August 2015

Adversary Juvenile Delinquency Proceedings: Impeachment of Juvenile Defendants by the Use of Previous Adjudications of Delinquency

David L. Herbert

V. Lee Sinclair Jr.

ADVERSARY JUVENILE DELINQUENCY PROCEEDINGS: IMPEACHMENT OF JUVENILE DEFENDANTS BY THE USE OF PREVIOUS ADJUDICATIONS OF DELINQUENCY

DAVID L. HERBERT*

V. LEE SINCLAIR, JR.†

INTRODUCTION

IN ADULT CRIMINAL PROCEEDINGS, any defendant who wishes to testify[1] faces certain risks[2] when he steps into the witness box. The risks such a defendant engenders certainly include the possibility of having his prior criminal convictions brought up by the prosecution, for purposes of impeaching his testimony.[3] In essence, the defendant who takes the stand, like any other witness, places his reputation for truth and veracity into issue.[4] The theory behind this general rule emanates from the belief that the defendant's testimony can be no more credible than the defendant himself.[5] Therefore, the prosecution is given the right, under certain

*Assistant Stark County Prosecuting Attorney; J.D., University of Akron School of Law; B.B.A., Kent State University.

† Legal Intern in the Stark County Prosecutor's Office.

1 Every criminal defendant has an absolute right to remain silent and hence, to decline to testify, U. S. CONST. amend. V. *See* Miranda v. Arizona, 384 U.S. 486 (1966); Malloy v. Hogan, 378 U.S. 1 (1964).

2 *See* Stone, *Cross-Examination by the Prosecution at Common Law and Under the Criminal Evidence Act, 1898: A Commentary on Maxwell v. Director of Public Prosecutions,* 51 L.Q. REV. 443 (1935) [hereinafter cited as Stone, *Cross-Examination*].

3 At common law persons convicted of certain crimes were disqualified from testifying as witnesses, 1 S. GREENLEAF, EVIDENCE § 373, at 514 (16th ed. 1899); 2 J. WIGMORE, EVIDENCE § 519, at 608 (3d ed. 1940). Modern statutes, however, now permit the previously convicted witness or defendant to testify, but grant the prosecution the opportunity to attack the witness' credibility by the use of the individual's previous convictions, those convictions to weigh inferentially upon the believability of the testimony given. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 43, at 85 (2d ed. 1972) [hereinafter cited as MCCORMICK].

4 Stone, *Cross-Examination, supra* note 2, at 454:

> The defendant who goes into the witness box acquires a new role in the proceedings, that of a witness... entirely separate from his role as defendant, and when he assumes it, he assumes... the burdens and benefits attaching to the role of witness.... Among the burdens is the risk of being examined as to credibility.

See also 2 WHARTON'S CRIMINAL EVIDENCE § 478, at 444-45 (13th ed. 1972):

> A defendant who testifies in his own behalf puts his credibility in issue the same as any other witness, even though no evidence has been adduced of his good character or reputation. In general, the same rules relating to impeachment, which are applicable to an ordinary witness, apply to the defendant.

5 MCCORMICK, *supra* note 3, § 41, at 81: "The character of a witness for truthfulness or mendacity is relevant circumstantial evidence on the question of the truth of particular testimony of the witness."

limitations,[6] to attack the credibility of the defendant and his testimony by inquiring into his past criminal "conduct."

While the foregoing discussion may be regarded as a generally acceptable statement of the law, jurisdictions throughout the United States vary greatly on the specific point regarding which particular criminal convictions may be raised for the purposes of impeachment.[7] Many jurisdictions allow inquiry as to any conviction for a crime involving moral turpitude.[8] Others permit inquiry as to convictions for felonies,[9] or "infamous crimes"[10] which may be classified as crimes involving *crimen falsi*.[11] Still others permit the trial judge at his discretion to determine whether or not the defendant's prior criminal convictions affect his credibility as a witness.[12] The Uniform Rules of Evidence[13] provide for the impeachment of a *witness* by the use of prior convictions for crimes involving dishonesty or false statement. If the witness also happens to be the defendant, no evidence of his prior criminal convictions is admissible under the Uniform Rules, unless he has first introduced evidence tending to support his own credibility.[14] Under the Federal Rules of Evidence,[15] a defendant's credibility may be attacked by the use of prior criminal convictions punishable by death or imprisonment in excess of one year (*i.e.*, felonies), or by the use of those involving dishonesty or false statement.[16]

Irrespective of the particular rule followed, courts permit inquiry into this area because of a rather strong belief that it would be misleading to the fact finder, to allow a previously convicted defendant to testify as if he were a "witness of blameless life. . . ."[17] While it is true that every

---

[6] 1 UNDERHILL'S CRIMINAL EVIDENCE § 242, at 751 (6th ed. 1973). The right to attack the credibility of a defendant or witness is granted for the purpose of enabling the fact finder to weigh his testimony in light of his previous actions. It can serve no other purpose, and in the case of a jury trial, the jury must be instructed as to the limited purpose that the evidence is to serve. *See* Spencer v. Texas, 385 U.S. 554, 561 (1967).

[7] *See* MCCORMICK, *supra* note 3, § 43, at 85-86.

[8] *See, e.g.*, ALA. CODE tit. 7, § 434 (1960).

[9] *See, e.g.*, CAL. EVID. CODE § 788 (West 1968).

[10] *See, e.g.*, People v. Birdette, 22 Ill. 2d 577, 177 N.E.2d 170 (1961).

[11] *See* MCCORMICK, *supra* note 3, § 43, at 84-85.

[12] *See* Burgess v. State, 161 Md. 162, 155 A. 153 (1931). *See also* Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968), *modifying* Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). Both *Gordon* and *Luck* were legislatively overruled by D.C. CODE ANN. § 14-305 (Supp. 1972), and the judicial discretion theretofore exercised was removed.

[13] The Uniform Rules of Evidence were drafted by the National Conference of Commissioners on Uniform State Laws and approved at its annual conference in 1953.

[14] UNIFORM RULES OF EVIDENCE, Rule 21 (1953). *See* MODEL CODE OF EVIDENCE, Rule 106 (1942).

[15] The Federal Rules of Evidence were enacted into law on January 2, 1975, to take effect 180 days from the date of enactment. *See* Pub. L. No. 93-595 (Jan. 2, 1975).

[16] FED. R. EVID. 609(a).

[17] MCCORMICK, *supra* note 3, § 43, at 89.

defendant who enters the courtroom starts his life "afresh,"[18] it is equally true that every such defendant brings with him his past, no matter how haunting or insidious it may be.[19] Therefore, insofar as it affects his credibility, past criminal convictions may be revealed to enable the fact finder to weigh the defendant's testimony in light of his background.

IMPEACHMENT IN JUVENILE COURT ON THE BASIS OF PRIOR JUVENILE COURT RECORDS

In adversary juvenile delinquency proceedings, the impeachment of any juvenile who wishes to testify,[20] by the use of the witness' previous adjudications of delinquency,[21] is somewhat more clouded than the aforementioned situation involving adult defendants.[22] This confusion arises, in part, from modern statutes relating to juvenile proceedings which typically provide that a judgment, finding, disposition, or any evidence given in a juvenile court shall not be used against a child in any other court, and that a finding of delinquency shall not be deemed to be a criminal conviction.[23]

An analysis of the various statutes leads to several possible conclusions:

1) They were designed to protect juvenile offenders from *any* subsequent use of their delinquency records except for dispositional or sentencing purposes;[24]

2) They were designed to protect juveniles from the possibilities of having their juvenile records or any evidence given in juvenile court revealed or used when such juveniles were transferred[25] to criminal

---

[18] People v. Zackowitz, 254 N.Y. 192, 197, 172 N.E. 466, 469 (1930).

[19] Any individual's past conduct obviously sheds some light upon his make-up. If the past conduct involves acts of a criminal nature, those acts are relevant circumstantial evidence of his inclination to speak the truth, MCCORMICK, *supra* note 3, § 41, at 81. Therefore, since all relevant evidence should be admitted at trial, 1 J. WIGMORE, EVIDENCE § 57, at 650 (3d ed. 1940), past criminal conduct can be revealed to inform the fact finder of all relevant data.

[20] As in the case of adult criminal defendants, juveniles have the constitutional right to remain silent. *See In re* Gault, 387 U.S. 1 (1967).

[21] As used in this article, the term "adjudications of delinquency" includes only those adjudications for some violation of criminal law.

[22] Inasmuch as there is very little case law on the question, there is room for confusion and disagreement as to what the law is or should be. *Compare* 3A J. WIGMORE, EVIDENCE § 980(7), at 834 (Chadbourn Rev. 1970) *with* MCCORMICK, *supra* note 3, § 43, at 86 *and* 1 UNDERHILL'S CRIMINAL EVIDENCE § 242, at 751 (6th ed. 1973). *Cf.* 4 JONES ON EVIDENCE § 26.20, at 223 (6th ed. 1972).

[23] *E.g.*, OHIO REV. CODE ANN. § 2151.358 (Page Supp. 1973). *See* 1 J. WIGMORE, EVIDENCE § 196, at 673 (3d ed. 1940, Supp. 1972) for a voluminous collection of the statutes. *See also* Pee v. United States, 274 F.2d 556, 561-63 (D.C. Cir. 1959) for a copious list of authorities holding that juvenile court proceedings are not criminal cases. *But see* GAULT: WHAT NOW FOR THE JUVENILE COURT (V. Nordin ed. 1968).

[24] *See* 4 JONES ON EVIDENCE § 26.20, at 223 (6th ed. 1972); MCCORMICK, *supra* note 3, § 43, at 86; 1 UNDERHILL'S CRIMINAL EVIDENCE § 242, at 751 (6th ed. 1973). *See also* Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941).

[25] Almost all states provide for the transfer of juvenile offenders to criminal court to be tried as adult defendants, *see, e.g.*, OHIO REV. CODE ANN. § 2151.26 (Page Supp.

court to be tried as adults,[26] or when they later became adult defendants,[27] or when they testified outside of juvenile court;[28]

3) They were designed to protect juvenile offenders from the possibility of having their prior juvenile records brought up for purposes of treating such offenders as habitual criminals, after they reached the age of majority.[29]

Each of these possible interpretations has received some support from highly respected commentators,[30] and various writers.[31] In addition, a few courts have had the opportunity to construe the statutes in reference to this impeachment question, and have reached somewhat different conclusions.[32]

For example, one Ohio court has recently interpreted a typical juvenile statute, such as that mentioned previously,[33] and has determined that a juvenile defendant's previous adjudications of delinquency may be brought up when he testifies in his own behalf at an adjudicatory hearing, for the purpose of discrediting his testimony. The court held that these prior offenses are admissible to show the juvenile's previous criminal behavior, and to demonstrate his possible interest in the outcome of the litigation.[34]

In contrast to this decision, one federal court in interpreting a

---

1973). *See also* Kent v. United States, 383 U.S. 541, 553 (1966); Schornhurst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited,* 43 IND. L.J. 583 (1968).

[26] *See* Malone v. State, 130 Ohio St. 443, 200 N.E. 473 (1936).

[27] *See* 1 J. WIGMORE, EVIDENCE § 196, at 673-74 (3d ed. 1940).

[28] *See* Brown v. United States, 338 F.2d 543, 547 (D.C. Cir. 1964). *But cf.* 3A J. WIGMORE, EVIDENCE § 980, at 834 (Chadbourn Rev. 1970).

[29] *See* 1 J. WIGMORE, EVIDENCE § 196, at 673-74 (3d ed. 1940).

[30] *Compare* 1 J. WIGMORE, EVIDENCE § 196, at 673-76 (3d. ed 1940), *and* 3A J. WIGMORE, EVIDENCE § 980, at 834 (Chadbourn Rev. 1970) *with* MCCORMICK, *supra* note 3, § 43, at 86, *and* 1 UNDERHILL'S CRIMINAL EVIDENCE § 242, at 751 (6th ed. 1973).

[31] *See* Comment, *Inferential Impeachment: The Presence of Parole Officers at Subsequent Juvenile Adjudications,* 55 MARQ. L. REV. 349 (1972); Comment, *Evidence—Impeachment of Witnesses—Use of Adjudications of Juvenile Delinquency and Specific Acts of Misconduct Committed by Juveniles,* 33 N.Y.U.L. REV. 406 (1958); Annot., 147 A.L.R. 443 (1943).

[32] *See, e.g.,* Brown v. United States, 338 F.2d 543 (D.C. Cir. 1964); Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941); State v. Kelley, 169 La. 753, 126 So. 49 (1930); People v. Smallwood, 306 Mich. 49, 10 N.W.2d 303 (1943); State v. Marinski, 139 Ohio St. 559, 41 N.E.2d 387 (1942); Malone v. State, 130 Ohio St. 443, 200 N.E. 473 (1936); *In re* Benthune, No. CA-4057 (Ct. App., 5th Dist. Ohio, Nov. 18, 1974); State v. Hale, 21 Ohio App. 2d 207, 256 N.E.2d 239 (1969).

[33] *See* text accompanying note 24 *supra. See also* OHIO REV. CODE ANN. § 2151.358 (Page Supp. 1973), which provides in part:

> The judgment rendered by the [juvenile] court... shall not impose any of the civil disabilities ordinarily imposed by conviction of crime in that the child is not a criminal by reason of such adjudication.... The disposition of a child under the judgment rendered or any evidence given in [juvenile] court is not admissible as evidence against the child in any other case or proceeding in any other court....

[34] *In re* Benthune, No. CA-4057 (Ct. App., 5th Dist. Ohio, Nov. 18, 1974).

juvenile statute[35] very similar to the Ohio law, determined that the overall rehabilitative philosophy of the juvenile court system forbade any use of previous adjudications of delinquency to impeach the testimony of a juvenile *witness* in juvenile court.[36] The court expressly held:

> As the language of the statute *expressly forbids* the interpretation that the disposition of a child in a juvenile court proceeding constitutes conviction of a crime, and as nothing short of conviction of crime is sufficient to warrant the inquiry which appellant was forbidden to make, his contention [that impeachment on the basis of previous adjudications of delinquency should have been allowed] is completely devoid of merit.[37]

A close reading of the statute interpreted by the federal court raises serious doubts as to the propriety of the court's analysis. As the dissent in the case poignantly indicated, the statute *did not* expressly forbid "[t]he juvenile court itself . . . [from considering] previous misconduct . . . of a witness . . . where that misconduct is of such a character as will bear upon the credibility of that witness."[38] The dissent certainly believed that a juvenile court's consideration of the previous misconduct of a child did not "impose upon a witness any of the civil disabilities ordinarily imposed by conviction, or treat a witness as a criminal, or constitute admission of evidence against a witness, contrary to the [juvenile statute in question.]. . . ."[39] The dissenter could not "conclude that it was the intention of Congress, when it laid down the wholesome protections of the Juvenile Court Act against treating children as criminals, to blind the eyes of the juvenile judge or of a jury in the juvenile court to considerations vitally bearing upon the credibility of testimony."[40]

The plain meaning of both the Ohio and the District of Columbia statutes[41] indicates that they were designed to protect juveniles from the use of their prior juvenile court dispositions, or any other evidence given in a juvenile court, in any court other than a juvenile court.[42] The statutes'

---

[35] Juv. Act of June 1, 1958 § 14, 52 Stat. 599, 600, D.C. CODE ANN. § 18-264 (Supp. V 1939): "The disposition of a child or any evidence given in the court shall not be admissible as evidence against the child in any case or proceeding in any other court. . . ."

[36] Thomas v. United States, 121 F.2d 905, 908-09 (D.C. Cir. 1941).

[37] *Id.* at 909 (emphasis added).

[38] *Id.* at 911.

[39] *Id.*

[40] *Id.*

[41] *See* statutes cited notes 33 and 35 *supra.* The wording of both statutes is virtually identical.

[42] The language of the statutes mentioned notes 33 and 35 *supra,* expressly provides that an adjudication of delinquency given in juvenile court is inadmissible in any other case or proceeding *in any other court.* This language "in any other court" can not be ignored as its wording is plain and unambiguous. As the Supreme Court stated in Caminetti v. United States, 242 U.S. 470, 485 (1917): "[T]he meaning of [a]...statute must, in the first instance be sought in the language in which the act is framed, and if that is plain,... the sole function of the courts is to enforce it according to its

clear intent is not to preclude the use of such dispositional findings or evidence in the juvenile court itself.[43] To determine otherwise would be to completely disregard the wording of the statute and the obvious legislative intent.[44]

The Ohio court, in interpreting the previously mentioned Ohio juvenile statute,[45] implicitly determined that an adjudication of delinquency, while not technically defined or regarded as a criminal conviction, carried with it sufficient probative value as to bear upon the credibility of the juvenile in question and his testimony.[46] This interpretation of the statute does not impose any civil disability upon the juvenile, nor does it treat him as a criminal.[47] Instead, this interpretation faces up to the true realities of the situation and helps to further the truth finding goals of the juvenile courts.[48]

If the interpretation herein supported is correct, juvenile courts will have the otherwise usual opportunity to weigh the testimony of any juvenile defendant against the juvenile's previous actions. Furthermore, if a juvenile has had prior court adjudications of delinquency, the court in allowing questioning as to his previous juvenile court record may be

---

terms." The statutes in question do *not* forbid the use of an adjudication of delinquency in the juvenile court itself. To hold otherwise would be to completely disregard the language of the enactments and the express legislative intent.

[43] The expressed intent of a legislative enactment can be gleaned from the plain meaning of the statutory wording. *See* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.01-.03 (4th ed. 1973). The plain meaning of the juvenile statutes being analyzed, indicates that the legislatures did not intend to forbid the juvenile courts themselves from considering all relevant evidence, including impeachment evidence. Had the legislatures intended some other result, logic dictates that some other wording would have been utilized, *e.g.:*

> A judgment rendered by a juvenile court or any evidence given in such court shall not be admissible against a child in any other case or proceeding in any court whatsoever, except that such an adjudication or disposition may be considered by any court whatsoever for dispositional or sentencing purposes. [Author's example.]

See In re Benthune, No. CA-4057 (Ct. App., 5th Dist. Ohio, Nov. 18, 1974). *See also* Davis v. Alaska, 415 U.S. 308 (1974), suggesting that such language as that offered could be constitutionally impermissible when balanced against the rights of a criminal defendant.

[44] When a statute's wording is plain and clear, that language cannot be ignored, and it is not subject to judicial interpretation but application to particular facts. *See* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1973). In the words of one federal court: "There is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses. . . ." Swarts v. Siegel, 117 F. 13, 18-19 (8th Cir. 1902).

[45] OHIO REV. CODE ANN. § 2151.358 (Page Supp. 1973). *See* note 33 *supra.*

[46] *In re* Benthune, No. CA-4057 (Ct. App., 5th Dist. Ohio, Nov. 18, 1974).

[47] *See* Thomas v. United States, 121 F.2d 905, 911 (D.C. Cir. 1941) (Stephens, J., dissenting in part): "For the juvenile court so to consider previous misconduct does not in my view impose upon a witness any of the civil disabilities [disqualification in a civil service examination, etc.] ordinarily imposed by conviction. . . ."

[48] *Cf.* State v. Hale, 21 Ohio App. 2d 207, 216, 256 N.E.2d 239, 245 (1969): "[A] reasonable interpretation of [juvenile statutes] . . . should not deny a judicial tribunal a reasonable search for the truth, and, in so doing, best serve the purpose of justice."

enlightened as to the juvenile's possible interest in the outcome of the action.[49] Thus, the impeachment questioning process should in fact support the system's truth determinative goals by enabling the court to consider all relevant facts and circumstances. It would be a true miscarriage of justice to require juvenile courts to determine cases through a "tinted window."[50]

IMPEACHMENT OUTSIDE OF JUVENILE COURT ON THE BASIS OF JUVENILE COURT RECORDS

Having supported the view[51] that impeachment of a juvenile defendant in juvenile court is proper under the typical juvenile statute, the question naturally arises as to whether juvenile records should be used as the foundation for impeachment questioning outside of juvenile court. This issue could arise, after the juvenile reaches majority and faces trial as an adult, or where a juvenile testifies in a court other than a juvenile court, as a defendant or a witness.

With some exceptions,[52] the courts have soundly held such questioning to be improper in light of the prohibitions found in the typical juvenile statute.[53] An analysis of the statutes lends support to this general view, as

---

[49] *See In re* Benthune, No. CA-4057 (Ct. App., 5th Dist. Ohio, Nov. 18, 1974). In this case, the juvenile in question had previously, on another charge, received a suspended permanent commitment to a juvenile institution. Inasmuch as he was almost certain to be committed if adjudicated delinquent on his present charge, the juvenile had a great interest in the outcome of the action. The fact that he was under a suspended commitment was relevant evidence of his possible motivation for being untruthful. *But see* Brown v. United States, 370 F.2d 242 (D.C. Cir. 1966). In that case the trial court indicated in an adult criminal prosecution that persons with prior convictions were likely to commit perjury because of the harsher sentences imposed upon repeat offenders. The Court of Appeals reversed holding that the statement of the trial judge was a misconstruction of the theory of impeachment. The court stated: "One need not look for prior convictions to find motivation to falsify, for certainly that motive inheres in any case, whether or not the defendant has a prior record. What greater incentive [to lie] is there than the avoidance of conviction?" 370 F.2d at 244.

[50] *See* Thomas v. United States, 121 F.2d 905, 911 (D.C. Cir. 1941) (Stephens, J., dissenting in part); State v. Marinski, 139 Ohio St. 559, 560, 41 N.E.2d 387, 388 (1942); State v. Hale, 21 Ohio App. 2d 207, 256 N.E.2d 239 (1969).

[51] *See* text accompanying notes 25, 26 and 27 *supra.*

[52] *See* Davis v. Alaska, 415 U.S. 308 (1974), *noted in* 43 U. CIN. L. REV. 647 (1974) (right of confrontation outweighs state's police power to protect juveniles from being impeached by the use of prior juvenile records); People v. Smallwood, 306 Mich. 49, 10 N.W.2d 303 (1943) (in a statutory rape prosecution, the credibility of a 15-year-old prosecutrix may be attacked by the use of her prior juvenile court record); State v. Marinski, 139 Ohio St. 559, 41 N.E.2d 387 (1942) (once a criminal defendant testifies on direct as to his life history including a list of the various schools he had attended, the prosecution may in rebuttal cross-examine the defendant as to his incarceration in a juvenile institution, where the defendant had failed to mention that fact on direct examination); State v. Hale, 21 Ohio App. 2d 207, 256 N.E.2d 239 (1969) (once a criminal defendant introduces evidence of his good character and conduct, the prosecution may in rebuttal, introduce evidence as to the defendant's previous involvement in juvenile court proceedings). *See also* FED. R. EVID. 609(d), Pub. L. No. 93-595 (Jan. 2, 1975), which allows impeachment of a juvenile witness, on the basis of juvenile records, in a criminal proceeding, where such would be necessary for a fair trial.

[53] *See, e.g.*, Brown v. United States, 338 F.2d 543 (D.C. Cir. 1964).

do interpretations two and three, mentioned above.[54] These interpretations seem to support the obvious meaning of the enactments and the overall rehabilitative philosophy of the juvenile justice system.

As opposed to the situation involving juvenile defendants testifying in juvenile court, it seems that the rehabilitative goals of the juvenile justice system would perhaps be destroyed, if an adult could be questioned as to previous transgressions committed while he was under the age of majority.[55] Assuming *arguendo,* that the rehabilitative goals of the system encourage the privacy and eventual elimination of juvenile records,[56] there seems to be an overriding interest in refusing to allow any impeachment of an adult as to his previous juvenile record.[57] Similarly, a juvenile testifying outside of the confines of a juvenile court should be protected from the embarrassment and possibly harmful degradation of impeachment questioning in a public courtroom.[58]

IF IMPEACHMENT IN JUVENILE COURT IS PROPER WHILE IMPEACHMENT OUTSIDE JUVENILE COURT IS IMPROPER, DOES THIS VIOLATE EQUAL PROTECTION?

If impeachment of a juvenile in juvenile court is proper, and if similar impeachment of a juvenile outside of a juvenile court or after he becomes an adult is improper, the question naturally arises as to whether this interpretation violates the constitutional safeguards of the equal protection clause.[59]

The equal protection clause of the United States Constitution simply protects members of the same class or grouping from unequal treatment by a state, for an unreasonable or irrational reason.[60] The clause does not command that all persons be treated absolutely equally, but merely that

---

[54] *See* text accompanying notes 25-29 *supra.*

[55] *See In re* Gault, 387 U.S. 1 (1967), *rev'g* 99 Ariz. 181, 407 P.2d 760 (1965). The Arizona Supreme Court had stated: "[T]he policy of the juvenile law is to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past." 99 Ariz. at 190, 407 P.2d at 767.

[56] *See, e.g.,* OHIO REV. CODE ANN. § 2151.358 (Page Supp. 1973) (providing for, *inter alia,* expungement of juvenile records).

[57] To allow impeachment questioning would totally defeat the rehabilitative goals of the juvenile justice system. Such a view would enable prosecutors and others to use juvenile records to haunt a person throughout his entire life. *See* Kozler v. New York Tel. Co., 93 N.J.L. 279, 281, 108 A. 375, 376 (N.J. 1919): "We see no reason why the Legislature may not enact that it is against the public policy to hold over a young person in terrorem, perhaps for life, a conviction for some youthful transgression." *But see* Davis v. Alaska, 415 U.S. 308 (1974).

[58] *See* Brown v. United States, 338 F.2d 543, 547 (D.C. Cir. 1964): "[T]he juvenile himself has a protected interest [when testifying in adult court] in maintaining the credibility of his public testimony."

[59] U.S. CONST. amend. XIV, § 1. Juveniles are "persons" within the meaning of the Constitution and are therefore entitled to the equal protection of the laws. *See In re* Gault, 387 U.S. 1 (1967). *See also* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); *In re* Brown, 439 F.2d 47, 51-52 (3d Cir. 1971).

[60] Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (Jackson, J., concurring).

if there is going to be some unequal treatment, there must be some rational basis for it.[61] If a state develops some classification which results in unequal treatment for no justifiable reason, the classification must be struck down as being repugnant to the Constitution. Correlatively, where fundamental interests are involved[62] or where suspect classifications are utilized,[63] not only must the classification be reasonable, but the state must also show a compelling reason for the statute's differentiation.

As a starting point, it appears quite reasonable to say that the juvenile impeachment issue does not involve fundamental interests.[64] Furthermore, the difference in treatment granted to juveniles testifying outside of juvenile court, or to adult defendants generally, is not based upon what is presently thought of as a suspect classification.[65] Therefore, the so-called traditional equal protection test[66] should be utilized to examine the unequal treatment mentioned above,[67] to determine whether or not that treatment violates the juvenile defendant's right to equal protection of the laws.

The crucial question to be answered in analyzing the interpretation herein supported, is whether the unequal treatment is based upon some reasonable foundation. If so, there can be no equal protection violation.

The limited impeachment position favored by this article furthers the truth determinative goals of the juvenile justice system;[68] supports the system's objectives of eliminating juvenile records after a specified time;[69] protects juveniles from the degradation of being impeached while testifying outside of juvenile court,[70] and lastly, helps to further the rehabilitative goals of the system generally.[71] These four points surely provide a reasonable justification, if not a compelling interest, for the

---

61 Rinaldi v. Yaeger, 384 U.S. 305 (1966). *See* Morey v. Doud, 354 U.S. 457 (1957).

62 Skinner v. Oklahoma, 316 U.S. 535 (1942).

63 *Cf.* Fronterio v. Richardson, 411 U.S. 677 (1973).

64 Cases such as Skinner v. Oklahoma, 316 U.S. 535 (1942), have tended to define fundamental interests as "basic civil rights" or "basic constitutional rights." *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Levy v. Louisiana, 391 U.S. 68 (1968). The juvenile impeachment question does not seem to involve any of these basic or fundamental interests.

65 Suspect classifications as they are commonly thought of, are based upon such things as race, religion, ethnic background, etc., *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). The classification, in reference to the juvenile impeachment question, is not based upon such a classification.

66 *See* Morey v. Doud, 354 U.S. 457 (1957); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949). *See also* Trussman and ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

67 *See* text accompanying note 59 *supra.*

68 *See* text accompanying notes 49 and 50 *supra.*

69 *See* text accompanying notes 55-57 *supra.*

70 *See* text accompanying note 58 *supra.*

71 From personal experience, this writer feels that juvenile court judges often consider the first step in the rehabilitation of a juvenile offender to be one of telling the truth, no matter what it may be. Therefore the impeachment questioning process may in fact encourage a juvenile to speak the truth.

unequal treatment involved. Therefore, under the traditional equal protection test at the very least, the equal protection clause apparently is not violated by the view espoused herein.

IF IMPEACHMENT OF A JUVENILE IN JUVENILE COURT IS PROPER, DOES THIS INTERFERE WITH THE JUVENILE'S RIGHT TO DUE PROCESS OF LAW?

Although one possible constitutional attack to the juvenile impeachment issue has been discussed and analyzed, another constitutional safeguard may have some application to this discussion.

In the landmark case of *In re Gault*,[72] the Supreme Court determined that the due process clause of the United States Constitution[73] had a vital role to play in adversary juvenile delinquency proceedings.[74] The Court felt that "[I]t would be extraordinary if [the]... Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process' [in juvenile delinquency proceedings]."[75] Consequently, the Court held that adversary juvenile delinquency proceedings "must measure up to the essentials of due process and fair treatment."[76]

Cases arising after *Gault* have generally determined that the applicable due process standard to be applied in juvenile proceedings is one of fundamental fairness.[77] Thus, the Supreme Court has determined that fundamental fairness includes, *inter alia*, the right to the assistance of counsel; the right to confront witnesses; the right to remain silent;[78] the right to an evidentiary standard of proof beyond a reasonable doubt;[79] but not the right to a trial by jury.[80] No Supreme Court case to date has specifically spelled out all the elements of a fundamental fairness-due process standard applicable in juvenile delinquency proceedings generally. However, the Court has extended only those standards which it deems to be essential to the general goal of fundamental fairness. So far this has been a somewhat more restricted standard than would be applied in an analogous adult criminal proceeding. It appears quite likely then, that only those standards deemed to be essential to due process will be extended to juvenile proceedings.

---

[72] 387 U.S. 1 (1967), *noted in, The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 173-176 (1967); Comment, *Waiver in the Juvenile Court*, 68 COLUM. L. REV. 1149 (1968). *See generally* GAULT: WHAT NOW FOR THE JUVENILE COURT (V. Nordin ed. 1968); Ketcham, *Guidelines From Gault: Revolutionary Requirements and Reappraisal*, 53 VA. L. REV. 1700 (1967).

[73] U.S. CONST. amend. XIV, § 1.

[74] *In re* Gault, 387 U.S. 1, 30 (1967).

[75] *Id.* at 28-9.

[76] *Id.* at 30.

[77] *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Winship, 397 U.S. 358 (1970).

[78] *In re* Gault, 387 U.S. 1 (1967).

[79] *In re* Winship, 397 U.S. 358 (1970).

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

Therefore, the question to be asked in reference to this discussion, is whether an interpretation which allows a juvenile to be impeached in juvenile court by the use of previous adjudications of delinquency, is so fundamentally unfair as to violate due process.

An extensive search of the available law has failed to uncover any case discussing this specific question.[81] However, several cases involving adult defendants have arisen which might shed some light on this problem. These adult cases, arising at both the state[82] and federal level,[83] have dealt with the question of whether due process is violated when a defendant during cross-examination is impeached by the prosecution on the basis of his prior criminal record. In these cases the claim was made that the jury, despite instructions to the contrary, was unable to consider the prior convictions solely for the purpose of weighing the credibility of the defendant and his testimony.[84] Therefore as this theory goes, due process was violated because the defendant was not afforded his sixth amendment right to trial by an impartial jury.[85] In the vast majority of these cases, this claim has been rejected.[86]

In contrast to the adult procedure, the juvenile process does not, as a general rule, involve a trial by jury. In fact, the Supreme Court in *McKeiver v. Pennsylvania*[87] held that juveniles were not as a matter of constitutional law entitled to a jury trial.[88] Therefore, the claims which have been made in some adult cases as to jury confusion in reference to the impeachment process, have little or no application to the juvenile situation where a jury is rarely involved. Even assuming that the claims put forth in the adult cases have some constitutional merit, the dangers of violating

---

81 *But see* 4 JONES ON EVIDENCE § 26.20, at 223 (6th ed. 1972); MCCORMICK, *supra* note 3, § 43, at 86-87, n.64.

82 *See, e.g.*, Dixon v. United States, 278 A.2d 89, 92-6 (D.C. App. 1972); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971).

83 *See, e.g.*, Spencer v. Texas, 385 U.S. 554 (1967).

84 *See* Comment, *Constitutional Problems Inherent in the Admissibility of Prior Record Convictions Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness*, 37 U. CIN. L. REV. 168 (1968).

85 *Id.*

86 *See* Spencer v. Texas, 385 U.S. 554 (1967). *But see* State v. Santiago, 53 Hawaii 254, 492, P.2d 657 (1971). In this context, Bruton v. United States, 391 U.S. 123 (1968), *overruling* Delli v. Paoli, 352 U.S. 232 (1957), may have some application. In the *Bruton* case, two adult defendants were jointly tried on the same charges. A confession of one of the defendants who did not testify was introduced into evidence. This confession implicated the co-defendant. Although the trial court instructed the jury to consider the confession only against the confessor, the Supreme Court, referring to Jackson v. Denno, 378 U.S. 368 (1964), held that such a limiting instruction did not overcome the prejudice to the co-defendant and was in violation of the co-defendant's constitutional right to confrontation. By analogy to the present situation, perhaps a limiting instruction to a jury in reference to the limited purpose of the impeachment questioning process does not overcome the prejudicial effect of the evidence, and in fact deprives the defendant of his constitutional right to a fair trial. This, however, is merely speculation and not the present state of the law.

87 403 U.S. 528 (1971).

88 *Id.* at 545.

due process are certainly minimized and perhaps eliminated when no jury is used, and a case is tried before the court, as is the usual situation in the juvenile process. Surely a judge, as opposed to a jury, will have no doubt about the limited purpose that impeachment questioning serves.

Assuming this analysis is well founded, another due process related question arises as to whether or not all prior adjudications of delinquency may be used for impeachment purposes. It would seem reasonable to suppose that the fundamental fairness concept might in fact be violated if all types of delinquency adjudications could be brought forth to impeach a juvenile when he testifies.[89]

In order for the process to remain fundamentally fair, the impeachment questioning process should be limited to only those adjudications of delinquency involving the commission of some crime which bears upon the credibility of the juvenile defendant.[90] Obviously, there are many crimes which do not bear upon the credibility of an actor who engages in deviant behavior.[91] Therefore, those crimes should not serve as the basis for impeachment questioning of a juvenile defendant in juvenile court.

Inasmuch as the juvenile judge sits as both the trier of the facts and applier of the law, the matter of what crimes should be used for impeachment questioning should not be left to his discretion, because that procedure would require some proffer of testimony before the questioning was allowed. Even though the judge strives for impartiality, such a procedure may have some unconscious but prejudicial effect upon the court if the proffer should be excluded from formal consideration. Therefore, a policy should be established to specify which particular crimes bear upon the credibility of any juvenile defendant. The best approach appears to be one which would allow impeachment on the basis of only those crimes involving either *crimen falsi* or moral turpitude, inasmuch as these crimes certainly bear upon the credibility of any

---

89 If all types of prior delinquency adjudications were allowed, even those not really bearing upon credibility, the process would certainly seem unfair.

90 As to the probative value of different types of criminal offenses for impeachment purposes, *see* Burg v. United States, 406 F.2d 235, 238 (9th Cir. 1969) (Ely, J., concurring). *But see* Brown v. United States, 338 F.2d 543, 547 (D.C. Cir. 1964): "Because of the purpose of the Juvenile Court Act and the absence of procedural safeguards, a finding of involvement against a juvenile [in the commission of a crime] does not have the same tendency to demonstrate his unreliability as does a criminal conviction for the adult offender." This position, as expressed by the *Brown* Court, in light of *Gault*, and the interpretation suggested here, seems dubious to say the least.

91 *See, e.g.*, State v. Russ, 122 Vt. 236, 167 A.2d 528 (1961) (conviction for traffic misdemeanor barred from use as the basis for impeachment). *See also* McIntosh v. Pittsburg Ry., 432 Pa. 123, 247 A.2d 467 (1968).

individual who violates the law.[92] In this manner, the juvenile court will consider only those adjudications of delinquency which vitally bear upon the credibility of the juvenile defendant. This approach would not ostensibly violate the fundamental fairness-due process standard applicable in juvenile proceedings.

CONCLUSION

When a minor commits a criminal act, the mere fact that he is underage does not, from a practical standpoint, erase the fact that a crime has been committed. He is not, however, classified as a criminal because it is the law's policy to attempt to help him rather than to punish him. Notwithstanding this fact, the criminal act that the juvenile commits still bears upon his credibility as a witness, and when he takes the stand to testify in his own behalf in juvenile court, the believability of his testimony should be tested by his past criminal misconduct.

The plain meaning of the juvenile statutes in question supports this interpretation, and in fact encourages it. Any other analysis would seem to do violence to the statute's obvious intent while hampering the juvenile courts' truth determinative goals.

---

[92] *See* 1 UNDERHILL'S CRIMINAL EVIDENCE § 242, at 750 (6th ed. 1973):

> Where a crime involving moral turpitude is the standard for impeachment, it is held that such a crime involves an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellows or to society which is contrary to accepted and customary rules of conduct. Perjury, larceny, murder, narcotics offenses, sex offenses, and filing fraudulent tax returns, all involve moral turpitude. It is generally not involved in liquor offenses, gambling, assault and battery, disorderly conduct, and breaches of military discipline."

See also McGee v. State, 207 Tenn. 431, 332 S.W.2d 501 (1960); Note, *Impeachment Evidence—Prior Convictions Involving Moral Turpitude,* 12 ALA. L. REV. 194 (1960).