Washington and Lee Law Review

Volume 78 | Issue 2 Article 5

Spring 2021

Pretrial Custody and *Miranda*

Kit Kinports
Penn State Law, University Park, kxk47@psu.edu

Pretrial Custody and *Miranda*

Kit Kinports*

Abstract

In two recent opinions, Maryland v. Shatzer *and* Howes v. Fields*, the Supreme Court concluded that inmates serving prison sentences were not in custody for purposes of* Miranda*—in Shatzer's case while he was living among the general prison population and in Fields's case while he was undergoing police interrogation. The question addressed in this Article is one that has divided the lower courts in the wake of those two decisions: the impact of the Court's rulings on the hundreds of thousands of pretrial detainees in this country, many of whom are poor, Black, and Brown.*

This Article maintains that the Court's language and reasoning in Shatzer *and* Fields*, as well as the relevant policy considerations, call for limiting the reach of those opinions to prisoners serving time. This Article therefore concludes that pretrial detainees should be deemed to be in* Miranda *custody for the duration of their confinement prior to trial. Any other result would allow gamesmanship on the part of prosecutors in making charging decisions and bail recommendations and would enable law enforcement to trade on the coerciveness of pretrial detention to elicit unwarned confessions from suspects who are especially susceptible to the threats and promises that are a leading cause of false confessions and who disproportionately represent communities of color and financially vulnerable populations.*

---

* Professor and Polisher Family Distinguished Faculty Scholar, Penn State Law at University Park. I am indebted to Joshua Dressler, David Kaye, George Thomas, and Sam Wiseman for their thoughtful comments on an earlier draft of this Article.

Table of Contents

INTRODUCTION

In 2018, 10.7 million people were admitted to more than 2,800 city and county jails in this country.[1] At the midpoint of that year, those jails held more than 738,000 persons, about two-thirds of whom—490,000 individuals—had not been convicted of a crime.[2]

While some arrestees are released quickly,[3] others are held pending trial[4] because they are denied bail or, more commonly, because they cannot afford to pay the amount of money bail

1. ZHEN ZENG, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 253044, JAIL INMATES IN 2018, at 1, 7 (2020).

2. *Id.* at 1.

3. *See, e.g.*, Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1058 (2013) (noting that many suspects are released after their initial arraignment, within a day or two following arrest).

4. *See* THOMAS H. COHEN, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 239673, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995–2010, at 2 (2013) (reporting that 64 percent of federal pretrial detainees were held for the duration of their case in 2010).

imposed.[5] In the largest counties in this country, almost 40 percent of felony defendants are detained awaiting trial.[6] As one scholar observed, pretrial detention is "the single most preventable cause of mass incarceration in America."[7]

Pretrial detention comes with significant costs, and those burdens fall disproportionately on communities of color[8] and economically vulnerable populations.[9] Pretrial detainees are more likely to be convicted, and they receive less advantageous

5. *See* THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 214994, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2007) (finding that only one-sixth of pretrial detainees were denied bail and the rest were unable to post bail); Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://perma.cc/J9YU-5LQK (noting that the median cash bail amount in felony cases is $10,000, about eight months' income for the typical pretrial detainee).

6. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.2(i), at 16 (6th ed. 2017) (putting the figure at 38 percent of felony defendants in the seventy-five largest counties); *see also* COHEN, *supra* note 4, at 3 (reporting that the 2010 pretrial detention rate in federal cases was 84 percent for drug charges, 86 percent for weapons offenses, and 87 percent for violent crimes).

7. SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 2 (2018).

8. *See* THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 6 (2018), https://perma.cc/BQ3D-AUTE (PDF) (finding that Black and Brown defendants were more likely to be denied bail, charged higher amounts of money bail, and detained because they were unable to pay the cash bail); Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://perma.cc/Z5B3-NXV6 (reporting that Black and Brown defendants are at least 10 to 25 percent more likely to be held prior to trial and their cash bail amounts are set at double the figure for White defendants). *But cf.* BAUGHMAN, *supra* note 7, at 106 (concluding that the racial disparity disappeared after controlling for the likelihood a suspect would commit a violent crime, and in fact judges tended to detain White suspects more than Black suspects who posed similar risks of committing violent and drug crimes).

9. *See, e.g.*, BAUGHMAN, *supra* note 7, at 48 (noting that most detainees unable to pay bail are in the poorest third of the population); Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1653 (2020) (commenting on the "widespread pretrial detention of the poor").

plea deals and longer sentences.[10] Pretrial detention can lead to loss of employment, housing, public benefits, and child custody.[11] As a result, some detainees are pressured to plead guilty in return for lenient sentences or even time served.[12] And, as a captive audience for law enforcement officials seeking information, pretrial detainees facing an uncertain future are particularly susceptible to the types of threats and promises that are highly correlated with false confessions.[13]

During the past decade, two Supreme Court decisions have determined that inmates who were serving prison sentences were not in custody for *Miranda*[14] purposes. In the first, *Maryland v. Shatzer*,[15] the Court, in a 2010 opinion written by Justice Scalia, held that a prisoner enjoyed a break in custody when an interrogation session ended with his invocation of the right to counsel and he was returned to the general prison population.[16] Two years later, Justice Alito wrote the majority opinion in *Howes v. Fields*,[17] concluding that an inmate who was questioned by two law enforcement officials for somewhere between five and seven hours was not entitled to *Miranda* warnings because the interrogation was noncustodial.[18]

The issue discussed in this Article is one that has divided the lower courts in the wake of *Shatzer* and *Fields*: what implications those two decisions have for pretrial detainees who make an unwarned confession while incarcerated awaiting trial.

---

10. *See, e.g.*, BAUGHMAN, *supra* note 7, at 82–85; THE SENTENCING PROJECT, *supra* note 8, at 17; Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 246–47, 250–52 (2018).

11. *See, e.g.*, BAUGHMAN, *supra* note 7, at 87; Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1423–28 (2017).

12. *See* BAUGHMAN, *supra* note 7, at 4; Wiseman, *supra* note 10, at 246.

13. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 309 (2008) (concluding that "promises of leniency and threats of punishment, whether implicit or explicit, are the primary cause of police-induced false confessions"); *see also* GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND 220 (2012) (reporting that "[f]alse confessions are the third leading cause of wrongful convictions").

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

15. 559 U.S. 98 (2010).

16. *Id.* at 112–14.

17. 565 U.S. 499 (2012).

18. *Id.* at 514–17.

In exploring that question, this Article argues that *Shatzer* and *Fields* should be limited to inmates who are serving prison sentences. Pretrial detainees, by contrast, should be deemed to be in custody for *Miranda* purposes during the length of their pretrial confinement.

In defending that position, this Article proceeds in three parts. Following this introduction, Part I briefly describes the Supreme Court precedent on custody, first tracing the variety of definitions the Justices have endorsed in the fifty-plus years since *Miranda* was decided and then focusing on the four opinions that have considered *Miranda* challenges raised by incarcerated individuals. In assessing the reach of *Shatzer* and *Fields*, Part II first addresses the increasingly pro-prosecution interpretation of precedent reflected in those four decisions and then analyzes the language and reasoning in *Shatzer* and *Fields*. Part III examines the relevant competing policy considerations, and the Article then concludes.

I. THE SUPREME COURT'S CUSTODY PRECEDENTS

A. *Definitions of Custody*

The "tortured path"[19] the Supreme Court has followed in defining custody for *Miranda* purposes has yielded various definitions over the years. In *Miranda* itself, the Court held that the combination of custody and interrogation triggers the right to warnings, reasoning that "no statement . . . can truly be the product of . . . free choice" when a suspect is isolated in "an unfamiliar atmosphere" and faced with the "compulsion inherent in custodial surroundings."[20] In defining custody, the *Miranda* Court made the somewhat circular observation that warnings are required whenever a suspect "has been taken into

19. George M. Dery III, *The Supposed Strength of Hopelessness: The Supreme Court Further Undermines* Miranda *in* Howes v. Fields, 40 AM. J. CRIM. L. 69, 78 (2012).

20. *Miranda*, 384 U.S. at 457–58. Even if pretrial detainees are deemed to be in custody, they are not entitled to *Miranda* warnings unless they are also subjected to interrogation. This point is discussed further *infra* notes 249– 256 and accompanying text.

custody or otherwise deprived of his freedom of action in any significant way."[21]

Seventeen years later, the Court repeated *Miranda*'s formulation in *California v. Beheler*.[22] But *Beheler* then went on to say that "the ultimate inquiry" is "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[23]

The following year, in *Berkemer v. McCarty*,[24] the Court again quoted *Miranda*'s custody standard but refused to give "talismanic power" to the reference to significant deprivations of freedom in the latter portion of the definition.[25] Despite acknowledging that a traffic stop "significantly" limits a driver's "'freedom of action,'" the Court held that "routine" traffic and *Terry* stops are not "the functional equivalent of formal arrest" and therefore do not rise to the level of custody.[26] In declining to

21. *Miranda*, 384 U.S. at 444. The Court made the same point several times, *see id.* at 445, 467, 478, at one point adding the qualifier "at the station." *See id.* at 477 (using the phrase "while in custody at the station or otherwise deprived of his freedom of action in any significant way"); *see also* Daniel Yeager, *Rethinking Custodial Interrogation*, 28 AM. CRIM. L. REV. 1, 68 (1990) (pointing out that the Court's repetition of the phrase demonstrates it was not used "cavalierly"). For other Supreme Court opinions applying *Miranda*'s definition of custody, see Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam) (finding that a suspect's "freedom to depart" was not "restricted in any way" when he voluntarily agreed to meet at the police station, was told he was not under arrest, and left the station after a half-hour interrogation); Beckwith v. United States, 425 U.S. 341, 347 (1976) (concluding that a suspect who was questioned by IRS agents for three hours in a home where he periodically stayed was not in custody even though he was the focus of the investigation); Orozco v. Texas, 394 U.S. 324, 327 (1969) (holding that a suspect was in custody when he was arrested in his bedroom early one morning and asked four questions).

22. 463 U.S. 1121, 1125 (1983) (per curiam).

23. *Id.* (quoting *Mathiason*, 429 U.S. at 495). For other Supreme Court opinions applying *Beheler*'s definition of custody, see New York v. Quarles, 467 U.S. 649, 655 (1984) (concluding that a suspect was in custody when he was handcuffed and surrounded by four police officers in a grocery store); Minnesota v. Murphy, 465 U.S. 420, 430–31 (1984) (finding that a probationer was not in custody at his probation officer's office even though he was required to attend the meeting and answer her questions truthfully).

24. 468 U.S. 420 (1984).

25. *Id.* at 437.

26. *Id.* at 435–36, 442 (quoting *Miranda*, 384 U.S. at 444); *see id.* at 437, 438–39 (reasoning that stops are "presumptively temporary and brief," are

give *Miranda*'s language a literal interpretation, the Court asserted that "[f]idelity" to the landmark decision demanded that it be "enforced strictly," but "only" in cases that "implicated" the "concerns" that underlay it.[27] When the majority went on to apply *Beheler*'s standard to the traffic stop at issue in *McCarty*, the Court added that the officer's "unarticulated plan" to arrest McCarty had "no bearing" on the custody determination because "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[28]

The Court continued in the same vein a decade later in *Stansbury v. California*,[29] quoting both *Miranda*'s and *Beheler*'s definitions of custody and then, following up on *McCarty*, pointing out that an officer's "subjective" "knowledge or beliefs" are irrelevant to the question of custody unless "they are conveyed, by word or deed," to the suspect.[30] In making custody determinations, a judge must consider "all of the circumstances surrounding the interrogation" and those subjective factors may be one relevant factor, the Court continued, only if they are "somehow manifested" to the suspect and "would have affected how a reasonable person in that position would perceive his or her freedom to leave."[31]

The Court further refined the reasonable person standard a year later in *Thompson v. Keohane*[32] in ruling that issues of custody are mixed questions of law and fact that merit independent review on habeas.[33] Given "the circumstances surrounding the interrogation," the Court held, the key is whether a reasonable person would have "felt . . . at liberty to

---

"most likely" to end in the driver's release, and are "substantially less 'police dominated'" because they usually take place in public and involve only one or two officers (quoting *Miranda*, 384 U.S. at 445)). *But cf.* Yeager, *supra* note 21, at 68, 22 (arguing that *Miranda*'s "disjunctive use of the word 'or'" signaled "the Court's intent to create *two* types of custodial restraint" that constitute custody, and suggesting that *Berkemer* instead should have decided that brief traffic stops are only "an *insignificant* deprivation of freedom").

27. *McCarty*, 468 U.S. at 437.

28. *Id.* at 442.

29. 511 U.S. 318 (1994) (per curiam).

30. *Id.* at 322, 324–25.

31. *Id.* at 322, 325.

32. 516 U.S. 99 (1995).

33. *Id.* at 102.

terminate the interrogation and leave."[34] The Court concluded that that objective standard can then be used to "resolve 'the ultimate inquiry'"—whether the *Beheler* test is met.[35]

Despite the *Miranda* Court's efforts to devise "'concrete . . . guidelines'" governing the admissibility of confessions that would provide "something more" than the amorphous totality-of-the-circumstances voluntariness due process test,[36] the Court has since admitted creating a "slippery" definition of custody.[37] The totality-of-the-circumstances approach to custody has yielded "no bright line" for determining when a suspect is in custody short of a "formal arrest[]"[38] and has led to the admission of a substantial number of unwarned confessions obtained through interrogations that were deemed to be noncustodial.[39]

B. *Custody and Incarceration*

Four of the Supreme Court's custody decisions involve incarcerated individuals who were questioned about crimes unrelated to the reasons for their imprisonment. In three of those cases, the suspects were serving prison sentences, and the fourth involved a pretrial detainee.

---

34. *Id.* at 112. In subsequent cases, the Court made clear that the reasonable person standard incorporates the age of a minor suspect, "so long as the child's age was known to the officer . . . or would have been objectively apparent to a reasonable officer," J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011), but does not include the suspect's inexperience with law enforcement. Yarborough v. Alvarado, 541 U.S. 652, 668 (2004).

35. *Thompson*, 516 U.S. at 112 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)). For another Supreme Court opinion applying *Thompson*'s definition of custody, see *Alvarado*, 541 U.S. at 663–65 (concluding that reasonable judges could disagree whether the station-house interrogation of a juvenile was custodial).

36. Dickerson v. United States, 530 U.S. 428, 439, 442 (2000) (quoting Miranda v. Arizona, 384 U.S. 436, 442 (1966)).

37. Oregon v. Elstad, 470 U.S. 298, 309 (1985).

38. 1 JOSHUA DRESSLER ET AL., UNDERSTANDING CRIMINAL PROCEDURE § 24.07[A], at 447 (7th ed. 2017).

39. *See* George C. Thomas III, *Stories About* Miranda, 102 MICH. L. REV. 1959, 1970, 1972 (2004) (reporting, in an empirical study of more than two hundred *Miranda* decisions, that almost half of the un-Mirandized statements were admitted because the suspect was not in custody).

The first case, *Mathis v. United States*,[40] came two years after *Miranda*, and the Court held there that an IRS agent should have administered *Miranda* warnings before interviewing Mathis in the jail where he was serving a state prison term.[41] In rejecting the government's argument that the official was merely conducting a routine civil investigation, the Court refused to make IRS agents "immune" from *Miranda*'s requirement that warnings be provided to "a person in custody."[42] The Court was also unimpressed with the government's attempt to limit *Miranda* to cases where the suspect is "'in custody' in connection with the very case under investigation."[43] Rather, the Court held, *Miranda* does not turn on "the reason why the person is in custody."[44] The Court therefore reversed Mathis's conviction on the ground that his un-Mirandized statement should not have been introduced against him.[45]

The second decision, *Illinois v. Perkins*,[46] came more than twenty years later and is the only one of the four that involved a pretrial detainee.[47] Perkins had been in a county jail for two days awaiting trial on aggravated battery charges when he admitted committing a previously unsolved murder in response to questioning from an undercover police officer.[48] In finding no violation of *Miranda*, the *Perkins* Court added a third trigger for *Miranda* warnings—"'interplay'" between custody and interrogation, meaning that suspects must realize they are talking to a government agent—on the grounds that the coerciveness *Miranda* was designed to alleviate is missing when a suspect "considers himself in the company of cellmates and not

40. 391 U.S. 1 (1968).
41. *Id.* at 2–3.
42. *Id.* at 4.
43. *Id.*
44. *Id.* at 4–5.
45. *Id.* at 5.
46. 496 U.S. 292 (1990).
47. *Id.* at 294.
48. *Id.* at 294–95; *id.* at 304 (Marshall, J., dissenting).

officers."[49] A major theme in the majority opinion, which was repeated several times, was that a suspect who is speaking to an undercover official does not feel the same compulsion to confess because of "the fear of reprisal" or "the hope of more lenient treatment" at the hands of someone "who appear[s] to control the suspect's fate."[50]

The majority opinion did not endorse the Solicitor General's argument that Perkins was not in custody because the jail was an environment familiar to him,[51] and the Justices implied that they thought he was "in custody in a technical sense."[52] Nevertheless, the Court expressly left open the question whether "[t]he bare fact of custody" invariably requires *Miranda* warnings when suspects know their questioners are government agents.[53]

Twenty years after *Perkins*, the third opinion, *Maryland v. Shatzer*,[54] created a break-in-custody exception to the *Edwards* line of cases protecting suspects who invoke the *Miranda* right to counsel.[55] In *Edwards v. Arizona*,[56] the Court held that interrogation must cease when a suspect requests a lawyer.[57]

---

49. *Id.* at 297, 296 (majority opinion) (emphasis omitted) (quoting Yale Kamisar, Brewer v. Williams*,* Massiah*, and* Miranda*: What Is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1, 63 (1978)).

50. *Id.* at 296–97 ("When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners."); *see id.* at 298 (observing that Perkins "had no reason to feel that [the] undercover agent . . . had any legal authority to force him to answer questions or . . . could affect [his] future treatment").

51. Brief for the United States as Amicus Curiae Supporting Petitioner at 10–14, *Perkins*, 496 U.S. 292 (No. 88-1972).

52. *Perkins*, 496 U.S. at 297.

53. *Id.* at 299.

54. 559 U.S. 98 (2010).

55. *Id*. at 110.

56. 451 U.S. 477 (1986).

57. *See id*. at 484–85. For discussion of the conflicting signals coming from the Supreme Court, and the resulting disagreement in the lower courts, on the question whether *Edwards* bans only police conduct that rises to the level of "interrogation" under *Miranda* or forbids law enforcement from even approaching a suspect who has asked for counsel, see Kit Kinports, *What Does* Edwards *Ban?: Interrogating, Badgering, or Initiating Contact?*, 43 N. KY. L. REV. 359 (2016).

Arizona v. Roberson[58] extended *Edwards* to ban questioning about all charges,[59] and *Minnick v. Mississippi*[60] expanded *Edwards* further to prohibit interrogating even suspects who have been able to consult with counsel after asserting their rights.[61] More than twenty years before *Shatzer*, the Court had granted cert in *United States v. Green*[62] to consider whether the *Edwards* ban on interrogation was eternal, but after oral argument the Court dismissed the case as moot when Green died.[63]

In holding that the *Edwards* protection ends after a fourteen-day break in custody,[64] *Shatzer* distinguished "the paradigm *Edwards* case" where an arrestee is "held in

58. 486 U.S. 675 (1988).

59. *See id.* at 683 (reasoning that a suspect's inability to "deal with" custodial interrogation without counsel is not affected by a change in the topic under discussion).

60. 498 U.S. 146 (1990).

61. *See id.* at 152–53 (explaining that the lawyer's presence during interrogation is key because a prior consultation does not protect the suspect from either "persistent" police efforts to induce a waiver or the "coercive pressures that accompany custody").

62. 507 U.S. 545 (1993).

63. *Id.* For further discussion of *Green*, see *infra* notes 142–147, 167–171 and accompanying text.

64. *See* Maryland v. Shatzer, 559 U.S. 98, 110 (2010). *But cf.* Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of* Edwards v. Arizona, 53 OKLA. L. REV. 11, 25 (2000) (discussing "the potential effect of coercive influences after custody is resumed"); Marcy Strauss, *Reinterrogation*, 22 HASTINGS CONST. L.Q. 359, 388–92, 401 (1995) (arguing that breaks in custody do not always suffice to dissipate coercion and proposing a six-month break-in-custody exception); Scott E. Sundby, *The Court and the Suspect: Human Frailty, the Calculating Criminal, and the Penitent in the Interrogation Room*, 98 WASH. U. L. REV. 123, 157 (2020) (noting that the Court had not "the slightest pretense of an empirical basis" for its fourteen-day rule); Elizabeth E. Levy, Note, *Non-Continuous Custody and the* Miranda-Edwards *Rule: Break in Custody Severs Safeguards*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 539, 569, 574 (1994) (pointing out that a second arrest could exacerbate a suspect's fear, and suggesting that courts should consider not only the length of the break in custody but also factors like whether the suspect was able to contact an attorney and the circumstances surrounding the first interrogation). For a description of how the Court "seem[ed] to pull an unduly abbreviated fourteen-day cutoff out of thin air," see Kit Kinports, *The Supreme Court's Love-Hate Relationship with* Miranda, 101 J. CRIM. L. & CRIMINOLOGY 375, 383 n.44, 389 (2011).

uninterrupted pretrial custody while th[e] crime is being actively investigated."[65] Picking up on the theme sounded in *Perkins*, the *Shatzer* Court reasoned that Edwards, Roberson, and Minnick "remain[ed] cut off from [their] normal life and companions, . . . isolated in an 'unfamiliar,' 'police-dominated atmosphere'" where their "captors 'appear[ed] to control [their] fate.'"[66]

The Court went on to hold that Shatzer did enjoy a break in custody when, after invoking his right to counsel, he was returned to the prison where he was serving a sentence for an unrelated crime.[67] Although acknowledging that an inmate's freedom is obviously restricted, the Court viewed "the freedom-of-movement test" as "only a necessary and not a sufficient condition" for defining custody.[68] The Court explained that inmates like Shatzer "live in prison" and "are not isolated with their accusers."[69] Moreover, their prison terms are fixed at sentencing, and the officials who question them have "no power to increase the duration of incarceration."[70] By contrast, the Court continued, for Edwards, Roberson, and Minnick, their "continued detention as suspects" depended on their questioners and they "confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would receive."[71]

Two years later, in the most recent case, *Howes v. Fields*, the Court rejected the Sixth Circuit's conclusion that an inmate who is removed from the general prison population and interrogated about "events that occurred outside the prison

65. *Shatzer*, 559 U.S. at 106.

66. *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 456–57 (1966); Illinois v. Perkins, 496 U.S. 292, 297 (1990)).

67. *Id.* at 113.

68. *Id.* at 112–13 (citing only *Berkemer v. McCarty* in support). *But cf.* Dery, *supra* note 19, at 81 (pointing out that this reasoning "equated *Beheler*'s formal/de facto arrest test with any restraint on 'freedom of movement,'" thereby treating "two mutually exclusive tests" as "interchangeabl[e]").

69. *Shatzer*, 559 U.S. at 113.

70. *Id.*; *see id.* at 114 (observing that Shatzer's "continued detention . . . did not depend on what he said (or did not say)" to the detective who first questioned him).

71. *Id.* at 114.

walls" is always in custody.[72] The Court dismissed the lower court's reliance on *Mathis*, interpreting that opinion as merely holding that inmates "who otherwise meet[] the requirements for *Miranda* custody" do not lose the right to *Miranda* warnings simply because no criminal investigation has yet begun or because they are in prison on charges unrelated to the interrogation.[73]

Echoing *Shatzer*'s point that limits on freedom do not necessarily create custody absent "the same inherently coercive pressures as the type of station house questioning" that occurred in *Miranda*, the Court in *Fields* identified "three strong grounds" for holding that "imprisonment alone is not enough to create a custodial situation."[74] First, the "paradigmatic *Miranda* situation"—arrest and police station interrogation—creates the "shock" of "sharp and ominous change," whereas "the ordinary restrictions of prison life . . . are expected and familiar" to an

72. 565 U.S. 499, 502 (2012). The Court reached this conclusion after first finding that the Sixth Circuit erred in granting habeas relief under AEDPA because the state court's contrary decision did not violate clearly established Supreme Court case law. *See id.* at 505–08. For the view that decisions like *Fields* that go on to rule on the substantive merits of a prisoner's habeas claim are impermissible advisory opinions because "a decision on the constitutional issue can never have any independent effect and can never change the outcome of the case," see Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 902 (2005).

73. *Fields*, 565 U.S. at 507.

74. *Id.* at 509, 511. *But cf.* Dery, *supra* note 19, at 85 (criticizing the Court for ignoring "the formal/de facto arrest test it had consistently employed from *Beheler* through *Keohane*"); David C. Berg, Second Circuit Review, *Putting the Fifth Amendment Behind Bars:* United States v. Morales, 55 BROOK. L. REV. 455, 476–77 (1989) (challenging the view that prisoners must be subjected to some additional restraint in order to deem their interrogations custodial as inconsistent with *Miranda*'s "emphasis on psychological coercion and its de-emphasis on physical compulsion"); Maya Dominguez, Recent Development, *"Custody" in Custody: Redefining* Miranda *Rights in Prison*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1305, 1312 (2011) (likewise calling this reasoning "flawed" because questioning of prisoners "results in an incommunicado interrogation . . . in a police dominated setting," and pointing out that, unlike other interrogations, "it is possible that no one other than the inmate and the interrogators know what is happening"); Michelle Parilo, Note, *Protecting Prisoners During Custodial Interrogation: The Road Forward After* Howes v. Fields, 33 B.C. J.L. & SOC. JUST. 217, 242 (2013) (arguing that the Court "minimized the violent and dehumanizing atmosphere of the prison").

inmate.[75] Second, one who is questioned at the station may cooperate because of "a longing for prompt release," whereas an inmate will not feel the same pressure to talk given the realization that "he will remain under confinement" after the interrogation ends.[76] Finally, the Court reiterated its observation in *Shatzer* and *Perkins* that a prisoner is aware the interrogator "probably" has no power to alter the length of confinement.[77]

Although the *Shatzer* Court had pointed out that "[n]o one question[ed]" Shatzer was in custody on both occasions when detectives interviewed him at the prison,[78] *Fields* interpreted that comment to signify only that the question of custody was "not contested" in *Shatzer*.[79] Looking at the totality of the circumstances surrounding Fields's interrogation, the Court concluded that he was not in custody when two sheriff's deputies questioned him for somewhere between five and seven hours.[80] Without acknowledging that the conference room where the interrogation was conducted was not in the prison, but in the nearby sheriff's department,[81] the Court found "[m]ost

75. *Fields*, 565 U.S. at 511; *see* Laurie Magid, *Questioning the Question-Proof Inmate: Defining* Miranda *Custody for Incarcerated Suspects*, 58 OHIO ST. L.J. 883, 929 (1997) (agreeing that, while a police station is "both unfamiliar and threatening," imprisonment does not create the same "unrelenting feeling of isolation and powerlessness"). *But cf.* Dery, *supra* note 19, at 88–89 (challenging the Court's reasoning because it "inject[s] a subjective component" into the Court's objective custody standard and risks creating "an underclass" of ex-prisoners and others who have had prior experience with law enforcement); Sherry F. Colb, *Why Interrogation in Jail May Not Count as "Custodial": The Supreme Court Makes New Law in* Howes v. Fields, JUSTIA: VERDICT (Mar. 28, 2012), https://perma.cc/GF9D-V4G5 (charging that the Court's view of prison "as an unpleasant place where people nonetheless feel relatively safe and certain about their day-to-day lives is . . . far off the mark").

76. *Fields*, 565 U.S. at 511. *But cf.* Dery, *supra* note 19, at 90 (arguing that this reasoning is a "dramatic change" from *Miranda* because it "shift[s]" to "viewing hopelessness" as an "asset" instead of a "liability").

77. *Fields*, 565 U.S. at 512.

78. Maryland v. Shatzer, 559 U.S. 98, 112 (2010).

79. *Fields*, 565 U.S. at 507.

80. *See id.* at 514–15.

81. *Compare id.* at 502 (describing the conference room as located in a different "section[] of the facility"), *with id.* at 518 (Ginsburg, J., concurring in part and dissenting in part) (pointing out that the interrogation took place "in

important" the fact that Fields was told he could leave and return to his cell.[82]

With this background in mind, the next Part of the Article evaluates the reach of *Shatzer* and *Fields* and, in particular, their relevance to questioning of pretrial detainees.

II. READING THE TEA LEAVES

Some lower courts have simply assumed without discussion that pretrial detainees are in the same position for purposes of the *Miranda* custody determination as inmates serving a prison sentence.[83] The courts that have recognized the issue and directly addressed it have not reached a consensus: some have concluded that pretrial detainees should be treated like

---

the sheriff's quarters"), *and* Brief for the United States as Amicus Curiae Supporting Petitioner at 2, *Fields*, 565 U.S. 499 (No. 10-680) (noting that the sheriff's department was "adjacent" to the jail).

82. *Fields*, 565 U.S. at 515; *see id.* at 517 (placing special emphasis on the fact that the deputies told Fields he could return to his cell).

83. *See, e.g.*, United States v. Williston, 862 F.3d 1023, 1028 & n.1, 1032– 33 (10th Cir. 2017) (applying *Fields*); Holland v. Rivard, 800 F.3d 224, 229, 237–40 (6th Cir. 2015) (same); United States v. Willoughby, 860 F.2d 15, 17, 23–24 (2d Cir. 1988) (applying federal appellate court cases involving sentenced prisoners); United States v. Johnson, No. 15:CR:90-01, 2015 U.S. Dist. LEXIS 163438, at *2, *10–11 (W.D. Mich. Dec. 7, 2015) (applying *Fields*); Cure v. State, 600 So. 2d 415, 419 (Ala. Crim. App. 1992) (relying on federal cases involving post-conviction incarceration); State v. Ames, 155 A.3d 881, 886–87 (Me. 2017) (applying *Fields*); Baumruk v. State, 364 S.W.3d 518, 526– 27 (Mo. 2012) (same); State v. Ford, 738 A.2d 937, 940, 943 (N.H. 1999) (relying on federal cases involving sentenced inmates); State v. Halverson, 937 N.W.2d 74, 77, 88–89 (Wis. Ct. App. 2019) (applying *Fields*), *aff'd*, 953 N.W.2d 847 (2021); *cf.* Alston v. Redman, 34 F.3d 1237, 1245 n.6 (3d Cir. 1994) (citing federal court cases involving convicted inmates in dictum, but ultimately leaving the custody question open); United States v. Juan, No. 19-CR-4032, 2019 U.S. Dist. LEXIS 175514, at *14 (N.D. Iowa Sept. 9, 2019) (distinguishing *Fields*, but solely on the ground that the pretrial detainee was not free to leave the officer's vehicle there); People v. Hunt, 969 N.E.2d 819, 820, 828 & n.1 (Ill. 2012) (citing *Fields*, but leaving the custody issue unresolved).

convicted prisoners,[84] whereas others distinguish between the two groups of defendants.[85]

84. *See, e.g.*, United States v. Ellison, 632 F.3d 727, 730 (1st Cir. 2010) (concluding that "the atmosphere of coercion" *Miranda* was designed to address was not present on the facts of that case); State v. Overby, 290 S.E.2d 464, 465 (Ga. 1982) (refusing to distinguish "institutional custody pending disposition of [a] case" and "serving [a] sentence"); State v. Pehowic, 780 A.2d 1289, 1293 (N.H. 2001) (equating "a person serving a prison sentence" and "one confined to a jail"); Commonwealth v. Champney, 161 A.3d 265, 283 (Pa. Super. Ct. 2017) (finding "no material difference" between sentenced prisoners and pretrial detainees, at least where the questioning involved an unrelated charge); Herrera v. State, 241 S.W.3d 520, 522, 527–30 (Tex. Crim. App. 2007) (discussing federal cases involving sentenced prisoners); *cf.* People v. Elliott, 833 N.W.2d 284, 296 (Mich. 2013) (applying *Fields* and *Shatzer* on the grounds that a parolee arrested for a suspected parole violation is "no different than a prisoner who was never paroled in the first place").

85. *See, e.g.*, Holman v. Kemna, 212 F.3d 413, 416, 418 (8th Cir. 2000) (concluding without analysis that a defendant being detained until trial was "clearly in a custodial situation"); Battie v. Estelle, 655 F.2d 692, 699 (5th Cir. 1981) (finding that the pretrial detainee was confined and therefore in custody); United States v. Coles, 264 F. Supp. 3d 667, 683 (M.D. Pa. 2017) (interpreting *Shatzer* as "based . . . on the distinction between post-conviction incarceration and pretrial detention"); United States v. McIntosh, No. 13-CR-18, 2014 U.S. Dist. LEXIS 180318, at *17–18 (N.D. Ga. Dec. 17, 2014) (similarly distinguishing *Shatzer*); United States v. Hollister, No. 12-CR-0013, 2012 U.S. Dist. LEXIS 131098, at *13–18 (D. Minn. Sept. 14, 2012) (same); People v. Krebs, 452 P.3d 609, 640 (Cal. 2019) (contrasting the reasoning in *Fields*); Trotter v. United States, 121 A.3d 40, 49 (D.C. 2015) (rejecting the lower court's view that any differences between pretrial detention and *Shatzer* were "not legally significant"); State v. Chavarria-Cruz, 784 N.W.2d 355, 360 & n.3 (Minn. 2010) (distinguishing *Shatzer*); Holyfield v. State, 711 P.2d 834, 835–36, 837 (Nev. 1985) (reasoning that a defendant who is "incarcerated for any reason" is in custody); State v. Wint, 198 A.3d 963, 979–80 (N.J. 2018) (distinguishing *Shatzer*, at least for pre-indictment detention); State v. Jackson, 75 N.E.3d 922, 926–27 (Ohio Ct. App. 2016) (finding that the reasoning in *Fields* supported this conclusion), *rev'd on other grounds*, 116 N.E.3d 1240 (Ohio 2018); Jones v. State, 119 S.W.3d 766, 776 & n.25 (Tex. Crim. App. 2003) (explaining that the defendant was detained in jail and therefore "clearly" in custody); *cf.* United States v. Byram, 145 F.3d 405, 406– 07, 409 & n.1 (1st Cir. 1998) (noting that the prosecution did not contest the issue of custody on appeal, but observing that the defendant "unquestionably" underwent custodial interrogation); United States v. Chitty, 760 F.2d 425, 431–32 (2d Cir. 1985) (holding, without expressly discussing custody, that unwarned statements made to a psychiatrist during a pretrial competency examination could not be admitted at defendant's sentencing hearing); United States v. Doe, No. 12-0052, 2012 U.S. Dist. LEXIS 156186, at *25–26 n.11 (W.D. La. Oct. 1, 2012) (distinguishing *Shatzer* in a case involving immigration detention pending deportation); Commonwealth v. Keaton, 45

In endorsing the latter approach and arguing that pretrial detainees should be deemed to be in *Miranda* custody for the length of their pretrial confinement, this Part of the Article first criticizes the increasingly prosecution-friendly interpretation of precedent reflected in the four Supreme Court opinions involving interrogations of prisoners and then focuses on the Court's language and reasoning in *Shatzer* and *Fields*.

A. *The Shifting Path from* Mathis *to* Fields

The conflicting approaches taken by the lower courts should come as no surprise. As this subpart explains, the Supreme Court's concept of custody in the four decisions addressing *Miranda* challenges brought by incarcerated suspects has been something of a moving target. Some language in the first three of the Court's opinions has seemed supportive of prisoners' *Miranda* rights, but subsequent cases have progressively read that language narrowly. The following discussion considers those three decisions in turn and then looks at other Supreme Court opinions involving incriminating statements made by pretrial detainees.

1. *Mathis v. United States*

Although the Court held that the IRS agent should have Mirandized Mathis before questioning him in prison, the majority in *Illinois v. Perkins* arguably cast some doubt on the reach of *Mathis*.[86] The Court first distinguished *Mathis* because Perkins did not realize his undercover interrogator was a government agent and therefore the Court's newly minted requirement of interplay between custody and interrogation was missing.[87] The *Perkins* majority then gratuitously went on to leave open whether "[t]he bare fact of custody" necessarily requires a known law enforcement official to administer

A.3d 1050, 1068 n.9 (Pa. 2012) (suggesting, without resolving the question, that *Fields* differentiated between convicted prisoners and pretrial detainees).

86. *But cf. infra* notes 104–109 and accompanying text (arguing that the Justices seemed to believe Perkins was in custody).

87. *See* Illinois v. Perkins, 496 U.S. 292, 299 (1990).

Miranda warnings.[88] The *Shatzer* majority completely ignored *Mathis*,[89] but *Fields* gave the *Mathis* opinion a narrow reading, interpreting the earlier decision as merely rejecting the lower court's view that *Miranda* does not apply when a criminal investigation has not yet begun and the suspect is imprisoned for an "'unconnected offense.'"[90]

But the Court reversed Mathis's conviction outright on the grounds that his *Miranda* rights were violated, signifying that the majority must have thought he was in custody.[91] As the dissenting opinion acknowledged, the majority "conclud[ed]" that Mathis was in custody "in the sense in which that phrase was used in *Miranda*."[92]

That reading of *Mathis* is consistent with the Court's initial treatment of the case as ruling that the custody trigger for *Miranda* warnings was satisfied on the facts there. In *Beckwith v. United States*,[93] the Court described *Mathis* as "squarely grounded . . . on the custodial aspects of the situation."[94] And *Oregon v. Mathiason*[95] characterized *Mathis* as finding *Miranda* "applicable" to interrogation conducted "in a prison setting during a suspect's term of imprisonment on a separate offense."[96] The *Fields* Court would later dismiss *Mathiason*'s

88. *Id.*

89. Only Justice Stevens's separate opinion cited *Mathis* among the Court's custody precedents. Maryland v. Shatzer, 559 U.S. 98, 126 n.12 (2010) (Stevens, J., concurring in the judgment).

90. Howes v. Fields, 565 U.S. 499, 506 (2012) (quoting Mathis v. United States, 376 F.2d 595, 597 (5th Cir. 1967), *rev'd*, 391 U.S. 1 (1968)).

91. *See* Mathis v. United States, 391 U.S. 1, 5 (1968).

92. *Id.* at 7 (White, J., dissenting); *see* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.6(e), at 828 (4th ed. 2015) (pointing out that *Mathis* "assumed that a person serving a prison sentence is 'in custody' for *Miranda* purposes").

93. 425 U.S. 341 (1976).

94. *Id*. at 347.

95. 429 U.S. 492 (1977) (per curiam).

96. *Id*. at 494; *see* Berkemer v. McCarty, 468 U.S. 420, 439 n.28 (1984) (citing *Mathis* as one of the cases "in which we have applied *Miranda*" and parenthetically describing it as involving a suspect "questioned by a Government agent while in jail"); New York v. Quarles, 467 U.S. 649, 654 n.4 (1984) (pointing out that *Miranda* is not limited to questioning at a police station and citing *Mathis* accompanied by the parenthetical "prison cell during defendant's sentence for an unrelated offense"); Brief for the United States as

observation as dictum "simply restat[ing]" *Mathis*'s holding,[97] but, while admittedly dictum, *Mathiason* interpreted the *Mathis* holding more generously than *Fields*: *Mathiason* read the prior decision as reaching the affirmative conclusion that Mathis was in custody rather than merely taking the negative view that the lower court's limitations on the concept of custody were unjustifiable. And, although the lower courts' treatment of *Mathis* varied, some of them interpreted the Supreme Court's decision as adopting a per se rule that prisoners are in custody for purposes of *Miranda*, at least when questioned by someone other than a prison employee.[98]

Moreover, the *Mathis* Court was perfectly aware of the arguments its successors would later endorse in *Shatzer* and *Fields*. The Solicitor General's brief claimed that Mathis was questioned in "surroundings which had been familiar to him for twenty months" and did not experience any "dislocation" that might affect his "capacity to resist questioning."[99] In addition, the Solicitor General's brief observed that Mathis "could hardly believe that anything he might say" to the IRS agent "could relieve him of any of the consequences of his State sentence."[100] And the government urged the Justices not to rule that "an individual's confinement, in and of itself," constitutes custody

---

Amicus Curiae Supporting Petitioner at 12, 14 n.5, Illinois v. Perkins, 496 U.S. 292 (1990) (No. 88-1972) (arguing that the *Mathis* opinion is ambiguous, but acknowledging that Mathis was in custody); Transcript of Oral Argument at 16, *Perkins*, 496 U.S. 292 (No. 88-1972) (indicating that the Solicitor General's lawyer likewise agreed at oral argument that Mathis was in custody).

97. Howes v. Fields, 565 U.S. 499, 507 (2012).

98. *See, e.g.*, United States v. Cheely, 36 F.3d 1439, 1447 (9th Cir. 1994); Battie v. Estelle, 655 F.2d 692, 699 (5th Cir. 1981); United States v. Redfield, 402 F.2d 454, 455 (4th Cir. 1968) (per curiam); United States v. Cadmus, 614 F. Supp. 367, 370–72 (S.D.N.Y. 1985); Blyden v. Hogan, 320 F. Supp. 513, 519 (S.D.N.Y. 1970); Holyfield v. State, 711 P.2d 834, 837 (Nev. 1985). For the contrary view that *Mathis* did not consider imprisonment per se custody, see, for example, United States v. Menzer, 29 F.3d 1223, 1231–32 (7th Cir. 1994); Garcia v. Singletary, 13 F.3d 1487, 1489–91 (11th Cir. 1994); Leviston v. Black, 843 F.2d 302, 304 (8th Cir. 1988); United States v. Conley, 779 F.2d 970, 972–73 (4th Cir. 1985); Cervantes v. Walker, 589 F.2d 424, 427 (9th Cir. 1978).

99. Brief for the United States at 17, Mathis v. United States, 391 U.S. 1 (1968) (No. 726).

100. *Id.* at 18.

for fear that *Miranda* warnings would become necessary whenever a government agent "seeks to obtain any information from an individual in prison."[101]

In addition, the three dissenters picked up on the Solicitor General's points, maintaining that Mathis was in "familiar surroundings" and was no more in custody than a taxpayer being questioned at home or in an IRS office.[102] Although the Court's opinion in *Mathis* was "quite terse," that may have been because the majority simply chose to give *Miranda*'s definition of custody a "literal" reading and "no restriction on freedom is more significant than incarceration."[103] Whatever the explanation, the majority was obviously unimpressed with the arguments raised by the Solicitor General and the dissent that would later gain traction in *Shatzer* and *Fields*.

2. *Illinois v. Perkins*

In discussing, and distinguishing, *Mathis*, the Court in *Illinois v. Perkins* added a parenthetical leaving open the question whether "[t]he bare fact of custody" invariably triggers a need for *Miranda* warnings.[104] According to *Fields*, that language reflected the Court's decision to "decline[] to adopt any categorical rule" whether or not prisoners are in custody for *Miranda* purposes.[105]

But the statement made in *Perkins* implies the Court thought Perkins was in custody when he was incarcerated pending trial on another charge.[106] Moreover, the Court

101. *Id.* at 18, 21.

102. *Mathis*, 391 U.S. at 7 (White, J., dissenting).

103. Yeager, *supra* note 21, at 10.

104. 496 U.S. 292, 299 (1990).

105. Howes v. Fields, 565 U.S. 499, 505 (2012); *cf.* Bradley v. Ohio, 497 U.S. 1011, 1013 (1990) (Marshall, J., dissenting from denial of certiorari) (noting that, despite the Court's decision to leave the issue unresolved in *Perkins*, *Miranda* and *Mathis* "already answered th[e] question" because imprisonment "result[s] in a severe restraint on . . . freedom of movement").

106. *See* Brief for Donovan E. Simpson as Amicus Curiae Supporting Respondent at 17, *Fields*, 565 U.S. 499 (No. 10-680) (pointing out that *Perkins* did not "remotely suggest[]" that the holding that Mathis was in custody "was no longer good law" in cases, like *Mathis*, where a prisoner is questioned by a law enforcement official).

acknowledged that Perkins was "in custody in a technical sense," and it criticized the lower court for erroneously "assum[ing] that because [he] *was in custody*, no undercover questioning could take place."[107]

Even if some ambiguity surrounds these statements, *Perkins*'s addition of the requirement of interplay between custody and interrogation supports the view that the Justices considered Perkins to be in custody within the meaning of *Miranda*.[108] After all, if Perkins was not in custody, the Court did not need to add the interplay trigger and could simply have accepted the Solicitor General's argument that the questioning was noncustodial because Perkins was experiencing only the "familiar" restrictions on freedom that are "a constant feature of prison life."[109]

3. *Maryland v. Shatzer*

Although the *Shatzer* Court thought that Shatzer enjoyed a break in custody when he returned to the general prison population, the majority pointed out that "[n]o one question[ed]" he was in custody during two interrogation sessions in the prison.[110] This statement arguably suggests the Court's agreement with that view, but *Fields* later interpreted the sentence to signify simply that the question of custody was "not contested" before the Court in *Shatzer*.[111] The issue was not "contested," however, only because it was conceded: the State of Maryland expressly acknowledged that Shatzer was in custody

107. *Perkins*, 496 U.S. at 297 (emphasis added); *see id.* at 300 n.* (Brennan, J., concurring in the judgment) (noting that the case might well have come out differently if Perkins had previously asserted his right to counsel given that he was "in custody on an unrelated charge when he was questioned").

108. *See* Dery, *supra* note 19, at 80–81 (observing that the notion of interplay was "premised on the existence of both custody and interrogation" on the facts of *Perkins*).

109. Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *Perkins*, 496 U.S. 292 (No. 88-1972).

110. Maryland v. Shatzer, 559 U.S. 98, 112 (2010).

111. *Fields*, 565 U.S. at 507.

during both interviews,[112] and the Solicitor General likewise argued that he "*ceased* to be 'in custody'" for *Miranda* purposes when the first interrogation ended.[113]

Moreover, the state and federal governments did not necessarily need to concede the issue if they thought there was an argument that Shatzer's interrogations were noncustodial. In fact, an amicus brief filed in support of the State argued that Shatzer was not in custody during the second interrogation.[114] The amicus thought that Shatzer was in "correctional custody," but not "police custody," because there was no evidence he was unable to end the interview "at any time" and the detective who questioned him could not change the duration of his confinement.[115] Although these were points the *Fields* majority would later make,[116] the state and federal governments did not endorse them in *Shatzer*.

The Court's opinion in *Shatzer* also observed that the Justices had "never decided" whether "incarceration" satisfies *Miranda*'s definition of custody, and it read the *Perkins* parenthetical quoted above[117] as "explicitly declin[ing]" to consider that question.[118] *Fields* interpreted this language in *Shatzer* as "expressly" refusing to "adopt a bright-line rule" for

112. *See* Brief for Petitioner at 22, *Shatzer*, 559 U.S. 98 (No. 08-680) (equating Shatzer's "[r]elease into the general prison population" following the first interview with "other types of release from police investigative custody"); Reply Brief for Petitioner at 7, *Shatze*r, 559 U.S. 98 (No. 08-680) (arguing that the "cessation of questioning" at Shatzer's first interrogation and his "return to the general prison population ended police custody"); Transcript of Oral Argument at 6, *Shatzer*, 559 U.S. 98 (No. 08-680) (quoting the State's lawyer conceding that Shatzer's second interview was "clearly an interrogation context").

113. Brief for the United States as Amicus Curiae Supporting Petitioner at 21, *Shatzer*, 559 U.S. 98 (No. 08-680) (emphasis added); *see* Transcript of Oral Argument at 24, *Shatzer*, 559 U.S. 98 (No. 08-680) (acknowledging that Shatzer was in custody when being interrogated).

114. *See* Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner at 31–32, *Shatzer*, 559 U.S. 98 (No. 08-680).

115. *Id.* at 31, 25. *But see id.* at 31 (distinguishing "pretrial police custody" from "postjudgment correctional custody").

116. *See supra* notes 76–77, 82 and accompanying text.

117. *See supra* note 104 and accompanying text.

118. *Shatzer*, 559 U.S. at 112.

evaluating *Miranda*'s "applicability . . . in prisons."[119] But *Shatzer* was talking about "incarceration," when inmates are among the general prison population "subject to a baseline set of restraints imposed pursuant to a prior conviction," and not "interrogative custody," when they are "taken to a separate location for questioning."[120] The *Miranda* protections are available to prisoners in "interrogative custody," the Court made clear, but they "end[]" when an inmate is "returned to his normal life."[121] For Shatzer, then, the coerciveness of "custodial interrogation *ended*" when he went back to the general prison population, implying that the Court thought he was in custody prior to that point.[122]

Each of the first three Supreme Court opinions to address *Miranda* claims filed by incarcerated individuals—*Mathis v. United States*, *Illinois v. Perkins*, and *Maryland v. Shatzer*—thus included some language seemingly protective of prisoners' *Miranda* rights. But by the time *Howes v. Fields* was decided, the Court had effectively backed away from that position.

4. Other Supreme Court Precedent

Even if *Fields*'s stingy reading of the three earlier decisions is plausible, Fields had already been convicted, and other Supreme Court opinions have held, or at least assumed, that pretrial detainees are in custody for *Miranda* purposes. In *Estelle v. Smith*,[123] the Court ruled that a psychiatrist who interviewed a pretrial detainee as part of a court-ordered competency examination about seven weeks after the indictment could not testify at the capital sentencing hearing that the defendant was likely to be a future danger.[124] The Court rejected the State's claim that the Fifth Amendment applied

119. Howes v. Fields, 565 U.S. 499, 506 (2012).

120. *Shatzer*, 559 U.S. at 113 & n.8 (conceding that "the duration of that separation is assuredly dependent upon [the] interrogators" (emphasis omitted)).

121. *Id.* at 113 n.8, 114.

122. *Id.* at 114 (emphasis added).

123. 451 U.S. 454 (1981).

124. *Id.* at 456–57, 468; Smith v. Estelle, 445 F. Supp. 647, 651 (N.D. Tex. 1977), *aff'd*, 602 F.2d 694 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981).

only to the guilt phase and not the penalty phase of a capital trial.[125] And the majority went on to find that the principles underlying *Miranda* were applicable to Smith's psychiatric evaluation: he was in custody at the county jail, and, when the psychiatrist testified at the sentencing hearing instead of just informing the court of his competency findings, the doctor's "role . . . became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting."[126]

The Court has made similar assumptions about pretrial detainees' custodial status in Sixth Amendment confessions cases. In *United States v. Henry*,[127] for example, one of the "important" considerations informing the Court's finding that an undercover agent deliberately elicited an incriminating statement from a pretrial detainee in violation of the Sixth Amendment was "the fact of custody."[128] Citing *Miranda*, the Court reasoned that "the mere fact of custody imposes pressures on the accused."[129] The Court has similarly described questioning of pretrial detainees as custodial interrogation in other opinions interpreting the Sixth Amendment.[130] The most recent example is *Montejo v. Louisiana*,[131] where the Court found that the Sixth Amendment did not foreclose admission of an incriminating apology letter the defendant wrote to the victim's widow while he was being held without bond.[132] Although the majority rejected Montejo's Sixth Amendment challenge, it remanded the case to afford him an opportunity to raise a *Miranda* claim on the ground that, if he had

125. *See Estelle*, 451 U.S. at 462–63.

126. *Id.* at 467; *see id.* at 468 (concluding that Smith had a right to *Miranda* warnings "when faced while in custody with a court-ordered psychiatric inquiry").

127. 447 U.S. 264 (1980).

128. *Id.* at 270, 273 n.11.

129. *Id.* at 274.

130. *See* McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) ("persons in pretrial custody"); Patterson v. Illinois, 487 U.S. 285, 309 (1988) (Stevens, J., dissenting) ("custodial, postindictment setting"); Michigan v. Jackson, 475 U.S. 625, 630–31 (1986) ("postarraignment custodial interrogations").

131. 556 U.S. 778 (2009).

132. *See id.* at 781, 797.

unambiguously asserted his right to counsel, he was protected by the *Edwards* line of cases and should not have been subjected to interrogation.[133]

Despite the Court's consistent assumption that pretrial detainees like Smith, Henry, and Montejo were in custody for *Miranda* purposes, the Justices' track record in the four *Miranda* custody opinions involving incarcerated individuals indicates that they cannot be counted on to adhere to the clear import of the decisions in *Estelle v. Smith* and the Sixth Amendment line of cases. The discussion that follows thus turns to the language and reasoning in *Shatzer* and *Fields* in assessing their impact on questioning of pretrial detainees.

B. *The Language and Reasoning in* Shatzer *and* Fields

The Court's opinions in *Shatzer* and *Fields* were drafted in terms of inmates serving a prison sentence and, on their face, therefore do not apply to pretrial detainees. In addition, the rationales the majority relied on to defend the conclusion that Shatzer and Fields were not in custody are inapplicable to pretrial detention. Those two decisions thus provide little support for extending their holdings to pretrial detainees.

As noted above, Shatzer and Fields were convicted defendants serving prison terms, and language in both opinions repeatedly referred exclusively to prisoners who had already been convicted and sentenced. In holding that Shatzer experienced a break in custody when he was returned to the general prison population, Justice Scalia's majority opinion mentioned sentencing and "incarceration pursuant to conviction" no fewer than eight times in the space of three pages.[134] And the Court distinguished prisoners like Shatzer from the "paradigm *Edwards* case," where a suspect is "held in uninterrupted *pretrial custody* while th[e] crime is being actively investigated."[135]

---

133. *See id.* at 797. On remand, the state supreme court concluded that Montejo's *Miranda* argument was barred because it had not been raised at trial. *See* State v. Montejo, 40 So. 3d 952, 957 (La. 2010).

134. *See* Maryland v. Shatzer, 559 U.S. 98, 112–14 (2010).

135. *Id.* at 106 (emphasis added).

The majority opinion in *Fields* followed a similar pattern. The Court's characterization of its prior ruling in *Shatzer* spoke in terms of prisoners serving sentences on three occasions.[136] And in rejecting the lower court rule that questioning an incarcerated individual about events taking place outside the prison necessarily rises to the level of custody, the *Fields* majority used language describing inmates serving sentences—referring to convictions, sentences, and parole—ten times over the course of only two pages.[137]

Moreover, the Court was certainly aware of the issues surrounding pretrial detention, especially in *Shatzer*. The State of Maryland distinguished pretrial detainees from convicted prisoners both in its brief and at oral argument in that case.[138] The Solicitor General's office drew the same distinction in briefing both *Shatzer* and *Fields*,[139] though its brief in the former case suggested that pretrial detainees might be in a different position after they are arraigned.[140] In fact, during the *Shatzer* oral argument, Chief Justice Roberts agreed with Shatzer's lawyer that a break-in-custody exception should not apply to pretrial detainees.[141]

---

136. *See* Howes v. Fields, 565 U.S. 499, 510, 516–17 (2012).

137. *See id.* at 511–12.

138. *See* Brief for Petitioner at 24, *Shatzer*, 559 U.S. 98 (No. 08-680) (pointing out that Shatzer was "not in the position of a pretrial detainee"); Transcript of Oral Argument at 4, *Shatzer*, 559 U.S. 98 (No. 08-680) (distinguishing Shatzer from those "in the pretrial detention category"); *id.* at 60 (acknowledging that Edwards, Roberson, and Minnick did not experience a break in custody because "those . . . were pretrial police custody situations").

139. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 24 n.1, *Fields*, 565 U.S. 499 (No. 10-680) (distinguishing a sentenced prisoner from "someone held in jail on pending charges"); Brief for the United States as Amicus Curiae Supporting Petitioner at 14, *Shatzer*, 559 U.S. 98 (No. 08-680) (differentiating between a prisoner like Shatzer and "a pretrial arrestee who . . . remained in continuous custody").

140. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 20, *Shatzer*, 559 U.S. 98 (No. 08-680); *see also id.* at 18 (referring to a suspect who is "detained pending an investigation" or "detained for investigatory purposes"). For further discussion of the impact of an arraignment on a pretrial detainee's custodial status, see *infra* notes 183–196 and accompanying text.

141. *See* Transcript of Oral Argument at 49, *Shatzer*, 559 U.S. 98 (No. 08-680) (reporting that the Chief Justice also pointed out that the State was

Interestingly, the Chief Justice had particular expertise on this issue, as he had argued on behalf of the government in *United States v. Green*,[142] when the Court first had the opportunity to consider limits on the duration of *Edwards*'s ban on interrogating suspects who have asked for a lawyer.[143] During the five-month gap in time between invoking his right to counsel on a drug charge and being questioned about a murder, Green had been in continuous detention, two months in pretrial detention and then three months awaiting sentencing following his guilty plea on the drug charge.[144] Notably, the government conceded that Green was "'in continuous custody'" during that five-month period.[145] At oral argument, then-Deputy Solicitor General Roberts argued that Green's guilty plea "dramatically" changed his status, but he contrasted "pretrial suspect[s]" who are in "the same position" when they assert the right to counsel and are later subject to further interrogation.[146] *Green* was mentioned when *Shatzer* was litigated before the Court, and both the Solicitor General and the State of Maryland distinguished suspects like Shatzer who are serving prison time from those like Green who are detained "in connection with various pending charges."[147]

---

not contending otherwise). For other references to pretrial detention during the *Shatzer* oral argument, see *id.* at 23, 37, 49–50.

142. 507 U.S. 545 (1993); *see* Transcript of Oral Argument at 1, United States v. Green, 507 U.S. 545 (1993) (No. 91-1521) (indicating that John Roberts appeared as counsel representing the United States).

143. *See* Brief for the United States at 14 & n.4, *Green*, 507 U.S. 545 (No. 91-1521).

144. *See* United States v. Green, 592 A.2d 985, 985–86 (D.C. 1991), *cert. granted*, 504 U.S. 908 (1992), *cert. dismissed*, 507 U.S. 545 (1993).

145. Brief for the United States as Amicus Curiae Supporting Petitioner at 21 n.16, *Shatzer*, 559 U.S. 98 (No. 08-680) (quoting Brief for Appellant at 21 n.16, *Green*, 592 A.2d 985 (No. 91-29)).

146. Transcript of Oral Argument at 8–9, *Green*, 507 U.S. 545 (No. 91-1521).

147. Brief for the United States as Amicus Curiae Supporting Petitioner at 21 n.6, *Shatzer*, 559 U.S. 98 (No. 08-680); *see* Transcript of Oral Argument at 15–16, *Shatzer*, 559 U.S. 98 (No. 08-680) (indicating that the Maryland State Attorney General distinguished pretrial detention and argued that *Green* turned on whether the break in custody started at the time of Green's guilty plea or sentencing).

Finally, Justice Stevens's separate opinion in *Shatzer* brought up the question of pretrial detention, suggesting that "the majority's logic" would extend the break-in-custody exception to pretrial detainees who were held for a sufficient period of time to "become 'accustomed' to the detention facility."[148] While the majority responded to several objections Justice Stevens raised, it did not mention this particular point.[149] Although the Court was therefore well aware of the issue of pretrial detention, the majority apparently saw no reason to modify the language in its opinion clearly limiting its holding to inmates serving a prison term.

In addition to the repeated references in both *Shatzer* and *Fields* to convicted defendants, the Court's rationales for concluding that Shatzer and Fields were not in custody are inapplicable to pretrial detainees who are undergoing interrogation. In finding that prisoners like Shatzer enjoy a break in custody when they return to the general prison population, the Court reasoned that they are no longer "isolated with their accusers."[150] Instead, they "return to their accustomed surroundings and routines" and "regain the degree of control they had over their lives."[151] Similarly, the Court's opinion in *Howes v. Fields* explained that, unlike a suspect who is "abruptly transported from the street into a 'police-dominated atmosphere,'" "the ordinary restrictions of prison life . . . are expected and familiar."[152]

Although the criminal charges about which Shatzer and Fields were questioned may not have contributed to any change in their day-to-day lives,[153] other inmates serving prison sentences have been subjected to more onerous restraints because they were suspected of committing additional crimes:

---

148. *Shatzer*, 559 U.S. at 128 n.14 (Stevens, J., concurring in the judgment) (quoting *id.* at 113 (majority opinion)).

149. *See id.* at 114–17 (majority opinion).

150. *Id.* at 113.

151. *Id.*

152. 565 U.S. 499, 511 (2012) (quoting Miranda v. Arizona, 384 U.S. 436, 456 (1966)).

153. *See Shatzer*, 559 U.S. at 114 (noting that Shatzer did not claim he was "placed in a higher level of security or faced any continuing restraints" following his request for counsel at the first interrogation).

for example, they have been placed in segregation, sometimes for lengthy periods of time,[154] or they have been transferred to a different cell[155] or a more secure facility.[156] When an inmate is suspected of committing a crime in prison, the questioning might be conducted by the very prison officials who "control the conditions of confinement."[157] And inmates who decline to be questioned may face discipline for "'disobeying a direct order.'"[158] As the Solicitor General's brief conceded in *Fields*, "coercive pressures" could arise when interrogators can "credibly threaten" more restrictive confinement conditions or prison rules punish a lack of cooperation with questioning.[159]

Pretrial detainees are not only potentially subject to the same adverse consequences as convicted inmates serving prison time, but the *Shatzer* majority appropriately distinguished

154. *See, e.g.*, United States v. Chamberlain, 163 F.3d 499, 504 (8th Cir. 1998) (noting that the prisoner was transferred to a more secure prison and then placed in segregation); Kochutin v. State, 813 P.2d 298, 300–01 (Alaska Ct. App. 1991) (observing that the inmate was in segregation from the end of July until some point in the fall), *vacated on other grounds*, 875 P.2d 778 (Alaska Ct. App. 1994); People v. Patterson, 588 N.E.2d 1175, 1177 (Ill. 1992) (pointing out that the prisoner was in segregation for six months); *see also* Sandin v. Conner, 515 U.S. 472, 485–86 (1995) (holding that prison discipline "in response to a wide range of misconduct falls within the expected parameters" of an inmate's sentence, and that a thirty-day stay in segregation was not "the type of atypical, significant deprivation" needed to create a liberty interest protected by the Due Process Clause).

155. *See, e.g.*, Cervantes v. Walker, 589 F.2d 424, 426 (9th Cir. 1978).

156. *See, e.g.*, *Chamberlain*, 163 F.3d at 504; *cf.* Schreane v. Ebbert, 864 F.3d 446, 449 (6th Cir. 2017) (acknowledging that a detective may have promised he would try to assist the inmate's transfer to another facility).

157. Reply Brief at 9, *Fields*, 565 U.S. 499 (No. 10-680). For illustrations of such cases, see, for example, Garcia v. Singletary, 13 F.3d 1487, 1489 (11th Cir. 1994); United States v. Cooper, 800 F.2d 412, 413 (4th Cir. 1986); United States v. Conley, 779 F.2d 970, 971 (4th Cir. 1985); United States v. Scalf, 725 F.2d 1272, 1273 (10th Cir. 1984); *Patterson*, 588 N.E.2d at 1177.

158. *Chamberlain*, 163 F.3d at 504 (quoting the pretrial hearing); *cf. Patterson*, 588 N.E.2d at 1181 (acknowledging that a guard could impose discipline, but finding no evidence that a ticket had been written in such situations).

159. Brief for the United States as Amicus Curiae Supporting Petitioner at 24–25, *Fields*, 565 U.S. 499 (No. 10-680); *see* Transcript of Oral Argument at 12–13, *Fields*, 565 U.S. 499 (No. 10-680) (indicating that the State's lawyer distinguished police officers who do not "have the ability to impact [an inmate's] day-to-day prison life the way someone inside the prison would").

sentenced prisoners from "the paradigm *Edwards* case," where a suspect is "held in uninterrupted pretrial custody" and the crime for which she was arrested "is being actively investigated."[160] *Edwards*, *Roberson*, and *Minnick* exemplified that paradigmatic situation, the *Shatzer* Court continued, because the defendants in those three cases never "regained a sense of control or normalcy" after being taken into custody.[161] And that was true even though Edwards's second interrogation and both of Minnick's interrogations occurred not at the police station, but at the jail where they were being held.[162] Nevertheless, the *Shatzer* Court apparently considered those two defendants to be "isolated with their accusers" rather than "liv[ing] among other inmates, guards, and workers" at the jail.[163] *Shatzer*'s treatment of the *Edwards* line of cases exposes the flaws in the lower court opinions that have found pretrial detainees were not in custody despite the fact that they had only been held overnight[164] or were interviewed in a jail other than the one that had allegedly become their pretrial "home."[165]

One could, however, try to distinguish pretrial detainees who are being held long term because they have been denied bail or lack the resources to pay bail, either on the ground that their cases are no longer under active investigation or that the defendants in the three "paradigm" cases had only been held for a limited period of time, ranging from less than a day to three days.[166] As for the first purported distinction, when questions surrounding limits on the duration of the *Edwards* ban first reached the Court in *United States v. Green*, then-Deputy

160. Maryland v. Shatzer, 559 U.S. 98, 106 (2010).

161. *Id.* at 107.

162. Minnick v. Mississippi, 498 U.S. 146, 148–49 (1990); Edwards v. Arizona, 451 U.S. 477, 479 (1981).

163. *Shatzer*, 559 U.S. at 113.

164. Herrera v. State, 241 S.W.3d 520, 522 (Tex. Crim. App. 2007).

165. Holland v. Rivard, 9 F. Supp. 3d 773, 787 (E.D. Mich. 2014).

166. *Shatzer*, 559 U.S. at 106–07. Likewise, the suspects in the Sixth Amendment cases discussed *supra* notes 127–133 had only been detained for a short period of time. *See* Montejo v. Louisiana, 556 U.S. 778, 781–82 (2009); McNeil v. Wisconsin, 501 U.S. 171, 173–74 (1991); Patterson v. Illinois, 487 U.S. 285, 287–88 (1988); Michigan v. Jackson, 475 U.S. 625, 627–28 (1986); United States v. Henry, 447 U.S. 264, 266 (1980).

Solicitor General John Roberts pointed out that "the investigative process" continues until a finding of guilt, when the defendant is "no longer a suspect" and instead has become "a convict."[167] Until a verdict is entered, the uncertainty pretrial detainees face about whether they will be convicted and of what charges makes them susceptible to the coercion *Miranda* warnings are designed to combat.[168]

As for the second purported distinction, the government maintained that Green was in a different position than an arrestee who had "recently" undergone interrogation because, after five months of detention, he was not likely to believe that he was being "'badgered' by the police," that they were not "serious" about his right to counsel, or that the interrogation session would last until he confessed.[169] The Solicitor General's brief in that case therefore concluded that the *Edwards* ban on interrogation should end after "a few days," when pretrial detention is no longer based "simply . . . on the strength of [an] initial arrest."[170] At oral argument, then-Deputy Solicitor General Roberts claimed in response to questions from the bench that the *Edwards* prohibition should no longer apply after a month of pretrial detention but "probably" should still be in effect after only two days.[171] And, in fact, some lower courts have suggested that, after some period of time, the *Edwards* protection disappears.[172]

Although these cases involve the appropriate length of the *Edwards* ban and therefore are not directly on point, similar

---

167. Transcript of Oral Argument at 12, 9, United States v. Green, 507 U.S. 545 (1993) (No. 91-1521); *see* Brief for the United States at 18, *Green*, 507 U.S. 545 (No. 91-1521) (same).

168. *See Shatzer*, 559 U.S. at 114.

169. *See* Brief for the United States at 19–20, *Green*, 507 U.S. 545 (No. 91-1521).

170. *Id.* at 21–22.

171. Transcript of Oral Argument at 17, *Green*, 507 U.S. 545 (No. 91-1521).

172. *See, e.g.*, United States v. Hall, 905 F.2d 959, 963 (6th Cir. 1990) (three months); State v. Newton, 682 P.2d 295, 298 (Utah 1984) (same). *But see* Kochutin v. State, 813 P.2d 298, 304 (Alaska Ct. App. 1991) (*Edwards* ban remained in effect one year later), *vacated on other grounds*, 875 P.2d 778 (Alaska Ct. App. 1994); State v. Wint, 198 A.3d 963, 980–81 (N.J. 2018) (holding that a six-month pre-indictment pretrial detention did not constitute a break in custody, but leaving open whether the *Edwards* ban is "eternal").

reasoning could be used to support the argument that pretrial detention eventually loses its custodial status. Determining precisely when pretrial detainees become "accustomed" to their surroundings obviously creates a difficult line-drawing challenge, whether it is the three days in *Roberson*,[173] nine or ten days,[174] one or two months,[175] five or six months,[176] a year,[177] or several years.[178] Green may have become "familiar" with the limitations on his freedom after five months, as the government argued,[179] but it not apparent why a week or a month of detention would have sufficed. And, while some detainees can remain in jail for long periods of time,[180] the average length of pretrial detention is only twenty-five days.[181] Moreover, even if

173. *See* Arizona v. Roberson, 486 U.S. 675, 683 (1988) (noting that Roberson was "still in custody").

174. *See* Jones v. State, 119 S.W.3d 766, 776 & n.25 (Tex. Crim. App. 2003) (finding that the defendant was "clearly in custody").

175. *See* Colorado v. Spring, 479 U.S. 564, 566–67 (1987) (noting that a pretrial detainee was given *Miranda* warnings when questioned in jail about two months after his arrest); Estelle v. Smith, 451 U.S. 454, 467–68 (1981) (finding that a pretrial detainee was in custody when questioned seven weeks following his indictment); People v. Krebs, 452 P.3d 609, 639–40 (Cal. 2019) (holding that the defendant was in custody after five weeks of pretrial detention).

176. *Compare* Commonwealth v. Champney, 161 A.3d 265, 282–84 (Pa. Super. Ct. 2017) (concluding that almost five months' pretrial detention constituted a break in custody), *with Wint*, 198 A.3d at 980 (holding that a six-month pre-indictment detention was not a break in custody), *and* Trotter v. United States, 121 A.3d 40, 48–49 (D.C. 2015) (finding that five months of pretrial detention was not a break in custody).

177. *See Champney*, 161 A.3d at 269 (noting that the defendant was held in pretrial detention for more than a year).

178. *See* Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), https://perma.cc/64V5-3DMF (describing the story of Kalief Browder, a sixteen-year-old who was held in pretrial detention at Rikers Island for three years, almost two of which were in solitary confinement, before charges that he stole a backpack and its contents were dismissed); *Pretrial Injustice*, PRETRIAL JUST. INST., https://perma.cc/R6UA-MCPY (discussing a similar case involving Ralph Berry, a teenager held in pretrial detention for three years for a murder he did not commit).

179. Reply Brief for the United States at 5, United States v. Green, 507 U.S. 545 (1993) (No. 91-1521).

180. *See, e.g.*, *Wint*, 198 A.3d at 981 (noting that pretrial detention can extend for years).

181. *See* ZENG, *supra* note 1, at 8.

pretrial detainees become somewhat adjusted to their surroundings after some period of time, the Court acknowledged in *Shatzer* that custody's coercive "pressure [is] likely to 'increase as custody is prolonged.'"[182]

Shortly following arrest, a detainee must be taken to court for an initial arraignment,[183] thereby starting adversary judicial proceedings and triggering the Sixth Amendment right to counsel.[184] Some judges and litigants have suggested that an arraignment or an indictment, which likewise triggers the Sixth Amendment,[185] may end the *Edwards* protection and, again, a similar argument could be made about the detainee's custodial status.[186] The Solicitor General's amicus brief in *Shatzer* distinguished "a prearraignment detainee" from a convicted prisoner,[187] and the District of Columbia's amicus brief in *Green* likewise described the three talismanic *Edwards* cases as involving "pre-arraignment questioning."[188] Admittedly, none of those three defendants had appeared before a magistrate when they made their confessions,[189] but the briefs offered no explanation why the onset of adversary judicial proceedings should make a difference for Fifth Amendment purposes.

---

182. Maryland v. Shatzer, 559 U.S. 98, 105 (2010) (quoting Minnick v. Mississippi, 498 U.S. 146, 153 (1990)).

183. *See* LAFAVE, *supra* note 6, § 1.2(i), at 15 (noting that the first appearance is usually required within twenty-four or forty-eight hours after arrest).

184. *See* Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008).

185. *See id.* at 198.

186. *Cf.* State v. Wint, 198 A.3d 963, 980 (N.J. 2018) (holding that "pre-indictment" pretrial detention does not constitute a break in custody).

187. Brief for the United States as Amicus Curiae Supporting Petitioner at 20, *Shatzer*, 559 U.S. 98 (No. 08-680); *see* Brief for the United States at 22, United States v. Green, 507 U.S. 545 (1993) (No. 91-1521) (referring to a suspect who is detained only "on the strength of his initial arrest").

188. Brief of the District of Columbia, *Amicus Curiae*, in Support of Reversal at 8, *Green*, 507 U.S. 545 (No. 91-1521).

189. *See* Arizona v. Roberson, 486 U.S. 675, 678 (1988) (noting that Roberson was "still in custody pursuant to the arrest" three days later); *id.* at 692 (Kennedy, J., dissenting) (observing that the Sixth Amendment did not "control" that case); Minnick v. State, 551 So. 2d 77, 83 (Miss. 1988) (linking Minnick's Sixth Amendment argument to the issuance of an arrest warrant, which triggered his Sixth Amendment right to counsel only under state law), *rev'd on other grounds*, 498 U.S. 146 (1990).

According to the Court's Sixth Amendment case law, a "formal . . . commitment to prosecute" turns the government's "relationship" with the detainee into a "solidly adversarial" one: the detainee is now "'faced with the prosecutorial forces of organized society'" and "'immersed in the intricacies'" of criminal law.[190] But, as that description suggests, rather than making detainees feel more comfortable, the filing of formal charges presumably serves to heighten their anxiety about the future and the potential for coerciveness. It is not obvious why Roberson's susceptibility to coercion would have been reduced if, in the three-day interval between his invocation of the right to counsel and his re-interrogation, he had appeared in court for the typically "quite brief" first appearance, during which a judge explained the charges, his rights, and the next step in the process and then either denied bail or set it at a level he could not afford.[191] In fact, in discussing the protection offered by the *Edwards* line of cases, the Court in *Montejo* properly saw no reason to distinguish between pre- and post-arraignment questioning.[192]

Moreover, the "relationship" between the government and the detainee is not fixed with the commencement of adversary judicial proceedings, as additional and more serious charges could still be filed. In *Texas v. Cobb*,[193] for example, Cobb was indicted for burglarizing a home but was ultimately charged with murdering two of its residents.[194] And the triggering of the Sixth Amendment right to counsel does not mean a pretrial detainee has ready access to legal advice. Counsel might not be appointed for weeks or months,[195] and a detainee who has

190. *Rothgery*, 554 U.S. at 207, 202, 198 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)).

191. LAFAVE, *supra* note 6, § 1.2(i), at 15.

192. *See* Montejo v. Louisiana, 556 U.S. 778, 795 (2009) (reasoning that if the *Edwards* line of cases adequately safeguards a suspect's right to counsel during questioning before arraignment, "it is hard to see why it would not also suffice to protect that same choice after arraignment").

193. 532 U.S. 162 (2001).

194. *Id.* at 164–65. For additional examples, see *infra* note 235 and accompanying text.

195. *See Rothgery*, 554 U.S. at 213 (leaving open whether a six-month delay in appointing counsel violated the Sixth Amendment); Douglas L.

received appointed counsel may not have much contact with the lawyer even after months of pretrial detention.[196]

Even if pretrial detention becomes a suspect's new normal after some period of time, the other rationales the Court advanced to support the results in *Shatzer* and *Fields* demonstrate that detainees do not enjoy the same "sense of control" as sentenced prisoners.[197] In both of those cases, the Court explained that the officials who questioned Shatzer and Howes had no authority to increase the prison terms imposed at sentencing, and therefore the inmates' "continued detention . . . did not depend on what [they] said (or did not say)" during the interrogation session.[198]

That assertion is debatable even with respect to sentenced inmates. Fields, for example, was serving a forty-five-day sentence on a minor disorderly conduct charge when he was interrogated about a child sexual abuse offense that ultimately led to a prison term of ten to fifteen years.[199] Even if Fields saw no connection between his interrogators and his jailers—and it is not obvious that is true, given that a corrections officer from the jail escorted him to the sheriff's department for questioning without telling him where he was going, the sheriff's department was located in another part of the same building as the jail, and Fields thought the deputies who questioned him

---

Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 337, 432– 53 (2011) (documenting the length of delay in different states).

196. *See* Kuren v. Luzerne County, 146 A.3d 715, 724 (Pa. 2016) (describing claims that defendants often did not meet their public defenders until just before the preliminary hearing and usually did not hear from their attorneys in the three months between the preliminary hearing and the status conference or between the status conference and the pretrial hearing); BAUGHMAN, *supra* note 7, at 7 (observing that pretrial detainees encounter difficulties consulting with their lawyers and their communications may be disclosed to prosecutors); Wiseman, *supra* note 10, at 246–47 (discussing pretrial detainees' lack of access to legal counsel and research materials).

197. Maryland v. Shatzer, 559 U.S. 98, 107 (2010).

198. *Id.* at 114; *see* Howes v. Fields, 565 U.S. 499, 512 (2012) (noting that prisoners understand that police officers "probably lack the authority to affect the duration" of their sentences).

199. *See* Brief for the United States as Amicus Curiae Supporting Petitioner at 2, *Fields*, 565 U.S. 499 (No. 10-680).

might return him to his cell[200]—any hopes he had for reducing his disorderly conduct sentence presumably paled in comparison to his concerns about the consequences of the potential charges his interrogators were investigating.[201]

Regardless of the relative severity of the crime of conviction and the subject of the interrogation, for all convicted prisoners, as the *Shatzer* Court recognized, "the possibility of parole [may] exist[]."[202] *Shatzer*'s assertion in response—that the questioner has "no apparent power to decrease the time served"—was not accompanied by any explanation or support.[203] The Justices equivocated on this a bit in *Fields*, commenting that the officers conducting the interrogation there "probably" had no authority "to bring about an early release," but again were only able to cite *Shatzer* for support.[204] In fact, however, prisoners have been promised early release and even released on probation to assist with law enforcement investigations,[205] and Shatzer's cooperation with the police could have been considered in determining his eligibility for parole under Maryland regulations taking into account a prisoner's "adjustment" and "attitude toward society . . . and other authority."[206] In addition to affecting the likelihood of parole, a prisoner's cooperation with

200. *See Fields*, 565 U.S. at 502, 516 n.6; Brief for the Respondent at 38, *Fields*, 565 U.S. 499 (No. 10-680).

201. *See* Dery, *supra* note 19, at 91 (calling the *Fields* Court's reasoning "technically true but, in the bigger picture, irrelevant").

202. *Shatzer*, 559 U.S. at 113.

203. *Id.* at 113–14.

204. *Fields*, 565 U.S. at 512.

205. *See*, *e.g.*, Simpson v. Warden, Warren Corr. Inst., 651 F. App'x 344, 355 (6th Cir. 2016); Simpson v. Jackson, 615 F.3d 421, 425–26 (6th Cir. 2010) (also pointing out that the defendant's lack of cooperation led to his arrest for failing to comply with the terms of his probation), *vacated on other grounds sub nom.* Sheets v. Simpson, 565 U.S. 1232 (2012); *see also* Brief for Donovan E. Simpson as Amicus Curiae Supporting Respondent at 24 n.8, *Fields*, 565 U.S. 499 (No. 10-680) (citing other cases in which a prisoner was released early or promised a letter to the parole board in exchange for cooperating with the authorities).

206. MD. CODE REGS. 12.08.01.18(A)(3) (2008), *cited in Shatzer*, 559 U.S. at 127–28 (Stevens, J., concurring in the judgment); *see* Brief for Respondent at 26, *Shatzer*, 559 U.S. 98 (No. 08-680) (noting that interrogators could recommend a cooperating prisoner's release on parole).

an interrogation could influence a prosecutor's response to the inmate's motion to reduce or modify her sentence.[207]

But, even if the Court's observations are taken at face value with respect to prisoners already serving a sentence, they are inapplicable to pretrial detainees, who may feel coerced to respond to questioning by "'the fear of reprisal'" or "'the hope of . . . more lenient treatment.'"[208] The State of Maryland appropriately distinguished Shatzer from a pretrial detainee, "'worried and uncertain about his fate with regard to . . . pending charges.'"[209] During oral argument in that case, Chief Justice Roberts agreed with Shatzer's attorney that a break-in-custody exception should not apply to pretrial detainees because they realize they are still "being looked at" for the crime that led to their invocation of the right to counsel.[210] The Solicitor General likewise acknowledged in *Fields* that a pretrial detainee is "differently situated" from an inmate serving a prison term because the former "can easily imagine that his continued incarceration, and what charges he faces, may be affected by whether he cooperates with authorities."[211]

In fact, pretrial detainees are frequently told that cooperating with their interrogators could be beneficial.[212] In

---

207. *See* Brief for Respondent at 26, *Shatzer*, 559 U.S. 98 (No. 08-680) (pointing out that a prisoner's unopposed motion to modify or reduce a sentence "could result in a shorter sentence").

208. *Fields*, 565 U.S. at 512 (quoting Illinois v. Perkins, 496 U.S. 292, 296– 97 (1990)).

209. Brief for Petitioner at 24, *Shatzer*, 559 U.S. 98 (No. 08-680) (quoting Magid, *supra* note 75, at 948); *see* Transcript of Oral Argument at 16, *Shatzer*, 559 U.S. 98 (No. 08-680) (quoting the Maryland Attorney General distinguishing Shatzer from a pretrial detainee, who has "different incentives to cooperate or not cooperate with the police"); *see also* Brief of Florida et al. as Amici Curiae in Support of Petitioner at 19, *Shatzer*, 559 U.S. 98 (No. 08-680) (arguing the same point on behalf of thirty-seven states).

210. Transcript of Oral Argument at 49, *Shatzer*, 559 U.S. 98 (No. 08-680).

211. Brief for the United States as Amicus Curiae Supporting Petitioner at 24 n.1, *Fields*, 565 U.S. 499 (No. 10-680).

212. *See*, *e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 186 n.1 (1991) (Stevens, J., dissenting) (noting that the pretrial detainee was told that "'tell[ing] his side of the story' . . . might help him later"); Edwards v. Arizona, 451 U.S. 477, 479 (1981) (reporting that the interrogator gave the suspect an opportunity to call the prosecutor to try to work out a deal); United States v. Coles, 264 F. Supp. 3d 667, 684 (M.D. Pa. 2017) (acknowledging that the interrogators "repeatedly insisted" they could help the pretrial detainee "alleviate his

addition, incriminating statements made by pretrial detainees during questioning have been considered in setting bail and imposing sentence,[213] and detainees may believe—with good reason—that prosecutors play a role in recommending pretrial detention conditions to the trial judge.[214]

Once adversary judicial proceedings have begun, law enforcement officials who wish to interrogate a suspect without administering *Miranda* warnings[215] will need to limit their questions to charges other than the one for which the suspect is being detained because, unlike the *Miranda* right to counsel, the

---

exposure"); State v. Ames, 155 A.3d 881, 887 n.3, 884 (Me. 2017) (observing that the detectives suggested that the pretrial detainee's cooperation could have an impact on his probation revocation proceedings and that a crime tied to a drug problem could lead to a lesser sentence); State v. Baker, No. 9-12-51, 2013 Ohio App. LEXIS 1621, at *9 (Ohio Ct. App. Apr. 29, 2013) (pointing out that the pretrial detainee was told that talking to the detective "might 'help his situation'"); Commonwealth v. Champney, 161 A.3d 265, 274 (Pa. Super. Ct. 2017) (noting that a police officer informed the pretrial detainee that another suspect was "'clearing . . . his slate by offering information'" and encouraged him to "'step up' and discuss his involvement" (citation omitted)); *cf.* Baumruk v. State, 364 S.W.3d 518, 527 (Mo. 2012) (explaining that defense counsel hoped that a social worker who questioned the pretrial detainee during a competency evaluation would testify for the defense at the death penalty sentencing hearing). For cases where similar comments were made to inmates serving prison sentences, see, for example, Schreane v. Ebbert, 864 F.3d 446, 449 (6th Cir. 2017) (noting that a detective promised to inform the prosecutor that the prisoner "had come forward on his own and cooperated with the police"); Georgison v. Donelli, 588 F.3d 145, 149 (2d Cir. 2009) (indicating that detectives asked the inmate whether he wanted to know what impact his confession would have on charges he committed an unrelated crime).

213. *See, e.g.*, United States v. Chitty, 760 F.2d 425, 430 (2d Cir. 1985).

214. *See, e.g.*, United States v. Ellison, 632 F.3d 727, 730 (1st Cir. 2010); *Champney*, 161 A.3d at 283 n.23. For discussion of ways in which prosecutors can influence the length and conditions of pretrial detention, see *infra* notes 226, 233–234 and accompanying text.

215. *Cf.* Patterson v. Illinois, 487 U.S. 285, 298–99 (1988) (holding that a *Miranda* waiver generally suffices to waive the Sixth Amendment as well). *But see* Arnold H. Loewy, *Distinguishing Confessions Obtained in Violation of the Fifth Amendment from Those Obtained in Violation of the Sixth Amendment*, 50 TEX. TECH L. REV. 145, 152 (2017) (criticizing *Patterson* for focusing on the Fifth Amendment's interest in dissipating "coercion" and ignoring the Sixth Amendment's distinct concern with addressing defendants' "ignorance"); Wayne A. Logan, *The Case for Greater Transparency in Sixth Amendment Right to Pretrial Counsel Warnings*, 52 TEX. TECH L. REV. 23, 36 (2019) (agreeing that *Patterson* "both understated and misstated" a lawyer's "role . . . in the post-critical stage context").

Sixth Amendment is "offense specific"[216] and prohibits "deliberately elicit[ing]" a confession only to the charged offense.[217] In cases where law enforcement officials suspect pretrial detainees of committing other crimes and can therefore interrogate about those charges without running afoul of the Sixth Amendment, prosecutors might claim that those officers do not control decisions about the defendants' "continued detention,"[218] especially if the unrelated charges are being investigated by a different law enforcement agency.[219] Just like convicted prisoners, the argument might go, the detainees may realize they "will remain under confinement" regardless of how cooperative they are during the interrogation.[220]

But other portions of the Court's reasoning in *Shatzer* distinguish those pretrial detainees from convicted offenders. The detainees face continued "uncertainties" surrounding what "final charges" will be brought and what sentence will be imposed if they are convicted—with respect to both the charges for which they are being detained and the other crimes that are the subject of interrogation.[221] And again, as the *Shatzer* Court observed, "'prolonged police custody'" is likely to create "mounting coercive pressures."[222]

In addition, the argument about split lines of authority is less persuasive when the same police department responsible for bringing the initial charges is investigating a pretrial detainee's potential involvement in other offenses.[223] Under

---

216. *McNeil*, 501 U.S. at 175. *But cf.* Arizona v. Roberson, 486 U.S. 675, 683 (1988) (holding that invocations of the *Miranda* right to counsel foreclose questioning on any charge).

217. Massiah v. United States, 377 U.S. 201, 206 (1964); *cf.* Texas v. Cobb, 532 U.S. 162, 173 (2001) (holding that the Sixth Amendment also attaches as to any crime that would be considered the same offense under the double jeopardy test articulated in Blockburger v. United States, 284 U.S. 299, 304 (1932)).

218. Maryland v. Shatzer, 559 U.S. 98, 114 (2010).

219. *But cf. infra* note 225 (citing sources making this argument even though the same law enforcement agency was investigating both offenses).

220. Howes v. Fields, 565 U.S. 499, 511 (2012).

221. *Shatzer*, 559 U.S. at 114.

222. *Id.* at 105 (quoting Arizona v. Roberson, 486 U.S. 675, 686 (1988)).

223. For illustrations of such cases, see Holland v. Rivard, 800 F.3d 224, 227–29 (6th Cir. 2015); People v. Krebs, 452 P.3d 609, 622 (Cal. 2019); Trotter

those circumstances, the detainee's "continued detention as [a] suspect[]" does "rest[] with" the interrogating officers and the prosecutors with whom they work,[224] just as it did for the three defendants in the *Edwards* line of cases.[225] Prosecutors can make decisions about whether to file a motion to increase the money bail or change the bail conditions, or how to respond to defense counsel's motion to reduce the amount of bail, based on how cooperative the detainee has been in questioning.[226]

Moreover, treating interrogations of pretrial detainees differently depending on which jurisdiction their questioners represent creates too fine a distinction, especially when the controlling point of view is that of the reasonable person in the detainee's position.[227] The reasonable suspect likely does not distinguish between distinct law enforcement agencies, instead viewing them as a united entity.[228] Minnick, for example, was questioned at a California jail, first by FBI agents and then several days later by a deputy sheriff from Mississippi.[229] Both interrogations discussed Minnick's escape from a Mississippi

---

v. United States, 121 A.3d 40, 46–47 (D.C. 2015); State v. Ames, 155 A.3d 881, 883–84 (Me. 2017); People v. Elliott, 833 N.W.2d 284, 286–88 (Mich. 2013); State v. Pehowic, 780 A.2d 1289, 1290–91 (N.H. 2001); Commonwealth v. Champney, 161 A.3d 265, 268–69 (Pa. Super. Ct. 2017); Jones v. State, 119 S.W.3d 766, 770–71 (Tex. Crim. App. 2003).

224. *Shatzer*, 559 U.S. at 114.

225. *But see Champney*, 161 A.3d at 283 n.22, 284 (reasoning that the pretrial detainee was "far removed" from the interrogating officer in the time between interrogations and the officer had no "ability to reward . . . or punish" the detainee, whose detention was based on unrelated charges being investigated by the same law enforcement agency); Brief for the United States at 22–23, United States v. Green, 507 U.S. 545 (1993) (No. 91-1521) (arguing that *Edwards* should not ban interrogation about a different crime being investigated by the same authorities if the suspect had been assigned counsel).

226. *See generally* Schilb v. Kuebel, 404 U.S. 357, 362 (1971) (pointing out the availability of such motions); Yates v. United States, 356 U.S. 363, 363–64 (1958) (noting that the amount of money bail fluctuated between $7,500 and $50,000 in that case). For discussion of other ways in which prosecutors can influence the length and conditions of pretrial detention, see *infra* notes 233– 234 and accompanying text.

227. *See supra* notes 31–34 and accompanying text.

228. *See Shatzer*, 559 U.S. at 128 (Stevens, J., concurring in the judgment) (wondering how convicted prisoners are "supposed to know" their "fate is not controlled" by police interrogators).

229. Minnick v. Mississippi, 498 U.S. 146, 148–49 (1990).

jail and the two murders for which he was ultimately convicted.[230] On each occasion, jail officials informed Minnick that he was required to go to the interviews.[231] From where Minnick sat, then, it could reasonably appear that three different law enforcement authorities—the FBI, the Mississippi sheriff's office, and his California jailers—were all working collectively in putting together a murder case against him.[232]

Neither the language appearing in the *Shatzer* and *Fields* opinions nor the reasoning used to justify the results in those cases supports extending the Court's rulings to pretrial detainees, regardless of the length of their detention, the onset of adversary judicial proceedings, or the subject of the interrogation. The next Part of the Article considers whether the relevant policy considerations dictate a different conclusion.

III. THE COMPETING POLICY CONSIDERATIONS

Even if Supreme Court precedent does not definitively foreclose prosecutors from claiming that questioning of pretrial detainees is noncustodial, the policy concerns underlying *Miranda* and its progeny call for that result. Because of the continuous uncertainty facing pretrial detainees and their susceptibility to coercion, these defendants should be deemed to be in custody for the duration of their confinement prior to trial.

Extending *Fields* and *Shatzer* to the pretrial detention context would allow government officials to engage in manipulation so as to circumvent *Miranda* and enhance their ability to interrogate without administering warnings. They could ask judges to deny bail or impose onerous bail conditions to increase the likelihood of extended pretrial detention.[233] They

230. *Id.*

231. *Id.*; *see* Edwards v. Arizona, 451 U.S. 477, 479 (1981) (noting that a guard at the jail told Edwards he had to talk to the detectives who had come to interview him).

232. *See Shatzer*, 559 U.S. at 128 (Stevens, J., concurring in the judgment) (pointing out that it "will 'appear'" to a prisoner that the guards and police are "not independent" when a jailer says the inmate is required to talk to police). For the argument that *Fields* may have had a similar impression, see *supra* note 200 and accompanying text.

233. *See, e.g.*, United States v. Ellison, 632 F.3d 727, 730 (1st Cir. 2010) (acknowledging that detainees might reasonably believe that "the authorities"

could influence the length and conditions of pretrial detention by adding or dropping charges or requesting continuances of the detainee's trial date.[234] They could charge a suspect with a minor crime and then conduct repeated interrogations on the charge they are really investigating, a more serious offense for which the detainee's Sixth Amendment rights have not yet attached.[235] They could resort to a form of "catch and release," conducting custodial interrogations and then promising to bring any pretrial detainee who invoked the *Miranda* right to counsel back for another round of questioning every fourteen days.[236] Requiring police to administer *Miranda* warnings before

play some role in recommending pretrial conditions to judges); BAUGHMAN, *supra* note 7, at 6–7 (noting that prosecutors are incentivized to seek high bail amounts); EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 39 (2019) (reporting that judges typically follow prosecutors' bail recommendations); Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 868 (2020) (observing that judges enjoy "almost unreviewable discretion" in making bail decisions).

234. *See, e.g.*, Gonnerman, *supra* note 178 (noting that prosecutors repeatedly requested short continuances in Kalief Browder's case, which led to at least a six-week delay each time because of the court's crowded dockets); *Pretrial Injustice*, *supra* note 178 (pointing out that Ralph Berry's trial was similarly delayed).

235. *See* Magid, *supra* note 75, at 889 (endorsing "this much applauded policy"). For possible examples of such cases, see People v. Krebs, 452 P.3d 609, 622, 640 (Cal. 2019) (noting that the defendant was arrested for violating his parole by possessing a BB gun and consuming alcohol, but it was "difficult to separate his jailed status" from two murder investigations); People v. Elliott, 833 N.W.2d 284, 286–87 (Mich. 2013) (observing that the questioning conducted on the day the defendant was arrested for a parole violation involved an unrelated robbery); Jones v. State, 119 S.W.3d 766, 771, 786 (Tex. Crim. App. 2003) (pointing out that, while the defendant was arrested for possessing a controlled substance and failing to pay various traffic fines, he was questioned about the murder of a woman whose body had been found earlier that day); *see also* Texas v. Cobb, 532 U.S. 162, 182–83 (2001) (Breyer, J., dissenting) (criticizing the majority for allowing police to evade the Sixth Amendment right to counsel by "asking questions about any other related crime not actually charged in [an] indictment," and listing by way of example the different charges that could be brought against an armed robber or drug dealer).

236. *Cf. Shatzer*, 559 U.S. at 110–11 (adopting a fourteen-day break-in-custody rule to discourage such tactics). For an illustration of a case involving such a promise, see State v. Baker, No. 9-12-51, 2013 Ohio App. LEXIS 1621, at *9–10 (Ohio Ct. App. Apr. 29, 2013).

interrogating pretrial detainees would disincentivize these forms of gamesmanship.

On the other side, some have argued that considering pretrial detainees to be in continuous custody would be tantamount to affording them "immunity from questioning"[237] and thus more robust Fifth Amendment protection than nonincarcerated individuals.[238] It seems somewhat counterintuitive to view someone in jail awaiting trial as occupying a privileged position given the significant personal, financial, and legal costs of pretrial detention.[239] Moreover, jails have been described as "worse places" than even prisons.[240] Jail inmates are "more likely to be in some kind of crisis," and jails are "far less professionalized" and more financially strapped than prisons.[241] In addition, jail can be more dangerous than prison because the rates of turnover are very high,[242] jailers often lack information about their detainees,[243] and those who are held without bail may tend to be more dangerous offenders.[244]

---

237. Commonwealth v. Champney, 161 A.3d 265, 283 n.22 (Pa. Super. Ct. 2017).

238. *See, e.g.*, Herrera v. State, 241 S.W.3d 520, 532 (Tex. Crim. App. 2007); *cf.* Magid, *supra* note 75, at 889 (making this argument in proposing a limit on the *Edwards* ban for pretrial detainees).

239. *See supra* notes 8–13 and accompanying text.

240. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1687 (2003).

241. *Id.* at 1687, 1684–85.

242. *See id.* at 1686; Struve, *supra* note 3, at 1055; *see also* ZENG, *supra* note 1, at 8 (reporting that the average weekly turnover rate in jails was 55 percent in 2018).

243. *See* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 336 (2012) (noting that arrestees can misrepresent their identity or provide false identification and jailers might not be able to obtain complete criminal history records).

244. *See* United States v. Salerno, 481 U.S. 739, 750 (1987) (observing that bail is denied in federal cases only when suspects charged with "extremely serious offenses" are proven by clear and convincing evidence to pose "a demonstrable danger to the community"); Struve, *supra* note 3, at 1059 (noting that most states likewise permit pretrial detention of dangerous defendants and tend to detain those who are more likely to endanger the community). *But cf.* BAUGHMAN, *supra* note 7, at 39–42, 75–76 (charging that judges, who must often make bail determinations quickly with very little information, are "substantially mistaken" in predicting which suspects are likely to be

The seemingly obvious response to the immunity argument is that any detainee can be interrogated after receiving *Miranda* warnings. But others have offered the more nuanced objection that government officials should not be required to administer *Miranda* warnings whenever they wish to pose a question to a detainee.[245] That concern might carry some weight in reference to inmates serving a prison sentence, who would become "unapproachable for the duration of their often lengthy incarceration."[246] But almost all prison sentences are longer than a year,[247] and, as noted above, pretrial detention is typically much shorter.[248]

Moreover, *Miranda* warnings are triggered by the combination of custody and interrogation, and therefore need not be given before "informal conversations"[249] with pretrial detainees that are not "reasonably likely to elicit an incriminating response" under the *Rhode Island v. Innis*[250]

---

dangerous); COHEN & REAVES, *supra* note 5, at 1 (reporting that only one-sixth of pretrial detainees were denied bail and the rest were unable to post bail); Mayson, *supra* note 9, at 1649 (contrasting the atypical "explicit denial of bail" and the common "functional denial of bail" (emphasis omitted)); Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 422 (2016) (pointing out that judges "have reason to err on the side of detention" and are "far more likely to detain or set a high bail requirement than one might expect from the text of the statutes passed").

245. *See, e.g.*, State v. Ford, 738 A.2d 937, 943 (N.H. 1999); Herrera v. State, 241 S.W.3d 520, 531 (Tex. Crim. App. 2007).

246. Brief for the United States as Amicus Curiae Supporting Petitioner at 20, Maryland v. Shatzer, 559 U.S. 98 (2010) (No. 08-680). This appears to be a familiar refrain coming out of the Solicitor General's office. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner at 25–26, Howes v. Fields, 565 U.S. 499 (2012) (No. 10-680); Brief for the United States at 24– 25, United States v. Green, 507 U.S. 545 (1993) (No. 91-1521); Brief for the United States as Amicus Curiae Supporting Petitioner at 10, 11 n.3, Illinois v. Perkins, 496 U.S. 292 (1990) (No. 88-1972); Brief for the United States at 21, Mathis v. United States, 391 U.S. 1 (1968) (No. 726). It has also been echoed by some courts. *See, e.g.*, United States v. Conley, 779 F.2d 970, 972–73 (4th Cir. 1985); People v. Patterson, 588 N.E.2d 1175, 1179 (Ill. 1992).

247. *See* E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 253516, PRISONERS IN 2018, at 6 (putting the figure at 97 percent).

248. *See supra* notes 180–181 and accompanying text.

249. United States v. Morales, 834 F.2d 35, 40 (2d Cir. 1987) (Oakes, J., concurring).

250. 446 U.S. 291 (1980).

definition of interrogation.[251] Although *Innis* also included "express questioning" within the realm of interrogation,[252] some courts have exempted spontaneous questions on the ground that they fall within *Miranda*'s exception for "[g]eneral on-the-scene questioning."[253] Even if a jailer's innocent question such as "What's going on here?" is considered to be interrogation,[254] the guard can Mirandize the detainee before continuing the questioning and then argue that any subsequent confession is untainted by the *Miranda* violation and thus admissible under *Oregon v. Elstad*.[255] That claim would be even stronger if the follow-up interrogation session was conducted by different jail personnel in another location and after some gap in time.[256]

---

251. *Id.* at 301 (defining the "functional equivalent" of "express questioning").

252. *Id.* at 300–01.

253. Miranda v. Arizona, 384 U.S. 436, 477 (1966). For illustrations of such cases, see United States v. Scalf, 725 F.2d 1272, 1276 (10th Cir. 1984); Cervantes v. Walker, 589 F.2d 424, 427 (9th Cir. 1978).

254. *See* 2 LAFAVE, *supra* note 92, § 6.7(b), at 844–45, 854–58 (describing the conflict in the lower courts on this question).

255. *See* Oregon v. Elstad, 470 U.S. 298, 318 (1985) (refusing to apply the fruits of the poisonous tree doctrine to exclude a second confession that was voluntary and followed proper *Miranda* warnings); *cf.* Missouri v. Seibert, 542 U.S. 600, 614–16 (2004) (plurality opinion) (distinguishing *Elstad* from a bad-faith violation intended to circumvent *Miranda*); *id.* at 620–22 (Kennedy, J., concurring in the judgment) (same).

256. *See Seibert*, 542 U.S. at 615–16 (plurality opinion) (refusing to apply *Elstad* where both interrogations were conducted by the same officer at the same time and place); *cf. id.* at 622 (Kennedy, J., concurring in the judgment) (suggesting that similar factors should be taken into account in consecutive confession cases involving bad-faith violations of *Miranda*). For lower court opinions addressing this issue in the context of pretrial detention, see, for example, United States v. Byram, 145 F.3d 405, 409–10 (1st Cir. 1998) (distinguishing a guard's "on-the-spot inquiry," and declining to apply *Elstad* where the initial *Miranda* violation was "neither technical nor mitigated by an intervening warning"); People v. Krebs, 452 P.3d 609, 644, 646 (Cal. 2019) (refusing to suppress a pretrial detainee's subsequent statements where the un-Mirandized interrogation was short and did not involve a deliberate *Miranda* violation and the second "detailed" confession came after a "change of setting"); Jones v. State, 119 S.W.3d 766, 774–75 (Tex. Crim. App. 2003) (finding *Elstad* inapplicable where the *Miranda* violation "reflect[ed], at the very least, a serious misunderstanding . . . of the dictates of *Miranda*" and "the unwarned and warned statements . . . were given during a nearly undifferentiated single event").

Finally, some object that incarcerated individuals are often transferred to different facilities, and a government official may not realize a prisoner previously invoked the *Miranda* right to counsel and therefore inadvertently violate the *Edwards* rule.[257] Again, this argument has greater force for those serving a prison sentence than for those awaiting trial. Even the Solicitor General's amicus brief in *Shatzer* distinguished requiring government officials to determine whether a pretrial detainee invoked the right to counsel "at some point in the relatively recent past" from the more burdensome task of ascertaining whether an inmate "serving a long prison sentence" previously asked for a lawyer "at any time, in any place, and to any law enforcement official during a period of continuous incarceration."[258] As the Court recognized in *Arizona v. Roberson*, an officer's "lack of diligence" in following "established procedures" and confirming whether a pretrial detainee previously requested counsel can have "no significance."[259]

In short, while countervailing policy arguments can be made, the ones on the government's side of the equation are much less weighty when directed at pretrial detainees rather than convicted inmates serving prison time. And those objections are outbalanced by the specter of government officials using manipulative tactics to circumvent *Miranda* should the rulings in *Shatzer* and *Fields* be extended to cases involving pretrial detainees.

CONCLUSION

The Supreme Court's decisions in *Maryland v. Shatzer* and especially in *Howes v. Fields*—that Shatzer experienced a break in custody when he returned to the general prison population following an interrogation session and that Fields was not in

257. *See, e.g.*, Shatzer v. State, 954 A.2d 1118, 1153 (Md. 2008) (Harrell, J., dissenting), *rev'd*, 559 U.S. 98 (2010); Transcript of Oral Argument at 25, Maryland v. Shatzer, 559 U.S. 98 (2010) (No. 08-680) (reporting the argument made by the Solicitor General's lawyer); *see also* Arizona v. Roberson, 486 U.S. 675, 687–88 (1988) (rejecting a good-faith exception to *Edwards*).

258. Brief for the United States as Amicus Curiae Supporting Petitioner at 20, *Shatzer*, 559 U.S. 98 (No. 08-680).

259. *Roberson*, 486 U.S. at 687–88.

custody when he was questioned for many hours, not in the prison where he was incarcerated, but in the sheriff's office—are certainly subject to criticism. But, consistent with the Justices' repeated assumption in other confessions cases that pretrial detention constitutes custody for purposes of *Miranda*, the Court carefully limited the language in both *Shatzer* and *Fields* to inmates serving prison sentences. Likewise, the reasoning underlying the two opinions is not easily transferred to pretrial detainees.

Despite the Court's gradual retreat from defendant-friendly language in its earlier opinions addressing claims that a prisoner's *Miranda* rights were violated, the holdings in *Shatzer* and *Fields* should not be extended to the pretrial detention context. Until pretrial detainees go to trial, they face a constant state of uncertainty about the future, accompanied by fear, anxiety, hope, and a susceptibility to coercion. Pretrial detainees should therefore be deemed to be in *Miranda* custody during the duration of their confinement prior to trial. Any other result will allow gamesmanship on the part of prosecutors in making charging decisions and bail recommendations and will enable law enforcement to capitalize on the coerciveness of pretrial detention to elicit confessions from suspects who are particularly susceptible to the threats and promises that lead to false confessions and who disproportionately represent communities of color and financially vulnerable populations.