# THE LAW OF DISPOSABLE CHILDREN: INTERROGATIONS IN SCHOOLS

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*Children are uniquely vulnerable to interrogation by authority figures, yet the Supreme Court has failed to meaningfully regulate interrogations of children in the school context, allowing school personnel unfettered access even when questioning children about crimes. This has left lower courts to define the Fifth Amendment rights of schoolchildren, which they have largely done by crafting permissive rules that allow for interrogations that would be unconstitutional if conducted against adult criminal suspects. This permissiveness includes reading down the Supreme Court's sole precedent protective of juvenile suspects,* J.D.B. v. North Carolina. *This Article describes the minimal attention the Supreme Court has given to the issue and then catalogs the doctrinal patterns that have emerged throughout the nation's lower courts in response to that doctrinal void. Students are subjected to interrogations without* Miranda *protections—even when involving police officers and when highly invasive—and with sometimes tragic results, including student suicide.*

*Even this doctrinal evaluation understates the problem because the vast majority of interrogations of schoolchildren do not receive any sort of court review. We interview experts working on issues relating to school students' lives and educations to see how the jurisprudence impacts students on the ground. These experts—representing both schools and schoolchildren, as well as independent parties such as judges and probation officers—all tell a consistent story: one of schoolchildren being subject to coercive interrogations without basic protections. The impact on children's lives can be devastating, including being caught up in the school-to-prison pipeline and excluded from all schooling options for years. It is imperative that the Supreme Court step in to protect the most basic rights of our most vulnerable. This Article is the third in a series examining Supreme Court, lower court, and state school actors' treatment of children in schools: together, they show that school searches and school discipline, combined with school interrogations, create a body of law that often treats children as disposable.*

## INTRODUCTION

Corey Walgren was a sixteen-year-old student at Naperville High School in Illinois, pulled from lunch by a Naperville Police Officer and a school dean to be interrogated.[1] Without receiving any *Miranda* warnings or having a parent or guardian present, Corey was interrogated behind closed doors in the deans' offices using the infamous Reid technique[2] "in a manner that caused him to

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1. Walgren v. Heun, No. 17-cv-04036, 2019 WL 265094, at *1 (N.D. Ill. Jan. 17, 2019).

2. The Reid technique was designed to circumvent Supreme Court holdings forbidding the use of physical or mental pain to extract confessions by instead teaching interrogators to apply psychological pressures to the suspect. *See* Brian R. Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L.J. 529, 551–61 (2010). Experts have shown the Reid technique to be so coercive as to overwhelm the will of adults and to lead to false confessions. *See* Megan Glynn Crane, *Childhood Trauma's Lurking Presence in the Juvenile Interrogation Room and the Need for a Trauma-Informed Voluntariness Test for Juvenile Confessions*, 62 S.D. L. REV. 626, 648 (2017) ("[T]he technique is a guilt-presumptive, accusatory, manipulative process; and it packs a powerful psychological punch."). For more about the use of the Reid technique in schools, *see infra* Part III.C.

suffer extreme psychological distress and fear."[3] The two adults accused him of possessing and disseminating child pornography, despite "lack[ing] any information that [he] possessed or disseminated any visual depictions that could be considered child pornography or committed any offense that would require him to register as a sex offender."[4] Even after searching his phone and finding no evidence, these two authority figures told him that "he was in possession of child pornography and that the contents of his phone could result in him having to register as a sex offender."[5] At the end of the interrogation, Corey was escorted to another office and ordered to wait there. He escaped the office, and "[e]xperiencing dire and desperate psychological conditions, he walked to the fifth level of a downtown Naperville parking garage and jumped with the intention of killing himself or causing great bodily harm."[6] He died later that day from injuries sustained from the fall.[7] Yet, in an action brought by Corey's parents under 42 U.S.C. § 1983 against the school, its administrators, and the city, the district court concluded that, under existing case law, the allegations "do not establish that the Individual Defendants acted in an objectively unreasonable manner" or "exceeded the bounds of an ordinary interrogation."[8]

The Supreme Court has recognized children are especially vulnerable and need special protection. For example, their lack of maturity, susceptibility to negative influences, and the transitory nature of being a juvenile make them ineligible for application of the death penalty.[9] In addition, the Court has found juveniles' "underdeveloped sense of responsibility" and less developed characters render life imprisonment of a minor without parole for a nonhomicide crime impermissible as a punishment.[10] Indeed, eight years before Corey was driven to such desperate action, in *J.D.B. v. North Carolina*, the Court recognized that children are both less mature and less responsible than adults and this must be reflected in the law of interrogations.[11] Since children are "more vulnerable or susceptible to . . . outside pressures" and more susceptible to interrogation and false confession, they will have a different perception as to when they are under arrest, and a more protective standard must apply when determining if a child is in custody.[12] Despite the grand rhetoric of this conclusion, the Court has provided minimal substantive protection to schoolchildren facing interrogations.

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3. *Walgren*, 2019 WL 265094, at *2.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *4–5.
9. Roper v. Simmons, 543 U.S. 551, 569–70 (2005).
10. Graham v. Florida, 560 U.S. 48, 68 (2010).
11. J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011).
12. *Id.* at 272–74 (internal citations omitted).

Logically, these scientifically grounded findings would appear equally relevant to the question of whether questioning constitutes an interrogation, the test for which is whether questioning is "likely to elicit" a self-incriminating response.[13] The susceptibility to interrogation and false confession that the Supreme Court recognized in relation to the question of custody also makes any questioning more likely to lead to self-incrimination by an impressionable child; as such, it is directly relevant to whether interrogation has occurred. Yet, the Court has resisted extending the natural logic of its own reasoning to this equally impactful, related inquiry.[14] Indeed, the Court has not directly answered whether the fundamental protections of *Miranda* warnings are required as applied to children in the school context, except by inference from a discussion of *J.D.B.*'s one caveat.[15] This is particularly problematic given that, when it comes to searches and seizures by school officials in schools, neither the Fourth Amendment's warrant or probable-cause requirements apply, and children can be searched under the lower threshold of "reasonable grounds" that the student has violated the law or *the rules of the school*.[16] Such searches often lead to interrogations.[17] Consequently, as shocking as the federal court's determination in Corey's case was—enough to provoke a public backlash and a legislative response in Illinois[18]—the court was not misapplying or disobeying Supreme Court doctrine because such doctrine has never been articulated.

This failure of the Supreme Court to develop any coherent jurisprudence around the rights of schoolchildren under the Fifth Amendment has left the definition of those constitutional rights to parties who have proved themselves inadequate to the task: the school administrators and police officers who interrogate schoolchildren, and lower courts. This Article shows that, while the ultimate outcome in Corey's case was atypical and especially tragic, his treatment was not. Rather, it is *J.D.B.*, the one Supreme Court case recognizing

13. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

14. On the Court's unwillingness to apply the logic to other similarly relevant questions, such as whether a person perceives oneself to be seized or subject to a *Terry* stop, see Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 CARDOZO L. REV. 2161, 2218 (2016) ("Certainly the characteristics that make juveniles . . . less culpable for Eighth Amendment purposes make them less able to meet the threshold behaviors required for seizure, consent, invocation, and waiver under the Fourth, Fifth, and Sixth Amendments.").

15. *See infra* Part I.A.

16. New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985) (emphasis added).

17. *See* Telephone Interview with Amy Meek, Civil Rights Bureau Chief, Ill. Att'y Gen.'s Office (Feb. 18, 2020) (interview notes on file with authors).

18. 105 ILL. COMP. STAT. ANN. 5/22-85 (West 2020). On the development of this legislation, known as Corey's Law, in response to public outrage, see Stacy St. Clair, *Prompted by Naperville Teen's Suicide, New Law Requires Parents Be Present Before Police Question Students on School Property*, CHI. TRIB. (Aug. 23, 2019, 5:10 PM), https://www.chicagotribune.com/news/breaking/ct-corey-walgren-new-illinois-law-naperville-teen-suicide-20190823-mws7jtsb2jczdiwdqpqhtagmxu-story.html [https://perma.cc/S976-2UXH]; for details, see *infra* Part II.B.

the vulnerability of children in the Fifth Amendment interrogation context,[19] that is the outlier. Overwhelmingly, the right of schoolchildren to be free from coercive pressures to self-incriminate is grossly under-protected, less than that of adults suspected of committing criminal offenses.[20]

With such minimal and inadequate guidance from the Supreme Court, understanding how schoolchildren's Fifth Amendment rights are treated in the courtroom requires examining how lower courts approach these issues. A survey of the interrogation decisions throughout the nation's lower courts reveals the core distinctions that courts generally make when evaluating interrogations conducted by school personnel. We show that when reviewing interrogations conducted jointly by police officers and school personnel, courts more closely scrutinize interrogations than when interrogations are just conducted by school personnel. However, officers are often able to leverage the permissiveness applied to school personnel to prevent *Miranda* protections from applying, simply by virtue of the interrogations being conducted in the school context.[21] This includes permitting the ubiquitous use of the "Reid technique" of interrogation, a technique designed specifically to create psychological coercion as a means of leverage over a suspect—precisely the coercion which the Court in *Miranda v. Arizona* sought to prevent.[22]

Yet, the situation is worse than this review of lower court jurisprudence suggests, because most interrogations of schoolchildren are never reviewed at all by any court. To understand how interrogations are commonly undertaken, we conducted eighteen interviews with various experts working on issues relating to school students' lives and educations in one jurisdiction, Illinois.[23] Our experts include attorneys representing students, disability advocates, advocates at various charitable organizations, deans of schools, school social workers, school administrators, probation officers in the juvenile justice system,

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19. Note, however, that the Court has made a similar recognition of the relevance of youth as a factor when assessing due process violation claims pertaining to interrogation of children. *See, e.g.*, Haley v. Ohio, 332 U.S. 596, 599 (1948) ("[W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. . . . That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."); Gallegos v. Colorado, 370 U.S. 49, 54–55 (1962) ("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. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights."); *In re* Gault, 387 U.S. 1, 55 (1967) ("If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."), *abrogated by* Allen v. Illinois, 478 U.S. 364 (1986).

20. *Compare* Walgren v. Heun, No. 17-cv-04036, 2019 WL 265094, at *2–5 (N.D. Ill. Jan. 17, 2019), *with* Missouri v. Seibert, 542 U.S. 600, 608–09 (2004).

21. *See infra* Part II.

22. *See* Miranda v. Arizona, 384 U.S. 436, 448–56 (1966); *see also* further discussion *infra* Part I.

23. All interviews were conducted between late 2019 and 2021 by the authors, with interviews taking place in person, by telephone, or via videoconferencing; detailed records of the interviews are available from the authors. Each interview subject consented to the interview's use in the Article, was shown the detailed record of the interview, and was given the opportunity to make any corrections.

juvenile court judges, post-incarceration reintegration officers, and others. These experts all tell a consistent story: one of schoolchildren being subject to invasive interrogations and the harm that can follow from those inquisitions. What emerges from these interviews is a picture of a system that not only fails many students, but that also permits schools to actively harm some students, discriminate among them, coerce confessions from them, and lead them into the school-to-prison pipeline.

Part I of this Article looks at what little the Supreme Court has said to regulate interrogations of schoolchildren. It shows that the Court is highly selective in recognizing the special vulnerability of children—it has failed to set out any general standard for the interrogations of children in the school context, despite having expounded on their special vulnerability in other contexts. Most of the legal literature on schoolchildren's rights stops there. Part II bridges some of this gap by turning to how interrogation rules are developed and applied throughout the nation. We develop a taxonomy of the doctrinal approaches of lower courts to the interrogation of schoolchildren, which largely varies by who leads the interrogation—police officers or school administrators; yet, we find that many interrogations of young children that involve police officers avoid meaningful scrutiny by using the mask of school personnel. Additionally, we show that many lower courts are skirting or even disobeying the Supreme Court's one protective rule, as articulated in *J.D.B.*, and yet, the Court does not review or overturn these decisions. Part III then examines just how harmful such permissive standards can be for schoolchildren. First, we show that this doctrinal permissiveness is so pervasive that even legislative reform is inadequate alone. Then, our interviews with a range of experts on the ground show that the many interrogations that do not ever reach lower court review are highly problematic: interrogation techniques that have been recognized as coercive when applied to adult criminal suspects are being used against young children without any protections at all; school administrators working hand-in-hand with police officers greatly contribute to the school-to-prison pipeline; and interrogations are conducted in a discriminatory way.

Before proceeding, it is important to note that the law surrounding interrogations is only one way in which the Supreme Court has failed schoolchildren. This Article is part of a broader project studying how the legal system treats schoolchildren's constitutional rights more generally with little regard. Our companion article on school searches shows that, as with interrogations, Supreme Court abdication has led to extreme lower court permissiveness and variability—and that as a result, search practices on the ground prove highly problematic.[24] Our second related project shows the field of school discipline is even less regulated and permits even more intrusions and

24. *See* Tonja Jacobi & Riley Clafton, *The Law of Disposable Children: Searches in Schools*, 13 U.C. IRVINE L. REV. 205 (2022).

harms by the state.[25] Without court oversight, school discipline procedures lead to the further deterioration of children's privacy rights, hamper their access to education, and foster the "school-to-prison-pipeline."[26] Notably, this lack of oversight has permitted school systems in some jurisdictions to exclude students not only from individual schools, but from the entire public school system for multiple years[27] via disciplinary procedures that fail to meet basic requirements of due process.[28] Interrogations of schoolchildren feed into these disciplinary procedures, and thus the consequences of these disciplinary procedures must be considered as part of the consequences of permitting interrogation of schoolchildren in the absence of *Miranda* protections. Each of these three areas requires an immediate response; together, they constitute a massive failure by the judiciary. In combination, they constitute—as multiple of our experts independently described—a legal system that treats some children as disposable.[29]

## I. Supreme Court Selectivity in Recognizing the Special Vulnerability of Children

### A. Miranda *Outside the School Context*

The foundational case of modern constitutional criminal procedure pertaining to police interrogations of criminal suspects, *Miranda v. Arizona*, established the rules of "admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way."[30] *Miranda* developed the requirement that the state must use procedural safeguards to protect against self-incrimination in order for

25. *See* Tonja Jacobi & Riley Clafton, *The Law of Disposable Children: Discipline in Schools*, 2023 U. Ill. L Rev. 1123 (2023).

26. *Id. See also* Advancement Project, Test, Punish, and Push Out: How "Zero Tolerance" and High–Stakes Testing Funnel Youth into the School-to-Prison Pipeline (2010); Advancement Project et al., Education on Lockdown: The Schoolhouse to Jailhouse Track (2005); Gary Fields & John R. Emshwiller, *For More Teens, Arrests by Police Replace School Discipline*, Wall St. J. (Oct. 20, 2014, 11:30 PM), https://www.wsj.com/articles/for-more-teens-arrests-by-police-replace-school-discipline-1413858602#.

27. For instance, Illinois permits "expulsions without services" for up to two years. *See* 105 Ill. Comp. Stat. Ann. 5/13A-3 (West 2020); Jacobi & Clafton, *supra* note 25, at 21.

28. For instance, Amy Meek, who represents schoolchildren in court, has witnessed expulsion proceedings stemming from an accusation without any corroborating evidence. Interview with Amy Meek, *supra* note 17, discussed further *infra* Part III.

29. Telephone Interview with Francisco Arenas, Supervisor Grants Coordinator, Cook Cnty. Juv. Prob. (Apr. 23, 2020) (interview notes on file with authors) (explaining that many schools treat children as "disposable"); Barbara Mahany, *Freeing the Spirit: Drum Circle Unlocks Emotions for Juvenile Inmates*, Chi. Trib. (July 13, 2008, 12:00 AM), https://www.chicagotribune.com/news/ct-xpm-2008-07-13-0807090407-story.html [https:// perma.cc/99AD-DM3T] (explaining why a reverend devotes himself to working with children coming out of the juvenile detention system, because they are often "the forgotten, discarded, disposable people.").

30. Miranda v. Arizona, 384 U.S. 436, 445 (1966).

statements stemming from custodial interrogation to be admissible in the prosecutor's case-in-chief against a defendant.[31] Where those safeguards are not employed, the statements are presumptively inadmissible. In addition to establishing this prophylactic requirement, the Court established the right to have the representation of counsel during interrogation.[32] This decision was premised on the need to protect suspects' free will to exercise their Fifth Amendment rights—particularly in light of the atmosphere of compulsion inherent in custodial interrogation—as well as citizens' dignity and the integrity of the system.[33] Importantly, the Court stressed that *Miranda* rights apply to everyone, regardless of their prior experience with the criminal justice system or any other factor.[34] Yet, we will see that the one exception that the Court has created is for schoolchildren.[35]

The nuances and limitations of the *Miranda* doctrine are well explored elsewhere,[36] but a few key aspects are important to highlight for the purposes of examining the school context. For *Miranda* to apply, (1) the suspect must have been taken into custody or otherwise been deprived of freedom in a manner comparable to custody, and (2) there must be interrogation[37] by law

31. *Id.* at 469. With the *Miranda* decision, the Court's interrogation jurisprudence largely shifted away from considerations of voluntariness. *See, e.g.*, Bram v. United States, 168 U.S. 532, 557–69 (1897); Brown v. Mississippi, 297 U.S. 278, 283 (1936); Chambers v. Florida, 309 U.S. 227, 236–42 (1940); Spano v. New York, 360 U.S. 315, 320–32 (1959); Jackson v. Denno, 378 U.S. 368, 390–91 (1964). It turned instead to whether adequate prophylactic warning had been given, or some exception could excuse failure to administer such a *Miranda* warning. *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291, 297–302 (1980); New York v. Quarles, 467 U.S. 649, 654–60 (1984); Duckworth v. Eagan, 492 U.S. 195, 202–05 (1989); Berghuis v. Thompkins, 560 U.S. 370, 380–83 (2010); Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 508 (2005) (discussing the doctrinal development).

32. *Miranda*, 384 U.S. at 469.

33. *Id.* at 444, 461.

34. *Id.* at 468–69.

35. The Supreme Court has carved out other exceptions to specific circumstances of *when Miranda* applies, but it has never otherwise carved out an exception concerning *to whom Miranda* applies. *See* Harris v. New York, 401 U.S. 222, 226 (1971) (permitting the use of un-Mirandized statements for impeachment purposes); see also Quarles, 467 U.S. at 655 (holding that the un-Mirandized statements are admissible if obtained when questions address a public safety concern); *see also* Michigan v. Tucker, 417 U.S. 433, 450 (1974) (allowing the admission of derivative evidence obtained as a result of the inadmissible confession).

36. *See, e.g.*, Tonja Jacobi, Miranda *2.0*, 50 U.C. DAVIS L. REV. 1 (2016) (summarizing the previous fifty years of *Miranda* doctrinal developments and arguing that *Miranda* fails to meet its primary purposes); Steven B. Duke, *Does* Miranda *Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 566–67 (2007) ("[*Miranda*] serves mainly to distract lawyers, scholars and judges from considering the real problem of interrogation, which is how to convict the guilty while protecting the innocent."); Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 310 (2003) (arguing that *Miranda* had an "immunizing effect" on deceptive interrogation methods); Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1521 (2008) ("[A]s a protective device, *Miranda* is largely dead."); Joshua I. Hammack, Note, *Turning* Miranda *Right Side Up: Post-Waiver Invocations and the Need to Update the* Miranda *Warnings*, 87 NOTRE DAME L. REV. 421, 421 (2011) (critiquing the jurisprudence as "difficult to understand, often unfair to criminal suspects seeking to invoke the right, and largely contrary to the *Miranda* Court's intention") (footnotes omitted).

37. Interrogation is undertaken when an officer uses words or actions that the officer knows or should know are reasonably likely to elicit an incriminating response from the suspect based on the officer's knowledge of the suspect. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

enforcement officers or at law enforcement's behest.[38] Custody is not defined by state law,[39] but rather is a constitutional question, and two discrete inquiries are involved: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."[40] These two factors feed into *Miranda*'s ultimate custody question: whether "a suspect's freedom of action is curtailed to 'a degree associated with formal arrest.'"[41] This is assessed by how a reasonable person in the suspect's position would understand the situation;[42] the subjective beliefs and intentions of the officer are relevant only to the degree that "they are conveyed, by word or deed, to the individual being questioned."[43] To assess custody, officers and courts cannot look to a specified list of relevant circumstances; rather, they must consider "any circumstance that 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'"[44]

One important protective element of *Miranda* is that when a confession stemming from a warned custodial interrogation follows closely on the heels of a confession drawn from an unwarned custodial interrogation, both confessions must be excluded.[45] This is because *Miranda* warnings are unlikely to be effective when the two confessions are close in time and similar in content.[46] The Court reasoned that the "manifest purpose" of such a technique "is to get a confession the suspect would not make if he understood his rights at the outset."[47] To assess whether the second confession is closely enough linked to the first confession that it, too, should be excluded, the Court asks whether the two interrogations were effectively one or whether the second interrogation was sufficiently separate, such that giving *Miranda* warnings would effectively safeguard the rights of the suspect.[48] This must be assessed in the following context:

> [T]he completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and

38. *See* Berkemer v. McCarty, 468 U.S. 420, 428 (1984).

39. *See* Stansbury v. California, 511 U.S. 318, 325–26 (1994).

40. *See* Thompson v. Keohane, 516 U.S. 99, 112 (1995) (footnote omitted); *see also Stansbury*, 511 U.S. at 322 ("In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'") (alteration in original) (internal citations omitted).

41. *Berkemer*, 468 U.S. at 440 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)).

42. *See id.* at 442.

43. *Stansbury*, 511 U.S. at 325.

44. J.D.B. v. North Carolina, 564 U.S. 261, 271 (2011) (internal citations omitted).

45. Missouri v. Seibert, 542 U.S. 600, 613 (2004).

46. *Id.* at 613.

47. *Id.*

48. *Id.* at 615.

> the degree to which the interrogator's questions treated the second round as continuous with the first.[49]

Despite the detail of this ruling, Part III shows that it is routinely ignored in the school context, with interrogations conducted by school personnel closely followed by law enforcement interrogations, even when law enforcement officers are present to witness the first confession and it is obvious to the child that police officers know the full details of the previous confession.

A final key element of *Miranda* protection worth highlighting is that the Court has held that *Miranda* warnings must be given even if a person knows their rights, or can be assumed to know their rights based on prior experience with the legal system, for three reasons: because giving a warning is "so simple, [that] we will not pause to inquire in individual cases" whether the suspect in fact knew their rights;[50] because assessments of a suspect's knowledge, based on information such as age, intelligence, education, and prior contact with the authorities, can only ever be speculative;[51] and because even for someone who is educated, experienced with the police, etc., warnings still serve an important role of overcoming pressures on the individual.[52] But this only explains why *Miranda* warnings are always required; it does not address whether *augmented* protection may be needed depending on factors such as age and education.

The Supreme Court endeavored to fill this gap with its holding in *J.D.B. v. North Carolina*. However, as we will describe, and despite the consistency of this determination with prior Supreme Court jurisprudence in related areas, this ruling has had limited impact in the nation's schoolhouses.

### *B.* J.D.B.*: Partial Expansion of* Miranda *for Children*

By 2011, the Supreme Court had recognized that children are especially vulnerable and need additional protection in a variety of contexts pertaining to the criminal justice system. For example, the Court deemed them incapable of the level of culpability requisite for application of the death penalty as a result of children's lack of maturity and susceptibility to negative influences.[53] Likewise, life imprisonment without any chance of parole for non-homicide offenses was found to be equally inapt due to juveniles' "underdeveloped sense of responsibility" and less formed characters.[54]

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49. *Id.*

50. Miranda v. Arizona, 384 U.S. 436, 468 (1966).

51. *Id.* at 468–69.

52. *Id.* at 468.

53. Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

54. Graham v. Florida, 560 U.S. 48, 68 (2010). Life imprisonment without parole for homicide offenses is still permitted as long as youth is considered; the sentence cannot be mandatory as applied to juveniles. Miller v. Alabama, 567 U.S. 460 (2012).

In this series of cases, the Court took judicial notice of social science studies thoroughly documenting how children are far more vulnerable than adults—but such studies have also shown this to be true in the context of interrogations. Juveniles are developmentally at a disadvantage compared to their adult counterparts in police–citizen encounters. They lack mature judgment and impulse control, which make them less likely to perceive risks,[55] and "less likely to think about the long-term consequences of their choices or actions."[56] Although by age sixteen or seventeen, teenagers have similar reasoning and processing *abilities* as adults, adolescents of this age are "less capable than adults are in *using* these capacities in making real-world choices."[57] Thus, even though they can identify the potential harms that spring from their actions, youth are unable to weigh those harms appropriately, impeding what would otherwise be competent decision-making—directly affecting their ability to assess whether they should talk to police and rendering them far more prone to police coercion. "[A]dolescents' present-oriented thinking, egocentrism, greater conformity to authority figures, minimal experience and greater vulnerability to stress and fear leave juveniles more susceptible than adults to feeling that their freedom is limited."[58] Indeed, "one of the most common reasons cited by teenage false confessors is the belief that by confessing, they would be able to go home."[59] Moreover, research confirms that "[a]dolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures."[60] For these same reasons, juveniles are more likely to falsely confess.[61] In sum:

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55. Cuevas & Jacobi, *supra* note 14, at 2184 (explaining that juveniles are risk-seeking, which makes them less mindful of the need to protect themselves and therefore more vulnerable to dominant authority).

56. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 FUTURE CHILD. 15, 20 (2008). *See also* Brief for the Am. Psych. Ass'n, & the Mo. Psych. Ass'n as Amici Curiae Supporting Respondent at 4–12, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636447, at *4–12 (discussing social science evidence that shows the legal relevance of age difference, and arguing that "[l]ate adolescence is a developmental period during which individuals are particularly prone to risky behavior"); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 232–33 (2006) (cataloging the social science describing juveniles' vulnerability to interrogation and inability to exercise their *Miranda* rights).

57. Scott & Steinberg, *supra* note 56. Statistics on car collisions, binge drinking, unsafe sex, and crime indicate that young people are "impel[led] . . . toward thrill seeking," but technically, adolescents are no less irrational, unaware of, or unable to evaluate consequences than fully developed adults. Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 CURRENT DIRECTIONS PSYCH. SCI. 55, 55 (2007).

58. Brief of Juv. L. Center et al. as Amici Curiae in Support of Petitioner at 11, J.D.B. v. North Carolina, 564 U.S. 261 (2011) (No. 09-11121), 2010 WL 5535752, at *11.

59. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 969 (2004). *See also* Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902 (2017); Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887 (2010).

60. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 357 (2003).

61. *See* Drizin & Leo, *supra* note 59.

> Even if an adolescent has an "adult-like" capacity to make decisions, the adolescent's sense of time, lack of future orientation, labile emotions, calculus of risk and gain, and vulnerability to pressure will often drive him or her to make very different decisions than an adult would in similar circumstances. This is especially the case when an adolescent is called upon to make a decision while under stress and without adult support or guidance.[62]

In 2011, in *J.D.B. v. North Carolina*,[63] the Court for the first time recognized the relevance of these findings to interrogation of children—but only with regard to assessing custody, not assessing interrogation. In a holding that seemingly changed the *Miranda* landscape, the Court ruled that a child's age must be considered in the custody analysis, as "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."[64] In this case—following a period of questioning which occurred outside of the school five days prior—thirteen-year-old J.D.B. was removed from his seventh-grade class by a uniformed School Resource Officer (SRO), a police officer stationed at the school. J.D.B. was brought to a school conference room where a police officer from the local department, the assistant principal, and an administrative intern questioned him about break-ins he was suspected of committing outside of school. J.D.B. was never provided with *Miranda* warnings, given the opportunity to speak to his guardian, or informed he had a right to leave the room.

During the questioning, officers began with casual conversation about the weekend prior, then asked about J.D.B.'s whereabouts when the crime was committed, confronted him with a camera that had been stolen, and pressured him to "do the right thing" because "the truth always comes out."[65] Finally, the officer warned J.D.B. that he may need to send J.D.B. to juvenile detention prior to court, and "[a]fter learning of the prospect of juvenile detention, J.D.B. confessed that he and a friend were responsible for the break-ins."[66] It was only after this unwarned confession that the officer warned J.D.B. of his right to refuse to answer questions and told him he was free to leave. The North Carolina Supreme Court held that J.D.B. was not in custody at the time of his questioning, explicitly declining to include age as a consideration in the custody analysis.[67]

In reversing the North Carolina Supreme Court, the U.S. Supreme Court held that police and courts must take account of a child's age, when known or

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62. Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 436 (2006) (footnotes omitted).

63. J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011). The factual discussion which follows is derived from the Court's discussion.

64. *Id.* at 264–65.

65. *Id.* at 266.

66. *Id.* at 267.

67. *Id.* at 268.

knowable, in undertaking analysis of custody for *Miranda* purposes.[68] Justice Sonia Sotomayor's majority cited to a litany of rationales for the necessity of taking account of a child's age, including social science indicating children are more likely to falsely confess,[69] previous Supreme Court precedent recognizing children as vulnerable and lacking the judgment of adults,[70] the heightened coercion children experience when interrogated,[71] and a long common law history recognizing that children cannot be viewed as miniature adults.[72]

In doing so, the Court held that the differences between adults and children are "a reality that courts cannot simply ignore."[73] As the majority explained, a child's age is not a subjective state of mind, but rather an objective fact: "[n]either officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances."[74] The Court considered that to do otherwise "would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults."[75] Consequently, where the age of a suspect is known or apparent to the questioning officer, the officer must take account of the child's unique vulnerabilities in undertaking a custody analysis; in turn, courts must do the same.[76]

While this decision appeared a landmark holding, it in fact illustrates the ways in which the Court has failed to meaningfully protect the rights of children in the context of interrogations. Most obviously, the Court has not applied the same logic of *J.D.B.* to the second prong of the *Miranda* analysis: whether an interrogation is in fact occurring. Indeed, if "the differentiating characteristics of youth are universal,"[77] why would such characteristics not also affect whether an officer's words or actions are "reasonably likely to elicit an incriminating response from the suspect"?[78] To be sure, the Court's case law as to interrogation provides that "[a]ny knowledge the police may have had

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68. *Id.* at 277.

69. *Id.* at 269 ("That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.").

70. *Id.* at 272 ("We have observed that children 'generally are less mature and responsible than adults;' that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them;' that they 'are more vulnerable or susceptible to . . . outside pressures' . . . and so on.") (internal citations omitted).

71. *Id.* at 272–73 ("'[N]o matter how sophisticated,' a juvenile subject of police interrogation 'cannot be compared' to an adult subject." (quoting Gallegos v. Colorado, 370 U.S. 49, 54 (1962))) (alteration in original).

72. *Id.* at 273 ("The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.").

73. *Id.* at 277.

74. *Id.* at 276.

75. *Id.* at 281.

76. *Id.* at 275–76.

77. *Id.* at 273.

78. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

concerning the *unusual* susceptibility of a defendant to a particular form of persuasion might be an important factor" in the analysis.[79] But if *J.D.B.* recognized that the age of a child necessarily and always relates to the child's susceptibility to interrogation[80]—such that a child's susceptibility is never unusual—why wouldn't the Court also require consideration of the known or objectively apparent age of the child in the interrogation analysis?

Similarly, the Court almost totally blinds itself to the age and vulnerability of children throughout the rest of its *Miranda* jurisprudence. There is no special consideration given to a child's age when it comes to a determination of whether a child has invoked their right to silence or waived their *Miranda* rights—it is but one factor to consider in a laundry list of considerations.[81] More importantly, the Court's prior jurisprudence has itself disregarded the importance of age as one of such factors; in the case of *Fare v. Michael C.*, the Court noted that "*no special factors* indicate that respondent was unable to understand the nature of his actions. He was a 16 ½-year-old juvenile with considerable experience with the police."[82] That the importance of age has not been recognized elsewhere in the Court's *Miranda* doctrine is particularly astounding given that *J.D.B.* concluded that:

> [C]hildren "generally are less mature and responsible than adults;" that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them;" that they "are more vulnerable or susceptible to . . . outside pressures" than adults; and so on. Addressing the specific context of police interrogation, we have observed that events that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."[83]

Surely such considerations are just as pressing, if not more so, when determining whether a child has validly invoked or waived his *Miranda* rights[84]—children are categorically less likely to understand their rights in order

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79. *Id.* at 302 n.8 (emphasis added).

80. *See, e.g.*, *J.D.B.*, 564 U.S. at 275 ("Precisely because childhood yields objective conclusions like those we have drawn ourselves—among others, that children are 'most susceptible to influence,' and 'outside pressures'—considering age in the custody analysis in no way involves a determination of how youth 'subjectively affect[s] the mindset' of any particular child.") (alteration in original) (internal citations omitted).

81. *See* Berghuis v. Thompkins, 560 U.S. 370, 388–89 (2010); Fare v. Michael C., 442 U.S. 707, 725 (1979) ("This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights . . . .").

82. *Fare*, 442 U.S. at 726 (emphasis added).

83. *J.D.B.*, 564 U.S. at 272 (internal citations omitted).

84. Although the analysis may be more complicated for waiver because custody is an objective inquiry about the reasonable person in the suspect's position, whereas waiver concerns the actions of the individual. *Compare* Berkemer v. McCarty, 468 U.S. 420 (1984), *with* North Carolina v. Butler, 441 U.S. 369 (1979). However, California has mandated that a child seventeen or younger in custody must consult with a lawyer before interrogation is permitted, thus illustrating such protection is possible. CAL. WELF. & INST. § 625.6(a) (West 2022).

to be able to invoke them, less capable of self-control and rational decision-making, and more susceptible to the pressure of authority.[85]

Age similarly is absent from inquiries as to whether a "midstream recitation of warnings after interrogation and unwarned confession could . . . effectively comply with *Miranda*[]"[86] or whether the warnings given "reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*,'" even when that suspect is a child.[87] The failure to expand the logic of *J.D.B.* to the doctrinal evaluation of the sufficiency of, invocation of, and waiver of *Miranda* is all the more troubling when one considers that the law recognizes that children lack the faculties to "enter a binding contract enforceable against them,"[88] yet finds children somehow possess the faculties to make decisions regarding complex constitutional rights when their liberty is at stake. By doing so, the Court has failed to consider how children respond differently than adults to figures of authority.

An analysis of the doctrine of confessions would be remiss without addressing the additional protection of the Due Process Clause of the Fourteenth Amendment, which requires that confessions be freely and voluntarily made.[89] Voluntariness is a question of law that is decided under the totality of the circumstances.[90] In determining voluntariness, considerations explicitly include the defendant's age,[91] as well as the defendant's background and mental capacity, and the methods of the officers.[92] However, the fact that a suspect is a minor is often mentioned in passing.[93] As mentioned, in *Fare v. Michael C.*, the Court concluded that "no special factors indicate" the need for additional protection of the juvenile in that case, particularly given he had

85. *See* Richard Rogers et al., *In Plain English: Avoiding Recognized Problems with* Miranda *Miscomprehension*, 17 PSYCH. PUB. POL'Y & L. 264, 282 (2011) ("Research has convincingly shown that juvenile defendants . . . evidence greater problems with Miranda comprehension than do their adult counterparts from the general population."); Drizin & Leo, *supra* note 59, at 963 ("One of the most troubling findings in our study concerns the number of young children who falsely confessed to serious crimes they did not commit."); Patrick M. McMullen, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 997 (2005) ("Juveniles are also more easily influenced and manipulated than adults, making them less likely to challenge misrepresentations by police and more likely to accept responsibility for acts they have not committed. This is true partly because juveniles tend to show greater deference to adult authority figures and will often comply with requests from adults simply to please them.") (footnotes omitted); King, *supra* note 62, at 475 ("Too many children lack the psychosocial and cognitive maturity to consider the consequences of a waiver of rights or to reason how to make this decision.").

86. Missouri v. Seibert, 542 U.S. 600, 604 (2004).

87. Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (alterations in original) (internal citations omitted).

88. *J.D.B.*, 564 U.S. at 273.

89. Jackson v. Denno, 378 U.S. 368, 376 (1964).

90. Spano v. New York, 360 U.S. 315, 323 (1959).

91. Haley v. Ohio, 332 U.S. 596, 599 (1948) ("Age 15 is a tender and difficult age for a boy of any race.").

92. *Id.* at 322–24. The ultimate question is whether the will of the defendant was overborne. *Jackson*, 378 U.S. at 385.

93. *See Haley*, 332 U.S. at 601 ("Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.").

"considerable experience with the police."[94] Not only is age sometimes discounted in this analysis, but it is quite perverse to reason that a child having had *more* encounters with police somehow demonstrates that child possesses the maturity, self-control, and emotional and social development necessary to voluntarily waive critical constitutional rights—the frequency of such encounters counsels in favor of finding a child *lacking* such faculties.[95]

Equally importantly, even if age is considered meaningfully as a factor in voluntariness, that makes its substantial absence from *Miranda* jurisprudence all the more odd. After all, *Miranda* became central to confessions jurisprudence largely because the vague totality-of-the circumstances approach of the voluntariness analysis in practice resulted in lower courts exercising their discretion to uphold many of the most objectionable confessions.[96] Indeed, the Court itself has recognized that *Miranda* really is the only game in town, as "giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver."[97] That the voluntariness analysis includes age in its laundry list of factors to consider does nothing to mitigate its absence from most *Miranda* analyses.

The upshot is that neither the protections of the Fifth nor Fourteenth Amendment are meaningful for children without judicial recognition of the fundamental importance of age in these analyses.

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In *Miranda*, the Supreme Court declared its warnings should be provided to everyone, regardless of age, experience, or any other matter: even the hardened recidivist may receive protection by its cautions, with no consideration of actual coercion or individual experience.[98] One may think,

94. Fare v. Michael C., 442 U.S. 707, 726 (1979).

95. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569–70 (2005); Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 108 (2013) (arguing that the logic of cases such as *Roper* and *Graham* of the "mitigating qualities of youth provide the rationale for a Youth Discount—a proportional reduction of adult sentence lengths based on the youth of the offender"); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 801 (2003) (arguing that because "developmental factors influence their criminal choices, young wrongdoers are less blameworthy than adults").

96. *See* Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1834 (1987) ("Lacking clear guidance, lower courts often upheld confessions that involved clearly improper and abusive tactics."); Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 133 (2012) ("The involuntariness route had appeared to become a dead end because the amorphous nature of the involuntariness standard gave the lower courts free rein and these courts generally used their discretion to uphold confessions, particularly when the crime charged was a serious one.").

97. Missouri v. Seibert, 542 U.S. 600, 608–09 (2004).

98. Miranda v. Arizona, 384 U.S. 436, 468–69 (1966).

then, that if even a hardened recidivist or a trained criminal lawyer ought to receive *Miranda* warnings, because even a person highly experienced with the criminal justice system can still have their will overborne by the coercive nature of interrogations, it is obvious that at the very least the same should apply to schoolchildren. And since the Supreme Court has declared that there is no reason for "courts to blind themselves to th[e] commonsense reality" that "children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave,"[99] it naturally follows that the Court ought to have laid out an expanded version of *Miranda* that applies in the school context to protect children from interrogations. Yet the opposite is the case.

Not only is there no Supreme Court precedent laying out any special protections for schoolchildren to protect them from coercive interrogations—as opposed to custody—there has never even been an explicit ruling by the Court detailing what standards govern the interrogations of schoolchildren when questioned by school officials or even in conjunction with school officials, or whether they are even afforded the constitutionally required minimum protections of *Miranda* in the school context.[100] While the Court has at least addressed what protections the Fourth Amendment affords to schoolchildren[101] and held that schools may violate students' procedural due process rights when doling out exclusionary discipline,[102] the Court has left untouched the application of *Miranda* inside school walls. With a lack of guidance by the Court, lower courts have been left to determine the application of *Miranda* to interrogations of schoolchildren. Therefore, to understand how *Miranda* is, or is not, applied in schoolhouses, it is necessary to turn to the decisions of lower courts.

## II. INTERROGATION RULES IN APPLICATION THROUGHOUT THE NATION

In our companion articles to this study reviewing how the law treats schoolchildren in terms of searches and disciplinary practices, the applicable law is sufficiently developed that we primarily focused on Illinois as a representative case study, examining every lower court case of that jurisdiction.

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99. J.D.B. v. North Carolina, 564 U.S. 261, 264–65 (2011).

100. The closest the Court has come to determining the application of *Miranda* when questioning is done by non-police entities is *Baxter v. Palmigiano*, which held *Miranda* inapplicable to prison discipline hearings. Baxter v. Palmigiano, 425 U.S. 308, 315 (1976).

101. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985) ("[A] search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.") (footnotes omitted); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 374 (2009) (applying the *T.L.O.* standard to a partial strip search of a child); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) (applying the *T.L.O.* standard and finding "[l]egitimate privacy expectations are even less with regard to student athletes").

102. Goss v. Lopez, 419 U.S. 565, 582–84 (1975).

However, when it comes to interrogations of schoolchildren, there has been so little development of the case law that only looking to Illinois fails to provide a representative sample. A review of the scant published cases in Illinois shows that Illinois courts have *never* held that *Miranda* applies to the interrogations of school children by school officials—lower courts have always found that their confessions to be voluntary even if the child was seized.[103] Thus, for this part of our analysis, to fully assess the application of *Miranda* to schoolchildren, we must look to cases throughout the nation.

A review of this case law shows an overall pattern of permissiveness toward schools, very limited protections of schoolchildren, and a relatively structured typology, with the case outcomes varying based on the actor—school personnel or law enforcement—exercising control over the interrogation of the schoolchild. First, where an officer is not involved in an interrogation, even if the school teacher or administrator is questioning a student about a crime and shares any information gained in the interrogation with law enforcement, courts hold that *Miranda* does not apply and there is no issue with voluntariness.[104] Second, in cases where an officer is present during the interrogation along with school personnel, courts usually again hold that *Miranda* is not required and there is typically no voluntariness issue so long as the investigation is primarily led by school teachers or administrators, even if the officer is involved in the questioning.[105] Third, where an officer and school administrators share in leading the interrogation, most of the time courts still hold that *Miranda* seldom applies.[106] Fourth and finally, only where an officer leads questioning in the school context are courts likely to find that *Miranda* is required, but even in these circumstances they do not always hold so.[107] We examine these categories in turn.

### *A. Interrogations by School Personnel*

Lower courts do not find questioning of a student by a teacher or administrator of the school to trigger *Miranda* or any Fifth Amendment voluntariness issues—regardless of the circumstances, the nature of the suspected behavior, or whether the child is seized. Most often, these holdings are premised on a lack of "custody."[108] Examples can be found in every

103. *See infra* Part III.

104. *See infra* Part II.A.

105. *See infra* Part II.B.

106. *See infra* Part II.C.

107. *See infra* Part II.D.

108. *In re* Harold S., 731 A.2d 265, 268 (R.I. 1999) ("The weight of authority is that *Miranda* warnings are necessary only when a defendant is subject to questioning by law-enforcement officials, their agents, and agents of the court while the suspect is in official custody."); Commonwealth v. Snyder, 597 N.E.2d 1363, 1369 (Mass. 1992) ("The Miranda rule does not apply to a private citizen or school administrator who is

jurisdiction, but some are worth detailing. In the case of *Boynton v. Casey*, Daniel Boynton was questioned by his principal and vice-principal about his alleged use of marijuana on school grounds[109]—a traditional crime.[110] Daniel was denied permission to leave and was not informed of his right not to answer questions.[111] During the hourlong questioning, Daniel admitted that he had used marijuana on school property and was immediately suspended and subsequently expelled.[112] In reviewing his challenge to the expulsion, the district court first concluded that there was no authority to support the extension of *Miranda* to the school context, based on the reasoning that, since *Miranda* was not extended to prison disciplinary proceedings, it was not required here.[113] This mirrors language used in other areas of law addressing the rights of schoolchildren—courts use parallel language in decisions regarding schools and detention facilities due to the purported need to maintain order and discipline in both contexts.[114] In drawing these parallels, as here, courts fail to explain why children who have not been adjudicated guilty of committing any crime are not entitled to any more protection than convicted, incarcerated adult criminals.

Second, the court concluded that despite the length of the interrogation and the denial of Daniel's permission to leave, the custody element could not be met.[115] This stands in stark contrast to Supreme Court cases like *Dunaway v. New York*, in which a murder suspect was found to be in custody when (a) he was asked to accompany the police, rather than told to do so; (b) he was not warned that he could not leave; and (c) he was not restrained in any way.[116] Even though Supreme Court cases such as *Dunaway* concern criminal suspects, against whom at the very least reasonable suspicion has been established,

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acting neither as an instrument of the police nor as an agent of the police pursuant to a scheme to elicit statements from the defendant by coercion or guile.").

109. Boynton v. Casey, 543 F. Supp. 995, 996 (D. Me. 1982).

110. *See, e.g.*, AM. C.L. UNION, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 7 (2020) ("Marijuana arrests made up 43% of all drug arrests in 2018, more than any other drug category.").

111. *Boynton*, 543 F. Supp. at 996.

112. *Id.*

113. *Id.* at 997 (discussing Baxter v. Palmigiano, 425 U.S. 308 (1976), which held that *Miranda* did not require prison inmates to be provided counsel during disciplinary proceedings).

114. *See* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) ("[T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause . . . ."); Bell v. Wolfish, 441 U.S. 520, 546 (1979) ("[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees."); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995) ("For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations . . . ."); Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 326 (2012) ("Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face.").

115. *Boynton*, 543 F. Supp. at 998.

116. Dunaway v. New York, 442 U.S. 200, 212–213 (1979).

schoolchildren, against whom no amount of suspicion of any crime has necessarily been established, do not receive equivalent protections.[117] Daniel's case was decided prior to *T.L.O.*; however, subsequent cases show that courts hold that the permissive seizure analysis of *T.L.O.* does not change the *Miranda* analysis. In fact, even though *T.L.O.* was justified on the grounds that the school environment is one of protection for schoolchildren, courts actually use the rationales to justify schoolteacher and administrator interrogations about traditional crimes, which can then be used as evidence against the child in subsequent prosecution for those crimes.[118]

For example, in a California case, *In re Corey L.*, the court held that the "[q]uestioning of a student by a principal, whose duties include the obligations to maintain order, protect the health and safety of pupils and maintain conditions conducive to learning, cannot be equated with custodial interrogation by law enforcement officers."[119] This was held to be the case even though minor Corey was being questioned about his suspected possession of cocaine and his case was referred to and subsequently prosecuted by the Oakland Police Department. Courts treat the school setting as providing carte blanche to administrators and personnel to interrogate children about alleged wrongs, including crimes, without any warning about their rights or the consequences of confessing.

The judicial failure to recognize that the allegedly child-protective functions of schools are undermined by school administrators' systematic coordination with law enforcement on traditional criminal matters is even more starkly illustrated in the case of *State v. V.C.*, decided by the District Court of Appeal of Florida.[120] Here, the court held that the only requirement for interrogations was satisfaction of the same amorphous (and essentially meaningless) "principle of reasonableness" as appeared in *T.L.O.*[121] In this case, a student reported to the school principal, Hindman, that two students robbed him—one of them being V.C. The principal knew that the student had also filed a police report. Nonetheless, Hindman took V.C. out of class and questioned him, told V.C. a police investigation was possible, and then brought V.C. to his office to write a statement that was later used against V.C. in criminal proceedings. The trial court found that "those statements were given in a "'police-like" atmosphere,

117. *T.L.O.*, 469 U.S. at 342 (emphasis added).

118. Paul Holland, *Schooling* Miranda*: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 41 (2006) ("Many courts have simplistically combined *T.L.O.* and *Miranda* and assumed that *Miranda* does not apply to questioning by school officials unless those officials are acting as agents of law enforcement. These opinions have not addressed, often because it was unnecessary on the facts presented, the extent to which the developments in school-law-enforcement collaboration have rendered the *T.L.O.* framework obsolete.") (footnotes omitted).

119. *In re* Corey L., 250 Cal. Rptr. 359 (1988).

120. State v. V.C., 600 So. 2d 1280, 1281 (Fla. Dist. Ct. App. 1992). The factual discussion which follows is derived from the court's discussion.

121. *Id.*

where the assistant principal worked almost as an agent for the police'" and suppressed the statements after finding that "'it was incumbent upon school authorities' to safeguard the students' Fifth Amendment privileges."[122] Yet, the court of appeal reversed, finding the interrogation reasonable because there was no evidence that the adult authority figure, the principal, acted in a way that was "overbearing" when ordering the student into his office, advising him that police investigation was possible, and questioning him.[123]

Moreover, the court held the statements could not be suppressed as given in violation of *Miranda* as V.C. was not in custody, concluding that "[a]lthough [V.C. and other students] were not free to leave, that restriction stemmed from their status as students and not from their status as suspects."[124] The outcome was not changed by the fact that the principal conceded that the "investigations he conducted within the school often yielded information that he would eventually turn over to the police."[125] The court reasoned:

> [The principal's] primary function when dealing with disciplinary problems was to act as a fact-finder for the school system. Hindman's testimony reveals that he was acting to further the interests of the school, not the police. Because there is no evidence in the record that Hindman was acting as an agent for the police, the trial court erred in suppressing the statements.[126]

Such reasoning is formalistic and illogical for numerous reasons. First, it applies the wrong test: under Supreme Court doctrine, custody is assessed objectively from the point of view of the reasonable person in the suspect's position, as to whether they are subject to restrictions on their freedom enough to make a reasonable person feel subject to arrest[127]—not viewed in terms of what motive the interrogator was pursuing. For instance, even if a police officer has decided to take a person into custody, the Supreme Court has deemed such a decision on part of the officer irrelevant if it is not apparent to the person being interrogated.[128] Second, even when looked at from the interrogator's point of view, the court's logic suggests that a student cannot ever be placed in custody by a school teacher or administrator alone—as such, it seems to be putting forward a per se rule against finding custody, rather than utilizing the

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122. *Id.* (internal citations omitted).

123. *Id.* at 1281–82.

124. *Id.* at 1281.

125. *Id.*

126. *Id.* at 1281–82.

127. Berkemer v. McCarty, 468 U.S. 420, 421–22 (1984) ("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."); Stansbury v. California, 511 U.S. 318, 325 (1994) (articulating the central question as "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action'" (quoting *Berkemer*, 468 U.S. at 440)).

128. *Berkemer*, 468 U.S. at 442.

fact-intensive inquiry required by the proper test.[129] Finally, it subverts the purpose of *Miranda*: "[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."[130] No court has provided any answer as to why school students are stripped of their Fifth Amendment rights, other than out of deference to the school. That is contrary to the Supreme Court's position that school students do not leave their First Amendment[131] or Fourth Amendment[132] rights at the schoolhouse door.

As problematic as this logic is, it prevails in courts and schools, even when courts explicitly find that a condition of seizure or custody would be established but for being in the school context. In *Commonwealth v. Ira I.*, the court held that no *Miranda* warning was required and the student could not show involuntariness because the principal was not acting as an agent of the police.[133] The court held so despite the fact that "a student summonsed to the assistant principal's office to discuss a potentially criminal matter would not feel free to leave, and that they did not consider themselves free to leave."[134] *Doe v. State* illustrates the reasoning underlying such holdings:

> The purpose of most school-house interrogations is to find facts related to violations of school rules or relating to social maladjustments of the child with a view toward correcting it. Giving Miranda-type warnings would only frustrate this purpose. It would put the school official and student in an adversary position. This would be in direct opposition to the school official's role of counselor.[135]

Once again, this logic invokes an improper analytical framework of looking to the purpose of the school official in undertaking the interrogation, rather than looking at the perception of the student being interrogated.[136] Perhaps even more insidiously, this logic takes a stance of willful blindness toward the truly adversarial nature of these school interactions. It ignores the fact that schoolchildren's confessions are routinely passed on to law enforcement, and that even when confined to school disciplinary procedures, such as suspension

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129. *Stansbury*, 511 U.S. at 322 (explaining that "a court must examine all of the circumstances surrounding the interrogation" to determine whether there has been a "'restraint on freedom of movement' of the degree associated with a formal arrest" (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983))); Yarborough v. Alvarado, 541 U.S. 652, 663 (2004) ("The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.").

130. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

131. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

132. *See* New Jersey v. T.L.O., 469 U.S. 325, 340–43 (1985).

133. Commonwealth v. Ira I., 791 N.E.2d 894, 901–03 (Mass. 2003). The factual discussion which follows is derived from the court's discussion.

134. *Id.* at 902.

135. Doe v. State, 540 P.2d 827, 833 (N.M. Ct. App. 1975).

136. *See* Holland *supra* note 118, at 72.

and expulsion, those procedures have potential for significant detriment to the student.[137]

The result is that courts are not requiring teachers or administrators to provide *Miranda* warnings that officers in the same situation would be required to give—even when questioning a student about a past crime, when that information is subsequently given to law enforcement to aid in investigating and prosecuting the student, or when students respond to questioning in compliance with the requirement that they follow the directives of school personnel.[138] These holdings afford the State almost unlimited discretion over students' rights and autonomy, so long as it is exercised by a teacher or school administrator rather than a police officer. This doctrinal pattern renders schoolchildren the least protected group of any, with less constitutional protection than adults suspected of murder,[139] those highly experienced with the criminal justice system,[140] and those against whom the State has already sufficiently developed a case as to have brought a formal indictment.[141]

### *B. Interrogations by School Personnel with Officers Present*

In the second category of cases—situations in which there is a police officer present during the interrogation of a child—the doctrinal approach typically adopted by lower courts is to hold that, so long as the questioning is led by school personnel, *Miranda* still does not apply and courts will not find voluntariness issues, either. *J.D. v. Commonwealth* is illustrative.[142] A series of thefts had occurred in school, and fourteen-year-old J.D. was suspected of involvement.[143] In response, "Wright, an associate principal at the school, summoned J.D. to his office and questioned him about the most recent

137. *See infra* Part III; *see also* LIZBET SIMMONS, THE PRISON SCHOOL: EDUCATIONAL INEQUALITY AND SCHOOL DISCIPLINE IN THE AGE OF MASS INCARCERATION 42 (2017) ("[S]chool discipline uses punishment to manage large-scale social problems such as poverty, hunger, homelessness, and youth protective custody . . . ."); Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 939 (2016) ("These methods, especially when coupled with the zero tolerance policies, end up pushing more students out of school or directly into the juvenile justice system."); Deborah N. Archer, *Introduction: Challenging the School-to-Prison Pipeline*, 54 N.Y. L. SCH. L. REV. 867, 868 (2009–2010).

138. *See, e.g.*, State v. Biancamano, 666 A.2d 199, 203 (N.J. Super. Ct. App. Div. 1995); State v. Tinkham, 719 A.2d 580, 583 (N.H. 1998); D.Z. v. State, 100 N.E.3d 246, 247 (Ind. 2018); State v. J.T.D., 851 So. 2d 793, 795–97 (Fla. Dist. Ct. App. 2003); S.E. v. Grant Cnty. Bd. of Educ., 544 F.3d 633, 641 (6th Cir. 2008); State v. C.G., No. 2441-1-II, 2000 WL 1009028, at *1–3 (Wash. Ct. App. July 21, 2000); *In re* Harold S., 731 A.2d 265, 268 (R.I. 1999).

139. Missouri v. Seibert, 542 U.S. 600, 605 (2004).

140. Miranda v. Arizona, 384 U.S. 436, 469 (1966) ("[W]hatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.").

141. Massiah v. United States, 377 U.S. 201, 206–07 (1964).

142. J.D. v. Commonwealth, 591 S.E.2d 721 (Va. Ct. App. 2004).

143. *Id.* at 723.

theft."[144] Present in the interrogation room were the school principal and the School Resource Officer, neither of whom participated in the interview.[145] During the interrogation, J.D. confessed.[146] The court notes that "[d]uring the interview, J.D. was not told he could not leave the office nor was he restrained in any way."[147] Inclusion of this statement is misleading, as a suspect is not expected or required to ask to leave or be restrained for the suspect to perceive they are in custody.[148]

The court refused to suppress the confession on two bases. First, the court ruled that *Miranda* did not apply because Wright was not "acting as an agent of a law enforcement governmental agency."[149] While this may technically be true as a matter of law, it is formalistic and cold comfort, given that the officer stood by in the room to receive any confession made. Second, the court ruled that since the officer did not make any "show of authority" or indicate that J.D. was under arrest, J.D. was not in custody, despite the fact that officers were present, J.D. had been ordered to Wright's office, and "a student can be disciplined for refusing to obey an assistant principal at Albemarle High School."[150] As for his challenge to the voluntariness of the confession, the court explicitly rejected the argument that J.D. "felt compelled to answer Wright's questions because his silence would have led to some type of administrative punishment or sanction, such as suspension or expulsion."[151] Thus, even though a state employee with explicit authority and capacity to punish the suspect—including for refusing to answer questions—questioned him in the presence of law enforcement, he was deemed to be not in custody.

The case of *State v. Antonio T.* is even more extreme. Two teachers suspected Antonio of intoxication at school and escorted him to the school's administrative offices.[152] Vice Principal Sarna called in the SRO, whom the court notes "was dressed in full police uniform and equipped with all of the standard instruments of lethal and non-lethal force."[153] Sarna also "stated that she had called in the deputy to administer a portable breath test (PBT), as well as to protect her in case Antonio became violent."[154] The opinion presents no

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *See* Dunaway v. New York, 442 U.S. 200, 212 (1979).

149. *J.D.*, 591 S.E.2d at 725.

150. *Id.* at 723, 725.

151. *Id.* at 727.

152. State v. Antonio T., 298 P.3d 484, 486 (N.M. Ct. App. 2012), *rev'd*, 352 P.3d 1172 (N.M. 2015). Although this decision was later reversed on state statutory grounds, as New Mexico's legislature passed a statute to "afford children greater statutory protection than what is constitutionally mandated," the decision remains instructive on constitutional jurisprudence. State v. Antonio T., 352 P.3d 1172, 1176 (N.M. 2015).

153. *Antonio T.*, 298 P.3d at 486. The factual discussion which follows is derived from the court's discussion.

154. *Id.*

facts to suspect Antonio would behave violently. Before having Antonio tested, she questioned him and he admitted to drinking and throwing the bottles away in the trash at school. The officer then administered the test, and Antonio's blood alcohol concentration was found to be 0.11%. The officer left briefly to look for the alcohol bottles, and after he was unable to find them, the officer read Antonio his *Miranda* rights and began questioning him. Once Antonio was given his *Miranda* warning by the officer, he asserted his rights in response to the officer's questions about his alcohol consumption.

The prior confession Antonio made to Vice Principal Sarna was admitted against him, despite the fact that the officer was present and "actively listening," and the fact that Antonio invoked his Fifth Amendment privilege once the officer began to interrogate him.[155] The court reasoned:

> Antonio was not taken to a new location or isolated with law enforcement; the office was not controlled by the officer. Sarna testified that, as a school administrator, her goals were the safety of Antonio and other students, rather than a pursuit of a criminal investigation. Because the purpose and location of the questioning were not controlled by law enforcement, we conclude that Antonio was not subject to a custodial investigation.[156]

It is difficult to square such reasoning with the facts of this case. Antonio was escorted by two teachers to the dean's office for suspected alcohol use and was questioned by a disciplinary dean in the presence of a fully armed police officer, whom he was told was there to administer an evidentiary test and to respond to potential violence. It is hard to imagine how Antonio could have felt he was not in custody. Under this doctrine, so long as the school dean testifies that her goal for an interaction was safety, even if an officer stands visibly in waiting to arrest the student and the school presents no evidence of any threat that the student poses, the court will find there was no custodial interrogation. In the absence of a Supreme Court requirement to do so, courts are not in the business of evaluating school personnel's decisions with any level of rigor.

Further, by limiting their inquiry to technicalities, courts abdicate their responsibility to meaningfully adjudicate whether schoolchildren's rights have been violated and to protect those rights. Consequently, schools are left to decide the constitutional rights of schoolchildren. Reliance on simplistic formalism over fact-intensive analysis to determine the level of coercion schoolchildren experienced is a pervasive theme throughout the cases. This is illustrated by *In Interest of J.C.*: high-schooler J.C. was "sent to the principal's office because he allegedly had been smoking marijuana on school grounds."[157]

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155. *Id.* at 486–87.

156. *Id.* at 487.

157. *In re* J.C., 591 So. 2d 315, 316 (Fla. Dist. Ct. App. 1991). The factual discussion which follows is derived from the court's discussion.

The court held that although the SRO asked some of the questions during the assistant principal's interrogation of J.C.,

> [T]he trial judge here was apparently satisfied that the deputy's contribution was de minimis and, as the judge said, "[I]t doesn't strike me that the questioning was by the police officer." Thus, although we cannot tell from the record what two questions the deputy asked, we conclude that the trial judge did not abuse his discretion.[158]

Cases such as this are an example of striking deference to the school at every level of review, even where it is contrary to law. As a general matter, courts often distinguish between cases where SROs are merely present and cases where officers are involved in the questioning, as explored in the next Subpart. Yet here, even when the SRO was involved in questioning, the court was nonetheless willing to find against custody by treating the SRO's involvement as *de minimis*. Further, the reviewing court did so even though it admittedly did not know *which* questions the police officer asked—the court was willing to simply *assume* that the unknown questions were not central to the interrogation. And, finally, the ruling is contrary to Supreme Court precedent; there is no case law to support the proposition that a small amount of questioning by a police officer is somehow exempt from *Miranda*.[159] As the dissent pointed out, "I am not aware of a 'de minimis' exception to *Miranda*. Where, as here, the police officer admits to questioning of appellant which would elicit incriminating responses in a custodial setting regarding the commission of a crime, *Miranda* warnings were required."[160]

In contrast to the prior category, in which *Miranda* is never found to apply to interrogations of schoolchildren by school personnel, there are examples of courts finding *Miranda* is required when law enforcement is present for the interrogation process. However, the extension of the protection of *Miranda* in such situations is limited to the cases with the most extreme facts. For instance, in *In re K.D.L.*, Oliver, a middle-school student accused of drug possession, was frisked by the school SRO, and then transported to the principal's office, located in another building, by police cruiser.[161] The principal interrogated Oliver there from 9:00 a.m. to 3:00 p.m. without permitting Oliver to leave for lunch, and the SRO remained present in the room for much of the interrogation.[162] The court reasoned that "[a]fter being accused of drug

158. *Id.* (second alteration in original).

159. Notably, even questions such as where a dangerous weapon has been hidden during an arrest are subject to *Miranda* unless they satisfy the public emergency exception. New York v. Quarles, 467 U.S. 649, 653 (1984) ("[T]his case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*.").

160. *In re J.C.*, 591 So. 2d at 317 (Warner, J., dissenting).

161. *In re* K.D.L., 700 S.E.2d 766, 772 (N.C. Ct. App. 2010). The factual discussion which follows is derived from the court's discussion.

162. *Id.*

possession, frisked, transported in a police cruiser, and interrogated nearly continuously from 9:00 a.m. to 3:00 p.m. with a police officer in the room for much of that interrogation, it was objectively reasonable for Oliver to believe he was functionally under arrest."[163] In so ruling, the court specifically noted that the officer's presence impacted the analysis:

> Deputy Holloway's conduct significantly increased the likelihood Oliver would produce an incriminating response to the principal's questioning. His near-constant supervision of Oliver's interrogation and "active listening" could cause a reasonable person to believe Principal Livengood was interrogating him in concert with Deputy Holloway or that the person would endure harsher *criminal* punishment for failing to answer.[164]

Thus, even this rare case in which a child was recognized to be in custody where an officer was present but did not question the student, the court's reasoning illustrates the severity of the general rule: an administrator interrogating a child for an entire day with no break, after the child is frisked by police, transported by police in a cruiser—a factor that alone is indicative of arrest of an adult criminal suspect[165]—and accused of a crime, would not be in custody but for the presence of a law enforcement officer during the administrator's interrogation.

### *C. Interrogation by School Personnel and Officers*

Even as officers become more involved, courts will typically still hold *Miranda* inapplicable to interrogations of schoolchildren. Take *State v. Lemon*.[166] Ronald Axtman, the Chief of Police of Elma, Washington, "went to Elma High School to investigate marijuana use by students."[167] In the vice principal's office, the principal had detained fifteen-year-old Matthew Lemon and his friend Patrick.[168] Prior to Axtman's arrival, the vice principal told Matthew "to sit down and wait for the police to arrive" and that "he would be suspended for 30 days or expelled if he did not answer the Chief's questions."[169] The office door was closed, and "Lemon did not feel free to leave."[170]

When Officer Axtman arrived at the scene, the vice principal informed Axtman that he was expelling Matthew for consuming marijuana, and Axtman

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163. *Id.*

164. *Id.*

165. Dunaway v. New York, 442 U.S. 200, 213 (1979) ("[A]ny 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause.").

166. State v. Lemon, No. 24070-0-II, 2000 WL 349765, at *1 (Wash. Ct. App. Mar. 31, 2000). The factual discussion which follows is derived from the court's discussion.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

asked Matthew "what it was all about."[171] Matthew admitted that he had smoked at a house on West Waldrip Street with a bowl fashioned from a Pepsi can, and Matthew "later accompanied Chief Axtman to the house and showed him the Pepsi can."[172] The Chief took a written statement from Matthew at the school before arresting him; Matthew "did not receive Miranda warnings before giving either his oral statement or his written statement."[173]

The court held that Matthew was not in custody and that his questions were not in response to police questioning, rendering *Miranda* inapplicable and his statement admissible.[174] To justify its holding, the court explained that Matthew

> was still at school, in the vice-principal's office, having been told he might be expelled or suspended. Upon arriving, the Chief did not promptly arrest Lemon or even begin questioning him. At that point, preceding Lemon's statement, the vice-principal was still trying to arrive at appropriate discipline, and the Chief was still evaluating whether police action was warranted.[175]

The school context gives courts the latitude to engage in reasoning that is literally contrary to established law: the Court has held explicitly that "[i]t is well settled [] that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*."[176] In Matthew's case, that means it is entirely irrelevant what the principal or officer were thinking; their plans, if not apparent to Matthew, cannot lawfully be used to ascertain Matthew's mental state.[177] There is little question Matthew would have felt he was under arrest, and the court determined that he did not feel free to leave.[178] Likewise, there is no doubt that he was subject to interrogation while in custody: he had been told he would be expelled if he did not answer the police officer's questions, meaning that not only was he likely to incriminate himself, but he was also actually being coerced to answer questions regardless of his desire to remain silent.

Another illustrative example is *State v. Schloegel*; there, Colin Schloegel was suspected of possessing drugs on campus grounds.[179] Although two officers "escorted" Colin to his car and took his keys, and the "school liaison officer" questioned him about the prescription pills and drugs found in his car, the court held that Colin was not in custody.[180] Instead, it concluded that if Colin was "in

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at *3.
175. *Id.* at *2.
176. Stansbury v. California, 511 U.S. 318, 324 (1994).
177. *Id.*
178. *Lemon*, 2000 WL 349765, at *1.
179. State v. Schloegel, 769 N.W.2d 130, 132 (Wis. Ct. App. 2009).
180. *Id.* at 133–43.

custody at all, [he] was in custody of the school and was not being detained by the police at that time."[181]

There are limits to this deference: as police involvement increases, the likelihood that a court will find a *Miranda* warning required increases. *In re Welfare of G.S.P.* is a good example of this.[182] Seventh-grader G.S.P. was removed from his class by Assistant Principal Wheeler and the school police officer after a BB gun was discovered in his backpack.[183] Wheeler told G.S.P. that everything he said would be recorded—a legal requirement for interrogation in North Carolina—that Wheeler would ask a few questions and then turn the discussion over to the police officer, and that G.S.P. had no choice but to answer the officer's questions.[184] G.S.P. explained that he had forgotten the BB gun was in his backpack after playing at a friend's house and there was no ammunition. In response, the officer quoted the statute with which G.S.P. would likely be charged and questioned G.S.P. as to his intentions and whether he interacted with any gangs.[185] The court noted from this exchange that Wheeler and the officer were working together in a concerted effort and applied an objective test to hold that G.S.P. was in custody, interrogated, and entitled to a *Miranda* warning.[186] This illustrates that the rules of *Miranda* can be applied meaningfully in the school context; they just often are not.

Some courts have held that any involvement or participation by law enforcement implicates *Miranda* and therefore triggers a finding of custody and its application.[187] Under this more protective application of the doctrine, even where school administrators make a "concerted effort to limit the officer's role during [] interviews," any involvement triggers greater protection.[188] Once again, this illustrates that the rules of *Miranda* can be applied meaningfully in the school context. However, most courts take the opposite approach and suppress only those statements made directly in response to an officer's questions.[189] In doing so, they admit statements from the exact same interrogation so long as the question was not actually asked by the police officer.[190] Thus, even when more permissive courts might recognize that the child is in custody, they nonetheless permit admission of some responses to the interrogation made in the absence of *Miranda* warnings. Again, this is contrary to general *Miranda* rules as applied to adult criminal suspects, for which un-

181. *Id.* at 134.

182. *In re* Welfare of G.S.P., 610 N.W.2d 651, 653–54 (Minn. Ct. App. 2000). The factual discussion which follows is derived from the court's discussion.

183. *Id.* at 657.

184. *Id.* at 655, 657.

185. *Id.*

186. *Id.* at 658–59.

187. *See, e.g.*, *In re* T.A.G., 663 S.E.2d 392, 394–95 (Ga. Ct. App. 2008).

188. *Id.*

189. M.H. v. State, 851 So.2d 233, 233–34 (Fla. Dist. Ct. App. 2003).

190. *Id.*

Mirandized interrogation cannot be remedied by having Mirandized law-enforcement-led questioning follow non-Mirandized questioning.[191]

### *D. Interrogation by Police Officers Only*

Only when questioning is done by a school officer alone are courts likely to regularly find that the protections of *Miranda* apply to schoolchildren.[192] The reasoning of cases like *State v. Doe*, in which a child was interrogated by his School Resource Officer alone, show this shift in reasoning:

> We think it unlikely that the environment of a principal's office or a faculty room is considered by most children to be a familiar or comfortable setting, for students normally report to these locations for disciplinary reasons, as Doe had in the past. It is also unlikely that any ten-year-old would feel free to simply leave the administrative area of the school after having been summoned there by school authorities for a police interview. We are persuaded that under these circumstances a child ten years of age would have reasonably believed that his appearance at the designated room and his submission to the questioning was compulsory and that he was subject to restraint which, from such a child's perspective, was the effective equivalent of arrest.[193]

It is difficult to dispute such reasoning. But what is missed is that much of this description applies equally to a ten-year-old entering the unfamiliar environment of the principal's office to be interrogated by school authorities, as described in the three prior categories.

Importantly, even this minimal protection is unreliably provided, as courts sometimes rely on the interrogation taking place in the school context to hold that *even interrogations by officers alone* do not necessarily trigger *Miranda*. In *State v.*

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191. Missouri v. Seibert, 542 U.S. 600, 608–09 (2004) (laying out a multi-factor test, of which change in personnel is only one consideration in determining whether subsequent warned questioning can be untainted by prior unwarned questioning).

192. Holguin v. Harrison, 399 F. Supp. 2d 1052, 1060 (N.D. Cal. 2005) ("[T]he State court's determination that Holguin was not in custody when the officers questioned him for nearly an hour in the Vice–Principal's office, the patrol car, and while looking for the gun near the creek involved an unreasonable application of controlling federal law."); State v. D.R., 930 P.2d 350, 353 (Wash. Ct. App. 1997) ("D.R. was in custody, in light of Detective Matney's failure to inform him he was free to leave, D.R.'s youth, the naturally coercive nature of the school and principal's office environment for children of his age, and the obviously accusatory nature of the interrogation."); *In re* Killitz, 651 P.2d 1382, 1383–84 (Or. Ct. App. 1982) ("Here, the *Paz* indicia of custodial interrogation are all present. *First*, defendant was not free to leave during the interrogation. He was in school during regular hours, where his movements were controlled to a great extent by school personnel. Defendant was interrogated by an armed, uniformed police officer in the principal's office with the principal present. Neither the police officer nor the principal said or did anything to dispel the clear impression communicated to defendant that he was not free to leave. *Second*, the fact that another student had implicated defendant in the burglary indicates that he was being questioned as a suspect rather than as a witness. *Third*, defendant cannot be said to have come voluntarily to the place of questioning. He would likely have been subject to the usual school disciplinary procedures had he not complied with the principal's request that he come to the office.").

193. State v. Doe, 948 P.2d 166, 173–74 (Idaho Ct. App. 1997).

*Polanco*, officers came to Jose Polanco's school to investigate a murder.[194] Jose was told "to leave his class and go to the conference room to meet with the police officers."[195] During the interrogation, the officers "told Polanco that they were conducting an investigation and that his name had come up" and asked where he had been on the night of the murder.[196] The court ruled that these statements to officers would not be suppressed, despite the fact that this same interrogation in the police station would surely constitute custody.[197] The court explained:

> [T]he fact that the defendant felt obliged to follow the school's instruction does not mean that he is automatically in custody for *Miranda* purposes. Here, there were no other circumstances during the school interview which would have reasonably led defendant to conclude that he was under arrest or restrained to the degree associated with a formal arrest . . . . The interview took place in an empty office on school premises. The inquiry extended solely to the question of defendant's whereabouts on the previous Sunday evening, and whether defendant knew Cooper. At the conclusion of this interview, defendant was asked to come to the police station. There is no testimony of any coercive tactics during the school interview. We see no basis on which to rule that the defendant was in custody for *Miranda* purposes during the school interview, nor is there a basis on which to conclude that the defendant's statements were involuntary for Fifth Amendment purposes.[198]

This is, quite simply, an affront to *Miranda* and the Due Process Clause. A high school student sent to meet with police officers in a conference room, unable to excuse himself from the interrogation—given that his school has told him he must be there—would likely view himself restricted to the point equivalent to arrest. The mere fact of the interrogation occurring on school grounds cannot plausibly change that reality. And the fact that the nature of the questions were limited in some way is not relevant: the only question is whether they were likely to elicit an incriminating response,[199] and the court does not go so far as to deny the questioning reached that threshold. As such, it was custodial interrogation conducted by a police officer, and the mere fact of it occurring on school grounds cannot, under Supreme Court precedent, constitute a basis for denying the proper application of *Miranda*. The requirements of *Miranda* have never been so spatially limited; *Miranda* applies

194. State v. Polanco, 658 So. 2d 1123, 1123–24 (Fla. Dist. Ct. App. 1995). The factual discussion which follows is derived from the court's discussion.

195. *Id.* at 1124.

196. *Id.* at 1125.

197. *Id.*

198. *Id.* at 1124–25 (internal citations omitted).

199. Rhode Island v. Innis, 446 U.S. 291, 300–02 (1980) (establishing the test for interrogation as whether any question or statement was likely to elicit an incriminating response from the subject of the interrogation).

with equal force in a car or a grocery store as in a police station.[200] The fact that there was "no testimony of any coercive tactics during the school interview" is disingenuous and misleading; *Miranda* held that interrogation by police officers is *inherently* coercive, even to an experienced and educated adult,[201] and to suggest a higher threshold ought to be applied to schoolchildren lacks any doctrinal basis.

Yet *Polanco* is not an aberration: similar analysis occurs in other cases, such as *In re J.H.*, where the District of Columbia Court of Appeals held that although it was "not clear" how twelve-year-old J. was "summoned or brought to" the school room where he was questioned by Investigator Gerald, "the record does not indicate that school authorities coerced J. into meeting with Investigator Gerald."[202] It bears repeating: that is not the correct test for *Miranda* to apply. Further, because "[n]obody told J. that he had to talk to the police, and there was nothing to indicate that Investigator Gerald 'was at all overbearing,'" J. was not in custody.[203] This was so, even though he was sent by his school to be privately interviewed about a sexual assault allegation.[204]

* * *

Throughout the nation, courts are misapplying *Miranda* analysis to schoolchildren, at every stage of inquiry and in each of the four categories that we identify. Even when interrogations are conducted by school personnel, given the authority such school personnel hold over students, courts should at the very least inquire as to whether under the facts at issue the student would have felt restraint equivalent to arrest. As police involvement increases, the *Miranda* analysis should become even more straightforward, with the conclusion ordinarily following that children would feel so restrained and subject to questioning likely to elicit incriminating responses. And yet, in each category, we see multiple applications where even the most intrusive police action—such as physical contact and transportation in a police cruiser, as well

200. For instance, in *Innis*, the conversation was not deemed interrogation, but only because of the offhand manner of the police comments; the fact that it occurred in a car in no way diminished the need for *Miranda* warnings if comments have constituted interrogation. *Id.* Likewise, in *New York v. Quarles*, a *Miranda* warning would have been required for an arrest made in the grocery store; it only was not required because of the public safety exception due to the possibility of a customer finding the discarded gun, not because of where the interrogation took place. New York v. Quarles, 467 U.S. 649, 659 (1984) ("Officer Kraft asked only the question necessary to locate the missing gun before advising respondent of his rights. It was only after securing the loaded revolver and giving the warnings that he continued with investigatory questions about the ownership and place of purchase of the gun.").

201. *Polanco*, 658 So. 2d at 1125; Miranda v. Arizona, 384 U.S. 436, 468 (1966) (stating that "such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere" and that "[i]t is not just the subnormal or woefully ignorant who succumb" to pressure and inherent threat).

202. *In re* J.H., 928 A.2d 643, 646, 649 (D.C. 2007).

203. *Id.*

204. *Id.* at 646.

as active police involvement in the questioning itself—nonetheless results in the conclusion that *Miranda* simply does not apply to schoolchildren. The protections provided to the nation's most dangerous criminals do not extend to young children in a setting they are required to attend.[205]

### *E. The Limited Impact of* J.D.B. v. North Carolina *in Lower Courts*

The foregoing resistance of lower courts to apply *Miranda* to children in the school context would seem to be on even shakier ground in light of *J.D.B. v. North Carolina*. In mandating that a child's age must be considered in the custody analysis because "it is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave,"[206] *J.D.B.* appeared to herald a new era of protection of schoolchildren from unwarned interrogations taking place in the schoolhouse. Despite the obvious application of *J.D.B.*'s logic to the interrogations of children at school, the case has not had the watershed impact one might have anticipated. State and lower federal courts often fail to apply *J.D.B.* with any rigor, responding in one of three ways, each of which contradicts both the word and spirit of the *J.D.B.* decision. One response is the use of bright-line rules to circumvent *J.D.B.*, by holding that it never applies to school officials. The second response is to simply ignore the ruling altogether if the interrogation is undertaken by school administrators. And the third response is to avoid applying the doctrine by distinguishing the case at issue from *J.D.B.*, even though *J.D.B.* does not require analogous facts; the broad holding required courts and officers to consider the age of the child in assessing whether the child would have felt in custody where age is known or objectively apparent.[207] Given that the questioning of a child *at school* necessarily indicates the youth of that child, it is difficult to conceive of any basis on which *J.D.B.* would not apply. We describe each of these three approaches in turn.

#### *1. Dismissing* J.D.B. *as Inapplicable*

A striking illustration that is unfortunately representative of the first, and very common, approach by courts to dismiss *J.D.B.* as inapplicable is found in

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205. *See* Stephanie Aragon, *Free and compulsory school age requirements*, EDUC. COMM'N OF STATES (2015), https://files.eric.ed.gov/fulltext/ED556467.pdf [http://perma.cc/7A64-JWYF]; Vivian E. Hamilton, *Home, Schooling, and State: Education in, and for, a Diverse Democracy*, 98 N.C. L. REV. 1347, 1353–59 (2020) (providing a history of the evolution of United States education). There are some narrow exemptions from this requirement, particularly for religious purposes. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Elizabeth Bartholet, *Homeschooling: Parent Rights Absolutism vs. Child Rights to Education & Protection*, 62 ARIZ. L. REV. 1, 27–43 (2020) (providing an overview of the legal framework from the perspective of the homeschooling debate).

206. J.D.B. v. North Carolina, 564 U.S. 261, 264–65 (2011).

207. *Id.* at 275.

*K.A. ex rel. J.A.*, from the Middle District of Pennsylvania.[208] Fourteen-year-old J.A. had given "spice"—synthetic marijuana—to a classmate to repay a debt; that classmate revealed to school administrators that J.A. had given him the spice. It is worth noting that the court never once explicitly states J.A.'s age at the time of the incident, only giving his birth year. That day, the school did not confront J.A., but rather contacted detectives from the District Attorney's Office to ask for assistance "in a drug investigation."[209] The next day, a school counselor brought J.A. to Vice Principal Antonetti's office, where Antonetti and the counselor questioned J.A. for two to three hours; Principal Elisa also joined, and J.A.'s backpack and phone were searched.[210] J.A. was then placed in the school suspension room for the entire day and was only removed to be brought back to Antonetti's office for further questioning. This questioning included whether drugs were used in J.A.'s home, which J.A. admitted to.[211]

Throughout the day, school officials were in contact with law enforcement.[212] J.A. was never told he should or could contact an attorney or his parents. When J.A. did not arrive home on the school bus, his mother, K.A., contacted the school and was told she needed to come down to the school. Immediately after she arrived at school, "police officers and law enforcement officials arrived on campus with a search warrant for KA's residence."[213] K.A. was only allowed to bring J.A. home under police escort, and upon arriving at the home, the officers executed a search warrant and recovered marijuana. J.A. was subsequently expelled for possession of contraband on school property for the remainder of the school year and the entire year following. K.A. brought suit against the district on J.A.'s behalf.

In reviewing J.A.'s claims under the Fifth Amendment, the court cited *J.D.B.* at the outset, but discarded its analysis for the reason that "in the public school context, 'students, as unemancipated minors, do not possess all of the rights of an adult, nor do they possess such rights to the same extent as an adult, when such rights do apply.'"[214] This seems remarkable given both that *J.D.B.* concerned an interrogation that took place in a school context and that the central holding of *J.D.B.* was that children should receive *greater* protection than adults. The Pennsylvania court ignored that mandate, holding *J.D.B.* was not "directly applicable," because no police officers were present, and "Defendants were not inquiring as to a crime, but rather a violation of school policies."[215] To

208. K.A. *ex rel.* J.A. v. Abington Heights Sch. Dist., 28 F. Supp. 3d 356, 365 (M.D. Pa. 2014). The factual discussion which follows is derived from the court's discussion.

209. *Id.* at 361.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 365 (quoting Picarella v. Terrizzi, 893 F. Supp. 1292, 1297 (M.D. Pa. 1995)).

215. *Id.* at 365–66.

be "bound by *Miranda* and its progeny," including *J.D.B.*, the court held that the school officials had to be acting in a police capacity—"Plaintiff must sufficiently plead that the defendants acted as instruments' [sic] or agents of the state; to wit, that the police coerced, dominated, or directed the actions of the school officials."[216] But *J.D.B.* was concerned with developing an expansive concept of when a child would feel under arrest, even if an adult would not feel so in the same circumstances. Certainly, the physical presence of police officers is relevant to that inquiry, but it is not essential to it.

Thus, the Pennsylvania court entirely disregards and sidesteps *J.D.B.* on the premise that schoolchildren in public school have fewer rights and the technicality that no police officers were physically present for the daylong interrogation. The court found the lack of police presence dispositive despite school officials having been in contact with the police throughout the entire day.[217] There is no question J.A. was in custody and was interrogated about a crime, yet the court held that *J.D.B.* does not apply specifically because J.A. is a child in school, interrogated by school officials, albeit working together with law enforcement—the exact opposite of the logic of *J.D.B.* It is important to emphasize that *J.D.B.* explicitly noted the school setting's importance and why it calls for greater protections of schoolchildren:

> [T]he effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned. A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game.[218]

Despite this clear statement by the Supreme Court, the court held *J.D.B.* is simply inapplicable so long as officers do not direct the inquiry and the investigation concerns a violation of school policy—even if it is also a crime.[219] Under this reasoning, no school interrogation by administrators alone can ever require *Miranda* warnings for children in school, regardless of the length of the interrogation, the level of coercion, the associated criminal penalties, or any other consequences for the child. This gives no consideration of the age of the child, in contrast to *J.D.B.*

This reasoning is common, although courts use a variety of means to get there. Some courts draw bright-line rules, such as a rule that *J.D.B.* does not ever apply to school officials—regardless of whether the statement to the school administrator will subsequently be used against the child in court—unless a formal agency relationship between the school personnel and police is

216. *Id.* at 366.
217. *Id.*
218. J.D.B. v. North Carolina, 564 U.S. 261, 276 (2011).
219. *K.A.*, 28 F. Supp. 3d at 365–366.

formed.[220] This formalistic agency analysis takes no account of *J.D.B.*'s admonition that children are particularly vulnerable, and a child will feel in custody in situations, like school, where an adult will not. It additionally ignores the reality that the authority of a school administrator on school grounds is akin to that of a police officer. Students are required to attend school, and once there, school administrators can direct students what to do and where to go and punish students for disobeying any such commands.[221]

Take for example *D.Z. v. State*.[222] There, the student first confessed to placing graffiti on the boy's bathroom to Principal Dowler; after being told that the principal "knew D.Z. was the culprit," D.Z. "remorsefully responded that he didn't know why he did it [and] that he knew it was wrong."[223] After Principal Dowler relayed this information to the SRO, the SRO questioned D.Z., obtained a confession, and informed D.Z. he was being charged with a crime. The court held it was clear that the un-Mirandized statements to the officer could not be admitted, but the statements to Principal Dowler could be admitted against him.[224] This misunderstands *J.D.B.*, which holds that when circumstances are such that a child feels they are subject to custodial interrogation, the logic of *Miranda* jurisprudence means *all* answers to *any* questions are off the table.

Finally, *People v. Kay* concerned the interrogation of an eighteen-year-old but illustrates the power of interrogations by school personnel over youths. Christian Kay was suspected of shooting other classmates with a BB gun.[225] "A week after the shooting, . . . Principal Jordan called Kay to his office. Officer Jenkins and two school administrators were also present."[226] During this meeting, Christian confessed first to the school personnel and then to the SRO, and in response to the SRO's questioning, told him where the BB gun was located; the SRO placed Christian "under arrest for assault with a deadly weapon, and placed him in handcuffs."[227] As the defense pointed out:

> Principal Jordan's questioning was "custodial" based on the following circumstances: Kay was obligated to be in school; he was made to sit at the

220. D.Z. v. State, 100 N.E.3d 246, 248–49 (Ind. 2018). The factual discussion which follows is derived from the court's discussion.

221. *See* sources cited *supra* note 205; Goss v. Lopez, 419 U.S. 565, 589–90 (1975) (Powell, J., dissenting) ("In prior decisions, this Court has explicitly recognized that school authorities must have broad discretionary authority in the daily operation of public schools. This includes wide latitude with respect to maintaining discipline and good order."); New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1985) ("[W]e have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures."); Jacobi & Clafton, *supra* note 25 (discussing how schools can draft their codes of conduct to require students to comply with school directives).

222. *D.Z.*, 100 N.E.3d at 247–48.

223. *Id.* at 247.

224. *Id.* at 250.

225. People v. Kay, No. CR1305518, 2018 WL 636215, at *1 (Cal. Ct. App. Jan. 31, 2018).

226. *Id.*

227. *Id.*

> principal's desk to face questions directly related to his role in the shooting; Jordan gave him an index card with the words "Easy" and "Hard" and told him they could do it the easy way or the hard way; the door to the principal's office was closed; Officer Jenkins was present in full uniform; and "Jenkins was the lead investigator into the shooting and had expressly authorized the questioning by Jordan for the sole purpose of trying to elicit a confession."[228]

To challenge the admission of his statements to Principal Jordan, Christian argued, based on the logic of *J.D.B.*, that "when the police are present for the questioning and specifically utilize a non-law enforcement person in a position of authority to gather evidence and admissions in a custodial setting for the purpose of criminal investigation," *Miranda* then becomes applicable because "the police presence brings added inherent pressures."[229] Yet, without even referencing *J.D.B.*, the court found there to be "no other circumstances that convince us Principal Jordan's interview was akin to a formal arrest,"[230] despite all the ways these circumstances mirror an arrest in any context other than school.[231]

Additionally, the court held that *Miranda* was no bar to admission of Christian's statements to the SRO either. The court found that "no added restrictions were placed on Kay's freedom 'over and above the normal school setting' when Jenkins questioned him . . . . We believe a reasonable 18–year-old in Kay's position would have understood that he was free to leave and return to class."[232] Again, Christian was removed from class and confronted with committing a crime in a closed room with multiple school disciplinary figures and a uniformed police officer present. Implicit in the court's reasoning is the absurd notion that a student would feel free to cease interrogation and return to class when their movements at school are subject to total control by the school administrators who brought them to the interrogation in the first place. This belies common sense. Further, bright-line rules such as these eschew the doctrinal rigor and requirements of *J.D.B.*

### 2. *Ignoring* J.D.B.

The use of formalistic rules to circumvent *J.D.B.* is only one means of avoiding its dictates. Another is simply to ignore the ruling altogether: many courts fail to even mention *J.D.B.* in their custody analysis if the interrogation is undertaken by school administrators. For instance, in the case of *C.R.M.*, an

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228. *Id.* at *5.

229. *Id.*

230. *Id.*

231. For instance, *Miranda* itself referenced such "good cop, bad cop" techniques, illustrated by the "easy versus hard" interrogation options given to Christian, as part of the coerciveness of the custodial interrogation process. Miranda v. Arizona, 384 U.S. 436, 452–53 (1966).

232. *Kay*, 2018 WL 636215, at *7.

assistant principal, Swain, "received a report of a 'suspicious' backpack 'being passed around in the classroom.'"[233] Upon searching the backpack, she discovered "two baggies of marihuana" inside.[234] She interviewed student C.R.M., who was suspected of possessing the backpack. C.R.M. admitted during the interview that the marihuana belonged to him and was taken into custody by the SRO.[235] In its analysis, the Texas Court of Appeals never even notes C.R.M.'s age, only referring to him as a juvenile.[236] And in assessing whether C.R.M. was subject to custodial interrogation, the court never mentions *J.D.B.*, despite the case being five years old at the time.[237]

The same occurred in *A.K.M. v. Commonwealth*, in which the questioning of A.K.M. by the school principal was deemed noncustodial without any reference to *J.D.B.*, despite the fact that Principal Lively brought A.K.M. to the teacher's lounge, "instructed A.K.M. to 'tell the truth' and informed him that a law enforcement officer was present at the school," then walked A.K.M. "to the principal's office where Officer Townsend and Mr. Pickelsimer (a Department of Juvenile Justice case worker) were waiting."[238] In this way, courts often evade any custody analysis at all, when *J.D.B.* specifically requires courts to look at children's age and vulnerability in determining custody.[239]

### *3. Distinguishing* J.D.B. *Away*

The final technique employed by courts to evade the requirements of *J.D.B.* is drawing and emphasizing distinctions, however minuscule, between the facts at issue and those of *J.D.B.* to justify failure to adhere to the decision. In a pair of cases from Ohio, *In re C.B.* and *In re M.B.*, a nine-year-old child had made sexual assault allegations against two neighborhood brothers, aged sixteen and fifteen.[240] Each of the boys were removed from class by the school principal and questioned by Lieutenant Joel Icenhour of the Ashland Police Department while the principal sat in on the interrogation.[241] In each of the cases, the boys were told that the officer was there to talk to them, that they were not under arrest, that they did not have to talk if they did not want to, and they were free

233. *In re* C.R.M., No. 03-14-00814, 2016 WL 4272115, at *1 (Tex. App.—Austin Aug. 10, 2016, no pet.) (internal citations omitted). The factual discussion which follows is derived from the court's discussion.

234. *Id.*

235. *Id.*

236. *Id.* at *2–3.

237. *Id.* at *2.

238. A.K.M. v. Commonwealth, No. 2012–CA–001190, 2014 WL 3887910, at *1 (Ky. Ct. App. Aug. 8, 2014).

239. *See also* State v. Daniell, 817 S.E.2d 358 (Ga. Ct. App. 2018); *In re* R.B.L., 776 S.E.2d 363 (N.C. Ct. App. 2015); State *In re* Interest of A.J., 151 So. 3d 659, 663 (La. Ct. App. 2014); People v. N.A.S., 329 P.3d 285, 289 (Colo. 2014).

240. *In re* C.B., No. 15–COA–027, 2016 WL 3570600, *1 (Ohio Ct. App. June 30, 2016); *In re* M.B., No. 15–COA–028, 2016 WL 3570621, at *1 (Ohio Ct. App. June 30, 2016).

241. *In re C.B.*, 2016 WL 3570600, at *1; *In re M.B.*, 2016 WL 3570621, at *1.

to leave.[242] Yet, this description belies the tough policing tactics that were used to elicit confessions from the two children.[243] Using the infamous prisoner's dilemma scenario to entice the boys to each act against their shared self-interest,[244] the officer interrogated one brother, then the other, and used the evidence gained in one interview against the other brother.[245] Both confessed and were charged with rape.[246]

In both cases, the court held that under *J.D.B.*, no *Miranda* warnings were required because the children were older than the child in *J.D.B.*, they were told they were not under arrest and could leave, and the officer was not in uniform.[247] While the boys were told that they could leave, they had been removed from class and brought to the principal's office by the principal. In C.B.'s case, he was also told that the officer "may need to speak with him again."[248] The high school boys could not possibly have felt free to leave given that the highest authority in the school had brought them to this interview in his office, a location of discipline, and remained seated there while the interview took place. In this way, the court distinguishes *J.D.B.* on factual bases to avoid applying it, when the requirement of *J.D.B.* is not that the facts be perfectly analogous, but the broad requirement that courts consider the age of the child in considering whether the child would have felt in custody.

Similarly, in *B.A. v. State*, "one of the janitors at Decatur Middle School discovered a message written . . . on the wall of one of the boys' restrooms at the school reading: 'I will got [sic] a bomb in the school Monday 8th 2016 Not a joke.'"[249] Officer Tutsie first did a sweep to establish there was no credible threat, then began an ongoing investigation to determine the culprit.[250] After honing in on thirteen-year-old B.A., Vice Principal Remaly and Officer Lyday boarded B.A.'s bus and brought him to Remaly's office where B.A. was questioned by Remaly in the presence of Officer Lyday and Officer Tutsie.[251] Remaly questioned B.A. while Officer Lyday encouraged him to cooperate and

242. *In re C.B.*, 2016 WL 3570600, at *1; *In re M.B.*, 2016 WL 3570621, at *1.

243. *See, e.g.*, Hayley M. D. Cleary, *Applying the Lessons of Developmental Psychology to the Study of Juvenile Interrogations: New Directions for Research, Policy, and Practice*, 23 PSYCH., PUB. POL'Y, & L. 118 (2017); David Blake Johnson & John Barry Ryan, *The Interrogation Game: Using Coercion and Rewards to Elicit Information from Groups*, 52 J. PEACE & RSCH. 822 (2015); Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, 35 L. & HUM. BEHAV. 327 (2011).

244. *See, e.g.*, Steven Kuhn, *Prisoner's Dilemma*, STAN. ENCYC. OF PHIL. (Apr. 2, 2019), https://plato.stanford.edu/archives/win2019/entries/prisoner-dilemma/#Bib [https://perma.cc/5FMU-DFUT] ("[T]he outcome obtained when both confess is worse for each than the outcome they would have obtained had both remained silent.").

245. *In re C.B.*, 2016 WL 3570600, at *1–3.

246. *Id.* at *3; *In re M.B.*, 2016 WL 3570621, at *2.

247. *In re C.B.*, 2016 WL 3570600, at *7; *In re M.B.*, 2016 WL 3570621, at *7.

248. *In re C.B.*, 2016 WL 3570600, at *2.

249. B.A. v. State, 73 N.E.3d 720, 722 (Ind. Ct. App. 2017), *transfer granted, opinion vacated*, 92 N.E.3d 1089 (Ind. 2017), *and vacated*, 100 N.E.3d 225 (Ind. 2018).

250. *Id.*

251. *Id.*

Officer Tutsie prepared a handwriting "scenario sample" to compare B.A.'s writing to the writing on the wall.[252] After telling B.A. he needed to complete the sample, Remaly concluded B.A. was the culprit and asked B.A. why he did it, at which point the boy cried and confessed.[253] B.A. was expelled from school, and was arrested and criminally charged.[254] The Indiana Court of Appeals noted *J.D.B.* but held that *J.D.B.* did not warrant reversal in this case because, in J.D.B.'s case, the interview was fifteen minutes longer and conducted in greater part by the school officers.[255] This is a clear misreading of *J.D.B.*, which does not require perfectly analogous facts to apply; rather, the Court admonished that courts and officers must consider the age of the child in the totality of the circumstances surrounding the custody analysis.

In this case, however, the Supreme Court of Indiana reversed the Indiana Court of Appeals; in doing so, it explicitly cited to *J.D.B.* for the proposition that "[c]hildren are particularly vulnerable to that coercion, making *Miranda* warnings especially important when police place a student under custodial interrogation at school."[256] This makes clear that *J.D.B.* can make a difference in cases where police are involved, if applied correctly. However, courts avoiding *J.D.B.*, misapplying it, and inappropriately differentiating the specific circumstances of the cases is concerningly common.

Another example of the impact *J.D.B.* can have where the court applies its requirements with rigor is *In re L.G.*, in which a bomb threat to the school had been called in and thirteen-year-old L.G. was suspected of placing the call.[257] While the school was locked down and the police were in active investigation, L.G. was removed from the student population by a SRO to be questioned.[258] The school district's Executive Director of Safety and Security questioned L.G., but two uniformed officers stood five to fifteen feet away from L.G. throughout the questioning.[259] L.G. was never given any *Miranda* warning, and after he confessed to the school administrator, charges were brought against him.[260] In light of *J.D.B.*, the court carefully assessed all of the circumstances and found L.G. to be in custody when he confessed:

> Under the specific facts before us, we agree with the juvenile court that L.G. was in custody when he was questioned by Director Bullens. It was apparent that an active police (as well as school) investigation was underway—

252. *Id.* at 723.

253. *Id.*

254. *Id.*

255. *Id.* at 730.

256. B.A. v. State, 100 N.E.3d 225, 230 (Ind. 2018) (citing J.D.B. v. North Carolina, 564 U.S. 261, 267, 269 (2011)).

257. *In re* L.G., 82 N.E.3d 52, 56 (Ohio Ct. App. 2017). The factual discussion which follows is derived from the court's discussion.

258. *Id.* at 54.

259. *Id.* at 54, 56.

260. *Id.* at 54–55.

> uniformed police officers and bomb-sniffing dogs were present, and a Crime Stoppers reward had been offered to the students. All students were gathered in the school's gymnasium following a bomb threat; they were not free to move about the school on their own. L.G. was retrieved from the gymnasium by the school resource officer, who had the authority of a special police officer. L.G. was brought to the cafeteria to be questioned by the school district's Executive Director of Safety and Security, not school personnel with whom L.G. would have been familiar. Two uniformed officers stood five to fifteen feet from L.G., standing closer to L.G. than to Bullens; Officer Stewart indicated that he observed Bullens's questioning of L.G. Under these circumstances, a reasonable person in L.G.'s position would have believed that he was in custody.[261]

Cases like this[262] demonstrate that *J.D.B.* is not only important for requiring courts to consider defendants' age in the custody analysis but also for calling on courts to look at the interrogations of children with a more critical eye. Not only is age important, but so are the circumstances unique to children—here, the fact that they are subject to the school's control and are not free to go in situations in which an adult would be.

## III. INTERROGATIONS THAT ARE NEVER REVIEWED BY COURTS: ILLINOIS AS A CASE STUDY

In our two companion articles on the treatment of schoolchildren, examining searches and seizures and disciplinary practices, we examined all available decisions in Illinois and showed how those trends were representative of judicial action throughout the nation.[263] However, when it comes to interrogations, Illinois has too few cases to identify all of the relevant doctrinal patterns. So instead, for purposes of this Article, we began with a national survey. Now, in Part III, we turn to an in-depth study of the landscape, both doctrinally and practically, of our case study state—Illinois. A canvas of the interrogation cases that have been decided in Illinois reveals that the small body of cases manifest many of the same themes seen at the national level: first, enormous deference given to school administrators to interrogate children, which indirectly—and sometimes directly—empowers law enforcement officers to interrogate children without providing the basic *Miranda* protections that would apply to adults; and second, courts regularly misapplying *Miranda* and issuing decisions that directly contradict Supreme Court holdings, most notably *J.D.B.* Even though they mimic the national pattern, the Illinois cases

261. *Id.* at 56.

262. *See also* N.C. v. Commonwealth, 396 S.W.3d 852, 862 (Ky. 2013) ("No reasonable student, even the vast majority of seventeen-year olds, would have believed that he was at liberty to remain silent, or to leave, or that he was even admitting to criminal responsibility under these circumstances." (citing Stansbury v. California, 511 U.S. 318, 325 (1994))).

263. *See* Jacobi & Clafton, *supra* note 24, at 209–11; Jacobi & Clafton, *supra* note 25, at 13–19.

are worth examining, to illustrate just how extreme the coercive practices that are tolerated when applied to schoolchildren can be, even when such practices would not be tolerated for adult criminal suspects.

It also sets the scene for the remainder of our case study, looking at how courts have hampered legislative attempts at reform in Illinois, and how our experts describe how interrogations that are never reviewed typically unfold. With such a judicial tilt in favor of protecting the power of schools and against protecting schoolchildren, it is important to see whether other branches of government and institutions are able, or willing, to step in to fill the void created by the judicial deference to school administrators. As one may expect, this deference to schools is not limited to the judiciary, but rather pervades the system. Perhaps more surprising, however, is our finding that even when there have been meaningful legislative responses, the judiciary's deeply entrenched and systemic deference to schools curtails and limits the efficacy of attempted reforms in application.

Finally, it is not enough to review the doctrine, laws, and regulations. The cases which appear as published decisions are a minuscule fraction of all the instances of school interrogations that take place. As is well known, more than 90% of the cases which result in criminal dispositions result in plea bargains,[264] and the vast majority of interrogations of schoolchildren will not even reach that point: most instances of the search, seizure, discipline, and interrogation of schoolchildren are resolved in unpublished administrative decisions.[265] Examining court cases provides only a small window into the impact that schoolhouse interrogations have on the lives of United States children. Therefore, it is necessary to look beneath the veneer provided by court analysis to understand how interrogations are practiced on a day-to-day basis in schools.

### *A. The Schoolhouse as a Carte Blanche*

Unlike examples found nationally, there is not a single published decision in the State of Illinois that has suppressed the statement of a schoolchild because that child was entitled to a *Miranda* warning prior to her or his interrogation. Further, there have been only a dozen or so published or otherwise available cases dealing with these interrogations at all. A brief review

264. "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." Missouri v. Frye, 566 U.S. 134, 143 (2012) (citing Padilla v. Kentucky, 559 U.S. 356, 372 (2010); *Sourcebook of Criminal Justice Statistics Online*, DEP'T. OF JUST., BUREAU OF JUST. STAT. (Nov. 22, 2010), http://www.albany.edu/sourcebook/pdf/t5222009.pdf [https://perma.cc/UY96-VN4U]; S. Rosenmerkel et al., *Felony Sentences in State Courts 2006 – Statistical Tables*, DEP'T. OF JUST., BUREAU OF JUST. STAT. 1, 1 (Nov. 22, 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf [https://perma.cc/3REQ-M33F]).

265. Interview with Monica Llorente, Senior Lecturer, Nw. Univ. Sch. L., in Chi. Ill. (Feb. 24, 2020) (interview notes on file with authors); Telephone Interview with Ashley Fretthold, Supervisory Att'y, Child. & Fams. Prac. Grp., Legal Aid Chi. (Feb. 7, 2020) (interview notes on file with authors).

of the case law in Illinois illustrates that the same themes we identified nationally apply in Illinois courts.

Our first theme identified above was how much leeway is given to schools when it comes to interrogations of their pupils, including those undertaken in pursuit of criminal charges. The case of *Bills ex rel. Bills v. Homer Consolidated School District No. 33-C* illustrates how permissive Illinois courts can be when it comes to reviewing interrogations of schoolchildren. In *Bills*, fifth-grader Robert Bills was pulled from class by a police officer and school administrators every day for an entire week after a fire broke out in a locker at his school.[266] The officer continued to interrogate Robert even after another student confessed to starting the fire with matches; after the officer again pulled Robert out of class and "questioned him in an allegedly coercive manner,"[267] Robert confessed to giving an uncovered propane torch to that student. The school then moved to expel Robert, and Robert brought suit under 42 U.S.C. § 1983 to oppose the disciplinary action. Despite the fact that this case involved a twelve-year-old child being interrogated by an officer and principal five days in a row, often unaccompanied by an adult, the court refused to condemn such conduct by the state in the school context.[268] To do so, the court ignored or directly contradicted first principles of the Supreme Court's *Miranda* doctrine. First, the court stressed that "plaintiff admitted that his mother was present at several of the interviews, and this tends to negate an inference that plaintiff felt as if he were under arrest."[269] The court is treating the fact that Robert was interrogated *multiple times* as mitigating the necessity of a *Miranda* warning.[270] Yet ordinarily, breach of protections relating to self-incrimination, including *Miranda* warnings, in an earlier interrogation cannot be excused by following the rules in another interrogation—indeed, the Supreme Court has held that an initial, problematic interrogation can entirely taint a subsequent interrogation that would otherwise be acceptable.[271] Furthermore, in any other context, repeated interviews would be presumed to *increase* a suspect's feelings of custody and the need for issuance of *Miranda* warnings.[272]

Our second theme—of schoolhouse cases ignoring or inverting fundamental principles of *Miranda* protection—is illustrated by the seminal interrogation case in Illinois, *People v. Pankhurst*, which laid the groundwork for the state's permissive approach to school interrogations. Principal Grady

266. Bills *ex rel.* Bills v. Homer Consol. Sch. Dist. No. 33-C, 959 F. Supp. 507 (N.D. Ill. 1997). The factual discussion which follows is derived from the court's discussion.

267. *Id.* at 510.

268. *See id.* at 513.

269. *Id.*

270. *See id.*

271. *See* Missouri v. Seibert, 542 U.S. 600, 608 (2004).

272. *Id.* at 624–25 (O'Connor, J., dissenting).

searched Nikolaus Pankhurst and then called the police.[273] Upon arrival, Officer Miller went to Dean McGuire's office, where Nikolaus was being held with Dean McGuire; shortly after, Principal Grady entered and asked Officer Miller to leave, closing the door behind him. Grady and the dean began questioning Nikolaus, and Nikolaus admitted to selling drugs. Grady then "ended the interview and informed [Officer] Miller of defendant's confession."[274] Miller arrested Grady and at this point provided *Miranda* warnings.[275] Evaluating Nikolaus's motion to suppress his confession to his principal, the court reasoned:

> By the time the officers arrived at the school, Grady and McGuire had already initiated their investigation into the allegations of drug possession by summoning defendant and [co-accused] Halfacre, searching them for drugs, and then placing them in separate rooms. When Miller arrived at McGuire's office, he did not question defendant about the allegations but at most asked him for his name. Miller's encounter with defendant was cut short when Grady entered the office and asked Miller to leave. Grady and McGuire saw fit to question defendant outside Miller's presence and did not obtain any direction or advice from Miller on how to conduct the investigation.[276]

This analysis fails to address the fact that the interrogation was bookended by officer interactions; a student is sure to feel in custody where a police officer enters the interrogation room, asks the student to identify himself, then waits outside the office while the principal questions the student about criminal activity before receiving a status report and concluding the interaction with a formal arrest. The court reasoned that because "Miller did not tell defendant that he was not free to leave," it is irrelevant that "Miller's very presence outside the door may have intimidated defendant"[277]—or given Nikolaus the impression he was under restraint equivalent to arrest. In no other area can the role of the police officer in an interrogation be dismissed because the police officer hands over the middle part of the interrogation to another state agent.

*People v. Savory* is another example of courts straying from the usual protections provided by *Miranda*. Officers were investigating two brutal knife stabbings and approached student Johnnie Savory at school.[278] Although he stated he did not want to speak with them, the officers "persisted," and Johnnie subsequently agreed to give them whatever information he had.[279] The officers questioned Johnnie in a school room, and then asked him to come to the police

273. People v. Pankhurst, 848 N.E.2d 628, 630 (Ill. App. Ct. 2006). The factual discussion which follows is derived from the court's discussion.

274. *Id.*

275. *Id.*

276. *Id.* at 633.

277. *Id.* at 636.

278. People v. Savory, 435 N.E.2d 226, 228 (Ill. App. Ct. 1982).

279. *Id.*

station with them.[280] Johnnie was interrogated in multiple interviews by multiple officers until around 10:00 PM, at which point they then administered polygraph testing.[281] Around 11:00 PM, they arrested Johnnie and administered his *Miranda* rights.[282] The court held that Johnnie was not entitled to *Miranda* warnings when he was

> [F]irst questioned at his school in a room adjacent to the principal's office, a less coercive environment than a police station, in the daytime and for about one-half hour; the questioning appeared to be inquisitory rather than accusatory. Two officers and defendant were present and there was no indicia of arrest.[283]

Despite the fact that Johnnie was approached in school, where he is by definition seized, and was persistently directed to speak with the officers, he was found to be not entitled to *Miranda* warnings.[284] Then, the court concluded that Johnnie "responded to a police request" to go the police station from this interview, so the next interview did not require a *Miranda* warning either.[285] The court so held despite that these facts are squarely analogous to *Dunaway v. New York*, in which the Supreme Court ruled that Dunaway was seized because he "was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room."[286] As the Court noted in *Dunaway*,

> The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, . . . obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny.[287]

The court did not explain why an adult would consider himself under arrest in these circumstances but a child transported by police car to the station—after being questioned in a school where he, by definition, cannot leave—would not. The court also did not explain why else this Supreme Court ruling is inapplicable because the court never even cites or discusses the *Dunaway* ruling. Instead, the court ruled that it was only subsequently, in a third interview beginning at 6:00 PM—when the questioning became accusatory as the officers

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280. *Id.* at 228–29.

281. *Id.* at 229.

282. *Id.* Johnnie was ultimately interrogated for a total of 31 hours. *See* William Lee, *Pardoned Man in Fatal Stabbings Files Federal Suit Against Peoria Cops*, CHI. TRIB. (Jan. 11, 2017, 7:06 PM), https://www.chicagotribune.com/news/breaking/ct-wrongful-conviction-lawsuit-0112-20170111-story.html [https://perma.cc/CHU2-LFXE].

283. *Savory*, 435 N.E.2d at 230–31.

284. *Id.* at 230.

285. *Id.* at 231.

286. Dunaway v. New York, 442 U.S. 200, 212 (1979).

287. *Id.* at 212–13 (citations omitted).

confronted Johnnie with disparities in his story—that *Miranda* was required.[288] Rather than providing any additional protection for juveniles, Illinois courts are failing to provide protections already recognized to apply to everyone, adults and juveniles, simply because of the school context.

Finally, as we saw in the national context, the impact of *J.D.B.* has similarly been limited within the school context in Illinois. In the case of *In re Marquita M.*, a high school administration was tipped off to a fight involving weapons that was set to occur that day.[289] The freshman dean of students and an SRO removed fifteen-year-old Marquita from her class, and the officer began asking Marquita why she had a knife at school. Marquita at first said the knife was in her locker but ultimately pulled a steak knife with a four-inch blade out of the hood of her sweatshirt and turned it over. The dean then began questioning Marquita about why she had the knife, and Marquita admitted she had the knife because she was supposed to fight with another student at school with whom she had been having problems.

In reviewing Marquita's adjudication for possession of a weapon, the Appellate Court of Illinois noted *J.D.B.* but failed to give the appropriate weight to the *J.D.B.* factors.[290] Instead, the court reasoned that since Marquita was not taken to the police station, was not handcuffed or physically restrained, and only one officer was present in the dean's office, Marquita was not in custody.[291] This constitutes an utter refusal to apply the Supreme Court doctrine: *J.D.B.* makes clear that the reviewing court is to consider the child's age in its custody analysis, that "the effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned,"[292] and that "children are most susceptible to influence and outside pressures."[293] The factors that the Appellate Court of Illinois applied were essentially the pre-*J.D.B.* factors of custody as would be applied to an adult, in direct contrast to the child-specific doctrine that the Supreme Court developed.

The jurisprudence of the Supreme Court, in recognizing rights associated with *Miranda*, has been thoroughly criticized for the minimalism of the protection it provides to suspects under interrogation.[294] Scholars have argued that, since *Miranda*, the Court has whittled away at the protection it recognized

288. *Savory*, 435 N.E.2d at 231. Johnnie spent nearly thirty years in prison before he was eventually represented by the Northwestern Center on Wrongful Convictions and pardoned by Governor Pat Quinn. *See* Andy Kravetz, *Johnnie Lee Savory Receives Pardon in 1977 Peoria Double Murder Case*, J. STAR (Peoria) (Jan. 13, 2015 7:38 PM), https://www.pjstar.com/story/news/crime/2017/01/11/johnnie-lee-savory-pardoned-for/22736306007/# [https://perma.cc/ZL6S-W9AK].

289. *In re* Marquita M., 970 N.E.2d 598, 601 (Ill. App. Ct. 2012). The factual discussion which follows is derived from the court's discussion.

290. *Id.* at 603–04.

291. *Id.* at 603.

292. J.D.B. v. North Carolina, 564 U.S. 261, 276 (2011).

293. *Id.* at 275 (citations and internal quotations omitted).

294. Jacobi, *supra* note 36, at 9–14.

as constitutional.[295] Nevertheless, the Court has recognized a few fundamental rights of suspects under custodial interrogation; however, as the foregoing makes clear, in Illinois most of these fundamental protections have been ignored, with the courts refusing to apply them in the context of schools—where children may be in the most need of protection.

Again and again, both nationally and on a state level, it becomes clear that state courts see their role primarily as justifying state action against schoolchildren, rather than reviewing such action under recognized constitutional standards. But as the next Subparts show, the impact that state action can have on the prospects of children to thrive and succeed is grave.

### *B. The Limitations of Reform and Corey's Case*

To understand the central importance of the judiciary in this problem, it is necessary to examine the limitations of legislative reform without judicial buy-in and enforcement. Illinois first took legislative steps to protect children against interrogation in 2017 with an amendment to the Juvenile Court Act of 1987.[296] The amendment provides additional protections for children under eighteen, requiring a "law enforcement officer, State's Attorney, juvenile officer, or other public official or employee" to administer a full *Miranda* warning before explicitly asking the child "(A) Do you want to have a lawyer?" and "(B) Do you want to talk to me?"[297] In the absence of adherence to the statute's protocols, the statement is presumed inadmissible.[298]

Although in theory this legislation appeared to be a major victory for school students, in practice it was not. Illinois courts have largely gutted the impact of the law by holding that it would be "absurd" for the terms "other public official or employee" to include school personnel:

> Such an interpretation of the statute would create a seismic shift in public policy by placing on individuals outside the realm of law enforcement the responsibility of learning and employing procedural safeguards heretofore required only of law enforcement officers. We find it implausible that the legislature intended the phrase "other public official or employee" as used in section 5-401.5(a-5) to have such a broad scope in the absence of an express definition of the phrase.[299]

The 2017 amendment was intended to reform how criminal laws apply to children.[300] Despite this purpose, and despite the fact that the use of police

295. *Id.* at 17–18.

296. *In re* Jose A., 133 N.E.3d 1137, 1144–45 (Ill. App. Ct. 2018), *appeal denied*, 113 N.E.3d 213 (Ill. 2018), *appeal denied*, 114 N.E.3d 838 (Ill. 2019).

297. 705 ILL. COMP. STAT. ANN. 405/5-401.5 (West 2017).

298. *Id.*

299. *In re* Jose A., 133 N.E.3d at 1147.

300. *Id.* at 1148–79.

tactics in schools yield very real criminal justice consequences for schoolchildren who confess to an educator, Illinois courts have held fast to the previously identified framework, finding the statute inapplicable to educators who "do not have as their primary mission the same duties as the individuals specifically listed" in the statute—police officers.[301] The court's reasoning denies the reality that school personnel have, in many schools, taken on the role of law enforcement, and that the amendments were intended as reforms to that status quo.[302] The effect of this interpretation by the courts was to render the statute completely ineffectual, undermining any new protection for students, since officers independently interrogating schoolchildren were already ordinarily required to administer *Miranda*.[303] Thus, not only have Illinois courts refused to provide protection for students themselves, or even apply existing Supreme Court doctrine minimally protecting children, but they systematically undermined protection provided by the legislature.

Not only can the judiciary limit reform with its interpretations of the law, but in the absence of judicial enforcement, the additional protections rendered by the legislature are largely empty promises. To illustrate this, we return to where we began: with Corey Walgren's story.

As we detailed in the opening vignette, Corey was removed from lunch with his friends, taken to the dean's office, interrogated using the Reid technique by a school dean and a Naperville police officer without a parent present, and accused of possessing and disseminating child pornography, even though the school and police officials "lacked any information" evincing that Walgren possessed or disseminated anything that could be considered child pornography.[304] Officers searched his phone and found no evidence of child pornography, yet they told Corey that they had uncovered child pornography which "could result in him having to register as a sex offender."[305] Corey was then escorted to, and ordered to wait in, another office; Corey escaped, and "[e]xperiencing dire and desperate psychological conditions," he jumped from a parking garage with the intention of killing himself and died later that day from injuries sustained from the fall.[306]

As discussed, the district court reviewing the Walgren's lawsuit upheld the use of "harsh and aggressive . . . ordinary police interrogation tactics" on Corey, despite the tragic consequences resulting.[307] Corey's parents did not stop with

301. *Id.* at 1150.

302. *See* discussion *infra* Part III.C; *see also In re* Jose A., 133 N.E.3d at 1148.

303. *See supra* Part II.D.

304. Walgren v. Heun, No. 17-CV-04036, 2019 WL 265094, at *2 (N.D. Ill. Jan. 17, 2019). The factual discussion which follows is derived from the court's discussion.

305. *Id.* at *2.

306. *Id.*

307. *Id.* at *11.

court proceedings. Instead, they pursued legislative relief, which resulted in the passage of Corey's Law.[308]

Corey's Law requires a "law enforcement officer, a school resource officer, or other school security personnel" to attempt to notify a child's parents and to:

> [m]ake reasonable efforts to ensure that the student's parent or guardian is present during the questioning or, if the parent or guardian is not present, ensure that school personnel, including, but not limited to, a school social worker, a school psychologist, a school nurse, a school counselor, or any other mental health professional, are present during the questioning.[309]

The statute is intended to ensure that "that no student is ever alone like Corey was."[310] While the reform is laudable, and important for protecting the well-being of the children interrogated by officers, it does not address the reality that, as Illinois courts previously held when interpreting the 2017 amendments, the same interrogation can be conducted in the same manner by educators without any protection for children or even a requirement for *Miranda* warnings. And just as importantly, the statute provides no judicial recourse for failure to adhere to Corey's Law.[311] Without judicial enforcement, school administrators and employees are permitted to continue interrogations in the exact same manner as we have documented throughout this Article.

It is clear, then, that without Supreme Court intervention, lower courts will fail to adequately protect schoolchildren from interrogations in the school context. Furthermore, even when legislatures are inspired to provide additional protection,[312] those same lower courts may well, as in the Illinois case, read such legislative protections so narrowly as to strip those regulations of any meaningful prophylactic effect. And finally, in response to such local permissiveness, police officers can use tactics against schoolchildren that have been shown to be coercive when used against adult criminal suspects. As such, it is incumbent upon the Supreme Court to step in and provide further protection and to force lower courts to follow the protection it has applied, most notably in *J.D.B.* The next Subpart shows that, without such intervention, the situation is even worse than an examination of court practices suggests: in the face of minimal and permissive review by lower courts, most interrogations

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308. St. Clair, *supra* note 18.

309. 105 ILL. COMP. STAT. ANN. 5/22-85 (West 2021).

310. St. Clair, *supra* note 18.

311. *See generally* 105 ILL. COMP. STAT. ANN. 5/22-88 (West 2021).

312. More recently, Illinois became the first state in the nation to prohibit law enforcement officers from using deception while interrogating juveniles. Innocence Staff, *Illinois Becomes the First State to Ban Police from Lying to Juveniles During Interrogations*, INNOCENCE PROJECT (July 15, 2021), https://innocenceproject.org/news/illinois-first-state-to-ban-police-lying/#:~:text=(Chicago%2C%20IL%20%E2%80%94%20July%2015,under%20the%20age%20of%2018 [https://perma.cc/PG5Q-LRHQ]. However laudable this reform, much like Corey's Law, it is limited to the police and does not include school officials.

are never challenged in court, and consequently school administrators and police personnel not only exploit those permissive rules but go well beyond what is legally permitted.

### C. *Interrogations on the Ground: Commonplace, Coercive, and Unreviewed*

In this Subpart, we turn from examining how school interrogations are treated in courtrooms to how they are actually conducted in schools by state actors, including school administrators, teachers, principals, deans, and law enforcement officers stationed in schools. As the low number of interrogation cases[313] in Illinois demonstrates, looking to court cases to understand how school interrogations are conducted is problematic. To understand how children's rights are actually being respected or curtailed in the schoolroom, this Subpart draws on eighteen interviews with various experts working on issues relating to school students' lives and educations in Chicago and in Illinois more broadly.[314] They include judges and probation officers in the juvenile justice system, post-incarceration reintegration officers, attorneys representing students, disability advocates, advocates at various charitable organizations, deans of schools, school social workers, and others.

At the outset, it is important to note that the experts agree with our doctrinal conclusion that the Supreme Court's ruling in *J.B.D.* provides little protection for schoolchildren when being interrogated, as most of the time it simply does not apply: *J.B.D.* only requires a *Miranda* warning for students when they are subject to arrest, as would be perceived by the child.[315] As we have seen, most interrogations in schools are deemed not to fall into that category when conducted by school administrators, and even sometimes when conducted by SROs—and schools take advantage of that lack of restriction. Judge Stuart F. Lubin, Circuit Judge in the Juvenile Justice Division, confirms our description of the general approach by courts in Illinois regarding school interrogations.[316] He says that children are generally not given *Miranda* warnings because they are deemed to not be in custody when principals and assistant principals interview them.[317] As a result, statements the students make are admissible against them in court, including in criminal trials resulting from interrogations at school.[318]

313. *See* Jacobi & Clafton, *supra* note 263, and accompanying text.

314. All interviews were conducted with detailed notes being taken and subsequently verified by the interviewee; interview notes are on file with the authors. *See supra* note 17.

315. J.D.B. v. North Carolina, 564 U.S. 261, 270 (2011).

316. Telephone Interview with Honorable Stuart F. Lubin, Cir. Judge, Juvenile Justice Div., Ill. (July 20, 2021) (interview notes on file with authors).

317. *Id.*

318. *Id.*

Amy Meek, formerly senior counsel for the Chicago Lawyers' Committee—a civil rights organization directed at countering discrimination—specialized in promoting "access to education by addressing the individual and systemic barriers that disproportionately impact historically disadvantaged communities."[319] She reports that in interrogations conducted by school administrators, administrators instruct students to sign statements admitting their culpability. Meek says that in her work, she has never come across any students who have refused to write such statements when instructed to do so by school personnel.[320] Moreover, the students are not given any warning that they could be incriminating themselves.[321] These statements are often then relied on to expel students without any due process.[322]

### *1. Use of the Reid Technique Against Students*

Most schoolhouse interrogations are deemed not to constitute custody; nonetheless there is ubiquitous use of the Reid technique in Illinois schools, a form of interrogation developed by former police officers with the intent of psychologically compelling criminal suspects into confessing.[323] First published as a manual in 1962, the Reid technique was designed to circumvent Supreme Court holdings forbidding the use of physical or mental pain to extract confessions, by instead teaching interrogators to apply psychological pressures to the suspect.[324] While it has become the standard model of interrogation used by police in the United States,[325] scholars have established that this interrogation technique's "'nine step' approach to the interrogation of a suspect" is "inherently coercive" to such a degree that it has been proven to induce false confessions of *innocent adult suspects*.[326] Nevertheless, the Reid

319. *See, e.g.*, *Equity Gaps and Student Rights During COVID-19*, CHI. LAWS' COMM. FOR C.R., (June 9, 2020), https://www.clccrul.org/blog/equity-gaps-and-student-rights-during-covid-19?rq=equity%20gaps%20and%20student%20rights [https://perma.cc/UZ6A-T9LS].

320. Interview with Amy Meek, *supra* note 17.

321. *Id.*

322. *See* Jacobi & Clafton, *supra* note 25.

323. *Cf.* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (5th ed. 2013) (outlining the interrogation technique).

324. Gallini, *supra* note 2, at 551–61.

325. INBAU ET AL., *supra* note 323; Ariel Neuman & Daniel Salinas-Serrano, *Custodial Interrogations: What We Know, What We Do, and What We Can Learn from Law Enforcement Experiences*, *in* EDUCING INFORMATION — INTERROGATION: SCIENCE AND ART 141, 142 (2006) ("Almost all manuals on interrogation techniques cover the same aspects of successful interrogation as the seminal Reid Technique.").

326. Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 151–59 (1998); *see also* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 443–44 (1998).

technique is not only implemented in police stations across the country[327] but across schools in Illinois.[328]

Under the Reid technique, interrogators conduct a neutral pre-interview in which the interrogator infers the suspect's guilt or innocence based on behavioral cues such as nervousness,[329] hesitations,[330] and posture and gestures, such as slouching and avoiding eye contact.[331] Then, upon concluding the suspect is guilty, interrogators conduct further questioning assuming the suspect's guilt,[332] with the interrogator developing a theme of the crime premised on the suspect's guilt, avoiding any denials or objections.[333] Reid explicitly encourages developing that theme through deception: through the investigator referencing to non-existent evidence,[334] overstating their certainty of the suspect's guilt,[335] and exaggerating the suspect's involvement in other crimes.[336]

The coerciveness of the Reid technique is arguably not a bug, but a feature:

> The genius or mind trick of modern interrogation is that it makes the irrational (admitting to a crime that will likely lead to punishment) appear rational (if the suspect believes that he is inextricably caught or perceives his situation as hopeless and cooperating with authorities as the only viable course of conduct). Regretfully, most interrogation training manuals—including the widely used [Reid technique]—give no thought to how the methods they advocate communicate psychologically coercive messages and sometimes lead the innocent to confess. Instead, they assume, in the face of empirical evidence, that their methods will produce only voluntary confessions from the guilty and dismiss the well-established social science research on interrogation-induced false

327. Charles D. Weisselberg, *supra* note 36, at 1530 (2008).

328. Telephone Interview with Christine Agaiby Weil, Adjunct Professor, Loyola Univ. Chi. Sch. of L. (Apr. 16, 2020) (interview notes on file with authors); Video Interview with Dr. Pamela Fenning, Professor & Co-Program Chair for Sch. of Psych., Loyola Univ. Chi. (Mar. 12, 2020) (interview notes on file with authors); *Dozens of Organizations to ISBE and IPA: Stop Offering Controversial Law Enforcement Interrogation Course to Teachers and Administrators*, CHI. LAWS.' COMM. FOR C.R. (Dec. 20, 2016), https://www.clccrul.org/press/dozens-of-organizations-to-isbe-and-ipa-stop-offering-controversial-law-enforcement-interrogation-course-to-teachers-and-administrators#:~:text=CHICAGO%20–%20The%20Chicago%20Lawyers%27%20Committee,professional%20development%20course%20for%20teachers [https://perma.cc/QQ89-HB7Y]; Alexa Van Brunt, *Adult Interrogation Tactics in Schools Turn Principals into Police Officers*, THE GUARDIAN (Mar. 19, 2015), https://www.theguardian.com/commentisfree/2015/mar/19/interrogation-schools-turns-principals-police-officers; Douglas Starr, *Why are Educators Learning How to Interrogate their Students?*, THE NEW YORKER (Mar. 25, 2016), https://www.newyorker.com/news/news-desk/why-are-educators-learning-how-to-interrogate-their-students.

329. INBAU ET AL., *supra* note 323, at 90–91.

330. *Id.* at 117–18.

331. *Id.* at 128.

332. *Id.* at 3.

333. *Id.* at 185.

334. *Id.* at 191.

335. *Id.* at 193.

336. *Id.* at 198.

> confession by mischaracterizing the authors of leadings [sic] studies as "opponents" or "critics" of interrogation.[337]

Because the technique is so coercive, "Reid itself cautions that its technique should only be used when the police are confident that the suspect is responsible for the crime being investigated. At its core, the technique is a guilt-presumptive, accusatory, manipulative process; and it packs a powerful psychological punch."[338]

The use of the Reid technique has been strongly criticized by psychologists as based on faulty empirical assumptions.[339] Even as applying to adult suspects, evidence shows that Reid often causes innocent suspects to confess, and even to "form false memories of the crimes that they did not commit."[340] Juveniles are even more susceptible to false confession, accounting for 42% of exonerated defendants in one influential study.[341] Even the International Association of Chiefs of Police warns that making inferences from slouching and avoiding eye contact is particularly unsafe as applied to juveniles, for whom such behavior is extremely common.[342]

Dr. Pam Fenning, a professor of psychology at Loyola University Chicago who specializes in school and educational psychology, says that limits on the protections of children from interrogations related to criminal investigations, as described *supra* Part II, are highly problematic in light of the fact that the Reid technique is used widely at schools.[343] Despite the vulnerability of juveniles to coercion and false confession, such that even the Reid manual now cautions that "[e]very interrogator must exercise extreme caution and care when interviewing or interrogating a juvenile," in practice, "school personnel are trained to conduct the nine-step interrogation process in essentially the same way as police detectives."[344] In Illinois, the Reid training—without modifications for children and their vulnerabilities—is widely used by school

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337. Drizin & Leo, *supra* note 59, at 919. *See also* Megan Crane, *Principal Interrogator: A Call for Youth-Informed Analysis of Schoolhouse Interrogations*, 23 J. GENDER RACE & JUST. 77, 97 (2020).

338. Crane, *supra* note 2, at 647–48.

339. *See, e.g.*, Timothy E. Moore & C. Lindsay Fitzsimmons, *Justice Imperiled: False Confessions and the Reid Technique*, 57 CRIM. L.Q. 509, 510 (2011) (describing the assumptions of the Reid technique as so lacking in "sound scientific support" that the overall validity of the approach is "dubious").

340. Frances E. Chapman, *Coerced Internalized False Confessions and Police Interrogations: The Power of Coercion*, 37 LAW & PSYCH. REV. 159, 162 (2013) (internal quotation marks omitted); Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCH. SCI. 125, 125 (1996).

341. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005).

342. Starr, *supra* note 328.

343. Interview with Dr. Pamela Fenning, *supra* note 328; Interview with Ashley Fretthold, *supra* note 265. *See also* Jacobi & Clafton, *supra* note 25.

344. Crane, *supra* note 337, at 100–01 (quoting *Making a Murderer: The Reid Technique and Juvenile Interrogations*, JOHN E. REID & ASSOCS. (Jan. 01, 2016), http://reid.com/resources/investigator-tips/empathy-guides-the-investigator-to-the-truth [https://perma.cc/9WBD-M5YV]).

principals, and the training program sells out each year.[345] It is particularly prevalent in the Chicago Public Schools district, where principals favor its use.[346] Not only is the adult technique for suspected criminals used, but in Illinois it was also approved, sponsored, and provided as a training method without *any* modification for the school setting: "the training proposal for the Illinois training sponsored by the Illinois Principal's Association includes all of the same material, resources, and the training for law enforcement to use on adults."[347] In sum, the Reid technique in schools "is a state-approved training that sets the administrators up to get a confession from the child; the guidelines are very harsh. For example, they note that if the child is getting upset, this is when the administrator should prey on that vulnerability and ask for more information."[348]

The technique's use in schools does not merely ignore the vulnerabilities of schoolchildren that have been established by social science and acknowledged by the Supreme Court—it deliberately exploits those weaknesses, despite ongoing opposition to such practices from numerous quarters, including civil rights advocacy groups.[349] As discussed in an open letter from numerous child welfare organizations objecting to the use of the Reid technique as applied to children, some of whom sat in on the trainings, all of the key techniques of Reid are applied to schoolchildren without modification in light of children's vulnerable state.[350] These approaches include the interrogators deceiving students[351] and taking advantage of children's weakness: for instance, if the child is getting upset, the administrator should exploit that emotionality and ask for more information.[352] Figure 1 provides direct evidence of this. It is an advertisement for the Reid technique training offered by the Illinois Principals Association.[353] It explicitly encourages interrogators of children to get in their "personal zone," to be within 4.5 feet of the child, and to conduct the interrogation in a very small room.

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345. Interview with Christine Agaiby Weil, *supra* note 328.

346. *Id.*

347. Crane, *supra* note 338, at 101.

348. Interview with Dr. Pamela Fenning, *supra* note 328.

349. *See, e.g.*, *Dozens of Organizations to ISBE and IPA: Stop Offering Controversial Law Enforcement Interrogation Course to Teachers and Administrators*, *supra* note 328.

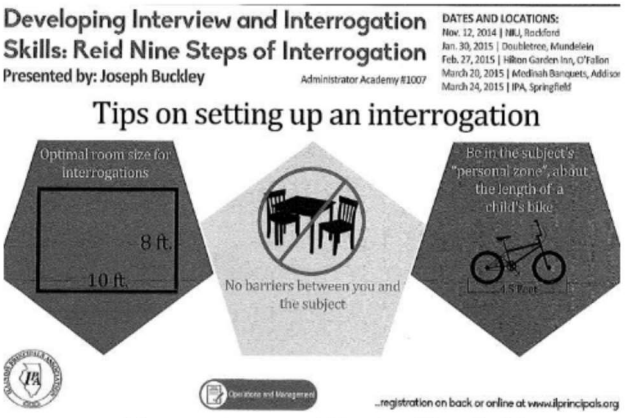
350. Open Letter to the Ill. Principals Ass'n (Dec. 20, 2016), https://static1.squarespace.com/static/5871061e6b8f5b2a8ede8ff5/t/5943f87fb6ac506e92fe5856/1497626752664/Reid+Open+Letter+and+Appendix+signed+dated.pdf [https://perma.cc/7T2V-TNL7]. The letter denounced the Reid technique as "unreliable and especially inappropriate to use on school-age children," and noted that "Juveniles—particularly those with mental illness—are especially vulnerable to the technique." *Id.* at 1.

351. *Id.* For example, school staff are encouraged to "falsely suggest that the school had surveillance cameras at the scene of the infraction and see how the student reacts." Starr, *supra* note 328.

352. Interview with Dr. Pamela Fenning, *supra* note 328 (describing the guidelines as "very harsh").

353. This seminar was granted approval by the Illinois State Board of Education (ISBE) as a training that fulfills the requirements that administrators need for their licensure. For more information about the seminar, see Freedom of Info. Act Response from Ill. State Bd. of Educ. to Miranda Johnson (Nov. 21, 2016) (on file with authors).

FIGURE 1: ADVERTISEMENT FOR REID TECHNIQUE TRAINING OFFERED BY THE ILLINOIS PRINCIPALS ASSOCIATION




This is not a problem unique to Illinois. The Reid company touts the popularity of its training for educators in eight states, saying its workshops for applying the technique to schoolchildren are sold out every year.[354] And documentation from those workshops reveals that they do not account for the school context in any mitigating way. Ashley Fretthold, a Supervisory Attorney in the Children and Families Practice Group of Legal Aid Chicago,[355] made a Freedom of Information Act (FOIA) request of the Illinois State Board of Education (ISBE) to provide documentation of the courses offered. The documents that ISBE provided in response to this FOIA request show that ISBE guidelines for interrogations of students mirror the standard language of Reid programs as applied to adults.[356] Moreover, in the trainings, the presenter showed multiple videos of interrogations for serious crimes, including murder and rape; those being interrogated were always referred to as "suspects" or "subjects," not as "students" or "kids."[357] The response indicated that thousands of administrators had undergone the training in recent years.[358]

There is seldom support provided for the student being interrogated. Christine Agaiby Weil, who worked for many years as a post-incarceration reintegration officer in the Illinois juvenile justice system, says that the "saddest thing" about the effect of schools using the Reid technique on children is that

354. Starr, *supra* note 342.

355. Interview with Ashley Fretthold, *supra* note 265.

356. Freedom of Info. Act Response, *supra* note 353, at 1 ("This workshop is designed to help administrators develop skills in interviewing and interrogation techniques. Participants will learn how to recognize verbal and nonverbal behavior to determine who is telling the truth (or not), will learn characteristics to determine if an allegation against another is true, and learn how to structure the investigative interview combining both investigative and behavior provoking questions.").

357. Starr, *supra* note 328.

358. *Id.*

the students react like they deserve this treatment.[359] The children, she adds, are powerless and do not know to expect any better.[360] Miranda Johnson, director of the Education Law and Policy Institute, and Diane Geraghty, Civitas Child Law Center Co-director—both child law experts at Loyola University School of Law—concur, indicating that these interrogations using the Reid technique traumatize children.[361] In the training, school administrators and teachers are encouraged to verbally celebrate when the child starts crying.[362] Moreover, the use of the technique treats a child like a suspected criminal, with myriad consequences.

Dr. Fenning says the use of such techniques causes children to perceive the authority of the SRO just by the SRO's presence, even if the law enforcement officer is not conducting the interrogation.[363] As such, use of the Reid technique makes the judicial distinction between interrogations by law enforcement and interrogations by school administrators in the presence of law enforcement[364] effectively meaningless.

Following the *Walgren* case, some schools paid closer attention to the use of the Reid technique. Tom Scotese, a former high school assistant principal, said that Corey's case, which occurred in a neighboring community to his school, had a big impact on Chicagoland schools and in fact throughout the state.[365] Many deans were shocked that could happen, and in some schools, Corey's case changed or reinforced better practices. For him, he says it reinforced the importance of alternative intervention practices.[366] The Illinois Principals Association did eventually stop officially using the training, but the Reid technique is still taught to educators in Illinois and numerous other states.[367]

As well as being traumatizing to students—by teaching students they deserve such treatment, tainting their relationship with their educational institutions, and subjecting them to inherently coercive interrogations—use of the Reid technique against children is, according to our experts, generally unnecessary. Judge Stuart F. Lubin said that "with students you really don't even need to use this technique. It isn't hard to get the students to speak."[368]

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359. *See* Interview with Christine Agaiby Weil, *supra* note 328.

360. *Id.*

361. Telephone Interview with Miranda Johnson, Clinical Professor of L. and Dir. of the Educ. L. & Pol'y Inst., Loyola Univ. Chi. Sch. of L. (Feb. 4, 2020) (interview notes on file with authors).

362. Starr, *supra* note 328.

363. Interview with Dr. Pamela Fenning, *supra* note 328.

364. *See supra* Parts II.B–II.C.

365. Telephone Interview with Tom Scotese, Former Assistant Sch. Principal (May 4, 2020) (interview notes on file with authors). Scotese has since retired. *Id.*

366. *Id.*

367. Crane, *supra* note 337, at 86–87 (discussing Reid technique trainings offered by school systems throughout the country).

368. Interview with Honorable Stuart F. Lubin, *supra* note 316.

Sarah Gibson, a school administrator at a charter school—part of Chicago's Noble network—agrees.[369] As a result, Gibson reports that "nine times out of ten, when you start talking to a student about any issues, they will just tell you what occurred or show you what they have."[370]

For those who are well-versed in both the Reid technique and the science of adolescent brain development, it is clear that the two are at odds. As Judge Lubin reports, the science of adolescent brain development far predated the Supreme Court's statements in *J.D.B.*:

> Chicago had the first juvenile court founded by Jane Adams; science now has backed her up on the need for this different treatment of children . . . I have been to seminars where we have looked at CAT scans of brains and seen the differences in the frontal lobe development of children at different ages . . . One reason the age was increased for juvenile court was in response to this . . . Science tells us there isn't maturation of the brain until 25-26; it isn't clear our legislature would go up to that, but we are up to 18 now.[371]

Having also attended seminars on the Reid technique, Judge Lubin expressed disdain for its use on children, saying: "I was amazed to see an officer recently come in and discuss use of the Reid technique and lie detectors in their offices, which for me puts into question those confessions obtained by these means."[372] Unfortunately, as we have seen, not all Illinois judges display such skepticism to confessions so obtained.

Amy Meek, speaking of the statutory reforms, explains that, while there are now protections in Illinois that prevent a student from being interrogated by police officer, as long as a teacher or other administrator has a student sign the statement described above admitting culpability, then the interrogation is admissible under Illinois law.[373] Thus, once again, we see the lower courts reading down legislative protections and allowing interrogations of schoolchildren with officers involved but masked by school personnel involvement—as described *supra*, the lower courts have read security officers who are employed by the school as not covered by the statute change even though the officer's sole job is enforcement of rules.[374]

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369. Telephone Interview with Sarah Gibson, Sch. Admin. with Noble Sch. (Aug. 17, 2021) (interview notes on file with authors).

370. *Id.*

371. Interview with Honorable Stuart F. Lubin, *supra* note 316.

372. *Id.*

373. Interview with Amy Meek, *supra* note 17.

374. *See supra* Part III.B.

*2. Disparate Treatment in Interrogations and Arrests in Schools*

As we have documented occurs with searches and school disciplinary practices,[375] there is considerable disparity among how different children are treated in school interrogations. Dr. Fenning says use of the Reid technique exacerbates the problem of unequal access to knowledge and resources. For example, the expungement cases she has seen are almost always for white students.[376] She says that white families know their rights and how to better protect themselves, whereas families and parents of color typically have fewer resources and do not know about these avenues.[377] In addition, cultural differences between communities can play into this differential, as different cultures have different standards as to how to treat one another and those in authority. For instance, she describes one Latinx student who was told by his parents to not speak to his teacher after an altercation, to show respect and contrition, but the teacher later revealed that she was very offended that the student never apologized.[378]

Some schools are much more restrained in how they conduct interrogations. Michelle Rappaport, a social worker at a therapeutic day school, which serves students with disabilities who have been removed from regular school,[379] describes her therapeutic day school as conducting interviews as a conversation, not as an interrogation.[380] They will have administrators lead the conversation unless there is a legal issue that arises, in which case they will hand the interview over to the SRO. Only serious matters, such as a fight or a staff member being injured, will result in a possible charge. She estimates that around five to ten incidents a year will lead to a charge.[381] Similarly, Susan Coleman, an assistant superintendent at another school, reports that at her school, they always follow a careful protocol on how to question children about misconduct.[382] They will interview the child with the relevant team, especially if the child is in special education or it is not the first time there has been an issue. They try to maintain a friendly tone, saying, for example, "If you have nothing to hide, let's not hide it."[383] Their approach depends on the amount of evidence they have; if they do not have much evidence, they will not conduct further

375. *See generally* Jacobi & Clafton, *supra* note 24; Jacobi & Clafton, *supra* note 25.

376. Interview with Dr. Pamela Fenning, *supra* note 328.

377. *Id.*

378. *Id.*

379. For more on the difference between regular schools and therapeutic day schools, see Jacobi & Clafton, *supra* note 25.

380. Telephone Interview with Michelle Rappaport, Licensed Clinical Sch. Soc. Worker, Ill. (Apr. 6, 2020) (interview notes on file with authors).

381. *Id.*

382. Telephone Interview with Susan Coleman, Assistant Sch. Superintendent (Apr. 24, 2020) (interview notes on file with authors).

383. *Id.*

action, they would just say, "Just so you know, this is what is being said—something to think about," putting the child on notice.[384]

But by her own description, Coleman is an assistant superintendent at a school that is "very white and wealthy."[385] Coleman says that the way her school conducts interrogations is in large part a product of teacher and administrator apprehension about aggressive or litigious responses from parents. She says that staff do not want to get involved in discipline or confrontations with the children; they are afraid to or do not want the hassle (although some sports coaches are more willing to get more involved) and fear lawsuits by hyper-assertive parents. Having worked in schools in a variety of socioeconomic communities, she describes the students in her district as "more disrespectful and robust."[386] She put this down to a sense of entitlement trained in the children; when parents are called about behavior problems of the children, they will often say they have taught their children to stick up for themselves, even when students have made false allegations about teachers or threatened teachers. In contrast, Coleman previously worked as a dean in a school district that contained both a large, poor Latinx population and an otherwise wealthy, mostly white population.[387] The superintendent said to Coleman that he "didn't want gang-banging kids" at the school—Coleman says he made this explicit and would use racial terminology.[388] The superintendent would deliberately craft discriminatory, draconian rules with a goal to set students up to fail. For instance, he would involve the police instead of deans in disciplinary issues, and he gradually decreased the number of deans from four to one in a school of 2,400 students. She says she believes he did this to reduce the amount of support for the poorer and minority students and to hamstring the ability of the deans to help children stay in school. Eventually, there were more security guards than social workers.[389]

The presence of police officers in schools exacerbates some of the other problems described herein. Rachel Shapiro sees how racial and other disparities come together, multiplying the effect of differences between the treatment of different students and which students end up in court.[390] She says she has had

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. The data indicate this is a problem in the country writ large. *See* AMIR WHITAKER ET AL., COPS AND NO COUNSELORS: HOW THE LACK OF SCHOOL MENTAL HEALTH STAFF IS HARMING STUDENTS 4 (Emily Greytak et. al., eds., ACLU 2019), https://www.aclu.org/sites/default/files/field_document/030419-acluschooldisciplinereport.pdf [https://perma.cc/MEY9-E7N3] ("14 million students are in schools with police but no counselor, nurse, psychologist, or social worker.").

390. Video Interview with Rachel Shapiro, Supervising Att'y, Equip for Equality (Mar. 30, 2020) (interview notes on file with authors); *see also* Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 86 (2014) (discussing analysis of national data, finding that "one out of every four disabled black children was suspended during the 2009–10 school year.").

perhaps ten white students who are court-involved out of about 700–800 of the total clients she represents in school disciplinary defense.[391] She says that it is so rare to have a court-involved white student that there are normally unusual circumstances, particularly significant family dysfunction and gang involvement, that explain why the police are targeting the child.[392] Most of her clients are Black and Latinx, and this is even more the case for her coworkers who speak Spanish. Many parents of these students do not speak English, and so it is more difficult for them to seek help for their children, particularly when they are undocumented and afraid to access resources for fear of garnering state attention. In addition, many of her students are from neighborhoods where they experience trauma and witness traumatic events and have very different experiences with policing. She reports that the response to the students by the SROs and other officers is also very different: "things that a white student would not get in trouble for will be things students of color will be [in trouble for]."[393]

Juvenile Court Judge Stuart F. Lubin concurs. He reports that children in his courtroom, which covers Chicago city districts, are disproportionately minority, and "it has always been that way."[394] Judge Lubin says the majority of children in his courtroom are Black or Latinx and that about 80% of children in detention are Black. He believes this is because police are more likely to arrest a minority child than a white child for the same conduct. He describes the phenomenon as a "funnel" that starts with the police department, whereby minority children are funneled into the juvenile justice system. He says any interaction with the criminal justice system has a disproportionate impact on minority children.[395]

Dan Losen, a scholar who studies the disparities in schools, says there is a general problem of discrimination on the basis of race, disability, and income in school treatment of children, but when it comes to interrogations and the arrests that follow, it is hard to get accurate data.[396] Losen says the Office for Civil Rights for the U.S. Department of Education collects data on school arrests and referrals to law enforcement, which can include anything from giving a student a ticket to arresting a student. Collecting this data became mandatory in 2010, but it is not being collected accurately. In many large urban

391. *Id.*

392. *Id.*

393. *Id.*

394. Interview with Honorable Stuart F. Lubin, *supra* note 316.

395. *Id.*

396. Zoom Interview with Daniel Losen, Dir. of Ctr. for Civ. Rights & Remedies at the Civ. Rights Project, Univ. of Cal., L.A. (Apr. 7, 2020) (interview notes on file with authors); *see also* CATHERINE Y. KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 1 (2010) ("Unfortunately, the youth who suffer disproportionately from these practices are likely to be precisely those who need the most support, including low-income students, students of color, English language learners, homeless youth, youth in foster care, and students with disabilities.").

districts, they are reporting zeros for arrests, and Losen says, "we know from talking to advocates that isn't accurate."[397] His organization uses freedom of information requests to prove these numbers are inaccurate. He says that even in situations where police do need to be called in, there are big variations in how that is done. For instance, after mass shootings in nearby schools, a common response is to bring more police into the schools, but research shows that police respond differently to students of color, and students respond differently to officers patrolling the school hallways.[398] His own recent research shows a correlation between an increase in security staff and increase in days of lost instruction: Black children's days of lost instruction is increased even more with the increased presence of SROs.[399] The loss of counselors also relates to increased lost instruction time in the school.[400]

The difference in the approaches between white wealthy schools and poor minority schools is stark, with white wealthy students eased into a conversation by teachers afraid of being sued, while poor students and students of color are subject to deliberately coercive techniques by police officers trained in psychological compulsion. As our experts have attested, police-involved interrogations are likely to traumatize children subject to techniques designed to break down the will of adult criminals. These interrogations lead to both school discipline actions and potentially criminal charges. The former can massively impact the prospects of students for the rest of their lives; the latter is the school-to-prison pipeline in action.[401]

## CONCLUSION

The Supreme Court's ruling in *J.B.D.* was much heralded when it was handed down.[402] This Article has shown that, in practice, the ruling has

397. Interview with Daniel Losen, *supra* note 396; *see also* WHITAKER ET AL., *supra* note 389, at 50 (discussing nonreporting of arrests and how zero reports at the district level has led the authors to "suspect non-reporting of referrals to law enforcement").

398. *Id.*

399. *See e.g.* DANIEL J. LOSEN & PAUL MARTINEZ, LOST OPPORTUNITIES: HOW DISPARATE SCHOOL DISCIPLINE CONTINUES TO DRIVE DIFFERENCES IN THE OPPORTUNITY TO LEARN 6 (2020), https://escholarship.org/content/qt7hm2456z/qt7hm2456z.pdf [https://perma.cc/Z2U5-2Q5R]; *see also* GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS (2004), https://files.eric.ed.gov/fulltext/ED489177.pdf [https://perma.cc/X9GF-6SW2] (examining causes of the large disparity in graduation rates by race, including students feeling "pushed out" from school after missing schooling days due to external forces).

400. NICOLE GON OCHI ET AL., OUR RIGHT TO RESOURCES 34 (Sylvia Torres–Guillén et. al., eds., ACLU 2020) https://www.aclusocal.org/sites/default/files/aclu_socal_right-to-resources.pdf [https://perma.cc/YJV8-DZXC].

401. *See What is the School to Prison Pipeline?*, ACLU (June 6, 2008), https://wp.api.aclu.org/documents/what-school-prison-pipeline [https://perma.cc/8Z59-D4LE] (discussing the way in which school discipline, juvenile detention, and court involvement contribute to the school-to-prison pipeline).

402. For instance, the American Bar Association issued a statement saying that it "agrees strongly with the court's smart, fair decision that a child's age must be considered when making a Miranda custody determination." Claire Chiamulera, *Juvenile's Age is a Factor in Miranda Custody Analysis*, ABA (July 01, 2011),

provided little protection for schoolchildren being interrogated. One reason is that most interrogations of schoolchildren are deemed to not constitute custodial interrogation, certainly when conducted by school administrators, and often even when involving police officers in the interrogation. As such, *J.B.D.* simply does not apply to the interrogations that most schoolchildren experience. Yet, it is all the Supreme Court has bothered to say on the question. Further, even when police are actively involved in the interrogation, such that the interrogation fits the fourth and most intrusive category of our taxonomy—interrogations run by law enforcement that involve criminal investigations—lower courts still avoid the protections of *J.B.D.* through jurisprudentially dubious methods, such as differentiating the minutiae of the challenged interrogation at hand to the specific circumstances giving rise to *J.B.D.*, even though the Supreme Court set out a broad rule that age must be considered in the custody analysis. The Supreme Court has done nothing to review this practice, even when lower courts are clearly defying its one statement on the practice of interrogations as applied to schoolchildren.

The logic of *J.B.D.* is that children are more vulnerable than adults, and so it is perverse that lower courts consistently find reasons to provide less protection to schoolchildren than adults. But this is so in most cases across the nation. Furthermore, even when legislatures attempt to provide additional protection, those same lower courts can undermine legislative protections by stripping the statutory provisions of any meaningful prophylactic effect, as was seen in Corey's Law, passed in response to court-approved treatment of a child by police officers that directly led to his suicide. In response to such judicial permissiveness, school administrators exploit courts' presumption that schools act in the interests of children, and police officers leverage liberal rules for school administrators by tag-teaming in their interrogations and bootstrapping that permissive atmosphere.

The absurdity of the lower courts' common rationales for this permissiveness as promoting school discipline and protection of children is illustrated by the fact that school administrators use the infamous Reid technique against schoolchildren. Even though this technique has been shown to psychologically coerce even adult criminal suspects, school guidelines reveal that there is often no accommodation made for the special vulnerabilities of schoolchildren to such techniques. School administrators routinely hand over confessions gained to police, acting as direct conduits in the school-to-prison

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https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol30/july_2011/juvenile_s_age_isafactorinmirandacustodyanalysis/ [https://perma.cc/V3RP-M8YX]; Hillary B. Farber, J.D.B. v. North Carolina*: Ushering in a New "Age" of Custody Analysis Under* Miranda, 20 J. LAW & POL'Y 117, 119 (2011) ("[W]ith the specific attributes of children now firmly acknowledged in Supreme Court precedent, a qualitatively different analysis is possible for juveniles in a variety of contexts.").

pipeline. This is particularly true of the treatment of minority children, worsening a systemic problem of mass incarceration of minorities.

Multiple of the experts we interviewed referred to this system as one of treating some children as "disposable."[403] It is hard to avoid the conclusion that some children are indeed treated as disposable. The interrogation of children in schools and the unwillingness of courts, including the Supreme Court, to meaningfully regulate those interrogations contributes to the school-to-prison pipeline. But harm to schoolchildren from these interrogations occurs even when they do not lead to arrests. Children can be interrogated in relation to breaches of school rules, and the admissions children make can massively affect their life prospects even without the danger of imprisonment. In Illinois, children can be excluded from school for up to two years as a result of disciplinary procedures—these exclusions do not simply apply to the given school where the breach occurred, but rather to the entire public schooling system within the state.[404] This is permissible because the relevant expulsion legislation stipulates that "[a]n expelled pupil *may* be . . . transferred to an alternative [school]"[405]—but does not *require* that the student be transferred—which creates the possibility that a school may instead leave a student without any schooling option for up to two years.[406] Experts say that students who are out of school for such a long time can never recover from such disruptions to their schooling.[407] And even children who were not involved in criminal behavior prior to such exclusion are much more likely to engage in criminal

403. Telephone Interview with Francisco Arenas, *supra* note 29. Arenas says he "finds it mind-boggling that there is this disposable approach" in the attitudes of some schools towards children. *Id.* Explaining why he devotes himself to working with children coming out of the juvenile detention system, Reverend Kelly said: "It's the forgotten, discarded, disposable people. That's so often who you find in jail—the forgotten." Mahany, *supra* note 29 (quoting Reverend David Kelly).

404. Jacobi & Clafton, *supra* note 25, at 3. In some states, such as Georgia, there is no time limit on exclusion; many states permit permanent expulsion with no alternative school option. D.B. v. Clarke Cnty. Bd. of Educ., 469 S.E.2d 438, 440 (Ga. Ct. App. 1996).

405. 105 ILL. COMP. STAT. ANN. 5/10-22.6(a) (West 2020) (emphasis added).

406. *See* 105 ILL. COMP. STAT. ANN. 5/10-22.6(d) (West 2020) ("The board may expel a student for a definite period of time not to exceed 2 calendar years, as determined on a case-by-case basis."). Multiple of our interviewees independently raised the issue as a major concern. *See, e.g.*, Interview with Ashley Fretthold, *supra* note 265; Interview with Amy Meek, *supra* note 17.

407. Dr. Pamela Fenning, a scholar specializing in school and child psychology, says that expulsion for this amount of time means there is basically no chance of educational recovery for a student. Interview with Dr. Pamela Fenning, *supra* note 328; *see also* Interview with Monica Llorente, *supra* note 265; Interview with Ashley Fretthold, *supra* note 265; EDUC. COMM'N OF THE U.S., POLICY SNAPSHOT: SUSPENSION AND EXPULSION 1 (Jan. 2018), https://files.eric.ed.gov/fulltext/ED581500.pdf [https://perma.cc/3N3W-84Q5] (These "disciplinary interventions negatively impact student achievement and increase both students' risk of dropping out and their likelihood of future involvement with the criminal justice system."). *See also* Emily Boudreau, *School Discipline Linked to Later Consequences*, HARV. GRADUATE SCH. OF EDUC. (Sept. 16, 2019), https://www.gse.harvard.edu/news/uk/19/09/school-discipline-linked-later-consequences [https://perma.cc/WY7G-6RK2]; Andrew Bacher-Hicks et al., *The School to Prison Pipeline: Long-Run Impacts of School Suspensions on Adult Crime* 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26257, 2019), https://www.nber.org/system/files/working_papers/w26257/w26257.pdf [https://perma.cc/FC9A-Q3ZC].

conduct and thus be drawn into the juvenile justice system when excluded for such long periods.[408] This treatment of some children as disposable is a failing by society, and it is also specifically a failing of the Supreme Court to in any way regulate how the nation's schools treat them.

408. Boudreau, *supra* note 407.