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STANDARDS FOR ACCEPTING GUILTY PLEAS TO MISDEMEANOR CHARGES

The guilty plea—not the trial—is the most common manner of disposing of criminal cases in America. It has been estimated that 90 percent of all convictions and 95 percent of misdemeanor convictions are the result of guilty pleas.¹ Various reasons have been advanced to explain this heavy reliance on the guilty plea. For example, it avoids the drain on judicial resources that would occur if all cases had to be tried.² In addition, it eliminates the risks and uncertainties of trials³ and permits flexibility in sentencing.⁴ Because of the prevalence of guilty pleas, there must be procedural safeguards to insure that defendants are treated fairly.

It has long been established that, in order to be valid, a guilty plea must be entered voluntarily and understandingly.⁵ Thus, the Supreme Court has held that a guilty plea is invalid if it is entered as the result of threats, intimidation, or other forms of coercion⁶ or as a result of

¹ D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 & n.1 (1966); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967) [hereinafter cited as TASK FORCE REPORT: THE COURTS]. The percentage for felony cases taken alone is somewhat lower—70 to 85 percent. D. NEWMAN, *supra*, at 3 n.1.

² THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 135 (1967) [hereinafter cited as CHALLENGE OF CRIME IN A FREE SOCIETY].

As a practical matter, many courts could not sustain the burden of having to try all cases coming before them. The quality of justice in all cases would suffer if overloaded courts were faced with a great increase in the number of trials. Tremendous investments of time, talent, and money, all of which are in short supply and can be better used elsewhere, would be necessary if all cases were tried.

Id.

³ *Id.*

⁴ *Id.*; AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY 2 (Approved Draft, 1968) [hereinafter cited as ABA STANDARDS]. It has often been said that defendants who plead guilty receive more lenient sentencing treatment than those who are tried and convicted. ABA STANDARDS § 1.8 (a) states that it is proper for a court to grant charge and sentence concessions to defendants who plead guilty "when the interest of the public in the effective administration of criminal justice would thereby be served." It then lists six factors that a court is to take into account in deciding this question. However, some courts and commentators have been highly critical of granting leniency to those who plead guilty, because such leniency in effect penalizes those who assert their right to trial. See *People v. Earegood*, 12 Mich. App. 256, 162 N.W.2d 802 (1968); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956).

⁵ See, e.g., *Kercheval v. United States*, 274 U.S. 220, 223-24 (1927).

⁶ E.g., *Machibroda v. United States*, 368 U.S. 487 (1962); *Waley v. Johnson*, 316 U.S. 101 (1942); *Walker v. Johnston*, 312 U.S. 275 (1941).

The type of coercion which would invalidate a guilty plea does not include the pressure that

ignorance or misapprehension.⁷ In *Boykin v. Alabama*,⁸ there were no allegations that the defendant's guilty plea resulted from misapprehension or any form of coercion, but the Supreme Court struck down the plea involved because the record failed to show affirmatively that it was voluntarily and understandingly entered.⁹ The Court held that it could not presume from a silent record that a guilty plea was entered voluntarily and knowingly.¹⁰ It emphasized that the trial judge must employ the utmost solicitude in "canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence[s]."¹¹ This requirement is intended to provide an additional procedural safeguard for the accused and an adequate record for appellate review.¹²

a defendant may feel to plead guilty in order to avoid the possibility of a heavier sentence being imposed upon conviction following a jury trial. *Brady v. United States*, 397 U.S. 742 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

⁷ E.g., *Palmer v. Ashe*, 342 U.S. 134 (1951); *Smith v. O'Grady*, 312 U.S. 329 (1941).

Thus, a defendant's conviction is invalid where he consented to a "prima facie" trial in ignorance of the fact that this was the practical equivalent of a guilty plea. *Brookhart v. Janis*, 384 U.S. 1 (1966). On the other hand, the defendant's plea is not invalidated by his ignorance of the legal sufficiency of his defenses. *Tollett v. Henderson*, 411 U.S. 258 (1973).

⁸ 395 U.S. 238 (1969).

⁹ The Court stated, "So far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court." *Id.* at 239.

¹⁰ The Court indicated that a guilty plea involved the waiver of three important constitutional rights: the right of confrontation, the right against self-incrimination, and the right to a jury trial. Therefore, the Court would not "presume a waiver of these three important federal rights from a silent record." *Id.* at 243 (footnote omitted). See text accompanying note 31 *infra*. For a consideration of *Boykin* in terms of principles governing the waiver of constitutional rights, see *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 181-87 (1969); Note, *Criminal Procedure: Effects of a Plea of Guilty on a Defendant's Constitutional Rights*, 27 OKLA. L. REV. 49 (1974); 22 ALA. L. REV. 76 (1969).

¹¹ 395 U.S. at 244. Justice Harlan in a dissent suggested that

The Court thus in effect fastens upon the States, as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure.

Id. at 245. Rule 11 provides, in pertinent part, that a court shall not accept a guilty plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

In *McCarthy v. United States*, 394 U.S. 459, 467-68 n.20 (1969), the phrase, "understanding of the nature of the charge," was construed to mean that the trial judge must make sure that the defendant understands the essential elements of the offense with which he is charged, at least in those cases in which the charge encompasses lesser included offenses.

The requirements which the Supreme Court imposed upon the states in *Boykin* are similar to the requirements of Rule 11 of the Federal Rules of Criminal Procedure, but it is unclear whether all the requirements of Rule 11, with the gloss put on it by *McCarthy*, are constitutionally mandated. Some state courts have held that Federal Rule 11 is now obligatory on the states. E.g., *Bishop v. Langlois*, 106 R.I. 56, 256 A.2d 20 (1969); *Ernst v. State*, 43 Wis. 2d 661, 170 N.W.2d 713 (1969). Others have held that not all the requirements of Federal Rule 11 are constitutionally mandated. E.g., *Byler v. State*, —Ark.—, 513 S.W.2d 801 (1974); *Boyd v. State*, 255 So. 2d 705 (Fla. Ct. App. 1971).

¹² 395 U.S. at 243-44. There is a split among state courts about whether an appellate court can look only to the record created by the trial judge at the time that a guilty plea is entered to

The defendant in *Boykin* pleaded guilty to a serious felony and was sentenced to death.¹³ This article will examine the constitutional and policy considerations which suggest the application of *Boykin* to misdemeanors¹⁴ and will consider whether the procedures developed to implement the *Boykin* principle in felony cases should likewise be followed in misdemeanors.

I. STANDARDS FOR ACCEPTING GUILTY PLEAS IN FELONIES

While the Supreme Court in *Boykin* indicated that there must be an affirmative showing in the record that a guilty plea is voluntarily and understandingly entered, it gave only a general indication of how the trial court is to assemble this record. A large number of state and lower federal court opinions¹⁵ have considered what specific inquiries the trial court must make before the defendant's plea is accepted.¹⁶ These inquiries can be grouped into five main areas, at least some of which are required by all courts.

determine compliance with *Boykin* or whether it can look also to the record as reconstructed at a post-conviction hearing. Some courts have reversed convictions when the record created at the time the plea was entered failed to show compliance with the *Boykin* requirements, thereby allowing the defendant to plead anew. *See, e.g.,* *People v. Kirkpatrick*, 7 Cal. 3d 480, 498 P.2d 992, 102 Cal. Rptr. 744 (1972); *Higby v. Sheriff of Clark County*, 86 Nev. 774, 476 P.2d 959 (1970). Some other courts have held that it is permissible to look to the entire record as reconstructed at a post-conviction hearing. *See, e.g.,* *Morgan v. State*, 287 A.2d 592 (Me. 1972); *Vickery v. State*, 258 S.C. 33, 186 S.E.2d 827 (1972). There is language in the *Boykin* opinion to support both views. The former is supported by the statement in *Boykin* that the procedure set forth is designed to forestall "the spin-off of collateral proceedings that seek to probe murky memories." 395 U.S. at 244. The latter group of courts is supported by a passage in *Carnley v. Cochran*, 369 U.S. 506, 516 (1962), dealing with the waiver of the right to counsel, which the Court in *Boykin* quotes with approval: "The record must show, or there must be an allegation and evidence which show, that an accused . . . intelligently and understandingly rejected" an offer of counsel. 395 U.S. at 242.

¹³ 395 U.S. at 239-40. The defendant pleaded guilty to five counts of common law robbery.

¹⁴ There are significant variations among the states in the manner in which offenses are classified as misdemeanors or felonies. *See* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 64-67 (1963). However, the standard that has been most widely adopted is that a misdemeanor is an offense punishable by not more than one year's imprisonment. *See* MODEL PENAL CODE § 1.05, Comment (Tent. Draft No. 2, 1954). Therefore, the term misdemeanor in this article will be used to refer to offenses punishable by a fine or imprisonment not exceeding a term of one year.

¹⁵ The emphasis in this part will be on state rather than federal cases, since the vast bulk of criminal prosecutions are brought in state courts.

Some of the procedures discussed in this section are themselves constitutionally mandated, while others have been adopted as a policy matter as being the most desirable means of creating the constitutionally required record of voluntariness and understanding.

¹⁶ Recent articles that deal with acceptance of guilty pleas include Bishop, *Guilty Pleas in Missouri*, 42 U. MO. KAN. C. L. REV. 304 (1974); Bishop, *Guilty Pleas in the Pacific West*, 51 J. URBAN L. 171 (1973); Bishop, *Guilty Pleas in Texas*, 24 BAYLOR L. REV. 301 (1972); Bishop, *Rights and Responsibilities of the Defendant Pleading Guilty*, 49 J. URBAN L. 1 (1971); Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy*,

The first area of inquiry concerns the defendant's understanding of the nature of the charge. It is widely accepted that the defendant must at least be informed of the nature of the charge against him.¹⁷ This is most often accomplished by the reading of the statutory violations charged in the indictment or information.¹⁸ However, some appellate courts have held that the defendant must also be advised of the essential elements of the offense.¹⁹ On the other hand, most courts which have considered the question have held that it is not necessary to advise the defendant about possible defenses.²⁰

A second area of inquiry is to determine the voluntariness of the plea. Most jurisdictions require such an inquiry to be made by the trial court before it accepts a plea.²¹ The trial judge will most frequently ask the defendant whether his plea has been induced in any way

6 VAL. U.L. REV. 111 (1972); Erickson, *The Finality of a Plea of Guilty*, 48 NOTRE DAME LAWYER 835 (1973); Heberling, *Judicial Review of the Guilty Plea*, 7 LINCOLN L. REV. 137 (1972); Note, *Post-Conviction Relief from Pleas of Guilty: A Diminishing Right*, 38 BROOKLYN L. REV. 182 (1971); Comment, *Pleas of Guilty*, 18 KAN. L. REV. 729 (1970); Comment, *Criminal Procedure-Requirements for Acceptance of Guilty Pleas*, 48 N.C.L. REV. 352 (1970); Note, *The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas*, 1970 WASH. U.L.Q. 289; Comment, *Profile of a Guilty Plea: A Proposed Trial Court Procedure for Accepting Guilty Pleas*, 17 WAYNE L. REV. 1195 (1971).

¹⁷ See, e.g., *In re Tahl*, 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969), cert. denied, 398 U.S. 911 (1970); *Purvis v. Connell*, 227 Ga. 764, 182 S.E.2d 892 (1971); *State v. Sisco*, 169 N.W.2d 542 (Iowa 1969); *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971); *Bishop v. Langlois*, 106 R.I. 56, 256 A.2d 20 (1969); ALASKA R. CRIM. P. 11(c)(1); ARIZ. R. CRIM. P. 17.2; COLO. R. CRIM. P. 11(c)(1); DEL. SUPER. CT. R. CRIM. P. 11; FLA. R. CRIM. P. 1.170(a); IDAHO CRIM. PRAC. & PROC. R. 11; ILL. S. CT. R. 402(a)(1); IND. ANN. STAT. § 9-1204(a) (Burns Cum. Supp. 1974); KAN. STAT. ANN. § 22-3210(3) (1974); KY. R. CRIM. P. 8.08; ME. R. CRIM. P. 11; MICH. GEN. CT. R. 785.7(1)(a); MO. R. CRIM. P. 25.04; MONT. REV. CODES ANN. § 95-1606(e) (1969); NEV. REV. STAT. § 174.035(1) (1973); N.J. CRIM. PRAC. R. 3:9-2; OHIO R. CRIM. P. 11(C)(2)(a); ORE. REV. STAT. § 135.385(1) (1974); VT. R. CRIM. P. 11(c)(1); VA. R. CRIM. PRAC. & PROC. 3A:11(c); WASH. SUPER. CT. CRIM. R. 4.2(d); WIS. STAT. ANN. § 971.08(1)(a) (1971); WYO. R. CRIM. P. 15. See also FED. R. CRIM. P. 11; ABA STANDARDS, *supra* note 4, § 1.4(a).

¹⁸ See Comment, *Profile of a Guilty Plea: A Proposed Trial Court Procedure for Accepting Guilty Pleas*, 17 WAYNE L. REV. 1195, 1216 (1971).

¹⁹ See, e.g., *People v. Cumbly*, 495 P.2d 225 (Colo. 1972); *People v. Hudson*, 7 Ill. App. 3d 800, 288 N.E.2d 533 (1972); *State v. Johnson*, 279 Minn. 209, 156 N.W.2d 218 (1968). *Contra*, *State v. Howell*, 109 Ariz. 165, 506 P.2d 1059 (1973); *Moore v. State*, 496 S.W.2d 810 (Mo. 1973).

²⁰ See, e.g., *People v. Hickey*, 110 Ariz. 527, 521 P.2d 614 (1974); *People v. Green*, 21 Mich. App. 188, 175 N.W.2d 235 (1970).

²¹ See, e.g., *Purvis v. Connell*, 227 Ga. 764, 182 S.E.2d 892 (1971); *State v. Sisco*, 169 N.W.2d 542 (Iowa 1969); *Alexander v. State*, 226 So. 2d 905 (Miss. 1969); *Bishop v. Langlois*, 106 R.I. 56, 256 A.2d 20 (1969); ALASKA R. CRIM. P. 11(d); ARIZ. R. CRIM. P. 17.3; COLO. R. CRIM. P. 11(c)(2); DEL. SUPER. CT. R. CRIM. P. 11; FLA. R. CRIM. P. 1.170(a); IDAHO CRIM. PRAC. & PROC. R. 11; ILL. S. CT. R. 402(b); IND. ANN. STAT. § 9-1205(a) (Burns Cum. Supp. 1974); KAN. STAT. ANN. § 22-3210(3) (1974); KY. R. CRIM. P. 8.08; ME. R. CRIM. P. 11; MICH. GEN. CT. R. 785.7(2); MO. R. CRIM. P. 25.04; MONT. REV. CODES ANN. § 95-1606(e) (1969); NEV. REV. STAT. § 174.035(1) (1973); N.J. CRIM. PRAC. R. 3:9-2; OHIO R. CRIM. P. 11(C)(2)(a); ORE. REV. STAT. § 135.390(1) (1974); PA. R. CRIM. P. 319(a); VT. R. CRIM. P. 11(d); VA. R. CRIM. PRAC. & PROC. 3A:11(c); WASH. SUPER. CT. CRIM. R. 4.2(d); WIS. STAT. ANN. § 971.08(1)(a) (1971); WYO. R. CRIM. P. 15. See also FED. R. CRIM. P. 11; ABA STANDARDS, *supra* note 4, § 1.5.

by threats or promises.²² Realizing that such an inquiry may be meaningless if the defendant is attempting to hide the fact that he has entered into a plea bargain with the prosecution,²³ several jurisdictions have recently adopted a requirement that such bargains be expressly stated in the record.²⁴

A third area of inquiry involves the defendant's understanding of the consequences of his plea. Many jurisdictions require that the defendant be advised of the maximum sentence that could be imposed for the offense to which he is pleading guilty.²⁵ However, there is substantial disagreement about whether the defendant must be advised that he will become ineligible for parole²⁶ or be subject to special

²² See D. NEWMAN, *supra* note 1, at 27.

²³ Some commentators have contended that plea bargaining is unconstitutional, arguing that pleas entered as a result of such bargaining are necessarily coerced and hence do not comply with the constitutional requirements of voluntariness. See Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970). However, in recent decisions, the Supreme Court has expressly sanctioned the use of plea bargaining and has indicated that plea bargaining is not inherently coercive. *Santobello v. New York*, 404 U.S. 257 (1971); *Brady v. United States*, 397 U.S. 742 (1970). In *Santobello*, the Court commented that "'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged." 404 U.S. at 260.

²⁴ See, e.g., *Paradiso v. United States*, 482 F.2d 409 (3d Cir. 1973); *People v. West*, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970); *Commonwealth v. Alvarado*, 442 Pa. 516, 276 A.2d 526 (1970); ALASKA R. CRIM. P. 11(e); ARIZ. R. CRIM. P. 17.4; ILL. S. CT. R. 402(d); MICH. GEN. CT. R. 785.7(2); OHIO R. CRIM. P. 11(F); VT. R. CRIM. P. 11(e); WASH. SUPER. CT. CRIM. R. 4.2(e). See also PROPOSED FED. R. CRIM. P. 11, 52 F.R.D. 409, 416-17 (1971); ABA STANDARDS, *supra* note 4, § 1.5. This development has been welcomed by commentators, one of whom noted,

The arguments supporting open examination of the defendant's plea bargain at his plea colloquy go directly to the twin themes of judicial control and judicial credibility in the plea process. Full public disclosure of the bargain and its terms will go far toward judicial elimination of misunderstandings between the defendant and defense counsel over the implications of a plea agreement. . . . And, since it is no longer necessary for counsel to rehearse the defendant or forewarn him against controverting what is said by others during the colloquy, the trial judge will be better able to control the plea process through his inquiry into the voluntariness of the plea and influence of the plea bargain.

Heberling, *supra* note 16, at 201-02 (footnote omitted).

A further issue beyond the scope of this article is whether plea bargaining in itself is desirable. For a discussion of the relevant considerations, see Rosett, *The Negotiated Guilty Plea*, 374 ANNALS 70 (1967); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971).

²⁵ See, e.g., *Jones v. United States*, 440 F.2d 446 (2d Cir. 1971); *State v. Sisco*, 169 N.W.2d 542 (Iowa 1969); *Mathews v. State*, 15 Md. App. 686, 292 A.2d 131 (1972); ALASKA R. CRIM. P. 11(c)(3)(i); ILL. S. CT. R. 402(a)(2); IND. ANN. STAT. § 9-1204(d) (Burns Cum. Supp. 1974); KAN. STAT. ANN. § 22-3210(2) (1974); MICH. GEN. CT. R. 785.7(1)(b); OHIO R. CRIM. P. 11(C)(2)(a); ORE. REV. STAT. § 135.385(2)(b) (1974); VT. R. CRIM. P. 11(c)(2). *But see* *Commonwealth v. O'Neill*, 451 Pa. 458, 304 A.2d 108 (1973); *State v. White*, 5 Wash. App. 615, 489 P.2d 934 (1971).

A similar requirement is for the defendant to be advised of any mandatory minimum. See, e.g., ALASKA R. CRIM. P. 11(c)(3)(i); ILL. S. CT. R. 402(a)(2); IND. ANN. STAT. § 9-1204(d) (Burns Cum. Supp. 1974); MICH. GEN. CT. R. 785.7(1)(b); VT. R. CRIM. P. 11(c)(2).

²⁶ Some courts have held that the trial court should advise the defendant if he is ineligible for parole under the offense he is pleading guilty to. See, e.g., *Berry v. United States*, 412 F.2d 189 (3d Cir. 1969); *Durant v. United States*, 410 F.2d 689 (1st Cir. 1969). Other courts have regarded parole as a matter of "legislative grace" and have therefore held that it is not

sentencing possibilities as a result of the plea.²⁷ On the other hand, most courts have held that it is not necessary to advise the defendant as to possible collateral consequences of his conviction such as loss of a passport,²⁸ loss of the right to vote,²⁹ or deportation.³⁰

A fourth area of inquiry involves the defendant's waiver of constitutional rights. The Supreme Court in *Boykin* indicated that a guilty plea involves the waiver of three important constitutional rights: the right to a jury trial, the right of confrontation, and the privilege against self-incrimination.³¹ Courts have split on whether the trial court must expressly advise the defendant about these rights. Some have held that on-the-record waivers of these rights are unnecessary³² since the *Boykin* Court did not explicitly make them a requirement. Other courts have found that the clear implication of *Boykin* is to require on-the-record waivers of the constitutional rights enumerated.³³ A few

necessary to advise a defendant of his ineligibility for parole. *See, e.g.,* *Smith v. United States*, 324 F.2d 436 (D.C. Cir. 1963); *Anushevitz v. Warden, Nev. State Prison*, 86 Nev. 191, 467 P.2d 115 (1970).

²⁷ Special sentencing statutes are statutes such as youth offender acts and recidivist statutes which impose a penalty separate from that provided by the statute punishing the substantive offense charged. *See* Note, *The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas*, 1970 WASH. U.L.Q. 289, 318-19. It has been held that a defendant must be advised of the special sentencing provisions of the Federal Youth Corrections Act. 18 U.S.C. § 5005 *et seq.* (1970). *Pilkington v. United States*, 315 F.2d 204 (4th Cir. 1963). However, it has been held that it is not necessary to advise a defendant that his guilty plea might subject him to a civil commitment hearing under defective delinquent acts. *Cuthrell v. Director, Patuxent Institution*, 475 F.2d 1364 (4th Cir. 1973); *Perry v. State*, 11 Md. App. 302, 273 A.2d 635 (1971).

²⁸ *E.g.,* *Meaton v. United States*, 328 F.2d 379 (5th Cir. 1964), *cert. denied*, 380 U.S. 916 (1965).

²⁹ *E.g.,* *United States v. Cariola*, 323 F.2d 180 (3d Cir. 1963); *People v. Thomas*, 41 Ill. 2d 122, 247 N.E.2d 177 (1968).

³⁰ *E.g.,* *United States v. Sambro*, 454 F.2d 918 (D.C. Cir. 1971); *Tafoya v. State*, 500 P.2d 247 (Alas. 1972), *cert. denied*, 410 U.S. 945 (1973). The *Tafoya* court explained why appellate courts are reluctant to require trial judges to advise a defendant of collateral consequences:

It would indeed be onerous and absurd to require the trial judge to delve into all the peculiarities of each defendant's birth, nationality, occupation, and other circumstances, and to apprise him of all the collateral consequences possibly flowing therefrom.

Id. at 251. *See generally* Note, *The Rational Basis for Guilty Pleas and the Restrictive Scope of Direct Consequences*, 31 WASH. & LEE L. REV. 236 (1974).

³¹ 395 U.S. at 243.

³² *See, e.g.,* *Kelly v. State*, 254 So. 2d 22 (Fla. Ct. App. 1971); *Commonwealth v. Morrow*, —Mass.—, 296 N.E.2d 468 (1973); *Turner v. State*, 493 S.W.2d 36 (Mo. Ct. App. 1973); *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971); *Heffley v. Warden, Nev. State Prison*, 89 Nev. 573, 516 P.2d 1403 (1973); *Tipton v. State*, 498 P.2d 429 (Okla. Ct. Crim. App. 1972).

³³ *See, e.g.,* *In re Tahl*, 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969); *Thomas v. State*, —Ind. App.—, 306 N.E.2d 136 (1974); *English v. State*, 16 Md. App. 439, 298 A.2d 464 (1973); *People v. Jaworski*, 387 Mich. 21, 194 N.W.2d 868 (1972). The court in *Jaworski* reasoned that the language and logic of the *Boykin* opinion require that "the defendant must be informed of these three rights, for without knowledge he cannot understandingly waiver [sic] those rights." *Id.* at 29, 194 N.W.2d at 871.

Cf. Schneckloth v. Bustamonte, 412 U.S. 218 (1973), in which the Supreme Court held that the fourth amendment does not necessarily require the state to prove that the one giving permission to a search knew that he had a right to withhold consent. But the Court noted in

jurisdictions have gone beyond *Boykin* to require that the defendant be informed of certain additional constitutional rights which he waives upon pleading guilty, such as the right to have compulsory process for obtaining witnesses in his favor.³⁴

A final area of inquiry concerns a determination of the factual basis for the plea. Until recently, few jurisdictions had such a requirement,³⁵ but several jurisdictions currently require that the trial judge establish a factual basis for the plea before it is accepted.³⁶ This requirement is usually fulfilled if the trial court elicits facts from the defendant about what he did which leads him to believe that he is guilty of the charge,³⁷ but it has been suggested that this requirement may also be satisfied by such other means as questioning the prosecuting attorney or examining the pre-sentence report.³⁸

II. STANDARDS FOR ACCEPTING GUILTY PLEAS IN MISDEMEANORS

A. *State of the Law*

The same standard of voluntariness and understanding applies to the acceptance of guilty pleas in misdemeanor as well as felony cases.

dictum that the knowledge of the rights being waived is required when various trial-related rights are being waived. *Id.* at 237-38.

³⁴ See, e.g., IND. ANN. STAT. § 9-1204(c) (Burns Cum. Supp. 1974); MICH. GEN. CT. R. 785.7(1)(d)(iii); OHIO R. CRIM. P. 11(C)(2)(c).

In dissenting from a denial of certiorari, Justice Douglas suggested that enumeration of certain trial related rights, in addition to those expressly enumerated in *Boykin*, may be required. *Johnson v. Ohio*, 419 U.S. 924 (1974), *cert. denied* (Douglas, J., dissenting).

³⁵ See Erickson, *supra* note 16, at 838; ABA STANDARDS, *supra* note 4, § 1.6, Commentary.

³⁶ See, e.g., *State v. Johnson*, 279 Minn. 209, 156 N.W.2d 218 (1968); *State v. LeGear*, 187 Neb. 763, 193 N.W.2d 763 (1972); ALASKA R. CRIM. P. 11(f); ARIZ. R. CRIM. P. 17.3; ILL. S. CT. R. 402(c); IND. ANN. STAT. § 9-1205(b) (Burns Cum. Supp. 1974); ME. R. CRIM. P. 11; MICH. GEN. CT.R. 785.7(3); N.J. CRIM. PRAC. R. 3:9-2; ORE. REV. STAT. § 135.385 (1974); VT. R. CRIM. P. 11(f); WASH. SUPER. CT. CRIM. R. 4.2(d); WIS. STAT. ANN. § 971.08(1)(b) (1971). See also FED. R. CRIM. P. 11; ABA STANDARDS, *supra* note 4, § 1.6. The purpose of the factual basis requirement has been stated as follows:

Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within this charge.

FED. R. CRIM. P. 11, Advisory Committee Note.

The inquiry as to a factual basis may be constitutionally required when a guilty plea is entered, coupled with a claim of innocence. See *North Carolina v. Alford*, 400 U.S. 25 (1970).

³⁷ See *People v. Hudson*, 7 Ill. App. 3d 800, 803, 288 N.E.2d 533, 535 (1972); *State v. LeGear*, 187 Neb. 763, 766, 193 N.W.2d 763, 765 (1972).

³⁸ See *People v. Hudson*, 7 Ill. App. 3d 800, 803, 288 N.E.2d 533, 536 (1972); *State v. LeGear*, 187 Neb. 763, 766, 193 N.W.2d 763, 765 (1972). In order to fulfill the factual basis requirement, it is not necessary that the defendant's guilt be proved beyond a reasonable doubt or even by a preponderance of the evidence. It is sufficient if there is a basis in the record from which one could reasonably conclude that the defendant committed the acts with the intent required to constitute the offense charged. *People v. Hudson*, 7 Ill. App. 3d at 803, 288 N.E.2d at 535.

Thus, a misdemeanor guilty plea is invalid if it is entered as the result of threats, intimidation, or other forms of coercion³⁹ or as the result of ignorance or misapprehension.⁴⁰ However, some courts have been less concerned about procedural safeguards to insure the fulfillment of this standard in misdemeanors than they have been in felonies. In some jurisdictions, it has been held that courts have no duty to determine the voluntariness of a guilty plea in a misdemeanor case⁴¹ or to advise the defendant about the consequences of his plea.⁴²

Some jurisdictions have statutes or court rules which require the court to determine that a guilty plea is entered voluntarily and understandingly. Some of these statutes or court rules apply by their terms to all criminal offenses.⁴³ Others apply only to felonies;⁴⁴ still others apply only to felonies and certain classes of misdemeanors.⁴⁵ In addition, certain other provisions placing such a duty upon a trial court are contained in court rules which exclude from their coverage the lower criminal courts, where some or all misdemeanors are tried.⁴⁶

³⁹ See, e.g., *Adams v. State*, 241 S.W.2d 150 (Tex. Crim. 1951); *State v. Stone*, 101 W. Va. 53, 131 S.E. 872 (1926).

⁴⁰ See, e.g., *State v. Blatherwick*, 238 Mo. App. 1005, 191 S.W.2d 1021 (1946).

⁴¹ E.g., *People v. Barry*, 23 Mich. App. 121, 178 N.W.2d 129 (1970); *Albrecht v. State*, 424 S.W.2d 447 (Tex. Crim. 1968).

⁴² E.g., *Kissinger v. State*, 147 Neb. 983, 25 N.W.2d 829 (1947); *Foster v. State*, 422 S.W.2d 447 (Tex. Crim. 1967).

⁴³ E.g., ALASKA R. CRIM. P. 11(c)-(f); COLO. R. CRIM. P. 11(c); COLO. MUN. CT. R. P. 211; IDAHO CRIM. PRAC. & PROC. R. 11; ILL. S. CT. R. 402(a)-(d); IND. ANN. STAT. §§ 9-1204, 9-1205 (Burns Cum. Supp. 1974); KY. R. CRIM. P. 8.08; MO. R. CRIM. P. 25.04; MO. MUN. & TRAFF. CT. R. 37.37; MONT. REV. CODES ANN. § 95-1606(e) (1969); NEV. REV. STAT. § 174.035(1) (1973); N.J. CRIM. PRAC. R. 3:9-2; N.J. MUN. CT. R. 7:4-2(b); WASH. SUPER. CT. CRIM. R. 4.2(d); WASH. JUST. CT. CRIM. R. 3.06(1); WIS. STAT. ANN. § 971.08(1) (1971).

⁴⁴ E.g., KAN. STAT. ANN. §§ 22-3210(2)-(5) (1974); LA. CODE CRIM. PRO. ANN. art. 556 (West 1967) (applies only when a defendant is not represented by counsel in a felony case); ME. R. CRIM. P. 11.

⁴⁵ E.g., ARIZ. R. CRIM. P. 17.1(b) (excludes minor traffic offenses); MICH. GEN. CT. R. 785.10 (excludes misdemeanors punishable by less than six months imprisonment); ORE. REV. STAT. § 135.385 (1974) (applies to felonies and other charges on which the defendant appears in person); PA. R. CRIM. P. 1(a), 319(a) (excludes summary offenses tried in Philadelphia County; a summary offense is one so designated by the statute defining the offense or one where the maximum punishment does not exceed ninety days' imprisonment. PA. STAT. ANN. tit. 18, § 106(c) (1973)). See also OHIO R. CRIM. P. 11, which requires a trial judge to make extensive inquiries when a defendant enters a guilty plea to a felony but less extensive inquiries when a defendant enters a guilty plea to a serious misdemeanor or a petty offense.

⁴⁶ E.g., DEL. SUPER. CT. R. CRIM. P. 1, 11; FLA. R. CRIM. P. 1.010, Committee Note (excludes municipal courts), 1.170(a); VT. R. CRIM. P. 11(c)-(f), 54(a)(1) (excludes police courts); VA. R. CRIM. PRAC. & PROC. 3A:11(c) (excludes courts not of record); WYO. R. CRIM. P. 15, 51(a) (excludes municipal and justice of the peace courts).

Jurisdictions such as Maine and Michigan, which specifically exclude misdemeanors or certain classes of misdemeanors from the provisions requiring the trial court to determine if the guilty plea was voluntarily and understandingly entered, could also be placed in this category because the court rules containing this provision are not applicable to the lower criminal courts. ME. R. CRIM. P. 54(b)(2); MICH. GEN. CT. R. 11.1.

The Federal Rule might also be placed in this category. FED. R. CRIM. P. 11 applies by its terms to all criminal offenses, but Rule 54(b)(4) excludes proceedings involving minor

In a number of jurisdictions, it is difficult to determine the actual procedures followed in the lower courts, because of the existence of provisions for a trial *de novo* upon appeal from a conviction in such "inferior" courts.⁴⁷ The effect of such a trial *de novo* provision is that any errors committed by the lower court are erased from the record and that the defendant is tried anew in the court of general jurisdiction.⁴⁸ It follows that in these jurisdictions, the procedures used by the lower criminal courts for accepting guilty pleas in misdemeanors are not effectively monitored by the appellate courts of the state.⁴⁹ Commentators who have studied the lower criminal courts have noted that in many such courts the trial judge does not ascertain whether a guilty plea is voluntarily and knowingly entered.⁵⁰

B. Impact of *Boykin*

One state court has expressly rejected the application of *Boykin* to "simple misdemeanors"⁵¹ while, in similar approaches, two other courts have found *Boykin* applicable only to certain more serious offenses.⁵² The courts of yet another state appear to have implicitly rejected the application of *Boykin* to misdemeanors.⁵³ On the other

offenses tried before United States magistrates. These latter proceedings are governed by the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, 400 U.S. 1037 (1971). U.S. MAGIS. R. 2(c), which governs the acceptance of guilty pleas to minor offenses other than petty offenses, provides that the magistrate shall proceed in accordance with the requirements of FED. R. CRIM. P. 11, while U.S. MAGIS. R. 3(b), which governs the acceptance of guilty pleas in petty offenses, does not contain such a provision. (A minor offense is a misdemeanor punishable by not more than one year imprisonment or a fine of not more than \$1000 or both, with certain enumerated exceptions. 18 U.S.C. § 3401(f) (1970). On the other hand, a petty offense is a misdemeanor punishable by not more than six months' imprisonment or a fine of not more than \$500 or both. 18 U.S.C. § 1(3) (1970)).

⁴⁷ See NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS 160, 162 (1973) [hereinafter cited as CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS].

⁴⁸ *Id.* at 160.

⁴⁹ *Id.* at 162; Bing & Rosenfeld, *The Quality of Justice: In the Lower Criminal Courts of Metropolitan Boston*, 7 CRIM. L. BULL. 393, 399-400 (1971).

⁵⁰ See Bing & Rosenfeld, *supra* note 49, at 425; Katz, *Municipal Courts—Another Urban Ill*, 20 CASE W. RES. L. REV. 87, 92, 95 (1968).

⁵¹ *See* People v. Tomlinson, 50 Mich. App. 655, 213 N.W.2d 803 (1973), *leave to appeal denied*, 391 Mich. 824 (1974). A "simple misdemeanor" is one punishable by less than six months' imprisonment. *Id.* at 657-58, 213 N.W.2d at 804-05.

⁵² These courts held that *Boykin* applies only to certain misdemeanors which carry a longer jail sentence: *Hamm v. State*, 123 Ga. App. 10, 179 S.E.2d 272 (1970) (held *Boykin* applicable where the defendant was sentenced to twelve months in the public work camps on each of two misdemeanor charges and suggested that the dividing line should be six months' imprisonment); *State v. Sisco*, 169 N.W.2d 542 (Iowa 1969) (held *Boykin* applicable to felonies and indictable misdemeanors; indictable misdemeanors are offenses punishable by fines in excess of \$100 or thirty days in jail, *State v. Berg*, 237 Iowa 356, 21 N.W.2d 777 (1946)).

⁵³ Texas seems to have implicitly rejected *Boykin*'s applicability to misdemeanors. In *Buchanan v. State*, 480 S.W.2d 207 (Tex. Crim. 1972), *appeal dismissed*, 409 U.S. 814 (1972), the court stated that it was leaving this question open; it found *Boykin* to have been complied

hand, three state courts have expressly held that *Boykin* applies to all misdemeanors,⁵⁴ and a few other courts have so held by implication.⁵⁵

III. SHOULD *BOYKIN* BE APPLIED TO MISDEMEANORS?

A. Constitutional Considerations

The Supreme Court in *Boykin* did not expressly limit its holding to serious felonies, and its rationale in the case—that a guilty plea involves the waiver of three important constitutional rights⁵⁶—applies equally to misdemeanors. An individual charged with a petty offense is not entitled to a jury trial⁵⁷ because of the peculiar history of that right.⁵⁸ But the necessary implication of various Supreme Court decisions is that the other two rights emphasized in *Boykin*—the right of confrontation and the right against self-incrimination—clearly apply to misdemeanors. For example, in *District of Columbia v. Clawans*,⁵⁹ the Supreme Court held that the offense with which the defendant was charged—dealing in secondhand property without a license, punishable by a fine of not more than \$300 or imprisonment for not more than ninety days—was a petty offense to which the jury trial right did not apply. Nevertheless, the Court reversed the defendant's conviction because the trial judge had prejudicially restricted the de-

with in that case. However, other Texas cases, without expressly mentioning *Boykin*, have rejected the basic thrust of the decision. There is a long line of Texas cases holding that a court has no duty to advise a defendant of the consequences of his plea in a misdemeanor case, and these cases have been reaffirmed after *Boykin*. See *Johnson v. State*, 492 S.W.2d 955 (Tex. Crim. 1973); *Whelan v. State*, 472 S.W.2d 140 (Tex. Crim. 1971).

⁵⁴ *Mills v. Municipal Court*, 10 Cal. 3d 288, 515 P.2d 273, 110 Cal. Rptr. 329 (1973); *City of Cleveland v. Whipkey*, 29 Ohio App. 2d 79, 278 N.E.2d 374 (1972); *Crew v. Nelson*, —S.D.—, 216 N.W.2d 565 (1974).

⁵⁵ A few courts have applied *Boykin* to offenses which are classified as misdemeanors without expressly discussing the applicability of *Boykin* to misdemeanors. *E.g.*, *Taylor v. State*, —Ind. App.—, 297 N.E.2d 896 (1973) (vagrancy); *State v. Casarez*, 295 Minn. 534, 203 N.W.2d 406 (1973) (unlawfully tampering with a motor vehicle); *State v. Harris*, 10 N.C. App. 553, 180 S.E.2d 29 (1971) (driving while intoxicated and driving with license revoked). Another case that might be placed in this category is *McCall v. State*, 9 Md. App. 191, 263 A.2d 19 (1970). In applying *Boykin*, the court in *McCall* recognized that the offense charged was a misdemeanor and stated that this should not change the result. However, it is unclear whether the court would apply *Boykin* to all misdemeanors because the defendant in *McCall* was charged with multiple counts of obtaining money and goods by false pretenses, punishable on each count by imprisonment of up to eighteen months or by fine of up to \$500. Md. ANN. CODE art. 27, § 142 (1957).

⁵⁶ See text accompanying note 31 *supra*. These three rights are now applicable to the states by reason of the due process clause of the fourteenth amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to a jury trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront one's accusers); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against compulsory self-incrimination).

⁵⁷ See, *e.g.*, *Baldwin v. New York*, 399 U.S. 66 (1970).

⁵⁸ See text accompanying notes 115-116 *infra*.

⁵⁹ 300 U.S. 617 (1937).

fendant's right of cross-examination, a right protected by the sixth amendment confrontation clause.⁶⁰ In *Schmerber v. California*,⁶¹ the Supreme Court held that, in a prosecution for the misdemeanor offense of driving while intoxicated, the taking of a blood sample from the accused over his protests did not violate his privilege against self-incrimination, because the evidence compelled was nontestimonial in nature. The clear implication of the decision was that the accused's right against self-incrimination would have been violated if the evidence had been testimonial in nature.

Since the right of confrontation and privilege against self-incrimination apply to all criminal offenses, the *Boykin* principle—based upon these rights, as well as the right to a jury trial—should likewise apply to all criminal offenses. The three courts that have expressly recognized the applicability of *Boykin* to misdemeanors have regarded this result as self-evident.⁶² For example, the California Supreme Court stated:

[T]he entry of a plea of guilty to a misdemeanor embodies the same waiver of constitutional rights that was present in *Boykin*. . . . The People have suggested no logical basis for confining . . . [*Boykin*] to the felony context in which . . . [it was] enunciated, and we can discern no rational ground for such a distinction.⁶³

Furthermore, the United States Supreme Court's adoption in 1971 of the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates must be considered.⁶⁴ These rules contain separate provisions governing the procedures to be followed in cases involving petty offenses⁶⁵ and those involving minor offenses other than petty offenses.⁶⁶ The rule governing the acceptance of pleas in cases involving minor offenses other than petty offenses includes a provision⁶⁷ expressly requiring the magistrate to adhere to the procedural requirements of Federal Rule of Criminal Procedure 11—the rule governing the acceptance of guilty pleas in Federal District

⁶⁰ The Supreme Court cited *District of Columbia v. Clawans*, 300 U.S. 617 (1937), for this proposition in *Argersinger v. Hamlin*, 407 U.S. 25, 28-29 (1972). In *Argersinger*, the Court stated, with respect to the right of confrontation and other rights guaranteed by the sixth amendment, "We have never limited these rights to felonies or to lesser but serious offenses." *Id.* at 28.

⁶¹ 384 U.S. 757 (1966).

⁶² *Mills v. Municipal Court*, 10 Cal. 3d 288, 297-99, 515 P.2d 273, 279-81, 110 Cal. Rptr. 329, 335-37 (1973); *City of Cleveland v. Whipkey*, 29 Ohio App. 2d 79, 84, 278 N.E.2d 374, 378 (1972); *Crew v. Nelson*, —S.D.—, 216 N.W.2d 565, 566 (1974).

⁶³ *Mills v. Municipal Court*, 10 Cal. 3d 288, 299, 515 P.2d 273, 280-81, 110 Cal. Rptr. 329, 336-37 (1973).

⁶⁴ 400 U.S. 1029 (1971).

⁶⁵ U.S. MAGIS. R. 3. See note 46 *supra*.

⁶⁶ U.S. MAGIS. R. 2. See note 46 *supra*.

⁶⁷ U.S. MAGIS. R. 2(c).

Courts.⁶⁸ However, no such requirement exists in the rule governing the acceptance of pleas by magistrates in petty offense cases.⁶⁹ However, the Supreme Court's adoption of the Magistrates Rules should not be regarded as an indication that the *Boykin* safeguards are not applicable to petty offenses. While the procedures required by Federal Rule 11 and those required by *Boykin* are similar, not all the procedures of Federal Rule 11 are necessarily required by *Boykin*. In fact, the Supreme Court has indicated that the exact procedures of Rule 11 are not constitutionally mandated.⁷⁰ The basic thrust of *Boykin* is to require an affirmative showing in the record that a guilty plea is voluntarily and understandingly entered; neither the Supreme Court⁷¹ nor any lower federal court has held that a magistrate can decline to make such a showing when accepting a guilty plea in a petty offense.

B. Policy Considerations

1. *Quality of the Lower Criminal Courts*—One reason for applying *Boykin* to misdemeanors is that it will improve the quality of justice dispensed in the lower criminal courts. The quality of justice in such courts has been severely criticized by several commentators.⁷² The lower criminal courts have been largely neglected, while society's attention has focused on the courts of general jurisdiction where felonies are tried. As a result, the lower courts have often failed to attract legal personnel of the same caliber as that found in the higher courts,⁷³ and many such courts lack adequate facilities and supporting

⁶⁸ See note 11 *supra*.

⁶⁹ U.S. MAGIS. R. 3(b).

⁷⁰ *McCarthy v. United States*, 394 U.S. 459, 465 (1969) (dictum). *But see Boykin v. Alabama*, 395 U.S. 238, 245 (1969) (Harlan, J., dissenting).

⁷¹ That omission of the requirements of FED. R. CRIM. P. 11 from the acceptance of guilty pleas in petty offense cases in magistrates' courts is not predictive of the Supreme Court's response if it is explicitly faced with the question of the extension of *Boykin* to misdemeanors is illustrated by *Argersinger v. Hamlin*, 407 U.S. 25 (1972). In that case the Supreme Court extended the right to appointed counsel to misdemeanor cases, including petty offenses, at least when imprisonment is imposed. U.S. MAGIS. R. 2(b), on the other hand, provides that a defendant accused of a minor offense other than a petty offense must be advised of his right to appointed counsel, but makes no such provision for petty offenses.

It has been suggested that at least some of the provisions of FED. R. CRIM. P. 11 are appropriate for petty offense cases heard by United States magistrates. See 8A J. MOORE, FEDERAL PRACTICE § 3.04, at App-48 (2d ed. 1975).

⁷² CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 2, at 128-30; TASK FORCE REPORT: THE COURTS, *supra* note 1, at 29-36; CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS, *supra* note 47, at 161-62; Bing & Rosenfeld, *supra* note 49, at 396; Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 386 (1951); Katz, *supra* note 50, at 90; Nutter, *The Quality of Justice in Misdemeanor Arraignment Courts*, 53 J. CRIM. L.C. & P.S. 215, 216 (1962).

⁷³ See CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 2, at 128; CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS, *supra* note 47, at 161-62; Katz, *supra* note 50, at 91, 119-20.

services.⁷⁴ The procedures used in such courts are frequently informal and in disregard of the normal procedural safeguards required in felonies.⁷⁵ Because of the huge volume of cases, clearing the docket frequently becomes the main concern in these courts.⁷⁶

The implementation of *Boykin* in the lower criminal courts will result in an improvement over the "mass-production" justice that is presently dispensed in many of these courts: defendants' rights are more likely to be protected, and an adequate record for appellate review will be developed. Moreover, the type of judicial inquiry required by *Boykin* provides "a dignified procedure designed to impress the defendant with its fairness and concern for his rights."⁷⁷ Since the vast majority of citizens who come into contact with the American system of criminal justice do so in the lower criminal courts,⁷⁸ the type of inquiry contemplated by *Boykin* will enhance community respect for law enforcement.

2. *Severity of the Consequences*—One argument that has been advanced for not applying *Boykin* to misdemeanors is that since the possible consequences to the defendant are less severe, the same procedural safeguards are not necessary.⁷⁹ But conviction for any criminal offense is a serious event for any person. As the Supreme Court has observed:

[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.⁸⁰

⁷⁴ See CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS, *supra* note 47, at 162.

⁷⁵ See TASK FORCE REPORT: THE COURTS, *supra* note 1, at 30-31.

⁷⁶ See CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 2, at 128; TASK FORCE REPORT: THE COURTS, *supra* note 1, at 31; CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS, *supra* note 47, at 162.

The President's Commission on Law Enforcement and Administration of Justice has characterized the lower criminal courts:

The Commission has been shocked by what it has seen in some lower courts. It has seen cramped and noisy courtrooms, undignified and perfunctory procedures, and badly trained personnel. It has seen dedicated people who are frustrated by huge caseloads, by the lack of opportunity to examine cases carefully, and by the impossibility of devising constructive solutions to the problems of offenders. It has seen assembly line justice.

CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 2, at 128. As a solution to this problem, it has been recommended that the lower criminal courts be abolished and be replaced with a single court system which would handle all offenses. *Id.* at 129; CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS, *supra* note 47, at 164-66. It has been suggested that if it is not feasible to completely unify the court system at the present time, then a temporary solution might be to establish a statewide system of lower courts to replace the municipal and justice-of-the-peace courts. *Id.* at 162.

⁷⁷ Hoffman, *Rule 11 and the Plea of Guilty*, 45 F.R.D. 151 (1969).

⁷⁸ See CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 2, at 128.

⁷⁹ *People v. Tomlinson*, 50 Mich. App. 655, 658-59, 213 N.W.2d 803, 805 (1973).

⁸⁰ *Baldwin v. New York*, 399 U.S. 66, 73 (1970).

Perhaps the most serious consequence of a misdemeanor conviction is the impact that it may have upon the defendant's employment. Imprisonment for thirty days may result in the loss of employment,⁸¹ and even if the defendant does not have to serve a jail sentence, his criminal record may adversely affect his future employment opportunities.⁸² Moreover, disqualification from licensed professions⁸³ or from public employment,⁸⁴ a consequence usually associated with felonies, may attach to misdemeanors involving moral turpitude.⁸⁵

Certain misdemeanors involve social stigma⁸⁶ and therefore may affect one's reputation. In addition, misdemeanor convictions in some jurisdictions are admissible to impeach one's credibility as a witness.⁸⁷

3. *Complexity of the Charge*—It has also been argued that the *Boykin* safeguards should not apply to misdemeanors because such offenses are simple and easily understood.⁸⁸ While misdemeanors such as minor traffic offenses are simple in nature, the same can not be said for others. For example, misdemeanors which have felony counterparts—simple assault and petty larceny—often involve the same factual and legal issues as the felonies to which they correspond.⁸⁹ Moreover, many defendants charged with such offenses have little or no criminal history⁹⁰ and are more likely to be confused and unfamiliar with court practices than are criminal repeaters.

4. *Right to Counsel*—It might be argued that the Supreme Court's

⁸¹ See *Marston v. Oliver*, 324 F. Supp. 691, 696 (E.D. Va. 1971).

⁸² See A. TREBACH, *THE RATIONING OF JUSTICE: CONSTITUTIONAL RIGHTS AND THE CRIMINAL PROCESS* 70-71 (1964); Kamisar & Choper, *supra* note 14, at 78. See also Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 *SOCIAL PROBLEMS* 133, 134-36 (1962), in which the authors discussed the results of a field experiment conducted in the Catskill resort area of New York state. In this study, four employment folders were prepared which differed only in the applicant's criminal record, and each folder was shown to twenty-five prospective employers of unskilled hotel workers. Of the twenty-five employers shown the folder of the applicant convicted of assault, only one gave a positive response, while of the twenty-five employers shown the folder of the applicant with no criminal record, nine expressed interest.

⁸³ See, e.g., ALA. CODE tit. 46, § 16 (Cum. Supp. 1972) (architects); CAL. BUS. & PROF. CODE § 3094 (1974) (optometrists); N.C. GEN. STAT. § 93A-4(b) (1965) (real estate brokers). See generally Comment, *The Collateral Consequences of a Criminal Conviction*, 23 *VAND. L. REV.* 929 (1970).

⁸⁴ See, e.g., *Raphalides v. New Jersey Department of Civil Service*, 80 N.J. Super. 407, 194 A.2d 1 (1963) (bookkeeping machine operator dismissed after conviction for petty larceny).

⁸⁵ See Comment, *supra* note 83, at 959-60.

⁸⁶ It has been suggested that driving while intoxicated involves social stigma. See *James v. Headley*, 410 F.2d 325, 334 (5th Cir. 1969); Kamisar & Choper, *supra* note 14, at 70 n.293.

⁸⁷ See C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 43 (2d ed. E. Cleary 1972).

⁸⁸ *People v. Tomlinson*, 50 Mich. App. 655, 658-59, 213 N.W.2d 803, 805 (1973).

⁸⁹ See TASK FORCE REPORT: *THE COURTS*, *supra* note 1, at 53, 55. See also *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972).

⁹⁰ See *CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS*, *supra* note 47, at 161.

extension of the right to appointed counsel to misdemeanors where imprisonment is imposed⁹¹ adequately safeguards the rights of the accused, including those rights associated with guilty pleas.⁹² But not all defendants charged with misdemeanors are represented by counsel; appointment of counsel under *Argersinger* is necessary only if imprisonment will actually be imposed.⁹³ Moreover, some defendants who plead guilty voluntarily waive their right to counsel before entering their plea.⁹⁴

Even assuming that many defendants charged with misdemeanors do in fact receive appointed counsel, representation by counsel does not eliminate the need for the trial judge to ascertain whether a guilty plea is voluntarily and knowingly entered. The Supreme Court invalidated *Boykin's* plea in spite of his representation by counsel.⁹⁵ Prior to *Boykin*, a number of jurisdictions held that if a defendant is represented by counsel, the trial judge has no duty to determine whether the plea was voluntarily and knowingly entered,⁹⁶ but several of these jurisdictions have reversed their position.⁹⁷ Most have done so in the felony context, but their rationale applies equally to misdemeanors.

There are two major methods of providing appointed counsel for indigents: assigned counsel systems and public defender systems.⁹⁸ Neither fully protects defendants who plead guilty. It has been contended that many assigned counsel are unfamiliar with the criminal process;⁹⁹ some therefore use the guilty plea as a quick way out.¹⁰⁰ In

⁹¹ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁹² *See* *People v. Tomlinson*, 50 Mich. App. 655, 659, 213 N.W.2d 803, 805 (1973).

⁹³ *See* *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

⁹⁴ *See* D. NEWMAN, *supra* note 1, at 203.

⁹⁵ *Boykin v. Alabama*, 395 U.S. 238, 239 (1969).

⁹⁶ *See, e.g.,* *People v. Mendez*, 27 Cal. 2d 20, 161 P.2d 929 (1945); *State v. Tipton*, 78 N.M. 600, 435 P.2d 430 (1967); *Application of Dutro*, 83 S.D. 168, 156 N.W.2d 771 (1968); *State v. Strickland*, 27 Wis. 2d 623, 135 N.W.2d 295 (1965).

⁹⁷ *See, e.g.,* *In re Tahl*, 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969); *Nachtigall v. Erickson*, 85 S.D. 122, 178 N.W.2d 198 (1970); *Ernst v. State*, 43 Wis. 2d 661, 170 N.W.2d 713 (1969). *But see* *Price v. Turner*, 28 Utah 2d 328, 502 P.2d 121 (1972).

⁹⁸ *See* 1 L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 15-74* (1965); LaFrance, *Criminal Defense Systems for the Poor*, 50 NOTRE DAME LAWYER 41, 58-62 (1974).

⁹⁹ *See* TASK FORCE REPORT: THE COURTS, *supra* note 1, at 57; Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 596 (1963).

¹⁰⁰ *See* A. TREBACH, *supra* note 82, at 148. In a recent survey of 3,400 criminal justice practitioners, 61 percent felt that it was probable or somewhat probable that most defense attorneys "engage in plea bargaining primarily to expedite the movement of cases," while 38 percent felt that it was probable or somewhat probable that most defense attorneys engaged in plea bargaining "pressure client[s] into entering a plea that the client feels is unsatisfactory." PROJECT STAR, *SURVEY OF ROLE PERCEPTIONS FOR OPERATIONAL CRIMINAL JUSTICE PERSONNEL: DATA SUMMARY*, 238, 243 (1972) *cited in* CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS, *supra* note 47, at 43.

public defender systems, the excessive caseload carried by many of the defenders limits the amount of time that can be spent on each case;¹⁰¹ this is especially true with respect to misdemeanors:¹⁰²

Often, too, the total representation in these minor cases involves no more than a short, in-court conference with the client a few minutes before he enters his guilty plea. The contribution of this type of representation in insuring accurate guilty pleas is minimal if it makes much difference at all.¹⁰³

5. *Burden upon the Courts*—Some state courts have held that extending *Boykin*, as it has been interpreted in the felony context, to misdemeanors would place too great a burden upon the extremely crowded municipal courts.¹⁰⁴ It is contended that too much time will be consumed if the judge is required to question each misdemeanor defendant as extensively as is required in felony cases.¹⁰⁵ However, this is inapplicable to many of the courts which hear misdemeanors. An adequate inquiry can be conducted by the judge in less than ten minutes,¹⁰⁶ an amount of time which courts in cities of low to moderate population should be able to afford. In fact, some such courts already do follow this procedure.¹⁰⁷

¹⁰¹ See LaFrance, *supra* note 98, at 92-97.

Another criticism of public defenders is that they lack independence because of their continuing relationship with the criminal court system, but the validity of this criticism has been seriously questioned. See 1 L. SILVERSTEIN, *supra* note 98, at 50-52; Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685, 697-703 (1968).

¹⁰² See LaFrance, *supra* note 98, at 94-95.

¹⁰³ D. NEWMAN, *supra* note 1, at 204. The standard which courts use in determining whether a defendant has been denied effective assistance of counsel is that ineffective assistance of counsel means "representation so lacking in competence that it becomes the duty of the court . . . to correct it, so as to prevent a mockery of justice." Commonwealth *ex. rel. Crosby v. Rundle*, 415 Pa. 81, 87, 202 A.2d 299, 303 (1964), *cert. denied*, 379 U.S. 976 (1965). Courts have generally held that the mere fact that counsel was not appointed until shortly before the defendant entered his plea does not itself establish ineffective assistance of counsel. See, e.g., *Keehn v. State*, 221 So. 2d 26 (Fla. Ct. App. 1969) (ten minutes); *Turley v. State*, 439 S.W.2d 521 (Mo. 1969) (fifteen to thirty minutes).

¹⁰⁴ See *Mills v. Municipal Court*, 10 Cal. 3d 288, 302-07, 515 P.2d 273, 283-87, 110 Cal. Rptr. 329, 339-43 (1973); *City of Cleveland v. Whipkey*, 29 Ohio App. 2d 79, 90-91, 278 N.E.2d 374, 382 (1972); *Crew v. Nelson*, —S.D.—, 216 N.W.2d 565, 567 (1974).

¹⁰⁵ See *Mills v. Municipal Court*, 10 Cal. 3d 288, 302-07, 515 P.2d 273, 283-87, 110 Cal. Rptr. 329, 339-43 (1973); *City of Cleveland v. Whipkey*, 29 Ohio App. 2d 79, 90-91, 278 N.E.2d 374, 382 (1972); *Crew v. Nelson*, —S.D.—, 216 N.W.2d 565, 567 (1974).

¹⁰⁶ See Erickson, *supra* note 16, at 848-49.

¹⁰⁷ In the early part of January, 1975, the author observed the disposition of misdemeanor cases in the Fourteenth and Fifteenth Judicial Districts in Washtenaw County, Michigan (Ann Arbor and Ypsilanti). MICH. GEN. CT. R. 785.7, the provision requiring the trial judge to make inquiries of the defendant about whether the guilty plea was voluntarily and knowingly entered, specifically excludes misdemeanors punishable by less than six months' imprisonment (MICH. GEN. CT. R. 785.10), while the District Court Rules do not have a comparable provision. Nevertheless, all the judges observed made extensive inquiries of the defendants before accepting guilty pleas in order to insure that the pleas were entered voluntarily and knowingly. One of the judges closely followed MICH. GEN. CT. R. 785.7, though not required to do so, while the others followed most of the provisions of this rule.

On the other hand, the municipal courts in some of the large metropolitan areas, beset with burgeoning caseloads and an insufficient number of judges, might have difficulty spending additional time with each defendant.¹⁰⁸ While the ultimate solution is to increase the number of judges,¹⁰⁹ an interim solution involving the use of forms embodying the required information may be acceptable to fulfill the requirements of *Boykin*.¹¹⁰

IV. SHOULD THERE BE A DIVIDING LINE?

It would be possible to extend *Boykin* to certain classes of misdemeanors but not to others. This part will consider the merit of discriminating among classes of misdemeanors for the purpose of guilty plea standards.

A. Petty Offense Criteria

One possible dividing line may be provided by the petty offense criteria used in determining the applicability of the right to a jury trial under the United States Constitution.¹¹¹ The Supreme Court has held that an offense punishable by in excess of six months' imprisonment is a nonpetty offense for jury trial purposes.¹¹² The Supreme Court has not definitely ruled out the possibility that some offenses, because of their inherent gravity, may be entitled to a jury trial even though punishable by less than six months' imprisonment. But in deciding whether an offense is a petty offense for jury trial purposes, it has stressed the possible length of imprisonment¹¹³ and has

¹⁰⁸ An example of such a city is Detroit, Michigan. In 1973, 10,230 misdemeanor cases were handled by a single judge presiding over the Misdemeanor Division of the Recorder's Court. 1973 RECORDER'S COURT ANN. REP. 1, 6. In the early part of January, 1975, the author observed the proceedings in the Misdemeanor Division of the Recorder's Court. Because of the large volume of cases, the inquiries about voluntariness and understanding were generally not made. Since the judge presiding over the Misdemeanor Division rotates monthly, the procedures followed may vary somewhat, but at the time the author observed the proceedings the normal procedure was for the defendant's attorney to state that he had advised the defendant of his constitutional rights, for the judge or prosecuting attorney to read the essential allegations of the complaint, and for the defendant to enter his plea.

¹⁰⁹ It is difficult to estimate the financial burden of increasing the number of judges so as to fully comply with *Boykin* in misdemeanors. However, the financial burden is probably significantly less than that of providing appointed counsel to indigent misdemeanor defendants. Some communities may be able to meet the standard without an increase in judicial manpower.

¹¹⁰ See part V B *infra*.

¹¹¹ This is the standard suggested by the court in *Hamm v. State*, 123 Ga. App. 10, 179 S.E.2d 272 (1970), and is, in effect, also the standard adopted by the court in *People v. Tomlinson*, 50 Mich. App. 655, 213 N.W.2d 803 (1973), though stated in different terms in that case.

¹¹² *Baldwin v. New York*, 399 U.S. 66 (1970).

¹¹³ *Id.* at 68-69; *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968).

held that imprisonment for a period of six months or less is sufficiently short to deny the jury trial right.¹¹⁴ The reason for adopting this standard to limit the jury trial right is largely historical. At the time the Federal Constitution was drafted, petty offenses were tried without a jury in the states,¹¹⁵ and it has been said that the framers of the Constitution intended to retain this practice and limit the jury trial guarantee to more serious offenses.¹¹⁶ However, similar historical reasons have not been advanced for limiting the other constitutional rights upon which *Boykin* is based—the privilege against self-incrimination and the right of confrontation.¹¹⁷ Therefore, the jury trial standard is not determinative of the issue here.

Another justification which has been offered for limiting the right to a jury trial is that a fair trial can be obtained without a jury, since the jury trial right is “brigaded with a system of trial to the judge alone”¹¹⁸—*i.e.*, many defendants waive a jury trial and receive a fair hearing before a judge alone. However, in this regard, the *Boykin* principle is essentially different because it is designed to ensure the fairness of the guilty plea process itself. In a trial, there are various safeguards to insure that a defendant is convicted only if actually guilty; many of the rules of evidence are designed to screen out untrustworthy evidence,¹¹⁹ and the prosecutor has the burden of proving the defendant’s guilt beyond a reasonable doubt.¹²⁰ However, in a guilty plea, the defendant is himself admitting his guilt.¹²¹

B. Actual Imprisonment Standard

Another possible dividing line is the actual imprisonment standard adopted by the Supreme Court in *Argersinger v. Hamlin*¹²² to define the extent of the right to appointed counsel. The Court in *Argersinger*

¹¹⁴ *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

¹¹⁵ See *District of Columbia v. Clawans*, 300 U.S. 617, 625-27 (1937); *Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 934-65 (1926).

¹¹⁶ See *Schick v. United States*, 195 U.S. 65, 70 (1904); *Frankfurter & Corcoran, supra* note 115, at 968-75.

¹¹⁷ *Cf. Junker, supra* note 101, at 705-06; *James v. Headley*, 410 F.2d 325, 333 (5th Cir. 1969).

¹¹⁸ *Argersinger v. Hamlin*, 407 U.S. 25, 29 (1972). See also *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968).

¹¹⁹ *C. McCORMICK, supra* note 87, § 245.

¹²⁰ *Id.* § 341.

¹²¹ It has been said of a guilty plea, “More is not required; the court has nothing to do but give judgment and sentence.” *Kercheval v. United States*, 274 U.S. 220, 223 (1927).

¹²² 407 U.S. 25 (1972). Such a dividing line was suggested by the State of California in *Mills v. Municipal Court*, 10 Cal. 3d 288, 299, 515 P.2d 273, 281, 110 Cal. Rptr. 329, 337 (1973).

stated that "no person may be imprisoned for any offense"¹²³ unless represented by counsel. In order to decide whether to appoint counsel under this standard, the trial judge must make an evaluation of each case to determine whether there is any likelihood that a jail sentence will be imposed if the defendant is convicted.¹²⁴

A similar standard should not be adopted to limit the application of the *Boykin* principle. As a practical matter it will be extremely difficult for a judge to determine, before a defendant enters his plea, whether imprisonment would be an appropriate penalty.¹²⁵ The difficulties involved in making such a determination may be worthwhile in deciding whether to appoint counsel, since the appointment of counsel involves significant state expense and court delay.¹²⁶ But the additional expense is not a relevant consideration in deciding whether to apply *Boykin*, since the additional inquiries by the judge obviously would not impose as great a burden on the state or court system as would the cost of counsel.¹²⁷

C. Exclusion of the Lower Criminal Courts

Another possible dividing line is to apply *Boykin* in all but the lower criminal courts.¹²⁸ In about half the jurisdictions, a defendant convicted in a lower criminal court has a right to a trial de novo on appeal in a court of general jurisdiction,¹²⁹ and in many such states, a trial de novo is allowed as a matter of course even following a guilty plea.¹³⁰ It might be argued that in such jurisdictions, the *Boykin* safeguards would not be necessary in the lower court because the defendant would be assured of all procedural safeguards in a trial de novo on appeal. This might be true if the appeals were commonly taken. But the vast majority of defendants convicted in the lower

¹²³ 407 U.S. at 37 (1972). However, the Court expressly left open the question whether the right to appointed counsel extended to cases not involving imprisonment. *Id.*

¹²⁴ *Id.* at 42 (Burger, C.J., concurring).

¹²⁵ *Mills v. Municipal Court*, 10 Cal. 3d 288, 301, 515 P.2d 273, 281, 110 Cal. Rptr. 329, 337 (1973). For problems in interpreting the proper standard to apply under *Argersinger*, see *Wood v. Superintendent Caroline Correctional Unit*, 355 F. Supp. 338 (E.D. Va. 1973); *Gilliard v. Carson*, 348 F. Supp. 757 (M.D. Fla. 1972).

¹²⁶ *Mills v. Municipal Court*, 10 Cal. 3d 288, 301, 515 P.2d 273, 281, 110 Cal. Rptr. 329, 337 (1973).

¹²⁷ *Id.*

¹²⁸ This is, in effect, the standard used by those jurisdictions cited in note 46 *supra*.

¹²⁹ See Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 3 & n.e (4th ed. 1974).

¹³⁰ See, e.g., *State v. Superior Court of Maricopa County*, 93 Ariz. 351, 380 P.2d 1009 (1963); *Holbrook v. Commonwealth*, 327 S.W.2d 950 (Ky. 1959); *State v. Hungary*, 75 Wyo. 423, 296 P.2d 506 (1956). But some jurisdictions limit the scope of review on appeal from a plea of guilty in an inferior criminal court to collateral questions such as propriety of the sentence imposed. See, e.g., *State v. Stoesser*, 55 Del. 70, 183 A.2d 824 (1962); *State v. Mull*, 30 N.J. 231, 152 A.2d 572 (1959).

criminal courts never appeal¹³¹ and thus are not accorded the protection of a trial de novo.¹³²

Also, it is questionable whether a constitutional right can be initially denied and then preserved on an appeal in a trial de novo. The Supreme Court held in *Callan v. Wilson*¹³³ that, in a prosecution for a nonpetty offense, a defendant who was denied a trial by jury in the first instance but allowed a jury on appeal in a trial de novo was effectively denied the right to a jury trial.¹³⁴ Reasoning by analogy, it might be argued that other constitutional rights may not be initially denied and then preserved on an appeal in a trial de novo. Such an analysis would apply to *Boykin* because it is based upon the waiver of three fundamental constitutional rights.¹³⁵

D. Inclusion of All Misdemeanors Except for Minor Traffic Offenses

Another possible classification includes all misdemeanors except for minor traffic offenses. Under this approach, the more serious traffic offenses, such as driving while intoxicated and leaving the scene of an accident, would be accorded the *Boykin* safeguards, but minor traffic offenses, such as exceeding the speed limit and failure to stop at a stop sign, would be excluded. This would appear to be the appropriate dividing line. Serious traffic offenses may result in social stigma,¹³⁶ the loss of a driver's license,¹³⁷ and possibly the imposition of a jail

¹³¹ See Bing & Rosenfeld, *supra* note 49, at 400; Note, *Metropolitan Criminal Courts of First Instance*, 70 HARV. L. REV. 320, 349 (1956).

¹³² It has been argued that the existence of a trial de novo system is one of the most significant barriers to improving the quality of the lower criminal courts because an appellate court never effectively reviews the procedures followed by the lower court. See Bing & Rosenfeld, *supra* note 49, at 399-401; CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS, *supra* note 47, at 162.

¹³³ 127 U.S. 540 (1888).

¹³⁴ *Callan v. Wilson*, 127 U.S. 540 (1888), was decided before the sixth amendment right to a jury trial was held applicable to the states via the fourteenth amendment due process clause. The Supreme Court has heard oral arguments in a case in which it will decide whether the states are required to adhere to this aspect of the federal jury trial right. *Costarelli v. Massachusetts*, 16 CRIM. L. REP. 4220 (March 19, 1975) (No. 73-6739). It can be argued that the rule in *Callan* is still viable even though the Supreme Court, in applying the sixth amendment to the states, has held that two other traditional aspects of the federal jury trial right are no longer required: the twelve-person jury (*Williams v. Florida*, 399 U.S. 78 (1970)) and jury unanimity (*Apodaca v. Oregon*, 406 U.S. 404 (1972)). *Williams* and *Apodaca* dealt with what a "jury" is for the purposes of the sixth amendment, while *Callan* dealt with the denial of a jury altogether in an initial proceeding. See generally Hasler, *De Novo Juries, Misdemeanor Counsel and Other Problems: Changes Ahead for the Maine District Courts?* 23 ME. L. REV. 63 (1971).

¹³⁵ See text accompanying note 31 *supra*.

¹³⁶ See *James v. Headley*, 410 F.2d 325, 334 (5th Cir. 1969); *Kamisar & Choper, supra* note 14, at 70 n.293.

¹³⁷ See *Kamisar & Choper, supra* note 14, at 70 n.293.

sentence.¹³⁸ Minor traffic offenses, on the other hand, are not viewed by society as truly criminal in nature;¹³⁹ moreover, since the number of individuals charged with traffic offenses vastly exceeds the number charged with other misdemeanors,¹⁴⁰ the burden on the courts would be too great. Comparable considerations do not apply to any other class of misdemeanors.¹⁴¹

V. SHOULD FELONY STANDARDS BE APPLIED TO MISDEMEANORS?

A. *The Major Inquiries*

Since the distinction between felonies and misdemeanors is largely artificial,¹⁴² the inquiries made in misdemeanor cases should be similar to those made in felony cases.¹⁴³

1. *Understanding of the Charge*—As with felonies, the first area of inquiry after the defendant pleads guilty to a misdemeanor should concern the defendant's understanding of the nature of the charges.¹⁴⁴ In many jurisdictions where judges do not inquire extensively into whether a guilty plea is voluntarily and knowingly entered, the defendant is at least informed of the basic allegations of the complaint.¹⁴⁵ However, more extensive inquiry is warranted in some cases. For instance, it would be desirable to advise the defendant of the essential elements of the offense charged,¹⁴⁶ particularly when the offense, such as petty larceny or worthless check violations, requires a specific intent.

2. *Voluntariness of the Plea*—The defendant should be asked

¹³⁸ See Junker, *supra* note 101, at 711.

¹³⁹ See James v. Headley, 410 F.2d 325, 334 (5th Cir. 1969); CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS, *supra* note 47, at 169.

¹⁴⁰ There are 4 to 5 million nontraffic misdemeanor prosecutions annually. See TASK FORCE REPORT: THE COURTS, *supra* note 1, at 55. On the other hand, there are an estimated 40 to 50 million traffic offenses annually. See Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1261 (1970).

¹⁴¹ Another offense which might arguably be excluded is public intoxication. As with traffic offenses, the number of individuals charged with this offense is considerable. See CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 2, at 233. However, unlike cases of minor traffic violations, social stigma may attach to a conviction of public drunkenness, and a jail sentence may be imposed. *Id.* at 233-35. See also R. NIMMER, TWO MILLION UNNECESSARY ARRESTS (1971).

¹⁴² See notes 79-90 and accompanying text *supra*.

¹⁴³ See Part I *supra*. Not all the specific inquiries discussed in this section are constitutionally required; rather, they are the desirable means of creating the constitutionally mandated record of voluntariness and understanding.

¹⁴⁴ See notes 17-20 and accompanying text *supra*.

¹⁴⁵ This conclusion is based upon the author's observations of the proceedings in the Misdemeanor Division of the Recorder's Court in Detroit, Michigan.

¹⁴⁶ See note 19 and accompanying text *supra*.

whether he is entering his plea voluntarily and whether his plea was the result of any threats or promises.¹⁴⁷ It might be contended that a requirement of disclosure of the terms of a plea bargain in open court¹⁴⁸ is not needed because there is little plea bargaining in many cases involving petty offenses.¹⁴⁹ But there are some offenses which involve conduct for which either a felony or misdemeanor could be charged, at the prosecutor's discretion.¹⁵⁰ In many such cases, the prosecutor may agree to dismiss a felony charge in exchange for a guilty plea to a misdemeanor.¹⁵¹ Such an agreement should be stated in the record and would eliminate any need for the defendant to be "coached" in advance as to how to answer the court's questions about the existence of any promises.¹⁵²

3. *Consequences of the Plea*—The defendant should be advised of the maximum punishment¹⁵³ because, no matter what the offense charged, an individual can not make an intelligent decision about whether to plead guilty unless he is aware of the possible sentence. On the other hand, the defendant should not ordinarily have to be advised of collateral consequences such as the loss of employment opportunities, for it would be too difficult for the judge to determine such consequences in each case.¹⁵⁴ However, one collateral consequence of which the defendant should be advised is the revocation of a driver's license upon conviction for certain motor vehicle offenses.¹⁵⁵ If the revocation of the license is mandatory upon conviction for a certain offense, the court could inform the defendant of this consequence without having to examine the background of each defendant. Knowledge of the certainty of such revocation might well affect an individual's decision

¹⁴⁷ See notes 21-22 and accompanying text *supra*.

¹⁴⁸ See note 24 and accompanying text *supra*.

¹⁴⁹ See CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 2, at 134.

¹⁵⁰ *Id.*

¹⁵¹ See Bing & Rosenfeld, *supra* note 49, at 433-34. For a discussion of prosecutorial discretion in general, see F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1970); Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174 (1965).

¹⁵² See note 24 *supra*.

¹⁵³ See notes 25 and accompanying text *supra*.

¹⁵⁴ See notes 28-30 and accompanying text *supra*.

¹⁵⁵ Some jurisdictions have statutes which require a court to advise a defendant of the mandatory revocation of his driver's license upon conviction for certain offenses. *E.g.*, MINN. STAT. ANN. § 168.44 (Cum. Supp. 1974); N.Y. CRIM. PRO. LAW § 170.10(4)(b) (McKinney Supp. 1974). However, courts in jurisdictions which do not have such statutes have held that it is not necessary to advise a defendant of the revocation of his driver's license upon his plea of guilty to a serious motor vehicle offense. *See, e.g.*, *People v. Jenkins*, 128 Ill. App. 2d 351, 262 N.E.2d 105 (1970); *Johnson v. State*, 490 P.2d 1130 (Okla. Ct. Crim. App. 1971). The court in *Jenkins* characterized the revocation of a driver's license as a regulatory measure adopted under the police power of the state rather than as punishment imposed by the court. 128 Ill. App. 2d at 354-55, 262 N.E.2d at 107.

about how to plead because a driver's license is essential to the livelihood of many individuals.¹⁵⁶

4. *Waiver of Constitutional Rights*—The defendant should be advised that he waives the right of confrontation and the privilege against self-incrimination by his guilty plea. These rights are applicable to misdemeanors as well as felonies.¹⁵⁷ However, in petty offense cases, he would not have to be advised of the right to a jury trial.¹⁵⁸

5. *Factual Basis*—Although an inquiry about factual basis for the plea¹⁵⁹ is the most time consuming of the suggested inquiries,¹⁶⁰ it serves the same important function in misdemeanors as in felonies. The inquiry is designed to insure that the defendant is guilty of a charge at least as serious as the one to which he is pleading guilty.¹⁶¹ This is particularly important in the more "complex" misdemeanors, such as assault and petty larceny, but it may also be helpful in some simpler offenses such as loitering and vagrancy, where the conduct which is proscribed is difficult to define.¹⁶²

B. Courtroom Procedures

In felony cases, the *Boykin* requirements are normally fulfilled by the trial judge personally addressing the defendant to determine whether his plea was voluntarily and understandingly entered.¹⁶³ Again, the policies suggesting application of *Boykin* to misdemeanors indicate that this procedure should be required in those cases as well. Certain goals of the inquiry, such as determining whether the defendant understands the nature of the charge, can not be adequately accomplished without oral questioning. If the defendant hesitates or indicates in some other way that he does not understand, the judge can direct additional inquiries along a particular line to assure himself of

¹⁵⁶ See *Bell v. Burson*, 402 U.S. 535, 539 (1971).

¹⁵⁷ See notes 59-61 and accompanying text *supra*.

¹⁵⁸ While the United States Constitution does not guarantee a jury trial to petty offenders, many states have constitutional provisions which do. See, e.g., CAL. CONST. art. I, § 7. In such cases the defendant should be advised of this right.

¹⁵⁹ See notes 35-38 and accompanying text *supra*.

¹⁶⁰ See Heberling, *supra* note 16, at 200-09.

¹⁶¹ See note 36 *supra*.

¹⁶² See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

¹⁶³ Many courts, in cases decided in the felony context, have held that *Boykin* requires such a personal examination of the defendant by the trial judge. See, e.g., *State v. Sisco*, 169 N.W.2d 542 (Iowa 1969); *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971); *Bishop v. Langlois*, 106 R.I. 56, 256 A.2d 20 (1969); *McBain v. Maxwell*, 2 Wash. App. 27, 466 P.2d 177 (1970). In addition, many of the statutes or court rules which were adopted in response to *Boykin* require the court to personally address the defendant. E.g., ALASKA R. CRIM. P. 11(c); ARIZ. R. CRIM. P. 17.2; ILL. S. CT. R. 402(a); IND. ANN. STAT. § 9-1204 (Burns Cum. Supp. 1974); MICH. GEN. CT. R. 785.7(1); OHIO R. CRIM. P. 11(C)(2)(a); ORE. REV. STAT. § 135.385(1) (1974); VT. R. CRIM. P. 11(c).

the defendant's comprehension. Use of personal inquiries may be particularly appropriate where a defendant has a low level of intellectual or educational attainment.¹⁶⁴

Conceding that there are an inadequate number of judges in the municipal courts of some large metropolitan areas, alternative procedures may be permissible as an interim solution until judicial manpower is increased. Such alternative procedures should require the active participation of the accused in order to satisfy the "canvassing" requirements of *Boykin*.¹⁶⁵

1. *Group Arraignments*—In some misdemeanor courts, defendants charged with misdemeanors are advised of their constitutional rights in large groups.¹⁶⁶ The three courts expressly extending *Boykin* to misdemeanors indicated that group arraignments may be used to comply with *Boykin* in the misdemeanor context,¹⁶⁷ while, in an analogous situation, other courts have held it permissible to use group arraignments to advise misdemeanants of their right to counsel.¹⁶⁸ The use of group arraignments, however, would appear to be an inadequate means of complying with *Boykin*, there being no opportunity for the active participation of individual defendants in dialogue with the judge. *Boykin* seems to contemplate that the judge will interrogate each defendant individually before accepting his plea.¹⁶⁹

2. *Use of Forms*—The California Supreme Court, in *Mills v. Municipal Court*,¹⁷⁰ upheld the use of written forms containing the required information as a means of complying with *Boykin*, and the other two courts expressly extending *Boykin* to misdemeanors suggested that the use of such forms would be acceptable.¹⁷¹ However, another court, which implicitly extended *Boykin* to misdemeanors, disapproved of such forms,¹⁷² while still other courts have done so in felony cases.¹⁷³ Forms have inherent weaknesses for use in determining whether a

¹⁶⁴ Cf. D. NEWMAN, *supra* note 1, at 219.

¹⁶⁵ See note 163 and accompanying text *supra*.

¹⁶⁶ See Nutter, *supra* note 72, at 216; TASK FORCE REPORT: THE COURTS, *supra* note 1, at 30.

¹⁶⁷ *Mills v. Municipal Court*, 10 Cal. 3d 288, 307, 515 P.2d 273, 286-87, 110 Cal. Rptr. 329, 342-43 (1973); *City of Cleveland v. Whipkey*, 29 Ohio App. 2d 79, 90-91, 278 N.E.2d 374, 382 (1972); *Crew v. Nelson*, —S.D.—, 216 N.W.2d 565, 567 (1974).

¹⁶⁸ See, e.g., *In re Johnson*, 62 Cal. 2d 325, 398 P.2d 420, 42 Cal. Rptr. 228 (1965); *State v. Simmonds*, 5 Conn. Cir. 178, 247 A.2d 502 (1968).

¹⁶⁹ See note 163 and accompanying text *supra*.

¹⁷⁰ 10 Cal. 3d 288, 515 P.2d 273, 110 Cal. Rptr. 329 (1973).

¹⁷¹ *City of Cleveland v. Whipkey*, 29 Ohio App. 2d 79, 90-91, 278 N.E.2d 374, 382 (1972); *Crew v. Nelson*, —S.D.—, 216 N.W.2d 565, 567 (1974).

¹⁷² *Taylor v. State*, —Ind. App.—, 297 N.E.2d 896 (1973).

¹⁷³ See, e.g., *People v. Carle*, 8 Ill. App. 3d 56, 288 N.E.2d 876 (1972); *People v. Cummings*, 7 Ill. App. 3d 306, 287 N.E.2d 291 (1972). The court in *Cummings* stated that the use of such forms would "perpetuate . . . contrived, rehearsed and hence, involuntary or unintelligent pleas." *Id.* at 308, 287 N.E.2d at 293.

defendant entered his plea voluntarily and understandingly because they can not accurately reflect the defendant's state of mind and any of his hesitations or doubts. Nevertheless, proper forms, containing all the required information, may constitute an acceptable interim solution. In order to promote a more careful reading, such forms should require the accused to do more than merely sign his name. As in *Mills*, the forms should require the accused to participate actively by specifically answering certain questions and checking or initialing various inquiries.¹⁷⁴

The form should indicate the statutory section that the defendant is charged with violating¹⁷⁵ and should contain a description in layman's terms of the offense charged, including any specific intent required.¹⁷⁶ The form should include questions to determine whether the defendant is entering his plea voluntarily¹⁷⁷ and should require the description of any plea agreement that has been made.¹⁷⁸ In addition, it should contain a statement of the maximum punishment for the offense charged¹⁷⁹ and a list of the constitutional rights being waived.¹⁸⁰ Finally, it should require the defendant to describe briefly in his own words what he did that makes him think that he is guilty of the crime charged.¹⁸¹

3. *Entry of Plea by Counsel*—A number of jurisdictions allow counsel for the defendant to enter a guilty plea in misdemeanor cases without the defendant's presence in court.¹⁸² Such provisions are designed for the convenience of a defendant charged with a minor offense.¹⁸³ But there are countervailing considerations which override considerations of convenience. If the defendant is not present in court, the trial judge can not "canvass" the matter with him to insure that he is entering his plea voluntarily and understandingly. In addition, the *Boykin* inquiries can serve an important rehabilitative function by impressing

¹⁷⁴ The form approved in *Mills* is printed in an Appendix to the opinion. 10 Cal. 3d 288, 312-13, 515 P.2d 273, 290-91, 110 Cal. Rptr. 329, 346-47.

¹⁷⁵ See text accompanying note 145 *supra*.

¹⁷⁶ See text accompanying note 146 *supra*.

¹⁷⁷ See text accompanying note 147 *supra*.

¹⁷⁸ See text accompanying notes 148-52 *supra*.

¹⁷⁹ See text accompanying note 153 *supra*.

¹⁸⁰ See text accompanying note 157 *supra*.

¹⁸¹ See text accompanying notes 159-62 *supra*.

¹⁸² See, e.g., CAL. PEN. CODE § 1429 (1970); COLO. R. CRIM. P. 11(d); KAN. STAT. ANN. § 22-3210(6) (Supp. 1973). See also FED. R. CRIM. P. 43. However, some jurisdictions require an individual to enter his plea in person in all cases. See, e.g., OKLA. STAT. ANN. tit. 22, § 516 (1969); WASH. JUST. CT. CRIM. R. 3.06(1).

It is constitutionally permissible, under certain circumstances, to waive one's right to be present at trial. *Illinois v. Allen*, 397 U.S. 337 (1970). It is unclear whether one can likewise waive his right to be present for entry of a guilty plea.

¹⁸³ See *Mills v. Municipal Court*, 10 Cal. 3d 288, 306, 515 P.2d 273, 285-86, 110 Cal. Rptr. 329, 341-42 (1973).

the in-court defendant with the fairness of the procedure and the court's concern for his rights;¹⁸⁴ such a function could not be served if the defendant does not appear in court to personally enter his plea.¹⁸⁵

C. Making of a Record

Boykin requires that there be an affirmative showing in the record that the defendant's guilty plea was voluntarily and understandingly entered,¹⁸⁶ but many lower criminal courts are not courts of record and therefore do not keep stenographic transcripts of their proceedings.¹⁸⁷ The required record in misdemeanor cases could be made by the use of electronic sound recording devices in courts which deem it impractical to keep a stenographic transcript; if a defendant decided to appeal, his case could be transcribed from the recording. Some jurisdictions at present permit the use of such electronic sound recording devices in certain proceedings.¹⁸⁸ Any other possible means of producing a record, such as notations in the docket, are inadequate because they do not reflect the active participation of the accused and are more vulnerable to error since they are often entered without much thought.¹⁸⁹

VI. CONCLUSION

In *Boykin v. Alabama*,¹⁹⁰ the Supreme Court announced a new procedural safeguard to insure that guilty pleas were voluntarily and understandingly entered. The new rule was announced in the context of a serious felony, but the considerations underlying the decision apply equally to misdemeanors. Therefore, *Boykin* should be extended to all misdemeanors, other than minor traffic offenses which are not truly criminal in nature. Since the distinction between felonies and misdemeanors is largely artificial, the procedure to insure that a guilty plea is voluntarily and understandingly entered should be basically the same no matter how the offense is classified.

—Richard A. Kopek

¹⁸⁴ See text accompanying notes 77-78 *supra*.

¹⁸⁵ The entry of a plea by counsel, accompanied by the forms involving the active participation of the accused as discussed in text accompanying notes 170-81 *supra* may be permissible as an interim solution in jurisdictions with insufficient judicial manpower to allow for personal examinations of each defendant.

¹⁸⁶ See notes 8-12 and accompanying text *supra*.

¹⁸⁷ See Katz, *supra* note 50, at 91, 117.

¹⁸⁸ See, e.g., ALASKA R. CRIM. P. 11(g); IDAHO CRIM. PRAC. & PROC. R. 11; MICH. COMP. LAWS ANN. § 600.8331 (Supp. 1974).

¹⁸⁹ For potential problems in using docket entries for this purpose, see *In re Birch*, 10 Cal. 3d 314, 515 P.2d 12, 110 Cal. Rptr. 212 (1973); Katz, *supra* note 50, at 97.

¹⁹⁰ 395 U.S. 238 (1969).