Campbell Law Review

Volume 44
Issue 1 *Winter 2022*

Article 6

2021

The Return to and Expansion of *Escobedo*

Anna Amsbaugh

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ABSTRACT

In 1966, the Supreme Court of the United States set out to correct the problems in America's criminal justice system by creating procedural safeguards in a ground-breaking case: Miranda v. Arizona. *These safeguards were created to protect innocent citizens from the psychological pressures and interrogation techniques used by police. However, these intended protections have failed. Subsequent Supreme Court cases have continued to rip apart* Miranda*'s procedural safeguards by placing a multitude of limitations on the doctrine, causing legal scholars everywhere to question* Miranda*'s effectiveness. This Comment explores both the history of the Fifth and Sixth Amendments and the foundational cases that* Miranda *was based upon. Additionally, this Comment will assess the subsequent limitations placed on* Miranda *itself and how those limitations have created "holes" for law enforcement to work through during interrogations. Lastly, this Comment will look at previous scholars' arguments on "fixing"* Miranda *and proposes that the Court should revert to and extend* Escobedo v. Illinois *in order for* Miranda*'s intended protections to be successfully carried out.*

INTRODUCTION

A common question that many people have likely heard before is, "why would someone who is innocent confess to a crime that they did not commit?" The reasonable person believes that those who admit to a crime actually committed it, but that is not always the case. Since the emergence of DNA exonerations in 1989, twenty-nine percent of the 375 DNA exonerees involved false confessions.[1] The answer to the preceding question is that standard police interrogation techniques, combined with psychological pressures, can easily cause an innocent person to confess. Throughout history, many have come to question our criminal justice system regarding whether it is just or fair, poring over what can be done to protect the innocent. The Supreme Court of the United States attempted to take on these problems in 1966 by creating procedural safeguards in *Miranda v. Arizona* to protect the innocent. However, subsequent years have led many to ask whether *Miranda v. Arizona* was successful in achieving its intended protections, or has the Court's post-*Miranda* limitations caused *Miranda* to fail miserably?

In July 2002, Karen Boes, a mother of two, had her life turned upside down. Shortly thereafter, she was able to answer that burning question: *Miranda* has failed miserably.

On July 30, 2002, Karen left her home in Zeeland, Michigan, early in the morning to go shopping with a friend.[2] While waiting for the store to open, she received a phone call alerting her that her house was on fire; knowing that her daughter was asleep when she left, she raced home only to learn that her daughter died in the fire.[3] The next thing Karen knew, she was sentenced to life without the possibility of parole for killing her daughter.[4]

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1. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/B6GX-PVYU].

2. John Agar, *Karen Boes Falsely Confessed to Daughter's Killing: Netflix Documentary*, M LIVE (Jan. 19, 2019, 4:19 PM), https://www.mlive.com/news/grand-rapids/2017/09/karen_boes_falsely_confessed_t.html [https://perma.cc/QH6X-C4QX].

3. FREE KAREN BOES, https://freekarenboes.com/ [https://perma.cc/A32X-2WLM].

4. *Id.*

Karen's story begins a week after the fire when she voluntarily went to police in an attempt to figure out how her daughter died.[5] Karen spent eleven and a half hours at the Zeeland Police Station and, during that time, she was subjected to a tag-team interview by law enforcement.[6] After the original interview, police subjected Karen to multiple interviews over a six-week period where officers became increasingly confrontational and began lying about evidence they had against her.[7] Over the six weeks of interviews, minor contradictions in her statements began to emerge, and she started second guessing her memory.[8] The interviews and tactics utilized by police led Karen not to expressly confess her guilt to the crime, but to say she could possibly have done it when she was not "in her right mind or in an unconscious state."[9] Her equivocal statement led Karen to spend the last eighteen years in prison without hope of ever being released unless the governor of Michigan grants clemency or a pardon.[10]

Karen is not the only person to recognize that the procedural safeguards created in *Miranda* have failed miserably. In previous years, many scholars have questioned the Court's decision in *Miranda* and the limitations placed on the *Miranda* decision in the years after. Many have argued for different ways to correct *Miranda* so that it fulfills the Court's expectations of protecting the innocent; however, these different approaches to correct the famous decision are not enough. The purposes of this Comment are to (1) propose a return to the previous framework created in *Escobedo v. Illinois*; (2) right the wrongs created by subsequent limitations on invoking criminal suspect's rights; and (3) protect the innocent from false confessions.

Part I of this Comment will explore the history of the Fifth and Sixth Amendments and the cases leading to *Miranda*, including both *Escobedo* and *Miranda*. Part II discusses the limitations created by the Court after their decision in *Miranda* and reviews the limitations created within the *Miranda* decision. Part III analyzes how the limitations discussed in Part II leave open the possibility to extract false confessions from innocent individuals. Lastly, Part IV addresses previous scholars' arguments for correcting *Miranda* and proposes a return to the framework created by the Court under *Escobedo*.

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5. Agar, *supra* note 2.
6. FREE KAREN BOES, *supra* note 3.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* (noting that at the time the source was last updated, Karen Boes had spent fourteen years in prison).

I. THE ROAD TO MIRANDA AND ITS CREATION

A. The Path that Led to Miranda v. Arizona

Miranda v. Arizona held that the Fifth Amendment's privilege against self-incrimination bars the admission of involuntary confessions obtained during custodial interrogation.[11] It also created the well-known "*Miranda* Warnings" as procedural safeguards to help courts determine whether a confession was voluntary or not.[12] Of these warnings, one in particular, "he has the right to the presence of an attorney,"[13] acknowledges a Fifth Amendment right to counsel to help protect a person against the inherently coercive atmosphere of an interrogation room.[14] However, there is no Fifth Amendment right to counsel.[15] A careful reading of *Miranda* demonstrates that the majority took the Sixth Amendment right to counsel and applied it to custodial interrogation by police.[16] Exploring the establishment of the privilege against self-incrimination, along with the cases leading up to *Miranda*, is important to understand how the Court reached its holding.

1. Establishment of the Privilege Against Self-Incrimination

The Fifth Amendment provides: "No person shall . . . be compelled in any criminal case to be a witness against himself."[17] These words represent the privilege against self-incrimination and extend back to the fourth century during the "medieval controversies between the English king and the [Roman Catholic] church."[18] The medieval days of England saw two systems of justice: the Church's inquisitorial system and the accusatorial system of England.[19] The former values the search for truth above an innocent person's rights; the latter exalts the opposite by placing the rights of the innocent above all else.[20] The accusatorial system is exemplified by a fifteenth-century Chief Justice, Sir John Fortescue: "[o]ne would much rather that twenty guilty persons should escape the punishment of death, than that

11. Miranda v. Arizona, 384 U.S. 436, 498 (1966).
12. *Id.* at 479.
13. *Id.*
14. *See id.* at 467–78.
15. U.S. CONST. amend. V.
16. *See Miranda*, 384 U.S. at 498.
17. U.S. CONST. amend. V.
18. DAVID J. BODENHAMER, OUR RIGHTS 155 (2007).
19. *Id.*
20. *Id.*

one innocent person should be condemned, and suffer capitally."[21] The sixteenth and seventeenth centuries saw a shift in the English practice; instead of protecting the innocent, the Star Chamber[22] favored "[s]ecret proceedings and torture."[23] The Star Chamber, along with other courts in England, favored ex-officio proceedings where people were forced to take an oath known as the "ex-officio oath" or forced to speak the truth and confess their guilt.[24]

The privilege not to incriminate oneself originated in England during the rebellion against the system and procedure during the trial of John Lilburn.[25] John refused to take the ex-officio oath or to answer against himself; "hundreds of others [also] refused to be sworn, or being sworn, refused to answer."[26] In response to Lilburn's heroism for his defense to liberty, Parliament abolished the Star Chamber in 1641.[27] When coming to America from England, the American colonists knew of this "history of royal abuse . . . and they brought with them a firm conviction that no man should be required to testify against or accuse himself."[28] In all the American colonies, "justice was to be administered as closely as possible 'to the common law of England,'"[29] and the colonists considered the privilege against self-incrimination to be a part of their rights under the common law.[30] Eventually, it became the Fifth Amendment to the U.S. Constitution.[31]

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21. *Id.*

22. *Star Chamber*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining Star Chamber) ("An English court having broad civil and criminal jurisdiction at the king's discretion and noted for its secretive, arbitrary, and oppressive procedures[.]").

23. BODENHAMER, *supra* note 18, at 155; *see also* Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 AM. J. LEGAL HIST. 326, 330 (2010) (noting that Parliament abolished the Star Chamber because (1) it overreached its jurisdiction under the law, (2) its proceedings were arbitrary, resulting in false convictions, and (3) it inflicted cruel and unusual punishments on the guilty).

24. R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 770 (1935).

25. *Id.*

26. *Id.*

27. BODENHAMER, *supra* note 188, at 156.

28. *Id.*

29. Pittman, *supra* note 244, at 766.

30. BODENHAMER, *supra* note 22, at 156 ("In 1641, for example, the Massachusetts Puritans included prohibitions against torture and self-incriminating oaths in their earliest law code . . . By the time of the Revolution, these protections were considered to be so essential to liberty that they appeared in various state constitutions[.]").

31. *Id.*

Throughout the nineteenth century, confessions that were the product of violence or trickery by officials were excluded by the courts, but confessions obtained using deception and psychological pressure by outside sources were admitted.[32] Confessions were admissible if they were made voluntarily, which was determined using a broad standard that was easily satisfied as long as there was no evidence of threats.[33] Courts during this time aspired to create an "efficient system of justice" and subsequently extended the privilege against self-incrimination to civil cases that could lead to criminal prosecution in federal cases.[34] While the Court understood the privilege to be a "wise and beneficent rule of evidence," they did not see it as an essential part of due process. Therefore, the Court allowed states to set their own standards even if that meant "order and national security trumped the rights of individuals to remain silent."[35]

2. The Amendments and Their Effects on the Court's Decisions in the Cases Leading to Miranda

Before the Court decided that the privilege against self-incrimination was essential under the Fourteenth Amendment's Due Process Clause in 1964, the Fifth Amendment did not apply to the states.[36] *Miranda*'s predecessors were decided under both the Sixth and Fourteenth Amendments. It is important to analyze the cases preceding *Miranda* to understand how the Court used those cases to create the procedural safeguards famously known as *Miranda* Warnings.

Between the 1930s and 1970s, the Court heard many cases dealing with the constitutionality of confessions obtained by law enforcement and held that they were inadmissible under the Fourteenth Amendment's due process voluntariness test.[37] In the 1932 landmark case of *Powell v. Alabama*, also known as the "first 'modern' procedural due process case," the Court established the constitutional principle of the right to counsel under

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 157.

36. *See* JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT 422 (2019 ed. 2019); *see also* Malloy v. Hogan, 378 U.S. 1, 7 (1964) ("[T]he issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person shall be compelled in any criminal case to be a witness against himself." (internal citation omitted)).

37. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 286 (1940) (holding that confessions obtained through violence were inadmissible).

the Due Process Clause.[38] In *Powell*, nine young defendants were arrested, arraigned, and never asked whether they were able to employ counsel or if they wished to appoint counsel.[39] They subsequently pleaded not guilty and were indicted for rape on the same day.[40] Prior to trial, the judge had "appointed all the members of the bar for the purpose of arraigning the defendants and then [assumed] the members of the bar would continue to [represent them at trial] if no new counsel appeared."[41] This subsequently led to no lawyer being named until the morning of the trial.[42] In the majority's opinion, the Court emphasized that the defendants were not "afforded a fair opportunity to secure counsel of [their] own choice" during the most critical period of proceedings: the pretrial-preparation period.[43] In the last few pages of the opinion, the Court went on to explain that the trial court's failure to give defendants "reasonable time and opportunity to secure counsel," equated to a clear violation of due process.[44] The Court then presented a limited statement about the right to counsel in state criminal cases:

> All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case . . . . In a case such as this, . . . the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.[45]

Four years after *Powell*, the Court decided its first Fourteenth Amendment Due Process confession case in *Brown v. Mississippi*.[46] Here, three African American defendants were beaten, whipped, and one defendant was even hung from a tree, until they all confessed as demanded by the deputy

38. ISRAEL ET AL., *supra* note 36, at 363.
39. Powell v. Alabama, 287 U.S. 45, 49–52 (1932).
40. *Id.*
41. *Id.* at 49.
42. *Id.* at 53.
43. *Id.*
44. *Id.* at 71.
45. *Id.* at 71–72.
46. ISRAEL ET AL., *supra* note 36, at 399.

sheriff.[47] The Court held that the confessions that had been obtained through physical coercion violated suspects' fundamental rights and constituted a violation of the Due Process Clause of the Fourteenth Amendment.[48] It reasoned that the Due Process Clause required that the treatment of suspects "be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[49]

In *Brown*, the Court made it clear that the case was not decided under the Fifth Amendment's privilege against self-incrimination: "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy."[50] However, if doing so "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," then they are not free to do so.[51]

As the Court's rationale in coerced confession cases evolved, it became clear that the due process voluntariness test was not very helpful in deciding the admissibility of confessions—it appeared the test was more conclusory than analytical. The totality of the circumstances test encompassed so many different factors to the point that everything was relevant, but no single factor was decisive. A shift in the constitutional atmosphere encouraged Supreme Court Justices to begin viewing access to a lawyer as fundamental to protecting defendants during police interrogations. In the unanimous 1959 case *Spano v. New York*, although ultimately decided on other grounds, it appeared as though a majority of the Court would support the contention that a person's constitutional right to counsel begins once that person is formally indicted.[52] The five like-minded Justices took this position, and in two separate opinions, the Justices emphasized that *Spano* was not a case where police were questioning a suspect in secret interrogations, but rather a case where the person had been formally charged with a crime following an indictment.[53] While a majority of the Court viewed the case this way, Chief Justice Warren's majority opinion did not decide the

47. Brown v. Mississippi, 297 U.S. 278, 281–82 (1936).

48. *See id.* at 285–86.

49. *Id.* at 286.

50. *Id.* at 285.

51. *Id.* (first quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); and then citing Rogers v. Peck, 199 U.S. 425, 434 (1905)).

52. Spano v. New York, 360 U.S. 315, 320 (1959).

53. *See Spano*, 360 U.S. at 324–26 (Douglas, J., concurring) ("[H]ere we deal not with a suspect but with a man who has been formally charged with a crime." (citing Crooker v. California, 357 U.S. 433 (1958))); *id.* at 327 (Stewart, J., concurring) ("Let it be emphasized at the outset that this is not a case where the police were questioning a suspect in the course of investigating an unsolved crime. When the petitioner surrendered to the New York authorities he was under indictment for first degree murder." (citations omitted)).

case on the grounds suggested by the concurring Justices. Instead, he found the confession to be inadmissible under the due process voluntariness test and the totality of the circumstances test.[54]

About four years after *Spano*, the Court held in *Gideon v. Wainwright* that every person accused of a crime, whether state or federal, is entitled to a lawyer at trial.[55] A little over a year after the *Gideon* decision, the Court extended the Sixth Amendment right to an attorney to individuals subjected to pretrial interrogation in *Massiah v. United States*.[56] The Court took the view of the concurring Justices in *Spano* and the majority in *Powell*, holding "the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."[57] *Massiah* provided the foundation for the Court's future decision in *Escobedo v. Illinois*.

3. Escobedo v. Illinois

By requiring states to provide lawyers, the Justices came to understand that "the Court could create a frontline agency for supervising police practices and [that] would be more effective than the exclusionary rule" in achieving its objectives.[58] Less than one month after *Massiah*, the Court incorporated the Fifth Amendment privilege against self-incrimination, making it applicable to the states.[59] About a week later, in *Escobedo*, it decided that an accused's Sixth Amendment right to counsel was necessary to protect that privilege in the period prior to indictment.[60]

In the early hours of January 20, 1960, defendant Escobedo was arrested for the murder of his brother-in-law.[61] Escobedo was interrogated for over twelve hours, refused to make a statement, and was subsequently released later that day under a state court writ of habeas corpus obtained by his lawyer, Mr. Wolfson.[62] About ten days later, Escobedo was arrested and, on the way to the police station, informed by the police that

54. *See Spano*, 360 U.S. at 321–24.

55. Gideon v. Wainwright, 372 U.S. 335, 341–44 (1963).

56. Massiah v. United States, 377 U.S. 201, 204–05 (1964).

57. *Id.* at 206 (dealing with a petitioner whose incriminating statements were secretly recorded by a codefendant outside of the police station after petitioner was indicted and released on bail).

58. LUCAS A. POWE JR., THE WARREN COURT AND AMERICAN POLITICS 386–87 (2000).

59. Malloy v. Hogan 378 U.S. 1, 6 (1964).

60. Escobedo v. Illinois, 378 U.S. 478, 488 (1964).

61. *Id.* at 479.

62. *Id.*

DiGerlando—another suspect already in police custody— "had named him as the one who shot" the deceased.[63] Escobedo responded by asking to speak with his lawyer.[64]

During Escobedo's interrogation by police, he repeatedly asked to speak to his lawyer but was denied because his lawyer "didn't want to see" him.[65] In reality, his lawyer was actually at the police station asking to see Escobedo, but the police refused his requests as well.[66] While in the course of interrogation, officers confronted Escobedo with DiGerlando while Escobedo was suffering from sleep deprivation; eventually, he told DiGerlando, "I didn't shoot Manuel, you did it."[67] Officers believed that the previous statement was Escobedo admitting to some knowledge of the crime.[68] After further statements implicating himself in the murder plot, the prosecutor was summoned to take a statement.[69] The Supreme Court of Illinois determined that the refusal to permit Escobedo to speak with his lawyer did not change the fact that he voluntarily confessed to murder.[70]

From these facts, the Supreme Court of the United States was left to decide whether Escobedo was denied his Sixth Amendment right to counsel when the police refused his requests to speak with his lawyer.[71] In reaching its holding, the Court primarily focused its analysis on three prior decisions: *Powell*, *Spano*, and *Massiah*. From these cases, the Court held that Escobedo was denied his Sixth Amendment right to counsel—even though he had yet to be formally charged—because the purpose of the interrogation was to have him confess and obtain a conviction.[72]

This holding is significant because the Court extended the Sixth Amendment right to counsel to include the time between the arrest and indictment. In their decision, the Court addressed the argument that extending the right to counsel prior to a formal indictment would diminish the number of confessions obtained by police. According to the Court, the argument "cuts two ways."[73] The Court reasoned that the time between the arrest and the indictment is the time when most confessions are obtained by police,

63. *Id.*
64. *Id.*
65. *Id.* at 481.
66. *Id.*
67. *Id.* at 482–83.
68. *Id.* at 483.
69. *Id.*
70. *Id.* at 483–84.
71. *Id.* at 479.
72. *Id.* at 485.
73. *Id.* at 488.

and if a person were to go without the "legal aid and advice" of a lawyer during this period, having legal representation at trial would be meaningless.[74] The Court linked the necessity of counsel's advice and the newly incorporated privilege against self-incrimination: "[o]ur Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination."[75]

Escobedo created an analytical framework by stating that the shift from the investigatory to the accusatory stage is where the adversary system attaches.[76] Simply put, under *Escobedo*, a suspect has the right to be left alone by the police—and to not be subject to any police interrogation—absent the presence of their counsel at the moment the process shifts from investigatory to accusatory.[77]

B. Miranda v. Arizona and its "Protections"

Just two years after *Escobedo*, the Warren Court issued one of its most controversial decisions. *Miranda* became known as the most contentious criminal procedure decision, prompting twenty-seven states to file an amicus brief "asking the Court to slow down."[78] "*Miranda* provoked a storm of opposition from police and prosecution . . . and a spirited defense from civil rights advocates and the academic community."[79] The decision "changed the standard by which confessions were deemed voluntary and, therefore, admissible at trial as part of the prosecution's case against the accused."[80] Before getting into the protections created by *Miranda*, a close analysis of the case is imperative.

Miranda addressed four different cases involving custodial interrogations. The cases all had similar issues where "the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which

74. *Id.* (citations omitted).

75. *Id.*; *see also id.* at 486 ("Petitioner, a layman, was undoubtedly unaware that under Illinois law an admission of mere complicity in the murder plot was legally as damaging as an admission of firing of the fatal shots." (citation omitted)).

76. *Id.* at 492 ("[W]hen the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.").

77. *Id.*

78. POWE, *supra* note 58, at 394.

79. Mark Berger, *Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1008 (1988).

80. Mandy DeFilippo, *You Have the Right to Better Safeguards: Looking Beyond Miranda in the New Millennium*, 34 J. MARSHALL L. REV. 637, 638 (2001).

he was cut off from the outside world."[81] However, none of the defendants were "given a full and effective warning of [their] rights at the outset of the interrogation process."[82] "In all the cases, the questioning elicited oral admissions and, in three of them, signed statements . . . were admitted at their trials."[83] In each separate case, the Court held that the statements were inadmissible because there was no evidence showing that "any warnings [were] given or that any effective alternative ha[d] been employed."[84]

The *Miranda* opinion begins with an endorsement of *Escobedo's* application of principles and quotes both the Fifth and Sixth Amendments as they worked together in *Escobedo*: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," and "the accused shall . . . have the Assistance of Counsel."[85] While the Court states that it reaffirms *Escobedo*, it is clear from the beginning of the opinion that it actually ignores *Escobedo* in deciding this case.[86] The Court is mostly concerned with the privilege against self-incrimination and police interrogation practices, which is shown through the extensive presentation of the then-present interrogation practices and procedures in modern police manuals and texts.[87] From these manuals, the Court concluded that, absent procedural safeguards, the inherently coercive pressures of police interrogation had proved overwhelming to individuals' ability to exercise their right against self-incrimination and that no confession given under these conditions "can truly be the product of [a suspect's] free choice."[88] Further, because of this inherently coercive environment, the Court found that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . ."[89]

From these concerns, the Court created a four-part procedural safeguard, now known as the Miranda Warnings. The warnings include: (1) the right to remain silent; (2) anything said can and will be used against the individual in a court of law; (3) the right to an attorney; and (4) if the

81. Miranda v. Arizona, 384 U.S. 436, 445 (1966).

82. *Id.* at 445.

83. *Id.*

84. *See id.* at 492–98.

85. *Id.* at 442.

86. *Id.* at 439 ("[W]e deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.").

87. *See id.* at 448–55.

88. *Id.* at 457–58.

89. *Id.* at 469.

individual cannot afford an attorney, one will be appointed to him.[90] These warnings were meant to protect the privilege against self-incrimination and they must be given as soon as a person is "deprived of his freedom of action in any significant way."[91] The Court believed that it is at this point when the formal "adversary system of criminal proceedings commences,"[92] and if a person is not read their rights and subsequently makes incriminating statements, those statements will be inadmissible under the Fifth Amendment.[93] If a person is both subject to interrogation and not read their rights, the Court will no longer stop to analyze the facts of a case to determine whether the individual was aware of their rights.[94] These rights were created to allow an individual the opportunity to exercise their privilege against self-incrimination[95] and, as expressed by the Court, "[t]he principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation . . . ."[96] While the Court in 1966 believed that these procedural safeguards would protect and uphold an individual's constitutional rights, that simply was not the case in the post-*Miranda* years.

II. MIRANDA'S LIMITATIONS

Miranda changed the prior constitutional balance between the prosecutor's interests and the suspect's interest. Courts can no longer "admit confessions obtained through custodial interrogations simply because they were 'voluntarily given' under the totality of the circumstances" test.[97] *Miranda* became a compromise between the totality of the circumstances test and *Escobedo's* "implication that there could be no interrogation unless counsel was present."[98] The compromise provided clear procedures for law enforcement to follow in pursuit of custodial interrogations producing confessions that would support both the prosecutor's interest in convicting

90. *Id.* at 479.

91. *Id.* at 444.

92. *Id.* at 477.

93. *Id.* at 476.

94. *Id.* at 468.

95. George Blum, Annotation, *What Constitutes "Custodial Interrogation" by Police Officer Within Rule of* Miranda v. Arizona *Requiring That Suspect Be Informed of His or Her Federal Constitutional Rights Before Custodial Interrogation—At Suspect's or Third Party's Residence*, 28 A.L.R. Fed. 6th 505 (2007).

96. *Miranda*, 384 U.S. at 477.

97. Paul G. Ulrich, Miranda v. Arizona*: History, Memories, and Perspectives*, 7 ARIZ. SUMMIT L. REV. 203, 212 (2013).

98. POWE, *supra* note 58, at 398.

presumably guilty persons and the suspect's interest in protecting their constitutional rights. However, the post-*Miranda* years have left many people asking if the compromise was enough.

A. The Limitations Presented in Miranda v. Arizona

While the Court in *Miranda* created procedural protections of an accused's constitutional rights, it also left issues unresolved that subsequent courts needed to define, such as what amounts to custody, what constitutes interrogation, and how an individual invokes and waives the rights afforded by *Miranda*. First, *Miranda* limited the procedural protections only to those who are in custody. This is clearly expressed throughout the decision, but in particular: "the protection which must be given . . . when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way."[99] The reason for this limitation, however, was that the Court did not want to "hamper the traditional function of police officers in investigating crime," so it only limited the protection to when a person is in custody.[100] Unfortunately, the Court never expressly defined what amounts to custody and left that issue unresolved for future courts to determine.

The first limitation of only protecting those who are in police custody leads to Miranda's second limitation: protection is only afforded to those who are subject to custodial interrogation. With this limitation, the Court defined what it meant by custodial interrogation: "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[101] This limitation leaves vulnerable those who are subjected to general inquiry investigation such as "on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process . . . ."[102] The Court believes that in those situations, the police-dominated atmosphere of custodial interrogation is not present.[103] What is still unclear from the Court's definition of custodial interrogation is what actually amounts to an interrogation and when general questioning becomes an interrogation that warrants invoking someone's *Miranda* rights. Unfortunately, the Court has yet to provide a bright-line rule.

99. *Miranda*, 384 U.S. at 477.
100. *Id.* at 477–78.
101. *Id.* at 444.
102. *Id.* at 477.
103. *Id.* at 478.

The Court in *Miranda* fully embraced the Fifth and Sixth Amendments by employing a right to counsel during custodial interrogations to protect a person's privilege against self-incrimination, but it completely diminished its intended protections by allowing a person to waive their rights.[104] A waiver by an individual is valid as long as it was made "voluntarily, knowingly and intelligently."[105] Furthermore, the Court never truly defined what "voluntarily," "knowingly," or "intelligently" meant, but it hinted that a warning is enough to "overcome [the interrogation's] pressures and to insure that the individual knows he is free to exercise the privilege at that point in time."[106] The Court also did not entirely explain how someone can invoke their rights. One question presented by this limitation is, "[a]t what point, if any, does a suspect's silence in the face of police questions constitute an assertion of her right to remain silent?"[107] The last limitation on a suspect's right is that the Court refused to prohibit free and voluntary statements: "[c]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence."[108] Limitations created by the Court make it easy for police to live within the *Miranda* compromise once they understand the different "loopholes."

*B. Limitations Created by the Court Post-*Miranda

Since its ruling in *Miranda*, the Court has created more limitations on an individual's constitutional rights based on the language within *Miranda*. These post-*Miranda* decisions help explain whether, and to what extent, the police can implement successful interrogation strategies.

The *Miranda* warnings are triggered when an individual is both in custody and interrogated. As previously noted, the Court's definition of custodial interrogation is: "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[109] Even with the Court defining custodial interrogation, there is still much confusion in the post-*Miranda* cases as to its meaning. In *Beckwith v. United States*, the Court held that being the focus of an investigation alone does not involve the inherently coercive

104. *Id.* at 475 ("An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver.").

105. *Id.* at 444.

106. *Id.* at 469.

107. ISRAEL ET. AL., *supra* note 366, at 445.

108. *Miranda*, 384 U.S. at 478.

109. *Id.* at 444.

pressures of an incommunicado custodial interrogation as described in *Miranda*.[110]

If being the focus of an investigation is irrelevant, what matters? When is a person exposed to the "inherently coercive pressures"[111] of an incommunicado custodial interrogation? Since *Miranda*, the Court has shown that if a suspect goes to the police station on his own, or voluntarily agrees to go with the police, police station questioning designed to produce incriminating statements may not be labeled "custodial interrogation."[112] A few years later, the Court in *Rhode Island v. Innis*, defined interrogation as not only referring to express questioning, but also to any words or actions on the part of the police that the police "should have known" are reasonably likely to elicit an incriminating response from a suspect.[113]

The Court created an objective test for custodial interrogation which required judges to evaluate the totality of the circumstances surrounding the interrogation in *Stansbury v. California*.[114] There, the Court held that the "initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."[115] A more recent case, *Yarborough v. Alvarado*, explains that a suspect is not in custody when there is an "absence of any intense or aggressive tactics" coupled with a suspect's ability to leave after being interviewed.[116]

When it comes to invoking the *Miranda* rights, what all is a person required to do or say? The Court gave a very clear answer to that question in *Davis v. United States*. The Court held that an individual who intends to assert his or her right to have counsel must articulate this "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[117]

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110. Beckwith v. United States, 425 U.S. 341, 347 (1976).

111. Howes v. Fields, 565 U.S. 499, 509 (2012).

112. *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam) (discussing when police questioning is noncustodial) ("[T]here is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way."); *see also* California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) ("Although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody" for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." (citing *Mathiason*, 429 U.S. at 495)).

113. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

114. Stansbury v. California, 511 U.S. 318, 322–23 (1994) (per curiam).

115. *Id.* at 323.

116. Yarborough v. Alvarado, 541 U.S. 652, 659 (2004).

117. Davis v. United States, 512 U.S. 452, 459 (1994).

As mentioned previously, a waiver must be made voluntarily, knowingly, and intelligently by the suspect.[118] But what does that mean? The Court explained what voluntarily, knowingly, and intelligently means in *Moran v. Burbine*:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.[119]

In more simple terms, voluntary can be interpreted when a suspect says, "the police did not make me waive my rights," and knowing and intelligent can be interpreted from saying, "I know what the *Miranda* rights mean and what may happen to me if I talk."

The cases, as they are previously laid out, show how the Court in *Miranda* left much to be explained and decided in the post-*Miranda* years. They also hint that as time moves on, the Court will continue to interpret *Miranda* and invoke new holdings as to the effect *Miranda* has on modern law enforcement strategies. But these cases, along with *Miranda*, leave open the possibility for false confessions.

III. THE LIMITATIONS LEAVE OPEN THE POSSIBILITY FOR FALSE CONFESSIONS

As previously stated, *Miranda* warnings were created to combat the pressures of interrogation and to permit a full opportunity to exercise the privilege against self-incrimination.[120] However, it is clear that the Warren Court's attempt has failed. *Miranda* narrowly defined custodial interrogations, which leaves individuals that are subjected to non-custodial interviews to fend for their own constitutional rights. Police officers "have adjusted to *Miranda* by shifting to noncustodial 'interviews' to skirt *Miranda*'s requirements."[121]

118. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

119. Moran v. Burbine, 475 U.S. 412, 421 (1985) (citations omitted).

120. Blum, *supra* note 95.

121. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 881 (1996).

Research has found that many officers refer to giving suspects a "*Beheler*" warning.[122] This is in reference to *California v. Beheler*, where the Court held that *Miranda* warnings were not required where the defendant, although a suspect, was not placed under arrest, had voluntarily come to the police station, and was allowed to leave unhindered after a brief interview.[123] Accordingly, the Court held Beheler was not taken into custody and his freedom "was not restricted in any way whatsoever."[124] "Drawn from this case, the *Beheler* warning consists of telling a suspect that he is not under arrest and is free to leave during the 'interview.'"[125] By allowing these non-custodial interviews, *Miranda* is not invoked and the individual being questioned is not given an attorney. Therefore, the inherently coercive, police-dominant atmosphere of an incommunicado custodial interrogation that the *Miranda* Court was so concerned about provides police officers with the possibility to obtain incriminating statements, false confessions, and any other statement that is "protected" under *Miranda*.

Furthermore, the Court's holding in *Innis*, in which they defined interrogation as not only referring to express questioning but also to any "words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response [from the suspect],"[126] can also lead to false confessions and other incriminating statements. In *Innis*, the criminal suspect was arrested and given his *Miranda* rights after killing a taxicab driver; he responded by saying he wanted to speak to his lawyer.[127] As the petitioner was being driven to the police station, the two officers in the front of the patrol car conversed with each other concerning the possibility that a handicapped child from the nearby handicapped school would find the suspect's gun and harm themself or others.[128] Overhearing the conversation, the suspect told the officers to turn the car around so that he could show them where the gun was located.[129] After returning to the scene, he was read his *Miranda* rights again and he responded that he understood his rights but "wanted to get the gun out of the way because of the kids in the area in the school."[130] He then led police to the gun and was subsequently

122. *Id.*
123. *See* California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam).
124. *Id.* at 1123.
125. Cassell & Hayman, *supra* note 121, at 882.
126. Rhode Island v. Innis, 446 U.S. 291, 303 (1980).
127. *Id.* at 293–94.
128. *Id.* at 294–95.
129. *Id.* at 295.
130. *Id.*

indicted for the murder.[131] The issue in *Innis* was whether the suspect was interrogated. From the Court's holding, it is clear that police can use trickery to get around an interrogation without it being considered an "interrogation."

Another way *Miranda*'s limitations can lead to false confessions is that *Miranda* does not require specific language for warnings. In *California v. Prysock*, the Court held that the content of *Miranda* warnings was not required to be a "virtual incantation of the precise language contained in the *Miranda* opinion."[132] This subsequently led to the Court holding in *Duckworth v. Eagan* that the Court requires no more than that "the warnings 'reasonably convey to a suspect his rights,' as required by *Miranda*."[133] This has resulted in many different variations of the warnings which has led to suspects misunderstanding their rights.[134] These misunderstandings have the possibility to lead to false confessions. For example, if a suspect does not understand their rights and they waive them, police then may use trickery and deceit to obtain a false confession or any other incriminating statement.

Similar to misunderstanding a suspect's rights is unambiguously invoking rights. As noted previously, the *Davis* Court held that an individual who is intending to assert his or her right to have counsel must articulate this "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."[135] Generally, custodial interrogation is likely to lead a suspect to express their wishes to tentatively invoke their rights.[136] To put it more simply, custodial interrogation ambiguously leads a suspect to unsuccessfully invoke their rights, leading to their statements being admissible in court.

Lastly, the Court in *Miranda* stated:

> [A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.[137]

131. *Id.*
132. California v. Prysock, 453 U.S. 355, 355 (1981) (per curiam).
133. Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (quoting *Prysock*, 453 U.S. at 361).
134. Janet C. Hoeffel, Miranda*'s First Principles*, 50 TEX. TECH. L. REV. 113, 129 (2017).
135. Davis v. United States, 512 U.S. 452, 459 (1994).
136. Hoeffel, *supra* note 134, at 132–33.
137. Miranda v. Arizona, 384 U.S. 436, 476 (1966).

Post-*Miranda* cases have metaphorically "killed" this assertion because courts have generally been reluctant to find involuntary waivers in cases where police misrepresented or exaggerated the evidence against a suspect. A prime example is *United States v. Velasquez*. There, officers misrepresented the strength of the case against the suspect by falsely informing her that a co-conspirator implicated her in a drug scheme.[138] The Court ruled that the suspect's waiver was voluntary because her will and capacity for independent judgement were not overcome even by the officers' misrepresentations.[139]

It is clear from the cases above that while *Miranda* was decided in order to protect against the police and the inherently coercive environment of interrogations, it has failed to do so because of the number of loopholes created within the decision itself and by post-*Miranda* cases in the years that followed.

IV. ADDRESSING THE ALTERNATIVES TO MIRANDA AND RETURNING TO ESCOBEDO

Commentators from both sides of the issue have argued for decades since *Miranda* that its doctrine is ineffective. As a result, many alternatives have been suggested. Some commentators have attempted to create rules guaranteeing that suspects would not be subject to a coercive environment, and some think the entire system of police interrogation is flawed and thus propose to restructure the criminal justice system. None of the proposed alternatives are satisfactory in preventing false confessions under *Miranda* in the current American criminal justice system. In particular, this Part of the Comment addresses the different proposed alternatives to *Miranda* and how the Court refuses to fix it. Then, this Part will propose a new alternative to the *Miranda* doctrine in its conclusion.

A. Alternatives to Miranda and the Court's Refusal to Fix It

The Court's decision in Miranda was met with criticism from both law enforcement and attorneys alike. Both thought that the requirements created by the decision would seriously affect their investigation efforts and ability to solve crimes. In light of this, just two years after *Miranda* was decided, Congress passed 18 U.S.C. § 3501 as part of the Omnibus Crime

138. United States v. Velasquez, 885 F.2d 1076, 1079 (3d Cir. 1989).

139. *Id.* at 1089.

Control Act of 1968.[140] Congress designed § 3501 to replace the *Miranda* doctrine in federal prosecutions:

> In any criminal prosecution brought by the United States or by the District of Columbia, a confession, . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence.[141]

The factors referred to in the statute are a combination of the pre-*Miranda* voluntariness test standards and some of the warnings created by *Miranda*. The five factors set forth in the statute are: (1) the amount of time between arrest and arraignment of defendant; (2) whether the defendant knew the nature of the offense against him; (3) whether the defendant was advised that he was not required to make a statement, and if he did, it could be used against him in court; (4) whether the defendant was told of his right to the assistance of counsel; and (5) whether the defendant was without assistance of counsel when he was questioned and when he made incriminating statements or gave a confession.[142] The statute does not make it mandatory that all of the standards be present for it to be conclusive as to whether the statement was voluntary or not. The different factors were to be considered by a judge.[143]

Section 3501 came before the Court for the first time in *United States v. Dickerson* after the Fourth Circuit Court of Appeals upheld § 3501, saying that it was the standard governing the admissibility of confessions in federal court and not *Miranda*.[144] The Court overruled the Fourth Circuit's decision and stated that the *Miranda* doctrine must protect the Fifth Amendment right of all suspects in custodial interrogations.[145] Overall the Court held that the *Miranda* doctrine was a constitutional requirement and that the language used in the opinion indicated that the Warren Court believed that it was "announcing a constitutional rule."[146] The Court also dismissed the argument that the Court's willingness to limit protections created by

140. 18 U.S.C. § 3501.
141. 18 U.S.C. § 3501(a).
142. 18 U.S.C. § 3501(b).
143. *Id.*
144. United States v. Dickerson, 166 F.3d 667, 692 (4th Cir. 1999).
145. *See* Dickerson v. United States, 530 U.S. 428, 442 (2000).
146. *Id.* at 439.

post-*Miranda* cases proves that it is not a constitutional requirement.[147] The Court's reluctance to overrule *Miranda* in *Dickerson* is very clear. The Court, in stating that *Miranda* is a constitutional requirement and that no constitutional rule is "immutable,"[148] shows that even though the majority of post-*Miranda* cases limit protections created, it still does not matter because the limiting of those protections shows that this "constitutional rule" continues to change.

After *Dickerson*, other alternatives to *Miranda* have been proposed by many scholars. One alternative that was proposed is a per se prohibition against custodial interrogations where only non-custodial interrogation would be permitted, and any incriminating statement made by a suspect during questioning would be admissible in court.[149] This rule aims to do what the Warren Court could not, and fulfill the anti-coercion rationale in *Miranda*.[150] This proposed per se rule goes completely against the importance of custodial interrogation and the confessions that are obtained during them. As such, no court is likely to accept this alternative. Even the *Miranda* court did not want to impair the "traditional function of police officers in investigating crime."[151] Further, if custodial interrogations were prohibited, police officers would just push the boundaries of non-custodial interrogations, resulting in more interrogations where suspects are not read their rights since *Miranda* only applies to custodial interrogations.

A second proposed alternative is the adoption of a per se rule prohibiting law enforcement authorities from interrogating a suspect in custody who has not consulted with an attorney.[152] Only after consulting with an attorney, an individual who desires to make a statement may do so and it can be used against them in court, and statements made without the assistance of counsel would be inadmissible.[153] The rationale behind this alternative is that this bright-line rule would eliminate the problems associated with *Miranda* by providing suspects adequate protection when subjected to police interrogation, and it would also be a bright-line rule for the officers when conducting the interrogation.[154]

147. *Id.* at 441.

148. *Id.*

149. Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 75 (1989).

150. *Id.*

151. Miranda v. Arizona, 384 U.S. 436, 477 (1966).

152. Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1842 (1987).

153. *Id.* at 1843.

154. *Id.*

While it is easy to agree with a per se replacement for *Miranda*, creating a non-waivable right to counsel during custodial interrogation is not sufficient for four reasons. First, as police in the past have already shown from the adoption of the *Miranda* rights, officers will find a way to push the boundaries of non-custodial interrogation because they would become their primary investigative source. Second, it would prevent law enforcement officers from obtaining confession evidence altogether because any reasonable attorney will advise their client not to speak. Third, this rule would be so broad that it would cancel non-Mirandized confessions, no matter how credible they are. Fourth, it would be inefficient and difficult to implement unless a police station had its own defense attorneys on site at all hours.

B. Proposal to Revert to Escobedo

After more than fifty years, it is clear that the *Miranda* doctrine in its current state does not adequately protect the privilege against self-incrimination. It is naive to think that the doctrine can be tweaked by the different alternatives or reforms that have been proposed in the past. The truth is that the Court will continue to refuse to fix *Miranda* because they view it as a constitutional requirement. Instead of trying to create an alternative to *Miranda* that has never been adopted by the Court, this Comment proposes a recycled, yet refreshed, approach: reverting to the framework created in *Escobedo*. *Escobedo* ensures the right to counsel goes into effect as soon as the police have focused their investigation on an individual and the purpose of the investigation is to obtain a confession.[155] The key aspect of the Court's holding is the automatic appointment of counsel regardless of an explicit request by the suspect when the investigation becomes accusatory.

Under the current *Miranda* framework, almost eighty-four percent of suspects waive their rights at the outset of custodial interrogation.[156] The number of waivers and the chance to elicit incriminating statements or false confessions would be reduced if a suspect was presented with a per se, non-waivable right to counsel *after* they speak with an attorney. While the framework created in *Escobedo* is good, it can, and should, be extended. Along the lines of the other proposed alternatives, simply reverting to *Escobedo* and requiring a non-waivable right to counsel once a suspect has been taken into custody and police begin to carry out a process of investigations is not enough. Police will turn to non-custodial interrogations as they would any other proposed alternative and take advantage of that situation.

155. Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964).

156. Cassell & Hayman, *supra* note 121, at 860.

This Comment proposes to extend the *Escobedo* framework to non-custodial interrogations to prevent false confessions and incriminating statements. For example, if the police were to bring someone in for general questioning, or if an individual voluntarily came to the station for questioning, the person should be informed of their rights from the outset, and instead of the non-waivable right to counsel attaching when the investigation became accusatory, they would have that right from the beginning. Upon arriving at the station, before police are allowed to speak to the individual, he or she would be able to speak with counsel and be informed of their rights and may choose to answer questions with an attorney present or decline to do so.

The key to protecting a person's life, liberty, and right against self-incrimination is the Sixth Amendment right to counsel.[157] The coercive nature of custodial interrogation, and even non-custodial interrogation, leads innocent individuals to falsely confess if there is no lawyer present to help them understand their rights. As the Court in *Escobedo* stated, "[t]here is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice."[158] Those who do not comprehend their rights are in critical need of an attorney at the outset of any type of interrogation.[159] The Court in *Powell* acknowledges this problem:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad . . . . He requires the guiding hand of counsel at every step in the proceedings against him.[160]

Moreover, extending *Escobedo*'s counsel requirement to non-custodial interrogations will have the ability to fulfill the anti-coercion rationale announced by the Court in *Miranda*. It will also protect individuals against the psychological trickery and tactics that officers have utilized to bypass

157. Gideon v. Wainwright, 372 U.S. 335, 343 (1963) ("[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938))).

158. *Escobedo*, 378 U.S. at 488.

159. *See* Miranda v. Arizona, 384 U.S. 436, 470–71 (1966) ("The accused who does not know his rights . . . may be the person who most needs counsel.").

160. Powell v. Alabama, 287 U.S. 45, 69 (1932).

constitutional protections in the past. Lastly, it will get rid of the objective test of whether someone is in custody or not, making the justice system more efficient.

CONCLUSION

The Court in *Escobedo* was predictive when it said that, "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[161] It is clear today, in the post-*Miranda* world, that our system of criminal law enforcement has come to depend on the confession and it has become less reliable based on the high number of exonerees who were convicted solely on the false confessions they gave during interrogation. Under the proposed *Escobedo* approach, individuals like Karen Boes would not be sitting in prison today. As soon as Karen arrived at the police station to answer officer's questions, she would have been appointed an attorney who would have informed her of her rights, and if she would choose to sit with an attorney during questions, officers would never have subjected her to a twelve-hour interrogation. The officers never would have been able to lie to her about the evidence they had against her linking her to the crime or give scenarios and lead her into answers. She would have never been worn down mentally and emotionally to the point where she started to second guess her memory and think, that in some crazed state, she killed her daughter.

"No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights."[162] A criminal justice system that depends heavily on confessions is not an even-handed justice system: "If the exercise of constitutional rights will thwart the effectiveness . . . of law enforcement, then there is something very wrong with that system."[163] Depending on a confession leads to lazy investigative work and puts innocent people behind bars. It costs the government money in the long run when it has to pay an exoneree who files a lawsuit. It is an inefficient system that costs people their lives. This proposed approach will be good not only for individuals who are summoned for police questioning, but the entire justice system, as it will become more reliable, efficient, and just.

161. *Escobedo*, 378 U.S. at 488–89 (footnotes omitted).

162. *Id.* at 490 (footnote omitted).

163. *Id.* (footnote omitted).

*Anna Amsbaugh**

*J.D. Candidate 2022, Campbell University School of Law. The author would like to first thank Professor Anthony Ghiotto for his mentorship and help on this Comment. The author would also like thank her mother, father, sister, and fiancé for always cheering her on and giving their endless support when times were tough. Finally, the author would like to thank the entire Volume 44 staff of the Campbell Law Review for all of their hard work on this piece.