POLICING THE SCHOOLHOUSE

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In his new book, *The Schoolhouse Gate: Public Education, the Supreme Court, and the Battle for the American Mind*, Professor Justin Driver describes the risk that schoolhouse gates can open to jail cells as schools become Constitution-free zones.[1] Many of the most troubling cases and examples in his account of how the U.S. Supreme Court, the focus of the book, has adjudicated public education cases involves criminal investigations. I want to place what Driver describes regarding the Justices' rulings and schools into a larger juvenile-justice context. The Court's rulings make more sense, but are still more troubling, when understood in relation to other criminal justice actors outside the school. During the same time period in which the Court engaged with policing in schools, amidst growing efforts to punish juveniles as adults, scientists have made important leaps in their research and learned much more about adolescent brain development. This book is about judges retreating from protecting student rights. As judges have retreated, police and prosecutors have moved in.

During the time period that Driver focuses on, as he notes, public schools have welcomed an increased presence of police, with a resulting "school-to-prison pipeline."[2] Yet during that time, Driver describes, the Supreme Court has done little to address the unique criminal procedure questions that arise in schools, despite some "welcome steps" in certain respects.[3] Driver begins with the seminal case of *New Jersey v. T.L.O.*,[4] decided by the Court in 1985, supporting the use of student searches using a low "reasonable suspicion" standard for searches by school officials. This standard is lower than the probable cause standard that would apply outside a public school under the Fourth Amendment. Driver describes the subsequent rise of uniformed school resources officers, with police in half of public high schools, and federal funding to support the hiring of police in schools beginning with the Safe Schools Act of 1994.[5] Driver argues that when it is a police officer executing a search of a student, the probable cause standard should apply, not the reasonable suspicion standard used for school officials.

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[1] JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND (2018).

[2] *Id.* at 186.

[3] *Id.* at 187.

[4] 469 U.S. 325 (1985).

[5] DRIVER, *supra* note 1, at 204.

With omnipresent police in many schools, criminal procedure matters to students far more than ever before. Driver describes how the Supreme Court in *Board of Education v. Earls*[6] upheld suspicionless drug testing in schools, even extended to all after-school activities. In one of the more lighthearted passages in the Court's recent public education cases, Justice Ruth Bader Ginsburg mocks the danger of "colliding tubas" in the marching band.[7] As Driver points out, there is no evidence that this random testing reduces student drug-use rates.[8] But such drug testing in public schools has expanded in the years since. One in seven public schools conduct such testing. Courts have been more skeptical of dog searches,[9] yet other rulings have upheld metal detectors, which Driver calls a "minimal intrusion" justified by the potential harm of discovering illegal weapons.[10]

Perhaps the most interesting criminal procedure case in recent years is *J.D.B. v. North Carolina*,[11] decided in 2011, in which the Supreme Court Justices grappled with *Miranda* warnings in the schoolhouse and the Fifth Amendment self-incrimination rights of public school students. Driver describes this as an unusual opinion, narrowly confined to the circumstances of the case. The Justices did not rule on whether J.D.B.'s questioning was custodial interrogation "despite overpowering evidence supporting that conclusion."[12] Driver argues that when police officers question students in school, such questioning should be presumed to be a custodial interrogation. Officers should have to give all juveniles the *Miranda* warnings.[13]

That is where the discussion ends: juveniles should get the same protections as adults and be given the legalistic *Miranda* warnings. Perhaps that is where a discussion might end, if it is largely confined to the Supreme Court-centered question of whether what the Court says in school cases is like what it says in other cases. To be sure, in non-school police questioning cases, the Court has increasingly created a wide range of exceptions to *Miranda*, including by being more flexible about what counts as police custody.[14] The reasoning in *J.D.B.* is very much in line—unfortunately, in my view—with many of the Justices' growing skepticism of the value of regulating police interrogation under the Fifth Amendment.

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[6] 536 U.S. 822 (2002).

[7] DRIVER, *supra* note 1, at 213.

[8] *Id.* at 216-17.

[9] *Id.*

[10] *Id.* at 218.

[11] 564 U.S. 261 (2011).

[12] DRIVER, supra note 1, at 235.

[13] *Id.*

[14] *See generally* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1 (2010); Brandon L Garrett, *Remaining Silent after* Salinas, 80 U. CHI. L. REV. DIALOGUE 116 **(**2013).

A different starting place is juveniles: who they are and what interrogations do to them. As the Supreme Court said in *In re Gault*,[15] the Court has long viewed juvenile confession evidence with "special caution."[16] Perhaps more importantly, the Court, in a range of cases not involving schools, has recognized the developmental differences between adults and juveniles. A substantial body of scientific research, including neurological research, documents how juveniles and minors are more impressionable and vulnerable to coercion and suggestion. Indeed, for that reason, the draft *Restatement of the Law, Children and the Law* § 14.22 and the *Principles of Policing* both state that "a juvenile age 14 or younger can give a valid waiver of the right to counsel and the right to remain silent only after meaningful consultation with and in the presence of counsel."[17]

While the Justices may wring their hands about how to interpret *Miranda* in school (and non-school) settings, the reality is that juveniles are simply at great risk for false confessions. Barry Feld, for example, has shown how even very brief questioning can produce false confessions in juveniles.[18] Indeed, "[a]rchival analyses of false confessions, surveys, and laboratory experiments have shown that juveniles are at increased risk of falsely confessing."[19] I have documented how one-third of false confessions that occurred in DNA exoneration cases involved juveniles; these include some very high-profile false confessions, such as those of the Exonerated Five in the Central Park case.[20]

[15] 387 U.S. 1 (1967).

[16] *Id.* at 45.

[17] PRINCIPLES OF POLICING § 11.05 (AM. LAW INST., Council Draft Aug. 2019); RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 14.22 (AM. LAW INST., Tentative Draft No. 1, 2018).

[18] BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 58 (2012).

[19] Christian A. Meissner, Christopher E. Kelly & Skye A. Woestehoff, *Improving Effectiveness of Suspect Interrogations*, 11 ANN. REV. L. & SOC. SCI. 211, 214 (2015). *See generally* Ingrid Candel et al., *"I Hit the Shift-Key and then the Computer Crashed": Children and False Admissions*, 38 PERSONALITY & INDIVIDUAL DIFFERENCES 1381 (2005); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003); Gisli H. Gudjonsson et al., *Custodial Interrogation, False Confession and Individual Differences: A National Study Among Icelandic Youth*, 41 PERSONALITY & INDIVIDUAL DIFFERENCES 49 (2006); Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141 (2003).

[20] Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1094 (2010) (finding that one-third of DNA exonerations who had falsely confessed were juveniles); *see* Brandon L. Garrett, *Confession Contamination Revisited*, 101 VA. L. REV. 395 (2015) (updating analysis); *see also* SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATION IN THE UNITED STATES, 1989-2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 58 (2012) (finding that 42% of exonerated defendants younger than eighteen at the time of the crime had confessed).

Moreover, the presence of police in schools is just one part of the apparatus that increasingly, particularly in the 1990s, began to treat far more juvenile offenders as adults than in the past. Indeed, in the 1990s, nearly every state revised its juvenile codes, including to facilitate transfer to adult courts.[21] A number of states increasingly began to impose juvenile life-without-parole sentences.[22] In rulings such as *Miller v. Alabama*,[23] concerning life without parole, the Supreme Court has found that states cannot impose mandatory life-without-parole sentences on juvenile offenders, noting the heightened risks that juveniles may confess falsely.[24] The Court, in forbidding the juvenile death penalty in *Roper v. Simmons*,[25] emphasized that juveniles have a "lack of maturity" and an "underdeveloped sense of responsibility," which "often results in impetuous and ill-considered actions and decisions."[26] Further, juveniles are "less likely to take a punishment into consideration when making decisions."[27]

The increasingly punitive approach towards juveniles that began in the 1990s, however, was accompanied not by a growing problem of juvenile crime but by a consistent decline in such crime.[28] The increase in youth homicides in the 1980s in the United States, an unprecedented trend that was largely gun-related, simply ended by the mid-1990s and was contrary to predictions. This period was followed by "the most sustained and substantial decline in youth homicide in modern U.S. history," as Frank Zimring has described.[29] In discussing the Supreme Court's rulings on policing in schools, Driver notes how the pressure to bring police into schools may continue, and he questions, for example,

[21] *See* PATRICIA TORBET & LINDA SZYMANSKI, U.S. DOJ, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996-97 UPDATE (1998), https://www.ncjrs.gov/pdffiles/172835.pdf [https://perma.cc/X38B-N38P].

[22] For a study of juvenile life without parole sentences in North Carolina, see Ben Finholt et al., *Juvenile Life Without Parole in North Carolina* (Duke Law Sch. Pub. Law & Legal Theory Series, Paper No. 2019-06, 2019), https://papers.ssrn.com/sol3/abstract_id=3329536 [https://perma.cc/P99E-XKG2].

[23] 567 U.S. 460 (2012).

[24] *Id.*

[25] 542 U.S. 551 (2005).

[26] *Id.* at 560

[27] *Id.* For discussion of the *Roper* ruling, see generally, for example, Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379 (2006); Elizabeth F. Emens, *Aggravating Youth:* Roper v. Simmons *and Age Discrimination*, 2005 SUP. CT. REV. 51 (2006); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89 (2009).

[28] *See* FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 63, 105-06 (2005); *see also* J. Robert Flores, *Foreword* to HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT, at iii (2006), https://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf [https://perma.cc/5KLY-UHY2] ("[T]he rate of juvenile violent crime arrests has consistently decreased since 1994, falling to a level not seen since at least the 1970s.")

[29] ZIMRING, *supra* note 28, at 8, 15-17, 19.

whether we need more law enforcement in schools in response to shootings.[30] As those debates continue, it is important to remember how misplaced the 1990s approach was towards juvenile and child punishment, as well as how poorly supported it was by subsequent evidence.

Seen in that broader context, the Supreme Court's lackluster rulings regarding criminal procedure in schools can be seen as a symptom of its typical deference to law enforcement, with just a touch of awareness of the underlying science of brain development, the suggestibility of juveniles and vulnerability to false confession, and only the most modest awareness of how juveniles must cope with growing police presence in schools. The Court has largely not regulated juvenile justice or the policing of juveniles or minors, although it has modestly intervened in cases like *J.D.B.* and more decisively in cases regarding the juvenile death penalty and life without parole. The large body of scientific research has not powerfully impacted the Supreme Court, outside of its rulings on juvenile life without parole, the death penalty, and custody for purposes of *Miranda*. Given the limited awareness the Justices have shown of both science and the practices of police, do we want the Court to be more involved inside the schoolhouse gates? Perhaps it is others, including a wide range of creative reformers at the state and local levels, who are better situated to bring together law, science, and policy, to reconsider punitive juvenile-justice practices.

[30] DRIVER, *supra* note 1, at 239.