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NOTES AND COMMENTS

MINNICK v. MISSISSIPPI: RATIONALE OF RIGHT TO COUNSEL RULING NECESSITATES REVERSAL OF *MICHIGAN v. MOSLEY*'S RIGHT TO SILENCE RULING

I. INTRODUCTION

The Spring of 1991 exploded with controversy as George Holliday's home video images exposed nightmarish acts of spontaneous police brutality.[1] The amateur cameraman's shocking revelation captured the attention of the nation, and incited an army of video vigilantes harboring an insatiable appetite for the discovery of clandestine police activity.[2] Mounting pressure arising from the savage beating in Los Angeles, combined with an increasing awareness of the pervasiveness of illicit police conduct,[3] has forced the United States Justice Department to consider

1. Faye Fiore & Phillip Gollner, *Video Showing Beating by L.A. Officers Investigated*, L.A. TIMES, March 5, 1991, at 28. At about 1 a.m. Sunday, March 3, George Holliday gazed out across the street from his second floor apartment window. Suddenly, a white sedan is forced off the road by ten pursuing police cars. Apparently following orders, the driver got out of his car and dropped prostrate to the pavement. Holliday then grabbed his camera and began filming. The tape initially shows three officers surrounding a defenseless man (Rodney King). As Holliday focuses in on the scene, the three men are beating King with their nightsticks at an accelerating rate while King strives desperately to protect his head and face. As King writhes on the ground in pain, several officers continue beating him across his legs, kidney areas, back, neck, and head. As many as ten policemen were at the scene, most of whom spectated passively, never interceding on behalf of the brutalized victim. After one officer stomped on King's head, others joined in with aggressive kicking. When the virulent attack subsided, the officers tied King's unconscious body with wire at the wrists and ankles, called an ambulance, and then abandoned him. *Id.*

2. *Video Vigilantes*, NEWSWEEK, July 22, 1991, at 42; *see also More Video Cameras Expected on Streets of Hampton Roads, Norfolk, Virginia*, UPI, May 21, 1991, *available in* LEXIS, Nexis Library, Current File.

3. *See, e.g.*, *Video Vigilantes*, *supra* note 2, at 42 (Texas patrolman beat a handcuffed male with twenty-four blows of a billy club); Carol McGraw & Henry Weinstein, *Two Juries Deliver Verdicts After Abuses by L.A. Deputies, Police; Courts: Family of Man Whose Neck was Broken is Awarded $3.16 Million, Woman Who was Imprisoned Gets $55,000*, L.A. TIMES, Apr. 2, 1991, at B8 (verdicts returned against sheriff's deputies—one for breaking a man's neck, and another for imprisoning a woman for questioning regarding a gang murder); *Three Miami Policemen Arrested in Beating*, WASH. TIMES, Apr. 4, 1991, at A6 (three Miami officers arrested; one for brutalizing an apprehended suspect, the other two for lying about it); Jerry Hicks & Gebe Martinez, *San Clemente Officer Held in Rape, Assaults*, L.A. TIMES, Apr. 5, 1991, at A1; *Metro Digest/Local News in Brief: Never Taught Not to Use Profanity, Officer Testifies*, L.A. TIMES, Apr. 11, 1991, at 2 (officer charged

hiring additional lawyers.[4] A *Washington Post* headline accurately and succinctly assessed the damage inflicted upon the reputation of our police force: "Police Inspire Trust, Fear; Mixed Views . . . ."[5] We feel naturally inclined to trust our neighborhood officers; however, reality manifested in the Rodney King beating stirs within us a chilling fear of the unknown. Even more unsettling is the fact that an investigatory commission declared that, without the videotape produced by Holliday, the allegations of official misconduct probably would have been dismissed.[6] What protection does one have from the long, unrestrained arm of the law?[7] If some officers are so volatile that they exercise unbridled brutality publicly, what protection is there for the apprehended suspect who, in the secrecy of stationhouse interrogation, finds himself alone with his inquisitors?

Establishing individual liberties for persons accused of criminal offenses, the Fifth Amendment to the United States Constitution commands that no person shall be induced to incriminate himself.[8] In

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with assault); Pamela A. MacLean, *Four Oakland Housing Police Convicted of Brutality*, UPI, Apr. 12, 1991, *available in* LEXIS, Nexis Library, Current File (Oakland Housing Authority police officers convicted of a campaign of brutality, intimidation, and false arrests of project residents); Carolyn Colwell, *Timing Adds to Indicted Cop's Battle*, NEWSDAY, Apr. 25, 1991, at 33 (Suffolk County homicide detective indicted for battery); *3 Not Guilty of Assault at Party; Law Enforcement: Jurors Did Not Believe Deputies were Attacked or Had Cause to Storm Bridal Shower*, L.A. TIMES, May 18, 1991, at B1 (deputies storm bridal shower clad in riot gear, claimed they were assaulted, but a neighbor's videotape shows the deputies clubbing handcuffed individuals); Dean E. Murphy, *1988 Video Shows Police Beating; Investigation: LAPD Launches Inquiry After Tape of Officer Striking Man with Baton is Shown on T.V. Department Spokesman Calls Images 'Very Disturbing'*, L.A. TIMES, Aug. 3, 1991, at B1 (three year old incident revived by local television station that aired a home videotape); *Beach Attacks*, USA TODAY, Aug. 16, 1991, at A3 (San Diego police officer jailed on charges of committing seven early morning rapes and robberies).

4. Stephanie Saul, *Complaints Increase, But Prosecution Lags*, NEWSDAY, Mar. 31, 1991, at 35.

5. Lynne Duke, *Police Inspire Trust, Fear; Mixed Views Played Out in Neighborhood*, WASH. POST, Apr. 5, 1991, at A1. *See also Chiefs Urge New Code of Police Ethics*, UPI, Apr. 17, 1991, *available in* LEXIS, Nexis Library, Current File (due to increasing publicity of police brutality, police chiefs from across the nation met to draft a new code of police ethics); *Law Enforcement Groups Call for State Hearings on Brutality*, UPI, Apr. 11, 1991, *available in* LEXIS, Nexis Library, Current File (various organizations challenged the California Legislature to establish a task force to determine if excessive force by police is widespread).

6. *Video Vigilantes*, *supra* note 2, at 42.

7. Without an adequate intermediary, such as a loaded video camera or the presence of an attorney, protection from the long arm of the law cannot be guaranteed. *See* Andy Court, *Off Camera, Brutal Police are Likely to Walk*, NEW JERSEY L.J., Apr. 25, 1991, at 9.

8. U.S. CONST. amend. V. The constitutional foundation of the privilege against self-incrimination is based on the respect that government, both state and federal, must accord to the individual's inalienable rights. Miranda v. Arizona, 384 U.S. 436, 460 (1966). "[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Id.*

Miranda v. Arizona,[9] the Supreme Court created a prophylactic rule governing the admissibility of confessions extracted during custodial interrogation.[10] The purpose of the *Miranda* ruling was to ensure that law enforcement personnel respect the suspect's right to "free" and "unfettered" exercise of the privilege against self-incrimination.[11]

The *Miranda* prophylaxis imposes two levels of procedural protection.[12] The first level requires informing the suspect 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."[13] The second level of protection defines the procedure that officials must follow when the suspect invokes his privilege against self-incrimination by asserting either his right to remain silent or the derivative right to the assistance and presence of counsel.[14] *Miranda*'s creation of additional protection has generated vigorous debate concerning the proper balance between society's interest in effective law enforcement and the individual's right to be free from compulsion to incriminate himself.[15]

Subsequent Supreme Court cases have dichotomized the second level of protection.[16] Thus, the procedure to be followed by law enforcement officials depends on whether the suspect invokes the right to remain silent or the derivative right to the presence of counsel.[17] In *Michigan v.*

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9. 384 U.S. 436 (1966).

10. *Id.* at 478-79. As defined by *Miranda*, custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* at 444.

In theory, rules governing the admissibility of confessions regulate the methods by which officials obtain incriminating evidence and provide protection of the apprehended suspect. Unfortunately, without counsel present on behalf of the suspect, there is no true regulation of police conduct. In the privacy of stationhouse interrogations, police activity remains totally unchecked, and the suspect is at the mercy of his captors.

11. *Miranda*, 384 U.S. at 457, 460.

12. Yale Kamisar, *The Edwards and Bradshaw Cases: The Court Giveth and the Court Taketh Away*, *in* 5 THE SUPREME COURT: TRENDS AND DEVELOPMENTS 153 (Jesse H. Choper et al. eds., 1984).

13. *Miranda*, 384 U.S. at 479.

14. *Id.* The right to the presence of counsel is a derivative right in that it was established to assure greater protection of the right to remain silent, and the privilege against self-incrimination. Kamisar, *supra* note 12, at 153.

15. See various resources cited in 1 WAYNE R. LAFAVE & JAROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.5, at 484-85 (1984), 103 (Supp. 1991).

16. Kamisar, *supra* note 12, at 153.

17. *Id.*

Mosley,[18] the Court addressed the question of whether police may resume interrogating a suspect who has invoked his right to remain silent.[19] Ignoring *Miranda*'s instruction that the accused is no longer subject to police-initiated questioning once he asserts the right to remain silent,[20] the *Mosley* court concluded that law enforcement officials can confront the accused and solicit a waiver of his rights.[21]

In a subsequent case, *Edwards v. Arizona*,[22] the Supreme Court addressed the question of whether police may resume interrogation of the accused in the absence of counsel after he has invoked his right to the presence of an attorney.[23] The *Edwards* Court created greater procedural protection for the right to counsel than *Mosley* established for the right to remain silent.[24] According to *Edwards, Miranda* unequivocally imposed a per se rule barring subsequent police-initiated interrogation of the accused unless his attorney is present, or unless the accused initiates communication with officials.[25]

Thus, the Supreme Court has imposed two separate procedures to be followed depending on whether the suspect invokes the right to remain silent or the derivative right to the presence of counsel. If the accused invokes the right to remain silent, officials may continue their efforts to induce an incriminating statement.[26] If, however, the accused invokes the right to the presence of counsel, officials are proscribed from pursuing an inculpatory statement.[27]

Recently, in *Minnick v. Mississippi*,[28] Mississippi challenged the Supreme Court to reduce *Edwards*' procedural protection of the right to the presence of counsel to the equivalent of *Mosley*'s protection of the right to remain silent.[29] Instead of equalizing the amount of procedural protection as proposed, the Court expanded the scope of protection provided by *Edwards*.[30]

With the reaffirmation and extension of the *Edwards* per se rule, the

18. 423 U.S. 96 (1975), *cert. denied*, 434 U.S. 861 (1977).
19. *Id.* at 98.
20. *Miranda*, 384 U.S. at 473-74.
21. *See Mosley*, 423 U.S. at 103-04.
22. 451 U.S. 477 (1981).
23. *Id.*
24. Kamisar, *supra* note 12, at 154.
25. *Edwards*, 451 U.S. at 484-85.
26. *See Mosley*, 423 U.S. at 103-04.
27. *Edwards*, 451 U.S. 477.
28. 111 S. Ct. 486 (1990).
29. *Id.* at 492. *See generally* Respondent's Brief, *Minnick*, (No. 89-6332).
30. *Minnick*, 111 S. Ct. at 489, 491.

sustaining rationale underlying the Supreme Court's holding in *Minnick v. Mississippi* necessitates reversal of *Michigan v. Mosley*. *Mosley* should be replaced with procedural protection equivalent to the protection provided under *Minnick*: once the right to remain silent or the right to the presence of counsel is invoked, all interrogation should cease until counsel for the suspect is present.

II. LAW PRIOR TO *MINNICK*

A. Miranda v. Arizona

1. The Necessity of "Adequate Protective Devices"

Since 1936, the admissibility of confessions extracted during custodial interrogation was governed by the due process voluntariness test which involved examination of the totality of the circumstances surrounding the confession at issue.[31] Under the voluntariness test, confessions were deemed inadmissible if police tactics so pressured the suspect to confess that his will to exercise his privilege to remain silent was broken.[32] The amount of pressure that could be legally applied to the suspect under the due process test was gradually reduced from torturous brutality to marathon, tag-team interrogation sessions.[33] Physical coercion was precluded, but psychological and emotional strategies designed to weaken the suspect's will and induce confession were developed and disseminated.[34] The psychological and emotional manipulation of the suspect that was tolerable under the due process standard became the focus of the Supreme Court's attention in *Miranda v. Arizona*.[35]

The factual scenario described by the *Miranda* Court did not appear

31. Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 437 (1987) (citing Brown v. Mississippi, 297 U.S. 278 (1936)).

One of many undesirable results of applying the voluntariness test was the confusion that arose from the lack of clear guidelines for law enforcement officials and courts to follow in conforming to constitutional mandates. *Miranda*, 384 U.S. at 441-42; *Minnick*, 111 S. Ct. at 492.

See generally Laurence A. Benner, *Requiem for* Miranda: *The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59 (1989) (for a comprehensive discussion of the historical development and perversion of the privilege against self-incrimination).

32. Schulhofer, *supra* note 31, at 437.

33. *Id.*

34. *Id. Miranda* elaborated extensively on the use of psychological stratagems during custodial interrogation. The Court cited law enforcement instruction manuals used in the United States which teach and encourage insidious techniques to subvert a suspect's constitutional rights in an effort to elicit confessions. *Miranda*, 384 U.S. at 448-49 n.8-9.

Fred E. Inbau and John E. Reid, co-authors of one of the manuals primarily referred to in *Miranda*, boast that the techniques for eliciting confessions delineated in their manual derive from personal experience, and are the most superior psychological stratagems to employ. *Id.* at 449 n.9.

35. 384 U.S. 436 (1966).

to involve the overt use of psychological or emotional ploys.[36] However, due to the apparent pervasiveness of such conduct and the fact that it was judicially encouraged as a lawful government practice, the majority attempted to alleviate the effect of these insidious tactics. The Court determined that the custodial interrogation atmosphere itself is inherently coercive[37] and violative of the Fifth Amendment compulsion standard,[38] even in the absence of psychological tactics.[39] Thus, the Warren majority concluded that "adequate protective devices" must be imposed to ensure that the decision to confess is the product of the suspect's free will, not compelling pressures.[40]

Determining what protective device would provide adequate protection, the Court considered two possible procedural regulations: informing the suspect of his rights, and the presence of counsel during interrogation.[41] Initially, *Miranda* emphasized that an awareness of

36. *Id.* at 457.

37. *Id.* at 455. The manuals teach that the primary determinant of a successful interrogation is privacy—being alone with the suspect undergoing intense questioning. *Id.* at 449. The manuals also emphasize the importance of depriving the accused of every psychological advantage. *Id.* (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 1 (1962); and CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1956)).

38. *Miranda*, 384 U.S. at 461-62. In contrast to the due process voluntariness test, the Fifth Amendment compulsion standard, as implemented by *Miranda* in reliance on Bram v. United States, 168 U.S. 532 (1897), barred *any* influence on the suspect to confess. *Id.* Because the law is incapable of quantifying the force of the pressure imposed or its impact on the suspect mentally, it therefore considers a confession inadmissible if any amount of disingenuous influence is used. Schulhofer, *supra* note 31, at 446 (citing *Bram*, 168 U.S. at 565). Schulhofer adds that:

> In self-incrimination analysis, the threshold of permissible pressure is low, and more importantly, the *amount* of pressure is less significant than the reason why pressures arise. Disabilities or pressures that have the effect of discouraging silence but are not created for that reason normally are permissible. But pressure imposed for the *purpose* of discouraging the silence of a criminal suspect constitutes prohibited compulsion whether or not it "breaks the will." This is the clear teaching of the fifth amendment's core applications to compulsion by legal process. The policy served by the amendment is not limited to preventing inhuman degradation or breaking the will, but extends to all governmental efforts intended to pressure an unwilling individual to assist as a witness in his own prosecution.

Id. at 445.

39. Historically, the privilege barred pretrial interrogation that was originally conducted by overreaching magistrates and justices of the peace. Schulhofer, *supra* note 31, at 438. However, law enforcement personnel perform the role of the magistrate in secret, alone with the suspect, and without the presence of an impartial mediator. *Id.* (citing Edmund Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 27-28 (1949)). Thus, abuse of the suspect and disregard for his constitutional privileges is not only inevitable, it is virtually invited. *Id.* at 448.

Many justices believe it is inconsistent to interpret the constitution as allowing officials to coerce an uncounseled suspect to submit to custodial interrogation when the magistrates of old were barred from such improper conduct. *Id.* at 437.

40. *Miranda*, 384 U.S. at 458, 460. The Court's use of the term "free will" reflects its utilization of the Fifth Amendment compulsion standard in its analysis and demonstrates its desire to bar *any* improper inducement to speak.

41. *Id.* at 465-79.

one's rights is an absolute necessity.[42] The Court recognized, however, that mere awareness will not sufficiently mitigate the inherent compulsion of custodial interrogation.[43] Chief Justice Warren stated that the presence of counsel would sufficiently insulate the accused from compelling pressures, and is an indispensable safeguard.[44] The Warren majority added that an attorney's presence would ensure that police conduct conforms to constitutional mandates.[45] Ultimately, however, the Court failed to require the presence of counsel during custodial interrogations.[46] Instead, it created the infamous *Miranda* warnings, and mandated that officials must "adequately and effectively"[47] apprise suspects of their rights prior to interrogation.[48] Thus, *Miranda* implemented a "protective device" that was concededly insufficient to accomplish the stated goal of ensuring that one's right to choose between silence and speech remain compulsion-free.

2. Waiver: *Miranda*'s Achilles Heel

The prophylaxis created by *Miranda* operates as follows. Once a

42. *Id.* at 467-68.
43. *Id.* at 468 n.37, 469-70.
44. *Id.* at 466, 469. The Court delineated three additional advantages to requiring the presence of counsel. These advantages include: (1) enhancing the reliability of alleged confessions; (2) reducing the likelihood of police using coercive measures; and (3) assuring that the accused gives a fully accurate statement to the police, and that the statement is correctly reported by the prosecution. *Id.* at 470.
45. *Id.*
46. *Id.* at 478-79.
47. *Id.* at 467. Although the Court did not expressly define what constitutes "adequate and effective," it did instruct that the warnings must be an "effective and express *explanation*" of one's rights. *Id.* at 473 (emphasis added). It follows that anything less is inadequate. But see cases cited in 1 LAFAVE & ISRAEL, *supra* note 15, § 6.8, at 515-18 (1984), at 121-22 (Supp. 1991) that do not require accurate readings or any explanation. The typical result is that the suspect is ostensibly mislead into waiving his right.

As one researcher noted:

> Even when detectives informed suspects of their rights without undercutting devices, the advice was often defused by implying that the suspect had better not exercise his rights, or by delivering the statement in a formalized, bureaucratic tone to indicate that the remarks were simply routine, meaningless legalism. Instinctively, perhaps, detectives tended to create a sense of unreality about the warnings by bringing the flow of conversation to a halt with the statement, "* * * and now I am going to inform you of your rights." Afterwards, they would solemnly intone: "Now you have been warned of your rights," then immediately shift into a conversational tone to ask, "Now would you like to tell me what happened?" By and large the detectives regarded advising the suspect of his rights as an artificial imposition on the natural flow of the interrogation.

1 LAFAVE & ISRAEL, *supra* note 15, § 6.5, at 483-84 (1984).

48. The decision of the majority not to require the presence of counsel as the "adequate protective device" is confusing, especially in light of the fact that they devoted almost fifteen pages of their discussion to emphasizing the importance of counsel in assuring efficacious protection of accused's constitutional rights. *Miranda*, 384 U.S. at 465-79.

suspect is taken into custody, he must be "adequately and effectively apprised" of his rights. Subsequent statements are inadmissible unless the prosecution demonstrates that the accused voluntarily, knowingly, and intelligently waived his rights to silence and counsel.[49] The *Miranda* Court's aspiration of providing meaningful protection of the privilege against self-incrimination was crippled by its failure to require the presence of counsel, and by subsequent rulings attacking *Miranda*'s Achilles heel—the waiver issue.

Unfortunately, *Miranda* does not expressly define how a suspect "knowingly and intelligently" waives his rights, but does provide some clues. First, an intelligent understanding of the privilege arises only when the suspect is made aware of his rights and the consequences of relinquishing them.[50] Second, the suspect must expressly waive his rights and make an inculpatory statement.[51]

Despite the clear admonition that a suspect must expressly waive his rights, the Rehnquist Court methodically dismantled *Miranda*'s waiver standard. In *North Carolina v. Butler*,[52] the Court rejected a per se rule derived from *Miranda* requiring that waivers be explicitly made or any resulting confession is inadmissible.[53] The *Butler* court held that an explicit waiver is not "invariably necessary," and an effective waiver may

49. *Id.* at 479.

50. *Id.* at 475. In addition, *Miranda* emphasized that to convincingly demonstrate that an adequate waiver was made, the prosecution must bear a heavy burden of proof. *Id.*

The Rehnquist Court has completely disregarded the "knowingly and intelligently" standard. It has adjudicated confessions admissible when made by defendants who misunderstood the operation of their rights, and inadvertently waived them. *See, e.g.*, Connecticut v. Barrett, 479 U.S. 523 (1987) (holding that inculpatory statements were admissible when defendant, under the impression that his statements could not be used against him unless in writing, expressed a willingness to speak, but refused to sign a written statement until his attorney arrived); Colorado v. Connelly, 479 U.S. 157 (1986) (concluding that suspect's waiver was voluntary despite suffering from a psychosis that impaired his ability to make free and rational choices). Most lower courts follow the Supreme Court's lead on these issues and allow admission of confessions obviously born of ignorance and misunderstanding of the operation of one's rights. *See* 1 LAFAVE & ISRAEL, *supra* note 15, § 6.9, at 132 (Supp. 1991). *See generally* Benner, *supra* note 31, at 122-51 (for a comprehensive critique of *Connelly*). According to Benner, *Miranda*'s holding that:

> [C]ustodial interrogation, no matter how brief, constitutes compulsion prohibited under the fifth amendment—has now been overridden by the new voluntariness test established in *Connelly*. Stripped of any requirement that focuses upon the mind of the accused, this new streamlined version of voluntariness (characterized as simply the absence of police misconduct which offends the Court's sensibilities) opens the door to a wide variety of police interrogation techniques which, through deception, trickery and surprise, can produce compelling pressure upon a person in custody to speak.

Id. at 151.

51. *Miranda*, 384 U.S. at 475.

52. 441 U.S. 369 (1979).

53. *Id.* at 374-76.

be inferred from the accused's "actions and words."[54] In *Colorado v. Connelly*,[55] the "heavy" burden of proof placed on the government by *Miranda* was lowered to the preponderance of the evidence standard.[56] In *Connecticut v. Barrett*,[57] the Court held that an invocation of the right to counsel with respect to written statements does not invoke that right for purposes of oral statements.[58] In *Colorado v. Spring*,[59] the Court affirmed a waiver of *Miranda* rights despite police deception regarding the subject matter of the interrogation.[60] By affirming the validity of a waiver where an officer deceived the suspect concerning the operation of his *Miranda* rights, the Court in *Duckworth v. Eagan*[61] openly invited disingenuous police conduct.[62] Instead of protecting the privilege against self-incrimination, *Miranda*'s progeny guarantees that if officials inform the suspect of his rights, no matter how deceptive or misleading their advice may be, any subsequent statement will be admissible.[63]

Examining the rules and instructions promulgated in *Miranda* regarding the invocation and waiver of one's rights, the American Law Institute noted a perplexing, fundamental inconsistency.[64] The *Miranda*

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54. *Id* at 375.

> Faced with "actions and words" of uncertain meaning, some judges may find waivers where none occurred. Others may find them where they did. In the former case, the defendant's rights will have been violated; in the latter, society's interest in effective law enforcement will have been frustrated. A simple prophylactic rule requiring the police to obtain an *express* waiver of the right to counsel before proceeding with interrogation eliminates these difficulties.

Id. at 378-79 (Brennan, J., Marshall, J., Stevens, J., dissenting) (emphasis added). Unfortunately, the suggestion proposed by Justices Brennan, Marshall, and Stevens, quoted above, fails to remedy the fact that custodial interrogations are secret affairs and that the validity of one's "express" waiver is still dubious at best. Therefore, the presence of counsel to witness what transpires behind closed doors is the "adequate protective device" that would ensure the veracity of the government's testimony and of the suspect's waiver.

55. 479 U.S. 157 (1986).

56. *Id.* Realistically, "the *high* standard" and "*heavy* burden" of demonstrating that a suspect knowingly and intelligently waived his *Miranda* rights is actually the "*lightest* heavy burden" and the "*lowest* high standard to be found." Benner, *supra* note 31, at 145 n.383.

57. 479 U.S. 523 (1987).

58. *Id.*

59. 479 U.S. 564 (1987).

60. Benner, *supra* note 31, at 120-21.

61. 492 U.S. 195 (1989).

62. Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 87 (1989).

63. Mark Berger, *Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protection*, 49 U. PITT. L. REV. 1007, 1063 (1988).

64. 1 LAFAVE & ISRAEL, *supra* note 15, § 6.5, at 485 (1984) (citing MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 39-40 (Study Draft No. 1, 1968)).

Court insisted that merely informing the suspect of his rights is insufficient to dispel the inherent compulsion of custodial interrogation.[65] Yet it decided that after a suspect is apprised of his rights, he could then waive them and incriminate himself.[66] If it is true that the custodial atmosphere is inherently compelling unless counsel for the accused is present, then an alleged waiver is subject to compulsion if made without the presence of counsel.[67] The logical conclusion of the *Miranda* analysis is that waivers are invalid when made without an attorney present.[68]

B. *Second Level* Miranda *Safeguards*

The second level *Miranda* safeguards are those procedures which law enforcement personnel must follow after a suspect invokes his Fifth Amendment privilege.[69] Since *Miranda*, the Supreme Court has drawn a dubious distinction between the invocation of the right to remain silent, decided in *Michigan v. Mosley*, and the right to counsel, addressed in *Edwards v. Arizona*.[70] The Supreme Court has determined that if the suspect invokes his right to remain silent, police may continue their efforts to elicit a confession.[71] However, if the suspect asserts his right to the presence of counsel, police must cease their attempts to extract incriminating testimony.[72]

1. The Right to Remain Silent: *Michigan v. Mosley*

After the suspect has been informed of his rights, if he indicates in "*any manner*" a desire to remain silent, *Miranda* requires that the interrogation be immediately terminated[73] and prohibits further questioning.[74] However, the *Mosley* court continued the erosion of the *Miranda* safeguards by allowing police to resume interrogation of a suspect who

65. *Miranda*, 384 U.S. at 469-70.

66. *Id.* at 475.

67. *See* 1 LAFAVE & ISRAEL, *supra* note 15, § 6.5 at 485 (1984) (citing MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 39-40 (Study Draft No. 1, 1968)) (construing *Miranda* as suggesting that a waiver obtained from a suspect in custody should be per se involuntary unless counsel is present).

68. Kamisar, *supra* note 12, at 154.

69. *Id.* at 153.

70. *Id.* (citing Michigan v. Mosley, 423 U.S. 96 (1975) and Edwards v. Arizona, 451 U.S. 477 (1981)).

71. *See Mosley*, 423 U.S. at 102-03.

72. *Edwards*, 451 U.S. at 484-85.

73. *Miranda*, 384 U.S. at 473-74 (emphasis added).

74. *Id.* at 445.

unequivocally invokes the right to remain silent.[75] Mosley, having been informed of his *Miranda* rights, refused to answer his inquisitors' questions.[76] The interrogation ceased, but another officer arrived approximately two hours later, repeated the warnings, resumed questioning Mosley regarding a different subject, and ultimately elicited a confession.[77] Whether this confession was legally obtained would appear to be easily resolved in light of *Miranda*'s decree that "*any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.*"[78] However, the *Mosley* majority reasoned that *Miranda* could not be literally interpreted to prohibit all subsequent interrogation since, the Court presumed, the suspect's ability to cut off questioning by invoking his right dissipates the coercive pressures of custodial inquisition.[79] The *Mosley* Court concluded that the admissibility of a confession obtained after the suspect has invoked the right to remain silent turns on whether his right to cut off questioning is "scrupulously honored."[80] Because Mosley's right to silence was "scrupulously honored," the Court held that his confession was not extracted in violation of his right to remain silent.

2. The Right to the Presence of Counsel: *Edwards v. Arizona*

Miranda further declared that if the suspect expresses a desire for the assistance of counsel,[81] officials are barred from interrogating him

75. *Mosley*, 423 U.S. at 112; Valerie D. Jolicoeur, Note, *Balancing the Right to Interrogate Against the Right to Counsel:* Edwards v. Arizona, 17 GONZ. L. REV. 697, 699-700 (1982).

76. Jolicoeur, *supra* note 75, at 699.

77. *Id.*

78. *Miranda*, 384 U.S. at 474 (emphasis added). Justice Brennan interprets *Miranda* as creating a presumption of illicit compulsion when a confession is evoked through renewed interrogation. *Mosley*, 423 U.S. at 114 (Brennan, J., Marshall, J., dissenting). This presumption should only be rebutted through the presence of adequate procedural safeguards such as the presence of counsel. *Id.* Brennan further asserts that renewed questioning is itself part of the inherently compelling process of custodial interrogation that can render a confession inadmissible. *Id.*

79. *Mosley*, 423 U.S. at 102-04.

80. *Id.* at 104-06. *Mosley* instructs that the "scrupulously honored" test is satisfied when: (1) the police immediately cease the interrogation; (2) resume questioning after a few hours cessation; (3) repeat the *Miranda* warnings prior to resuming interrogation; (4) a different officer resumes questioning; and (5) subsequent interrogations are restricted to subjects unrelated to previous interrogations. Kamisar, *supra* note 12, at 155. As predicted by Kamisar, the first three factors are the minimum requirements for reinitiating interrogation after the suspect invokes his right to silence. *Id. See, e.g.*, 1 LAFAVE & ISRAEL, *supra* note 15, § 6.9, at 537 (1984), at 133-34 (Supp. 1991) (confirming Kamisar's prediction).

But see People v. Mattson, 688 P.2d 887 (Cal. 1984) (rejecting *Mosley* in favor of a rule that once a suspect invokes his privilege, any subsequent confession is per se involuntary).

81. *See* Connecticut v. Barrett, 479 U.S. 523 (1987) (holding that an invocation of the right to counsel can be limited, and if it is, the *Edwards* protection is to be commensurately limited).

until his attorney is present.[82] The Supreme Court reinforced this safeguard in *Edwards* where the defendant invoked his right to the presence of counsel, but, like Minnick, was subsequently forced to meet with interrogators who were finally successful in eliciting an incriminating statement.[83] The Court held that once the suspect asserts his right to have counsel present during questioning, unless he subsequently decides to initiate communication with the police, the suspect may not be interrogated until his attorney arrives.[84]

III. *MINNICK V. MISSISSIPPI*

Following an escape from a county jail in Mississippi, Robert Minnick and James "Monkey" Dyess were burglarizing a mobile home when they were suddenly interrupted by the arrival of two men.[85] According to Minnick, Dyess murdered one man while forcing Minnick to kill the other.[86] After fleeing the state, the escapees split up. Four months later Minnick was arrested in San Diego, California pursuant to murder warrants issued in Mississippi.[87] Minnick testified that San Diego police officers "beat [him] up," "carried him to San Diego County Jail," and interrogated him without informing him of his rights to silence and counsel.[88] Nevertheless, Minnick remained silent.[89]

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82. *Miranda*, 384 U.S. at 474. The suspect must be granted the opportunity to not only consult his attorney, but also have him present during subsequent questioning. *Id.* at 470-71. In the interim, his right to silence must be respected. *Id.* Recall *Miranda*'s directive that any confession extracted after the suspect expresses a desire to have counsel present must be the result of coercion, subtle or otherwise. *Id.* at 474.

Until *Edwards*, three approaches prevailed among federal and state courts that have confronted the question of post-invocation waiver of rights: (1) once counsel is requested, a prophylactic proscription of interrogation arises; (2) a prophylactic prohibition of interrogation is imposed except that which is initiated by the suspect; and (3) application of a case by case, totality of the circumstances examination of the alleged confession. Jolicoeur, *supra* note 75, at 703-05. *Edwards* effectively overrules the third approach.

83. *Edwards*, 451 U.S. at 478-79. During the coerced interrogation, Edwards willingly conversed with the detective, but adamantly refused to allow his testimony to be taped-recorded (plausibly reflecting a misunderstanding of the operation of his rights). *Id.* Note the striking factual similarity to *Minnick*. Minnick eventually made a statement, but was unwilling to sign a waiver.

84. *Edwards*, 451 U.S. at 484-85. For cases defining "initiation," see 1 LAFAVE & ISRAEL, *supra* note 15, § 6.9, at 137-38 (Supp. 1991).

85. *Minnick*, 111 S. Ct. at 488.

86. *Id.* at 489; Petitioner's Brief at 2-5, *Minnick* (No. 89-6332); Respondent's Brief at 2-6, *Minnick* (No. 89-6332).

87. *Minnick*, 111 S. Ct. at 488; Petitioner's Brief at 2 (No. 89-6332).

88. Minnick v. State, 551 So. 2d 77, 82 (Miss. 1988), rev'd, 111 S. Ct. 486 (1990).

89. *Minnick*, 111 S. Ct. at 488; Petitioner's Brief at 3 (No. 89-6332); *Minnick*, 551 So. 2d at 82. According to *Miranda*, Minnick's refusal to respond constitutes an invocation of the right to remain silent. *Miranda*, 384 U.S. at 473-74.

The following day, two agents from the Federal Bureau of Investigation ("FBI") arrived to question Minnick.[90] When jailers arrived to escort him to the interview, Minnick declared that he did not want to see the FBI agents.[91] Despite Minnick's unequivocal invocation of his right to remain silent, the detention officer forced Minnick to meet with the investigators.[92] During the interrogation, Minnick refused to sign a form waiving his rights to silence and counsel.[93] When the agents began to question him regarding the murders, he refused to answer, and requested assistance of counsel. The agents persisted, and Minnick steadfastly repeated that he would only make a statement with his lawyer present.[94] Finally, the agents respected his requests, and ceased their interrogation efforts.[95] Minnick was provided counsel, with whom he met on at least two occasions, and testified that he was instructed not to respond to any questioning or sign any waiver forms.[96]

Two days later, Deputy Sheriff Denham arrived from Mississippi to interrogate Minnick.[97] Once again, Minnick was told by jailers that he had to talk to Denham and that he "could not refuse."[98] Prior to the interrogation, Denham read Minnick his *Miranda* rights, but Minnick continued to decline to discuss the murders, sign a waiver form, or allow any recording of the interrogation to be made.[99] Eventually Denham succeeded in engaging Minnick in conversation concerning subjects unrelated to the crimes and ultimately elicited an inculpatory statement.[100]

90. *Minnick*, 111 S. Ct. at 488; Petitioner's Brief at 3 (No. 89-6332). In some jurisdictions this reinitiation of interrogation would be satisfactory under *Mosley*. 1 LAFAVE & ISRAEL, *supra* note 15, § 6.9, at 134 (Supp. 1991).

91. *Minnick*, 111 S. Ct. at 488; Petitioner's Brief at 3 (No. 89-6332). Minnick's second invocation of his right to remain silent was not scrupulously honored.

92. *Minnick*, 111 S. Ct. at 488.

93. *Id.*

94. *Id.*

95. *Id.* Minnick asserted his right to counsel three times before his request was finally honored. Petitioner's Brief at 3 (No. 89-6332).

96. *Minnick*, 111 S. Ct. at 488, 493.

97. *Id.* at 488.

98. *Id.* at 488-89 (emphasis added).

99. *Id.* at 489, 493; Petitioner's Brief at 4, 11 (No. 89-6332).

100. *Minnick*, 111 S. Ct. at 493. The infamous Inbau-Reid interrogation manual instructs law enforcement officials to respond to suspects who initially refuse to discuss matters under investigation in the following manner:

> Pretend to concede him his right, then ask him questions that have no bearing on the matter under investigation. As a rule, the manual advises us, a suspect will answer questions unrelated to the investigation. Once he does, the manual tells us, the interrogator may gradually "start in with questions pertaining to the offense [under investigation]." . . . [T]he manual assures us, "*there are very few persons who will persist in their initial refusal to talk after the interrogator has handled the situation in this suggested manner.*"

Relying on *Edwards v. Arizona*,[101] Minnick's attorney filed three motions attacking the admissibility of the confession.[102] Due primarily to Denham's testimony regarding the confession, the trial court denied each motion, convicted Minnick of murder, and sentenced him to death.[103] Appealing to the Mississippi Supreme Court, counsel reiterated that once Minnick had invoked his right to the presence of an attorney, the state was constitutionally barred from reinitiating interrogation of Minnick without his attorney present.[104] Unpersuaded, the court held that Minnick's Fifth Amendment right to counsel was satisfied under *Edwards* when an attorney was made available to him prior to the interrogation with Denham.[105] Therefore, the confession was admissible and his conviction was upheld.

IV. THE *MINNICK* DECISION

The question addressed by the United States Supreme Court was whether a confession is obtained in violation of the Fifth Amendment if the suspect invokes the right to counsel, confers with counsel, and police then reinitiate interrogation without the accused's attorney present.[106]

Kamisar, *supra* note 12, at 171-72 (alteration in original) (emphasis added) (quoting FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 111-12 (1st ed. 1962)).

According to the records, after being brutalized by San Diego police officers, Minnick unequivocally indicated a desire to exercise his right to remain silent and to negotiate with officials only through his attorney at least six different times (including his refusals to sign waiver forms). *Minnick*, 111 S. Ct. at 489; Petitioner's Brief at 2-5 (No. 89-6332).

101. 451 U.S. 477 (1981); Petitioner's Brief at 5, *Minnick* (No. 89-6332). Edwards, arrested for robbery, burglary, and first degree murder, was informed of his *Miranda* rights and submitted to questioning. He later declared that he wanted an attorney before consummating a deal with police and the interrogation ceased. The next morning, the detention officer informed Edwards that two other detectives wished to question him. Edwards said that he did not want to speak to them, but the officer told him that he had no choice. The detectives read him his rights, confronted him with evidence that allegedly implicated him, and eventually elicited a confession. *Edwards*, 451 U.S. at 478-79. *Edwards'* holding reads as follows:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities *until counsel has been made available to him*, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85 (emphasis added).

102. Petitioner's Brief at 5, *Minnick* (No. 89-6332).

103. *Id.*

104. *Id.*

105. Minnick v. State, 551 So. 2d 77, 83 (Miss. 1988), *rev'd*, 111 S. Ct. 486 (1990).

106. *Minnick*, 111 S. Ct. at 488. *See, e.g.*, Roper v. State, 375 S.E.2d 600 (Ga.), *cert. denied*, 110 S. Ct. 290 (1989). Based on *Edwards*, the Georgia Supreme Court held a confession inadmissible

The *Minnick* Court determined that the *Edwards* rule, by preventing police from persistently reinitiating interrogation,[107] is designed to ensure that incriminating statements are not precipitated by compelling pressures.[108] Therefore, the *Minnick* Court decided that the ban on police-initiated interrogation should not be lifted once the accused has merely consulted with counsel.[109] Unless the integrity of custodial confessions can be assured through specific institutional safeguards, the Supreme Court concluded that neither the utilization of admissions nor the procurement of waivers are constitutionally legitimate.[110]

V. ANALYSIS

By extending *Edwards*, suspects are protected from tenacious police efforts to compel a waiver of previously asserted rights, and from the coercive pressures of prolonged incarceration.[111] In support of its expansive interpretation of the *Edwards* prophylaxis, the majority relies on: (1) a literal interpretation of *Miranda*'s language as utilized in *Edwards* that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present";[112] (2) the policy established in *Miranda* and reaffirmed in *Edwards* of ensuring that the confession is not the result of coercive pressures;[113] (3) the clarity of the rule's command and the certainty of its application;[114] and (4) a repudiation of Mississippi's proposed exception.[115]

A. *Literal Interpretation of* Miranda

To determine the proper second level procedure to follow when the suspect invokes his right to counsel, the *Minnick* Court recalled that in

where police reinitiated interrogation without the presence of the suspect's attorney despite the fact that the suspect had consulted with the attorney and was instructed to remain silent. *Id.* at 604.

107. *Minnick*, 111 S. Ct. at 489 (citing Smith v. Illinois, 469 U.S. 91, 98 (1984)). Without the *Edwards* prophylactic rule, through "badger[ing] or overreaching," no matter how "explicit or subtle, deliberate or unintentional," officials could wear down the accused's resolve and persuade him to confess despite his previous assertion of *Miranda* rights. *Id.*

108. *Id.*

109. *See id.*

110. *See id.* at 492.

111. *Id.* at 491. *Minnick* reaffirms that the essence of *Edwards* is preserving the integrity of the accused's choice to invoke his rights or relinquish them. *Id.*

112. *Miranda*, 384 U.S. at 474; *Edwards*, 451 U.S. at 484-85.

113. *Minnick*, 111 S. Ct. at 489.

114. *Id.* at 490.

115. *Id.* at 491-92.

Edwards it had focused on *Miranda*'s literal instruction that all questioning must be terminated until an attorney is present.[116] The *Minnick* Court also relied on literal interpretations of other excerpts from *Miranda* in its decision to extend the *Edwards* protection.[117] First, the presence of an attorney is an indispensable safeguard which ensures that the suspect's rights are not violated, and that his statements are not the result of custodial compulsion.[118] Second, the necessity of having an attorney includes not only the right to confer with counsel, but also to have him present during interrogations.[119]

In *Mosley*, however, the majority rejected *Miranda*'s literal instruction that any subsequent statement obtained during police-initiated interrogation must be the fruit of compulsion.[120] The *Mosley* Court claimed that *Miranda*'s requirement that interrogation cease after an assertion of the right to silence "tells us nothing" since it fails to prescribe when questioning may resume.[121] A perusal of the pertinent *Miranda* text, in light of its fifteen page discussion of the necessity of counsel, reveals what the *Miranda* court is "telling us": after a suspect asserts his right to silence, the police cannot resume questioning or in any way seek a confession.[122]

An illuminating footnote clarifies what *Miranda* regarded as the proper procedure after the suspect indicates a desire to remain silent. Further police-initiated questioning *may* be permissible *if* the suspect's

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116. *Id.* at 490 (citing *Miranda*, 384 U.S. at 474).

117. *Id.* at 491 (citing *Miranda*, 384 U.S. at 466).

118. *Miranda*, 384 U.S. at 466.

119. *Minnick*, 111 S. Ct. at 491 (citing to *Miranda*, 384 U.S. at 470).

120. *See Mosley*, 423 U.S. at 100-04. *Miranda*'s procedural instruction rejected by *Mosley* states as follows:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior 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.

Miranda, 384 U.S. at 473-74 (emphasis added) (footnote omitted).

121. *Mosley*, 423 U.S. at 109 (citing *Miranda*, 384 U.S. at 474).

122. *Miranda* subsequently stated that if the police continue to interrogate the accused without counsel present and eventually elicit a confession, the state bears a heavy burden of proving that the defendant knowingly and intelligently waived his privilege. *Miranda*, 384 U.S. at 475. However, Kamisar persuasively argues that the logical interpretation is that when a suspect asserts his right to remain silent, officials are precluded from renewing interrogation. But, the suspect can choose to re-engage the police in communication. Kamisar, *supra* note 12, at 154. For a comprehensive discussion of *Miranda* waivers, compare Berger, *supra* note 63, with Benner, *supra* note 31, at 143-47.

attorney is present.[123] Moreover, *Miranda* instructs that even if an attorney is present, and even if the interrogation is devoid of coercive police conduct, inculpatory statements might still be found inadmissible.[124] Dissenting in *Mosley*, Justices Brennan and Marshall reach the same conclusion.[125]

As an initial, foundational premise to the *Mosley* holding,[126] the Court claims that by exercising his right to remain silent, the suspect can regulate when interrogations take place, what questions are asked, and the duration of the inquisitions.[127] This erroneously assumes, however, that the suspect understands the procedural ramifications of his invocation of the right to remain silent. Most people, even most attorneys, do not know that saying "I want to see a lawyer" provides greater procedural protection than saying "I don't want to say anything."[128]

Another flawed contention advanced by the *Mosley* majority succumbs to the same reasoning that undermines its first premise. The *Mosley* Court argued that preventing the police from reinitiating interrogation would "deprive suspects of an opportunity to make informed and intelligent assessments of their interests."[129] This assertion is based on a mistaken supposition that the suspect is cognizant of the procedural consequences of his decisions. Moreover, it irrationally presumes that a suspect can assess his legal interests. Only through the assistance and presence of counsel can the suspect accurately appraise his legal situation and the interests at stake.[130]

Mosley's second premise, that scrupulously honoring the suspect's right to cut off questioning alleviates the coercive pressures of the custodial environment, is equally faulty. The police can hold the suspect for

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123. *Miranda*, 384 U.S. at 474 n.44.

> If an individual indicates his desire to remain silent, but has an attorney present, there *may* be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel *might* be free of the compelling influence of the interrogation process and *might* fairly be construed as a waiver of the privilege for the purpose of these statements.

Id. (emphasis added).

124. *Id.*

125. *Mosley*, 423 U.S. at 115-17 (Brennan, J., and Marshall, J., dissenting); Kamisar, *supra* note 12, at 154.

126. *Mosley* held that the admissibility of confessions elicited after the suspect asserts his right to remain silent turns on "whether his right to cut off questioning was scrupulously honored." *Id.* at 104.

127. *Id.* at 103-04.

128. Kamisar, *supra* note 12, at 157.

129. *Mosley*, 423 U.S. at 102.

130. Kamisar, *supra* note 12, at 157.

lengthy periods of incommunicado incarceration, and persistently interrogate him until they are able to wear down his resolve and extract an inculpatory statement.[131]

The *Mosley* majority also claimed that a literal interpretation would "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity."[132] By focusing on the suspect's right to terminate questioning, the *Mosley* Court circumvented *Miranda*'s instruction that a subsequent confession is the result of compulsion.[133] Since *Mosley*'s holding has been shown to be fundamentally defective due to faulty premises, suspects are left without adequate protection. Thus, even if police scrupulously honor the suspect's right to silence and later return and extract a confession, it violates the accused's Fifth Amendment privilege. The presence of counsel is the adequate protective device that would legitimate all custodial interrogation.

B. *Ensuring that Subsequent Confessions Are Not the Result of Coercion*

Refusing to find that consultation with an attorney satisfies the Fifth Amendment, the *Minnick* Court declared that the purpose of *Edwards* is to protect the accused's right to have counsel *present* during custodial interrogation.[134] Since the right to counsel is designed to assure that subsequent statements are not induced by custodial pressure, it would be worthless if the police are allowed to descend upon him immediately after his counselor leaves.[135] The Court based its opinion on *Miranda*'s conclusion that consultation with counsel is insufficient, and that the *presence* of counsel provides the necessary protective shield.[136]

In contrast, if the right to remain silent is asserted, *Mosley* allows officials to continually pressure the accused.[137] Thus, it is lawful to pressure a suspect into waiving his right to silence, but unconstitutional to compel him to waive his right to counsel. There is no justifiable reason to maintain such a procedural distinction.

131. *See Miranda*, 384 U.S. at 467, 476.

132. *Mosley*, 423 U.S. at 102. In light of pervasive abuses prevalent under the procedural guidelines established in *Mosley*, "legitimate" investigative activity must be regulated to provide some semblance of protection to the individual.

133. *Id.* at 103-04.

134. *Minnick*, 111 S. Ct. at 491.

135. *Id.* at 492.

136. *Id.* at 491 (citing *Miranda*, 384 U.S. at 470).

137. *Mosley*, 423 U.S. at 102-04.

C. *Clear and Unequivocal Guidelines*

The *Minnick* Court emphasized that an important aspect of the *Edwards* ruling is the clarity and certainty of its procedural guidelines.[138] By providing law enforcement officials with specific, concrete procedural rules, ambiguous determinations of the voluntariness of waivers are eliminated.[139] Replacing *Mosley* with a similar bright-line rule would eliminate the ambiguity surrounding the issue of whether a suspect's right to cut off questioning has been scrupulously honored.[140] Such a rule, according to *Minnick* and others, would provide additional clear and unequivocal guidelines to benefit both the state and the accused.[141]

D. *Rejection of Mississippi's Proposal*

Mississippi urged the Supreme Court to reduce the amount of protection provided under *Edwards* to the equivalent of the protection established under *Mosley*.[142] Mississippi argued that when police cease interrogation efforts upon the suspect's request to meet with counsel, the suspect will be confident that subsequent requests will also be respected.[143] The State concluded that the psychologically coercive elements of custody are thereby sufficiently ameliorated.[144] As long as the police scrupulously honor the suspect's right to have counsel present when requested, law enforcement personnel should be allowed to continually confront and interrogate him.[145] The State presciently cautions, however, that the police should not be allowed to subversively utilize this right to pressure the suspect into waiving his previously asserted privilege.[146] But how many times would the suspect have to reassert his right until his resolve deteriorates, he realizes that the right is meaningless,

138. *Minnick*, 111 S. Ct. at 490. The Warren Court decided to review *Miranda* for the purpose of establishing concrete constitutional guidelines to govern the activity of law enforcement personnel and the decision making process of state and federal courts. *Miranda*, 384 U.S. at 441-42.

139. *Miranda*, 384 U.S. at 441-42.

140. *Minnick*, 111 S. Ct. at 490. For a list of cases interpreting whether a suspect's right to silence has been scrupulously honored under *Mosley*, see 1 LAFAVE & ISRAEL, *supra* note 15, § 6.9, at 538-39 (1984), at 134-35 (Supp. 1991).

141. *Minnick*, 111 S. Ct. at 490 (citing Fare v. Michael C., 442 U.S. 707, 718 (1979)); Arizona v. Roberson, 486 U.S. 675, 679-82 (1988); Michigan v. Jackson, 475 U.S. 625, 634 (1986); Shea v. Louisiana, 470 U.S. 51 (1985); Smith v. Illinois, 469 U.S. 91, 98 (1984) (per curiam); Solem v. Stumes, 465 U.S. 638, 648 (1984); Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983).

See Schulhofer, *supra* note 31, at 448-52 for a discussion of the Supreme Court's use of bright-line, per se rules as an adjudicatory tool.

142. *See generally* Respondent's Brief, *Minnick* (No. 89-6332).

143. *Id.* at 17-20.

144. *Id.*

145. *Id.*

146. *Id.* at 19.

gives in to police tenacity, and incriminates himself? It is clear that any subsequent incriminating statement made in the absence of counsel would be subject to the coercive pressures of renewed questioning.

The *Minnick* majority rejected this proposal for several reasons. First, since a "scrupulously honored" rule would allow the police to continually pressure the suspect into waiving his previously asserted right, the right to have counsel present would not be adequately protected.[147] The concept of this proposal was addressed and repudiated in *Miranda.* The *Miranda* Court recognized that initial advice given by an attorney is insufficient to dispel the compulsion inherent in the secret world of custodial interrogation.[148]

Second, the "scrupulously honored" rule would eradicate the clear and unequivocal nature of *Edwards'* second level right-to-counsel procedure.[149] Third, because the *Edwards* protection could "pass in and out of existence multiple times prior to arraignment, at which point the same protection might reattach by virtue of [the] Sixth Amendment," implementation of the proposal would spawn inordinate confusion.[150] Actually, due to years of experience under *Mosley*'s guidelines, confusion would not arise. Officials would understand that as long as they "honor" an invocation of the right to counsel, and temporarily cease interrogation, they could reinitiate questioning until the accused reasserts his right.

Fourth, the proposed rule would create a sensitive issue over what constitutes sufficient consultation to satisfy *Edwards,* and would lead to inquiries skirting into the impermissible realm of the attorney-client privilege.[151] Finally, the Court anticipates that since the police would be free to reinitiate interrogation of the accused once he has consulted with counsel, dilatory assistance from counsel would be encouraged.[152]

E. *A Final Argument: Primary Right v. Derivative Right*

By precluding the admissibility of a statement obtained in the absence of counsel, *Minnick* affirms *Edwards'* establishment of greater protection for the suspect who invokes the right to counsel than the suspect

147. *Minnick,* 111 S. Ct. at 491.
148. *Id.* (citing *Miranda,* 384 U.S. at 470).
149. *Id.* at 492.
150. *Id.* (citing Michigan v. Jackson, 475 U.S. 625 (1986)).
151. *Id.*
152. *Id.*

who invokes the right to silence.[153] Since the right to counsel is a derivative right granted to ensure the protection of the privilege against self-incrimination, why should the derivative right receive greater protection than the right to silence?[154] Yale Kamisar argues that it is equally wrong for the police to renew interrogation of the suspect after he invokes the primary right to silence as it is when he invokes the derivative right to counsel.[155] He further asserts that if the accused indicates or expresses that he does not want to speak, then he is in essence invoking both his primary right to silence and his derivative right to counsel.[156] Thus, after indicating in any manner an unwillingness to speak, the suspect should not be subject to further police-initiated interrogation until counsel is present. As Kamisar concludes, either *Mosley* or *Edwards* was wrongly decided. The same standard of procedural protection should be applied to both the right to counsel and the right to silence, either according to the dictates of *Mosley* or *Edwards*.[157] It is illogical for the Supreme Court to continue to recognize two different procedures.

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153. Kamisar, *supra* note 12, at 154.

154. *Id.* at 157. Writing in dissent with Chief Justice Rehnquist, Justice Scalia states: "Either *Mosley* was wrongly decided or *Edwards* was." *Minnick*, 111 S. Ct. at 497 (quoting Kamisar, *supra* note 12, at 157). However, Justice Scalia conveniently failed to include Kamisar's conclusion. Kamisar concluded that *Mosley* was incorrectly decided. Kamisar, *supra* note 12, at 157.

155. Kamisar, *supra* note 12, at 157. Kamisar disagrees with the Court's interpretation that *Miranda* allows greater flexibility for police to resume questioning the suspect when he invokes the right to remain silent than when he asserts the right to the presence of counsel. *Id.* at 154. Kamisar argues:

> If anything, the language [*Miranda*, 384 U.S. at 470] *seems* to cut the other way: (1) once a suspect asserts his right to remain silent, *the police* may not resume interrogation period (but the *suspect* may change his mind and "initiate" reinterrogation); (2) once the suspect invokes his right to counsel the police may not resume interrogation (again, this doesn't mean the suspect can't change his mind, *without any pressure or prompting by the police*, and "initiate" reinterrogation) *unless and until* an attorney arrives and meets with his client.

Id. He continues that "a more plausible interpretation" which is supported by an accompanying footnote, *Miranda*, 384 U.S. at 474 n.44, "is that *regardless of which right the suspect asserts*, police interrogation may resume in the presence of counsel." *Id.*

156. *Id.* Kamisar cites the A.L.I., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.8(2)(d) (1975) for further support for this interpretation noting that the American Law Institute makes no distinction between invocation of the right to silence and the right to counsel. *Id.* at 154-55. The Code provides that if the suspect asserts either right, officials may not pursue a waiver or question the suspect until he has met with an attorney. *Id.* (citing MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE commentary at 371 (1975)). Further supporting the proposition that the distinction between the two procedures is erroneous is the fact that only one year prior to *Mosley*, the National Conference of Commissioners on Uniform State Laws approved a rule of criminal procedure that did not recognize a distinction. *Id.* at 155.

157. *Id.* at 157.

VI. Conclusion

The *Minnick* court concluded that mere consultation with one's attorney is itself an insufficient safeguard of the privilege against self-incrimination because it does not prevent police from continually confronting the accused without counsel present, nor does it eliminate the inherent pressures that accompany prolonged incarceration. Thus, to ensure that subsequent statements are not induced by coercive pressures of custody, the *Minnick* court extended the *Edwards* prophylaxis. In contrast, *Mosley's* "scrupulously honored" test affords law enforcement officials the subversive opportunity to retain the accused in prolonged custody subject to innumerable attempts to extract an incriminating statement. Therefore, even if its demonstrable analytical flaws are ignored, *Mosley* should be reversed based on the fact that it fails to ensure that subsequent statements are not induced by coercive pressures.

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