

NOTE

You Have the Right to Remain Thirteen: Considering Age in Juvenile Interrogations in *J.D.B. v. North Carolina*

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INTRODUCTION

Few reasonable adults would argue that a thirteen-year-old child is as suitable as an adult to join the military, marry, vote, or receive other privileges and responsibilities reserved for adulthood.¹ The difference in the rights or privileges granted to adults as compared with children is often explained and justified by citing to children's lesser level of maturity, their psychological and emotional development, or the mere "reality"² that children are not "miniature adults."³

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1. *Roper v. Simmons*, 543 U.S. 551, 561, 569 (2005) ("[T]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988))).

2. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011); *see also id.* at 2413 (Alito, J., dissenting).

3. *Id.* at 2397 (majority opinion); *see Roper*, 543 U.S. at 569 ("[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."

One substantial difference between adults and children is how they experience and understand the significance and resulting consequences of police interrogations.⁴ In recognition of this difference, several state statutes currently acknowledge children's differing legal status and increased vulnerability to coercion by providing heightened protections to juveniles in police interrogations.⁵ Despite these recognized differences in American society, culture, and the legal system, until recently in interrogations with law enforcement, children and adults were viewed through the same lens—that of the reasonable person.⁶

In *J.D.B. v. North Carolina*, the United States Supreme Court, in a divided decision, held that age is an objective factor a court may consider when determining whether an individual subjected to police interrogation was in custody for purposes of issuing *Miranda* warnings.⁷ In this

(quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)) (internal quotation marks omitted)); see also Brief of Juvenile Law Center, et al. as Amici Curiae in Support of Petitioner at 11, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (No. 09-11121) [hereinafter Brief of Juvenile Law Center, et al.] (“Psychosocial factors influence adolescents’ perceptions, judgment and decision-making and limit their capacity for autonomous choice.” (citing Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents’ Judgment and Culpability*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 325 (Thomas Grisso & Robert G. Schwartz eds., 2000))); Kathryn Lynn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 *LAW & HUM. BEHAV.* 78, 79-80 (2008).

4. See *Gallegos v. Colorado*, 370 U.S. 49, 54-55 (1962) (finding a fourteen-year-old’s age relevant in how he perceived interrogation from law enforcement); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (recognizing that a child may not be able to withstand a police interrogation’s pressures in the way an adult would); Barry C. Feld, *Juveniles’ Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 *MINN. L. REV.* 26, 41-48 (2006); see also *supra* note 3.

5. See, e.g., ME. REV. STAT. tit. 15, § 3204 (2003) (prohibiting the admissibility of statements of juvenile or juvenile’s family made in preliminary investigation or during assessment of juvenile for a juvenile drug treatment program); MO. REV. STAT. § 211.131 (2000) (requiring that parents of juveniles taken into custody be notified as soon as possible); N.C. GEN. STAT. § 7B-2101 (2007) (expanding *Miranda* rights for juveniles during custodial interrogations).

6. See *Yarborough v. Alvarado*, 541 U.S. 652, 667-68 (2004) (holding that the lower court did not err by failing to consider the minor defendant’s age in its custody analysis).

7. *J.D.B.*, 131 S. Ct. at 2402-03.

surprising holding,⁸ the Court found that children are undeniably different from adults and will often feel compelled to speak where an adult would not—a decision which will reverberate in the courtrooms, police stations, schoolhouses, and state legislatures in both the immediate and distant future.

In *In re J.D.B.*, the North Carolina Supreme Court held that the age of the respondent, a thirteen-year-old, should not be considered in determining whether the child was in custody when interrogated by police at his middle school.⁹ Based on the circumstances of the interrogation, excluding the child's age, the court concluded he was not in custody, and therefore *Miranda* warnings were properly withheld,¹⁰ as police must give *Miranda* warnings only when one is in police custody.¹¹

The United States Supreme Court granted certiorari¹² to resolve the question that J.D.B. argued should be answered in the affirmative: “[W]hether the *Miranda* custody analysis includes consideration of a juvenile’s age.”¹³

This Note examines the consideration of age in juvenile interrogations by law enforcement. It supports the United States Supreme Court’s determination that age is an objective factor relevant in the *Miranda* custody inquiry and suggests that it is still essential for states to implement additional protections for juveniles in law enforcement interrogations. Part I will provide a brief background of *Miranda* and its progeny. It will lay out the procedural history leading to the United States Supreme Court grant of certiorari on the issue of whether age is an objective factor to be considered in custodial interrogations. Part II discusses the facts surrounding J.D.B.’s case and the North Carolina Supreme Court’s holding and rationale. Next, Part III analyzes the United States Supreme Court’s decision in

8. See, e.g., Josh Blackman, *Today’s 5 New Supreme Court Opinions*, CONCURRING OPINIONS (June 16, 2011, 10:55 AM), <http://www.concurringopinions.com/archives/2011/06/todays-5-new-supreme-court-opinions.html>.

9. *In re J.D.B.*, 686 S.E.2d 135, 140 (N.C. 2009), *rev’d sub nom.* *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

10. *Id.*

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

12. *J.D.B. v. North Carolina*, 131 S. Ct. 502 (2010) (granting certiorari).

13. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2401 (2011).

J.D.B. v. North Carolina, considering the impact of this holding on the states thus far and in the future. Part III also will discuss reasons why the North Carolina state courts, on remand, should find J.D.B. in custody. In doing so, it will analyze the factors considered by the North Carolina Supreme Court and what now may be considered in the *Miranda* custody analysis following the United States Supreme Court's decision to include age in the analysis.

In light of the uncertainty likely to come from the United States Supreme Court's decision to consider age and the need for additional safeguards for juveniles in addition to *Miranda* protections, Part IV of this Note sets forth a proposal providing for additional protections for juveniles subjected to police interrogation. The proposal mandates the presence of a parent or guardian when a juvenile under sixteen years of age is questioned by law enforcement regarding his involvement in the incident—regardless of whether the child would be considered “in custody.”

I. THE *MIRANDA* CUSTODY ANALYSIS

The Fifth Amendment to the United States Constitution ensures that no person “shall be compelled in any criminal case to be a witness against himself.”¹⁴ *Miranda v. Arizona* safeguarded this right in setting forth the now ubiquitous *Miranda* warnings.¹⁵ The warnings are a procedural safeguard,¹⁶ protecting the Fifth Amendment right¹⁷ from

14. U.S. CONST. amend. V.

15. *Miranda*, 384 U.S. at 444 (“Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”). The Court went on to explain, however, that “Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective . . . in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.” *Id.* at 490.

16. See *Dickerson v. United States*, 530 U.S. 428, 442 (2000) (“*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored.”). In response to claims that *Miranda* is simply a “prophylactic” rule that could be overruled by an act of Congress, see, e.g., *Oregon v. Elstad*, 470 U.S. 298, 309 (1985), the Court in *Dickerson* held that Congress could not reject *Miranda* through a congressional act. *Dickerson*, 530 U.S. at 444. The Court's holding in *Dickerson* expressed that *Miranda* had “constitutional

the “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”¹⁸ *Miranda* rights were extended to juveniles a year after *Miranda* in *In re Gault*.¹⁹

The *Miranda* decision made clear that reading of *Miranda* rights is only required when an interrogation by a state agent is “custodial,” defined as where “a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”²⁰ Both the United States Supreme Court and various lower courts have found

underpinnings” that could not be overruled by Congress, suggesting that *Miranda* had “announced a constitutional rule.” *Id.* at 440 n.5, 444. However, not long after *Dickerson*, in *Chavez v. Martinez*, the Court held that the failure to give *Miranda* warnings during a custodial interrogation is not a constitutional violation of the Fifth Amendment where the non-Mirandized statements are not used against the suspect in court. 538 U.S. 760, 764, 767 (2003). The opinion again refers to *Miranda* as a prophylactic rule, perhaps weakening the argument that *Miranda* is a constitutional rule. *See id.* at 772; JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 490 (4th ed. 2006). *But see* Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 62-63 & n.105 (2006) (“[A]nalysis of *Miranda* claims cannot be so easily reduced to the quasi-constitutional or sub-constitutional status they previously received.”). Holland suggests that despite the cases that followed it, *Dickerson*’s holding made it so claims of *Miranda* as simply a prophylactic rule are, at least somewhat, without teeth. *Id.*

17. *Dickerson*, 530 U.S. at 435. The Court in *Dickerson* concluded that the *Miranda* rights are a constitutional rule. *Id.* at 444.

18. *Miranda*, 384 U.S. at 467.

19. 387 U.S. 1 (1967). *Gault* held that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,” noting that juveniles, along with adults, have: the right of notice of charges against him, the right to representation by counsel, the privilege against self-incrimination, and the right to confront witnesses against him. *Id.* at 13, 33-34, 41, 55, 57. In extending these rights to juveniles, *Gault* provided for the application of these rights in an identical fashion as to adults, rather than providing guidelines as to how these new rights should be used for juveniles. *See* Hillary B. Farber & Donna M. Bishop, *Joining the Legal Significance of Adolescent Development Capacities with the Legal Rights Provided by In re Gault* 136 (Northeastern Pub. Law & Theory Faculty Working Paper Series, Paper No. 28-2009, 2008), available at <http://ssrn.com/abstract=1306593> (“The Court erred in failing to recognize that procedures that succeed in securing fairness for adults may *not* be sufficient to secure fairness for children.”).

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

that the location of the interrogation, while relevant, is not necessarily dispositive for whether a suspect was in custody while interrogated.²¹ One may be in custody whether he is interrogated in a police station interrogation room,²² his bedroom,²³ a car,²⁴ a school,²⁵ or elsewhere. The test for determining custody for *Miranda* purposes has evolved over time,²⁶ but the United States Supreme Court has repeatedly expressed that the test is an objective,²⁷ reasonable person standard.²⁸

21. See *California v. Beheler*, 463 U.S. 1121, 1122, 1125 (1983) (questioning in a police station interrogation house was not found to be custodial where the interrogated appeared in the station voluntarily); *Orozco v. Texas*, 394 U.S. 324, 325-27 (1969) (holding *Orozco* was in custody when he was questioned in his bedroom by multiple officers).

22. See *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). Though the Court found that *Mathiason* was *not* in custody despite being questioned in a police station, it acknowledged the assumption that when someone is in a similar situation, he is usually in custody: “[T]he requirement of warnings [is not] to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.” *Id.*

23. See *Orozco*, 394 U.S. at 327.

24. See *United States v. Scharf*, 608 F.2d 323, 325 (9th Cir. 1978); *People v. Rifkin*, 733 N.Y.S.2d 710, 711 (App. Div. 2001).

25. See *Husband v. Turner*, No. 07-CV-391-bbc, 2008 WL 2002737, at *3 (W.D. Wis. 2008) (finding that minor who was questioned by police at school was in custody because he was escorted to a closed room by security and never told he was free to leave or to refrain from answering questions).

26. *Mathiason*, 429 U.S. at 495 (holding that an individual is in custody for *Miranda* purposes when his freedom of movement or freedom to leave the place of interrogation is restricted in any significant way); *Beheler*, 463 U.S. at 1125 (“[F]or purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” (quoting *Mathiason*, 429 U.S. at 495)); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (“[T]he only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.”); *Stansbury v. California*, 511 U.S. 318, 322 (1994) (“[A] court must examine all of the circumstances surrounding the interrogation”); *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (“Two discrete inquiries are essential to the determination [of whether a person is in custody]: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.”).

27. *Stansbury*, 511 U.S. at 323 (“[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the

Applying the Supreme Court's custody test has not been a straightforward task for the courts.²⁹ The Court had never fully abandoned its older iterations of the test³⁰ nor explicitly explained how to weigh the different factors surrounding the interrogation. *Thompson v. Keohane*, which contains the Supreme Court's most recent recitation of the custody rule prior to *J.D.B.*, set forth a clearer rule for lower courts to follow:

Two discrete inquiries are essential to the [custody] determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed,³¹ the court must apply an objective test to resolve "the ultimate inquiry": "[was] there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."³²

The test is a totality of the circumstances analysis: "[I]f encountered by a 'reasonable person,' would the identified

subjective views harbored by either the interrogating officers or the person being questioned.").

28. *Id.* at 325.

29. *McCarty*, 468 U.S. at 441 ("[T]he police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody."); see DAVID M. GREENWALD ET AL., 1 TESTIMONIAL PRIVILEGES § 4:29 (3d ed. 2008) ("The various decisions of the Supreme Court on this issue do not provide a simple definition of 'custody.'"); see also DRESSLER & MICHAELS, *supra* note 16, at 491 ("Ironically, therefore, although *Miranda* was intended to serve as a bright-line alternative to the totality-of-the-circumstances voluntariness standard, there is no bright line (formal arrests aside) for determining whether 'custody' exists and, therefore, whether *Miranda* applies.").

30. 23 AM. JUR. PROOF OF FACTS 2D 713 (1980) (database updated July 2010). While Supreme Court cases after *Miranda* "have severely limited the concept of custody, they have not established a clear test of when custody exists and when it does not. The tests developed by the lower courts are therefore still applicable within their respective jurisdictions." *Id.*

31. One author has interpreted the Court's language here to mean the majority was "direct[ing] judges to contextualize the facts of the interrogation as fully and richly as possible . . ." Holland, *supra* note 16, at 47.

32. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (internal quotation marks omitted)).

circumstances add up to custody as defined in *Miranda*?”³³ Though the court is to consider all of the objective circumstances of the interrogation, “the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.”³⁴ Thus, while this test considers the state of mind of the suspect, the “question is *not* whether a reasonable person would believe he was not free to leave, but rather whether such a person would believe he was in police custody of the degree associated with formal arrest.”³⁵ Though this is totality of the circumstances analysis, the high Court has never explicitly stated which specific factors³⁶ are “objective” and to be considered. United States Supreme Court and state court decisions have resulted in a list of factors considered relevant in the custody determination. Objective considerations have included: the length of the interrogation,³⁷ whether police escorted the subject to the interrogation,³⁸ whether the subject was placed in handcuffs,³⁹ whether the subject was told he was free to leave,⁴⁰ whether the door of the interrogation room

33. *Id.* at 113.

34. *Beheler*, 463 U.S. at 1125 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

35. WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 374 (5th ed. 2009).

36. *See* Reply Brief for Petitioner at 3, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (No. 09-11121). The petitioner’s reply brief to the United States Supreme Court expresses this sentiment further: “Beyond informing a suspect that he is under arrest, no ‘bright line’ exists in custody determinations and never has.” *Id.*

37. *See, e.g.*, *People v. Brown*, 909 N.Y.S.2d 820, 822 (App. Div. 2010). In noting that the court may look at various factors in making the custody inquiry, it cited as relevant the length of the interview, the cooperation of the suspect, the restriction on movement, and the location of questioning. *Id.*

38. *See, e.g.*, *United States v. Mendez-Argueta*, No. 1:09cr544, 2010 WL 545933, at *2 (E.D. Va. Feb. 12, 2010).

39. *See, e.g.*, *Vergara v. State*, 657 S.E.2d 863, 867 (Ga. 2008). The Georgia Supreme Court noted that whether the subject of the interrogation was placed in handcuffs was a relevant factor in determining if he were under the functional equivalent of arrest. *Id.*

40. *See, e.g.*, *State v. Rogers*, 760 N.W.2d 35, 44, 56 (Neb. 2009). The Nebraska Supreme Court discussed several relevant factors in the custody determination, including whether the subject of the interrogation were informed he could decline questioning and leave. *Id.* at 53-54.

was locked,⁴¹ whether the subject was permitted to leave the interrogation at its completion,⁴² the pressure used to detain the subject,⁴³ and “the extent to which the defendant is confronted with evidence of guilt.”⁴⁴ Prior to *J.D.B.*, the United States Supreme Court had never explicitly stated whether the age of the subject of the interrogation could be considered in the custody determination.⁴⁵ *Yarborough v. Alvarado*⁴⁶ was the only post-*Miranda* United States Supreme Court decision to discuss whether age has a role in determining whether a suspect was in “custody,” requiring advisement of *Miranda* rights.⁴⁷ The divided Court in *Alvarado* held that a court does not have to take age into account when determining that a suspect is in custody; yet, the Court did not determine if age *may* be considered.⁴⁸

41. See, e.g., *State v. Thompson*, 788 N.W.2d 485, 492 (Minn. 2010).

42. See, e.g., *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

43. See, e.g., *id.*

44. *United States v. Kim*, 292 F.3d 969, 974 (9th Cir. 2002).

45. *Yarborough v. Alvarado* discussed age in the *Miranda* custody context, but did not provide a determinative answer. 541 U.S. 652, 666-68 (2004); see also *In re J.D.B.*, 686 S.E.2d 135, 150 (N.C. 2009) (Hudson, J., dissenting) (“Neither this Court nor the United States Supreme Court has held squarely that age can never be relevant to the custody inquiry.”), *rev’d sub nom.* *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

46. 541 U.S. 652 (2004).

47. *Id.* at 666-68. The Supreme Court has considered age in other *Miranda* inquiries. See *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (holding age is a factor to consider amongst the totality of the circumstances when ascertaining if a *Miranda* waiver was voluntary). In *Michael C.*, the suspect was a sixteen and a half-year-old male who requested presence of his probation officer at his interrogation and was denied. *Id.* at 710-11. Before *Miranda* was decided, the Supreme Court recognized additional protections for juveniles subject to police interrogations. *Haley v. Ohio*, 332 U.S. 596, 601 (1948). In *Haley*, the Court held that a child cannot be held to the same standards as an adult in interrogations because a fifteen-year-old defendant “cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.” *Id.*

48. *Alvarado*, 541 U.S. at 666-68; *id.* at 669 (O’Connor, J., concurring) (“There may be cases in which a suspect’s age will be relevant to the ‘custody’ inquiry under *Miranda* . . .”). In *Alvarado*, a seventeen and a half-year-old murder suspect was brought to the station by his parents upon the request of the police, denied the right to have his parents sit in on the interrogation, never read his rights or told he was free to leave during the two hour interrogation, but permitted to leave with his parents after confessing. *Id.* at 656, 658, 665.

While the Court noted that age could be a “subjective inquiry,”⁴⁹ it also never reached a workable rule or standard for how such a consideration may be made.⁵⁰

Opponents to the consideration of age have mentioned that age need not be considered in the custody analysis, as one’s age is already a permissible consideration when determining whether a confession was knowingly, intelligently, and freely given.⁵¹ Though this distinct voluntariness test was not a direct concern in *J.D.B.*’s case, it had influence in the United States Supreme Court’s decision.⁵² The voluntariness test is an analysis separate from that of the custody analysis that looks at the evidentiary admissibility of incriminating statements uttered during a suspect’s custodial interrogation in order to determine whether they were spoken voluntarily or whether they were coerced.⁵³ The voluntariness test⁵⁴ was intended to prevent the government from compelling an individual to

49. *Id.* at 668.

50. *Alvarado* came before the high Court on a writ of habeas corpus, requiring great deference to the state court’s findings. *Id.* at 655, 659-60 (citing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254 (2006))). Under the Antiterrorism and Effective Death Penalty Act, the issue is whether the state court reasonably applied “clearly established Federal law.” 28 U.S.C. § 2254(d)(1). In deciding the “clearly established” law, the Court needed to determine only whether the state court correctly used established precedent and law when it decided not to consider the juvenile’s age in the custody determination. *See Alvarado*, 541 U.S. at 660-61; *United States v. Little*, 851 A.2d 1280, 1286 (D.C. 2004) (“*Alvarado* did not strictly decide whether an accused’s juvenile status is irrelevant to the *Miranda* custody determination. That was unnecessary for its decision.”).

51. *See Schneekloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973).

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

53. The voluntariness test is “an inquiry that examines ‘whether a defendant’s will was overborne’ by the circumstances surrounding the giving of a confession. The due process test takes into consideration ‘the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.’” *Dickerson v. United States*, 530 U.S. 428, 434 (2000) (quoting *Bustamonte*, 412 U.S. at 226).

54. The voluntariness test was first acknowledged in *Bram v. United States*, which held that coerced confessions are not admissible evidence. 168 U.S. 532, 564-65 (1897).

self-incriminate.⁵⁵ *Miranda* was decided, in part, because it was felt that the voluntariness test alone did not sufficiently protect an individual's rights.⁵⁶

The voluntariness test is a totality of the circumstances analysis,⁵⁷ arising out of the Due Process Clause of the Fourteenth Amendment and the right against self-incrimination in the Fifth Amendment.⁵⁸ The voluntariness test allows for consideration of personalized characteristics of the individual subject to the potentially coercive interrogation.⁵⁹ Relevant consideration in the voluntariness test's totality of the circumstances analysis have included age, education level, length of detention, the nature of the questioning, and whether the subject was informed of his constitutional rights.⁶⁰

II. *IN RE J.D.B.*: THE NORTH CAROLINA SUPREME COURT DECISION

In *In re J.D.B.*⁶¹ the North Carolina Supreme Court took a significant step backward for children's rights by holding that age is not a factor to be considered in determining if a

55. *Brown v. Mississippi*, 297 U.S. 278, 286-87 (1936); see U.S. CONST. amend. V. The voluntariness test is grounded in the Due Process Clause of the Fourteenth Amendment. See *Brown*, 297 U.S. at 286.

56. *Miranda v. Arizona*, 384 U.S. 436, 458 (1966) ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."); see also *J.D.B.*, 131 S. Ct. at 2408 ("*Miranda's* procedural safeguards exist precisely because the voluntariness test is an inadequate barrier when custodial interrogation is at stake."). But see *Miranda*, 384 U.S. at 512 (Harlan, J., dissenting) ("The Fifth Amendment, however, has never been thought to forbid *all* pressure to incriminate one's self in the situations covered by it.").

57. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963).

58. See *Brown*, 297 U.S. at 286.

59. *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

60. *Id.*

61. 686 S.E.2d 135 (N.C. 2009).

person subject to police interrogation is “in custody,” thus requiring *Miranda* rights.⁶²

A. *Background of In re J.D.B.: The Facts and Procedural History*

Thirteen-year-old special education student J.D.B. was adjudicated a juvenile delinquent after being found guilty of larceny and breaking and entering neighborhood homes.⁶³ The police officer assigned to the case, Detective DiCostanzo, came to J.D.B.’s middle school to speak with him.⁶⁴ Although DiCostanzo considered J.D.B. a suspect,⁶⁵ neither he, nor the school, contacted J.D.B.’s guardian,⁶⁶ though a North Carolina statute permits juveniles to have a parent or guardian present during custodial interrogations.⁶⁷ In fact, the statute also requires that for children under fourteen years of age, as J.D.B. was, a parent or guardian must be present during an in-custody admission or the admission will be suppressed.⁶⁸

A “uniformed, armed police officer”⁶⁹ assigned to the school⁷⁰ escorted J.D.B. from his seventh-grade classroom

62. *Id.* at 140. The United States Supreme Court, however, found otherwise—that age is an objective consideration in the custody analysis. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2408 (2011).

63. *In re J.D.B.*, 686 S.E.2d. at 136.

64. *Id.*

65. *See id.* However, the author is not suggesting that the detective’s belief that J.D.B. was a suspect added to the custody determination, as this was not initially articulated to J.D.B. *See Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (supporting the position that when an officer has formed the intent to arrest a suspect prior to his interrogation, this does not weigh on the custody determination if the suspect is not aware of the officer’s intentions).

66. *In re J.D.B.*, 686 S.E.2d at 136.

67. N.C. GEN. STAT. § 7B-2101 (2007). Because of this statute, it appears that it would have crossed the officer’s mind that such an interrogation may be deemed custodial and that a parent should be contacted due to J.D.B.’s very young age.

68. *Id.*

69. *In re J.D.B.*, 686 S.E.2d at 143 (Brady, J., dissenting).

70. “A school resource officer (‘SRO’) is a certified law enforcement officer who is permanently assigned to . . . a school or a set of schools.” Holland, *supra* note 16, at 74 (internal quotation marks omitted).

and informed J.D.B. that law enforcement had requested to speak with him.⁷¹ J.D.B. soon found himself in a closed room with four adults: the assistant principal, an administrative intern, the School Resource Officer, and Detective DiCostanzo.⁷² DiCostanzo directed J.D.B. to his interview with police on the day of the break-in⁷³ and asked J.D.B. if he would discuss it.⁷⁴ J.D.B. agreed to discuss this initial police encounter.⁷⁵ At this point, J.D.B. was not told that he was allowed to leave the office, that he could refuse to speak, or that he could contact his guardian.⁷⁶ DiCostanzo questioned J.D.B. about his involvement with crimes in the neighborhood and confronted J.D.B. with conflicting information.⁷⁷ When the child denied involvement, the detective confronted him with the stolen item itself.⁷⁸ The assistant principal urged J.D.B. to “do the right thing”⁷⁹ and told him “the truth always comes out in the end.”⁸⁰

71. *In re J.D.B.*, 686 S.E.2d at 136; *id.* at 143-44 (Brady, J., dissenting).

72. *Id.* at 136 (majority opinion).

73. On the day of the larceny, a police officer questioned J.D.B. and a friend who a police officer saw looking into the windows of a house. Brief for Petitioner at 2, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (No. 09-11121). Beyond speaking with J.D.B.’s guardian, his grandmother, nothing resulted from the police officer’s questioning that day. *Id.*

74. *Id.* at 3.

75. *Id.* at 3-4; *In re J.D.B.*, 686 S.E.2d at 136.

76. *In re J.D.B.*, 686 S.E.2d at 136, 139.

77. *Id.* at 147 (Brady, J., dissenting).

78. *Id.*

79. *Id.*

80. *In re J.D.B.*, 674 S.E.2d 795, 803 (N.C. Ct. App. 2009) (Beasley, J., dissenting), *aff’d*, 686 S.E.2d 135 (N.C. 2009), *rev’d sub nom.* *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011). Some courts have held that statements made by a school official to a student do not factor into the custody determination unless the official was acting as an “agent” for the police or under the direction of police. *See State v. V.C.*, 600 So. 2d 1280, 1281-82 (Fla. Dist. Ct. App. 1992) (assistant principal not acting as agent of police, so student not in custody); *In re T.A.G.*, 663 S.E.2d 392, 395-96 (Ga. Ct. App. 2008) (finding that assistant principal acted as an agent of the police when he interrogated student while school resource officer was present, so student was in custody); *People v. Pankhurst*, 848 N.E.2d 628, 636 (Ill. App. Ct. 2006) (finding no *Miranda* violation because school officials were not acting as agents of the police); *In re K.D.L.*, 700 S.E.2d 766, 767, 772 (N.C. Ct. App. 2010) (finding that juvenile interrogated by school officials while school resource officer was present was in

J.D.B. thereafter incriminated himself;⁸¹ he asked DiCostanzo “whether he would still be in trouble if he gave the items back.”⁸² DiCostanzo explained that while returning the items would “be helpful,” the matter was “going to court” anyway.⁸³ DiCostanzo stressed this further by telling J.D.B. that he was considering a secure custody order, which he informed J.D.B. would mean placement in juvenile detention.⁸⁴ DiCostanzo told J.D.B. that a secure custody order may be necessary because he was not certain that J.D.B. would behave.⁸⁵ Thus, J.D.B. needed to prove to DiCostanzo that he would not cause more trouble, by being cooperative and assisting the police—“help[ing] [him]self by making it right.”⁸⁶ Significantly, to thirteen-year-old J.D.B., being helpful or cooperative meant to “do what you told [sic] and not give ‘em [sic] any problems.”⁸⁷

After J.D.B. had incriminated himself, DiCostanzo told J.D.B. for the first time that he did not have to talk and that he could leave, but that he hoped J.D.B. would stay.⁸⁸

custody because school officials were acting “in concert” with the police); *J.D. v. Commonwealth*, 591 S.E.2d 721, 725 (Va. Ct. App. 2004) (finding no *Miranda* violation where assistant principal was not a law enforcement officer or acting as an agent of one).

81. See *In re J.D.B.*, 686 S.E.2d at 137.

82. *Id.* at 139 (internal quotation marks omitted).

83. *Id.*

84. *In re J.D.B.*, 674 S.E.2d at 803 (Beasley, J., dissenting).

85. *Id.* (“I specifically said, what’s done is done, [J.D.B.], now *you need to help yourself by making it right*. I told [J.D.B.] that with the information that I had been given, that *if I felt that he was going to go out and break into other people’s houses again because he really didn’t care, then I would have to look at getting a secure custody order*. And he asked what that was. And I explained to him that it’s where you get sent to juvenile detention before court.” (quoting DiCostanzo’s testimony)).

86. *Id.*; see also *id.* at 804 (“The unmistakable implication is that, to prevent Officer DiCostanzo from having the ‘feeling’ that J.D.B. might engage in future break-ins, J.D.B. would have to ‘help himself’ by providing the police with more information.”); see also Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 230 (2006) (“Juveniles may acquiesce more readily [than adults] to police suggestions during questioning.”).

87. New Brief for the State at 9, *In re J.D.B.*, 686 S.E.2d 135 (N.C. 2009) (No. 190A09) (quoting J.D.B.’s testimony).

88. *In re J.D.B.*, 674 S.E.2d at 803-04 (Beasley, J., dissenting).

J.D.B. then, “talking rapidly,”⁸⁹ told DiCostanzo about the items he took, answered DiCostanzo’s questions, and signed a statement.⁹⁰ At the end of thirty to forty-five minutes of questioning, and the end of the school day, Officer DiCostanzo permitted J.D.B. to take the school bus home, but told him that the police would meet him at his house later, where they would speak to his grandmother and aunt.⁹¹

The State filed two juvenile petitions against J.D.B. shortly after the interrogation.⁹² The youth moved to suppress his statements, claiming the admissions were a product of custodial interrogation where he should have been informed of his *Miranda* rights pursuant to *Miranda v. Arizona*⁹³ and section 7B-2101(a) of the General Statutes of North Carolina,⁹⁴ a state statute⁹⁵ that codifies and

89. Brief for Petitioner, *supra* note 73, at 5.

90. *Id.* at 5-6; *In re J.D.B.*, 686 S.E.2d at 137.

91. *In re J.D.B.*, 674 S.E.2d at 797-98. When J.D.B. returned home, DiCostanzo and another officer were waiting. *Id.* at 798. J.D.B.’s guardian was not home and had not been contacted. *Id.*; *see generally infra* note 96 (discussing the North Carolina statute requiring parents of juveniles under fourteen to be present during an interrogation if any statements the juvenile makes are to be admissible in court). J.D.B., who had already given police many incriminating statements, followed DiCostanzo’s advice that it would be “helpful” to give back the stolen items. *In re J.D.B.*, 686 S.E.2d at 137. J.D.B. brought stolen jewelry to the officers, showed them where he hid other items, and drove with police in their patrol car to his friend/accomplice’s home because he believed he could convince his friend to give stolen items to the police. *Id.*; Brief for Petitioner, *supra* note 73, at 7.

92. *In re J.D.B.*, 686 S.E.2d at 136.

93. 384 U.S. 436 (1966).

94. *In re J.D.B.*, 686 S.E.2d at 138.

95. N.C. GEN. STAT. § 7B-2101 (2007). The 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.

expands⁹⁶ *Miranda* warnings for juveniles.⁹⁷ The trial court, adjudicating J.D.B. a juvenile delinquent, found that he was not in custody while police interrogated him; the appellate court affirmed.⁹⁸ The lower courts of North Carolina and the North Carolina Supreme Court all held that age was a subjective factor not to be considered in the objective custody determination.⁹⁹ While the North Carolina Supreme Court acknowledged, in a footnote, that the habeas corpus standard of *Yarborough v. Alvarado*¹⁰⁰ was not binding on

(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.

96. *In re J.D.B.*, 686 S.E.2d at 138. It is important to note that section 7B-2101 expands *Miranda* rights for juveniles. It shows the intent of the state legislature to afford additional protection to juveniles in custody. The statute has particular precautions for those who are under fourteen years of age, requiring a parent present during any interrogation in order for an admission to be used against the child in court; thus, the statute legislature recognized an important difference between younger juveniles and those over the age of fourteen. *See* § 7B-2101.

97. *In re J.D.B.*, 686 S.E.2d at 138; *see* § 7B-2101.

98. *In re J.D.B.*, 686 S.E.2d. at 136-37.

99. *Id.* at 140.

100. 541 U.S. 652, 663-64 (2004).

the court,¹⁰¹ the court still held it persuasive,¹⁰² basing its decision upon *Alvarado*'s vague dicta.¹⁰³

B. *North Carolina Supreme Court Opinion: In re J.D.B.*

The North Carolina Supreme Court based its custody analysis on a North Carolina case with a nearly identical premise as the United States Supreme Court's test in *Thompson v. Keohane*.¹⁰⁴ Examining the totality of the circumstances in J.D.B.'s interrogation, the court found the following relevant to support a finding of no custody: (1) J.D.B. agreed to questioning,¹⁰⁵ (2) it appeared he understood the questions,¹⁰⁶ (3) the door to the interrogation room was neither locked nor guarded,¹⁰⁷ (4) the interview lasted thirty to forty-five minutes,¹⁰⁸ (5) J.D.B. was advised later in the interrogation that he did not need to answer

101. See Alan Raphael, *Does Miranda Allow a Court to Consider the Age of a Juvenile When Determining Whether He Was in Custody During an Interrogation?*, 38 PREVIEW OF U.S. SUP. CT. CASES 232, 233 (2011) ("Because of the procedural posture of [*Yarborough v. Alvarado*] and the standard of review involved, it is not clear precedent for [*J.D.B. v. North Carolina*] . . .").

102. *In re J.D.B.*, 686 S.E.2d at 140 n.1.

103. See *id.* at 140. In holding that age was not a factor to be considered in the *Miranda* custody determination, the court cites *Alvarado*, immediately before setting forth its rule, to state that it "adheres" to the rationale that age would "creat[e] a subjective inquiry." *Id.*

104. See *id.* at 138 ("[A]n appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." (internal quotation marks omitted) (citing *State v. Buchanan*, 543 S.E.2d 823, 827 (N.C. 2001)). In North Carolina, the custody analysis "requires application of an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way." *Id.* (internal quotation marks omitted). For the custody analysis in *Thompson*, see *Thompson v. Keohane*, 516 U.S. 99, 112-16 (1995).

105. See *In re J.D.B.*, 686 S.E.2d at 139.

106. See *id.* at 137 (noting that J.D.B.'s answers to the questions were "appropriately responsive," showing he understood the questions asked).

107. *Id.* at 142-43.

108. *Id.* at 137.

questions, was not under arrest, and could leave,¹⁰⁹ and (6) J.D.B. was allowed to go home on the bus at the end of the school day.¹¹⁰

The court did not find significant that: (1) J.D.B.'s guardian was not contacted,¹¹¹ (2) J.D.B. was in a closed room,¹¹² (3) a uniformed officer escorted J.D.B. from his classroom,¹¹³ (4) J.D.B. knew that the police would be waiting for him when he returned home,¹¹⁴ and (5) J.D.B. was not informed that he did not have to speak or that he could leave until *after* he had incriminated himself.¹¹⁵ The court found these factors were not "sufficient 'indicia of formal arrest'"¹¹⁶ to prove that J.D.B. "had been formally arrested or had had his freedom of movement restrained to the degree associated with a formal arrest."¹¹⁷ This is so despite many courts' determinations that these factors—such as confronting the subject of the interrogation with evidence of his guilt, the subject not coming to the interrogation voluntarily, and not affirming that the subject could refuse questioning have been upheld as strong indicators of custody.¹¹⁸

Most troubling about the North Carolina Supreme Court majority's finding is that it has increased the threshold necessary for a finding of custody when a child is interrogated in a school in North Carolina.¹¹⁹ The court

109. *Id.* As will be discussed shortly, J.D.B. did not receive these warnings until he had already made incriminating statements. See *infra* note 115 and accompanying text.

110. *Id.*

111. *Id.* at 136-37.

112. *Id.* at 136. The court did not mention whether J.D.B. was aware the door was unlocked.

113. *Id.* at 143 (Brady, J., dissenting).

114. *Id.* at 137 (majority opinion).

115. *Id.* at 137.

116. *Id.* at 139.

117. *Id.* (quoting *In re W.R.*, 675 S.E.2d 342, 344 (N.C. 2009)).

118. See, e.g., *United States v. Kim*, 292 F.3d 969, 973-74 (9th Cir. 2002); see also *supra* notes 37-45 and accompanying text.

119. See Clay Turner, *Simple Justice: In re J.D.B. and Custodial Interrogations*, 89 N.C. L. REV. 685, 705-06 ("[T]he majority introduces here a

emphasized that for juvenile students in the school setting, the restriction on freedom of movement must “go[] well beyond the limitations that are characteristic of the school environment in general” that apply to all students because a “school[s] environment inherently deprives students of some freedom of action.”¹²⁰ The court does not provide examples of restrictions beyond those “characteristic” in a school setting.¹²¹ In *In re K.D.L.*, decided a year after *In re J.D.B.*, the North Carolina Court of Appeals sheds some light on what the North Carolina Supreme Court might have considered an inappropriate restriction of a student’s freedom of movement.¹²² The court in *K.D.L.* proposed that a student “being frisked and transported in a police cruiser” would not be “one of the usual restraints” faced by all students in general and would be beyond the general restraints of the school environment.¹²³

Here, however, the North Carolina Supreme Court does not provide support for what it is implying: that the police questioning of a student in a closed room regarding a non-school related criminal act may be part of the typical school setting.¹²⁴ The court presents a new rule, but moves on without elaborating on the necessary benchmark that would reach beyond the typical limitations a child expects in school.¹²⁵ As both dissenting Justice Hudson¹²⁶ and the amici curiae for the United States Supreme Court case point out, requiring restraints beyond the “typical” restrictions applicable to all students while in school is not a workable

whole new tenet to the in-custody test—a minimum bar for finding a suspect in custody at school.”).

120. *Id.* at 705 (quoting *In re J.D.B.*, 686 S.E.2d at 138).

121. *Id.* (internal quotation marks omitted).

122. *In re K.D.L.*, 700 S.E.2d 766, 772 (N.C. Ct. App. 2010).

123. *Id.*; see also *In re I.J.*, 906 A.2d 249, 262-63 (D.C. 2005). The court in *In re I.J.* held that a youth was in custody when he was questioned in a private office at the youth center where, by court order, he lived and attended school, since his situation lay somewhere between a private home and prison environment and was “likely more coercive than that of a school.” *Id.* However, what the court found determinative was that police did not say anything or take any actions to “mitigate the compulsive atmosphere.” *Id.* at 263.

124. See *In re J.D.B.*, 686 S.E.2d at 139.

125. *Id.* at 138; see *supra* text accompanying notes 120-21.

126. *In re J.D.B.*, 686 S.E.2d at 146-47 (Hudson, J., dissenting).

test; it would be “virtually impossible” to find custody in schools under this threshold.¹²⁷

Even without considering age, the North Carolina Supreme Court incorrectly weighed a traditional objective custody consideration, freedom to leave. The court concluded that because J.D.B. was permitted to take the school bus home following the interview, this tips the scale toward no custody.¹²⁸ The court compared J.D.B.’s situation to *Oregon v. Mathiason*—where the United States Supreme Court held the adult suspect was not in custody because he “came voluntarily to the police station” and left “without hindrance”¹²⁹—by stating that J.D.B., too, left his interrogation “without hindrance.”¹³⁰ However, the *J.D.B.* majority ignored the fact that J.D.B., unlike the suspect in *Mathiason*, did not come to his interrogation voluntarily; J.D.B. was taken out of his class by a uniformed officer, without being told why police wanted to speak to him, and escorted to the interrogation room.¹³¹ If J.D.B. had come on his own volition, he would have been permitted to walk to the interrogation room unescorted.¹³² Further, had J.D.B. not gone with the officer, he would have likely faced disciplinary action from the school.¹³³ Furthermore, focusing on what an individual did after the interrogation to determine if an individual was in custody during the interrogation is, “as a matter of logic[,] unsound.”¹³⁴ Riding the bus home was not leaving “without hindrance” because

127. Brief of Juvenile Law Center, et al., *supra* note 3, at 17.

128. *See In re J.D.B.*, 686 S.E.2d at 137, 139-40.

129. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

130. *In re J.D.B.*, 686 S.E.2d at 139 (citing *Mathiason*, 429 U.S. at 495).

131. *Id.* at 136; *id.* at 143-44 (Brady, J., dissenting); *id.* at 147 (Hudson, J., dissenting).

132. *See id.* at 143-144. (Brady, J., dissenting) (“The only logical reason for Officer Gurley to escort J.D.B. was to restrain his freedom of movement . . .”).

133. *See id.* at 143 (“The Student Handbook at Smith Middle School . . . instructs students to ‘[f]ollow directions of all teachers/adults the first time they are given,’ ‘[s]top moving when an adult addresses’ them, and ‘[w]alk away only after the adult has dismissed’ them.”).

134. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 340 (3d ed. 2000). The authors do note, however, that despite the “unsound logic” the court has nonetheless considered whether a suspect was allowed to leave after the interview as a factor in the custody determination. *Id.*

J.D.B. was informed that the police would meet him at home.¹³⁵ Knowing this, J.D.B. likely faced the realization that he “literally [could not] escape” questioning and the continued involvement of law enforcement.¹³⁶

The police employed a version of “deliberate two-step”¹³⁷ questioning strategies in withholding from J.D.B. the fact that he could decline questioning until after he incriminated himself.¹³⁸ Even if, on remand, the North Carolina state court does not find the interrogation to be custodial, it should apply the rationale that it and many states have: “question first, warn later” interrogation techniques may be improper when determining *Miranda* cases.¹³⁹ Because J.D.B. was not told he could leave or decline questioning before he incriminated himself, the “fruit”¹⁴⁰ obtained after

135. *In re J.D.B.*, 686 S.E.2d at 137, 139 (majority decision).

136. *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984). In *Murphy*, the United States Supreme Court held that the compulsion felt by a suspect to continue an interrogation because of a fear that terminating it would lead to a revocation of probation, when such suspect was not physically restrained and could have left, is not comparable to the pressure exerted on a “suspect who is painfully aware that he literally cannot escape a persistent custodial interrogator.” *Id.* at 433-34. Though J.D.B., like *Murphy*, was not physically restrained, the pressure he, as a juvenile, likely felt is more akin to someone who “literally cannot escape” interrogation.

137. See Mark Hamblett, *Circuit Clarifies Law on ‘Two-step’ Confession Tactics*, N.Y. L.J., June 13, 2007, at 1.

138. *In re J.D.B.*, 674 S.E.2d 795, 803 (N.C. Ct. App. 2009) (Beasley, J., dissenting), *aff’d*, 686 S.E.2d 135 (N.C. 2009), *rev’d sub nom.* *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

139. See *Missouri v. Seibert*, 542 U.S. 600, 617 (2004) (“Because the question-first tactic effectively threatens to thwart *Miranda*’s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, [the] statements are inadmissible.”); *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) (“[A] trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where the midstream *Miranda* warning—in light of the objective facts and circumstances—did not effectively apprise the suspect of his rights.”).

140. See *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963) (holding that narcotics discovered by “illegal actions of the police” were “fruit of the poisonous tree”); see also *In re J.D.B.*, 674 S.E.2d at 805 (Beasley, J., dissenting) (citing *Wong Sun* for the proposition that J.D.B.’s statements were custodial and the information obtained from them should be suppressed.). Though the “fruits” test typically applies in the Fourth Amendment context, the rationale here is the

he was informed of his rights should be suppressed as “tainted.”¹⁴¹

III. UNITED STATES SUPREME COURT DECISION: *J.D.B. v. NORTH CAROLINA*

A. *Majority Opinion: Children Are Not “Miniature Adults”*

The United States Supreme Court majority held age is an objective factor that may be considered in the *Miranda* custody determination when the age is known or “objectively apparent” to the officer at the time of the interrogation.¹⁴² Justice Sonia Sotomayor—joined by Justices Kennedy, Ginsberg, Breyer, and Kagan—wrote a forceful and matter-of-fact majority opinion, plainly stating that states can no longer ignore the “common sense” knowledge that children are not adults and cannot be treated as adults in police interrogations.¹⁴³

After a recitation of the facts, the *Miranda* progeny, and the objectivity requirements that the caselaw has required for custodial interrogation, the majority discusses the “reality” that age is an objective circumstance that warrants consideration in determining custody.¹⁴⁴ Sotomayor cites to several of the Court’s earlier decisions acknowledging the difference between children and adults and how children “understand the world around them.”¹⁴⁵ Noting several legal restrictions already placed on children, the majority confirms the divergence between adults and children in the

same, as J.D.B. made his initial incriminating statement without knowing he did not need to answer the detective’s questions or even stay in the office.

141. *Seibert*, 542 U.S. at 604, 607 (“[A] midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda*’s constitutional requirement, [thus,] a statement repeated after a warning in such circumstances is inadmissible.”).

142. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2406 (2011).

143. *Id.* at 2398, 2407.

144. *Id.* at 2399-2406.

145. *Id.* at 2403.

law,¹⁴⁶ mirroring the petitioner's and his amici's arguments in their briefs.¹⁴⁷

Further distinguishing age from other "personal characteristics," the majority expresses that, unlike other qualities such as nationality or I.Q., youth is a characteristic that applies "universal[ly]" across the broad class of minors.¹⁴⁸ Sotomayor emphasizes that age is a "self-evident" characteristic that does not require a searching analysis or any special training for judges or law enforcement.¹⁴⁹ The majority demonstrates this by noting that age has been successfully considered as an objective circumstance in other areas of the law.¹⁵⁰ Sotomayor cites to tort law to show that age is considered to be a "relevant circumstance" in negligence cases due to children's differing community experience.¹⁵¹

While there was discussion at oral argument regarding psychological and empirical data readily available to prove the cognitive differences between an average adult and a child in comprehending an interrogation,¹⁵² the majority chooses to focus instead on human experience and knowledge of "what any person knows . . . about children generally"—that children and adults are distinguishable in many, significant ways.¹⁵³ The majority criticized applying the *Miranda* custody rule in a way that would create an artificial standard for children by holding them to the same

146. *Id.*

147. *See, e.g.*, Brief for Petitioner, *supra* note 73, at 19-22; Brief of Juvenile Law Center, et al., *supra* note 3, at 8-13.

148. *See id.* at 2403-04 ("Like this Court's own generalizations, the legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal.")

149. *See id.* at 2403 (stating that age generates conclusions that apply to children as a class and are "self-evident").

150. *Id.* at 2404.

151. *Id.* (quoting RESTATEMENT (THIRD) OF TORTS § 10 cmt. b (2005)).

152. *See* Transcript of Oral Argument at 12, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121). Justice Scalia was skeptical that empirical data was necessary to determine that "the older a child is to an adult [sic], the more adult-like they are. The younger, the farther away they are from that adult standard . . ." *Id.*

153. *J.D.B.*, 131 S. Ct. at 2403.

standard and ability to comprehend an interrogation as a reasonable adult.¹⁵⁴

The custody analysis requires judges to consider any objective circumstances that may be relevant¹⁵⁵ in determining whether “a reasonable person [would] have felt he or she was at liberty to terminate the interrogation and leave.”¹⁵⁶ Thus, the majority’s main rationale is that childhood “is different” because one can easily conclude that “children are most susceptible to influence.”¹⁵⁷ This conclusion, Sotomayor insists, is objective because it does not require the fact finder to consider the *specific* child’s mindset, but rather how interrogations may impact children as a class.¹⁵⁸

The majority attempts to dispel the respondent’s arguments that the Court must consider J.D.B.—and youths in general—as if he were an adult in the same situation. The majority engages in an effective, tongue-in-cheek analysis in which it asks the reader to consider the custody inquiry from the viewpoint of an adult being taken from a seventh grade classroom by a uniformed officer and being interrogated behind closed doors, surrounded by a police officer, his principal, and other adults.¹⁵⁹ The majority quickly points out that this satirical image would be an “absurdity.”¹⁶⁰ The majority opinion thereafter sets forth a new factor for *Miranda*: “so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.”¹⁶¹ As a practical necessity, the majority points out that the age of the youth

154. *Id.* at 2405.

155. *See id.* at 2407 (“Not once have we excluded from the custody analysis a circumstance that we determined was relevant and objective, simply to make the fault line between custodial and noncustodial ‘brighter.’”).

156. *Id.* at 2402 (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)).

157. *Id.* at 2404-05 (internal quotation marks omitted).

158. *Id.*

159. *Id.* at 2405.

160. *Id.*

161. *Id.* at 2406.

questioned will not be determinative or significant in all cases.¹⁶²

Responding to the dissent's attacks on the objectivity and practicality of such a test, the majority asserts that this new test does not overrule the standard that the interrogating officer's subjective "unarticulated, internal thoughts" are not objective considerations in the custody determination.¹⁶³ The majority—in a footnote—attempts to address concern of an overruling of this established standard by emphasizing that the consideration of age is a simple task because it only need be taken into account when the child's age is known or objectively apparent to the interrogating police officer.¹⁶⁴ Thus, because it is not a subjective analysis, looking into the mindset of the officer is not needed.¹⁶⁵

Along with the irrelevance of the interrogating officer's "internal thoughts,"¹⁶⁶ the majority asserts that consideration of age also does not require searching through the youth's "actual mindset,"¹⁶⁷ but into considerations which would impact how the reasonable person would perceive whether or not he was free to terminate the interrogation and leave.¹⁶⁸ The majority broadly claims that consideration of all objective circumstances in an interrogation requires an inquiry into how the subject of the interrogation would "internalize and perceive" the circumstances of the interrogation and thus, are relevant considerations.¹⁶⁹ The majority does not provide an illustration, so the reader has to consider whether other recognized objective circumstances—such as a locked door, handcuffs, not being told he is free to leave—would truly

162. *Id.*

163. *Id.* at 2406 n.8.

164. *Id.*

165. *See id.* The Court explains that "an officer's purely internal thoughts have no conceivable effect on how a reasonable person in the suspect's position would understand his freedom of action." *Id.*

166. *Id.*

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

168. *Id.* at 2407.

169. *Id.* (internal quotation marks omitted).

require looking into how the individual “internalize[s] and perceive[s] the circumstances of an interrogation.”¹⁷⁰

With disdain, the majority attacks a “fundamental flaw” in the dissent’s reasoning.¹⁷¹ Sotomayor stresses that clarity for law enforcement is not *Miranda*’s only purpose and, diverging from earlier opinions,¹⁷² argues that clarity is not the Court’s primary concern when balancing the interest in ease and even-handedness in application with assuring that the subject of the interrogation is adequately protected.¹⁷³

The majority concludes by dispelling the suggestion that the voluntariness test, which permits consideration of age and any relevant qualities of the individual in determining whether a waiver was voluntary, would provide sufficient protection to juveniles.¹⁷⁴ Such a test, the majority concludes, is not sufficient, alone, to protect the rights of juveniles from compulsion.¹⁷⁵ Pointing out that *Miranda* was created because the voluntariness test was inadequate at protecting against compulsion, the majority notes that relying on it alone to take age into account would give juveniles fewer rights than those afforded to adults through *Miranda*.¹⁷⁶

The majority seemingly does not want to admit that there may be some difficulty in applying its new test, so it defends it through what amounts to a policy argument—essentially, children must be considered as different. Ultimately, in attempting to articulate this new, breakout rule, the majority spends more time rebutting the dissent than providing guidance to the courts below—which is the ultimate weakness in an otherwise well-reasoned opinion and a hot target for the dissent.

170. *Id.* at 2406.

171. *Id.* at 2407.

172. *See, e.g.,* Yarborough v. Alvarado, 541 U.S. 652, 668-69 (“[T]he custody inquiry states an objective rule designed to give clear guidance to the police”); New York v. Quarles, 467 U.S. 649, 658 (1984) (recognizing the significance of an easily applied rule for law enforcement, who have a short amount of time to make the custody inquiry).

173. *J.D.B.*, 131 S. Ct. at 2407.

174. *Id.* at 2408.

175. *Id.*

176. *Id.*

B. *Dissenting Opinion: Derailing Miranda*

In an exacting dissent, Justice Alito, joined by Justices Roberts, Scalia, and Thomas,¹⁷⁷ claims the majority's holding "run[s] *Miranda* off the rails"¹⁷⁸ by injecting the "highly fact-intensive"¹⁷⁹ consideration of age into the objective *Miranda* test. Accusing the majority of unjustifiably expanding *Miranda*, the dissent finds that age is a subjective factor, not to be considered in the totality of the circumstances of an interrogation.¹⁸⁰ The dissent admits that *Miranda*, being both over- and under-inclusive, comes with high costs that often require law enforcement and the courts to ignore circumstances that may have impact on whether the individual would have felt free to leave.¹⁸¹ These costs also include suppression of "trustworthy and highly probative" statements that may be perfectly 'voluntary under [a] traditional Fifth Amendment analysis.'¹⁸² Acknowledging that many defendants differ from the hypothetical reasonable person, the dissent notes that this does not justify carving out exceptions for those personal characteristics.¹⁸³ The dissent argues that first, any of *Miranda*'s costs are outweighed by the need for a clear, straightforward custody analysis and second, that there are other safeguards available for more vulnerable defendants—the voluntariness test.¹⁸⁴

The dissent argues that not only is consideration of age in the custody analysis an erosion of *Miranda*, but an unnecessary one, as the voluntariness test is a sufficient safeguard that considers the suspect's age and other

177. *Id.* (Alito, J., dissenting).

178. *See id.* at 2418 (stating that the "constitutional rule against coercion" should be applied and that "[t]here is no need to run *Miranda* off the rails").

179. *Id.* at 2409.

180. *See id.* at 2414-15 (stating that the Court will have to abstractly declare that age is different from other characteristics like maturity, education, and intelligence, in order to avoid further undermining *Miranda*'s rationale).

181. *Id.* at 2408-10 (discussing relevant, but not considered factors, such as experience with law enforcement and particular sensitivity to police questioning).

182. *Id.* at 2411 (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)).

183. *Id.* at 2409.

184. *Id.*

individual characteristics.¹⁸⁵ The majority's consideration of age is deemed unnecessary for other reasons: first, many juveniles who are interrogated are near the age of majority;¹⁸⁶ second, youth may already know their *Miranda* rights due to prior experience with law enforcement¹⁸⁷ and/or *Miranda*'s pervasiveness in popular culture;¹⁸⁸ third, the majority's concerns mainly surround students interrogated in schools, where courts can provide a higher standard for the such interrogations without altering the custody analysis;¹⁸⁹ and fourth, state courts may always intervene to provide additional safeguards for children when the people deem it necessary.¹⁹⁰

One of the less parsed out parts of the majority opinion—the lack of a bright line, or any line, to distinguish age from other individual qualities—is what the dissent has its easiest time preying upon.¹⁹¹ While the dissent notes that age could arguably impact how the individual perceives an interrogation, it cannot find a rationale for distinguishing why one's intelligence, education, cultural background, or experience with law enforcement would be distinguishable from age.¹⁹² Though the majority hangs its hat upon the fact that the State conceded, in oral argument, that blindness would be an objective circumstance that could be considered as part of a totality of the circumstances analysis,¹⁹³ the dissent argues that blindness is distinguishable from age.¹⁹⁴ The dissent notes that age requires the inquirer to look into “internal circumstances” of the individual questioned, which

185. *See id.*

186. *Id.*

187. *Id.*

188. *Id.* at 2418 & n.13.

189. *Id.* at 2409; *see also* Brief of Indiana et al. as Amici Curiae in Support of Respondents at 2, *J.D.B.*, 131 S. Ct. 2394 (No. 09-11121).

190. *J.D.B.*, 131 S. Ct. at 2409 (Alito, J., dissenting).

191. *Id.* at 2413-15.

192. *Id.*

193. *Id.* at 2406 & n.9 (majority opinion). The State also conceded that paraplegia and deafness would be similar objective circumstances. *See* Transcript of Oral Argument, *supra* note 152, at 28, 41.

194. *J.D.B.*, 131 S. Ct. at 2417 n.10 (Alito, J., dissenting).

the Court's precedent has held to be inappropriate.¹⁹⁵ While the majority claimed that considering whether one's age would impact an individual's perception of an interrogation is a "common sense" analysis, the dissent notes that there are times when an officer cannot easily distinguish the age of a minor or where a minor lies about his age.¹⁹⁶

The dissent cautions against inquiring into the subjective views of the police officer, which, it argues, is what the majority's holding requires.¹⁹⁷ The dissent foresees courts facing a flood of litigation over whether the officer's perception of the suspect's age was reasonable.¹⁹⁸ A guideline to examine this reasonableness does not exist because the majority does not provide a way to guide judges in determining *when* age will be relevant.¹⁹⁹ Though the majority states that any person knows that "a 7-year-old is not a 13-year-old and neither is an adult,"²⁰⁰ it does not provide for any rationale for whether age is still relevant for a sixteen- or seventeen-year-old or why an eighteen-year-old would be any less susceptible to interrogation than a juvenile.²⁰¹

Predicting a future of overcautious police officers, frustrated courts, and inconsistency between the states, the dissent foresees a "bit by bit" breakdown of the clarity of the one-size-fits-all *Miranda* test.²⁰² Implicitly, then, the dissent laments that such procedure will mean fewer valid confessions and more guilty subjects evading punishment.²⁰³

195. See *id.* at 2411 ("The totality of *these* circumstances—the external circumstances, that is, of the interrogation itself—is what has mattered in this Court's cases.").

196. *Id.* at 2415.

197. *Id.*

198. *Id.*

199. *Id.* at 2416.

200. *Id.* (quoting majority opinion) (internal quotation marks omitted).

201. *Id.*

202. *Id.* at 2418.

203. Justice Alito explains that "[i]n its present form, *Miranda*'s prophylactic regime already imposes high costs by requiring suppression of confessions that are often highly probative and voluntary by any traditional standard." *Id.* at 2412-13 (internal quotation marks omitted). Alito thus suggests that a less clear rule will impose even higher costs.

The dissent predicts an ominous choice that will need to be made in the future: either restrict *Miranda's* consideration of other "personal" characteristics to one's age—which the dissent perceives as artificial line drawing²⁰⁴—or expand *Miranda* to include other traits, after which it would become unworkable.²⁰⁵

C. *Analysis: Age Does Not Obscure Clarity*

While the United States Supreme Court may not have provided much guidance on implementing the objective inquiry of age, North Carolina and the states can find guidance in courts of sister states who, even before the *J.D.B.* decision, demonstrated the ability to consider age in the *Miranda* analysis as just one part of the totality of the circumstances, without allowing the fact that the suspect was a juvenile to be determinative or carry more weight than other circumstances.²⁰⁶ The following pre-*J.D.B.* decisions similarly demonstrate the consideration of age without disastrous consequences.

1. *Pre-J.D.B. Decisions Considering Age in the Custody Determination.*

a. Nebraska. The Nebraska Supreme Court found differently from North Carolina when considering the objective circumstances of a juvenile's interrogation in connection with a sexual assault on his sister.²⁰⁷ *In re Interest of C.H.* presented a similar fact pattern to *J.D.B.*, leading to a finding that the juvenile was in custody.²⁰⁸ In that case, the child was also escorted to a school conference room.²⁰⁹ As in *J.D.B.*, the door to the interrogation room was closed, but not locked, and the child was not handcuffed.²¹⁰ Before the child, C.H., was questioned, he was not told he was not under arrest, that he did not have to speak to the

204. *Id.* at 2409.

205. *Id.*

206. *See, e.g., In re Interest of Tyler F.*, 755 N.W.2d 360, 372-74 (Neb. 2008).

207. *In re Interest of C.H.*, 763 N.W.2d 708, 714-15 (Neb. 2009).

208. *Id.* at 712, 715.

209. *Id.* at 712.

210. *Id.* at 712, 715.

officers, or that he could leave.²¹¹ Though the child's father consented to the interrogation, he apparently did so out of the child's presence.²¹² The Nebraska court followed *Thompson* in determining the restraint on the juvenile's freedom of movement, considering all of the objective circumstances surrounding the interrogation.²¹³ Similar to *J.D.B.*, there was no evidence that the child resisted speaking to the officers.²¹⁴ The interview lasted for thirty minutes—approximately as long as *J.D.B.*'s interrogation.²¹⁵ The officer performing the interrogation was dressed in plain clothes, as was DiCostanzo.²¹⁶ Like DiCostanzo, the officers confronted C.H. with incriminating evidence.²¹⁷ Though the child was physically unrestrained during the interview, Nebraska's high court found it most relevant that C.H., much like *J.D.B.*, confessed without "the assurance and knowledge that he was free to terminate the interview and leave."²¹⁸

While the court in *In re C.H.* did not discuss age in its custody inquiry explicitly, it was considered as an objective factor in their determination.²¹⁹ For instance, the court refers to a reasonable person standard, but in the same paragraph, mentions that the juvenile, C.H., was a

211. *Id.*

212. *Id.* at 711.

213. *Id.* at 713-14 (citing *Thompson v. Keohane*, 516 U.S. 99, 112, 116 (1995)); see also *supra* notes 31-33 and accompanying text.

214. *In re C.H.*, 763 N.W.2d at 715; *In re J.D.B.*, 686 S.E.2d 135, 137 (N.C. 2009), *rev'd sub nom.* *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

215. *In re C.H.*, 763 N.W.2d at 712; *In re J.D.B.*, 686 S.E.2d at 137.

216. *In re C.H.*, 763 N.W.2d at 715; *In re J.D.B.*, 686 S.E.2d at 144 (Brady, J., dissenting).

217. See *In re C.H.*, 763 N.W.2d at 712. ("Drummond [the investigating officer] described the conversation [with C.H.] as follows: 'I told [C.H.] that his sister . . . had spoken to her dad that morning and said that . . . there had been some inappropriate sexual contact and that [she] had gone to the hospital where we had been most of the morning and up until the time that we came and talked to him. That [she] had been interviewed and also had been—and checked physically.'"); *In re J.D.B.*, 686 S.E.2d at 136 ("The investigator questioned [J.D.B.] further and confronted him with the fact that the camera had been found.").

218. *In re C.H.*, 763 N.W.2d at 715.

219. *Id.* at 716.

fourteen-year-old high school student.²²⁰ What the court found dispositive was that C.H. was not told he was not under arrest or that he was free to leave.²²¹ Thus, at the pre-warning portion of J.D.B.'s interview when J.D.B. made incriminating statements, J.D.B. was under the same level of restriction and of the same mind-set as C.H. Under very similar circumstances, and using the same United States Supreme Court precedent, the Nebraska high court found C.H. was in custody.²²²

Similarly, in *In re Interest of Tyler F.*, the Nebraska Supreme Court demonstrated the objective consideration of age in a fact pattern similar to *J.D.B.*²²³ The court stated that even if it considered the juvenile's age as part of the custody analysis, it would not reach a finding of custody.²²⁴ In its view, the youth's age did not lead to a finding of custody because he was told he was not under arrest, was not handcuffed, the door to the interrogation room was unlocked, "strong-arm" questioning tactics were not used, and the youth returned to his classroom following the interrogation.²²⁵ Additionally, the youth's parent gave permission to the officers to speak to the youth.²²⁶

b. Wisconsin. A Wisconsin court found that a juvenile was in custody when he was questioned by law enforcement in a conference room in his high school regarding claims of criminal sexual child abuse.²²⁷ While the juvenile's mother consented to the interrogation,²²⁸ the juvenile did not have a

220. *Id.* ("C.H. was a 14-year-old high school freshman summoned to the principal's office and questioned by an officer from the sheriff's department regarding serious allegations of sexual assault. He was not told that he was free to leave, and we conclude *that someone in C.H.'s position* would not believe he was at liberty to terminate the interrogation and leave." (emphasis added)).

221. *Id.* at 712, 715.

222. *Id.* at 715.

223. 755 N.W.2d 360 (Neb. 2008).

224. *Id.* at 372 ("When compared to interrogations in case law from other jurisdictions, Tyler's interrogation would not be custodial even if we took his age into account.").

225. *Id.* at 368-69.

226. *Id.* at 364.

227. *Husband v. Turner*, No. 07-CV-391-bbc, 2008 WL 2002737, at *1 (W.D. Wis. May 6, 2008).

228. *Id.*

parent present.²²⁹ The juvenile was escorted to the interrogation, was kept in a room alone with police officers, was not told he could leave or decline to answer questions, and was not read his *Miranda* rights.²³⁰

The juvenile originally denied the conduct, but admitted involvement after the officer told him she did not intend to bring him to jail that day.²³¹ Though the child was aware he was going to return home, rather than to jail, at the end of his school day, the court held he was in custody because a reasonable person in the juvenile's position would not feel he could terminate the interview and leave.²³² The court, using a rationale that seems to predict the words of the United State Supreme Court's *J.D.B.* majority, found that consideration of the juvenile's age is a necessary step in determining the restriction on one's freedom of movement under the reasonable person standard:

A reasonable person in plaintiff's situation would be a *student* who was escorted by school personnel from class to a room near the school offices, left alone in the room with interrogating police officers and never informed that he was free to leave and not answer questions. That *reasonable person* would not feel that he was "at liberty to terminate the interrogation and leave."²³³

Though the court admits that considering age in the custody analysis would be "inappropriate in many interrogation situations,"²³⁴ consideration of the plaintiff's status as a high-school-age student was found necessary in this case.²³⁵

c. New Mexico. The New Mexico Supreme Court in *State v. Javier M.* did not find the juvenile, who was questioned

229. *Id.*

230. *Id.* at *3.

231. *Id.* at *1.

232. *Id.* at *2-*3.

233. *Id.* at *3 (emphasis added) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)).

234. *Id.* at *3.

235. *Id.*; see also *In re Welfare of G.S.P.*, 610 N.W.2d 651, 657 (Minn. Ct. App. 2000) (deciding custody determination of juvenile under a reasonable person standard, but also discussing that suspect was a 12-year-old seventh grader who had never been sent to the principal's office nor had had contact with law enforcement).

by police in an open stairwell in a friend's home with his peers present, to be in custody for purposes of *Miranda* warnings and a New Mexico state statute²³⁶ codifying and expanding *Miranda* protections for juveniles.²³⁷ However, the state's high court held that though the questioning was only a brief, non-custodial "investigatory detention," thus not falling under *Miranda*, the child would still be granted the additional protections in the statute.²³⁸ Here, the police knew that the youth was under eighteen.²³⁹ While the court found the child was not in custody when questioned, it held that the legislature intended to extend protections to juveniles questioned during non-custodial situations when the child is suspected or alleged to have committed an act of juvenile delinquency.²⁴⁰ The court explained that the rights would only be given to a child who is *suspected* or *alleged* to be a juvenile delinquent and that the child only need be informed of his right to remain silent, rather than be read the full *Miranda* rights.²⁴¹

2. *The Impact and Implementation of J.D.B. v. North Carolina.* The "shape"²⁴² of *Miranda* will certainly change as a result of *J.D.B.* The extent of this change is hotly debated, with some commentators predicting that *J.D.B.* will lead to the "end of *Miranda* itself."²⁴³ While the full impact of *J.D.B.* has yet to be seen, as the case is still relatively recent, the initial impact will fall upon law enforcement.²⁴⁴ Police departments will have to provide additional training to

236. N.M. STAT. ANN. § 32A-2-14 (2010).

237. 33 P.3d 1, 5-6, 10-11 (N.M. 2001). While this case was decided pre-*Alvarado*, the holding still stands as does the state statute.

238. *Id.* at 13 ("[W]e conclude that a child need not be subject to custodial interrogation in order to be afforded the right to be advised of his or her constitutional rights prior to police questioning."); *id.* at 20.

239. *See id.* at 9. Police had separated the adult party guests from the minors by the time police questioned Javier M. *Id.*

240. *Id.* at 13-14, 20.

241. *Id.* at 16, 18.

242. Lyle Denniston, *Argument Recap: The Future of Miranda*, SCOTUSBLOG (Mar. 23, 2011, 2:58 PM), <http://www.scotusblog.com/?p=116539>.

243. *The Supreme Court, 2010 Term—Leading Cases*, 125 HARV. L. REV. 172, 246-47 (2011).

244. Lyle Denniston, *Opinion Analysis: Children's Age and Miranda*, SCOTUSBLOG (June 16, 2011, 11:18 AM), <http://scotusblog.com/?p=122090>.

their officers for performing juvenile interrogations. The difficulty is that the training is likely to be put into place almost immediately, while the cases interpreting and clarifying *Miranda* will trickle in far more slowly. Thus, at least at the outset, the police officers may be over-inclusive when interrogating juveniles, erring on the side of caution.²⁴⁵ Notably, however, many police departments may have a juvenile unit with officers specifically trained to work with juveniles, as was DiCostanzo.²⁴⁶ Thus, while all officers will require training, police departments can focus their efforts on those officers most likely to come into contact with juveniles.

While the *J.D.B.* majority may not provide “a word of actual guidance”²⁴⁷ in the implementation of age into the custody analysis, the impact may not be as much of an impediment as the dissent dramatically predicts. As discussed, state courts that have considered age in the custody determination prior to *J.D.B.* have been able to complete the analysis without finding age to be overwhelming or determinative in all cases.²⁴⁸ As the dissent itself points out, most juveniles interrogated are “teenagers nearing the age of majority.”²⁴⁹ Thus, in many cases, the age factor will be less relevant and not determinative of whether the juvenile was in custody. The *J.D.B.* case does not place as high a burden on law enforcement as the dissent propounds; it requires that the officer only consider age when he either knows the child’s age or when the age is objectively apparent to the reasonable officer.²⁵⁰

While the dissent portends situations where a child presents a false ID or where a child looks mature for his age, those would not be situations that would be found to be “objectively apparent.”²⁵¹ It would require an inquiry into

245. *Id.*

246. See Transcript of Oral Argument, *supra* note 152, at 9.

247. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2416 (2011) (Alito, J., dissenting).

248. See *supra* Part III.C.1.

249. *J.D.B.*, 131 S. Ct. at 2417.

250. *Id.* at 2404 (majority opinion).

251. *Id.* at 2415 (Alito, J., dissenting).

the surrounding circumstances—did the child present falsified identification? The majority of these concerns can be quelled by having the officer ask the child his age. If the child lies and tells the officer an age of majority, the officer cannot be held to have known the child was underage if the circumstances surrounding the interrogation would not have led a reasonable officer to conclude otherwise.²⁵² In close situations—for instance, where a 17-year-old tells the officer he is eighteen, the officer should not be held responsible for a good faith mistake.²⁵³ Yet, where a twelve-year-old claims he is eighteen, the surrounding circumstances can be analyzed and there, it likely would be held that the child's age would be objectively apparent.²⁵⁴ That inquiry would be guided by the majority's "common sense" analysis that a seven-year-old is neither a thirteen-year-old nor an adult.²⁵⁵ While there may arise situations like those anticipated by the dissent, the majority's threshold does not appear to fault an officer who made a good faith mistake, based on the surrounding circumstances.²⁵⁶

3. *Post J.D.B. v. North Carolina Decisions.* *J.D.B.* has been analyzed in a few state court cases relevant to the area of custodial interrogation.²⁵⁷ Significantly, *J.D.B.* is most cited in these cases for the holding that, though age is a proper consideration, it is not always dispositive. The Iowa

252. See Transcript of Oral Argument, *supra* note 152, at 20.

253. See *id.*

254. See *id.*

255. *J.D.B.*, 131 S. Ct. at 2407.

256. See Transcript of Oral Argument, *supra* note 152, at 20.

257. While still more cases have cited to *J.D.B.*, they do so as a mere citation, in order to note that age is an objective inquiry or that age may or may not be determinative. See, e.g., *Kalmakoff v. State*, 257 P.3d 108, 122 & n.62 (Alaska 2011) (citing to *J.D.B.* for the point that a child's age is a proper consideration in the *Miranda* custody analysis); *In re Louis D.*, 934 N.Y.S.2d 648, 653 (Fam. Ct. 2011) ("Courts recognize that juveniles are not miniature adults."); *D.V. v. State*, 265 P.3d 803, 807-09 (Utah Ct. App. 2011) (citing to *J.D.B.* to hold that because a fourteen-year-old may not have the same level of understanding as an adult, the child could not be said to have understood a court order that he was to remain in foster placement and that if he violated the order he could be held in contempt of court). However, few cases actually use *J.D.B.* to perform a custody analysis. Thus, the cases that merely cite to *J.D.B.* or use *J.D.B.* in non-custodial interrogation situations will not be discussed here.

Supreme Court referred to *J.D.B.* when analyzing whether an interrogation by a minor's social worker, wherein the minor incriminated himself, was a custodial interrogation.²⁵⁸ The Iowa court thereafter found that the youth's age was not relevant to the custody analysis as he was "just seven months shy of his eighteenth birthday"²⁵⁹ Though the *J.D.B.* case did not provide for consideration of other *personal* characteristics, the Iowa Supreme Court also noted the child's long history with law enforcement in its custody analysis.²⁶⁰ Similarly, the Rhode Island Supreme Court cited *J.D.B.* when considering whether a minor was in custody when questioned by law enforcement prior to being read her *Miranda* rights.²⁶¹ While the court noted the child's young age was known to the officer, the court found that the child's age was not dispositive due to the other circumstances surrounding the pre-Mirandized interrogation.²⁶²

The dissent's prediction of the difficulty of "a 60-year-old judge attempting to make a custody determination through the eyes of a hypothetical, average 15-year-old"²⁶³ has proven to be a feasible task not requiring great "imaginative powers," "knowledge of developmental psychology," or "training in cognitive science."²⁶⁴ While these early cases have not presented the challenges that may arise in the future, they may indicate that the majority was correct with its common sense mantra—that age in the custody analysis can be considered with the same amount of

258. *State v. Pearson*, 804 N.W.2d 260, 268-69, 271 (Iowa 2011). The minor was earlier in police custody, was Mirandized, and refused to speak, requesting an attorney. *Id.* at 262. The child was later questioned by his regular social worker in his bedroom at his youth home. *Id.* at 268.

259. *Id.* at 269.

260. *Id.*

261. *In re Frances G.*, 30 A.3d 630, 632, 634-35 (R.I. 2011).

262. *Id.* at 634-35.

263. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2416 (2011) (Alito, J., dissenting).

264. *Id.* (quoting majority opinion) (internal quotation marks omitted).

effort as would consideration of a locked door or handcuffs.²⁶⁵

IV. A PROPOSAL: PARENT OR GUARDIAN PRESENCE AT ALL POLICE INTERROGATIONS

A. *Introduction*

While the United States Supreme Court determined that age is a relevant factor to consider in the totality of the circumstances, it remanded the case back to the North Carolina state court to determine whether J.D.B. was in custody.²⁶⁶ Though North Carolina's current statute, section 7B-2101, affords juveniles heightened protections in police interrogations, these safeguards are reserved for custodial interrogations of children under age fourteen.²⁶⁷ As such restrictions would not provide sufficient protection in all interrogation settings, additional safeguards are needed to supply juveniles with protections during interrogations—regardless of whether the questioning is deemed custodial under a *Miranda* analysis.²⁶⁸

265. One author suggests that the dissent's concern with the ease of application of the consideration of age is misguided, as such a situation would be rare:

We would have to face a situation where the outcome of the case did in fact turn on the officer making the "correct" decision about whether to give a *Miranda* warning. This could only occur in a case where a police officer gave a *Miranda* warning when he wasn't obligated to do so; the officer would have chosen *not* to give the warnings if the interrogation test were easier to apply; and the fact that he did give the warning when he wasn't obligated to do so actually affected the outcome of the case.

Christopher Jackson, Commentary, *J.D.B. v. North Carolina and the Reasonable Person*, 110 MICH. L. REV. FIRST IMPRESSIONS 9, 13 (2011), <http://www.michiganlawreview.org/assets/fi/110/Jackson.pdf>.

266. The case is pending on the Orange County juvenile court docket. Telephone Interview with Barbara S. Blackman, Defense Attorney for Petitioner (Nov. 3, 2011).

267. N.C. GEN. STAT. § 7B-2101 (2007).

268. The *Miranda* analysis is, under the totality of the circumstances, whether the suspect is under arrest or the formal equivalent of arrest. *See supra* Part I; *see also* *Miranda v. Arizona*, 384 U.S. 436 (1966).

Notably, because the United States Supreme Court opinion chose not to discuss the permissibility of North Carolina's heightened standard of interrogations in schools, this portion of the North Carolina Supreme Court decision remains good law in North Carolina.²⁶⁹ If such a heightened requirement is permitted to stand, there may be a risk that law enforcement will purposely choose to question a minor at school in order to take advantage of the greater restrictions on freedom of movement that would need to be shown as a precursor to a finding of custody.²⁷⁰

Though the United States Supreme Court has now added the consideration of age to the *Miranda* analysis, its decision falls short of providing additional protection to students interrogated in North Carolina schools. Even where a North Carolina court will consider age, North Carolina's current requirement of additional restriction on freedom of movement beyond those *customary* in a school environment will still apply.²⁷¹ Thus, it is even more imperative that North Carolina implements a safeguard against false and impermissible confessions from its youth.

Miranda opponents and those who would join with the *J.D.B.* dissent cite to a hindrance of law enforcement as the paramount reason for their criticism.²⁷² Proponents of such arguments insist that providing non-custodial interrogations with additional safeguards will inhibit confessions,²⁷³ "cause police officers to second-guess the legal future of a case,"²⁷⁴ and otherwise prevent law enforcement

269. See Turner, *supra* note 119, at 686.

270. *Id.* at 708.

271. The North Carolina Supreme Court requires that restrictions on a student's freedom be "well beyond the limitations that are characteristic of the school environment in general." *In re J.D.B.*, 686 S.E.2d 135, 138 (N.C. 2009), *rev'd sub nom.* *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

272. *The Supreme Court, 2010 Term—Leading Cases*, *supra* note 243, at 248-49 (discussing how *J.D.B.* destroys the paramount benefit of *Miranda*—a straightforward custody test).

273. See Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 394 (1996).

274. Allison Retka, *Miranda Ruling: Not Just for Kids? North Carolina Defense Attorneys Hope to Apply it to Teens Tried as Adults*, N.C. LAWYERS WEEKLY, Jun. 17, 2011.

from convicting the proper wrongdoer.²⁷⁵ Whether there is truth to this argument for adult convictions is a separate question,²⁷⁶ however, the rationale of this argument for minors is moot. *Miranda* itself held that the potential for lost confessions and convictions is a smaller price for society to pay than for a person to be deprived of his constitutional rights.²⁷⁷

The United States Supreme Court affirmed this rights-based view in *J.D.B. v. North Carolina* by holding that the respondent's dogged focus on clarity and simplification of the custody analysis was a "fundamental flaw," as clarity must take a backseat to proper protections from coercion.²⁷⁸ The juvenile justice system is, or should be, one of rehabilitative and restorative justice, not of retribution.²⁷⁹ With this universal goal in mind, and with the recognition by scholars, empirical research, and the United States Supreme Court that youth are less capable than adults in comprehending and managing coercion,²⁸⁰ affording a

275. LAFAYETTE ET AL., *supra* note 134, at 308-09 (discussing that although statistics are "inconclusive," some have argued that confessions are essential in securing convictions).

276. See JOSEPH D. GRANO, POLICE INTERROGATION AND CONFESSIONS: A REBUTTAL TO MISCONCEIVED OBJECTIONS 3 (1987) ("[A] civilized, decent society need not be embarrassed by police interrogations and confessions. [Thus,] the thinking that underlies much of the support for cases like *Miranda* must be rejected, for these cases reflect a premise that police interrogation is a suspect institution.").

277. See *Miranda v. Arizona*, 384 U.S. 436, 479-81 (1966) ("Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the 'need' for confessions."). Empirical studies show *Miranda* has been applied with limited conviction loss or difficulty to law enforcement. See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 501-03 (1996).

278. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2407 (2011).

279. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971); *In re Gault*, 387 U.S. 1, 15-16 (1967).

280. For a recognition of juveniles as different in psychosocial and brain development, see Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 WASH. & LEE L. REV. 385, 418-19 (2008) ("[E]mpirical studies have shown that adolescents are particularly vulnerable to the classic interrogative techniques of confronting the suspect with false evidence and utilizing other forms of 'trickery.'"), and Patrick M. McMullen,

juvenile his right against self-incrimination is of greater importance than the societal cost of a possible lost confession. While there may be a reduction in confessions after implementation of this parental presence requirement,²⁸¹ this factor improperly equates the goals of the adult criminal justice system with that of the juvenile court.²⁸² Moreover, this argument ignores currently existing public policy in many states for affording additional protections to juveniles not given to adults.²⁸³

New Mexico's approach in *Javier M.*²⁸⁴ of heightened protections for juveniles should serve as a general model for state legislatures in the approach they should take in affording proper protections to juveniles. While New

Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 992 (2005) (“[M]ost psychologists [have] attribut[ed] age-based variance to either cognitive or psychosocial deficiencies.”).

281. There may arise instances where the parent will be too protective of the child, to the detriment of law enforcement, such as “interfering with or sabotaging candid communication” between the juvenile, law enforcement, or even a juvenile’s attorney “in the name of ‘protecting’ the child.” See Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1503 (2009) (citing Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custody Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1307 (2004)). Such circumstances can be cautioned against by law enforcement setting standards, such as allowing the parent to consult with the child before the interrogation, but not allowing the parent/guardian to speak on the child’s behalf during the interrogation until the officer gives the parent/guardian permission to do so. Such a limitation on a wily parent would still give the juvenile his protections of parental presence, but would allow law enforcement to speak to the child if the child and parent consented to the interrogation.

282. See Birkhead, *supra* note 281, at 1483-84 (“Children’s limited knowledge and understanding of the criminal justice system . . . underscores the importance of creating a system that young offenders perceive as fair and impartial. This goal is further supported by empirical evidence suggesting a possible causal connection between procedural justice and lowered recidivism rates for juveniles.”); Lode Walgrave, *Restoration in Youth Justice*, 31 CRIME & JUST. 543, 544 (2004) (“Restorative practices have been inserted in different degrees into most systems of responding to crime, especially youth crime.”).

283. See *In re J.D.B.*, 686 S.E.2d. 135, 140 (N.C. 2009) (Brady, J., dissenting), *rev’d sub nom.* *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

284. *State v. Javier M.*, 33 P.3d 1 (N.M. 2001).

Mexico's standard asks more out of law enforcement,²⁸⁵ it provides needed procedural safeguards for youth. Though the New Mexico approach is a good starting point, in that it extends a warning requirement to traditionally non-custodial questioning, it is still too limited. While the standard requires informing a juvenile being interrogated of his right to remain silent and refuse questioning,²⁸⁶ it does not require the presence of a parent or guardian for younger juveniles, which puts those children at a greater risk of feeling confused or coerced substantially more than they would if they had a parent or guardian's advisement.

B. *Proposal*

To provide a workable, effective method for protecting rights of juveniles, North Carolina and other states must adopt a standard providing for mandatory parental presence, or valid waiver of such presence, in police interrogation of juveniles—regardless of whether the questioning is traditionally considered custodial.²⁸⁷ When a police officer or law enforcement agent wishes to interrogate

285. See Maria E. Touchet, Note, *Investigatory Detention of Juveniles in New Mexico: Providing Greater Protection Than Miranda Rights for Children in the Area of Police Questioning—State of New Mexico v. Javier M.*, 32 N.M. L. REV. 393, 405 (2002) (“A test of whether a child was subject to an investigatory detention requires a subjective inquiry into the mind of law enforcement officers and may prove difficult to analyze in less factually clear cases in the future. Application of Javier’s test would have provided objective proof of the officer’s subjective state of mind, ‘that is, whether he or she suspects that the Child was delinquent.’ Instead, the court applied a test with a strong subjective component that may not prove easy in the practical application of law enforcement.”).

286. See N.M. STAT. ANN. § 32A-2-14 (2010).

287. Authors analyzing juvenile interrogations have proposed different solutions in order to grant additional protections to juveniles confronted with interrogations. One such proposal would mandate counsel’s presence at any police interrogation—custodial and non-custodial. See Ellen Marrus, *Can I Talk Now: Why Miranda Does Not Offer Adolescents Adequate Protections*, 79 TEMP. L. REV. 515, 527-33 (2006). This proposal is unworkable because it would be far too great of a burden on states. Such a proposal would essentially require the state to provide an attorney any time law enforcement questions a juvenile. Another proposal would require parental presence only at custodial interrogations. Robert E. McGuire, Note, *A Proposal to Strengthen Juvenile Miranda Rights: Requiring Parental Presence in Custodial Interrogations*, 53 VAND. L. REV. 1355, 1380-86 (2000). As this Note argues, presence at custodial interrogations is not sufficient to protect juveniles’ rights, such as J.D.B.’s.

a juvenile under the age of eighteen regarding his knowledge or involvement in criminal or delinquent conduct, a parent or legal guardian must be contacted and present at questioning.

If the juvenile is sixteen or seventeen, the parent or legal guardian may give consent for the police to interrogate the juvenile without his or her presence. However, a parent or guardian may only give such consent if the sixteen- or seventeen-year-old juvenile is first (1) informed of the police's desire to question him, (2) the child affirmatively expresses that he does not wish to have his parent or guardian present, and (3) is told that police will be contacting his parents or guardians whether or not he requests their attendance. A parent or guardian shall not be permitted to waive his or her presence if the child is under the age of sixteen nor may the juvenile under sixteen years waive his parents' presence.

In addition, even where a juvenile does not wish his parent or guardian to be present, the juvenile shall not be able to waive his parent or guardian's presence if the parent wishes to attend. If there arises a circumstance where an interrogating officer does not contact the parent to implement the parental requirement or waiver as needed, a per se rule will apply to bar as tainted any incriminating statements that may result from the questioning. This suppression will be true of all interrogations of minors without parent contact—both those over and those under sixteen-years-of age.

North Carolina affords additional rights to juveniles through section 7B-2101 of the General Statutes of North Carolina by making inadmissible an in-custody confession of a child under fourteen if the confession was made in the absence of a parent, guardian, or attorney.²⁸⁸ However, there are two limitations in section 7B-2101 that need to be expanded in order to provide juveniles with adequate protections. First, the current statute invalidates in-custody confessions made outside the presence of a parent, guardian, or attorney for children under fourteen, but does not afford these same protections to children over the age of fourteen.²⁸⁹ Second, North Carolina's current statute limits

288. N.C. GEN. STAT. § 7B-2101(b) (2007).

289. *Id.*

the protections to custodial interrogations.²⁹⁰ Though the *Miranda* custody analysis now requires a consideration of the youth's age, as age may frequently be deemed non-determinative, juveniles must be afforded the additional protection of parental presence during all police interrogations beyond investigatory detentions.

1. *Implementing the Parental Presence Proposal.* The rationale for parental presence at juvenile interrogations by law enforcement is twofold. First, this nation has recognized, through both empirical research²⁹¹ and common law,²⁹² that juveniles will often feel intimidated and coerced during law enforcement interrogations in ways that an adult may not²⁹³—especially when the child is informed he is a suspect or is facing charges.²⁹⁴ Second, having a parent or guardian present levels the playing field for minors.²⁹⁵ An adult would generally help to reduce the level of coercion and would be, in many situations, better able to explain the situation to the child and guard against any coercive tactics.²⁹⁶

290. *Id.*

291. *See, e.g.,* Feld, *supra* note 4, at 52-59; *see also supra* note 3.

292. *See, e.g.,* J.D.B. v. North Carolina, 131 S. Ct. 2394, 2398-99, 2408 (2011); Roper v. Simmons, 543 U.S. 551, 570-71, 578-79 (2005) (recognizing the difference between children and adults by prohibiting the death penalty for juveniles).

293. *See, e.g.,* Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (“Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.”).

294. *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 357 (2003) (“Adolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures . . . when being interrogated by the police . . .”).

295. *See* McGuire, *supra* note 287, at 1382 (“[S]tudies indicate that a child, unaccompanied by an adult advisor or a parent, would not only have serious trouble understanding the warnings as given, but might not be in a position to indicate to police that he does have such trouble.”).

296. *See id.* While there may arise some cases where a parent is difficult to reach or is unable to come to the location of interrogation at the time required, states must work out practical alternatives. This may include an oral promise by the parent or guardian to convene on an alternate date or, in extreme

Distinguishing between those over sixteen and under sixteen years of age is a necessary differentiation. In his dissent, Justice Alito struggled to comprehend how to differentiate between “the average 16-year-old, . . . 15-year-old, or 13-year-old, as the case may be.”²⁹⁷ The majority did not provide a workable test for these “gradations” beyond proposing use of one’s common sense.²⁹⁸ A proposal that incorporates the Court’s acknowledgement that age will not always be relevant, while providing a workable standard that would satisfy the *J.D.B.* dissenters, will provide for a greater ease of application of the consideration of age in the *Miranda* custody analysis. Recognizing that parental presence is a necessary safeguard for juveniles, and one that is even more essential for younger children, this Note’s proposal importantly reflects the “reality” recognized by the Court: that older children, close to the age of majority, may not feel compelled in a law enforcement interrogation while an elementary or middle school aged child may.²⁹⁹

There may be situations where a sixteen- or seventeen-year-old, or the relevant parent or guardian, challenges the validity of the waiver of parental presence, claiming such waiver was not voluntarily and knowingly given. In such a situation, the state should present evidence to show that the waiver was valid in the same way that they would argue for the voluntariness test to show waiver of *Miranda* rights.³⁰⁰ Thus, wherever possible,³⁰¹ the wisest standard practice for police should be to require juvenile and parental waivers in writing.³⁰² Similarly, if a juvenile ever claims he was coerced

circumstances, an appointment of a guardian ad litem until the parent may arrive. It appears unlikely such a dire situation would arise.

297. *J.D.B.*, 131 S. Ct. at 2416 (Alito, J., dissenting).

298. *Id.* at 2407 (majority opinion).

299. *See id.* at 2399.

300. *Miranda v. Arizona*, 384 U.S. 436, 475-76 (1966); *see also* *Brown v. Mississippi*, 297 U.S. 278, 281-82, 287 (1936) (stating that a confession is admissible when it is given voluntarily).

301. Notably, there will be situations where parents choose to agree to their child’s choice for a waiver because they are unable to come to the interrogation in person. In such situations, requiring the written waiver may not be possible or practical.

302. *See Miranda*, 384 U.S. at 475 (“An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver.”).

into saying he did not want a parent present, the voluntariness test could apply to inquire whether the waiver was coerced or whether it was knowing, intelligent, and voluntary.³⁰³

In addition, mandating parental presence for juveniles under sixteen, while permitting a waiver for those aged sixteen and older reflects the understanding that younger children are in need of additional protections due to their lesser life and community experience than some sixteen- and seventeen-year-olds.³⁰⁴ Sixteen is a rational age for this split because of the national recognition that sixteen-year-olds are capable of accepting greater responsibility than those younger than sixteen. All fifty states and the District of Columbia either prosecute children sixteen or older in adult criminal court or allow for a transfer to criminal court at that age.³⁰⁵ Further, there are other significant legal distinctions between sixteen-year-olds and younger children, including compulsory attendance laws, which do not require children to remain in school past age sixteen,³⁰⁶ and minimum age for drivers' licenses or learners' permits.³⁰⁷

303. *Id.*

304. *Yarborough v. Alvarado*, 541 U.S. 652, 669 (O'Connor, J., concurring) ("17 ½-year-olds vary widely in their reactions to police questioning, and many can be expected to behave as adults.").

305. *See* U.S. GEN. ACCOUNTING OFFICE, *JUVENILE JUSTICE: JUVENILES PROCESSED IN CRIMINAL COURT AND CASE DISPOSITIONS 64-88 (1995)*, available at <http://www.gao.gov/archive/1995/gg95170.pdf>. In New York, for example, sixteen- and seventeen-year-olds charged with a criminal act are automatically tried as an adult. *See* N.Y. PENAL LAW § 30.00(1) (McKinney 2009); N.Y. CRIM. PROC. LAW § 180.75(3)(a)-(b) (McKinney 2007); N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2012). Similarly, in North Carolina and Connecticut, a juvenile is an individual under the age of sixteen. *See* CONN. GEN. STAT. § 46b-120 (2011); N.C. GEN. STAT. § 7B-1501(7) (2011).

306. *See, e.g.*, 105 ILL. COMP. STAT. 5/26-1 (Supp. 2011); IND. CODE § 20-33-2-6 (2007); IOWA CODE § 299.1A (2008); KAN. STAT. ANN. § 72-1111 (2009); KY. REV. STAT. ANN. § 159.010 (LexisNexis 2006); MICH. COMP. LAWS § 380.1561(1) (Supp. 2010); N.Y. EDUC. LAW § 3205(1)(a)-(b) (McKinney 2009); N.C. GEN. STAT. § 115C-378(a) (2011); N.D. CENT. CODE § 15.1-20-01(1) (2003); P.R. LAWS ANN. tit. 29, § 450 (2009); VA. CODE ANN. §22.1-254 (2010).

307. Unrestricted drivers' licenses are issued to minors at various ages, ranging from sixteen years to eighteen years of age. *See, e.g.*, KAN. STAT. ANN. § 8-236 (2001) (unrestricted licenses issued at sixteen years of age in Kansas);

This proposal still requires a totality of the circumstances analysis as set forth in *J.D.B. v. North Carolina*. Thus, even with the implementation of this proposal, when a court needs to make a determination as to whether the juvenile was in custody for purposes of receiving *Miranda* warnings—a question that is separate from the proposal here, which does not ask if the child was in custody—the court will need to consider youth in the totality of the circumstances. If a seventeen-year-old youth declines to have a parent present when interrogated by the police, a court can still consider whether his age is determinative in creating a custodial interrogation when analyzing whether the youth should have been read *Miranda* rights.

Parent or guardian presence at interrogations will not act as a significant roadblock for police. Parental presence does not equate to refusal to cooperate with law enforcement nor lost confessions.³⁰⁸ As a child is more subject to the pressures of an interrogation than an adult, specifically in an in-school interrogation, a parent or guardian will generally be more of a “match” for law enforcement and will be better equipped to represent the interests of the juvenile.³⁰⁹ In many cases parental presence would likely provide security and a sense of comfort for the juvenile in an unfamiliar situation, reducing unnecessary coercion or tactics the investigator may otherwise try to use on the juvenile alone.

Parent or guardian presence will not protect the child from coercive interrogation nor lead to waiver of his rights

N.J. STAT. ANN. § 39:3-10 (West 2011) (unrestricted licenses granted at eighteen years of age in New Jersey).

308. *S.A. v. State*, 654 N.E.2d 791, 796-97 (Ind. Ct. App. 1995) (holding child was not in custody when questioned in his school by law enforcement and by his parent); *see also State v. Bogan*, 774 N.W.2d 676, 680-82 (Iowa 2009) (finding custody for juvenile when he was interrogated by law enforcement in the presence of his father where he was not told he was free to leave); *In re A.S.*, 999 A.2d 1136, 1146, 1149-50 (N.J. 2010) (holding a child’s incriminating statements must be suppressed where the child’s mother was present during the interrogation coerced and pressured her daughter to speak).

309. McGuire, *supra* note 287, at 1382 (“[S]tudies indicate that a child, unaccompanied by an adult advisor or a parent, would not only have serious trouble understanding the warnings as given, but might not be in a position to indicate to police that he does have such trouble.”).

in every case.³¹⁰ Certainly there will be situations where a parent or guardian will pressure the youth to cooperate with law enforcement, leading the youth to confess or incriminate himself.³¹¹ Similarly, there will be circumstances where the parent may not understand the interrogation and will not be able to sufficiently aid the juvenile.³¹² Scenarios can be imagined where a parent or guardian does not truly understand the consequences of an incriminating statement—due to the parent's intelligence level, disability, a language barrier, or other circumstance. Even with such possibilities in mind, the average reasonable adult would still be far better at understanding the circumstances of the interrogation than the average juvenile.³¹³

While this Note's proposal does not require the giving of formal *Miranda* warnings at non-custodial interrogations, empirical research on comprehension of *Miranda* warnings reveals that children, in general, are at a great disadvantage in understanding interrogation situations when compared to adults. Widely cited studies on juveniles' ability to comprehend *Miranda* warnings show that juveniles are less capable than adults in understanding police interrogations.³¹⁴ For instance, in one study, when juveniles were asked to explain the definition of *Miranda* terms such as "consult" or "attorney," 20.9% of juveniles, as compared to 42.3% of adults, were able to show an understanding of such terms and over 55% of juveniles, compared to only 23.1% of adults, showed they did not completely understand *Miranda* warnings.³¹⁵ Though adults may have some difficulty with comprehending *Miranda*

310. See Farber, *supra* note 281, at 1293-96 (noting that a conflict is likely to arise where the parent is the victim of the juvenile's alleged offense or has a connection with the victim of the alleged offense whereby the parent may influence the judge, prosecutor, or other authority figure).

311. *In re A.S.*, 999 A.2d at 1146; Transcript of Oral Argument, *supra* note 152, at 16.

312. *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 656-58 (Mass. 1983).

313. See Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1136-43, 1156-59 (1980).

314. *Id.* at 1156-59.

315. See Marrus, *supra* note 287, at 525-26 (discussing Grisso's research to support her argument that juveniles need additional protections during interrogations).

warnings and custodial interrogations in general, it is apparent that children comprehend the situation far less than adults.³¹⁶ While a parent may not fully understand a police interrogation of his or her child,³¹⁷ custodial or otherwise, the parent will likely be in a substantially better position to understand, leaving the child and his rights less vulnerable than they would be without the parental presence.³¹⁸

Rather than mandate a per se rule that all police interrogations of juveniles require *Miranda* warnings, the more workable and objective proposal here would be for the relevant police interrogations³¹⁹ to occur in the presence of the child's parent or guardian. It is important to note that such parental presence would not be required for a mere investigatory detention where police are asking basic, background questions,³²⁰ but when the child is believed to have knowledge relating to a criminal or delinquent act and the questions relate to such knowledge or participation.

316. *Id.*

317. Transcript of Oral Argument, *supra* note 152, at 10 (noting that adults, along with children, will sometimes have difficulty understanding *Miranda* warnings).

318. *See, e.g.*, Marrus, *supra* note 287, at 525-26 (explaining that, while some adults fail to understand their *Miranda* rights, they generally understand them much better than adolescents).

319. The proposal is only for interrogations, not questioning that could be "routine booking questions," which would not require parental presence under this rule. *See* Touchet, *supra* note 285, at 405 ("A test of whether a child was subject to an investigatory detention requires a subjective inquiry into the mind of law enforcement officers and may prove difficult to analyze in less factually clear cases in the future. Application of Javier's test would have provided objective proof of the officer's subjective state of mind, 'that is, whether he or she suspects that the Child was delinquent.' Instead, the court applied a test with a strong subjective component that may not prove easy in the practical application of law enforcement.").

320. Such questions would be considered "general questioning" as they would only cover basic background information and would not seek to find out answers to questions concerning the alleged crime at hand. *See* *Miranda v. Arizona*, 384 U.S. 436, 477 (1966) ("General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding."); *see also* *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990); *United States v. Duarte*, 160 F.3d 80, 82 (1st Cir. 1998) ("[There is an] exception to the *Miranda* rule for questioning that is designed to obtain only routine booking information.").

This proposal is not unworkable. Several state statutes and case law currently afford additional protections to juveniles in the areas of interrogation and criminal proceedings.³²¹ The currently existing laws recognize the need to provide youth with different and additional protections, recognizing the difference between the two groups. For example, New York's statute regarding custodial interrogation of a juvenile allows for considerations of a child's age in the determination of the appropriateness of the length of questioning and the necessity for parental presence.³²² Further, under New York's statute, the police are required to contact the child's parent or guardian as soon as they have taken the child into custody.³²³ West Virginia also takes an even stronger stance in that it does not require a child to be in custody in order to have statements made to law enforcement suppressed if they were not made in the presence of his counsel or his guardian.³²⁴ West Virginia's statute is significant in that it does not require the statements to be made in an interrogation setting.³²⁵ Some states currently require parental presence when the child is subject to custodial interrogation,³²⁶ while others mandate that the child's parent at least be contacted before *any* interrogation or questioning commences.³²⁷

2. *Alternative Proposals.* There exist many differing proposals for providing additional protections to juveniles interrogated by law enforcement regarding their involvement in criminal or delinquent acts. Some authors advocating for additional protections for youth have proposed a per se rule requiring the presence of counsel

321. Brief of Juvenile Law Center, et al., *supra* note 3, at 25.

322. N.Y. FAM. CT. ACT § 305.2(8) (McKinney 2012).

323. *Id.* § 305.2(3).

324. *See* W. VA. CODE § 49-5-2(*l*) (2009).

325. *Id.*

326. *E.g.*, COLO. REV. STAT. § 19-2-511 (2011); KAN. STAT. ANN. § 38-2333 (Supp. 2010); MO. REV. STAT. § 211.059 (2000); OKLA. STAT. tit. 10A, §2-2-301 (2010).

327. *E.g.*, CAL. WELF. & INST. CODE § 627(a) (West 2008); FLA. STAT. § 985.101 (2008); HAW. REV. STAT. § 571-32 (2006); IOWA CODE § 232.19 (2011); MONT. CODE ANN. § 41-5-331 (2010).

regardless of custody.³²⁸ Another has suggested mandatory parental presence only when the youth is in custody.³²⁹ The former suggestion is an unrealistic one. While it ensures the juvenile would likely make the most informed decision, it presumably requires the state to provide an attorney every time an officer wishes to speak to a juvenile. Such a requirement would likely be both costly and burdensome.

Requiring parental or guardian presence at a custodial interrogation is an important requirement and one that is encompassed within this Note's proposal; however, requiring a parent only after it is determined that an interrogation is custodial will not provide sufficient protections to juveniles.³³⁰ There will undoubtedly arise situations like the one present in J.D.B.'s case, where the officer does not believe the interrogation to be custodial, and thus, a parent is not contacted. Under a standard requiring parental presence only during custodial interrogation, the only time a child could be guaranteed parental presence is if he is placed in handcuffs or told he is under arrest.³³¹ Requiring parental presence at interrogation for all law enforcement interrogations beyond the basic background questions provides necessary protections to juveniles while maintaining the prohibition against searching into the officer's mind and rationale.³³²

A third proposal sets forth additions to expand section 7B-2101 of the General Statutes of North Carolina. This proposal comes closest to providing youth with the appropriate level of protection from law enforcement coercion. The proposal would require that a juvenile:

328. See, e.g., Marrus, *supra* note 287, at 528-29 (discussing benefits of per se rule).

329. See McGuire, *supra* note 287, at 1359 (explaining the proposed approach requiring parental notification and presence for custodial interrogations of juveniles).

330. See Cara A. Gardner, *Failing to Serve and Protect: A Proposal for an Amendment to a Juvenile's Right to a Parent, Guardian, or Custodian During a Police Interrogation After State v. Oglesby*, 86 N.C. L. REV. 1685, 1687-88 (2008) (discussing the need for increased juvenile protections).

331. See *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (citing *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

332. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011).

[S]hall be “in-custody” for the purpose of this section when, in light of the totality of the circumstances, a reasonable juvenile of the age and in the position of the juvenile would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way.³³³

This proposal would expand the United States Supreme Court’s holding in *J.D.B. v. North Carolina* by inquiring into the *specific* age of the juvenile and *mandating* that age be determinative, where as *J.D.B.* declines to look into “gradations” of age and says age may or may not be significant.³³⁴ This proposal’s second prong would mandate that any interrogation regarding off-school-grounds criminal acts equate to custodial interrogation when the minor is questioned by police in school.³³⁵ It requires that when a juvenile is “questioned by police in school about a crime having taken place outside of the school [the juvenile] shall be ‘in-custody’”³³⁶ The latter proposal, requiring that all interrogations occurring on school grounds regarding any criminal conduct are deemed a custodial interrogation, would lead to the breakdown of *Miranda* the *J.D.B.* dissent feared. While such a standard would afford far greater protections to youth, in light of the proposal’s first requirement, this school-specific per se rule is superfluous. If the child were to be found in custody under a totality of the circumstances *Miranda* analysis, he should similarly be found in custody if the same circumstances exist during an in-school interrogation. Thus, this proposal is overreaching and erodes *Miranda* further than is necessary to provide adequate protections to juveniles.

3. *Facing Opposition.* This Note’s proposal will not likely face implementation without some strong opposition from some states. The states of Georgia, Louisiana, and Pennsylvania are examples that opponents to this proposal will be sure to have in their arsenal. These three states have adopted alternatives to a strict totality of the circumstances test in the analysis of custody for a juvenile, but reverted back to a true totality of the circumstances test

333. Turner, *supra* note 119, at 712.

334. See *J.D.B.*, 131 S. Ct. at 2406-07.

335. See *id.* at 2405 (discussing “the coercive effect of the schoolhouse setting”).

336. Turner, *supra* note 119, at 712.

not long after.³³⁷ While the tests in these three states are distinguishable from the proposal set forth in this Note, analyzing the concerns these states held in overturning their safeguards may mirror the kind of concerns states may raise when presented with this proposal.

Georgia, Louisiana, and Pennsylvania enacted per se approaches as alternatives to the totality of the circumstances test, and soon after switched back.³³⁸ In Georgia, the court adopted a rule that stated if a parent is not separately advised of the juvenile's right to counsel, incriminating statements that result from the juvenile are excluded.³³⁹ The Georgia Supreme Court disapproved this approach,³⁴⁰ less than ten years after its adoption, without providing much rationale.³⁴¹

Similarly, Louisiana's per se rule required that the juvenile subject to a custodial interrogation have a "meaningful" opportunity to speak with an interested parent, guardian, attorney, or adult who has been fully advised of the juvenile's rights before the juvenile waives his right to remain silent.³⁴² Louisiana reverted to the totality of the circumstances test two decades later, citing to the rigidity of the per se test, but showing a true concern about losing valuable confessions.³⁴³

Finally, Pennsylvania's per se rule had a similar foundation to Louisiana's approach. A juvenile's incriminating statements were invalid unless the juvenile had the opportunity to speak with an interested adult before the custodial interrogation.³⁴⁴ Finding the per se rule

337. See Touchet, *supra* note 285, at 406.

338. *Id.*

339. Freeman v. Wilcox, 167 S.E.2d 163, 166-67 (Ga. Ct. App. 1969).

340. Riley v. State, 226 S.E.2d 922, 926 (Ga. 1976) ("To the extent *Freeman* . . . can be read to require an automatic exclusion, if the parent is not separately advised, it is disapproved.").

341. See David T. Huang, "Less Unequal Footing": State Courts' Per Se Rules for Juvenile Waivers During Interrogations and the Case for Their Implementation, 86 CORNELL L. REV. 437, 457 (2001).

342. State in the Interest of Dino, 359 So. 2d 586, 594 (La. 1978), overruled by State v. Fernandez, 712 So. 2d 485 (La. 1998).

343. *Fernandez*, 712 So. 2d at 487-89.

344. Commonwealth v. McCutchen, 343 A.2d 669, 670 (Pa. 1975), overruled by Commonwealth v. Christmas, 465 A.2d 989 (Pa. 1983).

too restrictive, Pennsylvania soon adopted a rebuttable presumption test that the automatic invalidity of incriminating statement made without the opportunity to speak with an interested adult could be rebutted where the prosecutor could show a knowing, intelligent, voluntary waiver.³⁴⁵ However, the court rejected the presumption standard a year later³⁴⁶ and reinstated a totality of the circumstances test.³⁴⁷

The most substantial difference between the proposal at hand and the per se protections overturned in Georgia, Louisiana, and Pennsylvania is that this Note's approach does not overcome the totality of the circumstances test. It does not require that all interrogations of juveniles are per se custodial or that all confessions or incriminating statements are per se invalid. This proposal echoes the common sense sentiment of the majority of *J.D.B. v. North Carolina* in that it recognizes that a juvenile will not be as well-equipped as an adult to understand interrogations and protect his interests.³⁴⁸ Allowing for an additional layer of protection and allowing for the totality of the circumstances and the voluntariness tests to act as back up provides juveniles with the level of protection necessary to protect them from coercion and confusion. Furthermore, though these three states determined their public policy to surround a focus on confessions rather than additional protections to juveniles, several other states have upheld per se tests and other standards affording an additional layer of protection on top of *Miranda*.³⁴⁹

345. *Christmas*, 465 A.2d at 992, *overruled by* Commonwealth v. Williams, 475 A.2d 1283 (Pa. 1984).

346. *Williams*, 475 A.2d at 1288.

347. *Id.*

348. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011).

349. See Huang, *supra* note 341, at 449-56 (discussing the laws of the states of California, Indiana, Vermont, Massachusetts, and Kansas and their per se rules); see also Penelope Alysse Brobst, Note, *The Court Giveth and the Court Taketh Away: State v. Fernandez—Returning Louisiana's Children to an Adult Standard*, 60 LA. L. REV. 605, 614 & n.81 (2000) (citing to thirteen states that have adopted per se approaches, twelve of which are currently still in effect, with the exception of North Carolina's).

CONCLUSION

J.D.B. was a thirteen-year-old special education student who was subject to interrogation by law enforcement regarding his involvement in criminal conduct.³⁵⁰ J.D.B. was not told he could call his guardian.³⁵¹ J.D.B. was not told he was not under arrest.³⁵² J.D.B. was not told that he was free to leave the interrogation or decline to answer questions until he had already incriminated himself.³⁵³ When the juvenile attempted to share his perspective of the events, his version of the facts was contradicted and he was presented with evidence against him.³⁵⁴ When J.D.B. finally admitted his involvement, police informed him that he may be placed in juvenile detention.³⁵⁵ J.D.B. left the interrogation only after law enforcement permitted him to do so and with the knowledge that police would be meeting him at his home.³⁵⁶

A thirteen-year-old in such a situation would feel that he were under arrest and unable to terminate the interrogation. Justice Alito, in his dissent in *J.D.B. v. North Carolina*, argued that allowing for consideration of J.D.B.'s age would turn the custody determination into a subjective one;³⁵⁷ however, the pre-*J.D.B.* standard the dissent supports is not a reasonable person standard, but a reasonable adult standard. As the high Court has recognized that adults and children have significant physiological and cognitive differences,³⁵⁸ ignoring the child's age in any interrogation could result in a great loss of protection to juveniles.

350. *In re J.D.B.*, 686 S.E.2d 135, 136 (N.C. 2009), *rev'd sub nom.* *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

351. *Id.* at 144 (Brady, J., dissenting).

352. *See id.*

353. *Id.* at 137 (majority opinion).

354. *Id.* at 136.

355. *See id.* at 137.

356. *Id.*

357. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2411-12 (2011) (Alito, J., dissenting).

358. *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005).

North Carolina must now recognize what the United States Supreme Court has acknowledged—that a child undergoing interrogation by law enforcement may feel that he were under arrest or its equivalent, even where an adult would not.³⁵⁹ In acknowledging this accepted differentiation, North Carolina and other states should implement the proposal this Note promotes to safeguard society's vulnerable class. Significantly, had J.D.B.'s guardian been present during his interrogation, this case would likely not be before the Court as his guardian would have likely better protected his rights.³⁶⁰ To safeguard juveniles in interrogations similar to J.D.B.'s, state legislatures need to afford their youth the additional procedural safeguards necessary to protect them from self-incrimination by mandating that their parent or guardian be present at all police interrogations.

359. See *J.D.B.*, 131 S. Ct. at 2403.

360. See Brief for Petitioner, *supra* note 73, at 2. On the day of the larceny, law enforcement spoke with J.D.B.'s grandmother, his legal guardian, who expressed hostility and resistance to the police officer; therefore, there is a chance she would have prevented J.D.B. from speaking with police at all had she been aware of the interrogation that was to occur. *Id.*