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A Proposal to Strengthen Juvenile "Miranda" Rights: Requiring Parental Presence in Custodial Interrogations

Robert E. McGuire

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I. INTRODUCTION

On October 31, 1997, eleven-year-old Nathaniel Abraham was at school and enjoying Halloween with his grade school classmates. The festivities ended, however, when members of the Pontiac, Michigan police department entered the classroom and arrested Nathaniel for first degree murder. Two days before, on October 29, eighteen-year-old Ronnie Lee Greene was walking out of a convenience store in Pontiac when a .22 caliber bullet struck him in the head and killed him.[1] Police suspected Nathaniel who, at the time of his arrest, had

1. *See* Randi Goldberg, *11-year-old Boy Ordered Tried as Adult in Sniper Slaying*, DET. NEWS, Nov. 15, 1997, at A1.

over twenty encounters with law enforcement.[2] Once in custody, Nathaniel eventually confessed to shooting Greene and signed a form waiving both his right to remain silent and his right to have his attorney present during questioning.[3] Prior to trial, however, Family Court Judge Eugene Arthur Moore barred the confession as inadmissible at trial, finding that Nathanial was unable to understand the *Miranda* rights as they were read to him.[4] The court relied on psychological evaluations that placed twelve-year-old Nathaniel's mental and emotional level at that of a six or an eight year old.[5] On April 1, 1998, the Michigan Court of Appeals reversed, finding that the confession was in fact admissible in court.[6]

After the appellate court's decision, Nathaniel's trial proceeded and received heavy coverage not only in Michigan but nationally as well.[7] During the trial, news cameras followed the 4'9", sixty-five pound boy in and out of Michigan courtrooms.[8] In the fall of 1999, a jury convicted Nathaniel Abraham of first degree murder, making him one of the youngest people convicted of murder in the history of the United States.[9] Amid the publicity stemming from the murder trial,

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2. *See id.*

3. *See id.*

4. *See* James A. McClear, *Murder Confession Thrown Out: Judge Says Nathaniel Abraham, 12, Wasn't Clear on Rights During Pontiac Investigation*, DET. NEWS, May 8, 1998, at C1.

5. *See id.* (" 'I'm satisfied he did not know the meaning of the statements [made to police about the crime],' the judge declared, 'or understand the consequences of what he said.' ").

6. *See* Mike Martindale, *Court Allows Boy's Statement: Ruling Strengthens Case Against Accused Killer, Who was 11*, DET. NEWS, Apr. 2, 1999, at C4. An emergency appeal to the Supreme Court was denied by Justice John Paul Stevens. *See* Mark Truby, *High Court Deals Boy Setback: Statements He Made to Police After Arrest can be Used in Youngest Murder Suspect's Trial*, DET. NEWS, Oct. 1, 1999, at C4.

7. Geoffrey Fieiger, the recent Democratic nominee for Governor of Michigan and nationally-known defense attorney for clients such as Dr. Jack Kevorkian, joined Nathaniel's defense team at trial. *See* Oralandar Brand-Williams & Mark Truby, *Feiger Bursts in to Teen's Defense: Controversial Attorney could Change Course of 13-year-old's Murder Trial Experts Say*, DET. NEWS, Oct. 20, 1999, at A1. Geraldo, Good Morning America, 20-20, Court TV and newspapers in Singapore and France covered the case. *See* Ron French & Kim Kozlowski, *Does Nate Understand Plight?: While a Courtroom Full of Lawyers Debate, Accused Teen asks, "When do I Get to go Home?"*, DET. NEWS, Oct. 22, 1999, at A1. Ed Bradley interviewed him on 60 Minutes. *See* Tim Kiska et al., *The System Failed Him*, DET. NEWS, Nov. 5, 1999, at A1. Bradley later commented on his impression of Nathaniel Abraham, " 'I was left with the fact that he's still a kid. He's 13 years old. And not a very mature 13-year-old.' " *See id.*

8. *See* French & Kozlowski, *supra* note 7, at A1.

9. *See Jury Finds Abraham Guilty of Second-Degree Murder*, DET. NEWS, Nov. 16, 1999, at C1. The recent killing of six-year-old Kayla Rolland by a first grade classmate could have broken this dubious record. *See* Peter Slevin & William Claiborne, *1st-Grader Shoots Classmate to Death*, WASH. POST, Mar. 1, 2000, at A1. Authorities, however, did not charge the six-year-old shooter, but rather charged the owner of the gun with manslaughter. *See* William Claiborne, *Man Charged in Schoolgirl's Slaying*, WASH. POST, Mar. 3, 2000, at A3. The Kayla Rolland kill-

jurists, attorneys and commentators have begun to re-examine the juvenile criminal law system and the constitutional rights afforded juveniles in that system.

One of the constitutional rights afforded juveniles and adults alike is the Fifth Amendment right against compelled self-incrimination.[10] The constitutional protections afforded citizens in custodial interrogations were described by the Supreme Court in the landmark case of *Miranda v. Arizona*.[11] One year later, the Court held in *In re Gault* that juveniles are entitled to the same constitutional protections as adults in custodial interrogations.[12] The Court's decision in *Gault* followed decisions in *Haley v. Ohio*[13] and *Gallegos v. Colorado*[14] in which the Court recognized that juveniles in custody need at least the same constitutional protections that adults enjoy and possibly more.

The Court deviated from this trend of evaluating juvenile constitutional rights with a view towards enhanced Fifth Amendment protection in *Fare v. Michael C.*[15] In *Fare*, the Court held that a juvenile's request to see his probation officer was not necessarily an invocation of his Fifth Amendment rights under *Miranda* and that the voluntariness of a juvenile's confession must be evaluated using a "totality of the circumstances" test.[16] A problematic side effect of the test is that court officials and police officers who are often untrained in even basic psychology must engage in a psychological evaluation of the

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ing is only the latest example of violent action taken by juveniles, much of which ends in criminal prosecution. *See id.*

10. *See* U.S. CONST. amend. V.

11. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) (holding that a person in police custody "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 . . . an attorney, either retained or appointed" in order to counteract the inherently coercive environment of the stationhouse). A custodial interrogation is the questioning of a defendant that takes place while the defendant is in police custody. *See id.* at 444.

12. *In re* Gault, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment, nor the Bill of Rights is for adults alone.").

13. Haley v. Ohio, 332 U.S. 596, 597-98, 601 (1948) (holding that a juvenile's confession was inadmissible because the juvenile did not have access to anyone during his interrogation which lasted for five hours, and there was some evidence the child bad been physically abused).

14. Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (holding that, because a juvenile did not have any access to an adult, he did not understand his rights, and his confession was therefore obtained involuntarily).

15. Fare v. Michael C., 442 U.S. 707, 725 (1979) (holding that the voluntariness of a juvenile confession needs to be evaluated by a "totality-of-the-circumstances" test).

16. *Id.* at 727-28. The "totality of the circumstances" test "includes an evaluation of the juvenile's age, experience, education, background, and intelligence and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Id.* at 725.

juvenile to fulfill the ends of the test.[17] *Fare* muddied the constitutional waters for juveniles in custody and for law-enforcement officials. The "totality of the circumstances" test the Court urged in *Fare* was intentionally subjective[18] and leaves the various states to come up with their own formulations of the rule.

As one would expect, the way states have dealt with the constitutional mandates handed down by the Supreme Court has varied widely.[19] On one end of the spectrum are states that have decided that a juvenile's rights against compelled self-incrimination can be protected only by the presence of an "interested adult".[20]

In the middle of the spectrum are those states which follow *Fare*, but also address *Miranda*'s concern that the juvenile be effectively apprised of his rights.[21] Courts in these states have ruled that the absence of a parent or guardian during a custodial interrogation can in some circumstances render a confession involuntary and inadmissible.[22]

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17. Obviously, practicality demands that someone make a decision about these matters. This Note argues that police and courts should turn to the most immediately qualified person to make such decisions: the parents or guardian of a juvenile.

18. *Fare*, 442 U.S. at 725; *see also supra* note 16.

19. *Compare In re* E.T.C., Juvenile, 449 A.2d 937, 940 (Vt. 1982) (holding that a juvenile's confession taken in the absence of his parent was involuntary and therefore should be suppressed as violative of the Fifth Amendment), *with* Commonwealth v. Williams, 475 A.2d 1283, 1288 (Pa. 1985) (holding that a juvenile's confession made in the absence of his parent was voluntary in the totality of the circumstances).

20. *See, e.g.*, Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983) (holding that, in order for the Commonwealth to prove a juvenile voluntarily and knowingly waived his rights against compelled self-incrimination, a parent or interested adult must be present); State v. Fincher, 305 S.E.2d 685, 692 (N.C. 1983) (holding that the defendant did not knowingly waive his self-incrimination rights because he was not informed he had a right for a parent or guardian to be present); E.T.C., 449 A.2d at 940 (holding that a juvenile cannot waive his rights against compelled self-incrimination without the presence of an interested adult). An "interested adult" has been defined as "an informed parent, or person standing in loco parentis." A Juvenile, 449 N.E.2d at 657.

21. *See, e.g., In re* LaShun H. 672 N.E.2d 331, 339 (Ill. App. Ct. 1996) (holding that, in the totality of the circumstances, the absence of a juvenile suspect's parents rendered the juvenile's confession involuntary); People v. Smith, 630 N.E.2d 1068, 1084 (Ill. App. Ct. 1994) (holding that the absence of juvenile's parent during his confession did not make his statement involuntary and thus inadmissible). For a fuller discussion of these cases, see *infra* note 22.

22. *See LaShun H.* 672 N.E.2d at 339. The Illinois appellate court's holding in *In re LaShun H.*—that a juvenile's confession was involuntary because of the absence of his parent—was a rare finding of involuntariness in a state that applies the *Fare* test. *Id.* at 339. Research yields only a few of these kinds of cases. The rarity of this finding is instructive in that it shows how the *Fare* test, intended to provide judges more flexibility in considering juvenile confessions, has been applied rigidly and allows juvenile confessions in all but the rarest of circumstances. An unfortunate side effect coming from those states, however, is that different defendants in similar circumstances have had their confessions ruled voluntary and admissible. This could result in one's Fifth Amendment rights being affected largely by the jurisdiction within which one was arrested. *See Smith*, 630 N.E.2d at 1084. The *People v. Smith* case was decided in the First Dis-

Finally, in the majority of states in which *Fare*'s totality of the circumstances analysis is applied, a juvenile defendant will almost always lose any subsequent motion to suppress a confession based on the absence of a parent or guardian.[23] In these states, the kinds of facts that would result in a holding of involuntariness would be so egregious that it stretches the imagination to think they could ever possibly occur. For example, it is likely these states would suppress a confession obtained by police brutality.[24] Consequently, juveniles are often interrogated without a parent or guardian present, and even the youngest defendants have been held to have "voluntarily" waived the constitutional rights.[25]

This Note recommends a new approach towards juvenile custodial interrogations that would resolve the problems inherent in the application of current constitutional mandates and allow police officers, judges and attorneys to mark their behavior consistent with the Constitution. More importantly, it would secure a greater protection for juvenile constitutional rights in custodial interrogations. In cases where a juvenile is arrested on suspicion of a felony, the police should inform the child, in addition to the *Miranda* warnings mandated by *Gault*, that he has the right to have a parent or guardian with him during questioning. The police should then not interrogate that juvenile until the juvenile's parent, guardian or legal counsel is present with the juvenile in the interrogation room. Any confession obtained in contravention of these procedures would be inadmissible at trial.

Part II of this Note will discuss the constitutional framework of juvenile constitutional rights in custodial interrogation settings. Part III of this Note will then describe how individual states have ap-

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trict of the Sixth Division of the Appellate Court of Illinois. *Id.* at 1068. The *LaShun H.* case was decided in the First District of the Fifth Division of the Appellate Court of Illinois. *LaShun*, 672 N.E.2d at 331.

23. *See, e.g.*, State v. Scholtz, 791 P.2d 1070, 1072 (Ariz. Ct. App. 1990); People v. Bonnie H., 56 Cal. App. 4th 563, 577-79 (Cal. Ct. App. 1997); W.M. v. State, 585 So. 2d 979, 983 (Fla. Dist. Ct. App. 1991); People v. Givans, 575 N.W.2d 84, 89 (Mich. Ct. App. 1997); State v. Jones, 566 N.W.2d 317, 325-26 (Minn. 1997); Commonwealth v. Williams, 475 A.2d 1283, 1288 (Pa. 1984).

24. *See In re* N.L., 711 A.2d 518, 519, 523 (Pa. 1998) (holding that a juvenile defendant who initially invoked his right to silence and then spoke to police on immediato re-questioning could not suppress his statement to police). In *In re N.L.* a fourteen year old initially teld police that he wished to remain silent. *Id.* at 519. After a few minutes he was asked if he wanted to talk and said that he did and confessed. *See id.* His confession led to his conviction on sexual assault charges. *See id.* However, at least one court has held that the totality test would not necessarily mandato suppression of the confession of a juvenile who initially invoked his *Miranda* rights but confessed on re-questioning after a short interval.

25. *See W.M.*, 585 So. 2d at 983 (holding that a ten year old's confession was voluntarily given, in the totality of the circumstances, even in the absence of the juvenile's parent or guardian).

plied the Supreme Court's opinions concerning juvenile constitutional rights during police interrogation. In Part IV, this Note will discuss a proposal that would more fully effectuate the Supreme Court's decisions regarding juvenile constitutional rights by requiring an adult's certification that a child's decision to speak with police is voluntary.

In conclusion, this Note recognizes that more and more juveniles like Nathaniel Abraham are being charged with increasingly publicized and horrific crimes like murder and rape.[26] In light of this increased volume of juvenile felony cases, this Note argues that constitutional safeguards must be tailored to the specific characteristics of children in order to ensure that their constitutional rights are protected at the same level as adults.

II. CONSTITUTIONAL FRAMEWORK

To understand the necessity for the presence of a parent or guardian during juvenile questioning, one must understand how various states have grappled with the problem. While the Supreme Court has rarely spoken regarding the rights of juveniles in custody, the holdings of the Court provide a starting point for an examination of juvenile constitutional rights.[27] First, the Court acted to curtail abuses in all custodial interrogations, not simply those of juveniles, with its landmark decision in *Miranda v. Arizona*.[28] Second, the Court has recognized that juveniles in custody need more protection than do

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26. In 1997, law enforcement agencies made an estimated 2.8 million juvenile arrests. *See* Howard Synder, *Estimated Number of Juvenile Arrests, 1997*, OJJDP STATISTICAL BRIEFING BOOK (visited Jan. 6, 2000), <http://ojjdp.ncjrs.org/ojstabb/qa001.html>. Of those arrests, over 123,000 were for murder, non-negligent manslaughter, forcible rape, robbery, or aggravated assault. *See id.* Of all the juvenile arrests for violent crimes, an estimated 30% of those juveniles arrested were under the age of fifteen. *See id.* The number of juvenile arrests for violent crimes increased around 49% from 1988 to 1997. *See id.* Overall, nine out of ten juvenile convictions in criminal court were for felony charges. *See id.* at 5. The number of juveniles charged with murder grew every year from 1984 to 1994 before declining slightly in 1995. *See* Howard Synder, *Murders Known to Involve Juvenile Offenders, 1980-1995*, OJJDP STATISTICAL BRIEFING BOOK (visited Jan. 6, 2000) <http://www.ncjrs.org/ojjdp/ojstatbb/qa051>. Some 823 juveniles were charged with murder in 1984. *See id.* That number rose as high as 2,317 in 1994 before receding to 1,932 in 1995. *See id.*

27. *See In re* Gault, 387 U.S. 1, 13 (1967) (noting that the Bill of Rights applies to juveniles); Gallegos v. Colorado, 370 U.S. 50, 53 (1962) (noting that the young age of the petitioner weighs into considerations of the voluntariness of his confession); Haley v. Ohio, 332 U.S. 596, 599-600 (1948) (holding that a juvenile deserves at least as much constitutional protection in police interrogations as an adult).

28. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that warnings must be given to suspects to prevent police overarching in questioning).

adults.[29] Finally, the Court slowed its expansion of the protections laid out in *Miranda* and juvenile decisions prior to *Miranda*. In *Fare v. Michael C.* the Court held that a juvenile's invocation of their Fifth Amendment rights could not be made by simply asking for a parent for such a rule would make invocation too easy.[30]

A. *Before* Miranda: *Protecting the "Lad of Tender Years"*

1. *Haley v. Ohio*

Around midnight on October 19, 1945, fifteen-year-old John Harvey Haley was awakened from his bed and brought to the Canton, Ohio police station for questioning about a robbery and murder.[31] Police questioned Haley for five straight hours that night, and he signed a confession around 6:30 A.M.[32] He was then held incommunicado for three days and neither his attorney nor his mother was allowed to see him.[33]

Haley's case gave the Supreme Court its first chance to evaluate the conduct of the police during custodial interrogations of juveniles. The Court reacted against the heavy-handed methods used to extract Haley's confession.[34] Specifically, the Court cited Haley's age, the number of hours that he was "grilled," the intensity of his questioning and the fact that he had "no friend or counsel to advise him."[35] The Court also noted the "callous attitude of the police towards [Haley's] rights."[36] The Court was convinced that "this was a confession

29. *See Gallegos*, 370 U.S. at 54 ("[The teenage suspect] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."); *Haley*, 332 U.S. at 599-600 ("We cannot believe that a lad of tender years is a match for the police in such a contest [as custodial interrogation].").

30. Fare v. Michael C., 442 U.S. 707, 723 (1979) (holding that the *Miranda* per se rule should not be expanded due to the risk of making the standard too broad and too easily applied). The *Fare* Court refers to the *Miranda* per se rule: that a request for an attorney will be treated as a per se invocation of one's Fifth Amendment rights will have the same constitutional force as an assertion of one's right to silence. *Id.*

31. *See Haley*, 332 U.S. at 597.

32. *See id.* at 598.

33. *See id.* Haley was not totally without visitors. A newspaper photographer was allowed into the stationhouse to take his picture shortly after his confession—five days before his mother would be allowed to see him. *See id.* When Haley's mother finally saw him, he was bruised and skinned in several places. *See id.* at 597.

34. *See id.* at 601. Justice William O. Douglas wrote for the Court in *Haley*, as he would in *Gallegos v. Colorado*, a later case concerning juvenile custodial interrogation. *Gallegos*, 370 U.S. at 49.

35. *Haley*, 332 U.S. at 600-01.

36. *Id.*

wrung from a child by means which the law should not sanction."[37] Fundamental for the purpose of this Note was the Court's recognition that Haley should have received different treatment because of his young age and because he was, as the Court put it, "an easy victim of the law."[38]

The majority first cited the obvious differences between the maturity of a grown adult and that of a juvenile, noting that "[a]ge 15 is a tender and difficult age for any boy of any race. He cannot be judged by more exacting standards of maturity."[39] The majority then noted that juveniles, because of their age and immaturity, are more easily manipulated by authority figures and, thus, more likely to confess.[40] The Court questioned whether juveniles, facing the questions of police alone in the intimidating confines of the stationhouse, could ever hope to be a fair match for the officers they faced.[41] The majority found that the sheer weight of the state's investigatory power, when placed squarely on the chest of a fifteen-year-old boy, required that someone be with the boy to help bear that burden.[42]

The opinion in *Haley* makes much of the fact that no adult friend or counselor was with young Haley during his questioning.[43] The Court also questioned how the police could claim that their interrogation was "conducted in a fair and dispassionate manner" when "[a] photographer was admitted [to see Haley] at once; but his closest friend—his mother—was not allowed to see him for over five days after his arrest."[44] That the majority focused so prominently on the absence of Haley's mother from his interrogation indicates that the Court believed that John Haley needed more than legal counsel in order to have the benefit of his full constitutional rights.[45] The lack of additional support from someone other than legal counsel, coupled with the exposure of a "lad of tender years" to intense police ques-

37. *Id.* at 601.

38. *Id.* at 599 ("What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used.").

39. *Id.*

40. *See id.* ("A 15 year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition.")

41. *See id.* at 599-600. ("We cannot believe that a lad of tender years is a match for the police in such a contest.").

42. *See id.* at 600. ("[The juvenile in custody] needs counsel and support if he is not to become the victim first of fear, then of panic.").

43. *Id.* ("No friend stood at the side of this 15-year old boy.... No lawyer stood guard....").

44. *Id.*

45. *See id.*

tioning, was a major factor in leading the Court to overturn Haley's conviction and throw out his confession.[46]

2. *Gallegos v. Colorado*

Nearly fifteen years later, the Supreme Court revisited the subject of juvenile custodial interrogations in *Gallegos v. Colorado*.[47] The facts in *Gallegos* were similar to those in *Haley*;[48] police arrested the fourteen-year-old petitioner on suspicion of robbery and assault and held him for five days.[49] During this time, he was not allowed to see a lawyer, parent or other interested adult before he signed a confession.[50] The *Gallegos* Court[51] recognized the similarity to the *Haley* case, yet the majority conceded that there were differences between the two cases; in *Haley*[52] the detention was shorter and there was no evidence of physical abuse of the suspect.[53] The Court's reasoning and analysis in *Gallegos* also differed from that in *Haley*; the *Gallegos* Court developed a "totality of the circumstances" test for determining the validity of a juvenile's waiver of the Fifth Amendment.[54] On the facts of the case, however, the Court found that the circumstances surrounding Gallegos' interrogation necessarily barred his confession and the Court reversed his convictions.[55]

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46. *Id.* at 599-601. The Court noted that the juvenile in custody "needs *someone on whom to lean* lest the overpowering presence of the law, as he knows it, may not crush him." *Id.* at 600 (emphasis added).

47. Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (holding that a juvenile needs some kind of adult protection while being interrogated).

48. For a discussion of Haley's incarceration and interrogation, see *supra* notes 31-33 and accompanying text.

49. *See Gallegos*, 370 U.S. at 50.

50. *See id.* The victim of Gallegos' alleged assault later died from his injuries and Gallegos was charged by information with first degree murder. *See id.* As in *Haley*, the juvenile's mother attempted to see her son but was denied by the police. *See id.*; *see also supra* note 33.

51. The majority opinion in *Gallegos* was written by Justice Douglas—the same justice who wrote the decision in *Haley*. *Gallegos*, 370 U.S. at 49.

52. Haley v. Ohio, 332 U.S. 596, 596 (1948).

53. *See id.* at 597-98.

54. *Gallegos*, 370 U.S. at 55. *See also infra* note 55 (describing the *Gallegos* totality test).

55. *See Gallegos*, 370 U.S. at 55. Interestingly, the *Gallegos* Court's description of the "totality of the circumstances" test did not at all resemble the test later laid down by *Fare*. While the *Gallegos* test focused on the conduct of the police, the *Fare* test focuses on the comprehension of the juvenile. *Compare Gallegos*, 370 U.S. at 55 ("There is no guide to the decision of cases such as this, except the tetality of circumstances that bear on the two factors we have mentioned. The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, *the failure to see to it that he had the advice of a lawyer or friend*—all these combine to make us conclude that the formal confession on which this conviction may have rested was obtained in violation of due process.") (emphasis added), *with* Fare v. Michael C., 442 U.S. 707, 725 (1979) ("[The tetality of the circumstances test] includes evaluation of the juvenile's age, experience, education, background, and intelli-

On the other hand, the Court identified what made the cases so similar; during Gallegos's detention, his mother attempted to see him and was denied access by the police.[56] Nor was Gallegos allowed to see any "lawyer or adult advisor" during his custodial interrogation.[57] The absence of a "lawyer or adult advisor," the Court stated, gave "the case an ominous cast."[58] If the Court had simply been worried about Gallegos's lack of counsel it could have simply couched its discussion in those terms. But *Gallegos* is not simply a "right to counsel" case; the Court's focus was on the fact that Gallegos, a fourteen year-old boy, was alone during his interrogation on serious charges.[59] A juvenile's lack of intellectual ability to weather police questioning without additional support—which the Court indicated could have come from an "adult advisor" as well as a lawyer—was a crucial point in the *Gallegos* case.[60]

In *Gallegos*, the majority reiterated the fundamental point it made in *Haley*—that a juvenile's ability to cope with the custodial environment is necessarily limited by the juvenile's immaturity.[61] But the *Gallegos* Court made the point with more force. The majority held that a juvenile cannot possibly be compared with an average adult in his ability to comprehend his surroundings and the consequences of his actions.[62] Because of this, the majority reasoned that *"without the aid of more mature judgment"* as to what the juvenile should do, he will be hopelessly coerced by the nature of his environment.[63]

The *Gallegos* Court also noted that it was constitutionally irrelevant that Gallegos had not asked for a lawyer or for his parents, a position that the prosecution apparently stressed before the Court.[64] The Court recognized that a juvenile in custody might have difficulty

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gence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.").

56. *See Gallegos*, 370 U.S. at 50 (describing the circumstances of Gallegos's time in custody).

57. *Id.* at 54.

58. *Id.*

59. *Id.* ("Adult advice would have put him on a less unequal footing with his interrogator . . . ."). The Court does not say "legal counsel" or "an attorney" would have placed the boy on a more equal footing with police but rather the Court says that any adult advice would have helped. *See id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* (emphasis added).

64. *Gallegos*, 370 U.S. at 54 ("The prosecution says the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14 year old boy, no matter how sophisticatod, is unlikely to have any conception of what will confront him when he is made accessible only to the police.").

articulating his concerns or fears to a lawyer.[65] The juvenile's youth and immaturity, the Court feared, would thus render him helpless to assert his rights.[66] But placing a parent or guardian with the juvenile during this interrogation—an idea supported by both the *Haley*[67] and *Gallegos*[68] Courts—compensates for the juvenile's inability to adequately assert his constitutional rights.[69] The majority focused on the presence of an interested adult as an appropriate addition to other protections as a cure to abuses in juvenile interrogation.[70]

B. Miranda *and* Gault*: Protections For Those in Custody, Including Juveniles*

1. *Miranda v. Arizona*

The Supreme Court took up the constitutional questions regarding custodial interrogations for adults in *Miranda v. Arizona.*[71] The Court offered examples of subtle and non-violent police interrogation tactics desigued to overpower a suspect's will and induce confessions which violated a suspect's Fifth Amendment rights.[72] The majority focused almost entirely on the inherently coercive atmosphere of the stationhouse and the police tactics of interrogation as its basis for creating a series of safeguards to prevent involuntary confessions.[73] The Court offered as a remedy for coercive nature of the custodial environment a requirement that police inform suspects of their constitu-

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65. *See id.* ("That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.").

66. *See id.*

67. Haley v. Ohio, 332 U.S. 596, 600 (1948) (holding that the absence of the boys mother was a large factor in ruling his confession was not voluntary).

68. *Gallegos*, 370 U.S. at 54 ("Adult advice would have put him on a less unequal footing with his interrogators").

69. For a discussion regarding the Court's statements on the necessity of adult advice in a custodial interrogation setting, see *infra* notes 74-75 and accompanying text.

70. *See Gallegos*, 370 U.S. at 54 ("[A]n adult relative or friend could have given the petitioner the protection which his own immaturity could not . . . . Without some adult protection against this inequality, a 14 year old boy would not be able to know, let alone assert, such constitutional rights as he had.").

71. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that a suspect in custody must be advised of their rights before police interrogation).

72. *See id.* at 448-50 (outlining police procedures for interrogation that include putting the suspect in unfamiliar confines, displaying confidence in the suspect's guilt and minimizing the moral seriousness of the offense).

73. *See id.* at 456 ("[W]e concern ourselves primarily with this interrogation atmosphere and the evils it can bring.").

tional rights with regard to the interrogation.[74] If the police apprised the suspects of their constitutional rights, the Court reasoned, the coercive nature of the interrogation itself would be lessened.[75]

The Court made clear that the pressures of interrogation were combated only if the accused was "adequately and effectively apprised of his rights."[76] The majority, however, did not clarify the extent to which the accused had to be "adequately and effectively" apprised in order to satisfy constitutional requirements.[77] The Court seemingly wanted to convey to police officers that it was not enough merely to read a suspect his rights; rather, the suspect had to understand those rights in order to give them force.[78] The Court pointed out that in order to ensure that the suspect understood the rights as read to him, a police officer might have to more fully explain their meaning.[79] Though the majority stressed that the warnings had to be understood by the accused, the Court ultimately based its decision on one fundamental assumption—that in informing the suspect of his rights, the suspect will understand his rights and assert or waive them voluntarily.[80] Yet the majority did not contemplate the use of the warnings—or their near lack of usefulness—in a situation where the accused is unable to understand them due to a lack of maturity or sufficient cognitive development.[81]

The majority in *Miranda*, however, left the door open to methods that would expand upon its decision and allow for suspects in custody to receive more comprehensive information regarding their con-

74. *See id.* at 444. The warnings police must give include the suspect's right to remain silent, that any evidence given can be used against the suspect, and that the suspect has a right to counsel being present with him during questioning. *See id.*

75. *See id.* at 469 ("[A] warning at the time of interrogation is indispensable to overcome its pressures and insure that the individual knows he is free to exercise the privilege at that point in time.").

76. *Id.* at 467.

77. *See id.*

78. *See id.*

79. *See id.* at 473.

80. *See id.* at 468-69 ("The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.") Consider, however, the "totality of circumstances" test offered by the *Fare* court that is concerned entirely with the "speculation" cautioned against by this passage. *See supra* note 16 (outlining the "totality of the circumstances" test in *Fare*).

81. *See Miranda*, 384 U.S. at 468-69; *see also infra* noto 82 (discussing the absence of this idea).

stitutional rights.[82] The *Miranda* Court intimated that the decision should be a starting point in informing suspects of their constitutional rights and not a guarantee of those rights themselves.[83] Any policy designed to ensure juvenile understanding would be consistent with *Miranda.*

2. *Miranda*'s Application to Adults with Mental Incapacity

The way in which some courts have evaluated a *Miranda* waiver when an adult defendant has a mental defect or is of subordinate intelligence provides an example of how courts ascribe more protection to adults with insufficient cognitive development to intelligently waive their *Miranda* rights.[84] Adults with a mental defect or subnormal intelligence are similar to juveniles from a legal standpoint because of their limited cognitive ability.[85] As such, how courts treat these individuals provides a helpful model for analyzing juvenile *Miranda* rights. Several courts have indicated that when a person's cognitive ability is low, the corresponding constitutional protections should be high.[86]

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82. *Id.* at 478-79 ("Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required."). The Court is currently considering whether other means that have been adopted by Congress would better effectuate the Constitution's purpose on this issue. *See* Dickerson v. United States, 166 F.3d 667 (4th Cir. 1999) *cert. granted* 120 S. Ct. 578 (1999). In *Dickerson v. United States*—on which the Court heard oral arguments in early December, 1999—the Court considered a federal statute passed shortly after *Miranda* which would make all confessions voluntary, with or without warnings, unless the defendant could show that he was coerced by the government. *Id.* If the Court affirms the Fourth Circuit, the resulting effect on juvenile law is unclear. Since it is a federal law under consideration, presumably the decision would affect only those arrested by federal officers. Since most juvenile offenders are arrested at the state level, this would have little effect on them; and this proposal articulated in this Note would remain a viable option. If the Court was to interpret *Dickerson* more widely, and freed the states from the *Miranda* ruling, the likelihood of juvenile self-incrimination would increase. In any event, the Court's ruling in *Dickerson* would affect the overall constitutional framework of juvenile rights.

83. *Miranda*, 384 U.S. at 478-79 (noting that any subsequent proposal regarding the warnings needs to at least encompass the basic constitutional protections outlined by the *Miranda* decision).

84. *See* Charles C. Marvel, Annotation, *Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession*, 8 A.L.R.4th 16, 24-25 (1981).

85. *See id.* at 28. This is not to say, however, that juvenile cognition is the same as the cognition of the mentally retarded, for example. The point of this analysis is not to compare juvenile cognition to cognition of those with subnormal intelligence from a medical or psychological perspective. Rather, for the purposes of this Note, it is the legal treatment of these individuals and how courts approach the *Miranda* guarantees with respect to these individuals that is instructive.

86. *See, e.g.* Smith v. Zant, 855 F.2d 712, 719 (11th Cir. 1988) *rev'd on other grounds*, 887 F.2d 1407, 1418 (11th Cir. 1989) (en banc) (holding that a defendant with a definite mental de-

The Supreme Court has held that an evaluation of the validity of a waiver of one's Fifth Amendment protections has "two distinct dimensions."[87] The first dimension of a proper waiver is that the waiver must be voluntary and free from police intimidation or coercion.[88] The Court expanded on this first dimension of a proper waiver in *Colorado v. Connelly*.[89] In *Connelly*, the Court held that mental illness (specifically "hearing voices") could not serve as a compulsion that would invalidate *Miranda* waiver free of police instigated coercion.[90]

The second dimension of a proper waiver is that the waiver must be intelligently made with a full knowledge of the consequences of the waiver.[91] The Supreme Court has not expanded on this aspect of the analysis other than to acknowledge that it exists.[92]

Several lower courts have followed the Supreme Court's lead and held that a *Miranda* waiver is invalid if the defendant is mentally retarded or has below average intelligence.[93] In doing so, lower courts have reasoned that these defendants need more protection than the average defendant because of their limited mental ability.[94] In *Smith v. Zant*, for example, the Eleventh Circuit found that a defendant was mentally retarded and that his mental defect prevented him from making a knowing and intelligent *Miranda* waiver.[95] The *Smith* case

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fect—mental retardation—could not make an intelligent *Miranda* waiver and, as such, deserved more protection from police coercion).

87. Moran v. Burbine, 475 U.S. 412, 421 (describing that a valid waiver must be, first, voluntary and, second, made intelligently with full awareness of the consequences of waiver).

88. *See id.* ("First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception . . . .").

89. Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that a "voice of God" telling Connelly te confess was not a compulsion that overwhelmed his ability to voluntarily confess to murder).

90. *Id.* (holding that Connelly's confession was voluntary because the police did not actively coerce him inte confession and that his only coercion was the voice he heard in his head).

91. *See Moran*, 475 U.S. at 421 ("Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision te abandon it.").

92. *See, e.g., Connelly*, 479 U.S. at 170-71 (focusing on the fact that Connelly's confession was voluntary rather than whether his waiver was intelligently made).

93. *See* United States v. Moses, 137 F.3d 894, 902 (6th Cir. 1998) (questioning the competence of a defendant to make and understand the nature of his confession based in part on his extremely low intelligence); United States v. Hull, 441 F.2d 308, 312 (7th Cir. 1971) (holding the waiver of a thirty-four year-old man with an I.Q. of 54 and the mental age of an eight or nine year old te be invalid).

94. *See, e.g. Moses*, 137 F.3d at 902 (describing how defendant's extremely low intelligence cast doubts on the state's claim that his constitutional waiver was valid).

95. Smith v. Zant, 855 F.2d 712, 719 (11th Cir. 1988) (holding that Smith's mental retardation prevented him from making an intelligent *Miranda* waiver).

and other lower court cases thus provide a basis for reasoning that, where the defendant has subnormal cognitive ability, the defendant is given more protection and his waiver is more closely scrutinized.[96] This treatment is analogous to juveniles who, though they do not have cognitive limitations due to mental defect, have cognitive limitations due to lack of maturity and their young age.[97]

In addition to mental retardation and low intelligence as factors that invalidate a *Miranda* waiver, one court has found that low mental capacity coupled with limited English skills can be grounds to find a *Miranda* waiver to be invalid.[98] In *United States v. Garibay*, the Ninth Circuit held that Garibay's low intelligence as well as his inability to understand spoken English made him unable to intelligently waive his Fifth Amendment rights.[99] The *Garibay* case is important for an analysis of juvenile constitutional rights because the issue in that case was that the defendant did not understand his rights when read to him[100]—in the same way a juvenile might be unable to understand his rights when read to him.[101] In *Garibay*, the court gave more protection to a defendant who was unable to understand his rights which gives credence to this Note's theory that those with cognitive limitations, juveniles in this instance, deserve greater constitutional protection.[102]

The cases in this area are instructive when evaluating a juvenile's ability to intelligently and knowingly waive his or her *Miranda* rights. The fact that courts have applied a stronger degree of *Miranda* protection to adults proven to have lower than normal cognitive ability suggests that courts evaluating juvenile custodial interrogations might use analogous reasoning; juveniles, who by virtue of their age are not as developed cognitively than normal adults, deserve more stringent protection of their *Miranda* rights.

In addition to an analogy with adult *Miranda* rights in the context where an adult defendant lacks normal cognitive abilities, the Supreme Court has also addressed the way in which *Miranda* applies specifically to juveniles.

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96. *Id.*

97. *See generally* DAVID WOOD, HOW CHILDREN THINK AND LEARN (1989).

98. *See* United States v. Garibay, 143 F.3d 534, 539 (9th Cir. 1998) ("the facts surrounding Garibay's interrogation clearly indicated that he did not understand the nature of the rights he was waiving").

99. *Id.* ("[W]e conclude the district court erred in finding that despite Garibay's low IQ and poor English-verbal comprehension, he nonetheless functioned at a level sufficient to have understood and waived the constitutional rights.").

100. *Id.*

101. *See infra* note 181 and accompanying text.

102. *Garibay*, 143 F.3d at 154.

3. *Miranda*'s Application to Juveniles

One year after *Miranda*, the Court addressed its application to the juvenile justice system.[103] In *In re Gault*, the Court held that the juvenile justice system, despite its less formal and less adversarial nature, was still bound by the requirements of the Fifth and Fourteenth Amendments.[104]

The *Gault* Court found that "authoritative opinion has cast formidable doubt on the reliability and trustworthiness of 'confessions' by children" made without the presence of an interested adult.[105] The Court recognized that children and adults often faced similar penalties and that commitment to a children's state institution was similar, in effect, to incarceration in an adult prison.[106] In light of these facts, the majority concluded that juveniles are entitled to the constitutional protections outlined in *Miranda*.[107] The Court noted that the *Miranda* warnings were a basic guarantee for juveniles in custody and intimated that juveniles, because of their age and relative inexperience, would likely need even more than the base level *Miranda* warnings to fully effectuate their constitutional rights.[108]

In addition to securing for juveniles the right to be informed of their constitutional rights under the Fifth Amendment, the *Gault* Court recognized that juveniles might require a higher degree of protection during custodial interrogations.[109] While the *Gault* decision tracks *Miranda* by focusing on the presence or absence of counsel in determining a Fifth Amendment waiver, the Court illustrates that the presence of a juvenile's parents—while decidedly not a substitute for counsel—can guarantee that the child is voluntarily participating in a police questioning. The Court noted that special techniques may be

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103. *See In re* Gault, 387 U.S. 1, 55 (1967) (holding that privilege against self-incrimination is applicable in the juvenile system).

104. *Id.* at 13 ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

105. *Id.* at 52. The Court cited an opinion from the New York Court of Appeals in which two boys confessed to assault and rape and a psychiatrist testified that one of the boys "would admit 'whatever he thought was expected so that he could get out of the immediate situation.'" *Id.*

106. *See id.* at 49-50 (discussing how juveniles may not even get assurances they will not be placed in prison with adult criminals).

107. *See id.* at 47 (holding that juveniles deserved, at least, the same protections as adults in the context of juvenile confessions).

108. *See id.* ("It would be indeed surprising if the privilege against self-incrimination were available to hardened criminals but not to children.") The issue in *Gault* was simply whether or not *Miranda* applied to juveniles in custody who faced juvenile proceedings. *See id.* at 13-14. The Court answered that *Miranda* did apply. *See id.* at 56-57.

109. *Id.* at 55 ("[S]pecial problems might arise with respect to waiver or the privilege by or on behalf of children . . . .").

developed by police to handle waiver by juveniles, "depending on the age of the child and the presence and competence of parents."[110] In its reasoning, the majority returned to the notion that the presence or absence of parents in juvenile custodial interrogation should dictate, in large part, police procedures.[111] The Court found that when parents were absent and the juvenile had no legal counsel with him in the interrogation room, "the greatest care must be taken to assure the admission was voluntary."[112] Not only must police be sure the admission was voluntary, but police must ensure that the admission actually has some basis in fact and is not instead a case of the juvenile telling police what the juvenile thinks the police want to hear.[113]

C. *The Limitation of Per Se Invocation Under* Miranda: Fare v. Michael C.

The Supreme Court again confronted the issue of juvenile *Miranda* rights in *Fare v. Michael C.*, twelve years after the Court's decision in *Gault.*[114] The facts in *Fare* were similar to *Haley*[115] and *Gallegos*;[116] a juvenile was arrested for murder and interrogated by police without the presence of a parent or an attorney.[117] The juvenile's confession was later used to convict him.[118] The juvenile in custody in *Fare* was not physically abused, nor was he kept in custody for an extended amount of time.[119] When police brought Michael C. into custody after informing him of his rights, he asked to see his probation officer.[120] The

110. *Id.* (emphasis added).

111. *See id.* at 38 n.65 (describing President's Crime Commission report on which the Court relied).

112. *Id.* at 55 (emphasis added).

113. *See id.* ("[The admission cannot be] the product of ignorance of rights or of adolescent fantasy, fright or despair.").

114. Fare v. Michael C., 442 U.S. 707, 723 (1979) (holding a juvenile's request for his probation officer did not constitute a per se invocation of his Fifth Amendment rights).

115. Haley v. Ohio, 332 U.S. 596, 597-98 (1948).

116. Gallegos v. Colorado, 370 U.S. 49, 49-50 (1962).

117. *See Fare*, 442 U.S. at 710.

118. *See id.* at 711.

119. The *Fare* decision never discloses how long Michael C. was in police custody before he confessed. *See id.* at 710-11. Given the importance the Court ascribed to the juvenile's length of detention in other cases one can only assume the length of Michael C. custodial interrogation was unremarkable.

120. *See id.* The actual exchange between the officer and the juvenile is instructive to the juvenile mindset while in police custody:

Q: Do you want to give up your right to have an attorney present while we talk about [the crime]?

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.

police denied that request and Michael C. subsequently confessed to the murder.[121] Michael C. later appealed the admissibility of his confession in the juvenile proceedings, claiming that his request for his probation officer was a per se invocation of his Fifth Amendment rights under *Miranda*.[122] The Court broke from its prior interpretations of juvenile constitutional rights in the interrogation setting and narrowed juvenile *Miranda* rights by holding that Michael C.'s request was not a per se invocation of his Fifth Amendment rights.[123] Under the terms of *Miranda*, a suspect's request for counsel during a custodial interrogation would have the same constitutional force as a more explicit invocation by the suspect of his right to remain silent. Thus, a request for counsel became a per se invocation of the Fifth Amendment. By holding that Michael C.'s request for his probation officer was not a per se invocation of the Fifth Amendment—and since he had not availed himself of his right to silence or specifically requested legal counsel—the Court held that he had no grounds to request the suppression of his confession.[124]

In its opinion, the Court first addressed whether a juvenile's request for a probation officer would automatically afford him the same protection that a request for counsel provided under *Miranda*.[125] The Court found that a request for a probation officer was simply not the same as a request for counsel. It reasoned that a lawyer has a distinct role in the judicial system and a corresponding duty to protect his client.[126] A probation officer, on the other hand, has neither.[127] Rather, the duty of a probation officer is to prosecute offenders—a role that puts him at odds with the fiduciary responsibilities of a lawyer.[128]

A: How I know you guys won't pull no police officer in here and tell me he's an attorney?
Q: Huh?
Id.

121. *See id.* at 711-12.

122. *See id.* at 712. After losing in the California Court of Appeals, Michael C. won in the California Supreme Court which held that Michael C.'s request for his probation officer did constitute a per se invocation of his *Miranda* rights. *See id.* at 713-15.

123. *See id.* at 724.

124. *See id.*

125. *See id.* at 719 (discussing that a lawyer's societally recognized place in the judicial system as the fiduciary advocate of her clients rights makes a request for a lawyer constitutionally meaningful and powerful).

126. *See id.* ("[T]he lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation.").

127. *See id.*

128. *See id.* at 720. The Court offered no discussion and no mention of the potential role that a parent could play in this scenario. *See id.* at 719-22. Indeed, the Court mentions "parent" only once and in passing. *See id.* at 725 (using the word "parent" in a fuller description of the totality of the circumstances test).

The Court was concerned that a holding that a juvenile's request for his probation officer is a per se invocation of his Fifth Amendment rights would expand *Miranda* beyond its intended scope.[129] Such a holding, the Court feared, would lead to a potentially unlimited list of people the juvenile could ask to consult.[130] The Court envisioned potential scenarios where a juvenile might ask for his football coach, neighbor, school buddy, "clergyman or close friend."[131] Were the Court to hold as the Respondent urged, reasoned the majority in *Fare*, consulting any of these would constitute an invocation of a suspect's Fifth Amendment rights and would end a custodial interrogation.[132] This would likely end the usefulness of juvenile custodial interrogations altogether.[133] Obviously, a parent is no substitute for an attorney and this Note does not advocate that a parent is. Instead, this Note suggests that the question before the *Fare* court was a narrow one—whether a request for a probation officer is constitutionally the same as a request for a lawyer—and has limited applicability when considering the role of a parent or guardian in juvenile custodial interrogations. A parent's presence is not to provide the juvenile with legal advice but could assure that a juvenile understood what was going on. It could be an extra layer of protection for the juvenile's constitutional rights that the *Fare* Court was not asked to contemplate and, as a result, did not.

Finally, the *Fare* Court employed the "totality of the circumstances" test.[134] The Court used this test to provide judges with more flexibility in determining if a juvenile's confession was, in fact, voluntary.[135] The Court reasoned that this test would allow a juvenile court to take into account any requests that the juvenile might have made, whether it was to consult his parents, his probation officer, or another party.[136]

Fare was a constriction of juvenile *Miranda* rights when read against *Haley*, *Gallegos* and *Gault* as well as the provisions of

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129. *See id.* at 723 (describing the effect a new rule would have on *Miranda*).

130. *See id.* ("If it were otherwise, a juvenile's request for almost anyone he considered trustworthy enough to give him reliable advice would trigger the rigid rule of *Miranda*.").

131. *Id.* at 722-23.

132. *Id.*

133. *See id.* at 723.

134. *Id.* at 725-27 "[The totality of the circumstances test] includes evaluation of the juvenile's age, experience, education, background, and intelligence, and inquires into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Id.*

135. *See id.*

136. *See id.* ("[T]he totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination.").

Miranda applicable to all subjects of police interrogation. Yet the decision in *Fare* does not require that a juvenile not be allowed to consult anyone other than legal counsel in order to accommodate the constitutional guarantees provided for by *Miranda* and *Gault*.[137] The crucial problem with the totality of the circumstances test is that the test mandates complicated psychological analysis to determine if a juvenile waiver is voluntary when state courts were unable to perform such an analysis.[138] In fact, the rule enunciated in *Fare* is perhaps the least effective way to bridge the gap in constitutional protections between *Fare*, *Miranda*, and *Gault*.

III. THE STATES' RESPONSE

The vast majority of juvenile cases are disposed of in the juvenile systems of the states.[139] As such, the burden usually falls to the state courts to interpret the Court's constitutional framework in the area of juvenile custodial confessions in order to accommodate the *Miranda* guarantees against compelled self-incrimination as well as *Fare*'s "totality of the circumstances" test.[140] In applying the law from both cases, the states have typically accorded more deference to one or the other.[141] For example, some states that emphasize the importance of the *Miranda* guarantees have held that a juvenile cannot be inter-

137. *Id.* (describing a situation where a juvenile's request for his parents could actually serve as an invocation of his right to remain silent).

138. For the varying state responses te this rule, see *infra* Part III. Most states have applied the totality of the circumstances test in a way that allows virtually all juvenile confessions to be admitted. Conversely, other states have completely abandoned the totality test in favor of a rule that would bar juvenile confessions obtained without the presence of an interested adult. In either case, the "flexible" test that the *Fare* Court thought it created has not been applied flexibly.

139. Ninety-four percent of State court prosecutors offices had responsibility for handling all juvenile cases. *See* CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, JUVENILES PROSECUTED IN STATE CRIMINAL COURTS 1 (1997). The U.S. Department of Justice does not systematically collect information on juvenile transfers from the state criminal justice system to the federal system. *See id.* In order for a juvenile to be transferred from the state system to the federal system, the U.S. Attorney must show at least one of the following: the state does not have jurisdiction; the state refuses to assume jurisdiction; the state with jurisdiction "does not have adequate programs or services for juvenile offenders"; or the offense charged is a violent felony, drug offense or firearm offense. *See id.*

140. For a discussion of the responsibility of state systems in prosecuting juvenile offenders, see *infra* notes 167-82 and accompanying text.

141. *Compare In re* E.T.C., 449 A.2d 937, 940 (Vt. 1982) (exemplifying a state placing a higher value on broad *Miranda* guarantoes), *with* Commonwealth v. Williams, 475 A.2d 1283, 1288 (Pa. 1984) (exemplifying a state adhering to the totality test).

rogated in the absence of an "interested adult."[142] At least one state has adopted a totality of the circumstances test and applied it in such a manner that requires a suspect to be effectively apprised of his rights for any waiver to be voluntary in addition to accounting for the juvenile's circumstances to test his voluntariness.[143] The vast majority of states, however, have chosen to apply the *Fare* test to a juvenile confession.[144] In doing so, some state courts have focused on the exact language of *Fare* by taking unsophisticated measurements of the stated factors in juvenile voluntariness.[145] These courts engage in a limited analysis of whether or not a juvenile understood his rights and chose to waive them freely. These states do not necessarily apply the totality test with flexibility, as the *Fare* Court hoped, but rather employ a more formulaic style that neglects the focus of *Miranda* that questioned whether the suspect understood his rights during interrogation and whether he waived them voluntarily.[146]

A. The Rigidity of the "Totality" Test: Fare*'s Unintended Consequences*

The totality of the circumstances analysis, as the *Fare* Court constructed it, was intentionally vague.[147] The Court made the test vague in order to give judges enough flexibility to make appropriate judgments regarding the validity of juvenile waiver on a case-by-case basis.[148]

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142. *See, e.g.*, Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983) (holding that in order for the state to prove that a juvenile voluntarily and knowingly waived his rights against compelled self-incrimination, a parent or interested adult must be present); *E.T.C.*, 449 A.2d at 940 (holding that a juvenile cannot waive his rights against compelled self-incrimination without the presence of an interested adult).

143. *See In re* LaShun H., 672 N.E.2d 331, 335-36 (Ill. App. Ct. 1996) (holding that in the totality of the circumstances the absence of a juvenile suspect's parents rendered the juvenile's confession involuntary).

144. *See* Elizabeth J. Maykut, *Who Is Advising Our Children: Custodial Interrogation of Juveniles in Florida*, 21 FLA. ST. U. L. REV. 1345, 1364-68 (1994) (discussing the prevalence of the totality test).

145. Fare v. Michael C., 442 U.S. 707, 725 (1979) ("[The totality of the circumstances test] includes evaluation of the juvenile's age, experience, education, background, and intelligence and inquires into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."); *see also* W.M. v. Florida, 585 So.2d 979, 983 (Fla. Dist. Ct. App. 1991) (holding that a ten year old's age was not a bar to an intelligent waiver and that his background and intelligence gave him the ability to waive his Fifth Amendment rights).

146. *See, e.g.*, Arizona v. Scholtz, 791 P.2d 1070, 1072 (Ariz. Ct. App. 1990); Michigan v. Givans, 575 N.W.2d 84, 89 (Mich. Ct. App. 1997).

147. *Fare*, 442 U.S. at 725-26 (discussing how the totality test is broadly written to allow for flexibility)

148. *See Fare*, 442 U.S. at 725 ("Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain

Unfortunately, the flexible standard the Court envisioned has not been borne out in state decisions subsequent to *Fare*.[149] As a practical matter, these states have held that, regardless of the circumstances, a juvenile's waiver is almost always voluntary and that his confession is thus admissible.[150]

One of the initial problems with applying the totality of the circumstances test has been the emergence of "jurisdictional justice."[151] Case law illustrates that the totality test can yield different results for similarly situated juveniles, which makes the admissibility of confessions—and possibly the prospect of life imprisonment—turn on where a juvenile committed the crime.[152]

A comparison of the *Fare* "checklist" of factors with the overarching goals of *Miranda* illustrates the shortcomings of the totality test as a means of guaranteeing juveniles their constitutional rights. The *Miranda* Court held that a defendant must have the warnings given and explained to him so that "there can be any assurance of *real understanding* and intelligent exercise of the privilege."[153] In adult cases, like that of Miranda himself, the Court likely assumed that an adult would understand the warnings and require only a brief explanation. However the requirement that the defendant must understand the warnings is explicit in *Miranda*, as the quoted portion above indicates.[154]

Justice Marshall, in his dissent in *Fare*, wrote that *Miranda* requires that an interrogation cease when a juvenile asks for an adult "obligated to represent his interests."[155] Marshall wrote that the youth of the defendant mandated that the *Miranda* Court's "prophylactic

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silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination.").

149. *See W.M.*, 585 So. 2d at 985 (Farmer, J., dissenting) (discussing how the Florida court engaged in a rigid application of the totality test).

150. *See, e.g.*, Michigan v. Givans, 575 N.W.2d 84, 88-89 (Mich. Ct. App. 1997); Minnesota v. Critt, 554 N.W.2d 93, 96 (Minn. Ct. App. 1996); *In re* R.M., 880 S.W.2d 297, 299 (Tx. Ct. App. 1994).

151. *Compare In re* Lashun H., 672 N.E.2d 331, 335-36 (Ill. App. Ct. 1996) (holding that in the totality of the circumstances a juvenile's waiver was involuntary), *with In re* J.E. & V.B., 675 N.E.2d 156, 163-64 (Ill. App. Ct. 1996) (holding that a juvenile's waiver was voluntary). This Note is not suggesting that this problem is endemic to juvenile custodial interrogations. Rather, it is a theoretical problem with a real life example in the above cited cases. While the juvenile defendants were not in the exact same circumstances (one defendant was fourteen, the other sixteen) the cases are very similar but with different results. These two cases only raise this issue as a potential unintonded problem of *Fare* rather than prove its existence.

152. *See supra* notes 109-13 and accompanying text.

153. Miranda v. Arizona, 384 U.S. 436, 469 (1966) (emphasis added).

154. *Id.* (explaining that understanding of the warnings is required).

155. Fare v. Michael C., 442 U.S. 707, 729 (1979) (Marshall, J., dissenting).

requirements"—the warnings themselves and that a request for counsel was a per se invocation of the Fifth Amendment privilege—be construed broadly to accomplish their "intended purpose" of dispelling the inherent compulsion of police questioning.[156]

The *Fare* majority, however, described an imprecise test for determining if a juvenile fully understands his Fifth Amendment rights and the consequences of waiving those rights.[157] It calls for judges to examine juvenile "intelligence" and a juvenile's "capacity to understand."[158] In light of these problematic tests, state courts have often applied them inflexibly. The reason why state courts have applied the *Fare* test so rigidly is speculative at best. One reason could be that this area calls for a bright line test on the voluntariness of a juvenile's confession because it is too difficult for the bench to adequately probe juvenile understanding and intelligence. When the state court has been given no bright line test, it has essentially turned the vague totality test into a presumption of admissibility for juvenile confessions.

The inflexibility of the *Fare* test as applied by state courts is evident in some of the more egregious cases where a court evaluating the "totality of the circumstances" found a "voluntary waiver" on the part of the juvenile. In *Minnesota v. Jones*, the defendant offered expert testimony that his IQ placed him in the mental retardation range, and that he was "extremely susceptible to domination by persons whom he perceive[d] to be in positions of authority."[159] The court was not persuaded and found Jones' waiver to be voluntary.[160]

In *Miller v. Arkansas* the court considered the waiver of a thirteen year old who was not told during his custodial interrogation that he had a right to speak to his parents—despite the fact that Arkansas law provided him that right.[161] Despite these facts, the court found that "the totality of the circumstances" indicated that the juvenile had voluntarily waived his *Miranda* rights.[162] Thus the court upheld the juvenile's felony murder conviction.[163]

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156. *Id.* (Marshall, J., dissenting).

157. *Id.* at 725-27.

158. *Id.* at 725.

159. Minnesota v. Jones, 566 N.W.2d 317, 325 (Minn. 1979).

160. *See id.* The prosecution offered their own expert testimony that Jones' intellect did not interfere with his ability te make decisions—yet the court did not state whether the experts had testified that Jones understood what he was doing when he made his statements. *See id.*

161. Miller v. Arkansas, 994 S.W.2d 476, 478 (Ark. 1999). The court held that though Miller had a right to speak to his parents, the police had no obligation to inform him of that right because the statute had not mandated it. *See id.* at 479.

162. *Id.* at 480.

163. *See id.* Other cases illustrate the same problem in the application of *Fare*. In *Alabama v. Banks*, 734 So. 2d 371, 371 (Ala. Crim. App. 1999), a juvenile received adult *Miranda* warnings instead of juvenile *Miranda* warnings. This occurred even though Alabama law requires that a

The dissenting judge in *W.M. v. Florida*, a case where a ten year old was found to have voluntarily waived his *Miranda* rights, noted that the "totality of the circumstances" test was so inflexible it had become a misnomer.[164] The judge said that "not a single objective factor" in the juvenile's case even suggested that the juvenile's confession to police was voluntary.[165] The judge concluded that the test applied by the Florida court in the juvenile's case "seemed to . . . be the *very antithesis* of the 'totality-of-the-circumstances.' "[166]

B. Providing an "Interested Adult": The Minority Position

Shortly after *Fare* was decided, state juvenile courts confronted the problems inherent in juvenile custodial interrogations. This time, however, they had a test offered by the Supreme Court that was intended to let them take into account all relevant circumstances.[167] Despite the *Fare* test, a number of state courts created different procedures that rested on state grounds.[168] These procedures would allow juvenile custodial interrogations to take place, but would at the same time address the potential for juvenile confessions resulting solely from intimidation. The state courts did this by holding on independent, state constitutional grounds that juvenile confessions would be considered involuntary if made in the absence of a parent or guardian.[169]

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juvenile be apprised of his right to speak to his parent before making a statement. *See id.* at 371. The Alabama court decided the case by holding that while Banks was a juvenile when arrested and given his *Miranda* rights, he was eventually charged as an adult and thus, in the totality of the circumstances, his waiver was voluntary. *See id.* at 373. Juvenile *Miranda* warnings are warnings that some states have adopted to help juveniles understand them; they use smaller words, more simplistic phraseology and other devices to make the warnings more suitable te children. *See* W.M. v. Florida, 585 So. 2d 979, 983 (Fla. Dist. Ct. App. 1991) (holding that a ten-year-old with a learning disability was, in the totality of the circumstances, capable of voluntarily waiving his Fifth Amendment rights and finding his confession voluntary).

164. *Id.* at 985 (Farmer, J., dissenting).

165. *Id.* (Farmer, J., dissenting).

166. *Id.* (Farmer, J., dissenting) (emphasis added).

167. *See* Fare v. Michael C., 442 U.S. 707, 725 (1979) (describing the totality of the circumstances test).

168. *See, e.g.*, Colorado v. Salazar, 541 P.2d 676, 681 (Col. 1975) (describing a Colorado statute that presumes a juvenile confession is involuntary when made in the absence of a parent or guardian); *see also* N.C. GEN. STAT. § 7B-2101(b) (1999) (barring the admissibility of a juvenile confession obtained without the presence of the juvenile's parent or guardian).

169. *See, e.g., In re* E.T.C., Juvenile, 449 A.2d 937, 939 (Vt. 1982) (describing the state constitutional grounds for the holding).

The Supreme Judicial Court of Massachusetts first adopted the "interested adult" rule in *Commonwealth v. A Juvenile.*[170] The Massachusetts high court first noted that there was a distinct need for caution in evaluating juvenile confessions to prevent juveniles from confessing out of "fantasy, fright or despair."[171] The court suggested that studies of juvenile waiver supported the idea that juveniles were unable to clearly understand the gravity of a custodial interrogation (and the potential consequences of that interrogation) even after given notice of their rights.[172] In order to make up for this deficiency of understanding on the part of the juvenile, the court concluded that the only way for the state to prove that a juvenile had made a knowing and valid waiver of his Fifth Amendment rights was to show that an "interested adult was present, understood the warnings, and had the opportunity to explain those warnings and Fifth Amendment rights to the juvenile."[173] The court noted that the procedure reflected an assumption that "an informed parent, or person standing in loco parentis" would be able to assist the child in understanding rights that the juvenile would be unable to understand on his own.[174]

Similarly, the Supreme Court of Vermont recognized that minors held both a subordinate and a protected status in society with legally recognized differences from adults.[175] Based on these assumptions, the court found that juveniles are unable to understand their rights against compelled self-incrimination unless an "interested adult" is allowed to consult with the child during a custodial interrogation.[176] As a result, the Vermont high court held that for a juvenile's waiver of his Fifth Amendment rights to be valid, an interested adult must be provided to the juvenile, informed of the juvenile's rights and given an opportunity to consult with the juvenile.[177]

Other states have also adopted statutes which bar a juvenile's confession from being admissible in court unless an adult is present with the juvenile during questioning.[178] In North Carolina, a juvenile

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170. Commonwealth v. A Juvenile, 449 N.E.2d 654, 657-58 (Mass. 1983) (holding that a juvenile could not be questioned outside the presence of an "interested adult").

171. *Id.* at 656 (quoting Gallegos v. Colorado, 387 U.S. 49, 54 (1962)).

172. *See id.* (noting that studies suggested that most juveniles do not understand the significance and protective function of these rights even when they are read the *Miranda* warnings).

173. *Id.* at 657.

174. *Id.*

175. *See In re* E.T.C., 449 A.2d 937, 939 (Vt. 1982).

176. *See id.*

177. *See id.* at 940.

178. *See, e.g.*, ME. REV. STAT. ANN. tit. 15, § 3204 (West 1999) (barring admissibility of a juvenile's confession if obtained in the absence of a parent or guardian); COLO. REV. STAT. ANN. § 19-2-511(1) (West 1997) (barring admissibility of a juvenile's confession if obtained in the absence of a parent or guardian).

under the age of fourteen cannot be interrogated in the absence of his parent or guardian.[179] Nor can a juvenile waive his Fifth Amendment rights without consulting that person.[180]

These states that have held that juveniles are likely incapable of making a knowing or voluntary waiver of their Fifth Amendment rights are in the minority.[181] Admittedly, the "interested adult" standard has problems. The test does not adequately address who is legally "interested" in the rights and welfare of a juvenile. Nor does the test address the *Fare* Court's concerns that a juvenile could consult an unlimited number of people as a per se invocation of his Fifth Amendment rights.[182] Although the "interested adult" test is not perfect, it is at least an attempt to protect juveniles from the threat of having confessions coerced out of them.

In summary, neither the "interested adult" test nor the "totality of the circumstances" test adequately address the need for effective police investigation and the effective protection of juvenile constitutional rights. In an attempt to bridge the gap between them, this Note proposes that a bright line rule be created to allow a juvenile access to a parent or guardian during questioning about a serious crime.

IV. PROPOSAL

More and more juveniles are being prosecuted for serious crimes.[183] As more and more juveniles are processed through the adult criminal system and pressure to speed the process along increases with that increase in volume, it stands to reason that the temptation

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179. *See* N.C. GEN. STAT. § 7B-2101(b) (1999).

180. *See id.* Similarly, Colorado bars the admissibility of juvenile custodial statements made without the presence of a parent or guardian but only allows the admissibility of such statements if certain circumstances are present that tond to show a juvenile's contact with a parent would be unhelpful to the juvenile. *See* COLO. REV. STAT. ANN. § 19-2-511.

181. *See* Maykut, *supra* note 144, at 1364-68 (describing the limitod number of states that have such a rule).

182. Fare v. Michael C., 442 U.S. 707, 725 (1979) (describing unlimited list of people who a juvenile may invoke).

183. In 1997, law enforcement agencies made an estimated 2.8 million arrests of persons under the age of 18. *See* Howard Synder, *Estimated Number of Juvenile Arrests, 1997*, OJJDP STATISTICAL BRIEFING BOOK (visited Jan. 6, 2000) <http://ojjdp.ncjrs.org/ojstabb/qa001.html>. Of those arrests, over 123,000 were for murder, non-negligent manslaughtor, forcible rape, robbery or aggravated assault. *See id.* Of all the juvenile arrests for violent crimes, an estimated 30% of those juveniles arrested were under the age of fiftoen. *See id.* In the nation's seventy-five largest counties, 66% of the juveniles transferred to criminal court were violent felony offenders. *See* KEVIN J. STROM, BUREAU OF JUSTICE STATISTICS, JUVENILE FELONY DEFENDANTS IN CRIMINAL COURTS 2 (1998).

to coerce confessions would increase. It is against this background that the following proposal is offered.

The challenge in offering a new model for the protection of a juvenile's Fifth Amendment rights in the context of custodial interrogations lies in addressing two major concerns.[184] The first concern is that the system must adequately protect the rights of the juveniles in custody because of the danger of coerced confessions.[185] The second concern is that police must be free to investigate criminal activity and not be "handcuffed" by an overbroad application of *Miranda* and *Gault*.[186]

The basic premise of this Note is that juvenile custodial interrogation procedures should reflect the mandate the Court set out in *Miranda* and later applied to children through *Gault*. Courts must take great care to see that the accused juvenile is "adequately and effectively apprised of his rights."[187] This includes a necessary recognition that juveniles, particularly younger juveniles, have trouble solving basic analytical problems with regard to complicated concepts such as "rights," "waiver" and "consequences."[188] Childlike impulses or lack of experience are often cited as leading a child to make an illogical choice based on extraneous factors.[189] For example, juveniles cannot be expected to logically decide whether to speak to police because their cognitive development is not at the level of adults.[190] Two psychologists have suggested that some cognitive lessons are learned only with increasing age, and it is a mistake to hold children to an average adult standard of cognition.[191] When faced with a coercive environment or

184. *See* Miranda v. Arizona, 384 U.S. 436, 439 (1966) (discussing the balance between upholding the federal constitution and prosecuting criminals).

185. *See In re* Gault, 387 U.S. 1, 13 (1967) (holding that juveniles enjoy the same constitutional protections as adults against coerced confessions).

186. *Miranda*, 384 U.S. at 439 (describing the societal need to prosecute criminals).

187. *Id.* at 467.

188. *See, e.g.*, WOOD, *supra* note 97, at 199 ("Children may fail te solve problems which entail drawing inferences because they are too impulsive and accept the first model that comes to mind as the only possibility. They may also lack effective resources and/or strategies for memorizing the results of their model-making . . . children are also able to process less information simultaneously than adults . . . .").

189. *See id.*

190. *See id.* at 200 ("If, however, children are more limited than adults in how much information they can process, either because their speed of mental processing is slower (Chase) or because they have more restricted processing capability (Halford), then we should not expect them to solve logical problems . . . because they do not possess the mental resources to build models which incorporate all the necessary relations."). Chase and Halford are other eminent child psychologists with theories on the speed of adolescent mental processes and the limits of child processing capability, respectively. *See id.*

191. *See* Mal Leicester & Richard Pierce, *Cognitive Development, Self Knowledge and Moral Education*, 26 J. MORAL EDUC. 455 (1997).

show of authority, a child is more willing to do what it appears the authority figure would have them do.[192] Taken together, these studies indicate that a child, unaccompanied by an adult advisor or a parent, would not only have serious trouble understanding the warnings as given, but might not be in a position to indicate to police that he does have such trouble.[193] Simply put, a juvenile might say he understands a warning out of fear or out of a desire to please. Thus, in order for a juvenile to be effectively apprised of his rights as required by *Miranda*, the child needs more than simply a warning by police officers.

A second role that a parent or guardian could play in this context is that of an emotional counselor or trustworthy advisor.[194] This would not totally conflict with the Court's concerns in *Fare*; a parent is quite unlike a probation officer in that society looks to the parent to protect the child in his dealings with the world.[195] *Fare* does not specifically address how the ruling would have been affected had Michael C. requested his parent instead of his probation officer. The proposition that the *Fare* Court used to distinguish a request for counsel from a request for a probation officer—that the attorney is the person to whom society looks as the protector of his client[196]—is easily transmutable to the idea that a parent is the one person to whom society looks as the protector of his child.[197] It follows that the limitation of the class of people whom the juvenile could request to consult that would serve as a per se invocation of their Fifth Amendment rights to the juvenile's parent, guardian or counsel, would counter the *Fare* Court's concerns without resort the rigidity of the totality test.

The totality test was designed to give greater latitude to police and court officers in making determinations about the voluntariness of a child's waiver, but an unfortunate side effect is that those officers

192. *See* Stephen J. Blumberg & David H. Silvera, *Attributional Complexity and Cognitive Development: A Look at the Motivational and Cognitive Requirements for Attribution*, 16 SOC. COGNITION 253, 263-65 (1997) (outlining the idea that children often have a "need for closure" and are more prone to being pressured to make a decision).

193. *See supra* notes 172-77 and accompanying text.

194. The Court disregarded the juvenile's earlier statement: "How I know you won't pull no police officer in and tell me he's an attorney?" Fare v. Michael C., 442 U.S. 707, 711 (1979). The juvenile was seeking a real fiduciary, someone he knew and trusted—in his mind a lawyer was neither. *See id.*

195. The *Fare* Court used a similar description in outlining a lawyer's role: "the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts." *Id.* at 719.

196. *Id.*

197. *See* Haley v. Ohio, 332 U.S. 596, 600 (1948) (describing John Haley's mother as his "closest friend" and someone he needed in time of trouble).

are often unprepared to make such complicated evaluations.[198] Most police officers do not have advanced clinical psychological training and generally have no relationship with the juvenile aspect. As such, an average police officer is likely unprepared to make complicated psychological evaluations.

Requiring the presence of a parent, guardian or legal counsel during a juvenile custodial interrogation is an approach that could solve a number of the problems outlined in this Note. It could remedy the problems encountered by states and allow police officers and courts to tailor their behavior to the Constitution.[199] It would both adequately protect juvenile's constitutional rights but still allow police to utilize current interrogation procedures to investigate crime and apprehend the criminal.[200]

The procedure would work as follows.[201] Once a juvenile is in police custody on suspicion of a felony, he should be read his *Miranda* warnings as required by *Gault* and *Miranda*.[202] Then the police should inform the child that he has the right to have a parent or guardian with him during questioning.[203] Police would then ask the juvenile the names and phone numbers of his parents or guardian and ascertain how the parent or guardian of the child could be reached.[204] The police officer would then have to take reasonable steps to contact the juvenile's parents or guardian to notify them of the juvenile's arrest and what the juvenile's rights are. Exactly what constitutes "reasonable steps" could be a point of some contention. A good faith effort would include calling the phone numbers the juvenile gave or taking other moderate effort to contact a parent such as consulting the phone book or calling two alternate locations where the parent might be (i.e. the parent's workplace or cellular phone number). If a juvenile simply re-

198. *See Fare*, 442 U.S. at 725 (describing the flexibility of the totality test).

199. *See id.* at 729 (Marshall, J., dissenting) (describing how *Miranda* mandates that an interrogation cease when a child asks for a parent or guardian).

200. *See id.* at 734 (Powell, J., dissenting) (describing the ease with which police could have taken measures to assist Michael C. in his interrogation).

201. This Note addresses the procedure under the assumption that the parent is able to be present. Although there will be numerous circumstances where a parent will not be able to be present, they are beyond the scope of this Note.

202. *In re* Gault, 387 U.S. 1, 14 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

203. A number of states already feature this warning as a part of their "juvenile Miranda" statutes and procedures. *See, e.g.*, ALA. R. JUV. P. 11(B)(4) (stipulating that Alabama juveniles have a right to communicate with a parent or guardian before making a statement).

204. A number of states as well as the federal government already require law enforcement to notify a juvenile's parents if the juvenile is arrested. *See, e.g.*, 18 U.S.C. § 5033 (1999) (requiring the police to notify a parent or guardian on the arrest of the juvenile as a part of the Juvenile Delinquency Act).

fuses to give police the name of a parent, an attorney would be provided to the juvenile to assure his statements to police were voluntary.

If the juvenile blurts out a confession to police after receiving *Miranda* warnings but before a parent or guardian arrives, the *Fare* totality test would still be applicable. As imprecise as the test may be in a spontaneous confession situation, where the extra protection of an adult presence failed, it would still be valuable precedent.

The police officer would be bound only to contact the juvenile's parent or legal guardian. The legal guardian could include a stepparent or grandparent if that person has taken the juvenile into their home and provided for their welfare as required by law. The police officer would not be bound to contact the juvenile's priest, teacher, friend, relative or anyone else the juvenile requested. This provision is necessary to address the concern in *Fare* that there not be an unlimited list of people whom the juvenile could consult which would serve as a per se invocation of the juvenile's Fifth Amendment rights.[205]

Once contact with the juvenile's parent or guardian is established and the basic information imparted, the police officer would then request that the parent or guardian come to the police station to be present with the juvenile during interrogation.

Until the parent or guardian arrives, the police would be forbidden to ask the juvenile any questions regarding the alleged crime. It would be a situation constitutionally similar to that of an adult defendant who has asserted his right to counsel under the Fifth Amendment—all police interrogation would cease.[206] Any information elicited from the juvenile by the police before a parent or guardian was present would be inadmissible at trial as violative of the Fifth Amendment.[207]

Upon the arrival of the parent or guardian, the police would verify that both the child and parent understood the *Miranda* rights as had been read to them. This might take the form of a written acknowledgement that the juvenile had been read his rights and under-

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205. *Fare*, 442 U.S. at 723 ("The State cannot transmute the relationship between the probation officer and juvenile offender inte the type of relationship between attorney and client that was essential to the holding of *Miranda* . . . . If it did, the State could expand the class of persons covered by the *Miranda* per se rule simply by creating a duty to care for the juvenile on the part of other persons, regardless of whether the logic of *Miranda* would justify that extension.").

206. *See* Brewer v. Williams, 430 U.S. 387, 404-05 (1977) (holding that statements made to police after a defendant has invoked his right to counsel are inadmissible at trial). Obviously *Brewer* deals with a defendant who has invoked his right to counsel. This Note does not suggest that a request for a parent is analogous to a request for counsel. Rather, for the purposes of this proposal, the inadmissibility of a juvenile's statement made outside the presence of a parent would be similar to the inadmissibility of the defendant's statement in *Brewer*.

207. *See id.*

stood them. Key to this aspect of the procedure is that the parent must verify to the police that the child understands the *Miranda* warnings. This has the benefit of removing from doubt the issue of whether a child understands the warnings from the hands of police and court officers. It would no longer be necessary to rely on police testimony or psychological evaluations of the child post-interrogation. In states that use a *Miranda* waiver form[208],a parent or guardian could simply countersign the child's form verifying that the juvenile understands the warnings. Once this verification has been made, the police may commence an interrogation. Of course, at any time the child may assert his right to silence or to counsel.[209] If the child decides to talk to the police, the parent must ascertain that the child is doing so voluntarily and inform police that the child is speaking of his own free will.[210] Once this has occurred, the police may freely interrogate the child and any statements the juvenile makes can be used against him at trial. Statements the juvenile makes within this framework have the advantage of near unquestioned reliability—a defense lawyer would be hard pressed to argue his client was coerced if his client's parent was sitting next to the juvenile during the interrogation. Police officers would also be able to conduct an interrogation without fear of having a confession suppressed at trial. Both of these advantages were cited by the *Fare* Court as advantages of the holding in *Miranda.*[211] This model assures that juvenile custodial interrogations receive the same advantages.

Yet the greatest advantage is that a court's application of the totality of the circumstances test would be far simpler. In addition to measuring a juvenile's voluntariness at the time of the interrogation

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208. Several states now use an actual *Miranda* waiver form where the defendant stipulates that they have been read and understand their rights and wish to waive them to speak to police. *See* Duckworth v. Eagan, 492 U.S. 195 (1989) (discussing *Miranda* waiver forms).

209. One thing this model would not change is that the juvenile himself would still be required te assert his own rights. That is, a parent could not invoke the juvenile's right to silence or counsel. The parent's presence is for the purpose of making sure that the child understands those rights are available and making the child feel comfortable in asserting those rights—not to assert the rights on behalf of the child. *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966) ("The warning of the right to remain silent must be accompanied by the explanation [of the right] . . . It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege").

210. This confronts the Court's skepticism of a juvenile's ability to confess voluntarily in the setting of a custedial intorrogation. *See In re* Gault, 387 U.S. 1, 53-54 (1967) (finding that juvenile confessions are often unreliable and untrustworthy because they are products of a coercive environment).

211. Fare v. Michael C., 442 U.S. 707, 718 (1979) (stating that Miranda's holding had the "virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.").

through police reports, officer testimony or psychological evaluations, the court would also have evidence that the juvenile's parent thought the child was speaking to police voluntarily. A parental verification made at the time of the questioning would serve to indicate that the juvenile's statements were voluntary. A court would make judgments it is prepared to make—on issues of police misconduct or constitutional improprieties—rather than being forced to make judgments more appropriate for a child psychologist or juvenile specialist.

V. CONCLUSION

On January 13, 2000 Nathaniel Abraham was sentenced to serve in a juvenile institution until the age of eighteen, when he can be evaluated again.[212] Looking at the most recent juvenile statistics, it seems likely that cases like that of Nathaniel Abraham will work their way through the appellate court system, and this kind of issue could potentially reach the Supreme Court. The issue of juvenile waiver of the Fifth Amendment in custodial interrogations is increasingly relevant. Every day more and more juveniles are being convicted of brutal and terrible crimes.[213]

The juvenile custodial interrogation model advocated by this Note is an attempt to bridge the gap between the broad constitutional guarantees in *Miranda* and the practical limitations required in *Fare*. It attempts to accommodate a need for adequate constitutional protection of juveniles as well as the need for aggressive police investigation and prosecution of crime. If this proposal errs, it errs on the side of more constitutional protection for juveniles rather than less. The procedures described here could either be adopted by a legislature in the form of a statute or rule of procedure or adopted by a court as a common law measure.

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212. *See Michigan Judge Sentences Boy Killer to Juvenile Detention*, (last checked March 14, 2000) <http://www.cnn.com/2000/US/01/13/abraham.sentencing.03/CNN.com>. Under the sentence imposed by Judge Moore, a court will review Nathaniel's case when he turns eighteen. *See id.* On the basis of these evaluations, he will serve time in an adult correctional facility, be placed on probation, or possibly even be released completely. *See id.*

213. *See, e.g.*, Peter Slevin & William Claiborne, *1st-Grader Shoots Classmate to Death*, WASH. POST, Mar. 1, 2000, at A1.

As a society, we must not rush to convict these juveniles. To do so would be to sacrifice constitutional rights for the sake of expediency. Instead, we must pay special attention to the needs of juveniles in the justice system. America's children deserve nothing less.

Robert E. McGuire[*]

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