The Applicability of *Miranda* Warnings to Non-felony Offenses: Is the Proper Standard "Custodial Interrogation" or "Severity of the Offense"?

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THE APPLICABILITY OF MIRANDA WARNINGS TO NON-FELONY OFFENSES: IS THE PROPER STANDARD "CUSTODIAL INTERROGATION" OR "SEVERITY OF THE OFFENSE"?

In 1966, the United States Supreme Court decided *Miranda v. Arizona*, which required law enforcement officers to inform criminal suspects of their fifth amendment right against self-incrimination prior to the initiation of custodial interrogation. Although the Supreme Court has redefined and sharpened the focus of the *Miranda* decision on numerous occasions, it has not yet specifically addressed the applicability of the *Miranda* warnings to non-felony offenses such as misdemeanors and traffic infractions.

Although the majority of states have required that police give *Miranda* warnings to suspects prior to custodial questioning for any offense, several states have held that the warnings are not necessary.

1. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V.
2. *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court declared that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.
384 U.S. at 478-79.
for misdemeanors, traffic violations, or both.\textsuperscript{6} The United States Court of Appeals for the Sixth Circuit, in a decision overturning Ohio case law, recently held that vehicular misdemeanors were within the scope of \textit{Miranda}.\textsuperscript{7} This holding directly conflicts with a prior Fourth Circuit decision that \textit{Miranda} warnings are not required for misdemeanor traffic offenses.\textsuperscript{8} The United States Supreme Court recently granted certiorari to resolve this issue.\textsuperscript{9}

This Note argues that the proper standard for determining the necessity of the \textit{Miranda} warnings for any offense is the existence of custodial interrogation. When interrogation for non-felony offenses takes place in a custodial atmosphere, \textit{Miranda} warnings should be required, as they are for more serious offenses. Part I summarizes the two basic approaches taken by courts that have confronted the question of the applicability of the \textit{Miranda} warnings to non-felony of-

\begin{itemize}
\item People v. Ceccone, 260 Cal. App. 2d 886, 67 Cal. Rptr. 499 (1968) (requiring \textit{Miranda} for custodial interrogation in traffic offenses);
\item State v. Kinn, 288 Minn. 31, 178 N.W.2d 888 (1970) (requiring \textit{Miranda} when an officer determines to take a person into custody);
\item People v. McLaren, 55 Misc. 2d 676, 285 N.Y.S.2d 991 (Nassau County Dist. Ct. 1967) (applying \textit{Miranda} to all custodial interrogations, including police “interview” after D.W.I. arrest);
\item State v. Lawson, 285 N.C. 320, 204 S.E.2d 843 (1974) (holding that \textit{Miranda} applies to custodial interrogation for such offenses as public intoxication and D.W.I.);
\item State v. Fields, 294 N.W.2d 404 (N.D. 1980) (holding warnings necessary for traffic offenses when custodial interrogation occurs);
\item State v. Teafatiller, 64 Or. App. 612, 669 P.2d 379 (1983) (requiring \textit{Miranda} warnings for misdemeanor custodial interrogations, even if suspect is subsequently cited and released, rather than arrested);
\item Commonwealth v. Bonser, 215 Pa. Super. 452, 258 A.2d 675 (1969) (applying \textit{Miranda} to misdemeanors, regardless whether found in the penal or vehicle codes);
\item Newberry v. State, 552 S.W.2d 457 (Miss. 1977) (requiring \textit{Miranda} for all custodial interrogations);
\item State v. Darnell, 8 Wash. App. 627, 508 P.2d 613 (requiring \textit{Miranda} for custodial interrogation in traffic offenses), \textit{cert. denied}, 414 U.S. 1112 (1973);
\item State v. Bunders, 68 Wis. 2d 129, 227 N.W.2d 727 (1975) (requiring full panoply of \textit{Miranda} warnings when police interrogate a driver as to his condition while driving).
\end{itemize}

6. \textit{See} State v. Bliss, 238 A.2d 848 (Del. 1968) (holding warnings not necessary in custodial interrogations for traffic offenses, absent a showing of actual prejudice to the defendant); State v. Gabrielson, 192 N.W.2d 792 (Iowa 1971) (rejecting a requirement for a \textit{Miranda} warning when offense charged is a simple misdemeanor), \textit{cert. denied}, 409 U.S. 912 (1972); State v. Angelo, 251 La. 250, 203 So. 2d 710 (1967) (holding that statements made in misdemeanor cases can be used without necessity of informing the suspect of his right to counsel); Capler v. City of Greenville, 207 So. 2d 339 (Miss. 1968) (holding \textit{Miranda} not required in misdemeanors), \textit{cert. denied}, 392 U.S. 941 (1968); State v. Neal, 476 S.W.2d 547 (Mo. 1972) (holding \textit{Miranda} not necessary for traffic violations); State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970) (holding \textit{Miranda} not applicable to motor vehicle violations); State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969) (not requiring \textit{Miranda} in interrogations for misdemeanors), \textit{cert. denied}, 396 U.S. 1007 (1970); Byers v. Oklahoma City, 497 P.2d 1302 (Okla. 1972) (requiring warnings only in cases leading to a felony charge).


fenses. Part III argues that neither the rationale for the *Miranda* doctrine nor the roots of the fifth amendment support a distinction based on the severity of the offense with which the suspect is charged. Part II also distinguishes the *Miranda* privileges from other areas of the law where such distinctions based on severity of the crime are valid. Part III considers how the component parts of the custodial interrogation standard would work in practice in minor offense investigations, and how *Miranda* warnings will not unduly impair investigations for non-felony offenses. Part III concludes that there are sound reasons for imposing this minor burden on the police in order to protect the fifth amendment rights of non-felony suspects.

**I. APPROACHES TO THE APPLICATION OF *Miranda* WARNINGS IN NON-FELONY INVESTIGATIONS**

Courts addressing the issue of whether *Miranda* applies to non-felony offenses have generally taken one of two basic approaches to the issue. These two conflicting approaches, and the outcomes suggested by each, are exemplified by the contrasting reasoning of the two federal appellate courts that have reached opposite conclusions as to the necessity of the *Miranda* warnings for misdemeanor traffic offenses.

**A. The Nature of the Offense**

Most jurisdictions that have held that *Miranda* is not required for certain non-felony offenses have focused on the nature of the violation for which the suspect was interrogated. In *Clay v. Riddle*, for example, the Fourth Circuit held that *Miranda* warnings were not required for misdemeanor traffic offenders. The defendant was arrested...

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10. See, e.g., *Clay v. Riddle*, 541 F.2d 456, 457-58 (4th Cir. 1976) ("[T]he unlawful incident was a commonplace event — a traffic offense — a breach of the law to which we believe the *Miranda* decision does not extend."); *State v. Bliss*, 238 A.2d 848, 850 (Del. 1968) ("There are practical reasons why motor vehicle offenses should be treated somewhat differently ... than most other offenses."); *State v. Gabrielson*, 192 N.W.2d 792 (Iowa 1971) ("To hold *Miranda* warnings applicable to simple misdemeanors would unduly interfere with proper law enforcement in that area . . . ."); *cert. denied*, 409 U.S. 912 (1972); *State v. Angelo*, 251 La. 250, 255, 203 So. 2d 710, 711 (1967) (misdemeanors do not require the same "elaborate, strict, highly formalized procedural safeguards" as felonies); *Capler v. City of Greenville*, 207 So. 2d 339, 341 (Miss. 1968) ("We consider this question in light of the fact that only a misdemeanor is involved"), *cert. denied*, 392 U.S. 941 (1968); *State v. Neal*, 476 S.W.2d 547, 553 (Mo. 1972) ("*Miranda* does not say that the rule shall be applied in cases involving so-called minor offenses"); *State v. Macuk*, 57 N.J. 1, 268 A.2d 1 (1970) (holding that motor vehicle violations, as "petty offenses," are not serious enough to require *Miranda*); *State v. Pyle*, 19 Ohio St. 2d 64, 67, 249 N.E.2d 826, 827 (1969) ("Investigative procedures ordinarily followed with respect to misdemeanors . . . differ markedly from the investigative procedures ordinarily followed with respect to felonies."); *cert. denied*, 396 U.S. 1007 (1970).

11. 541 F.2d 456 (4th Cir. 1976).
for the misdemeanor of driving while under the influence of alcohol. 12
During transport to a hospital for a breath test, the defendant made an incriminating statement in response to a question asked without Miranda warnings. Significantly, the prosecution later used the statement to support his felony conviction under the state "habitual offender" statute, 13 for which the defendant was sentenced to imprisonment for one year. The Fourth Circuit cited a number of prior state cases from several jurisdictions which gave two general justifications for rejecting claims such as Clay's request for habeas corpus relief: 14
(1) a variety of theoretical assumptions supporting the assertion that the scope of Miranda did not extend to minor offenses; 15 and (2) arguments that the application of Miranda warnings to minor offenses would overburden law enforcement, 16 sometimes balanced against the minor consequences resulting from convictions for non-felonies. 17 This approach, which requires a crime-by-crime determination of whether Miranda warnings are required, 18 has led to discrepancies among the jurisdictions which adopt it. The approach has also not created any single bright-line test to determine when Miranda applies, 19 nor has

13. VA. CODE §§ 46.1-387.2, -387.6, -387.8 (1950) (making it a felony for an "habitual offender" to drive on the highway).
14. 541 F.2d at 457-58.
15. Courts have based theoretical distinctions on historical differences between minor offenses and more serious crimes, State v. Zucconi, 93 N.J. Super. 380, 391, 226 A.2d 16, 23 (App. Div.), aff'd, 50 N.J. 361, 235 A.2d 193 (1967), and on a general reluctance to expansively interpret court-made rules. State v. Pyle, 19 Ohio St. 2d 64, 66-67, 249 N.E.2d 826, 827 (1969), cert. denied, 396 U.S. 1007 (1970). Furthermore, courts have reasoned that the primary purpose of Miranda was to proscribe "the lengthy incommunicado [police interrogation] seeking to 'sweat out' a confession" that supposedly occurred in felony, but not in misdemeanor interrogations. State v. Macuk, 57 N.J. 1, 16, 268 A.2d 1, 9 (1970); see infra notes 96-97 and accompanying text; see also State v. Neal, 476 S.W.2d 547, 552 (Mo. 1972).
16. Several cases point to the vast numbers of traffic infractions that occur in their respective jurisdictions and imply that the justice system would grind to a halt if suspects could invoke Miranda rights. See, e.g., State v. Bliss, 238 A.2d 848, 850 (Del. 1968) (noting that there were 1087 arrests for drunk driving in Delaware in 1966); State v. Macuk, 57 N.J. 1, 17, 268 A.2d 1, 9 (1970) (stating that 726,763 non-parking traffic complaints were filed in New Jersey in 1968-69).
17. See, e.g., State v. Macuk, 57 N.J. 1, 16, 268 A.2d 1, 9 (1970) ("The violations involved are not serious enough in their consequences to warrant the time consuming interference which would result to effective law enforcement . . . in petty offense cases").
18. For example, this determination might depend upon classifications regarding the seriousness of the crime that vary greatly from state to state, such as whether the offense was classified in the traffic code, see, e.g., State v. Bliss, 238 A.2d 848 (Del. 1968), or as a "simple misdemeanor," e.g., State v. Gabrielson, 192 N.W.2d 792 (Iowa 1971), cert. denied, 409 U.S. 912 (1972), or as a "petty offense," e.g., State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970), or as any misdemeanor, e.g., State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), cert. denied, 396 U.S. 1007 (1970); see also infra note 20.
19. The confusion as to the proper line to be drawn may be present in the case to which the Supreme Court recently granted certiorari. Berkemer v. McCarty, 104 S. Ct. 697 (1984) (No. 83-710). In this case, 716 F.2d 361 (6th Cir. 1983), the Sixth Circuit explicitly over-
it proven a consistent, workable test in practice. As a result of the differing lines drawn by courts focusing on the nature of the crime, interrogation for a given infraction may be subject to the \textit{Miranda} requirements in one jurisdiction and not in another. This is due to the disparate statutory classifications of the offense in various jurisdictions, as well as the discretion of the courts in determining whether or not to apply the \textit{Miranda} warnings to that class of offense.\footnote{For example, by holding that \textit{Miranda} does not apply to petty offenses under municipal ordinances, the court in County of Dade v. Callahan, 259 So. 2d 504 (Fla. Dist. Ct. App. 1971), exempted a large class of offenses from the \textit{Miranda} requirement, including drunk driving. On the other hand, in a different jurisdiction the same infraction might be found in the state code, with a relatively severe punishment. In Commonwealth v. Bonser, 215 Pa. Super. 452, 258 A.2d 675 (1969), the court, noting the potential seriousness of the legislatively prescribed punishment, held the \textit{Miranda} warnings applicable to custodial interrogation for misdemeanor drunk driving. New Jersey courts have taken a somewhat different approach by expressly altering their definition of "crime" by declaring that certain offenses are merely "quasi-criminal," and thus not subject to the same \textit{Miranda} standards as "criminal" offenses. See State v. Zucconi, 93 N.J. Super. 380, 236 A.2d 16 (App. Div.), aff'd, 50 N.J. 361, 235 A.2d 193 (1967) (citing State v. Maier, 13 N.J. 235, 99 A.2d 21 (1953), which drew this distinction between crimes and petty offenses); see also infra notes 76-88 and accompanying text.}

Furthermore, linking \textit{Miranda} warnings to the seriousness of the offense gives added significance to the infraction with which the suspect is initially charged. \textit{Miranda} warnings could be denied if the investigating police officer initially decides to charge a suspect with a non-felony or vehicular offense, regardless of other, more serious charges arising out of the incident that may be pursued at a later date.\footnote{There have been instances, such as \textit{Clay}, in which defendants charged with non-felony offenses have had their incriminating statements made without benefit of \textit{Miranda} warnings used against them in subsequent felony prosecutions stemming from the same incident. See infra note 128.}

A federal district court in the Fourth Circuit severely criticized \textit{Clay} for allowing this possible result.\footnote{In United States v. Schultz, 442 F. Supp. 176 (D. Md. 1977), the defendant, who was initially stopped because of apparent erratic driving, confessed to smoking marijuana, a misdemeanor. The court pointed out that the officer's further inquiries regarding whether the defendant had more marijuana in the vehicle could have led to felony charges, if the amount possessed was large enough. During further interrogation, the defendant admitted to possessing an illegal weapon, for which he was tried in federal court. In granting defendant's motion to suppress his statements, the court attempted to distinguish \textit{Clay} by noting that the interrogation went beyond the "mold" of a traffic offense when the officer asked about drugs. In addition, the court specifically endorsed the dissent's reasoning in \textit{Clay}.}

There may also be fundamental constitutional questions involved if, for example, prior misdemeanor convictions obtained with the aid of non-\textit{Miranda} confessions are used to increase the degree of offense or the sentence for subsequent convictions.\footnote{See infra notes 130-132 and accompanying text.}
B. The Existence of Custodial Interrogation

The second method of analysis used by courts focuses on whether the incriminating statements were the product of custodial interrogation, regardless of the nature of the offense for which the suspect was interrogated.\(^\text{24}\) The Sixth Circuit adopted such an approach in *McCarty v. Herdman*\(^\text{25}\) by applying a bright-line test mandating *Miranda* warnings whenever law enforcement authorities engage in custodial interrogation, regardless of the nature of the offense. In *McCarty*, the defendant was suspected of driving while intoxicated. He was arrested, transported to the county jail, and given an intoxilyzer test, which showed no alcohol in his system. During the accompanying questioning without *Miranda* warnings for the purpose of filling out an "Alcohol Influence Report," however, McCarty made incriminating statements about smoking marijuana. The trial court refused to exclude these incriminating statements, and McCarty pleaded nolo contendere to driving while intoxicated, a first degree misdemeanor.\(^\text{26}\) He was sentenced to ninety days in jail, eighty of which were suspended.

\(^{24}\) *See, e.g., McCarty v. Herdman, 716 F.2d 361, 363-64 (6th Cir. 1983)* ("*Miranda* warnings must be given to all individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense . . . . The privilege against self-incrimination is an enduring right, undiminished by the number of people who enjoy it or the frequency of its exercise.") (emphasis in original), *cert. granted sub nom. Berkemer v. McCarty, 104 S. Ct. 697* (1984) (No. 83-710); *Campbell v. Superior Court, 106 Ariz. 542, 552, 479 P.2d 685, 695 (1971)* ("*Miranda* warnings must be given when the officer determines that . . . an arrest for a misdemeanor or felony is to be made. At this time the person is being deprived of his freedom of action in [a] significant way") (quoting *Miranda*, 384 U.S. at 477); *People v. McLaren, 55 Misc. 2d 676, 677, 285 N.Y.S.2d 991, 992-93* (Nassau County Dist. Ct. 1967) ("Since the defendant was not informed of [his *Miranda*] rights prior to his [custodial] interrogation . . . the defendant's . . . responses to the queries derived from the [forty-four question drunk driving questionnaire] . . . are suppressed out of hand"); *State v. Bunders, 68 Wis. 2d 129, 134, 227 N.W.2d 727, 730 (1975)* ("We believe that the state's argument that [in drunk driving cases] no criminal proceeding is involved . . . is without merit. If the police did in fact interrogate the driver as to her driving or intoxication . . . the full panoply of *Miranda* warnings would be required"); *cf. State v. Tellez, 6 Ariz. App. 251, 431 P.2d 691* (1967) (stating that *Miranda* is required for custodial interrogation for misdemeanors as well as felonies; however, statements admissible because suspect not yet in custody); *State v. Roberti, 293 Or. 236, 646 P.2d 1341* (in petition to suppress non-*Miranda* confessions stemming from drunk driving investigation, court focusing on whether there was custodial interrogation, *rev'd on rehearing* 293 Or. 59, 644 P.2d 1104 (1982), *petition for cert. filed*, 51 U.S.L.W. (Aug. 20, 1982) (No. 82-315); *Salt Lake City v. Carner, 664 P.2d 1168* (Utah 1983) (not requiring warnings in investigatory setting, but stating that accused drunk driver must be given *Miranda* warnings if setting of interrogation is custodial). *But see Commonwealth v. Bonser, 215 Pa. Super. 452, 460 n.5, 258 A.2d 675, 680 n.5 (1969)* (holding that one accused of a misdemeanor is entitled to *Miranda* prior to custodial interrogation, regardless whether the offense is found in the Penal or Vehicle Codes, but distinguishing, in a footnote, drunk driving in Pennsylvania for *Miranda* purposes from drunk driving in states that hold *Miranda* inapplicable to drunk driving, by the harsher sentences available in Pennsylvania).


In granting McCarty's petition for habeas corpus, the Sixth Circuit focused on the necessity of the *Miranda* procedural safeguards to protect the fifth amendment privilege against self-incrimination during custodial interrogation, and explicitly rejected limiting the scope of *Miranda* by the nature of the crime being investigated.\(^{27}\) Significantly, even the dissenting judge agreed with the majority that the suspect's stationhouse confessions fell within the purview of *Miranda*.\(^{28}\) His disagreement with the majority's holding was essentially factual: because the suspect made similar incriminating statements at the scene, the dissenting judge found the stationhouse admissions immaterial to the conviction.\(^{29}\) The central proposition of this Note is that, possible factual peculiarities of *McCarty* notwithstanding,\(^{30}\) both the majority and dissent in that case reached the correct legal conclusion that the applicability of the *Miranda* doctrine depends on the existence of custodial interrogation, rather than the type of offense being investigated.

II. THE BASIS FOR THE *Miranda* DOCTRINE AND THE HISTORY OF THE PRIVILEGE AGAINST SELF-INCrimINATION SUPPORT WARNINGS FOR ALL CUSTODIAL INTERROGATIONS

A. *The Miranda Rationale*

The theoretical justification for the *Miranda* decision is that custodial interrogation of a suspect by law enforcement personnel contains "in-
herently compelling pressures." The factor the Court deemed important in creating these inherently coercive pressures was the relationship between interrogation and police custody and the effect that the resulting atmosphere of intimidation has on a suspect's free will. The Court considered these pressures to be of such a magnitude that the suspect's free will to decide whether or not to cooperate with the police easily could be overborne without prophylactic safeguards. Neither interrogation nor police custody alone, however, creates a coercive atmosphere of such magnitude as to require the Miranda warnings. Rather, it is the interplay between police interrogation and police custody which reinforces the pressures exerted by each element singly, until the will of the suspect is subjugated to the will of the examiner. Thus, in order to show the requisite inherently coercive atmosphere needed to prove a violation of Miranda, two essential elements must be established: custody and interrogation. This rationale continues intact to the present day. Although the Supreme Court has acknowledged that the exact form of the prophylactic Miranda warnings is not dictated by the Constitution, the Court held that its basic formulation

suspect's later, custodial confession is harmless error, if it is error at all. See generally infra notes 101-114 and accompanying text.

31. The court explained that "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion [as described in popular police interrogation manuals] cannot be otherwise than under compulsion to speak." 384 U.S. at 461.

32. "In the cases before us today . . . we concern ourselves primarily with [the incomunicado police-dominated] interrogation atmosphere and the evils it can bring . . . . It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner." Id. at 456-57.

33. The Court emphasized that

[i]t is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. [It] is at odds with one of our Nation's most cherished principles — that the individual may not be compelled to incriminate himself. Unless 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.

Id. at 457-58 (footnote omitted).


35. In defining the situations covered by Miranda, the Court stated that "we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444 (emphasis added).

For further discussions of the privilege and Miranda, see generally Y. kamisar, W. LaFave & J. Israel, Modern Criminal Procedure 553-72 (5th ed. 1980); O. Stephens, The Supreme Court and Confessions of Guilt (1973).

36. For a detailed discussion of the definition of "custody" and the effect the current standard would have on the necessity of Miranda warnings in investigations of many minor crimes, see infra notes 101-114 and accompanying text. The current definition of "interrogation" is discussed infra notes 94-100 and accompanying text.

of the warnings is to be mandatory to protect the underlying fifth amendment rights in all criminal cases unless Congress or the states develop alternative procedures that would be *at least* as effective in protecting the suspects' right against self-incrimination as the warnings.\(^\text{38}\) To this end, the court has generally required at least a substantial approximation of the warnings when the existence of custody and interrogation trigger *Miranda*.\(^\text{39}\) Furthermore, the Supreme Court has continued to subscribe to the two-prong custody/interrogation test for determining the applicability of *Miranda*. Indeed, many of the most important fifth amendment decisions of the Court in the last fifteen years, continuing through the last term, deal with the threshold questions of when custody and interrogation exist within the *Miranda* context.\(^\text{40}\)

safeguards are not themselves rights protected by the Constitution, but are instead measures to insure that the fifth amendment rights are not violated).

38. The Court recognized that:

\>[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted . . . . However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right to silence and in assuring a continuous opportunity to exercise it, the [safeguards set forth in this opinion] must be observed.

384 U.S. at 467.

39. Cf. California v. Prysock, 453 U.S. 355 (1981) (finding suspect fully informed of his rights, but finding the issue of the availability of appointed counsel before further interrogation not clearly communicated. Held not to be grounds for reversal); Michigan v. Tucker, 417 U.S. 433 (1974) (finding that although suspect was warned of his rights to silence and counsel, he was not informed of his right to appointed counsel if indigent. Held not to be grounds for reversal since record clearly showed that statements were not involuntary).

40. Supreme Court decisions focusing on whether "custody" existed at the time of interrogation have included California v. Beheler, 103 S. Ct. 3517, 3520 (1983) (noting that the ultimate inquiry regarding custody for *Miranda* purposes is simply whether there is formal arrest or the functional equivalent of formal arrest); Oregon v. Mathiason, 429 U.S. 492 (1977) (finding that voluntary appearance of suspect at police station for questioning, after which he was released, was not custody); Beckwith v. United States, 425 U.S. 341 (1976) (holding that suspect was not in custody for *Miranda* purposes during Internal Revenue Service interview in a private home); Orozco v. Texas, 394 U.S. 324 (1969) (finding that person questioned by four police officers in his boarding house bedroom at 4:00 a.m. was in "custody"); and Mathis v. United States, 391 U.S. 1 (1968) (holding that defendant incarcerated for reasons unrelated to purposes of instant investigation was in *Miranda* custody when questioned by IRS agents in his prison cell). Cf. Dunaway v. New York, 442 U.S. 200 (1979) (finding that suspect "picked up" for questioning and transported to station house was "seized" for fourth amendment purposes, i.e., functional equivalent of arrest).

The leading case focusing on interrogation as related to *Miranda* is Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980) (finding *Miranda* safeguards necessary whenever a person in custody is subjected to either express questioning or its functional equivalent). The extent of this definition of interrogation can be seen by contrasting it with violations of the sixth amendment right to counsel, such as that which occurred in United States v. Henry, 447 U.S. 264 (1980), in which a jailed informant reported incriminating conversations with a bank robbery defendant. See White, *Interrogation Without Questions*: Rhode Island v. Innis and United States v. Henry, 78 MICH. L. REV. 1209 (1980):

[T]he best reading of the *Innis* test is that it turns upon the *objective purpose manifested* by the police. Thus, an officer 'should know' that his speech or conduct will be
B. The Fifth Amendment Historically Applies Regardless of the Degree of the Offense or the Severity of the Punishment

Historical analogy also provides a basis for justifying application of the prohibition of coerced confessions (and the resulting requirement of pre-interrogation warnings) to non-felony offenses. The common law privilege against self-incrimination, embodied in the fifth amendment, developed separately from the supression of coerced confessions. Because the confessions doctrine has also become part of the fifth amendment privilege against self-incrimination, however, both provisions should follow the same distinctions regarding severity of offense.

1. The doctrine against involuntary confessions as part of the fifth amendment—Although the first regular supression of coerced pretrial confessions in England occurred in the latter half of the 1700's, this practice developed separately from the privilege against self-incrimination. There was some recognition of a nexus between the two doctrines, but, in America, they were originally considered separate entities with only the self-incrimination prohibition included within the scope of the fifth amendment.

In 1897, the Supreme Court rejected this notion in *Bram v. United States*. In that case, the Court declared that in criminal trials, “wherever [sic] a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment...commanding that no person ‘shall be compelled in any criminal case to be a witness against himself.’” This view,

*reasonably likely to elicit an incriminating response* when he should realize that the speech or conduct will probably be viewed by the suspect as designed to achieve this purpose.

Id. at 1231-32; see also Kamisar, *supra* note 34, for the proposition that, unlike violations of the sixth amendment right to counsel, the fifth amendment *Miranda* approach requires that the suspect know he is dealing with a police officer in order to show a sufficient level of coercion to give rise to the “interrogation” prong of *Miranda*.

41. “[I]n 1783, in *Warickshall’s Case...* the modern rule received a full and clear expression, and confessions not entitled to credit because of the promises or threats by which they had been obtained were declared inadmissible in evidence.” 3 J. Wigmore, *Evidence* § 820, at 297 (Chadbourne rev. ed. 1970); cf. L. Levy, *Origins of the Fifth Amendment*, 325-29 (1968), (tracing the gradual emergence of the supression of coerced confessions from the abolition of torture in the mid-1600's through the establishment a century later of an evidentiary rule holding coerced confessions inadmissible).


45. 168 U.S. 532 (1897).

46. Id. at 542.
however, was widely criticized throughout the first two-thirds of the 20th century, and it was not entirely certain that all courts actually accepted it.

In *Miranda* the Supreme Court dispelled any confusion about this issue by explicitly extending the fifth amendment privilege to police interrogations. The court stated that "[t]oday . . . there can be no doubt that the fifth amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." 

2. **Application of the fifth amendment self-incrimination privilege without regard to offense**— Historically, courts applied the privilege against self-incrimination to the judicial compulsion of incriminating testimony without distinction as to the severity of the crime. In fact, some of the earliest examples of the English use of the privilege occurred in prosecutions for relatively minor offenses. The language of the fifth amendment itself suggests that the framers recognized that the privilege would apply regardless of the degree of the offense. As a result of the merger of the self-incrimination and coerced confession doctrines in the fifth amendment, the latter should take on the same broad application as the self-incrimination privilege. The *McCarty* decision relied on this merger in noting that, because the language of the

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47. See, e.g., 8 J. Wigmore, Evidence § 2252, at 328-29 (McNaughton rev. ed. 1961); Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 29 (1949). But see Kamisar, *Equal Justice*, supra note 43, at 20-38 (supporting the application of the privilege to the police interrogation room, or, as Professor Kamisar refers to it, the "gatehouse" of the criminal justice system).


Note that apparently even the petitioners in *Miranda* were unsure whether to proceed on fifth amendment grounds, or to confine themselves to more "conventional" sixth amendment grounds. See Y. Kamisar, W. LaFave & J. Israel, supra note 35, at 578 (remarks of John Flynn, defense counsel in *Miranda*).


50. Id. at 467. But see id. at 526-27 (White, J., dissenting).

51. See 8 J. Wigmore, *Evidence* § 2250, at 289 (McNaughton rev. ed. 1961) (stating that in the 1600's, it began to be flatly claimed "that no man is bound to incriminate himself on any charge . . . or in any court."). See generally L. Levy, supra note 41, at 301-32 (1968).

52. For example, in 1638, the case of John Lilburne, who refused to make incriminating sworn statements in a prosecution in the Star Chamber for the relatively minor (see infra note 57 and accompanying text) crimes of religious non-conformity and seditious libel, led to a bill in the House of Lords declaring that "none of the King's subjects hereafter [shall] be put to accuse themselves by or upon their own oaths in any criminal case whatsoever . . ." L. Levy, supra note 41, at 281 (1968). See generally id. at 271-84; see also 8 J. Wigmore, supra note 42 § 2250, at 289 (McNaughton rev. ed. 1961).

53. See supra note 1. It may be unwise, however, to place too much reliance on the literal wording of the amendment. See discussion of the limitations of the sixth amendment rights to jury trial and counsel, infra notes 60-61 and accompanying text.

54. See supra text accompanying notes 45-50.
fifth amendment has never been construed to limit the privilege to those charged with felonies, it would be illogical to suggest that a defendant charged with a misdemeanor could be compelled to testify against himself.55 Merger of the confession and self-incrimination doctrines into the fifth amendment should therefore compel the same conclusion with regard to misdemeanors and coerced pre-trial confessions.

C. The Application of Sixth Amendment Guarantees Supports Extention of Miranda Warnings to Non-Felony Investigations Utilizing Custodial Interrogation

Several courts and commentators have analogized to the sixth amendment’s distinction between serious and minor crimes to determine whether prophylactic warnings are required for non-felony custodial interrogation.56

1. Areas in which different treatment for Felony and Non-felony Defendants is Justified— The criminal law has a long tradition of distinguishing between crimes of a serious nature and offenses of a lesser nature, especially between felonies and misdemeanors. The original common law distinction between felonies and misdemeanors was quite pronounced, because felonies were generally punishable by death and forfeiture of property while misdemeanors were not.57 Today, of course, this harsh demarcation between felonies and misdemeanors has collapsed, although the severity of prescribed punishment is still widely used as the standard to determine whether a crime is a felony or some lesser offense. Both the Model Penal Code and Title 18 of the United States Code define felonies as crimes punishable by one year or more of imprisonment and further divide the class of lesser crimes into misdemeanors and petty misdemeanors.58 The authorized sentence for a crime,
including whether it is classified as a felony, misdemeanor, or petty misdemeanor, continues to have some independent relevance in certain legislatively defined policy areas. Analogous Constitutional distinctions, however, are more useful in evaluating whether informing suspects of their fifth amendment privilege against self-incrimination should be so conditioned.

2. **Is the fifth amendment privilege against self-incrimination more like the sixth amendment right to jury trial or the right to counsel?**—The sixth amendment provides a useful analogy, especially because it sets constitutional, as opposed to legislative, standards. The right to a jury trial under the sixth and fourteenth amendments has been held to turn on whether the maximum authorized imprisonment for the crime being tried is greater than six months. The Supreme Court, has held, however, that the sixth amendment right to counsel at trial attaches whenever the defendant is to be sentenced to any actual custodial sentence, regardless of the length of the sentence or the type of crime.

In addition to noting the strong historical support for the right to trial by jury being conditioned on the maximum allowable sentence, the Supreme Court has engaged in a balancing of the high costs imposed by requiring jury trials for petty offenses versus the marginal gains in justice that might hypothetically occur. Essentially, the Court has expressed its belief that a fair trial may be obtained without a jury.

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(2) A crime is a felony if it is so designated in the code or if persons convicted thereof may be sentenced to a term of imprisonment which ... is in excess of one year.

(3) A crime is a misdemeanor if it is so designated in the code or if persons convicted thereof may be sentenced to a term of imprisonment which ... is in excess of thirty days but not more than one year.

(4) A crime is a petty misdemeanor if it is so designated in this code or if persons convicted thereof may be sentenced to imprisonment for a term which ... does not exceed thirty days.

Title 18 of the United States Code, Crimes and Criminal Procedure, reads in part:

- (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
- (2) Any other offense is a misdemeanor.
- (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.


59. For example, many jurisdictions use the type of crime or the length of the sentence to determine whether post-conviction incarceration will be to a penitentiary or to a local jail or workhouse. The federal evidence rules, Fed. R. Evid. 609(a)(1), and the evidence rules of various states allow impeachment of witnesses for prior convictions only if the conviction was for a crime punishable by more than one year of imprisonment.


62. See Baldwin v. New York, 399 U.S. 66 (1970). The Court noted that, with few exceptions, crimes traditionally triable without a jury in the United States were generally punishable by no more than a six-month prison term.

Although not always explicitly acknowledging the analogy, some courts holding *Miranda* inapplicable to certain non-felony offenses have employed a similar balancing test.\(^{64}\)

The Supreme Court’s break with the jury trial distinction in sixth amendment right to counsel cases weakens the external validity of this approach.\(^{65}\) The purpose of the *Miranda* protections more closely resembles the sixth amendment right to counsel, which applies to all offenses punished by actual imprisonment, rather than the right to a jury trial, which does not apply to crimes punishable by less than six months imprisonment. In 1972, the Court noted that the historical support that existed for a “severity of punishment” standard for the right to trial by jury did not exist regarding the assistance of counsel at trial and that, unlike the presence of a jury, the presence of counsel “is often a requisite to the very existence of a fair trial.”\(^{66}\) Like the sixth amendment right to counsel, the fifth amendment rights are also ultimately premised on the fairness of the judicial process.\(^{67}\) Thus, the sixth amendment right to counsel, which rejects a balancing test at least insofar as there is any jail sentence upon conviction, is more closely analogous to the *Miranda* protections than is the right to trial by jury. Indeed, one of the theoretical underpinnings of the McCarty holding requiring *Miranda* protections is an explicit analogy to the sixth amendment right to counsel.\(^{68}\)

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65. In the early years after *Miranda*, the sixth amendment right to trial by jury was more clearly delinated in misdemeanor cases than was the sixth amendment right to counsel. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court indicated that the right to jury trial was inapplicable to offenses punishable by less than six-months imprisonment. Thus, state courts were aware that the Supreme Court did not apply at least this constitutional right to petty offenses, and thus could reason that other rights (such as the *Miranda* prophylactic protections of the privilege against self-incrimination) may similarly be inapplicable to petty offenses.

66. Argersinger v. Hamlin, 407 U.S. 25, 31 (1972); cf. Scott v. Illinois, 440 U.S. 367 (1979) (holding that counsel was required in every case in which the defendant was given a sentence that deprived him of liberty).

67. The *Miranda* court stated “‘[W]ithout the protections flowing from adequate warning and the rights of counsel, all the careful safeguards around the giving of testimony . . . 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.’” 384 U.S. at 466 (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)); cf. Kamisar, *Equal Justice, supra* note 43. But cf. United States v. Mohabir, 624 F.2d 1140, 1149 (2d Cir. 1980) (implying that the sixth amendment right to counsel standard may be more stringent than the fifth amendment right to counsel standard). Compare Brewer v. Williams, 430 U.S. 387 (1977) (finding a violation of the sixth amendment right to counsel) with Rhode Island v. Innis, 446 U.S. 291 (1980) (finding no violation of the fifth amendment right to counsel).

3. Limitations on the sixth amendment right to counsel analogy in determining the applicability of the Miranda warnings—Use of the sixth amendment right to counsel analogy, however, does not completely resolve the issue of Miranda's applicability to non-felony offenses. The Supreme Court has held that the sixth amendment requires that any defendant actually sentenced to a term of imprisonment be entitled to the assistance of counsel at trial. These decisions, however, imply that an indigent misdemeanor defendant is not entitled to appointed counsel unless a jail sentence is to be imposed upon conviction. Therefore, a rigid application of an analogy to this sixth amendment right would require that a distinction be made between interrogation during the investigation of offenses for which incarceration is ultimately imposed upon conviction, and interrogation for infractions for which incarceration is ultimately not imposed. Such a distinction would not only dilute and impose additional requirements on the Miranda focus on custodial interrogation, but it also would be virtually impossible to apply as a practical matter.

For example, one troublesome aspect of the sixth amendment right to counsel standard which might be carried over into the Miranda area is the sixth amendment's effective requirement that arraigning judges who are loath to appoint counsel for all indigents either conduct a preliminary hearing regarding the probability of incarceration upon conviction, or refuse to appoint counsel and waive the right of the sentencing judge to incarcerate the defendant. This result has been criticized for removing flexibility in sentencing discretion and for tampering with legislative determinations of appropriate sentences. Were an analogous standard adopted, which allowed the interrogating officer


71. Such a holding by the United States Supreme Court would, of course, mean that the defendant in the case currently before the Court would succeed in having his conviction overturned for lack of Miranda warnings, since he served a jail term. Yet an identical defendant who ultimately did not receive a sentence including imprisonment would not be entitled to Miranda protection.

72. See infra notes 73-75 and accompanying text; see also infra notes 126-132 and accompanying text.

73. See generally Y. Kamisar, W. LaFave & J. Israel, supra note 35, at 70-72.

74. See The Supreme Court, 1978 Term, 93 Harv. L. Rev. 82 (1979): It seems ... likely that, due to the sheer volume of misdemeanor cases, judges simply will not appoint counsel, thereby relinquishing their discretion to impose the penalty of imprisonment. However, because it eliminates a penalty authorized by statute, this practice is unacceptable; in effect, the judiciary would be interfering with the legislature's judgment concerning the appropriate range of penalties. Id. at 87 (citations omitted); see also Scott v. Illinois, 440 U.S. 367, 382 (1979) (Brennan, J., dissenting) (noting that problems inherent in the application of the actual imprisonment standard "demonstrate the superiority of an 'authorized imprisonment' standard that would require the appointment of counsel for ... any offense for which imprisonment for any time is authorized").
to decide not to administer the *Miranda* warnings prior to interrogation based on his opinion as to the suspect's "potentiality of incarceration" upon an eventual conviction, the weaknesses of the sixth amendment standard would be exacerbated. In many cases the officer, who may not be trained to analyze sentencing provisions, would be making a determination before formal charges have even crystallized. If the interrogator decided not to give the warnings, the *Miranda* exclusionary rule would presumably require either that any incriminating admissions be suppressed at trial, or (in an analogy to the sixth amendment right to counsel) that the judge admit the statements and waive the ability to sentence the defendant to any actual imprisonment. Therefore, adoption of a non-felony *Miranda* standard closely modeled on the sixth amendment right to counsel standard would be unsatisfactory.

4. The sixth amendment's limitation on "all criminal prosecutions" to exclude petty offenses is inconsistent with the *Miranda* rationale—The most expedient constitutional justification for limiting *Miranda*'s applicability would be to alter the fifth amendment's definition of "any

75. Likewise, such a standard would not solve some of the problems that currently exist in decisions such as that in *Clay v. Riddle*, 541 F.2d 456 (4th Cir. 1976). See *infra* notes 128-132 and accompanying text. For example, the charges that the interrogating officer may be contemplating might grow considerably more serious after interrogation, as in *State v. Lewin*, 163 N.J. Super 439, 395 A.2d 211 (App. Div. 1978) (defendant arrested for driving while intoxicated following accident; statements made during custodial interrogation without prior *Miranda* warnings later used in death by auto prosecution after death of passenger) *certification denied*, 81 N.J. 58, 404 A.2d 1157, *cert. denied*, 444 U.S. 905 (1979). In such instances, the dilemma facing the judge could be unacceptable — either suppress the incriminating statements and jeopardize the conviction, or admit the statements and be unable to impose appropriate punishment. Furthermore, in jurisdictions in which multiple offenders are subject to charges of greater degree or enhanced sentences, the interrogating officer would have to delay questioning until these implications of the charge had been determined. *Cf. infra* notes 130-32 and accompanying text: *Baldasar v. Illinois*, 446 U.S. 222 (1980) (holding that prior misdemeanor conviction obtained without benefit of sixth amendment assigned counsel could not be used to elevate subsequent conviction to a felony).

At least one commentator has argued that a "potentiality of incarceration" standard be employed in determining the necessity of the fifth amendment *Miranda* warnings. See Note, *Potentiality of Incarceration, supra* note 56. This proposed standard would require the warnings whenever incarceration is statutorily authorized for the offense for which the suspect is being interrogated. This standard would not solve the very real problem of the possible charges not having crystallized at the time of the interrogation, thus requiring that either the statements be suppressed or imprisonment not to be imposed if more serious charges are later filed. Furthermore, the Supreme Court rejected this type of "authorized sentence" formulation for the sixth amendment right to counsel in *Scott v. Illinois*, 446 U.S. 367 (1979).

Another solution to this problem is suggested by the *Revised Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates* rule 2(b) (Preliminary Draft 1979) (requiring the magistrate to give what are essentially the *Miranda* warnings to petty offense defendants at the initial appearance before the court, unless the defendant is charged with a crime not covered by *Scott* and *Argersinger* (i.e., no imprisonment will be imposed if the defendant is convicted)). A similar modification to the *Miranda* warnings could take place during the interrogation phase, but would also be subject to challenge for the reasons applicable to the previously mentioned conditional solution.
criminal case’” to not include certain petty offenses. The Supreme Court limited the sixth amendment definition of “all criminal prosecutions” in this way to validate not extending the right to a jury trial to petty offenses. The New Jersey courts took this approach to limit Miranda. New Jersey has expressly altered its definition of “crime” by declaring that petty offenses are merely “quasi-criminal” and thus not subject to the same Miranda standards as “criminal” offenses.

Such definitional manipulations avoid the history of the fifth amendment and the acceptance that the fifth amendment privilege applies at trial for even the most minor offenses. Furthermore, the rationale for Miranda, the existence of “inherent compulsion” in the custodial interrogation process, does not lose its validity simply because the offense for which the interrogation is conducted does not rise to a certain level of seriousness. To do so would be effectively to impose a third prong on the “interplay of custody and interrogation” standard.

Even one noted authority who is favorably disposed toward the Miranda doctrine, however, has stated that the warnings might not be applicable unless the offense for which the interrogation is conducted contains a sufficient degree of “stigma” to be considered a “crime” by the community. This argument is essentially grounded on the assumption that the coercion inherent in custodial interrogation may be held not to reach a sufficiently high level without some realization by the suspect of the seriousness of the matter.

This formulation finds no support in the Miranda decision or in

76. U.S. Const. amend V.
79. See supra note 55 and accompanying text. New Jersey, however, does not make the “quasi-criminal” distinction in determining the availability of the in-court privilege for petty offense defendants. See N.J. Ct. R. 3:4-2. (requiring that defendant must be warned of privilege against self-incrimination at first appearance before the Court); cf. State v. Pyle, 19 Ohio St. 2d 64, 69-70, 249 N.E.2d 826, 829 (1969) (Duncan, J., dissenting) (arguing that Miranda applies to misdemeanor offenses because the fifth amendment privilege applies to testimony in misdemeanor trials), cert. denied, 396 U.S. 1007 (1970).
80. See supra notes 31-40 and accompanying text.
81. Admittedly, in order to fulfill the “inherently coercive” standard, the suspect must at least realize he is dealing with law enforcement officials. See Kamisar, supra note 34 (arguing that with undercover agents, there is no interplay between custody and interrogation in the suspect’s mind, because he does not feel compelled to speak by color of official authority).
83. See Kamisar, supra note 34, which states:
When a suspect is arrested and brought downtown for police questioning, at least in the case of a major felony, he will often be in “a crisis laden situation. The stakes are high — often his freedom for a few or many years — and his prospects hinge
following cases.\textsuperscript{84} In addition, the "stigma" proposition is probably untrue as a matter of human nature. Although a "hardened criminal" might find the "inherent coercion" lessened to some extent when he is interrogated for burning leaves on Sunday without a permit,\textsuperscript{85} a heretofore law-abiding senior citizen placed in custody for the same infraction might well consider this a major calamity.\textsuperscript{86} The \textit{Miranda} opinion itself peripherally addressed this concern by noting that the warnings would be required for all suspects subjected to custodial interrogation, regardless of their background.\textsuperscript{87} In short, imposing any type of additional severity requirement is inconsistent with the fundamental rationales of the privilege.\textsuperscript{88}

III. \textbf{Applying the \textit{Miranda} Protections to All Custodial Interrogations is a Workable Standard}

Although there are compelling theoretical justifications for applying \textit{Miranda} identically for all types of infractions, regardless of their seriousness or potential sentences, some courts have focused on various "practical" objections to such a requirement. One objection to the custodial interrogation formulation is that the type of questioning involved in minor offenses does not reach the level of "interrogation" on decisions that must be quickly made: to cooperate and hope for leniency, to try and talk his way out, to stand adamantly on his rights." \textit{Id.} at 196-97. (quoting Project, \textit{Interrogations in New Haven: The Impact of Miranda}, 76 \textit{Yale L.J.} 1519, 1613-14 (1967)) (emphasis added).

\textsuperscript{84} In fact, a recent Supreme Court case involving a drunk driving arrest appears to assume tacitly the applicability of the warnings to custodial interrogation, but finds that blood alcohol tests are not "testimonial," and thus do not meet the interrogation requirement of the privilege against self-incrimination. South Dakota v. Neville, 103 S. Ct. 916 (1983). See Schmerber v. California, 384 U.S. 757 (1966) (taking of blood sample, etc. does not violate privilege against self-incrimination because the event is non-testimonial in nature); \textit{see also} Arenella, \textit{Schmerber and the Privilege against Self-Incrimination: A Reappraisal}, 20 \textit{Am. Crim. L. Rev.} 31, 38-40 (1982) (discussing fifth amendment distinction between testimonial and non-testimonial evidence).

\textsuperscript{85} Professor Kamisar used the burning leaves hypothetical to illustrate his point about "stigmaless" offenses. \textit{A New Look at Confessions: Escobedo — The Second Round, supra note 82, at 109.}

\textsuperscript{86} Cf. R. \textit{Medcalfe, From Escobedo to Miranda: The Anatomy of a Supreme Court Decision} 60 (1966) (excerpt from amicus brief of the National District Attorney's Association) (claiming that the beneficiaries of warnings "are the professional and the recidivist" rather than the innocent); Inbau, \textit{Police Interrogation — A Practical Necessity}, 51 \textit{J. Crim. L. Criminology & Police Sci.} 16, 19-20 (1961) (arguing that the police must deal with criminals on a lower moral plane than would be necessary with law-abiding citizens).

\textsuperscript{87} \textit{See Miranda v. Arizona}, 384 U.S. at 468-69 (requiring warnings regardless of background of individual, including "prior contact with the authorities").

\textsuperscript{88} Finally, even if one accepts this "lack of stigma" argument, the case to which the Supreme Court granted certiorari would clearly be found to have such "stigma" as to constitute a crime. The defendant was convicted and sentenced to jail for operating a motor vehicle while under the influence of alcohol and/or drugs, a first-degree misdemeanor under \textit{Ohio Rev. Code Ann. § 4511.19} (Page Supp. 1982). Furthermore, drunk driving clearly has been receiving increased nationwide attention and condemnation recently.
for *Miranda* purposes. Another set of objections has been based on the premise that the justice system would be overburdened, if not crippled, by a flood of petty and traffic offense suspects invoking their *Miranda* rights, especially indigents invoking the right to appointed counsel. The *Miranda* custody standard as it is currently articulated, however, should eliminate much of this burden. Furthermore, even those cases falling within the custodial interrogation standard do not significantly increase the hardship on law enforcement.

### A. The Custodial Interrogation Standard of *Miranda* in Practice

The general trigger for the *Miranda* requirements is the existence of custodial interrogation. The Supreme Court's definitions of "interrogation" and "custody" are both equally applicable to non-felony offenses and felonies. In addition, the current custody standard will itself reduce much of the potential overburdening that has concerned some courts. Therefore, an examination of the two prongs of the standard is warranted.

1. **Interrogation**— Interrogation has been held to include not only express questioning but also "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." This broad definition of interrogation...
does not depend on the length or intensity of the questioning.95

At least one court, however, sought to distinguish questioning for minor crimes from the type of questioning at which *Miranda* was directed, because police questions relating to minor offenses are not “lengthy, incommunicado inquisition[s] seeking to ‘sweat out’ a confession.”96 The same court, however, admitted that the fruits of questioning for minor violations may nevertheless be incriminating.97 Under the Supreme Court’s definition of “interrogation,” this distinction would clearly be erroneous.98 Although questioning for non-felony crimes in some cases may not be as extensive as for felonies,99 questioning for the purpose of eliciting incriminating statements nevertheless falls clearly within the *Miranda* definition of interrogation, regardless of its degree of “intensity.”100

2. Custody—There are important limitations built into the *Miranda* definition of custody. On its face, the *Miranda* definition of “custody” is not entirely clear.101 If custody occurred each time that a police officer had the “articulable and reasonable suspicion” necessary to stop an automobile102 or made an investigatory stop of a suspicious person on the street,103 there might be grounds for concern that the role of police in investigating routine incidents might be somewhat hampered.104

of the officer’s remarks, infer that these remarks were “designed to elicit an incriminating response.” White, *supra* note 40, at 1231, 1233. Under this analysis, if the police do not intend to interrogate a suspect in custody, they presumably would not need to give *Miranda* warnings. 95. The *Innis* court broadly defined “incriminating response” to include any statement that the prosecution may seek to introduce at trial. 446 U.S. at 301 n.5.

This definition would include many questions routinely asked in the course of investigations for minor crimes, such as, “where did you get this necklace?” (shoplifting); “Do you know how fast you were going?” (speeding); or “how many drinks have you had this evening?” (drunk driving). See also infra notes 119-125 and accompanying text (obtaining drunk driving convictions may depend on these types of questions).


97. The New Jersey court stated that questioning in motor vehicle violations normally “embraces only simple standard inquiries ... even though some of the information obtained may go beyond the so-called investigatory phase and be inculpatory as to the violation ....” Id.

98. See supra note 94.

99. But see People v. McLaren, 55 Misc. 2d 676, 677, 285 N.Y.S.2d 991, 992 (Nassau County Dist. Ct. 1967) (involving a police custodial “interview” for drunk driving that consisted of 44 questions and answers). Cases like this reduce the persuasiveness of the blanket position adopted by some courts, like the *Macuk* court, that interrogation for minor offenses never rises to the necessary level of coerciveness to require *Miranda*.

100. See supra notes 94-95 and accompanying text.

101. *Miranda* holds that procedural safeguards must be employed when “an individual is taken into custody or otherwise deprived of his freedom ... in any significant way.” 384 U.S. at 478 (emphasis added).


103. See *Terry* v. Ohio, 392 U.S. 1 (1968).

104. Shortly after the *Miranda* decision Professor Kamisar stated that he believed that *Miranda* clearly covered the “stop-on-the-street-and-question” situation. A NEW LOOK AT CONFESSIONS: Escobedo — THE SECOND ROUND, *supra* note 82, at 98. This view would impose substantial
The *Miranda* decision itself, however, qualified the scope of custody by noting that the holding "is not intended to hamper the traditional function of police officers in investigating crime . . . . General on-the-scene questioning as to the facts surrounding a crime . . . is not affected by our holding."\(^ {105} \)

In subsequent cases the Court has clarified the investigatory exception to *Miranda*.\(^ {106} \) Today, the general custody standard which triggers *Miranda* is defined as formal arrest or a restraint on freedom equivalent to formal arrest.\(^ {107} \) Thus, the definition of "custody" for *Miranda* purposes does not include even relatively lengthy investigatory stops and automobile stops to write citations,\(^ {108} \) even if the jurisdiction gives the police officer the discretion to arrest or, alternatively, to issue citations.\(^ {109} \) Unless the suspect has actually been taken into custody before he makes incriminating statements, the *Miranda* custody standard is not met.\(^ {110} \)

The definition of "custody" for *Miranda* purposes, therefore, effectively exempts questioning in the majority of traffic offenses (with the possible exception of drunk driving)\(^ {111} \) and many misdemeanors...

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burdens on law enforcement: in a city the size of Chicago, there may be over 250,000 police-suspect encounters of this type annually. Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 35, at 14. A general uncertainty regarding the scope of the custody requirement may have caused some courts to refuse to apply *Miranda* for fear of overburdening the law enforcement system.\(^ {105} \) 384 U.S. at 477.


107. In California v. Beheler, 103 S. Ct. 3517 (1983) (per curiam), the Court stated that "the ultimate inquiry [in determining whether a suspect is 'in custody' for the purposes of receiving *Miranda* protection] is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.* at 3520. (quoting Oregon v. Mathiason, 429 U.S. at 495).

108. See *Note, Traffic Arrests, supra* note 56, at 199-200.


110. But see *Model Code of Pre-Arraignment Procedure § 110.2(5) (1975)* (requiring *Miranda* before any sustained questioning of persons stopped by an officer who suspects the person may have committed a crime).

The Supreme Court currently has the opportunity to clarify exactly when custody occurs in the aftermath of a traffic infraction. State v. Roberti, 293 Or. 59, 644 P.2d 1104, *rev'd on rehearing*, 293 Or. 236, 646 P.2d 1341 (1982), *petition for cert. filed*, 51 U.S.L.W. 3150 (Aug. 20, 1982). The Oregon Supreme Court assumed that once an alleged drunk driver is in custody, *Miranda* warnings are required. The only question being appealed to the Supreme Court is whether the suspect was in custody for *Miranda* purposes. See 52 U.S.L.W. 3095 (Aug. 16, 1983).

Even the dissenting judge in *McCarty*, the recent Sixth Circuit decision which is now before the United States Supreme Court, acknowledges that, had custody been established, the police would have been required to give the *Miranda* warnings prior to interrogation. The dissenting judge, however, believed that the incriminating remarks were elicited prior to the establishment of custody, and that post-custody statements were therefore irrelevant. *McCarty* v. Herdmann, 716 F.2d 361, 364-65 (6th Cir. 1983) (Wellford, J. dissenting), *cert. granted sub nom.* Berkemer v. *McCarty*, 104 S. Ct. 697 (1984) (No. 83-710). See *supra* notes 28-30 and accompanying text.

111. See *infra* notes 119-125 and accompanying text.
from the warnings requirement, because law enforcement officers routinely issue citations to suspects and release them after investigations of traffic or petty violations. Furthermore, even if the officer eventually arrests the suspect for a minor offense, most of the questioning takes place at the scene, before Miranda custody is established. Only in those comparatively uncommon instances in which an officer arrests the non-felony suspect and engages in post-arrest interrogation does the interplay between custody and interrogation which triggers Miranda occur. Nevertheless, in those non-felony cases in which custodial interrogation does take place, the Miranda rationale applies to the same extent as when custodial interrogation occurs for more serious offenses.

B. The Burden of Giving Miranda Warnings is Insignificant

Although the custodial interrogation requirement largely destroys the validity of the overburdening arguments against Miranda, even when the warnings are given, suspects subjected to custodial interrogation will not invoke their rights in all cases. Several studies have concluded that even in felony arrests, which would, because the stakes are much higher than misdemeanors, presumably have a higher Miranda invocation rate, very few defendants actually invoke their Miranda rights. Based on this evidence, police would not be overwhelmed with requests


113. One commentator who supports Miranda warnings for various minor offenses even suggests that police deliberately delay the onset of custody in minor cases until questioning is complete in order to circumvent the Miranda custody requirement. Note, Traffic Arrests, supra note 56, at 212-13.

114. The availability of non-custodial, and thus non-Miranda, questioning also helps alleviate potential problems in meeting the necessary "knowing and intelligent" Miranda rights waiver standard. 384 U.S. at 444, 475 (derived from Johnson v. Zerbst, 304 U.S. 458 (1938)). Sometimes persons arrested for lesser offenses are under the influence of alcohol or drugs. The waiver standard is not met if the defendant can prove a sufficient degree of intoxication at the time of custodial interrogation, as in Commonwealth v. Bonser, 215 Pa. Super. 452, 258 A.2d 675 (1969) (finding lack of valid waiver in a drunk driving case because of intoxication). Because the waiver requirement in non-custodial questioning is the somewhat less strict "voluntariness" test, this potential problem does not arise in many non-felony investigations. The police procedure of deferring interrogation until alcohol or drug intoxication diminishes to insure a knowing and intelligent waiver may be employed for both non-felony and felony suspects. In fact, in many felony cases some form of intoxication interferes with questioning. See Nati'l District Attorneys Assoc., Confessions and Interrogations After Miranda 58-59 (rev. 5th ed. 1975).

115. Medalie, Zeitz & Alexander, Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda, 66 Mich. L. Rev. 1347, 1352 n.23 ("If all 73,492 nontraffic offenses are considered, the rate of those requesting counsel is only 2%. As might have been expected, the rate of call for lawyers . . . was higher for persons charged with more serious offenses . . . ").

116. See Medalie, Zeitz & Alexander, supra note 115, at 1352 & n.23 (reporting that during one year, only seven percent of those arrested for felonies and serious misdemeanors requested
for lawyers or invocations of silence in those misdemeanor cases in which they wished to conduct custodial interrogation. Even in those relatively rare instances in which defendants invoked their *Miranda* rights, the authorities would merely have to proceed in the same manner as they do for invocations of the rights in more serious offenses.\textsuperscript{117}

Finally, the consequences of an invocation of *Miranda* in minor offenses is often less detrimental to the state's case than in serious crimes. This is because the police officer is much more likely to have witnessed the minor infraction directly and thus is likely to be able to establish the elements of the offense without the necessity of eliciting incriminating admissions by the suspect.\textsuperscript{118}

The specific context of drunk driving violations is, however, an example of one area in which the overburdening argument may have more force.\textsuperscript{119} Although breath tests and other methods of chemically determining the blood alcohol content of a suspected drunk driver are not subject to *Miranda* requirements,\textsuperscript{120} procuring other necessary information may require some interrogation. Information obtained by questioning the suspect, such as the time of his first and last drinks, is often important in proving that the suspect was legally intoxicated at the time he was operating the motor vehicle. This testimonial evidence is especially important if there has been a delay between the time of the police stop and the administration of the test.\textsuperscript{121}

If *Miranda* warnings are required prior to questioning drivers about their condition, at least some suspects would probably invoke their counsel. The rate dropped to two percent for all offenses); Project, *supra* note 83, at 1523 (concluding "[t]here is no evidence indicating that the [Miranda] warnings . . . caused many suspects to refuse to talk or ask for counsel."); *see also* O. Stephens, *supra* note 35, at 165-200 (compiling several studies). *But see* F. Graham, *The Self-Inflicted Wound*, 280-81 (1970) (stating that some prosecutors dispute the results of the academic studies).

117. In this regard, it is of interest to note that the Delaware Supreme Court, although holding that *Miranda* is not required prior to questioning for a drunk driving offense, suggested that law enforcement personnel give the *Miranda* warnings because of the ease of doing so and because the fulfillment of *Miranda* requirements would actually prevent delays in the judicial system due to challenges to the admissibility of incriminating statements elicited without benefit of *Miranda*. *State v. Bliss*, 238 A.2d 848, 850 (Del. 1968).

118. *Cf.* *State v. Pyle*, 19 Ohio St. 2d 64, 67, 249 N.E.2d 826, 827-28 (1969) (taking judicial notice that misdemeanors generally take place in the presence of the arresting officer, thus mitigating the necessity for concerted interrogation not conducted at or near the scene), *cert. denied*, 396 U.S. 1007 (1970).

119. Note that some states, when faced with a drunk driving case, have exempted all vehicular offenses from *Miranda* requirements. *See, e.g.*, *State v. Bliss*, 238 A.2d 848 (Del. 1968); *State v. Neal*, 476 S.W.2d 547 (Mo. 1972).


121. Blood alcohol content peaks approximately one hour after the ingestion of alcohol and then decreases at a relatively constant rate. Therefore, the time of the last drink taken is relevant to determining the blood alcohol content at the time of operation of the vehicle. *See generally* 1 R. Erwin, *supra* note 120, at § 15.01-.04.
rights. Even if suspects answer the police officer's questions, they may later challenge the admissibility of the statements by alleging that their intoxication prevented them from making a knowing and intelligent waiver of their *Miranda* rights. This problem, however, can be minimized by police procedural changes. Police can ask the pertinent questions as part of their non-custodial roadside investigation. In addition, law enforcement officials can minimize the delay between apprehension and testing, and thus the need for such questioning, by equipping police units to perform chemical sobriety tests in the field.

C. The Consequences of Non-felony Conviction Are Sufficiently Serious to Merit Fifth Amendment Procedural Protection

In a cost-benefit sense, it may be possible to argue that the minor consequences accompanying misdemeanor or traffic offense convictions do not justify burdening law enforcement officers with the duty to issue *Miranda* warnings to such suspects. This reasoning is implied by those courts which justify allowing the fruits of non-*Miranda* custodial interrogations for minor offenses by pointing to the less-than-severe consequences that would befall an accused who is convicted by self-incrimination.

First, such an assumption is completely at odds with the basic *Miranda* rationale. The *Miranda* court addressed this issue when it rejected the assertion that society's need for interrogation outweighed the privilege against self-incrimination. The Court noted that "[i]n announcing these principles, we are not unmindful of the burdens which

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122. *See supra* note 114.
123. Such procedural changes in minor crime interrogations have been advocated by another commentator. *See supra* note 113.
124. For discussion of the custody standard see *supra* notes 101-114 and accompanying text.
126. 384 U.S. 436 (1966). The Court stated: [A] recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided
law enforcement officials must bear, often under trying circumstances ... The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement."

There are other, more practical reasons to recognize the imposition of this modest burden on law enforcement personnel. Conditioning the availability of the *Miranda* prophylactic safeguards on the seriousness of the offense could open a large loophole through which to circumvent the *Miranda* requirements altogether. There have been some reported instances in which defendants charged with non-felony offenses have had their incriminating statements, made without benefit of prior *Miranda* warnings, used against them in subsequent felony prosecutions stemming from the same incident. The ability to use statements obtained without *Miranda* warnings in this way could lead to somewhat unsavory police practices that might include arresting a suspect, deliberately charging him only with an offense not subject to *Miranda* warnings, obtaining incriminating statements, then charging the suspect with more serious offenses.

There are also potential constitutional problems when a non-felony conviction, obtained as the result of non-*Miranda* incriminating custodial statements, is used to elevate the degree of a subsequent crime or to increase its sentence. This situation might arise when a recidivist misdemeanant or traffic offender, is convicted in a jurisdiction requiring the degree of the subsequent conviction to be raised or an in-

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in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.

*Id.* at 479 (citations omitted).

127. *Id.* at 481 (emphasis added).


130. This situation is analogous to the sixth amendment issue in *Baldasar v. Illinois*, 446 U.S. 222 (1980), in which the Court held that a prior misdemeanor conviction obtained without the benefit of assigned counsel, although permissible under *Scott v. Illinois*, 440 U.S. 367 (1979), could not be used to elevate a subsequent conviction for a similar offense to a felony. Justice Stewart's concurrence made clear that the defendant had been sentenced to an increased term of imprisonment solely because he had been convicted of a prior misdemeanor without the assistance of counsel. 446 U.S. at 224 (Stewart, J., concurring). For a further discussion of the distinctions between the fifth and sixth amendment standards, see *supra* notes 60-75 and accompanying text.

131. Such as the defendant in Clay v. Riddle, 541 F.2d 456 (4th Cir. 1980), who was convicted under the state "habitual offender" statute. See *supra* notes 12-14 and accompanying text.
creased sentence to be imposed.\textsuperscript{132} If one or more of the defendant’s prior convictions was the result of statements obtained because the questioning officer determined not to give \textit{Miranda} warnings, the defendant could face a significant penalty due to statements made without the warnings. For this reason as well, the availability of the \textit{Miranda} safeguards should not be conditioned on the severity of the offense or punishment.

\textbf{Conclusion}

Suspects charged with non-felony offenses in some cases face severe consequences. In addition to the potential loss of liberty, for however brief a time, there is also a risk that law enforcement officers will use statements from custodial questioning in misdemeanor and traffic offense investigations to support felony convictions. Furthermore, courts might also use confessed non-felony offense violations to justify enhanced sentencing under "habitual offender" statutes. These significant consequences justify requiring \textit{Miranda} warnings whenever suspects face custodial interrogation, regardless of the severity of the offense. Because this practice is consistent with the theoretical underpinnings of the privilege against self-incrimination and the rationale of the \textit{Miranda} decision, the extension of \textit{Miranda} to non-felony custodial interrogations should be foreclosed only by a compelling law enforcement interest. Requiring \textit{Miranda} warnings in these cases would not be unduly burdensome to law enforcement and, as a bright line test, would be easy for police officers to apply.\textsuperscript{133} Therefore, courts should recognize the importance of giving defendants warnings of their self-incrimination rights in all cases.

—Kenneth W. Gaul

\textsuperscript{132} See, e.g., Va. Code \$ 46.1-387.2, -387.6, -387.8. (1950) (imposing longer sentence in \textit{Clay}).

\textsuperscript{133} The Supreme Court has expressed a preference for bright line rules in this area, and in police practices generally. See, e.g., Oregon v. Bradshaw, 103 S. Ct. 2830 (1983); Edwards v. Arizona, 451 U.S. 477, 484 (1981) (establishing a two-prong per se rule that, after the \textit{Miranda} right to counsel had been asserted by an accused, further interrogation of the accused should not take place "unless the accused himself initiates further communication . . . with the police," and a valid waiver of the \textit{Miranda} rights occurs); \textit{cf.} Dunaway v. New York, 442 U.S. 200, 213-14 (1979) (holding that a "single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront").