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Laurie L. Levenson¹

*All the world's a stage,
And all the men and women merely players:
They have their exits and their entrances;
And one man in his time plays many parts,
His acts being seven ages.²*

What is it that we want the American criminal courtroom to be? This is one of the fundamental questions facing our criminal justice system today. Although we have constructed an elaborate system of evidentiary rules and courtroom procedures, an American criminal trial is much more than a mere sum of its evidentiary parts. Rather, it is a theater in which the various courtroom actors play out the guilt or innocence of the defendant for the trier of fact to assess.³

¹ Professor of Law, William M. Rains Fellow & Director, Center for Ethical Advocacy, Loyola Law School, Los Angeles. This article is based upon work and inspiration from my dear friend and former student, Kelly White. I am very grateful for the insights of my colleagues during the Loyola Workshop program. A special thank you to Victor Gold, David Leonard, Sam Pillsbury, Marcy Strauss and Peter Tiersma for reviewing early drafts of this work. Finally, this work would not have been possible without the invaluable assistance of my research assistants, Jeffrey Jensen, Krista Kyle, Emil Petrossian, Reid Jason and William Smyth.

² WILLIAM SHAKESPEARE, *As You Like It*, in THE WORKS OF WILLIAM SHAKESPEARE GATHERED INTO ONE VOLUME 611, 622 (Sir Paul Harvey ed., Oxford University Press 1938) (1623).

³ Recognizing that the courtroom is a theater where lawyers act out their advocacy, see Peter W. Murphy, "There's No Business Like ...?" *Some Thoughts on the Ethics of Acting in the Courtroom*, 44 S. TEX. L. REV. 111 (2002), practitioners are often instructed on how to act effectively in the courtroom. See, e.g., Donald B. Fiedler, *Acting Effectively in Court: Using Dramatic Techniques*, 25 CHAMPION 18 (July 2001). Moreover, jurors often view the courtroom as a theater. The comments of one of the jurors in the O.J. Simpson murder trial are particularly telling:

The whole thing with those closing arguments was I felt it was all a script. Everybody had his or her little script. I hated it because at that point you're supposed to be tying in all the evidence and tying in everything. So you're sitting there and trying to just focus on the issues and here they are, Marcia Clark, the woe-is-me . . . trying to get the tear thing. And Johnnie Cochran is going on about Proverbs and this, that, and the other, and the hat routine and "if it doesn't fit, you must acquit."

One view of the courtroom is that of a controlled laboratory in which the science of the law is performed. Under this model, attorneys present evidence, the judge supervises for quality control, and the jurors give the results of the experiment; there is little room for emotions or actions whose impact cannot be predicted. A trial is simply the sum of the parties' formal evidence: eyewitness testimony, exhibits, and stipulations. Neither the words of counsel, nor the mannerisms of the defendant off the stand, nor the reaction of the gallery affects the outcome of a case.

Yet, as any experienced trial lawyer knows, this sanitized venue for trials is a fantasy. In reality, trials often take on a life of their own, and the outcome of the case is affected by many factors that are not technically evidence—the quality of the lawyers' presentations,⁴ the appearance and reaction of the defendant in the courtroom,⁵ and even the presence of the victim's representatives.⁶ As Clarence Darrow once said, "Jurymen

GIBLERT GEIS AND LEIGH B. BIENEN, *CRIMES OF THE CENTURY* 187 (1998).

⁴ My colleague, Victor Gold, has written one of the seminal articles on the effects of lawyers' advocacy in the courtroom. See Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481 (1987). See also Michelle Pan, *Strategy or Stratagem: The Use of Improper Psychological Tactics by Trial Attorneys to Persuade Jurors*, 74 U. CIN. L. REV. 259 (2005); William M. O'Barr & John M. Conley, *When a Juror Watches a Lawyer*, BARRISTER, Summer 1976, at 8. The focus of this article, however, is not the nonverbal communication of lawyers, but rather the impact of the nonverbal communication of the defendant on spectators in the courtroom.

⁵ Expert jury consultants write chapters on how defense counsel should present and interact with their clients in the courtroom. See, e.g., LAWRENCE J. SMITH & LORETTA A. MALANDRO, *COURTROOM COMMUNICATION STRATEGIES* §§ 1.37-1.38, at 71-78 (directing attorneys on how to do everything from touching their clients to show psychological closeness, to projecting likability and approachability in the courtroom). As Smith and Malandro relate in one of their chapters, jurors act like "detectives," looking for any clues, on or off the witness stand, to assist them in deciding a case. *Id.* § 1.49, at 87-90. "The eye, the ear and other sense organs are therefore social organs as well as physical ones." *Id.* § 1.49, at 90 (quoting R. Buckhout, *Eyewitness Testimony*, 231 SCI. AM. 23, 24 (1974)). For instance, in one case, post-trial jury interviews revealed that jurors' observations of the oft-changing color of the plaintiff's toenail polish during the trial had as much or greater impact on the jurors as the testimony of any witness. See *id.*

⁶ Expert jury consultants such as Dr. Jo-Ellan Dimitrius report that jurors consider all of the dynamics of the courtroom in reaching a verdict. See John Spano, *Weller's Absence Plays Uncertain Role in Trial*, L.A. TIMES, Oct. 9, 2006, at B5, available at 2006 WLNR 17440608 ("The courtroom becomes the home for the jury. . . . They look and watch everyone who walks into their home—the defendant, the judge, or someone

seldom convict a person they like, or acquit one that they dislike. The main work of a trial lawyer is to make a jury like his client, or, at least, to feel sympathy for him; facts regarding the crime are relatively unimportant.”⁷ Under this second model, the courtroom is viewed as a theater in which the parties act out a human drama and the jury provides the conclusion. Formal evidence continues to play an important role, but other factors that constitute non-evidence, such as the defendant’s demeanor off the stand, may affect the outcome of a case. For the most part, courts trust jurors to evaluate this non-evidence and use it in an appropriate manner in reaching their verdicts.

Rather than deciding which model of a criminal trial we ought to have, we profess to require jurors to rely only on “evidence” in deciding cases; we look the other way to the reality that jurors do in fact consider a defendant’s non-testimonial demeanor in their decisions. While a defendant sits in court, exercising his Sixth Amendment right to confront the witnesses against him, he is at center stage and on display for the jury. Jurors scrutinize his every move, attaching deep importance to a quick glance or a passing remark—details a non-juror might consider insignificant.⁸ High-profile criminal trials⁹ show that jurors use a defendant’s courtroom demeanor to determine his sincerity

in the audience. They make assumptions based on their interaction with people in the courtroom.” (quoting Dr. Dimitrius) (internal quotation marks omitted)). The extent to which jurors consider the demeanor of third parties in the courtroom is taking on additional importance as victims are being given additional rights in the court. See Tresa Baldas, *Victims Ascendant*, 29 Nat’l L.J. 1 (Feb. 19, 2007).

⁷ Quoted in V. HANS & N. VIDMAR, *JUDGING THE JURY* 131 (1986).

⁸ HAZEL THORNTON, *HUNG JURY: THE DIARY OF A MENÉNDEZ JUROR* 47 (1995).

⁹ Among those discussed in this article are the trials of Lorena Bobbitt, Erik and Lyle Menendez, and Timothy McVeigh.

and culpability. The impression that the defendant makes on the jury can thus have an enormous impact on the outcome of the trial.¹⁰

As a society, we are “hard-wired” to judge people based on their appearances; the same holds true in the courtroom.¹¹ Consequently, defense lawyers try to use appearances to their advantage.¹² They adjust their own language, dress, and overall courtroom style to please the jury,¹³ and attempt to change their clients’ looks as well.¹⁴ Criminal defense guides encourage client makeovers—each defendant needs the right outfit, a perfect hairstyle, and lessons on appropriate courtroom behavior.¹⁵

What the criminal justice system needs now more than ever is an honest look at the dynamic of criminal trials so that courts can make a conscious decision as to how

¹⁰ This article focuses on the impact of a defendant’s appearance and demeanor on jurors. Of course, there is also the issue of whether such factors affect a judge’s decisions, including those at sentencing. For more information on this issue, *see, e.g.*, William T. Pizzi, Irene V. Blair & Charles M. Judd, *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & LAW 327 (2005).

¹¹ *See, e.g.*, David L. Wiley, *Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials*, 27 ST. MARY’S L.J. 193, 211-12 (1995) (“Research suggests that people viewed as facially unattractive are more likely to be perceived as criminal than are facially attractive persons.”); SMITH & MALANDRO, *supra* note 5, § 1.90 at 148-54 (discussing studies in which the social attractiveness of the defendant was found to have a measurable impact on the jury).

In one important study, Professors Michael Searcy, Steve Duck and Peter Blanck analyze how conduct is interpreted based upon the social context in which it takes place. Thus, verbal and nonverbal behavior that may be interpreted in one way if it occurs outside the courtroom is likely to give a different impression inside the courtroom. *See* M. Searcy, S.W. Duck & P. Blanck, *Communication in the Courtroom and the “Appearance” of Justice*, in APPLICATIONS OF NONVERBAL COMMUNICATION (Robert Feldman & Ron Riggio eds. 2004).

¹² *See, e.g.*, Julie Hinds, *Dressing for a Hoped-For Success*, USA TODAY, at 3A, available at 1994 WLNR 2334687 [hereinafter Hinds, *Hoped-For Success*] (noting the various ways in which the attorneys for both Lorena and John Bobbitt attempted to sculpt their clients’ appearances to their respective advantages at trial).

¹³ Gold, *supra* note 4, at 483.

¹⁴ *See* F. LEE BAILEY & KENNETH J. FISHMAN, CRIMINAL TRIAL TECHNIQUES §§ 41, 44 (1994) (providing advice on “Successful Courtroom Dressing” and proper body language and appearance for “Defendant as a Witness”).

¹⁵ *See id.*; *see also* CRIMINAL DEFENSE TECHNIQUES 1A-6 to 1A-10 (Juliet Turner et al. eds., 1997).

much extrajudicial information triers of fact should be allowed to consider. If jurors consciously or unconsciously consider the defendant's non-testimonial demeanor and appearance in court,¹⁶ should there be specific instructions on how juries may treat such information? Are such instructions likely to be effective? Should we allow lawyers to comment on that demeanor or appearance so that jurors can be directed as to how to consider such information during their deliberations?

The current approach of many courts is unsatisfactory. Judges have been lulled into believing that so long as they follow the dictated rules of evidence and procedure, the trials they supervise will lead to the correct result.¹⁷ But, criminal trials are more than just "who dunnit?" They are morality plays that add to the equation the questions of whether the defendant deserves to be punished and whether punishing that person serves society's interests. To answer those questions, we may need to look beyond the witness box and openly recognize and guide the jury on how to deal with the theater of the courtroom.

The first part of this Article examines examples of cases where the defendant's courtroom demeanor off the witness stand likely had an impact on the outcome of the case. While no scientific studies quantifying the impact of demeanor evidence exist, its

¹⁶ The difference between a defendant's demeanor and appearance is that the latter refers to how a person **acts**, consciously or not. A person's appearance may become evidence in a case, for example, when it forms the basis for identification. Demeanor, as a form of nonverbal communication, can be used throughout a trial to convey information to the jury without the person being required to testify. For more regarding "nonverbal" communication, see Peter Meijes Tiersma, *Judge as Linguist*, 27 LOY. L.A. L.REV. 269, 275 (1993).

¹⁷ Even those researchers who recognize that jurors go beyond the evidence to construct a "story" of the events, based upon their own experiences or pretrial publicity, have failed to address the effect of a defendant's demeanor on jurors. See, e.g., NORMAN J. FINKEL, COMMONSENSE JUSTICE: JUROR'S NOTIONS OF THE LAW 71 (1995).

effect is undeniable.¹⁸ Part II discusses the inconsistent approaches that courts have taken on the issue of whether courtroom demeanor should be openly recognized in court and should be the subject of comment by the parties and counsel. As discussed, there is a significant split in how courts address this issue. Part III examines the evolution of the modern criminal jury trial and the role of demeanor in criminal cases. While in the past, the free-flowing dynamic of a jury trial allowed jurors to consider a defendant's demeanor in deciding cases, the current system, with its strict rules of evidence and procedure, is less accommodating. Finally, this article ends by analyzing whether considering a defendant's demeanor as evidence and allowing the lawyers to comment on it makes sense on policy grounds, given the role of today's criminal jury trial. If, as this article suggests, extreme dangers exist in allowing jurors to decide cases based on defendants' appearances and demeanors off the witness stand, then jury instructions should be used in every case to counter jurors' natural instinct to judge a defendant by his looks and mannerisms. This article proposes an instruction that generally directs jurors not to rely on demeanor evidence in their deliberations. For those rare cases where a defendant's non-testifying demeanor becomes relevant, this article proposes an alternative instruction cautioning jurors regarding the use of such evidence.

¹⁸ Although specific studies quantifying how quickly jurors form an opinion regarding the defendant do not exist, Smith and Malandro posit that that when it comes to trial counsel, "[j]urors form their initial impressions during the first four minutes. Their assessment is based primarily on visual perceptions. They tend to accept the visual and nonverbal cues while rejecting the verbal cues." SMITH & MALANDRO, *supra* note 5, § 5.93 at 538. Accordingly, there is little reason to believe that the nonverbal cues of a defendant have any less impact on the jurors than those of the attorneys.

I.

COURTROOM Demeanor¹⁹

“Tim McVeigh just sat there somberly, almost emotionless, throughout the trial—even today. . . . He just looked at us, and we looked at him, each one of us.”²⁰

“For me, a big part of it was at the end, the verdict—no emotion, no anything. That spoke a thousand words.”²¹

“You don’t want him to look guilty. It’s all about communicating a relaxed, confident air. . . . It’s meant to say that no matter what the prosecution has, I’m innocent.”²²

“I was fascinated by . . . how important [Scott Peterson’s] demeanor in the courtroom was. . . . [Jurors shouldn’t consider it], but they are allowed to look at the defendant.”²³

Based on interviews with jurors in high-profile cases, it is undeniable that a defendant’s demeanor and appearance in the courtroom can influence their decisions. Although demeanor impacts both high-profile and routine cases, the high visibility cases provide the starkest evidence that jurors readily consider all conduct in the courtroom, not just the testimony of witnesses, in reaching their decision.

¹⁹ While “demeanor” most frequently refers to a testifying witness’s facial expressions and body language, some courts have recognized that the term also applies to the conduct, expression, and reactions of non-witnesses sitting in the courtroom. *See, e.g.*, *United States v. Schipani*, 293 F. Supp. 156, 163 (E.D.N.Y. 1968), *aff’d*, 414 F.2d 1262 (2d Cir. 1969).

²⁰ Richard A. Serrano, *McVeigh Gets Death*, L.A. TIMES, June 14, 1997, at A1, A20, available at 1997 WLNR 5651204 (discussing the comments of a juror following the criminal trial of Timothy McVeigh).

²¹ CNN.com, *Jurors: Evidence, Peterson’s Demeanor “Spoke for Itself,”* Dec. 14, 2004, <http://www.cnn.com/2004/LAW/12/13/jury.reax/index.html> (last visited on Jan. 15, 2007) (discussing the comments of a juror who pointed to Scott Peterson’s demeanor in the courtroom as affecting her decision to find him guilty of murdering his wife).

²² Mark Katches, *Potential Panelists See a Confident, Smiling Defendant*, L.A. DAILY NEWS, Sept. 28, 1994, at N8, available at 1994 WLNR 1361430 (quoting Erwin Chemerinsky, on the first week of voir dire in O.J. Simpson’s criminal trial) (internal quotation marks omitted).

²³ *American Morning: Verdict in for Scott Peterson* (CNN television broadcast Dec. 14, 2004) (transcript 121404CN.V74 in Lexis Nexis).

Consider the following three cases: Lorena Bobbitt—the Virginia woman charged with maliciously wounding her sleeping husband by cutting off his penis; Erik and Lyle Menendez—the two brothers convicted of murdering their parents who hung the jury in their first trial by appearing as preppy and youthful as possible; and Timothy McVeigh—the bomber of the Alfred P. Murrah Federal Building in Oklahoma City, OK, who demonstrated no emotion during his trial for murdering 168 men, women, and children in the bloodiest act of domestic terrorism in American history.

In Bobbitt’s trial, the defense’s strategy was for Bobbitt to appear as small and helpless in the courtroom as possible in order to support her defense that she was incapable of being the aggressor against her “burly, ex-marine husband.”²⁴ Technically, Bobbitt’s manner of dress, her innocent looks at counsel table, and her cowering when her husband appeared were not evidence, and the jury should not have considered these factors in rendering a verdict. Nevertheless, post-trial interviews indicated that they did.

In the infamous Menendez Brothers’ case, the defense similarly tried to manipulate the jury by the manner in which the defendants dressed and acted at the counsel table. During the first trial for murdering their parents,²⁵ defense counsel dressed the defendants in crewneck sweaters, button-down shirts, and slacks. This young, preppy

²⁴ *Bobbitt’s Wife Guilty, Says Poll*, S.F. EXAMINER, Jan. 16, 1994, available at 1994 WLNR 20789, see Hinds, *Hoped-For Success*, *supra* note 12. Both sides tried to influence the jury with their presentations of the parties. For example, John Bobbitt dressed without a tie (a phallic symbol) to look less powerful and more like someone who would never attack his wife.

²⁵ Lyle and Erik Menendez became the subject of one of the most sordid, publicized murder cases in history when they went on trial for killing their parents with a shotgun in their family’s Beverly Hills mansion in 1989. See Sally Ann Stewart, *Beverly Hills Horror Story*, USA TODAY, Sept. 21, 1993, at 1A. The brothers attempted to justify murdering their parents by asserting that their parents had sexually abused them and that the brothers were afraid for their lives. *Id.* Their first trial ended in a hung jury when the jury could not agree on whether the defendants committed murder or manslaughter. On retrial, they were both convicted of murder and sentenced to life in prison.

look added to the illusion that the “boys”²⁶ were incapable of committing the vicious acts with which they were charged.

First-hand accounts from the jurors in the first Menendez trial chronicle the extent to which jurors observed and considered the non-testimonial demeanor of the defendants. Hazel Thornton, one of the jurors in the case, recalled that during the opening statements “Erik cried, noticeably but unobtrusively, when Ms. Abramson talked about his mother.”²⁷ She then noted that when Lyle testified as to his father’s sexual abuse of Erik, Erik cried. “[A]t one point he began taking his frustrations out on his brother Erik in a sexual way . . . , and this was the most painful and dramatic thing to watch of all: Lyle’s public confessions and apology to Erik, who of course was also in tears.”²⁸ Thornton also noted that she “speculate[d] endlessly about the audience”²⁹ and tried desperately to put together the story of the trial from who was in attendance. Even during deliberations, jurors observed the defendants’ demeanor during testimony readbacks.³⁰ As one

²⁶ Stewart, *supra* note 25; *see also* THORNTON, *supra* note 8, at 73-74 (stating that the jurors noticed the brothers’ dress, references to “boys” and defense counsel’s maternal behavior; by referring to the defendants as “boys,” the defense associated the alleged killers with youth who were too innocent to commit the alleged heinous crime).

²⁷ *See* THORNTON, *supra* note 8, at 73-74. Of course, it is impossible to know *why* Menendez cried when his mother was mentioned. Like other non-testimonial demeanor, a defendant may be reacting because he is genuinely saddened by the loss of his mother or because he regrets his involvement in her death. Even the sincerest of reactions can be confusing to jurors. They add an emotional dimension to the case, but do little to answer key factual questions in a case.

²⁸ *Id.* at 25.

²⁹ *Id.* at 47.

³⁰ *Id.* at 85 (describing how Erik was mortified when readback testimony focused on him being a homosexual). One of the most interesting parts of Thornton’s book is the psychological commentary on the diary provided by two noted social scientists, Lawrence S. Wrightsman and Amy J. Posey. *Id.* at 99. Using Thornton’s diary, Wrightsman and Posey attack some of the basic assumptions we have about jurors and how they decide cases. For example, they attack the assumption that jurors focus only on admissible evidence during trial. *Id.* at 108. Specifically, they note that jurors look to the reaction of the defendant while someone is testifying against him and may be influenced by the physical appearance of the trial participants. *Id.* at 111. Thornton notes in her diary that jurors discussed the fact that the defendants wore

sociologist noted after studying the juror's book, it is clear that jurors notice things in the courtroom that are not evidence and "it is difficult, if not impossible, for someone to ignore or fail to be influenced by information provided by *any* avenue."³¹

Finally, consider how important courtroom demeanor was in the trial of Timothy McVeigh.³² In death penalty cases, jurors are instructed to consider all aspects of the defendant, including his character, in deciding what punishment to impose. Thus, it is not surprising that jurors tend to be influenced in death penalty cases by a defendant's demeanor and reactions in the courtroom.³³ McVeigh's demeanor was scrutinized and

sweaters and that Leslie Abramson (defense counsel) often engaged in maternal behavior when interacting with Erik Menendez. The jurors also recognized, however, that these actions may have been a ploy to elicit juror sympathy. *Id.* at 112.

³¹ *Id.*

³² Timothy McVeigh was convicted of all 11 counts of bombing the Oklahoma City federal building. *See generally* James Collins, et al., *Days of Reckoning: The Jury That Found McVeigh Guilty Wrestles with Emotion and Tears as It Prepares to Decide His Fate*, TIME MAGAZINE, June 16, 1996, at 26. Jurors reported being influenced by McVeigh's icy composure as prosecutors argued that he should be sentenced to death. *See Killer Maintains Icy Composure, Waves to Parents*, CLEVELAND PLAIN DEALER, June 14, 1997, at A1 available at 1997 WLNR 6322051

³³ *See generally*, Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1561-66 (1998) (providing a sampling of juror statements that indicate that one of the primary factors used by jurors in deciding that a death penalty defendant lacked remorse and therefore deserved to die was the jurors' perceptions of the defendant's flat and nonchalant behavior at trial). While it may not be surprising that jurors in death penalty cases scrutinize a defendant's courtroom demeanor to assess the defendant's character and his or her level of remorse, it is surprising that courts do not issue standardized instructions to jurors to disabuse them of the notion that a defendant's demeanor in the courtroom may not actually reflect the defendant's true character, including the defendant's level of remorse or likelihood of future dangerousness. For years, defense counsel have been concerned that jurors' decisions are improperly influenced in death penalty cases by a defendant's demeanor, and rightfully so. *See* Brief for the American Bar Association as Amicus Curiae Supporting Petitioner, *McCarver v. North Carolina*, 532 U.S. 941 (2001), *cert. dismissed*, 533 U.S. 975 (2001) (No. 00-8727), at 12-14 (discussing the capital murder trials of John Paul Penry, a mentally retarded defendant who "'sat at the defense table and drew pictures' while the prosecutor summed up why Penry should be sentence to die," and Anthony Porter, a mentally retarded defendant who would, "'walk[] into a room slowly, real cool, like some streetwise punk, a smirk on his face, eyes shifting back and forth, as if he[was] on to something or in on a big secret'—clearly inappropriate behavior from someone accused of a heinous crime") (quoting ROBERT PERSKE, *UNEQUAL JUSTICE?* 19, 21-22 (1991); Eric Zorn, *Questions Persist As Troubled Inmate Faces Execution*, CHI. TRIB., Sept. 21, 1998, at 1, available at 1998 WLNR 6565896 (citation omitted)); *see also* *State v. Rizzo*, 833 A.2d 363, 431-32 (Conn. 2003) (stating that "[a]mong the factors that may be considered by a court at a sentencing hearing are the defendant's demeanor and his lack of veracity and remorse as observed by the court during the course of the trial on the

analyzed by jurors as well as the media: “Like his clothing—solid-colored, long-sleeved, open-necked shirts and khaki pants—Mr. McVeigh’s demeanor [was] distinguished by its blandness.”³⁴ Some compared him to a “soldier standing trial in enemy country.”³⁵ McVeigh’s demeanor personified that of a “cold, heartless and calculating killer,”³⁶ leading a juror to later state, “I don’t understand how any man or woman could not have shown an emotion one way or the other. It said he didn’t care.”³⁷ Even though jurors claimed not to have discussed McVeigh’s demeanor during deliberations, individually, some noted that they “wanted to see some remorse,” and one juror claimed that he “was very bothered that [McVeigh] was so stone-faced.”³⁸ Indeed, a stoic defendant in the courtroom sends the unspoken message to the jury that he just does not care.³⁹

In all three of these cases, the defendants’ demeanors in the courtroom may very well have influenced their respective fates; the same is likely true in routine criminal

merits” (quoting *State v. Anderson*, 561 A.2d 897, 905 (Conn. 1989)); *Schiro v. State*, 479 N.E.2d 556, 559-60 (Ind. 1985) (holding that the trial judge did not violate the defendant’s due process rights or Fifth Amendment right against self-incrimination when he considered the defendant’s continuous rocking motions during trial in sentencing the defendant to death).

³⁴ Victoria Loe, *McVeigh Gives Observers Little to Go on in Court: Defendant’s Demeanor Leaves Reporters, Families Guessing*, DALLAS MORNING NEWS, Apr. 12, 1997, at 1A, available at 1997 WLNR 6667777.

³⁵ *CBS This Morning: Oklahoma City Bombing Jury in Deliberations to Decide Whether Timothy McVeigh Should Get the Death Penalty*, (CBS television broadcast June 13, 1997).

³⁶ *See Killer Maintains Icy Composure, Waves to Parents*, *supra* note 32.

³⁷ *Jurors’ Enduring Question: Why? But Little Wavering When It Came Time for Their Decision*, USA TODAY, June 16, 1997, at 4A.

³⁸ Tom Kenworthy & William Booth, *Bomb Jurors Profoundly Affected; Sympathy Declared for Oklahomans*, THE WASHINGTON POST, June 15, 1997, at A1.

³⁹ This problem with a defendant’s demeanor may also occur in non-capital cases. For example, in the case of George Weller, the 89-year-old man convicted of killing 10 people by crashing his car through a farmer’s market in Santa Monica, CA, the defendant did not even come to trial because of his poor health. *See Spano*, *supra* note 6. Nonetheless, some experts believe that the jurors held Weller’s absence against him because he did not come to court, sit through the evidence, and thereby show remorse for his actions. *See id.* (citing Ken Broda-Bahm, president of the American Society of Trial Consultants).

prosecutions that transpire every day in the nation's courthouses but which garner little or no media attention. Consider, for example, the reported, yet not particularly famous, case of *People v. Danks*.⁴⁰ In *Danks*, the defendant physically attacked his lawyer during the penalty phase of his death penalty case. After stabbing his lawyer twice, Danks headed toward the jury box before he was subdued by the sheriffs. The court was not particularly worried about the impact of this spectacle on the jury. It gave only a cursory instruction that the defendant's conduct should not be considered as evidence and then continued with the penalty phase of the capital trial -- a stage in which the jury must decide whether the defendant's future dangerousness should be an aggravating factor justifying imposition of the death penalty.

Despite the potentially serious ramifications a defendant's courtroom demeanor can have on the outcome of a case, courts are reluctant to take a consistent approach to dealing with this issue. As the next section details, most courts make no effort to direct jurors on whether and how to consider a defendant's courtroom demeanor. So long as the parties do not comment on the defendant's demeanor, some courts assume that the jurors will ignore it—a very dubious assumption, indeed. Other courts not only permit jurors to consider a defendant's demeanor, but also allow the parties to comment on it. For these courts, as well as for the legendary Dean Wigmore,⁴¹ it is both unrealistic and counterproductive to assume that jurors can be “mentally blind” to a defendant's

⁴⁰ 32 Cal.4th 269, 8 Cal.Rptr.3d 767, 82 P.3d 1249 (2004).

⁴¹ Dean Wigmore strongly believed that a defendant's demeanor off the witness stand and in the courtroom is admissible evidence. See 2 JOHN HENRY WIGMORE, EVIDENCE § 274(2), at 119-20 (Chadbourn rev., 1979).

demeanor off the stand. In their view, how a defendant acts in the courtroom is a legitimate factor for jurors to consider in making a decision.

II.

THE SPLIT: TO ACKNOWLEDGE OR NOT TO ACKNOWLEDGE A DEFENDANT’S DEemeanor IN THE COURTROOM?

A. *Schuler’s Split*

Courts are split on how to treat the issue of demeanor in the courtroom. The Ninth Circuit’s split decision in *United States v. Schuler*⁴² illustrates the division that exists not only between courts of different jurisdictions, but also within individual courtrooms within the same jurisdiction.

In *Schuler*, the defendant, Scott Schuler, was charged with threatening the life of then-President Ronald Reagan.⁴³ Schuler made the threatening remarks when he flew into a tirade after being arrested at a department store for shoplifting.⁴⁴ In addition to screaming racial slurs and an assortment of other vulgar comments, Schuler told the police that “when the President came to town, he would get him.”⁴⁵

At trial, Schuler’s counsel claimed that Schuler’s remark was just a general expression of anger directed at law enforcement and not a serious threat.⁴⁶ Schuler’s first

⁴² 813 F.2d 978 (9th Cir. 1987).

⁴³ 18 U.S.C. § 871.

⁴⁴ *Schuler*, 813 F.2d at 979.

⁴⁵ *Id.*

⁴⁶ *Id.*

trial ended in a mistrial.⁴⁷ In Schuler's second trial, the prosecutor took extra steps during his closing argument to convince the jury that Schuler's threats were serious, stating:

[W]hile Mr. Schuler was being interrogated by the two security agents, Schuler made a number of racial comments about the number of people he was going to kill, a number of sexual comments. I noticed a number of you were looking at Mr. Schuler while that testimony was coming in and a number of you saw him laugh and saw him laugh as they were repeated.⁴⁸

Defense counsel objected to the prosecutor's statement, but the trial judge overruled the objection and instructed the jury that the prosecutor's argument was proper.⁴⁹

On appeal, the Ninth Circuit reversed Schuler's conviction on two separate grounds.⁵⁰ First, the court held that the prosecutor had improperly injected the issue of the defendant's bad character into the trial in contravention of Federal Rule of Evidence 404(a) because Schuler had not first offered evidence of good character.⁵¹ Other courts

⁴⁷ *Id.*

⁴⁸ *Id.* (alteration in original).

⁴⁹ *Id.*

⁵⁰ *See id.* at 982-83. Defense counsel had argued several grounds for error, including that the prosecutor's comments improperly constituted an indirect comment on the defendant's failure to testify at trial. However, the court did not rest its decision on that argument. In a footnote, the court noted that at least two other courts have rejected claims that a prosecutor's comment on the expressionless courtroom demeanor of a defendant necessarily constitutes an indirect comment on the defendant's failure to testify. *Id.* at 980 n. 1 (citing *Borodine v. Duozanis*, 592 F.2d 1202, 1210-11 (1st Cir. 1979); *Bishop v. Wainwright*, 511 F.2d 664, 668 (5th Cir. 1975), *cert. denied*, 425 U.S. 980 (1976)). Later in the *Schuler* decision, the court expressly rejected Schuler's argument that the prosecutor's comment may have impinged on his Fifth Amendment right not to testify. *Id.* at 981-81; *see also*, Brett H. McGurk, *Prosecutorial Comment on a Defendant's Presence at Trial: Will Griffin Play in a Sixth Amendment Arena?*, 31 UWL L. REV. 207, 244-50 (2000). Judge Boochever wrote, "we doubt that jurors would construe the prosecutor's comment on Schuler's laughter as referring to his failure to testify." *Schuler*, 813 F.2d at 982. Although the court was concerned that allowing prosecutors to comment on a defendant's demeanor may force a defendant to testify to explain his courtroom demeanor, *id.*, the focus of the court's decision was on the broader issue in the case: Are comments regarding a defendant's demeanor improper because they impermissibly convict a defendant on the basis of information that cannot be considered evidence from the witness stand?

⁵¹ *Schuler*, 813 F.2d at 980-81.

have taken a similar approach.⁵² Nevertheless, this line of reasoning was a bit of a stretch given the facts of *Schuler*. The prosecutor was not really arguing that Schuler was an angry, hostile person and thus guilty of the crime charged. If anything, it was the defense who claimed that Schuler's statements reflected his anti-government attitude and not his intended actions. Rather, the government was asking the jury to take note of how Schuler responded when the witnesses testified to his actions. His laughter and cavalier manner were, the prosecution suggested, an indication that he was unrepentant about his actions.

The court then went on to its second ground for reversing Schuler's conviction.⁵³ In doing so, the court addressed head-on the issue of whether a defendant's demeanor in the courtroom should play a role in determining his guilt or innocence. The court ruled that "in the absence of a curative instruction from the court, a prosecutor's comment on a defendant's off-the-stand behavior constitutes a violation of the due process clause of the fifth amendment. That clause encompasses the right not to be convicted except on the basis of evidence adduced at trial."⁵⁴

⁵² See, e.g., *United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973).

⁵³ See *Schuler*, 813 F.2d at 981-82.

⁵⁴ *Id.* at 981. In support of its holding, the court noted that the Eleventh Circuit has also confronted the issue of a prosecutor commenting during closing arguments on the defendant's behavior off the witness stand. *Id.* (citing *United States v. Pearson*, 746 F.2d 787 (11th Cir. 1984)). In *Pearson*, the prosecutor argued: "Does it sound to you like [the defendant] was afraid? You saw him sitting there in the trial. Did you see his leg go up and down? He is nervous. (Appellant's objection overruled) You saw how nervous he was sitting there. Do you think he is afraid?" 746 F.2d at 796. The *Pearson* court held that the prosecutor's statement gave the jury the wrong impression that the defendant's behavior off the witness stand was evidence and, as a result, violated the defendant's right to be convicted only on the evidence introduced at trial. *Id.*; see also *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978) (holding that the trial court's failure to issue a requested instruction on the defendant's presumption of innocence violated his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment where the prosecutor's remarks during opening and closing statements contributed to a genuine danger that the jury would convict the defendant on the basis of extraneous considerations rather than on evidence introduced at trial). The *Schuler* court also relied on *United States v. Wright*, 489 F.2d 1181 (D.C. Cir. 1973) and *United States v. Carroll*, 678 F.2d 1208 (4th Cir. 1982). In both cases, the courts held that the defendants' conduct off the witness stand was not legally relevant to the question of their guilt or innocence for the crimes with which they were respectively charged. See *Wright*, 489 F.2d at 1186; *Carroll*, 678 F.2d at 1209-10.

In dissent, Judge Cynthia Holcomb Hall took issue with the majority’s conclusion that a defendant’s courtroom demeanor is not evidence:

Sound policy reasons exist for allowing a jury to consider the courtroom demeanor of a defendant. As Wigmore noted: “[I]t is as unwise to attempt the impossible as it is impolitic to conduct trials upon a fiction; and the attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory”⁵⁵

According to Judge Holcomb Hall, it was perfectly reasonable for the jury to consider the defendant’s demeanor in response to the evidence adduced at trial to assess whether he had intended his remarks about harming the President to constitute a genuine threat.

Unlike in the cases cited by the majority,⁵⁶ Schuler’s demeanor in the courtroom could help answer a key issue in the case—Schuler’s intent at the time of the alleged threat.

Was Schuler serious about his remarks, or did he treat them as a joke? Just like with evidence of other acts admitted under Rule 404(b),⁵⁷ a defendant’s conduct can be probative of his intent.

⁵⁵ *Schuler*, 813 F.2d at 983 (Holcomb Hall, J., dissenting) (citing WIGMORE, *supra* note 41, § 274) (alteration in original).

⁵⁶ See cases cited *supra* note 54.

⁵⁷ FED.R. OF EVID.404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 404(b) is considered as an exception to the general rule that character evidence may not be used to show the propensity of a defendant to commit a crime. Because the rule allows the introduction of specific acts to prove specific issues, it does not allow the parties to simply argue that because the defendant did something wrong before he must have done it again. Rather, the incident tends to prove a specific point, such that the defendant acted intentionally with regard to a specific act. In the context of a defendant’s demeanor in the courtroom, proponents of the evidence argue that the defendant’s demeanor evidence is evidence of “other acts” that can explain whether the defendant’s actions for which he is charged were intentional. Thus, because the defendant laughs in the courtroom over references to his prior threats, jurors can infer that those threats were serious and intentional.

The *Schuler* case represents the split in how judges view the theater of the courtroom. For many judges, verdicts must be based solely on the evidence adduced from the witness stand; nothing else that happens in the courtroom should matter. However, for judges like Judge Holcomb Hall, a trial takes on an additional dimension that is not directly addressed by the evidence rules. Under this view, the parties' actions in the courtroom are relevant to helping the jury assess the evidence presented to it from the witness stand.

B. In the Path of *Schuler*

Several courts have taken an approach similar to that of the *Schuler* court. For example, in *Bryant v. Maryland*,⁵⁸ a murder trial in which the defendant chose not to testify, the prosecutor commented during closing arguments:

There is so much evidence that corroborates what [the prosecution's witness] told you. When I spoke about her demeanor when she testified, and how she answered [defense counsel's] questions, did you notice the defendant's demeanor when she testified, the way he kept looking down and couldn't look at her? She looked in his eyes several times.

. . . You observed that, members of the jury, you were sitting here. We all saw it. He couldn't sit up and look her in the eye because he knew she was telling the truth. He knew she was telling the truth.⁵⁹

⁵⁸ 741 A.2d 495 (Md. Ct. Spec. App. 1999). In *Bryant*, the defendant was convicted of first degree murder, attempted first degree murder, and two counts of using a handgun in the commission of a felony. *Id.* at 498. He received a life sentence for the murder conviction and concurrent sentences for the remaining convictions. *Id.*

⁵⁹ *Id.* at 498-99 (second alteration in original).

During the criminal trial, the prosecution's principal witness, Florence Winston, testified that she witnessed the shooting, and that she spoke with the defendant the following morning. *Id.* at 497. Winston testified that the defendant "looked nervous" and apologized for shooting in her direction the night before. *Id.* (internal quotation marks omitted). Winston was a "self-described 'dope-fiend'" who sold crack cocaine to support her drug habit, *id.*, and she had agreed to testify against the defendant in exchange for assistance with theft and probation violation charges that were pending against her. *Id.* at 497-98. During closing argument, the prosecutor acknowledged Winston's self-interested motive for testifying, and

On appeal, the Maryland Court of Special Appeals overturned the defendant's convictions and ordered a new trial on the ground that the trial judge committed reversible error by failing to sustain the defendant's timely objection to the prosecutor's statement regarding the defendant's courtroom demeanor.⁶⁰ The court reasoned:

Argument that asks the jury to consider the demeanor of a witness when testifying is proper and is consistent with the jury instruction given in this case to consider "the witness's behavior on the stand and way of testifying; did the witness appear to be telling the truth."⁶¹ Argument that comments on the courtroom demeanor of a defendant who elects not to testify is a different matter. Courts that have considered this question have reached different conclusions about when, if ever, comment on a defendant's courtroom demeanor is proper.

.....

In our view, the courtroom demeanor of a defendant who has not testified is irrelevant. His demeanor has not been entered into evidence and, therefore, comment is beyond the scope of legitimate summary. Moreover the practice is pregnant with potential prejudice. A guilty verdict must be based upon the evidence and the reasonable inferences therefrom, not on an irrational response which may be triggered if the prosecution unfairly strikes an emotion in the jury."⁶²

The *Bryant* court thus rejected all attempts to allow the jury to consider a defendant's courtroom demeanor in its decision, concluding that the prosecutor's comments regarding

conceded that "Winston's lifestyle was not exemplary." *Id.* at 498. The prosecutor then tried to corroborate and lend credibility to Winston's testimony by highlighting the defendant's demeanor during Winston's testimony. *Id.*

⁶⁰ *Id.* at 501.

⁶¹ Although courts readily accept that a defendant's demeanor on the witness stand may be used to determine a defendant's credibility, even such inferences are highly suspect. It is not at all clear that jurors can accurately assess witness credibility from witness demeanor. See Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1088 (1991) (finding that "with impressive consistency, the experimental results indicate that ... ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments.). See generally James P. Timony, *Demeanor Credibility*, 49 CATH. U.L. REV. 903, 930 (2000); Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1189 (1993).

⁶² 741 A.2d 495 at 499-500 (citations omitted).

the defendant's demeanor were improper because they were not based upon "evidence" and because they constituted an emotional appeal to the jurors.⁶³

Likewise, the Supreme Court of Delaware held it is improper for prosecutors to comment on a non-testifying defendant's courtroom demeanor.⁶⁴ In *Hughes v. State*, the defendant had been convicted of his wife's murder based entirely on circumstantial evidence. Hughes sought reversal citing a litany of improper actions by the prosecution including misstating evidence and, during summation, impermissibly commenting that the defendant's courtroom demeanor was "unemotional, unfeeling and without remorse."⁶⁵ The court viewed the courtroom demeanor of a non-testifying defendant as "irrelevant" and since demeanor had not been entered into evidence, such a comment "is beyond the scope of legitimate summary."⁶⁶ Because demeanor is not technically evidence and a jury's verdict must be based upon evidence, the jurors should not be allowed to draw any inferences, suggested by counsel, from their perceptions of the defendant's courtroom behavior.⁶⁷

⁶³ *Id.* at 500. *But see* *Campbell v. State*, 501 A.2d 111, 114 (Md. Ct. Spec. App.) (1985) (holding that "[t]he circumstances and the nature and language of the comment" may justify an exception to the general rule that statements regarding the defendant's personal appearance are improper except with regard to the defendant's appearance while testifying or where the defendant's identity is at issue); *see also* *Brothers v. State*, 183 So. 433, 436 (Ala. 1938) (holding that the defendant's courtroom demeanor is a proper subject of comment where the defendant's sanity was a primary issue in the case and the defendant may have been seeking to create an impression of insanity through his demeanor before the jury).

⁶⁴ *Hughes v. State*, 437 A.2d 559 (Del. 1981).

⁶⁵ *Id.* at 572.

⁶⁶ *Id.*

⁶⁷ Other courts that have taken this approach include: *Pope v. Wainwright*, 496 So. 2d 798, 802 (Fla. 1986) (stating it was clearly improper for prosecutor to comment on defendant's demeanor off the witness stand); *Blue v. State*, 674 So. 2d 1184, 1213-15 (Miss. 1996) (explaining that prosecutor may not comment on non-testifying defendant's demeanor and appearance during trial); *People v. Garcia*, 206 Cal. Rptr. 468, 472-75 (Cal. Ct. App. 1984) (finding prosecutor acted improperly in referring to defendant's courtroom behavior); *Baldez v. State*, 679 So. 2d 825, 826 (Fla. Dist. Ct. App. 1996) ("It is improper for a prosecutor to comment on the defendant's demeanor when he is not on the witness stand."); *Craig v. United States*, 81

In *Baldez v. State*,⁶⁸ the Florida District Court of Appeal reversed a defendant's conviction for sexual battery on a minor because the prosecutor commented in closing argument that the defendant had been "glaring" at the victim's eight-year-old brother when he testified to seeing the defendant rape the girl. Although witness intimidation may be very relevant to a juror's decision on witness credibility, the *Baldez* court, like the *Schuler* court, held it was improper for the prosecution to try and bolster the witness's testimony by arguing that the victim was able to testify despite the defendant's intimidation.⁶⁹

C. A Different Path: Acknowledging a Defendant's Courtroom

Demeanor

Many courts have taken the same position as the *Schuler* majority, but a sizeable number of courts will allow jurors to consider a defendant's demeanor off the witness stand in making their decisions.⁷⁰ For example, in the famous trial of Kennedy cousin Michael Skakel, a juror reported that he had seen the defendant mouth something like "good job" to his testifying cousin.⁷¹ The defendant's conduct bothered the juror a great

F.2d 816, 829 (9th Cir. 1936) (stating that asking jurors to keep an eye on defendant's demeanor during closing arguments was ill-advised, but not reversible error).

⁶⁸ 679 So. 2d 825, 826-27 (1996).

⁶⁹ *See id.* at 827. The Florida courts had previously held that a prosecutor cannot comment on a defendant's demeanor when the defendant is not on the witness stand. *See Pope v. Wainwright*, 496 So. 2d 798, 802 (Fla. 1986) (finding that the prosecutor erred by arguing in closing argument that the defendant was "grinning from ear-to-ear" during the trial).

⁷⁰ Dean Wigmore strongly believed that demeanor off the witness stand and in the courtroom is admissible evidence. 2 WIGMORE, EVIDENCE § 274(2) at 119-20 (Chadbourne rev. 1979). He dismissed as unrealistic the belief that jurors can be "mentally blind" to demeanor off the stand. *Id.*

⁷¹ Lynne Tuohy, *A Furor Over Juror's Remark Proceedings Stalled by Alleged Comments from Skakel*, HARTFORD COURANT, May 24, 2002, at B7. Skakel was convicted of the murder of Martha Moxley

deal and the defense complained that the juror should be removed because he was considering information that was not formally evidence in the trial.⁷² The trial judge rejected the defense claim, accepting the prosecutor's claim that "the jury is allowed to consider the defendant's demeanor in the courtroom."⁷³

Similarly, the Supreme Judicial Court of Massachusetts held that a prosecutor may comment on the defendant's squirming, smirking, and laughing during trial.⁷⁴ The Supreme Court of North Carolina ruled that prosecutor's comments on the courtroom demeanor of a defendant are proper because the demeanor of a defendant is before the jury at all times.⁷⁵

In the more extreme case of *People v. Bizzell*,⁷⁶ the prosecutor was so brazen as to argue in opening statement that the jury would "see" that Bizzell's "own behavior in the

twenty-five years after the event. Skakel bludgeoned his teenage neighbor to death with a golf club, allegedly because she had spurned his advances. *See generally, Kennedy Cousin on Trial*, COURTTV.COM <http://www.courttv.com/trials/moxley/index.html> (last visited Jan. 22, 2007).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Commonwealth v. Smith*, 444 N.E.2d 374, 380 (Mass. 1983). The defendant received a life sentence after being convicted of murder, arson and armed robbery. *Id.* at 376. The Massachusetts Supreme Judicial Court ordered a reversal and new trial because of prosecutorial misconduct. *Id.* However, the court found proper the prosecutor's comments on the defendant's demeanor, simply stating, "The jury were entitled to observe the demeanor of the defendant during the trial." *Id.* at 381.

⁷⁵ *State v. Brown*, 358 S.E.2d 1, 15 (N.C. 1987), *cert. denied*, 484 U.S. 970 (1987). *See also State v. Myers*, 263 S.E.2d 768, 773-74 (N.C. 1980) (finding prosecutor's comments on defendant's reactions to photographs of his murdered wife were permissible since his demeanor was "before the jury at all times"); *Wherry v. State*, 402 So. 2d 1130, 1133 (Ala. Crim. App. 1981) (holding prosecutor's comments during closing argument highlighting the defendant's demeanor to challenge her plea of insanity were a proper subject of comment rather than an improper attempt to draw attention to defendant's failure to testify); *Bishop v. Wainwright*, 511 F.2d 664 (5th Cir. 1975) (stating it is permissible to refer to defendant's expressionless courtroom demeanor).

⁷⁶ 2005 WL 2842055, at *5 (Cal. Ct. App. 2005). Bizzell was convicted of assault, attempted murder and other crimes after he attacked his ex-girlfriend by choking her and holding a knife to her throat. *Id.* at *2-3. During the trial Bizzell frequently interrupted the proceedings by making comments or laughing at statements, and the court sustained several objections to Bizzell's answers when on the stand, including that they were often narratives or non-responsive or that no question was pending. *Id.* at *4.

courtroom will indicate that he's guilty." As predicted, Bizzell was his own worst enemy during trial. He displayed anger on and off the witness stand to the point his own lawyer had to remind him to be "careful."⁷⁷ These actions fed into the prosecutor's argument that the defendant was out of control when he tried to kill his victim.⁷⁸ In later proceedings, Bizzell complained that it was ineffective assistance of counsel for his lawyer to allow the prosecutor to make such arguments, but the appellate court disagreed and upheld his conviction.⁷⁹

Thus, in many courts, not only do judges silently countenance jurors considering a defendant's demeanor in their decisions, but they do not find it per se error for prosecutors to comment on that demeanor. For these courts, the courtroom is a dynamic stage – a theater where everyone's role in reaching the just verdict is properly considered.

D. Finding Middle Ground

Finally, there are courts that attempt to set standards as to when conduct by a defendant can be considered and when it cannot. For example, in *United States v. Cook*,⁸⁰ the defendant was charged with the unpremeditated murder of his 14-month-old daughter. The defense claimed Cook was insane and had an expert witness testify on his behalf.⁸¹ In closing argument, the prosecutor sought to counter the expert's opinion by

⁷⁷ *Id.* at *8.

⁷⁸ *See id.* at *6 ("[W]e all know why we're here, power and control. The defendant's conduct shows that. It shows that when he took the stand, it show that throughout this whole event... He's out of control. You saw that.").

⁷⁹ *Id.*

⁸⁰ 48 M.J. 64, 65 (C.A.A.F. 1998).

⁸¹ *Id.* at 65.

referring the jurors to their own observations of the defendant and his demeanor in the courtroom:

You have had more observation of this accused sitting right here over the course of the last two weeks than Dr. Hocter [the defense expert] had. You've been able to gauge his response. You've been able to watch him when a witness is talking about an aspect of his daughter's death as he yawns, relaxes. He's really into this trial. Using your own knowledge of the ways of the world and mankind, what does that mean to you? You're able to perceive him. You are better than Dr. Hocter as to an opinion of what the accused intended. That's your job. That's what you are here for.⁸²

On appeal, Cook complained that the prosecutor's argument improperly interjected his character in the case, violated his right against self-incrimination, and trampled on his due process right to be judged only on the "evidence" introduced at trial.⁸³

The United States Court of Appeals for the Armed Forces tried to split the baby. It began by noting that a significant part of communication is nonverbal: "Nonverbal communication may occur outside the courtroom as well as on and off the witness stand."⁸⁴ By doing so, it suggested that there might a proper role under some circumstances for the trier of fact to consider demeanor in its decisions. However, in the next line, the appellate court warned, "[i]nterpretations of nonverbal communication are fallible and idiosyncratic."⁸⁵ In finding that the prosecutor's comments were not plain error, the *Cook* court noted that non-testimonial demeanor evidence may be considered

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* (citing JEFFREY L. KESTLER, QUESTIONING TECHNIQUES AND TACTICS §§ 3.34-3.39 at 160-67 (2d ed. 1992)).

⁸⁵ *Id.*

irrelevant.⁸⁶ However, the burden is on the defendant to argue why such evidence should not be permitted. Given that cases go both ways on the issue, the court was unwilling to reverse Cook's conviction because of the prosecutor's reference.

The goal of the *Cook* court was to allow nonverbal communication to be considered evidence only when it has a particular role to play and can be fairly interpreted. Examples include: demonstrating whether a particular item of clothing fits a defendant,⁸⁷ showing that the defendant bears physical characteristics relevant to the case,⁸⁸ or even noting the defendant's indifferent reaction when informed that the money in his wallet was counterfeit.⁸⁹ In these situations, demeanor evidence is allowed even though the defendant is not testifying because it is clear what is being communicated by the defendant's actions. Thus, threats by a defendant to witnesses or court participants

⁸⁶ The court cited *Schuler* for this principle, as well as two other cases in which the prosecutor was found to have improperly commented on a defendant's consultations with his lawyer during trial (*see* *United States v. Carroll*, 678 F.2d 11208 (4th Cir. 1982) or on the defendant's nervous leg actions during trial (*see* *United States v. Pearson*, 746 F.2d 787 (11th Cir. 1984)).

⁸⁷ Prosecutor Christopher Darden's ill-fated use of a courtroom demonstration with the "bloody glove" during the O.J. Simpson murder trial provides a perfect example of the use (or misuse) of nonverbal communication. Wanting the jury to understand that the extensive "DNA evidence figuratively put the gloves on Simpson," Darden had Simpson try the glove on, which apparently did not fit. *See* Stephen D. Easton, *Lessons Learned the Hard Way From O.J. and "The Dream Team,"* 32 TULSA L.J. 707, 732-33 (1997) (discussing the O.J. Simpson Trial and reviewing the book, CHRISTOPHER DARDEN WITH JESS WALTER, *IN CONTEMPT* (1996)). The implication of the glove fitting or not fitting had a particular role (whether or not it was O.J.'s) and could be fairly interpreted (if it did not fit it did not belong to O.J.).

⁸⁸ Courts tend to accept such evidence as proper "demonstrative evidence" that may be considered by the jury. *See, e.g.,* *People v. Williams*, 201 N.W.2d 286 (Mich. Ct. App. 1972) (stating prosecutor allowed to comment on defendant's efforts not to grin and show his teeth because the robbery suspect had been identified as having bad teeth). Professors Brain & Broderick define demonstrative evidence as "any display that is principally used to illustrate or explain other testimonial, documentary, or real proof, or a judicially noticed fact. It is, in short, a visual (or other sensory) aid." Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 957, 967-68 (1992). Their work recognizes demonstrative evidence as an analytically separate class of evidence. *Id.* They highlight the defining characteristic of the evidence as being derivative in relevance, in that it has a secondary or derivative function because it is only used to explain other previously introduced evidence. *Id.* at 961.

⁸⁹ *See* *United States v. Robinson*, 523 F.Supp. 1006 (E.D.N.Y. 1981).

would also be properly considered as “evidence” that demonstrates consciousness of guilt.⁹⁰

However, when the defendant’s conduct is ambiguous and could reflect either a guilty or not guilty consciousness, the *Cook* court would be reluctant to allow the jury to consider it. Thus, should that court have decided *Schuler*, it too would have barred reference to Schuler’s laughter because such courtroom behavior does not necessarily indicate whether the defendant intended to threaten the life of the President. Rather, he could have been scoffing at the suggestion that his earlier remarks were serious threats.

A similar issue existed in *United States v. Pearson*.⁹¹ Evidently, one of the defendants, Petracelli, had the nervous habit of shaking his leg throughout the trial and the judge allowed comment on it (over objection) to the jury.⁹² The appellate court disagreed with the court’s approach, stating that “In overruling Petracelli’s objection and in failing to give a curative instruction, the court, in effect, gave the jury an incorrect impression that appellant’s behavior off the witness stand was evidence in this instance, upon which the prosecutor was free to comment.”⁹³ Aside from the fact that it is often problematic when a judge comments on matters at trial,⁹⁴ there was no way to know

⁹⁰ See, e.g., *United States v. Gatto*, 995 F.2d 449, 454 (3d Cir. 1993) (explaining jurors may note threats or intimidation of witnesses); *United States v. Mickens*, 926 F.2d 1323, 1328-29 (2d Cir. 1991) (stating defendant’s hand gesture in the shape of a gun may be considered by jury); *United States v. Maddox*, 944 F.2d 1223, 1229-30 (6th Cir. 1991) (finding that jurors may consider defendant’s alleged mouthing of the words “you’re dead”).

⁹¹ 746 F.2d 787, 796 (11th Cir. 1984).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Because of the judge’s position of authority, jurors often ascribe too much weight to the judge’s comments, thereby affecting the defendant’s right to an “impartial” hearing. See Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 479-483 (1996). See generally, Jack Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the*

whether the defendant's habit of shaking his leg reflected a guilty conscious or just the strain on an innocent man standing trial for a crime he did not commit.

For similar reasons, courts would bar any reference by a prosecutor to a defendant's actions in assisting his lawyer at trial. For example, in *United States v. Carroll*,⁹⁵ the court held that comments about a defendant examining a court exhibit and then explaining it to his lawyer were off limits. Interactions with defense counsel are to be expected in any trial and do not demonstrate the guilt or innocence of a defendant.

In *Cook*, after giving a general overview of when demeanor evidence may be allowed, the court found that it was improper for the prosecutor to comment on the defendant's yawn while a witness described his daughter's death.⁹⁶ A yawn is too ambiguous to be relevant as to whether a defendant callously killed his own daughter.

E. Reconciling the Approaches

As these cases demonstrate, the courts have not been consistent in how they have dealt with the issue of jurors considering a defendant's nontestimonial demeanor.⁹⁷ One

Evidence in Jury Trials and some Suggestions on Charging Juries, 118 F.R.D. 161 (1988) (discussing generally the propriety and necessity of commenting on evidence by federal trial judges). When a judge comments on matters at trial, a standard instruction given to the jury is: "You are not to consider any statements or rulings which I have made during the course of this trial as indicating that I believe the verdict should be one way or the other. I have no opinion, and even if I did, it would be wholly irrelevant." HOWARD G. LEVENTHAL 1 CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE IN NEW YORK §4:76 (2006).

⁹⁵ *United States v. Carroll*, 678 F.2d 1208, 1209-10 (4th Cir. 1982).

⁹⁶ *United States v. Cook*, 48 M.J. 64, 67 (C.A.A.F. 1998). The court, however, did not overturn the conviction since trial defense counsel could have objected to the comment and the remarks did not constitute plain error. *Id.*

⁹⁷ As Professor Imwinkelried notes, courts have not even been consistent in how they have treated the demeanor of witnesses while they are not testifying. See Edward J. Imwinkelried, *Demeanor Impeachment: Law and Tactics*, 9 AM. J. TRIAL ADVOC. 183, 196-97 (1985) (some courts allow jurors to consider a witness's demeanor "in or about the courtroom").

judge may evaluate a defendant's refusal to look a witness in the eye as evidence that the defendant knows the witness is telling the truth; another judge may find the defendant's demeanor irrelevant because it could just be the reaction of an innocent person who is afraid that a lying witness will lead to his conviction.

It is time to take a more critical and consistent approach. To do so, it is important to understand the history of jury trials and a defendant's role in them, the modern approach to regulating the "evidence" a jury may consider, and the findings of sociologists and psychologists regarding the extent to which a defendant's social and character attractiveness influence juror judgments.⁹⁸

III.

THE DYNAMICS OF THE MODERN COURTROOM

*"Jurymen are to see with their own eyes,
To hear with their own ears, and to make use of their
own consciences and understandings, in judging of the lives,
liberties or estates of their fellow subjects."*
Andrew Hamilton⁹⁹

The modern jury trial takes a fairly restrictive view of what constitutes evidence. As explained later,¹⁰⁰ historically defendants played a much more dynamic role in the

⁹⁸ See Susanne Shay, *Effects of Defendant Character and Juror Authoritarianism on the Decision Making Process* (1987) (unpublished Ph.D. thesis, Temple University), *microformed on* GETINFO (UMI 1988); D. Landy & E. Aronson, *The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors*, 5 J. EXPERIMENTAL SOC. PSYCHOL. 141-152 (1969); Jennifer F. Orleans & Michael B. Gurtman, *Effects of Physical Attractiveness and Remorse on Evaluations of Transgressors*, 6 ACAD. PSYCHOL. BULL. 49 (1984).

⁹⁹ Hamilton served as defense counsel to John Peter Zenger who was tried for seditious libel in 1735. See generally, HANS & VIDMAR, *supra* note 7, at 35.

¹⁰⁰ See Part III(C) *infra*.

courtroom and jurors had broader leeway in deciding how they would reach their verdict. However, as a result of efforts in the mid-20th Century to standardize court procedures with rules of evidence and rules of procedure, defendants are expected to take a more limited role and cases are expected to be decided on “evidence,” rather than the drama of the courtroom.

A. What is “evidence”?

Today, evidence is limited to certain types of information ordinarily presented from the witness stand. Evidence may include: (1) witness testimony, (2) writings, (3) recordings, (4) photographs, (5) physical evidence, and (6) demonstrations.¹⁰¹ Jurors are instructed to reach a verdict based only on admissible evidence.¹⁰² They are also told not to consider an attorney’s questions or arguments as evidence.¹⁰³ However, jurors are not given any direction on how to consider a defendant’s demeanor.

Under the current approach, the court controls what information the jurors will allegedly use in reaching their decision. Elaborate rules of evidence were established in England as far back as 1700 to try to rein in the decision making of the jury.¹⁰⁴ More

¹⁰¹ FED. R. EVID. Table of Rules.

¹⁰² Admissible evidence is evidence which is relevant (“having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence”). FED. R. EVID. 401, 402. However, some relevant evidence may be excluded if its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Id.* R. 403.

¹⁰³ See CALJIC 1.02. See also 3 FEDERAL JURY PRACTICE & INSTRUCTIONS §103.01 (5th ed.) (listing the general instructions for federal cases); LEVENTHAL, *supra* note 94 § 4.76 (“Nor are you to consider or give any weight at all to statements or opinions of counsel: they are not witnesses, and their statements, arguments and opinions do not constitute evidence.”)

¹⁰⁴ See LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 70 (2d ed. 1988).

recently, Congress and the courts adopted the Federal Rules of Evidence in 1975 to try to create consistency in trials.

One of the areas of evidence that has always concerned the courts is to what extent character evidence should be admissible to prove a defendant's culpability.¹⁰⁵ In general, the rule is that a defendant's guilt should be based upon his conduct, not his character, and the rules traditionally limit to what extent character evidence is admissible.¹⁰⁶ In the "Notes of Advisory Committee on Proposed Rules" the drafters of the Federal Rules of evidence noted the following principles behind the general rule against character evidence:

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.¹⁰⁷

With evidentiary rules, a trial is viewed as nothing more than the sum of its evidentiary parts. Jurors are expected to draw rational conclusions from the evidence they are allowed to receive and reach a decision accordingly. However, the reality is quite different.

¹⁰⁵ In the early trials of the seventeenth century, "it was not considered irregular to call witnesses to prove a prisoner's bad character in order to raise a presumption of his guilt." JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 191-92 (2003), *quoting*, James Fitzjames Stephen, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 368 (1883). However, for almost the last three hundred years, courts have been concerned about allowing a defendant to be tried on his character and have put limitations on the use of character evidence.

¹⁰⁶ *See, e.g.*, FED. R. EVID. 404. A notable exception to this rule is the admissibility of character evidence in cases alleging sexual offenses. In these situations, the general rule is that past activities of the defendant that show he has a propensity to commit the alleged sexual acts are admissible. *See* FED. R. EVID. 413.

¹⁰⁷ 56 F.R.D. 183, 219 (1973) *quoting* CAL. LAW REVISION COMM'N, REP. REC. & STUDIES TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE (ART. VI. EXTRINSIC POLICIES AFFECTING ADMISSIBILITY) 657-58 (1964).

B. The Real Courtroom Dynamic

Jurors are not machines and courtrooms are not laboratories. Laboratories are controlled environments in which trial and error are accepted protocol. Even with rules of evidence, there is not the same type of controlled, sterile environment for trials. Moreover, because a person's liberty is at stake, the trial-and-error approach to judgments is unacceptable.

Rather, as we have learned from psychologists and sociologists, there is a dynamic to the courtroom that is more akin to, but not precisely like, a theater. Jurors use all of their senses, including their intuition, to reach their verdicts.¹⁰⁸ "In the courtroom, nonverbal communication subtly affects the entire proceedings of a trial."¹⁰⁹ Yet, because courtrooms are not for mere entertainment or education, we expect that the verdict in the courtroom will be based on concrete, verifiable information and not impressions of the parties' personalities.

¹⁰⁸ Of course, we already allow jurors to use these cues in deciding on the credibility of witnesses, even though it is difficult to know how valid nonverbal cues are in making these decisions. *See generally*, Robert K. Bothwell & Mehri Jalil, *The Credibility of Nervous Witnesses*, 7 J. SOC. BEHAV. & PERSONALITY 581 (1992); David Dryden Henningsen, Michael G. Cruz & Mary Claire Morr, *Pattern Violations and Perceptions of Deception*, 13 COMM. REP. 1 (2000). Moreover, law enforcement officers use nonverbal indicators to assess the credibility of their suspects' statements. *See, e.g.*, John E. Hocking & Dale G. Leathers, *Nonverbal Indicators of Deception: A New Theoretical Perspective*, 47 COMM. MONOGRAPHS 119 (1980). Even judges use physical cues to decide the honesty and dishonesty of statements. *See* James A. Forrest & Robert S. Feldman, *Detecting Deception and Judge's Involvement: Lower Task Involvement Leads to Better Lie Detection*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 118 (2000). The focus of this article is on whether the behavioral and demeanor cues from a defendant should be used in deciding that person's guilt or innocence.

¹⁰⁹ Elizabeth A. LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 L. & PSYCHOL. REV. 83 (1984).

We currently allow aspects of both models to define our criminal courtrooms. Formal procedures and evidentiary rules attempt to create a controlled atmosphere for decision making. Nonetheless, the drama of each trial also impacts decisions by jurors.

The non-testimonial communications that affect jurors' decisions range from facial expressions, gestures, body movements, and smells to paralanguage.¹¹⁰ Even when the defendant is not testifying, jurors will watch him or her at counsel table. Several studies have concluded that a defendant's physical attractiveness (or lack thereof) can influence a jury's verdict.¹¹¹ A defendant's fidgeting¹¹² may also impact the jurors' decisions. Although it is difficult to know how a particular juror will interpret a defendant's fidgeting, many studies correlate fidgeting with a person's anxious or hostile nature.¹¹³ Hand movements can also affect jurors' perceptions of the defendant and the case.¹¹⁴ People from different cultures tend to interpret hand movements differently. For example, in some cultures, hand movements are part and parcel of normal communication and carry with them coded messages. Other observers are less

¹¹⁰ *Id.*

¹¹¹ See *id.* at 91-93; Saul M. Kassin & Lawrence S. Wrightsman, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 100-103 (1988); Jennifer F. Orleans & Michael B. Gurtman, *Effects of Physical Attractiveness and Remorse on Evaluations of Transgressors*, 6 ACAD. PSYCHOL. BULL. 49 (1984); Michael G. Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task*, 8 J. RES. PERSONALITY 45 (1974). See also Lee Ross & Donna Shestowsky, *Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior: Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081 (2003); Ronald Krute, *Physical Attractiveness and Severity of Sentencing*, 40 PSYCHOL. REP. 315 (1977).

¹¹² "Fidgeting" is defined as "engaging in actions that are peripheral or nonessential to ongoing focal tasks or events." See Albert Mehrabian & Shari L. Friedman, *Fidgeting*, 54 J. PERSONALITY 406 (1986). Prominent lawyers have rejected the claim that fidgeting is a sign of guilt. As the renowned Daniel Webster proclaimed, "miserable, miserable, indeed, is the reasoning which would infer any man's guilt from agitation...." H. HARDWICKE, THE ART OF WINNING CASES 154 (1901).

¹¹³ *Id.* at 427-28.

¹¹⁴ See generally, Paul Ekman & Wallace V. Friesen, *Hand Movements*, 22 J. COMM. 353 (1972).

comfortable with hand movements and will read them differently. Jurors can even be influenced by a defendant's smile, even though scientifically it has been shown that people are not particularly good at distinguishing between a sincere and insincere smile.¹¹⁵ Finally, whether a person has eye contact with jurors can affect their decisions. Lack of eye contact is often read as deception, even though it might be the product of shyness or fear.¹¹⁶

Up to now, the courts have given very little attention to the question of how the criminal justice system should deal with jurors' perceptions of a defendant's demeanor in court.¹¹⁷ Only in the rare situations where a defendant is considered incompetent for trial or overly medicated do the courts tend to get involved.¹¹⁸

However, courts have recognized that appearances and events in the courtroom, even if not evidence, can affect the jurors' verdicts. For example, in *Estelle v. Williams*,¹¹⁹ the Supreme Court considered "whether an accused who is compelled to

¹¹⁵ See generally, Jinni A. Harrigan & Kristy T. Tainy, *Fooled by a Smile: Detecting Anxiety in Others*, J. NONVERBAL BEHAV. 203 (1997).

¹¹⁶ See Paul Ekman & Wallace V. Friesen, *Nonverbal Leakage and Clues to Deception*, 32 PSYCHIATRY 88 (1969).

¹¹⁷ Interestingly, there has been some focus on how a defendant's demeanor is changed by videoconferencing and should therefore be a concern in deciding whether to allow video-appearances of defendants. See Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1124-225 (2004).

¹¹⁸ See Vickie L. Feeman, *Reassessing Forced Medication of Criminal Defendants in Light of Riggins v. Nevada*, 35 B.C. L. REV. 681 (1994) (describing the court's concerns that a heavily medicated defendant may have involuntary facial expressions, tremors, spasms, and other movements that could affect the defendant's appearance and mannerism in court).

¹¹⁹ 425 U.S. 501, 502 (1976). After an altercation between the defendant and his former landlord, Williams was convicted of assault with intent to commit murder with malice in a Texas state court. *Id.* Before going to trial, the defendant asked an officer for civilian clothes to wear instead of the prison garb, but was denied the change of clothes and attended trial in the prison issue. *Id.* Neither the defendant nor his counsel raised an objection at trial to the clothing. *Id.* The Court held that while "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes,

wear identifiable prison clothing at his trial by a jury is denied due process or equal protection of the laws.” The Court held that just the defendant’s appearance in the courtroom in prison clothes could undermine the fairness of the trial.¹²⁰ Obviously, the defendant’s apparel is not evidence; nonetheless, the Court recognized that it could have a detrimental impact on the jury’s decision making process.

Similarly, the Supreme Court has held that a defendant may not be shackled in a courtroom unless there are compelling security interests.¹²¹ Although the shackles are not “evidence” in the case, they can nevertheless affect the jurors’ verdict. The courts worry that the very presence of the shackles changes the dynamic of the courtroom from one in which the defendant is presumed innocent to one in which the defendant is viewed by the jury as a safety risk and probably guilty.¹²²

More recently, the courts have tried to deal with the issue of how apparel and reactions by spectators in the courtroom can affect jury verdicts. In the 2006 decision in

for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.” *Id.* at 512-13

¹²⁰ *Id.* at 512-13.

¹²¹ *Deck v. Missouri*, 544 U.S. 622 (2005). Carman Deck was convicted of robbing and shooting to death an elderly couple, and he received the death penalty. *Id.* at 624-25. The state supreme court upheld his conviction but ordered a new sentencing hearing. *Id.* During the hearing, Deck was forced to wear leg irons, handcuffs and a bellychain, to which his counsel objected three times to no avail and Deck again received the death sentence. *Id.* The Supreme Court overturned the sentence, holding that unless specific circumstances warrant shackling, such as security concerns, that “courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.” *Id.* at 633.

¹²² *Id.* at 633. (“The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community...It also almost inevitably affects adversely the jury's perception of the character of the defendant.”).

Carey v. Musladin,¹²³ the defendant filed a petition under 28 U.S.C. § 2254 to reverse his conviction because members of the victim’s family sat in the front row of the spectators’ gallery wearing buttons displaying the victim’s image.¹²⁴ The California Court of Appeal had refused to reverse his conviction because it found that Musladin had failed to show actual or inherent prejudice from the victims’ family’s actions. The district court denied Musladin’s petition for habeas relief, but nonetheless, the United States Court of Appeals for the Ninth Circuit reversed.¹²⁵ It found that the spectators’ courtroom conduct was inherently prejudicial and that the state court ruling “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”¹²⁶

The Supreme Court reversed the Ninth Circuit on procedural grounds because Musladin had not shown that the state court’s ruling was contrary to “clearly established Federal law.”¹²⁷ In fact, the Supreme Court has never ruled on whether buttons worn by civilian spectators deny a defendant his right to a fair trial. The closest the Court has come was in deciding *Holbrook v. Flynn*.¹²⁸ In *Flynn*, four uniformed state troopers sat in the spectators’ seats immediately behind the defendant during trial.¹²⁹ Nonetheless, the

¹²³ 127 S. Ct. 649, 651 (2006).

¹²⁴ *Id.* at 652.

¹²⁵ *Id.*

¹²⁶ *Id.* quoting *Musladin v. Lamarque*, 427 F.3d 653, 655, 661 (9th Cir. 2005). Under the Antiterrorism and Effective Death Penalty Act of 1996, an application for federal habeas relief cannot be granted unless the defendant meets the threshold procedural requirement of showing that the state court decision involved an unreasonable application of clearly established Federal law. *See* 28 U.S.C. § 2254(d)(1).

¹²⁷ *Musladin*, 127 S. Ct. at 651.

¹²⁸ 475 U.S. 560 (1986).

¹²⁹ *Id.* at 562.

Court held that the troopers' actions were not so inherently prejudicial that they denied the defendant a fair trial.¹³⁰ The test for whether spectators' actions violate a defendant's right to a fair trial is "whether 'an unacceptable risk is presented of impermissible factors coming into play.'"¹³¹

Thus, the Court has opined that spectators' actions can violate a defendant's right to a fair trial, although it has not established a firm test for when such a right is violated.¹³² The Court has also not set forth guidelines as to when a defendant's demeanor, or the prosecutor's comments on it, violate either the defendant's right to a fair trial or the government's interest in fair proceedings. At most, the Court has given the impression that the courtroom is neither a sterile laboratory nor an open forum where spectators can rally for their cause. A certain amount of drama is part and parcel of the trial atmosphere, but jurors should not feel intimidated into reaching a particular verdict.¹³³

¹³⁰ *Id.* at 571.

¹³¹ *Id.* at 570 (quoting *Estelle v. Williams*, 425 U.S. 501, 505 (1976)).

¹³² Justice Clarence Thomas authored the opinion for the majority in *Musladin*. He left open the question of what spectator conduct is egregious enough to violate a defendant's right to a fair trial. Rather, he decided the case on the procedural basis that *Musladin* had failed to demonstrate that the state court had unreasonably applied clearly established federal law. *Musladin*, 127 S. Ct. at 651. Following the *Musladin* decision, the *New York Times* called for courts to establish uniform rules to evaluate when spectators' actions are impermissible. See Editorial, *Lobbying the Jury*, N.Y. TIMES, Dec. 13, 2006, at A32, available at www.nytimes.com/2006/12/13/opinion/13wed2.html.

¹³³ In an interesting concurrence in *Musladin*, Justice Anthony Kennedy went as far as any of the Justices in addressing the desired "atmosphere" of the courtroom. He began his concurrence by stating, "Trials must be free from a coercive or intimidating atmosphere. This fundamental principle of due process is well established." *Musladin*, 127 S. Ct. at 656 (Kennedy, J., concurring). He then explained that "[t]he rule against a coercive or intimidating atmosphere at trial exists because 'we are committed to a government of laws and not men,' under which it is 'of utmost importance that the administration of justice be absolutely fair and orderly. . . .'" *Id.* citing *Cox v. Louisiana*, 379 U.S. 559, 562 (1965) (quoting *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963)). Thus, while not all reactions in the courtroom can or should be barred, actions of coercion or intimidation must be. The preferred atmosphere for the court is one of "calm and dignity." 127 S.Ct. at 657.

Cognizant of the fact that jurors take in all aspects of the courtroom proceedings, including spectator appearances and demeanor, lower courts have sought to limit the extent to which victims and supporters of victims may display their emotions during a trial.¹³⁴ Typically, courts are wary of displays of emotion by a victim's family member or representative in the courtroom, and these displays are often suppressed. Crying mothers of murder victims' have been reprimanded for displaying too much emotion in the courtroom and thereby potentially improperly affecting the jurors' decisions.¹³⁵

The limitations on community spectators and the buttons they wear are proof of the implicit recognition by the courts that the courtroom dynamic can and does affect the outcome of a case. Lawyers use their understanding of the theater of the courtroom to help make their presentations more effective. For example, a standard defensive tactic by defense lawyers is to load a courtroom with spectators, hoping to distract the jurors from focusing on the evidence in the courtroom. By loading the courtroom audience with supporters, a lawyer can manipulate the meaning that the jurors ascribe to the evidence.¹³⁶

¹³⁴ See, e.g., *Norris v. Risley*, 918 F.2d 828, 830-31 (9th Cir. 1990) (finding spectators' buttons that said "Women Against Rape" deprived defendant of a fair trial); *Buckner v. State* (stating that while "prejudicial exhibition of emotion may deprive defendant of a fair trial," the brief moment when a spectator flashed a picture of the victim was not so prejudicial as to change the outcome of the case).

¹³⁵ See, e.g., *People v. Chatman*, 133 P.3d 534, 552 (Cal. 2006) (showing judge's willingness to force the witness to leave should she continue to have emotional outbursts). Some judges go to extreme lengths to ensure that a victim's emotional display does not unfairly bias a juror. For example, in a case in Florida, the judge warned the victims' mother not to cry in the courtroom, including on the witness stand. "Warned by the judge that tears could trigger a mistrial, a mother was stoic in front of a Florida jury ... as she relived the day she discovered the bloodied bodies of her children." Emanuella Grinberg, *Judge Warns Victims' Mother Not to Cry on Stand*, CNN.com, Sept. 14, 2006, <http://www.cnn.com/2006/LAW/09/13/no.crying/index.html>. In order to ensure that the mother's testimony was sanitized enough, she gave her testimony outside the presence of the jury and then had a video of it played for the jury when it was deemed "unemotional" enough. *Id.*

¹³⁶ See Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 496 (1987).

While the criminal justice system seeks to prohibit or, at least minimize certain types of non-evidence that may influence jurors' decisions, it does not bar all aspects of interaction that may impact a verdict. We are committed to live presentation of the proceedings, with all the unpredictability that it includes. Although not acknowledged in formal court opinions, "[l]ive presentation may indicate something of the sources to which decisionmakers may turn ... First, live presentation may shift attention from the rules of decision to the environment of decision."¹³⁷ We want jurors to realize that their decision is not a judgment in the abstract; it will have an impact on numerous individuals, especially the defendant. Second, once the jurors realize who will be impacted by their decisions, they can do a better job of assessing the information they are receiving about that individual.¹³⁸ Jurors must rely on evidence, but their observations in the courtroom can help them test the inferences they are willing to make from such evidence.

C. Role of the Defendant in the Courtroom: A Historical Perspective

The current approach to trials, with restrictive rules of procedure and evidence, is of fairly recent vintage. The Federal Rules of Criminal Procedure did not become effective until 1946,¹³⁹ and the Federal Rules of Evidence were not adopted until 1975.¹⁴⁰

Prior to that time, the court had broad discretion in governing what type of information

¹³⁷ Milern S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81, 105 (1975).

¹³⁸ *See id.* at 105-06.

¹³⁹ FED. R. CRIM. P. HISTORICAL NOTE. The rules were adopted by order of the Supreme Court in 1944, transmitted to Congress in 1945, and became effective in 1946.

¹⁴⁰ FED. R. EVID. HISTORICAL NOTE. The rules were adopted by order of the Supreme Court in 1972, transmitted to Congress in 1973, and became effective in 1975. Until these rules took effect, courts relied on common law rules of evidence.

jurors would use to reach their decisions.¹⁴¹ While evidence still referred generally to the testimony of witnesses or physical evidence, parties and spectators in the courtroom played a more dynamic role.

Long before the current procedures for trials, a criminal trial was a “lawyer-free” contest between citizen accusers and citizen accused.¹⁴² Rather than formally presenting witnesses, the victim and accused engaged in a confrontational dialogue about the circumstances of the alleged offense. The accused was disqualified from testifying, but his non-testifying role in the courtroom ensured that his explanations and arguments would be considered by the jury. Moreover, his role ensured that jurors would consider not just what was said in the courtroom, but how it was presented, including the demeanor of the defendant in his adversarial role.

At the time of the colonies, cases still were being decided on the basis of a defendant’s appearance or gestures in the courtroom. Thus, during the Salem Witch Trials, many a defendant was condemned based upon her appearance and performance in the courtroom.¹⁴³ Prior to the 1830s, criminal trials generally began with a statement by

¹⁴¹ As described in Professor Lawrence M. Friedman’s seminal work, *Crime and Punishment in American History*, juries prior to the rules were allowed more leeway in what they considered for their verdict. “Witnesses had a good deal of leeway to tell their stories uninterrupted; there was less fussing over minor points of evidence than would be true today, less shadowboxing over rules of procedure; the judge’s charge was looser, freer, more colloquial, more tailored to the particular case.” LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 237 (1993).

¹⁴² See generally, JOHN LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 13 (2003). “The felony criminal trial retained its lawyer-free character into the 1730s. Citizen accusers confronted the accused in altercation-style trial. Prosecution counsel was virtually never used; defense counsel was forbidden. The accused conducted his own defense, as a running bicker with the accusers.” *Id.* at 253. These types of trials were referred to as the “accused speaks” trials. *Id.*

¹⁴³ See JANICE SCHUETZ, *THE LOGIC OF WOMEN ON TRIAL: CASE STUDIES ON POPULAR AMERICAN TRIALS*, 26-27 (1994). Not only were the physical attributes of the defendants examined in order to determine whether they had a witch’s teat or other unusual mark or body excretion, but defendants were also required to touch an alleged victim of their witchcraft to see if the touch triggered demonic fits. *Id.*

the defendant not under oath. “The prisoner’s statement enabled the court to hear the prisoner’s version of events, and observe his demeanor, notwithstanding the prohibition on the prisoner giving evidence.”¹⁴⁴ Jurors were expected to observe the defendant’s behavior in court and consider it in their decision making.¹⁴⁵

One reason that defendants played a greater role in the courtroom was that there was no right to be represented by counsel.¹⁴⁶ Defendants appeared *pro se*, and the strength of their appearances, non-testimonial arguments, and overall conduct in the courtroom could persuade jurors that defendants should not be convicted.¹⁴⁷ Thus, defendants could influence the jurors’ verdicts without even testifying.

The criminal trials of our past were less structured and provided an opportunity for the jury to evaluate not merely the evidence against the defendant, but also the defendant’s character.¹⁴⁸ While verdicts were to be based on the evidence, they also clearly represented a “judgment” regarding the defendant’s moral responsibility and prospects for a law-abiding future.¹⁴⁹

¹⁴⁴ DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL 1800-1865* 49 (1998).

¹⁴⁵ *Id.* at 78.

¹⁴⁶ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 94 (Simon & Schuster, Inc. 2d ed. 1985). “The early colonial years were not friendly years for lawyers....There were few lawyers among the settlers. In some colonies, lawyers were distinctly unwelcome...[for example], [i]n Pennsylvania, it was said, ‘They have no lawyers. Everyone is to tell his own case, or some friend for him ... `Tis a happy country.’” *Id.*

¹⁴⁷ *See* GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800* 174 (1985).

¹⁴⁸ Jurors could even play a role in establishing the defendant’s character by testifying during the very cases in which they sat as jurors. *See* LANGBEIN, *supra* note 142, at 320.

¹⁴⁹ Such judgments may also be the psychological remnants of trials by ordeal in which a defendant’s fate relied more on his or her physical reactions than evidence presented against the defendant. *See generally*, ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL* (1989); TRISHA OLSON, *The Passing of the Ordeals and the Rise of the Jury Trial*, 50 *Syracuse L. Rev.* 109

IV.

DEFENDANT’S Demeanor AND THE ROLE OF THE JURY: RESOLVING THE CONFLICT

As we have seen, certain realities must be accepted when deciding how to deal with the issue of a jury’s consideration of the defendant’s demeanor in the courtroom. First, how much we allow a jury to consider the defendant’s demeanor depends on what decision-making roles we want to give to jurors. If jurors have a limited role in evaluating evidence, it makes sense to limit their use of non-testimonial information. In that case, rather than allowing jurors to take ambiguous cues from a defendant’s demeanor, jurors should be routinely instructed not to consider demeanor in their decisions. However, if we believe that a defendant’s demeanor can play a valid role in jurors’ decision making, we should identify what aspects of a defendant’s demeanor can be considered and give jurors specific instructions as to how to consider that information in their deliberations.

A. Arguments in Favor of Instructing Jurors to Disregard a Defendant’s Non-Testifying Demeanor

There are several arguments in favor of simply instructing jurors that a defendant’s demeanor is irrelevant to their decisions and must not be considered in their deliberations. First, as noted earlier, there has been a historical move from a trial system

(2000); Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 Ohio St. L.J. 713 (1983).

in which the defendant and jurors interacted throughout the proceedings to one in which a defendant, unless testifying, is a mere observer of the proceedings. When jury trials first began, jurors served as compurgators -- individuals who were selected to sit as jurors because they knew the defendant and could, as witnesses, offer opinions regarding the defendant's credibility and law-abiding nature.¹⁵⁰ As structured, it made sense for jurors to consider a defendant's demeanor both in and out of the courtroom because the jurors knew the defendant and could properly evaluate the meaning of the defendant's reactions. However, as jury trials metamorphosed¹⁵¹ into formalized proceedings where jurors are outsiders who must listen to the evidence and exclude everything except what they have heard in open court from sworn witnesses,¹⁵² allowing jurors to consider their perceptions of the defendant was no longer reliable, nor consistent with the nature of formalized proceedings in which the judge closely regulates what evidence jurors may consider.

Second, it is not at all clear that jurors are equipped to properly evaluate the significance of a defendant's demeanor in the courtroom.¹⁵³ Without subjecting the

¹⁵⁰ In the first jury trials, the jurors were "men drawn from the neighbourhood who were taken to have knowledge of all the relevant facts (anyone who was ignorant was rejected) and were bound to answer upon their oath and according to their knowledge [of the disputants]." MOORE, *supra* note 104, at 8.

¹⁵¹ The change was slow, and began with parties putting on their case but with no distinction among pleadings, evidence and argument. *Id.* at 56. The criminal trial continued to change throughout the last four centuries, and continues to evolve today. See generally HANS & VIDMAR, *supra* note 7, at 43 (describing jury as being "in a process of continual evolution"); see also Valerie P. Hans, *U.S. Jury Reform: The Active Jury and the Adversarial Ideal*, 21 ST. LOUIS UNIV. PUBLIC L. REV. 85 (2002); B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280 (1996); B. Michael Dann, *Learning Lessons and Speaking Rights: Creating Educated and Democratic Juries*, 68 IND. L. J. 1229 (1993) (describing proposed jury reforms).

¹⁵² Devlin, at 10-11

¹⁵³ Studies indicate that jurors can easily misinterpret behavior in the courtroom because of their expectations of how people are to act in the courtroom setting. Searcy, Duck & Blanck, *supra* at note 11, at 2. If a defendant is unaware of those expectations, behavior that might be interpreted as humorous or eccentric outside the courtroom may be viewed as inappropriate and inculpatory inside the courtroom.

In a key study on how demeanor and nonverbal communication affects jurors' decisions, Professor Michael Saks, a professor of law and psychology, found that "demeanor cues often reduce accuracy in

defendant to questioning, it may be impossible for lay observers to know whether a defendant's reaction is genuine or staged.¹⁵⁴ It is often difficult, if not impossible to tell from someone's facial expressions what he or she is thinking or feeling. Certain individuals react to terrible news with an inappropriate smile or joke; others sob when they are happy. A face of stone could be interpreted as uncaring, when the individual is actually worried, frightened or distracted.¹⁵⁵ Defendants with mental disabilities may act inappropriately in court because of those disabilities. Defendants may also be instructed by their counsel as to how to react or not to react during the proceedings. It is often nothing more than mere speculation for jurors to guess what a defendant's demeanor means with regard to his mental state, consciousness of guilt or remorse. Moreover, there is a high likelihood that jurors mistakenly believe that they are more capable of interpreting demeanor in the courtroom than they have right to believe. Because jurors are given license to use a witness's demeanor in deciding that witness's credibility, they may be under the misimpression that they can bring the same observations to bear when analyzing the conduct of other persons in the courtroom. Certainly, without instructions to tell them otherwise, jurors may very well assume that they have the expertise and life experience to accurately interpret a defendant's behavior in the courtroom.

detecting deception, by distracting people into looking at cues they think are associated with lying and overlooking cues that actually are.... Apparently, facial cues provide little help and sometimes do more harm than good." Michael J. Saks, *What do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDIS. L.J. 1 (1997).

¹⁵⁴ Additionally, attractive people are seen as more honest than unattractive people, and symmetrical faces more honest than asymmetrical. Denise Mann, *Born to Lie?*, <http://www.medicinenet.com/script/main/art.asp?articlekey=50286> (last visited Jan. 24, 2007).

¹⁵⁵ Profound cultural differences may affect demeanor. In some cultures, male defendants are discouraged from displaying any emotion, regardless of whether they have particular feelings.

Third, openly sanctioning jurors' use of demeanor evidence risks creating an atmosphere in the courtroom in which the staging of the witness stand can overshadow the evidence presented by the witnesses. The ideal courtroom trial is calm and dignified. While not every display of emotion will make a trial unfair,¹⁵⁶ the goal is to have jurors decide the case from the evidence and not in response to courtroom lobbying efforts. If jurors are allowed to consider a party's demeanor, there is the constant risk that lawyers will coach their clients on how to communicate with jurors without testifying.¹⁵⁷

Fourth, other than when the defendant is testifying and it is understood that the jurors should focus their attention on him or her, there are no set times when jurors are told that they should focus on the defendant's demeanor. Thus, the likelihood is that only a few of the decision makers will observe the defendant at any particular time. There will not be a common observation for the jurors to consider when they go into their deliberations. One juror's quick glimpse of the defendant may carry undue weight during the jurors' discussions. It will be extremely difficult for the trial and appellate courts to police the use of demeanor evidence unless each glance or movement is noted for the record.

Fifth, there are important policy grounds for discouraging jurors from interpreting a defendant's activities and reactions at counsel table. Generally, there is a policy to allow open and honest communications between lawyers and their clients, especially during trial. Although counsel and client are in open court, there is still an expectation

¹⁵⁶ See, e.g., *Carey v. Musladin*, 127 S. Ct. 649, 651 (2006) (holding that a murder trial where the victim's family wore buttons of the victim's picture did not deny the defendant the right to a fair trial).

¹⁵⁷ Such coaching raises serious ethical issues, as it does when lawyers coach their witnesses on their appearance and delivery of testimony. See Richard C. Wydick, *The Ethics of Witness Coaching*, 17 *CARDOZO L. REV.* 1 (1995).

that their communications will remain privileged.¹⁵⁸ It is often difficult for counsel and client to communicate during court because their communications are limited to whispers and notes passed to each other. Jurors should be discouraged from scrutinizing a defendant during trial so that there can be more open communication between clients and their lawyers.

Sixth, to the extent that jurors divine any information from a defendant's demeanor, they are generally obtaining information regarding the defendant's character. Under current evidentiary rules, a defendant's guilt or innocence should not be based upon a defendant's character.¹⁵⁹ Accordingly, by allowing jurors to use information that they observe from a defendant's courtroom demeanor, even when they would not be allowed to hear direct evidence on a defendant's demeanor, undermines a crucial rule of evidence used in criminal cases.

Seventh, jurors should be told to disregard a defendant's demeanor during trial because putting the defendant in the spotlight operates contrary to a defendant's Fifth Amendment privilege not to incriminate himself. Unless jurors are instructed to disregard a defendant's reactions in court, these reactions may very well be treated as "evidence" against the defendant and used by the jury to convict him. Conversely, but

¹⁵⁸ Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) ("The attorney client privilege is one of the oldest recognized privileges for confidential communications").

¹⁵⁹ FED. R. EVID. 404(a). Character evidence is excluded to prevent confusion of issues, unfair surprise and undue prejudice. *Michelson v. United States*, 335 U.S. 469, 476 (U.S. 1948). There are exceptions to this general rule for sex crime offenses, where character and propensity evidence may play a much greater role. *See* FED.R. EVID. 413-415.

also troubling, a defendant may be able to tell the jury his story without being subject to cross-examination.¹⁶⁰

Finally, it is one thing to let the jury observe demeanor and another to direct them that it is permissible to draw inferences from it. The former may be unavoidable; however, the latter is not necessarily required. It is impractical to expect judges to observe all conduct of parties during trial, especially when they must be concentrating on the witnesses and making rulings during the proceedings. Unless a defendant's conduct is flagrant enough to command the attention of everyone in the courthouse, there may be little basis for the judge to decide whether it is proper to allow the jury to draw any inferences from the defendant's alleged conduct in the courtroom.

Thus, there are strong policy and constitutional reasons to instruct jurors to disregard a defendant's demeanor during trial. If only "evidence" should be considered by jurors in their deliberations, defendant's reactions do not qualify, and jurors should not be considering them. It is not enough to give jurors only an affirmative instruction to consider only "evidence," because, as experience has taught us, jurors nonetheless observe a defendant's reactions in the courtroom. Jurors must be told to disregard those observations and to rest their verdict only on evidence from the witness stand. Since a defendant's reactions are not evidence and, therefore, not part of the court record, it should also be impermissible for lawyers to refer to them in argument.

¹⁶⁰ In addition to Fifth Amendment implications, use of demeanor evidence may also raise Confrontation Clause issues. Generally, has the right "to confront" evidence against him. Although a defendant's demeanor may be used against him in jury deliberations, there is generally no specific opportunity for the defendant to confront the inferences being drawn from that demeanor.

B. Arguments in Favor of Allowing Demeanor Evidence

Despite the foregoing arguments against allowing jurors to consider a defendant's demeanor in their deliberations, many judges believe that a defendant's demeanor and conduct in the courtroom is relevant and should be considered by jurors in their deliberations. The support for this approach is both historical and practical.

First, as we have seen, historically there was no problem with jurors considering a defendant's demeanor because the courtroom was a venue where the jury had the general responsibility of assessing a defendant's character and deciding on the just result for the case. Although trials have become more formal, there is still an interest in ensuring that jurors reach a moral conviction that a defendant should or should not be held accountable for a crime. For that reason, we still allow jurors to reach decisions contrary to the evidence, such as when jurors engage in jury nullification.¹⁶¹ We also accept inconsistent verdicts from jurors.¹⁶²

Second, it is impractical to believe that jurors will be able to disregard their impressions of the defendant as developed from their observations in the courtroom, even if they are instructed to do so. Some psychologists estimate that people get as much as 90

¹⁶¹ See generally Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUMBIA L. REV. 960-61 (2006) (Jury nullification "refers to the power of jurors to disregard the evidence and vote to acquit a defendant on any grounds they seem fit, including their disagreement with the law"); Irwin A. Horowitz, Norbert L. Kerr & Keith e. Niedermeier, JURY NULLIFICATION: LEGAL AND PSYCHOLOGICAL PERSPECTIVES, 66 BROOK L. REV. 1207 (2001) (noting that courts do not sanction the nullification power of the jury, but judges tacitly recognize the jury's right to nullify verdicts based upon their own observations, moral values and intent). See also Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 UNIV. OF CINCINNATI L. REV. 1377, 1399 (1994) (defining jury nullification as "the power [of the jury] to convict on reduced charges despite overwhelming evidence against the defendant"). By jury nullification, jurors may accept both the crime in theory, and the punishment that attaches to it, but maintain that neither fit the particular defendant they are ask to judge. NORMAN J. FINKEL, COMMON SENSE JUSTICE: JURORS' NOTIONS OF THE LAW, 33 (1995) (providing an excellent history of jury nullification and stating, "The jurors may believe in the legitimacy of the crime, and may believe that it warrants punishment generally – but not here.").

¹⁶² *Dunn v. United States*, 284 U.S. 390, 394 (1932).

percent of their information from nonverbal cues.¹⁶³ Try as we might to compartmentalize evidence in trial, jurors adjudge cases based upon inferences and subjective evaluations of the proceedings.¹⁶⁴ Instructing jurors not to consider a defendant's demeanor evidence would merely push to the subconscious level information that jurors will nonetheless consider when they decide whether to vote guilty or not guilty.¹⁶⁵ Moreover, such an instruction works contrary to other instructions that tell jurors to use their common sense and life experience in deciding a case.¹⁶⁶

Third, with proper instructions, jurors will be able to give demeanor evidence the weight, if any, that it deserves. Thus, if jurors see a defendant try to intimidate a witness through menacing gestures, they should be able to consider those actions in deciding a defendant's consciousness of guilt. However, jurors are capable of understanding that a defendant's failure to react in the courtroom does not provide sufficient information to be

¹⁶³ "The Nonverbal Code," Intercultural Communication, www.sagepub.co.uk/upm-data/11826_Chapter8.pdf.

¹⁶⁴ In fact, legal philosophers opine that our very sense of justice "begins not with a principle but with a feeling." ROBERT C. SOLOMON, *A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT* 201 (1990). Moral sentiments guide jurors in their judgments. "We evaluate a real person's behavior as just or unjust on the basis of particular motives and actions along with his or her general character, and among the crucial ingredients in that amalgam of motives, actions, and character are the moral sentiments and what we might more generally call moral sensibilities." *Id.* at 203. Given this natural inclination, it is unlikely that jurors will completely disregard their emotional assessment of the defendant made from their firsthand observations. So long as jurors are able to perceive the defendant, they will make judgments, especially if they are not warned or directed as to how to deal with those perceptions.

¹⁶⁵ Jury experts have theorized that "People make decisions by emotion (unconscious mind) and validate them with logic (conscious mind)." SMITH & MALANDRO, *supra* NOTE 5, § 4.06 (1987). Thus, jurors anchor their perceptions of the evidence through the lens of what they have observed overall in the courtroom, including their observations of the defendant's behavior. As with the issue of jury nullification, the true controversy is probably not whether jurors use demeanor evidence in their decisions; they clearly do. The issue is whether we should acknowledge this use as a legitimate part of the legal process and inform jurors of when and how to consider such information. *See* R. Alex Morgan, *Jury Nullification Should be Made a Routine Part of the Criminal Justice System, But it Won't Be*, 29 ARIZ. ST. L.J. 1127, 1128 (1997).

¹⁶⁶ *See, e.g.*, CALCRIM 226 (instructing that jurors must use their "common sense and experience" in deciding whether testimony is to be believed).

useful to the jury and therefore should not be considered in their deliberations. Rather than barring jurors from considering demeanor evidence, expert testimony or jury instructions should be provided to give the jurors the proper tools to use to understand such demeanor information.¹⁶⁷

Fourth, the fact that the parties can manipulate demeanor evidence should not determine whether such information should be barred. It is well recognized that lawyers can manipulate jurors through the way that witnesses are dressed or taught to speak. Jurors are capable of understanding that a defendant will likely fake his reactions in court. No special expertise is needed, and, to the extent it is, the parties should be allowed to argue the issue or present expert witnesses regarding demeanor. This is particularly the case where there is evidence that a defendant has been coached or medicated to make a specific impression on the jury.

Fifth, there is no reason to worry about violations of a defendant's Fifth Amendment rights, since the defendant is not being compelled to provide testimony.

¹⁶⁷ This argument depends, of course, on whether judges will be willing to allow expert testimony on demeanor. Courts have broad discretion in deciding whether to admit expert testimony in general, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and judges particularly resist admitting evidence that is similar to analysis of witness demeanor, such as expert testimony regarding eyewitness testimony. If jurors are allowed to consider non-testifying demeanor evidence, there is no guarantee that jurors will be provided expert testimony to assist them in this analysis. For more information regarding the admissibility of eyewitness expert testimony, see Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2006 FED. CTS. L. REV. 3 (2006) Jennifer L. Overbeck, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. REV. 1895 (2005); Scott Woller, *Rethinking the Role of Expert Testimony Regarding the Reliability of Eyewitness Identifications in New York*, 48 N.Y. L. REV. 323 (2003); Hon. Robert p. Murrian, *The Admissibility of Expert Eyewitness Testimony Under the Federal Rules*, 29 CUMB. L. REV. 379 (1999); Andrew R. Tillman, *Expert Testimony on Eyewitness Identification: The Constitution Says, "Let the Expert Speak*, 56 TENN. L. REV. 735 (1989); Christopher M Walters, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402 (1985); Margaret J. Lane, *Eyewitness Identification: Should Psychologists be permitted to Address the Jury?*, 75 J. CRIM. L. & CRIMINOLOGY 1321 (1984).

Although the concept is very much up in the air these days,¹⁶⁸ the term “testimonial” generally requires a defendant to relate in more formalized manner information regarding an event. Reactions, facial expressions and demeanor, which are not elicited through interrogation are generally not considered to be testimonial. Thus, it is unlikely that a defendant’s reactions in court would be considered “compelled testimony.”¹⁶⁹

Finally, the most persuasive reason to allow a defendant’s demeanor to be considered by a jury is the argument that the theater of the courtroom matters. In other words, although there are rules of evidence, trials have not become and should not become so regimented that the natural dynamic of the courtroom is lost. There is an uncalculated value in having jurors use information that is not formally “evidence” in their decision making. When the public evaluates the legitimacy of a verdict, it will focus on the individual on trial – including that person’s behavior – as well as the evidence that is presented. Thus, the verdict should reflect the jurors’ evaluation of the evidence, as it makes sense in light of what they have observed firsthand about the person they have been asked to judge. Courtrooms are not laboratories; they are halls of judgment where “[j]urors confront a real, live defendant and real-life consequences.”¹⁷⁰

An example of the impact and role of the theater of the courtroom is the Chicago Seven Conspiracy case.¹⁷¹ In that trial, seven radical dissidents were put on trial for

¹⁶⁸ Crawford v. Washington, 541 U.S. 36, 51-53 (2004) (noting that multiple formulations of the term “testimonial” exist, from affidavits to out of court statements made under circumstances where the witness would reasonably believe that the statement could be used at trial).

¹⁶⁹ To the extent that a defendant’s demeanor is viewed as testimonial, it certainly is not “compelled.”

¹⁷⁰ Finkle, *supra* note 161, at 39.

¹⁷¹ For an excellent description of the dynamics of that trial, see JANICE SCHUETZ & KATHRYN SNEDAKER, COMMUNICATION AND LITIGATION: CASE STUDIES OF FAMOUS TRIALS 217 (1988). The trial is described as a “burlesque drama,” where the satirical drama of the courtroom had as much or more of an impact than the actual evidence presented at trial.

conspiracy to cross state lines to cause a riot. The trial became a political showcase. Even more important than the evidence from the witness stand were the actions of the defendants during trial. The defendants frequently and deliberately interrupted the proceedings with outbursts of profanity. Whenever a government witness would point at the defendants, the defendants would make “oink, oink” sounds from their chairs.¹⁷² The prosecutors asked the court to admonish the defendants to stop laughing during the case because the laughter was giving the jury the impression that the trial was absurd.¹⁷³ To convey their disdain for the court, defendants appeared unshaved, with long hair, wearing peace symbols, beads and black arm bands. They sat on the floor and used vulgar gestures, such as raising their middle fingers or plugging their ears with their fingers to disparage the prosecution’s case.

In the end, the jurors were asked to decide whether the defendants were illegal protestors or modern American heroes. To make that determination, they needed to absorb and consider the full milieu of the trial. As experts note, “although jurors forget much of the content of the trial discourse, they recall general impressions and attitudes that then enter into their decisions.”¹⁷⁴ The defendants’ demeanor and actions in the Chicago Seven case partially worked by getting the jurors to exonerate all of the defendants on charges of conspiracy, and later leading to an appellate reversal for those defendants convicted of crossing state lines with intent to riot. In the end, the trial was not simply about what the defendants had done in Chicago that summer. Rather, the

¹⁷² *Id.* at 228.

¹⁷³ *Id.* at 237.

¹⁷⁴ *Id.* at 235, citing Colley (1981).

burlesque of the courtroom succeeded in persuading a broader audience – that of the community – of a higher truth. To the extent that trials are an opportunity for society to judge itself and its standards for justice, then the full drama of the courtroom may be needed to make such a judgment.

If one accepts the arguments in favor of allowing jurors to openly consider the dynamics of the courtroom, including the defendant's demeanor or action, then jury instructions should be fashioned that best explain to the jurors how to critically evaluate such evidence and what its role should be in their deliberations.

C. A Compromise Solution

Given the arguments for and against the use of demeanor evidence, it is not surprising that the courts are split in how they address the issue. But, there may be a better approach than never allowing demeanor evidence or always allowing it.

One such solution would be to limit the manner in which demeanor evidence may be considered and to instruct jurors accordingly. As with character evidence, demeanor evidence should be used sparingly. In most cases, jurors should be instructed that a defendant's demeanor is generally not considered to be evidence because there is no way to test the validity of a defendant's reactions. Especially in cases such as death penalty and commitment cases, where jurors must make findings regarding a defendant's character, they should be cautioned not to infer conclusions from the defendant's appearance and conduct in the courtroom. Rather, the jurors should keep their attention directed on the evidence coming from the witness stand and should not speculate as to the meaning of the defendant's demeanor.

However, in rare cases where a defendant's reactions demonstrate consciousness of guilt, the prosecution should have an opportunity to formalize this evidence and have it presented to the jury. One way to do this is to have a witness to the conduct testify during the proceedings and be subject to cross-examination by defense counsel who could elicit the innocuous or innocent explanations for the defendant's behavior. With this approach, all of the jurors are getting the same information and are obtaining it without turning their attention from what is being presented on the witness stand. Moreover, the defendant would be on notice as to how the prosecution plans to use his or her conduct in the courtroom and, directly or through counsel, has an opportunity to address whether it is fair and accurate to derive any inferences from that conduct.

Although jurors can ignore jury instructions, there is still a value in giving them to educate the jurors on how to use the information they perceive in the courtroom. Instructions not only communicate the rules of law, but also the rules of jury behavior.¹⁷⁵ Jurors have no reason to believe that they should not take into account a defendant's sobs, laughter or rolling of the eyes in reaching their verdict. Instructions that address the relevance and irrelevance of such conduct can help direct the discussion of jurors as they reach their verdicts.¹⁷⁶

¹⁷⁵ See Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 UNIV. CINCINNATI L. REV. 1377, 1411 (1994).

¹⁷⁶ For example, an instruction could read: In determining the guilt or innocence of the defendant, you are cautioned against relying on the defendant's demeanor while not testifying. People react to stress or surprise in different ways. Some may cry, others may laugh, still others may not react at all. Although you are expected to incorporate your life experiences into your consideration of the case presented, including the demeanor of witnesses on the stand, guilt or innocence should be determined based on the evidence presented.

V.

CONCLUSION

Despite all of the rules of evidence and all of the rules of procedure, the courtroom is still a theater. The leading role belongs to the defendant, yet jurors are expected to ignore their star throughout the proceedings. We either need to counter the natural inclinations of jurors to base their judgments, in part, on their assessments of the defendant, or we need to control how they consider such information.

We may be reluctant to tell jurors to ignore the defendant altogether because we value a dynamic in which the community literally faces the accused. This dynamic goes beyond the Confrontation Right of having the accused face his accuser, rather it includes the historical notion that a trial is society's way of resolving disputes between the defendant and the overall community. Since this dynamic is valuable, the best approach is to try to regulate how jurors use their perceptions. Jury instructions and witnesses who will testify regarding demeanor are tools available to do so.

Admittedly, drafting such an instruction is not easy. It is a daunting task in general to draft effective jury instructions,¹⁷⁷ let alone those that must direct jurors in how to consider information that does not come in the form of traditional evidence. However, the following language may be helpful:

Ladies and Gentlemen of the jury, you must decide this case based upon all of the evidence presented in this case. In deciding the credibility of a witness, you may consider that witness's demeanor on the witness stand. Conduct that occurs in the courtroom, but not while a person is on the witness

¹⁷⁷ For an understanding of the challenges of drafting effective and proper jury instructions, *see generally*, Peter M. Tiersma, *Legal Language* (1999); Nancy S. Marder, *Bringing Jury Instructions in the Twenty-First Century*, 81 NOTRE DAME L. REV. 449 (2006).

stand, is not considered evidence unless you have been specifically instructed to consider it by the court. This includes the conduct and demeanor of any of the parties, counsel, the court, and even courtroom spectators.¹⁷⁸

In those cases in which the court has decided that a defendant's conduct may be considered as evidence, the following instruction should be added:¹⁷⁹

In this case, [the prosecution or defense] has given notice¹⁸⁰ that it plans to argue that you should draw inferences from the defendant's behavior in the courtroom. It is completely up to you what inferences you draw from the defendant's conduct. Before drawing any such inferences, you should consider (1) whether such conduct was intentional and intended to convey information relevant to an issue in this case, such as the defendant's intent; (2) any innocent explanations for the defendant's behavior; and (3) the context in which the conduct occurred. You are not to consider or speculate about any communications between the defendant and his or her counsel, nor should you draw any inferences from a defendant's decision not to testify in this case.¹⁸¹

Some courts might choose to be even more cautious in the giving of such an instruction by identifying for the jurors specific problems with drawing inferences from demeanor evidence. The instruction may be tailored for cases where the risks of misinterpretation are particularly high, such as when the defendant comes from a different culture.

The need to analyze how we are going to treat a defendant's demeanor in the courtroom is particularly great at this time when courts, legislatures and the Executive

¹⁷⁸ Although this article has discussed the possible impact of spectator conduct, it does not advocate allowing jurors to draw inferences from such conduct. Most likely, the defendant did not have control over such actions and to allow inferences from such conduct would be to encourage distractions during trial.

¹⁷⁹ The instruction may be given as a separate instruction or added to preexisting instructions defining the nature of "evidence" in a case. Some instructions already inform jurors to disregard anything that they see or hear when the court is not in session. *See* CALCRIM 104 (2006). If demeanor is going to be considered as evidence, this would be an appropriate place to explain its use.

¹⁸⁰ As with evidence of other acts under Federal Rule of Evidence 404(b), notice should be required before a party can refer to non-testifying demeanor evidence in argument. By requiring notice, the court can better ensure that disputes about what occurred in the courtroom are clarified for the record and that the defendant has an opportunity to explain, either personally or through another witness, what that conduct reflected.

¹⁸¹ Presumably, in cases in which the defendant testifies, there will be an opportunity to examine and cross-examine the defendant regarding the meaning of any conduct in the courtroom.

Branch are returning to basic questions of how criminal trials should be presented.¹⁸²

The right of the defendant to be present in the courtroom is important because it gives the defendant the opportunity to confront witnesses against him. But, systemically this right does more. It ensures that the courtroom is a place of judgment where the focus is on an individual and not just an obscure set of facts.¹⁸³

The goal is to focus on the defendant, as well as the facts of the case, without allowing the defendant's actions to mislead the jury. To accomplish this, standards and model jury instructions are needed. For jurors, there is nothing intuitive about ignoring the star of the show. Pretending that jurors do not consider a defendant's demeanor is akin to pretending that jurors do not engage in jury nullification.¹⁸⁴ Just as courts have authorized instructions regarding jury nullification,¹⁸⁵ jury instructions should be given regarding the proper consideration of a defendant's demeanor in the courtroom.

¹⁸² In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the United States Supreme Court held that the procedural rights accorded to enemy combatant Hamdan were not in accordance with international standards or the standards required by civilized peoples, and the deviation from acceptable procedures was not justified by a compelling need. *Id.* at 2798.

¹⁸³ In this regard, it is interesting to note that many jurisdictions do not allow a defendant to waive his appearance for trial in capital cases. *See, e.g.*, FED. R. CRIM. PROC. 43(c)(1)(B). Part of the reason for not allowing such waivers in capital cases is that the process of judging the life and death of the defendant involves a dynamic that requires the juror's direct observations of the defendant, including his demeanor.

¹⁸⁴ Or, as stated by advocates of clear instructions regarding jury nullification, "[t]he current practice ... has been analogized to 'telling jurors to watch a baseball game and to determine who won without telling them the rules until the game is over.'" W. Crispo, Jill M. Slansky & Geanene M. Yriarte, *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 57 (1997).

¹⁸⁵ *See* Bradley J. Huestis, *Jury Nullification: Calling for Candor from the Bench and Bar*, 173 MIL. L. REV. 68 (2002) (author argues that "[t]he best solution to address the jury nullification dilemma is a tightly worded, restrictive pattern instruction"). *See also* Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 529-30 (2001) (arguing that out of respect and fairness to jurors, jury instruction should be given to alert jurors to court's perspective on whether jury nullification should be used); Douglas E. Litowitz, *Jury Nullification: Setting Reasonable Limits*, 11 – SEP CBA REC. 16 (1997) (advocating that jurors should be informed about power to nullify, but informed in such a way that minimizes their tendencies to do so).

Additionally, if a defendant's courtroom demeanor is going to be considered by the jury, there may be a need to clarify the definition of "relevant" evidence in evidence codes. For example, Federal Rule of Evidence 401 currently defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The rule does not address whether demeanor of a courtroom participant may be considered as evidence. In order to ensure that such information may be considered in limited situations by the jury, it may be necessary to clarify specifically what qualifies as "evidence" in a case.

The dynamics of criminal courts change constantly. If we accept that it is unrealistic to consider courtrooms as mere laboratories where strict formulas regarding the processing of information will be obeyed by jurors, then we need to be realistic as to how we deal with the theater of the courtroom. Demeanor evidence of nontestifying parties is the new frontier. Like all frontiers, it poses its risks. However, it also has its rewards. It can infuse emotive due process into our adversary system,¹⁸⁶ by guiding decision makers in how to use their subjective assessments of a defendant's character in determining a case. Jurors are already naturally engaging in this process. The best protection against them misusing this information is to develop consistent and principled rules and instructions governing the use of nontestifying demeanor evidence.

¹⁸⁶ See Samuel H. Pillsbury, *A Problem in Emotive Due Process: California's Three Strikes Law*, 6 BUFF. CRIM. L. R. 483 (2002).