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Amy Gallicchio

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THE DISPOSITIONAL PHASE OF THE JUVENILE JUSTICE SYSTEM IN THE DISTRICT OF COLUMBIA: THE IMPLICATIONS OF *IN RE A.A.*

The juvenile justice system in the District of Columbia has evolved around the doctrine of "parens patriae." Under this doctrine the district government acts as the ultimate parent when proper care and supervision of a child is lacking in his or her home. Essential to this philosophy is the concept that a child, unlike an adult, has a right "not to liberty but to custody." In fact, the commitment of a child to an agency of the District of Columbia is viewed simply as the exercise of parental restraint. This parental orienta-

1. The concept of "parens patriae" derives from the time of the chancery courts in England and surfaced in America in the early nineteenth century. See P. PRESCOTT, THE CHILD SAVERS 52-54 (1981). It is a legal provision that allows the state to assume custody over, and provide protection for, a child in the event of parental default. *Id.* at 52.

In the landmark decision, *In re Gault*, 387 U.S. 1 (1967), Justice Fortas said of the doctrine of parens patriae, "[t]he Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme . . . . [T]he meaning is murky and its historical credentials are of dubious relevance." *Gault*, 387 U.S. at 16. However, instead of abandoning the concept, he limited it by saying, "[T]he admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness . . . . [T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony . . . . [T]he [adjudicatory] hearing must measure up to the essentials of due process and fair treatment." *Id.* at 30 (quoting Kent v. United States, 383 U.S. 541, 544-55, 562 (1966)).

2. *Gault*, 387 U.S. at 17. The *Gault* decision recognized that the constitutional guarantees of due process apply to juveniles as well as adults. Justice Fortas, speaking for the majority, concluded that departures from constitutional procedures in juvenile courts have not enhanced the child's chance of rehabilitation but instead have resulted in arbitrariness. *Id.* at 18-21. *Gault* gave to children who are adjudicated delinquent six fundamental rights that have long applied in adult proceedings. They are the right to notice of charges, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, the right to a transcript of the proceedings, and the right to appellate review. The Supreme Court has also extended to juveniles the requirement that guilt be shown beyond a reasonable doubt, declaring that the old civil court standard of a preponderance of the evidence was insufficient in delinquency proceedings. *In re Winship*, 397 U.S. 358 (1970). However, the Court refused to extend to juveniles the right to trial by jury. See *McKeiver* v. Pennsylvania, 403 U.S. 528 (1971).

3. The concept of the state as ultimate guardian and protector was expressed in *Gault*. There, Justice Fortas, in a recapitulation of the history of the juvenile justice system, recited the basic philosophy that, "[i]f [the child's] parents default in effectively performing their custodial functions—that is, if the child is 'delinquent'—the state may intervene. In doing so, it
tion toward, and governmental interest in, preserving and promoting the welfare of the child is most evident and important in the dispositional phase of a delinquency case.  

In the District of Columbia, the Family Division of the Superior Court (the Division) handles juvenile delinquency proceedings. If the court finds that the child has committed a delinquent act or is in need of supervision and that care and rehabilitation is required, then the Division can impose an appropriate “disposition” or sentence. The court can place the child on probation or transfer legal custody of the child to the District of Columbia Department of Human Services (DHS), the public agency responsible for

does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled.” Gault, 387 U.S. at 17.

In 1984, the Supreme Court in Schall v. Martin, 104 S. Ct. 2403 (1984), echoed the above philosophy recited by Justice Fortas in Gault. Justice Rehnquist, speaking for the majority, stated that a juvenile's interest in freedom from institutional restraints "must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody." Schall, 104 S. Ct. at 2410.

4. The terminology used in juvenile court was devised to reflect the parental orientation of the system. To reflect the theoretically nonadversarial nature of proceedings, cases are captioned “In the Matter of . . .” rather than “District of Columbia versus . . . .” An accused child is called the “respondent” rather than the “defendant” and a “petition” is filed “in his behalf,” instead of an “information” or an “indictment” being handed down. A child is charged with committing a “delinquent act” rather than a “crime” or “offense.” Instead of being “tried” a “fact-finding hearing” is held where the child may be “adjudicated” delinquent instead of “convicted.” This is followed by a “disposition hearing” instead of a “sentencing” where a child could be ordered “committed” instead of “incarcerated.”

5. D.C. CODE ANN. § 16-2320(c) (1981). A delinquent act is defined in § 16-2301(7) of the D.C. Code as “an act designated as an offense under the law of the District of Columbia, or of a State if the act occurred in a State, or under Federal law. Traffic offenses shall not be deemed delinquent acts unless committed by an individual who is under the age of sixteen.” Id. D.C. CODE ANN. § 16-2301(8) (1981) also defines the term “child in need of supervision” as one who is habitually truant from school; has done an act which because of his status as a "child" is considered an offense; or “is habitually disobedient of the reasonable and lawful commands of his parent, guardian, or other custodian and is ungovernable; and is in need of care and rehabilitation.” Id. The term “child” refers to a person under eighteen years of age. D.C. CODE ANN. § 16-2301(3) (1981).


8. D.C. CODE ANN. § 16-2320(c)(2) (1981). If a child is found to be delinquent, the Division has several other dispositional options in addition to probation and commitment. The Division could permit the child to remain with his parent or guardian subject to such conditions and limitations as the Division may prescribe, D.C. CODE ANN. § 16-2320(a)(1) (1981), or the Division could place the child under protective supervision, D.C. CODE ANN. § 16-2320(a)(2) (1981), whereby the child is permitted to remain in his home under supervision but subject to return to the Division during the proscribed period. D.C. CODE ANN. § 16-2301(19) (1981). The Division could also transfer legal custody of the child to a private organization or to a relative or other individual who the Division finds to be qualified to receive and care for the child. D.C. CODE ANN. § 16-2320(a)(3)(B)-2320(a)(3)(c) (1981). The child could be committed on an in-patient basis for medical, psychiatric, or other treatment. The Division
caring for delinquent children.

In recent years, the District of Columbia Court of Appeals has been confronted with the question of how much authority and continuing jurisdiction the Division can exercise over a child once it has ordered that DHS take legal custody. The most recent case dealing with this issue, In re A.A.I.,9 came before the court of appeals on November 14, 1984. The issue on appeal was whether the Division had the authority to issue a new commitment order after DHS failed to execute the conditions of the original commitment order placing the juvenile in the legal custody of DHS.10 Judge Yeagley, writing for the majority, upheld the action of the Division and affirmed the second commitment.11 He acknowledged that the Division relinquishes its authority over a child once legal custody vests in DHS, but held that this vesting occurs only upon DHS' execution of the conditions of the Division's initial disposition order.12

This Note will demonstrate the significance of In re A.A.I. in light of the previous case law in this area. This Note will also discuss the tension that exists between the Division and DHS over the custody of a child after commitment. It will discuss the extent to which In re A.A.I. alleviates this tension and suggest that the decision may, in fact, aggravate it. Finally, this Note will close with the observation that perhaps the emphasis in the juvenile justice system should be on the child's liberty rather than on the state's custody interest.

I. LIMITATIONS ON JUDICIAL AUTHORITY

The definitive authority on the subject of the Division's post-disposition jurisdiction is In re J.M.W.13 In that case, a juvenile, J.M.W., was ordered

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10. Id. at 1206. The initial disposition order for A.A.I. was issued on June 10, 1983. It transferred custody to DHS and ordered DHS to find residential placement in a rehabilitative facility for A.A.I., with a specific request for the Community Advocate for Youth Foster Home (CAY) or the Youth Advocate Program (YAP). Id. The order specifically provided that Cedar Knoll would not be an appropriate placement. See infra note 16. In spite of the order, DHS placed A.A.I. at Cedar Knoll when CAY Foster Homes rejected him. A.A.I., 483 A.2d at 1207. DHS never sought placement with the Youth Advocate Program. On August 17, 1983 the Division issued a second disposition order placing A.A.I. in the Martin Pollack Project located in Annapolis, Maryland. Id. at 1208. The Pollack Project is a community based residential and educational service for children who have been unsuccessful in other programs and have been determined to be beyond rehabilitation.
11. A.A.I., 483 A.2d at 1206.
12. Id. at 1208.
committed to the custody of DHS for an indeterminate period not to exceed two years with release into immediate aftercare status, in effect continuing the aftercare status in which he had been placed previously.\textsuperscript{14} Approximately two months later, while on aftercare, J.M.W. was arrested and, upon a motion of the Corporation Counsel to the Division, J.M.W.'s aftercare status was revoked.\textsuperscript{15} The Division remanded the child to the custody of DHS and ordered placement at the Oak Hill Youth Center.\textsuperscript{16} J.M.W. contested the Division's exercise of authority in the District of Columbia Court of Appeals.

In ruling in favor of the child, the court held that the Division was without statutory power to intervene after it committed a child to the legal custody of DHS and accordingly vacated the order revoking the child's aftercare status.\textsuperscript{17} The court noted that while section 16-2327 of the D.C. Code gives the Division the authority to modify or revoke probation upon petition by the Corporation Counsel, no such provision is provided in commitment cases.\textsuperscript{18} In fact, by statute, the legal custodian has the power to determine where and with whom the child shall live.\textsuperscript{19} It also has the authority to release the child from its custody at its own discretion.\textsuperscript{20}

The \textit{J.M.W.} decision caused a great deal of uncertainty among judges, attorneys and DHS regarding the Division's authority to intervene after

\textsuperscript{14} \textit{Id.} at 346. Aftercare in the juvenile system is the functional equivalent of parole in the adult criminal system. Like parole, aftercare status can be revoked and the child can be given a more restrictive placement if the conditions placed on his aftercare status are violated. Unlike the adult system, in the juvenile system there is no correlation between the type of offense committed and the penalty imposed. Under D.C. law, the penalty, regardless of the offense, is "an indeterminate period not exceeding two years," D.C. \textsc{code} ANN. § 16-2322(a)(1) (1981), that "may be extended for additional periods of one year, upon motion of the department, agency, or institution to which the child was committed." D.C. \textsc{code} ANN. § 16-2322(b) (1981). A child, however, cannot be held, regardless of the offense, beyond his twenty-first birthday. D.C. \textsc{code} ANN. § 16-2322(f) (1981).

\textsuperscript{15} \textit{In re J.M.W.}, 411 A.2d at 347. The revocation was based on two curfew violations.

\textsuperscript{16} \textit{Id.} Oak Hill Youth Center and Cedar Knoll School together are known as the Children's Center and are located in Laurel, Maryland. They are residential facilities run by DHS for juveniles who are either detained prior to trial or committed following disposition. Cedar Knoll is a minimum security facility for boys and girls, while Oak Hill is a maximum security facility housing only boys.

\textsuperscript{17} \textit{Id.} at 348.

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} D.C. \textsc{code} ANN. § 16-2301(21) (1981). This provision defines the term "legal custody."

\textsuperscript{20} D.C. \textsc{code} ANN. § 16-2322(a)(1) (1981). There is a proviso in this section that qualifies the agency's authority to release. The authority cannot be exercised if the original disposition order vesting legal custody in a department or agency specifies that release is permitted only by order of the Division, thereby restrictively committing a child. \textit{See infra} note 32.
commitment. A similar case, *In re J.J.*, \(^{21}\) demonstrates this confusion. There, the Division, uncertain of the impact of *In re J.M. W.*, and upon a determination of delinquency, refused to commit J.J. to the custody of DHS but instead retained him on probation.\(^ {22}\) The Division reasoned that by retaining legal custody of the child, it could follow through and supervise the placement which, in light of *In re J.M. W.*, it could not do if it granted legal custody of J.J. to DHS.\(^ {23}\) The Division then ordered the Commissioner of Social Services of DHS to pay for the special education the Division determined was necessary.\(^ {24}\)

The Commissioner appealed this decision, claiming that the Family Division can only order services from DHS pursuant to a transfer of legal custody to the agency.\(^ {25}\) The court of appeals, holding in appellant's favor, stated that the scope of the Division's power over DHS is in part defined by the statutory authority granted to the agency.\(^ {26}\) The court noted, in particular, "that the agency has no obligation to provide services, unless and until the court vests legal custody of the child with that agency.”\(^ {27}\) Once custody is transferred, "the court relinquish[es] its authority to determine the appropriate measures needed to insure rehabilitation . . . . [T]he agency . . . [has] exclusive supervisory responsibility over the juvenile . . . absent a fresh delinquency determination.”\(^ {28}\)

The court of appeals pointed out that, rather than circumventing *J.M. W.*, the Division could have reached virtually the same result statutorily. Under section 16-2320(c)(1) of the District of Columbia Code, in conjunction with section 16-2320(a)(5)(i), the Division can both transfer custody to DHS and specify a particular placement it deems to be in the best interests of the child, provided that it is not beyond the authority of DHS.\(^ {29}\) In *J.M. W.*, the appeals court restricted the Division's authority to intervene once a child is

\(^{22}\) Id. at 589.
\(^{23}\) Id.
\(^{24}\) Id. The trial court ordered that J.J. be placed in the New Dominion School in Dillwyn, Virginia, which already had accepted J.J.
\(^{25}\) Id. at 588. Audrey Rowe, the Commissioner of Social Services of DHS, refused to comply with the order and was held in contempt. Id.
\(^{26}\) Id. at 590. D.C. CODE ANN. § 16-2320(a)(5) (1981) states in part that "[t]he Division shall have the authority to (i) order any public agency of the District of Columbia to provide any service the Division determines is needed and which is within such agency's legal authority . . . ."
\(^{27}\) *In re J.J.*, 431 A.2d at 591.
\(^{28}\) Id. (quoting *In re J.M.W.*, 443 A.2d at 349).
\(^{29}\) *In re J.J.*, 431 A.2d at 591. Section 16-2320(c)(1) allows the Division to order any disposition which is authorized by subsection (a) (other than paragraph (3)(A) thereof, which deals with neglected children). Paragraph (5) of subsection (a) allows the Division to order a disposition not prohibited by law and deemed to be in the best interests of the child. This
committed to an agency, but said nothing about the Division's authority to play an integral part in the commitment process by designating a specific placement in the commitment order. Therefore, by taking this statutory approach, the Division would not be circumventing *J.M.W.*

II. THE STRUGGLE TO RETAIN POST-DISPOSITIONAL JUDICIAL AUTHORITY

While the combination of *J.J.* and *J.M.W.* established the Division's power to select a particular placement at the time of commitment of the child to DHS, these decisions left open important questions regarding the Division's jurisdiction subsequent to the issuance of a disposition order. These issues surfaced and became the focus of judicial controversy in the case of *In re J.A.G.*

In *J.A.G.*, the Division ordered a second placement of the child at the expense of DHS two years after the issuance of its original disposition order, when the child was already on aftercare status. The court of appeals reversed, but the two judges in the majority, Chief Judge Newman and Judge Ferren, employed radically different rationales in reaching that result. Chief Judge Newman concluded that the Division loses all power over the child after custody has been transferred to DHS. Judge Ferren, however, expressed the view that the Division has continuing jurisdiction to review and to intervene after disposition. This includes the power to modify or terminate placements when the initial placement proves inappropriate.

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includes ordering any public agency to provide any service the Division determines is necessary and within the agency's legal authority. See *supra* note 26.


32. *Id.* at 15. The Division granted custody of *J.A.G.* to DHS, specifying placement at Highland Hospital in its initial disposition order issued June 8, 1979. The Division also directed that DHS release *J.A.G.* on aftercare when, in DHS's opinion, he was sufficiently rehabilitated. *Id.* at 14. The Division, therefore, chose not to retain a veto power over release provided for under D.C. CODE ANN. § 16-2322(a)(1) (1981). *See supra* note 20. After the issuance of the initial order, the Division tried two times to reassert jurisdiction over *J.A.G.* First, on May 5, 1980, the Division issued an order "authorizing" DHS to release *J.A.G.* from Highland. This was not considered a modification but merely a reiteration of the initial disposition order of June 8, 1979. *J.A.G.*, 443 A.2d at 15 n.6. Second, on October 9, 1980, the Division held an ex parte review hearing at which *J.A.G.* requested placement at Gables Academy in Atlanta, Georgia, at the expense of DHS. *J.A.G.*, 443 A.2d at 15. It is this second attempt at intervention that the court of appeals held was beyond the Division's jurisdiction. *Id.*


34. *Id.* at 21. On the basis of *J.M.W.*, Judge Ferren concurred in the judgment of reversal. He did not, however, concur in the opinion.

35. Judge Ferren claimed that no provision of the D.C. Code abrogates the general grant, to the Division, of continuing post-dispositional jurisdiction found in § 16-2303 of the Code.
Judge Ferren also proposed that the Division may not lose jurisdiction to the child’s legal custodian if, in the original commitment order, it specifically lists all the supervisory authority it intends to retain during the period between disposition and outright release. Although In re J.J. unquestionably established the Division’s authority to specify a particular placement in its order to DHS, Judge Ferren’s opinion raised the possibility of the Division extending this authority to encompass the power to monitor the child’s progress in the placement.

III. POSTPONING THE TRANSFER OF CUSTODY: A VICTORY FOR THE DIVISION

The difficult question of whether the Division or DHS has continuing jurisdiction was addressed recently in In re A.A.I. The A.A.I. decision appears to focus Judge Ferren’s approach and adds a needed proviso to J.M. W. The court of appeals in A.A.I. granted the Division continuing jurisdiction over the juvenile during the period between the issuance of the disposition order and the point when the agency entrusted with the legal custody actually efectuates the placement in accordance with the Division’s order. The court points out that the concerns expressed in J.M. W., J.J. and J.A.G., over the extent of judicial authority, would not even be reached.

J.A.G. 443 A.2d at 20. This provision states, in part, that “jurisdiction obtained by the Division in the case of a child shall be retained by it until the child becomes twenty-one years of age . . . .” D.C. CODE ANN. § 16-2303 (1981). The court of appeals had found this argument unpersuasive two years earlier in J.M. W. There, it held that § 16-2303 does not allow the court “to exercise its authority in a manner which is inconsistent with or broader than statutory mandate.” J.M. W., 411 A.2d at 348. The J.M. W. court further noted that “to hold that this section provides for judicial modification of a commitment order would extend the powers of the court far beyond that which is expressly delegated by statute.” Id.

Judge Ferren disagreed with J.M. W. that the express grant of authority to the Division in § 16-2327 of the D.C. Code to modify or revoke a probation order negates the Division’s continuing jurisdiction over a commitment order. J.A.G., 443 A.2d at 21. See supra notes 13-20 and accompanying text. He also believes that the correct interpretation of § 16-2322(a)(1) of the Code, giving the Division the authority to retain a veto power over release, is that it gives the Division continuing jurisdiction over the child up to the point of ultimate release. J.A.G., 443 A.2d at 21. He stated further that the fact that the legal custodian can release a child without permission of the Division if no veto power is retained should be interpreted as “merely a legislative recognition of the custodian’s presumptive expertise and good judgment,” Id. at 21, and not as a congressional denial of authority in the Division to intervene. Id.

40. See supra notes 13-20 and accompanying text.
41. A.A.I., 483 A.2d at 1208.
in this interim period. The court's opinion reformulates the rule of *J.M.W.* regarding the moment when custody vests. It holds that it is not at the issuance of the disposition order but at its implementation by DHS that the Division relinquishes its authority to order a new disposition. Custody will vest in DHS only upon implementation and execution of the conditions of the order and only then can DHS assume exclusive supervisory authority over the juvenile. The court of appeals reasoned that the statutory authority, recognized in *J.J.*, of the Division to designate a particular placement would be rendered meaningless if mere inaction of an agency could be allowed to thwart the Division's dispositional schemes.

It appears from *A.A.I.* that the Division has gained some leverage in deciding the fate of a juvenile through judicial intervention. That intervention is sanctioned, at least up until the newly created point at which custody vests in DHS.

IV. *POST IN RE A.A.I.: UNRESOLVED ISSUES AND UNCERTAIN IMPACTS*

The *A.A.I.* court left several issues unresolved. It did not address the issue of what limitations, if any, are placed on the Division in making its initial disposition order. Beyond the Division specifying a particular placement and retaining a veto power over release, there still remains the unanswered question whether the Division can retain the power to monitor a child once DHS has placed him as ordered. Judge Ferren interpreted the Division's authority to retain a veto power over a child's release from DHS to be a confirmation of continuing jurisdiction over the child up to the point of ultimate release. Judge Ferren's opinion supports a view of section 16-2322(a)(1) that permits the Division to supervise the treatment of the child while the child is under the custody of DHS.

The validity of the Ferren interpretation of section 16-2322(a)(1) has yet to be tested. The onus is on the Division, when ordering a restrictive commitment under section 16-2322(a)(1), to demonstrate its parental interest over the treatment and rehabilitation of the child. This can be done by initiating a system that will monitor the child at the institution to which he is

42. *Id.* at 1209. The court of appeals in *A.A.I.* noted that *J.M.W.*, *J.J.* and *J.A.G.* all involved situations where only after placement was effected, in accordance with the Division's order, did the Division attempt to intervene to reassert its authority. *Id.* In *A.A.I.*, DHS had not even begun to execute the Division's placement scheme, when the Division intervened. *Id.*
43. *A.A.I.*, 483 A.2d at 1208.
44. *Id.*
45. *Id.*
46. *See supra* note 35 and accompanying text.
committed. As the legislative history of section 16-2322(a)(1) indicates, it was the goal of the drafters to "end the situation in which a child is, after the original disposition, 'lost' insofar as the court is concerned. Children change rapidly and it is important that disposition orders not be permitted to drift on without specific review."\textsuperscript{47}

The Ferren interpretation of section 16-2322(a)(1) will help to alleviate an atrocious situation. It is common for a child to sit out his commitment, which generally runs from six months to two years, at an institution that provides inadequate educational or vocational services, psychological or psychiatric counseling, medical or health services, and drug or family counseling.

The \textit{A.A.I.} court also may have created new uncertainties and potential areas of dispute between the Division and DHS in the process of creating this new point of vesting. First, the \textit{A.A.I.} court did not provide a rule regarding the extent to which DHS must implement the conditions of the order, before it would find that custody has transferred. Secondly, the Division gave no guidance as to how soon the conditions must be implemented after the issuance of the order. It is often the case that a child is placed temporarily at Cedar Knoll or Oak Hill while awaiting an opening in a special residential placement or educational program. These two open questions allow for a great deal of discrepancy in judicial approaches and are prime targets for future litigation.

Ultimately, the question remains whether the District is adequately preserving and promoting the welfare of a child, in its role as ultimate parent, by allowing for such uncertainty in the dispositional phase of a case where a child's "right to custody" is at stake. Perhaps a greater concern for the liberty interest of a child would rid the juvenile justice system of the in-fighting that currently exists over his custody.

\textbf{V. Conclusion}

Despite its potential for controversy, \textit{A.A.I.} can be the means by which to provide alternative placements and to ensure their effective implementation. The emphasis then will be on rehabilitation rather than on punishment and the goal will be to return the child to the liberty to which he is entitled rather than to perpetuate his custody.

\textit{Amy Gallicchio}

THE SIXTH AMENDMENT RIGHT TO CONFRONTATION WHERE RELIABILITY OR CREDIBILITY OF A WITNESS IS AT ISSUE: THE EXTENT AND SCOPE OF CROSS-EXAMINATION

It is a basic legal presumption that all persons charged with a criminal offense are deemed innocent until proven guilty beyond a reasonable doubt.\(^1\)

In order to safeguard this presumption in favor of the criminal defendant, the framers of the United States Constitution afforded the accused certain protections in the sixth amendment confrontation clause.\(^2\) Specifically, the confrontation clause is interpreted as providing the accused with two fundamental rights that are essential to a fair trial in a criminal prosecution: the right of an accused to confront the witnesses against him and the right to cross-examine an adverse witness.\(^3\)

\(^1\) The Supreme Judicial Court of Massachusetts expressed this principle in a homicide case in 1850. Commonwealth v. Webster, 59 Mass. (5 Cush.) 295 (1850), and held that it must exist in every criminal prosecution. Id. at 320. The court held that, "[a]ll the presumptions of law . . . are in favor of innocence; and every person is presumed to be innocent until he is proven guilty. . . . [T]he evidence must establish the truth of the fact to a reasonable and moral certainty. . . . This we take to be proof beyond a reasonable doubt." Id.

\(^2\) The sixth amendment provides that, 

\textit{In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.} 

U.S. CONST. amend. VI (emphasis added).

\(^3\) See, e.g., Pointer v. Texas, 380 U.S. 400, 404 (1965). "The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." Id. In Pointer, the Court noted that,

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. . . . Moreover, the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases.

\textit{Id.} at 404.

The Court, in Pointer, also pointed out that this is one of the few subjects upon which it and other courts have been in nearly unanimous agreement. \textit{Id.} at 405. A particularly exemplary
One of the most important functions of cross-examination is to test the credibility or reliability of an adverse witness, particularly an identification witness. The primary method at the disposal of the cross-examiner is impeachment. Some of the most effective methods of impeachment are the introduction of evidence of a prior conviction, the introduction of prior inconsistent statements and the exposure of biases, prejudices or motivations of the witness. Although cross-examination of a witness is a constitutional right, the scope of inquiry is usually within the discretion of the trial court.

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4. Singletary v. United States, 383 A.2d 1064, 1073 (D.C. 1978). In Singletary, the District of Columbia Court of Appeals not only recognized the need for full cross-examination when the line of inquiry seeks to discredit an identification witness, but also discussed the right of recross-examination. The court held that if new matters are brought out on redirect examination, the confrontation clause demands that the opposing party be given the opportunity to recross-examine, but only on the new issues. Id. at 1073.

5. Davis, 415 U.S. at 316.

6. Alford v. United States, 282 U.S. 687, 694 (1931). The Supreme Court found prejudicial error due to the abuse of the trial court's discretion in limiting the extent of cross-examination. Id. at 694. The trial court cut off in limine all inquiry into the place of residence of the government witness. Id. The Court held that this was an appropriate line of questioning, not only for the purpose of ascertaining the witness' environment, but also to show bias due to the
It is this power to limit cross-examination that has been the subject of many criminal appeals and the source of reversible error.\textsuperscript{7}

Recently, in \textit{Goldman v. United States},\textsuperscript{8} the District of Columbia Court of Appeals addressed the issue of full cross-examination where questioning of a witness is intended to demonstrate the lack of reliability or credibility of the witness.\textsuperscript{9} In that case, the court reversed the lower court's conviction of Goldman because it found that the lower court excessively curtailed Goldman's right of cross-examination in violation of the sixth amendment confrontation clause.\textsuperscript{10}

This Note will focus on the sixth amendment right to confront and cross-examine adverse witnesses in the context of the \textit{Goldman} decision. It will discuss the currently accepted methods, as propounded in \textit{Goldman}, of attacking through cross-examination a witness' credibility or reliability in the District of Columbia courts. In addition, it will examine some of the limitations placed on the extent and scope of cross-examination by statutory provisions and by the discretion of the trial court. Finally, this Note will conclude with a comment on the important role of the attorney and the court in safeguarding the constitutionally protected right to confrontation.

\section{I. Goldman v. United States}

In \textit{Goldman}, the defendant, Jerome E. Goldman, was charged with armed robbery.\textsuperscript{11} The only eyewitness to the crime was the victim, Gene Ray Artis, who was, therefore, the source of the government's most damaging testimony.\textsuperscript{12} At a pretrial suppression hearing, Artis was cross-examined by defense counsel on the defendant's identifying facial characteristics.\textsuperscript{13} He witness' police detention, regardless of whether the detention is related to the offense for which the defendant is charged. \textit{Id.} at 693.


\textsuperscript{8} 473 A.2d 852 (D.C. 1984).

\textsuperscript{9} \textit{Id.} at 854.

\textsuperscript{10} \textit{Id.} at 854. Goldman also contended on appeal that a reversal of the lower court's decision was mandated because of prosecutorial misconduct. This was founded on the testimony elicited by the prosecution that Goldman had been counseled by his attorney to enter a plea of guilty. Goldman also contended on appeal that he was denied a fair trial by a display of trial court bias. \textit{Id.} The government conceded to the allegation of misconduct and to its constitutional dimension. \textit{Id.} Therefore, the appellate court did not address that issue nor did the court deem it necessary to address the allegation of trial court bias because the other contentions were, in themselves, sufficient to warrant reversal. \textit{Id.} at 854. n.1.

\textsuperscript{11} \textit{Id.} at 854.

\textsuperscript{12} \textit{Id.} at 857.

\textsuperscript{13} \textit{Id.} at 855.
testified to seeing Goldman at the time of the robbery and to observing a scar on Goldman's forehead and one under his eye.\textsuperscript{14}

The case was tried in the District of Columbia Superior Court,\textsuperscript{15} and Artis was again called by the government as an identification witness. On direct examination, Artis testified that the events leading to the robbery took five to six minutes and that he was certain of his in-court identification.\textsuperscript{16} On cross-examination, defense counsel impeached Artis' direct testimony by eliciting evidence that the entire event actually only took fifteen seconds.\textsuperscript{17} Defense counsel sought further to pursue the line of questioning he had begun at the pretrial hearing concerning identifying facial characteristics of the man who committed the robbery.\textsuperscript{18} Government counsel objected to this as being beyond the scope of the direct examination.\textsuperscript{19} The judge sustained the objection and curtailed any further inquiry, stating that the testimony as to identification was already quite clear.\textsuperscript{20} Goldman was eventually found guilty not of armed robbery as charged but of the lesser offense of robbery.\textsuperscript{21}

On appeal,\textsuperscript{22} Goldman argued that the trial court improperly curtailed his cross-examination of Artis in that he was all but precluded from asking the only witness to the crime questions involving the identification of the accused.\textsuperscript{23} He argued that the line of questioning concerning the facial scars was central to his case.\textsuperscript{24} Goldman claimed that had Artis testified that he did not remember the scars, it would have contradicted his pretrial suppression hearing testimony and thereby subjected him to impeachment.\textsuperscript{25} If Artis had testified to remembering the scars, Goldman's counsel was prepared to present medical evidence showing that, at the time of the robbery,

\begin{itemize}
\item \textsuperscript{14} Id. At the time of the robbery, Gene Ray Artis was leaving a liquor store when a man asked him if he had seen any car keys, to which Artis responded negatively. The man approached Artis a second time and standing squarely in front of him, announced this was a hold-up. Two other assailants were involved, and they robbed Artis of approximately $200. Id. at 854.
\item \textsuperscript{15} Judge Joseph M. F. Ryan, Jr. presided at the trial. Id. at 852-53.
\item \textsuperscript{16} Id. at 854-55.
\item \textsuperscript{17} Id. at 855 (Artis labeled his earlier estimate a "misjudgment").
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id. at 854.
\item \textsuperscript{22} Chief Judge Newman presided on appeal in the District of Columbia Court of Appeals.
\item \textsuperscript{23} Goldman, 473 A.2d at 856.
\item \textsuperscript{24} Id. at 855.
\item \textsuperscript{25} Id. at 856. As noted previously, at the pretrial suppression hearing Artis testified to observing scars on Goldman's forehead and under his eyes. See supra note 14 and accompanying text.
\end{itemize}
Goldman had no scars. Goldman contended that when identification testimony is crucial to the government's case, curtailment of cross-examination relevant to the trustworthiness and credibility of the testimony constitutes a violation of the sixth amendment right to confrontation. The District of Columbia Court of Appeals agreed with Goldman and reversed the lower court's conviction.

II. THE HOLDING IN GOLDMAN: A CONCISE AND WORKABLE RULE

In Goldman, the District of Columbia Court of Appeals arrived at a clear standard in cases involving the issue of the proper scope of cross-examination intended to test the reliability or credibility of a witness. The court ruled that the standard of review employed by the appellate court for claims of error based upon the excessive curtailment of cross-examination by the trial court "depend[s] upon the scope of cross-examination permitted by the trial court measured against [the appellate court's] assessment of the appropriate degree of cross-examination necessitated by the subject matter thereof as well as the other circumstances that prevailed at trial." This statement indicates the highly subjective nature of such decisions and places importance on the peculiarities of each case.

The appellate court must first examine the record to determine if the error in curtailing cross-examination is of constitutional dimension. When it is determined that the error is of constitutional dimension, either a per se or harmless error test is applied. If the court finds no cross-examination was allowed by the trial court, the result is per se reversible error. If some amount of cross-examination was allowed at trial before curtailment, the appellate court will review for harmless error. The Goldman court adhered
to an interpretation of the harmless error rule adopted in Springer v. United States. The rule states that "[f]or a conviction to stand despite constitutional error it must be clear beyond a reasonable doubt '(1) that the defendant would have been convicted without the witness' testimony, or (2) that the restricted line of inquiry would not have weakened the impact of the witness' testimony.'" The first element of the test applies when it is not possible to know what testimony cross-examination would have elicited. The second part applies when the appellate court has available the excluded testimony for its review.

In Goldman, the court applied the first element because the trial court did not allow Goldman's attorney to make a record concerning the identification issue that was curtailed on cross-examination. When the rule was applied it became apparent that the trial court's error was not harmless. It is highly unlikely that Goldman would have been convicted without the testimony of Artis, the sole eyewitness and most important government witness. Moreover, it is highly likely that the curtailed questioning would

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34. See Goldman, 473 A.2d at 857; see also Springer, 388 A.2d at 856.
35. Springer, 388 A.2d at 856 (quoting Note, Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska, 73 MICH. L. REV. 1465, 1473 (1975) (footnote omitted)); see also Goldman, 473 A.2d at 857; Tabron v. United States, 444 A.2d 942, 944 (D.C. 1982). In Tabron, the Court held that the failure to disclose records of prior juvenile adjudications of government witnesses to the defense counsel did not entitle the defendant to a new trial where "cross-examination about . . . [such] adjudications would not have weakened the impact of testimony by government witnesses who had a relationship with the court . . . during the period of investigation, prosecution, and trial of [the] case." Tabron, 444 A.2d at 943. Additionally, the defendant was not entitled to a new trial where "cross-examination about prior adjudications of government witnesses who did not have a relationship with the court during the period at issue would not have affected the outcome of the trial." Id.
36. Goldman, 473 A.2d at 857; see also Tabron, 444 A.2d at 944.
37. Goldman, 473 A.2d at 857; see also Tabron, 444 A.2d at 944.
38. Goldman, 473 A.2d at 856 n.2, 857. If Artis had been allowed to answer defense counsel's inquiry into identification of the man who committed the robbery and if the testimony, on motion of the government, had been excluded, then the appellate court would review the claim of error by applying the second element of the harmless error rule. To establish the second element, "it must be clear beyond a reasonable doubt . . . that the restricted line of inquiry would not have weakened the impact of the witness' testimony." Id. at 857 (quoting Springer, 388 A.2d at 856).
40. Id. at 857-58.
have weakened the government's case.41

The restricted line of inquiry was important in the assessment of the witness' credibility and reliability.42 Assessing credibility through cross-examination was especially crucial because Artis already had been impeached with the testimony he had given on direct-examination regarding the amount of time he claimed to have seen the robber.43 Because the scars Artis described at the pretrial hearing did not exist at the time of the crime,44 the curtailment of inquiry as to this inconsistency denied the jury the opportunity to fully assess the credibility of Artis.45 The court noted from one of its prior decisions that "the necessity for full cross-examination is particularly acute in the context of a case . . . [where] questioning is [intended] to demonstrate the lack of reliability or credibility of an identification witness."46 This statement is more than substantiated in Goldman. As the reversal by the court of appeals suggests, Goldman's conviction had its roots in the trial court's refusal to allow defense counsel to demonstrate that the government's identification witness was less than reliable or credible.47

III. THE CROSS-EXAMINER'S RIGHT TO ATTACK CREDIBILITY OR RELIABILITY IN THE DISTRICT OF COLUMBIA COURTS: ACCEPTED METHODS AND LIMITATIONS

The opportunity to cross-examine a witness is a fundamental right guaranteed by the sixth amendment and is the principal method to test the believability and truthfulness of a witness.48 This right, however, is not an unlimited right.49 "[T]he extent and scope of cross-examination lies within the [broad] discretion of [the] . . . trial judge."50

In Goldman, the District of Columbia Court of Appeals clearly delineated

41. Id. at 858.
42. Id. at 857.
43. Id.
44. 473 A.2d at 857.
45. Id.
47. Goldman, 473 A.2d at 857-58.
50. Id. In Rogers, the court found no error in the trial court's refusal to allow defense counsel the opportunity to cross-examine the government witness about her institutionalization at St. Elizabeth's Hospital several years earlier for alcoholism and narcotics abuse when that issue was not relevant to her testimony. Id. at 978-81. Further, the appellate court found that the trial court did not commit error by precluding inquiry into the complainant's drug usage at any time except the time at which the offense occurred. Id. at 978-79, 981. The appellate court stated, "[g]iven the highly inflammatory nature of an allegation that a witness is a drug user, a trial court must exercise discretion concerning the proper scope of examination." Id. at 981.
its most recent position on the need for full cross-examination in a criminal case. The court's holding, however, can be applied only in a case of similar factual circumstances. Consequently, for purposes of attacking witness credibility, the practitioner should be aware of the various precepts, methods and limitations that generally have been accepted as applicable in this area. Because the issue involves constitutional protections, many of the decisions in this area can be found in the opinions of the United States Supreme Court.

In *Davis v. Alaska*, the Supreme Court stated that the principal means employed by the practitioner to test "the believability of a witness and the truth of his testimony" is cross-examination. In exercising this right, "the 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." The District of Columbia Court of Appeals has held, in accordance with the Supreme Court, that the court has no duty "to protect a witness from being discredited on cross-examination." The appellate decision in *Goldman* preserved this view by reversing Goldman's conviction after concluding that the lower court had, indeed, protected the government witness from being discredited.

In preparation for cross-examination, the practitioner should be concerned with the jury's overall perception of the witness. For example, a general attack on credibility is performed through evidence of the witness' prior criminal convictions. Such evidence allows the jury to draw the inference that the witness is less likely to tell the truth than the "average trustworthy citizen."

A witness' credibility can also be attacked by revealing biases, prejudices or motivations for testifying. The District of Columbia Court of Appeals

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52. *Id.* at 316.
53. *Id.* See also supra note 3.
54. Alford v. United States, 282 U.S. 687, 694 (1931). The Alford Court acknowledged that the constitutionally protected right against self-incrimination is an exception to the rule that the court has no duty to protect a witness from being discredited through cross-examination. *Id.*
55. *Goldman*, 473 A.2d at 857.
56. *Davis*, 415 U.S. at 316.
57. *Id.*
58. *Id.* at 316-17. "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Id.* at 316 (quoting 3A J. WIGMORE, EVIDENCE, § 940, at 775 (Chadbourn rev. 1970)). The Court further stated that "we have recognized that the exposure of a witness' motivation in testifying is a proper & important function of the constitutionally protected right of cross-examination." *Id.* at 316-17 (citing Green v. McElroy, 360 U.S. 474, 496 (1959)).
in Springer v. United States\(^5\) stated that the demonstration that a witness is motivated by bias or partiality often has a more damaging effect on the validity of a witness' testimony than the more general credibility attack.\(^6\) In that case, the court of appeals reversed the conviction by the lower court because of improper curtailment of defense counsel's cross-examination of a key government witness regarding his status as a paid government informant.\(^7\) This restricted line of inquiry was crucial to show the witness' financial motive in providing information to the government and, in general, his motive to "curry favor with the government."\(^8\) Exposure of such bias or partiality, the court noted, may be crucial in the jury's determination of a witness' trustworthiness\(^9\) and, thus, "bias is always a proper subject of cross-examination."\(^10\)

An exception to the above sanctioned use of prior criminal convictions\(^11\) is occasionally invoked when cross-examination seeks to reveal a witness' juvenile record.\(^12\) In this context, an important distinction is made between two purposes behind cross-examination. The first purpose is to generally attack the credibility of a witness while the second is to expose a witness' biases, prejudices or ulterior motives.\(^13\) In the case of the former, the District of Columbia Court of Appeals held that "evidence of a prior conviction usually is inadmissible if the conviction resulted from a juvenile adjudication."\(^14\)

\(^6\) 388 A.2d at 855.
\(^7\) Id. at 856-57.
\(^8\) Id.
\(^9\) Id. at 855.
\(^10\) Id. (quoting Hyman v. United States, 342 A.2d 43, 44 (1975)).
\(^11\) See supra notes 56-57 and accompanying text. The District of Columbia Court of Appeals held in 1983 that, "the test for determining whether previous conviction impeachment evidence is improper is whether the prosecutor's reference to defendant's prior convictions during his cross-examination can be intended only to suggest to the jury that the defendant is guilty of the crime charged because of his previous conviction or convictions." Baptist v. United States, 466 A.2d 452, 459 (D.C. 1983). The court held in 1982 that the use of prior convictions for the purpose of impeachment is allowable only when used to attack issues other than general credibility, for example, reputation and bias. Reed v. United States, 452 A.2d 1173, 1178 (D.C. 1982).
\(^12\) See, e.g., Brown v. United States, 338 F.2d 543, 547 (D.C. Cir. 1964); Thomas v. United States, 121 F.2d 905, 907-09 (D.C. Cir. 1941); Smith v. United States, 392 A.2d 990, 992 (D.C. 1978).
\(^13\) Smith v. United States, 392 A.2d at 992.
\(^14\) Id. at 993. The court quoted from Brown v. United States, 338 F.2d 543 (D.C. Cir. 1964), which held that a prior adjudication of delinquency cannot be used to impeach a witness' general credibility. Id. at 547. The Brown court stated that "[b]ecause of the purpose of the Juvenile Court Act and the absence of procedural safeguards, a finding of involvement against a juvenile does not have the same tendency to demonstrate his unreliability as does a criminal conviction for the adult offender." Id.
The court reasoned\textsuperscript{69} that the District of Columbia Code only makes provisions for impeachment upon a showing of the conviction of a crime\textsuperscript{70} and that under the Juvenile Court Act,\textsuperscript{71} an adjudication of a child is not deemed a conviction of a crime.\textsuperscript{72}

A different situation results, however, when a witness' juvenile adjudication is introduced to show bias. In \textit{Davis v. Alaska},\textsuperscript{73} the Supreme Court allowed the government to cross-examine the witness as to his juvenile record.\textsuperscript{74} The intent of this cross-examination was to reveal the fact that the witness was on probation for a crime while he was aiding the police in identifying the accused.\textsuperscript{75} The court found that such evidence of a juvenile record is admissible to demonstrate that the witness was biased because of his vulnerable status as a probationer.\textsuperscript{76} In a concurring opinion, Justice Stewart states that the Court's holding in no way suggests that the same evidence is admissible generally to impeach a witness' character as a truthful person.

\textsuperscript{69} 392 A.2d at 546-48.
\textsuperscript{71} Juvenile Court Act, D.C. CODE ANN. § 16-2308(d) (Supp. III 1964). This provision can be found in D.C. CODE ANN. § 16-2318 (1981). The 1985 Supplement contains no revision of or addition to this provision.
\textsuperscript{72} The Juvenile Court Act provides:
An adjudication upon the status of a child in the jurisdiction of the court does not operate to impose any of the civil disabilities ordinarily imposed by conviction, and a child is not deemed a criminal by reason of an adjudication. An adjudication is not deemed a conviction of a crime, and a child may not be charged with or convicted of a crime in any court, except as provided by section 11-1553.

The 1981 edition of the D.C. Code has virtually the same provision:
A consent decree, order of adjudication, or order of disposition in a proceeding under this subchapter is not a conviction of crime and does not impose any civil disability ordinarily resulting from a conviction, nor does it operate to disqualify a child in any future civil service examination, appointment or application for public service in either the Government of the United States or of the District of Columbia.

\textsuperscript{73} 415 U.S. 308 (1974).
\textsuperscript{74} Id. at 320-21.
\textsuperscript{75} Id. at 310-11, 317-18. The Court made clear that it by no means challenged the State's interest in protecting the anonymity of juvenile offenders. \textit{Id.} at 319. The State argued that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. \textit{Id.} Furthermore, the State argued that the exposure might cause the youth to commit further acts of delinquency or cause him to lose employment or "otherwise suffer unnecessarily for his youthful transgression." \textit{Id.} Nevertheless, the Court held that, "whatever temporary embarrassment might result to [the defendant] or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." \textit{Id.}
\textsuperscript{76} Id. at 317-18.
However, according to the ruling in *Smith v. United States*, it is incumbent on the party seeking to introduce the evidence to proffer a reason why the witness' juvenile record would make his testimony partial or biased.

There are other recognized exceptions to the principle that a court has no duty to protect a witness from being discredited through cross-examination. For example, the court may limit cross-examination that is repetitive and unduly harassing in nature. Cross-examination can also be precluded when a witness' testimony might put him in danger of retaliation or when his testimony would cause degradation or humiliation. The court can also limit inquiry into matters that are irrelevant or have little probative value to the issue at hand. Additionally, cross-examination can be limited when a witness' testimony would cause self-incrimination.

The District of Columbia Court of Appeals, in *Goldman*, did not invoke

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77. 392 A.2d 990 (D.C. 1978).
78. *Id.* at 992.
80. *Id.* In United States v. Marti, 421 F.2d 1263 (2d Cir. 1970), the court held that it was not a violation of the confrontation clause to prevent the cross-examination of the government witness regarding his street address where: (1) the failure to elicit the address in court did not prejudice any in or out of court investigation of the witness (*but cf.* Smith v. Illinois, 390 U.S. 129, 131 (1968), where the witness' testimony as to his address was crucial to the issue of credibility); (2) the address of the witness was not necessary to place the witness in his proper environment (*but cf.* Alford v. United States, 282 U.S. 687, 692-93 (1931), where the witness' address, which would have shown him to be in the custody of federal authorities, was necessary to show bias because of an expectation of receiving immunity or perhaps because of the coercive effect of his detention); and (3) the address was not relevant to the witness' knowledge or credibility (*but cf.* Alford, 282 U.S. at 690, where the witness, at the time of trial, was residing in jail). *Marti*, 421 F.2d at 1265-66. The court noted that a valid reason for wanting to prevent the revelation in open court of a witness' address "may be that the answer may subject the witness to reprisals or that the question is being used to humiliate or annoy the witness." *Marti*, 421 F.2d at 1266. The court also stated that the party opposing revelation of the witness' address must come forth with reasons for the objection. *Id.* However, in *Marti*, failure to do so was not enough to warrant reversal. *Id.*

An example of a situation where cross-examination may be properly precluded to prevent testimony that would cause degradation or humiliation is found in *Tinker v. United States*, 417 F.2d 542 (D.C. Cir. 1969). The court there prohibited testimony of the alleged homosexual preference of the government's witness, a police officer. The court stated that such evidence "has an enormous proclivity for humiliation and degradation of a participant in a fashion completely unrelated to testimonial honesty." *Id.* at 544. Such evidence "would unfairly debase him in the eyes of the jury." *Id.* The court must balance the evidentiary value against the "illegitimate propensities" of this type of evidence. *Id.* at 545.

81. *Id.* See, e.g., supra notes 49-50.
82. The fifth amendment provides, in part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. For a discussion and critique of the Supreme Court's treatment of the fifth amendment right against self-incrimination and its test for determining whether that right as been violated, see Seidelson, *The Confrontation Clause, the Right Against Self-Incrimination and the Supreme Court: A Critique and Some Modest Proposals*, 20 DUQ. L. REV. 429, 453-61 (1982).
any of the above exceptions as warranting the trial court's curtailment of Goldman's sixth amendment right. In fact, the case is an example of the type of situation contemplated by the Supreme Court in Davis, one demanding full cross-examination, not only to test the witness' perceptions and memory but also to discredit him.

IV. THE TRIAL JUDGE: DISCRETION OR ABUSE OF DISCRETION

In the context of cross-examination, it is evident that the trial judge plays a crucial role. Because he is empowered with such wide discretion to limit cross-examination, it is essential that the practitioner be aware of the parameters of an accused's sixth amendment rights, which the courts have expressly shielded from encroachment. This knowledge will undoubtedly lend more predictability and less ambiguity to sixth amendment analysis.

However, no matter how versed the practitioner is in the standards of cross-examination accepted by the court, as Goldman demonstrates, the trial judge at times exercises unbridled and seemingly standardless discretion in curtailing this constitutionally protected right to cross-examine adverse witnesses. The fate of a criminal defendant may depend on a judge's personal idiosyncracies and his temperament on a particular occasion.

It is well settled, however, that the trial judge may intervene in an effort to promote a clear and orderly presentation of evidence. He can participate for the purpose of preventing undue repetition of testimony in order to expedite the development of the facts. Any participation by the trial court, however, should be undertaken with an awareness of the sensitive role it plays in a jury trial. An appearance of advocacy or partiality may have a strong influence on the jury's determination of guilt or innocence, and such

83. See supra notes 79-82 and accompanying text.
84. Davis, 415 U.S. at 316. See supra notes 51-53 and accompanying text.
85. See supra note 7; infra note 90.
86. United States v. Harris, 501 F.2d 1 (9th Cir. 1974), is an example of a case warranting reversal due to judicial impropriety. In a case where reliability and credibility of the informant was a crucial issue, the lower court restricted defense counsel's inquiry of a government informant concerning his motive for testifying and possible bias or prejudice. Id. at 9. The trial judge excessively interjected himself into the proceedings and often came to the aid of the prosecutor by interrupting the defense counsel. Id. at 9-10.
88. Id.
89. Id.
behavior can be a source of reversible error.\textsuperscript{90}

The District of Columbia Court of Appeals has effectively preserved the right to cross-examination and confrontation guaranteed by the sixth amendment. However, \textit{Goldman v. United States} demonstrates that the human element, namely the behavior of the trial judge, occasionally acts to circumscribe that guaranteed right.

In \textit{Goldman}, when defense counsel asked to approach the bench to explain the importance of his line of questioning concerning identifying facial characteristics,\textsuperscript{91} the trial court refused, stating "Ladies and gentlemen, I discourage approaches to the bench. I feel like that's whispering in front of company and 99 times out of 100 there's nothing to it. You have overdone it. . . ."\textsuperscript{92} It is fair to state that Goldman's fate at trial was established at that point because the precluded testimony was crucial to his case.

\textsuperscript{90} In cases where the District of Columbia Court of Appeals has reversed convictions based on the trial court's behavior, the trial courts had intervened excessively on behalf of the government or imposed unnecessarily severe restraints upon the defense counsel's cross-examination of key government witnesses, or both. \textit{See, e.g.,} Benjamin \textit{v. United States}, 453 A.2d 810 (D.C. 1982); Coligan \textit{v. United States}, 434 A.2d 483 (D.C. 1981); Springer \textit{v. United States}, 388 A.2d 846 (D.C. 1978); Moss \textit{v. United States}, 368 A.2d 1131 (D.C. 1977); Gillespie \textit{v. United States}, 368 A.2d 1136 (D.C. 1977); Holmes \textit{v. United States}, 277 A.2d 93 (D.C. 1971).

The circuit courts have also reversed lower court convictions for reasons similar to those warranting reversal in the District of Columbia. \textit{See, e.g.,} United States \textit{v. Harris}, 501 F.2d 1 (9th Cir. 1974); United States \textit{v. Foster}, 500 F.2d 1241 (9th Cir. 1974); United States \textit{v. Green}, 429 F.2d 754 (D.C. Cir. 1970); United States \textit{v. Kartman}, 417 F.2d 893 (9th Cir. 1969); Blumberg \textit{v. United States}, 222 F.2d 496 (5th Cir. 1955). \textit{See also supra} note 7 and accompanying text.

In \textit{Harris}, the court provided examples of the lower court's interruptions. \textit{Harris}, 501 F.2d at 11-14 & n.20. "Although none of the instances cited above, considered alone, would be of great significance, we are convinced that the cumulative effect of the court's attitude, rulings, and conduct was to deprive the defendants of a fair trial." \textit{Id.} at 14 n.20. The court also cited Canon 15 of the Canons of Judicial Ethics which provides a rule of proper judicial behavior:

\begin{quote}
A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examining of witnesses, or a severe attitude on this part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.

Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.

He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.
\end{quote}

\textit{Id.} at 11 n.19 (quoting Canon 15 of the Canons of Judicial Ethics).

\textsuperscript{91} \textit{See supra} notes 13-28 and accompanying text.

\textsuperscript{92} \textit{Goldman}, 473 A.2d at 856.
Although the appellate court did not rule on Goldman's contention of trial court bias, the decision to reverse because of improper curtailment of cross-examination is unquestionably a silent condemnation of the trial court's behavior.

V. CONCLUSION

In Goldman v. United States, the District of Columbia Court of Appeals held that excessive curtailment of the defendant's right to cross-examine a key government identification witness, where the defendant was attempting to demonstrate the lack of reliability or credibility of the witness, violated the defendant's sixth amendment right to confrontation. The court reached this conclusion after applying the harmless error rule to the facts of the case. In so doing, the court found that it was not clear beyond a reasonable doubt that the defendant would have been convicted without the witness' testimony. Furthermore, the court found it was highly likely that the curtailed cross-examination would have weakened the government's case.

Goldman provides an effective method for examining cases of purported sixth amendment constitutional error involving the restriction of cross-examination that is intended to test a witness' credibility or reliability. Goldman also demonstrates the crucial role the trial court plays in determining the outcome of a trial when it exercises its discretion to limit cross-examination.

To protect the principle that all persons charged with a criminal offense are deemed innocent until proven guilty, the practitioner and the courts must seek to preserve the defendant's sixth amendment right to confront adverse witnesses. The defense counsel, an accused's only advocate, has a duty to know and to utilize the methods available to him on cross-examination to test the government witness' credibility or reliability. Only in that way can he protect his client from testimony based on biases, prejudices or motivations of an adverse witness. Such testimony, as Goldman demonstrates, often determines the fate of an accused.

Amy Gallicchio