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Potentiality of Incarceration: A Proposed Standard for the Applicability of Miranda to Nonfelony Offenses

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NOTES

Potentiality of Incarceration: A Proposed Standard for the Applicability of Miranda to Nonfelony Offenses

In the landmark decision of *Miranda v. Arizona*,[1] the United States Supreme Court held:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.[2]

Mr. Chief Justice Warren, the author of the majority opinion, did not, however, expressly state whether the *Miranda* warnings[3] are mandated in connection with misdemeanors, motor vehicle violations and other petty offenses. Because of the Court's silence, state and federal courts forced to wrestle with the perplexing dilemma of the applicability of *Miranda* to nonfelony offenses have relied on grossly disparate legal analyses reaching inconsistent results.

This note examines these conflicting arguments in light of the practical implications and spirit of the *Miranda* decision and in light of the policies relevant to the constitutional rights upon which it was based. The note proposes, as a reasonable standard in terms of policy and practicality, that the potentiality of incarceration be the touchstone for determining when nonfelony defendants are entitled to *Miranda* warnings.

WITHHOLDING MIRANDA WARNINGS IN NONFELONY OFFENSES

Through the litigation process the courts have developed a number of rationales supporting the denial of *Miranda* rights in nonfelony cases. Although somewhat overlapping, there are four basic arguments: (1)

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[1]384 U.S. 436 (1966).

[2]*Id.* at 444.

[3]*Miranda* requires that an individual taken into custody and subjected to interrogation must be informed before any questioning that he has the right to remain silent; that anything he says may 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 before any questioning if he so desires. 384 U.S. at 478-79.

requiring *Miranda* warnings in nonfelony cases is impractical because of the great number of such offenses; (2) nonfelony offenses are presumably minor offenses with minor penalties, and the harm resulting from not requiring *Miranda* warnings is inconsequential; (3) the *Miranda* rule is a court-made rule of law which should be construed narrowly, and since *Miranda* considered only felony offenses, a narrow application of the holding limits it to felony offenses; and (4) misdemeanors do not generally result in "custodial interrogation," and thus, the *Miranda* warnings are not applicable. Although these arguments do have merit, they fail to fully recognize substantial policy and constitutional issues.

The Impracticality of Application

The rationale most often used by courts refusing to apply *Miranda* to nonfelony offenses is that to do so would be impractical in terms of sheer numbers.[4] It is argued that a great number of traffic offenders and misdemeanants would be likely to request an attorney's assistance,[5] thereby substantially increasing court costs and possibly paralyzing court processing. These courts also fear that applying *Miranda* to nonfelonies would place an unduly onerous burden on law enforcement officers by requiring them to allow misdemeanants to speak with their attorneys and by requiring them to provide indigent misdemeanants with appointed counsel before interrogation.[6] The courts fear that such a rule would

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[4]*See, e.g.*, State v. Bliss, 238 A.2d 848, 850 (Del. 1968), which, while arguing that there were practical reasons to treat motor vehicle offenses differently from most other offenses, noted that the single offense of driving under the influence of alcohol had resulted in 1,087 arrests in Delaware in 1966.

[5]*See* State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970), which stated:

> [D]uring the court year 1968-69, 726,763 non-parking traffic complaints were filed in the municipal courts, of which 38%, or over 275,000, were disposed of by court hearing. Certainly a substantial percentage of those involved police questioning of indigent defendants which went beyond investigatory aspects and who could demand the furnishing of a lawyer prior to interrogation if *Miranda* were to be held applicable. The massive impossibility of doing so is manifest.

Id. at 17, 268 A.2d at 9. *See* also People v. Letterio, 16 N.Y.2d 307, 266 N.Y.S.2d 368, 213 N.E.2d 670 (Ct. App. 1965), where the New York Court of Appeals stated: "We point out that the practical result of assigning counsel to defendants in traffic cases would be chaotic. Assigning counsel in but 1% of these millions of cases could require the services of nearly half the attorneys registered in the State." *Id.* at 312, 266 N.Y.S.2d at 371, 213 N.E.2d at 672.

[6]*See, e.g.*, State v. Neal, 476 S.W.2d 547 (Mo. 1972). The court deemed it neither:

> reasonable [n]or practical to rule that a trooper or other traffic officer investigating a vehicular accident, or in arresting a driver for speeding or driving while intoxicated, or other vehicular offenses, must give the *Miranda* warnings and possibly wait for the driver to obtain an attorney, or for one to be appointed for him, before he can ask him the usual questions involved in such an investigation. And, as indicated, there are probably not enough attorneys readily available to provide preinterrogation counsel for all of the persons desiring such that are involved in the thousands of vehicular offenses that occur every year in this state.

Id. at 553.

impede the effective investigation of misdemeanors and motor vehicle offenses.[7] These courts appear to assume that such requirements would increase the amount of time spent on each investigation, and since misdemeanor offenses constitute the bulk of police investigations, they fear that the requirements would slow the investigative process and create unmanageable backlogs for the police and the courts.[8] The following language of *Miranda* is used in support of this denial of warnings to misdemeanants:

> In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances . . . . This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions.[9]

Despite the number of courts which have utilized this practicality rationale to rule *Miranda* inapplicable to nonfelony offenses, there is no evidence to support their fears.[10] Indeed, what little empirical evidence is available thoroughly discredits this practicality rationale.[11] These data

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[7]*See* State v. Neal, 476 S.W.2d 547 (Mo. 1972), where the court stated: "The practical effect of a ruling requiring that the *Miranda* rule be complied with in vehicular cases would be to substantially impair, if not destroy, the effectiveness of our system of investigating traffic accidents and violations." *Id.* at 553. *Accord*, State v. Gabrielson, 192 N.W.2d 792 (Iowa 1971); State v. Dubany, 184 Neb. 337, 167 N.W.2d 556 (1969). *See also* State v. Pyle, 19 Ohio St. 2d 64, 67-68, 249 N.E.2d 826, 827-28 (1969), where the Ohio Supreme Court explains that a misdemeanor, usually a traffic offense, generally takes place in the presence of the arresting officer. Therefore, concentrated investigation or interrogation is rarely necessary. The interrogation is normally conducted at or near the scene, not in any coercive atmosphere created by the law enforcement officers once an individual has been taken into custody. *But see* People v. McLaren, 55 Misc. 2d 676, 285 N.Y.S.2d 991 (1967), where the court, in applying *Miranda* to a driving under the influence arrest, did not even consider the proposition that *Miranda* warnings in a nonfelony situation might be detrimental to effective investigation by law enforcement officials.

[8]In State v. Gabrielson, 192 N.W.2d 792 (Iowa 1971), the Iowa Supreme Court concluded: "To hold Miranda warning rules applicable to simple misdemeanors would unduly interfere with proper law enforcement in that area and preclude the police from carrying out their traditional investigatory functions." *Id.* at 796. *See* State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970), where the court stated that "the violations [involving motor vehicle offenses] are not serious enough in their consequences to warrant the time consuming interference which would result to effective law enforcement and the expeditious administration of justice in petty offense cases." *Id.* at 16, 268 A.2d at 9.

[9]Miranda v. Arizona, 384 U.S. 436, 481 (1966).

[10]*See* State v. Neal, 476 S.W.2d 547 (Mo. 1972) (dissenting opinion).

[11]*See Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967). This study states: "In a primarily statistical analysis, we conclude that there is no evidence indicating that the warnings . . . caused many suspects to refuse to talk or ask for counsel." *Id.* at 1523. The study further stated: "Our findings suggest *Miranda* will rarely bring lawyers to the stationhouse. Defendants, told of their right to counsel, usually neglect the offer and let

indicate that *Miranda's* effect on individuals' requests for assistance of counsel is minimal. The data further show that requests for attorneys increase only when the offense is of a more serious nature.[12]

The courts invoking this practicality rationale appear to be weighing the state's presumed burden, created by requiring warnings, against the injury to the defendant who is not given the warning. By assuming that the duty to warn creates an onerous burden on the state, courts find such a duty too burdensome to be required.[13] This belief is without basis. As the empirical evidence suggests, the burden on the state will be slight, at least in relation to the potential injury which the defendant faces. Of the large number of new defendants receiving *Miranda* warnings, only a few individuals should be expected to request the assistance of counsel or to refuse to cooperate.[14] Furthermore, given the ease with which *Miranda* warnings can be given,[15] impracticality is a weak agrument for denying the application of *Miranda* to misdemeanants.

The Minor Nature of the Offense

A second rationale advanced by some courts refusing to apply *Miranda* to lesser offenses is that such violations do not generally involve serious consequences.[16] These courts assume that if potential injury to a defendant is minor then no serious harm occurs if warnings are not given. The basis of this rationale appears to involve a balancing test similar to that used in

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interrogation proceed." *Id.* at 1600. *See also* Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968). The study presented findings of *Miranda's* implementation in the District of Columbia where twenty-four hour availability of counsel for defendants was arranged for one year. During fiscal 1967, only 7 percent (1,262 of 15,430) of the persons arrested for felonies and serious misdemeanors requested counsel from the arranged attorney service. *Id.* at 1352.

[12]Medalie, Zeitz & Alexander, *supra* note 11, stated: "If all 73,492 nontraffic offenses are considered, the rate of those requesting counsel is only 2%. As might have been expected, the rate of calls for lawyers . . . was higher for persons charged with more serious offenses . . . ." *Id.* at 1353 n.23.

[13]*But see* State v. Neal, 476 S.W.2d 547, 554 (Mo. 1972) (dissenting opinion), where it was stated that, "[i]t is a mistake, in my opinion, to decide the question of whether the Miranda rule applies to a drunken driving charge on the erroneous assumption the police would be swamped with requests for counsel if the rule is held to apply to motor vehicle offenses in general . . . ." *Id.* at 554.

[14]*See* notes 11 & 12 *supra.*

[15]*See* State v. Bliss, 238 A.2d 848, 850 n. * (Del. 1968). Although the court held *Miranda* warnings inapplicable to motor vehicle offenses, the court did note that police are advised to give the *Miranda* warning because it is "easily given and, if given, forestalls delays in dispostion of cases in instances like the present one." *Id. See also* State v. Neal, 476 S.W.2d 547, 554 (Mo. 1972) (dissenting opinion).

[16]*See, e.g.*, State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970) stating, "the violations involved are not serious enough in their consequences to warrant the time consuming interference which would result to effective law enforcement and the expeditious administration of justice in petty offense cases." *Id.* at 16, 268 A.2d at 9.

connection with the practicality rationale.[17] Nevertheless, these courts seem loathe to delineate the considerations which lead them to strike the balance as they do, simply holding that *Miranda* is inapplicable to minor offenses.[18]

Although the absence of serious consequences in most petty offenses and misdemeanors may weigh against the issuance of *Miranda* warnings, it should be emphasized that under some statutes the consequences of such offenses may be great.[19] Recognition of this fact seems to have motivated

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[17]*See* notes 6-8 *supra* & text accompanying.

[18]In County of Dade v. Callahan, 259 So. 2d 504 (Fla. 1971), the arresting officer testified that he witnessed the defendant drive her automobile into a properly parked car on the street. He went to the scene, observed the defendant's physical condition and conduct, and then arrested her. The officer testified that he did not give the defendant *Miranda* warnings. After explaining that driving under the influence of an intoxicating beverage and careless driving amount to a misdemeanor or petty offense and not to a felony, the court simply held: "[T]he Miranda warnings need not be given on these petty offenses as they are presently defined under these metropolitan ordinances." *Id.* at 507.

In Clay v. Riddle, 391 F. Supp. 1049 (W.D. Va. 1975), the court reached a similar conclusion. In *Riddle*, the defendant was stopped pursuant to a motor vehicle violation. Without giving *Miranda* warnings, the police officer asked the petitioner if he was the driver of the car. The petitioner acknowledged that he was. Subsequently it developed that petitioner had violated a more serious law, felonious operation of a motor vehicle, in that he had driven on public highways after having been declared an habitual traffic offender. Although the petitioner received a one year sentence, the court held that "the required warnings announced in *Miranda* . . . do not apply to offenses of so common and minor a nature as a motor vehicle violation." *Id.* at 1051.

In State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970), the defendant was convicted of operating an automobile under the influence of intoxicating liquor. He had not been apprised of his *Miranda* rights. Under New Jersey law, motor vehicle violations are not crimes, but only petty offenses which entail no right to indictment or to a jury. *Id.* at 5, 268 A.2d at 5. Such offenses are tried in the first instance in a summary manner in the municipal court, and jail sentences resulting therefrom may not exceed six months. In affirming the defendant's conviction and sentence, the court held *Miranda* inapplicable to all motor vehicle offenses. *Id.* at 15-16, 268 A.2d at 9.

[19]In State v. Bunders, 68 Wis. 2d 129, 227 N.W.2d 727 (1975), the court held that *Miranda* warnings were not required when an arrested driver is asked to submit to a breathalyzer. However, if the police do in fact interrogate the driver as to his driving or intoxication, then the full panoply of *Miranda* will be required. In reaching this conclusion, the court gave weight to the consideration that an intoxicated driver may be convicted of operating a motor vehicle under the influence of an intoxicant which carries a maximum one year jail sentence. *Id.* at 134, 227 N.W.2d at 730.

See also State v. Macuk, 57 N.J. 1, 10, 268 A.2d 1, 6 (1970), where the court pointed out that a second conviction of driving under the influence within ten years of a previous conviction imposes a mandatory three month sentence plus a ten year license forfeiture. In this modern age, many would consider the loss of a driver's license for ten years a serious consequence.

See also Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 712 (1968). In the context of arguing in favor of the right to counsel in certain misdemeanor cases, Junker suggests: "[t]here is little doubt that for sixth amendment purposes it ["crime"] ought to include proceedings in which the individual is exposed to the possibility of incarceration or to the stigma that flows from official condemnation." *See* notes 89-91 *infra* & text accompanying. *Compare* the dissent in State v. Neal, 476 S.W.2d 547 (Mo. 1972), which noted the fallacy of distinguishing crimes from petty offenses on the basis of language rather than logic. The dissent stated that excepting:

the court in *Commonwealth v. Bonser.*[20] There the appellee hit a parked car and was arrested for driving under the influence of intoxicating liquor, a misdemeanor in Pennsylvania. The maximum penalty involved was three years' imprisonment and a five-hundred dollar fine.[21] The court distinguished cases from other states which had held *Miranda* inapplicable to drunk driving infractions; it found that in those jurisdictions driving under the influence was regarded as only a minor offense for which small fines and short jail sentences were provided, in contrast to the severe penalty possible in Pennsylvania.[22] In light of the substantial loss of liberty if convicted, the court concluded that "[U]nder these circumstances he is entitled to full protection under the Constitution as implemented by *Miranda.* Nor should there be any different holding because the offense is found in The Vehicle Code instead of The Penal Code."[23]

In determining whether or not to apply *Miranda,* it seems correct that a failure to give the warnings may result in little harm when the offense is clearly minor and can result in only a minimal penalty. On the other hand, when the potential injury to an individual is great, the labels "misdemeanor" or "motor vehicle offense" are not sufficient bases for denying *Miranda* warnings.[24] Such a system fails to provide the necessary constitutional safeguards to those who are charged with a nonfelony offense, yet who face the prospect of severe consequences.[25]

> *all* offenses involving the operation of a motor vehicle from the application of *Miranda* would equate a speeding ticket with a prosecution for manslaughter by culpable negligence in the operation of a motor vehicle . . . Assuming that the privilege against self-incrimination and the right to counsel are divisible so as to apply in some cases and not in others, the consequences of conviction may in sum total be as serious for the misdemeanant as for the felon.

Id. at 556.

[20]215 Pa. Super. Ct. 452, 258 A.2d 675 (1969).

[21]*Id.* at 459-60, 258 A.2d at 680.

[22]*Id.*

[23]*Id.* at 460, 258 A.2d at 680.

[24]For example, the motor vehicle offense of hit and run manslaughter may result in a lengthy jail sentence. *See, e.g.,* IND. CODE § 35-13-4-2 (Burns Supp. 1976).

[25]The problem remains of where to draw the line. Furthermore, once the line is drawn in accordance with the potential consequences attending the particular offense, a problem arises from the practical necessity that the police officer in each situation know the classification and maximum sentence for the particular offense involved before he can determine if he is required to give the *Miranda* warnings. Nevertheless, the police lose little by giving suspects warnings which turn out to have been unnecessary. They lose much by having failed to give warnings to suspects who are subsequently found to have been entitled to them. The Supreme Court has suggested, in analogous contexts of other constitutional rights, two appropriate places to draw the line. *See* Argersinger v. Hamlin, 407 US. 25 (1972) (right to counsel afforded wherever a defendant is charged with an imprisonable offense); Duncan v. Louisiana, 391 U.S. 145 (1968) (no right to jury trial in petty offenses carrying a penalty of less than six months' imprisonment). This note argues that the *Argersinger* standard is the more persuasive analogy to the issue considered here, as the *Miranda* warnings include advising a suspect of his right to have the assistance of counsel. *See* notes 86-95 *infra* & text accompanying.

Narrow Application of a Court-Made Rule

Another major argument advanced against the application of *Miranda* to misdemeanors involves the principle that a court-made rule of law must be narrowly read to apply only to the facts precipitating the rule. An example of this rationale can be found in *State v. Pyle*[26] where the Ohio Supreme Court reversed a lower court's determination[27] that *Miranda* warnings were required in instances involving the misdemeanor of driving under the influence of intoxicants. Noting that *Miranda* and its three companion cases all involved serious felonies with long jail sentences and taking judicial notice that investigative procedures ordinarily followed with respect to misdemeanors differ markedly from the procedures with respect to felonies, the court concluded that "the United States Supreme Court, in *Miranda,* was concerned with the procedures followed by law enforcement officers in investigations in felony cases, not with the procedures adhered to by those same authorities in investigations in misdemeanor cases."[28] The court therefore held *Miranda* inapplicable to all misdemeanors. This court and many other courts assumed that procedures involved in investigating and prosecuting misdemeanors are markedly different from those employed in felony cases.[29] Felony investigations were characterized as "lengthy incommunicado police interrogation seeking to sweat out a confession,"[30] while misdemeanor investigations, on the other hand, were stereotyped as routine perfunctory procedures presenting no special dangers to a defendant.[31] Since the Supreme Court

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[26]19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), *cert. denied,* 396 U.S. 1007 (1970).
[27]State v. Pyle, 18 Ohio App. 2d 33, 246 N.E.2d 577 (1969).
[28]*Id.* at 66-67, 249 N.E.2d at 827.
[29]*See, e.g.,* State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970):

> [T]he type of police questioning involved in motor vehicle violations is not ordinarily the lengthy, incommunicado inquistion seeking to "sweat out" a confession at which *Miranda* was aimed. Generally it encompasses only simple standard inquiries for the purpose of a necessary accident or violation police report, even though some of the information obtained may go beyond the so-called investigatory phase and be inculpatory as to the violation.

Id. at 16, 268 A.2d at 9.
[30]*Id. See also* State v. Neal, 476 S.W.2d 547 (Mo. 1972), where the court determined that *Miranda* does not apply to misdemeanor motor vehicle offenses because the dangers inherent in a felony investigation were not incurred by a misdemeanor investigation. In describing the practices of felony investigations which *Miranda* intended to prohibit, the court stated, "[i]t is significant that all four of the cases encompassed in *Miranda* involved very serious crimes (murder, rape, robbery, and kidnapping), and that the primary purpose of that opinion was to proscribe the practice of lengthy incommunicado police interrogation seeking to "sweat out" confessions." *Id.* at 552.
[31]In State v. Tellez, 6 Ariz. App. 251, 431 P.2d 691 (1967), the court explains that the *Miranda* standards were established to thwart possible attempts by authorities to attain confessions and admissions through intimidation and coercion. Although recognizing that the language of *Miranda* applies to crimes and that Arizona law clearly establishes that both misdemeanors and felonies are crimes, the court, nonetheless, distinguishes "routine" traffic violations from those traffic offenses where the violator is arrested. The court observed that

considered only felony procedures in its *Miranda* decision, many lower courts have held that *Miranda* must be limited to only those circumstances.[32]

The assumption that the police practices which *Miranda* sought to eliminate do not occur in misdemeanor cases has little support. This issue was clearly presented in *People v. McLaren.*[33] In *McLaren,* the defendant was the driver of an automobile involved in an accident. A police officer arrived at the scene, arrested the defendant for driving while intoxicated, and took him into custody.[34] At the precinct house the defendant was subjected to an interview consisting of forty-four questions from a form questionnaire and to a series of performance tests pertaining to balance. At no time during this custody and questioning was the defendant given any warnings concerning his right to counsel and his right against self-incrimination. The state, however, attempted to introduce information gained from the custodial interrogation at the defendant's trial. The court suppressed the evidence because of the failure to warn defendant of his rights under *Miranda.*[35] The facts of this case clearly support the proposition that the police practices which *Miranda* sought to eliminate—the employment of techniques to elicit incriminating evidence from a defendant who remains unaware of his constitutional rights to remain silent and to have the assistance of counsel—will continue to occur if such warnings can be denied solely because an offense is labelled a misdemeanor.

"traffic offenses are not ones in which we find such a risk of this kind of official behavior. In most cases, the offender is not detained longer than is needed to make out a citation and have it signed. A.R.S. § 28-1054. Often he may remain in his own car." *Id.* at 255, 431 P.2d at 695. *See also* State v. Zucconi, 93 N.J. Super. 380, 226 A.2d 16 (1967), where the court held *Miranda* inapplicable to misdemeanors as it pointed out that the *Miranda* rules are not contained in the Constitution, but were adopted by the Supreme Court. The opinion states that "[t]he question is not whether the rights against self-incrimination and to counsel exist in a motor vehicle prosecution, but whether the Supreme Court intended that in such a prosecution those rights must always be implemented with the *Miranda* rules." *Id.* at 390, 226 A.2d at 22. The court believed that the police practices which precipitated the *Miranda* ruling have no pertinence to minor offenses. The court presumes that the Supreme Court is "of course, fully aware of the problems which would be entailed if *Miranda* were applied willy-nilly to all minor offenses." *Id.* at 391, 226 A.2d at 23.

[32]*See* State v. Zucconi, 93 N.J. Super. 380, 226 A.2d 16 (1967), where the court stated that "until the United States Supreme Court says otherwise, we think we should assume, and we do believe, that its treatment of such cases as the one at bar would be based on what is practical and possible, and on the historical difference between such offenses and crimes." *Id.* at 391, 226 A.2d at 23.

[33]55 Misc. 2d 676, 285 N.Y.S.2d 991 (1967).

[34]*Id.* at 678, 285 N.Y.S.2d at 993.

[35]*Id.* at 680, 285 N.Y.S.2d at 995. It is interesting that the court suppresses "out of hand" the answers to the questionnaire under the authority of *Miranda.* Nowhere in the opinion does the court discuss the applicability of *Miranda* to misdemeanors. The court simply assumes *Miranda's* applicability.

Further support for this logic can be found in *Commonwealth v. Bonser.*[36] In *Bonser,* the defendant was taken into custody on a charge of driving under the influence of alcohol but was not informed of his constitutional rights prior to interrogation. The prosecution attempted to overcome the failure to issue the warnings on the grounds that the Supreme Court's silence in *Miranda* regarding the question of misdemeanors indicated that such rights did not apply to misdemeanors.[37] The *Bonser* court, however, interpreted that silence quite differently. In its discussion of the question whether the misdemeanor conviction before it was distinguishable in terms of constitutional safeguards from the felony convictions in *Miranda,* the court deemed *Miranda's* general holding significant. The *Bonser* majority found no indication in *Miranda* "that one accused of a misdemeanor, who faces the potential of a substantial prison sentence, must subject himself to police interrogation absent the fundamental safeguards afforded others."[38] To deny a defendant *Miranda* warnings solely because the Court in *Miranda* failed to sweep within its holding misdemeanor offenses is without basis. The dangers the Court wished to proscribe in *Miranda* arise as easily in misdemeanors as in felonies. It is thus illogical to distinguish the applicability of *Miranda* solely on the basis of an offense's classification as a misdemeanor or felony.[39]

Custodial Interrogation

Even in cases that do not present a problem of *whether Miranda* warnings must be given, the problem of *when* they must be given has plagued courts ever since the Supreme Court decided *Miranda.*[40] Its standard of requiring warnings prior to "custodial interrogation" has resulted in varying approaches to determine the point in the investigatory process at which the warnings should be issued.[41] In the nonfelony context

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[36]215 Pa. Super. Ct. 452, 258 A.2d 675 (1969).

[37]*Id.* at 458, 258 A.2d at 679.

[38]*Id.* at 458, 258 A.2d at 679 (footnote omitted).

[39]This point was succinctly noted by the dissent in State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969):

> It is inconsistent to hold that the *Miranda* warning aspect of the privilege against self-incrimination is not applicable to misdemeanors, while no suggestion is made that the other judicial interpretations concerning the privilege against self-incrimination are not applicable to misdemeanors. A defendant charged with a misdemeanor could never be compelled to take the witness stand, or, if he testified could he ever be compelled to give an answer incriminating himself, nor could the prosecution comment on such a defendant's failure to testify. The privilege against self-incrimination is not divisible so as to exclude a crime for which a person may be imprisoned for one year or less.

Id. at 69-70, 249 N.E.2d at 829.

[40]*See, e.g.,* Note, *Two Approaches to Defining Custody Under Miranda,* 36 FORDHAM L. REV. 141 (1967).

[41]On this point, the Supreme Court stated that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or

some courts have confused the issue of when warnings should be given with the question of whether warnings should be given. These courts avoid the real issue of whether *Miranda* applies to nonfelonies by taking a restrictive view of custodial interrogation in the nonfelony situation.

An example of this confusion can be found in *State v. Desjardins*.[42] In that case, an officer approaching an accident scene saw the defendant standing on the passenger side of the vehicle. The defendant, who smelled of alcohol and was bleeding, was arrested for drunkenness.[43] The defendant was then asked without the benefit of *Miranda* warnings if he was the driver of the vehicle. The defendant answered that he was. The officer then arranged to have the defendant sent to a hospital for treatment and a blood test while he went to swear out a warrant against the defendant for driving while intoxicated. The officer returned to the hospital, again arrested the defendant, and advised him of his rights under *Miranda*.[44] The New Hampshire Supreme Court affirmed his subsequent conviction, denying that prior to the issuance of the warnings following his second arrest defendant had been taken into custody or otherwise deprived of his freedom in any significant way.[45] The court viewed the officer's initial inquiry as merely part of the "general on-the-scene questioning"[46] which *Miranda* was not intended to impede. The court seemed to give no weight to the fact that the officer had indeed arrested the defendant—thus establishing custody—[47] before interrogating him as to who was the driver.

It seems clear that the issue of whether *Miranda* warnings are required, and if so at what point such warnings are required, are distinct questions.[48] They should be treated as such. If it is determined that warnings are necessary, the standards used to discern custodial interrogation should be the same for both felonies and nonfelonies.[49] Courts have struggled with

otherwise deprived of his freedom of action *in any significant way*." Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis added).

[42]110 N.H. 511, 272 A.2d 599 (1970).

[43]*Id.* at 511-12, 272 A.2d at 600.

[44]On appeal the defendant contended his statement that he had been driving must be excluded because it resulted from interrogation while he was in custody and before he was apprised of his rights. *Id.* at 513, 272 A.2d at 601.

[45]*Id.* at 513, 272 A.2d at 601.

[46]*See* Miranda v. Arizona, 384 U.S. 436, 477 (1966).

[47]State v. Desjardins, 110 N.H. at 515-16, 272 A.2d at 602-03 (dissenting opinion). The dissent attacks the majority's narrow construction of custody, pointing out that *Miranda* specifically limited general on-the-scene investigations to "persons not under restraint." The dissent argues persuasively that the defendant, being under arrest, was under restraint and in the officer's custody when asked if he was driving. *Id.*

Cf. Orozco v. Texas, 394 U.S. 324 (1969), where the Supreme Court reversed a conviction for the failure to give defendant *Miranda* warnings. Although questioned in his own bedroom, the defendant, according to the officer's testimony, had been under arrest and was not free to leave.

[48]*See* Annot., 25 A.L.R.3d 1076, 1081 (1969).

[49]*But see* State v. Neal, 476 S.W.2d 547 (Mo. 1972). In *Neal*, the officer arrested the defendant and immediately advised him that any answers he gave could be used against him.

the custodial interrogation concept in order to avoid reversing misdemeanor convictions for the failure to follow *Miranda.* The *Desjardins* court viewed custody restrictively in order to broaden "general on-the-scene questioning" to encompass the case before it.[50] The court in *Commonwealth v. Bonser,*[51] on the other hand, applied the same custodial interrogation standard that has been developed in felony cases to the misdemeanor of driving while intoxicated.[52] This approach seems clearly superior, at least in regard to misdemeanors involving substantial consequences.

The court in *State v. Kinn*[53] also applied the same test of custodial interrogation to misdemeanors as would apply to felonies. The *Kinn* opinion focused on the difficulty in distinguishing on-the-scene investigations from custodial interrogations. In attempting to clarify the distinction, the court stated:

> The police are not required to give a Miranda warning to every bystander or person in the vicinity of a happening which it is their duty to investigate. They may properly elicit information in the ordinary course of their investigative work. While it is not suggested that police may defer the formal arrest in order to gather further admissions, an officer should not be required to give a warning statement until he has reasonable grounds to believe both that a crime has been committed and that the defendant is the culprit. When it appears that, in the performance of his duties, the officer determines to take a person into custody, or, in other words, *when the point is reached where the adversary system begins to operate,* he is required to give the Miranda warning.[54]

Good reasons exist for abandoning the foregoing approaches which deny *Miranda* warnings in nonfelony contexts. There are also, however, sound

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476 S.W.2d at 552. However, the officer did not offer the rest of the warnings. Thereafter, defendant in answer to the officer's inquiry admitted driving the vehicle.

Despite a prima facie violation of *Miranda,* the court ruled that the warnings were not required to bring into evidence admissions made to investigative officers by individuals involved in motor vehicle offenses "regardless of whether the questions are asked before or after the arrest." *Id.* at 553. In contrast to the *Desjardins* method of restricting "custodial interrogation," the *Neal* court simply chose to hold *Miranda* inapplicable in such a situation, thereby leaving unclear the role "custodial interrogation" played in the court's decision. *Compare* State v. Neal, 476 S.W.2d 547 (Mo. 1972), *with* State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), *cert. denied,* 396 U.S. 1007 (1970). In *Pyle,* the court simply held *Miranda* inapplicable without any discussion of "custodial interrogation." *See generally* Note, *Privilege Against Self-Incrimination: Application of Miranda v. Arizona to Motor Vehicle Violations,* 38 Mo. L. REV. 652, 654 n.14 (1973).

[50]*See also* State v. Darnell, 8 Wash. App. 627, 508 P.2d 613, *cert. denied,* 414 U.S. 1112 (1973). The court interprets "custodial interrogation" narrowly in order to uphold a misdemeanor conviction. Note the lack of discussion of the applicability of *Miranda* to misdemeanors.

[51]215 Pa. Super Ct. 452, 258 A.2d 675 (1969).

[52]*Id.* at 459, 258 A.2d at 679. In response to the prosecution's contention that one arrested for this offense is not entitled to warnings before custodial interrogation, the court stated: "There is no indication [in *Miranda*] that one accused of a misdemeanor . . . must subject himself to police interrogation absent the fundamental safeguards afforded others." *Id.* at 458, 258 A.2d at 679 (footnote omitted).

[53]288 Minn. 31, 178 N.W.2d 888 (1970).

[54]*Id.* at 35, 178 N.W.2d at 891 (emphasis added).

policy reasons that militate against absolute application of *Miranda* in all such situations.

APPLYING MIRANDA TO ALL NONFELONY OFFENSES

Not all courts have mechanically denied the application of *Miranda* to misdeameanors. Many courts have recognized the constitutional and policy arguments favoring application. There are two basic arguments: (1) nonfelonies are criminal offenses and should be treated as such under the fifth and sixth amendments; and (2) *Miranda* warnings were intended to provide constitutional safeguards in situations where harsh consequences might evolve from coercive custodial interrogation, and since misdemeanors are quite likely to result in harsh consequences, they should be within *Miranda's* reach. Both of these arguments fail, however, to fully consider the practical difficulties of an absolute rule requiring *Miranda* warnings in all nonfelony offenses.

Implications of the Fifth and Sixth Amendments

A primary argument advanced in favor of the application of *Miranda* to misdemeanors is that such application is mandated by the language of the fifth[55] and sixth[56] amendments. This position was taken in *Commonwealth v. Bonser*,[57] which held that a person arrested for the misdeameanor of driving under the influence of alcohol is entitled to *Miranda* warnings.[58] In support of its holding, the court in *Bonser* points to the fifth and sixth amendments' absence of any distinction between serious and minor crimes. Those amendements refer only to "criminal case" and "criminal prosecutions" respectively.[59] Since driving under the influence is an indictable offense in Pennsylvania, the *Bonser* court concluded that it clearly falls within the ambit of a "criminal case" or "criminal prosecution."[60]

The term "crime" has traditionally been construed to include misdemeanors. As early as 1888 the Supreme Court construed the term "crime"[61] to include all felonies and misdeamors which involve the deprivation of liberty.[62] This followed an even earlier determination that the term

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[55]"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . nor shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

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

[57]215 Pa. Super. Ct. 452, 258 A.2d 675 (1969).

[58]*See* notes 20-23 *supra* & text accompanying.

[59]*See* notes 55-56 *supra.*

[60]215 Pa. Super Ct. 452, 459, 258 A.2d 675, 679 (1969).

[61]U.S. CONST. art. III, § 2, cl. 3.

[62]"It would be a narrow construction of the constitution to hold that no prosecution for a misdemeanor is a prosecution for a 'crime' within the meaning of the third article or a 'criminal prosecution' within the meaning of the sixth amendment." Callan v. Wilson, 127 U.S. 540, 549 (1888).

"[c]rime is synonymous with misdemeanor, and includes every offense below felony punished by indictment as an offense against the public."[63] Under the Supreme Court's interpretation of the Constitution it is nearly impossible to conclude that a felony is a crime but that a misdemeanor is not. Any distinction between the two is manifestly artificial.

A line of analysis relating to the artificiality of the distinction between misdemeanors and felonies was espoused by two Ohio lower court opinions holding that *Miranda* applied to the misdemeanor of operating a motor vehicle while under the influence.[64] Although both courts were reversed by the Ohio Supreme Court's blanket ruling that *Miranda* was inapplicable to all misdemeanors,[65] both courts had held that a distinction between misdemeanors and felonies is an insufficient justification to affect the basic question of fairness which is an inherent quality of every constitutional safeguard.[66] The court in *City of Piqua v. Hunger*[67] stated:

> The Constitution is, of course, aloft from administrative inconvenience, and we perceive no other valid reason for lowering its protective shield during the trial of misdemeanor cases. The onerous prospect of confinement in the county jail rather than the state penitentiary is hardly an adequate substitute for a fair trial . . . .[68]

In *City of Piqua* the defendant had been convicted of operating a motor vehicle while under the influence of alcohol. The defendant was not advised of his right to counsel until after the officers had taken movies of his actions at the police station, administered a breath test and received answers to questions from a police questionnaire. The appellate court, citing *Miranda*, reversed the trial court's conviction. The court remarked that even though the defendant was not a criminal in the usual sense, he was entitled to identical constitutional protection to that afforded hardened criminals.[69]

Following *City of Piqua*, the appellate court in *State v. Pyle*[70] also found that *Miranda* applied to the misdemeanor of operating a motor

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[63]Kentucky v. Dennison, 65 U.S. 66, 76 (1860). *See also* Guetling v. State, 199 Ind. 630, 158 N.E. 593 (1927) (crime includes all grades of public offenses which at common law included treason, felony, and misdemeanor); State v. Blitz, 171 Mo. 530, 71 S.W. 1027 (1903) ("crime" construed to be any offenses, misdemeanor or felony, for which imprisonment may follow); *In re* Voorhes, 32 N.J.L. 141 (1867) (crime includes every type of indictable offense.

[64]State v. Pyle, 18 Ohio App. 2d 33, 246 N.E.2d 577 (1969), *rev'd*, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), *cert. denied*, 396 U.S. 1007 (1970); City of Piqua v. Hunger, 13 Ohio App. 2d 108, 234 N.E.2d 321 (1967), *rev'd on other grounds*, 44 Ohio Op. 2d 81 (1968).

[65]State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), *cert. denied*, 396 U.S. 1007 (1970). *See* notes 26-29 *supra* & text accompanying.

[66]City of Piqua v. Hunger, 13 Ohio App. 2d 108, 112, 234 N.E.2d 321, 324 (1967).

[67]13 Ohio App. 2d 108, 234 N.E.2d 321 (1967).

[68]*Id.* at 112, 234 N.E.2d at 324.

[69]*Id.* at 112, 234 N.E.2d at 323-24. The court in *City of Piqua* cites City of Columbus v. Hayes, 9 Ohio App. 2d 38, 222 N.E.2d 829 (1967), a contrary court of appeals ruling, which had held the *Miranda* ruling inapplicable to the offense of driving under the influence of alcohol. The *City of Piqua* court discounts that case, after pointing out that it offered no reasons for its conclusion.

[70]18 Ohio App. 2d 33, 246 N.E.2d 577, *rev'd*, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969).

vehicle while under the influence of alcohol. The court opined that the artificial distinction between felonies and misdemeanors is not a realistic basis for deciding whether *Miranda* should apply to misdemeanors. The court stated that "the activation of the constitutional privilege against self-incrimination should be based upon criteria which is [sic] more stable and discernible than the theoretical difference between confinement in the county jail and confinement in the state penitentiary."[71]

The contention that the fifth and sixth amendments require that *Miranda* be applicable to all crimes, whether misdemeanor or felony, may rely too heavily on a literal interpretation of the language in those amendments.[72] Basing the threshold test for the necessity of *Miranda* warnings on the definition of "criminal prosecution," "criminal case," or perhaps "crime" would result in inconsistency among the states due to the varying definitions of these terms from state to state. For instance, under New Jersey law motor vehicle violations are not included within the definition of crime or criminal prosecution,[73] but in Pennsylvania at least some motor vehicle violations fall within the category of criminal case or criminal prosecution.[74] Determining *Miranda's* application to misdemeanors, motor vehicle violations and other petty offenses on the basis of how broadly each state defines these terms is too mechanical[75] to serve the substantial interest of protection of fundamental liberties articulated in *Miranda.*

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[71]State v. Pyle, 18 Ohio App. 2d 33, 34, 246 N.E.2d 577, 578 (1969), *rev'd*, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969). The dissenting opinion in the Ohio Supreme Court's reversal criticizes the inherent inconsistency in holding *Miranda* inapplicable to misdemeanors. 19 Ohio St. 2d at 69-70, 249 N.E.2d at 829. The artificality of such distinctions is highlighted by the fact that in Ohio, a misdemeanant may be imprisoned for up to six months in a county jail. *See* OHIO REV. CODE ANN. §§ 2929.21 (Page 1975).

[72]*See* note 93 *infra*. The Supreme Court has apparently rejected a literal interpretation of the "criminal prosecution" language of the sixth amendment in the right to counsel context. Middendorf v. Henry, 425 U.S. 25, 33 (1976) (summary court-martial held not a "criminal prosecution" for purposes of the sixth amendment); *see generally* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation proceeding held not a "criminal proceeding"); *In re* Gault, 387 U.S. 1 (1967) (juvenile hearings not a "criminal proceeding"; nevertheless counsel held required).

In *Middendorf*, the Court stated that *Gault* and *Gagnon* "surely stand for the proposition that even in the civilian community a proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial." 425 U.S. at 38.

The Supreme Court, however, could easily distinguish these cases in the future; they respectively concern courts-martial in the military community, probation revocation of persons already convicted and juvenile hearings which have special rehabilitative purposes, and are thus *sui generis*. *See* note 93 *infra*.

[73]State v. Macuk, 57 N.J. 1, 9-10, 268 A.2d 1, 5 (1970).

[74]Commonwealth v. Bonser, 215 Pa. Super Ct. 452, 459, 258 A.2d 675, 679 (1969).

[75]Indeed, in order to dispense with the requirement of *Miranda* warnings, a state legislature could merely redefine these terms as noncriminal in nature under such a mechanical test.

Possibility of Severe Consequences

Perhaps the most compelling argument offered to support the applicability of *Miranda* to nonfelonies comes from the harsh consequences resulting from some of these offenses.[76] In many states, convictions resulting from certain misdemeanors involve heavy fines or lengthy imprisonment, or both.[77] Moreover, in some states conviction of certain motor vehicle violations may result in permanent loss of one's operator's license,[78] certainly a serious consequences in this vehicular age.

In *Commonwealth v. Bonser*[79] the court accorded significant weight to the potentially serious consequences and refused to hold *Miranda* inapplicable to all misdemeanors. After pointing out that the defendant faced a possible sentence of three years for driving under the influence of alcohol, the court stated that "the appellee, if convicted, faces a substantial loss of liberty. Under these circumstances he is entitled to full protection under the Constitution as implemented by *Miranda*. Nor should there be any different holding because the offense is found in The Vehicle Code instead of The Penal Code."[80] Following a similar line of reasoning, the dissent in *State v. Neal*[81] criticized the majority's holding that *Miranda* is inapplicable to all misdemeanors arising from the operation of a motor vehicle by noting that "the consequences of conviction may in sum total be as serious for the misdemeanant as for the felon."[82] *State v. Angelo*[83] provides an actual

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[76]*See, e.g.*, Commonwealth v. Bonser, 215 Pa. Super. Ct. 452, 258 A.2d 675 (1969). *See also* People v. Letterio, 16 N.Y.2d 307, 213 N.E.2d 670 (1965), *cert. denied*, 384 U.S. 911 (1966) (dissenting opinion); Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 708-15 (1968) (suggesting that in some misdemeanors the stigma flowing from official condemnation alone should be deemed a serious consequence for sixth amendment purposes).

[77]*See, e.g.*, 75 PA. CONS. STAT. ANN. § 1037 (Purdon 1971) ("a fine of not less than one hundred dollars ($100.00) and not more than five hundred dollars ($500.00) . . . or undergo imprisonment for not more than three (3) years, or suffer both such fine and imprisonment"); State v. Angelo, 251 La. 250, 203 So. 2d 710 (1967) (defendant received concurrent twelve-month and sixteen-month sentences upon conviction for contributing to the delinquency of a minor and indecent behavior with a juvenile, both misdemeanors).

[78]*See, e.g.*, MO. REV. STAT. §§ 564.440, 302.302, 302.304, 302.309 (Vernon 1972).

[79]Commonwealth v. Bonser, 215 Pa. Super. Ct. 452, 258 A.2d 675 (1969).

[80]*Id.* at 460, 258 A.2d at 680 (footnote omitted). *See* notes 27-30 *supra* & text accompanying.

[81]476 S.W.2d 547 (Mo. 1972).

[82]*Id.* at 556 (dissenting opinion). The dissent further states that "to exempt literally *all* offenses involving the operation of a motor vehicle from the application of *Miranda* would equate a speeding ticket with a prosecution for manslaughter by culpable negligence in the operation of a motor vehicle under Sec. 599.070, an equation we regard as untenable . . . ." *Id.* In Missouri the first two convictions for operating a motor vehicle under the influence are considered misdemeanors. The first offense may result in up to six months in the county jail, while the second may bring a one year term. In addition, a second conviction results in the loss of the misdemeanant's driving privileges. The third and subsequent offenses are felonies for which the penalty is either incarceration in the county jail for not less than ninety days nor more than one year, or by confinement in the penitiary for a term of not less than two nor more than five years. *See* Note, *Privilege Against Self-Incrimination—Application of Miranda v. Arizona to Motor Vehicle Violations*, 38 MO. L. REV. 652, 655-56 (1973).

[83]251 La. 250, 203 So. 2d 710 (1967).

example of the serious consequences which may befall a misdemeanant. Angelo, an adult, was convicted in a juvenile court of contributing to the delinquency of a juvenile and indecent behavior with a juvenile. He was sentenced to concurrent twelve-month and sixteen-month sentences. The Louisiana Supreme Court affirmed both convictions and sentences, holding that *Miranda* does not apply to an accused charged with a misdemeanor.[84]

The severity of the consequences clearly seems to be a more rational factor in determining whether *Miranda* should be applicable in a particular situation than a mechanical distinction between felonies and misdemeanors. Simply because a state happens to label a certain offense a misdemeanor does not mean that the penalty for that offense will not entail heavy consequences. As *Angelo* indicates, misdemeanor convictions can lead to a substantial deprivation of liberty.

The utilization of "severity of consequences" as a threshold for the necessity of *Miranda* warnings may not prove wholly satisfactory either. Such a test is too elastic and uncertain. What may be serious to one court may not be serious to another court. Moreover, a court may find a penalty to be severe in one case, while in another case the same court may find that the penalty was not severe in light of the egregious nature of the offense. Additionally, such a definitional test would lead to a case-by-case after the fact analysis. It would be nearly impossible for law enforcement officers to discern when *Miranda* warnings would be required.[85] On the other hand, it would seem that deprivation of liberty is *per se* a severe penalty. Accordingly, one way to forestall the uncertainty of a broad "severity of consequences" test is to employ instead a standard based on the "potentiality of incarceration."

POTENTIALITY OF INCARCERATION STANDARD

In view of the foregoing problems pertaining to the application of *Miranda* in the nonfelony context, a solution is needed which will provide a practical yet protective standard. The proper solution to the dilemma can be derived from the test laid down by the Supreme Court in *Argersinger v. Hamlin*[86] in connection with the right to court-appointed counsel. In *Argersinger,* the Court ruled that defendants accused of any imprisonable offense are entitled to the right to have counsel appointed. It seems clear that analogizing the "potentiality of incarceration" standard espoused in *Argersinger* to the context of the right against self-incrimination leads to

[84]*Id.* at 255, 203 So. 2d at 711-12.

[85]For example, consider the practical difficulty for a police officer arresting an individual in Missouri for driving under the influence of intoxicants of knowing the severity of consequences for that particular defendant under the law of that state, which can turn on how many previous convictions the individual has. *See* authorities cited in note 96 *infra.*

[86]407 U.S. 25 (1972).

the conclusion that, in the self-incrimination context, a similar standard would alleviate the constitutional objections to any blanket rule exempting nonfelonies from *Miranda* requirements. Moreover, such a standard would meet the fears of many courts that effective law enforcement would be impeded by requiring warnings in some but not all nonfelony cases.

In *Argersinger,* the Supreme Court held that the constitutional right to counsel attached to any offense, whether classified as petty, misdemeanor or felony, for which one may be imprisoned.[87] Mr. Justice Douglas wrote that assistance of counsel might well be necessary, even in a petty offense prosecution, in order to ensure a fair trial.[88] He pointed out that the questions involved in a case that actually lead to incarceration, even if only for a brief time, are no less complex than those which may lead to a sentence of more than six months.[89]

The reasoning of Mr. Justice Douglas applies equally to the issue of whether *Miranda* warnings are required in nonfelony cases which nevertheless threaten imprisonment. It seems that coercive police practices which *Miranda* was intended to curb or eliminate are not limited to felony cases.[90] Thus, it is inconsistent with the policies underlying *Argersinger* to require, on the one hand, that the right to assistance of counsel be protected with respect to a defendant charged with an imprisonable misdemeanor, while on the other hand with respect to that same imprisonable misdemeanor, to permit the police not to advise the accused of his *Miranda* rights, which include the right to have the assistance of counsel.[91] In many instances, not requiring *Miranda* warnings to be issued to misdemeanants who face potential incarceration will in effect render the right to counsel under *Argersinger* a nullity.

For example, the elements generally material to a conviction for the misdemeanor of driving while intoxicated are intoxication and operation of the vehicle by the defendant. If after arresting the defendant, the officer asks him if he was driving, and the defendant answers affirmatively, then operation of the vehicle is established. If the defendant is not warned prior to the interrogation of his right to see an attorney, then his *Argersinger*

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[87]*Id.* at 37. In *Argersinger,* Mr. Justice Douglas rejected "the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer." *Id.* at 30-31.

[88]407 U.S. at 33.

[89]*Id.*

[90]Indeed, one may envision certain misdemeanors, *e.g.,* driving while intoxicated, where coercive police practices would be more prevalent than in certain felonies, *e.g.,* embezzlement, where such practices would be less likely to occur. *See* notes 33-35 *supra* & text accompanying for an illustration of a misdemeanant subjected to such practices absent *Miranda* warnings.

[91]The inconsistency of an accused's having the right to counsel at trial under *Argersinger,* yet not being informed of this entitlement until after interrogation, is heightened in light of the fact that *Miranda* was partially based on the sixth amendment right to counsel. 384 U.S. at 465-66.

right to assistance of counsel will be an exercise in futility because the material elements of the offense have already been established. Hence, the constitutional right to counsel is effectively watered down when the case is already made against the defendant before he is even advised of his right to such assistance.[92] Therefore, in order to preserve the constitutional mandate of that decision,[93] it follows that *Miranda* warnings should be afforded every defendant charged with a nonfelony which carries with it the potentiality of incarceration.

This proposition must also meet the argument that the present Supreme Court is apparently unwilling to expand the parameters of *Miranda*.[94] Therefore, it should be emphasized that the potentiality of incarceration standard does not represent an extension of *Miranda;* rather, under the mandate of the policy considerations which underlay both the

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[92]It seems clear that the Court in Miranda v. Arizona, 384 U.S. 436 (1966), intended to prevent such situations. The Court stated:

> Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt a confession, would have already been obtained at the unsupervised pleasure of the police."

Id. at 466 (citations omitted).

[93]*But see* Middendorf v. Henry, 425 U.S. 25 (1976), which seems to indicate that the current Court is limiting the reach of *Argersinger* rather than extending it. In *Middendorf*, the majority, in an opinion delivered by Mr. Justice Rehnquist, refused to apply *Argersinger's* constitutional mandate of appointed counsel to summary court-martial proceedings even though the plaintiffs faced possible confinement at hard labor for thirty days, reduction in grade and loss of pay. *Id.* at 34-37. In support of its holding, the majority cites Gagnon v. Scarpelli, 411 U.S. 778 (1973), for the proposition that "[t]he fact that the outcome of a proceeding may result in loss of liberty does not by itself, even in civilian life, mean that the Sixth Amendment's guarantee of counsel is applicable." *Id.* at 35. In *Gagnon*, the Court held that a probation revocation proceeding was not a "criminal proceeding," and hence the right to appointed counsel did not arise.

Conceivably, the Supreme Court's refusal in *Middendorf* and *Gagnon* to extend *Argersinger's* imprisonable offense standard might be interpreted to indicate that the Court would be unwilling to develop such a threshold test for the requirement of *Miranda* warnings. However, a more plausible explanation of the Court's restrictions on *Argersinger's* imprisonable offense test in *Middendorf* and *Gagnon* is the *sui generis* nature of these two cases.

In *Gagnon*, the Court noted that there were critical differences between probation revocation proceedings and criminal trials. 411 U.S. at 788. Moreover, in such a proceeding the defendant has been previously sentenced. Likewise, in *Middendorf*, the summary court-martial differs in many respects from a traditional trial. 425 U.S. 38. Also, decisions of the Supreme Court indicate that cases involving the military community are often treated differently. *See* Parker v. Levy, 417 U.S. 733 (1974). *See also*, Note, *The Right to Counsel at Summary Courts-Martial: COMA at the Crossroads*, 52 IND. L.J. 241 (1976), for a critical analysis of *Middendorf*.

Thus, if confronted with a case to which *Argersinger's* requirement of appointed counsel clearly applies, such as a driving while intoxicated offense, the Supreme Court might be less reluctant to utilize the "potentiality of incarceration" standard for the triggering of the requirement of *Miranda* warnings.

[94]*See, e.g.*, Garner v. United States, 424 U.S. 648 (1976); Michigan v. Mosley, 423 U.S. 96 (1975); Schneckloth v. Bustamonte, 412 U.S. 218, 246-47 (1973).

Miranda and *Argersinger* holdings,[95] the implementation of the potentiality of incarceration test in the nonfelony situation strikes the proper balance between protection of fundamental constitutional rights and the requirements of efficient and effective law enforcement.

CONCLUSION

It is imperative that the problem of the applicability of *Miranda* to nonfelonies be resolved. The utilization of a "potentiality of incarceration" standard would require *Miranda* warnings only in those cases where the defendant faces the possibility of imprisonment. This test balances the competing constitutional requirements and policy considerations in the best possible manner. Such a rule, while not jeopardizing the achievement of efficient and effective law enforcement, meets the constitutional requirements of the fifth and sixth amendments.

Requiring *Miranda* warnings for any offense for which the loss of liberty is a possible sanction would meet many of the arguments advanced against such an application of *Miranda*. The argument that misdemeanors, motor vehicle violations and petty offenses do not involve consequences serious enough to warrant the application of *Miranda* would be weakened significantly by the imprisonable offense limitation.[96] Similarly, objections based on practicality and routineness may be minimized under such a test in light of the limitation. Moreover, the presence of

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[95]*See* note 92 *supra* & text accompanying.

[96]This view may explain the decision in Duncan v. Louisiana, 391 U.S. 145 (1968), where the Court held that the sixth amendment guarantee of trial by jury applied to all misdemeanors except so-called "petty offenses." *Id.* at 161. In Baldwin v. New York, 399 U.S. 66 (1970), the right to jury trial was reaffirmed in cases where the offense is not petty, *i.e.*, those carrying potential imprisonment for more than six months.

Before the *Argersinger* decision, at least three courts denied the application of *Miranda* to nonfelony offenses on the strength of analogy to *Duncan*. *See* State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), *cert. denied*, 396 U.S. 1007 (1970):

> The Supreme Court of the United States has refused to apply some provisions of the Bill of Rights in the federal courts, such as the right to a jury trial, in so-called petty offenses, which it has defined "as those punishable by no more than six months in prison and a $500 fine." It is difficult to perceive why the requirements of *Miranda* should be imposed upon Ohio in this case, where the maximum penalty was a fine of $500 and imprisonment in the county jail or workhouse for six months.

Id. at 68-69, 249 N.E.2d at 828-29 (concurring opinion) (citations omitted). *Accord*, County of Dade v. Callahan, 259 So. 2d 504 (Fla. Dist. Ct. App. 1972); State v. Desjardins, 110 N.H. 511, 272 A.2d 599 (1970).

But the Supreme Court has since indicated that the right to counsel is higher on the scale of fundamental rights than the right to trial by jury: the potentiality of imprisonment for any period triggers the right to counsel under *Argersinger*, while only the possibility of imprisonment for six months or more invokes the right to jury trial under *Duncan* and *Baldwin*. Since the *Miranda* warnings include advising a suspect of his right to have the assistance of counsel, it follows that a misdemeanant facing possible imprisonment for any period of time should be entitled to *Miranda* warnings. Thus, any analogy to *Duncan* is comparatively weak when measured against the standard proposed herein. *See* notes 86-95 *supra* & text accompanying.

Argersinger's mandate mitigates the impact on states' legal resources that would be entailed by a rule broader than the potentiality of incarceration standard.[97] It is difficult to believe that a potentiality of incarceration standard would significantly impair effective police investigation. Indeed, it seems that effective prosecution demands the issuance of *Miranda* warnings in the majority of situations.[98] One foreseeable objection to drawing the line at imprisonable offenses may be based on the seemingly unfair burden placed on law enforcement authorities to discern imprisonable from nonimprisonable offenses.[99] Nevertheless it appears imperative that the possibility of incarceration be entitled to the status of "serious consequence."[100] Although police officers cannot be expected to know as much law as a judge, it does not appear unduly burdensome or unfair to require officers to know which offenses involve possible incarceration.

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[97]Because *Argersinger* forces a state to provide indigents with counsel at trial, requiring *Miranda* warnings in only imprisonable offenses will in effect merely require a state to provide indigents the opportunity for assistance of counsel at an earlier stage in the proceeding. Providing counsel at an earlier point in the process will not result in an onerous burden on legal resources. This protection is further strengthened by empirical studies showing that *Miranda* warnings seldom lead to requests for counsel anyway. *See* notes 7-12 *supra* & text accompanying.

See generally Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1260-62 (1970), which estimates that there are four to five million court cases, excluding traffic offenses, involving misdemeanors each year. The number of traffic violations cases is estimated to be approximately fifty million.

See generally Argersinger v. Hamlin, 407 U.S. 25, 37 n.7 (1972). The Court states its belief that the nation's legal resources are adequate to implement the rule that counsel be provided to all indigent misdemeanants involving imprisonable offenses. The Court notes that the additional number of attorneys estimated to be needed was "relatively insignificant when compared with the total number of attorneys in the United States." *Id. See also* Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 708-15 (1968).

[98]*See* State v. Neal, 476 S.W.2d 547, 554-56 (Mo. 1972) (dissenting opinion). The dissent points out the inherent risks involved in police failing to give *Miranda* warnings in situations where it appears that only a minor motor vehicle offense is involved. Investigations may be spoiled for want of *Miranda* warnings at the outset when police later find that a major felony has been committed.

[99]In *Argersinger* the burden is on the judge to determine before trial whether the offense in question involves the possibility of confinement. 407 U.S. at 40.

[100]*See* Baldwin v. New York, 399 U.S. 66 (1970), where the Court stated that "[t]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation." *Id.* at 73. *See also* Marston v. Oliver, 324 F. Supp. 691 (E.D. Va. 1971), which held that "[a]ny incarceration of over thirty days, more or less, will usually result in loss of employment, with a consequent substantial detriment to the defendant and his family." *Id.* at 696.