MARYLAND V. SHATZER: STAMPING A FOURTEEN-DAY EXPIRATION DATE ON *MIRANDA* RIGHTS

INTRODUCTION

Over forty years ago, the United States Supreme Court established a suspect's right to be informed of his rights to counsel and silence in *Miranda v. Arizona*.[1] Today, *Miranda* rights inundate American televisions, movie screens, and perceptions of criminal justice.[2] In its controversial decision, the *Miranda* Court used the Self-Incrimination Clause of the Fifth Amendment as the foundation for rights of the accused.[3] Although *Miranda* has been a part of American culture since the decision was handed down in 1966, the Court is still fine-tuning the application of *Miranda* rights.[4] Most recently, the Court held in *Maryland v. Shatzer*[5] that a suspect's invocation of the right to counsel is only powerful enough to prevent further questioning by law enforcement for fourteen days after the suspect's release from custody.[6]

This Comment explores the flaws, inconsistencies, and impact of the *Shatzer* fourteen-day rule. Overall, the *Shatzer* Court lost sight of the prophylactic ideas of *Miranda* in its quest for an easy standard—jeopardizing not only the accused's right to counsel but also his right to remain silent. Furthermore, even though these constitutional rights are more valuable to suspects today than they were at the time *Miranda* was decided, the *Shatzer* fourteen-day rule continues the Court's pattern of gradually deteriorating suspects' *Miranda* rights.

Part I of this Comment briefly describes the Court's development and clarification of *Miranda* rights, highlighting the topics most altered by *Shatzer*. Part II summarizes the facts, procedural history, and opinions of *Shatzer*. Part III asserts four propositions: (1) *Shatzer* continues the Court's retreat from the prophylactic principles of *Miranda*, further compromising the right to remain silent and the right to counsel; (2) the Court's retreat wrongly abandoned prophylactic measures in favor of efficiency; (3) the Court's fourteen-day rule compromises a suspect's *Miranda* rights at a time when those rights are increasingly valuable and

1. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
2. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").
3. *Miranda*, 384 U.S. at 458, 467.
4. *See, e.g.*, Davis v. United States, 512 U.S. 452, 461–62 (1994) (holding that a suspect's request for counsel must be unambiguous); Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) (holding that after a suspect has invoked his right to counsel, questioning cannot resume until the suspect has obtained counsel or the suspect initiates discussion).
5. 130 S. Ct. 1213 (2010).
6. *Id.* at 1223.

decisive to his case; and, (4) the Court's focus on the *Edwards* rule, instead of *Miranda* rights, makes it easier for the Court to continue to curtail the rights of the accused. This Comment concludes that *Shatzer* was wrongly decided, and that the decision will have a detrimental effect on the fair administration of criminal justice in America.

I. BACKGROUND

Prior to *Miranda*'s landmark ruling in 1966, the only way for a defendant to attack the prosecution's use of his confession made before indictment or the filing of charges was by bringing a due process claim.[7] A defendant cannot rely on the Sixth Amendment to challenge confessions made during initial interrogations because the right to counsel—guaranteed by the Sixth Amendment—attaches only when prosecution formally commences, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[8] Although constitutional challenges under the Due Process Clause remained available to defendants, the prophylactic measures established by the *Miranda* Court provided additional protections to ensure that a suspect's constitutional rights were fully honored.

However, because the rights guaranteed by *Miranda* were not explicitly found in the text of the Constitution,[9] its holding has been subject to several challenges—resulting in numerous exceptions to the *Miranda* holding. Although the Court has kept *Miranda*'s mandate alive, its pattern of fashioning exceptions to *Miranda*'s application has slowly deteriorated the rights that it previously found indispensible to suspects in custodial interrogation.

A. Traditional Constitutional Challenges to the Admissibility of Statements

The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[10] Prior to 1966, the United States Supreme Court interpreted this right literally to mean that a criminal defendant cannot be compelled to testify in his own criminal proceeding.[11] Therefore, the

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7. *Dickerson*, 530 U.S. at 433 ("[F]or the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process.").

8. Brooks Holland, 99 J. CRIM. L. & CRIMINOLOGY 381, 390 (2009) (quoting McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)).

9. Miranda v. Arizona, 384 U.S. 436, 490 (1966). Although there is no right to be advised of one's rights in the Constitution, the Constitution's relation to *Miranda* warnings has been debated by the Court. *Compare Dickerson*, 530 U.S. at 444 (concluding "that *Miranda* announced a constitutional rule that Congress may not supersede legislatively"), *with Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting) (accusing the majority of playing "word games" to make *Miranda* a constitutional mandate).

10. U.S. CONST. amend. V.

11. William T. Pizzi & Morris B. Hoffman, *Taking* Miranda*'s Pulse*, 58 VAND. L. REV. 813, 814–15 (2005) (explaining that prior to the *Miranda* decision, the United States Supreme Court held

Self-Incrimination Clause cannot single-handedly protect suspects from police coercion during interrogations outside of any criminal proceedings or prevent the admission of any evidence obtained from such coercion at trial.[12] Similarly, the Fifth Amendment could not provide suspects with counsel during interrogation because the Sixth Amendment alone governed the right to counsel.[13]

In the mid-twentieth century, the Court became increasingly concerned about coerced confessions obtained through dishonest and threatening police interrogations.[14] Although the bare text of the Self-Incrimination Clause did not encompass police tactics prior to trial, the Court sought to condemn and prevent involuntary confessions[15] by looking to the Due Process Clause of the Fifth and Fourteenth Amendments.[16] Unlike voluntary confessions, coerced confessions offend due process by forcing an individual to incriminate himself, thereby preventing him from attaining a fair trial.[17] Framing the issue around due process, the Court established a totality of the circumstances inquiry to determine the voluntariness of a confession in *Johnson v. Zerbst*.[18] This analysis evaluated whether a confession was truly voluntary by determining "whether the defendant's will was overborne at the time he confessed."[19]

While the due process approach afforded defendants broader rights than the Self-Incrimination Clause, the Due Process Clause had its own set of limitations.[20] Notably, it did not affirmatively protect suspects from coercion, but only afforded defendants the opportunity to challenge any involuntary statements at trial.[21] Furthermore, because interrogations

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that a "case" meant the actual criminal proceeding, and "compelled" applied only to a defendant's right to not be held in contempt for refusing to testify at the proceeding).

12. *See* Michael J. Zydney Mannheimer, *Ripeness of Self-Incrimination Clause Disputes*, 95 J. CRIM. L. & CRIMINOLOGY 1261, 1317–18, 1323 (2005) (arguing that the United States Supreme Court violates the Constitution by hearing claims based on the Self-Incrimination Clause before charges have been filed or a criminal proceeding has commenced because such claims are not yet ripe for adjudication under the plain language of the Fifth Amendment).

13. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

14. Dickerson v. United States, 530 U.S. 428, 434–35 (2000) ("In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion.").

15. Miranda v. Arizona, 384 U.S. 436, 458–59 (1966) (tracking the Court's historical disapproval of coerced confessions, which finds its roots in the Star Chamber Oath).

16. *Dickerson*, 530 U.S. at 433 ("[F]or the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process."); *see, e.g.*, Haynes v. Washington, 373 U.S. 503, 515 (1963); Lynumn v. Illinois, 372 U.S 528, 537 (1963); Payne v. Arkansas, 356 U.S. 560, 568 (1958).

17. *See Haynes*, 373 U.S. at 515; *Lynumn*, 372 U.S. at 534, 537.

18. 304 U.S. 458, 464 (1938).

19. *Lynumn*, 372 U.S. at 534.

20. Chavez v. Martinez, 538 U.S. 760, 796 (2003) (Stevens, J., concurring in part and dissenting in part).

21. Note, *Procedural Protections of the Criminal Defendant – A Reevaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity to Commit Crime*, 78 HARV. L. REV. 426, 430–31 (1964) (asserting that only preventing the admission of involuntary

were often conducted secretly, defendants would struggle to prove the use of coercive interrogation tactics in court over the contradictory testimony of law enforcement officers.[22] As a result, only extremely visible instances of police brutality and deceit were found to violate due process.[23] Due to concerns about more subtle and sophisticated police tactics that made coercion often difficult to ascertain, the Court sought additional protections for suspects in custodial interrogation.[24]

B. *Additional Safeguards to the Right against Self-Incrimination:* Miranda v. Arizona

In an "unprecedented stretch of the language of the Self-Incrimination Clause," the *Miranda* Court imposed an affirmative obligation on law enforcement to prevent the occurrence of involuntary statements.[25] In *Miranda,* Ernesto Miranda was accused of kidnapping and rape.[26] Miranda was taken into custody and questioned without first being advised that he had a right to have an attorney present.[27] After being interrogated, Miranda eventually confessed.[28] At trial, the State presented evidence of Miranda's confession over his objection.[29]

In considering whether Miranda's confession was properly admitted at trial, the Supreme Court addressed "the necessity for procedures which assure that [an] individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."[30] To set the stage for its landmark holding, the *Miranda* Court depicted the nature and setting of in-custody interrogations, focusing on recent studies and case law revealing police brutality during such ques-

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statements at trial does not provide enough protection to defendants because juries may assume the parties are debating over a confession when the defense objects to evidence the prosecution attempts to admit, and the prosecutor's knowledge of a confession, admissible at trial or not, could heavily influence his decision whether or not to press charges).

22. *Id.* at 431.

23. *See, e.g.*, Leyra v. Denno, 347 U.S. 556, 558–59 (1954) (finding the defendant's confession involuntary because defendant had been questioned on different days for eight hours, fourteen hours, and twenty-three hours respectively, and during the last session a police psychiatrist, posing as a medical doctor to treat the suspect's sinus infection, attempted to hypnotize the suspect); Brown v. Mississippi, 297 U.S. 278, 284 (1936) (finding the defendant's confession involuntary because defendant had been whipped and tortured over several days).

24. *See, e.g.*, Escobedo v. Illinois*,* 378 U.S. 478, 490–91 (1964) (holding that absent the right to counsel and an opportunity to remain silent, any incriminating statements obtained from a suspect in custody were inadmissible at trial). The defendant in *Escobedo* was accused of murder, held in custody, and not advised of his constitutional rights. *Id.* at 479, 481. The *Escobedo* Court found that any rights lost during interrogation were irrevocably lost and therefore interfered with any rights guaranteed to the accused during trial. *See id.* at 486. In other words, the *Escobedo* Court found that although the Constitution's language only applied to the courtroom, certain rights could be curtailed before a defendant ever reached the courtroom. *See id.*

25. Pizzi & Hoffman, *supra* note 11, at 815–16.

26. Miranda v. Arizona, 384 U.S. 436, 491 (1966).

27. *Id.* at 492.

28. *Id.*

29. *Id.*

30. *Id.* at 439.

tioning.[31] The Court was especially concerned with incriminating statements made by defendants who faced more subtle police tactics and "inherently compelling pressures"[32] of custodial interrogation that were not egregious enough to warrant protections under the Due Process Clause. Thus, the Court returned to the Self-Incrimination Clause of the Fifth Amendment in order to provide a more effective set of protections to defendants in these circumstances.[33]

Although the Fifth Amendment does not provide a textual right to counsel, the *Miranda* Court considered the right necessary to secure the explicit privilege in the Self-Incrimination Clause to remain silent.[34] Pursuant to the Fifth Amendment, the right to remain silent was an established principle at the time of *Miranda*.[35] The *Miranda* Court—aiming to ensure that a suspect's choice to communicate with the police was voluntary throughout the interrogation process—reasoned that the presence of an attorney would make a suspect more confident and able to remain silent if desired.[36] The Court found that in order to give meaning to a suspect's right to silence, "the compulsion inherent in custodial interrogation [had] to be diffused by warning the suspect not only of his right to silence, but of his right to an attorney" as well.[37] For this reason, the Court held that the right to counsel, though not a textual right in itself, was an indispensable companion to the fundamental right to remain silent.[38]

C. *Effects of* Miranda

Miranda's mandate was clear: prior to any questioning, the authorities must warn a suspect that he has the right to remain silent and the right to an attorney.[39] The Court made equally clear that any questioning must automatically cease once a suspect invokes his right to remain silent.[40] Similarly, when a suspect invokes his right to counsel, the interrogation cannot continue until counsel is present.[41] If a suspect cannot ob-

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31. *Id.* at 445–47; *see also id.* at 446 n.7 (citing multiple cases involving police brutality). The Court was particularly disturbed by police manuals that described in detail how to psychologically disadvantage suspects and extract confessions. *Id.* at 448–55; *see also id.* at 449 n.8 (referring to several of the manuals then in use by the police).

32. *Id.* at 467.

33. *See id.* at 442.

34. *Id.* at 466; Marcy Strauss, *Understanding* Davis v. United States, 40 LOY. L.A. L. REV. 1011, 1015 (2007).

35. Malloy v. Hogan, 378 U.S. 1, 8 (1964) (holding that a person has the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence").

36. *Miranda*, 384 U.S. at 469–70.

37. Donald P. Judges & Stephen J. Cribari, *Speaking of Silence: A Reply to Making Defendants Speak*, 94 MINN. L. REV. 800, 812 (2010).

38. *Id.* at 812–13.

39. *Miranda*, 384 U.S. at 444.

40. *Id.* at 473–74.

41. *Id.* at 474.

tain an attorney on his own, law enforcement must either accept his decision to remain silent or provide him with counsel.[42]

Adherence to these rules has become a prerequisite for the admissibility of any statement made by a defendant at his criminal trial.[43] The *Miranda* holding "drastically overhauled the law of police interrogations"[44] by imposing a "positive obligation on police to advise suspects of a given litany of rights before any custodial interrogation could begin."[45] Accordingly, most of *Miranda*'s critics attack the decision for meddling with law enforcement procedures,[46] asserting that it prevents the admission of voluntary confessions in criminal trials.[47] Specifically, extending the application of *Miranda* rights may deter police from trying to obtain voluntary confessions, which are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law."[48] Although a suspect may waive his *Miranda* rights, the government has the heavy burden of demonstrating that the defendant knowingly and intelligently waived his privilege.[49] The Court openly acknowledged that it imposed a heavy burden on the government, but averred that because the government is in a position of authority throughout the interrogation process, that "burden is rightly on its shoulders."[50] Furthermore, the American criminal justice system places the burden of proof wholly on the government for every element of a crime, including proof of the voluntariness of any confession offered as evidence.[51]

D. A "Second Layer of Prophylaxis": Edwards v. Arizona[52]

Fifteen years after *Miranda*, the Court buttressed the accused's right to counsel in *Edwards v. Arizona* by clarifying that a custodial interrogation cannot be resumed until the protections articulated in *Miranda* have been provided.[53] In *Edwards*, the defendant was charged with robbery, burglary, and first-degree murder.[54] Pursuant to an arrest warrant, Edwards was detained and interrogated by law enforcement officials after

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42. *Id.*
43. *Id.* at 476.
44. Strauss, *supra* note 34, at 1014.
45. Pizzi & Hoffman, *supra* note 11, at 817.
46. *See id.* at 817 n.20.
47. *See* Maryland v. Shatzer, 130 S. Ct. 1213, 1221–22 (2010).
48. *Id.* at 1222 (quoting McNeil v. Wisconsin, 501 U.S. 171, 181 (1991)).
49. *Miranda*, 384 U.S. at 475 (citing Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (holding that the Constitution "imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused")).
50. *Miranda*, 384 U.S. at 475.
51. *Id.* at 460; *see also* Judges & Cribari, *supra* note 37, at 806 (noting that in the late eighteenth century to early nineteenth century, American criminal justice switched from an accused-speaks model to a testing-the-prosecution model).
52. 451 U.S. 477 (1981). The *Edwards* holding was labeled a "second layer of prophylaxis." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991).
53. *Edwards*, 451 U.S. at 484–85.
54. *Id.* at 478.

being properly informed of his *Miranda* rights.[55] Questioning quickly ceased after Edwards denied involvement in the crimes and requested to speak with an attorney.[56] However, when officers visited Edwards at the county jail the next morning, the jail's guard told Edwards that he "had to" speak with them.[57] As a result, Edwards spoke to officers and implicated himself in the crimes, even after officers again informed him of his *Miranda* rights.[58]

In its review, the *Edwards* Court considered whether the defendant had voluntarily waived his right to counsel by speaking with law enforcement at the second interrogation.[59] Relying heavily on its rationale in *Miranda*, the Court held that the waiver was involuntary and that the confession was inadmissible at trial.[60] The Court reasoned that once a suspect initially invokes his right to counsel, any subsequent waivers of that right are presumed involuntary because such waivers are likely the result of police coercion, badgering, or dishonesty.[61] Therefore, when Edwards asserted his right to an attorney on the night of his arrest, the police were required to honor his desire to communicate with law enforcement only through counsel for the remainder of the investigation.[62]

However, the *Edwards* decision permitted questioning to resume if the suspect initiated the discussion with law enforcement.[63] The Court reasoned that where the accused initiated the discussion, the risk of any police coercion was minimal and the presumption of involuntariness no longer applied.[64] The Court found that the effect of a suspect's assertion of his right to counsel differed from a suspect's invocation of the right to remain silent, which only temporarily paused the interrogation.[65]

Although a seemingly bright-line rule, the Court has since been inundated with proposed exceptions to the *Edwards* application. In nearly all of the challenges to *Edwards*, "[T]he Court was concerned with preserving the clear, bright-line nature of the *Edwards* decision."[66] For ex-

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55. *Id.*
56. *Id.* at 479.
57. *Id.*
58. *Id.*
59. *Id.* at 482–84.
60. *Id.* at 487.
61. *See id.* at 484–85.
62. *Id.* at 484–86.
63. *Id.* at 484–85.
64. *See id.* at 484–86 & n.9.
65. Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under* Miranda, 17 WM. & MARY BILL RTS. J. 773, 818–19 (2009) (asserting that invoking the right to counsel has more dire consequences for law enforcement than does asserting the right to remain silent). *Compare Edwards*, 451 U.S. at 484–85 (holding that when a suspect invokes the right to counsel, the interrogation must cease and cannot resume until counsel is made available or the suspect initiates discussion), *with* Michigan v. Mosley, 423 U.S. 96, 102–04 (1975) (holding that although an interrogation must immediately cease upon assertion of the right to remain silent, it does not follow that law enforcement may not resume questioning two hours later).
66. Strauss, *supra* note 34, at 1022.

ample, the Court applied the *Edwards* rule to interrogations concerned with unrelated offenses, forbidding police from questioning a suspect if he had asserted his right to counsel during a prior interrogation for an unrelated offense.[67] Additionally, the Court applied the *Edwards* rule when a suspect had the opportunity to consult with counsel, but did not have counsel present for questioning.[68] For about a decade, the right to counsel was a powerful and effective protection against deceitful interrogation techniques. Despite several challenges and critiques, *Edwards* rendered any police-initiated confessions made after an assertion of the right to counsel per se involuntary.

E. The Court's Gradual Retreat from Additional Prophylaxes

Although *Edwards* secured a suspect's right to counsel, the Court crafted various exceptions to other aspects of *Miranda*'s application in the decades following the advent of *Miranda* rights.

Davis v. United States[69] established a notable limitation on *Miranda*'s application. In *Davis,* the defendant was accused of murder and initially waived his *Miranda* rights during an interview.[70] However, an hour-and-a-half into the interview, Davis stated that he might want to speak with a lawyer.[71] The defendant's interviewers testified that they asked Davis if he meant that he wanted a lawyer, to which Davis allegedly answered, "No, I'm not asking for a lawyer."[72] After a short break, the interview continued for another hour until Davis stated, "I think I want a lawyer before I say anything else."[73] At trial, Davis moved to suppress statements made during the interview.[74] Specifically, Davis claimed that his statement, "Maybe I should talk to a lawyer," constituted an invocation of his right to counsel, and that based on *Miranda* and *Edwards*, the interrogation should have ceased until that right was fully honored.[75]

In its review, the *Davis* Court considered how law enforcement officers should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning.[76] Stressing the need for effective law enforcement, the Court held that interrogations may continue unless a suspect clearly and une-

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67. Arizona v. Roberson, 486 U.S 675, 687 (1988); *see also* Thomas N. Radek, Note, Arizona v. Roberson*: The Supreme Court Expands Suspects' Rights in the Custodial Interrogation Setting*, 22 J. MARSHALL L. REV. 685, 686 (1989).
68. Minnick v. Mississippi, 498 U.S. 146, 153 (1990).
69. 512 U.S. 452 (1994).
70. *Id.* at 454.
71. *Id.* at 455. Specifically, Davis said, "Maybe I should talk to a lawyer." *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *See id.* at 459.
76. *See id.* at 454.

quivocally requests an attorney.[77] This caveat that a request for counsel must be unambiguous introduced an element of uncertainty to the *Edwards* rule and limited its reach.[78] Paradoxically, the Court highlighted the importance of *Miranda* rights,[79] while making the invocation of those rights difficult.

Other notable exceptions to *Miranda* provided loopholes for admitting statements obtained without advising a suspect of his rights, as required by *Miranda*. In *Michigan v. Tucker*,[80] the Court held that the exclusion of the "fruits" of a *Miranda* violation—the statement of a witness whose identity the defendant revealed while in custody—was not required.[81] Additionally, the Court ruled in *Oregon v. Haas*[82] that voluntary statements obtained without advising a suspect of his *Miranda* rights could be used to impeach a defendant at trial.[83] In *New York v. Quarles*,[84] the Court created a "public safety" exception that freed law enforcement from *Miranda* requirements if questioning needed to occur quickly to secure the safety of the public.[85] Despite these exceptions, in *Dickerson v. United States*,[86] the Court asserted the continued importance and survival of *Miranda*'s core holding when it invalidated an act of Congress meant to overrule *Miranda* because *Miranda* was itself a "constitutional" holding.[87] In its ruling, the Court rejected the idea that the advisement of *Miranda* rights was merely a factor for a court to consider in determining the voluntariness of a statement.[88]

Although the Court has declined to overrule *Miranda*, it has begun to limit the application of the *Edwards* rule. Prior to its decision in *Maryland v. Shatzer*, the Court had only broadly recognized a time limit to the application of the *Edwards* case, noting, in dicta, that *Edwards* applied "assuming there has been no break in custody."[89] The Court would next have to determine what exactly constituted a "break in custody." The

77. *Id.* at 460–61. In contrast to *Miranda* and *Edwards*, the *Davis* Court appeared to value law enforcement efficiency more than rights of the accused. According to *Davis*, the primary benefit of *Miranda* was the *advisement* of rights. It was then up to the suspect to unambiguously invoke those rights. *See id.*

78. *See* Strauss, *supra* note 34, at 1027–28.

79. *Davis*, 512 U.S. at 458.

80. 417 U.S. 433 (1974).

81. *Id.* at 450–52.

82. 420 U.S. 714 (1975).

83. *Id.* at 723–24.

84. 467 U.S. 649 (1984).

85. *Id.* at 653. In a grocery store, police apprehended a rape suspect known to be carrying a gun, did not find the gun on his person, and then asked him where he had put the gun. *Id.* at 652. The suspect answered, "[T]he gun is over there." *Id.* The statement was ruled admissible under a "public safety" exception. *Id.* at 659–60.

86. 530 U.S. 428 (2000).

87. 18 U.S.C. § 3501 (2000), *invalidated by* Dickerson v. United States, 530 U.S. 428 (2000).

88. *Dickerson*, 530 U.S. at 442–44.

89. Maryland v. Shatzer, 130 S. Ct. 1213, 1220 (2010) (quoting McNeil v. Wisconsin, 501 U.S. 171, 177 (1991)).

answer revealed just how far the Court was willing to extend the prophylactic measures it instituted in *Miranda* and solidified in *Edwards*.

II. *MARYLAND V. SHATZER*

In *Maryland v. Shatzer*, the United States Supreme Court considered whether a suspect's invocation of his right to an attorney indefinitely shields the suspect from further questioning until he hires or is provided an attorney. In *Shatzer*, the defendant was re-interrogated for the same charge two-and-a-half years after he asserted his right to an attorney concerning that charge. Although the entire Court agreed that two-and-a-half years was a sufficient time period for the suspect's invocation of *Miranda*/*Edwards* rights to expire, the majority insisted on pinpointing exactly how long law enforcement must honor a suspect's request for an attorney. Despite criticism from two concurring Justices, the majority held that a suspect's assertion of his right to an attorney guarded the suspect from further interrogation without an attorney present for only fourteen days.

A. Facts

In *Shatzer*, a detective initially visited the defendant, Michael Shatzer, Sr., in 2003 to question him about allegations of sexually abusing his own son.[90] At the time, Shatzer was serving a sentence for an unrelated child sexual-abuse offense at the Maryland Correctional Institution-Hagerstown.[91] When he learned the reasoning behind the detective's visit, Shatzer declined to speak to the detective without an attorney present.[92] The detective then ended the visit and closed the case.[93]

Two-and-a-half years later, the case was re-opened based on additional evidence obtained from Shatzer's son.[94] Investigators visited Shatzer at the Roxbury Correctional Institute, where Shatzer had been transferred.[95] This time, Shatzer waived his *Miranda* rights and consented to a polygraph examination.[96] During the interview, he "admitted to masturbating in front of his son at a distance of less than three feet."[97] Later, after failing the polygraph, Shatzer told police that he "didn't force" his son to perform fellatio on him, thereby admitting that the act had occurred.[98] Following this admission, Shatzer requested an attorney and the detectives ended the interrogation.[99]

90. *Id.* at 1217.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1217–18.
95. *Id.*
96. *Id.* at 1218.
97. *Id*
98. *See id.*
99. *Id.*

B. Procedural History

"The State's Attorney for Washington County, Maryland, charged Shatzer with second-degree sexual offense, sexual child abuse, second-degree assault, and contributing to conditions rendering a child in need of assistance."[100] In response, Shatzer argued that the *Edwards* protections rendered his 2006 waiver involuntary and moved to suppress his statements from that day.[101] Shatzer pled not guilty and waived his right to a jury trial.[102]

The trial court denied Shatzer's motion and found him guilty of sexually abusing his son.[103] The Court reasoned that *Edwards* did not apply because the two-and-a-half-year time period separating the two interrogations constituted a sufficient break in custody to allow his previously asserted *Miranda* rights to expire.[104] The Court of Appeals of Maryland reversed and remanded, holding that: (1) the passage of time alone was insufficient to end *Edwards* protections; and (2) if a break-in-custody exception to *Edwards* existed, Shatzer's release back into prison did not constitute such a "break in custody."[105] The United States Supreme Court granted certiorari to determine whether, and at what point, "a break in custody ends the presumption of involuntariness established in *Edwards*."[106]

C. Majority Opinion

Justice Scalia wrote the opinion of the Court, with Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor joining in the decision.[107] The majority's main concern was that without some time limit on *Edwards*'s protections, the effect of a suspect's invocation of the right to counsel would be "eternal," and therefore an acute burden on the administration of justice.[108] Accordingly, the Court sought to place an objective, predictable limit on the applicability of *Edwards* by employing a cost-benefit analysis of the indefinite protection it provided.[109]

According to the Court, the primary benefit of *Edwards* was "measured by the number of coerced confessions it suppresse[d] that otherwise

100. *Id.*
101. *See id.*
102. *Id.*
103. *Id.* at 1218 & n.1 (discussing Maryland's filing of a *nolle prosequi* to the second-degree sexual offense charge, and consenting to dismissal of the misdemeanor charges barred by the statute of limitations).
104. *Id.* at 1218.
105. Shatzer v. State, 954 A.2d 1118, 1131 (Md. 2008), *rev'd*, 130 S. Ct. 1213 (2010).
106. *Shatzer*, 130 S. Ct. at 1217.
107. *Id.*
108. *See id.* at 1222.
109. See *id.* at 1220.

would have been admitted" at trial.[110] On the other hand, any voluntary confessions withheld from evidence constituted a cost paid by society.[111] The Court elaborated on the costs by arguing that because *Edwards* protections apply even where a subsequent interrogation concerns a different crime,[112] or is conducted by a different law enforcement agency,[113] a repeat offender may escape conviction because he remains protected after a single unrelated invocation of his rights.[114] The Court concluded that with no set limitations, the costs of the *Edwards* rule outweighed its benefits.[115]

In Shatzer's case, the Court found that the two-and-a-half year break in custody was sufficient to make his subsequent waiver voluntary.[116] However, the Court then questioned whether a period of one year or one week would have been sufficient.[117] The Court held that it would be impractical to leave these answers unresolved and established a clear-cut rule that a fourteen-day break in custody was sufficient to end the presumption of involuntariness established in *Edwards*.[118]

Although the fourteen-day limitation appeared with little explanation, the Court justified the rule in two ways. First, the Court reasoned that the need for the *Edwards* protections lessened where a suspect returned to "normal life."[119] A return to normal life, the Court noted, increased the likelihood that the suspect would have consulted with friends, family, or an attorney, and decreased the likelihood that a waiver was the result of badgering or coercion by law enforcement officers.[120] The Court found that two weeks was a sufficient amount of time to constitute a return to normal life.[121] Second, the Court asserted that a suspect would still be protected under *Johnson v. Zerbst*,[122] which mandated a totality of the circumstances inquiry into the voluntariness of a confession.[123] While the Court acknowledged that it was unusual for the Court to set precise limits governing police action, it asserted its prerogative to clarify its own legal mandate[124] and instituted its fourteen-day rule over the biting criticism of Justice Thomas[125] and Justice Stevens.[126]

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110. *Id.*
111. *See id.*
112. *See* Arizona v. Roberson, 486 U.S. 675, 687–88 (1988).
113. *See* Minnick v. Mississippi, 498 U.S. 146, 153–54 (1990).
114. *Shatzer*, 130 S. Ct. at 1222.
115. *See id.*
116. *See id.*
117. *Id.*
118. *Id.* at 1223.
119. *Id.* at 1221.
120. *Id.*
121. *Id.* at 1223.
122. *Id.* at 1223 n.7.
123. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
124. *Shatzer*, 130 S. Ct. at 1220 ("We have frequently emphasized that the *Edwards* rule is not a constitutional mandate, but judicially prescribed prophylaxis.").
125. *See infra* Part II.D.

The Court also considered judicial and law enforcement efficiency in its determination.[127] The *Edwards* bright-line rule conserved judicial resources that would otherwise be dedicated to determining the voluntariness of a suspect's waiver.[128] By establishing another clear-cut rule, the *Shatzer* Court was able to maintain efficiency while restricting *Edwards*'s application.[129] The Court strengthened its holding by identifying those hardships on law enforcement that the fourteen-day rule would alleviate, increasing the admissibility of voluntary confessions.[130] Specifically, the Court reasoned that police investigations are more effective if officers "know, with certainty and beforehand, when renewed interrogation is lawful."[131]

Last, the Court addressed whether release back into the general prison population constituted a release from custody for *Edwards* and *Miranda* purposes.[132] Because prisoners retain some control over their lives, are often able to communicate with others, and the interrogator has no power over the incarceration, the Court answered the question in the affirmative.[133] Thus, the Court defined "normal" as merely returning to the state of life enjoyed by the suspect immediately before the interrogation. The Court held that as long as the suspect was not in "interrogative custody," meaning isolated with his accusers, release back into the general prison population constituted a break in custody for purposes of *Miranda* and *Edwards*.[134]

D. Justice Thomas's Concurring Opinion

Justice Thomas, concurring in part and in the judgment, criticized the majority's bright-line fourteen-day rule. Thomas immediately made clear his disagreement with any extension of the *Edwards* rule beyond the narrow facts of that case.[135] He then argued that even if *Edwards* applied in Shatzer's case, the majority's rule was arbitrary, incomplete, and inefficient.[136]

Furthermore, Justice Thomas maintained that the new fourteen-day rule was unnecessary because *Zerbst* mandated a totality of the circum-

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126. *See infra* Part II.E.
127. *Shatzer*, 130 S. Ct. at 1220.
128. *Id.*
129. *Id.* at 1223–24 ("Now, in cases where there is an alleged break in custody, they simply have to repeat the inquiry for the time between the initial invocation and reinterrogation. In most cases that determination will be easy. And when it is determined that the defendant pleading *Edwards* has been out of custody for two weeks before the contested interrogation, the court is spared the fact-intensive inquiry into whether he ever, anywhere, asserted his *Miranda* right to counsel.").
130. *Id.* at 1223.
131. *Id.* at 1222–23.
132. *Id.* at 1224.
133. *Id.*
134. *Id.* at 1224–25.
135. *Id.* at 1227 (Thomas, J., concurring).
136. *See id.* at 1227–28.

stances test, which accounted for any time lapse, to determine the voluntariness of a waiver.[137] In addition, Justice Thomas disagreed with the majority's conclusion that the fourteen-day rule would aid police investigations.[138] Specifically, Justice Thomas stated, "Determining whether a suspect was previously in custody, and when the suspect was released, may be difficult without questioning the suspect, especially if state and federal authorities are conducting simultaneous investigations."[139] Last, Justice Thomas accused the majority of valuing certainty and ease of application over well-reasoned, substantive conclusions.[140]

E. Justice Stevens's Concurring Opinion

Justice Stevens, also concurring in the judgment, attacked the fourteen-day rule mainly on public policy concerns. He asserted that any bright-line rule was unsatisfactory because "[n]either a break in custody nor the passage of time ha[d] an inherent, curative power" to establish genuine voluntariness.[141] Justice Stevens argued that a suspect may assume that his requests for counsel have been ignored if he is re-interrogated after two weeks without having obtained counsel, and may assume he has no choice but to submit to the interrogation.[142] Moreover, Justice Stevens maintained that the police will be motivated "to delay formal proceedings, in order to gain additional information by way of interrogation after the time limit lapses."[143]

Justice Stevens also addressed the dangerous implications of the fourteen-day rule for suspects already in prison. First, Justice Stevens argued that because prisoners are summoned by guards to interrogation, they may assume that the guards and police are not independent, and feel forced to surrender to the questioning.[144] Next, Justice Stevens asserted that the fourteen-day rule could encourage officers or guards to badger imprisoned suspects, who will not have the opportunity to overcome the pressures from the interrogation.[145] Although Shatzer did not claim any disparate treatment by prison officials or guards between his two interrogations,[146] Justice Stevens was concerned with this "troubling set of incentives for police."[147] Last, because a suspect is already in custody, po-

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137. *Id.* at 1227 n.1 (citing Miranda v. Arizona, 384 U.S. 436, 475 (1966)).
138. *See Shatzer*, 130 S. Ct. at 1228 n.2.
139. *Id.*
140. *Id.* at 1228.
141. *Id.* at 1234 (Stevens, J., concurring).
142. *Id.* at 1229.
143. *Id.* at 1231.
144. *Id.* at 1233 ("Prisoners are uniquely vulnerable to the officials who control every aspect of their lives; prison guards may not look kindly upon a prisoner who refuses to cooperate with police. And cooperation is frequently relevant to whether the prisoner can obtain parole.").
145. *See id.* at 1232 (asserting that a prisoner's freedom is "severely limited," making it unlikely that a suspect in prison has communicated with friends, family, or an attorney within fourteen days after questioning).
146. *Id.* at 1225 (majority opinion).
147. *Id.* at 1233 n.13 (Stevens, J., concurring).

lice have no need to formally place the suspect under arrest and can "comfortably bide their time, interrogating and reinterrogating their suspect" with little or no evidence of guilt, until the suspect surrenders and incriminates himself.[148]

III. ANALYSIS

The *Shatzer* fourteen-day rule confirms the Court's retreat from the prophylactic measures established in *Miranda* and *Edwards*. This retreat jeopardizes a suspect's rights to counsel and to remain silent. With *Shatzer*, the Court continued its gradual abandonment of *Miranda*'s protections by valuing efficiency above individual rights. Distressingly, this abandonment arrives at a time when Fifth and Sixth Amendment rights are increasingly more valuable to suspects. And while suspects are most in need of those rights, the Court's recent focus on *Edwards* makes it easier to curtail suspects' rights, making the *Shatzer* opinion more detrimental to suspects today. The Court's continued limitation of *Miranda* rights is logically unsound, wrongly focused, and inconsistent with the modern realities of criminal justice.

A. *The Court's Retreat from the Prophylactic Ideals of* Miranda *and* Edwards

The Court's recent retreat from prophylactic tenants overlooks the general concerns that guided the *Miranda* Court forty years ago. Relying on *Miranda*'s assertions, the *Shatzer* Court noted that a set of prophylactic measures was necessary to protect suspects from the "'inherently compelling pressures' of custodial interrogation."[149] "Inherently compelling" pressures denoted an inescapable characteristic of interrogation that generated psychological pressures and uncomfortable experiences for individuals under interrogation. Accordingly, the Court recognized some degree of psychological pressure present in *all* custodial interrogations.[150]

In *Edwards*, the Court recognized that these inherent pressures build with subsequent interrogations.[151] As such, *Edwards* held that waivers of the right to counsel occurring after a previous invocation of that right are presumed involuntary.[152] Concerned with genuine voluntariness, the *Edwards* Court likely declined to place a limit on the time between interrogations because every person will react to, and overcome, any coercive techniques differently and within varying timeframes. *Edwards* adhered to the *Miranda* Court's concerns about inherent pressures by holding that

148. *Id.*
149. *Id.* at 1219 (majority opinion) (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).
150. *See Shatzer*, 130 S. Ct. at 1219.
151. *See* Edwards v. Arizona, 451 U.S. 477, 483–84 (1981).
152. *See id.* at 484–85.

an inherent characteristic does not fade with time, and no generalizations about individual triumph over coercion would prove effective.

However, the *Shatzer* Court imported its own determination of the time it takes a suspect to overcome coercive effects of an interrogation and make a voluntary waiver: fourteen days.[153] That is all it takes to eliminate coercive psychological pressures, according to the Court.[154] The Court admits that pressures will still exist during subsequent interrogations, but assumes that the degree of pressure felt by a suspect after a two-week break in custody will never be more than the pressure felt at any prior custodial interrogations.[155] This assumption ignores the likely possibility that an individual will feel more pressured after a second, third, or tenth interrogation because he feels hunted and badgered by police.

Because pressure naturally builds in this way, the Court's estimation that pressure will only increase in "narrow circumstances" where no break in custody has occurred is flawed.[156] Though the Court contends that repeated interrogation attempts will increase the likelihood that a suspect will again assert his right,[157] it is more likely that a suspect will feel his requests have been ignored and he has no option but to talk.[158] Feeling that his rights have been ignored naturally increases pressure because the suspect will feel that he cannot trust his questioners. Logically, a break in custody will not always place a suspect in the same, or better, position than he was at the initial meeting.

Not only did the *Shatzer* Court discount and misapprehend the meaning of inherent pressures, it also erroneously failed to account for variances in individual personalities, experiences, and understandings of the criminal justice system. *Miranda* sought to provide "individuals the tools to counter inherently coercive pressure by asserting their right not to deal with the police alone."[159] However, although every suspect is given the same "tool" by being read the same rights, every individual has varying capacities to use this tool. For example, providing every American with a fishing pole does not mean that every American eats fish for dinner that night. Some Americans will have no clue what to do with the contraption, others will be scared of the sharp hook and live bait, and

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

154. *Id.* at 1222–23.

155. *Id.* at 1223 ("It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.").

156. *Id.* at 1226; *see id.* at 1231–32 (Stevens, J., concurring).

157. *Id.* at 1226 (majority opinion) (arguing that if a break in custody has not changed the suspect's mind about having counsel present, he will know from experience that he need only ask for counsel for the interrogation to cease).

158. *Id.* at 1229 (Stevens, J., concurring).

159. Strauss, *supra* note 65, at 815.

others still will be physically unable to maneuver the device because of age or disability.

A rule based on blanket generalizations is directly opposed to the core of *Miranda*'s analysis. The *Miranda* Court strongly asserted that "the privilege against self-incrimination applies to *all individuals*."[160] In fact, *Miranda* declared that the Fifth Amendment privilege is so fundamental that the defendant's "age, education, intelligence, or prior contact with authorities" should have no bearing on his ability to exercise his rights.[161] This reasoning accorded with the Court's earlier holding in *Zerbst* that "[t]he 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."[162]

Interestingly, the Court made the same mistake in *Davis* when it declared that a suspect's invocation of the right to counsel must be unambiguous.[163] Numerous scholars argue that the *Davis* rule will have a disproportionate effect on females and minorities.[164] Specifically, women and minorities are far more likely to use indirect speech patterns such as "maybe" and "I think."[165] Therefore, by failing to account for linguistic variances in certain segments of the population, *Davis* arbitrarily denied some individuals the right to counsel.[166]

Despite precedent that acknowledged and protected individual abilities, the Court ignored this principle in *Davis* and *Shatzer*. With its fourteen-day rule, the *Shatzer* Court took *Miranda*'s and *Edwards*' concern with genuine, individual voluntariness and replaced it with a blanket generalization about human reaction to subsequent or repeated interrogation techniques. The *Shatzer* Court expressed this generalization as the suspect returning to "normal life."[167] However, the emphasis on a return to normalcy is troublesome because even if a suspect is placed back at equilibrium, *inherent* pressures will still revisit him during subsequent interrogation. And if he felt unwilling or unable to communicate to his interrogators without counsel the first time, the return of these pressures will probably restore, or even enhance, that feeling.

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160. Miranda v. Arizona, 384 U.S. 436, 472 (1966) (emphasis added).
161. *Id.* at 468–69.
162. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
163. Davis v. United States, 512 U.S. 452, 459 (1994).
164. Strauss, *supra* note 34, at 1030 (citing David Aram Kaiser & Paul Lufkin, *Deconstructing* Davis v. United States*: Intention and Meaning in Ambiguous Requests for Counsel*, 32 HASTINGS CONST. L.Q. 737, 759 n.69 (2005) ("[T]he actual linguistic practices of many women and minorities preclude them from meeting the standard of clarity demanded by *Davis*.")).
165. Strauss, *supra* note 34, at 1030–31.
166. Strauss, *supra* note 34, at 1031.
167. Maryland v. Shatzer, 130 S. Ct. 1213, 1221 (2010) (majority opinion).

The Court's retreat from prophylactic measures compromises not only a suspect's right to counsel, but also his right to remain silent. "The right to counsel exists only to protect the right to remain silent," as the *Miranda* Court considered the former as a means to protect the latter.[168] Consequently, any limitations on the right to counsel also limit the right to remain silent. *Shatzer*'s limitation of the right to counsel may also spur nationwide decisions similarly limiting the right to remain silent. Although courts have largely considered the two rights as separate and distinct standards,[169] nine out of eleven circuits and the District of Columbia have applied the *Davis* standard for invoking the right to counsel to the right to remain silent.[170] Similarly, *Shatzer*'s limitation of the right to counsel may be applied in cases concerning the right to remain silent. Admittedly, because the right to remain silent is already quite limited,[171] *Shatzer*'s fourteen-day rule would actually bolster that right. But the underlying trend of *Shatzer* and *Davis*—limiting the prophylactic protections awarded by *Miranda* and *Edwards*—is a dangerous ideal to transport into cases involving the right to remain silent. Courts may use *Shatzer*'s fourteen-day rule to proportionally limit the time lapse required to spoil a suspect's invocation of the right to remain silent. And any additional limitations on the right to remain silent may evaporate the right entirely.

B. *The* Shatzer *Court Wrongly Abandoned Prophylactic Measures in Favor of Efficiency*

The *Shatzer* Court held that it would be "impractical" to leave *Edwards*'s application open for clarification on a case-by-case basis, partly for judicial efficiency[172] and partly to ensure that law enforcement officers know for certain when renewed interrogation is lawful.[173] Though the importance of judicial efficiency is debatable, it is beyond the scope of this Comment.[174] Nevertheless, the Court placed too much emphasis

168. Strauss, *supra* note 65, at 817.

169. *See supra* note 65 and accompanying text.

170. Strauss, *supra* note 65, at 784–85 (citing Valle v. Sec'y for the Dep't of Corr., 459 F.3d 1206, 1213–15 (11th Cir. 2006); United States v. Nelson, 450 F.3d 1201, 1211–12 (10th Cir. 2006); United States v. Sherrod, 445 F.3d 980, 982 (7th Cir. 2006); McGraw v. Holland, 257 F.3d 513, 519 (6th Cir. 2001); Simmons v. Bowersox, 235 F.3d 1124, 1131 (8th Cir. 2001); United States v. Anderson, No. 95-3048, 1996 WL 135720 (D.C. Cir. Feb. 16, 1996) (per curiam)).

171. *See supra* note 65, and accompanying text.

172. *Shatzer*, 130 S. Ct. at 1222–24 (finding that the fourteen-day rule would conserve judicial resources by making the determination of voluntariness "easy" if a suspect has been out of custody for two weeks or longer).

173. *See id.* at 1222–23.

174. The Court has often expressed its preference for bright-line rules over totality of the circumstances approaches. *See, e.g.*, Davis v. United States, 512 U.S. 452, 461 (1994) ("[I]f we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application [set forth in *Edwards*] would be lost."); Minnick v. Mississippi, 498 U.S. 146, 151 (1990) ("The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application.").

on ensuring ease of application for law enforcement, and abandoned its dedication to prophylactic measures established in *Miranda*.

After the Court barely kept the core of *Miranda*'s holding alive in *Dickerson*, it once again turned its back on one of *Miranda*'s main principles: that law enforcement's investigative powers, though valuable to society, are limited by the rights of the accused guaranteed in the Sixth Amendment.[175] Individual rights should not and do not have to be compromised to establish an effective system of law enforcement.[176] The *Miranda* Court acknowledged the importance of police investigations and interrogations but refused to abridge constitutional rights to make the prosecutor's job a little easier.[177] With *Shatzer*, the Court tipped the scales in the opposite direction based on a flawed focus on efficiency.

Contrary to the Court's assertion, the fourteen-day rule is not necessary to ensure the fair and effective administration of justice. The original *Edwards* rule did not prevent all confessions. If a suspect wishes to make a voluntary confession, he may do so even after invoking his rights, as *Edwards* allows questioning to resume if a suspect initiates the discussion.[178] And because only twenty percent of suspects invoke their rights,[179] *Edwards* ultimately has no effect on a vast majority of cases, and the number of confessions that may be suppressed is slim. Moreover, the Court's fixation with law enforcement is unfounded and contrary to a fair criminal justice system. In a just system, law enforcement should not "have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights."[180] The mere fact that law enforcement fears a suspect's exercise of his fundamental rights is unsettling.

In fact, those fears may not be legitimate. Despite the Court's intentions in *Miranda*, false confessions are still prevalent,[181] showing that the numerous exceptions to *Miranda* have provided law enforcement with sufficient loopholes to continue to practice coercive tactics during interrogations. Although it is now well established that physical abuse is an illegal tactic to extract confessions, the line between acceptable psychological techniques and psychological coercion that is a violation of the Constitution remains blurred.[182] The fourteen-day rule, along with the

175. Holland, *supra* note 8, at 390.

176. Strauss, *supra* note 65, at 773 (quoting Escobedo v. Illinois, 378 U.S. 478, 490 (1964) ("If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.")).

177. Miranda v. Arizona, 384 U.S. 436, 479–81 (1966).

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

179. Strauss, *supra* note 65, at 774.

180. Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

181. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1060 (2010).

182. *See* Laura Hoffman Roppe, *True Blue? Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729, 732 (1994).

Court's progeny of exceptions to *Miranda*, has informed law enforcement officers of exactly how much questionable behavior they can legally employ.

Specifically, *Shatzer*'s rule will actually aid law enforcement in extracting confessions from suspects in custody because those suspects will be susceptible to incessant re-questioning every two weeks, even if they properly assert their right to counsel. Those people unable to make bail for whatever reason will therefore be more detrimentally impacted by the fourteen-day rule than will the rest of society. Hence, the rule will be arbitrarily more harmful to certain individuals with no justification.

Ultimately, by continuing to institute exceptions and limitations to the application of *Miranda* rights, the Court is instituting a dangerous pattern that actually helps police engage in trickery and coercion. Nonetheless, the *Shatzer* decision continued the Court's precedent of chipping away at *Miranda* rights to satisfy concerns about effective law enforcement. Moreover, as law enforcement officers become more clever and confident in their techniques, suspects struggle to assert and protect their fundamental rights, which are particularly critical in today's criminal prosecutions.

C. Why Fifth and Sixth Amendment Rights are More Important to Suspects Today

The *Shatzer* fourteen-day rule limited a suspect's rights at a time when a suspect's pretrial rights are becoming increasingly critical to the outcome of his case. Approximately ninety percent or more of today's criminal trials are resolved by negotiated disposition rather than trial, meaning defendants "rarely face their accusers during traditional courtroom proceedings that pit skilled trial lawyers against each other."[183] This is a recent development in criminal law that differs from the reality the Court faced at the time of *Miranda*. Specifically, between 1980 and 2002, the rate of federal criminal cases concluded by a bench and jury trial fell from 23 percent to 4.8 percent.[184] So today, pretrial contexts, such as interrogation settings, are the stage for judgment, where damage can be minimized, bargains can be struck, and cases can be won or lost.[185] In fact, only in rare cases does the "compulsion" sought to be protected by the Fifth Amendment occur at trial.[186]

This modern reality makes a suspect's right against self-incrimination incredibly valuable, as there may not be a trial to argue the

183. Holland, *supra* note 8, at 382.
184. Frank O. Bowman, III, Response, *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer*, 156 U. PA. L. REV. PENNUMBRA 226, 226 (2007), http://www.pennumbra.com/responses/11-2007/Bowman.pdf.
185. Holland, *supra* note 8, at 382–83.
186. Manheimer, *supra* note 12, at 1265.

voluntariness of a statement. Even more troubling for suspects, the rate of acquittal has declined alongside the falling rate of criminal trials.[187] The declining rate of acquittals has been attributed to the enactment of the United States Sentencing Guidelines, which provided prosecutors more bargaining leverage.[188] Thus, suspects are at a disadvantage from the initiation of the investigation because the interrogation context is increasingly more influential to the result of their case, *and* prosecutors have increased bargaining power. And at this time when pretrial contexts are especially valuable to suspects, the Court is continuing to curtail the pretrial rights of the accused.

The trend of modern criminal prosecution also clouds the line separating Fifth and Sixth Amendment protections, which further increases a suspect's need for prophylactic protections that transcend the bare text of the Constitution. Unlike the Fifth Amendment, the Sixth Amendment textually guarantees a suspect's right to counsel in a "criminal prosecution."[189] This right need not be invoked, but automatically takes effect when prosecution commences.[190] However, this right does not attach until the "critical stage" of the proceedings, which can include post-charge interrogations and lineups.[191] Today, as initial and pre-charge interrogations grow increasingly influential in criminal prosecutions, the definition of this "critical stage" is changing. While the increasingly blurred line between the critical and non-critical stage of criminal prosecution would support stronger rights earlier in the process, the Court has done the opposite. Ignoring the realities of modern criminal prosecution, the Court has made the right to counsel harder to invoke[192] and more difficult to maintain.[193]

D. How the Court's Focus on Edwards *Makes it Easier for the Court to Curtail Suspect Rights*

The *Shatzer* Court confidently flexed its muscles by declaring its prerogative to alter its own "judicially prescribed prophylaxis."[194] The *Shatzer C*ourt justified its drastic limitation on individual rights by pro-

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187. Bowman, *supra* note 184, at 227.

188. Bowman, *supra* note 184, at 226–27 (citing Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 101–06 (2005) (presenting data to support the assertion that the post-1987 federal sentencing system consisting of the United States Sentencing Guidelines provided prosecutors more bargaining leverage, directly resulting in the declining number of acquittals)).

189. U.S. CONST. amend. VI.

190. Holland, *supra* note 8, at 390.

191. *Id.* (citing Moran v. Burbine, 475 U.S. 412, 428 (1986)).

192. Davis v. United States, 512 U.S. 452, 459 (1994) (holding that a suspect's invocation of the right to counsel must be unambiguous to halt the interrogation).

193. Maryland v. Shatzer, 130 S. Ct. 1213, 1223 (2010) (holding that a suspect's assertion of his right to counsel forbids police from interrogating the suspect again for fourteen days if he has not obtained counsel).

194. *Id.* at 1220.

claiming that the *Edwards* rule is not a constitutional mandate.[195] But only a decade ago in *Dickerson*, the Court avoided overruling *Miranda* by declaring unconstitutional an act of Congress that purported to reduce *Miranda* warnings to a mere factor for consideration in determining the voluntariness of a statement.[196] Critical to the *Dickerson* Court's reasoning was that *Miranda* was a "constitutional decision" of the Court, which may not be overruled by an act of Congress.[197] Although the *Dickerson* Court qualified its decision by explaining that constitutional rulings are not immutable, but are subject to judicial modification,[198] the Court explicitly classified *Miranda* as a "constitutional decision."[199] Only ten years after this controversial classification, the *Shatzer* Court declared that *Edwards*, a direct offspring of *Miranda*,[200] is not a constitutional mandate.[201]

Because *Edwards* and *Miranda* are so intimately related, this shift is not fully justified. The *Edwards* opinion simply reconfirmed[202] the *Miranda* mandate that an accused has a constitutional right to have counsel present during custodial interrogation.[203] The *Edwards* Court aimed to provide "substance" to *Miranda* and its progeny, and emphasized that it is inconsistent with *Miranda* for police to reinterrogate a suspect in custody after he has clearly asserted his right to counsel.[204] Therefore, the *Edwards* rule was fashioned completely on *Miranda*'s heels, and if one rule is a constitutional mandate, the other should be as well.[205]

Characterizing *Edwards* as merely a judicially created prophylaxis increases and assists the Court's ability to further curtail suspect rights. By switching its focus from *Miranda* to *Edwards*, the *Shatzer* Court has found an easier way to limit rights of the accused. Specifically, limiting the *Edwards* rule is easier than limiting the *Miranda* rules because by classifying the *Edwards* rule as a judicial prophylaxis instead of a constitutional rule, the Court need not defend its limitations on that prophylaxis, as it did with *Miranda* in *Dickerson*.[206]

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195. *Id.*
196. Dickerson v. United States, 530 U.S. 428, 432 (2000).
197. *Id.*
198. *Id.* at 441.
199. *Id.* at 432.
200. *Shatzer*, 130 S. Ct. at 1219–20 (describing the advent of the *Edwards* rule as an expansion of *Miranda* rights).
201. *Id.* at 1220.
202. Edwards v. Arizona, 451 U.S. 477, 485 (1981).
203. *Id.* at 482.
204. *Id.* at 485.
205. *See Shatzer*, 130 S. Ct. at 1228 (Stevens, J., concurring) ("The source of the holdings in the long line of cases that includes both *Edwards* and *Miranda*, however, is the Fifth Amendment's protection against compelled self-incrimination applied to the 'compulsion inherent in custodial' interrogation . . . .").
206. Dickerson v. United States, 530 U.S. 428, 439–44 (2000).

CONCLUSION

The United States Supreme Court began running with the idea of additional safeguards for the accused in *Miranda* and *Edwards*, but tripped over those safeguards with *Davis* and eventually fell backwards with *Shatzer*. In *Shatzer*, the Court correctly asserted its prerogative to clarify and constrain its own prophylactic creations, but lost sight of its concurrent responsibility to protect individual rights, albeit those the Court itself has created. By focusing on the *Edwards* rule instead of *Miranda* rights generally, the Court was able to create the fourteen-day rule with minimal constitutional challenge, although the changing process of criminal justice makes *Edwards*' prophylactic measures more closely related to explicit constitutional rights.

Consequently, the Court ignored the realities of the modern criminal prosecution process and drastically limited *Miranda* rights at a time when suspects need them the most. The Court, and Justice Thomas in his concurrence, ask their audience to find solace in *Zerbst* protections still available to defendants.[207] But because *Zerbst* predates *Miranda* by twenty-eight years, it can be argued that *Miranda* replaced the need for *Zerbst*, meaning that *Shatzer* was the Court's last opportunity to salvage *Miranda* rights. Given this opportunity, the Court not only constricted the accused's right to counsel, but also jeopardized his right to remain silent.

Given the Court's flawed reasoning, detrimental impact, and inconsistency with the realities of modern criminal prosecutions, *Shatzer* was wrongly decided and will hinder the fair administration of criminal justice in America.

Hannah Misner[*]

207. *Shatzer*, 130 S. Ct. at 1227 n.1 (Thomas, J., concurring).

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