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COMMENTS

MIRANDA AND MISDEMEANORS

In 1966, the United States Supreme Court decided *Miranda v. Arizona*,[1] the landmark fifth amendment case whose holding[2] safeguarding the privilege against self-incrimination has become as well-known as the alphabet to television crime show enthusiasts. The rules announced in *Miranda* have figured in a myriad of lower court decisions,[3] while innumerable commentators have expressed their views on the decision.

Although *Miranda* and its companion cases were felony prosecutions, the decision was based on the fifth amendment, which makes no distinction between felonies and misdemeanors.[4] Moreover, the holding of *Miranda* was expressed in general terms[5] after the Court had stated the purpose of *Miranda* as that of providing broad constitutional mandates.[6]

Disregarding the Court's purpose, a number of lower courts have determined that the *Miranda* rules do not apply to violations of motor vehicle laws,[7] and some courts have gone as far as to extend its inapplicability to all misdemeanors.[8] Consequently in those jurisdictions, the standard

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1. 384 U.S. 436 (1966).
2. *Miranda* requires procedural safeguards to be employed when an individual "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.
   Unless the accused chooses to speak after having been informed "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed," *Id.*, any statement he makes in response to questioning may not be used by the prosecution.
3. Some indication of the number of cases affected by *Miranda* is given by the twenty-five pages of citations to the case in SHEPARD'S UNITED STATES CITATIONS through October, 1978.
4. The fifth amendment provides, in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."
5. "[W]hen an individual is . . . deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." Miranda v. Arizona, *supra* note 1, at 478.
6. "We granted certiorari in these cases . . . in order further to explore some facets of the problems, thus exposed, 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." *Id.* at 441-2.
7. Clay v. Riddle, 541 F2d 456 (4th Cir. 1976); State v. Neal, 476 S.W.2d 547 (Mo. 1972); State v. Beasley, 10 N.C.App. 663, 179 S.E.2d 820 (N.C.Ct.App. 1971); State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970); State v. Bliss, 238 A.2d 848 (Del. Supr. Ct. 1968); People v. Bliss, 53 Misc.2d 472, 278 N.Y.S.2d 732 (Allegheny Co. Ct. 1967).
8. State v. Gabrielson, 192 N.W.2d 792 (Iowa 1971); State v. Angelo, 251 La. 250, 203 So.2d 710 (1967); State v. Pyle, 19 Ohio St.2d 64, 249 N.E. 2d 826 (1969), *cert. den.* 396 U.S. 1007 (1970).

for determining the admissibility of the defendant's statement is the voluntariness test applicable in criminal cases before *Miranda*.[9]

This discussion will briefly review the voluntariness standard, applicable where a court avoids *Miranda's* mandates, and will then examine *Miranda's* applicability to minor offenses. The theory underlying this discussion is that the decisions holding *Miranda's* rules inapplicable to misdemeanors[10] are based on a superficial reading of the opinion and, as such, should not be followed.

THE PRE-MIRANDA VOLUNTARINESS STANDARD

Concepts of voluntariness have evolved over time. At first, judicial interest centered on the trustworthiness of the confession. A confession was admissible as long as it was free of influence which made it untrustworthy or unreliable. Because of the Court's fear that a confession was motivated, not by guilt, but by the desire to avoid pain or to secure some favor, independent corroboration was necessary before a confession was admissible.[11]

The "untrustworthiness" rationale explains the exclusion of the confession in *Brown v. Mississippi*,[12] the first confession case predicated upon the due process clause of the fourteenth amendment. Although *Brown* held as violative of the fourteenth amendment a conviction resting "solely" upon a confession extorted by brutality and violence,[13] it soon became clear that due process was violated by the pro-

9. The traditional tests of voluntariness of confessions are not completely dead, but *Miranda* has superimposed upon those tests procedural safeguards which must be satisfied before the question of voluntariness can be considered.
   Also, when no interrogation has taken place, a statement given voluntarily may still be admitted. People v. Mercer, 257 Cal. App. 2d 244, 64 Cal. Rptr. 861 (Ct. App. 1967).
   Further, statements made voluntarily may be available to impeach even if not admissible as direct evidence. Harris v. New York, 401 U.S. 222 (1971). For a discussion of the voluntariness standard in Wyoming, see 11 LAND & WATER L. REV. 277, 286 (1976).
10. There is variation among jurisdictions as to distinctions between felony and misdemeanor. For example, Wyoming distinguishes the two in terms of place of incarceration. *See* Wyo. Stat. § 6-1-102 (1977). Other states classify the crimes according to length of incarceration. *See* Ohio Rev. Code § 2901.02(D), (E) (1978).
   The term misdemeanor will be used in this discussion to refer to the less serious offenses in any jurisdiction.
11. *See*, Isaacs v. U.S., 159 U.S. 487 (1895), see generally, MCCORMICK, EVIDENCE § 147 (2d. ed. 1972).
12. 297 U.S. 278 (1936).
13. The deputy who presided over the beating of the defendant conceded that one prisoner had been whipped "not too much for a Negro."

secution's mere use of an involuntary confession. The Court became less concerned with the *reliability* of the confession and more with coercive police *methods* which might cause the confession to be *involuntary*. The Court recognized that psychological as well as physical impact of interrogation techniques often render a statement involuntary even in the absence of physical abuse.[14]

By using the voluntariness test the Court engaged in a case-by-case scrutiny of the "totality of circumstances" surrounding the statements. Such factors as the accused's age,[15] intelligence,[16] the conditions under which the interrogation took place,[17] the physical and mental condition of the accused,[18] inducements used to persuade the accused to confess,[19] and whether warnings were given the accused[20] were considered. If a confession was not the "product of a rational intellect and a free will,"[21] it was not admissible.

Few guidelines emerged from the case-by-case approach, and local courts nearly always resolved the cases in favor of admissibility of the incriminating statement.[22] The defendants' only recourse was appeal and this avenue was not available to most. As Justice Black remarked, in the course of oral arguments in *Miranda*, "[I]f you are going to determine [the admissibility of a confession] each time on the circumstances, [if] this Court will take them one by one . . . it is more than we are capable of doing."[23]

The first significant step away from sole reliance on the voluntariness test was taken in *Escobedo v. Illinois,*[24] where the Court held inadmissible incriminating statements made after the accused had requested and been denied counsel. Although the decision was based on the sixth amendment

14. *See,* Ashcraft v. Tennessee, 322 U.S. 143 (1944); where the police, despite the absence of "one single tangible clue pointing to his guilt," had interrogated Ashcraft for thirty-six hours, during which time he had been held incommunicado without sleep or rest. The Court found the situation to be "inherently coercive."
15. *See,* Haley v. Ohio, 332 U.S. 596 (1948) a fifteen year old boy.
16. *See,* Townsend v. Sain, 372 U.S. 293 (1963) a nineteen year old "near mental defective."
17. *See,* Fay v. Noia, 372 U.S. 391 (1963) continued and coercive interrogation.
18. *See,* Blackburn v. Alabama, 361 U.S. 199 (1960) mentally ill defendant.
19. *See,* Lynumn v. Illinois, 372 U.S. 528 (1963) woman persuaded to confess so that her children would not be taken from her.
20. *See,* Haynes v. Washington, 373 U.S. 503 (1963).
21. Blackburn v. Alabama, *supra* note 18, at 208.
22. KAMISAR, LAFAVE, ISRAEL, MODERN CRIMINAL PROCEDURE 513 (4th ed. 1974).
23. *Id.*
24. 378 U.S. 478 (1964).

right to counsel,[25] the Court implicitly recognized a fifth amendment privilege against self-incrimination at the interrogation stage.[26]

Two years later came *Miranda v. Arizona*,[27] which explicitly relied on the fifth amendment privilege against self-incrimination. The Court attempted to establish a clear-cut test of admissibility of confessions to obviate the uncertainties and difficulties that arose in applying the voluntariness test. Failure to follow the *Miranda* procedures renders any statement inadmissible at trial *regardless of its voluntariness.*[28]

SCOPE OF MIRANDA

"One might wish to criticize the *Miranda* opinion for its far-ranging 'guidebook' format. But, rightly or wrongly, that opinion is what it is."[29] There is no language in *Miranda* which shows the Court did not intend its decision to apply to both felonies and misdemeanors. In fact, Chief Justice Warren's opening statement tends to refute a contrary belief: "The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for *crime.*"[30] The term "crime" encompasses both felonies and misdemeanors.[31]

The requirement of apprising an individual of his fifth amendment protections does not hinge on the degree of seriousness of the crime. Rather, the individual must be informed of his rights whenever the "privilege against self-incrimination is jeopardized."[32] The privilege is jeopardized "when an individual is taken into custody or otherwise deprived of

25. *Id.* at 490-91.
26. *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."
27. *Supra*, note 1.
28. *See*, Miranda v. Arizona, *supra* note 1, at 471-72.
29. Dershowitz and 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).
30. Miranda v. Arizona, *supra* note 1, at 439 (emphasis added).
31. BLACK'S LAW DICTIONARY notes that " 'crime' and 'misdemeanor,' properly speaking, are synonymous terms. . . . [C]rime [is] a term of broad and general import, including both felonies and misdemeanors, and hence covering all infractions of the criminal law."
32. Miranda v. Arizona, *supra* note 1, at 478.

his freedom by authorities in any significant way and is subjected to questioning."[33] Thus, a court's attention should be focused on the question of whether the suspect was in custody, rather than whether a felony or misdemeanor was committed. The need for giving *Miranda* warnings should be determined by the nature of the interrogation, not by the nature of the offense.[34] Both Arizona[35] and California[36] have recognized the question of custody as the issue involved in a fifth amendment case, be it felony or misdemeanor.[37] In *People v. Ceconne,*[38] the California court recognized, in a misdemeanor case, that "*Miranda* permits no questioning without a prior warning once the suspect is in custody."[39]

PRO-MIRANDA MISDEMEANOR DECISIONS

Well-reasoned cases have applied *Miranda* to misdemeanors. Perhaps the clearest explanation is given in the Arizona case of *State v. Tellez:*[40] "The language of the *Miranda* case applies its rules to all crimes. . . . Those accused of either a felony or a misdemeanor are entitled to the warnings of constitutional rights."[41]

The Pennsylvania court has also held *Miranda* applicable to misdemeanors, reasoning:

> Despite the fact that *Miranda* itself, as well as a great bulk of decisions following it have been felony prosecutions, there is no indication that one accused of a misdemeanor . . . must subject himself to police interrogation absent the fundamental safeguards afforded others.[42]

In the same vein, the Ohio court, in speaking of a defendant charged with driving while intoxicated, expressed no

33. *Id.*
34. Clay v. Riddle, *supra* note 7, at 459 (dissenting opinion).
35. *See* Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971); State v. Tellez, 6 Ariz. App. 251, 431 P.2d 691 (1967).
36. *See,* People v. Ceconne, 260 Cal. App.2d 937, 67 Cal. Rptr. 499 (1968).
37. The question of what constitutes custodial interrogation is beyond the scope of this discussion. Suffice it to say, again, that the determination of whether the suspect was in custody should be the focal point of any fifth amendment self-incrimination case.
38. *Supra* note 35.
39. People v. Ceconne, *supra* note 35, at 503.
40. *Supra* note 35.
41. State v. Tellez, *supra* note 35, at 695.
42. Commonwealth v. Bonser, 215 Pa. Super. 452, 258 A.2d 675, 679 (1969) where the defendant was charged with driving while intoxicated, was taken to the police station where he made incriminating statements.

sympathy for the defendant noting that traffic offenses are very serious crimes.

> But, [the court said], 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 protections afforded daily to hardened criminals.[43]

These cases clearly have recognized *Miranda's* mandates and have observed the restraints "consistent with the Federal Constitution in prosecuting individuals for crime."[44]

ANTI-MIRANDA MISDEMEANOR DECISIONS

Disregarding the apparent constitutional mandates set forth in *Miranda*, several courts[45] have held *Miranda* inapplicable to misdemeanors. This discussion turns now to the rationales of those decisions. At lease five different reasons have been employed for failing to apply *Miranda* to misdemeanors.

Undue Interference With Law Enforcement

Some courts[46] have purported to find support for deciding upon *Miranda's* inapplicability in the words of *Miranda* itself where the Court noted: "The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement."[47] For instance the Iowa court interpreted this language as authorizing law enforcement officials to disregard the constitutional warnings when to follow them would "constitute an undue interference with a proper system of law enforcement,[48] [and, the court continued,] to hold *Miranda* warnings applicable to simple misdemeanors would unduly interfere."[49]

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43. 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 (1968), *cert. den.*, 393 U.S. 1001 (1968).
44. Miranda v. Arizona, *supra* note 1, at 439.
45. *Supra* notes 7 and 8.
46. State v. Gabrielson, *supra* note 8; State v. Angelo, *supra* note 8; State v. Macuk, *supra* note 7; State v. Pyle, *supra* note 8.
47. Miranda v. Arizona, *supra* note 1, at 481.
48. State v. Gabrielson, *supra* note 8, at 795; *accord* State v. Pyle, *supra* note 8, at 67-68, 828.
49. State v. Gabrielson, *supra* note 8, at 796.

By focusing upon this isolated passage, the Iowa court seems to have misinterpreted the language. More reasonably, this passage[50] was an expression of the Court's belief that requiring compliance with the *Miranda* rules will not interfere with proper law enforcement. Further, the warnings are easily given and the procedures for giving them have become routinized, with the suspect generally being given a printed notice of rights with a waiver form attached.[51]

Moreover, there is evidence that applying *Miranda's* rules does not have a crippling effect upon law enforcement. A study made by a group at Yale Law School as to the workings of the *Miranda* rule at the New Haven, Connecticut police station during an eleven month period in the summer of 1966 concluded, "that warnings had little impact on suspects' behavior. No support was found for the claim that warnings reduce the amount of 'talking.' "[52]

Besides the warnings have been constitutionally mandated by *Miranda* so they ought be given, despite any imagined interference with law enforcement. As the *Miranda* Court observed:

> The Fifth Amendment is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning . . . so simple . . . [that] a warning at the time of interrogation is indispensable.[53]

Miranda Was a Felony

Miranda v. Arizona and its companion cases[54] were felony prosecutions for kidnapping and rape, first degree robbery, bank robbery, and first degree murder. In deciding whether the *Miranda* holding extends to those persons accused of misdemeanors, as well as felonies, some courts have adhered "to the accepted principle that any court-made rule of law must be read in relation to the facts which precipitated it."[55]

50. *See*, text accompanying note 46.
51. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENVER L. J. 1,9 (1970).
52. Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519, 1563 (1967).
53. Miranda v. Arizona, *supra* note 1, at 468-9.
54. Vignera v. New York; Westover v. U.S.; California v. Stewart.
55. State v. Pyle, *supra* note 8, at 827, *accord* State v. Gabrielson, State v. Angelo, *supra* note 8.

While it may be technically accurate to say that *Miranda* applies only to felony cases since only felony cases were before the Court, the *Miranda* holding did not purport to be limited to its facts.[56] "The fact that a felony was involved in *Miranda* . . . does not give rise to an inference that the thrust of that decision goes to felonies only."[57] The dissenting judge in *State v. Pyle,* recognizing *Miranda* as premised upon the privilege against self-incrimination, logically reasoned:

> It is inconsistent to hold that the *Miranda* warning aspect of the privilege against self-incrimination is not applicable to misdemeanors, while no suggestion is made that the other judicial interpretations concerning the privilege against self-incrimination are not applicable to misdemeanors. A defendant charged with a misdemeanor could never be compelled to take the witness stand, or, if he testified could he ever be compelled to give an answer incriminating himself, nor could the prosecution comment on such a defendant's failure to testify.[58]

The privilege against self-incrimination should not divisible merely because fragmenting the privilege might be convenient for the lower courts.

Insufficient Number of Lawyers

In holding *Miranda* inapplicable to motor vehicle violations, the New Jersey court in *State v. Macuk*[59] and the Missouri court in *State v. Neal*[60] postulated that it would be utterly impossible to provide sufficient lawyers to consult with the number of motor vehicle operators who would request legal advise.

Statistical evidence is contrary to the courts' speculation. The Yale Law School Study[61] found in only a few cases did the warnings cause suspects to ask for counsel, even though felonies and serious misdemeanors were involved. "Our findings suggest *Miranda* will rarely bring lawyers to the stationhouse. Defendants, told of their right to counsel,

56. *See* text accompanying notes 4, 30, and 42.
57. State v. Pyle, *supra* note 8, at 829 (dissenting opinion).
58. *Id.*
59. *Supra* note 7.
60. *Supra* note 7.
61. *Supra* note 52.

usually neglect the offer and let interrogation proceed."[62] From June 1966 to June 1977, the Junior Bar Association of the District of Columbia and the Neighborhood Legal Services Project set up a program to provide around-the-clock availability of counsel for defendants. In that year, only seven percent of those arrested for felonies and serious misdemeanors requested counsel from the Project.[63]

Even if it were true that police are swamped with requests for counsel, this is certainly not a compelling reason for failing to hold *Miranda* applicable to all crimes. *Miranda*, premised on the fifth amendment, applies to any criminal proceeding.[64] Further, the "lack-of-lawyers" argument used to avoid *Miranda's* requirements in misdemeanor cases has been largely mooted by the Supreme Court in *Argersinger v. Hamlin*,[65] where the Court extended the sixth amendment right to appointed counsel to all cases in which imprisonment will be imposed. In other words, a defendant may not be imprisoned, no matter how minor the offense, unless he has been offered counsel to defend him at trial.[66] A misdemeanant often faces the possibility of imprisonment.[67] Therefore, in order to safeguard the court's option to impose a jail sentence, the suspect must be informed of his right to counsel.

Acceptable Investigatory Tactics

Several cases have tried to distinguish *Miranda* by arguing that it was concerned with preventing lengthy, incommunicado interrogation seeking to "sweat out" confessions which is unlikely to occur in misdemeanor investigations. Thus, the argument continues, *Miranda* does not apply.[68]

Again, these decisions ignore *Miranda's* guidebook format. The Supreme Court emphasized that *Miranda's* principles were not limited to the "third degree": "Even without employing brutality [or] the 'third degree' . . . the very fact of

62. *Id.* at 1600.
63. Medalie, Zeitz, Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968).
64. *Supra* note 4.
65. 407 U.S. 25 (1972).
66. *Id.* at 37.
67. *See*, WYO. STAT. § 6-1-107 (1977).
68. State v. Macuk; State v. Neal, *supra* note 7; State v. Pyle; State v. Gabrielson, *supra* note 8.

custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[69] The rules announced in *Miranda* are to assure that the decision to speak is intelligently made, and is not aimed only at preventing overzealous interrogation of suspected felons.

Harmless Error

Some cases rejecting *Miranda's* applicability to misdemeanors dealt with statements that might well have been admissible under *Miranda.* In *State v. Macuk*[70] and *State v. Bliss,*[71] each court coupled its rejection of the Miranda requirements with the observation that the admission of the defendant's statement was probably harmless error. In *Macuk,* the court noted that the interrogation conducted without benefit of *Miranda* warnings "produced no more inculpatory information than had the previous permissible on-the-scene investigatory inquiries."[72] The defendant in *Bliss,* the court noted, suffered no harm from the failure to tell him about availability of appointed counsel.[73] Likewise the Louisiana court[74] preferred to state broadly that *Miranda* does not apply to misdemeanors, rather than base the admissibility of the incriminating statement on the absence of custodial interrogation.

In view of these factors, the declarations of these courts that *Miranda* does not apply to misdemeanors are, at best, alternative holdings and, as such, "their precedential value is limited."[75]

CONCLUSION

Opinions which have determined that the *Miranda* requirements are inapplicable to misdemeanors are unconvincing. *Miranda* states rules which apply in *all* criminal cases.

"A system that treats defendants who are charged with minor offenses with less dignity than it treats those who are

69. Miranda v. Arizona, *supra* note 1, at 455-56.
70. *Supra* note 7.
71. *Supra* note 7.
72. State v. Macuk, *supra* note 7, at 9.
73. State v. Bliss, *supra* note 7.
74. State v. Angelo, *supra* note 8.
75. Clay v. Riddle, *supra* note 7, at 460 (dissenting opinion).

charged with serious crimes is hard to justify."[76] It is, this writer submits, impossible to justify.

BARBARA CASE COCKREHAM

76. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF A FREE SOCIETY 129 (1967).