WHAT DOES Edwards BAN?: INTERROGATING, BADGERING, OR INITIATING CONTACT?

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I. INTRODUCTION

The suspects who are best served by Miranda today are the small minority who actually assert their rights, particularly those who invoke the right to counsel.¹ Michigan v. Mosley requires the police to “scrupulously honor” the rights of suspects who wish to remain silent,² and the Edwards v. Arizona line of cases provides even greater protection to those who ask for a lawyer.³ Precisely what bars Edwards erects has been the subject of some controversy, however, as the Supreme Court for many years fluctuated between describing Edwards as simply prohibiting the police from interrogating suspects and taking the broader view that Edwards prevents law enforcement officials from even approaching suspects in ways that do not qualify as “interrogation” for purposes of Miranda.

Unsurprisingly, the mixed signals coming from the Supreme Court generated a division among the lower courts, a conflict that was seemingly resolved in favor of the broader interpretation by the Court’s 2010 opinion in Maryland v. Shatzer.⁴ In dictum in Shatzer, the majority took the position that Edwards bars not just interrogation, but also “subsequent attempts” at interrogation, “requests for interrogation,” and “any efforts to get [the suspect] to change his mind.”⁵ Despite Shatzer, however, the lower courts continue to be divided.

This Article discusses the post-Shatzer record on this issue, criticizing the courts that have ignored Shatzer’s straightforward language and continue to limit Edwards to circumstances where police conduct rose to the level of

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¹. See Richard A. Leo, Miranda’s Irrelevance: Questioning the Relevance of Miranda in the Twenty-First Century, 99 Mich. L. Rev. 1000, 1009 (2001) (citing studies finding that about 80% of suspects waive their Miranda rights); George C. Thomas III, Stories About Miranda, 102 Mich. L. Rev. 1959, 1976 (2004) (reporting similar figures, and noting that “[m]ore than 10 times as many suspects waived Miranda as invoked” their rights); see also William J. Stuntz, Miranda’s Mistake, 99 Mich. L. Rev. 975, 988 (2001) (citing the fact that “[a]lmost no one invokes his Miranda rights once questioning has begun” as evidence that “Miranda is not working”). But cf. Lawrence Rosenthal, Against Orthodoxy: Miranda Is Not Prophylactic and the Constitution Is Not Perfect, 10 Chapman L. Rev. 579, 609 (2007) (responding that Miranda “produces valid waivers under long-settled conceptions of waiver,” and, while those waivers “may often be foolish, . . . they are made with full awareness of the rights foregone”).


⁴. Id. at 105, 113 n.8.

⁵. Id. at 105, 113 n.8.
“interrogation.” The Article also makes the broader point that even seemingly precise legal rules, like the one the Court created in Edwards, have the potential to unravel in surprising ways.

In defending the broader interpretation of the Edwards prohibition, the Article proceeds in four parts. Part I addresses the Supreme Court case law leading up to Shatzer and then the Shatzer dictum, concluding that Shatzer’s conception of Edwards’ scope is more faithful to the Court’s opinion in Edwards itself. Part II then describes the lower courts’ treatment of Shatzer and their conflicting views on the reach of the Edwards ban. Turning to the policy considerations underlying the Edwards line of cases, Part III maintains that those concerns likewise support the broader view of Edwards and goes on to advocate that cases involving post-invocation confessions be analyzed by asking which party reinitiated the conversation, applying the same standard of initiation to both the suspect and the police. Under this approach, the type of comments made by a suspect that would be considered initiation and thereby would remove her from the Edwards shield would likewise be treated as initiation when made by law enforcement officials and thus would invalidate the suspect’s subsequent waiver of Miranda. Part IV concludes.

II. THE EDWARDS LINE OF CASES

A. The Court’s Pre-Shatzer Precedent

In 1975, the Supreme Court focused for the first time on suspects who assert their Miranda rights, holding in Michigan v. Mosley that the police must “scrupulously honor” the rights of suspects who want to remain silent.6 The Court found that standard met on the facts before it, given that interrogation ended “immediately” after Mosley invoked his rights, he was given a “significant” break of more than two hours, and it was a different police officer who subsequently readministered Miranda warnings and questioned Mosley about “an unrelated” crime.7

Six years later, Edwards v. Arizona adopted a different approach for those who instead invoke the right to counsel, holding that a suspect who has “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.”8 “[A] valid waiver” of the right to counsel, the Court admonished, “cannot be established by showing only that [the suspect] responded to further police-initiated custodial interrogation.”9

7. Id. at 104, 106.
9. Id. at 484.
The Court later extended the Edwards protection in Arizona v. Roberson to apply to a case reminiscent of Mosley where police wanted to discuss a charge different from the one on the table when the suspect first asked for a lawyer.10 The Court distinguished Mosley on the ground that invoking the right to counsel creates a “presumption” that the suspect “considers himself unable to deal with the pressures of custodial interrogation without legal assistance”—a presumption, the Court thought, that “does not disappear simply because the police have approached the suspect . . . about a separate investigation.”11 Roberson also refused to create a good-faith exception to the Edwards rule, reasoning that “Edwards focuses on the state of mind of the suspect and not of the police.”12

The Edwards shield was then broadened still further in Minnick v. Mississippi to protect a suspect who had been given an opportunity to speak to a lawyer subsequent to his invocation of the right to counsel.13 Refusing to take the position that “Edwards terminates once counsel has consulted with the suspect,” the Court instead read Edwards to prohibit “police-initiated interrogation” unless a lawyer was actually with the suspect “at the time of questioning.”14 Assuming a suspect asserts the right to counsel sufficiently clearly,15 and does not fall into the trap of subsequently “initiat[ing]” contact with the police,16 then, the Supreme Court’s case law provides a greater degree of

12. Roberson, 486 U.S. at 687. See also Michael J.Z. Mannheimer, The Two Mirandas, 43 N. KY. L. REV. 342 (2016) (citing this discussion in Roberson to illustrate the discrepancies in the Court’s precedents on the fundamental question whether Miranda was meant to regulate police conduct or to address the admissibility of suspects’ statements).
14. Id. at 151, 153.
15. See Davis v. United States, 512 U.S. 452, 459 (1994) (holding that the Edwards protection is triggered only if a suspect “unambiguously request[s] counsel, . . . sufficiently clearly that a reasonable police officer . . . would understand the statement to be a request for an attorney”). Davis’ clear invocation rule has deservedly come under heavy fire. See, e.g., Janet E. Ainsworth, In a Different Register: The Pragmatics of Powerlessness in Police Interrogation, 103 YALE L.J. 259, 302 (1993) (arguing that expecting suspects to make “direct, assertive, unqualified invocations of counsel” is not only inconsistent with Miranda’s basic premise that custodial interrogation is inherently coercive, but is also “a gendered doctrine that privileges male speech norms, . . . thus disadvantag[ing] women and other marginalized and relatively powerless groups in society”); Tonja Jacobi, Miranda 2.0, 50 U.C. DAVIS L. REV. 72-73 (2016), available at http://ssrn.com/abstract=2656405 (recommending that police either inform suspects they must unambiguously invoke Miranda or ask whether they wish to assert their rights); Kit Kinports, Criminal Procedure in Perspective, 98 J. CRIM. L. & CRIMINOLOGY 71, 106-07 (2007) (observing that Davis’ reasonable police officer standard strayed from the Court’s focus on the suspect’s perspective in other Miranda cases); Laurent Sacharoff, Miranda, Berghuis, and the Ambiguous Right to Cut Off Police Questioning, 43 N. KY. L. REV. 391 (2016) (noting that some of the case law applying Davis essentially reasons that “no means yes”).
16. Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (plurality opinion) (holding that the defendant lost the protection of Edwards by asking, “Well, what is going to happen to me now?”).
protection to suspects who ask for a lawyer than to those who invoke the right to remain silent. 17

Exactly what conduct is barred by Edwards has been the subject of debate, however, as the Supreme Court for many years alternated between describing Edwards as simply prohibiting the police from interrogating suspects and adopting the broader position that they may not reinitiate contact with suspects in ways that might not constitute “interrogation” within the meaning of Miranda— for example, giving suspects information about the case or asking whether they have changed their minds about wishing to speak with a lawyer. 18 In discussing the relevant cases below, I shall refer to these, respectively, as the narrow and broad interpretations of the Edwards ban. 19

1. Edwards v. Arizona

The confusion arguably began with Edwards itself. Edwards was decided just a year after Rhode Island v. Innis had determined that “interrogation” for

For further discussion of Bradshaw’s initiation exception, see infra notes 144-48 and accompanying text.

17. For further discussion of the rationale underlying the Court’s decision to differentiate between the two types of invocations, see infra notes 41-43 and accompanying text. The distinction nevertheless remains controversial. Compare Geoffrey S. Corn, Miranda, Secret Questioning, and the Right to Counsel, 66 ARK. L. REV. 931, 947, 949 (2013) (observing that Mosley and Edwards are based on “different premise[s]” and that the suspect who asks for a lawyer “place[s]” the police “on notice” that she “does not feel capable of dealing with” them alone), and William J. Stuntz, Waiving Rights in Criminal Procedure, 75 VA. L. REV. 761, 821 (1988) (agreeing that “the seeming arbitrariness of the distinction” can be explained on this ground), with Steven P. Grossman, Separate but Equal: Miranda’s Rights to Silence and Counsel, 96 MARQ. L. REV. 151, 153, 154 (2012) (arguing that the “distinction . . . was highly questionable from its genesis” and is “unsupported by either theoretical or pragmatic justifications”), and Yale Kamisar, The Edwards and Bradshaw Cases: The Court Giveth and the Court Taketh Away, in 5 The Supreme Court: Trends and Developments 1982-1983, at 153, 157 (Jesse H. Choper et al. eds., 1984) (questioning whether “[t]he average person” really distinguishes between the two rights, and concluding that “either Mosley was wrongly decided or Edwards was”). See also Marcy Strauss, Reinterrogation, 22 HASTINGS CONST. L.Q. 359, 384 (1995) (noting that Miranda was “at best equivocal” on this point).

18. See Maryland v. Shatzer, 559 U.S. 98, 115 (2010) (distinguishing between “reinterrogating?” and “asking . . . permission to be interrogated” (emphasis omitted)); 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.7(c), at 782 & n.111, 787 & n.133 (3d ed. 2007) (citing conflicting lower court cases on the question whether police engage in “interrogation” when they provide information about the evidence they have collected or the charges a suspect might face).

19. Compare Richard A. Leo & Welsh S. White, Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with the Obstacles Posed by Miranda, 84 MINN. L. REV. 397, 428 & n.156 (1999) (interpreting Edwards as allowing police to “subly persuad[e]” a suspect to change her mind “[s]o long as the police persuasion does not amount to interrogation,” though recognizing that the Court’s opinion “may be read” more broadly to prohibit police from “attempting to induce a waiver”), with Corn, supra note 17, at 941 (reading Edwards and its progeny, including Shatzer, to bar “even a police request for a suspect to reconsider his invocation”), and Stuntz, supra note 17, at 819 (endorsing the broad view that Edwards “cuts the police off entirely” so that they “cannot refuse to take no for an answer”).
purposes of Miranda consists of “either express questioning or its functional equivalent,” with the latter defined as “any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.” Opening with a quotation from Miranda, the majority in Edwards observed that, once a suspect invokes the right to counsel, “the interrogation must cease until an attorney is present.” The Court’s reference here to “the interrogation” presumably relates to the interrogation session already in progress or about to begin when a suspect asserted her rights, especially given that the Miranda opinion at that point was discussing “the right to cut off questioning” “at any time prior to or during questioning.” Alternatively, however, the Edwards Court could have meant that police conduct falling short of “interrogation” as defined in Innis need not “cease” upon a suspect’s invocation of her rights.

The most direct support in the Court’s decision in Edwards for reading the ruling narrowly is the unqualified statement that police may not “reinterrogate” a suspect who has invoked the right to counsel. But the rest of the opinion is either more equivocal or supports the broader interpretation of the Edwards ban.

Notably, Innis’ interrogation standard does not appear anywhere in the majority’s opinion in Edwards. This omission is somewhat surprising given that Innis marked the first time the Court had interpreted the concept of “interrogation” for Miranda purposes and presumably was fresh in the Justices’ minds. If “interrogation” was meant to be a key component of the Edwards analysis, one would have expected the Court’s ruling to include at least the definition of the term.

The Edwards majority did cite to Innis following its observation that “[a]bsent [custodial] interrogation, there would have been no infringement of the

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21. Edwards v. Arizona, 451 U.S. 477, 482 (1981) (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)). This phrase is a staple feature in the Edwards line of cases. See, e.g., Davis v. United States, 512 U.S. 452, 462 (1994) (“We held in Edwards that if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present”); see also Minnick v. Mississippi, 498 U.S. 146, 150 (1990); Arizona v. Roberson, 486 U.S. 675, 680 (1988). In practice, however, invoking the right to counsel may end the interrogation session, but it does not typically result in the appearance of an actual lawyer. See Mark A. Godsey, Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings, 90 MINN. L. REV. 781, 804, 797 (2006) (observing that the “Miranda right to counsel is in reality an empty promise” given that “[f]orty years of experience” has shown that, contrary to the Miranda Court’s “factual assumptions,” “no attorney is provided” in “the vast majority” of cases when a suspect asserts the right to counsel); see also Shatzer, 559 U.S. at 121 (Stevens, J., concurring in the judgment) (pointing out that a suspect who asked for, and never received, an opportunity to consult with counsel is “likely to feel that the police lied to him and that he really does not have any right to a lawyer”).


23. Edwards, 451 U.S. at 485 (emphasis added). Edwards’ unqualified reference to “reinterrogation” has been repeated in subsequent Supreme Court opinions. See Davis, 512 U.S. at 459; Minnick, 498 U.S. at 150.
right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver.

But this comment is ambiguous: it appeared in the context of a discussion explaining the options available to the police had Edwards been the one to reinitiate communications with them. In that event, the Court said, the officers could have “listen[ed] to his voluntary, volunteered statements” because *Miranda* only guarantees the right to counsel “at any custodial interrogation.”

The police are always permitted to keep an ear open for comments a suspect happens to volunteer, however, and therefore this reference says little about whether they may employ active strategies short of “interrogation” to try to persuade a suspect to change her mind about wanting a lawyer. Moreover, *Edwards* apparently cited *Innis* here to support the last part of the “[a]bsent [custodial] interrogation” sentence—for the proposition that *Innis* made “sufficiently clear” that judges need not engage in a waiver inquiry if no interrogation took place, an issue unrelated to the intended reach of the *Edwards* ban.

At the end of the opinion, *Edwards* referred to *Innis* again, this time in a context that did allude to *Innis*’ conception of “interrogation.” The Court noted that Edwards’ confession was inadmissible because he “was subjected to custodial interrogation . . . within the meaning of *Rhode Island v. Innis* . . . and . . . this occurred at the instance of the authorities.” But this comment seems to be directed at the “interrogation” that occurred after Edwards agreed to speak to the officers and not the detectives’ conduct that preceded and may have facilitated that “interrogation.” Additionally, this language indicates that the Court thought it important not only that interrogation à la *Innis* occurred but also that the interrogation came about “at the instance” of the police—i.e., it was not initiated by Edwards. The conjunctive structure of the sentence thus tends to support the broader view that *Edwards* bars the police from doing anything to initiate a resumption of interrogation once a suspect asks for a lawyer.

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25. *Id.* at 485-86.

26. *See Miranda*, 384 U.S. at 478 (noting that “[v]olunteered statements of any kind are not . . . affected by our holding today”).

27. *Edwards*, 451 U.S. at 486 (citing *Rhode Island v. Innis*, 446 U.S. 291, 298 n.2 (1980), where the Court declined to analyze whether Innis had “waived his right under *Miranda* to be free from interrogation until counsel was present” given its conclusion that he “was not ‘interrogated’ for *Miranda* purposes”).

28. *Id.* at 487.

29. It is not entirely clear what happened in the interrogation room after Edwards was re-Mirandized and told the officers, “I’ll tell you anything you want to know, but I don’t want it on tape.” *Id.* at 479. The majority said only that Edwards “thereupon implicated himself in the crime,” *id.*, but Justice Powell’s separate opinion indicated that there “clearly was questioning” and Edwards “was subjected to renewed interrogation.” *Id.* at 490 (Powell, J., concurring in the result).

30. The *Edwards* majority’s only other citation to *Innis* is simply a restatement of the *Edwards* holding: “just last Term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the ‘undisputed right’ under *Miranda* to remain silent and to be
Despite these few inconclusive references to Rhode Island v. Innis, the clear import of the Edwards opinion supports reading the decision broadly. Recall the Edwards Court’s summary of its holding set out above. A suspect who has invoked the right to counsel may be “subject[ed] to further interrogation,” presumably as defined in Innis, under only two circumstances: where either “counsel has been made available” to the suspect or she was the one to “initiate[] further communication, exchanges, or conversations with the police.” On the other hand, an effective Miranda waiver cannot be proven “by showing only that [the suspect] responded to further police-initiated custodial interrogation.” This language indisputably suggests that renewed “interrogation” of a suspect who has invoked the right to counsel may not be initiated by the police—for example, by approaching the suspect, readministering Miranda warnings, and asking if she has changed her mind—unless, of course, that conversation takes place in the presence of counsel.

Similarly, in making the point that Edwards was not “powerless to countermand his election” and thereby leaving open the possibility that under some circumstances the prosecution would be allowed to introduce “incriminating statements [he] made . . . prior to . . . having access to counsel,” the Court explained, “[H]ad Edwards initiated the meeting. . . . nothing . . . would prohibit the police from merely listening to his voluntary, volunteered statements

free of interrogation ‘until he had consulted with a lawyer.’” Id. at 485 (majority opinion) (quoting Innis, 446 U.S. at 298).

31. See supra notes 8-9 and accompanying text.
33. Id. at 484 (emphasis added). For subsequent opinions to the same effect, see Montejo v. Louisiana, 556 U.S. 778, 797 (2009) (noting that if the defendant invoked his right to counsel, “no interrogation should have taken place unless Montejo initiated it”); Minnick v. Mississippi, 498 U.S. 146, 153 (1990) (“In our view, a fair reading of Edwards and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning”); Michigan v. Harvey, 494 U.S. 344, 349 (1990) (describing Edwards as providing that “any waiver . . . given in a discussion initiated by the police is presumed invalid”); Arizona v. Roberson, 486 U.S. 675, 686 (1988) (“[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling.”); Smith v. Illinois, 469 U.S. 91, 95 (1984) (per curiam) (summarizing Edwards as providing that, “if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked”); Solem v. Stumes, 465 U.S. 638, 646 (1984) (“Edwards established a new test for when [a] waiver would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication.”); Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983) (plurality opinion) (“We recently restated the requirement . . . to be that before a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the ‘suspect himself initiates dialogue with the authorities.’” (quoting Wyrick v. Fields, 459 U.S. 42, 46 (1982) (per curiam))).

34. For the view that this conduct does not rise to the level of interrogation, see supra note 18 and accompanying text and infra note 39 and accompanying text.
and using them against him at the trial.”

This language confirms that a suspect-initiated conversation—and not a change of heart induced by the police through means short of “interrogation”—is the only scenario that can ultimately lead to a second interrogation session. And even then, the police may only “listen” to statements the suspect is willing to “volunteer”; they may not engage in interrogation absent a waiver.

Elaborating on the waiver analysis, the Court observed in a footnote that “frequently,” in “a meeting initiated by the accused, the conversation is not wholly one-sided” and the officers may well “say or do something that clearly would be ‘interrogation.’” Those circumstances, the Court explained, would trigger a waiver inquiry to be resolved by considering “the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.” But here again, the reference to “interrogation” focuses on police conduct following a suspect’s reinitiation of communications, not their actions that led up to and influenced the suspect’s decision to retract the request for counsel.

The Court’s application of its standard to the facts of Edwards likewise supports the broad reading of the opinion. In finding a violation of Edwards’ Miranda rights, the Court identified the following “critical facts”: Edwards invoked his rights; he was not given an opportunity to consult with counsel; and “the police . . . returned the next morning to confront him and, as a result of the meeting, secured incriminating oral admissions.” But the meeting the following day began, not with anything that could plausibly be considered the functional equivalent of interrogation, but instead with the officers “identif[y]ing” themselves, stat[ing] they wanted to talk to [Edwards], and inform[ing] him of his Miranda rights.”

The Court’s conclusion that “Edwards was subjected to custodial interrogation . . . within the meaning of Rhode Island v. Innis” and that this occurred at the instance of the authorities” was based on the premise that “the police returned to him the next day” and did not do so “at his suggestion or

36. Id. at 486 n.9.
37. Id. See also Bradshaw, 462 U.S. at 1044 (interpreting this footnote to mean that “initiation’ of a conversation by a defendant” does not “amount to a waiver of a previously invoked right to counsel”; instead, “where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver” of the right to counsel); id. at 1048 (Powell, J., concurring in the judgment) (acknowledging that the other eight Justices all endorsed this “two-step analysis”).
38. Edwards, 451 U.S. at 482.
39. Id. at 479. See Smith v. Illinois, 469 U.S. 91, 100-01 (1984) (Rehnquist, J., dissenting) (arguing that police did not engage in interrogation by completing Miranda warnings); LAFAYE ET AL., supra note 18, § 6.7(c), at 787 n.131 (citing lower court case law agreeing that providing Miranda warnings does not qualify as interrogation).
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request.\footnote{\textit{Edwards}, 451 U.S. at 487; see also \textit{id.} at 485 (referring to “the interrogation initiated by the police”).} Again, the key was that the police were the ones to initiate the conversation, not that in doing so their conduct rose to the level of interrogation.

Further supporting the position that \textit{Edwards} was meant to be interpreted broadly is the fact that the majority opinion was authored by Justice White. Justice White was the first member of the Court to perceive a distinction between suspects who invoke the right to silence and those who request counsel. Writing separately in \textit{Mosley}, Justice White expressed the view that the former group, who had “chosen . . . to make [their] own decisions regarding [their] conversations with the authorities, . . . should not be deprived even temporarily of any information relevant to the decision.”\footnote{\textit{Michigan v. Mosley}, 423 U.S. 96, 109 n.1 (1975) (White, J., concurring in the result).} On the other hand, Justice White continued, the police have no business supplying that same information to suspects who have asked for a lawyer. “[T]he reasons to keep the lines of communication . . . open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice,” Justice White pointed out, because, in that case, “[t]he authorities may . . . communicate with him through an attorney.”\footnote{\textit{Id.} at 110 n.2.} Justice White was referring here to “information” that today might not fall within the \textit{Innis} definition of interrogation: telling suspects that the evidence against them was “unusually strong” or that their “immediate cooperation . . . would redound to [their] benefit.”\footnote{\textit{Id.} at 109 n.1. For conflicting views as to whether such statements qualify as interrogation, see infra notes 92-103 & 151 and accompanying text.} Although \textit{Mosley} predated both \textit{Edwards} and, more importantly, \textit{Innis}, Justice White seemed to be under the impression that the police are not permitted to supply any information about the case to suspects who have invoked the right to counsel.

The broad interpretation of the Court’s opinion in \textit{Edwards} is also confirmed by the approach taken by the Justices writing separately, who expressed a willingness to support the narrower view that law enforcement officials should be allowed to reinitiate contact with a suspect who has invoked the right to counsel. Concurring in the result, Justice Powell, joined by Justice Rehnquist, disagreed with the majority’s “emphasis on [the] single element [of] ‘initiation’” and instead thought that “police legitimately may inquire whether a suspect has changed his mind about speaking to them without an attorney.”\footnote{\textit{Edwards}, 451 U.S. at 491, 490 (Powell, J., concurring in the result). For the view that such an inquiry does not rise to the level of interrogation, see \textit{supra} note 18 and accompanying text.} Chief Justice Burger likewise concurred only in the judgment, refusing to endorse “a special rule” specifying how suspects “may waive the right to be free from interrogation” and noting that \textit{Innis} had “rejected” the idea that “any ‘prompting’ of a person in custody is somehow evil per se.”\footnote{\textit{Edwards}, 451 U.S. at 487-88 (Burger, C.J., concurring in the judgment).} The fact that these Justices were in the
minority supports the inference that the majority intended to prohibit the type of police conduct their colleagues would have condoned and therefore corroborates other evidence in the Court’s opinion suggesting it meant for its ruling in Edwards to be read broadly.

2. Before and After Edwards

Although the Court’s intent in Edwards seems relatively transparent, language in other Supreme Court decisions has waffled between the broad and narrow view of what restrictions on police conduct follow from an invocation of the right to counsel. None of the relevant majority opinions discuss the issue in any detail and most of them support the broad interpretation of the Edwards ban, but at times the Justices have suggested the police are safe unless their actions rose to the level of “interrogation” as defined in Rhode Island v. Innis.

Beginning with Innis itself, that case would presumably be analyzed under Edwards today given that the defendant there invoked the right to counsel.46 While the Court cannot be faulted for failing to anticipate the ruling in Edwards, the majority did not cite Mosley or the “scrupulously honor” test despite the fact that Innis had asserted his Miranda rights.47 Nevertheless, Innis did refer to the same discussion in Miranda concerning suspects who invoke the right to counsel that the Edwards Court would quote the following year: “In Miranda v. Arizona, the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present.”48 In the sentence that immediately followed, however, the Innis majority described “[t]he issue in this case” as whether Innis “was ‘interrogated’ in violation of the standards promulgated” in Miranda.49 Later in the opinion, the Court made a similar comment, noting that the parties agreed Innis had invoked his right to counsel and “therefore” “[t]he issue . . . [was] whether [he] was ‘interrogated’ . . . in violation of [his] undisputed right . . . to remain silent until he had consulted with a lawyer.”50 Although these observations provide support for the narrow view of the Edwards ban, it is somewhat speculative to read too much into this language in trying to interpret a line of cases that would not begin for another year.51

47. Only Justice Stevens’ dissent mentioned Mosley, arguing that the Court’s opinion in that case must at minimum bar “deliberate attempts to elicit statements” from suspects who have asserted their rights. Id. at 310 (Stevens, J., dissenting).
48. Id. at 293 (majority opinion); see supra note 21 and accompanying text.
49. Innis, 446 U.S. at 293.
50. Id. at 298. Cf. id. at 309, 311 (Stevens, J., dissenting) (interpreting Miranda to require that “any type of interrogation cease until an attorney was present,” though adopting a broader definition of “interrogation” that would encompass any police conduct that “appear[ed] to call for a response” or was “designed to do so”). For criticism of Innis’ standard and outcome, see infra notes 139-40 and accompanying text.
51. For other opinions that predate both Innis and Edwards but nevertheless provide some tentative support for the narrow interpretation of Edwards, see Michigan v. Mosley, 423 U.S. 96, 104 (1975) (seemingly distinguishing between “resum[ing] the questioning” and trying to
Arizona v. Mauro, however, post-dated Edwards and nevertheless tracked the decision in Innis. Although the Court quoted the Edwards holding, it then treated the case no differently than if Mauro had never asserted his rights. The majority observed that Mauro had invoked and never waived his right to counsel and then, mirroring the language in Innis quoted above, asserted that “[t]he sole issue, then, is whether the officers’ subsequent actions rose to the level of interrogation [within] the language of Innis.”

Dictum in the Court’s opinion in Arizona v. Roberson arguably provides further support for the narrow view of the Edwards ban. The Roberson Court mentioned in passing that law enforcement officials are “free to inform a suspect who has invoked the right to counsel about “the facts of [a] second investigation as long as such communication does not constitute interrogation” within the meaning of Innis. In the very next sentence, however, the majority observed that Edwards “made clear” that additional conversations initiated by a suspect “are perfectly valid,” suggesting that police may be permitted to provide information about another investigation only in cases where the suspect has asked “what the new investigation is about.”

Moreover, elsewhere the Roberson Court seemed to adopt the broader view of Edwards, noting that “any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the ‘inherently compelling pressures’ and not the purely voluntary choice of the suspect.” The use of the terms “behest” and “instigation” suggests the Court was concerned about any police-initiated contact with a suspect, whether or not it rose to the level of interrogation. The Roberson majority went on to quote

“persuade Mosley to reconsider his position”); Miranda v. Arizona, 384 U.S. 436, 484, 485 (1966) (characterizing as “consistent with the procedure which we delineate today” FBI practices that included allowing “the interview” to “be continued” following an invocation of the right to counsel “as to all matters other than the person’s own guilt or innocence”).

53. See id. at 522.
54. See id. at 525-26.
55. Id. at 527; see also id. at 532 (Stevens, J., dissenting) (noting that Mauro had requested a lawyer and therefore “could not be subjected to interrogation until he either received the assistance of counsel or initiated a conversation with the police,” and because “neither event occurred, the . . . evidence must be excluded if it was the product of ‘interrogation’ within the meaning of Rhode Island v. Innis”). For criticism of Mauro’s standard and outcome, see infra notes 139-40 and accompanying text.
57. Id. at 687 (citing Rhode Island v. Innis, 446 U.S. 291 (1980)). For a lower court opinion relying on this language to support the narrow reading of Edwards, see Hartman v. State, 2013 Ind. LEXIS 417, at *6-7 (Ind. May 31, 2013).
59. Id. at 681 (emphasis added) (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)); see also id. at 683 (referring to the police “approach[ing] a suspect “about a separate investigation”).
similar language from Justice White’s separate opinion in *Mosley*, which, as noted above, is consistent with the more expansive interpretation of *Edwards*: “As Justice White has explained, ‘the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities’ insistence to make a statement without counsel’s presence may properly be viewed with skepticism.’”  

*Roberson* is not the only Supreme Court opinion to endorse a broad reading of the *Edwards* shield. In *Smith v. Illinois*, the Court found “‘no justification’” for an officer’s decision to “‘proceed[] through to the end of the *Miranda* warnings’” after the defendant had invoked the right to counsel and “‘in the course of doing so misrepresent[] . . . that [the defendant] had to talk to the interrogator.’”  

The majority thereby rejected the view expressed in Justice Rehnquist’s dissent that, while *Edwards* “requires interrogation to cease, . . . here no ‘interrogation’ was being conducted by the police; they were simply in the process of giving petitioner his full *Miranda* warnings.”  

Rather, the Court voiced the more wide-ranging concern that *Edwards* was designed to prevent law enforcement officials “through ‘[badgering]’ or ‘overreaching’—explicit or subtle, deliberate or unintentional—[from] wear[ing] down the accused and persuad[ing] him to incriminate himself notwithstanding his earlier request for counsel’s assistance.”  

Again, the Court did not suggest that these “subtle” forms of “badgering” need to rise to the level of “interrogation” as defined in *Innis*.  

Another opinion supporting a more generous reading of *Edwards* is *Minnick v. Mississippi*, where the Court justified holding that the *Edwards* protection continues even after a suspect has been given an opportunity to speak to a lawyer as “an appropriate and necessary application of the *Edwards* rule.”  

“A single consultation with an attorney,” the Court explained, “does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and . . . may increase as custody is prolonged.”  

Writing in dissent, Justice Scalia, joined by Chief Justice Rehnquist, repeated interpreted the majority opinion as barring police conduct that does not qualify as “interrogation.” The dissenters accused the Court of adopting “a rule excluding all confessions that follow even the slightest
They described the majority opinion as holding that “a person in custody who has once asked for counsel cannot thereafter be approached by the police unless counsel is present.” And they criticized the Court for “permanently prevent[ing] a police-initiated waiver” following the invocation of the right to counsel, thus “mak[ing] it largely impossible for the police to urge a prisoner who has initially declined to confess to change his mind—or indeed, even to ask whether he has changed his mind.”

Justice Scalia’s recurring use of these expansive terms to describe the Court’s ruling could not have escaped the attention of the majority, which notably never bothered to deny his characterization of its opinion. Rather, the Court’s only response was the observation that the Edwards line of cases “does not foreclose finding a waiver. . . , provided the accused has initiated the conversation or discussions with the authorities.” But, the Court continued, that finding could not be made on the facts of Minnick because “[t]here can be no doubt that the interrogation in question was initiated by the police; it was a formal interview which petitioner was compelled to attend.” As in Edwards, the meeting in Minnick began with the administration of Miranda warnings, not with police conduct that could arguably qualify as the functional equivalent of interrogation. Like Edwards, Roberson, and Smith, then, Minnick focused on whether the police were the ones to reopen the conversation, not whether they were able to convince the defendant to change his mind by means short of interrogation.

Although the broad reading of the Edwards ban is most faithful to the Court’s opinion in that case as well as the predominant view expressed in other
Supreme Court precedent, language in some of the Court’s decisions seemingly
endorses the narrow reading, treating Innis’ definition of interrogation as the
controlling standard in determining what police may do following an invocation
of the right to counsel. The next section turns to the Court’s most recent
discussion of this issue in Maryland v. Shatzer.

B. The Shatzer Dictum

Unsurprisingly, the conflicting signals coming from the Supreme Court
generated a division among the lower courts, with some adopting the narrow
position that Edwards bars only police tactics that rise to the level of
“interrogation” under Rhode Island v. Innis and others interpreting the Supreme
Court’s opinions to prohibit a wider variety of police conduct. The Court
seemingly resolved that conflict in favor of the broader view in its 2010 decision
in Maryland v. Shatzer.

Although the relevant language appeared in dictum, Shatzer represents the Court’s most extensive and direct discussion of the issue to date.

In the course of announcing the so-called break-in-custody exception to
Edwards, Justice Scalia’s majority opinion in Shatzer returned to the themes
expressed in his dissent twenty years earlier in Minnick. Edwards, the Court
asserted in Shatzer, bars “subsequent attempts” at interrogation, “requests for
interrogation,” and in fact “any efforts to get [the suspect] to change his mind.”
Quoting the Roberson admonition set out above that, following an invocation
of the right to counsel, any waiver of Miranda must come from “‘the suspect’s own
instigation’” rather than “‘at the authorities’ behest,’” the Shatzer majority
explained that “subsequent requests for interrogation pose a significantly greater
risk of coercion,” both because of police officers’ “persistence in trying to get the
suspect to talk” and because “the continued pressure” of custody is “likely to
increase as custody is prolonged.”

73. See supra notes 33 and 72.
74. See LAFAVE ET AL., supra note 18, § 6.9(f), at 845-47 (citing conflicting lower court
rulings).
75. Maryland v. Shatzer, 559 U.S. 98 (2010). Five years earlier, the Court had dismissed cert
as improvidently granted in a case involving the scope of the Edwards ban. See Maryland v. Blake,
76. See Shatzer, 559 U.S. at 110 (holding that the Edwards protection ends after a break in
custody of fourteen days). For the argument that Shatzer’s break-in-custody exception was
consistent with a pragmatic approach to Miranda, see Kit Kinports, The Supreme Court’s Love-
77. Shatzer, 559 U.S. at 105, n.8.
78. Id. at 104 (quoting Arizona v. Roberson, 486 U.S. 675, 681 (1988)); see id. at 123 n.6
(Stevens, J., concurring in the judgment) (quoting the same passage from Roberson). See also
supra note 59 and accompanying text.
79. Shatzer, 559 U.S. at 105 (emphasis added) (quoting Minnick v. Mississippi, 498 U.S. 146,
153 (1990)); see also id. at 108 (noting that after a break in custody, “it is far fetched to think that a
police officer’s asking the suspect whether he would like to waive his Miranda rights will any more
would enable law enforcement officials to “take advantage of the mounting coercive pressures of ‘prolonged police custody’ by repeatedly attempting to question a suspect who requested counsel until the suspect is ‘badgered into submission.’”

Lest there be any doubt, the Shatzer Court then criticized Justice Stevens’ separate opinion for speaking in terms of “reinterrogat[ing]” a suspect. The “fallacy” of Justice Stevens’ argument, the majority cautioned, “is that we are not talking about ‘reinterrogating’ the suspect; we are talking about asking his permission to be interrogated.” This is clearly a broader reading of Edwards than the view that police do not violate the Miranda rights of a suspect who has asserted the right to counsel unless their conduct constitutes “interrogation” as defined in Innis. And notably none of the Justices disavowed that interpretation of the Edwards line of cases. Although the term “reinterrogate” appeared in Justice Stevens’ opinion, his response to the majority’s criticism of the word seemingly supported the broader view of the Edwards ban: he agreed with Justice Scalia that “[p]olice may not continue to ask . . . a suspect [who has invoked the right to counsel] whether they may interrogate him until that suspect has a lawyer present.

If Shatzer was meant to put an end to the controversy surrounding the scope of Edwards, that message has been slow to reach some of the lower courts. Their treatment of this issue in the wake of Shatzer is the subject of the following section.

II. THE POST-SHATZER RECORD IN THE LOWER COURTS

Despite the clear import of the Shatzer dictum, the conflict in the lower courts persists, with some courts continuing to take the narrow view that the Edwards ban is limited to police actions that rise to the level of “interrogation”

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‘wear down the accused’ than did the first such request” (quoting Smith v. Illinois, 469 U.S. 91, 98 (1984) (per curiam)).
80. Id. at 105 (emphasis added) (quoting Roberson, 486 U.S. at 686; id. at 690 (Kennedy, J., dissenting)); see also id. at 107 (referring to “the later attempted interrogation”); id. at 117 (referencing “attempts at interrogation”). For discussion of the relationship between Innis’ definition of interrogation and the intent of the police, see infra note 139 and accompanying text.
81. Shatzer, 559 U.S. at 115 (quoting id. at 121 (Stevens, J., concurring in the judgment)).
82. Id. Likewise, at oral argument, Justice Scalia asked the State’s attorney: “I thought that you couldn’t approach him. I thought that once he’s invoked his right to counsel, you can’t approach him and say, would you like to talk now? Right? Isn’t that . . . the rule?” Transcript of Oral Argument at 26, Maryland v. Shatzer, 559 U.S. 98 (2010) (No. 08-680).
83. Justice Thomas disagreed with the majority’s fourteen-day break-in-custody rule and would have refused to apply Edwards to any “interrogations that occur after custody ends,” but his opinion did not address the Court’s discussion of what law enforcement conduct is barred by Edwards. Shatzer, 559 U.S. at 118 (Thomas, J., concurring in part and concurring in the judgment).
84. Id. at 121 n.2 (Stevens, J., concurring in the judgment); see also id. at 123 (agreeing that police may not “‘coerce’ or ‘badger’ a suspect who has invoked the right to counsel into “abandoning” that right (quoting id. at 106 (majority opinion))).
under *Rhode Island v. Innis*. Law enforcement officials in these jurisdictions are therefore allowed to engage in tactics designed to persuade suspects who have invoked the right to counsel to change their minds—so long as their conduct cannot be characterized as the functional equivalent of interrogation. Other courts, however, take the Supreme Court at its word and adhere to the more generous interpretation of *Edwards*.

An illustration of a case in the former camp is *McKinney v. Ludwick*, where a state law enforcement official told McKinney, following his invocation of the right to counsel, that he might face federal charges and therefore could be subject to the death penalty.85 Apparently picking up on that comment the following morning, McKinney said he wanted to talk to the detective “’to see what the Feds had against him and how the case was going to proceed.’”86 The Sixth Circuit quoted the Shatzer dictum prohibiting the police from “’taking advantage’” of the custodial environment “’by repeatedly attempting to question’” suspects until they are “’badgered into submission’” and also acknowledged that McKinney had been subjected to “a type of ‘subtle compulsion’ to cooperate.”87 Nevertheless, the Sixth Circuit viewed *Innis*’ definition of interrogation as controlling, observing that it was “by no means clear” the officer had engaged in the functional equivalent of interrogation, rather than the “’subtle’” pressure tactics permitted by *Innis* and therefore, according to the court of appeals, “not foreclosed by *Miranda* and *Edwards*.”88

In applying *Innis* to the facts before it, the Sixth Circuit thought the question was a “close” one, but ultimately upheld the state court’s conclusion that the *Innis* standard was satisfied under the deferential standard of review required by AEDPA.89 But the Sixth Circuit also deferred to the state court’s finding that McKinney came within the initiation exception, rejecting his argument that “his request to talk to police was precipitated by [the] death-penalty comment.”90 Although the court quoted Shatzer’s concern about “’the mounting coercive pressures of prolonged police custody,’” it reasoned that “[a]n entire night [had] passed” and the fact that McKinney had not responded “immediately” to the detective’s statement “’reduce[d] the likelihood that [he] was under any compulsion to confess.’”91 Therefore, the Sixth Circuit concluded that “any

85. McKinney v. Ludwick, 649 F.3d 484, 486 (6th Cir. 2011).
86. Id. (quoting the detective).
87. Id. at 491 (quoting Shatzer, 559 U.S. at 105; Rhode Island v. Innis, 446 U.S. 291, 303 (1980)).
88. Id. at 490 (quoting *Innis*, 446 U.S. at 303); see also id. at 489 (using the *Innis* standard to define “’[t]he ‘interrogation’ precluded’ by *Edwards*”).
89. Id. at 490-91.
90. Id. at 490.
91. Id. at 491 (quoting Shatzer, 559 U.S. at 105; Holman v. Kemna, 212 F.3d 413, 419 (8th Cir. 2000)).
coercive effect” of the detective’s comments “had subsided” by the time McKinney asked to speak to him the following morning.92

In Benjamin v. State, the Mississippi Supreme Court, like the Sixth Circuit in McKinney, quoted Shatzer’s language purporting to prohibit police from “‘take[ing] advantage’” of custody and “‘repeatedly attempting to question’” suspects who have sought counsel, but nevertheless applied Innis’ definition of interrogation.93 The transcript of the post-invocation interrogation room conversation in Benjamin reveals that the fourteen-year-old murder suspect was obviously concerned about spending the night in jail, and the officer commented that “it may be best to just wait until tomorrow and talk, . . . and let him stay back there in jail tonight . . . We don’t really need to talk to him. We just wanted his side of it.”94 In response to Benjamin’s inquiry whether he was going to be locked up, the officer said, “[w]ell that has a lot to do with what you talk about and everything,” even though, according to the state supreme court, “it was a virtual certainty that Benjamin would be incarcerated that night no matter what he told the police.”95 The officer also told Benjamin the police did not think he was “the shooter,” but then went on to warn him, “you’re either going to have to tell your side of the story or we’re going to go with what everybody else is saying . . . Tell me what happened last Thursday evening.”96 The court ultimately concluded that the police engaged in the functional equivalent of interrogation because they “encourage[d] a parent to pressure a fourteen-year-old suspect to talk” and “foster[ed] the suspect’s mistaken belief that talking would allow him to avoid a night in jail.”97

In State v. Adamcik, the Idaho Supreme Court also adopted the narrow view of Edwards but reached the opposite conclusion in applying Innis to facts comparable to Benjamin.98 Detectives in that case told a sixteen-year-old suspect who had invoked his right to counsel that they had “overwhelming evidence,” including a confession from the other suspect as well as a knife and masks used in the murder, and that his “full cooperation [could] do nothing but help [him] at this point.”99 “You know exactly what happened and what you need to do,” the officers said.100 In finding no violation of Edwards, the state supreme court did

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92. Id. at 492.
94. Id. at 119.
95. Id. at 120.
96. Id. at 125 (Pierce, J., dissenting).
97. Id. at 123 (majority opinion). For other opinions viewing Innis as controlling, but finding that its standard was met, see United States v. Wysinger, 683 F.3d 784, 796 (7th Cir. 2012) (ruling that Edwards was violated when officer asked if the suspect had any drugs or money in his van and “challenged the truth of [his] explanation” why he was in the area); Hartman v. State, 2013 Ind. LEXIS 417, at *9-14 (Ind. May 31, 2013) (reaching the same conclusion where officer read the search warrant to the suspect and asked if he had any questions).
99. Id. at 439.
100. Id.
not acknowledge the Supreme Court’s ruling in *Shatzer*, but did cite the Court’s earlier opinion in *United States v. Davis* for the similar proposition that “the rationale behind prohibiting the police from attempting to reinitiate communications with a suspect after he invokes his right to counsel was to prevent the defendant from being badgered into waiving his rights.”[101] Nevertheless, the Idaho Supreme Court viewed the *Innis* definition of interrogation as controlling, affirming the district court’s conclusion that the officers’ comments were “in line with a recitation of the evidence gathered against [Adamcik], rather than an interrogational line of questioning reasonably likely to evoke an incriminat[ing] response.”[102] Although the district court thought the officers’ comments were “coated with a layer of precariousness,”[103] the Idaho Supreme Court noted, the lower court concluded that they did not “rise to the level in which an objective observer would conclude [they] were designed to invite comment from [Adamcik].”[103]

A final, though somewhat more ambiguous, illustration of a case interpreting *Edwards* narrowly is *United States v. Maza*.[104] In finding that a request for consent to search the suspect’s body and property did not violate *Edwards*, the Navy-Marine Corps Court of Criminal Appeals applied the *Innis* definition of interrogation, noting that “the Supreme Court has never extended the *Edwards* prophylactic rule to bar non-interrogative interaction between police and a suspect following that suspect’s request for counsel.”[105] The court therefore rejected a “broader per se rule” banning “all law enforcement-initiated communication” on the grounds that, “taken to its logical conclusion, virtually any non-interrogative ‘communication, exchange[,] or conversation[,]’”[105] by law enforcement officials after a suspect invoked the right to counsel could lead to “a

101. *Id.* at 442 (emphasis added) (citing *Davis* v. United States, 512 U.S. 452, 458 (1994)).
102. *Id.* at 443.
103. *Id.* (quoting district court) (also concluding that the suspect’s responses were triggered by his father’s questions rather than the officers’ comments). For other opinions that have ignored *Shatzer* in reading the *Edwards* ban narrowly, see *United States v. Wysinger*, 683 F.3d 784, 796, 803 (7th Cir. 2012); *Mickey v. Ayers*, 606 F.3d 1223, 1235 (9th Cir. 2010); *Gillett v. State*, 56 So. 3d 469, 486 (Miss. 2010). For opinions that have at least been aware of the existence of the *Shatzer* decision and nevertheless interpreted *Edwards* narrowly, see *United States v. Hutchins*, 72 M.J. 294, 300-01 (C.A.A.F. 2013) (Ryan, J., concurring in the result) (endorsing the narrow view of *Edwards* despite the majority opinion’s citation to *Shatzer*); *id.* at 305, 307-08 (Baker, C.J., dissenting) (same); *Hartman v. State*, 2013 Ind. LEXIS 417, at *8-9, 13-14 (Ind. May 31, 2013) (citing *Shatzer*’s break-in-custody exception, but ignoring the dictum relevant to this issue).
105. *Id.* at 523; see *id.* at 524 (noting that “the ‘Miranda-Edwards regime . . . [does not] govern . . . noninterrogative types of interactions between the defendant and the State’” (quoting *Montejo v. Louisiana*, 556 U.S. 778, 795 (2009))). *But cf.* *Montejo*, 556 U.S. at 795 (offering lineups as an example of a “noninterrogative interrogation[ ]” that does not “involve inherently compelling pressures” (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966))). *See generally LAFAYE ET AL., supra note 18, § 6.7(c), at 787 & n.128* (citing lower court cases agreeing that asking for consent to search does not constitute “interrogation”).
permanent bar to further interrogation regardless of an accused’s desire to initiate a conversation.”

On the other hand, in the face of precedent from the Court of Appeals for the Armed Forces that gave the Shatzer dictum a more literal reading, the Maza court conceded “the general proposition that there may be certain factual circumstances . . . where law enforcement-initiated communication, short of interrogation, ‘may’ violate Edwards.” Likewise, the court suggested a somewhat broader view of the Edwards ban when it observed that law enforcement officials may engage in “post-invocation interaction” with a suspect that is “not interrogative in nature, or indicative of ‘badgering.’” In support, the court cited Shatzer’s concern about police “‘take[ing] advantage’” of custody “‘by repeatedly attempting to question’” suspects, but then immediately turned around and associated Shatzer, not with a generous reading of Edwards, but with the Supreme Court’s “apparent trend to narrow Edwards’s prophylactic contours” (because it created the break-in-custody exception). The Maza court, therefore, seemed more sympathetic to the narrow interpretation of Edwards but, bound by precedent, acknowledged a slightly broader approach.

Other courts, by contrast, have unequivocally endorsed the view that is most faithful to the language in Edwards and called for by the Shatzer dictum. In United States v. Hutchins, the Court of Appeals for the Armed Forces precedent distinguished in Maza, the court concluded that Edwards was violated because an investigator “initiated contact . . . to further the investigation” by requesting consent to search Hutchins’ possessions and also made “an implicit accusatory

106. Maza, 73 M.J. at 520, 524 (quoting Edwards v. Arizona, 451 U.S. 477, 485 (1981)); see also id. at 521 (fearing that a broader ban “effectively prohibits all post-invocation admissions by an accused if the police engage in any conversation following an accused’s invocation”).
107. Id. at 522 (citing Hutchins, 72 M.J. at 298).
108. Id. at 525 (emphasis added).
109. Id. (quoting Maryland v. Shatzer, 559 U.S. 98, 105 (2010)).
110. Id. at 525 (citing Shatzer, 559 U.S. at 109); see also id. at 517 (citing Shatzer for the proposition that Edwards is “not constitutionally-based, but rather a judicially-created prophylaxis”).
111. For other cases that do not clearly specify which interpretation of Edwards they are endorsing, see United States v. Valadez-Nonato, 2011 U.S. Dist. LEXIS 116036, at *9-10, 12 (D. Idaho Oct. 6, 2011) (citing the Innis standard as well as Shatzer’s “‘badgered into submission’” language, but finding an Edwards violation because the officer’s statement that she “[g]ave [the suspect] a shot to be accountable and honest” was “a repetition of an interrogation tactic” that represented “a continuing . . . effort to obtain a confession” and to “‘pressur[e] the Defendant to keep talking” (quoting Shatzer, 559 U.S. at 105)); Manley v. State, 698 S.E.2d 301, 309 (Ga. 2010) (observing, without citing either Shatzer or Innis, that “any questioning should have stopped immediately” and concluding that detectives violated Edwards by asking questions to confirm whether the suspect wanted a lawyer or wanted to speak to them); State v. Ortega, 813 N.W.2d 86, 94, 96-97 (Minn. 2012) (applying the Innis standard despite recognizing that the police “could not interview Ortega unless he reinitiated discussions with them,” but then finding unobjectionable the officer’s statement that he “‘wouldn’t mind . . . getting [Ortega’s] side of the story’” because the officer “did not attempt to pressure or coerce Ortega” and did not “suggest that . . . Ortega’s side of the story would remain unknown or [his] silence would otherwise hamper his defense”).
statement” by “remind[ing] Hutchins that he was under investigation” for certain crimes.112 Although the court cited Shatzer generally on the coerciveness of custody, it did not specifically mention the Supreme Court’s dictum in dismissing Innis as irrelevant on the ground that “the issue . . . is not whether the request for consent to search was an ‘interrogation’” but whether it was “a reinitiation of ‘further communication’ prohibited by Edwards.”113

In United States v. Edenso, the district court did expressly cite Shatzer’s reference to “attempted interrogation[s]” in holding broadly that, if a police officer makes comments that are either “(1) the functional equivalent of interrogation, (2) designed to generate the retraction of an earlier request for counsel or (3) made to keep a dialogue going, a suspect cannot be said to have initiated further conversation.”114 On the facts before it, the court found an Edwards violation because the agent’s suggestion that it would be “better” for the suspect to speak to the FBI was “intended to coax Edenso into submitting to an interview” and thus “a contrived attempt to get around the Edwards rule and to inspire Edenso to talk . . . in the hopes of getting a confession.”115

In Carr v. State, the Indiana Supreme Court similarly relied on Shatzer in finding that Edwards was violated when a detective “fail[ed] to immediately cease communications,” but instead “continued by inviting the defendant to talk,” telling him that “kn[e]w what happened” and “just wanted to know why.”116 The officer also tried to reassure the suspect that “[i]t might not be as bad as it appears,” and the court thought the detective’s comment about “lesser degrees” of murder was “an open-ended invitation encouraging further communication.”117 The court therefore concluded that the defendant’s confession was “the result of police instigation, not further communication voluntarily initiated” by him.118

112. Hutchins, 72 M.J. at 298-99 & n.10; see also id. at 298 (noting that the official’s “purpose was to seek Hutchins’s cooperation in the ongoing investigation”). Cf. Maza, 73 M.J. at 522 (distinguishing Hutchins on the grounds that “a unique set of circumstances” was involved there because the defendant was “held essentially in solitary confinement within a combat zone of a foreign country”).

113. Hutchins, 72 M.J. at 298, 299 n.9.


115. Id. at *11.


117. Id. at 1105, 1106.

118. Id. at 1106; see also id. at 1107 (noting that the detective “prolonged the conversation and thus instigated the subsequent dialogue”). For other opinions relying on Shatzer in taking a broad view of the Edwards ban, see Cazares v. Evans, 2010 U.S. Dist. LEXIS 142142, at *98 (C.D. Cal. Nov. 8, 2010) (suggesting that detective violated Edwards by asking the “innocuous question” whether the suspect was aware he was going to court the following day, even though the question did not lead to an incriminating response); People v. Bridgford, 194 Cal. Rptr. 3d 336, 346, 348 (Cal. Ct. App. 2015) (finding Edwards’ violation because “further conversations [were] initiated by the police” when a deputy approached the suspect and “informed him that [a detective] wished to speak with him further about the homicide investigation” (quoting People v. Thomas, 281 P.3d 361, 373 (Cal. 2012))); State v. Edler, 833 N.W.2d 564, 567, 573 (Wis. 2013) (concluding that Edwards
Some courts have adopted the broad view of the Edwards ban without citing Shatzer at all. In United States v. Thomas, for example, the Eleventh Circuit observed that police may not “‘ask questions, discuss the case, or present the accused with possible sentences and the benefits of cooperation.’”\(^\text{119}\) Therefore, the court held, the officers did not conform to the dictates Edwards when they “not only continued discussing Thomas’s case, but . . . also pressed on her the possible ‘benefits of cooperation’ as well [as] the penalties of disobedience.”\(^\text{120}\) Likewise, the Sixth Circuit concluded that Edwards was violated in Moore v. Berghuis when an officer informed Moore that he had not been successful in contacting Moore’s attorney, but had only reached the answering service, and then inquired whether Moore wished to speak to him.\(^\text{121}\) Although Moore ultimately waived his rights and agreed to talk, the court found a failure to comply with Edwards because the suspect had not initiated the conversation.\(^\text{122}\)

The Court’s opinion in Shatzer has not succeeded, therefore, in putting to rest the controversy concerning the reach of Edwards. The next section goes on to analyze whether the policy rationales that animated Edwards call for a broad or narrow reading of the case and to propose a solution to this persistent conflict that serves those policies.

### III. Resolving the Conflict and Effectuating the Policies Underlying Edwards

The broader interpretation of the Edwards ban is supported not only by the Court’s unequivocal language in Shatzer, but also by the policy considerations the Edwards rule was intended to further. Although several alternative approaches would give effect to those policies as well as the Shatzer dictum, the one that would require the least disruption to the Supreme Court’s Miranda jurisprudence is to apply the same standard of initiation to both suspects and the police in cases involving post-invocation confessions. Under this proposal, the same type of comment on the part of a suspect that would trigger Edwards’ initiation exception and thereby take her out of the Edwards protection would

was violated when officer “explained the evidence they had against [Edler] and that [he] needed to come clean” and then read Miranda warnings, because there was “no indication . . . that Edler initiated further communications . . . to indicate a valid waiver under Edwards”). See also Thomas, 281 P.3d at 373 (quoting Shatzer and noting that, “[i]f further conversations are initiated by the police when there has not been a break in custody, the defendant’s statements are presumed involuntary,” but finding that the defendant was the one to reinitiate communications there); People v. Schuning, 928 N.E.2d 128, 137, 139 (Ill. App. Ct. 2010) (citing Shatzer’s reference to “subsequent requests for interrogation” and observing that, “if the police subsequently initiate a conversation with the accused in the absence of counsel, the accused’s statements are presumed involuntary,” but finding no need to apply that standard to the facts of the case).

119. United States v. Thomas, 521 F. App’x 878, 882 (11th Cir. 2013) (per curiam) (quoting United States v. Gomez, 927 F.2d 1530, 1539 (11th Cir. 1991)).
120. Id.
122. See id. at 888-89.
likewise be considered initiation if made by a police officer and thus would invalidate the suspect’s subsequent waiver of *Miranda*.

The Supreme Court has identified three related policies underlying the *Edwards* line of cases. First, *Edwards* is designed to respect the decisions made by suspects. In the words of the *Shatzer* Court, the “fundamental purpose” of the *Edwards* ban is to “‘[p]reserve[e] the integrity of an accused’s choice to communicate with police only through counsel.’”123 As the Court put it elsewhere, *Edwards*’ “‘prophylactic rule . . . ‘protect[s] a suspect’s voluntary choice not to speak outside his lawyer’s presence.’”124

Any post-invocation efforts on the part of the police to extend or reopen a conversation with a suspect are inconsistent with the suspect’s preference to communicate through counsel. Likewise, law enforcement officials do not respect the decisions made by suspects when they second-guess those choices and try to explain the benefits of cooperating and talking to the police without a lawyer.125 Thus, restricting the reach of *Edwards* to police conduct that rises to the level of interrogation undermines the policy of deferring to suspects’ wishes. Although the Navy-Marine Corps Court of Criminal Appeals disagreed in *United States v. Maza*, contending that a broad reading of *Edwards* would “permanent[ly] bar” interrogation even when the suspect “desire[d]” to retract her invocation of counsel,126 that court’s concern ignored the Supreme Court’s repeated admonition that a suspect who actually “desires” to resume communications with the police simply has to initiate the conversation herself.127

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125. See, e.g., *Yale Kamisar, On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It – and What Happened to It*, 5 Ohio St. J. Crim. L. 163, 187 (2007) (observing that police “are tricking the suspect” when they create “the false impression that it is in his best interest to tell them his side of the story”); *Leo & White*, supra note 19, at 436 (charging that “focusing the suspect’s attention on the importance of telling his story . . . totally undermin[es] the Miranda warnings’ effect”); *Charles D. Weisselberg, Mourning Miranda*, 96 Calif. L. Rev. 1519, 1537-38 (2008) (noting that police “distort[] suspects’ perceptions of their choices” when they “lead[] them to believe they will benefit by making a statement”).


A second, related policy underlying the Edwards line of cases is to protect suspects from police “badgering.” In Shatzer, for example, the Court observed that the Edwards ban “‘prevent[s] police from badgering a defendant into waiving his previously asserted Miranda rights.’” 128

Allowing the police to engage in any tactics short of “interrogation” disserves this “antibadgering rationale.” 129 As the Court explained in Smith v. Illinois, without the Edwards shield, the police could engage in “explicit or subtle” forms of “‘[badgering]’ that would eventually ‘wear down the accused and persuade him to incriminate himself.’” 130 The “subtle” techniques that could succeed in “wear[ing] down” a suspect’s resolve include attempts designed to persuade the suspect to change her mind that would not necessarily qualify as the functional equivalent of interrogation—such as explaining the strength of the evidence against her or the benefits of cooperating with the police. 131 Permitting the police to pepper a suspect with statements about her dire situation leaves room for a good deal of badgering even if it does not amount to interrogation under Innis.

Finally, the Shatzer Court noted, Edwards is based on the premise that a suspect who requests a lawyer has “indicate[d] that ‘he is not capable of undergoing . . . questioning without advice of counsel.’” 132 The majority in Arizona v. Roberson likewise quoted from Justice White’s separate opinion in Mosley to the same effect: the suspect who has invoked the right to counsel has “expressed his own view that he is not competent to deal with the authorities without legal advice.” 133

In such cases, the suspect’s “discomfit,” the Court made clear in Roberson, is “presume[d] to persist unless the suspect . . . initiates further communication”—

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128. Shatzer, 559 U.S. at 106 (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)); see also Montejo, 556 U.S. at 789 (observing that Edwards is “meant to prevent police from badgering defendants into changing their minds about their rights”). For other opinions citing the badgering concern, see Davis, 512 U.S. at 458; Minnick, 498 U.S. at 150; Bradshaw, 462 U.S. at 1044. But cf. Stuntz, supra note 17, at 819 (finding this rationale “not terribly convincing” and “overprotective” because “waiting several hours and asking a suspect if he has changed his mind” does not “send the signal that he has no choice but to say yes”).

129. Montejo, 556 U.S. at 788.


131. See supra notes 18 & 43 and accompanying text and infra note 139 and accompanying text.


133. Roberson, 486 U.S. at 681 (quoting Michigan v. Mosley, 423 U.S. 96, 110 n. 2 (1975) (White, J., concurring in the result)); see George C. Thomas III, Happy Birthday, Miranda, 43 N. Ky. L. Rev. 300 (2016) (tracing the long history of the law’s concern with the power imbalances that lead to confessions); see also Laura I. Appleman, A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice, 128 Harv. L. Rev. 94-95 (2015) (listing “custodial interrogation” as one example of “the asymmetrical nature of the criminal justice system”).
not unless the police are able to persuade her to change her mind. As noted above, any justification for “keep[ing] the lines of communication . . . open” between the police and a suspect disappears once the right to counsel has been invoked because at that point the police can, and should, “communicate with [the suspect] through an attorney.”

Suspects who have admitted that they feel outmatched in the interrogation room are the last ones who should be forced to invoke their right to counsel a second time. Thus, any police efforts to continue or reinitiate a conversation without the suspect’s lawyer contravene this rationale as well.

In order to give effect to the Court’s opinions in Edwards and Shatzer as well as the policies underlying the Edwards line of cases, the Edwards ban should not be restricted to police conduct that rises to the level of interrogation under Rhode Island v. Innis. Admittedly, the view that post-invocation confessions reflect either police interrogation or suspect initiation is not unreasonable as an abstract matter. But that strict dichotomy is indefensible given the prevailing definitions of interrogation and initiation. Effectuating the policies underlying Edwards requires either the reformulation of one of those concepts or the recognition of a third category of cases—i.e., where police initiated contact with, but did not interrogate, a suspect.

134. Roberson, 486 U.S. at 684; see also id. at 681 (warning that when a suspect has conveyed this sense of incompetence, a confession made “‘at the authorities’ insistence’” should “‘be viewed with skepticism’” (quoting Mosley, 423 U.S. at 110 n.2 (White, J., concurring in the result))); Corn, supra note 17, at 932 (observing that “contacting a suspect to elicit a subsequent Miranda waiver effectively exploits [the suspect’s] expressed vulnerability”).

135. Mosley, 423 U.S. at 110 n.2 (White, J., concurring in the result); see supra note 42 and accompanying text.


137. The Court has also cited “the virtues of a bright-line rule” as a consideration animating the Edwards line of cases. Roberson, 486 U.S. at 681; see also Minn. v. Mississippi, 498 U.S. at 146, 151 (1990) (touting Edwards for “the clarity of its command and the certainty of its application”); Smith v. Illinois, 469 U.S. 91, 98 (1984) (per curiam) (noting that Edwards “set forth a ‘bright-line rule’” (quoting Solem v. Stumes, 465 U.S. 638, 646 (1984))). But Shatzer discounted the importance of that rationale, see Shatzer, 559 U.S. at 112 (arguing that “clarity and certainty are not goals in themselves,” but instead are “valuable only when they reasonably further the achievement of some substantive end”), and the Court has willingly tolerated ambiguity in some of its rulings in this area. See Davis v. United States, 512 U.S. 452, 474-75 & n.7, 469 (1994) (Souter, J., concurring in the judgment) (questioning the clarity of the majority’s unambiguous invocation rule and advocating an alternative approach that would avoid “fine distinctions and intricate rules”); Mosley, 423 U.S. at 115 (Brennan, J., dissenting) (criticizing the majority’s “vague and ineffective procedural standard”). For a discussion of the Court’s fluctuating commitment to administrability concerns in its criminal procedure jurisprudence, see Kinkors, supra note 15, at 126-29.

One possible alternative would be to expand the narrow confines of **Innis’** definition of interrogation, to encompass deliberate police attempts to elicit information, or at least to apply **Innis’** concept of the functional equivalent of questioning in a more realistic manner so that, for example, the police do not need a specific reason to believe a suspect is “peculiarly susceptible” to a classic interrogation technique in order for them to realize the tactic is “reasonably likely to elicit an incriminating response.” Another solution would be to narrow the concept of initiation, so that a suspect does not lose the protection of **Edwards** by asking what is going to happen to her “only minutes after” invoking the right to counsel. Both of these options have much to recommend them, but they would require dramatic changes in the Court’s definitions of interrogation and initiation and therefore seem less likely to receive approval from a majority of the Justices.

A more modest approach that would lead to an interpretation of **Edwards** faithful to both the **Shatzer** dictum and the policies underlying this line of cases would be to apply the same standard used in analyzing whether a suspect has initiated further communication with the police to law enforcement officials as well. Under this proposal, post-invocation initiation by police officers would invalidate the suspect’s subsequent waiver of **Miranda** and render any statements she made inadmissible.

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139. See Rhode Island v. **Innis**, 446 U.S. 291, 302 n.7, 300 n.4 (1980) (noting that the intent of the police, though “not . . . irrelevant,” is not controlling and justifying the refusal to follow the Sixth Amendment approach, which prohibits officers from “‘deliberately [eliciting]’ incriminating information,” on the grounds that the Fifth and Sixth Amendments involve “quite distinct” policy concerns and therefore “are not necessarily interchangeable” (quoting **Massiah** v. United States, 377 U.S. 201, 206 (1964))); see also Arizona v. **Mauro**, 481 U.S. 520, 528 (1987) (observing that “[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself”). But cf. **Innis**, 446 U.S. at 305 (Marshall, J., dissenting) (arguing that a suspect is interrogated “whenever police conduct is intended or likely to produce a response”); id. at 310 (Stevens, J., dissenting) (maintaining that police should be prohibited from “making deliberate attempts to elicit statements”).

140. **Innis**, 446 U.S. at 302 (reasoning that the absence of evidence that police “were aware that [Innis] was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children” suggested that the officers’ expression of concern about a disabled child finding the murder weapon was not the functional equivalent of express questioning); see also **Mauro**, 481 U.S. at 528 (noting that the officers’ “aware[ness] of th[e] possibility” that Mauro might make an incriminating comment when they recorded his conversation with his wife did not satisfy the definition of interrogation). But cf. id. at 531 (Stevens, J., dissenting) (contending that the police engaged in a “powerful psychological ploy” by exploiting Mrs. Mauro’s request to visit her husband and “setting up a confrontation between them”); **Innis**, 446 U.S. at 306 (Marshall, J., dissenting) (pointing out that “one can scarcely imagine a stronger appeal to the conscience of . . . any suspect” than the one used in that case); id. at 312 (Stevens, J., dissenting) (commenting that “most suspects are unlikely to incriminate themselves even when questioned directly”); Jesse C. Stewart, Note, The Untold Story of Rhode Island v. **Innis**: Justice Potter Stewart and the Development of Modern Self-Incrimination Doctrine, 97 VA. L. REV. 431, 469, 471 (2011) (arguing that Justice Stewart’s majority opinion in **Innis** was “designed to clarify and reinforce the Sixth Amendment right to counsel under **Massiah**” and, while it also “revitalized the **Miranda** doctrine,” going even further and “vindicat[ing] Thomas Innis . . . likely would have cost him his solid majority”).


142. The question whether a sufficient gap in time between police attempts to reopen the conversation and a suspect’s subsequent initiation of communications can act to remove the taint of the **Edwards** violation, or instead increases the coercive pressure on the suspect to speak, is beyond
The initiation exception has its roots in *Edwards v. Arizona*, where the Court suggested that a suspect who asserts the right to counsel loses the protection afforded by that decision if she “initiates further communication, exchanges, or conversations with the police.”\textsuperscript{143} In *Oregon v. Bradshaw*, the plurality elaborated on the scope of the initiation exception, making clear that it does not come into play simply because a suspect makes a comment “relating to routine incidents of the custodial relationship” (such as asking for water or a phone call).\textsuperscript{144} A suspect, however, who expresses “a desire . . . to open up a more generalized discussion relating directly or indirectly to the investigation” leaves the protective shield of *Edwards*.\textsuperscript{145}

*Bradshaw*’s focus was understandably on suspect-initiated communication because the question before the Court there was whether the initiation exception applied to a defendant who asked, “Well, what is going to happen to me now?”\textsuperscript{146} Nevertheless, language in the plurality opinion referred to law enforcement officers as well, and the Justices manifested no intent to apply a different standard depending on whether the initiation allegedly came at the hands of the suspect or the police. Thus, the plurality noted, “there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to ‘initiate’ any conversation or dialogue.”\textsuperscript{147}

While a wholesale endorsement of everything the plurality had to say in *Bradshaw* may be difficult to stomach,\textsuperscript{148} there is no justification for allowing the

\textsuperscript{144} Bradshaw, 462 U.S. at 1045; see also id. at 1046 (distinguishing comments that are “merely a necessary inquiry arising out of the incidents of the custodial relationship”).
\textsuperscript{145} Id. at 1045; see also id. at 1045-46 (noting that Bradshaw “evinced a willingness and a desire for a generalized discussion about the investigation”); id. at 1055 (Marshall, J., dissenting) (agreeing that the initiation exception applies when a suspect “demonstrate[s] a desire to discuss the subject matter of the criminal investigation”). For discussion of the two-step inquiry mandated by *Bradshaw*, see supra note 37 and accompanying text.
\textsuperscript{146} Bradshaw, 462 U.S. at 1042.
\textsuperscript{147} Id. at 1045; see also id. (“Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally ‘initiate’ a conversation in the sense in which that word was used in *Edwards*.”). Cf. Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (excluding from the definition of “interrogation” police words or conduct “normally attendant to arrest and custody”).
\textsuperscript{148} See, e.g., Bradshaw, 462 U.S. at 1055 & n.3 (Marshall, J., dissenting) (pointing out that Bradshaw’s question “might well have evinced a desire for a ‘generalized’ discussion” if “posed by Jean-Paul Sartre before a class of philosophy students,” but here Bradshaw’s “‘only desire’ was to find out where the police were going to take him” and the officer “took advantage of [the] inquiry to commence once again his questioning” (quoting id. at 1045 (majority opinion))); Leo & White, supra note 19, at 427 (arguing that the *Bradshaw* standard of initiation could apply “whenever a suspect says anything that could be construed by the police as pertaining to the charges against him”); James J. Tomkovicz, Standards for Invocation and Waiver of Counsel in Confession Contexts, 71 IOWA L. REV. 975, 1033-34 (1986) (criticizing *Bradshaw*’s definition as “overinclusive[ ]” because it extends to “many situations in which suspects may not have changed their minds”).
police to play by different rules. Thus, if a suspect is deemed to initiate further communications by asking what charges or sentence she could face, an officer who decides with no prompting to volunteer information about potential charges or sentences should likewise be seen as reopening the conversation. If asking the police about the evidence they have collected triggers the initiation exception, then taking the initiative to inform the suspect about that evidence should also be seen as initiation. And if the initiation exception applies when a suspect like Bradshaw inquires about the next step in the process, the police should also be deemed to have resumed the conversation when they offer an unsolicited explanation of what the suspect can expect to happen as the case progresses.

Conversation is a two-way street, and the courts should be equally stingy or generous in interpreting the words chosen by suspects and law enforcement officials. The same type of comments from a suspect that are considered initiation and thus remove her from the Edwards shield should likewise be treated as initiation when made by law enforcement officials and therefore should invalidate the suspect’s subsequent waiver of Miranda. Although this approach creates a middle ground between suspect initiation and police interrogation, it gives effect to the Court’s language in Edwards and Shatzer and protects the policy interests underlying those cases without deviating from the Court’s case law in this area.

IV. CONCLUSION

The suspects who take the Miranda warnings to heart and assert the right to counsel account for only a small subset of those subjected to custodial


150. Compare LAFAVE ET AL., supra note 18, § 6.9(f), at 849-50 nn.138-39 (citing conflicting lower court cases on the issue whether such a question from a suspect triggers the initiation exception), with id. § 6.7(c), at 787 & n.133 (citing conflicting lower court cases on the issue whether such a statement by the police constitutes “interrogation”).

151. Compare Liddell v. Kramer, 2011 U.S. Dist. LEXIS 134788, at *34-35 (C.D. Cal. July 26, 2011) (concluding that the initiation exception was triggered when the suspect asked what evidence the police had against him), with LAFAVE ET AL., supra note 18, § 6.7(c), at 782 & n.111 (citing conflicting lower court cases on the issue whether such a statement by the police constitutes “interrogation”), and id. § 6.9(f), at 841 (same). Cf. Innis, 446 U.S. at 299 (noting that “psychological ploys” like “[positing] ‘the guilt’” of the suspect “amount to interrogation” (quoting Miranda v. Arizona, 384 U.S. 436, 450 (1966))).

152. Compare Bradshaw, 462 U.S. at 1045-46, and LAFAVE ET AL., supra note 18, § 6.9(f), at 849-50 nn.138-39 (citing conflicting lower court cases on the issue whether such a question from a suspect triggers the initiation exception), with United States v. Maza, 73 M.J. 507, 519, 525 (N.-M. Ct. Crim. App. 2014) (finding that the officer’s comment that he planned to seek judicial authorization to search the suspect had “a proper purpose”—“to reduce the appellee’s stress by explaining to him why he would be sitting in the room for an extended period”—and did not constitute the functional equivalent of interrogation).

153. For a similar critique of other aspects of the Court’s Miranda jurisprudence, see Kinports, supra note 76, at 401-03, 413-14, 431-33.
interrogation, but the response to those invocations on the part of some law enforcement officials is part of a general pattern of strategic police attempts to manipulate and undermine Miranda.\footnote{154\textsuperscript{154}} Despite the purportedly per se nature of the Edwards rule and the clear import of the Shatzer dictum, some officers continue to engage in flagrant post-invocation attempts to persuade suspects to change their minds.

In Dorsey v. United States, for example, the D.C. Court of Appeals concluded that police investigating the assault and robbery of an elderly victim “badger[ed]” the defendant “with a vengeance” for more than five hours following his invocation of the right to counsel.\footnote{155\textsuperscript{155}} Their tactics included “depriv[ing] him of needed sleep,” “disparag[ing] [his] desire to talk to a lawyer,” “appeal[ing] to [his] ‘conscience’ and his feelings for his mother,” “misrepresent[ing] the benefits of confessing before consulting with counsel,” “threaten[ing] that the prosecutors would ‘up the charges,’” and “exaggerat[ing] the strength of the evidence against him.”\footnote{156\textsuperscript{156}}

If law enforcement officials still engage in such egregious Edwards violations even in cases that do not involve highly charged crimes like mass shootings, terrorism, or police killings, they can be expected to resort to more indirect methods to circumvent Edwards and take advantage of the pressures of custody to induce suspects who have asked for counsel to change their minds. Perhaps this is not surprising, given the obvious incentive police have to obtain confessions.\footnote{157\textsuperscript{157}} More disturbing is that, six years after Shatzer, a number of lower courts are continuing to let them get away with it.\footnote{158\textsuperscript{158}}

\footnote{154\textsuperscript{154} See, e.g., Kamisar, supra note 125, at 186 (charging that police have engaged in a pattern of “‘circumventing,’ ‘evading,’ or ‘disregarding’” Miranda); Leo, supra note 1, at 1021, 1027 (concluding that “police have transformed Miranda into a tool of law enforcement” such that “Miranda has now become a standard part of the machine”).


156. Id. at 1197, 1201; see also United States v. Thomas, 521 F. App’x 878, 880 (11th Cir. 2013) (per curiam) (finding that the defendant asserted the right to counsel “long before the police claim[ed] she did,” but that they “continued interrogating Thomas, discussing the case, discussing the benefits of talking, and warning her of the consequences of not talking,” including telling her that other charges could be brought against her, offering to “help her out” by calling the prosecutor “if she cooperated,” and “not[ing] in passing that they soon would be arresting [her] boyfriend”).


158. Cf. Dorsey, 60 A.3d at 1204-06 (deferring to the trial judge’s factual finding that the defendant’s ultimate decision to waive his Miranda rights was caused by his “genuine feelings of remorse . . . rather than the detectives’ coercive inducements” and that his confession was therefore voluntary and admissible for impeachment purposes).}
Interpreting *Edwards* narrowly, as banning only police conduct that constitutes the functional equivalent of interrogation under *Rhode Island v. Innis*, not only contravenes the language of the Supreme Court’s opinions in this area but also disserves the policy rationales underlying *Edwards*. In order to remain faithful to the language and reasoning in the Court’s precedents, the same standard of initiation should apply to both suspects and the police. Accordingly, the same type of statements made by a suspect that trigger the initiation exception and thereby take her out of the *Edwards* protection should likewise be considered initiation when made by law enforcement officials and thus should invalidate the suspect’s subsequent waiver of her *Miranda* rights.