

Student Note

Compulsory Classrooms and Custody: Applying State Truancy Laws to Find that School is Inherently Custodial for the Purposes of *Miranda* Warnings

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I. INTRODUCTION

When Ava Duvernay depicted the grueling interrogation of the Central Park Five¹ in her 2019 Netflix limited series *When They See Us*, the director took nearly seven hours of interrogation² and turned it into twenty minutes of horror for millions of viewers. The Exonerated Five, who have since been released from prison, had their convictions overturned, and were later compensated by the state of New York after a civil suit, were all minors at the time of their interrogations.³

Similarly, a few years prior, Netflix also released *Making a Murderer* that contained raw footage of the confession of then minor, Brendan Dassey. Like the confessions in *When They See Us*, Dassey's confession immediately sparked debate about police tactics when interrogating minors. In both Dassey's and the Exonerated Five's cases, minors were convicted based on what they said and signed on the day of their confessions.⁴ Though The Exonerated Five were taken into custody and interrogated at a police station, the interrogation of Dassey

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1. Once known as "The Central Park Five," Yusef Salaam, Antron McCray, Kevin Richardson, Raymond Santana, and Korey Wise are now known as the "Exonerated Five" due to each of their convictions being individually overturned. See Terry Gross, *Central Park 'Exonerated 5' Member Reflects on Freedom and Forgiveness*, NPR (May 26, 2021), <https://www.npr.org/2021/05/26/1000454798/central-park-exonerated-5-member-reflects-on-freedom-and-forgiveness>.

2. BBC News, *Central Park Five: The True Story behind When They See Us*, Newsbeat, (Jun. 12, 2019) <https://www.bbc.com/news/newsbeat48609693#:~:text=Focus%20soon%20shifted%20to%20the,of%20the%20others%20assaulted%20her>. (last visited Apr. 2022)

3. See *id.*

4. See *id.*; *Dassey v. Dittman*, 877 F.3d 297 (7th Cir. 2017).

began how many interrogations of minors begin—by him being removed from the classroom.⁵

This Note specifically addresses interrogation within a school setting. Through evaluation of *Miranda* requirements, this Note seeks to demonstrate that students are already in a custodial environment prior to formal questioning in school, that the school environment is inherently coercive, and therefore the custody analysis for *Miranda* purposes must begin much earlier than courts have generally applied the totality of circumstances test.

First, this Note will explore the requirements of when a subject must be *Mirandized* and when a subject can validly waive their *Miranda* rights. Then, I ask the question of whether children have the capacity to meet those requirements and whether children can ever meet those requirements while in a school setting. This Note then reviews the factors that make up the totality of the circumstances analysis that courts use when determining whether students are in custody in school, and whether that analysis begins early enough to properly recognize the environment that state truancy laws create.

Next, this Note addresses common law and statutory remedies that could be used to quell the likelihood of police intimidation during interrogation of minors and the likelihood of minors' false confessions. Ultimately, this Note comes to the conclusion that retroactive remedies still do not properly protect students in interrogation settings. And, that while some state laws attempt to protect minors in interrogations, these laws continue to require the subjective determination of law enforcement to find that custody is triggered; by applying truancy laws to the *Miranda* custody analysis, the custody of students in school becomes an objective analysis based in the reality of law and consequence.

5. Innocence Project, *Brendan Dassey's Confession Highlights Importance of Recording Interrogations*, (Feb. 01, 2016) <https://innocenceproject.org/brendan-dasseys-confession-highlights-importance-of-recording-interrogations/>, (last visited Mar, 2022).

II. BASIS OF *MIRANDA* REQUIREMENT

In *Miranda v. Arizona*, the Supreme Court acknowledged that a police interrogation is inherently coercive.⁶ As such, the Court determined that for a person's Fifth Amendment right against self-incrimination to be fully recognized, law enforcement officers must ensure that an in-custody suspect be made aware of their rights prior to questioning.⁷ The Court cited a litany of police interrogation tactics at the time that were cause for concern and highlighted the move from physical coercion to psychological coercion as one of the reasons it was important to make subjects fully aware of their rights prior to questioning.⁸ The *Miranda* Court did not specify the language of the warning, and allowed individual police departments to set their own policies on the warning; however, the warning has become so standardized that it is a staple in American crime television that many people know by heart: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to . . . a[n attorney.] . . . If you cannot afford [one], one will be [provided for] you."⁹ But, the last part of the *Miranda* warning is often faded out as television detectives place a handcuffed suspect into the back of a squad car and is arguably the most important: "Do you understand . . . these rights [as] I have explained [them] to you?"¹⁰ The requirement of *comprehension* of the rights outlined in the *Miranda* warning is central to its purpose of protecting due process. Therefore,

6. *Miranda v. Arizona*, 384 U.S. 436, 458, 467-68 (1966).

7. *Id.* at 468 ("More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.").

8. *Id.* at 448-55 (citing INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962) (Reid Manual)).

9. See, Akhil Reed Amar, *Ok, All Together Now: 'You have the Right to . . .'*, L.A. TIMES, Dec. 12, 1999; COLUMBIA POLICE DEP'T, COLUMBIA POLICE DEP'T POLICY AND PROCEDURE MANUAL, Standard, Policy 440.4, (6th ed. 2018). See e.g., Off. of the Att'y Gen. of S.C., Opinion Letter (June 4, 2009) (Questioning whether "law enforcement [has] the new responsibility of including this 'new fifth right' when Mirandizing a person being arrested, and should such a case be dismissed in the absence of this . . . (claimed right)?"). *Miranda* itself does not set out the vocabulary required to inform a subject of their rights. Specific language is subject to change from precinct to precinct, though most have standardized the *Miranda* language after additional constitutional litigation that is outside the scope of this Note. See *cf.*, Florida v. Powell, 559 U.S. 50 (2010) (reversing the Supreme Court of Florida, finding that a subject knowingly waived his *Miranda* rights even though a standard verbal warning was not given).

10. COLUMBIA POLICE DEP'T *supra* note 9, at Policy 440.

the Court in *Miranda* also required that the “heavy burden” of proving a subject knowingly, intelligently, and voluntarily waived these rights lies with the state, and that unwarned statements would be prima facie unconstitutional.¹¹

Later, the Court addressed the voluntariness prong of the *Miranda* Waiver in *Moran v. Burbine*, where a Justice O’Connor-penned opinion spelled out that, for a waiver to be voluntary, it must: (1) be the “product of a free and deliberate choice rather than intimidation, coercion, or deception,”¹² and (2) [the subject] must have an understanding of the right that they are waiving and the consequence of relinquishing that right.¹³ The determination of whether or not these requirements have been sufficiently fulfilled will be judged on the totality of the circumstances and will involve a factual and subject-specific analysis.¹⁴ In this opinion, the Court ruled that information unknown to the subject at the time of questioning did not influence his decision to waive the right to counsel and the right to remain silent.¹⁵

Determining custody is an objective inquiry where the court will first determine what the circumstances of the interrogation were, and second, whether a reasonable person would feel free to leave or resist police questioning given those circumstances.¹⁶ There are a few noteworthy issues when using this framework during the interrogation of minors. First, a determination of whether a suspect is in custody is based on whether the reasonable person (an adult) would feel free to leave or refuse police questioning.¹⁷ Second, minors are inherently subordinate when speaking to adults in authority positions.¹⁸ And finally, in determining their capacity to waive their *Miranda* protections, the likelihood that children and minors actually do understand the consequences of waiving their right to remain silent is slight at best.¹⁹

11. *Miranda*, 384 U.S. at 475.

12. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

13. *Id.*

14. *Id.*

15. *Id.* at 422.

16. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

17. *Id.* at 271.

18. *Id.* at 274-75.

19. *Id.* at 273 (“[C]hildren characteristically lack the capacity to exercise mature judgement.”).

By maintaining the same adult-centric “totality of the circumstances” framework when determining whether minors have the capacity to understand that they are (1) in custody and (2) afforded certain constitutional protections, both the criminal justice system and judiciary fall short in properly analyzing the capacity of minors in interview and interrogation settings. In doing so, not only do we stray far from the spirit of the *Miranda* warning, but we fall far short of affording minors the privilege against self-incrimination and due process protections required by the Fifth Amendment.²⁰

Nowhere is this more prevalent than in the interrogation of minors at school. School, where students are legally compelled to be²¹, is an inherently custodial environment that should trigger not only an immediate *Miranda* warning but also the ability of students to recant statements they may have made while in a school interrogation setting.

III. PROBLEMS WITH JUVENILE CONFESSIONS

The Supreme Court has grappled with the confessions of minors for the last seventy years.²² In 1948, the Court found in *Haley v. Ohio* that there was need for “special care” when the confession was one of a “mere child.”²³ Furthermore, the Court found in *Haley* that there was undisputed evidence that coercion was used in extracting the confession at issue due to the police denying the minor his right to counsel.²⁴ But while the age of the subject at the heart of *Haley* is the premise of the Court’s decision, it was not necessary to its ultimate holding. Notably, the Court found that the circumstances surrounding *Haley*’s interrogation would have triggered the same inquiry, and likely the same result, for an adult suspect.²⁵

Later, the Court reiterated its position from *Haley* and the need for pause when evaluating the confession of a minor. In *Gallegos v. Colorado*, police held a fourteen-year-old boy for five days, refusing him contact with both his mother and his lawyer, as well as any other

20. U.S. CONST. amend. V, cl. 3-4.

21. See *infra* Section III.B.1.

22. See *Haley v. Ohio*, 332 U.S. 596, 599 (1948).

23. *Id.* at 599.

24. *Id.* at 600.

25. *Id.* at 601.

adult who may have had the child's best interests in mind.²⁶ In *Haley*, the Court asserted that the minor would not have understood the full gravity of his confession without the presence of a parent, lawyer, or other "friendly adult."²⁷ But here too, the circumstances were such that the Court could have found the subject's confession involuntary regardless of the age. In *Gallegos*, the fact-specific inquiries found especially egregious were the failure to present him in front of a Juvenile Court judge, the length of his detention, and the isolation from guardian or representation.²⁸ While all of these factors were exacerbated by the defendant's age, age alone was not dispositive.²⁹ Because *Haley* and *Gallegos* were both pre-*Miranda* cases, the inquiries in both focused on the involuntariness of the defendants' confessions as a violation of the privilege against self-incrimination. The Court formally extended the Sixth Amendment right to counsel and Fifth Amendment privilege against self-incrimination to minors in 1967.³⁰ In *In re Gault*, the Court formally recognized that there may be "special problems" when acting on the waiver of a minor and that law enforcement officers may need to utilize techniques different from those used on adults when extracting a confession and when relying on the child's ability to waive their Fifth Amendment privilege.³¹

Throughout the early twenty-first century, the Court recognized, through a series of Eighth Amendment challenges, that there were serious differences in the development of children and adolescents as opposed to adult criminal defendants.³² Through these cases, the Court pointed specifically to the neurological development of children, noting first that they have an "undeveloped sense of responsibility," that children and adolescents are "more susceptible to influence and outside pressures," and that a juvenile's character is less formed than an adult's so their actions are less likely to be morally perverse in perpetuity (less likely to always be bad).³³

26. *Gallegos v. Colorado*, 370 U.S. 49, 50 (1962).

27. See *Haley*, 332 U.S. at 599.

28. See *Gallegos*, 370 U.S. at 54.

29. *Id.* at 55.

30. *In re Gault*, 387 U.S. 1, 55 (1967).

31. *Id.*

32. *Gall v. United States*, 552 U.S. 38, 57 (2007); see generally Hannah Seigel Proff & Michael Stevens Juba, *Evolving the Standard of Decency: How the Eighth Amendment Reduces the Prosecution of Children as Adults*, COLO. LAWYER, Mar. 2018, at 39.

33. *Gall*, 552 U.S. at 57; *In re Gault*, 387 U.S. at 55.

However, it wasn't until 2011 that the Supreme Court took up the issue of a subject's age when determining custody.³⁴ In *J.D.B. v. North Carolina*, the Supreme Court considered whether or not the age of a suspect should be an element considered when making the custody determination.³⁵ In that case, a North Carolina student was removed from his school classroom by a uniformed police officer and taken to a conference room for questioning.³⁶ The school and local authorities worked together to isolate the student from the general school population and urged his confession without contacting his legal guardians,³⁷ but the Court only made the narrow determination that age was a necessary factor when determining if a subject was in custody.³⁸

In its decision in *J.D.B.*, the Court recognized that there are inherent differences in a child's perception of police questioning and that there are instances when an adult would feel free to leave or terminate questioning when a minor would not.³⁹ Additionally, the Court determined that when the age of a minor subject is known or obvious to an interrogator, then that is part of the objective inquiry to determine custody.⁴⁰ In other words, the Court held that because age is knowable, even though age is a personal characteristic, age is an objective element and therefore allowed to be used when determining whether or not a subject is in custody and therefore afforded the protections of a *Miranda* warning prior to questioning. However, though age may be knowable, using age requires the interrogators to undertake a subjective analysis of whether age is a predominating factor. Additionally, by only using age as a factor, the Court forecloses the reality that there may be some students who are not minors (i.e., seniors in high school over the age of eight-teen), that are nonetheless be subject to the general restrictions of being in school.

Though the Court ruled in favor of including age in the custody analysis, it conclusively did not adopt a framework that would have recognized that school is inherently custodial in *J.D.B. v. North*

34. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

35. *Id.* at 275.

36. *Id.* at 265-66.

37. *Id.*

38. *Id.* at 277, 281.

39. *Id.* at 272-73.

40. *Id.* at 274.

Carolina.⁴¹ Justice Alito, in his dissent in *J.D.B.*, properly recognizes that school is inherently custodial.⁴² The majority in *J.D.B.* requires police officers to make a determination as to a minor's age when making a custody determination, Justice Alito urges the objective consideration of "the setting in which questioning occurs, restrictions on a suspect's freedom of movement, and the presence of police officers *or other authority figures*."⁴³ Not only does this framework keep the *Miranda* analysis objective and takes the custody determination out of the hands of police officers, but this analysis also properly recognizes that, regardless of age, there are certain settings, such as school, that are inherently custodial for minors.⁴⁴

A. Youth and Adolescents Are More Likely to Improperly Waive *Miranda* Rights Due to Cognitive Development

Like the Supreme Court found in *J.D.B.*, researchers have also found that children lack the cognitive ability to fully understand their rights during an interrogation, and that children also lack the ability to know when adults seek a truthful answer and not the answer that they *believe* the adult wants to hear.⁴⁵ But research has shown, for at least the last twenty-five years, that minors, and not just juvenile offenders, categorically lack the capacity to properly understand the consequences that stem from legal proceedings.⁴⁶ Specifically, research has shown that minors under the age of fifteen may not even understand what a right is, and are particularly likely to misconstrue the concept of *Miranda* rights, such as having the right to an attorney without being charged with a crime, and a basic understanding of the right to remain silent—not only silent until spoken to.⁴⁷ These findings lend support to the hypothesis that minors are not able to adequately comprehend their *Miranda* rights to waive them, and fail the knowing requirement for a valid *Miranda* waiver. The "knowing" prong of the *Miranda* waiver analysis is greatly

41. *Id.* at 276.

42. *Id.* at 293 (Alito, J., dissenting).

43. *Id.* (emphasis added).

44. *Id.* at 297.

45. See Naomi E.S. Goldstein et al., *Waving Good-Bye to Waiver*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2018).

46. JUVENILE CRIME, JUVENILE JUSTICE 15-16 (McCord et al. eds., 2001).

47. *Id.*

impacted by age because, for a subject to properly waive their *Miranda* rights, they must first comprehend them. Particularly:

Children may have many motivations for waiving *Miranda*: from childhood on, parents teach their children to tell the truth—a social duty and value in itself. The compulsion inherent in the interrogation room amplifies social pressure to speak when spoken to and to defer to authority. Justice personnel suggested that juveniles waived to avoid appearing guilty, to tell their story, or to minimize responsibility. Some thought they waived because they did not expect severe sanctions or believed that they could mitigate negative consequences. Others ascribed waivers to naïve trust and lack of sophistication. Others attributed waivers to a desire to escape the interrogation room—the compulsive pressures *Miranda* purported to dispel.⁴⁸

Not only do minors lack the ability to properly conceptualize their rights during interrogations, but minors are also more likely to make false confessions.⁴⁹ Through a study of the interrogation experiences of youth offenders, researchers Lindsay Malloy, Elizabeth Shulman, and Elizabeth Cauffman identified that the manner by which many youth offenders had been interrogated lent itself to not only false confessions, but also false pleas.⁵⁰ The American system of interrogation is guilt-based and is often centered on tactics that are confrontational, accusatorial, and intimidating;⁵¹ and police investigators are trained to interrogate minors in the same manner as adults, using false evidence, deceit, repeated questioning,⁵² and even some techniques that are

48. Goldstein et al., *supra* note 45, at 29 (citations omitted).

49. Jason Mandelbaum & Angela Crossman, *No Illusions: Developmental Considerations in Adolescent False Confessions*, AM. PSYCH. ASS'N (Dec. 2014) (citing that in a study of 328 exoneration cases, forty-four percent of juveniles falsely confessed compared to thirteen percent of adults; and the youngest cases, involving twelve-to-fifteen-year-olds, seventy-five percent falsely confessed).

50. Lindsay C. Malloy et al., *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders*, 38 LAW & HUM. BEHAV. 181 (2014).

51. *Id.* at 182.

52. *Id.*

purposefully meant to gain an advantage over minors given their “developmental vulnerabilities.”⁵³ Of studied interrogation tactics, minors have reported that police most commonly use deception, duress (threats), befriending, and intimidation;⁵⁴ and that most interrogations lasted longer than two hours.⁵⁵ Furthermore, of the youth offenders studied, over one third had given a false admission of guilt to a police officer or a judge, and roughly 17% claimed to have falsely confessed to police only.⁵⁶ Strikingly, none of the youth offenders who admitted to giving a false confession to police claimed to have a lawyer or parent present at the time they falsely confessed; and of those who did confess, those to whom police refused to give a break were more likely to falsely admit guilt.⁵⁷ These numbers are even more telling when you consider the reason that many minors gave for their false confessions: Protection of another.⁵⁸

Central to understanding whether minors have the cognitive capacity to understand their *Miranda* rights during interrogation is data demonstrating that the majority of those who falsely confessed did so to protect another person that they may know to have committed the crime, instead of simply remaining silent or requesting the presence of an attorney.⁵⁹ Minors’ propensity to falsely confess to protect others is consistent with theories that youth and teens are incredibly sensitive to peer influence, and a fear of losing social status and friends may unduly influence youth to falsely confess.⁶⁰ What Mallory’s data shows us is that youth consider a wide range of variables during confession and they do not adequately weigh their own rights when deciding to speak to

53. *Id.*; see also Goldstein et al., *supra* note 45, at 27 (“Psychologically coercive strategies that contribute to interrogative suggestibility play on young suspect’s eagerness to please, firm trust in people of authority, lack of self-confidence, increased desire to protect friends/relatives and to impress peers, and increased desire to leave the interrogation sooner.”).

54. See Malloy et al., *supra* note 50, at 187; see also Goldstein, *supra* note 45, at 27 (“In situations wherein police officers present the waiver decision as an inconsequential formality or imply that waiver is in the youth’s best interests, the youth faced with the question may be ill-equipped to independently grasp the significance of waiving rights. That youth may also be less able to resist the perceived pressure to submit to the officers’ continued questioning.”).

55. Malloy et al., *supra* note 50, at 188. It is notable that these tactics do not comport with the holdings in *Haley* or in *Gallegos* where the Supreme Court recognized the care that would need to be taken in interrogating minors.

56. *Id.* at 186.

57. *Id.* at 188-89.

58. *Id.* at 186.

59. *Id.*

60. *Id.* at 189-90.

police, confess to police, or both. Therefore, minors' ability to properly comprehend the gravity of their rights during interrogation is insufficient to properly waive their *Miranda* rights.⁶¹

Dr. Thomas Grisso conducted a study that found that knowing comprehension of *Miranda* rights and subsequent waiver was based on age.⁶² That study found that around 90% of youth waive their *Miranda* rights, an exponentially higher rate than adults, and that the younger the subject being interrogated, the less likely they were to actually understand not only what rights they had under *Miranda*, but, most importantly, what rights they were waiving when they chose to speak to police.⁶³ The Grisso study found that 88% of ten to eleven-year-olds, 73% of twelve-year-olds, 65% of thirteen-year-olds, and 54% of fourteen-year-olds did not have an adequate grasp on a *Miranda* warning, or its function in the legal system.⁶⁴ These numbers are nothing short of shocking when you take into account that many young people's first interactions with police happen at school, which leads to an inevitable exacerbation of the school to prison pipeline.⁶⁵

61. This is similarly illustrated in the Seventh Circuit ruling in *Dassey v. Dittman*, where the court noted that Brenden Dassey's interrogation was latent with suggestive interviewing techniques when investigators told Dassey, "Honesty here Brendan is the thing that's gonna help you. OK, no matter what you did, we can work through that. OK. We can't make any promises but we'll stand behind you no matter what you did. OK. Because you're being the good guy here . . . And by you talking with us, it's helping you. OK? Because the honest person is the one who's gonna get a better deal out of everything." *Dassey v. Dittman*, 877 F.3d 297, 307 (7th Cir. 2017).

62. See generally Goldstein et al., *supra* note 45.

63. *Id.* at 29-30.

64. *Id.* at 30.

65. Discussions surrounding the prevalence of SROs and the School to Prison Pipeline are outside of the scope of this Note. However, for more comprehensive scholarship on these topics, see Jillian Lesley, Note, *Discipline of Crime: An Analysis of the Use of Memoranda of Understanding to Regulate School Resource Officer Intervention in South Carolina Schools*, 50 J.L. & EDUC. 192 (2021) (discussing the relationship between schools and hired resource officers) and see Meghan Wicker Darby, Note, *Ending the School-to Prison-Pipeline in South Carolina through Legislative Reform*, 50 J.L. & EDUC. 390 (2021) (discussing the school-to-prison pipeline in South Carolina and possible remedies).

B. Coercion During Interrogations Is Heightened in a School Setting Because Students Are in an Inherently Subordinate Situation.

Even if courts remain steadfast in holding that minors can have the capacity to waive their *Miranda* rights, school interrogations are still inherently coercive due to the subordinate nature of the student–schoolhouse relationship. Though students have always been subordinate to school faculty and administrators, over the last few decades, a flood of federal school safety funding has increased the presence of police in schools.⁶⁶ This increase has exacerbated the subordinate relationship of students to school administrators and school resource officers (SROs).⁶⁷ No longer are students simply subject to the discipline of faculty, rather, students are faced with SROs daily—and the threat that a simple infraction can land them in custody of these officers.⁶⁸ This ever-evolving relationship between students, administrators, and SROs demonstrates that, like one researcher found, “[b]ecause legal standards for searches and interrogations have a much lower standard within schools, SROs may operate with more latitude than other police officers, thus posing a threat to students’ civil rights.”⁶⁹ Inevitably, given the discussion above, the change in this relationship requires us to examine whether the schoolhouse is an inherently coercive environment when making *Miranda* determinations.

66. Chelsea Connery, *The Prevalence and the Price of Police in Schools*, UCONN CTR. FOR EDUC. POL’Y, at 2 (2020).

67. *Id.*

68. See e.g., Ryan King & Marc Schindler, *A Better Path Forward for Criminal Justice: Reconsidering Police in Schools*, BROOKINGS INST. 37, 39 (2021), https://www.brookings.edu/wp-content/uploads/2021/04/4_Better-Path-Forward_Ch4_Reconsidering-Police-in-Schools.pdf.

69. See Connery, *supra* note , 66 at 8.

1. Truancy Laws Create Inherently Custodial Environments for Students Because They Are Not Allowed to Leave, and They or Their Guardians Could be Found Criminally or Civilly Liable for Missing School.

Across the country, truancy laws⁷⁰ compel student attendance at school, making their presence required. The first truancy laws were enacted in 1852 in Massachusetts, but by 1918 every state had some version of compulsory attendance law.⁷¹ Created to curtail child labor during the industrial revolution of the early twentieth century, truancy laws were a reflection of the shifting labor market punctuating an evolving society, our lowered reliance on children in the agriculture sector, and the increase in immigrant labor that filled much of the workforce that children once had.⁷²

Unlike other school behavioral issues, truancy affects male and female students almost equally.⁷³ Truancy issues also highlight a divide between upper- and lower-income students—essentially, students with more resources often have a greater chance of addressing underlying issues that affect attendance and are not subject to dealing with the repercussions of truancy laws and chronic absenteeism when they are at school.⁷⁴ Usually, truancy peaks in high school, around age sixteen⁷⁵ and can be caused by myriad factors:

Kids don't often have a lot of forward thinking[;] they don't think about the consequences of skipping once versus the consequences of skipping twice. Some of them have real challenges [at home, too]. Some of the

70. Sometimes referred to as “compulsory attendance” laws, truant is defined as: “a child who is regularly absent from school without permission.” *Truant*, CAMBRIDGE DICTIONARY ONLINE, <https://dictionary.cambridge.org/us/dictionary/english/truant> (last visited Jan. 7, 2022).

71. Adriana Lleras-Muney, *Were Compulsory Attendance and Child Labor Laws Effective? An Analysis from 1915 to 1939*, 45 J.L. & ECON. 401, 403 (2002).

72. *Id.* at 401–02. *But see* Nadja Popovich, *Do US Laws That Punish Parents for Truancy Keep Their Kids in School?*, THE GUARDIAN (June 23, 2014), <https://www.theguardian.com/education/2014/jun/23/-sp-school-truancy-fines-jail-parents-punishment-children>.

73. Popovich, *supra* note 72.

74. *Id.*

75. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUST., JUVENILE COURT STATISTICS 2018, at 66 (2018), <https://ojdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/juvenile-court-statistics-2018.pdf>.

kids who are truant, man, you just have to commend them for getting out of bed in the morning. Their lives are sometimes incredibly hard, and teachers and others at school don't often know what is going on in their life. Maybe they have to babysit for a younger sibling, or take care of grandma, or if mom and dad were fighting all night and you couldn't sleep. A lot could be going on.⁷⁶

Regardless of which students are more prone to violate truancy laws, the majority of states levy fines on parents if their children do not attend school regularly.⁷⁷ Some states, like South Carolina, even include truancy as a possible basis for the criminal charge of delinquency of a minor.⁷⁸ In one of the most egregious applications of truancy laws, a Pennsylvania woman died while serving a forty-eight-hour jail sentence for her child's truancy fines, that totaled roughly two thousand dollars.⁷⁹

In effect, truancy laws can be incredibly detrimental to parents and students found in violation; they have the full force of any other civil or criminal penalty, and some states have incredibly strict truancy laws:

76. Popovich, *supra* note 72.

77. Popovich, *supra* note 72.

78. S.C. CODE ANN. § 16-17-490 (1976).

79. Popovich, *supra* note 72.

State	Definition of Truancy	Consequence of Violation
<p>Pennsylvania</p> <p>24 PA. STAT. AND CONS. STAT. ANN. §§ 13-1326, 1333.3 (West 2016).</p>	<p>More than three unexcused absences from school. After three unexplained absences, students and parents are both found in violation of state truancy law.</p>	<p>Student and parent can be fined up to \$300 per additional unexcused absence. If parents cannot or do not pay, or if they do not complete a required parenting class, they “may be sentenced to the county jail for a period not to exceed three (3) days.”</p>
<p>Georgia</p> <p>GA. CODE ANN. §20-2-690.1 (2014)</p>	<p>Defines truancy as any more than five unexcused absences</p>	<p>(1) a fine of up to \$100; (2) up to thirty days in jail; (3) community service; (4) any combination of the above.</p>
<p>California</p> <p>CAL. EDUC. CODE §§ 48260–48293 (2013); CAL. PENAL CODE § 270.1 (2011).</p>	<p>Students are considered truants if they miss three full days in a single school year or are late to class more than thirty minutes on three occasions, without a valid excuse, in a school year. California defines a chronic truant as any student who is subject to the compulsory attendance law who misses 10% or more of the school year without a valid excuse.</p>	<p>Chronic truants, or those who have been referred to the school truancy board four times, can be referred to juvenile court and their parents can be fined up to one thousand dollars for civil contempt. Additionally, parents of students in kindergarten through eighth grade may be found guilty of a misdemeanor and jailed for no more than one year and fined up to \$2,000.00</p>
<p>Delaware</p> <p>DEL. CODE ANN. tit. 14, §§ 2721–2729 (2021).</p>	<p>Students are considered truants after three unexcused absences during the school year. Upon a determination that a student is a truant, school officials can schedule a meeting with the student and guardian and can also file a complaint with the court.</p>	<p>Parents who are found guilty can be fined up to \$300 and imprisoned up to ten days; second offenses can carry a fine of up to \$500 and twenty days in jail; and third offences come with a fine of up to \$1,150 and thirty days in jail.</p>

Just last year, over three hundred students and parents in two Dallas area school districts⁸⁰ were referred to court for truancy actions. And though Texas has taken legislative action in the last five years to decriminalize truancy for students, students and their parents can still be subject to civil liability for missing school.⁸¹ In one such case highlighted by The Dallas Morning News, a mother was unable to watch her children during virtual learning because she had to go to work in person.⁸² The mother told the court that she did not send the children to in-person school because she could not afford to buy them new clothes so they stayed home.⁸³ Though the judge connected the mother with a second-hand clothing closet for her children so they could return to in-person learning (during a pandemic, in one of the highest transmission states), the mother will still be responsible for paying the truancy fine accumulated.⁸⁴

Texas is far from alone in its enforcement of truancy laws. Juvenile Court Statistics show that truancy remains the top offense referred to juvenile court, making up 62% of juvenile court cases in 2018.⁸⁵

But what, if anything, should truancy laws do for the *Miranda* custodial analysis? Unequivocally, truancy laws remove the aspect of choice from school attendance—because truancy laws apply to private and public schools alike.⁸⁶ So it would follow that where students do not have a choice as to whether they can be away from school, and where there is a heightened presence of police in school, that any time they engage with police or resource officers on school grounds, they are *already* in a custodial environment. The custodial analysis of *Miranda* centers around the psychological interpretation of in custody, focusing on isolating a subject to be questioned, distinguishing a subject being at home or elsewhere familiar with making a subject succumb to

80. Talia Richman, *Some North Texas Students and Parents Facing Court for Classes Missed During the Pandemic*, THE DALLAS MORNING NEWS (Apr. 1, 2021), <https://www.dallasnews.com/news/education/2021/03/31/some-north-texas-students-and-parents-facing-court-for-classes-missed-during-the-pandemic/>. (“Mesquite referred 19 students to truancy court last fall along with 86 parents. Of those, nearly all were Black or Hispanic. Duncanville filed cases on 65 parents and 143 students, most of whom came from low-income families.”).

81. *Id.* Previously, children and teens were subject to criminal sanctions and even jail time for missed school, which would ironically make them miss more school.

82. *Id.*

83. *Id.*

84. *Id.*

85. HOCKENBERRY & PUZZANCHERA, *supra* note 75, at 64.

86. *See, e.g.*, S.C. CODE ANN. § 59-65-10 (1976).

questioning “at least in a room of [the officer’s] choice,” such as the interrogator’s office.⁸⁷ But *Miranda* requires an objective determination on whether the subject would have felt free to leave. Undeniably, students—in all fifty states, regardless of if they attend public or private schools—are not free to leave according to the state’s own truancy laws.⁸⁸ *Miranda* requires that confessions are more than simply voluntarily made; instead, *Miranda* requires the absence of compulsion:

The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that, from the causes which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement when but for the improper influences he would have remained silent.⁸⁹

The Court continued, citing Justice Brandeis’s decision in *Ziang Sung Wan v. United States*:

In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the

87. *Miranda v. Arizona*, 384 U.S. 436, 449 (1966).

88. *State Education Practices, Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT’L CTR. FOR EDUC. STATS. (2017), https://nces.ed.gov/programs/statereform/tab1_2-2020.asp [hereinafter NAT’L CTR. FOR EDUC. STATS.].

89. *Miranda*, 384 U.S. at 462.

compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.⁹⁰

Both the *Miranda* Court and the Court in *Ziang Sung Wan* recognized that the custodial analysis, and subsequent voluntarily analysis, require us to expand our definition for whatever may have been the character of the compulsion.

Contemporary truancy laws, coupled with the heightened presence of police officers, SROs, or both, in schools creates an environment where students are not physically or psychologically free. As such, students interrogated in a school setting do not have the requisite voluntariness component to waive their *Miranda* rights.

Additionally, recognizing that students are not voluntarily in school, and therefore already in a custodial situation, keeps both law enforcement and the courts from undertaking a massive totality of the circumstances analysis that requires an inquiry into case specific factors, none of which account for compulsory attendance.

C. The Current Totality of the Circumstances Custody Analysis Is Insufficient to Recognize the Reality That Students Are Already in a Custodial Environment in Schools.

Some courts have properly found that students are in a custodial setting while being questioned in school, but those cases have involved in intensive exploration of fact-specific circumstances that has left the school-custody analysis as a hodgepodge of factors to be considered—rather than a clear understanding that students are in a custodial environment when in a school setting. In *B.A. v. State*, the Supreme Court of Indiana identified the absurd number of considerations that both law enforcement, and subsequently the justice system, must undertake to determine whether a student should be afforded *Miranda* protections while being questioned at school.⁹¹

The court in that case concluded that the student, who was escorted off his school bus and to the vice principal's office for questioning by the vice principal and a single SRO, was in fact in custody.⁹² The court

90. *Id.* (quoting *Ziang Sung Wan v. United States*, 266 U.S. 1, 14–15 (1924)).

91. *B.A. v. State*, 100 N.E.3d 225, 232–33 (Ind. 2018).

92. *Id.* at 233–34.

relied heavily on the original *Miranda* analysis, noting that “the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals”⁹³ and that “[c]hildren are particularly vulnerable to that coercion, making *Miranda* warnings especially important when police place a student under custodial interrogation at school.”⁹⁴ Additionally, the *B.A.* court identified the heightened disciplinary aspect and risk of educational consequences that students face while they are being investigated at school; namely, that students *are already at risk* of suspension or expulsion regardless of whether an officer is present during questioning.⁹⁵

Though the factors identified in *B.A. v. State* are all part of the totality of the circumstances analysis required by the current *Miranda*-custody framework, each of these factors, derived from cases across the country, warrant their own analysis because each factor fails to properly recognize the compulsory aspect of school attendance in the first place:

Factor 1—The number of officers present and how they are involved: In *S.G. v. State*,⁹⁶ the Court of Appeals of Indiana found that a seventeen-year-old student, suspected of stealing a cellphone, was not in custody when questioned by the school’s principal in the presence of an officer who worked at the school.⁹⁷ There, the court relied on the student being brought to the principal’s office at the request of the principal, and not as part of a direct police investigation. However, the court glanced over the fact that the student was escorted out of class by the officer and brought to the principal’s office, where the officer remained while the student was questioned. The court further rationalized that because the principal, and not the police officer, asked the question about the cell phone, the student was not in a custodial environment.⁹⁸

This analysis fails basic reasoning. Regardless of who asked questions of the student, the student in *S.G.* was removed from his class by a uniformed officer; therefore, he was under the physical direction of the officer and should have been considered to be in custody then. What

93. *Id.* at 230 (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, (1966)).

94. *Id.*

95. *See id.* at 229.

96. *See S.G. v. State*, 956 N.E.2d 668 (Ind. Ct. App. 2011).

97. *Id.* at 679.

98. *Id.*

should the student have done? Run? Was he free to say “I’m not going with you” when removed from class? Of course not. While at school, students are expected to follow the direction of adults in authority positions. We use schools to embed in students a certain amount of respect for authority and social understanding.⁹⁹ When coupled with the subordinate nature of the student–faculty relationship, S.G.’s situation demonstrates that regardless of how involved an officer may be in the actual questioning, students are in a restricted environment well before formal interrogation.

Factor 2—Whether the setting is a traditional school discipline environment or is police-dominated: In *In re Tyler F.*,¹⁰⁰ the Supreme Court of Nebraska also found that a student was not in a custodial environment when plain-clothed police came to his school, requested that the SRO remove the student from class, and then questioned him.¹⁰¹ Neither the officers nor the SRO ever read the student his *Miranda* rights, even though the questioning was part of an active investigation.¹⁰² Though the court identified the six-part test to determine custody used by the Eighth Circuit:

- (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to [leave], or that the suspect was not considered under arrest;
- (2) whether the suspect possessed unrestrained freedom of movement during questioning;
- (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions;
- (4) whether strong[-]arm tactics or deceptive stratagems were employed during questioning;
- (5) whether the atmosphere of the questioning was police dominated; or,
- (6) whether the suspect was placed under arrest at the termination of the questioning.¹⁰³

99. See Nancy Kober, *Public Education for the Common Good: Why We Still Need Public Schools*, CTR. ON EDUC. POL’Y 7, 10 (2007), <https://eric.ed.gov/?id=ED503799>.

100. *In re Tyler F.*, 755 N.W.2d 360 (2008).

101. *Id.* at 364-65.

102. *Id.* at 365.

103. *Id.* at 367.

The court placed an inordinate amount of emphasis on the last three factors. The court found no *Miranda* violation because Tyler provided no evidence that he was threatened with juvenile detention, Tyler was told he was not formally under arrest, Tyler was not handcuffed or physically restrained, and the atmosphere of the interrogation was the school, rather than the police station.¹⁰⁴

This again begs the question if *any reasonable person* would have felt free to resist police and authority figures in such a situation. Any person who has ever gone to school, ever been called to the principal's office, or ever been in a small, windowless room with not only authority figures, but also armed police officers, knows that this is exactly the type of situation where *Miranda* is most important. Reliance on a subjective, six-factor test in this case fails the accused in this case. Recognizing that the instant Tyler is removed from class by a resource officer, or by any school authority figure, would place him in a not-free-to-leave situation would properly push the custody analysis back to well before questioning even began.

Factor 3—What the student is told about the interview: *In re C.H. v. C.H.*,¹⁰⁵ the Supreme Court of Nebraska again took up the custody in school analysis, but, in applying the same six-factor test, determined that the student in that case was in custody.¹⁰⁶ The court this time properly found that not only had the student never been told he was free to leave but also that he was never told that he was neither under arrest nor that he had the choice to not talk to the officers.¹⁰⁷ The student in *C.H.* allegedly committed sexual assault against his step-sister; C.H. was taken directly to juvenile custody after interrogation because he was not welcome back at home.¹⁰⁸ Here, C.H. was not only in a custodial environment, but also in a situation where adults responsible for his well-being abandoned him due to his alleged conduct. Arguably, C.H.'s constitutional due process rights required even more heightened consideration and clarity because he had no adult willing to advocate for him. Again though, had there been an initial recognition of the need for a *Miranda* warning prior to questioning, not only would C.H.'s due

104. *Id.* at 369-70.

105. *In re C.H. v. C.H.*, 763 N.W.2d 708 (2009).

106. *Id.* at 715.

107. *Id.*

108. *Id.* at 712.

process rights been given proper consideration, but this investigation would have been without procedural defect, making justice for the victim more likely.

Factor 4—The length of the interview: In *People v. N.A.S.*,¹⁰⁹ during a sexual assault investigation, a student was removed from regular school activities and taken to the principal's office.¹¹⁰ There, he was met by his father and uncle and was soon joined by not only the SRO, but also a uniformed police officer who presented a *Miranda* card to the student.¹¹¹ The student and the father acknowledged that the student understood his rights and could proceed with questioning.¹¹² The student denied knowing anything about the alleged incidents, and the whole interrogation took somewhere between five to ten minutes.¹¹³

Upon appellate review of the trial court's proper determination that the student did not knowingly, voluntarily, and intelligently waive his rights, the Supreme Court of Colorado determined the student was never actually in custody—so no *Miranda* warning was ever needed.¹¹⁴ The court weighed yet another set of factors in coming to this determination:

1. the time, place, and purpose of the encounter;
2. the persons present during the interrogation;
3. the words spoken by the officer to the defendant;
4. the officer's tone of voice and general demeanor;
5. the length and mood of the interrogation;
6. whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation;
7. the officer's response to any questions asked by the defendant;
8. whether directions were given to the defendant during the interrogation; and

109. *People v. N.A.S.*, 329 P.3d 285 (Colo. 2014).

110. *Id.* at 287.

111. *Id.*

112. *Id.*

113. *Id.* at 288.

114. *Id.* at 291.

9. the defendant's verbal or nonverbal response to such directions.¹¹⁵

The court reasoned the questioning did not constitute custodial interrogation because: the interrogation was relatively short, non-law-enforcement personnel were present, the officer never raised his voice, the questioning happened in a school setting and not in a police station, and the student's movements were never restricted.¹¹⁶ Furthermore, the court gave only a passing glance at the age of the suspect—who was thirteen.¹¹⁷ The court would never undertake this analysis if only there was the recognition that the removal of a student from regular school activity to a questioning environment constitutes custody.

This case also demonstrates exactly why it is imperative not only to recognize that students are in an inherently custodial environment at school but also to recognize that minors cannot properly waive their *Miranda* rights in school settings. Like the trial court in this case found, though the subject here was accompanied by his father, who assured the officer that the child understood his rights, the waiver was improper. Children, when faced with a room full of adults, in a place where they are not free to leave, are not capable of voluntarily or intelligently waiving their rights. Not only is it likely that the student was following his father's lead in the waiver of his rights but also it is empirically likely that the child did not fully understand the rights he was waiving.¹¹⁸

Factor 5—The student's age. As discussed in the beginning of this Note, *J.D.B. v. North Carolina*, while inserting an age factor into the totality of the circumstances analysis, consideration of age alone is insufficient to properly recognize that students are already in custody in school.¹¹⁹ Many truancy laws apply to students over the age of eighteen.¹²⁰ These students, likely older high school students, are still in a subordinate relationship with faculty and staff while at school, and, for purposes of this analysis, are at even greater risk of adverse impact of truancy laws because they are likely responsible for their own civil

115. *Id.* at 289.

116. *Id.* at 289-90.

117. *Id.* at 291.

118. See generally discussion *supra* Part III.A.

119. *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

120. See NAT'L CTR. FOR EDUC. STATS., *supra* note 88.

finances and are ineligible for juvenile court. Exactly because truancy laws can compel school attendance for students over the age of eighteen who have not completed high school, it is necessary to find that schools are inherently custodial, regardless of the age of the students affected.

Factor 6—Whether the student is taken into custody after the interview: In *Howes v. Fields*, the Supreme Court determined that an already incarcerated person was not in a custodial interrogation setting precisely because he was already incarcerated when questioning began.¹²¹ Even though this factor is listed by the Supreme Court of Indiana as a factor to consider for the custody analysis of students, adding this factor to the custodial interrogation analysis is too little too late. Subjects are afforded *Miranda* protections *before* custodial questioning. Whether a subject is subsequently arrested requires a retro-analysis of the circumstances surrounding the interrogation. This factor improperly shifts the analysis to the objective actions of the officers and strays from analyzing the objective understanding of the subject. Subsequent arrest should not be a part of the totality of the circumstances analysis and can be disposed of by acknowledging that students are in custody when being questioned in school.

Factor 7—The relationship between the parties, including whether police officers act as teachers, counselors, or law enforcement agents:¹²² By interjecting this factor into the custody analysis, the court in *B.A. v. State* requires further fact-specific inquiry, on a case-by-case basis, for understanding the relationship between schools and their resource officers or law enforcement officers before determining custody. This factor, while important to understanding the overall custodial environment created by these relationships, again removes the analysis from whether the student would feel free to leave during questioning, and places improper emphasis on contractual relationships that students are not privy to. Students do not objectively know the relationship between their school administrators and the officers on school grounds. In fact, schools use this to their advantage¹²³ by creating an environment where students have a multitude of authority figures on

121. *Howes v. Fields*, 565 U.S. 499, 509 (2012) (listing yet another set of factors for the custody analysis); As author of this Note, I do not agree with the Court's analysis and would argue that, like school, prison is also inherently custodial for the same reasons set forth herein

122. See *Minnesota v. Murphy*, 465 U.S. 420, 459–60 (1984) (Marshall, J., dissenting); see also Lesley, *supra* note 65.

123. See Connery, *supra* note 66.

school grounds; schools wield considerable power over students' freedom to resist any of the authority figures they are met with daily.

The preceding seven factors, though not exhaustive or exclusive of a fuller totality of the circumstances analysis, are the most comprehensive custody analysis afforded students to date. What is readily apparent when considering all of these factors is that, because the custody analysis entails fact-specific inquiries by the courts, a proper analysis of all relevant factors is virtually impossible for law enforcement officers to make in the moment.

Unfortunately, retroactive consideration of all relevant factors is a dereliction of the responsibility that we all owe to minors to protect their constitutional rights. In schools, the custody analysis should be much less cumbersome. Students are required to be present in school by way of the legal obligation created by truancy laws. Therefore, *Miranda* warnings must be given at any time when a student is directly questioned by law enforcement or is removed from the classroom by law enforcement for the purpose of being questioned at school. However, because minors lack capacity to properly understand their *Miranda* rights, we must also recognize that no *Miranda* waiver can be made intelligently by minors, or voluntarily in schools, because there is an inherent aspect of compulsion in school attendance.

IV. REMEDIES

There has been a recent push to recognize that various aspects of the juvenile justice system fail to properly address the special circumstances that minors are in when engaging with either law enforcement or the justice system itself. Even the Supreme Court in recent years has taken steps to recognize that child offenders are psychologically different than adult offenders by finding it unconstitutional for minors to receive the death penalty and finding it unconstitutional for minors to receive life without parole for non-homicide crimes.¹²⁴ But the Court has not been

124. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("A majority of states have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment."); *Graham v. Florida*, 560 U.S. 48, 74 (2010) ("In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders. This determination; the limited culpability of juvenile nonhomicide offenders; and

as forward-thinking when it comes to applying the same acknowledgement of the lowered capacity of minors when it comes to the custody analysis. As such, there has been a jumble of attempted remedies.

Some scholars and courts have passively found that *Miranda* waivers create quasi-contracts that impart a higher level of obligation on the state to not use incriminating statements when a *Miranda* warning is given and then improperly waived.¹²⁵ Other remedies are statutory in nature, which aim to codify the rights of minors during interrogations. But none of these remedies, either through common law or statutory law, begin the analysis early enough to properly protect interrogated students in schools.

A. Common Law Provided Remedy by Viewing *Miranda* Waivers as Quasi-Contracts

Quasi-contracts are “obligations created by law for reasons of justice.”¹²⁶ In essence, a quasi-contract is an operation of the legal system to find parties bound to one another through the promise of performance—regardless of whether performance has occurred and in the absence of a formal contract.¹²⁷ The court may find a quasi-contract exists to prohibit a party from becoming unjustly enriched by the another when they do not reciprocally act.¹²⁸

Miranda waivers do not have to be written to show that the subject waived their rights in a voluntary, knowing, and intelligent manner.¹²⁹ But, *Miranda* waivers essentially create lop-sided performance obligations for the subjects: Subjects allegedly have information that law enforcement wants, but subjects also have rights; to get the

the severity of life without parole sentences all lead to the conclusion that the sentencing practice under consideration is cruel and unusual.”).

125. See *Hawkins v. LeFevre*, 758 F.2d 866, 875 (2d Cir. 1985); *Morgan v. Hall*, 569 F.2d 1161, 1165–66 (1st Cir. 1978); Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 906 (2017).

126. RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. b (1981); *id.* § at 14 (“Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person’s eighteenth birthday.”).

127. Quasi-contract Definition, *Black’s Law Dictionary* (11th ed. 2019) available on Westlaw.

128. *Id.*

129. *Miranda Waivers and Invocations (MP3)*, FED. LAW ENF’T TRAINING CTRS., <https://www.fletc.gov/miranda-waivers-and-invocations-mp3> (last visited Nov. 22, 2021).

information, law enforcement wants the subject to bargain those rights. Subjects then bargain those rights by speaking, in hopes that the interrogation will end, and give law enforcement the information they sought by bargaining their rights. Here, the transfer of information is the execution of the promise by the subject, which creates a quasi-contractual relationship.

It is important to note that because quasi-contracts are not formal contracts, and are judicially and retroactively imposed, they do not require mutual assent.¹³⁰ This particularly matters for purposes here, because law enforcement officers do not have to promise anything to the subjects, nor do either of the parties need to demonstrate that they came to a mutual understanding as to *why* they were giving this information.¹³¹ Likewise, courts have interpreted the Supreme Court holding in *Doyle v. Ohio* to be based in implied contract law theory, which would in turn make *Miranda* warnings implied contracts.¹³² Where the courts have found *Miranda* warnings themselves are based in contract law, it is objectively apparent that the waiver of one, of some, or of all the constitutional and contractual rights would also be contractual in nature.

But why would this matter?

Finding that *Miranda* waivers create quasi-contracts is important because minors are afforded an equitable remedy in contract law: The defense of infancy.

The defense of infancy, often called “the Infancy Doctrine,” allows minors to disaffirm their contractual obligations, which has historically protected minors against both their own misunderstandings about the ramifications of contractual relationships and protected them from

130. See George P. Costigan, Jr., *Implied-in-Fact Contracts and Mutual Assent*, 33 HARV. L. REV. 376 (1920); see Quasi-contract Definition, *Black’s Law Dictionary* (11th ed. 2019) available on Westlaw.

131. The absence of a mutual assent requirement in quasi-contracts is critical to this analysis. Law enforcement does not need to promise anything for the relationship to be formed. For example, this relationship can be formed without the law enforcement officer saying something to the effect of: “If you just tell me what happened, I can help you.” Instead, quasi-contractual relationships already acknowledge and take into account that there may be contractual relationships formed even where one party that is savvy, or readily understands the limits that formal, reciprocal promises may have on the parties.

132. See *Hawkins v. LeFevre*, 758 F.2d 866, 875 (2d Cir. 1985); *Morgan v. Hall*, 569 F.2d 1161, 1165–66 (1st Cir. 1978).

uncompassionate and opportunistic adults who would take advantage of a minor's youth and lack of worldly understanding.¹³³ Historically, infancy has been used to uncouple minors from personal property obligations, but like some scholars and judges have alluded to,¹³⁴ it is beyond the pale that we would give minors greater leeway to rescind their contractual obligations than we would to disaffirm statements given to law enforcement after compromising their constitutional rights.

Though the application of the Infancy Doctrine to *Miranda* waivers is worthy of further exploration, this too would be a remedial measure that would not affect minors in a pre-*Miranda* setting. Though it is very likely that minors understand their constitutional due process rights even less than they understand their contractual obligations,¹³⁵ retroactively applying the Infancy Doctrine would still not adequately affect the custodial analysis; by determining that school is an inherently custodial situation for students due to compulsory attendance laws, we would properly begin the student-custody analysis from the standpoint of recognizing that, in school, students may not freely leave.

B. State Statutory Remedies

Over the last few years, some states have taken initiative to protect minors from due process violations during interrogations. These statutory remedies, which include not allowing minors to waive their *Miranda* rights without the presence of an interested adult, not allowing law enforcement to lie to minors during interrogations, and requiring interrogated students to have contact with an attorney prior to signing a *Miranda* waiver, while being important steps in correctly recognizing the general failures of the juvenile justice system, are still not adequate for properly dealing with students interrogated in schools.

133. Thomas E. Greenwald, *Contracts: Infant's Disaffirmance and Infant's Right to Void*, 52 MARQ. L. REV. 437, 438 n.8 (1969) ("The philosophy stems from the policy of protecting the minor against his own improvidence and the impositions of more mature and worldly adults, by permitting the minor to freely void his contracts not for necessities. Annot., 12 A.L.R.3d 1174 (1967). This policy is perfected by use of the historical doctrine of incapacity to make a binding contract or irrevocable conveyance. Such a tool was borrowed from early feudal law, where it was enacted to protect not so much the child or the wife of the lord of the manor, but the lord himself, since the responsibilities and obligations of the minors and women fell upon him.").

134. See *Serrano v. State*, 15 So.3d 629, 641-42 (2009) (Browning, J., dissenting).

135. See discussion *supra* Part III.A.

Illinois's law, which attempts to remedy the high rate of false confessions attributable to police coercion, bars police from lying to minors during interrogations.¹³⁶ Though the Illinois law is crucial for interrogation integrity, it does nothing to address when the police may begin the questioning of minors in the first place. For this law to be in effect, a minor must already be the subject of an interrogation, and it must be clear that there is, in fact, an interrogation happening. By finding that students are in an inherently custodial situation when engaging with law enforcement in schools, we would protect students' due process rights before questioning began.

California's law requires that minors be provided consultation with an attorney prior to waiving their rights before custodial interrogation.¹³⁷ Applicable to minors fifteen and younger, California Welfare & Institutions Code section 625.6 addresses one of the central concerns of juvenile justice advocates, of whether children can ever properly waive their rights in an interrogation.¹³⁸ But what the California law requires, like the Illinois law, is recognition that a custodial interrogation is happening or is about to happen. To determine whether a minor subject is in custody requires law enforcement to make an in-the-moment, totality of the circumstances analysis that is beyond the scope of what many officers are capable of because officers are traditionally only trained in adult interrogations.¹³⁹ So, while a consultation with a lawyer may be considered a best practice—even internationally¹⁴⁰—when interrogating minors because it cuts down on the number of improper waivers and lowers the likelihood of false confessions,¹⁴¹ the required

136. Jaclyn Diaz, *Illinois is the 1st State to Tell Police They Can't Lie to Minors in Interrogations*, NPR (July 16, 2021, 5:12 AM), <https://www.npr.org/2021/07/16/1016710927/illinois-is-the-first-state-to-tell-police-they-cant-lie-to-minors-in-interrogat>.

137. *California: New Law Protects Children in Police Custody*, HUMAN RIGHTS WATCH (Sept. 30, 2020, 8:00 PM), <https://www.hrw.org/news/2020/09/30/california-new-law-protects-children-police-custody>.

138. CAL. WELF. & INST. § 625.6 (2017).

139. Hayley M.D. Cleary & Todd C. Warner, *Police Training in Interviewing and Interrogation Methods: A Comparison of Techniques Used with Adult and Juvenile Suspects*, 40 L. & HUM. BEHAV. 270, 272 (2016) (reporting that only ten minutes of instructional hours were dedicated to child interrogations).

140. See Madalyn K. Wasilczuk, *Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense*, 45 N.Y.U. J. INT. L. & POL'Y 291, 318–20 (2012).

141. See generally Hana M. Sahdev, *Juvenile Miranda Waivers and Wrongful Convictions*, 20 J. CONST. L. 1211 (2018).

consultation with an attorney still assumes law enforcement officers will properly determine when students are in or about to be in custody.

The Iowa Department of Education, while asserting that school officials who question students do not automatically trigger the need for a *Miranda* warning, expressly states that anytime a SRO or law enforcement officer is involved in the questioning there is a duty to Mirandize the subject.¹⁴² Furthermore, Iowa does not allow any juvenile subject under the age of fourteen to waive their *Miranda* rights without an adult present.¹⁴³ But, as we have seen, even the presence of an interested adult such as a parent may not adequately protect a student-subject while in school.¹⁴⁴ Requiring *some* interested adult creates a dynamic where the minor subject may be looking to the adult, who may understand what a *Miranda* waiver is, while still not understanding the rights they are giving up themselves.

Simply stated, none of these remedies begin the custody analysis early enough to properly address the reality that American students find themselves in every day. And we must begin to recognize that students are compelled by law to be present in school; therefore, they can never truly feel free to leave a possible custodial interrogation while in school.

V. CONCLUSION

The current totality of the circumstances analysis for custody determinations of students is a mix of court-determined factor tests and state laws that create a patchwork of rights when it comes to determining whether minors are in custody when they are at school. But, by applying the rationale that truancy laws compel the attendance of students in both public and private schools, and carry civil or criminal consequences, the justice system can clarify that students are already in a custodial environment in school, which would streamline the *Miranda* analysis and remove the subjective determinations of law enforcement in the totality of the circumstances tests. Changes in the make-up of American schools, through an influx in the presence of law enforcement and SROs, coupled with state specific truancy laws, have created both a

142. *Miranda Warnings to Students*, IOWA DEP'T OF EDUC., <https://educateiowa.gov/resources/legal-resources/legal-lessons/miranda-warnings-students> (last visited Jan. 2022).

143. *Id.*

144. *See* *People v. N.A.S.*, 329 P.3d 285 (Colo. 2014).

subjective and objective custodial environment for students. By beginning the custody analysis in school prior to the active questioning of students by law enforcement officers, we would actively protect their due process rights in interrogations. Finding that truancy laws compel attendance of students and therefore restrict their freedom to resist interrogative questioning while on school grounds would not only properly acknowledge the reality of schoolchildren across the United States, but would also cut down on retroactive, fact-specific inquiries by the courts when determining custody for *Miranda* purposes. Finally, if the custody in school analysis remains impervious to change, then *Miranda* waivers should be considered quasi-contracts, and minors should maintain rescission rights similar to the rescission right considered in the Infancy Doctrine.