rather, the admissibility of statements elicited from a suspect who exercised his right to remain silent depends on "whether his 'right to cut off questioning' was 'scrupulously honored.'"[35] The Court concluded that Mosley had effectively stopped the police interrogation about the robberies because the questions immediately ceased after he had asserted his right to remain silent. Morever, the police had scrupulously honored his decision to cut off questioning despite the subsequent interrogation. The second interrogation focused exclusively on a crime of a different nature and occurred at a different time and place from the original interrogation. Also, it involved different officers who again read him his *Miranda* warnings, and it occurred a significant period of time after the first invocation.[36] In these circumstances, a defendant would not feel that his original request to remain silent was being ignored.[37]

32. *Id.* at 102. *See also* United States v. Barone, 968 F.2d 1378 (1st Cir. 1992).

33. *Mosley,* 423 U.S. at 102-03.

34. *Id.* at 102.

35. *Id.* at 104.

36. *Id.* at 104-06. Here, a two hour time gap was considered significant. *Id.* at 106.

37. *Id.* at 105. It is not clear from *Mosley,* nor from any subsequent Supreme Court decision, which, if any, of these factors are necessary, and which are sufficient to find that a suspect's rights were scrupulously honored despite a reinterrogation. For example, must the questioning be about a different crime? A suspect, however, need not be told the topic of interrogation prior to instituting a valid waiver. Colorado v. Spring, 479 U.S. 564 (1987). Thus, why does it matter if the subject happened to be a different crime if the suspect,

Six years later, in *Edwards v. Arizona*,[38] the Supreme Court distinguished between invoking the right to remain silent and invoking the right to counsel with respect to reinterrogation. Although in *Mosley* the Court explicitly rejected a ban on reinterrogation after a suspect invokes the right to remain silent, in *Edwards* the Court embraced such a per se proscription of indefinite duration upon further questioning after the invocation of the right to counsel.

In *Edwards* the defendant was arrested for burglary, robbery, and first degree murder. Edwards stated that he understood his rights and was willing to speak with the authorities after he was read his *Miranda* rights. After being told that another suspect had implicated him, Edwards denied any involvement and gave a taped statement presenting an alibi defense. He then stated that he wanted to "make a deal." After the officer told him that he did not have the authority to make a deal, Edwards then asserted his right to counsel by stating, "I want an attorney before making a deal." At that point, all questioning ceased and Edwards was taken to jail.[39]

The next morning two detectives came to the jail to see Edwards. When told that the officers wanted to speak to him, Edwards replied that he did not want to talk to anyone. After the guard told him that he "had to" talk to them, Edwards met with the detectives. The officers informed him of his *Miranda* rights; Edwards said that he was willing to talk, but that he wanted to hear the taped statement of the accomplice who had implicated him. After listening to the tape, Edwards said he would make a statement but that he did not want it tape-recorded. Although the officers told him that any statement still could be used against him even if not taped, Edwards still insisted that

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when agreeing to the reinterrogation, did not know the subject at the time of the waiver? In any event, the lower courts have disagreed about which of the *Mosley* elements are most significant. In United States v. Hsu, the Court of Appeals noted:

> Among the factors to which the Court looked in *Mosley* were the amount of time that elapsed between interrogations, the provision of fresh warnings, the scope of the second interrogation, and the zealousness of officers in pursuing questioning after the suspect has asserted the right to silence. At no time, however, . . . did it imply that a finding as to one of these enumerated factors—such as, for example, a finding that only a short period of time had elapsed—would forestall the more general inquiry into whether, in view of all relevant circumstances, the police 'scrupulously honored' the right to cut off questioning.

852 F.2d 407, 410 (9th Cir. 1988) (citation omitted). *See also* Grooms v. Keeney, 826 F.2d 883, 886 (9th Cir. 1987) (holding that the identity of the subject matter in both interrogations was not enough in itself to render the second interrogation inadmissible); United States v. Heldt, 745 F.2d 1275, 1278 n.5 (9th Cir. 1984) (most important factor is provision of fresh set of warnings).

38. 451 U.S. 477 (1981).

39. *Id.* at 479.

it not be taped. He then proceeded to implicate himself in the crime.[40]

Edwards moved to suppress his confession on the ground that his *Miranda* rights had been violated when the officers questioned him after he had invoked his right to counsel and no counsel had been provided to him. The Supreme Court agreed that the use of his confession at trial violated his Fifth Amendment rights under *Miranda.*[41] Although the Court recognized the defendant's ability to validly waive his *Miranda* rights and respond to interrogation, when the suspect requests counsel,

> when an accused has invoked his right to have counsel present during custodial interrogation, and 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. . . . *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.*[42]

Thus, in *Edwards,* the Court made clear that they were adopting more stringent protections when a suspect invokes the right to counsel than they did for the right to remain silent. Although a suspect's right to silence had only to be "scrupulously honored," his right to counsel would seemingly operate as an absolute bar to further police-initiated interrogation in the absence of counsel. Under the rule in *Edwards,* police-initiated reinterrogation is prohibited even when the suspect, upon being requestioned, expressly waives his *Miranda* rights. Fresh warnings and evidence of voluntariness in responding to questions do not overcome the presumption that any subsequent waiver is invalid. To reinforce the protections of *Miranda, Edwards* adopted a prophylactic, seemingly bright-line rule: once a defendant asserts the right to counsel, all questions must cease unless counsel is present or the defendant himself initiates the conversation.[43]

Almost immediately, challenges were brought to clarify the meaning of this restriction on subsequent interrogations under *Edwards.* In virtually all post-*Edwards* cases, the Court has reaffirmed

40. *Id.*

41. *Id.* at 485-86.

42. *Id.* at 484-85 (emphasis added) (footnote omitted).

43. *See* Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983) (plurality defines initiation as further exchanges of communication or conversations by the accused evidencing a desire for a generalized discussion relating to the investigation).

the vitality of the bright-line rule prohibiting police-initiated interrogation after a suspect invokes the right to counsel.[44] Most signficantly, the Court rejected an attempt to make the *Edwards* rule offense-specific,[45] and rejected an argument that reinterrogation can occur after the suspect has had the opportunity to consult with an attorney following the initial invocation.[46]

Relying heavily on *Michigan v. Mosley,* many lower courts had held that a defendant who asserts the right to counsel during interrogation can nonetheless be approached to waive his rights on a separate, unrelated offense. The Supreme Court rejected this position in *Arizona v. Roberson,*[47] finding that the *Edwards* protection is not offense-specific.[48] In *Roberson,* the suspect was read his *Miranda* rights when he was arrested at the scene of a burglary. Roberson asserted his right to counsel before answering any questions; the questioning apparently ceased. Three days later, a different officer, who did not know about the earlier request for counsel approached Roberson to question him about a different burglary. The suspect was again informed of his rights; this time, he waived his *Miranda* rights and made an incriminating statement about this burglary. The trial court suppressed the statement as violating the defendant's right under *Miranda* and *Edwards.*[49]

The Supreme Court agreed that admission of the statement violated the defendant's *Edwards* rights even though the second interrogation concerned an unrelated offense. In so deciding, the Court emphasized the desirability of maintaining the bright-line rule established in *Edwards.* Moreover, the Court was concerned that permitting reinterrogation, even on an unrelated offense, would wear down the accused's will and badger him into waiving his rights. "[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling."[50]

44. *See* Ainsworth, *supra* note 13, at 297 n.195 (Oregon v. Bradshaw, 462 U.S. 1039 (1983), and its lenient interpretation of "initiation" represent an exception to the Court's approach of maintaining or expanding the *Edwards* protections).

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

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

47. 486 U.S. at 678.

48. *Id.*

49. *Id.*

50. *Id.* at 686.

Finally, the Court attempted to distinguish the invocation of the right to remain silent and that of the right to counsel. According to the Court, a suspect's decision to cut off questions does not imply that he would be unwilling to speak on a different subject at a different time.[51] Invoking the right to counsel, on the other hand, evidences the suspect's belief that he is incapable of proceeding vis-à-vis the authorities without the countervailing weight of an attorney on his side.[52] In other words, the pressures of custodial interrogation which a suspect wishes to avoid by interjecting an attorney between himself and the police exist regardless of the subject of the questioning. Thus, in *Roberson,* the Court refused to limit *Edwards* protections to the specific topic of the initial invocation.

A few years later, the Court was faced with another possible limitation on *Edwards.* In *Minnick v. Mississippi,*[53] the Court was asked to determine the meaning of the requirement that the suspect not be subject to further interrogation until "counsel has been made available to him."[54] Does this passage mean that once the suspect has the opportunity to *consult* with counsel the police may reapproach and attempt to obtain a valid waiver of rights? Or is the protection broader than this; that once counsel is requested, all police-initiated questions must cease unless counsel is present during any subsequent interrogation?

The Supreme Court rejected the former approach and embraced the latter in *Minnick.*[55] Minnick was questioned in jail by two FBI agents who read him his rights. Although Minnick refused to sign a waiver form, he acknowledged that he understood his rights and said he would not answer "very many questions." After discussing a few issues, and being reminded that he did not have to answer any questions without a lawyer present, Minnick told the agents to come back on Monday because he would have a lawyer by then and would make a complete statement. After the FBI interview, appointed counsel met with Minnick; apparently he spoke to his attorney two or three times, either in person or by telephone. On Monday, the sheriff came to the jail to question Minnick. Minnick testified that he was told that he could not refuse to speak to the sheriff. After being advised again

51. Michigan v. Mosley, 423 U.S. 96, 102.

52. *Roberson,* 486 U.S. at 686.

53. 498 U.S. 146 (1990).

54. *Id.* at 147.

55. *Id.* at 153.

of his rights, Minnick declined to sign a waiver form but proceeded to make incriminating statements about the murder.[56]

Prior to trial, Minnick moved to suppress the statements, arguing that the statements were elicited in violation of his *Edwards* rights because the police reinterrogated him without counsel being present after his assertion of the right to counsel. The Mississippi Supreme Court concluded that because counsel was made available to Minnick, the Fifth Amendment was satisfied and the statements were admissible.[57]

The United States Supreme Court disagreed.

> In context, the requirement that counsel be 'made available' to the accused refers to more than an opportunity to consult with an attorney outside the interrogation room. . . . 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.[58]

Only this bright-line clarification of the *Edwards* rule, according to the Court, could preserve the suspect's Fifth Amendment right: "A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and that may increase as custody is prolonged."[59] Moreover, the Court was concerned that a contrary rule would lack clarity and thus undermine *Edwards'* clear and unequivocal character.[60] The definition of consultation is far from certain; it encompasses a range of contact from a telephone call to a hurried exchange in the hall to a lengthy in-person conference. It would be difficult for the courts to discern which type of consultation was sufficient to displace *Edwards.*

Thus, prior to the grant of certiorari in *United States v. Green,*[61] the Supreme Court had declined two attempts to limit the reach of *Edwards.* In *Green,* the Court was once again faced with a request to depart from the bright-line rule of *Edwards.*

Green originally was arrested on July 18, 1989 on a charge of possessing a controlled substance with intent to distribute. He signed a form indicating that he was unwilling to answer questions without

56. *Id.* at 148-49.
57. *Id.* at 159.
58. *Id.* at 152-53.
59. *Minnick,* 498 U.S. at 153.
60. *Id.* at 154.
61. 592 A.2d 985 (D.C. 1991), *cert. granted,* 112 S. Ct. 1935 (1992), *vacated and cert. dismissed,* 113 S. Ct. 1835 (1993).

having an attorney present; the defendant appeared in court the next day and an attorney was appointed to represent him. In July, the drug case was dismissed at the preliminary hearing; the defendant was then remanded to the custody of juvenile authorities in connection with another offense pending against him at the time. He was subsequently indicted on the drug charge and arraigned in September, 1989. Green remained in custody until he pled guilty to the lesser included offense of attempted possession with intent to distribute cocaine. Following the plea he was held in the Youth Center, Lorton Reformatory, while a Youth Act Study was being conducted.[62]

Prior to sentencing on the drug offense, Detective Gossage obtained an arrest warrant charging the defendant with the murder of Cheaver Herriott in December, 1988. Green was brought to the police Homicide Office for booking.[63] He was advised of his *Miranda* rights, waived those rights, and discussed with Gossage his involvement in the murder of Herriott. After being advised a second time of his rights, he agreed to make a videotaped statement in which he admitted his involvement in the robbery and murder of Herriott. Six weeks later, he was sentenced to fifteen months incarceration under the Youth Act for the drug offense; several months after his sentencing he was indicted on various charges including first-degree murder.

Green moved to suppress his confession on the ground that, given his initial refusal to answer questions without counsel at the time of his arrest on the drug charges, the statement was obtained in violation of his *Edwards* rights. The trial judge initially disagreed for three reasons. First, the time between the invocation of the right and the second interrogation was deemed significant; the court called the five month interval "an extraordinary" time lapse. Second, the court noted the absence of a coercive environment. Although the defendant was under some restraint of liberty during the five months, during the last part of the period he was not in jail but held at the Youth Center. Finally, the defendant had the opportunity to consult repeat-

62. *Id.* at 986.

63. As is often the case, the defendant's testimony paints a different picture concerning the circumstances of his interrogation. Green claimed that he asked for his attorney at the police station and only signed the form after the police told him: "You can make this hard on yourself or make it easy. We got you for Kevin Henson too, you are a suspect in that case. If you don't tell us something about Jamacian Tony, you are going to get charged for both of these cases." The trial judge, as is usually the case, credited the detective's version of the events and thus found that Green had been read his rights and waived them. Brief for Respondent at 4, United States v. Green, 113 S. Ct. 1835 (1992) (No. 91-1521). *See generally,* Richardson, *supra* note 19. *See also* Ainsworth, *supra* note 13, at 292 ("In any swearing match between a police officer and a defendant, the defendant loses.")

edly with counsel between his invocation of rights and the waiver of rights that preceded his confession of murder.[64]

A few days after the trial court's ruling, however, *Minnick v. Mississippi* was decided, causing the trial judge to reconsider his order. Noting that the most significant ground of his first ruling had been the opportunity to consult with counsel and that in *Minnick* the Supreme Court had specifically held that such an opportunity did not satisfy *Edwards*, the judge ordered the confession suppressed.[65]

On appeal, the government essentially urged the Court of Appeals to consider the unique factual context as distinguishing the instant case from *Edwards, Roberson* and *Minnick.* The circumstances of this case included the facts that the defendant had been furnished counsel and had consulted with him, that the renewed questioning concerned a crime entirely unrelated to the crime in which the defendant invoked his right to counsel, that there was a five month time period between questioning, and that the defendant had pled guilty to the first crime. The government argued that these facts justified departing from the *Edwards* rule because these factors, by themselves or in combination, ensured against police badgering designed to coerce a waiver of a previously asserted *Miranda* right.[66]

The Court of Appeals rejected the government's attempts to replace the bright-line approach of *Edwards* and its progeny with a case-by-case determination.[67] As to the ability to consult counsel and the unrelated offense, the court noted that each fact was rejected in *Minnick* and *Roberson*, respectively, and that they "are not convinced that in combination the [Supreme] Court would regard these two factors differently."[68] The appellate court had more sympathy for the argument that a five-month interval between interrogations should dispel the *Edwards* presumption that the new waiver of rights is involuntary.[69] Nonetheless, the court felt ill-equipped to delineate the precise lapse of time sufficient to limit *Edwards.*

> If five months in custody without evidence of police 'badgering' is held sufficient to dispel *Edwards*' presumption . . . then why not three months or three weeks? At what point in time—and in conjunction with what other circumstances—does it make

64. *Green,* 592 A.2d at 986.

65. *Id.* at 986-87.

66. Brief for the United States at 9, United States v. Green, 113 S. Ct. 1835 (1992) (No. 91-1521).

67. *Green,* 592 A.2d at 991.

68. *Id.* at 988.

69. *Id.*

> doctrinal sense to treat the defendant's invocation of his right to counsel as countermanded without any initiating activity on his part? . . . [W]e think only the Supreme Court can explain whether the *Edwards'* rule is time-tethered . . . .[70]

Thus, the court held that in the absence of Supreme Court guidance, so long as the defendant remains in custody, the five months between questioning cannot, singly or in combination with other factors, justify a departure from *Edwards.*[71]

Finally, the Court of Appeals addressed what they considered the most potent argument: that the guilty plea represents a sufficient break in events to undermine the assumption that a subsequent waiver of *Miranda* rights was the result of police coercion.[72] The court conceded that a guilty plea factually distinguished *Green* from *Edwards*, and that such a plea represents an important break in the chain of events in the criminal process.[73] Still, the court concluded that a voluntary guilty plea, which was likely achieved through negotiation between attorney and government, was consistent with the decision to deal with government officials only through an attorney. That decision to interpose an attorney between oneself and the authorities is precisely the interest *Edwards* seeks to protect.

Thus, the Court of Appeals concluded that none of these factors, either singly or in combination, act as the pivotal break in events terminating *Edwards'* protection. In so ruling, however, the court often seemed more concerned with not overstepping its proper role in the judicial structure than with rejecting the government's arguments on the merits. In other words, the Court of Appeals was deferring to the Supreme Court to make any exceptions and qualifications to *Edwards.* As the court concluded: "If [our assessment of how the Supreme Court would apply its precedent to the facts in this case] is wrong, then it is for the Court in this case or some future one to provide the *Leitfaden*—the red thread—through its decisions leading to the correct result."[74]

Such guidance was not forthcoming. As previously mentioned, although the Supreme Court agreed to hear the case, certiorari was

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70. *Id.* at 989.

71. *Id.* at 989-90.

72. *Green,* 592 A.2d at 990. An analogy can be drawn to the Fourth Amendment attenuation doctrine: the government can admit evidence if it can show, for example, that it is sufficiently attenuated from the primary illegality. For example, a confession that can be traced back to a violation of that amendment may still be admissible under various circumstances. *See* Oregon v. Elstad, 470 U.S. 298 (1985).

73. *Green,* 592 A.2d at 990 (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).

74. *Green,* 592 A.2d at 991.

ultimately dismissed for mootness after the defendant was murdered a few blocks from the Supreme Court building.[75]

Thus, the various questions posed by *Green* remain unanswered. Although most commentators would instinctively agree that *Edwards* rights cannot exist in perpetuity, exactly what factors signal an end to those rights? The next section presents a framework for answering that question by exploring in greater detail the concerns that animated the Court from *Miranda* and *Edwards* to *Roberson* and *Minnick*. Why has the Court built what Justice Scalia depicted as "prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restrictions upon law enforcement?"[76]

II. The Right to Counsel During Custodial Interrogation: A Consideration of the Underlying Values

What interests do courts consider in crafting a right to counsel when a suspect faces interrogation by authorities? There are four goals or values which any court or scholar suggesting an alteration or interpretation of *Edwards* should recognize and evaluate: ensuring a voluntary, noncoerced confession; maintaining a bright-line rule; providing a framework for effective law enforcement; and adhering to precedent.

A. To Ensure a Voluntary Confession

The objective of the rule crafted in *Miranda* and enforced through *Edwards* is ensuring that a defendant's privilege against self-incrimination is respected. In *Miranda,* the Justices feared that a suspect would be compelled, either by police trickery or by the compelling pressures inherent in custody, to make an incriminating statement. To counteract these pressures, the Court required that the suspect facing custodial interrogation be told of his rights. Only upon a knowing and voluntary waiver[77] of these rights could it be said that an inculpatory statement was made voluntarily rather than in response to the coercion inherent in custodial police questioning.

Of course, in some sense, "no confession is really voluntary, in that the person always is subject to—and some would insist controlled

75. *See supra* notes 17-19 and accompanying text.

76. Minnick v. United States, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting).

77. A detailed discussion of waiver under *Miranda* is beyond the scope of this Article. *But see* North Carolina v. Butler, 441 U.S. 369 (1979) (rejecting a proposed rule that waivers of *Miranda* rights be deemed involuntary absent an explicit assertion of waiver by the suspect).

by—both internal and external causal pressures."[78] Despite inevitable difficulties in assessing what is voluntary, the Court in *Miranda*, perhaps overly simplistically, equated a voluntary confession with the absence of police coercion. A person subjected to custodial interrogation who agrees to answer questions without being informed of his right to remain silent is presumed by *Miranda* to be speaking not based on his own free will but in response to the coercion inherent in custodial interrogation. Similarly, a suspect who invokes his rights, who is subject to police requestioning and continued requests to waive those rights, and who ultimately waives those rights and makes incriminating statements is presumed to be acting under compulsion prohibited by the Fifth Amendment.

In *Edwards,* then, the Court devised a rule to implement the commands of *Miranda* and to ensure a voluntary confession when the suspect expresses a desire for the presence of counsel. The Court feared that without an absolute prohibition on police reinterrogation, the police, after some initial period of honoring the request for counsel, would nonetheless pressure a defendant in custody to change his mind and speak to them. "Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny . . . ."[79] *Edwards'* ban on subsequent interrogation, reinforced in *Roberson* and *Minnick*, not only communicates to the suspect that the police intend to respect his constitutional rights, it also is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."[80]

Thus, any interpretation of *Edwards* that limits a suspect's right to counsel must ensure that the government's ability to wear down a defendant, to badger or coerce, is in no way strengthened. Any restriction on *Edwards* must not undermine this central concern for voluntariness consistently embraced by the Court from *Miranda* to the present.

B. To Provide a Bright-Line Rule

One of the much lauded features of *Edwards,* consistently emphasized by the courts, is that it provides a bright-line rule governing when police can reinitiate interrogation. For example, in *Minnick* the Court noted that "[t]he merit of the *Edwards* decision lies in the clar-

78. Grano, Miranda v. Arizona *and the Legal Mind, supra* note 4 at 261. *See also* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 15 (1980).

79. Patterson v. Illinois, 487 U.S. 285, 291 (1988).

80. Michigan v. Harvey, 494 U.S. 344, 350 (1990).

ity of its command and the certainty of its application."[81] In *Roberson*, the Court stressed that the *Edwards* rule provides "'clear and unequivocal' guidelines to the law enforcement profession."[82]

Obviously clear rules serve many useful purposes. They provide guidance to the police in determining the constitutionality of interrogations. Specific guidelines are particularly useful in the area of interrogation where vague, general guidance may give the police significant leeway to wear down the accused and persuade him to incriminate himself.[83] Moreover, precise and defined rules help inform the courts in determining when statements obtained during police interrogations may be properly suppressed. Judicial resources which would otherwise be expended making difficult assessments concerning the admissibility of confessions are thus conserved.[84] Accordingly, specificity in rules benefit the accused and the state alike.[85]

The importance of bright-line rules, however, should not be overstated. While it is a desirable end, it must be secondary to the content of the rules. A bright-line rule could be established by declaring either that no confessions are admissible or that all confessions are inadmissible. The desire for a clear and precise rule gives us no way to differentiate between these two extremes. While choosing between two comparable approaches, the clarity of one rule is certainly a point in its favor, but it cannot be the pre-eminent objective.

> *Edwards'* bright line is not a laser, burning inexorably through form and substance into infinity. When the factual circumstances of a case fall into a predictable, potentially recurring pattern to which the underlying policy of *Miranda* and *Edwards* cease to apply, then so too does the bright-line of *Edwards* cease to shine.[86]

The clarity of *Edwards*, moreover, may very well be overstated. There are still significant gray areas surrounding the application of the rule. For example, "custody"—a pre-requisite before *Miranda* warnings are even required—has been poorly defined by the courts thus

81. Minnick v. United States, 498 U.S. 146, 151 (1990).

82. Arizona v. Roberson, 486 U.S. 675, 682 (1988).

83. *See* Smith v. Illinois, 469 U.S. 91, 98 (1984) ("In the absence of such a bright-line prohibition, the authorities . . . might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance."). Clear guidelines also help the police determine when interrogation is permissible. *See* Davis v. United States, 114 S. Ct. 2350, 2355 (1994) (Clear rules help police decide whether to proceed with the interrogation.).

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

85. Fare v. Michael C., 442 U.S. 707, 718 (1979).

86. Kochutin v. State, 813 P.2d 298, 310 (Alaska Ct. App. 1991) (Bryner, J., dissenting) (footnote omitted).

far.[87] What constitutes an invocation of the right to counsel is still being litigated.[88] Even the definition of interrogation has been subject to some dispute.[89] Perhaps most striking for its lack of definition is the meaning of "initiation:" the police may obtain a waiver and reinterrogate a suspect without counsel being present as long as the suspect initiates the conversation.[90] What constitutes initiation, however, is never spelled out in *Edwards* and has been a source of confusion for the courts.[91]

The point, of course, is not to provide a definitive exploration of these areas still unresolved after *Edwards.* Nor is it to say that the existence of some open questions is evidence of the futility of being precise. Rather, the point is simply that while the Court should strive for a clear, precise, bright-line rule, that objective should not be sought after at the expense of other, more important goals.

C. Societal Interest in Crime Control

While preservation of a suspect's Fifth Amendment rights through prophylactic rules has certain benefits, these have always been weighed, at least to some extent, against any concomitant reduction in law enforcement effectiveness. In other words, to the extent that a proposed interpretation of *Edwards* enhances or decreases society's ability to fight crime and convict the guilty, these costs should be considered.[92]

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87. The Court in *Miranda* stated that its holding applied once a person "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444. Subsequently, the Court, in essence reading out the latter part of the sentence, has required that there be a "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)). *See, e.g.,* Berkemer v. McCarty, 468 U.S. 420 (1984) (officer engaged in a routine traffic stop does not create custody, and, therefore, officer need not obtain a waiver before asking questions). Whether custody exists in a particular case is assessed on a case-by-case basis. *See generally* Stansbury v. California, 114 S. Ct. 1526 (1994) (discussing factors in determining whether custody exists).

88. *See* Ainsworth, *supra* note 13.

89. *See, e.g.,* Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (defining interrogation as express questions or their functional equivalent). For a consideration of the fact-specific nature of defining interrogation, *compare* United States v. Calisto, 838 F.2d 711, 717-18 (3d. Cir. 1988) *and* Commonwealth v. Rubio, 540 N.E.2d 189 (Mass. Ct. App. 1989) *with* People v. Rowen, 314 N.W.2d 526 (Mich. App. Ct. 1981).

90. *Bradshaw,* 462 U.S. at 1044.

91. *See, e.g.,* James J. Fyfe, Oregon v. Bradshaw—*What's Happening Here?* 20 CRIM. L. BULL. 154 (1984).

92. *See, e.g.*, Davis v. United States, 114 S. Ct. 2350, 2356 (1994) ("In considering how a suspect must invoke the right to counsel, we must consider the other side of the *Miranda* equation: the need for effective law enforcement.").

The Court often has taken an inconsistent position on the key questions of whether the *Miranda* and *Edwards* rules decrease the number of confessions or inculpatory statements and, equally important, whether any such decrease truly represents a "loss" to the system. It should be stressed that these are two separate considerations: first, do decisions like *Miranda* and *Edwards* decrease the number of inculpatory statements acquired by the police; second, will any resultant decrease stifle the ability of law enforcement personnel to fight crime or convict the guilty. For example, it could be argued that *Miranda* in fact has not significantly lowered the number of confessions obtained by the authorities. Additionally, it may be contended that *Miranda* does decrease the number of confessions, but that confessions are unreliable and therefore should not play a significant role in our adversary system. Finally, it could be argued that *Miranda* and *Edwards* have substantially reduced the number of confessions obtained by the police and that this is highly undesirable given the necessity of relying on confessions in our criminal justice system.

Not surprisingly, the evidence with respect to the effect of *Miranda* on the number of confessions obtained by the police is controversial. Some studies support the contention of *Miranda* critics that *Miranda* has led to a decrease in the number of suspects willing to speak to the police after being informed of their rights. A study by Professors Seeburger and Wettick, for example, demonstrated a substantial reduction in the number of confessions in Pittsburgh. They found that prior to *Miranda* about sixty percent of suspected murderers and robbers confessed; after *Miranda* that number was cut in half.[93]

Other surveys, however, dispute any significant decrease in the number of confessions. Significantly, the most recent data is fairly consistent: while some declining confession rates could be documented immediately after the *Miranda* decision was handed down, "within a year or two, both clearance and conviction rates were thought to be returning to pre-*Miranda* levels. Study after study confirmed this trend."[94]

There are various explanations for this phenomenon. First, the police departments, realizing that *Miranda* was the law of the land,

93. Richard H. Seeburger & R. Stanton Wettick, Miranda *in Pittsburg—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967). *See also* Grano, Miranda v. Arizona *and the Legal Mind*, *supra* note 4, at 224-25 (discussing a number of similar studies).

94. Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 456 (1987) (footnote omitted).

gradually adjusted to its requirements. Second, most suspects continued to talk, even after being informed of their rights, partly out of a belief that they can talk their way out of trouble.[95] And, in part, the Court's interpretation of various aspects of the *Miranda* decision has minimized its impact.[96] Thus, even scholars like Professor Joseph Grano who believe that *Miranda* was wrongly decided recognize that "the concern over *Miranda* is much ado about nothing. Suspects, after all, continue to confess, and the worst fears of the *Miranda* dissenters simply have not materialized."[97]

Moreover, in evaluating the issues posed in *Green*, the critical question is not whether *Miranda* has led to a decrease in confessions. This article assumes that *Miranda* is not going to be overruled;[98] indeed, even the most ardent critics of the decision concede that *Miranda* is here to stay.[99] The precise question posed by this Article is:

95. *Id.* at 456-57.

96. To some extent, the limited effect of *Miranda* may be partly attributed to the Court's narrowing of the protections over the years. In fact, "[t]he blanket prohibition [adopted in *Edwards*] is one of the only significant constitutional protections for the criminal accused that has not been eroded considerably during the tenure of the Rehnquist court." Ainsworth, *supra* note 13, at 297. *See, e.g.,* Oregon v. Mathiason, 429 U.S. 492 (1977) (discussing the meaning of custody; finding suspect not in custody when he voluntarily went to police station at the request of an officer); Oregon v. Elstad, 470 U.S. 298 (1985) (rejecting application of the fruit of the poisonous tree doctrine when an initial statement is obtained as a result of a *Miranda* violation but is otherwise voluntary); Harris v. New York, 401 U.S. 222 (1971) (statements elicited in violation of *Miranda* may be used for impeachment); Oregon v. Bradshaw, 462 U.S. 1039 (1983) (defining initiation to include asking "what is going to happen to me now"); New York v. Quarles, 467 U.S. 649 (1984) (adopting a public safety exception to *Miranda*); Illinois v. Perkins, 496 U.S. 292 (1990) (no compulsion exists—and no *Miranda* warnings are necessary—when person does not know he is speaking to an officer).

97. Grano, Miranda v. Arizona *and the Legal Mind*, *supra* note 4, at 266.

98. *See, e.g.,* Mark Berger, *Compromise and Continuity:* Miranda *Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1009 (1988) ("While outright reversal of *Miranda* remains a possibility, it is more likely that *Miranda* will survive the current round of attacks. Interrogation warnings and waivers, after all, have been the center-piece of the law of confessions for more than twenty years and have integrated themselves into the criminal justice process."); Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law,* 84 MICH. L. REV. 662, 664 (1986) ("The present Supreme Court would not have spawned *Miranda.* Nevertheless, perhaps because of institutional considerations, the Court seems disinclined to take the drastic step of overruling *Miranda* and rethinking the basic premises of confessions law.").

99. *See, e.g.,* comments of Justice Burger: "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date." Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring). Of course, in an ultimate sense, any decrease in coerced confessions is a "cost" of the Fifth Amendment, and not merely of *Miranda.*

what is the effect of the *Edwards* rule on the incidence of confessions, and, even more precisely, how might the incidence of confessions be affected by "breaking" the *Edwards* rights at some point in time. No study has measured the specific effects of *Edwards* on confession rates; most studies on the effect of *Miranda* were conducted before *Edwards* was even decided. The studies documenting the effects of *Miranda*, however, have some relevance here: overall, they demonstrate that the police, even after informing suspects of their rights, are able to obtain virtually the same number of confessions as before *Miranda*.

In sum, the evidence thus far suggests that *Miranda* has not significantly hampered law enforcement's ability to obtain incriminating statements. Even if the evidence showed otherwise and the *Edwards* rule translated into some quantifiably decreased number of confessions, is that necessarily a "bad" thing? Does a loss of confessions translate into a loss of convictions? Are statements of guilt elicited from the defendant's mouth really a valuable tool of law enforcement?

The Supreme Court has vacillated on the value and legitimacy of confessions as an essential part of the adversary system. On the one hand, the Justices have expressed some distrust for a system that significantly relied on the use of a suspect's own words. A central premise underlying our criminal justice system is that "ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."[100] Given some inherent uneasiness about any confessions obtained during custodial interrogation, the government should not rely primarily—or even significantly—on confessions for effective prosecutions. Rather, the police should put their energy into other, more reliable law enforcement techniques in order to convict the guilty. Justice Warren's majority opinion in *Miranda* reflected this position, minimizing the value of relying on the accused's own statements. The Court in *Miranda*, for example, spoke about the "overstatement of the 'need' for confessions" in obtaining convictions.[101] According to this philosophy, any decrease in confessions due to the protection of individual rights would have a de minimis effect on the

100. United States v. Mandujano, 425 U.S. 564, 587 (1976) (quoting Rogers v. Richmond, 365 U.S. 534, 541 (1961)).

101. *Miranda*, 384 U.S. at 481. The dissent characterized the majority as having "a deep-seated distrust of all confessions." *Id.* at 537 (White, J., dissenting).

criminal justice system; confessions obtained during custodial interrogations are viewed as unreliable and unnecessary to the effective and efficient workings of the criminal justice system.

On other occasions, and especially in recent years, many of the Justices seem to take the opposite approach. In *McNeil v. Wisconsin,*[102] for example, the Court held that the accused's invocation of his Sixth Amendment Right to Counsel during a judicial proceeding did not constitute invocation of the right to counsel under *Edwards.* The Court emphasized that if it adopted a contrary rule:

> most persons in pretrial custody for serious offenses would be *unapproachable* by police officers suspecting them of involvement in other crimes, *even though they have never expressed any unwillingness to be questioned.* Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser.[103]

Or, as the Court emphatically stated in *Moran v. Burbine,*[104] "[a]dmissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."[105]

Which of these competing theories expressed over time by the Supreme Court has more empirical support? Numerous attempts have been made over the years to measure the "value" of confessions. Despite the often vehement assertions of many Justices that confessions play an essential role in convictions, empirical evidence, although not definitive, supports the view that excluding confessions will not damage law enforcement. In fact, a study demonstrates that *Miranda* has not had a deleterious effect on criminal prosecutions,

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102. 501 U.S. 171 (1991).

103. *Id.* at 181 (emphasis in original).

104. 475 U.S. 412 (1986).

105. *Id.* at 426 (quoting United States v. Washington, 431 U.S. 181, 187 (1977)). *See also* Maine v. Moulton, 474 U.S. 159, 180 (1985) (There is no doubt that the public has a legitimate "interest in the investigation of criminal activities."). Not only are confessions viewed by many as a legitimate law enforcement technique, but they are also perceived as important for the confessor and ultimately for reforming the criminal. Justice Scalia expressed this view in his dissenting opinion in *Minnick*:

> While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, 'admission[ ] of guilt . . . , if not coerced, [is] inherently desirable,' because it advances the goals of both 'justice *and* rehabilitation.'

Minnick, 498 U.S. at 167 (Scalia, J., dissenting) (quoting respectively United States v. Washington, 431 U.S. 181, 187 (1977) and Michigan v. Tucker, 417 U.S. 433, 448 n.23 (1974)) (citations omitted) (emphasis in original).

even when there has been a decrease in the confession rate.[106] For example, although the Pittsburgh study found a significant decline in confession rates, there was no significant change in clearance or conviction rates.[107]

Thus, contrary to popular perception, the suppression of a confession does not mean a brutal murderer is released to prey on the public. Rather, most cases proceed as *Edwards*: after admission of the defendant's own statements was found to violate *Miranda*, the defendant was re-tried without the confession being admitted into evidence. Based on other evidence, Edwards was again convicted of armed robbery, armed burglary, and murder; he was sentenced to life imprisonment for the murder.[108]

In sum, when evaluating a rule that limits—or fails to limit—the scope and reach of *Edwards*, the effect on law enforcement must be considered. Such consideration, however, should not succumb to platitudes and cries of outrage lambasting the great harm of requiring the police to inform suspects of their rights, and of requiring the police to respect any invocation of rights. While there has always been much outrage over *Miranda,* the reality is that the rule has not significantly weakened law enforcement.

Yet even the possibility of hindering law enforcement, however unquantifiable, should still be factored into any proposed interpretation of *Edwards.* Any proposed change in the *Edwards* rule must still consider the possible ramifications on crime control. It may be that *Miranda/Edwards* has had little cost because the courts have not construed the rule to last in perpetuity.[109] If that interpretation of *Edwards* is rejected and an invocation of counsel precludes any future interrogation (or leads to the suppression of an illegally obtained confession), the effect on the criminal justice system should be assessed. The empirical research, however, strongly supports an argument that the system adjusts, even to the loss of confessions. The current evidence demonstrates that, if unable to rely on confessions, the police develop equally—if not more—effective and reliable sources of evidence.

106. Schulhofer, *Reconsidering* Miranda, *supra* note 94, at 457.

107. *Id.*

108. *Id.* at 459. This subsequent conviction was reversed by the Arizona Supreme Court on the ground that hearsay evidence was improperly admitted at the retrial. State v. Edwards, 665 P.2d 59, 70 (Ariz. 1983). The case was remanded once again. "[O]n the day the new trial was to begin, Edwards agreed to plead guilty in return for a fifteen-year sentence." Schulhofer, *Reconsidering* Miranda, *supra* note 94, at 460 n.62.

109. *See supra* notes 94-95 and accompanying text.

D. Adherence to Precedent

A final objective in devising a rule concerning a break in *Edwards'* prohibition on reinterrogation is fidelity to precedent. Obviously, any court deciding these issues would not be writing on a blank slate; consideration of the numerous cases where the Court has explored the scope and extent of *Miranda* is essential.

Such a task, however, is complicated by the inconsistent approaches of the Court. Specifically, many scholars contend that there is an inconsistency between the waiver of the right to silence and the right to counsel.[110] As previously discussed, the Court forbids waiver of the right to counsel once invoked (short of initiation or presence of counsel) while the right to silence need only be "scrupulously honored."

The Court has attempted to justify this distinction in several ways. First, it points to the language in *Miranda* as supporting the difference between the treatment of the right to silence and that of the right to counsel. That language, however, is at best equivocal. The effect of the two rights is at times described interchangeably in *Miranda*: when either is invoked, the police must "cease" the interrogation. In other passages, the Court modified this by adding that when the right to counsel is invoked, interrogation must cease "until an attorney is present."[111] But if the former statement—that interrogation "must cease"— is not taken literally to mean that all police-initiated interrogation must stop for all time and in all circumstances, why is the latter viewed as absolute? In other words, why should the fact that the ending point is specified—when counsel is present—be read to mean that event is the *only* possible breaking point in *Edwards*? Unless we read into the passage that an attorney being present is not only a *sufficient* condition for terminating *Edwards* rights and permitting reinterrogation, but also a *necessary* one, there is no reason to view the rights differently. Both could potentially be ended by myriad factors, as the Court recognized in *Mosley*. In fact, the Court has held that the presence of counsel is not a necessary condition for requestioning since a suspect's initiation allows the police to seek a valid waiver and commence interrogation even in the absence of counsel.

Besides considering the language of *Miranda,* the Court normatively tries to justify the distinction between the two rights on the ground that the suspect is communicating two very different ideas

110. *See, e.g.,* Donald A. Dripps, Miranda *After 25 Years: Alive and Well?*, TRIAL, Mar. 1991, at 13, 15.

111. *Miranda,* 384 U.S. at 474.

when he says "I don't want to talk without my attorney" rather than "I don't want to talk." According to the Court, in the former invocation the suspect is expressing his inability to deal with the police at all times, and on any topic, without his attorney as shield. In the latter, the Court assumes that the suspect is merely indicating a temporary desire: he does not *now* feel like speaking with the police, but he may at a later time, particularly with different officers and especially on a different subject.

Drawing such a distinction between waivers of the right to silence and the right to counsel based on this perceived difference makes little sense. Why is one viewed as a temporary desire and the other as permanent? Do suspects really have such different interests in mind when they stop an interrogation or refuse to waive their rights? In other words, is a suspect who insists that "he doesn't want to talk" really expressing a different desire than one who states, "I don't want to talk without my lawyer?" If part of the objective is to preserve the choice of the defendant, the results in *Mosley* and *Edwards* are likely irreconcilable. As Professor Kamisar argued:

> The average person has no idea that different procedural safeguards are triggered by saying "I want to see a lawyer," (or "I don't want to say anything until I see a lawyer") rather than "I don't want to say anything," (or "I don't want to talk to you.") If, after being advised both of his right to remain silent and his right to counsel, a suspect replies that he wants to remain silent, he may really be saying that he wants to remain silent until he sees a lawyer. Indeed, I would argue that if, immediately after being informed of his right to remain silent and his right to counsel, the suspect responds "I don't want to say anything," he is invoking both rights.[112]

In essence, the justification for permitting reinterrogation when the suspect invokes the right to remain silent, but not when he invokes the right to counsel, is weak at best. In both cases, the subject is telling the police that he chooses not to cooperate or assist in the investigation. The accused is as emphatic when insisting he will not speak as when he declines to speak without his attorney.[113]

What significance does the inconsistency between *Edwards* and *Mosley* have in deciding the duration of *Edwards?* In one sense, it goes beyond the true focus of this paper, which is not to present a

112. Yale Kamisar, *The* Edwards *and* Bradshaw *Cases: The Court Giveth and the Court Taketh Away*, in THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1982-1983, 153, 157 (Jesse H. Choper et al. eds., 1984).

113. Erickson, *supra* note 28, at 296. Judge Erickson believes that *Edwards* was wrongly decided and should be more aligned with *Mosley*'s totality of circumstances test.

detailed criticism of *Mosley* or to suggest it be overturned, nor to urge the Court to overrule *Edwards*. On the other hand, the dichotomy goes to the core of this paper. The Court in *Mosley* was faced with precisely the issue considered here: should we construe the rights guaranteed in *Miranda* to last in perpetuity? What events or circumstances, if any, should render a subsequent waiver of these rights valid?

III. Possible Breaking Points in the *Edwards* Rule: A Consideration of the Values

Thus, the question becomes: given these divergent and sometimes conflicting goals, when may the police obtain a valid waiver of the *Miranda/Edwards* rights after a suspect initially asserts his desire to proceed only through counsel. There are a number of possible "events" that arguably should break the protection of *Edwards*, permitting the police to obtain a valid waiver despite the suspect's request for the assistance of a lawyer. The most significant include: (1) a break in custody; (2) the end of the offense for which the defendant invoked his right to counsel; and (3) the passage of time. A totality of the circumstances test could also be employed.

These potential termination points for *Edwards* will be contrasted with another possible answer to the question of when *Edwards* rights end: no police-initiation is allowed under any circumstances once the right to counsel has been invoked. That is, once the suspect asserts a right to counsel, the police must interrogate him only in the presence of a lawyer or obtain a valid waiver based on the suspect's own initiation.

A. The End of Custody

Virtually every court that has considered this issue has held (or noted in dicta) that a break in custody permits the police to reapproach a suspect who had previously asserted his *Edwards* rights and to try to obtain a waiver.[114] The Eleventh Circuit, for example, in finding that a break in custody dissolves a defendant's *Edwards* claim,

114. *See, e.g.*, Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988); McFadden v. Garraghty, 820 F.2d 654, 660-61 (4th Cir. 1987); United States v. Skinner, 667 F.2d 1306, 1308-09 (9th Cir. 1982); People v. Trujillo, 773 P.2d 1086, 1091-92 (Colo. 1989); State v. Bymes, 375 S.E.2d 41, 41-42 (Ga. 1989); State v. Norris, 768 P.2d 296, 301-02 (Kan. 1989); Brown v. State, 661 P.2d 1024, 1029-30 (Wyo. 1983); State v. Kyger, 787 S.W.2d 13, 24-25 (Tenn. Crim. App. 1989); United States *ex rel.* Espinoza v. Fairman, 813 F.2d 117, 125-26 (7th Cir. 1987).

held that subsequent confessions obtained from police-initiated interrogation are admissible if there has been an intervening break in custody even if the police wrongfully ignore a defendant's request for counsel.[115] In that case, *Dunkins v. Thigpen*,[116] the suspect was arrested and brought to the courthouse on a rape and murder charge. After being read his rights, the defendant replied, "Before I talk anymore now, I would like to talk to my lawyer or either my mama or somebody . . . ."[117] The deputies asked a few more questions, put the suspect in a line-up, and then returned him to his place of work. The next morning the defendant was picked up for a polygraph test which he had agreed to take the day before. He was again returned to his job; later that day he was brought in for more questioning. After an hour or so of questioning, the defendant signed a waiver of his rights and confessed to the crime. The Court of Appeals held that the confession was admissible: the breaks in custody ended the need for the prophylactic *Edwards* rule, and the subsequent waiver of rights was voluntary.[118]

The Ninth Circuit also adopted a break in custody rule based on similar facts. In *United States v. Skinner*,[119] the suspect was questioned on July tenth at an undisclosed location concerning a murder. He was read his rights and agreed to talk. Shortly thereafter, he voluntarily went to the police station to answer further questions.[120] He was again advised of his rights and signed a waiver form. The session ended after almost two hours when the suspect said he wanted to speak to an attorney before answering further questions. Skinner left the station. The following morning he was arrested for the murder. In the car on the way to the station he was advised of his rights; the defendant said he understood, agreed to answer questions and confessed immediately thereafter.[121] At the station, he was once again advised of his rights; he signed a waiver form and again confessed.

Skinner moved to suppress the confessions, arguing that because he had asserted his right to counsel at the July tenth interrogation, the police could not obtain a valid waiver the next day because he had not initiated the conversation and his attorney was not present. The court disagreed: "We find *Edwards* to be distinguishable. Edwards was

115. Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988).
116. *Id.*
117. *Id.* at 396.
118. *Id.* at 398.
119. 667 F.2d 1306 (9th Cir. 1982).
120. *Id.* at 1308.
121. *Id.*

under arrest and in custody continuously from the time he requested an attorney through the next day when the guard told him 'he had to' talk and officers interrogated him again. *Skinner however, was not in continuous custody.*"[122]

Although the Supreme Court has not considered this issue directly, in dicta the Court appeared to endorse the principle that a break in custody permits the police to reapproach a suspect to try to obtain a waiver of her rights. In *McNeil v. Wisconsin,*[123] the Court described the holding in *Edwards* and its progeny as follows: "If the police do subsequently initiate an encounter in the absence of counsel *(assuming there has been no break in custody),* the suspect's statements are presumed involuntary and therefore inadmissible . . . ."[124]

Thus, the argument would be that *Edwards* applies only as long as a suspect remains in custody after initially asserting his *Miranda* rights. A suspect released from continuous custody may be contacted by the police and issued new *Miranda* warnings if subjected to custodial interrogation, and that police-initiated contact will not be barred by *Edwards.*

What is it about the break in custody that extinguishes a defendant's *Edwards* rights? There are several possible reasons why continuous custody might be required before applying *Edwards.* First, it could be that such a break in custody permits the defendant an easy opportunity to consult with a lawyer. That seemed to be an important factor for the court in *Skinner;* it noted that "[W]hen Skinner left the station that afternoon, he had the opportunity to contact a lawyer or to seek advice from friends and family if he chose to do so."[125] *Skinner,* however, was pre-*Minnick.* In *Minnick,* the Supreme Court held that consultation with counsel does not substitute for the presence of counsel at the interrogation.[126] The police may not approach a suspect and attempt to obtain a waiver of rights simply because the suspect has had the opportunity to meet with an attorney. Thus, this possible explanation for a break in custody rule is no longer valid.

A second possible justification for the break in custody rule is that it extinguishes the coercive pressures present when the defendant first invoked the assistance of counsel. For example, the district court

122. *Id.* at 1309 (emphasis added) (citation omitted).

123. 501 U.S. 171 (1991).

124. *Id.* at 177 (emphasis added). *See also* Richardson, *supra* note 19, at 165 (supporting a break in custody as "the only possible 'significant event' at which the *Edwards* presumption should end").

125. United States v. Skinner, 667 F.2d 1306, 1309 (9th Cir. 1982).

126. Minnick v. Mississippi, 498 U.S. 146, 153 (1990).

noted in *Green* (before reversing itself on other grounds) that "unlike in *Roberson*, Mr. Green was not continuously in custody of the police and therefore arguably subject to the same coercive pressure in January 1990 as he was in July of 1989." The point would be that the *Edwards* rule has established an irrefutable presumption of coercion only where the circumstances reveal a real risk of coercion. When there is a break in custody, that presumption would not be indulged.

This argument has little merit. First, *Edwards* establishes a presumption of coercion; coercive factors should not be considered anew in each circumstance. Any subsequent interrogation must occur in custody for the *Miranda/Edwards* protections to apply, and the Court has been consistent in noting that custodial interrogation is inherently coercive. Why does the fact that the defendant experienced a few hours of freedom[127] make it less coercive when the police reapproached him, in a custodial setting, to obtain a waiver of his previously asserted rights? The *Roberson* majority, in distinguishing *Edwards* from *Mosely*, emphasized that a suspect's decision to request an attorney raises the presumption that he is unable to deal with the authorities even with respect to a completely different offense.[128] Even a new set of warnings, apprising the defendant that he could (again) assert his rights fails to extinguish any coercion. Why would a break in custody do so? There is nothing about this event that remotely suggests that the suspect has changed his or her mind and now wishes to speak directly to the police.[129] Indeed, if any assumption can be made, it should be that a suspect in this position would want to pursue precisely the same course as before: that is, deal with the police only with the buffer and protection of counsel.

A break in custody does not alleviate the danger that the suspect will feel his will is being overborne by police who reapproach him to obtain a waiver. If anything, the break in custody rule practically encourages police to badger and wear down the will of the suspect. The police could circumvent *Edwards* simply by releasing a person and then reapprehending him, re*Miranda*izing him, and hoping to obtain a waiver. It is easy to imagine this rule being abused; the police could release a suspect for a short period of time (even hours) in order to

127. In many cases the suspect was only released overnight and questioning continued the next day. *See, e.g., Skinner,* 667 F.2d at 1308; Dunkins v. Thigpen, 854 F.2d 394, 396 (11th Cir. 1988).

128. Arizona v. Roberson, 486 U.S. 675, 683 (1988).

129. Thus, a break in custody cannot be considered initiation by the suspect. It is not an expression of the suspect's desire to open up further dialogue with the police on the subject of the initial interrogation. *See* Oregon v. Bradshaw, 462 U.S 1039, 1044 (1983).

break the link, and then, upon taking the suspect into custody, obtain a valid waiver by rereading his rights. Although the police might believe that the cost of releasing some suspects might pose too great a risk, it would be a viable option in numerous circumstances.

In fact, as a psychological tactic, the break in custody "routine" might work very well: by freeing the suspect, the police can act like the "good cop," win favor with the person, and then hope that the suspect will eventually agree to speak without an attorney being present. Yet this behavior, rather than ending the coerciveness of custody, likely enhances the coercive effect. The uncertainty of fate that being released from custody and then reapprehended entails is, in some circumstances, more coercive than continual custody. It is difficult not to view the reinterrogations that occurred in both *Skinner* and *Dunkins*, coming in both cases after the suspects had asserted their desire to speak only through counsel, as precisely the kind of badgering *Edwards* was designed to avoid. The fact that both defendants had been released from custody after asserting their rights does nothing to minimize this coerciveness.

Perhaps those who contend that a break in custody "erases" the request for counsel really are saying that there needs to be some way to minimize the costs of *Edwards*, and this line at least provides a clear, easily enforceable ending point. In other words, the belief is that *Edwards* rights cannot last forever, and the end of custody seems like a reasonable, clear termination. An analogy might be drawn to the attenuation doctrine in Fifth Amendment jurisprudence. There, the Court has held that, even when there has been an earlier, coerced confession, the court will not automatically exclude the subsequent confession because it feels the cost is too great; at some point the relationship between the two confessions should be viewed as attenuated.[130]

This argument—that some breaking point is needed for *Edwards*, and that the end of custody provides at least a clear termination point—has two dubious assumptions: first, that the costs of *Edwards* otherwise would be too great, and, second, that the definition of custody constitutes a bright-line rule.

The first assumption—that *Edwards* lasting forever would prove too costly—has been discussed previously. There is no reliable evidence that the retention of *Edwards* rights significantly decreases the

130. *See* Oregon v. Elstad, 470 U.S. 298 (1985); McFadden v. Garraghty, 820 F.2d 654 (4th Cir. 1987).

number of confessions, or, more importantly, decreases the number of convictions.

The latter argument, that custody provides a clear, easy to enforce breaking point, is also assailable. First, of course, the value of having a bright-line rule is only as great as its other justifications. And here the justification is weak. As previously discussed, a break in custody does not inevitably eliminate the coercive environment which prompted the initial request for counsel.

Second, it is not certain that a break in custody would be a bright-line rule easily assessed by the courts. Even those judges who accept this as a significant event extinguishing *Edwards* rights recognize the potential for abuse, and therefore assert the caveat that the release from custody cannot be contrived or used as a pretext simply to permit future interrogations. Precisely how the Court is going to make this factual determination is not clear. In other areas of criminal procedure, pretext arguments have not generally represented the courts highest achievement for clarity and consistency.[131]

Moreover, even defining custody for purposes of this rule may be problematic. Courts have struggled with the meaning of custody for purposes of determining whether *Miranda* applies in the first place.[132] This would add yet another layer of confusion. In everyday parlance, a break in custody seems easy to define; it implies a release from prison or jail. At a minimum, a person previously restricted in freedom of movement would be free to go about his everyday business as he chooses. Some courts, however, define "break in custody" more broadly, and indicate that a change in the "level" of custody would suffice for showing a break. In other words, the level of intensity in the manner of incarceration is analyzed. If a defendant in jail no longer experiences the same degree of restrictive environment that he previously experienced— if the circumstances are less coercive than before—that will be considered a break in the element of custody. For example, in *Green* it was argued—and accepted initially by the

131. *See generally* United States v. Strickland, 902 F.2d 937, 940 (11th Cir. 1990). *Compare* United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) ("[S]o long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry.") *with* United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988) (The court set forth a test to determine if police action is pretextual: "a court should ask not whether the officer *could* validly have made the stop, but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose." Here the court needs to determine usual practice and whether the officer deviated from it.).

132. *See* Stansbury v. California, 114 S. Ct. 1526 (1994). *See also supra* note 81 and accompanying text.

trial court—that Green was not in custody during the five month interval between interrogations because he was confined at a youth center and "not with the police" during that time. Thus, the court concluded that the "same" coercive pressures were not at stake. If courts were to undertake such an analysis, and determine whether the suspect felt under compulsion in the time period between interrogations, any illusion that the break in custody rule is a bright-line test is destroyed. For a court to undertake, in every case, a psychological analysis of the conditions of incarceration and their effect on the suspect would prove extraordinarily difficult, time consuming, and potentially arbitrary.

Thus, I conclude that a break in custody, while it may aid law enforcement by opening up a window of opportunity for questioning a suspect who has invoked his rights, should not constitute an event that, by itself, eliminates the *Edwards* presumption. A break in custody seems unrelated to the notion of voluntariness in the sense of implementing the suspect's choice to deal with the authorities only through counsel. It does not represent the end of coercion during the time of the interrogation. Although ostensibly it would be a bright-line rule, the factual inquiries raised above render it more of a case-by-case inquiry than a bright-line rule.

B. The End of the Offense

Most courts and commentators assume that if the defendant asserts the right to counsel when being questioned on an offense, and "liability" for that offense ends, *Edwards* should not bar subsequent waivers of police initiated interrogations. The end of an offense might be defined in many ways; it could include the government's decision to drop charges, the expiration of the statute of limitations, conviction for the offense, or sentencing.[133] Thus, it can be argued that *Edwards*' prophylactic rule dissolves once a defendant is convicted and/or sentenced for the offense for which he invoked his *Edwards* rights. Judge Bryner argued that sentencing represents a reasonable breaking point for *Edwards*:

> When a person is confined in custody solely as a sentenced prisoner, with no charges pending, the issue of guilt resolved by a final verdict, and the terms and conditions of future confinement clearly defined in a written judgment that is a matter of

133. Justice O'Connor suggested sentencing as the termination point for the *Edwards* presumption during oral argument in *Green. Interrogation; Invocation of Right to Counsel, Voluntary Confession Following Consultation and Guilty Plea*, 61 U.S.L.W. 3453, 3454 (January 5, 1993).

> public record, the anxiety and uncertainty that support *Miranda's* finding of inherent coercion simply cease to exist. When custody is not related to any pending or unresolved matter, it seems to me that there is little cause for concern that a police officer will "appear to control the suspect's fate."[134]

In *Green,* the argument was taken one step further. The government argued that Green's *guilty plea* in the drug case made *Edwards* inapplicable to the murder case. Such a plea, the government maintained, represented a break in the suspect's status as a pretrial arrestee. A suspect who has pled guilty is unlikely to feel badgered if the police subsequently approach him, repeat the *Miranda* warnings, and seek to question him about an unrelated offense. The plea in essence represents a waiver of the defendant's Fifth Amendment privilege against compelled self-incrimination. Accordingly, as, the government urged in *Green,*

> [b]ecause a guilty plea marks a sharp break in the proceedings, and because a guilty plea constitutes a waiver of the same Fifth Amendment right that is protected by the *Miranda* and *Edwards* rules, it does not make sense to automatically treat a defendant who has pleaded guilty as if he were still a pretrial arrestee. To the contrary, the entry of a guilty plea to the charge as to which the defendant invoked his *Edwards* rights should be sufficient to lift the irrebuttable presumption that any subsequent waiver of that right is the product of police coercion.[135]

In other words, where the status of the defendant has changed dramatically, as it does after an adjudication of guilt, the continued application of *Edwards'* irrebutable presumption is unreasonable.

Concededly, a guilty plea, or an adjudication of guilt after trial changes a defendant's status. But the question is whether that change of status should make any difference for purposes of applying *Edwards.* A defendant still stands in the same position with respect to the critical issue: does this event in any way cast doubt on the defendant's continuing desire to deal with the authorities only through the assistance of counsel? There is no reason to believe that a guilty plea or any other adjudication of the offense alters this desire on the part of the defendant. If anything, the plea or resolution of the offense likely reinforces the defendant's belief in the necessity of counsel. A guilty plea typically results from the advice of counsel, which is consistent with the defendant's original election to deal with government

134. Kochutin v. State, 813 P.2d 298, 309 (Alaska Ct. App. 1991) (Bryner, C.J., dissenting) (quoting Illinois v. Perkins, 496 U.S. 292, 297 (1990)).

135. Brief for the United States at 15-16, United States v. Green, 113 S. Ct. 1835 (1992) (No. 91-1521).

officials only through an attorney. Thus, as Professor Richardson concludes:

> [a]lthough a guilty plea . . . is a place at which a bright line rule could easily be drawn, there is no justification for ending *Edwards* protection at this point. A guilty plea does not change the coercive nature of continued custody . . . . Indeed, for a suspect such as Green who was awaiting sentencing, coerciveness might be heightened after the suspect pleads guilty because he desires to do everything possible to receive a favorable sentencing recommendation. A guilty plea also does not indicate a desire to deal with interrogators without the presence of a lawyer.[136]

When the defendant first invokes the right to counsel upon being questioned about offense A, that assertion evidences his perceived inability to deal with the police without the aid of counsel. As the Supreme Court made clear in *Roberson*, that invocation of the right to the assistance of counsel is presumed to apply to interrogation concerning any offense; the defendant is declaring his belief that for all interrogations on any topic, he needs the assistance of an attorney. Disposition of offense A does nothing to eradicate this presumption. The only argument would be that pleading guilty or being sentenced after trial on offense A is equivalent to a defendant who, after asserting his rights under *Edwards*, changes his mind and initiates conversation on that topic. In that situation, the police would presumably be free to obtain a waiver with respect to offense A as well as any other possible topic. In other words, pleading guilty could be seen as initiation under *Edwards* and *Bradshaw,* inviting the government to reopen dialogue with the defendant on any topic in the absence of counsel.

But pleading guilty, or proceeding through trial is not the equivalent of initiation. When the defendant initiates discussion on the topic of the interrogation, a critical presumption is erased because the action specifically reflects a considered decision on the part of the defendant to recontact the police alone.[137] Pleading guilty or being tried does not reflect that sentiment. Rather, a guilty plea or trial usually reflects the defendant's choice to face the authorities only through the intermediary of counsel. As the Court of Appeals in *Green* recognized:

> [W]hile the knowing and voluntary plea [of guilty] presumably demonstrated that acceptance of personal responsibility and not the pressures of custody caused him to incriminate himself, it also was consistent with his original election to deal with gov-

136. Richardson, *supra* note 19, at 164-65.

137. To some extent, this turns on the courts' interpretation of initiation. To the extent that the courts interpret it broadly, this argument loses some of its persuasiveness.

> ernment officials only through an attorney. Indeed, from defendant's viewpoint the fact that counsel had negotiated a plea to a lesser charge . . . would only have confirmed the wisdom of his choice to insist on the shield of legal representation.[138]

Accordingly, a plea of guilty or any other final disposition of an offense should not be viewed as breaking points for *Edwards* rights because they are consistent with the defendant's election to interact with the police only through counsel. Nor does a defendant somehow lose all his Fifth Amendment privileges upon pleading guilty or even being sentenced. By pleading guilty, "[a] witness does not lose his Fifth Amendment right to refuse to testify concerning *other* matters or transactions not included in his conviction or plea agreement."[139] There is no basis for concluding that a defendant upon pleading guilty to one offense somehow gave up his right to counsel at subsequent custodial interrogations, particularly since the invocation of the right is not offense-specific.

C. Time Elapsed Between the Invocation of Counsel and the Second Approach

Another possible factor in assessing the application of the *Edwards* presumption is time. Should courts consider the amount of time between the initial assertion of the right to counsel and any subsequent interrogation? The Courts' decisions applying *Edwards* have all involved repeated police-initiated questions within a short time span after the suspect's arrest and original invocation of the right to counsel. In *Edwards*, for example, the police reinitiated interrogation only one day after the suspect invoked the right to counsel.[140] In *Roberson*,[141] as well as in *Minnick*,[142] the interval between invocation of the right to counsel and requestioning by the police was only three days. In *Green*, however, the police reinitiated questioning five months after Green's assertion of his *Edwards* right. Should the signficantly greater passage of time rebut the presumption of *Edwards*?

There are strong arguments for viewing the passage of time as a breaking point in *Edwards*. First, it is reasonable to assume that a person changes his mind over time. After some passage of time—for

138. United States v. Green, 592 A.2d 985, 990 (D.C. 1991).

139. United States v. Tindle, 808 F.2d 319, 325 (4th Cir. 1986), *cert. denied*, 490 U.S. 1114 (1989) (emphasis in original).

140. *Edwards*, 451 U.S. at 478-79.

141. Arizona v. Roberson, 486 U.S. 675, 678 (1988).

142. Minnick v. Mississippi, 498 U.S. 146, 148-49 (1990).

example, several years—the presumption that the defendant wishes to proceed only in the presence of counsel very well might change. While there may be nothing about being released from custody or pleading guilty that would logically demonstrate a change of mind (and, in fact, such events more likely reinforce the original election), time often changes the perspective of individuals on many issues. Why not at least allow the police to ask the defendant whether time changed his desire to be questioned only in the presence of counsel?

Concededly, if a person does change her mind over time, she is free to initiate conversation on the offense and thereby invite the police to reapproach the suspect, and possibly to obtain a valid a waiver under *Edwards* to question the suspect outside the presence of counsel. Thus, it could be argued that it is safer to maintain the presumption that those who do not initiate still wish to interject an attorney in their dealings with the authorities, despite the passage of time. But a presumption must be based on some factual basis; and it may be as logical to assume that individuals who do not initiate conversation with police over time are perfectly willing to discuss the issue with the police without an attorney as it is to presume that they have not changed their mind. The question here is: where should the presumption lie? An argument could be made that the *Edwards* presumption—that an individual's initial desire, expressly asserted, for counsel during interrogation on any offense—loses vitality over some period of time. Thus, some argue the passage of time should constitute a significant event terminating a person's *Edwards* rights.

Second, some argue that time should break *Edwards* rights because the presumption of coercion should not be indulged forever. That is, a suspect whose rights are respected for a significant period of time will not feel badgered when ultimately reapproached by the police. Thus, a core purpose behind *Edwards'* prophylactic rule is preserved. As the court of appeals noted in *Green:*

> There is no question that to the extent *Edwards* is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights' . . . that danger is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights.[143]

In other words, the fear in *Edwards* that repeated attempts to question the suspect will exacerbate the already significant compulsion to

143. United States v. Green, 592 A.2d 985, 988 (D.C. 1991). Of course, in *Mosley,* a two hour time gap was considered significant! *See supra* notes 31-37 and accompanying text.

speak is significantly lessened when the police make no effort to question the suspect for a substantial period of time.

Third, to the extent that a break in *Edwards* rights after a certain period of time permits reinterrogation, the goal of law enforcement is enhanced because it increases the flow of potentially valuable information. Moreover, it may be fairer to the police to allow them the opportunity to obtain a waiver after a certain passage of time:

> [i]t is one thing to require the police to determine whether a suspect has recently invoked the right to counsel under *Miranda*. It is quite another to require the police to determine whether a suspect in long term custody has ever invoked the *Edwards* right at any time, in any place, during any interrogation by any police officer.[144]

These arguments have significant merit. Regardless, the passage of time, by itself, should not be enough to eradicate the suspect's *Edwards* rights. While the need for a bright-line rule should not be overstated, it seems to have a special poignancy here. How is a court—or a police officer in the first instance—to draw the line and determine how long is long enough? If six months, for example, is deemed long enough, why not six weeks? Can one be rationally defended over another (beyond the fact that one is longer than the other)?[145] It is not simply the matter of finding a bright-line rule. To the extent one errs, making the time interval too short, the fear of badgering and coercing confessions in violation of the Fifth Amendment becomes all too real.

The passage of time, moreover, if spent in custody, may actually increase the coercive pressure to respond to interrogation, not dissipate it.[146] "While in custody, a suspect lives a restricted life: he is told when to wake up, what to do while he is awake, and what time he

144. Brief for the United States at 20 n.6, *Green*, 592 A.2d 990.

145. *See* Richardson, *supra* note 19, at 164 (arguing that a passage of time rule does not allow for bright-line analysis). The oral arguments in *Green* demonstrate this difficulty.

> J. White: *Edwards* wears out?
> [Deputy Solicitor General] Roberts: The presumption outlives its purpose.
> J. O'Connor: Is three months enough?
> Roberts: Yes.
> J. O'Connor: Is one month enough?
> Roberts: Yes.
> J. O'Connor: Is two months enough?
> Roberts: Yes.
> J. O'Connor: Is two days enough?
> Roberts: Two days is probably not enough.

Interrogation; Invocation of Right to Counsel, Voluntary Confession Following Consultation and Guilty Plea, 61 U.S.L.W. 3453, 3454 (Jan. 5, 1993).

146. *Minnick*, 498 U.S. at 153 (coercive pressures "may increase as custody is prolonged.").

must go to bed."[147] The atmosphere of incarceration works to undermine a person's free will over time, not enhance it.

Thus, the passage of time should not be a factor ending the prophylactic protection of *Edwards* for two reasons. First, determining case by case the passage of time sufficient to break *Edwards* would eliminate the bright-line nature of that rule. Second, the passage of time spent in custody does not eliminate the coercive influences which lay at the heart of the rationale for *Edwards* protections.

D. A Totality of Circumstances Approach

As discussed above, neither a break in custody, a disposition on the initial charge, nor the passage of time should constitute events that terminate *Edwards'* protection. Such an argument means that a suspect who invokes his right to counsel on one occasion can never be reapproached by the police in the absence of counsel at any future point. That prospect, of course, is troubling. For example, a 17 year old is picked up for questioning concerning a car theft. He is briefly interrogated at the police station. At one point he says that he wants to see a lawyer; the questions cease and the teenager is released. The police never approach him again until ten years later, when he is a suspect in a murder investigation. He is arrested, read his *Miranda* warnings, and he signs a waiver form. He then makes several inculpatory statements regarding the murder. Should the confession be suppressed because it violated *Edwards*? According to the arguments discussed above, that result seems likely.[148] It is difficult to escape the feeling that this result is too extreme, that it cannot be what the Court in *Edwards* contemplated happening. What is to prevent an anticipatory assertion of the right if there is no offense-specific limit, no time-tethering, or continual custody requirement to the *Edwards* rule? That is, what would prevent a person from writing to the police department: "If I am ever in custodial interrogation, I hereby invoke my right to counsel." The Court has suggested that anticipatory elections are illegitimate,[149] but why would this be so?

147. Richardson, *supra* note 19, at 163.

148. It might be possible to argue that the invocation of the right to counsel does not apply to crimes not yet committed at the time of invocation. That is, although *Edwards* is not crime-specific, it does not extend to crimes not yet committed. Amicus makes this argument in *Green*. *See also* United States v. Hall, 905 F.2d 959 (6th Cir. 1990).

149. *See* McNeil v. Wisconsin, 501 U.S. 171, 180 n.1 (1991).

Although I have strong distrust for a system that permits any waiver of rights outside the presence of counsel,[150] if such waivers are allowed, the above example seems grossly unfair. Is there an alternative? There are at least three possible answers to this problem.

One approach would be to accept the conclusion that *Edwards* rights persist in perpetuity, and argue that such a result is acceptable if not desirable. With respect to the values discussed in Section II, an advocate of this approach would argue that it does not significantly hamper effective law enforcement. *Edwards*, after all, does not preclude the police from investigating the crime. The police simply must use resources outside of the defendant's own words against him at trial. Hopefully, other investigatory techniques can fill the void left by the inability to use confessions. Law enforcement interests are actually enhanced if these other investigatory methods prove more reliable than a confession obtained after an initial assertion of *Edwards* rights.

Further, *Edwards* does not absolutely preclude the police from speaking to the defendant. A person who wishes to is still free to approach the police and volunteer information concerning the crime. The police can even initiate an interrogation so long as they ensure that the suspect is represented by counsel at the interrogation. If that course of action results in fewer confessions because suspects choose not to speak on the advice of the attorney, that is the price of the suspect's knowing and intelligent exercise of his rights.

Additionally, this approach would preserve the bright-line nature of the *Edwards* rule. The rule would be clear: once a suspect invokes the right to counsel, any subsequent waiver would be invalid absent initiation by the defendant. Finally, it fulfills the *Edwards* goals of ensuring voluntary confessions and eradicating coercion because it provides the penultimate assurance against police badgering and wearing down of the will of the suspect.

It is unlikely, however, that the Court would accept the view that *Edwards* lasts forever. Recent pronouncements by the Court indicate a growing acceptance of the value of confession and the appropriate role it plays in law enforcement. The Court's most recent holdings elaborating on *Edwards* rights suggest a desire to limit, rather than

150. I am inclined to agree with the suggestion of Professor Charles Ogletree that all suspects in custody "should have a nonwaivable right to consult with a lawyer before being interrogated by the police." Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1842 (1987).

expand, its application. In *McNeil v. Wisconsin*,[151] for example, the Supreme Court held that as a matter of law, the assertion of the Sixth Amendment Right to Counsel does not imply an assertion of the Fifth Amendment Right to Counsel recognized in *Miranda.* The Court further stated that the assertion of Sixth Amendment rights should not be so construed as a matter of policy. Such a construction would not promote the goal of preventing "badgering," since the suspect would not have requested counsel during an interrogation before, and would in fact "seriously impede effective law enforcement" by making suspects unapproachable by the police. Admissions of guilt, the Court concluded, are not merely desirable; they are essential to "finding, convicting, and punishing those who violate the law."[152] Moreover, a court intent on limiting the reach of *Edwards* would simply stretch to find initiation whenever possible. In this way, the legal meaning of initiation might be distorted, as well as limiting a suspect's rights.

Assuming then, that the Court will want to find some breaking point to *Edwards,* what should constitute that change of circumstance so significant as to eliminate the presumption that any waiver is involuntary? As described above, none of the factors traditionally suggested, in isolation, should end the prophylactic protection of *Edwards.* Thus, some suggest (as was argued in *Green*) that a totality of circumstances test should be utilized. In other words, *Edwards* would be brought more in line with the result in *Mosley,* and the question would become whether the defendant's rights were "scrupulously honored." The factors discussed above would all be considered, as would possibly the opportunity to consult with a lawyer and whether the interrogation concerns a new crime.

The idea is that the whole is greater than the sum of its parts. Although none of the factors in isolation justify deviating from *Edwards,* the factors considered in conjunction with each other might. This approach would be faithful to precedent by aligning *Edwards* with *Mosley* (although it might be inconsistent with others, as will be discussed below.) Arguably, it strikes the best balance between respecting the suspect's right against self-incrimination and the interests of law enforcement by permitting reinterrogation except where it is shown to be coercive in the circumstances.

151. 501 U.S. 171 (1991). In June 1994, the Supreme Court narrowed the reach of *Edwards* by requiring a clear and unequivocal assertion of counsel. Davis v. United States, 114 S. Ct. 2350, 2355-56 (1994).

152. *McNeil,* 501 U.S. at 181 (quoting Moran v. Burbine, 475 U.S 412, 426 (1986)).

It is unlikely, however, that the Court would endorse this option, nor would it be particularly desirable. The Court has repeatedly emphasized that the merit of *Edwards* lies in its clarity and the certainty of its application.[153] It explicitly rejected the opportunity to utilize a totality of the circumstances approach in *Edwards, Minnick,* and *Roberson.*

There may, however, be a third approach, a middle ground that lies between a totality of circumstances test and a ruling that *Edwards* lasts in perpetuity. That is, the court may consider some of the factors but confine them narrowly. This approach lets certain events cut off the *Edwards* presumption against waiver, but does so in a very narrow circumstance. That limited circumstance would be a combination of time and custody, and both terms must be precisely prescribed. Thus, a possible rule could be: police initiated custodial interrogation of a suspect may occur even though that person had earlier invoked his *Edwards* rights if: (1) that person has been released from custody, and (2) at least six months has transpired since the release from custody following the initial assertion of his right to counsel. Custody would be defined as being under arrest or the functional equivalent to arrest. A person whose freedom to choose how to spend his time, or whose ability to choose where to go, is restricted by the government would be viewed as "in custody." A defendant switched from a maximum security prison to a less intrusive but still restricted environment should still be considered as being in custody.

There are several arguments in support of this rule. First, the combination of release from custody and the passage of a significant period of time mitigate against police coercion. A suspect who asserts his *Edwards* rights, and has those rights respected for six months during which the suspect is not in custody, will likely not believe she is a victim of police badgering. The facts of a particular case may show otherwise, and a defendant of course would be free to argue that such facts defeat the voluntariness of the waiver. But to indulge in a presumption of coercion after six months and a release from custody seems unnecessary.

Second, the release from custody requirement ensures that the time interval does not serve to increase the coercion, as may happen when the passage of time occurs while the accused is in custody. The person must be released from custody for at least six months after the initial invocation. During this period, any residual coercive effects of

153. Minnick v. Mississippi, 498 U.S. 146, 151 (1990).

that custodial situation will probably have dissipated, at least enough to allow the suspect to make a voluntary decision whether to speak to the authorities. The six-month requirement also ensures against the police using a release from custody as a pretext for badgering or coercing a suspect into making an incriminating statement. It is highly unlikely that the police will release a suspect for the sole purpose of breaking *Edwards* if they must wait six months before police-initiated reinterrogation can begin.

Third, this rule also provides clear guidance to the police about when they may reapproach a suspect. Although the circumstances for such reinterrogation are, concededly, signficantly limited, the officers should be fairly easily able to determine whether they may lawfully attempt to question a person who has invoked the right to counsel. Of course, the rule requires that the government keep fairly detailed records concerning the time of the initial invocation and the date of the release from custody.

The rule also requires that officers, before engaging in custodial interrogation, check computer databases to ascertain whether the protection of *Edwards* applies. While this may seem somewhat onerous, the computer capabilities of most police departments should minimize the burdens. An officer who is unsure should err on the side of caution and only question the suspect, if at all, in the presence of counsel or upon the suspect's own initiation. It should be stressed that these precautions need only be taken when the police wish both to take someone into custody and to interrogate them. Custodial interrogation is not casual interaction between the police and a citizen. Noncustodial questioning, or custodial interactions that do not constitute interrogations, may still freely occur.

Finally, the six-month time period helps meet the goal in *Edwards* of preserving a person's choice whether to speak to the police with or without counsel. Six months is a significant enough interval that at least it can be argued that some individuals might indeed feel differently about dealing with authority. If an accused in custody changes his mind, it would be fairly easy for that person to initiate a discussion that could lead to a valid *Edwards* waiver. When a person has been released from custody, however, the opportunity for initiation is not as readily forthcoming. There is a significant difference between speaking to a jailer or an officer with whom you are in fairly constant contact, and taking the initiative to go to the police station, seek out an officer, and talk about an offense. In other words, if a defendant in custody does not initiate conversation about an offense, it can be quite

properly assumed that she has not changed her mind about discussing those events without the presence of counsel. Out of custody, that same assumption cannot be indulged because of the greater effort and difficulty involved in initiation.

This rule will not unduly thwart law enforcement objectives. The police are free to pursue other incriminating evidence (subject, of course to other constitutional or statutory limitations). Moreover, the police may be able to rely on the suspect's own testimony as well. Even during the six months when the authorities cannot obtain a waiver from the defendant, the police are still not powerless to question the defendant. First, the police could approach the suspect with his attorney present. Second, because he is released from custody, they could speak to him in a non-custodial atmosphere. That is, *Edwards* presumably would not be violated if the police initiate *non-custodial* interrogation.[154] Thus, for example, if a suspect invokes the right to counsel, and is released from custody, the police could approach him at his house prior to the expiration of the six month period and question him there without having to obtain a waiver. As such questioning would constitute interrogation without custody, the *Miranda/Edwards* protections would not govern this encounter.[155]

At the same time, a rule that ends *Edwards* protections after six months and a release from custody is troubling. Perhaps most telling is the argument that a six-month time period is arbitrary. While it may be acceptable for the legislature to delineate such a time frame, it may be wholly inappropriate for a court to "pick" such an interval seemingly out of the air. As mentioned earlier, if six months is sufficient for ending *Edwards*, why not five? A court should not be drawing such lines without more significant support for the precise time period chosen. The credibility of the court—which is its only weapon—would be severely strained.

This argument has significant merit and is, indeed, troubling. There are, nonetheless, several possible responses. First, of course, would be to urge legislative change rather than judicial construction of *Edwards*. It is more realistic, however, to assume that the issue will be brought before the Court much sooner than it will face legislative scrutiny. Second, the six-month time period can be justified, albeit imperfectly. Any line drawn will be to some degree, arbitrary. None of the arguments—i.e., that the passage of time minimizes the effects

154. Even non-custodial interrogation could be coercive. Thus, the traditional voluntariness test could still be used to ferret out coercion in these settings.

155. *See supra* notes 4-5 and accompanying text.

of badgering—can be precisely quantified. But if any error is made, it is on the side of protecting the defendant's rights; if anything, six months is likely over-protective of the right to counsel. Finally, the Court has before drawn seemingly random time periods without significant detriment. For example, in *Riverside v. McLaughlin,*[156] the Court ruled that suspects arrested must be arraigned within forty-eight hours of being taken into custody. To some extent, this forty-eight hour rule is arbitrary; forty-nine hours would not pose a significantly greater danger to the suspect's rights than forty-seven hours. Yet some line needed to be drawn. Similarly, although six months cannot be defended as against five months and twenty days, six months seems a reasonable compromise in protecting the suspect's rights as well as the interests of law enforcement.

IV. Conclusion

Since the 1930s, the Supreme Court has struggled with the problems posed by police interrogations; *Miranda* and its progeny have represented a Herculean effort on the part of the Court to limit the excesses of police practices. In many ways, *Edwards* represents the culmination of these efforts. By establishing a clear rule prohibiting further interrogation upon assertion of the right to counsel, the Court in *Edwards* provided assurances to suspects that their constitutional rights would be honored by the government. Any attempt to limit or re-define those rights should be undertaken with caution. Yet, unless society and the courts are prepared to honor an assertion in perpetuity, some breaking point consistent with the values and goals of *Miranda* and *Edwards* must be discovered. This article attempted to provide such a point. At a minimum, the enumeration of values and goals, and the discussion of the most frequently suggested breaking points demonstrate that ending the *Edwards* presumption should not be lightly undertaken. Reinterrogation is fraught with dangers for a suspect's rights against self-incrimination; hopefully this article added to the dialogue just now beginning concerning this critical subject.

156. 500 U.S. 44 (1991).