Simple Justice: In Re J.D.B. and Custodial Interrogations

Clay Turner
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INTRODUCTION

"You have the right to remain silent." Thus begins a refrain made familiar to Americans through seemingly endless repetition on Law & Order, Cops, and many other popular depictions of police interrogations. In the real world, this ritualistic incantation of rights is much more than a dramatic moment—it is an important protection against police coercion. Indeed, it is a constitutional imperative.1

Miranda v. Arizona2 and the eponymic police warnings which it mandated shield the Fifth Amendment rights of individuals from the vast coercive power of the state.3 At its core, Miranda requires "the use of procedural safeguards effective to secure the privilege against self-incrimination."4 Defining the contours of these procedural safeguards is a task that has troubled judges and scholars alike.5 More basic, however, than the thorny questions of what constitutes a sufficient Miranda warning,6 and how that standard should change in special contexts,7 is the foundational question of when a suspect must be Mirandized.

In December 2009, the Supreme Court of North Carolina took up this question and provided an alarming answer. In In re J.D.B.,8 the court held that a juvenile’s age was irrelevant to the inquiry into whether an interrogation was “custodial” under chapter 7B, section 2101 of the General Statutes of North Carolina,9 which provides for

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3. Id. at 467–73.
4. Id. at 445.
6. See, e.g., Florida v. Powell, 130 S. Ct. 1195, 1203–04 (2010) (examining whether a suspect was adequately apprised of his right to have counsel present during the interview by a warning which informed him of his right to counsel before questioning).
7. North Carolina, for example, has legislatively provided for an enhanced Miranda warning requirement for juveniles. See N.C. GEN. STAT. § 7B-2101 (2009).
an enhanced *Miranda* warning for juveniles.\textsuperscript{10} Perhaps more troubling, the court created, out of whole cloth, a higher bar for finding police interrogations custodial when conducted inside school, as opposed to outside of school.\textsuperscript{11} Together these findings will allow the police to elide the Fifth Amendment and the added protections of section 2101 by conducting in-school interrogations of juveniles about out-of-school crimes. If it stands uncorrected, *In re J.D.B.* will incentivize the targeting of children in our schools to obtain coerced confessions.

This Recent Development contends that in the *In re J.D.B.* majority's search for simple rules—for police and for courts—simple justice for North Carolina's children was lost. Part I sets forth the factual background and the central holding of the *In re J.D.B.* decision. Part II argues that the court erred by refusing to consider age in the *Miranda* in-custody test. Part III contends that the court further erred by creating a wholly new presumption that an in-custody finding for a student at school requires restraint by police of a nature that goes far beyond the inherent restrictions of the school environment. Finally, Part IV proposes two simple amendments to section 2101 which would correct these mistakes. In its entirety, this Recent Development provides an argument for why, in light of *In re J.D.B.*'s harshly restrictive new in-custody test, the General Assembly should amend the North Carolina Juvenile Justice Reform Act of 1998\textsuperscript{12} (the "Juvenile Justice Act") to give section 2101 the renewed force needed to accomplish its important mission.

\section*{I. *In re J.D.B.*}

On September 24, 2005, uniformed and armed police officers escorted J.D.B., a thirteen-year-old seventh grade student at Smith Middle School in Chapel Hill, North Carolina, from his class to a closed conference room where a Chapel Hill Police investigator interrogated him for thirty to forty-five minutes.\textsuperscript{13} The investigator gave J.D.B. neither a *Miranda* warning nor the enhanced warning required under section 2101.\textsuperscript{14} When questioned, J.D.B. at first denied

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\textsuperscript{10} *In re J.D.B.*, 363 N.C. at 671–72, 686 S.E.2d at 139–40.
\textsuperscript{11} See id. at 669–70, 686 S.E.2d at 138.
\textsuperscript{13} *In re J.D.B.*, 363 N.C. at 666–67, 686 S.E.2d at 136–37; id. at 678, 686 S.E.2d at 143 (Brady, J., dissenting).
\textsuperscript{14} Id. at 666, 686 S.E.2d at 136 (majority opinion).
\end{flushleft}
involvement in any criminal activity. At last, under pressure from his assistant principal to “do the right thing,” and after the police investigator informed him that a stolen camera had already been found, J.D.B. asked if he “would still be in trouble if he gave the items back.” Following this exchange, J.D.B. confessed to stealing from two Chapel Hill homes.

J.D.B. was charged with two counts each of breaking and entering and larceny. He filed a motion to suppress the confession. The trial court denied the motion and subsequently adjudicated J.D.B. delinquent. After remanding for further factual findings on the custody issue, a divided panel of the court of appeals affirmed the trial court’s ruling that J.D.B was not in custody and that the confession was admissible. The Supreme Court of North Carolina affirmed the court of appeals finding that J.D.B. was not in “police custody such that the officers should have afforded him the protection of N.C.G.S. § 7B-2101.” The court rested its holding on its reading of a non-precedential United States Supreme Court decision, Yarborough v. Alvarado, as well as on its unsupported contention that a student’s already limited freedom of action at school creates a higher bar for determining that an interrogation is custodial.

II. CONSIDERATION OF A JUVENILE’S AGE IS PROPER UNDER NORTH CAROLINA’S “TOTALITY OF THE CIRCUMSTANCES” TEST

To determine whether an interrogation is custodial, North Carolina employs “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.” The In re J.D.B. majority applied this test for custody as the prerequisite trigger for both the Fifth Amendment’s Miranda protection and the enhanced Miranda protections of section

15. Id.
16. Id.
17. Id. at 670, 686 S.E.2d at 139.
18. Id. at 666, 686 S.E.2d at 137.
19. Id. at 665, 686 S.E.2d at 136.
20. Id.
21. Id.
22. Id. at 664–65, 686 S.E.2d at 135–36.
23. Id. at 665, 686 S.E.2d at 136.
24. 541 U.S. 652 (2004); see discussion infra Part II.
25. See discussion infra Part III.
The analytical roots of this test, as well as the public policy considerations that *Miranda* and its progeny were designed to protect, counsel toward the consideration of age in the test to determine custody. Because the *In re J.D.B.* majority relied so heavily on language from the United States Supreme Court in *Alvarado*, it is useful to turn first to the development of the Supreme Court’s “reasonable person” standard before examining both the unfortunate break from North Carolina law that *In re J.D.B.* represents as well as the negative public policy implications of that decision.

**A. Defining “Custodial” from Miranda to Alvarado**

In the years following *Miranda*, circuits were split over whether the test to determine custody should be subjective or objective. In *Berkemer v. McCarty*, the Court resolved this split and adopted an objective, “reasonable person” test, holding that a “policeman’s unarticulated plan” to not let a suspect leave did not affect “whether [the] suspect was ‘in custody’ ” and that “the only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.” A decade later, in *Thompson v. Keohane*, the Court clarified the test, explaining that “[t]wo 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.”

As a conceptual starting point, it should be noted that age, if it is to be taken into account, may be considered under either part of Keohane’s two part test; it may be viewed as part of “the circumstances surrounding the interrogation” on the one hand, or, on the other, as characteristic of the “reasonable person.” Accordingly, some courts have treated age as a factor in the totality of the circumstances test while leaving the reasonable person standard unmodified. At the same time, the roots of this “reasonable person”

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27. See *In re J.D.B.*, 363 N.C. at 669-72, 686 S.E.2d at 138-40.
30. Id. at 442.
32. Id. at 112.
33. See id.
34. See *infra* notes 52-57 and accompanying text.
standard can be traced back to tort law, which has long recognized the consideration of age through the use of a "modified" reasonable person test.35

In Yarborough v. Alvarado,36 the Supreme Court—ignoring the tort law origins of the reasonable person standard and the mere possibility of including age as an objective fact in the "totality of the circumstances"—suggested that age should not be considered in the objective test for custody under Miranda.37 Five Justices joined the majority opinion and held that a California state court had not "unreasonably applied clearly established law when it held that the respondent was not in custody for Miranda purposes."38 Strictly speaking, the holding in Alvarado was that age did not have to be considered, not that it could not be considered.39 The opinion simply found that failure to consider age was not an "unreasonable application of clearly established law."40 In overturning the Ninth Circuit, the Court reasoned that "the Court of Appeals [had] ignored the argument that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry."41 Without explicitly holding whether age could or could not be considered in the test, the Court simply concluded that California's failure to consider Alvarado's age did not "provide a proper basis for finding that the state court's decision was an unreasonable application of clearly established law."42 Accordingly, as a limited review of a state court's application of established federal case law, Alvarado provides no definitive answer to the question of when, if ever, age should be considered in the determination of whether an interaction was custodial.

37. See id. at 668. But see id. at 673–74 (Breyer, J., dissenting) ("The 'reasonable person' standard does not require a court to pretend that Alvarado was a 35-year-old with aging parents whose middle-aged children do what their parents ask only out of respect. Nor does it say that a court should pretend that Alvarado was the statistically determined 'average person'—a working, married, 35-year-old white female with a high school degree."); id. at 674 ("In this case, Alvarado's youth is an objective circumstance that was known to the police.").
38. Id. at 655 (majority opinion).
39. See id.
40. Id. at 668.
41. Id. (emphasis added).
42. Id.
Further casting doubt on Alvarado's disapproval of the consideration of age in the Miranda custody inquiry, Justice O'Connor, while providing the fifth vote for the bare majority decision, also wrote separately. Justice O'Connor's concurrence somewhat obliquely proclaimed that "[t]here may be cases in which a suspect's age will be relevant to the [Miranda] 'custody' inquiry." Her concurrence focused heavily on the fact that Alvarado was almost eighteen at the time of his questioning. Read in its entirety, Justice O'Connor's concurrence makes clear that she did not intend her deciding vote in Alvarado to create a categorical rule against the consideration of age in the custody inquiry.

B. North Carolina Precedent on the "In Custody" Inquiry

Whatever its meaning, Alvarado is not precedential for an inquiry under section 2101. The In re J.D.B. court was not bound by

43. Id. at 669 (O'Connor, J., concurring).
44. See id. The In re J.D.B. court's leap—from Alvarado's holding that not considering a juvenile's age in the totality of the circumstances was not a clearly erroneous application of federal law to In re J.D.B.'s conclusion that age cannot be appropriately considered in such an inquiry—is the central question presented to the United States Supreme Court in J.D.B.'s recently granted petition for certiorari. See Petition for Writ of Certiorari at i, J.D.B. v. North Carolina, No. 09-11121, 2010 WL 4278709 (U.S. May 28, 2010) (presenting the question of "[w]hether a court may consider a juvenile's age in a Miranda custody analysis in evaluating the totality of the circumstances").
45. See Alvarado, 541 U.S. at 669 (O'Connor, J., concurring). The concurrence in its entirety reads:

I join the opinion of the Court, but write separately to express an additional reason for reversal. There may be cases in which a suspect's age will be relevant to the "custody" inquiry under Miranda v. Arizona. In this case, however, Alvarado was almost 18 years old at the time of his interview. It is difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority. Even when police do know a suspect's age, it may be difficult for them to ascertain what bearing it has on the likelihood that the suspect would feel free to leave. That is especially true here; 17 1/2-year-olds vary widely in their reactions to police questioning, and many can be expected to behave as adults. Given these difficulties, I agree that the state court's decision in this case cannot be called an unreasonable application of federal law simply because it failed explicitly to mention Alvarado's age.

Id. (citations omitted).
46. The In re J.D.B. majority admitted that Alvarado was not controlling because of the procedural nature of its decision, but it failed to note that federal interpretations of Miranda in general do not control the court's interpretation of complementary sections of the Juvenile Justice Code. In re J.D.B., 363 N.C. 664, 672 n.1, 686 S.E.2d 135, 140 n.1 (2009) ("We are aware that Alvarado is not binding on this Court because the Supreme Court of the United States merely held in that case that 'the state court considered the proper factors and reached a reasonable conclusion' and, thus, that an application for a writ of habeas corpus under 28 U.S.C. § 2254(d)(1) should not have been granted.")
federal precedent in interpreting a North Carolina law. Yet despite this freedom, the In re J.D.B. majority latched onto the most logically suspect, widely criticized, and dubiously authoritative language in Alvarado and found that age was a subjective factor not to be accounted for in the reasonable person standard of a custody inquiry. Quoting Alvarado, the court opined:

This Court adheres to the view that “the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect’s individual characteristics—including his age—could be viewed as creating a subjective inquiry.” Under the circumstances of the case sub judice, we decline to extend the test for custody to include consideration of the age and academic standing of an individual subjected to questioning by police.

In adopting this language from Alvarado, In re J.D.B. did in North Carolina what Alvarado could not do in the federal courts: it created a bright line rule against the consideration of a suspect’s age in the test for custody. Without elucidation or support, Alvarado introduced the idea that age was a “subjective” factor not to be examined in the test for custody, and under cover of this dicta, In re J.D.B. made the idea law in North Carolina, without citing North Carolina precedent or providing a coherent rationale for the change.

This bright line rule against the consideration of age is at odds with North Carolina precedent. In In re J.D.B., the Supreme Court of North Carolina, without acknowledging that it was doing so, implicitly overruled its previous holding in State v. Smith that age

(quotting Alvarado, 541 U.S. at 669), cert. granted sub nom. J.D.B. v. North Carolina, 79 U.S.L.W. 3268 (U.S. Nov. 1, 2010). Justice Brady noted this fact in his dissent. Id. at 674, 686 S.E.2d at 141 (Brady, J., dissenting).

47. While neither the majority nor the dissent directly addressed the question, the In re J.D.B. court, while required to provide the minimum protections demanded by the Federal Constitution, was free to interpret North Carolina’s analogue to the Fifth Amendment, article I, section 19 of the state constitution, as well as the Juvenile Justice Act, to provide greater protection than federal law provides. See State ex rel. Martin v. Preston, 325 N.C. 438, 449–50, 385 S.E.2d 473, 479 (1989) (“In construing and applying our laws and the Constitution of North Carolina, this Court is not bound by the decisions of federal courts, including the Supreme Court of the United States.”).


49. See discussion supra Part II.A.

50. In re J.D.B., 363 N.C. at 672, 686 S.E.2d at 140.

51. Id. (footnote omitted) (citations omitted).

was a factor to be considered in the totality of the circumstances test for custody.\textsuperscript{53} \textit{Smith} used a defendant's age as a consideration to determine whether he was in custody under the almost identical predecessor\textsuperscript{54} of current section 2101\textsuperscript{55}:

At no time was defendant told that he was free to leave. In fact, the constant presence of law enforcement officers with firearms would suggest the contrary to a person of defendant's age and experience.

Under these circumstances, we cannot say that a reasonable person in defendant's position would have believed that he was free to go or that his freedom of action was not being deprived in a significant way. Therefore, we conclude that defendant was "in custody" at the time his confession was obtained.

The State contends that the facts of this case are so similar to the facts in \textit{Oregon v. Mathiason} and \textit{State v. Jackson} that those cases should control the decision here. In each of those cases, it was determined that the defendant was not in custody. However, we note that the defendant in each of those cases was \textit{an adult} . . . . Therefore, we do not find these cases controlling.\textsuperscript{56}

\textit{Smith} unmistakably considered age as a relevant factor in the inquiry.\textsuperscript{57} In an obfuscating circumnavigation of this reality, the \textit{In re J.D.B.} majority proclaimed that "[t]his Court has not accounted for such matters in conducting the proper custody inquiry in the past."\textsuperscript{58} The majority implies that \textit{Smith} is not of precedential value because it utilized an articulation of the "reasonable person" custody inquiry that was ruled improper by \textit{State v. Buchanan}\textsuperscript{59} in 2001.

At issue in \textit{Buchanan} was whether

the trial court's inquiry was based on the incorrect standard of whether a reasonable person in defendant's position, under the totality of the circumstances, would have felt "free to leave," rather than whether a reasonable person would have perceived

\begin{thebibliography}{99}
\item \textbf{53.} \textit{See In re J.D.B.}, 363 N.C. at 674, 686 S.E.2d at 140 (Brady, J., dissenting); \textit{Smith}, 317 N.C. at 105, 343 S.E.2d at 520-21.
\item \textbf{55.} \textit{See Smith}, 317 N.C. at 105, 343 S.E.2d at 520-21.
\item \textbf{56.} \textit{Id.} (emphasis added) (citations omitted).
\item \textbf{57.} \textit{See id.} at 104-05, 343 S.E.2d at 520-21.
\item \textbf{58.} \textit{In re J.D.B.}, 363 N.C. at 671, 686 S.E.2d at 139 (emphasis added).
\item \textbf{59.} 353 N.C. 332, 339-40, 543 S.E.2d 823, 828 (2001); \textit{see discussion infra} Part II.C.
\end{thebibliography}
that there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." 60

Buchanan explicitly rejected the articulation of the test that asked whether a reasonable person in the suspect's position would feel "free to leave." 61 In doing so, it disavowed prior cases "[t]o the extent" that they had utilized this standard, declaring:

[t]o the extent that [Smith and other North Carolina cases] have stated or implied that the determination of whether a defendant is "in custody" for Miranda purposes is based on a standard other than the "ultimate inquiry" of whether there is a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest," that language is disavowed. 62

In cleaning up the Miranda custody inquiry, Buchanan did not throw out the baby with the bathwater. That is to say, it did not obliterate all precedential value of every prior case that used the "free to leave" language. Rather, it disavowed the offending language.

Except for its use of the offending "free to leave" language, Smith's articulation of the Miranda custody test remains the law in North Carolina. Smith's description of the custody test as an "objective test" of "whether 'a reasonable person in the suspect's position would believe himself to be in custody or that his freedom of action was deprived in some significant way,'" 63 is practically identical to the test the In re J.D.B. majority adopted. Quoting Buchanan and State v. Greene, the In re J.D.B. majority noted that

"the definitive [custody] inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." This inquiry requires application of "an objective test as to whether a reasonable person in the position of the defendant would believe himself to

60. Buchanan, 353 N.C. at 336, 543 S.E.2d at 826 (quoting State v. Gaines, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997)).
61. Id. at 340, 543 S.E.2d at 828.
62. Id. (citation omitted) (quoting State v. Gaines, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997)).
be in custody or that he had been deprived of his freedom of action in some significant way."\textsuperscript{64}

It is not hard to imagine why the majority was less than forthright about its evasion of the \textit{Smith} precedent. The hidden hairsplitting\textsuperscript{65} by the majority was not, as the opinion intimates,\textsuperscript{66} between an objective "reasonable person" test and something else, but between two objective "reasonable person" tests—one of which used the phrase "free to leave."\textsuperscript{67} As Justice Brady stated flatly in dissent, "this Court has found it appropriate to consider the subject's age under the \textit{reasonable person standard} of the \textit{Miranda} 'in custody' analysis."\textsuperscript{68} The next section outlines how the distinction drawn by the majority to avoid \textit{Smith}'s clear precedent is a logically vacuous one.

\textbf{C. The Twin Tests for "Custody" and "Seizure" in North Carolina}

Beyond ignoring—or perhaps, in order to ignore—the court's analysis in \textit{Smith}, the \textit{In re J.D.B.} majority disregarded the logical chasm it was creating by no longer allowing age to be considered in the custody test but still allowing age to be considered in the seizure analysis. As outlined below, the reasonable person tests for Fourth Amendment seizure and Fifth Amendment custody inquiries are


\textsuperscript{65} The majority had set the stage for this hidden hairsplitting earlier in the opinion:

Notably, the inquiry as to "whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest," is not equivalent to the broader "free to leave" test that "has long been used for determining, under the Fourth Amendment, whether a person has been \textit{seized}.''

\textit{Id.} (citations omitted).

\textsuperscript{66} The majority opinion juxtaposes its recent use of the "objective 'reasonable person' standard" with its contention that it has not taken a suspect’s age into account when "conducting the proper custody" analysis:

This Court has not accounted for such matters in conducting the proper custody inquiry in the past. In the recent case of \textit{In re W.R.}, for example, we considered whether the questioning of a fourteen-year-old juvenile was custodial in nature. In reversing the Court of Appeals' holding that the juvenile was in custody, we applied the objective "reasonable person" standard, and at no point did we consider the juvenile's age.

\textit{Id.} at 671, 686 S.E.2d at 139 (emphasis added) (citations omitted).

\textsuperscript{67} \textit{Smith}, 317 N.C. at 104, 343 S.E.2d at 520. In fact, \textit{Smith} did not use the "free to leave language" in its sentence articulating the reasonable person test but included the language in a subsequent sentence rearticulating the test. See \textit{id.}

\textsuperscript{68} \textit{In re J.D.B.}, 363 N.C. at 674, 686 S.E.2d at 141 (Brady, J., dissenting) (emphasis added).
intimately linked both analytically and historically. Because the tests are essentially the same, there is no logical reason for considering age in one context and ignoring it in the other, but that is the position in which In re J.D.B.'s reversal of Smith leaves North Carolina law.69

Before State v. Buchanan was decided in 2001, North Carolina had long used the same test for both Fourth Amendment seizure analysis and Fifth Amendment in-custody analysis.70 The adoption of this “free to leave” standard predates the court’s decision that the test for custody should be objective. In the 1979 decision State v. Perry,71 the Supreme Court of North Carolina (reacting to a national debate) explored, without explicitly deciding, the issue of whether this test [for custody] should be objectively applied and involve determining whether a reasonable person would believe under the circumstances that he was free to leave, or whether it should be subjectively applied and involve determining whether the defendant believed, even unreasonably, that his freedom of movement was significantly restricted.72

Following Perry, the court explicitly adopted an objective test in State v. Davis.73 Tellingly, Davis cited United States v. Mendenhall,74 the landmark Fourth Amendment case, to support its adoption of an objective test for the Fifth Amendment custody inquiry under Miranda.75 Smith continued using this objective reasonable person

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69. Compare In re I.R.T., 184 N.C. App. 579, 584, 647 S.E.2d 129, 134 (2007) (finding age to be a relevant consideration in the Fourth Amendment seizure analysis), with In re J.D.B., 363 N.C. at 672, 686 S.E.2d at 140 (holding that age cannot be considered in the Fifth Amendment in-custody analysis).

70. See, e.g., State v. Davis, 305 N.C. 400, 410, 419, 290 S.E.2d 574, 580–81, 586 (1982) (using the same test and facts to determine both a Miranda inquiry issue and a Fourth Amendment seizure question).


72. Id. at 506–07, 259 S.E.2d at 499 (emphasis added).

73. Davis, 305 N.C. at 410, 290 S.E.2d at 580–81.

74. 446 U.S. 544 (1980).

75. Davis, 305 N.C. at 410, 290 S.E.2d at 580–81. Recognizing that both inquiries used the same test, Davis cited directly to Mendenhall's newly articulated reasonable person standard since the United States Supreme Court had not yet explicitly adopted that standard in a Miranda situation. Id. For this standard's later adoption by the United States Supreme Court, see Thompson v. Keohane, 516 U.S. 99, 112 (1995) (“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.”); Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (“A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.”). Thus, Davis adopted the following custody inquiry from the Fourth Amendment seizure test in Mendenhall:
seizure/custody test and included age as a factor in the test.\textsuperscript{76} It was not until 2001 that the Supreme Court of North Carolina changed course in \textit{State v. Buchanan} and declared that “free to leave” was not the appropriate test for a \textit{Miranda} custody inquiry.\textsuperscript{77} In \textit{Buchanan}, the court differentiated the two inquiries, noting that the custody test “requires circumstances which go beyond those supporting a finding of temporary seizure and create an objectively reasonable belief that one is actually or ostensibly ‘in custody.’”\textsuperscript{78}

The \textit{In re J.D.B.} majority correctly noted that, after \textit{Buchanan}, the test for custody is distinct from the “free to leave” test still utilized to determine Fourth Amendment seizures.\textsuperscript{79} Nevertheless, as the court’s own multi-decade collapsing of the tests would indicate, they are analytically very similar beasts. Both tests gauge the same basic occurrence—police restraint of an individual’s freedom. Both are “objective” tests that look toward the totality of the circumstances.\textsuperscript{80} Both tests ultimately ask how a “reasonable person” would feel in those circumstances.\textsuperscript{81} The essential distinction between the two tests


\textsuperscript{78}Id. at 339, 543 S.E.2d at 828 (citations omitted).


\textsuperscript{81}Compare \textit{In re J.D.B.}, 363 N.C. at 669, 686 S.E.2d at 138 (performing Fifth Amendment custody analysis), with \textit{Freeman}, 307 N.C. at 360, 298 S.E.2d at 333 (performing Fourth Amendment seizure analysis). \textit{Freeman} articulated the following test for Fourth Amendment seizures:


\begin{quote}
Neither the subjective beliefs of law enforcement officers nor those of a defendant with regard to whether the defendant is free to leave at will are dispositive of the question of whether he has been seized within the meaning of
\end{quote}
is that the "reasonable person" is, in one instance, asked whether he believes himself "free to go" and, in the other, whether he believes "himself to be in custody or that he had been deprived of his freedom of action in some significant way."82 In light of this reality, there is no logical reason for considering age in one of these tests but not the other.

Yet that is precisely the situation that In re J.D.B. created in North Carolina. While not completely settled law, the Fourth Amendment seizure test has generally allowed for the consideration of a juvenile's age.83 In Kaupp v. Texas,84 a unanimous United States Supreme Court included the suspect's age in its examination of the totality of the circumstances surrounding the illegal seizure of the defendant.85 While the Supreme Court of North Carolina has not ruled on the question, the North Carolina Court of Appeals, in In re I.R.T.,86 noted the similarity to the Fifth Amendment context and explicitly held that age is a relevant factor in the seizure test:

A defendant's age has been used to determine whether he was in custody,87 but the test to determine custody is not identical to the test to determine whether a seizure has occurred. That said, we see no legal or common sense reason to make a distinction. Thus, we hold that the age of a juvenile is a relevant factor in

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85. See id. at 631. The court wrote:

A 17-year-old boy was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated "we need to go and talk." He was taken out in handcuffs, without shoes, dressed only in his underwear in January, placed in a patrol car, driven to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned.

Id.
87. While the Court of Appeals of North Carolina gave no citation for this proposition, the obvious case intended is State v. Smith, 317 N.C. 100, 104–05, 343 S.E.2d 518, 520 (1986), abrogated in part by State v. Buchanan, 353 N.C. 332, 340, 543 S.E.2d 823, 828. See supra text accompanying notes 52–68.
determining whether a seizure has occurred within the meaning of the Fourth Amendment.88

In re I.R.T. is the law in North Carolina unless and until the United States Supreme Court or the Supreme Court of North Carolina overrules it. While it is hard to predict how the state’s supreme court would rule on the issue in light of the holding in In re J.D.B., the United States Supreme Court does not appear poised to apply its controversial suggestion in Alvarado to the Fourth Amendment context.89 Both In re J.D.B.’s prohibition on considering age in the reasonable person standard for custody determinations and In re I.R.T.’s age-sensitive reasonable person test for determining Fourth Amendment seizures remain good law in North Carolina. No logical reason or public policy consideration supports this divide.

D. Public Policy Goals Support the Consideration of Age in the “In-Custody” Test

In re J.D.B. stands in opposition to the widely shared public policy judgment that, in many situations, age matters. The generally held societal belief that children differ from adults, and therefore require differential treatment in some contexts, has found expression in our laws.90 In North Carolina, one prominent example of this phenomenon is the Juvenile Justice Act.91 Further, North Carolina’s recognition of the legal salience of age reflects a deeply-rooted principle in American law which further counsels against use of the age-insensitive test promulgated by In re J.D.B.

In re J.D.B.’s failure to consider age as a relevant circumstance in the in-custody determination runs contrary to the animating principles behind the Juvenile Justice Act. The people of North Carolina, through their elected legislators, have repeatedly endorsed the view that children should be given enhanced Miranda warnings.92

88. In re I.R.T., 184 N.C. App. at 584, 647 S.E.2d at 134 (citations omitted).

89. In a ruling recently denied certiorari by the United States Supreme Court, the Supreme Court of Illinois declared that “[w]hen assessing whether a juvenile was seized for purposes of the fourth amendment, we modify the . . . reasonable person standard to consider whether a reasonable juvenile would have thought that his freedom of movement was restricted.” People v. Lopez, 892 N.E.2d 1047, 1061 (Ill. 2008) (emphasis added), cert. denied, 129 S. Ct. 998 (2009).


As Justice Brady reasoned in dissent, it is only "logical that age should be considered as part of the reasonable person standard in a custody analysis under N.C.G.S. § 7B-2101." In passing section 7B-2101, the General Assembly expressed a policy judgment that the unique vulnerabilities of children should be taken into account in the level of procedural protection against self-incrimination that juveniles receive. In re J.D.B. assumes, without explaining, that the General Assembly created a separate, enhanced Miranda law for juveniles, but it intended that the custodial determination—the sole gateway to enjoy these protections—be an adult standard. In this light, it is hard to miss the bitter irony of the majority's stark refusal to consider J.D.B.'s juvenile status in applying the foundational test used to judge whether his rights under the statute were triggered. As Justice Brady wrote: "[t]he entire Code was created to ensure unique services for juveniles because of the special circumstances inherent in their youth; to ignore age when interpreting any section of the Juvenile Code defies common sense and the very purpose of the Code." 

Similarly, courts have long recognized, under the voluntariness inquiry, the unique vulnerabilities of children during police questioning. In Haley v. Ohio, a 1946 decision, the Supreme Court held that the interrogation of a fifteen-year-old boy violated the Due Process Clause of the Fourteenth Amendment. Referring to the juvenile as "a mere child—an easy victim of the law," the Court concluded of his lengthy interrogation, "we cannot believe that a lad of tender years is a match for the police in such a contest." Stressing the common sense conclusion that age matters during coercive police questioning, the Court reasoned, "15 is a tender and difficult age for a boy of any race. He 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." In Gallegos v. Colorado, the Court elaborated on this theme, noting that to disregard the "youth and immaturity of the petitioner" would "be in callous disregard of this boy's constitutional rights." Because of the juvenile's "unequal footing with his interrogators," the Court
reasoned, an unaided "14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had." In light of this belief, the Gallegos Court concluded that to "allow this conviction to stand would, in effect, be to treat [the juvenile] as if he had no constitutional rights."

This central concern—the danger that disregarding the reality of a juvenile's age will effectively deny him his constitutional rights—is equally present in today's custodial interrogation determinations. *Miranda* ’s safeguards are utterly denied unless they are triggered by a finding that the suspect was "in custody." If age is not taken into consideration for this foundational inquiry, all *Miranda* protections may well be lost. It is of little consolation for the child whose age is disregarded by a court and is therefore found not to be in custody (and thus to have no *Miranda* rights at all) that, had he been found to have been in custody, his age *would* have been a factor in examining whether he had made an effective waiver of his now triggered *Miranda* rights.

Both common sense and modern science support the Court's observations about the special vulnerability of juveniles to police coercion as a result of children's immature decision making capabilities and of the extreme power differential in play when the police question a juvenile. Importantly, the frontal lobe, which is critical to making rational decisions based on long-term outcomes,

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101. Id.
102. Id. at 54–55.
104. Id. at 672, 686 S.E.2d at 140 (declining to consider J.D.B.'s age in the "in custody" determination and subsequently finding that J.D.B. was not in custody and thus "was not entitled to the protections of N.C.G.S. § 7B-2101(a) and *Miranda v. Arizona*.")
105. See Fare v. Michael C., 442 U.S. 707, 725 (1979) (holding that age is a factor for consideration in determining whether an intelligent waiver of rights has been made); In re J.D.B., 363 N.C. at 671, 686 S.E.2d at 140; State v. Fincher, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983) (holding that age is a factor for consideration in determining whether an intelligent waiver of rights has been made).
is among the last areas of the brain to develop in humans. At the same time, in interactions with the police, “juveniles’ relative emotional immaturity and dependence upon adults renders them more vulnerable to pressure and to suggestion.” Additionally, juveniles frequently hold the erroneous belief that cooperating completely with police will help end the questioning quickly and will provide the most beneficial outcome for themselves and their families.

Clear public policy goals, as well as the fundamental principles of the Juvenile Justice Act, are well served by the consideration of age as a factor in the totality of the circumstances test for custody. In opposition to these interests—if we are to believe the In re J.D.B. and Alvarado majorities—is the need for simplicity. Simplicity is promoted, in the first instance, by the courts giving police “‘clear guidance’” and “ensuring that [they] do not need ‘to make guesses as to [the circumstances] at issue before deciding how they may interrogate the suspect.’” Similarly, simplicity is fostered by the courts in the form of an “objective test” that “furthers ‘the clarity of [Miranda’s] rule.’” On a basic level, not taking into account a juvenile’s age simplifies the decision-making tasks of both judges and the police—a desirable outcome, no doubt. Yet this line of argument, reducto ad absurdum, finds increasing simplicity as the decision-maker accounts for less and less in the analysis until—at the sublime endpoint—absolute simplicity is achieved through the analysis of nothing.

This reducto ad absurdum exposes the central fallacies of the simplicity argument: justice requires that facts be taken into account, and at some point, the refusal to consider relevant circumstances (or, in the extreme example, anything at all) results in a grave miscarriage of justice. As desirable as providing simplicity and clarity for police and judges alike may be, it is not the primary aim of the law. Thus,

110. Id. at 31.
113. Id. (alterations in original) (quoting Berkemer v. McCarty, 468 U.S. 420, 430 (1984)).
the appropriate inquiry for a court in choosing what information to include or ignore in its analysis is to first examine what information needs to be considered to justly give effect to the law. In the case of *Miranda* and section 2101, the overriding purpose of the law is to safeguard the individual's right to avoid self-incrimination against the coercive power of the police. These procedural safeguards are triggered whenever an "in-custody interrogation," with its "inherently compelling pressures," occurs. In *In re J.D.B.*, the court was charged with determining whether J.D.B. was in custody. In answering this question, the court's analysis— that is to say the in-custody test they employed—should have taken into account all those factors necessary to justly resolve the issue. The public policy considerations outlined above suggest that J.D.B.'s age was one such factor. In such a situation, the benefits of increased simplicity in the administration of the law should not override the necessity of considering those factors required for the just administration of the law.

In the aftermath of the *Alvarado* decision, critics have written copiously about the arguments for considering age in the custody test, but there is, perhaps not unsurprisingly, a dearth of scholarly writing making policy arguments to support ignoring age in the test. One recent commentator has, however, advanced an in-depth policy argument against the use of age as a factor in the Fourth Amendment seizure context under the rule in *In re I.R.T.* He claims that "subjectifying the seizure inquiry" and "imposing differential

114. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) ("We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.").
115. *Id.*
116. See discussion *supra* Part II.D.
standards . . . to account for age”119: (1) “exponentially increases the circumstances in which a police-juvenile encounter will be deemed a seizure”;120 (2) “fosters uncertainty by forcing police to guess when their conduct is reasonable under the Fourth Amendment thereby frustrating police investigatory techniques essential to effective deterrence of crime”;121 and (3) “establishes a slippery slope precedent that encourages overreaching by judges to incorporate other individual variations into the seizure analysis that risk rendering the test meaningless as a gauge of proper police conduct and ineffective as a check on abusive police behavior.”122 At least in the Miranda context, these contentions lack merit.

Argument (1) rests on the premise that such an increase would be a bad thing. It is equally true to say that not using a differential standard for age “exponentially” decreases the situations in which a juvenile would be deemed in custody. In any event, the extreme negative repercussions of having police more frequently give enhanced Miranda warnings to juveniles are hard to imagine. Perhaps more children may ask for their parents, “lawyer up,” or otherwise more effectively assert their right to avoid self-incrimination, but of course, that is precisely the point.

Argument (2) is another example of the simplicity argument advanced by Alvarado and In re J.D.B. that is examined above. It should be noted that, whatever its dubious merits in the larger set of Miranda cases, it has no force for the inquiry in In re J.D.B. First, it has no merit because, in point of fact, the investigator questioning J.D.B. did not need to do any guesswork in determining the juvenile status of a seventh grader he had removed from class.125 Second, and

119. Id. at 1422.
120. Id.
121. Id.
122. Id.
123. Justice Brady pointedly noted this fact in his dissent:

Here, the difficulty of guessing defendant’s age is nonexistent. Investigator DiCostanzo sought out J.D.B. at a middle school, where he knew J.D.B. was a seventh-grade student. All seventh graders are juveniles, roughly between the ages of twelve and fourteen, and as Investigator DiCostanzo testified, he was able to obtain J.D.B.’s exact age from school records. Therefore, defendant’s “frailty”—his youth—was evident from the very location Investigator DiCostanzo selected to conduct the interrogation. Additionally, Investigator DiCostanzo was a juvenile investigator with the Chapel Hill Police Department, specially trained in dealing with juveniles and educated in laws concerning their rights.

more broadly, it has no merit because the North Carolina General Assembly has already imposed the burden of determining juvenile status on police by adopting section 2101.124

Argument (3) ignores the unique legal salience of age.125 Smith's consideration of age in the custody inquiry did not lead to a rash of judicial activism seeking “individual variations” among people in the test. Moreover, in the context of section 2101, the slippery slope argument is particularly inapt. The legislature has singled out age as an important consideration in the Miranda context; there is little reason to think that the courts would arbitrarily expand into consideration of other factors.

On balance, public policy concerns strongly support including age as a factor in the in-custody test. The widely subscribed belief that children are different, and that these differences merit differential treatment for juveniles and adults, has supported the legal salience of age in many other contexts.126 The already dubious public policy arguments against differential treatment by age in the Miranda custody context lose all force when juxtaposed with the General Assembly's judgment expressed in section 2101 that age does matter in the Miranda context.

III. CHILDREN AT SCHOOL NEED HEIGHTENED, NOT LOWERED, PROTECTION AGAINST COERCION BY THE POLICE

Beyond mandating an age-insensitive test for determining custody under section 2101, In re J.D.B. drew a logically fallacious and ultimately harmful distinction between questioning that takes place within school and that which takes place outside of school. The perverse effect of this distinction is to actually require a greater restraint on freedom to find a student in custody than an adult. This distinction cannot be justified by prior case law and, contrary to

124. Indeed, under section 2101, police not only have to differentiate between juveniles and adults but also between those under fourteen and those over. See N.C. GEN. STAT. § 7B-2101(a)-(b) (2009).

125. See Roper v. Simmons, 543 U.S. 551, 571–74 (2005) (relying on the developmental differences between adolescents and adults to create a per se rule that execution of a defendant who was under eighteen years old at the time of the crime violates the Eighth Amendment).

126. The law has historically recognized the difference between juveniles and adults in two key ways: first, by “compensating for youthful vulnerability,” often in a paresns patria (parent substitute) role; and, second, by recognizing constitutional protections for children often “not commensurate with those of adults.” PAUL R. KFOURY, CHILDREN BEFORE THE COURT: REFLECTIONS ON LEGAL ISSUES AFFECTING MINORS 107 (Butterworth Legal Publishers 1991) (1987).
important public policy concerns, creates a dangerous incentive for police to target children for interrogation at school.

A. In re J.D.B.'s Dismissal of the School Environment's Inherent Restraint on Freedom as Not Only Insignificant but as Actually Raising the Threshold at Which an Interaction Becomes Custodial Runs Contrary to Logic and Established Law

Restraint on student freedom while at school is a pedagogical necessity and, thus, a reality. The In re J.D.B. majority, recognizing that students in school are to some degree already in custody of the state, observed that "[t]he uniquely structured nature of the school environment inherently deprives students of some freedom of action." With a perfunctory dismissal, the majority's next two sentences discounted any "typical" restriction on a student's freedom as immaterial to the custody determination:

However, the typical restrictions of the school setting apply to all students and do not constitute a "significant deprivation of freedom of action" under the test set forth in Greene. For a student in the school setting to be deemed in custody, law enforcement must subject the student to "restraint on freedom of movement" that goes well beyond the limitations that are characteristic of the school environment in general.

Without providing any support for the notion, the majority introduces here a whole new tenet to the in-custody test—a minimum bar for finding a suspect in custody at school. This new minimum bar requires that police curtail a student's freedom "well beyond the limitations that are characteristic of the school environment in general" before a student can be found in custody. Such an addition to the custody test is illogical. The established custody test, as the majority notes, queries "whether a reasonable person in the position

128. Id. at 669-70, 686 S.E.2d at 138 (citation omitted).
129. Id. at 670, 686 S.E.2d at 138.
130. As Justice Hudson lamented in her dissent:

I fear that the majority here actually affords juveniles less protection when questioned by law enforcement officers at school, as compared to elsewhere. In my opinion, in the school environment, where juveniles are faced with a variety of negative consequences—including potential criminal charges—for refusing to comply with the requests or commands of authority figures, the circumstances are inherently more coercive and require more, not less, careful protection of the rights of the juvenile.

Id. at 683, 686 S.E.2d at 147 (Hudson, J., dissenting).
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.\textsuperscript{131} The only way that the majority's new minimum bar can be incorporated into this test is by making the dubious assumption that a "reasonable person" in school (that is, the "position of the defendant") would only believe himself "to be in custody" or "deprived of his freedom of action in some significant way"\textsuperscript{132} when the restraint on freedom imposed upon him by the police "goes well beyond the limitations that are characteristic of the school environment in general."\textsuperscript{133} Such an assumption strains credulity.

The \textit{In re J.D.B.} majority's modification of the custody test can be viewed as providing two rules: (1) that the inherent restraint on student freedom in the school context does not count toward the restraint on freedom relevant in determining custody and (2) that non-pedagogical restraint on freedom by the police must rise to a much higher level than this inherent restraint on freedom before it can form the basis for a finding of custody. Each of these rules is fatally flawed.

First, in the \textit{Miranda} context, the custody inquiry does not distinguish between the reasons that a suspect's freedom is curtailed by the state. Restraint of an individual's freedom—even when for a legitimate purpose that is unrelated to the reason for the questioning—still counts as restraint. For example, in \textit{Mathis v. United States},\textsuperscript{134} the United States Supreme Court found that a prisoner was in custody for \textit{Miranda} purposes despite the fact that he "had not been put in jail by the officers questioning him, but was there for an entirely separate offense."\textsuperscript{135} In that case, the Court declared:

\begin{quote}
The Government . . . seeks to narrow the scope of the \textit{Miranda} holding by making it applicable only to questioning one who is "in custody" in connection with the very case under investigation. There is no substance to such a distinction, and in effect it goes against the whole purpose of the \textit{Miranda} decision which was designed to give meaningful protection to Fifth Amendment rights. We find nothing in the \textit{Miranda} opinion which calls for a curtailment of the warnings to be given
\end{quote}

\footnotesize

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{In re J.D.B.}, 363 N.C. at 670, 686 S.E.2d at 138.

\textsuperscript{134} 391 U.S. 1 (1968).

\textsuperscript{135} \textit{Id.} at 4.
persons under interrogation by officers based on the reason why the person is in custody.\textsuperscript{136} In \textit{Mathis}, the restraint on the suspect’s freedom was completely unrelated to his questioning by authorities. That is to say, the 	extit{custodial} element of the “custodial interrogation” in \textit{Mathis} was provided by the prison setting rather than by the (non-criminal) Internal Revenue agent who interviewed Mathis. In \textit{In re J.D.B.}, on the other hand, the suspect’s freedom was restrained both by the school setting and by the actions of the police investigator.\textsuperscript{137} Yet, rather than counting the unrelated custodial nature of the setting toward the in-custody threshold as the \textit{Mathis} court did, the \textit{In re J.D.B.} majority subtracted it by claiming that an in-custody finding is only appropriate when police restraint “goes well beyond the limitations that are characteristic of the school environment in general.”\textsuperscript{138} The incongruent result is that if the Internal Revenue agent in \textit{Mathis} had questioned Mathis outside of prison, the questioning would not have been custodial. However, if the police investigator in \textit{In re J.D.B.} had questioned J.D.B. outside of school, the \textit{In re J.D.B.’s} majority’s analysis would counsel toward just the opposite result—that J.D.B. was now indeed in custody.

The \textit{In re J.D.B} majority’s underlying assumption in discounting, rather than counting, the custodial nature of school in the in-custody inquiry appears to be a belief that “the typical restrictions of the school setting apply to all students and do not constitute a ‘significant’ deprivation of freedom of action.”\textsuperscript{139} Two separate contentions—both untenable—about why such restrictions should be discounted can be parsed from this statement: first, that the restrictions are “typical,” and, second, that they are applied across the whole group (“all students”). Of course, for a prisoner, the restraints of incarceration are both “typical” and apply to all prisoners, yet, as the Court noted in \textit{Mathis}, “the whole purpose of the \textit{Miranda} decision” demands that such unrelated restraints on freedom be taken into account in determining custody.\textsuperscript{140}

Furthermore, the assertion made by the \textit{In re J.D.B.} majority that, not only should the school environment’s unrelated restraint on freedom be ignored, but that it should instead provide a minimum bar

\textsuperscript{136} Id. at 4–5.
\textsuperscript{137} \textit{In re J.D.B.}, 363 N.C. at 677–78, 686 S.E.2d at 143–44 (Brady, J., dissenting).
\textsuperscript{138} Id. at 670, 686 S.E.2d at 138 (majority opinion).
\textsuperscript{139} Id. at 669, 686 S.E.2d at 138 (emphasis added).
\textsuperscript{140} \textit{Mathis}, 391 U.S. at 4.
that police restraint on the student's freedom must surpass before custody is found fails even assuming, arguendo, that unrelated restraints on freedom by the state should be ignored in the test. This is to say that there is no logical reason for creating a heightened baseline, based on the inherent curtailment of freedom in school, for judging police restraint of a suspect's freedom. The fact that a student's freedom of movement is curtailed while sitting in class does not lessen the curtailment of freedom he experiences at the hands of police. While being questioned by police, a reasonable person would not believe himself to be any less "in custody" or "deprived of his freedom of action in some significant way" merely because the questioning was taking place in school (an environment where restrictions on freedom abound). In other words, only an unreasonable person would harbor such an irrational belief, yet, implicitly, this is the very belief that the majority ascribes to the reasonable person. After the majority's tinkering with the custody test in the school context, the erstwhile "reasonable person" now fancies himself "in custody" or "deprived of his freedom of action in some significant way" only when the police restrain his freedom "well beyond the limitations that are characteristic of the school environment in general."

B. Sound Public Policy Counsels Against In re J.D.B.'s Dismissal of the School Environment's Inherent Restraint on Freedom as Not Only Insignificant but as Actually Raising the Threshold at Which an Interaction Becomes Custodial

Beyond its serious legal shortcomings, the majority's in-school/out-of-school distinction will have unintended public policy implications. Chief among these is the creation of a perverse incentive for police to interrogate children at school in order to avoid having to provide the procedural protections of section 2101. The resulting failure to provide section 2101's protections to many students will undermine the public policy goals sought to be advanced by the statute. At the same time, police targeting of children at school will interfere with schools' core pedagogical missions.

Even without providing a reprieve from the protections of section 2101, schools are already an attractive venue for a police

142. Id.
investigator seeking a psychological edge over a suspect during interrogation. As Justice Hudson noted in dissent, quoting a recent commentator:

Questioning the student at school, the officer not only takes advantage of the student's compulsory presence at school and the background norm of submission to authority, but also chooses to interact with the student at a time when the student will not be in the presence of a parent, the figure most likely to have the inclination or ability to either arrange for the presence of counsel or to advise the youth to refuse to answer the officer's questions.  

Such was clearly the situation in In re J.D.B. In his dissent, Justice Brady observed that "[l]aw enforcement in the instant case took advantage of the middle school's restrictive environment and its psychological effect by choosing to interrogate J.D.B. there, instead of at his home or in any other public, more neutral location." forces.  

This incentive to target children for interrogation at school increases exponentially when coupled with the knowledge that the trigger for granting Miranda rights is much heavier in the schoolhouse. In her dissenting opinion in In re J.D.B., Justice Hudson was "particularly concerned about creating an incentive for an investigating police officer to enter a middle school to question a juvenile about crimes that may have occurred away from school grounds and to take advantage of the more restrictive school atmosphere without providing the protections of [section 2101]." Nevertheless, under the majority's rule, the extreme psychological advantages held by the police over a juvenile can now be exploited in the schoolhouse in a large number of cases, In re J.D.B. included, without triggering the very enhanced juvenile protections of section 2101 designed to protect children from such psychological overpowering.

Perhaps the most compelling argument for treating in-school interrogations differently than outside-of-school interrogations is the unique imperatives of the school environment, where student rights must often be balanced against overarching pedagogical concerns. This balancing sometimes leads to serious curtailment of student

145. In re J.D.B., 363 N.C. at 677, 686 S.E.2d at 143 (Brady, J., dissenting).
146. Id. at 683–84, 686 S.E.2d at 147 (Hudson, J., dissenting).
rights at school. Why not impose a higher bar for an in-custody finding at school? While such reasoning might apply in situations that are beyond the scope of this Recent Development, it has no merit in the situation at issue in In re J.D.B.

While in a broad sense, "in-school" interrogations might include a wide variety of scenarios with variables such as whether the interrogation was conducted by police or by school administrators and whether the questioning was about an in-school or an out-of-school incident, this Recent Development focuses its argument, as well as its ultimate suggestions for reform, on at-school interrogations by the police regarding a crime committed outside of the school—the situation presented by In re J.D.B. It does so because this scenario is the most troubling and the most analytically clean since the choice to interrogate the student at school about any out-of-school incident is utterly unrelated to any pedagogical concern. In such a situation, the usual argument for curtailing student rights in response to the school environment's unique needs turns back on itself. Concerns about good pedagogy do not justify bringing the police on school grounds to interrogate suspects about outside events. Rather they counsel against it. As Justice Brady noted of the situation in In re J.D.B., "a public middle school, which should be an environment where children feel safe and protected, became a place where a law enforcement investigator claimed a tactical advantage over a juvenile." Police targeting of children at school is antithetical to the "safe" environment Justice Brady recognized as essential to learning. More directly, such targeting of children at school actually removes the student unnecessarily from the pedagogical environment of the classroom and may disturb the learning process for others who observe a classmate escorted away by armed police, as J.D.B. was.

147. See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (finding that the pedagogical environment of school "does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."). Critically, however, T.L.O. explicitly limited this lowered standard to searches by school officials and did not change the probable cause standard for searches by police or by police in conjunction with school administrators. Id. at 341 n.7.

148. The picture becomes cloudier both logically and legally when the investigation is more closely wedded to the pedagogical atmosphere, such as when a principal questions a student about an in-school crime. On when questioning by school administrators implicates Miranda rights, see Holland, supra note 144, at 39-41.

149. In re J.D.B., 363 N.C. at 678, 686 S.E.2d at 143 (Brady, J., dissenting).

150. See id.

151. See id.
This is perhaps what Justice Hudson had in mind when she decried "the potential disruption of the learning atmosphere in the school . . . if this practice [of at-school questioning by police] became widespread." 152

IV. A PROPOSAL FOR AMENDING SECTION 2101

Because of the extreme vulnerability of children to police interrogation methods, some have argued for a per se rule requiring the presence of counsel regardless of whether an interrogation is considered custodial. 153 Such a rule would sweep too broadly by prohibiting many desirable police-juvenile interactions, and it would create an extreme burden on the legal system by requiring the appointment of counsel in virtually every police-juvenile encounter. This Recent Development proposes a more modest statutory revision to right the wrong of the In re J.D.B decision by clarifying that age is a factor when applying the "in custody" test under section 2101 and by creating a bright line rule that any questioning by police of a student at school about an outside crime is custodial for purposes of the statute.

Below are the current provisions of section 2101 with proposed additions:

Interrogation procedures

(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.

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152. Id. at 684, 686 S.E.2d at 147 (Hudson, J., dissenting).
153. Ellen Marrus, Can I Talk Now?: Why Miranda Does Not Offer Adolescents Adequate Protections, 79 TEMP. L. REV. 516, 517, 527 (2006) ("In order for children to be adequately protected during police interrogation, the child should be entitled to the presence of counsel prior to and during any questioning, regardless of whether the juvenile is in custody.").
(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.\textsuperscript{154}

\textit{[proposed addition]} (e) A juvenile shall 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.

\textit{[proposed addition]} (f) Notwithstanding subsection (e) of this section, a juvenile who is questioned by police in school about any crime having taken place outside of the school shall be "in-custody" for the purpose of this section.

Proposed subsection (e) legislatively overrules the \textit{In re J.D.B.} decision and makes clear that a juvenile "in-custody" test is to be used in applying the juvenile \textit{Miranda} protections of the law. Proposed subsection (f) creates a \textit{per se} rule that prohibits police from taking advantage of the pedagogical environment, and its concomitant restrictions on student freedom and rights, to avoid giving suspects their full procedural rights under the statute. Subsection (f) only applies to questioning about outside crimes and thus in no way interferes with the pedagogical needs of school administrators to investigate and discipline students.

\footnotesize{\textsuperscript{154} N.C. GEN. STAT. § 7B-2101 (2009).}
These proposals are aimed at limiting the negative repercussions of the In re J.D.B. ruling, and as such, they are modest—and hopefully realistic—in their scope. Unfortunately, the good that such amendments might accomplish through broadening the application of procedural Miranda safeguards is limited: first, providing Miranda warnings does not make children understand them or give them the capacity to knowingly waive them; second, subsection (f)'s per se rule would not apply in the contexts of interrogation by school administrators or of interrogation by the police regarding in-school crimes. Yet, adoption of these, or similar, amendments would represent an important reaffirmation of the principles undergirding section 2101’s original adoption and would provide significantly stronger Miranda protections to juveniles in North Carolina.

CONCLUSION

Turning on its head the legislature's reasoned judgment that juvenile North Carolinians require heightened protection against potentially coercive police interrogations, the In re J.D.B majority issued a judicial fiat that not only denied the protection of section 2101 to many children by ignoring the very vulnerability of children the statute was designed to protect, but also perversely made the schoolhouse an arena where such enhanced Miranda protections for juveniles are most parsimoniously applied.

The decision purports to protect the police from an untenable requirement that they must foresee the myriad—unknown and unknowable—variations of human nature and human frailty that might cause a suspect to hold a subjective belief that she is in custody. As this Recent Development has argued, there are easy and already existing frameworks for considering age in an objective test, without descending into the nightmarish swamp of subjectivity courts so abhor. Rather than protecting the police from an utterly unreasonable requirement of omniscience regarding a suspect's subjective state of mind, the decision encourages police to use objective knowledge about a suspect's age to purposefully create in the suspect a belief that she is in custody. The decision allows police to target the unique vulnerabilities of minors to psychological interrogation practices at school, secure in the knowledge that the very objective fact (of the suspect's age) that they utilized to drive the

155. See Young, supra note 109, at 30.
156. See id. at 30-31.
157. For more on this thorny question, see Holland, supra note 144, at 39-41.
suspect to self-incrimination will be quickly dismissed by judges as improperly "subjective" and (2) that they are free to curtail the juvenile's freedom of action so long as that restraint does not go "well beyond" the level of restraint typically experienced by students at school.

In response to the misguided decision in *In re J.D.B.*, the General Assembly should reaffirm its judgment that age does matter in the *Miranda* context by adopting language making clear that age is to be considered in the section 2101 in-custody analysis. Moreover, the legislature should undo the perverse incentive to target children at school by adopting a *per se* rule that police questioning at school about a crime that takes place outside of school is considered custodial under section 2101. Adopting these, or similar amendments, would legislatively correct *In re J.D.B.*'s ill-advised judicial fiat and ensure against the targeting of children for interrogation without the procedural protections of section 2101.

CLAY TURNER