

# THE *MIRANDA* CUSTODY REQUIREMENT AND JUVENILES\*

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## INTRODUCTION

Concerns about the interrogation process and the ability of minors to navigate the criminal justice system often intersect. The impact of the age of juveniles can be seen in a variety of judicial decisions, most markedly those dealing with punishment. The Supreme Court has made clear that juveniles are not to be treated as adults during sentencing. For example, the Court does not allow

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killers to be executed if younger than eighteen-years-old,<sup>1</sup> it has eliminated sentences of life without parole for non-homicide offenses committed by young people,<sup>2</sup> and has prohibited mandatory life sentences without parole for minors.<sup>3</sup> But judicial concern for juveniles goes well beyond sentencing. The interrogation process raises especially grave fears.<sup>4</sup>

Since the Supreme Court issued its landmark ruling in *Miranda v. Arizona* disallowing compelled inculpatory statements by criminal suspects and defendants, there has been concern as to whether juveniles fully understand and appreciate their rights as articulated in *Miranda* and based in the Fifth Amendment to the United States Constitution.<sup>5</sup> This Article examines the way a defendant's age is factored into a court's review of how the defendant understood his or her rights during the criminal justice process. This Article specifically reviews this question as it concerns a juvenile defendant's waiver of rights, behavior during interrogation, requests for counsel and other entitlements, custodial status as mandated by *Miranda*, and his or her general receipt of the *Miranda* warning. This Article also examines the holding and application of another Supreme Court decision, *J.D.B. v. North Carolina*, in which the Court articulated the parameters surrounding when age must be considered in making *Miranda* custody determinations.<sup>6</sup> To fully appreciate the difficulties posed by applying *Miranda* to juveniles, it is appropriate to first look briefly at *Miranda* and its custody mandate.

### I. *MIRANDA V. ARIZONA*

The United States Supreme Court in its landmark decision fifty years ago sought to give clarity to a murky area. Prior to *Miranda*, the prevailing law on confessions looked almost entirely to the issue of

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1. See *Roper v. Simmons*, 543 U.S. 551 (2005).

2. See *Graham v. Florida*, 560 U.S. 48 (2010).

3. See *Miller v. Alabama*, 567 U.S. 460 (2012); see also *People v. Lopez*, 2017 WL 2953682, at \*9 (Cal. Ct. App. July 11, 2017) ("There is little question that new and evolving research on adolescent brain development has significantly altered our jurisprudence on adolescent culpability in a variety of ways. . .").

4. The judiciary's wariness of juvenile interrogation is discussed in the case which is central to this article, *J.D.B. v. North Carolina*, 564 U.S. 261 (2011). As we shall see *infra*, the Supreme Court in *J.D.B.*, *id.*, emphasized that the age of the minor suspect is relevant when determining whether she was in custody for the purpose of requiring *Miranda* warnings during questioning.

5. See U.S. CONST. amend. V; *Miranda v. Arizona*, 384 U.S. 436 (1966).

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

voluntariness: did the police coerce an incriminating statement thus violating due process? After a large number of decisions,<sup>7</sup> the Court ended up giving little guidance on the appropriate standards. Each case seemed to be remarkably fact specific.<sup>8</sup> Indeed, as one commentator recently noted, the cases did not set out the standards with any degree of precision:

Not surprisingly . . . the first thirty years of the Court's experiment with regulating confession law demonstrated the unworkability of a completely open-ended standard. The lower courts were all over the map in their descriptions of what made a confession involuntary and were consistent only in their pervasive tendency to uphold whatever the police might do in a given case. It was well understood that police were beating suspects—particularly African American men in the South—and using extreme psychological and physical pressure to get suspects to confess. But the voluntariness test was too vague to force police to stop these abusive interrogation methods. Potentially innocent people were being convicted . . . .<sup>9</sup>

This level of confusion pushed the Court into rethinking its approach on interrogation, resulting in a broadening of the Fifth Amendment Privilege Against Self-Incrimination. In *Miranda v.*

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7. See generally Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U.L. REV. 601 (2006).

8. The leading case is *Spano v. New York*, 360 U.S. 315 (1959). There, the Court found the incriminating statement to be involuntary because of more than a dozen significant factors, including: Spano was foreign-born with no past history of law violation, he had progressed only one-half year into high school, he had a history of emotional instability, he did not make a narrative statement, he was asked leading questions by an experienced prosecutor leading to a question and answer confession, he was subjected to questioning by many officers, he was questioned for virtually eight straight hours before he confessed, the questioning was not conducted during normal business hours (it began in early evening and continued well into the night), the questioners persisted even with repeated refusals by Spano to answer on the advice of his attorney, and the officers ignored his requests to contact a local attorney. Additionally, the officers used a childhood friend of Spano's in the interrogation, who was at that time attending the police academy. The friend, Bruno, falsely told Spano that Bruno's job was in jeopardy unless Spano confessed, and that the loss of his job would be disastrous to his three children, his wife and his unborn child. *Id.* at 321–23. With so many factors considered, there was not a great deal of precedential value created by that decision.

9. Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 6 (2015).

*Arizona*<sup>10</sup> the majority—over the sharp dissents of several Justices—concluded that the privilege applied to the interrogation process and that a specific set of warnings would be required in most settings.<sup>11</sup> The Chief Justice made clear that the majority no longer wished to view the issues here principally on a case-by-case basis:

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. 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.<sup>12</sup>

This certainly seems straightforward enough. If an individual is in custody and is being questioned, any resulting incriminating statements cannot be used at trial unless those warnings were given. However, it is not so straightforward, as the Court never conclusively defined “interrogation.” Consider statements by an officer to a suspect in the squad car where the statements were not questions, but were appeals to the individual’s conscience “that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve

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10. 384 U.S. 436 (1966).

11. *Id.* at 444.

12. *Id.* There has been much fine scholarship over the past half century about the decision and its implications. For a look at some of the more recent work, see Donald Dripps, *Miranda for the Next Fifty Years: Why the Fifth Should Go Fourth*, 97 B.U. L. Rev. 893 (2017); Tonja Jacobi, *Miranda 2.0*, 50 U.C. DAVIS L. REV. 1 (2016); Tracey Maclin, *A Comprehensive Analysis of the History of Interrogation Law, with Some Shots Directed at Miranda v. Arizona*, 95 B.U. L. REV. 1387 (2015); Primus, *supra* note 9. The nation’s premier expert on *Miranda* is Michigan Professor Yale Kamisar. One of his most recent articles in the area is *The Rise, Decline and Fall(?) of Miranda*, 87 WASH. L. REV. 965 (2012).

and murdered.”<sup>13</sup> The Court in *Brewer v. Williams* found that these statements qualified as interrogation.<sup>14</sup> But, the Court shifted in *Rhode Island v. Innis*<sup>15</sup> and found that a similar statement made in a squad car would not be interrogation because the comment was directed by one officer to another in the car, even though it was heard by the accused.<sup>16</sup>

The Court in *Miranda* repeatedly explained acceptable language that warnings should include. Some law enforcement officers have, however, moved beyond the language in the decision and have used somewhat less precise language with suspects. Does the Court reject warnings that do not make it clear to the suspects that they could have an attorney before, during, and after the questioning? The Court concluded such warnings are close enough if they “touch[] all of the bases required by *Miranda*.”<sup>17</sup> These are hardly the only issues surrounding the *Miranda* requirements. Other issues include whether an improper statement could be used at trial to impeach,<sup>18</sup> whether tangible evidence found as a result of the improper statement could be offered at trial,<sup>19</sup> defining the role of the traditional fruit-of-the-poisonous tree doctrine in the Fifth Amendment context,<sup>20</sup> and the possibility of exceptions in cases of true emergency.<sup>21</sup>

These and other *Miranda*-related issues are of particular importance when the suspect is a juvenile. Serious questions are then raised on whether the suspect adequately understands and waives his

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13. *Brewer v. Williams*, 430 U.S. 387, 393 (1977).

14. *Id.* at 399–400. Although the case was decided under the Sixth Amendment not the Fifth Amendment (because the accused had already been charged and had retained counsel), the standard for interrogation in both instances is the same in practice.

15. 446 U.S. 291 (1980).

16. *Id.* at 305.

17. *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *see also* *Florida v. Powell*, 559 U.S. 50, 53 (2010); *California v. Prysock*, 453 U.S. 355, 355 (1981).

18. *Harris v. New York*, 401 U.S. 222 (1971) (such a statement can be used to impeach).

19. *United States v. Patane*, 542 U.S. 630 (2004) (such evidence can be offered at trial).

20. Historically, most of the case law on the fruit of the poisonous tree doctrine came from Fourth Amendment search rulings, as in *Wong Sun v. United States*, 371 U.S. 471 (1963). In the Fifth Amendment area, however, the Court is much more deferential to the government as to the application of the rules. *See, e.g.*, *Oregon v. Elstad*, 470 U.S. 298, 310–11 (1985) (allowing a second confession with warnings just after a first—inadmissible—confession was given without warnings).

21. *New York v. Quarles*, 467 U.S. 649, 655–56 (1984) (exceptions are granted in cases of true emergency).

*Miranda* rights, whether the content of the interrogation is unduly coercive in part because of the suspect's age, and whether a juvenile is adequately equipped to request an attorney or the ceasing of the interrogation.

#### A. Waiver

Courts tend to be anxious when it comes to a young person's understanding of *Miranda* warnings.<sup>22</sup> There is considerable case law exploring whether a minor sufficiently understands warnings to be able to waive a right to remain silent or speak with counsel. In its principal ruling on the issue, the Supreme Court found that a juvenile's request to speak with his probation officer was not a request to remain silent or to have the assistance of an attorney.<sup>23</sup> The Court reaffirmed that the totality of the circumstances is relevant when determining whether an incriminating statement was voluntary and whether a waiver of rights was valid,<sup>24</sup> finding that

[t]his totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the

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22. Some of the best work on the topic is by University of Minnesota Law Professor Barry Feld. In two particular articles, he explores social science research and case law on the ways minors construe warnings given to them by law enforcement officers. See Barry Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395 (2013); Barry Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26 (2006); see also Jessica Powell, *Do You Understand Your Rights as I Have Read Them to You? Understanding the Warnings Fifty Years Post Miranda*, 43 N. KY. L. REV. 435, 439 (2016) ("Considering that between 10–12% of the prison population has an 8th grade education or less and that about 40% did not complete high school or obtain a GED, the vocabulary level of *Miranda* warnings may be too high for a significant number of suspects to understand."). See generally Kristin North, *Recess is Over: Granting Miranda Rights to Students Interrogated Inside School Walls*, 62 EMORY L.J. 441, 459–62 (2012). The problem, of course, goes beyond juvenile suspects.

23. *Fare v. Michael C.*, 442 U.S. 707, 719–23 (1979).

24. *Id.* at 724–25.

capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.<sup>25</sup>

Many court decisions consider the waiver issue as it relates to minors. Courts uniformly stress the youth of the offender. The New York Appellate Division emphasized this factor, stating that the

County Court properly found that defendant's confession to the police was knowing, intelligent and voluntary. The question of whether a statement is voluntary is a factual issue to be determined based on the totality of the circumstances, with deference accorded to the suppression court's factual findings and credibility determinations. Some of the factors to be considered in this assessment include "the defendant's age, experience, education, background, intelligence and capacity to understand the warnings, constitutional rights and consequences of a waiver."<sup>26</sup>

Similarly, the Rhode Island Supreme Court stated "[W]e are very much aware that respondent is of tender years. For that reason '[i]t is well settled' that 'the validity of a juvenile's waiver of his or her rights should be evaluated in light of the totality of the circumstances surrounding that waiver.'"<sup>27</sup> The Oregon Court of Appeals similarly found that

youth was of average intelligence and the testing administered by the psychologist did not indicate that youth had any learning disabilities. Youth's education level and mental age were both commensurate with his chronological age. In fact, taken together, youth's age, intelligence, education, and demonstrated cognitive ability to track with and respond to the detective's questions constitute evidence that he had the competency to understand the warnings and the consequences of waiving them.<sup>28</sup>

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25. *Id.* at 725 (citing *North Carolina v. Butler*, 441 U.S. 369 (1979)). *But see* Jean Pierce, Comment, *Juvenile Miranda Waivers: A Reasonable Alternative to the Totality of the Circumstances Approach*, 2017 B.Y.U. L. Rev. 195 (2017) (sharply criticizing this approach).

26. *People v. Perkins*, 124 A.D.3d 1062, 1063 (N.Y. App. Div. 2015) (internal citations omitted) (sixteen-year-old offender).

27. *In re Francis*, 30 A.3d 630, 635 (R.I. 2011) (citing *In re Joseph B.*, 822 A.2d 172, 174 (R.I. 2003)) (twelve-year-old); *see also* *State v. Diaz*, 847 N.W.2d 144, 165 (S.D. 2014) (sixteen-year-old); *Crowe v. County of San Diego*, 608 F.3d 406, 432 (9th Cir. 2010) (fourteen and fifteen-year-olds).

28. *In re L.A.W.*, 226 P.3d 60, 66 (Or. Ct. App. 2010) (twelve-year-old); *see also* *In Re S.W.*, 124 A.3d 89, 98 (D.C. 2015) (citations omitted) ("The 'admissions and confessions of juveniles require special caution.' Applying the totality of the

Courts have evaluated the age factor to find both non-understanding and understanding of a waiver. The California Court of Appeals recognized that

defendant was 17 and one-half years old, and the recording reveals not a frightened, immature child but a calm, composed young man. [D]efendant was born in California and, while defendant's exact level of education is unclear, he understood what was said to him and asked of him, and he responded appropriately.<sup>29</sup>

Many states use this analytical framework, focusing on the age of the offender.<sup>30</sup>

Questions about the ability of young people to understand the waiver process has led some states to enact specific statutes offering added protection to youthful suspects. They include laws mandating that waivers be recorded,<sup>31</sup> requiring a responsible adult to be present during the waiver process,<sup>32</sup> or establishing a rebuttable presumption that confessions by some minors are not admissible unless the state shows by clear and convincing evidence that—as expressed in her own

circumstances inquiry to the juvenile context, we consider ‘the juvenile’s age, experience, education, background and intelligence, the circumstances under which the statement was given, and whether the juvenile has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights’” discussing a fifteen-year-old).

29. *People v. Bonilla*, 2016 WL 4733257, at \*7 (Cal. Ct. App. Sept. 12, 2016); *see also* *Hall v. Thomas*, 623 F. Supp. 2d 1302, 1316 (M.D. Ala. 2009) (“Hall was fifteen, not a young child, and he could read, and could function independently—walking to and from school, taking care of his sister, taking care of his needs at home.”); *Carter v. Thompson*, 690 F.3d 837, 844 (7th Cir. 2012) (sixteen-year-old).

30. “In the context of *Miranda* rights, ‘the question of waiver must be determined on ‘the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the accused.’ That a suspect is a juvenile is, of course, of significance in the analysis of the waiver issue. The inquiry into the totality of circumstances extends to the ‘evaluation of the juvenile’s age, experience, education, background, and intelligence, and [consideration of] whether [the juvenile] has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.’” *M.A.B. v. State*, 957 So. 2d 1219, 1230 (Fla. Dist. Ct. App. 2007) (citation omitted) (fifteen-year-old). *See generally* *People v. Jones*, 213 Cal. Rptr. 3d 167, 186–87 (Cal. Ct. App. 2017) (sixteen-year-old); *In re Anna G.*, 2016 WL7438702 \*3–4 (Cal. App. 2016) (fifteen-year-old); *Carter v. Thompson*, 690 F.3d 837, 843 (7th Cir. 2012) (sixteen-year-old); *United States v. Guzman*, 879 F. Supp. 2d 312, 321 (E.D.N.Y. 2012) (seventeen-year-old).

31. *See* WIS. STAT. §938.195 (2013).

32. *See* 705 ILCS 405/5-170(a) (2016).

words—the suspect understood the warnings.<sup>33</sup> One broad model is the North Carolina statute, which expanded protection in several ways:

§7B-2101. 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.

(b) When the juvenile is less than 16 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.<sup>34</sup>

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33. New Mexico law, as explained in *State v. Deangelo M.*, 360 P.3d 1151, 1157 (N.M. 2015).

34. N.C. GEN. STAT. §7B-2101 (2015) (discussed in *State v. Saldierna*, 794 S.E.2d 474, 477–78 (N.C. 2016)). Some legislators have proposed rewording warnings so that juveniles are more likely to understand the process and the protections offered. See Lorelei Laird, *Miranda For Youngsters: Police Routinely Read Juveniles Their Rights, But Do Kids Really Understand Them?*, ABA J. June 2016, [http://www.abajournal.com/magazine/article/police\\_routinely\\_read\\_juveniles\\_their\\_miranda\\_rights\\_but\\_do\\_kids\\_really\\_und](http://www.abajournal.com/magazine/article/police_routinely_read_juveniles_their_miranda_rights_but_do_kids_really_und). A proposal from the Reporters to the American Law Institute on *Principles of the Law Policing* is quite specific as to the needs of minors being questioned:

### B. Interrogation

Another major hesitation concerning juveniles in the criminal justice system involves the amount of pressure exerted by a police officer before a statement is deemed involuntary, and thus inadmissible, under the Due Process Clause. This is wholly apart from *Miranda* considerations, and is especially distinct when the person being questioned is not an adult. The case law in this area is voluminous, with two leading decisions of the United States Supreme Court in *Haley v. Ohio*,<sup>35</sup> and *Gallegos v. Colorado*.<sup>36</sup> In *Haley*,<sup>37</sup> fifteen-year-old Haley was arrested near midnight on a charge of murder relating to an armed robbery which had been committed five days earlier. His interrogation ended around 5 a.m. with a signed confession.<sup>38</sup> At a time when juries were allowed to consider whether confessions were involuntary and thus inadmissible,<sup>39</sup> the jurors

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#### § 11.06. Questioning of Members of Vulnerable Populations

Officers should assess carefully a person's background, age, education, mental impairment, and physical condition in order to determine vulnerability to coercion and suggestion. Officers should minimize the need to question members of vulnerable populations, such as juveniles, people with mental illness, and people with intellectual disability, and they should do so with minimal coercion and the utmost care. In addition:

(a) Hearing-impaired individuals or non-English-speaking individuals should be provided with necessary assistance or translators prior to the reading of rights or any questioning.

(b) A juvenile age 14 or younger can give a valid waiver of the right to counsel and the right to remain silent only after meaningful consultation with and in the presence of counsel.

Preliminary Draft No. 3, October 4, 2017 at 92. This requirement of a lawyer goes well beyond what the vast majority of states mandate.

35. 332 U.S. 596 (1948).

36. 370 U.S. 49 (1962).

37. 332 U.S. at 597.

38. *Id.* at 598.

39. The Supreme Court in *Jackson v. Denno*, 378 U.S. 368 (1964), changed the jury's involvement in this process. Prior to the holding in *Jackson*, in many states a trial court would "receive the confession and leave to the jury, under proper instructions, the ultimate determination of its voluntary character and also its truthfulness," *Stein v. New York*, 346 U.S. 156, 172 (1953), even if the incriminating statement was arguably coerced. The Court remarked that this procedure made it "impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it", *Jackson*, 378 U.S. at 379, and, as a result, eliminated the jurors from the due process evaluation of coercion.

The New York jury is at once given both the evidence going to voluntariness and all of the corroborating evidence showing that the confession is true and that the defendant committed the crime. The jury may therefore believe the confession and believe that the defendant has committed the very act with

determined that the statement was voluntary and then found Haley guilty as charged.<sup>40</sup> The U.S. Supreme Court reversed the judgment of the state courts and determined that the methods used to obtain the conviction violated the Due Process Clause of the Fourteenth Amendment.<sup>41</sup> The Court particularly focused on the youth of the offender:

What transpired would make us pause for careful inquiry if a mature man were involved. . . . Age 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. . . . A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition.<sup>42</sup>

Similarly, in *Gallegos*, the Court once again emphasized the importance of the fourteen-year-old defendant's youth in evaluating the methods used to exact a confession:

The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.<sup>43</sup>

It is important to note that review of the suspect's individual characteristics has never been limited only to *juveniles* who confessed. Unlike the chiefly objective focus on custody under *Miranda*, the examination of coercion in the interrogation process has always been heavily subjective for all those being questioned. The Supreme Court

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which he is charged, a circumstance which may seriously distort judgment of the credibility of the accused and assessment of the testimony concerning the critical facts surrounding his confession.

*Id.* at 381. After *Jackson*, the voluntariness determination is entirely up to the court, though the jury may still be asked to consider "that the manner in which the confession was obtained casts doubt on its credibility." *Crane v. Kentucky*, 476 U.S. 683, 689 (1986).

40. 332 U.S. at 599.

41. *Id.* at 599–601.

42. 332 U.S. at 599; see also *In re Matter of S.R.*, 2017 WL 1300092 (Kan. Ct. App. April 7, 2017); *State v. Saldierna*, 2017 WL 3027285 (N.C. Ct. App. July 18, 2017).

43. 370 U.S. at 54.

in *Yarborough v. Alvarado*,<sup>44</sup> discussed *infra*, would not look at the age of the suspect when determining whether custody under *Miranda* was present. The Court was careful, however, to distinguish the analysis required by the due process review of interrogation.<sup>45</sup> “[T]he voluntariness of a statement is often said to depend on whether ‘the defendant’s will was overborne,’ a question that logically can depend on ‘the characteristics of the accused’.<sup>46</sup> The characteristics of the accused can include the suspect’s age, education, and intelligence, as well as a suspect’s prior experience with law enforcement.”<sup>47</sup> Of course, the Court in *J.D.B. v. North Carolina*<sup>48</sup> moved to the more subjective analysis of juveniles and the custody issue, as we shall see.

One can quickly find many important decisions which heavily weigh the age and experience of the suspect in determining if a confession by a minor was given voluntarily. Some recent cases show just how difficult the interrogation process for juveniles can be. The defendant in one prosecution was a fifteen-year-old who was with the police for nearly eleven hours after his arrest, being questioned for five-and-a-half hours.<sup>49</sup> The detectives used “tactics such as minimizing, suggesting that [the] death may have been an accident, and telling Moore that other witnesses were saying he shot [the victim], to elicit a confession from him.”<sup>50</sup> Still, the majority was not troubled, noting that while such “tactics may have influenced Moore, they are tactics that courts commonly accept.”<sup>51</sup> The court explained its view that the confession was freely given further, stating:

The age of the suspect may affect how we view police tactics; “the younger the child the more carefully we will scrutinize police questioning tactics to determine if excessive coercion or intimidation or simple immaturity that would not affect an adult has tainted the juvenile’s confession.” When a suspect is a juvenile, “special caution” must be taken with the methods of interrogation used when “a parent, lawyer, or other friendly adult” is not present.

.....  
Although Moore was only 15-years-old at the time of his questioning, he had more experience with police and law enforcement than most people his age. Moore demonstrated that he was able not only to develop a story about his noninvolvement in the shooting but also to adapt the details of

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44. 541 U.S. 652 (2004) (a habeas corpus challenge under the Antiterrorism and Effective Death Penalty Act).

45. *Id.*

46. *Id.* at 668.

47. *Id.* at 667–68.

48. *See* 564 U.S. 261 (2011).

49. *State v. Moore*, 864 N.W.2d 827, 830 (Wis. 2015).

50. *Id.* at 839.

51. *Id.*

that story to information— either true or untrue—possessed by the police.<sup>52</sup>

Compare and contrast this decision with the opinions written in a case involving the interrogation of a sixteen-year-old, made famous by the Netflix series *Making a Murderer*.<sup>53</sup> The trial court looked at a number of relevant factors<sup>54</sup> in deciding the case, for “the voluntariness of juvenile confessions must be evaluated with ‘special care.’”<sup>55</sup> Ultimately that court found that the confession was coerced. “For starters, Dassey was a juvenile—only 16 years old—at the time of his confession.”<sup>56</sup> The trial judge elaborated:

Dassey was 16 years old and, aside from this investigation, had never had any contacts with law enforcement. . . . His IQ was assessed as being in the low average to borderline range. He was a “slow learner” with “really, really bad” grades. Specifically, he had difficulty understanding some aspects of language and expressing himself verbally. He also had difficulties in the “social aspects of communication” such as “understanding and using nonverbal cues, facial expressions, eye contact, body language, tone of voice.” . . . [H]e received special education services at school.

.....  
The March 1, 2006, interview was the fourth time the police had questioned Dassey in 48 hours. . . . No adult was present on Dassey’s behalf.

. . . Fassbender stated [to Dassey], “I want to assure you that Mark and I both are in your corner[.] We’re on your side.”

. . . Over the next approximately three hours (with a roughly half-hour break), generally responding to the investigator’s questions with answers of just a few hushed words, a story evolved whereby in its final iteration Dassey implicated himself in the rape, murder, and mutilation of [the victim].<sup>57</sup>

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52. *Id.* at 838. Two justices dissented, however. *See id.* at 849–52 (emphasizing the defendant’s age, level of education, diminished intellectual function, and mental health issues; the duration of custody and interrogation; and the absence of a friendly adult to confer with).

53. *See* *Dassey v. Dittman*, 201 F. Supp. 3d 963 (E.D.Wis. 2016), *aff’d*, 860 F.3d 933 (7th Cir. 2017), *vacated & reh’g granted*, *Dassey v. Dittmann*, 2017 U.S. App. LEXIS 14374 (7th Cir. 2017) (*Dassey I*).

54. In *Dassey I*, the court analyzed the interrogation’s length, location, and continuity, and the defendant’s maturity, education, physical condition, and mental health. *Id.* at 993 (citing Supreme Court precedent).

55. *Id.*

56. *Id.* at 999.

57. *Id.* at 969–70 (second alteration in original) (citations omitted). A panel of the 7th Circuit affirmed the trial court, focusing again on the youth of the defendant and the interrogation techniques used by the police: “Nowhere is the risk of involuntary

The Seventh Circuit en banc, over a vigorous dissent, took a very different view and allowed the statement:

[Many] factors support the finding that Dassey's confession was indeed voluntary. Start with the circumstances of the interrogation. As stipulated by both sides, Dassey was not in custody when he admitted participating in the crimes of October 31st. He went with the officers voluntarily and with his mother's knowledge and consent. He was given Miranda warnings and understood them sufficiently. The interrogation was conducted during school hours and in a comfortable setting. Dassey showed no signs of physical distress. He had access to food, drinks, and restroom breaks. The interrogation was not particularly lengthy, especially with the breaks that were taken every hour.

Dassey was not subject to physical coercion or any sort of threats at all. Given the history of coercive interrogation techniques from which modern constitutional standards for confessions emerged, this is important. The investigators stayed calm and never even raised their voices. As the Wisconsin courts found, there is no sign that Dassey was intimidated. Turning to the techniques used in the interrogation, the investigators told Dassey many times that they already knew what had happened when in fact they did not. Such deception is a common interview technique.... Also, most of the incriminating details in Dassey's confession were

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and false confessions higher than with youth and the mentally or intellectually disabled. It is for this reason that the Supreme Court has cautioned courts to exercise 'special caution' when assessing the voluntariness of juvenile confessions." *Dassey v. Dittmann*, 860 F.3d 933, 952 (7th Cir. 2017)), *rev'd en banc*, *Dassey v. Dittmann*, 877 F.3d 297 (7th Cir. 2017) (*Dassey II*); *see also In re K.T.*, 2017 WL 767002 (Cal. Ct. App. Feb. 28, 2017) (where the court emphasized that the suspect was only fourteen-years-old and could well have been strongly influenced by investigators); *People v. Jones*, 213 Cal. Rptr. 3d 167, 188–89 (Cal. Ct. App. 2017) (where the detective made several deceptive statements to the sixteen-year-old suspect about the nature of the evidence that the police had against both the suspect and his father, but conviction was affirmed with the court stressing that the detective had not threatened either the son or the father). In *K.T.*, the court observed that:

[The investigator's] request that the minor "just sign right there" and continued statements that the shoplifting incident was "[n]ot a big deal" and "not the end of the world" make the voluntariness of the minor's confession highly suspect. The minor could have believed, based on [the investigator's] statements that he had shoplifted and it was not a big deal, that she would not be in trouble if she said she had stolen items from the store.

*K.T.*, 2017 WL 767002, at \*3 (second alteration in original).

not suggested by the questioners. He volunteered them in response to open-ended questions.<sup>58</sup>

The dissenting appeals judges sharply disagreed:

Psychological coercion, questions to which the police furnished the answers, and ghoulish games of “20 Questions,” in which Brendan Dassey guessed over and over again before he landed on the “correct” story (i.e., the one the police wanted), led to the “confession” that furnished the only serious evidence supporting his murder conviction in the Wisconsin courts. Turning a blind eye to these glaring faults, the *en banc* majority has decided to deny Dassey's petition for a writ of habeas corpus. . . . As the district court and the panel majority recognized, we have before us . . . an extreme malfunction. Dassey at the relevant time was 16 years old and had an IQ in the low 80s. His confession was coerced, and thus it should not have been admitted into evidence. And even if we were to overlook the coercion, the confession is so riddled with input from the police that its use violates due process. Dassey will spend the rest of his life in prison because of the injustice this court has decided to leave unredressed.<sup>59</sup>

Of course, if the child being questioned is very young, the review sharpens considerably. See, for instance, the decision of one Illinois court, in reviewing the actions of the law enforcement officers in eliciting a confession from a nine-year-old child.<sup>60</sup>

[We] recognize that “the receiving of an incriminating statement by a juvenile is a sensitive concern.” Thus, the “greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.” In light of these concerns, we view respondent's age as a key factor in the voluntariness analysis.<sup>61</sup>

Furthermore, the court explained its finding that the child's statement was coerced, stating:

The use of deception or subterfuge does not alone invalidate a confession as a matter of law, but it is a factor to consider in examining the totality of the circumstances. . . . From the

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58. *Dassey v. Dittmann*, 877 F.3d 297, 312–13 (7th Cir. 2017) (en banc) (internal citations omitted).

59. *Id.* at 319 (Wood, C.J., Rovner and Williams, JJ., dissenting).

60. *In re D.L.H., Jr.*, 32 N.E.3d 1075 (Ill. 2015).

61. *Id.* at 1090.

outset of the second interview, [Detective] Adams seized on respondent's fear that his [family members] would go to jail, or that he, himself, would be taken away. Adams promised respondent that no matter what he said, no one was going to jail, no one would be in trouble, he would not be taken from his father and, at the end of the day, he could go to his grandmother's house and "hang out" with his dad. Adams continually reinforced the notion that no consequences would attach to an admission by respondent that he hit T.W. Adams also rejected respondent's repeated denials of wrongdoing, making plain that anything less than an admission was unacceptable. Adams further downplayed the significance of an admission, unceasingly telling respondent that whatever happened was an accident or a mistake, and everybody makes mistakes, even the detective. Adams was also explicit about the kind of admission that would suffice—an admission that respondent hit T.W. once. Respondent eventually admitted to just that: hitting the infant *once*. Though an adult might very well have been left "cold and unimpressed" with Adams's mode of questioning respondent was just a boy of nine, functioning at the level of a seven or eight-year-old, and thus far more vulnerable and susceptible to police coercion of this type.<sup>62</sup>

The difference in the tone of the decisions, if not the holdings, is impossible to reconcile.<sup>63</sup>

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62. *Id.* at 1095–96. In *People v. Jones*, 213 Cal. Rptr. 3d 167, 188 (Cal. Ct. App. 2017), the court allowed the sixteen-year-old's incriminating statement:

Jones asserts that the detectives also used other deceptive tactics, including threats against his father, to coerce Jones into confessing to his involvement in the shootings. Jones argues that the various ploys and threats used by the detectives were sufficient to overcome his will and undermine the voluntariness of his confession. However, "the use of deceptive comments does not necessarily render a statement involuntary. Deception does not undermine the voluntariness of a defendant's statements to the authorities unless the deception is 'of a type reasonably likely to procure an untrue statement.' The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable."

*Id.* at 188 (citations omitted). *But see In re Matter of S.R.*, 2017 WL 1300092, at \*4 (Kan. App. 2017) (thirteen-year-old suspect's statement coerced).

63. *In re S.W.*, 124 A.3d 89 (D.C. 2015), involved another fifteen-year-old suspect. He was handcuffed to the floor during the interrogation; the detective used all sorts of trickery and made veiled threats to induce the defendant to talk. *Id.* at 93–94. The court rejected the incriminating statement and emphasized the youth of the subject, stating that:

Bearing these principles in mind, we are keenly aware of the "special caution" required in our *de novo* review of the voluntariness of appellant's confession, given his juvenile status, and we take great care to assess the impact of subtle

*C. Requests by the Suspect*

One other significant issue that surfaces regularly in this area is whether the minor genuinely intends to cut off questioning or request an attorney. The Supreme Court in *Davis v. United States*,<sup>64</sup> decided that the right to a lawyer during interrogation can only be legally asserted with an “unambiguous or unequivocal request for counsel.”<sup>65</sup> The point was reiterated, with a request for silence, in *Berghuis v.*

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interrogation tactics. . . . [W]e must determine whether, on the totality of the circumstances, appellant’s will was overborne by Detective Howland’s remarks and the circumstances of the interrogation. Specific to the voluntariness component, we also consider a juvenile suspect’s physical and mental condition, the duration and intensity of the interrogation, the hour at which it occurred, and any evidence of physical abuse, threats, punishment, or trickery.

. . . .

We emphasize the role of appellant’s juvenile status. In any custodial interrogation situation, “the seemingly benign transmittal of information to an accused may resemble the kind of mental games that largely generated the *Miranda* decision itself.” This warning is all the more applicable in the juvenile context, where courts must exercise “special caution” in conducting a voluntariness analysis.

*Id.* at 101–04 (citations omitted). In the case of *In re Elias V.*, 188 Cal. Rptr. 3d 202 (Cal. Ct. App. 2015), the judges were deeply concerned over the interrogator’s tactics and the potential for abuse when used with juveniles. The court stated:

Thus, for example, the most recent edition of the Reid manual on interrogations notes that although the use of deception, including the use of “fictitious evidence which implicates the subject,” has been upheld by the courts “this technique should be avoided when interrogating a youthful suspect with low social maturity . . .” because such suspects “may not have the fortitude or confidence to challenge such evidence and depending on the nature of the crime, may become confused as to their own possible involvement if the police tell them evidence clearly indicates they committed the crime. Factors such as the adolescent’s level of social responsibility and general maturity should be considered before fictitious evidence is introduced.” The developing consensus about the dangers of interrogation has resulted from the growing number of studies showing that the risk interrogation will produce a false confession is significantly greater for juveniles than for adults; indeed, juveniles usually account for one-third of proven false confession cases.

*Id.* at 218 (citations omitted). The court concluded that the statement of the minor was not voluntary. *Id.* at 225; see also *State ex rel. A.W.*, 51 A.3d 793 (N.J. 2012), where the judges sharply disagreed on the voluntariness of a thirteen-year-old’s statement to investigators.

64. 512 U.S. 452 (1994).

65. *Id.* at 461–62.

*Thompkins*.<sup>66</sup> Since *Davis* and *Thompkins*, a number of cases have been litigated exploring the reach of the decisions. Many of them involve minors. The rulings here are utterly inconsistent. Some decisions seemingly do not weigh the age of the declarant even though her attorney raised age in this context.<sup>67</sup> Other opinions make mention of the matter, but the age does not factor heavily in the determination of custody. One court wrote,

While *J.D.B.*'s analysis generally supports the view that a juvenile suspect's known or objectively apparent age is a factor to consider in an invocation determination, knowledge of defendant's age would not have altered a reasonable officer's understanding of defendant's statements in the circumstances here. As indicated, defendant, who was 15-years-old, appeared confident and mature.<sup>68</sup>

Still others apply *J.D.B.* and ultimately conclude that the unequivocal request rule is satisfied principally because the suspect is a minor, such as the court in *In re Art T*.<sup>69</sup> The court there looked at both *J.D.B.* and the youth of the declarant (thirteen-years-old) in finding a clear request for an attorney:

[W]e find that Art's age of 13 and middle school level of education, combined with his repeated requests for his mother, would have made his lack of maturity and sophistication objectively apparent to a reasonable officer. In this context, Art's statement after viewing the video of the shooting, "Could I have an attorney? Because that's not me," was an unequivocal request for an attorney.<sup>70</sup>

There is a tremendous volume of litigation surrounding these issues, and the courts are hardly consistent in applying apparently concrete constitutional mandates as to minors. In one area judicial decisions have been especially uneven and at odds: the application of the *Miranda* custody requirement in cases in which the suspect is a young person.

## II. THE CUSTODY MANDATE

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66. 560 U.S. 370 (2010).

67. See *Rogers v. Kerns*, 485 Fed. App'x 24, 31 (6th Cir. 2012).

68. *People v. Nelson*, 266 P.3d 1008, 1022 n.7 (Cal. 2012); see also *Saldierna*, 794 S.E.2d at 478–79 (applying a state law giving special protection to minors). See text accompanying notes 116–19, *infra*.

69. 183 Cal. Rptr. 3d 784 (Cal. Ct. App. 2015).

70. *Id.* at 799; see also *People v. Villasenor*, 194 Cal. Rptr. 3d 796, 817 (Cal. Ct. App. 2015).

While the aforementioned are important issues, what this article examines is another recurring question, one that especially involves minors in the criminal justice system: custody. A determination of custody is of particular importance because *Miranda's* mandate is only triggered when a suspect undergoes "custodial interrogation."<sup>71</sup> Unfortunately, the Court in *Miranda* gave little guidance on what it meant by "custody" when it stated that its ruling comes into play "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."<sup>72</sup>

In determining if the freedom of action has been limited significantly, it is not the defendant's state of mind or the officer's opinion that matters. It is an objective standard. "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."<sup>73</sup> Further, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."<sup>74</sup>

This objective standard is easy to state, but it is far more difficult to apply in practice. Consider, for instance, three situations that have vexed the courts, ultimately requiring the Supreme Court to resolve conflicts among lower tribunals.

#### A. *Interrogations at the Suspect's Residence*

The defendant in *Orozco v. Texas*<sup>75</sup> was arrested in his bedroom during the night and he was interrogated.<sup>76</sup> No *Miranda* warnings were given.<sup>77</sup> The government contended that warnings were not needed, "since petitioner was interrogated on his own bed, in familiar surroundings."<sup>78</sup> The Court strongly disagreed, stating that

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

72. *Id.*

73. *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quotations omitted).

74. *Id.* at 323.

75. 394 U.S. 323 (1969).

76. *Id.* at 325.

77. *Id.*

78. *Id.* at 326. The point was picked up in the dissenting opinion of Justice White, joined by Justice Stewart.

“[a]ccording to the officer’s testimony, petitioner was under arrest and not free to leave when he was questioned in his bedroom in the early hours of the morning. The *Miranda* opinion declared that the warnings were required when the person being interrogated was ‘in custody at the station or otherwise deprived of his freedom of action in any significant way.’”<sup>79</sup>

Of course, just as *Orozco* does not mean that a person is *never* in custody if interrogated in her own home, it also does not mean that a person is *always* in custody if interrogated in her own home. The litigation continues apace involving the thorny question of when is that person in custody if interrogated at home but not under formal arrest. These factors have turned out to be important in answering that question: where the defendant is told she is not under arrest,<sup>80</sup> where the defendant is told she may not leave until the officers are finished,<sup>81</sup> where the defendant is handcuffed during the questioning,<sup>82</sup> where the defendant is told she may use her cell phone,<sup>83</sup> where questioning goes on for a lengthy period of time<sup>84</sup> or is for but a limited time,<sup>85</sup> where friends or family are present during the interrogation,<sup>86</sup> and where the defendant was being questioned to obtain information, not because he was the key suspect.<sup>87</sup>

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[The decision] ignores the purpose of *Miranda* to guard against what was thought to be the corrosive influence of practices which station house interrogation makes feasible. The Court wholly ignores the question whether similar hazards exist or even are possible when police arrest and interrogate on the spot, whether it be on the street corner or in the home, as in this case. No predicate is laid for believing that practices outside the station house are normally prolonged, carried out in isolation, or often productive of the physical or psychological coercion made so much of in *Miranda*. It is difficult to imagine the police duplicating in a person’s home or on the street those conditions and practices which the Court found prevalent in the station house and which were thought so threatening to the right to silence.

*Id.* at 329–30 (White & Stewart, JJ., dissenting).

79. *Id.* at 327.

80. See, e.g., *United States v. Ramos-Guerrero*, 145 F. Supp. 3d 753, 762 (N.D. Ill. 2015); *United States v. Williams*, 760 F.3d 811, 814–15 (8th Cir. 2014); *People v. Castillo*, 175 Cal. Rptr. 3d 192, 198 (Cal. Ct. App. 2014).

81. *State v. McKenna*, 103 A.3d 756, 765 (N.H. 2014).

82. *United States v. Borostowski*, 775 F.3d 851, 860–61 (7th Cir. 2014).

83. *Spencer v. United States*, 132 A.3d 1163, 1170 (D.C. Cir. 2016).

84. *People v. Jones*, 2006 WL 1980365 \*10–11 (Cal. Ct. App. 2006).

85. *State v. Beausoleil*, 2015 WL 11181927, at \*3 (N.H. 2015); *State v. Kittredge*, 97 A.3d 106, 111 (Me. 2014).

86. *United States v. Krstic*, 708 F. Supp. 2d 1134, 1145–47 (D. Or. 2010).

87. *State v. Kilgore*, 882 N.W.2d 493, 500 (Wis. Ct. App. 2016).

*B. Interrogations at a Police Station*

Consider next an interrogation that takes place at a police station. A police station interrogation would be, for many people, frightening and potentially traumatizing. Reasonable persons might well believe that being interrogated in a police station would establish custody and invoke the requirements of *Miranda*. Not so, wrote the Supreme Court in *Oregon v. Mathiason*.<sup>88</sup> The question, according to the majority, was not the location of the process.<sup>89</sup> Rather, the question turned on whether a reasonable person would have felt free to leave the station.<sup>90</sup> Because the process in *Mathiason* was seemingly non-coercive, there was no custody.<sup>91</sup> The per curiam opinion was short and directly to the point:

[T]here is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way."

Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment."

Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where

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88. 429 U.S. 492 (1977).

89. *Id.* at 495.

90. *Id.*

91. *Id.*

there has been such a restriction on a person's freedom as to render him "in custody." It was *that* sort of coercive environment to which *Miranda*, by its terms was made applicable, and to which it is limited.<sup>92</sup>

### C. Interrogations in Prison

Being questioned in jail or in prison is arguably more coercive and frightening than even the police station. The early rulings of the Supreme Court seemed to bear this out in finding custody for the prisoner or inmate being interrogated. The defendant in *Mathis v. United States*<sup>93</sup> was in prison serving a state sentence.<sup>94</sup> He was questioned there by a federal agent, and his incriminating statements earned him a conviction in federal court.<sup>95</sup> No warnings were given during the questioning.<sup>96</sup> The government argued that the defendant was not in custody during the interrogation because *Miranda* should be "applicable only to questioning one who is 'in custody' in connection with the very case under investigation."<sup>97</sup> In succinct fashion, the majority rejected this view, noting that it "goes against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights."<sup>98</sup> *Mathis*

92. *Id.* Dissenting Justice Marshall strongly disagreed. For him, the application of *Miranda* was needed in this intense atmosphere:

*Miranda* requires warnings to "combat" a situation in which there are "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." It is of course true, as the Court notes, that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it." But it does not follow that, because police "are not required to administer *Miranda* warnings to everyone whom they question," that they need not administer warnings to *anyone* unless the factual setting of the *Miranda* cases is replicated. Rather, faithfulness to *Miranda* requires us to distinguish situations that resemble the "coercive aspects" of custodial interrogation from those that more nearly resemble "[g]eneral on-the-scene questioning . . . or other general questioning of citizens in the fact-finding process" which *Miranda* states usually can take place without warnings.

*Id.* at 497-98 (Marshall, J., dissenting). Justice Stevens also dissented, though on other grounds. *Id.* at 499-500 (Stevens, J., dissenting).

93. 391 U.S. 1 (1968).

94. *Id.* at 2.

95. *Id.*

96. *Id.*

97. *Id.* at 4.

98. *Id.* Dissenting Justices White, Harlan and Stewart disagreed, emphasizing the familiarity of the surroundings. "But *Miranda* rested not on the mere fact of physical restriction, but on a conclusion that coercion—pressure to answer questions—

seemingly settled the matter. If the suspect is incarcerated, custody would be present regardless of the purpose of the interrogation.

That, at least, was the prevailing wisdom until 2012 with the decision in *Howes v. Fields*.<sup>99</sup> There, the Supreme Court reviewed a court of appeals ruling that “a prisoner is in custody within the meaning of *Miranda v. Arizona*, if the prisoner is taken aside and questioned about events that occurred outside the prison walls.”<sup>100</sup> Not so, held the majority of Justices. The opinion by Justice Alito recognized the earlier *Mathis* ruling but found that it is not the case that “a prisoner is always in custody for purposes of *Miranda* whenever a prisoner is isolated from the general prison population and questioned about conduct outside the prison.”<sup>101</sup> The process involves a two-step analysis, the first being whether the defendant’s freedom of movement has been curtailed.<sup>102</sup> Here, the courts must look to all the surrounding circumstances in making that decision.<sup>103</sup> The second is whether the interrogation took place in a coercive atmosphere, and being in an incarcerated situation does not necessarily make that atmosphere coercive so as to require *Miranda* warnings.<sup>104</sup> Several factors present in the instant case persuaded the majority that this individual was not in custody for the purpose of *Miranda*.<sup>105</sup> “[R]espondent was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted. Moreover, respondent was not physically restrained or threatened and was interviewed in a well-lit,

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usually flows from a certain type of custody, police station interrogation of someone charged with or suspected of a crime. Although petitioner was confined, he was at the time of interrogation in familiar surroundings.” *Id.* at 7. This was the point which formed the basis for the later decision in *Howes v. Fields*, *infra* note 99.

99. 565 U.S. 499 (2012).

100. *Id.* at 502 (citations omitted).

101. *Id.* at 508. The Court took the appeals judges to task. “The Sixth Circuit misread *Mathis*, which simply held, as relevant here, that a prisoner who otherwise meets the requirements for *Miranda* custody is not taken outside the scope of *Miranda* because he was incarcerated for an unconnected offense. It did not hold that imprisonment alone constitutes *Miranda* custody.” *Id.* at 499.

102. *Id.*

103. Including “the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning.” *Id.* at 509 (citations omitted).

104. *Id.*

105. *Id.*

average-sized conference room, where he was ‘not uncomfortable.’ [Plus] [h]e was offered food and water . . . .”<sup>106</sup>

As illustrated by the examples above, a custody determinations can be extremely nuanced, and anything but straightforward. The matter is only complicated further when the suspect is a juvenile, with arguably less understanding than an adult would have in a similar situation.

### III. CUSTODY AND MINORS, THE DECISION IN *J.D.B. v. NORTH CAROLINA*

Less than ten years before the decision in *J.D.B. v. North Carolina*,<sup>107</sup> the Supreme Court determined whether a trial court must consider the age of the minor in deciding if the custody requirement was met under *Miranda*.<sup>108</sup> The matter arose in *Yarborough v. Alvarado*.<sup>109</sup> Using rather broad language, the majority found that weighing the age of the person questioned would be inappropriate under the objective standard test set out in *Miranda*.<sup>110</sup> “[C]ustody must be determined based on how a reasonable person in the suspect’s situation would perceive his circumstances . . . 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.”<sup>111</sup>

For two reasons, though, in *J.D.B.* the Court was not bound by this earlier decision. First, *Alvarado* did not come up on direct appeal

106. *Id.* at 516. Dissenting Justice Ginsburg—joined by Justices Breyer and Sotomayor—analyzed the matter quite differently:

I would not train, as the Court does, on the question whether there can be custody within custody. Instead, I would ask, as *Miranda* put it, whether Fields was subjected to “incommunicado interrogation . . . in a police-dominated atmosphere,” whether he was placed, against his will, in an inherently stressful situation, and whether his “freedom of action [was] curtailed in any significant way.”

*Id.* at 518 (Ginsburg, Breyer, & Sotomayor, JJ., dissenting). For her, *Miranda* was violated here. “Today, for people already in prison, the Court finds it adequate for the police to say: ‘You are free to terminate this interrogation and return to your cell.’ Such a statement is no substitute for one ensuring that an individual is aware of his rights.” *Id.* at 519 (citations omitted).

107. 564 U.S. 261 (2011).

108. *Id.*

109. 541 U.S. 652 (2004).

110. *Id.*

111. *Id.* at 662, 668.

from a conviction.<sup>112</sup> Instead, the Justices considered only the narrow matter of whether the state court's decision on custody was an "unreasonable application of clearly established law" under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>113</sup> Second, the precise holding there was not established; the deciding vote in the 5–4 *Alvarado* decision came from Justice O'Connor.<sup>114</sup> While she did not see the need to take the age of this particular offender into consideration—he was almost eighteen-years-old at the time of the questioning—she wrote that "[t]here may be cases in which a suspect's age will be relevant to the 'custody' inquiry."<sup>115</sup>

When *J.D.B.* came before the Court, the principal question on direct appeal was whether a trial court must consider the youth of a juvenile offender in making the custody determination under *Miranda*.<sup>116</sup> In a 5–4 decision, the answer was a resounding "Yes."<sup>117</sup> To state the matter succinctly,<sup>118</sup> it is important to consider the youth

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112. *Id.* at 659.

113. *Id.* at 653–54.

114. *Id.* at 654.

115. *Id.* at 669. The four dissenters, in an opinion by Justice Breyer, forcefully wrote of the relevance of the offender's age.

What about Alvarado's youth? The fact that Alvarado was 17 helps to show that he was unlikely to have felt free to ignore his parents' request to come to the station. [J]uveniles [are] assumed "to be subject to the control of their parents." And a 17-year-old is more likely than, say, a 35-year-old, to take a police officer's assertion of authority to keep parents outside the room as an assertion of authority to keep their child inside as well. . . . Our cases do instruct lower courts to apply a "reasonable person" standard. But 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.

*Id.* at 673–74. This analysis became the basis for the standard of the new majority in *J.D.B.*

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

117. *Id.* at 264.

118. Succinctly because neither the *J.D.B.* holding nor the wisdom of the majority or dissent is the focus of this paper. Much excellent scholarly work has been done on the basis for the Court's *J.D.B.* decision and the soundness of that ruling. The writings on *J.D.B.* have been overwhelmingly supportive of the Court's ruling. See e.g., Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109 (2012); Sally T. Green, *A Presumptive In-Custody Analysis to Police-Conducted School Interrogations*, 40 AM. J. CRIM. L. 145 (2013); Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the*

of the alleged offender because, as the majority put it in its opening paragraph,

[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis.<sup>119</sup>

*J.D.B.* was a thirteen-year-old middle school student who was taken out of his classroom and questioned by several adults, including a uniformed police officer.<sup>120</sup> He was not given *Miranda* warnings and he made an incriminating statement while being questioned.<sup>121</sup> The state courts refused to look to his age in deciding if custody was present.<sup>122</sup> The lower courts there relied on *Alvarado* and wrote that they would not “extend the test for custody to include consideration of the age . . . of an individual subjected to questioning by police.”<sup>123</sup> Justice Sotomayor for the majority<sup>124</sup> took a very different view,

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*Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?* 47 HARV. C.R.-C.L.L. REV. 501 (2012); Joshua A. Tepfer, Laura H. Nirider & Steven A. Drizin, *Scrutinizing Confessions In a New Era of Juvenile Jurisprudence*, 50 CT. REV. (2014). For a contrary view, see Ronald J. Allen, *Do (Should) Juveniles Have More, Less, The Same, Or Different Rights Than Adults: The Gravitational Pull Of Miranda's Blackhole: The Curious Case Of J.D.B. v. North Carolina*, 46 TEX. TECH. L. REV. 143 (2013).

119. *J.D.B.*, 564 U.S. at 264–65.

120. *Id.* at 265.

121. *Id.* at 267.

122. *Id.* at 268.

123. *Id.*

124. Justices Scalia and Thomas, along with the Chief Justice, joined Justice Alito in dissent. For them, the majority had moved away from the key goal of *Miranda*: to apply a neutral, objective test for the admissibility of incriminating statements under the Fifth Amendment.

Today's decision shifts the *Miranda* custody determination from a one-size-fits-all reasonable-person test into an inquiry that must account for at least one individualized characteristic—age—that is thought to correlate with susceptibility to coercive pressures. Age, however, is in no way the only personal characteristic that may correlate with pliability, and in future cases the Court will be forced to choose between two unpalatable alternatives. It may choose to limit today's decision by arbitrarily distinguishing a suspect's age from other personal characteristics—such as intelligence, education, occupation, or prior experience with law enforcement—that may also correlate with susceptibility to coercive pressures. Or, if the Court is

emphasizing the difficult situation involving minors and their susceptibility to influence by law enforcement personnel.<sup>125</sup> Of particular concern was the growing evidence relating to false confessions given by minors.<sup>126</sup>

By its very nature, custodial police interrogation entails “inherently compelling pressures.” Even for an adult, the physical and psychological isolation of custodial interrogation can “undermine the individual’s will to resist and . . . compel him to speak where he would not otherwise do so freely.” Indeed, the pressure of custodial interrogation is so immense that it “can induce a frighteningly high percentage of people to confess to crimes they never committed.” That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.<sup>127</sup>

Rejecting the dissenters’ characterization of the majority holding as an unworkable extension of *Miranda*, Justice Sotomayor wrote that age was only one additional factor which police officers and judges could readily evaluate.<sup>128</sup>

Though the State and the dissent worry about gradations among children of different ages, that concern cannot justify ignoring a child’s age altogether. Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age. Indeed, they are competent to do so even though an interrogation room lacks the

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unwilling to draw these arbitrary lines, it will be forced to effect a fundamental transformation of the *Miranda* custody test—from a clear, easily applied prophylactic rule into a highly fact-intensive standard resembling the voluntariness test that the *Miranda* Court found to be unsatisfactory.

*Id.* at 283.

125. *Id.* at 281.

126. *Id.* at 269.

127. *Id.* The most recent research consistently finds that adolescents are more likely to confess falsely than adults. See e.g., Pamela Pimentel, et al., *Taking the Blame for Someone Else’s Wrongdoing: The Effects of Age and Reciprocity*, 39 *Law and Human Behavior* 219 (2015), <http://dx.doi.org/10.1037/lhb0000132>.

128. *J.D.B.*, 564 U.S. at 279.

“reflective atmosphere of a [jury] deliberation room.” The same is true of judges, including those whose childhoods have long since passed. In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child’s age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.<sup>129</sup>

That key question as to the use of age in the custody determination under *Miranda* has now been answered, and numerous state and federal decisions have been issued on point.<sup>130</sup> The key inquiry, though, is how the courts have, in the several years since *J.D.B.*, applied the mandate that they must weigh the age of the minor in deciding if she was in custody while being interrogated. The long answer is a bit complicated. The short answer, however, is clear: the courts have not applied the mandate in any sort of consistent fashion.

#### IV. APPLYING THE *J.D.B.* CUSTODY REQUIREMENT

The impact of *J.D.B.* has not been overwhelming, nor has it been severely limited. Its impact has not been overwhelming in part because the majority of juvenile offenders (and presumably those being subject to interrogation) are at least sixteen-years-old.<sup>131</sup>

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129. *Id.* at 279–80.

130. Though not in the *J.D.B.* case itself. On remand to the North Carolina courts, no official action was taken; *J.D.B.* was not recharged in the matter. There is no official, available record reflecting this. The information comes from correspondence with counsel, on file with the author.

131. This point was emphasized by Justice Alito in his *J.D.B.* dissent:

As an initial matter, the difficulties that the Court’s standard introduces will likely yield little added protection for most juvenile defendants. Most juveniles who are subjected to police interrogation are teenagers nearing the age of majority. These defendants’ reactions to police pressure are unlikely to be much different from the reaction of a typical 18-year-old in similar circumstances. A one-size-fits-all *Miranda* custody rule thus provides a roughly reasonable fit for these defendants.

*Id.* at 283. A dividing line as to responsible maturity levels has drawn criticism from neuroscientists who research brain development in young people. As one prominent scholar wrote, “Neuroscientists aren’t too concerned with trying to pinpoint the age of maturity—because we see plenty of problems with doing that—but policy has really dragged us into the conversation, which is making the community question how we can translate the research responsibly.” *The Challenge of Defining Maturity When the Brain Never Stops Changing*, NEURON, December 21, 2016,

Empirical evidence shows that there is relatively little difference between the sixteen- or seventeen-year-olds and the eighteen-year-olds in understanding—if not fully appreciating—rights in the interrogation setting.<sup>132</sup> To be sure, the *J.D.B.* majority itself seemed to concede the point: “This is not to say that a child’s age will be a

[https://www.eurekalert.org/pub\\_releases/2016-12/ep-tco121416.php](https://www.eurekalert.org/pub_releases/2016-12/ep-tco121416.php). For a discussion of the ongoing debate, see Carl Zimmer, *You’re an Adult. Your Brain, Not So Much*, N.Y. TIMES (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/science/youre-an-adult-your-brain-not-so-much.html>

132. One commentator makes the point clearly. “Most youths sixteen years of age or older exhibit cognitive abilities comparable to adults. . . .” Barry C. Feld, *Questioning Gender*, 49 WAKE FOREST L. REV. 1059, 1075. That same commentator, however, cautions care in equating the thought process of the teen to the adult. “While most youths sixteen years of age or older exhibit cognitive abilities comparable with adults, they do not develop mature judgment and adult-like competence to make decisions until their twenties.” Feld, *Behind Closed Doors*, *supra* note 22, at 405. See also Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 CARDOZO L. REV. 2161, 2184–85 (2016).

Juveniles are developmentally at a greater disadvantage than their adult counterparts in police—citizen encounters. Specifically, they lack mature judgment and impulse control, which make them less likely to perceive risks and thus be more reckless and greater risk-takers. . . . Although by age sixteen or seventeen, teenagers have similar reasoning and processing *abilities* as adults, adolescents of this age are “less capable than adults [] in using these capacities in making real-world choices.”

For a good discussion of this difference, see Nat’l Inst. of Mental Health, *The Teen Brain: Still Under Construction*, <https://infocenter.nimh.nih.gov/pubstatic/NIH%2011-4929/NIH%2011-4929.pdf>. One commentator put the matter in stark terms:

After advising suspects that they have a right to counsel and the right to remain silent, police typically ask a suspect some version of the following questions:

Q: Do you understand each of the rights as I’ve explained them to you?

Q: Do you wish to speak with me?

These deceptively simple questions require juveniles to do a cognitive task that often exceeds their abilities. Overwhelming empirical evidence shows that juveniles do not understand their constitutional privilege against self-incrimination, or the consequence of waiving their rights. This is not new information. . . . All told, research paints a dubious picture of juvenile suspects’ capacity to understand and assert their rights during custodial interrogation. The reality is likely even worse than the research shows. Because of limits on experiments involving human subjects (researchers cannot ethically replicate the capacity-reducing stress of an interrogation room), the findings likely *overstate* youths’ ability to understand and assert their rights.

Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 914–15, 918 (2017).

determinative, or even a significant, factor in every case.”<sup>133</sup> Still, the Court’s mandate of age consideration as to custody has made a genuine and substantial impact. Many juveniles each year are charged with serious crimes, and many of these individuals are below the age of sixteen, sometimes well below that age.<sup>134</sup> To be sure, as noted above, J.D.B. himself was thirteen-years-old when he was interrogated by the police.

We turn, then, to a look at the case law where *J.D.B.* has made a difference.<sup>135</sup> As both the *J.D.B.* majority and Justice Alito properly

133564 U.S. at 277.

134. For most criminal offenses, those under fifteen-years-old are arrested roughly one-third of the time as reflected in juvenile proceedings. Some crimes (arson, theft) occur more often with such minors, other crimes (especially alcohol related) occur less often. See U.S. DOJ, *OJJDP Statistical Briefing Book*, <http://www.ojjdp.gov/ojstatbb/crime/qa05104.asp?qaDate=2014>.

135. The court decisions are certainly instructive, but it is surprising that there is little guidance beyond the case law. There are few police department handbooks or national law enforcement association manuals which even mention the process which is to take place in deciding the custody question specifically for minors. See Appendix *infra* pp. 302–03. Researchers at the College of William & Mary looked at the police manuals for the 20 largest U.S. cities, not one discussed this matter. Indeed, even the *BNA Law Officer’s Pocket Manual*, 2016 edition, is silent on the subject. In the section dealing with *Miranda* and custody, §6:2 A 1, there is no mention at all of officers questioning minors. One useful worksheet can be found in International Association of Police Chiefs, *Reducing Risks: An Executive’s Guide to Effective Juvenile Interview and Interrogation*, at 27–28 (2006). School districts throughout the U.S. do a better job of offering guidance with the interrogation of students at school. See, for instance, these procedures:

- If it is found to be appropriate to question a student and if the parent/guardian is not present during the questioning, the investigating officer will inform the student that if requested, the administrator may remain in the room with the police officer and the student to witness the questioning. If the parent/guardian is present and requests to witness the interview, the administrator shall so advise the law enforcement officer. Marin Schools, *Protocol for Police Interviewing Students on a School Campus*, [www.marinschools.org/SafeSchools/Documents/P1-Interviewing.PDF](http://www.marinschools.org/SafeSchools/Documents/P1-Interviewing.PDF).
- Law enforcement officers may wish to interview students regarding their knowledge of suspected criminal activity and may wish to interrogate students who are themselves suspected of engaging in criminal activity. Except when law enforcement officers have a warrant or other court order, or when an emergency or other exigent circumstances exist, such interviews and interrogations are discouraged during the students’ class time. Oyster River, North Carolina Cooperative School Board, *Student Interviews and Interrogations*, [http://www.orcsd.org/UserFiles/Servers/Server\\_538005/File/School%20Board/Policies/J/JIHD\\_Student\\_Interviews\\_and\\_Interrogations.pdf](http://www.orcsd.org/UserFiles/Servers/Server_538005/File/School%20Board/Policies/J/JIHD_Student_Interviews_and_Interrogations.pdf).
- The principal or designee should be present throughout the questioning or interrogation, except in cases where the investigation concerns a student who

noted, the custody decision should involve a consideration of all the relevant circumstances of the interrogation.<sup>136</sup> Under the majority's view, the age of the youthful offender is part of this "totality of circumstances" approach.<sup>137</sup> Other factors are "such things as where the questioning occurred, how long it lasted, what was said, any physical restraints placed on the suspect's movement, and whether the suspect was allowed to leave when the questioning was

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is the victim of physical or sexual abuse where a member of the student's immediate family or household is suspected of being the perpetrator or a conspirator in such abuse and where the police investigator is a representative of a special unit trained to do such interviews. Sussex County, *Interrogations, Searches and Seizures*, [www.irsd.net/common/pages/DisplayFile.aspx?itemId=645039](http://www.irsd.net/common/pages/DisplayFile.aspx?itemId=645039).

- Whenever possible, law enforcement officials should contact and/or question students out of school. When it is absolutely necessary for an officer to make a school contact with a student, the school authorities will bring the student to a private room and the contact is made out of the sight of others as much as possible. . . . Attempts must be made to notify the school principal before a student may be questioned in school or taken from a classroom. . . . The administration shall attempt to notify the parent(s) of the student to be interviewed by the law enforcement officials before questioning begins, unless extenuating circumstances dictate that this is not to be done. Hilliard City School District, *Interrogations and Searches*, [https://www.hilliardschools.org/board/policy/JFG\\_R\\_Interrogations\\_and\\_Searches.pdf](https://www.hilliardschools.org/board/policy/JFG_R_Interrogations_and_Searches.pdf).
- If the police find it necessary to interrogate a student about possible criminal conduct or activity, to issue Miranda rights to a student, or the student is taken into police custody, the school official shall immediately take all reasonable steps to contact the parent(s)/guardian(s) of the minor student. The school officials or designee will continue efforts to contact the parent(s)/guardian(s) until actual contact is made to advise them of the action taken by the police. Wausau School District, *Interviews/Interrogations of Students by Law Enforcement Officers During School Hours and at School Buildings*, [http://www.wausauschools.org/UserFiles/Servers/Server\\_808843/File/District/5740.pdf](http://www.wausauschools.org/UserFiles/Servers/Server_808843/File/District/5740.pdf).

136. 564 U.S. at 284.

137. *Id.* One can readily find an enormous number of cases applying the totality approach in determining if minors and young adults were in custody. *See, e.g., In re Adriana G.*, 2017 WL 605671, at \*6 (Cal. Ct. App. Feb. 15, 2017); *State v. Jensen*, 385 P.3d 5, 12 (Idaho Ct. App. 2016); *N.C. v. Commonwealth*, 396 S.W.3d 852, 862 (Ky. 2013); *Norwood v. State*, 114 A.3d 267, 276 (Md. Ct. Spec. App. 2015); *Commonwealth v. Bermudez*, 980 N.E.2d 462, 468–69 (Mass. App. Ct. 2012); *In re R.S.*, 2014 WL 4071562, at \*3 (Ohio Aug. 18, 2014); *In re E.W.*, 114 A.3d 112, 117 (Vt. 2015); *Commonwealth v. Floyd*, 2011 WL 4026805, at \*4 (Va. Ct. App. Sept. 13, 2011); *State v. A.I.*, 2017 WL 2229931, at \*9 (Wash. Ct. App. May 22, 2017).

through.”<sup>138</sup> To this, of course, we must now add the age of the suspect. Let us look at the cases through this lens.<sup>139</sup>

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138. 564 U.S. at 286, relying on these cases: *Maryland v. Shatzer*, 559 U.S. 98, 110, 113 (2010) (Edwards v. Arizona’s presumption of involuntariness for communications with law enforcement persists only for 14 days after the right to counsel is invoked); *Berkemer v. McCarty*, 468 U.S. 420, 434–37 (1984) (declining to extend *Miranda* protections to routine traffic stops); *New York v. Quarles*, 467 U.S. 649, 655–56 (1984) (establishing an exception to *Miranda* requirements where questioning by law enforcement is “reasonably prompted by a concern for the public safety”); *California v. Beheler*, 463 U.S. 1121, 1123 (1983) (no custody where defendant voluntarily accompanied officers to police station to answer questions shortly after offense was committed and suspect was not arrested). *United States v. Patterson* provides a good overview of the law governing custody:

In determining whether a reasonable person in the suspect’s shoes would have felt free to leave, we consider “all of the circumstances surrounding the interrogation.” Factors relevant to the totality of the circumstances analysis include: (1) the location of the interrogation; (2) the duration of the interrogation; (3) any statements made by the suspect during the interrogation; (4) any use of physical restraints during the interrogation; and (5) whether the suspect was released at the end of the interrogation. We have provided a non-exhaustive list of example factors, which includes: “whether the encounter occurred in a public place; whether the suspect consented to speak with the officers; whether the officers informed the individual that he was not under arrest and was free to leave; whether the individual was moved to another area; whether there was a threatening presence of several officers and a display of weapons or physical force; and whether the officers’ tone of voice was such that their requests were likely to be obeyed.”

826 F.3d 450, 455 (7th Cir. 2016); *see also* *United States v. Hernandez-Gonzalez*, 2017 WL 2954678, at \*4 (S.D. Fla. Jul. 6, 2017); *United States v. Diaz*, 2016 WL 4180981, at \*2–3 (E.D. La. Aug. 8, 2016).

139. One commentator developed for the general reader a list of even more specific factors:

- Who asked the questions? Was it a police officer? A prison guard? Was the questioner in a position of authority? Was he or she carrying a gun? The identity of the questioner goes to the intimidation level of the interview. For example, a court may consider an armed police officer or prison guard more compelling than a postal inspector.
- How many officers were there? More officers points to a more coercive setting.
- Who else was there? A court may find a situation less coercive if the suspect is surrounded by friends or family.
- Who initiated the discussion? A suspect walking up to an officer and asking questions suggests a non-custodial situation.
- Did the officer tell the suspect the interview was voluntary? If so, a court is more likely to consider the interview non-custodial.
- Where did the questioning take place? Was it at the police station? The suspect’s house? On the street? In a hospital room? The issue is how familiar

A. *Cases Where Age of the Suspect was of High Importance in Custody Determination*

The question is not entirely about the number of years the individual has attained. As pointed out by Justice Sotomayor, “[o]ur history is replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults.”<sup>140</sup> Still, the age of the minor is of primary significance. Common sense indicates that the younger the suspect, the more concerned one should be with the process. Just as Justice O’Connor in *Alvarado*<sup>141</sup> was not moved by the age of the soon-to-be eighteen-year-old offender, courts certainly ought to be moved by the questioning of juveniles who are well below the age of eighteen. Precedent dictates that the cut off seems to be about thirteen-years-old. Below that age, the courts are highly skeptical; much above that age and the courts are more inclined to defer to law enforcement. For this category, at least, there is some consistency. Still, even nine-year-olds (*yes*, nine-year-olds) can be

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or coercive the setting is to the suspect. An interview at a police station, for example, would likely be more intimidating than one on a sidewalk.

- Did the officer use any force on the suspect? If an officer used force prior to or during the questioning, a court may consider it a custodial situation.
- Did the officer use any physical restraints? Was the suspect able to move around? Restriction of movement supports a finding of custody.
- What time was it when the conversation took place? Was it the middle of the night? Or during the day? An interview at an odd hour may point to custody.
- How long did the questioning last? Longer interviews lean toward a finding of custody.
- What was the style of the interview? Were the questions accusatory or routine? An interviewer accusing the suspect of certain acts in a threatening manner may indicate a custodial situation.
- Was the suspect free to leave at the end of the conversation? A “yes” answer tends to suggest that the suspect wasn’t in custody.

Jane Rydholm, *Miranda: The Meaning of “Custodial Interrogation”*, NOLO, <http://www.nolo.com/legal-encyclopedia/miranda-the-meaning-custodial-interrogation.html>; *see also* LaToya Powell, *Applying the Reasonable Child Standard to Juvenile Interrogations After J.D.B. v. North Carolina*, JUV. L. BULL., at 8 (Feb. 2016) (discussing the application of *J.D.B.* factors in interrogations); Allison Redlich, et al, *The Police Interrogations of Children and Adolescents*, in INTERROGATION, CONFESSIONS AND ENTRAPMENT 107 (G. Daniel Lassiter ed., 2004) (examining the factors as applied in interrogations); *see also* Appendix, *infra* pp. 302–03.

140. *J.D.B.*, 564 U.S. at 274. Or, as one court recently put it: “[T]he mind of a fourteen-year-old is markedly less developed than that of an adult.” *Weeden v. Johnson*, 854 F.3d 1063, 1070 (9th Cir. 2017).

141. *See supra* text accompanying note 115.

found to be not in custody, while cases with seventeen-year-olds may reach different results.<sup>142</sup>

There are many illustrations of the basic point. In a recent case, a twelve-year-old was accused of sexually abusing her younger friend.<sup>143</sup> She was questioned at the police station, was not given warnings, and made an incriminating statement.<sup>144</sup> The court found that the minor was in custody, though the government argued to the contrary relying on the fact that she had not been arrested until after the incriminating statement was made.<sup>145</sup> The court considered a number of factors in finding custody, including that K.C. was twelve-years-old at the time of the interview with the police, she had no previous experience with the criminal justice system, she was brought by her mother at the detectives' request, which limited her control over events and rendered her presence involuntary.<sup>146</sup> The court also recognized that though the room where the detectives conducted the interview was

142. A nine-year-old was the subject of *D.L.H., Jr.*, 32 N.E. 3d 1075 (Ill. 2015). There the court wrote:

[T]he court must make an objective determination as to whether a reasonable person, innocent of wrongdoing, would have believed he or she was free to terminate the questioning and leave. Where, as here, the person questioned is a juvenile, the reasonable person standard is modified to take that fact into account. . . . After thoroughly reviewing the video recordings of the two interviews of respondent, as well as Detective Adams's testimony at the suppression hearing, we conclude respondent was not in custody when he was questioned. Both interviews took place in surroundings familiar to respondent—his home, at his kitchen table. Detective Adams was the only officer present. He wore his service revolver, but was not in uniform. . . . Detective Adams was aware that respondent was just nine years old. Indeed, he testified that he had concerns about questioning someone so young. The State concedes that this factor favors a finding that respondent was in custody. It is, however, only one factor of many. . . .

*Id.* at 1088. The child was found to be not in custody. Two justices disagreed with the court's reasoning.

Certainly the most compelling factor here is respondent's tender age. Although I question whether *any* child—particularly a child under the age of 13—ever truly feels that he or she has the freedom to *not* cooperate with police, it is clear to me that a nine-year-old such as respondent here, who had no prior experience with law enforcement, would have felt compelled to speak to Detective Adams.

*Id.* at 1098 (Burke & Freeman JJ., specially concurring). The issues with older juveniles are discussed *infra* notes 157–65 and accompanying text.

143. *In re K.C.*, 32 N.E. 3d 988, 990 (Ohio Ct. App. 2015).

144. *Id.*

145. *Id.* at 993.

146. *Id.*

unlocked, it was small, approximately 10'x10' or 12'x12', and contained only a table and three or four chairs.<sup>147</sup> The detectives initially told K.C. and her mother that K.C. was not under arrest, and that she would be going home at the *conclusion* of the interview.<sup>148</sup> The detectives asked her mother to leave immediately during the interview, and K.C. was left alone with the two female detectives; the detectives did not offer to let her talk to her mother during the interview, which lasted approximately 75 minutes.<sup>149</sup>

Even with many factors, it is clear that the youth of the suspect was pivotal, as reflected in the language of that decision and others: “This is not to say that we would reach the same result in every case involving a 12-year-old.”<sup>150</sup> In another recent case involving a twelve-year-old, the juvenile was questioned in the office of his middle school principal by a police officer.<sup>151</sup> He, too, was not warned of his rights.<sup>152</sup> The court found that he was in custody and thus the interrogation violated *Miranda*.<sup>153</sup> Once again, while noting that “[n]o one factor is dispositive”<sup>154</sup>, the court focused on the age of the minor.<sup>155</sup> “Considering all the circumstances of F.F.’s interrogation, we conclude no reasonable 12-year-old in F.F.’s position would believe he was free to leave the principal’s office or terminate the police officer’s interrogation.”<sup>156</sup>

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147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *In re F.F.*, 2013 WL 1274706, at \*1 (Cal. Ct. App. Mar. 28, 2013).

152. *Id.*

153. *Id.*

154. *Id.* at \*2.

155. *Id.* at \*3 (“A consideration in the objective custody determination, as the Supreme Court has noted, was F.F.’s youth and detention in the principal’s office. A school principal’s office is a more coercive atmosphere for a child attending that school than for the average adult.”); *Id.* at \*6 (“F.F., 12 years old and 4 feet 10 inches tall, was seated, unhandcuffed, in the principal’s office. Sergeant Baarts was aware of his youth, and testified he estimated F.F. to be under the age of 14.”).

156. *Id.* The court in *In re L.G.*, 2017 WL 2223058, at \*3–4 (Ohio Ct. App. May 12, 2017) considered the custody issue with the questioning at school of a thirteen-year-old:

It was apparent that an active police (as well as school) investigation was underway—uniformed police officers and bomb-sniffing dogs were present, and a Crime Stoppers reward had been offered to the students. All students were gathered in the school’s gymnasium following a bomb threat; they were not free to move about the school on their own. L.G. was retrieved from the gymnasium by the school resource officer, who had the authority of a special

Such determinations may make good sense when the suspect is a very young child. Few courts, though, reach the same conclusion under relatively similar circumstances when the individual is older. For example, in *Gaono v. Long* the suspect was seventeen-years-old.<sup>157</sup> The interrogation process there was intense.<sup>158</sup> It took place at the police station, the defendant had been handcuffed, and the questioning was for a few hours around midnight.<sup>159</sup> Still, a state court finding of no custody was upheld,<sup>160</sup> citing the fact that the suspect was “nearing the age of majority.”<sup>161</sup> Another California decision was even less concerned with the age of the suspect.<sup>162</sup> In investigating an attempted murder, the police questioned the defendant at his home.<sup>163</sup> The officer testified that he went to the defendant’s house, and asked the suspect to come out to the porch; the officer stated “that he would not have allowed defendant to go back

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police officer. L.G. was brought to the cafeteria to be questioned by the school district’s Executive Director of Safety and Security, not school personnel with whom L.G. would have been familiar. Two uniformed officers stood five to fifteen feet from L.G., standing closer to L.G. than to [Executive Director]; Officer Stewart indicated that he observed [Executive Director’s] questioning of L.G. Under these circumstances, a reasonable person in L.G.’s position would have believed that he was in custody.

*In re* L.G., 2017 WL 2223058, at \*3–4 (Ohio Ct. App. May 12, 2017); *see also In re* Edgar, 2014 WL 3752828 (Cal. Ct. App. Jul. 31, 2014) (“Edgar was only 13 years old at the time of his police interview. At no point did Officer Horvat or the assistant principal give Edgar an opportunity to call his mother, tell him he was free to leave, or inform him that he was not obligated to speak to her. In our view, a reasonable 13 year old in Edgar’s position would not have felt free to leave the assistant principal’s office where the officer asked the door be closed and both the assistant principal and officer were present. A child in Edgar’s situation would reasonably believe that his disobedience would subject him to disciplinary action.”); *United States v. IMM*, 747 F.3d 754, 767 (9th Cir. 2014) (“the detective’s aggressive, coercive, and deceptive interrogation tactics created an atmosphere in which no reasonable twelve year old would have felt free to tell the detective, an adult making full use of his position of authority, to stop questioning him.”). *But see* B.A. v. State, 2017 WL 1162205 (Ind. Ct. App. Jun. 1, 2017) (where the thirteen-year-old was found not to be in custody; there the questioning was conducted by a school official, not a police officer).

157. 2014 WL 171548 (S.D. Cal. Jan. 10, 2014).

158. *Id.* at \*17.

159. *Id.*

160. A later interview of the suspect was found to be custodial, as at that point he “asked [the officer] if he could leave, she stated that she did not know what was going on, that he would have to leave with his mother because of his age, and that he should put his head down and rest.” *Id.*

161. *Id.* at \*18.

162. *People v. Gonzales-Loredo*, 2013 WL 754057, at \*1 (Cal. App. Feb. 28, 2013).

163. *Id.*

inside his house and shut the door.”<sup>164</sup> The court did not find custody; the discussion of the custody issue was minimal, with the appeals court simply noting, “[t]he defendant was close to his 17th birthday.”<sup>165</sup>

*B. Focusing on Location in Making Custody Determination*

Most relevant litigation involves questioning taking place either in or near the suspect’s home or at the individual’s school. In many of these cases courts weigh the presence of an adult at that location as part of the determination. This is true whether the adult is viewed as part of the law enforcement team, or as someone who is supportive of the minor, such as a parent, relative, or friend. Still other courts write about the friendly (or unfriendly) environment in which the questioning takes place. Looking at these factors, however, has led courts to issue rulings on custody which appear to be utterly irreconcilable.<sup>166</sup>

In one recent Ohio case, no custody was found where the very young child—nine-years-old—was questioned near his home with his mother “in the immediate vicinity.”<sup>167</sup> There was no custody where the child, after the questioning, “was not placed under arrest and was allowed to go home with his parents.”<sup>168</sup> A similar ruling, with another nine-year-old child, focused on the questioning occurring at home with the father of the child being present.<sup>169</sup> A judge in the case, specially concurring, saw things quite differently.

[S]ince respondent was in his own home, where could he have gone if he wanted to leave? . . . In addition, the fact that respondent’s father was present, in my view, only served to place the parent’s imprimatur on the questioning. The father

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164. *Id.*

165. *Id.* at \*2. As stated in *Commonwealth v. Bermudez*, 980 N.E. 2d 462, 468 (Mass. App. Ct. 2012): “The defendant’s age, a few months shy of his eighteenth birthday, placed him on the cusp of majority, and far removed from the tender years of early adolescence.”; *see also In re C.O.*, 84 A.3d 726, 734 (Pa. Super Ct. 2014). *Compare* *N.C. v. Commonwealth*, 396 S.W. 3d 852, 862 (Ky. 2013) (seventeen-year-old; custody found), *with State v. Jones*, 55 A3d 432, 440 (Me. 2012) (seventeen-year-old; no custody). *See generally State v. Pearson*, 804 N.W.2d 26, 269 (Iowa 2011) (court emphasized that the defendant was “a hardened seventeen-year-old”).

166. *See infra* notes 167–79 and accompanying text.

167. *In re R.L.*, 23 N.E. 3d 298, 303 (Ohio Ct. App. 2014).

168. *Id.* The court did not mention *J.D.B.*

169. *D.L.H., Jr.*, 32 N.E. 3d at 1082.

played virtually no role in counseling or advising his son. The only time respondent's father advised him was to tell him to "tell the truth," which reinforced the notion that respondent was required to speak to the police.<sup>170</sup>

The court in a 2015 case from California had an even easier time deciding that an older suspect was not in custody.<sup>171</sup> The juvenile was seventeen-years-old, he was questioned just outside his home and his mother was there.<sup>172</sup> The court made clear that the officer "spoke politely. . . [and there was] no evidence the officer was coercive or attempted to pressure Minor, and he did not restrict Minor's freedom of movement."<sup>173</sup>

Other courts, however, reached quite different results looking to very much the same elements. Coming back to Ohio we find another recent case in which the fourteen-year-old was brought to Children Services by his mother.<sup>174</sup> The court recognized that the interview had not occurred at the police department and the minor was told he was not under arrest.<sup>175</sup> Still, custody was found, as "a reasonable juvenile in T.W.'s position would likely not feel free to stand, walk past the authoritarian figure seated near the door and out of the interview room."<sup>176</sup> A Louisiana court also decided the minor, a fifteen-year-old, was in custody when he was interviewed at school.<sup>177</sup> This was so even though his mother had brought him to the school,<sup>178</sup> a very familiar environment. The majority explained:

[H]is presence [at the school] was ostensibly involuntary. . . . Bearing this in mind, at fifteen years of age, a reasonable juvenile in J.D.'s position would, in all likelihood, be intimidated and overwhelmed. Thus, the evidence tends to

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170. *Id.* at 1098 (Burke & Freeman, JJ., specially concurring). *See also In re Adriana*, 2017 WL 605671, at \*6 (Cal. Ct. App. Feb. 15, 2017); *In re T.J.*, 2016 WL 2754107, at \*5 (Cal. Ct. App. May 9, 2016).

171. *In re Cristofer*, 2015 WL 5919114 (Cal. Ct. App. Oct. 9, 2015).

172. *Id.* at \*3.

173. *Id.* at \*5.

174. *In re T.W.*, 2012 WL 1925656, at \*1 (Ohio Ct. App. May 29, 2012).

175. *Id.* at \*5.

176. *Id.*

177. *State in the Interest of J.D.*, 154 So. 3d 726, 733 (La. Ct. App. 2014).

178. *Id.* at 728–29.

suggest that a reasonable fifteen-year-old would believe that his freedom of movement had been significantly restricted.<sup>179</sup>

If these holdings stand under *J.D.B.*, how then to explain the result in *In re R.S.*?<sup>180</sup> There, the court determined the sixteen-year-old was not in custody even though he was brought to the office of the juvenile probation officer and was questioned by a uniformed police officer.<sup>181</sup> And, while the officer said that the minor and his father were free to leave the office at any time, the officer did not tell this to the minor or his father.<sup>182</sup> The court concluded that “a reasonable 16-year-old in R.S.’s position would have felt free to terminate the interview and leave the premises.”<sup>183</sup>

With these cases, it is extremely difficult to see any uniform pattern of location and presence of others beyond a recitation of the factors to be considered. To illustrate the point, one must ask where this statement by a court in Alaska<sup>184</sup> fits with these other decisions:

[C]ourts “are virtually unanimous in recognizing that a directive or ‘request’ for a secondary school student to leave class for the purpose of being questioned by a police officer can result in a custodial interrogation for *Miranda* purposes.” . . . [A] student who is told by a principal or teacher that he must speak with a law enforcement officer might reasonably believe that he is not free to leave the interview or break off questioning. Furthermore, a police interview is not something that a reasonable student would anticipate as part

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179. *Id.* at 732–33. *But see* *Cobb v. Sec’y Dep’t of Corr.*, 2011 WL 5525355, at \*8 (M.D. Fla. 2011) (seventeen-year-old brought to school offices, but he was not a suspect “and was free to leave at any time.”).

180. *In re R.S.*, 2014 WL 4071562, at \*1 (Ohio Ct. App. 2014).

181. *Id.* at \*1, \*4–6.

182. *Id.* at \*5.

183. *Id.* at \*6; *see also In re J.T.M.*, 884 N.W. 2d 535 2016 WL 3884577, at \*1 (Wis. Ct. App. Jul. 19, 2016) (questioning at private residential facility for children with special needs; suspect was sixteen-years-old). There are numerous cases where the presence of a family member in the interview setting is deemed highly relevant. *See, e.g., In re Hector S.*, 2016 WL 3685091, at \*8–10 (Md. Ct. Spec. App. Jul. 12, 2016) (sister); *In re T.J.*, 2016 WL 2754107, at \*5–6 (Cal. Ct. App. May 9, 2016) (father). *But see State v. Betancourth*, 2016 WL 7222859, at \*16 (Wash. Ct. App. Dec. 8, 2016) (suspect’s parents were barred from the interview room, but the court did not find custody because “[n]o officer told Betancourth that he was under arrest. . . . [He] left when he wanted.”).

184. *Kalmakoff v. State*, 257 P.3d 108, 112 (Alaska 2011) (fifteen-year-old defendant was taken out of school for an interview in a city office).

of a normal school day and is simply not comparable to routine activities such as taking a standardized test or speaking with a counselor about class choices. Thus, the fact that a student was directed by school authorities to leave class to speak with law enforcement officers is a relevant fact “pertaining to events before the interrogation” that may, depending on the individual circumstances, support a finding of *Miranda* custody.<sup>185</sup>

*C. Evaluating the Duration of the Interrogation in Making Custody Determination*

Somewhat surprisingly, the duration of the interrogation is not often a major issue in reported cases dealing with custody issues for minors. One might think that the number of hours of questioning would be significant, especially when a juvenile suspect is involved. Still, there are relatively few reported cases in which the interrogation of a minor lasted an extended period. Perhaps law enforcement officers are heeding the advice given in the major police set of guidelines published by the International Association of Chiefs of Police, mentioned above.<sup>186</sup> The prevailing advice is to keep it minimal:

Juveniles can tolerate only about an hour of questioning before a substantial break should occur. A juvenile interrogation should never last longer than four hours. In fact, if a child or adolescent is questioned for a prolonged period of time, the risk that any statement will be either involuntary or unreliable increases substantially with each passing hour.<sup>187</sup>

Of course, if the questioning lasts for only minutes, that timing will help establish that no custody was present.<sup>188</sup> If the interrogation

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185. *Id.* at 121, 123 (citations omitted).

186. *See* The International Association of Chiefs of Police, *supra* note 135.

187. *Id.* at 8.

188. *See, e.g.,* *People v. N.A.S.*, 329 P.3d 285, 292 (Colo. 2014) (“[t]he entire interview was over within 5-10 minutes.”). Still, there is not complete agreement. Another judge, concurring in judgment in *N.A.S.*, focused on factors apart from the time involved:

Here, the encounter occurred at school in a small, closed room; a uniformed police officer and the two school officials were present; the officer and the principal stood during the interrogation; N.A.S. did not have an opportunity to speak to a parent or legal guardian alone (although his father and uncle were also in the room); the officer did not tell N.A.S. that he was free to leave;

lasts for a longer, but not extended, period, then duration becomes a consideration—albeit a relatively minor one.<sup>189</sup>

*D. Evaluating Statements Made by Police and Whether Suspect was Told She was Free to Leave*

For some courts, this factor is the most important in the analysis. In essence, courts are asking if the minor truly understood from the officers' words that she was not being detained. In some cases, the courts make clear that the tone and mood of the conversation will be determinative on the matter of custody. For instance, in one Illinois case involving a fifteen-year-old,<sup>190</sup> the court was moved by some key facts surrounding the questioning: "the record does not show the officer badgered respondent"<sup>191</sup> "the officer's use of a hypothetical shows the questioning was inquisitory ('[W]hat would have happened if you and T.H. got into a fight?') rather than accusatory ('You were going to stab T.H., weren't you?'),"<sup>192</sup> "nothing indicates [the officer] engaged in any physical or mental abuse or made threats or promises to respondent in an attempt to coerce or intimidate her into making an inculpatory statement."<sup>193</sup>

Contrast the tone in that opinion with that found in *In re* of S.R.,<sup>194</sup> where the officer took a very different posture in the interrogation process:

The detective and S.R. initially made small talk. Then the detective told S.R. about the alleged victim's accusations and said that the alleged victim was not lying. The detective continually encouraged S.R. to be honest, at one point telling

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the officer warned N.A.S. that the charges were very serious and could affect the rest of his life; the officer's tone and demeanor were serious; and the mood was somber and intimidating, especially for a 13-year-old child.

*Id.* at 294 (Hood, J., concurring in judgment); *see also In re* T.D.B., 2017 WL 1208755, at \*1 (Minn. Ct. App. April 3, 2017) (five to seven minute interrogation of a seventeen-year-old); *In re* T.J., 2016 WL 2754107, at \*5 (Cal. Ct. App. May 9, 2016) (interview of the thirteen-year-old lasted twenty to thirty minutes).

189. As it was in *People v. Sample*, 2013 WL 5460190, at \*1 (Cal. Ct. App. Oct. 1, 2013), discussed *infra*, where the questioning of the high school student lasted two hours. *Id.* at \*10. Of most importance to the court was that the suspect was told that he was not under arrest. *See infra* note 197.

190. *In re* Marquita, 970 N.E.2d 598, 603 (Ill. App. Ct. 2012).

191. *Id.* at 604.

192. *Id.*

193. *Id.* at 605.

194. 2017 WL 1300092, at \*1 (Kan. Ct. App. Apr. 7, 2017).

him that people are usually more lenient or more forgiving towards those who are honest. The detective told S.R. that everyone makes mistakes and nothing he said would prevent him from leaving on his own.<sup>195</sup>

The court found custody even though the officer had earlier told the suspect that he was not under arrest and that he could end the questioning and leave if he wished.<sup>196</sup> Though noting that the decision on custody was “a close call,” the court found a *Miranda* violation:

[T]he facts surrounding the interrogation highlight the differences between how an adult may have viewed the situation versus a child. S.R.’s interrogation occurred around 8 a.m. at the Gardner police station. The district court did not find the time of the interrogation to be coercive. However, the interrogation did take place at a police station rather than at a neutral location, which generally points to the interrogation being custodial. The interrogation lasted about 1 hour and 40 minutes, which also adds to the custodial nature of the interrogation, although there have been instances where longer interrogations have been held to be noncustodial.

...

... While an adult may have felt free to leave in this instance, the entire record suggests that S.R.—an immature child of 13 who was unfamiliar with the criminal justice system—did not feel free to leave.<sup>197</sup>

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195. *Id.* at \*1.

196. *Id.*

197. *Id.* at \*3–4; *see also* United States v. IMM, 747 F.3d 754, 766–67 (9th Cir. 2014) (discussing the interrogation of a twelve-year-old). *But cf.* Sample, 2013 WL 5460190, at \*11–12:

We think a reasonable person in Sample’s position would have felt free, under these circumstances, to end the questioning and leave. Sample was told twice that he was not under arrest, and he was also assured that police did not intend to arrest him that day. The door to the interview room was not locked. Although Sample was asked at the start of the interview to “do [Pritchard] a favor” and turn off his cell phone, it was not taken from him, and there were at least two breaks when Sample was left alone and could have called anyone he wanted to call.

*Id.* (sixteen-year-old suspect).

Of course, if the officer directly advises the juvenile that he is not under arrest and may leave, generally, that greatly helps the claim that the suspect was not in custody during the interrogation. For instance, in one recent case,<sup>198</sup> the fifteen-year-old suspect was “clearly told [the officer] was only there to talk to him, he was not under arrest, he did not have to talk and was free to leave.”<sup>199</sup> An Alaska court acknowledged that “a fifteen-year-old is significantly more likely than an adult to be intimidated by the type of confrontational questioning that took place in this case.”<sup>200</sup> The court nevertheless decided that the minor was not in custody, as he “was told that he did not have to submit to the interview, and he was given the chance to consult with, or obtain the presence of, a parent or guardian.”<sup>201</sup>

Nevertheless, even telling the suspect she is not under arrest may be insufficient to dispel the notion of custody. The matter can remain difficult, as in one recent case where the petitioner, sixteen-years-old, was suspected of killing his eighteen-month-old daughter.<sup>202</sup> While at school he was brought to the administrative office to be interviewed by a police officer.<sup>203</sup> He was immediately told that he was not under arrest.<sup>204</sup> A second time—while he was being questioned at the police station—he was told he was not under arrest and further that “the door is open; you’re free to leave at any time.”<sup>205</sup> Soon thereafter he was told yet again that he was not under arrest.<sup>206</sup> Still, the United States Magistrate Judge found that the suspect was in custody because of the time elapsed between the advisements and the incriminating statement, along with other comments made by the investigating officers which “actually conveyed the opposite indication

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198. *In re M.B.*, 2016 WL 3570621, at \*1 (Ohio Ct. App. June 30, 2016).

199. *Id.* at \*7; *see also In re Adriana*, 2017 WL 605671, at \*6 (Cal. Ct. App. Feb. 15, 2017) (where police told the fifteen-year-old suspect that she was not under arrest).

200. *W.L. v. State*, 2015 WL1757343, at \*4 (Alaska Ct. App. Apr. 15, 2015).

201. *Id.*; *see also In re C.B.*, 2016 WL 3570600, at \*6 (Ohio Ct. App. Jun. 30, 2016) (“At the outset, C.B. was told by [the officer] he was there to talk to him, he was not under arrest, he did not have to talk to him, and he was free to leave.”); *In re C.M.A.*, 2013 WL 3481517, at \*4 (Tx. App. Jul. 2, 2013) (“C.M.A. was expressly told that he was not under arrest. During the first interview, there was likewise evidence that C.M.A. was also told that he did not need to speak with Beathard and was free to leave the room at any time.”).

202. *Smith v. Clark*, 612 F. App’x 418, 421 n.2 (9th Cir. 2015).

203. *Smith v. Clark*, 2013 WL 4409717, at \*5 (E.D. Cal. Aug. 15, 2013).

204. *Id.*

205. *Id.* at \*12.

206. *Id.* at \*13.

that a reasonable person would feel free to leave.”<sup>207</sup> The Ninth Circuit, on appeal, took a very different view. Applying the deferential standard mandated in a habeas corpus proceeding,<sup>208</sup> the court found that the state court’s conclusion of no custody was not unreasonable.<sup>209</sup> The court stressed the words spoken to the minor:

Most significantly, as the state appellate court emphasized, the police advised Smith that he was not under arrest three times and that he was free to leave twice. The Supreme Court and this Court have consistently recognized that such advisements weigh strongly in favor of the view that an interviewee was not in custody.<sup>210</sup>

The concurring judge was much less convinced.

The police subjected the petitioner in this case, Jovon’z Smith, to incommunicado interrogation in a police-dominated atmosphere—namely, a small, windowless room in the bowels of the police station, without his parents or any other family members present. Interrogating a suspect in that setting, the Court recognized in *Miranda*, gives the police a significant psychological advantage in overcoming a suspect’s desire to remain silent. Why? Mainly because the suspect is alone, cut off from the rest of the world, in surroundings that are intimidating and unfamiliar.

. . . .

In giving all-but-dispositive weight to a “you’re not under arrest” advisement, the California courts appear to be validating a practice adopted by at least some California police departments. Those departments interpret existing Supreme Court precedent to mean that so long as a suspect is told he’s

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207. *Id.*

208. The court stated that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA):

authorizes the grant of a state prisoner’s petition for a writ of habeas corpus when the relevant state court decision was (1) “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court” or (2) “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

612 F. App’x at 418 (quoting 28 U.S.C. §2254(d)).

209. *Id.* at 419–20.

210. *Id.* at 420; *see also* Booker v. Commonwealth, 2017 WL 1102987, at \*5 (Ky. Ct. App. Mar. 24, 2017) (fifteen-year-old told he was not suspect).

not under arrest, officers need not provide *Miranda* warnings, even if the circumstances surrounding the interrogation give rise to the same “inherently compelling pressures” to speak that the warnings were designed to combat.<sup>211</sup>

The complications here were also explored by two state judges in a recent Vermont case.<sup>212</sup> For the majority, the determinative fact was that the juvenile was not told he was free to leave:

There is no dispute that the officer here did not explain to E.W. or his foster parent that they were free to end the interview and leave. Although not dispositive, we have held that a clear communication from the police to the person being questioned about his or her freedom is “the most important factor” in determining whether a reasonable person would have felt free to terminate the interview and leave at any time. When the police are questioning a minor, the relative inexperience and vulnerability to authority of the youthful suspect renders this factor even more critical.<sup>213</sup>

The dissenting justice looked to other significant facts which led him to believe there was no custody, even though the suspect had not been told he was not under arrest:

Common sense demonstrates that a fifteen-year-old juvenile is more responsible than a younger child and able to understand whether a situation has created a “restraint on freedom of movement of the degree associated with a formal arrest.” Vermont law recognizes this fact, treating juveniles differently depending upon the nature of the alleged crime and the age of the juvenile. . . . Here, given the other circumstances—that E.W. was questioned by one police officer in a familiar setting and with family members close by—there is nothing to indicate that a reasonable fifteen-year-old in E.W.’s circumstances would perceive that he was under arrest and not free to leave.<sup>214</sup>

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211. 612 F. App’x. at 422, 424. (Watford, J., concurring) (citations omitted).

212. *In re E.W.*, 114 A.3d 112 (Vt. 2015).

213. *Id.* at 117 (citations omitted).

214. *Id.* at 123–24 (Dooley, J., dissenting) (citations omitted); *see also* State v. Jensen, 385 P.3d 5, 12 (Idaho Ct. App. 2016) (finding no custody when the seventeen-year-old suspect “was never told he was not free to leave”).

*E. Evaluating Whether Suspect had Freedom of Movement when Making Custody Determination*

Often the concerns with limitation of movement are fused into other categories, such as the location of the interrogation and the words spoken to the suspects. Still, it is important to point out the significance courts place on any apparent restraints on the movement of the individual. If it is made quite clear to that person, through actions or words, that she can leave when she wishes to, courts simply will not find custody. That was the situation in one California case involving a seventeen-year-old.<sup>215</sup> While the defendant was questioned at the police station, the court found that this was not custodial interrogation.<sup>216</sup> The defendant “was not physically restrained at any time. He was placed in an interview room and told he was not in custody or under arrest, could leave at any time, and that the door was closed only for privacy reasons.”<sup>217</sup> In short, there was no showing that the defendant “was actually or constructively restrained.”<sup>218</sup> The District of Columbia Court of Appeals reached the same result even though the sixteen-year-old defendant there was transported by the police from a city street back to his home.<sup>219</sup> Specifically, the court reasoned that

A.J. was not handcuffed or otherwise restrained, nor did Officer Parsons accuse him of a crime. Indeed, beyond the bare fact of temporary seizure to transport A.J. to his home nearby for purposes of investigation, there is nothing that the officer did that could plausibly be perceived, from A.J.’s perspective or any other, as coercive, or as though he was being arrested.<sup>220</sup>

Yet here, as elsewhere, it is difficult to find consistency in the application of the custody doctrine laid out by the Supreme Court. Another California case makes the point nicely.<sup>221</sup> There, the thirteen-year-old boy’s father was actively involved in the entire interrogation

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215. *People v. Rocha*, 2013 WL 4774758, at \*1 (Cal. Ct. App. Sept. 6, 2013).

216. *Id.* at \*6–8.

217. *Id.* at \*7.

218. *Id.*; see also *Commonwealth v. Bermudez*, 980 N.E. 2d 462, 468 (Mass. App. Ct. 2012) (discussing factors weighing against finding custodial interrogation).

219. *In re A.J.*, 63 A.3d 562, 568–69 (D.C. 2013).

220. *Id.*

221. *In re J.R.*, 2015 WL 1577270, at \*1 (Cal. Ct. App. Apr. 7, 2015).

process: he initiated contact with the police and he consented to the police questioning of his son.<sup>222</sup> Yet, the interrogation in the suspect's home was deemed custodial based on the following facts:

Three officers in uniforms, bullet-proof vests, utility belts, and guns arrived at the apartment where J.R. lived with his father. They were just moving in and the apartment was unfurnished. [The officer] repeatedly told J.R. to stop coming outside and to remain inside the apartment. . . . Essentially, J.R. was kept inside the apartment, away from his father, by [the officers]. [The minor] was later taken into an unfurnished bedroom with two of the officers for questioning (although one officer later agreed to leave). The officers closed the bedroom door during the questioning. . . . The purpose of the interview was not to question J.R. as a witness, but as a suspect. The police never told J.R. that he was free to terminate the interview, leave the apartment, or have his father present for the questioning. . . .

Although the questioning occurred where J.R. lived, the apartment was hardly a comfortable and secure home-like environment; it was not yet furnished and the only seating was in the bathroom. Finally, J.R. was a 13-year-old boy, and no evidence suggested he had any experience with the criminal justice system, such that he would understand he was free to end the questioning and leave.<sup>223</sup>

#### CONCLUSION

It is of great importance that courts apply the *Miranda* ruling to juveniles in custody decisions.<sup>224</sup> Certainly, courts follow the *J.D.B.* mandate and factor in the age of the minor being interrogated. But the way in which age is factored in is wholly another matter. There simply is no uniformity in the reported cases. This is true whether one

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222. *Id.* at \*6.

223. *Id.*

224. Each year, almost one million juveniles are arrested. See U.S. DEPT OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK, version 2015, [https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qa\\_](https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qa_) (https://www.ojjdp.gov/gojstatbb/crime/qa05101.asp?q)[https://perma.cc/T5R3-2ULX](https://perma.cc/T5R32ULX) (last visited Nov. 28, 2017). Former President Obama discussed this in his recent article. See Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 852 (2017).

looks only to the age of the suspect or to other elements such as the location and duration of the interrogation. Though such lack of consistency is disappointing, it is not surprising. After all, men and women, mostly in their fifties and sixties, are being asked to consider how a reasonable teen or younger child would think about the deprivation of liberty in a given situation.<sup>225</sup>

It is a task that may be beyond virtually all adults. One thoughtful commentator recently stated the matter clearly:

Finally, adolescents' decision-making processes differ significantly than adults'. Generally, and not surprisingly, studies of adolescence reveal that teens as a class are less competent decision-makers than adults. Even as teens' cognitive capacities approach that of adults in mid-adolescence, they are less skilled than their adult counterparts in using these capacities to make real-life decisions.

.....  
[The law's] reliance on inference is fundamentally flawed as it fails to account for the distinctive thought processes of adolescent actors. Recent developments in neuroscience confirm this difference. The impulsive, risk taking, reward centered, consequence blind existence that is adolescence is both a shared right of passage and a lost moment for adult fact finders. While a juror or judge may remember youth, he will not remember the decision-making processes that drove his daily adolescent existence. Therefore as criminal law asks him to sit in judgment of juvenile defendants, it asks him to perform the impossible task of placing himself back in time into the mind of an adolescent.<sup>226</sup>

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225. The average and median age of currently-serving U.S. judges is about sixty-years-old while the average and median age at the time of appointment is about 50-years-old. BARRY J. MCMILLION, CONG. RESEARCH SERV., R43426, U.S. CIRCUIT AND DISTRICT COURT JUDGES: PROFILE OF SELECT CHARACTERISTICS 11 (2017), available at <https://www.fas.org/sgp/crs/misc/R43426.pdf>. The question then becomes: How do such advanced in age adults decide "whether, based upon the objective circumstances, a reasonable child of the same age [as the suspect] would believe his freedom of movement was significantly restricted"? *C.M.A.*, 2013 WL 3481517, at \*4 (quoting *In re L.M.*, 993 S.W.2d 276, 289 (Tex. App. 1999)).

226. Jenny E. Carroll, *The Problem with Inference and Juvenile Defendants*, 45 FLA. ST. L. REV. (forthcoming 2017).

While there has been considerable social science research on what young people believe, and how they process information,<sup>227</sup> the judicial decisions hardly mention such scholarship. Until courts look to the actual evidence of understanding by minors in this setting, the best solution one can hope for is to add to the constitutional mandate. That is, more legislatures should be encouraged to adopt the specific and somewhat strict limits some states have put in statutory language on how, when and where minors can be interrogated by law enforcement officers.<sup>228</sup> While hardly dispute free, these laws offer the kind of guidance simply not present with *Miranda* and *J.D.B.* as applied. If the Justices will not act to fully support this view, it is up to legislators to do so.

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227. *See supra* notes 131–32.

228. *See supra* text accompanying notes 31–34. The New Mexico Supreme Court in *State v. Rivas*, 398 P. 3d 299 (N.M. 2017) discussed the varied legislative approaches:

Recognizing these principles, numerous other jurisdictions have established, by statutory scheme, special protections for children subject to police questioning, both before and after attachment of the Sixth Amendment right. Some require that a parent or guardian be present at questioning, or before a child may validly waive the right to counsel. *See, e.g.*, Conn. Gen. Stat. Ann. § 46b-137(a) (West 2012) (statements of a child under sixteen inadmissible unless made in the presence of a parent or guardian who has been advised of the child's rights); Miss. Code Ann. § 43-21-303(3) (West 1980) (police must extend invitation to parent or guardian to be present for child's interrogation). Others require the presence of parent or counsel. *See, e.g.*, Ind. Code Ann. § 31-32-5-1(3) (West 1997); N.D. Cent. Code Ann. § 27-20-26(1) (West 2012); cf. Colo. Rev. Stat. Ann. § 19-2-511(1) (West 1999). Still others direct that waiver can be made only with the assistance of counsel. Tex. Fam. Code Ann. § 51.09(1) (West 1997); W. Va. Code Ann. § 49-4-701(l) (West 2016).

*Id.* at 311.

## APPENDIX

|  |   |   |
|--|---|---|
|           | <p><b>ANYTOWN POLICE DEPARTMENT</b><br/>         123 Main Street<br/>         Anytown, USA 070470</p> |  |
| <b>WORKSHEET - IS THIS JUVENILE INTERVIEW CUSTODIAL?</b>                                   |   |   |
| <b>Incident:</b>   |   |   |
| Incident #: _____  |   | Officer / Investigator: _____   |
| Juvenile Name: _____   |   | DOB: _____  |
| <b>Nature of Interview:</b>  |   |   |
| Suspect __ Victim __ Complainant __ Witness __ Other __                                    |   |   |
| <b>Interview:</b>  |   |   |
| Date: _____  |   | Time: _____   |
| Location: _____  |   |   |
| Check All That Apply:  |   |   |
| Residence: Interviewee's Residence __ Friend's Residence __ Other Residence __ School __   |   |   |
| School Administrator's Office __ SRO's Office __ Classroom __ Police Station __ Juvenile   |   |   |
| Bureau __ Detective Bureau __ Turnout Room __ Lobby __ Designated Juvenile Interview       |   |   |
| Room __ Office __ Outside __ Outside School Property __ Public Area __ Private Property __ |   |   |
| Describe Setup of Room: _____  |   |   |
| Can interviewee easily leave if they wanted to? Yes __ No __                               |   |   |
| Is this clearly understood by the child? Yes __ No __                                      |   |   |
| Door Locked? Yes __ No __  |   |   |
| <b>Primary Interviewer:</b>  |   |   |
| Name: _____  |   |   |
| Law Enforcement: Yes __ No __  |   |   |
| Rank: _____ Uniformed: Yes __ No __  |   |   |
| Weapon Visible: Yes __ No __   |   |   |
| Civilian: Yes __ No __   |   |   |
| School Official __ Social Worker __ Probation Officer __ Other __                          |   |   |
| <b>Who Is Present?</b>   |   |   |
| Law Enforcement Present In Addition To Primary Interviewer:                                |   |   |
| Name: _____  |   |   |
| Rank: _____ Uniformed: Yes __ No __  |   |   |
| Weapon Visible: Yes __ No __   |   |   |

Parent/Guardian/Concerned Person:  
Present: Yes \_\_\_ No \_\_\_  
Name: \_\_\_\_\_  
Relationship: \_\_\_\_\_

Additional People Present:  
Name: \_\_\_\_\_  
Relationship: Family \_\_\_ Law Enforcement \_\_\_ School Official \_\_\_ Social Worker \_\_\_  
Probation Officer \_\_\_ Clergy \_\_\_

Name: \_\_\_\_\_  
Relationship: Family \_\_\_ Law Enforcement \_\_\_ School Official \_\_\_ Social Worker \_\_\_  
Probation Officer \_\_\_ Clergy \_\_\_

**Method of Documentation:**  
Note Taker: Yes \_\_\_ No \_\_\_  
Written: Yes \_\_\_ No \_\_\_  
    Handwritten: Yes \_\_\_ No \_\_\_  
    Typed: Yes \_\_\_ No \_\_\_  
Video: Yes \_\_\_ No \_\_\_  
Audio: Yes \_\_\_ No \_\_\_

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Conclusion: In your professional opinion after considering the above information, current case law and the totality of the circumstances:  
**Is this Interview Custodial? YES \_\_\_ NO \_\_\_**  
**IF YES, ADMINISTER *MIRANDA* WARNINGS TO THE JUVENILE.**

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**"Totality of the Circumstances" Test – Factors:**

- Circumstances of the confession
- Environment
- Methods used to obtain confession
- Suspect's physical condition
- Suspect's mental condition
- Length of interview or interrogation
- Age
- Education and intelligence (developmental level, comprehension)
- Experience with juvenile justice system