

CASENOTES

Invocation of Miranda Rights: A Question of Fact?: *Fare v. Michael C.*¹ —On February 4, 1976 the Van Nuys, California police arrested a sixteen-and-a-half year old juvenile, Michael C., on suspicion of murder.² At the police station, prior to any interrogation, Michael C. was informed of his rights under *Miranda v. Arizona*.³ He stated that he understood his rights and might be willing to talk to the police.⁴ Then, when asked if he would be willing to talk to the police without an attorney present, Michael C. responded: "Can I have my probation officer here?"⁵ This request was refused.⁶ The officer

¹ 442 U.S. 707 (1979).

² *Id.* at 710. When arrested Michael C. had a record of previous minor offenses, had been on probation since age twelve, and had served a term in a youth corrections camp. *Id.* The police had probable cause to arrest Michael C. *Id.*

³ *Id.* *Miranda v. Arizona*, 384 U.S. 436 (1966), held that before any custodial interrogation may take place a suspect must be informed that he has the right to remain silent, that anything he says may be used against him, and that he has the right to the presence of an attorney, either retained or appointed. *Id.* at 467-73. *Miranda* also required that custodial interrogation cease upon the suspect's request for an attorney or his assertion of his right to remain silent. *Id.* at 444-45, 473-74. See text at notes 43-47 *infra*.

⁴ 442 U.S. at 710.

⁵ *Id.* The tape recorded exchange was as follows:

"Q. Do you understand all 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 to 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."

Id. at 710-11 (emphasis in original).

⁶ *Id.* at 710.

again informed Michael C. of his right to an attorney. Michael C. then twice asked in response "How I know you guys won't pull no police officer in and tell me he's an attorney?"⁷ The officer did not reply. Instead, he again ascertained directly that Michael C. understood his rights and asked once more if he was willing to talk to the police without an attorney.⁸ Michael C. responded in the affirmative, and, in response to police questioning, made incriminating statements and sketches.⁹ Michael C. was crying at the time he talked with the police officers.¹⁰

In juvenile court Michael C. moved to suppress these materials on the basis that they were obtained in violation of his *Miranda* rights.¹¹ He argued that a request to see his probation officer was an invocation of his fifth amendment right to remain silent¹² and that, consequently, the failure of the police to terminate questioning at that point rendered his statements and sketches inadmissible as evidence against him in the juvenile court proceedings.¹³

The juvenile court denied the motion to suppress.¹⁴ It held that whether a minor has waived his right to remain silent is a question of fact,¹⁵ and that on the facts Michael C. had waived his right.¹⁶ It adjudged Michael C. a ward of the court and committed him to the California Youth Authority.¹⁷

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 733 n.2 (Powell, J., dissenting).

¹¹ *Id.* at 711-12. See text at notes 43-47 *infra* and note 3 *supra*.

¹² *Id.* In relevant part, the fifth amendment provides: "nor shall any person be compelled in any criminal case to be a witness against himself" U.S. CONST. amend. V.

¹³ 442 U.S. at 712. In support of this contention, Michael C. relied by analogy on an earlier California case, *People v. Burton*, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971), which held that a minor's request to see his parents, in the absence of evidence to the contrary, is to be construed as an invocation of his fifth amendment right. 442 U.S. at 712. See discussion in text at notes 49-53 *infra*. Michael C. called as a witness at the suppression hearing his probation officer, who testified that he had instructed Michael C. to contact him immediately if he ever had contact with the police or other trouble, and that on a previous occasion he had reprimanded Michael C. for not following this instruction. *Id.* at 712.

¹⁴ 442 U.S. at 712.

¹⁵ *Id.* The juvenile court found *People v. Burton*, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971), inapposite on the facts and therefore made its findings on the basis of waiver rather than invocation. In re Michael C., 135 Cal. Rptr. 762, 765 (1977) (vacated). See text at notes 111-20 *infra*.

¹⁶ 442 U.S. at 712. The Court reasoned that despite Michael C.'s request, he had indicated clearly that he was willing to talk with the police; that the request and subsequent agreement to talk had come at the beginning of rather than after lengthy interrogation; and, that Michael C. had had previous experience with the courts. *Id.* at 712-13. It should be noted that without the confession the evidence was insufficient to sustain a conviction. In re Michael C., 135 Cal. Rptr. 762 n.1 (1977) (vacated).

¹⁷ *Id.* at 763. The commitment was pursuant to CAL. WELF. & INST. CODE § 602 (West Supp. 1979). In re Michael C., 21 Cal. 3d 471, 473, 579 P.2d 7, 8, 146 Cal. Rptr. 358, 359 (1978).

The California Supreme Court in a 5-2 decision reversed Michael C.'s conviction.¹⁸ It held that a minor's request to see his probation officer during custodial interrogation is an invocation of his fifth amendment privilege in the absence of proof by the state that the request was not so intended.¹⁹ Finding that the state had not met its burden,²⁰ the court held that the incriminating materials had been obtained unlawfully from Michael C. and their admission into evidence against him, therefore, was reversible error.²¹

The United States Supreme Court, in a 5-4 decision, reversed.²² Interpreting the California Supreme Court's decision as having created the *per se* rule that a juvenile's request for his probation officer during custodial interrogation was an invocation of his fifth amendment rights,²³ the Court HELD: first, that a juvenile's request to see his probation officer neither is analogous to a request for an attorney nor compels a conclusion that the juvenile was directly invoking his right to silence under *Miranda*;²⁴ and second, under the "totality of the circumstances" approach of *Miranda*,²⁵ Michael C. had knowingly and voluntarily waived his rights.²⁶ Consequently, the Court determined that there was no error in admitting the incriminating materials into evidence.²⁷ Three Justices,²⁸ joining in one of the case's two dissents, argued from *Miranda* and other precedent that a juvenile's request for any adult obligated to protect his interests must be treated as a *per se* assertion of his fifth amendment rights.²⁹ Justice Powell, in a separate dissent, agreed with the majority that the California Supreme Court had erred in extending the *per se* rule of *Miranda* to encompass a juvenile's request for his probation officer,³⁰ but decided that, on the record, Michael C.'s statements had not been made voluntarily.³¹

Although the Supreme Court's decision in *Fare v. Michael C.* rests on the narrow ground that a juvenile's request to see his probation officer is not a *per se* invocation of his rights under *Miranda*, its significance is not restricted to its

¹⁸ *Id.* at 478, 579 P.2d at 11, 146 Cal. Rptr. at 362 (1978).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² 442 U.S. at 728.

²³ *Id.* at 715-16 n.3. This casenote will focus on the *per se* rules of invocation derived from *Miranda*, i.e., the request for an attorney and the indication of a desire to remain silent. It should be noted, however, that the term *per se* is often used with respect to other substantive and procedural rules of *Miranda*. For example, failure of the police to terminate questioning upon a suspect's request for an attorney, is often termed a *per se* violation of *Miranda*. Similarly, failure to give the required warnings before initiating interrogation of a suspect is also termed a *per se* violation of *Miranda*.

²⁴ 442 U.S. at 723-24.

²⁵ 384 U.S. 436, 475-77. See text and notes at notes 58-60 & 211-12 *infra*.

²⁶ 442 U.S. at 727.

²⁷ *Id.*

²⁸ Justice Marshall was joined by Justices Brennan and Stevens.

²⁹ 442 U.S. at 729. In *re Gault*, 387 U.S. 1 (1967); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).

³⁰ 442 U.S. at 732.

³¹ *Id.* at 734.

limited holding. Its significance is also reflected in that it is the first Supreme Court decision to consider the manner in which an accused must invoke his *Miranda* rights before the *Miranda* proscription against further interrogation is triggered. As such, the decision signals the Court's unwillingness to extend the *per se* rules of invocation which it announced in *Miranda*. If the decision should be extended beyond the scope of its narrow holding, therefore, it is probable that in future cases an accused will be allowed to invoke his rights only through either an express request to have an attorney present or an explicit statement of his unwillingness to talk to the police.³²

There is a critical, but to date largely unrecognized, distinction between the concept of invocation of fifth amendment rights under *Miranda* and the concept of waiver of those rights under that case. In developing this distinction, this casenote will first outline *Miranda v. Arizona*³³ and its relevant Supreme Court progeny which have developed the concept of waiver. It then will discuss the concept of invocation of the fifth amendment rights introduced as a question of fact under *Miranda* and developed more fully by the line of California cases which culminated in *In re Michael C.*³⁴ The Supreme Court's decision in the case will be examined. Finally, this casenote will discuss *Fare v. Michael C.*'s significance in the area of confessions under *Miranda*. It will be suggested that the major weakness in the Supreme Court's decision is its failure to consider invocation of the fifth amendment rights as a question of fact under *Miranda*.

I. *MIRANDA*, ITS PROGENY AND THE CONCEPT OF WAIVER

Based on its belief that the atmosphere inherent in incommunicado custodial police interrogation compels an accused to incriminate himself where he otherwise might not, the Supreme Court in *Miranda v. Arizona* established a set of procedural safeguards to ensure that, consonant with the fifth amendment privilege against self-incrimination, an accused's statements were the product of his free will and not of the coercive atmosphere.³⁵ These safeguards include the requirement that the suspect be informed of his constitutional rights prior to any police interrogation³⁶ and that any statement obtained in violation of these rights be excluded from evidence.³⁷ The purpose of the requirement that the suspect be told his rights as a prerequisite to questioning is four-fold: 1) to make a suspect aware of his rights; 2) to inform him of the consequences of foregoing them; 3) to dispel the pressures of custodial interrogation; and, 4) to show the suspect that the police are prepared to honor his rights should he choose to exercise them.³⁸ To fulfill

³² Because the Court assumed without deciding that the principles of *Miranda* were fully applicable in the juvenile proceedings before it, *id.* at 717 n.4, this casenote will not discuss the desirability of extending *Miranda* to juvenile court proceedings.

³³ 384 U.S. 436 (1966).

³⁴ 21 Cal. 3d. 471, 579 P.2d 7, 146 Cal. Rptr. 358 (1978).

³⁵ 384 U.S. at 445, 455, 457-58, 467, 478.

³⁶ *Id.* at 467-73.

³⁷ *Id.* at 477.

³⁸ *Id.* at 467-73.

these goals, the burden of affirmatively demonstrating that the required warnings were given is placed on the state.³⁹ This demonstration, moreover, is a pre-condition to the introduction at trial of any evidence which was obtained through interrogation of the accused.⁴⁰ Any confession obtained through interrogation when not preceded by the required warnings is *per se* inadmissible in evidence.⁴¹

Miranda also fashioned as part of its protective devices two means by which a suspect can demonstrate his intent to invoke the fifth amendment privilege. The first means is by a statement any time prior to or during interrogation that he wants the assistance of an attorney.⁴² This method of invoking the right against self-incrimination is grounded in the "vital role"⁴³ which attorneys play in the criminal justice system and in their perceived ability to protect the privilege⁴⁴ and dispel the inherent pressures of incommunicado interrogation.⁴⁵ The second method of invoking the privilege is by the suspect's "indicat[ing] in any manner, at any time prior to or during questioning, that he wishes to remain silent. . . ."⁴⁶ To ensure that a suspect's fifth amendment rights are honored, *Miranda* directs that upon a suspect's invocation of his rights by either means police interrogation cease without regard to the stage in the interrogation process at which they are exercised.⁴⁷

Miranda allows that a suspect might waive his right to the fifth amendment privilege and to the presence of an attorney.⁴⁸ It carefully circumscribes, however, the procedural and substantive limits of an effective waiver. A suspect's waiver must be both knowing and intelligent.⁴⁹ Because of the state's responsibility in establishing the circumstances under which interrogation takes place and because it alone possesses the means of providing corroborative evidence, *Miranda* requires that the state shoulder the "heavy burden" of proving that a suspect has knowingly and intelligently waived his rights.⁵⁰ A valid waiver can not be presumed from the accused's silence after the warnings have been given or simply from the fact that a confession has been obtained.⁵¹ An affirmative showing that the accused has intelligently and understandingly waived his rights is needed.⁵² In addition, and as with

³⁹ *Id.* at 475, 479.

⁴⁰ *Id.* at 444, 476, 479.

⁴¹ *Id.* at 468-69, 479.

⁴² *Id.* at 444-45, 473-74.

⁴³ *Id.* at 481.

⁴⁴ *Id.* at 472.

⁴⁵ *Id.* at 470. The Court also noted that the presence of counsel could serve several subsidiary functions as well: 1) mitigation of the dangers of untrustworthiness should the suspect decide to talk; 2) reduction of the likelihood that the police would practice coercion; 3) in the event of police coercion, the attorney could so testify at trial; and 4) ensuring that the accused gives a fully accurate statement to the police and that that statement is correctly reported at trial. *Id.*

⁴⁶ *Id.* at 473-74.

⁴⁷ *Id.* at 444-45, 473-74.

⁴⁸ *Id.*

⁴⁹ *Id.* at 475.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*, citing *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

the required warnings, the state is compelled to demonstrate the validity of a claimed waiver as a prerequisite to the admission into evidence at trial of any statement made by the accused in response to interrogation.⁵³

Moreover, in certain circumstances the state is foreclosed from asserting and proving that a knowing and intelligent waiver was given. No waiver can be shown where the incriminating statements resulted from police interrogation not preceded by the required warnings,⁵⁴ nor is the state permitted to argue that a waiver was made merely because the suspect answered some inquiries before invoking the privilege.⁵⁵ Where a suspect once invokes his fifth amendment right, either by a request for an attorney or by an indication of his intent to remain silent, any statement obtained through the failure of police to discontinue questioning at that point is inadmissible as *per se* involuntary, and the state is precluded from curing the violation by arguing that subsequently an effective waiver was given: "... any statement taken after the person invokes the privilege can not be other than the product of compulsion, subtle or otherwise. Without the right cut-off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has once been invoked."⁵⁶ Where the accused invokes his rights by a request for an attorney, *Miranda* forbids renewed questioning until the suspect has had the opportunity to confer with counsel, and counsel is present at the subsequent interrogation session.⁵⁷

Miranda left open the standard by which a "knowing and intelligent" waiver would be measured, although the Court hinted that a "totality of the circumstances" approach was envisioned.⁵⁸ In *North Carolina v. Butler*⁵⁹ the Court confirmed that an explicit waiver is not required by *Miranda*: "at least in some cases waiver can be clearly inferred from the actions and words of the person interrogated."⁶⁰ Under *Miranda* and *North Carolina v. Butler* the concept of waiver of fifth amendment rights is well-developed. The state has the

⁵³ *Id.* at 444, 476, 479. The Court noted that its prohibition was limited to statements obtained through interrogation:

we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

Id. at 478.

⁵⁴ *Id.* at 470. *But see* *Michigan v. Tucker*, 417 U.S. 433 (1974). Although decided on non-*Miranda* grounds, *Tucker* contained the suggestion that technical errors or omissions in the giving of *Miranda* warnings may not require the exclusion from evidence of resulting statements in the absence of wilful or negligent police conduct. *Id.* 446-47.

⁵⁵ 384 U.S. at 475-76 (1966).

⁵⁶ *Id.* at 474.

⁵⁷ *Id.*

⁵⁸ *Id.* at 475-77. *But see* Justice Harlan's dissent, which assumed that an express waiver was required. *Id.* at 504, 516-17 (Harlan, J., dissenting).

⁵⁹ 441 U.S. 369 (1979).

⁶⁰ *Id.* at 373 (footnote omitted).

burden of proving on the totality of the circumstances that after the accused was informed of his rights⁶¹ he voluntarily waived them.⁶² If the accused either requests an attorney or "indicates in any manner, at any time" that he does not wish to speak, however, any statement obtained thereafter through police questioning is inadmissible as the product of compulsion.⁶³ In *Michigan v. Mosley*,⁶⁴ the Court modified this stance where a suspect has indicated that he wishes to remain silent (as distinct from a request for an attorney⁶⁵) in one interrogation session and another interrogation session is subsequently held. *Mosley* held that the admissibility of statements obtained after the suspect invokes his right to silence depends on whether his right to cut-off questioning was scrupulously honored.⁶⁶ In that decision, however, the Court implicitly reaffirmed the *Miranda* "irrebuttable presumption"⁶⁷ of compulsion where in any given interrogation session incriminating statements are elicited through questioning after invocation of the right to remain silent. In short, within the context of a single interrogation session, once the suspect has indicated "in any manner, at any time"⁶⁸ that he wishes to remain silent, it is not open to the state to introduce these statements into evidence on the basis that the suspect subsequently waived his rights if the alleged waiver occurs during the same interrogation session and is the product of continued questioning after the privilege has been invoked. Any statement obtained under these circumstances, including a statement of waiver, must be excluded from evidence in the state's case-in-chief⁶⁹ against the accused as involuntary and a *per se* violation of *Miranda*.⁷⁰

⁶¹ In the typical *Miranda* confession case, the giving of the warnings to the accused is not in issue and is usually stipulated to at the accused's pre-trial motion to suppress or at trial. The critical issue is the validity of the accused's waiver. See, e.g., *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973).

⁶² In practice, at trial or at the pre-trial motion to suppress, the accused must come forward with sufficient evidence of the involuntariness of his waiver to raise the issue. The state then has the burden of proving, usually by a preponderance of the evidence, that on the facts and circumstances surrounding the interrogation session the accused's waiver was voluntarily given. *Lego v. Twomey*, 404 U.S. 477, 486 (1972). See, e.g., SMITH, 30 MASS. PRACTICE: CRIMINAL PRACTICE AND PROCEDURE (West Supp. 1979).

⁶³ *Miranda v. Arizona*, 384 U.S. 436, 474 (1966).

⁶⁴ 423 U.S. 96 (1975).

⁶⁵ *Id.* at 101 n.7. The Court noted that the case did not involve a request to see an attorney and stated that the procedures to be followed in that circumstance were detailed in *Miranda*. *Id.*

⁶⁶ *Michigan v. Mosley*, 423 U.S. 96, 104 (1975).

⁶⁷ *Id.* at 114 (Brennan, J., dissenting).

⁶⁸ *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966).

⁶⁹ *Harris v. New York*, 401 U.S. 222 (1971) (statements obtained in violation of *Miranda* may be used for impeachment purposes); accord, *Oregon v. Hass*, 420 U.S. 714 (1975).

⁷⁰ Because the Court in *Miranda* unequivocally articulated the procedures to be followed upon a suspect's request for an attorney or statement of unwillingness to talk and the consequences of failure to follow these mandated procedures, the claim that the alleged waiver was ineffective because of an earlier express invocation should rarely arise. Following from *Miranda*, however, were the accused to so contend, the only issue in question, on which the state would bear the burden of proof, would be whether the accused had made the alleged statement of invocation. Cf. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (state establishes the circumstances under which interrogation takes place and has the means to provide corroborating evidence, therefore state must prove accused waived his rights).

In summary, the Court in *Miranda* created mandatory procedural safeguards to ensure that any incriminating statement by an accused was freely given. Although the Court recognized that a suspect might waive his right to silence or to the presence of an attorney, it placed the burden on the state to prove such a waiver and carefully delimited the circumstances under which a valid waiver could be made. Subsequently, the Court made clear that the test of whether a waiver has been knowingly and voluntarily given is based on an examination of the totality of the circumstances surrounding the interrogation. The concept of waiver under *Miranda*, therefore, has been the focus of considerable attention, and consequent development, by the Court. Except for the Court's statement in *Miranda* that the fifth amendment right can be invoked either by a request for an attorney or by a suspect's indicating his wish to remain silent, however, the Supreme Court has not developed the aspect of invocation: the circumstances under which the fifth amendment protection will be deemed to have been invoked when an accused fails to expressly request an attorney or explicitly state that he does not wish to speak.

II. THE CALIFORNIA CASES AND THE CONCEPT OF INVOCATION

A. *The California Supreme Court and the Early Cases on Invocation*

In the absence of direction from the United States Supreme Court on the parameters of the concept of invocation of the fifth amendment rights under *Miranda*, the California Supreme Court focused its attention on the development of that concept in a line of cases which culminated in *In re Michael C.* The court rested its conclusions on the premise that to require particular conduct or a strict verbal formula to invoke the privilege would subvert the prophylactic purpose of *Miranda*.⁷¹ *People v. Fioritto*⁷² was the seminal case in

As will be developed in text at notes 199-200 *infra*, *Miranda* allows for the accused's contention that as a factual matter he asserted the privilege (*i.e.*, by words or conduct which reasonably indicate an unwillingness to talk but which fall short of an express, unambiguous statement) in a given interrogation session prior to the alleged waiver. Procedurally, proof of this assertion parallels that of waiver. See note 62 *supra*. The accused would have the burden of coming forward with sufficient evidence to raise the issue of assertion: he would have to satisfy the court that it is as likely as not that the words or conduct in question demonstrated his intent to remain silent. Having done so, the state should then have the burden of proving that the accused's words or conduct were not indicative of his intent to remain silent. The state's failure to meet this burden would render the alleged waiver invalid and the statements would be excluded from evidence.

⁷¹ See, *e.g.*, *People v. Randall*, 1 Cal. 3d 948, 955, 464 P.2d 114, 118, 83 Cal. Rptr. 658, 662 (1970):

a suspect may indicate that he wishes to invoke the privilege by means other than an express statement to that effect; no particular form of words or conduct is necessary.

To strictly limit the manner in which a suspect may assert the privilege, or to demand that it be invoked with unmistakable clarity (resolving any ambiguity against the defendant) would subvert *Miranda*'s prophylactic intent. Moreover, it would benefit, if anyone, only the experienced criminal. . . . Conversely, it would operate most severely on the ignorant and unsophisticated suspect who is most susceptible to the compulsion arising from the tactics of custodial interrogation.

Id. (footnote omitted).

⁷² 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817.

the line of California decisions. In *Fioritto*, the accused and two accomplices were apprehended for burglary.⁷³ At the police station, after having been informed of his rights under *Miranda*, the accused refused the police request that he sign a form waiving those rights.⁷⁴ Immediately thereafter the police confronted him with his two accomplices who already had confessed and had implicated him.⁷⁵ In the presence of the police officers the accused and one of the accomplices got into a heated argument.⁷⁶ The police then again informed the accused of his rights and again asked him to sign the waiver form and confess.⁷⁷ The accused did so.⁷⁸ Citing *Miranda*, the California Supreme Court held that the accused's confession had been obtained in violation of his rights.⁷⁹ The court reasoned that the accused, by his initial refusal to waive his rights, had indicated that he intended to assert those rights.⁸⁰ After the defendant thereby invoked the privilege, all further attempts at interrogation should have ceased.⁸¹ Consequently, the confession, secured in violation of *Miranda*, was inadmissible.⁸² In explaining the limits of its decision, the court noted that volunteered statements, those statements initiated by a suspect after his invocation of his rights, were unaffected by its holding; only those statements which resulted from police-initiated discussion after an invocation of the privilege were prohibited.⁸³ The Court observed that in determining whether the proscriptions of *Miranda* had been violated, "the form of the renewed inquiries, however subtle or gentle" could not be considered.⁸⁴

Fioritto was followed by *People v. Ireland*.⁸⁵ In *Ireland*, the accused, arrested for murder,⁸⁶ was advised of his *Miranda* rights on the way to the police car prior to being transported to the station house.⁸⁷ At that time he stated, "Call my parents for my attorney."⁸⁸ The officers made no response

⁷³ *Id.* at 716-17, 441 P.2d at 626, 68 Cal. Rptr. at 818.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 718-19, 441 P.2d at 627, 68 Cal. Rptr. at 819, citing *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966).

⁸⁰ 68 Cal. 2d at 718-19, 441 P.2d at 627, 68 Cal. Rptr. at 819.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 719-20, 441 P.2d at 627-28, 68 Cal. Rptr. at 819-20. As the *Fioritto* court noted, voluntary statements are expressly authorized by *Miranda*: "There is no requirement that police stop a person who enters a police station to confess to a crime, or a person who calls the police to offer a confession or any other statement he wishes to make. Volunteered statements of any kind are not barred by the Fifth Amendment." *Id.*, quoting *Miranda v. Arizona*, 384 U.S. 436, 478 (1966). Thus, voluntary statements are not included within the protections of *Miranda*. Such statements, however, are distinguished from those which result through continued questioning either after invocation of the privilege or after a waiver which is later determined to have been ineffective. In these latter cases, none of the resulting statements are voluntary under a *Miranda* analysis.

⁸⁴ *Id.* at 720, 441 P.2d at 628, 68 Cal. Rptr. at 820.

⁸⁵ 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969).

⁸⁶ *Id.* at 525, 532, 450 P.2d at 581, 586, 75 Cal. Rptr. at 189, 194.

⁸⁷ *Id.* at 532-33, 450 P.2d at 586, 75 Cal. Rptr. at 194.

⁸⁸ *Id.*

and did not communicate the request to superior officers.⁸⁹ Shortly after his arrival at the station house, Ireland was again advised of his rights and was asked by the interrogating officer to talk, whereupon he confessed.⁹⁰ The California Supreme Court held that *Ireland's* statement en route to the station house constituted a request for an attorney.⁹¹ In rejecting the state's argument that Ireland's statements had been made voluntarily and were therefore admissible, the court reaffirmed that a defendant in custody might make statements admissible under *Miranda* if it were shown that they were the result of the defendant's own initiative and did not arise from custodial interrogation.⁹² Here, however, it noted, the confession had resulted from direct questions by the police officer after Ireland's invocation.⁹³ The confession, therefore, was inadmissible.⁹⁴

The evolution of the concept of invocation by the California Supreme Court continued with *People v. Randall*.⁹⁵ Randall was arrested⁹⁶ in his apartment and there advised of his rights.⁹⁷ Upon his arrival at the station house, in accordance with police procedure, he was allowed to make two telephone calls.⁹⁸ In the presence of and to the knowledge of police officers,⁹⁹ Randall placed one of the telephone calls to his attorney.¹⁰⁰ He was subsequently questioned by the police.¹⁰¹ Later police learned of an outstanding and unrelated arrest warrant for robbery against Randall.¹⁰² Randall was again informed of his *Miranda* rights and in response to police questioning confessed to the robbery.¹⁰³ On appeal to the California Supreme Court the state argued that a telephone call to an attorney should not be interpreted as equivalent to the request for an attorney in *Ireland* or to the refusal to sign a waiver form in *Fioritto* because such a call in no way signified a desire not to talk with the police or to have an attorney present.¹⁰⁴ The court rejected this argument, observing that the state had presented "no sensible distinction"¹⁰⁵ between the actions of those defendants and that of Randall. The court concluded that in each case the suspect had demonstrated conduct which reasonably appeared inconsistent with a desire to speak freely and completely with the police at that time.¹⁰⁶

⁸⁹ *Id.*

⁹⁰ *Id.* at 533-34, 450 P.2d at 586-87, 75 Cal. Rptr. at 194-95.

⁹¹ *Id.* 536, 450 P.2d at 588, 75 Cal. Rptr. at 196.

⁹² *Id.* at 536-37, 450 P.2d at 588-89, 75 Cal. Rptr. at 196-97.

⁹³ *Id.* at 537, 450 P.2d at 588-89, 75 Cal. Rptr. at 196-97.

⁹⁴ *Id.* See note 83 *supra* distinguishing voluntary statements and statements which result from continued questioning after initial invocation of the privilege.

⁹⁵ 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970).

⁹⁶ The opinion is unclear as to the reason for his arrest.

⁹⁷ 1 Cal. 3d at 951, 464 P.2d at 115-16, 83 Cal. Rptr. at 659-60.

⁹⁸ *Id.* at 952, 464 P.2d at 116, 83 Cal. Rptr. at 660.

⁹⁹ *Id.* at 952, 953, 464 P.2d at 116, 117, 83 Cal. Rptr. at 660, 661.

¹⁰⁰ *Id.* at 952 n.4, 953, 464 P.2d at 116 n.4, 117, 83 Cal. Rptr. at 660 n.4, 661.

¹⁰¹ *Id.* at 952-53, 464 P.2d at 116, 83 Cal. Rptr. at 660.

¹⁰² *Id.* at 952, 464 P.2d at 116, 83 Cal. Rptr. at 660.

¹⁰³ *Id.* at 952, 953, 464 P.2d at 116, 117, 83 Cal. Rptr. at 660, 661.

¹⁰⁴ *Id.* at 955-56, 464 P.2d at 118-19, 83 Cal. Rptr. at 662-63.

¹⁰⁵ *Id.* at 956-57, 464 P.2d at 118-19, 83 Cal. Rptr. at 663-64.

¹⁰⁶ *Id.* at 956, 464 P.2d at 118, 83 Cal. Rptr. at 663.

Acknowledging the possibility that a suspect's call to his attorney might be indicative of something other than his intent to invoke the privilege, the court concluded that, nonetheless, it was unwilling to presume that a call to an attorney was not an indication of the intent to invoke the privilege.¹⁰⁷ Accordingly, it held:

When as appears here, the suspect to the knowledge of the police completes a call to his attorney, the People—if they contend that the fact of such a call should not be considered an invocation of the privilege—*must affirmatively demonstrate that the suspect was not thereby indicating a desire to remain silent until he obtained the full advice of counsel.*¹⁰⁸

Finding that the state had not attempted to meet this burden and that the questioning of Randall had not ended as required by *Miranda*, the court held the confession inadmissible.¹⁰⁹ In a footnote,¹¹⁰ the court stressed that its holding applied only to statements obtained through continued interrogation after assertion of the privilege and not to statements later volunteered by the suspect.

*People v. Burton*¹¹¹ was the fourth case in the line which had developed from *People v. Fioritto*. Burton was a sixteen year old minor when arrested for murder and assault with the intent to commit murder.¹¹² At the station house, prior to being advised of his rights, Burton asked to see his par-

¹⁰⁷ *Id.* at 956-57, 464 P.2d at 118-20, 83 Cal. Rptr. at 663-64.

¹⁰⁸ *Id.* at 957, 464 P.2d at 120, 83 Cal. Rptr. at 664 (emphasis added).

¹⁰⁹ *Id.* at 957, 464 P.2d at 120, 83 Cal. Rptr. at 664.

¹¹⁰ *Id.* at 956 n.7, 464 P.2d at 119 n.7, 83 Cal. Rptr. at 663 n.7:

It [conduct which appears reasonably inconsistent with a present willingness to talk to the police at that time] is, of course, not inconsistent with either of two divergent subsequent occurrences: 1) a change of mind on the part of the defendant prompted by the advice of counsel, his own psychological make-up, or similar facts; or 2) a change of mind prompted by continued interrogation and efforts to convince the defendant to communicate with the officers. The former is not prescribed [sic] by *Miranda* [sic], nor by our application of its teaching in *Fioritto* and *Ireland*. 'The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings or counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.' . . . 'Not only did we affirm our adherence to this principle in the *Fioritto* case, but we also there indicated that even a defendant in custody might make statements admissible under *Miranda* if it were shown that such statements were the result of the defendant's own initiative and did not arise in the context of custodial interrogation.'

Id. (citations omitted) (emphasis in original).

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

¹¹² *Id.* at 378, 491 P.2d at 795, 99 Cal. Rptr. at 2. Burton was arrested on two charges of murder and on assault with intent to commit murder. *Id.*

ents.¹¹³ The request was refused.¹¹⁴ Immediately thereafter the police explained the *Miranda* rights to him.¹¹⁵ Burton stated that he understood his rights, waived them and made a full confession.¹¹⁶ Relying on its reasoning in *Randall*, the court disputed the state's contention that a minor's request for a parent could be made for many reasons and therefore should not be construed as an invocation of the privilege.¹¹⁷ The court suggested that it would be most likely and normal that a juvenile in custody would express his desire for help and his unwillingness to talk with the police without such help by a request to see one of his parents.¹¹⁸ The court therefore held that a minor's request for one of his parents at any time prior to or during interrogation was to be construed as indicating that the minor intended to invoke his fifth amendment privilege unless the state presented evidence compelling a contrary conclusion.¹¹⁹ Finding that the state had not met its burden and that questioning had continued after Burton had invoked the privilege, the court held that Burton's confession should have been excluded from evidence and reversed.¹²⁰

With the decisions in *Randall* and *Burton*, the California Supreme Court had developed the concept of invocation to include in two types of factual situations—a telephone call to an attorney and a minor's request for his parents—a burden-shifting approach to the issue of invocation.¹²¹ If a suspect demonstrated either of the two behaviors, a presumption arose that he thereby was indicating his intent to remain silent. In order for any statement which resulted from continued or renewed police questioning thereafter to be

¹¹³ *Id.* Burton's father was at the station house at the time Burton made his request. Burton's father had also asked to see his son and was refused. *Id.*

¹¹⁴ *Id.* at 379, 380, 491 P.2d at 795, 796, 99 Cal. Rptr. at 3, 4.

¹¹⁵ *Id.* at 381, 491 P.2d at 796, 99 Cal. Rptr. at 4.

¹¹⁶ *Id.* The juvenile confessed on three separate occasions. *Id.*

¹¹⁷ *Id.* at 383, 491 P.2d at 798, 99 Cal. Rptr. at 6, citing *People v. Randall*, 1 Cal. 3d 948, 957, 464 P.2d 114, 120, 83 Cal. Rptr. 658, 664 (1970).

¹¹⁸ 6 Cal. 3d at 382-83, 491 P.2d at 798, 83 Cal. Rptr. at 6.

¹¹⁹ *Id.* at 383-84, 491 P.2d at 798, 83 Cal. Rptr. at 6.

¹²⁰ *Id.*

¹²¹ Compare California's approach to determining if a suspect had invoked the privilege to that which would normally exist under *Miranda* in determining invocation as a factual matter. See note 70 *supra*. Normally under *Miranda*, a suspect would raise the issue of invocation by demonstrating that, on all the facts and circumstances, his behavior and/or statements were indicative of his intent to invoke the privilege. Having so raised the issue, the state would then be called upon to prove, also using all relevant facts and circumstances, that whatever the purpose of the behavior or statements, it was not a manifestation of his intent to invoke the privilege. (Note also the similarity in approach between an analysis of invocation as a fact question and the analysis involved in determining waiver, see text at notes 206-08 *infra*.) The California court, by contrast, allows the accused to meet his burden by showing either that he placed a telephone call to his attorney to the knowledge of the police or that he was a minor and requested his parents. Thus, in either of these circumstances, the accused is enabled to raise the issue of invocation as a factual matter by relying on one fact out of the universe of facts or circumstances by which a suspect would normally raise the issue. By demonstrating the one fact, the state's responsibility to meet its burden of proof is triggered.

admissible in evidence,¹²² the state was called upon to prove that the suspect's behavior—the telephone call or the minor's request—was not a manifestation of his intent to invoke the privilege. The California Supreme Court, however, had repeatedly underscored that any statements volunteered by a suspect even after initial invocation of the privilege were not encompassed by its decisions and were admissible in evidence. It was against this backdrop that *In re Michael C.* was decided.

B. *The California Supreme Court and In re Michael C.*

In reaching its decision in *In re Michael C.*, the California Supreme Court relied on its decisions in *Randall* and *Burton*, and extended the holding of the latter by analogy.¹²³ On the basis of the emphasis which the California juvenile court places on a close relationship between a minor and his probation officer¹²⁴ and Michael C.'s probation officer's instructions that Michael C. contact him immediately in the event of any trouble,¹²⁵ the court concluded that Michael C.'s request for his probation officer was a "call for help"¹²⁶ akin to that in the *Burton* juvenile's request for his parents.¹²⁷ Accordingly, the court held that "the People must meet the burden of proving that a minor who requests to see his probation officer does not intend to assert his Fifth Amendment privilege."¹²⁸ On the facts the court held that the state had not met its burden and therefore found that Michael C.'s statements and sketches, as the product of continued questioning after invocation of the privilege, were inadmissible in evidence against him.¹²⁹ The court rejected the state's contention that a minor's request for his probation officer could be distinguished from a request for a parent because a probation officer represents "an arm of the prosecutorial system" and could not, therefore, provide the counsel and protection of a parent.¹³⁰ The court countered this claim, stating that, not-

¹²² In *People v. Disbrow*, 16 Cal. 3d 101, 113, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976), California rejected on state constitutional grounds the application in state criminal proceedings of the U.S. Supreme Court's decision in *Harris v. New York*, 401 U.S. 222 (1971), which held that statements obtained in violation of *Miranda* may be used for impeachment purposes if the accused elects to testify in his own behalf. Similarly, in *People v. Pettingill*, 21 Cal. 3d 231, 246, 578 P.2d 108, 117, 145 Cal. Rptr. 861, 870 (1978), the California Supreme Court rejected the application in state criminal proceedings of the U.S. Supreme Court's decision in *Michigan v. Mosley*, 423 U.S. 96 (1975) ("circumstances of the renewed interrogation" test), by resting *People v. Fioritto*, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968) (interrogation may not be renewed until counsel is present) on state constitutional grounds.

¹²³ 21 Cal. 3d at 476, 579 P.2d at 10, 146 Cal. Rptr. at 361. The California court's decisions in both *Burton* and *Michael C.* were ambiguous with regard to whether the respective behaviors were analyzed under the *Miranda* request for an attorney means for invoking the privilege or the "indication in any manner of the wish to remain silent" means.

¹²⁴ *Id.* at 476, 579 P.2d at 9, 146 Cal. Rptr. at 361.

¹²⁵ *Id.*

¹²⁶ *Id.* at 476, 579 P.2d at 10, 146 Cal. Rptr. at 361.

¹²⁷ *Id.* at 478, 579 P.2d at 11, 146 Cal. Rptr. at 362.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 476, 579 P.2d at 10, 146 Cal. Rptr. at 361.

withstanding a probation officer's status as a peace officer, he was frequently the person to whom a minor would turn for advice and assistance.¹³¹ Moreover, the court noted, "[w]hen Michael C. asked to see his probation officer, he was not seeking to confide in a prosecutor."¹³² The state's second claim that, should the *Burton* decision be extended to include a request for a probation officer, the court could not reasonably distinguish a minor's request for any adult¹³³ also was dismissed. Such a distinction, the court retorted, was easily made. A probation officer is charged by statute to represent the interests of and to advise and care for the juvenile.¹³⁴ The state's final argument, relying on precedent, was that whether a juvenile had the capacity to understand and waive the *Miranda* rights was a question of fact.¹³⁵ The state contended that on the facts Michael C. possessed the requisite capacity and his confession was, therefore, voluntary and admissible.¹³⁶ The court, rejecting this argument, responded that at issue in the instant case was whether when Michael C. asked for his probation officer he had invoked his fifth amendment privilege, not whether he had the capacity to waive it.¹³⁷ Finding that the state had not met its burden of disproving Michael C.'s intention to invoke the privilege by his request for his probation officer, the court held that Michael C.'s confession should have been excluded from evidence and reversed.¹³⁸

There was language in the opinion, however, in which the court appeared to hold, in contradiction to the factual inquiry just discussed, that a minor's request for his probation officer *per se* invoked his rights under *Miranda*.¹³⁹ The court appeared to suggest that it viewed such a request, like the request for an attorney under *Miranda*, as sufficient without more to trigger the *Miranda* proscription against continued questioning.¹⁴⁰ These two

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 477, 579 P.2d at 10, 146 Cal. Rptr. at 361.

¹³⁴ *Id.*

¹³⁵ *Id.*, citing *People v. Lara*, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967); *In re Dennis M.*, 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969).

¹³⁶ 21 Cal. 3d at 477, 597 P.2d at 10, 146 Cal. Rptr. at 361-62.

¹³⁷ *Id.*

¹³⁸ *Id.* at 478, 579 P.2d at 11, 146 Cal. Rptr. at 362.

¹³⁹ *Id.* at 477, 579 P.2d at 10-11, 146 Cal. Rptr. at 362. The court stated:

In cases in which we must decide whether a confession is voluntary or coerced we have looked to the 'totality of the circumstances' to find whether the confessant was capable of understanding the interrogation and voluntarily confessed or whether his will was actually overcome. *Here, however, we face conduct which, regardless of considerations of capacity, coercion or voluntariness, per se invokes the privilege against self-incrimination.* Thus our question turns not on whether the defendant had the ability, capacity or willingness to give a knowledgeable waiver, and hence whether he acted voluntarily, but whether, when he called for his probation officer, he exercised his Fifth Amendment privilege. *We hold that in doing so he no less invoked the protection against self-incrimination than if he had asked for an attorney.*

Id. (emphasis added).

¹⁴⁰ *Id.*

statements of the court's holding raised immediate question as to whether the decision rested on a factual inquiry or a *per se* rule.

Justice Clark, in the case's only dissent, underscored the confusion in the majority's opinion created by the two contradictory statements of the holding.¹⁴¹ Because of this confusion, Clark believed it necessary to emphasize that what was in issue was not the simple fact of the request but rather whether that request was intended as an invocation of the privilege.¹⁴² Clark stressed that this determination was one of fact, to be resolved on the totality of the circumstances.¹⁴³ On the facts he disagreed with the majority, concluding that Michael C.'s request was not an indication of his unwillingness to proceed with the interrogation and, further, that Michael C. had voluntarily waived his rights.¹⁴⁴ It was with this patent ambiguity as to its holding—whether Michael C. had as a factual matter invoked the privilege by his request for his probation officer or whether a minor's request for his probation officer was deemed a *per se* invocation of the privilege (thereby extending *Miranda*)—that *In re Michael C.* reached the United States Supreme Court.

III. THE UNITED STATES SUPREME COURT AND *FARE V. MICHAEL C.*

A. *The Majority Opinion*

Given the ambiguity as to the precise nature of the California Supreme Court's holding, the United States Supreme Court in *Fare v. Michael C.* first had to resolve whether the California court had found as a matter of fact that Michael C. had invoked the privilege or whether it had extended the *per se* invocation rules of *Miranda* by holding that a minor's request for his probation officer during custodial interrogation was in all cases to be considered an invocation of the privilege.¹⁴⁵ It then considered whether a probation officer possessed skills, abilities and status, vis-a-vis the juvenile in custody and the criminal justice system, sufficiently similar to those possessed by an attorney such that an extension of the *Miranda per se* rule with respect to the request for an attorney was warranted.¹⁴⁶ Finally, it turned to whether Michael C. had knowingly and intelligently waived his rights.¹⁴⁷ The Court determined that a *per se* rule had been established;¹⁴⁸ that a probation officer is unable to serve a juvenile in the same way as an attorney so that no justification for an extension of the *per se* rules of *Miranda* exists;¹⁴⁹ and, on the facts, Michael C.'s waiver had been knowingly and intelligently made.¹⁵⁰

In determining that the California Supreme Court had held that a minor's request for his probation officer was a *per se* invocation of his fifth

¹⁴¹ *Id.* at 480-81, 579 P.2d at 12-13, 146 Cal. Rptr. at 363-64. Justice Clark was joined in his dissent by Justice Manuel.

¹⁴² *Id.*

¹⁴³ *Id.* at 481, 579 P.2d at 13, 146 Cal. Rptr. at 364.

¹⁴⁴ *Id.*

¹⁴⁵ 442 U.S. at 714, 715-16 n.3.

¹⁴⁶ *Id.* at 719-22.

¹⁴⁷ *Id.* at 724-27.

¹⁴⁸ *Id.* at 715-16 n.3.

¹⁴⁹ *Id.* at 722.

¹⁵⁰ *Id.* at 727.

amendment rights, the United States Supreme Court found two factors conclusive. The first factor was the "strong *per se* language"¹⁵¹ in the California opinion. The second factor was a footnote in *Randall*¹⁵² which the Court construed as creating a *per se* rule.¹⁵³ In reaching this interpretation the Supreme Court noted that the *Randall* footnote stated that even though a suspect might have invoked the privilege, it might be possible that subsequent voluntary statements, not prompted by interrogation, would be admissible if the state could show that they were the product of the suspect's voluntary decision to waive the rights he had earlier invoked.¹⁵⁴ The Court interpreted this footnote to mean that the state had no opportunity to dispute that the suspect intended by the words or conduct at issue to invoke the privilege but only the opportunity to prove that after the *per se* invocation of the privilege the suspect made a voluntary decision to abandon the rights which he had earlier asserted and to volunteer statements. The Supreme Court reasoned from this interpretation and the *per se* language in the instant case that the state could have negated the *per se* effect of Michael C.'s request only by showing that he later voluntarily decided to waive those rights and volunteer statements.¹⁵⁵ The Supreme Court therefore concluded that any ambiguity in the opinion had to be resolved in favor of a determination that the California Supreme Court had held that a minor's request to see his probation officer *per se* invoked his fifth amendment privilege under *Miranda*.¹⁵⁶

The Court next characterized the California court's holding as being based on the view that a probation officer would act to protect the juvenile's interests in the same way as would an attorney.¹⁵⁷ It therefore turned its attention to the rationale for the *per se* rule announced in *Miranda* with respect to the request for an attorney.¹⁵⁸ The Court explained that that rule was rooted in the unique role a lawyer performs in the legal system.¹⁵⁹ He is a trained advocate, with special ability to aid an accused in preserving his fifth amendment rights; his presence serves to guard against police overreaching and ensures that any statements made are accurately reported; he has the power to act on behalf of his client; and, communication between him and his client is privileged.¹⁶⁰ In sum, the attorney is the one to whom society looks for the protection of legal rights.¹⁶¹ A probation officer, on the other hand, lacks these skills and attributes with regard both to the accused and to the

¹⁵¹ *Id.* at 715-16 n.3.

¹⁵² 1 Cal. 3d at 956 n.7, 464 P.2d at 119 n.7, 83 Cal. Rptr. at 663 n.7.

¹⁵³ 442 U.S. at 715-16 n.3. See note 110 *supra*.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 714. See text at notes 123-27 and note 123 *supra*. The California opinion is ambiguous in this regard, although there is some support in the opinion for this characterization. See *In re Michael C.*, 21 Cal. 3d at 475-76, 579 P.2d at 9-10, 146 Cal. Rptr. at 360-61 (1978).

¹⁵⁸ 442 U.S. at 719-23.

¹⁵⁹ *Id.* at 719.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

legal system.¹⁶² Moreover, the Court reasoned, as a peace officer and employee of the state which seeks to prosecute the accused, a probation officer's loyalties are necessarily divided; he can not simultaneously be counselor to the youth and officer of the state.¹⁶³ Conceding the existence of the probation officer's statutory duty to protect the juvenile's interests¹⁶⁴ and the possibility of a relationship of trust between a minor and his probation officer,¹⁶⁵ the Court nevertheless deemed a probation officer ill-equipped to fulfill the "pivotal role of legal counsel that justifies the *per se* rule established in *Miranda* . . ." ¹⁶⁶ It therefore concluded that a juvenile's request for his probation officer is not sufficiently similar to a request for an attorney under *Miranda* to support an extension of the *Miranda per se* rule.¹⁶⁷

The Court then considered whether the request for a probation officer, apart from any analogy to the request for counsel, should be treated as a *per se* invocation of the right to silence.¹⁶⁸ It dismissed this idea, observing that there is nothing inherent in the request which compels this conclusion.¹⁶⁹ In some circumstances, the Court asserted, a minor's request for his probation officer might be consistent with a desire to speak to the police.¹⁷⁰ Declining to find in the request a *per se* invocation of the right to remain silent, it suggested that courts might take into account such a request in evaluating whether a juvenile, in fact, had waived his rights.¹⁷¹

Finally, the Court reaffirmed the *Miranda* "totality of the circumstances" approach to the determination of waiver as providing sufficient protection for juveniles, and affirmed the juvenile court's finding that Michael C. had effectively waived his rights.¹⁷² The Court stated that he had been informed of his rights; the police had ensured that he understood them; his rights were

¹⁶² *Id.*

¹⁶³ *Id.* at 720-22. As an example, the Court noted that a probation officer is generally required to report to the state any wrongdoing by the juvenile even where he learns of the wrongdoing from the juvenile himself. *Id.* at 720. The Court also noted that it was Michael C.'s probation officer who had filed the petition to have him adjudged a ward of the court and that it was the acting chief of probation for the state who was the petitioner in the case. *Id.* The Court recognized that by the time it decided *Fare v. Michael C.*, the California statutory provision, CAL. WELF. & INST. CODE ANN. § 650 (West 1972), had been amended to require that the prosecuting attorney, not a probation officer, file the petition to have a juvenile adjudged a ward of the court. 442 U.S. at 720 n.5. It dismissed this change of circumstances, however, as only one factor in its analysis. *Id.*

¹⁶⁴ *Id.* at 722. The Court rejected the distinction which the California Supreme Court had drawn between probation officers and others on the basis of the statutorily-created relationship/see *In re Michael C.*, 21 Cal. 3d at 477, 579 P.2d at 10, 146 Cal. Rptr. at 361, observing that the state could expand the class of persons included simply by creating such a statutory duty to care. *Id.* at 723.

¹⁶⁵ 442 U.S. at 722.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 722-23.

¹⁶⁸ *Id.* at 723-24.

¹⁶⁹ *Id.* at 724.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 724, 725.

¹⁷² *Id.* at 725.

again explained to him after the denial of his request for his probation officer; he clearly expressed his willingness to waive his rights, and nothing indicated that he lacked the capacity to comprehend the nature of his actions.¹⁷³ The Court concluded, therefore, that the admission of the incriminating materials against Michael C. in the juvenile court proceedings had been correct.¹⁷⁴

In summary, the Court found that because a probation officer cannot offer the legal assistance needed to protect the fifth amendment rights of an accused in custody, and because of the handicaps which his position in the juvenile court system pose to his serving as a protector of the rights of juveniles, a request by a minor for his probation officer cannot *per se* constitute a request to remain silent. In addition, on the basis of the record, the Court concluded that Michael C. had effectively waived his right to remain silent.

B. The Dissents

Citing the Court's historical recognition of and concern for the increased coercive impact of custodial interrogation on juveniles,¹⁷⁵ Justice Marshall, joined by Justices Brennan and Stevens,¹⁷⁶ argued that *Miranda* must be construed broadly where juveniles are concerned to accomplish its purpose of dispelling the compulsion inherent in custodial interrogation.¹⁷⁷ He contended that *Miranda* requires that interrogation cease whenever a juvenile requests any adult obligated to protect his interests.¹⁷⁸ Such a request, he reasoned, is both an attempt to obtain advice and a general invocation of the right to silence, and is clearly inconsistent with a present desire to speak freely.¹⁷⁹ He noted that requiring a "strict verbal formula" to invoke the privilege would protect only the knowledgeable, while "abandoning the young person who knows no more than to ask for the . . . person he trusts."¹⁸⁰ Justice Marshall concluded that on his reading of *Miranda* a juvenile's request for his probation officer should be treated as a *per se* invocation of his fifth amendment rights.¹⁸¹

¹⁷³ *Id.* at 726-27.

¹⁷⁴ *Id.* at 728.

¹⁷⁵ *Id.* at 729, citing *In re Gault*, 387 U.S. 1 (1967); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948).

¹⁷⁶ 442 U.S. at 728-32.

¹⁷⁷ *Id.* at 729.

¹⁷⁸ *Id.* at 729-30.

¹⁷⁹ *Id.* at 730.

¹⁸⁰ *Id.*, citing *Chaney v. Wainwright*, 561 F.2d 1129, 1134 (5th Cir. 1977) (Goldberg, J., dissenting).

¹⁸¹ 442 U.S. at 730. Justice Marshall also took issue with the majority's view that the law enforcement duties of a probation officer would inhibit his ability to aid the juvenile in light of the California Supreme Court's express determination that these duties presented no significant obstacle. *Id.* at 731. He disagreed with the majority's "speculation" that probation officers must cooperate with the police, pointing out that Michael C.'s probation officer had instructed all his charges "not to go and admit openly to an offense, [but rather] to get some type of advice from . . . parents or a

In a separate dissent,¹⁸² Justice Powell agreed with the majority that the *per se* rules of *Miranda* do not encompass a juvenile's request for his probation officer, but disagreed with its finding that Michael C. had waived his rights voluntarily.¹⁸³ Citing the same earlier Supreme Court cases involving juveniles on which the Justice Marshall dissent relied, he stated that the Court had repeatedly, stressed that "the greatest care" must be taken to ensure that a juvenile's confession is voluntary.¹⁸⁴ Referring to the appellate record, he characterized Michael C., as "immature, emotional and uneducated" and noted the Michael C. was crying during much of the interrogation session.¹⁸⁵ He suggested that Michael C., because of these factors, was most likely to be particularly vulnerable to the type of "skillful, two-on-one, repetitive style of interrogation to which he was subjected."¹⁸⁶ Justice Powell contended that Michael C.'s twice-repeated response of "How I Know you guys won't pull no police officer in and tell me he's an attorney?" when informed of his right to the presence of an attorney demonstrated Michael C.'s "limited understanding."¹⁸⁷ He noted, moreover, that Michael C.'s request for his probation officer occurred during this part of the interrogation.¹⁸⁸ Finally, he argued that despite Michael C.'s repeated denials of involvement in the murder under investigation, the police persisted in questioning him in the absence of counsel until they finally obtained a confession.¹⁸⁹ Justice Powell concluded that the police had not taken the required "greatest care" to ensure that Michael C.'s confession was voluntary.¹⁹⁰ He therefore would have affirmed the California Supreme Court's judgment.¹⁹¹

IV. THE *MIRANDA* MANDATE: INVOCATION OF THE FIFTH AMENDMENT AS A QUESTION OF FACT

The Supreme Court's reading of the California decision in *Michael C.* as having created a *per se* rule of invocation is not well-founded. The better interpretation of the California court's decision is that it created a rebuttable presumption approach to whether a minor by his request for his probation officer was demonstrating his intent to remain silent. This erroneous interpretation, however, is not the most serious problem in the opinion. The more critical flaw in the Supreme Court's opinion is the Court's failure to explore invocation of the privilege as a factual matter under *Miranda*. It will be argued that *Miranda* mandates such an inquiry and that such an inquiry is desirable.

lawyer." *Id.* at 731-32. In light of these facts, Marshall argued that at the very least a California juvenile's request for his probation officer should be deemed a *per se* invocation. *Id.* at 730, 732.

¹⁸² *Id.* at 732-34.

¹⁸³ *Id.* at 732-34.

¹⁸⁴ *Id.* at 732-33. See cases cited at note 175 *supra*.

¹⁸⁵ *Id.* at 733, 733 n.2.

¹⁸⁶ *Id.* at 733.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 734.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

It is unfortunate that the United States Supreme Court interpreted the California decision as establishing a *per se* rule. Because of the questions about invocation of the privilege as a factual matter which arise from *Michael C.* and which remain unanswered, it would have been preferable for the Court to address these issues. Had the Court correctly interpreted the California decision as creating a presumption, a clear statement from the Court on whether and why an explicit invocation of the right to remain silent is necessary to compel the termination of custodial questioning under *Miranda* might have resulted.

The California Supreme Court's contribution to the current uncertainty regarding the United States Supreme Court's attitude toward the question of invocation as a factual matter cannot be underestimated. As noted earlier,¹⁹² it appeared to hold in one paragraph that a minor's request for his probation officer was a *per se* invocation of his rights under *Miranda*. In the succeeding paragraph, however, it held that the state had the burden of proving that a minor's request for his probation officer was not indicative of his intent to invoke the fifth amendment privilege and that the state had failed to meet its burden. These alternative statements of the holding are fundamentally irreconcilable: if a *per se* rule were created, it would not be open to the state to rebut the inference of intention to invoke the privilege. Although the Supreme Court's determination that a *per se* rule, and, therefore, an extension of *Miranda*, had been created finds obvious support in the California decision, its weakness lies in that it fails to give effect to the rest of the opinion and, in particular, to the other, contradictory, statement of the holding. In addition, such an interpretation is inconsistent with the holdings in *Randall* and *Burton*, from which *Michael C.* evolved and on which it expressly relied.¹⁹³

The first problem with the interpretation of the California decision as adopting a *per se* rule is that it completely ignores the language in the California opinion, also denominated as its holding, which states that the state must meet the burden of proving that a minor who requests to see his probation officer does not intend to invoke his fifth amendment privilege¹⁹⁴ and, further, that in the instant case the state had failed to meet that burden.¹⁹⁵ There is an explanation for the *per se* language in the California decision which is not dependent on a reading that a *per se* rule was created. The *per se* language appears at the point in the opinion wherein the California Supreme Court was responding to the state's contention that a juvenile's capacity to waive his rights is to be determined on the totality of the circumstances and, using that test, the juvenile court had correctly found that Michael C.'s waiver had been made voluntarily.¹⁹⁶ The California court in using the *per se* language was observing that the issue of a juvenile's capacity to give an effective waiver was inapposite to the decision at hand. The court had found that

¹⁹² See text at notes 128-29, 139-40 & note 139 *supra*.

¹⁹³ In re *Michael C.*, 21 Cal. 3d 471, 475-76, 477, 579 P.2d 7, 10-11, 146 Cal. Rptr. 358, 360-61, 362.

¹⁹⁴ *Id.* at 478, 579 P.2d at 11, 146 Cal. Rptr. at 362.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 477, 579 P.2d at 10-11, 146 Cal. Rptr. at 362.

Michael C. had successfully invoked the privilege under *Miranda*, and therefore the state was precluded from arguing that he subsequently had waived his rights because the "waiver" had been obtained within the same interrogation session and through continued questioning after the invocation of the privilege. This analysis would explain the California court's use of the *per se* language. Because the court had decided on the facts of the case that Michael C., by his request for his probation officer, had invoked the fifth amendment privilege no less than if he had expressly requested an attorney under *Miranda*, the issue of Michael C.'s capacity to give a knowing and intelligent waiver in the circumstances was irrelevant. Second, as discussed earlier,¹⁹⁷ in *Randall* and *Burton* the California Supreme Court had held that a telephone call to an attorney and a minor's request for his parents give rise to a presumption that the accused was thereby indicating his intent to remain silent. In order for any statement thereafter obtained through police questioning to be admissible the state is required to prove that the suspect's behavior was not a manifestation of an intent to invoke the privilege. The interpretation of the California court decision in *Michael C.* as adopting a *per se* rule is therefore inconsistent with the California Supreme Court's decisions in those earlier cases in which it created a rebuttable presumption approach to the issue of invocation of the privilege under *Miranda*. Finally, as the Supreme Court opinion conceded, Michael C. argued that the California court had not established a *per se* rule but had held that on the facts Michael C. had invoked his rights.¹⁹⁸ It cannot be said, therefore, that the alternative to a view that a *per se* rule was created was not squarely before the Court.

In summary, an evaluation of that portion of the opinion in which the *per se* language appears, the cases in the line of California cases which preceded *Michael C.*, and the argument before the Supreme Court that the California court did not create a *per se* rule suggest that the Supreme Court's interpretation that a *per se* rule had been created is not sound. The alternative interpretation—that the California decision held that a minor's request for his probation officer is by itself sufficient to raise a presumption of his intention to invoke the privilege—avoids the weaknesses to which the *per se* interpretation is subject. Such an interpretation is compatible with the use of the *per se* language in the California opinion and allows for effect to be given to that language in the manner suggested above. Moreover, this interpretation is consistent with the earlier decisions in *Randall* and *Burton*. For these reasons it is submitted that the sounder interpretation of the California opinion in *Michael C.* is that a rebuttable presumption approach—a factual analysis—was adopted.

The Supreme Court's arguably incorrect determination that a *per se* rule had been created facilitated, but did not mandate the primary weakness with the Supreme Court's opinion—the Court turned directly from a discussion of the *per se* issues to whether Michael C. had effectively waived his rights, omitting consideration of whether Michael C. had invoked the privilege as a matter of fact.

¹⁹⁷ See text and notes at 121-22 *supra*.

¹⁹⁸ 442 U.S. 715-16 n.3.

Miranda, it may be recalled, provides that the privilege may be invoked either by a request for an attorney or by an indication in any manner at any time of a desire to remain silent.¹⁹⁹ The language by which the latter means of invoking the privilege may be made is expansive and open-ended. It permits and may even mandate a factual inquiry into whether a suspect invoked his rights during custodial interrogation where his statements or conduct may be reasonably indicative of such intent but fall short of an express indication of unwillingness to speak.²⁰⁰ That state criminal proceedings were involved poses no obstacle to consideration of this issue because interpretation of a federal constitutional law is involved.²⁰¹ Therefore, no legal impediments prevented the Court from considering whether Michael C. had in fact invoked his rights.²⁰²

To date, few courts, state or federal, have entertained this issue.²⁰³ Three factors may combine and contribute to this myopia. First, *Miranda* emphasized the required warnings and a valid waiver as prerequisites to the admissibility of self-incriminating statements against the accused.²⁰⁴ Although the case established *per se* rules, it failed to address invocation of the right as a factual matter beyond its broad statement that the right to silence could be invoked in any manner. Second, although invocation of the right and waiver are conceptually distinct, they are temporally linked. At the point where an accused is waiving his right, he is *ipso facto* not invoking it; the converse is also true. That these occur simultaneously within the confines of a single interrogation session, however, does not preclude a prior effective invocation of the

¹⁹⁹ *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966).

²⁰⁰ See notes 62, 70 & 121 *supra*.

²⁰¹ See *Oregon v. Haas*, 420 U.S. 714, 719-20; *North Carolina v. Butler*, 441 U.S. 369 (1979). Even prior to the fifth amendment being held binding on the states, *Malloy v. Hogan*, 378 U.S. 1 (1964), the Supreme Court applied the same standard in evaluating the admissibility of confessions in state courts as in federal courts. *Miranda v. Arizona*, 384 U.S. 436, 464 n.33. See also *Haynes v. Washington*, 313 U.S. 503 (1963).

²⁰² Had the Supreme Court inquired whether Michael C. had invoked the privilege as a matter of fact, a different decision in the case might have resulted. As Justice Powell observed in his dissent, Michael C., when advised of his right to an attorney twice asked "How I know you guys won't pull no police officer in and tell me he's an attorney." 442 U.S. at 733-34. The police did not respond and made no attempt to allay his concern. *Id.* at 730 n.1. It was during this part of the interrogation that Michael C. requested his probation officer. *Id.* at 734. Moreover, Michael C.'s probation officer had not only instructed Michael C. to contact him immediately in the event of contact with the police but also "not to go and admit openly to an offense [but rather] to get some type of advice from . . . parents or a lawyer." *Id.* at 731-32. Finally, Michael C. was crying during much of the interrogation session. *Id.* at 733 n.2. Had the Court reviewed these facts in the context of whether Michael C. had invoked his right to silence as a question of fact it may well have concluded that he had. If so, his subsequent waiver would have been ineffective as a *per se* violation of *Miranda* and his incriminating statements and sketches would have been suppressed.

²⁰³ See, e.g., *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir. 1978); *People v. Riley*, 49 Ill. App. 3d 304, 364 N.E.2d 306 (1977), *cert. denied*, 435 U.S. 1000 (1978); *Chaney v. Wainwright*, 561 F.2d 1129 (5th Cir. 1977) (Goldberg, J., dissenting); *U.S. v. Riggs*, 537 F.2d 1219 (4th Cir. 1976).

²⁰⁴ *Miranda v. Arizona*, 384 U.S. 436, 444, 476, 479 (1966).

right as a matter of fact.²⁰⁵ Finally, procedurally under *Miranda* an accused raises the issue of the involuntariness of the alleged waiver on the basis of the totality of the circumstances,²⁰⁶ the same approach which the state utilizes in proving that the waiver was voluntary.²⁰⁷ Were the accused to attempt to raise the issue of invocation of the right as a factual matter, he also would use the totality of the circumstances approach.²⁰⁸ Virtually the same set of facts and circumstances, therefore, would be used in raising the issue of invocation as a matter of fact as would be used in raising the issue of and proving waiver. This similarity serves to obscure the distinction, already subtle, between invocation and waiver. These factors may explain the failure of courts to consider invocation of the privilege as a factual inquiry. That courts to date largely have not addressed the issue should not disguise its importance. A critical difference in outcome in terms of the admissibility of incriminating statements may, in many cases, lie in the focus of inquiry. Although both the inquiry into whether there was an effective waiver and the inquiry into whether there was an invocation as a matter of fact depend on a review of the totality of the circumstances, where the focus is on whether the waiver was knowing and intelligent, those factors which would tend to show invocation are submerged among all the other facts and circumstances which are evaluated in the determination. Where, however, the focus is on whether there was an invocation, those same factors which may seem of little significance in an evaluation of the waiver take on heightened saliency and relevance. Simply put, the answer obtained often may depend on the question asked.

In addition to the similarities between invocation as a factual matter and waiver which serve to obfuscate the important substantive and procedural distinctions between the two, an argument can be made that courts should be disinclined to open the avenue of invocation of the privilege under *Miranda* as a question of fact. *Miranda* was adopted in part to avoid the vagaries of case-by-case review of the voluntariness of confessions²⁰⁹ by introducing "concrete constitutional guidelines for law enforcement agencies and courts to follow."²¹⁰ Opening the issue of invocation of the privilege as a matter of fact, therefore, would be to reintroduce one of the very elements which *Miranda* was designed to avoid. This, however, ignores that pre-*Miranda* determinations of voluntariness have reappeared under *Miranda* as determinations of the validity of the waiver. Prior to *Miranda* the standard which governed the admissibility of confessions was voluntariness.²¹¹ The test by which the volun-

²⁰⁵ Where multiple interrogation sessions are involved, the validity of a waiver obtained in a session subsequent to the one in which the right to silence is initially invoked is governed by *Michigan v. Mosley*, 423 U.S. 96 (1975).

²⁰⁶ See notes 62, 70 & 121 *supra*.

²⁰⁷ *North Carolina v. Butler*, 441 U.S. 369 (1979).

²⁰⁸ See notes 62, 70 & 121 *supra*.

²⁰⁹ *Michigan v. Mosley*, 423 U.S. 96, 113 (1975) (Brennan, J., dissenting).

²¹⁰ *Miranda v. Arizona*, 384 U.S. 436, 441-42 (1966).

²¹¹ Prior to *Miranda*, the Supreme Court focused on whether the confession had been voluntarily given, holding in federal cases that confessions involuntarily obtained violated the fifth amendment. See, e.g., *Bram v. U.S.*, 168 U.S. 532, 542 (1897). The Court achieved the same result in state criminal proceedings by relying on the due

tariness of a confession was determined was that of the totality of the circumstances.²¹² *Miranda*, therefore, has imported into the determination of the validity of a waiver the same standard which was used in the pre-*Miranda* determinations of the voluntariness of a confession. The argument that inquiry into invocation of the privilege as a factual matter reintroduces undesirable subjectivity, therefore, has little force.

There are compelling reasons supporting inquiry into invocation as a question of fact. The primary reason is the express direction of *Miranda* that an individual may indicate his desire to remain silent "in any manner, at any time."²¹³ Requiring a strict verbal formula to trigger the *Miranda* protections fails to recognize, in contravention of that direction, that a suspect may signal his intent to remain silent by means which fall short of an express statement. Moreover, in some cases, at least arguably, a less than express indication of the desire to remain silent may be a direct product of the intimidating and coercive environment that *Miranda* was crafted to combat. In any event, a flexible approach to the issue of invocation is more in keeping with the broad prophylactic purpose of *Miranda* than is a requirement of a strict verbal formula. The argument may be advanced that to require police to interpret ambiguous statements or conduct would unduly hamper law enforcement efforts and would place police in the position of having to second-guess a suspect's intent. Where a suspect manifests ambiguous conduct, however, there would seem to be nothing to inhibit police from asking "clarifying" questions²¹⁴ to determine if the suspect is indicating his desire to remain silent. Several courts have already found that such police questions in the face of ambiguous statements or conduct by a suspect do not violate *Miranda*.²¹⁵ Requiring police to

process clause of the fourteenth amendment, *see, e.g.*, *Chambers v. Florida*, 309 U.S. 227, 241 (1940); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936), until 1964 when the fifth amendment privilege was held binding on the states in *Malloy v. Hogan*, 378 U.S. 1, 13 (1964).

An oft-quoted statement of the parameters of the voluntariness test appears in *Culombe v. Connecticut*, 367 U.S. 568, 601-02 (1961):

No single litmus-paper test for constitutionally impermissible interrogation has been evolved: neither extensive cross-questioning . . . ; nor undue delay in arraignment . . . ; nor failure to caution a prisoner . . . ; nor refusal to permit communication with friends and legal counsel at stages in the proceeding when the prisoner is only a suspect. . . .

Each of these factors, in company with all of the surrounding circumstances—the duration of and conditions of detention . . . , the manifest attitude of the police towards him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—is relevant. The ultimate test remains. . . . Is the confession the product of essentially free and unconstrained choice by its maker? . . . [I]f his will has been overborne and his capacity for self-determination critically impaired, the use of this confession offends due process.

Id.

²¹² See note 211 *supra*.

²¹³ *Miranda v. Arizona*, 384 U.S. 436, 441-42.

²¹⁴ *U.S. v. Chansriharaj*, 446 F. Supp. 107, 109 (S.D.N.Y. 1978); *U.S. v. Riggs*, 537 F.2d 1219, 1222 (4th Cir. 1976).

²¹⁵ *See, e.g.*, *U.S. v. Chansriharaj*, 446 F. Supp. 107, 109 (S.D.N.Y. 1978); *cf. Taylor v. Riddle*, 409 F. Supp. 631, 636 (D. Va. 1976) (question to determine whether accused's silence indicates his desire to remain silent).

clarify a suspect's intent before proceeding with substantive interrogation does not appear to be an undue burden. In addition, notions of equity and fundamental fairness would seem to support the position that because an explicit statement is not necessary to waive one's fifth amendment rights an explicit statement to invoke those rights should not be. Finally, to require particular conduct or a strict verbal formula to invoke the safeguards which *Miranda* harbors would protect from the coercion of custodial interrogation, if anyone, only the experienced and knowledgeable accused while leaving the inexperienced accused, the one most in need of the preventive purpose and protection of *Miranda*, unaided.

In *Fare v. Michael C.* the Court rejected a perceived attempt to create additional *per se* invocation rules or to broaden the existing ones to include less explicit statements or conduct. The Court's decision, however, may be read as effectively rejecting examination of invocation of the privilege as a matter of fact. Not only the majority but also both dissents by-passed inquiry into this issue. While this collective omission from consideration of invocation as a matter of fact may have been the result of failure to recognize the issue,²¹⁶ it is also possible that this omission signals the Court's unwillingness to open the issue of invocation as a factual question. If the latter is the explanation, *Fare v. Michael C.* represents a further narrowing of the protections announced in *Miranda*²¹⁷ by limiting the accused's means of invoking the fifth amendment privilege to those of requesting an attorney, explicitly asserting

²¹⁶ See text at notes 203-10 *supra*.

²¹⁷ In *Harris v. New York*, 401 U.S. 222 (1971), the Court allowed the use of statements obtained in violation of *Miranda* to be used for impeachment purposes if the accused testified in his own behalf. *Accord*, *Oregon v. Haas*, 420 U.S. 714 (1975). *But see* *Mincey v. Arizona*, 437 U.S. 385 (1978). This decision was made despite the *Miranda* Court's directive that statements so obtained not be used for any purpose. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966). In *Michigan v. Tucker*, 417 U.S. 433 (1974), decided on non-*Miranda* grounds, the Court suggested that technical errors or omissions in the giving of *Miranda* warnings may not require the exclusion from evidence of resulting statements in the absence of willful or negligent police conduct. *Id.* at 447. This suggestion directly contravenes the Court's express statements in *Miranda* that the giving of the required warnings is a prerequisite to the admission into evidence of self-incriminating admissions against the accused. *Miranda v. Arizona*, 384 U.S. 436, 444, 479 (1966). In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Court held that the admissibility of statements obtained as a result of custodial interrogation in a session subsequent to one in which the accused initially invoked the right to silence depends on whether the accused's right to cut off questioning was "scrupulously honored" and the circumstances surrounding the renewed interrogation. *Id.* at 104. *Miranda*, however, implicitly required that all interrogation cease, or alternatively, that interrogation not be renewed until an attorney is present. *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966). In *Oregon v. Mathiason*, 429 U.S. 492 (1977), the Court held that all police interrogation is not custodial interrogation requiring that the suspect be advised of his rights. *Id.* at 494-95. *See* *Beckwith v. United States*, 425 U.S. 341 (1976). *Beckwith* and *Mathiason* taken together with *Orozco v. Texas*, 394 U.S. 324 (1969) (defendant arrested and questioned in his bedroom) seem to require arrest as an antecedent to the giving of the *Miranda* warnings. The *Miranda* Court instructed, however, that the warnings be given not only when the individual is in custody but also when he is "otherwise deprived of his freedom in any significant way. . . ." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

the privilege or simply refusing to make any statement at all. There is some explicit language in the majority opinion to that effect. The Court stated:

We conclude . . . that whether statements obtained during subsequent interrogation of a juvenile who has asked to see his probation officer, *but who has not asked to consult with an attorney or expressly asserted his right to remain silent*, are admissible on the basis of waiver remains a question to be resolved on the totality of circumstances surrounding interrogation. . . .²¹⁸

If the Court believes that it is not unreasonable to require that juveniles, towards whom it has had an historically protective attitude,²¹⁹ explicitly request a lawyer or expressly state a desire to remain silent, there can be no doubt that it would accept no less from an adult accused.

CONCLUSION

In *Fare v. Michael C.* the Supreme Court held that a minor's request for his probation officer during custodial interrogation is not a *per se* invocation of his rights requiring the termination of police questioning under *Miranda*. In declining to adopt a *per se* rule, the Court explicitly affirmed the *Miranda* totality of the circumstances approach to the determination of waiver as providing sufficient protection of the rights of juveniles during custodial interrogation.

The importance of the Court's decision lies in the possibility that the Court may be signaling an inclination to require that a suspect explicitly state that he wishes to remain silent or to consult with an attorney in order to trigger the protective device of *Miranda* that interrogation cease. On this reading of *Fare v. Michael C.*, its effect within the context of a single interrogation session would be to allow police questioning to continue where a suspect's statements or conduct falls short of an unambiguous announcement of his intent to remain silent. The admissibility of resulting statements would be judged not on whether the accused's statements or conduct were reasonably indicative, as a factual matter, of an intent to remain silent but rather on the validity of the subsequent waiver. It has been suggested that divergent conclusions on admissibility often may depend on whether the focus of inquiry is on invocation or waiver. Unfortunately, because the Court did not explicitly hold that express statements will now be required, the law regarding the available means of invoking the privilege under *Miranda* remains unsettled.

PATRICIA A. ASACK

²¹⁸ 442 U.S. at 728 (emphasis added).

²¹⁹ See cases cited at note 175 *supra*.