Notes

BACK TO THE BASICS: A FAIL-SAFE METHOD FOR ADMINISTERING THE *MIRANDA* WARNINGS AFTER *DUCKWORTH V. EAGAN*

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While Miranda laudably was prompted by the Court's desire to prevent compulsion, . . . its approach virtually assured that twenty years later the precise wording of its rubrics rather than the underlying constitutional concern to which they theoretically relate would be consuming intellectual energy.[1]

Nineteen eighty-six marked the twentieth anniversary of the Supreme Court's decision in *Miranda v. Arizona*.[2] Surrounded by controversy, the *Miranda* warnings recently lost the support of several leading authorities.[3] Other commentators accuse the Supreme Court of slowly eliminating *Miranda* through recent opinions.[4] On June 26, 1989, the Court handed down *Duckworth v. Eagan*.[5] *Duckworth* initially appears to further the demise of *Miranda*, but may effectively reestablish the weakened doctrine of law.

This Note analyzes the potential impact of the *Duckworth* opinion upon the future of the *Miranda* warnings. Focusing on their precise wording, the issue presented is whether the warnings adequately convey fifth amendment rights to the accused.[6] First, a brief history of the *Miranda* decision establishes the original purpose the Court intended the warnings to serve. Second, the controversy emanating from various circuit courts demonstrates the sharp division of authority regarding the formula required to satisfy the mandates of

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1. Grano, *Miranda v. Arizona and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 246 (1986).
2. 384 U.S. 436 (1966).
3. Edward Meese declared the *Miranda* decision "the epitome of Warren Court activism in the criminal law area." JUSTICE DEPARTMENT, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (Feb. 12, 1986) (Markham Report). Several recent commentators also believe that the Supreme Court should overrule *Miranda*. *See, e.g.*, Frey, *Modern Police Interrogation Law: The Wrong Road Taken*, 42 U. PITT. L. REV. 731 (1981); Gangi, *The Inbau-Kamisar Debate: Time for Round Two?*, 12 WASH. L. REV. 117 (1984); Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979).
4. *See, e.g., Is* Miranda *Crumbling?*, National Law Journal, Feb. 28, 1989, at 15, col. 1; *Supreme Court Narrows* Miranda; *IACP Urges Complete Review*, 18 CRIM. JUST. NEWSL. 5 (May 15, 1987).
5. 109 S. Ct. 2875 (1989).
6. *Id.* at 2880.

Miranda. Third, a review of a related Supreme Court opinion[7] and subsequent interpreting district court decisions proves the necessity of instruction from the Supreme Court to resolve which version of the warnings complies with *Miranda*. Finally, an analysis of *Duckworth* and its impact upon *Miranda* assesses the probable future status of the warnings.

THE *MIRANDA* DECISION

The United States Supreme Court grappled with the proper standard for excluding an accused's coerced confession from trial for over thirty years.[8] The controversy leading the Supreme Court to issue the *Miranda* decision reveals the Court's struggle to find a constitutional basis for permitting the judiciary to impose restrictions upon state law enforcement official procedures. First, the Court relied upon the fourteenth amendment due process clause. From 1936[9] until the mid-1960's, the Court engaged in a due process voluntariness test to determine the validity of a defendant's confession. The Court then experimented briefly with the Federal Rules of Criminal Procedure as a basis for protecting the accused from coercive pressure to confess.[10] In the early sixties, the Court turned to the sixth amendment's guarantee of the right to counsel for authority to exclude an illegal confession.[11] Finally, the Court settled upon the fifth amendment's privilege against self-incrimination as the underlying premise for the mandates espoused in the *Miranda* decision.

The Supreme Court examined a confession's admissibility into a criminal prosecution at an early date.[12] In *Brown v. Mississippi*,[13] the Court reversed the defendants' murder convictions when evidence proved that law officers extracted crucial incriminating statements from the three black suspects by physical torture.[14] A confession obtained in a manner "revolting to justice" violates the accused's fourteenth amendment right to due process.[15] The Court's decision instructed lower courts to consider whether the accused

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7. California v. Prysock, 453 U.S. 355, 360 (1981), held that the warnings do not have to be a "virtual incantation" of the precise wording of the *Miranda* decision, but they may be insufficient if the police link the defendant's right to counsel to a future point in time, e.g., subsequent to interrogation.

8. W. LA FAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.1, at 262 (1985).

9. Brown v. Mississippi, 297 U.S. 278 (1936).

10. FED. R. CRIM. P. 5(a).

11. Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964).

12. Hopt v. Utah, 110 U.S. 574 (1884), is one of the earliest decisions by the Supreme Court regarding the admissibility of a confession. *See also* Bram v. United States, 168 U.S. 532 (1897), in which the Court examined English and American principles regarding the admissibility of a confession. The Court excluded the defendant's statements, which a detective obtained by stripping and interrogating the accused behind closed doors. *Id.* at 538. Though the majority couched this decision in fifth amendment terms, the Court did not follow this line of reasoning in subsequent cases until the mid-1960's.

13. 297 U.S. 278 (1936).

14. *Id.* at 287.

15. The *Brown* Court relied upon the due process clause and not the *Bram* decision, since the fifth amendment at that time did not apply to the states. The due process clause "requires 'that state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confes-

suffered a "hardship so acute and shocking" that it violated "fundamental principles of liberty and justice" under due process privileges.[16] From 1936 to 1964, the Court expanded the due process voluntariness test as a means to prevent not only blatant physical abuse but also psychological coercion.[17]

The voluntariness test evolved into a fact-intensive consideration of the totality of the circumstances surrounding the accused's confession. The two primary factors were the law enforcement officer's conduct in creating a coercive atmosphere and the accused's physical and mental ability to resist undue pressure.[18] Other factors began to determine whether an accused's confession was voluntary.[19] The appellate courts eventually became jurors, reviewing detailed facts in a case-by-case manner.[20] The voluntariness test proved to be effective only in extreme cases of abuse.[21] Dissatisfied with the inconsistency developing among lower appellate court decisions, the Supreme Court looked to other sources for gauging the validity of a suspect's confession.

The Supreme Court briefly turned to the Federal Rules of Criminal Procedure[22] as an alternative. Rejecting the traditional voluntariness standard, the Court adopted the *McNabb-Mallory* rule and invalidated a confession if the length of time between the suspect's arrest and appearance before a judicial officer exceeded statutory directives.[23] Congress, however, considered this rule excessively constraining upon police interrogation procedures and virtually eliminated it through legislation.[24] Thus, Congress forced the Court to consider other means for determining the admissibility of a confession.

During the evolution of the voluntariness test, a separate line of cases developed under the sixth amendment's guarantee that an accused shall have

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sions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Id.* at 286 (citation omitted).

16. Palko v. Connecticut, 302 U.S. 319, 328 (1937) (citation omitted).

17. Benner, *Requiem for* Miranda: *The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U.L.Q. 114 (1989). The Supreme Court stated the expanded due process test in Culombe v. Connecticut, 367 U.S. 568, 602 (1961): "Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

18. *Project: Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-87*, 76 GEO. L.J. 660-84 (1988).

19. In *Culombe*, 367 U.S. at 601, the Supreme Court admitted that "no single litmus-paper test" exists. The Court has considered a wide range of circumstances in past decisions. *See, e.g.*, Haynes v. Washington, 373 U.S. 503 (1963) (threats used by police to obtain confession); Gallegos v. Colorado, 370 U.S. 49 (1962) (age of suspect), *Culombe*, (suspect's intelligence); Spano v. New York, 360 U.S. 315 (1959) (deceptions by friend/police officer, suspect's age, denial of suspect's request for an attorney, length of interrogation, suspect's mental state); Crooker v. California, 357 U.S. 433 (1958) (suspect's level of education).

20. Marcus, *Defending* Miranda, 24 LAND & WATER L. REV. 241, 241-252 (1989).

21. *Id.* at 243.

22. FED. R. CRIM. P. 5(a).

23. McNabb v. United States, 318 U.S. 332 (1943) (Supreme Court held inadmissible the defendant's statements, which the police obtained in a period of time exceeding the statutory directive to present an accused before a judicial officer promptly); Mallory v. United States, 354 U.S. 449 (1957) (Court held inadmissible a confession procured in violation of the federal rules mandating that an arrested person be taken before a committing magistrate without unnecessary delay).

24. The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. § 3501(a) (1968).

access to an attorney during a criminal prosecution.[25] The Supreme Court based over fifty decisions on this line of reasoning from 1932 to 1963.[26] In *Massiah v. United States*,[27] the Court held that the government violated the indicted defendant's right to counsel when it arranged for a co-defendant to elicit and record secretly incriminating statements from the defendant.[28] Peripheral issues regarding when the right to counsel attaches distracted courts following the sixth amendment standard.[29] The dilemma culminated when the due process voluntariness cases and sixth amendment cases converged in *Escobedo v. Illinois*.[30] Written in sixth amendment terms, the opinion appeared to provide a broad right to counsel during interrogation, but the Court carefully limited its holding to the facts of the case.[31] Instead of providing the lower courts with definite standards, *Escobedo* confused the issue.[32] The Court failed to explain which facts or circumstances of the case controlled the admissibility of a confession: must the accused request counsel? When must the accused be apprised of his right to remain silent? These and other unanswered questions deemed *Escobedo* the stepping stone for the *Miranda* decision.

The Supreme Court purported to resolve lower court confusion in *Miranda v. Arizona*.[33] The Court selected the four cases contained in the opinion to clarify *Escobedo* since they were typical state criminal cases and free from complicated fact patterns.[34] Based upon the fifth amendment privilege against self-incrimination,[35] the decision provided law enforcement officers with an almost fail-safe procedure for obtaining an admissible confession from a suspect. The Court's opinion, in a legislative style, mandated that state and federal law enforcement officials recite the following four warnings prior to engaging in custodial interrogation:[36]

> 1) The interrogator must inform the defendant of his right to remain silent.[37]

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25. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

26. *See generally* Warden, Miranda—*Some History, Some Observations, and Some Questions*, 20 VAND. L. REV. 39 (1966).

27. 377 U.S. 201 (1964).

28. *Id.* at 207.

29. W. LA FAVE & J. ISRAEL, *supra* note 8, at 262.

30. 378 U.S. 478 (1964). Escobedo hired an attorney prior to his arrest. After his arrest, but before his indictment, the police denied both the accused's and his attorney's requests to consult. *Id.* at 480-81.

31. The Court held only that when the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — the adversary system begins to operate, and under the circumstances here, the accused must be permitted to consult with his lawyer. 378 U.S. at 492. *See also* W. LA FAVE & J. ISRAEL, *supra* note 8, at 263 (*Escobedo* was a cautious step because the Court carefully limited its decision to unique facts).

32. Benner, *supra* note 17, at 118.

33. 384 U.S. 436 (1966).

34. Warden, *supra* note 26, at 45.

35. The fifth amendment states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

36. *Miranda*, 384 U.S. at 467. Litigation regarding the meaning of "custodial" and "interrogation" plagued the lower courts. The Supreme Court attempted to provide a standard definition for each term. Berkmeyer v. McCarty, 468 U.S. 420 (1984) established a definition for "custodial" and Rhode Island v. Innis, 446 U.S. 291 (1980) defined "interrogation."

37. *Miranda*, 384 U.S. at 469.

2) The interrogator must warn the defendant that anything he says will be used against him in court.[38]

3) The interrogator must explain to the defendant that he has the right to consult with any attorney prior to and during the questioning.[39]

4) The interrogator must inform the suspect that if he is indigent, the court will appoint counsel to represent him.[40]

The Court established the constitutional basis for judging the admissibility of a confession and addressed each question left open in *Escobedo*.

Although the decision was broad, the Court carefully established *Miranda's* boundaries. If the government intends to introduce any incriminating statements into trial to prove the accused's guilt, the police must adhere to the warning requirements prior to a custodial interrogation.[41] The Court made it clear that the decision did not require law enforcement officials to recite the warnings verbatim from the opinion but mandated officers to inform an accused of his substantive rights. The Court held that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant."[42] The purpose of *Miranda* was to free the judiciary from its burden of scrutinizing the facts of each case to prevent coerced confessions.[43] Imposing a rigid formula would not further the Court's objective.[44]

Immediately following the *Miranda* decision, state courts began to interpret the Court's formula for advising a suspect of his constitutional rights.

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38. *Id.*

39. *Id.* at 472.

40. *Id.* at 473.

41. *See generally* Galloway, *Basic* Miranda *Analysis*, 28 SANTA CLARA L. REV. 795 (1988).

42. *Miranda*, 384 U.S. at 476 (emphasis added). *See also* Rhode Island v. Innis, 446 U.S. 291, 297 (1980) (referring to the "now-familiar *Miranda* warnings . . . or their equivalent").

43. *See, e.g., Moran v. Burbine: Duty to Inform, Police Deception and the Egregious Standard for* Miranda, 23 NEW ENG. L. REV. 151 (1988). *See also* Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435 (1987).

44. The controversial *Miranda* decision continues to receive mixed reviews. A number of leading commentators defend the merits of the Court's purpose. *See, e.g.*, Marcus, *supra* note 20; White, *Defending* Miranda: *A reply to Professor Caplan*, 39 VAND. L. REV. 1 (1986); Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda," 54 U. CHI. L. REV. 938 (1987). Others criticize its effects. *See supra* note 4.

Several recent Supreme Court opinions appear to whittle away the *Miranda* safeguards. *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977) (police interrogation may not be "custodial" for *Miranda* purposes); Michigan v. Tucker, 417 U.S. 433, 444, 446 (1974) (Chief Justice Rehnquist stated that the *Miranda* warnings are not "themselves protected by the Constitution," but only "prophylactic standards" designed to "provide practical reinforcement" for the fifth amendment); Harris v. New York, 401 U.S. 222 (1971) (incriminating statements obtained in violation of *Miranda* may be admitted into trial to impeach the defendant's conflicting testimony). Professor Stone believes *Tucker* "laid the groundwork to overrule *Miranda*." *See* Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 129-37. *But see* Rhode Island v. Innis, 446 U.S. at 300-301 (the police must recite *Miranda* warnings whenever they expressly question a suspect or engage in its functional equivalent). Though the main litigation points do not focus on the precise wording or format of the warnings, the decisions devote considerable attention to the issue. *See generally supra* note 36 for two of the primary litigation points of the decision.

These decisions reflect inconsistent interpretations of the precise wording required by the Court. The controversial case law leading the Supreme Court to address the issue twenty-three years after *Miranda*[45] demonstrates the disparity developing among the lower courts. Judicial action was necessary to standardize the test for determining the constitutional adequacy of litigated warnings.

THE CONTROVERSY AMONG LOWER COURTS

Within months after the *Miranda* decision, district courts in many states addressed the adequacy of warnings recited by police officers during custodial interrogations.[46] The interrogator usually informed the suspect of his right to remain silent, but often failed to convey to the accused his right to consult with an attorney prior to and during the questioning.[47] State courts disagree drastically over the standards imposed by the *Miranda* decision. Many courts consider an ambiguous reference to the defendant's right to an attorney reversible error and overturn serious felony convictions.[48] Other courts refuse to follow these decisions and consider the error harmless.[49] Leading decisions represent both sides of the issue and demonstrate the necessity of the Supreme Court's resolution of the debate.

The Fifth Circuit issued one of the first decisions considering the adequacy of the *Miranda* warnings in *Lathers v. United States*.[50] Though later overruled,[51] *Lathers* laid the foundation for the ensuing debate. Cited by courts on both sides of the issue, *Lathers* established two requirements for sufficient warnings.[52] First, the police must have informed the defendant of his right to have an attorney present. Second, the officers must have conveyed to the defendant that his right was to have an attorney "here and now . . . before he uttered a syllable."[53] The phraseology of a sufficient warning remained at issue, however, as circuit courts developed different standards for meeting the *Lathers* requirements.

Several early decisions clearly violated the standards established by *Miranda*. By expressly linking the right to an appointed counsel to some

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45. *Duckworth*, 109 S. Ct. 2875.

46. *See, e.g.*, State v. Mumbaugh, 107 Ariz. 589, 491 P.2d 443 (1971). *Mumbaugh* was filed September, 1966, three months after the Supreme Court handed down the *Miranda* decision. *Id.* at 597, 491 P.2d at 451.

47. The cases addressing the issue usually involve a common "misstated" version of the warnings. *See infra* note 58. Generally, the police inform the suspects of all of their rights required under *Miranda* and then add a confusing qualifier concerning the availability of an appointed attorney.

48. *See infra* note 60 and accompanying text.

49. *See infra* notes 77-85 and accompanying text.

50. 396 F.2d 524 (5th Cir. 1968).

51. United States v. Contreras, 667 F.2d 976 (11th Cir. 1982), held that *Prysock* overruled *Lathers* and its progeny, which deemed insufficient a warning to a defendant that "if he was unable to hire an attorney . . . the Court would appoint one for him." *Lathers*, 396 F.2d at 535. "The *Miranda* warning must effectively convey to the accused that he is entitled to . . . counsel *here and now*. If the words are subject to the construction that such counsel will be available only in the future, *Miranda* has not been obeyed." *Id.* (emphasis added). For a discussion of *Prysock* and its progeny, *see infra* notes 97-107 and accompanying text.

52. *Lathers*, 396 F.2d at 535.

53. *Id.*

unknown time in the future, the police officer fails to convey adequately to the accused that he has the right to an attorney prior to and during interrogation.[54] *United States v. Garcia*[55] set the standard by reversing the defendant's conviction for importing narcotics. The court held that the *Miranda* warnings the police recited were inconsistent and did not inform the defendant of her right to have an attorney present before she said a word.[56] In *United States v. Cassell*,[57] the court explained that this type of defective warning is misleading and could prevent the defendant from understanding this right.

Many state and federal law enforcement agencies adopted a standard formula for the *Miranda* warnings.[58] Though litigated from its inception, the police continued to repeat this version of the warnings through 1989.[59] Sharply divided lower courts have interpreted the adequacy of this warning inconsistently so that defendants convicted of the same or similar charge receive different treatment.[60]

United States ex rel. *Williams v. Twomey*[61] was one of the leading cases to find these warnings insufficient. In a *habeas corpus* proceeding, the defendant petitioned the court to overturn his murder conviction based on the alleged inadequacy of the warnings.[62] The interrogating officer read the

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54. *See, e.g., Prysock*, 453 U.S. at 360.

55. 431 F.2d 134 (9th Cir. 1970). The federal agents gave the defendant several *Miranda* warnings using the same standard formula. First, they told her that she had the right to counsel "when she answered any questions." Then, they explained that she could "have an attorney appointed to represent you when you first appear before the United States Commissioner or the Court." *Id.* at 134.

56. *Id.*

57. 452 F.2d 533 (7th Cir. 1971). The warnings were almost identical to those in *Garcia*. The controversial phrase informed the defendant of his right to appointed counsel "*if and when you go to Court or before a United States Commissioner.*" *Id.* at 541 (emphasis in original).

58. The following version, or very similar version, of the *Miranda* warnings is at issue in the cases discussed herein (unless indicated otherwise), including *Duckworth v. Eagan*:

> "Before we ask you any questions, it is our duty as police officers to advise you of your rights and to warn you of the consequences of waiving your rights."
> "You have the absolute right to remain silent."
> "Anything you say to us can be used against you in court."
> "You have the right to talk to an attorney before answering any questions and to have an attorney present with you during questioning."
> "You have this same right to the advice and presence of an attorney whether you can afford to hire one or not. *We have no way of furnishing you with an attorney, but one will be appointed for you, if you wish, if and when you go to court.*"
> "If you decide to answer questions now without an attorney present, you will still have the right to stop answering at any time. You also have the right to stop answering any time until you talk to an attorney."

United States *ex rel.* Williams v. Twomey, 467 F.2d 1248, 1249 (7th Cir. 1972) (emphasis added). *See also* Eagan v. Duckworth, 843 F.2d 1554, 1555-56 (7th Cir. 1988).

59. This version is cited from 1969, in Square v. State, 283 Ala. 548, 219 So. 2d 377 (1969), through 1989, in *Duckworth*, 109 S. Ct. at 2875.

60. *See, e.g., Square*, 283 Ala. at 551, 219 So. 2d at 379, where the court reversed and remanded the defendant's first degree murder conviction on the basis of the defective warning. *But see* State v. Sterling, 377 So.2d 58, 63 (La. 1979), where the court refused to reverse the defendant's murder conviction, finding this version of the warnings adequate.

61. 467 F.2d 1248 (7th Cir. 1972).

62. *Id.* at 1250.

warnings printed on a standard Indiana Police Department form.[63] Relying upon the language of the *Miranda* decision,[64] the court held the warning was "equivocal and ambiguous" and conveyed a contradictory message to the indigent defendant.[65] On one hand, the *Williams* warnings informed the defendant of his right to appointed counsel prior to answering questions. On the other hand, they explained that counsel would not be available until a later time. The court held the warnings misleading and reversed the denial of the defendant's petition because the inconsistent information could have caused the "unsophisticated indigent" to give up his right to counsel at "a critical moment."[66]

Prior to *Williams* a significant number of courts from a variety of states reached the same conclusion after reviewing these or very similar warnings.[67] One court established a test for determining whether the warnings recited are equivocal to those contained in *Miranda*.[68] After applying the test to the warnings at issue, subsequent decisions held that the message conveyed by the *Williams* warnings is confusing and fails to provide the defendant with a clear understanding of his rights.[69] Since *Miranda* explicitly requires interrogators to be effective and express,[70] the *Williams* set of warnings do not suffice.[71]

A number of other courts reached the opposite conclusion. *United States v. Lacy*[72] held the identical warnings at issue in *Williams* constitutionally sufficient. The court acknowledged that the law enforcement official's warning stated that the court would appoint an attorney at a later date.[73] The warning, however, also informed the defendant that he had the right to refrain from answering questions until that unknown, future time.[74] The court held that the only logical conclusion a defendant could reach from the warnings was that the

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63. *Id.* at 1249. The opinion contained the warnings as stated in full. *See supra* note 58.

64. The court cited the following passage from *Miranda* to justify its position:

> The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent — the person most often subjected to interrogation — the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurances that he was truly in a position to exercise it.

Williams, 467 F.2d at 1250 (quoting *Miranda*, 384 U.S. at 473).

65. *Id.*

66. *Id.*

67. *See, e.g.*, United States v. Garcia, 431 F.2d 134 (9th Cir. 1970); Sullins v. United States, 389 F.2d 985 (10th Cir. 1968); Fendley v. United States, 384 F.2d 923 (5th Cir. 1967); *Square*, 283 Ala. 548, 219 So. 2d 377; State v. Creach, 77 Wash. 2d 194, 461 P.2d 329 (1969).

68. Commonwealth v. Singleton, 439 Pa. 185, 190, 266 A.2d 753, 755 (1970), held that the test for determining whether a version of the *Miranda* warnings is constitutionally defective is whether the "offered version is more likely to give a suspect a better understanding of his constitutional rights and a heightened awareness of the seriousness of his situation" (emphasis omitted).

69. *See, e.g., Eagan*, 843 F.2d 1554; Commonwealth v. Johnson, 484 Pa. 349, 399 A.2d 111 (1979).

70. *"[O]nly by effective and express* explanation to the indigent . . . can there be assurance. . . ." (emphasis added). *Miranda*, 384 U.S. at 473. *See also supra* note 64.

71. *Johnson*, 484 Pa. at 352, 399 A.2d at 115.

72. 446 F.2d 511 (5th Cir. 1971).

73. *Id.* at 513.

police could not question him until the court appointed an attorney.[75] Given his expressed right to an attorney during and prior to questioning, together with the police's inability to provide an attorney at the station, the defendant presumably realizes that the police cannot question him.[76]

Many courts chose to follow *Lacy* and expressly declined to follow the holding in *Williams*.[77] *People v. Swift* squarely rejected the defendant's contention that these warnings were confusing.[78] First, the court held that *Miranda* does not require the police to furnish the accused with counsel.[79] It follows that if the police do not have counsel available, they may not question the defendant until the court provides counsel.[80] Second, the warnings explain to the indigent defendant that he has the right to counsel prior to answering any questions and may stop the interrogation at any time if he decides he needs counseling.[81] The court held that an ordinary person would understand the warnings and refused to provide an additional warning regarding the manner in which the court would appoint counsel.[82]

Courts adopting the *Lacy* line of reasoning base their decision upon an interpretation of the *Miranda* decision that appears contrary to *Lathers*. These courts claim that since *Miranda* does not require the police to produce an attorney on call, the defendant does not actually have the right to receive counsel here and now.[83] The courts assume that defendants know that the police will not proceed with questioning since the defendant must wait for the court to appoint an attorney. The warning contains all of the elements required by *Miranda* and merely adds qualifying language to explain when an attorney will be available for those choosing to invoke their right.[84] In their entirety, the warnings' failure to inform the defendant of his right to counsel is counterbalanced by the additional statement that the defendant may stop answering at any time.[85]

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74. *Id.*
75. *Id.*
76. *Id.*
77. *See, e.g.*, Wright v. North Carolina, 483 F.2d 405 (4th Cir. 1973); Schade v. State, 512 P.2d 907 (Alaska 1973); *Mumbaugh*, 107 Ariz. 589, 491 P.2d 443; People v. Swift, 300 N.Y.S.2d 639, 32 A.D.2d 183 (1969); Rowbotham v. State, 542 P.2d 610 (Okla. 1975); Grennier v. State, 70 Wis. 2d 204, 234 N.W.2d 316 (1975) (though this court found the warning constitutionally sufficient, it specifically recommended against its use).
78. 300 N.Y.S.2d at 643, 32 A.D.2d at 188.
79. "'This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners.'" *Swift*, 300 N.Y.S.2d at 643, 32 A.D.2d at 186 (quoting *Miranda*, 384 U.S. at 474).
80. *Id.*
81. *Id.* at 644, 32 A.D.2d at 187.
82. *Id.*
83. *See, e.g.*, Mayzak v. United States, 402 F.2d 152, 155 (5th Cir. 1968).
84. *Grennier*, 70 Wis. 2d at 215, 234 N.W.2d at 322. Justice Heffernan made an interesting comment when he stated that "it is inexplicable why some police departments, almost ten years after *Miranda*, continue to fail to use the recommended form." *Id.* He held the warnings at issue "minimally constitutionally correct. . . ." *Id.* Note that the same warnings are at issue in *Duckworth*, more than twenty years after the *Miranda* decision.
85. *Id.* at 215, 234 N.W.2d at 321-22 (failure to warn the defendant of the right to have counsel appointed immediately was rendered harmless by the additional statement that the defendant had the right to remain silent); *Schade*, 512 P.2d at 915-16 (the additional language did not dilute the meaning of the rights set forth in the balance of the warnings).

Two relatively recent cases evaluate the dichotomy among the courts and follow different sides of the issue. The Supreme Court of Montana considered the rationale of *Lacy* and its progeny unconvincing in *State v. Dess*.[86] Since the defendant could reach several conclusions from the confusing language, the court held that the warnings conflict with *Miranda*'s requirement that interrogators be effective and express.[87] The *Miranda* protections are intended for defendants incapable of the sophisticated logical analysis presumed by the opposing courts.[88]

The Supreme Court of Louisiana, however, cited the *Lacy* opinion with approval in *State v. Sterling*.[89] Given the custodial context of the warnings, the court held them fully adequate to inform the defendant of his right to refuse to answer any questions in the absence of an appointed lawyer.[90] Though the language of the warnings, out of context, may appear misleading, *Sterling* refuses to accept that a suspect in custody is incapable of the simple logical deduction.[91]

These conflicting standards created inconsistent treatment of defendants in similar situations.[92] The decisions did not hinge upon the severity of the crime or the individual characteristics of the defendants, but upon the application of *Miranda*.[93] The United States Supreme Court, though, hesitated to review the factual application of the *Miranda* decision by lower courts.[94] After fifteen years of conflicting interpretations, the Court issued *California v. Prysock*[95] to clarify the purposes of *Miranda*.[96]

CALIFORNIA V. PRYSOCK

The Supreme Court issued a *per curiam* decision in response to a California Court of Appeals' ruling that required a "virtual incantation" of the

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86. 184 Mont. 116, 602 P.2d 142 (1979).
87. *Id.* at 122, 602 P.2d at 145. *See also supra* note 64.
88. *Dess*, 184 Mont. at 121, 602 P.2d at 145 (citing *Williams*, 467 F.2d at 1250). *See also* Commonwealth v. Johnson, 484 Pa. at 355, 399 A.2d at 113, which held that *Lacy* requires defendants "to possess sophisticated knowledge of logic." Those capable of such reasoning are not the object of the *Miranda* safeguards. The court relies upon the language of a California Supreme Court opinion cited by the Supreme Court in *Miranda*: "The defendant who does not ask for counsel is the very defendant who most needs counsel." *Miranda*, 384 U.S. at 471 (citing People v. Dorado, 62 Cal. 2d 338, 351, 398 P.2d 361, 369-70, 42 Cal. Rptr. 169, 177 (1965)).
89. 377 So. 2d 58 (La. 1979).
90. *Id.* at 63.
91. *Id.*
92. *See supra* note 60.
93. It is interesting to note the variety of offenses at issue in the cases discussed above. Ranging from mail fraud to murder, the severity of the offense does not appear to influence the court. *Square*, 283 Ala. 548, 219 So. 2d 377 reversed the defendant's first degree murder charge, while *Mumbaugh*, 107 Ariz. 589, 491 P.2d 443 affirmed the defendant's conviction for first degree murder. Other offenses for which the court refused to reverse on the basis of the warnings' adequacy include stealing a mail bag (Gilpin v. United States, 415 F.2d 638 (5th Cir. 1969)) and robbery (*Johnson*, 484 Pa. at 349, 399 A.2d at 116). Convictions that courts have reversed on this basis include transporting stolen motor vehicles interstate (*Lacy*, 446 F.2d at 512), mail fraud (*Massimo*, 463 F.2d at 1171) and robbery (*Swift*, 300 N.Y.S.2d 639, 32 A.D.2d 183).
94. *Prysock*, 453 U.S. at 355.
95. 453 U.S. 355.

precise language contained in the *Miranda* decision.[97] The defendant was a minor suspected of murder.[98] After the arresting officer advised him of his *Miranda* rights, the defendant refused to talk. The police notified the minor's parents, who then arrived at the station.[99] When the defendant agreed to talk, the police restated the warnings.[100] The defendant claimed that the warnings advised him inadequately of his right to have counsel before and during interrogation because of the sequence in which the officer read them.

The Supreme Court upheld the adequacy of the warnings even though they were not in the precise language or order provided by *Miranda*.[101] The Court distinguished the warnings at issue in *Garcia* and other cases[102] cited by the defendant, which refer the suspect's right to appointed counsel to a future point in time.[103] The Court indicated that a defendant must prove more than the possibility of ambiguity in the order or language before a court will find them insufficient.[104] Thus, the Court instructed the lower courts that a rigid application of the exact *Miranda* decision is unnecessary.

The impact of the *Prysock* decision is minimal. Though reiterating the *Miranda* decision's position that "no talismanic incantation was required," the Court failed to provide a direct answer to the debate raging among the lower courts. By quickly dismissing *Garcia*, the Court left open the warnings at issue in *Williams* and *Lacy*. Rather than settle the issue, the Court may have instigated greater confusion. The dissenters noted that the majority opinion focused upon the order of the warnings rather than the substance of the rights conveyed.[105] Moreover, the dissent claimed that the warnings never tied together the defendant's general right to an attorney and his right to have the

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96. *Id.*
97. *Id.*
98. *Id.* at 356.
99. *Id.*
100. The officer stated the following on tape:

> You have the right to remain silent. This means you don't have to talk to me at all unless you so desire. Do you understand this? If you give up the right to remain silent, anything you say can and will be used against you in a court of law. Do you understand this? You have the right to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this? You also, being a juvenile, have the right to have your parents present, which they are. You have the right to a lawyer appointed to represent you at no cost to yourself. Do you understand this?

Immediately following these warnings, the defendant's mother requested that the officer turn off the tape and asked if the defendant could have an attorney appointed later if he agreed to talk now. The officer assured her that he could. The majority concluded that Mrs. Prysock's concern indicated that the officer clearly stated the defendant's right to counsel prior to and during the interrogation. *Id.* at 361 n.3. The dissent, however, argued that her confusion proved the inadequacy of the warnings. *Id.* at 364-65 (Stevens, J., dissenting).

101. *Id.* at 361.
102. The defendant cited *Garcia*, 431 F.2d at 134, People v. Bolinski, 260 Cal. App. 2d 705, 67 Cal. Rptr. 347 (1968) (the police warned one defendant that "if he was charged . . . he would be appointed counsel" and warned the other defendant, who was in Illinois but about to be transferred to California that "the court would appoint [an attorney] in Riverside County [California]") and People v. Stewart, 267 Cal. App. 2d 366, 73 Cal. Rptr. 484 (1968) (police warned that "[an attorney] will be appointed for you, if you wish, before you go to court").
103. 453 U.S. at 360.
104. *Id.* at 361.
105. *Id.* at 363 & n.2 (Stevens, J., dissenting).

court appoint one if he could not afford it.[106] The right to an attorney was thus linked to a future time. The decision may in fact relay to the police and lower courts that they have flexibility to "play with" the wording of the warnings.[107] The case law succeeding *Prysock,* however, reveals the decision's minimal impact and demonstrates the importance of *Duckworth v. Eagan.*

United States v. Contreras[103] begins a line of cases interpreting the impact *Prysock* had upon the preceding court decisions. The court reviewed warnings analogous to those at issue in *Prysock.*[109] The defendant relied upon *Lathers* in contending that the warnings were insufficient.[110] The court rejected the defendant's position and held that *Prysock* overruled *Lathers* and its progeny.[111] Since *Miranda* does not expressly provide the defendant with the right to have counsel appointed here and now, the warnings suffice as long as they do not condition the right to counsel upon a future event. The court held the warnings in *Contreras* complied with *Miranda.*[112]

The confusion surrounding *Prysock, Lacy* and *Lathers* culminated in two opinions handed down recently by the Seventh Circuit.[113] In *United States v. Sanchez,*[114] the district court convicted the defendant of unlawful possession of a gun. The arresting officer advised the defendant that "if he could not afford an attorney, the court would appoint him an attorney."[115] The defendant analogized these warnings to the warnings in *Williams.*[116] The court distinguished the two types of warnings and held the warnings at issue sufficient.[117]

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106. *Id.* at 362 (Stevens, J., dissenting). *See also* Kamisar, *Police Interrogation and Confessions: Will California v. Prysock Prove to be a Substantial Setback for* Miranda?, in 3 J. CHOPPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1980-81, at 138 (1982).

107. Kamisar, *supra* note 106, at 146. Kamisar predicted that the Supreme Court would eventually limit *Prysock* to its unique facts. He suggested that the police may have disturbed the normal order of the *Miranda* warnings to inform the minor that he had the right to have his parents present, thus deviating from the standard flow for good cause. *See also Criminal Law: The Accused's Right to* Miranda *Warnings — or Their Functional Equivalent,* 21 WASHBURN L.J. 427-33 (1982), in which the author notes that *Prysock* acknowledges the ability of the police to recite the functional equivalent of *Miranda* but fails to provide the lower courts guidelines as to an adequate substitute.

108. 667 F.2d 976 (11th Cir. 1982). In *Duckworth,* 109 S. Ct. at 2881, the majority opinion quickly dismisses *Prysock* as inapplicable to the warning cited in that case.

109. 667 F.2d at 978. A DEA agent translated the warnings into Spanish for the defendant and stated the following after advising the defendant of his right to counsel: "If you want an attorney but cannot pay for one on your own, the United States Magistrate in this city or in the Federal Court will assign you an attorney free of charge." *Id.*

110. *Id.* at 979. Specifically, the defendant quoted the passage cited *supra* note 51 from *Lathers,* 396 F.2d at 535.

111. 667 F.2d at 979. The court held *Prysock* to mean "that a *Miranda* warning is adequate if it fully informs the accused of his right to consult with an attorney prior to questioning and does not condition the right to appointed counsel on some future event."

112. *Id.*

113. *Williams,* 467 F.2d 1248, was also decided by the Seventh Circuit.

114. 859 F.2d 483 (7th Cir. 1988).

115. *Id.* at 484.

116. *Id.* at 485.

117. *Id.*

The court recognized the weakness of its distinction.[118] The court explained that the warnings at issue in *Williams* stated bluntly that the police could not provide counsel immediately and that the defendant would have to wait until an unknown, future time to obtain an attorney.[119] The warnings at issue in *Sanchez* simply explained to the suspect that only the court could appoint an attorney, without inferring how long it might take. This type of warning forces the defendant to estimate the future date and fails to warn the defendant of his right to have an attorney present prior to answering any questions.[120]

In an effort to justify its decision to uphold the warnings, the court turned to the substantive issue of whether the police informed the defendant of his fifth amendment rights.[121] Since the Supreme Court recently held that the Constitution does not require the *Miranda* warnings,[122] the *Sanchez* court intimated that the inadequately stated warnings may not provide a constitutional basis for excluding a confession.[123]

A few months prior to *Sanchez*,[124] the Seventh Circuit decided *Eagan v. Duckworth*.[125] In May, 1982, Eagan reported seeing the naked body of a woman lying on the shore of Lake Michigan to the Chicago police.[126] The defendant took the police to the beach where the woman lay crying for help. Upon their approach the victim recognized Eagan and accused him of stabbing her.[127] Eagan admitted that he and his friends had been with the woman earlier but that a group of men attacked him and abducted the victim.

Prior to initial questioning by Indiana police, Eagan signed a waiver form containing a version of the *Miranda* warnings identical to the warnings at issue in *Williams*.[128] Eagan maintained his exculpatory explanation. The police placed the defendant in jail and repeated questioning the next day after the defendant had signed an additional waiver form.[129] The defendant then made a full confession to the stabbing and took the officers back to the scene of the crime on the beach, revealing the knife used for the stabbing and several items of clothing.[130] A jury for the United States District Court for the Northern

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118. *Id.* "It would be folly to pretend that our cases establish a clear principle."
119. *Id.*
120. *Id.*
121. *Id.* The court stated that "[s]mall variations are far less important than whether the differences threaten achievement of the purposes of the warnings. The dispositive question must be whether the defendant waived his privilege against compulsory self-incrimination, the constitutional right the *Miranda* warnings are designed to protect" (citation omitted).
122. *See* Moran v. Burbine, 475 U.S. 412, 449 (1986) (Supreme Court does not perceive the *Escobedo* right to counsel as a full-fledged constitutional right emanating from the sixth amendment). *See also* Oregon v. Elstad, 470 U.S. 298, 305-07 (1985).
123. 859 F.2d at 485-86.
124. The Seventh Circuit decided *Sanchez* on September 30, 1988 and *Eagan* on March 22, 1988.
125. 843 F.2d 1554.
126. *Id.* at 1555.
127. *Id.* Upon seeing the defendant in the presence of the police, the victim exclaimed, "Why did you stab me? Why did you stab me?"
128. *Id.* at 1556. Prior to each interview, the defendant read and signed the standard form provided by the police, which expressed the *Miranda* warnings in terms identical to those at issue in *Williams*. *See supra* note 58.
129. 843 F.2d at 1556.
130. *Id.*

District of Indiana found the defendant guilty of stabbing the victim nine times for refusing to engage in sexual relations with him.[131] The district court judge sentenced Eagan to thirty-five years imprisonment for attempted murder.[132]

The defendant petitioned the district court for a writ of *habeas corpus*, alleging that the police recited constitutionally defective *Miranda* warnings.[133] The court denied the petition and Eagan appealed. The United States Court of Appeals for the Seventh Circuit issued a sharply divided opinion.[134] The majority reversed the district court's denial of the petition and remanded the case to trial for a determination of whether the defendant knowingly and intelligently waived his right to an attorney during a subsequent interrogation.[135]

The court relied primarily upon the logic of its earlier decision in *Williams*, which was still the seminal case for the circuit.[136] The court held that the warning, as stated, implies that non-indigent defendants can have the right to have an attorney present immediately prior to the interrogation, while indigents must wait.[137] The warning also suggests that if the state drops the charge and the accused does not "go to court," he may never have the right to counsel.[138] The Supreme Court granted certiorari to resolve the conflict.[139]

DUCKWORTH V. EAGAN

Duckworth v. Eagan squarely addressed the issue still raging in the the lower courts twenty years after the *Miranda* decision. The Supreme Court reversed the court of appeals' decision and held that the *Miranda* warnings recited by the police were sufficient.[140] Reiterating the issue, the Court stated that the inquiry is simply "whether the warnings reasonably 'conve[y] to a [suspect] his rights as required by *Miranda*.'"[141] The Court rejected the long line of case law following the *Williams* decision and held that the warnings adequately contained all of the requirements set forth in *Miranda*.[142]

The opinion states the Court's reasoning concisely. First, the warning accurately describes the procedure in Indiana for obtaining an appointed attorney.[143] Second, since the defendant will presumably ask[144] when he will

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131. *Id.*
132. *Id.*
133. *Id.* Eagan objected to the "if and when you go to court" provision, which he claimed misled him. He denied understanding that he had the right to appointed counsel prior to answering the interrogator's questions.
134. Judge Coffey filed an eighteen page dissent, tracing the history of the debate regarding the wording of the warnings and sharply criticizing the majority's reversal.
135. 843 F.2d at 1558.
136. *See supra* text accompanying notes 61-66.
137. 843 F.2d at 1557. The Supreme Court in *Duckworth* held that this line of reasoning "misapprehended the effect of the inclusion of 'if and when you go to court.'" 109 S. Ct. at 2880.
138. 843 F.2d at 1557.
139. *Duckworth*, 109 S. Ct. at 2878.
140. *Id.* at 2881.
141. *Id.* at 2880 (quoting *Prysock*, 453 U.S. at 361).
142. *Id.*
143. *Id.* Indiana law provides appointed counsel at the defendant's initial appearance in court.

receive an appointed attorney, the warning merely answers the question ahead of time by stating "if and when you go to court."[145] Third, the Court states that *Miranda* does not provide the defendant with the right to an attorney who is producible on call.[146] The police must warn the accused that he has the right to an attorney before and during the interrogation, and the court will appoint one if he cannot afford one. The police do not have to appoint counsel but must refrain from questioning a suspect until the court appoints one. Finally, the warning as a whole clarifies any ambiguities raised by the questionable phrase "if and when you go to court."[147]

The Court addressed its holding in *Prysock,* which implied that warnings linking the right to counsel to some future time violate *Miranda.*[148] Citing *Prysock,*[149] the Court distinguished the warnings at issue from those linking the court's appointment of counsel to a future point in time *after* the interrogation. Since the *Duckworth* warnings informed the defendant of his right to counsel before and during questioning,[150] they were sufficient.

A strong dissenting opinion espoused the tenets of *Williams* and admonished the majority for misconstruing *Miranda.*[151] The dissenters claimed most defendants are incapable of understanding contradictory warnings and cannot discern their true meaning.[152] Since an attorney is not immediately available and may not be for an indefinite period of time, the defendant may feel pressured into talking to avoid interim imprisonment.[153] Indefinitely delayed interrogation effects a device through which the police may pressure the suspect to speak without the assistance of counsel.[154] Approval of this version of the warnings would condone coercive persuasion and deny the defendant constitutional protection.

THE *MIRANDA* WARNINGS AFTER *DUCKWORTH*

Duckworth v. Eagan is arguably a logical continuation of the trend to overturn *Miranda.*[155] The Supreme Court approved a set of warnings augmenting those prescribed by the original decision.[156] *Duckworth* undeniably grants the police authority to improvise the phraseology of the warnings. Over

144. *Id.* The Court explained, "[w]e think it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask *when* he will obtain counsel." (emphasis in original).
145. *Id.*
146. *Id. See supra* note 79. *See also Mayzak,* 402 F.2d at 155.
147. 109 S. Ct. at 2880-81.
148. *Id.*
149. 453 U.S. at 360. *Prysock* held the warnings insufficient "if the reference to the right to appointed counsel was linked [to a] future point in time after the police interrogation."
150. 109 S. Ct. at 2881.
151. The dissenters claimed that the majority reached its decision "by seriously mischaracterizing [*Miranda*]." 109 S. Ct. at 2886 (Marshall, J., & Brennan, J., dissenting) (Blackmun, J., & Stevens, J., dissenting as to Part I).
152. *Id.* at 2887 (Marshall, J., Brennan, J., Blackmun, J., & Stevens, J. dissenting). The dissent characterizes the typical recipient as "frightened suspects unlettered in the law."
153. *Id.* at 2888.
154. *Id.*
155. *See supra* note 4.
156. *See supra* note 58 and accompanying text.

time, the net effect of this discretionary authority threatens to compromise the substance of the rights conveyed.

Although *Duckworth* appears to encourage deceptive versions of the *Miranda* warnings, this result is unlikely for several reasons. First, case law following the Court's similar ruling in *California v. Prysock* demonstrates negligible deviation from the traditional warnings. Second, the *Duckworth* opinion is based primarily upon, and often cites the language of, the *Miranda* decision. Finally, in settling a long-disputed issue, the opinion enhances the vitality of *Miranda's* spirit while steering the lower courts away from a strict formalistic interpretation. *Duckworth* establishes with finality a fail-safe method for administering the *Miranda* warnings.

First, the impact of the Supreme Court's ruling in *California v. Prysock*[157] provides a basis for determining the potential effect *Duckworth* may have upon lower court decisions. Minor deviations from the original script appeared after *Prysock*,[158] which also seemed to invite abusive police discretion. In *De La Rosa v. State of Texas*,[159] the Fifth Circuit refused to reverse the defendant's murder conviction because of allegedly inadequate warnings. The court recognized the warnings' deficiency but held *Prysock* as controlling.[160] Reversible error occurs only when the police engage in major deviations from the recommended warnings.[161]

The courts continue to keep the police in check by rejecting fatally flawed versions of the warnings and establishing limitations for the flexibility permitted. In *United States v. Connell*,[162] the Ninth Circuit reversed the defendant's theft conviction based upon constitutionally inadequate warnings. The court affirmed *Prysock* but found the version at issue below the minimal standard required.[163] Courts will not accept misleading or confusing recitations in spite of the flexibility encouraged by *Prysock*.[164]

Prysock also minimally affected state law enforcement departments. There is no indication that law enforcement officials have abused their discre-

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157. 453 U.S. 355. *See also supra* text accompanying note100.

158. *See, e.g.*, United States v. Burns, 684 F.2d 1066, 1074-75 (2d Cir. 1982) (failure to state expressly that the defendant has the right to an attorney during questioning does not render warnings inadequate when, taken in their entirety, they made the right clear); and United States v. Kimball, 555 F. Supp. 1366, 1377-78 (D. Me. 1983) (minor deviations from *Miranda* tolerated).

159. 743 F.2d 299 (1984).

160. *Id.* at 302.

161. *Id.*

162. 869 F.2d 1349 (9th Cir. 1989).

163. The court held a warning stating that "a lawyer *may* be appointed to represent you" and "if [you] want but cannot afford a lawyer 'arrangements will be made for [you] to obtain a lawyer *in accordance with the law*'" misleading and constitutionally inadequate. *Id.* at 1352-53 (emphasis in original).

164. Henson v. United States, 563 A.2d 1096 (D.D.C. 1989), confirms this conclusion. Relying primarily upon *Duckworth*, the court upheld somewhat embellished warnings but included a strong admonition against using "if and when you go to court" in order to avoid unnecessary litigation. *Id.* at 1098. The court also warned that if police use the statement to confuse defendants purposely, the court may need to reexamine the language. *Id.* (citing *Duckworth*, 109 S. Ct. at 2880 n.6).

tion.[165] State police departments print and issue the state's version of the warnings on cards or forms.[166] The forms generally adhere to the mandates of *Miranda* and *Prysock*. *Duckworth* reiterates the validity of the procedures already adopted by most police departments and eliminates the ambiguities remaining from its earlier decisions.

The language of *Duckworth v. Eagan* reestablishes the solid ground upon which the original decision once stood. Justice Rehnquist's opinion relies primarily upon the reasoning and language of the *Miranda* Court.[167] The Court obtains the required substance[168] and form[169] of the warnings explicitly from the original language. The decision neither overturns nor significantly narrows the scope of the warnings. Affirming its prior decisions,[170] the Rehnquist Court has merely reiterated the substantive principles of *Miranda*.

Finally, rather than weaken the tenets of *Miranda*, the Court has consistently edified its spirit, while discouraging rigid or technical applications. Contrary to the contention that the Court is whittling away the doctrine,[171] prior decisions interpreting other facets of *Miranda* reflect an affirmative reinforcement of its flexible substantive principles. For example, when a state supreme court held *Miranda* imposed a *per se* requirement that the defendant expressly waive his right to counsel prior to questioning, the Supreme Court reversed the decision succinctly.[172] The totality of the circumstances dictate the waiver's validity.[173] The Court refused to adopt the "simple prophylactic

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165. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 999 n.93 (1986), commented that the "potential for abuse created by *Prysock's* holding that verbal variance is permissible does not seem to have been realized." *See also* Sculhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435-61 (1987). Berger, *Compromise and Continuity:* Miranda *Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1010 (1988), notes the various deviations tolerated by lower courts. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 664 (1986), notes the changes in F. Inbau & J. Reid, Criminal Interrogation and Confession (3d ed. 1986), the leading police instruction manual. For example, Grano claims the authors urge police officers to refrain from embellishing the warnings and to read them more narrowly than suggested in the earlier edition, comparing pp. 181-82 of the earlier edition to pp. 220-32 of the latest edition. *Id.* at 664 n.12. Schulhofer, *supra* note 165, at 454, states that the *Miranda* warnings provide much better guidelines for police than if the Court had simply declared interrogation "inherently compelling" and left police agencies to guess what would comply with the Court's constitutional mandates.

166. *See generally* J. MILLS, D. RICHARDSON, & A. SCUDELLARI, THE LAW OFFICER'S POCKET MANUAL 8:11 (1988-89 ed.). The recommended warnings are similar to the version at issue in *Duckworth*. *See supra* note 58.

167. The Court cites *Miranda* throughout the text of the opinion, including a verbatim recitation of the warnings from the original decision. 109 S. Ct. at 2879. Claiming that the warnings "touched all the bases required by *Miranda*," the Court states that the inquiry is simply "whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*." *Id.* at 2880 (citing *Prysock*, 453 U.S. at 361). The dissent, however, claims the majority misread *Miranda*. *Id.* at 2888 (Marshall, J., Brennan, J., Blackmun, J., & Stevens, J., dissenting).

168. *Id.* at 2879 (citing the warnings as stated in *Miranda*, 384 U.S. at 467-74).

169. *Id.* (no rigidity required and functional equivalents suffice).

170. The Court cites with approval all of the decisions allegedly eroding the foundation of *Miranda*. *See supra* note 44.

171. *See supra* note 44.

172. North Carolina v. Butler, 441 U.S. 369 (1979).

173. *Id.* at 374.

rule"[174] urged by the lower court and the dissenters because such a rigid interpretation of *Miranda* does not "speak to the concerns" underlying the decision and misconstrues the purpose of the safeguards provided.[175]

The situation is analogous to the judicial refinement of the sixth amendment right to counsel. Initially, the Supreme Court declared that a defendant had the right to an attorney at trial when charged with any offense, misdemeanor or felony.[176] Seven years later the Court responded to conflicts developing among the lower courts by discouraging rigidity of the rule's application.[177] Without eroding the defendant's fundamental right to counsel, the Court refined its earlier decision. A defendant has the right to counsel only for serious felonies or if actual imprisonment is eventually imposed.[178] The decision reiterated the necessity of adequate counsel during a criminal prosecution but rejected any *per se* rule adopted by the lower courts. Thus, the Supreme Court refuses to legislate narrow rules requiring rote application by lower courts. Broad guidelines established with flexibility create an effective judicial system.

Legal scholars question the future of *Miranda*. A number of commentators even propose alternatives to the *Miranda* safeguards.[179] Ranging from legislative intervention to simple police tactics,[180] the reforms overlook perhaps the best way to obtain a legal confession. The Supreme Court has now provided at least three acceptable versions of the warnings.[181] Returning to the basics of *Miranda*, it is incomprehensible why any law enforcement officer would attempt to impose his own version of the warnings. By providing a standard form with either of the approved versions, police officials will eliminate countless judiciary resources wasted to untangle the syntax and semantics of the warnings and will enable the courts to return to the substantive issues.

CONCLUSION

An indigent defendant charged with a serious criminal offense is in a precarious position. Every word he utters may impact his future. The defendant's need for counsel at this critical moment is undisputed but his resources may not enable him to procure adequate help. The Constitution imposes the

174. *Id.* at 379 (Brennan, J., dissenting).
175. *Id.* at 374.
176. Argersinger v. Hamlin, 407 U.S. 25 (1972).
177. Scott v. Illinois, 440 U.S. 367 (1979).
178. *Id.* at 374.
179. Johnson, *A Statutory Replacement for the* Miranda *Doctrine*, 24 AM. CRIM. L. REV. 303-13 (1986) (*Miranda* Symposium). *See also* Markman, *Yes, A Substitute for the* Miranda *Rules*, The Washington Post, Feb. 14, 1987, at A21, col. 2.
180. *See* Troxell & Bailey, *Will the Suspect Please Speak into the Microphone?*, 27-50-173 ARMY LAW. 46 (May, 1987), for a proposal to tape record all confessions to avoid disputes regarding the message conveyed.
181. The original decision provides explicit phraseology adopted by Chicago and Houston. *See* J. COOK & P. MARCUS, CRIMINAL PROCEDURE 759-65 (1986) for reprinted forms used by the Chicago and Houston police departments. Tomkovicz, *supra* note 165, at 998-99 agrees that "officers would probably do well by sticking to the *Miranda* script." The version approved of in *Duckworth* also provides police with an option. Evidently a number of states have relied upon this version since the inception of *Miranda*. *See supra* text accompanying notes 58-61.

responsibility upon the courts to appoint an attorney for those who request assistance. Prior knowledge that the right exists is imperative. Assuming ignorance, the courts require law enforcement officers to inform the accused of his right to consult with counsel prior to making incriminating statements.

The seemingly trivial issue of providing an accused with constitutional protection plagued lower courts for fifteen years before the Supreme Court decided *Prysock*. Failing to address the issue squarely in *Prysock*, the Court spawned eight more years of uncertainty and confusion. The Court has finally resolved the issue in *Duckworth*. Although this decision initially appears to diminish the strength of *Miranda*, it in fact stabilizes the *Miranda* foundation.

The goal underlying custodial interrogation is to elicit voluntary, true statements from the accused. Almost twenty-five years of reversed convictions and appeals based upon the precise wording of *Miranda* have marred the criminal justice system. The Supreme Court explicitly rejected a rigid formula to ensure that the wording of the warnings would not hinder police procedures. Twenty-three years later the Court affirmed *Miranda* in *Duckworth* and once again offered the police a fail-safe method for administering the warnings.