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To Testify or Not to Testify: The Dilemma Facing Children with Multiple Cases before the Same Judge in Delinquency Court

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TO TESTIFY OR NOT TO TESTIFY: THE DILEMMA FACING CHILDREN WITH MULTIPLE CASES BEFORE THE SAME JUDGE IN DELINQUENCY COURT

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In juvenile court, children are often involved in multiple delinquency proceedings.[1] This problem is most pervasive among those children who live in group foster homes or attend alternative schools.[2] In most

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[1] Delinquency proceedings are proceedings in juvenile court in which children are charged with "delinquent acts," which is the juvenile equivalent of an adult crime. In most states, the law provides that delinquent acts are not crimes. *See, e.g.*, FLA. STAT. § 985.35(6) (2007); GA. CODE ANN. § 15-11-72 (West 2000); N.Y. FAM. CT. ACT § 380.1(1) (McKinney 2007). Thus, statutes that increase the degree of a crime for subsequent offenses do not apply to children. For example, in many states, an adult's first conviction for battery is a misdemeanor. Each subsequent conviction for battery is a felony. *See, e.g.*, FLA. ST. ANN. 784.03(2) (West 2007). However, even if a child has multiple battery charges, they remain misdemeanors.

[2] *See* Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3 (2003). Additionally, Senator Paul Wellstone stated in a 1999 congressional debate that "[o]f the 100,000 children who are arrested and incarcerated each year, as many as [fifty] percent suffer from a mental or emotional disturbance." 145 CONG. REC. 17,421 (1999). It is also well-documented that poor and minority children are substantially over-represented in the delinquency population. *See* HEIDI M. HSIA ET AL., OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., NCJ 201240, DISPROPORTIONATE MINORITY CONFINEMENT 2002 UPDATE (2004) (noting that although approximately one-third of youths are members of a minority, minority youth comprise two-thirds of the juvenile detention/corrections population); CARL E. POPE, RICK LOVELL & HEIDI M. HSIA, U.S. DEP'T OF JUST., NCJ 198428,

jurisdictions, all of a child's delinquency cases are assigned to the same judge; if a child is repeatedly taken into custody, each case is assigned to the same judge.[3] This means that if a child exercises his or her right to go to trial in each case, the child would have to appear before the same judge in each trial. If the cases are set for trial on the same day, as they often are, the judge hears each case in succession. Even if a child does not exercise his or her right to go to trial in every case, the judge is aware of the child's other pending cases and may have accepted the pleas in one or more of the other cases before presiding over the trial.

This Article argues that having the same judge assigned to each of a child's cases can violate state rules of evidence, which bar the admission of juvenile adjudications of delinquency to impeach, and can also chill the child's constitutional right to testify. Further, this Article looks generally at the use of juvenile adjudications to impeach. Given that no state allows the use of juvenile adjudications of delinquency to impeach an accused (whether in juvenile or adult court), this Article recommends that states adopt a rule requiring a child to provide notice to the court if the child wishes to testify at his or her adjudicatory hearing. Once such notice is provided, the adjudicatory hearing should be held in front of a judge who does not have knowledge of the child's prior history in delinquency court. Only in this way can a child's absolute right to testify in his or her own defense be protected.[4]

I. A HISTORY OF THE JUVENILE COURT SYSTEM

Although every state has a juvenile court system today, the role of juvenile courts has changed over time. Early in the twentieth century, "progressive reformers applied the new theories of social control to the new ideas about childhood and created a social welfare alternative to criminal courts to treat criminal and noncriminal misconduct by youth."[5]

DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001 (2002). For excellent information about the realities of life for poor children, see the National Center for Children in Poverty at Columbia University (available at http://www.nccp.org).

[3] NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES JUVENILE DELINQUENCY SENTENCING GUIDELINES 74 (2005), *available at* http://www.ncjfcj.org/sites/default/files/juveniledelinquencyguidelinescompressed[1].pdf ("Because the jurisdiction assigns judges geographically, the youth automatically appears before his or her assigned judge every time.").

[4] The child would retain his or her right to testify if the facts at trial develop in such a way that he or she chooses to testify after hearing the presentation of the State's evidence. Prior notice would ensure that the case is not heard by a judge pre-disposed to not believe the child.

[5] Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 691

After several decades of reform, however, delinquency courts now closely resemble adult criminal courts.[6] Jurisdictional, jurisprudential, and procedural reforms informed this change.[7] In effect, society has increasingly been willing to criminalize the conduct of children.[8] Although modern penalties are harsher than before and juvenile sanctions are more like criminal sanctions, children do not receive the same protections that criminal defendants receive.[9] In theory, "juvenile courts' procedural safeguards closely resemble those of criminal courts; in reality, the justice routinely afforded juveniles is lower than the minimum insisted upon for adults."[10] Juvenile Justice Professor Barry Feld argues:

> The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people.[11]

More recently, the U.S. Supreme Court decided three landmark cases that recognize the fundamental principle that children are different from adults.[12] Each of these decisions relied to a large extent on science demonstrating that children's brains function in a fundamentally different way than do the brains of adults.[13] Although the science of juvenile brain

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(1991).

[6] *Id.* at 691–92.

[7] *Id.* at 692–93.

[8] *See id.* at 692.

[9] *See id.* at 691–93.

[10] *Id.* at 691–92.

[11] *Id.*

[12] *See* Roper v. Simmons, 543 U.S. 551 (2004) (abolishing the juvenile death penalty); Graham v. Florida, 130 S. Ct. 2011 (2010) (abolishing life without parole for children convicted of crimes other than homicide); J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (holding that a child's age must be taken into account in determining whether a child was in custody for purposes of Miranda v. Arizona, 384 U.S. 436 (1966)).

[13] An *amicus* brief relied upon by the *Graham* Court explains succinctly how children's brains are different:

> Research in developmental psychology and neuroscience - including the research presented to the Court in *Simmons* and additional research conducted since *Simmons*

development has advanced considerably, there have not been any corresponding major changes in delinquency court.

II. PROTECTIONS FOR CHILDREN IN DELINQUENCY PROCEEDINGS

A. FROM IDEALISM TO REALITY

Historically, children in delinquency court were not afforded many of the protections given to adults facing criminal charges[14] because juvenile court was seen as a way for the state to step in where children were at risk of entering the adult criminal system.[15] A report submitted by the Cook

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> was decided—confirms and strengthens the conclusion that juveniles, as a group, differ from adults in the salient ways the Court identified. Juveniles—including older adolescents—are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions. For all those reasons, even once their general cognitive abilities approximate those of adults, juveniles are less capable than adults of mature judgment, and more likely to engage in risky, even criminal, behavior as a result of that immaturity. Research also demonstrates that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," while at the same time they lack the freedom and autonomy that adults possess to escape such pressures . . . Finally, because juveniles are still in the process of forming a coherent identity, adolescent crime often reflects the "signature"—and transient—"qualities of youth" itself . . . rather than an entrenched bad character. Research has documented that the vast majority of youthful offenders will desist from criminal behavior in adulthood. And the malleability of adolescence means that there is no reliable way to identify the minority who will not.

Brief for the Am. Psychological Ass'n et al. as Amici Curiae Supporting Petitioners, Graham v. Florida, 2009 WL 2236778 (U.S. July 23, 2009) (Nos. 08-7412, 08-7621) (citing *Roper*, 543 U.S. at 569–70).

[14] In 1967, the Supreme Court noted some of the protections not afforded to children in delinquency court:

> From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury. It is frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles.

In re Gault, 387 U.S. 1, 14 (1967).

[15] The *Gault* Court further noted:

> [Early reformers] believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." The child—essentially good, as they saw it—was to be made "to feel that he is the object of (the state's) care and solicitude," not that he was under

County (Illinois) Bar Association to the legislature in support of the creation of the first juvenile court stated:

> The fundamental idea of the Juvenile Court Law is that the State must step in and exercise guardianship over a child found under such adverse social or individual conditions as develop crime . . . It proposes a plan whereby he may be treated, not as a criminal, or legally charged with a crime, but as a ward of the state.[16]

Over time, the Supreme Court and lower courts recognized that this ideal—kind juvenile court judges who use their wide discretion to help at-risk children—was far from the reality children faced every day in delinquency court. In the seminal case of *In re Gault*, the Supreme Court explained:

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: 'The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . . .' The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.[17]

The facts of *Gault* demonstrate the dangers of allowing judges unbridled discretion. One afternoon in 1964, fifteen-year-old Gerald Francis Gault purportedly made a prank phone call with a friend.[18] As eloquently described by Justice Fortas, the calls "were of the irritatingly offensive, adolescent, sex variety."[19] At the time of the "offense," Gerald was on probation because he had been caught in the company of another teenager who stole a wallet.[20] Gerald was taken into custody while both of his parents were at work, and because no notice had been left and no attempt had been made to let the parents know that their son was in custody, his parents had to learn of his whereabouts from the friend's

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arrest or on trial.

387 U.S at 15.

[16] Fla. Bar, Florida Juvenile Law and Practice § 1.2 (2011).

[17] *In re Gault*, 387 U.S. at 18–19.

[18] *Id.* at 4.

[19] *Id.*

[20] *Id.*

mother.[21] Upon learning of her son's whereabouts, Gerald's mother went to the detention home where a probation officer told her about the alleged acts and informed her that there would be a hearing in juvenile court the next day.[22] The probation officer filed a petition on the day of the hearing, which Gerald's parents did not see until the federal habeas proceeding months later.[23] The petition did not allege any factual basis for the court proceeding.[24]

At the "hearing," the complainant was not present and no transcript or written memorandum of the proceedings was created.[25] The judge questioned Gerald without first informing him that he had the right to remain silent.[26] Gerald was released a few days later without explanation.[27] That evening, his parents were notified that there would be another hearing.[28] Once again, the complainant was not present and Gerald testified without being advised of his constitutional rights.[29] Gerald's mother specifically requested the presence of the complainant so that she could identify which of the two boys had actually made the lewd remarks,[30] but the judge denied her request.[31] The court also never showed Gerald or his parents the probation officers' referral report.[32] At the end of the hearing, the judge sentenced Gerald to the State Industrial School until his twenty-first birthday "unless sooner discharged by due process of law."[33] At no point were Gerald or his parents advised that Gerald had a right to counsel.[34] In essence, Gerald was sentenced to six years in juvenile prison for a prank phone call without any notice of the charges, without cross-examination of the complainant, without knowledge that he could remain silent, and without the option to consult counsel.

The *Gault* decision re-evaluated the juvenile justice system and held

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[21] *Id.* at 5.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 43–44.
[27] *Id.* at 6.
[28] *Id.*
[29] *Id.* at 43–44.
[30] *Id.* at 7.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 7–8.
[34] *Id.* at 4–8.

that many of the fundamental protections afforded to criminal defendants must be afforded to children facing charges in delinquency court. These protections include due process, which requires that children be given notice of the charges against them;[35] Sixth and Fourteenth Amendment rights, which require that children be advised of their right to counsel and be provided with counsel if they cannot afford counsel;[36] and Fifth, Sixth and Fourteenth Amendment rights, which require that children be able to confront and cross-examine the witnesses against them and invoke the right against self-incrimination.[37] *Gault* noted the severity of delinquent adjudications, saying, "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."[38]

A few years later, in *In re Winship*, the Supreme Court held that every element of the delinquent offense must be proven to the trier of fact beyond a reasonable doubt.[39] The gains in protection for children in

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[35] *Id.* at 33–34 ("Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.").

[36] *Id.* at 36 ("The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'" (quoting Powell v. State of Alabama, 287 U.S. 45, 69 (1932))).

[37] Although a defendant may invoke the privilege of self-incrimination, the standard governing self-incrimination is no longer as broad as *Gault* implies. *See* Allen v. Illinois, 478 U.S. 364, 372 (1986) ("*Gault*'s sweeping statement that 'our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty,' is plainly not good law . . . . [I]nvoluntary commitment does not itself trigger the entire range of criminal procedural protections." (quoting *In re* Gault, 478 U.S. at 50)). While the Court declined to rule on the child's argument that the Constitution requires appellate review of juvenile delinquency proceedings and the right to a transcript of such proceedings, most states provide for transcription of delinquency proceedings and appellate review of these proceedings. *See, e.g.*, FLA. R. JUV. P. 8.830 (providing for written transcripts of all proceedings in delinquency court); FLA. STAT. ANN. § 985.534 (West 2011) (providing a right to appeal from an adjudication of delinquency).

[38] *Gault*, 478 U.S. at 27–28.

[39] In re Winship, 397 U.S. 358, 364 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). *Winship* further held that this right is applicable to children "during the adjudicatory stage of a delinquency proceeding." *Id.* at 368. *But see* Patterson v. New York, 432 U.S. 197, 210 (1977) (holding that the State is not required to "disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses

juvenile proceedings came to a halt only one year later, however, when the Supreme Court in *McKeiver v. Pennsylvania* held that children were not entitled to a jury in delinquency proceedings.[40] Although *Gault* and *Winship* established that the "applicable due process standard in juvenile delinquency proceedings . . . is fundamental fairness,"[41] *McKeiver* held that juries in delinquency proceedings were not necessary based upon the notion that juvenile proceedings were supposed to be rehabilitative rather than punitive.[42] Thus, despite acknowledging the many flaws in the juvenile system and that the juvenile system could impose the functional equivalent of prison on children, *McKeiver* held that juries were not required in delinquency proceedings:

> Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of pre-judgment—chooses to ignore it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.[43]

Ultimately, while the primary purpose of juvenile court may at one point have been rehabilitation, this is no longer the case.[44] Today, the legislative intent for the juvenile justice system in most states[45] is to

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related to the culpability of an accused").

[40] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (holding that a jury is not constitutionally required in juvenile delinquency proceedings). In most states, a juvenile judge presides over all pre-trial hearings and the adjudicatory hearing. *See, e.g.*, FLA. R. JUV. P. 8.110(c) ("The adjudicatory hearing shall be conducted by the judge without a jury. At this hearing the court determines whether the allegations of the petition have been sustained.").

[41] *McKeiver*, 403 U.S. at 543.

[42] *Id.* at 547.

[43] *Id.* at 550.

[44] *See generally* Feld, *supra* note 5, at 691–96 (explaining how *In re Gault* inspired legislative, judicial, and administrative changes that moved juvenile courts toward punitive rather than rehabilitative goals).

[45] A few states, however, still prioritize the rehabilitation and care of the child. *See, e.g.*, LA. CHILD. CODE ANN. art. 801 (2011) ("The purpose of this Title is to accord due process to each child who is accused of having committed a delinquent act and, except as provided for in Article 897.1, to insure that he shall receive, preferably in his own home, the care, guidance, and control that will be conducive to his welfare and the best interests of the state and that in those instances when he is removed from the control of his parents, the court shall secure for him care as nearly as possible equivalent to that which the parents should have given him."); NEB. REV. STAT. § 43-402 (2012) ("It is the intent of the Legislature that the juvenile justice system provide individualized accountability and individualized treatment for juveniles in a manner consistent with public safety to those juveniles who violate the law. The juvenile justice system

protect the public from acts of delinquency;[46] preventing delinquency, strengthening the family, providing early intervention and rehabilitation are often listed as secondary goals of the juvenile justice system.[47] It appears that Justice Fortas' warning in *Kent v. United States* over forty years ago is more applicable today than ever: "There may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[48]

B. THE RIGHT TO TESTIFY

A fundamental right afforded to all children in delinquency court is the right to testify in their own defense.[49] Interestingly, this was not one of the rights addressed by the Supreme Court in *Gault*. In fact, the first case in which the Supreme Court recognized a criminal defendant's right to testify was not decided until 1987—twenty years after *Gault*. In *Rock v. Arkansas*,[50] the Supreme Court held that a *per se* rule barring hypnotically refreshed testimony violated a criminal defendant's right to testify in one's own defense.[51] The Supreme Court, in *Harris v. New York*,[52] actually

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shall also promote prevention efforts which are community-based and involve all sectors of the community. Prevention efforts shall be provided through the support of programs and services designed to meet the needs of those juveniles who are identified as being at risk of violating the law and those whose behavior is such that they endanger themselves or others.").

[46] *See, e.g.*, COLO. REV. STAT. § 19-2-102(1) (2012) ("[T]he intent of this article is to protect, restore and improve the public safety by creating a system of juvenile justice that will appropriately sanction juveniles who violate the law and, in certain cases, will also provide the opportunity to bring together affected victims, the community and the juvenile offenders for restorative purposes."); FLA. STAT. § 985.02(3) (2012) (legislative intent of the juvenile justice system is "to first protect the public from acts of delinquency"); VT. STAT. ANN. tit. 3, § 3085c(c)(1)(A) (2011) (first goal of juvenile justice system is to "hold juveniles accountable for their unlawful conduct."); WIS. STAT. § 938.01(2) (2011) ("It is the intent of the legislature to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively.").

[47] *See* FLA. STAT. ANN. § 985.02(3)(a)–(d) (West 2011).

[48] Kent v. United States, 383 U.S. 541, 556 (1966).

[49] *See* FLA. R. JUV. P. 8.110(d).

[50] Rock v. Arkansas, 483 U.S 44, 44 (1987).

[51] *See id.* at 51–53 ("The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.' (quoting Faretta v. California, 422 U.S. 806, 819, n. 15 (1975)). The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony . . . (quoting *In re* Oliver, 333 U.S. 257, 273 (1948)) . . . The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the

stated years earlier that "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so,"[53] but the Supreme Court did not hold that the right to testify at one's criminal trial was absolute until *Rock*.

While the Supreme Court has not expressly held that children have the right to testify on their own behalf in delinquency proceedings, it would be the logical conclusion of reading *Gault* and *Rock* together. *Gault* held that the Fifth and Fourteenth Amendments preclude the State from forcing a child to be a witness against oneself,[54] and *Rock* held that an individual must be able to testify on behalf of oneself.[55] This demonstrates that it is important for juvenile courts to protect a child's right to testify.

III. ADMISSIBILITY OF PRIOR ADJUDICATIONS OF DELINQUENCY

The admissibility of prior adjudications must be viewed from two distinct angles. First, one must consider the right of a defendant (in either juvenile or adult court) to cross-examine the State's witnesses to reveal bias and motive and to explore the witness's general credibility. Second, one must consider the use of a juvenile adjudication as an impeachment tool, especially when the adjudication was the result of a proceeding lacking in basic protections afforded to adults, most importantly the right to a jury trial. One must also consider whether a juvenile adjudication of delinquency is relevant to an adult's credibility years after the juvenile adjudication. The law must allow accused individuals to cross-examine the witnesses against him or her in a manner that reveals all biases and possible motives. The law must also protect accused individuals from being painted in a negative light by events that occurred when they were

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right to call 'witnesses in his favor,' a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. (quoting Washington v. Texas, 388 U.S. 14, 17–19 (1967)) . . . Even more fundamental to a personal defense than the right of self-representation, which was found to be 'necessarily implied by the structure of the Amendment,' is an accused's right to present his own version of events in his own words . . . The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. In *Harris v. New York*, 401 U.S. 222, 230 (1971), the Court stated: 'Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.' *Id.* at 225.").

[52] *Harris*, 401 U.S. at 222.

[53] *Id.* at 225. In *Harris*, the Court held that if a defendant testifies, he may be impeached with his own statements to law enforcement even if those statements were taken under circumstances that did not comply with *Miranda v. Arizona*, 384 U.S. 436 (1966).

[54] *See supra* note 51 and accompanying text.

[55] *See generally Rock*, 483 U.S. at 49–53 (holding that a defendant's right to testify is grounded in the Fifth, Sixth, and Fourteenth Amendments).

younger, especially if their disputes were adjudicated in a forum without all the protections accorded criminal defendants.

In *Davis v. Alaska*, the Supreme Court recognized that barring the defense from cross-examining a prosecution witness about an adjudication of delinquency can violate a defendant's right to confront witnesses under the Sixth and Fourteenth Amendments.[56] In *Davis*, the defendant was accused of burglary and grand larceny[57] and the key prosecution witness, Richard Green, was on juvenile probation for two burglaries.[58] Using Green's probation, the defense sought to demonstrate to the jury that Green had motive to falsely identify the defendant as having been near the stolen safe because he wanted to remove suspicion from himself.[59] Further, the defense sought to show that Green was particularly susceptible to pressure from law enforcement due to fear of having his probation revoked for failure to cooperate.[60]

Davis acknowledged the difference between using adjudications of delinquency for general impeachment purposes and using such adjudications to show possible biases, prejudices, or motives of a witness.[61] The Supreme Court in *Davis* held that the Sixth and Fourteenth Amendments require that the defense be allowed to question a witness about an adjudication of delinquency when such evidence could reveal a witnesses' bias, prejudice, or motive.[62] In *Davis*, the defendant's right to

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[56] *See* Davis v. Alaska, 415 U.S. 308 (1974).

[57] *Id.* at 308.

[58] *Id.* at 311.

[59] *Id. at* 316–17.

[60] *Id. at* 311.

[61] *Id.* at 316–17 ("One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is affected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross- examination." (citing Greene v. McElroy, 360 U.S. 474 (1959))).

[62] *Davis* provides an excellent example of the problem with a blanket rule preventing the use of juvenile adjudications of delinquency to impeach. As noted, the witness in *Davis* was on juvenile probation for two burglaries. It is reasonable to infer from this fact that the witness was at some point questioned by law enforcement about the burglaries. Yet, when asked by defense counsel at trial if he had ever been questioned by law enforcement before the incident at bar, the

confront a witness trumped the interests of the state and the child in maintaining the anonymity of children charged in delinquency court.[63] *Davis*, however, did not address the issue of using juvenile adjudications of delinquency for general impeachment purposes.[64]

The statutes governing the admissibility of adjudications of delinquency to impeach must be read in light of *Davis*. A survey of the rules of evidence in all fifty states was conducted to determine how many states allow a child to be impeached with an adjudication of delinquency (if the act involves an act of dishonesty or is punishable for an adult by a year or more in jail). Ten states currently have statutes or cases that ban the admissibility of juvenile adjudications to impeach.[65] The majority of

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witness testified "no." *Davis*, 415 U.S. at 313. Defense counsel was unable to bring out the fact that the witness was on probation for two burglaries in order to impeach his testimony.

[63] *See id.* at 319 (the defendant "sought to introduce evidence of [the witnesses'] probation for the purpose of suggesting that [the witness] was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had [the defendant] been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.").

[64] The importance of a defendant's right to confront the witnesses against her was reiterated by the Supreme Court thirty years after *Davis* in *Crawford v. Washington*, 541 U.S. 36 (2004). While the issue before the Court was different in the two cases, the reasoning of *Crawford* supports the Court's ruling in *Davis*: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68–69.

[65] *See* ALA. R. EVID. 609(d) ("Evidence of juvenile or youthful offender adjudications is not admissible under this rule."); FLA. ST. ANN. § 90.610(b) (West 2011) ("Evidence of juvenile adjudications are inadmissible under this subsection."); KY. R. EVID. 609(a) and KY. REV. ST. § 635.040 (Rule 609(a) allows impeachment if witness has been convicted of certain crimes. Kentucky Statute § 635.040 states that no "adjudication by a juvenile session of District Court shall be deemed a conviction"); LA. CODE EVID. ANN. art. 609(d) (2012) ("Evidence of juvenile adjudications of delinquency is generally not admissible under this article."); MONT. CODE ANN. 609 (2009) (bars impeachment by prior convictions for both adults and children: "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible"); NEBRASKA REV. ST. § 27-609 (2012) ("Evidence of juvenile adjudications is not admissible under this rule."); NEVADA REV. ST. 50.095(4) (2012) ("Evidence of juvenile adjudications is inadmissible under this section."); *In re* K.P., 167 N.J. Super. 290, 293–94 (N.J. Super. Ct. App. Div. 1979) (adjudications of juvenile delinquency are not crimes and are inadmissible to impeach under New Jersey Rule of Evidence 609); N.Y. FAM. CT. Law § 380.1 (McKinney 2012) (juvenile adjudications of delinquency are not convictions); OHIO R. EVID. 609(d) ("Evidence of juvenile adjudications is not admissible except as provided by statute enacted by the General Assembly."); OR. R. EVID. 609(6) (juvenile adjudications of delinquency are not crimes).

states, however, have adopted rules that generally bar the admissibility of juvenile adjudications of delinquency, but allow them in a criminal trial when such admission is necessary for a fair determination of guilt or innocence.[66]

In the majority of states, the rules that govern impeachment through the use of prior juvenile delinquencies are not specifically delineated, but rather require the judge to make the ultimate decision of admissibility based on the unique circumstances of each case.[67] For example, Arizona admits evidence of juvenile delinquency to impeach a witness other than the accused if it would be admissible against an adult *and* the trial court finds that its admission is necessary for a fair determination of guilt or innocence.[68] This is contrary to the first section of the same rule, which requires that a witness have been *convicted of a crime* in order to be impeached.[69] Arizona law makes clear that a juvenile adjudication of delinquency "shall not be deemed conviction of a crime"[70] while allowing a witness to be impeached with an adjudication of delinquency when it is necessary to protect the rights of the accused.[71]

According to some rules, for example the Federal Rules of Evidence, the admission of juvenile adjudications of delinquency to impeach only protects a defendant.[72] While a defendant has an absolute right to confront and cross-examine a witness offered by the government to show bias, the state has no similar right regarding the accused.[73] Therefore, if the accused testifies, he or she is protected in most states from impeachment via records of juvenile adjudications of delinquency.

Florida Rule of Evidence 90.610 sets forth rules governing the use of

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[66] *See* ALASKA R. EVID. 609(e); ARIZ. R. EVID. 609(D); ARK. R. EVID. 609(d); DEL. R. EVID. 609(d); GA. CODE. ANN. § 24-9-84.1; ILL. R. EVID. 609(d); IND. R. EVID. 609(d); IOWA R. EVID. 5.609(d); MICH. R. EVID. 609(d); N.H. R. EVID. 609(d); N.M. R. EVID. 11-609(d); N.C. R. EVID. 609(d); N.D. R. EVID. 609(d); OKLA. R. EVID. 609(d); PA. R. EVID. 609(d); R.I. R. EVID. 609(d); S.D. R. EVID. 609(d); TENN. R. EVID. 609(d); TEX. R. EVID. 609(d); UTAH R. EVID. 609(d); VT. R. EVID. 609(d); WASH. R. EVID. 609(d); W.V. R. EVID. 609(d); WYO. R. EVID. 609(d).

[67] *See supra* note 66.

[68] *See* ARIZ. R. EVID. 609(d).

[69] *See* ARIZ. R. EVID. 609(a) ("attacking a witness's character for truthfulness by evidence of a *criminal conviction*") (emphasis added).

[70] ARIZ. REV. STAT. ANN. § 8-207(A) (2012).

[71] *See* ARIZ. R. EVID. 609(d).

[72] *See* FED. R. EVID. 607.

[73] *See* U.S. CONST. amend. V.

certain crimes to impeach witnesses and defendants who testify.[74] Generally, the rule provides that a witness, including the accused, may be impeached by evidence that he or she was criminally convicted if the crime involved either a sentence of more than one year of incarceration or a dishonest or false statement.[75] This rule mimics the rule applicable in most state courts and in Federal court.[76] However, unlike the rule in most states, Florida Rule 90.610(b) specifically provides that "[e]vidence of juvenile adjudications are inadmissible under this subsection."[77] If the rule is read to apply only to general impeachment, it should withstand scrutiny under *Davis*. On the other hand, if the rule is read broadly to bar the use of juvenile delinquency records to show a witness's bias or motive, the rule violates the *Davis* holding. The precise wording of the rule states that "[a] party may attack the *credibility* of any witness . . . ."[78]

While the Federal Rules of Evidence do not contain such a blanket exception, the accused is similarly protected. Federal Rule of Evidence 609 provides that juvenile adjudications are generally not admissible.[79] Subsection (d) also provides that, in a criminal case, a juvenile adjudication may be used to impeach a witness *other than the accused* if the court determines that it is necessary to admit the adjudication in order to reach a fair determination of guilt or innocence and the adjudication would be admissible to impeach an adult.[80] Thus, most states and the Federal Rules of Evidence provide similar protection to children such that they may not be impeached with evidence of adjudications of juvenile delinquency if they choose to testify.

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[74] FLA. R. EVID. § 90.610 (West 2012).

[75] *Id.*

[76] *See* FED. R. EVID. 609; ALASKA R. EVID. 609; ARIZ. R. EVID. 609; ARK. R. EVID. 609; DEL. R. EVID. 609; GA. CODE. ANN. § 24-9-84; ILL. R. EVID. 609; IND. R. EVID. 609; IOWA R. EVID. 5.609; MICH. R. EVID. 609; N.H. R. EVID. 609; N.M. R. EVID. 11-609; N.C. R. EVID. 609; N.D. R. EVID. 609; OKLA. R. EVID. 609; PA. R. EVID. 609; R.I. R. EVID. 609; S.D. R. EVID. 609; TENN. R. EVID. 609; TEX. R. EVID. 609; UTAH R. EVID. 609; VT. R. EVID. 609; WASH. R. EVID. 609; W.V. R. EVID. 609; WYO. R. EVID. 609.

[77] FLA. R. EVID. § 90.610(b).

[78] FLA. R. EVID. § 90.610(1) (emphasis added).

[79] *See* FED. R. EVID. 609.

[80] *See id.*

IV. THE IMPLICATIONS OF A SINGLE JUDGE ADJUDICATING MULTIPLE DELINQUENCY CASES FOR A CHILD IN LIGHT OF THE RULES GOVERNING THE ADMISSIBILITY OF PRIOR JUVENILE ADJUDICATIONS OF DELINQUENCY

Consider the case of a child who has five pending cases set for trial on the same day. The child has an absolute right to go to trial in all five cases. Assume that he or she exercises this right and is adjudicated delinquent in the first four cases and wishes to testify in the fifth case. In order to comply with the state rules of evidence cited above, a judge would have to adjudicate the fifth case as if the judge had no knowledge that the child was adjudicated delinquent in the first four cases. Given that the judge adjudicated the child delinquent, this is simply not possible. While in theory, the judge should be able to evaluate each case independently, studies on judicial bias support the argument that bias is an inevitable result.[81] Such studies support the theory that when juvenile judges are exposed to inadmissible information, they cannot separate this from the admissible evidence before them.[82] Thus, this practice chills the child's constitutional right to testify in his or her own defense.

In their 2005 study, Andrew J. Wistrich, Chris Guthrie, and Jeffrey J. Rachlinski concluded that "judges are generally unable to avoid being influenced by relevant but inadmissible information of which they are aware. Nevertheless, judges displayed a surprising ability to do so in some situations."[83] In total, 265 sitting judges participated in the study, all of whom were appointed rather than elected.[84] The study, however, did not include any juvenile judges.[85] One conclusion of the study was that judges were unable to disregard an inadmissible criminal conviction.[86] The

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[81] *See, e.g.*, Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (arguing that evidence ruled inadmissible by judges nonetheless influences those judges' decisions) [hereinafter *Can Judges Ignore Inadmissible Information?*]; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007) (suggesting that judges often utilize an intuitive approach to deciding cases when a more deliberative approach would be preferable) [hereinafter *Blinking on the Bench*]; Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 571 (1998) (questioning the effects of judges' exposure to inadmissible extra-record evidence that could prove harmful to trial outcomes for accused juveniles).

[82] *See, e.g.*, Guggenheim & Hertz, *supra* note 81, at 571–72.

[83] *Can Judges Ignore Inadmissible Information?*, *supra* note 81, at 1251–52.

[84] *Id.* at 1279–80.

[85] *Id.* at 1280.

[86] *Id.* at 1306.

scenario presented to the judges was a civil case in which the only issue to be decided was the appropriate damage award for pain and suffering.[87] The judges in the non-control group were told that the defendant in a products liability case sought to introduce evidence that the badly injured plaintiff had a criminal record for operating schemes in which he stole the life savings of elderly retirees.[88] The conviction had occurred fourteen years ago and the plaintiff had spent two years in prison.[89] Those in the non-control group were asked to rule on the admissibility of the prior conviction and both groups of judges were asked to state how much they would award in pain and suffering damages.[90] The study concluded that the judges who ruled that the plaintiff's criminal history was inadmissible awarded an average of 12% less in pain and suffering damages than did the judges with no exposure to the plaintiff's criminal history.[91] Interestingly, this reduction in damages occurred despite the fact that most of the judges ruled to suppress the plaintiff's criminal history.[92] The study concluded that "[m]uch like mock jurors, judges seemed unable to ignore a prior conviction."[93] Two years later, the same authors did another study on the ways in which judges decide cases.[94] This study concluded that "judges generally make intuitive decisions but sometimes override their intuition with deliberation."[95] The authors proposed an "intuitive-override" model of judging in which judges would "use deliberation to check their intuition."[96]

Prior to these two studies, Martin Guggenheim and Randy Hertz demonstrated that there were "substantial reasons to question the accuracy of [the] premise" that "judges can be as fair as jurors in assessing guilt or innocence" in juvenile delinquency trials.[97] Guggenheim and Hertz noted that an important distorting influence was the fact that judges in bench trials are often presented with "inadmissible, extra-record evidence."[98] For example, juvenile judges may preside over suppression hearings and then

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[87] *Id.* at 1305.

[88] *Id.* at 1306.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.* at 1307.

[93] *Id.*

[94] *See Blinking on the Bench*, *supra* note 81, at 1.

[95] *Id.* at 3.

[96] *Id.* at 5.

[97] Guggenheim & Hertz, *supra* note 81, at 553.

[98] *Id.* at 571.

over the trial in the same matter.[99] A jury is barred from knowing about suppressed evidence for fear of bias, but the current system maintains the fiction that a juvenile judge can suppress a statement prejudicial to a child and then fairly and impartially preside over the child's trial.[100] The authors also describe how judges who sit in juvenile court hear the same types of stories repeatedly and can become biased against such testimony.[101] This bias could be particularly magnified when a child testifies in multiple cases before the same judge on the same day. The authors further point to Justice Blackmun's plurality opinion in *Ballew v. Georgia*, which notes scientific studies indicating that group decision-making processes are less prone to bias than individual decision-making processes.[102]

The Guggenheim-Hertz article also notes an earlier study that found that judges are more likely than juries to convict in criminal cases.[103] A review of appellate decisions, in which the trial below was before the court, suggested that "judges often convict on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt."[104] The authors provided examples of cases in which a judge found a child to be delinquent, but in which a jury likely would not have found delinquency.[105]

The author of this Article came to juvenile court after practicing in adult court for many years in civil, criminal, and capital post-conviction cases. At a certain point, one can no longer be shocked by the injustices of the "justice" system. Th author's first eighteen months representing children in delinquency court caused a level of shock and despair that she did not believe she was capable of experiencing. One case from the author's first few months working with children exemplifies the problems inherent in the current system. The client, a very intelligent seventeen-year-old with aspirations of joining the Marines, had grown up in foster care after having been given back to the State by his family not once, but twice. His "record" consisted of two convictions for battery, from which one might infer that the client had anger or impulse control issues. Both incidents took place at a group foster home where the police were called

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[99] *Id.*

[100] *Id.* at 571–72.

[101] *Id.* at 574.

[102] *Id.* at 577.

[103] *Id.* at 562–63 (citing Harry Kalven Jr. & Hans Zeisel, The American Jury (1971)).

[104] *Id.* at 564.

[105] *Id.* at 564–65.

on a regular basis for what most people would consider normal age-appropriate misbehavior. In one incident he threw a pencil at another student during class, in another he chest-bumped a staff member. The author's office represented the young man when he was charged in delinquency court for the third time.

The client's friend became involved in a fight and a staff member at the group home called the police. The client did not want his friend to get in trouble, so he pressed down on the "hook" mechanism of the phone to disconnect the call, forcing a staff member to complete the call on a cellphone. Unbelievably, the young man was charged with Tampering with or Harassing a witness, victim or informant—a third degree felony.[106] On the morning of trial, the State offered a felony plea with a recommendation of probation. The State informed the young man that if he went to trial and was adjudicated delinquent, the State would recommend commitment to a residential juvenile program. The client had just turned eighteen, was in the process of completing his GED, and was looking forward to life as an independent young adult.

Counsel advised the client to proceed to trial rather than accept the plea, but the client was terrified of going to a commitment program and accepted the plea against legal advice. During the plea hearing, counsel for the client argued that the court should not accept the plea as there was no factual basis. The court accepted the plea, but gave the client the right to appeal whether there was a factual basis for his plea. On appeal, the State did not argue that the young man had used physical force against a person. Rather, the State argued that due to a defect in the plea colloquy, the appellate court lacked jurisdiction. In a footnote, the State argued that the young man had violated the statute by engaging in "misleading" conduct—an argument it made for the first time on appeal. The State's argument should have been foreclosed by the fact that the Petition did not charge the young man with "misleading" conduct. The State failed to explain how hanging up a phone was "misleading." Given that the State failed to argue the merits on appeal, the author initially believed that the young man would not have to suffer the life-long consequences of having a felony on his record; however, the appellate court issued a per curiam affirmance.

It is difficult to believe that a jury would have convicted the young man had he been six months older and charged in a criminal court. A jury would not have known about the young man's "priors" and some jurors

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[106] *See* FLA. STAT. ANN. § 914.22(1), (2)(a) (West 2011).

could have been sympathetic to a young person who did something that, while certainly not laudable, might not be a crime. Even if the jurors were convinced that the young man was at fault, a jury has the power to nullify and could possibly have done so under these facts. While it is not possible to know the judge's thoughts, it is possible, if not likely, that he was influenced by the young man's prior "record." The judge did not know that the two battery charges consisted only of a chest bump and one teenager throwing a pencil at another—conduct that almost certainly would not have been prosecuted in a middle class suburban high school. The prejudice to young people who are charged in delinquency court rather than being disciplined at school is severe. This felony will haunt the young man for the rest of his life. Had the judge not known about his prior record, it is possible that he would not have accepted the plea.

In many states, battery on a school employee is a felony.[107] It is not uncommon for children at alternative schools who have behavioral and mental health issues to have multiple charges under this statute.[108] One child the author represented had five such charges. On its face, it appeared as if the fourteen-year-old routinely beat up his teachers, but a look at the facts proved otherwise. One charge resulted from the child touching a teacher's chest with his finger because the teacher looked over the child's shoulder when he was on a school computer. Another was based on the child lightly smacking a teacher's arm when she tried to move him during a lineup.

The same judge heard all of these cases, four of which were set for trial on the same day. At trial for the first charge, the child's counsel argued that, for such minor misconduct, putting a felony on the record of a child who has mental issues would violate the Eighth Amendment because the child's mental health diagnosis prevented him from forming the requisite intent. Under applicable law, battery is a violent felony that can never be expunged.[109] Juvenile adjudication of delinquency for battery on a teacher would therefore limit the child's future access to student loans, prevent him from participating in college athletics, preclude him from many government jobs, prohibit him from becoming a police officer or firefighter, and possibly bar him from entering some branches of the

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[107] *See e.g.*, FLA. STAT. ANN. 784.081(2)(c), 784.03 (West 2011); MASS. GEN. LAWS ANN. ch. 265 § 13D (West 2008).

[108] *See generally* Tulman, *supra* note 2 (analyzing how school and delinquency systems fail "to recognize and respond appropriately to children's education-related disabilities").

[109] *See e.g.*, FLA. STAT. ANN. § 943.0585 (West 2011).

military.[110] The judge adjudicated the child delinquent, but told counsel afterward that they had made a compelling argument. One can only wonder what the result would have been if the judge had not known that the child had four identical charges pending against him. A jury would not have known about the other charges and might have been more likely to find that the child could not have had the requisite intent due to his mental health issues.[111]

Studies have shown that the earlier a child enters the delinquency system, the more likely it is that the child will acquire an extensive juvenile record making it even more important that a judge independently and impartially decide every case involving a young child.[112] Once a child has prior adjudications of delinquency, the chance that he or she will remain in the system is very high, especially given the difficulty that at-risk children have with complying with the strict terms of probation.

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[110] Under the guidelines of some athletic programs, if a child is arrested for any violent felony, possession of a weapon on school grounds, possession/sale of drugs on school grounds, or any other offense that can lead to expulsion from school, the child athlete may become ineligible to participate in the school's athletic program, including band and cheerleading. The Army has a "waiver" process for applicants who have received a conviction or juvenile adjudication for a serious offense, but waivers for serious offenses are rarely granted; the Navy and Marines require an explanation for all juvenile cases even if the case was nolle prosse'd or non-filed, the Navy and Marines conduct a review to ensure that the dismissal was on the merits and not to facilitate enlistment into the Armed Forces. The Air Force has a waiver process similar to that used by the Army but also looks at the surrounding circumstances and the applicant's overall record. Federal law (42 U.S.C. § 1437(d) (2006)), and some local rules state that no member of a family living in subsidized housing may engage in drug-related or violent criminal activity. The standard used in determining whether to evict is a preponderance of the evidence. A genuine addiction can be a defense to an eviction proceeding. The Higher Education Act (20 U.S.C. § 1091r) provides that a person who is convicted of possession or sale of a controlled substance becomes ineligible to receive financial aid including work-study for a set period of time depending on the number of violations the person has. Many states deny scholarships to students with a felony conviction. *See, e.g.*, FLA. STAT. ANN. § 1009.531 (West 2011) (Bright Futures and Medallion scholarships are not available to a student who has been convicted of a felony and not granted clemency).

[111] In another case, a ten-year-old child was charged with felony battery on a teacher when he purportedly tried to knock a camera out of the teacher's hand with a piece of cardboard. It is hard to believe that a jury would put a felony on a child's record for minor, age-appropriate misbehavior like this. This case has not yet gone to trial.

[112] *See* Gloria Danziger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication*, 37 FAM. L.Q. 381, 386 (2003) ("[T]hose who began offending as young children were more likely to become violent offenders . . . the earlier a youth entered the juvenile justice system, the more likely he or she was to acquire an extensive juvenile court record.") (citing Howard N. Snyder, *Epidemiology of Official Offending*, *in* CHILD DELINQUENTS: DEVELOPMENT, INTERVENTION, AND SERVICE NEEDS (Rolf Loeber and David P. Farrington, eds. 2001) and Howard N. Snyder, *Prevalence and Development of Child Delinquency*, CHILD DELINQ. BULL. (Mar. 2003)).

Similarly, given that rehabilitation and treatment are secondary goals of the juvenile system,[113] and because children do not have the right to a jury trial,[114] the impartiality of juvenile judges is crucial. Studies have shown that disqualification rules and statutes are rarely used in juvenile court, even in Unified Family Courts.[115] In addition, judges who have access to information that would otherwise be inadmissible in a criminal trial have difficulty separating admissible from inadmissible evidence when presiding over a juvenile delinquency trial.[116]

Prior to sentencing, called a "disposition" in juvenile court,[117] the State prepares a report recommending where the child should be placed.[118] This report is replete with information that would be inadmissible in a criminal trial, including an extensive social history of the child.[119] Reports detailing information about the child's behavior are often hearsay, unsupported by evidence, and not proven in court.[120] If the child is released from a commitment program and is subsequently arrested and appears before the same judge, that judge will possess inadmissible information about that child.[121] As noted above, studies have shown that while judges try to be impartial, they have trouble separating admissible from inadmissible evidence.[122]

To test this hypothesis, the author surveyed a majority of the public defender offices in Florida to determine common practices regarding juvenile delinquency.[123] Most circuit courts in Florida do not have Unified

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[113] *See* FLA. STAT. ANN. § 985.534 (West 2011).

[114] McKeiver v. Pennsylvania, 403 U.S. 528, 529 (1971).

[115] *See* John M. Greacen, *Confidentiality, Due Process, and Judicial Disqualification in the Unified Family Court: Report to the Honorable Stephanie Domitrovich*, 46 FAM. CT. REV. 340, 344 (2008) (judicial disqualification rules apply to unified family court but are rarely used).

[116] *See Blinking on the Bench*, *supra* note 81, at 1251–52.

[117] *See* 18 U.S.C. § 5037 (2006).

[118] MARK S. RHODES, ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 32:33 (2012).

[119] *Id.*

[120] *Id.*

[121] *See Blinking on the Bench*, *supra* note 81, at 1251–52.

[122] *Id.*

[123] Initially, this author sent an email to the head of the juvenile division of the public defender's office in each circuit. The email asked the attorneys to answer each of the following questions:

1. How many judges in your circuit handle juvenile delinquency? *See* Table 1.
2. Does your circuit have Unified Family Court? *See* Table 2.
3. If your circuit has more than one judge that hears juvenile delinquency cases, are all pending cases for one child assigned to the same judge? *See* Table 3.

Family Courts where one judge hears each child's delinquency and dependency cases.[124] In most of the surveyed circuits, when a child had multiple delinquency cases, the same judge would hear all of the cases.[125] In at least one circuit, however, all pending cases were assigned to the same judge, but on the day of trial, the cases were separated and given to different judges.[126] The majority of public defenders surveyed did not believe that a judge could maintain impartiality if the judge heard several cases for the same child.[127] One surveyed individual stated, "[w]ell, judges make lousy jurors to begin with!"[128] Another surveyed individual noted that judges tend to group juveniles into "good kids" and "bad kids."[129]

Surprisingly, most public defenders believed that if one judge hears multiple cases for one child, it would not impact the child's decision to testify.[130] However, some felt otherwise.[131] One surveyed individual noted that "juveniles throw their hands up case after case," while another said that it depends on the circumstances.[132] Another surveyed individual noted, "I do believe that because the judge hears and knows all about the kid before even getting to trial, the kid is not believed by the judge, so it does not truly matter if the kid testifies or not. The judge is not going to believe her."[133] Several other public defenders noted that judges do not find children accused of delinquent acts credible under any circumstances.[134]

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4. If all cases are assigned to the same judge, is this a local rule, or just a custom in your circuit? *See* Figure 1.

5. What are your thoughts on a judge's ability to consider each case individually? *See* Table 4.

6. Do you believe that having all of the cases in front of the same judge makes juveniles less likely to testify in any one individual case? *See* Figure 2.

7. If your jurisdiction has Unified Family Court, do you believe that helps or hurts the child in their delinquency case? *See* Figure 3.

[124] *See infra* Table II.

[125] *See infra* Table III.

[126] *See infra* Table III.

[127] *See infra* Table IV.

[128] *See infra* Table IV.

[129] *See infra* Table IV.

[130] *See infra* Figure 2.

[131] *See infra* Figure 2.

[132] Author Survey of Public Defender Offices in Florida (on file with author).

[133] *Id.*

[134] *Id.*

V. CONCLUSION AND RECOMMENDATIONS

The practice of a single judge hearing all of a child's delinquency cases chills the child's constitutional right to testify in his or her own defense. If a child has been adjudicated delinquent in other cases by the same judge, the judge will necessarily take the previous adjudications of delinquency into account when assessing the child's credibility. Therefore, a child should be required to give notice if he or she plans to testify. That way, the child's testimony can be heard by a judge who is unaware of the child's history. While a child would still maintain the right to testify without notice, the aforementioned requirement would ensure that juvenile judges hear a child's testimony without pre-judging whether the child is "good" or "bad," or "credible" or "not credible."

Children, like adults, are entitled to an impartial trier of fact. The relevant due process standard is fundamental fairness.[135] Based on evidence provided by numerous studies along with the experience of juvenile lawyers across the United States, it seems that the trier of fact cannot remain impartial if he or she is aware of a child's delinquency history, especially if that history is lengthy. Thus, the practice of having one judge adjudicate all of a child's delinquency cases denies the child his or her constitutional right to an impartial trier of fact.

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[135] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 528 (1971).

TABLE 1. NUMBER OF JUDGES FOR JUVENILE DELINQUENCY CASES PER CIRCUIT*

Circuit #	# of Judges
1	*??*
2	1
3	7 (NONEXCLUSIVE)
4	3
5	1
6	4
7	2
8	5
9	5
10	2 (1 judge and 1 relief judge that helps with trials)
11	4
12	*??*
13	*??*
14	*??*
15	*??*
16	4
17	*??*
18	*??*
19	*??*
20	*??*

*The question: "How many judges are there in your circuit for juvenile delinquency cases?" There were 11 responses out of 20 requests.

TABLE 2. CIRCUITS WITH A UNIFIED FAMILY COURT*

Circuit #	Unified Family Court?
1	??
2	YES
3	NO
4	YES
5	NO
6	YES
7	YES
8	NO
9	YES (YES FOR OSCEOLA/NO FOR ORANGE)
10	NO
11	YES (PARTIAL UFC COURT WITH SOME CROSSOVER CHILDREN)
12	??
13	??
14	??
15	??
16	??
17	??
18	??
19	??
20	??

*The question: "Does your circuit have Unified Family Court (all delinquency and dependency cases are assigned to the same judge)?"
There were 11 responses out of 20 requests.

TABLE 3. JUVENILE CASES ASSIGNED TO SAME JUDGE*

Circuit #	Unified Family Court?
1	*??*
2	YES
3	YES
4	YES
5	YES
6	YES
7	YES
8	NO
9	YES (SOMETIMES CASES ARE TRANSFERRED IF THERE ARE CO-DEFENDANTS IN OTHER DIVISIONS WITH LOWER CASE NUMBERS)
10	YES (ON THE DAY OF TRIAL THEY ARE SEPARATED TO DIFFERENT JUDGES)
11	YES (UNLESS CHILD HAS A CO-DEFENDANT WITH A LOWER CASE NUMBER)
12	*??*
13	*??*
14	*??*
15	*??*
16	SOMETIMES
17	*??*
18	*??*
19	*??*
20	*??*

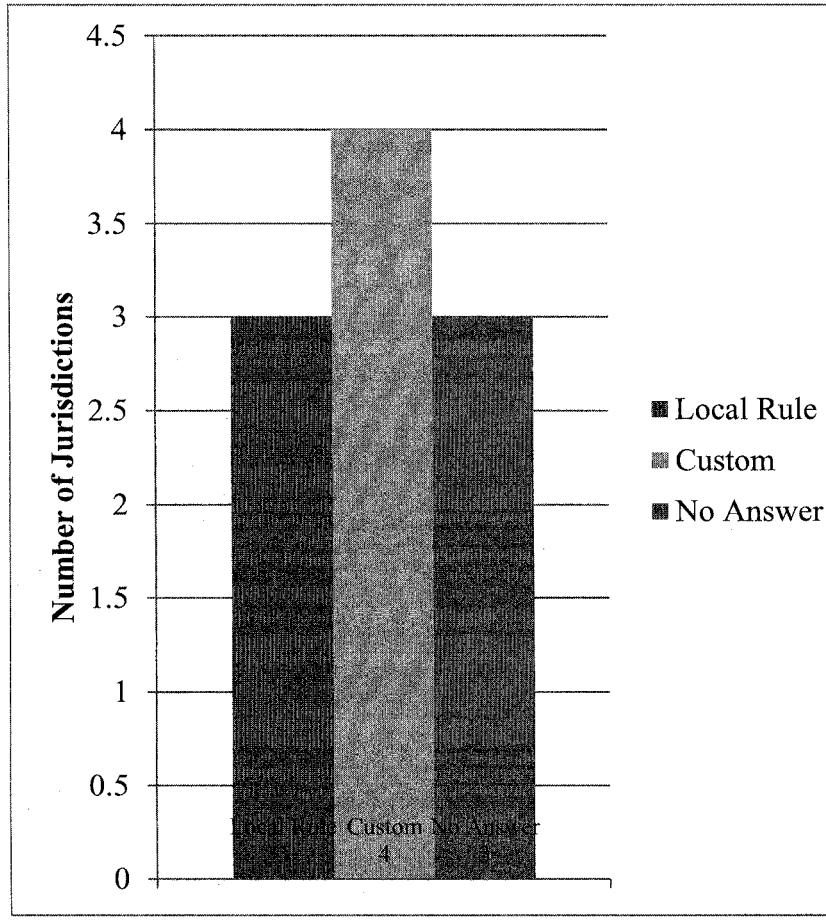
*The question: "If your circuit has more than one judge that hears juvenile delinquency cases, are all pending cases for one juvenile assigned to the same judge?"
There were 11 responses out of 20 requests.

TABLE 4. A JUDGE'S ABILITY TO SEPARATE INDIVIDUAL CASES*

Juvenile Defender Board Responses to the Question: "What are your thoughts on the judges' ability to consider each case individually?"
"Well...Judges make lousey [sic] jurors to begin with!"
"It depends on the judge."
"No different than any other juvenile case."
"Poor."
"Judges do their best to view each separately, but detention and disposition decisions are based on the judge's feelings about whether the kid is 'good' or 'bad.'"
"Good judges can consider each case individual and bad judges are bad with one case or more than one case."
"Judges are unable to consider cases individually."
"There is a problem when Child has multiple cases I believe."

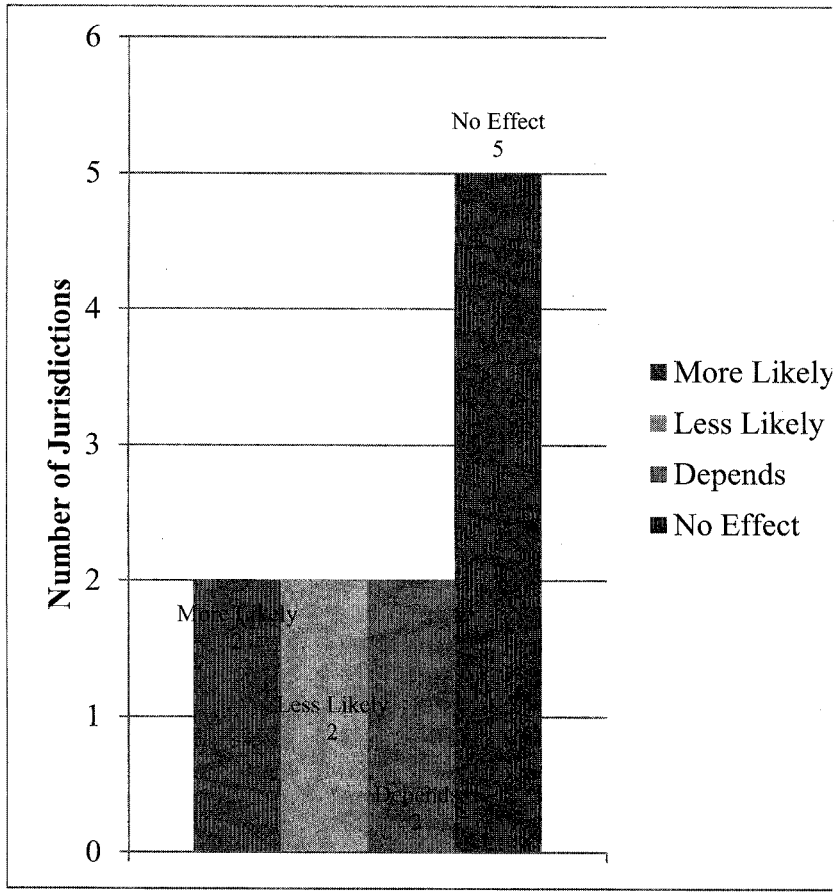
*The Juvenile Defender Board was asked: "What are your thoughts on the judges' ability to consider each case individually?"
Responses are randomized and are in no particular order.
There were 9 responses out of 20 requests.

FIGURE 1. LOCAL RULE OR CUSTOM?



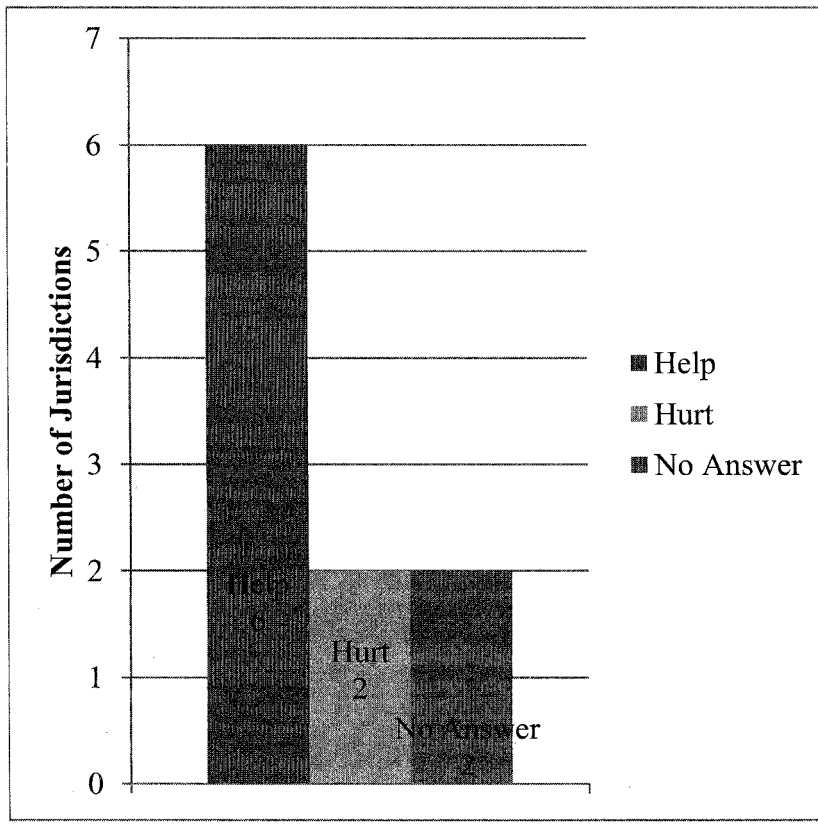
Subset of Table 3 Data: Of those jurisdictions that assign juvenile cases to the same judge, the Juvenile Defender Board was asked, "If all cases are assigned to the same judge, is this a local rule, or just a custom in your circuit?" There were 10 responses out of a possible 20 requests.

FIGURE 2. EFFECT ON JUVENILE TESTIMONY



Subset of Table 3 Data: Of those jurisdictions that assign juvenile cases to the same judge, the Juvenile Defender Board was asked, "Do you believe that having all of the cases in front of the same judge makes the juvenile less likely to testify in any individual case?"

FIGURE 3. DOES UNIFIED FAMILY COURT HELP OR HURT THE CHILD IN THEIR DELINQUENCY CASE?



Subset of Table 2 Data: Of those jurisdictions with a unified family court, the Juvenile Defender Board was asked, "If your jurisdiction has unified family court, do you believe that helps or hurts the child in their delinquency cases?"
There were 10 responses out of a possible 20 requests.