A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility

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I. INTRODUCTION

The belief in the utility of observing a witness’ demeanor in assessing his or her credibility at trial—"demeanor evidence"—has roots deep in the history of jurisprudence. Relying on a principle almost three thousand years old, the legal community has instilled in its judicial framework the fundamental premise that "the opportunity . . . to view the demeanor of a witness is of great value" in deciding whether that witness is telling the truth. Since ascertaining truth is the very function of the trial, the deliberate perpetuation of any such device which reputedly enhances "the accuracy of the truth-determining process" is hardly surprising. The principle can be traced as a juridical axiom from the times of the early Roman judex to the thirteenth- and fourteenth-century Postglossators, through the earliest English common law to the foundations of this country's early legal reasoning. Case law in the United States has endowed demeanor evidence with precedential value to the extent that the concept is reified in both case law and the Federal Rules of Evidence. In both civil and criminal trials, jurors are instructed that they may take the demeanor, manner, and conduct of witnesses into account when assessing witness evidence and credibility. Research has indicated that when there is disagreement among witnesses, jurors often tend to make their determinations based on witnesses’ demeanor, rather than on the substance of witness testimony. It has long been recognized that these determinations are of the utmost importance, as "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." Extensive empirical research has been conducted, however, on the

5. Id. at 488.
7. See Rowley, supra note 6, at 1551; Pollitt, supra note 6, at 398-400.
8. See infra part III.
9. See FED. R. EVID. Article VIII, advisory committee's Introductory Note ("The demeanor of the witness traditionally has been believed to furnish trier and opponent with valuable clues.").
10. See infra text accompanying notes 41-45.
act of deception and its perception and detection by observers. One branch of such research has focused on efforts to quantify experimentally the skill of ordinary subjects in judging whether a speaker (or witness) is engaging in deceptive behavior (or testimony). Specifically, this research is designed to answer whether it is possible for such subjects to detect in a speaker’s behavior indicia of attempted deception. Social scientists have thus effectively subjected to empirical trial the validity of the demeanor evidence concept described above. Surprisingly, successive testing of this “fundamental” legal precept has repeatedly demonstrated its fallacy. The studies establish that typical subjects are unable to use the “manner and conduct” of a speaker to successfully detect deceptive information on any reliable basis.

This article will explain why the long-standing confidence in the principle of demeanor evidence is unfounded, and it will suggest simple yet effective reforms to remedy the underlying problems. Part II gives a brief overview of the deficiency of the concept and of its under-

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14. This article will apply findings from a subject observing a speaker in a psychologist’s laboratory to the ability of a jury to discern a witness’ deception. In both situations, a randomly chosen person (juror or subject) is presented with a potentially deceptive speaker and asked to judge that speaker’s credibility. As Professor Wellborn points out, “[c]ourtrooms have more in common with laboratories than with ‘real life.’” Wellborn, supra note 1, at 1079. Various studies have, in fact, used a courtroom settings instead of laboratories to increase the external validity of the studies. See Peter D. Blanck et al., The Appearance of Justice: Judges’ Verbal and Nonverbal Behavior in Criminal Trials, 38 STAN. L. REV. 89, 90 (1985); Gordon D. Hemsley & Anthony N. Doob, The Effect of Looking Behavior on Perceptions of a Communicator’s Credibility, 5 J. APPLIED SOC. PSYCHOL. 136 (1978); Gerald R. Miller & Judee K. Burgoon, Factors Affecting Assessments of Witness Credibility, in THE PSYCHOLOGY OF THE COURTROOM 169 (Robert M. Bray & Norbert L. Kerr eds., 1978); GERALD R. MILLER & NORMAN E. FONTES, THE EFFECTS OF VIDEOTAPED COURT MATERIALS ON JUROR RESPONSE 11-42 (1978). Other research has focused on the extent to which it is actually possible to increase external validity. See generally Robert M. Bray & Norbert L. Kerr, Methodological Considerations in the Study of the Psychology of the Courtroom, in THE PSYCHOLOGY OF THE COURTROOM 287 (Norbert L. Kerr & Robert M. Bray eds., 1982); EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW (1981); Ebbe B. Ebbessen & Vladimir J. Konecni, On the External Validity of Decision-Making Research: What Do We Know About Decisions in the Real World, in COGNITIVE PROCESSES IN CHOICE AND DECISION BEHAVIOR 21 (Thomas S. Wallsten ed., 1980).

15. Although I will also use the terms “deception” and “perjury” and their derivatives interchangeably, it is with a caveat that I do so. Deception entails an intention to mislead, while perjury refers primarily to an outright lie under oath.

16. See infra part IV.
pinnings. Part III examines demeanor evidence in the judicial process, summarizing the history of the demeanor concept and its juridical antecedents, with particular emphasis on the Confrontation Clause of the Sixth Amendment. Part IV reviews social science literature on the subject of deception to illustrate the premise's invalidity. Finally, Part V examines the implications such evidence has for the legal process.

II. OVERVIEW OF THE PROBLEM

A. Social Science and the Law

As a preliminary matter, the threshold question might be whether it is appropriate for empirical findings from social science or other fields to be applied to the law. It is not an easy question, in fact, and the controversies still rage over the admissibility of certain expert testimony and of DNA analyses, of the validity of eyewitness testimony, and of other scientific advances. To what extent should the discoveries of social science be taken into account in the process of judicial reasoning?

I will address this broader issue in an abridged manner, and leave a more extensive discussion for a subsequent article. The analysis of necessity involves discussions of the overarching themes and purposes of psychology and of the law, of the legal foundations for accepting new facts and discoveries, and of constitutional polemics of natural versus positive law. As is clear from this Article, I favor the application of clearly demonstrated, accepted theories of social science when they can reasonably be applied to the highly insular judicial process. An example would be the recent research indicating that, contrary to both popular attitudes and Supreme Court decisions, the confidence that a particular witness shows in a judgment he or she makes, specifically in the area of an eyewitness identification, is not a good indicator of the accuracy of that judgment.

17. One purpose of psychology is to accumulate knowledge. Should such knowledge be applied sparingly, once it is proven and incontrovertible, or should it be integrated into daily life as it is discovered, in order to improve society as quickly and efficiently as possible? Likewise, is the purpose of law to protect society from individuals' itinerant moralities, or to protect individuals from the diffused apathy, intolerance, or active prejudice of society's majorities, or some unspecified combination of these extremes?

18. E.g., applying a sort of Frye test to academia and advocacy.

19. Is "law" a schema of rigid rules to be applied equally to everyone and immutably to novel situations, or should such novelties and "evolving standards" of morality, decency, or knowledge have more of an influence on established rules?

on the topic of deception: empirical studies consistently demonstrate that confidence in one’s ability to detect lies is unrelated to the actual accuracy of the statements.\textsuperscript{21}

Psychology and social science should not, however, be given carte blanche to revamp the law. An argument based on neo-Freudian principles that a murder should be excused because the murderer had an unresolved Oedipal complex and the victim reminded him of his father should not change the legal consequences of the act. Similarly, a rapist’s actions should not be rationalized by the assertion that he is aggressive and fixated in the genital stage. These psychological theories, perhaps helpful in determining the appropriate clinical treatment, should not function to subvert viable legal standards.\textsuperscript{22} Grayer areas exist as well. Issues in perceptual and personality psychology relate to the differing perceptions formed by a police officer and a home owner about the intimidation present during a search request.\textsuperscript{23} Such issues are relevant in both psychological and legal domains, but do they properly fall under the psycholegal rubric? And to what extent should such findings influence traditional evidentiary and other procedural perceptions of law? My reply is of necessity both straightforward and complex. Arguments that are based on social science and designed to inspire changes in the law, should be subjected to a simple preliminary standard: \textit{does the recommended change help to further the ends of the judicial process?}\textsuperscript{24} This criterion will obviously engender more fundamental problems, but is the yardstick by which new hypotheses should be measured.\textsuperscript{25} Articles such as the one at hand, 1984), \textit{with} Neil v. Biggers, 409 U.S. 188 (1972)(eyewitness confidence important predictor of identification accuracy)[and] Manson v. Braithwaite, 432 U.S. 98 (1976)(reaffirming confidence standard).


22. For example, a discussion of a variation on this theme, the claim of a multiple-personality disorder (MPD) in which an “alternate” persona committed a double homicide, appears in MICHAEL P. WEISSBERG, \textit{THE FIRST SIN OF ROSS MICHAEL CARLSON} (1992). The psychiatrist author concludes that the murderer had been lying all along, and had planned his defense far in advance. These cautions, however, should not be read to advocate an unsympathetic view towards all such defenses. My assertion applies to the potential for broad legal policies based on nebulous or arguable claims such as those based on MPD.


24. This is, essentially, a more expansive description of the Federal Rule of Evidence which governs the admissibility of expert opinion and deems admissible “knowledge [which] will assist the trier of fact to understand the evidence.” FED. R. EVID. 702. [This article was written prior to the decision in \textit{Daubert v. Merrell Dow Pharmaceuticals}, — U.S. —, 113 S. Ct. 2786 (1993)].

the Smith, Kassin, and Ellsworth article\textsuperscript{26} or that of Blanck, Rosenthal, and Cordell,\textsuperscript{27} offer suggestions that help focus the "truth-seeking process" into a more effective system, and satisfy that standard. Thus, it is appropriate to analyze the ramifications that empirical research may have for the legal perspective on demeanor evidence. Demonstrating the invalidity of the legal perspective on demeanor evidence demands reappraisal of some areas of evidentiary policy.

B. Perceived and Actual Deception

The problem with the value ascribed to demeanor evidence rests on an important discrepancy largely ignored by case law and by historical and legal background. Case law focuses on the use of demeanor in assessing the "credibility" and the "reliability" of a witness's evidence, on the "trustworthiness of witnesses"\textsuperscript{28} or on whether a witness is "worthy of belief."\textsuperscript{29} No opinion, however, suggests that demeanor is a guide to the actual truth of a witness's testimony, that ideal goal of trial, but to the weight that should be accorded to that testimony. This theoretical leap from measuring the reliability of a witness, as judged by his demeanor, to a measure of the underlying truth of the testimony\textsuperscript{30} is the underpinning of the very concept of demeanor evidence. Triers of fact subscribe to an extreme version of falsus in uno\textsuperscript{31}, falsus in omnibus\textsuperscript{32} when they make judgments of perjury or deception on the basis of a witness's gaze, his "nervous" smile or his shifting posture.

Empirical findings demonstrate that the behavioral cues used by jurors and other observers to perceive and measure deceptive discourse are "more strongly associated with judgments of deception than with actual deception."\textsuperscript{33} In other words, a wipe of the hand, a lick of the lips, or a stammer in a witness's speech will yield a judg-

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\textsuperscript{26} Supra note 20.
\textsuperscript{27} Supra note 14.
\textsuperscript{28} NLRB v. Dinion Coil Co., 201 F.2d 484, 488 (2d Cir. 1952)(citations omitted).
\textsuperscript{29} Mattox v. United States, 156 U.S. 237, 243 (1895).
\textsuperscript{30} The theoretical leap is also made from judgments about demeanor to other significant judgments. See infra part III(A).
\textsuperscript{31} THE BLACK'S LAW DICTIONARY 543 (5th ed. 1979).
\textsuperscript{32} Id.
\textsuperscript{33} Zuckerman et al., supra note 13, at 16 (emphasis added). See also Kraut, supra note 13.
ment of deception far more often than a deception on the part of that witness actually occurs.34

This is the fundamental problem with demeanor evidence as glorified by the judicial process. Social science has produced overwhelming evidence refuting the ability of people to identify that a witness is lying when the witness is actually being deceptive.35 Yet jurists persist in the fallacious belief—unfounded yet attributed to common sense—that this ability exists. Whether a witness is giving deceptive testimony or not, if he exhibits certain “telltale indicators”36 which have always been perceived as resulting from an act of deception, then the witness is perceived as being deceptive in his testimony. As described in Part IV of this article, this ratiocination, circular at best, is demonstrably false.

C. Operational Definitions

Detractors would contend that, as long as there is a quantified, reasonable correspondence37 between indicators of actual and perceived deception, the validity of the legal premise is reasonable. However, while it may be that there is some correlation between perceived and actual deception, it is indisputably an imperfect correlation. Clearly, it cannot be argued that this is “good enough” for trial practice. It is imperative that the trier of fact apply higher standards for seeking the accuracy of any testimony. The integrity of the truth-seeking process is irremediably violated when a capricious or even uninformed judgment is made or perpetuated as to how a particular factor serves the ends of that process. Where such a factor can be refined to better serve the truth-seeking process, such refinement is undoubtedly an advisable change. Furthermore, when the underlying assumptions supporting a premise are shaky or manifestly false, it is proper to reassess that premise.

Even assuming *arguendo* that the distinction between actual and perceived deception is a recondite or manufactured incongruity, two

34. This does not necessarily imply that those behavioral cues which lead to *judgments* of perceived deception have no homology at all with those cues displayed by *actual* deceptive witnesses. In fact, one empirical study obtained a statistical correlation between a list of indicia of perceived deception and a list of actual deception indicia. Bella M. DePaulo et al., *Actual and Perceived Cues to Deception: A Closer Look at Speech*, 3 Basic and Applied Soc. Psychol. 291 (1982). Thus, there is correspondence between those cues which are simply associated with observers guessing that a witness is lying and those which actually tend to be displayed by a perjurious witness. *Id.* Again, however, it is indisputable that “there are more cues which reliably predict perceptions of deception than actual deception.” Zuckerman et al., *supra* note 13, at 39.

35. *See infra* part IV.

36. *See infra* note 47 and accompanying text.

37. *See supra* note 34 and accompanying text.
closely connected problems impugn the validity of demeanor evidence. The first is the question of precisely which cues or indicators are considered symptomatic of deceptive discourse. Although a wide variety of cues are subsumed under the legal rubric of "demeanor," certain of these cues are actually vastly more helpful to an observer in detecting genuine deception than others. In practice, however, the legal construct of demeanor evidence ignores this hierarchy and actually assigns the greatest weight to the least helpful cues. To some extent this is due to the historical background of both the demeanor evidence premise and the Confrontation Clause of the Sixth Amendment.

This misplaced emphasis is also a function of the second problem, which is a matter of operational definitions. In law, the term "demeanor" has expanded to encompass many characteristics displayed by witnesses:

- the tone of voice in which a witness' statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity.

In sharp contrast, the lay definition of "demeanor" is much more focused on behavioral indicia, emphasizing external appearance and physical cues displayed by a witness: "[o]utward behavior; manner; conduct; deportment." Thus, even jurors who believe they understand exactly what to look for when told they may use demeanor as an index of a witness's credibility, will focus on those aspects which they believe define the term: outward physical behaviors, the "batting of an eye, the coloring of the cheek, or the twiddling of the thumbs." In addition, the term "demeanor" is less often used in a jury charge or preliminary instructions than the terms "manner and conduct," terms that focus the jurors' attention on indicia that are nonverbal. More-

38. See infra notes 41-45 and accompanying text.
39. See infra part IV(C).
40. As described in the next heading, some trial instructions explicitly focus juror attention to presumptively helpful cues which are actually misleading. Other instructions, however, implicitly disserve the demeanor evidence principle. For example, the common instruction that all witnesses should be presumed to be telling the truth actually changes an observer's focus of attention while he or she is regarding the speaker. See, e.g., Miron Zuckerman et al., Nonverbal Strategies for Decoding Deception, 6 J. NONVERBAL BEHAV. 171 (1982)(assumption that speaker is truthful increases reliance on certain indicia in judgments of deception); see also infra part IV.
41. BLACK'S LAW DICTIONARY 430 (6th ed. 1990)(citing Rains v. Rains, 8 A.2d 715, 717 (1939)).
42. WEBSTER'S NEW WORLD DICTIONARY 375 (2nd ed. 1984).
44. There is, moreover, a distinct trend toward drawing juror attention to specific
over, it is apparent that as a practical matter, the law actually regards this lay definition as definitive.\(^{45}\)

Together, these two problems detract from the validity of demeanor evidence. A trier of fact, when using demeanor as a gauge of a witness's credibility, places emphasis on cues that have been shown to be not only unhelpful but actually misleading. Thus, not only is the use of demeanor evidence unhelpful in the detection of deception, but given the cues on which the legal process focuses, it in fact "diminishes rather than enhances the accuracy of credibility judgments."\(^{46}\)

**III. DEMEANOR AND THE LAW**

In all its long history, rarely has the legal premise described above been more explicitly articulated than by Judge Freedman:

Demeanor is of the utmost importance in the determination of the credibility of a witness. The innumerable telltale indicators which fall from a witness actions as opposed to general impressions. "In making your assessment [of a witness's credibility] you should carefully scrutinize . . . each witness's . . . appearance and manner while on the witness stand." EDWARD J. DEVITT ET AL., 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL AND CRIMINAL § 15.01 (4th ed. 1992); "[i]n considering what testimony to believe, consider . . . the manner of the witness while testifying." MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT, Instruction No. 3.04 (1992); "[i]n deciding what to believe, you may consider . . . (3) the witness's manner while testifying. . . ." MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE NINTH CIRCUIT, Instruction No. 1.07 (1992); "[i]n considering the testimony of any witness, you may take into account . . . his manner while testifying. . . ." FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, Instruction No. 1.02 (1980); "[a]sk yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?" PATTERN CRIMINAL JURY INSTRUCTIONS OF THE DISTRICT JUDGES ASSOCIATION OF THE SIXTH CIRCUIT, Instruction No. 1.07 (1991); "[y]ou should decide whether you believe what each witness had to say. . . . Did the person impress you as honest?" PATTERN JURY INSTRUCTIONS OF THE DISTRICT JUDGES ASSOCIATION OF THE FIFTH CIRCUIT, CRIMINAL CASES, Instruction No. 1.09 (1990); "[i]n deciding whether you believe or do not believe any witness I suggest you ask yourself a few questions: Did the person impress you as one who was telling the truth?" PATTERN JURY INSTRUCTIONS OF THE DISTRICT JUDGES ASSOCIATION OF THE ELEVENTH CIRCUIT, CRIMINAL CASES, Basic Instruction No. 5 (1985).

This focus is especially dangerous in light of strong evidence that directing an observer's attention to particular aspects of a witness or his testimony can yield vastly different judgments about the witness' veracity. See infra notes 266-274 and accompanying text.

\(^{45}\) See Faircloth v. State, 208 So.2d 66,70 (1968) ("relates to physical appearance; 'outward bearing or behavior '") (citation omitted).

\(^{46}\) Wellborn, supra note 1, at 1075. Professor Wellborn is inaccurate, however, in the extent to which he considers demeanor useless. He misconstrues the social science findings which demonstrate that vocal cues such as tone of voice or hesitations in speech are actually helpful in detecting deception, while the majority of facial and other physical cues are misleading. It is this important distinction which this article addresses. Compare parts III and IV infra.
during the course of his examination are often much more of an indication to judge or jury of his credibility and the reliability of his evidence than is the literal meaning of his words.47

He continued, "observation of the demeanor of the witness confers on the fact finder [a superior advantage]"48 in ascertaining the truth at trial. The assumption that "telltale indicators" will be displayed by a perjurious witness reflects the oft-quoted, nearly three-thousand year old description of a liar: "He does not answer questions, or they are evasive answers; he speaks nonsense, rubs the great toe along the ground, and shivers; his face is discolored; he rubs the roots of the hair with his fingers."49 Judge Frank, an ardent supporter of demeanor evidence, emphasized the following indicia: "his manners, his intonations, his grimaces, his features, and the like...."50 Judge Frank illustrated the traditional standpoint when he wrote, "[a]ll of us know that, in every-day life, the way a man behaves when he tells a story—his intonations, his fidgetings or composure, his yawns, the use of his eyes, his air of candor or evasiveness—may furnish valuable clues to his reliability .... So the courts have concluded."51 For centuries, jurists have used these and similar indicia as axiomatic in credibility judgments, implicating demeanor both directly and indirectly in diverse areas of law.52

Four examples of these areas illustrate the extent to which demeanor evidence now inheres in the judicial system.

48. Id. at 549.
51. JEROME FRANK, COURTS ON TRIAL 21 (1950)
52. Since this article analyzes the actual validity of the demeanor evidence construct as accepted at its most basic, it will not address questions that arise from an assumption that the construct is valid. Such questions include when demeanor evidence can qualify as substantive rather than simply credibility evidence; when a witness or other party's demeanor in the courtroom may properly be assessed by the trier of fact; and to what extent a trial judge may and/or should preserve for the record the specific behavioral elements he or she used in making a judgment based on demeanor. Such issues are discussed more thoroughly in Edward J. Imwinkelreid, Demeanor Impeachment: Law and Tactics, 9 Am. J. TRIAL ADVOC. 183 (1985).

A related topic examines the use of demeanor evidence in detecting false testimony that is not deliberate deceit but is merely inaccurate. An erroneous identification by an eyewitness who is nevertheless confident and sincere in that identification would fall into this category. While Professor Wellborn address this topic cogently, see Wellborn, supra note 1, it is an inappropriate corollary to the main topic of demeanor evidence. An observer cannot detect deceit by any means if it does not exist. If a witness is convinced of the veracity of his statements, "telltale indicators" that he is lying should not be apparent.
A. Sentence Enhancements for Mendacity

The first example of the use of demeanor evidence in the judicial process is subtle, but it has potentially drastic ramifications. Fifteen years ago, the Supreme Court, in *United States v. Grayson*,53 addressed the issue of a trial court's use of a convicted defendant's mendacity at trial in enhancing that defendant's sentence. Affirming *Chaffin v. Stynchcombe*,54 the Court relied on language which tenaciously held to the belief in the ease of observing a witness and thus discerning his thoughts: "[o]pportunity to observe the defendant, particularly if he chose to take the stand in his defense, can often provide useful insights into an appropriate disposition."55 *Grayson* endorses the contentions both that a defendant's "truthfulness or mendacity while testifying on his own behalf . . . [is] probative of his attitudes toward society"56 and that the defendant's readiness to lie under oath . . . [is] among the more precise and concrete of the available indicia57 to be used by a judge at sentencing.

Thus, a convicted defendant, who testified on his own behalf but was viewed by the trial judge—perhaps on the basis of demeanor—to have perjured himself, could be deemed to have diminished "prospects for rehabilitation"58 at sentencing. All hope can be given up as to "the likelihood that he will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, the degree to which he does or does not deem himself at war with his society."59 Under pre-Sentencing Guidelines law, based solely on an assessment of the defendant's antipathy for society manifested as perjury, a judge could order an increased sentence, albeit "within the limitations fixed by statute."60 Even under the current Guidelines sentencing, a convicted defendant may be subjected to an increase of

54. 412 U.S. 17, 33 (1973) ("Jury sentencing, based on each jury's assessment of the evidence it hears and appraisal of the demeanor and character of the accused, is a legitimate practice.").
57. United States v. Hendrix, 505 F.2d 1233, 1236 (2d Cir. 1974).
59. United States v. Hendrix, 505 F.2d 1233, 1236 (2d Cir. 1974).
60. Humes v. United States, 186 F.2d 875, 878 (10th Cir. 1951). See, e.g., United States v. Pavlico, 961 F.2d 440, 443 (4th Cir. 1992) (increase for perjury in pre-Guidelines case); see also United States v. Campbell, 864 F.2d 141, 154-55 (D.C. Cir. 1982) (sentencing judge may infer from testimony and demeanor of witnesses at trial that defendant coerced or allowed defense witness to commit perjury); Fabiano v. Wheeler, 583 F.2d 265, 269-70 (6th Cir. 1978) (sentencing judge may infer from testimony and demeanor of witnesses at trial that defendant coerced or allowed defense witness to commit perjury).
two offense levels if it is found that he "willfully obstructed or impeded . . . the administration of justice" by giving false testimony or statements.61

Accordingly, a defendant who gives testimony in a calm, straightforward manner, could be perceived by the presiding judge as calculated, unrepentant, impertinent, and brazen in the defendant's disregard for the process of justice. This composure, however, could as easily be due to repetitious practicing of testimony with counsel.62 A judge who makes a determination about a convicted defendant's mendacity, based primarily on that defendant's demeanor while testifying on his own behalf, could increase the defendant's sentence by years,63 without regard to the attenuated nature of the factors on which the decision is based.64 Clearly, where determinations are based on a dis-

61. UNITED STATES SENTENCING GUIDELINES § 3C1.1 (1987). See also, United States v. Noland, 960 F.2d 1384, 1390-91 (8th Cir. 1992)(district court's opportunity to judge witnesses' credibility); United States v. Seabolt, 958 F.2d 231, 233-34 (8th Cir. 1992)(finding of perjury based on the witnesses' demeanor); United States v. Osborne, 931 F.2d 1139, 1152 (7th Cir. 1991); United States v. McDonald, 935 F.2d 1212, 1219 (11th Cir. 1991)(district court "uniquely suited" to make judgment of perjury since able to observe demeanor of witness); United States v. Beaulieu, 900 F.2d 1537, 1540 (10th Cir. 1990)(judge's determination that defendant committed perjury based on personal observation of defendant's demeanor, which gives adequate "indicia of reliability"); see also United States v. Urooechea-Casallas, 946 F.2d 162 (1st Cir. 1991); United States v. Stubbs, 944 F.2d 828 (11th Cir. 1991).

This provision is qualified, however, in that when it is applied "suspect testimony and statements should be evaluated in a light most favorable to the defendant." UNITED STATES SENTENCING GUIDELINES § 3C1.1, Application Note 2 (1987). Recent decisions, under Guidelines law, have apparently begun to restrict a sentencing court's ability to enhance a defendant's sentence for obstruction of justice. See, e.g., United States v. Dunnigan, 944 F.2d 178, 182-85 (4th Cir. 1991). The restriction is specifically related to the added burden such enhancements place on defendants, and not to the dangers associated with using the defendant's demeanor as a gauge of mendacity. Id. at 185.


63. Under certain circumstances, a Guidelines sentence could conceivably be increased by more than ten years, given a two-level adjustment for obstructing or impeding justice.

64. Jurists take this danger into account in other contexts such as when a defendant takes the stand at a competence or sanity hearing. See Commonwealth v. Louraine, 453 N.E.2d 437, 442 (Mass. 1983). A defendant should not testify at such a hearing if he is under the influence of strong medication, for "[w]hen mental competency is at issue, the right to offer testimony involves more than mere verbalization." State v. Maryott, 492 P.2d 239 (Wash. App. 1971). The right "includes the [right] to offer his demeanor in an unmedicated state." Id. Further, "the jury are [sic] likely to assess the . . . evidence before them with reference to
putable factor such as demeanor, such determinations may lead to misinterpretations with grave consequences.65

B. Trial Tactics

If there is indeed a disparity between behaviors that lead to perceptions of perjury and behaviors which are true indicators of mendacity,66 its importance is most evident in the stratagems and devices wielded by trial attorneys to use witness demeanor in attacking credibility.67 The trial tactics include dressing a defendant in a particular manner,68 requesting that an adverse witness allow the jury “a good look at [him],”69 and pre-trial interviewing of specific witness and researching demeanor evidence in general.70 In fact, since the early part of this century commentators have advocated that attorneys cultivate a familiarity with social science studies regarding demeanor.71 The corpus of literature about the importance of demeanor evidence at trial, both in terms of its effect on juries72 and in terms of methods

the defendant’s demeanor. [If the defendant appears calm and controlled at trial [due to the medication’s influence], the jury may well discount any testimony that the defendant [was incompetent].] Commonwealth v. Louraine, 453 N.E.2d 437, 442 (emphasis added).

65. It is true, of course, that a trier of fact may not make a finding of fact based solely on disbelief of testimony: “there must be more than the batting of an eye, the coloring of the cheek, or the twiddling of the thumbs as a basis for finding facts.” Chapman v. Troy Laundry Co., 47 P.2d 1054, 1062 (1935).

66. See supra part II(A).

67. See generally Imwinkelreid, supra note 52.

68. An example of this tactic is evident in Patricia Hearst’s demure attire at her trial for bank robbery. It has been suggested that F. Lee Bailey, her counsel, required her to dress in this manner to present a reserved and impassive appearance which would “bolster his claim that her will and judgment were overborne by her captors. . . .” DAVID L. HERBERT AND ROGER K. BARRETT, ATTORNEY’S MASTER GUIDE TO COURTROOM PSYCHOLOGY: HOW TO APPLY BEHAVIORAL SCIENCE TECHNIQUES FOR NEW TRIAL SUCCESS 308-09 (1981).

69. Clarence Darrow, in the Unger trial, used this device particularly skillfully. See FRANCIS X. BUSCH, 3 LAW AND TACTICS IN JURY TRIALS 751 (encyc. ed. 1960). A key prosecution witness

was a squat, heavy-set man of medium height. . . . His swollen face, bleary eyes, puffy eyelids, and reddish-purple nose marked the habitual drunkard. His shaggy . . . hair had been stranger to brush or comb for so long as to have become tangled and matted. His clothes . . . were covered with dirt and grease. His huge hands . . . were covered with grime.

Id. Darrow’s cross-examination was a simple request to the witness to stand up and turn around, and Darrow drove his point home by saying, “[t]hat’s all. I just wanted the jury to get a good look at you.” Id.

70. See, e.g., JEFFREY L. KESTLER, QUESTIONING TECHNIQUES AND TACTICS § 3.34 (1982).

71. See, e.g., ROLLA R. LONGENECKER, SOME HINTS ON THE TRIAL OF A LAWSUIT 68 (1927).

72. See Wellborn, supra note 1; Stephen H. Peskin, Non-Verbal Communications in the Courtroom, 3 TRIAL DIPLO. J. 8 (1980).
through which to capitalize on that effect, has burgeoned since that time.

A wide range of approaches has been espoused by litigators for capitalizing on this belief in the validity of demeanor evidence. Such approaches have included reviewing the relevant social science literature to acquire an overall understanding of the topic and paying close attention to a prospective witness's demeanor at a pretrial deposition in order to plan a more or less aggressive examination at trial. Other approaches include drawing out "favorable" demeanor from friendly witnesses, and physically positioning oneself in the most advantageous spot in the courtroom to allow the jury to observe the "favorable" demeanor of a friendly witness or the "unfavorable" demeanor of an adverse witness. Still others include exploiting an adverse witness's nervousness or discomfort to elicit an unfavorable demeanor, and adhering to particular types of questions which elicit particular demeanors from a witness.

This practical area of law exemplifies the manner in which demeanor evidence has achieved undue importance in the legal framework. Any lawyer who makes it his or her business to research the relevant social science literature will quickly determine that demeanor, as extolled by the courts, is an inappropriate means of detecting perjury and deception. However, it is precisely because the construct is so extolled that lawyers, to borrow a phrase, let the "tail wag the dog." Because the accepted supposition is that a particular type of demeanor implies deception, litigators attempt to provoke such demeanor. They capitalize on the prevalent assumptions about demeanor not by focusing on those aspects of a witness' behavior that in fact do serve as signals of deception, but by focusing on aspects of be-


74. E.g. Wellborn, supra note 1.

75. Imwinkelreid, supra note 52, at 209.

76. See supra note 62.


78. "[A]n adverse witness's credibility can be damaged by slowly moving towards the witness during cross-examination. Frequently, the witness will . . . begin to show signs of anxiety [and] the fact-finder may perceive that the witness is nervous and stumbling in his or her testimony because he or she is being deceptive." Id.

79. See Edward J. Imwinkelreid, supra note 52.

80. See infra part IV.

behavior that are popularly perceived as accurate indicators of deception. The discrepancy between indicia of actual and of perceived deception is perpetuated through various trial strategies used to expose witness demeanor.

C. Out-of-Court Declarations

A third, more widely known instance in which reliance on the principle of demeanor evidence is apparent is the reluctance to accept into evidence statements made outside of the courtroom: the hearsay rule. Despite its tortuous development under common law, up to the multifarious intricacies it presents under Article VIII of the Federal Rules of Evidence, the foundation of the rule can be simplified—oversimplified, perhaps—to a basic tenet: out of court statements should generally be disallowed in court because the demeanor—and thus a means of assessing the credibility—of the declarant at the time he made that statement is unavailable to the trier of fact. That is, "[t]he importance of demeanor to the jury is one of the rationales for the

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82. See supra part II(A).
83. See FED. R. EVID. 801(c) ("Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.") [and] FED. R. EVID. 802 ("Hearsay is not admissible. . . .").
85. See, e.g., Donnelly v. United States, 228 U.S. 243, 273 (1912) (reason hearsay is excluded is that statements are made "without opportunity for the court, jury, or parties to observe [witnesses'] demeanor"). While this reasoning can apply equally to the relationship between demeanor evidence and the issues which arise under the Sixth Amendment's Confrontation Clause, recent case law has been careful to distinguish application of the right to confrontation from application of the hearsay rule. See, e.g., Dutton v. Evans, 400 U.S. 74, 80 (1970) (right of confrontation does not necessarily preclude introduction of evidence that would violate rule against hearsay); California v. Green, 399 U.S. 149, 155-56 (1970) (merely because evidence is admitted in violation of hearsay rule does not necessarily violate confrontation clause and vice versa); see also White v. Illinois, 112 S. Ct. 735, 741 (1992); Idaho v. Wright, 110 S. Ct. 3139, 3146 (1990); United States v. Ray, 920 F.2d 582 (9th Cir. 1990) (admission under hearsay rule does not violate confrontation clause); Ferrier v. Duckworth, 902 F.2d 545 (7th Cir. 1990), cert. denied, 111 S. Ct. 526 (1990) (confrontation clause does not enact hearsay rule); State v. Hanna, 471 N.W.2d 238 (Wis. App. 1991) (different tests for admission under confrontation clause and hearsay rule). But see United States v. Morales-Macias, 855 F.2d 693 (10th Cir. 1988) (statements admissible under hearsay rule unobjectionable under confrontation clause); State v. White, 809 S.W.2d 731 (Mo. App. 1991); State v. Palomo, 783 P.2d 575, cert. denied, 111 S. Ct. 80 (Wash. 1989) (even though prop-
hearsay rule . . .”86

It is not, of course, the only rationale, and demeanor is certainly not the dispositive factor required for admission of hearsay evidence. Despite its importance, demeanor evidence can be dispensed with when other “indicia of reliability”87 are available to validate out of court statements. Such indicia are the foundation for the current list of hearsay exceptions in the Federal Rules of Evidence.88 Essentially, the rule against hearsay prohibits “extrajudicial statements not subject to cross-examination and not falling within a specific exception to the rule.”89

In Ohio v. Roberts,90 the Supreme Court established a framework that demonstrates the reluctance to admit such evidence and the endorsement of it when other validating indicia are present. Reflecting the importance ascribed to demeanor evidence, and affirming Barber v. Page,91 the Court held that the prosecution, when offering adverse statements or testimony, must produce the declarant or demonstrate that he or she is “unavailable.”92 If a witness is shown to be unavailable, the Court then must make an assessment of the surrounding “indicia of reliability.”93 Only if the “trier of fact is afforded a satisfactory basis for evaluating the truthfulness of the prior statement”94 and determines that it possesses adequate reliability, is the hearsay state-

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86. Imwinkelreid, supra note 52, at 186 n.34.
89. Rowley, supra note 6, at 1561; see also WIGMORE, supra note 84, § 1397 (1974)(use of witness’s prior testimony notwithstanding present status as witness is nontraditional).
90. 448 U.S. 56 (1980).
91. 390 U.S. 724-25 (1968). Ruling in terms of the Confrontation Clause, Barber v. Page required that a good faith effort must be made to obtain such a witness before a finding of unavailability can be made. Affirming Barber, Berger v. California, gave it retroactive application, based in part on the importance of the “opportunity to assess the credibility of witnesses.” 393 U.S. 314, 315 (1969).
92. Id. at 66.
93. FED. R. EVID. 804.
94. Rowley, supra note 6, at 1561.
ment admissible.\textsuperscript{95}

In sum, the doctrine of demeanor evidence is one of the cornerstones of the rule prohibiting hearsay evidence. Its significance, however, may have been obscured in the development of the hearsay rule, which now focuses on peripheral guarantees of reliability and credibility.

D. Demeanor and the Confrontation Clause

The importance of demeanor evidence has not been so obscured, however, in a second area of the legal system. Its entrenchment in the judicial process is epitomized by its relation to the "Confrontation Clause" of the Sixth Amendment\textsuperscript{96} to the United States Constitution. For centuries—arguably, for millennia—the concept of forcing an accuser to stand face-to-face with the accused has been predominantly a function of the belief that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"\textsuperscript{97} This nation's highest court steadfastly clings to its faith in demeanor evidence when interpreting Confrontation Clause issues, invoking "something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial . . .'"\textsuperscript{98}

At the most fundamental level, this claim rests on the fact that actually placing a witness face-to-face with the accused enables both the accused and the trier of fact to view the witness' demeanor. Two widely disparate contentions are collapsed into this point, however. The accepted, but unfounded, claims that there is a "profound effect upon a witness of standing in the presence of the person [he] accuses,"\textsuperscript{99} and that personal confrontation "undoubtedly makes it more

\textsuperscript{95} Reliability, of course, may be considered implicit, if the statement or testimony falls within a hearsay exception. See FED. R. EVID. 803 & 804. But see Stewart, supra note 88 (criticizing the inherent reliability of some of these exceptions).

\textsuperscript{96} The Amendment states, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI. This phrase is commonly known as the "Confrontation Clause."

\textsuperscript{97} Coy v. Iowa, 487 U.S. 1012, 1019 (1988). See also, e.g., Commonwealth v. Ludwig, 594 A.2d 281, 284 (Pa. 1991)("Many people possess the trait of being loose tongued or willing to say something behind a person's back that they dare not or cannot truthfully say to his face or under oath in a courtroom. It was probably for this reason . . . that [the right of confrontation] was given to every person accused of crime.").

\textsuperscript{98} Id. at 1017 (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)).

\textsuperscript{99} Id. at 1019. This "effect" allegedly makes the witness "feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts," making him "understand what sort of human being that man is." Id., (citations omitted). This idealistic approach, still expounded today, reflects Wigmore's "subjective moral effect," reputedly capable of "unstring[ing] the nerves of a false witness." WIGMORE, supra note 84, § 1395 n.2. Yet even Wigmore's analysis conceded that this belief was more predomi-
difficult to lie against someone, particularly if that person is an accused and present at trial,"^{100} are substantively different from the contention that demeanor evidence is helpful in credibility assessments. Both, however, are considered integral parts of the Confrontation Clause.\textsuperscript{101}

On another level, however, the confluence of the two principles reflects Dean Wigmore’s belief that confrontation promotes the reliability of trial testimony through cross-examination, which he considered the most important aspect of trial.\textsuperscript{102} Cross-examination is integral in allowing the trier of fact to hear a witness’s story from two or more different perspectives, and one of its “critical goal[s] . . . is to draw out discrediting demeanor to be viewed by the factfinder.”\textsuperscript{103} Specifically, confrontation “mak[es] it possible for the tribunal before whom the witness appears to judge from his demeanor the credibility of his evidence.”\textsuperscript{104} Because the Confrontation Clause thus ensures cross-examination, it “confound[s] and undo[es] the false accuser”\textsuperscript{105} or the lying witness, flustering the witness into exposing a “false” demeanor to the jury. While controversy as to the exact “reasons for, and the basic scope of, the protections offered by the Confrontation Clause”\textsuperscript{106} is found in almost every opinion dealing with the Clause, each accepts the element of demeanor evidence as a crucial one.

It is thus impossible to understand the origin of the enthusiasm surrounding the demeanor evidence doctrine without examining the Confrontation Clause. The Clause “reflects a preference for face-to-face in “earlier and more emotional times,” and that the effect would be more due to the witness’s presence before a formal court or tribunal than to actually beholdng the accused. \textit{Id.} \S 1395.

\begin{enumerate}
\item \textsuperscript{100} Ohio v. Roberts, 448 U.S. 56, 64, n.6 (1980).
\item \textsuperscript{101} \textit{See}, e.g., California v. Green, 399 U.S. 149, 158 (1970).
\item \textsuperscript{102} \textit{See} \textit{WIGMORE, supra} note 84, \S 1395 (“The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination. . ..”)(emphasis in original). Contrary to recent decisions such as that of \textit{Coy v. Iowa}, 487 U.S. 1012 (1988), Wigmore subordinated the importance of physical confrontation to the opportunity for “direct and personal putting of questions and obtaining immediate answers.” \textit{Id.}
\item \textsuperscript{103} Ohio v. Roberts, 448 U.S. 56, 64 n.6. \textit{See also}, United States v. Giese, 597 F.2d 1170, \textit{cert. denied}, 444 U.S. 970 (holding that jurors are entitled to see how witness reacts when cross-examiner catches him in a contradiction or exposes one of his falsehoods).
\item \textsuperscript{104} Virgin Islands v. Aquino, 378 F.2d 540, 547 (3rd Cir. 1967). Contrary to the assertion in \textit{Coy}, this advantage inheres “not from the confrontation between the witness and the accused, but from the witness’s presence before the tribunal.” \textit{Id.}
\item \textsuperscript{105} \textit{Coy v. Iowa}, 487 U.S. 1012, 1020 (1988).
\item \textsuperscript{106} California v. Green, 399 U.S. 149, 156 (1970)(discussing whether the focus of confrontation is procedural or substantive, a strict availability requirement or an opportunity to attack a witness’s testimony through cross-examination). \textit{Compare} Justice Harlan’s concurring opinion \textit{with} Justice Brennan’s dissenting opinion.
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face confrontation," ensuring the opportunity to regard a witness' demeanor, and the history of the Clause has ensured a steadfast belief in the validity of the use of that demeanor evidence. The next sections of this paper trace the history of the Confrontation Clause as it pertains to the construct of demeanor evidence. The paper examines the development of the Confrontation Clause in common law, through the Supreme Court holdings which defined and explicated the right to confrontation, up to cases of especial import from the past three years.

1. Early Development of Demeanor and the Confrontation Clause

Through Biblical and Roman law, as well as modern commentators and case law the principle of confronting an accused with those who denounce him has been firmly established. The principle was evident in subsequent English law, under which a confrontation requirement existed: it was necessary for an accuser to make an "appeal" to the court, at which time he was obliged to recite his grievance. After a flawless recitation of his allegations he was required to document the injury, either by a physical exhibition in the case of a wound, or through the testimony of complaint witnesses to bolster his oath and contentions. This requirement of physically confronting a tri-

108. E.g., the Roman Emperor Trajan, when asked by the younger Pliny how to treat the "new sect known as Christians," replied: "anonymous accusations must not be admitted in evidence as against any one, as it is introducing a dangerous precedent, and out of accord with the spirit of our times." Pollitt, supra note 6, at 384. [In the biblical account of St. Paul's trial for alleged sedition before Porcius Festus, the Roman governor of Judea, Festus refused to render judgment against Paul until Paul was physically confronted by his accusers because "it is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face.

Acts 25:16, quoted in Rowley, supra note 6, at 1548. These samples epitomize the factions into which interpreters of the Confrontation Clause have broken. One faction views the Clause as a substantive rule designed to protect against ex parte affidavits and other extra-judicial assertions, and at its most extreme, it becomes a constitutionalization of the hearsay rule. See, e.g., Pollitt, supra note 6, at 384. The second faction regards the Clause as a procedural right afforded to an accused at trial and designed to ensure cross-examination or, in the reductionist view of Coy, simply that both accuser and accused are forced to look at each other. See, e.g., Rowley, supra note 6, at 1548.

bunal with the injury most likely reduced the number of "anonymous accusations" that so worried the Emperor Trajan. Later, a much more literal method of "confrontation" was championed by the conquering Normans—trial by personal combat. It was a "novel and hated thing in England. In the so-called 'Laws of William the Conqueror' it figures as being the Frenchman's mode of trial, and not the Englishman's," and, according to Thayer, it was not widely practiced.

In the early thirteenth century a variation of the "probable cause hearing" required the accuser to supply two complaint witnesses to support his claims before an accused was tried. At such "hearings" the defendant was allowed confrontation in the form of cross-examination of these witnesses. Gradually, however, through the thirteenth century, this variation and similar forms which afforded an accused some measure of confrontation or cross-examination were subordinated to the developing concept of "trial by jury."

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112. See supra note 108.
113. Id. at 397.
114. According to legal documents of the time, however, it is apparent that this mode of trial was far more prevalent than Thayer leads us to believe. See Julius J. Marke, History in the Law Books, N.Y. L.J., September 15, 1992, at 4. ("'Glanvill,' a 12th Century legal classic...refers to trial by battle as one of the chief modes of trial in the King's Court. 'A debt...is proved by the court's general mode of proof, viz., by writing or by duel.'") Marke notes that while trial by battle was gradually replaced by trial by jury, it was due more to the former's excessive costs. Id. While for the most part, trial by battle did become obsolete by the thirteenth century, appeals to its precedent surface in cases from 1571 and 1638. Id. An 1817 trial, in which an appellant literally "threw down a gauntlet" in strict accordance with the old means of challenge, caused English lawmakers to officially ban the use of trial by personal combat in an 1819 act of Parliament. Id.
115. This proviso is a direct result of the canonical rule requiring two witnesses in order to try an accused for a capital crime.
116. Thayer, supra note 111, at 372.
117. This line of development is most applicable to English jurisprudence, which, due primarily to the signing of the Magna Carta, "progressed" more rapidly than its Continental counterparts. Elsewhere, the vagaries of trial were even more dependent on the political or religious power that held sway (although the cases of the fifty English heretics burned at the stake in the thirteenth and early fourteenth centuries imply that this could be so more in theory than in practice). Perhaps the best example is the French King Philip IV's crusade against the Knights Templar in 1315: after ordering a "dress rehearsal" which imprisoned and condemned most of the Jews in France, he moved against the Templar order out of purely financial motives. JOHN J. ROBINSON, DUNGEON, FIRE AND SWORD: THE KNIGHTS TEMPLAR IN THE CRUSADES 423-69 (1991). His accusations, prosecution, and subsequent conviction and disbanding of the order was instigated almost exclusively by means of false informers and anonymous affidavits. Id. Based on the presiding magistrates' fear of the King, when the Templars conducting their own defense demanded to be confronted with their accusers, they were refused. Id.
this concept began to progress and become accepted between the late thirteenth and the early sixteenth centuries, the jury primarily consisted of the witnesses in the case. Chosen from the area in which the dispute originated, they were presumed to have some knowledge of the events leading to that dispute. Since no actual witnesses were involved, there was no confrontation or cross-examination as such.

With the advent of the practice of calling actual material witnesses, from the sixteenth to eighteenth centuries, the right of confrontation began to re-solidify in England. In 1554, Parliament enacted a law which prescribed, in part, that any adverse witness "shall, if living, and within the Realm, be brought forth in Person before the party arraigned if he require the same, and... say openly in his Hearing, what they or any of them can against him." The importance of cross-examination for "confound[ing]... the false accuser" and exposing false demeanor was also recognized by this time: Sir Charles Smith, Queen Elizabeth's Secretary of State, remarked that "[t]he adverse party or his advocates... interrogat[e] sometimes the witnesses and driv[e] them out of countenance." Despite various abuses motivated by politics and religion,

118. See Pollitt, supra note 6, at 386.
119. But see Pollitt, supra note 6, at 386-87 (describing means afforded an accused similar to such devices).
120. 1 & 2 Philip and Mary, ch. 10 (1554). That the phrasing is "in his Hearing" is of interest, given the discrepancy between the use of vocal cues and nonverbal cues discussed infra. Obviously, Parliament's legislation was not deliberately designed to enable the accused simply to hear and not to see the "adverse witness," but in light of the research (described infra, part IV) regarding the differential detection of deception when looking at a witness and when listening to him, it is intriguing to note the difference between this and other similar confrontation requirements. See, e.g., United States ex rel. Laughlin v. Russell, 282 F. Supp 106 (E.D. Pa. 1968)(Sixth Amendment requires that accused be permitted to hear witnesses who testify against him.)
122. 1 Sir W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 335 n.2 (7th ed., 1956).
123. Most analyses of the scant history of the Confrontation Clause agree that its primary function was to prevent the abuses perpetrated against the holdings of the acts described above, and similar ones. See White v. Illinois, 112 S. Ct 736, 745-46 (1992); Mattox v. United States, 156 U.S. 237, 242 (1895)("The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness ... "); California v. Green, 399 U.S. 149, 156 (1970)

It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.

Id. Dutton v. Evans, 400 U.S. 74, 94 (1970)(Harlan, J., concurring)(the "paradigmatic evil the Confrontation Clause was aimed at" was "trial by affidavit").
the right of an accused to confrontation, and the attendant reliance on demeanor evidence, was eventually assured under English law. In 1696, Sir John Fenwick was charged in Parliament with high treason. His defense argued: "[o]ur law requires persons to appear and give their testimony 'viva voce'; and we see that their testimony appears credible or not by their very countenances and the manner of their delivery; and their falsity may sometimes be discovered by questions that the party may ask them ...." Similarly, by the early eighteenth century the right to confrontation and cross-examination had become an integral part of the constitutions and charters of the American colonies. When it came time for the ratification of the new Federal Constitution, some states, most notably Virginia, Massachusetts, and New York, refused to accept it as drafted because it lacked procedural safeguards such as confrontation. Without such safeguards, one legislator asserted, the new Government would have so few restrictions that it could "institute judicatories, little less inauspicious than ... the Inquisition." With this heritage, confrontation, cross-examination, and demeanor evidence were incorporated into the United States Constitution.

2. Demeanor and Confrontation Under the Supreme Court

Even before interpretation of the Confrontation Clause in Mattox v. United States, the Supreme Court lauded demeanor evidence. In early decisions, the Court noted that an appellate court should ordina-

124. The most commonly cited instance of such abuse is the 1603 trial of Sir Walter Raleigh, in which he was denied occasion to confront the author of the extrajudicial affidavit by which he was convicted and sentenced to death.

125. The Puritan John Lilburne, charged in 1637 with printing and publishing seditious books (i.e. books containing attacks on the bishops of the Church of England), refused to answer the trial court's charges until confronted by his accusers. See Rowley, supra note 6, at 1550-51. His confrontation rights were ignored by that court and by a higher court, and Lilburne was imprisoned for three years. Id. When a new Parliament released him in 1640, they passed a resolution which ensured the right of confrontation thenceforth. Id.


128. Pollitt, supra note 6, at 390-95.


130. As with the Raleigh and Lilburne trials alluded to supra, notes 124 & 25, I treat the abuses, trials, and polemics from which the confrontation right in the Colonies emerged in perhaps a more sketchy manner than they merit. This is so because by this time both the importance of the right and the reliance on demeanor evidence were firmly established—and thus the controversies did not focus on the substance of these principles, but rather on whether the right was to be afforded at all. For a further account of the circumstances under which the right was realized, see Pollitt, supra note 6, at 390-98; Rowley, supra note 6, at 1550-54.

rily defer to a trial court's judgments about witness credibility, since the lower court is in a position to observe witnesses first hand.132 In Mattox and in Reagan v. United States,133 the Court officially recognized the construct that had developed relative to the Confrontation Clause. Reagan held simply that the jury may consider "demeanor and conduct upon the witness stand and during the trial."134 Mattox, however, resulted in a holding which has become the bedrock of the Supreme Court's Confrontation Clause interpretation:

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives testimony whether he is worthy of belief.135

The Mattox Court further refined the confrontation principle, holding that the two most essential elements were the advantage of "seeing the witness face to face, and of subjecting [that witness] to the ordeal of a cross-examination."136 While it may occasionally be subordinated to important public policies,137 the confrontation right was deemed by the Mattox Court to be a crucial safeguard against repetition of the earlier abuses.138 Actual, physical confrontation as well as cross-examination substantially satisfied the Sixth Amendment right.139

Mattox firmly established the importance of the right to confrontation as a due process issue and laid the groundwork for the subtle differentiation between admission of its safeguards and those appertaining to the hearsay rule. However, in the Mattox Confrontation Clause progeny there has always been ambiguity as to which elements, if any, are indispensable in satisfying the Clause. This controversy as to the precise fundamental elements of confrontation has occupied the Supreme Court in recent cases. Specifically, with the

132. See Sparf v. United States, 156 U.S. 51, 181 (1895)(opportunity to see witnesses' demeanor affords assistance in weighing evidence); The Quickstep, 76 U.S. 655, 669 (1869)(trial court best able to reconcile differences in witnesses' testimony based on opportunity to "observe their demeanor, and compare their degree of intelligence"); Iasigi v. Brown, 58 U.S. 183 (1854)(disparaging use of "peremptory directions to return verdicts," as "fatal to the losing party in a court of error, to which court the appearance, demeanor, and credibility of witnesses can never be transferred.")
133. 157 U.S. 301 (1895).
134. Id. at 308 (citations omitted).
136. Id. at 244.
139. Rowley supra note 6, at 1554-55.
advent of the use of closed-circuit television for the testimony of some witnesses (especially child victims of abuse),\textsuperscript{140} dissension over the relative merits of physical confrontation and cross-examination has been thrust to the fore.\textsuperscript{141} This dissension is of paramount importance, as it is based on the opportunity to view demeanor; therefore, physical confrontation may not be considered as important as it has been, if it is shown that demeanor evidence is not valuable in assessing deception.

The post-\textit{Mattox} cases reflecting this disagreement can be split along two discrete lines. The first, pertaining to the importance of cross-examination, began with concerns over what otherwise confidential material a defendant was entitled to in order to impeach adverse witnesses. This was a prominent issue during the “Red Scare” of the 1950’s, and the substantial restrictions the government attempted to place on suspected communist sympathizers resulted in the ruling of \textit{Jencks v. United States}.\textsuperscript{142} Subsequent cases differed as to the import of such prejudice, however, and on the issue of cross-examination and confrontation, the Court ultimately held that “the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to . . . cross-examin[e]” a witness, in order to call to the fact-finder’s attention “the reasons for giving scant weight to the witness’ testimony.”\textsuperscript{143} Further holdings, however, have admonished that the right to cross-examination is not absolute: “[t]he denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case.”\textsuperscript{144}

\textsuperscript{140} This subject evokes yet another interesting point regarding current confrontation cases. As discussed \textit{infra}, the most recent cases involving actual confrontation arise as a direct result of the emergence of technological practices. If there is a future case lurking in and among upcoming Sixth Amendment cases which does not involve sexual abuse of minors, it may give rise to a different ratiocination as applied to adult witnesses. That is, it is conceivable that the analyses in \textit{Coy} and \textit{Craig} (see \textit{infra} Part III(D)(3)) could be distinguished from a future case because the witnesses against the accused are minors. Neither case law nor commentators have addressed this potential distinction.

\textsuperscript{141} \textit{See especially} Maryland v. Craig, 497 U.S. 836 (1990); Coy v. Iowa, 487 U.S. 1012 (1988).

\textsuperscript{142} 353 U.S. 657 (1957). In \textit{Jencks} the Court held that preventing the accused from reviewing even FBI reports that were redacted by the trial court was “clearly incompatible with our standards for the administration of criminal justice,” \textit{Id.} at 668. The Court asserted that such prevention restricted the defendant’s access to means of cross-examining the FBI agents who authored the reports. \textit{Id.}

\textsuperscript{143} Delaware v. Fensterer, 474 U.S. 15, 22 (1985).

\textsuperscript{144} Delaware v. van Arsdall, 475 U.S. 673, 682. \textit{See also} United States v. Cogwell, 486 F.2d 823 (7th Cir.), \textit{cert. denied} 416 U.S. 959 (1973)(right of cross-examination not absolute); United States ex rel. Scarpelli v. George, 687 F.2d 1012 (7th Cir. 1982), \textit{cert. denied} 459 U.S. 1171 (1983)(right to cross-examine adverse witness not absolute and may be limited); United States ex rel. Fuller v. Attorney General, 589 F.Supp. 206 (N.D. Ill. 1984), \textit{aff’d} 762 F.2d 1016 (7th Cir. 1985); People v. Car-
The second line of cases, more important for the present purposes, have focused on the proper role of actual, physical confrontation at trial. While some readings of \textit{Mattox} may have implied that both confrontation and cross-examination were fundamental to satisfying the Clause, the question as to indispensable elements now centers on which of these two is more important. The disagreement over which is more important is apparent in the language of two cases: \textit{Douglas v. Alabama}^{145} stated that \textit{"an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation;}^{146} and \textit{California v. Green}^{147} stated that \textit{"it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the confrontation clause."}^{148}

Ostensibly, the former assertion is contrary to the proposition that demeanor evidence is crucial, for under this reasoning one can imagine a witness being cross-examined while somehow hidden from the accused, while the latter assertion preserves the importance of demeanor evidence by requiring confrontation and exposure to demeanor. A closer reading, however, indicates that demeanor evidence is so accepted in the judicial process that it is not even a consideration in these two assertions. Both focus on physical confrontation between the parties, rather than the witness and the trier of fact, which seems to be the more important. This focus sends these assertions back to Wigmore's more or less discredited "subjective moral effect" alluded to above.\textsuperscript{149} Case law continues to conjoin this "effect" with demeanor evidence, and to assume that every element subsumed under the rubric of "physical confrontation"—cross-examination and exposure of the witness to the trier of fact and to the accused—"provide[] all that the Sixth Amendment demands."\textsuperscript{150} Thus, case law continues to fail to distinguish between confrontation, which "ensure[s] the reliability of the evidence against a criminal defendant,"\textsuperscript{151} and that which can "call[] into question the ultimate 'integrity of the fact-finding process.'"\textsuperscript{152} This distinction correlates with, and sanctions, the discrepancy described above between indicia which give rise to perceptions of deception and indicia which are truly symptomatic of

\footnotesize{\textsuperscript{145} \textit{380 U.S. 415} (1965).}
\textsuperscript{146} \textit{Id.} at 418.
\textsuperscript{147} \textit{399 U.S. 149} (1970).
\textsuperscript{148} \textit{Id.} at 157.
\textsuperscript{149} See supra note 99, and accompanying text.
\textsuperscript{150} \textit{Ohio v. Roberts}, 448 U.S. 56, 69 (1980).
deception.\textsuperscript{153}

To a great extent, then, the ultimate issue in terms of the Confrontation Clause—and more importantly for present purposes, in terms of demeanor evidence—.turns on the degree to which the Court finds actual, physical confrontation truly necessary to advance the accuracy of the fact-finding process. If Wigmore's approach is accepted, and cross-examination is considered the ultimate goal of the Confrontation Clause, then the question becomes moot for either of two contrary reasons. First, demeanor evidence can be considered only a dispensable incidental to "confronting" a witness, as long as there is "the opportunity to cross-examine the witness effectively."\textsuperscript{154} Alternatively, demeanor evidence can be considered the actual goal of cross-examination, as discussed above.\textsuperscript{155} If reliability and "accuracy" are sought through the simple presence of the witness on the stand before the tribunal, then the question becomes moot because every witness faced with the imposing gravity of the courtroom will become suddenly overwhelmed and will in no way attempt to dissemble.\textsuperscript{156}

Thus, physical confrontation, whenever possible, is considered crucial to the Confrontation Clause.\textsuperscript{157} As long as this is so, and the position espoused in \textit{Green}\textsuperscript{158} is embraced, then a substantial part of the entire rationale behind the Clause as interpreted by the Court, is simply based on deluded reasoning. It is actually the exercise of the right, rather than its interdiction, that has the potential to subvert the accu-

\begin{itemize}
  \item \textsuperscript{153} See \textit{supra} part II(A).
  \item \textsuperscript{154} M. Abbell & M. Sherman, \textit{The Bill of Rights in Transnational Criminal Litigation}, 16(8) \textit{THE CHAMPION} 22, 26, (citing \textit{California v. Green}, 399 U.S. 149 (1970)). The Supreme Court recently noted, however, that the thesis that cross-examination was the "only essential interest preserved by the right" of confrontation is "on its face implausible, if only because the phrase 'be confronted with the witnesses against him' is an exceedingly strange way to express a guarantee of nothing more than cross-examination." \textit{Coy v. Iowa}, 487 U.S. 1012, 1018 n.2 (1988).
  \item \textsuperscript{155} See \textit{supra} notes 104-105 and accompanying text.
  \item \textsuperscript{156} See \textit{California v. Green}, 399 U.S. 149, 158 (1970) (confrontation "insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury"). Given that this notion was losing its validity even when Wigmore wrote, however, \textit{see supra} note 99, it is hard to accept its legitimacy today.
  \item \textsuperscript{157} The subtle difference between the Clause and the hearsay rule should once again be noted. The necessity of a witness' physical presence has been obviated by the hearsay exceptions, present in some form through common law. \textit{See, e.g.}, \textit{Mattox v. United States}, 156 U.S. 237 (1885). Since the Clause was never intended to be a "codification" of the hearsay rule or, indeed, of any rules of evidence, \textit{see California v. Green}, 399 U.S. 149, 155 (1970), its standards are different. While no element has been found to be absolutely indispensable under the right to confrontation, and physical confrontation has been expressly considered dispensable (\textit{see supra} note 186 and accompanying text), the case law discussed in the next section reveals the extent to which confrontation is a fundamental part of the legal framework.
  \item \textsuperscript{158} \textit{California v. Green}, 399 U.S. 149 (1970).
\end{itemize}
racy of the fact-finding process. Although the Supreme Court and the legal profession champion the right of physical confrontation, it becomes a detriment to finding the truth, not an asset.

3. Cases on Literal Confrontation

In two recent cases the Supreme Court has dealt directly with this issue, addressing the specific importance of physical, face-to-face confrontation. In both *Coy v. Iowa* and *Maryland v. Craig*, such confrontation was ostensibly denied the defendant, raising the question of whether the defendant’s Sixth Amendment right was violated. Together, the two cases establish the current perspective on physical confrontation.

a. Coy v. Iowa

Justice Scalia’s majority opinion approached the issue of face-to-face confrontation quite literally, analyzing the etymology of the very word “confront.” Pointing out that previous analyses by the Court focused on other elements of confrontation, Scalia claimed that this was so precisely because those elements were subject to challenge. The element of face-to-face confrontation, however, is the “irreducible literal meaning of the clause.” In a quintessential appeal to *stare decisis*, Scalia “embellished” the opinion with “references to and quotations from [both] antiquity” and “modern times,” in order to support his contention that “there is something deep in human nature that regards face-to-face confrontation . . . as ‘essential to a fair trial in a criminal prosecution.’” Citing the Biblical and Roman allusions

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161. Both cases involved sexual abuse of one or more minors. In *Coy v. Iowa*, pursuant to a state statute, a large screen was placed between the defendant and the witness stand when the two 13-year-old victims testified. The arrangement allowed the defendant to see the witnesses dimly, but the witnesses were completely unable to see him. *Coy v. Iowa*, 487 U.S. 1012, 1014-15. Significantly, the screen allowed both the judge and attorneys, as well as the jury, to see the witnesses, and both the witnesses’ and the defendant’s demeanor was visible to the jury during the testimony. *Id.* at 1027 (Blackmun, J., dissenting). In *Maryland v. Craig*, also pursuant to a state statutory provision, the six-year-old victim was allowed to testify by one-way closed circuit television. Again, while the witness was unable to see the defendant, the latter could see her, and the judge and jury were able to view the witness and her demeanor on the television screen. *Maryland v. Craig*, 497 U.S. 836, 841 (1990).
163. *Id.* at 1021.
164. *Id.* at 1017 (quoting Pointer v. Texas, 380 U.S. 400 (1965)).
above, as well as remarks of President Eisenhower and two lines from Shakespeare's *King Richard II*, Scalia maintained that confrontation is and always has been considered fair because it is fair. Scalia based his reasoning on both the usual axiomatic, untested claims as well as on the principle of demeanor evidence. He placed

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165. See supra note 108.

166. The President's remarks, from a 1953 speech, are often quoted in Confrontation Clause analyses. See, e.g., Pollitt, supra note 6, at 381. Eisenhower was describing a basic code of his home town of Abilene, Kansas, where, he said, one had to come face to face [with someone] with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry . . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. Coy v. Iowa, 487 U.S. 1012, 1017-18 (1988)(emphasis added).

Far from being a solid buttress of Scalia's position on the issue, however, President Eisenhower's remarks seem better suited to a claim that personal integrity is a fundamental national precept which requires courage to stand up to someone before expressing disagreement.

167. Shakespeare's lines are quoted even more often than President Eisenhower's. Act I, Scene i, of the play contains the King's command to bring forth two quarreling noblemen: "[t]hen call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . ." Coy v. Iowa, 487 U.S. 1012, 1016 (1988)(quoting WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1). Unfortunately, the lines provide less support than Eisenhower's remarks for the crucial importance of physical confrontation. Their importance rests on two dubious assumptions: first, that two lines of Shakespeare can be taken to exemplify the jurisprudence of either his own or King Richard's time; and second, that the playwright was concerned with recording such jurisprudence for posterity, rather than writing good lines of blank verse. (If this is so then the Butcher's exhortation in *Henry VI, Part II*, IV:—"The first thing we do, let's kill all the lawyers"—becomes especially dangerous). It is true that the Court used this quote not as a reference to legal precedent but to define "confrontation" and to show the antiquity of the belief in the justness of face-to-face confrontation. Coy v. Iowa, 487 U.S. 1012, 1018 n.2 (1988). However, even if this is all these two lines stand for, reading further to the resolution of the scene actually demonstrates the inconsistency of using this quotation: "[t]here shall your swords and lances arbitrate. The swelling difference of your settled hate. Since we cannot atone you, we shall see Justice design the victor's chivalry." WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1. In spite of the fact that the two opposing parties were called together "face to face" before King Richard, the trier of fact, they could not reach an agreement and were instructed to prepare for trial by combat—the more common means of "confrontation" and trial in King Richard's time—to determine which was telling the truth. Id.


169. The opinion offers two "common-sense" assertions which do not reflect the findings of empirical research: "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back,'" since "even if the lie is told, it will often be told less convincingly." Coy v. Iowa, 487 U.S. 1012, 1019 (1988). "The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions." Id. (emphasis added). These quotes illustrate the judicial process, reliance on demeanor evidence without consideration of the findings of empirical
physical confrontation on an equal footing with cross-examination—the one designating an explicit right, the other designating a right implicit in the Sixth Amendment—in its ability to ensure the "integrity of the fact-finding process." Finally, Scalia specifically noted that previous holdings on the appropriateness of exceptions to other, merely implicit, confrontation elements could not expand to subsume the literal right of physical confrontation. Nevertheless, exceptions to this "most literal application" might be found, as long as they are "firmly . . . rooted in [the Court's] jurisprudence," and they "further an important public policy." In sum, Coy held that the Clause "guarantee[s] the accused the right to a literal face-to-face confrontation with the witness who testified against him at trial at least in the absence of a specific showing of need," and the need must be of sufficient import to more overarching concerns.

The dissent in Coy is relevant to the present discussion of de minimis evidence, for it correctly points out the flaw mentioned above in not only the majority's, but in the prevailing juridical viewpoint. Noting that the appellant's only grievance was that the testifying victims were unable to observe him during their testimony, the dissent highlighted the fact that the concealing screen "did not prevent the girls from seeing and being seen by the judge and counsel, as well as by the jury," even after the witnesses were informed that the appellant could see them and hear their testimony.

Writing for the dissent, Blackmun quoted both California v. Green's assertion
that the Clause was designed in part "to compel the defendant 'to stand face to face with the jury';" and Wigmore's conviction that one element of the confrontation right is the presence of the witness before the tribunal so that his demeanor while testifying may furnish such evidence of his credibility as can be gathered therefrom. . . . [That principle] is satisfied if the witness, throughout the material part of his testimony, is before the tribunal where his demeanor can be adequately observed. Thus, for the first time, an opinion (albeit a dissent) recognized that the important issue in demeanor evidence is not whether the accused and the witness come face to face, but whether the trier of fact is able to see the result of that presentation.

b. Maryland v. Craig

Coy's fairly rigid procedural framework was relaxed somewhat two years later, in Maryland v. Craig. There the Court once more explicitly recognized that it had never held "that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial." The Court focused instead on the substantive reasons for the right in a more interpretive mode of analysis than it took in Coy. Writing for the Court, Justice O'Connor derived her reasoning "not only from the literal text of the Clause, but also from [the Court's] understanding of its historical roots." Noting that Coy had explicitly left open the possibility of exceptions to the "preference" for physical confrontation, Justice

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184. Id. at 1029 (quoting WIGMORE, supra note 84, § 1399 (Chadbourne rev. ed. 1974) (emphasis in original). Blackmun also recognized the importance of cross-examination, as well as the claim, initially set forth in Mattox, that the Clause's primary goal should be to prevent anonymous accusers. Id. at 1028.
188. See supra notes 171-176, and accompanying text.
O'Connor analyzed the motivation for the confrontation right to ascertain when such exceptions are appropriate.

The matter of exceptions, however, is not as important for this discussion as is the Court's holding as to what is important in confrontation.\(^{189}\) The Court's primary holding was that "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."\(^{190}\) Quoting Mattox and Green, the Court determined that that guarantee is accomplished by the combination of four elements of confrontation: "physical presence, oath, cross-examination, and observation of demeanor by the trier of fact."\(^{191}\) Because these elements were present in some form in Craig, the admission of testimony was "consonant" with the intentions of the Confrontation Clause.\(^{192}\)

Again, this reasoning was based on an interpretive rather than a literal construction of the Sixth Amendment. By construing, rather than simply applying, the language of that Amendment, Justice O'Connor expressed this difference in her holding: "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."\(^{193}\) According to this newest interpretation, then, the four elements of confrontation ensure that reliability, and "serve[] the purpose of the

\(^{189}\) It has been established since Mattox that such rights under the Confrontation Clause can be regulated if an overriding public policy exists. See supra part III. D. iv. The exception question in Craig, therefore, focused on whether guarding a child victim of sexual abuse from the trauma of testifying before her assailant was an important enough concern as to so limit the confrontation right. Maryland v. Craig, 497 U.S. 836 (1990).

\(^{190}\) Id. at 845 (emphasis added). The debate was thus moved from the procedural arena to the substantive. See supra note 88. See also Kentucky v. Stincer, 482 U.S. 730, 739 (1987)("the right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial"); Lee v. Illinois, 476 U.S. 530, 540 (1986)(confrontation guarantee serves "symbolic goals" and "promotes reliability"); Dutton v. Evans, 400 U.S. 74, 89 (1970)(plurality opinion)("the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact has a satisfactory basis for evaluating the truth of the [testimony]' ").

\(^{191}\) Maryland v. Craig, 497 U.S. 836, 946 (1990). See also Ohio v. Roberts, 448 U.S. 55, 69 (1980)(oath, cross-examination, and demeanor provide "all that the Sixth Amendment demands: substantial compliance with the purposes behind the confrontation requirement' ") (quoting California v. Green, 399 U.S. 149, 166 (1970). Thus, even though Craig and Coy take different approaches to the Clause, both accord demeanor evidence the same status as cross-examination, the "greatest legal engine ever invented for the discovery of truth." WIGMORE, supra note 84, § 1367.


\(^{193}\) Id. at 845.
Confrontation Clause."\textsuperscript{194} Whether the confrontation right is viewed as procedural or as substantive, the presumption endures that the simple act of confronting an accused with the witnesses against him will inherently augment the accuracy and truth of the witnesses' testimony. This is the fundamental premise of every confrontation clause opinion and analysis,\textsuperscript{195} and it is a millstone around the neck of the very process it is designed to advance.

However, there is evidence in Craig of an attitude which would allow for changes that would alleviate the problem of this erroneous presumption. The majority's explicit admission that the right to, and the need for, physical confrontation must "be interpreted in the context of the necessities of trial and the adversary process"\textsuperscript{196} invokes the important concession in Roberts that any inquiry must "build[] on past decisions, draw[j] on new experience, and respond[j] to changing conditions."\textsuperscript{197} The "new experiences" and "changing conditions" of novel and relevant knowledge gleaned from professional, persuasive social science studies are exactly what must be applied in these inquiries. Just as advances in medical and other "hard" sciences can be and are taken into account in Constitutional analyses,\textsuperscript{198} so too should relevant social science research be used in the process of judicial reasoning.

E. Summary

It is clear that demeanor evidence is a barnacle firmly fastened to numerous areas of the judicial system. As described above, a plethora of commentators and trial practitioners have urged numerous methods of manipulating witnesses into exhibiting those telltale indicators which are associated with deception. Further, the entrenched belief goes beyond the notion that "[t]he importance of demeanor to the jury is one of the rationales for the hearsay rule and the sixth amendment confrontation guarantee."\textsuperscript{199} The belief encompasses the notion that a criminal defendant's demeanor on the stand is probative of his truthfulness and his entire ethos, and can and should be used in determining his prospects for rehabilitation or even whether his sentence

\textsuperscript{194} Id.
\textsuperscript{196} Maryland v. Craig, 497 U.S. 836, 849 (1990).
\textsuperscript{197} Ohio v. Roberts, 448 U.S. 56, 64 (1980)(emphasis added).
\textsuperscript{198} The most obvious examples are the discussions of emergent medical technology and beliefs in Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990)(right of vegetative patient's relatives to demand withdrawal of treatment); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989)(abortion); and Roe v. Wade, 410 U.S. 113 (1973)(abortion).
\textsuperscript{199} Imwinkelreid, supra note 52, at 186 n.34.
warrants an increase. Such is the status of demeanor evidence in the legal profession to date. With few exceptions the case law has accepted its use and importance at face value, and commentators have primarily focused on methods of exploiting this belief.

Substantial evidence, amassed from studies conducted by social psychologists and others, indicates that the mechanism underlying demeanor evidence—judging a person's credibility by his or her outward behavior, manner or conduct—promotes faulty judgments and greatly disserves the truth-seeking process. The next section of this paper reviews this evidence. It examines social science research which demonstrates that simple alterations to the form of the law's approach to such credibility judgments and instructions, would lead the legal community back onto the truth-seeking path from which it has strayed.

IV. DEMEANOR AND SOCIAL SCIENCE

While deception and the act of lying have been analyzed in a variety of different ways—evolutionary, physiological, social, utilitarian, and others—it was not until relatively recently that the axiomatic assumptions about deception and the use of demeanor were addressed empirically. This approach began about two decades ago when Ekman and Friesen developed a model of nonverbal behavior which categorized various actions into different channels: face, body, and voice. The important concept derived from this model was that

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200. E.g., United States v. Grayson, 438 U.S. 41 (1978); United States v. Beaulieu, 900 F.2d 1537 (10th Cir. 1990)(judge's determination that defendant committed perjury based on personal observation of defendant's demeanor, which gives adequate "indicia of reliability").

201. Professor Wellborn is virtually alone in addressing the possible misuse of this principle. See Wellborn, supra note 1. But see Michael Saks, Enhancing and Restraining Accuracy in Adjudication, 51 LAW AND CONTEMP. PROBS. 243, 262-64 (1988)(addressing problems with demeanor evidence). The topic is treated more thoroughly, however, in the social science literature. See infra part IV.


203. See, e.g., Kevin R. Murphy, Detecting Infrequent Deception, 72 J. APPLIED PSYCHOL. 611 (1987); David T. Lykken, Psychology and the Lie Detector Industry, 29 AM. PSYCHOLOGIST 725 (1974).


these channels are differentially controllable. One channel may be less difficult to control than another and may exhibit less information about the speaker's discourse than another more "leaky" channel. In non-deceptive discourse, a controllable channel can send a great deal of information; in deceptive discourse it can hide just as much. In general, "the channel which is most informative when the communicator is truthful is most misleading when the communicator is deceptive." It is generally believed that the priority of facial gestures and expressions (of which senders are usually aware, transmit a large amount of information relatively rapidly, and are of primary focus for receivers) indicates that the face is the most easily controlled channel of communication, and it thus hides or reveals the most information. Based on a variety of anatomical and sociocultural factors, Ekman and Friesen claimed that the body is less controllable or "leakier" than other channels of communication. Other studies have demonstrated that the voice is even less controllable than the body, that it is actually the "leakiest" of the three channels. Thus, since the inception of the "channel" model, much deception research has focused on whether the model holds true for observers trying to detect hidden information such as deception. That is, the "telltale indicators" axiom has been put to empirical testing. The most common paradigm has involved the presentation to subjects of videotapes of speakers both lying and telling the truth, and subjects must then judge the speakers' veracity. Subjects are exposed to a video containing either the full video and audio cues or some permutation thereof (i.e. only audio; only the speaker's body and audio; only the speaker's face; only a transcript; etc.), and the subjects' skill at detecting deception in each of the various conditions is statistically an-

207. Zuckerman et al., supra note 13, at 5.
208. Also known as “video primacy,” see Bella M. DePaulo et al., Decoding Discrepant Nonverbal Cues, 36 J. PERSONALITY & SOC. PSYCHOL. 313 (1978).
209. Zuckerman et al., supra note 13, at 5, Ekman & Friesen, supra note 206.
210. See Ekman & Friesen, supra note 206.

Studies have also examined which facial expressions, body movements or auditory (paralinguistic) cues are most effectively used by such subjects in detecting the deception. The expectation has been that since the voice is a relatively leaky channel through which information is transmitted more easily than through the face or body, observers will detect deception with greater accuracy through the voice than through face or body cues. In their study, Ekman and Friesen predicted that subjects exposed to facial expressions alone would not be able to detect lies.

Subsequent studies conducted over the next decade yielded just such results. Two literature reviews examined and statistically...
analyzed the previous literature addressing verbal and nonverbal behaviors associated with either actual or perceived deception. In both conditions (actual or perceived), the reviewers examined which specific facial, body or vocal cues correlated with actual deception. Thus, the reviews analyzed the entire corpus of psychological literature on deception to determine which, if any, individual, observable indicia could predict and identify a speaker's deception. Three important and lasting sets of findings were empirically established by these reviews: that certain behaviors occur when a speaker deceives; that there are qualitative indicia that observers watch for in order to identify deception; and, most importantly, that there are significant differences between those two sets of cues.\(^{219}\)

A. Cues to Actual Deception

The two reviews extracted almost twenty actions or cues from the welter of previous studies and classified them under either visual or auditory channels.\(^{220}\) These were analyzed in terms of whether, when a speaker was lying, the action or cue increased or decreased. Fewer than half of the behaviors were found to be significantly present when deception occurred, and only three (increases in adaptors, pupil dilation, and shrugs) were from the visual channel.\(^{222}\) As might be expected from the Ekman-Friesen model, not one of the accepted visual cues—Frank's grimaces or smiles, Rains's "furtive glances" and shifty gaze, or nervous blinking—was observed at a significant level when speakers lied, and in almost all other behaviors there was an actual decrease during deception.\(^{225}\) The studies showed that some of our favorite cultural stereotypes about liars do not withstand the test provided by the existing empirical data . . . . [T]he studies that have been con-

\(^{219}\) Zuckerman et al., supra note 13.

\(^{220}\) Behaviors classified as visual included pupil dilation, gaze, blinking, smiling, head movements, gestures, shrugs, adaptors, foot and leg movements, and postural shifts. Cues classified as auditory included response latency, response length, speech rate, speech errors, speech hesitations, pitch, negative statements, irrelevant information, and self-references. DePaulo et al., supra note 13; Zuckerman et al., supra note 13.

\(^{221}\) These include self-manipulations (e.g. S. Finkelstein, The Relationship Between Physical Attractiveness and Nonverbal Behaviors, Unpublished honors thesis, Hampshire College (1978)); hand to face gestures (e.g. John E. Hocking & Dale G. Leathers, Nonverbal Indicators of Deception: A New Theoretical Perspective, 47 COMM. MONOGRAPHS 119 (1980)); and grooming (e.g. Robert E. Kraut & Donald Poe, On the Line: The Deception Judgements of Customs Inspectors and Laymen, 39 J. PERSONAL & SOC. PSYCHOL. 784 (1980)).

\(^{222}\) DePaulo et al., supra note 13, at 340, Zuckerman et al., supra note 13, at 12.

\(^{223}\) See note 50, supra

\(^{224}\) Id. at 17 (Table II).

\(^{225}\) See note 41, supra.
ducted so far do not support the notion that liars have shifty eyes—nor even shifty bodies; neither glances nor shifts in posture occur significantly more often when people are lying compared to when they are telling the truth.\textsuperscript{226} In marked contrast, nearly all of those behaviors received via the auditory channel were observed at a significant frequency during deception.\textsuperscript{227} This is clearly consonant with a model asserting that the voice is more leaky than the face, especially since one cue, pitch, is the auditory aspect that is most identified with a person’s “voice.”\textsuperscript{228} Subsequent studies have replicated these findings.\textsuperscript{229} Thus, based on five decades of research,\textsuperscript{230} the current paradigm reflects that identifiable cues to deception are present more often in the vocal channel than in the visual. This is especially so in a comparison of the voice to the face.

B. Cues to Perceived Deception

The legal perspective assumes that observers know which indicia to look for in detecting perjury and deception, and that these indicia are true indicators of deception.\textsuperscript{231} Other analysis extracted discrete cues from the corpus of deception studies, to create ten categories of behaviors that were classified as either visual or auditory.\textsuperscript{232} The crucial finding as it relates to the present discussion was that almost twice

\begin{itemize}
\item \textsuperscript{226} DePaulo et al., \textit{supra} note 13, at 339.
\item \textsuperscript{227} Auditory cues included speech errors, speech hesitations, response length, pitch, irrelevant information, negative statements, nonimmediacy, and leveling. \textit{Id.} at 340.
\item \textsuperscript{228} Pitch (or fundamental frequency) and tone of voice which are sometimes used interchangeably, can be analyzed without reference to the actual words being spoken. \textit{Content-filtering} is a process entailing the removal of all frequencies above or below a given frequency from the stimulus. It leaves the voice stimulus unintelligible, but most prosodic elements can still be perceived. \textit{See, e.g.}, \textit{Id.} at 329 n.1; Peter Rogers et al., \textit{Content Filtering Human Speech: A Simple Electronic System}, \textit{3 Behav. Research Methods and Instrumentation} 16 (1971); John A. Starkweather, \textit{Content-free Speech as a Source of Information About the Speaker}, \textit{52 J. Abnormal and Soc. Psychol.} 394 (1956). \textit{Random splicing} involves piecing together dissected bits of a recorded speech into a new auditory stimulus. Slightly fewer elements are retained through this process than through content-filtering.
\item \textsuperscript{229} \textit{See, e.g.}, Ekman & O'Sullivan, \textit{supra} note 213; Zuckerman et al., \textit{supra} note 213; Littlepage & Pineault, \textit{supra} note 214; Glenn E. Littlepage et al., \textit{Relationship Between Nonverbal Sensitivities & Detection of Deception}, \textit{57 Perceptual & Motor Skills} 651 (1983).
\item \textsuperscript{230} The earliest study reviewed in Zuckerman et al., \textit{supra} note 13, was F. K. Berrien & G. H. Huntington, \textit{An Exploratory Study of Pupillary Responses During Deception}, \textit{32 J. Experimental Psychol.} 443 (1943).
\item \textsuperscript{231} \textit{See supra} part IV(A).
\item \textsuperscript{232} In this analysis, the visual cues included gaze, smiling, adaptors, and postural shifts. The auditory cues included response latency, response length, speech rate, speech hesitations, speech errors, and pitch. DePaulo et al., \textit{supra} note 13, at 340; Zuckerman et al., \textit{supra} note 13, at 17.
\end{itemize}
as many cues were related to perceived deception than to actual deception.\textsuperscript{233} Consistent with popular and legal conjecture, for example one of the strongest correlations was a perceived avoidance of gaze: when speakers avoided others' gaze, observers predicted deception significantly more often than not.\textsuperscript{234} Other perceived predictors included decrease in smiling, increase in postural shifts in the visual channel, and all auditory cues except for response length.\textsuperscript{235} These perceived predictors correspond to those behaviors accepted by the legal profession as indicative of deception or perjury.\textsuperscript{236} Accordingly, the half-century of research also resulted in the unsurprising, somewhat prosaic finding that empirical data supports popular perceptions about indicators of deception.

C. Differences

The important conclusion from these findings is that those behaviors which are popularly believed to manifest a speaker's deception are \textit{qualitatively} and \textit{quantitatively} different than those which are actually observed during deception. More importantly, neither a witness' decrease in smiling or his "furtive or meaning glances,"\textsuperscript{237} two of the three visual cues associated with perceived deception, were found to be present at a significant level in actual deception.\textsuperscript{238} Thus, according to the empirical evidence, the assumptions as to these indicia are simply wrong. Moreover, the third visual cue, postural shifts which include "carriage,"\textsuperscript{239} and "fidgetings or composure,"\textsuperscript{240} are considered by observers as an indicator of deception.\textsuperscript{241} In reality, during actual deception, speakers tend to be still and to perform fewer body movements.\textsuperscript{242} Similar contradictory trends were detected for all other physical movements. Observers commonly assume that people who are being deceptive are uncomfortable, shifty, restless in their seats, and move their heads in all directions so as to avoid an observer's scrutiny.\textsuperscript{243} During actual deception, however, there is in fact a \textit{decrease} in each of these behaviors.\textsuperscript{244} This is probably a direct result of the fact that people who are being deceptive know which behaviors result in

\begin{itemize}
\item \textsuperscript{233} Zuckerman et al., \textit{supra} note 13, at 17 (Table II).
\item \textsuperscript{234} Id. at 17 (Table II).
\item \textsuperscript{235} DePaulo et al., \textit{supra} note 13, at 340; Zuckerman et al., \textit{supra} note 13, at 17.
\item \textsuperscript{236} See \textit{supra} part II(C).
\item \textsuperscript{237} See \textit{supra} note 41.
\item \textsuperscript{238} Zuckerman et al., \textit{supra} note 13, at 12 (Table I).
\item \textsuperscript{239} See \textit{supra} note 41.
\item \textsuperscript{240} See \textit{supra} note 51.
\item \textsuperscript{241} Zuckerman et al., \textit{supra} note 13, at 17 (Table II).
\item \textsuperscript{242} The frequency of this value did not reach statistical significance and was simply reported as a trend.
\item \textsuperscript{243} Zuckerman et al., \textit{supra} note 13, at 17 (Table II).
\item \textsuperscript{244} Zuckerman et al., \textit{supra} note 13, at 12.
\end{itemize}
judgments of deception. If a speaker expects those observing him to interpret postural shifts as signs of deception, he will try to reduce such movement.

Clearly, then, reliance by a jury or other trier of fact on observations of a witness on the stand to identify deception is ineffectual. Jury instructions on "demeanor" or "manner and conduct" focus jurors' full attention on what they see and obviate most, if not all, chances that they will accurately detect deception. Worse, where a trier of fact maintains dependence on these cues, he or she is actually misled into identifying deception where it may not have occurred. The psychological literature explicitly sums up the problem with the legal schema:

Sometimes the cues that [people] should be using . . . are cues that they do not even notice. Other cues that might potentially be quite informative may be noticed, but regarded as insignificant and therefore ignored, or—worse, yet—used in exactly the wrong ways . . . . This less-than-perfect correspondence between cues that really are indicative of deception (actual cues) and cues that are believed to be indicative of deception (perceived cues) has important implications . . . . If a completely innocent truth teller happens to engage in behaviors that others perceive as signs of deception . . . that person risks being labeled a liar. Both for liars . . . and for truth tellers . . . it is more important to know about the cues that people interpret as signs of deceptiveness and truth than it is to know about the cues that really are signs of deceit.

Reliance on the vocal evidence, however, appears to be more valuable. Most of the behaviors received through the auditory channel that were associated with perceptions of deception were also observed during actual deception: increases in speech hesitations, speech errors, and in the pitch of a speaker's voice.

This is, of course, consistent with the channel model described above. Since the visual channels of face and body are more controllable than the leakier voice channel, it is easier for a speaker to conceal useful information from an observer who is focusing on visual cues. The degree of effort that is used to conceal such information corresponds to another variable examined in the literature. Prevalent assumptions in law about a witness being exposed to aspects of a courtroom atmosphere such as Wigmore's "subjective moral effect" parallel assumptions that any witness or speaker who lies simply is giving a false answer, without regard to the cognition that goes on behind the

245. This creates the difficulties discussed in supra part III(A). Additionally, if a juror takes an instruction regarding falsus in uno, falsus in omnibus literally, it is conceivable that, based on an nervous eye twitch, stammer, or posture shift at any time during a witness's testimony, he will disregard that witness's entire testimony.

246. DePaulo et al., supra note 13, at 343 (emphasis added).

247. Id. at 340; Zuckerman et al., supra note 13, at 17.

248. See supra notes 206-212 and accompanying text.

249. See supra notes 99 and 156 and accompanying text.
content of the answer. There is, however, a definite hierarchy of deception, in which one lie may have greater importance or immediacy to the witness than another. Based on the position that the particular act of deception occupies in that hierarchy, a speaker may be more or less motivated to deceive his audience, and to exert more or less effort to conceal his misrepresentation.

This phenomenon is reflected in the studies which divide analyses of actual deception into high and low motivation conditions. The high motivation condition, of course, is most pertinent to a discussion of courtroom deception, as lies which most affect admissible evidence in a case are important and are told to deceive a jury. These studies also produced results that contradict the accepted beliefs of the legal system. Head and body movements decreased significantly during high motivation deception, indicating that when a lie is of greater importance to a speaker, the speaker can effectively control those behaviors which are easily masked or controlled. The less controllable channel of voice showed a similar pattern. Under low motivation, there was a very small, non-significant trend toward an increase in pitch, while high motivation conditions were associated with a significant and expected increase in pitch.

For example, a witness may view a lie about the defendant's activities on the night in question as more or less important than a lie about the clothes the defendant was wearing on the night in question. Similarly, a witness who lies by omission to avoid drawing attention to what he perceives as an insignificant detail may be less motivated to lie than a career criminal whose liberty may be at stake if he tells the truth.

Since most research is conducted at universities, many subjects are college students, and their participation in experiments is required for course credit. In these cases, performance motivation may be fairly low. Some university experimenters use monetary incentives to compensate their subjects. Subjects receive higher monetary rewards the more they detect deception or successfully deceive others, and performance motivation is also higher. Some studies entail deliberate misrepresentation about their methodologies, and subjects are told that success in the experiment is directly related to job success in their chosen professions to increase performance motivation.

It can be argued that many—perhaps even most—of the lies perpetrated in everyday life (e.g. insincere compliments, dissimulations of interest in soporific conversations) are ... uninvolving and unarousing. ... Still, there are important instances in which the stakes for success at deceit are quite high (e.g. in responding to a spouse's accusations of infidelity or in testifying in a murder trial).


Changes in frequency of the visual cue of blinking illustrate this control. Overall, there was a non-significant increase in blinking during actual deception; however, under low motivation lying, this trend became significant, and under high motivation deception, there was a significant decrease in blinking.

Id. at 12.

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253. Zuckerman et al., supra note 13, at 12-14. Changes in frequency of the visual cue of blinking illustrate this control. Overall, there was a non-significant increase in blinking during actual deception; however, under low motivation lying, this trend became significant, and under high motivation deception, there was a significant decrease in blinking. Id.

254. Id. at 12.
The interesting aspect of this empirical substantiation is that even subjects who were highly motivated to lie were relatively unsuccessful in concealing their deception when observers were exposed to nonverbal vocal cues (e.g. tone of voice), and not just to words and visual cues. Thus, "in deceptive contexts in which senders' nonverbal cues are showing, the harder senders try to get away with their lies, the less successful they will be." This reasoning applies to the courtroom environment, and it may facilitate the use of demeanor evidence, whether the trier of fact realizes what happens or not. However, as mentioned previously, this can all too easily be a function of where the trier of fact's attention is focused. If a juror pays too much attention to the visual or verbal cues at the expense of nonverbal indicia like tone of voice, the ability to detect deceit will plummet. Further, the degree to which the speaker's failure to detect occurs will bear a direct relation to the lack of controllability of the channel in question.

There thus exists powerful evidence from social science studies which demonstrates that the construct of demeanor evidence as aggrandized by the law is invalid as it stands. When a juror is told that he may use a witness's conduct, manner, bearing or demeanor in order to assess that witness' credibility, the juror will attempt to use cues and behavior which actually mislead him and cause him to conclude that a witness is perjurious more often than the juror should. This evidence has been accessible to attorneys, jurists, and policymakers for years, and it has been repeatedly corroborated.

D. Jurors' Attentional Biases

Such corroboration illustrates that empirical research on deception has much to offer the law in assessing the validity of demeanor evidence. The studies are equally applicable to another aspect of the topic. Recent data indicate that certain jury instructions create even more difficulty for jurors in their attempts to identify perjury by focusing their attention on misleading or false cues. Three related problems with jurors' focus during testimony illustrate this problem.

First, jurors are often given the preliminary instruction that they should presume that any witness testifying is honest and answers the

255. See Ekman & M. O'Sullivan, supra note 213.
256. DePaulo et al., supra note 252. When subjects were able to use tone of voice cues, their accuracy in identifying deception was markedly higher than when they relied on visual or verbal cues only.
257. DePaulo et al., supra note 13, at 334.
258. See, discussion infra, parts IV(D) & V.
259. This is consistent with the channel mode discussed supra notes 206-212.
questions put to him truthfully. However, it has been shown that when an observer operates under such an assumption, his or her reliance on the face for cues to a speaker’s underlying thoughts increases. That is, “[a] priori beliefs that the target is telling the truth increases reliance on facial cues relative to other indicia. This is clearly detrimental to a successful detection of deception, as facial cues are misleading identifiers of deception. Second, the same study found that “suspicion of deception led subjects to discount the readily faked face more than the leakier voice and body.” When subjects were led to believe that the stimulus speaker’s discourse would involve deception, the subjects fell prey to fewer misleading visual cues.

Finally, a fascinating study conducted a decade ago revealed that juror perceptions of deception can be altered through instructions concerning the appropriate aspects of witness testimony on which to focus. The study proceeded from the premise, demonstrated by the review by Zuckerman and colleagues, that when observers have access to behavioral cues which include words and paralinguistic cues such as tone of voice, they are far more skilled at detecting deception. Acknowledging that previous studies had presented the speakers’ discourse in discrete or combined channels (e.g. only voice, only face, etc.), DePaulo and associates approached their study from a more pragmatic perspective:

261. See, e.g., United States v. Hall, 854 F.2d 1036, 1040 (7th Cir. 1988)(holding that following instruction was not improper: “[i]n weighing the testimony of witnesses ... we start out assuming that the witness will speak the truth”). Moreover, the assumption that a speaker is sincere—that the message he tries to impart is truthful, clear, unambiguous, and relevant—is a fundamental societal one. H. P. Grice, Logic and Conversation in 3 SYNTAX AND SEMANTICS 41 (Peter Cole & Jerry L. Morgan eds., 1975). An assumption that a speaker tells the truth is routine and unexceptional. See Bella M. DePaulo et al., Humans as Lie Detectors, 30 J. COMM. 129 (1980).
262. Zuckerman et al., supra note 40.
263. Id. at 180.
264. Id., quoted in Zuckerman et al., supra note 13, at 21.
265. Thus, it may be that suspicion of deception aids in focusing an observer’s attention to leaky or useful cues to deception. Several recent researchers have examined the “Othello error” a phenomenon in which a suspicious observer discounts cues of a speaker’s veracity in order to conform his perceptions to his schema of presumed deception. See, Charles F. Bond, Jr., & William Fahey, False Suspicion and the Misperception of Deceit, 26 BRITISH J. SOC. PSYCHOL. 41 (1987); PAUL EKMAN, TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS, AND MARRIAGE (1985); Carol Toris & Bella M. DePaulo, Effects of Actual Deception and Suspiciousness of Deception on Interpersonal Perceptions, 47 J. PERSONALITY AND SOC. PSYCHOL. 1063 (1984).
266. Bella M. DePaulo et al., Attentional Determinants of Success at Detecting Deception and Truth, 8 PERSONALITY AND SOC. PSYCHOL. BULL. 273 (1982).
268. DePaulo et al., supra note 266, at 274.
information does not come packaged in such neat, separate bundles... a more realistic—and very straightforward—test of the special utility of vocal cues in deception-detection attempts... involve[s] a paradigm in which all subject have full audiovisual access to the deceivers, but are given different instructions about where to direct their attention.269

Thus, utilizing an environment that was more similar to both real life and a courtroom, the researchers investigated an issue with important relevance to courtroom assessments of credibility. Subjects were presented with videotapes of speakers who were either speaking truthfully or attempting to deceive. Each videotape had full auditory cues. The important variation in this experiment was that “[s]ubjects were instructed to pay particular attention to the senders’ tone of voice, their words, or their visual cues...”270 Consonant with the experimenters' predictions,271 those subjects who had been given explicit instructions to concentrate on the speakers' tone of voice were significantly more skilled at discriminating truths from lies.272 Those who were told to pay close attention to visual behaviors (i.e. those who were given the equivalent of a demeanor instruction) performed no better than those who were given no instructions at all and markedly worse than those who were instructed to focus on vocal or paralinguistic cues.273 The obvious implications are that: “[f]irst, tone of voice... may serve as a particularly good indicator of deception. Second, the lie detector must adopt an attend-to-tone strategy in order to take advantage of the available information.”274 Specific instructions to an observer or juror concerning the aspect of speaker or witness behavior or testimony to which he should attend can drastically alter that observer's perceptions of credibility.

E. Level of Planning

One final finding having applicability to the courtroom concerns judgments by observers as to the level of planning that a speaker evinces. On the one hand, it has been shown that discourse with more hesitations and more errors is significantly associated with both per-

269. Id. (emphasis added).

270. Id. To ensure empirical validity, one group of subjects was given no instructions at all and was presented with the videotape. This group represented what is known in experimental research as the “control” group. Control groups detect influences by factors other than the variables being examined. They increase the validity of empirical research.

271. These predictions were based in part on the models discussed previously and on earlier research for which this experiment provided support. See Glenn E. Littlepage & Martin A. Pineault, Detection of Truthful and Deceptive Interpersonal Communications Across Information Transmission Modes, 114 J. SOC. PSYCHOL. 57 (1981).

272. DePaulo et al., supra note 266, at 276.

273. DePaulo et al., supra note 266.

274. Zuckerman et al., supra note 13, at 22.
ceived and actual deception. However, there is abundant evidence as well that a response that seems planned or rehearsed actually appears more deceptive to an observer. Current research continues to explore this dilemma.

F. Summary

Social psychology has engaged in empirical review of the act of deception and its detection for decades. Repeatedly, these studies have produced findings that run counter to both popular and jurisprudential attitudes about the methods of identifying a liar. Evidence demonstrates that there are some behaviors that are predominantly displayed when a speaker attempts to deceive another and that there are some behaviors which are ordinarily identified as betokening such deception. However, these sets of behaviors have little in common. In fact, it has been shown that some of those behaviors the increase of which is commonly believed to indicate deception—those comprising visual indicia such as avoidance of gaze, postural shifts or head movements—actually occur less often in those attempting to deceive, while those behaviors that fall in the vocal or, especially, the paralinguistic category such as tone of voice, are actually more helpful in identifying deception. This is due to the relative controllability and leakiness of the separate channels.

Further, incongruous findings have been put forth as to whether a response that appears rehearsed or spontaneous will elicit a judgment of deception or not from an observer, whether suspicious or not. Finally, whether an observer suspects deception and on what aspect of a speaker's discourse his attention is focused, will markedly affect that observer's skill at identifying deception. When an observer is suspicious, his attention tends, consciously or not, to be drawn to the vocal and paralinguistic cues which aid in deception detection, while the vastly more common assumption of truth-telling focuses attention on the face and other visual cues which detract from the ability to discern deceit. Explicitly drawing an observer's attention to one or the other category can benefit or harm his chances of detecting such deceit appropriately.

V. IMPLICATIONS FOR THE LAW

The perspective of hundreds of years of jurisprudence on demeanor evidence is clear, as is the substantial evidence from the body
of social science research regarding its inutility. Consequently, what implications does that research have for the legal perspective?

Surely the most conspicuous consequence of such data is the need for a reassessment of the current assumptions and jury instructions on demeanor evidence. First, it must be acknowledged that prevailing findings overwhelmingly indicate that the assumption that “ordinary people... will make significantly more accurate judgments of credibility if they have the opportunity to view the demeanor of a witness than if they do not”\(^{278}\) is simply false. Observers can actually be misled and fooled into making significantly less accurate judgments as to a speaker’s deceit when they watch a witness’ behavior. They are, however, better able to identify deception when they make use of indicia by which a witness unconsciously “leaks” hidden information, such as vocal and paralinguistic cues.

The problem with current judicial instructions and assumptions is that they tend to focus fact-finders’ attention on those cues which are misleading and unhelpful. What such instructions should do instead is expressly indicate to finders of fact that there are more effective indicators by which to identify deceit and upon which they should focus; that this shift in attention is highly useful was shown by DePaulo and her colleagues a decade ago.\(^{279}\) Thus, a simple alteration in the instruction on making judgments regarding credibility would aid significantly in making such judgments. In place of an instruction to watch the “manner and conduct” of a witness in order to be alerted to deception, one which instructs fact-finders to pay attention instead to the sound of a witness’ voice would be far superior in situations which require particular emphasis on exposing deception or assessing credibility.\(^{280}\) This “simple suggestion to attend to tone can increase the degree to which people discriminate truth from deception”\(^{281}\) and will by definition aid the truth-seeking process. If this runs too far counter to jurists’ parochial attitude, then at the very least, any instruction which does tend to focus a fact finder’s attention on a witness’s visual aspects should be discontinued.

This restructured perspective impacts profoundly on at least two aspects of the legal process previously discussed, sentence enhancements based on perjury and cases appertaining to Confrontation

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278. Wellborn, supra note 1, at 1075.
279. See DePaulo, et. al., supra note 13.
280. Since, as noted in Part III, supra, this runs counter to popular perception, it may be advisable to refer to the profusion of empirical evidence which supports it. While some may argue that this would cause the jury to accord the instruction disproportionate weight, simply because “science says so,” it should be noted that such mounting corroborative evidence precisely satisfies the standards for expert or other scientific testimony at trial. Fed. R. Evid. 702.
281. See DePaulo et. al., supra note 13, at 277.
Clause issues. Remedies for the former are simple; it is clear that much more care should be taken with the former; with the prevailing popular position it is all too easy to make mistaken or naive credibility judgments with unwarranted ramifications.

In Confrontation Clause cases, however, the analysis must be somewhat more penetrating. A juxtaposition of views must be constructed. First, it must be understood that actual physical confrontation—that is, a witness' live testimony—can enhance credibility judgments by the finder of fact. It must also be realized, however, that this is not a function—and was not the original intent of the right—of forcing the witness to view the defendant, with the hopes that he would break down and confess his duplicity. Thus, screens or closed-circuit television arrangements which hide a defendant from the witness' view should not be the dispositive issues that they have been in confrontation clauses cases, insofar as demeanor evidence is concerned. Nor is it a function of exposure to a tribunal—surely "career criminals" who are present relatively often before a judge will not so succumb to the majesty of a courtroom atmosphere. Rather, as Justice Blackmun's dissent in Coy correctly implies, detection of deception is solely a function of the accessibility of the fact-finder to the witness and his behavior. Under conditions present in cases such as Coy, perhaps the ideal arrangement would be a screen which hides the defendant from the witness (after the witness has been told that the defendant can see her), and the witness from the jury, who can then focus on her voice in assessing credibility! The importance to policymaking of a proper understanding of what is useful and what is not in assessing the credibility of a live witness cannot be overstated.

Finally, the most important issue relating to reliance on demeanor evidence in case law is the deference to be accorded the trial court's findings as to credibility by courts of higher review. Empirical research does to some extent seem to support this deference. While fact-finders at trial may attend to the wrong indicia of perjury or de-

282. See Parts III(A) and III(D), supra.
283. All that is necessary is for the witness to know that a defendant can see him or simply knows that he is testifying. This information will satisfy those who still subscribe to Wigmore's "profound moral effect."
284. The extreme precaution of putting all witnesses in masks, as one author half-seriously suggests, may not be quite necessary (though, strictly speaking, it has the potential to improve assessment of credibility). Saks, supra note 201, at 264.
285. See Wellborn, supra note 1, § IV(B); Fed. R. Civ. P. 52(a)("[f]indings of fact [by the trial court] shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"); 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2586, at 737 (1971)(to set aside finding based on trial judge's evaluation of conflicting testimony requires "most unusual circumstances"); Universal Camera Corp. v. NLRB, 340 U.S. 474, 495-96 (1951).
286. See supra notes 227-230.
if they pay attention to those cues that have been shown to be useful in deception detection, then their findings are due some deference by reviewing courts. This deference, however, is subject to a point raised by Professor Wellborn. While his faith in demeanor evidence is somewhat exaggerated, he properly raises the question as to whether an appellate court can effectively judge credibility assessments from a "cold" transcript of a lower court proceeding. If demeanor evidence is useful, of course, then greater deference must be accorded a lower court's findings than if it is not. A problem arises when it is shown that such evidence can be categorized as genuinely useful indicators of perjury or deceit (e.g. paralinguistic cues) or useless (e.g. visual cues).

This is a problem because research has shown that observers exposed to a witness' voice are able to judge deceit best, and those exposed to merely a transcript and no "demeanor cues" do almost as well, up to twice as well as those who are exposed to visual cues. Thus, there is support for the claim that findings of credibility could be reviewed de novo by appellate courts.

Professor Wellborn raises one of the strongest arguments against the claim by drawing attention to the "clear error" standard of review. He correctly points out that legislative and jurisprudential history do not premise such review solely on the fact-finder's access to demeanor evidence. A standard less demanding than clear error reflects poorly on the dignity and jurisdiction of the appellate courts. Review should "encourage appeals that are based on a conviction that the trial court's decision has been unjust; [not] appeals that are based on the hope that the appellate court will second-guess the trial court." Further, valid demeanor evidence is certainly not controlling: "[f]indings that appear clearly incorrect on the basis of the record should not be sustained on the theory that they might be premised upon a witness's demeanor."

An equally problematic aspect of transcript evidence is its quality and specificity. There is currently dispute as to the accuracy of the

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287. Wellborn, supra note 1.
288. While Professor Wellborn correctly interprets the research illustrating the inappropriateness of using visual cues as the sole basis for detecting deceit, he considers the use of other cues equally useless and views demeanor evidence as completely invalid. As this paper reveals, his claim is too extreme.
290. See generally Wellborn, supra note 1, at 1094-96.
291. Wellborn, supra note 1, at 1095-96.
292. Id.
293. Id. at 1096 (citations omitted).
294. Lundgren v. Freeman, 307 F.2d 104, 114 (9th Cir. 1962).
295. Wellborn, supra note 1, at 1096.
current transcription procedures,296 and the words of a witness must be captured with absolute precision if credibility judgments are to be made about him. In addition, even if a transcript is completely accurate in the content of the speech, behaviors which are proven manifestations of deceit, such as speech hesitations or disfluencies, are typically not preserved in a transcribed record. Thus, any judgment as to credibility or veracity would of necessity be made based on content at the appellate level of review. This is certainly not as proficuous a basis on which to judge veracity as full vocal expression.

VI. CONCLUSION

Credibility judgments can be a fundamental aspect of any case, civil or criminal, and are often the determining factors at trial.297 It is unforgivable that the legal system deliberately ignores demonstrated, relevant findings about demeanor evidence and willfully adheres to an ineffectual traditional approach. Advances in medical science and investigative techniques are integrated facilely into the insular legal system, and other advances in knowledge should be accepted, as well. When a conventional juridical policy is demonstrably unhelpful, despite all appeals to precedent or tradition, it should be reassessed in light of the data which disprove it. Social science has convincingly demonstrated the disutility of demeanor evidence as misapplied by the legal community, and its recommendations and solutions should be recognized by the legal system. Extensive revamping of judicial policy is not necessary. Rather, simple changes in evidentiary instructions and the ways in which certain constitutional rights are interpreted and applied can prevent the mistakes to which current legal assumptions about demeanor evidence easily lead. The results of these small changes can only enhance the truth-seeking process.