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Fifth Amendment--Waiver of Previously Invoked Right to Counsel

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FIFTH AMENDMENT—WAIVER OF PREVIOUSLY INVOKED RIGHT TO COUNSEL

Edwards v. Arizona, 101 S. Ct. 1880 (1981).

I. INTRODUCTION

On June 13, 1966, the Supreme Court of the United States handed down its controversial decision in *Miranda v. Arizona*[1] and introduced the fifth amendment privilege against self-incrimination[2] as constitutional authority for the regulation of police conduct. Although the basis of the Court's decision in *Miranda* was somewhat uncertain,[3] the majority opinion explicitly described the procedures that the police were to follow before subjecting a suspect to "custodial interrogation"[4]:

> [A suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[5]

The Court held that these four warnings were necessary to counteract the potential for compulsion inherent in custodial interrogation and to protect an individual's fifth amendment privilege against self-incrimina-

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

[2] The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

[3] The majority opinion in *Miranda* suggests two rationales for the decision: that custodial interrogation is inherently compelling, 384 U.S. at 458, 467, 468, 478; and that warnings are necessary as "prophylactic safeguards" to counteract the potential for compulsion inherent in custodial interrogation. *Id.* at 457. The Burger Court's decision in Michigan v. Tucker, 417 U.S. 433 (1974), effectively overruled the "inherent compulsion" rationale. In *Tucker*, the Court explicitly emphasized that violations of *Miranda* are not necessarily violations of the fifth amendment. *Id.* at 444. Although the Burger Court has reluctantly accepted the "prophylactic safeguard" rationale, that approach has a limited impact on the regulation of police conduct. Because the violation of a "prophylactic safeguard" does not entail the violation of a constitutional right, police conduct may transgress the dictates of *Miranda* without requiring the reversal of a subsequent conviction. For a discussion of these two rationales, *see* Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 42 (1979).

[4] The Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444.

[5] *Id.* at 479.

tion.[6] The Court required that all evidence obtained in violation of these rules be excluded at trial.[7]

Although the *Miranda* decision established that the fifth amendment authorizes an individual to invoke either the right to remain silent or the right to counsel, the justices also contemplated a waiver of those rights.[8] Unfortunately, the passages in the majority opinion outlining the characteristics of a valid waiver of fifth amendment rights are not entirely clear. Last term, the Court had the opportunity to clarify the standard of waiver required before the authorities may subject an individual who has invoked his fifth amendment right to counsel to custodial interrogation.

In *Edwards v. Arizona*,[9] the Court held that once a suspect has invoked his fifth amendment right to counsel, a showing only that the suspect responded to subsequent police-initiated custodial interrogation cannot establish a valid waiver of that right.[10] This limitation applies even if the police advise a suspect of his rights prior to the subsequent interogation.[11] In addition, the Court held that once a suspect has invoked his fifth amendment right to counsel, the police cannot subject him to custodial interrogation prior to the appointment of an attorney.[12] An exception is made, however, in the event that the suspect initiates further contact with the police. In that situation, subsequent custodial interrogation is permitted if there has been a "knowing and intelligent" waiver of the right to counsel under the "totality of the circumstances."[13] As this exception indicates, *Edwards* represents yet another attempt by the Burger Court to limit the impact of *Miranda* and avoid the establishment of per se exclusionary rules.[14] Unfortunately, the decision also exemplifies the Burger Court's failure to implement the rationale of *Miranda* and to provide "concrete constitutional guidelines for

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6 *Id.* at 467, 478-79.

7 *Id.* at 444, 478-79.

8 *Id.* at 444, 475. The Court emphasized that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination. . . ." *Id.* at 475.

9 101 S. Ct. 1880 (1981).

10 *Id.* at 1884.

11 *Id.*

12 *Id.* at 1885. As used in this Note, the "appointment" of an attorney includes the opportunity to confer with counsel and to have counsel present at any custodial interrogation.

13 *Id.* at 1885 n.9. The concept of a "knowing and intelligent" waiver under the "totality of the circumstances" is outlined in note 61 *infra*.

14 *See* Grossman & Lane, *Miranda: The Erosion of a Doctrine*, 62 CHI. B. REC. 250, 264 (1981). *See* notes 68-74 & accompanying text *infra*. *See also* Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99; Comment, *Miranda v. Arizona: The Emerging Pattern*, 12 U. RICHMOND L. REV. 409 (1978); Comment, *Michigan v. Mosley: A Further Erosion of Miranda?*, 13 SAN DIEGO L. REV. 861 (1976); Comment, *The Declining Miranda Doctrine: The Supreme Court's Development of Miranda Issues*, 36 WASH. AND LEE L. REV. 259 (1979).

law enforcement agencies and courts to follow."[15] Moreover, it is unlikely that the principles outlined in the majority opinion will adequately protect an individual's fifth amendment privilege against self-incrimination when a court confronts a difficult fact situation.[16]

II. EDWARDS V. ARIZONA

On January 19, 1976, a sworn complaint was filed against Robert Edwards in Arizona state court charging him with robbery, burglary, and first degree murder.[17] An arrest warrant was issued pursuant to the complaint and the police arrested Edwards at his home later that same day. They took him to the police station and informed him of his rights as required by *Miranda v. Arizona*.[18] Edwards indicated that he understood his rights and that he was willing to submit to questioning. After the police told him that another suspect already in custody had implicated him in the crime, Edwards denied involvement and gave a taped statement presenting an alibi defense. He then sought to "make a deal" with the interrogating officer. The officer informed Edwards that he wanted a statement but that he did not have the authority to negotiate a deal. The officer then provided Edwards with the number of the county attorney, with whom Edwards spoke briefly. Following his conversation with the attorney, Edwards said, "I want an attorney before making a deal." At that point, all questioning ceased and the police took Edwards to the county jail.

On January 20, 1976, two detectives came to the county jail and asked to see Edwards. This visit occurred at 9:15 in the morning and Edwards was scheduled to receive counsel at 1:30 that afternoon.[19] When the detention officer informed Edwards that the detectives wanted to speak with him, Edwards replied that he did not want to talk

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[15] The Supreme Court granted certiorari in *Miranda* to develop "concrete constitutional guidelines for law enforcement agencies and courts to follow." 384 U.S. at 441-42. The Court had been unable to articulate a clear and predictable definition of "voluntariness."

[16] *Edwards v. Arizona* did not present the Court with a difficult fact situation. The authorities initiated contact with and interrogated an unwilling suspect, the suspect's statements indicated that he did not understand the implications of his responses, the purpose of the interrogation was to expedite a conviction rather than to gather evidence essential to the solution of a crime, and the authorities scheduled their interrogation to occur only a few hours before the appointment of counsel. In a concurring opinion, Justice Powell, joined by Justice Rehnquist, noted that "few cases will be as clear as this one." 101 S. Ct. at 1888 (Powell, J., concurring).

[17] The facts stated in the text are for the most part taken from the opinions of the Arizona Supreme Court and the Supreme Court of the United States.

[18] *See* note 5 & accompanying text *supra*.

[19] Brief for Petitioner at 6, Edwards v. Arizona, 101 S. Ct. 1880 (1981). In Arizona, individuals arrested on warrants issued upon a felony complaint are brought before a magistrate. At that time, individuals who cannot afford an attorney receive court-appointed counsel. Edwards' appearance before a magistrate was scheduled for January 20, 1976, at 1:30 p.m.

to anyone. The detention officer told him that he "had to" and took him to meet with the detectives. The detectives identified themselves to Edwards, stated that they wanted to speak with him, and informed him of his *Miranda* rights. Edwards indicated that he was willing to talk, but that he first wanted to hear the taped statement of the alleged accomplice who had implicated him in the crime. After listening to the tape for several minutes, Edwards said that he would make a statement but that he did not want it to be tape recorded. The detectives explained that they could testify in court as to his oral statements, but Edwards said, "I'll tell you anything you want to know, but I don't want it on tape." Edwards then gave a statement implicating himself in the crime.

Before trial, Edwards moved to suppress his confession on the ground that the detectives violated his *Miranda* rights when they subjected him to custodial interrogation after he had invoked his right to counsel. The trial court initially granted the motion to suppress, but reversed its ruling when presented with a supposedly controlling decision of a higher Arizona court.[20] The trial court stated without explanation that it found Edwards' statement to be voluntary. Edwards was tried twice and convicted, with evidence of his confession being admitted at both trials.[21]

On appeal, the Arizona Supreme Court affirmed the trial court's decision.[22] The court held that Edwards had invoked his fifth amendment right to counsel during the custodial interrogation conducted on the night of January 19,[23] but that he had voluntarily waived any constitutional safeguards prior to the custodial interrogation conducted the next morning.[24] The court reasoned that *Miranda* did not create a per se rule against a waiver of the fifth amendment right to counsel once that right has been invoked[25] and that the trial court was to answer the question of waiver in a decision guided "by the rules for determining voluntariness."[26] The court concluded that reading *Miranda* to create a per se rule would preclude a defendant from acting in his own best interests

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20 State v. Travis, 26 Ariz. App. 24, 545 P.2d 986 (1976).

21 The jury in the first trial was unable to reach a verdict.

22 State v. Edwards, 122 Ariz. 206, 594 P.2d 72 (1979). Edwards was sentenced pursuant to portions of A.R.S. § 13-454 which the Supreme Court of Arizona had held unconstitutional in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1979). For this reason, the decision of the trial court was affirmed in part and remanded for resentencing in part.

23 The State disputed this issue. *Id.* at 211, 594 P.2d at 77. The court held that although Edwards' statement was equivocal, it was to be interpreted "as a request for counsel and as a request to remain silent until counsel was present." *Id.*

24 *Id.* at 212, 594 P.2d at 78.

25 *Id.* at 211, 594 P.2d at 77.

26 *Id.* at 212, 594 P.2d at 78.

and would " 'imprison a man in his privileges.' "[27] Because there was no evidence of clear and manifest error, the Arizona Supreme Court upheld the trial court's finding that "the waiver and confession were voluntarily and knowingly made. . . ."[28]

The Supreme Court of the United States reversed the decision of the Arizona Supreme Court and held that the use of Edwards' confession at trial constituted a violation of his rights under the fifth and fourteenth amendments.[29] The majority opinion, authored by Justice White, cited two reasons for this reversal. First, the Court noted that waivers of counsel must not only be voluntary, but must also constitute an understanding and intelligent relinquishment of a known right.[30] Because the trial court had only focused upon the voluntariness of Edwards' alleged waiver and confession, there was no showing of a knowing and intelligent waiver of the fifth amendment right to counsel.[31] Therefore, the Arizona Supreme Court incorrectly rejected Edwards' motion to suppress his confession. Second, the Court reasoned that additional safeguards are necessary when an individual has invoked the fifth amendment right to counsel.[32] Examining a number of recent Supreme Court decisions, the Court emphasized that "it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel."[33] Because the authorities had reinterrogated Edwards in custody at their instance, use of the resulting confession at trial constituted a violation of his fifth amendment privilege against self-incrimination.

Although the Supreme Court suppressed the use of Edwards' confession at trial, the majority refused to interpret *Miranda* as eliminating the possibility of waiver once an individual has invoked his fifth amendment right to counsel. Instead, the Court focused only upon the implications of police-initiated custodial interrogation. In a footnote, the majority opinion provided that an individual who has invoked his fifth amendment right to counsel may subsequently waive that right if he initiates contact with the authorities.[34]

Near the end of the majority opinion, the Court emphasized that an individual who has invoked his fifth amendment right to counsel has

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[27] *Id.* at 211, 594 P.2d at 77 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942)).

[28] *Id.* at 212, 594 P.2d at 78.

[29] 101 S. Ct. at 1882.

[30] *Id.* at 1883.

[31] *Id.* at 1884.

[32] *Id.*

[33] *Id.* at 1885.

[34] *Id.* at 1885 n.9.

an "undisputed right" to be free from custodial interrogation.[35] It is puzzling, therefore, that the majority opinion provided for the forfeiture of this "undisputed right" in the following paragraph. The Court did not directly explain the reasons for this exception, but did note that nothing in the fifth amendment prohibits the police from merely listening to a suspect's volunteered statements and using them against him at trial.[36] Working from that premise, the Court seemed to make two assumptions. First, the Court assumed that an individual who initiates contact with the authorities is likely to be doing so in order to volunteer a statement.[37] Second, the Court assumed that the giving of a volunteered statement is likely to involve some amount of custodial interrogation and that this custodial interrogation is sometimes appropriate.[38] The Court concluded that custodial interrogation is permitted if an individual has initiated contact with the authorities and there has been a knowing and intelligent waiver of the right to counsel under the totality of the circumstances.[39] The majority opinion emphasized that the examination of waiver must include the "necessary fact" that the suspect initiated contact with the police.[40]

In a concurring opinion, Chief Justice Burger agreed that the Court should suppress Edwards' confession, but objected to the majority's "special rule as to how an accused in custody may waive the right to be free from interrogation."[41] The Chief Justice argued that the holding of *Miranda*, as distinguished from its dicta, did not affect the traditional standard for determining whether there has been a valid waiver of the right to counsel.[42] He concluded that the detention officer's statement to Edwards that Edwards "had to" talk to the detectives demonstrated that the resumption of interrogation was not voluntary and that there

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35 *Id.* at 1885.

36 *Id.* The procedural safeguards outlined in *Miranda* are required only when the authorities subject an individual to police interrogation in custodial surroundings. Because custodial interrogation does not occur when the authorities merely listen to an individual's volunteered statements, there is no potential for compulsion and fifth amendment rights do not attach.

37 Although the Court does not actually articulate this assumption it is difficult to understand how the majority could otherwise justify the selection of suspect-initiated contact as the point at which an individual forfeits his absolute protection from custodial interrogation. Unless an individual who initiates contact with the authorities does so more often than not in order to volunteer a statement, the Court's emphasis on "initiation" is misplaced. The constitutional safeguards outlined in *Miranda* were designed to prevent the admission of involuntary statements rather than to insure that no voluntary statements were excluded. *See* note 92 & accompanying text *infra*.

38 101 S. Ct. at 1885 n.9.

39 *Id.*

40 *Id.*

41 *Id.* at 1886 (Burger, C.J., concurring).

42 *Id.*

had not been a knowing and intelligent waiver.[43]

In a separate concurring opinion, Justice Powell, joined by Justice Rehnquist, agreed that the Court should suppress Edwards' confession, but expressed uncertainty as to the meaning of the majority opinion.[44] Discussing the majority's emphasis on "initiation," Justice Powell feared that the Court's opinion might create "a new per se rule, requiring a threshold inquiry as to precisely who opened any conversation between an accused and state officials. . . ."[45] He insisted that such a rule would "superimpose a new element of proof on the established doctrine of waiver of counsel" and frustrate legitimate communications between an individual and the authorities.[46] Justice Powell would treat "initiation" as only one of many circumstances that are relevant to the question of whether there has been an understanding and intelligent relinquishment of a known right.[47]

III. "SECOND LEVEL" PROTECTIONS AND THE RIGHT TO COUNSEL

Although a waiver of constitutional rights must always be knowing and intelligent,[48] additional requirements must be met under certain circumstances. *Edwards v. Arizona* is important because it presented the Court with two such circumstances. First, the case concerned the standard of waiver to be employed once an individual has invoked his fifth amendment rights. Second, the case involved the invocation of the fifth amendment right to counsel as opposed to the fifth amendment right to remain silent.

If an individual does not invoke his fifth amendment rights, a court may find that he implicitly waived them.[49] A decision to remain silent or to be represented by counsel, however, triggers "second level" *Miranda* protections and places additional restrictions on police conduct.[50] Consequently, the standard employed to determine whether there has been a valid waiver of fifth amendment rights is stricter once an individual has asserted those rights.

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[43] *Id.* at 1887 (Burger, C.J., concurring).

[44] *Id.* (Powell, J., concurring).

[45] *Id.*

[46] *Id.*

[47] *Id.* at 1888 (Powell, J., concurring).

[48] *See, e.g.*, Tague v. Louisiana, 444 U.S. 469, 470 (1980); Fare v. Michael C., 442 U.S. 707, 725 (1979); North Carolina v. Butler, 441 U.S. 369, 373 (1979); Brewer v. Williams, 430 U.S. 387, 404 (1977); Faretta v. California, 422 U.S. 806, 835 (1975); Johnson v. Zerbst, 304 U.S. 458,464 (1938).

[49] *See, e.g.*, North Carolina v. Butler, 441 U.S. 369, 373 (1979).

[50] The reference to "second level" *Miranda* protections is taken from People v. Grant, 45 N.Y.2d 366, 372, 380 N.E.2d 257, 260, 408 N.Y.S.2d 429, 432 (1978). These protections are discussed in White, *Rhode Island v. Innis: The Significance of a Suspect's Assertion of His Right to Counsel*, 17 AM. CRIM. L. REV. 53, 63 (1979).

In *Miranda v. Arizona*, the Supreme Court discussed the implications of "second level" protections. Near the beginning of the majority opinion, Chief Justice Warren addressed the question of waiver:

> The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.[51]

This passage illustrates that additional protections follow from an invocation of fifth amendment rights.

In *Michigan v. Mosley*,[52] the Supreme Court examined the "second

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[51] 384 U.S. at 444-45.

[52] 423 U.S. 96 (1975). In *Mosley*, the authorities arrested the defendant in connection with a robbery and brought him to the police station for interrogation. After being given his Miranda warnings, he indicated that he did not want to answer any questions about the robbery and the interrogation ceased. Approximately two hours later, however, a different officer took the defendant to a different office to interrogate him about a homicide. After again being given his *Miranda* warnings, the defendant made statements implicating himself in the homicide. These statements were used against him at trial, and he was convicted of first degree murder.

The Michigan Court of Appeals reversed the conviction, holding that "*Miranda* cannot be circumvented by the simple expedient of shuttling a person from one police officer to another for purposes of questioning . . . ." People v. Mosley, 51 Mich. App. 105, 108, 214 N.W.2d 564, 566 (1974). The Supreme Court reversed.

A passage from the majority opinion in *Miranda* controlled the question represented in *Mosley*:

> 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.

384 U.S. at 473-74. Unfortunately, *Miranda* did not indicate the circumstances, if any, in which the authorities might resume interrogation once an individual has invoked his fifth amendment right to remain silent.

The *Mosley* Court noted that it could interpret *Miranda* to require either a per se rule against subsequent custodial interrogation or only the immediate cessation of custodial interrogation and a momentary respite. The majority opinion rejected both of these extremes as "absurd and unintended." 423 U.S. at 102. The Court reasoned that permanent immunity from custodial interrogation would "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Id.* At the same time, the Court reasoned that the continuation of custodial interrogation after only a momentary cessation would "frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned." *Id.* The Court held that the admissibility of statements obtained through the custodial interrogation of an individual who has invoked his fifth amendment right to remain silent depends upon whether the individual's "right to cut off questioning" has been "scrupulously honored." *Id.* at 104.

In holding that the police had "scrupulously honored" the defendant's "right to cut off

level" protections required when an individual has invoked his fifth amendment right to remain silent. The Court held that once an individual has asserted his right to remain silent, the admissability of statements subsequently obtained depends upon whether the individual's "right to cut off questioning" has been "scrupulously honored."[53] Although the majority opinion in *Mosley* establishes that an individual who has invoked his right to remain silent may implicitly waive that right by subsequently responding to custodial interrogation, the decision suggests that a court must automatically exclude statements obtained within an unspecified period of time after the initial invocation of the right.[54] This protection is not provided to individuals who have not asserted their fifth amendment rights.

Although the invocation of either fifth amendment right triggers "second level" *Miranda* protections, those protections are greater when an individual has invoked his fifth amendment right to counsel. In *Miranda*, the Supreme Court outlined the procedure to be followed once the authorities have given an individual the four protective warnings:[55]

> If the individual indicates in any manner . . . that he wishes to remain silent, the interrogation must cease. . . . 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.[56]

Although custodial interrogation "must cease" following a decision to remain silent, custodial interrogation "must cease until an attorney is present" following a decision to be represented by counsel. This qualification indicates that an invocation of the fifth amendment right to

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questioning" in *Mosley*, the Court emphasized that the police had promptly ceased the initial interrogation, resumed interrogation only after the passage of a significant period of time, given the defendant his *Miranda* warnings prior to the second interrogation, and restricted the second interrogation to a crime that had not been the subject of the initial interrogation. *Id.* at 106. Unfortunately, the Court did not suggest which, if any, of these factors was crucial to the determination of whether the defendant's fifth amendment right to remain silent had been "scrupulously honored."

In a concurring opinion, Justice White argued that the police should be allowed to subject an individual who has invoked his fifth amendment right to remain silent to custodial interrogation after only a momentary respite and use any voluntary statements subsequently obtained. *Id.* at 107 (White, J., concurring). In a dissenting opinion, Justice Brennan, joined by Justice Marshall, reasoned that the police should not be allowed to subject an individual who has invoked his fifth amendment right to remain silent to custodial interrogation until the appointment of counsel. *Id.* at 116 (Brennan, J., dissenting). The majority opinion indirectly labelled Justice White's position "absurd" but failed to address the alternative suggested by Justice Brennan and Justice Marshall.

53 *Id.* at 104.

54 *Id.* at 107 (White, J., concurring).

55 *See* note 5 & accompanying text *supra*.

56 384 U.S. at 473-74.

counsel restricts police conduct to a greater extent than an invocation of the fifth amendment right to remain silent. Moreover, it suggests that once an individual has invoked his fifth amendment right to counsel, the authorities may not subject him to custodial interrogation prior to the appointment of an attorney.

In *Michigan v. Mosley*, the Court emphasized the importance of an invocation of the fifth amendment right to counsel as opposed to the fifth amendment right to remain silent. In the majority opinion, Justice Stewart noted that *Miranda* "distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney. . . ."[57] In a concurring opinion, Justice White suggested some reasons for this distinction:

> It is sufficient to note that the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.[58]

Although the various opinions in *Mosley* indicated that the standard of waiver would be stricter when the right at issue shifted from silence to counsel, the majority of the justices gave no indication of what that standard would be.[59]

IV. THE SUPREME COURT DECISION

The Supreme Court's earlier rulings by no means predetermined the result reached by the Court in *Edwards v. Arizona*.[60] Nevertheless, the

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[57] 423 U.S. at 104, n.10.

[58] *Id.* at 110, n.2 (White, J., concurring).

[59] In *Mosley*, the Court emphasized that the case did not involve "the procedures to be followed if the person in custody asks to consult with a lawyer. . . ." *Id.* at 101, n.7. The Court noted that these procedures were outlined in the *Miranda* opinion. In a dissenting opinion, Justices Brennan and Marshall (the only members of the *Mosley* Court who had voted with the majority in *Miranda*) reasoned that the police should not be allowed to subject an individual who has invoked his fifth amendment right to remain silent to custodial interrogation prior to the appointment of an attorney. *Id.* at 116-17 (Brennan, J., dissenting). One would have assumed that Justices Brennan and Marshall would have required equal if not greater restrictions on police conduct once an individual has invoked his fifth amendment right to counsel. Their alignment with the majority in *Edwards*, however, reveals the inaccuracy of that assumption.

[60] Because of the uncertainty that had surrounded the question presented in *Edwards*, the courts of appeals produced conflicting opinions on the standard of waiver required once an individual has invoked his fifth amendment right to counsel. A number of cases decided in the Fourth Circuit established that an individual who has invoked his fifth amendment right to counsel may subsequently waive that right. *See, e.g.*, United States v. Grant, 549 F.2d 942

majority opinion is a logical extension of the principles outlined in *Michigan v. Mosley* and is consistent with the other Burger Court interpretations of *Miranda v. Arizona*. Unfortunately, the result of this consistency is an unfounded construction of the language found in *Miranda* and an inadequate application of the decision's rationale.

A number of Supreme Court decisions support the Court's position that waivers of the right to counsel must not only be voluntary but must also constitute an understanding and intelligent relinquishment of a known right.[61] The cases in which courts have applied this standard of waiver, however, have involved waivers of the right to counsel when the suspect has not invoked that right. As noted above, "second level" *Miranda* protections require a stricter standard of waiver.[62] The majority opinion achieves this stricter standard by eliminating the possibility of a valid waiver of the fifth amendment right to counsel during subsequent police-initiated custodial interrogation.

The case law also supports the Court's emphasis on the importance of the right to counsel[63] and the majority opinion correctly cites *Miranda* as requiring additional procedural safeguards when an individual has invoked that right.[64] Working from the suggestion in *Mosley* that custodial interrogation must cease for an unspecified period of time after an

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(4th Cir.), *cert. denied*, 432 U.S. 908 (1977); United States v. Clark, 499 F.2d 802, 807 (4th Cir. 1974) (dictum). The Courts of Appeals for the Seventh and Ninth Circuits specifically rejected an unqualified per se rule against a valid waiver of the fifth amendment right to counsel once that right has been invoked. *See, e.g.*, Kennedy v. Fairman, 618 F.2d 1242, 1246 (7th Cir. 1980); White v. Finkbeiner, 611 F.2d 186, 192 (7th Cir. 1979); United States v. Rodriguez-Gastelum, 569 F.2d 482, 488 (9th Cir.) (en banc), *cert. denied*, 436 U.S. 919 (1978); United States v. Pheaster, 544 F.2d 353, 367-68 (9th Cir. 1976), *cert. denied sub nom.* Inciso v. United States, 429 U.S. 1099 (1977). The rule in the Fifth Circuit, however, prohibited a finding of a knowing and intelligent waiver of the right to counsel and restricted subsequent custodial interrogation to the clarification of an equivocal invocation of that right. *See, e.g.*, Thompson v. Wainwright, 601 F.2d 768, 772 (5th Cir. 1979); Nash v. Estelle, 597 F.2d 513, 517 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979); United States v. Massey, 550 F.2d 300, 307 (5th Cir. 1977); United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969).

[61] This standard of waiver was first established in Johnson v. Zerbst, 304 U.S. at 464:

> A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Subsequent decisions have continued to apply this standard to determine whether there has been a "knowing and intelligent" waiver under the "totality of the circumstances." *See, e.g.*, Tague v. Louisiana, 444 U.S. at 471; Fare v. Michael C., 442 U.S. at 725; North Carolina v. Butler, 441 U.S. at 373; Brewer v. Williams, 430 U.S. at 404; Faretta v. California, 422 U.S. at 835.

[62] *See* notes 49-54 & accompanying text *supra*.

[63] 101 S. Ct. at 1885. The majority opinion cites the following cases: Rhode Island v. Innis, 446 U.S. 291 (1980); Fare v. Michael C., 442 U.S. 707; Michigan v. Mosley, 423 U.S. 96; *Id.*

[64] *See* notes 55-59 & accompanying text *supra*.

individual asserts his fifth amendment right to remain silent, the Court in *Edwards* prohibits police-initiated custodial interrogation once an individual has invoked his right to counsel until an attorney has been appointed. Because the Court rejected a prohibition of custodial interrogation in *Mosley*,[65] *Edwards* represents a conscious decision to extend additional procedural safeguards to an individual who has invoked his fifth amendment right to counsel.

Despite the accusations of overreaching found in the concurring opinions,[66] the majority opinion in *Edwards* reflects many of the principles that have become characteristic of Burger Court interpretations of *Miranda*. In general, Supreme Court decisions in the past decade have undermined the foundation of *Miranda* and moved towards the pre-*Miranda* standard of voluntariness.[67] In cases decided since 1971, the Court has permitted the use of *Miranda*-violative statements for impeachment purposes,[68] sanctioned police attempts to reinterrogate an individual even though the individual has invoked his fifth amendment right to remain silent,[69] and ruled that the procedural safeguards authorized by *Miranda* do not apply to grand jury proceedings[70] or to situations in which the authorities have not placed an individual under "arrest."[71]

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65 The Court in *Mosley* refused to address the argument. To support this refusal, the majority opinion incorrectly cited *Miranda* as requiring that " 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney.' " 423 U.S. at 104 n.10. By including the word "only," the Court distorted the meaning of the original phrase and applied it to support an unintended result.

66 *See* note 80 & accompanying text *supra*.

67 *See* the articles cited in note 14 *supra*.

68 Harris v. New York, 401 U.S. 222 (1971). In *Harris*, the police arrested the defendant and subjected him to custodial interrogation in violation of *Miranda*. During the interrogation, the defendant made several incriminating statements. The Supreme Court ruled that these statements could not be used by the prosecution as part of its case in chief, but that they could be used to impeach the defendant at trial. The Court reasoned that policy considerations demanded that *Miranda* not be "perverted into a license to use perjury by way of defense. . . ." *Id.* at 226.

69 Michigan v. Mosley, 423 U.S. 96. *See* note 52 *supra*.

70 United States v. Mandujano, 425 U.S. 564 (1976). In *Mandujano*, the defendant was subpoenaed to testify before a grand jury, at which point he was given incomplete *Miranda* warnings. During the interrogation, the defendant perjured himself. The Supreme Court ruled that *Miranda* did not prohibit the use of this testimony. The Court reasoned that "the *Miranda* Court simply did not perceive judicial inquiries and custodial interrogations as equivalents. . . ." *Id.* at 579.

71 Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976). In *Beckwith*, Internal Revenue Service agents interrogated the defendant at a private home after giving him incomplete *Miranda* warnings. During the interrogation, the defendant made several incriminating statements. The Supreme Court ruled that *Miranda* did not apply because the defendant was neither arrested nor detained against his will. The Court reasoned that *Miranda* was primarily concerned with "custody" rather than with the "coerciveness" of a setting. 425 U.S. at 346.

In *Mathiason*, the police interrogated the defendant at the police station without giving him *Miranda* warnings. The defendant had agreed to meet at the police station and was not

At the same time, these and other decisions have established that *Miranda* does not require the per se exclusion of evidence. In *Michigan v. Mosley*,[72] *North Carolina v. Butler*,[73] and *Fare v. Michael C.*,[74] the Court rejected per se exclusionary rules and instead applied a case by case, totality of the circumstances approach.[75] Finally, the Court ruled last term that for purposes of *Miranda*, "interrogation" includes any words and actions on the part of the police that are "reasonably likely to elicit an incriminating response" from a suspect.[76] Although this definition seems to protect individuals from the potential for compulsion inherent

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placed under arrest when he arrived there. During the interrogation, the defendant made several incriminating statements. The Supreme Court ruled that *Miranda* did not apply because the defendant was not in custody or otherwise deprived of his freedom of action in any significant way. The Court reasoned that "a noncustodial situation is not converted to one in which *Miranda* applies simply because . . . the questioning took place in a 'coercive environment.' . . . *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" 429 U.S. at 495.

72 423 U.S. 96. *See* note 52 *supra*.

73 441 U.S. 369. In *Butler*, the police arrested the defendant in connection with a kidnapping and gave him his *Miranda* warnings. The defendant stated that he understood the warnings, but refused to sign a waiver of his rights. During custodial interrogation, the defendant made several incriminating statements. The Supreme Court ruled that *Miranda* did not require an explicit waiver of fifth amendment rights and that the defendant's statements were therefore admissible at trial. The Court reasoned that an inflexible per se rule went beyond the requirements of federal law. *Id.* at 376.

74 442 U.S. 707. In *Fare*, the police arrested the defendant in connection with a murder and gave him his *Miranda* warnings. The defendant, a juvenile, stated that he understood the warnings and that he wanted to speak with his probation officer. The police refused to call the probation officer. After the defendant indicated that he would talk without an attorney, the police subjected him to custodial interrogation. During the interrogation, the defendant made several incriminating statements. The Supreme Court ruled that the defendant's request to speak with his probation officer was not an invocation of his fifth amendment right to counsel and that his statements were therefore admissible at trial. The Court reasoned that a probation officer "is not in the same posture with regard to either the accused or the system of justice as a whole" as an attorney. *Id.* at 719.

75 *See* Grossman & Lane, *supra* note 14, at 266. The totality of the circumstances approach is outlined in note 61 *supra*. This approach is identical to the pre-*Miranda* voluntariness test and requires an examination of police conduct and the defendant's capabilities. Because the "totality of the circumstances" test depends upon the facts of a particular case, the approach introduces the subjectivity which *Miranda* sought to eliminate.

76 Rhode Island v. Innis, 446 U.S. at 301. In *Innis*, the police arrested the defendant in connection with several robberies that had been committed by a man armed with a sawed-off shotgun. The defendant was not armed when the police arrested him. The police advised the defendant of his *Miranda* rights and he invoked his fifth amendment right to counsel. At that point, the defendant was placed in a police car with three officers who were ordered to transport him to the police station. On the way to the station, one of the officers observed that there was a school for handicapped children in the vicinity and expressed concern that one of the children might find the shotgun and hurt herself. As a result of this statement, the defendant indicated that he would direct the officers to the weapon. The trial court sustained the admissibility of the shotgun and testimony related to its discovery and the defendant was subsequently convicted of murder. The Supreme Court affirmed the decision of the trial court and ruled that although the defendant had been in "custody" when he was in the police car, the police had not subjected him to "interrogation" for purposes of *Miranda*. *Id.*

in custodial interrogation, the Court applied it in such a manner that findings of subtle interrogation in future cases are unlikely.[77]

The Court's decision in *Edwards* continues the trends outlined above. Although the majority opinion provides additional safeguards to an individual who has invoked his fifth amendment right to counsel, the Court diluted those safeguards with exceptions and qualifications. The police may subject an individual to custodial interrogation if that individual initiates contact with the authorities.[78] Moreover, the police may initiate contact with a suspect so long as their words and actions fall short of a very narrow definition of "interrogation."[79]

In their concurring opinions, Chief Justice Burger and Justice Powell dispute the "special" or "new per se" rule implied by the majority's emphasis on "initiation."[80] Indeed, the Court's decision appears to require a preliminary analysis as to who initiated contact between a suspect and the police. Although this reading of the case seems inconsistent with previous Burger Court rejections of per se exclusionary rules, the exceptions and qualifications noted above sharply limit this "special" or "new per se" rule. In addition, the need to extend additional protections to an individual who has invoked his fifth amendment right to counsel explains much of the deviation from the Burger Court trend.

The Supreme Court decision in *Edwards v. Arizona* goes further than any previous Burger Court ruling to protect an individual from the potential for compulsion inherent in custodial interrogation. Nevertheless, the decision does not go far enough. Given *Miranda*'s language and rationale, the Court should have announced in *Edwards* an unqualified per se rule against a valid waiver of the fifth amendment right to counsel once an individual has invoked that right.

The majority opinion in *Edwards* provides that an individual who has invoked his fifth amendment right to counsel may subsequently waive that right if he initiates contact with the authorities.[81] This em-

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77 In *Innis*, the police officer attempted to elicit an incriminating response from the defendant. Although it is possible that the officer's attempt might have failed, it does not seem that the defendant's response or any other incriminating response was unlikely. This position is supported by the fact that the officer's words and actions brought about the desired result.

In a dissenting opinion, Justice Marshall, joined by Justice Brennan, asserted that the majority's reasoning "verg[ed] on the ludicrous." 446 U.S. at 306 (Marshall, J., dissenting). In a separate dissenting opinion, Justice Stevens termed the holding "remarkable . . . [and] clearly wrong . . . as a matter of law." *Id.* at 314 (Stevens, J., dissenting). Grossman and Lane argue that "it seems reasonable to assume that if a majority of the Court was unwilling to find 'interrogation' in *Innis*, it is unlikely that they will ever find it." Grossman & Lane, *supra* note 14, at 267.

78 *See* note 13 & accompanying text *supra*.

79 *See* note 12 & accompanying text *supra*.

80 101 S. Ct. at 1886 (Burger, C.J., concurring); *Id.* at 1887 (Powell, J., concurring).

81 *See* notes 34-40 & accompanying text *supra*.

phasis on "initiation" is unfounded. That a suspect initiated contact with the police may reveal something about the voluntariness of a subsequent confession, but the initiation of contact is irrelevant to the question of whether a waiver of the right to counsel has been knowing and intelligent. There is no rational basis for the majority's selection of suspect initiated contact as the point at which the authorities may disregard an individual's "undisputed right" to be free from custodial interrogation.

Permitting custodial interrogation once a suspect initiates contact with the police will increase the potential for compulsion which *Miranda* sought to dispel, as well as the incentive for police misconduct. Although the *Miranda* decision was primarily concerned with the potential for compulsion inherent in custodial interrogation, the Court also recognized the coerciveness of custody alone.[82] Under the majority opinion in *Edwards*, the coerciveness of custody may compel an individual to initiate contact with the authorities and forfeit his absolute protection from custodial interrogation. Authorities desiring to interrogate an individual who has been taken into custody and seeking to avoid the automatic exclusion of any statements subsequently obtained might simply ignore the individual until his concern about his status and the coerciveness of custody compel him to "initiate" contact with the police. Although the courts should not protect an individual suspected of a crime from all of the pressures of the criminal process,[83] these pressures should not undermine the constitutional safeguards authorized by the fifth amendment.

The Supreme Court granted certiorari in *Miranda v. Arizona* in order to develop "concrete constitutional guidelines for law enforcement agencies and courts to follow."[84] In *Edwards*, the Court abandoned this concern and introduced a qualified standard of waiver that is certain to leave the police and the lower courts without guidance. The majority opinion provided that an individual forfeits his "undisputed right" to be free from custodial interrogation if he has initiated contact with the authorities. Moreover, that the individual initiated contact with the au-

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82 384 U.S. at 458. The Court emphasized the importance of preventing "the compulsion inherent in custodial surroundings" from undermining an individual's free choice.

83 *Miranda* was not designed to protect individuals from all of the pressures of the criminal process. The potential for compulsion is inherent in any encounter with the authorities, but only gains constitutional significance after a certain point. The Court in *Miranda* established "custodial interrogation" as the point at which the potential for compulsion endangers the fifth amendment privilege against self-incrimination. The majority opinion in *Edwards* permits the potential for compulsion inherent in custody alone to indirectly endanger the fifth amendment privilege against self-incrimination by undermining the effectiveness of the *Miranda* warnings.

84 *See* note 15 *supra*.

thorities is a "necessary fact" in determining whether a valid waiver of the right to counsel preceded any subsequent custodial interrogation. As a result, the outcome of any given case may depend upon an interpretation of "initiation"[85] or upon the amount of weight given to the "necessary fact" that a suspect initiated contact with the police.[86] The possibility that the police and the lower courts may use ambiguous concepts such as these to procure and validate confessions of doubtful constitutionality directly conflicts with the purpose of *Miranda*.

The implications of an invocation of the fifth amendment right to counsel require an unqualified per se rule against a valid waiver of that right prior to the appointment of an attorney. When an individual asserts his fifth amendment right to remain silent, he indicates that he will make his own decisions regarding his conversations with the authorities. When an individual asserts his fifth amendment right to counsel, however, he expresses his inability to act in his own best interests.[87] A presumption of incompetence arises which the initiation of contact in no way rebuts. There is no reason to assume that an incompetent individual has gained the ability to make a knowing and intelligent waiver of a constitutional right simply because he has initiated contact with the authorities. Only the appointment of counsel adequately protects an individual's fifth amendment privilege against self-incrimination.[88]

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[85] For example, the police might notify a suspect that he should contact them if he has any questions about his status. Although a suspect might subsequently initiate contact with the police as a result of this notice, this should not result in a forfeiture of his absolute protection from custodial interrogation. The Court does not indicate the extent to which the concept of initiation must be applied literally.

[86] For example, one suspect might initiate contact with the police to volunteer a statement while another suspect might initiate contact with the police to complain about conditions. These two cases are very different in terms of their tendency to reveal a willingness or an ability to waive the fifth amendment right to counsel. The Court does not indicate, however, the difference in weight, if any, that each "necessary fact" should be given in determining whether there has been a valid waiver of counsel. The wide range of circumstances that might bring about suspect-initiated contact suggests the complexity of the problem.

[87] *See, e.g.*, Comment, *The Right to Counsel in Police Interrogation Cases: Miranda and Williams*, 12 U. MICH. J.L. REF. 112, 139-40, 142-43 (1978); Note, *Constitutional Law—Criminal Procedure—Custodial Suspect's Admissions After Assertion and Subsequent Waiver of Right to Counsel Are Not Per Se Excluded in Absence of Coercion*, 31 VAND. L. REV. 1069, 1075 (1978). There are, of course, situations in which the invocation of the right to counsel is spontaneous and reveals nothing about an individual's competence to act in his own best interests. Nevertheless, any attempt to detect these situations would undermine the effectiveness of the *Miranda* protections. Unless an individual's initial invocation of the fifth amendment right to counsel is equivocal, he should not be subjected to subsequent custodial interrogation to determine whether he still desires to be represented by an attorney. Further questioning would increase the potential for compulsion by diminishing an individual's confidence in his ability to limit police conduct.

[88] In *Miranda*, the Court emphasized that "the presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of [the fifth amendment privilege against self-incrimination]." 384 U.S. at 466.

An unqualified per se rule against a valid waiver of the fifth amendment right to counsel once that right has been invoked would avoid the problems outlined above. First, it would eliminate the possibility that the coerciveness of custody might compel an individual to forfeit his absolute protection from custodial interrogation. Second, it would eliminate the incentive that authorities might otherwise have to keep an individual uninformed as to his status. An unqualified per se rule would require that any statements obtained as a result of custodial interrogation be excluded at trial, regardless of who initiated contact between an individual and the authorities.[89] Moreover, an unqualified per se rule would provide the police and the lower courts with "concrete constitutional guidelines" by establishing the appointment of an attorney as the point at which the authorities may subject an individual who has invoked his fifth amendment right to counsel to custodial interrogation. This approach is unambiguous and is consistent with *Miranda*'s recognition of the importance of counsel in offsetting the potential for compulsion inherent in custodial interrogation.[90]

An unqualified per se rule against a valid waiver of the fifth amendment right to counsel once that right has been invoked is desirable despite the criticisms that are often directed at per se exclusionary rules. In general, two arguments are made.[91] First, a per se rule is by definition inflexible and may result in the exclusion of properly admissible statements. Second, a per se rule may deprive an individual of the opportunity to exercise independent judgment by committing him to an initial decision.

The constitutional safeguards outlined in *Miranda* were designed to prevent the admission of involuntary statements rather than to insure that no voluntary statements were excluded.[92] The exclusion of a few properly admissible statements is necessary to protect the fifth amendment privilege against self-incrimination. An unqualified per se rule against a valid waiver of the fifth amendment right to counsel once that right has been invoked would not prohibit custodial interrogation indefinitely. It would merely postpone it until the appointment of an attorney. The need to protect the fifth amendment privilege against self-incrimination and the guidance which per se rules provide for the police

89 An unqualified per se rule would not, however, prevent an individual from volunteering an incriminating statement. *See* note 36 *supra*.

90 *See* note 88 *supra*.

91 The Arizona Supreme Court used these two arguments to support its rejection of an unqualified per se rule. 122 Ariz. at 211, 594 P.2d at 77. *See* Note, *Fifth Amendment, Confessions, Self-Incrimination—Does a Request for Counsel Prohibit a Subsequent Waiver of Miranda Prior to the Presence of Counsel?*, 23 WAYNE L. REV. 1321, 1336-37 (1977).

92 *See, e.g.*, Michigan v. Mosley, 423 U.S. at 113 (Brennan, J., dissenting).

and the lower courts outweigh any potential harm to efficient law enforcement.

Once an individual has invoked his fifth amendment right to counsel, an unqualified per se rule against a valid waiver of that right prior to the appointment of an attorney in no way restricts the exercise of independent judgment. The invocation of the right to counsel itself is an act of independent judgment. If an individual thereafter decides that he would rather act on his own behalf, he may do so after the appointment of counsel. If it is argued that an attorney will prevent an individual from exercising independent judgment, it is better that the individual be coerced by someone who is obligated to act in the individual's best interest than by someone who is determined to implicate him in a crime.

V. CONCLUSION

A majority of the members of the Supreme Court of the United States evidently believe that the decision in *Miranda v. Arizona* is unsound.[93] Nevertheless, those justices have chosen to undermine the foundation of the controversial decision rather than to overrule it.[94] The Burger Court's assault on *Miranda* continues with *Edwards v. Arizona*. Although the decision diverges slightly from earlier Burger Court rulings by establishing a limited per se exclusionary rule, the exception to that rule will certainly limit the impact of the decision on future cases.

The majority opinion in *Edwards* fails to protect the fifth amendment privilege against self-incrimination. The decision increases the potential for compulsion which *Miranda* sought to dispel by ignoring the coerciveness of custody. It also encourages police misconduct by providing an incentive to bring about suspect-initiated contact. Moreover, the decision is based upon ambiguous concepts that leave the police and the lower courts without guidance.

An unqualified per se rule against a valid waiver of the fifth amendment right to counsel once that right has been invoked would avoid the problems outlined above. First, it would require that any statements obtained as a result of custodial interrogation be excluded at trial, regardless of who initiated contact between an individual and the authorities. Second, it would provide the police and the lower courts with "concrete constitutional guidelines" by establishing the appoint-

93 Only Justice Brennan and Justice Marshall have consistently voted in support of the principles outlined in *Miranda*.

94 In Brewer v. Williams, 430 U.S. 387, the Court rejected an appeal made by 22 states that the Court use the decision to overrule *Miranda*. The Court decided the case on sixth amendment grounds.

ment of an attorney as the point at which the authorities may subject an individual to custodial interrogation. Moreover, an unqualified per se rule is responsive to the implications of an individual's decision to be represented by an attorney. When an individual asserts his fifth amendment right to counsel, he expresses his inability to act in his own best interests. An attorney is required to explain the potential disadvantages of self-representation and the legal significance of any actions that might be taken. Only then can an individual make a knowing and intelligent waiver of constitutional rights. Once an individual has invoked his fifth amendment right to counsel, the appointment of an attorney is required to protect the fifth amendment privilege against self-incrimination.

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