False Accuracy in Criminal Trials: The Limits and Costs of Cross-Examination

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According to the popular culture of criminal trials, skillful cross-examination can reveal the whole "truth" of what happened. In a climactic scene, defense counsel will expose a lying accuser, clear up the statements of a confused eyewitness, or surface the incentives and biases in testimony. Constitutional precedents, evidence theory, and trial procedures all reflect a similar aspiration—that cross-examination performs lie detection and thereby helps to produce accurate outcomes. Although conceptualized as a protection for defendants, cross-examination imposes some unexplored costs on them. Because it focuses on the physical presence of a witness, the current law of confrontation suggests that an opportunity for in-person questioning suffices to ensure the reliability of testimony. Confidence in the value of demeanor evidence endures despite extensive social science on the garbled signals that nonverbal cues send. That misplaced trust can lead to the admission of problematic evidence that has not otherwise been substantively tested. Reliance on cross-examination also precludes development of broader potential meanings of defendants' Sixth Amendment right to confront the government's case, which could require access to the reports and resources necessary to conduct effective questioning. In addition, appellate courts often point to cross-examination when they decline to consider trial errors or to evaluate the deficiencies of defense counsel. This Essay challenges conventional wisdom about the purposes of cross-examination. It suggests that a clearer view of its role could lead to deeper evaluation of the reliability of testimony, broader challenges to prosecution evidence, and more complete review for error.

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I. Cross-Examination in Culture and Courtrooms

A. The Mythology of Cross-Examination

The expansive catalogue of trial movies features many marquee scenes of cross-examination—moments when a defense lawyer exposes unjust prosecution tactics or conclusively establishes their client's innocence. Faced down by unlikely heroes such as Vincent LaGuardia Gambini (in *My Cousin Vinny*) or Elle Woods (in *Legally Blonde*), witnesses realize mistakes, reveal incentives, signal dishonesty, and even offer explosive confessions.

My Cousin Vinny portrays two college students on a cross-country road trip whose misadventure in rural Alabama leads to charges that they murdered the clerk at a convenience store.[1] Through cross-examination, their defense lawyer, Vinny, establishes that various witnesses erred when they identified the defendants as the murderers. After exposing a witness's poor vision with an in-court experiment, Vinny prompts her to acknowledge that she may not have seen the perpetrators clearly enough to identify them. Another eyewitness at first claims that he saw the defendants walking into the store from his kitchen window while cooking his breakfast and then heard gunshots immediately thereafter. But by leading the witness into the realization that he spent twenty minutes cooking grits for his breakfast, Vinny gets him to admit that he may have seen the defendants and heard the fatal shots at two distinct times.

The classic cross-examination in the film based on Harper Lee's *To Kill a Mockingbird* involves a bad-faith witness.[2] Atticus Finch is defending an innocent Black defendant, Tom Robinson, accused of assaulting a white

1. MY COUSIN VINNY (20th Century Fox 1992).
2. TO KILL A MOCKINGBIRD (Brentwood Prods. 1962).

woman, Mayella Ewell. After narrowly avoiding a lynch mob, Robinson stands trial before an all-white jury. In his examination of Mayella's father, Bob Ewell, Finch's careful tone and clever technique reveal Ewell's bias against Robinson and his callous disregard for Mayella. When asked why he did not seek medical assistance for her, Ewell responds that there was "no need" because he "seen who done it." Without a firsthand view of the witness's hostility and his mounting aggression over the course of the questioning, jurors would not have had access to his emotional connection to the events or become aware of his attitude toward the victim and the defendant. Finch also lays the groundwork for viewing the witness as an alternative perpetrator when a demonstration reveals that Ewell is left-handed, as the attacker was.

Many films feature an alternative perpetrator's emotional confession as the climactic scene. In *Legally Blonde*,[3] Elle Woods is a Harvard Law student who joins the defense team for Brooke Windham, charged with murdering her husband. Woods cross-examines Windham's stepdaughter, Chutney, and destroys her alibi by catching her in a lie about showering immediately after having her hair permed. Once the alibi collapses, Chutney confesses to killing her father by accident in an attempt to shoot Windham.

Perhaps no scene encapsulates the imagined potential of cross-examination better than Colonel Nathan Jessup's declaration that the defense lawyer "can't handle the truth" in *A Few Good Men*.[4] Rookie lawyer Lieutenant Daniel Kaffee is defending a murder case involving the death of a Marine at the Guantanamo base. Although plenty of unrealistic trial practice occurs throughout the film—including open-ended questions, speculative inquiries without a good-faith basis, and extended monologues by both witnesses and advocates in the course of questioning—the film also offers a powerful demonstration of the most effective cross-examination technique. Kaffee repeatedly gets Jessup to commit to a detail in his story (that no one would ever defy his orders) and then exposes a contradiction in his testimony (that he had to order the removal of the victim Marine from the base to protect him even though he had given another order not to harm him). Pressed by this classic commit-and-contradict maneuver, Jessup erupts and he confesses to having ordered the harsh discipline that led to the Marine's death.

Each of these vignettes represents an aspirational version of cross-examination, rendered especially dramatic when the witnesses acknowledge the impact of the questioning mid-testimony. They do not, however, illustrate

3. LEGALLY BLONDE (MGM 2001).
4. A FEW GOOD MEN (Columbia Pictures 1992).

what typically occurs in court.[5] While skillful lawyering can discredit the testimony of witnesses, deconstruct a prosecution narrative, or contribute to reasonable doubt, nonfiction cross-examinations rarely trigger witness corrections or confessions. Yet this cherished belief about what cross-examination can accomplish has a long provenance. In *Murder on the Orient Express*, Agatha Christie wrote that confronting "anyone who has lied with the truth" will usually lead them to "admit it—often out of sheer surprise."[6] And the *Perry Mason* television show that aired in the 1950s and 1960s may have raised the stakes for defense attorneys because the title character won every case due to his meticulous cross-examinations.[7] Fictional constructs about criminal justice have repercussions because they "can and do spill over to shape public views,"[8] they in turn affect jury decision-making about which witnesses to rely on or reject, and they surface in judicial opinions as well.[9]

Myths about cross-examination persist in both culture and courts, and a generation of social science debunking observational lie detection has not changed the narrative or advanced the applicable doctrine. Misconceptions about what a face-to-face confrontation can accomplish contribute to a range of errors and ultimately narrow the right to probe testimony. This is in part because the Supreme Court's emphasis on the performative dimensions of cross-examination distills the confrontation right down to a simple guarantee: the physical presence of a witness. And then unexamined confidence in this encounter—the notion that the jury's clear view of a witness will ensure truthful testimony—means that once a witness appears, the mere opportunity to ask questions occupies the field of what confrontation means and can also shield trial errors from review.

B. Constitutional Sources on the Jury's Role and Cross-Examination

The American justice system's attachment to cross-examination as a key means of ascertaining truth—and therefore delivering justice—did not,

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5. *See, e.g.*, State v. Weatherspoon, 514 N.W.2d 266, 280–81 (Minn. Ct. App. 1994) (noting that "Perry Mason" moments on cross-examination "tend only to happen on late night TV if your station carries reruns").

6. AGATHA CHRISTIE, MURDER ON THE ORIENT EXPRESS 223 (Dodd, Mead & Company Greenway 1968) (1933).

7. *See* STEVEN D. STARK, GLUED TO THE SET: THE 60 TELEVISION SHOWS AND EVENTS THAT MADE US WHO WE ARE TODAY 97 (1997) ("[B]efore audiences of millions, Perry Mason presented a view of police and lawyers that did more to give people the verdict on how the legal system operates than any grade-school civics course or news article ever could."). Similarly, recent depictions of high-tech CSI evidence in crime procedurals may have an impact on the clarity and closure that observers expect from criminal trials. *E.g.*, Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1063–65 (2006).

8. Tyler, *supra* note 7, at 1063.

9. *See, e.g.*, United States v. Hinkson, 585 F.3d 1247, 1254 (9th Cir. 2009) (en banc) (describing a "Perry Mason court-room drama" moment).

of course, originate with popular culture. The trial jury and testimony from live witnesses played important roles in the debate surrounding the adoption of the American Constitution itself, and both guarantees have deep roots in the common law. The jury formed the centerpiece of the protections outlined in the Bill of Rights and was even the "paradigmatic image" of the balance between individual rights and the authority of the new government.[10] Thomas Jefferson called the jury the "only anchor . . . by which a government can be held to the principles of its constitution."[11] And according to Alexander Hamilton, "friends and adversaries" at the Constitutional Convention who "agree[d] [o]n nothing else[] concur[red] at least in the value they set upon the trial by jury."[12]

When it incorporated the Constitution's provision of a jury trial in criminal cases against the states, the Supreme Court explained that the Constitution included juries in order to soothe fears of "unchecked power" in the criminal justice process.[13] More recently, the Court reaffirmed the jury's role as the "circuitbreaker in the State's machinery of justice,"[14] citing the Framers' belief that it constitutes "the heart and lungs, the mainspring[,] and the center wheel" of liberty.[15]

Both the lack of courtroom sophistication and the general common sense of citizen participants are celebrated in descriptions of the trial process.[16] Jurors are particularly entrusted with the question of witness credibility and instructed to apply their good judgment and life experience to evaluating it. As the Supreme Court stated in 1891, determining credibility

10. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991).

11. THOMAS JEFFERSON, Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* 3 THE WRITINGS OF THOMAS JEFFERSON 69, 71 (H.A. Washington ed., 1864).

12. THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

13. Duncan v. Louisiana, 391 U.S. 145, 149, 156 (1968) ("Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."); *see also* Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge.").

14. United States v. Haymond, 139 S. Ct. 2369, 2380 (2019) (internal quotation marks omitted) (quoting Blakely v. Washington, 542 U.S. 296, 306 (2004)).

15. *Id.* at 2375 (quoting JOHN ADAMS, Letter from Clarendon to William Pym (Jan. 27, 1766), *in* 1 PAPERS OF JOHN ADAMS 155, 169 (R. Taylor ed., 1977) (internal quotation marks omitted)); *see also* Neder v. United States, 527 U.S. 1, 30–32 (1999) (Scalia, J., concurring in part and dissenting in part) (calling the jury the "spinal column of American democracy" and noting its link to the Founders' "healthy suspicion of the power of government").

16. *See* G.K. CHESTERTON, TREMENDOUS TRIFLES 85–86 (1909) ("[I]t is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed . . . . And the horrible thing about all legal officials . . . is simply that they have got used to it."); PATRICK DEVLIN, TRIAL BY JURY 154 (1956) (arguing that though jurors may not be as skilled as judges at "separating the wheat from the chaff . . . there are some cases in which a little admixture of chaff is not a bad thing.").

is the "part of every case" that "belongs to the jury," and jurors are "fitted for it by their natural intelligence and their practical knowledge of men and the ways of men."[17] The jury's charge to assess credibility via common sense had less significance when witness oaths alone were thought to guarantee truth-telling on the stand.[18] At common law trials, many witnesses feared divine punishment for dishonest testimony.[19] That moral peril in part explains why defendants were not competent to bear witness in their own trials until the 19th century.[20] Once both accuser and accused were deemed competent witnesses, however, jurors could be in the position of judging swearing contests between contradictory witnesses who had all taken oaths. That made the jury's observation of demeanor during adversarial questioning a more substantial test of trustworthiness for testifying witnesses.[21] In the many cases where defendants do not testify, questioning of witnesses to detect deception or establish reasonable doubt lies at the heart of the defense case and demonstrates the protective function of the jury.

The significance of cross-examination developed alongside this affection for the institution of the jury and the emphasis on the jury's active role in evaluating credibility. Much like the idealized version of the jury trial itself, the practice of confronting adverse witnesses is a right that "comes to us on faded parchment."[22] In Sir Walter Raleigh's 1603 trial, he insisted that a witness to his alleged treason "maintain his accusation to [his] face,"[23] and that demand set the stage for contemporary debates about the Confrontation Clause.[24]

Among evidence theorists, cross-examination is celebrated as well. Perhaps the most cited phrase in evidence law is John Henry Wigmore's categorical description of cross-examination as "beyond any doubt the

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17. Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891).

18. *See* Frederick Schauer, *Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond*, 95 CORNELL L. REV. 1191, 1194 (2010) ("When people genuinely believed that lying under oath would send them to hell, the law could comfortably rely on a witness's fear of eternal damnation to provide confidence that witnesses were likely to tell the truth.").

19. *See* FREDERICK SCHAUER, THE PROOF: USES OF EVIDENCE IN LAW, POLITICS, AND EVERYTHING ELSE 99 (2022) (referencing the belief, even more widespread in the past, that speakers would "suffer in the afterlife, if not sooner, should they tell a lie after swearing to tell the truth").

20. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 662 (1997).

21. *See id.* at 579–81 (contrasting the pre-jury system, which "sought to avoid . . . credibility conflicts altogether," against the jury system, which, over the course of the last several centuries, has "committed ever more—and more intractable—credibility conflicts to the jury's black box").

22. California v. Green, 399 U.S. 149, 173–74 (1970) (Harlan, J., concurring).

23. Raleigh's Case, 2 How. St. Tr. 1, 13–14, 24 (1603).

24. *E.g.*, Kenneth Graham, *Confrontation Stories: Raleigh on the Mayflower*, 3 OHIO ST. J. CRIM. L. 209, 209 (2005).

greatest legal engine ever invented for the discovery of truth."[25] Contemporary scholars have also stated that "[t]he mythic power of cross-examination remains enshrined in the American adjudicative process" and that it "is regarded as the *sine qua non* of the American trial system."[26]

Similar expectations for cross-examination surface in Supreme Court decisions describing a "probing, prying, pressing form of inquiry."[27] According to the Court, cross-examination provides the "principal means by which the believability of a witness and the truth of his testimony" are evaluated[28] and can "afford the trier of fact a satisfactory basis for evaluating the truth."[29] When it rejected the automatic admission of polygraph evidence in *United States v. Scheffer*,[30] the Court concluded: "A fundamental premise of our criminal trial system is that 'the *jury* is the lie detector.'"[31]

C. Common-Sense Veracity Tests and the Confrontation Clause

The culture and commentary around cross-examination depict the jury's observation of adversarial questioning and assessment of credibility as an essential task. Various evidentiary rules protect jurors from distraction and distortion and cast them in a passive role.[32] But when it comes to cross-examination, the court tells jurors to consider the demeanor of each testifying witness and appraise it according to their personal experience. The jury's ability to render this judgment is deemed superior to what any machine for lie detection, expert on psychiatry, character witness, or supervising judge could offer.[33] "All hierarchies of rank, learning, and technical prowess give way in the face of this asserted power of common jurors to spot a lie . . . ."[34] Jurors tend to believe that they are making accurate judgments about the facts

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25. 5 John Henry Wigmore, Evidence in Trials at Common Law § 1367, at 32 (James H. Chadbourn ed., 1974).

26. Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk*,*"* 14 WIDENER L. REV. 427, 427, 448 (2009).

27. *See* Bronston v. United States, 409 U.S. 352, 358–59 (1973) (pointing to the "lawyer's responsibility" to bring evasive witnesses "back to the mark, to flush out the whole truth with the tools of adversary examination").

28. Davis v. Alaska, 415 U.S. 308, 316 (1974).

29. *See* California v. Green, 399 U.S. 149, 160–61 (1970) (reasoning that "contemporaneous cross-examination"—the sort that would occur if the jury were "whisked magically back in time to witness a grueling cross-examination of the declarant as he gives his first statement"—would not be "so much more effective than subsequent examination" so as to render the latter unsatisfactory).

30. *See* 523 U.S. 303, 313 (1998) (plurality opinion) ("[A] polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth.").

31. *Id.* at 313 (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973)).

32. Rule 403, for example, gives courts discretion to exclude evidence because of dangers like "unfair prejudice," "confusing the issues," or "misleading the jury." FED. R. EVID. 403.

33. *See* Fisher, *supra* note 20, at 577 & n.2 (discussing the superiority of the jury as sole judge of witness credibility).

34. *Id.*

based on witnesses' "behavior and manner of testifying."[35] And courts validate that belief, instructing jurors to gauge credibility according to their perceptions of demeanor.[36] The idea that watching witness comportment will yield a telltale sign of deception is so pervasive that pattern jury instructions even tell jurors that their "job" is to think about how much to believe each witness when they testify.[37]

The jury's presumed capacity to detect deceit when observing cross-examination impacts constitutional precedents on the meaning of the Confrontation Clause. Although the Constitution guarantees the right to a jury trial, it does not mention cross-examination per se. The Sixth Amendment provides instead that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[38] The Supreme Court has deemed face-to-face engagement with witnesses in court the "irreducible literal meaning" of "confrontation" and a cornerstone of defendants' procedural protections.[39] By doing so, it has also concluded that any opportunity for observational lie detection of a prosecution witness answering questions on the stand serves to vindicate the confrontation right entirely.

Most of the Supreme Court's recent cases on the Sixth Amendment concern *when* confrontation is required rather than *what* the protection means.[40] Numerous decisions redefining the status of hearsay statements in light of the Confrontation Clause focus exclusively on whether out-of-court statements are admissible in the absence of cross-examination.[41] When there is a right to cross-examination, the Court has said almost nothing about its

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35. *See* ADAM BENFORADO, UNFAIR: THE NEW SCIENCE OF CRIMINAL INJUSTICE 138 (2015) (discussing model jury instructions that empower jurors to assess credibility "just as [they] would in any [other] important matter").

36. *Id.* When they observe a defendant under cross-examination, jurors may be further instructed to pay particular attention to their perceptions of demeanor, to make common-sense deductions about the defendant's interest in the outcome of the case, and to apply "careful scrutiny" to the veracity of the defendant's testimony. *E.g.*, Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309, 324–25 (2020).

37. *See, e.g.*, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 1.09 (DIST. JUDGES ASS'N FIFTH CIR. 2019) ("Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say."). This systemic reliance on demeanor-based lie detection extends to investigative criminal procedure; it *also* surfaces in the most widely used police manual on interrogations. *See* FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS 101–37 (5th ed. 2013) (offering guidance on the use of behavior symptom analysis—that is, the evaluation of an individual's speech, demeanor, mannerisms, expressions, and other behaviors—in police interrogations).

38. U.S. CONST. amend. VI.

39. Coy v. Iowa, 487 U.S. 1012, 1016–17, 1021 (1988).

40. *See, e.g.*, Michigan v. Bryant, 562 U.S. 344, 358 (2011) (focusing on whether a statement has the "primary purpose of creating an out-of-court substitute for trial testimony").

41. *E.g.*, Ohio v. Clark, 576 U.S. 237, 240 (2015).

content or scope, or the witness's minimal responsiveness. The chance to ask questions presumptively satisfies the constitutional command.[42]

Confrontation Clause issues arise because the rules of evidence exclude many statements made by speakers outside of the trial setting as "hearsay."[43] Hearsay is testimony by a trial witness repeating something first expressed in a different place or by a different person.[44] When these out-of-court statements are offered to prove the truth of what they assert, the hearsay prohibition excludes them from evidence.[45] One way of thinking about prohibited hearsay statements is that their "evidentiary value depends upon the credibility of the declarant without the assurances of oath, presence, or cross-examination."[46]

The hearsay rules, in theory, "foster accuracy, ensuring that, in contexts where juries struggle to separate out-of-court truth from fiction, only reliable evidence is introduced."[47] But more than thirty exceptions to the hearsay rule allow such statements based on the necessity and likely accuracy of particular categories of statements.[48] For example, business records and declarations made in moments of excitement or agitation generally fit within hearsay exceptions and can be repeated in court despite the prohibition.[49]

Read literally and outside the context of the hearsay rules, the Confrontation Clause would preclude any out-of-court statement offered against criminal defendants. The term "witnesses against" in the Sixth Amendment, however, does not extend to all instances of communicative evidence.[50] Rather than imposing an absolute bar, the constitutional law interacts with the law of evidence such that prosecutors can introduce some statements by absent witnesses that fit within hearsay exceptions.[51] But just

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42. *See* United States v. Owens, 484 U.S. 554, 560 (1988) (reasoning that so long as "a hearsay declarant is present at trial and subject to unrestricted cross-examination . . . the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements").

43. FED. R. EVID. 802.

44. FED. R. EVID. 801(c).

45. FED. R. EVID. 801(c), 802.

46. KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, DAVID H. KAYE & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 246, at 589–90 (Robert P. Mosteller ed., 8th ed. 2020).

47. Jeffrey Bellin, *The Evidence Rules that Convict the Innocent*, 106 CORNELL L. REV. 305, 348–49 (2021).

48. FED. R. EVID. 803–04 & advisory committee's notes.

49. FED. R. EVID. 803(2), (6).

50. *See, e.g.*, Mattox v. United States, 156 U.S. 237, 240, 242–43 (1895) ("[G]eneral rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case.").

51. *See, e.g.*, Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1867 (noting that the Court has "strictly cabined the category of hearsay to which the reinvigorated confrontation right applied," limiting it to "testimonial" hearsay—all otherwise

which hearsay statements avoid the constitutional prohibition is a longstanding point of constitutional confusion. The Supreme Court formerly interpreted the Confrontation Clause to allow the use of hearsay evidence that fell within well-established exceptions or that otherwise possessed "indicia of reliability."[52] That made the Confrontation Clause a redundancy to a certain extent—judges excluded little evidence not already barred by the hearsay rules.[53] Then in a series of decisions beginning with *Crawford v. Washington*[54] in 2004, the Court purported to expand the Sixth Amendment requirement by decoupling it from the hearsay rules and rationales.[55]

In the pivotal *Crawford* decision, Justice Scalia cited historical conceptions of the jury's contributions and the crucial role of cross-examination in testing government witnesses.[56] The Court ruled that "testimonial" hearsay would no longer be admissible against a criminal defendant unless the declarant takes the stand and submits to cross-examination (or is technically unavailable but previously submitted to cross-examination).[57] But *Crawford* defers any comprehensive definition of testimonial statements.[58] The opinion merely states that the testimonial category should include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[59] So in other words, testimonial statements look like testimony. The Court has established that statements resembling testimony include certified forensic reports by crime laboratory analysts,[60] responses to formal police interrogations, and statements made at preliminary hearings, grand jury proceedings, or prior trials.[61]

Outside of these formal categories, new factual scenarios arose post-*Crawford*, and fractures emerged over how to determine whether out-of-court declarations constitute testimonial hearsay. The question whether to

admissible, "nontestimonial" hearsay is "'not subject to the Confrontation Clause' at all" (quoting Davis v. Washington, 547 U.S. 813, 821–22 (2006))).

52. Ohio v. Roberts, 448 U.S. 56, 66 (1980) (internal quotation marks omitted) (quoting Mancusi v. Stubbs, 408 U.S. 204, 213 (1972)).

53. *See id.* (noting the Court's prior determination that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them" would not offend the Sixth Amendment).

54. 541 U.S. 36 (2004).

55. *Id.* at 60.

56. *Id.* at 44–45.

57. *Id.* at 68–69.

58. *Id.* at 68.

59. *Id.* at 52 (quoting Brief for Nat'l Ass'n of Crim. Def. Laws. et al. as Amici Curiae Supporting Petitioner at 3, *Crawford*, 541 U.S. 36 (2004) (No. 02-9410), 2003 WL 21754961, at *3).

60. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307, 310 (2009).

61. *Crawford*, 541 U.S. at 68.

admit statements made in 911 calls, for example, got different answers in the trial courts.[62] In *Davis v. Washington*,[63] the Supreme Court endeavored to set a workable test. The Court held that even though some statements made in 911 calls may not look like testimony, they can have the same intent to inculpate defendants.[64] To figure out whether informal interactions with law enforcement or first responders produce testimonial statements, courts must decide what the "primary purpose" of a statement is.[65] If it "establish[es] or prove[s] past events potentially relevant to later criminal prosecution[s]," it is testimonial and cannot be admitted without cross-examination.[66] If it is made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," then it is not testimonial and admissible even without cross-examination.[67]

Once the Court started divining the "purpose" of statements, differences about what exactly confrontation is supposed to accomplish surfaced as well. Dissenting in *Michigan v. Bryant*,[68] Justice Scalia insisted that the definition of "testimonial" cannot revolve around reliability to any extent.[69] In his view, weaker substitutes for live witnesses might be more reliable or less reliable, but either way they look like testimony.[70] For Justice Scalia, applying Confrontation Clause rights turned solely on whether a declarant made the statement "with the understanding that it may be used to invoke the coercive machinery of the State against the accused."[71] But this stands in contrast with the other Justices' rationale for admitting emergency communications without cross-examination: that witnesses are less inclined to fabricate details when facing extreme circumstances.[72]

The strongest *Crawford* adherents, however, resist any consideration of the likely reliability of the out-of-court declaration in question. Justice Scalia regarded the line of *Crawford* cases as his most significant legacy.[73] And

62. *See* Davis v. Washington, 547 U.S. 813, 817–20 (2006) (consolidating cases concerning 911 calls and reactive police questioning in the domestic-violence context).

63. 547 U.S. 813 (2006).

64. *See id.* at 826–27 (discussing how a 911 call is not necessarily made to establish some past fact).

65. *Id.* at 822.

66. *Id.*

67. *Id.*

68. 562 U.S. 344 (2011).

69. *Id.* at 381, 390–91 (Scalia, J., dissenting) (rejecting the majority's conclusion that *Davis* focused on the reliability of statements and maintaining that "[a] declarant-focused inquiry is . . . the only inquiry that would work in every fact pattern implicating the Confrontation Clause").

70. *Id.* at 386.

71. *Id.* at 381.

72. *Id.* at 361 (majority opinion).

73. *See* Marcia Coyle, *Antonin Scalia's "Profound" Influence on the Supreme Court*, NAT'L L.J. (Feb. 14, 2016, 10:10 AM), https://www.law.com/nationallawjournal/almID/1202749718827/

across several opinions, he sought to reshape the right to confrontation as entirely procedural rather than substantive.[74] That means privileging the performance of cross-examination over the ways in which questioning might enhance truth-seeking.

Of course, confronting government witnesses enhances defense participation in the trial process. And cross-examination can also serve an expressive function and vindicate the defendant's dignity interests.[75] But the core function of cross-examination, the one mentioned across legal commentary and portrayed throughout legal popular culture, is supposed to be helping factfinders get to the right result.[76] Yet despite mentioning accuracy issues like "[s]erious deficiencies" in crime laboratories as a justification for expanding the Confrontation Clause,[77] Justice Scalia consistently asserted that the definition of testimonial turns on whether the *nature* of a prior statement is an accusation rather than whether the *quality* of a statement is suspect.[78]

Pursuant to the Court's now muddled and divided Confrontation Clause precedents, the right to cross-examination applies when a hearsay declarant made the statement in a setting, considering all of the circumstances of the conversation objectively, that was intended as a substitute for trial testimony.[79] As a result, several years into the *Crawford* "revolution,"[80] the Supreme Court has more or less landed on a rule that statements functionally

[https://perma.cc/JJ64-B7C4] (quoting Justice Scalia as calling *Crawford* his "proudest" case because in it he "restored the confrontation clause to its original meaning").

74. Crawford v. Washington, 541 U.S. 36, 61 (2004); *see also Bryant*, 562 U.S. at 390, 392–93 (2011) (Scalia, J., dissenting) (criticizing the majority's "revisionist narrative" as putting its thumb on the scale in "emergencies and faux emergencies" in pursuit of substantive reliability).

75. *See, e.g.*, Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 289 (2013) (discussing the goals of trials beyond merely finding facts and discovering "truth"); *see also* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 211 (2014) ("Constitutional rights to introduce evidence and confront state witnesses serve political norms that value individual autonomy and process participation, independent of whether they improve accuracy in trial judgments.").

76. The accuracy imperative also surfaces in precedents defining other Sixth Amendment protections like the right to counsel. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 688 (1984) (affirming that effective assistance of counsel is necessary to "render the trial a reliable adversarial testing process"); United States v. Wade, 388 U.S. 218, 236–38 (1967) (concluding that the presence of counsel at a lineup identification is constitutionally necessary because of the possibilities for error arising from intentional or unintentional manipulation by law enforcement).

77. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318–19 (2009).

78. *See Bryant*, 562 U.S. at 381 (Scalia, J., dissenting) (arguing that a testimonial statement is made "with the understanding that it may be used to invoke the coercive machinery of the State against the accused").

79. *Id.* at 356, 358–59 (majority opinion) (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)).

80. *See, e.g.*, Michael S. Pardo, *Confrontation After Scalia and Kennedy*, 70 ALA. L. REV. 757, 766 (2019) (stating that the "*Crawford* revolution appeared to be on its way" until "significant disagreements and rifts began to emerge").

equivalent to live testimony count as testimonial. The definition remains circular and formalistic, and the protection it affords is a hollow formalism as well. Confrontation only requires the opportunity for a mechanical assessment of demeanor during some in-court questioning. The substantive validity of testimony no longer plays any role in whether defendants have a right to cross-examine a statement or whether the cross-examination that occurs is adequate to expose flaws in the evidence. The right applies without reference to potential inaccuracies in the particular testimony at issue because reliability itself is regarded, post-*Crawford*, as an "amorphous, if not entirely subjective, concept."[81]

As a matter of evidence law, applying hearsay rules requires engaging with the reliability of out-of-court statements. But as a matter of constitutional law, the Confrontation Clause protects something else. It "commands, not that evidence be reliable, but that reliability be assessed in a particular manner."[82] While the Court has discussed the history and significance of cross-examination extensively, it has not made actual cross-examination—in terms of the substance of the information it can produce—any more consequential. And the inattention to what cross-examination needs to accomplish seems at odds with the historical goals the Court cites. The inquiry is supposed to prevent the government from manipulating evidence and to surface what would otherwise be *ex parte* examinations for the jury's view. But the *Crawford* line of cases leads to the admission of accusations that may or may not have been tested as long as they have been hooked up, at some point, to the machine of a cross-examination.

D. Jury-Based Lie Detection in Theory and Practice

Evidence theory reinforces this notion of cross-examination sorting honest from dishonest witnesses via a staring contest. Wigmore not only called it the greatest engine but also "the most efficacious expedient ever invented for the extraction of truth."[83] And Jerome Frank wrote in 1949:

> All of us know that, in every-day life, the way a man behaves when he tells a story—his intonations, his fidgetings or composure . . . the use of his eyes, his air of candor or of evasiveness—may furnish valuable clues to his reliability. Such clues are by no means

81. Crawford v. Washington, 541 U.S. 36, 63 (2004).

82. *Id.* at 61; *see also* Hemphill v. New York, 595 U.S. 140, 152–53 (2022) (reaffirming *Crawford*'s core holding that the role of the trial judge is not "to weigh the reliability or credibility of testimonial hearsay evidence" but "to ensure that the Constitution's procedures for testing the reliability of that evidence are followed").

83. 1 John Henry Wigmore, Evidence in Trials at Common Law § 8, at 608 (Peter Tillers rev., 1983).

> impeccable guides, but they are often immensely helpful. So the courts have concluded.[84]

The adversarial tradition that shapes American criminal trials intersects with the high drama of cross-examination portrayed by screenwriters. And trial practitioners have made the lore their own as well. Cross-examination is often referred to in the practitioner's literature as an "art."[85] And while popular culture characterizes courtroom exchanges as full of surprises, real cross-examination involves scripted and controlled performances. True, trial lawyers spotlight the interaction with the witness, but not because they expect any surprises. In fact, the use of leading questions can mean that cross-examination yields no spontaneous revelations at all. There is even a trial lawyer aphorism about never asking a cross-examination question unless you already know the answer.[86]

Cross-examination is described as both art and science—choreography and a crucible at once. But it rarely lives up to the hype. And the hype matters. But this is not because there ought to be *less* cross-examination overall or because there are no cases in which it offers defendants important opportunities to challenge the testimony of witnesses against them. A powerful and protective version of witness confrontation could occur, but courts (and advocates) focus on the *performance* of exposing deception and deem that sufficient. Reduced to an exercise in lie detection, cross-examination does not require much of witnesses and therefore does not accomplish much either.

II. Where Cross-Examination Falls Short

Contrary to time-honored evidence theory, celebrated popular culture, constitutional doctrine, and the tenets of trial advocacy, face-to-face questioning may not be enough to support truth-seeking and produce just outcomes. It used to be said that criminal defense lawyers aspired to be the fictional Atticus Finch from *To Kill a Mockingbird* or the revered nonfictional advocate Clarence Darrow—both known for their rhetorical skill and their devotion to representing the disadvantaged and marginalized. But the fact that cross-examination did not ultimately produce acquittals for

84. Jerome Frank, Courts on Trial: Myth and Reality in American Justice 21 (1949).

85. *E.g.*, Irving Younger, The Art of Cross-Examination (Aug. 12, 1975), *in* AM. BAR ASS'N SECTION OF LITIG., 1 THE SECTION OF LITIGATION MONOGRAPH SERIES (1976).

86. *See, e.g.*, HARPER LEE, TO KILL A MOCKINGBIRD 202 (HarperCollins 1999) (1960) ("Never, never, never, on cross-examination ask a witness a question you don't already know the answer to, was a tenet I absorbed with my baby-food. Do it, and you'll often get an answer you don't want, an answer that might wreck your case."); Younger, *supra* note 85, at 23 (declaring "*never* ask[ing] a question to which you do not already know the answer" the "fourth commandment" of cross-examination).

the defendants in their signature cases is rarely discussed. Racial bias led the jury to convict Tom Robinson despite Finch's effective questioning in *To Kill a Mockingbird*.[87] Moreover, contrary to the version of the 1925 Scopes "monkey" trial popularized by the play and the film *Inherit the Wind*,[88] Darrow did not even conduct any formal cross-examination of William Jennings Bryan in his effort to defend the teaching of evolution.[89] His legendary questioning of Bryan took place outside the presence of the jury and outside of the courthouse.[90] Because hundreds of spectators gathered and the courtroom was hot, Darrow and Bryan faced off on an open-air platform.[91] As a result, the trial jury did not hear Darrow lead Bryan into acknowledging that some passages in the Bible could not be taken literally.[92] And the judge subsequently ruled the entire examination irrelevant to the actual case.[93]

The archetype of an inquiry so piercing that it could reveal the truth about an unjust accusation in *To Kill a Mockingbird* or liberate ideas in *Inherit the Wind* exists only as a satisfying construct. And while it might seem a harmless ideal, the fiction of the proverbial pointed finger and sweating brow has some negative consequences for accuracy. The idealized version of cross-examination detects lies, reveals mistakes, and exposes biases. And these inflated expectations about cross-examination may lead factfinders to err in their interpretations of witness testimony.

Wigmore *also* said—and one does not see these quotations very often—that cross-examination was "almost equally powerful for the creation of false impressions"[94] and that adversaries can use it to "make the truth appear like falsehood."[95] A superficial approach to witness availability, the shortcomings of observational lie detection, and the uneven treatment of witness bias all demonstrate how this occurs.

A. The Sufficiency of Physical Presence

The steepest cost of cross-examination mythology is the failure to consider the adequacy of the actual cross-examinations that ordinary lawyers

87. LEE, *supra* note 86, at 233, 241.

88. INHERIT THE WIND (Stanley Kramer Prods. 1960).

89. EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION 186–87 (1997).

90. *Id.*

91. *Id.*

92. *Id.* at 187, 189.

93. *Id.* at 190–91. And this is not even to mention that Scopes was ultimately convicted and fined, though the conviction was overturned on a technicality about the imposition of the fine. *Id.* at 220.

94. JOHN HENRY WIGMORE, SELECT CASES ON THE LAW OF EVIDENCE 3 (2d ed. 1913).

95. 5 WIGMORE, *supra* note 25, § 1367, at 32.

conduct. Because getting to look a witness in the eye is its essence, that opportunity presumptively satisfies the right. Even assuming the potential to coax mistaken witnesses into acknowledging error, the right to confrontation does not ensure that any probing inquiry will occur.[96] Sharing physical space with an accuser is just one component of what cross-examination should guarantee. Pointed questioning and substantive answers make a more significant difference to the defense. All of the things that cross-examination could do—such as exposing a good-faith error with an unanticipated question or using closed-loop control and a witness's previous answers to prompt a commit-and-contradict admission—only work if the witness is actually responding to questions. But there is no right to artful or successful—much less substantive or comprehensive—cross-examination.

At the start of every law school course in evidence, students learn that "a brick is not a wall." This saying comes from McCormick's canonical treatise and appears in the Advisory Committee Notes to the Federal Rules of Evidence.[97] The image of relevant evidence as but one brick—logically connected to the issues in the case but not by itself sufficient to prove or disprove the claim—is a metaphor almost as common as the idea of cross-examination as the greatest engine for discovering truth. And it might be helpful to think of the primary role of cross-examination more in terms of the opportunity to lay bricks than in terms of its capacity to reveal truth and lies.

Confronting adversarial witnesses can ensure a measure of fairness, underscore the proof burden the government bears, and test some incentivized testimony for consistency. Carefully constructed questions can also reveal substantive gaps in testimony. And lawyers can use the scaffolding of cross-examination to make their record for an argument about reasonable doubt or an appeal based on the insufficiency of evidence. This searching version of cross-examination intersects with the theory of the case, reveals details that enrich the jury's understanding, and recalibrates the level of certainty about contested facts.

The emphasis on the procedural nature of the confrontation right, however, ends up justifying questioning where none of these benefits really obtain. A defendant is promised the opportunity to look a witness in the eyes, but there is no guarantee of memory or knowledge behind the eyes that bears on the case.[98] So the defendant's right to "look an accuser in the eye" really

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96. *See* United States v. Owens, 484 U.S. 554, 560 (1988) ("[*S*]*uccessful* cross-examination is not the constitutional guarantee." (emphasis added)).

97. FED. R. EVID. 401 advisory committee's note (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 152, at 317 (1st ed.1954)).

98. *See Owens*, 484 U.S. at 561 ("The Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987))); Delaware v. Fensterer, 474 U.S. 15, 21–22 (1985) (per curiam) ("The Confrontation

just offers the chance to look *at* an accuser. There is no obligation for a witness to return the gaze or respond in any relevant way.[99] Confrontation demands the superficial willingness to engage with questions but not the actual ability to answer them. Although that would seem inconsistent with *Crawford*'s command that declarants be "present at trial to *defend* or *explain*,"[100] Justice Scalia emphasized presence over substance. "[S]omething deep in human nature," he wrote, requires the "essential" physical presence of an accusing witness.[101] And confrontation has come to guarantee nothing more.

Accordingly, a witness who takes the stand but cannot answer questions about the relevant events can still meet the constitutional requirement. Consider *State v. White*,[102] a Louisiana case where the primary evidence implicating the defendant in a fatal shooting was the videotaped statement a witness gave police officers.[103] The witness later lost his memory because of an unrelated accident between the statement and the trial, and he could not recall the shooting, the police interview, or his own accident when he testified.[104] Beyond reporting his age and address, the witness was effectively a blank slate on the stand.[105] The examination yielded no details about the alleged murder, the investigation, or his contradictory statements surrounding the incident.[106] But the trial court admitted his videotaped accusation of the defendant.[107] White was convicted, and the state appellate court upheld the conviction, concluding that cross-examination requires a witness to appear at trial but "there is nothing in the Constitution so restrictive as to suggest that only *meaningful* or *effective* cross-examination would be tolerated."[108] The court deemed physical presence sufficient for purposes of confrontation because the jury had a clear view of his demeanor while he

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Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion.").

99. Coy v. Iowa, 487 U.S. 1012, 1019 (1988) ("The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions.").

100. Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004) (emphasis added).

101. *Coy*, 487 U.S. at 1017 (internal quotation marks omitted) (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)); *see also* United States v. Yates, 438 F.3d 1307, 1313 (11th Cir. 2006) (en banc) (noting the importance of the "intangible elements of the ordeal of testifying" (internal quotation marks omitted) (quoting United States v. Gigante, 166 F.3d 75, 81 (2d Cir. 1999))).

102. 243 So. 3d 12 (La. Ct. App. 2018).

103. *Id.* at 13–14.

104. *Id.* at 14.

105. *Id.* at 14–15.

106. *Id.* at 14.

107. *Id.* at 14–15.

108. *Id.* at 15.

answered minimal personal history questions and affirmed that he recognized himself on the videotape.[109]

A similar scenario unfolded in a Minnesota case, *State v. Holliday*.[110] Over a series of meetings, a witness told police and prosecutors that the defendant had targeted him in another shooting incident (thus supplying the necessary evidence of intent).[111] At trial, the witness professed an inability to recall the content or even the occurrence of the meetings with law enforcement.[112] But because of his physical presence on the stand, reports from the meetings that contained the witness's accusation were admitted, and that decision was upheld.[113]

The *White* and *Holliday* courts, like many courts reaching the same conclusion, relied on the Supreme Court's decision in *United States v. Owens*,[114] also authored by Justice Scalia. *Owens* involved an assault on a prison guard, Foster, that caused the guard's partial memory loss.[115] When an FBI agent visited Foster in the hospital and first attempted to interview him, he was unable to identify his attacker.[116] But when the agent visited again just two weeks later, Foster described the attack and identified the attacker both by name and from an array of photographs.[117] At trial, Foster testified that he clearly remembered this second interview and his identification of the defendant, although he could not explain the basis for that identification, or for that matter recall any of the other visitors he saw in the hospital.[118]

The Court nonetheless held that Foster's identification could be admitted, and that his testimony was adequately "subject to cross-examination" for purposes of the evidence rules and the Confrontation Clause.[119] The factual context matters, and Foster's focus on the details most favorable to the government may have given his testimony a self-impeaching quality.[120] Although he could not answer whether anyone had suggested that Owens was the perpetrator—thus hindering the defendant's cross-examination—he did respond to questions about his activities before the attack, described the sensation of the blows to his head, and recalled seeing

109. *Id.* at 16.

110. 745 N.W.2d 556 (Minn. 2008).

111. *Id.* at 561.

112. *Id.*

113. *Id.* at 568.

114. 484 U.S. 554 (1988).

115. *Id.* at 556.

116. *Id.*

117. *Id.*

118. *Id.* at 555–56.

119. *Id.* at 561–62.

120. *See id.* at 558 (explaining that forgetful witnesses may be inherently discredited if the jury concludes that both their memory and the substance of their testimony are unreliable).

his own blood on the floor afterwards.[121] The extensions of the *Owens* case can stretch its basic holding because many witnesses who claim memory loss only afford the jury an opportunity to assess their credibility with respect to the claim of memory loss itself. In *Owens*, a salient fact was that Foster had a clear memory of the out-of-court identification of the defendant as his assailant.[122] But some lower court cases deem forgetful witnesses subject to cross-examination when they recall neither the events in question nor the circumstances of their prior identification or testimony.[123]

At a minimum, if cross-examination is to expose error or falsehood, witnesses must answer questions about the context of their prior statements.[124] Many lower courts, however, ignore the details and reference *Owens* to conclude that a witness can forget or deny making a prior statement and still appear for cross-examination within the meaning of the Confrontation Clause.[125] This view epitomizes the preference for testimony that *seems* honest rather than testimony that has been tested for accuracy through substantive inquiry. That is, the question under this reading of *Owens* is merely whether cross-examination happened, not whether it actually did anything.

B. Overweighing Observational Lie Detection

Witness appearance and deportment are what make testimony seem honest or dishonest. Evaluating demeanor gives factfinders the *feeling* of knowing what is true. Placing too much weight on observed behavior, however, undercuts the potential for cross-examination. Perhaps the most consistent justification for its centrality in confrontation jurisprudence is that cross-examination prevents perjury. But it turns out that demeanor conveys inaccurate signals of deception. And focusing on superficial cues has inhibited the identification of good faith errors and shielded some incentivized witnesses from exposure as well.

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121. *Id.* at 556.

122. *Id.*

123. *See, e.g.*, State v. Price, 146 P.3d 1183, 1192 (Wash. 2006) (en banc) (holding that a child victim was subject to cross-examination because they appeared in court, even though they could not remember either the relevant incident or their prior statements about it).

124. *See* Goforth v. State, 70 So. 3d 174, 186 (Miss. 2011) (holding that, where a witness both "ha[s] no recollection of the underlying events surrounding his statement" and can "not recall ever having [given it] to [the] police," the Confrontation Clause bars admission); *see also* State v. Hutton, 205 A.3d 637, 655 (Conn. App. Ct. 2019) (reasoning that introduction of a witness's videotaped statement when he refused to answer a single question on the stand violated the Confrontation Clause); State v. Canady, 911 P.2d 104, 115 (Haw. Ct. App. 1996) (concluding that a witness "[should] be subject to cross-examination about the subject matter of the prior statement" and should "be capable of testifying substantively about the event").

125. *E.g.*, United States v. Milton, 8 F.3d 39, 47 (D.C. Cir. 1993); Trimble v. Trani, 460 F. App'x 763, 767 (10th Cir. 2012).

1. Social Science and Deception Detection.—Staring a witness down does little to enrich judgments about veracity and may even be misleading or counterproductive. And there is no data or evidence that supports the continued significance of eye-contact encounters in court. The efficacy of cross-examination is almost entirely a matter of faith, and most courts praising it just quote Wigmore.[126] But even at the time, Wigmore himself acknowledged that his declaration about the utility of cross-examination's "engine" did not have empirical support or reflect much critical analysis.[127] Legal historians describing adversarial trials now recognize cross-examination as more a "blunt instrument" than some finely tuned machine or scorching crucible for truth.[128]

Empirical social science has since demonstrated that observational lie detection simply does not work. According to a 2003 meta-analysis of 116 psychology studies, "nonverbal cues are, for the most part, unrelated" to a speaker's attempts at deception.[129] So face-to-face questioning, especially the affected version that the formal requirements of witness testimony will permit, does very little to expose lies. Indeed, jurors are just as likely to misread clues about deception as they are to correctly identify a liar.[130] Some experiments reveal the lowest detection rates for observers who enter an unfamiliar situation or hear about a topic for the first time,[131] which, of course, describes most jurors. And a 2006 meta-analysis of studies on individuals' ability to detect deceit found that paying attention to visual cues,

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126. *See* Richard O. Lempert, *Built on Lies: Preliminary Reflections on Evidence Law as an Autopoietic System*, 49 HASTINGS L.J. 343, 345 (1998) ("[T]he likely effectiveness of cross-examination in getting at the truth is seldom examined—numerous court opinions and commentaries rely on Wigmore's conclusion . . . rather than on empirical evidence."); *see also* SCHAUER, *supra* note 19, at 102 (stating that portrayals of cross-examination have "painted a dramatically unrealistic picture of [its] nature and effectiveness" in "testing the truth of testimonial evidence").

127. *See* 5 WIGMORE, *supra* note 25, § 1368, at 36 ("What is the theory of [cross-examination's] efficiency? . . . Upon this we commonly reflect but little.").

128. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 270 (2003); *see also* Adam J. Kolber, *Will There Be a Neurolaw Revolution?*, 89 IND. L.J. 807, 837 (2014) ("Our entrenched preference for jury decision making is largely a result of the path of history, rather than an empirically validated conclusion about how good juries are at discerning credibility.").

129. Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 166 (2020) (citing Bella M. DePaulo, James J. Lindsay, Brian E. Malone, Laura Muhlenbruck, Kelly Charlton & Harris Cooper, *Cues to Deception*, 129 PSYCH. BULL. 74, 83, 102–06 (2003)).

130. *See* Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1088 (1991) ("[O]rdinary observers do not benefit from the opportunity to observe nonverbal behavior in judging whether someone is lying. . . . [T]here is no persuasive evidence to support the hypothesis that lying is accompanied by distinctive body behavior that others can discern.").

131. Timothy R. Levine, *New and Improved Accuracy Findings in Deception Detection Research*, 6 CURRENT OP. IN PSYCH. 1, 3 (2015).

as compared to auditory and audiovisual cues, may even hinder the ability to detect lies.[132]

Moreover, watching cross-examination inflates confidence. Survey participants report that they can detect lies in conversations with an average accuracy rate of eighty-two percent.[133] This faith in the ability to sense lying through in-person contact is nothing new. Nineteenth-century philosopher Friedrich Nietzsche famously claimed that he could smell truth.[134] And the "human lie detector" paradigm now regularly appears in the media. The "MasterClass" franchise added a class in 2023 called "How to Tell if Someone Is Lying," taught by an FBI profiler.[135] Lists of the top methods for identifying the liars in one's social and professional circles using behavioral cues pop up on web sites as clickbait.[136] Various popular books also describe deception detection techniques, including how to read microexpressions,[137] spot the facial signs "deadly" to business and personal relationships,[138] and apply CIA training on the telltale signs of lying.[139] None of these intuitions or expert tips about the behavior of deceptive speakers, however, can stand up to any empirical testing.[140]

The confidence problem applies to experienced observers who work in the criminal justice system as well. The most widely used interrogation

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132. Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCH. REV. 214, 231 (2006).

133. Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident But Erroneous*, 23 CARDOZO L. REV. 809, 814 (2002).

134. *See* Robert Pippin, *Truth and Lies in the Early Nietzsche*, J. NIETZSCHE STUDIES, Spring 1996, at 49. According to Pippin, Nietzsche believed "[one can] always detect, or smell, a psychopathology; we are forced to the language of fear, ressentiment, cowardice." *Id.* Granted, Nietzsche may have been making a metaphorical claim about instinct, but he often made statements about the genius of his nostrils when it came to detecting falsehood. *E.g.*, FRIEDRICH NIETZSCHE, ECCE HOMO: HOW ONE BECOMES WHAT ONE IS 126 (R. J. Hollingdale trans., Penguin Books 1979) (1888) ("I was the first to *discover* the truth, in that I was the first to sense—*smell*—the lie as lie . . . My genius is in my nostrils.").

135. *How to Tell if Someone Is Lying: Expert John Douglas's Tips*, MASTERCLASS (Oct. 20, 2022), https://www.masterclass.com/articles/how-to-tell-if-someone-is-lying [https://perma.cc/9HR8-NT6M].

136. *E.g.*, Áine Cain & Rachel Gillett, *11 Signs Someone Might Be Lying to You*, BUS. INSIDER (Nov. 17, 2018, 9:51 AM), https://www.businessinsider.com/11-signs-someone-is-lying-2014-4 [https://perma.cc/XWT9-YAAC]; Robin Dreeke, *Former FBI Agent of 21 Years: These Are the 8 Biggest 'Warning Signs' That Reveal a Dishonest Person*, CNBC: MAKE IT (Feb. 12, 2020, 11:52 AM), https://www.cnbc.com/2020/02/12/retired-fbi-agent-warns-do-not-trust-people-who-have-these-8-habits-of-dishonesty.html [https://perma.cc/7C9D-ELSC].

137. PAUL EKMAN, TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS, AND MARRIAGE 168–70 (1985).

138. PAMELA MEYER, LIESPOTTING: PROVEN TECHNIQUES TO DETECT DECEPTION 68 (2010).

139. PHILIP HOUSTON, MICHAEL FLOYD & SUSAN CARNICERO, SPY THE LIE 3 (2012).

140. *See* Aldert Vrij, Maria Hartwig & Pär Anders Granhag, *Reading Lies: Nonverbal Communication and Deception*, 70 ANN. REV. PSYCH. 295, 307–08 (2019) (stating that no empirical research since 2006 has established that observing behaviors alone leads to improved accuracy of lie detection).

manual instructs investigators on the infamous Reid technique and suggests that a suspect's lies will be revealed through "nonverbal behaviors that reflect comfort versus anxiety, confidence versus uncertainty, and a clear conscience versus guilt or shame."[141] Among these behaviors: avoiding eye contact, "jittery legs," and "lint picking."[142] Many law enforcement agents who act in a screening capacity, at borders and airports for example, receive similar training on nonverbal clues to deception.[143] Although these agents have a high rate of false positives, they also justify the lay lie detection approach by pointing to cases in which they identify high-risk travelers.[144] Because most lies go undetected, there is no real feedback on what successful lying looks like. And this same problem, which makes it difficult to test common intuitions about how liars appear in everyday life, makes law enforcement claims about behavioral cues suspect. Law enforcement agents have no baseline data, for example, on how much contraband slips through their behavioral screens. Moreover, the empirical data on how institutional actors perform when attempting interpersonal lie detection reveals the same basic result that lay observers achieve: accuracy equivalent to guessing.[145] That result holds for law enforcement personnel and trial judges as well.[146]

Setting traps for liars in settings like interrogations or cross-examination connects to the idea that lying requires effort while honesty will be spontaneous. Neuroscientists have experimented with technology like electroencephalography (EEG) and functional magnetic resonance imaging

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141. INBAU ET AL., *supra* note 37, at viii, 121.

142. *Id.* at 131, 134.

143. *See* Jessica Seigel, *Can You Tell When Someone Is Lying?*, BBC (Apr. 5, 2021, 7:01 AM), https://www.bbc.com/future/article/20210401-how-to-tell-when-someone-is-lying [https://perma.cc/J4SF-ZS6U] (stating that the Transportation Security Administration (TSA) has a "secretive behavioural screening checklist" referencing averted gaze along with "prolonged stare, rapid blinking, complaining, whistling, exaggerated yawning, covering the mouth while speaking and excessive fidgeting or personal grooming" even though all of these supposed indicators of deception "have been thoroughly debunked by researchers").

144. *See* John Tierney, *At Airports, A Misplaced Faith in Body Language*, N.Y. TIMES (Mar. 25, 2014), https://www.nytimes.com/2014/03/25/science/in-airport-screening-body-language-is-faulted-as-behavior-sleuth.html [https://perma.cc/9D2X-3EUS] (reporting the TSA's claim that the agency's $1 billion program to train officers in behavior detection led to identifying more high-risk passengers than random screening and citing a GAO report challenging the methodology behind the TSA's assertion given that 30,000 passengers a year were identified as suspicious and fewer than one percent of those were arrested for any offense).

145. Saul M. Kassin, *On the Psychology of Confessions: Does* Innocence *Put* Innocents *at Risk?*, 60 AM. PSYCH. 215, 217 (2005).

146. Bond & DePaulo, *supra* note 132, at 229; *see also* Aldert Vrij, *Nonverbal Detection of Deception*, *in* FINDING THE TRUTH IN THE COURTROOM: DEALING WITH DECEPTION, LIES, AND MEMORIES 163, 165 (Henry Otgaar & Mark L. Howe eds., 2018) (78 percent of police officers report, for example, that they make veracity judgments based on cues like "gaze aversion," which is a common miscue).

(fMRI) to link effortful neural activity with lie detection.[147] The rules of evidence even relax the hearsay prohibition for statements that constitute "excited utterances" made in the heat of the moment without an opportunity for fabrication.[148] As Barbara Kingsolver wrote, "[t]he truth needs so little rehearsal."[149] While it is true that telling lies entails cognitive effort that may be accompanied by physiological arousal, other people cannot reliably observe that internal process.

Certainly, focused questioning can catch a dissembling witness, but exposing fabrication turns more on the substantive flaws that appear than on the opportunity to observe demeanor.[150] Studies comparing the responses of subjects shown videotaped testimony or given transcripts further demonstrate the confounding distractions of visual cues.[151] Lie detection based only on visual stimuli was found to be the least accurate, while assessments based on audio recordings or written transcripts both produced sounder conclusions.[152] Experiments with veiled witnesses confirm this. When witnesses wearing niqabs (which cover the face but not the eyes) or hijabs (which cover the hair and neck but not the face) testify, "observers' performance at detecting lies improve[s] to above-chance levels."[153] The researchers hypothesize that veiling limited the amount of visual information and forced participants to listen more than watch and "base their decisions on verbal cues."[154]

The listening works better because it focuses on content. In contrast, almost all *nonverbal* signals of dishonesty on the witness stand are subject to conflicting interpretations and are, therefore, effectively worthless.[155] Both

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147. *E.g.*, Owen D. Jones, *The Future of Law and Neuroscience*, 63 WM. & MARY L. REV. 1317, 1324, 1339 (2022).

148. FED. R. EVID. 803(2).

149. BARBARA KINGSOLVER, ANIMAL DREAMS 319 (1st ed. 1990).

150. *See* Chris William Sanchirico, *"What Makes the Engine Go?" Cognitive Limitations and Cross-Examination*, 14 WIDENER L. REV. 507, 514–15 (2009) ("[P]resenting consistent, detailed, and robust testimony draws a much heavier cognitive load for the fabricating witness than for the witness who honestly recounts her actual memories.").

151. *See* Hannah J. Phalen, Jessica M. Salerno & Janice Nadler, *Emotional Evidence in Court*, *in* RESEARCH HANDBOOK ON LAW AND EMOTION 288, 289 (Susan A. Bandes, Jody Lyneé Madeira, Kathryn D. Temple & Emily Kidd White eds., 2021) ("[I]n one study mock jurors who viewed videotaped testimony (compared to reading a transcript) reported being more disturbed and in turn rated the plaintiff as less at fault.").

152. *E.g.*, Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 178 (2011).

153. Simon-Kerr, *supra* note 129, at 171.

154. *Id.* (quoting Amy-May Leach, Nawal Ammar, D. Nicole England, Laura M. Remigio, Bennett Kleinberg & Bruno J. Verschuere, *Less Is More? Detecting Lies in Veiled Witnesses*, 40 LAW & HUM. BEHAV. 401, 408 (2016)).

155. *See* Saul M. Kassin, Richard A. Leo, Christian A. Meissner, Kimberly D. Richman, Lori H. Colwell, Amy-May Leach & Dana La Fon, *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM BEHAV. 381, 382–83 (2007) (stating

excessive blinking and a fixed stare supposedly indicate lying, and the same goes for talking too fast and choosing words too deliberately, smiling and frowning, shifting in the witness chair, and sitting rigidly still.[156] One of the most referenced cues to lying—gaze aversion—may be the most insignificant of all. Shifting eye contact does not occur with any greater frequency when people are lying than when they are telling the truth.[157]

To emphasize whether a witness appears forthcoming also elevates the theater of the examination—the skirmish or jousting that jurors expect.[158] That performance both distracts from the substance of testimony and disfavors witnesses who do not fare well in a verbal duel.[159] In fact, a witness who faces dire consequences, has a truthful exculpatory story to tell, and fears the jurors' skepticism may well appear significantly more nervous than a witness venturing a brazen lie.

Because of the definition of testimonial accusations and the current construction of the Confrontation Clause, more victims, including vulnerable victims, submit to cross-examination.[160] An assault victim, for example, may experience intimidation or even trauma from adversarial questioning. Vigorous questioning in cases involving domestic violence and child abuse often successfully discredits victim-witnesses, but researchers have documented a counterproductive effect to those exchanges.[161] Cross-examination can ultimately distort, rather than clarify, evidence because it

that the research into any "sixth sense" for deception based on cues like posture and anxiety "indicates that this faith is misplaced").

156. *See, e.g.*, Margaret Talbot, *Duped: Can Brain Scans Uncover Lies?*, NEW YORKER (June 25, 2007), https://www.newyorker.com/magazine/2007/07/02/duped [https://perma.cc/J76X-7558] (summarizing myths about nonverbal cues to deception).

157. *See* Simon, *supra* note 152, at 176 ("Invariably, visually observable behaviors—namely . . . gaze aversion—were not found to be related to deceit.").

158. *Cf.* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 279 ("[S]hall we continue to regard the criminal trial as 'in the nature of a game or sporting contest' and not 'a serious inquiry aiming to distinguish between guilt and innocence'?" (quoting Glanville Williams, *Advance Notice of the Defense*, 1959 CRIM. L. REV. (Eng.) 548, 554)).

159. *See* Joyce Plotnikoff & Richard Woolfson, *'Kicking and Screaming': The Slow Road to Best Evidence*, *in* CHILDREN AND CROSS-EXAMINATION: TIME TO CHANGE THE RULES? 21, 22 (John R. Spencer & Michael E. Lamb eds., 2012) ("[C]ross-examination aims not at accuracy or best evidence but at persuading witnesses to adopt an alternative version of events or discrediting their evidence.").

160. *See* SCHAUER, *supra* note 19, at 104 (explaining that cross-examination can "impede the search for truth" when it casts "unjustified doubts on the testimony of witnesses" or discourages witnesses "from even being willing to testify in the first place").

161. 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 PSYCH.: APPLIED 187, 193 (2003).

"allows so much latitude for bullying and other truth-defeating stratagems."[162]

Searching for traces of duplicity both distracts factfinders from essential information and distances them from the most vulnerable witnesses. That includes not only victims and other fact witnesses but defendants as well. Occasionally, cross-examination will highlight an obvious falsehood, but it can also make honest witnesses appear hesitant, confused, or defiant and thereby cause factfinders to reject truthful evidence. And cross-examination can introduce more bias than it exposes. Because demeanor assessments turn on unarticulated hunches, instincts, and impressions, they also animate implicit biases. Credibility judgments based on deportment exacerbate a "demeanor gap" along lines of gender and race.[163] "'[R]eading' demeanor is often largely an exercise in drawing comparisons between the reader's expectations about how a forthright or honest person should look, sound or otherwise appear"[164] and how the speaker appears to them.

This ad hoc credibility evaluation is also wholly unregulated. According to Bennett Capers, demeanor provides the type of in-court information that fact finders consider and apply to their decisions without the structure of any formal evidentiary rules.[165] Although demeanor is "always assumed to *be* in evidence," there are no guidelines for its consideration in the code of evidence.[166] When witnesses might seem unappealing to the jurors or otherwise alienate them—even reliable witnesses who can provide valuable context—the parties will often just forgo their testimony.

The open-ended assessment of demeanor makes taking the witness stand more perilous for criminal defendants as well. It complicates an already difficult decision that defendants face about whether to testify.[167] Staying silent is a costly decision because of the widespread assumption that innocent defendants will testify to clear their names.[168] And taking the stand may be a defendant's best opportunity to explain their conduct, mitigate damaging facts, or put their earlier statements in context. Defendants already contend

162. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 833 (1985).

163. Amanda Carlin, Comment, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 475–77 (2016).

164. Simon-Kerr, *supra* note 129, at 161.

165. Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 869, 881 (2018).

166. 3A WIGMORE, *supra* note 25, § 946, at 783 (1970) (emphasis added).

167. *See, e.g.*, Jesus Jiménez, *Lawyers Say Alex Murdaugh Taking the Witness Stand Is a Risky But Calculated Move*, N.Y. TIMES (Feb. 24, 2023, 4:12 PM), https://www.nytimes.com/live/2023/02/24/us/alex-murdaugh-trial-murder [https://perma.cc/GT7L-GELD] (quoting a defense lawyer's statements that though "there's no silence more deafening than a defendant invoking his right to remain silent," testifying at one's own trial requires "walking between raindrops without getting wet").

168. *See* Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 410 (2018) (explaining the extent to which jurors penalize defendants who choose not to testify).

with some deficits to their credibility that arise from bias, and they then confront rules that make it risky to testify.[169] In many cases, defendants face impeachment via their criminal history.[170] Even if they could tell a true story of innocence, either prior convictions expose them to prejudice, or they worry that they will not *seem* honest to jurors. Data on defendants convicted at trial and later determined to be factually innocent suggests that the decision whether to take the stand turns on these risks and not the content of potential testimony.[171]

Despite the documented deficiencies and biases, faith in demeanor cues and impeachment through cross-examination persists. And that belief has been impervious to contemporary social science and evidence theory. As George Fisher states, it is an "intractable task" for jurors to determine from the facial expressions, gestures, and overall presentation of a stranger whether or not they are deceptive, and our "unguarded confidence that jurors are up to this task is the more remarkable for being so probably wrong."[172] Richard Uviller likewise wrote thirty years ago that "we can hardly afford to ignore the cumulative conclusion, painful as it may be to some cherished assumptions about the process," that nonverbal behavior does not reveal lying.[173] Yet we continue to ignore this conclusion.

Indeed, the myth of cross-examination as lie detection surfaced again when courts faced the challenges of criminal proceedings during the COVID pandemic. Many courts delayed trials due to concerns about masked witnesses,[174] even though the passage of time harms defendants who await

169. *See, e.g.*, Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2259 (2017) ("[A] witness of color is automatically considered less credible, and to bolster the witness of color's character of truthfulness the party must navigate rigorous evidence rules.").

170. *See* FED. R. EVID. 609 (providing for admission of some prior convictions as evidence of a witness's character for truthfulness).

171. For example, in one study, only 43 percent of defendants who testified at trial had a criminal record, while 91 percent of those who declined to take the stand would have faced impeachment for their prior convictions. John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 490 (2008). Yet defendants who testify stand the best chance of persuading the jury. *See* Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1, 5–6, 12 (1993) ("It is almost impossible to see the defendant as a deserving person unless he testifies, partly because the natural order of trial dehumanizes him."); *see also* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 2002 (2016) (explaining that testifying "permits a criminal defendant to remind—or show—the jury that he is a human being").

172. Fisher, *supra* note 20, at 578.

173. H. Richard Uviller, Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale, 42 DUKE L.J. 776, 788 (1993).

174. *See, e.g.*, Twenty-Ninth Emergency Order Regarding the COVID-19 State of Disaster, Misc. Docket No. 20-9135, at 2 (Tex. 2020), https://www.txcourts.gov/media/1450050/209135.pdf [https://perma.cc/3MQM-APV5] (prohibiting Texas courts from holding jury proceedings during COVID, including jury selection or a jury trial, prior to February 1, 2021).

resolution of their cases while detained, creates substantive disadvantages around evidence preservation, and harms victims as well.[175] Other courts stretched public health guidelines and replaced masks with plexiglass barriers in order to provide access to demeanor cues.[176] Most participants wore masks to court, but when live witness questioning took place, courts focused on the visibility of facial features. Some judges adjusted mask requirements given the problem of "assessing witness credibility" without all the details of facial expressions,[177] including allowing temporary removal of witness masks[178] or even the use of plastic face shields instead.[179] One New York prosecutor commented that it is vital for jurors "to watch the credibility of a witness, and to see whether or not he or she is being forthright," which is "hard to do if the person is wearing a mask."[180] In a Texas trial court, the judge agreed that masks stopped factfinders from determining if a witness "looks like he's being sincere, or if she looks like she's making stuff up and not telling the truth."[181] Another trial judge concluded that the minimum requirement for adequate confrontation would be a transparent mask, citing her sympathy "to the notion of reading faces."[182] And some defense attorneys

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175. *See, e.g.*, United States v. Barket, 530 F.2d 189, 193 (8th Cir. 1976) (stating that the death of six witnesses during a nearly four-year trial delay "undoubtedly impaired" an individual's defense); Burke v. State, 835 So. 2d 286, 289 (Fla. Dist. Ct. App. 2003) ("Remoteness precludes the use of evidence that has become unverifiable through loss of memory, unavailability of witnesses, and other similar problems.").

176. *See* Melissa Chan, *'I Want This Over.' For Victims and the Accused, Justice Is Delayed as COVID-19 Snarls Courts*, TIME (Feb. 23, 2021, 10:12 AM), https://time.com/5939482/covid-19-criminal-cases-backlog [https://perma.cc/AB5M-PL7K] ("By fall 2020, some criminal jury trials had resumed with restrictions, including in areas of New York State, where each county was allowed to hold one criminal trial at a time in courtrooms outfitted with plexiglass barriers . . . .").

177. IND. SUP. CT. OFF. OF JUD. ADMIN., RESUMING OPERATIONS OF THE TRIAL COURTS: COVID-19 GUIDELINES FOR INDIANA'S JUDICIARY 36 (2020), https://www.in.gov/judiciary/files/covid19-resuming-trial-court-operations.pdf [https://perma.cc/N2ZS-BHQG].

178. In the Matter of Restricting Physical Access to Court Facilities Due to a Public Health Emergency and Transition to Resumption of Certain Operations, Administrative Order No. 2020-078, at 3, http://www.superiorcourt.maricopa.gov/SuperiorCourt/AdministrativeOrders/AdminOrders/AO%202020-078.pdf [https://perma.cc/9Q3H-ENT8].

179. *Judge Releases Court Rules*, THE TIMES-GAZETTE (June 4, 2020), https://www.timesgazette.com/news/48933/judge-releases-court-rules-2 [https://perma.cc/3TQA-BTDL].

180. Melissa Krull, *Witnesses Wearing Masks? Trials in Auditoriums? How Trials Could Be Conducted*, SPECTRUM NEWS (May 12, 2020, 1:45 AM), https://spectrumlocalnews.com/nys/central-ny/news/2020/05/11/how-will-future-trials-be-conducted-# [https://perma.cc/WXW5-T3W4].

181. Angela Morris, *'I Want to See the Person's Face': Houston Judges Poll Attorneys About Face Masks, COVID-19 Reopening Precautions*, TEX. LAW. (May 19, 2020, 5:48 PM) (quoting Judge Robert Schaffer), https://www.law.com/texaslawyer/2020/05/19/i-want-to-see-the-persons-face-houston-judges-poll-attorneys-about-face-masks-covid-19-reopening-precautions/?slreturn=20200430112232# [https://perma.cc/6S89-Y28P].

182. Maria Dinzeo, *Judge Orders Transparent Masks for Witnesses in Criminal Trial*, COURTHOUSE NEWS. SERV. (July 16, 2020) (quoting San Francisco Superior Court Judge Vedica Puri), https://www.courthousenews.com/judge-orders-transparent-masks-for-witnesses-in-criminal-trial/ [https://perma.cc/8ACD-HMM4].

even argued that wearing *any* form of mask would be prejudicial because it could prevent them from eliciting "micro-expressions."[183]

These assertions are consistent with longstanding emphasis on how witnesses appear rather than what they say. Even when some disguise is necessary to further important state interests like ensuring a witness's safety, only the minimum needed to shield identity is permitted. In a case allowing a witness to wear a wig and a false mustache, the Ninth Circuit reasoned that "the reliability of the . . . testimony was otherwise assured, because . . . despite his disguise, the jury was able to hear [the witness's] voice, see his entire face including his eyes and facial reactions to questions, and observe his body language."[184] As the court explained, "[t]hese are all key elements of one's demeanor that shed light on credibility."[185]

2. *Surface Layers of Consistency and Validity*.—Because witnesses must show their faces to jurors but need not answer questions, cross-examination can also fail to expose the honest mistakes that cause the most enduring trial errors. A mechanistic conception of cross-examination suggests that facts lie there waiting to be "found" at trial, that the right questions can reveal them, and that sincere witnesses can deliver them. Often, however, factfinders must sift through deeper layers for consistency, via a broader conception of what cross-examination accomplishes.

Emphasizing a face-off is misdirection that prevents screening for common honest mistakes. Consider the emphasis on whether "out-of-court" statements have been subject to cross-examination. Among the hundreds of defendants exonerated by DNA evidence over the past few decades, there is not a single one whose wrongful conviction has been coded as the product of unconfronted hearsay from some out-of-court statement.[186] On the other hand, direct witnesses, testifying live and subject to cross, often present misinformation that appears credible because they genuinely believe in it. Insincere witnesses may stumble during cross-examination, given the difficulty of maintaining an invented storyline, and that could prove useful to a defendant. Most witnesses, however, have authentic commitments to their own misperceptions and incomplete narratives.

Fictional cross-examinations include scenes like *My Cousin Vinny*'s revelations about the time it takes to cook grits or a witness's demonstrated visual impairment—moments of clarity that exposed the flaw in eyewitness

183. *See id.* (citing a public defender's argument that viewing "micro-expressions [is] so critical").

184. United States v. De Jesus-Casteneda, 705 F.3d 1117, 1120–21 (9th Cir. 2013).

185. *Id.* at 1121.

186. *See* David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 18 ("[N]one of the hundreds of prisoners exonerated over the past few decades by DNA evidence appear to owe their wrongful convictions to hearsay evidence.").

identifications. But inaccurate identifications by eyewitnesses often arise from misplaced certainty, and the very act of testifying and submitting to cross-examination can reproduce and reinforce that error.[187] Through interactions with law enforcement agents, interviews, trial preparation with prosecutors, and the solemnity of repeating the account in the courtroom, the confidence of honestly mistaken witnesses only increases,[188] and with it the confidence cue they send to the jury.[189] The evidentiary rules further validate the reliability of eyewitness identifications repeated in person and on the stand—all past identifications are defined as non-hearsay and admissible if the witness submits to cross-examination.[190]

Forensic analysts also reinforce their authority and sincerity when cross-examined, and often in misleading ways. There are thousands of pages of law review commentary interpreting which analysts must be made available for cross-examination, and of course the requirement of a witness is itself some check on the power of the government. In its precedents on the Confrontation Clause, the Supreme Court has assumed that cross-examination will weed out incompetent analysts or inspire reconsideration of forensic testimony.[191] Forensic analysts tend to defend their reports, however, and rarely admit the possibility of error.[192] Expert witnesses dependent on a particular methodology for their livelihood seem especially unlikely to reevaluate their conclusions because of some pointed questions.

Advocates for extending the reinvigorated right to confrontation to laboratory analysts have explained, for example, how subjectivity and bias can impact DNA testing and how inadequate confrontation has been to date.[193] There are some notable examples of forensic analysts revealing

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187. *See* United States v. Downing, 753 F.2d 1224, 1230 n.6 (3d Cir. 1985) ("To the extent that a mistaken witness may retain great confidence in an inaccurate identification, cross-examination can hardly be seen as an effective way to reveal the weaknesses in a witness' recollection of an event.").

188. *See* DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 160 (2012) (explaining how elements like repeated questioning and confirmatory feedback can inflate witness confidence).

189. *See* Simon, *supra* note 152, at 157–58 (summarizing research on the impact of witness confidence).

190. FED. R. EVID. 801(d)(1)(C).

191. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319 (2009) (stating that a forensic analyst "who provides false results may, under oath in open court, reconsider his false testimony"); *id.* ("Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well.").

192. Experts often testify that they are "100 percent certain" of their conclusions, convey that their methods are infallible, and resist studies of error rates. *See* BRANDON L. GARRETT, AUTOPSY OF A CRIME LAB: EXPOSING THE FLAWS IN FORENSICS 62 (2021).

193. *E.g.*, Brief of Amicus Curiae The Innocence Network in Support of Petitioner at 14, Williams v. Illinois, 567 U.S. 50 (No.10-8505) (2012).

knowledge gaps or recognizing errors on cross-examination.[194] In a Maryland murder case, during the pre-trial hearing (questioned before the judge but not a jury), a chemist conceded that she did not understand the science behind the testing she performed on blood samples and failed to record some results.[195] These are unusual examples of consequential questioning, and they involve the worst witnesses committing the clearest errors. Many more forensic experts have testified to conclusive facts developed through careless application of invalid methodologies. And cross-examination did nothing to expose them. Like lay witnesses, experts often emerge from cross-examination with enhanced credibility instead.

Moreover, even valid methodologies have layers of opportunity for error, and cross-examination cannot reach all of them because representative witnesses often suffice for Confrontation Clause purposes. Consider, for example, testimony about inculpatory comparisons of DNA profiles. The analyst who delivers the top-line conclusion—typically the only one who must appear for cross-examination—cannot necessarily validate the DNA extraction, quantification, or amplification performed by others.[196]

Or take *Stuart v. Alabama*,[197] a case in which prosecutors relied on the results of a blood-alcohol test conducted hours after Vanessa Stuart's arrest to establish her intoxication while driving.[198] They refused, however, to call the analyst who performed the test as a witness at trial.[199] The government instead presented a substitute witness who referred to the results of the test after Stuart's arrest and combined that information with data about the rate at which alcohol is metabolized.[200] The witness then estimated what Stuart's blood-alcohol level would have been hours earlier, when she was driving.[201] The only information defense counsel could challenge was general science about metabolizing alcohol and basic math about the passage of time. But the lower courts found no Confrontation Clause violation, despite the absence of

194. The dissent in *Williams v. Illinois* opens with one such example: an analyst who realized under questioning that she had switched the victim's control sample with the defendant's DNA sample and therefore erroneously testified that the defendant's DNA was present on the victim's bloody sweatshirt. 567 U.S. 50, 118 (2012) (Kagan, J., dissenting).

195. Stephanie Hanes, *Chemist Quit Crime Lab Job After Hearing, Papers Show*, BALT. SUN (Mar. 19, 2003), https://www.baltimoresun.com/news/bs-xpm-2003-03-19-0303190116-story.html [https://perma.cc/P7ER-5KWF].

196. *See, e.g.*, Williams v. Illinois, 567 U.S. 50, 56–58 (2012) (plurality opinion) (permitting testimony about a DNA test performed by an outside agency from an expert witness who was not the original analyst).

197. Stuart v. State, No. CR-16-0752 (Ala. Crim. App. Dec. 8, 2017), *cert. denied* 139 S. Ct. 36 (2018).

198. 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from denial of certiorari).

199. *Id.*

200. *Id.*

201. *Id.*

the analyst who performed the various stages of testing at which human error might have occurred.[202]

3. Government-Created Evidence and Incentivized Witnesses.—Given the Court's current construction of the Confrontation Clause, the one thing that cross-examination surely must guarantee is an opportunity to reveal manipulated evidence. The constitutional doctrine and popular culture of cross-examination both emphasize the telling question about a witness's incentives. Atticus Finch's questioning, for example, exposed Bob Ewell's ulterior motives.[203] However, bias seldom presents as the sort of personal animus that Ewell's character felt for Tom Robinson in *To Kill a Mockingbird*. More commonly, a witness will have mixed incentives and testify in a way calculated to curry favor with prosecutors. As the Court recognized in *Crawford*, government influence on witness testimony is the core danger against which the Sixth Amendment right protects.[204] "Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar."[205]

In *Davis v. Alaska*,[206] the Court also noted how important questioning on "possible biases, prejudices, or ulterior motives" can be to revealing the partiality of incentivized witnesses.[207] About half of all documented wrongful convictions for capital murder involve some compelling trial testimony by witnesses who earned reductions in their charges or sentences that may have inspired falsehoods.[208] Vigorous questioning of cooperating witnesses could be the sort of cross-examination that makes a real difference. Yet the scope of such questioning is limited. Courts do not always permit cross-examination of government witnesses about the terms of cooperation agreements, the penalties the witnesses could have faced, or the sentences

202. *See id.* at 36–37 (describing a "terse" lower-court opinion and the State's reading of *Williams* in defense of it). The Supreme Court recently granted cert. in *Smith v. Arizona* and will potentially reconsider the question that was presented in *Bullcoming* and then sidestepped in *Stuart*: whether a testifying lab analyst who took no part in the original tests can satisfy the Confrontation Clause if they offer opinions based on the notes and reports of an absent analyst. Petition of Writ of Certiorari at (i), Smith v. Arizona, No. 22-899 (2023).

203. LEE, *supra* note 86, at 200–01.

204. Crawford v. Washington, 541 U.S. 36, 50 (2004).

205. *Id.* at 56 n.7.

206. 415 U.S. 308 (1974).

207. *Id.* at 316; *see also* Delaware v. Van Arsdall, 475 U.S. 673, 678–79 (1986) ("[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (internal quotation marks omitted) (quoting *Davis*, 415 U.S. at 316–17)).

208. ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 7 (2009).

they received. Generally, this has been justified on the grounds that jurors focused on guilt should not hear testimony that could distract them with the separate issue of punishment.[209] Courts allow references to cooperators' "substantial" or "significant" potential sentences, but not the number of years involved.[210] For example, in a case involving conspiracy to transport cocaine, one defendant testified against another in exchange for prosecutors dropping a related firearms charge.[211] Defense counsel attempted to inquire about the thirty-five-year sentence the cooperating witness would have faced on those charges.[212] The court concluded, however, that the jury could appraise "possible biases and motivations" without learning the extent of the break on sentencing.[213]

This troubling incentive structure, however, seems exactly the place to deploy cross-examination as a check on government-created evidence. Cooperating witnesses often know that they will receive a statutorily prescribed minimum sentence unless they satisfy the government with cooperation that the prosecutor regards as substantial and meaningful.[214] So the minimum sentence looming in the background counts as potential bias that ought to be revealed to the jury. But the circuit courts are divided on the extent to which specific sentencing breaks expose witness bias, and the Supreme Court has not resolved the issue.[215] Courts that exclude the particulars of cooperation deals regard nonspecific questioning about having a plea agreement as sufficient because jurors can view the witness's reactions

209. *See* United States v. Walley, 567 F.3d 354, 360 (8th Cir. 2009) (reasoning that without "proof that [a witness] expected that a particular benefit would flow from his cooperation," jurors would not be given a different impression of that witness's credibility).

210. *See* United States v. Trent, 863 F.3d 699, 703, 706 (7th Cir. 2017) (holding that the district court "did not err, let alone abuse its discretion" by allowing questioning "about the 'substantial mandatory minimum' each [witness] faced 'without quantifying the exact amount'" of those minimums).

211. United States v. Luciano-Mosquera, 63 F.3d 1142, 1148, 1153 (1st Cir. 1995).

212. *Id.* at 1153.

213. *Id.*

214. *See* U.S. SENT'G GUIDELINES MANUAL § 5K1.1, at 467 (U.S. SENT'G COMM'N 2021) (providing that judges may consider whether a defendant has provided "substantial assistance" in the investigation or prosecution of another person who has committed a crime when determining an appropriate sentence); *cf.* Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

215. *See* United States v. Dimora, 843 F. Supp. 2d 799, 843–44 (N.D. Ohio 2012) (discussing conflicting decisions on the scope of a defendant's right to question a cooperating witness about incentives to testify); *see also* United States v. Lanham, 617 F.3d 873, 884 (6th Cir. 2010) (noting the circuit split).

on the stand.[216] The limits on cross-examination thus preclude exposure of some obvious incentives.

III. The Collateral Consequences of Confidence in Cross-Examination

This Essay has explored how the narrow "lie detection" conception of cross-examination took hold and why that is misguided. The underlying values that support the role of cross-examination are laudable, but there are some flawed assumptions about the extent to which the in-person opportunity to face a witness fully serves those values. As a result, confrontation has become a trial right that offers defendants less protection than it seems to provide. And there are further costs to misunderstanding what cross-examination currently accomplishes. Because cross-examination as lie detection gets too much credit, it also limits the development of other guarantees and gives courts unwarranted faith in the factfinding at trial. Effectively examining witnesses requires significant adjacent protections and opportunities. Confining witness confrontation to limited in-person questioning clutters the definition of testimonial, blocks broader reforms that might gain purchase in the Confrontation Clause, and shields both evidentiary errors and incompetent counsel from appellate review.

A. Disregarding Reliability: Lost Evidence and Constitutional Confusion

One explanation for the evidentiary rules requiring live testimony from witnesses before admitting their own out-of-court statements is that the speaker at time one and the witness at time two are not actually the same person. You are not the same person that you were yesterday or last year, and you will change again tomorrow. Intervening events, experiences, and information alter us. Likewise, the eyewitness who identifies a perpetrator in a line-up differs from the trial witness who repeats that identification in court, even though the same individual speaks about the crime at both times. In between the moments after the crime and the trial months later, things happen: fear grows or subsides, meetings with law enforcement agents and prosecutors unfold, and memory fades. What the witness remembers and recounts becomes what happened, but there is significant discontinuity between their trial testimony and what they experienced. Consequently, the important accusation—the testimony that requires confrontation—is the initial line-up identification and not just the subsequent appearance in court.

In order to import that first identification into trial evidence, the witness in the chair needs to answer questions about the earlier moment as well as

216. *See, e.g.*, United States v. Cropp, 127 F.3d 354, 359 (4th Cir. 1997) (adopting the *Luciano-Mosquera* court's inquiry, which considers not the specificity of the questioning but "whether the jury possesses sufficient evidence to enable it to make a 'discriminating appraisal' of bias and incentives to lie on the part of the witnesses" (quoting *Luciano-Mosquera*, 63 F.3d at 1153)).

their current beliefs—both the underlying past events and the circumstances of speaking about them before. Otherwise, counsel only cross-examines the "second person," and all that the jury observes is the largely insignificant demeanor of someone different from the witness who matters.

Yet cross-examination can provide the jury with meaningful information when it exposes the space between the person making the initial statement at time one and the witness offering testimony in court at time two. This version of cross-examination reveals the effects of time and influence, and it is not merely lie detection because the witness's mistakes will likely be honest ones. An eyewitness otherwise may not reveal much on cross-examination because they sincerely believe they are proffering accurate information about the identity of the perpetrator. Social science suggests that jurors do not intuitively understand how an eyewitness can change by the time they testify in court,[217] and they could benefit from fuller explanations about who is being cross-examined and what they previously saw and said.[218] That is why the *Owens* precedent has had a pernicious effect. It allows courts to deem nonresponsive witnesses sufficiently cross-examined even though they tell the jury nothing about the accuracy of the first identification or intervening distortions.

It is also why the Court has lost the thread of what testimonial evidence does. For almost two decades, the Supreme Court has granted review on new iterations of the question and struggled to define the hinge on which the requirement of cross-examination turns. Indeed, they have fought quite bitterly over the meaning of testimonial—Justice Scalia called the majority's description of the emergency in *Michigan v. Bryant* "so transparently false that professing to believe it demeans this institution."[219] By the 2012 decision in *Williams v. Illinois*,[220] no rationale garnered majority support.[221] There, in a plurality opinion, the Court concluded that a testifying Illinois analyst could reference the content of a DNA report prepared by a non-testifying Maryland

217. *See* Griffin, *supra* note 75, at 313 (discussing the durability of the myth that witnesses will "never forget a face").

218. *Cf.* Bellin, *supra* note 47, at 349 ("[A] key ingredient of critical evidence-rule failures appears to be a specific type of unreliability that eludes the wisdom of lay jurors.").

219. Michigan v. Bryant, 562 U.S. 344, 379 (2011) (Scalia, J., dissenting).

220. 567 U.S. 50 (2012).

221. *Compare id.* at 57–58 (plurality opinion) (concluding that a lab report was nontestimonial because it "was sought not for the purpose of obtaining evidence to be used against petitioner" but that even if it were, the Confrontation Clause has "no application to out-of-court statements that are not offered to prove the truth of the matter asserted"), *with id.* at 103–04 (Thomas, J., concurring in judgment) (disagreeing with the majority's hearsay-based rationale yet, in applying his own formality-and-solemnity-based approach, agreeing that the Sixth Amendment was not offended), *and id.* at 138 (Kagan, J., dissenting) ("[T]he report is, in every conceivable respect, a statement meant to serve as evidence in a potential criminal trial. And that simple fact should be sufficient to resolve the [confrontation] question.").

analyst.[222] The deciding vote, however, came with Justice Thomas's concurrence, which expressed his unique view that the Confrontation Clause does not apply to forensic reports unless they contain a formal certification.[223] Bewilderment abounds in the lower courts, a situation that Justice Gorsuch noted in dissenting from the denial of certiorari in *Stuart v. Alabama*.[224] The Court's "various [*Williams*] opinions," he concluded, "have sown confusion in courts across the country."[225] Chief Justice Rehnquist predicted as much in *Crawford* itself, protesting that "the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers . . . now, not months or years from now."[226] That was twenty years ago, and the Court has only moved farther away from clarity and consensus.

One solution lies in a purposive definition of testimonial, but it first would mean abandoning the mechanical lie detection–based conception of cross-examination. A statement should be called testimonial considering both what it does (whether it makes an accusation) and what cross-examination could accomplish (its capacity to expose fraud or error). Existing precedents leave space to add these purposive considerations to the definition of testimonial and the trigger for cross-examination. The Confrontation Clause remains one of the most fluid constitutional doctrines as well as one of the least correlated with partisan preferences.[227] The current Court could refine the meaning of testimonial to clarify that reliability remains a relevant goal of confrontation. At times, the Court's Confrontation Clause pronouncements seem to hint at this. To determine if otherwise admissible hearsay is testimonial, the Court has looked to the purpose of the entire encounter from which it arises.[228] The statements and actions of both declarant and the original questioner matter, as does the formality or informality of the setting.[229] In some cases, the Court has considered all of the circumstances under which a statement was created in order to decide if its primary purpose is to establish or prove past events relevant to a later criminal prosecution.[230]

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222. *Id.* at 57–60 (plurality opinion).

223. *Id.* at 103–04 (Thomas, J., concurring in judgment).

224. *See* Stuart v. Alabama, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from denial of certiorari) (collecting cases).

225. *Id.*

226. Crawford v. Washington, 541 U.S. 36, 75 (2004) (Rehnquist, C.J., concurring in judgment).

227. *See, e.g.*, Bellin, *supra* note 51, at 1867 ("[T]he reinvigoration of the Sixth Amendment confrontation right was led by Justice Scalia playing counter-to-type and striking a resounding blow against prosecutorial power.").

228. Michigan v. Bryant, 562 U.S. 344, 370 (2011).

229. *Id.* at 366–67.

230. *See, e.g.*, Ohio v. Clark, 576 U.S. 237, 246–48 (2015) (considering, among other factors, the age of the parties, the setting of the testimony, and the parties' relative sophistication).

The Court could also resolve open questions about what cross-examination demands, moving beyond the idea that any opportunity to question a witness in person before a jury will suffice. When the cross-examination requirement applies, it should include questions about all the facts and circumstances that made the statement testimonial in the first place. This is especially true where the government attempts to pass off evidence it has somehow engineered as original to an absent witness. Those out-of-court statements merit careful questioning about their substance and origin, which is not the same thing as in-person lie detection. Emphasizing the narrow and superficial aspects of cross-examination rather than a broad potential exchange of information understates cross-examination's potential to contribute to the accuracy of trials.[231]

The testimonial category remains both over- and under-inclusive in part because of the Court's narrow view of what cross-examination does. Conceptualized as just a credibility screen, the purpose of cross-examination does not add much to the definition, but considering the broader potential for cross-examination to ensure reliability could prompt better sorting in both directions. Lost evidence imposes accuracy costs too, and some statements that are otherwise unavailable at trial can add essential information in their out-of-court form. Seemingly reliable statements that appear to condemn—including victims' initial statements to law enforcement, medical professionals, or other first responders—are often excluded because of the way testimonial is defined. When a witness refuses to talk (as up to seventy percent of domestic violence complainants do),[232] or when a victim is otherwise beyond the court's reach, should the evidence always disappear along with the declarant? Excluding that evidence silences victims and makes it "significantly more difficult to convict the guilty, without improving the chances of vindicating the innocent."[233] If the firsthand account is not available, sometimes an earlier statement constitutes the only source of information, and sometimes it has been tested in ways that validate its accuracy.[234]

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231. *See, e.g.*, ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 19 (2009) ("The assumption underlying cross-examination is that the witness has chosen to cut into the great booming, buzzing confusion of life in a way that is consciously or unconsciously willful, that he or she has left out something important that changes the meaning of everything."); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339, 1414 n.255 (1987) (implying that accuracy is maximized if the jury has "more information about the specific circumstances affecting [the declarant's] perception and memory of the events").

232. *E.g.*, Rachel Louise Snyder, *We Prosecute Murder Without the Victim's Help. Why Not Domestic Violence?*, N.Y. TIMES (May 4, 2019), https://www.nytimes.com/2019/05/04/opinion/sunday/domestic-violence-recanting-crawford.html [https://perma.cc/VU37-9KBR].

233. Donald A. Dripps, *Controlling the Damage Done by* Crawford v. Washington*: Three Consecutive Proposals*, 7 OHIO ST. J. CRIM. L. 521, 535 (2010).

234. *See* Lisa Kern Griffin, *The Content of Confrontation*, 7 DUKE J. CON. L. & PUB. POL'Y (SPECIAL ISSUE) 51, 69–70 (2011) (suggesting that hearsay in a recorded form, such as a deposition,

The focus on live witnesses, however, leads to the exclusion of some useful alternatives to testimony. Out-of-court reports of all sorts can be less ritualistic and more substantive than testimony. They are less likely to be prepared and rehearsed, and it may even be easier to properly credit or discredit such statements without the distractions of a witness's self-presentation. On the other hand, bad witnesses acting in good faith (like mistaken eyewitnesses) and good witnesses acting in bad faith (like expert purveyors of flawed methodologies) fare well on cross-examination, and that is the only test they face.

Consider the status of witness statements written or recorded out of court, which can provide ample opportunity to test the substance of proffered facts for inconsistencies and contradictions. It takes more effort to evaluate layers of substance than to observe superficial behavior on the stand, but reviewing records may give jurors a better opportunity for quality control.[235] Transcripts eliminate distracting nonverbal data,[236] and they allow factfinders to pace review and focus on the most salient moments. They also emphasize cognitive methods over behavioral cues. Because speakers find it easier to control facial expressions than vocal intonations, critically confronting an audio recording can also provide a superior opportunity to screen for deception. Audible cues generally yield more information than visual ones about credibility because the signals that do correlate with accuracy include rich details and discrepancies, and para-verbal cues like voice pitch and vocal tension.[237] In some studies, judges themselves have rated "internal inconsistency and external contradiction" as the most telling signals of the accuracy of statements.[238] Those characteristics can be weighed without the theater of in-court examination when transcriptions or audio recordings are available.[239]

"affords a better opportunity to review for accuracy, consistency, and the suggestiveness or manipulability of the initial questioning").

235. *See* Chris William Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291, 328 (2004) (demonstrating that paper trails can be more trustworthy than a witness's description of his past communications).

236. *See* Charles F. Bond Jr. & Bella M. DePaulo, *Individual Differences in Judging Deception: Accuracy and Bias*, 134 PSYCH. BULL. 477, 487 (2008) (explaining that facial anatomy impacts perceptions of one's credibility).

237. *See* Bond & DePaulo, *supra* note 132, at 217; Simon, *supra* note 152, at 176.

238. Uviller, *supra* note 173, at 825 (emphasis omitted).

239. *See* Bond & DePaulo, *supra* note 132, at 227 (concluding that unplanned witness statements are easier to evaluate for credibility than rehearsed in-court testimony); *see also generally* Maria Hartwig, Pär Anders Granhag, Leif A. Strömwall & Ola Kronvist, *Strategic Use of Evidence During Police Interviews: When Training to Detect Deception Works*, 30 LAW & HUM. BEHAV. 603 (2006) (reporting significant improvements in the accuracy of evaluating statements for deception when questioners focus on the consistency of the content).

The current rules on the scope of cross-examination disfavor any such substitutes for live testimony.[240] In *Maryland v. Craig*,[241] the Supreme Court analyzed the legitimacy of virtual confrontation in the context of alleged child victims testifying on camera and outside the presence of the defendant.[242] The Court did hold that video testimony maintained the key attributes of the Sixth Amendment right and that the state's interest in protecting child victims justified the departure from traditional in-person confrontation.[243] But in a sharp dissent, Justice Scalia insisted that giving a criminal defendant "virtually everything" the Constitution guarantees is only "virtually constitutional,"[244] and his view of the Confrontation Clause became the *Crawford* rule.[245]

That rule has developed so that it not only excludes potentially valuable and reliable evidence but also allows some unreliable statements to be admitted. There is no confrontation of nontestimonial hearsay because *Crawford* both deepens the core right and sets a perimeter around its application. The purpose of the out-of-court statement controls, and whatever substantive purpose cross-examination might serve is immaterial. That means more hearsay statements coming in overall, including some secondhand testimony that presents real dangers of unfairness or inaccuracy.

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240. *But see* John Futty, *Woman's Testimony Will Be Allowed at Her Own Murder Trial*, COLUMBUS DISPATCH (Apr. 14, 2018, 12:01 AM), https://www.dispatch.com/story/news/crime/2018/04/14/woman-s-testimony-will-be/12693491007/ [https://perma.cc/6Q8T-QH7Z] (discussing videotaped deposition testimony in Ohio murder case that court permitted because defense attorneys were able to question the victim during the deposition).

241. 497 U.S. 836 (1990).

242. *Id.* at 840.

243. *Id.* at 851, 855. Lower courts have since stringently applied *Craig*'s requirement that substitute confrontation must be "necessary to further an important public policy," 497 U.S. at 850. *See, e.g.*, United States v. Carter, 907 F.3d 1199, 1207–08 (9th Cir. 2018) (discussing superiority of face-to-face confrontation over virtual questioning and requiring presence of a witness despite health complications). Even concerns about COVID transmission did not persuade the courts to forgo in-person confrontation. *E.g.*, United States v. Casher, No. CR 19-65, 2020 WL 3270541, at *3–4 (D. Mont. June 17, 2020) (order denying third-party motion to quash subpoenas).

244. 497 U.S. at 870 (Scalia, J., dissenting). Justice Scalia articulated his view of the formal requirements of the Sixth Amendment as follows:

> The Court has convincingly proved that the Maryland procedure . . . gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals . . . .

Id.

245. *Compare id.* at 862 ("[T]he defendant's [Confrontation Clause] right . . . means, always and everywhere, at least what it explicitly says: the 'right to meet face to face all those who appear and give evidence at trial.'" (quoting Coy v. Iowa, 487 U.S. 1012, 1016 (1988))), *with* Crawford v. Washington, 541 U.S. 36, 68 (2004) (requiring face-to-face confrontation vis-à-vis all testimonial evidence unless the witness is unavailable and the defense has already had an opportunity to cross-examine them).

Take a closer look at *Michigan v. Bryant*, for example. There, a shooting victim answered questions from police officers while lying bleeding on the pavement at a Detroit gas station.[246] The victim later died, but he identified the gunman and the location of the shooting during the exchange, and his statements were admitted at trial.[247] Justice Sotomayor, writing for the majority, concluded that the statements were not a "substitute for trial testimony" but rather a response to an ongoing emergency involving a "victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim."[248] According to the Court's reasoning, the rationale for *Davis*'s primary-purpose test is that "the prospect of fabrication in statements given for the primary purpose of resolving [an] emergency is presumably significantly diminished" so no cross-examination is required.[249] But even if that is granted, the victim identified "Rick" (Bryant) as the gunman despite the fact that the bullet passed through the closed back door of Bryant's house. Moreover, the victim's physical description of his assailant did not match the defendant's appearance.[250] Though the Court correctly assessed the primary purpose of the out-of-court statement, it did not consider the potential impact that cross-examination might have had.

Adding a broader purpose of cross-examination to the calculus of what counts as testimonial could improve the definition and would also enlarge the scope of those examinations when they are required. *Crawford*'s basic premise is sound: there should be careful assessment of any testimonial evidence that government agents might have manipulated. But the Court has not followed through on that principle. A purposive definition of testimonial that accounts for the potential gains from cross-examination—in terms of substantive questioning rather than mechanical lie detection—could clarify the goals of confrontation. It could prevent the loss of trustworthy evidence and exclude dubious out-of-court accounts. The current rule does not, however, weigh whether cross-examination might cut through confusion or expose inaccuracy. The Court has only considered when defendants have a right to in-person engagement with witnesses and has not addressed what cross-examination actually accomplishes or how it can protect reliability.

B. Narrowly Construing the Right to Confrontation

Unexamined notions of the power of cross-examination, its equation with lie detection, and its contraction to pure procedure ultimately narrow

246. Michigan v. Bryant, 562 U.S. 344, 349 (2011).
247. *Id.* at 348–49.
248. *Id.* at 358–59.
249. *Id.* at 361.
250. People v. Bryant, 768 N.W.2d 65, 67 (Mich. 2009), *vacated*, 562 U.S. 344, 378 (2011).

defendants' rights and inhibit accuracy. This occurs not only in application of the cross-examination guarantee pursuant to interpretations of the Confrontation Clause but also in terms of what the Confrontation Clause as a whole could protect. Defendants suffer collateral consequences that go beyond the scope of witness questioning. This Essay does not suggest that cross-examination performs no useful functions. Rather, it argues that valorizing in-person questioning has led to an impoverished notion of what confronting prosecution evidence requires. By occupying the field of what confrontation could mean, cross-examination masks shortfalls in other procedural protections.

The Sixth Amendment does not specify that questioning a witness fully vindicates the confrontation right, and broader concerns about reliability animated the Clause when it was drafted.[251] According to Bernadette Meyler, no legal dictionary of the Founding era defined either "confront" or "confrontation," and there is no clear source describing cross-examination as the full scope of what the Clause was intended to encompass.[252] Although several cases have since stated that cross-examination is the settled meaning of confrontation,[253] the Supreme Court has also said that it is just the "primary" object of the clause.[254] And earlier decisions state that the Confrontation Clause aims broadly to "advance a practical concern for the accuracy of the truth-determining process in criminal trials."[255]

That concern has narrowed to an opportunity to conduct an in-person examination of a live witness to assess demeanor without any consideration of additional or alternative mechanisms. The idea that cross-examination fully solves the problem of government-created evidence thus arrested the development of other protections and left all reliability concerns to hard-to-win due process claims.

But has a defendant been confronted with the government's evidence when afforded only a minimal opportunity to question witnesses? Some of those witnesses no longer possess any relevant information, and the knowledgeable ones tend to hold up on cross-examination because they have the advantage of believing what they say. The core purpose of confrontation, expressed at the Framing and reasserted in the *Crawford* line of cases, is to expose errors or corruption in the prosecution's construction of its case.

251. *See* Ronald J. Allen, *From the Enlightenment to* Crawford *to* Holmes*: Address at the Association of American Law Schools Evidence Conference*, 39 SETON HALL L. REV. 1, 12 (2009) ("There is no reason to think that the Sixth Amendment reflects a fetish for cross-examination rather than a concern about reliability during a time when unreliable outcomes were relatively easy to manufacture.").

252. Bernadette Meyler, *Common Law Confrontations*, 37 LAW & HIST. REV. 763, 767–68 (2019).

253. *E.g.*, Coy v. Iowa, 487 U.S. 1012, 1016–17, 1021 (1988).

254. Douglas v. Alabama, 380 U.S. 415, 418 (1965).

255. Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion).

Confrontation supposedly guarantees a criminal defendant's right "to know, to examine, to explain and to rebut" the government's evidence.[256] And that requires an "analysis calculated to discover and expose in detail its possible weaknesses, and thus to enable the tribunal to estimate it at no more than its actual value."[257] To accomplish that, witnesses might matter less than, say, information about the process law enforcement used to construct a photo array or lineup, background on the techniques for interviewing a suspect, or social science expertise on the flaws in identifications and confessions. Cross-examination may create the illusion of revealing faults without providing the essential facts necessary to challenge evidence.

Scientific evidence illustrates some of the shortcomings of using cross-examination alone to confront the government's case. The more that law enforcement relies on technical testimony, the less adequate cross-examination seems to be for quality control. The Court has focused on the debate about whether confrontation requires testimony from the original analyst, but a broader question is whether cross-examination is the best way, or even a good way, to expose inaccuracies in forensic expertise. Scientific evidence is not "immune from the risk of manipulation."[258] So is an analyst's predictable testimony about process and conclusions what a defendant most needs to examine? Sufficient resources to pursue competing expertise could do more to enable challenges to flawed forensic testimony than cross-examination of analysts.

The analyst who testifies also tends to be the minimally constitutionally sufficient witness. And at best they can speak to the potential for isolated human error. But evidence itself is changing. Consider the DNA report that was the subject of the Court's most recent Confrontation Clause decision in *Williams*.[259] Andrea Roth explains that the analyst's testimony implicated "not only standardized machine processes but also standardized human-created protocols about which peaks to treat as computer noise and which to treat as true genetic markers as well as human ad hoc judgments about when to override those standardized protocols based on special circumstances."[260] According to Roth's analysis, this hybrid testimony involves "distributed cognition," which means there is no single source—person or machine—for the facts introduced.[261] Forensic analysts are neither the sole authors of their

256. Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 402 (1959).

257. 5 WIGMORE, *supra* note 25, § 1360, at 1.

258. Stuart v. Alabama, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from denial of certiorari) (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318 (2009)).

259. Williams v. Illinois, 567 U.S. 50, 56 (2012) (plurality opinion).

260. Andrea Roth, *Beyond Cross Examination: A Response to Cheng and Nunn*, 97 TEXAS L. REV. ONLINE 193, 195 (2019).

261. *Id.* at 194–95.

testimony nor "mere scrivener[s]" restating machine-made results.[262] If an analyst declares a substance to be cocaine, that conclusion includes some automated information, some observation and reasoning by the analyst, and a certification that someone (likely not the analyst themselves) properly calibrated and maintained the laboratory equipment. An analyst on the stand might provide some of the necessary assurances, but access to laboratory data would help defendants significantly more.[263]

Although evidence law should not fetishize witnesses to the extent that it does, it seems important to state again that questioning witnesses can create opportunities for defendants, including when it comes to forensic expertise. The problem is not the right to cross-examination, as far as it goes. The issue is that it is not *enough* by itself. And it has foreclosed other truth-seeking procedures better calibrated to expose error. Justice Scalia even acknowledged in *Melendez-Diaz v. Massachusetts* that there might be "other ways—and in some cases better ways—to challenge or verify the results of a forensic test" than cross-examination.[264] Perhaps the resources for investigation and expertise, information about the algorithms that law enforcement might use in big data policing and analysis, broader discovery of potentially exculpatory evidence under *Brady*,[265] and better-financed indigent defense? But there are no available Confrontation Clause arguments in favor of these rights because the formal opportunity to observe demeanor is both the floor and the ceiling of what the clause requires. Cross-examination is the "only indicium of reliability sufficient to satisfy constitutional demands"[266] as well as all that the Confrontation Clause currently provides.

C. Constraining Error Correction

Because cross-examination is presumed to ensure accuracy, it also creates difficulties for defendants who seek review of their convictions. Appellate courts frequently cite cross-examination when they conclude that they must defer to trial judges.[267] Like jurors, trial judges supposedly observe demeanor, determine whether to credit witnesses, and thereby develop a

262. Bullcoming v. New Mexico, 564 U.S. 647, 659–60 (2011) (quoting State v. Bullcoming, 226 P.3d 1, 9 (N.M. 2010), *rev'd*, 564 U.S. 647, 668 (2011)).

263. *See* Sklansky, *supra* note 186, at 18, 72–74 (explaining why cross-examination of forensic experts is often ineffectual and concluding that defendants need access to independent experts, underlying data, and even samples and materials to meaningfully test expert methodologies).

264. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318 (2009).

265. Brady v. Maryland, 373 U.S. 83 (1963).

266. Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

267. *See, e.g.*, State v. Byrge, 614 N.W.2d 477, 492–93 (Wis. 2000) (concluding, because of the lower court's ability to observe demeanor, that the appellate court could not "second-guess" any factual determinations).

complete understanding of the weight of the government's proof. As we have seen here, witness demeanor makes minimal contributions to truth-seeking and is just as likely to distort perceptions of the evidence. But a lower court's vantage point on cross-examination nonetheless justifies deference to verdicts even when there are credible claims of error. "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded," the Supreme Court wrote in *United States v. Oregon Medical Society*.[268] "In doubtful cases," the Court continued, the trial judge's "power of observation" is "the most accurate method of ascertaining the truth."[269] Appellate courts simply note that "facial expressions, eye contact, attitude, body language, length of pauses, hesitation, sincerity, gestures, candor, tone of voice, expression, dress, [and] grooming habits" were excluded from their view and that the distance obscures assessment of the record.[270] Other elements of credibility—including inconsistencies, degree of responsiveness, or witness incentives—might be reviewable by an appellate court referencing the record.[271] But the rule that demeanor is critical insulates credibility findings from meaningful appellate review.

Completed cross-examinations also inhibit reappraisal of potentially false testimony. Belief perseverance raises doubts about the significance of facts that conflict with the confirmed narrative, which is why even DNA evidence might not persuade prosecutors that an exonerated defendant should be released.[272] When cases involve violent crimes, prosecutors may grow especially attached to convictions and seek to preserve mistaken ones.[273] They will often view witnesses who attempt to recant their testimony with

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268. 343 U.S. 326, 339 (1952) (quoting Boyd v. Boyd, 169 N.E. 632, 634 (N.Y. 1930)); *see also* United States *ex rel.* Sostre v. Festa, 513 F.2d 1313, 1317 (2d Cir. 1975) (calling the trial judge's opportunity to "personally observ[e]" demeanor "a factor of major moment").

269. *Or. Med. Soc'y*, 343 U.S. at 339 (internal quotation marks omitted) (quoting *Boyd*, 169 N.E. at 634).

270. *See* Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1338, 1350 & n.108 (2015) ("[A]ppellate courts overturn credibility determinations only where a witness's testimony is impossible under the laws of nature or incredible as a matter of law—an extraordinarily high standard.").

271. Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985); *see also* Doe v. Menefee, 391 F.3d 147, 184–88 (2d Cir. 2004) (Pooler, J., dissenting) (considering testimonial inconsistencies and witness incentives).

272. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 314–16 (discussing enduring wrongful convictions and the mechanisms by which the guilt judgment "persisted on appeal and through postconviction proceedings").

273. *E.g.*, Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129 (2004).

particular skepticism.[274] In 1989, Gary Dotson became the first prisoner exonerated by DNA evidence.[275] The alleged victim of the abduction and rape for which he was convicted recanted her story, but the prosecutors, the judge, the Illinois Prisoner Review Board, the Governor of Illinois, and the *Chicago Tribune* all discounted her recantation, in part based on her cross-examined trial testimony.[276] Most jurisdictions require proof that any recantation is made in the same proceeding (i.e., during the cross-examination).[277] But not all witnesses will confess to false testimony immediately. In fact, many will not recant until after their testimony leads to a wrongful conviction.[278] There is no recantation defense to perjury, moreover, and the threat of perjury charges discourages recantations on direct appeals or collateral proceedings.[279] So witnesses are dissuaded from truthfully recanting testimony, and courts and prosecutors hardly ever credit recantations.[280] Even where there is obvious error that is later confirmed by DNA analysis, the adversarial questioning at trial cements the false narrative.

Cross-examination interacts as well with the minimal standards for constitutionally sufficient counsel. Like the Sixth Amendment right to confrontation, the Sixth Amendment right to representation has a narrow window for claiming violations.[281] Because of the formalistic and process-focused conception of adequate cross-examination, almost any attempt at questioning will preclude a claim that cross-examination was constitutionally incompetent. What's more, cross-examining government witnesses, however inartfully, largely protects defense counsel from broader ineffective-assistance claims.[282] If given the opportunity to at least see (if not actually

274. This is true not only of prosecutors but also of the courts. *See* United States v. Santiago, 837 F.2d 1545, 1550 (11th Cir. 1988) ("[R]ecantations are viewed with extreme suspicion by the courts.").

275. Bluhm Legal Clinic Center on Wrongful Convictions, *First DNA Exoneration*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html [https://perma.cc/FAU5-963L].

276. Rob Warden, *Reacting to Recantations*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION 106, 106 (Daniel S. Medwed ed., 2017).

277. Russell D. Covey, *Recantations and the Perjury Sword*, 79 ALB. L. REV. 861, 880 (2016).

278. *Id.* at 861.

279. *Id.* at 862, 879–80.

280. *Id.* at 863, 868, 881–82.

281. *See* Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting) (objecting to the required showing of prejudice for ineffective-assistance-of-counsel claims because "it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent").

282. *See, e.g.*, United States v. Watkins, 486 F.3d 458, 466 (8th Cir. 2007), *vacated on other grounds*, 552 U.S. 1091 (2008) (noting the difficulty of showing that "the trial outcome would have been different had specific questions been asked on cross examination" (internal quotation marks omitted) (quoting United States v. Watkins, No. CR 99-73, 2006 WL 1523149, at *13 (June 2, 2006))); Wilson v. State, 340 P.3d 1213, 1227 (Kan. Ct. App. 2014) ("[W]e must determine not what a highly skilled trial attorney would do; we must determine what a minimally adequate cross-

confront) a witness on the stand, a defendant cannot complain that questioning failed to damage the government's case.[283]

There is no guarantee of successful cross-examination, and nothing ensures access to a successful cross-examiner either. But the opportunity to cross-examine even an alert and informed witness will not mean much without able counsel to conduct the examination. Although a well-formed cross-examination can expose helpful facts and press a strategic advantage, the woeful state of indigent defense means that few lawyers have the time or resources to prepare to effectively challenge the government's case on cross-examination. It is difficult to conduct even cursory witness examinations when appointed counsel may earn less than $1,000 for an entire felony trial, public-defender caseloads require representation of hundreds of clients at a time, and public-defense budgets do not include funds for experts and investigators.[284]

That calls into question the adequacy of both confrontation and representation because "Sixth Amendment rights support each other."[285] Cross-examination means little without competent counsel to conduct it, and competent counsel cannot meet the government's case without an expansive right to cross-examine.[286] The *Strickland* standard sets such a low bar for a sufficient defense—requiring a showing both that representation fell below an objective standard of reasonableness and that the deficient performance materially affected the outcome of the case[287]—that even lawyers who fall asleep while their clients are being cross-examined do not render

examination would be."); Hodge v. Haeberlin, No. CIV A. 04-CV-185, 2006 WL 1895526, at *82 (E.D.K.Y. July 10, 2006) (excusing failures to cross-examine on key points in damaging testimony on the theory that it might be a strategy to avoid calling attention to the testimony); *cf.* State v. Clark, 365 A.2d 1167, 1174 (Conn. 1976) ("The decision whether to cross-examine a witness is peculiarly one for defense counsel and his judgment should be entitled to great respect by the court." (internal quotation marks omitted) (quoting United States v. Clayborne, 509 F.2d 473, 479 (1974))).

283. *E.g.*, United States v. Owens, 484 U.S. 554, 560 (1988).

284. *See* Lisa Kern Griffin, *State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense*, 80 LAW & CONTEMP. PROBS., no. 1, 2017, at 83, 94 (2017) (discussing the resource shortfalls in public defense).

285. United States v. Fields, 483 F.3d 313, 373 (5th Cir. 2007) (Benavides, J., dissenting); *see also id.* ("Without counsel, the right of cross-examination may be an exercise in futility. Without the right to cross-examine the state's witnesses or to present favorable evidence, the right to counsel may be an empty formalism." (quoting John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2010 (2005))).

286. *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) (stating that the "skill and knowledge" of defense counsel determines whether a trial offers a "reliable adversarial testing process").

287. *Id.* at 687–88; *see id.* at 691–92, 694 (noting that the test for ineffective-assistance prejudice "finds its roots" in other materiality tests and requires a reasonably probable showing that "but for counsel's unprofessional errors, the result of the proceeding would have been different").

constitutionally ineffective assistance.[288] The *Strickland* standard also requires reviewing courts to guess what might have happened had competent counsel made timely objections or conducted effective cross-examinations, and a court's best guess is usually that it would not have made any difference.[289] Precisely because counsel did not build an adequate record, the trial transcripts do not suggest substantial injury to a defendant.[290] Notwithstanding the cultural and historical resonance of cross-examination and the Supreme Court's current preoccupation with defining when it is required, there are no standards ensuring that the Sixth Amendment right to have counsel conduct a cross-examination means anything at all. And courts have failed to hold counsel to a standard higher than conducting *some* examination, however superficial.[291]

Nor should the availability of cross-examination consistently shield the violation of other constitutional rights from sanction. Professions of faith in the "good sense and judgment of American juries," for example, have ended inquiries into the due process implications of faulty line-ups.[292] Judges tend to conclude that cross-examination will protect reliability even when inaccurate law enforcement practices may have contributed to identifications or confessions.[293] They also cite the adversary system and the opportunity to

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288. *See* Muniz v. Smith, 647 F.3d 619, 622–25 (6th Cir. 2011) (concluding that prejudice only arises when a lawyer sleeps through a "substantial portion of [defendant's] trial").

289. *See* Stephen F. Smith, *Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515, 542–43 (2009) (concluding that the *Strickland* standard shields "a wide array of stunningly incompetent and unprofessional representation"); *id.* at 520–21 (maintaining that claims of constitutional ineffectiveness will fail wherever there is "*any* conceivable basis for rationalizing the attorney's actions").

290. Justice Marshall, dissenting in *Strickland*, noted this very infirmity:

> [I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. . . . On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.

466 U.S. at 710 (Marshall, J., dissenting).

291. *See, e.g.*, Velasco v. Comm'r of Corr., 987 A.2d 1031, 1036 (Conn. App. Ct. 2010) ("The fact that counsel arguably could have inquired more deeply into certain areas, or failed to inquire at all into areas of claimed importance, falls short of establishing deficient performance.").

292. Manson v. Brathwaite, 432 U.S. 98, 112–13, 116 (1977); *see also* Perry v. New Hampshire, 565 U.S. 228, 245 (2012) (noting that confrontation of witnesses is one of the "safeguards built into our adversary system" and can "caution juries against placing undue weight on eyewitness testimony of questionable reliability").

293. *See, e.g.*, Abu-Jamal v. Horn, No. CIV. A. 99-5089, 2001 WL 1609690, at *33 (E.D. Pa. Dec. 18, 2001), *abrogated on other grounds by* Smith v. Spisak, 558 U.S. 139 (2010) (concluding that, because a state trial court judge was able to observe the demeanor of witnesses, factual determinations should be upheld as reasonable despite claims about witness credibility).

cross-examine as a justification for liberal admission of evidence and less rigorous screening of expertise.[294]

The folklore about cross-examination not only shields error but imposes opportunity costs. The Supreme Court has considered case after case about when criminal defendants have the right to cross-examine whom, accepting the premise that haling the right witness into court can ensure honest testimony and ultimately accurate factfinding. Relying in part on cross-examination, the Court has declined to review many other significant challenges to the way the criminal justice system produces evidence and treats defendants.

* * *

Important benefits arise from cross-examination, even in real trials, and especially for criminal defendants. At its core, the Confrontation Clause is both a grant of positive rights to the defendant and a potential restraint on government manipulation of evidence. Requiring confrontation can increase defendants' agency, raise objections to the government's case, and occasionally dispense with some flawed evidence. It is critical, however, to recognize what cross-examination can and cannot reveal, and where it might have negative effects. Too often, it falls short and only achieves performative reliability. The one thing it clearly does not accomplish is the very task that the system has assigned to it: lie detection. And over-reliance on its capacity to test credibility can lead to the exclusion of some valuable evidence, introduce misinformation via witness demeanor, diminish other procedural protections, and insulate errors from later review.

Defendants are entitled not just to questions but to answers—about the circumstances of prior statements, the incentives for testifying, and the various entry points for inaccuracies. Providing that information could start with a renewed inquiry into what it means to confront government evidence as well. The Sixth Amendment Confrontation Clause could support other trial rights and supply additional arguments for expanded discovery, access to technical expertise, and minimally adequate counsel. Finally, reviewing courts should look beyond the demeanor shield and conduct a more searching inquiry into potential errors at trial.

Each of these reforms could introduce productive discomfort. The current conception of cross-examination's role eases the decisional burden for jurors and judges. They determine who to believe rather than processing what each witness has to say. They buy into folklore that dates back to the common law, surfaces in constitutional debates, and dominates popular

294. *See, e.g.*, Williams v. Illinois, 567 U.S. 50, 96 (Breyer, J., concurring) (2012) (stating that forensic expertise that contributed to wrongful convictions was cross-examined and that courts erred in relying on cross-examination that was "rarely effective" (citing Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 10–12, 84, 89–90 (2009))).

culture about the criminal justice system. But entertaining scenes from hit movies and tips for detecting lies mislead about the utility of demeanor and the value of in-person confrontation. Cross-examination does not guarantee accuracy, and it can make factfinders too confident about their judgments just when there are many more questions to ask.