

## Due Process Rights and Children: Fifty Years of *In re Gault* – Part Five, the Privilege Against Self-Incrimination

[Juvenile defenders](#), the [court system](#), the [governor](#), and other advocates recently celebrated a historic moment in juvenile justice. Monday was the [50<sup>th</sup> Anniversary](#) of the *In re Gault* decision, which guaranteed juveniles the right to due process in delinquency proceedings. In honor of the event, this multiple part series on due process has explored the history of *Gault* and how it transformed juvenile court by ensuring that juveniles have the right to notice, the right to counsel, and the right to confrontation and cross-examination. This final post discusses the Fifth Amendment privilege against self-incrimination and the protection it provides to juveniles, assuming they understand what it means and know how to assert it.

### The Fifth Amendment Privilege and Juveniles

In 1964, Gerald Gault was ordered to serve nearly six years in a state industrial school for allegedly making a prank phone call. His adjudication was based upon a confession obtained without his parents or a lawyer being present and without advising him of the right to remain silent. The Arizona courts decided that such formalities (*i.e.*, the advisement of rights and participation of lawyers and parents) were unnecessary in juvenile court where the goal was treatment and not punishment. The U.S. Supreme Court disagreed.

Recognizing that children are more prone to coerced confessions than adults, the court rejected the notion that the Fifth Amendment privilege did not apply to children due to the labeling of juvenile court as “civil” and not criminal. 387 U.S. 1, 45. Describing the harsh realities of juvenile court, the Supreme Court held that:

juvenile proceedings to determine ‘delinquency,’ which may lead to commitment to a state institution, must be regarded as ‘criminal’ for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the ‘civil’ label-of-convenience, which has been attached to juvenile proceedings. Indeed, in over half of the states, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult ‘criminals.’ In those states, juveniles may be placed in or transferred to adult penal institutions after having been found ‘delinquent’ by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one’s will, whether it is called ‘criminal’ or ‘civil.’ And our Constitution guarantees that no person shall be compelled to be a witness against himself when he is threatened with deprivation of his liberty[.]

*Id.* at 49-50.

***Gault* also extended the *Miranda* rule to juveniles**, requiring law enforcement officers to advise juveniles in custody of their Fifth Amendment rights prior to any questioning. Under the *Miranda*

rule, statements made by a juvenile while “in custody” are inadmissible in court unless *Miranda* warnings were given and the juvenile knowingly and voluntarily waived the juvenile’s rights. The *Gault* court recognized that “special problems may arise with respect to waiver of the privilege by or on behalf of children,” but did not establish any specific requirements for such waivers. *Id.* at 55. As a result, state laws vary significantly with respect to whether and how juveniles may waive their rights and whether they must do so in the presence of a parent or an attorney.

## **NC Juvenile Code Requirements**

North Carolina law provides juveniles with special protections that go well beyond *Gault*’s minimum requirements. [G.S. 7B-2405](#), which codifies the privilege against self-incrimination and other due process rights for juveniles, mandates that trial courts *shall* protect these rights in the adjudication hearing. The Juvenile Code also requires:

**Notice to Parents When a Juvenile is in Custody.** When a juvenile is taken into temporary custody by a law enforcement officer without a court order, the officer must notify the juvenile’s parents and inform them of their right to be present with their child until a decision is made as to whether continued custody is necessary. [G.S. 7B-1901\(a\)\(1\)](#).

**Advisement of the Right to Parental Presence During Custodial Interrogation.** In NC, juveniles under the age of 18 are entitled to have a parent present during a custodial interrogation. Thus, before a law enforcement officer questions any juvenile who is in custody, the officer must advise the juvenile of the following rights: (1) that the juvenile has a right to remain silent; (2) that any statement made by the juvenile can be used against him or her; (3) that the juvenile has the right to have a parent, guardian, or custodian present during questioning; and (4) that the juvenile has the right to an attorney and that one will be appointed if the juvenile is not represented and wants representation. [G.S. 7B-2101\(a\)](#). When officers fail to give these warnings, any statements made by a juvenile while in custody are inadmissible in court. *In re K.D.L.*, 207 N.C. App. 453 (2010).

**No Waiver of Rights by Juveniles Under Age 16.** NC law now requires that when a juvenile is under the age of 16, a parent or an attorney must be present during the custodial interrogation in order for the juvenile’s statements to be admissible in court. Also, if an attorney is not present, both the parent and juvenile must be informed of the juvenile’s rights; although, only the juvenile can waive his or her rights. [G.S. 7B-2101\(b\)](#).

**Advisement of Rights When Accepting Juvenile’s Admission.** A trial court may only accept a juvenile’s admission (*i.e.*, guilty plea) after personally addressing the juvenile to make six mandatory inquiries, including informing the juvenile that the juvenile has the right to remain silent and that anything the juvenile says may be used against him or her. [G.S. 7B-2407](#). Because there is a greater duty to protect the rights of juveniles in juvenile proceedings, the court’s failure to address even one of these mandatory inquiries is reversible error. *In re T.E.F.*, 359 N.C. 570

(2005).

**Advisement of Rights When Juvenile Testifies.** In order to comply with the mandate in [G.S. 7B-2405](#) to protect a juvenile's privilege against self-incrimination, trial court judges must advise juveniles of the right to remain silent before allowing the juvenile to testify in his or her own delinquency proceeding. [In re J.R.V.](#), 212 N.C. App. 205 (2011).

Requiring the advisement of these warnings prior to interrogations by law enforcement and before a juvenile enters admissions in court increases the likelihood that juveniles will understand their rights and will have an opportunity to exercise them. However, potential barriers may still exist.

### **The Practical Reality**

Some advocates argue that these statutory protections do not go far enough, if juveniles cannot fully understand their rights or effectively assert them. According to this [article](#) in the ABA Journal, most youth find *Miranda* rights to be confusing, and nearly 90% of them waive their rights without understanding the consequences.

Another potential barrier to juveniles exercising their rights is the requirement that juveniles must satisfy adult legal standards to trigger their rights under *Miranda*. Until six years ago when the Supreme Court decided [J.D.B. v. North Carolina](#), police officers applied a "reasonable adult" standard to determine when they must advise a juvenile of *Miranda* and juvenile rights. *J.D.B.* held that the *Miranda* custody test must account for a child's youth and its unique characteristics. However, recent appellate decisions reveal that courts have not significantly changed how they apply the *Miranda* analysis to interrogations of juveniles (see this [bulletin](#) addressing the reasonable child standard).

Advocates also argue that juveniles should not be allowed to waive their rights without the assistance of a parent or attorney. North Carolina law, by requiring the presence of a parent or attorney during custodial interrogations of juveniles younger than 16, implicitly recognizes that children lack the capacity to understand their rights without a helpful adult. Despite this protection, juveniles continue to face barriers when attempting to invoke their rights.

In 2015, the NC Court of Appeals held in [State v. Saldierna](#) that a 16-year-old possibly attempted to invoke his right to have a parent present during a police interrogation when he asked the detective if he could call his mother, which triggered a requirement that the interrogating officers clarify his statement before proceeding. However, last December, the NC Supreme Court reversed the decision. It held that a juvenile must clearly and unambiguously invoke the statutory right to have a parent present during a custodial interrogation, just like an adult must do to invoke *Miranda* rights. [State v. Saldierna](#), \_\_\_ N.C. \_\_\_, 794 S.E.2d 474 (2016). A prior [blog post](#) discusses why the Supreme Court's decision possibly conflicts with *J.D.B.*'s mandate that police officers and courts must account for the special vulnerability of juveniles during police interrogations.

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Despite these potential barriers, significant progress has been made in the fifty years since *Gault*, especially in [North Carolina](#). Let us know your thoughts about additional ways courts can better protect a juvenile's rights.