Principal Interrogator: A Call for Youth-Informed Analysis of Schoolhouse Interrogations

Megan Crane[*]

In the wake of *Making a Murderer*, which exposed the police-induced false confession of cognitively limited sixteen-year-old Brendan Dassey to rape and murder, and *When They See Us*, depicting New York police coerce five adolescent and teenage boys into falsely confessing to rape and attempted murder, there is a newfound public outcry over the psychologically coercive tactics that police use to interrogate youth across our country. Parents are often shocked to learn that their children can be interrogated by police without an attorney or a parent present, and often without a parent even being notified. People are similarly appalled to hear that police are allowed to deceive suspects, even kids, with lies about the evidence and the potential consequences to get a confession. Thankfully, at least some courts across the country are bringing renewed rigor to their examination of the interrogations of youth and giving teeth to the special care that the United States Supreme Court requires for kids in the interrogation room.

Modern school-based policing practices, however, make it increasingly likely that students will experience interrogations at school rather than the police station, and often by a school official, like the vice-principal, rather than a police officer. This is problematic because these schoolhouse interrogations regularly evade judicial review and leave the youth without any constitutional protections. Suspects interrogated by law enforcement are entitled to receive their *Miranda* warnings before any interrogation begins, advising the suspect of his right to remain silent, that anything he says may be used against him, and of his right to an attorney during questioning. Due process also prohibits law enforcement from eliciting an involuntary statement from

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suspects, and courts evaluate confessions elicited by police for voluntariness. Yet, on school grounds, statements elicited from students by school officials are regularly denied these protections. For the most part, courts do not require that students be provided their *Miranda* rights, and courts typically do not evaluate a student's schoolhouse statement for voluntariness. Even in states where local laws require parents to be notified when a juvenile under a certain age is interrogated, the laws do not apply to interrogations by school officials. School officials are not law enforcement state actors; thus, courts hold that they are not subject to the same constitutional obligations. But, regardless of the identity of the interrogator, the results are the same: a student may be prosecuted in court and subject to criminal consequences based on their confession.

While the law on juvenile police interrogations moves forward, the law on schoolhouse interrogations has remained stagnant, and in some cases even moved backward. The United States Supreme Court held long ago that youth must be treated with the greatest care in the interrogation room, directing courts to apply special care when analyzing whether a youth validly waived his *Miranda* rights and whether his confession was truly voluntary. Recently, courts have been applying special care to juvenile interrogation and confessions with renewed vigor, particularly as public ire over this issue increased. Many courts now recognize that a confession from a youth must be analyzed through the eyes of a child.

Yet, courts do not apply the same special care to the analysis of students' statements elicited at school. Instead, when faced with a student confession, courts routinely conduct a simplistic analysis that wholly ignores the special care doctrine. Many courts justify blindly blessing a student's schoolhouse interrogation based on a superficial analysis with the outdated notion that school officials act *in loco parentis* (with the authority of the parent, not the state). The implication seems to be that school officials are benevolently looking out for the student's best interest and the safety of the student body, and thus the school official's conduct requires less scrutiny than law enforcement. When the first school interrogation cases were percolating through the courts about fifteen years ago, a handful of courts conducted a more robust analysis. Today, however, most courts short circuit the need for any substantive analysis with a holding that the school official is not law enforcement and was acting in the interest of school safety. This article aims to demonstrate why such blanket assumptions are gravely misplaced.

Interrogations are commonplace in our schools. Given the reality that the schoolhouse now often leads to the jailhouse, we must provide students constitutional protections during in-school interrogations, regardless of who conducts the questioning. A recent development makes the provision of Miranda and due process to students even more imperative: John E. Reid & Associates, the company that markets and trains nearly all law enforcement

on how to interrogate adult criminal suspects, is now training school officials how to interrogate their students using police tactics—tactics which already have been widely recognized to be psychologically coercive and likely to elicit false and involuntary statements from juvenile suspects.

This article sheds light on this troubling trend in schools across our country—kids being criminally prosecuted, or adjudicated in juvenile court, based on statements they made to a school official like a teacher, principal, or other school administrator—administrators—not a police officer. This article argues that the current legal framework for evaluating whether such statements can be admitted in court is inadequate and fails to recognize what we now know about interrogation tactics, youth vulnerability to such tactics, and the realities of today's schools and their pervasive interaction with law enforcement. This article argues that, if any legitimate question remained about whether constitutional protections should be required for schoolhouse statements, the fact that school officials are now being trained to interrogate like law enforcement answers that question. The legal hurdles to litigating such confessions are then examined and a new legal framework is proposed. This article also proposes some additional creative litigation strategies for keeping a student's confession to a school official out of court.

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designed for adult experienced criminals—on juvenile suspects.[9] That is bad enough, but here is what is shocking: now school officials, principals, and teachers are using these coercive tactics on their students.[10]

Increasingly, statements are being used against youth in criminal prosecutions and juvenile delinquency proceedings that were elicited by school officials at the schoolhouse, rather than cops at the stationhouse. Many of these school officials have been trained in the same interrogation technique that police use on adult suspects in the interrogation room at the police station.[11] When an interrogation is conducted by a school official, however, it is generally insulated from legal review because a school official is not law enforcement and not considered a state actor for the purposes of criminal

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of a survey of law enforcement showing that almost all officers used the same techniques on minors as on adults).

[9] Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 952 (2010) (examining the effect damaging interrogation techniques may also have on juvenile guilty pleas); Lauren Kirchner, *How Can We Prevent False Confessions from Kids and Teenagers?*, PAC. STANDARD, https://psmag.com/news/preventing-false-confessions-kids-https://psmag.com/news/preventing-false-confessions-kids-8359083590 [https://perma.cc/GAN9-4X2A] (last updated May 3, 2017) (summarizing a recent University of Virginia survey of 178 police from across the country on whether they "thought about using different interrogation methods on juveniles" than adults, which showed that almost all of the officers "frequently" interrogated adults the same way as adults and that most do not receive any relevant training). *See generally* Jessica R. Meyer & N. Dickon Reppucci, *supra* note 8 (reporting results of a 2004 survey of law enforcement showing that almost all officers used the same techniques on minors as on adults). *See also* N. Dickon Reppucci et al., *Custodial Interrogation of Juveniles: Results of a National Survey of Police*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 67–80 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (demonstrating that surveyed officers generally recognize that juveniles are more vulnerable or suggestible, but in practice do not alter their interrogation methods when interrogating a young suspect to account for the differences).

[10] *See* D.Z. v. State, 96 N.E.3d 595, 601 n.2 (Ind. Ct. App. 2018) (citing an Indiana Department of Education flyer advertising Reid & Associates interrogation training for school official that is no longer available online), *vacated*, 100 N.E.3d 246 (Ind. 2018). Alexa Van Brunt, Opinion, *Adult Interrogation Tactics in Schools Turn Principals into Police Officers*, GUARDIAN (Mar. 19, 2015, 7:15 AM), https://www.theguardian.com/commentisfree/2015/mar/19/interrogation-schools-turns-principals-police-officers [https://perma.cc/WG8A-WEEF]. *See also* JOHN E. REID & ASSOCS., INC., THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION FOR SCHOOL ADMINISTRATORS (2012), http://reid.com/media/webinar-sa-all.pdf [https://perma.cc/R35U-PFHT] [hereinafter THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION FOR SCHOOL ADMINISTRATORS]; *So the School Principal has Interrogated Your Child…*, HARRIS CTY. CRIM. LAW. ASS'N (May 3, 2016), https://hccla.org/so-the-school-principal-has-interrogated-your-child (noting that the Reid company is educating school administrators and examining the myriad of problems this raises); Douglas Starr, *Why Are Educators Learning How to Interrogate Their Students?*, NEW YORKER (Mar. 25, 2016), https://www.newyorker.com/news/news-desk/why-are-educators-learning-how-to-interrogate-their-students [https://perma.cc/CQN9-ZWUF] (describing Reid trainings for school officials and interviewing several individuals who have attended these trainings).

[11] *See infra* Part IV.

constitutional law.[12] Courts' refusals to treat school officials like law enforcement state actors carry dire consequences for students. As a result, students are not provided their *Miranda* rights, including their right to remain silent and their right to an attorney; parents are not contacted (even if state law would require parental consent for a police interrogation); and courts typically do not evaluate whether a student's statement was voluntary before admitting it in a criminal case. Understandably, many students may not understand that their statements to their principal may be used against them in a court of law. Given the frequency of schoolhouse interrogations and the reality that schoolhouse confessions can and regularly do lead to criminal consequences and a youth's loss of liberty, constitutional protections must apply to schoolhouse interrogations to protect youth.

II. THE PROBLEM: STUDENTS ARE STRIPPED OF THEIR CONSTITUTIONAL RIGHTS IN SCHOOLHOUSE INTERROGATIONS

Today, interrogations are increasingly taking place in the schoolhouse instead of the stationhouse. Law enforcement find their way into the schoolhouse for two distinct reasons: the matter originated at school or law enforcement chose to go to school and pull a student from class to interrogate them regarding an off-campus crime, rather than visit them at home and have to get past a gatekeeper parent.[13] These interrogations in the schoolhouse are increasingly conducted by school officials, such as the principal, rather than a law enforcement officer.[14] Sometimes law enforcement is present while the school official interrogates a student, sometimes they are not. There are many cases where the officer waited right outside the door while the school official conducted the interrogation and then was brought into the room as soon as the student confessed.[15] Each of these forms of schoolhouse interrogations raises significant troubling questions about what, if any, legal protections students are entitled to when interrogated by school officials rather than by police.

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[12] Note that while public school officials are regularly considered state actors in civil actions, that is not the case in the criminal context. *See infra* Part VII. In the criminal context, the Constitution generally only applies to actions taken by law enforcement or the prosecutor. *See infra* Part VII.

[13] *See, e.g.*, *In re* Elias V., 188 Cal. Rptr. 3d 202, 207, 227–28 (Cal. Ct. App. 2015) (overturning juvenile adjudication after police pulled thirteen-year-old from class and interrogated him in a school office regarding an alleged crime that happened off campus without his mother or attorney and failed to provide him *Miranda* rights).

[14] *See* NAT'L JUV. DEF. CTR., DEFENDING CLIENTS WHO HAVE BEEN SEARCHED AND INTERROGATED AT SCHOOL: A GUIDE FOR JUVENILE DEFENDERS 4 (2013), https://njdc.info/wp-content/uploads/2013/11/Defending-Clients-Who-Have-Been-Searched-and-Interrogated-at-School.pdf [https://perma.cc/4R76-QCPQ].

[15] *See, e.g.*, D.Z. v. Indiana, 100 N.E.3d 246, 248 (Ind. 2018). *See infra* Part VII.

One may ask why we need to be concerned about the interrogation of students in the schoolhouse, especially when the questioning is by a school official for a matter that relates to school discipline and/or school safety issues. We intrinsically assume principals, teachers, and other school personnel to be working in the best interest of their students, so our students should not need legal protection for their interactions with them. Right? The answer, unfortunately, is not so simple. Kids increasingly suffer criminal consequences for their conduct at school.[16] Cooperation between school officials and law enforcement has become the rule rather than the exception.[17] As a result, even school officials acting with the best intentions, who may be primarily motivated by student and campus safety, regularly produce evidence, including confessions, that is later used against students in a court of law.

Two foundational articles on this topic powerfully called for reform of the law governing schoolhouse interrogations over a decade ago in 2006.[18] The first article, published by clinical professor Paul Holland in spring of 2006 entitled *Schooling* Miranda*: Policing Interrogation in the Twenty-First Century Schoolhouse*, called for courts to conduct a more context-specific analysis of the schoolhouse interrogations that recognized the reality of increased interaction between school officials and law enforcement.[19] Holland, however, did not call for a change to any legal test and conceded that constitutional protections are not required for all interrogations by school officials.[20] The second article by law professor Meg Penrose, published in March 2006 and titled *Miranda, Please Report to the Principal's Office*, more boldly advocated for *Miranda* protections to apply to all student interrogations by school officials.[21] Unfortunately, these calls for law reform fell on deaf ears and neither proposal was adopted by courts.[22] The law on schoolhouse interrogations has seemingly gotten worse, not better, since 2007.

This article offers an updated expansion of the thorough analysis of this issue presented by Holland and Penrose. An update is now required for a couple of reasons. First, in the over thirteen years since those articles were published, schoolhouse interrogations have only become more common.

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[16] *See infra* Part III.

[17] *See infra* Part III.

[18] Paul Holland, *Schooling* Miranda*: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 43 (2006); Meg Penrose, *Miranda, Please Report to the Principal's Office*, 33 FORDHAM URB. L.J. 775, 789 (2006).

[19] Holland, *supra* note 18 at 43.

[20] *Id.* at 111.

[21] Penrose, *supra* note 18 at 789.

[22] *See, e.g.*, NAT'L JUVENILE DEF. CTR., *supra* note 14, at 5–8 (explaining the state of the law applied to schoolhouse interrogations, and demonstrating that none of these proposed reforms had been adopted).

Accordingly, there is a larger body of case law on this issue to analyze. While there is more case law, the jurisprudence is unfortunately not richer because it has remained largely stagnant, and arguably moved backward. While the early schoolhouse interrogation cases show some rigorous analysis of the (at that time) novel issue, more recent decisions present a formulaic, superficial analysis of a complex issue.

Second, while Holland and Penrose focused primarily on the relationship and coordination between police and school officials, a reality that has only increased since 2006, as will be discussed in Part III, this article instead emphasizes courts' glaring oversight of the vulnerabilities of students being interrogated by school officials. In every interrogation, there are two key players: the interrogator and the individual being interrogated. Holland and Penrose focused heavily on the interrogator. This article aims to give equal, if not more weight, to the unique vulnerabilities of the individual being interrogated: a child or teenager at school. This article is timely because, since Holland and Penrose published their articles, the United States Supreme Court has issued several transformative opinions regarding the unique vulnerabilities of youth and how these vulnerabilities impact their interactions with the criminal justice system. In a series of cases about extreme punishments for youth, the Court recognized that youths' brains are biologically different from adults' in ways that critically impact their cognition and behavior.[23] The Court then carried these precedents over to the interrogation room in *J.D.B. v. North Carolina*, where the Court held that a determination of whether a juvenile is in custody (and thus whether *Miranda* will apply) must be assessed from the perspective of a reasonable juvenile. The vast majority of courts addressing schoolhouse interrogation wholly ignore this rich body of jurisprudence.[24] While courts regularly cite *J.D.B.*, and its predecessors and progeny, in cases involving police interrogation of youth, these cases are scarcely mentioned in the schoolhouse cases. This is unacceptable.

I have spent much of the past five years defending individuals who falsely confessed to crimes that they did not commit when they were under eighteen-years-old. I have seen firsthand the impact that the United States Supreme Court jurisprudence establishing that children are (constitutionally) different can have on a fact-finder—judge or jury—when presented with a

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[23] *See* Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016) (holding *Miller* to be retroactive and concluding it will be "the rare juvenile offender whose crime reflects irreparable corruption." (citation omitted)); Miller v. Alabama*,* 567 U.S. 460, 560 (2012) (prohibiting mandatory life without parole for juveniles and requiring meaningful individualized assessments to allow meaningful opportunity for release); J.D.B. v. North Carolina*,* 564 U.S. 261, 281 (2011) (custody analysis under Fifth Amendment different for kids based on age and vulnerabilities of youth); Graham v. Florida, 560 U.S. 48, 74–75 (2010) (precluding life without parole terms for juveniles in non-homicide cases); Roper v. Simmons, 543 U.S. 551, 578 (2005) (banning death penalty for juveniles).

[24] *J.D.B.*, 564 U.S. at 264.

cogent, tangible explanation of why the biological vulnerabilities of youth, and the underlying science, is critically relevant to an analysis of a youth's culpability. [25] This article is an effort to connect these dots in the schoolhouse interrogation context and to arm defense attorneys and judges with the tools to finally incorporate this science and precedent into the schoolhouse interrogation jurisprudence.

Third, there is an additional reason why the time is right for an update on Holland and Penrose's scholarship. An alarming development adds ammunition to the call for reform. School officials across the country are now being trained to interrogate their students using the same tactics that police use to interrogate adult experienced criminals. John E. Reid & Associates, the company that developed and markets the most widely used police interrogation technique,[26] is now marketing the technique to schools, including elementary schools.[27] These tactics are widely recognized to be inherently coercive, even when used on adults, and they pose an unacceptably high risk of eliciting a false confession when used on youth.[28] Nonetheless, Reid is proactively, and quite successfully, bringing their toxic tactics into the schoolhouse. They are training school personnel on how to interrogate students, often outside the presence of law enforcement, to "get at the truth" when school discipline and/or criminal matters arise.[29]

According to Reid & Associates, as of 2012, the company had already offered "a one-day training program on The Reid Technique of Interviewing

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[25] *See, e.g.*, *In re* Elias V., 188 Cal. Rptr. 3d 202, 204 (Cal. Ct. App. 2015) (holding that a thirteen-year-old's confession was coerced by a detective and issuing a model opinion analyzing the detective's coercion and manipulation of the youth's inherent vulnerabilities). *In re Elias V.* is discussed in greater detail *infra* Part V.B.

[26] *See In re* Elias V., 188 Cal. Rptr. 3d at 211 ("The current Reid training manual, which remains the leading law enforcement treatise on custodial interrogation, was published in 2013. . . . It has been estimated that about two-thirds of police executives in this nation have had training in the 'Reid Technique.'") (first citing INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (5th ed. 2013); and then citing Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward* Miranda *and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873, 920 (2007)).

[27] *See, e.g.*, Starr, *supra* note 10 (describing Reid trainings for school officials and interviewing several individuals who have attended these trainings)*; see also* THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION FOR SCHOOL ADMINISTRATORS, *supra* note 10, at 2 (referencing a one-day seminar); The Reid Technique of Interviewing and Interrogation for School Administrators Parts *1–7*, JOHN E. REID & ASSOCS., INC., https://www.reid.com/store2/detail.html?sku=webinar-sa-all [https://perma.cc/DQG2-RLKL] (last visited Dec. 30, 2019) (advertising webinar and referencing in-person three-day seminar for school administrators); HARRIS CTY. CRIM. LAW ASS'N, *supra* note 10 (noting that school administrators trained by the Reid company and examining the myriad problems this raises).

[28] *See infra* Part IV.B.

[29] Starr, *supra* note 10. *See* THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION FOR SCHOOL ADMINISTRATORS, *supra* note 10, at 4.

and Interrogation for school administrators" to the following states: "Illinois, Indiana, Michigan, Minnesota, Wisconsin, Missouri, Oregon[,] and New York."[30] Reid also boasts on its website that the Department of Education is a client. [31] Michigan recently hosted its twentieth Reid Seminar, which began in 2005, each taught by Joseph Buckley, the current president of Reid.[32] In 2015, the Illinois Principals Association hosted a Reid training called "Investigative Interviewing and Active Persuasion."[33] That same year, the School Administrators Association of New York State offered a Reid workshop called "Are you Sure They Are Telling the Truth[]"[34] In some states, associations for principals and/or school administrators sponsor these trainings.[35] "Ed Leaders Network, a professional development organization with affiliates across the country," has even offered "Reid training as one of its webinars."[36]

I regularly speak around the country on police interrogation of youth and juvenile false confessions. When I share this development with audiences, it shocks them. Parents cannot wrap their head around the reality that their child would be interrogated without a phone call to alert them and invite them to join, much less that unaccompanied interrogation would be conducted using police tactics widely recognized to be psychologically coercive and likely to break the will of even an adult.[37] Audiences wonder why a school official would ever need to use law enforcement interrogation tactics, which were designed to crack adult criminals, on children at school. While emergency situations sometimes arise that may require more drastic measures to urgently obtain information, we assume that law enforcement would take over at that point and school officials revert back to the nurturing role to ensure the safety of the student body.

These Reid trainings for school officials flew under the radar for many years. In 2016, however, a couple of attorneys, including a former colleague

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[30] THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION FOR SCHOOL ADMINISTRATORS, *supra* note 10, at 2.

[31] *Company Information*, JOHN E. REID & ASSOCS., INC., http://www.reid.com/r_about.html [https://perma.cc/KX9X-W6P4] (last visited Dec. 30, 2019) (see the blue box on the right side of Reid's website, listing their clients).

[32] Starr, *supra* note 10 (quoting the executive director of Michigan Association of Secondary School Principals: "Our feedback has always been incredibly positive . . . They habitually sell out, year after year.")

[33] Van Brunt, *supra* note 10.

[34] *Id.*

[35] *Id.*

[36] Starr, *supra* note 10.

[37] *See* Corley v. United States, 556 U.S. 303, 320–21 (2009); Miranda v. Arizona, 384 U.S. 436, 448–50 (1966).

of mine, attended a training in Illinois sponsored by the Illinois Principals Association and were appalled by what they witnessed.[38] The trainer presented essentially the same training Reid & Associates provides law enforcement on how to interrogate adult suspects brought in for crimes as serious as murder; in fact, some of the videos shown during the training included clips of adult murders suspect's interrogation.[39] Few modifications were made to account for the school context or the youth of the subjects of interrogation.[40] Nonetheless, the trainings are popular. According to the Illinois State Board of Education, over 1400 school administrators had attended a Reid training over the previous six years.[41] Based on the attorneys' observations, a coalition of educators, advocates, and community groups published an open letter to the Executive Director of the Illinois Principals Association, the Illinois State Board of Education, the Superintendents of Illinois School Districts, among other entities, calling for the training to be "immediately discontinued."[42] The coalition asserted "[t]his interrogation technique, which has been widely discredited in law enforcement settings, has no place in our children's schools."[43]

One local lawyers association in Texas captured the issue well, when it warned the local bar:

> Teaching educators to "dabble" in law enforcement is just as dangerous as teaching them to "dabble" in psychology or other sciences. When they get it wrong (not "if" but "when"), we will have false confessions taking children down the prison pipeline with little hope of stopping.
>
> And, why? We already have entire law enforcement agencies created and ran by our school districts. Officers are already on campus or very near campus to respond. Seems one or the other simply isn't necessary. Ah, but then again, if we relied on our law enforcement officers, we

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[38] *See infra* Part IV.C. (discussing details about what my colleague and another attorney saw).

[39] Starr, *supra* note 10.

[40] *Id.*

[41] Letter from Jessica Schneider, Chi. Lawyers' Comm. for Civil Rights, et al. to Jason Leahy, Director of Illinois Principal's Association, et al. at 1 (Dec. 20, 2016), https://static1.squarespace.com/static/5871061e6b8f5b2a8ede8ff5/t/5943f87fb6ac506e92fe5856/1497626752664/Reid+Open+Letter+and+Appendix+signed+dated.pdf [https://perma.cc/H52J-L77Q] [hereinafter Open Letter to IPA].

[42] *Id.*

[43] *Id.*

> would have to respect the child's constitutional and statutory rights.[44]

Indeed, empowering educators to "dabble" in these toxic police interrogation tactics is placing a potent tool in amateur hands. The problems with the Reid method, and the dire results of hundreds of police-coerced false confessions, are now well-established. It is safe to assume that the known risks of this interrogation technique will only be exacerbated when wielded by people who do not have nearly as extensive training as law enforcement, or the on-the-ground experience of law enforcement.

This raises the following questions: Are school officials interrogating students in place of police as an end-run around providing students' constitutional rights? Are school officials being trained in police interrogation tactics so that they can better fill this role? Is this a coordinated effort by law enforcement to elicit more confessions without all the red tape created by the Constitution? Do any of these questions matter? Or is the outcome simply enough: kids are going to court, and even prison, because school officials got them to confess and a court admitted the confession, even where it would have been excluded had it been elicited by law enforcement.

Courts appear to suffer from the same assumptions we all intrinsically do school officials will act in the best interest of our children, their students. That assumption, however, is increasingly outdated and misplaced. This article makes the case that it is constitutionally intolerable to continue to insulate school interrogations from judicial review, given (1) what we now know about youth's inherent vulnerability to the pressures of interrogation, and (2) what we now know about school officials' training to act more like police, to continue to insulate school interrogations from judicial review.

III. Criminalization of the Classroom: A Necessary Context for Analysis of Rights Warranted During Schoolhouse Interrogations

Schoolhouse interrogations are happening within the larger context of the criminalization of the classroom across our country. This article will not spend much time explaining the details of the criminalization of our schools because this has been well-established in previous articles, including articles by Holland and Penrose.[45] Since a central question to the legal analysis is the degree of interaction and/or cooperation between the school officials and law enforcement, this brief summary of the growing presence of law

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[44] Harris Cty. Crim. Law. Ass'n, *supra* note 10.

[45] Holland, *supra* note 18, at 73–90; Penrose, *supra* note 18, at 785–89.

enforcement in our education system over the past couple of decades informs that question.[46]

Over the past few decades, law enforcement has significantly increased its presence in schools.[47] Indeed, the disturbing insinuation of police interrogation techniques into schools is only the latest twist in an ongoing trend of law enforcement efforts intermingling with school discipline.[48] According to "national estimates, 17,000 law enforcement officers—often termed 'school resource officers' (SROs)—are assigned permanently to schools."[49] Other sources report an even more pervasive police presence in our schools: 43,000 SROs and other police officers, plus 39,000 security guards, are now working in 84,000 public schools.[50] In 2014, thirty percent of schools had SROs, as compared to only ten percent in 1997.[51]

While many school police officers also have education and counseling responsibilities, the primary job responsibility "is to further law enforcement goals."[52] Even schools that do not have a full-time law enforcement officer on campus have a policy or practice of calling local police officers to come to campus to handle student misconduct.[53] For example, in one Indiana school, the student handbook includes a "Referral to Police" policy.[54] Under this policy, the police and the court system may be involved in "modifying" a student's negative behavior, including criminal consequences for actions at

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[46] *See infra* Part VI.

[47] *See infra* Part III.

[48] Josie Foehrenbach Brown, *Developmental Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 962 (2009).

[49] Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation,* 42 J. L. & EDUC. 653, 656 (2013).

[50] Emma Brown, *Police in Schools: Keeping Kids Safe, or Arresting Them for No Good Reason?*, WASH. POST (Nov. 8, 2015), https://www.washingtonpost.com/local/education/police-in-schools-keeping-kids-safe-or-arresting-them-for-no-good-reason/2015/11/08/937ddfd0-816c-11e5-9afb-0c971f713d0c_story.html [https://perma.cc/ABH6-ZVNQ] (citing the National Center for Education Statistics).

[51] Kyle Spencer & Adam Hooper, *Bullied by the Badge*, HUFFINGTON POST (Aug. 10, 2016, 12:00 PM), http://data.huffingtonpost.com/2016/school-police/mississippi [https://perma.cc/ES79-U8PA].

[52] Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1078 (2003).

[53] *See infra* Part VI.

[54] *See* BROWNSBURG COMMUNITY SCHOOL CORPORATION, BROWNSBURG HIGH SCHOOL STUDENT 2017–2018, at 32 (n.d.), https://www.brownsburg.k12.in.us/cms/lib/IN02200676/Centricity/Domain/77/1718_High_School_Handbook_FINAL.pdf [https://perma.cc/HN6F-NQ6A].

a school.[55] Some schools even have mandatory reporting arrangements, which obligate school officials to contact local police if certain things occur on school property.[56] Such "zero tolerance" policies remove the discretion that school officials historically had when deciding how to discipline a student and employ criminal charges and intervention by the juvenile justice system instead of in-school discipline strategies.[57] This is true for "common school misbehavior," as well as more serious misconduct.[58] For example, the Gun-Free Schools Act of 1994 required local educational agencies to expel any student who brought a firearm to school for at least one year.[59]

Expanded police presence has led to greater student contact with the criminal justice system and children facing criminal sanctions for offenses that were normally handled by teachers and school officials.[60] Misconduct that previously would have resulted in a visit to the principal's office now can mean juvenile detention, or worse. State legislatures have followed suit and passed new laws that define new school-specific crimes, for things like simply talking back to a teacher, disrupting class or school assemblies, or disorderly conduct and loitering or trespassing on school property.[61] As a result, not only are there more frequent interactions between students and police on school grounds but "[s]chool administrators have altered their activities to collaborate with police officers."[62]

In 2012, the most recent year for which comprehensive national data is available through the United States Civil Rights Data Collection, 250,000 students were "referred" to law enforcement and over 64,000 students were subject to school-related arrests.[63] By 2003, sixty-three percent of schools

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[55] *Id.*

[56] *See* Penrose, *supra* note 18, at 786.

[57] *See* N.C. v. Commonwealth, 396 S.W.3d 852, 862–64 (Ky. 2013).

[58] *Id.*

[59] *See* 20 U.S.C. § 7961 (2018) (noting, however, that the Act allowed for modifications to be made on a case-by-case basis). *See also* NAT'L JUV. DEF. CTR., *supra* note 14, at 1 (discussing this Act as one source of zero tolerance policies).

[60] Maryam Ahranjani, *The Prisonization of America's Public Schools*, 45 HOFSTRA L. REV. 1097, 1101–02 (2017). *See also* Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y. L. SCH. L. REV. 1373, 1374 (2012) (describing the "national pattern of schools relying on exclusionary discipline, police tactics, and criminal punishments to address even the slightest kind of misbehavior by students.").

[61] NAT'L JUV. DEF. CTR., *supra* note 14, at 2.

[62] Holland, *supra* note 18, at 39.

[63] *Civil Rights Data Collection, 2011–12 State and National Estimations*, OFFICE FOR CIVIL RIGHTS, https://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12 [https://perma.cc/5PTJ-C2HD] (last visited Dec. 30, 2019) (follow "Discipline" hyperlink; then follow "Referrals to law enforcement"; then download the Excel file; then follow sheet

reported at least one crime to law enforcement, up to six percent from 1992, even though school crime declined by approximately fifty percent during the same time.[64] School disciplinary policies can even result in the incarceration of students.[65] Data consistently shows that the criminalization of the classroom disproportionately impacts students of color.[66] The bottom line is that school officials now refer hundreds of thousands of students to law enforcement and our courts each year, greasing and fueling the "school-to-prison pipeline."[67]

IV. JUVENILES REGULARLY FALSELY AND INVOLUNTARILY CONFESS UNDER THE COERCIVE PRESSURE OF POLICE INTERROGATION TACTICS

Now, not only are students increasingly handed over to law enforcement as the result of misconduct at school, school officials are now taking a page out of law enforcement's book and interrogating their students using the exact same technique that police use to interrogate adult criminal suspects. To fully appreciate how toxic the Reid-style interrogation tactics are on students, it is important to understand the impact these tactics have on youth brains that are still developing. This section provides an overview of police interrogation tactics, originally designed for use on experienced adult criminals known to be guilty, as well as a summary of the neuroscience of adolescent brain development. The staggering rate of juvenile false confessions is the direct result of the toxic interaction of police tactics with the developing brain of a youth suspect.[68]

"SCH_3T8_Total" for the total of referrals in the United States). *Id.* (follow "Discipline" hyperlink; then follow "School-related arrests"; then download the Excel file; then follow sheet "SCH_3T9_Total" for the total of referrals in the United States).

[64] NAT'L JUV. DEF. CTR., *supra* note 14, at 1.

[65] *See* ADVANCEMENT PROJECT, TEST, PUNISH, AND PUSH OUT: HOW "ZERO TOLERANCE" AND HIGH-STAKES TESTING FUNNEL YOUTH INTO THE SCHOOL-TO-PRISON PIPELINE 9 (2010), https://b.3cdn.net/advancement/d05cb2181a4545db07_r2im6caqe.pdf [https://perma.cc/SNA6-DJBX] (explaining that punitive school discipline policies are directly tied to the law enforcement strategies that have led to the extraordinary increase in the number of incarcerated Americans).

[66] *See id.* at 10.

[67] *See, e.g.*, Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 862 (2012) (school officials now "refer a growing number of youths to the juvenile and criminal justice systems for school-based misconduct."). *See generally* CATHERINE Y. KIM ET. AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 34 (2010) [hereinafter THE SCHOOL-TO-PRISON-PIPELINE] (providing an overview of the "school-to-prison pipeline and examines the root causes and possible solutions).

[68] *See infra* Part IV.B.

A. Police Interrogation & The Reid Technique

Most police officers across our country have been trained to conduct interrogations using the Reid Technique, a technique developed and marketed by John E. Reid & Associates for one purpose: to extract confessions.[69] For that reason, 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.[70] In other words, prior to the interrogation, the investigation should be well underway or complete, and the evidence should decisively point to the suspect. The technique is guilt-presumptive, accusatory, and manipulative, and it packs a powerful psychological punch.[71] It is carefully orchestrated to manipulate a suspect's cost-benefit analysis to force the suspect to conclude that confessing is in his or her best interest.[72] The following sections outline how the Reid Technique works to obtain confessions.

1. Phase One: The Myth of the "Human Lie Detector"

Officers begin with open-ended questions in a non-confrontational, conversational manner.[73] The officer is thus able to build rapport and engage with the suspect. Meanwhile, the officer is focused on the suspect's verbal and behavioral cues as he answers questions.[74] The officer is trained to believe that he can function essentially as a "human lie detector" by observing and interpreting the suspect's supposed verbal and behavioral cues.[75] According to Reid, certain seemingly reflexive and ordinary behaviors on the part of the suspect being questioned—slouching, lack of eye contact, crossing one's arms, even scratching one's nose—are indicators of the suspect's

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[69] *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 6 (2010) ("In short, the single-minded purpose of interrogation is to elicit incriminating statements, admissions, and perhaps a full confession . . ."). *See also* Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 910 (2017) (stating that the Reid Technique, designed to weaken a suspect to obtain a confession, is the most common interrogation technique taught to law enforcement in the United States); FRED E. INBAU ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS (5th ed. 2013) (essentially the manual on how to conduct a Reid style interrogation, now its Fifth Edition); JAMES L. TRAINUM, HOW THE POLICE GENERATE FALSE CONFESSIONS: AN INSIDE LOOK AT THE INTERROGATION ROOM 47, 83 (2016); *Company Information*, *supra* note 32 (stating that "[t]he Reid Technique of Interviewing [] and Interrogation is now the most widely used approach to question subjects in the world" and listing their many clients).

[70] INBAU ET AL., *supra* note 69, at 187.

[71] *Id.*; TRAINUM, *supra* note 69, at 85. *See* Kassin et al., *supra* note 69, at 7.

[72] Kassin et al., *supra* note 69, at 17–18.

[73] TRAINUM, *supra* note 69 at 24, 84–85.

[74] *Id.*

[75] *Id.*

truthfulness or deceit.[76] Reid boldly claims interrogators trained in their method should be able to accurately identify deception with eighty percent accuracy.[77]

Studies, however, have repeatedly discredited these claims.[78] There is no behavior unique to deception; humans, even trained professionals, are very poor lie detectors.[79] In fact, research shows that the average person's ability to distinguish between truth and deception, whether a layperson or a trained professional, is essentially no better than the blind guess of a coin flip.[80] Indoctrinated with this pseudoscience, officers confidently (even when mistaken) believe that a suspect is lying, and thus must be guilty, and they proceed to interrogation—the first step down the road to a false confession.

2. Phase Two: The Coercion of Interrogation

Officers are trained to isolate the suspect in a small interview room to increase anxiety.[81] The interrogation room should be small, windowless, and without any barriers (such as a table) between the interrogator and the suspect.[82] Following the conversational phase of open-ended questioning, the interrogator is supposed to leave the suspect alone in the room for at least five minutes.[83] After this period of isolation, designed "to increase the level of insecurity and apprehension," the interrogator then directly confronts the suspect.[84]

Upon re-entering the interrogation room, officers are trained to immediately accuse the suspect and exude unwavering confidence in the suspect's

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[76] *Id.* at 72.

[77] *Id.* at 25.

[78] Kassin et al., *supra* note 69, at 6 (citing Aldert Vrij, DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES (2d ed. 2008); DePaulo et al., *Cues to Deception*, 129 PSYCHOL. BULL. 74 (2003) ("[I]n laboratories all over the world, research has consistently shown that most commonsense behavioral cues are not diagnostic of truth and deception."). *See also* Christian A. Meissner & Saul M. Kassin, *"He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 L. & HUM. BEHAV. 469, 470 (2002) (citing and summarizing studies that show "although many in the law enforcement community assume, often with great confidence, that investigators can use verbal and nonverbal behavioral cues to make accurate judgments of truth and deception, there is little hard evidence to support this assumption.").

[79] *See* Kassin et al., *supra* note 69, at 6.

[80] A layperson can only distinguish between truth and deception fifty-four percent of the time, and trained professionals perform "only slightly better, if at all." *See id.*

[81] INBAU ET AL., *supra* note 69, at 191.

[82] TRAINUM, *supra* note 69, at 84.

[83] INBAU ET AL., *supra* note 69, at 191. *See* TRAINUM, supra note 69, at 86.

[84] INBAU ET AL., *supra* note 69, at 191. *See* TRAINUM, supra note 69, at 86.

guilt.[85] Officers must strenuously reject any denials or claims of innocence made by the suspect.[86] Officers must be persistent, and relentless in their accusations. The goal is to make the suspect feel as though he has been caught.[87] An officer may use props like a thick file of papers and claim it includes the evidence proving the suspect's guilt.[88] Disturbingly, the officer is even allowed to lie, telling the suspect there is evidence, *e.g.*, a fingerprint, a video, or an eyewitness, connecting the suspect to a crime when no such evidence exists.[89] Through dominance, deception, and denial of any opportunity to explain, the interrogator continues until he essentially breaks the suspect, making him feel trapped and certain that nothing he can say or do will shake the interrogator's confidence in the suspect's guilt.[90]

Once the interrogator breaks the suspect down to a state of hopelessness, the interrogator implicitly (or sometimes explicitly) suggests that the benefits of confessing will outweigh the costs of maintaining innocence.[91] The interrogator may offer a moral or legal equivocation for the suspect's supposed crime, to make it more tolerable for the suspect to admit guilt.[92] For example, in a sex abuse case, interrogators may suggest to an adolescent suspect that he was simply curious—all adolescents are curious after all—or that his hormones just got the best of him for a moment, and that this happens to the best of us, especially when we are teenagers.

Having planted a seemingly forgivable explanation for the crime, interrogators will then give the suspect a stark choice.[93] "Are you the guy who temporarily lost control because of curiosity or raging hormones, or are you the sexual predator who planned and premeditated this attack?" Interrogators ask the suspect, "who would you rather be when you appear before a judge, the curious, impulsive normal guy or the predator?" They may even

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[85] *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 990 (1997)*;* TRAINUM, supra note 69, at 87.

[86] INBAU ET AL., *supra* note 69, at 191, 193. *See* TRAINUM, supra note 69, at 87 (explaining the rationale behind this tactic, the training provided to officers, and its effect on suspects).

[87] INBAU ET AL., *supra* note 69, at 191.

[88] *Id.*

[89] Kassin et al., *supra* note 69, at 27–28; TRAINUM, *supra* note 69, at 88, 109–10.

[90] INBAU ET AL., *supra* note 69, at 5. *See* TRAINUM, *supra* note 69, at 84–92.

[91] Ofshe & Leo, *supra* note 85, at 990, 999. *See also* TRAINUM, *supra* note 69, at 108–09 (explaining how interrogators "manipulate the suspect's knowledge of their situation, creating the perception that it is in the suspect's best interest (even if only temporarily) to tell the investigator what they want to hear.").

[92] Kassin et al., *supra* note 69, at 12.

[93] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 916 (2004); INBAU ET AL., *supra* note 69, at 20–03; TRAINUM, *supra* note 69, at 88–89.

imply that the judge will be more lenient if the suspect confesses to acting out of curiosity or on impulse.[94] It is important to note that the choice provided by the interrogator is also a false choice; the criminal consequences of either option are usually the same.

Interrogators often also suggest paternalistically that the suspect will get help if they confess, suggesting the only way the suspect can help himself is to confess. For the youth accused of sexual misconduct in the above scenario, the interrogator may vaguely promise that the suspect will get the help that he "needs" if he just confesses. In Brendan Dassey's case, his interrogators told him that confessing would "set him free" and that everything would be "okay" if he just confessed.[95] In *In re Elias V*, discussed in Part VII, a case involving a thirteen-year-old boy's confession to the inappropriate touching of a three-year-old girl, the interrogator emphasized that he had a problem and needed help: "[w]hy don't we just get this over with . . . so we can get you the help you need."[96] By deploying these tactics at the right psychological pressure points, experienced interrogators can be extraordinarily effective in causing a suspect to produce self-incriminating information. Sadly, that information is far too often false.[97]

3. Phase Three: The Confession & Risks of Contamination

After setting the trap, officers are then trained to elicit a detailed narrative of the criminal act and record a confession by the suspect in writing or on video.[98] A guilty suspect should be able to provide details of the crime that have not been revealed to the public and should also be able to lead police to information or evidence that was previously unknown to the police.[99] The innocent suspect, however, does not possess this "inside knowledge" of the crime. Recorded interrogations prove that interrogators regularly provide suspects this information during the interrogation, whether

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[94] Kassin et al., *supra* note 69, at 18.

[95] *Making a Murderer: Fighting for Their Lives* (Netflix Dec. 18, 2015).

[96] *In re* Elias V., 188 Cal. Rptr. 3d 202, 215 (Cal. Ct. App. 2015) (alteration in original).

[97] *See, e.g.*, *False Confessions Happen More Than We Think*, INNOCENCE PROJECT (Mar. 14, 2011), https://www.innocenceproject.org/false-confessions-happen-more-than-we-think/ [https://perma.cc/3KQY-A86F] (stating that approximately twenty-five percent of people exonerated by DNA evidence falsely confessed to the crimes that we now know with scientific certainty they do not commit). *See also* Corley v. United States, 556 U.S. 303, 321 (2009) (explaining the growing evidence that "a frighteningly high percentage of people . . . confess to crimes they never committed").

[98] Ofshe & Leo, *supra* note 85, at 991–92. *See also* INBAU ET AL., *supra* note 69, at 310–21 (guidance to law enforcement on how to achieve this step of interrogation technique); TRAINUM, *supra* note 69, at 91–92 (explaining the process by which officers preserve written and oral confessions).

[99] TRAINUM, *supra* note 69, at 126–28.

intentionally or not.[100] When interrogators ask leading questions that include information about the crime, such as "you committed this offense with Joe, right?" or "you paid $20 for the marijuana, didn't you?" This "contamination" is unavoidable and all too frequent.[101] Devastatingly, for the innocent suspect, this kind of information disclosure allows him to incorporate accurate details about the crime into his or her confession.[102] The result is a false, but plausible, confession that sounds disturbingly and convincingly true.

B. The Reid Technique is Widely Recognized to be Inherently Coercive

Despite Reid's claims of accuracy, today, many experts agree that modern interrogation techniques are psychologically coercive and can lead to false and involuntary confessions, even when used on adults.[103] The proof is easily seen in the scores of DNA exonerees who falsely confessed to crimes that we now know—with scientific certainty—they did not commit. According to the Innocence Project, more than twenty-five percent of people exonerated by DNA evidence falsely confessed to crimes.[104] According to the National Registry of Exonerations, 303 of 2492 exonerations—a little more than twelve percent—involved proven false and coerced confessions.[105]

The United States Supreme Court is also coming to terms with the fallibility of these interrogation tactics. Indeed, they recognized this reality back in 1966 in the landmark *Miranda v. Arizona* decision.[106] The Court, after describing standard interrogation practices and citing the first edition of the Reid interrogation manual, concluded that the "heavy toll" of custodial

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[100] Laura H. Nirider et al., *Combating Contamination in Confession Cases*, 79 U. CHI. L. REV. 837, 847 (2012); Ofshe & Leo, *supra* note 85, at 992.

[101] Nirider et al., *supra* note 100, at 847.

[102] *Id.*

[103] *See* Corley v. U.S., 556 U.S. 303, 321 (2009) (stating that newly collected evidence suggests the number of false confessions is much higher than originally thought); Miranda v. Arizona, 384 U.S. 436, 448–57 (1966) (noting that the goal of interrogation techniques is to psychologically exhaust suspects so that the desired confession is obtained).

[104] *False Confessions Happen More Than We Think, supra* note 97.

[105] NAT'L REGISTRY OF EXONERATIONS, *supra* note 3 (obtaining this numberby running a search for all false confessors. That search can be conducted by clicking on the "Browse Cases" tab, selecting "Detailed View," then clicking on the "FC" drop down menu which will filter out only the exonerations that involved a false confession). *See also % Exonerations by Contributing Factors by Crime*, NAT'L REGISTRY OF EXONERATIONS, UNIV. OF MICH., https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [https://perma.cc/9VHJ-8KP9] (last visited Jan. 10, 2020) (presenting graphs of the NRE exonerations contributing factor generally and by type of crime).

[106] *Miranda*, 384 U.S. at 436.

interrogation may result in false confessions.[107] More recently in *Corley v. U.S.*, the Court went even further, pointedly stating "there is mounting empirical evidence that these pressures can induce a *frighteningly high percentage of people* to confess to crimes they never committed."[108]

Underscoring the emerging recognition of the problems inherent with these common interrogation techniques, in 2017, Wicklander-Zulawski & Associates, a global interrogation training service (and John E. Reid & Associates' primary competitor), announced it would no longer offer interrogation training on the "controversial" Reid Technique.[109] While Wicklander-Zulawski had used the Reid method to train law enforcement and federal government agencies for the past thirty-three years, the company now publicly recognized that Reid's confrontational approach can, and all too often does, produce false confessions.[110] Similarly, several European countries have banned the Reid technique, and other similar spin-off methods of interrogation, because of the unacceptable risk of false confessions and unreliable information.[111]

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[107] *Id.* at 448–57. The Court decided *Miranda* a mere four years after the first Reid manual of interrogation was published. The Reid Technique, as we know it today, would not be fully realized until Reid published the third edition of the manual in 1986, but, in *Miranda*, the Court recognized and warned against "the psychological coercion at the heart of the Reid Technique." Alan Hirsch, *Going to the Source: The "New" Reid Method and False Confessions*, 11 OHIO ST. J. CRIM. L. 803, 804 (2014).

[108] Corley v. United States, 556 U.S. 303, 321 (2009) (emphasis added) (Note that the Court was referring to the pressures of police interrogation generally, and not specifically discussing the Reid Technique of interrogation. That being said, at the time of the *Corley* opinion, the Reid technique was the most widely used police interrogation technique, and it still is to this day). *See, e.g.*, Kassin et al., *supra* note 69, at 7 (citing FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001)) (paper published in 2010, asserting that "the most influential approach is the so-called Reid technique"). *See also In re* Elias V, 188 Cal. Rptr. 3d 202, 211 (Cal. Ct. App. 2015) ("John E. Reid & Associates was the largest national provider of training in interrogation techniques at the time *Miranda* was decided, and still is today.")

[109] Press Release, Wicklander-Zulawski & Assocs., Inc., Wicklander-Zulawski Discontinues Reid Method Instruction After More Than 30 Years (Mar. 6, 2017), http://www.prweb.com/releases/2017/03/prweb14123356.htm [https://perma.cc/ZGE4-4LTK].

[110] *Id. See also* Eli Hager, *The Seismic Change in Police Interrogations*, MARSHALL PROJECT (Mar. 7, 2017, 10:00 PM), https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20170308-708#.LKB6BUwbs [https://perma.cc/AU6H-DL8U] (last visited Dec. 30, 2019) (quoting statements from Wicklander-Zulawski and John E. Reid representatives on the Wicklander-Zulawski discontinuation announcement).

[111] AMINA MEMON ET AL., PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY, AND CREDIBILITY 124–44 (1st ed. 1998).

C. Youth are Significantly More Likely to Confess to Something They Did Not Do Than Adults

Youth are at even greater risk of involuntarily and falsely confessing because these common psychological interrogation tactics, designed for adult criminals, exploit the developmental vulnerabilities of youth.[112] Youths' brains are not yet fully developed in areas relating to judgment, decision-making, and risk evaluation, particularly in assessing between short-term versus long-term risks.[113] Inside the interrogation room, these traits can make youth more likely to succumb to the pressures of interrogation by deciding that a confession is the only way out of a difficult situation—regardless of the truth.[114]

Compared to adults, youth are scientifically "more susceptible to influence, less future oriented, less risk averse, and less able to manage their impulses and behavior," because key parts of their brain are still in an ongoing phase of development and maturation.[115] In fact, the prefrontal cortex, which is located behind the forehead and is sometimes known as the "CEO" of the brain, does not develop fully until one's early to mid-twenties.[116] Crucially, the prefrontal cortex is responsible for executive functioning, which includes planning, the ability to consider future events, organization, judgment and decision-making, problem solving, working memory, and regulation of mood and emotion.[117]

On the other hand, the limbic system, which deals with emotion and is stimulated by excitement, risks, stress, and fear, develops earlier than the prefrontal cortex. In an adult, the prefrontal cortex acts as a "brake" on the limbic system when it is activated by fear, stress, or other exciting emotions. However, in the case of adolescents, this "brake" system is faulty.[118] The

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[112] Redlich, *supra* note 9, at 953.

[113] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1013 (2003). *See* Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 55, 55–59 (2007).

[114] Steinberg, *supra* note 113, at 55–59.

[115] Steinberg & Scott*, supra* note 113, at 1013.

[116] *Id. See* Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal And Striatal Regions*, 2 NATURE NEUROSCIENCE 10, 10 (1999) (stating the frontal lobe does not mature until the early twenties, and far more change occurs during adolescence than any other stage of life)*;* Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS IN COGNITIVE SCI. 69, 69–74 (2005);

[117] Steinberg & Scott, *supra* note 113, at 1013–14. *See* Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77, 77 (2004).

[118] *See* INT'L ASS'N OF CHIEFS OF POLICE, REDUCING RISKS: AN EXECUTIVE'S GUIDE TO EFFECTIVE JUVENILE INTERVIEW AND INTERROGATION (2012), https://www.nationalpublicsafetypartnership.org/clearinghouse/Content/ResourceDocuments/IACP%20Reduci

combination of an immature prefrontal cortex and a more advanced limbic system means that reward-seeking impulses and social pressure more easily override rational thinking, resulting in classic teenage traits, such as impulsivity, vulnerability to pressure and suggestibility, as well as a tendency to be motivated by short-term rewards.[119]

The notorious case of sixteen-year-old Wisconsin resident Brendan Dassey, whose hotly disputed confession to murder was profiled in the Netflix series *Making a Murderer*, is a notable example of youthful vulnerabilities at work in the interrogation room. In the eyes of a federal district court, interrogation tactics—including police assurances that everything would be "okay" and that Dassey would not have any "problems" if he simply confessed—caused Brendan to expect that "he would *not* be punished" and "that he would be allowed to return to school that day," even after confessing to murder.[120] Another example is Davontae Sanford, who was exonerated by the true confession of a professional hitman after falsely confessing to quadruple homicide when he was only fourteen years old. Davontae confessed after two days of interrogation without a lawyer, or even a parent, because he was befriended by police who bought him a cheeseburger and fries and let him play on their computers, and he believed he that he would home right away if he signed the statement that they wrote for him.[121] Michael Crowe was also only fourteen when he falsely confessed to murdering his younger sister. The videorecording of his confession shows him explaining that he does not remember killing his sister but he must have done it because the police are certain he did and claim to have evidence proving as much. Even at the end of his confession, he directly told police" I'm only saying this because it's what you want to hear."[122]

Even John E. Reid & Associates and other law enforcement organizations now recognize that kids need special protections in the interrogation room. On the Reid & Associates website, one of several "investigator tips" provides: "[i]t is well accepted that juvenile suspects are more susceptible to falsely confess than adult suspects," warning that "[e]very interrogator must exercise extreme caution and care when interviewing or interrogating a

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ngRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf [https://perma.cc/S5LY-LJ5P].

[119] *See* Steinberg, *supra* note 113, at 1013–14.

[120] Dassey v. Dittmann, 201 F. Supp. 3d 963, 1002–03 (E.D. Wis. 2016) (noting "significant doubts as to the reliability" of Dassey's confession.), *rev'd en banc* 877 F.3d 297 (7th Cir. 2017).

[121] *See supra* note 5.

[122] *Crowe v. Michael Crowe*, (9th Cir. 2010). *See also* Rachael Bell, *Coerced False Confessions During Police Interrogations: Michael Crowe's Forced Confession*, TruTV (describing the coercive REID interrogation and evidence that the confession was false and coerced)

juvenile."[123] The International Association of Chiefs of Police also now warns that interrogators should question children using "different and more appropriate interrogation tactics that reflect the differences between adults and teenagers."[124] Nonetheless, police continue to interrogate youth the same way every day across the country.[125]

D. Reid Fails to Adapt Interrogation Training for School Officials to Account for the Inherent and Well-Established Vulnerabilities of Youth

While many people have expressed misgivings about the interrogation technique, it does not seem to impact the expansion of Reid. Reid is actually doubling down by expanding the distribution of his technique and its use on the most vulnerable subjects—youth in school settings.[126] Given what we now know about youths' heightened vulnerability to interrogation, and the predictable risk of a false and/or involuntary confession, one would expect that the Reid company would adapt their trainings to school officials to account for the critical differences between adult and youth interrogees. One would also expect differences in how professional law enforcement are trained to elicit information in a criminal case, versus how school personnel are trained to handle a student in a school matter.

Yet, it appears that school personnel are trained to conduct the nine-step interrogation process in essentially the same way as police detectives.[127] Indeed, 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.[128] Reid fails to cite any research indicating that their technique is appropriate for use on youth in a school setting.[129]

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[123] *Making a Murderer: The Reid Technique and Juvenile Interrogations,* JOHN E. REID & ASSOCS., INC. (Jan.–Feb. 2016), https://www.reid.com/educational_info/r_tips.html?serial=20160101-1&print=[print]%20(last%20visited%20Nov.%2026,%202019);%20Research%20Reveals%20Insight%20on%20Juvenile%20Interrogations%20and%20Confessions,%20JOHN%20E.%20REID%20&%20ASSOCS.,%20(Mar.%E2%80%93Apr.%202014),%20http://www.reid.com/educational_info/r_tips.html?serial=20140301 [https://perma.cc/9WBD-M5YV].

[124] INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 118, at 7.

[125] *See* Meyer & Reppucci, *supra* note 8, at 757 (reporting results of a 2014 survey of law enforcement showing that almost all officers used the same techniques on minors as on adults).

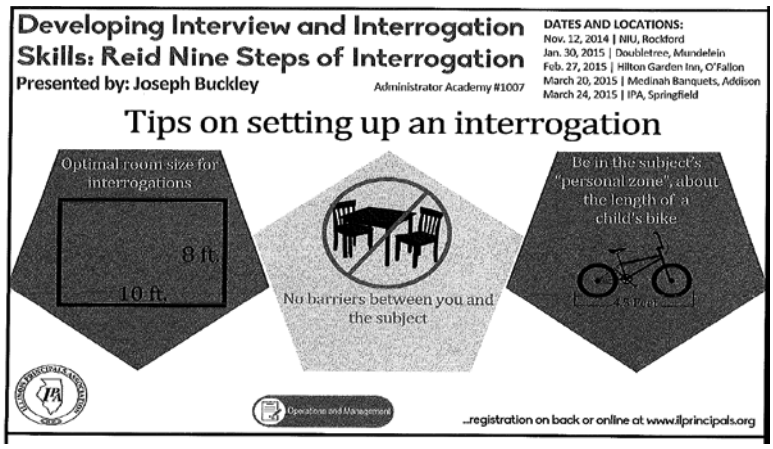
[126] *See, e.g.*, Starr, *supra* note 10 (describing Reid trainings for school officials and interviewing several individuals who have attended these trainings).

[127] *See, e.g.*, Open Letter to IPA, *supra* note 41. *See* Starr, *supra* note 11. *See also* JOHN E. REID & ASSOCS., INC., *supra* note 27 (describing webinar use of language from standard Reid training for law enforcement and not referring to any special care for students being interrogated).

[128] *See* Open Letter to IPA, *supra* note 41, at 2.

[129] *Id.*

An advertising flyer for a Reid training for school administrators in Illinois promises training on the nine steps of interrogation and includes a graphic illustrating how to set up an ideal "optimal" interrogation room in a school.[130] The flyer specifies that the room must be small, such as ten feet by eight feet, that there should no barriers between interrogator and the subject, and that the interrogator must be in the subject's "personal zone," standing no further away than "about the length of a child's bike."[131] The goal of this physical set up is to make the kid feel isolated, helpless, and that he has no choice but to confess.[132]



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Based on training materials and an online training video available to school personnel for a fee, Reid also does not appear to adapt the behavioral analysis phase of interrogation to account for categorical verbal and behavioral differences between youth and adults.[134] For example, "slouch[ing]" is a one of the behavioral indicators that Reid touts as a sign of deception.[135] But does anyone know a teenager who does not slouch? Here are just a few

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130 Illinois Principals Association Flyer for Reid Training for School Administrators in 2015.

131 *Id.*

132 INBAU ET AL., *supra* note 69, at 191.

133 *Id. See also* Open Letter to IPA, *supra* note 41 (calling for IPA to end Reid training of school officials); Starr, *supra* note 10 (describing author's experience at Reid & Associates interrogation training).

134 THE REID TECHNIQUE OF INTERVIEWING AND INTERROGATION FOR SCHOOL ADMINISTRATORS, *supra* note 10 (describing general outline of Reid seminar for school administrators without accounting for child subjects).

135 *See* Starr, *supra* note 10 ("Buckley described to trainees how patterns of body language—including slumping, failing to look directly at the interviewer, offering 'evasive' responses, and showing generally 'guarded' behaviors—could supposedly reveal whether a suspect was lying.").

other examples that most teachers and parents have almost certainly seen in their own children and students that, according to Reid, indicate a guilty kid: biting or chewing his or her nails, defensiveness, complaining, and acting guarded or defensive.[136]

At the Illinois training sponsored by the Illinois Principals' Association discussed in Part II, *supra*, precious few modifications to the technique, and no words of warning, were offered despite the subjects' youthfulness.[137] The instructor was the president of Reid, who regularly trains uniformed police officers and FBI agents.[138] No role during the interrogation was envisioned, much less recommended, for a parent.[139] The only time youth was acknowledged during the training was when the trainer advised school officials what to do when a child cries.[140] The trainer instructed that school administrators should "handle tears" by not relenting: "Don't stop . . . . Tears are the beginning of a confession."[141]

V. Special Care Required for Juvenile Confessions

As set forth above, it is dangerous to interrogate youth using police tactics because there is a significant risk of an involuntary and/or false confession.[142] For precisely this reason, courts require that confessions from minor children be analyzed with special care.[143] While many courts have historically failed to give this "special care" any teeth, routinely blessing and admitting juvenile confessions elicited using police interrogation tactics, some courts are finally starting to rigorously apply special care.

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[136] Trainum, *supra* note 69, at 24, 84–85.

[137] *See* Starr, *supra* note 10 ("None of the videos portrayed young people being questioned for typical school misbehavior").

[138] *Id.*

[139] *Id.* (no mention of contacting or involving a parent in schoolhouse interrogation).

[140] *Id.*

[141] *Id.*

[142] *See*, *supra* Part IV.

[143] *See In re* Gault, 387 U.S. 1, 55 (1967); *see also* Fare v. Michael C., 442 U.S. 707, 725 (1979) (holding that courts must look at the "juvenile's age, experience, education, background, and intelligence" when evaluating confessions following police interrogation); Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (to ignore youth of a defendant interrogated by police would be "in callous disregard of this boy's constitutional rights" because "[h]e cannot be compared with an adult in full possession of his senses and knowledgeable about the consequences of his admissions."); Haley v. Ohio, 332 U.S. 596, 599–600 (1948) (where a 15-year-old is interrogated by police, the court must use "special care in scrutinizing the record . . . . Age 15 is a tender and difficult age . . . . He cannot be judged by the more exacting standards of maturity").

[143] *Gallegos*, 370 U.S. at 54.

A. Law of Confessions

Before discussing the special care that courts must give to juvenile confessions, a brief summary of the law governing the admission of confessions is helpful. The admission of a criminal defendant's statements is controlled by the Fifth Amendment *Miranda* test and the Fourteenth Amendment voluntariness test.[144] Both tests entail an examination of "the totality of the circumstances" of the circumstances of an interrogation.[145]

1. Fifth Amendment Protection Against Self-Incrimination—Miranda Rights

Under *Miranda v. Arizona*, incriminating statements made during custodial interrogation are inadmissible unless the suspect is first advised that he has the right to remain silent, that any statement made may be used against him as evidence, that he has the right to consult with an attorney and have an attorney present during the interrogation, and the right to have an attorney provided at no cost if he cannot afford one.[146] These well-established *Miranda* warnings are intended to protect a suspect from "the compulsion inherent in custodial surroundings,"[147] and they are "prerequisites to the admissibility of any statement made by a defendant."[148] For a statement to rebut a claim of a Fifth Amendment violation, the state must prove (1) that a proper *Miranda* warning was provided to the defendant, and (2) that the defendant "voluntarily, knowingly, and intelligently" waived his Fifth Amendment rights.[149] Commentators have observed that *Miranda* is increasingly toothless, because post-Miranda "police practices have gutted *Miranda*'s safeguards," but it remains the primary protection criminal defendants have against self-incrimination.[150]

Miranda only applies to custodial interrogations.[151] Custody is determined by an objective test: given the circumstances of the interrogation,

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[144] *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966); Jackson v. Denno, 378 U.S. 368, 385–86 (1964).

[145] *See S*chneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); *Miranda*, 384 U.S. at 444.

[146] *Miranda*, 384 U.S. at 444.

[147] *Id.* at 458.

[148] *Id.* at 458, 476.

[149] *Id.* at 444.

[150] Charles D. Weisselbert, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1521, 1599 (2008) (concluding that Miranda protections today are "more mythic than real"). *See also* Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It–And What Happened to I*t, 5 OHIO ST. J. CRIM. L. 163; Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions,* 32 HARV. C.R.-C.L. L.REV. 105. (1997).

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

would a reasonable person have felt free to terminate the interrogation and leave?[152] Significantly, and particularly relevant to this article, the Supreme Court resolved a state court split in the past decade and established that a suspect's age matters to the custody analysis.[153] If the suspect is a youth, then the analysis must be from the perspective of a reasonable child.[154] The Court held that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it is clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis."[155]

Miranda explicitly refers only to custodial interrogations conducted by law enforcement.[156] In other, words, an interrogation by a public official other than a police officer generally will not trigger *Miranda*.[157] As observed by criminal law scholars in a preeminent criminal procedure treatise, however, a couple of Supreme Court cases "seem[] to have rejected the notion that *Miranda* applies only to criminal law enforcers."[158]

For example, in *Mathis v. United States*, the Court held that an IRS agent was required to provide *Miranda* rights where he was a civil investigator and referred a case for criminal investigation "whenever and as soon as he finds 'definite indications of fraud or criminal potential.'"[159] While the question whether *Miranda* applies to public officials other than law enforcement officers is often "clouded by uncertainty as to whether the defendant was even in a 'custodial' situation,"[160] that was not an in issue in *Mathis* because the man being interrogated was already in jail serving a sentence on an unrelated crime.The Court held that *Miranda* applied because "there was always the possibility during his investigation that his work would end up in a criminal

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

[153] *Id.* at 281.

[154] *Id.* at 269. *See also* Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in* J.D.B. v. North Carolina *for Purposes of the* Miranda *Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 503, 517–18 (2012).

[155] *J.D.B.*, 564 U.S. at 272.

[156] *Miranda*, 384 U.S. at 441–42 ("We granted certiorari . . . to give concrete constitutional guidelines for law enforcement agencies and courts to follow.").

[157] *See In re* L.G., 82 N.E.3d 52, 57 (Ohio Ct. App. 2017) (quoting State v. Bolan, 271 N.E.2d 839, 842 (Ohio 1971) ("It is well established that 'the duty of giving *Miranda* warnings is limited to employees of governmental agencies whose function is to enforce law.'" (internal quotations omitted). State supreme court case compiling cases from other states holding that detention and questioning by non-law enforcement does not require *Miranda* warnings).

[158] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 486 § 6.10(c) (4th ed. 2018).

[159] Mathis v. United States, 391 U.S. 1, 6 n.2 (1968) (White, J., dissenting).

[160] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 486 § 6.10(c) (4th ed. 2018).

prosecution."[161] The Court similarly declined to limit *Miranda* to interrogation by police officers in *Estelle v. Smith*.[162] In *Estelle*, the Court applied *Miranda* to a court-ordered psychiatric examination, holding "[t]hat respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney is immaterial" where the psychiatrist ultimately testified for the prosecution.[163] The Court concluded, when he testified for the prosecution regarding the defendant's future dangerousness, "his role changed and became essentially like that of an agent of the State recounting unwarned statements."[164]

2. Fourteenth Amendment Protections—Voluntariness

The due process clause of the Fourteenth Amendment to the United States Constitution bars the use of an involuntary confession against a criminal defendant.[165] A confession is involuntary if it is not "the product of a rational intellect and a free will."[166] Courts employ a totality of the circumstances test to determine whether a statement is involuntary, requiring a weighing of factors relating both to the police conduct and to the traits of the individual suspect.[167] With regard to police conduct, courts consider factors such as the location and length of the interrogation, the number of officers present, whether the suspect was informed of his constitutional rights, whether the suspect was provided food, water, or the opportunity to sleep, whether any force was used, and whether any threats or promises were made by police.[168] With regard to the individual suspect, courts consider factors including the suspect's age, IQ, any mental illness, education history, and prior experience with law enforcement.[169] Voluntariness requires an

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[161] *Mathis*, 391 U.S. at 4.

[162] Estelle v. Smith, 451 U.S. 454 (1981). *See also* WAYNE R. LAFAVE ET AL, CRIMINAL PROCEDURE 486 § 6.10(c) (4th ed. 2018).

[163] *Estelle*, 451 U.S. at 467.

[164] *Id.*

[165] Jackson v. Denno, 378 U.S. 368, 385–86 (1964).

[166] Mincey v. Arizona, 437 U.S. 385, 398 (1978) (quoting Townsend v. Sain, 372 U.S. 293, 307 (1963).

[167] Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); Haynes v. Washington, 373 U.S. 503 (1963).

[168] *Schneckloth*, 412 U.S. at 226.

[169] *Id. See also* Colorado v. Connelly, 479 U.S. 157, 164–65 (1986) (affirming that "mental condition is surely relevant to an individual's susceptibility to police coercion" and thus an important factor in the voluntariness analysis, but holding that a finding of coercive police conduct is required for a determination of involuntariness); Fare v. Michael C., 442 U.S. 707, 725–27 (1979) (the totality-of-the-circumstances approach "includes evaluation of the juvenile's age, experience, education, background, and intelligence" and considering defendant's

individualized inquiry, asking "whether the techniques for extracting the statements as applied to *this* suspect," were unduly coercive.[170] While the voluntariness doctrine protects against the use of coerced confessions against defendants, it is important to recognize that it is an amorphous and subjective test, that leaves much room for outcome-determinative analysis. It is a rare case where a confession is found involuntary.

B. Courts Required to Analyze Juvenile Confessions with Special Care

While courts are required to consider the age of the suspect, they vary wildly on what such consideration means. *J.D.B.* is the keystone Supreme Court case recognizing that youth are uniquely vulnerable in the interrogation room. In *J.D.B.*, the Court emphasized that children are uniquely susceptible to coercion during interrogations, noting that "[e]ven for an adult, the physical and psychological isolation of custodial interrogation can 'undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely.'"[171] Children are more at risk of coercive pressure, the Court explained, as they "generally are less mature and responsible than adults," "lack the experience, perspective, and judgment" to avoid harmful choices, and "are more vulnerable or susceptible to . . . outside pressures."[172]

J.D.B reinforces decades of precedent requiring the greatest care when children are subject to interrogation.[173] More than fifty years ago, in *Gallegos v. Colorado*, the Court held unconstitutional the confession of a fourteen-year-old boy, noting that a teenager "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."[174] The *Gallegos* Court adopted the reasoning of *Haley v. Ohio*, in which a plurality of the Court held that age was the crucial factor in determining the voluntariness of a confession.[175] "That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens,"

"considerable experience with police," "record of several arrests," and that "he was not worn down by improper interrogation tactics or lengthy questioning or trickery or deceit" in concluding confession was voluntary); Clewis v. Tex, 386 U.S. 707, 711 (1967) (finding a confession involuntary for reasons including, but limited to, "substantial concern as to the extent to which petitioner's faculties were impaired by inadequate sleep and food, sickness, and long subjection to police custody with little or no contact with anyone other than police," "only a fifth-grade education," and he had "apparently never been in trouble with the law before").

[170] Miller v. Fenton, 474 U.S. 104, 116 (1985).

[171] J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011) (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).

[172] *Id.* at 272 (citation omitted).

[173] *See In re* Gault, 387 U.S. 1, 55 (1967). *See also Fare*, 442 U.S. at 725; Gallegos v. Colorado, 370 U.S. 49, 54 (1962); Haley v. Ohio, 332 U.S. 596, 599–600 (1948).

[174] *Gallegos*, 370 U.S. at 54.

[175] *Id.* at 53; *Haley*, 332 U.S. at 599–601.

the Court explained in *Haley*, concluding that protracted questioning of a juvenile without the aid of counsel undermined "that due process of law which the Fourteenth Amendment commands."[176] Again, in *In re Gault*—the seminal Supreme Court case on juvenile due process protections—the Court emphasized that "the greatest care must be taken to assure" that any admission by a child was truly voluntary.[177]

A California appellate court provides a model example of heightened judicial scrutiny of a juvenile confession.[178] (Notably, for purposes of this article, this juvenile interrogation took place at school and with the school principal present).[179] *In re Elias V.* involved a thirteen-year-old boy confessing to inappropriately touching his friend's three-year-old sister.[180] After being pulled out of class, Elias was placed in a small room at school and interrogated by a detective for twenty to thirty minutes.[181] Increasing the pressure on the thirteen-year-old boy, his school principal and a second detective were also present, with a third officer standing outside the closed door.[182] The detective began the interrogation by accusing Elias of sexually touching his three-year-old neighbor.[183] She refused to entertain Elias's denials and attempts to explain what happened.[184] She repeatedly accused him in explicit language until he conceded. Over the course of the interrogation, the detective fed Elias every detail of the alleged criminal activity.[185] Elias repeatedly and adamantly denied the detective's assertions that he touched the three-year-old girl, and not a single inculpatory fact came from Elias; instead, they all originated with the detective.[186] Nonetheless, Elias's defense counsel lost a motion to suppress his confession.[187] The court found Elias's confession voluntary because the interrogation was only twenty minutes, and it was "not intimidating" because the detective was female, she spoke in a calm tone,

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[176] *Haley,* 332 U.S. at 599.

[177] *In re Gault*, 387 U.S. at 55.

[178] *In re* Elias V., 188 Cal. Rptr. 3d 202, 203 (Cal. Ct. App. 2015).

[179] *Id.* at 212.

[180] *Id.* at 207.

[181] *Id.*

[182] *Id.* at 212.

[183] *Id.* at 213 ("Conforming to most of [the] directives [of Reid], Detective Buchignani posited Elias's guilt quickly and dispositively. Brushing off his repeated denials of her accusations, Buchignani told Elias he was 'obviously nervous because you're not telling me the truth about what happened.'")

[184] *In re* Elias V., 188 Cal. Rptr. 3d at 213.

[185] *Id.* at 213–17.

[186] *Id.* at 207, 216, 223.

[187] *Id.* at 204.

and asked "gentle" questions.[188]

A California appellate court saw things differently, however, and overturned the lower court's decision, reversing Elias's adjudication in full.[189] In reversing the lower court, the court explicitly called out the interrogating detective for using classic Reid technique tactics, all of which "were condemned by the Supreme Court in *Miranda*."[190] The court held that a proper assessment of Elias's confession required putting oneself in the shoes of the thirteen-year-old and asking how he would perceive the conduct and behavior of the police interrogators.[191] In this way, the age of the suspect colored and informed the judicial analysis of all of the factors considered, even those that initially appear to relate only to the police conduct.[192] As the United States Supreme Court held back in 1948, "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."[193]

This judge understood that a court must view interrogation tactics that may be "normal" for an adult suspect *through the eyes of a child*. In other words, coercion is in the eye of the beholder. For example, the court concluded that "the aggressive, deceptive, and unduly suggestive tactics [the detective] employed would have been particularly intimidating" given that "Elias was a young adolescent" who was not "particularly sophisticated" and "had no prior confrontations with police."[194] The court further concluded that "the use of deceptive techniques [was] significantly more indicative of involuntariness where, as here, the subject is a 13-year-old adolescent."[195] The court understood that a child-sensitive opinion cannot turn upon black and white, tick the box-style analysis of the interrogator's tone of voice or the availability of food or drink; rather, a child-sensitive analysis should consider, line by line, what was said by interrogators and how a child might understand and experience those words. Essentially the court recognized that conduct not coercive for an adult may be coercive to a child. Also, of particular relevance to this article, the court held that school was an inherently coercive location for an interrogation: "the mere fact of police questioning of a minor in the

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[188] *Id.* at 307–08.

[189] *Id.* at 227.

[190] *In re* Elias V., 188 Cal. Rptr. 3d at 209 (citing Miranda v. Arizona, 384 U.S. 436 (1966)).

[191] *Id.* at 220.

[192] *Id.* (declaring that "[t]here is every reason to believe the aggressive, deceptive, and unduly suggestive tactics [the detective] employed would have been particularly intimidating in these circumstances."). The court goes on to say "the use of deceptive techniques is significantly more indicative of involuntariness where, as here, the subject is a 13-year-old adolescent." *Id.* at 222.

[193] Haley v. Ohio, 332 U.S. 596, 599 (1948).

[194] *In re* Elias V., 188 Cal. Rptr. 3d at 220.

[195] *Id.* at 222.

schoolhouse setting may have a coercive effect, because the child's 'presence at school is compulsory and [his] disobedience at school is cause for disciplinary action.'"[196]

VI. LEGAL ANALYSIS OF SCHOOLHOUSE INTERROGATIONS BY SCHOOL OFFICIALS

The problem for students is that this "special care" does not automatically come into the schoolhouse with them. Instead, when it comes to students' confessions elicited at school by school officials, courts are giving little to no care. Courts analyzing confessions elicited by school officials rarely, if ever, mention *J.D.B.*, or any of Supreme Court jurisprudence recognizing the inherent vulnerability of youth to the pressures of interrogation. Instead, courts conduct a simplistic analysis of whether the school official was acting as an "agent" of law enforcement when he questioned the student. If not, the Constitution does not apply and courts do no further analysis; there is no custody analysis, voluntariness analysis, or any engagement with *J.D.B.*, or its predecessors.

Courts conduct this watered-down analysis because constitutional protections for students in the schoolhouse have historically been softened based on the notion, antiquated though it may be, that school officials are acting *in loco parentis*, with the authority of the parent and not the State.[197] Courts, for the most part, still buy into this rationale and, as a result, do not require school officials to follow the law when interrogating a student. Courts regularly hold that the Constitution does not apply when a school official interrogates a student based on one or more of related rationales: the official was interrogating for an "educational purpose," the official's goal was to protect the safety of the students and school staff, the official was focused on discipline, not criminal punishment, or it was not within the official's "scope of employment" to consider criminal consequences.[198]

The problem is that regardless of the school official's purported purpose, the result is the same. In every case discussed in this article, a student was criminally prosecuted and convicted (or adjudicated delinquent), often with serious criminal consequences. Whatever the original purpose or intent of the interrogating school official, that becomes less relevant than the criminal outcome. Moreover, it is overly simplistic to think that a school official has a singular purpose or motivation, and unnecessary for one purpose to

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[196] *In re* Elias V., 188 Cal. Rptr. 3d at 213 (quoting J.D.B. v. North Carolina, 564 U.S. 261, 276 (2011)).

[197] New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) ("Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State.").

[198] *See supra* Part IV.

negate another. The reality is that in the modern schoolhouse, a school official is well aware that criminal consequences are possible when a student misbehaves at school.[199] The average student knows this as well.[200] Most school officials are working hand-in-hand with law enforcement, either employed by the school district or the local police force.[201]

A. Chipping Away at Students' Constitutional Rights in the Schoolhouse

Before examining the state of the law on schoolhouse interrogations by school officials, an overview of the United States Supreme Court jurisprudence on students' constitutional rights at school is warranted. Students should not "shed their constitutional rights . . . at the schoolhouse gate," proclaimed the United States Supreme Court in 1969.[202] This sounds like good news; students should be protected by the Constitution at school just as they are off campus. But while well-intentioned and doctrinally sound, the Court's evolving jurisprudence since then has entailed a series of carve-outs and made the enforcement of constitutional rights at school more the exception than the rule, particularly in the criminal justice context. While the United States Supreme Court has never directly addressed the application of *Miranda* or voluntariness rules to schoolhouse interrogations by school officials, lower courts analyzing these questions extrapolate from United States Supreme Court jurisprudence regarding the applicability of other constitutional rights in the schoolhouse and do not apply Miranda or voluntariness. Those United States Supreme Court cases will be briefly discussed herein.

The Constitution only applies to the actions of state actors. In the criminal justice context, the Constitution generally applies only to the actions of law enforcement and prosecutors. Nonetheless, the United States Supreme Court has held that public school officials should be treated as state actors for purposes of *some* constitutional protections. In 1969, the Court held that the First Amendment protected students' right to freedom of expression in schools.[203] In applying the First Amendment to the students' conduct, the Court necessarily held that the public school officials constituted state actors.[204] And, in 1975, the Court held that school officials were subject to the protections of the Due Process Clause of the Fourteenth Amendment when

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[199] *See supra* Part III.

[200] *See supra* Part III.

[201] *See supra* Part III.

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

[203] *Id.* at 511 ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.").

[204] *Id.* at 509 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion . . . .").

imposing school suspensions and expulsions.[205] By 1985, the Court found it "indisputable" that "the Fourteenth Amendment protects the rights of students against encroachment by public school officials."[206]

The Court held in *Ingraham v. Wright*, however, that a distinction must be made between constitutional protections intended for criminal defendants and those that apply to the school setting.[207] *Ingraham* involved a school's use of corporal punishment as discipline. The Court held that the Eighth Amendment protection against cruel and unusual punishment does not apply to school setting because it was "intend[ed] to limit the power of those entrusted with the criminal-law function of government" and "designed to protect those convicted of crimes."[208]

Most recently, in *New Jersey v. T.L.O.*, in 1985, the Court again limited the reach of the Constitution on students' right to be free from unreasonable search and seizure by school officials.[209] While the Court maintained that the Fourth Amendment applies to the public school and its officials, the Court loosened the standard in recognition of the purported "special nature of [school officials]' authority over schoolchildren."[210] The Court stated, "[t]eachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment."[211]

But, the Court also recognized that modern day "public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies."[212] The *T.L.O.* Court held that "[i]n carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment."[213] The Court ultimately adopted a balancing test that gave school officials greater latitude under Fourth Amendment in

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[205] Goss v. Lopez*,* 419 U.S. 565, 572–73 (1975).

[206] New Jersey v. T.L.O., 469 U.S. 325, 334 (1985).

[207] *See* Ingraham v. Wright, 430 U.S. 651, 664 (1977).

[208] *Id.*

[209] *T.L.O.*, 469 U.S. at 341–43.

[210] *Id.* at 336.

[211] *Id.*

[212] *Id.*

[213] *Id.* at 336–37.

furtherance of their educational responsibilities to search student and their property.[214]

With regard to whether *Miranda* applies in the schoolhouse, scholar Paul Holland concluded back in 2006 that most 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."[215] One of the earliest examples is *Commonwealth v. Snyder*, involving a high school student suspected of possessing marijuana at school.[216] After the student was prosecuted for marijuana found in his locker in school and on the basis of his subsequent confession to his principal, he appealed and challenged the search of his locker on Fourth Amendment grounds, and challenged the admission to his principal on Fifth Amendment grounds.[217] The court upheld the admission of both the marijuana evidence and the confession, holding that "[t]he Miranda rule does not apply to a . . . school administrator who is 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."[218] Just as the *T.L.O.* Court carved out an exception to the Fourth Amendment for "searches carried out by school authorities acting alone and on their own authority,"[219] for the Fifth Amendment context, the Snyder court carved out an exception to Miranda rights when it held that school authorities not acting under the agency of police, need not provide Miranda warnings to students prior to questioning them.[220] Since then, most courts have completely exempted school officials from *Miranda*, as well as the Fourteenth Amendment due process analysis of whether a confession is voluntary.[221] Many courts explicitly rely on *Snyder*, or on a case citing *Snyder*, for the rule that school officials acting alone and/or on their own authority while interrogating a student are not required to abide by the Fifth Amendment *Miranda* rule.[222] Courts ask whether the school official was acting as an "agent" of law enforcement when interrogating a student.[223]

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[214] *Id.* at 340.

[215] Holland, *supra* note 18, at 41 (emphasis added).

[216] Commonwealth v. Snyder, 597 N.E.2d 1363 (Mass. 1992).

[217] *See id.* at 1364.

[218] *Id.* at 1369.

[219] *T.L.O.*, 469 U.S. at 341 n.7.

[220] *Id.*; *Snyder*, 597 N.E.2d at 1368–69.

[221] *See infra* Part VII.B.

[222] *See infra* Part VII.B.

[223] *See, e.g.*, D.Z. v. State, 100 N.E.3d 246, 248 (Ind. 2018) ("[W]hen police officers aren't present, a clear rule applies: students are neither in custody nor under interrogation, unless school officials are acting as agents of the police."); *In re* W.R., 675 S.E.2d 342, 34 (N.C.

B. Students Must Fend for Themselves When Interrogated by School Officials

Two case studies nicely frame the problem that confronts our students in today's schoolhouses.

Case 1:[224]

Middle school students discover a bomb threat scribbled on the side of a bathroom stall: "I will Got A bomb in the school Monday May 8th, 2016 not A Joke". A school resource officer named Tutsie, who works full-time at the middle school, learns of the graffiti threat. He investigates and identifies two students, including one named B.A., as the prime suspects. On May 8, the School Resource Officer Tutsie, along with other school resource officers, and school officials search the school before the students arrive; they do not find a bomb and declare the school safe. When the bus pulls up to school, school resource officer Tutsie and Vice-Principal Remaly take B.A. from the bus to the vice-principal's office for questioning.

Vice-Principal Remaly questions B.A. He sits at his desk across from B.A. School Resource Officer Tutsie stands next to B.A. During the questioning, the two other school resource officers sit behind B.A. All three officers are in uniform. The office door is closed. Vice-Principal Remaly does most of the questioning, but the school resource officers occasionally speak up. B.A. is not asked if he wants to talk to his mom, or a lawyer.

Remaly begins; he asks B.A. if he knows why he is there in his office. B.A. says he had no idea. Officer Tutsie makes B.A. do a handwriting test to see if his penmanship matches the graffiti; Remaly concludes it's a match. Remaly tells B.A.: "I know you wrote the bomb threat in the bathroom. Your handwriting proves it. I know you did it. Why did you do it?" Tutsie jump in to encourage B.A. "[c]ome on, man, just—just tell the truth."

After fifteen minutes, B.A. starts crying, bows his head, and says "I don't know why I did it. I'm sorry." Vice-Principal Remaly calls B.A.'s mother and tells her what has happened. When she arrives to the school, frantic with worry, B.A. apologizes to her and explains that it supposed to be a joke and he knows it was a dumb thing to do. Vice-Principal Remaly suspends B.A.

2009) (holding that when questioned by a school official, "[e]ven if the person occupies some official capacity or position of authority, *Miranda* does not apply to questioning by such persons unless the person is an agent of law enforcement"); State v. Tinkham, 719 A.2d 580, 583–84 (N.H. 1998) (holding that neither the fact that the principal intended to turn over evidence of criminal conduct to police nor the fact that she first told police she was going to question defendant made the principal an agent of the police).

[224] B.A. v. State, 100 N.E.3d 225 (Ind. 2018) (holding that a student was in custodial interrogation, and Miranda rights were thus required, when, among other things, an officer escorted him from bus to principal office, three officers were present during questioning, an officer asked for a hand writing sample, and an officer asked him to tell the truth).

Remaly then hands B.A. over to Officer Tutsie. Tutsie arrests B.A. and takes him to the juvenile detention center. B.A. is charged with false reporting and criminal mischief.

Case 2:[225]

High school students discover graffiti on a bathroom stall depicting sex acts and naming female students at the school. Vice-Principal Dowler asks one of the resource officers, Officer Flynn, to investigate who is responsible. Officer Flynn reviews surveillance footage from the school and identifies a 17-year-old student named D.Z. as the culprit.

Vice-Principal Dowler calls D.Z. to his office, closes the door, and questions him about the graffiti. School Resource Officer Flynn waits outside the door during the questioning. D.Z. is not asked if he wants to talk to his parents or a lawyer, and his parents are not notified that he is being questioned. D.Z. is not advised that he has a right not to answer questions. Dowler begins by informing D.Z. that he had been "tracking some restroom graffiti, and he explains his investigation to him. Dowler made clear that he "knew that D.Z. was the one that was responsible." D.Z. admits he did it but says he does not know why he did it. He apologizes and says he knows it was wrong. Dowler suspends D.Z. for five days. He then calls D.Z.'s father and tells him what happened.

Officer Flynn then enters the office in uniform, and questions D.Z. as well. Officer Flynn also does not advise D.Z. of his constitutional rights, contact D.Z.'s father, or record his interview of D.Z. D.Z. repeats his confession to Flynn. Dowler suspends D.Z. for five days. Officer Flynn arrests D.Z. and D.Z. is charged with criminal mischief and harassment.

Both of these school-questioning scenarios are commonplace today. It is not unusual for the principal or vice-principal to work hand-in-hand with law enforcement, often law enforcement that works at the school, to investigate school misconduct and interrogate student suspects. The criminal consequences for B.A. and D.Z. are also not unusual; it is a reality of life today that school conduct can lead to criminal consequences. In fact, these hypotheticals are taken from two real life recent cases out of Indiana.[226] In both cases, the students were charged with criminal conduct. In both cases, the students were tried by a juvenile court. Both students' confessions were admitted in court and used against them. Both students were found delinquent.

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[225] *D.Z.*, 100 N.E.3d at 246 (2018) (holding *Miranda* warnings not required where the school resource officer stood outside the door during interrogation and declaring "clear rule" that an interrogation by a school official is not custodial if law enforcement is not present in the room).

[226] *B.A.*, 100 N.E.3d at 225; *D.Z.*, 100 N.E.3d at 246.

Both students served time in a juvenile detention center. One student's constitutional rights were ultimately recognized and protected, while the other student's constitutional rights were ignored.

In the first case of B.A., the Indiana Supreme Court overturned the student's conviction, holding that B.A.'s constitutional rights were violated when the vice-principal questioned Remaly because, at the time of questioning, B.A. was in a closed room, surrounded by three law enforcement officers and without his mother.[227] The Court concluded that B.A. was in custody and entitled to his *Miranda* rights.[228] For D.Z., the Indiana Supreme Court saw it differently.[229] The court concluded that the questioning was not custodial because the law enforcement officer was not in the room; the Constitution did not apply simply because the officer was on the other side of the door.[230]

Should this make a difference? In both cases, the school official and the school resource officer worked together to investigate school misconduct, identify the suspect, and obtain an admission. Both students were handed over to law enforcement and both cases resulted in adjudication of the juvenile. While the courts held that the physical presence of law enforcement was the determinative factor, this article argues that the physical location of the school resource officer at the time of the admission is a distinction without a difference where school authorities worked hand-in-hand with law enforcement up to the point of questioning.

C. Even School Resource Officers Sometimes Interrogate with Impunity

As an initial matter, it is worth noting that even when school resource officers, who are indisputably law enforcement officers, interrogate students at school, some courts hold that *Miranda* does not apply.[231] These holdings

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[227] *B.A.*, 100 N.E.3d at 233–34.

[228] *Id.*

[229] *D.Z.*, 100 N.E.3d at 246.

[230] *Id.* at 248–49.

[231] *See, e.g.*, *In re* L.A., 21 P.3d 952, 955 (Kan. 2001) (school security officer was not required to provide *Miranda* warning prior to interrogating student because the "function of a school security officer is to protect school district property, and the students, teachers, and other employees . . . . A school security officer is not employed by an entity whose primary responsibility is law enforcement."); State v. Wolfer, 693 P.2d 154, 159 (Wash. Ct. App. 1984) (citing People v. Wright, 57 Cal. Rptr. 781, 782 (Cal. Ct. App. 1967)) (holding that a school officer is charged with responsibility of protecting people and property on the premises of the school district is not required to give Miranda warnings); State v. D.J., 132 Wash. App. 1055 (Wash. Ct. App. 2006) (holding that the detainment of a student by the assistant principal and the questioning by the school assistant principal without the assistance of the school resource officer did not rise to the level associated with a formal arrest requiring Miranda warnings). *But see In re* R.H., 791 A.2d 331, 334 (Pa. 2002) (holding that a school resource should be

are typically justified by the notion that the SRO's purpose is to protect the students, employees, and property of the school, rather than enforce the law.[232] Fortunately, this is increasingly rare[233] because it is understood that "[p]olice officers are not divested of their law enforcement authority when they enter schools; schools employ them precisely because they wield this authority."[234]

D. A Close Call: Courts are Split on Whether Miranda Applies to a School Official's Interrogation of a Student When Law Enforcement is in the Room

If the SRO is not the primary interrogator, and instead he is simply in the room while a school official interrogates a student, courts are split on whether *Miranda* applies. Most courts hold that the presence of an SRO (or another law enforcement officer) does not trigger *Miranda* if he is not conducting the interrogation of a student himself.[235] A couple of state supreme courts have gone the other way though. In the earliest such case identified, a Georgia appellate court held in 2008 that an officer's presence in the room during a school official's interrogation of a student required *Miranda* warnings based on a nuanced assessment of the SRO's level of participation.[236] The Georgia court held ". . . [a]lthough an officer's mere presence in the room, without more, might not constitute police participation, at least some evidence supports the . . . finding that the officer was more involved here" (including evidence that the officer advised the principal about the criminal

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considered a law enforcement officer "within the purview of Miranda," and suppressing a student's un-Mirandized confession to vandalism to SRO).

[232] *See, e.g.*, *In re* L.A., 21 P.3d at 960–61(stating that when a school resource officer is investigating a school policy violation, he is not working pursuant to is law enforcement duties, but rather his duty to protect the school, students, and staff).

[233] *See, e.g.*, *In re* R.H., 791 A.2d at 334 (explaining that when the questioning is by "school police officers" who, while "employees of the school district," are "also judicially appointed and explicitly authorized to exercise the same powers as municipal police on school property," they are "law enforcement officers" within the meaning of *Miranda*.).

[234] Holland, *supra* note 18, at 78.

[235] State v. Moses, 327 P.3d 1052 (Kan. Ct. App. 2014) (holding that an assistant principal's interrogation of a student did not trigger Miranda despite the presence of law enforcement because the officers did not initiate the questioning); *In re* R.B.L., No. COA14-1043, 2015 WL 4429626, at *7 (N.C. Ct. App. 2015) (holding student was not in custody and *Miranda* did not apply where the SRO did not frisk or deploy physical restraint against a juvenile, and the administrators took charge of the questioning focusing on school rules instead of evidence for a prosecution); *In re* K.D.L., 700 S.E.2d 766 (N.C. Ct. App. 2010) (reasoning that presence of a SRO at the request of administrators does not automatically render the questioning of a juvenile a custodial interrogation); *In re* W.R., 675 S.E.2d 342 (N.C. Ct. App. 2009) (holding that participation of school resource officer did not convert a school official's questioning of a student to a custodial interrogation).

[236] *In re* T.A.G., 663 S.E.2d 392, 395 (Ga. Ct. App. 2008) (suppressing thirteen-year-old's confessions to robbery of other students on campus).

charges that could be brought in front of the student and the "armed officer . . . invited into the interview after" the confession).[237]

The Kentucky Supreme Court was a trailblazer on this issue, issuing a robust and progressive opinion in 2013, holding that the mere presence of a SRO acting quietly in tandem with the assistant principal made a schoolhouse interrogation custodial such that it required *Miranda* rights.[238] The New Mexico Supreme Court agreed in 2015, holding that the "mere presence" of a SRO during a school principal's interrogation of seventeen-year-old student suspected of being drunk at school "converted the school disciplinary interrogation into a criminal investigatory detention."[239] Most recently, the Indiana Supreme Court agreed in *B.A.*, the model for Case Study 1, *supra.*[240] That court clarified that same day, however, in *D.Z.*, that the court maintained that a clear rule applies when officers are not present: students are neither in custody nor under interrogation, unless school officials are acting as agents of the police.[241]

E. Courts Only Care About School Officials' Interrogation of Students If They are Acting as an Agent of Law Enforcement

Against this low bar, where even interrogations by school resource officers and school official interrogations in the presence of law enforcement are often held to be immune from *Miranda*, we now examine when, if ever, interrogations by school officials alone, with no law enforcement present, will trigger *Miranda*. Many articles have been written about governing law when law enforcement interrogates students at school, as well as addressing interrogations by school officials in the presence of law enforcement. To the author's knowledge, no article has yet focused more narrowly on the interrogation of students by school officials outside of the presence of law enforcement. This article presumes that this is the next frontier that courts will need to address because Reid is now widely training educators to interrogate like law enforcement and because the current state of the case law empowers law enforcement to utilize school officials as interrogators to circumvent their constitutional obligations. As explained above in Part VI.A., *supra*, when a student is interrogated by a school official without law enforcement present, courts ask whether the school official was acting as an agent of law enforcement when he or she interrogated the student. *Miranda* will only apply

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[237] *Id.*

[238] *See* N.C. v. Commonwealth, 396 S.W.3d 852, 862–64 (Ky. 2013).

[239] *See* State v. Antonio T., 2015-NMSC-019, 352 P.3d 1172, 1179 (N.M. 2015).

[240] B.A. v. State, 100 N.E.3d 225, 233 (Ind. 2018).

[241] D.Z. v. State, 100 N.E.3d 246, 248 (Ind. 2018).

if the school official is found to be an agent of law enforcement.[242] As you may expect, this is an exceedingly rare holding.

In fact, this author has only found a single case where a school official who interrogated a student *with no law enforcement present* was found to be an agent of law enforcement.[243] In *State v. Heirtzler*, two vice-principals interrogated a student suspected of bringing marijuana to school based on information collected by a SRO.[244] The SRO had decided he did not have "enough information to warrant further investigation," but the vice-principal called the student in for questioning and a physical search because he concluded, "it was the school's administrative duty to act upon the information."[245] The *Heirtzler* court affirmed the trial court's suppression of the statements, holding that the vice-principals were acting as agents of law enforcement and, accordingly, they should have given the student *Miranda* warnings.[246]

Notably, however, in *Heirtzler*, the school resource officer essentially conceded that the school officials had an agency relationship with him.[247] He testified during a deposition that a "'silent understanding' existed between him and school officials that passing information to the school when he could not act was a technique used to gather evidence otherwise inaccessible to him due to constitutional restraints."[248] He further testified that he delegated the responsibility of investigating less serious, potential criminal matters—drug cases—to school officials; the vice-principal "confirmed that this was a 'fair' characterization of the arrangement between the school and the department."[249] Most damningly, the SRO admitted that "passing information to the school when he could not act was a technique used to gather evidence otherwise inaccessible to him."[250] The *Heirtzler* court held:

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[242] Miranda v. Arizona, 384 U.S. 436, 441 (1966) (explaining that the Supreme Court "g[a]ve concrete constitutional guidelines for law enforcement agencies and courts to follow").

[243] *See* State v. Heirtzler, 789 A.2d 634, 636 (N.H. 2001) (applying *Miranda* and affirming suppression of a student confession elicited by school officials, even though no law enforcement was present during the questioning, because the court concluded that the police and the school officials had an agency relationship). *See also* People v. Pankhurst, 848 N.E.2d 628, 635 (Ill. Ct. App. 2006) (observing that *Heirtzler* is the only case found by the court where a school official was found to be an agent of law enforcement when interrogating a student).

[244] *Heirtzler*, 789 A.2d at 636.

[245] *Id.*

[246] *Id.* at 641.

[247] *Id.* at 638.

[248] *Id.* at 347.

[249] *Id.* at 640.

[250] *Heirtzler*, 789 A.2d at 637.

> Because they are not law enforcement officers, when school officials search for contraband in order to foster a safe and healthy educational environment, they are afforded greater flexibility than if a law enforcement officer performed the same search. If school officials agree to take on the mantle of criminal investigation and enforcement, however, they assume an understanding of constitutional criminal law equal to that of a law enforcement officer. In such circumstances, even if school officials claim their actions fall within the ambit of their administrative authority, they should be charged with abiding by the constitutional protections required in criminal investigations.[251]

This is a sensible and well-reasoned decision. But it is an outlier. Every other case of a student interrogated by a school official identified by this author came out the other way. Where other courts recognize *Heirtzler*, courts distinguish it on the basis of the SRO's admission of an agreement and intention to evade constitutional protections.[252]

Even where law enforcement is present, the author has only found one additional case where the school official interrogator was found to be an agent of law enforcement. In *T.A.G.*, the Georgia case finding that the police officer's presence during a school official's interrogation triggered *Miranda*, the court also held *Miranda* applicable on the alternative basis that the vice-principal who was interrogating the student was an agent of police.[253] Like *Heirtzler*, the *T.A.G.* court's finding of agency turned upon an admission: the vice-principal admitted that she "often conferred with the officer about possible criminal charges, as well as questions to ask during an interview," and that "she and the officer knew that different 'rules' would apply if the police became involved, so they decided that the officer should not ask questions."[254]

F. Agency Test is Impossible for School Official Interrogators to Satisfy

The justifications that courts employ for finding no agency relationship between law enforcement and school officials who interrogate students boil down to a couple common themes. First, when school officials are acting within the "scope of their employment," courts find they are not acting as

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[251] *Id.* at 640 (emphasis added) (internal citations omitted).

[252] *See, e.g.*, People v. Pankhurst, 848 N.E.2d 628, 635–36 (Ill. Ct. App. 2006) (distinguishing *Heirtzler* because there was no "evidence of an arrangement like that in *Heirtzler*, designed to circumvent constitutional protection" and holding a school official interrogator was not an agent of law enforcement).

[253] *In re* T.A.G., 663 S.E.2d 392, 395 (Ga. Ct. App. 2008).

[254] *Id.*

agents of law enforcement.[255] In simpler terms, it was not the school official's "job" to "'ask[] questions that could result' in criminal prosecution."[256] When school officials are acting *in loco parentis*, which grants them disciplinary powers, they are held to not be agents of law enforcement.[257] School officials are charged with maintaining order and discipline in schools;[258] while these duties might sometimes involve investigation of conduct that is also criminal, "this does not alone make those officials agents of the police."[259] A New Jersey appellate court held that:

> A school official must have leeway to question students regarding activities that constitute either a violation of the law or a violation of school rules. This latitude is necessary to maintain discipline, to determine whether a student should be excluded from the school, and to decide whether further protection is needed for the student being questioned or for others.[260]

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[255] *See, e.g.*, Commonwealth v. Ira I., 791 N.E.2d 894, 900–01 (Mass. 2003) (alteration in original) ("School officials acting within the scope of their employment, rather than 'as [instruments] of the police [or] as [agents] of the police,' are not required to give *Miranda* warnings prior to questioning a student in conjunction with a school investigation."). *See also* State v. Antonio T., 298 P.3d 484, 485–86 (N.M. 2012) (holding that vice principal did not act in some capacity beyond scope of her employment) *rev'd*, 352 P.3d 1172 (N.M. 2015); *In re* R.L.N., No. C1-98-26, 1998 WL 405026, at *1 (Minn. Ct. App. 1998).

[256] People v. Kay, A145381, 2018 WL 636215, at *6 (Cal. App. 2018).

[257] *Pankhurst*, 848 N.E.2d at 633.

[258] *See, e.g.*, In re Jose A., No. 2-18-0170, 2018 WL 5077958 (Ill. App. Ct. 2018)(holding it dispositive that dean's primary duties were administration and discipline within high school, and not protection of public interest and enforcement of the law); State v. C.G., 101 Wash.App. 1053 (Wash. Ct. App. 2000) (holding that the vice principal's responsibility to maintain order and discipline in the schools does not translate into an allegiance with law enforcement sufficient to trigger Miranda).

[259] *Pankhurst*, 848 N.E.2d at 633. *See, e.g.*, In re Jose A., No. 2-18-0170, 2018 WL 5077958 (Ill. App. Ct. 2018) (holding it dispositive that dean's primary duties were administration and discipline within high school, and not protection of public interest and enforcement of the law); In State v. C.G., 101 Wash.App. 1053 (Wash. Ct. App. 2000) (holding that the vice principal's responsibility to maintain order and discipline in the schools does not translate into an allegiance with law enforcement sufficient to trigger Miranda); People v. Butler, 725 N.Y.S.2d 534, 541 (N.Y. Sup. Ct. 2001) (holding that a dean interrogating a student on school grounds on a matter of school discipline—even a matter that would carry criminal sanctions—is still a private individual, with respect to whose questioning Miranda is inapplicable); *In re* Phillips, 497 S.E.2d 292, 295 (N.C. Sup. Ct. 1998) (principal's interrogation of student was for school disciplinary purposes); State v. V.C., 600 So.2d 1280, 1282 (Fla. Dist. Ct. App. 1992) (held that principal was not working as agent for police because his primary function when dealing with disciplinary problems was to act as fact finder for school system).

[260] State v. Biancamano, 666 A.2d 199, 202 (N.J. Super. Ct App. Div. 1995); *In re* V.P., 55 S.W.3d 25, 33 (Tex. Ct. App. 2001). *See also* State v. Tinkham, 719 A.2d 580, 582–83 (N.H. 1998); *In re* J.T.S., 698 S.E.2d 768 (N.C. Ct. App. 2010) (principal's purpose in questioning student was to protect the safety of other students).

Finally, and relatedly, protecting the safety of the student body is always a powerful counterpoint.[261] Other courts have held that school officials are not agents of law enforcement because they are not "trained nor equipped conduct police investigations."[262]

Some courts have strictly held that a finding of an agency relationship "requires proof of some affirmative action by a police officer or other governmental official that preceded the interrogation and can reasonably be seen to have induced the third party to conduct the interrogation."[263] Courts have even held that a school official's premeditated intention to turn a student over to law enforcement is *irrelevant* to an analysis of agency.[264] Cooperation has not been held to be sufficient.[265] Instead, "a critical factor is whether the police officer supervised the interrogation."[266] One court went further, asking whether the police "coerced, dominated, or directed the actions of the school officials."[267]

G. Indiana Supreme Court Cases: A Paradigm of the Problem

The set of Indiana Supreme Court cases used as the case studies featured at the beginning of this section illustrate fatal flaws of the current legal test for schoolhouse interrogations by school officials. Most importantly, they reveal how easy it is for law enforcement to evade their constitutional obligations when working with school officials. A brief examination of the judicial analysis of these two cases is instructive for how advocates should frame their legal arguments in future cases.

In *B.A.*, the case where three SRO's were in the room during the interrogation, the appellate court initially affirmed the student's adjudication, finding it determinative that a school official conducted the questioning "for

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[261] *In re* Corey L., 250 Cal. Rptr. 359 (Cal. Ct. App. 1988) ("Questioning 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.").

[262] *Pankhurst*, 848 N.E.2d at 634.

[263] *Tinkham*, 719 A.2d at 583 (quotation and ellipsis omitted) (citing State v. Gosselin, 552 A.2d 974, 976 (N.H. 1988)).

[264] Commonwealth v. Snyder, 597 N.E.2d 1362, 1369 (Mass. 1992) ("[t]he fact that the school administrators had every intention of turning the marihuana over to the police does not make them agents or instrumentalities of the police in questioning [the defendant]").

[265] *In re* D.E.M., 727 A.2d 570, 573–74 (Pa. Super. Ct. 1999) (holding that the mere fact that school officials cooperated with police does not establish that the police acquiesced in or ratified the search).

[266] *In re* Gruesbeck, No. 97-CA-59, 1998 WL 404516, at *3 (Ohio Ct. App. Mar. 27, 1998).

[267] *In re* D.E.M., 727 A.2d at 574.

an educational purpose."[268] While the Court acknowledged that that a SRO conducted the handwriting test, the court found it determinative that the SRO acted at the request of the school administrator.[269] The appellate court also relied on a United States Supreme Court case, *Stansbury v. California*, holding that "aspects of an investigation which have not been communicated to the individual in question do not impact the inquiry into whether the individual is in custody."[270] The appellate court highlighted that there was no evidence that B.A. had knowledge of the ongoing law enforcement investigation (or the vice-principal's role in it).[271]

The Indiana Supreme Court reversed.[272] The Court disagreed that an "educational purpose" can negate the custodial nature of a detention, and astutely recognized that such an exception would wholly contravene the "special caution" that the United States Supreme Court requires for interrogations of and confessions from juveniles.[273] The Court concluded "there is no 'educational purpose' exception to *Miranda* like the one our Court of Appeals applied" because such an "exception would swallow the *Miranda* rule, leaving less protection for students than other suspects."[274] Thus, because B.A. was not free to leave when he was questioned in the vice-principal's office and surrounded by three law enforcement officers, he was in custody and entitled to receive *Miranda* warnings. The Court described the circumstances as "an unfamiliar, police-overshadowed situation without parental or other support" in which "[n]o one told [him] that he was free to call his mother, leave the room, take a break, or go to class," and held that "the consistent police presence would place considerable coercive pressure on a reasonable student in B.A.'s situation."[275]

In *D.Z.*, the case where the SRO stood outside the door while the vice-principal interrogated a student, the appellate court actually reversed the adjudication and held that the student's confession to the vice-principal should

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[268] B.A. v. State, 73 N.E.3d 720, 730 (Ind. Ct. App. 2017), *vacated*, 100 N.E.3d 225 (Ind. 2018).

[269] *Id.*

[270] *Id.* (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)) (citing Stansbury v. California, 511 U.S. 318, 323–24 (1994)) ("[U]nder Miranda '[a] policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time'; rather, 'the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.'").

[271] *Id.*

[272] *Id.* at 234.

[273] *Id.* at 231.

[274] *B.A.*, 73 N.E.3d at 730.

[275] *Id.* at 234.

have been suppressed.[276] This opinion follows in the footsteps of the *Elias V*. California appellate court, and is a model opinion for how a schoolhouse interrogation should be analyzed.[277] Even though the SRO was not in the room when D.Z. confessed to the assistant principal, the appellate court recognized the danger of blessing a school official's ability to interrogate and elicit a confession from a student and then hand him over to law enforcement to repeat their confession.[278]

The court analogized this to a United States Supreme Court case, *Missouri v. Seibert*, condemning an old police tactic of interrogating without *Miranda* warnings, obtaining a confession, and then asking them to repeat the confession after they provide the suspect their *Miranda* warning.[279] The Court observed "[t]his sequence of events strongly suspects that the assistant principal and the officer were purposefully exploiting the school administrator's assumed ability to question without warnings and raises troubling echoes of the 'confession-first' mode of interrogation found problematic . . . in *Missouri v. Seibert*."[280] And, indeed, how easy to do. If this is permitted, why would not all school officials use this work-around to keep things simple?

The court of appeals refused to engage in the charade entertained by the lower court. "Although on its face appearing to be a school disciplinary proceeding, the 'discussion' between [the assistant principal] and D.Z. amounted in essence to an interrogation, geared toward a criminal proceeding."[281] The court highlighted that: (1) the assistant principal asked law enforcement to investigate the graffiti and that the school and law enforcement investigations "became inextricably intertwined," (2) underscored that the assistant principal knew that criminal charges could ensue, (3) the SRO was "waiting outside" the assistant principal's office during the questioning, and (4) that the SRO was informed "immediately" after D.Z. confessed.[282]

Based on the above significant circumstances, the court found that the assistant principal and the SRO were acting "in concert" and held that this was enough to render the assistant principal's questioning of D.Z. custodial, despite the fact that no law enforcement was in the room.[283] The court

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[276] D.Z. v. State, 96 N.E.3d 595*,* 603 (Ind. Ct. App. 2018), *vacated*, 100 N.E.3d 246 (Ind. 2018).

[277] *In re* Elias V., 188 Cal. Rptr. 3d 202 (Cal. Ct. App. 2015).

[278] *D.Z.,* 96 N.E.3d at 603.

[279] *See D.Z.*, 96 N.E.3d at 603 (discussing why the assistant principal and the officer should have realized that Miranda warnings were needed, stating "[i]f we no longer allow the Seibert interrogation method in the stationhouse, why should we bless it in the schoolhouse?").

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id.*

further held that "[n]o reasonable student" would have felt free to leave the assistant principal's office when the door is closed and the principal is questioning him.[284] In concluding that the "cooperation" between the school official and the SRO determinative to the constitutional question, the court considered the rapidly shifting landscape of America's schools today.[285] The court noted that

> [T]he presence of police in schools has changed more than just the frequency and nature of interactions between students and police and many schools have instituted 'zero tolerance' for school behavior . . . caus[ing] a dramatic shift away from traditional in-school discipline towards greater reliance on juvenile justice interventions. Such policies, which emphasize criminal charges, can serve to change the nature of questioning of a student for purposes of school discipline into a criminal investigation. In light of this changing educational landscape, school administrators have altered their activities to collaborate more actively with police officers.[286]

In light of all of this, the court concluded "[j]ust as a school cannot pretend ignorance of the rules of criminal procedure, neither can police officers ignore, as beyond their responsibility, the ways in which school administrators take advantage of their presence and actions."[287]

Central to this article's premise, the court highlighted as significant the fact that Indiana school administrators had been trained in law enforcement techniques of interviewing and interrogation, under the auspices of the Indiana Department of Education.[288] The court quoted a Department of Education advertisement that read: Reid Nine Steps of Interrogation: review the interrogation process, beginning with how to initiate the confrontation, develop the interrogational theme, stop denials, overcome objections, and use the alternative question to stimulate the admission.[289] The court implied that school administrators receiving Reid training served as a powerful piece of evidence that established that, in today's "changing educational landscape," where "one should not be surprised to see a police officer" "[w]alking the

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[284] *Id.* at 602.

[285] *D.Z.*, 96 N.E.3d at 601 (citations omitted).

[286] *Id.* (citations omitted).

[287] *Id.*

[288] *Id.*

[289] *Id.* at 601 n.2. (citations omitted).

halls" of the school, "school administrators have altered their activities to collaborate more actively with police officers."[290]

Unfortunately, the Indiana Supreme Court reversed the appellate court's model opinion applying a sensible test that reflects the realities of today.[291] Instead, the Indiana Supreme Court ignored the lower appellate court's thoughtful analysis accounting for up-to-date law like *JDB*, on the basis of a formalistic view of agency principles and a blindly simplistic view of the circumstances and the quite evident coordination of school officials and law enforcement.[292] The Indiana Supreme Court found it determinative that the SRO was not in the room, wholly ignoring the "cooperation" and "in concert" action detailed by the appellate court.[293] The court concluded that the SRO was not acting as an agent of the assistant principal:

> Nor does Officer Flynn's interview with D.Z. show an agency relationship simply because it came on the heels of [the vice principal]'s interview. Yes, Officer Flynn knew during his investigation that criminal charges were possible. And he did tell D.Z. at the end of his interview that criminal charges were coming. But that is not enough to show that [the vice principal]'s interview was pretextual priming for Officer Flynn's interrogation . . . Assistant Principal . . . thus was not acting as an agent of the police.[294]

The Court went a step further in dicta, commenting that even if the vice principal had been an agent of Officer Flynn, *Miranda* warnings still would not have been required because the student must be aware of the agency relationship for it to be relevant to the analysis.[295]

While there are of course factual differences in the cases—the students are four years apart in age, the severity of the crime is different, and school safety was more at issue in B.A.—criminal consequences were on the table, and ultimately enforced, in both cases. In fact, both students were charged with the same crime, criminal mischief. Regardless, the degree of charges and severity of possible criminal consequences should not change a youth's entitlement to be protected by his constitutional rights.

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[290] *Id.* at 601.

[291] *See* D.Z. v. State, 100 N.E.3d 246, 246 (Ind. 2018).

[292] *See id.* at 248–49.

[293] *See id.* at 248; D.Z. v. State, 96 N.E.3d 595, 603 (Ind. 2018), *vacated*, 100 N.E.3d 246 (Ind. 2018).

[294] *D.Z.*, 100 N.E.3d at 249.

[295] *See id.*

This divergence of these opinions may, at first blush, seem defensible and legitimate. The reality, however, is that you can elicit a confession from a student, using police interrogation tactics, so long as you make sure that the law enforcement is standing on the other side of the door for the ultimate confession. Presumably, law enforcement could even be listening in as long as the student doesn't know the officer is involved in that moment. School officials and law enforcement seem to be receiving this message loud and clear.

While the *D.Z.* court claimed to be establishing a "clear rule"—that "when school officials alone meet with students, a clear rule governs—*Miranda* warnings are not required."[296] A fair reading of these cases together reveals that this rule is far too easy to get around, and does little to nothing to protect a youth from having a confession involuntarily coerced from him. *D.Z.* illustrates why asking whether law enforcement is present in the room is an inadequate test for determining whether the Constitution applies. Moreover, *D.Z.* exposes why the agency test is also an inadequate backstop, because it is too malleable and subjective of an inquiry. The agency test also does not reflect the reality of today's school or what we now know about how youth perceive interrogation and respond to its inherent psychological pressures.

VII. The Agency Test Wholly Fails to Protect Students Interrogated by School Officials

The agency framework is a poor test for schoolhouse interrogation. The current formulation of the agency test is practically toothless as the result is almost always the same: the school official is not an agent of law enforcement and the student had no constitutional rights to protect him against self-incrimination and coercion. This standard can only be satisfied when school officials and/or police freely admit that they have an arrangement to facilitate evasion of students' legal rights cannot stand.[297]

A. Demand for Reform of Agency Test

Now that schoolhouse interrogations regularly result in criminal or juvenile consequences, it is high time to adopt a legal framework that ensures kids are protected by their constitutional rights. School officials, who now hire and supervise law enforcement that work on campus and regularly turn over students to police, should no longer be permitted to hide behind the fallacy of solely pursuing an educational purpose. If the agency test survives, it must be reformed.

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[296] *Id.* at 247.

[297] *See supra* Part VI.E. (discussing State v. Heirtzler, 147 N.H. 344 (N.H. 2002)).

1. The Current Agency Test Fails for a Number of Reasons

As set forth in detail in Part III, cooperation and coordination between law enforcement and school officials is pervasive and normalized in the modern schoolhouse.[298] Against this backdrop, it hardly makes sense to conduct a formalistic analysis of an outdated agency test that requires a showing of an affirmative act by law enforcement to enlist the services of a school official as an agent. When cooperation with law enforcement is part of the daily operations of a school—for example, when the school employs one or more law enforcement who are on campus every day—there may not be discrete, identifiable acts that would satisfy the agency test.

Moreover, as *D.Z.* revealed, sometimes, perhaps more often than not, the school official will direct the law enforcement officer, rather than the other way around.[299] Where an SRO is employed by the school, the principal manages and exerts authority over the SRO. Thus, the SRO is subject to the direction of the principal. An agency test that is only satisfied when the law enforcement directs the action of the school official simply does not fit the typical school of today and the professional relationships and power dynamics therein. The fact that the agency relationship is inverted, however, does not negate or minimize the degree of cooperation and partnership.

The *D.Z.* opinion from the Indiana Supreme Court exposed perhaps the most damning problem created by the legal framework adopted by vast majority of state courts. The "clear rule" that *Miranda* will only apply when law enforcement is in the room during the interrogation makes it far too easy to evade *Miranda* simply by asking the officer to wait outside the door while the school official elicits a confession to hand over to law enforcement. In some cases, the school officials and officers have admitted that was indeed their plan.[300] Even where this is not the clear intent, the result is the same.

The comparison of the *B.A.* and *D.Z.* opinions out of the Indiana Supreme Court in 2018 illustrate this glaring problem. In *D.Z.,* the Indiana Court of Appeals named the problem—confession-first, worry about rights later.[301] Such a tactic, when used by police, has already been squarely

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[298] *See supra* Part III.

[299] *D.Z.*, 100 N.E.3d at 603 (assistant principal told school resource officer about student misconduct, directed him to investigate, and directed him to wait outside the door while he elicited a confession from the student). *See also* State v. Schloegel, 246 N.W.2d 130 (Wis. 2009) (holding that the assistant principal was not an agent of law enforcement, finding it important that the SRO's cooperation in the investigation and interrogation was at the direction of the assistant principal).

[300] *See* State v. Heirtzler, 789 A.2d 634, 637 (N.H. 2001); *In re* T.A.G., 663 S.E.2d 392, 395 (Ga. Ct. App. 2008).

[301] *See D.Z.*, 100 N.E.3d at 249–50.

prohibited by the United States Supreme Court in *Missouri v. Seibert.*[302] In 2004, the Unites States Supreme Court granted certiorari in Patrice Seibert's case to resolve a circuit split whether *Miranda* was sufficiently honored when police question and obtain a confession first, then *Mirandize*, and then elicit the confession once again.[303] The frequency with which such cases were popping up around the country convinced the Court that this was more than an unintentional mishap or oversight; instead, Justice Souter called it a "police protocol" in his opinion.[304] The United States Supreme Court framed the issue as follows: "[t]he threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings should function 'effectively' as *Miranda* requires."[305] The Court concluded that "[t]here is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment."[306]

The Court wisely recognized that:

> [T]he reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble.[307]

Justice Souter appreciated that a suspect will likely react with "perplexity about the reason for discussing rights at that [late] point, bewilderment being an unpromising frame of mind for a knowledgeable decision" or it "could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail."[308] For students, with what we now know about their developing brain's capacity for judgment and evaluation of consequences, they are almost certain to fall prey to the latter possibility, and assume the damage is done.

As the Indiana Court of Appeals astutely asked in *D.Z.*, "[i]f we no longer allow the *Seibert* interrogation technique in the stationhouse, why

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[302] Missouri v. Seibert, 542 U.S. 600, 613–14 (2004).

[303] *Id.*

[304] *Id.* at 604.

[305] *Id.* at 612.

[306] *Id.*

[307] *Id.* at 613.

[308] *Seibert,* 542 U.S. at 613.

should we bless it in the schoolhouse?"[309] Just as in Seibert, the "manifest purpose" of using the school official to conduct the interrogation in lieu of law enforcement is clear: to avoid the constitutional requirements of *Miranda*. There is no reason to bless it in the schoolhouse. Quite the opposite is true. As the same court underscored in *B.A.*, "special caution" due to juvenile interrogations requires heightened standards and constitutional protections for young suspects, not less.[310] Moreover, as the United States Supreme Court and many other courts increasingly recognize, the school setting is a uniquely coercive environment for students; it is more not less coercive than other settings. Thus, there can be no legitimate basis for allowing a *Seibert* work-around in the schoolhouse.

2. A Reformed Agency Test Must Examine Cooperation & Coordination Between School Officials and Law Enforcement

Instead of requiring a student defendant to prove that the school official was acting as an agent of law enforcement when he elicited a confession from the student, the more appropriate question to ask is whether there was joint action, cooperation, or coordination between the school officials and law enforcement. Were they working together or in tandem? Some courts have successfully employed this framework instead of a strict agency analysis and the student defendants' rights were protected.[311] A finding of joint action or cooperation should be sufficient, on its own, to trigger Fifth Amendment (*Miranda* warning) and Fourteenth Amendment due process protections (voluntariness analysis).

Better yet, cooperation and coordination should be presumed and held to be sufficient for the application of *Miranda* and a voluntariness analysis of the student's interrogation, unless the state can prove that the school official was acting completely independently from law enforcement. In other words, the burden should shift to the state to prove that the school official was an independent actor from law enforcement. Such burden-shifting makes sense in the modern schoolhouse—where (1) law enforcement is on staff and on campus on a daily basis, (2) the non-law enforcement personal is trained to interrogate students like law enforcement, using standard police interrogation tactics, (3) there is mandatory reporting to police for certain conduct, and (4) zero tolerance policies—it should be presumed that the school official who is interrogating a student about conduct that could constitute a crime is acting in tandem with.

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[309] D.Z. v. State, 96 N.E.3d 595, 603 (Ind. Ct. App. 2018), *vacated,* 100 N.E.3d 246 (Ind. 2018).

[310] B.A. v. State, 100 N.E.3d 225, 231 (Ind. 2018).

[311] *See id.*; *In re* G.S.P., 610 N.W.2d 651, 659 (Minn. Ct. App. 2000) (holding the fact that the school official and law enforcement were working in "one concerted effort" to be determinative of holding that *Miranda* warnings required).

The new test should not require a showing that the student was aware of the cooperating relationship between the school official interrogating him and law enforcement. The current test requires that the student know that the school official interrogating him was an agent of police.[312] This is an impossibly high standard. Instead, it should be presumed unless the state can show otherwise. In other words, the reformed test should shift the burden to the State. This burden-shifting makes sense given that public school students today are well aware of the regular police presence at school and the fact that criminal consequences are possible for their actions at school.

B. All of Courts' Justifications for Insulating School Official Interrogators from Constitution Fail Today

All of the purported justifications for insulating school official interrogators from constitutional inquiry fall away in the context of the criminalized modern schoolhouse and when viewed through the lens of a reasonable juvenile student, as required by *J.D.B.* Today, law enforcement is employed by and a constant presence in most public schools. Even if a school does not employ its own school resource officer(s), it likely has a policy mandating that school officials report certain school misconduct to police for criminal investigation and possible prosecution. Interaction between school officials and law enforcement is the daily norm, rather than the rare exception. There is a working cooperative relationship between school officials and law enforcement that is regularly characterized by hand-in-hand, intentional, and pre-planned coordination. To the extent any question remains about the relationship of school official's relationship with law enforcement, the fact that school officials are now being trained to employ law enforcement interrogation tactics on their students answers that question. Each and every rationale found in cases across the country for insulating school official interrogators from constitutional obligations is easily refuted in today's circumstances.

As an initial matter, it is not an unrealistic reach to suggest that the Fifth Amendment *Miranda* rule apply to interrogations by school officials. As noted above, there is some controlling Supreme Court jurisprudence, which is still good law, that suggests the *Miranda* rule is not limited to law enforcement.[313] In *Mathis*, the Court's decision to apply *Miranda* turned upon the fact that the IRS agent conducting the interrogation knew that criminal prosecution was possible. Some federal circuit courts and state courts have also applied Miranda in a variety of circumstances where non-law enforcement elicited incriminating statements from individuals with knowledge that

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[312] *See infra* Part VI.G. (discussing *B.A.*, 73 N.E.3d at 730 and Stansbury v. California, 511 U.S. 318, 323–24 (1994)).

[313] *See* Penrose, *supra* note 18, at 788–89.

criminal consequences could ensue.[314] It is indisputably true that today school officials know that juvenile or criminal prosecution is possible for school misconduct, particularly where school resource officers are involved in the investigation and interrogation, and/or the school official reports the misconduct to the police. To pretend otherwise is simply disingenuous and a blatant attempt to evade constitutional rights.

Similarly, while the Supreme Court drew a line in *Ingraham* between constitutional rights intended to protect criminal defendants and those intended to more generally protect citizens (and students), *see* Part VI.A., that line was blurred by the reality that today students regularly become criminal defendants as a result of events at school. Where a student is prosecuted on the basis of incriminating statements elicited at school, he is both a criminal defendant and a student. It is a fallacy, and an injustice, to say that he should not benefit from the constitutional rights intended to protected defendants in our criminal justice system.

Finally, the softening of constitutional rights within the schoolhouse, and sometimes exclusion from the schoolhouse, has long been justified by the argument that the authority of school officials is *in loco parentis*: "their authority is that of the parent, not the State."[315] But the Supreme Court recognized back in 1985 that parental authority was no longer the only authority wielded by school officials.[316] The balance of authority has shifted even further into the realm of law enforcement authority since then. Schools hire law enforcement, they work hand-in-hand with officers on a daily basis, request and direct officers' investigation of school misconduct, they report school conduct to law enforcement, and sometimes even hand student confessors

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[314] *See* United States v. D.F., 857 F.Supp. 1311, 1326 (E.D. Wis. 1994), *aff'd*, 115 F.3d 413 (7th Cir. 1997) (noting that staff at a mental health facility "either enlisted or volunteered to act as law enforcement surrogates in eliciting confessions from troubled teens."). *E.g.*, Jackson v. Conway, 763 F.3d 115, 138 (2d Cir. 2014) (observing that a child protective services caseworker's interview of defendant while he was in police custody for child abuse, though conducted in connection with "an independent civil investigation for possible family court action[,]" was covered by *Miranda*, because the caseworker here was aware of a "possibility" of criminal charges and by law and was obligated to report to police any evidence of sexual abuse). *See also* State v. Deases, 518 N.W.2d 784, 784 (Iowa 1994) (holding that the *Miranda* rule applied to questioning by a correctional officer who was trying to determine the nature and extent of defendant's culpability regarding an in-prison homicide); Buster v. Commonwealth, 406 S.W.3d 437 (Ky. 2013) (finding that a social worker is a state actor for purposes of *Miranda* where she was an investigator for Health and Family Services, was working in cooperation with the police, and sought information likely to support prosecution).

[315] New Jersey v. T.L.O., 469 U.S. 325, 336 (1985).

[316] *See T.L.O.*, 469 U.S. at 336–37 (rejecting the idea that school officials are completely exempt from the Fourth Amendment "by virtue of the special nature of their authority over schoolchildren" because the idea that school administrators "act *in loco parentis* in their dealings with student" is "in tension with contemporary reality and the teachings of [the Supreme Court]").

over to law enforcement for prosecution.[317] Now that school officials are being trained to interrogate like a police officer would interrogate a criminal suspect, there is simply no question that the school official has some law enforcement authority and is well aware that criminal prosecution may result from their actions. In *T.L.O.*, a thirty-five-year-old case from a time where the interaction was significantly less pervasive, the Court adopted a balancing test.[318] At a minimum, a balancing test is now appropriate for the *Miranda* context. For all of these reasons, a school official should no longer be able to insulate his interrogation of a student from constitutional examination by claiming it had an educational purpose.[319]

Finally, if for no other reason, school officials should no longer be allowed to interrogate with impunity because of what we know about the vulnerabilities of youthful students to the pressures of interrogation. This is especially true when the school official has been trained to conduct a law enforcement-style interrogation widely acknowledged to be inherently coercive. We now know without a doubt that youth are significantly more vulnerable to the interrogation methods that school officials are now being trained to wield against their students. *J.D.B.* must be applied to judicial analysis of an interrogation by a school official in the coercive setting of school.

C. Additional Proposed Protections for School Official-Elicited Confessions

Finally, in addition to the reforming the agency test proposed above, there are a couple of additional steps that every court should take when presented with a juvenile confession elicited by a school official. These proposals are intended to both (1) help protect students until the agency test is reformed or replaced in a way that meaningfully protects them, and (2) to be implemented even if courts adopt a new agency test. In other words, these protections can be implemented now to help fill the gap in protection for vulnerable young students who are subject to interrogation at school but will also remain relevant and necessary if and when the agency test is replaced. Also, because courts typically will only consider the arguments presented to them (and not develop their own arguments *sua sponte*), defense and juvenile attorneys should ask the court to conduct each of the following tests whenever they are representing a juvenile who confessed to a school official.

First, every court should conduct a *Seibert* screening for every student statement elicited by a school official that is used as evidence in a criminal proceeding. Courts should ask if a school official, rather than a member of

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[317] *See generally, supra*, Part III.

[318] *T.L.O.*, 469 U.S. at 337

[319] *See, e.g.*, B.A. v. State, 100 N.E.3d 225, 231 (Ind. 2018) (rejecting the lower court's holding that an educational purpose insulated the school official's interrogation from constitutional review).

law enforcement, elicited the confession from the student as an end-run around having to advise the student of the *Miranda* rights. In other words, is the school official conducting the questioning in lieu of a police officer to circumvent the protections that the *Miranda* Court intended to afford. The *Seibert* Court laid out the following factors that a court should consider when determining whether the police were attempting to evade *Miranda*: (1) the completeness and detail of the questions and answers in first round of questioning, (2) overlapping content, (3) timing and setting of first and second rounds of questioning, (4) continuity of police personnel, and (5) the degree to which the interrogator's questions treated the second round as continuous with the first.[320] A similar set of questions could be used to guide the analysis of schoolhouse interrogations where a school official interrogates first in order to elicit the confession, and then hands the student and his confession over to law enforcement. Given the inherent vulnerability of youth, the inherent coerciveness of the school setting, and the special care owed to juvenile confessions, it should not be necessary to prove that this was the school official or law enforcement's intent.[321] It should be sufficient that the result circumvented the protections guaranteed by *Miranda*.

Second, in every case involving a student confession elicited by a school official, the court should be required to engage with *J.D.B.*, and its predecessors, which require that the analysis of the interrogation of a youth be conducted through the lens of a reasonable juvenile.[322] The court should put itself in the shoes of the child, adolescent, or teenage student, and ask whether the child would have felt free to leave the office of this school official, and whether the child may have believed that he or she could go just back to class if he or she said what the official clearly wanted to hear, and whether the child's will may have ultimately been overborn by the interrogation tactics employed by the school official.

Third, in every case involving a student confession elicited by a school official, the court should evaluate whether the confession was voluntary, in addition to whether *Miranda* was honored. As a California appellate court observed in *Elias V.*:

> Many who study the subject closely think post-*Miranda* police practices 'have gutted *Miranda's* safeguards' so

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[320] Missouri v. Seibert, 542 U.S. 600, 601–02 (2004).

[321] Note that *Seibert* was a split opinion by the Supreme Court. The justices split on the question whether the intent of the officer's matter to the analysis. Since the decision, there has been confusion among lower courts about whether the "results test" outlined in Souter's opinion, in which it is irrelevant whether the officers intended to circumvent *Miranda*, or the "intent" test outlined in Kennedy's opinion controls. *Seibert*, 542 U.S. at 615–616, 622 (concluding that the test set forth in Souter's opinion "cuts too broadly" by including "unintentional two-stage interrogations").

[322] J.D.B. v. North Carolina, 564 U.S. 261.

> that today, '*Miranda* 's protections are more mythic than real.' Increasingly, the survival of those protections, and the vindication of the *Miranda* court's concern about the increasing number of false confessions, which is of particular concern with adolescent suspects, may depend upon the willingness of trial judges to engage in vigorous individual assessment of the voluntariness of a statement despite the suspect's *Miranda* waiver.[323]

Unfortunately, the author has found only a small handful of cases involving a confession elicited by a school official where the court conducted a voluntariness analysis.[324] In each, the student's confession was held to be voluntary.[325] The United States Supreme Court, and two state courts, have recognized that school is a uniquely and inherently coercive setting for an interrogation of a student.[326] If courts start applying the special care required for any interrogation of a youth, and consider it with the inherent coerciveness of the school setting, there are automatically two factors weighing towards involuntariness, raising the bar for what the State must show to prove voluntariness.

Lastly, the court should always inquire whether the school official who conducted the interrogation had been trained in the Reid technique of interrogation, or a similar technique. If so, this must inform the court's analysis because it means that the school official was trained to use a technique that has been proven to regularly elicit involuntary, unreliable, and even false

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[323] *In re* Elias V., 188 Cal. Rptr. 3d 202, 225 (Cal. Ct. App. 2015).

[324] *See In re* Navajo Cty. Juvenile Action No. JV91000058, 901 P.2d 1247, 1249 (Ariz. Ct. App. 1995); State v. V.C., 600 So.2d 1280, 1281 (Fla. Dist. Ct. App. 1992); S.G v. State, 956 N.E.2d 668, 680–81 (Ind. Ct. App. 2011); Commonwealth v. Ira I., 791 N.E.2d 894, 903 (Mass. 2003); People v. Garrett, No. 234708, 2002 WL 226907, at *1 (Mich. Ct. App. Feb. 8, 2002) (per curium); *In Re* Welfare of R.L.N., No. C1-98-26, 1998 WL 405026, at *2–3 (Minn. Ct. App. July 21, 1998); *In re* Gruesbeck, No. 97-CA-59, 1998 WL 404516, at *4 (Ohio Ct. App. Mar. 27, 1998); J.D. v. Commonwealth, 591 S.E.2d 721, 726 (Va. Ct. App. 2004).

[325] *See supra* note 324.

[326] J.D.B. v. North Carolina, 564 U.S. 261, 276 (2011) (recognizing that schoolhouse to be a uniquely problematic and coercive setting for an interrogation because "presence at school is compulsory and . . . disobedience at school is cause for disciplinary action"); *In re* Elias V., 188 Cal. Rptr. 3d at 213 (holding that "the mere fact of police questioning of a minor in the schoolhouse setting may have a coercive effect, because the child's 'presence at school is compulsory and [his] disobedience at school is cause for disciplinary action.'") (alteration in original) (internal citation omitted); Commonwealth v. T.C., 365 S.W.3d 216, 224–225 (Ky. Ct. App. 2012) ("The fact is a school is where compliance with adult authority is required and where such compliance is compelled almost exclusively by the force of authority. Like it or not, that is the definition of coercion.").

confessions.[327] This is highly relevant to the whether the student would have felt free to leave the room, whether their incriminating statements are reliable, and whether the statements were voluntary.

VIII. RESPONSE TO COUNTER-ARGUMENTS

The primary counterargument to providing due process protections to students' subject to a schoolhouse interrogation—and the original guiding principle for this body of law—is school safety. Yet, in a society that incarcerates more of its population than any other country,[328] that prosecutes and harshly sentences children as adults,[329] and that now regularly sends students from the classroom to the cell, is it not time for the judicial system to prioritize protecting students from unconstitutional and coercive self-incrimination and wrongful conviction? The good news is that it is possible to both protect the safety of the student body and protect the constitutional rights of individual students.

Moreover, the objectives of ensuring school safety and protecting students' constitutional rights are not necessarily at odds, for several reasons. First, the *Miranda* doctrine has always included an exception to protect the public safety.[330] In *New York v. Quarles*, the United States Supreme Court held there is a "'public safety' exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence."[331] There is no reason that the *Quarles* public safety exception would not apply to the schoolhouse as well. Thus, even when *Miranda* applies in the schoolhouse, school officials and law enforcement have the ability to forego *Miranda* rights in exigent circumstances. Indeed, *Quarles* should be the standard. There is no legitimate basis for lowering the test for what constitutes an emergency at the schoolhouse. Such an argument may have had merit in the past, but it can no longer stand when we know the risk of a false and/or involuntary confession when a youth is interrogated at school.

Second, nothing is stopping school officials from interrogating their students without providing them their *Miranda* rights. The only thing estopped is the state subsequently using this un-*Mirandized* statement to prosecute the

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[327] *See* D.Z. v. State, 96 N.E.3d 595, 601 n.2 (Ind. Ct. App. 2018) (emphasizing the fact that the school officials who interrogated a juvenile defendant had been trained in the Reid technique).

[328] *Highest to Lowest—Prison Population Rate*, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison-population-total [https://perma.cc/B58D-4NDM] (last visited Dec. 25, 2019).

[329] *See, e.g.*, *Children in Prison*, EQUAL JUSTICE INITIATIVE, https://eji.org/issues/children-in-prison/ [https://perma.cc/YJ3Y-Q6LS] (last visited Dec. 25, 2019).

[330] *See generally* New York v. Quarles, 467 U.S. 649 (1984).

[331] *Id.* at 655.

youth. As attorney and academic Meg Penrose concluded in her 2006 article regarding *Miranda* rights at schools, "[i]f school safety *is* the true concern, something that is debatable at this point, then police involvement is not relevant because the sanctions should be limited to those required to keep students and school officials safe."[332] In other words, if the questioning is actually for an educational purpose, then it is irrelevant whether the elicited statements will later be admissible in a court of law. "Where the behavior is school-related and deals strictly with disciplinary issues, the Fifth Amendment poses no obstacle to school officials furthering the safety and order of their charges."[333]

Third, many of the interrogations being conducted at school actually involve alleged crimes committed off-campus. In such cases, "school involvement cannot encompass anything other than pseudo-police behavior. Non-school events that have predominantly, if not exclusively, non-school effects should disqualify school officials from working in concert with police officers without invoking traditional criminal procedure protections."[334]

Fourth, studies show that school crime is actually on the decline, and has been for many years.[335] Thus, the primary rationale used to minimize or eliminate students' due process protections at the schoolhouse is losing steam. Nonetheless, "[e]ven as the occurrence of crimes at schools has been declining, schools are reporting more crimes to law enforcement, which reflects an increasingly close collaboration between school officials and law enforcement."[336]

Fifth, given what we know about the Reid technique's proclivity for producing unreliable confessions from youth, its use by school officials in schools actually does not promote school safety.[337] It will not benefit anyone to elicit false, misleading information in the midst of any ongoing school emergency. There are alternatives. For example, the National Association of School Psychologists has developed a training called PREPARE focused on school safety and crisis prevention.[338] This is not the only option; the point

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[332] Penrose, *supra* note 18, at 788.

[333] *Id.* at 785.

[334] *Id.* at 787.

[335] Eleftheria Keans, *Student Interrogations by School Officials: Out with Agency Law and in with Constitutional Warnings*, 27 B.C. THIRD WORLD L. J. 375, 406 (2007) (internal citation omitted) ("Between 1992 and 2003, overall youth crime declined by approximately half, both at school and away from school, while during the same time period, schools reporting at least one crime to law enforcement rose from 57% to 63%.").

[336] *Id.* at 405.

[337] *See, e.g.*, Open Letter to IPA, *supra* note 41, at 3.

[338] *Id.* at 4.

is that any training on interviewing and investigating students should be designed by, or at least in partnership with, a psychologist or other qualified professional who understands adolescent brain development and behavior and understands the school context.[339]

IX. CONCLUSION

It is high time for courts to recognize that interrogations by school officials are just as likely, if not more, to be coercive and elicit involuntary confessions from their students. This is an injustice, even if it only impacts school discipline; it is a constitutionally unacceptable injustice if that involuntary confession is then admitted in court in a juvenile or adult criminal proceeding against the student with criminal consequences, including the possibility of imprisonment. It is not a fluke when a youth ends up prosecuted on the basis of incriminating statements that he made to his principal; it is by design. It is now a fairly common occurrence, and often the result of an orchestrated cooperation between law enforcement and school officials. Our laws must start reflecting the realities of today to better protect our students.

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[339] *Id.*