

A SEARCH FOR THE TRUTH OR TRIAL BY ORDEAL: WHEN PROSECUTORS CROSS-EXAMINE ADOLESCENTS HOW SHOULD COURTS RESPOND?

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It is an axiom of the law that cross-examination is, in John Henry Wigmore's words, the "greatest legal engine ever invented for the discovery of truth."¹ In part because of its perceived utility in getting to the truth of a matter, courts are generally reluctant, despite broad authority to do so, to step in and to govern the conduct of cross-examination.² But is cross-examination invariably calculated to ascertain the truth? While most lawyers are familiar with Wigmore's famous quotation, few are familiar with the caveat that shortly follows it: "A lawyer can do anything with cross-examination He may, it is true, do more than he ought to do; he . . . may make the truth appear like falsehood."³ Because of cross-examination's power to distort the truth, Wigmore recognized the need for it to be controlled.⁴

It seems clear that at least in some instances, cross-examination, as it is conducted in contemporary American courtrooms, may in fact hinder the

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1. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 1367, at 32 (James H. Chabourn ed., Little Brown 1974). *See generally* Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."); Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk,"* 14 WIDENER L. REV. 427, 430-34 (2009) (discussing the historical roots of the right to cross-examination and asserting that "as to all witnesses who actually testify, and to at least a core aspect of hearsay, cross-examination is the *sine qua non* of the adversary adjudicative process.").

2. 2 JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES 651, 652 (2005). The other major rationale for courts' reluctance to too closely govern cross-examination is that it is the means by which a criminal defendant's Sixth Amendment right to confront witnesses against him is vindicated. *See Davis*, 415 U.S. at 315 ("Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.'") (alteration in original) (citing Douglas v. Alabama, 380 U.S. 415, 418 (1965)). Because this Article addresses the use of cross-examination by prosecutors and not defense attorneys, the Confrontation Clause rationale is not at issue here. Some commentators have criticized trial judges for being too willing to interfere with defendants' presentation of evidence. *See* Louise Ellison, *The Mosaic Art?: Cross-examination and the Vulnerable Witness*, 21 J. LEGAL STUD. 353, 366 (2001); Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243 (2000).

3. WIGMORE, *supra* note 1, § 1367, at 32. Professor Epstein has recently observed that the "mythic status of cross-examination" may actually interfere with the truth finding process because "leading questions are not always an appropriate or sufficient tool for truth finding." Epstein, *supra* note 1, at 437.

4. WIGMORE, *supra* note 1, § 1367, at 32.

ascertainment of the truth.⁵ Courts and commentators have generally addressed the issue of cross-examination by considering and critiquing its conduct by defense attorneys.⁶ However, this Article considers how a prosecutor conducts cross-examination on an adolescent defendant or an adolescent witness testifying for the defense. I will argue that courts have a duty to control prosecutors' conduct of cross-examination or run the risk of frustrating the legal process's truth-seeking function. In order to define these concerns, Part I of this Article will include an example from my practice as well as other sources to illustrate the overly aggressive prosecutorial cross-examination techniques. Part II will briefly address the nature and purposes of cross-examination, and will include a discussion of the prosecutor's right to conduct a cross-examination. Part III will consider two areas of inquiry that have received considerably more attention than the cross-examination of juvenile defendants—the interviewing of possible child victims by social workers and law enforcement officers and their questioning in court, as well as the interrogation of juvenile suspects by law enforcement officers—and will draw an analogy from those bodies of work to the issue presently considered. Part IV will consider what tools are currently available to courts to control the overly aggressive cross-examination of juvenile defendants and adolescent witnesses called on behalf of the defense, and will argue that courts should exercise their considerable authority to disallow such questioning.

I.

In this section, I first describe a case from earlier in my career in which a prosecutor was permitted to overzealously cross-examine an adolescent defendant, the harm that resulted from the prosecutor's actions, and the court's unwillingness to exercise its duty to control the prosecutor's actions. I then turn to case law and the literature for other examples of prosecutorial overreaching when conducting cross on adolescents.

A.

I began my law career as a deputy defender in the Juvenile Defender Office (JDO), a division of the Legal Aid and Defender Association of Detroit. The JDO provided representation exclusively to children, with its caseload divided

5. See generally LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 226-27 (1994) (discussing effect where cross-examination may cause child witnesses to testify inaccurately); STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM 210 (1994) (“[C]ontrary to many lawyers’ and jurors’ instincts, independent studies show that the stress of cross-examination, rather than forcing truth to the surface, impairs memory and reduces the accuracy of testimony.”).

6. See, e.g., *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Davis*, 415 U.S. at 316; MYERS, *supra* note 2, at 652; MCGOUGH *supra* note 5, at 170-71.

between child protection and juvenile delinquency cases. This mix provided an interesting contrast in how the law—and, more specifically, legal actors such as prosecutors and judges—handled child witnesses. On the child protection side of the docket, children were, of course, thought of as victims. When they appeared in court, they were cared for and protected from the harshness that so often characterizes the legal process. There were special waiting areas in the courthouse if the child had to testify. Michigan, like other jurisdictions, has numerous provisions in the law intended to protect child witnesses who appear in child protection proceedings.⁷ These include the use of leading questions on direct examination,⁸ videorecorded statements⁹ and special hearsay exceptions,¹⁰ closed circuit television to prevent children from having to confront directly those who are alleged to have harmed the child,¹¹ and impartial questioners to pose questions to child witnesses.¹² Lawyers were on their best behavior, and judges would tolerate not the least bit of aggressive questioning.

The allegedly delinquent minors received none of this solicitous attention. They were perpetrators. Bad kids. Evil. In truth, they were very often the same kids.¹³ But that is not how the legal system and the actors in the courtroom treated them.

7. See generally MYERS, *supra* note 2, at 157-90 (discussing various protections for child witnesses); Ellison, *supra* note 2.

8. *People v. Watson*, 629 N.W.2d 411, 421-422 (Mich. Ct. App. 2001) (citing *People v. Kosters*, 438 N.W.2d 651, 655 (Mich. Ct. App. 1989)); see also *United States v. Demarrias*, 876 F.2d 674, 678 (8th Cir. 1989) (approving prosecutions use of leading questions to conduct direct examination of fourteen year old sexual assault victim); *United States v. Nabors*, 762 F.2d 642, 650-51 (8th Cir. 1985) (approving use of leading questions on direct exam with twelve year old witness for the prosecution).

9. MICH. COMP. LAWS SERV. § 712A.17b (LexisNexis 2005) (permitting videorecorded statements of some child witnesses to be use in lieu of their in court testimony).

10. See MICH. R. EVID. 803A (permitting child's hearsay statements describing sexual abuse to be admitted in delinquency or criminal proceedings).

11. MICH. CT. R. 3.923(E).

12. MICH. CT. R. 3.923(F) ("The court may appoint an impartial person to address questions to a child witness at a hearing as the court directs."). See generally *In re Brock*, 499 N.W.2d 752, 755-56 (Mich. 1993) (using social worker as independent questioner during trial to question child witness).

13. The relationship between children as victims of abuse and neglect and children who become the perpetrators of delinquent and criminal acts is well documented. See JAMES GARBARINO, *LOST BOYS: WHY OUR SONS TURN VIOLENT AND HOW WE CAN SAVE THEM* 82 (1999); Cathy Spatz Widom et al., *An Examination of Pathways from Childhood Victimization to Violence: The Role of Early Aggression and Problematic Alcohol Use*, 21 VIOLENCE & VICTIMS 675 (2006) (finding that a history of child abuse or neglect victimization is directly and indirectly predictive of arrest for violence); Katherine W. Scrivner, Student Essay, *Crossover Kids: The Dilemma of the Abused Delinquent*, 40 FAM. CT. REV. 135, 136 (2002) (noting that "children between the ages of nine and twelve who were reported abused or neglected were sixty-seven times more likely to be arrested . . ."). This point has been recognized explicitly or implicitly by courts at all levels. See, e.g., *In re Nuñez*, 93 Cal. Rptr. 3d 242, 250 (Ct. App. 2009) (mitigating minor's sentence after detail about a history of trauma including being physically abused by an alcoholic father, seeing his brother murdered, being shot himself, and random violence in his

While working at the JDO, I represented a fourteen year old boy whom I will call DeShawn. Tall, broad shouldered and handsome with a ready and enveloping smile, he was a first time offender charged with armed robbery. The complaining witness, a somewhat portly thirty-two year old man, alleged that DeShawn had confronted him at midday in front of his apartment building on a busy street on the city's Westside, produced a gun, and demanded his wallet. Scared, the man alleged that he handed over his wallet to DeShawn, who then ran away down the street.

Within minutes, the police apprehended DeShawn based on the complainant's description. Although this alleged crime took place in broad daylight on a busy city street, there was not a single disinterested witness. The police did not recover a wallet or a gun. In fact, no physical evidence of any sort linked DeShawn to the crime. The man said he had nearly a hundred dollars in cash in the wallet, but DeShawn had no cash when arrested.¹⁴

The case came down to a swearing contest. Would the judge believe the complainant or DeShawn, who asserted that while there had been a confrontation with the complainant, he did not have a gun and did not take the man's wallet? DeShawn explained that the confrontation had been over money. He explained that he had been, for some time, permitting this man to perform sexual acts on him in exchange for money. The man had not paid. DeShawn testified that he confronted the man about the money he was owed, and when the man did not pay, DeShawn said he would call the police. In the foot race to the telephone, DeShawn lost.

At trial, the complainant was the prosecution's first witness. After identifying DeShawn, he testified that he never saw my client before that day on the street in front of his apartment. I was fairly certain that this was a lie because I had three witnesses—all, like DeShawn, teenage boys who claimed that the complainant had paid them to have sexual relations—waiting in the hallway prepared to testify that they had seen the complainant and DeShawn together on numerous occasions. On cross-examination, I reiterated the complainant's testimony that he had never seen my client before the day of the alleged robbery. The prosecutor seemed confused by my insistence on this point. Then I directly asked the complainant if it was true that he had seen my client before, and that he had in fact paid him to perform sexual acts. The

neighborhood); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (holding that an adult death penalty defendant's rights were violated when his history of victimization as a child was not presented as mitigating evidence during sentencing phase of proceeding).

14. Technically, DeShawn was not "arrested." Under Michigan law an alleged juvenile delinquent is "take[n] into custody" or detained. *See* MICH. COMP. LAWS SERV. § 712A.14(1) (LexisNexis 2005). In fact the police ordered him at gun point to lie face down on the sidewalk after which he was handcuffed, searched, and transported to the major crimes unit of the Detroit Police Department in the backseat of a police cruiser. By any reasonable definition, DeShawn was arrested.

prosecutor exploded. When the dust settled, the judge allowed the question. Predictably, the complainant denied the allegation.

Then, the police officer that responded to the armed robbery call took the stand to testify. He gave us an unexpected gift. In answering a question asked by the prosecutor, he mentioned in passing that he had previously seen DeShawn and the complainant together in a parked car a few days before the alleged armed robbery. They were in the back seat and the officer testified that he simply told them to move along. The officer's testimony made it clear that the complainant had lied.

The judge, correctly, denied our motion for a directed verdict. I called DeShawn. He denied ever taking the man's wallet and then testified at length about his relationship with the complainant and his threat to report him to the police if he did not pay the money he owed. The prosecutor was livid. His cross-examination was brutal. He humiliated the kid, called him a liar, yelled and screamed, and literally pounded on the table. At times he physically intimidated DeShawn by standing only inches from him and screaming his questions. The court overruled repeated objections to the prosecutor's conduct and tone. "This is cross-examination," the judge said repeatedly. Finally, after this abuse went on for nearly half an hour, and after it was clear that his frustration and anger were building, DeShawn lost his temper. In response to a question asking DeShawn to describe exactly what the man had done to him, DeShawn responded, "He sucked my d***, Motherf*****."¹⁵

B.

My experience in representing DeShawn does not appear to be unique.¹⁶ A review of the case law and the literature provides other examples of

15. The judge found DeShawn guilty of armed robbery. She found that in the swearing contest between DeShawn and the complainant, the adult man who had obviously and demonstrably lied to her, was the more credible witness. This experience was not unusual during my years in the JDO. Prosecutors routinely questioned juvenile defendants and their adolescent witnesses in a hostile and aggressive manner, and courts repeatedly refused to exercise their authority to control such behavior. In many instances the testifying youth, after growing frustrated and angry, lashed out only to have the court find such behavior indicative of their lack of credibility.

16. While this article addresses the overly zealous cross-examination of adolescent witnesses, prosecutor's use of intimidating and hostile tactics is certainly not limited to their treatment of youthful witnesses. For videotaped example of a prosecutor using these tactics with an adult defendant, see *Interesting Cross-examination by a Prosecutor*, <http://albany-lawyer.blogspot.com/2009/01/interesting-cross-examination-by.html> (last visited Feb. 19, 2010). In this video clip, a prosecutor is cross-examining an adult defendant in a murder prosecution. The first two questions are delivered from behind a podium and in a firm but moderate tone of voice. By the third question, the prosecutor begins to escalate his tone, his voice becoming louder. By the fifth question, his voice is raised well beyond a moderate tone. In short, he is yelling at the witness. This draws an objection from defense counsel that "he's screaming at the witness," which the court promptly overrules. At this point, the prosecutor leaves the podium, moves closer to the witness, and begins to scream his questions in an

prosecutorial overreaching when conducting cross-examination on adolescent witnesses, and the predictable response of these immature witnesses to the prosecutor's behavior.¹⁷

In the Washington, D.C. case *In re L.G.*,¹⁸ a sixteen year old was called to testify as a witness for the defendant in a murder prosecution.¹⁹ During cross-examination, the prosecutor attempted to demonstrate that L.G. had lied during direct.²⁰ In the course of this testimony, the prosecutor asked the following: "You just told [defense counsel] a few minutes ago, you always have you[r] gun with you. Right? You said—" L.G. interjected at this point: "I said it was in the car, motherf****. Don't be coming hollering at me like that, man."²² In the teen's response, we glean something of the prosecutor's tone and conduct that is not discernable from the dry trial transcript; it is clear that the teen felt as though the prosecutor was yelling at him.

Further on in the cross, the prosecutor asked this long and complicated question:

So, if your uncle said that [the deceased] was minding his own business and walked out of this building, didn't say a thing to anybody, didn't pull a weapon on anybody, and just walked out of here and then you jumped off the steps and started shooting at him while your uncle is sitting right there, that's not true. Is that what you are saying?²³

L.G., obviously confused by this question, responded, "Hold on, man. You got to slow the f*** down. I don't know what the f*** you are saying."²⁴

argumentative fashion. Again the defense attorney objects, the frustration in his voice is plain. "I've overruled it," comes the judge's response. This seems to give the prosecutor permission to escalate his actions; he becomes more argumentative, continues screaming his questions and pronounces, "My God! Is this your testimony?" Another objection by defense counsel as to both the way in which the question is asked and the characterization in the witness' testimony. The judge strikes from the record the characterization as the video clip fades. *Id.* The prosecutor's behavior led to a motion for a mistrial by the defense, which was denied. See Jim O'Hara, *Defendant Calm As Prosecutor Shouts-Stacey Castor Displays No Emotion In Responding to DA's Cross-Examination*, POST-STANDARD (Syracuse, N.Y.), Jan. 31, 2009, at B1 (noting that the prosecutor "alternated between sarcasm and shouting").

17. While this example involves an adolescent called as a defense witness on behalf of an adult defendant, I use it because it illustrates, again, what appears to be a relatively routine practice of prosecutors overzealously interrogating adolescent witnesses and their responses. Of course, similar responses no doubt result from prosecutors' cross-examination of adults, but because of developmental differences which will be discussed later in this article, I do not address these responses by adults.

18. *In re L.G.*, 639 A.2d 603 (D.C. Cir. 1994).

19. *Id.* at 604.

20. *Id.*

21. *Id.* (alteration in original).

22. *Id.*

23. *Id.* (alteration in original).

24. *In re L.G.*, 639 A.2d at 604.

Later, as he was walking away from the witness stand, past the prosecutor, he apparently called her a “stinking b****.”²⁵

These examples illustrate that: 1) prosecutors do not hesitate to question young people very aggressively, and courts permit such questioning; 2) a prosecutors’ tone of voice can be loud and intentionally intimidating; 3) courts permit prosecutors to ask convoluted, multipart questions of youthful defense witnesses; and 4) young witnesses may sometimes act impulsively and impetuously when dealing with the frustration caused by cross-examination.²⁶ In my experience, some youths in this position simply shut down as a result of the stress of trying to cope with cross-examination rather than lash out.²⁷ They become silent and refuse to answer more questions.²⁸

While I have been unable to find any empirical data analyzing this point, it appears that other practitioners have had similar experiences. For example, Professor Thomas Geraghty of Northwestern University Law School has written briefly about excessively zealous prosecutorial cross-examination during his long experience in representing youths in delinquency and criminal proceedings. He writes:

Anyone who has defended a child in criminal court knows that putting a child on the stand in that setting is often unwise. Children who are defendants in adult criminal proceedings rarely make good witnesses. And their testimony is often made even less credible by the aggressiveness of cross-examinations that are likely to occur in the criminal court setting. A child cross-examined by a skilled adversary is unlikely to survive the battle of credibility.

Admittedly, cross-examinations of children in juvenile court can be just as aggressive, mean spirited, and abusive as cross-examinations of children in criminal court²⁹

What one English commentator observed of child witnesses in the United Kingdom seems similarly true of adolescents called to testify on their own behalf or on behalf of other defendants in the United States: “children in

25. *Id.*

26. In *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005), Justice Kennedy discusses at some length the developmentally normative propensity of adolescents to act with impetuosity and impulsivity.

27. These reactions by young witnesses do not take place only when prosecutors conduct cross-examination. Adolescent witnesses sometimes lash out in this manner when cross-examined by defense attorneys, too. *See, e.g.*, Joseph P. Fried, *Witness in Howard Beach Case Erupts During Relentless Cross-Examination*, N.Y. TIMES, Oct. 20, 1987, at B1 (reporting on testimony of nineteen year old witness who lashed out at a defense attorney during cross-examination with profanity and refused to testify).

28. *See, e.g.*, *People v. Davidson*, No. D044834, 2005 WL 3346290, at *3-4 (Cal. Ct. App. Dec. 9, 2005) (complaining adolescent witness in a sexual assault case refused to answer questions on cross-examination and her testimony stricken from the record).

29. Thomas F. Geraghty, *Justice for Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190, 224 (1997) (internal citations omitted).

criminal trials ‘are afforded little sensitivity, dignity or respect, even less the chance to present their account of events in a straightforward or meaningful way.’”³⁰

Of course, much has been written about child witnesses,³¹ and most jurisdictions now have laws that protect child witnesses in some contexts.³² But little seems to have been said in legal or social science literatures or in case law about this issue when the witness is an adolescent defendant.³³

II.

Cross-examination is rooted in the theory that a witness will not disclose all that is relevant upon questioning by his or her proponent, leaving open the possibility that the trier of fact will be deprived of information that is necessary for an accurate understanding of the matter.³⁴ Wigmore details two broad concerns that are the proper subjects of cross-examination, each well-known. The first concern is that the witness will not divulge all that he or she knows about the facts and circumstances of the matter in issue.³⁵ Thus, the opposing party must be allowed to conduct cross-examination to bring to light the facts known to the witness but left undisclosed during direct examination. Secondly, there may be matters bearing the witness’s credibility that should be considered in order to aid the trier of fact in assessing the value of the

30. Ellison, *supra* note 2, at 356 (citing Helen L. Westcott, *Children’s Experiences of Being Examined and Cross-examined: The Opportunity to be Heard?*, 4 EXPERT EVIDENCE 13, 14 (1995)).

31. See, e.g., John E.B. Myers, *Children in Court*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 323 (Marvin Ventrell & Donald N. Duquette eds., 2005); MCGOUGH, *supra* note 5.

32. See generally MYERS, *supra* note 2, at 167-176 (providing numerous examples of statutes intended to protect young witnesses from trauma associated with testifying in court and to facilitate the taking of children’s testimony).

33. There are a number of cases that address the testimonial capacity and conduct when an adolescent is a victim—typically of sexual abuse. See, e.g., *Unites States v. Littlewind*, 551 F.2d 244, 245 (8th Cir. 1977) (approving prosecutor’s use of leading questions on direct where adolescent victims of sexual assault were questioned); *United States v. Flute*, 363 F.3d 676, 678-69 (8th Cir. 2004). Social science and legal literature seem entirely devoid of consideration of children’s testimony in this context. See, e.g., Ellison, *supra* note 2; Jessica Owen-Kostelnik et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AM. PSYCHOLOGIST 286 (2006).

34. WIGMORE, *supra* note 1, § 1368, at 37.

35. *Id.* Wigmore provides two rationales for this belief. First, he argues that most witnesses are partisans. *Id.* Secondly, witnesses respond to questions asked by counsel, and each lawyer is likely only to ask about the facts known to the witness that favor his or her case. *Id.*; *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“[T]he cross-examiner is not only permitted to delve into the witness’ story to test the witness’ perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness.”).

witness's testimony.³⁶ Cross-examination has a powerful influence on the trier of fact because it is immediate, as it follows close on the heels of direct, and because it draws additional facts and credibility-damaging information from the witness's own mouth rather than requiring collateral forms of proof.³⁷

The right of an accused to conduct cross-examination upon adverse witnesses has ancient roots.³⁸ Over time, it has become an essential element of the common-law system of justice.³⁹ Weary of the power of the state to condemn an accused on untested testimony, the right of cross-examination was ensured to a defendant through the adoption of the Sixth Amendment's Confrontation Clause.⁴⁰ Writing recently in *Crawford*, the United States Supreme Court observed that "the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."⁴¹ Indeed, "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."⁴² Thus, in both federal and state prosecutions, the defendant must be given the opportunity to confront witnesses against him and to put questions to those witnesses which test the accuracy and truthfulness of statements, test the witness's bias, prejudice, along with other interest in the outcome of the matter.⁴³

In contrast to a criminal defendant, the prosecutor enjoys no specifically articulated constitutional right to cross-examine witnesses called by the defense. Rather, the prosecutor's right to cross-examine witnesses called on behalf of the defense is more general. It is rooted in the common law notion that a litigant must be allowed to test an adverse witness's testimony through cross-examination to ensure that his or her statements enhance the trial's truth

36. WIGMORE, *supra* note 1, § 1368, at 37. While in theory the proponent of a witness has no interest in disclosing to the trier of fact information that might suggest his witness is untrustworthy, in practice, law students and lawyers are generally encouraged to do just this to prevent the opponent from disclosing these facts first. See THOMAS A. MAUET, TRIAL TECHNIQUES 114 (7th ed. 2007).

37. WIGMORE, *supra* note 1, § 1368, at 38.

38. *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (citing *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988)) (noting that "[t]he right to confront one's accusers is a concept that dates back to Roman times").

39. See *Crawford*, 541 U.S. at 43-47 (discussing English common law's development of the right to confrontation and cross-examination and distinguishing it from the civil law use of *ex parte* examination).

40. *Id.* at 49. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

41. *Crawford*, 541 U.S. at 61.

42. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (quoting 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1395 (3d ed. 1940)).

43. See *Pointer v. Texas*, 380 U.S. 400 (1965); *Crawford*, 541 U.S. at 36; *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009).

seeking function.⁴⁴ As such, this right may be granted, altered or even denied by legislative enactment,⁴⁵ court rule⁴⁶ or the applicable rules of evidence.⁴⁷

Even though the prosecutor enjoys the right to cross-examine defense witnesses, the court is not without authority to limit its scope or control the method by which it is conducted.⁴⁸ As discussed below, the court has a duty to do so in certain circumstances.⁴⁹

III.

The United States Supreme Court has recently recognized that adolescents, as a result of normal developmental processes, are distinguishable from adults in ways that are important to the criminal justice system.⁵⁰ Writing for the majority in *Roper v. Simmons*, Justice Kennedy outlined three broad areas of development that distinguishes adolescent defendants from their adult counterparts.⁵¹ Of these, one, the developmental immaturity of youth, which often leads to impulsive and impetuous behavior, is most relevant to the

44. See generally WIGMORE, *supra* note 1, § 1367, at 32-36.

45. See, e.g., ARIZ. REV. STAT. ANN. § 13-117 (2001).

A defendant in a criminal action or proceeding shall not be compelled to be a witness against himself, but may be a witness in his own behalf. If he offers himself as a witness in his own behalf, he may be cross-examined to the same extent and subject to the same rules as any other witness.

Id.; MICH. COMP. LAWS SERV. § 600.2158 (LexisNexis 2005); MINN. STAT. § 595.07 (2008); N.Y. CRIM. PROC. LAW § 190.50 (McKinney 2010).

46. See, e.g., MICH. CT. R. 6.414(B).

The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence

Id.

47. See FED. R. EVID. 611.

48. See generally *Delaware v. Van Arsdall*, 475 U.S. at 673, 679 (1986) (observing that a trial court may limit cross-examination of witnesses “based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant”).

49. See *infra* section IV.

50. See *Roper v. Simmons*, 543 U.S. 551, 569-71 (2005) (abolishing the imposition of the death penalty on defendants who were below eighteen years of age at the time of the crime). The Court recently extended the principals set forth in *Roper* to the imposition of life without parole on juvenile defendants. See *Graham v. Florida*, 130 S. Ct. 2011 (2010).

51. The three distinguishing features of are 1) immaturity; 2) susceptibility to peer pressure; and 3) lack of full character development. *Roper*, 543 U.S. at 569-70.

current discussion.⁵² Because this developmental immaturity is the result of normal development of the adolescent brain, even older adolescents, sixteen to eighteen year olds, who are cognitively similar to adults, may lack the social maturity to exercise sound judgment.⁵³ The younger the adolescent, the less developed that youth's brain is likely to be, and therefore, the poorer his or her judgment is likely to be.⁵⁴ These youths' psychosocial immaturity leads to poor decision-making, a problem that is exacerbated when the youth is acting under stress.⁵⁵ Yet, training manuals that teach cross-examination contain a good

52. I have seen this impulsivity and impetuosity play out in different ways in the courtroom. As the examples that began this article demonstrate, youthful witnesses sometimes lash out at a prosecutor's overzealous cross-examination, while at other times youth shut down. They may simply refuse to answer further questions, which risks their entire testimony being stricken from the record.

53. See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 36-44 (2008).

54. *Id.* at 44-50.

55. C. Antoinette Clarke, *The Baby and the Bathwater: Adolescent Offending and Punitive Juvenile Justice Reform*, 53 U. KAN. L. REV. 659, 709 (2005).

Testing in adolescents shows mild decreases in frontal lobe function, which, when coupled with the increased levels of sex hormones that accompany puberty, can lead to hyperresponsiveness to stimuli. Normal adolescents appear to have brains equivalent to those suffering from a mild anxiety disorder. The more time spent in this hypofrontal state, the more indiscriminate the responses to otherwise innocuous stimuli Puberty becomes the last straw, so to speak, placing the young person in a position in which a simple event may elicit an overblown, impulsive, or violent reaction. Violence and rage are released indiscriminately, and fight-or-flight responses with a "kill-or-be-killed" attitude are expressed without a moment's reflection. The adolescent reacts to events without interpreting them appropriately, and then acts inappropriately, that is, "without controls."

Id.

This suggests that adults are wired to be reflective when interpreting emotional stimuli while adolescents are wired to be reactive. A child is more likely to react than to try to think through his or her options in an emotionally charged situation. In the same study, Yurgelun-Todd also found that adolescents frequently misidentified facial expressions and identified expressions as exhibiting anger or fear where adults saw something else. These findings suggest that kids are doubly handicapped in stressful situations involving emotional stimuli. That is, they both misinterpret the stimuli they are trying to process and they lack the ability to access their higher-order reasoning centers when considering how to respond to the stimuli.

Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 442-43 (internal citations omitted).

Yurgelun-Todd's work on how adolescents process the emotional stimuli of facial expressions suggests that a child who is subjected to interrogation in tense, serious circumstances may well misinterpret the stimuli and will not process them in the same way an adult would. Thus, the child may see an angry and threatening face where the

deal of advice that suggests that prosecutors should endeavor to increase a witness's stress.⁵⁶

It must be noted that the Court in *Roper* focused on the normal developmental processes of youth. This is true of most scholarly writing in the field, as well.⁵⁷ Most adolescent juvenile defendants, however, have had life experiences that impede normal developmental trajectories, sometimes severely.⁵⁸ For instance, it is estimated that twenty to twenty-five percent of juvenile offenders suffer from serious, biologically based mental illnesses.⁵⁹ Researchers estimate that the rate of mental illness among delinquent youth is at least twice the rate in the general population.⁶⁰ Additionally, many youth caught up in the juvenile and criminal justice systems suffer from learning disabilities that may impede their capacity to understand the legal system and to integrate information.⁶¹ Delinquent youth suffer from grossly elevated rates

adult would recognize the face as determined or stern, but not as angry or threatening. That the adult interrogator did not intend to look angry or threatening or intend his or her words to threaten is largely irrelevant to whether the child perceived a threat.

Id. at 471-72.

56. See, e.g., Kyle C. Reeves, *Effective Cross-examination Techniques: A Prosecutor's View* (Kings County Criminal Bar Ass'n, Feb. 27, 2008), available at www.kcba.org/kyle%20reeves%20cross%20exam%20outline.pdf (advising prosecutors not to "give the witness a chance to think about their answers" and to "[s]et subtle traps for [the] witness"); Brian K. Holmgren, *Effective Cross-examination Strategies in Child Maltreatment Cases* (unpublished training manuscript outline on file with the author). See generally MAUET, *supra* note 36, at 251-311 (discussing techniques for effective cross-examination).

57. See generally Dorothy Otnow Lewis et al., *Ethics Questions Raised by the Neuropsychiatric, Neuropsychological, Educational, Developmental, and Family Characteristics of 18 Juveniles Awaiting Execution in Texas*, 32 J. AM. ACAD. PSYCHIATRY & L. 408 (2004).

58. See *id.* (detailing numerous developmental challenges faced by violent adolescents).

59. David E. Arredondo et al., *An Evaluation of the Nation's First Juvenile Mental Health Court for Delinquent Youth with Chronic Mental Health Needs*, 2009 CHILD. L. MANUAL SERIES 205 (citing David E. Arredondo et al., *Juvenile Mental Health Court: Rationale and Protocols*, JUV. & FAM. CT. J. Fall 2001, at 1); THOMAS GRISSO, *DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS* (2004); see also Solomon Moore, *Mentally Ill Offenders Stretch the Limits of Juvenile Justice*, N.Y. TIMES, Aug. 10, 2009, at A1 (estimating that two-thirds of juveniles in state custody suffer from at least one mental illness).

60. Arredondo et al., *supra* note 59, at 206 (citing Joseph J. Cocozza & Kathleen R. Skowrya, *Youth With Mental Health Disorders: Issues and Emerging Responses*, JUV. JUST. (Office of Juv. Just. & Delinq. Prevention, Wash. D.C.), Apr. 2000, at 3, 6). Thomas Grisso, one of the nation's leading researchers in the mental health issues impacting juvenile justice, has observed that the juvenile justice system has become the primary point of referral for mentally ill youth. GRISSO, *supra* note 59, at 5; see also Moore, *supra* note 59 (noting that "[a]ccording to a Government Accountability Office report, in 2001, families relinquished custody of 9,000 children to juvenile justice systems so they could receive mental health services.").

61. See Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 WASH. & LEE L. REV. 385, 417 (2008) (citing Marty Beyer, *What's Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel*, 58 GUILD PRAC. 112, 112 (2001) (noting that between seventeen and fifty-three percent of juveniles charged with criminal offenses have learning disabilities)); William Arroyo, *PTSD in*

of post-traumatic stress disorder.⁶² Many youth in the juvenile system experience the co-occurrence of more than one of these developmental inhibitors.⁶³ Many of these developmental challenges may arise from the child's history of victimization and exposure to traumatic life events, such as fetal exposure to alcohol, child abuse and neglect, and exposure to violence within their home and community of origin, all of which can alter a child's development.⁶⁴ Moreover, delinquent youth are much more likely to have histories of substance abuse than youth in the general population.⁶⁵ Despite the developmental issues—both normal and abnormal—there are no explicit protections that exist in the law for juvenile defendants when they testify. As will be discussed in more detail later in this article, some child witness protections intended to protect younger children are written broadly enough that they could arguably be invoked to protect an adolescent witness, at least in some cases.⁶⁶ Too often, however, the law excludes these youth from the protection of statutes aimed at protecting young witnesses.⁶⁷ This is typically accomplished by defining “child” in such a way that delinquent defendants, and possibly all adolescent witnesses, are excluded.⁶⁸

Despite the commonality of issues when the witness is an older child and is thought to be a perpetrator of crime rather than a victim, the cross-examination of juvenile defendants and adolescent witnesses by prosecutors has received little, if any, direct attention in the literature.⁶⁹ However, two analogous areas of concern have received considerable attention by courts and academic researchers and provide insight in the current discussion. The first relates generally to child witnesses, which has, for some two decades, been a

Children and Adolescents in the Juvenile Justice System, in PTSD IN CHILDREN AND ADOLESCENTS 59, 61 (Spencer Eth ed., 2001).

62. Arroyo, *supra* note 61, at 63 (noting that studies of youth in the juvenile justice system have found rates of PTSD from 24% to 48.9%, which reflect rates four to eight times higher in the juvenile justice population than the community at large); *see also In re Nuñez*, 93 Cal. Rptr. 3d 242 (Ct. App. 2009) (describing the traumatic history of one adolescent defendant who had been shot, seen his brother murdered, lived in a neighborhood where shooting was a commonplace occurrence and lived in a household where domestic violence was prevalent).

63. Arroyo, *supra* note 61, at 61-62.

64. *See id.* at 62-67.

65. *Id.* at 67 (noting studies that have found drinking alcohol to be a problem in 34.5% to 37% of incarcerated youth while it is an identified problem in only 10.2% to 18.4% of the general youth population, and studies that have found as many as 83% of youth in secure juvenile facilities have substance abuse problems).

66. *See infra* Part IV.B.

67. *See, e.g.*, 18 U.S.C. § 3509 (2006).

68. *Id.* (defining “child” as “a person who is under the age of 18, who is alleged to be (A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or (B) a witness to a crime committed against another person”).

69. Most commentators address the right of cross-examination from the perspective of constitutional analysis and focus on the criminal defendant's right to cross-examine as a function of the Sixth Amendment confrontation right. *See, e.g.*, Epstein, *supra* note 1, at 430-31; MYERS, *supra* note 2, at 650-55.

matter of intense study, producing a vast literature and numerous court opinions. Secondly, and more recently, scholars have begun to study the impact of police interrogation methods on adolescent suspects. This part of the article will briefly examine relevant material from these two fields of study and will argue that these areas of concern are relevant to the discussion of cross-examination of juvenile defendants and adolescent witnesses by the prosecution.

A.

Legal and social science literature are replete with discussion and debate about the strengths and weaknesses of child witnesses.⁷⁰ Similarly, numerous court opinions highlight the challenges that child testimony presents for the legal system.⁷¹ Two major concerns have driven these discussions over the past twenty years. First, the concern about the ability of children and adolescents to relate their stories of victimization in the courtroom without special procedures has led to the adoption of numerous child witness protections.⁷² Some of these protections are explicitly outlined in statute or court rule.⁷³ Other concerns, such as allowing the prosecutor to use leading questions on direct examination with a young witness, have come about through traditional common law methodologies. This evolution occurred because of the discretion and latitude that trial judges gave prosecutors in presenting evidence, and the subsequent approval of this practice by the appellate courts.⁷⁴

Secondly, concern about the suggestibility of children when being questioned by investigators outside the courtroom has led courts and legislatures to adopt special precautions to ensure the reliability of children's

70. *See generally* SHERRIE BOURG CARTER, CHILDREN IN THE COURTROOM: CHALLENGES FOR LAWYERS AND JUDGES (2005); STEPHEN J. CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY (1995); BILLY WRIGHT DZIECH & CHARLES SCHUDSON, ON TRIAL: AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN (2d ed. 1991); DEBRA A. POOLE & MICHAEL LAMB, INVESTIGATIVE INTERVIEWS OF CHILDREN: A GUIDE FOR HELPING PROFESSIONALS (1998); MCGOUGH, *supra* note 5; MYERS, *supra* note 2.

71. *See generally* MYERS, *supra* note 2 (discussing hundreds of cases addressing various aspects of child witnesses).

72. *See id.* at 157-90 (discussing various child witness protections).

73. *See, e.g.*, 18 U.S.C. § 3509 (2006) (providing protections for witnesses under age eighteen including the use of closed-circuit television and videotaped depositions).

74. *See, e.g.*, United States v. Littlewind, 551 F.2d 244, 245 (8th Cir. 1977) (approving use of leading questions when prosecutor questioned thirteen and fourteen year old witnesses); United States v. Demarrias, 876 F.2d 674 (8th Cir. 1989) (approving use of leading questions by prosecutor when questioning fourteen year old victim); United States v. Grassrope, 342 F.3d 866, 869 (8th Cir. 2003) (approving prosecutor's use of leading questions on direct examination of seventeen year old victim).

testimony.⁷⁵ Much of this scholarship and commentary has focused on interviewing and presenting the testimony of younger children.⁷⁶ More recently, researchers have begun to focus on the suggestibility of older children and adolescents.⁷⁷ These researchers have found that little differentiates older children from younger children in terms of suggestibility.⁷⁸ Indeed, some studies have found that older children are more susceptible to suggestion than younger children.⁷⁹

Adolescents are developmentally distinct from both younger children and adults.⁸⁰ While intellectually they are perhaps closer to adults, psychosocially, they may more closely approximate children.⁸¹ In general, legal professionals are prone to overestimate the linguistic capacities of adolescents.⁸² Although adolescents may be adult-like in intellectual functioning, courts have long recognized that trial practices may need to be altered to accommodate them when they must testify.⁸³ For instance, in *United States v. Rossbach*,⁸⁴ the Eighth Circuit Court of Appeals affirmed a prosecutor's use of leading questions during direct examination of fifteen and seventeen year old complaining witnesses in a sexual assault prosecution where "the prosecution's use of leading questions was necessary and was not excessive."⁸⁵ Moreover, federal

75. See, e.g., MICH. COMP. LAWS SERV. § 722.628(6) (LexisNexis 2005) (mandating that child protective services investigators use a model interview protocol); *State v. Michaels*, 642 A.2d 1372 (N.J. 1994) (requiring "taint" hearings to ensure that children have not experienced suggestive interviewing before their testimony may be admitted at trial); STATE OF MICH., GOVERNOR'S TASK FORCE ON CHILDREN'S JUSTICE & DEPARTMENT OF HUMAN SERVICES, FORENSIC INTERVIEWING PROTOCOL (2005).

76. Owen-Kostelnik et al., *supra* note 33, at 291.

77. *Id.*; see also MYERS, *supra* note 2, at 25-28 (discussing briefly the suggestibility of adolescents).

78. Owen-Kostelnik et al., *supra* note 33, at 291 (citing several studies).

79. *Id.* (citing two studies).

80. SCOTT & STEINBERG, *supra* note 53, at 28-60.

81. *Id.* at 36-38.

82. POOLE & LAMB, *supra* note 70, at 154 (citing findings that younger children sometimes perform better than older children when questioned in court "because adults asked them simpler questions, indicating that the legal professionals had adjusted the complexity of their speech for younger witnesses"); Ellison, *supra* note 2, at 356 n.12 (citing MARK BRENNAN & ROSLIN E. BRENNAN, STRANGE LANGUAGE: CHILD VICTIMS UNDER CROSS-EXAMINATION (1988)) (citing an example in which a fifteen year old makes the following statement when interviewed by researchers: "Some of the words [the lawyers] use, the long words that they might use and they might not even know the meaning of [sic]. And yet they sit there and they don't tell you and they expect you to answer.").

83. See *United States v. Littlewind*, 551 F.2d 244, 244-45 (8th Cir. 1977) (approving trial court's decision to permit the prosecutor to use leading questions on direct examination of thirteen and fourteen year old complainants); *United States v. Demarrias*, 876 F.2d 674, 678 (8th Cir. 1989) (approving use of leading questions during prosecutor's direct examination of fourteen year old witness); see also 18 U.S.C. § 3509 (2006) (permitting the use of various witness protections for "child" witnesses and defining "child" as "a person who is under the age of 18" who is the victim of a crime or is a witness to a crime committed upon another person).

84. *United States v. Rossbach*, 701 F.2d 713 (8th Cir. 1983).

85. *Id.* at 718.

law specifically provides that courts may utilize protective measures to ensure that a witness who is under eighteen or who suffers from “mental or other infirmity” has a fair opportunity for their voices to be heard in the judicial process.⁸⁶

Suggestibility concerns have led scholars and courts to express concern about interviewer bias.⁸⁷ An interviewer’s bias may influence how the interview is conducted, and this may then influence the accuracy of the interviewee’s testimony.⁸⁸ Evidence of an interviewer’s bias can be discerned when the interviewer evinces a singular focus in gathering only the evidence that will confirm his preconceived understanding of the facts.⁸⁹ Alternative explanations are discounted if not disregarded entirely.⁹⁰ Biased interviewers tend to use more leading questions than unbiased interviewers “which serve to confirm [the interviewer’s] own beliefs rather than obtain an accurate account of what actually happened.”⁹¹ For this reason, the highly regarded forensic psychologist Sherrie Bourg Carter has flatly stated that leading questions “have no place in child witness interviews”⁹²

B.

The methods used by law enforcement officers to interrogate adolescents have long been a source of concern.⁹³ In 1948, the Supreme Court addressed the interrogation of juvenile suspects in *Haley v. Ohio*. In *Haley*, a fifteen year old alleged accomplice in a robbery-shooting was questioned by numerous

86. 18 U.S.C. § 3509 (2006).

87. CECI & BRUCK, *supra* note 70, at 79-94; POOLE & LAMB, *supra* note 70, at 67; *see also* State v. Michaels, 642 A.2d 1372, 1376 (N.J. 1994).

88. CECI & BRUCK, *supra* note 70, at 92.

89. *Id.* at 79.

One of the hallmarks of interviewer bias is the single-minded attempt to gather only confirmatory evidence and to avoid all avenues that may produce negative or inconsistent evidence. Thus, while gathering evidence to support his hypothesis, an interviewer may fail to gather any evidence that could potentially disconfirm his hypothesis.

Id.

90. *Id.* at 79-80.

91. BOURG CARTER, *supra* note 70, at 41.

92. *Id.* at 22.

93. *In re Gault*, 387 U.S. 1, 46 (1967) (citing *In re Gregory W. & Gerald S.*, 224 N.E.2d 102 (N.Y. 1966) (finding that a twelve year old suspect was questioned from 8:00 p.m. until 1:00 a.m. before confessing, and questioning continued for almost twenty-four hours)); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948); *In re Carlo & Stasilowicz*, 225 A.2d 110 (N.J. 1966) (discussing how a fifteen year old fifth grader was questioned for over four hours before making an oral confession, with a written confession taken two hours later); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219 (2006).

police officers in teams of two or three for approximately five hours beginning at midnight. His confession, which was obtained without informing him of the right to counsel and after denying him access to his parents, was admitted at trial and he was convicted of first-degree murder. His conviction was ultimately reversed after the Supreme Court found his confession was illegally taken.⁹⁴ Fourteen years later in *Gallegos v. Colorado*, the Supreme Court reversed a fourteen year old's conviction for first degree murder after finding that his confession, which was taken after he was held in police custody for five days without seeing either an attorney or his parents, was obtained in violation of due process.⁹⁵ These cases established a principal that courts should take special precaution to carefully scrutinize confessions given by minors.⁹⁶ The Court reiterated its concern about the manner in which police conduct interrogations of juvenile suspects in *In re Gault*,⁹⁷ the 1967 decision mandating that the rudiments of due process be available to juvenile defendants tried in the nation's juvenile courts.⁹⁸ There, a juvenile court judge questioned a fifteen year old defendant without advising the juvenile of his right not to answer questions and have the assistance of counsel.⁹⁹ He apparently made incriminating statements.¹⁰⁰ In holding that a juvenile defendant has the right to remain silent and the right to counsel at trial, the Court stated that "admissions and confessions of juveniles require special caution."¹⁰¹ Although the law had shown a long history of unique concern for adolescents and special attention had been given to their confessions, the Court has more recently retreated from its protective stance and ruled that confessions by juveniles should be examined using the same "totality of the circumstances" test by which adult confessions are tested.¹⁰²

Just as experience with child witnesses led to the careful consideration of the ways in which children are questioned, recent experience with police interrogations of children and adolescents has led to heightened scrutiny. Abuse of police authority has been the subject of articles in the vernacular press,¹⁰³ documentary film,¹⁰⁴ and scholarly writing.¹⁰⁵ Courts,¹⁰⁶ empirical

94. *Haley*, 332 U.S. at 598-600.

95. *Gallegos*, 370 U.S. at 49-51.

96. *See id.* at 53 (citing *Haley*, 332 U.S. at 599-600).

97. *In re Gault*, 387 U.S. at 1.

98. *Id.* at 57.

99. *Id.* at 4-11.

100. *Id.* at 43. There was no verbatim record of the proceeding made and there were disagreements among the parties in attendance regarding precisely what the youth had admitted.

101. *Id.* at 45.

102. *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979).

103. Ken Armstrong et al., *Officers Ignore Laws Set Up To Guard Kids: Detectives Grill Minors Without Juvenile Officers, Parents Present*, CHI. TRIB., Dec. 18, 2001, at 1 (describing how police and prosecutors frequently use abusive tactics when interrogating children and adolescents); Alex Kotlowitz, *The Unprotected*, NEW YORKER, Feb. 8, 1999, at 42.

104. MURDER ON A SUNDAY MORNING (CNC Documentary 2003).

researchers,¹⁰⁷ and commentators in both mental health¹⁰⁸ and law¹⁰⁹ have begun carefully examining the methods that police utilize when interrogating young suspects.¹¹⁰ Numerous child witness protections were established to address the concerns about a child's capacity to provide reliable testimony in open court subject to cross-examination, and now legislatures and courts have utilized this knowledge about police-youth interrogation methods to begin establishing special procedures to protect these vulnerable suspects.¹¹¹ There is concern, however, that even when legislatures enact measures intended to protect youth in the interrogation room, law enforcement officers ignore or undermine their effectiveness.¹¹²

As a general matter, "juvenile suspects are more vulnerable than adult suspects to interrogative pressure."¹¹³ Yet while numerous procedures have been adopted to ensure that suggestible children and youth are not improperly influenced by the professionals who interview them,¹¹⁴ there have been few procedures mandated to protect youth when they are thought to be the

105. Steven A. Drizin & Beth A. Colgan, *Tales From the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions from Juvenile Suspects*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT (G. Daniel Lassiter ed. 2004).

106. *See, e.g.*, State v. Farrell, 766 A.2d 1057 (N.H. 2001) (requiring reversal of conviction when police officers failed to comply with statute mandating that they notify the parent or other adult interested in the welfare of a minor immediately upon arrest).

107. Feld, *supra* note 93. Professor Feld notes that there is very little empirical work published regarding what actually happens in the interrogation rooms when youth are questioned by police. *Id.* at 234-35.

108. Owen-Kostelnik et al., *supra* note 33; Allison D. Redlich et al., *The Police Interrogation of Children and Adolescents*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT, *supra* note 105, at 701.

109. Birkhead, *supra* note 61; Feld, *supra* note 93.

110. *See generally* Armstrong et al., *supra* note 103 (describing how police and prosecutors frequently use abusive tactics when interrogating children and adolescents).

111. *See, e.g.*, 18 U.S.C. § 5033 (2006) (requiring officer who arrests a juvenile to advise the juvenile of his rights in language comprehensible to the juvenile and to immediately notify the Attorney General and the juvenile's parent or legal custodian); N.H. REV. STAT. ANN. § 594:15 (2001) (requiring that a police officer immediately notify "the parent, nearest relative, friend or attorney" of an arrested minor); *In re Jerrell C.J.*, 699 N.W.2d 110, 120-24 (Wis. 2005) (requiring police to electronically record interrogations of juvenile suspects as a condition precedent to their admission at trial) (citing *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994)).

112. *See, e.g.*, State v. Farrell, 766 A.2d 1057, 1060 (N.H. 2001) (describing how police ignored state law which required immediate notification of a juvenile's parents, other trusted adult, or an attorney when the juvenile was taken into custody); Armstrong et al., *supra* note 103, at 1.

113. Owen-Kostelnik et al., *supra* note 33, at 291.

114. *See, e.g.*, *People v. Katt*, 662 N.W.2d 12, 26 (Mich. 2003) (permitting a child's out-of-court statement to a children's protective services worker to be admitted in a criminal prosecution, but only after the witness established that she had not used suggestive or coercive questioning techniques); *State v. Michaels*, 642 A.2d 1372, 1382 (N.J. 1994).

perpetrators.¹¹⁵ Indeed, when young people are thought to have perpetrated a crime, their questioning has generally been handled indistinguishably from adult suspects. For instance, the Supreme Court has held that the same totality of the circumstances test that is applicable to determining whether an adult's statements to the police during interrogation were freely and voluntarily made has been applied to juveniles.¹¹⁶ Moreover, law enforcement interrogators use the same intentionally deceptive interviewing techniques with adults as are used when interrogating juveniles.¹¹⁷ Despite serious concern that these methods may lead juveniles to falsely confess,¹¹⁸ courts typically approve of their use.¹¹⁹

A number of law enforcement questioning techniques have raised concern that they may contribute to a juvenile suspect making inaccurate statements or false confessions.¹²⁰ These include interviewer bias, the intentional isolation of the adolescent from adults who could be expected to be supportive of him, suggestive and even coercive methods of questioning, and the use of trickery and deception to enhance the possibility that the adolescent suspect will make incriminating statements.¹²¹

A major problem with police interrogation of adolescent suspects is that they are biased interviewers.¹²² That is, they come to the interrogation believing they know the truth of the situation they are investigating, and what truthful answers to their questions are, before they pose the questions.¹²³ As such, when police initiate the interrogation of juvenile suspects, they are no

115. A minority of jurisdictions have mandated that a juvenile being questioned by police have an interested adult present during the interrogation. *See, e.g.*, *State v. Benoit*, 490 A.2d 295, 302 (N.H. 1985), *and* *Commonwealth v. A Juvenile*, 449 A.2d 654, 657 (Mass. 1983) (enforcing state statutes which require a parent or other adult to be present at the time a juvenile is questioned). However, a parent's presence during questioning is frequently not helpful to the juvenile because the parent encourages the child to waive his or her rights and talk with police. *See* BARRY C. FELD, *CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION* 318-19 (2d ed. 2004).

116. *See* *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979).

117. Feld, *supra* note 93, at 222.

118. Drizin & Colgan, *supra* note 105, at 132-33; *see also* Kotlowitz, *supra* note 103, at 48.

119. *See* FELD, *supra* note 115, at 318-19 (discussing courts' approval of police interrogation practices); *see also* Birkhead, *supra* note 61, at 432 (noting that "courts reinforce and become complicit in such phenomena as interviewer bias and coercive interviewing techniques when they fail to find that a suspect's age is a critical factor when determining whether interrogation was custodial.").

120. Drizin & Colgan, *supra* note 105 (discussing police use of multiple interviews, use of fictional evidence of guilt to trick the suspect into confessing, use of reward and punishment schemes).

121. Feld, *supra* note 93 (discussing police interrogation techniques).

122. Drizin & Colgan, *supra* note 105, at 132-33.

123. *See* FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 5-10 (Jones & Bartlett Publishers 2004) (2001) (describing the differences between interviews and interrogations and noting that interrogations are accusatory in nature rather than investigative or for the purpose of gathering information).

longer searching for the truth. They are questioning the juvenile only for the purpose of confirming what they already believe they know.¹²⁴

Adolescent suspects are typically isolated from supportive adults—parents, guardians, attorneys—who might advise the juvenile regarding the situation.¹²⁵ This is sometimes true even in the face of clear statutory commands aimed at law enforcement officers to ensure that youth have supportive adults present during their interrogation.¹²⁶

Police investigators routinely use suggestive, even coercive, methods of interrogating suspects without regard to their age.¹²⁷ Most police officers are trained in using the Reid interrogation technique.¹²⁸ Using this methodology, the investigator may conduct a preliminary interview with a suspect then proceed to interrogate that individual after the officer has formed the opinion that the suspect is guilty of the offense. Once interrogation has begun, the officer will cut off any verbalizations by the suspected perpetrator that suggests his innocence.¹²⁹ Despite robust criticism from legal commentators, use of the Reid approach persists.¹³⁰

Law enforcement interrogators also routinely engage in trickery and deception to induce adolescents to confess to crimes.¹³¹ Among other methods, police present juvenile suspects with false evidence of their guilt, make promises or imply that they will work to see that the system goes easy on the juvenile, and tell children that by admitting responsibility they will be able to go home sooner rather than later.¹³² Even when police advise youth to tell the truth, they often couple this suggestion with other questioning techniques that convert a request for honesty into a form of trickery or manipulation.¹³³

124. *Id.*

125. Birkhead, *supra* note 61, at 411.

126. *See, e.g.*, State v. Farrell, 766 A.2d 1057, 1062 (N.H. 2001) (reversing juvenile defendant's conviction because police did not comply with a law that required that they contact an interested adult and permit that adult to be present during questioning).

127. Feld, *supra* note 93, at 260-61 (discussing questioning techniques such as the use of leading questions, the use of "maximization techniques"—stressing the level of trouble the young person is in and the seriousness of the charges being considered and the like—and "minimization techniques," which essentially provide the juvenile with a social acceptable excuse for why he committed the crime—e.g., he was drunk or the other person provoked him); Birkhead, *supra* note 61, at 416-17.

128. *See* Feld, *supra* note 93, at 234-35 (discussing the prevalence of the use of the Reid technique for suspect interrogation); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 334 (citations omitted).

129. Birkhead, *supra* note 61, at 410-12; Feld, *supra* note 93, at 236-37, 242-43.

130. Findley & Scott, *supra* note 128, at 235-37.

131. Feld, *supra* note 93, at 244-46 (describing numerous instances of trickery that police engage in to gain confessions by juvenile suspects).

132. *Id.*

133. *Id.* at 269-71 (describing an officers' admonitions to 'tell the truth' which were often combined with other interrogation techniques, and which were aimed at inducing a juvenile's confession to a crime for which the officer had pre-determined his guilt).

C.

The law is clear that the prosecutor, like every trial litigant, has the right to conduct a “full and fair” cross-examination on juvenile defendants and adolescent witnesses for the defense.¹³⁴ If the prosecutor believes a witness called on behalf of a juvenile defendant is not telling the truth, they have both a right and a duty under the law to attempt to expose the witness’s dishonesty.¹³⁵ As one California appellate court has observed, even when questioning a young witness called on behalf of a defendant, the prosecution may “launch into a searching cross-examination.”¹³⁶ While the scope of prosecutorial cross-examination may properly be broad and deep, a prosecutor has neither any legal authority to, nor any legitimate interest in, using improper questioning techniques to destroy the credibility of a juvenile witness.

When juveniles testify on their own behalf or on behalf of other defendants, the prosecutors’ cross-examination may suffer from many of the same weaknesses that plague a young child’s improperly conducted interview by a social services investigator, or a law enforcement officers’ interrogation of a juvenile crime suspect. Prosecutors are prime examples of the sort of biased interviewers that led to the call for the adoption of forensic interviewing protocols to document or to reduce the incidence of undue influence on young witnesses.¹³⁷ Indeed, they may be the quintessential biased interviewer. After all, if they did not believe the juvenile was guilty, they would not—or, at least, should not—have brought the charges in the first place. A prosecutor conducting cross-examination on a juvenile defendant is in a similar position to a forensic interviewer examining a child who may have been abused for the first time. He has some information about what may have happened, but is unlikely to know all the facts and circumstances of the incident at issue. Like a social worker conducting a forensic interview of a child who may have been sexually abused, a prosecutor, when he cross-examines a juvenile defendant, is supposed to be seeking the truth in the particular matter. He is not supposed to be merely confirming some preconceived notion of what he believes happened.

Returning to DeShawn’s case for a moment, it seems clear that the prosecutor was unaware of the prior existing relationship between the complaining witness and the juvenile defendant. Rather than the new

134. ANTHONY J. BOCCHINO & DAVID A. SONENSTEIN, FEDERAL RULES OF EVIDENCE WITH OBJECTIONS 26 (NITA 2008); FED. RULES EVID. 611 (“For every witness presented by a party, the adverse party has the right to a full and fair cross-examination.”).

135. *People v. Ah Wing*, 169 P. 402, 404 (Cal. Ct. App. 1917) (asserting that a prosecutor may use every legal means to vindicate his belief if he thinks a witness is not telling the truth).

136. *People v. Brown*, 14 Cal. Rptr. 370, 372 (Ct. App. 1971).

137. POOLE & LAMB, *supra* note 70, at 106-09. *See generally* KATHLEEN COULBORN FALLER, INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE: CONTROVERSIES AND BEST PRACTICE 66-89 (2007).

information altering his theory of the case, he maintained his predetermined belief in what happened, became more aggressive, and savagely attacked the young witness. If a social worker in the field questioned a child in this way, he would be heavily criticized, if not excoriated for his conduct, for disregarding newly developed information and for trying to dominate the interviewee-child to vindicate some predetermined truth of the matter.

From a developmental standpoint, it makes no difference whether the youth is thought to be a victim of a crime or suspected of perpetrating a criminal offense.¹³⁸ Children suspected of involvement in criminal behavior are at least as vulnerable to coercive question techniques as child victims.¹³⁹ Indeed, given the overrepresentation among juvenile offenders of traumatized children with serious mental health concerns, developmental disorders, and learning disabilities, there is good reason to be concerned that juveniles suspected of violating the law may be more vulnerable to suggestive and coercive questioning than the average child victim.

Due to their psychosocial immaturity, one aspect of normal adolescent development is that during these years many youths may experience objectively non-threatening stimuli as a threat.¹⁴⁰ This aspect of development may well be magnified in adolescents charged with criminal conduct. Since so many minors involved in serious delinquent behavior have had traumatic life experiences, the juvenile-defendant-witness may experience a “[h]eighted sensitivity to perceived threats” which they may well meet with aggression and hostility.¹⁴¹ Thus, for some allegedly delinquent kids, the overly zealous prosecutor will be perceived as posing a threat that triggers the juvenile’s flight or fight response.¹⁴² Such a youth may meet the perceived aggression that is

138. Birkhead, *supra* note 61, at 427.

139. *Id.*

140. THE NATIONAL CHILD TRAUMATIC STRESS NETWORK, HELPING TRAUMATIZED CHILDREN: TIPS FOR JUDGES 1, <http://www.nctsnet.org/ncts/asset.do?id=1471> (last visited Apr. 22, 2010) [hereinafter HELPING TRAUMATIZED CHILDREN].

141. *Id.* (“A majority of children involved in the juvenile justice system have a history of trauma. Children and adolescents who come into the court system frequently have experienced not only chronic abuse and neglect, but also exposure to substance abuse, domestic violence, and community violence.”).

142. Debra Niehoff, *Invisible Scars: The Neurobiological Consequences of Child Abuse*, 56 DePaul L. Rev. 847, 855-56 (2007).

An encounter with an assailant, for example, triggers the familiar fight or flight response: heart and lungs work harder, energy stored in the form of fat and glycogen is mobilized to fuel active muscles, white blood cells are deployed to fend off infection after injury, and nonessential functions like reproduction are temporarily suspended. At the cost of temporarily increasing the burden on the heart and lungs, flooding the body with insulin, and consuming energy reserves (an imposition physiologists refer to as allostatic load), these adjustments ensure that tissues vital to the escape effort receive sufficient amounts of oxygen and glucose during a period of greater demand.

displayed during zealous prosecutorial questioning with reciprocal aggression. This may explain why DeShawn lashed out at the prosecutor. It may also explain why L.G. reacted in such a hostile manner to the prosecutor's aggressive questioning in the L.G. case. While some youth will lash out, others may exhibit symptoms of withdrawal and refuse to continue answering questions.¹⁴³

Despite the fact, developmentally speaking, that child suspects and victims are similarly situated, the law has treated these two classes of young people very differently. The law has developed numerous protections for child-victim-witnesses, while children thought to be the perpetrators of crime derive none of the specific benefits of such compassionate treatment. This inconsistency has not been lost on observers of the legal system.¹⁴⁴ The disparate treatment of youthful-victims and youthful-perpetrators has led to calls for reform in interrogation techniques; there is a need for greater consistency in the questioning of children by law enforcement officers, and a need to ensure the accuracy of the child's statements.¹⁴⁵ As one commentator has argued:

Courts and legislatures must cease to reinforce the biases exhibited by law enforcement towards juvenile suspects and must, instead, take the lead in promoting and instituting reforms and procedural safeguards for the interrogation of juvenile suspects that are comparable to those that now exist for the questioning of child victims and witnesses.¹⁴⁶

While the defendant is entitled to the presumption of innocence from the court, he is entitled to no such thing from the prosecution.¹⁴⁷ A prosecutor conducting cross-examination of a juvenile defendant or witness, like an

Id.

The first two responses, 'fight or flight,' are a response tendency recognized for at least seventy years and involve either attacking the threatening stimulus or fleeing after the body and mind have been mobilized for action. Fight responses under intense stress typically involve surprise, startle responses, impulsive acting, disorientation and mental confusion, and disorganized action sequences.

Harold Hall et al., *Extreme Mental or Emotional Disturbance (EMED)*, 23 U. HAW. L. REV. 431, 458 (2001).

143. While some alleged delinquents with histories of trauma may engage in the survival mechanism of "fight," others will engage in "flight," that is, they may withdraw into themselves and be non-communicative, discontinue answering questions. See HELPING TRAUMATIZED CHILDREN, *supra* note 140, at 1. For an example of a case in which an adolescent witness was unable to answer questions on cross-examination and, as a result, had her testimony stricken from the record, see *People v. Davidson*, No. D044834, 2005 WL 3346290, at *3-4 (Cal. Ct. App. Dec. 9, 2005).

144. Owen-Kostelnik et al., *supra* note 33, at 298; Birkhead, *supra* note 61, at 420-24.

145. Birkhead, *supra* note 61, at 429-32.

146. *Id.* at 432.

147. I have been reminded of this point repeatedly by prosecutors in the past two decades.

officer interrogating a juvenile suspect, is not seeking the truth because he or she believes they know what the truth is—they believe that the juvenile defendant *is* guilty of the crime or that the juvenile witness testifying on behalf of the defendant is mistaken, or worse, intentionally lying. Like police officers, then, prosecutors are biased interviewers. While prosecutors are charged with seeking a just result and ensuring that a defendant receives a fair trial, they nonetheless have predetermined that the juvenile defendant is guilty, or they would not have brought the charge for which the defendant is standing trial. Since they believe that the defendant is guilty of the crime charged, in their minds, their aggressive conduct on cross-examination is justifiable. Like police interrogators, prosecutors use coercive questioning techniques. The very act of cross-examination is intended to permit the questioner to control the witness' answers by carefully controlling the form and content of the questions asked;¹⁴⁸ this is the point of permitting the use of leading questions on cross-examination.¹⁴⁹

While a police interrogator is advised to isolate the suspect from those who might be of assistance, or to minimize the impact of those persons, cross-examination takes place in an open courtroom. However, it is clear that children and youth often feel isolated while testifying.¹⁵⁰ This is why, in the child-victim-witness context, the law quite often permits the child to have a support person sit nearby while he or she is testifying.¹⁵¹ The natural sense of isolation that children feel while testifying is intentionally exacerbated when prosecutors encroach upon the witness' physical space, raise their voices to intimidate, demand that juvenile witnesses look at them or refrain from looking at others in the courtroom who may be supportive, or when they intentionally position themselves in the courtroom so as to block the juvenile's view of his attorney or supportive family members.

Like law enforcement officers, prosecutors often resort to trickery to get juvenile defendants and witnesses to make ill-considered statements during cross-examination.¹⁵² Basic trial practice textbooks recommend such techniques. For example, Thomas Mauet in his text *Trial Techniques* advises that “[s]uccessful cross-examinations are sometimes based on *indirection*—the ability to establish points without the witness perceiving your purpose or becoming aware of the point until it has been established.”¹⁵³

148. MAUET, *supra* note 36, at 261.

149. *Id.* at 257.

150. *See* MYERS, *supra* note 2, at 157-61 (describing the isolation sometimes felt by child witnesses).

151. *Id.* (collecting cases); *see also* 18 U.S.C. § 3509(i) (2006).

152. Reeves, *supra* note 56, at 5 (advising prosecutors to “set subtle traps for [the] witness” and to “1. Use innocuous questions to set up big questions 2. Witness shouldn't see questions coming so won't [sic] be able to plan answers”); *see also* Holmgren, *supra* note 56.

153. MAUET, *supra* note 36, at 255.

Because prosecutors may engage in many of the problematic interviewing and cross-examination techniques that the law has been concerned about with young children and, more recently, with the interrogation of juvenile suspects, it is the duty of the court to govern such prosecutorial behavior. This ensures that the trial remains a search for the truth and does not simply devolve into an ordeal to be endured by the adolescent witness. The next section will address the responsibility of the courts and the tools currently available to meet that responsibility.

IV.

A defendant, including a juvenile defendant, has the right to trial by an impartial fact finder, whether by a judge in a bench trial or a jury.¹⁵⁴ A trial judge has a duty to ensure that a defendant, whether in a juvenile or adult prosecution, receives a fair trial.¹⁵⁵ However, two areas of social science research suggest problems with a judge's ability or willingness to fulfill this duty. First, research suggests that legal professionals overestimate the linguistic abilities of children and youths.¹⁵⁶ This problem seems to be particularly exaggerated with adolescents. Debra Poole and Michael Lamb, in their book on interviewing children, describe research demonstrating that legal professionals ask—and courts permit them to ask—questions of child witnesses which children simply do not understand.¹⁵⁷ In the study described, fifty percent of six year olds could correctly repeat questions asked of them while only ten percent of fourteen and fifteen year olds could properly repeat the questions asked.¹⁵⁸ The reason, they argue, is that legal professionals overestimate the linguistic capacities of older children resulting in the use of more complicated words and more complex question structures, which results in less understanding.¹⁵⁹ If judges do not understand verbal and other limitations of adolescents, they cannot properly exercise their discretion to control the questioning.

Secondly, research suggests that trial judges may be predisposed to disbelieve juvenile defendants who testify on their own behalf as well as juvenile witnesses who testify on behalf of other criminal defendants.¹⁶⁰ This

154. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (finding that a trial with a judge who had a direct monetary interest in the outcome of the case violated due process of law); *see also In re Gault*, 387 U.S. 1, 30-31 (1967) (holding that a juvenile delinquency proceeding must contain those elements of due process necessary to ensure fundamental fairness).

155. Pinard, *supra* note 2, at 274 (citing ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 167 (1974)). *See generally In re Gault*, 387 U.S. at 1.

156. POOLE & LAMB, *supra* note 70, at 154-55 (citing BRENNAN & BRENNAN, *supra* note 82, at 62 (discussing a study of trial transcripts in which a high percentage of children misunderstood the questions put to them)).

157. POOLE & LAMB, *supra* note 70, at 154.

158. *Id.*

159. *Id.*

160. Bircckhead, *supra* note 61, at 392 (citations omitted).

could explain why in DeShawn's case the trial judge disbelieved his coherent story, which was supported by other witnesses and ascribed more credibility to the adult's story despite the fact that the adult had demonstrably lied. It may also help to explain why the judge refused to impose controls on the prosecutor's conduct of cross-examination.

In our adversary system of justice, judges are generally thought of as playing a passive role.¹⁶¹ Both appellate courts¹⁶² and commentators have criticized trial judges for being too actively involved in questioning witnesses or otherwise stepping out of their role as an impartial arbiter of the process.¹⁶³ In the context in which a juvenile is on trial or an instrumental witness for the defense, however, the trial judge may need to play a more active role in ensuring that the youth has a fair opportunity to give his or her evidence in a coherent manner.¹⁶⁴ Current law provides judges several tools for doing so.

161. Pinard, *supra* note 2, at 251-53.

162. *West v. State*, 519 So. 2d 418, 424 (Miss. 1988) (holding that it is reversible error for a trial judge to be actively involved in murder trial on behalf of the prosecution); *State v. Taffaro*, 950 A.2d 860, 866 (N.J. 2008) (finding trial court's questioning of defendant during contempt trial improper because it underscored the weaknesses of the defense and suggested to the jury that the court doubted the defendant's version of the facts).

Upon our review of the record in this case we find that the Trial Judge unduly injected himself into the trial by his excessive questioning and examination of the witnesses which tended to emphasize the key elements of the prosecution's case and trivialize the theory of the defense. By his conduct, the Trial Judge assumed the role of an advocate rather than an impartial referee and thereby denied defendant a fair trial.

People v. Cruz, 473 N.Y.S.2d 21, 22 (App. Div. 1984).

163. Pinard, *supra* note 2, at 267-69. Professor Pinard criticizes trial judges for their overactive involvement in trials in ways that communicate bias in favor of the prosecution and which prejudices the defendant. His criticism based upon judicial acts of commission is well placed. However, he recognizes that just as a judge may project bias and prejudice through overactive participation (e.g., hostile questioning of defense witnesses, facial expressions suggesting disbelief on the part of the judge to testimony offered by a defendant or his witnesses), he or she may also communicate bias or prejudice through acts of omission by failing to step in to control the process when the circumstances require that the judge do so to protect the integrity of the truth finding process of the trial. *Id.*

164. *See generally* MYERS, *supra* note 2, at 154-57 ("Children often are intimidated by testifying, and attorneys ask questions children cannot understand. When the court detects a breakdown in communication, the judge may require counsel to reframe questions in developmentally appropriate language. Additionally, the judge may question children to ensure understanding.").

A.

In some circumstances, trial judges are granted broad authority to control how litigants present evidence.¹⁶⁵ Indeed, Federal Rule of Evidence 611, which has been adopted in some form by a vast majority of states,¹⁶⁶ imposes a duty on trial court judges to exercise control over the presentation of evidence, including the examination of witnesses.¹⁶⁷ That rule provides three rationales for this requirement, two of which are relevant to the present discussion. First, the court must control the presentation of evidence in order to ensure that the trial serves its ultimate purpose of ascertaining the truth.¹⁶⁸ The rule contemplates that a judge must be as active as necessary to “see that the trial is just.”¹⁶⁹

Secondly, the court is charged with the duty to protect witnesses from “harassment or undue embarrassment.”¹⁷⁰ Trial courts have broad discretion under Rule 611 to govern the conduct of cross-examination and may even exclude some lines of inquiry if they are deemed to be of little relevance.¹⁷¹ Thus, for instance, where evidence of a witness’ possible drug addiction holds little probative value regarding the issues in the case, yet holds the possibility of unfairly prejudicing a prosecution witness, a defendant may be denied, despite the Sixth Amendment right to conduct cross-examination, from raising

165. *Id.* at 141; Pinard, *supra* note 2, at 278-79 (noting that sometimes judges will need to intervene in the proceeding in order to assure a defendant’s constitutional rights are protected).

166. *See* ALA. R. EVID. RULE 611; ALASKA R. EVID. 611; ARIZ. R. EVID. 611; ARK. R. EVID. 611; CAL. EVID. CODE §§ 765-767, 772-773; COLO. R. EVID. 611; CONN. CODE OF EVID. §§ 6-8; DEL. R. EVID. 611; FLA. STAT. § 90.612 (2009); HAW. R. EVID. 611 (2009); IDAHO R. EVID. 611; IND. R. EVID. 611; IOWA R. EVID. 5.611; KY. R. EVID. 611; LA. CODE EVID. ANN. art. 611 (2009); ME. R. EVID. 611; MD. CODE ANN., MD. RULES § 5-611 (2009); MICH. R. EVID. 611; MINN. R. EVID. 611; MISS. R. EVID. 611; MONT. R. EVID. 611; NEB. REV. STAT. ANN. § 27-611 (2009); NEV. REV. STAT. § 50.115 (2007); N.H. R. EVID. 611; N.J.R. EVID. 611; N.M.R. EVID. 11-611; N.C. GEN. STAT. § 8C-611 (2008); N.D.R. EVID. 611; OHIO R. EVID. 611; OR. REV. STAT. § 40.370 (2008); PA. R. EVID. 611; R.I.R. EVID. 611; S.C.R. EVID. 611; S.D. CODIFIED LAWS § 19-14-18 to 20 (2009); TENN. R. EVID. 611; TEX. R. EVID. 611; UTAH R. EVID. 611; VT. R. EVID. 611; WASH. R. EVID. 611; W. VA. R. EVID. 611; WIS. STAT. ANN. § 906.11 (2009); WYO. R. EVID. 611.

167. *See* FED. R. EVID. 611(a) (“The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.”). Some states have addressed the judge’s duty to control the presentation of evidence to ensure that a trial is a search for the truth. *See, e.g.*, CAL. EVID. CODE § 765(a); N.J.R. EVID. § 611(a); ME. R. EVID. § 611(a); MICH. COMP. LAWS SERV. § 768.29 (LexisNexis 2005); *Cranberg v. Consumers Union of U.S., Inc.*, 756 F.2d 382, 391 (5th Cir. 1985) (describing the court’s “affirmative obligation” to control the proceeding).

168. FED. R. EVID. 611(a)(1).

169. *Cranberg*, 756 F.2d at 391.

170. FED. R. EVID. 611(a)(3).

171. *United States v. Kizer*, 569 F.2d 504, 505 (9th Cir. 1978).

the issue during cross-examination.¹⁷² This authority to protect witnesses from harassment extends to the form of questions asked and the manner—tone of voice and physical gestures accompanying the questioning—in which they are put.¹⁷³

In general, leading questions are permitted only during cross-examination by the party against whom the witness testifies.¹⁷⁴ Both federal and state courts, however, have long permitted the use of leading questions on direct examination when the witness is young and the court believes that doing so is necessary to enable the youth to testify.¹⁷⁵ Thus, the court has the flexibility to adapt the traditional mode of questioning in order to protect young witnesses and to ensure that they have a fair opportunity to give their evidence.

Similarly, courts have long had the authority to limit cross-examination as necessary to maintain the truth-seeking function of the trial. In *Delaware v. Van Arsdall*, the Court noted that a trial court has broad discretion to limit cross-examination by defense counsel when necessary to address concerns about “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.”¹⁷⁶ This same rule must, of course, apply to the court’s duty to control the prosecutor’s conduct during cross-examination because the rationales offered for the rule granting the court authority to limit cross examination by defense counsel are equally applicable to prosecutors. Indeed, the court’s authority to circumscribe vexatious cross-examination by the prosecution may be stronger than its authority to limit cross by defense counsel because, as noted earlier, the prosecutor, unlike a criminal defendant, has no constitutionally protected right to conduct cross-examination.¹⁷⁷

Similarly, the argument for courts to exercise the authority granted them in Rule 611 to control prosecutorial cross-examination is strengthened by the prosecutor’s duty to do justice rather than merely advance the interests of a

172. *Id.* at 506.

173. *See generally* *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (noting that the trial court has broad discretion to control the questioning of witnesses).

174. FED. R. EVID. 611(c). However, some states have, by statute, granted courts broad authority to permit the use of leading questions at any time. *See, e.g.*, MICH. COMP. LAWS SERV. § 768.24 (LexisNexis 2005) (“Within the discretion of the court no question asked of a witness shall be deemed objectionable solely because it is leading.”).

175. MYERS, *supra* note 2, at 148-150 (collecting dozens of cases in which courts have approved the use of leading questions on direct examination by prosecutors where the witness is a child).

176. *Van Arsdall*, 475 U.S. at 679.

177. As the *Van Arsdall* Court made clear, even where the defendant has a constitutionally protected right to confront witnesses against him for the purpose of conducting cross-examination, the court may limit that cross to ensure the truth-seeking function of the proceeding is maintained, or to prevent witnesses from being harassed in the same manner as DeShawn. *See id.* at 679.

client or secure a conviction.¹⁷⁸ First, prosecutors or former prosecutors have themselves recognized that the way in which they frame a question may influence the truthfulness and accuracy of the response.¹⁷⁹ Next, in the present context, the commentator James C. Backstrom, himself a prosecutor, has observed that

[t]he juvenile prosecutor should assume the traditional adversary role in the adjudicatory hearing, recognizing, however, the particular vulnerability of child witnesses. All juvenile witnesses, including suspects should they testify, must be treated fairly and with sensitivity in direct examination, cross-examination, and throughout the process.¹⁸⁰

Too often in practice, the prosecutor's behavior falls short of this sensible standard. When a prosecutor does so, it is incumbent upon the trial court judge to step in and impose controls on the prosecutor to ensure the trial's truth-seeking function is preserved.

In exercising their discretion pursuant to Rule 611, courts should be vigilant about ensuring that the language used, the pacing and the form of questions are intended to secure a coherent story from the juvenile witness rather than to confuse or intimidate. As noted earlier, legal professionals tend to overestimate the linguistic abilities of adolescents. Trial judges should ensure that the language used by the prosecutor is understandable to the adolescent witness, that is, that each question is asked in a developmentally appropriate manner.¹⁸¹ Courts should not, for instance, permit prosecutors to ask convoluted, multipart questions to a juvenile witness. Recall that in *In re L.G.*, in response to a multipart question by the prosecutor, the youth responded by swearing, suggesting strongly that the witness was confused and frustrated by his inability to follow the question.¹⁸²

B.

While Rule 611 imposes a duty and provides a broad grant of authority to courts to control the conduct of cross-examination by prosecutors, it is by no means the only tool available to courts and advocates to ensure that juvenile defendants and supporting witnesses are given a fair opportunity to present their evidence in a way that will maintain the truth-seeking function of the trial

178. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2006).

179. Bennett L. Gershman, *Witness Coaching By Prosecutors*, 23 CARDOZO L. REV. 829, 844-45 (2002) (noting that young witnesses are especially vulnerable to the influence of prosecutors' suggestive or coercive questioning techniques).

180. James C. Backstrom & Gary L. Walker, *The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community*, 50 S. C. L. REV. 699, 709 (1999).

181. To do so, judges may need to seek out training in child and adolescent development.

182. See *supra* Part I.B.

process. It is worth reiterating here that adolescents alleged to be delinquent are likely to be developmentally delayed and function more like a younger child, sometimes profoundly so.¹⁸³ Judges should be aware of this fact and should respond accordingly with a focus on the youth's developmental rather than chronological age.

With these basic principals in mind, courts could take steps to ensure adolescents can provide their testimony in a fair manner. When adolescent witnesses are called to testify, courts should instruct the juvenile witness about the "rules" of testifying. Young people could be instructed, beyond the taking of the oath, about the duty to tell the truth and as well as the consequences of lying.¹⁸⁴ Courts should implement questioning practices in the courtroom that emulate those that we now expect social work investigators to implement when interviewing children and youth suspected of having been victims of abuse or neglect. These may include limiting—perhaps severely—the use of leading questions or other questioning techniques in the courtroom that would be considered improperly coercive in the interview suite at the local child advocacy center.

In the mid-1990's, Debra Poole and Michael Lamb emerged as leading proponents of interviewing protocols for social services investigators who interview youth and children who are, or may be, victims of child abuse or neglect.¹⁸⁵ In response, a number of jurisdictions have adopted interviewing protocols for law enforcement officers and children's protective services workers. For instance, Michigan, where I practice, adopted a Forensic Interviewing Protocol in 1998, the use of which is mandated by statute.¹⁸⁶ The protocol, which was largely written by Professor Poole,¹⁸⁷ is a seven-stage interview protocol designed to ensure that information elicited from the child-interviewee is accurate and well developed.¹⁸⁸ Some elements of these protocols could be adapted and adopted by courts when adolescent defendants are called to the stand. First, the judge should introduce him or herself, and should explain the courtroom and its procedures to the youth. The judge should answer any questions the youth may have regarding testifying, his rights, or the courtroom setting. Next, the court should establish the basic ground rules for the giving of testimony. For instance, the judge should remind the witness not to guess when attempting to answer a question; that if he or she is uncertain of the answer, "I don't know" is the appropriate

183. See text accompanying notes 57–65, *supra* (discussing the elevated rates of developmental delay and dysfunction found among minors facing prosecution).

184. See Myers, *supra* note 31, at 331-32.

185. See POOLE & LAMB, *supra* note 70.

186. MICH. COMP. LAWS SERV. § 722.628 (LexisNexis 2005).

187. STATE OF MICH. GOVERNOR'S TASK FORCE ON CHILDREN'S JUSTICE AND DEPARTMENT OF HUMAN SERVICES, FORENSIC INTERVIEWING PROTOCOL (2005).

188. *Id.*

response. Without the judge's explicit permission to respond with "I don't know," a child or adolescent may feel compelled to provide a substantive answer to every question posed. Similarly, the judge should explicitly instruct the young witness that it is acceptable for them to tell the court when they do not understand a question. The judge should instruct the juvenile that if the questioner is incorrect, he or she should correct the questioner and explain how the questioner is wrong in some aspect of the question. The judge should then ask the youth a question for practice. For instance, the judge might ask the youth, "What is my dog's name?" Obviously, the youth would not know whether the judge has a dog, or if she does, the dog's name, and should respond, "I don't know."¹⁸⁹ Trial courts routinely undertake this sort of instruction to young witnesses when they are thought to be the victims of crimes, and to implement these procedures when the youngster is the defendant or called on behalf of a defendant would be no substantial imposition upon the court.¹⁹⁰

189. See generally FALLER, *supra* note 137, at 68.

- 1) If I misunderstand something you say, please tell me. I want to get it right.
- 2) If you don't understand something I say, please tell me and I will try again.
- 3) If you feel uncomfortable at any time, please tell me or show me with the stop sign.
- 4) Even if you think I already know something, please tell me anyway.
- 5) If you are not sure about the answer, please do not guess, tell me you're not sure before you say it.
- 6) Please [sic] when you are describing something, I wasn't there.
- 7) Please remember that I will not get angry at you or upset with you.
- 8) Only talk about things that are true and really happened.

Id. (describing the Stepwise Interview technique which suggests the aforementioned rules be explained to child-interviewees).

190. For young witnesses when they are the alleged victims of a crime, this sort of instruction for has become standard in criminal proceedings. For instance, the following exchange took place between a judge and an eleven year old girl when she was called to testify during a preliminary hearing in a case in which her stepfather was charged with three counts of sexually assaulting her (the child's name has been changed to protect her identity):

THE COURT: Hello, what's your name?

THE WITNESS: Abby.

THE COURT: What's your last name?

THE WITNESS: Baxter.

THE COURT: How old are you Abby?

THE WITNESS: I'm 11.

THE COURT: . . . Well, welcome to my court. You understand what it means to tell the truth?

THE WITNESS: Yes.

THE COURT: What happens if somebody tells a lie?

THE WITNESS: They'll get in trouble.

THE COURT: Yeah. . . .

THE COURT: . . . Is it ever good to tell a lie?

In addition to this common law remedy, there may be statutes in place that would facilitate adolescents' testimony. Child witness protection statutes may be written broadly enough to include juvenile witnesses called on behalf of a defendant.¹⁹¹ If such a statute in fact applies, the juvenile defendant or juvenile witness may be provided a support person while testifying,¹⁹² may be deposed on videotape rather than having to testify in open court,¹⁹³ or may qualify for the use of an independent questioner rather than having the lawyers question the witness directly.¹⁹⁴ Young people may need to take breaks during their testimony.¹⁹⁵

Some will argue, of course, that it is the duty of the defense attorney to prepare her witnesses to testify, and there is certainly merit to that position. However, the duty to ensure that a trial maintains its truth-seeking purpose and to protect all witnesses from overzealous cross-examination ultimately

THE WITNESS: No.
 THE COURT: No, I don't think so either. So, I want to make sure that as you are asked questions today, you make sure first of all you understand what the question is okay? And if you don't understand it's perfectly okay to say that you don't understand.
 THE WITNESS: Okay.
 THE COURT: And sometimes adults say questions that are somewhat confusing and if you don't understand don't be bashful to say so okay?
 THE WITNESS: Okay.
 * * *

THE COURT: It's also okay if you don't remember or don't know the answer to a question; it's perfectly okay to say that. That's a lot better than making something up. Am I right?
 THE WITNESS: Right.
 THE COURT: Okay.
 THE WITNESS: 'Cause then you'll be lying.
 THE COURT: Then you'd be lying. That's exactly right. And in court that is especially important isn't it? To tell the truth I mean. Am I right?
 THE WITNESS: Yes.

Transcript of Record at 7-10, *People v. Johnson*, Preliminary Exam, Washtenaw County Circuit Court, Case No. 09-1213-FC.

191. *See, e.g.*, 18 U.S.C. § 3509 (2006) (permitting the use of special protective measures when a minor witness is called to testify); CAL. PENAL CODE §§ 868.5 – 868.8 (West 2008); HAW. REV. STAT. ANN. § 801D-4 (LexisNexis 2007); IDAHO CODE ANN. § 19-3023 (2004); KAN. STAT. ANN. § 22-3433 (2007); MICH. COMP. LAWS SERV. § 600.2163 (LexisNexis 2005); MO. REV. STAT. § 491.680 (1996); NEB. REV. STAT. ANN. § 29-1925 (LexisNexis 2009); N.D. CENT. CODE § 12.1-35-02 (2009).

192. MYERS, *supra* note 2, at 157-59 (discussing the law relating to the presence of a support person while a child testifies and citing social science research indicating that the presence of a support person can enhance a child's capacity to answer questions).

193. *See, e.g.*, 18 U.S.C. § 3509(b)(2) (2006) (permitting use of videotaped deposition for taking child's testimony).

194. *See, e.g.*, MICH. CT. R. 3.923(F) (permitting court broad authority to use independent questioners to aide in securing the testimony of youth).

195. Myers, *supra* note 31, at 335 (citing *State v. Hillman*, 613 So. 2d 1053, 1058-59 (La. Ct. App. 1993)).

rests with the court. Courts should institute procedures to ensure these youthful witnesses are given a fair opportunity to give their evidence to the court free from harassment or trickery.

CONCLUSION

For many juvenile defendants and adolescent witnesses called on their behalf, testifying is an ordeal rather than a part of an orderly search for the truth of a matter. This is because prosecutors are too frequently permitted to overzealously cross-examine youthful witnesses. The law has learned a great deal over the past two decades about the dangers of inappropriately questioning child witnesses, and, more recently, from the interrogation techniques used by law enforcement officers when questioning juveniles. Too often, prosecutors' cross-examinations take on the worst elements of both of these areas of concern. Ultimately, courts have a duty to ensure that juveniles have a fair opportunity to present their testimony free from overzealous prosecutorial cross-examination. But courts are not without tools to address this problem. Courts should embrace their duty to ensure that trials of juveniles maintain their truth-seeking purpose. To ensure that a trial remains a search for the truth, courts should exercise their considerable discretion to mandate that prosecutorial cross-examination be conducted in a developmentally sensitive manner.

