MIRANDA'S FIRST PRINCIPLES

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I. INTRODUCTION

There is no Fifth Amendment right to counsel.[1] Despite the widely held belief that *Miranda v. Arizona* established a Fifth Amendment right to counsel applicable to custodial interrogation by police, it did no such thing.[2] A close reading of *Miranda* and an understanding of its context demonstrates that the majority intended the Sixth Amendment right to counsel to apply to

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1. *See* U.S. CONST. amend. V.
2. *See* Miranda v. Arizona, 384 U.S. 436 (1966); *see also infra* Section II.B.

custodial interrogations.[3] The United States Supreme Court did not create out of whole cloth a right that does not exist in the text of the Fifth Amendment. Rather, it applied a right that does exist in the text of the Sixth Amendment and one that had already been applied to custodial interrogation in *Escobedo v. Illinois*.[4]

Many have mourned the fate of *Miranda* in the fifty years since the case was decided.[5] While it was originally believed to be a meaningful protection for suspects against police coercion in incommunicado interrogation, subsequent case law and the realities of how *Miranda* operates on the ground have demonstrated its utter failure as a measure of protection.[6] As we enter the second fifty years of *Miranda* jurisprudence, the Court has an opportunity to revisit the first principles of *Miranda* and provide the full measure of protection the Court invoked through the Sixth Amendment right to counsel.

The difference between a so-called Fifth Amendment right to counsel and a Sixth Amendment right to counsel has important ramifications for suspects who currently have little protection against police coercion during interrogation. If the Sixth Amendment applied as it does in all other contexts, the police would not be able to interrogate suspects without the presence of counsel.[7] A suspect could waive this right but not without the advice of counsel. Despite the fact that a lawyer would likely advise the suspect not to speak, there would not be a dearth of confessions.[8] Instead, there would be, as there is today, counseled confessions: 90% to 95% of all defendants plead guilty.[9] For all felonies and misdemeanors in which the defendant is given a prison sentence, a lawyer stands by his or her side, advising and guiding them through this critical stage in the proceedings.

Part II of this Article demonstrates that *Miranda* applied a Sixth Amendment right to counsel to protect a defendant's Fifth Amendment right against compelled self-incrimination during custodial interrogation.[10] Part III explains how and why the Sixth Amendment aspect of the case was lost

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3. *See Miranda*, 384 U.S. 436.

4. *See* Escobedo v. Illinois, 378 U.S. 478 (1964); *see also infra* Part II.

5. *See, e.g.*, Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 849 (2017); Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It—And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163 (2007); Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519 (2008).

6. *See infra* Parts III, IV.

7. *See infra* Part III.

8. *See infra* text accompanying notes 200–02 (explaining that there will still be many confessions in the form of guilty pleas, but there would be fewer out-of-court confessions).

9. *See, e.g.*, Lafler v. Cooper, 566 U.S. 156, 170 (2012) (citing sources showing 97% of federal convictions and 94% of state convictions are the result of guilty pleas); BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 22, 24 tbl.21 (2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf (stating that over 95% of felony convictions occurred through a guilty plea).

10. *See infra* Part II.

and replaced with the concept of a Fifth Amendment right to counsel.[11] Part IV describes how *Miranda*'s protections are toothless and have not in fact protected suspects against compelled self-incrimination.[12] Finally, Part V explains how utilizing the robust Sixth Amendment, which the *Miranda* majority embraced but did not fully actualize, will lead to the actual protection from the coercion the Court expected.[13] No other alternative will suffice. Uncounseled custodial confessions are no longer desirable or necessary in light of all that we know now and the fact that the overwhelming majority of defendants give fully counseled confessions in court every day.

II. *MIRANDA* IS A SIXTH AMENDMENT RIGHT TO COUNSEL CASE

To understand *Miranda* as a Sixth Amendment case (as well as a Fifth Amendment case, because it is both), one must first understand the principles the Supreme Court set out in *Escobedo v. Illinois*—a case applying the Sixth Amendment right to counsel to custodial interrogations.[14] The Court decided *Escobedo* just two terms before *Miranda* and with eight of the same Justices on the Court.[15] The *Miranda* majority opened its decision by embracing *Escobedo*: "We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it."[16] Despite later Courts' attempts to distinguish or bury *Escobedo*, it has never been overruled, and *Miranda* explicitly depended upon it.[17]

Second, the language of *Miranda* itself established no new Fifth Amendment right to counsel but utilized the language and case law of the Sixth Amendment right to counsel.[18] The Court clearly anticipated that the Sixth Amendment right to counsel would apply to custodial interrogation such that counsel would aid a defendant in understanding his Fifth Amendment privilege against self-incrimination.

A. Escobedo v. Illinois*: A Sixth Amendment Right to Counsel During Custodial Interrogation*

Two weeks after the Court incorporated the Fifth Amendment privilege against self-incrimination, making it applicable to the states,[19] the Court

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11. *See infra* Part III.
12. *See infra* Part IV.
13. *See infra* Part V.
14. *See generally* Escobedo v. Illinois, 378 U.S. 478 (1964).
15. *See generally* Kamisar, *supra* note 5. Justice Fortas replaced Justice Goldberg between *Escobedo* and *Miranda*. *Id.*
16. Miranda v. Arizona, 384 U.S. 436, 442 (1966).
17. *See id.*
18. *See id.* at 479.
19. Malloy v. Hogan, 378 U.S. 1, 5 (1964).

decided, in *Escobedo v. Illinois*,[20] that an accused's Sixth Amendment right to counsel was necessary to protect that right.

Danny Escobedo had been arrested for murder.[21] The police rejected his repeated requests for his lawyer.[22] The Court held that he was denied his Sixth Amendment right to counsel despite the fact that he had not yet been formally charged because this was a "critical stage" of the proceedings:

> The "guiding hand of counsel" was essential to advise petitioner of his rights in this delicate situation. This was the "stage when legal aid and advice" were most critical to [the] petitioner. It was a stage surely as critical as was the arraignment in *Hamilton v. Alabama*, and the preliminary hearing in *White v. Maryland*. What happened at this interrogation could certainly "affect the whole trial," since rights "may be irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes."[23]

Thus, the Court found it irrelevant that Escobedo had not yet been indicted as the defendant had been in *Massiah v. United States*,[24] its previous case that applied the Sixth Amendment right to counsel to extrajudicial questioning.[25] The Court stated: "It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment."[26] Escobedo had been arrested and "the purpose of the interrogation was to 'get him' to confess his guilt."[27]

The holding of *Escobedo* appears at first to be a fact-specific one, such that an accused has been denied his Sixth Amendment right to counsel when: (1) a suspect is in custody; (2) the police inquiries turn from investigatory to accusatory, designed to elicit incriminating statements (a point at which "our adversary system begins to operate"); (3) the suspect has requested, and been denied, consultation with his lawyer; and (4) the police have not advised him of his right to remain silent.[28]

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20. *See generally* Escobedo v. Illinois, 378 U.S. 478 (1964).
21. *Id.* at 479–80.
22. *Id.* at 481.
23. *Id.* at 486 (citations omitted).
24. *See generally* Massiah v. United States, 377 U.S. 201 (1964).
25. *See Escobedo*, 378 U.S. at 484–85 (citation omitted) ("In *Massiah v. United States*, this Court observed that 'a Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" (citations omitted)).
26. *Id.* at 486. "The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference. When petitioner requested, and was denied, an opportunity to consult with his lawyer, the investigation had ceased to be a general investigation of 'an unsolved crime.'" *Id*. at 485 (citation omitted).
27. *Id.*
28. *Id.* at 490–92.

However, the principles announced by the Court in the case are broader and indicate a blanket Sixth Amendment right to the presence of counsel at a custodial interrogation. In the following passage, the Court set forth a powerful argument for an absolute right to counsel's guidance, regardless of whether counsel is requested:

> It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances . . . ." This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a "stage when legal aid and advice" are surely needed . . . . The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There 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. Our 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.[29]

Hence, the Court linked the necessity of counsel's advice and the newly incorporated privilege against self-incrimination. For example, Escobedo, "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 shot."[30] In this way, the Sixth Amendment right to counsel's advice would aid a defendant in exercising his Fifth Amendment right.

If the Court adopted the State's view that the right to counsel did not apply at this stage, such a rule

> would make the trial no more than an appeal from the interrogation; and the "right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination." One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial."[31]

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29. *Id.* at 488 (citation omitted).
30. *Id.* at 486.
31. *Id.* at 487–88 (citations omitted).

Again, this argument by the Court commanded counsel's presence and aid regardless of an explicit request by a suspect.[32] Finally, the Court appealed to history's lessons to support an absolute right to counsel despite its likely impact of fewer confessions.[33] First, "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."[34] Second,

> [n]o 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, those rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.[35]

Justice White's dissent, joined by Justices Clark and Justice Stewart, recognized the broader holding.[36] Justice White emphasized that the majority opinion ultimately stood for a broad Sixth Amendment right to counsel's advice during custodial police interrogation stating: "[I]t would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel, or has asked to consult with counsel in the course of interrogation."[37] He bemoaned that, in his view,

> [t]he right to counsel now not only entitles the accused to counsel's advice and aid in preparing for trial but stands as an impenetrable barrier to any interrogation once the accused becomes a suspect. From that very moment apparently his right to counsel attaches, a rule wholly unworkable and

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32. *See id.* at 487.

33. *See id.* at 488–89.

34. *Id.* The Court quoted at length from Dean Wigmore for this proposition:

> [A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus, the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.

Id. at 489 (quoting VIII WIGMORE, EVIDENCE § 309 (3d ed. 1940)).

35. *Id.* at 490; *see* Kamisar, *supra* note 5, at 171 (emphasis omitted) ("*Escobedo* has an accordion-like quality. At some places the opinion seems to limit the holding to its specific facts. At other places, however, it launches such a broad attack on law enforcement's reliance on confessions that it threatens (or promises) to eliminate virtually all police interrogation.").

36. *Escobedo*, 378 U.S. at 495 (White, J., dissenting) (citations omitted).

37. *Id.* (White, J., dissenting) (citations omitted).

> impossible to administer unless police cars are equipped with public defenders and undercover agents and police informants have defense counsel at their side.[38]

Hence, even the dissent believed that *Escobedo* stood for a Sixth Amendment right to have counsel present at any pretrial custodial interrogation, regardless of whether the suspect had been charged and regardless of whether the suspect asked for counsel.[39]

B. Miranda *Applied the Sixth Amendment Right to Counsel to Custodial Interrogation*

Miranda did not create a Fifth Amendment right to counsel, a right that does not exist in the Constitution. Rather, the majority invoked the Sixth Amendment right to counsel as necessary to protect a suspect's Fifth Amendment privilege against self-incrimination.[40] This was exactly as *Escobedo* saw it.[41]

The *Miranda* opinion began with an endorsement of *Escobedo*'s principles and quoted the language of *both* the Fifth and the Sixth Amendments as working together:

> We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "*the accused shall . . . have the Assistance of Counsel*"—rights which were put in jeopardy in that case through official overbearing.[42]

To reaffirm "the principles" *Escobedo* announced was to reaffirm the application of the Sixth Amendment right to counsel to the custodial interrogation context, as the dissent in *Escobedo* foresaw.[43] The *Miranda* majority agreed with its view in *Escobedo* that "[i]t is at this point [custodial interrogation] that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries."[44]

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38. *Id.* at 496 (White, J., dissenting).

39. *See id.* at 492. While *Escobedo* employed language indicating counsel must be present when the investigation "focus[ed] . . . on the accused," *id.*, *Miranda* clarified that this was better understood as "custodial interrogation." Miranda v. Arizona, 384 U.S. 436, 444 n.4 (1966).

40. *Miranda*, 384 U.S. at 436.

41. *See generally Escobedo*, 378 U.S. 478.

42. *Miranda*, 384 U.S. at 442 (emphasis added).

43. *Escobedo*, 378 U.S. at 496 (White, J., dissenting).

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

The manner in which the Court discussed the right to counsel at custodial interrogation leads to the conclusion that counsel must, in fact, be present—and does not require a request that counsel be present—at any custodial interrogation to protect the defendant's Fifth Amendment right against compelled self-incrimination. For example, the majority said:

> The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.[45]

Further, the Court accentuated the importance of the right to counsel's presence for the fact-finding process:

> That counsel is present when statements are taken from an individual during interrogation obviously enhances . . . the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warning and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."[46]

More importantly, the Court waxed eloquently on why "the right to have counsel present at the interrogation is *indispensable* to the protection of the Fifth Amendment privilege under the system we delineate today"[47]:

> Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with

45. *Id.* at 466.
46. *Id.*
47. *Id.* at 469 (emphasis added).

> counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.[48]

The Court then emphasized that a defendant need not ask for a lawyer to have the right to a lawyer's presence: "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."[49] While the Court did not repeat its initial statement that it was embracing the right to have the "[a]ssistance of [c]ounsel," Justice Harlan's dissent recognized the Sixth Amendment right to counsel "is never expressly relied on by the Court but [its] judicial precedents turn out to be linchpins of the confession rules announced today."[50]

III. WHAT HAPPENED TO *MIRANDA*'S SIXTH AMENDMENT RIGHT TO COUNSEL?

The above-quoted language of the *Miranda* Court on the right to counsel created a robust Sixth Amendment right: No counsel, no interrogation. As will be discussed later, that understanding is consistent with how the Sixth Amendment right to counsel works in all other contexts.[51] Two things happened to diminish this right and cause one of the dissenters and later decisions to recast it as some unarticulated Fifth Amendment right to counsel, not worthy of equal respect; after all, it does not even exist in the Constitution.[52]

First, in the *Miranda* decision itself, after embracing the Sixth Amendment right wholeheartedly and eschewing a mere warning of rights by the police, the Supreme Court then appeared to allow such a mere warning that the defendant had a right to counsel's presence to substitute for the actual presence of counsel.[53] This failure to follow through on its own claim for a robust Sixth Amendment right to counsel apparently was the result of internal pressures from members of the Court and external pressures from the bench, bar, and police concerned that commanding the presence of counsel for any custodial interrogation would eliminate confessions altogether.[54] Second, six years later with a different membership on the Court, the Court recast *Escobedo* as a case about only the Fifth Amendment privilege and held that

48. *Id.* at 469–70 (citation omitted).

49. *Id.* at 471 (quoting Carnley v. Cochran, 369 U.S. 506, 513 (1962)).

50. *Id.* at 513 (Harlan, J., dissenting).

51. *See infra* text accompanying note 194 (demonstrating the Sixth Amendment right to counsel in other contexts).

52. *See, e.g.*, *Miranda*, 384 U.S. at 537 (White, J., dissenting).

53. *Id.* at 444–45.

54. *See* Kamisar, *supra* note 5, at 172–73.

the Sixth Amendment right to counsel does not attach at arrest or custodial interrogation, as *Escobedo* and *Miranda* held, but at formal charging.[55]

A. Miranda*'s Confusion: Embracing the Sixth Amendment Right to Counsel and then Relying on Warnings*

After making it crystal clear that only the presence of an attorney would dispel the coercion inherent in custodial interrogation and that a mere warning by interrogators was not enough, the *Miranda* Court is widely understood as allowing a regime of mere warnings.[56] In the same few paragraphs, the Court invoked the absolute right to the presence of an attorney, without a request, and then substituted this right with a warning to the suspect that he possessed this right.[57]

The Court extolled the virtues of having a lawyer present to "mitigate the dangers of untrustworthiness,"[58] and noted that "[w]ith a lawyer present the likelihood that the police will practice coercion is reduced,"[59] and "the right to be furnished counsel does not depend upon a request,"[60] and then in its very next breath stated:

> Accordingly[,] we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today.[61]

Then, the Court stated, once such a warning is given, "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present."[62] If the interrogation continues without the presence of an

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55. *See infra* text accompanying notes 92–103 (discussing the 1972 case *Kirby v. Illinois*, 406 U.S. 682 (1972)).

56. *See* Stephen Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 881 (1981) (reviewing Yale Kamisar, *Police Interrogation and Confession: Essay in Law and Police* (1980)). "[A]fter noting that 'a once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice,' the Court, 'implement[ed] this insight by merely requiring another once-stated warning concerning the right to counsel.'" Kamisar, *supra* note 5, at 191 (quoting Schulhofer, *supra*). Schulhofer suggested the Court could have done better "by requiring initial consultation with an attorney or friend, or even by mandating that warnings and waivers take place in the presence of a neutral magistrate who could break the wall of isolation and hostility surrounding the suspect." Schulhofer, *supra*. He also suggested that the Court could have adopted a requirement of the presence of counsel during interrogations. *Id.*

57. *Miranda*, 384 U.S. at 469–70.

58. *Id.* at 470.

59. *Id.*

60. *Id.* at 471 (citation omitted).

61. *Id.*

62. *Id.* at 474. The majority emphasized that its decision "does not mean . . . that each police station must have a 'station house lawyer' present at all times to advise prisoners," but only that the suspect who requests counsel may not be questioned. *Id.*

attorney and a statement is taken, the prosecution must prove the defendant "knowingly and intelligently waived" his right to silence and counsel.[63] The Court held that "unless other fully effective means are adopted" to protect a defendant's Fifth Amendment rights, the warnings and waiver system must be employed.[64]

Hence, while the Court's first principles employed the absolute right to assistance of counsel at the interrogation to protect a defendant's right against compelled self-incrimination, the Court purported to effectuate that right through the diminished and unproven means of warnings and waiver.[65] The dissent saw the irony in holding that a mere advisement of the right to a suspect in custody could serve to dispel the coercion the majority believed inherent in the custodial context:

> But if the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the Court ever accept his negative answer to the question whether he wants to consult his retained counsel or counsel whom the court will appoint?[66]

As will be discussed herein, *Miranda*'s call for "fully effective means" to dispel the inherent coercion of custodial interrogation has not been met by the warning and waiver system as a substitute for its first stated principles calling for the presence of counsel.

Miranda started solely as a Sixth Amendment *Escobedo* case in its briefing of issues before the Court.[67] Yet, there was a great deal of pressure not to expand upon *Escobedo*. As Professor Kamisar recounted, "[t]he sweeping language and broad implications of *Escobedo* greatly troubled, one might even say alarmed, most law enforcement officials and many members

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63. *Id.* at 475.

64. *Id.* at 479.

65. *See* Weisselberg, *supra* note 5, at 1527 (stating "there was no empirical basis for the justices' faith that a program of warnings and waivers could counter those pressures and serve as a 'fully effective means' of protecting suspects' Fifth Amendment privilege"); *see also* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 517 (2002) (stating that *Miranda* "rested upon an untested, unverified, and unproven assumption . . . that [warnings] work").

66. *Miranda*, 384 U.S. at 536 (White, J., dissenting).

67. *See generally id.* One of the lawyers who worked on *Miranda*'s brief to the Supreme Court wrote that the question presented in the merits brief was "[w]hether the written or oral confession of a poorly educated, mentally abnormal, indigent defendant, taken while he is in police custody and without the assistance of counsel, which was not requested, can be admitted into evidence over specific objection based on the absence of counsel?" Paul G. Ulrich, *What Happened in* Miranda*?*, CHAMPION, May 2016, at 18, 20–21. Further, the "petition and the underlying record . . . presented only Sixth Amendment right-to-counsel issues for decision." *Id.* at 20. "Only an ACLU amicus brief largely written by Prof[essor] Anthony G. Amsterdam argued the 'marriage of the Fifth Amendment and the Sixth Amendment right to counsel.'" *Id.* at 21 (citation omitted).

of the bench and bar."[68] He further related that Chief Justice Warren likely seized upon the warnings because of the example set by the Federal Bureau of Investigation (FBI):

> It is not easy to understand . . . "the curiously tentative posture" of the *Miranda* opinion—its failure to follow its own convictions—unless and until one keeps in mind that in 1966 the Warren Court was probably barely able (or perceived itself as barely able) to go as far as it did. It seems the Court was so closely divided in *Miranda* that, according to one justice who attended the March, 1966 conference on *Miranda*, if FBI agents had not been informing suspects of their rights for many years, there might not have been a landmark *Miranda* decision.[69]

The majority's apparent belief that a warning would be an effective substitute for counsel's presence perhaps lies in its stated establishment of high burden for waiver of the right: "[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[70] The Court cited *Johnson v. Zerbst*[71] for the proposition that the Court set high standards for the waiver of constitutional rights, indicating that the Court was potentially endorsing a lengthy colloquy, perhaps by a magistrate or lawyer, to ensure the defendant understood what it meant to waive the right to counsel.[72] However, the Court then said, "[a]n 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."[73] The Court unwittingly made it decidedly easy for the police to obtain a waiver.

This watered-down advisement of the right to counsel in place of the Court's lofty first principles of the absolute right to counsel's presence is likely what caused Justice White in his dissent, subsequent courts, and every

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68. Kamisar, *supra* note 5, at 172. Professor Kamisar noted that, "on the eve of *Miranda*, a case that was to reexamine *Escobedo* and to clarify its meaning and scope, the nation's most respected judges [of] the United States Supreme Court . . . spoke publicly in anticipation of the Court's ruling and urged the Court to turn back or at least to reconsider where it was going . . . . And Judge Friendly warned that 'condition[ing] questioning on the presence of counsel is . . . really saying that there may be no effective, immediate questioning by the police' and 'that is not a rule that society will long endure.'" *Id.*

69. *Id.* at 192 (citation omitted).

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

71. *See generally* Johnson v. Zerbst, 304 U.S. 458 (1938).

72. *See id.* at 464 ("It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'"); *see also* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 415 (1999) ("By equating the standards of waiver applied in *Miranda* with those applied when the right to trial counsel is at issue, the Court seemed to indicate that a *Miranda* waiver could only be found when the suspect was shown to be fully aware of the consequences of foregoing his rights.").

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

casebook in the land to label it a "Fifth Amendment right to counsel."[74] However, Justice White's phrasing in his dissent demonstrates the error in the label; he wrote that "the Court has created a limited Fifth Amendment right to counsel—or, as the Court expresses it, a 'need for counsel to protect the Fifth Amendment privilege.'"[75] The Sixth Amendment right to assistance of counsel is, in fact, often employed to protect a criminal defendant's other constitutional rights.[76] For example, the Sixth Amendment right to counsel does not become a limited confrontation right to counsel when used to effectuate the right of confrontation.[77] To say that counsel is needed to protect a defendant's Fifth Amendment rights is not to undo the fact that the right to counsel the Court employed was the obvious Sixth Amendment right and not some new ghost right under the Fifth Amendment.

B. United States v. Wade *Confirms* Miranda *as a Sixth Amendment Case and Gives Full Sixth Amendment Protection*

The pressure the *Miranda* Court must have felt to turn back on its promise of an absolute Sixth Amendment right to counsel—meaning, an absolute right to provide counsel for custodial interrogation or forego interrogation—can best be seen by comparing it to a contrary outcome one term later in *United States v. Wade*.[78] It is difficult to understand the different outcomes in those cases unless based upon practicalities.

In *Wade*, the Court held that the defendant's Sixth Amendment right to counsel was violated when the police subjected him to a post-indictment lineup in the absence of counsel and without notice to his counsel.[79] Notably, the Court cited *Escobedo* and *Miranda* with approval as support for its holding.[80] Citing *Escobedo*, the *Wade* Court wrote, where "the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation, . . . [w]e again noted the necessity of

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74. *Id.* at 536 (White, J., dissenting). A search in the law reviews and journals database in Westlaw for "Fifth Amendment right to counsel" received 440 hits. WESTLAW.COM, https://1.next.westlaw.com/Browse/Home/SecondarySources/SecondarySourcesLibrary?MetaDataPublicationTypeFacet=Law+Reviews+%26+Journals&transitionType=CategoryPageItem&contextData=(sc.Default) (last visited Oct. 10, 2017) (using the search term "Fifth Amendment right to counsel"). The Author's own co-authored criminal procedure casebook discusses *Miranda*'s establishment of a Fifth Amendment right to counsel. *See* RUSSELL L. WEAVER ET AL., CRIMINAL PROCEDURE: A CONTEMPORARY APPROACH 671–89 (2015).

75. *Miranda*, 384 U.S. at 536 (White, J., dissenting).

76. *See, e.g.*, United States v. Wade, 388 U.S. 218, 236–37 (1967) (employing the Sixth Amendment right to counsel at a line-up identification procedure to protect the defendant's right of confrontation at trial).

77. *See, e.g.*, *id.*

78. *Id.* at 242.

79. *Id.* at 237.

80. *Id.* at 225–26 (citing *Miranda*, 384 U.S. at 436; Escobedo v. Illinois, 378 U.S. 478 (1964).

counsel's presence if the accused was to have a fair opportunity to present a defense at the trial itself."[81] Citing *Miranda*, the *Wade* Court further wrote: "[T]he rules established for custodial interrogation included the right to the presence of counsel."[82]

The *Wade* Court then quoted *Powell v. Alabama*,[83] *Massiah v. United States*,[84] *Escobedo*, and *Miranda* as support for the Sixth Amendment right to counsel and stated:

> [I]n addition to counsel's presence at trial, the accused is *guaranteed that he need not stand alone against the State at any stage of the proceeding, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial*. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment . . . . In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial.[85]

Again here, as in the *Miranda* opinion, the Court spoke as if the presence of counsel was required at a custodial interrogation.[86]

The *Wade* decision, the case in which the Sixth Amendment right to counsel applied to the pretrial lineup ("whether before or after indictment or information"[87]), did not simply require a warning to the suspect about a right to counsel as *Miranda* did.[88] The Court held that "both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an 'intelligent waiver.'"[89] The Court did what it suggested it did in *Miranda*, stating:

> [T]o refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this Court has operated in Sixth Amendment cases. We rejected similar logic in *Miranda v. State of Arizona*, concerning presence of counsel during custodial interrogation.[90]

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81. *Id.* at 225 (citing *Escobedo*, 378 U.S. 478).
82. *Id.* at 226 (citing *Miranda*, 384 U.S. 436).
83. *See* Powell v. Alabama, 287 U.S. 45 (1932).
84. *See* Massiah v. United States, 377 U.S. 201 (1964).
85. *Wade*, 388 U.S. at 226–27 (emphasis added) (citations omitted).
86. *Id.*
87. *Id.* at 251 (White, J., dissenting) (summarizing the Court's holding).
88. *Id.*
89. *Id.* at 237.
90. *Id.* at 237–38. The Court appeared to endorse *Miranda*'s first principles and not the watered-down warnings. *Id.* Similarly, Justice Black, dissenting in part and concurring in part, stated:

Wade is widely interpreted in practice as requiring the police to have counsel present for a lineup procedure. There is no warning substitution for actual counsel. If there is no counsel, then there should be no lineup procedure.[91] If *Miranda* applied the Sixth Amendment as it purported to do and as interpreted in *Wade*, then there would be no interrogation without counsel present. However, the difference between the outcomes of the two cases is not based on the first principles of the Sixth Amendment as it should be, but on the practicalities of the two situations—once counsel is obtained, a lineup would still go forward in counsel's presence. Hence, the police investigation proceeds unimpeded. The interrogation, on the other hand, most likely would *not* go forward with counsel present; any decent counsel would advise their client not to speak. The *Miranda* Court diminished its own exaltation of the Sixth Amendment right to counsel when it bowed to the pressures of those practicalities.

C. Kirby v. Illinois*: Burying* Miranda*'s Sixth Amendment Right to Counsel*

In 1972, in *Kirby v. Illinois*, the Burger Court declared that the Sixth Amendment right to counsel does not attach until the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[92] Therefore, Kirby was not entitled to counsel at a pre-indictment lineup procedure because it preceded the initiation of judicial criminal proceedings.[93] Such initiation, the Court held, "is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute."[94]

The Court noted, as support for its proposition, that all previous Sixth Amendment cases involved points in time after the initiation of judicial criminal proceedings.[95] Of course, the Court entirely ignored the fact that *Miranda* employed the Sixth Amendment right to counsel as a protection for

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> And I agree with the Court that a lineup is a "critical stage" of the criminal proceedings against an accused, because it is a stage at which the Government makes use of his custody to obtain crucial evidence against him. Besides counsel's presence at the lineup being necessary to protect the defendant's specific constitutional rights to confrontation and the assistance of counsel at the trial itself, the assistance of counsel at the lineup is also necessary to protect the defendant's in-custody assertion of his privilege against self-incrimination.

Id. at 246 (Black, J., dissenting in part, concurring in part).

91. Justice White's dissent expressed the holding as a broad one: "The Court's opinion is far-reaching. It proceeds first by creating a new *per se* rule of constitutional law: a criminal suspect cannot be subjected to a pretrial identification process in the absence of his counsel without violating the Sixth Amendment, . . . whether before or after indictment or information." *Id.* (White, J., dissenting).

92. Kirby v. Illinois, 406 U.S. 682, 689 (1972).

93. *Id.* at 690.

94. *Id.* at 689.

95. *Id.* at 688–89.

a suspect's Fifth Amendment rights, disregarding *Miranda*'s statement that at the point of custodial interrogation "our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries."[96]

However, the *Kirby* Court did deal directly with *Escobedo*, which clearly applied the Sixth Amendment to a pre-charge stage—that is, custodial interrogation.[97] The Court's attempt to neutralize *Escobedo* was decidedly disingenuous. The Court said that *Escobedo* was "not apposite" for two reasons.[98] First, the Court stated that it "in retrospect perceived the 'prime purpose' of *Escobedo* [as] not to vindicate the . . . right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination.'"[99] That statement in no way undermines *Escobedo*'s application—it indeed applied the Sixth Amendment right to counsel to aid a suspect in protecting his Fifth Amendment rights. The Court cited *Johnson v. New Jersey* for the proposition that the "prime purpose" of the rulings in *Escobedo* and *Miranda* was "to guarantee full effectuation of the privilege against self-incrimination,"[100] but that does not undermine the fact that the right to counsel was employed in each case to guarantee such full effectuation. The *Kirby* Court stated that the other reason *Escobedo* was "not apposite," was because the Court in *Johnson* limited *Escobedo* to its facts and those facts were distinguished.[101] While the *Johnson* opinion does cite the narrower, fact-specific holding of *Escobedo*,[102] the *Kirby* Court ignored the more important similarity between the facts of *Escobedo* and *Kirby*—both were pre-charge, police-initiated processes leading to incriminating evidence.[103]

The majority blatantly ignored *Wade*'s broad holding. Justice White's dissent in *Kirby* is illuminating on this point.[104] He had previously dissented in *Wade* because he read the majority opinion as too "far-reaching."[105] He wrote in *Wade* that the majority "proceeds first by creating a new *per se* rule of constitutional law: a criminal suspect cannot be subjected to [a] pretrial identification . . . in the absence of his counsel without violating the Sixth Amendment."[106] And this per se rule applied "before or after indictment or

96. Miranda v. Arizona, 384 U.S. 430, 477 (1966).
97. *See generally Kirby*, 406 U.S. at 682.
98. *Id.* at 689.
99. *Id.* (quoting Johnson v. New Jersey, 384 U.S. 719, 729 (1966)).
100. *Johnson*, 384 U.S. at 729.
101. *Kirby*, 406 U.S. at 689.
102. *Johnson*, 384 U.S. at 733–34.
103. *Kirby*, 406 U.S. at 689.
104. *Id.* at 705 (White, J., dissenting).
105. United States v. Wade, 388 U.S. 218, 250 (1967).
106. *Id.* (White, J., dissenting).

information."[107] While Justice White disagreed with the holding in *Wade*, he felt bound to it and dissented in *Kirby*, in which he wrote that *Wade* compelled reversal.[108]

Justices Brennan, Douglas, and Marshall also dissented in *Kirby*, not only because it breached the holding in *Wade*, but also because "'the initiation of adversary judicial criminal proceedings[]' is completely irrelevant to whether counsel is necessary at a pretrial confrontation for identification in order to safeguard the accused's constitutional rights to confrontation and the effective assistance of counsel at his trial."[109] The same can be said of the necessity of counsel to protect the accused's constitutional right to be free from compelled self-incrimination. As the next section demonstrates, *Miranda*'s warnings and waiver scheme have failed to activate the Sixth Amendment right to counsel that the *Miranda* Court extolled as critical.

IV. HOW *MIRANDA*'S PROTECTIONS HAVE BECOME INEFFECTUAL

Fifty years of experience with *Miranda* and its progeny have shown that the warnings and waiver system does not protect against police coercion at all. Rather, studies have shown the following: (1) the language of the warnings is not well understood by those for whom it is meant to serve; (2) police are trained to adapt to the case law and use it to their advantage to coerce waivers among all but the most stolid felons; and (3) police are so good at it they can even get confessions from innocent people.[110]

A. The Inadequacy of Miranda *Warnings*

The *Miranda* Court did not require specific language for the warnings, allowing for the Burger Court to require no more than that the warnings "reasonably conve[y] to [a suspect the] rights" set out by the Supreme Court.[111] The result has been a wide variation in warnings across the United States with little proof that most criminal defendants understand them and a lot of proof that they do not.

One study examined 560 separate and non-redundant *Miranda* warning forms from 448 jurisdictions.[112] Combined with another study of 385 sets of warnings from 190 additional jurisdictions,[113] these two studies showed that

107. *Id.* at 251 (White, J., dissenting).
108. *Kirby*, 406 U.S. at 704 (White, J., dissenting).
109. *Id.* at 697 (Brennan, J., dissenting) (citation omitted).
110. *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 7 (2010); Leo & White, *supra* note 72; Weisselberg, *supra* note 5.
111. Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (citation omitted).
112. Weisselberg, *supra* note 5, at 1565 (citing 2007 study).
113. *Id.* (citing 2008 study).

the warnings portion ranged from 21 to 231 words and that the total for the warnings and waiver ranged from 49 to 547 words.[114] The required reading level for understanding the warnings ranged from a third-grade level to "the verbal complexity of postgraduate textbooks."[115]

Furthermore, and meaningfully here, the right to counsel warning required a higher level of understanding than other warnings.[116] The average grade level for understanding the right to counsel was above an eighth-grade level of education, and for the right to appointment of counsel, it was above a tenth-grade reading level.[117] Shockingly, and demonstrating that the creation of warning forms is not a duty that should be entrusted to the police, out of the 560 warning forms, only 32% informed suspects of their right to have counsel appointed free of charge.[118] As additional proof of weaknesses in the warnings, in a study of 420 participants drawn from a Dallas County jury pool, while most recognized that questioning would stop eventually after a request for counsel, 27.5% believed that the interrogation could continue after a request, even for hours, until counsel was physically present.[119]

The experience is even worse for adults with mental disabilities and adolescents. As a team of researchers summarized:

> [S]tudies have repeatedly shown that a substantial proportion of adults with mental disabilities, and "average" adolescents below age 16 have impaired understanding of *Miranda* warnings when they are exposed to them. Even adults and youth who understand them sometimes do not grasp their basic implications . . . . For example, one may factually understand that "I can have an attorney before and during questioning" yet not know what an attorney is or what role an attorney would play.[120]

Professor Morgan Cloud conducted a study in 2002 that compared a group of intellectually-disabled and borderline-disabled people with a control group and found that the disabled group understood only about 20% of the important words of the warnings—compared to the control group which understood 83% of those words.[121] Similarly, the mentally disabled and adolescents especially "lack the capacity to weigh the consequences of rights waiver, and are more susceptible to waiving their rights as a matter of mere compliance with authority."[122]

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114. *Id.* at 1565–66 (citing 2007 and 2008 studies).
115. Kassin et al., *supra* note 110 (citing 2007 study).
116. Weisselberg, *supra* note 5, at 1567.
117. *Id*. at 1568 (using data from two studies).
118. Kassin et al., *supra* note 110, at 7.
119. Richard Rogers et al., *General Knowledge and Misknowledge of* Miranda *Rights: Are Effective* Miranda *Advisements Still Necessary?*, 19 PSYCHOL. PUB. POL'Y & L. 432, 437 (2013).
120. Kassin et al., *supra* note 110, at 8.
121. Weisselberg, *supra* note 5, at 1569 (citing Professor Cloud's study).
122. Kassin et al., *supra* note 110, at 9.

After reviewing the research, Professor Charles Weisselberg concluded that "[b]ecause the warnings vary so widely, it is no longer possible to assume that suspects will understand just any warnings. The evidence shows that, to be understood, many warnings demand a greater educational background than many suspects possess."[123]

Making the warnings understandable to all groups is a task worth undertaking.[124] But, as the next section demonstrates, even if a suspect understands the warnings, police will have little problem getting almost any suspect to waive their rights through various tactics that serve to undermine the protective role the *Miranda* Court thought the warnings would play.

B. Getting a Waiver: Everything Old Is New Again

The Court in *Miranda* famously quoted from police training manuals—in particular, the best-selling manual by Fred Inbau and John Reid—and criticized the coercive tactics that were advised.[125] Walter Pope, a Ninth Circuit judge, when asked to comment on *Miranda* at the Ninth Circuit Judicial Conference in 1966 said, "the persons who are the first sure victims of this decision are the authors of the quoted police manuals. Poor Mr. Inbau and poor Mr. Reid,[ ]they will never be able to sell their books again."[126] Nothing could have been further from the truth. The Reid Technique, as it is called, is alive and well. As Professor Weisselberg noted in 2008, John E. Reid & Associates is the:

> largest national provider of training in interrogation techniques . . . including a basic course on "The Reid Technique of Interviewing and Interrogation" . . . . expand[ing] on the methodology initially explained in the very first edition of the Inbau and Reid text, which was discussed in *Miranda*. The current manual is now in its fourth edition.[127]

The most important feature of the interrogation techniques is training on getting the suspect to waive his rights. As the *Miranda* jurisprudence evolved, Supreme Court decisions have helped the police in this enterprise by undercutting *Miranda*'s exhortation that the government bears a "heavy

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123. Weisselberg, *supra* note 5, at 1577.

124. However, writing better warnings may be impossible. For example, one study of warnings written specifically for juveniles showed that they are typically much longer and even harder to understand than general warnings. *Id.* at 1573 (citing study).

125. *See* Miranda v. Arizona, 384 U.S. 436, 449–54 & nn.9, 10, 12–13, 15, 17, 20–23 (1966) (citing techniques from INBAU & REID, CRIMINAL INTERROGATIONS AND CONFESSIONS (1962)).

126. Walter L. Pope, *Address at the Ninth Circuit Judicial Conference in Newport Beach, California:* Escobedo*, Then* Miranda *and Now* Johnson v. New Jersey (July 14, 1966), 40 F.R.D. 351, 357 (1966).

127. Weisselberg, *supra* note 5, at 1530.

burden" of proving waiver.[128] The *Miranda* Court cited *Johnson v. Zerbst* here, a case setting forth that heavy burden before a defendant can be said to have knowingly and intelligently waived his right to counsel at trial.[129] Professor Yale Kamisar surmised, "*Miranda* seemed to indicate that the Court would be receptive to nothing short of an express waiver of the rights involved."[130] Yet the Court, three years later, undercut this heavy burden in *North Carolina v. Butler*, allowing waiver to be implied from the circumstances when the suspect did not say anything after being read his rights and refused to sign the waiver form but then answered police questions.[131]

More recently, the Court built upon the precedent set by *North Carolina v. Butler* in *Berghuis v. Thompkins*, taking implied waiver and shifting the burden to the defendant to prove he invoked his rights.[132] *Thompkins* set a new low bar. The Court held that once warnings are given and a suspect indicates he understands them, if he ultimately makes a statement—even if it is after hours of remaining largely silent while police interrogate him—that is a "course of conduct indicating waiver."[133] Placing the burden on a suspect in an inherently coercive environment to invoke his right to counsel was made even more difficult by the Court's decision in *Davis v. United States*.[134] The *Davis* Court held that while a suspect invoking his right to counsel "need not 'speak with the discrimination of an Oxford don,'"[135] he must unambiguously assert his rights such that "a reasonable police officer [under] the circumstances would understand the statement to be a request for an attorney."[136] Lower courts have read this requirement very strictly, rejecting as invocations statements such as, "I think I would like to talk to a lawyer,"[137] despite the fact that social science research establishes that those in powerless positions—such as suspects in the inherently coercive environment of

128. *See Miranda*, 384 U.S. at 475; Kamisar, *supra* note 5, at 178–84 (discussing the weakening of *Miranda*).

129. *Miranda*, 384 U.S. at 475 (citing Johnson v. Zerbst, 304 U.S. 458 (1938), *overruled in part by* Edwards v. Arizona, 415 U.S. 477 (1981), *as recognized in* Watkins v. Lafler, 517 F. App'x 488, 499 (6th Cir. 2013)).

130. Kamisar, *supra* note 5, at 180.

131. North Carolina v. Butler, 441 U.S. 370, 370–71, 373 (1969).

132. Berghuis v. Thompkins, 560 U.S. 370, 380–89 (2010).

133. *Id.* at 384–85.

134. *See generally* Davis v. United States, 512 U.S. 452 (1994).

135. *Id.* at 459 (citation omitted).

136. *Id. Thompkins* made clear what lower courts had assumed, that one must also unambiguously assert one's right to remain silent and not simply remain silent for hours, as Thompkins had done. *Thompkins*, 560 U.S. at 381–82.

137. Weisselberg, *supra* note 5, at 1580–81 (surveying lower court cases).

custodial interrogation—express their wishes tentatively and with hedging language.[138]

Police start out with the distinct advantage in the case law, with lower courts easily finding waiver in almost every case;[139] but they also have all of the psychological advantages, and it is those advantages that the training manuals stress to ensure a waiver is obtained. The training materials set out much of the same psychological ploys the *Miranda* Court deplored—isolation, an assertion of guilt, minimization of the suspect's role—and the lower courts have generally overlooked these ploys as not enough to show an involuntary waiver under a totality of the circumstances.[140] *Miranda* asserted:

> [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.[141]

The techniques employed by the police and the tacit approval of the courts make this assertion a dead letter.

There have been several comprehensive studies of police interrogation techniques—all show the same set of procedures used to gain waivers.[142] In 1996, Richard Leo wrote an article based on his observation of 200 police interrogations in which he noted one successful technique for getting a waiver:

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138. *Id.* at 1589 (citing studies). In addition, in a study of 400 participants drawn from a Dallas County jury pool, 61.3% were unaware of the need for precise language when requesting an attorney. Rogers et al., *supra* note 119, at 437.

139. George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1082, 1103–05 (2001). After reading hundreds of appellate opinions deciding whether police complied with *Miranda*, Professor Thomas wrote:

> [O]nce the prosecutor proves that the warnings were given in a language that the suspect understands, courts find waiver in almost every case. *Miranda* waiver is extraordinarily easy to show—basically that the suspect answered police questions after saying that he understood the warnings. This waiver process bears little resemblance to waiver of the Fifth Amendment privilege at trial where the prosecutor is not permitted to badger the defendant with requests that he take the witness stand . . . . [T]he *Miranda* version of the Fifth Amendment permits waiver to be made carelessly, inattentively, and without counsel.

Id.

140. Leo & White, *supra* note 72, at 423 (citing lower court cases and concluding, "[a]s these cases indicate, application of the totality of the circumstances test to determine the validity of a *Miranda* waiver provides only minimal restrictions on the types of inducements interrogators may use to obtain a waiver.").

141. Miranda v. Arizona, 384 U.S. 436, 476 (1966).

142. *See* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 664 (1996) (reviewing 200 police interrogations observed in more than nine months); *see also* Leo & White, *supra* note 72, at 412–13, 433–46 (drawing from numerous interrogation transcripts collected over the past 12 years); Weisselberg, *supra* note 5, at 1558–59 (reviewing techniques used in cases in California).

> Most commonly, detectives tell suspects that there are two sides to every story and that they will only be able to hear the suspect's side of the story if he waives his rights and chooses to speak to them. Detectives may emphasize that they already know the victim's side of the story, implying that the victim's allegations will become the official version of the event unless the suspect speaks. The detective might add that the prosecutor's charging decision will be influenced by what the detective tells the prosecutor, which in turn is based on what the detective knows about the suspect's side of the story.[143]

In 1999, Richard Leo and Welsh White examined interrogation transcripts collected over a period of twelve years.[144] They concluded:

> Based on an examination of numerous interrogations conducted in a wide variety of settings, [we] conclude[] that interrogators employ a range of sophisticated strategies to induce waivers. In particular, interrogators are able to de-emphasize the warnings to such an extent that suspects often perceive that waiver of their rights is the natural and expected course of action. Indeed, interrogators are sometimes able to present the *Miranda* warnings so that suspects are led to believe that waiving their *Miranda* rights will be to their advantage.[145]

De-emphasizing warnings can be done in several ways: (1) referring to them as a mere formality; (2) trivializing them by reference to popular culture; or (3) treating the waiver as a "fait accompli" to create the appearance of a non-adversarial friendship between the interrogator and the suspect.[146] Further,

> [o]ne of the most powerful de-emphasizing strategies involves focusing the suspect's attention on the importance of telling his story to the interrogator. The interrogators communicate to the suspect that they want to hear his side of the story, but that they will not be able to do so until the suspect waives his *Miranda* rights . . . . [This strategy] not only de-emphasizes the significance of the *Miranda* warnings but also communicates to the suspect that he will receive a benefit in exchange for waiving his rights . . . . When this strategy is effectively employed, some suspects will be so eager to tell their side of the story that they can hardly wait to waive their rights.[147]

On *Miranda*'s fortieth birthday, Professor Yale Kamisar emphasized that "[o]ne of the principal purposes of the four-fold warning is, quoting from

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143. Leo, *supra* note 142.
144. Leo & White, *supra* note 72, at 413.
145. *Id.*
146. *Id.* at 434–38.
147. *Id.* at 435–37, 443.

the 'original *Miranda*,' 'to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.'"[148] But he noted that the case studies showing the police techniques for getting waivers

> seriously undermine this purpose by leading (or should one say, misleading?) the suspect into believing that it is in his best interest to waive his rights and talk to his 'friends' in the interrogation room, his 'protectors' against the detectives' heartless superiors and the zealous prosecutor, who will charge the suspect with first degree murder unless the suspect tells his 'friends' his side of the story.[149]

The preceding discussion should put the fact that about 80% of custodial suspects waive their *Miranda* rights in a different light.[150] While some suspects may not have been subject to the coercive techniques described, most police officers are trained in these techniques, and it is likely they were used.[151] It is also illuminating to know that "suspects who presently invoke their *Miranda* rights are not randomly distributed but, instead, are more likely to have prior criminal records, especially prior felony records."[152] Custodial suspects with felony records are three or four times more likely to invoke their rights than those with no records.[153] These "silent types" are well aware that no good can come from talking and are immune to the ploys to get them to tell their story.[154]

C. Getting the Confession: Follow the Steps

Once the police have obtained the waiver, they are trained in the Reid Technique, or something similar, to get a confession.[155] After isolating the suspect, police follow a nine-step process to getting to a confession.[156] The

148. Kamisar, *supra* note 5, at 186–87.

149. *Id.* at 187.

150. Leo, *supra* note 142.

151. *See* Weisselberg, *supra* note 5, at 1533 ("In a recent survey of police executives nationwide, about two-thirds of respondents 'reported that "most" or "some" officers [in their department] had training in the "Reid method."'" (citation omitted)).

152. Leo & White, *supra* note 72, at 654.

153. Leo, *supra* note 142, at 654–55.

154. *See* William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 991 (2001) ("*Miranda* gives Silent Types the valuable right to avoid questioning altogether, and gives other suspects nothing. Total protection for the few, no protection for the many—that is *Miranda*'s achievement in a nutshell.").

155. Kassin et al., *supra* note 110, at 6–7 ("As described in INBAU ET AL., *Criminal Interrogation and Confessions* (2001), the most influential approach is the so-called Reid technique (named after John E. Reid who, along with Fred Inbau, developed this approach in the 1940s and published the first edition of their manual in 1962).").

156. *Id.*

premise to interrogation is always that the person being interrogated is, in fact, guilty and his guilt is forcefully posited by the police.[157] As a group of social science researchers explain, "[T]he purpose of interrogation is therefore not to discern the truth, determine if the suspect committed the crime, or evaluate his or her denials. Rather, police are trained to interrogate only those suspects whose culpability they 'establish' on the basis of their initial investigation."[158]

The interrogators use "maximizing" and "minimizing" techniques:

> Today's interrogators seek to manipulate a suspect into thinking that it is in his or her best interest to confess. To achieve this change in perceptions of subjective utilities, they use a variety of techniques, referred to broadly as 'maximization' and 'minimization.' Maximization involves a cluster of tactics designed to convey the interrogator's rock-solid belief that the suspect is guilty and that all denials will fail . . . . In contrast, minimization tactics are designed to provide the suspect with moral justification and face-saving excuses for having committed the crime in question.[159]

Similarly,

> [o]n one hand, the interrogator confronts the suspect with accusations of guilt, assertions that may be bolstered by evidence, real or manufactured, and refuses to accept alibis and denials. On the other hand, the interrogator offers sympathy and moral justification, introducing 'themes' that minimize the crime and lead suspects to see confession as an expedient means of escape.[160]

Police are so good at getting confessions that they obtain false confessions as well. Research reveals that false confessions are present in 15% to 20% of all DNA exonerations[161] and yet, because those are only cases in which there was DNA and a proven exoneration, "the cases that are discovered most surely represent the tip of an iceberg."[162] Researchers conclude that, "As illustrated by the Reid technique and other similar approaches, the modern American police interrogation is, by definition, a guilt-presumptive and confrontational process—aspects of which put innocent people at risk."[163]

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157. *Id.*
158. *Id.* at 6.
159. *Id.* at 12.
160. Kassin et al., *supra* note 110, at 7.
161. *Id.* at 3.
162. *Id.*
163. *Id.* at 27.

It is widely agreed that *Miranda* has had a negligible effect on confessions.[164] As Yale Kamisar noted, given that the tactics described by researchers are likely widespread, it is "no wonder" that *Miranda* has had little effect on confessions.[165] The consensus is that *Miranda* has been good for the police. When the Court first decided *Miranda*, "[p]olice and politicians 'reacted to *Miranda* as if the Court had given criminals the trump card. The police . . . were aghast at *Miranda*.'"[166] By the time *Dickerson v. United States* decided the constitutionality of the *Miranda* protections in 2000, the Court that had been chipping away at its protections was prepared to embrace *Miranda*, no doubt because police had embraced it.[167] The majority stated that the warnings had "become embedded in police practice . . . [and] part of our national culture."[168] It explicitly recognized that "our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement."[169] Then-United States Attorney General Janet Reno stated that the *Dickerson* decision "recognizes [that] *Miranda* rights [have] been good for law enforcement."[170] In 1987, a special committee of the American Bar Association reported that, "[A] very strong majority of those surveyed—prosecutors, judges, and police officers—agree that compliance with *Miranda* does not present serious problems for law enforcement."[171] As Yale Kamisar noted, "This report, taken together with many earlier empirical studies indicat[ed] that *Miranda* posed no significant barrier to effective law enforcement."[172]

Returning to Judge Pope in 1966, his view then appears prescient given what we know now:

> I think we shall be able to live with this decision. As for the police, they know how to evade all rules relating to confessions. If we assume that the police are as willing to use chicanery, tricks, and artifices as the opinion implies, then there may well be something to the dissenters' suggestion: "Those who use third degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers . . . . The Court's

164. Kamisar, *supra* note 5, at 177 (noting the "one conspicuous exception" of Paul Cassell and citing the articles criticizing his conclusions and assumptions).

165. *Id.* at 188.

166. Ulrich, *supra* note 67, at 18.

167. Dickerson v. United States, 530 U.S. 428, 444 (2000).

168. *Id.* at 443.

169. *Id.*

170. Press Release, U.S. Dep't of Justice, Statement by Attorney General Janet Reno on Today's Decision Upholding the *Miranda* Ruling (June 26, 2000), http://www.justice.gov/opa/pr/2000/June/364ag.htm (stating further that *Miranda* "set out clear standards for police officers, helped get confessions admitted into evidence, and ensured the credibility of confessions in the eyes of jurors").

171. *See* Kamisar, *supra* note 5, at 177 (quoting ABA SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC'Y, CRIMINAL JUSTICE IN CRISIS 28 (1988)).

172. *Id.*

> new rules . . . do nothing to contain the policeman who is prepared to lie from the start."[173]

As noted by researchers in the field of confessions, "some law enforcement professionals [(including Fred Inbau)] have argued that lying is sometimes a necessary evil, effective, and without risk to the innocent."[174]

In sum, there are three things we know now that the Court did not consider when deciding *Miranda*. First, many, if not most, suspects are ill-equipped to understand the warnings—either literally or as to their operation or effect.[175] Second, police can deliver the warnings in a way that minimizes and de-emphasizes their importance so that most suspects are primed to waive their rights.[176] Finally, police engage in techniques that are much the same as those derided by the Court in *Miranda* and those techniques are ultimately effective at getting confessions—even from the innocent.[177]

Miranda itself stated that its warning procedures were required as long as states did not come up with a better replacement to protect a suspect from the inherent compulsion of incommunicado interrogation.[178] If the Court knew then what we know now, it would no longer endorse these procedures. Rather, the Court would have gone all the way with the Sixth Amendment protections it strongly espoused and disallowed interrogations without the presence of counsel or a counseled waiver.

V. RETURNING TO *MIRANDA*'S FIRST PRINCIPLES: SIXTH AMENDMENT PROTECTIONS DURING CUSTODIAL INTERROGATION

In *Miranda*, the Court stated in no uncertain terms that a suspect facing custodial interrogation should have the assistance of counsel.[179] The Court used the language of the Sixth Amendment in endorsing its application.[180] When the Court did not fully actualize the right, by substituting a warnings

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173. Pope, *supra* note 126, at 377.

174. Kassin et al., *supra* note 110, at 29 (citing FRED INABAU ET AL., CRIMINAL INTERROGATION & CONFESSIONS (4th ed. 2001)).

175. *See supra* Section IV.A (showing the inadequacies of *Miranda* warnings).

176. *See supra* Section IV.B (discussing techniques used when providing *Miranda* warnings).

177. *See supra* Section IV.C (explaining the techniques used by police after waiver).

178. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

> Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards [the warnings] must be observed.

Id.

179. *Id.* at 460–61.

180. *Id.* at 442.

system, it had no way of knowing that time would prove this was not an adequate substitute for the actual presence of counsel—that police would be able to coerce waivers from all but the few seasoned felons.[181] The warnings have done nothing to dispel the inherent coercion of the custodial setting that concerned the Court.

In every other setting in which the Sixth Amendment applies, including pretrial procedures, the right attaches automatically—the accused does not have to ask for counsel.[182] This is the case with the Court's current application of the Sixth Amendment to police interrogations; the right attaches automatically at indictment or the first judicial proceeding.[183] Extending this automatic attachment of the Sixth Amendment right to pre-charge custodial interrogation would mean overruling *Kirby*.[184] In crafting its rule, the *Kirby* Court relied, in part, on the Sixth Amendment's language that the accused shall have the right to counsel in all "criminal prosecutions."[185] However, *Kirby* gave a cramped reading of that language, a reading that both *Escobedo* and *Wade* rejected.[186] The founding fathers did not have a professional police force and so did not have to consider the impact it would have on determining the beginning and critical stages of a criminal prosecution.

There is little doubt that custodial interrogation as it is carried out by the police—with the assumption of guilt, tactics to achieve waivers, and the multiple-step procedure for inducing confessions—is a critical stage of the prosecution as the case goes forward. Confession evidence "is perhaps the most powerful evidence of guilt admissible in court—so powerful, in fact, that 'the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained.'"[187] When the police obtain a confession from a suspect, it is for use in prosecution in a criminal case. Using an uncounseled confession at trial is a denial of the right to counsel in that prosecution. There is nothing counsel at trial can do to protect the defendant against compelled self-incrimination—that time has passed.

At trial, counsel can aid their client in the exercise of his or her right against self-incrimination in the decision as to whether or not to testify. There is no valid reason why the exercise of the Sixth Amendment right to counsel in the pretrial custodial setting should look any different than the trial

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181. *See supra* Section IV.B (explaining that police are able to coerce waivers in much the same way as they did before *Miranda*).

182. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 404 (1977).

183. Rothgery v. Gillespie Cty., 554 U.S. 191, 194 (2008) (citing *Brewer*, 430 U.S. at 398–99).

184. *See* Kirby v. Illinois, 406 U.S. 682, 688 (1972).

185. *Id.* at 690 (quoting U.S. CONST. amend. VI).

186. *See* Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964); *see also* United States v. Wade, 388 U.S. 218, 227–28 (1967).

187. Kassin et. al, *supra* note 110, at 9 (citation omitted) (quoting Colorado v. Connelly, 479 U.S. 157, 182 (1986)).

setting. Just as the prosecution cannot put the defendant on the stand and compel answers from him, neither should the investigative arm of the prosecution—the police—be able to compel answers outside of court that will then be used against the suspect at trial.

At this time, because warnings given by the police in the inherently coercive setting of custodial interrogations have become all but ineffective at dispelling coercion, we need to return to the Sixth Amendment first principles set out by *Miranda* and require the actual presence of counsel. The Court in *Miranda* invited the crafting of procedures that would be as good as, or better than, the warning procedures it outlined.[188] That time has come. Videotaping confessions, as some have called for,[189] is not a better procedure for the same reasons the warnings have not worked: Police will use tactics to work around the videotape, such as softening up the suspect before the tape starts rolling. At this time, only the actual presence of counsel can ensure that an accused has the advice needed to exercise his Fifth Amendment privilege against self-incrimination.

Some may argue that we do not know that all statements gained through custodial interrogation are coerced.[190] In that light, consider how the *Wade* Court likened the rationale for the requirement of counsel at a pretrial line-up to the rationale for requiring counsel at an interrogation:

> [T]he confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification . . . . A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.[191]

The Court required the presence of counsel because "as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations."[192]

A confession is essentially an uncounseled guilty plea. Once the confession is obtained, the usefulness of counsel thereafter is vastly

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188. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1986).

189. *See, e.g.*, Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337 (2001); Wayne T. Westling, *Something Is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537 (2001).

190. *See, e.g.*, Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1 (2001).

191. *Wade*, 388 U.S. at 228.

192. *Id.* at 230.

limited.[193] The Court has held that the Sixth Amendment right to effective assistance of counsel extends to plea negotiations.[194] The rationale of these decisions applies to the advice *Miranda* deemed essential during custodial interrogation. In *Lafler v. Cooper*, the Court stated that the Sixth Amendment "applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice" and that "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."[195] In *Lafler*'s companion case, *Missouri v. Frye*, the Court explained the critical nature of the plea bargaining process:

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system."[196]

The negotiation of a plea is "almost always the critical point for a defendant,"[197] and it can be beneficial

> for defendants to admit their crimes and receive more favorable terms at sentencing . . . . In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. "Anything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'"[198]

It would be absurd to say the Sixth Amendment requires counsel's aid and advice on whether to plead guilty, but that *Miranda*'s invocation of the

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193. *See* Eve Brensike Primus, *Disentangling* Miranda *and* Massiah*: How to Revive the Sixth Amendment Right to Counsel as a Tool for Regulating Confession Law*, 97 B.U. L. REV. 1085, 1092 (2017) ("When the defendant is denied an attorney at the pretrial interrogation, his legal rights might be forever compromised, because any resulting confession 'might well settle the accused's fate and reduce the trial itself to a mere formality.'" (quoting *Wade*, 388 U.S. at 224)).

194. Lafler v. Cooper, 566 U.S. 156, 162 (2012).

195. *Id.* at 165, 170.

196. Missouri v. Frye, 566 U.S. 134, 143–44 (2012) (emphasis in original) (citations omitted).

197. *Id.* at 144.

198. *Id.* (quoting Massiah v. United States, 377 U.S. 201, 204 (1964)).

Sixth Amendment right to counsel's presence does not require that same advice as to whether or not to incriminate oneself to the police. A confession simply moves the guilty plea backward in time. The purpose that counsel's presence could serve at pretrial interrogation is summarized nicely by Eve Brensike Primus:

> The suspect may not understand the nature of the charges, that complicity [could] be just as damning as actual perpetration of the offense, or that a lawyer could explain the legal elements to him. It is not always intuitive to a suspect that a lawyer might examine the indictment for legal sufficiency before permitting him to talk or that [a] lawyer might be better at negotiating a plea for him if he does not give an incriminating statement. In the world of sentencing guidelines with downward departures, an attorney might be able to negotiate a deal for a client who is inclined to cooperate with authorities . . . . The suspect might not understand what it means to be indicted . . . . He might think he can talk his way out of things, wholly unaware that there is no talking his way out at that point.[199]

If counsel were required for any pre-charge custodial interrogation, there would be fewer out-of-court confessions.[200] Given what we know about how these confessions are obtained and the number of false confessions that result,[201] this should be considered a positive result. Instead, we will continue to have in-court counseled confessions in the form of guilty pleas from 90% to 95% of criminal defendants.[202] The Court has indicated how important effective counsel is to these counseled confessions by extending its Sixth Amendment effective assistance of counsel guarantees to the plea context.[203]

VI. CONCLUSION

The Court in *Escobedo* was prescient 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."[204] The coercive techniques of incommunicado custodial interrogation continue unabated from the time *Miranda* was decided and are likely even more well-honed with time. We should not become complacent but should follow the exhortation of the *Miranda* Court to employ the full

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199. Primus, *supra* note 193, at 1103–04.

200. Of course, there will still be volunteered statements or answers to noncustodial questioning.

201. *See* Lindsey Devers, *Plea and Charge Bargaining Research Summary,* BUREAU OF JUST. ASSISTANCE 2 (Jan. 24, 2011), http://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

202. *Id.* at 1.

203. *Frye*, 566 U.S. at 144.

204. Escobedo v. Illinois, 378 U.S. 478, 488–89 (1964).

protections of the Sixth Amendment right to counsel. The Court did not mince words or equivocate when it said that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege."[205]

Time has shown that the experimentation with a warnings and waiver system has failed to protect a defendant's exercise of his Fifth Amendment privilege. *Miranda* itself called for any improvement on its own experiment. Nothing short of the mandatory presence of counsel will suffice, and requiring such presence before any custodial interrogation returns us firmly to the first principles of *Miranda*. All who teach, read, and rely on *Miranda* should read it again and see that *Miranda* was indeed a Sixth Amendment case as well as a Fifth Amendment case. Our criminal justice system runs on, and depends on, counseled confessions in the form of guilty pleas. Counseled confessions are not error-free, but they ensure the defendant the right to counsel's advice at this critical stage of any prosecution.

205. Miranda v. Arizona, 384 U.S. 436, 469 (1966).