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SIXTH AMENDMENT—*MIRANDA* RIGHTS OF JUVENILES

Fare v. Michael C., 99 S. Ct. 2560 (1979).

I

In a case decided this past term, *Fare v. Michael C.*,[1] the Supreme Court refused to extend the scope of *Miranda*[2] rights in juvenile cases. The Court in *Fare* ruled that a juvenile's request to see his probation officer was not equivalent to an invocation of his right to discontinue interrogation, thus limiting the mandatory invocation of *Miranda* rights to situations where the defendant has requested an attorney.[3] Because the Court believed only an attorney could effectively protect the rights of a defendant, even in a juvenile case, it held that a request for someone other than an attorney did not deserve the status of a per se invocation of the right to remain silent.[4] Having determined that the per se rule was inappropriate, the Court went on to examine the facts of *Fare* in light of the constitutionally mandated voluntariness standard. The Court held that incriminating statements made by Michael C., the juvenile defendant in this case, after his request to see his probation officer, were admissible because he had voluntarily and intelligently waived his rights.[5]

The basis of Michael C.'s objection to the admissibility of statements he made during interrogation was the Court's landmark decision in *Miranda v. Arizona*.[6] In *Miranda* the Court set out specific warnings which must be given to an accused held for custodial interrogation.[7] After receiving the warnings if the suspect indicates in any way that he desires to remain silent,[8] or if he asks for an attorney,[9] he automatically invokes his fifth amendment rights, and further interrogation is barred. Even if the defendant does not fall within these per se categories, he is required to knowingly and intelligently waive his fifth amendment rights or else his statements are inadmissible.[10] If there is a question about the adequacy of the waiver, and the interrogation nevertheless continued, the state bears a heavy burden to prove that waiver was properly made.[11]

The present Court has been reluctant to construe the provisions of *Miranda* broadly.[12] This reluctance was again evident this term in *Fare v. Michael C.*[13] Defendant Michael C., a sixteen-year-old juvenile, was arrested on Feburary 4, 1976, on suspicion of a murder. After receiving his *Miranda* warnings, the defendant stated that he understood his rights and that he wanted to see his probation officer.[14] Police refused his request, but again asked him if he wanted the assistance of counsel.[15] The defendant apparently consented to further interrogation without an attorney, although the competence of his consent was questionable.[16] The Court, in holding

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[1] 99 S. Ct. 2560 (1979).

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

[3] 99 S. Ct. at 2568–71.

[4] *Id.*

[5] *Id.* at 2573.

[6] 384 U.S. 436 (1966).

[7] The Court held that "[t]he person must be warned 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.* at 444. This language has been adopted almost verbatim by most police departments as part of their standard operating procedure.

[8] The Court stated:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

Id. at 473–74.

[9] *Id.* at 474. According to the Court, if the individual requests an attorney, the police must wait until he has had a chance to talk to the attorney before they continue the interrogation.

[10] Concerning the issue of waiver, the Court stated:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Id. at 475.

[11] *Id.*

[12] *See generally* Lederer, *Miranda v. Arizona—The Law Today*, 78 MIL. L. REV. 107 (1977); Comment, 10 SUFFOLK U.L. REV. 1141 (1976).

[13] 99 S. Ct. 2560 (1979).

[14] *Id.* at 2564.

[15] *Id.*

[16] *Id.*

that consent was given, cited the following testimony:

> "Q. . . . Do you understand all of these rights as I have explained them to you?
> "A. Yeah.
> "Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?
> "A. What murder? I don't know about no murder.
> "Q. I'll explain to you which one it is if you want to talk to us about it.
> "A. Yeah, I might talk to you.
> "Q. Do you want to give up your right to have an attorney present here while we talk about it?
> "A. Can I have my probation officer here?
> "Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.
> "A. How I know you guys won't pull no police officer in and tell me he's an attorney?
> "Q. Huh?
> "A. [How I know you guys won't pull no police officer in and tell me he's an attorney?]
> "Q. Your probation officer is Mr. Christiansen.
> "A. Yeah.
> "Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk with us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something, you can, and if you don't want to say something you don't have to. That's your right. You understand that right?
> "A. Yeah.
> "Q. Okay, will you talk to us without an attorney present?
> "A. Yeah I want to talk to you."[17]

After this discussion Michael made statements connecting him to the crime. Only then was his probation officer called.[18]

At trial, the defendant objected to the admission of the statements, arguing that by requesting the presence of his probation officer, he invoked his fifth amendment rights.[19] The juvenile court rejected this argument.[20] Viewing the totality of the circumstances, the court held that Michael had voluntarily and intelligently waived his rights.[21]

The state court of appeals affirmed the trial court's ruling on the *Miranda* issue, declining to give a request for a probation officer the same status as a request for an attorney or for one's parents.[22] The defendant appealed to the Supreme Court of California.

The California Supreme Court reversed,[23] holding that Michael's conduct was indistinguishable from an adult's request for an attorney[24] and, therefore, subsequent interrogation was improper regardless of the circumstances. The court relied heavily on its prior decision in *People v. Burton*[25] where a juvenile made several requests to see his parents that were refused even though his parents were present at the police station. The *Burton* court held that subsequent statements were inadmissible as a matter of law because the request for a parent indicated a desire to halt interrogation. The court pointed out that a parent is the adult to whom a child most naturally turns for advice and protection.[26]

In *Fare*, the California court held that a juvenile would place a similar type of trust in his probation officer, and therefore the rationale of *Burton* was

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[17] *Id.* (emphasis deleted).

[18] *Id.*

[19] These fifth amendment rights were made applicable to the states through the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1 (1964). Procedural rights in general were made applicable to juvenile proceedings in *In re* Gault, 387 U.S. 1 (1967). *Gault* is a landmark case that emphasizes the need for adequate procedural safeguards for minors. Originally, juvenile courts were set up as noncriminal, nonadversary courts, with no attorneys, in order to remove the stigma associated with crime from the proceedings. The state was to act as the substitute parent in an effort to rehabilitate, rather than to punish, the youth. Unfortunately, until *Gault*, this left juveniles without procedural protection. *See* Seigel, Senna & Libby, *Legal Aspects of the Juvenile Justice Process: An Overview of Current Practices and Law*, 12 NEW ENGLAND L. REV. 223–68 (1976); Davis, *Justice for the Juvenile: The Decision to Arrest and Due Process*, 1971 DUKE L.J. 913 (1971).

The Court in *Fare* explicitly stated that the question of whether *Miranda* rights are applicable to juvenile proceedings has not been decided. 99 S. Ct. at 2567 n.4.

[20] The opinion of the juvenile court was not published. However, the court of appeals quoted extensively from the opinion in *In re* Michael C., 135 Cal. Rptr. 762, 765–66 (1977). Further indications of the trial court's disposal of the case appear in the Supreme Court's opinion. 99 S. Ct. 2560, 2565, 2573, 2576 n.2.

[21] 135 Cal. Rptr. at 765–66

[22] *In re* Michael C., 135 Cal. Rptr. 762 (1977).

[23] *In re* Michael C., 21 Cal. 3d 471, 146 Cal. Rptr. 358, 579 P.2d 7 (1978).

[24] *Id.* at 476, 146 Cal. Rptr. at 361, 579 P.2d at 9.

[25] 6 Cal. 3d 375, 99 Cal. Rptr. 1, 491 P.2d 793 (1971).

[26] The court in *Burton* went on to state:

> For adults, removed from the protective ambit of parental guidance, the desire for help naturally manifests in a request for an attorney. For minors, it would seem that the desire for help naturally manifests in a request for parents. It would certainly severely restrict the "protective devices" required by *Miranda* in cases where the suspects are minors if the only . . . invocation of the privilege is the call for an attorney.

Id. at 382, 99 Cal. Rptr. at 5, 491 P.2d at 797.

analogous.[27] Moreover, the court noted that the probation officer had a statutory duty to act in the interests of the child in much the same fashion as a parent.[28] It concluded that police are required to discontinue interrogations in situations where the juvenile requests a conference with his probation officer until after the juvenile has had a chance to consult with him.[29]

The United States Supreme Court, however, refused to extend *Miranda's* absolute requirements to a request for one's probation officer.[30] The Court regarded the *Miranda* safeguards as useful to both the state and the accused insofar as they told police exactly what to do when an accused asks for an attorney.[31] In the case of a request for an attorney, the benefits of an exact rule outweighed the burden of the suppression of trustworthy evidence, some of which would be admissible under traditional tests of voluntariness.[32] To extend these requirements to requests for probation officers, however, would increase the burdens on police without a concomitant increase in benefits to the accused.[33]

This conclusion was based upon the Court's emphasis on the unique role of an attorney in protecting the rights of an accused person undergoing interrogation.[34] The Court reasoned that unlike a probation officer, a lawyer was a skilled advocate who knew his client's rights and the consequences of statements made to police.[35] Also, conversations with a lawyer were protected by the attorney-client privilege, whereas a conversation between a defendant and his probation officer would be admissible in evidence against the defendant.[36] Additionally, the lawyer would not experience the conflict of interest that was inherent in a probation officer's position.[37] For example, the probation officer had a duty to investigate the incident involving his juvenile charge and had the powers of an officer of the peace.[38] The Court held that these duties were "incompatible with the view that he may act as a counselor to a juvenile accused of a crime."[39] For these reasons, the Court refused to establish a general rule placing a request for a probation officer on the same constitutional plane as a request for an attorney.[40]

Although the Court refused to rule that Michael's request was a per se invocation of his right to discontinue interrogation, there remained the question of whether, under the circumstances of this case, he had voluntarily and intelligently waived his right to remain silent.[41] If the totality of the circumstances indicated that Michael had not effectively waived that right, his statements were inadmissible in court.[42] The Court noted that the age of the defendant was only one consideration in this factual determination.[43] Other factors include experience, education, background, and intelligence.[44] Upon reviewing the record, the Court found that Michael's waiver was made voluntarily and intelligently.[45] Accordingly, the decision of the California Supreme Court was reversed.

Justice Marshall, with whom Justices Brennan and Stevens joined, dissented. Marshall argued that *Miranda* should be construed more broadly to effectuate its intended purpose of vitiating the coercive pressures of custodial interrogation.[46] Marshall discussed several cases which involved the protection of juvenile rights as support for his proposition that juveniles are particularly suscep-

[27] 21 Cal. 3d at 478, 146 Cal. Rptr. at 362, 579 P.2d at 9, 10.

[28] The California Welfare & Institutions Code provides:

> Except where waived by the probation officer, judge or referee and the minor, the probation officer shall be present in court to represent the interests of each person who is the subject of a petition to declare such person to be a ward or dependent child upon all hearings or rehearings of his case, and shall furnish to the court such information and assistance as the court may require. If so ordered, he shall take charge of such person before and after any hearing or rehearing.
>
> It shall be the duty of the probation officer to prepare for every hearing on the disposition of a case . . . a social study of the minor, containing such matters as may be relevant to a proper disposition of the case. Such social study shall include a recommendation for the disposition of the case.

CAL. WELF. & INST. CODE § 280 (West 1978).

[29] 21 Cal. 3d at 477, 146 Cal. Rptr. at 362, 479 P.2d at 11.

[30] 99 S. Ct. 2560 (1979).

[31] *Id.* at 2568.

[32] *Id.*

[33] *Id.* at 2571.

[34] *Id.* at 2568–71.

[35] *Id.* at 2569–71.

[36] *Id.* at 2569.

[37] *Id.*

[38] Section 283 of the California Welfare & Institutions Code provides, "Every probation officer . . . shall have the powers and authority conferred by law upon peace officers . . . . " CAL. WELF. & INST. CODE § 283 (West 1978).

[39] 99 S. Ct. at 2569 n.5.

[40] *Id.* at 2571.

[41] *Id.* at 2571–72.

[42] *See* note 10 *supra.*

[43] 99 S. Ct. at 2572.

[44] *Id.*

[45] *Id.* at 2573.

[46] *Id.* at 2574–75 (Marshall, J., dissenting).

tible to the pressures against which *Miranda* was designed to protect.[47] Because of this susceptibility, he would have extended the per se protection whenever a youth requested the counsel of an adult who had a duty to look after his interests.[48] Marshall reiterated much of what the Supreme Court of California had said regarding the value of a per se rule in juvenile cases.[49] According to Marshall, a request for a probation officer was a clear indication of a youth's desire to exercise his right to remain silent until he talks to a trusted adult.[50] Requiring a statement of desire to remain silent which follows an exact verbal formula would aid the knowledgeable juvenile while leaving the naive juvenile unprotected.[51] Furthermore, the case-by-case approach advocated by the majority did not provide enough guidance for police and left the juvenile insufficiently protected because that approach failed to enunciate specific and definite guidelines.[52]

Justice Powell also dissented, although he agreed with the majority that the per se requirements of *Miranda* should not be extended to this type of request.[53] Powell cited the record which showed that Michael was "immature, emotional and uneducated" and was crying during the interrogation.[54] Michael also had extensive family problems. His probation officer testified that he had told Michael to call him, "at any time he has a police contact, even if they stop him and talk to him on the street."[54] In light of these facts, Powell concluded that the confession was not voluntary under the standards established by the Court.[55]

II

The Court's refusal in *Fare* to extend the rigid requirements of a per se rule is not surprising. The current Court seems less concerned with the dangers of psychological coercion resulting in involuntary confessions than did the *Miranda* Court.[56] The prevailing judicial attitude toward *Miranda* is exemplified by the exception, developed in a recent line of cases, which allows the prosecution to use incriminating statements that were illegally obtained under *Miranda* standards as long as the statements are used only to impeach the testimony of the defendant on cross-examination. *Harris v. New York*,[57] the case in which this impeachment rule was first established, and *Michigan v. Tucker*,[58]

[47] Marshall relied on *In re* Gault, 387 U.S. 1 (1967), Gallegos v. Colorado, 370 U.S. 49 (1962), and Haley v. Ohio, 332 U.S. 596 (1948).

In *Haley*, the defendant, a 15-year-old black youth, was arrested in connection with a robbery and shooting. He was kept incommunicado by police for five days before he was allowed to see his mother. His lawyer was refused admittance. Eventually a confession was elicited. The Court held that the confession could not stand because it was clearly not voluntary. The Court emphasized the special care and counseling required to protect the rights of a child in interrogation adequately. 332 U.S. at 601.

In *Gallegos*, a 14-year-old suspected of murder was arrested and held for five days without seeing any friendly adult. The Court held the confessions inadmissible even though there was no prolonged questioning or physical abuse, noting that any statements are suspect when made in secret, inquisitorial surroundings. The fourteenth amendment condemns such practices because

> [the youth] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not.

370 U.S. at 54. *In re* Gault is discussed in note 19 *supra*.

[48] 99 S. Ct. 2574 (Marshall, J., dissenting).

[49] *Id.* at 2574–75. See note 22 and accompanying text *supra*.

[50] 99 S. Ct. at 2574 (Marshall, J., dissenting).

[51] *Id.*

[52] *Id.* at 2574 n.2.

[53] *Id.* at 2575–76. (Powell, J., dissenting).

[54] *Id.*

[55] *Id.* at 2577.

[56] *See generally* Lederer, note 12 *supra*; Comment, 10 SUFFOLK U.L. REV. 1141 (1976).

[57] 401 U.S. 222 (1971). Although *Miranda* warnings are absolute prerequisites for use of defendant's statements in the state's case-in-chief, the Court allowed use of them on cross-examination if they were trustworthy by traditional legal standards. The Court reasoned that to hold otherwise was to give the defendant the right to commit perjury. *Id.* at 225, 226.

The dissent in *Harris* pointed out that the exception for impeachment testimony would effectively take away a defendant's freedom to take the stand without fear of the use of illegal evidence. Police would not be deterred from respecting a defendant's *Miranda* rights, and even if they were, the mainstay of the privilege was not deterrence, but rather effectively preserving the right against self-incrimination. *Id.* at 231.

[58] 417 U.S. 433 (1974). In that case, the defendant raped and severely beat a 43-year-old woman. Incriminating statements were elicited after the defendant said he understood his rights, but that he did not want an attorney. The only flaw was that be had not been told of his right to *free* counsel. The Court, after reviewing the long history of the right to be free from self-incrimination, held that the *Miranda* violation in *Tucker* did not infringe defendant's fifth amendment rights, but rather were only violations of the prophylactic rules of *Miranda*.

a subsequent case, involved situations in which police failed to give the defendant complete warnings. In *Oregon v. Hass*[59] the impeachment exception was expanded beyond mere failure to give complete warnings and applied to a situation where a defendant's confession was made before he had waived his rights. The recurring theme underlying these cases is that the traditional test of voluntariness is sufficient to assure against coerced loss of the fifth amendment right against self-incrimination.

The sole rationale which the Court currently recognizes for continuing to impose the rigid requirements of *Miranda* is deterrence. The Court's emphasis on deterrence is apparent in the following language from *Michigan v. Tucker*:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.[60]

If exclusion will not effect police conduct, the Court is reluctant to extend procedural protection.

The heavy emphasis of the present Court on considerations of deterrence is in contrast with the earlier rationale given for exclusion. Previous Courts were more concerned with the government's obligation to play fairly with the accused[61] and to develop its case primarily from evidence other than the defendant's confessions.[62] Although the decision in *Fare* did not rest simply on the ground that deterrent purposes would not be served by the admission of Michael's confessions, it is consistent with the Court's reluctance to expand *Miranda* beyond what is absolutely required by a deterrence rationale.

Strong arguments have been advanced advocating a reversal of this trend, especially in the area of juvenile interrogations.[63] Tests have indicated that minors are particularly susceptible to the coercive pressures of police methods with which the Court in *Miranda* was concerned.[64] Other studies show that frequently juveniles do not even understand the *Miranda* warnings.[65] For example, a study published in the San Diego Law Review concluded that eighty-one of the eighty-six juveniles observed who voluntarily waived their rights did not consciously and fully understand them.[66] Minimum *Miranda* protection under these circumstances does not ensure that elicited statements are trustworthy and freely given. Even when they are aware of their rights, many juveniles will waive them, in spite of their desire not to speak.[67] Youths also cooperate with police because making a favorable

[59] 420 U.S. 714 (1975). The suspect was given proper *Miranda* warnings but made incriminating statements while alone with police after he had requested an attorney. Although the Court found that the statements were inadmissible under *Miranda*, since they were made in a police car on the way to the station, after the suspect requested an attorney and was told that he would have to wait until they arrived at the station to talk to an attorney, nevertheless, the Court allowed the testimony under the impeachment exception.

[60] 417 U.S. 433, 447 (1974).

[61] *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952), in which Justice Frankfurter stated:

> Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency.

Id. at 173.

[62] *See* Watts v. Indiana, 338 U.S. 49 (1949), in which Justice Frankfurter stated:

> To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.
>
> This is so because it violates the underlying principle in our enforcement of the criminal law. Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber. . . . Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation.

Id at 54.

[63] *See* Comment, *The Interrogated Juvenile: Caveat Confessor?*, 24 HASTINGS L.J. 413 (1973).

[64] *Id.* at 419-23.

[65] Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970). Similar findings were made in general population studies in Colorado. *See* Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DEN. L.J. 1 (1970).

[66] *See* Ferguson & Douglas, *supra* note 65, at 53.

[67] Comment, *The Interrogated Juvenile: Caveat Confessor?*, *supra* note 63, at 419.

impression on police is often crucial in determining how their case will be handled.[68]

A per se requirement that interrogation cease where a minor indicates in a specific, natural way a desire not to be questioned, such as an affirmative request for his probation officer, would at least partially alleviate these problems by giving greater recognition to the youth's attempt to exercise his rights. The request for a probation officer is particularly suitable for a per se rule because such a request almost invariably constitutes an indication that the juvenile wishes to exercise his right to remain silent. If the underlying reason for extending a per se rule is that the particular request is prima facie evidence of the youth's invocation of his rights,[69] the rule could reasonably be extended to cover such requests even though not all youths would take advantage of the rule by looking to their probation officer for help.

Moreover, California has specifically encouraged a juvenile to depend on his probation officer for help. For example, under the California Welfare & Institutions Code, the probation officer has a wide variety of duties including representing the interests of the child in court,[70] providing services to keep the minor's family together,[71] handling the minor's funds,[72] and authorizing the sale of a ward's handiwork.[73] Specifically, in *Fare,* Michael's probation officer attempted to act as a buffer between Michael and police.[74] The Supreme Court's emphasis on the crucial and unique role of an attorney,[75] as opposed to that of a probation officer, in protecting a juvenile's rights ignores these facts and assumes that a juvenile justice system could not be constructed in which a non-attorney would be effective in safeguarding these rights. The Court also necessarily assumes, without citing any supporting evidence, that a probation officer would not advise the youth to get an attorney.

Another reason that the Court distinguished a request for an attorney is the traditional rule that statements made by the juvenile to his attorney are protected by the attorney-client privilege, whereas statements to a probation officer are not.[76] The California Supreme Court removed that distinction recently when it held that statements to a probation officer are privileged.[77] The California decision was another step in promoting a trusting and candid relationship between juveniles and their probation officers. As a result of the *Fare* decision, the California courts will not have the option of strengthening that relationship through a liberal interpretation of *Miranda.*

On the other hand, despite the necessity for special protection of juveniles, even a broad reading of *Miranda* may not require more than a totality of the circumstances approach. The knowledge and experience of juvenile offenders varies so widely[78] that a per se standard is arguably inappropriate, because it does not provide a flexible test. A flexible standard is consistent with the analysis of the California Supreme Court. For example, that court stated:

[68] *Id.* at 422 (citing Ferster & Courtless, *The Beginning of Juvenile Justice, Police Practices and the Juvenile Offender,* 22 VAND. L. REV. 567, 578–79 (1969):

> Ferster and Courtless' article on the disposition of arrested juveniles shows that one of the most critical factors determining how a child's case will be handled is the impression he makes on police when he is detained. Nearly half of the minors arrested never reach either juvenile or criminal court, but are either released or referred to welfare or police agencies.

Id.

[69] This assumption is implicit in the California Supreme Court's opinion. *See In re* Michael C., 21 Cal. 3d 471, 146 Cal. Rptr. 358, 579 P.2d 7 (1978). The U.S. Supreme Court did not adopt this rationale for extending a per se rule. The Court stated: "It is [the] pivotal role of legal counsel that justifies the *per se* rule established in *Miranda*. . . . " 99 S. Ct. at 2570.

[70] CAL. WELF. & INST. CODE § 280 (West 1978).

[71] *Id.* § 272.5.

[72] *Id.* § 276.

[73] *Id.* § 277.

[74] *See* 21 Cal. 3d at 477, 99 Cal. Rptr. at 361, 579 P.2d at 10.

[75] 99 S. Ct. at 2568–71.

[76] *Id.* at 2569.

[77] *In re* Wayne H., 24 Cal. 3d 595, 156 Cal. Rptr. 344, 596 P.2d 1 (1979). The court ruled in that case that statements made by a minor to his probation officer were privileged because policy required complete candor by the youth so that the officer would have all available information to make a recommendation to the court under § 626 of the California Welfare & Institutions Code.

[78] Justice Powell pointed out that

> Minors who become embroiled with the law range from very young up to those on the brink of majority. Some of the older minors become fully 'street-wise,' hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in *In re Gault,* . . . the facts relevant to the care to be exercised in a particular case vary widely.

99 S. Ct. at 2576 n.4. (Powell, J., dissenting)(citation omitted).

> In view of the emphasis which the juvenile court system places upon the close relationship between a minor and his probation officer, and in light of the probation officer's instructions in the present case that his ward contact him immediately in case of trouble, the 'normal reaction' of the minor here would be to request consultation with his probation officer.[79]

The California Supreme Court's analysis is arguably more appropriate to a totality of the circumstances approach than a per se rule insofar as it takes into account the subjective needs for the individual defendant, Michael C. *Miranda* and *Burton* apply the objective per se approach only after asserting that *all* persons so subjected are in need of protective safeguards. Theoretically, any situation requiring per se protection would be subsumed under the protection of a totality of the circumstances test.

An extension of per se requirements to a request for a probation officer would also present line-drawing problems. Some youths look to other adults in much the same way that an adult looks to an attorney in a custodial interrogation. The court of appeals stated: "While such extension might, at first blush, appear logical, we believe a line must be drawn before a request for consultation with one's football coach, music teacher or clergyman, be deemed to invoke Fifth Amendment privileges."[80] A per se rule would have to be extended to all possible situations in which a youth makes a similar request if all juveniles are to be protected equally.

The California Supreme Court attempted to differentiate probation officers from other adults to whom the juvenile might turn for help, by citing the special statutory duties[81] of probation officers in California.[82] Under Section 280 of the California Welfare & Institutions Code, "the probation officer shall be present in court to represent the interests of each person who is the subject of a petition."[83] This statutory provision does not remove the line-drawing problems, however. Juveniles do not consider statutes when they seek advice from a trusted adult, with the result that a request for a probation officer is no more probative of a desire to discontinue interrogation than is a request for some other adult friend.

Arguably, however, the Court in *Fare* was not faithful to its own voluntariness standard. The facts related in the majority and dissenting opinions do not clearly indicate that under all the circumstances Michael C. actually waived his rights voluntarily.[84] While it is inappropriate for the Court to review the trial court's factual conclusions, it must ensure that proper legal standards were applied. The burden of proof which the state must meet is one of these legal standards. In defining the state's burden to show that effective waiver was made, the Court in *Miranda* said:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . . This Court has always set high standards of proof for the waiver of constitutional rights, . . . and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.[85]

The Court in *Fare* makes no mention of this heavy burden of proof, either to apply or to modify it.

The Supreme Court has not indicated that it is ready to abandon this standard, however. As it stated recently in *North Carolina v. Butler*,[86] "[t]he courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."[87] In actuality this strict standard may have little real force today. The Commentary to the *ALI Model Code of Pre-Arraignment Procedure* states: "This 'heavy burden' requirement is alluded

[79] 21 Cal. 3d at 476, 99 Cal. Rptr. at 361, 579 P.2d at 9, 10.

[80] 135 Cal Rptr. at 766. The Supreme Court in *Fare* also recognized the problem. 99 S. Ct. at 2571.

[81] *See* note 28 and accompanying text *supra*.

[82] 21 Cal. 3d at 477, 99 Cal Rptr. at 361, 579 P.2d at 10.

[83] CAL. WELF. & INST. CODE § 280 (West 1976).

[84] Michael was crying during part of the interrogation, 99 S. Ct. at 2573, and he did not trust police to get a bonafide attorney, *see* text accompanying note 17 *supra*. On the other hand, he was a 16-year-old with a long history of contact with police procedures. Moreover, the trial judge, who was presumably in the best position to evaluate the evidence, concluded that the waiver was voluntary.

[85] 384 U.S. at 475.

[86] 99 S. Ct. 1755 (1979).

[87] *Id.* at 1757.

to by the appellate courts, but does not appear to have been applied in practice.... [W]hile waiver will still not be found from a completely empty record, it will be found from a nod or a shrug."[88] In view of the absence of any guidelines in *Fare*, states will probably continue to have wide latitude in finding that a defendant has waived his rights.

Conclusion

The Court is unlikely to enforce *Miranda* strictly in the near future. In fact, the Court reserved the question of whether *Miranda* rights apply at all in juvenile proceedings. On the other hand, states desiring more stringent safeguards against coerced confessions, such as per se protection or a higher burden of proof under a totality of the circumstances approach, are not necessarily constrained by the Court's ruling in *Fare*. As the Court pointed out in *Oregon v. Hass*,[89] while states cannot construe the federal Constitution more strictly than the Supreme Court, they are free to interpret similar provisions in their own law more restrictively.[90] If the states choose to exercise their power to interpret the self-incrimination provisions of their own constitution more strictly the net result will be a varied application of standards of waiver where an explicit request for an attorney is not made. The circumstances in which a waiver will be recognized will be different in each jurisdiction.

The *Fare* decision is a clear indication that the Court will be unlikely to extend per se protection where a defendant requests to see anyone except an attorney, even in a juvenile case. Rather, a totality of the circumstances approach will be applied. It appears that, under this standard, the state's burden of proof in demonstrating adequate waiver will continue to be a matter of the lower court's discretion. Juveniles will have to look to a source other than the federal Constitution for strict procedural safeguards.

[88] ALI Model Code of Pre-Arraignment Procedure 161 Commentary (1974).

[89] 420 U.S. 714 (1975).

[90] *Id.* at 719.