Duckworth v. Eagan: A Semantical Debate or the Continuing Debasement of Miranda?

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NOTE

DUCKWORTH v. EAGAN: A SEMANTICAL DEBATE OR THE CONTINUING DEBASEMENT OF MIRANDA?

The United States Constitution affords a criminal defendant the opportunity to be represented by counsel under certain circumstances. In particular, the sixth amendment provides a defendant the right to counsel in criminal prosecutions. Additionally, the self-incrimination clause of the fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." While this clause does not directly guarantee a criminal defendant the right to counsel, the United States Supreme Court interprets the self-incrimination clause of the fifth amendment to afford an accused a limited right to counsel prior to and during police interrogation.

In Miranda v. Arizona, the United States Supreme Court held that, prior to questioning, the police must warn an accused of the right to remain silent and the right to consult with an attorney prior to and during interrogation, and that, absent a voluntary and knowing waiver of those rights, any statement made by the accused cannot be used by the prosecution. While offering a standard set of warnings to be used by law enforcement officers during custodial interrogation, the Miranda Court indicated that a "fully effective equivalent" of the enunciated warnings would satisfy fifth amendment requirements. Since Miranda, courts have been receptive to warnings that deviate from the explicit language of Miranda, but are in disagreement

1. "In all criminal prosecutions the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI; see infra notes 62-72 and accompanying text.
2. U.S. CONST. amend. V.
3. "[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." Miranda v. Arizona, 384 U.S. 436, 478 (1966).
5. Id. at 479.
6. See infra notes 80-89 and accompanying text.
7. Miranda, 384 U.S. at 476. The Court stated that "[t]he warnings required . . . are, in the absence of a fully effective equivalent, prerequisites to the admissability of any statement made by a defendant." Id. (emphasis added).
as to what constitutes a fully effective equivalent of *Miranda* warnings. In particular, advisements that indicate that counsel will not be appointed until some point after an accused's questioning have generated substantial confusion among federal and state courts.

In *Duckworth v. Eagan*, the Court considered what form *Miranda* warnings should take, but did little to clarify the confusion. Rather, the Court held that *Miranda* is satisfied when pre-interrogation warnings, in their totality, "reasonably convey" to a suspect the right against self-incrimination. In *Duckworth*, Gary James Eagan was a suspect in a rape and stabbing. Prior to questioning, the police had Eagan sign a voluntary waiver form. The form provided that prior to and during questioning, Eagan had the right to the presence of an attorney. Nevertheless, a later provision in the waiver added: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." Eagan initially gave an exculpatory explanation of his actions, but later, after executing a second waiver of his rights, confessed to the stabbing.

The trial court admitted both of Eagan's statements, and a jury convicted him of attempted murder. The Supreme Court of Indiana affirmed the conviction. The United States District Court for the Northern District of Indiana denied Eagan's petition for a writ of habeas corpus. The United States Court of Appeals for the Seventh Circuit, on an appeal from the denial of a writ of habeas corpus, reversed the District Court decision and remanded the case. Specifically, a majority of the divided panel found the first *Miranda* warning given to Eagan, containing the ambiguous "if and when" language, violative of *Miranda*. The dissenting judge found the majority's approach an overly technical application of *Miranda*. The United

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8. *See infra* notes 90-125 and accompanying text.
9. *See infra* notes 110-40 and accompanying text.
11. *Id.* at 2880 (quoting California v. Prysock, 453 U.S. 355, 361 (1981)).
13. *See infra* note 147.
15. *Id.* (emphasis added).
16. *Id.* at 2877-78.
18. *Id.*
21. *Id.* at 1557-58. The Seventh Circuit remanded the case for a determination of whether Eagan executed a knowing and intelligent waiver of his right to an attorney during the second interrogation. *Id.*
22. *Id.* at 1558 (Coffey, J., dissenting) (citing United States *ex rel.* Williams v. Twomey, 467 F.2d 1248, 1253 (7th Cir. 1972) (Pell, J., dissenting)).
States Supreme Court granted certiorari to review whether "if and when you go to court" language renders 

The Supreme Court, holding the warnings sufficient, reversed the Seventh
Circuit's decision.\footnote{Duckworth v. Eagan, 109 S. Ct. 2875, 2881 (1989). The Court was divided with five
Justices joining in the majority opinion, and four Justices dissenting. \textit{Id.} at 2878.}
Chief Justice Rehnquist, writing for the majority,\footnote{The Chief Justice was joined by Justices White, O'Connor, Scalia, and Kennedy.}
found that Eagan's initial waiver form "touched all of the bases required by
\textit{Miranda}."\footnote{\textit{Duckworth}, 109 S. Ct. at 2880.} The Court explained that the "if and when you go to court"
language simply anticipates a commonplace question which suspects ask re-
garding when they will be able to obtain appointed counsel.\footnote{\textit{Id.} The majority also noted that the waiver "accurately described the procedure for
the appointment of counsel in Indiana." \textit{Id.}}
The Chief Justice concluded that, in their totality, the warnings sufficed because they
did not link the right to counsel with an event that would occur after ques-
tioning and because they "reasonably conveyed" to Eagan his rights under
\textit{Miranda}.\footnote{\textit{Id.}}

In a strong dissent, Justice Marshall rejected the contention that pre-inter-
rogation warnings need only "‘touc[h] all of the bases required by \textit{Mi-
rranda}’"\footnote{\textit{Id.} at 2888 (Marshall, J., dissenting) (quoting \textit{id.} at 2880 (majority opinion)).}
and instead focused on whether the warnings "clearly informed" Eagan of his rights.\footnote{\textit{Id.} at 2886 (citing \textit{Miranda} v. \textit{Arizona}, 384 U.S. 436, 471, 479 (1966)).}
The dissent asserted that an "if and when you go to court" caveat could not clearly inform a suspect of his right to appointed
counsel prior to and during interrogation.\footnote{\textit{Id.}} Rather, such language leads a
suspect to believe that an attorney will not be provided until some indeter-
minable time after questioning.\footnote{\textit{Id.}} Moreover, Justice Marshall chided the
majority for not adequately protecting the rights of the indigent, the people
most frequently subjected to custodial interrogation.\footnote{\textit{Id.}} Labeling the major-
ity's holding a "mockery" of the \textit{Miranda} decision, the dissent stated that it
refused to concur in the "continuing debasement of this historic
precedent."\footnote{\textit{Id.}}

This Note first reviews the limited rights afforded an accused prior to the
Supreme Court's \textit{Miranda} decision, and the case-by-case approach used
by reviewing courts to test the voluntariness of statements made during interro-
gation. This Note then examines the Supreme Court's decision in \textit{Miranda},

\begin{itemize}
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  Justices joining in the majority opinion, and four Justices dissenting. \textit{Id.} at 2878.}
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  \item \footnote{\textit{Id.} The majority also noted that the waiver "accurately described the procedure for
  the appointment of counsel in Indiana." \textit{Id.}}
  \item \footnote{\textit{Id.}}
  \item \footnote{\textit{Id.} at 2888 (Marshall, J., dissenting) (quoting \textit{id.} at 2880 (majority opinion)).}
  \item \footnote{\textit{Id.} at 2886 (citing \textit{Miranda} v. \textit{Arizona}, 384 U.S. 436, 471, 479 (1966)).}
  \item \footnote{\textit{Id.}}
  \item \footnote{\textit{Id.}}
  \item \footnote{\textit{Id.} at 2886-87; \textit{see infra} note 190.}
  \item \footnote{\textit{Id.} at 2886; \textit{see infra} note 181.}
\end{itemize}
focusing on the Court's creation of a limited right to counsel under the self-incrimination clause of the fifth amendment and the Court's rejection of a case-by-case analysis of the admissibility of custodial confessions. Next, this Note scrutinizes Supreme Court and lower court decisions interpreting the *Miranda* Court's requirement that suspects be informed of the right to appointed counsel prior to and during custodial questioning. Specifically, this Note examines judicial treatment of *Miranda* warnings that condition the right to counsel on a suspect's appearance in court. This Note then reviews the majority, concurring, and dissenting opinions in *Duckworth v. Eagan*. This Note observes that the Court could remedy the problem highlighted in *Duckworth*, namely, ambiguously worded pre-interrogation warnings, by endorsing specific *Miranda* language for all pre-interrogation warning and waiver forms. This Note suggests that if the Court is not satisfied with *Miranda*'s requirements, it should explicitly overrule *Miranda* and announce specific warnings that, in the Court's mind, strike an appropriate balance between effective police interrogation and a suspect's right against self-incrimination. This Note concludes that the *Duckworth* Court misread or intentionally disregarded *Miranda*, and predicts that other ambiguously worded pre-interrogation warnings will create confusion for reviewing courts, resulting in inconsistent application of the *Miranda* rule.

I. THE ORIGINS OF INVOLUNTARY CONFESSIONS

A. The Due Process Approach

In *Brown v. Mississippi*, the United States Supreme Court held that confessions compelled through physical beatings were "revolting to the sense of justice" and, therefore, invalid under the due process clause of the fourteenth amendment. In *Brown*, three black males were beaten and whipped by a deputy sheriff and a group of white men until they confessed to murder-


38. The due process clause of the fourteenth amendment provides: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. XIV.
ing a white farmer. Apart from the confessions, there was no evidence of the suspects' participation in the murder. The trial court found the three men guilty of murder and sentenced them to death. The Supreme Court of Mississippi affirmed the death sentence but, upon a writ of certiorari, the United States Supreme Court set aside the convictions. The Court determined that the convictions, secured solely by the heinous activity of the torturers, were violative of due process.

Shortly after Brown, the Court held confessions elicited through psychological coercion equally violative of due process. In Chambers v. Florida, the police took between twenty-five and forty blacks into custody, accusing them of robbing and murdering an elderly white man. The suspects were taken to a prison and repeatedly questioned by the sheriff and a prison guard. After a week of interrogation, during which the suspects were denied visits by counsel, family, and friends, one of the suspects "confessed" to the crime. The prosecution used this statement to convict the suspects of the offense and the prisoners were sentenced to death. The United States Supreme Court, reversing the conviction, noted that excessive psychological pressure, in the form of protracted questioning and cross-examination, was coercive. Thus, the Court determined that statements made subject to those conditions were invalid under the fourteenth amendment.

40. Id. at 279.
41. Id.
43. Brown, 297 U.S. at 287.
44. Id.
46. 309 U.S. 227 (1940).
47. Id. at 230-35.
48. Id.
49. Id. The interrogation included at least one all-night questioning session. Id. at 231.
50. Id. at 235.
51. Id. at 239-40.
52. Id. at 240-41.
B. The Voluntariness Approach

Following Chambers, courts employed a coerced confession doctrine, and reviewed custodial confessions on a case-by-case basis to determine whether, under the totality of the circumstances, a statement was voluntary. In determining voluntariness, courts applied a subjective test, taking into account such factors as the length and intensity of police interrogations, the nature and amount of any inducement, and the individual's age, intelligence, education, and prior experience in dealing with law enforcement officers.

The Supreme Court's decision in Ashcraft v. Tennessee illustrates a subjective approach to a determination of voluntariness. Ashcraft was arrested and accused of being an accessory in the murder of his wife. For thirty-six hours, police refused to allow Ashcraft to make contact outside the police station, while allowing him no sleep or rest, questioning him without respite. While it was uncertain whether Ashcraft actually made an incriminating statement, the Court held that any confession made under such circumstances was involuntary.

53. See Note, supra note 35, at 249-52.
No single litmus-paper test for constitutionally impermissible interrogation has been evolved . . . .

The ultimate test remains . . . the test of voluntariness. 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.

55. See generally Haynes v. Washington, 373 U.S. 503, 504 (1963) (defendant was held for 16 hours and told that he could not contact his wife or an attorney until he "cooperated" with the police by confessing to participation in a robbery). See also Stein v. New York, 346 U.S. 156 (1953); Watts v. Indiana, 338 U.S. 49 (1949); Ward v. Texas, 316 U.S. 547 (1942); Lisenba v. California, 314 U.S. 219 (1941).
56. See Fare v. Michael C., 442 U.S. 707 (1979). The Court stated:
The totality approach permits—indeed, it mandates— inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the [accused's] age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

57. 322 U.S. 143 (1944).
58. Id. at 144.
59. Id. at 153. Indeed, "[t]estimony of the officers shows that the reason they questioned Ashcraft 'in relays' was that they became so tired they were compelled to rest." Id. at 149.
C. The Sixth Amendment Approach

In Escobedo v. Illinois, the Supreme Court moved away from reviewing the admission of confessions according to the voluntariness test and due process standards, focusing instead on an individual's sixth amendment right to counsel during interrogation. In Escobedo, police arrested the defendant and brought him to the police station for questioning concerning the murder of his brother-in-law. The police did not advise Escobedo of his right to remain silent or his right to consult with an attorney. During interrogation, Escobedo asked to see his attorney, who was in the building. The police, however, falsely told Escobedo that his attorney did not want to see him. Subsequently, Escobedo made an incriminating statement to the police which was used to convict him at trial.

In overturning Escobedo's conviction, the Supreme Court held that when a police investigation begins to focus on a particular suspect, and that suspect, after being taken into custody, has not been afforded an opportunity to consult with an attorney, any custodial questioning of the suspect is violative of the accused's sixth amendment right to counsel. The Court reasoned

61. See, e.g., Rogers v. Richmond, 365 U.S. 534, 541 (1961)("ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth").
63. Id. at 490-91. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const. amend. VI. Five weeks before Escobedo, the Supreme Court decided Massiah v. United States, 377 U.S. 201 (1964), which held that the right to counsel attaches at the post-indictment stage of a criminal proceeding. Id.
64. Escobedo, 378 U.S. at 479.
65. Id. at 483.
66. Id. at 481.
67. Id. Indeed, Escobedo's attorney made repeated attempts to see his client but was refused. At one point, Escobedo and his attorney came into view of one another, but were denied an opportunity to consult. Id. at 480-81.
68. Id. at 483. When confronted by another suspect in the murder, Escobedo exclaimed, in the presence of the police, "I didn't shoot Manuel, you did it." Id.
69. Id. at 490-91. The Court, however, limited its holding to the circumstances of the case. Id. at 492.
that Escobedo had become the accused in the murder investigation, and that
the underlying purpose of the police interrogation was to compel Escobedo
to admit his guilt.\textsuperscript{70} Further, the Court noted that because the police did not
inform Escobedo of his right to remain silent, the police implicitly urged him
to make an involuntary statement.\textsuperscript{71} Recognizing that Escobedo's question-
ing constituted a critical stage in the criminal process, the Court asserted
that legal advice was essential to ensure that Escobedo was aware of his
rights.\textsuperscript{72} The Court, therefore, held any statement elicited from the accused
while in police custody, without a warning of the right to counsel and the
right to remain silent, inadmissible at trial.\textsuperscript{73} Significantly, the \textit{Escobedo}
Court extended the right to counsel to the pre-indictment stage of criminal
proceedings.\textsuperscript{74}

II. \textit{Miranda} Changes the Rules Regarding Custodial
Interrogation

Noting inconsistent application of the \textit{Escobedo} principle, the United
States Supreme Court granted certiorari in \textit{Miranda v. Arizona}.\textsuperscript{75} In \textit{Mi-
randa},\textsuperscript{76} the police arrested Miranda and others and took them into police

\textsuperscript{70} \textit{Id.} at 485. The Court concluded:
We have learned the lesson of history, ancient and modern, that a system of crim-
nal law enforcement which comes to depend upon 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.
\textit{Id.} at 488-89 (footnotes omitted).

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{Id.} at 486.

\textsuperscript{73} \textit{Id.} at 490-91.

\textsuperscript{74} \textit{Id.} at 485. The Court, however, qualified its holding.
We hold 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—our adversary
system begins to operate, and, under the circumstances here, the accused must be
permitted to consult with his lawyer.
\textit{Id.} at 492. Justice White's dissent, joined by Justices Clark and Stewart, argued that: "By
abandoning the voluntary-involuntary test for admissibility of confessions, the Court seems
driven by the notion that it is uncivilized law enforcement to use an accused's own admissions
against him at his trial." \textit{Id.} at 496 (White, J., dissenting). The dissent therefore concluded
that the Court's decision is "another major step in the direction of the goal . . . to bar from
evidence all admissions obtained from an individual suspected of crime, whether involuntarily
made or not." \textit{Id.} at 495 (White, J., dissenting).

\textsuperscript{75} 384 U.S. 436, 440 (1966). \textit{Compare} United States v. Childress, 347 F.2d 448 (7th Cir.
1965), \textit{cert. denied}, 384 U.S. 1012 (1966) (the right to an attorney does not attach until the
accused requests one) \textit{with} Collins v. Beto, 348 F.2d 823 (5th Cir. 1965) (whether the accused
requests an attorney is irrelevant, the right still exists).

\textsuperscript{76} In addition to \textit{Miranda v. Arizona}, the Court decided \textit{Vignera v. New York}, on certio-
rari to the Court of Appeals of New York; \textit{Westover v. United States}, on certiorari to the
United States Court of Appeals for the Ninth Circuit; and \textit{California v. Stewart}, on certiorari
custody without warning them of their right to remain silent or their right to consult with an attorney. All four defendants made incriminating statements during police interrogations. These statements were subsequently used against the defendants at trial. The Supreme Court held that the police obtained the defendants' statements under conditions that violated the defendants' fifth amendment right against self-incrimination.

In arriving at its decision, the Court highlighted several cases where overbearing police practices resulted in involuntary confessions. In addition, the Court stressed that modern police interrogation focused on psychological intimidation of the accused. The Court found that psychologically coercive police procedures, gathered from various police manuals and texts, undermined an individual's will to remain silent and compelled that individual to speak. To overcome these pressures, and to secure freedom against self-incrimination, the Court required that the police employ certain safeguards, or their "fully effective equivalent," when questioning a defendant to the Supreme Court of California. The Court noted that in all four cases there was interrogation in a police-dominated atmosphere, resulting in incriminating statements without full warnings of constitutional rights. Miranda, 384 U.S. at 456-58.

77. Miranda, 384 U.S. at 440.
78. Id. All four defendants made oral admissions, and three of the four also signed statements admitting guilt. Id.
79. Id. at 491. Five justices joined in the majority opinion.
82. See Miranda, 384 U.S. at 448-55.
83. Id. at 467.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights. Id. at 455 (citation omitted).
84. Id. at 476. The Court invited Congress or the States to search for other "effective ways of protecting the rights of the individual while promoting efficient enforcement of our
while in custody. The specific safeguards enunciated by the Court required that a suspect be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.85

The Miranda Court indicated that the accused must be afforded these rights throughout interrogation, and that only upon a voluntary, knowing, and intelligent waiver does he relinquish these rights.86 Thus, the Court imposed a heavy burden upon the prosecution to demonstrate that the accused executed such a waiver before a solicited statement becomes admissible at trial.87

By establishing concrete constitutional protections for the accused during custodial interrogation, the Miranda Court sought to provide a “bright line” rule for testing the voluntariness of confessions.88 The Court anticipated that the bright line rule would eliminate the confusion created by the subjective, case-by-case approach of the voluntariness test.89

85. *Id.* at 467. The Court clearly stated, however, that until such a substitute was proffered, the safeguards it set forth must be followed. *Id.*

86. *Id.* at 479.

87. *Id.* In his dissent, Justice Harlan, joined by Justices Stewart and White, concluded that:

The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward “voluntariness” in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

*Id.* at 505 (Harlan, J., dissenting). One commentator remarked: “The difference between the Miranda majority and dissenters lies in their differing views . . . on the social costs of applying the Miranda rule to custodial interrogations—the dissenters predicating it would lead to a decrease in criminal convictions.” Lippman, *supra* note 36, at 257.


89. See *id.*
III. JUDICIAL INTERPRETATION OF MIRANDA'S REQUIREMENTS

Miranda made clear that a recitation of the exact language the Court proposed was not a per se requirement for the admissibility of custodial statements.90 To the contrary, the Court intended that its enunciated warnings were to be used "in the absence of a fully effective equivalent."91 Throughout the Miranda opinion, however, the Court pointed out that any substituted warnings must be equally effective in apprising a suspect of the fundamental rights guaranteed under the fifth amendment.92 Armed with this language, the Supreme Court, along with lower federal and state courts, has been willing to accept warnings that deviate from the explicit language set forth in Miranda.93 The courts, however, have held that substitutes to Miranda requirements are not limitless.

A. The Supreme Court Rejects Miranda Warnings Linking Right to Counsel to a Future Event After Questioning

In California v. Prysock,94 the United States Supreme Court proclaimed that no precise formulation of the Miranda warnings is required to pass constitutional muster.95 The Court found, however, that warnings informing the accused that the right to appointed counsel attaches only after questioning are inadequate to protect the individual's fifth amendment right against self-incrimination.96 In Prysock, police arrested Randall James Prysock, a minor, for murder.97 Prysock initially refused to cooperate with police, but, after speaking with his parents, he consented to police questioning.98 During a tape recorded interrogation, police explained, and Prysock professed to understand, his Miranda rights.99 At trial, however, Prysock attempted to suppress his recorded statements, contending that the warnings did not ad-

90. Miranda, 384 U.S. at 476.
91. Id.
92. See infra note 188.
93. See infra notes 94-140 and accompanying text.
95. Id. at 359.
96. Id. at 360-61.
97. Id. at 356.
98. Id. at 357.
99. Id. When Prysock was first brought to the police station, he was read his rights. Id. at 356. At the recorded session, the police officer sought to clarify these rights and make sure Prysock understood them. Id. During this recitation, the officer also added, between the third and fourth elements of the Miranda rights, that, as a juvenile, Prysock had the right to have his parents present. Id. at 357. At Mrs. Prysock's request, the questioning officer elaborated that Prysock could have an attorney at a later time if he waived his right to counsel now. Id.
vise him of his right to a free attorney prior to and during the police questioning.\textsuperscript{100}

A California trial court denied Prysock's motion to suppress the statements, and a jury convicted him of first-degree murder.\textsuperscript{101} The California Court of Appeal reversed the trial court decision, finding the warnings deficient under \textit{Miranda}.\textsuperscript{102} In effect, the California Court of Appeal held the warnings deficient because of the order in which the police gave them.\textsuperscript{103} The United States Supreme Court granted certiorari and reversed the California Court of Appeal.\textsuperscript{104}

The Supreme Court held that the warnings given Prysock did not suggest any limitations on his right to the presence of counsel during police interrogation, and that the warnings fully conveyed the requirements of \textit{Miranda}.\textsuperscript{105} The Court noted that other courts examining the sequencing of pre-interrogation warnings were not concerned with a verbatim recitation of \textit{Miranda}, but focused on whether police warnings linked the right to appointed counsel to a point in time after police interrogation.\textsuperscript{106} Warnings with a link to a future event, the Court stated, did not fully advise suspects

\begin{footnotes}
\begin{enumerate}
\item Id. at 358.
\item Id. Prysock was also convicted of murder with two special circumstances (torture and robbery); robbery with the use of a dangerous weapon; burglary with the use of a deadly weapon; automobile theft; escape from a youth facility; and destruction of evidence. \textit{Id}.
\item Id. In an unpublished opinion, the California Court of Appeal found the warnings given Prysock inadequate because they did not explicitly inform him of his right to have an attorney appointed before further questioning. \textit{Id.} at 358-59. The California Supreme Court denied a petition for rehearing, with two Justices dissenting. \textit{Id.} at 359.
\item Id. at 361.
\item Id. The Court granted certiorari because the California Court of Appeal essentially laid down a flat rule requiring that the content of \textit{Miranda} warnings be a virtual incantation of the precise language contained in the \textit{Miranda} opinion. . . . Such a rigid rule was not mandated by \textit{Miranda} or any other decision of this Court, and is not required to serve the purposes of \textit{Miranda} . . . . \textit{Id}.
\item Id. at 361. "The warnings given [Prysock] were defective, not because 'the officer did not parrot the language of \textit{Miranda},' but because, in the form in which the warnings were given, they failed to convey the essential information required by \textit{Miranda}." \textit{Id.} at 364 n.2 (Stevens, J., dissenting) (citation omitted).
\item Id. at 361 (majority opinion). The Court cited two cases where such a situation existed. In United States v. Garcia, 431 F.2d 134, 134 (9th Cir. 1970) (per curiam), the court found advice to the defendant that "she could 'have an attorney appointed to represent you when you first appear before the U.S. Commissioner or the Court' " inadequate. Likewise, in People v. Bolinski, 260 Cal. App. 2d 705, 723, 67 Cal. Rptr. 347, 358 (1968), warnings were deemed insufficient where a defendant, who was currently in Illinois but was to be transported to California, was told that " 'the court would appoint [an attorney] in Riverside County [, California].' " The \textit{Prysock} Court noted that both of these cases exemplified a situation in which warnings were invalid because they failed fully to advise the suspect of his right to appointed counsel before police interrogation. \textit{Prysock}, 453 U.S. at 361.
\end{enumerate}
\end{footnotes}
of their *Miranda* rights. The Court concluded, however, that the warnings given Prysock did not suffer from that defect, because the warnings gave complete notice of the right to appointed counsel prior to interrogation.

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### B. Lower Courts in Disagreement as to Sufficiency of Miranda Warnings Linking Right to Counsel to a Future Event After Questioning

Both before and after the *Prysock* decision, trial courts reached contradictory results over warnings which link the right to counsel with an event after police questioning. In *United States ex rel. Placek v. Illinois*, the defendant was advised that if he could not afford an attorney, one would be “appointed through the Court for him.” The defendant argued that the warning did not specifically advise him of his right to immediate appointment of counsel and, therefore, was deficient under *Miranda*. In rejecting the defendant’s argument, the United States Court of Appeals for the Seventh Circuit relied on earlier cases which held that similar warnings effectively advised the accused that no statement would be required until an attorney could be consulted. *Placek*, the court noted, did not involve in-

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107. *Prysock*, 453 U.S. at 360. In both *Garcia* and *Bolinski*, “the reference to appointed counsel was linked to a future point in time after police interrogation, and therefore did not fully advise the suspect of his right to appointed counsel before such interrogation.” *Id.*

108. Dissenting Justices Stevens, Brennan, and Marshall disagreed. They pointed out that suspects must be “adequately informed” of their right to appointed counsel prior to questioning and that *Prysock* was not provided with this “crucial information.” *Id.* at 363-64 (Stevens, J., dissenting). Noting that *Miranda* requires “meaningful advice... in language which [an accused] can comprehend and on which he can knowingly act,” the dissent argued that the warnings given were open to several reasonable interpretations and therefore could in no way be deemed meaningful. *Id.* at 364 n.3 (quoting *Coyote* v. United States, 380 F.2d 305 (10th Cir.), cert. denied, 389 U.S. 992 (1967)).

109. *Prysock*, 453 U.S. at 360-61. “This is not a case in which the defendant was not informed of his right to the presence of an attorney during questioning... or in which the offer of an appointed attorney was associated with a future time in court...” *Id.* at 361 (quoting *United States v. Noa*, 443 F.2d 144, 146 (9th Cir. 1971)).

110. 546 F.2d 1298 (7th Cir. 1976). The case came to the Seventh Circuit on a habeas corpus petition after petitioner was convicted in a bench trial before an Illinois court and after the United States District Court for the Northern District of Illinois dismissed the petition without an evidentiary hearing. *Id.*

111. *Id.* at 1300.

112. *Id.*

113. The court relied on United States v. Adams, 484 F.2d 357, 361-62 (7th Cir. 1973), which in turn relied on United States v. *Lamia*, 429 F.2d 373, 377 (2d Cir.), cert. denied, 400 U.S. 907 (1970). The warnings in *Lamia*, however, were substantially different from those given in *Placek*. In *Lamia*, the defendant was told: “You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you if you wish.” *Lamia*, 429 F.2d at 375 n.1. The warnings do not mention the appointment of counsel attaching at some future time.
ternally inconsistent warnings advising an accused of the right to counsel prior to questioning while explaining that an attorney could not be appointed until a later time.\textsuperscript{114} Further, the court concluded, the warnings given did not “purport to take away in one sentence rights announced in another.”\textsuperscript{115}

In \textit{Lathers v. United States},\textsuperscript{116} the United States Court of Appeals for the Fifth Circuit deemed invalid a warning similar to that given in \textit{Placek}. Specifically, the police warned Lathers that if he was unable to afford an attorney, “the Commissioner or the Court [would] appoint one” for him.\textsuperscript{117} In a strongly worded opinion, the Fifth Circuit stated that \textit{Miranda} warnings must be so clear that they remove all doubt as to the right to counsel prior to questioning.\textsuperscript{118} The court concluded that a warning implying that an attor-

\textsuperscript{114} The court contrasted the present warnings with those given in United States ex rel. Williams v. Twomey, 467 F.2d 1248 (7th Cir. 1972); United States v. Garcia, 431 F.2d 134 (9th Cir. 1970) (per curiam); and Coyote v. United States, 380 F.2d 305 (10th Cir.), \textit{cert. denied}, 389 U.S. 992 (1967).

\textsuperscript{115} \textit{Placek}, 546 F.2d at 1300-01; \textit{see also} Richardson v. Duckworth, 834 F.2d 1366, 1370-71 (7th Cir. 1987) (viewed under the totality of the circumstances, an oral explanation to the defendant that “it [would] take some time” before an attorney would be appointed does not make \textit{Miranda} warnings invalid); Tasby v. United States, 451 F.2d 394, 398-99 (8th Cir. 1971), \textit{cert. denied}, 406 U.S. 922 (1972) (advisement that an attorney would be appointed “at the proper time” . . . does not negate the over-all effectiveness of the warning”); United States v. Oliver, 421 F.2d 1034, 1037-38 (10th Cir. 1970) (remanded to determine whether warning “that if [you] could not afford an attorney, the United States Commissioner . . . would appoint one for [you]” was sufficient under \textit{Miranda}); Klinger v. United States, 409 F.2d 299, 307-08 (8th Cir.), \textit{cert. denied}, 396 U.S. 859 (1969) (warning that you “have the right to have an attorney appointed by the Court for you if you are later charged with a Federal offense” is adequate under \textit{Miranda}); Mayzak v. United States, 402 F.2d 152, 155 (5th Cir. 1968) (an agent’s statement “that the [Federal Bureau of Investigation] could not furnish a lawyer until federal charges were proffered against him does not vitiate the sufficiency of an otherwise adequate warning”).

State courts have also accepted warnings linking the appointment of counsel with some point in time after questioning. \textit{See, e.g.}, State v. Maluia, 56 Haw. 428, 539 P.2d 1200 (1975); Emler v. State, 259 Ind. 241, 286 N.E.2d 408 (1972); and Jones v. State, 69 Wis. 2d 337, 230 N.W.2d 677 (1975).

\textsuperscript{116} 396 F.2d 524 (5th Cir. 1968).

\textsuperscript{117} \textit{Id.} at 535.

\textsuperscript{118} \textit{Id.} The court stated:

The \textit{Miranda} warning must effectively convey to the accused that he is entitled to a government-furnished counsel here and now. If the words are subject to the construction that such counsel will be available only in the future, \textit{Miranda} has not been obeyed. Although there is no talismanic or heraldic abracadabra which must be fulfilled, the offer of counsel must be clarion and firm, not one of mere impressionism. The words must asseverate with conviction that any accused can have a lawyer before speaking. Otherwise, the warning is delusory and the \textit{Miranda} safeguards are illusory.

\textit{Id.} (footnote omitted).
ney would only be appointed “somewhere down the line” is inadequate. Further, the court stressed that an accused in a criminal case must be informed of the right to the presence of counsel prior to speaking.

Similarly, the United States Court of Appeals for the Ninth Circuit addressed the effect of contradictory police warnings on a defendant’s understanding of Miranda rights. In United States v. Connell, the police told the defendant that if he could not afford an attorney one might be appointed to represent him. A written warning, which Connell read simultaneously, stated, however, that arrangements would be made in accordance with the law if Connell could not afford an attorney. The Ninth Circuit noted that other circuit decisions found Miranda warnings adequate even though the warnings failed to state explicitly the right to have an attorney present prior to and during questioning, provided that right could be easily inferred from the totality of the warnings given. Here, however, the Ninth Circuit labeled the warnings given “affirmatively misleading,” because, taken together, they created confusion and were open to misinterpretation.

C. “If And When You Go To Court” Caveat Adds to Lower Court Confusion

Miranda warnings advising that an attorney will be appointed “if and when you go to court” have caused considerable dissension and confusion.

119. Id.

120. Id. Cf. United States v. Contreras, 667 F.2d 976, 979 (11th Cir.), cert. denied, 459 U.S. 849 (1982) (holding that Prysock effectively overruled Lathers and any other precedent which required Miranda warnings to “convey to the accused his right to appointed counsel ‘here and now’”). Note the court’s closing comment, however, which states: “The warnings [given to the defendant] did not condition appointment of an attorney on any future event and therefore were not deficient.” Contreras, 667 F.2d at 979; see also United States v. Garcia, 431 F.2d 134 (9th Cir. 1970) (per curiam); Sullins v. United States, 389 F.2d 985 (10th Cir. 1968); Fendley v. United States, 384 F.2d 923 (5th Cir. 1967).

121. 869 F.2d 1349 (9th Cir. 1989).

122. Id. at 1350 (emphasis in original).

123. Id. The oral warning included:

[T]he right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. However, you must make your own arrangements to obtain a lawyer and this will be at no expense to the Government. If you cannot afford to pay for a lawyer, one may be appointed to represent you.

Id. (emphasis in original). In contrast, the written warning stated, in pertinent part: “I further understand that if I cannot afford to pay for a lawyer and want one arrangements will be made for me to obtain a lawyer in accordance with the law.” Id. at 1350-51 (emphasis in original).


125. Connell, 869 F.2d at 1352-53.
among reviewing courts.126 In Massimo v. United States,127 the United States Court of Appeals for the Second Circuit held that “if and when” warnings were not fatal to the effectiveness of Miranda rights. In Massimo, the police advised the defendant upon arrest that he had the right to appointed counsel before and during questioning. The police, however, also told Massimo that they could not furnish him with an attorney at the present time, and that an attorney would be appointed to represent him “if and when he went to court.”128 The Second Circuit held that Massimo could only conclude from the warnings that “since he was clearly entitled to have a lawyer present during questioning and since no lawyer could now be provided, he could not now be questioned.”129

In United States ex rel. Williams v. Twomey,130 however, the United States Court of Appeals for the Seventh Circuit held an identical warning to be a clear violation of Miranda.131 In Williams, the court found that an attempt to question a suspect after informing him that a court could not immediately provide counsel was the type of practice anticipated and condemned by Mi-

128. Id. at 1173. The waiver form signed by Massimo stated, in part:
(c) You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
(d) You have the same right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of furnishing you a lawyer but one will be appointed for you, if you wish, if and when you go to court.
Id. (emphasis in original).
130. 467 F.2d 1248 (7th Cir. 1972).
131. Id. at 1250. The court found the “if and when you go to court” warning not an “effective and express explanation;” to the contrary, it was equivocal and ambiguous. In one breath appellant was informed that he had the right to appointed counsel during questioning. In the next breath, he was told that counsel could not be provided until later . . . The entire warning is therefore, at best, misleading and confusing and, at worst, constitutes a subtle temptation to the unsophisticated, indigent accused to forego the right to counsel at this critical moment.

Id.
The Seventh Circuit stated that a warning advising a defendant of
the right to consult with counsel must be clear and unequivocal, not mislead-
ing and confusing like the “if and when” language. Therefore, the court
asserted, an “if and when” warning fails to convey to the accused an effective
and express explanation of Miranda rights.

The Seventh Circuit has attempted to reconcile cases such as Placek, in
which the warning refers to the court’s role in appointing counsel, with cases
such as Williams, which link the appointment of counsel with some time
after questioning. In United States v. Sanchez, the United States Court of
Appeals for the Seventh Circuit found the variation in the conflicting circuit
court approach to the wording of Miranda warnings to be “one of de-
gree.” In Sanchez, the arresting officer told the defendant that if he could
not afford an attorney, the court would appoint one for him. En route to
the police station, Sanchez made incriminating statements which were subse-
quently used against him at trial. Noting that the police recited to
Sanchez his other Miranda rights, that Sanchez had experience with the
criminal justice system, and that the defendant was not coerced into making
a statement, the court stated that it was confident that admitting Sanchez’s
incriminating statements would not deprive him of his right against self-in-
crimination. The court therefore focused on whether there was a valid
waiver of the privilege against self-incrimination.

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132. Id. at 1251. The dissent, however, found this an “overly technical application of the
Miranda rule.” Id. at 1253 (Pell, J., dissenting).
133. Id. at 1250.
134. Id.; see also United States v. Cassell, 452 F.2d 533, 541 (7th Cir. 1971) (“if and when”
language is insufficient to inform a defendant of the right to appointed counsel during interro-
gation); Gilpin v. United States, 415 F.2d 638, 641 (5th Cir. 1969) (“if and when” language
does not convey the notion that a defendant is entitled to a lawyer then and there); Square v.
State, 283 Ala. 548, 550, 219 So.2d 377, 378-79 (1968) (“if and when” warning insufficient
under Miranda); Moore v. State, 251 Ark. 436, 442-43, 472 S.W.2d 940, 944 (1971) (“if and
when” language does not comply with Miranda); State v. McBroom, 394 N.W.2d 806, 812
(Minn. Ct. App. 1986) (“if you appear in court” caveat was improper, but statement made in
response to warning was not incriminating and new trial not required); State v. Dess, 184
Mont. 116, 120-22, 602 P.2d 142, 144-45 (1979) (“if and when” warning is inconsistent with
Miranda and therefore defective); State v. Robbins, 4 N.C. App. 463, 464-65, 167 S.E.2d 16,
17-18 (1969) (“if and when” warning did not effectively apprise defendant of his Miranda
rights); Commonwealth v. Johnson, 484 Pa. 349, 351-57, 399 A.2d 111, 112-14 (1979) (“if and
when” statement is “inadequate to fully inform appellant of his constitutional rights”).
136. Id. at 485. The court also noted that “[i]t would be folly to pretend that our cases
establish a clear principle.” Id.
137. Id. at 484.
138. Id.
139. Id. at 485-86.
140. Id. at 484-85.
Sanchez exemplifies a return to the pre-Miranda practice of judging the adequacy of the custodial warnings on a case-by-case basis. Significantly, a return to a subjective approach undermines the Miranda Court's intent to utilize a bright line rule for determining the voluntariness of confessions.

IV. DUCKWORTH v. EAGAN: STRETCHING MIRANDA BEYOND ITS LIMITS

In Duckworth v. Eagan, the United States Supreme Court reduced the test for determining the adequacy of Miranda requirements to a simple inquiry as to whether the warnings "reasonably conveyed" to a suspect the fifth amendment right against self-incrimination. In Duckworth, Eagan reported to a friend on the Chicago police force that he had seen a woman's body, which had been stabbed, lying along the beach of Lake Michigan. Eagan voluntarily led several police officers to the site where he had seen the body, whereupon the victim, still alive, immediately identified Eagan as her assailant. While Eagan admitted being with the victim earlier that night, he denied any involvement in the crime and contended that both he and the victim were attacked by a group of men who then abducted the woman.

The following morning, Eagan voluntarily went to the police station for further questioning. Prior to interrogation, the police, reading from a waiver form, told Eagan that he had the right to counsel prior to and during questioning, and that this right existed even if he could not afford to hire an attorney. After signing the form, Eagan repeated his

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142. Id. at 2876-77.
143. Id. at 2877. The victim, upon seeing Eagan, exclaimed: "Why did you stab me? Why did you stab me?" Id.
144. Id.
145. Id. After filing a battery complaint against his alleged attackers at a local police station, Eagan agreed to go to the Hammond, Indiana police station for further questioning. Id. The Hammond, Indiana police were deemed to have jurisdiction over the case. Id.
146. Id.
147. Id. The entire waiver form, entitled "Voluntary Appearance; Advice of Rights," provided:

Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answer-
exculpatory statement of the previous night. The police detained Eagan at the stationhouse overnight and twenty-nine hours later, after signing a second waiver, Eagan confessed to stabbing the victim.

An Indiana trial court admitted both Eagan's exculpatory and inculpatory statements, and a jury convicted him of attempted murder. The trial court sentenced Eagan to thirty-five years imprisonment. On appeal, the Supreme Court of Indiana upheld Eagan's conviction for attempted murder, finding that regardless of the "if and when" language, Eagan understood his fifth amendment rights and knowingly and intelligently waived those rights. The United States District Court for the Northern District of Indiana determined that the police adhered to the appropriate standards providing questions at any time. You also have the right to stop answering at any time until you've talked to a lawyer.

Id. (emphasis supplied by court) (citation omitted). The waiver continued:

I, [Gary Eagan] have come to the Detective Bureau of the Hammond, Indiana Police Department, of my own choice to talk with Officers . . . In [sic] regard to an investigation they are conducting. I know that I am not under arrest and that I can leave this office if I wish to do so. Prior to any questioning, I was furnished with the above statement of my rights. . . . I have (read) (had read to me) this statement of my rights. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

Id. at 2877 n.1 (citation omitted).

148. Id. at 2877.
149. Id. The second waiver form provided:
1. Before making this statement, I was advised that I have the right to remain silent and that anything I might say may or will be used against me in a court of law.
2. That I have the right to consult with an attorney of my own choice before saying anything, and that an attorney may be present while I am making any statement or throughout the course of any conversation with any police officer if I so choose.
3. That I can stop and request an attorney at any time during the course of the taking of any statement or during the course of any such conversation.
4. That in the course of any conversation I can refuse to answer any further questions and remain silent, thereby terminating the conversation.
5. That if I do not hire an attorney, one will be provided for me.

Id. at 2877-78 (citation omitted).

150. Id. at 2878. Eagan admitted that he stabbed the victim nine times after she refused to have sexual relations with him. Id. at 2876. The following day, Eagan led police to the location of the knife used in the attack as well as various articles of the victim's clothing. Id. at 2878.

151. The trial court also admitted the knife used in the stabbing and several articles of the victim's clothing. See Eagan v. Duckworth, 843 F.2d 1554, 1556 (7th Cir. 1988); Eagan v. Indiana, 480 N.E.2d 946, 948 (Ind. 1985). Eagan was acquitted of rape. See Eagan, 843 F.2d at 1556.

152. See Eagan, 480 N.E.2d at 947.

153. Id. at 947-50. The United States District Court for the Northern District of Indiana denied Eagan's petition for a writ of habeus corpus. See Duckworth, 109 S. Ct. at 2878.
scribed in *Miranda* and denied Eagan's habeas corpus petition. Eagan appealed the denial of his habeas corpus petition to the United States Court of Appeals for the Seventh Circuit. A divided Seventh Circuit, relying principally on its previous decision in *United States ex rel. Williams v. Two-mey*, held that the warning given Eagan was constitutionally defective because the language failed to give the accused a clear and unequivocal admonition of the right to appointed counsel prior to any interrogation. The Court reversed and remanded the proceeding for a determination of whether Eagan waived his right to counsel knowingly and intelligently. In dissent, one Seventh Circuit judge labeled the court's approach to the *Miranda* warnings as "formalistic, technical and unrealistic," arguing that the first set of warnings given Eagan satisfied the requirements of *Miranda*. The Seventh Circuit denied rehearing en banc. The United States Supreme Court granted certiorari to resolve the conflict among the lower courts as to whether language indicating an attorney will be appointed "if and when you go to court" renders *Miranda* warnings inadequate.

### A. The Majority: Nonchalantly Misinterpreting *Miranda*

A majority of five Justices professed to apply *Miranda* in light of the Court's original intent to provide a prophylactic rule. Specifically, the majority opinion, written by Chief Justice Rehnquist, placed particular emphasis on the *Miranda* disclaimer that the warnings suggested by the Court in its decision were required to satisfy the fifth amendment only in the absence of a "fully effective equivalent." The Chief Justice further pointed out that since the *Miranda* decision, the Court had never insisted that *Miranda* warnings be in the exact form described in the Court's opinion. The majority theorized that the Court's flexible approach to the wording of the warnings.

155. See id. at 4.
156. 467 F.2d 1248 (7th Cir. 1972).
158. Id. at 1558. The Court of Appeals denied rehearing en banc with four judges dissenting from that order. See *Duckworth*, 109 S. Ct. at 2878.
160. See *Duckworth*, 109 S. Ct. at 2878; Petitioners' Brief at 4.
161. *Duckworth*, 109 S. Ct. at 2878. Although the Court of Appeals specifically remanded the case for a determination whether Eagan made a knowing and intelligent waiver during the second interrogation, the Supreme Court granted certiorari on the broader issue of whether "if and when you go to court" renders *Miranda* warnings inadequate." Id. (footnote omitted).
162. Id. at 2879 (quoting *Miranda*, 384 U.S. at 476).
163. Id.; see Rhode Island v. Innis, 446 U.S. 291, 297 (1980) (referring to "the now familiar *Miranda* warnings . . . or their equivalent"); *Prysock*, 453 U.S. at 359 ("no talismanic incantation [is] required to satisfy [Miranda's] strictures").
was a function of a practical concern that an officer outside the stationhouse might not have access to printed *Miranda* warnings. Therefore, that officer might inadvertently deviate from standard *Miranda* warnings, especially if a suspect requested an elaboration of the warnings. The majority also noted that, because *Miranda* warnings are a prophylactic measure and not a right specifically protected under the Constitution, reviewing courts need not dissect the language used “as if construing a will or defining the terms of an easement.” Rather, the majority stated, to determine whether there was a violation of an accused’s constitutional rights, a court need only ascertain whether the officer “reasonably” conveyed the *Miranda* rights to the accused.

The Chief Justice noted that the “if and when you go to court” language, used to explain when an attorney would be appointed, correctly described Indiana’s procedure for the appointment of counsel. Further, the Chief Justice contended, such language simply anticipated a commonplace question asked by an accused: “When will I obtain appointed counsel?” The Chief Justice also made clear that the Court’s *Miranda* decision did not require that police have a stationhouse lawyer or an attorney producible on call, it only required that a suspect be informed of his right to appointed counsel. The Court asserted that if the police could not provide counsel, they need only refrain from questioning a suspect, unless there is a voluntary and knowing waiver of the right to counsel. The Chief Justice found that Eagan did indeed waive his right to counsel when he signed the waiver form.

The majority expressed little concern for the specific wording of the warnings as long as those warnings “reasonably conveyed” to the suspect his constitutional rights and “touched all the bases” of *Miranda*. Further, the

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165. *Id.*
166. “The prophylactic *Miranda* warnings are ‘not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.’” *Id.* at 2880 (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).
167. *Id.*
168. *Id.*
169. *Id.* Under Indiana law, once a “person is found to be indigent, the judicial officer shall assign counsel to him.” *Ind. Code Ann.* § 35-33-7-6 (Burns 1985).
171. *Id.*
172. *Id.* The Chief Justice, however, did not mention *Miranda*’s requirement that an attorney be provided within a reasonable period of time. See *Miranda v. Arizona*, 384 U.S. 436, 474 (1966).
majority held that the adequacy of *Miranda* warnings given an accused need not be measured word by word, but should be measured in their totality.\textsuperscript{174}

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**B. Concurrence: Miranda Claims Inappropriate for Federal Habeas Corpus Review**
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While joining the majority's opinion and judgment, Justice O'Connor issued a separate concurrence asserting that Eagan's claim was unnecessarily before the Court. Specifically, Justice O'Connor declared that Eagan's suppression remedy for violation of *Miranda* was an inappropriate ground for appeal in a federal habeas corpus petition.\textsuperscript{175} Justice O'Connor relied on the United States Supreme Court's decision in *Stone v. Powell*\textsuperscript{176} to support her position. In *Stone*, the Court held that when a full and fair opportunity to litigate a claim in state court is made available to a defendant, it is not appropriate to subject that same probative evidence to a federal habeas proceeding.\textsuperscript{177}

Justice O'Connor reinforced the majority's assertion that the *Miranda* rule is a prophylactic measure and not a dictate of the fifth amendment.\textsuperscript{178} The effect of the *Miranda* rule, according to Justice O'Connor, was to overprotect fifth amendment guarantees at the expense of uncovering evidence of crime and punishing criminals.\textsuperscript{179} Justice O'Connor further speculated that relitigating a *Miranda* claim did not further a fundamental intent of the "

\textsuperscript{174} Id. at 2881.
\textsuperscript{175} Id. at 2882 (O'Connor, J., concurring). While the focus of this Note is on the requirements under the Supreme Court's *Miranda* decision, and not the propriety of a habeas corpus petition under the facts of *Duckworth*, Justice O'Connor's concurring opinion sheds light on her view of the *Miranda* decision.

Eighteen state and federal judges have now given plenary consideration to [Eagan's] *Miranda* claims. None of these judges has intimated any doubt as to [Eagan's] guilt or the voluntariness and probative value of his confession. After seven years of litigation, the initial determination of the *Miranda* issue by the state trial judge and the Indiana Supreme Court has been found to be the correct one. In my view, the federal courts' exercise of habeas jurisdiction in this case has served no one: no violation of the Fifth Amendment itself has ever been alleged; there is no doubt that [Eagan] is guilty of the crime of which he was convicted and deserving of punishment; [Eagan] had a full and fair opportunity to litigate his claim in state court; and the marginal possibility that police adherence to *Miranda* will be enhanced by suppression of highly probative evidence some seven years after the police conduct at issue in this case is far outweighed by the harm to society's interest in punishing and incapacitating those who violate its criminal laws.

Id. Justice Scalia joined in Justice O'Connor's concurrence.

177. Id. at 486. The *Stone* Court's holding specifically applied to police conduct which allegedly violated the fourth amendment.
179. Id.
Continuing Debasement of Miranda?

Continuing Debasement of Miranda?—to create a disincentive for police officers to coerce confessions from the accused—because the award of habeas relief would come years after a conviction, and therefore have no appreciable effect on police behavior. Based on these presumptions, Justice O'Connor concluded that *Miranda* claims seeking suppression of probative evidence are inappropriate for federal habeas review.

C. The Dissent: An Honest Interpretation of Miranda

1. Suspects Must be Clearly Informed of Their Miranda Rights

The dissent, authored by Justice Marshall, focused on the *Miranda* decision's requirement that a police warning "clearly inform" a suspect that if he cannot afford an attorney, the court will appoint one prior to police questioning. Justice Marshall asserted that a warning including an "if and when you go to court" caveat does not clearly inform a suspect of this right. Rather, the dissent stated, an "if and when" warning does exactly what the Supreme Court denounced in *California v. Prysock*; it links the right to appointed counsel with some event to take place after questioning. Justice Marshall observed that the majority decision simply ignored the fact that the warnings given Eagan were exactly the type previously con-

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180. *Id.* at 2883-84.


182. *Duckworth*, 109 S. Ct. at 2886 (Marshall, J., dissenting). In *Miranda*, the Court 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. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.


demned by the Court in *Prysock.*\(^{186}\) Thus, concluded Justice Marshall, *Duckworth* could not be reconciled with the Court's decision in *Prysock.*\(^{187}\)

While the dissent readily conceded that *Miranda* required no specific verbal formulation, Justice Marshall pointed to specific portions of the *Miranda* opinion in which the *Miranda* Court required, at the very least, substantial compliance with the enunciated requirements.\(^{188}\) Relying on the Court's notion of substantial similarity, Justice Marshall concluded that a "clear and unequivocal" warning, with regard to the right to appointed counsel prior to questioning, was an absolute prerequisite to interrogation.\(^{189}\) The dissent, unlike the majority opinion, also emphasized that the protections afforded by the *Miranda* Court's decision specifically applied to indigents to ensure that they, too, had a right to counsel.\(^{190}\) In particular, the dissent noted that, according to *Miranda,* only effective and express explanation of the right to appointed counsel can ensure that an indigent suspect is able to understand and exercise the right to an attorney.\(^{191}\) Without such an explanation, the dissent asserted, an accused's fifth amendment right becomes hollow.\(^{192}\)

Justice Marshall also criticized the majority opinion for failing to notice that the recipients of *Miranda* warnings are often "frightened suspects unlettered in the law."\(^{193}\) The dissent opined that, because an accused often lacks an understanding of the law, it would be unreasonable to expect the accused

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\(^{186}\) *Id.* at 2888-89. The *Prysock* Court explained that if the "reference to appointed counsel was linked to a future point in time after police interrogation[, the warning would] not fully advise the suspect of his right to appointed counsel before such interrogation." *Prysock*, 453 U.S. at 360 (emphasis added). Yet, significantly, the majority in *Duckworth* cavalierly substitutes the word "reasonably" for the *Prysock* Court's "fully." See *id.* at 361.

\(^{187}\) *Duckworth*, 109 S. Ct. at 2889.

\(^{188}\) *Id.*; see *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) ("only a fully effective equivalent of the warnings described will pass muster"); *id.* at 444 (requiring "other fully effective means"); *id.* at 467 (requiring "alternative that is at least as effective"); *id.* at 490 (stating that "Congress and the States are free to develop their own safeguards for the privilege [against self-incrimination], so long as they are fully as effective as those described above").

\(^{189}\) *Duckworth*, 109 S. Ct. at 2889 (quoting *Miranda*, 384 U.S. at 471).

\(^{190}\) *Id.* Without an additional warning that an indigent suspect will also be appointed counsel to represent him,

the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. 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.

*Miranda*, 384 U.S. at 473.

\(^{191}\) *Duckworth*, 109 S. Ct. at 2889 (Marshall, J., dissenting); see *Miranda*, 384 U.S. at 473.

\(^{192}\) *Duckworth*, 109 S. Ct. at 2889 (Marshall, J., dissenting).

\(^{193}\) *Id.* at 2887.
to interpret easily contradictory and ambiguous "if and when" warnings. The dissent asserted that the Chief Justice, in his majority opinion, failed to recognize the Miranda decision's focus on language that would actually convey to the accused the right to have counsel present prior to and during police interrogation.

Further, the dissent found little comfort in the fact that the warning given Eagan correctly described the procedure for appointment of counsel in Indiana. The dissent asserted that there is a strong indication that Eagan felt coerced into talking with the police. According to Justice Marshall, the likelihood that Eagan interpreted the warning to mean that it would be a long time before he would be appointed counsel may, in itself, have compelled him to talk to the police. Justice Marshall suggested that a warning subject to such an interpretation is exactly the type of coercive police practice the Miranda Court condemned, and sought to end, with its decision.

Finally, the dissent offered a simple solution for eradicating the confusion caused by "if and when" warnings. The dissent posited that to delete the offending language from the waiver form posed only a slight burden on law enforcement officers. Devoid of this language, the dissent concluded, the warning would give a suspect the straightforward message that the right to an attorney prior to and during police questioning is not dependent on whether the accused goes to court.

2. An Uninvited and Inaccurate Concurrence

Declaring that Justice O'Connor's concurrence paved the way for future assaults on federal habeas corpus review, the dissent attacked the legitimacy and rationale of that opinion. The dissent further asserted that the Supreme Court's decision in Stone v. Powell, heavily relied upon by Jus-

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194. Id.; see Commonwealth v. Johnson, 484 Pa. 349, 356, 399 A.2d 111, 115 (1979). The court, faced with similar "if and when" language, stated: "It cannot seriously be maintained that the pretzel-like warnings here—intertwining, contradictory, and ambiguous as they are—gave appellant 'a better understanding of his constitutional rights' than a straightforward recitation of those rights would have." Id.


196. Id. at 2887-88; see supra note 169.


198. Id.

199. Id.

200. Id. at 2889.

201. Id.

202. Id. at 2889-90. Justice Brennan joined this part of the dissent, while Justices Blackmun and Stevens joined only as to Part 1. Id. at 2885.

The dissent noted that Congress never indicated that certain federal claims should be afforded federal habeas review and others should be deemed unworthy. Rather, the dissent contended, Congress deemed all federal claims equally deserving of federal habeas review. Assuming that Stone was properly decided, the dissent stated that a Miranda claim exemplifies a situation in which federal habeas review is appropriate. Backing this proposition, the dissent noted that a Miranda claim brings into question the probity of the factfinding process at the state court level, thereby requiring federal review.

The dissent further accused Justice O'Connor of harboring an intense distaste for the Miranda decision. The dissent noted, however, that regardless of the concurring opinion's view of the merits of Miranda, the decision was still good law. The dissent further observed that the federal courts have been reviewing Miranda claims via habeas corpus petitions for the last twenty-three years without an indication of disapproval from Congress. The dissent concluded that if Justice O'Connor was discontent with the Miranda decision, she should attack the decision head on, rather than advocating that federal courts be barred from deciding Miranda claims on habeas corpus review. Ultimately, the dissent concluded that Justice O'Connor's indirect attack on Miranda constituted "judicial activism at its worst."

205. Id.
206. Id. Justice Marshall stated:
I have read and reread the federal habeas corpus statute, but I am unable to find any statement to the effect that certain federal claims are . . . more worthy of collateral protection than others. . . . On the contrary, Congress deemed all federal claims worthy of collateral protection when it extended the writ to any person "in custody pursuant to the judgment of a State Court . . . in violation of the Constitution or laws or treaties of the United States."

Id. (quoting 28 U.S.C. § 2254(a) (1988) (emphasis added)).
207. Id. at 2891-92.
210. Id. The dissent stated:
But irrespective of one's view of the merits of Miranda, the critical point is that Miranda is still good law. With few exceptions, prosecutors in state courts may not introduce statements taken from a criminal suspect in violation of his Miranda rights. If a state trial court permits the introduction of such statements, federal constitutional error has been committed. Unless the defendant's conviction is reversed, he is indisputably being held "in violation of the Constitution . . . of the United States."

Id. (quoting 28 U.S.C. § 2254(a) (1988) (emphasis by Court)).
211. Id. at 2893.
212. Id.
213. Id.
Continuing Debasement of Miranda?

V. GRADUALLY UNDERMINING THE RIGHT AGAINST SELF-INCrimination

A. An Unfortunate Interpretation of Miranda

In Duckworth v. Eagan, the Supreme Court concentrated on the flexibility of Miranda's language rather than on the concerns and intent of the Miranda Court's decision. In effect, Duckworth held that any language which "reasonably conveys" to the accused the right to the appointment of an attorney, either immediately or in the future, is acceptable. \(^{214}\) By allowing the warnings in Duckworth to pass constitutional muster, and by failing to provide a clear standard for lower courts to review the wording of Miranda warnings, the Duckworth Court's decision will likely precipitate inconsistent results. \(^{215}\) Moreover, if the Court's holding can be read so broadly as to allow any warnings which "touch[all] of the bases required by Miranda," Duckworth constitutes a significant erosion of the accused's right against self-incrimination. \(^{216}\)

Justice Marshall's dissent, on the other hand, interpreted Miranda in accordance with the Court's original decision. The dissent noted that Miranda clearly requires that, once a suspect is taken into custody, the police must convey to that suspect rights secured under the fifth amendment. These warnings must be in language that an accused will understand, and that permits an accused to make a voluntary and informed decision. \(^{217}\) While the Miranda Court did not profess that the language it suggested was ideal, the Court did endorse the principles behind the language it proposed. \(^{218}\) The

\(^{214}\) Id. at 2880 (majority opinion).

\(^{215}\) In the majority opinion, Chief Justice Rehnquist looked to the warnings in their totality. Id. at 2881. Because Eagan was given "good" Miranda warnings prior to the "if and when" language, his statements were properly admitted. Id. However, the Chief Justice did not put a limitation on what police can tell a suspect after giving valid Miranda warnings. For that reason, the Court has opened the door for other confusing and misleading police statements.

\(^{216}\) For example, after satisfying the requirements of Miranda may the police add, in a warning or waiver form, that "although you have these rights, we have no way of allowing you to implement them"?

\(^{217}\) Duckworth, 109 S. Ct. at 2886 (Marshall, J., dissenting) ("only by effective and express explanation to the indigent . . . can there be assurance that he was truly in a position to exercise it") (quoting Miranda v. Arizona, 384 U.S. 436, 473 (1966)).

\(^{218}\) The Miranda Court stated:

"Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In
Duckworth Court appears to misread Miranda, allowing language equivalents that undermine the principles that initially compelled the Miranda Court’s decision. Further, by adopting a “reasonableness” test, the Duckworth Court has frustrated Miranda’s objective of eliminating subjectiveness through a bright line rule.\(^\text{219}\)

In addition, as the dissent explicitly suggests, an “if and when you go to court” caveat is not only unreasonable, but also unnecessary.\(^\text{220}\) If, as the Chief Justice suggests, the “if and when” language simply anticipates a commonplace question of suspects taken into custody,\(^\text{221}\) such language should be conveyed to an accused when requested.\(^\text{222}\) Because Eagan did not initiate questioning concerning appointment of counsel, but was told that he could not obtain counsel until he went to court, the officer should have been required to further inform Eagan that if an attorney were requested, then all questioning would terminate. The addition of such a requirement would be consistent with the Miranda Court’s attempt to provide protection from the coercive nature of custodial interrogation.\(^\text{223}\)

Moreover, because “if and when” language is open to numerous interpretations,\(^\text{224}\) warnings should be looked at from the perspective of the accused. Here, Eagan could reasonably have concluded that there was no reason to ask for an attorney because he could not afford one and because the police

order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored. Miranda, 384 U.S. at 467.

\(^{219}\) The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.

\(^{220}\) Id. at 468-69 (footnote omitted).

\(^{221}\) Duckworth, 109 S. Ct. at 2889 (Marshall, J., dissenting).

\(^{222}\) Id. at 2880 (majority opinion).

\(^{223}\) It should not be acceptable for the police to anticipate certain questions and not others. There are a number of questions that a suspect might want to ask: Do you have any witnesses to the crime? Did my friend confess? If I am convicted, will I get a heavier sentence because I refused to “cooperate” with you? See Kamisar, A Wrong Answer on Police Interrogation, 124 N.J.L.J. 199, 207 (July 27, 1989).

\(^{224}\) Miranda, 384 U.S. at 458.

\(^{225}\) Duckworth, 109 S. Ct. at 2887 (Marshall, J., dissenting). Because going to court, in common parlance, is understood as going to trial, a suspect could reasonably interpret an “if and when you go to court” warning as meaning that if he is never taken to court, he “is not entitled to an attorney at all.” Id. (quoting Eagan v. Duckworth, 843 F.2d 1554, 1557 (7th Cir. 1988)).
Continuing Debasement of Miranda?

had informed him that they would not provide him with an attorney until he went to court. If Eagan had been told, however, that if he requested an attorney, then all questioning would stop until counsel was present, the defect in the warning would be cured. The Miranda Court likely would have endorsed a warning that could easily facilitate a suspect's understanding of the right against self-incrimination.

B. Judicial Solutions to the Duckworth Dilemma

Law enforcement motives may contribute to the formulation of Miranda warnings that link the right to counsel to some point after custodial questioning. Given a choice, law enforcement officers likely would prefer to interrogate a suspect immediately after arrest rather than permit the suspect to invoke the right to counsel and remain silent. Logically, the police, suspecting that the accused knows more than he admits about a crime, should pursue the vulnerability of the suspect immediately after arrest, provided such interrogation is done in constitutional fashion. Thus, the Duckworth Court's failure to articulate a clear standard for informing a suspect of the right against self-incrimination is troublesome both for law enforcement officials and the lower courts. The Court's hesitation to strike down "if and when you go to court" warnings opens the door to other misleading police warnings which are likely to invite "cooperation" that threatens an accused's fifth amendment right against self-incrimination.

The Duckworth Court could simply have rejected the use of "if and when you go to court" language on all waiver forms. Without this qualifying language, Eagan would have been given a straightforward and fully effective warning of his rights. Such a decree from the Court would send a clear

225. Id.
226. See Kamisar, supra note 222, at 199.
227. Id. The author contends that "this [is] not because the police are more dishonest than the rest of us. . . . [but] rather because they are no less human than the rest of us—no less inclined to further their own interests if given the leeway to do so." Id. Further, it seems unlikely that a superior would congratulate a police officer for giving such careful and emphatic Miranda warnings that a suspect asserted his constitutional rights and refused to engage in questioning. Id.
228. Id.
229. At oral argument in Duckworth, the United States said that federal law enforcement officials do not use the "if and when you go to court" language in order to avoid "unnecessary litigation." Duckworth, 109 S. Ct. at 2880 n.6 (citation omitted). Further, the Federal Bureau of Investigation has eliminated "if and when you go to court or before a United States Commissioner" from its warning form. United States v. Cassell, 452 F.2d 533, 541 & n.8 (7th Cir. 1971) (emphasis omitted). "Apparently the FBI was aware of the judicial controversy surrounding the use of this warning, and to avoid losing cases, abandoned it." Comment, Criminal Procedure: Miranda Warning and the Right to "Instant Counsel"—A Growing Schism, 29 Okla. L. Rev. 957, 965 (1976).
message to law enforcement officers that language linking appointment of
counsel with a future event would not be tolerated.

Following the Seventh Circuit's decision in United States ex rel. Williams
v. Twomey, which found the identical waiver form used in Duckworth
constitutionally defective, Indiana law enforcement officials were aware that
"if and when you go to court" language was suspect. Yet Indiana refused to
eliminate that language. One explanation for retaining the qualifying lan-
guage is that the "if and when" language confuses suspects, thereby inducing
voluntary cooperation with the police. If it is true, or even a likely possi-
bility, that "if and when" language confuses suspects regarding their right to
counsel, the Court should unequivocally condemn the use of "if and when"
language on all waiver forms.

Moreover, the Court's tacit approval of such ambiguous language on
waiver forms will continue to precipitate litigation. The ambiguity inherent
in Duckworth-type warnings will permit police to continue to argue that sus-
pects were "reasonably conveyed" their rights, while allowing suspects lee-
way to contend that the warnings did not adequately inform them of their
fifth amendment rights. The litigation spurred as a by-product of ambigu-
ously worded warnings could be eliminated by requiring specific language on
all waiver and warning forms. By requiring straightforward and standard
warnings, the Supreme Court could eliminate the ongoing semantical debate
surrounding Miranda warnings, while securing the protection the Miranda
decision intended to provide through the development of an objective test for
police warnings.

If the Supreme Court believes that the Miranda rule is too strict, unwork-
able, or prevents effective interrogation, then, alternatively, Miranda should
be explicitly overruled. In its place, a new standard that strikes an appropri-
ate balance between the opportunity for effective police interrogation and
securing an accused's right against self-incrimination should be enunciated.
By gradually eroding the purpose and certainty of the Miranda decision's
bright line test, however, the Supreme Court has left lower courts, and law
enforcement officials, with little guidance regarding the proper procedure for
advising an accused of constitutional rights prior to custodial interrogation.

VI. CONCLUSION

In Duckworth v. Eagan, the United States Supreme Court missed an op-
pportunity to guide the lower courts in determining what constitutes a "fully
effective equivalent" to Miranda warnings. Rather, the Court added to the

230. 467 F.2d 1248 (7th Cir. 1972).
231. Kamisar, supra note 222, at 199.
confusion. By holding that an “if and when you go to court” caveat effectively conveys to the indigent his right to appointment of counsel prior to questioning, the Court misread, or intentionally disregarded, the purpose of *Miranda*. As a result, courts are left to their own subjectivity and must sift through warnings to determine whether, in their totality, those warnings are reasonable. After *Duckworth*, warnings need only pass a “reasonableness” test to protect adequately the accused’s right against self-incrimination as interpreted under *Miranda*. For these reasons, ambiguously worded pre-interrogation warnings will continue to result in inconsistent application of the *Miranda* rule.

The Court should have avoided the subjectiveness of a reasonableness approach by requiring that all standard waiver forms contain explicit language of an accused’s rights prior to and during custodial interrogation. If the present members of the Court are not content with the language used in the *Miranda* decision, they should explicitly overrule that decision and replace it with a standard that strikes a more appropriate balance between the concerns of the police in effective interrogation and the suspect’s right against self-incrimination. By reading *Miranda* to require only that rights must be reasonably conveyed to the accused, the Court encourages an environment in which overzealous police officers are allowed to engage in semantic trickery and the accused is provided with technical loopholes.

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