CROSS-EXAMINATION, COLLEGE SEXUAL-ASSAULT ADJUDICATIONS, AND THE OPPORTUNITY FOR TUNING UP THE “GREATEST LEGAL ENGINE EVER INVENTED”

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With its reputation as the “greatest legal engine ever invented” cross-examination rarely receives critical evaluation. This Article seeks to narrow that academic gap and offer pragmatic advice to policymakers and judges considering the in-the-trenches issues of cross-examination. Despite a great body of empirical and interdisciplinary work on cross-examination, legal scholarship often relegates discussion of cross-examination’s benefits and costs to an errant footnote or a short paragraph. But cross-examination’s efficacy should not be an afterthought or aside to doctrinal exegesis. Answers to the hardest questions about the presence, scope, and format of cross-examination rely on assumptions about the benefits and costs of cross-examination much more than they do analysis of seventeenth century English opinions. This Article considers potential lessons from a setting in which systematic preferences with regard to cross-examination differ markedly from those in traditional adjudications.

The current issue of cross-examination’s role in college sexual-assault adjudications is both the impetus for this project and the vehicle for reexamination. This Article explores questions about cross-examination’s efficacy. Does focusing on witness demeanor during cross-examination hurt or help a hearing’s accuracy? Which questioning techniques improve truth seeking and which ones only abuse witnesses and harm the system?

However, the knowledge gathered herein has much broader applicability. Shifting legal debates mere inches away from tired references to tradition and towards critical evaluation means that policymakers and judges alike have a chance at meaningful reform. Even the best engines need a tune-up. It is time to reexamine assumptions about cross-examination.

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INTRODUCTION

Few things are as engrained in the American judicial system as cross-examination.¹ The Confrontation Clause enshrines it as a constitutional right in criminal trials.² Due process requires the opportunity for cross-examination in civil trials and many administrative hearings.³ One can scarcely read a trial-practice case, textbook, or law-review article without seeing John Henry Wigmore’s quote proclaiming cross-examination “the greatest legal engine ever invented for the discovery of truth.”⁴ And popular culture portrayals of the cross-examination that wins the day evince our societal adherence to the view that cross-examination ensures just outcomes.⁵ Thus, it is perhaps unsurprising that there is a dearth of legal scholarship examining cross-examination’s true benefits and costs.⁶ But is cross-examination necessary to discovering the truth? Is it necessary to a fair hearing? In its current structure, do its benefits outweigh its costs?

Most colleges and universities across the United States resoundingly reply no to each of these questions when it comes to their internal sexual-assault adjudications.⁷ The decision to remove cross-examination from these proceedings has required policymakers, practitioners, and scholars alike to critically reevaluate what we gain and lose by having cross-examination.

This Article proceeds in two parts. Part I gives a brief overview of the social and legal frameworks that led colleges and universities to jettison cross-examination, the challenges these institutions now face as a result, and alternatives to the current structure. Alternatives in mind, Part II evaluates cross-examination’s benefits and costs, noting the implications of adopting alternatives to cross-examination in the college context. The Article concludes by noting what broader lessons this examination of cross-examination offers.

¹ See, e.g., David Alan Sklansky, Hearsay’s Last Hurrah, 2009 SUP. CT. REV. 1, 71 (2009).
⁷ See, e.g., Cleta Mitchell & Trent Lott, Rethinking How We Deal With Campus Sexual Assault, WASHINGTON POST, Oct.4, 2015, http://wapo.st/1Nf3WYt?tid=SS_mail.
Many readers will come to this piece with preconceived notions about the proper balance to strike in court and college proceedings. My intention here is not to argue for one process or another, but to provide some clarity about tradeoffs involved in requiring or rejecting cross-examination. Among the many values that these proceedings purport to serve, accuracy and fairness are paramount. Yet the connection between allowing cross-examination and advancing these values receives little critical examination. Decision makers too often cite long-standing and largely unevaluated perceptions as concrete substantiation for their conclusions. Empirical evidence may not determine answers to the ultimate conclusions, but the same is not true for all the subsidiary questions that must be answered along the way. In undertaking reform, policymakers, judges, and college administrators should reevaluate traditional assumptions about the benefits and costs of cross-examination. At least in the college context, this reevaluation will help reformers find a sensible middle ground between prohibition of cross-examination and full-scale trial-type procedures.

I. SEXUAL-ASSAULT ADJUDICATIONS ON CAMPUS

Although the fight against sexual assault and rape on college campuses has been a problem for years, recent government action has brought the debate about solutions into the national spotlight. On April 4, 2011, the Office of Civil Rights for the U.S. Department of Education (“OCR”) released policy guidance detailing steps that colleges had to take to comply with Title IX—the federal statute prohibiting sex discrimination in education. This guidance and similar changes to federal mandates over the last six years, has resulted in a dramatic shift in how

8 For example, in Coy v. Iowa, the Court remarked that “the perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it.” 487 U.S. 1012, 1019 (1988). The evidence for this truth came from similar statements in prior cases. Id.

9 For purposes of these adjudications, colleges define “sexual assault” and “rape” themselves, but this Article uses the term “sexual assault” to cover any adjudication involving claims of rape, sexual assault, or other impermissible sexual behavior.

10 Widely known as the “Dear Colleague Letter.” Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. DEP’T OF EDUC. (Apr. 4, 2011) (hereinafter “DCL”), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. As guidance, it should not be binding, but the administrative issues occasioned by DCL have been covered in other Articles. See, e.g., Tamara Rice Lave, Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter, 64 U. KAN. L. REV. 915 (2016).


colleges investigate and adjudicate sexual-assault complaints on their campuses.\textsuperscript{13}

Many see this as a welcome solution to problems of under-reporting and under-enforcement.\textsuperscript{14} Victimized students often find police investigations and criminal trials invasive and traumatizing.\textsuperscript{15} A student subject to a sexual assault\textsuperscript{16} who does not want to turn to the criminal-justice system can instead seek justice on campus.\textsuperscript{17} However, others express concerns that these new procedures severely limit the accused student’s opportunity to receive a fair hearing.\textsuperscript{18} Members of top law-school faculties have issued statements condemning these campus policies.\textsuperscript{19} Mothers of falsely accused students have started organizations like Families Advocating for Campus Equality (FACE) and Save Our Sons to raise awareness and provide resources to other accused students.\textsuperscript{20}

These commendations and criticisms apply in largely the same fashion to colleges across the nation. Although structures vary somewhat


\textsuperscript{16} This Article uses “complainant” and “victim” to refer to students bringing these complaints. But this use implies nothing about the guilt of the accused, nor is it meant to take a position in the debate on how to refer to targets of sexual assault.


across institutions, most colleges now have similar procedures for investigating and adjudicating complaints of sexual assault. After an office of student affairs receives a complaint, it investigates and gathers preliminary evidence, often requiring the accused student to respond to allegations before the adjudication begins. Next, the complainant and accused appear before an adjudicatory panel—comprised mainly of university staff—which hears arguments, questions witnesses, and renders factual and legal findings. Most colleges also have an appellate-review process.

While these proceedings mirror trials in some ways, many of the procedural protections normally afforded criminal or civil defendants are markedly absent. Colleges severely limit the accused student’s ability to conduct discovery, and the panel bases its decision primarily on evidence gathered by the college itself. Accused students often receive no representation, and colleges heavily restrict what role privately retained counsel can play in these proceedings. The accused has no right to cross-examine witnesses, and in most cases can only propose witnesses or questions to the panel, which questions witnesses itself. At all stages of the adjudication, the accused’s role is narrowly circumscribed.

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22 Triplett, supra note 18, at 492–93. Colleges often employ private investigators not subject to cross-examination, raising further concerns about bias. Ric Feld, This Georgia Lawmaker Is a Champion for College Men Accused of Rape. And He’s Winning., MOTHER JONES, June 20, 2016, http://www.motherjones.com/politics/2016/05/earl-ehrhart-title-ix-lawsuit.

23 Triplett, supra note 18, at 493; Barbash, supra note 20.

24 Triplett, supra note 18, at 493.


27 Colleges are not required to provide counsel and differ in how they allow privately retained counsel to participate in the process. Triplett, supra note 18, at 525–26; Barbash, supra note 20.

28 Triplett, supra note 18, at 520–22; Barbash, supra note 20; see also Cummins, 2016 WL 7093996, at *1–2.
The entire process resembles an inquisitorial system much more than an adversarial one.29

Beyond the structural problems, reports continue to surface of cursory proceedings predetermined to expel or suspend accused students.30 The following deposition taken from a university official in a recent suit against George Mason University illustrates this problem:

Q. . . . Is it your testimony that when John walked into your office on October 8, 2014, you had essentially prejudged his case before you even spoke to him?
A. Haven’t I already answered that?
Q. Answer it again.
A. Yes. Essentially . . .
Q. Let’s take essentially out of it. When he walked into your office on October 8, 2014, having met with Jane, having read her appeal, and having looked at all the evidence, you had prejudged his case, right?
A. Yes. But I was giving him the opportunity to discuss it with me.
Q. And nothing he said was going to make a difference, right?
A. Nothing he did say made a difference.
Q. And nothing that you can think of that he could have possibly said would have made a difference, correct?
A. The best I can answer the question, correct.31

These structural flaws and biased adjudications demand attention as legal challenges to these proceedings continue to grow,32 with accused

29 Other differences raising criticism include redefining sexual assault to include behavior not found in other legal definitions; consolidating the investigation and adjudication process in one office—often the same office responsible for Title IX compliance; using a preponderance-of-the-evidence standard; and providing no representation. See supra notes 18–19.
30 Baker, supra note 15, at 269; McHugh & Farrow, supra note 26; Barbash, supra note 20; Feld, supra note 22.
32 One recent estimate claims that “[t]here are currently more than 100 pending legal cases involving alleged due process violations in campus sexual assault adjudication[s].” Derek Quizon, Critics Questioning Role of Universities in Title IX Cases, The DAILY PROGRESS (May 28, 2016), http://www.dailyprogress.com/news/local/critics-questioning-role-of-universities-in-title-ix-cases/article_e41cfc7a-4318-5d47-a587-ae5cd06cc75.html. For a discussion of the due-process claims’ legal merits see Safko, supra note 12, at 2293–2302; see
students bringing their complaints to the courtroom.\textsuperscript{33} Some seek damages.\textsuperscript{34} Others call on courts to invalidate suspensions and expulsions.\textsuperscript{35} Although initially unresponsive, courts have recently been issuing favorable rulings to accused students challenging campus investigations and adjudications.\textsuperscript{36} And even OCR—the office responsible for pushing for these procedures—has begun to investigate reports of college administrators running roughshod over accused students’ rights.\textsuperscript{37}

Against this backdrop, the public is increasingly in favor of the criminal courts reclaiming their role in these investigations and adjudications.\textsuperscript{38} Critics worry that these unfair proceedings have unintended results, “simultaneously failing to punish rapists adequately and branding students sexual assailants when no sexual assault occurred.”\textsuperscript{39} In the end, unfair proceedings undermine efforts to combat sexual assault.\textsuperscript{40} Federal lawmakers are once again taking notice, and considering ways to address the concerns raised.\textsuperscript{41}


\textsuperscript{41} Nick Anderson, Under DeVos, Education Department Likely to Make Significant Shift on Sexual Assault, Washington Post (Jan. 18, 2017), https://wpo.st/8SHb2; Safko, supra
Either to stem the tide of legal liability or in response to future legislative change, colleges will once again have to revamp their procedures for investigating and adjudicating sexual assault. The stakes are quite high in this context because outside forces aggravate the unenviable position colleges find themselves in.\textsuperscript{42} If federal regulators or victims’ groups view a procedure as too harmful to complainants, then colleges face investigation, loss of federal funding, or suits from victims.\textsuperscript{43} If the procedure swings too far to the other side, colleges must defend themselves in expensive litigation brought by accused students.\textsuperscript{44} ‘The presence and form of cross-examination will be among reformers’ central concerns.

Currently most schools err on the side of disallowing cross-examination.\textsuperscript{45} Most colleges allow witness questioning only from the adjudicators, sometimes with the caveat that parties may submit questions to the panel.\textsuperscript{46} Under the panel-submission-only model, parties cannot ask...
follow-up questions not submitted in advance, and must instead rely on the panel to add questions necessary for a thorough examination.

While colleges can modify this process in many ways, this Article primarily considers two possible alternatives. First, colleges can screen or shield the victim from the accused, the panel, or both. Colleges can experiment with different screening formats: physical barriers without video feed, one-way video feeds, two-way video feeds, and pre-recorded testimony. Second, colleges could also employ impartial intermediaries—separate from the adjudicative panel—to perform cross-examination. Before questioning, the accused would provide preliminary questions and frameworks, and the intermediary would make initial edits that the accused could see. During examination, questions could be funneled through an intermediary separate from the panel using simple headset technology or related means; follow-up inquiries would occur in real time, the only caveat being that the intermediary could omit or adjust the format of impermissible questions.

But before colleges move to push cross-examination in some format back into their adjudications they should examine its benefits and costs. The remainder of this Article seeks to do just that. Beginning with accuracy, moving to fairness, and concluding with administrative costs, this Article unpacks the traditional assumptions that surround cross-examination, discussing empirical work where relevant. While many of the principles discussed herein have broader applicability, the focus of this discussion highlights the role cross-examination plays in sexual-assault cases, and the implications that adopting the alternatives discussed above might have for adjudicating these cases in the college context.

47 “Shielding” herein encompasses physical and virtual screens interposed between the witness and others. This Article mentions specific differences where relevant.

48 See Griffin, supra note 6, at 69 (noting that “video uplinks, satellite testimony, or close-circuit questioning could supply meaningful confrontation”); Frederic Lederer, The Legality and Practicality of Remote Witness Testimony: Eventually, the Question May Be Whether Physical Presence Is Really Necessary At All, 20 PRAC. LITIGATOR 19, 22–24, 28–29 (2009). This list simplifies various technological setups currently possible, but is meant to convey that colleges can alter shielding procedures that affect who the complainant can see and hear. Carolyn W. Kenniston, You May Now “Call” Your Next Witness: Allowing Adult Rape Victims to Testify Via Two-Way Video Conferencing Systems, 16 J. HIGH TECH. L. 96, 99 (2015) (noting growth in use, sophistication, and capability of trial videoconferencing technology).


51 TASLITZ, supra note 49, at 117–20; see also Zajac et al., supra note 50, at 195.
II. BENEFITS AND COSTS OF CROSS-EXAMINATION

Cross-examination is assumed to aid in producing accurate and fair outcomes. Before this assumption can be analyzed it must be broken down into its two components. Although striving for accuracy and fairness are not completely divorced goals, they each serve distinct purposes. This section evaluates how cross-examination’s structure and mechanisms further a hearing’s accuracy and improve its overall fairness, and concludes by adding another often-overlooked consideration for reformers to balance—the administrative cost of cross-examination.

A. Accuracy

When most people speak of an adjudicatory system’s accuracy, they are referring to its ability to approximate the “truth”—some version of what really happened. At the American adversarial system’s inception, cross-examination was promoted as a way to “detect and thus deter [witness] prevarication and hence promote truthful outcomes.” Similarly, the Supreme Court has described the right to cross-examination as “the age-old tool for ferreting out truth in the trial process.” Undoubtedly, witness testimony plays an integral, if not paramount, role in divining the truth. Factfinders do their best to mine truth from the mountains of evidence presented, but they are ill-equipped for the task, and when all else fails, factfinders often credit a witness’s version of truth in lieu of coming to their own conclusions. But this reliance comes with a danger; the implicit assertion of relevance and verisimilitude shrouds correct and incorrect testimony the same. Cross-examination gives advocates an opportunity to remind factfinders that the truth about what really hap-

52 See David Alan Sklansky, Confrontation and Fairness, 45 Tex. Tech L. Rev. 103, 105 (2012).
57 “Factfinder” refers herein to judges, adjudicators, and juries. This Article uses more specific terms where relevant.
59 See id. at 1036.
pened may be buried beneath layers of witness deception, error, or both. But how does cross-examination accomplish this goal?

1. The Demeanor Myth

The advantages of cross-examination are not what conventional wisdom suggests. Many believe that behavioral responses to questioning signal witness deception, and also believe that factfinders can both pick up on these responses and draw reliable conclusions from demeanor evidence.1 Our judicial system institutionalizes this belief in its approach from investigation to adjudication to appeal. Investigators and interrogators receive training in detecting deception that focuses not on what comes out of a suspect’s mouth, but instead on what his eyes, hands, and feet are doing when he is speaking.2 This dogma also permeates through to the courtroom.3 The judicial system orders jurors to observe witness demeanor closely, and the confidence judges have in their own abilities to evaluate deception through demeanor evidence remains unwaivering.4 Likewise, appellate courts give substantial deference to lower courts’ factual findings because “only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.”5 Yet, this persistent belief lacks a foundation; overall, laypeople and experts alike are terrible lie detectors when they focus on demeanor evidence.6

To begin, scientific evidence proves that most, if not all, readily observable behavioral cues assumed to indicate deceit do not actually do

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60 Not analyzed herein is the plausible claim that cross-examination’s presence deters lying in pretrial proceedings because witnesses are afraid of being exposed on cross-examination. See, e.g., Roger C. Park, Adversarial Influences on the Interrogation of Trial Witnesses, in Adversarial versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems 131, 160–61 (Peter J. van Koppen & Steven D. Penrod eds., 2003).

61 Uviller, supra note 53, at 788–89; Detecting Deception: Current Challenges and Cognitive Approaches xvi (Per Anders Granhag et al. eds., 2015); Simon, supra note 53, at 176.


63 This is a problem in direct examination and for questions asked by a judge or inquisitor, but this section focuses on how beliefs about demeanor affect cross-examination.


66 Altbert Vrij, Detecting Lies and Deceit The Psychology of Lying and The Implications For Professional Practice 2, 75–81, 217 (John Wiley & Sons Ltd. ed., 2000); Altbert Vrij et al., Police Officers’ Ability to Detect Deceit: The Benefit of Indirect Deception Detection Measures, 6 Legal & Criminological Psychol. 185, 186 (2001); Lucy Akehurst et al., Lay Persons’ and Police Officers’ Beliefs Regarding Deceptive Behaviour, 10 Appl. Cognit. Psychol. 461, 462, 468 (1996); see also Sara Landström et al., Children’s Live and Videotaped Testimonies: How Presentation Mode Affects Observers’ Perception, Assessment and Memory, 12 Legal & Criminological Psychol. 333, 334 (2007).
From evasive eyes to twitching toes, behavioral responses to questioning seem to be more idiosyncrasies than deception giveaways. Researchers continue to investigate a few selected cues that may provide useful information. Although not uniform in result, some studies have found associations between paraverbal cues (e.g., voice pitch or vocal tension) and deceit. Likewise, a few studies have associated two subtle visual cues with deceit—pupil dilation and chin raising. However, recent research all but completely undermines the association between deception and easily observed cues.

Furthermore, even the studies associating subtle behavioral cues with deceit have important limitations. One limitation is that most studies can demonstrate only that a majority of liars exhibit a certain cue; the implicit complication, of course, being that a significant population exhibits the opposite behavior when lying. For example, one researcher completing a meta-analysis of his past experiments found that 64% of participants decreased certain movements during deception, while 35% increased these movements during deception. Furthermore, the imperceptibility of most visual and paraverbal cues presents another complication for accurately analyzing demeanor evidence; observers in most settings cannot reliably discern these phenomena without sophisticated technical equipment.

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67 Vrij, supra note 66, at 38, 54; Bella M. DePaulo et al., Cues to Deception, 129 Psychol. Bull. 74–118 (2003).
69 See Simon, supra note 53, at 176 n.139 (noting that “[t]wo visual cues—pupil dilation and chin raise—were found to be positively related to deceit, but they were observed in only four studies each” (citing De Paulo et al., supra note 67, at 92)).
70 See, e.g., Detecting Deception: Current Challenges and Cognitive Approaches, supra note 61, at 45 (performing a meta-analysis and concluding “research on nonverbal cues that distinguish truth from lies finds that such cues tend to be weak and inconsistent and, to the extent there is empirical support for such cues, that support systematically diminishes as research accumulates”).
71 See, e.g., Vrij, supra note 66, at 38.
72 Id.
73 Simon, supra note 53, at 179; see Granhag, Vrij, & Verschuere, supra note 61, at 317–323; Vrij, supra note 66, at 32–33 (noting that vocal behaviors thought to differentiate liars and truth-tellers “are usually very small (only a few hertz), and therefore only detectable with sophisticated equipment”); Wellborn, supra note 53, at 1088 (“[S]ubjects who receive transcript[s] consistently perform as well as or better [at detecting lies] than subjects who receive recordings of the respondent’s voice.”).
lem with the underlying assumption about lie-detection and demeanor evidence: studies consistently shows that focusing on demeanor does not aid observers in deciding if a witness is telling the truth or lying.\footnote{Simon, supra note 53, at 176; Uviller, supra note 53, at 787; see generally Vrij, supra note 66, at 92–93; Charles F. Bond, Jr. & Bella M. DePaulo, Individual Differences in Judging Deception: Accuracy and Bias, 134 PSYCHOL. BULL. 477 (2008).}

Put simply, even assuming a list of universal cues, ordinary observers cannot faithfully apply any methodological approach.\footnote{Vrij, supra note 66, at 54; Simon, supra note 53, at 177.} Discerning any information from demeanor requires that an observer simultaneously process a flood of verbal evidence and a variety of subtle behavioral cues.\footnote{See Simon, supra note 53, at 177.} Then the observer must account for any offsetting factors, and objectively reach conclusions about both individual statements and overall credibility.\footnote{Id.} Performing this task for one witness would be tough enough, but that is not how most trials or hearings proceed. After observing the first witness, the factfinder must replicate this process for successive witnesses, whose testimony must also be weighed against prior witnesses.\footnote{See Wellborn III, supra note 53, at 1080.}

The possibility for erroneous conclusions only grows as these unrealistic expectations combine with an individual observer’s unreliable hunches.\footnote{Bond & DePaulo, supra note 74, at 483; Akehurst et al., supra note 66, at 462.} For one, observers can wrongly attribute cues to deceptive behavior when other explanations exist.\footnote{See, e.g., Akehurst et al., supra note 66, at 468–69.} For instance, witness behavior may be a response to the courtroom or hearing process itself.\footnote{Simon, supra note 53, at 179.} That is, many cues people associate with deception are also reactions brought about by the high stress environment of an adjudicatory hearing.\footnote{Chris William Sanchirico, Evidence, Procedure, and the Upside of Cognitive Error, 57 STAN. L. REV. 291, 312 (2004); see Vrij, supra note 66, at 93; Simon, supra note 53, at 179; Sara Landström et al., Witnesses Appearing Live Versus on Video: Effects on Observers’ Perception, Veracity Assessments and Memory, 19 APPLIED COGNITIVE PSYCHOL. 913, 914 (2005).} Relatedly, cultural phenomena affect the presence, frequency, and meaning of cues.\footnote{GRANHAG, VRIJ, & VERSCHUERE, supra note 61, at 177–79; Vrij, supra note 66, at 88–91; Nancy Gertner, Videoconferencing: Learning Through Screens, 12 WM. & MARY BILL. RTS. J. 769, 784 (2004).} And most ironically, repeat liars realize that observers attach significance to certain behavioral cues and become adept at controlling those cues.\footnote{Vrij, supra note 66, at 48, 219; see also Sporer & Schwandt, supra note 68, at 438.}

Additionally, a courtroom or hearing context both alters and limits how ordinary observers implement their typical deception-detection
heuristics. Observers do not evaluate demeanor in the courtroom the way they usually do when interacting with friends or family. For one, lawyers, not the observers, interact with the witnesses. Studies demonstrate that a lawyer’s demeanor towards the witness can prejudicially affect an observer’s conclusions about witness deception. In addition, formal proceedings rarely place observers within inches of the witness, making it harder, if not impossible, to pick up on subtle visual or auditory cues to judge a witness’s deceptiveness.

In fact, some studies illustrate that encouraging an observer to focus on behavioral cues diminishes the observer’s ability to detect deception. Faulty assumptions and misdirected attention explain these results. Most people wrongly assume that visual behavioral cues indicate deception. That assumption, combined with the problems discussed above, leads observers to fixate on evidence that will either be irrelevant or point them toward invalid conclusions about witness deception. At the same time, this fixation diverts attention from phenomena that do relate to deception detection. Cross-examination’s accuracy-increasing functions have more to do with what the witness is being asked and how questions are being presented, than with the witness’s demeanor when responding.

2. Witness Error and Deception

Cross-examination highlights the errors of well-intentioned and deceptive witnesses alike. Witnesses can neglect to explain their account fully or make mistakes. When a witness first testifies, her words are “a selective presentation of aspects of what the witness remembers, organized in a willful or at least a purposeful manner.” Cross-examination breaks down carefully curated narratives: “[it] places in the hands of the cross-examiner some of the means to show the gaps between the truth and the telling of it.”

85 See Vrij, supra note 66, at 67–70, 76, 82–84, 93.
86 Uviller, supra note 53, at 780.
87 Id.; Wellborn, supra note 53, at 1080.
88 Simon, supra note 53, at 179; see Granhag, Vrij, & Verschuer, supra note 61, at 317.
89 Mann et al., supra note 68, at 1063; Vrij, supra note 66, at 68, 76; see Wellborn, supra note 53, at 1088 (summarizing psychological studies and noting that “some evidence suggests that observation of facial behavior diminishes the accuracy of lie detection”).
90 See Mann et al., supra note 68, at 1062; see also Simon, supra note 53, at 176.
91 See Vrij, supra note 91, at 38–39.
92 Id.; see also Epstein, supra note 92, at 444–45 (explaining how jurors have “a greater preference and/or capacity” for visual, as opposed to aural, information and discussing studies suggesting that visual focus affects “juror reception and retention of orally-presented proof”).
94 Id.
an illusion constructed by the unholy union between the human’s brain fallible nature and outside influences.\textsuperscript{95}

Probing questioning elicits details that did not appear in the witness’s first account.\textsuperscript{96} As the witness adds details, his story may change or completely contradict original assertions.\textsuperscript{97} Each new detail or differing characterization represents information the factfinder would not have otherwise received.\textsuperscript{98} In so doing, adversarial questioning exposes witness error, or at least the source of possible error.\textsuperscript{99}

The shortcomings of perception and memory are among the errors that remain hidden without cross-examination.\textsuperscript{100} Cross-examination reminds factfinders that the limitations of perception and memory affect the verisimilitude of all testimony.\textsuperscript{101} Without this reminder, factfinders may place undue weight on witness testimony.

Take eyewitness identifications as an example: empirical work has laid bare the fallibility and malleability of eyewitness identification and memory.\textsuperscript{102} This holds true for victims of crime as well; one study found that in 93\% of wrongful rape convictions surveyed “a victim testified as an eyewitness at trial.”\textsuperscript{103} But judges and jurors place great weight on eyewitness testimony, and assume that eyewitnesses are rarely mistaken.\textsuperscript{104} Cross-examination works to undermine this unwarranted assumption. Questions can point out environmental limitations that reduce the likelihood of a reliable identification, perceptive limitations of individual witnesses, and the impact of questioning techniques.

\textsuperscript{95} See VRIJ, supra note 66, at 150, 158.
\textsuperscript{97} Id.
\textsuperscript{98} See Lempert, supra note 6, at 347 (noting “the value of information about context or other matters that cross-examining the speaker might reveal”). But see Rachel Zajac & Harlene Hayne, I Don’t Think That’s What Really Happened: The Effect of Cross-Examination on the Accuracy of Children’s Reports, 9 J. EXPERIMENTAL PSYCHOL. APPLIED 187, 187 (2003) (“[I]t is equally possible that a witness may succumb to the effects of complex, misleading, or aggressive questioning even when he or she was originally telling the truth.”).
\textsuperscript{99} See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319 (2009) (“Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.”).
\textsuperscript{100} Burns, supra note 93, at 18; see also Eleanor Swift, A Foundation Fact Approach to Hearsay, 75 Calif. L. Rev. 1339, 1355–58 (1987).
\textsuperscript{103} Garrett, supra note 102, at 51.
\textsuperscript{104} Id. at 48, 54; Lisa Kern Griffin, Narrative, Truth, and Trial, 101 Geo. L.J. 281, 313 (2013) (“Despite mounting evidence linking eyewitness identification errors to wrongful convictions, a recent study revealed that jurors continue to disregard variables that detract from eyewitness accuracy.”).
individual witnesses, and possible contamination by actors such as investigators.\footnote{105 See \textit{Garrett}, supra note 102, at 127. But note also that some remain skeptical of the ability of cross-examination to bring many of these errors to the factfinders' attention. \textit{Garrett}, \textit{supra} note 102, at 260; Epstein, \textit{supra} note 102, at 729.}

Furthermore, perception and memory are not a witness's only limits; biases color testimony.\footnote{106 Of course, biases can also serve as a motive for fabrication.} Familial ties, financial interests, political ideology, personal history, and a litany of other concerns tint how a witness perceives and recalls events.\footnote{107 Blinka, \textit{supra} note 101, at 386–88.} Cross-examination remains one of the only opportunities to bring these biases to factfinders' attention\footnote{108 Spencer Martinez, \textit{Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency}, 47 \textit{CLEV. ST. L. REV.} 141, 160 (1999); see also \textit{Paul Butler, Let's Get Free: A Hip-Hop Theory of Justice} 14 (2010).} because witnesses rarely volunteer this information.\footnote{109 For instance, during direct examination, government informants often omit or lie about possible motivations to testify, only to "recall" during cross-examination that charges against them were dropped or reduced. \textit{See, e.g., Garrett, supra} note 102, at 128.} For example, false sexual-assault complaints sometimes arise from the desire to cover-up a consensual sexual encounter when others learn of it.\footnote{110 \textit{See} \textit{Olden v. Kentucky}, 488 U.S. 227, 231–33 (1988) (discussing potential bias on part of rape-complainant); Barbash, \textit{supra} note 20.} A complainant's desire to protect her reputation, another romantic relationship, or a relationship with disapproving parents can all serve as motivation. Deciding how a particular bias affects any witness is a decision for the factfinder, but cross-examination performs the necessary task of uncovering that possible bias in the first place.\footnote{111 \textit{United States v. Abel}, 469 U.S. 45, 50 (1984); \textit{Alex Wood, Girl Describes Sex Abuse, Denies Ulterior Motive}, \textit{JOURNAL INQUIRER}, June 9, 2016, http://www.journalinquirer.com/crime_and_courts/girl-describes-sex-abuse-denies-ulterior-motive/article_aeb7a1e-2e53-11e6-9c26-bf1cd30fe51a.html.}

Moreover, witness testimony is only one piece in the evidentiary puzzle; effective cross-examination contextualizes other trial evidence.\footnote{112 \textit{See, e.g., Christie Anderson, Cop Admits Palm Island Mistakes}, \textit{TOWNSVILLE BULLETIN}, Mar. 7, 2016, http://www.townsvillebulletin.com.au/news/cop-admits-palm-island-mistakes/news-story/42b8c4a2a0555e578d585900078b5849.} It explains how an opposing party obtained prior statements or evidence pertaining to the witness.\footnote{113 \textit{See}, e.g., \textit{Sklansky, supra} note 1, at 67.} The line between discovering and manufacturing evidence is a thin one. Investigators can unduly influence witnesses in a range of evidence-gathering activities from identifications to confessions.\footnote{114 \textit{See}, e.g., \textit{Margaret A. Berger, The Deconstitutionalization of the Confrontation Clause: A Proposal for A Prosecutorial Restraint Model}, 76 \textit{MINN. L. REV.} 557, 561 (1992).} This influence can transform a witness into a false
conduit for information that otherwise would not have been offered. \(^{115}\) Importantly, this contamination results not only from unethical investigators, but also investigators unaware of the truth-altering impact their actions may have on a witness. \(^{116}\) Probing questioning cannot eliminate outside influences on witnesses, but it does situate the evidence in the context from which it was elicited. \(^{117}\)

Through questioning, advocates can chip away at the reliability of an individual’s testimony and prompt factfinders to consider the limitations of testimony generally. Without this context, factfinders may reach erroneous conclusions based on partial information. \(^{118}\)

Moreover, witnesses do lie, and cross-examination provides one of the only opportunities to expose such deception. The cultural archetype of a successful cross-examiner consists of an advocate whose quick questioning conquers deception, leaving even the most cunning witness with the choice of admitting his lies or giving obviously inconsistent testimony. The iconic performances of Tom Cruise or Joe Pesci come to mind. \(^{119}\) While many trials conclude without such Hollywood moments, the ability to draw out substantive inconsistencies between the witness’s testimony and other evidence may assist factfinders in uncovering witness deception. \(^{120}\) While not all inconsistencies arise from deceit, \(^{121}\) studies have reliably established a link between consistency in testimony and truth telling. \(^{122}\) And in general, deceitful witnesses have a harder time maintaining consistency under questioning that builds upon their previous answers. \(^{123}\)


\(^{116}\) One study of exonerees wrongfully convicted based on their false confessions found that detectives in 95% of the cases believed that they did not engage in the tactics that led to contaminated or coerced confessions. GARRETT, supra note 102, at 19–21.

\(^{117}\) Simon, supra note 53, at 182.

\(^{118}\) See GARRETT, supra note 102, at 166–67 (investigating the role ineffective cross-examination played in wrongful convictions).

\(^{119}\) A Few Good Men (Columbia Pictures 1992); My Cousin Vinny (Twentieth Century Fox Films 1992).

\(^{120}\) These inconsistencies can occur within testimony, between the current testimony and the witness’s prior statements, and between the current testimony and other evidence. See Griffin, supra note 6, at 64; see also Park, supra note 60, at 145–46 (explaining the commit-and-contradict approach of cross-examination).

\(^{121}\) Especially for victims of crime, trauma can lead to memory errors. See, e.g., Nancy Mehrkens Stellay, A Meta-Analytic Review of the Weapon Focus Effect, 16 J.L. & HUM. BEHAV. 413–22; see also Vrij, supra note 66, at 138–39.

\(^{122}\) DePaulo et al., supra note 67, at 92; Landström et al., supra note 82, at 916; Judy Zaparniuk et al., Assessing the Credibility of True and False Statements, 18 IST’L. J.L & PSYCHIATRY 343, 344, 350 (1995).

\(^{123}\) Sanchirico, supra note 81, at 335–36; Granhag, Vrij, & Verschuere, supra note 61, at 46; see also Vrij et al., supra note 75, at 164; Zajac et al., supra note 50, at 199.
This occurs because remembering a fabrication and building on it imposes significant cognitive strain or “cognitive load.”\textsuperscript{124} One easy way to understand the concept is to attempt a multiplication problem mentally, for example 17 x 24.\textsuperscript{125} Performing this task is “mental work: deliberate, effortful, and orderly.”\textsuperscript{126} Remembering the formula for double-digit multiplication inflicts the initial cognitive strain.\textsuperscript{127} Subsequently, computation adds to that cognitive load; you must multiply the numbers one-by-one, at the same time remembering the results from the last multiplication.\textsuperscript{128} Do you have the answer? If you are like most law-review readers, this task was not easy. “You felt the burden of holding much material in memory, as you needed to keep track of where you were and of where you were going, while holding on to the intermediate result.”\textsuperscript{129}

The questioning format of cross-examination tests truthfulness by pushing a witness to the limits of her cognitive-load capabilities. At the outset, lying is usually more cognitively taxing than truth telling for a number of reasons:\textsuperscript{130} fabricating a lie requires more cognitive resources than telling the truth; a liar monitors his demeanor and interviewers’ demeanor more carefully to gauge his believability; and lying necessitates a variety of other mental actions that truth-telling does not.\textsuperscript{131} All these mental activities take a serious toll before unanticipated questions and follow-up questions increase a witness’s cognitive stress.

For liars already beginning with significant demands on their cognitive capacities, answering unanticipated questions is like performing long multiplication mentally. The fabricated narrative is the formula. An unanticipated question during cross-examination forces a deceptive witness to generate an answer that fits within that formula.\textsuperscript{132} Each question presents a new multiplication problem imposing its own cognitive de-

\textsuperscript{124} Vrij, supra note 66, at 223; Hartwig et al., supra note 75, at 471; Sporer & Schwandt, supra note 68, at 426; see also Aldert Vrij et al., Outsmarting the Liars: The Benefit of Asking Unanticipated Questions, 33 J.L. & Hum. Behav. 159, 160 (2009) (noting that increasing cognitive loads “increase[s] the difference between liars and truth tellers”).

\textsuperscript{125} Daniel Kahneman, Thinking Fast and Slow 20 (2011).

\textsuperscript{126} Id.

\textsuperscript{127} See id.

\textsuperscript{128} See id.

\textsuperscript{129} Id.

\textsuperscript{130} Vrij, supra note 66, at 26; see also Aldert Vrij et al., Increasing Cognitive Load to Facilitate Lie Detection: The Benefit of Recalling an Event in Reverse Order, 32 J.L. & Hum. Behav. 253, 254 (2008) (surveying then existing studies).

\textsuperscript{131} Granhag, Vrij, & Verschuere, supra note 61, at 205–07.

\textsuperscript{132} Chris William Sanchirico, “What Makes the Engine Go?” Cognitive Limitations and Cross-Examination, 14 Widener L. Rev. 507, 516 (2009); see also Vrij, supra note 66, at 41–42, 223 (noting strain imposed by a lie’s content-complexity and how probing can reveal holes).
mands, only exacerbated further by the need to build off previous answers.\footnote{See Granhag, Vrij, & Verschuer, supra note 61, at 213–14; see also Butler, supra note 108, at 13 (detailing how a police officer lying during cross-examination could not answer the cross-examiner’s questions).}

The opportunity for inconsistency grows at an alarming rate as cross-examination progresses. If a witness’s fabricated narrative does not easily generate an answer to a question, then he must spontaneously add new details, and in turn commit those details to memory.\footnote{Sanchirico, supra note 132, at 516; Aldert Vrij et al., Detecting Deception By Manipulating Cognitive Load, 10 TRENDS IN COGNIT. SCI. 141, 141 (2006).} Moreover, the fabrication does not occur in a vacuum; the witness “must also be calling to mind the set of external facts provable by the other side”\footnote{Granhag, Vrij, & Verschuer, supra note 61, at 206; Vrij, supra note 66, at 223; Sanchirico, supra note 132, at 516; Sporer & Schwandt, supra note 68, at 426.} as to both the original fabrication and the additions.\footnote{Sanchirico, supra note 81, at 336.} Then the questioner formulates follow-up questions based on the witness’s answer. As a deceptive witness attempts to answer these unanticipated questions, he must account for recently added details.\footnote{Sanchirico, supra note 81, at 341; Gary L. J. Lancaster et al., Sorting the Liars From the Truth Tellers: The Benefits of Asking Unanticipated Questions on Lie Detection, 27 APPL. COGNIT. PSYCHOL. 107, 107 (2013); Sanchirico, supra note 132, at 521; see also Vrij, supra note 66, at 26 (explaining cognitive strain caused by content-complexity).} Each new question compounds the demands on the witness’s cognitive faculties.\footnote{Sanchirico, supra note 81, at 335.} The deceptive witness must simultaneously fit each new fabrication within her larger framework, evaluate the implications of the new fabrications for future questions, and maintain consistency across questions.\footnote{Granhag, Vrij, & Verschuer, supra note 61, at 206; Sanchirico, supra note 132, at 516; Hartwig et al., supra note 75, at 481–82.} These complications exponentially intensify cognitive strain, leading to a greater chance of confusion and inconsistency.\footnote{Simon, supra note 53, at 175; Sanchirico, supra note 81, at 322; see also Vrij et al., supra note 124, at 160 (noting similar implications in interrogations).} Long multiplication is a poor descriptor; mental multivariate calculus is the more apt metaphor. In contrast, truthful witnesses need only pull answers from memory.\footnote{Sanchirico, supra note 81, at 336; Lancaster et al., supra note 138, at 108; see also Hartwig et al., supra note 75, at 480 (finding that liars gave more inconsistent statements than truth-tellers when evidence was disclosed after initial interrogation).} “[T]his is not to say that spontaneous memory retrieval is always easy[,] only that it is a good deal easier than the set of tasks facing the insincere witness in the same position.”\footnote{Sanchirico, supra note 81, at 336; Sporer & Schwandt, supra note 68, at 426.}

Still, other reasons besides struggling to maintain a lie may explain why a witness might give inconsistent answers, and relying on the cognitive-load theory alone will results in imperfect outcomes. In other
words, the same engine that uncovers truth in one context can conceal it in another.  

Many advocates use cross-examination more to trap witnesses than to add information. This strategy may be beneficial when witnesses admit truthful information, but the types of questions “commonly used in cross-examination include question formats that can limit the completeness and accuracy of the answer; including leading questions, use of negative, closed questions, either/or questions, yes/no questions and multiple questions.” This can limit relevant information, and frame the information factfinders do receive in incomplete or inaccurate ways.

Similarly, witness suggestibility offers cross-examiners an enticing opportunity to distort the truth. Experimental studies suggest that cross-examination can mislead witnesses and cause them to change accurate answers to inaccurate answers. Admittedly, there are more studies documenting how cross-examination negatively affects the accuracy of child-victims’ testimony, but the literature suggesting similar results for adult victims continues to grow. A number of factors contribute to the likelihood that a witness will revise what was at first accurate testimony.

First, time and timidity are a cross-examiner’s best friends. Cross-examiners harness the uncertainty generated by the significant time lapse between questioned events and the trial to pressure witnesses into changing their answers, and people become more susceptible to suggestibili-

143 See Taslitz, supra note 49, at 128 (“There is ample empirical proof of the reliability-distorting effects of traditional rape victim cross-examination.”).
146 Valentine & Mara, supra note 145, at 555; see also Cheryl A. Terrance et al., The Role of Expectation and Memory-retrieval Techniques in the Construction of Beliefs About Past Events, 14 APPL. COGNIT. PSYCHOL. 361, 374 (2000) (“Researchers have found that repeated probing increased the likelihood that vivid and detailed memories for events which may not have happened are reported.”).
148 See, e.g., Valentine & Mara, supra note 145, at 554.
149 See Zajac & Hayne, supra note 98, at 193 (“There is ample empirical proof of the reliability-distorting effects of traditional rape victim cross-examination.”).
ity “when under pressure or in an intimidating environment.” Notably, these influences disproportionately affect vulnerable witnesses, such as victims subjected to sexual assault or abuse, witnesses with learning difficulties, and children. Put simply, “honest witnesses can be misled by cross-examination.”

Moreover, the type of questioning employed on cross-examination takes advantage of an individual’s proclivities towards suggestibility. New information in leading questions can both change witnesses’ recollections of an event and cause them to recall things that never happened. Numerous studies have documented this occurrence—often referred to as the “misinformation effect.” Even small differences in question wording can lead to this phenomenon. For example, one early study found that participants were more likely to erroneously believe they saw a nonexistent item in a video if exposed to a question that included a false presupposition or reference to that nonexistent item. Suggestive or constrictive question formatting similarly can cause inaccurate answers. Generally, “as questions become more and more specific responses become less accurate.” Furthermore, when cross-

152 Lauren R. Shapiro et al., Eyewitness Memory for a Simulated Misdemeanor Crime: The Role of Age and Temperament in Suggestibility, 19 APPL. COGNIT. PSYCHOL. 267, 284–85 (2005); Cossins, supra note 148, at 105; Taslitz, supra note 130.
153 Valentine & Mara, supra note 145, at 554, 559; Zajac & Hayne, supra note 98, at 105; Shapiro et al., supra note 152, at 286–87; Taslitz, supra note 49, at 126.
154 Valentine & Mara, supra note 145, at 559; see also Terrance et al., supra note 146, at 364.
155 Studies have shown that these accuracy-reducing questions occur much more on cross-examination than they do on direct. See, e.g., Kebbell et al., supra note 145, at 55.
156 BADDELEY supra note 104, at 204–09; LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 68-70 (1994); Kebbell et al., supra note 145, at 50.
159 Id. at 566-69 (asking “how fast was the white sports car going when it passed the barn while traveling along the country road?”, as opposed to a variant that contained no reference to the nonexistent barn) (emphasis added).
160 Kebbell et al., supra note 145, at 50.
161 Id.
examiners ask witnesses to accede to complex characterizations, uncertain witnesses are more likely to comply than they are to seek clarification.\textsuperscript{162} This is true regardless of whether they understand what the cross-examiner posited.\textsuperscript{163} The same principle applies to witnesses who fail to comprehend a question’s sentence structure or vocabulary: They are more likely to agree with the cross-examiner, or attempt some kind of answer, instead of asking the lawyer to clarify.\textsuperscript{164} “Answers to yes/no questions may be particularly inaccurate because of acquiescence . . . the tendency of an individual to answer questions with a ‘yes’ irrespective of the content.”\textsuperscript{165} In short, when witnesses fail to comprehend questions, they are more likely to give inaccurate answers.

Problems in specific questioning formats are symptomatic of a larger problem with cross-examination: the danger that the cross-examiner will develop only a carefully crafted narrative at the expense of broader context and accuracy. Through one formulation or another, all lawyers know the familiar maxim: never ask a question you do not know already know the answer to.\textsuperscript{166} In these situations, advocates may not pursue information or ask clarifying questions.\textsuperscript{167} Curating questions to constrain the witness’s possible responses functions as a corollary to the rule against unknowns, and when a question causes truncated testimony, witnesses have very little opportunity to explain.\textsuperscript{168} As a result, underdeveloped or inaccurate testimony can replace truth.\textsuperscript{169} These are not unethical tactics; on the contrary, it is the approach taught in trial-advocacy textbooks:

\textit{Don’t let the witness explain.} Open-ended questions are disastrous on cross-examination. . . .

\textit{Keep control over the witness.} Control comes in large part by asking precisely phrased leading questions that never give the witness an opening to hurt you.\textsuperscript{170}

\begin{footnotesize}
\begin{enumerate}
\item Zajac & Cannan, \textit{supra} note 151, at S49; see also Douglass, \textit{supra} note 96, at 241.
\item Zajac & Cannan, \textit{supra} note 151, at S49; Ellison, \textit{supra} note 49, at 356.
\item Ellison, \textit{supra} note 49, at 354–61.
\item Kebbell et al., \textit{supra} note 145, at 50 (citation omitted).
\item Park, \textit{supra} note 60, at 142–43; Douglass, \textit{supra} note 96, at 254.
\item Kebbell et al., \textit{supra} note 145, at 54; Wendy Larcombe, \textit{The “Ideal” Victim V Successful Rape Complainants: Not What You Might Expect}, 10 \textit{FEMINIST LEGAL STUD.} 131, 142 (2002).
\item Ellison, \textit{supra} note 49, at 356–60; see also Epstein, \textit{supra} note 4, at 437.
\item THOMAS A. MAUET, \textit{FUNDAMENTALS OF TRIAL TECHNIQUES} 216 (2d ed. 1988).
\end{enumerate}
\end{footnotesize}
The “dialogue” that occurs between witness and cross-examiner can, in some cases, morph into an elaborately disguised speech. As the witness confirms or denies each proposition, the cross-examiner continues to extract only what he wants, seizing upon any ambiguity to thread the responses back into his patchwork tale. If an answer proves unfavorable or unworkable, counsel still has many options: attack witness credibility, restyle answers immediately in follow-up questions, or reformulate the answer later as a characterization of former testimony.

Regardless of what the witness says, objections by opposing counsel, or limiting instructions from a judge, the thrust of questions sticks with factfinders. Most lay factfinders assume cross-examiners have a strong evidentiary basis for their questions, and skillful cross-examiners take advantage of this reality. Take, for example, an inquiry about whether intoxication limited a witness’s perceptive abilities. “Did you drink any alcohol that day?” may not stand out in the minds of jurors, but “Didn’t you have five shots of tequila at Neighborhood Pub just one hour prior to the incident?” conveys information apart from the witness’s response. In longer trials or hearings, factfinders struggle to separate out “information communicated within the questions from those contained within the answers.” Thus, leading, unsubstantiated, or otherwise impermissible questions implant erroneous or poorly evidenced claims into the factfinders’ minds, which they later recall as truth.

3. Implications for the College Context

At first glance, it may seem impossible to differentiate between a suggestible witness and a deceptive one. Has cognitive strain overcome a deceptive witness or has the cross-examiner preyed on a witness’s suggestibility?

Factfinders’ inability to later distinguish testimony from questions may derive in part from factfinders’ preoccupation with demeanor evidence. During cross-examination, the adversarial system directs factfinders to dial in with laser-like focus on a witness’s reaction as she

171 See Griffin, supra note 6, at 69 (“The witness, after all, is often just a prop during cross examination, with the examining lawyer providing most of the content.”).
172 Douglass, supra note 96, at 255; Taslitz, supra note 49, at 87–88; Zajac et al., supra note 50, at 19.
174 Griffin, supra note 104, at 322–23 (noting the ineffectiveness of jury instructions).
176 Id.
178 See supra Part II.A.1.
responds. As factfinders futilely attempt to suss out witness credibility through unreliable demeanor evidence, factfinders lose the ability to analyze the cross-examiner’s tricks and illusions. The possibility that abusive or intimidating questions will evoke a witness response that factfinders equivocate with a lack of credibility further compounds these errors.

Depending on the format, shielding or questioning by an intermediary could obviate many of the problems caused by the current presentation of demeanor evidence. By preventing factfinders from focusing on unreliable visual demeanor cues, shielding refocuses the factfinders on the evidence being presented, and its internal logic consistency. In addition, technological screening, or presenting intermediary questioning in video format, may strengthen the reliability of paraverbal-demeanor evidence—the behavioral cues that might be accurately associated with deception. Sophisticated recording equipment can register small changes in the witness’s pitch or tone that the naked human ear normally cannot perceive. Thus, depending on format, shielding could dampen inclinations to depend on misleading demeanor evidence while simultaneously achieving the heretofore-elusive goal of enabling reliable demeanor judgments based on paraverbal cues.

Opponents of shielding balk at the idea of removing face-to-face interaction between the victim and the accused. Many believe that witnesses will have a harder time lying if they come face-to-face with the accused, or have to look into the eyes of a jury or judge.

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179 Levenson, supra note 87, at 574–76; see also supra Part II.A.1.
180 Ellison, supra note 49, at 361.
181 Id.
182 Blumenthal, supra note 68, at 1202; Gwyneth Doherty-Sneddon & Sandra McAuley, Influence of Video-Mediation on Adult-Child Interviews: Implication for the Use of Live Link with Child Witnesses, 14 APPL. COGNIT. PSYCHOL. 379, 380–81, 391 (2000); see also Landström et al., supra note 82, at 928.
183 See supra Part II.A.1; Lyn M. Van Swol & Michael T. Braun, Channel Choice, Justification of Deception, and Detection, 64 J. COMM. 1139, 1140, 1154 (2014); Blumenthal, supra note 68, at 1202.
184 See supra Part II.A.1.
185 See id.; Sporer & Schwandt, supra note 68, at 443. The ability to play video in slow motion may also lead to observers being able to detect deception more reliably through visual cues. See Granhag, Vrij & Verschueren, supra note 61, at 317.
187 Maryland v. Craig, 497 U.S. 836, 846 (1990); Coy v. Iowa, 487 U.S. 1012, 1019 (1988); Marc C. McAllister, The Disguised Witness and Crawford’s Uneasy Tension with Craig: Bringing Uniformity to the Supreme Court’s Confrontation Jurisprudence, 58 DRAKE L. REV. 481, 526–27 (2010); Todd E. Pettys, Counsel and Confrontation, 94 MINN. L. REV. 201, 221–22 (2009). This is despite evidence that some of earliest proponents of cross-examination, such as Wigmore, viewed this assumption as tenuous. Sklansky, supra note 4, at 1645.
refer to this theory as the “Social Distance Hypothesis”—i.e., that “people are uncomfortable about engaging in deception and prefer more social distance from the receiver when they deceive.”188 For obvious reasons, this assumption evades empirical research.189 Nonetheless, shielding witnesses from the panel still may improve accuracy by preventing factfinders from focusing on unreliable visual demeanor cues and refocusing their attention on the evidence being presented, the way questions are being asked, and the testimony’s internal logic consistency.190 For example, studies comparing live-video or videotaped testimony to traditional live-testimony formats show no significant differences across mediums in observers’ ability to detect deception.191

This procedural innovation aside, any move towards or away from cross-examination remains an imprecise balancing act. Many practitioners assume that redirect cures misleading cross, just as careful cross-examination corrects a misleading direct. If cross-examination can uncover or undermine truth, then good advocacy and control of unethical behavior may be the answer. However, another option remains: attacking what causes misinformation.

Panel-submission-only questioning succeeds in some respects by removing the opportunity for the cross-examiner to exploit witness suggestibility or restrict witness testimony.192 Because the panel controls the form and delivery of the questions, each response can be fully contextualized. But the panel-submission-only procedure insulates witnesses from unanticipated questions and follow-up questions.193 Submitting questions before the hearing cannot replicate cross-examination; even the most skilled advocate cannot chart sub-questions for each question, and sub-questions for those sub-questions, before the witness

188 Van Swol & Braun, supra note 183, at 1140.
189 Researchers in some studies have found that when people have a choice they prefer to lie through other mediums such as text-chat or telephone as opposed to face-to-face lies. See, e.g., id. at 1152; Bella M. DePaulo et al., Lying in Everyday Life, 70 J. PERSONALITY & SOC. PSYCHOL. 979, 980, 985, 992 (1996). However, these results are not uniform and others have found that people prefer face-to-face deception to other modes of deception. Van Swol & Braun, supra note 183, at 1154; Jeffery T. Hancock et al., Deception and Design: The Impact of Communication Technology on Lying Behavior, 6 CHI 2004 130, 133–34 (2004) (finding more lies in face-to-face interaction than in email).
190 Blumenthal, supra note 68, at 1202; Doherty-Sneddon & McAuley, supra note 182, at 391; Van Swol & Braun, supra note 183, at 1140, 1154; see also Landström et al., supra note 82, at 928.
191 See, e.g., Landström et al., supra note 66, at 344; Lederer, supra note 48, at 21; Craig, 497 U.S. at 850; see also Landström et al., supra note 82, at 927 (noting that both live and video observers were poor in terms of assessing veracity”); Kenniston, supra note 48, at 119.
192 Particularly concerning effects in the context of sexual-assault victims.
193 See Sanchirico, supra note 132, at 521–23 (explaining how live questioning differs); Park, supra note 60; at 149 (explaining how a neutral questioner cannot achieve the same end of drawing out inconsistent statements from the witness as cross-examination does).
begins to answer.\textsuperscript{194} This monumental task becomes nearly impossible when one considers the accused’s limited investigatory power prior to the hearing.\textsuperscript{195} Colleges intentionally design the investigation and adjudication process to separate the accused from the complainant.\textsuperscript{196} Because of this and related restrictions, the accused may not know the majority of questions to ask until the complainant and other witnesses begin testifying; the hearing may be the only time the accused has to investigate, probe, and test the credibility of witnesses.\textsuperscript{197}

Questioning by intermediaries provides some—though of course not all—of cross-examination’s truth-seeking benefits.\textsuperscript{198} Funneling questions through an intermediary hampers the cognitive-load technique by interrupting cross-examination’s taxing tempo. Inconsistencies arise when deceptive witnesses must quickly process questions and perform the attendant tasks required to maintain a coherent narrative.\textsuperscript{199} The intermediary process slows down questioning because of the delay between when the accused suggests the question, and when the intermediary formulates the question;\textsuperscript{200} cognitive strain decreases as the time between questions lengthens.\textsuperscript{201} In some cases, the intervening time could be enough for witnesses to conform their lies to questioning.

But through the intermediary process, the accused can still ask unanticipated follow-up questions that expose witness deception or error, and, as intermediaries gain knowledge and skill from repeat practice, the gap between question formulation and presentation will narrow. Likewise, control of question pacing and delivery by the intermediary may enhance the hearing’s accuracy in other ways.\textsuperscript{202} Unlike an advocate with an agenda, intermediaries ensure that the witness answers the question in its full context.\textsuperscript{203} This weakens the ability of the cross-examiner to prey on suggestibility through narrowly framed, or confusingly worded questioning.\textsuperscript{204} Moreover, the accused cannot covertly expose the factfinder to impermissible suggestions and unfairly prejudicial information. Because the intermediary is censoring questions—instead of the

\textsuperscript{194} See Sanchirico, supra note 132, at 521–23 (describing how live testimony is the only way to achieve the benefits from closed-loop questioning); see also Sanchirico, supra note 81, at 336; Terence F. McCarthy, McCarthy On Cross-Examination 73–76 (2007).
\textsuperscript{195} See Triplet, supra note 18, at 523–25 (noting the discovery limits placed on the accused).
\textsuperscript{196} Baker, supra note 15, at 272.
\textsuperscript{197} Triplet, supra note 18, at 521–22.
\textsuperscript{198} Taslitz, supra note 49, at 131; Kenniston, supra note 48, at 111.
\textsuperscript{199} See supra Part II.A.2.
\textsuperscript{201} See supra Part II.A.2; Ellison, supra note 49, at 364.
\textsuperscript{202} Taslitz, supra note 49, at 129; Ellison, supra note 49, at 364–65.
\textsuperscript{203} Ellison, supra note 49, at 364–65.
\textsuperscript{204} See id.
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factfinder ruling on objections—there would be less opportunity for the factfinder to wrongly remember impermissible questions as evidence. However, questioning by an intermediary takes more time and results in more questioning than panel-submission-only questioning. Opponents of introducing any form of cross-examination into the college context worry that this additional questioning adds more opportunities for factfinders to unfairly discount the victim’s account; there is always the risk that an honest witness’s failure to recall inconsequential details, or her inability to maintain complete consistency, will unfairly prejudice factfinders against her.205 While empirical evidence can get reformers closer to examining the right factors, it cannot precisely weigh how much truth a procedure produces in each individual hearing.

B. Procedural Fairness

A separate set of rationales for cross-examination sounds in a principle still more difficult to measure: fairness. When the reality of unknown and indeterminate values confronts reformers, advocates of any procedure often resort to arguments about fairness.206 Like the assumption that questioning through cross-examination enhances accuracy, cross-examination has also been thought to improve a hearing’s fairness by respecting the accused’s procedural rights.207 However, because criminal prosecutions juxtapose the accused to the State, how “fair” a procedure is to the victim was an overlooked consideration for much of the American adversarial system’s history. While changes to rules of evidence have recently began responding to these concerns,208 advocates of the college adjudication system openly admit that the movement represents a direct reaction to what its proponents saw as a failure to properly consider the fairness of requiring a victim to undergo a criminal trial with its attendant procedures—foremost among their concerns being a grueling cross-examination. Unfortunately, attempts to reify procedural fairness and balance the rights of the accused against accuser result in an even more frustrating lack of concrete answers. Yet, reformers can have a more productive conversation about weighing these values against one another without resorting to all-or-nothing rhetoric. In an attempt to frame that discussion, this section begins the arduous task of drilling down to what advocates and reformers mean when they speak of fairness.

207 See id.
208 See id. at 1538 n.295.
1. Fairness to the Accused

Beyond determining the “truth” of what happened, the American judicial system places a premium on providing a “fair” process. Disputes will always be unfair in the sense that resource asymmetries between the parties exist. Someone accused of sexual assault may never have the investigatory resources of a government prosecutor or college. But increasing procedural rights and options has been the American judicial system’s preferred counteraction. At the most basic level, our judicial system considers a process “more fair” when each side has the same procedural opportunities. Allowing both parties the same opportunity to develop evidence and question witnesses through cross-examination moves a trial or hearing closer to that ideal of procedural fairness.

The triumph of this ideal of procedural fairness in the American legal system has followed largely from an aversion to the inquisitorial model of adjudication, and a belief that moving adjudications away from an inquisitorial format achieves fairness by inching the parties closer to procedural parity. And while there may not actually be a pure inquisitorial or adversarial model in existence, our judicial system and constitutional law jurisprudence have selected cross-examination as the best legal innovation for approximating perfect procedural parity. The ability of the accused to participate in the proceedings against him prevents the accused from becoming merely the subject of a trial where inquisitors determine his fate. Similarly, endeavoring for procedural parity between adversaries increases institutional legitimacy in the eyes of the accused and society, which some maintain is a value in and of itself.

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210 See Barbara Allen Babcock, Introduction: Taking the Stand, 35 WM. & MARY L. REV. 1, 1 (1993) (“[W]ith our deep cultural distaste for mismatches, we seek to balance the odds at trial by shoring up the accused, giving him independence and autonomy, rights and options.”).

211 See Robert P. Mosteller, The Sixth Amendment Rights to Fairness: The Touchstones of Effectiveness and Pragmatism, 45 T EX. T ECH L. R EV. 1, 28 (2012) (“[Fairness means] fair procedure to all as a value separate from the impact on accuracy (or innocence).”); Sklansky, supra note 52, at 105, 109; see also Toni M. Massaro, The Dignity Value of Face-to-Face Confrontations, 40 U. FLA. L. REV. 863, 902 (1988) (“[A fair] procedure should allow those affected to participate meaningfully, personally, and on equal footing with their adversary.”).

212 See Lempert, supra note 6, at 353 (“[T]ruth is supposed to be a product of fair process. Rules should be fairly read and applied neutrally. Language should not change in meaning, depending on which side is helped and whether that side’s case is more likely to be true.”).

213 See, e.g., Crawford v. Washington, 541 U.S. 36, 50 (2004); Sklansky, supra note 4, at 1644–45.

214 See Crawford, 541 U.S. at 50; Sklansky, supra note 4, at 1644–45.

These assumptions have cemented cross-examination into the American ideal of procedural fairness. But again, the primacy of this ideal and cross-examination’s assumed ability to approximate it are assumptions rarely subjected to critical examination. A useful inquiry—both with regard to sexual-assault adjudications and in the broader trial-system context—is to examine what elements of the accused’s participation actually make a process fairer.

The aforementioned struggle of obtaining truly “accurate” outcomes forms part of the reason for valuing the accused’s participation. Cross-examination accepts the reality of trial, a process more akin to storytelling than science. “Truth” is an elusive concept. Trials cannot re-create the past, but instead must settle on an imperfect version of it.216 “Many social scientists who study juries have concluded that they interpret information not by considering and weighing each relevant piece of evidence in turn, but by constructing competing narratives and then deciding which story is more persuasive.”217 Thus, “the trial is won by the most elegant story, the one that accounts for the facts in the most meaningful way, the one with the most explanatory power, the one that speaks best to the jury in the most familiar terms.”218

As the first mover, the prosecution or plaintiff has a significant advantage.219 “Experiments show that the first piece of evidence or argument presented to a jury wields the greatest influence on both its interpretation of evidence and which story the jury deems most believable.”220 In particular, jurors remember this first narrative better, downplay its inconsistencies, and funnel all future information through its construct.221 With such asymmetries, a fair trial requires that the accused play some role in shaping the initial narrative. To some degree, this Article’s discussion of accuracy has already noted the procedural fairness value in cross-examination: its ability to expose errors and contextualize evidence.222

But the act of cross-examination itself adds to a trial or hearing’s procedural fairness in yet another way because it constitutes a part-

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216 See Griffin, supra note 104, at 293 (“[R]esearch has yielded the insight that jurors do not, by and large, estimate probabilities when determining the events that transpired in a case; rather, they draw conclusions based on whether information assembles into plausible narratives.”).
217 Id. at 285.
218 STEVEN LUBET, THE IMPOSSIBILITY OF THE WHOLE TRUTH 186 (2002); Griffin, supra note 104, at 293–94.
221 Podlas, supra note 219, at 484–85 (footnotes omitted).
222 See supra Part II.A.2.
ticipatory right. Its performative nature injects the accused and his narrative into the proceeding, according him “a degree of dignity, allowing him some agency in the adjudication process and treating his input and his objections as worthy of respect.” This prevents not only inaccurate results, but also results reached without consideration of a dispute’s human element. Without cross-examination, factfinders evaluate evidence created and tailored outside the trial, by unquestioned investigators and well-prepped witnesses. By juxtaposing the initial narrative with the accused’s, cross-examination reminds factfinders “not only that there are two stories to tell about most events, but also that there is always a discontinuity between any event and even the best telling of it. Cross-examination helps put the jury on the road to a truth beyond storytelling.” When the accused confronts his accusers, factfinders must confront the fact that their decision will affect both the humanity of the victim and the accused. The procedural benefits of humanizing the accused are difficult to quantify, but they constitute an important additional consideration when trying to achieve a fair process. The value of these benefits derives from cross-examination’s ability to transform the accused from subject to active participant, commanding consideration—if not vindication—for his narrative.

2. Fairness to the Victim

But his narrative is not the only narrative that deserves consideration. Although cross-examination confers procedural benefits on the accused, those advantages come with costs. For instance, the cross-examiner may focus on conveying his narrative to the detriment of a more complete and accurate one. Relatedly, probing questioning is not particularly kind to the witness. At its worst, some cross-examina-

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223 Burns, supra note 93, at 122 (discussing the benefits of oral and dramatic presentation).
224 Burns, supra note 1, at 67; Griffin, supra note 6, at 65; Richard D. Friedman, The Confrontation Clause Re-Rooted and Transformed, CATO SUP. CT. REV. 439, 442 (2004).
225 See LaMagna, supra note 209, at 1503–05 (discussing the procedural value of live testimony).
226 Burns, supra note 93, at 17.
227 Burns, supra note 93, at 6 (noting that “the natural order of the trial dehumanizes”).
228 Of course, this is a criticism that could be leveled against the adversary system as a whole. Opening statements, direct examinations, closing statements, and so on, all focus on a specific party’s narrative. But prevalence is not a valid defense to criticism. If narrative-myopia frustrates the accuracy and fairness goals of a judicial system, reformers should consider changes to individual procedures. At the very least, reformers should recognize that the status quo perpetuates a declared preference for both parties to have an equal opportunity at obscuring the truth over other values; i.e., having all stages affected by this flaw is preferable to having one stage where the strategic advantage is mitigated in favor of accuracy or fairness goals.
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tions have served no purpose other than to intimidate or abuse. And abusive questioning causes harm apart from polluting the accuracy of individual trials. These questions harm testifying witness. The most able judge cannot protect a witness from all the negative aspects of a grueling cross-examination, and the traumatic experience of cross-examination falls hardest on testifying victims. This negative aspect of cross-examination comes with a diverse range of consequences not only for individual victims, but also for society as a whole. If abusive questioning occurs on a systemic basis—as many suggest it does in sexual-assault and rape cases—groups of people refuse to cooperate with the judicial system. Without their participation and cooperation, the judicial system cannot punish and deter wrongdoing, and it will have a harder time developing reform to encourage participation and cooperation. But like assumptions about cross-examination’s benefits, these conclusions require a little more unpacking.

To begin, some questions do not advance a truth-seeking function at all, but instead serve only to embarrass or abuse.230 Testifying often entails a deep dive into private aspects of a witness’s life.231 Evidentiary rules may limit some questions,232 but this does not stop many cross-examiners from asking questions about impermissible topics.233 Likewise, creative cross-examiners can devise subtle subterfuge to elicit the same information or make the same insinuations through permissible questioning.234 In most trials and hearings, non-party witnesses are not represented by counsel and thus are powerless against repeated attacks from the cross-examiner if the non-questioning advocate does not object.235 Even if an advocate objects, impermissible and unnecessary questions still negatively affect the witness.

Many of these harms fall disproportionately hardest on those whom the judicial system aims to protect—victims.236 In most trials, adjudicatory systems are supposed to determine whether a wrong occurred, society cannot really sort the victims from wrongful or mistaken accusers until after the fact. But just because society cannot conclusively categorize whether there was a true “victim” in an individual case does not mean that observations about the aggregate harm to victims cannot be made. The

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231 Lininger, supra note 5, at 1354–55.
233 Taslitz, supra note 49, at 84–85.
235 See, e.g., Lininger, supra note 5, at 1358, 1362; Taslitz, supra note 49, at 93–97.
236 It is pertinent to pause and distinguish victims and complainants. Protecting the psyche of a wrongful or mistaken accuser does not outweigh the costs of a wrongful accusation. A wrongly accused defendant obviously suffers considerable trauma from arrest through trial. If convicted, society punishes a wrongly accused defendant for a crime he did not commit. And collateral consequences such as loss of reputation follow even from an acquittal. If adjudicatory systems are supposed to determine whether a wrong occurred, society cannot really sort the victims from wrongful or mistaken accusers until after the fact. But just because society cannot conclusively categorize whether there was a true “victim” in an individual case does not mean that observations about the aggregate harm to victims cannot be made. The
tors have difficulty differentiating abusive and repetitive questioning from questioning relevant to fact-finding and credibility. Take a cross-examination of a rape victim, revolving around questions of consent:

The lawyer must grill the victim about the details of her behavior, attitudes and attire on the night of the attack—feigning regret, perhaps, that circumstances compel the lawyer to be so graphic. The lawyer must characterize every detail vividly from the most salacious point of view attainable and present it all with maximum innuendo. Had she been drinking? Had she told the defendant some dirty jokes before they left the bar? Was she wearing a sexy tank top? Had she brushed her hand against the defendant’s, or allowed him to kiss her? Did she resist when he lifted her skirt? Did she respond while the defendant was inside her? To make it seem plausible that the victim consented and then turned around and charged rape, the lawyer must play to the jurors’ deeply rooted cultural fantasies about feminine sexual voracity and vengefulness. All the while, without seeming like a bully, the advocate must humiliate and browbeat the prosecutrix, knowing that if she blows up she will seem less sympathetic, while if she pulls inside herself emotionally she loses credibility as a victim.237

It is understandable why many see cross-examination as a vehicle to “try the victim,”238 when adjudicators fail to limit questioning like this. Harm to the victim follows naturally from this type of questioning, especially in abuse, sexual-assault, and rape cases. Unlimited and probing cross-examination causes mental and physical distress during the trial, and can exacerbate the psychological harm a victim suffers after the discussion does not take an absolute position on what risks our system should preference over others, or what procedures should be used to effectuate those preferences. Rather, this section only chronicles the observable and empirical costs current cross-examination procedures impose on victims.


239 For example, some witnesses report feeling “physically nauseated” when undergoing cross-examination. Amanda Konradi, Too Little, Too Late: Prosecutors’ Pre-court Preparation of Rape Survivors, 22 L. & SOC. INQUIRY 1, 41 (1997).
Even before trial, victims of abuse, sexual assault, or rape are already so traumatized by the crime that they may well suffer lasting psychological problems. At trial, the victim must undergo that trauma again when she recounts her experience in court. In an attempt to exculpate the accused, many advocates tap into factfinders’ preexisting beliefs and stereotypes about what “real” assault, abuse, or rape looks like. “Did you fight or resist him?” “What did you say to him during sex?” “Why didn’t you go to the police right after?” “Did you continue your relationship with him after the event?” And so on. These narratives reinforce oppressive social norms and leave many victims feeling partially responsible for the harm done to them.

The desire to discredit witnesses intertwines these problems with cross-examination. Direct attacks on the witness’s credibility are not uncommon during the victim’s recounting:

“That is simply not true . . .”
“You are indulging in the realms of fantasy . . .”
“Utter fantasy is it not?”
“This is a lie . . .”

240 Golding et al., supra note 238, at 3; Zajac & Cannan, supra note 151, at S38; Fan, supra note 234, at 786–87; Ellison, supra note 49, at 360; Lininger, supra note 5, at 1355; Taslitz, supra note 49, at 111; Patricia Yancey Martin & R. Marlene Powell, Accounting for the “Second Assault”: Legal Organizations’ Framing of Rape Victims, 19 L. & SOC. INQUIRY 853, 856 (1994).


245 Fan, supra note 234, at 786–87; Taslitz, supra note 49, at 84–85.
“What you have told this jury is a complete pack of lies . . .”\textsuperscript{246}

If the accused is not punished, the victim experiences psychological harm resulting from fear, doubt, and regret that she endured a futile process.\textsuperscript{247} Even when a favorable outcome occurs, the trauma inflicted by the trial can contribute to lasting psychological injury.\textsuperscript{248}

Furthermore, abusive questioning impoverishes the entire judicial system. Witnesses who fear abusive cross-examination often entirely avoid judicial systems.\textsuperscript{249} Adjudications either do not begin or falter for lack of evidence. This immunizes individual instances of wrongdoing from justice.\textsuperscript{248} Likewise, without these cases, the system has no opportunity to deter specific wrongdoers and has fewer occasions to deter the community more generally.\textsuperscript{251}

Moreover, because “[l]egal processes not only reflect, but also create, familiar narratives,”\textsuperscript{252} diverse perspectives are key. Take the recent highly publicized case of Brock Turner, a former Stanford University athlete convicted of sexually assaulting an unconscious woman.\textsuperscript{253} Although prosecutions of college athletes for sexual assault occasionally make the news, the firestorm of media coverage surrounding this story seemed atypical. This one case from Santa Clara County, California sparked national debates about procedures in sexual-assault prosecutions, sentencing practices, and how colleges handle sexual-assault


\textsuperscript{247} See, e.g., Robinson, \textit{supra} note 241, at 174; Campbell, \textit{supra} note 244, at 703.

\textsuperscript{248} Researches cannot completely isolate the trial process from other influences on psychological well being, but most agree that the trial process has this detrimental effect. Golding et al., \textit{supra} note 238, at 3; Fan, \textit{supra} note 234, at 784–88; Nat’l Crime Victim Law Inst., \textit{supra} note 242, at 1–2 & n.15; Campbell, \textit{supra} note 244, at 704–05; Larcombe, \textit{supra} note 168, at 132 & n.2; see also Martin & Powell, \textit{supra} note 240, at 856 (“Some research indicates, furthermore, that prosecution per se harms victims.”).

\textsuperscript{249} See Lininger, \textit{supra} note 5, at 1357 (“As a general matter, victims’ willingness to report crimes varies inversely with their fear of embarrassment during cross-examination.”); Anderson, \textit{supra} note 243, at 936–37 (citing studies supporting the proposition for victims of sexual assault and rape); Park, \textit{supra} note 60, at 164; Konradi, \textit{supra} note 239, at 47–48.

\textsuperscript{250} Fan, \textit{supra} note 234, at 787–88; Triplett, \textit{supra} note 18, at 514.


\textsuperscript{252} Griffin, \textit{supra} note 104, at 290–91.

problems, even prompting former Vice President Joe Biden to weigh in on the handling of the case. And this media attention has generated concrete political efforts for change. Beyond efforts to alter California laws, many citizens are exploring the possibility of recalling the judge in the case. Stanford allocated $2.7 million of its budget towards sexual-assault-prevention-and-response programs. Although many factors may have contributed to this story becoming national news, one particular circumstance seems to have been the catalyst: the victim’s decision to participate in the trial and read a 12-page letter in open court describing her experience before the judge sentenced the defendant. As one commentator put it, the victim’s “statement has brought more attention to rape culture than any single indictment or verdict could.” Society paused and considered how it was handling the problem of sexual assault because of one victim’s statements. Her perspective had an invaluable impact on the national narratives surrounding reform.

Conversely, when groups of people refuse to turn to legal processes, narratives form without their perspectives. Thus, the harm continues in a vicious cycle. The inefficiencies of the system—failing in its duties to protect witnesses, to eviscerate destructive social narratives, and to punish wrongdoers—deter witnesses from turning to it. Without these witnesses’ perspectives, beneficial legal and social reforms to these

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254 Perez, supra note 253; Fantz, supra note 253.


257 CAL. PENAL § 1203.065 (2016); Mollie Reilly, California Closes Loophole That Allowed Brock Turner’s Light Sentence, HUFFINGTON POST (Sept. 30, 2016), http://www.huffingtonpost.com/entry/california-rape-sentencing-brock-turner_us_57c6f0a9e4b078581f10631.

258 Reilly, supra note 257; Fantz, supra note 253; Liam Stack, Judge Aaron Persky Under Fire For Sentencing in Stanford Rape Case, N.Y. TIMES (June 7, 2016), http://www.nytimes.com/2016/06/08/us/judge-in-stanford-rape-case-is-being-threatened-who-is-aaron-persky.html. The judge was also recently removed from another sexual-assault case, a powerful message considering the high bar required for such an action. Susan Svrluga, Judge Who Issued Controversial Sentence in Stanford Trial Removed From a New Sexual Assault Case, WASH. POST: GRADE POINT (June 14, 2016), http://wpo.st/Sea62.


260 Fantz, supra note 253. The trial and its surrounding narrative only became the center of a national debate after the victim’s letter went viral on the Internet. See, e.g., Kate Geiselman, In Brock Turner’s Home Town, We’re Raising Kids Who Are Never Told “No”, WASH. POST: POSTEVERYTHING (June 8, 2016), http://wpo.st/rea62.

261 Geiselman, supra note 260.
inefficiencies become less likely. The participatory rights of victims should be considered if our legal system truly ascribes a fairness value to participatory parity.

3. Implications for the College Context

The panel-submission-only approach to questioning in college sexual-assault adjudications is a reaction to what victim’s rights advocates saw as an institutional disregard of the victim’s procedural participatory rights. In their view, panel-submission-only questioning lessens victims’ suffering and reduces impediments to adjudication of meritorious complaints.

In many cases, this belief may prove true. As the accused’s participation in the process declines, the trauma a complainant experiences while testifying wanes. Even the most attentive arbiters cannot censor all abusive questions, so by allowing a panel to censor or change questions ex ante, this process has the capacity to preclude abusive questioning altogether. Furthermore, the questions come from a neutral panel, as opposed to antagonistic parties like the accused or his counsel. The panel can also control the length of the proceeding by circumscribing the scope of the inquiry, protecting victims from ill-defined or excessively long proceedings.

Moreover, the panel-submission-only procedure enhances an institution’s ability to encourage reporting. Victims are less likely to report sexual assaults as procedures become more akin to a courtroom proceeding, and some evidence suggests that fear of cross-examination may be the primary driving force behind underreporting in the criminal-justice system. College adjudications likely are encouraging victims to come forward in greater numbers.

But the procedural-fairness pendulum may have swung too far, too fast. The panel-submission-only procedure all but eliminates the accused’s opportunity for procedural participation. Participation in these cases becomes all the more necessary because the hearing’s resolution

262 TASLITZ, supra note 49, at 155; I. Bennett Capers, Real Women, Real Rape, 60 UCLA L. REV. 826, 866 (2013) (noting studies that suggest destructive social narratives affect juror decision-making); Anne M. Coughlin, Interrogation Stories, 95 Va. L. REV. 1600, 1607 (2009) (“[T]he ultimate objective is not merely to remove victim-blaming stories from the courtroom, but to purge them from the popular stockpile as well. . . .”); see also Griffin, supra note 104, at 334–35 (noting the importance of trials in legal and social reform).


264 TASLITZ, supra note 49, at 118–120.

265 See supra Part II.A.2.

266 See Triplette, supra note 18, at 514 (discussing the chilling effect of victim testimony that occurs when college proceedings are delayed or prolonged).

267 Baker, supra note 15, at 270–71; see Fan, supra note 234, at 788.

268 See supra note 249.
often depends on weighing the victim’s credibility against the accused’s credibility. In the vast majority of cases, no one else witnesses the act and no other evidence exists. One witness’s isolated testimony forms the core of the case against the accused. Although uncommon, false reporting does occur. In the immediate aftermath of an unfavorable adjudication, the accused faces suspension or expulsion. A negative finding goes on a student’s record and adversely affects future educational and professional opportunities. These hearings may not directly result in convictions or civil liability, but in many cases, they serve as evidence in future trials. That these results flow from the panel’s evaluation of a swearing contest amplifies the necessity of procedural participation to a fair hearing. Eliminating this participation limits the fairness of the instant adjudication and future ones.

The gravity of these hearings, combined with the centrality of witness testimony, elevates the need for some form of cross-examination. Shielding and the intermediary method each provide some protection to the victim without eviscerating the accused’s procedural participation, and add fairness value on their own.

Shielding mitigates the suffering a victim experiences when confronting the accused face-to-face. These benefits to the complainant may collaterally improve the accuracy of the hearing. Victims of physical and sexual abuse often do not, or cannot, testify in the presence of the accused abuser. By excluding this obstacle, shielding facilitates testi-

269 Baker, infra note 298, at 23; see also Sanchirico, supra note 81, at 303.
270 See, e.g., Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (noting that the only evidence before the college disciplinary panel was the accuser’s and the accused’s accounts); see also Baker, supra note 15, at 236–40 (noting the difficulties in proving these types of cases).
271 See, e.g., David Lisak et al., False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases, 16 Violence Against Women 1318, 1329–31 (2010) (finding a 5.9% false report rate in its study on sexual assaults investigated by a university police department and reporting other studies that put the number between 2.1% and 10.9%).
275 ALEXANDER & ALEXANDER, supra note 32, at 193, 218.
276 See supra Part II.B.1.
277 See Triplett, supra note 18, at 520–22.
mony that might not otherwise take place in the same way that the panel-
submission-only format does. Varying the format of shielding also of-
fers opportunities to reformers who believe that preserving face-to-face
confrontation serves fairness values. For example, two-way closed circuit
video can facilitate a form of face-to-face confrontation while still les-
sening some trauma.280 Colleges could also determine the need for
screening in individual cases.281 For example, trauma counselors with
appropriate training could make individualized determinations about
whether the harm to the witness would be significant enough to merit
screening.282

Adopting an intermediary process can provide similar benefits, but
it has an additional cost. Similar to the panel-only-questioning model,
the intermediary’s control of questions obstructs the accused’s attempts
to frame his own narrative,283 especially if the accused disagrees with the
way the intermediary restructures a question, or if the intermediary ref-
uses to ask a question. However, the intermediary process would allevi-
ate most of the problems associated with cross-examination while still
retaining cross-examination in some form. Like the shielding process,
the victim does not have to confront her tormentor and suffer the accom-
panying anguish.284 Similarly, through omission and alteration, the in-
termediary prevents damaging insinuations, or irrelevant attacks, from
reaching the victim.285 Sustaining objections to the form of an already
asked question does not retract the question’s assault on the victim; its
power to wreak havoc comes from its introduction into the testimonial
experience.286 And again, lowering transaction costs for testifying vic-
tims improves the efficacy of the entire system.287

Additionally, while it will not do these additional points justice, a
few differences between judicial systems and college adjudications bear
mentioning when discussing ways to improve overall procedural fairness
with less cost to the accused’s rights.

First, college adjudicators have more latitude than courts in devel-
op ing procedure.288 Concerns that implementing cross-examination

280 Fan, supra note 234, at 812-13; Friedman, supra note 200, at 702-03.
281 See Thielmeyer, supra note 278, at 813–14 (explaining how the process outlined in
Maryland v. Craig could be applied to adult victims in rape trials).
282 Kenniston, supra note 48, at 123–26 (proposing a reform that extends the Craig
approach).
283 See supra Part II.B.
284 See Kenniston, supra note 48, at 117, 120 (noting that with two-way video conferenc-
ing, victims avoid trauma and psychological harms).
286 See supra Part II.B.2.
287 See supra Part II.B.2.
288 See Ellison, supra note 49, at 366-69 (noting constraints that judicial systems
impose).
would require a complex evidence code ignore that the administration will only have to develop procedures and rules on topics that come up frequently, such as a witness’s other sexual experiences or consumption of intoxicants.

Second, the complainant can have her own advocate in these adjudications.289 One of the common criticisms of criminal trials is that prosecutors do not have the incentive to protect the victim because they do not represent the victim. A prosecutor’s goals may not align with minimizing harm to the victim on cross-examination.290 College adjudications relieve this problem by allowing for the presence of a victim’s advocate or attorney.291

Third, the college adjudicatory system could become more professionalized without losing the benefits of keeping cases out of court. For example, a hybrid system that involved “independent, professionally trained investigators, litigators and judges” alleviates some of the concerns about bias.292 Beyond concerns for bias, there is also the serious problem that the school administrators responsible for these proceedings are inexperienced in conducting investigations and adjudications.293 Many of the investigators employed by the school do not adhere to even the most rudimentary procedural-fairness practices followed by the police or other investigators (e.g., recording interviews or preserving notes).294 Another common challenge to these proceedings is delayed notice; the defendant often only hears about charges for the first time weeks or months after the event.295 Furthermore, shortcomings affect not only the wrongfully accused, but also victims and criminal prosecutions. While Title IX’s hawkish prosecution policies have led many colleges to become overcautious when interacting with victims, reports still surface of ill-performed proceedings that psychologically harm victims while simultaneously complicating or derailing successful criminal prosecutions.296 A formalized process, conducted by unbiased parties, could result in more accurate and fair hearings, and fewer legal challenges to these proceedings.

289 See, e.g., UNC Equal Opportunity and Compliance Office, supra note 45.
290 Lininger, supra note 5, at 1362, 1392, 1394–96.
291 See id. at 1398–1400; Campbell, supra note 244, at 705.
293 McHugh & Farrow, supra note 26.
294 Feld, supra note 22.
295 See, e.g., McHugh & Farrow, supra note 26.
ADMINISTRATIVE COSTS

And while it should not be the primary consideration, colleges do consider the financial benefits and costs of each procedure when creating a policy. Many legal reformers fail to consider the administrative burden cross-examination imposes because it has been such an established procedure. In both court and non-court settings, cross-examination prolongs hearings and adds minor administrative costs. What starts as questioning one testifying witness frequently devolves into a mini-trial of extrinsic evidence and character witnesses because of the impeachment threat that accompanies cross-examination. To accommodate cross-examination, a judicial system must invest more in developing rules governing the scope of permissible questioning. Once rules are in place, adjudicators must be trained to control questioning so as to implement these rules.

When it comes to college disciplinary proceedings, the mechanisms for conducting cross-examination are not in place. Reformers must decide whether parties will assume responsibility for questioning or if it should occur through another medium. Either internal or external bodies must supervise and evaluate the implementation of these new procedures. As these costs increase, concomitant advantages that other forums have over the court system decrease. Implementing full-scale cross-examination, shielding, or an intermediary procedure will each inflict new costs.

In addition, the intermediary procedure requires a substantial outlay of other administrative resources. The equipment and technological infrastructure that can transmit questions directly, instantly, and correctly from the accused to an intermediary does not come cheaply, and information-technology departments must monitor and repair the equipment. Technology costs would only be the tip of the iceberg. Additionally, colleges would have to hire and train qualified intermediaries. The system would also require more review procedures. Colleges could train

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299 Id.


301 See Triplett, supra note 18, at 525–26 (discussing access to counsel issues).


303 See, e.g., TASLITZ, supra note 49, at 118–19; Ellison, supra note 49, at 365.
panels on handling objections to changes the intermediary made to questions, but ruling on objections would add significant time to an already lengthy process. At the very least, colleges would have to provide an avenue in the post-hearing appeals process to challenge the intermediary’s questioning. Likewise, someone has to oversee the intermediaries and the review process to ensure that each operates as intended. All of these costs also have a first-mover disadvantage: the pioneering college implementing this vast system will bear the brunt of learning costs and regulatory backlash.

Yet, the administrative costs imposed by an intermediary method might initially be overestimated, and the procedure confers ancillary benefits that lower other administrative costs. Before questioning occurs, initial edits help the accused understand the permissible scope of questioning. This transfers debates over major categories of exclusion from the hearing process to the pre-hearing process, which could shorten hearings. Colleges could also foreclose the need for lengthy appeals by implementing a waiver doctrine in cases where the accused fails to object to limitations that the initial editing process put him on notice of. Furthermore, only the intermediary would have to undergo training on handling vulnerable witnesses, alleviating the need to train panel members and advocates. Similarly, the intermediary could function as the conduit for questions running not only between the accused and the complainant, but also for all witness questioning. This minimizes the need to provide advocates when the college does not want the parties directly questioning witnesses.

Determining which measures to adopt requires balancing, but implementing at least some of these measures mollify concerns that protecting victims will come exclusively at the cost of the accused. Examining alternatives to full cross-examination or no cross-examination demonstrates that colleges do not have to import the exact trial format of cross-examination to receive some of its benefits.

**CONCLUSION**

The two alternatives to cross-examination discussed in this Article constitute only a small subset of possible reforms colleges can undertake when adjusting the format of cross-examination and the adjudication itself. The adjudication of sexual-assault allegations—which typically involve not only credibility contests but also vulnerable victim witnesses—brings into sharp relief both the benefits and the costs of cross-examination. Accordingly, the accommodations universities have attempted, and

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304 See Zajac et al., supra note 50, at 196 (noting administrative costs associated with intervening in cross-examination of children and why that may lead to judges intervening less).
will attempt, in order to address such accusations provide useful insights into the optimal format for cross-examination.

Like colleges, legislatures and courts shy away from broad and overarching reform in trial procedure. Society may never agree on definitions for amorphous concepts like “truth” or “fairness.” Without parallel universes, one cannot compare how much truth or deception a procedure produces in each unique, fact-specific context. Likewise, it is hard to measure a procedure’s dignitary or fairness value. Balancing unknown costs against unknown benefits does not lead to a satisfying answer. As the late Justice Scalia remarked, it is “like judging whether a particular line is longer than a particular rock is heavy.”

But the immeasurability of some quantities does not justify declaring the status quo the best and only choice. Hope that a balance will eventually work itself out provide cold comfort to those who receive the worst of a system’s shortcoming. Legal challenges to administrative hearings, civil proceedings, and criminal trials confront judges with the undesirable task of deciding what procedure most closely approximates an accurate and fair outcome.

Most would agree that reducing trauma to victims and approving the efficacy of judicial systems represent worthwhile goals. Part of the hesitation to change comes from knowable unknowns. Would a procedure actually encourage more victims to come forward? How much does it cost to maintain employees and equipment necessary to effectuate these procedures? Do these procedures reduce long-term harm to victims? Innovations in the college-adjudication context could generate empirical answers to each of these questions.

Tradition also forms a large part of the resistance to change. Practitioners and policymakers eschew hard evidence for tired references to legal tradition. Judges cite precedent as if recycling and restating untested assumptions validates them. Of the pages and pages of legal scholarship spent on cross-examination, musing on constitutional doctrine and legal exegesis far outnumber articles citing empirical or scientific research. Perhaps these critiques are unfair. If a specific legal doctrine controls then the inquiry is truly at its end. However, questions surrounding cross-examination rarely admit of such tidy and definitive answers.

306 One early Supreme Court formulation candidly characterized the due-process inquiry as balancing the “hurt complained of and good accomplished.” Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951).
307 For example, the Court’s Confrontation-Clause jurisprudence could learn much from what shielding procedures for adult witnesses entails. See, e.g., Sklansky, supra note 4, at 1645.
For the most part, the historical and institutional baggage of the court system does not burden college adjudications. Colleges are constructing their own procedures, and they can account for the most recent empirical research when they do so. College adjudications can also serve to demonstrate the flaws and virtues of new structures and inform future changes to the legal system as a whole. They present an opportunity to reconsider the balance between the interests of the accused, the victim, and the system. Slavish adherence to assumed truths leads to worse institutional outcomes in both the college system and the court system. Even the best engines need a tune-up; it is time to reexamine assumptions about cross-examination.