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Articles

Note

Article

Constitutional Penumbras and Prophylactic Rights: The Right to Counsel and the "Fruit of the Poisonous Tree"

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Abstract

This Article argues that a non-coercive right to counsel violation under *Miranda* and *Edwards* does not implicate "fruit of the poisonous tree" suppression of evidence. A *Miranda/Edwards* violation takes place when a suspect in police custody invokes his right to counsel and the police subsequently initiate further conversation without making counsel available. The fruit of the poisonous tree doctrine holds that "second generation" derivative evidence must be excluded if it is acquired as a result of "first generation" evidence obtained by constitutionally impermissible means. For example, suppose a murder suspect under interrogation invokes his right to counsel, but later an officer mistakenly re-initiates questioning without making counsel available to him. The suspect then confesses and reveals the location of the murder weapon. The confession (as first-generation evidence) is properly excluded pursuant to the *Miranda/Edwards* exclusionary rule. However, contrary to the holdings of various lower courts, the "fruit of the poisonous tree" suppression doctrine does not operate to exclude the murder weapon because no constitutional violation has occurred. The Article further analyzes various ways in which courts might be misled to hold that a non-coercive *Miranda/Edwards* violation triggers the fruit of the poisonous tree suppression doctrine.

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> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.[1]

1. Michigan v. Tucker, 417 U.S. 433, 446 (1974).

I. Introduction

Suppose a murder suspect under police interrogation invokes his right to counsel, whereupon interrogation ceases. Later an officer mistakenly re-initiates questioning without making counsel available to the suspect (thus inadvertently committing a non-coercive *Miranda/Edwards* violation). The suspect confesses and reveals the location of the murder weapon, which is retrieved and offered into evidence. The *Miranda/Edwards* exclusionary rule excludes the confession from evidence, but the murder weapon remains admissible. In such circumstances, the accused may attempt to call in the "fruit of the poisonous tree" doctrine to exclude the murder weapon as well. But, as this Article demonstrates, because there has been no violation of the Constitution, the fruit of the poisonous tree doctrine does not apply to exclude the murder weapon (or any other evidence obtained in relevantly similar ways).

The Fifth Amendment declares that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."[2] Consequently, a compelled confession[3] is inadmissible in evidence for all purposes whatsoever, and any evidential "fruit"[4] subsequently obtained from that confession is likewise suppressed.[5] In 1966, the Supreme Court declared for the first time that the Fifth Amendment right against compulsory self-incrimination extends to custodial interrogation.[6] That case, *Miranda v. Arizona*, established a penumbral exclusionary rule,

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2. U.S. CONST. amend. V.

3. A compelled confession is one that is coerced or involuntarily given. *See* Mincey v. Arizona, 437 U.S. 385 (1978).

4. The "fruit" in "fruit of the poisonous tree" refers to evidence subsequently derived from, or obtained as a result of, a violation that is of constitutional magnitude. *See* Costello v. United States, 365 U.S. 265, 280 (1961) "([T]he 'fruit of the poisonous tree' doctrine excludes evidence obtained from or as a consequence of lawless official acts . . . ."); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.").

5. *See, e.g.*, New Jersey v. Portash, 440 U.S. 450, 459 (1979); *Mincey*, 437 U.S. at 398. The suppression of the derivative "fruit" of a Fifth Amendment violation is subject, of course, to operation of the "inevitable discovery," "independent source," and "dissipation of taint" (or attenuation) doctrines which function to admit some tainted evidence. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 443 (1984) ("The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation."); *Id.* at 444 ("If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received."); Nardone v. United States, 308 U.S. 338, 341 (1939) ("Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint."); *Silverthorne*, 251 U.S. at 392 ("[T]his does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . .").

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

which, in the words of a later Supreme Court decision, "sweeps more broadly than the Fifth Amendment itself," and "may be triggered even in the absence of a Fifth Amendment violation."[7] This exclusionary rule is triggered by a failure on the part of the police to observe a set of prophylactic rules or "procedural safeguards" suggested by the *Miranda* Court.[8] Perhaps because the protections are broader, the evidentiary consequences of the police's failure to observe these rules are less severe.

That is not to say that the consequences are insignificant. Even in the absence of actual compulsion, a failure to properly advise a suspect of his rights results in a presumption of compulsion that requires excluding, for substantive evidential purposes, a suspect's pre-advised statements.[9] But that presumption of compulsion is narrowly circumscribed in two ways: it prohibits only the pre-advised statements and only their use in the prosecution's case-in-chief. A voluntary, pre-advised statement is still admissible for impeachment purposes.[10] Furthermore, any evidential fruit obtained as a result of that statement (whether physical evidence or later statements of the suspect himself or a third party) is admissible for any purpose.[11]

Thus far, *Miranda* violations have been spoken of in terms of the failure to advise a suspect of his rights. Crucially, however, failing to advise a suspect of his rights is not the only way to violate the prophylactic rules of *Miranda*. Another way involves failing to observe a suspect's invocation of his *Miranda* right to counsel.[12]

In *Edwards v. Arizona* the Supreme Court created a "second layer of prophylaxis"[13] designed to further insulate the Fifth Amendment's right against compulsory self-incrimination. The *Edwards* Court held that "an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[14]

Just like a failure to advise a suspect of his rights, a violation of the *Miranda/Edwards* right-to-counsel rule results in a presumption of compulsion (even in the absence of actual compulsion) that requires a suspect's post-violation statements to be excluded for substantive evidential

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7. Oregon v. Elstad, 470 U.S. 298, 306 (1985).

8. *Miranda*, 384 U.S. at 444.

9. *Id.* at 476.

10. Harris v. New York, 401 U.S. 222 (1971).

11. *See, e.g.*, Patane v. United States, 542 U.S. 630 (2004) (plurality opinion); *Elstad*, 470 U.S. 298; Michigan v. Tucker, 417 U.S. 433 (1974).

12. *Miranda*, 384 U.S. at 474–75. Yet another way to violate the prophylactic rules of *Miranda* would be to fail to observe the suspect's invocation of his right to silence. *Id.* at 444.

13. McNeil v. Wisconsin, 501 U.S. 171, 176 (1991).

14. Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

purposes.[15] Likewise, just as a suspect's pre-advised statements are admissible for impeachment purposes, so also are a suspect's statements made after having invoked the right to counsel but before being provided with an attorney.[16] In these respects, a *Miranda/Edwards* right-to-counsel violation has evidentiary consequences identical to a failure to advise a suspect of his *Miranda* rights.

But now comes the important question: What about the subsequent evidential fruit of a non-coercive *Miranda/Edwards* violation? May such evidence be admitted, like the subsequent fruit of a failure to advise a suspect of his *Miranda* rights? Or must such evidence be suppressed, like the subsequent fruit of a statement that is coerced in violation of the Fifth Amendment? On this issue, the federal circuits are split,[17] and the United States Supreme Court has not ruled. Nevertheless, as this paper demonstrates, such evidence should be admissible. A non-coercive violation of the *Miranda/Edwards* right to counsel does not trigger fruit of the poisonous tree suppression of subsequently obtained evidence.[18]

The fruit of the poisonous tree suppression doctrine applies only where there is a *constitutional* violation.[19] The premise that a non-coercive

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15. *See McNeil*, 501 U.S. 171.

16. Oregon v. Hass, 420 U.S. 714 (1975) (a pre-*Edwards* case).

17. *See, e.g.*, Burgess v. Dretke, 350 F.3d 461, 468–69 (5th Cir. 2003) (holding that a trial court's admission of "physical evidence obtained after a Fifth Amendment, *Edwards*-style violation" did not violate the fruit of the poisonous tree doctrine); Howard v. Moore, 131 F.3d 399, 415 (4th Cir. 1997) (holding that the fruit of the poisonous tree doctrine was inapplicable to a defendant's confessions obtained after he had invoked his Fifth Amendment right to remain silent and subsequently confessed to his parole officer because it determined that his confession to his parole officer was not involuntary despite the *Edwards* presumption of compulsion); Krimmel v. Hopkins, 44 F.3d 704, 709 (8th Cir. 1995) (holding that evidence obtained after a Fifth Amendment violation was admissible because the defendant's post-violation statements were voluntary); Greenawalt v. Ricketts, 943 F.2d 1020, 1026 (9th Cir. 1991) ("[W]e hold that a voluntary confession inadmissible on the ground of *Edwards* does not taint a subsequent voluntary confession."); United States v. Downing, 665 F.2d 404, 407 (1st Cir. 1981) (holding that evidence obtained as a result of questioning that occurred after the defendant had invoked his Fifth Amendment right to counsel was inadmissible as fruit of the improper questioning).

18. The secondary source that most squarely discusses this issue is Mark S. Bransdorfer, Note, *Miranda Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine*, 62 IND. L.J. 1061 (1987). Also useful are: Brief for the Criminal Justice Legal Foundation as Amicus Curiae Supporting Petitioner, State v. Blake, 126 S. Ct. 602 (2005) (No. 04-373), 2005 WL 1429276; David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L.J. 805 (1992); Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995); Justin Bishop Grewell, *A Walk in the Constitutional Orchard: Distinguishing Fruits of Fifth Amendment Right to Counsel from Sixth Amendment Right to Counsel in* Fellers v. United States, 95 J. CRIM. L. & CRIMINOLOGY 725 (2005); Mark E. Cammack, *The Rise and Fall of the Constitutional Exclusionary Rule in the United States*, 58 AM. J. COMP. L. 631 (2010); and Yale Kamisar, *Postscript: Another Look at* Patane *and* Siebert, *the 2004 "Poisoned Fruit" Cases*, 2 OHIO ST. J. CRIM. L. 97 (2004). Helpful Fifth Amendment resources include: LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968); MARK BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION (1980); and STEVEN M. SALKY, THE PRIVILEGE OF SILENCE: FIFTH AMENDMENT PROTECTIONS AGAINST SELF-INCRIMINATION (2009). For a helpful overview of current Fourth, Fifth and Sixth Amendment law, *see generally* JOSHUA DRESSLER AND ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE (5th ed. 2010).

19. Oregon v. Elstad, 470 U.S. 298, 305, 308 (1985).

Miranda/Edwards violation is not a constitutional violation follows in part from the fact that no right to counsel is expressly or implicitly included in the text of the Fifth Amendment (the Sixth Amendment notwithstanding[20]). It follows also in part from the fact that over the past several decades the Supreme Court has repeatedly affirmed that the *Edwards* rule is to be understood as a judicially-created "second layer of prophylaxis,"[21] designed to protect against violations of the "first layer" *Miranda* procedures, which are themselves designed to protect against violations of the Fifth Amendment right against compulsory self-incrimination.

Hence, the conclusion follows by sheer force of logic: A non-coercive *Miranda/Edwards* violation triggers application of the fruit of the poisonous tree suppression doctrine only if a non-coercive *Miranda/Edwards* violation is a constitutional violation.[22] But a non-coercive *Miranda/Edwards* violation is not a constitutional violation.[23] Therefore, a non-coercive *Miranda/Edwards* violation does not trigger application of the fruit of the poisonous tree suppression doctrine.

In what follows, Part II lays out the legal background necessary for an adequate understanding of both the *Miranda/Edwards* rule and the fruit of the poisonous tree doctrines. Part III surveys the Supreme Court's repeated refusals to extend the fruit of the poisonous tree to *Miranda* and *Miranda/Edwards* violations. Part IV inventories various ways in which lower courts might be misled to hold that a non-coercive *Miranda/Edwards* violation triggers the fruit of the poisonous tree suppression doctrine. These are intended to serve as preventative measures (or as corrective ones, as the case may be) for courts or legal analysts considering the question. Finally, Part V concludes the Article.

II. Doctrinal Background

Among recent decisions involving alleged *Miranda/Edwards* violations, the most high profile case was one decided by the Arkansas Supreme Court on June 25, 2009.[24] In that case, the court overturned the capital murder conviction of the defendant, Kenneth Ray Osburn, in the death of a seventeen-year-old girl named Casey Crowder.[25] Osburn twice confessed to murdering Crowder, but the court threw out both confessions.

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20. Unlike the Fifth Amendment, the Sixth Amendment's text contains an explicit guarantee of the right to counsel: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

21. McNeil v. Wisconsin, 501 U.S. 171, 176 (1991).

22. The truth of this premise follows from the Supreme Court's statements in *Oregon v. Elstad*: "Since there was no actual infringement of the suspect's constitutional rights, [*Michigan v. Tucker*, 417 U.S. 433 (1974),] was not controlled by the doctrine expressed in *Wong Sun* [*v. United States*, 371 U.S. 471 (1963),] that fruits of a constitutional violation must be suppressed." 470 U.S. 298, 308 (1985).

23. *See supra* notes 20–21 and accompanying text.

24. Osburn v. State, 326 S.W.3d 771 (Ark. 2009).

25. *Id.* at 774–75, 779.

It found that police had obtained the first confession in violation of the *Miranda/Edwards* right to counsel. Furthermore—and crucially—the court held that a *Miranda/Edwards* violation was a violation of the Fifth Amendment, with the result that the fruit of the poisonous tree doctrine functioned to exclude the second confession as well. Consequently, the court held that the trial court improperly admitted both of Osburn's confessions, and it reversed Osburn's conviction and his sentence of life imprisonment without parole.[26]

Without doubt, the answer a court gives to the central question raised in this Article is no small matter. In the end, the Arkansas Supreme Court's finding that the fruit of the poisonous tree doctrine applies to non-coercive *Miranda/Edwards* violations had the real-world consequence that a confessed killer was acquitted. Was justice served?[27] To resolve the difficult questions raised by this and similar cases, it is necessary to understand the relevant legal doctrines. This Part discusses, first, the creation and development of the *Miranda/Edwards* right to counsel; second, it explores that of the fruit of the poisonous tree suppression doctrine.

A. The Creation and Development of the *Miranda/Edwards* Right to Counsel

The "right to counsel" in custodial interrogation was created by the Supreme Court in 1966 in *Miranda v. Arizona*. That right was sustained fifteen years later in *Edwards v. Arizona*.

1. *Miranda v. Arizona*

The *Miranda* Court, after surveying various criminal interrogation techniques described in police interrogation manuals, examined the historical sources and precedential development of the Fifth Amendment right against compulsory self-incrimination in order to "determine its applicability in [the present] situation" where custodial interrogation is commonplace.[28] From this survey, the Court concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him

26. *Id.* at 795.

27. In the end, justice may in fact have been served by the outcome of this particular case. The dispositive portion of the opinion treated Osburn's case as involving a violation of *Edwards* that was essentially non-coercive. *Osburn*, 326 S.W.3d at 784. Nevertheless, in an unusual move (almost certainly intended to preclude review by the United States Supreme Court on the *Edwards* issue), the majority opinion went on, in a non-dispositive portion of its decision, to find that Osburn was coerced into making a confession. *Id.* Justice being served in this case does not, of course, mean that the court was correct to find that a violation of *Edwards* was a violation of the Fifth Amendment, but only that the court's overturning the defendant's conviction in this particular case was justified on other grounds.

28. Miranda v. Arizona, 384 U.S. 436, 458 (1966).

to speak where he would not otherwise do so freely."[29] To ensure that police interrogation does not compel the individual to incriminate himself, the Court decided that some kind of safeguard must be created.[30]

The Court observed that it was impossible to foresee what sorts of procedural safeguards Congress or the states might develop to protect an individual's Fifth Amendment right against compulsory self-incrimination.[31] With that fact in mind, the Court continued: "[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted."[32] In other words, the *Miranda* Court found that *some* safeguard is necessary, but it was unwilling to assert that any specific procedure or set of procedures was *constitutionally mandated* under the Fifth Amendment. To emphasize this point, the Court then stated that its "decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect."[33] In fact, the Court "encourage[d] Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."[34]

The Court then articulated its proposed set of procedural safeguards, the first part of which—the *Miranda* warnings—have become famous. Before being interrogated, a person in custody must be informed "that he has the right to remain silent,"[35] "that anything said can and will be used against the individual in court,"[36] "that he has the right to consult with a lawyer and to have the lawyer with him during interrogation,"[37] and "that if he is indigent a lawyer will be appointed to represent him."[38]

The giving of the warnings was itself only the first part of the Court's proposed set of procedural safeguards. The Court went on to say that "[o]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[39] Continuing, the Court said:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney

29. *Id.* at 467.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 467–68.
36. *Id.* at 469.
37. *Id.* at 471.
38. *Id.* at 473.
39. *Id.* at 473–74.

> and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to the police, they must respect his decision to remain silent.[40]

Furthermore, "[i]f the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[41] Finally, "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant."[42] Here, the Court gestured toward its previous statement that any set of procedures would be acceptable, so long as they were shown to be "at least as effective" as those proposed by the Court in ensuring that police interrogation does not compel an individual to incriminate himself.[43]

2. *Edwards v. Arizona*

Several years later, in 1981, the Court took the opportunity in *Edwards v. Arizona* to revisit the *Miranda* decision. Whereas *Miranda* created a complete set of procedural safeguards to protect the individual's right against compulsory self-incrimination, *Edwards* dealt with only one component of that set: the right to counsel.[44]

On January 19, 1976, Arizona police officers arrested Robert Edwards pursuant to an arrest warrant issued on charges of robbery, burglary, and first-degree murder.[45] The officers took Edwards to the police station, where they advised him of his *Miranda* rights.[46] Edwards stated that he understood his rights and that he was willing to submit to questioning.[47] After the interrogating officer informed Edwards that another suspect had already implicated him in the crime, Edwards initially denied involvement, but then he stated that he wanted to "make a deal," to which the officer responded that he did not have the authority to negotiate a deal and only wanted a statement from Edwards.[48] The officer allowed Edwards to place a call to a local attorney, but a few moments after dialing the number, Edwards hung up and told the officer that he wanted an

40. *Id.* at 474.
41. *Id.* at 475.
42. *Id.* at 476.
43. *Id.* at 467.
44. Edwards, v. Arizona, 451 U.S. 477, 478 (1981).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 479.

attorney "before making a deal."[49] At that point, the officer ended the interrogation and took Edwards to the county jail.[50] The next morning, two detectives came to the jail and asked to see Edwards.[51] When the detention officer went to retrieve him, Edwards indicated that he did not want to talk to anyone.[52] The officer replied to Edwards that "he had" to talk to the detectives, and the officer escorted him to meet with them.[53] After the detectives informed Edwards of his *Miranda* rights, he stated that he would be willing to talk if the detectives allowed him to listen to the taped statement of the suspect who had implicated him.[54] After listening to the tape for several minutes, Edwards confessed to his involvement in the crime.[55]

At trial Edwards moved to suppress his confession on the ground that the detectives had violated his *Miranda* rights by questioning him after he had invoked his right to counsel.[56] The trial court declined to suppress Edwards' confession, and his case eventually made its way to the United States Supreme Court, which based its decision squarely on the *Miranda* precedent.[57]

The *Edwards* Court recognized that *Miranda* had required police to advise the suspect of his right to the presence of an attorney and, furthermore, that it had "indicated the procedures to be followed subsequent to the warnings. If the accused . . . requests counsel, 'the interrogation must cease until an attorney is present.'"[58] After observing that "the [*Miranda*] Court ha[d] strongly indicated that additional safeguards are necessary when the accused asks for counsel,"[59] the *Edwards* Court held "that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[60] The Court ruled that, because Edwards had invoked his right to counsel and had neither waived that right nor initiated conversation with the police when he was re-interrogated, his confession was inadmissible and should have been suppressed by the trial court.[61]

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49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 480.
58. *Id.* at 482 (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)).
59. *Id.* at 484.
60. *Id.* at 484–85.
61. *Id.* at 487.

The *Miranda/Edwards* right to counsel, then, guarantees that after an individual in custody has invoked his right to counsel the police may not interrogate him again in the absence of counsel, unless the individual himself initiates conversation with the police regarding the investigation.[62] Consequently, an "*Edwards* violation" occurs whenever the police re-interrogate an individual without giving him the benefit of counsel.[63] The remedy for such a violation is the exclusion from evidence of any testimony obtained as a proximate result of that violation.[64]

B. The Creation and Development of the Fruit of the Poisonous Tree Doctrine

The ultimate origin of the fruit of the poisonous tree suppression doctrine is in the 1920 Fourth Amendment case of *Silverthorne Lumber Co. v. United States*.[65] Many years later, in 1963, the Court in *Wong Sun v. United States*[66] extended the doctrine to suppress testimonial evidence, but still in a Fourth Amendment context.[67]

1. The Origin of the Fruit of the Poisonous Tree Doctrine: *Silverthorne Lumber Co. v. United States*

In *Silverthorne Lumber Co. v. United States*, officers arrested Frederick W. Silverthorne on violations of federal law.[68] After this arrest, representatives of the Department of Justice and a United States Marshal went to the office of the Silverthorne Lumber Company, and "without a shadow of authority . . . [they] made a clean sweep of all the books, papers and documents found there."[69] The officers made photographs and copies of the seized materials, and the district attorney drew up an indictment based upon the content of those documents.[70] The district court ordered the officers to return the original books and documents to Silverthorne, which they did.[71] Nevertheless, a grand jury subpoenaed the original books and documents.[72] Silverthorne refused to produce the originals, but the district court ordered him to comply with the subpoena, despite the fact that it was based on photographs and copies of the documents that had been seized in

62. *Id.*
63. *Id.*
64. *Id.*
65. 251 U.S. 385 (1920).
66. 371 U.S. 471 (1963).
67. *Id.* at 485.
68. *Silverthorne*, 251 U.S. at 390.
69. *Id.*
70. *Id.* at 391.
71. *Id.*
72. *Id.* at 390.

violation of the Fourth Amendment.[73] When Silverthorne still did not produce the originals, the district court fined the Silverthorne Lumber Company two hundred fifty dollars and ordered Silverthorne to be imprisoned for contempt.[74]

On the appeal of the district court's order to the United States Supreme Court, the government conceded that "its seizure [of the papers] was an outrage which the Government now regrets."[75] Nevertheless, it argued that it had "a right to avail itself of the knowledge obtained by that means which it otherwise would not have had."[76] The government argued that the Fourth Amendment covered "the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act."[77] The Supreme Court was unmoved, ruling that the "essence" of the Fourth Amendment's protection against unreasonable search and seizure is not that "evidence so acquired shall not be used before the Court but that it shall not be used at all."[78]

Although the Court did not come to employ the fruit of the poisonous tree metaphor until nineteen years later,[79] its application in this case is clear: The search and seizure violated the Fourth Amendment, the government's unconstitutional seizure of the evidence was the poisonous tree, and the subsequently produced photographs and copies of the original documents were the tainted fruit. The Court found that this fruit could not be used in any way as evidence against Silverthorne, and it reversed the district court's fine and contempt order against him.[80]

2. *Wong Sun v. United States*

The Court extended the fruit of the poisonous tree doctrine to suppress *testimonial* evidence obtained in violation of the Fourth Amendment in *Wong Sun v. United States*.[81] *Wong Sun* presents a relatively complicated set of facts, but for present purposes, the salient facts of the case are as follows: About six o'clock in the morning on June 4, 1959, six federal agents went to Oye's Laundry in San Francisco, based on a tip from a suspect already in custody that the operator of the laundry, James Wah Toy, was selling heroin.[82] The agents had neither a search warrant nor an arrest warrant.[83] Agent Alton Wong rang the doorbell, and

73. *Id.* at 390–91.
74. *Id.* at 390.
75. *Id.* at 391.
76. *Id.*
77. *Id.*
78. *Id.* at 392.
79. *See* Nardone v. United States, 308 U.S. 338, 341 (1939).
80. *Silverthorne*, 251 U.S. at 392.
81. Wong Sun v. United States, 371 U.S. 471, 484 (1963).
82. *Id.* at 473–74.
83. *Id.* at 481.

when Toy came to the door, Wong pretended that he was there to pick up his dry cleaning.[84] Toy replied that the laundry did not open until eight o'clock and instructed Wong to come back at that time.[85] As Toy began to close the door, Agent Wong displayed his badge and identified himself as a federal narcotics agent.[86] Toy then slammed the door shut and ran through the laundry to his bedroom in the back.[87] In what was ultimately determined to be an unlawful entry, Agent Wong and the other federal officers then broke through the door and arrested Toy in his bedroom.[88] After the agents searched the premises and failed to find any narcotics, an agent told Toy about the tipster's statement that Toy had been selling heroin.[89] Toy responded, "No, I haven't been selling any narcotics at all. However, I do know somebody who has."[90] Toy related that he had smoked heroin the previous night at a house on Eleventh Avenue that belonged to a man named Johnny Yee.[91] The agents immediately went to the house on Eleventh Avenue, where they found Yee, who surrendered several tubes containing about an ounce of heroin.[92] Yee told the agents that Toy and another man, Wong Sun, had given him the heroin four days earlier.[93] The agents then tracked down Wong Sun and took him into custody as well.[94]

James Wah Toy and Wong Sun were tried together in the United States District Court for the Northern District of California.[95] The trial judge admitted into evidence both Toy's statement made in his bedroom and the heroin surrendered to the agents by Yee, and both men were convicted.[96] On appeal to the United States Supreme Court, the Court followed its previous decision in *Silverthorne* by holding that the indirect fruits of a violation of the Fourth Amendment right against unreasonable searches must be suppressed.[97] Consequently, the Court said, "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."[98] Thus, the Court employed fruit of the poisonous tree analysis to find that the trial judge should have suppressed the

84. *Id.* at 474.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 474, 484.
89. *Id.* at 474.
90. *Id.*
91. *Id.*
92. *Id.* at 475.
93. *Id.*
94. *Id.* at 472.
95. *Id.* at 477.
96. *Id.*
97. *Id.* at 484–85.
98. *Id.* at 485.

statements made by Toy in his bedroom as well as the heroin surrendered by Yee.[99]

III. The Supreme Court's Repeated Refusals to Extend the Fruit of the Poisonous Tree Suppression Doctrine to *Miranda* and *Miranda/Edwards* Violations

In a series of decisions spanning the nearly half-century since *Miranda* was decided, the Supreme Court has repeatedly and consistently refused to find that *Miranda* violations trigger the fruit of the poisonous tree doctrine. This Part surveys those decisions to show that the prevailing currents in the Supreme Court's recent jurisprudence flow in opposition to the construal of *Miranda* and *Miranda/Edwards* violations as constitutional violations that might warrant application of the fruit of the poisonous tree suppression doctrine.

A. *Michigan v. Tucker*

On April 19, 1966, the police in Pontiac, Michigan, began investigating a brutal rape and beating that left the victim unable to remember any details about her assailant.[100] Police soon arrested a neighbor, Thomas Tucker, for the crime and took him to the police station for questioning.[101] The police advised Tucker of his constitutional rights, including his right to an attorney and that any statements he made could be used against him.[102] Nevertheless, because the arrest took place prior to the decision in *Miranda v. Arizona*, the police did not (and were not required to) inform Tucker that he would be provided with an attorney free of charge if he could not afford to retain one himself.[103] Tucker provided the police with an alibi that put him with a man named Robert Henderson when the crime was committed.[104] The police contacted Henderson, who confirmed that he had been with Tucker on the day of the crime, but maintained that they had parted ways earlier than Tucker said.[105] Furthermore, Henderson told the police that the day following the crime Tucker had appeared with scratches on his face and had made comments indicating that they had been caused by "some woman [who] lived the next block over."[106]

Before Tucker's trial, the Supreme Court handed down the decision in *Miranda v. Arizona*.[107] Consequently, Tucker moved to suppress any

99. *Id.* at 487–88.
100. Michigan v. Tucker, 417 U.S. 433, 435 (1974).
101. *Id.* at 436.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 436–37.
107. *Id.* at 437.

testimony by Henderson, arguing that, since he had not been advised of his full *Miranda* rights at the time that he revealed Henderson's identity, his Fifth Amendment right against compulsory self-incrimination had been violated.[108] The trial judge denied the motion.[109] Henderson testified at the trial, and Tucker was convicted of rape.[110]

On appeal to the United States Supreme Court, Tucker argued "that all evidence derived solely from statements made without full *Miranda* warnings [should] be excluded" from evidence, essentially, as fruit of the poisonous tree.[111]

In its opinion, the Court briefly recounted the historical origins of the Fifth Amendment's privilege against self-incrimination, noting that it was designed to guard against a recurrence of the Inquisition and the Star Chamber's practice of compelling people to admit their own guilt.[112] It then noted that *Miranda* had for the first time extended the Fifth Amendment right to custodial interrogations.[113] The Court recounted the *Miranda* Court's decision to require the prosecution to "demonstrate[] the use of procedural safeguards effective to secure the privilege against self-incrimination" in order to use statements obtained from custodial interrogation.[114] Then, after briefly describing *Miranda*'s recommended procedural safeguards, the Court noted that *Miranda* had "recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."[115] Consequently, the police's failure to inform Tucker of his right to appointed counsel "did not abridge [his] constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege."[116] Without a constitutional violation, the fruit of the poisonous tree doctrine from *Wong Sun* did not apply to exclude Henderson's testimony.[117] Thus, the Court found that the trial court properly admitted Henderson's testimony.[118]

B. *New York v. Quarles*

On September 11, 1980, a young woman approached two police officers in Queens, New York, and told them that she had just been raped

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108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 439.
112. *Id.* at 440.
113. *Id.* at 443.
114. *Id.*
115. *Id.* at 444.
116. *Id.* at 446.
117. *Id.*
118. *Id.* at 452.

by a man who was then located in a nearby supermarket.[119] The officers radioed for assistance, drove to the supermarket, and Officer Kraft entered to look for the suspect.[120] Upon seeing the officer, the suspect, Benjamin Quarles, turned and ran toward the rear of the store.[121] Officer Kraft gave chase, and although he lost sight of Quarles for several seconds, he quickly apprehended Quarles, frisked him, and discovered that Quarles was wearing an empty shoulder holster.[122] Officer Kraft handcuffed Quarles and then asked him where the gun was, to which Quarles responded by nodding in the direction of some empty cartons and saying, "'[T]he gun is over there.'"[123] The police discovered a loaded .38-caliber revolver hidden among the cartons.[124] It was only then that the police formally placed Quarles under arrest and advised him of his *Miranda* rights.[125] Quarles indicated his willingness to answer questions without an attorney present, so Officer Kraft asked Quarles whether the gun was his and where he bought it.[126] Quarles stated that the gun was his and that he had bought it in Miami, Florida.[127]

In a subsequent prosecution for criminal possession of a weapon, the trial court suppressed both Quarles's statement, "[T]he gun is over there," as well as the gun itself, because the officer had not advised Quarles of his *Miranda* rights before asking him about the gun's location.[128] The trial judge also excluded as fruit of the poisonous tree Quarles's later, post-Mirandized statements that he owned the gun and that he had bought it in Miami.[129]

The case made its way to the United States Supreme Court, which overturned the trial judge's decision on all points in a decision that is significant for two reasons. First, the Court in this case created a "public safety" exception to *Miranda*'s requirement that any statement a suspect makes must be excluded from evidence unless the police have explicitly advised that suspect of his rights.[130] The Court cited *Michigan v. Tucker* for the proposition that "[t]he prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the Constitution[,] but are instead measures to insure that the right against compulsory self-incrimination is protected.'"[131] "[T]his case," the Court said, "presents a situation where

119. New York v. Quarles, 467 U.S. 649, 651–52 (1984).
120. *Id.* at 652.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 652–53.
129. *Id.* at 653.
130. *Id.* at 655.
131. *Id.* at 654 (internal quotation marks and brackets omitted).

concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[132] Such an exception to the *Miranda* rule would simply not be possible if *Miranda*'s requirements were *constitutionally* mandated.

The second significant aspect of the *Quarles* decision is Justice O'Connor's opinion, in which she concurred in the judgment in part and dissented in part.[133] O'Connor argued that the Court had not provided sufficient justification for its departure from the *Miranda* rule in this instance.[134] First, agreeing with the majority's judgment (but following the rule of *Miranda*), O'Connor would have excluded Quarles's initial, pre-Mirandized response to Officer Kraft about the location of the gun.[135] Nevertheless, she would have found the gun itself admissible because "nothing in *Miranda* or the privilege itself requires exclusion of non-testimonial evidence derived from informal custodial interrogation. . . ."[136] Next, O'Connor considered the statements the police elicited from the suspect after they advised him of his rights. Here, O'Connor explicitly called into question the applicability of the fruit of the poisonous tree doctrine to *Miranda* violations in general, stating that "[w]hether the mere failure to administer *Miranda* warnings can 'taint' subsequent admissions is an open question."[137] In her view, admission of the subsequently obtained statements "should turn solely on whether the answers received were voluntary."[138] In other words, where the *Miranda* procedures have been violated, the test for admitting the suspect's subsequent, post-Mirandized statements should be whether those statements were themselves actually *compelled* in violation of the Fifth Amendment.[139] O'Connor's reasoning in her *Quarles* dissent is significant because the very next year it provided the basis for her authored opinion of the Court in *Oregon v. Elstad.*

C. *Oregon v. Elstad*

The precedential high ground in the debate over whether a *Miranda/Edwards* violation taints a subsequent confession as fruit of the poisonous tree is *Oregon v. Elstad.* The facts of this case are as follows. Officers Burke and McAlister of the Polk County Sheriff's office went to

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132. *Id.* at 653.

133. *Id.* at 660.

134. *Id.*

135. *Id.*

136. *Id.* By "privilege," Justice O'Connor refers to the Fifth Amendment privilege against compulsory self-incrimination, which ensures that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Thus the privilege protects only against the admission of testimonial evidence. *See, e.g.*, Fisher v. United States, 425 U.S. 391 (1976).

137. *Quarles*, 467 U.S. at 660 n.1.

138. *Id.*

139. That this is Justice O'Connor's meaning is clear from her statement later in the footnote that "a proper inquiry must focus at least initially, if not exclusively, on whether the subsequent confession is itself free of actual coercion." *Id.* at 660 n.1.

the home of eighteen-year-old Michael Elstad, whom a witness had implicated in the robbery of the home of Gilbert Gross.[140] Elstad's mother answered the door and led the officers to Elstad's bedroom, where he was laying on the bed listening to his stereo.[141] They asked Elstad to get dressed and accompany them to the living room.[142] Once there, Officer Burke voiced his suspicion that Elstad had been involved in the Gross robbery.[143] Elstad replied, "Yes, I was there."[144] The officers took Elstad to the Sheriff's headquarters, and about an hour later, they met with him in Officer McAlister's office.[145] Officer McAlister then for the first time advised Elstad of his *Miranda* rights.[146] Elstad indicated that he understood his rights and wished to speak with the officers.[147] He then made a full confession, thus implicating himself in the robbery.[148] The confession was typed and signed by Elstad and both officers.[149]

At trial Elstad filed a motion to suppress his initial oral statement, "I was there."[150] The State of Oregon conceded that its officers had Elstad in custody at the time of that statement, and because Elstad had not been advised of his *Miranda* rights when he made it, the judge ruled that the statement must be suppressed.[151]

Elstad also moved to suppress the signed confession.[152] Elstad's counsel contended that the pre-Mirandized statement Elstad made at his home tainted his subsequent, post-Mirandized confession as fruit of the poisonous tree.[153] This argument was unsuccessful, however. The trial judge admitted the signed confession and found Elstad guilty of first degree burglary.[154]

On appeal before the United States Supreme Court, counsel for Elstad argued that "a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as 'fruit of the poisonous tree.'"[155] Elstad's counsel cited *Wong Sun*'s holding that a violation of the Fourth Amendment right against unreasonable searches is a "poisonous tree" (the testimonial "fruit" of

140. Oregon v. Elstad, 470 U.S. 298, 300 (1985).
141. *Id.*
142. *Id.*
143. *Id.* at 301.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 302.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 304.

which must be suppressed).[156] He argued that the Supreme Court should conceive a *Miranda* violation in relevantly similar terms, thus requiring the reversal of the trial judge's decision to admit the signed confession into evidence.[157]

But that is not what happened. Instead, the Supreme Court essentially affirmed the trial judge's decision to admit the signed confession.[158] As the Court said, "Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made"—that is, on whether it violates the Fifth Amendment itself.[159] The Court then went on to consider whether Elstad's Fifth Amendment right against compulsory self-incrimination was violated.[160] The Court determined that, in this case, "the breach of the *Miranda* procedures . . . involved no actual compulsion," and hence, Elstad's Fifth Amendment right against compulsory self-incrimination was not violated.[161] The Court concluded:

> [T]he unwarned questioning did not abridge respondent's constitutional privilege but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege. Since there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed.[162]

D. Post-*Elstad* Cases Bearing on the *Miranda/Edwards* Right to Counsel

Since *Elstad*, the Supreme Court has made it increasingly clear that the *Miranda/Edwards* right to counsel is not a constitutional right but rather a prophylactic measure designed to safeguard the Fifth Amendment right against compulsory self-incrimination.

In 1990, a majority of the Court declared that "*Edwards v. Arizona* added a second layer of protection to the *Miranda* rules . . . . *Edwards* thus established another prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda*

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156. *Id.*

157. *Id.*

158. *Id.* at 309.

159. *Id.*

160. *Id.* at 308.

161. *Id.*

162. *Id.* (quoting Michigan v. Tucker, 417 U.S. 433, 446 (1974)) (internal quotation marks and ellipsis omitted). The Court's opinion uses this language to refer directly to the respondent in *Tucker*, but very shortly makes it clear that it intends for this conclusion to apply to Elstad (the respondent in the present case) as well. At the beginning of the very next paragraph, the Court says, "We believe that this reasoning applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony." *Id.*

rights."[163] Later that same year, the Court decided *Minnick v. Mississippi*,[164] which added yet *another* layer of prophylaxis. The Court declared that the *Edwards* rule is not satisfied by merely allowing a suspect to consult with an attorney; rather, counsel must be made available to the suspect in the sense that the attorney is present with the suspect during any subsequent interrogation.[165] Justice Scalia authored a characteristically sarcastic dissent in *Minnick*, objecting to what he perceived to be the creation of

> the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement. This newest tower, according to the Court, is needed to avoid inconsistency with the purpose of *Edwards*' prophylactic rule, which was needed to protect *Miranda*'s prophylactic right to have counsel present, which was needed to protect the right against compelled self-incrimination found (at last!) in the Constitution.[166]

In 2003, a four-justice plurality discussing the Fifth Amendment prophylactic rules declared that "[r]ules designed to safeguard a constitutional right . . . do not extend the scope of the constitutional right itself, just as violations of the judicially crafted prophylactic rules do not violate the constitutional rights of any person."[167]

By 2009, Justice Scalia seemed to have made his peace with *Minnick*. That year, he wrote the majority opinion in *Montejo v. Louisiana*,[168] in which he described, without sarcasm, the law as it now stands:

> Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. Under *Edwards*' prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. And under *Minnick*'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney."[169]

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163. Michigan v. Harvey, 494 U.S. 344, 350 (1990).

164. 498 U.S. 146 (1990).

165. *Id.* at 150–53.

166. *Id.* at 166 (Scalia, J., dissenting) (citations omitted) (quoting *id.* at 154 (majority opinion)) (internal quotation marks, emphasis, and brackets omitted).

167. Chavez v. Martinez, 538 U.S. 760, 772 (2003).

168. Montejo v. Louisiana, 556 U.S. 778, 794 (2009).

169. *Id.* at 794 (internal citations omitted).

IV. What Misleads Courts to Hold that a Non-Coercive Violation of the *Miranda/Edwards* Right to Counsel Triggers Fruit of the Poisonous Tree Suppression of Evidence?

The Fifth Amendment states, in pertinent part, that "[n]o person shall be ... compelled in any criminal case to be a witness against himself."[170] It goes without saying that there is no "right to counsel" to be found in this constitutional text. Furthermore, the lesson to be gleaned from the line of cases examined in the Part III is that the *Miranda/Edwards* right to counsel is not a constitutional right but a prophylactic measure designed to safeguard the Fifth Amendment right against compulsory self-incrimination. Because the fruit of the poisonous tree suppression doctrine applies only where there is a constitutional violation[171] (and a non-coercive *Miranda/Edwards* violation is not, as such, a constitutional violation), it follows that a non-coercive *Miranda/Edwards* violation does not trigger application of the fruit of the poisonous tree suppression doctrine.

Nevertheless, some courts in recent years have been misled to hold that a non-coercive violation of the *Miranda/Edwards* right to counsel does trigger the fruit of the poisonous tree suppression doctrine. The ways in which a court may be so misled are legion. The discussion that follows examines a number possibilities, which run the gamut from a failure to distinguish *Miranda/Edwards* from the fruit of the poisonous tree doctrine (Part A) or from the Sixth Amendment (Part B), to a failure to appreciate *Miranda/Edwards*' character as a procedural safeguard (Part C). Courts could also be misled as a result of captivation by "rights" language and metonymy (Part D) or metaphor (Part E), or by the faulty assumption that a *Miranda/Edwards* violation is conclusive evidence of actual coercion or bad faith conduct (Part F). Finally, lower courts could be misled by the faulty assumption that the Supreme Court's opinion in *Dickerson v. United States* elevated *Miranda*'s procedural safeguards to the level of fully recognized constitutional rights (Part G).

A. The Failure to Distinguish the *Miranda* and *Edwards* Exclusionary Rules from the Fruit of the Poisonous Tree Suppression Doctrine

The *Miranda* and *Edwards* exclusionary rules function automatically to exclude first-generation evidence obtained as a proximate result of *Miranda* and *Miranda/Edwards* violations. The fruit of the poisonous tree suppression doctrine, on the other hand, differs in two ways: it functions to exclude *later*-generation evidence that is obtained as an

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170. U.S. CONST. amend. V.

171. As demonstrated above, the truth of this premise (i.e., that the fruit of the poisonous tree suppression doctrine applies only where there is a constitutional violation) in the Fifth Amendment context follows from the Supreme Court's statements in *Oregon v. Elstad*. *See supra* note 22 and accompanying text.

eventual consequence of an initial *constitutional* violation. These exclusionary doctrines are analytically distinct, and although they may potentially apply in one and the same situation, application of one doctrine in no way necessarily entails application of the other.

A failure to keep these two exclusionary doctrines analytically distinct could mislead a court to hold that a non-coercive violation of the *Miranda/Edwards* right to counsel triggers the fruit of the poisonous tree suppression doctrine. To appreciate how dangerous such a failure could be, consider how this confusion would impact interpretation of a couple of claims made by the Supreme Court in *Oregon v. Elstad.* In *Elstad*, the Court claimed that "[t]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation."[172]

One who fails to appreciate that the *Miranda* exclusionary rule and the fruit of the poisonous tree doctrine have different triggering conditions may read the Court's observation that "[t]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment"[173] to mean that the fruit of the poisonous tree doctrine applies just as broadly as the *Miranda* exclusionary rule. Furthermore, one may read that "[t]he *Miranda* exclusionary rule . . . may be triggered even in the absence of a Fifth Amendment violation"[174] and suppose this statement to reiterate that the fruit of the poisonous tree doctrine is applicable even where there is no actual Fifth Amendment violation.

The problem, of course, is that in *Oregon v. Elstad* the inferences go in precisely the opposite direction: it is *because* "[t]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment" that the fruit of the poisonous tree suppression doctrine should *not* be applied as broadly as the *Miranda* exclusionary rule.[175] Or, as the Court alternatively puts it, it is *because* "the *Miranda* exclusionary rule . . . may be triggered even in the absence of a Fifth Amendment violation" that the fruit of the poisonous tree doctrine should *not* be applied in every case where there is a *Miranda* violation.[176] Suppressing evidence is a drastic measure, and, absent a full-blown constitutional violation, the interests of justice and effective criminal prosecution require that it be done sparingly.

It is important, then, to keep in mind the differences between the *Miranda* and *Edwards* exclusionary rules, on the one hand, and the fruit of the poisonous tree suppression doctrine, on the other. To fail to do so is to risk misapplying the law.

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172. Oregon v. Elstad, 470 U.S. 298, 306 (1985).
173. *Id.*
174. *Id.*
175. *See id.*
176. *See id.*

B. The Failure to Distinguish the *Miranda/Edwards* Right to Counsel from the Sixth Amendment Right to Counsel

As noted above, there is no right to counsel in the text of the Fifth Amendment.[177] Nevertheless, when the Supreme Court extended the protection of the Fifth Amendment to custodial interrogation in *Miranda*, it created the "right to counsel" as a prophylaxis "to counteract the inherent pressures of custodial interrogation"[178] that might compel a suspect to incriminate himself.

The Sixth Amendment, on the other hand, contains a right to counsel in its very terms: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[179] The Sixth Amendment right automatically attaches when "a prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'"[180] Furthermore,

> The purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to protect the unaided layman at critical confrontations with his expert adversary, the government, *after* the adverse positions of government and defendant have solidified with respect to a particular alleged crime.[181]

The Sixth Amendment makes counsel available to a suspect for all purposes of that suspect's defense and trial preparation. The *Miranda/Edwards* rule, on the other hand, makes counsel available at a potentially earlier point, but for only a single purpose: to accommodate the suspect's "desire for the assistance of an attorney *in dealing with custodial interrogation by the police*,"[182] that is, "for the particular sort of lawyerly assistance that is the subject of *Miranda*."[183] The purpose of the *Miranda/Edwards* right to counsel, then, is solely to protect against violations of the individual's Fifth Amendment right against compulsory self-incrimination.

The fruit of the poisonous tree suppression doctrine applies to evidence obtained as a product of a violation of the Sixth Amendment right

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177. *See supra* notes 170–71 and accompanying text.

178. Arizona v. Roberson, 486 U.S. 675, 685 (1988).

179. U.S. CONST. amend. VI.

180. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984)).

181. *Id.* at 177–78 (quoting *Gouveia*, 467 U.S. at 189) (internal quotation marks and brackets omitted).

182. *Id.* at 178 ("The purpose of the *Miranda–Edwards* guarantee, on the other hand—and hence the purpose of invoking it—is to protect a quite different interest: the suspect's 'desire to deal with the police only through counsel.'" (quoting Edwards v. Arizona, 451 U.S. 477, 484 (1981))).

183. *Id.*

to counsel.[184] Nevertheless, a violation of the *Miranda/Edwards* right to counsel in no way entails a violation of the Sixth Amendment.[185] Hence, the Sixth Amendment "fruits" doctrine does not apply to suppress subsequently obtained evidence in the context of a *Miranda/Edwards* violation.

C. The Failure to Appreciate the Nature of the *Miranda/Edwards* Right to Counsel as a Judicially-Created "Procedural Safeguard"

Part II began with a brief discussion of a high profile case in which the Arkansas Supreme Court threw out two of a defendant's confessions: one on the basis that it was obtained in violation of the *Miranda/Edwards* right to counsel, and the other on the basis that it was fruit of the poisonous tree.[186] That court explicitly followed the reasoning of the Wisconsin Supreme Court's 1996 decision in *State v. Harris*.[187] The Wisconsin court had held that "an *Edwards* violation triggers the fruit of the poisonous tree doctrine requiring suppression of the fruits of that . . . violation."[188] The Wisconsin court found that a Wisconsin State Police detective had initiated a conversation with Harris, the suspect, in a Texas jail after Harris invoked his right to counsel.[189] During that conversation, Harris made comments that led to the subsequent discovery of a gun and other physical evidence.[190]

At trial Harris moved to suppress this evidence as fruit of the poisonous tree.[191] In its opposition to this motion, the prosecution relied on *Tucker* and *Elstad* for the proposition that a violation of the *Miranda* prophylactic rules did not rise to the level of a constitutional violation, and hence, did not trigger fruit of the poisonous tree suppression of subsequently obtained evidence.[192] The Wisconsin court's opinion criticized this argument, suggesting that the prosecution "fail[ed] to distinguish between [the] violation of a procedure (informing an accused of his rights) and [the] violation of a right (the right to have counsel present during interrogation)."[193]

The court's reasoning in *Harris* runs the risk of losing sight of the fact that the "right to counsel" in custodial interrogation is itself one of the *Miranda* decision's judicially-created "procedural safeguards."[194] That the "right to counsel" is such a safeguard is evident from even a cursory

184. *See, e.g.*, Nix v. Williams, 467 U.S. 431 (1984).
185. *See, e.g.*, *McNeil*, 501 U.S. at 178.
186. Osburn v. State, 326 S.W.3d 771, 778–84 (Ark. 2009); *see supra* Part II.
187. 544 N.W.2d 545 (Wis. 1996).
188. *Id.* at 553.
189. *Id.* at 547.
190. *Id.*
191. *See id.*
192. *Id.* at 550.
193. *Id.* at 553.
194. *See supra* Part II.A.1.

reading of the *Miranda* decision.[195] It is, then, potentially misleading for the Wisconsin Supreme Court to draw a distinction between the "violation of a procedure (informing an accused of his rights) and [the] violation of a right (the right to have counsel present during interrogation)."[196] Both are violations of the *Miranda* procedures, and both are rights guaranteed by that decision. As such, it is difficult to see how the Wisconsin court's reasoning could possibly provide a principled basis to think that the fruit of the poisonous tree doctrine should be triggered by the failure to provide counsel, but not by the failure to advise a suspect of his rights.

Of course, the Wisconsin Supreme Court's reasoning is a bit more subtle than this. The court continues:

> The procedure required under *Miranda* is that warnings must be given prior to custodial interrogation, while the procedure required by *Edwards* is that once a suspect invokes the right to counsel, all police-initiated questioning must cease until counsel is present. With the former, it is possible to act in a manner that is violative of the safeguard but not of the rights it seeks to protect; this is not possible with conduct that violates *Edwards*.[197]

It is unclear which right (or rights) the court is referring to when it says that it is not possible to violate the rule that a suspect must be provided with counsel during custodial interrogation without also violating "the rights it seeks to protect."[198] Nevertheless, the most plausible candidate is the *Miranda/Edwards* right to counsel itself. On this reading, the *Harris* court recognized that it is misleading to say that if the *Miranda/Edwards rule* (i.e., that the suspect must be provided with counsel upon request) is violated, then the *Miranda/Edwards right* is "also" violated—such a statement would wrongly treat them as if they were two different things. As such, *Harris* recognized that the right has no reality outside of the rule: take away the *rule* that a suspect must be provided with counsel and the suspect's *right* to be provided with counsel vanishes with it. If this is in fact the court's view, then its reasoning is sound: one simply cannot violate the *Miranda/Edwards* rule without violating the *Miranda/Edwards* right to counsel.

But in that case, the Wisconsin court's argument fails to distinguish between violations of the rule that a suspect must be provided with counsel, on one hand, and violations of the rule that a suspect must be given *Miranda* warnings, on the other. For the same analysis can be done in both cases. By parity of reasoning, if the right that the *Miranda/Edwards* rule

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195. *See* Miranda v. Arizona, 384 U.S. 436, 474–77 (1966). The Court provides two other summaries of the procedures required of custodial interrogations, which further support the conclusion that right to counsel is itself a procedural safeguard. *See id.* at 444–45, 478–79.

196. *Harris*, 544 N.W.2d at 553.

197. *Id.* at 553.

198. *Id.*

"seeks to protect" is the *Miranda/Edwards* rule itself, then the right that the *Miranda* rule "seeks to protect" is the right to be Mirandized itself. Consequently, it is misleading to say that if the *Miranda* rule (i.e., that a person must be Mirandized) is violated, then the *Miranda* right is "also" violated. Rather, the rule and the right are *the exact same thing*. Take away the *rule* that a suspect must be Mirandized, and the suspect's *right* to be Mirandized vanishes with it.

The rule that a suspect must be Mirandized and the rule that a suspect must be provided with counsel are in the same boat. In neither case can the rule be violated without violating the right that the rule "seeks to protect." But this is contrary to what the Wisconsin court maintained in its attempt to justify applying the fruit of the poisonous tree doctrine to violations of the right to counsel. The lesson is that, just as the fruit of the poisonous tree doctrine is not triggered by a violation of one prophylactic rule, neither is it triggered by violation of another.[199] At the very least, the reasoning of the Wisconsin Supreme Court does not show the contrary to be the case.

It is possible, of course, that the *Miranda/Edwards* right to counsel was not what the Wisconsin court had in mind as a right that the *Miranda/Edwards* rule "seeks to protect." The only other plausible candidate is the Fifth Amendment right against compulsory self-incrimination. On this reading, a violation of the *Miranda/Edwards* rule is conclusive evidence of actual compulsion. For an examination of this possibility, see Part IV.F, infra.

D. Captivation by "Rights" Language and Metonymy Resulting in the Assumption that the *Miranda/Edwards* Right to Counsel is a Constitutional Right

As has just been shown, the "right to counsel" is not separate from or independent of the effect of the *Miranda/Edwards* procedural rule that establishes it. Yet, when unaccompanied by reflection on the origin of this right, the language frequently used by lawyers tends to create that impression. That is, the frequent (and unreflective) use of the shorthand "right to counsel" to refer to the effect of the *Miranda/Edwards* rule can foster the illusion that there exists a right beyond the rule (and even, for those who are more reflective, the further illusion that the rule must have been created to protect that separate, pre-existing right). This illusion of an independently existing "right to counsel" is made even more problematic by the fact that it is often referred to as "the *Fifth Amendment* right to

199. Furthermore, as *Tucker* and *Elstad* recognized (and as the prosecution in the Wisconsin case argued), the right infringed by such a violation is not a *constitutional* one. *See supra* Part III.A., C. Hence, there can be no principled basis for applying fruit of the poisonous tree suppression of subsequently obtained evidence to violations of the *Miranda/Edwards* rules.

counsel,"[200] thereby becoming endowed, in some minds at least, with full-blown constitutional significance.[201]

What, then, is the significance of the Supreme Court's occasional statements that seem to imply the existence of a Fifth Amendment right to counsel? Two factors explain the Court's use of such language. First, it is indeed quite helpful to speak of "the Fifth Amendment right to counsel" if one means to distinguish the *Miranda/Edwards* right to counsel from the *Sixth Amendment* right to counsel. The *Miranda/Edwards* rule is, after all, designed specifically to serve the Fifth Amendment and *not* the Sixth Amendment.

Second, such occasional references are often instances of metonymy, a common figure of speech by which a reference to one thing is substituted for a reference to something else with which it is closely associated.[202] Common examples of metonymy include the attribution to "Duke" of the performance of the Duke University basketball team and the attribution to "the White House" of statements made by the President or even by the spokesperson for the Office of the President. It is much more communicatively efficient to say "Duke's latest win" or "the White House's reaction," instead of tediously (and unnecessarily) articulating the institutional structure of the thing being referred to. Using "the Fifth Amendment right" when speaking of the *Miranda/Edwards* right to counsel is simply one more useful communicative device.

Captivation by "rights" language and metonymy might mislead a court to hold that the *Miranda/Edwards* right to counsel is a constitutional right, and hence, that a non-coercive violation of that right triggers fruit of the poisonous tree suppression of subsequently obtained evidence.[203] But appreciating the elliptical use of this sort of language and recognizing the figure of speech for what it is can help prevent such a mistake.

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200. *See, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 175, 178 (1991) (emphasis added); *id.* at 184, (Stevens, J. dissenting) (emphasis added); Minnick v. Mississippi, 498 U.S. 146, 150 (1990) (emphasis added).

201. Justice Scalia, for one, might suggest that this is an amazing rags-to-riches story: what began as a lowly procedural rule in the service of guarding the noble Fifth Amendment "right against compulsory self-incrimination" rises, through an unlikely series of events, to become the Fifth Amendment "right to counsel," with an exalted constitutional status equal, in almost all respects, to that of the master it was born to serve.

202. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

203. It is possible that the Wisconsin court in *State v. Harris* was captivated in this way. Immediately after the passages quoted in the previous subsection above, the court states that "[a] violation of *Edwards* is a violation of the right to counsel under the Fifth Amendment," and then explicitly concludes that "police-initiated interrogation conducted after a suspect unambiguously invokes the right to have counsel present during questioning . . . is a violation of a constitutional right." *Harris*, 544 N.W.2d at 553.

E. Captivation by Metaphor

Captivation by metaphor is another thing that might mislead a court to hold that a non-coercive *Miranda/Edwards* violation triggers fruit of the poisonous tree suppression of subsequently obtained evidence. *Oregon v. Elstad* recognized two metaphors that could be misleading if used in the context of a *Miranda* violation: the "fruit of the poisonous tree" metaphor itself and the "cat out of the bag" metaphor.[204]

First, the "fruit of the poisonous tree" metaphor has a certain conceptual "grammar." It implies that the police cultivate and harvest the evidential "fruit," which develops as an organic growth from the "poisonous tree" of improper police conduct. From the fact that the tree is poisonous it follows that the fruit is poisonous as well. Now if just any kind of police misconduct or breach of protocol were sufficient to constitute a "poisonous tree" (the fruit of which was to be suppressed), the criminal justice system would be crippled, due to the vast amount of evidence that would be excluded as a result. Captivation by this metaphor could easily mislead a court to automatically suppress any evidence obtained subsequent to a *Miranda/Edwards* violation, whether it is physical evidence, third-party testimony, or a subsequent statement of the defendant himself.

The "cat out of the bag" metaphor, on the other hand, is most aptly applied to cases in which the admissibility of the defendant's own subsequent confession is at issue. The following passage from *United States v. Bayer*[205] aptly describes the dynamic behind this metaphor, and its analysis remains as true today as when it was originally written:

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed.[206]

Even if a suspect's subsequent confession *is* in some sense the product of his already having "let the cat out of the bag" in circumstances where his initial confession was inadmissible (e.g., immediately following a *Miranda/Edwards* violation), this does not in itself call for the suppression of any subsequent confession.

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204. Oregon v. Elstad, 470 U.S. 298, 303–04 (1985).

205. 331 U.S. 532 (1947).

206. *Id.* at 540.

Consider the following: either the initial confession was involuntary or it was voluntary. If it was involuntary (i.e., compelled), then the Fifth Amendment right against compulsory self-incrimination is implicated, and the initial confession as well as all its fruits, including the subsequent confession, will be suppressed. On the other hand, if the initial confession was given voluntarily, then only the *Miranda/Edwards* rule has been violated, and the violation of that rule is cured by suppressing the initial confession (i.e., suppressing only what was obtained as a proximate result of the violation).

To wish for a more far-reaching suppression of evidence where the initial confession was *voluntarily* given is to be improperly captivated by the "cat out of the bag" metaphor. After all, if the initial confession was *in fact* voluntarily given, then why does it matter that the suspect subsequently experiences the "psychological disadvantages" of having voluntarily confessed? He has not been coerced, his will has not been overborne, and his Fifth Amendment right has not been violated. To be sure, a suspect may be unaware that his initial confession cannot be used in evidence against him, but again, if the suspect confessed *voluntarily*, why should it matter that he is unaware of this fact?[207] To an observer who is free of improper captivation by the "cat out of the bag" metaphor, the answer is that it makes no difference at all. A suspect's ignorance regarding the inadmissibility of an initial voluntary confession has no bearing on the admissibility of a later confession; hence, a court should not attribute any weight to that fact when considering whether to admit a subsequent confession. The cure for a non-coercive *Miranda/Edwards* violation is the suppression of the initial confession, and surely this is a sufficient remedy. Hence, careful employment of this metaphor provides no legitimate reason to think that fruit of the poisonous tree suppression of a subsequent confession should be triggered by a non-coercive *Miranda/Edwards* violation.

F. The Assumption that a *Miranda/Edwards* Violation is Conclusive Evidence of Actual Compulsion or Bad Faith Police Conduct

The assumption that a *Miranda/Edwards* violation is conclusive evidence of actual compulsion also might mislead a court to hold that a non-coercive *Miranda/Edwards* violation triggers fruit of the poisonous tree suppression of subsequently obtained evidence. Some state courts have

207. In fact, this is an instance where a non-coercive *Miranda/Edwards* violation is not prejudicial in a way that a failure to give *Miranda* warnings is. In the case of a failure to give *Miranda* warnings, if a suspect voluntarily implicates himself in criminal activity, he may suffer an "uh-oh" moment when he eventually is advised that his statements will be used against him. Thereafter, the suspect might voluntarily give up another confession because he thinks he has nothing more to lose (and only losses to mitigate) by further cooperating with the police. In the case of a *Miranda/Edwards* violation, however, any initial confession will be not only voluntary but also made *after* the suspect is advised that his statements will be used against him. Here there is no "uh-oh" moment and no psychological disadvantage of the suspect feeling as though he is starting out at a loss by having spoken before being advised that his statements will be used against him.

already made such holdings in the context of "right to silence" cases. The New Jersey Supreme Court, for example, has declared that "we are convinced that the failure to honor a previously-invoked right to silence smacks so inherently of compulsion that any statement following that failure is involuntary by definition."[208]

Now it is certainly true, under *Miranda*, that pre-advised confessions are presumed to be involuntary.[209] But it would be wrong to assume that this presumption means such confessions are therefore *actually compelled.* The Supreme Court has recognized that the *Miranda* exclusionary rule excludes some confessions that are in fact *voluntarily* given under the Fifth Amendment.[210] Furthermore, the Supreme Court has made clear that *Miranda*'s presumption of compulsion can be quite narrowly circumscribed. For example, the presumption of compulsion arising from a failure to properly advise a suspect of his *Miranda* rights prohibits admission of *only* the pre-advised statement and *only* its use in the prosecution's case-in-chief.[211] A voluntary, pre-advised statement is still admissible for impeachment purposes.[212] Moreover, any evidential fruit subsequently derived from that statement is fully, substantively admissible.[213] The *Miranda* presumption is narrowly circumscribed in this way because the Court recognizes that the initial confession—although legally presumed to be compelled for certain limited purposes—was in fact voluntarily given.

The outcome of the argument is this: the fact that a confession is actually voluntary is not—and cannot be—changed by its being obtained in violation of *Miranda*, or even by the limited presumption (for certain purposes) that it was compelled. A *Miranda* violation is by no means conclusive evidence of actual compulsion. By parity of reasoning, then, the fact that a confession is actually voluntary cannot be changed by its being obtained in violation of the *Miranda/Edwards* rule, or even by any analogous legal presumption that it was compelled. Hence it is wrong to conclude that a *Miranda/Edwards* violation is conclusive evidence of actual compulsion. Since the confession is voluntary, the Fifth Amendment is not implicated. And even though the *Miranda* or *Edwards* exclusionary rule applies to suppress the improperly obtained initial confession, there is no good reason why the fruit of the poisonous tree suppression doctrine should

208. State v. Hartley, 511 A.2d 80, 94 (N.J. 1986).

209. *See supra* notes 9, 15 and accompanying text.

210. Arizona v. Roberson, 486 U.S. 675, 682 (1988). This is the significance of the Supreme Court's statement in *Oregon v. Elstad* that the *Miranda* exclusionary rule "sweeps more broadly than the Fifth Amendment itself," and "may be triggered even in the absence of a Fifth Amendment violation." Oregon v. Elstad, 470 U.S. 298, 306 (1985).

211. *See* Harris v. New York, 401 U.S. 222 (1971).

212. *See id.*

213. *See, e.g.*, Patane v. United States, 542 U.S. 630 (2004) (plurality opinion); *Elstad*, 470 U.S. 298; Michigan v. Tucker, 417 U.S. 433 (1974).

apply to suppress evidence obtained subsequently to that initial, voluntary confession.

Nor should it be thought that *Miranda/Edwards* violations are necessarily the result of bad faith or intentional police conduct. When *Miranda/Edwards* violations occur, they frequently result from the simple absence of full communication between officials engaged in different investigations, whether two officials from two different agencies investigating the same crime (e.g., the local police department, a police department in another jurisdiction, the Federal Bureau of Investigation, the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, etc.), or two officers from the same agency investigating two different crimes by the same suspect.[214]

When viewed in the context of multiple ongoing investigations, it is not hard to imagine scenarios in which even a characteristically scrupulous and careful investigator might commit an inadvertent *Miranda/Edwards* violation. Take the facts of *Arizona v. Roberson*, for example. On April 16, 1985, police arrested Roberson at the scene of a just-completed burglary.[215] The arresting officer took Roberson into custody and advised him of his rights.[216] Three days later, while Roberson was still in custody, a different officer (who was investigating a different robbery) sought to question Roberson.[217] That officer, unaware that Roberson had invoked his right to counsel upon being arrested three days earlier, also advised Roberson of his rights and proceeded to question him about the other burglary.[218] During that interview Roberson gave incriminating statements. There was no coercion and no intentional or bad faith conduct, yet there was a *Miranda/Edwards* violation.

It is wrong, then, to assume that a *Miranda/Edwards* violation is conclusive evidence of either actual compulsion or bad faith police conduct. Such an assumption could mislead a court to hold that a non-coercive *Miranda/Edwards* violation triggers fruit of the poisonous tree suppression of subsequently obtained evidence.[219]

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214. *See, e.g.*, *Roberson*, 486 U.S. at 678; *infra* notes 215–19 and accompanying text.

215. *Roberson*, 486 U.S. at 678.

216. *Id.*

217. *Id.*

218. *Id.*

219. The Supreme Court's observation in *Michigan v. Tucker* is especially apt here: "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose." Michigan v. Tucker, 417 U.S. 433, 446 (1974).

G. The Assumption that *Dickerson* Elevated *Miranda*'s Procedural Safeguards to the Level of Fully-Recognized Constitutional Rights

Another thing that might mislead a court into holding that a non-coercive *Miranda/Edwards* violation triggers the fruit of the poisonous tree suppression doctrine is the assumption that the Supreme Court's 2000 decision in *Dickerson v. United States*[220] elevated *Miranda*'s procedural safeguards to the level of fully-recognized constitutional rights. Indeed, courts have already been thus misled, but the Supreme Court has since made clear that holdings to this effect are in error.[221]

Dickerson held "[t]hat *Miranda* announced a constitutional rule that Congress may not supersede legislatively."[222] Subsequent to this ruling, the Ninth Circuit Court of Appeals sought to incorporate a broad reading of *Dickerson* into its analysis of whether physical evidence discovered as a result of statements obtained after a failure to advise a suspect of his *Miranda* rights must be excluded as fruit of the poisonous tree.[223] The Ninth Circuit (in the words of the Supreme Court) "equated *Dickerson*'s announcement that *Miranda* is a constitutional rule with the proposition that a failure to warn pursuant to *Miranda* is itself a violation of the Constitution (and, more particularly, of the suspect's Fifth Amendment rights)."[224]

But in 2003 the Supreme Court, per a three-justice plurality joined by a two-justice concurrence, rejected this holding.[225] The plurality explained that "the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause."[226] It found that the fruit of the poisonous tree suppression doctrine should not apply to *Miranda* violations.[227] Furthermore, the plurality reiterated that evidence obtained in violation of *Miranda* does not have to be discarded as inherently tainted,[228] and that "[s]uch a blanket suppression rule could not be justified by reference to the 'Fifth Amendment goal of assuring trustworthy evidence' or by any deterrence rationale."[229] Then, after citing *Tucker*, *Quarles*, *Elstad*, *Harris*, and other "*Miranda*" cases, the Court declared that "nothing in *Dickerson*, including its characterization of *Miranda* as announcing a constitutional rule, changes any of these observations."[230]

As noted, the three-justice plurality was not alone in this judgment. Justice Kennedy wrote a concurring opinion in which Justice O'Connor

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220. 530 U.S. 428 (2000).
221. Patane v. United States, 542 U.S. 630, 636–37, 640–44 (2004) (plurality opinion).
222. *Dickerson*, 530 U.S. at 444.
223. *Patane*, 542 U.S. at 635.
224. *Id.* at 636.
225. *Id.* at 636–37, 640–44.
226. *Id.* at 636.
227. *Id.* at 637.
228. *Id.* at 639.
229. *Id.* at 639–40 (quoting Oregon v. Elstad, 470 U.S. 298, 308 (1985)).
230. *Id.* at 640.

joined. Justice Kennedy specifically cited *Elstad*, *Quarles*, and *Harris*—decisions that emphasize the difference between full-blown violations of the Fifth Amendment and mere violations of *Miranda* prophylactic rules—and declared that "I agree with the plurality that *Dickerson v. United States* did not undermine these precedents."[231]

After this ruling, it is easier to understand what the Court was up to in *Dickerson*. Rather than elevating the *Miranda* safeguards to the level of fully-recognized constitutional rights, the Court's ruling in *Dickerson* turned out to be consistent with the original holding of *Miranda* itself—if not with the original significance that many attached to the *Miranda* holding. *Miranda* established that *some* kind of safeguard is constitutionally required to ensure that police interrogation does not compel the individual to incriminate himself.[232] Nevertheless, it did not assert that any *particular* procedure or set of procedures was constitutionally mandated under the Fifth Amendment.[233]

Dickerson reaffirmed that "*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent [read: right against compulsory self-incrimination] and that will assure the suspect that the exercise of that right will be honored."[234] It found that Congress's attempt to legislatively supersede *Miranda* amounted to a return to the totality-of-the-circumstances test—the very test that the *Miranda* procedures were designed to improve upon.[235]

Consequently, the penumbral "constitutional rule" of *Miranda*—the "rule that Congress may not supersede legislatively"[236]—is the rule that *adequate procedures are required* to inform a suspect of his right against compulsory self-incrimination and to ensure "that the exercise of that right will be honored."[237] This means that the *Miranda* procedures are not themselves constitutionally mandated, just as the *Miranda* Court originally stated when remarking that its "decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect."[238] The outcome of all of this for present purposes is that, since the *Miranda* procedures are not constitutionally mandated, a non-coercive violation of those procedures cannot be a constitutional violation. And in that case, a non-coercive violation of those procedures does not trigger application of the fruit of the poisonous tree doctrine.

231. *Id.* at 644–45 (Kennedy, J., concurring) (internal citation omitted).
232. Miranda v. Arizona, 384 U.S. 436, 467 (1966).
233. *Id.*
234. Dickerson v. United States, 530 U.S. 428, 442 (2000).
235. *Id.* at 442–43.
236. *Id.* at 444.
237. *Id.* at 442.
238. *Miranda*, 384 U.S. at 467.

V. Conclusion

This Article has argued that a non-coercive violation of the *Miranda/Edwards* right to counsel does not trigger fruit of the poisonous tree suppression of subsequently obtained evidence. The primary basis for this conclusion is that the *Miranda/Edwards* right to counsel is not a constitutional right. The language of the Fifth Amendment points to this conclusion, as does the Supreme Court's modern jurisprudence and the sound public policies of ensuring that criminals are effectively prosecuted and that all trustworthy evidence is available for use at trial. Even so, there are many ways in which courts might be (and have been) misled into making a contrary holding. These ways include captivation by "rights" language or metonymy, a failure to appreciate the nature of the *Miranda/Edwards* right to counsel as a judicially-created procedural safeguard, an assumption that a *Miranda/Edwards* violation is conclusive evidence of actual compulsion or bad faith police conduct, and others.

This is not, of course, to say that a non-coercive *Miranda/Edwards* violation could not be a constitutive *part* of a constitutional violation under *Miranda* (or *Dickerson*). *In the absence of other procedural safeguards*, a *Miranda/Edwards* violation would contribute to a failure to inform a suspect of his right against compulsory self-incrimination and to ensure that the exercise of that right is honored. Such an absence of adequate procedural safeguards—and not the *Miranda/Edwards* violation, by itself—would indeed be a violation of the Fifth Amendment right against compulsory self-incrimination under *Miranda* (or *Dickerson*). But that is a far cry from the false proposition that a mere *Miranda/Edwards* violation rises to the level of a constitutional violation.

Article

A Presumptive In-Custody Analysis to Police-Conducted School Interrogations

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I. Introduction

A child and his parent anticipate an array of experiences that the child might encounter on any given school day. Some experiences are beyond their reasonable expectation. For instance, being subjected to police

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questioning incident to an active police investigation is not usually within the scope of educational experiences that either the parent or the child would anticipate. Nevertheless, police questioning in the schoolhouse is becoming more common as the incidents of crimes committed by children increase.[1] Because police investigations increasingly involve interrogation of child suspects in schools, consideration for their constitutional rights is crucial. While the constitutional protections afforded by the United States Supreme Court in *Miranda v. Arizona*[2] have provided protection for adults against self-incrimination, the custodial analysis has not always afforded the same to child suspects.[3] Specifically, the reasonable person's belief that he or she is free to leave police-initiated interrogations is not qualitatively the same for a child suspect.[4] The special circumstances presented by the school setting further complicate the determination of what a reasonable child suspect believes when confronted with police questioning.[5] Children will not likely assess the legal consequences of making statements to the police.[6]

Additionally, the risk of self-incrimination and the evolution of legal jurisprudence relevant to false confessions foundationally explain how even children who commit crimes are incapable of fully understanding the consequences of their actions.[7] State statutes generally provide age limits[8] when determining a child's ability to comprehend his or her constitutional rights under the Fifth Amendment, as well as the child's ability to knowingly waive them.[9] Age limits are especially important when children operate under the false perception that they are not under the authority of the police, as in school interrogation situations.[10] The United States

1. Children often do not sufficiently understand the gravity of their potentially criminal actions, as well as the constitutional rights afforded them under the law. Trey Meyer, *Testing the Validity of Confessions and Waivers of the Self-Incrimination Privilege in the Juvenile Courts*, 47 U. KAN. L. REV. 1037, 1050–51 (1999); *see also* Meg Penrose, *Miranda, Please Report to the Principal's Office*, 33 FORDHAM URB. L.J. 775, 785–88 (2006); Stephanie Forbes, *Reading, Writing, and Interrogating: Providing Miranda Warnings to Students in Schoolhouse Interrogations*, 47 CT. REV. 68, 68 (2011); Lee Remington, Note, *The Ghost of Columbine and the Miranda Doctrine: Student Interrogations in a School Setting*, 41 BRANDEIS L.J. 373, 373–75 (2002).

2. 384 U.S. 436 (1966).

3. *See* Pamela M. Henry-Mays, *Farewell Michael C., Hello Gault: Considering the Miranda Rights of Learning Disabled Children*, 34 N. KY. L. REV. 343, 343–44 (2007) (arguing that adults are sufficiently apprised of their Fifth Amendment protections when *Miranda* warnings are given,and noting that the U.S. Supreme Court in "*In re Gault* recognized that children required special consideration when under interrogation because they could be overwhelmed by the will of an adult").

4. *See infra* notes 36–47 and accompanying text.

5. *See* Henry-Mays, *supra* note 3, at 357("[J]uveniles have great difficulty foreseeing what waiver of their *Miranda* rights may mean to them in the future. When asked about their reasons for waiving their rights, most juveniles were more concerned with their immediate detention or release.").

6. *Id.* at 349–50.

7. State v. Benoit, 490 A.2d 295, 300 (N.H. 1985) (discussing studies showing the failure of juveniles to fully comprehend the substance and significance of waiving their constitutional rights).

8. *See, e.g.*, N.M. STAT. ANN. § 32A-2-14 (2010); CONN. GEN. STAT. § 46b-137(c) (Supp. 2012).

9. Meyer, *supra* note 1, at 1051.

10. The lines between school officials' authority and the local police authority have been blurred

Supreme Court addressed application of the *Miranda* custody analysis in its recent ruling, *J.D.B. v. North Carolina*,[11] where the Court determined that "age may indeed be relevant" when affording children Fifth Amendment protections against self-incrimination during police-conducted school interrogation.[12] Certainly, age is relevant when determining whether it is cruel and unusual punishment to impose the death penalty on juveniles or to impose life without parole sentencing[13] based on the legally recognized theory of diminished culpability.[14] The Court's age-is-relevant ruling, however, does not sufficiently protect children during in-school interrogations where they might operate under the false perception that their statements and actions are not made under the authority of the police.[15] The states should therefore adopt a presumptive in-custody determination that eliminates the two-step totality of circumstances and reasonable child test.[16] Each state should amend its juvenile *Miranda* statute[17] or adult *Miranda*

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in cases where the validity of a child suspect's confession made to the school administration is challenged. *See* State v. Tinkham, 719 A.2d 580, 584 (N.H. 1998) (holding that the principal was not operating as a law enforcement officer or an agent of the police when he obtained a child's confession regarding possession of marijuana). States have litigated the issue of agency relationships between the police and school authorities in the context of such school interrogations. Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 61 (2006). A critical distinction must be made between a school "importing" local police authority versus a law enforcement agency "exporting" local authority to the school. *Id.* at 73. Officers who are hired by the school are generally not required to provide *Miranda* warnings. *See* Peter Price, Comment, *When is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools*, 99 J. CRIM. L. & CRIMINOLOGY 541, 551 (2009); *see also* Farmer v. State, 275 S.E.2d 774, 776 (1980).

11. 131 S. Ct. 2394 (2011).

12. *Id.* at 2405 (quoting Yarborough v. Alvarado, 541 U.S. 652, 669 (2004) (O'Connor, J., concurring)) (internal quotation marks omitted). The Court considered the issue of age and other psychological factors impacting the child's mindset to be irrelevant in its precedent case, Yarborough v. Alvarado, 541 U.S. 652 (2004). In *Alvarado*, these factors were considered as subjective rather than objective. *Id.* at 668. However, in *J.D.B.*, the Court views its ruling as consistent with *Alvarado* by stating that age is different because it does not involve a subjective determination about the mindset of the child. *J.D.B.*, 131 S. Ct. at 2404.

13. Graham v. Florida, 130 S. Ct. 2011, 2016 (2010).

14. *Id.* at 2038 (Roberts, C.J., concurring); *see* Henry-Mays, *supra* note 3, at 350 ("Children are different from adults with low intelligence as they lack the worldly experience and the knowledge time will bring.").

15. Indeed, even courts have wrestled with the issue of whether police in the school setting are acting in their capacity as police or as "school officials." *See* Remington, *supra* note 1, at 379–80 ("[C]ourts across the nation have been confused as to which standard applies when police officers, such as on-site school resource officers or officers acting on behalf of school authorities, conduct searches or seizures of students on school grounds. Courts have had to determine whether police officers are to be considered as 'school officials' and therefore allowed to conduct searches and seizures based upon the lesser standard of 'reasonable suspicion.'").

16. *See J.D.B.*, 131 S. Ct. at 2402. The Court describes two independent questions used to determine whether a suspect is in custody: "'[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.'" *Id.* (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)). If "in custody," the child is entitled to the *Miranda* warnings, which are pivotal to the child's protection under the Constitution. *Id.* However, the Court regards the child's ability to comprehend the warning when given as without merit if the circumstances do not amount to a custodial interrogation. *Id.* at 2401.

17. *See, e.g.*, N.C. GEN. STAT. § 7B-2101 (2011) (requiring that juveniles be Mirandized before

statute, as the case may be, to include a presumption that children should be provided *Miranda* warnings when questioned in the school setting.[18] The police authorities may interview children at school, but no statement made to the police can be admissible under the proposed presumption unless it is made in the presence of a parent, guardian or attorney. In effect, the child suspect would have to be escorted to the police station since a parent, guardian, or attorney is not likely to be present at the school. While in the presence of a parent, guardian, or attorney, the police can provide proper *Miranda* warnings to the child suspect before any statements can be admitted into evidence or any determinations are made regarding the waiver of rights. By amending statutes to include a presumption that a child is in custody,[19] the states would extend a heightened level of constitutional protection that is necessary given the enhanced risk of false statements made in the school setting.[20]

The United States Supreme Court's jurisprudence has recognized a heightened risk of coercion and subsequent false confessions by juveniles during interrogation, yet the *J.D.B.* Court held that considering age as a relevant factor is enough to address these risks.[21] In the school interrogation context, obtaining a knowing, intelligent, and voluntary confession is inextricably linked to the custodial interrogation analysis. Consequently, the law addressing the voluntariness of confessions must necessarily be considered when applying legal protections to children in the school setting.[22] This Article will address how school interrogations substantially amount to a "custodial interrogation" and how the reasonable child test supports the adoption of a presumptive in-custody approach.

Part II provides a case summary of the *J.D.B.* opinion. Part III explains the long-standing U.S. Supreme Court jurisprudence that

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questioning when in custody and prohibiting the use of a confession from a minor under fourteen years old unless a guardian or attorney is present).

18. In Minnesota, a juvenile is afforded the same protections against self-incrimination as an adult. MINN. R. JUV. DEL. P. 5.07 subd. 3. ("At the beginning of the detention hearing, the court shall advise all persons present of: (A) the reasons why the child was taken into custody; (B) the allegations of the charging document; (C) the purpose and scope of the detention hearing; (D) the right of the child to be represented by counsel at the detention hearing and at every other stage of the proceedings, and the right of a child alleged to be delinquent to counsel at public expense; and (E) the right of the child to remain silent."). Similarly, a juvenile in Washington is also protected against self-incrimination. WASH. REV. CODE § 13.40.140(8) (2004).

19. For examples of statutes that give constitutional protections to juveniles in custody, see COLO. REV. STAT. § 19-2-511 (2005); CONN. GEN. STAT. § 46b-137(c) (Supp. 2012); GA. CODE ANN. § 15-11-7 (2012); N.M. STAT. ANN. § 32A-2-14 (2010); N.C. GEN. STAT. § 7B-2101 (2011); WASH. REV. CODE § 13.40.140 (2004).

20. *See* Henry-Mays, *supra* note 3, at 357 (discussing how a child does not anticipate the impact of statements made to the police, or the long-term consequences of a waiver of rights, thereby leading to high rates of false confessions).

21. *J.D.B.*, 131 S. Ct. at 2401–02; *see also* Stansbury v. California, 511 U.S. 318, 322–25 (1994) (discussing the inquiry necessary to determine whether an individual is in custody and therefore entitled to *Miranda* warnings).

22. *See* Meyer, *supra* note 1, at 1048 (commenting on the use of a totality of circumstances test by federal courts and state courts to evaluate the admissibility of a custodial statement under the due process standard).

articulates constitutional standards for protecting juveniles from self-incrimination. The reasonable-person standard determines whether the suspect is in custody for *Miranda* purposes, and the totality-of-circumstances test considers the immaturity of the child and other relevant factors.[23] The totality of circumstances in the school setting presumptively amounts to in-custody interrogation for *Miranda* purposes.[24] Part IV argues that the totality of circumstances in police-conducted school interrogations uniquely compels the reasonable child to make potentially false statements. Accordingly, the states' juvenile *Miranda* statutes provide the appropriate forum for ensuring that juvenile suspects receive adequate protection when the police interrogate them at school. Part V reviews Texas and other state statutes and case law that support the adoption of a presumptive in-custody approach. The following case summary provides context for the relevant issues surrounding school interrogations.

II. *J.D.B. v. North Carolina*

In *J.D.B v. North Carolina*, the United States Supreme Court held that a child's age is relevant to the *Miranda*[25] custody analysis when police officers either know the child's age at the time of questioning, or the age is objectively apparent to the reasonable officer.[26] J.D.B. was a thirteen-year-old seventh-grade special-education student[27] who was escorted away from his classroom by a uniformed police officer to a school conference room.[28] Four adults, including the assistant principal, an administrative intern, and two police officers, proceeded to question him behind closed doors for approximately thirty to forty-five minutes.[29] The officers had previously questioned him[30] about two home burglaries that occurred during the prior week.[31] For this second questioning, the police placed J.D.B. in a closed-door conference room and asked him about the digital camera found at the middle school that matched the description of one of the stolen items.[32] No

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23. *See infra* Part III.

24. *See infra* Part III–IV.

25. Miranda v. Arizona, 384 U.S. 436 (1966) (ruling that statements obtained from defendants in police-dominated interrogations without full warning of constitutional rights are inadmissible and violate defendants' Fifth Amendment privilege against self-incrimination).

26. *J.D.B.* 131 S. Ct. at 2399, 2406.

27. Petition for Writ of Certiorari, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121), 2010 WL 4278709, at *4.

28. *J.D.B.*, 131 S. Ct. at 2399.

29. *Id.*

30. *Id.* A police officer told J.D.B. that he had additional questions as follow-up to the questions he asked five days earlier when he found J.D.B. in the neighborhood where the crimes were committed. Petition for Writ of Certiorari, *supra* note 27, at *3.

31. *J.D.B.*, 131 S. Ct. at 2399.

32. The school resource officer, the assistant principal, and an administrative intern were in the closed-door conference room, in addition to the juvenile investigator from the local police. *Id.* School resource officers are police officers that are primarily based within a school. *See* Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 878 (2012). This segment of law enforcement is

parent, guardian, or other trusted adult was present in the room during the questioning.[33] Ultimately, the young suspect confessed to the robberies and gave details about the location of the stolen items.[34]

In holding that a child's age is relevant to the *Miranda* custody analysis, the Court acknowledged how the physical and psychological isolation of custodial interrogation creates intense pressure and increases the percentage of individuals who may be induced to confess to crimes they did not commit.[35] The risk of coerced confessions is heightened when the suspect is a juvenile.[36] A child does not respond to police questioning like an adult counterpart under the same circumstances, mostly because children do not always perceive their constitutionally supported right to remain silent.[37] The Court refers to the child's response to police questioning as a "commonsense reality"[38] grounded in its precedent-based observation that children are "generally less mature and. . . often lack . . . perspective and judgment, [and] are more vulnerable or susceptible to . . . outside pressures" than adults.[39] In order to protect an individual from self-incrimination during police questioning, the Court determined, in *Miranda v. Arizona*, that suspects must be specifically warned prior to questioning that their statements may be used against them.[40] For children, however, their ability to understand the warnings becomes integral to their constitutional protection.

The *J.D.B.* Court concluded that a child's ability to understand *Miranda* warnings is irrelevant when no *Miranda* warnings are given.[41] The concern over the coercive nature of a custodial interrogation is triggered only when the suspect perceives that his freedom of action is

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the fastest growing division. *Id.*

33. *See J.D.B.*, 131 S. Ct. at 2399.

34. *Id.* at 2400. The prosecutor filed a juvenile petition alleging breaking and entering and larceny. *Id.* During a suppression hearing, the juvenile public defender argued that the young suspect's confession was obtained during a police custodial interrogation made without *Miranda* warnings given to him and that the confession was involuntary. *Id.* The trial court denied the defense's motion to suppress and ruled that the confession was voluntary and that the schoolhouse questioning was not a custodial interrogation for *Miranda* purposes. *Id.* The North Carolina Court of Appeals affirmed, ruling that consideration of age was not a valid extension of the custody analysis. *Id.*

35. *Id.* at 2401.

36. *J.D.B.*, 131 S. Ct. at 2401–02; *See* Clay Turner, *Simple Justice: In re J.D.B. and Custodial Interrogations*, 89 N.C. L. REV. 685, 713 (2011).

37. *J.D.B.*, 131 S. Ct. at 2398. The factor that highly distinguishes schoolhouse interrogations from generic police-conducted interrogations is the age of the suspect and, consequently, the suspect's inability to comprehend the severity of the situation. Holland, *supra* note 10, at 84.

38. *J.D.B.*, 131 S. Ct. at 2399.

39. *Id.* at 2403 (citations omitted) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982); Bellotti v. Baird, 443 U.S. 622, 635 (1979); Roper v. Simmons, 543 U.S. 551, 569 (2005)) (internal quotation marks omitted).

40. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

41. *J.D.B.*, 131 S. Ct. at 2401 n.4 ("*Amici* on behalf of J.D.B. question whether children of all ages can comprehend *Miranda* warnings and suggest that additional procedural safeguards may be necessary to protect their *Miranda* rights. Whatever the merit of that contention, it has no relevance here, where no *Miranda* warnings were administered at all." (internal citation omitted)).

restricted.[42] Determining whether a suspect is restricted in his freedom, or otherwise considered to be in custody is an objective standard.[43] The Court refers to two essential inquiries that, in summary, involve: (1) the totality-of-circumstances test and (2) the reasonable-person test.[44] Based on the outcome of these two tests, we can determine whether the suspect is entitled to the *Miranda* warnings as a constitutionally-protected right incident to an in-custody interrogation.

In balancing the competing considerations of the State while considering the practical implications for "in-the-moment judgments"[45] made by the police, the Court concludes that even under the objective test age is relevant to the custodial analysis.[46] Turning to its case precedent on the commonsense conclusions of childhood behaviors, the Court recognized that children are "less mature and responsible than adults" and lack the experience and perspective to avoid choices that may be detrimental or otherwise resulting from outside pressures.[47] Nonetheless, officers do not have to consider individualized characteristics "'unknowable' to them," but can make determinations based on what is known at the time of the interview or on what is objectively apparent to any reasonable officer.[48]

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42. *Id.*

43. *Id.* at 2402. The North Carolina Supreme Court ruled that consideration of the child's age is not relevant to determining whether his confession is lawful; however, they addressed the objective standard by specifically acknowledging the school environment. *In re* J.D.B., 686 S.E.2d 135, 138, 140 (N.C. 2009). The court stated that the school environment does not constitute a "significant deprivation of freedom of action." *Id.* at 138. The court explained that the inquiry as to whether a reasonable person would believe himself to be in custody and deprived of his freedom of action in some significant way associated with formal arrest is not equivalent to the broader "free to leave" test that has been applied under the Fourth Amendment. *Id.* Citing Yarborough v. Alvarado, 541 U.S. 652, 668 (2004), the court expressed its adherence to the view that the objective standard is designed to give clear guidance to officers, and considering a suspect's individual characteristics could be deemed a subjective inquiry. *Id.* at 140. The court further concluded that the nature of the school environment deprives students of some freedom of action, but it applies to all students and does not meet the requisite deprivation of freedom of action in a significant way. *Id.* at 138. The court accepted the trial court's finding that J.D.B. was not restrained in any way and no one stood guard at the door. *Id.* at 139. It noted that the investigator only began questioning after J.D.B. stated he was willing to answer questions. *Id.* Even further, in order to be considered in custody, J.D.B. would have had to have been restrained well beyond the usual limitations of the school setting. *See id.* ("[W]e determine that there were not sufficient 'indicia of formal arrest' to justify a conclusion that J.D.B. 'had been formally arrested or had had his freedom of movement restrained to the degree associated with a *formal arrest*.'" (emphasis added) (citation omitted)). The Court focused its ruling primarily on facts surrounding the level of participation of the school resource officer and the degree of restraint involved in the presence of a closed, but not locked, door. *Id.* These factors comprised the Court's objective consideration of the totality of circumstances. *Id.*

44. *J.D.B.*, 131 S. Ct. at 2402.

45. *Id.*

46. *Id.* at 2402, 2406. The Court stated 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 clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis." *Id.* at 2403.

47. *Id.* at 2403 (citing Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982); Bellotti v. Baird, 443 U.S. 622, 635 (1979); Roper v. Simmons, 543 U.S. 551, 569 (2005)).

48. *Id.* at 2404 (quoting Berkemer v. McCarty, 468 U.S. 420, 430 (1984)).

Unfortunately, the *J.D.B.* Court demonstrated its unwillingness to regulate the notable impact of police presence, much less questioning, on a child suspect. When coupled with the potentially misleading impressions of a school setting that minimizes the severity of the child's suspected illegal conduct, the risk of false confession is impermissibly high. The in-custody presumption would provide the scope of required constitutional protection for child suspects in this unique setting.

III. United States Supreme Court Jurisprudence has Long Recognized a Heightened Risk of Coercion and False Confessions of Juveniles During Custodial Interrogations

The mere presence, pressure, and power of the police exacerbate the long-standing problems of false juvenile confessions obtained during school interrogations.[49] In *J.D.B.*, the Court applied its recent case precedent on the extent of Fifth Amendment protection required during school interrogations.[50] Prior case law discusses the immaturity of juveniles and their propensity to make poor judgments.[51] The Court has addressed the juvenile's perception of his constitutional right to leave when questioned by the police in an earlier opinion, *Yarborough v. Alvarado*,[52]

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49. *See* Henry-Mays, *supra* note 3, at 358.

50. *See J.D.B.*, 131 S. Ct. at 2404 (discussing Yarborough v. Alvarado, 541 U.S. 652 (2004)).

51. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), petitioner was convicted of first-degree murder and sentenced to death. *Id.* at 818. States distinguish between the rights and duties of adults compared to those of juveniles when affording the right to vote, right to hold office, right to serve on a jury, and other rights and duties. *Id.* at 823–24. In *Thompson*, the Court held that the normal fifteen-year-old is not ready to assume the full responsibilities of an adult. *Id.* at 825. Juveniles are known to be more vulnerable, more impulsive, and less self-disciplined than adults. *Id.* at 834. They have less capacity to think in long-range terms like adults. *Id.* The Court suggested that the crimes of juveniles are not exclusively the offender's fault, but offenses by the juvenile represent failure of family, school, and the social system. *Id.* Juveniles are not trusted with the same privileges and responsibilities as adults; therefore, their irresponsibility is not as morally reprehensible as that of an adult. *Id.* at 835. More recently, in *Roper*, the Court recognized that "[t]hree general differences between juveniles under [eighteen] and adults demonstrate that juvenile offenders cannot be classified among the worst offenders." *Roper*, 543 U.S. at 569. First, juveniles more often have an underdeveloped sense of responsibility when compared to adults, which can result in ill-considered actions and decisions. *Id.* (citing Johnson v. Texas, 509 U.S. 350, 367 (1993)). Juveniles have been noted as being "overrepresented statistically in virtually every category of reckless behavior." *Id.* (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992)) (internal quotation marks omitted). The second difference is that juveniles are more vulnerable and susceptible to influences than adults. *Id.* (citing *Eddings*, 455 U.S. at 115). Juveniles also tend to have less control over their own environment. *Id.* The third noted difference is that the character of juveniles is not as well formed as that of adults. *Id.* at 570.

52. 541 U.S. 652 (2004). Paul Soto and Michael Alvarado attempted to steal a truck from a mall parking lot. *Id.* at 655. Alvarado was five months shy of his eighteenth birthday. *Id.* at 656. Detective Comstock, the leading detective on the case, contacted Alvarado's mother to inform her that the police wished to speak with Alvarado. *Id.* Alvarado's parents took him to the police station to be questioned. *Id.* The parents asked to be present during the interview, but were kept out, so they waited in the lobby. *Id.* Alvarado was not given *Miranda* warnings during his two-hour interview in the small interview room with Detective Comstock. *Id.* A few months later, Alvarado was charged with first-degree murder and attempted robbery. *Id.* at 658. He was sentenced to fifteen years to life. *Id.* at 659.

where it stated that a determination of "custody" is based on how a reasonable person in a similar situation as the suspect would perceive the circumstances.[53] While there were facts that supported the conclusion that the juveniles were in custody, the Court pointed to other facts that supported the contrary argument.[54] Factors such as Alvarado's prior history with law enforcement were not proper for determining custody[55] and considering the relationship between a suspect's past experiences and the likelihood that a reasonable person[56] would feel free to leave would be speculative.[57] Additionally, Justice O'Connor stated that it would be difficult to recognize that a suspect is a juvenile if he is close to the majority age.[58]

Even before the *Miranda* opinion, however, the Court acknowledged the immaturity of a child when confronting police authorities. In *Haley v. Ohio*,[59] the Court held that fifteen is a tender age for a child of any race; therefore, he cannot be held to standards of high maturity like adults.[60] While an adult can react to some situations in an unimpressed manner, a child can become overwhelmed in similar situations.[61] The Court determined that a child needs counsel and support to refrain from becoming a victim of fear and panic.[62] Then, in *Gallegos v. Colorado*,[63] the Court held that individual cases should closely scrutinize factors like the length of the questioning, the use of fear to break a suspect, and the age of the accused youth.[64] The Court noted that despite how sophisticated a juvenile may be, a fourteen-year-old boy "is unlikely to have any conception of what will confront him when he is made accessible only to the police."[65] A child is "unable to know how to protect his own interests or how to get the benefits of his constitutional rights."[66] Therefore, a child

53. *Id.* at 662.

54. *Id.*

55. *Id.* at 668.

56. The dissenting opinion noted that a reasonable person taken to the police station by his parents, questioned in a small interview room alone for two hours, and confronted with claims that there is strong evidence to show his participation in a serious crime, would not feel free to get up and leave at their own will at any time. *Id.* at 670–71 (Breyer, J., dissenting). The parents' involvement also indicated that Alvarado's statement was involuntary. *Id.* at 671.

57. *Id.*

58. *Id.* at 669 (O'Connor, J., concurring).

59. 332 U.S. 596 (1948).

60. *Id.* at 599.

61. *Id.* The age of the suspect holds weight when the courts evaluate the validity of waived *Miranda* rights. *See id.* As such, studies have concluded that juveniles are incapable of comprehending the legal implications of ignoring *Miranda* warnings and waiving those rights. Meyer, *supra* note 1, at 1035; *see also*, Henry-Mays, *supra* note 3, at 343–44.

62. *Haley*, 332 U.S. at 600.

63. 370 U.S. 49 (1962).

64. *Id.* at 52.

65. *Id.* at 54.

66. *Id.* Consequently, a younger suspect will generally be afforded more leniency by the courts when discerning whether the juvenile understood his rights. Meyer, *supra* note 1, at 1071.

has no way of knowing the consequences of a confession without the aid of mature judgment as to what steps to take.[67] Adult advice would place him on less unequal ground with the police.[68] The Court also held that to allow the conviction to stand would be equal to treating the child as if he had no constitutional rights.[69]

These cases reflect the Court's long-standing concern for the basic constitutional rights of child suspects when they are subjected to police questioning in the absence of a trusted adult. However, the *J.D.B.* Court failed to extend the same analysis to the heightened danger present during police questioning in the school setting.

Employing the typical custodial-interrogation determination leading to the shield of *Miranda* protections does not provide the level of procedural safeguards a juvenile needs in the school setting. As a result, juveniles subjected to police questioning in the school setting do not benefit from the usual custodial-interrogation/*Miranda*-warning framework, long-established as the governing standard for sufficient constitutional protection of their adult counterparts.

The police-conducted-school-interrogation setting presents a totality of circumstances that is inherently coercive and custodial in nature.[70] The juvenile is at an even greater risk of making false statements in the presence of school administrative authority and state police authority.[71] Accordingly, the totality of the circumstances would lead any reasonable school-age child to believe that the questioning is taking place under the restriction of freedom and movement that goes beyond the ordinary school policy.[72] If the risk for false confessions is heightened, then a presumptive in-custody approach that embodies key factors articulated in the "totality of circumstances" test utilized by post-*Miranda* case law[73]

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67. *Gallegos*, 370 U.S. at 54.

68. *Id.*

69. *Id.* at 55.

70. *See* Remington, *supra* note 1, at 375–82 (discussing the *Miranda* in-custody standard as it is applied to juveniles, especially in the school setting); Marjorie A. Shields, Annotation, *What Constitutes "Custodial Interrogation" Within Rule of Miranda v. Arizona Requiring That Suspect be Informed of Federal Constitutional Rights Before Custodial Interrogation—At School*, 59 A.L.R.6th 393, at § 9 (2010) (listing cases finding that the questioning of a student by a law enforcement officer constituted a custodial interrogation).

71. Forbes, *supra* note 1, at 70.

72. *See In re* J.D.B., 686 S.E.2d 135, 138 (N.C. 2009) (holding that this restriction needs to go beyond the usual limitations).

73. In *Miranda*, the Court held that a suspect in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation; and that, if he is indigent, a lawyer will be appointed to represent him. Miranda v. Arizona, 384 U.S. 436, 444 (1966). These warnings are in place to protect the suspect's constitutional rights and avoid involuntary confessions. *Id.*; *see also* B.M.B. v. State, 927 So. 2d 219, 222 (Fla. Dist. Ct. App. 2006), listing five factors that the Supreme Court of Florida has provided for determining whether under the totality of circumstances a suspect's Fifth Amendment rights against self-incrimination were violated when he was being questioned by the police). The Florida court summarized the five factors to be considered as follows:

more expansively addresses the interconnected issue of voluntary or involuntary confessions incident to the custodial setting.

Specifically, the suspect's age, experience, background and intelligence,[74] and the fact that the suspect's parents were not contacted and the juvenile was not given an opportunity to consult with his or her parents before questioning[75] are key factors considered by the post-*Miranda* case law that closely resembles the test articulated by the *J.D.B.* Court for the in-custody determination.[76] This Article will show how the presumptive in-custody approach properly considers both the totality-of-circumstances test made for determining "custody" and the required *Miranda* warnings.

IV. The Totality of Circumstances in Police-Conducted School Interrogations Leads the Reasonable Child to Believe He Must Respond and Make Potentially False Statements

The U.S. Supreme Court in *J.D.B.* based its decision about the relevancy of age in a custody analysis on an objective inquiry into the totality of circumstances.[77] When examining all of the circumstances surrounding the interrogation, the police must necessarily consider how, under the identified circumstances, a reasonable person would perceive restrictions on his freedom.[78] This means that the totality-of-circumstances test is a global consideration of several factors that potentially amount to a custodial determination. If it is determined that the child is in custody, then that child's constitutional Fifth Amendment rights must be protected through the administration of *Miranda* rights.[79]

> (1) "the manner in which the *Miranda* rights were administered, including any cajoling or trickery"; (2) "the suspect's age, experience, background and intelligence"; (3) "the fact that the suspect's parents were not contacted and the juvenile was not given an opportunity to consult with his or her parents before questioning"; (4) "the fact that the questioning took place in the station house"; and (5) "the fact that the interrogators did not secure a written waiver of the *Miranda* rights at the outset."

Id. (quoting Ramirez v. State, 739 So. 2d 568, 575–76 (Fla. 1999)).

74. *Miranda*, 384 U.S. at 469; *see also* Remington, *supra* note 1, at 376.

75. Remington, *supra* note 1, at 377–78; *see* J.D.B. v. North Carolina, 131 S. Ct. 2394, 2399 (2011) (noting that "J.D.B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother," who was his legal guardian). Other factors include the juvenile's understanding of the *Miranda* warnings, the seriousness of the alleged offense, the possibility of criminal prosecution, and the perceived coerciveness of the environment. *See* Holland, *supra* note 10, at 54–55.

76. *See supra* Part II.

77. *J.D.B.*, 131 S. Ct. at 2402. Specifically, the Court noted that two inquires are relevant to the in-custody determination: "[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave." *Id.* (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).

78. *Id.*

79. *See id.* at 2408 ("To hold, as the State requests, that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.").

However, a police-conducted school interrogation does not ordinarily provide for administering *Miranda* rights unless, as a result of the undeclared "custodial interrogation," the child suspect is arrested.[80] In the schoolhouse setting, the general totality of circumstances includes easily ascertainable information relevant to consideration of the child suspect's age, experience, background, and intelligence.[81] This information is available to the police prior to the interrogation and the administration of *Miranda* rights. Additionally, the child suspect's parents are usually not contacted to join the police at the schoolhouse prior to questioning or arrest, and the child may only be given the opportunity to contact his or her parent *after* incriminating statements have been made or the police have otherwise obtained sufficient information during the interrogation process to sustain an arrest.[82]

The schoolhouse interrogation setting is, therefore, contrary to establishing a knowing and voluntary confession that is incident to the in-custody determination and invocation of *Miranda* rights. That is, once the child suspect is questioned under the unique circumstances that operate together in the schoolhouse setting, timing is key in the reading of *Miranda* rights *before* incriminating statements are made. Child suspects might mistakenly believe that if they comply with the school rules and cooperate during the interrogation, then they will be able to return to class without further incident. On the contrary, child suspects may be read their *Miranda* rights and be asked to knowingly and voluntarily sign a written waiver form.[83]

Ultimately, police-conducted school interrogations invite multiple interconnected concerns that link to whether proper constitutional protections against coerced confessions are made. The importance of the preliminary determinations, involving whether the child suspect, under the totality of circumstances, believes that his freedom of movement is restricted, is heightened. Once that first custodial determination is made, the police secondarily provide the *Miranda* warnings as a procedural safeguard that informs the suspect that incriminating statements, if made, will be used against him. However, children cannot be effectively protected in the same manner when they are questioned in an environment where the adult authority is constantly and consistently dominant, and where their usual propensity is to respond when questioned by an authority figure without regard to restrictions on movement.[84] Therefore, the states must adopt a presumptive in-custody approach to all police-conducted school

80. *See* Remington, *supra* note 1, at 389–93 (arguing that a "reasonable child . . . would feel as if he or she were in 'custody'" when questioned by police in a school setting and should therefore be entitled to protections similar to those provided by *Miranda*).

81. *Id.*

82. *Id.* at 393.

83. *See* Holland, *supra* note 10, at 112. The signing of a waiver form provides no indication that the juvenile understood the implications involved. *Id.*

84. Turner, *supra* note 36, at 708–09.

interrogations based on the totality of the circumstances. This approach can be employed under the States' juvenile *Miranda* statutes.

Furthermore, there are several notable aspects of a schoolhouse interrogation that should compel a legal in-custody determination. Examination of the facts in *J.D.B.* exemplifies this point. Specifically, the police utilized persuasion tactics prior to J.D.B.'s incriminating statements while interrogating the young suspect for close to one hour behind closed doors.[85] All of the adults in the room were school or police officials.[86] J.D.B. was not informed of his right to remain silent before the interrogation or to have his grandmother present.[87] When the police asked questions about the neighborhood burglaries, J.D.B. was "pressed" or "urged" by the school's assistant principal to "do the right thing" and was told "the truth always comes out in the end."[88] J.D.B. responded by questioning whether return of the stolen goods would result in him "still be[ing] in trouble."[89] The police officer then resorted to threats of juvenile detention.[90] J.D.B. confessed to the crimes only after he understood the threat of juvenile incarceration.[91] Once he confessed, the police officer advised him that he did not have to answer more questions and that he could leave.[92] J.D.B. continued to talk and provided more details of the crime until the interrogation ended and police officers and school officials allowed him to leave the room and the school.[93]

If the totality-of-circumstances test is used to make custodial determinations in the schoolhouse setting, and if confessions made during police questioning are challenged based on this test, then perhaps an in-custody presumption will expansively protect the rights of the juvenile against self-incrimination. The case precedent addressing the issue of juvenile confessions supports the link between the totality of a custodial interrogation and the subsequent statements made incident to the interrogation.[94] If the courts make determinations about, first, whether the suspect is in custody when addressing false, incriminating confessions, then concluding that the suspect is in custody presumptively will immediately invoke the suspect's *Miranda* rights and cause the authorities to make other

85. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2399 (2011).

86. *Id. Compare In re* T.A.G., 663 S.E.2d 392, 394–95 (Ga. Ct. App. 2010) (holding that *any* police involvement, even mere presence, violates a juvenile's Fourth Amendment rights and should result in the exclusion of evidence), *with* State v. Schloegel, 769 N.W.2d 130, 134, 136–37 (Wis. Ct. App. 2009) (holding that a *Miranda* evaluation is irrelevant until the juvenile is in custody).

87. *See J.D.B.*, 131 S.Ct. at 2399.

88. *Id.*

89. *Id.*

90. *Id.* at 2400.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See* State v. Oglesby, 648 S.E.2d 819, 822 (N.C. 2007); State v. Burrell, 697 N.W.2d 579, 592–97 (Minn. 2005).

considerations (e.g., presence of a parent or guardian) proscribed in the state's juvenile *Miranda* statutes.

For example, in *Transcoso*,[95] a U.S. district court recently examined challenges to a voluntary confession where a child was questioned for fifty-five hours regarding a murder investigation.[96] The sixteen-year-old defendant was given *Miranda* warnings; however, the court's decision referred back to the circumstances incident to when she was interrogated.[97] Consideration of these circumstances directly addressed the custodial environment—although the defendant had waived her *Miranda* rights, rendering her confession voluntary, the court found that while in police custody she was not told that she was free to leave or that she did not have to answer police questions.[98] These are the considerations made when deciding preliminarily whether the juvenile is in custody and therefore entitled to Fifth Amendment protection.[99] The court ruled that the totality of circumstances governs any determination of whether a statement was voluntary,[100] and the determination "includes evaluation of the juvenile's age, experience, education, background, and intelligence, and [considers] whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[101]

Despite the fact that the totality of circumstances supported the state appellate court's determination that the juvenile's confession in this case was voluntary,[102] the U.S. district court did not believe that the state appellate court properly considered the magnitude of the conditions under

95. United States *ex rel.* Carter v. Transcoso, No. 10 C 1270, 2011 WL 1636994 (N.D. Ill. Apr. 28, 2011).

96. *Id.* at *3. On appeal to obtain a certificate of appealability, the U.S. district court considered the voluntariness of a confession given by a sixteen-year-old girl who was originally questioned by the police as a witness to her nineteen-year-old roommate's murder. *Id.* at *9. The Court aptly considered the voluntariness of Carter's confession in the context of factors which we commonly refer to as the totality of circumstances (evaluation of the juvenile's age, experience, education, background, and intelligence), but goes further to consider whether she had the capacity to understand the warnings given her, the nature of her Fifth Amendment rights, and the consequences of waiving those rights. *Id.*

97. *Id.* at *9–*10.

98. *Id.* at *2.

99. *See id.* at *8 ("A person is seized 'within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" (quoting United States v. Mendenhall, 446 U.S. 544, 545 (1980))).

100. *Id.* at *9.

101. *Id.* (quoting Ruvalcaba v. Chandler, 416 F.3d 555, 561 (7th Cir. 2005)). The district court determined that the state appellate court appropriately applied these standards. *Id.* The district court's only question was whether the manner in which the state court applied the standards was unreasonable. *Id.*

102. Carter confessed to murdering Thompson without prompting or questioning from the police. *Id.* at *10. Police gave her opportunity to speak with her father prior to her confession. *Id.* at *5. She was read her *Miranda* rights at the time of the polygraph examination, and then again before any further statements were taken. *Id.* at *9. When her father suggested that he hire an attorney for her, she refused. *Id.* at *10.

which her confession was given.[103] Because the state court did not specifically address the circumstances involving fifty-five hours in the police station and the stress generated by those circumstances, further review of the voluntariness issue was warranted.[104] The court's analysis in *Transcoso* highlights the importance of the totality of circumstances surrounding a juvenile's questioning even when the police provide *Miranda* warnings. It shows that even when *Miranda* warnings are given, juveniles are not always protected if they have previously been subjected to a potentially coercive custodial environment. The *Transcoso* court's analysis represents the depth of consideration that must be given so that child suspects receive constitutional protection. Amending the states' juvenile *Miranda* statutes to include a presumptive in-custody approach would facilitate the constitutional protection for child suspects who are subjected to police questioning in the school environment.

In the school setting, a child suspect might be originally questioned as a witness, just like the defendant was in *Transcoso*. Once statements are made or information is obtained, the tenor of police questioning changes. *Miranda* rights might be given. The problem is that the inherently coercive nature of a school interrogation creates a totality of circumstances that heightens the risk of coercion.[105] When challenged on appeal, as in the *Transcoso* case, reasonable jurists can still potentially regard the circumstances as coercive when a trusted adult was present, like the father in *Transcoso*, who had access to the child intermittently, and the child suspect remained in the physical presence of a police station for over two nights. School interrogations often occur without the legal guardian because the police have purposively chosen to question the child at school.[106] The freedom to leave is already regulated by the school rules.[107] Arguably, these rules compromise the child suspect's ability to protect

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103. *Id.* at *9–*10.

104. *Id.* at *13. The court referenced the unusual and unfortunate circumstances of Carter's interrogation, which might not have been coercive. *Id.* Even still, they were "undoubtedly far from ideal, and certainly unfortunate." *Id.* at *10. Specifically, Carter was unable to go home because she was without an available legal guardian and, at the time, she feared what might happen to her at the hands of the murderer. *Id.* "Once there, the fact that she spent the night in uncomfortable and potentially embarrassing conditions, and that she was never told she could leave, certainly weigh against a finding that her ultimate confession was voluntary." *Id.* The court stated,

> [O]ther indicia of reliability make a finding that Carter's confession was voluntary reasonable. Nonetheless, the Court is disturbed by the fact that a sixteen-year-old girl with no available legal guardian was subject to repeated questioning, sometimes without the benefit of *Miranda* warnings, while she was kept at a police station for 55 consecutive hours without access to basic comforts and amenities and without being told she was free to leave. The Court recognizes that reasonable jurists might disagree regarding the effects of these conditions.

Id. at *13.

105. *See supra* notes 20, 71 and accompanying text.

106. *See* Remington, *supra* note 1, at 377–79.

107. *Id.* at 379 ("This is because, once inside the confines of the classroom, the student's freedom to leave is already restrained because he or she is under the control of the school.").

himself under the Fifth Amendment when the school setting does not ordinarily raise concerns over possible self-incrimination incident to a criminal investigation. A presumptive in-custody approach would protect the child suspect from the inherently coercive totality of circumstances in the school setting.

If Fifth Amendment protection guards against the heightened risk of coerced false statements, then children subjected to police questioning about a crime are at even greater risk of sustaining a Fifth Amendment constitutional violation of their rights.[108] *J.D.B.* leaves the door open for possible admissions of guilt by a minor who is subjected to school interrogation in the absence of *Miranda* warnings.[109] The in-custody analysis should be made with emphasis on not just the age of the child, but also on the heightened risk of self-incrimination when interrogations are conducted in the school setting.[110] The *Miranda* protections against coerced, self-incriminating statements are required when the person perceives that he is in custody and is no longer free to relieve himself from police questioning.[111] For child suspects, this means that the law will protect them from self-incrimination via proper *Miranda* warnings *only if* the police questioner considers the child's age as it relates to the child's perceived restriction on his freedom.[112]

The problem is that the *J.D.B.* Court did not perceive that a child's "freedom" of movement is inherently restricted in the school setting.[113] Even the thirteen-year-old seventh grader in *J.D.B.* had to be "removed" from his classroom by a uniformed officer and "escorted" to the school's conference room.[114] The expectations of the child, the teacher, the school officials, and the police were that J.D.B. would not be "free" to leave the interview without permission. If school interrogations are usually conducted in this environment of repressed physical movement, then the presumptive in-custody analysis would operate to provide the required constitutional protection.

Because the in-custody analysis is an objective inquiry requiring police officers to examine the circumstances,[115] schoolhouse interrogations offer one of the more "objective" settings for making that analysis.[116] The circumstances are essentially predetermined by the school's rules and

108. *See* State v. Burrell, 697 N.W.2d 579, 591–92 (Minn. 2005).

109. *See supra* Part II.

110. *See supra* notes 20, 71 and accompanying text.

111. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402 (2011).

112. *See supra* notes 42–48 and accompanying text.

113. *J.D.B.*, 131 S. Ct. at 2402 (omitting school setting from the freedom-of-movement analysis).

114. *Id.* at 2399.

115. *Id.* at 2402.

116. The Court observed that one of the "benefit[s] of the objective custody analysis is that it is 'designed to give clear guidance to the police.'" *Id.* (quoting Yarborough v. Alvarado, 541 U.S. 652, 668 (2004)).

policies for management of student conduct.[117] The "custodial" inquiry of *Miranda* is satisfied because a child suspect is more likely to make a self-incriminating statement in the school setting rather than merely walk away from an inherently coercive interrogation.[118]

V. The States' Juvenile *Miranda* Statutes and Case Precedent Provide the Appropriate Forum for Implementation of the Presumptive In-Custody Approach

The states' juvenile *Miranda* statutes already provide the framework that affords juveniles the appropriate constitutional rights.[119] These statutes are usually applied to cases that challenge whether the juvenile has made a knowing and willing confession.[120] For instance, under the North Carolina statute, a juvenile is entitled to request the presence of a "guardian" during police questioning.[121] In *State v. Oglesby*, the defendant filed a motion to suppress statements made when the police did not honor his request for his aunt to be present.[122] The trial court determined whether

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117. *See* Remington, *supra* note 1, at 379.

118. *See J.D.B.*, 131 S. Ct. at 2409 (acknowledging the heightened risk of school interrogations).

119. *See, e.g.*, COLO. REV. STAT. § 19-2-511 (2005); CONN. GEN. STAT. § 46b-137(c) (Supp. 2012); GA. CODE ANN. § 15-11-7 (2012); N.M. STAT. ANN. § 32A-2-14 (2010); N.C. GEN. STAT. § 7B-2101 (2011); WASH. REV. CODE § 13.40.140 (2004).

120. *See* State v. Oglesby, 648 S.E.2d 819 (N.C. 2007).

121. N.C. GEN. STAT. § 7B-2101 (2011). In addition to the right to request the presence of a guardian during police questioning, the North Carolina statute provides juveniles with several other protections. *Id.* Specifically, the North Carolina statute provides:

> (a) Any juvenile in custody must be advised prior to questioning:
>
> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.
>
> (b) When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile's rights as set out in subsection (a) of this section; however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.
>
> (c) If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that the juvenile does not wish to be questioned further, the officer shall cease questioning.
>
> (d) Before admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights.

Id.

122. *Oglesby*, 648 S.E.2d at 820–21.

the juvenile knowingly, willingly, and understandingly waived his rights.[123] Because the court was unwilling to extend the interpretation of the term "guardian" to encompass anything other than a relationship established by legal process, the motion to suppress was denied.[124]

While the majority opinion in *Oglesby* straightforwardly applied the term "guardian" within the plain meaning of the word,[125] the dissent provided a relevant and interesting recitation of the North Carolina precedent on the issue of juvenile confessions.[126] Specifically, Justice Timmons-Goodson referenced the greater obligation of the state to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution.[127] The dissent further recognized how juvenile proceedings are unlike an ordinary criminal proceeding such that the burden upon the state to see that a juvenile's rights are protected is increased rather than decreased.[128]

Oglesby is relevant because it shows how the law considers protections against false confessions as inextricably linked to protections against self-incrimination, especially in cases involving juveniles.[129] *Oglesby* illustrates how the juvenile *Miranda* statutes provide the legally relevant context for ensuring that school officials and the police who question a child in the school setting adhere to a process that protects the child from self-incrimination.[130]

The adoption of a presumptive in-custody status as a matter of statutory law would facilite the necessary protection. If the burden rests on the state to show that a juvenile has provided a knowing and intelligent waiver,[131] then a presumptive approach to in-custody police questioning assists in the analysis. Because the presumption places the juvenile in custody under the juvenile *Miranda* statute, the police must then comply with the requirement that the juvenile be advised of his rights, including the right to a parent or guardian's presence during questioning.[132]

Even though an independent and separate determination must be made as to the knowing and intelligent waiver[133] that may come thereafter, at least the presumption potentially averts an underlying challenge made by the juvenile defendant as to his initial right to remain silent. When a

123. *Id.* at 822.

124. *Id.*

125. *Id.*

126. *Id.* at 823–24 (Timmons-Goodson, J., dissenting).

127. *Id.* at 823 (citing *In re* T.E.F., 614 S.E.2d 296, 299 (N.C. 2005)).

128. *Id.* at 823.

129. *See id.* at 821–23.

130. *Id.* at 822.

131. *See* State v. Miller, 477 S.E.2d 915, 920 (N.C. 1996).

132. North Carolina, for instance, provides such a right. *See supra* notes 121–28 and accompanying text.

133. *Oglesby*, 648 S.E.2d at 823 (Timmons-Goodson, J., dissenting) (considering age as an important factor in assessing the possible violation of constitutional or statutory rights).

defendant asserts a false confession, the courts will examine the language in the relevant juvenile *Miranda* statute.[134] If the child suspect is presumptively in custody during the schoolhouse interrogation, then the court will determine whether the *Miranda* warnings were given.[135] This Article asserts that the totality-of-circumstances test supports the adoption of the presumptive in-custody approach, and the states' case precedent supports guarding juveniles, especially, from the dangers of constitutional infringement on their right to remain silent.[136]

In *State v. Burrell*, the Minnesota Supreme Court noted the number of times that the juvenile requested his parent, as well as the timing of his request at the onset of police interrogation.[137] The court believed that a totality-of-circumstances analysis should particularly address the juvenile's propensity to be misled as to his constitutional rights when he is questioned in a non-adversarial setting.[138] If the juvenile court process is generally viewed as protective,[139] then a child who is subject to police questioning in the school setting is more likely to improperly perceive the gravity of the circumstances that he faces. Therefore, the concern for potentially coerced statements is even more heightened, especially when the police employ commonly used tactics such as deceit and trickery.[140] The police must be given the structure of statutory authority to guide the school interrogation process. A presumptive in-custody approach would provide that structure.

The *Burrell* court ultimately ruled that the juvenile's waiver was not knowing and intelligent because he repeatedly requested the presence of his parent. In addition, the court noted the police interrogator's "pre-

134. *Cf. id.* at 822 (looking to section 7B-2101 of the North Carolina Juvenile Code to determine the juvenile defendant's rights regarding custodial interrogation).

135. *See supra* notes 41–43 and accompanying text.

136. *See, e.g.*, *In re* T.A.G., 663 S.E.2d 392, 394–95 (Ga. Ct. App. 2010) (holding that *any* police involvement, even mere presence, violated a juvenile's Fourth Amendment rights and should result in the exclusion of evidence); *Oglesby*, 648 S.E.2d at 822 (acknowledging a juvenile's right, under North Carolina law, to have a guardian present during police interrogation); State v. Burrell, 697 N.W.2d 579, 592–97 (Minn. 2005) (reviewing prior case law on the waiver of Miranda rights by juveniles, and noting that "courts must closely examine under the totality of the circumstances whether the juvenile is able to make a valid *Miranda* waiver without a parent's presence").

137. *Burrell*, 697 N.W.2d at 595–97, 605 (holding "that the district court committed error by ruling that Burrell's *Miranda* waiver was knowing, intelligent, and voluntary" in light of his "repeated requests" for his mother's counsel and granting him a new trial on first-degree murder for the benefit of a gang and attempted first-degree murder for the benefit of a gang).

138. *Id.* at 592. The court indicated, "We have stated that the best course is to specifically warn the minor that his statement can be used in adult court, particularly when the juvenile might be misled by the 'protective, non adversary' environment that juvenile court fosters." *Id.* (quoting State v. Loyd, 212 N.W.2d 671, 676–77 (Minn. 1973)). The court also considered other factors, such as the juvenile's "maturity, intelligence, education, physical deprivations, prior criminal experience, length and legality of detention, lack of or adequacy of warnings, and the nature of the interrogation." *Id.* at 595.

139. *Id.* at 592.

140. *Id.* at 596 (citing State v. Thaggard, 527 N.W.2d 804, 810 (Minn. 1995) (regarding consideration for the nature of the interrogation and whether the police used deception or trickery in an attempt to secure a waiver and eventual confession)).

Miranda mischaracterization" of the case.[141] Most importantly, this case points out, as part of the totality-of-circumstances test, how the tactics and trickery of the police interrogation process pre-*Miranda* warnings can lead to false statements by a juvenile.[142] While the presence of a parent was not applied in *Burrell* as a per se rule, the court deemed the circumstances of the juvenile's repeated request as directly relevant to his statements made to the police.[143]

The presumptive in-custody approach in the states' juvenile *Miranda* statutes guards against the heightened risk of false statements made by juveniles where the totality of the school setting creates a false sense of constitutional protection. Courts have also employed the reasonable-child test in addressing the constitutional rights of juveniles.[144]

A. The Reasonable School-Aged Child Experiences Sufficient Restriction of Freedom to Support a Presumptive In-Custody Approach

In a case involving statements made by four juveniles to a school administrator, the court in *Commonwealth v. Ira I.*[145] determined that *Miranda* warnings should not have been given because the juveniles were not subject to custodial interrogation.[146] This case is particularly relevant because the juvenile judge had made specific findings regarding the impact of the school interrogation setting based on application of the reasonable-person test.[147] He noted the role assumed by the assistant principal and the

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141. *Id.* at 597.

142. *See id.* at 596 (citing *Miranda v. Arizona*, 348 U.S. 436, 476 (1966)) (noting the *Miranda* Court's criticism of "trickery, threats, and cajolement to persuade a suspect to waive his Fifth Amendment rights" and finding that pre-*Miranda* mischaracterization of evidence was a circumstance indicating that the defendant's waiver of his rights was not knowing, intelligent and voluntary).

143. *Id.* at 596–97.

144. *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402–03 (2011) ("In some circumstances, a child's age 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.' That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." (quoting Stansbury v. California, 511 U.S. 318, 325 (1994))).

145. 791 N.E.2d 894 (Mass. 2003).

146. *Id.* at 902.

147. The court applied a reasonable person test and considered the following factors:

> where the interrogation took place; whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect; the tone and nature of the questioning; and whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest.

Id. (quoting Commonwealth v. Brum, 777 N.E.2d 1238 (Mass. 2002) (internal quotation marks omitted). The *J.D.B.* Court ruled that age is relevant when deciding what a reasonable school child would perceive. *J.D.B.*, 131 S. Ct. at 2402–06. Dissenting justices in the North Carolina Supreme Court pointed to the historical content under North Carolina's civil common law for consideration of a child's age on issues of contributory negligence. *In re* J.D.B., 686 S.E.2d 135, 142 (N.C. 2009). The civil common law imposes responsibility based on negligence principles where the jury examines "the doing of something which a reasonable person would not do, or the failure to do something which a reasonable

impact of his actions on possible infringement of the juveniles' constitutional rights.[148] Since the assistant principal conducted the investigation, the juvenile judge determined that he was representing himself to the children as a member of law enforcement.[149] And, if the children were not free to leave but instead were treated in a custodial fashion as opposed to in a school fashion, then they should be afforded certain due-process rights.[150]

The Massachusetts Supreme Court's ruling suggests that if, in fact, the police had called the juveniles into the assistant principal's office to question them regarding the alleged incident, then the custodial setting would have indicated the need for constitutional protections.[151] Any elicited statements given by the juveniles would be under Fifth Amendment scrutiny. In addition, the court concluded that the juveniles were not in custody based on how a reasonable person in the juvenile's position would have understood his situation.[152] Questioning in the principal's office did not constitute a formal arrest, or the indication that formal arrest was impending.[153] *Ira* supports the argument that if, instead, the police had questioned the juveniles in the principal's office, constitutional protections would have been required.

Students who make statements to a school official are not generally protected against false self-incrimination because they are not considered in custody.[154] Accordingly, since police interrogations have become commonplace in the schools, we must consider the impact that interrogation sessions

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person would do, under facts similar to those shown by the evidence." Carlson v. Construction Co., 761 N.W.2d 595, 599 (S.D. 2009). Under the criminal application, "the 'reasonable person' standard presupposes an innocent person." Florida v. Bostick, 501 U.S. 429, 438 (1991). However, the evaluation of whether a person is in custody for *Miranda* purposes includes consideration of all of the circumstances surrounding the interrogation, including those that "would have affected how a reasonable person in [the suspect's position] would perceive his or her freedom to leave." Stansbury v. California, 511 U.S. 318, 322, 325 (1994).

148. *Ira I.*, 791 N.E.2d at 900. During the investigation of an alleged assault and battery, the assistant principal, Lapan, questioned students who might have been on a bus with the victim. *Id.* at 897. Lapan spoke with them individually in his office and questioned each one for approximately fifteen to twenty minutes. *Id.* He took written statements from five students. *Id.*

149. *Id.* at 900.

150. *Id.* The juveniles asserted that they were in custody because they were summoned to the assistant principal's office regarding a potentially criminal matter, and they did not consider themselves free to leave. *Id.* at 903.

151. *See id.* at 900–903 ("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." (quoting Commonwealth v. Snyder, 597 N.E.2d 1363, 1369 (1992))). The court also noted, "A trip to the principal's office for an interview is not a 'formal arrest,' nor does it suggest to the student that he or she faces such an arrest." *Id.* at 902.

152. *Id.* at 902.

153. *Id.* The court viewed the investigative process conducted by the assistant principal as within the realm of expected school-official conduct when addressing student behavioral issues. *Id.*

154. *See generally* Price, *supra* note 10. A school official acting alone may question a student without complying with *Miranda*'s requirements, and the juvenile's responses will be admissible in criminal proceedings. Holland, *supra* note 4, at 40–41.

might have on the reasonable juvenile's perception. Often, the reasonable-child test is applied when examining the issue of incriminating statements made by juveniles to non-police officials.[155] If the presumptive in-custody approach is adopted in the states' juvenile *Miranda* statutes, then there will be fewer false confessions incident to police-conducted interrogations in the school setting. In effect, the states' can kill two proverbial birds with one stone.

B. Amending the States' Juvenile *Miranda* Statutes to Include an In-Custody Presumption During Police-Conducted School Interrogations Will Alleviate the Problem of Coerced Confessions

State appellate courts recognize the importance of establishing un-coerced confessions obtained during custodial interrogations because of the heightened risk of false confessions or inculpatory statements made by juveniles.[156] The Florida Court of Appeals applied their juvenile *Miranda* statute in a case that links the custodial questioning of a child with false confessions.[157] In *B.M.B. v. State*, the juvenile was not provided the opportunity to consult with a parent *before* being questioned.[158] The governing Florida statute required that the police attempt to notify the parent when a child is taken into custody.[159] The court used the police's failure to comply with the statutory requirement as a factor in ultimately determining that the confession was involuntary.[160] If the states incorporate

155. *See, e.g.*, Commonwealth v. A Juvenile, 521 N.E.2d 1368, 1369–70 (Mass. 1988). The juvenile moved to suppress his confessions and the victim's in-court identification of him regarding an alleged assault because he did not receive *Miranda* warnings. *Id.* at 1369. Additionally, he argued that he did not have an opportunity to consult with an interested adult on the question of waiver. *Id.* The court held that the district judge properly suppressed the juvenile's confession to the assistant director of a troubled-adolescent house where the accused was living. *Id.* at 1370. When the director interrogated the juvenile, he was acting as an instrument of the police; therefore, appropriate *Miranda* warnings were warranted. *Id.* at 1370. The decision in *A Juvenile* parallels the same court's later decision in *Ira I.* where a juvenile was entitled to *Miranda* warnings; however, the court in *Ira I.* found that the juvenile was not in custody when questioned by the school assistant principal. *Ira I.*, 791 N.E.2d at 902. Instead, the court in *A Juvenile* reasoned that a reasonable person would have believed himself to be in custody since the child was interrogated in a Department of Youth Services detention facility where he was subject to continuous supervision, and from which he was not free to leave. *A Juvenile*, 521 N.E.2d at 1370. On the issue of his confession, the Massachusetts common law, rather than statutory *Miranda* warnings, requires that a child who has attained the age of fourteen be given a meaningful consultation with a parent, interested adult, or attorney to ensure that any waiver is knowing and intelligent. *Id.* at 1371. The court found no evidence to support that the juvenile had a high degree of knowledge, experience or sophistication. *Id.*

156. *See* Remington, *supra* note 1, at 375–76.

157. *See* B.M.B. v. State, 927 So. 2d 219 (Fla. Dist. Ct. App. 1998).

158. *Id.* at 223; *accord* Meyer, *supra* note 1, at 1061 (describing a Kansas statute prohibiting the use of incriminatory statements made by juveniles under the age of fourteen unless they have had a consultation with their parent or guardian about waiving their rights *before* the statement was made).

159. *B.M.B.*, 927 So. 2d at 223.

160. *Id.*; *see also* FLA. STAT. § 985.101(3) (2012) ("When a child is taken into custody as provided in this section, the person taking the child into custody shall attempt to notify the parent, guardian, or legal custodian of the child.").

a presumptive in-custody approach into their juvenile *Miranda* statutes, then factors such as parental involvement as well as other considerations for obtaining a knowing waiver can be addressed early in the investigative process.[161] The constitutional protection of the child suspect is, therefore, more meaningfully ensured because procedures will be in place to prevent a coercive environment.[162]

Furthermore, the North Carolina Supreme Court in *State v. Smith*[163] applied the principles of the Fifth and Sixth Amendment protections articulated by the United States Supreme Court regarding custodial interrogations.[164] This is extremely persuasive for the states adopting a presumptive in-custody approach because the amendment of their juvenile *Miranda* statutes would be in accordance with the presumption that embodies the constitutional protection principles used by the North Carolina Supreme Court in deciding challenges to custodial interrogations.[165] In *Smith*, even though the juvenile was asked very few questions by the police, the court held that the conversation focused primarily around the juvenile's participation in the crime and created the "functional equivalent" of questioning, such that the police should have expected that the juvenile would feel compelled to respond.[166] Specifically, the court stated, "Interrogation refers to 'not only express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'"[167]

The analysis is particularly relevant when the police conduct school interrogations because the physical environment is not an overt custodial setting, like a police department. In fact, the police can utilize the perception of a noncustodial setting to their advantage to elicit information in response to their interview tactics, such as those used in the *Smith* case.[168] The court's in-custody analysis was paramount to its determination of constitutional protection from involuntary confession[169] as specifically

161. *See* Larson, *supra* note 21, at 640.

162. *See, e.g.*, COLO. REV. STAT. § 19-2-511 (2005) (showing a similarity to Florida's statute by requiring a juvenile's parent be present in order for a child to make a statement).

163. 343 S.E.2d 518 (N.C. 1986), *abrogated on other grounds by* State v. Buchanan, 543 S.E.2d 823 (N.C. 2001).

164. *Id.* at 521 (recognizing that the U.S. Supreme Court cases were not controlling, but the established principles were applicable under the state's juvenile *Miranda* statute).

165. *See id.*

166. *Id.* at 522.

167. *Id.* at 521–22 (quoting Rhode Island v. Innis, 446 U.S. 291, 301 (1980)).

168. *See id.* at 522 (describing how the police escorted a sixteen-year-old robbery suspect to the police station and, while waiting for the parent to arrive, stated to the juvenile, "[Y]ou do what you want to; and certainly I don't want you to make any remarks until your mother gets here. . . . [J]ust listen to me; . . . I want you to know these facts of the case. I want you to know the circumstances that surround what we're hoping to interview you about.").

169. *Id.* at 520.

provided by the state statute.[170] Under the circumstances, the North Carolina Supreme Court held that a sixteen-year-old robbery suspect might have reasonably believed that his freedom of action was being deprived.[171] Therefore, he was in custody.[172]

Likewise, when a juvenile is questioned pursuant to an ongoing police investigation in the confines of a room populated entirely by police and other school administrators and in the absence of a parent or trusted adult, he is in custody.[173] The risk of coercion and fear is high.[174] Since juveniles are likely to make false statements to the police under those circumstances, a presumptive in-custody approach protects their constitutional rights. Existing state statutes already define parameters that consider the environment in which juveniles are questioned and the circumstances under which incriminating statements are admissible against them.

VI. What are the States Doing?

A. Texas

The states generally codify constitutional protections against self-incrimination in statutory provisions addressing the custodial-interrogation determination and the voluntariness of waived statements made while in custody.[175] Texas statutes[176] and case law address the admissibility of false statements and custodial interrogation.[177] Texas case law employs a two-

170. N.C. GEN. STAT. § 7B-2101 (2011); *see also Smith*, 343 S.E.2d at 520 (citing N.C. GEN. STAT. § 7A-595, which has since been replaced by § 7B-2101).

171. *Smith*, 343 S.E.2d at 520.

172. *Id.* at 520–21.

173. Ryan Patterson, *In Re Andre M.: Analyzing the Totality of Circumstances When a Parent is Intentionally Excluded From a Juvenile Interrogation*, 46 ARIZ. L. REV. 601, 604–06 (2004).

174. *See id.* at 604 ("A parent's presence protects the juvenile from the coercive environment of interrogations.").

175. *See, e.g.*, COLO. REV. STAT. § 19-2-511 (2005); CONN. GEN. STAT. § 46b-137(c) (Supp. 2012); GA. CODE ANN. § 15-11-7 (2012); N.M. STAT. ANN. § 32A-2-14 (2010); N.C. GEN. STAT. § 7B-2101 (2011); WASH. REV. CODE § 13.40.140 (2004).

176. *See* TEX. FAM. CODE ANN. § 54.03(e) (West Supp. 2012) (providing the requirements for adjudication hearings including the protections against self-incrimination); TEX. FAM. CODE ANN. § 51.095(a)(1)(A) (West Supp. 2012) (governing the admissibility of statements made by a child).

177. *See generally In re* D.J.C., 312 S.W.3d 704, 711–22 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (discussing the various provisions of the Texas Family Code dealing with custodial interrogation of a juvenile); Martinez v. State, 131 S.W.3d 22, 31–32 (Tex. App.—San Antonio 2003, no pet.) ("If the juvenile is not given the statutorily required admonishments, then the juvenile's statement is inadmissible. However, a statement which is not the product of a custodial interrogation is not required to be suppressed, even if the juvenile does not receive the statutory admonishments." (citations omitted) (citing TEX. FAM. CODE ANN. § 51.095(a); Melendez v. State, 873 S.W.2d 723, 725 (Tex. App.—San Antonio 1994, no pet.))); *In re* D.A.R., 73 S.W.3d 505, 512–13 (Tex. App.—El Paso 2002, no pet.) (declaring that because the juvenile was in custody at the time of the interrogation, any statement made was inadmissible under section 51.095(a)(5) of the Texas Family Code, which provides that a juvenile's "statement is only admissible if the child is given warnings by a magistrate before the statement is made and the child knowingly, intelligently, and voluntarily waives each right stated in the

step analysis that includes consideration for the totality-of-circumstances and reasonable-child tests.[178] Both the statute and the case law set forth circumstances under which a child's statements are admissible; however, the statutory language more specifically refers to situations where written and oral statements can be used.[179]

The Texas courts first examine the circumstances surrounding the interrogation in order to assess whether there was a formal arrest or restraint of freedom of movement.[180] The test imposes an objective standard, but case law sets forth specific situations that generally constitute custody.[181] The school setting uniquely satisfies the previously contemplated circumstances that present a significant, physical deprivation of freedom and creation of a situation that would lead the reasonable child to believe his freedom is restricted.[182] Because children are generally regarded under the law as susceptible to influence,[183] the law that purports to protect their constitutional rights against self-incrimination should take into account how children in the school setting are indoctrinated into compliance with those in authority over them.

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warning").

178. *See D.J.C.*, 312 S.W.3d at 712 ("A two-step analysis is employed in a juvenile delinquency proceeding to determine whether an individual is in custody."). In *D.J.C.*, a sixteen-year-old juvenile who was adjudicated delinquent argued for the suppression of statements he made to an officer's questioning conducted in a police station interview room without the presence of his grandmother. *Id.* at 708–10, 713–15. The court elaborated on its two-step analysis as follows:

> First, the court examines all the circumstances surrounding the interrogation to determine whether there was a formal arrest or restraint of freedom of movement to the degree associated with a formal arrest. This initial determination focuses on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. Second, the court considers whether, in light of the given circumstances, a reasonable person would have felt he or she was at liberty to terminate the interrogation and leave.

Id. at 712 (citations omitted).

179. *See generally*, TEX. FAM. CODE ANN. § 51.095(a)–(d) (West Supp. 2012).

180. *D.J.C.*, 312 S.W.3d at 712.

181. The *D.J.C.* court declared,

> The following situations generally constitute custody: (1) when the suspect is physically deprived of his freedom of action in any significant way; (2) when a law enforcement officer tells the suspect that he cannot leave; (3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; or (4) when there is probable cause to arrest and law enforcement officers do not tell the suspect that he is free to leave.

Id. at 713 (citing Dowthitt v. State, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996); Jeffley v. State, 38 S.W.3d 847, 855 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd)).

182. *See id* at 712 ("Custodial interrogation is questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of his freedom in any significant way. . . . A child is in custody if, under the objective circumstances, a reasonable child of the same age would believe his freedom of movement was significantly restricted." (citations omitted)). *See generally* Henry-Mays, *supra* note 3 at 358–60.

183. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2405 (2011).

The *D.J.C.* court concluded that a child who was prevented from access to his grandmother, read his rights, and later returned to a locked interview room for police questioning, was restrained from movement sufficient to satisfy the totality-of-circumstances test.[184]

Police-conducted school interrogations, however, do not evolve from non-custodial to custodial[185] where the child suspect is potentially questioned in the absence of a parent or guardian, but then detained in a locked or closed door conference room, and given *Miranda* warnings by the officer once he gains sufficient information to support probable cause.[186] Instead, a child suspect like J.D.B can be immediately placed into a room where he is restrained from leaving until those in authority have dismissed him.[187] If the Texas courts apply the totality-of-circumstances test, acknowledging the impact of police interrogation on a child suspect, then the Texas statutes can be amended to consider children in the school setting as presumptively in custody.

B. Other States

Aside from Texas, other states, such as Colorado and Connecticut, have juvenile statutes with very broad terms of protection for their juveniles.[188] Connecticut's juvenile statute provides for a totality-of-circumstances approach that supports the argument for a presumptive in-custody approach in the school setting.[189] The statute gives judges authority to broadly consider how a valid waiver is given by a juvenile,[190] but when applied in the school setting, the police can argue their "good-faith belief" that the child was at least eighteen, if not older.[191]

Some state statutes require that *Miranda* warnings be given to juveniles based on a sixteen- to seventeen-year-old cutoff limit.[192]

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184. *D.J.C.*, 312 S.W.3d at 714; *see also In re* L.M., 993 S.W.2d 276, 290–291 (Tex. App.—Austin 1999, pet. denied). In *L.M.*, the appellant, an eleven-year-old, was arrested after she allegedly beat another child to death. *Id.* at 278, 280. The appellant was classified as a delinquent when a jury found her guilty of committing the offense of injury to a child. *Id.* at 281. Three days after the appellant was removed from her home, two police officers and a representative of the Austin Police Department met with the appellant in a room at the administrative offices of the children's shelter. *Id.* at 280. The interview took about two hours and was recorded. *Id.* At the end of the interview the appellant signed a written statement, which was prepared by the officers, and implicated her in the victim's death. *Id.*

185. *See D.J.C.*, 312 S.W.3d at 713 ("'The mere fact that an interrogation begins as non-custodial, however, does not prevent it from later becoming custodial; police conduct during the encounter may cause a consensual inquiry to escalate into custodial interrogation'" (quoting *Dowthitt*, 931 S.W.2d at 255)).

186. *See supra* notes 77–84 and accompanying text.

187. *J.D.B.*, 131 S. Ct. at 2404–06.

188. *See* COLO. REV. STAT. § 19-2-511 (2005); CONN. GEN. STAT. § 46b-137(c) (Supp. 2012).

189. *See* CONN. GEN. STAT. § 46b-137(c) (Supp. 2012).

190. *Id.*

191. *Id.*

192. *See, e.g.*, *id.* § 46b-137(a) (providing that statements obtained specifically from children "under the age of sixteen" are inadmissible unless the child's parents are present and certain warnings are given); *id.* § 46b-137(b)–(c) (providing similar protections for children "sixteen or seventeen years

Connecticut's statute provides that juveniles under the age of sixteen must have a parent or guardian present during an interrogation in order for a statement to be used against them.[193] However, it further requires that before any statement, admission, or confession of a child sixteen- or seventeen-years-old can be admissible, the child shall have the opportunity to contact a parent or guardian, and be afforded his *Miranda* rights.[194] Arguably, a child who is seventeen-and-a-half is just as vulnerable to constitutional infringements as a thirteen-year-old. Other statutes have incorporated a provision requiring a parent, guardian or attorney to be present.[195]

Colorado's case law and juvenile statute provide a totality-of-circumstances approach that supports the argument for a presumptive in-custody approach in the school setting.[196] This approach, like Connecticut's, suggests that it is imperative for judges to consider broadly how a valid waiver is given by a juvenile.[197]

VII. Conclusion

When police question children in a school setting, they should be considered presumptively in custody, signaling that appropriate *Miranda* warnings be given. Many states have enacted juvenile *Miranda* statutes that generally mandate the exclusion of a child's statements made during custodial interrogation unless they are offered the presence of a trusted adult, legal guardian, or attorney.[198] However, the application of these statutes is predicated on the initial determination that the child is subject to

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of age").

193. *Id.* § 46b-137(a)

194. *Id.* § 46b-137(b).

195. *See, e.g.*, COLO. REV. STAT. § 19-2-511(1) (2005) ("No statements or admissions of a juvenile made as a result of the custodial interrogation . . . shall be admissible in evidence against such juvenile unless a parent, guardian, or legal or physical custodian of the juvenile was present at such interrogation . . . ."); N.C. GEN. STAT. § 7B-2101(a)(3), (b) (2011) ("Any juvenile in custody must be advised prior to questioning . . . [t]hat the juvenile has a right to have a parent, guardian, or custodian present during questioning . . . . When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney.").

196. COLO. REV. STAT. § 19-2-511 (2005); People v. Barrow, 139 P.3d 636, 638 (Colo. 2006) (en banc) ("[W]e face only the legal question of whether the totality of the circumstances of the officer's interaction with the juvenile defendant constituted a proper advisement and waiver of the defendant's right to have a parent or guardian present during interrogation.").

197. *Id.*

198. *See, e.g.*, CONN. GEN. STAT. § 46b-137(a) (Supp. 2012) ("Any admission, confession or statement, written or oral, made by a child under the age of sixteen . . . shall be inadmissible . . . unless made by such child in the presence of the child's parent or parents or guardian . . . ."); *id.* § 46b-137(b) ("Any admission, confession or statement, written or oral, made by a child sixteen or seventeen years of age . . . shall be inadmissible . . . unless (1) the police or Juvenile Court official has made reasonable efforts to contact a parent or guardian of the child, and (2) such child has been advised that (A) the child has the right to contact a parent or guardian and to have a parent or guardian present during any interview . . . ."); statutes cited *supra* note 195.

in-custody interrogation.[199] This article advocates for the states to implement procedural safeguards provided by *Miranda* prior to questioning, based on the assumption that the school setting inherently misleads child suspects into believing that their statements will not generate legally binding consequences such as a criminal conviction.[200]

The states should adopt presumptive language specifically into their statutes to fully afford Fifth Amendment protection to juveniles in the school setting because the totality-of-circumstances approach[201] that is typically applied under a *Miranda* analysis is insufficient protection for a child suspect in the school setting. The *J.D.B.* Court did not directly answer whether the child was in custody based on the totality of circumstances, but instead provided guidance to the lower courts in making that determination based on consideration of the child's age.[202] Even when the trial courts consider age as relevant, as constitutionally mandated by *J.D.B.*, the influential impact of police presence in the school still provides a substantial possibility for constitutional infringement. The ruling that age is relevant expands the considerations for affording constitutional protections to juveniles, but, unfortunately, it drastically underestimates the presence, pressure, and power of the police. The school venue for questioning a child suspect raises fundamental custodial interrogation issues, especially when the parent, guardian, or trusted adult is rarely or never present.[203] Accordingly, the states must promote attention to the issues of coerced confessions and involuntary waivers since ample case precedent indicates the frequency of false and coerced confessions by juveniles.[204] The state bears the burden of establishing a knowing and voluntary waiver resulting from in-school interrogations,[205] and the burden is significantly harder to meet without the presumptive in-custody approach.

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199. *See supra* note 41 and accompanying text.

200. *See supra* Part III.

201. Courts have applied the following factors for determining whether, under the totality of circumstances, a juvenile suspect's Fifth Amendment rights against self-incrimination were violated when being questioned by the police:

> (1) the manner in which the *Miranda* rights were administered, including any cajoling or trickery; (2) the suspect's age, experience, background and intelligence; (3) the fact that the suspect's parents were not contacted and the juvenile was not given an opportunity to consult with his or her parents before questioning; (4) the fact that the questioning took place in the station house; and (5) the fact that the interrogators did not secure a written waiver of the *Miranda* rights at the outset.

Ramirez v. State, 739 So. 2d 568, 575–76 (Fla. 1999) (citations omitted).

202. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2408 (2011).

203. Remington, *supra* note 1, at 377–78.

204. Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53, 59–62 (2007); *see* Turner, *supra* note 36, at 713 (discussing how the North Carolina Supreme Court in *J.D.B.* incentivizes the police to target school children and intimidate them into giving false confessions).

205. Turner, *supra* note 36, at 704.

Article

Florence and the Machine: The Supreme Court Upholds Suspicionless Strip Searches Resulting from Computer Error

George M. Dery III*

Abstract

This Article analyzes *Florence v. Board of Chosen Freeholders of the County of Burlington*, in which the Supreme Court considered whether the Fourth Amendment permitted corrections officials to automatically compel all new inmates to undergo a close visual observation while undressed before being admitted to a correctional facility's general population. The *Florence* Court ruled that jail and prison officials could strip search every new prisoner without having reasonable suspicion that the detainee might possess contraband and regardless of the nature of the charged offense, the inmate's lack of prior criminal history, or the prisoner's demeanor. This Article examines the concerns created by *Florence*'s ruling, and asserts that, in emphasizing the need for deference toward corrections officials, *Florence* has promoted the desire for clear administrative rules over the Fourth Amendment's right to privacy. Further, *Florence* failed to fairly balance all of the interests implicated by strip searching new inmates, and therefore distorted the Fourth Amendment's own balancing analysis. Finally, *Florence,* in allowing strip searches—even of persons improperly arrested due to computer error—further erodes incentives for law enforcement to maintain accurate computer records.

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I. Introduction

On March 3, 2005, April and Albert Florence were driving to the home of April's mother to celebrate their purchase of a new home.[1] A New Jersey state trooper stopped their car and arrested Albert Florence on a bench warrant that charged him with "a non-indictable variety of civil contempt."[2] Despite April Florence's presentation of a document showing that the arrest was erroneous, the trooper continued with the arrest, relying on his computer system.[3] At Burlington County Jail, Albert Florence had to remove all his clothing while an officer performed a "visual observation" of him to note any identifying marks or wounds.[4] After six days in jail, Florence was transferred to the Essex County Correctional Facility, where officers ordered him and other detainees to strip and "open their mouths, lift their genitals, turn around, squat, and cough."[5] When brought to court, a judge determined Florence was not wanted for arrest and ordered his immediate release.[6]

Florence filed suit contending jail officials at both facilities had violated his Fourth Amendment rights by subjecting him to suspicionless strip searches.[7] The Supreme Court, when presented with the fact that a

1. Brief for the Petitioner at 2, Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (No. 10-945), 2011 WL 2508902 at *2 [hereinafter Brief for the Petitioner]. Albert Florence, the finance director of a car dealership, lived with his wife and their three children. *Id.*

2. Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 299 (3d Cir. 2010).

3. Brief for the Petitioner, *supra* note 1, at 3.

4. *Id.* at 4–5.

5. *Id.* at 6.

6. *Id.* at 7.

7. *Id.* The Fourth Amendment provides:

person was arrested and twice stripped of all clothing because of a computer error that remained in a statewide system for two years, seemingly gave the lapse little thought, writing it off as happening "for some unexplained reason."[8] One explanation the *Florence* Court failed to consider was the signal the Court itself had sent law enforcement by refusing to exclude evidence improperly obtained due to computer error.[9] In 1995, the Court in *Arizona v. Evans* upheld admission of evidence improperly obtained during a search incident to arrest based on a faulty computer report of a nonexistent warrant.[10] *Herring v. United States*, a case handed down after Albert Florence was arrested and strip searched, also involved acquisition of evidence due to a false computer record of an arrest warrant.[11] The Court in *Herring* refused exclusion because police wrongdoing did not rise to "deliberate, reckless, or grossly negligent conduct, or . . . recurring or systemic negligence."[12] *Evans*, in condoning sloppy electronic record keeping, has removed the government's incentive to maintain adequate computer records in police departments across the nation. *Herring,* in turn, will lower the bar even further by turning a blind eye to all but the most culpable records errors.

Presented in *Florence* with two strip searches of a citizen wrongfully arrested due to computer error, the Court still sided with police. In fact, the Court in *Florence* doubled down on its earlier bet on government competency by explicitly deferring to the expertise of corrections officials.[13] Further, in balancing the competing interests implicated by strip searching arrestees about to be placed in the general jail population, the Court in *Florence* focused primarily on the concerns of the government in security rather than on those of the individual in privacy or dignity. As a result, when Albert Florence urged that his Fourth Amendment privacy rights had been violated by a strip search based on an

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> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

8. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1514 (2012).

9. *See* Arizona v. Evans, 514 U.S. 1, 4–6, 14–16 (1995) (holding that marijuana obtained during an arrest on a warrant that had been quashed seventeen days before yet erroneously still appeared in the Sheriff's Office's computer system was not subject to the Court's Fourth Amendment exclusionary rule); *see also* Herring v. United States, 555 U.S. 135, 137–38, 144–48 (2009) (holding that methamphetamine and a pistol obtained during an arrest on a warrant that had been recalled five months earlier yet erroneously still appeared in law enforcement computer systems were not subject to exclusion under the Fourth Amendment).

10. *Evans*, 514 U.S. at 4–6, 14–16 (1995).

11. *Herring*, 555 U.S. at 137–38.

12. *Id.* at 144.

13. *See Florence*, 132 S. Ct. at 1517 ("The task of determining whether a policy is reasonably related to legitimate security interests is 'peculiarly within the province and professional expertise of corrections officials.'" (quoting Bell v. Wolfish, 441 U.S. 520, 548 (1979))).

inaccurate computer record, the Court rejected his contentions, instead backing up the corrections bureaucracy's reliance on the electronic representations of a machine.

In Part II, this Article reviews the background of suspicionless searches in jails and prisons. Part III examines *Florence*, exploring both its facts and the Court's opinion. Part IV explores the implications of the Court's reasoning in *Florence* by considering the concerns raised by undue deference to government expertise, the potential problems created by the Court's lopsided balancing of the interests at stake in strip search cases, and the signal the case sends to law enforcement regarding reliance on questionable electronic records.

II. Review of the Court's Fourth Amendment Precedent Regarding Strip Searches of Inmates and Other Security Issues

The Court in *Florence* deemed *Bell v. Wolfish*[14] as "the starting point" for assessing Fourth Amendment challenges to visual searches of inmates stripped naked upon entering a correctional facility.[15] *Bell* involved a class action suit in federal court setting out "a veritable potpourri of complaints" regarding practices at the Metropolitan Correctional Center (MCC) in New York, a federal facility designed to hold pretrial detainees.[16] One issue the inmates advanced concerned "whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause."[17]

To answer this question, the *Bell* Court, in an opinion written by Justice Rehnquist, began by considering the big picture.[18] *Bell* recognized that those entering prison do not forfeit all their constitutional rights; no "iron curtain" separates them from the Constitution.[19] Nevertheless, lawful incarceration necessarily brings with it a curtailment of rights due to a correctional facility's need to preserve "internal order and discipline."[20] The Court, recognizing the government's central aim of safeguarding both the corrections personnel and the inmates themselves, had to accord "wide-ranging deference" to prison administrators,[21] who possessed the expertise required for such dangerous settings.[22]

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14. 441 U.S. 520 (1979).

15. *Florence*, 132 S. Ct. at 1516. For an interesting discussion of this issue prior to *Bell*, see Gabriel M. Helmer, Note, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U.L. REV. 239, 242–56 (2001).

16. *Bell*, 441 U.S. at 523, 527. Specifically, inmates' challenges included contentions regarding overcrowding, improper searches, limitations on reading materials, inadequate recreational, education, and employment, and inadequate staffing. *Id.* at 527.

17. *Id.* at 560 (emphasis in original).

18. *Id.* at 545.

19. *Id.*

20. *Id.* at 546.

21. *Id.* at 547.

22. Specifically, the *Bell* Court noted that security concerns were "peculiarly within the province

When focusing on post contact visit body-cavity inspections, Justice Rehnquist candidly admitted, "this practice instinctively gives us the most pause."[23] To assess the reasonableness of such searches, *Bell* rejected any mechanical application of the Fourth Amendment in favor of balancing "the need for the particular search against the invasion of personal rights that the search entails."[24] In balancing the interests, *Bell* found body cavity searches following contact visits to be reasonable under the Fourth Amendment.[25] Since the detention facility was uniquely fraught with security dangers, including the smuggling of drugs, money, and weapons potentially secreted in body cavities, safety concerns allowed such searches in the absence of probable cause.[26]

While *Bell* was the Court's last word on strip searches until *Florence*, the Court consistently backed officials' judgments in later cases involving prison security. In *Block v. Rutherford*,[27] for example, the Court upheld as constitutional the Los Angeles County Central Jail's blanket prohibition against contact visits for pretrial detainees and its shakedown searches of cells in an inmate's absence.[28] *Block* echoed *Bell* in warning that the assessment of whether a specific restriction was reasonably related to security concerns was "peculiarly within the province and professional expertise of corrections officials," and therefore deserved the courts' deference.[29] The *Block* Court found the connection between the contact visit ban and internal security was "too obvious to warrant extended discussion," because such interactions allowed smuggling of weapons and other contraband.[30] *Block* also deemed the random shakedowns of cells a reasonable security measure.[31] The Court was simply unwilling to substitute its own judgment in such "difficult and sensitive matters" for that of "'the persons who are actually charged with and trained in the running' of such facilities."[32]

In another case involving prison shakedowns, *Hudson v. Palmer*,[33] the Court held that inmates lacked a Fourth Amendment privacy

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and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Id.* at 548.

23. *Id.* at 558.

24. *Id.* at 559.

25. *Id.* at 558.

26. *Id.* at 559–60.

27. Block v. Rutherford, 468 U.S. 576 (1984).

28. *Id.* at 586, 589, 591.

29. *Id.* at 584–85 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)). The *Block* Court noted that the facility at issue was the "largest jail in the country, with a capacity of over 5,000 inmates." *Id.* at 577.

30. *Id.* at 586.

31. *Id.* at 590–91.

32. *Id.* at 588 (citation omitted) (quoting Bell v. Wolfish 441 U.S. 520, 562 (1979)).

33. 468 U.S. 517 (1984).

expectation in prison lockers and cells.[34] The *Hudson* Court was mindful that prison officials had to be ever vigilant of drugs and weapons smuggling, which it characterized as one of "the most perplexing problems of prisons today."[35] Such institutional security issues prompted the Court to conclude, "A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells."[36]

The Court, from *Bell* to *Hudson*, consistently adhered to certain fundamental themes. While inmates did not relinquish all their constitutional rights upon entering correctional facilities, their interests needed to be carefully balanced against government concerns. Prison security, implemented for the safety of both officers and inmates, consistently tipped the balance in favor of government intrusion. The particular danger of smuggling weapons or other contraband into facilities caused the Court to defer to the expert judgment of those who ran jails and prisons on a daily basis. This was the state of the law when Albert Florence entered the Burlington County Jail.

III. *Florence v. Board of Chosen Freeholders of the County of Burlington*

A. The Facts

On March 3, 2005, a New Jersey state trooper stopped April Florence as she was driving in Burlington County.[37] Upon learning that April's husband, Albert Florence, was the owner of the BMW, the trooper handcuffed and arrested him on the basis of an outstanding warrant listed in the computer system.[38]

Seven years earlier, Albert Florence had been arrested after fleeing Essex County, New Jersey, police officers.[39] Although charged with obstruction of justice and use of a deadly weapon,[40] Florence pleaded guilty to a minor offense described as "a non-indictable variety of civil contempt,"[41] and was sentenced to pay a fine in monthly installments.[42] In

34. *Id.* at 519, 530.

35. *Id.* at 527.

36. *Id.*

37. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1514 (2012); Brief for Respondents Board of Chosen Freeholders of the County of Burlington, et al. at 1, *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 3706116 at *1 [hereinafter Brief for Respondents].

38. *Florence*, 132 S. Ct. at 1514; Brief for the Petitioner, *supra* note 1, at 2–3

39. *Florence*, 132 S. Ct. at 1514. "By his own account—Mr. Florence was stopped while driving a vehicle he did not own. Rather than remain at the scene, he fled. He was subsequently arrested by the Maplewood police . . . ." Brief for Respondents, *supra* note 37, at 4, n.3 (citations omitted).

40. *Id.*

41. Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 299 (3d Cir. 2010). Specifically, Florence "pleaded guilty to hindering prosecution and obstructing the administration of law, and was sentenced to two years of probation and ordered to pay a fine." Brief for the United States as Amicus Curiae Supporting Respondents at 2, n.1 *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 3821404 [hereinafter United States Amicus Brief].

2003, when Florence fell behind on his payments and failed to appear at an enforcement hearing, the court issued a bench warrant for his arrest.[43] Florence then paid the outstanding balance "less than a week later,"[44] satisfying the judgment underlying the warrant,[45] and retaining an official copy of the resulting document.[46]

The trooper therefore arrested Florence on the strength of a warrant erroneously remaining in the statewide computer database.[47] Aware of the problem, April Florence showed the copy of the satisfied judgment to the trooper.[48] But the officer instead heeded the computer's warning of an outstanding warrant for the charge of "Hinder Prosecution," which was accompanied by the mandate, "You are ordered to take into custody the above defendant . . . and bring him/her before the Superior Court" and took Florence to the Burlington County jail.[49] The jail, as part of its standard intake procedure for anyone being placed with other inmates, required Florence to shower with a delousing agent.[50] Delousing involved new inmates disrobing and then being handed a delousing agent that a same-sex corrections officer ensured was applied properly.[51] Afterwards, the officer would observe the inmate for injury, illness, gang tattoos, or contraband before having the person shower with warm, soapy water.[52] After this "visual observation," an officer could, should he or she deem it necessary, conduct a more intrusive "strip search" designed to intercept contraband.[53] According to the jail's records, although Florence was subjected to visual observation while naked by an officer standing about an arm's length away, he was not "strip searched" as that term is used by the Burlington County jail.[54] Florence himself remembered being instructed "to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals."[55]

After six days, officials moved Florence to the Essex County Correctional Facility, "the largest jail in New Jersey."[56] At the Essex

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42. *Florence*, 132 S. Ct. at 1514.

43. *Id.* Florence "failed to make the agreed-upon monthly payments on the resulting $1574 fine; indeed between November 1999 and March 2003, he made only five payments (each for $50 or less)." Brief for Respondents, *supra* note 37, at 4, n.3.

44. *Id.*

45. Brief for the Petitioner, *supra* note 1, at 3.

46. Florence retained a copy because "in his view he had been previously been [sic] detained as an African American who drove nice cars and he wanted to avoid being wrongly arrested." *Id.*

47. *Florence*, 132 S. Ct. at 1514.

48. Brief for the Petitioner, *supra* note 1, at 3.

49. Brief for Respondents, *supra* note 37, at 3–4.

50. *Florence*, 132 S. Ct. at 1514; Brief for Respondents, *supra* note 37, at 5. The process is called being "kwelled," as the delousing lotion is called Kwell. Brief for Respondents, *supra* note 37, at 5.

51. *Florence*, 132 S. Ct. at 1514; Brief for Respondents, *supra* note 37, at 5.

52. *Florence*, 132 S. Ct. at 1514; Brief for Respondents, *supra* note 37, at 5.

53. Brief for Respondents, *supra* note 37, at 5; Brief for the Petitioner, *supra* note 1, at 4–5.

54. Brief for Respondents, *supra* note 37, at 5; Brief for the Petitioner, *supra* note 35, at 5.

55. *Florence*, 132 S. Ct. at 1514; United States Amicus Brief, *supra* note 41, at 2.

56. United States Amicus Brief, *supra* note 41, at 2. Albert and April Florence were both told that his status would be resolved when Essex County officials retrieved him "the next day," rather than the

facility, all entering inmates passed through a metal detector.[57] Further, jail officials mandated that all incoming detainees submit to "body cavity inspections," in which Florence, after showering, "was required to open his mouth, lift up his arms, turn around so he was facing away from the officers, lift up his genitals, squat, and cough."[58] Officials searched every incoming inmate in this manner "regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history."[59] The day after this search, the charges against Florence were dropped and he was released from custody.[60]

Florence sued in federal court, claiming in part that compelling inmates arrested for minor offenses "to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the intake process" violated the Fourth Amendment.[61] The district court determined that "any policy of 'strip searching' nonindictable offenders without reasonable suspicion violated the Fourth Amendment."[62] The Court of Appeals for the Third Circuit, finding that the intake procedures reasonably balanced the competing needs of privacy and security, reversed.[63] The Court granted certiorari.[64]

B. The Court's Opinion

The Court, in an opinion written by Justice Kennedy, framed the issue in *Florence* as "whether every detainee who will be admitted to the general population may be required to undergo a close visual inspection while undressed."[65] After noting the need for deference to corrections officials' judgment regarding the administration of jails in light of the Court's limited expertise,[66] Justice Kennedy also cautioned that the phrase "strip search" was "imprecise."[67] He thereafter employed "close visual

six days. Brief for the Petitioner, *supra* note 1, at 3.

57. Brief for the Petitioner, *supra* note 1, at 5.

58. United States Amicus Brief, *supra* note 41, at 3.

59. *Florence*, 132 S. Ct. at 1514.

60. *Id.*

61. *Id.* at 1514–15.

62. *Id.* at 1515.

63. *Id.*

64. *Id.*

65. *Id.* at 1513. Curiously, Justice Kennedy repeatedly restated the issue throughout the Court's opinion, each time with greater specificity. First, he offered, "This case presents the question of what rules, or limitations, the Constitution imposes on searches of arrested persons who are to be held in jail while their cases are being processed." *Id.* Next, he ventured that "the controversy concerns whether every detainee who will be admitted to the general population may be required to undergo a close visual inspection while undressed." *Id.* Finally, Justice Kennedy specified, "The question here is whether undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the more intrusive search procedure at issue absent reasonable suspicion of a concealed weapon or other contraband." *Id.* at 1518.

66. *Id.* at 1513–14.

67. *Id.* at 1515. In his majority opinion, Justice Kennedy indicated that "strip search" could refer to several inspections of differing intrusiveness:

inspection,"[68] phrasing that closely matches that adopted by the government.[69]

This deference to the government continued throughout the Court's opinion. Justice Kennedy bemoaned the "difficulties of operating a detention center," some of which process hundreds of people each day.[70] With jails admitting over 13 million inmates each year, the *Florence* Court cautioned that corrections officials "must have substantial discretion to devise reasonable solutions to the problems they face."[71] The Court explained that maintaining institutional security was "'peculiarly within the province and professional expertise of corrections officials.'"[72] Justice Kennedy recalled that the Court's recognition of such expertise had led it to uphold visual inspection of body cavities after contact visits in *Bell*, and general bans on contact visits in *Block*.[73]

The *Florence* Court accepted that the government had a "significant interest" in visually inspecting the entire bodies of all inmates during the intake process.[74] Such searches could detect lice and contagious disease, thus protecting the health not only of corrections officers and the jail population, but of the "new detainee himself or herself."[75] New inmates could have wounds or other injuries necessitating immediate medical attention.[76] To prevent deadly fights among gang members, officers needed to search for tattoos indicating gang affiliation.[77] Jailers had a "most serious responsibility" to detect contraband such as "knives, scissors, razor blades, [and] glass shards" which previously had been concealed in body cavities, or drugs which could "embolden" aggressive behavior.[78] Even innocuous items, such as pens, chewing gum, cash, or cell phones, could undermine prison security.[79]

> It may refer simply to the instruction to remove clothing while an officer observes from a distance of, say, five feet or more; it may mean a visual inspection from a closer, more uncomfortable distance; it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position.

Id.

68. *Id.* at 1513.

69. Burlington County drew a distinction between a "'visual observation," which was intended to discover any identifying marks or wounds, and a "strip search," which was intended to recover contraband before an inmate was admitted to jail. Brief for the Petitioner, *supra* note 1, at 3.

70. *Florence*, 132 S. Ct. at 1515.

71. *Id.*

72. *Id.* at 1517 (quoting Bell v. Wolfish, 441 U.S. 520, 548 (1979)).

73. *Id.* at 1516.

74. *Id.* at 1518.

75. *Id.*

76. *Id.*

77. *Id.* at 1518–19.

78. *Id.* at 1519.

79. *Id.* Pens pose a danger as weapons for assault, while chewing gum can block a locking device. *Id.* Currency "begets violence, extortion, and disorder." *Id.* Cell phones "orchestrate violence

Albert Florence argued for limits on such searches, urging an exemption for inmates who were not arrested for "a serious crime or for any offense involving a weapon or drugs."[80] He conceded that even these low-risk detainees, however, could be searched if they gave "officers a particular reason to suspect them of hiding contraband."[81] The *Florence* Court dismissed these limits as "unworkable."[82] Justice Kennedy noted that some of the nation's most dangerous criminals, including Oklahoma City's Timothy McVeigh, serial killer Joel Rifkin, and one of the September 11 terrorists came into police contact due to relatively trivial traffic offenses.[83] Thus, those detained for even minor offenses could conceivably be "devious and dangerous criminals," making the seriousness of an offense a "poor predictor of who has contraband."[84] As a result, the Court posited that pre-intake classification of inmates based "on their current and prior offenses" might be "difficult, as a practical matter."[85] The Court determined that corrections officials, burdened with false identifications and inaccurate or incomplete records, would become less effective, and even less fair, should they be saddled with the rules suggested by Florence.[86] Instead, officers who interact with persons suspected of violating the law need simpler rules that can be readily administered.[87] The Court in *Florence* thus held that the procedures at the Burlington County jail and the Essex County Correctional Facility struck the necessary and reasonable balance between inmate privacy and institutional security required to satisfy the Fourth Amendment.[88]

IV. Implications of *Florence*

A. In Deferring to the Expertise of Corrections Officials, *Florence* Exalted Administrable Rules Over the Fourth Amendment Right to Privacy.

The Court in *Florence* emphasized the need for deference toward corrections officials five times in its opinion.[89] This hands-off approach

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and criminality both within and without jailhouse walls." *Id.*

80. *Id.* at 1520.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 1521.

86. *Id.*

87. *Id.* at 1522.

88. *Id.* at 1523.

89. Specifically, the Court mentioned the need to "defer," the importance of "deference," and the fact that it "deferred" to corrections officials as follows: "In addressing this type of constitutional claim courts must defer to the judgment of correctional officials," *Id.* at 1513–14; "The Court has confirmed the importance of deference to correctional officials," *Id.* at 1515; "[The Court] deferred to the judgment of correctional officials," *Id.* at 1516; "'[C]ourts should ordinarily defer to [correctional officers'] expert judgment in such matters,'" *Id.* at 1517 (quoting Block v. Rutherford, 468 U.S. 576, 584–85 (1984)); and, "The Court has held that deference must be given to the officials in charge of the jail." *Id.* at 1518.

translated into a mandate that government officials "have substantial discretion" because maintenance of "safety and order at these institutions requires the expertise of correctional officials."[90] The Court even went so far as to declare, "The task of determining whether a policy is reasonably related to legitimate security interests is 'peculiarly within the province and professional expertise of corrections officials.'"[91] Such a rule, if taken at face value, would amount to the Court largely delegating the role of determining the reasonableness of a government practice, and therefore its legality under the Fourth Amendment, to the executive branch.

This approach stands in stark contrast to the Court's analysis of the reasonableness of official action in other settings. The Court refused to abdicate its authority in *Terry v. Ohio*,[92] the seminal case creating Fourth Amendment limits on stop and frisks, even though the Court was cognizant of the practical "limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street." [93] The *Terry* Court was not content to let officers loose guided by little more than their own expertise, despite recognizing that street encounters were so potentially dangerous that "the answer to the police officer may be a bullet."[94] Instead, the Court employed a balancing test to determine both when the Fourth Amendment was implicated and when an officer's interest in conducting a search exceeds the suspect's Fourth Amendment privacy interests.[95] The *Terry* Court was mindful of the challenge it was facing in crafting a rule for encounters that were diverse,

90. *Id.* at 1515.

91. *Id.* at 1517 (quoting Bell v. Wolfish, 441 U.S. 520, 548 (1979)).

92. 392 U.S. 1 (1968).

93. *Id.* at 30–31.

94. *See id.* at 12–13, 17 n.15.

95. *Id.* at 8–27. Indeed, the Court declared,

> [T]here is no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails. And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple good faith on the part of the arresting officer is not enough. . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police.

Id. at 21–22 (footnotes omitted) (citations omitted) (internal quotation marks omitted).

rapidly unfolding, and in need of "an escalating set of flexible responses."[96] The Court explicitly noted that it was dealing with "an entire rubric of police conduct" that involved "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat."[97] Yet the Court did not shirk its responsibility to place specific Fourth Amendment limits on street encounters, noting:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.[98]

The *Terry* Court therefore did not flinch from intricately assessing both the officer's initial stop[99] and his subsequent frisk.[100] The Court specified that police justify their actions with "specific and articulable facts" that would cause a person "of reasonable caution" to believe the action was appropriate.[101] *Terry* focused on such minute details as whether the officer "patted down" an individual's "outer clothing," or went "beyond the outer surfaces of his clothes."[102] Thus, in *Terry*, the Court was able to fully engage concerns about Fourth Amendment privacy despite the fact that the activity it was assessing—street encounters—involved dangerous, even potentially fatal, activity necessitating government agent expertise, training, and flexibility.

The Court also did not shrink from its role in yet another dangerous context: search incident to arrest in *Chimel v. California*.[103] Certainly one would not consider Supreme Court justices experts in apprehending armed and dangerous criminals. Nevertheless, the Court in *Chimel* did not hesitate to formulate a rule limiting searches incident to arrest. Alert to the dangers officers faced while making an arrest, *Chimel* deemed it "reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated."[104]

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96. *Id.* at 10, 13.
97. *Id.* at 20.
98. *Id.* at 21.
99. *Id.* at 22–23.
100. *Id.* at 30–31.
101. *Id.* at 21, 22.
102. *Id.* at 29–30.
103. 395 U.S. 752 (1969).
104. *Id.* at 762–63.

Chimel also reasoned that an officer's search could extend to any "area into which an arrestee might reach" to grab weapons or evidence.[105] Again, despite its lack of time on the streets, the Court had no problem in judicially limiting police searches to the areas within the arrestee's immediate control.[106] Thus, in settings requiring just as much special expertise as those needed in corrections, the Court has risen to the occasion to exercise its judgment in assessing the reasonableness of official action in order to preserve Fourth Amendment rights.

Given these precedents, the *Florence* Court's reticence to second-guess corrections officers signaled a curious lack of confidence in assessing the Fourth Amendment in prisons and jails. In the second paragraph of the Court's opinion, Justice Kennedy even expressed a doubt about the Court's own abilities to assess the issue at hand, worryingly stating, "The case turns in part on the extent to which this Court has sufficient expertise and information in the record to mandate, under the Constitution, the specific restrictions and limitations sought by those who challenge the visual search procedures."[107]

Florence's adoption of the phrase "visual search procedures" itself is telling, for it shows that the Court's insecurity led it to passively accept the government's characterization of the intrusion. In its brief, the government drew a distinction between a "visual observation," where an officer of the same sex observed the naked body of a prisoner for evidence of gang tattoos, injury, illness, or contraband, and a "strip search," which involved a "more rigorous search" performed only after the marking of a form.[108] Thus, as county personnel used the term, Burlington County jail officials did not "strip search" Florence.[109] The Court, deeming the phrase "strip search" to be "imprecise,"[110] instead framed its issue in terms of the awkward phrase, "a close visual inspection while undressed."[111] Curiously, the Court suffered no similar qualms when considering the searches of disrobed students at a public school. In *Safford Unified School District No. 1 v. Redding*,[112] the Court simply declared that school officials had strip searched Savana Redding, a thirteen-year-old student suspected of secreting over-the-counter pills.[113] The *Safford* Court repeatedly described the search

105. *Id.* at 763.
106. *Id.*
107. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1513 (2012).
108. Brief for Respondents, *supra* note 37, at 5.
109. *Id.*
110. *Florence*, 132 S. Ct. at 1515.
111. *Id.* at 1513.
112. 557 U.S. 364 (2009).
113. *Id.* at 369–74.

Savana suffered as a "strip search"[114] even though the unfortunate girl kept on her bra and underpants.[115]

The *Florence* Court's deference to corrections officials severely limited its choices in rulemaking. The Court felt it proper to give corrections officials, already burdened by the "laborious administration of prisons,"[116] only "readily administrable rules."[117] In support of saving jailers from a "complicated constitutional scheme,"[118] Justice Kennedy relied on *New York v. Belton*,[119] a case that created a bright-line rule allowing police to automatically search the "passenger compartment" of an arrestee's cars.[120] Ironically, *Florence*'s reliance on *Belton* to demonstrate the desirability of simple rules was misplaced, as *Belton*'s bright-line rule had become uncomfortably complicated when the Court altered it in *Arizona v. Gant*.[121] The *Gant* Court imposed a "reaching-distance"[122] limit on *Belton* because officers were stretching their right to search vehicles to incidents where arrestees were already handcuffed and locked inside police cruisers.[123] Justice Scalia saw such searches as contemplating arrestees "possessed of the skill of Houdini and the strength of Hercules."[124] Rather than demonstrating the advisability of presenting officials with simple rules, *Belton* and its progeny pointed to the danger of the Court's reliance on officers to limit their own conduct.

The creation of simple rules constituted only a part of the Court's overall effort to address the government's concerns in administering correctional facilities. Justice Kennedy worried that it might be difficult for officials to classify prisoners as minor or major offenders prior to the intake search.[125] He likewise showed concern about corrections officers having to deal with "inaccurate or incomplete" records.[126] The Court further

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114. *Id.* at 374–75, 378–79 ("The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it.").

115. *Id.* at 369.

116. *Florence*, 132 S. Ct. at 1521.

117. *Id.* at 1522 (quoting Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001)).

118. *Id.*

119. 453 U.S. 454 (1980). In *Belton*, the Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460.

120. *Id.* at 460.

121. 556 U.S. 332, 335 (2009) (holding that "*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle").

122. *Id.*

123. *Id.*; *see also* Thornton v. United States, 541 U.S. 615, 617–624 (holding that "[s]o long as an arrestee is the sort of 'recent occupant' of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest" in a case where the officer approached the suspect after he had exited his vehicle and searched the vehicle only after the suspect was handcuffed and placed in the back seat of the patrol car).

124. *Thornton*, 541 U.S. at 625–26 (Scalia, J., concurring in the judgment) (quoting United States v. Frick, 490 F.2d 666, 673 (5th Cir. 1973)) (internal quotation marks omitted).

125. *Florence*, 132 S. Ct. at 1521.

126. *Id.*

recognized that officials had their hands full administering jails that were "crowded, unsanitary, and dangerous."[127] The *Florence* Court's focus on the burdens of harried corrections officials turned the Fourth Amendment on its head.

The Fourth Amendment, by its own terms, is a "right of the people," not of the government.[128] Yet rather than have the government justify its intrusion on the individual, the *Florence* Court expected the inmate to justify his assertion of a constitutional right. Justice Kennedy admonished that "practical problems" were an "inevitable" result of the defendant's suggested changes[129] and worried about imposing a "difficult task" on officers.[130] How, the *Florence* Court seemed to ask, can Albert Florence ask for an exemption from a search when corrections officials are grappling with overcrowding, filth, bad record keeping, and danger? Florence thus found himself called upon to restrain the exercise of his rights due to conditions beyond his control or fault. Meanwhile, the government, responsible for the policy decisions leading to such failures in prison housing, sanitation, record maintenance, and safety, was able to employ those very failings to invade a citizen's privacy.

B. By Failing to Adequately Balance All Interests Implicated in Strip Searches of Arrestees Entering the General Jail Population, *Florence* Distorted Fourth Amendment Interest-Balancing Analysis

The *Florence* Court declared that the "need for a particular search must be balanced against the resulting invasion of personal rights."[131] But the Court itself never seriously performed such a balance, for it focused almost exclusively on the government's side of the scales. The opinion's first sentence betrays the lopsidedness of the Court's perspective. Before even articulating the issue, Justice Kennedy volunteered, "Correctional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in on their bodies."[132] Rather than considering the privacy implications of being forced to lift one's genitals for government inspection, the Court stayed on the government's side of the balance by noting the danger of contraband being introduced into the jail population.[133]

The remainder of the Court's opinion in *Florence* was filled largely with a detailed assessment of each concern the government faced in housing inmates at jails or prisons. Justice Kennedy emphasized the immense workload shouldered by those operating detention centers by counting both

127. *Id.* at 1520.
128. U.S. CONST. amend. IV.
129. *Florence*, 132 S. Ct. at 1521.
130. *Id.* at 1522 (quoting Welsh v. Wisconsin, 466 U.S. 740, 762 (1984)).
131. *Id.* at 1516.
132. *Id.* at 1513.
133. *Id.*

the numbers of persons admitted per year and estimating the quantity processed each day.[134] He considered not only the large facilities but also the smaller jails, which at times had to adjust to overcrowding due to a particular police operation or inmates arriving from other jurisdictions.[135] The Court lamented that the brevity of detentions and the constant turnover in inmate population exacerbated the difficulty jail officials faced in identifying which inmates were dangerous.[136] The *Florence* Court considered how the government's needs change depending on the day of the week, noting the different conditions jailers face on weekend nights.[137] The Court noted the government's interests in combating lice, infections, wounds, gang tattoos, as well as all kinds of contraband.[138] Justice Kennedy also considered behavioral issues. He noted that corrections officers had to avoid establishing predictable routines for fear that prisoners would "adapt to any pattern or loopholes they discovered."[139] He pondered the possibility that hardened criminals might coerce those arrested for minor offenses into being smugglers.[140] The Court even discussed an "underground economy" involving the trade of scarce items.[141]

In contrast, the individual received none of the attention the Court lavished on government interests. Justice Kennedy never mentioned the sense of outrage a reasonable person mistakenly arrested must feel when forced to undress for close examination by an employee of the government. Even though the Court understood that the Essex County officials looked in the detainee's "ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings," regardless of the "circumstances of the arrest, the suspected offense, or the detainee's behavior,"[142] it never seriously discussed the humiliation a reasonable person would feel at being checked for lice or the invasion an innocent person might experience being checked for contraband she never gave officers a reason to suspect she possessed. The Court considered the individual's interest only in welcoming a strip search in order to avoid dangers posed by the rest of the inmate population[143] or the coercion to smuggle that an exemption from a search might provoke.[144] The Court, however, was careful to note, "There are no

134. The Court noted that "[j]ails . . . admit more than 13 million inmates a year," with the largest facilities "process[ing] hundreds of people every day." *Id.* at 1515.

135. *Id.*

136. Justice Kennedy emphasized it would be,"'a difficult if not impossible task' to identify 'inmates who have propensities for violence, escape, or drug smuggling'" due to "'the brevity of the detention and the constantly changing nature of the inmate population.'" *Id.* at 1516 (quoting Block v. Rutherford, 468 U.S. 576, 587 (1984)).

137. *Id.* at 1515.

138. *Id.* at 1518–19.

139. *Id.* at 1517 (citing Hudson v. Palmer, 468 U.S. 517, 529 (1984)).

140. *Id.* at 1521.

141. *Id.* at 1519.

142. *Id.* at 1514.

143. *Id.* at 1513.

144. *Id.* at 1521.

allegations that the detainees here were touched in any way as part of the searches," as if this somehow mitigated the severity of an attentive visual search of a person's entire nude body.[145] The Court did not even address the greater intrusions that the defendant asserted he had suffered: having to "lift his genitals, turn around, and cough in a squatting position."[146]

Most tellingly, the Court did not address the concerns implicated by the uncontested invasion that occurred in this case: a person improperly arrested while on his way to a family celebration[147] finds himself, without giving officials any reason to believe he possesses contraband of any kind, stripped naked twice for officers to explore his body so closely that they could detect lice in hair or items secreted in "body openings."[148] While the *Florence* Court wrung its hands over each challenge faced by corrections officials, it spared little time for the thousands of citizens, some mistakenly arrested, who suffer suspicionless strip searches.[149] *Florence's* asymmetry was exposed in the Court's own framing of the issue, where it pitted the government's "undoubted security imperatives" against the mere "assertion" that some detainees endure strip searches only on a showing of reasonable suspicion.[150]

The *Florence* Court's sympathy for corrections officers' interests led it to examine some of the government's interests with a less-than-critical eye. Justice Kennedy feared that minor offenders who themselves did not wish to smuggle contraband might be "coerced into doing so by others."[151] He envisioned a dramatic danger: "A hardened criminal or gang member can, in just a few minutes, approach the person and coerce him into hiding the fruits of crime, a weapon, or some other contraband."[152] Believing that exempting minor offenders from intrusive searches could thus "put them at greater risk," Justice Kennedy concluded, that, "This is a substantial reason not to mandate the exception petitioner seeks as a matter of constitutional law."[153] Yet such a prospect, however frightening, was completely disconnected from the facts in *Florence*. Albert Florence, by definition a new detainee being subject to intake procedures, had yet to come into contact with any criminals, hardened or otherwise.[154] At least for his entry into the Burlington County jail, no inmate had the access

145. *Id.* at 1515.

146. *Id.* at 1514.

147. Brief for the Petitioner, *supra* note 1, at 2.

148. *Florence*, 132 S. Ct. at 1514.

149. *See id.* at 1515–1523.

150. The Court declared, "The question here is whether undoubted security imperatives involved in jailhouse supervision override the assertion that some detainees must be exempt from the more invasive procedures at issue absent reasonable suspicion of a concealed weapon or other contraband." *Id.* at 1518.

151. *Id.* at 1521.

152. *Id.*

153. *Id.*

154. *Id.* at 1514.

necessary to force him to smuggle anything;[155] the prospect of coercion by fellow prisoners was a non-issue and therefore should not have entered the Court's calculus.[156]

Perhaps the most troubling analysis of government challenges involved *Florence*'s references to the Oklahoma City Bomber, a serial killer, and a 9/11 terrorist.[157] Justice Kennedy offered these individuals as evidence of the fact that the most heinous criminals might come to police attention by committing mere infractions.[158] Timothy McVeigh and Joel Rifkin were both stopped for driving without a license, while the terrorist received a speeding ticket.[159] Since the most dangerous of people can be apprehended for minor offenses, the Court deemed it reasonable to "conduct the same thorough search of everyone" who entered corrections facilities.[160] Of course, McVeigh, Rifkin, and the 9/11 attacker all came to police attention due to motor vehicle violations. Following the *Florence* Court's logic, since such dangerous persons drove cars, all motorists should be automatically subject to strip searches during a traffic stop. McVeigh and the terrorist were such extreme examples that their cases hardly created a proper foundation for a broad constitutional rule. Since both were suspected of notorious crimes, it was unlikely that they would have spent much, if any, time in the general population, undermining the relevance of their cases to *Florence*'s rationale. Further, despite the heinousness of their crimes, one wonders whether a strip search of McVeigh, Rifkin, or the terrorist would have actually recovered anything that posed a danger to others. In the present case, Florence, a man who had fully paid for his minor offense before he was mistakenly arrested, found himself arbitrarily lumped in with terrorists, serial killers, and bombers. The Court, while failing to consider the humiliating intrusion on Florence's own person, let its imagination readily roam free in envisioning the dangers the government could face from society's absolute worst.

C. In Allowing Strip Searches Based on Computer Error, *Florence* Continued to Undermine Law Enforcement Incentives to Maintain Accurate Computer Records

The Court was mystified by the faulty records the police encountered in *Florence*, especially upon learning that "for some

155. *Id.*

156. Florence was ultimately taken to a second facility. *Id.* Presumably, had a hardened criminal inside the Burlington County Jail known that Florence would sometime be transferred to another detention center, he could have approached Florence to smuggle an item into the Essex County facility. If this were a genuine concern, the Court could have tailored its rule to apply only to those leaving one facility to be transferred to another. The Court made no such specific distinction.

157. *Id.* at 1520.

158. *Id.*

159. *Id.*

160. *Id.*

unexplained reason, the warrant remained in a statewide computer database."[161] The Court lamented that officers had been hamstrung by "inaccurate or incomplete" records, and cited Florence's own rap sheet as an example.[162]

The Court, had it wished, would not have needed to search far to find an explanation for the flawed police database. The first stop on its quest should have been *Arizona v. Evans*, where the Court allowed admission of evidence illegally obtained in reliance on an inaccurate computer record.[163] In *Evans*, Phoenix police stopped Isaac Evans for driving the wrong way on a one-way street and ran his name in the patrol car's computer.[164] When the information on the computer screen indicated that Evans had an outstanding misdemeanor warrant, the officer arrested him and discovered marijuana during the search incident to the arrest.[165] The trial court hearing Evans's case determined that the warrant upon which the arrest was based had been quashed seventeen days prior to the traffic stop.[166] Notations from officials involved in maintaining the computer records indicated the likely source of the error was a court clerk.[167] The trial court granted a motion to suppress the evidence obtained as a result of the arrest, concluding that the State was responsible for the records mistake.[168]

The *Evans* Court disagreed.[169] Although *Mapp v. Ohio*[170] had held that the exclusionary rule applied to state violations of the Fourth Amendment,[171] Chief Justice Rehnquist, writing for the *Evans* majority, did not rush to suppress the evidence obtained from the faulty computer record.[172] He noted that the text of the Fourth Amendment made no actual mention of excluding evidence.[173] The *Evans* Court emphasized that the exclusionary rule, as merely a "judicially created remedy," was to be employed only when it would appreciably deter illegality.[174] The Court noted that *United States v. Leon*[175] had created the good faith exception, where evidence obtained in violation of the Fourth Amendment was still admissible if an officer had reasonably relied upon a search warrant.[176]

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161. *Id.* at 1514.
162. *Id.* at 1521.
163. Arizona v. Evans, 514 U.S. 1, 4, 15–16 (1994).
164. *Id.* at 4.
165. *Id.*
166. *Id.*
167. *Id.* at 5.
168. *Id.*
169. *Id.* at 4.
170. 367 U.S. 643 (1961).
171. *Id.* at 655.
172. *Evans*, 514 U.S. at 10.
173. *Id.*
174. *Id.* at 10–11.
175. 468 U.S. 897 (1984).
176. *Evans*, 514 U.S. at 11; *see Leon*, 468 U.S. at 905.

Therefore, the question of exclusion did not simply flow from the fact of a Fourth Amendment violation.[177]

In *Evans*, although the Court would not explicitly conclude as much, the mistake that led to a violation of the Fourth Amendment seemed to reside in the court clerk's office.[178] If court clerks were responsible for the computer error, the exclusionary rule would fail to sufficiently deter future mistakes because it was designed to deter police, not judicial employees.[179] Court clerks, lacking any stake in obtaining convictions, were immune to the threat of evidence suppression.[180] Moreover, no evidence pointed to court employees even being inclined to subvert the Fourth Amendment in the first place.[181] Thus, the *Evans* Court concluded, "Application of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees."[182] The Court therefore allowed admission at trial of evidence illegally obtained due to government errors in maintenance of computer records.[183]

The *Evans* Court expanded the good-faith exception to include computer errors despite being fully warned of the long-term consequences that such a decision could have on government recordkeeping. Justice Ginsburg, in her dissent, voiced the concern that "[w]idespread reliance on computers to store and convey information generates, along with manifold benefits, new possibilities of error."[184] Computerization and interagency sharing of information amplifies mistakes by tainting millions of records nationwide.[185] The clerk's blunder in *Evans* was not an isolated incident. Once authorities discovered the error in Evans's records, "an immediate check revealed that three other errors of the very same kind had occurred on 'that same day.'"[186] Such mistakes could lead to situations where police draw weapons on perfectly innocent citizens. Justice Ginsburg offered as an example the sorry case of Terry Dean Rogan, who had suffered four arrests in two different states, three at gunpoint, due to an entry in a computer database erroneously linking him to robbery and murder.[187]

To counter this distressing trend, Justice Ginsburg suggested enforcing the exclusionary rule for illegality based on computer records error. She noted, "Applying an exclusionary rule as the Arizona court did

177. The Court noted, "The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Id.* at 10 (quoting Illinois v. Gates, 462 U.S. 213, 223 (1983)).

178. *See id.* at 5.

179. *Id.* at 14.

180. *Id.* at 15.

181. *Id.* at 14–15.

182. *Id.* at 16.

183. *See id.*

184. *Id.* at 26 (Ginsburg, J., dissenting).

185. *Id.* at 26–27.

186. *Id.* at 28.

187. *Id.* at 27.

may well supply a powerful incentive to the State to promote the prompt updating of computer records."[188] As noted by Justice Stevens, excluding evidence could effectively alter police conduct on a system-wide scale, because law enforcement officials "stand in the best position to monitor such errors . . . [and therefore] can influence mundane communication procedures in order to prevent those errors."[189]

Rather than address such concerns, the Court further limited sanctions on erroneous record keeping in *Herring v. United States*.[190] In *Herring*, a Coffee County, Alabama, Sheriff investigator recognized Bennie Dean Herring as he entered the Sheriff's Department to retrieve an item from his impounded truck.[191] The investigator had a warrant clerk check with the Dale County Sheriff's clerk for any outstanding warrants on Herring.[192] When the Dale County clerk responded that her computer indicated Herring had an active arrest warrant for failure to appear on a felony charge, the investigator pursued Herring, pulled his truck over, and arrested him.[193] During the search incident to this arrest, the investigator recovered methamphetamine and a pistol.[194] When the Dale County clerk checked the actual files, she discovered that the warrant had been recalled five months earlier.[195] By the time she reported the mistake in her computer records to Coffee County, the investigator had already recovered Herring's drugs and gun.[196]

Here, the relevant communications occurred between clerks of sheriff's offices—the records blunder was entirely law enforcement's. With no court employee to take the blame, the Court in *Herring*, in an opinion written by Chief Justice Roberts, could no longer avoid exclusion by finding law enforcement's behavior beyond reproach.[197] Instead, *Herring* switched the inquiry from the source of error to the level of police misconduct.[198] The Chief Justice declared, "[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus."[199] Viewing the exclusionary rule as the Court's "last resort,"[200] *Herring* mandated that "police conduct must be sufficiently deliberate that

188. *Id.* at 29.

189. *Id.* at 21 (Stevens, J., dissenting).

190. Herring v. United States, 555 U.S. 135, 144 (2009) (holding that the Fourth Amendment "exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence").

191. *Id.* at 137.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 138.

196. *Id.*

197. *Herring* acknowledged that the police made mistakes as a result of negligence. *Id.* at 147.

198. *Id.*

199. *Id.* at 143 (quoting United States v. Leon, 468 U.S. 897, 911 (1984)) (internal quotation marks omitted).

200. *Id.* at 140.

exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[201] The Court thus limited exclusion to cases involving "deliberate, reckless, or grossly negligent conduct" or "systemic negligence."[202] The Sheriff's Office's error did not rise to this level,[203] so any "marginal deterrence" excluding evidence would have here would not "pay its way."[204]

Such an accounting failed to consider certain benefits the exclusionary rule provided on a larger scale. When assessing the overall system of recordkeeping in law enforcement—described by Justice Ginsburg's dissent as "the nervous system of contemporary criminal justice operations"—the threat of exclusion might spur policy makers and systems managers to prioritize accuracy of their databases.[205] No such incentive existed in *Herring*, and thus the Sheriff's Office possessed "no routine practice of checking the database for accuracy."[206] The *Herring* holding destroyed any prospect of agencies obtaining an incentive to avoid careless recordkeeping. Thus, both *Evans* and *Herring* actually rewarded officers for relying on faulty information, for in each case the negligent failure to remove a warrant from computer records resulted in police being able to obtain incriminating evidence from a person the officer had no right to arrest.

The distorted incentives created by *Evans* and *Herring* become even more alarming when considered alongside *Atwater v. City of Lago Vista*, a case in which an officer subjected Gail Atwater, a mother of a three-year-old and a five-year-old, to a full custodial arrest for failing to secure herself and her children in a seatbelt.[207] Atwater had to take a "mug shot" and also had to remove "her shoes, jewelry, and eyeglasses, and empty her pockets."[208] Atwater urged that founding-era common law forbade officers from making warrantless misdemeanor arrests unless there was a "breach of the peace."[209] Although conceding that such an arrest was "inconvenient and embarrassing to Atwater," the Court held that her arrest did not violate the Fourth Amendment.[210] Therefore, only the relevant statutory authority limited police power to commit a full-custody arrest for the most minor of offenses. Now, *Florence*, when combined with *Evans*, *Herring*, and *Atwater,* creates the potential for a mushrooming escalation

201. *Id.* at 144.

202. *Id.*

203. *Id.*

204. *Id.* at 147–48.

205. *Id.* at 153–54, 155 (Ginsburg, J., dissenting).

206. *Id.* at 154.

207. Atwater v. City of Lago Vista, 532 U.S. 318, 323–24 (2001). Gail Atwater also failed to present her driver's license and insurance documentation. *Id.* at 324. When she explained that she could not show such documents because her purse had just been stolen, the officer responded that he had "heard that story two-hundred times." *Id.* at 324.

208. *Id.* at 324.

209. *Id.* at 327.

210. *Id.* at 354, 355.

from the smallest of computer mistakes. Police, prompted by a records error involving even a minor violation, could arrest a person and subject him or her to an automatic strip search at a local jail without any Fourth Amendment consequences. While each analytical step taken in *Evans*, *Herring*, *Atwater*, and *Florence* might in isolation seem both reasonable and harmless, in combination, these steps add up to automatic police rights that enable officers to sprint well off the track.

V. Conclusion.

When Justice Ginsburg considered the illegal search in *Evans*, she worried about the "'potential for Orwellian mischief' in the government's increasing reliance on computer technology in law enforcement."[211] Yet even Big Brother did not strip persons and then command them to squat and cough. The action that Justice Ginsburg deemed "repugnant to the principles of a free society" was the arrest and jailing of a person due to "computer error precipitated by government carelessness."[212] Now, under *Florence*, the deeper deprivation of a strip search of a wrongfully arrested person is deemed a reasonable, albeit an unfortunate, cost of doing business in our corrections system.[213]

Florence's strip search for commission of a minor offense was hardly an isolated incident. Sister Bernie Galvin, a Catholic nun of the Divine Providence for over fifty years, was strip searched after being arrested at an anti-war demonstration in 2003.[214] Betty Heathcock, who "attempted to exit a parking garage immediately upon entering because she thought the cost was too high" was strip searched after being arrested for "false pretences."[215] Karen Masters "failed to appear in traffic court because the judge gave her the wrong appearance date."[216] When a deputy came to her home to arrest Masters, she showed him her appearance card containing the improper date, but the officer took her to the station anyway, and dropped Masters's two young children off at their grandmother's house.[217] At jail, Masters was forced to remove all her clothing except her underpants, which she then had to lower while bending over and exposing her rectum.[218] Laura Goode, a thirty-year-old employee of Citigroup who

211. Arizona v. Evans, 514 U.S. 1, 25 (1994) (Ginsburg, J., dissenting) (quoting State v. Evans, 866 P.2d 869, 872 (Ariz. 1994)).

212. *Id.* at 34.

213. *Florence*, 132 S. Ct. at 1523.

214. Brief for Sister Bernie Galvin et al. as Amici Curiae Supporting Petitioner at 9, 10, *Florence*, 132 S. Ct. 1510 (2012) (No. 10-945), 2011 WL 3017402 at *17–18 [hereinafter Sister Galvin Amicus Brief].

215. Brief for the Petitioner, *supra* note 1, at 26.

216. Police had charged Masters with operating a vehicle with expired registration plates and lacking auto insurance. Sister Galvin Amicus Brief, *supra* note 214, at 19–20; Masters v. Crouch, 872 F.2d 1248, 1250 (6th Cir. 1989).

217. *Masters*, 872 F.2d at 1250.

218. *Id.*

had never before been arrested, was pulled over for "failing to have a properly lit tag light" and was ultimately arrested and forced to fully disrobe and bend over while a female guard separated her buttocks and made her cough.[219] Offenses that could result in arrest, and therefore a strip search, include driving with a noisy muffler, parking in a no-parking zone, and riding a bike without an audible bell.[220]

Florence's suspicionless strip search rule has created a genuine potential for minor matters to quickly escalate to humiliating dimensions. An equipment violation or an improperly filled-out appearance card could suddenly result in squatting naked for an officer's close observation in a jail.[221] Even worse, an entirely innocent person, ensnared in a faulty computer report, could be forced to submit to a jail strip search due to a records error law enforcement had no incentive to fix.[222] The *Florence* Court, in refusing to restrain the most intrusive of searches, has, with *Evans*, *Herring*, and *Atwater*, structured the criminal justice system in such a fashion that we all will worry when seeing an officer approach.

Albert Florence, in asserting his Fourth Amendment right against being strip searched, faced two machines. One machine was the computer database preserving an erroneous record of an arrest warrant for two years. The other machine was even more problematic—the bureaucracy of the government's corrections system, which allowed no exceptions for rules it deemed necessary for security. The officers searching Florence probably had the best of intentions and would have happily informed him that their decision to search was "nothing personal." To Florence, of course, it could not be more personal. The Court in *Florence*, focusing on the government's side of the scales, failed to fully appreciate this concern.

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219. Goode had refused to allow a narcotics agent to search her car, thinking, "it was ridiculous to be asked to search a car over a license plate light." Sister Galvin Amicus Brief, *supra* note 214 at 9. Further, when Goode was arrested and taken to the back of her car, she "noticed both tag lights were working." *Id.* at 10. Goode found the episode all the more traumatic because she had "severe scarring on her chest from abuse inflicted when she was six years old." *Id.* at 9.

220. Brief for the Petitioner, *supra* note 1, at 25.

221. *See supra* notes 216–20 and accompanying text.

222. For example, a reporter, checking his own record with a data broker, learned that his file incorrectly noted that he was charged with child molestation. Brief of Amici Curiae Electronic Privacy Information Center, Privacy and Civil Rights Organizations, and Legal Scholars and Technical Experts in Support of Petitioner at 20, Herring v. United States, 129 S. Ct. 695 (2009) (No. 07-513), 2008 WL 2095709 at *30.

Note

Understanding Hate Crime Statutes and Building Towards a Better System in Texas

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I. Introduction

On April 22, 2012, three women were assaulted outside a bar in Williamson County, Texas.[1] Julie Ward, one of the victims, said that she and her companions had been targeted because they were gay.[2]

Ward claimed that she, her sister, and her sister's partner were first asked to leave the bar because of their sexual orientation.[3] She said that next, patrons of the bar followed them outside, restrained them, and assaulted them.[4] The bar manager's wife, meanwhile, told a different story: that the women were roughhousing; that they were not asked to leave the bar because of their sexual orientation; and that they were not assaulted at all.[5] When asked whether the incident would be considered a hate crime, a representative from Williamson County Sheriff's Office said only that an investigation was ongoing and that "if 'it is warranted that charges be filed for a hate crime, charges will be filed.'"[6]

Incidents such as this fuel an ongoing nationwide debate about the proper scope and function of hate crime laws. How will law enforcement investigate such offenses? Under Texas's current bias crime statute, will a prosecutor be willing or even able to charge perpetrators with a hate crime? While it is undisputed that bias-motivated crime should not be tolerated, there is little consensus as to whether current laws actually prevent hate crimes from occurring.[7] Are our current laws effective? One obvious goal of such statutes is to reduce crime, but aside from that objective, are current laws serving the community through public awareness and education?

Nowhere are these questions more appropriate than in Texas. Despite the fact that Texas has had a hate crimes statute on the books since 1993, prosecutors seem extremely reluctant to charge defendants with hate crime offenses. Indeed, data indicates that Texas prosecutors have only used the hate crime law eighteen times since 2001.[8] If prosecutors are not utilizing hate crime laws, the public will not become educated about this important issue, and perpetrators will not be held accountable for their

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1. Claire Osborn, *Sheriff's Office Investigating Report of Assault on Gay Women Outside Weir Bar*, AUSTIN AMERICAN-STATESMAN, Apr. 24, 2012, http://www.statesman.com/news/williamson/sheriffs-office-investigating-report-of-assault-on-gay-2323580.html.

2. *Id.*

3. *WATCH: Lesbian Says She Was Kicked Out of Williamson County Bar, Beaten by Patrons*, DALL. VOICE, April 24, 2012, http://www.dallasvoice.com/lesbian-beaten-bar-north-austin-10107483.html.

4. *Id.*

5. *Id.*

6. *Id.*

7. *See generally* Susan Gellman & Frank Lawrence, *Agreeing to Agree: A Proponent and Opponent of Hate Crime Laws Reach for Common Ground*, 41 HARV. J. ON LEGIS. 421 (2004) (discussing the arguments for and against bias-crime laws and proposing a model bias-crime statute to balance the competing concerns of proponents and opponents of such laws).

8. *Cases in Which a Hate Crime Finding was Requested*, TEX. JUDICIAL COUNCIL (Dec. 11, 2012), http://www.txcourts.gov/oca/hate_crimes.pdf.

actions to the fullest extent provided by statute. Of course, while higher rates of prosecution do not necessarily mean that a hate crime statute is effective at stopping crime, prosecution is at least evidence that the statute is being used. What can be done to make Texas's hate crime statute more accessible to prosecutors and, ultimately, more effective at curtailing crime?

This Note will first explore the history, types, and scope of hate crime statutes throughout the United States. It will then analyze hate crime statistics in a number of particular states, in order to determine which are utilizing their hate crime statutes, and whether the construction of those states' statutes has any effect on hate crime rates. Finally, it will outline suggestions about how Texas's hate crimes statute and reporting programs can be improved.

II. History of Hate Crime Statutes

A hate crime, at its most basic level, is an "attack upon the person or property of an individual motivated by hatred of a characteristic of that person, such as race, religion, gender, sexual orientation, or ethnicity."[9] During the 1980s, legislatures and private organizations began to be troubled by reports of increasing bias-motivated crime throughout the country.[10] A major advocate for hate crimes legislation was the Anti-Defamation League (ADL), which drafted two model hate crime laws in 1981 and 1991.[11] These model statutes, while not uniformly ratified by any state, have achieved widespread acceptance.[12]

The federal government has enacted a number of statutes targeting bias offenses. In 1990, the Federal Hate Crimes Statistics Act was passed into law, directing the Attorney General to collect and report data about hate crimes nationwide.[13] The Attorney General subsequently delegated this responsibility to the FBI, which releases a "Hate Crimes Statistics" report each year.[14] Then, in 1994, Congress directed the US Sentencing Commission to provide a sentence enhancement for federal crimes identified as a hate crime by the trier of fact,[15] which was added to federal

9. Theresa Suozzi et al., *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y 29, 31 (1995).

10. *See* Craig Peyton Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 S.D. L. Rev. 1, 5, 9 (1994) (declaring that "incidents of anti-gay violence reported to the National Gay & Lesbian Task Force increased from 2,042 in 1985 to 7,031 in 1989" and noting that "twenty-nine states passed hate crime statutes between 1981 and 1991").

11. *Id.* at 8–9.

12. *Id.* at 9.

13. Hate Crimes Statistics Act, Pub. L. No. 101-275, §§ 1–2, 104 Stat. 140, 140–41 (1990) (codified as amended at 28 U.S.C. § 534 (2006)).

14. *About Hate Crime Statistics*, FED. BUREAU OF INVESTIGATION (Dec. 2012), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/resources/abouthatecrime_final.pdf.

15. Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, § 28003, 108 Stat. 1796, 2096 (1994) (codified as amended at 28 U.S.C. § 994 (2006)).

sentencing guidelines by the Commission in 1995.[16] Most recently, in 2009, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act was signed into law, making federal hate crimes that result in bodily injury a substantive offense.[17]

State legislatures have also passed a myriad of different hate crime statutes, many based on the ADL's 1981 or 1991 model legislation.[18] Today, nearly every state, as well as the District of Columbia, has passed some form of anti-bias offense statute, although some states' statutes are either more vague or less inclusive than others'.[19] Texas passed its first hate crime statute, the Texas Hate Crimes Act, into law in 1993.[20]

Acceptance of hate crime laws has not been universal. Opponents of anti-bias statutes argue that such laws unlawfully interfere with individuals' rights of free expression.[21] Nevertheless, in *Wisconsin v. Mitchell*,[22] the United States Supreme Court unanimously ruled that a Wisconsin hate crime statute did not violate a defendant's First Amendment right to free speech because it punished conduct which caused special harm to the victim and the community.[23] The hate crime statute, the court reasoned, was aimed at addressing this harm and was not designed to punish the offender because of his beliefs.[24] While the Court's decision in *Mitchell* did not rule out the possibility of future constitutional challenges, it did legitimize the government's basis to legislate against bias offenses.[25]

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16. ANTI-DEFAMATION LEAGUE, HATE CRIME LAWS 14 (2012), *available at* http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-Law.pdf ("In May 1995, the United States Sentencing Commission announced its implementation of a three-level sentencing guidelines increase for hate crimes, as directed by Congress.").

17. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4707, 123 Stat. 2835, 2838–41 (2009) (codified as amended at 18 U.S.C. § 249 (Supp. 2012); *see also* Sarah Finnane Hanafin, *Legal Shelter: A Case for Homelessness as a Protected Status Under Hate Crime Law and Enhanced Equal Protection Scrutiny*, 40 STETSON L. REV. 435, 453–54 (2011) (describing several provisions of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act).

18. ANTI-DEFAMATION LEAGUE, *supra* note 16, at 2; Gaumer, *supra* note 10, at 9–11.

19. ALISON M. SMITH & CASSANDRA L. FOLEY, CONG. RESEARCH SERV., RL33099, STATE STATUTES GOVERNING HATE CRIMES (2010), *available at* http://www.fas.org/sgp/crs/misc/RL33099.pdf. Wyoming's statute is particularly vague: "No person shall be denied the right to life, liberty, pursuit of happiness or the necessities of life because of race, color, sex, creed or national origin." WYO. STAT. ANN. § 6-9-102 (West 2012).

20. TEX. PENAL CODE ANN. § 12.47 (West 2011); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West 2006); *see also* David Todd Smith, *Enhanced Punishment Under the Texas Hate Crimes Act: Politics, Panacea, or Pathway to Hell?*, 26 ST. MARY'S L.J. 259, 259–63 (1994) (summarizing the events leading up to the passage of the Texas Hate Crimes Act).

21. FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 80–81 (1999).

22. 508 U.S. 476 (1993).

23. *Id.* at 487–88.

24. *Id.* at 488.

25. *See generally* Suozzi, *supra* note 9, at 45–47 (discussing the Court's reasoning in *Wisconsin v. Mitchell*); *id.* at 40–59 (discussing the Supreme Court's and various state courts' approaches to First Amendment challenges to hate crime statutes).

III. Types of Hate Crime Statutes

The federal government and state legislatures have taken a number of different approaches when drafting statutes that address bias offenses. The Congressional Research Service has identified four main categories of hate crimes statutes:[26] (1) *institutional vandalism*, which criminalize the destruction of property belonging to a particular (often religious) organization; (2) *sentence enhancements*, which add extra time in prison or otherwise increase the severity of an offense if it is proven that the commission of the offense was based on bias or prejudice; (3) *substantive offenses*, which re-criminalize already existing low-level offenses into new crimes if they were motivated by bias or prejudice; and (4) *data collection*, which typically mandate an executive agency to collect statistics regarding hate crime offenses and (sometimes) prosecution of hate crimes. A brief analysis and examples of each type of legislation follow.

A. Institutional Vandalism

This type of legislation protects against acts of vandalism committed against buildings used for religious activities, as well as buildings of civic or educational importance.[27] Crimes of institutional vandalism are distinct from other hate crimes statutes in that they do not require evidence of bias or prejudice on the part of the offender.[28] Such statutes assume that the protected property is sufficiently associated with a particular religious (or ethnic) group that a finding of bias motivation is not a necessary prerequisite to punishing an offender more harshly than a typical vandalism offense.[29] This reasoning has been criticized as an attempt to criminalize conduct more severely simply because it is

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26. *See* SMITH & FOLEY, *supra* note 19, at 2–31 (classifying state hate crime statutes into four categories: (1) crime/penalty enhancement; (2) institutional vandalism; (3) data collection; (4) law enforcement training); *cf.* ANTI-DEFAMATION LEAGUE, supra note 16, at 2–7 (explaining the ADL's model hate crime legislation with a focus on "penalty enhancement" and "institutional vandalism"); LAURA L. FINLEY, ENCYCLOPEDIA OF JUVENILE VIOLENCE 125 (2007) (identifying four types of hate crime legislation: "sentence enhancements; substantive crimes; civil rights statutes; and/or reporting statutes"); GLEN KERCHER, CLAIRE NOLASCO & LING WU, CRIME VICTIMS' INSTITUTE, HATE CRIMES 8 (2008), *available at* http://www.crimevictimsinstitute.org/documents/Hate%20Crimes%20Final.pdf ("Hate crime legislation at the federal or state level takes on four specific forms: (1) statutes defining hate crimes as substantive offenses, (2) sentence enhancement, (3) statistics collection, and (4) civil remedies."). This Note distinguishes between crime enhancement and penalty enhancement.

27. *See* ANTI-DEFAMATION LEAGUE, *supra* note 16, at 2, 4 (describing institutional vandalism as "vandalism aimed at houses of worship, cemeteries, schools and community centers").

28. *See, e.g.*, *id.* at 4 (presenting the text of ADL's model hate crime legislation dealing with institutional vandalism, which requires only that the offender "knowingly vandaliz[e], defac[e] or otherwise damage[]" a protected structure).

29. JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 85 (1998) ("These laws do not require proof of biased motivation, only that the offender committed the act knowing that the object was a church, cemetery, government building, or other designated structure.").

offensive.[30] Additionally, these statutes raise issues regarding which expressions deserve special punishment and which buildings deserve special protection.[31] Such distinctions might implicate First Amendment or Equal Protection issues.

Pennsylvania's Institutional Vandalism statute is typical: "A person commits the offense of institutional vandalism if he knowingly desecrates, . . . vandalizes, defaces or otherwise damages . . . any church, synagogue or other facility or place used for religious worship or other religious purposes . . . ."[32]

B. Sentence Enhancements

This type of hate crime legislation increases the punishment for offenses when the finder of fact determines that the defendant's motivation for the underlying offense was based on bias or prejudice.[33] Some sentence enhancement statutes provide a range of additional years in prison by which the sentence for the underlying offense can be increased.[34] Other statutes increase the underlying offense to the next level of severity, thereby triggering increased punishment based on the state's sentencing ranges.[35] The length of the additional penalty varies widely from state to state, and can range from just a few years[36] to up to triple the maximum sentence for the underlying offense.[37] One criticism of sentence enhancement statutes is that their practicality is called into question in cases of particularly serious crimes.[38] It is useless for a prosecutor to go to the trouble of proving the

30. *Id.* at 34–35, 84–86.

31. *Id.* at 85–86.

32. 18 PA. CONS. STAT. ANN. § 3307 (West Supp. 2012).

33. Alex Ginsberg, *How New York's Bias Crimes Statute Has Exceeded Its Intended Scope*, 76 BROOK. L. REV. 1599, 1608 (2011).

34. *See, e.g.*, CAL. PENAL CODE § 422.75 (West 2010) ("[A] person who commits a felony that is a hate crime or attempts to commit a felony that is a hate crime, shall receive an additional term of one, two, or three years in the state prison, at the court's discretion.").

35. *See, e.g.*, N.Y. PENAL LAW § 485.10 (McKinney Supp. 2013) ("When a person is convicted of a hate crime pursuant to this article and the specified offense is a misdemeanor or a class C, D or E felony, the hate crime shall be deemed to be one category higher than the specified offense the defendant committed, or one category higher than the offense level applicable to the defendant's conviction for an attempt or conspiracy to commit a specified offense, whichever is applicable.").

36. CAL. PENAL CODE § 422.75.

37. *See* FLA. STAT. ANN. § 775.085 (West Supp. 2013) (reclassifying crimes that "evidence[] prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or advanced age of the victim" by one degree of severity, declaring, for instance, that "[a] felony of the third degree is reclassified to a felony of the second degree"); *id.* § 775.082(3)(c)–(d) ("A person who has been convicted of any other designated felony may be punished as follows: For a felony of the second degree, by a term of imprisonment not exceeding 15 years. . . . For a felony of the third degree, by a term of imprisonment not exceeding 5 years."); *see also* VT. STAT. ANN. tit. 13, §§ 1454, 1455 (2009) (providing a sentence enhancement double the maximum for the underlying offense).

38. Beverly McPhail & Valerie Jenness, *To Charge or Not to Charge?—That Is the Question: The Pursuit of Strategic Advantage in Prosecutorial Decision-Making Surrounding Hate Crime*, 4 J. HATE STUD. 89, 97–99 (2006).

elements of a hate crime statute when the same sentence is already available based solely on the underlying offense.[39]

California's sentence enhancement statute is an example of a statute that provides a range of years that may be added to the sentence of the underlying offense: "[A] person who commits a felony that is a hate crime or attempts to commit a felony that is a hate crime, shall receive an additional term of one, two, or three years in the state prison, at the court's discretion."[40]

Florida's sentence enhancement statute is an example of a statute where the underlying offense is increased in degree of severity:

> The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, [or a number of other enumerated characteristics] of the victim: (1) A misdemeanor of the second degree is reclassified to a misdemeanor of the first degree. (2) A misdemeanor of the first degree is reclassified to a felony of the third degree . . . [etc.][41]

C. Substantive Offenses

This type of hate crime statute identifies criminal conduct motivated by prejudice as a new crime or, more often, as an aggravated form of an existing crime.[42] In most jurisdictions, this takes the form of an "intimidation" statute, which, as proposed by the ADL's model legislation,[43] criminalizes threatening or violent conduct done with the intent to intimidate or harass an individual on the basis of that person's race, religion, or other protected factor.[44] Notably, substantive offense statutes do not typically reclassify high-level offenses such as murder, rape, or aggravated assault.[45] Perhaps because of this fact, many states have both

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39. *Id.*

40. CAL. PENAL CODE § 422.75(a).

41. FLA. STAT. ANN. § 775.085. Such a sentencing structure results in much more severe penalties for individuals convicted of hate crimes than California's system of increasing the sentence by a maximum of four years. *See* FLA. STAT. ANN. § 775.082 (providing penalties for crimes by the severity of the offense); CAL. PENAL CODE § 422.75(b) ("[A]ny person who commits a felony that is a hate crime, . . . and who voluntarily acted in concert with another person, . . . shall receive an additional two, three, or four years in the state prison, at the court's discretion.").

42. JACOBS & POTTER, *supra* note 29, at 33.

43. *See* ANTI-DEFAMATION LEAGUE, *supra* note 16, at 4–6.

44. *Id.* at 5.

45. *See* McPhail & Jenness, *supra* note 38, at 98 ("Hate crime enhancements are precluded in first-degree felonies since that is the highest level that can be charged and the penalties cannot be further enhanced. . . . The hate crime enhancement may be more helpful at the lower levels of offenses because there is room to enhance the punishment.").

a sentence enhancement statute and a substantive offense statute, that deal with higher- and lower-level crimes, respectively.[46]

While sentence enhancement and substantive offense statutes may seem to be constructed very differently, they are actually very similar in purpose. Despite the fact that one statute enhances the sentence of an existing crime, while the other creates a new category of crime for low-level bias offenses, the result of both statutes is to provide a harsher punishment for already-criminalized conduct when that conduct is motivated by bias or prejudice.[47]

New York has enacted a typical substantive offense hate crime statute:

> A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: . . . [s]trikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of a belief or perception regarding such person's race, color, national origin, [or a number of other enumerated special groups], regardless of whether the belief or perception is correct . . . .[48]

D. Data Collection

This type of statute mandates jurisdictional authorities to collect, analyze, and report on the prevalence of hate crimes within the jurisdiction.[49] Data collection statutes typically require local law enforcement agencies, such as police departments or constables, to maintain data on each hate crime offense that is committed.[50] This data is then reported to a state law enforcement agency. Such a requirement leads to questions about which crimes are considered hate crime offenses in the statute, as well as by local law enforcement officials.[51] While information on the prevalence of offenses is helpful, such data does not speak to how often a hate crime statute is used or how effective it is at obtaining a sentence. Unfortunately, few states have enacted data collection statutes

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46. For example, California, CAL. PENAL CODE §§ 422.6, 422.75 (West 2010); Kansas, KAN. STAT. ANN. §§ 21-4716, 21-4003 (2007); New York, N.Y. PENAL LAW §§ 240.30, 240.31, 485.10 (McKinney 2008 & Supp. 2013).

47. *See* Ginsberg, *supra* note 33, at 1608 ("The distinction between penalty-enhancing statutes and substantive-crime-creating statutes is primarily a procedural one . . . .").

48. N.Y. PENAL LAW § 240.30 (McKinney 2008).

49. KERCHER, NOLASCO & WU, *supra* note 26, at 9–10.

50. *See, e.g.*, CONN. GEN. STAT. § 29-7m (Supp. 2013).

51. *See* JACOBS & POTTER, *supra* note 20, at 40. The federal Hate Crimes Statistics Act, for example, only initially listed eight predicate crimes as hate crimes, making "[t]he limitation of hate crime reporting to these eight crimes . . . seem[] arbitrary . . . ." *Id.*

that require prosecutors to report statistics on the disposition of hate crime prosecution.[52]

Connecticut provides a typical example of a data collection statute:

> "[T]he Division of State Police . . . shall monitor, record and classify all crimes committed in the state which are motivated by bigotry or bias. The police department, resident state trooper or constable who performs law enforcement duties for each town shall monitor, record and classify all crimes committed within such town which are violations of [various hate crime statutes] and report such information to the Division of State Police . . . ."[53]

IV. Scope of Hate Crimes

Another important aspect of hate crime laws is the scope of the statute. What type of behavior does the hate crime statute punish? Under both sentence enhancement and substantive offense statutes, the motivation of the defendant is a key element. Was the victim targeted on the basis of his or her affiliation with a particular group?

Inherent difficulty exists when a statute targets an offender based primarily on his or her motive. As opposed to "intent," a defendant's "motive" has not traditionally been a required element of criminal offenses in American jurisprudence.[54] There is an important distinction between motive and intent. "[M]otive can perhaps be best described as simply the 'why' behind a defendant's conduct," while intent can be seen as "'what' the defendant meant to accomplish" by his or her conduct.[55] Making motive an element of a hate crime offense is also seen as constitutionally problematic, as it can be seen as criminalizing a defendant's thoughts.[56] The Supreme Court's ruling in *Mitchell*, however, addressed these issues and seemed to indicate that motive as an element of a hate crime offense was not a violation of the First Amendment.[57]

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52. New York and Hawaii appear to be the only states that mandate prosecutors, as well as law enforcement officials, to submit data on hate crimes. *See* N.Y. EXEC. LAW § 837 (McKinney Supp. 2013); HAW. REV. STAT. § 846-54 (LexisNexis 2007).

53. CONN. GEN. STAT. ANN. § 29-7m.

54. Gaumer, *supra* note 10, at 12–13.

55. *Id.* at 13.

56. *Id.* at 13–14; *see also* JACOBS & POTTER, *supra* note 20, at 112–13.

57. Wisconsin v. Mitchell, 508 U.S. 476, 483–88 (1993); *see also* Gaumer, *supra* note 10, at 19 ("The Court expressed an assortment of justifications to support its conclusion that the sentence enhancement did not violate the first amendment: 1) motive allegedly plays the same role in the penalty-enhancement statute as it does in antidiscrimination laws; 2) the statute is aimed at the state's interest in redressing individual and social harm caused by bias-motivated crimes; 3) the defendant's motive for acting has been used throughout history as a consideration at sentencing; and 4) the statute was aimed at conduct, which is generally unprotected by the First Amendment.").

Motive as an element of the offense is an essential aspect of both sentence enhancement and substantive offense statutes. However, within that broader category, Professor Fred Lawrence has identified two main subsets in terms of scope: the "racial animus model," where the offender has acted out of hatred for the victim's affiliation with a particular group; and the "discriminatory selection model," which requires only that the offender has selected his victim because of the victim's affiliation with a particular group.[58] Because of the fine distinction between these two categories, a closer look at the effects and implications of each model is warranted.

The racial animus hate crime statute is fairly straightforward: it punishes an offender when the trier of fact determines that the offender committed the crime, at least in part, on the basis of hatred towards a particular subset of the population.[59] While this model grapples with the First Amendment issue of punishing the offender's motivation, it strikes at the heart of what legislators and, indeed, the public at large, seem to believe hate crime laws should address.[60] However, establishing the "motivation" element can be difficult, and many prosecutors have indicated their reluctance to pursue that course when the possibility of charging the offender with a different, non-bias-motivated crime is a possibility.[61]

Rhode Island's hate crimes statute is a good example of the racial animus model:

> If a person has been convicted of a crime . . . in which he or she intentionally selected the [victim or property affected by the offense] because of the actor's hatred or animus towards the actual or perceived [affiliation with a list of enumerated special groups], he or she shall be subject to the penalties provided in this section.[62]

The other type of statute is the "discriminatory selection model." This type of statute punishes the offender if he or she selected the victim on the basis of the victim's affiliation with a particular subset of the population.[63] Under this type of statute, "it is irrelevant *why* an offender

58. LAWRENCE, *supra* note 21, at 29–30.

59. *See, e.g.*, Ginsberg, *supra* note 33, at 1600–01 (distinguishing "between 'pure hate' crimes and 'opportunistic bias' crimes" and explaining that "pure hate" crimes "need[] little explanation; these are offenses involving palpable and virulent animus towards a particular group or demographic").

60. *Id.* at 1601–02; *see also* LAWRENCE, *supra* note 21, at 34–35 (declaring that the racial animus model "is consonant with the classical understanding of prejudice as involving more than deferential treatment on the basis of the victim's race").

61. McPhail & Jenness, *supra* note 38, at 97 ("One prosecutor stated it this way: 'When you make a decision to use a hate crime law, you add to the complexity of the case. It's another element you must prove that you wouldn't have to prove otherwise. . . . [M]ost prosecutors would decline to use it if the crime already had a sufficient range of punishment.'").

62. R.I. GEN. LAWS § 12-19-38 (2002).

63. LAWRENCE, *supra* note 21, at 29–30; Ginsberg, *supra* note 33, at 1600–01.

selected his victim"; it is sufficient merely that the selection was made on the basis of that affiliation.[64] Thus, all racial animus statutes fall under the larger umbrella of discriminatory selection statutes because, under the former model, the victim is selected *on the basis of* their affiliation with the protected group.[65] However, the reverse is not true; not all discriminatory selection statutes can be considered racial animus statutes because an offender may have a different reason for selecting the victim than hatred or animus (e.g., the offender feels that women, or Hispanics, or homosexuals, are easier to assault than members of another special group).[66]

The Wisconsin hate crimes statute, which the Supreme Court upheld in *Mitchell*, is typical of the "discriminatory selection" model. The statute requires the offender to:

> Intentionally select[] the person against whom the crime . . . is committed . . . in whole or in part because of the actor's belief or perception regarding the race, religion, color, [or affiliation with a number of other enumerated special groups] of that person[,] . . . whether or not the actor's belief or perception was correct.[67]

Despite the fact that the discriminatory selection model was upheld by the Supreme Court, this type of statute is problematic. Should an offender who targets a member of a special group because of hatred for that group be as equally culpable as an offender who targets a member of a special group for some other reason (for example, the burglar who robs the homes of white families based not on hatred of whites, but on the belief that whites own more valuable possessions)?[68] Additionally, legislatures are often unaware of the fine distinction between the racial animus and discriminatory selection models, effectively delegating to prosecutors the decision of whether certain individuals who did not act out of hatred towards a protected group can still be punished as if they had so acted.[69]

Of course, the language of some states' statutes is vague enough that it does not seem to fit under either model.[70] Many states' statutes indicate that the offender is guilty of a hate crime if his or her conduct is motivated "*because of*" bias or prejudice towards a protected group.[71]

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64. LAWRENCE, *supra* note 21, at 30.

65. *Id.*

66. *Id.* at 74; *see also* Ginsberg, *supra* note 33, at 1600–01 (describing "opportunistic bias" crimes as are not motivated by any negative feelings towards the group or demographic, but nonetheless constitute offenses that fit some statutory definitions of hate or bias crimes").

67. WIS. STAT. ANN. § 939.645 (West 2005).

68. *Cf.* LAWRENCE, *supra* note 21, at 52–53 (discussing the role of culpability in assessing the seriousness of particular crimes, determining appropriate punishment, and measuring the harm caused to the victim).

69. Ginsberg, *supra* note 33, at 1630–32.

70. LAWRENCE, *supra* note 21, at 35–38.

71. *Id.*

These statutes do not mention the requisite hatred of the racial animus model; nor do they require that the offender intentionally select the victim on the basis of their affiliation with the protected group.[72] Rather, the language lies somewhere in between.[73] As was indicated above, this provides prosecutors with excessive leeway to charge offenders as they see fit, rather than by what is mandated by statute.[74]

V. Which Groups to Protect?

Another fundamental question about hate crime laws is which groups should be protected under the statute. Does expansive inclusion of many different groups lead to less crime, or does it diffuse effectiveness because the categories are too broad? Arguments have been made on both sides, but ultimately it seems that a flexible approach may be the best when determining who to protect.

Race, ethnicity, and religion are traditional categories protected under the vast majority of hate crime statutes.[75] The ADL, which has been the driving force behind the hate-crime movement for decades, has also made a push for gender to be included as a protected group, despite the presence of state and federal statutes that already deal with crimes against women and domestic violence.[76] Sexual orientation is another category that has received considerable attention.[77] Today, gender and sexual orientation are included as protected special groups under federal law as well as under many states' statutes.[78]

Should hate crimes continue to expand in order to protect more and more subsets of the population? In recent years, violence against homeless individuals in urban America has led to a movement seeking for protection of the homeless under hate crime laws.[79] Proponents of the movement say

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72. *Id.*

73. *Id.*

74. *See supra* note 61 and accompanying text.

75. Gellman & Lawrence, *supra* note 7, at 423 ("In the United States, every federal and state bias-crime law covers race, ethnicity, and religion in some form.").

76. ANTI-DEFAMATION LEAGUE, *supra* note 16, at 3; *see also* JACOBS & POTTER, *supra* note 29, at 133–34 (discussing the exclusion of certain groups from hate crime laws and declaring that "[t]he exclusion of gender prejudice from hate crime laws—on the ground that it would water down the special significance of racial, religious, and ethnic prejudice-related crime—is likely to cause a rift among historic civil rights movement allies"). "In 1990, only seven of the 31 states which had hate crime statutes included gender. Today, 19 of the 41 statutes cover victims chosen by reason of their gender." ANTI-DEFAMATION LEAGUE, *supra* note 16, at 3.

77. *See generally* Teresa Eileen Kibelstis, *Preventing Violence Against Gay Men and Lesbians: Should Enhanced Penalties at Sentencing Extend to Bias Crimes Based on Victims' Sexual Orientation?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309 (1995) (analyzing anti-gay violence and arguing for sentence enhancements for bias-crimes motivated by the sexual orientation of the victim). "There appear to be at least 25 states that protect potential victims of sexual orientation." SMITH & FOLEY, supra note 19, at 1.

78. *See supra* notes 76–77.

79. NAT'L COAL. FOR THE HOMELESS, HATE CRIMES AGAINST THE HOMELESS: VIOLENCE HIDDEN IN PLAIN VIEW (2012), *available at* http://www.nationalhomeless.org/publications/hatecrimes/

that the homeless must be protected because they are essentially disenfranchised members of the community.[80] However, opponents of the movement argue that while race, religion, and sexual orientation are (arguably) "immutable characteristics" (or at least constitutionally protected rights) that are eligible for heightened protection under the law, homelessness is clearly not an immutable characteristic eligible for inclusion under a hate crimes statute.[81] Despite these concerns, Florida became the first state to include homelessness as a protected characteristic under its hate crime statute in 2010.[82]

Table 1 lists the special groups that are currently protected under state and federal law. The question remains, however, whether inclusion of a greater or fewer number of groups actually has a positive effect on crime or prosecution rates.

hatecrimes2010.pdf; Eric Lichtblau, *Attacks on Homeless Bring Push on Hate Crime Laws*, N.Y. TIMES, Aug. 7, 2009, http://www.nytimes.com/2009/08/08/us/08homeless.html.

80. *See* Hanafin, *supra* note 17, at 457–58 ("What makes homelessness worthy of hate crime protection is its similarity to currently protected classifications—the homeless are victims of targeted violence based upon virulent discrimination and thus require additional protection from the legal and political process."); NAT'L COAL. FOR THE HOMELESS, supra note 79, at 11 ("These crimes of hate are committed against a community of vulnerable individuals in our country who are at risk because they live outside or in public spaces. . . . Homeless people are treated so poorly by society that their attacks are often forgotten or unreported.").

81. Scott Steiner, *Habitations of Cruelty: The Pitfalls of Expanding Hate Crime Legislation to Include the Homeless*, 45 CRIM. L. BULLETIN, Sept.–Oct. 2009, at 810.; *see also* Hanafin, *supra* note 17, at 457–58.

82. FLA. STAT. ANN. § 775.085 (West Supp. 2013).

Table 1: Protected Groups by Jurisdiction (2011)[83]

	Federal Protection	State Protection
Race, Ethnicity, Color, Nationality	Federal Government, District of Columbia	AL, AK, AZ, CA, CO, CT, DE, FL, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SD, TN, TX, VT, VA, WA, WV, WI **(44)**
Religion	Federal Government, District of Columbia	AL, AK, AZ, CA, CO, CT, DE, FL, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SD, TN, TX, VT, VA, WA, WV, WI **(44)**
Sexual Orientation	Federal Government, District of Columbia	AZ, CA, CO, CT, DE, FL, HI, IL, IA, KS, KY, LA, ME, MD, MA, MN, MO, NE, NV, NH, NJ, NM, NY, OR, RI, TN, TX, VT, WA, WI **(30)**
Physical or Mental Disability	Federal Government	AL, AK, AZ, CA, CO, DE, FL, HI, IL, IA, LA, ME, MA, MN, MO, NE, NV, NJ, NM, NY, OK, OR, RI, TN, TX, VT, WA, WI **(28)**
Gender	Federal Government, District of Columbia	AK, AZ, CA, CT, HI, LA, ME, MD, MI, MN, MS, MO, NE, NH, NJ, NM, NY, ND, RI, TN, TX, VT, WA, WV **(24)**
Age	District of Columbia	FL, IA, LA, MN, NE, NM, NY, TX, VT **(9)**
Political Affiliation	District of Columbia	IA, WV **(2)**
Homelessness		FL, MD **(2)**
Physical Disability Only	District of Columbia	CT **(1)**
Other*	District of Columbia	VT, MT **(2)**
None**		AR, GA, IN, SC, UT, WY **(6)**

* Marital Status, Personal Appearance, Matriculation (District of Columbia); Service in the Armed Forces (Vermont); Involvement in Human or Civil Rights (Montana)

** Arkansas and Indiana have only an institutional vandalism statute. Georgia also has an institutional vandalism statute, as well as a sentence enhancement statute based on actions motivated by general "bias or prejudice"; however, this statute has been struck down by the Georgia Supreme Court as being unconstitutionally vague. South Carolina has provisions criminalizing Ku Klux Klan conduct, as well as an institutional vandalism statute. Utah has a provision criminalizing harassment "with intent to terrorize"; it has no specific institutional vandalism statute. Wyoming's statute merely criminalizes interference with constitutional privileges on the basis of "race, color, creed, or national origin"; Wyoming also has no institutional vandalism statute.

83. Data derived from the findings of the Congressional Research Service's report compiling state statutes governing hate crimes. *See* SMITH & FOLEY, *supra* note 19.

VI. State Responses to Hate Crimes

As each state's hate crime statute is subtly different, a state-by-state analysis of how hate crimes are being addressed is worthwhile. Many states have data collection statutes in place, which facilitate an analysis of crime rates—and in some cases, prosecution rates as well.[84] However, the vast majority of states' hate crime statistics reports include only law enforcement data.[85]

While law enforcement agency statistics are helpful at measuring how many hate crimes actually occur within a state each year, they reveal little about how much effect a hate crime statute *itself* is having on the attitudes of the general public, because such statistics do not reveal how often hate crime statutes are actually *used.* An analysis of hate crime data in a number of states reveals that the most useful information regarding trends of bias offenses comes from those states that mandate reporting from prosecutors as well as by law enforcement. Although fluctuation in crime rates can be attributed to many factors in addition to prosecution rates, data regarding the prosecution of hate crimes is essential to an analysis of the effectiveness of a hate crimes statute.

A. Wisconsin

Perhaps any discussion of the effectiveness of hate crimes by state should begin with Wisconsin, as the Supreme Court essentially made Wisconsin's hate crime statute a touchstone for constitutionality when it upheld the statute in *Mitchell.*[86] Wisconsin's bias offense takes the form of a sentence enhancement and uses the discriminatory selection model.[87] It also has an institutional vandalism statute.[88] Between 2000 and 2009, there were no substantive changes made to Wisconsin's hate crimes statutes.[89]

While Wisconsin has no data collection statute specifically for hate crimes, it does have a Uniform Crime Reporting program in place that calls for voluntary crime reports on a yearly basis from law enforcement agencies throughout the state.[90] This crime data includes statistics about

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84. *See, e.g.*, CONN. GEN. STAT. § 29-7m (Supp. 2013); *see also* SMITH & FOLEY, *supra* note 19 (summarizing state statutes governing hate crimes, including statutes mandating data collection).

85. *See supra* notes 50–53 and accompanying text.

86. Wisconsin v. Mitchell, 508 U.S. 476 (1993); *see also* LAWRENCE, *supra* note 21, at 30 ("*Mitchell* was the first case in which the Supreme Court expressly sustained a modern bias crime law. Because *Mitchell* represents the constitutional authority for the enactment of bias crime laws, the Wisconsin statute warrants close examination.").

87. WIS. STAT. ANN. § 939.645 (West 2005); LAWRENCE, *supra* note 21, at 30; *see supra* note 67 and accompanying text.

88. WIS. STAT. ANN. § 943.012 (West 2005).

89. The Wisconsin legislature made minor language revisions to section 939.645 in 2001. 2001 Wis. Sess. Laws 1533.

90. STATISTICAL ANALYSIS CTR., WIS. OFFICE OF JUSTICE ASSISTANCE, CRIME AND ARRESTS IN WISCONSIN – 2000, at 1–2 (2002) [hereinafter CRIME AND ARRESTS IN WISCONSIN – 2000].

hate crimes.[91] According to Wisconsin's Uniform Crime Report (UCR), substantially all of the state's 398 reporting agencies also submitted hate crimes statistics during at least the last ten years.[92]

In the year 2000, Wisconsin reported that forty-nine incidents of hate crime occurred throughout the year.[93] Strangely, this number included only a tiny amount of institutional vandalism offenses (about 10%).[94] Then, in 2006, reports of institutional vandalism offenses spiked[95] and, since then, have consistently accounted for 30%–40% of all reported hate crimes in the state.[96] While these statistics might reflect a sudden surge of institutional vandalism crimes in Wisconsin, it is far more probable that law enforcement officials simply began reporting more vandalism crimes. Thus, there were likely more than forty-nine incidents of hate crime in 2000 (perhaps as many as 30% more, judging by the statistics of later years). A better estimate is that around sixty incidents of hate crime occurred in Wisconsin in 2000.[97]

In 2009, the most recent year for which Wisconsin statistics have been released, sixty-three incidents of hate crime were reported.[98] Thirty-two percent of those offenses were incidents of institutional vandalism; 21% were simple assaults; and 14% were incidents of intimidation.[99] While sixty-three incidents in 2009 seems at first glance to be considerably higher

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91. *Id.* at 237–38.

92. *See* STATISTICAL ANALYSIS CTR., WIS. OFFICE OF JUSTICE ASSISTANCE, HATE CRIME IN WISCONSIN: 2009, at 3, (2010) [hereinafter HATE CRIME IN WISCONSIN: 2009], *available at* http://oja.wi.gov/sites/default/files/2009%20Hate%20Crime%20in%20Wisconsin.pdf ("Of the state's 398 UCR reporting agencies, hate crimes occurred in 26 jurisdictions."); *cf.* CRIME AND ARRESTS IN WISCONSIN – 2000, *supra* note 90, at 237 ("It should be noted that about ninety-eight percent of Wisconsin law enforcement agencies submitted Hate Crime forms during 2000."). *But see* STATISTICAL ANALYSIS CTR., WIS. OFFICE OF JUSTICE ASSISTANCE, CRIME AND ARRESTS IN WISCONSIN: 2006, at 117 (2007) [hereinafter CRIME AND ARRESTS IN WISCONSIN: 2006], *available at* http://oja.state.wi.us/sites/default/files/2006%20Crime%20and%20Arrests%20in%20Wisconsin.pdf ("It should be noted that only 25 of the 372 agencies reporting UCR submitted hate crime forms in 2006. Because so few agencies report hate crimes, we suspect that they continue to be underreported in the state.").

93. CRIME AND ARRESTS IN WISCONSIN – 2000, *supra* note 90, at 237–38.

94. *See id.* (identifying five reported vandalism hate crime offenses in 2000).

95. CRIME AND ARRESTS IN WISCONSIN: 2006, *supra* note 92, at 118 (indicating twenty-five reported vandalism hate crimes in 2006, out of a total of seventy-eight reported hate crimes that year).

96. *See* HATE CRIME IN WISCONSIN: 2009, *supra* note 92, at 5 (declaring that 32% of hate crimes reported in 2009 were for vandalism offenses); STATISTICAL ANALYSIS CTR., WIS. OFFICE OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE ASSISTANCE, HATE CRIME IN WISCONSIN: 2008, at 5, (2009) (declaring that 27% of hate crimes reported in 2008 were for vandalism offenses); CRIME AND ARRESTS IN WISCONSIN: 2006, *supra* note 92, at 118 (indicating that twenty-five out of seventy-eight, or about 32%, of reported hate crimes in 2006 were for vandalism offenses).

97. Indeed, sixty-two hate crimes were reported in 2001, only a year later. STATISTICAL ANALYSIS CTR., WIS. OFFICE OF JUSTICE ASSISTANCE, CRIME AND ARRESTS IN WISCONSIN – 2001, at 249.

98. HATE CRIME IN WISCONSIN: 2009, *supra* note 92, at 3–5. FBI statistics indicate that Wisconsin reported ninety-three incidents of hate crime in 2010. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2010, at tbl.13 (2010), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/tables/table-13/wisconsin.

99. HATE CRIME IN WISCONSIN: 2009, *supra* note 92, at 3–5.

than the 2000 report of forty-nine incidents, the 2000 statistic would likely closely match the 2009 statistic if additional institutional vandalism incidents are factored into the 2000 report.[100]

The statistics indicate that hate crime rates in Wisconsin have remained relatively steady over the last ten years.[101] Even factoring in changes in the population rate from 2000 to 2009, the crime rate remained level at around one hate crime incident per 90,000 people per year. One way to look at this data is to say that since these rates have remained so steady, Wisconsin's hate crime statute has not been successful at deterring crime. However, without data on arrest or prosecution rates, it is impossible to know whether the statute is being used at all.

B. Florida

Hate crime statistics from Florida will become particularly relevant during the next few years, as Florida is one of only two states that has recently added "homelessness" to its list of protected characteristics under its hate crimes statute.[102] While the most recent released data does not yet include hate crimes against the homeless, an analysis of Florida statistics before and after the addition will help determine whether hate crime legislation actually has a positive effect upon bias crimes. If 2011 statistics indicate a higher number of crimes against the homeless than subsequent years reveal, such data would indicate that the statute has had a deterring effect upon offenders targeting the homeless. Additionally, such a trend would settle fears that adding additional protected groups to hate crimes statutes dilutes the statutes' effectiveness.[103]

Florida has a sentence enhancement statute that follows the racial animus model, as well as an institutional vandalism statute.[104] Like Wisconsin, Florida only requires law enforcement agencies to report hate crime statistics under its UCR program.[105] No data on arrest or prosecution rates for hate crimes are available. All of Florida's 367 reporting agencies routinely submit hate crime statistics for federal use.[106]

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100. *See supra* notes 93–97 and accompanying text.

101. *See supra* notes 95–99 and accompanying text.

102. *See* FLA. STAT. ANN. § 775.085 (West Supp. 2013); MD. CODE ANN., CRIM. LAW § 10-304 (LexisNexis 2012).

103. *See Room For Debate: Are Hate Crimes Laws Necessary?*, N.Y. TIMES March 7, 2012, http://www.nytimes.com/roomfordebate/2012/03/ 07/are-hate-crime-laws-necessary.

104. FLA. STAT. ANN. §§ 775.0845, 775.085, 806.13, 877.19 (West 2010 & Supp. 2013) (as elaborated in Part VII, *infra*, the inclusion of institutional vandalism offenses is supported as potential substitutes for hate crimes where the latter offense's intent elements may have a weaker evidentiary basis).

105. FLA. STAT. ANN. § 877.19 (West 2000).

106. OFFICE OF FLA. ATTORNEY GEN., HATE CRIMES IN FLORIDA: JANUARY 1-DECEMBER 31, 2010, at 5 (2011) [hereinafter HATE CRIMES IN FLORIDA: 2010], *available at* http://myfloridalegal.com/webfiles.nsf/WF/MRAY-8PSRLS/$file/2010HateCrimesReport.pdf.

In the year 2000, Florida reported that 269 hate crime offenses occurred throughout the year.[107] Since that time, the number of hate crime offenses reported in the state has steadily declined.[108] In 2010, only 149 offenses were reported by law enforcement agencies throughout the year.[109] From the standpoint of the general population, while in 2000 there was about one incident per 60,000 people, by 2010 that amount had decreased to around one incident per 125,000 people.[110]

Is Florida therefore a hate crimes success story? On its face, Florida's very inclusive statute[111] seems to be deterring offenders from committing hate crimes.[112] However, similar to Wisconsin's statistics, without additional data including information regarding arrests and prosecution of hate crimes, it is impossible to determine whether Florida's hate crime law—or, for that matter, public education or simply falling crime rates—is causing a decrease in the occurrence of hate crimes.

C. Hawaii

Hawaii's hate crime statistics and reporting programs are unique in multiple ways. First, Hawaii does not contribute to the FBI's yearly national hate crime reports.[113] Second, Hawaii is a state that, contrary to UCR practices, in its yearly hate crime reports provides only prosecution statistics unaccompanied by law enforcement data.[114] According to its published hate crime report, Hawaii's methodological use of only incidents that clearly meet the State's legal definition of hate crime avoids false

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107. OFFICE OF FLA. ATTORNEY GEN., HATE CRIMES IN FLORIDA: JANUARY 1, 2000-DECEMBER 31, 2000, at 5 (2001) [hereinafter HATE CRIMES IN FLORIDA: 2000], *available at* http://www.myfloridalegal.com/00hate.pdf.

108. HATE CRIMES IN FLORIDA: 2010, *supra* note 106, at 8.

109. *Id.* at 5.

110. *Id.*; HATE CRIMES IN FLORIDA: 2000, *supra* note 107, at 5 (2001); UNITED STATES CENSUS BUREAU, *Population Estimates: State Intercensal Estimates (2000-2010)* [hereinafter U.S. CENSUS BUREAU], *available at* http://www.census.gov/popest/data/intercensal/state/state2010.html.

111. Besides homelessness, Florida's protected demographics include race, ethnicity, religion, sexual orientation, disability, national origin, ancestry, color, mental or physical disability, and advanced age. *See* FLA. STAT. ANN. §§ 775.085 (West Supp. 2013).

112. *See* NAT'L COAL. FOR THE HOMELESS, HATE CRIMES AGAINST THE HOMELESS: THE BRUTALITY OF VIOLENCE UNVEILED (2012), *available at* http://www.nationalhomeless.org/publications/hatecrimes/hatecrimes2011.pdf (noting that Florida homeless hate crimes "significantly decreased" from twenty-one in 2010 to four in 2011 "due to the emergence of a new state-level legislation" against such crimes).

113. FEDERAL BUREAU OF INVESTIGATION, *Methodology*, FBI.GOV, http://www.fbi.gov/ about-us/cjis/ucr/hate-crime/2010/resources/hate-crime-2010-methodology (last visited April 27, 2012).

114. CRIME PREVENTION & JUSTICE ASSISTANCE DIV., HAW. DEPT. OF THE ATTORNEY GEN., HATE CRIMES IN HAWAII, 2010, at 2 (2011) [hereinafter HATE CRIMES IN HAWAII 2010], available at http://ag.hawaii.gov/cpja/files/2013/01/Hate-Crime-Report-2010.pdf.; FEDERAL BUREAU OF INVESTIGATION, *UCR General FAQs*, *available at* http://www.fbi.gov/about-us/cjis/ucr/frequently-asked-questions/ucr_faqs (noting data collection on "known offenses and persons arrested by law enforcement", but expressly not "the finds of a court . . . or the decision of a prosecutor.").

positives made by law enforcement officials, thus avoiding the "pitfall" that other jurisdictions make by providing only law enforcement statistics.[115]

Like Florida, Hawaii's hate crime statute is a sentence enhancement, which follows the racial animus model.[116] It also has an institutional vandalism statute.[117] From 2002 to 2011, Hawaii has reported a total of only seventeen hate crime dispositions by prosecutors,[118] an average of slightly more than one disposition per year. In 2002, this amounted to one disposition of a hate crime offense per every 620,000 people, a figure that by 2009 had decreased to one disposition per 1.3 million people.[119]

Is Hawaii's method of reporting only prosecution data to be preferred over that of states that report only law enforcement data? In enacting this type of reporting method, Hawaii has the opposite problem from states such as Wisconsin and Florida, namely that the state has no record of hate crimes committed—only of crimes prosecuted. Consequently, the implication by Hawaii's reporting agency that this method leads to more accurate data suffers an equivalent failure to portray the relationship between crimes committed and convictions secured. Thus, there is no way to tell whether Hawaii's hate crimes statute is actually effective at controlling crime.

D. New York

New York is one of the few states that provides both law enforcement and prosecution statistics for hate crimes. As a result, its data set is one of the few that provides a clear picture of the relationship between hate crime incidents and the effectiveness of the hate crimes statute. Regarding enforcement, New York has both a substantive offense and a sentence enhancement statute,[120] both of which follow the discriminatory selection model. It also has an institutional vandalism statute.[121]

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115. HATE CRIMES IN HAWAII 2010, *supra* note 114, at 2.

116. HAW. REV. STAT §§ 706-662, 846-51–846-54 (LexisNexis 2007 & Supp. 2012).

117. HAW. REV. STAT. §§ 846-51–846-54 (LexisNexis 2007); *see also* HAW. REV. STAT. § 711-1107 (LexisNexis 2007).

118. CRIME PREVENTION & JUSTICE ASSISTANCE DIV., HAW. DEPT. OF THE ATTORNEY GEN., HATE CRIMES IN HAWAII, 2011, at 3 (2012) [hereinafter HATE CRIMES IN HAWAII 2011], *available at* http://ag.hawaii.gov/cpja/files/2013/01/Hate-Crime-Report-2011.pdf.

119. CRIME PREVENTION & JUSTICE ASSISTANCE DIV., HAW. DEPT. OF THE ATTORNEY GEN., HATE CRIMES IN HAWAII, 2002, at 2 (2003) [hereinafter HATE CRIMES IN HAWAII 2002], *available at* http://ag.hawaii.gov/cpja/files/2013/01/Hate-Crimes-2002.pdf.; CRIME PREVENTION & JUSTICE ASSISTANCE DIV., HAW. DEPT. OF THE ATTORNEY GEN., HATE CRIMES IN HAWAII, 2009, at 1 (2010) [hereinafter HATE CRIMES IN HAWAII 2009], *available at* http://ag.hawaii.gov/cpja/files/2013/01/Hate-Crime-Report-2009.pdf.; U.S. CENSUS BUREAU, *supra* note 110.

120. N.Y. PENAL LAW §§ 485.05, 485.10 (McKinney Supp. 2013); N.Y. EXEC. LAW § 837 (McKinney Supp. 2013).

121. N.Y. PENAL LAW §§ 240.30–.31 (McKinney 2008).

In 2000, before New York had an intrastate hate crimes statistics program in place, it reported 617 occurrences of hate crimes to the FBI.[122] Since 2008, when New York launched its present statistics program, the number of recorded offenses has remained steady at around 600–700 offenses per year.[123] Thus, in 2000, New York experienced about one hate crime offense per 31,000 people, with that statistic increasing slightly by 2009 to about one offense per 28,200 people.[124]

While the number of hate crime offenses in New York has remained steady, the number of final dispositions of arrests for hate crime offenses has increased significantly each year. In 2008, the state reported ninety-eight final dispositions for hate crime arrests; in 2009, there were 138 dispositions; in 2010, there were 159 dispositions; and in 2011, there were 194 dispositions.[125] This increase also reflects an upward trend in convictions for hate crime arrests: sixty-four in 2008; eighty-seven in 2009; ninety-seven in 2010; and 122 in 2011.[126] Given that offenses have remained steady while convictions have increased, it seems that prosecutors in New York are becoming more comfortable with pursuing convictions for individuals who have been arrested for committing hate crimes.

Still, New York's data is not flawless because it does not indicate how many of those convictions are actually for hate crimes. Indeed, it is possible that the majority of these offenders were convicted for other crimes (such as murder, assault, etc.) and not under New York's hate crime laws at all. Additionally, the lack of change in the rate of hate crimes—despite an increasing number of prosecutions—is troubling. It may suggest that increased prosecution has no impact on reducing the occurrence of hate crime. Or, if increased willingness to prosecute has only been present since

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122. FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS: 2000, at 18 (2001), *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2000.

123. N.Y. DIV. OF CRIM. JUSTICE SERV., OFFICE OF JUSTICE RESEARCH & PERFORMANCE, HATE CRIME IN NEW YORK STATE: 2008 ANNUAL REPORT, at 2 (2009) [hereinafter HATE CRIME IN NEW YORK STATE 2008], *available at* http://www.criminaljustice.state.ny.us/pio/annualreport/hatecrimereport2008.pdf; N.Y. DIV. OF CRIM. JUSTICE SERV., OFFICE OF JUSTICE RESEARCH & PERFORMANCE, HATE CRIME IN NEW YORK. STATE: 2009 ANNUAL REPORT, at 2 (2010) [hereinafter HATE CRIME IN NEW YORK STATE 2009], *available at* http://www.criminaljustice.state.ny.us/crimnet/ojsa/hate-crime-in-nys-2009-annual-report.pdf.; N.Y. DIV. OF CRIM. JUSTICE SERV., OFFICE OF JUSTICE RESEARCH & PERFORMANCE, HATE CRIME IN NEW YORK STATE: 2010 ANNUAL REPORT, at 2 (2011) [hereinafter HATE CRIME IN NEW YORK STATE 2010], *available at* http://www.criminaljustice.state.ny.us/crimnet/ojsa/hate-crime-in-nys-2010-anuual-report.pdf.; N.Y. DIV. OF CRIM. JUSTICE SERV., OFFICE OF JUSTICE RESEARCH & PERFORMANCE, HATE CRIME IN NEW YORK STATE: 2011 ANNUAL REPORT, at 2 (2012) [hereinafter HATE CRIME IN NEW YORK STATE 2011], *available at* http://www.criminal justice.ny.gov/crimnet/ojsa/2011-hate-crime.pdf (showing slight decrease to 554 reported hate crimes).

124. *See* U.S. CENSUS BUREAU, *supra* note 110.

125. *See* HATE CRIME IN NEW YORK STATE 2008, *supra* note 123, at 7; HATE CRIME IN NEW YORK STATE 2009, *supra* note 123, at 6; HATE CRIME IN NEW YORK STATE 2010, *supra* note 123, at 6; HATE CRIME IN NEW YORK STATE 2011, *supra* note 123, at 7.

126. *See* HATE CRIME IN NEW YORK STATE 2008, *supra* note 123, at 7; HATE CRIME IN NEW YORK STATE 2009, *supra* note 123, at 6; HATE CRIME IN NEW YORK STATE 2010, *supra* note 123, at 6; HATE CRIME IN NEW YORK STATE 2011, *supra* note 123, at 8.

2008, it is possible that it is still too soon to see any change in rates of hate crime in the state.

E. California

Like New York, California provides both prosecution data and law enforcement data on hate crimes in its annual reports. Interestingly, California's data collection statute grants the state Attorney General broad leeway in determining what data will be collected and how that data will be reported.[127] As early as 1995, the Attorney General's Hate Crime Reporting program began soliciting data from law enforcement agencies and prosecution offices alike.[128] Most importantly, California's prosecution data contains not only how many hate crime arrests receive final dispositions, it also indicates how many of those dispositions were for hate crime offenses.[129] As a result, California's data collection program is the most comprehensive of any state.

Like New York, California has both substantive offense and sentence enhancement statutes that follow the discriminatory selection model,[130] as well as an institutional vandalism statute.[131] But unlike New York, the number of hate crimes reported in California has declined significantly since 2000. By way of illustration, the State reported 1,957 hate crime offenses in 2000; 1,397 offenses in 2008; and only 1,107 offenses in 2010.[132] Even taking into account significant population growth during that period (an additional three million people lived in California in 2009 than in 2000),[133] the number of offenses declined from about one offense per 17,300 people in 2000 to one offense per 33,600 people in 2009.[134]

An analysis of California's prosecution statistics also seems to reveal positive trends throughout the last decade. While the numbers of case referrals of hate crimes by law enforcement to prosecution agencies

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127. *See* CAL. PENAL CODE § 13023 (West 2012).

128. CRIMINAL JUSTICE STATISTICS CTR., CAL. DEPT. OF JUSTICE, HATE CRIME IN CALIFORNIA: 2009, at i–ii (2010) [hereinafter HATE CRIME IN CALIFORNIA 2009], *available at* http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/hatecrimes/hc09/preface09.pdf.

129. *Id.* at 8–9.

130. CAL. PENAL CODE §§ 422.55, 422.6–.76 (West 2010 & Supp. 2013).

131. CAL. PENAL CODE § 594.3 (West Supp. 2013).

132. CRIMINAL JUSTICE STATISTICS CTR., CAL. DEPT. OF JUSTICE, HATE CRIME IN CALIFORNIA: 2000, at 3 (2001) [hereinafter HATE CRIME IN CALIFORNIA 2000], *available at* http://ag.ca.gov/cjsc/publications/hatecrimes//hc2000/preface.pdf; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEPT. OF JUSTICE, HATE CRIME IN CALIFORNIA: 2008, at ii (2009) [hereinafter HATE CRIME IN CALIFORNIA 2008], *available at* http://ag.ca.gov/cjsc/publications/hatecrimes/hc08/preface08.pdf; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEPT. OF JUSTICE, HATE CRIME IN CALIFORNIA: 2010, at 1 (2011) [hereinafter HATE CRIME IN CALIFORNIA 2010], *available at* http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/hatecrimes/hc10/preface10.pdf.

133. *See* U.S. CENSUS BUREAU, *supra* note 110.

134. *Id.*; HATE CRIME IN CALIFORNIA 2000, *supra* note 132, at 3; HATE CRIME IN CALIFORNIA 2009, *supra* note 128, at 1.

fluctuated from year to year, the number was always within the range of 350–550 referrals per year.[135] Rates of hate crime convictions fluctuated as well, from as many as 213 in 2000 to only seventy in 2010.[136] Despite these fluctuations, one thing is clear: California prosecutors are actually using the State's hate crimes statutes, and they are securing convictions when they do so. Additionally, prosecutors seem to be growing more comfortable with the tools at their disposal. In 2000, one hate crime case was filed for every 5.4 offenses, and one conviction was secured for every 9.2 offenses.[137] By 2009, those numbers had increased to one hate crime case being filed for every three offenses and one conviction per 8.4 offenses.[138]

F. Texas

Texas's hate crime law takes the form of a sentence enhancement statute that follows the racial animus model, and it has also enacted an institutional vandalism statute.[139] The primary Texas data collection provision only requires law enforcement agencies to report hate crimes statistics for the State's annual report.[140] However, legislation passed in 2001 requires court clerks to report the filing and judgment of hate crimes to the Texas Judicial Council.[141]

As in California, reported hate crime offenses have consistently dropped in Texas during the last decade. In 2000, 305 offenses were reported, a number that by 2007 decreased to 255, then to 171 by 2010.[142] Accounting for population growth, this amounts to approximately one offense per 68,500 people in 2000, and only one offense per 148,500 people in 2009.[143]

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135. *See, e.g.*, HATE CRIME IN CALIFORNIA 2000, *supra* note 132, at 24; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEPT. OF JUSTICE, HATE CRIME IN CALIFORNIA: 2007, at 11 (2008) [hereinafter HATE CRIME IN CALIFORNIA 2007], *available at* http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/hatecrimes/hc07/preface07.pdf; HATE CRIME IN CALIFORNIA 2008, *supra* note 132, at 6; HATE CRIME IN CALIFORNIA 2010, *supra* note 132, at 13.

136. *See* HATE CRIME IN CALIFORNIA 2000, *supra* note 132, at 4; HATE CRIME IN CALIFORNIA 2010, *supra* note 132, at 2; *see also* HATE CRIME IN CALIFORNIA 2007, *supra* note 135.

137. HATE CRIME IN CALIFORNIA 2000, *supra* note 132, at 2–3.

138. *See* HATE CRIME IN CALIFORNIA 2009, *supra* note 128, at 8–9; U.S. CENSUS BUREAU, *supra* note 110.

139. TEX. PENAL CODE ANN. § 12.47 (West 2011); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West 2006).

140. TEX. GOV'T CODE ANN. § 411.046 (West 2012).

141. TEX. CODE CRIM. PROC. ANN. art. 2.211 (West 2005).

142. TEX. DEPT. OF PUB. SAFETY, CRIME IN TEXAS: 2000, at 61–63 (2001), *available at* http://www.txdps.state.tx.us/administration/crime_records/docs/cr2000/Crime%20in%Texas%206.pdf; TEX. DEPT. OF PUB. SAFETY, CRIME IN TEXAS: 2007, at 61–63 (2008), *available at* http://www.txdps.state.tx.us/crimereports/07/citch6.pdf; TEX. DEPT. OF PUB. SAFETY, CRIME IN TEXAS: 2010, at 47–49 (2011) [hereinafter CRIME IN TEXAS 2010], *available at* http://www.txdps.state.tx.us/crimereports/10/citCh6.pdf. The latest Texas hate crime statistic, for 2011, was even lower at 152. TEX. DEPT. OF PUB. SAFETY, CRIME IN TEXAS: 2011, at 46–48 (2012), *available at* http://www.txdps.state.us/crimereports/11/citCh6.pdf

143. U.S. CENSUS BUREAU, *supra* note 110.

Why have hate crime rates dropped in Texas? One possibility is that Texas's hate crime statute is effectively deterring offenders. However, according to data reported to the Texas Judicial Council, only fifteen sentence enhancements pursuant to a finding of a hate crime have been issued to offenders in Texas since 2001.[144] Additionally, according to a recent article in the *Austin-American Statesman*, most of these findings have come in plea arrangements—in fact, during the last ten years, only one hate crime case was taken before a jury in Texas.[145] If prosecutors are not using the statute to convict or even charge offenders, it is likely that the decrease in crime is attributable to other factors.

Table 2: Selected Hate Crime Statistics by State

	No. of Incidents (2000)	No. of Incidents (2007)	No. of Incidents (2009)	No. of Convictions (2009)	Offense Rate by Population (2000)	Offense Rate by Population (2009)
Wisconsin[146]	49	74	63	N/A	1/109,700*	1/90,000
Florida[147]	269	193	148	N/A	1/60,000	1/125,000
Hawaii[148]	N/A	N/A	N/A	1	N/A	N/A
New York[149]	617	N/A	683	87**	1/30,800	1/28,600
California[150]	1,957	1,426	1,397	131	1/19,000	1/33,600
Texas[151]	305	255	167	1	1/68,500	1/147,500

* Wisconsin hate crime incidents in 2000 should be adjusted upwards to account for additional institutional vandalism offenses. A good estimate is 90 offenses. Likewise, the offense rate should be adjusted upwards to around 1 offense per 90,000 people.

** New York does not report the number of hate crime convictions per year, but it does report hate crimes with "dispositions," which includes convictions as well as acquittals and dismissals.

144. TEX. JUDICIAL COUNCIL, *supra* note 8; *see also* Eric Dexheimer, *Texas Hate Crime Law Has Little Effect*, AUSTIN-AMERICAN STATESMAN, Jan. 21, 2012, http://www.statesman.com/news/news/special-reports/texas-hate-crime-law-has-little-effect/nRjsf/.

145. Dexheimer, *supra* note 144.

146. *See supra* Part VI.A.

147. *See supra* Part VI.B.

148. *See supra* Part VI.C.

149. *See supra* Part VI.D.

150. *See supra* Part VI.E.

151. *See supra* Part VI.F.

VII. Hate Crime Prosecution

Why are prosecutors so reluctant to charge offenders under hate crimes statutes? The primary reason is because prosecuting a hate crime requires proof of a bias-centered motive on the part of the offender.[152] Proving motive is typically a difficult task for a prosecutor. In a case where the offender did not make any sort of clear-cut, incriminating statement demonstrating a bias towards the victim's protected group, a prosecutor has to rely on circumstantial evidence alone to prove bias, or must draw a bias motive out from the offender's multiple, co-mingled criminal motivations.[153] This difficulty either causes prosecutors to avoid such cases altogether, or encourages them to charge the offender with a different offense in order to avoid the stringent requirements of the hate crime statute.

Compounding the difficulty of proving a bias motive is the fact that the extra work involved in proving that motive may not even be worth the effort. When a prosecutor first considers a potential case, she will perform a careful cost-benefit analysis, essentially weighing the benefits of charging an offender under a hate crime statute against the risks of such a charge.[154] If the costs ultimately outweigh the benefits, the hate crimes statute will not be used.

The risks of charging an offender under a hate crime statute involve the difficulty of proving the bias motive, the increased complexity of the case, and more work (for example, proving a racial hate element requires more careful questioning of potential jurors during voir dire).[155] The benefit of invoking the hate crime charge is a longer sentence for the offender, whether under a sentence enhancement or a substantive offense statute. Yet for a state like Texas, which has extremely open-ended sentencing ranges,[156] the underlying offense is frequently enough to put a perpetrator in prison for an extended period of time, without having to use the hate crime enhancement at all. In such a case, the costs of using a hate crimes statute would outweigh the benefits, and the hate crimes statute would not be used.

For a variety of reasons, prosecutors file cases they believe they can win.[157] Because of this fact, prosecutors "operationalize" hate crimes statutes in order to make them functional in light of the inherent difficulties

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152. Catherine Pugh, Comment, *What Do You Get When You Add Megan Williams to Matthew Shepard and Victim-Offender Mediation? A Hate Crime Law That Prosecutors Will Actually Want To Use*, 45 CAL. W. L. REV. 179, 190–91 (2008).

153. *Id.* at 191–94.

154. McPhail & Jenness, *supra* note 38, at 103–04.

155. *Id.*

156. *See* TEX. PENAL CODE ANN. §§ 12.31–.34 (West 2011).

157. Laurie Elizabeth Woods, Sometimes It's Personal: Hate Crime Prosecution in California (Dec. 2008) (unpublished Ph.D. dissertation, Vanderbilt University) (on file with Heard Library, Vanderbilt University).

in winning such a case. In researching hate crime prosecution in Texas, Beverly McPhail has identified a number of tactics that prosecutors currently employ to make hate crime laws work for them.[158] For example, prosecutors narrow the scope of potential cases that can be charged as hate crimes by only looking for offenses where hate was the sole motivation for the crime, and ruling out more difficult cases where dual or multiple motivations were present.[159] If prosecutors continue to only use hate crime laws in a very narrow set of circumstances, these laws will not ever realize their full potential.

VIII. Effectiveness of Hate Crimes Statutes

The ultimate aim of hate crime legislation seems to be eliminating bias-motivated crime in its entirety in the United States. But are our current types of hate crime laws effective at reducing hate crime rates? And beyond that obvious goal, do (and should) hate crime laws have other purposes? Such purposes might involve victim reparation, increased community education and awareness regarding hate crimes, or heightened punishment for conduct society has deemed undesirable.

Critics of hate crime laws argue that our current forms of legislation do not deter hate crimes. According to FBI statistics, between 7,000–9,000 hate crimes have been committed nationwide during each of the last seven years.[160] This number has held steady despite the fact that nearly every

158. McPhail & Jenness, *supra* note 38, at 113.

159. *Id.*

160. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2004, at 65–66 (2005), *available at* http://www2.fbi.gov/ucr/cius_04/documents/CIUS2004.pdf (reporting 7,649 incidents of hate crimes and 9,035 hate crime offenses committed in 2004); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2005: INCIDENTS AND OFFENSES 1 (2006), *available at* http://www2.fbi.gov/ucr/hc2005/docdownload/incidentsandoffenses.pdf (reporting 7,163 incidents of hate crimes and 8, 380 hate crime offenses committed in 2005); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2006: INCIDENTS AND OFFENSES 1 (2007), *available at* http://www2.fbi.gov/ucr/hc2006/downloadablepdfs/incidentsoffenses.pdf (reporting 7,722 incidents of hate crimes and 9,080 hate crime offenses committed in 2006); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2007: INCIDENTS AND OFFENSES 1 (2008), *available at* http://www2.fbi.gov/ucr/hc2007/downloadablepdfs/incidentsandoffenses.pdf (reporting 7,624 incidents of hate crimes and 9,006 hate crime offenses committed in 2007); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2008: INCIDENTS AND OFFENSES 1 (2009), *available at* http://www2.fbi.gov/ucr/hc2008/documents/incidentsandoffenses.pdf (reporting 7,783 incidents of hate crimes and 9,168 hate crime offenses committed in 2008); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2009: INCIDENTS AND OFFENSES 1 (2010), *available at* http://www2.fbi.gov/ucr/hc2009/documents/incidentsandoffenses.pdf (reporting 6,604 incidents of hate crimes and 7,789 hate crime offenses committed in 2009); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2010: INCIDENTS AND OFFENSES 1 (2011), *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-incidents-and-offenses.pdf (reporting 6,628 incidents of hate crimes and 7,699 hate crime offenses committed in 2010); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2011: INCIDENTS AND OFFENSES 1 (2012), *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/narratives/incidentsandoffenses_final.pdf (reporting 6,222 incidents of hate crimes and 7,254 hate crime offenses committed in 2011).

state now has some form of anti-bias statute in place.[161] This lack of results has led even proponents of hate crime legislation to concede the data does not indicate that bias-crime laws are effective at deterring hate crimes.[162]

Some believe that hate crime rates have remained steady because all three types of hate crime statutes are geared towards increased punishment.[163] Opponents of hate crime legislation have argued that punishing a hate crime offender with a lengthened sentence fulfills no valid penological purpose and ultimately has little effect on rates of bias-motivated crime.[164] The racially-charged atmosphere of prisons in the United States is not likely to convince a prejudiced offender of the error of his ways; if anything, it may exacerbate his bias.[165]

Similarly, current hate crime laws are not effective at providing victim reparation. While prosecuting the offender sometimes provides victims with an opportunity to testify at trial or share their feelings as part of a victim impact statement at sentencing, prosecution is more often institutionally expressed as a contest between the government and the offender, often to the complete exclusion of the victim.[166] Punishment is also inadequate, because it only affects the offender and often offers nothing for the victim, or the community, that was harmed.[167]

But if hate crime statutes are ineffective, how does one account for reduced hate crime rates in states such as Texas, California, and Florida? It has been argued that lower hate crime rates are simply reflections of the fact that all violent crime, not just hate crime, has decreased in the United States during the last ten years.[168] While this larger trend may be a factor in a decrease in hate crime, it is also likely that the proliferation of hate crime statutes has sent a message to the public that bias offenses will not be tolerated. Criminal punishment is expressive of societal disapproval, and it seems plausible that, because of hate crime laws, many attitudes have changed over the course of the decade in which most states have had such statutes in place.[169]

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161. SMITH & FOLEY, *supra* note 19, at 1 (noting "at least" 45 states and the District of Columbia had statutory bias-motivated criminal penalties); *see also Ga. High Court Strikes Down State's Hate Crimes Law*, WASHINGTON POST, Oct. 26, 2004, http://www.washingtonpost.com/wp-dyn/articles/A62848-2004Oct25.html (counting 48 states with hate crime laws in 2004).

162. Gellman & Lawrence, *supra* note 7, at 441.

163. *See id.* at 429–30.

164. Gaumer, *supra* note 10, at 41–42.

165. *See id.* at 46; *see also* JORGE RENAUD, BEHIND THE WALLS: A GUIDE FOR FAMILIES AND FRIENDS OF TEXAS PRISON INMATES 130 (2002) (describing how "insidious racism . . . permeates prison" and how "the system" has failed "to deal with it in any fashion but through forced integration.").

166. Pugh, *supra* note 152, at 197–200; *see also* Woods, *supra* note 157, at 101 ("Victims appear to be judged for their characteristics and how that will play to juries, rather than protected for their immutable states.").

167. Pugh, *supra* note 152, at 198.

168. *See* Dexheimer, *supra* note 144.

169. LAWRENCE, *supra* note 21, at 163–65. Even opponents of hate crime legislation admit that hate crime statutes likely have some educational effect. *See* Gaumer, *supra* note 10, at 44 ("If hate crime laws serve any deterrent or education functions at all, they send the message that bigotry and other

However, to ensure that the public benefits from full exposure to the existence and power of hate crime laws, those laws must be used. After all, social stigma against hate crimes is hard-pressed to develop if no offenders are ever charged with bias offenses under the statute. California may have already seen some benefits from increased prosecution of offenders under hate crime statutes, in the form of lower crime rates and a higher conviction-to-offense ratio.[170] But if California prosecutors' willingness to utilize hate crime statutes is what lowers crime rates, how does one explain Texas's reduced hate crime rate when it seems clear that Texas prosecutors are not utilizing hate crimes statutes?[171]

Unfortunately, without clearer data, factors other than prosecution or well-drafted legislation could be influencing lower crime rates, even in states like California. One element that is difficult, if not impossible, to quantify is how law enforcement officials respond to hate crime incidents when they encounter them. A number of states have enacted law enforcement training statutes, in an attempt to educate officers as to the proper response in a situation involving a hate crime.[172] However, there seems to be little oversight in place to ensure that law enforcement officials are actually receiving or utilizing this training.

At present, the effectiveness of a hate crimes statute is in the hands of law enforcement officers and prosecutors. Officers are the first to respond to hate crime incidents, and often make decisions regarding whether an incident is to be classified as a hate crime. Prosecutors, likewise, make the decision whether to charge a defendant with a hate crime, and have a significant effect on the outcome of a case. Increased community awareness stems from prosecutors and officers embracing and utilizing hate crime statutes.

IX. Recommendations for Texas

In light of this reality, the following are suggestions regarding the improvement of Texas's current system.

A. Underutilized Portions of Texas's Current Hate Crimes Statute Should Be Put Into Practice

Before statutory reform can be contemplated, Texas should focus on utilizing laws that it already has in place. Specifically, there are a number of provisions of the 2001 James Byrd, Jr. Hate Crimes Act that have seemingly been ignored during the decade since the law was passed.

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forms of statutorily defined prejudices are inappropriate values.").

170. *See supra* notes 135–38 and accompanying text.

171. *See* Dexheimer, *supra* note 144.

172. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-294n (Supp. 2013); CAL. PENAL CODE § 13519.6 (West 2012).

A primary concern among prosecutors is that they do not have the time or the resources to prosecute difficult hate crimes, especially where a determination of a bias motive must be made.[173] However, the Texas Penal Code allows the state's Attorney General to assist prosecuting attorneys in the investigation or prosecution of offenses committed because of bias or prejudice.[174] Furthermore, Texas's Code of Criminal Procedure indicates that counties can receive reimbursement from the state for expenses incurred pursuant to the investigation or prosecution of a hate crime offense.[175] These provisions would provide prosecutors with additional, much-needed state resources with which to move forward with hate crimes cases, even in less favorable circumstances than might be typical. However, according to one Equality Texas report, many prosecutors may be unaware that these provisions exist at all.[176]

Training and community awareness are also addressed by the Act. Under the state Education Code, the Texas Attorney General must develop a program to provide instruction to students and the community about state laws addressing hate crimes, available upon the request of a school district.[177] While private organizations operate hate crime awareness programs in public schools,[178] there is no indication that the state government has ever made good on this promise to educate the community. Additionally, the state Government Code requires the Texas Court of Criminal Appeals to provide training to prosecuting attorneys regarding the use of Texas's hate crime sentence enhancement provisions.[179] While the Court of Criminal Appeals does furnish grant money to various entities to provide local prosecutorial training, there is no indication that this training includes hate crime laws in the way intended by the 2001 Hate Crimes Act.[180]

B. Prosecutors Should Be Required to Submit Data on How Many Offenders are Charged and Convicted for Hate Crimes Each Year

Currently, Texas's data collection statute requires that a central repository for collection and analysis of data be maintained by the Texas Department of Public Safety (DPS).[181] A separate provision, enacted by the James Byrd, Jr. Act, requires court clerks to report the filing and judgment

173. *See supra* notes 153–55 and accompanying text.

174. TEX. PENAL CODE ANN. § 12.47 (West 2011).

175. TEX. CODE OF CRIM. PROC. art. 104.004 (West 2006).

176. Hunter Jackson, *Why has Texas' James Byrd Jr. Hate Crimes Act been so ineffective?*, EQUALITY TEXAS BLOG (October 30, 2009), http://equalitytexas.typepad.com/blog.

177. TEX. EDUC. CODE ANN. § 29.905 (West 2012).

178. Anti-Defamation League, *Programs: No Place For Hate*, ADL.ORG (April 30, 2012, 2:50 PM), http://regions.adl.org/southwest/programs/no-place-for-hate.html.

179. TEX. GOV'T CODE ANN. § 22.111 (West 2012).

180. Interview with the Office of the Clerk of Court, Texas Court of Criminal Appeals (April 27, 2012).

181. TEX. GOV'T CODE ANN. § 411.046 (West 2012).

of hate crimes to the Texas Judicial Council.[182] Thus data about hate crime offenses is maintained separately from data regarding prosecution of hate crimes.

The annual report issued by the DPS is helpful, in that it provides data regarding the number of hate crime offenses reported by law enforcement throughout the state.[183] However, it does not contain any information on how frequently prosecutors actually seek a finding of a hate crime pursuant to the sentence enhancement statute. Likewise, the report issued by the Texas Judicial Council does not present a complete picture of how hate crimes in Texas are being investigated and prosecuted. For example, the data from the Texas Judicial Council states that in every single case where a finding of a hate crime was requested by a prosecutor, an affirmative finding of a hate crime was later entered by a court clerk.[184] Does this mean that prosecutors in Texas are extraordinarily gifted at obtaining affirmative findings of hate crimes? Perhaps the data simply indicates that prosecutors are only requesting a hate crime finding when they are absolutely sure that they will obtain one, or that court clerks, in practice, report only affirmative hate crime findings to the Council.

In any case, additional information is needed. On a yearly basis, statistics from both prosecutors and law enforcement officials should be reported. In addition to data that is already submitted, this information should include the number of arrests made by law enforcement, the number of requested findings of a hate crime made by prosecutors, and the number of affirmative findings ultimately entered by courts. Such data would present a clearer picture of the extent that Texas's hate crime laws are being used.

C. Provide Additional Training for Law Enforcement Personnel, as well as Oversight of that Training by State Officials

If officers do not report hate crimes, or do not know how to identify them as they are defined under the statute, then even a well-drafted statute is meaningless. Texas should follow the example of other states in enacting a law enforcement training program that would serve to educate officers about how to better recognize and respond to incidents of hate crime. Improved efforts by officers to effectively respond to hate crime incidents will result in increased community awareness as to the importance and impact of these crimes.

Law enforcement agencies nationwide are beginning to recognize that curtailing hate crime begins with local law enforcement. In 2004, the International Association of Chiefs of Police published an article asserting, "the manner in which officers in the field handle hate crimes depends on the

182. TEX. CODE CRIM. PROC. ANN. art 2.211 (West 2005).

183. CRIME IN TEXAS 2010, *supra* note 142, at 47.

184. TEX. JUDICIAL COUNCIL, *supra* note 8.

priority and importance that is placed on [hate] crimes by [a] department's leadership."[185] The Association emphasized that policy, procedures, resources, and training must be established to encourage officers to prevent hate crimes and apprehend offenders.[186]

The Association also advised local agencies to not be afraid of an increase in reported hate crimes. Such an increase is not a reflection of a spike in criminal activity and does not reflect badly upon the jurisdiction, but rather indicates that officers are better prepared to recognize and respond to crimes, and that victims are developing more confidence in police and are not afraid to report incidents of hate crime.[187]

Operating principles such as these need to be taught in Texas. However, oversight over training programs by state officials is also necessary in order to ensure that police forces are receiving the appropriate information, skills, and direction required to facilitate increased awareness and responsiveness to hate crimes.

X. Conclusion

Primarily due to a lack of adequate data, any assessment of whether hate crime statutes nationwide effectively curtail hate crime is problematic at best. This is certainly true in Texas, as a determination of the effectiveness, or even the use, of the state's current hate crimes laws is hampered by insufficient data, inadequate law enforcement training, and underutilization of already-enacted statutes.

In the end, how will a case like the assaults in Williamson County play out? Assuming that local law enforcement even apprehends a perpetrator, there is no guarantee that a prosecutor will take the case as a hate crime. Despite prosecutors' apprehensions, statutory provisions are theoretically at their disposal that would help alleviate their concerns about difficulty, time, and expense. Such provisions also provide prosecutors with needed training. Additionally, if law enforcement training programs were put in place, police would be more likely to apprehend offenders and victims would be more likely to report crimes. If we are to ensure that increasingly few hate crimes will be committed in the future, we must first guarantee that prosecutors and law enforcement officials are properly utilizing the laws that can—and should—be at their disposal.

185. Karen L. Bune, *Law Enforcement Must Take Lead on Hate Crimes*, THE POLICE CHIEF, April 2004, *available at* http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=270&issue_id=42004.

186. *Id.*

187. *Id.*