Comments

Miranda and Minor Offenses

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Since *Miranda v. Arizona*[1] was decided in 1966, the case has evoked a plethora of criticism. The rules[2] announced in *Miranda* have figured in a myriad of lower court decisions,[3] while a host of commentators, legal and otherwise, have expressed their often critical views on the decision.[4] One commentator has even proposed modifying the *Miranda* rules by amending the fifth amendment.[5] Congress has expressed displeasure with the decision by enacting a statute which conflicts with the rules.[6] Recently, the Supreme Court initiated a new round in the controversy. The decision in *Harris v. New York*[7] intimates that *Miranda*, rather than remaining as a landmark, may ul-

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

2. Basically, the *Miranda* holding is that statements made by an accused in response to questioning after he "has been taken into custody or otherwise deprived of his freedom of action in any significant way," *id.* at 444, may not be used by the prosecution unless the accused chooses to speak after having been advised that he has certain constitutional rights. See text accompanying note 29 *infra.*

3. Some indication of the number of cases affected by *Miranda* is that through the October, 1972 advance sheet, cases citing *Miranda* cover more than 14 pages in 3 SHEPHARD'S UNITED STATES CITATIONS (1971 & Supp. Oct. 1972).

4. *See, e.g.*, F. GRAHAM, THE SELF-INFLICTED WOUND 153-93 (1970); Ervin, *Miranda v. Arizona: A Decision Based on Excessive and Visionary Solicitude for the Accused*, 5 AM. CRIM. L.Q. 125 (1966); Friendly, *The Fifth Amendment: The Case for a Constitutional Change*, 40 PA. B. ASS'N Q. 524 (1969); Schaefer, *Patrolman Perspectives on Miranda*, 1971 L. & SOCIAL ORDER 81; Stephens, *Police Interrogation and the Supreme Court*, 17 J. PUB. L. 241 (1968).

5. Friendly, *supra* note 4. The relevant portion of U.S. CONST. amend. V provides, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

6. Omnibus Crime Control and Safe Streets Act of 1968, Title II, 18 U.S.C. § 3501 (1970). The statute provides that confessions or other self-incriminating statements by an accused shall be admissible if voluntarily made, and the presence or absence of warnings need not be conclusive as to admissability. The statute has not superseded *Miranda.*

7. 401 U.S. 222 (1971) (statements made voluntarily by an accused but inadmissible as direct evidence because of failure to give *Miranda* warnings may be used to impeach the accused's trial testimony).

timately denote the high-water mark of judicial extenson of the privilege against self-incrimination.

The extensive literature on *Miranda* has fully illuminated the central issues presented by the decision, and the wisdom of the *Miranda* rules as applied to felonies will not be discussed here. There remain ramifications of the opinion that need to be further explored, however. One such area is the applicability of the *Miranda* rules to offenses classified as minor.

Although *Miranda* was a felony case, the decision was based on the fifth amendment privilege against self-incrimination, which by its terms applies in all criminal proceedings. Moreover, since the Court's purpose in *Miranda* was to provide broad constitutional mandates,[8] the general tenor of the opinion is such that the decision will not fit comfortably under the rubric that the rule of a case applies only to closely comparable fact situations. The issue arises, therefore, as to the scope of the pronouncements. The determination to be made is what degree of similarity to *Miranda* is required before its rules will govern.

A number of courts have determined that the *Miranda* rules do not apply to violations of motor vehicle laws,[9] and the highest courts in three states have held *Miranda* inapplicable in misdemeanor cases generally.[10] Consequently in those jurisdictions, the primary rule for determining the admissibility of the defendants' statements is the voluntariness test which was applicable in criminal cases before *Miranda.* This discussion will review briefly the developments preceding *Miranda* and will then examine *Miranda*'s applicability to minor offenses, focus-

8. *See* text accompanying note 48 *infra.*

9. State v. Bliss, 238 A.2d 848 (Del. 1968); State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970); People v. Bliss, 53 Misc. 2d 472, 278 N.Y.S.2d 732 (Allegheny County Ct. 1967); State v. Beasley, 179 S.E.2d 820 (N.C. Ct. App. 1971).

10. State v. Gabrielson, 192 N.W.2d 792 (Iowa 1971), held *Miranda* inapplicable to simple misdemeanors. In Iowa, simple misdemeanors are offenses punishable by a maximum of 30 days in the county jail or workhouse and a $100 fine. Other misdemeanors are punishable by a maximum of one year in the county jail and a $500 fine. IOWA CODE ANN. § 687.7 (1950). State v. Angelo, 251 La. 250, 203 So. 2d 710 (1967), and State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), *cert. denied,* 396 U.S. 1007 (1970), held *Miranda* inapplicable to all misdemeanors. In Ohio, misdemeanors are crimes carrying a penalty of not more than 1 year in an institution other than the state penitentiary. OHIO REV. CODE ANN. §§ 1.05, .06 (Baldwin 1971). In Louisiana, however, the sole determinant of whether an offense is a felony or a misdemeanor is the place of confinement; felons are imprisoned in the state penitentiary and misdemeanants in the parish prison. LA. CIV. CODE ANN. § 14:2 (West 1951). Imprisonment in the parish prison for more than 1 year may be authorized, but the offense is still a misdemeanor. *E.g., id.* § 14:92 (West Supp. 1972).

As is evident from the foregoing, there is much variation among jurisdictions as to distinctions between felony and misdemeanor, major and minor offense. In view of this variation, it must suffice to state that all jurisdictions make such distinctions. The terms misdemeanor and minor offense will be used interchangeably in this discussion to refer to offenses on the less serious side of the dividing line in any given jurisdiction.

ing on the recent case of *State v. Gabrielson.*[11] The hypothesis to be explored is that the decisions holding *Miranda*'s rules inapplicable to minor offenses are unconvincing and should not be followed.

Background

An assessment of *Miranda*'s applicability to minor offenses is enhanced by a brief review of the reasons historically recited by the Supreme Court for excluding involuntary confessions of an accused, and the tests devised by the Court to determine the admissibility of self-incriminating statements. The remedy, when the confession has been coerced, has always been to exclude the confession at trial.[12] The difficulty has been in defining coercion, a definition depending in part upon the interests to be served by the exclusionary rule.

Early cases emphasized the unreliability of coerced confessions.[13] Other cases suggested deterrence of improper police practices as the basis for exclusion,[14] and this ground was finally more clearly recognized.[15] Another theme, implicit in early cases[16] and explicit in recent ones,[17] is that under an accusatorial system of criminal justice, a confession which is not a result of the unhindered exercise of the accused's free will is inadmissible even if the interrogators have not resorted to offensive or shocking tactics. To serve these interests, the Court fashioned the "voluntariness" test based upon the fundamental fairness required by the due process clause of the fourteenth amendment,[18] under which the "totality of the circumstances" surrounding a confession was

11. 192 N.W.2d 792 (Iowa 1971).
12. *See* Hopt v. Utah, 110 U.S. 574, 583-85 (1884).
13. *See, e.g.*, Lyons v. Oklahoma, 322 U.S. 596 (1944); Ward v. Texas, 316 U.S. 547 (1942); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).
14. *See* Haley v. Ohio, 332 U.S. 596 (1948); Ashcraft v. Tennessee, 322 U.S. 143 (1944).
15. Rogers v. Richmond, 365 U.S. 534 (1961). Confessions which are the product of physical or psychological coercion are inadmissible

> not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Id. at 540-41.
16. *See* Watts v. Indiana, 338 U.S. 49 (1949); Lisenba v. California, 314 U.S. 219 (1941).
17. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Townsend v. Sain, 372 U.S. 293 (1963).
18. Haynes v. Washington, 373 U.S. 503 (1963). Earlier, the Court had relied upon the common law rule of evidence barring use of confessions obtained by threat or promise, Hopt v. Utah, 110 U.S. 574 (1884), and, with what now seems prescience, the fifth amendment privilege against self-incrimination. Bram v. United States, 168 U.S. 532 (1897).

examined to determine whether it was given of the suspect's own volition.[19]

In recent years, the Court has moved away from the complex weighing of factors required under the voluntariness test[20] toward a new standard for determining the admissibility of statements made by a criminal suspect. In *Escobedo v. Illinois*[21] the Court held inadmissible incriminating statements made during custodial interrogation because the accused had requested and was denied an opportunity to consult with counsel and because no effective warnings were given to notify the accused of his absolute right to remain silent.[22] Although the decision was based on the sixth amendment right to counsel,[23] the Court implicitly recognized a fifth amendment privilege against self-incrimination at the interrogation stage.[24]

Two years after *Escobedo* came *Miranda v. Arizona*.[25] Rather than relying on the fundamental fairness rationale of the voluntariness test,[26] the opinion explicitly rested upon the fifth amendment privilege against self-incrimination and made the privilege fully applicable to custodial interrogation.[27] To protect the privilege and the principles it represented, the Court fashioned the now familiar rules referred to by the dissenters as a "constitutional code of rules for confessions."[28] These were summarized by Chief Justice Warren in the majority opinion:

> [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. . . . [U]nless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may

19. Haynes v. Washington, 373 U.S. 503, 514 (1963).
20. *See* text & notes 125-39 *infra*.
21. 378 U.S. 478 (1964).
22. *Id.* at 490-91.
23. *Id.*
24. *Id.* at 488: "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination."

One week before *Escobedo* was decided, the Court had held the fifth amendment privilege applicable to the states through the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1 (1964).

25. 384 U.S. 436 (1966).
26. *Id.* at 444-91.
27. *Id.* at 467-68. For the definition of "custodial interrogation," see note 2 *supra*. For elaboration on this cryptic definition in the lower courts, see note 98 *infra*.
28. *Id.* at 504 (Harlan, Stewart & White, J.J., dissenting).

> be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. . . .[29]

The majority based its decision on the unreliability of coerced confessions,[30] the accusatorial nature of the criminal justice system in which the prosecution must "shoulder the entire load"[31] and the right of the individual "to remain silent unless he chooses to speak in the unfettered exercise of his own will."[32] The Court attempted to establish a clear-cut test of admissibility for confessions to obviate the uncertainties and difficulties that arose in applying the voluntariness test, such as weighing different factors to determine whether the suspect knew his rights but had waived them or whether he was simply unaware of his rights altogether.[33] The question to be addressed is whether the voluntariness test was replaced by the *Miranda* rules only for felonies or in all criminal cases.

State v. Gabrielson—*The Basic Issue*

A recent decision holding the *Miranda* warnings inapplicable in misdemeanor cases is *State v. Gabrielson.*[34] Because this opinion by the Supreme Court of Iowa is relatively devoid of collateral issues[35] and incorporates almost all of the arguments that have been advanced for not requiring the warnings in cases involving minor offenses, it provides an appropriate vehicle for examining the scope of *Miranda.*

In *Gabrielson* four young men had been taken to the police station where the officer, who had stopped their car about 3:00 a.m., "engaged them in conversation" concerning their activities prior to being stopped.[36] One of the four, 20-year-old Joel Gabrielson, stated that they had attended a party where he had drunk beer. The officer failed to give Gabrielson the *Miranda* warnings until just before issuing him a summons to appear in justice court on a charge of illegal possession of beer.[37] Gabrielson was found guilty in justice court and appealed.

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29. 384 U.S. at 444.
30. *Id.* at 470.
31. *Id.* at 460.
32. *Id., quoting* Malloy v. Hogan, 378 U.S. 1, 8 (1964).
33. *Id.* at 468-69. *Miranda* has not completely eliminated the voluntariness test, but has simply relegated it to a position of secondary importance. When no interrogation has taken place, for example, a statement given voluntarily may still be admitted. See People v. Mercer, 257 Cal. App. 2d 244, 64 Cal. Rptr. 861 (Ct. App. 1967). In addition, statements made voluntarily by an accused which are inadmissible as direct evidence because *Miranda* warnings have not been given may be admitted to impeach the accused's testimony. Harris v. New York, 401 U.S. 222 (1971).
34. 192 N.W.2d 792 (Iowa 1971).
35. There is little question that Joel Gabrielson was in police custody, an issue which often complicates motor vehicle cases. See text & notes 103-14 *infra.*
36. 192 N.W.2d at 793.
37. The *Gabrielson* opinion states that the youths had no beer and that none was found in the car, *id.*, and gives no clue why a minor who admitted drinking beer at a private party was charged with illegal possession.

At trial in the district court, the statements made by Gabrielson at the police station were excluded on the basis that the *Miranda* warnings had not been timely given, and Gabrielson was acquitted for lack of evidence. On appeal, the Supreme Court of Iowa reversed the district court's interpretation of *Miranda*, expressly holding that the warnings were not required in investigations of simple misdemeanors,[38] which, under Iowa law, are offenses punishable by a fine not to exceed $100 or a jail term not to exceed 30 days.[39]

With respect to the *Miranda* warnings, a number of courts[40] "have encountered some difficulty in recognizing why constitutional rights are any less sacred in misdemeanor than in felony cases."[41] If the right to be informed of the privilege against self-incrimination is inherent in the fifth amendment, then the distinction is difficult indeed to understand.

Felony Versus Misdemeanor Distinction

The *Gabrielson* court began its discussion of the defendant's fifth amendment claim by distinguishing *Miranda* on the basis that it involved a felony prosecution.[42] While central to the reasoning of most opinions finding those suspected of minor offenses not entitled to the warnings,[43] it is suggested that this distinction is specious. *Miranda* was concerned with guarding the privilege against compelled self-incrimination which applies "in any criminal case."[44] The fifth amendment privilege is available regardless of the seriousness of the charge. One accused of a minor offense could not be compelled to testify at trial, nor could the prosecution comment upon the defendant's failure to take the stand.[45] Since the privilege against self-incrimination at trial has

38. *Id.* at 796. Although the supreme court reversed the decision below, it did not remand the case since Gabrielson had been once in jeopardy. *Id.* at 793.

39. *See* statutes cited note 10 *supra*.

40. *E.g.*, Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1970); People v. Mulak, 40 Ill. 2d 429, 240 N.E.2d 633 (1968); People v. McLaren, 55 Misc. 2d 676, 285 N.Y.S.2d 991 (Dist. Ct. 1967); Dixson v. State, 54 Misc. 2d 100, 281 N.Y.S.2d 912 (Ct. Cl. 1967), *rev'd on other grounds*, 30 App. Div. 2d 626, 290 N.Y.S. 2d 626 (1968); State v. Brown, 485 P.2d 444 (Ore. Ct. App. 1971); Commonwealth v. Bonser, 215 Pa. Super. 452, 258 A.2d 675 (1969). *See also* Price, *A Proposal for Handling of Petty Misdemeanor Offenses*, 42 CONN. B.J. 55 (1968).

41. City of Piqua v. Hinger, 13 Ohio App. 2d 108, 112, 234 N.E.2d 321, 323-24 (1967), *rev'd on other grounds*, 15 Ohio St. 2d 110, 238 N.E.2d 766, *cert. denied*, 393 U.S. 1001 (1968).

42. 192 N.W.2d at 794.

43. *See, e.g.*, State v. Bliss, 238 A.2d 848 (Del. 1968); State v. Angelo, 251 La. 250, 203 So. 2d 710 (1967); State v. Fearon, 110 N.J. Super. 131, 264 A.2d 482 (Super. Ct. App. Div. 1969), *rev'd on other grounds*, 56 N.J. 61, 264 A.2d 446 (1970); State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), *cert. denied*, 396 U.S. 1007 (1970).

44. *See* text of U.S. CONST. amend. V, *supra* note 5.

45. *See* Griffin v. California, 380 U.S. 609, 611 n.3 (1965); State v. Pyle, 19 Ohio St. 2d 64, 69-70, 249 N.E.2d 826, 829 (1969) (dissenting opinion), *cert. denied*,

never been limited to serious crimes,[46] it is inconsistent to argue that it should be so limited at the pretrial stage.

While it may be technically accurate to say that the *Miranda* right to be informed applies only to felony cases, since only felony cases were before the Court, *Miranda* did not purport to be limited to its facts. The opening sentence of the opinion declared that the subject under discussion was "the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for *crime*."[47] The court continued by stating, "[w]e granted certiorari . . . to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[48] There is no language in the opinion which can be found to show that the Court did not intend its decision to apply to both felonies and misdemeanors. As two commentators have recently noted, "[o]ne might wish to criticize the *Miranda* opinion for its far-ranging 'guidebook' format. But, rightly or wrongly, that opinion is what it is . . . ."[49]

Perhaps the most direct line of reasoning regarding *Miranda*'s applicability to misdemeanors is that employed in the Arizona case of *State v. Tellez*: "The language of the Miranda case applies its rule to crimes. [*Arizona Revised Statutes Annotated*] § 13-103 makes it clear that crimes are either felonies or misdemeanors. Those accused of either a felony or a misdemeanor are entitled to the warnings of constitutional rights."[50] Likewise, in *Commonwealth v. Bonser*,[51] a prosecution for driving while intoxicated (DWI), an appellate court noted that *Miranda* and the bulk of reported decisions following it were felony prosecutions, but found "no indication" that one accused of a misdemeanor "who faces the potential of a substantial prison sentence" could be subjected to police interrogation "absent the fundamental safeguards afforded others."[52]

One possible argument for distinguishing felonies from misdemeanors is that the severity of the typically-authorized sentence for misdemeanors is "insufficient" to invoke *Miranda*.[53] Although the courts

396 U.S. 1007 (1970); *In re* Neff, 20 Ohio App. 2d 213, 229, 254 N.E.2d 25, 38 (Ct. App. 1969) (but *Miranda* inapplicable); State v. Clark, 58 N.J. 72, 275 A.2d 137 (1971); J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL 234 (1971).

46. *See* authorities cited in note 45 *supra*. *See also* Malloy v. Hogan, 378 U.S. 1 (1964).

47. 384 U.S. at 439 (emphasis added).

48. *Id.* at 441-42.

49. Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1210 (1971).

50. 6 Ariz. App. 251, 255, 431 P.2d 691, 695 (1967).

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

52. *Id.* at 458, 258 A.2d at 679.

53. In some cases, there is also a difference in the place of confinement, but that

which have relied on this argument as a reason for declaring *Miranda* inapplicable[54] have cited no authority for the proposition, the analogy they appear to be drawing is to the right to jury trial cases.[55] In these cases, the severity of the offense as indicated by the authorized sentence has been considered by the Supreme Court as the criterion of the time the sixth amendment right to jury trial attaches.[56]

The Court has justified such a distinction, however, by expressing its conviction that a fair trial may be obtained without a jury.[57] A similar distinction cannot be justified even in regard to other rights afforded by the sixth amendment. This point is critical and has been reaffirmed recently by the Supreme Court in *Argersinger v. Hamlin*.[58]

> [T]he right to trial by jury has a different genealogy and is brigaded with a system of trial to a judge alone. . . .
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> . . . .
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> While there is historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases,' there is no such support for a similar limitation on the right to assistance of counsel.
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> We reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than six months may

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distinction is even less meaningful than a difference in authorized sentences.

> The distinction between misdemeanors and felonies is found in the penalty provisions of the criminal law, and this distinction, which is based entirely upon the place of possible confinement, has little or nothing to do with the actual trial of a criminal case. How then could this distinction affect the basic question of fairness which is an inherent quality of every constitutional safeguard?
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> The Constitution is, of course, aloft from such administrative inconvenience, and we perceive no other valid reason for lowering its protective shield during the trial of misdemeanor cases.

City of Piqua v. Hinger, 13 Ohio App. 2d 108, 112, 234 N.E.2d 321, 324 (1967), *rev'd on other grounds*, 15 Ohio St. 2d 110, 238 N.E.2d 766, *cert. denied*, 393 U.S. 1001 (1968). *Miranda* has since been held inapplicable to misdemeanors by the Supreme Court of Ohio. State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), *cert. denied*, 396 U.S. 1007 (1970).

54. State v. Macuk, 75 N.J. 1, 268 A.2d 1 (1970); City of Columbus v. Hayes, 9 Ohio App. 2d 38, 222 N.E.2d 829 (1967).

55. State v. Pyle, 19 Ohio St. 2d 64, 68-69, 249 N.E.2d 826, 828-29 (1969) (Taft, J., concurring), *cert. denied*, 396 U.S. 1007 (1970).

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

57. *See* Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968) (dictum).

58. 407 U.S. 25 (1972). Argersinger had been convicted in Florida of carrying a concealed weapon, a misdemeanor punishable by a maximum of 6 months imprisonment and a $1,000 fine. The trial was to a judge and the defendant was not represented by counsel. After being sentenced to serve 90 days in jail, Argersinger petitioned the Supreme Court of Florida for a writ of habeas corpus, asserting that he had been denied his sixth amendment right to counsel since, as an indigent, he was unable to retain a lawyer and the state had not provided one for him. The Supreme Court of Florida, in a four to three decision, rejected the contention and drew the line for the right to appointed counsel coextensively with the limit of the right to a trial by jury. State *ex rel.* Argersinger v. Hamlin, 236 So. 2d 442, 443 (Fla. 1970), *rev'd*, 407 U.S. 25 (1972).

> be tried without a jury, they may also be tried without a lawyer.
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> The assistance of counsel is often a requisite to the very existence of a fair trial.[59]

The same reasons exist for rejecting the premise that since prosecutions for crimes punishable by imprisonment for less than 6 months may be tried without a jury, the warnings required by the fifth amendment may also be cast aside in such cases. Where the privilege against self-incrimination is inadequately protected at a questioning session prior to the commencement of formal judicial proceedings, the use of damaging statements at trial renders that trial unfair.

> Without the protections flowing from adequate warnings . . . '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.'[60]

There is also no historical support for limiting the privilege against self-incrimination to serious criminal cases. Wigmore traces the development of the privilege as a common law rule of evidence for confessions from the early 1500's, when there was no restriction upon admissibility, through the 1700's, when it was recognized that some confessions should be rejected as untrustworthy, to the 1800's, when "exclusion becomes the rule, admission the exception."[61] According to Wigmore, the modern rule received a full and clear expression in 1783 in *Warickshall's Case*:[62] "confessions not entitled to credit because of the promises or threats by which they had been obtained were declared inadmissible in evidence. From this time on, the history of the doctrine is merely a matter of the narrowness or broadness of the exclusionary rule."[63]

It appears clear, then, that by the time the fifth amendment was drafted, the rule of evidence was well established that confessions obtained under pressure were inadmissible. The Supreme Court reviewed the decision of a territorial supreme court in *Hopt v. Utah*[64] under this common law doctrine, stating the rule to be that a confession was inadmissible when made by a defendant in consequence of an inducement, threat or promise which "deprives him of that freedom of will or self-control essential to make his confession voluntary within the

59. 407 U.S. at 29-31.
60. Miranda v. Arizona, 384 U.S. 436, 466 (1966), *quoting* Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting).
61. 3 J. WIGMORE, EVIDENCE § 817 (McNaughton rev. 1961).
62. 1 Leach 263, 168 Eng. Rep. 234.
63. J. WIGMORE, *supra* note 61, at § 819.
64. 110 U.S. 574 (1884).

meaning of the law."[65] A few years later, the Court stated that such was the case as to state constitutional provisions as well:

> So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.[66]

Finally, in *Bram v. United States*,[67] the Court reversed a federal conviction because evidence of a confession was erroneously admitted. In an opinion which extensively reviewed the common law authorities, both primary and secondary, the Court found that "in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by . . . the Fifth Amendment to the Constitution of the United States. . . ."[68] This, said the Court, is because "the generic language of the Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted."[69]

As a common law evidentiary rule, the confessions doctrine was applicable to minor as well as serious crimes.[70] The constitutional privilege which codified this rule of evidence also applies to all crimes, and the Supreme Court has deemed the *Miranda* warnings to be an integral part of that privilege.[71]

Another possible ground for carving misdemeanors from the broad stroke of *Miranda* is the wording of the required warnings. Although "it is necessary to warn the [defendant] not only that he has a right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him,"[72] the Supreme Court has never held that an accused misdemeanant at the pretrial stage has the right to appointed counsel as announced in *Gideon v. Wainwright*.[73] It has

65. *Id.* at 585.
66. Brown v. Walker, 161 U.S. 591, 597 (1896).
67. 168 U.S. 532 (1897).
68. *Id.* at 542.
69. *Id.* at 543.
70. That the common law rule of evidence excluded involuntary confessions in all criminal cases can be traced through innumerable treatises. *See, e.g.*, G. GILBERT, THE LAW OF EVIDENCE 140 (1769); S. PHILLIPS & A. AMOS, A TREATISE ON THE LAW OF EVIDENCE 384 (1839); T. STARKE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 36 (pt. 1 1842); J. STEPHEN, A DIGEST OF THE LAW OF EVIDENCE 53 (1887).
71. The Supreme Court's conviction that the warnings, or equivalent measures, are a necessary part of the fifth amendment is reflected in its statement that, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." Miranda v. Arizona, 384 U.S. 436, 458 (1966).
72. *Id.* at 473.
73. 372 U.S. 335 (1963). The *Gideon* right to counsel has been extended by at least one state to all criminal prosecutions. See PA. R. CRIM. PRO. 318 (Supp. 1971).

been possible to argue, therefore, that the warnings should be omitted entirely until the Supreme Court declares that an accused misdemeanant is entitled to all the rights specified in the *Miranda* warnings.

The Supreme Court, in its last revision of the arraignment provisions of the *Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates*, rejected such an approach. Rather than state that no advisement of rights is required where the suspect would not have the right to appointed counsel, the Court provided for giving *Miranda* warnings, merely omitting that portion concerning the right to an appointed attorney at the interrogation stage.[74] This approach is surely more justifiable than omitting the warnings altogether.

Discussion of such fine points has been largely mooted, however, and the argument against giving the *Miranda* warnings to minor offenders because of the absence of the right to counsel has been emasculated by the recent decision of the Supreme Court in *Argersinger v. Hamlin*.[75] In *Argersinger* the Court extended the *Gideon* right to appointed counsel for indigent defendants to all cases in which imprisonment can be imposed. A defendant may not be imprisoned, no matter how minor the offense, unless he has been offered counsel to defend him at trial.[76] It is now possible that this right to appointed counsel

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Other states have extended the right to those prosecutions in which "the particular nature of the charge is such that imprisonment in fact or other consequence of magnitude is actually threatened or is a likelihood on conviction." Rodriquez v. Rosenblatt, 58 N.J. 281, 295, 277 A.2d 216, 223 (1971).

74. *Compare* RULES OF PROCEDURE FOR THE TRIAL OF MINOR OFFENSES BEFORE UNITED STATES MAGISTRATES 2(b) (1971) *with id.* 3(b). The rules distinguish between "petty" and other "minor" offenses for purposes of the warnings. Under federal law, a petty offense is one punishable by no more than 6 months imprisonment or a $500 fine, or both. 18 U.S.C. § 1(3) (1971). Generally speaking, minor offenses are those for which the maximum penalty is imprisonment for one year, or a fine of $1,000, or both. *Id.* § 3401(f). Under Rule 3(b), upon a defendant's appearance the magistrate shall inform him, if charged with a minor offense other than a petty offense, of his right to counsel, either retained or appointed if he is unable to retain counsel. Under Rule 2(b), a defendant charged with a petty offense is to be advised merely "of his right to counsel" with no mention of appointed counsel. Presumably, these rules will be changed to conform with the decision in Argersinger v. Hamlin, 407 U.S. 25 (1972).

75. 407 U.S. 25 (1972), *discussed* note 58 *supra*. The difficulty of providing sufficient lawyers to defend those newly entitled to appointed counsel under *Argersinger* was, of course, an issue, but was not of sufficient magnitude to sway even one member of the Court. As Chief Justice Burger pointed out in his concurring opinion: "The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it." *Id.* at 44. If the Supreme Court was not deterred by the problem of finding sufficient attorneys to represent misdemeanants at trial, such a problem should not prevent warning them, before being questioned, of their right to have appointed counsel present during interrogation.

76. *Id.* at 37. The problem of the warning may remain for those accused of crimes for which no imprisonment may be imposed. Such "crimes" often consist of violations of regulatory statutes. *E.g.*, 26 U.S.C. § 7235(d) (1970) (dealing in adulterated butter without paying special tax); ARIZ. REV. STAT. ANN. § 45-323 (1956) (failing to comply with ground water statutes and regulations).

will be extended to the pretrial stages. No other result should follow from the *Gideon-Argersinger* and *Escobedo-Miranda* doctrines.[77]

As demonstrated by the foregoing, there are no meaningful distinctions between felonies and misdemeanors which could justify a refusal to extend the *Miranda* right to be informed to misdemeanor cases. Anyone hoping to prevent such an extension must search for other grounds.

Offensive Versus Acceptable Investigatory Tactics

The *Gabrielson* court relied upon language from opinions of other courts purporting to provide another, slightly different basis for distinguishing *Miranda* factually.[78] These cases have argued that *Miranda* was concerned with preventing lengthy, incommunicado questioning to "sweat out" confessions, while misdemeanor investigations are less intensive and are pursued with less zeal than are investigations of felonies. Therefore, the argument proceeds, offensive interrogation tactics are unlikely to occur in misdemeanor investigations and *Miranda* should not apply.[79] Again, for good or ill, *Miranda*'s guidebook format is a fact of life. The Supreme Court emphasized that the principles announced in *Miranda* were not limited in their applicability to the "third degree." The Court reasoned that custodial interrogation by law enforcement officers is inherently coercive:

> Even without employing brutality, [or] the 'third degree' . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals. . . .
>
> In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. . . .[80]

Indeed, some subtle interrogation strategems designed to elicit a confession from the defendant and "cajole him out of exercising his constitutional rights"[81] might be more successful with persons accused

77. The extension of the *Gideon* right to counsel in *Argersinger* to mean "that no person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment" (407 U.S. at 37-38), mandates the extension of the right to the pretrial stage when one recognizes that the sixth amendment right to counsel was interpreted to include the pretrial stages in *Escobedo*. See text accompanying note 23 *supra*. The only escape from this conclusion may be the ability of those arguing against such an extension to establish that the *Miranda* decision extending the right of pretrial counsel to indigents is based on the fifth amendment and not the sixth amendment.

78. 192 N.W.2d at 795.

79. *See* State v. Macuk, 57 N.J. 1, 16, 268 A.2d 1, 9 (1970); State v. Pyle, 19 Ohio St. 2d 64, 67, 249 N.E.2d 826, 827-28 (1969), *cert. denied*, 396 U.S. 1007 (1970).

80. 384 U.S. at 455-56.

81. *Id.* at 455.

of minor crimes than with those facing more serious charges. Such techniques as minimizing the blameworthiness of the offense, shifting the blame from the accused to others or to society in general and offering reasons for the commission of the offense as excuses[82] could result in a confession from a destitute shoplifter more readily than from a desperate rapist. Thus, the *Miranda* Court fashioned rules it deemed more effective than the voluntariness test to assure that the decision to speak would be freely and intelligently made in all criminal cases.[83] They were not special rules to deal with overzealous interrogation of suspected felons.

Even the unworkable voluntariness test applicable in the pre-*Miranda* confession cases[84] attempted to exclude statements obtained through the use of interrogation techniques far too subtle to be classed as "third degree."[85] It had become increasingly clear that a suspect's decision to speak must be "in the unfettered exercise of his own will."[86] Assurance of that freedom of decision, not the mere discouragement of obvious pressure tactics by interrogators, was the aim of the voluntariness test.[87] Because the test failed to accomplish that goal, however, it was necessary to fashion the *Miranda* rules.[88] Nothing indicates that the voluntariness test is more effective for misdemeanors than for felonies and that it should be maintained in cases involving minor offenses.

Undue Interference with Law Enforcement

The *Gabrielson* court purported to find support for its decision in *Miranda* itself, quoting from the opinion: "[t]he 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."[89] This language was interpreted by the *Gabrielson* court to authorize disregarding the warning rules when to follow them would, according to the reviewing court's standards, constitute "undue interference with a proper system of law

82. *See id.* at 450-51.
83. *See* F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION 396 (1969) [hereinafter cited as F. REMINGTON].
84. *See* text & notes 125-39 *infra.*
85. For example, the Supreme Court had found statements to be involuntary where law enforcement interrogators had refused to allow a suspect to telephone his wife. Haynes v. Washington, 373 U.S. 503 (1963).
86. Malloy v. Hogan, 378 U.S. 1, 8 (1964).
87. *See* text accompanying notes 14-19 *supra.*
88. *See* Miranda v. Arizona, 384 U.S. 436, 468-69 (1966), where the court concludes that the voluntariness test produces no more than speculation, while the *Miranda* rules can provide a clear-cut fact.
89. 192 N.W.2d at 794, *quoting* 384 U.S. at 481.

enforcement" or "preclude police from carrying out their traditional investigatory function."[90]

A more reasonable interpretation of this passage is that it was an expression of the Supreme Court's belief that requiring police compliance with the *Miranda* rules would not hamper *proper* police investigatory techniques, even though required in all criminal cases. Proper techniques would be those incorporating the *Miranda* procedures or incorporating equivalent safeguards. This passage should be read in no other way. The Court did not espouse a case-by-case balancing of the need to protect the fifth amendment privilege against the degree of interference with police investigation in order to determine in what cases the warnings must be given. Rather, the Court intended to establish a simple, clear-cut test of admissibility, in contrast to the traditional voluntariness standard which involved the weighing of numerous factors.[91]

The assertion in *Gabrielson* that applying the *Miranda* rules to simple misdemeanors would unduly interfere with proper law enforcement[92] should not, even if true, justify disregard of a constitutionally based Supreme Court decision. There is evidence, moreover, that *Miranda* has not had the crippling effect on law enforcement predicted by the decision's critics. A group at the Yale Law School made an extensive first-hand study of interrogations in New Haven and concluded that the

> warnings had little impact on suspects' behavior. No support was found for the claim that warnings reduce the amount of 'talking.' Other factors such as the seriousness of the crime involved, the amount of evidence available, and whether or not the suspect had a record seemed much more determinative of interrogation outcome.[93]

A study in Pittsburgh also supports the "generalization that *Miranda* has not impaired significantly the ability of the law enforcement agencies to apprehend and convict the criminal."[94] Whether this generali-

90. 192 N.W.2d at 794-95; *accord*, State v. Pyle, 19 Ohio St. 2d 64, 67-68, 249 N.E.2d 826, 828 (1969), *cert. denied*, 396 U.S. 1007 (1970).

91. 384 U.S. at 468-69. For examples of factors which may be relevant in a voluntariness determination, see text accompanying notes 126-36 *infra*.

92. 192 N.W.2d at 794.

93. Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1563 (1967). The New Haven study group observed 127 actual police station interrogations, interviewed police officers and lawyers and examined police files. *Id.* at 1524-25. The researchers found that giving the *Miranda* warnings could have adversely affected a necessary interrogation in only six of the 127 interrogations observed. *Id.* at 1523. Indeed, interrogation of the suspect was deemed to be "necessary" (sufficient evidence could be obtained in no other manner) in at most 12 cases. *Id.* at 1584.

94. Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 26 (1967).

zation is true because the suspect's propensity to talk is unaffected by the warnings or because "[c]onfessions are essential to a successful prosecution in only a small percentage of criminal cases,"[95] it appears that giving the warnings has not seriously hampered law enforcement.

The contention of undue interference with investigations loses much of its force when it is noted that *Miranda* imposes no formalized requirements on investigators of any crime, be it misdemeanor or felony, until a suspect is "taken into custody or otherwise deprived of his freedom of action in any significant way."[96] Hence, warning rules do not apply when police conduct a general on-the-scene investigation into the circumstances surrounding an offense.[97] In making the "hairline distinction" required to determine the point at which the warnings must be given, courts have looked at the "totality of circumstances" to decide if the questioning was custodial.[98] Under any of the tests which have been developed, however, there remains a substantial area for police investigation before the warning rules come into play.

In addition, the procedures for informing suspects of their rights have become routinized, the suspect occasionally being given a printed notice of rights with a waiver form attached, sometimes even before arriving at the police station.[99] All this lends credence to the observation in *Miranda* that "[t]he Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple," that the giving of the warnings should be an absolute prerequisite to admitting the accused's statements at trial.[100]

Case Precedent

The *Gabrielson* court attempted to bolster the creditability of its decision by citing a number of cases as precedent. Because seven of

95. Younger, *Results of a Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the Effect of the Miranda Decision Upon the Prosecution of Felony Cases*, 5 AM. CRIM. L.Q. 32, 33 (1966).

96. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

97. *Id.* at 477. *See* People v. Morgan, 24 Mich. App. 604, 180 N.W.2d 508 (1970).

98. A variety of tests have evolved for determining when the line is crossed between general on-the-scene questioning and custodial interrogation. See Windsor v. United States, 389 F.2d 530 (5th Cir. 1968) (degree to which investigation has focused upon suspect); Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971) (intention of investigating officer to arrest or otherwise hold suspect); *cf.* Orozco v. Texas, 394 U.S. 324 (1969); People v. Ceccone, 260 Cal. App. 2d 886, 67 Cal. Rptr. 499 (1968) (suspect's belief that he is under arrest or not free to leave); People v. P. (Anonymous), 21 N.Y.2d 1, 233 N.E.2d 255, 286 N.Y.S.2d 225 (1967) (reasonable person would believe he was not free to leave).

99. *See* Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENVER L.J. 1, 10 (1970).

100. 384 U.S. at 468. Another danger in declaring *Miranda* inapplicable to minor offenses is that it raises the possibility that officials may, after making a felony arrest

the eight cases relied upon by the *Gabrielson* court involved violations of motor vehicle laws,[101] an examination of the applicability of the *Miranda* rules in such cases will facilitate an evaluation of the validity of the *Gabrielson* holding. Initially, it must be noted that each of the opinions finding those suspected of such offenses not entitled to the warnings has as its cornerstone the determination that *Miranda* could be distinguished on at least one of the foregoing grounds.[102] It is suggested that each of the cases contain shortcomings which seriously limit their precedential value.

First, not all of the motor vehicle violation cases are in accord with the *Gabrielson* holding, as reported cases have reached divergent results on the issue of the applicability of *Miranda*'s rules. Some courts have clearly applied *Miranda* by excluding statements obtained in the absence of the warnings.[103] Others, in response to the contention that *Miranda* is inapplicable in motor vehicle cases, have stated that the warning rules apply, but have not found exclusion required since the

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but failing to give the warnings, reduce the charge and thus obtain the conviction on a lesser included offense upon the basis of evidence which would have been inadmissible on the felony charge.

101. State v. Bliss, 238 A.2d 848 (Del. 1968) (DWI); Capler v. City of Greenville, 207 So. 2d 339 (Miss.) (DWI), *cert. denied*, 392 U.S. 941 (1968); State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970) (DWI); State v. Fearon, 110 N.J. 131, 264 A.2d 482 (Super. Ct. App. Div. 1969) (DWI), *rev'd on other grounds*, 56 N.J. 61, 264 A.2d 446 (1970); State v. Zucconi, 93 N.J. Super. 380, 226 A.2d 16 (Super. Ct. App. Div. 1967) (careless driving); State v. Beasley, 179 S.E.2d 820 (N.C. Ct. App. 1971) (DWI); State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969) (DWI), *cert. denied*, 396 U.S. 1007 (1970).

The *Capler* case cannot properly be cited as holding *Miranda* inapplicable, since no damaging statements by the defendant were introduced into evidence. The defendant's novel argument was that he had been denied his sixth amendment right to counsel because he had not been advised of his right to counsel upon arrest, and an attorney would have demanded immediate chemical tests which would have proved his innocence of the DWI charge. 207 So. 2d at 341.

102. *See* cases cited notes 9-10 *supra*. Indication that *Miranda* has not seriously hampered law enforcement can be gleaned from the motor vehicle cases. Apparently, most courts believe that the routine questioning of a person stopped for a motor vehicle violation is not custodial interrogation, and warnings need not be given. See cases cited note 105 *infra*. In addition, because most motor vehicle violations are witnessed by the law enforcement officer who stops the offender, further questioning will not usually enhance the chance of conviction. *Cf.* F. REMINGTON, *supra* note 83, at 381-82.

Situations in which interrogation may seem to be of value are accident investigations and arrests for driving while intoxicated. In such cases, officers may be inclined to interrogate to determine who was driving and whether that person had been drinking. The police are not left without effective methods of investigation, however. "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected" by *Miranda*. Miranda v. Arizona, 384 U.S. 436, 477 (1966). Familiar physical symptoms of intoxication also may be observed by the officer. This, coupled with the increasing use of chemical tests of the blood alcohol level of DWI suspects, tends to render statements by the accused superfluous for purposes of successful prosecution. See "Constitutional Implications of Arizona's Implied Consent Law," 13 ARIZ. L. REV. 313, 426 (1971).

103. People v. Mulack, 40 Ill. 2d 429, 240 N.E.2d 633 (1968); People v. McLaren, 55 Misc. 2d 676, 285 N.Y.S.2d 991 (Dist. Ct. 1967); Commonwealth v. Bonser, 215 Pa. Super. 452, 258 A.2d 675 (1969).

accused was said not to be in custody when questioned.[104] In still another group of cases, the interrogation has been found not to have been custodial without any indication that the court would have excluded the statements had the defendant been in custody.[105] The last group demonstrates the most common disposition of a defendant's *Miranda* claim in motor vehicle cases. Such decisions inferentially apply *Miranda* since they determine admissibility under the rules announced in that case. Finally, at the other extreme are cases explicitly declaring *Miranda*'s rules to be inapplicable in motor vehicle cases because of the nature of the offense charged.[106] This was the line of cases relied upon by the *Gabrielson* court.

Some of the motor vehicle cases relied upon belie dissatisfaction with the *Miranda* rules themselves as shown by a willingness of the courts to go further than necessary in order to find the warning rules inapplicable to an entire class of police interrogations. For example, in *State v. Zucconi*[107] and *State v. Beasley*,[108] the courts found the accused not to have been in police custody when the statements objected to were made. In *State v. Bliss*[109] the admission of incriminating remarks of the defendant in response to custodial questioning was held to be harmless error.[110] In view of these factors, the declarations of these courts that *Miranda* does not apply to motor vehicle cases are ar-

104. Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971); State v. Tellez, 6 Ariz. App. 251, 431 P.2d 691 (1967). In these cases, the courts have said that a motorist detained only long enough for the officer to issue a traffic citation is not in "custody" as the term is used in *Miranda*. This may be an instance of creating a legal fiction to justify a result desired for practical reasons. Although the motorist is released upon accepting the citation, he could not simply drive away while it is being prepared without incurring detrimental consequences.

105. United States v. LeQuire, 424 F.2d 341 (5th Cir. 1970); United States v. Chase, 414 F.2d 780 (9th Cir.), *cert. denied*, 396 U.S. 920 (1969); State v. Dubany, 184 Neb. 337, 167 N.W.2d 556 (1969); State v. Zucconi, 50 N.J. 361, 235 A.2d 193 (1967) (alternative holding); State v. Beasley, 179 S.E.2d 820 (N.C. Ct. App. 1971) (alternative holding); State v. Brown, 485 P.2d 444 (Ore. Ct. App. 1971).

106. *See* cases cited notes 9 & 101 *supra*.

107. 93 N.J. Super. 380, 226 A.2d 16 (Super. Ct. App. Div. 1967). Twelve days after the accident, the defendant in *Zucconi* admitted he was the driver of the car involved in the accident. The admission was first made to an investigating officer while the defendant was in a hospital being treated for injuries sustained in the accident. The admission was repeated 4 days later in a written statement which the defendant signed at his home.

108. 179 S.E.2d 820 (N.C. Ct. App. 1971). *Beasley* involved a DWI charge. Officers had found the defendant sitting in his car spinning the wheels in an attempt to get out of a ditch. In response to questioning, he admitted having had several beers at a tavern. On the issue of when the warnings must be given, see text & note 98 *supra*.

109. 238 A.2d 848 (Del. 1968).

110. *Id.* at 850. In this DWI case, a police officer stopped the defendant and, after smelling alcohol on his breath, took him to the police station. All of the *Miranda* warnings were given except advisement of the right to appointed counsel if retained counsel could not be afforded. This omission was held to be harmless since from all indications the defendant was able to retain his own counsel; the police were not required to advise the suspect of a theoretical right to which he was not entitled in fact.

guably dicta or at best alternative holdings.[111] The *Zucconi* court, in addition to finding no custodial interrogation, noted that the defendant's trial had taken place before the effective date of *Miranda*,[112] and seized the opportunity to forestall invocation of *Miranda* in all careless driving cases.[113] The *Beasley* court proceeded in a similar fashion, stating "[w]e note that the officer gave defendant the well-known *Miranda* warnings. We do not wish to be understood as implying that his failure to do so would have rendered the statements inadmissible."[114]

Miranda *and Minor Offenses*

The privilege against self-incrimination, which the *Miranda* rules were deemed necessary to fully effectuate, serves high ideals. It preserves the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution carries the entire burden of proving all the elements of an offense.[115] The system is not designed to aid in the ascertainment of truth, but rather reflects the great importance placed by the constitution upon the "right of each individual to be let alone."[116] "[T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."[117] It is anomalous to require the government to "shoulder the entire load" when pursuing suspected felons, but to permit it to subject a far greater number of citizens accused of lesser offenses to the inherently coercive atmosphere of police custody, and thereby contribute involuntarily to their own convictions.[118]

Concern for the dignity and integrity of the citizen should not decline with the seriousness of the charge. As the President's Commis-

111. Even so, they will undoubtedly be followed by lower courts in those jurisdictions. It is well to remember Judge Friendly's warning on condemnation of a court's language as dictum: "A court's stated and, on its view, necessary basis for deciding does not become dictum because a critic would have decided on another basis." Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 385-86 (1964).

112. 93 N.J. Super. at 383, 226 A.2d at 18.

113. *Id.* at 392, 226 A.2d at 23.

114. 179 S.E.2d at 822.

115. Tehan v. Shott, 382 U.S. 406, 415 (1966).

116. *Id.* at 416. In other words, the value to be protected by *Miranda* is privacy. F. REMINGTON, *supra* note 83, at 396.

117. Miranda v. Arizona, 384 U.S. 436, 460 (1966).

118. Approximately 5,000,000 persons annually are charged with misdemeanors, excluding traffic offenders. This is more than 14 times the number charged with felonies. For indigent accused, the misdemeanor-felony ration drops to 8-1. Approximately 1,250,000 indigents are accused of misdemeanors annually. 1 L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 9, 123, 125 (1965); *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 392 (1966).

sion on Law Enforcement and Administration of Justice noted in its statement of objectives, fair treatment of every individual is an essential element of justice; this means "fair in fact and also perceived to be fair by those affected."[119] In discussing the inadequacies of the nation's lower courts, the Commission declared that "[a] system that treats defendants who are charged with minor offenses with less dignity and consideration than it treats those who are charged with serious crimes is hard to justify."[120] One court recognized this principle in a DWI case:

> We have no sympathy for the defendant in this case. Traffic problems being as they are, he has been charged with a very serious crime. But the defendant is not a criminal in the usual sense. His occupation is that of a paper hanger, and he should be entitled, at least, to the same constitutional protection afforded daily to hardened criminals.[121]

Those courts which have decided not to require warnings in misdemeanor cases have either expressly stated[122] or implied[123] that the admissibliity of incriminating statements in such cases will be determined by the voluntariness test applicable in all cases before *Miranda*. *Miranda* laid the voluntariness test to rest for situations involving custodial interrogation; *Gabrielson* and similar decisions revive it for minor offenses. The inadequacies of this test, however, were a major factor in the Court's determination to replace it.[124]

The voluntariness test requires a court to examine the "totality of the circumstances" under which statements are made to decide whether they were freely given.[125] The considerations which are important under the voluntariness test include not only such factors as physical abuse,[126] threats,[127] extensive questioning,[128] incommunicado detention,[129] denial of the right to consult with counsel[130] and warning or

119. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY viii (1967).
120. *Id.* at 129.
121. City of Piqua v. Hinger, 13 Ohio App. 2d 108, 112, 234 N.E.2d 321, 324 (1967), *rev'd on other grounds*, 15 Ohio St. 2d 110, 238 N.E.2d 766, *cert. denied*, 393 U.S. 1001 (1968).
122. State v. Gabrielson, 192 N.W.2d 792, 796 (Iowa 1971); State v. Pyle, 19 Ohio St. 2d 64, 68, 249 N.E.2d 826, 828 (1969), *cert. denied*, 396 U.S. 1007 (1970).
123. *See* State v. Angelo, 251 La. 250, 253, 203 So. 2d 710, 710-11 (1967); State v. Beasley, 179 S.E.2d 820, 821 (N.C. Ct. App. 1971); City of Columbus v. Hayes, 9 Ohio App. 2d 38, 222 N.E.2d 829 (1967).
124. *See* text accompanying note 88 *supra*.
125. *See* text & notes 18-19 *supra*.
126. *See* Lee v. Mississippi, 332 U.S. 742 (1948).
127. *See* Payne v. Arkansas, 356 U.S. 560 (1958).
128. *See* Turner v. Pennsylvania, 338 U.S. 62 (1949).
129. *See* Davis v. North Carolina, 384 U.S. 737 (1966).
130. *See* Fay v. Noia, 372 U.S. 391 (1963).

not warning the suspect of his rights,[131] but also such imprecise determinants as the accused's lack of education,[132] emotional instability,[133] age,[134] health[135] and general background and experience.[136] A return to this test will hamper the swift administration of justice in that large class of criminal offenses classified as minor.[137] Not only is consideration of such factors time-consuming, but a conclusion based upon them is apt to be erroneous. "Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact."[138] Because it is speculative at best, adhering to the voluntariness test in minor offense cases gives a defendant only diluted protection of his constitutional rights.

Conclusion

The *Gabrielson* opinion and others which have determined that *Miranda* warnings are not required when the offense under inquiry is minor can perhaps best be explained as the manifestation of an underlying dissatisfaction with the rules of *Miranda.* The arguments advanced for not requiring the warnings are unconvincing as *Miranda* cannot properly be distinguished factually. It states rules which apply "in any criminal case."

Predictions are always perilous, and none will be attempted here as to the likelihood of the adoption of the minority view of *Gabrielson* in additional jurisdictions. It is hoped, however, that the doctrine will not find wide acceptance. The distinctions which have been employed to make *Miranda* inapplicable in minor offense cases may not be distinctions without a difference, but they are distinctions without sufficient justification.

131. *See* Leighton v. Cox, 365 F.2d 122 (10th Cir. 1966).
132. *See* Culombe v. Connecticut, 367 U.S. 568 (1961).
133. *See* Spano v. New York, 360 U.S. 315 (1959).
134. *See* Gallegos v. Colorado, 370 U.S. 49 (1962).
135. *See* Jackson v. Denno, 378 U.S. 368 (1964).
136. *See* Leighton v. Cox, 365 F.2d 122 (10th Cir. 1966).
137. *See* note 118 *supra.*
138. Miranda v. Arizona, 384 U.S. 436, 468-69 (1966).