

# ***J.D.B. V. NORTH CAROLINA AND THE REASONABLE PERSON***

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## INTRODUCTION

This Term, the Supreme Court was presented with a prime opportunity to provide some much-needed clarification on a “backdrop” issue of law—one of many topics that arises in a variety of legal contexts, but is rarely analyzed on its own terms. In *J.D.B. v. North Carolina*,<sup>1</sup> the Court considered whether age was a relevant factor in determining if a suspect is “in custody” for *Miranda* purposes, and thus must have her rights read to her before being questioned by the police. *Miranda*, like dozens of other areas of law, employs a reasonable person test on the custodial question: it asks whether a reasonable person would, given the circumstances, believe that she is free to leave.<sup>2</sup> The issue posed by *J.D.B.*, then, was whether age counts as part of a suspect’s “circumstances” for *Miranda* purposes. Unfortunately, the Court’s June opinion managed only to compound the confusion and, in an ironic twist, did so while extolling the virtue of providing “clear guidance to the police.”<sup>3</sup> This Essay critically examines the *J.D.B.* opinion, using it as a lens to both critique the traditional objective/subjective distinction and articulate a more honest interpretation of the reasonable person test—one based on the uncomfortable truth that the test is, at its core, arbitrary.

## I. THE CASE

The facts in the case are straightforward. J.D.B. was a thirteen-year-old special education student whom the police suspected of breaking into a neighbor’s home and stealing several items, including a digital camera. While in school, J.D.B. was removed from his social studies class by a uniformed police officer, told the police wanted to talk to him, and escorted into a conference room with a police officer, the school’s assistant principal, and the assistant principal’s intern. The police officer began questioning the

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1. No. 09-11121, slip op. (U.S. June 16, 2011).
2. See *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).
3. *J.D.B.*, 09-11121, slip op. at 8 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004)).

suspect about the burglary; before the officer read him his *Miranda* rights, he confessed. Two juvenile petitions were filed, and J.D.B. was eventually found delinquent.

In *Miranda v. Arizona*, the Supreme Court held that if a suspect is in custody, she must be informed of her Fifth Amendment rights before being interrogated.<sup>4</sup> “In custody” covers more than an arrest: it includes any “restraint on freedom of movement of the degree associated with a formal arrest.”<sup>5</sup> In determining whether this standard is satisfied, the police must apply an objective test and ask whether a reasonable person in the suspect’s situation would “have felt he or she was not at liberty to terminate the interrogation and leave.”<sup>6</sup> In *J.D.B.*, the issue was whether age is a relevant circumstance to that question. The Court answered in the affirmative, holding in a 5–4 decision by Justice Sotomayor that “[s]o long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.”<sup>7</sup>

## II. RELEVANT CIRCUMSTANCES

The reasonable person test comes up in dozens of different areas of law, from *Miranda*’s in-custody analysis to negligence suits to criminal law self-defense claims. And whenever this test is applied, the courts must determine which factors are relevant—that is, which facts about the situation they should include in the reasonable person inquiry. Factors like the physical location of the incident are intuitively relevant; the individual’s particular beliefs or desires, on the other hand, are not. And other considerations—like a person’s age—occupy a gray area, not falling easily into either camp. Unfortunately, there is no principled way to deal with these middle-of-the-road factors.

In my attempt to try to prove a negative, let’s start by considering the way the Court and most commentators have tried to solve the problem: by appealing to the distinction between “objective” and “subjective” factors. In *J.D.B.*, the Justices wrote, “As we have repeatedly emphasized, whether a suspect is ‘in custody’ is an objective inquiry.”<sup>8</sup> The benefit of employing this objective test, they argue, is that “limiting analysis to the objective circumstances of the interrogation . . . avoids burdening the police.” with cumbersome rules that are difficult to apply.<sup>9</sup>

There are several reasons why this distinction will not work. To begin with, the kinds of factors that we might want to label subjective, and thus

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4. *Miranda v. Arizona*, 483 U.S. 436, 478-79 (1966).

5. *Alvarado*, 541 U.S. at 667.

6. *Id.*; see also *Thompson*, 516 U.S. at 112.

7. *J.D.B.*, slip op. at 14.

8. *Id.* at 7.

9. *Id.* at 8.

irrelevant to the reasonable person inquiry, are actually objective, in the sense that there's a fact of the matter about them. There is, for example, a matter of fact about what kinds of experiences a person had in the past and what effect they have on her reasoning; we could incorporate these facts into an objective test by asking what a reasonable person *with those particular experiences* would do. But including all of the objective facts about a person (her age, past experiences, psychological makeup, mental states, physical characteristics, reactive attitudes, etc.) would collapse the test into an investigation of what that particular person in that particular case would do—precisely the outcome we want to avoid. And so, consistent with this reasoning, the Court has rejected a number of objective factors in applying the reasonable person test, including, in *Alvarado*, mental states and past interrogation history (though it incorrectly refused to call them objective factors). The word “subjective” is similarly unavailing. We might first think that “subjective” means something like “the person’s beliefs.” But that definition is underinclusive: there are a host of characteristics besides a person’s beliefs that we want to screen out of the reasonable person test, including her past experiences, desires, behavioral dispositions, and reactive attitudes.

Perhaps the objective/subjective distinction is meant instead to track something like physical facts vs. psychological facts. “Psychological facts” seems to work better than the term “beliefs” because it can capture those irrelevant characteristics I just mentioned (past experiences, desires, etc.). But this alternative doesn’t do any better in the long run. First, on a wider view, the distinction between physical and psychological collapses in on itself: the reason why a person has a particular mental state is just because of certain physical facts that pertain—in particular, physical facts about that person’s brain. But it’s a fair point that as a matter of folk psychology, at least, we’re intuitively able to draw this distinction in a way that looks nonarbitrary, and this may provide us with guidance in distinguishing relevant factors from irrelevant ones under *Miranda*. Unfortunately, there are a number of factors we would readily categorize as psychological—and thus supposedly irrelevant to *Miranda*—that the Court would be compelled to include in the reasonable person test. Take language. To the extent a person’s language skills have to be classified as either physical or psychological, it seems clear they would fit into the latter: they have to do with the mental states that flow from a person’s hearing certain sounds, and they don’t keep good company with physical descriptors like height, weight, and eye color. But the Court would find it impossible to exclude facts about the language a suspect speaks in determining whether she is in custody. Consider a case where the police say, in Italian, “We are the police. We have placed you under arrest, and we are backed by the power of the State. If you try to leave, we will shoot you with our guns.” If the suspect speaks Italian, the Court couldn’t seriously argue that he wasn’t in custody because a reasonable, English-speaking person wouldn’t understand the threat. And the reverse is true as well: a suspect who doesn’t understand Italian couldn’t claim his *Miranda* rights were violated because a reasonable

Italian-speaking person would believe he was in custody. The language abilities of the particular suspect must be taken into account, and as a result, the objective/subjective distinction relied on by the *J.D.B.* majority must be rejected.

The dissenting Justices in *J.D.B.* are well aware of these problems, but do not offer a compelling alternative. Justice Alito's dissent has it right when he argues that the majority has backed itself into a corner: it must limit its decision by "arbitrarily distinguishing a suspect's age from other personal characteristics . . . that may also correlate with susceptibility to coercive pressures," or else turn *Miranda* into a "highly fact-intensive standard" that considers every personal trait of each defendant.<sup>10</sup> Alito would instead have deemed relevant only the "external" circumstances of the interrogation, by which he means to exclude any fact about the suspect that we might think of as internal to her. He relies on the Court's 2004 decision in *Alvarado*, which said, "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test and resolve the ultimate inquiry . . ." <sup>11</sup> Alito's argument is deceptively persuasive: it neatly avoids tough line-drawing questions by screening out all of the suspect's individual characteristics and considering only "where the questioning occurred, how long it lasted, what was said, any physical restraints . . . and whether the suspect was allowed to leave when the questioning was through."<sup>12</sup> But adopting such a cramped view of *Miranda* would force the lower courts to ignore essential background facts. Take the suspect's language ability, as I discussed above. That the defendant speaks Italian certainly isn't a fact about the physical setting of the interrogation; it's a fact internal to her and thus off the table under the dissent's view. Or consider blindness, another specific (and thus internal) characteristic of the suspect that even the dissent admits is relevant to *Miranda*. Justice Alito, calling such a case a "far-fetched hypothetical," writes that it "presumably" would only arise where the police give a blind person "a typed document advising him he [is] free to leave."<sup>13</sup> According to Alito, "[F]urnishing this advice in a form calculated to be unintelligible to the suspect would be tantamount to failing to provide the advice at all." This is an accurate statement, but it is accurate *precisely because* blindness constitutes part of the reasonable person's circumstances—the tension between the footnote and the dissent's larger position is palpable. Alito goes on to claim that "advice by the police that a suspect is or is not free to leave at will has always been regarded as a circumstance" that must be taken into account. But that isn't right. A statement by the police that a suspect is free to go

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10. *Id.* at 3 (Alito, J., dissenting).

11. *Alvarado*, 541 U.S. at 662–63 (citation omitted).

12. *J.D.B.*, slip op. at 6 (Alito, J., dissenting).

13. *Id.* at 16 n.16. I can think of a number of other situations where blindness would be relevant: where the police point a gun at the suspect; where the police quietly lock the door in front of the suspect; where the police show photos of a crime scene during the interrogation; and so on.

wouldn't be relevant if the statement were given on the other side of a soundproof wall. The existence of the soundproof wall—a relevant circumstance—compels this conclusion. And it is only by assuming that blindness is also a relevant circumstance that we may draw a similar inference.

### III. WHERE WE GO FROM HERE

If there is no principled way to determine which circumstances are relevant under *Miranda*'s reasonable person test, it is worth asking what the Court should base its decisions on. My aim is to sketch a few possibilities in the hope of generating further discussion.

I start with four suggestions alluded to by the Court. I want to begin by noting a significant tension in the opinion: if *J.D.B.* is meant to track the objective/subjective distinction, it isn't clear why the Court quickly ran through a few policy arguments. And if these arguments are meant to be the real justification for the holding, the Court throws them in much too cavalierly. In any case, the majority begins by noting that “in some circumstances, a child's age would have affected how a reasonable person in the suspect's position would perceive his or her freedom to leave.”<sup>14</sup> While accurate, this reasoning applies equally well to other factors the Court has ruled are irrelevant: it would be just as correct to say, for example, that the suspect's past interrogation history will affect how a reasonable person would perceive the situation.<sup>15</sup>

The majority is also worried about administrability concerns, emphasizing the importance of “provid[ing] clear guidance to the police” about whom to Mirandize.<sup>16</sup> There are two reasons why administrability gets much more airtime in the Court's opinions than it should. First, ease of application isn't exactly the driving force in the Court's *Miranda* jurisprudence. After all, we could make the test easy to apply by saying the police must always inform the suspect of her rights. Second, it's a very rare case where ease of application will make a practical difference. We would have to face a situation where the outcome of the case did in fact turn on the officer making the “correct” decision about whether to give a *Miranda* warning. This could only occur in a case where a police officer gave a *Miranda* warning when he wasn't obligated to do so; the officer would have chosen *not* to give the warnings if the interrogation test were easier to apply; and the fact that he did give the warning when he wasn't obligated to do so actually affected the outcome of the case. That's a lot of assumptions, and my hunch is that such a case is quite rare.

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14. *Id.* at 8 (majority opinion) (citations omitted).

15. *See Alvarado*, 541 U.S. at 668–69 (rejecting past interrogation history as a relevant circumstance).

16. *J.D.B.*, slip op. at 8 (citing *Alvarado*, 541 U.S. at 668).

The Court also observes that “the law has historically reflected the . . . assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them,”<sup>17</sup> and gives several examples. This line of argument has promise, but much more needs to be said. As it stands, the Court’s analysis doesn’t go very far in explaining why age is a relevant circumstance in the *Miranda* context in particular: the law has traditionally treated insane people differently in any number of ways, but the Court has already decided that “the frailties and idiosyncrasies” of a suspect aren’t relevant.

Finally, Sotomayor makes the curious claim that “the custody analysis would be nonsensical absent some consideration of the suspect’s age.”<sup>18</sup> How, the Court asks, could a court evaluate how a reasonable person would react to “objective circumstances that, by their very nature, are specific to children[,] without accounting for the age of the child subjected to those circumstances?”<sup>19</sup> But it is perfectly sensible to make this evaluation: a court would simply ask what an adult would think if she were sitting in a seventh-grade class, told to go to the principal’s office, and then questioned. And if the Court is suggesting (as I think it is) that the inquiry is nonsensical because an adult can’t make sense of what it’s like for a child to be pulled from his seventh-grade class and questioned without referencing age, then it is assuming the conclusion it set out to prove: by asking *what a child* would think in that situation, the Court has already incorporated age into the test. A similar argument could be made about a person who is interrogated by the police in a mental hospital while she is suffering from a severe psychosis: how, I could ask, can a court evaluate how a reasonable person would react to objective circumstances that are, by their very nature, specific to psychotics?

Apart from what we can squeeze out of the *J.D.B.* opinion itself, there are other ways we might distinguish relevant from irrelevant circumstances. First, the Court could base its decisions on a concern about coerced confessions. This is, after all, the primary focus of *Miranda*, rooted as it is in the Fifth Amendment right against self-incrimination. But as the *J.D.B.* dissent pointed out, even if the police were not obligated to give *Miranda* warnings in a particular case, the defendant could always argue that his confession was involuntary. *Miranda* warnings, the *J.D.B.* court reiterated, are a prophylactic measure. *Miranda*, then, could only make a practical difference in two ways: First, we would have to have a case where a confession was given; the confession was coerced; the trial court incorrectly found the confession was not coerced; the police weren’t obligated to give *Miranda* warnings; and if the police had given *Miranda* warnings, the suspect would not have confessed. Second, it would make a difference if the constitutional requirement that police give *Miranda* warnings in certain

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17. *Id.* at 10.

18. *Id.* at 12.

19. *Id.* at 13.

situations somehow reduces, ex ante, the number of confessions police coerce and then use against the suspect. Again, I would think such situations are rather rare. There may be arguments to the contrary—advocates may be able to create and analyze data that show *Miranda* makes a significant practical difference—but now the debate has shifted firmly into empirical territory, and the issue should be discussed on those terms, rather than having the Supreme Court declare by fiat that *Miranda* has a particular effect.

A few other suggestions—ones I only point out for further thought—include ensuring consistent application of Fifth Amendment jurisprudence by different courts; protecting against the violation of human dignity that occurs when state actors interrogate innocent suspects; and putting a greater emphasis on either positive or negative freedom (and with that, a concomitant focus on psychological or physical coercion). *Miranda* scholars have opinions about the purposes of that famous decision, and those opinions can inform the way we distinguish relevant from irrelevant circumstances. Or, we might decide that application of the reasonable person test shouldn't vary depending on the area of law, and base our decisions on issues not specific to the Fifth Amendment. My only point here is that the answers to these issues are not obvious: the Court and academic commentators should tackle them head-on, rather than dressing up poorly constructed distinctions like the supposed differences between objective v. subjective or external v. internal facts.

## CONCLUSION

The reasonable person test shows up again and again in dozens of areas of law, and yet the Supreme Court's most recent decision on the subject only further obfuscated its use and application, making an arbitrary distinction about which circumstances are relevant to the inquiry. The Court should instead defend these distinctions on alternative grounds—grounds that are articulated and defended on their own terms.