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Demeanor Credibility

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ARTICLES

DEMEANOR CREDIBILITY

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INTRODUCTION

Tony: Why are you arresting me?
Sheriff: Because we think you shot the store clerk.
Tony: I shot the store clerk!!!
Sheriff: You shot the store clerk?
Tony: I shot the store clerk!!!
Sheriff: I knew you'd confess.[1]

Witnesses may use irony or sarcasm to convey their meaning. Unfortunately, the written transcript cannot reflect all of the subtleties of a witness, such as an inflection of voice or a particular gesture that may completely change the meaning of the testimony. Often the sincerity of the witness may be observed only from the way the witness sounds or looks.[2] When the sheriff accused him of shooting the clerk, Tony ex-

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1. MY COUSIN VINNY (Twentieth Century Fox 1992) (dialogue between Tony and the Sheriff at the time of Tony's arrest). Depending on how he expressed the words, Tony was either confessing or expressing surprise and disbelief. A transcript of such dialogue—like the transcript of trial testimony or a deposition—"cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration[.]" Arnstein v. Porter, 154 F.2d 464, 470 (2d Cir. 1946).

2. *See* Untermeyer v. Freund, 37 F. 342, 343 (S.D.N.Y. 1889) ("A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression."). Judging credibility by demeanor is a precept of human behavior well studied by philosophers and poets. *See, e.g.*, DAVID J. LIEBERMAN, PH.D., NEVER BE LIED TO AGAIN 8 (1998) (displaying a Sigmund Freud quote, in which Freud noted that "[h]e that has eyes to see and ears to hear may convince himself that no mortal can keep a secret. If his lips are silent, he chatters with

pressed disbelief because he, in fact, had not shot the clerk. A reading however, of the transcript without the benefit of observing the accused's demeanor may, however, give the fact-finder the impression that the accused has confessed. To fully judge the witness's testimony, the fact-finder must see and hear the witness's demeanor.[3]

Under our common law system of litigation, the trier of fact uses the witness's demeanor to determine the truth of the testimony. In recent years, psychologists have challenged the use of the witness's demeanor as a test of credibility, suggesting that decisions of deceit should be made dispassionately from transcripts of testimony rather than in the heat of battle in the courtroom. This dispute is not new. It was at the heart of the English struggle for supremacy between the equity courts (dominated by the Church and King) and the common law courts (dominated by Parliament and the Bar), and has continued in this country.

For hundreds of years, judges or juries[4] have decided the credibility of testimony[5] on the demeanor of the witness,[6] including the witness's ap-

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his fingertips; betrayal oozes out of him at every pore"); OSCAR WILDE, PICTURE OF DORIAN GRAY 29 (Penguin Books 1982) ("It is only shallow people who do not judge by appearances."). *But see* CHARLES DICKENS, HUNTED DOWN 176 (Peter Haining ed., 1996) ("I have known a vast quantity of nonsense talked about bad men not looking you in the face. Don't trust the conventional idea. Dishonesty will stare honesty out of countenance, any day of the week, if there is anything to be got by it."); *John* 7:24 (suggesting that one should "[j]udge not according to the appearance").

3. Demeanor includes the facial expressions and body language of either a testifying witness or a non-witness sitting in the courtroom. *See* United States v. Schipani, 293 F. Supp. 156, 163 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969).

4. The fact-finder may include a trial judge in a bench trial, a jury, an administrative law judge, or some other presiding official in judicial or administrative adjudicatory proceedings.

5. *See* NLRB v. Dinion Coil Co., 201 F.2d 484, 488 (2d Cir. 1952) (noting that observing one's demeanor "confer[s] immense discretion on those who, in finding facts, rely on oral testimony"). In the Federal courts in the nineteenth century, the fact-finder was often unable to observe a witness's demeanor as "oral testimony in open court was not required in equity litigation; indeed, for many years it was virtually banned." *Id.* (remarking that it was not until the Equity Rules of 1912 that suits in equity relied upon oral testimony on a consistent basis).

6. Demeanor outside of the courtroom is also used to determine fault. *See* Rothgeb v. United States, 789 F.2d 647, 651 (8th Cir. 1986) (holding that evidence of defendant's demeanor during police interrogation was admissible against him). The facts of a flight of the accused, escape from custody, resistance to arrest, concealment, and assumption of a false name are admissible as evidence of consciousness of guilt. *See* Harrington v. Sharff, 305 F.2d 333, 338 (2d Cir. 1962) (determining that leaving the scene of an accident was admissible in a civil case); Kanner v. United States, 34 F.2d 863, 866 (7th Cir. 1929) (holding that evidence of the pendency of offer of reward and two-year nationwide fruitless search was admissible to prove flight and concealment).

> In the olden time it was a popular superstition, that the corpse of the slain would bleed afresh if touched by the murderer; and it was deemed almost conclusive of guilt, that he who was charged with the murder refused to lay his finger on the

pearance, attitude, and manner.[7] The process is subjective and difficult to describe. Jurors usually do not have to elucidate the reasons for their verdict, but the trial judge who specifies a negative physical characteristic of the witness's demeanor risks reversal on appeal.[8] Now, empirical evaluations of credibility suggest that demeanor evidence lacks reliability[9] and that a better credibility result could be achieved by focusing on the exact words used by the witness as recorded in the transcript of the testimony.[10]

Until the middle of the twentieth century, demeanor evidence was covered in a large body of psychological literature and motivated insightful discussions in older trial practice texts. Thereafter, the treatment of

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> body, or to take its hand. In recent years persons suspected of murder have been required to touch the dead body; not because the old superstition was indulged, bu[t] that its effect on them—the emotion produced and manifested—could be observed.

Gassenheimer v. State, 52 Ala. 313, 317 (1875).

7. Katherine Shaver, *If Looks Could Convict, Clark's Presence May Sway Jurors*, WASH. POST, Oct. 13, 1999, at B1. Shaver illustrates the point in the context of the present day jury in a criminal trial:

> Although jurors are instructed to weigh a case strictly on the evidence, defense lawyers say jurors also carefully watch a defendant, perhaps imagining whether the person in front of them could have committed such horrible crimes. In other words, jurors try to picture whether the person fits the part . . . . In a case that relies almost entirely on circumstantial evidence, jury experts say, the defendant's appearance and the vibes he sends to jurors are even more important. "If the evidence is not as clear-cut, the jurors still have to make the same decision—whether he's guilty or not guilty—but they'll have less hard evidence to go on," said Majorie Fargo, president of Jury Services Inc., an Alexandria-based jury consulting firm. It's what Fargo calls the "subjective" and "subconscious" part of how jurors reach a decision. "They'll have to piece it together themselves, and they'll address the issue of whether he could have done it," Fargo said, describing a process that she said she has pieced together by interviewing jurors after they have returned their verdicts. "They'll think, 'Does he look like he could have done it?' If they play completely by the rules, they shouldn't address that, but human nature takes over, and they do talk about that," Fargo said.

Id.

8. *See* Quercia v. United States, 289 U.S. 466, 471-72 (1933) (deciding that it was a reversible error for the trial judge to tell the jury that "wiping" hands during testimony is "almost always an indication of lying").

9. *See* Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1189 (1993) (discussing demeanor in the context of social science); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1088 (1991) ("[D]eception detection studies indicate that many subjects can do better than chance in detecting falsehood.").

10. *See* Wellborn, *supra* note 9, at 1091 ("Transcripts are probably superior to live testimony as a basis for credibility judgments because they eliminate distracting, misleading, and unreliable nonverbal data and enhance the most reliable data, verbal content."); Blumenthal, *supra* note 9, at 1203 (discussing Professor Wellborn's beliefs on the level of control afforded demeanor evidence).

demeanor evidence was common only in trial advocacy textbooks. It was Professor Imwinkelried's 1985 thoughtful article that deplored the paucity of the then current legal literature on demeanor evidence.[11] Professor Imwinkelried encouraged further research and writing about demeanor evidence, pointing out that the "witnesses' demeanor seemingly determines the outcome of a large percentage of trials."[12] After Professor Imwinkelried's article, the literature on demeanor increased with articles usually criticizing the use of a witness's demeanor as a criterion of credibility.

In addition to the fact-finder's use of demeanor in determining credibility, literature has demonstrated that attorneys use demeanor in preparing witnesses for court, in selecting juries, in examining witnesses, and in the counsel's own dress, mannerisms, body language, and voice modulation.[13] This article will focus on the fact-finder's use of a witness's demeanor in the context of determining credibility, and the history, nature, actual use, and criticism of demeanor evidence. This article supports the use of demeanor (stated in behavioral conclusions rather than physical descriptions) as a factor in determining witness credibility, and suggests the feasibility of expert testimony[14] on demeanor determinations where demeanor evidence adduced at the trial is the sole factor which

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11. *See* Edward J. Imwinkelried, *Demeanor Impeachment: Law and Tactics*, 9 AM. J. TRIAL ADVOC. 183, 186 (1985) (noting that the "leading evidence treaties" and "[m]ost evidence casebooks" of the time were virtually silent on the role of witness demeanor). Professor Imwinkelried attributes the recent lack of demeanor evidence coverage in legal literature to fewer "swearing contests," or he-said, she-said scenarios between a plaintiff and defendant. *Id.* at 233-34. Professor Imwinkelried argues that the lack of legal analysis of demeanor evidence stems from the greater use of expert testimony, greater acceptability of polygraph evidence and psychiatric testimony on the issue of a witness's credibility, and liberalized admissibility of opinion or reputation testimony probative of the character of a witness. *See id.*

12. *Id.* at 234 (calling the lack of contemporary legal analyses of demeanor "deplorable").

13. For an example of literature written for courtroom lawyers on how to use psychological principles to their advantage, *see generally* THOMAS SANNITO, PH.D. & PETER J. MCGOVERN, J.D, ED.D., COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS (1985). In citing professional psychological opinions, Sannito and McGovern provide practical insights on non-verbal communications. *See generally id.* at ch. 4 (stating that, *inter alia*, people with enlarged pupils are compassionate and those with beady-eyes use cold logic; a person who looks up and to the left while thinking is metaphorical and one who looks to the right reasons logically; thin lips mean frugality; hands and feet are more expressive than a face; and a low pitched voice indicates confidence, while a high pitched voice reduces believability).

14. The standard for admissibility of scientific evidence includes specialized knowledge that (1) will assist the fact-finder and (2) is derived by a scientific method so that it is generally accepted by the scientific community. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589-91 (1993) (citing FED. R. EVID. 702).

may be used in deciding a vital issue in the case.

I. CREDIBILITY EVIDENCE

To effectively comprehend the role demeanor evidence plays in a trial, it is necessary to understand its use as a part of the evidence of witness credibility as a whole. At a trial, when witnesses testify about their knowledge of what happened during an event at issue in the litigation, their stories often vary. In such a situation, it is the fact-finder who must decide whom to believe. This decision often involves an evaluation of the evidence presented on the credibility of each witness.

Credibility evidence may include the witness's opportunity and capacity to observe and relate to the event, and his demeanor, bias, character, and any prior inconsistent statements. In addition, contradiction of, or support for, a witness's version of events by other evidence, and the plausibility of the witness's version, fall within the scope of credibility evidence.[15]

A. Demeanor

As mentioned above, demeanor is often used as part of the evidence probative of a witness's credibility. Generally, demeanor includes the witness's dress, attitude, behavior, manner, tone of voice, grimaces, gestures, and appearance. In other words, demeanor includes "all matters which 'cold print does not preserve.'"[16] Assessment of demeanor, therefore, depends upon direct observation of the witness.[17]

This direct observation can be as powerful as it is simplistic. For example, in one of renowned defense attorney Clarence Darrow's cases, a key prosecution witness with a rather unappealing appearance was called to testify. In a classic example of the use of demeanor evidence, Darrow observed:

> [The 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

15. *See* Hillen v. Department of the Army, 35 M.S.P.B. 453, 458 (1987); Tim Hallahan, *An Overview of Trial Evidence Techniques*, PRAC. LITIGATOR 5, 21, 25-26 (1996) (arguing, in a discussion on the relevancy of credibility evidence, that "[a] witness's credibility is always at issue" in a trial).

16. Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949); *see also* Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952) (acknowledging the conduct, manner, and appearance that make up a witness's demeanor).

17. *See* Weaver v. Department of the Navy, 2 M.S.P.B. 129, 133 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

> tangled and matted. His clothes . . . were covered with dirt and grease. His huge hands . . . were covered with grime.[18]

Darrow's cross-examination of the witness consisted only of his request that the witness stand up and turn around for the jury.[19]

B. The Opportunity and Capacity to Observe and Narrate the Event

In addition to demeanor evidence, several other factors determine the level of credibility afforded to a particular witness. Central to a witness's credibility is the requirement that the witness qualified to testify about relevant facts must have first hand knowledge of the subject matter of the testimony, and the capacity to testify accurately. Personal knowledge is an essential qualification of a witness, established by the witness's opportunity to observe the event at issue.[20] The witness's capacity to testify refers to the ability of the witness to observe and understand what was seen and to narrate it intelligently.[21]

C. Bias

Another form of evidence that is used to impeach a witness's credibility is that which constitutes bias. Bias describes the existence of a relationship between the witness and a party that may lead the witness to slant testimony in favor of or against a party.[22] If a witness's bias is established and thus, the witness's credibility is called into question, the

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18. Imwinkelried, *supra* note 11, at 226-27 (quoting Clarence Darrow).

19. Darrow's follow up statement was concise and effective: "That's all. I just wanted the jury to get a good look at you." *Id.* at 227 (quoting Clarence Darrow).

20. *See* 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS OF COMMON LAW § 1005(f) (James H. Chadbourne ed., 1970) (suggesting that the inability of a witness to have personal knowledge of that to which he is testifying "may be shown to discredit" the witness).

21. *See id.* § 993 (recommending a method for testing a witness's capacity to testify accurately); 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6097 (1990) (discussing capacity's impact on credibility). The admissibility of evidence pertaining to capacity, although not explicitly directed by the Federal Rules of Evidence, is generally "implied by the relevance rules [Article IV] and Rule 607." 3A WIGMORE, *supra* note 20, § 993.

22. *See* United States v. Abel, 469 U.S. 45, 52 (1984). The witness's testimony, affected by the bias, may work for or against the party. In *Abel*, the Court opined:

> Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. The "common law of evidence" allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to "take the answer of the witness" with respect to less favored forms of impeachment.

Id.

jury may view the subject matter of the testimony less favorably than if the bias was left undisclosed to the fact-finder.[23]

D. Character

In everyday life, we rely on our appraisal of a person's character in judging one's behavior. In order to ascertain whether a person performed an alleged act, it is often useful to know what kind of person he is. The trier of fact must ask himself if this particular person is the kind of person who would do such an act. In deciding whether to believe his story, we want to know his respect for truth and how fairly and accurately he observes, recites and narrates the events in question.

At law, however, evidence about the character of a person to show that it is consistent with conduct at issue in the litigation is generally not admissible.[24] Yet, character evidence is admissible for alternative purposes, specifically to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[25]

Character evidence may be used to impeach a witness on the theory that certain characteristics render that person more prone to testify untruthfully. For example, general evidence of the trait of truthfulness or dishonesty of a witness is admissible on the issue of the credibility of the testimony.[26] This form of impeachment evidence may be established by prior misconduct, including criminal convictions, or testimony that demonstrates a reputation for, or an opinion of, untruthfulness.[27]

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23. *See id.* at 51 (noting the possible effects on the trier of fact following a successful showing of bias).

24. *See* FED. R. EVID. 404(a). In discussing the inadmissibility of general character evidence, the Supreme Court reasoned that "[t]he inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Michelson v. United States, 335 U.S. 469, 475-76 (1948). The Federal Rules of Evidence do, however, allow character evidence of a pertinent trait of either the accused or the victim in a criminal trial when such evidence is offered by the accused or the prosecution to rebut such evidence presented by the defense. FED. R. EVID. 404(a)(1)-(2).

25. FED. R. EVID. 404(b) (stating that under these circumstances, evidence of other crimes or bad acts are admissible).

26. *See* FED. R. EVID. 608. Columbia Law School Professor H. Richard Uviller finds that the use of character evidence to prove a predisposition to perjury is a "complex and dangerous" area of law that is "differently understood and differently applied from courtroom to courtroom." H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 827 (1993). Professor Uviller would ban character impeachment. *See id.* at 831.

27. *See* FED. R. EVID. 609 (governing impeachment of a witness by evidence of criminal conviction); FED. R. EVID. 608(a) (stating that character evidence attacking the credibility of a witness, by either reputation or opinion testimony, is admissible if proba-

E. Prior Inconsistent Statement

An attorney may impeach a witness by demonstrating that, on prior occasions, the witness made statements that are inconsistent with the witness's present trial testimony. These prior inconsistent statements are not inadmissible hearsay because they are not offered to prove the truth of the matter asserted in the prior statement.[28] Instead, an attorney offers evidence of a prior inconsistent statement to show that the witness says different things at different times and is therefore untrustworthy.[29] The presentation of a witness's prior inconsistent statement is not offered to prove that the witness's present testimony is false, but that the inconsistency raises doubt as to the truthfulness of any of the witness's statements.[30]

F. Contradiction or Corroboration

Another issue of witness credibility arises in a situation where a party denies facts asserted by a witness and offers evidence that tends to contradict the witness's version.[31] If the party attempts to use extrinsic evidence to demonstrate the contradiction, the evidence must address a material aspect of the impeached witness's testimony.[32] Evidence demonstrative of a contradiction raises an inference that a witness mis-

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tive of truthfulness or dishonesty); *see also* 4 JACK B. WEINSTIEN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 608.02[1] (Joseph M. McLauglin ed., 2d ed. 1999) (discussing character evidence's relevance for impeachment of a witness's credibility); WRIGHT & GOLD, *supra* note 21, § 6115 (describing the conditions for the admissibility of character evidence).

28. *See* FED. R. EVID. 801(c) (defining hearsay as "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").

29. *See* Uviller, *supra* note 26, at 782 (describing the impeachment of a witness through evidence of a prior inconsistent statement).

30. *See* 1 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 34 (5th ed. 1999). A witness's prior inconsistent statement may be either oral or written. *See* FED. R. EVID. 613(a) (stating that the witness's previous statement may be "written or not"). In the examination of a witness concerning a prior inconsistent statement made by the witness, the statement need not first be disclosed to the witness, but must be disclosed to opposing counsel upon request. *See id.* It should be noted, however, that the witness must be afforded an opportunity to explain or deny any extrinsic evidence of a prior inconsistent statement. *See id.* 613(b).

31. *See* 3A WIGMORE, *supra* note 20, § 1000 (discussing the mechanics of contradiction and its effect on a witness's credibility); 27 WRIGHT & GOLD, *supra* note 21, § 6096 (acknowledging that "[t]he credibility of a witness is attacked by contradiction when evidence is introduced suggesting that a fact to which a witness testified is not true").

32. *See* 1 STRONG ET AL., *supra* note 30, § 45 (stating the general rule that a witness may not be impeached through the use of extrinsic evidence of "collateral" facts); Uviller, *supra* note 26, at 781 (discussing contradiction as a form of impeachment).

taken about one fact also may be mistaken about other facts disclosed in his testimony.[33] A witness may, however, corroborate his testimony by presenting consistent documents or statements. Contradicting or corroborating evidence may be offered through oral testimony; however, contradicting or corroborating documents, especially those written in the ordinary course of business and not for litigation, are one of the best sources of the truth.[34]

G. Plausibility

A determination of a witness's credibility often includes an evaluation by the fact-finder of the likelihood of the event occurring in the manner described in the testimony.[35] Effective cross-examination challenges a witness's testimony by looking for omission, embroidery, or implausibility.[36] A skillful examiner may make even the honest witness hesitant, confused or defiant,[37] opening a question of the plausibility of the witness's story.[38] Often, findings of plausibility may be based on the witness's demeanor.[39]

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33. *See* 4 WEINSTEIN & BERGER, *supra* note 27, § 607.06[1] (noting that contradicting a witness's testimony may show the fact-finder that all of the testimony is "untrustworthy").

34. See opinions of Judge Welles and Judge Davidson in their summary of credibility factors, *infra* notes 43-45 and accompanying text.

35. *See* Local 162, Int'l Bhd. of Teamsters v. NLRB, 782 F.2d 839, 842-43 (9th Cir. 1986) (upholding an administrative law judge's credibility finding based on lack of candor and inconsistency of a witness, who denied throwing a rock at a security guard at work sites, but admitted spitting at drivers and carrying an object believed to be a baseball bat); United States v. Marin, 761 F.2d 426, 434 (7th Cir. 1985) (upholding a finding of a district judge who, after observing the witness's demeanor and hearing her testimony, did "not find it credible that a woman who has been in the country for nine years indicates that she does not read and understand English"); Meyer v. United States Customs Serv., 18 M.S.P.B. 545, 546 (1984) (holding it improbable that appellant, a special agent trained in criminal investigations, received government property from the custodian of the property at its storage facility without knowing that it was government property).

36. *See* Uviller, *supra* note 26, at 782.

37. *See id.* at 783.

38. *See id.* at 784. In Professor Uviller's survey of district court judges, plausibility of a witness's story, defined as "the factfinder's experience and familiarity with 'human nature' and 'the real world'" was given a somewhat favorable rating as an indicator of witness credibility. *Id.* at 825 (noting that "[a] substantial plurality . . . called it one of the better indices" of credibility).

39. *See In re* Visx, Inc., FTC Docket No. 9286, at 141 (filed May 27, 1999) (on file with *Catholic University Law Review*). Administrative Law Judge Levin stated that:

> Having observed his appearance and demeanor at the hearing, I found that Gholz is precise in his use of language, meticulous in his demeanor, and highly skillful and nuanced in the presentation of his testimony. There is nothing haphazard about him. While all things are possible, I am not persuaded, in this in-

H. Weight of Credibility Factors

The applicability of the above seven credibility factors varies with the facts of each case. Rarely are all factors used in determining any one witness's credibility. In addition, the application of the factors vary in weight, and from judge to judge.[40]

In a survey conducted by Professor H. Richard Uviller of fifty-six federal judges studying the standards by which fact-finders determine the credibility of witnesses, prior inconsistency and contradiction were used most often.[41] The use of demeanor to determine witness credibility also ranked high.[42]

Former National Labor Relations Board Chief Administrative Law Judges, Mel Welles and David Davidson, surveyed trial judges and found that the best credibility factors include changes in witness's behavior and loss of poise when confronted by a new document, evasiveness, defensiveness, and rationalization.[43] Such factors may be revealed, in part, by

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> stance, that he forgot to file an IDS in his client's interest, or that it never occurred to him to file during the entire course of the prosecution.

Id. (citation omitted).

40. Continental Western European law, based on Roman canon law, as explained in Tancred's treatise written around 1215, left less discretion in determining witness credibility. *See* George Fisher, *The Jury's Rise as Lie Dectector*, 107 YALE L.J. 575, 589 (1997). In paraphrasing Tancred's treatise, Charles Donahue, Jr. noted that:

> [T]he judge ought to attempt to reconcile their statements if he can. If he cannot, then he ought to follow those who are most trustworthy—the freeborn rather than the freedman, the older rather than the younger, the man of more honorable estate rather than the inferior, the noble rather than the ignoble, the man rather than the woman. Further, the truth-teller is to be believed rather than the liar, the man of pure life rather than the man who lives in vice, the rich man rather than the poor, anyone rather than he who is a great friend of the person for whom he testifies or an enemy of him against whom he testifies. If the witnesses are all of the same dignity and status, then the judge should stand with the side that has the greater number of witnesses. If they are of the same number and dignity, then absolve the defendant.

Id. (citing Charles Donahue, Jr., *Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law*, *in* ON THE LAWS AND CUSTOMS OF ENGLAND 131 (Morris S. Arnold et al. eds., 1981)).

41. *See* Uviller, *supra* note 26, at 825.

42. *See id.* In his article, Professsor Uviller reported the results of the survey of judges:

> Clear winners were *internal inconsistency* and *external contradiction*. *Demeanor* fared somewhat less well, with . . . most judges rating it somewhat better than middling, tending toward "one of the better indices" which deserved at least the importance that jurors usually ascribe to it. *Character* . . . was simply "one of several factors that should be taken into account."

Id.; *see also supra* note 38 (quoting Professor Uviller's findings on plausibility).

43. Videotapes: Training Lectures (Judge Welles, 1984 and Judge Davidson, 1996) (on file with the Office of Administrative Law Judges, National Labor Relations Board).

the witness's behavior.[44] The surveyed trial judges look for the interest of the witness, inconsistencies in testimony, poor recollection or perception, demeanor, and plausibility where supported by independent evidence, corroboration by documents or disinterested witnesses, and undisputed facts.[45]

There is no consensus on demeanor evidence. To understand why some judges deprecate the use of demeanor to assess witness credibility while others rank it high, an assessment of the history of live trials is important. The custom of weighing the truthfulness of witnesses based on their conduct and appearance, the nature and description of demeanor, and the actual use of demeanor in cases grew out of the live trial setting.

II. DEMEANOR EVIDENCE

Demeanor evidence of the witness's credibility, such as some evidence of the witness's character and capacity to observe and narrate accurately, and the plausibility of the testimony, includes the witness's attitude, ap-

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44. *See id.*

45. Judge Davidson summarized his view of credibility determinations:

> [I]n most cases, I would start by looking at the undisputed facts and what has been established by documents .... I generally regard a witness' interest or lack of interest in the outcome of the case as important and employee witnesses who have no interest in the outcome, but testify against their employer's interests, often get a point up from me for that. I look at inconsistencies next and try to weigh their importance and to determine what may be due to poor recollection or perception and what may not. In this regard, I find the old maxim "false in one, false in all" generally unappealing. If I become convinced that a witness has lied deliberately, I am inclined to discredit that witness in all respects except where corroborated. But if I am convinced that I can't credit a portion of the witness' testimony because of poor recollection or perception, I may credit that witness' testimony in other important respects. Very often I conclude that the facts lie somewhere between the individual recollections of each of the witnesses. Corroboration, particularly by document, by an opposing witness, or by disinterested witnesses, gets substantial weight. I put demeanor low on my list. In most cases I don't find it helpful. So much of what we observe is ambiguous in significance .... [B]ehaviors which can indicate lying can also indicate powerlessness, nervousness, etc. But ... [c]hanges in demeanor, while the witness is on the stand, mean more to me than consistent behavior. If a confident witness loses his poise when confronted with what appears to be a document he had forgotten about and cannot explain, that change in demeanor will impress me. But even then, the change in demeanor rarely stands alone. It is usually accompanied by evasiveness, defensiveness, excessive rationalization, all of which appear on the face of the record and give an independent basis for resolving credibility. ... Finally, while I do it at times, I am leery about basing credibility resolutions on the plausibility or implausibility of a witness .... That something is implausible means that it may happen only one out of one hundred times, but your case may be that one time.

Id.

pearance and conduct. This evidence tends to probe the credibility of testimony by indicating the witness's sincerity based on the witness's manner and conduct.

The use of demeanor to make credibility determinations assumes that a witness appears in person before the fact-finder. In our system of adjudication, trials are usually held in open court unless a supervening policy (e.g., protecting witness privacy or trade secrets) intervenes. The emphasis on testimony in open court was incorporated into the Federal Rules of Civil Procedure "to combat the practice in equity of presenting juries with edited depositions of witnesses' testimony."[46] In addition to the concerns pertaining to the accuracy and completeness of testimony, which might be compromised by edited depositions, the Federal Rules of Civil Procedure's strong preference for the testimony of live witnesses allows the fact-finder to observe the demeanor of the witness.[47] Improvements in technology, however, show the need for flexibility in requiring testimony to be presented in open court.

An exception to the modern trend of live testimony, for example, is the use of video technology[48] to present testimony to the trier of fact.[49]

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46. Murphy v. Tivoli Enterprises, 953 F.2d 354, 359 (8th Cir. 1992) (discussing the Advisory Committee's reasoning in drafting Rule 43(a)). Rule 43(a) of the Federal Rules of Civil Procedure states, in part, that "[i]n every trial the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise." FED. R. CIV. P. 43(a).

47. *See* Adair v. Sunwest Bank, 965 F.2d 777, 780 (9th Cir. 1992) (articulating the primary purposes of Rule 43(a) of the Federal Rules of Civil Procedure).

48. There are generally four types of video testimony used in litigation: video depositions, demonstrative evidence on videotape, video transcripts, and video hearings. *See* Henry H. Perritt, Jr., *Changing Litigation With Science and Technology: Video Depositions, Transcripts and Trials*, 43 EMORY L.J. 1071, 1071 (1994). With video testimony, a judge may edit the video, deleting inadmissible evidence and arguments, and thereby shorten and rationalize the trial. *See* James L. McCrystal & Ann B. Maschari, *Prerecorded Trials*, 9 LITIG. 32, 32-33 (1983). A courtroom in the Sarasota, Florida County Judicial Center has five cameras and seven supersensitive microphones that enable jurors "to use the video to review a defendant's behavior on the witness stand." Tom Spalding, *Cameras Provide Courtroom Video*, SARASOTA HERALD TRIB., Jan. 3, 2000, at 1.

49. Another, more dubious exception to the modern trend of live testimony involves the federal district courts' delegation of a pre-trial motion to a magistrate and, on review under the Magistrates Act, adoption of a magistrate's credibility findings. The district court's reversal of those findings that are based upon the magistrate's observation of the witness's demeanor "could well give rise to serious questions" of due process. United States v. Raddatz, 447 U.S. 667, 681 n.7 (1980). The dissent believed demeanor was so important that a district court must rehear testimony when credibility is at issue, even when upholding the magistrate's finding. *See id.* at 687-91 (Stewart, J., dissenting). The majority expressed serious reservations about allowing a judge to make findings contrary to the credibility determinations of the magistrate. *See id.* at 680-81 & n.7 (stating in dicta that the majority "assume[s] it is unlikely that a district judge would *reject* a magistrate's

Video technology allows a witness to testify without being physically present in court, while still giving the fact-finder the advantage of observing the witness's demeanor.[50] Despite the preference for live testimony over deposition testimony, that preference is substantially undercut when a videotape provides the trier of fact with the opportunity to observe the deponent answering questions.[51]

Another exception to live testimony is the use of tape-recorded telephone depositions. The use of such evidence affords a higher level of due process in determining witness credibility than written deposition transcripts because the court hears the witness's voice, one of the indicia of demeanor credibility.[52] Seeking to lower costs and expedite determinations, some administrative agencies have adopted telephone hearings to decide on the merits, among other matters, disability, welfare, and unemployment compensation.[53] Due process, however, may require in-

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proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal").

50. *See* Neil Fox, Note, *Telephonic Hearings in Welfare Appeals: How Much Process is Due?*, 1984 U. ILL. L. REV. 445, 456 ("Researchers have concluded that juries respond no differently to videotaped testimony than to live testimony."). Rule 43(a) of the Federal Rules of Civil Procedure was amended on December 1, 1996, to provide: "The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location." FED. R. CIV. P. 43(a). If a witness is unable to travel to trial because of illness, but can testify from a remote location, contemporaneous transmission is preferable to difficulties involved with rescheduling the trial. *See id.* advisory committee's note. The Advisory Committee makes clear the importance of presenting live testimony in court whenever possible: "The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. *The opportunity to judge the demeanor of the witness face-to-face is accorded great value in our tradition.*" *Id.* (emphasis added).

51. *See* Keil v. Eli Lilly & Co., 88 F.R.D. 296, 299 (E.D. Mich. 1980). A few jurisdictions have adopted videotaped testimony as standard procedure. In these jurisdictions, entire trials may be prerecorded and presented to juries at a later date. *See* Fox, *supra* note 50, at 456 n.58 (discussing Ohio's use of videotaped trials); *Videotaped Murder Trial in Ohio*, 68 A.B.A. J. 533, 533 (1982) (mentioning that the first videotaped murder trial in the nation's history was believed to take place in Ohio in the early 1980s).

52. Such electronic evidence is generally admissible, assuming the live testimony of the witness would be admissible. *See* Official Airline Guides, Inc. v. Churchfield Publications, Inc, 756 F. Supp. 1393, 1398-99 n.2 (D. Or. 1990), *aff'd sub nom.* Official Airline Guides, Inc. v. Goss, 6 F.3d 1385 (9th Cir. 1993) (overruling objections to the use of telephone testimony by witnesses and reasoning that because the testimony was made in open court and under oath, it satisfies Rule 43(a) of the Federal Rules of Civil Procedure); *see also* Rothermel v. Georgia-Pacific Corp., No. 95-2253, 1996 U.S. App. LEXIS 3815, at *16-*17 (8th Cir. Mar. 5, 1996) (per curiam) (holding that it was not error to play the tape of a telephone deposition at trial); *In re* San Juan Dupont Plaza Hotel Fire Litig., 129 F.R.D. 424, 426 (D.P.R. 1989) (permitting counsel to examine witnesses, beyond the subpoena power, by live television satellite hookup).

53. *See* 7 C.F.R. §§ 1.141(b)(2)(i), 1.144(c)(11) (1999) (authorizing, in the United States Department of Agriculture Rules of Practice, hearings by telephone or audio/visual

person hearings[54] when credibility is a major issue in the case, even in administrative proceedings.[55]

A. The History of Live Testimony

Live testimony and the demeanor evidence stemming from it have a long history in the development of trial practice. In *NLRB v. Dinion Coil Co.*,[56] Judge Frank discussed the early Roman legal practice of witnesses testifying orally before the judge. In the fourteenth century, "Postglossators," sitting as judges, maintained that the "indispensable requisite for the judge to form his opinion on the trustworthiness of witnesses was that they appeared before him personally."[57] The oral testimony was not recorded, but the judge put on the record the "personal

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electronic means); *see also generally* Allan A. Toubman et al., *Due Process Implications of Telephone Hearings: The Case for an Individualized Approach to Scheduling Telephone Hearings*, 29 U. MICH. J.L. REFORM 407 (1996) (discussing the challenges of conducting a hearing by telephone lines).

54. *See* Mathews v. Eldridge, 424 U.S. 319, 343-47 (1976) (holding that a recipient of social security disability benefits was not entitled to a pretermination hearing, and noting that where "issues of witness credibility and veracity often are critical to the decision-making process . . . 'written submissions are a wholly unsatisfactory basis for decision'"); *see also* Califano v. Yamasaki, 442 U.S. 682, 696-97 (1979) (stating that when the Social Security Administration must balance a claimant's intelligence, physical and mental condition, and good faith, the Court could "not see how these can be evaluated absent personal contact between the recipient and the person who decides his case"); Martin v. Helstad, 699 F.2d 387, 391 (7th Cir. 1983) ("[D]eprivations of a property interest without opportunity for an oral personal exchange are generally disfavored . . . [a]nd where credibility is in issue, an oral hearing is required."); S. Buchsbaum & Co. v. FTC, 153 F.2d 85, 88 (7th Cir. 1946) (finding that due process requires a demeanor observation). In cases involving school or prison discipline, or juvenile commitment to a mental hospital, truncated procedures satisfy the due process requirement of a hearing. *See* Hewitt v. Helms, 459 U.S. 460, 476 (1983); Parham v. J.R., 442 U.S. 584, 607 (1979); Goss v. Lopez, 419 U.S. 565, 583 (1975).

55. Credibility and demeanor determinations are central to most disability determinations. *See* Fox, *supra* note 50, at 469-70 (discussing the role of credibility evidence in a fact-finder's determination of disability). In welfare cases and some other administrative cases credibility is not as important and federal court decisions have been mixed. *Compare* Gray Panthers v. Schweiker, 716 F.2d 23, 37-38 (D.C. Cir. 1983) (ordering the district court to examine the class of medicare claims under $100 to determine if credibility was involved and suggesting that in the minority of cases where credibility was determinative, telephone hearings may violate due process rights), *with* Casey v. O'Bannon, 536 F. Supp. 350, 353-54 (E.D. Pa. 1982) (holding that a hearing officer's visual analysis is not a constitutional requirement and reasoning that the hearing officer "can effectively judge credibility over the phone by noting voice responses, pauses, [and] levels of irritation"); *see also* Bigby v. INS, 21 F.3d 1059, 1064 (11th Cir. 1994) (holding that "when credibility determinations are not in issue, an [administrative law] judge may hold a hearing by telephonic means").

56. 201 F.2d 484 (2d Cir. 1952).

57. *Id.* at 488.

impressions made upon the judge by the witnesses, their way of answering questions, their reactions and behavior in Court . . . [such as,] that the witness stammered, hesitated in replying to a specific question, or showed fear during the interrogation."[58]

It is believed that the first English criminal jury trial took place in 1220 at Westminster.[59] Prior to 1215, criminal trials were by ordeal, but in that year, Pope Innocent III and the Fourth Lateran Council forbade priests to officiate at ordeals and the criminal justice system moved to jury trials.[60] King Henry III ordered the substitution of judgment by neighbors for the ordeal in 1219, and by the end of the thirteenth century the older methods of trial were largely superseded.[61] The English criminal courts were reluctant to decide upon sworn testimony, at first allowing only the prosecutor to call sworn witnesses. Until about 1550, the defendant could only speak unsworn; he could not call witnesses. It was not until approximately 1700 that the defendant could call sworn witnesses, and not until the mid-nineteenth century that the defendant could give sworn testimony.[62]

The Anglo-American legal system, evolving out of the common law, generally requires live testimony by the witness to allow the fact-finder to observe the demeanor and to assess the witness's credibility. In England, although the chancery courts rarely conducted in-court witness examinations, the common law courts used open, in-court testimony.[63]

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58. *Id.*

59. *See* Fisher, *supra* note 40, at 585 (noting that prior to 1220 juries sat in civil disputes, but had yet to be employed in criminal cases).

60. *See id.* at 585-86 (discussing the pre-1215 practice of trial by ordeal); Stephan Landsman, *The History and Objectives of the Civil Jury System*, *in* VERDICT ASSESSING THE CIVIL JURY SYSTEM 22, 26 (Robert E. Litan ed., 1993) (describing the decisions of the Church in 1215). The end of trial by ordeal was imminent:

> English and other European justice systems soon abandoned the ordeal in criminal cases. Though the Church took no action against trial by battle, that form of trial lacked the popular support needed to fill the role of the lost ordeals; too often, combat between accuser and accused ended badly for a worthy but weak litigant. Moreover, it was not always obvious who should do battle for the prosecution. Criminal justice systems throughout Europe, therefore, suddenly sought a new form of trial.

Fisher, *supra* note 40, at 586 (footnotes omitted).

61. *See generally* Fisher, *supra* note 40, at 585-87.

62. *See id.* at 579-80 (exploring the history of the criminal trial jury).

63. *See* Colby v. Klune, 178 F.2d 872, 873 n.2 (2d Cir. 1949) (discussing the different practices of oral trial testimony in the early Anglo-American equity courts and common-law courts). Early Roman law used oral testimony before a private individual who had the duty of settling disputes of fact. *See* Fox, *supra* note 50, at 450. Most continental canon and lay courts chose not to use open, in-court testimony, and instead relied upon written testimony given by a witness out the trier of fact's sight. *See id.* The common law's pref-

Proponents of open, in-court testimony argued that it was more probative of finding the truth than the secret examination taken in writing.[64] The backers correctly noted that with in-court testimony, "the persons who are to decide upon the evidence have an opportunity of observing the . . . witness."[65] In 1875, the chancery court ended this divergence in principle from its common law brethren by adopting open, in-court testimony.[66]

Early American jurisprudence followed the English chancery, as prior to 1912 witness testimony came in the form of written deposition in equity litigation.[67] The Equity Rules of 1912 changed this position by shifting to the common law practice method of oral testimony. Rule 43 of the Federal Rules of Civil Procedure now articulates the general rule that "[i]n every trial the testimony of witnesses shall be taken in open court."[68]

A live witness, facing a possible attack on his credibility, serves two significant purposes. First, the trier of fact can observe the witness's demeanor, and second, he can inspire the witness to testify truthfully to "'ensur[e] the integrity of the factfinding process.'"[69] Live testimony should be replaced only with great care.

B. Importance of Demeanor Evidence

The scope of conduct that encompasses demeanor is quite broad. A witness's demeanor includes:

> [T]he tone of voice in which a witness's statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidence 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

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erence for in-court testimony ruled the day as it was not until 1831 that Parliament changed the law to permit unavailable witnesses to give their testimony by written deposition. *See id.* at 451.

64. *See* Fox, *supra* note 50, at 451.

65. *Id.*

66. *See id.*

67. *See* NLRB v. Dinion Coil Co., 201 F.2d 484, 488 (2d Cir. 1952) (stating that "[i]n federal courts, except for a short period from 1789 to 1802, oral testimony in open court was not required in equity litigation; indeed, for many years it was virtually banned").

68. FED. R. CIV. P. 43(a); *see also supra* notes 46-47 and accompanying text (discussing the purposes behind Rule 43(a)).

69. Coy v. Iowa, 487 U.S. 1012, 1019-20 (1988) (quoting Kentucky v. Stincer, 482 U.S. 730, 736 (1987)).

of candor or seeming levity.[70]

It is possible that the witness's demeanor is the determinative factor in appraising trustworthiness and, therefore, can never be ignored.[71] Witnesses' demeanor has long been regarded as a primary "method of ascertaining the truth and accuracy of their narratives."[72]

There is judicial precedent holding that the importance of demeanor evidence alone could be enough to decide a particular issue, or even a case.[73] Judge Learned Hand articulated the importance of demeanor evidence:

> The words used are by no means all that we rely on in making up our minds about the truth of a question . . . a jury . . . may, and indeed they should, take into consideration the whole nexus of sense impressions which they get from a witness. . . . [S]uch evidence may satisfy the tribunal, not only that the witness's testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.[74]

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70. BLACK'S LAW DICTIONARY 430 (6th ed. 1990). The witness's "manner, his intonations, his grimaces, [and] his gestures" are often critical indicators of truthfulness. Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949) (articulating that while demeanor is no fool-proof means to determine the truthfulness of testimony, "it is one of the best guides available"); JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 21 (2d ed. 1950) (discussing the use of demeanor to determine the reliability of the testimony).

71. *See* Government of the Virgin Islands v. Aquino, 378 F.2d 540, 548 (3d Cir. 1967) (discussing the importance of demeanor in assessing the witness's credibility).

72. Arnstein v. Porter, 154 F.2d 464, 470 (2d Cir. 1946) (opining on the importance of live testimony as an avenue for the fact-finder to observe the witness's demeanor to judge credibility). In *Arnstein*, the plaintiff, a composer, sued Cole Porter for copyright infringement by several musical compositions and the trial court issued summary judgment on depositions. *Id.* at 469. The circuit court reversed and remanded, reasoning that the plaintiff's credibility was an issue and, therefore, a matter for the jury. *See id.* The court correctly observed that the jury, despite the plaintiff's "fantastic" story, must have an opportunity to observe the witnesses' demeanor to ascertain truthfulness. *Id.*

73. *See Broadcast Music*, 175 F.2d at 80; Stanley v. Review Bd. of the Dep't of Empl. and Training Servs., 528 N.E.2d 811, 813, 815 (Ind. Ct. App. 1988) ("[I]t is vital to our holding that we find the *sole* determinative factor in the present cause to be that of demeanor credibility."). In *Broadcast Music*, the court "held that, solely on the basis of a trial judge's disbelief in the oral testimony of a plaintiff's witness—a disbelief resulting entirely from the witness's demeanor—the judge may decide for the defendant." Dyer v. MacDougall, 201 F.2d 265, 270 n.3 (2d Cir. 1952) (Frank, J., concurring) (discussing the holding in *Broadcast Music*).

74. *Dyer*, 201 F.2d at 269. This case is frequently cited for this quote by Judge Hand, which is dicta, and for Judge Frank's concurring opinion:

There is, however, substantial opposition to Judge Hand's view.[75] Some argue that determining the credibility of a witness's testimony solely on the basis of demeanor evidence is, at best, unreliable.[76]

Demeanor will never be an infallible method of determining the veracity of a witness. It is inevitable that at times liars will convince juries and judges of their truthfulness, while honest witnesses nervously fail to convince.[77] Irrespective of its potential pitfalls when analyzed with other factors, such as consistency and corroboration, demeanor evidence is still one of the best guides to judging a witness's credibility.[78] Demeanor evidence requires fact-finders to use their "natural and acquired shrewdness" and experience to assess demeanor and credibility.[79]

> I agree with Judge Hand that (at least in some cases) a trial judge should be allowed to find that a plaintiff has discharged his burden of proof when the judge disbelieves oral testimony all of which is adverse to plaintiff, solely because of the trial court's reaction to the witnesses' demeanor and there is no evidence for plaintiff except that "demeanor evidence."

Id. at 270 (Frank, J., concurring) (footnotes omitted).

75. *See* Wellborn, *supra* note 9, at 1100.

> Two related doctrinal controversies concern credibility of testimony: first, whether the trier may reject the uncontradicted, unimpeached testimony of a disinterested witness, and second, whether the trier may find a fact on the basis of disbelief of testimony denying the fact. The prevalent law on these issues reflects a degree of judicial skepticism concerning the power of demeanor to reveal truth and falsehood to jurors. All courts have refused to permit findings based solely on disbelief of testimony to the contrary . . . . A few courts have permitted juries to disbelieve uncontradicted, unimpeached, disinterested testimony, but the great majority do not.

Id. (footnotes omitted).

76. *See* Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1084-85 (9th Cir. 1977) (Duniway, J., concurring in part and dissenting in part). In *Penasquitos Village*, Judge Duniway pointed out those situations in which the consideration of demeanor evidence by the trier of fact results in an incorrect conclusion of the witness's truthfulness. *Id.* (Duniway, J., concurring in part and dissenting in part). Judge Duniway does acknowledge, however, that analyzing the witness's demeanor is an indispensable factor in determining credibility. *See id.* (Duniway, J., concurring in part and dissenting in part). ("The law would not permit me to so hold if I wished to, and I do not wish it to.").

77. *See id.* at 1084-85. (Duniway, J., concurring in part and dissenting in part). The accomplished liar cited by Judge Duniway in *Penasquitos Villiage* could mask the clues of deception, just as with the polygraph test, by becoming convinced of his story, thereby seemingly testifying with sincerity. *Id.* (Duniway, J., concurring in part and dissenting in part); *see also* PAUL EKMAN, TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS, AND MARRIAGE 51 (2d ed. 1992) [hereinafter EKMAN, TELLING LIES] (acknowledging that the polygraph test "does not detect lies, just signs of emotion").

78. *See* NLRB v. Dinion Coil Co., 201 F.2d 484, 488 (2d Cir. 1952) (suggesting that despite the immense discretion conferred on the trial judge or hearing examiner to make demeanor-based credibility determinations, "few would doubt that the risk involved is, on the whole, well worthwhile"); *supra* note 70 and accompanying text.

79. *Dinion Coil*, 201 F.2d at 489.

C. Ineffable Demeanor

Demeanor evidence is one of those "elusive and incommunicable" imponderables[80] that is hard to isolate and to quantify scientifically, but nonetheless forms a foundation for our legal system. As stated above, to determine the witness's credibility, the fact-finder must observe the witness's posture, whether the witness acts nervous, avoids eye contact, demonstrates pain, sheds tears, fluctuates the tone of his speech, as well as an assortment of other nonverbal communications.[81]

Despite the long history of demeanor evidence and the requirement that the fact-finder specify exact factors of demeanor relied upon in reaching a determination of witness credibility,[82] traditionally the common law accepted generally the fact-finder's determinations of witness credibility based on demeanor.[83] Judge Frank, a supporter of the use of demeanor to determine credibility, assumed that unless the fact-finder described irrationally the witness's conduct, the fact-finder's assessment of demeanor credibility was unassailable on appeal.[84] In addition, Judge Hand believed that a true assessment of the witness's demeanor should not be limited to words and phrases but should include "consideration [of] the whole nexus of sense impressions"[85] from the witness's observations.[86] Judge Frank and the prevailing tradition of the common law seem to hold that the credibility conclusion based on witness demeanor

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80. Henry S. Sahm, *Demeanor Evidence; Elusive and Intangible Imponderables*, 47 A.B.A. J. 580, 580 (1961) (noting that the fact-finder faces a difficult task in correctly assessing a witness's credibility on the basis of demeanor evidence due to the relatively short time to observe the witness on the stand). Often, the trial judge does more harm than good in instructing the jury on demeanor evidence. For instance, in *Quercia v. United States*, 289 U.S. 466 (1933), the Supreme Court reversed a criminal conviction because the judge, in instructing the jury, stated that the defendant "wiped" his hands during testimony and "that is almost always an indication of lying." *Quercia*, 289 U.S. at 468.

81. *See Penasquitos Village*, 565 F.2d at 1078-79; *see also* 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1395 (James H. Chadbourne ed., 1974) (citing authorities).

82. *See supra* Part II.A-B. (discussing the history of live testimony and the role of demeanor evidence).

83. *See Penasquitos Village,* 565 F.2d at 1078-79 (reasoning that the fact-finder has the opportunity to observe the live witness).

84. *See Dinion Coil*, 201 F.2d at 488-89; Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949). Judge Frank felt, however, that "methods of evaluating the credibility of oral testimony do not lend themselves to formulations in terms of rules and are thus, inescapably, 'un-ruly.'" *Dinion Coil*, 201 F.2d at 488-89.

85. Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952).

86. *See* Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985) ("[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."); *cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 495-97 (1951).

is ineffable, leaving to the triers of fact the responsibility for determining demeanor credibility based upon their "own nature and acquired sagacity."[87]

D. Deference Accorded Findings Based on Credibility of Witness

Federal courts apply the clearly erroneous standard of review to testimonial evidence where the trial court observes and evaluates the witness's credibility firsthand.[88] In articulating the standard of review, the Supreme Court stated that:

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.[89]

Consequently, the trier of fact may disregard the witness's testimony as untruthful, and those findings must be given great deference. The appellate court applies the clear error rule improperly when it weighs evidence *de novo* where the trial court's finding is based on demeanor and credibility.[90]

A trial judge's credibility determinations, based on an evaluation of credibility of conflicting witnesses, can virtually never be clear error. Clear error is usually found only where the "judge believes physically impossible things, or disbelieves testimony supported by unrefuted documents."[91] It must be noted, however, that the trial judge cannot insulate his findings from review by labeling the findings "credibility de-

87. *Dinion Coil*, 201 F.2d at 489. Conclusory opinions of lay persons are regularly admitted as evidence. *See* Cardwell v. Chesapeake & Ohio Ry., 504 F.2d 444, 447-48 (6th Cir. 1974) (admitting a wife's testimony that her husband suffered "anxiety, depression [and] resentment"); United States v. Gallagher, 437 F.2d 1191, 1195 (7th Cir. 1971) (holding that a lay person may testify as to whether another person was intoxicated); Chicago & N.W. Ry. v. Green, 164 F.2d 55, 63 (8th Cir. 1947) ("It is competent for any witness to testify from observation that a person appeared to be in pain.").

88. *See* Vermont Microsystems, Inc. v. Autodesk, Inc., 88 F.3d 142, 151 (2d Cir. 1996); Hiram Walker & Sons, Inc. v. Kirk Line, 30 F.3d 1370, 1376 (11th Cir. 1994) (discussing the standard of review of the fact-finder's credibility determination); Metzen v. United States, 19 F.3d 795, 798 (2d Cir. 1994) ("[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.").

89. *Bessemer City*, 470 U.S. at 575.

90. *See* Reynolds v. United States, 98 U.S. 145, 156-57 (1878) ("The manner of the [witness] while testifying is oftentimes more indicative of the real character of his opinion than his words . . . [c]are should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.").

91. Reed-Union Corp. v. Turtle Wax, Inc., 77 F.3d 909, 911 (7th Cir. 1996).

terminations."[92] The witness's demeanor is just one factor used to decide a witness's credibility. It may turn out that documents or some other form of objective evidence contradict the witness's story. In addition, the witness's story itself may be so internally inconsistent or implausible on its face as to render the reasonable fact-finder to dismiss it as untruthful. Where factors other than demeanor are present, the reviewing court may find clear error, even if the finding was purportedly based on a credibility determination.[93]

E. Demeanor Findings in Administrative Agencies

Administrative Law Judges (ALJs),[94] like other trial judges in bench trials, find facts and decide witnesses' credibility.[95] The ALJ either recommends or makes an initial decision; however, at most agencies reviewing on appeal, the agency "has all the powers which it would have in making the initial decision."[96] In fact, the agency can determine facts even where those findings are based on the witness's demeanor. An administrative agency may not, however, ignore findings by the ALJ based

92. In addition, of course, these findings should not be irrational. For instance, in *People v. Patubo*, 71 P.2d 270 (Cal. 1937), the California Supreme Court reversed a murder conviction when the trial judge told the jury that the testifying defendant had the "hangdog look of a guilty man." *Patubo*, 71 P.2d at 272; *see also, e.g.*, Hadley Mfg. Corp., 108 N.L.R.B. 1641, 1644 & n.3 (1954) (rejecting the trial examiner's credibility finding involving a "youthful, buxom and attractive" witness).

93. *See Hadley*, 108 N.L.R.B. at 1643-44.

94. The title of Administrative Law Judge was conferred upon triers of fact of administrative proceedings in 1972. The position was formerly known as "hearing examiner" or "trial examiner." A United States Civil Service Commission regulation changed the title to Administrative Law Judge on August 19, 1972. *See* Programs for Specific Positions and Examinations, 37 Fed. Reg. 16,787 (1972). The title was statutorily enacted on March 27, 1978. *See* 5 U.S.C. § 3105 (1994).

95. For a discussion on the judicial status of the federal ALJ, see James P. Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 W. NEW ENG. L. REV. 807, 810-15 (1983). In addition to federal ALJs, as of 1992, 438 officers with law degrees known as "administrative judges" preside at 11 federal agencies, including Boards of Contract Appeals, Equal Employment Opportunity Commission, Immigration and Naturalization Service, Merit System Protection Board and Department of Veterans Affairs. *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 274, 349 (1992). There are more than 2000 other presiding officers, almost all of whom are not lawyers and have duties in addition to their adjudicatory responsibilities. *See id.* at 350. Although the "administrative judges" are not selected under the rigorous selection process used for ALJs and do not have the ALJs' statutory protections against interference with their independent and impartial decision-making, they generally perform the same judicial tasks. *See* James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L.J. AM. U. 629, 633-36 (1993).

96. 5 U.S.C. § 557(b) (1994).

on credibility.

Deference is given to the ALJ's observation of the witness's demeanor[97] and, although generally the agency has fact-finding power on review of the judge's decision, the judge's findings of fact must at least be considered.[98] At some federal agencies, the judge's findings are final and conclusive if supported by substantial evidence,[99] unless clearly erroneous.[100] Thus, even if the agency reviews and reconsiders a judge's conclusions of law, the factual basis for such analysis may be conclusively determined by the ALJ.

F. Standard for Review by Courts of Administrative Law Judge's Credibility Findings

In federal appeals of an administrative agency opinion, the ALJ's credibility determinations, adopted by the agency, are reviewed under a variety of standards. Appellate courts have used a test of "heightened scrutiny"[101] and have upheld the agency's (and, thus the ALJ's) findings unless they are "patently without basis in the record."[102] Courts reverse

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97. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951); Eastern Eng'g & Elevator Co. v. NLRB, 637 F.2d 191, 197 (3d Cir. 1980).

98. *See* 5 U.S.C. § 557(c).

99. *See* Chacon v. Phelps Dodge Corp., 709 F.2d 86, 90-92 (D.C. Cir. 1983) (holding that "the only 'question' relating to the factual findings of an ALJ that the Commission can consider is whether those finding are supported by substantial evidence").

100. *See* 19 C.F.R. § 210.44 (1999) (discussing the standard of review for a reviewing International Trade Commission (citing to 19 C.F.R. § 210.43(b)(1)(i))). Findings of fact in the federal district courts are reviewed under the clearly erroneous standard. *See* FED. R. CIV. P. 52(a). The substantial evidence rule places a higher limitation on judicial review of findings of administrative agencies. *See* United States v. United States Gypsum Co., 333 U.S. 364, 395-96 (1948). Therefore, an ALJ's findings, which are subject to the substantial evidence rule, if not reversed by the agency, may carry more weight than those of federal district court judges. *See id.*

101. In *Aylett v. HUD*, 54 F.3d 1560 (10th Cir. 1995), the court held that the Housing and Urban Development Secretary's rejection of the credibility findings of the ALJ who dismissed all charges that respondents had discriminated against a woman who wanted to rent their apartment did not pass the "heightened scrutiny" test. *Aylett*, 54 F.3d at 1560, 1562. The Tenth Circuit reasoned that:

> [W]here the Secretary, acting through the Appeals Council, overturns a decision of the ALJ granting benefits, and, in so doing, differs with the ALJ's assessment of witness credibility, the Secretary should fully articulate his reasons for so doing, and then, with heightened scrutiny, we must decide whether such reasons find support in the record.

Id. at 1566 (noting that the basis for heightened scrutiny is the ALJ's opportunity to hear and observe the witness's live testimony, which places the ALJ in the best position to assess the witness's demeanor and its impact on the credibility determination).

102. Southwest Merchandising Corp. v. NLRB, 53 F.3d 1334, 1341 (D.C. Cir. 1995) (citing Caterair Int'l v. NLRB, 22 F.3d 1114, 1120 (D.C. Cir. 1994)).

an Administrative Law Judge's credibility determinations only in "rare circumstances,"[103] where the ALJ "overstepped the bounds of reason,"[104] and those findings are "hopelessly incredible,"[105] "inherently incredible," "patently unreasonable,"[106] or "patently wrong."[107] The ALJ's findings of credibility are reviewed with great deference,[108] as it is not the appellate courts' "function to review [an] ALJ's credibility determinations."[109]

G. Specificity of Demeanor Findings

In federal administrative adjudication under the Administrative Procedure Act, it is usually the administrative agency, and not the ALJ[110] or other presiding official, that has the ultimate fact finding responsibility.[111] The agency, therefore, may be reluctant to present this power to the trial

103. NLRB v. McCullough Envtl. Servs., Inc., 5 F.3d 923, 928 (5th Cir. 1993).

104. NLRB v. Horizons Hotel Corp., 49 F.3d 795, 799 (1st Cir. 1995) (affording great weight to the ALJ's credibility determinations because of his opportunity to observe the witness's testimony and holding that the ALJ's credibility determinations may not be discarded unless it is evident the ALJ jumped the fence of reason).

105. Pergament United Sales, Inc. v. NLRB, 920 F.2d 130, 138 (2d Cir. 1990) (discussing the weight of an agency's acceptance of an ALJ's credibility finding).

106. Bobo v. United States Dep't of Agric., 52 F.3d 1406, 1416 (6th Cir. 1995) (stating that the Court of Appeals "generally will not disturb and gives deference to the credibility assessments of an ALJ who had the opportunity to observe the demeanor of the witnesses"); Retlaw Broad. Co. v. NLRB, 53 F.3d 1002, 1006 (9th Cir. 1995).

107. Herr v. Sullivan, 912 F.2d 178, 182 (7th Cir. 1990) ("An ALJ's credibility determinations will be affirmed on appeal unless the appellant can demonstrate that they are 'patently wrong.'").

108. *See* Indosuez Carr Futures, Inc. v. CFTC, 27 F.3d 1260, 1266 (7th Cir. 1994) (noting the heightened deference afforded to the ALJ's credibility determinations compared to the already "substantial deference" given to an ALJ's general fact findings); Henry v. Department of Navy, 902 F.2d 949, 953 (Fed. Cir. 1990) (stating that an ALJ's credibility findings are "virtually unreviewable"); *see also* 5 U.S.C.A. § 7703(c) (1996) (discussing the limited circumstances where a court of appeals may set aside agency determinations upon review).

109. Owens v. NTSB, 734 F.2d 396, 398 (8th Cir. 1984).

110. Federal ALJs are "functionally comparable" to trial judges within the judicial branch. Butz v. Economou, 438 U.S. 478, 513 (1978). The Administrative Procedure Act guarantees ALJs independence. *See id.* at 514; *see also generally*, Frye, *supra* note 95, at 263-65; Timony, *supra* note 95, at 631-33, 635 n.29.

111. *See* 5 U.S.C. § 557(b) (1994); *see also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 495 (1951) (articulating the Supreme Court's belief that although the administrative agency had all the powers that it would have in making the initial decision, its decision should "be influenced by the [ALJ's] opportunity to observe the witnesses he hears and sees and the Board does not"). Statutes give significance to the examiners' findings that could be of consequence, for example, to the extent that material facts in any case depend upon the determination, of the witnesses' credibility, by an "impartial, experienced examiner who has observed the witnesses and lived with the case," as shown by the witnesses' demeanor or conduct at the hearing. *Id.* at 496.

judge and may require trial judges who make demeanor findings to specify the impressions derived from observing the witnesses testify.[112] In reversing a trial judge's demeanor credibility findings, the agency may revert to England's nineteenth century equity court practice that did not follow the common law cases recorded by Blackstone, which held that persons who decide evidence should have the opportunity to observe the witness.[113] By denying the person presiding at trial the right to have credibility findings, the agency may, in turn, deny due process to the litigating parties.[114]

Literal compliance with the specification of impressions received from the observation of a witness's testimony is a complex task.[115] There are many indicia of a speaker's emotions.[116] To provide a record that may rationally be reviewed on appeal, a more general description of the observed behavior by the fact-finder would assist the reviewing authority.[117]

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112. In 1960, the NLRB required hearing examiners to:

> [S]pell out in detail, the indicia upon which they believe one witness as against another. In both those cases the Board reversed the examiners' credibility resolutions because they did not rest their evaluation of the witnesses' credibility on "demeanor." Both examiners merely prefaced their conclusions by stating that they based their credibility findings on their "observation of the witnesses." Evidently, this is not sufficient. It would appear that in evaluating a witness' testimony in terms of demeanor evidence, the Board will require examiners to delineate specifically the impressions derived from observing the witness testify.

Sahm, *supra* note 80, at 582; *see also* Special Counsel v. Eubanks, 76 M.S.P.B. 405, 416 (1997) (discussing the identical requirement of the Merit Systems Protection Board).

113. These cases held that a witness's "demeanor" includes the witness's "quality, age, education, understanding, behavior, and inclinations." 2 WILLIAM BLACKSTONE, COMMENTARIES 373 (2d ed. 1876). Psychological research shows that the jurors of the late twentieth century instinctively based a portion of their credibility decisions on the witness's "social status, style of speech, clothing, or occupation." J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741, 749 (1988).

114. *See* United States v. Raddatz, 447 U.S. 667, 684-85 (1980) (Blackmun, J., concurring) (stating that a district judge's reversal of a magistrate's credibility determinations would upset accurate decisionmaking); *see also generally* Califano v. Yamasaki, 442 U.S. 682, 696-97 (1979) (supporting the argument that due process requires that witness credibility findings must be made by the person presiding at the trial).

115. The Merit System Protection Board requires the trial judge to "summarize all the evidence on each disputed question of fact sufficient to disclose the evidentiary basis for the presiding official's finding of fact." *Eubanks*, 76 M.S.P.B. at 413.

116. One expert, Dr. Paul Ekman, has identified 60 body movements and 46 facial muscle movements as emblems of the speaker's emotions. *See* EKMAN, TELLING LIES, *supra* note 77, at 98.

117. *See* MORELL E. MULLINS, MANUAL FOR ADMINISTRATIVE LAW JUDGES 111-12 (3d ed. 1993). Professor Mullins suggested the following standard:

> Where credibility is in issue the reviewing authority may look to the judge's demeanor findings on the theory that the judge observed the witness and therefore

H. "Sit and Squirm" Demeanor

The reviewing court may find that the ALJ's use of demeanor evidence to determine witness credibility is not warranted. For instance, at Social Security Administration disability hearings where the claimant alleges disabling pain, the ALJ may determine that the claimant's demeanor demonstrates evidence on that issue. The ALJ's demeanor observations at the hearing cannot cause him to ignore subjective testimony of the claimant's pain. The ALJ may not reject a claimant's assertion of pain where uncontroverted evidence corroborates the claim as genuine.[118]

In *Wilson v. Heckler*,[119] the ALJ observed the claimant at the hearing and saw no physical signs of severe pain. Although the claimant used a cane and stood at times during the hearing, the ALJ determined that the witness answered the questions alertly, that his thoughts did not wander, and that he manifested no clinical symptoms of constant and severe pain. The court reversed the ALJ's denial of disability benefits on this basis and condemned the procedure as "sit and squirm jurisprudence."[120]

> was in the best position to evaluate the witness' credibility. Consequently, the judge should exercise extreme care in such findings, and avoid conclusory statements such as "from the witness' demeanor it is concluded that the testimony cannot be believed." Instead, credibility findings should be supported by specific conduct or observations. For instance, a witness may be talkative and comfortable in response to all questions, except those addressing the issue on which credibility is doubtful, but whenever the questioning turns to that issue, the witness becomes evasive and starts looking away from the judge and toward counsel, as if for signals. At any rate, to the extent possible, findings grounded on witness demeanor should have some reference point in observed behavior, such as evasiveness, hesitancy, or discomfort under questioning.

Id.

118. *See* Harris v. Heckler, 756 F.2d 431, 436 (6th Cir. 1985); Benson v. Schweiker, 652 F.2d 406, 409 (5th Cir. 1981); Hon. Thomas P. Smith & Patrick M. Fahey, *Some Points on Litigating Title II and Title XVI Social Security Disability Claims in United States District Court*, 14 QUINNIPIAC L. REV. 243, 268 (1994).

119. 734 F.2d 513 (11th Cir. 1984).

120. *Id.* at 517; *see also* Lovelace v. Bowen, 813 F.2d 55, 59-60 (5th Cir. 1987); Reinhart v. HHS, 733 F.2d 571, 573 (8th Cir. 1984); Aubeuf v. Schweiker, 649 F.2d 107, 113 (2d Cir. 1981). One court found that the absence of pain during the disability hearing is not the issue. *See Lovelace*, 813 F.2d at 59-60 (reversing the ALJ's denial of disability benefits on the grounds that obesity, like alcoholism, can be disabling, albeit remediable, and that demeanor alone was not sufficient to overcome subjective evidence of pain). The court in *Lovelace* stated that:

> Even if a person's demeanor can be taken to reflect his degree of pain when that pain is chronic, the issue is not how much pain Lovelace suffers when he is at rest. The relevant question is how much pain he experiences when trying to work. Lovelace's demeanor at the hearing sheds little, if any, light on that question.

Id. at 60 (footnote omitted). However, if the claimant's pain must be measured only in

Courts deprecating the "sit and squirm" method of detecting pain argue that an ALJ, who is not a medical expert, is subjectively using an index of traits. The fear is that in using this approach the ALJ formulates unreliable conclusions.[121] In addition, using this index may discourage claimants from facing an ALJ "for fear that they may not appear to the unexpert eye to be as bad as they feel."[122]

Even in circuit courts denouncing "sit and squirm" findings, however, the ALJ's evaluation of the witness's credibility is entitled to judicial deference, and if demeanor is one of several factors analyzed in coming to a credibility finding, the finding will be upheld.[123] Distinctions made by the ALJ between the evidentiary value of "sit and squirm" demeanor evidence and such evidence in other courts should not overcome the need for such decisions to be made by the fact-finder who presides at the taking of the testimony.

I. Terms of Credibility and Demeanor

Fact-finders often specify the details of their impressions derived from observing the witness testify, thereby following Professor Morell Mullins's suggestion that findings based on the witness's demeanor have some reference point in observed behavior, such as evasiveness, hesitancy, or discomfort while testifying.[124] Foregoing the entertaining but ambiguous descriptions such as twitching, stuttering, sweating, or blinking, the fact-finder may use instead terms and phrases such as "recalcitrance and obvious reluctance" to answer questions, "sudden lapse[s] of memory," "seemingly defiant demeanor," or "hesitant and noncommittal."[125] In the alternative, the trier of fact may uphold the witness's ve-

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the workplace, medical reports of physicians' examinations in their offices, rather than at the claimant's workplace, would seem to suffer the same deficiency.

121. *See* Tyler v. Weinberger, 409 F. Supp. 776, 789 (E.D. Va. 1976) (holding that the "sit and squirm" standard upon which the ALJ based his credibility determination was legally impermissible).

122. *Id.* at 798.

123. Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999) (holding that the ALJ's credibility finding, which was based on the claimant's demeanor and medical evidence, was proper); Shrewsbury v. Chater, No. 94-2235, 1995 U.S. App. LEXIS 27968, at *10 n.7 (4th Cir. Oct. 6, 1995) (per curiam) ("[I]t is not reversible error for an ALJ to consider a claimant's demeanor when he has already determined that the claimant's alleged level of pain is inconsistent with the objective medical evidence."); Villa v. Sullivan, 895 F.2d 1019, 1024 (5th Cir. 1990) (determining that demeanor was just one factor in the ALJ's credibility finding).

124. *See supra* note 117 and accompanying text.

125. *E.g.*, Getahun v. INS, No. 98-2223, 1999 U.S. App. LEXIS 10860, at *3-*4 (4th Cir. May 26, 1999) (per curiam) (discussing the ALJ's finding of a lack of credibility based on an observation of the witness's "seemingly defiant demeanor," in which the ALJ de-

racity with positive demeanor findings such as honesty and forthrightness, frankness and sincerity, or straightforwardness.[126]

In determining a witness's credibility, trial judges sometimes cite demeanor as the lone factor[127] or cite both demeanor and some other credibility factor, such as plausibility, character, inconsistencies, incomplete and unsound explanation, or collaborating evidence.[128] Credibility find-

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termined that the witness was not "forthright, her testimony was constricted and limited to the bare minimum in her responses, and her testimony was vague and evasive"); Underwriters Labs. Inc. v. NLRB, 147 F.3d 1048, 1053 (9th Cir. 1998) (stating that the ALJ found that, based on their demeanor and the shifting nature of their testimony, two witnesses were not "particularly reliable" because they were "hesitant and noncommittal"); Esquivel-Acevedo v. INS, No. 95-70093, 1996 U.S. App. LEXIS 8569, at *5-*6 (9th Cir. Apr. 1, 1996) (mem.) (upholding the ALJ's finding that the witness's "demeanor did not correspond with that of a credible witness because he failed to respond directly to proffered questions"); *In re* Bongiorno, 694 F.2d 917, 921-22 (2d Cir. 1982) (upholding a contempt ruling based on a witness's demeanor, his "inherently incredible" answers, his "recalcitrance and obvious reluctance to answer" questions implicating others, and his sudden loss of memory and inability to recognize even himself in photographs).

126. *See, e.g.*, *Underwriters Labs.*, 147 F.3d at 1048, 1053 (discussing the ALJ's finding of credibility due to the witness's forthrightness); Aylett v. HUD, 54 F.3d 1560, 1568 (10th Cir. 1995) (upholding the ALJ's findings that a particular witness was credible because of the ALJ's observation of the witness's demeanor, which led the ALJ to conclude that the witness was "very frank and sincere [and] . . . very convincing"); Shelton v. Babbitt, 921 F. Supp. 787, 790 n.8 (D.C. Cir. 1994) (articulating the court's finding that the witness was "a calm individual with an appropriate witness demeanor, whose testimony was credible"); United States v. $19,047.00 in United States Currency, No. 92 Civ 8052, 1994 U.S. Dist. LEXIS 17126, at *30 (S.D.N.Y. Nov. 30, 1994), *aff'd*, 95 F.3d 248 (2d Cir. 1996) (finding the witness credible in light of the fact that "[h]er demeanor on the stand was straightforward and her answers to questions were prompt and reasonable"); New York Life Ins. Co. v. Wittman, 813 F. Supp. 1287, 1304 n.12 (N.D. Ohio 1993) (noting that the witness was "straightforward and credible" and did not give "oblique answers").

127. *See, e.g.*, United States v. Adames, 56 F.3d 737, 742 (7th Cir. 1995) ("The district court heard [the witness's] testimony, observed his demeanor and determined that he was a credible witness."); United States v. Costillo, 866 F.2d 1071, 1078 (9th Cir. 1989) (upholding a trial court's finding that, after observing his demeanor, the witness was credible); NLRB v. Boyer Bros., Inc., 448 F.2d 555, 561 (3d Cir. 1971) (mentioning that the trial examiner rejected part of witness's testimony concerning unfair labor practices because of her "poor" demeanor); Jenkins v. Beto, 442 F.2d 655, 656 (5th Cir. 1971) ("The district court who heard the witnesses and observed their demeanor found that the appellant was not a credible witness.").

128. *See, e.g.*, NLRB v. AMFM of Summers County, Inc., Nos. 95-1323 and 95-1812, 1996 U.S. App. LEXIS 14894, at *11 (4th Cir. June 20, 1996) (per curiam) (upholding the ALJ's finding that the witness was credible, "based on her demeanor and collaborating evidence"); Plumbers & Pipefitters Local 507 v. Robert Carlson Plumbing, Inc., Nos. 93-1179 and 93-1484, 1994 U.S. App. LEXIS 624, at *6 (7th Cir. Jan. 14, 1994) (discussing the judge's finding that the witness was not credible, which was based on the witness's demeanor and his prior inconsistent statements); United States v. McNeal, 955 F.2d 1067, 1071 (6th Cir. 1992) (noting that due to inconsistencies among the witness's written statement, testimony and general demeanor on the stand, the court did not find her to be a credible witness); *see also, e.g.*, Kimbrough v. Beto, 412 F.2d 981, 987 (5th Cir. 1969). In *Kimbrough*, the Fifth Circuit upheld the trial court's credibility determination and stated

ings involving the witness's demeanor carry more weight when based in terms of observed behavior; however, the trier of fact is not required to detail the witness's specific physical appearance or conduct that led to the credibility determination.

III. EMPIRICAL EVIDENCE

As a result of the great deference afforded to the credibility findings based on the witness's demeanor by fact-finders, many have attempted to quantify the usefulness of such evidence in ascertaining the truth. More than twenty years ago, judges argued eloquently that demeanor credibility findings are an unreliable but necessary part of the litigation process.[129] This argument holds that demeanor is only one factor, and perhaps the least reliable factor, in the ultimate finding of credibility, and must be weighed with the internal consistency of what the witness is saying and the level of consistency of the testimony with other evidence in the record.

Over the last decade or so, several commentators have looked to empirical evidence in studying the reliability of demeanor evidence. Many of these commentators have concluded that demeanor findings based on visual observations are generally of little use in determining the witness's credibility.[130] One such commentator went so far as to conclude that all demeanor evidence is essentially worthless.[131]

A. The Wellborn Article

Psychologists have investigated whether demeanor can be effectively used to determine whether a person is lying. In an influential article, Professor Olin G. Wellborn III found that "[w]ith impressive consis-

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that:

> That conclusion would have been arrived at from his demeanor alone. In addition, his record of felony convictions showed that he was just a rank hoodlum. It was plain that he had no integrity or sense of social responsibility, that he was ruthless and would be willing to swear to anything, no matter how false, to get out of the penitentiary.

Id.

129. *See* Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1084 (9th Cir. 1977) (Duniway, J., concurring in part and dissenting in part) ("[M]uch that is thought and said about the trier of fact as a lie detector is a myth or folklore.").

130. *See, e.g.*, Blumenthal, *supra* note 9, at 1200; Margaret A. Lareau & Howard R. Sacks, *Assessing Credibility in Labor Arbitration*, 5 THE LAB. LAW. 151, 155 (1989); Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, 51 LAW & CONTEMP. PROBS. 243, 245 (1988); Wellborn, *supra* note 9, at 1104 (1991); *see also generally* Uviller, *supra* note 26.

131. Wellborn, *supra* note 9, at 1075.

tency, the experimental results indicate that . . . ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments."[132]

Under this view, the witness's credibility should be determined not on the witness's demeanor, but on the witness's accuracy of perception, memory, and ability to recount his story. Supporters of Professor Wellborn's theory contend that the experimental evidence suggested that a witness's appearance and nonverbal behavior determined neither the accuracy nor the sincerity of a witness's beliefs.[133]

Professor Wellborn argues that there are three categories of nonverbal "channels" that make up a witness's demeanor: face, body, and voice.[134] Professor Wellborn's study of demeanor evidence produced several conclusions including: (1) "ordinary observers do not benefit from the opportunity to observe nonverbal behavior in judging whether someone is lying," (2) observation of facial behavior "diminishes the accuracy of lie detection," and (3) a transcript of testimony provides better clues than "paralinguistic" clues such as the witness's voice.[135]

Some of Professor Wellborn's data, however, seem to provide conflicting findings.[136] One such study divided credibility finders into three groups: those who watched an interview of a witness; those who only heard the recording of the witness's testimony; and those who only read the transcripts.[137] The watchers had a deception detection accuracy averaging 58%, and the listeners and readers both had an accuracy averaging

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132. *Id.* More than 30 law reviews have cited the Wellborn article, including John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 259 n.340 (1999); Richard O. Lempert, *Built on Lies: Preliminary Reflections on Evidence Law as an Autopoietic System*, 49 HASTINGS L.J. 343, 345 n.6 (1998); Mercedeh Momeni, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*, 41 HOW. L.J. 155, 176 n.139 (1997).

133. *See* Blumenthal, *supra* note 9, at 1166 n.52 ("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.").

134. Wellborn, *supra* note 9, at 1078.

135. *Id.* at 1088.

136. For a vigorous dissent to Professor Wellborn's findings, see Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 906 n.43 (1992). In disparaging all demeanor evidence, Professor Wellborn dismissed, without merit, the evidence showing that several vocal clues can assist the factfinder in detecting deception. *See* Blumenthal, *supra* note 9, at 1165 n.46.

137. *See* Wellborn, *supra* note 9, at 1082.

77%.[138]

Another study used individuals who viewed "episodes" under the following four conditions: (1) facial, verbal, and paralinguistic cues; (2) verbal and paralinguistic cues (audio with no video); (3) facial and verbal cues (audio with a dubbed voice); and (4) facial cues (silent videos).[139] This study revealed that the first three groups were equally accurate, but that the fourth group's "accuracy fell to the chance level."[140] Professor Wellborn observed a third study that found little difference in accurately determining credibility among live, video, or transcript testimony; however, where the trier of fact heard just the audio of the testimony, correct credibility findings were comparatively evasive.[141] Further, a fourth study showed that the fact-finder's accuracy in determining credibility was highest when the fact-finder was afforded the opportunity to observe all of the demeanor (color, head, body, and audio).[142]

Based on this "available evidence," Professor Wellborn found that:

> Strictly with regard to accuracy of credibility judgments, the available evidence indicates that legal procedures could be improved by abandoning live trial testimony in favor of presentation of deposition transcripts. Transcripts are probably superior to live testimony as a basis for credibility judgments because they eliminate distracting, misleading, and unreliable nonverbal data and enhance the most reliable data, verbal content.[143]

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138. *See id.*

139. *Id.* at 1083.

140. *Id.*

141. *See id.* at 1084. This study conflicts with the study described at *supra* text accompanying notes 137-38.

142. *See id.* at 1085.

143. *Id.* at 1091. In a surprising construction of the law, Professor Wellborn appears to argue that both *Coy v. Iowa*, 487 U.S. 1012 (1988), and the 1603 trial of Sir Walter Raleigh on treason charges did not rely on the issue of the witness's demeanor. *See id.* at 1093. My reading of both cases leads me to the conclusion that the witnesses' demeanor was, at the very least, a part of the fray. In *Coy*, the defendant was convicted of sexual assault on two thirteen year-old girls. *Coy*, 487 U.S. at 1014. At trial, a screen allowed the defendant to see the girls testifying but blocked their views of him. *See id.* The Court held that the Confrontation Clause of the Sixth Amendment "guarantees the defendant a face-to-face meeting with witnesses." *Id.* at 1016. Justice Antonin Scalia, writing for the majority, specifically relied on the opportunity to see the witness's demeanor as a reason for the Confrontation Clause:

> 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*. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss—the right to cross-examine

The use of mere transcripts to determine facts would weaken the power of the fact-finder. Despite his distrust of the use of demeanor evidence, Professor Wellborn wisely suggests that to propose to abandon live testimony is "both unrealistic and illogical," because the right of confrontation is a due process requirement in both criminal and many civil cases, and is imbedded in our legal tradition.[144] Furthermore, live testimony may have a deterrent effect, as it may prevent the dishonest witnesses from testifying untruthfully, and thus, increases the acceptability of trial outcomes.[145] Disregard for a trial court's demeanor finding would impair confidence in the trial court and may, in turn, multiply appeals. However, Professor Wellborn does propose disregarding findings based on the witness's demeanor that the record shows are clearly incorrect.[146]

B. Blumenthal Article

Criticism of the Wellborn article does not mean that there is no reliable empirical evidence of the effect of demeanor on credibility. In what appears to be a knowledgeable analysis of the empirical research of the effect of demeanor on credibility, psychologist Jeremy A. Blumenthal finds that deception clues are present more often in the voice than in the

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the accuser; both "ensur[e] the integrity of the factfinding process." *Id.* at 1019-20 (emphasis added) (citing Kentucky v. Stincer, 482 U.S. 730, 736 (1987)); *see also* Maryland v. Craig, 497 U.S. 836, 845-46 (1990) (arguing that the Confrontation Clause "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility") (citing California v. Green, 399 U.S. 149, 158 (1970). In discussing the 1603 trial against Sir Walter Raleigh, Professor Wellborn stated that "[w]hen Raleigh demanded that his accuser, Lord Cobham, be produced in person, Raleigh did not contemplate either that he would cross-examine Cobham or that Cobham's demeanor would display the falsity of the accusation." Wellborn, *supra* note 9, at 1093. In fact, Raleigh demanded to confront and cross-examine Lord Cobham because Raleigh wanted his accuser present in the courtroom for a jury to see. *See* Richard H. Underwood, *Perjury: An Anthology*, 13 ARIZ. J. INT'L & COMP. L. 307, 318 (1996). Raleigh even made a Biblical reference when he complained of being condemned without a chance to examine his accuser. *See id.* Cross examination provides the fact-finder with an opportunity to judge the demeanor of the witness by providing a vehicle:

> [N]ot 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 his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895). Therefore, in demanding confrontation and examination of Lord Cobham, Raleigh sought an opportunity to view the witness's demeanor in a live testimony.

144. Wellborn, *supra* note 9, at 1091.

145. *See id.* at 1092 (arguing that "[i]t is probably more important that the results of litigation be accepted than that they be accurate").

146. *See id.* at 1096.

face or rest of the body.[147] Empirical data led Blumenthal to conclude that two of the leading visual clues associated with "perceived deception"—a witness's averted eyes and a decrease in smiling—were not significantly present in "actual deception."[148]

Blumenthal posited that when deception actually occurred, a few visual clues increased, such as hand-to-face gestures, pupil dilation, and shrugs, while the usual suspects of demeanor observations, such as grimaces or smiles, furtive glances, shifty gaze, and nervous blinking, actually decreased.[149] By contrast, the research showed that deception clues were found more often in voice[150] than in facial or other visual expressions.[151]

Furthermore, Blumenthal stated that the more important the lie, the more pronounced the auditory clues became, as head and body movements decreased and voice clues increased.[152] Finally, subjects of the experiments who were instructed "to concentrate on the speakers' tone of voice were significantly more skilled at discriminating truths from lies."[153]

Regardless of these interesting experiments, however, it is doubtful whether this empirical evidence of the effect of demeanor on credibility is, or should be, admissible on the question of its continuing use in the courtroom.[154] The classroom is not the courtroom. The conditions of the psychological experiment do not have the ceremony, oath,[155] atmosphere,

147. *See* Blumenthal, *supra* note 9, at 1193.

148. *Id.* at 1194.

149. *See id.*

150. "Voice" includes "speech errors, speech hesitations, response length, pitch, irrelevant information, [and] negative statements," all of which increased during deception. *Id.* at 1193 & n.227. Researchers have found that the speed and pitch of a witness's voice while testifying affect a listener's perception of the witness's credibility, intelligence, and persuasiveness. *See* Jeffrey D. Smith, *The Advocate's Use of Social Science Research into Nonverbal and Verbal Communication: Zealous Advocacy or Unethical Conduct?*, 134 MIL. L. REV. 173, 175-76, 178-79 (1991). Subjects in the experiment equated high-pitched voices with nervousness and less truthfulness than lower pitched voices, and believed that quick speech was associated with more knowledgeable, trustworthy testimony. *See id.* at 175-76. In addition, "[p]articipants rated witnesses using the powerful style of speech as more convincing, more competent, more intelligent, and more trustworthy than witnesses using the powerless style." *Id.* at 180.

151. *See* Blumenthal, *supra* note 9, at 1193.

152. *See id.* at 1196-97.

153. *Id.* at 1199.

154. *See* Green v. United States, 19 F.2d 850, 852 (9th Cir. 1927) (rejecting a proposal to test a witness's ability to identify a party by voice at trial because conditions in the courtroom were not similar to the original context).

155. Professor Blumenthal disagrees with the holding in *California v. Green*, 399 U.S. 149, 158 (1970), which stated that the oath and confrontation of a live testimony impress upon the witness "the seriousness of the matter" and guard "against the lie by the possibility of a penalty for perjury." Blumenthal, *supra* note 9, at 1182 & n.156.

and institutional tradition of a courtroom and do not inspire the same sincerity.

C. Remedies

Professor Wellborn concludes that twenty-five years of controlled experiments, involving thousands of subjects, showed that ordinary people do not possess the capacity to detect falsehood or error by observing the witness's nonverbal behavior.[156] He suggests that, "[a]lthough the law may have been wrong about the value of witness demeanor, . . . the general requirement of live testimony, the hearsay rule, and the right of confrontation have ample foundations apart from assumptions regarding the value of demeanor."[157] Although Professor Wellborn determined that empirical research indicated that a transcript is as good a basis for credibility determinations as observing the witness's demeanor during live testimony, the need to enhance the work done by the trial court provides a basis to restrict appellate review of trial court factual findings.[158]

To remedy his perceived imperfections of demeanor evidence, Professor Wellborn suggests several relatively minor changes. For instance, he condoned a "liberalization of the rules of admissibility of depositions and former testimony in civil cases," and more use of alternative dispute resolution (ADR) and summary jury trials that do not employ live testimony.[159] Finally, Professor Wellborn argues for the vigilant adherence to the rule that demeanor evidence alone may not serve as a basis for rejecting uncontradicted, disinterested testimony, and that disbelief of demeanor evidence may not support a finding to the contrary.[160]

Professor Blumenthal, by contrast, finds that "[i]t is unforgivable that the legal system deliberately ignores demonstrated, relevant findings

156. *See* Wellborn, *supra* note 9, at 1104-05. There is evidence, however, that ordinary people may be trained to observe and interpret nonverbal behavior. *See infra* notes 186-93 and accompanying text (discussing demeanor as a lie detector); *see also* Nancy Clare Kehoe, Nonverbal Communication: A Comparative Study of Counselors and Noncounselors, 98-99 (1973) (unpublished Ph.D. dissertation, Boston College) (on file with Boston College, Department of Education). Kehoe concluded that training does affect significantly the ability to observe and interpret nonverbal behavior. *See id.* at 100.

157. Wellborn, *supra* note 9, at 1105.

158. *See id.* at 1094, 1105. Professor Wellborn explained that "[e]ven in instances where an appellate court is in as good a position to decide as the trial court, it should not disregard the trial court's [demeanor] finding[s], for to do so impairs confidence in the trial courts and multiplies appeals." *Id.* at 1095-96 (quoting 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2586, at 737 (1971)).

159. *Id.* at 1105 (arguing that concerns over the accuracy of demeanor evidence in these proceeds are "misplaced").

160. *See id.*

about demeanor evidence and willfully adheres to an ineffectual traditional approach."[161] He concludes that empirical evidence shows that "observers exposed to a witness's voice are able to judge deceit best,"[162] and recommends that "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!"[163] Professor Blumenthal also recommends that jury instructions be amended in order to focus attention on those physical clues that have been shown by empirical research to be reliable indicators of deceit, such as the sound of a witness's voice.[164]

D. Lessening Due Process to Achieve Psychological Benefits

Proponents of eliminating the use of demeanor in a determination of witness credibility believe that empirical research, based on principles of psychology, proves the unreliability of assessing the witness's demeanor for that purpose. In response to those perceived psychological benefits, other areas of evidence law have changed in recent years as a result of minimizing due process restrictions.[165]

Fundamental changes in common law procedure must, however, be slow and studied,[166] and we should be extremely careful in making any change in the law of credibility determinations based on demeanor evidence. It has been a long-standing proposition that the opportunity to observe a witness's demeanor during live testimony is part of the common law credibility determination and ensures the integrity of the fact-

161. Blumenthal, *supra* note 9, at 1204.

162. *Id.* at 1202-03.

163. *Id.* at 1202.

164. *See id.* at 1201.

165. A primary example of this has emerged in the case of child abuse. *Cf.* Allen D. Cope, *Alabama's Child Hearsay Exception*, 47 ALA. L. REV. 21, 215 (1995) (noting the increase of child abuse cases in recent years). Where an allegedly abused child would suffer emotional distress by testifying in the presence of the accused, legislatures have attempted to safeguard the psychological well-being of the child victim. Some of these cases have involved allegations of child abuse in schools and day care centers, and political pressure to secure convictions has resulted in extensive use of hearsay and the misuse of interviewing procedures, leading to comparisons to Salem witch trials. *See* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 564-65 (1991); *see also* Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 927 n.2 (1993).

166. *See* O. W. HOLMES, JR., THE COMMON LAW 1 (Boston, Little, Brown & Co. 1881) (noting eloquently that "[t]he life of the law has not been logic; it has been experience").

finding process.[167]

IV. TECHNOLOGY

Although the use of demeanor credibility findings must continue in spite of the disquieting empirical evidence, modern techniques may improve their quality.[168] As knowledge of human behavior advances, this improved information can refine the adjudicatory process.

The bases for many of our rules of evidence may be found in observations of human behavior.[169] For instance, the common law's permissible inference of guilt by flight, disqualification for infants, and hearsay exceptions for trustworthiness by admission of dying declarations, and statements made against a party's interest, are all based in part on behavioral justifications. Social scientists have long studied human behavior to develop objective physiological techniques of determining credibility, including hypnosis, voice stress analysis, truth serum (sodium amytal), pupil dilation, and body language.[170] The most widely known scientific device used to detect truth is the polygraph or lie detector test.

As far back as 1906, a psychologist disparaged the legal profession for its failure to adopt early lie detection tests, developed by German scientists, in the courtroom.[171] These early prototypes have developed into more sophisticated polygraph tests that use elements of demeanor, such as changes in the pulse rate, blood pressure, respiration, and electrodermal response, under the theory that a person telling a lie undergoes defi-

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167. *Cf.* Coy v. Iowa, 487 U.S. 1012, 1019-20 (1988) ("The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it.").

168. One such technique is the advent of expert psychological testimony to assist the fact-finder in her evaluation of an eyewitness's credibility. *See* United States v. Downing, 753 F.2d 1224, 1231 (3d Cir. 1985); United States v. Smith, 736 F.2d 1103, 1106 (6th Cir. 1984) (discussing the expert witness's testimony as to the reliability of the eyewitness's identification). The use of such expert testimony is a response to the well documented fears of misidentification by the eyewitness. *See* United States v. Wade, 388 U.S. 218, 228 (1967) (acknowledging that "[t]he vagaries of eyewitness identification are well-known").

169. In fact, empirical evidence developed in psychological tests suggests that the untruthful witness often gives clues of his deceit. *See* Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 185 & n.116 (1990) ("[L]ying witnesses move their hands less, speak with higher pitched voices, and, even though they may control their facial expression, may reveal their deceit through foot and leg movements.").

170. *See* Colonel J. Jeremiah Mahoney & Captain Christopher C. vanNatta, *Jurisprudential Myopia: Polygraph in the Courtroom*, 43 A.F. L. REV. 95, 118 & n.111 (1997) (discussing "scientific endeavor[s] that purport[] to find truth or detect deception").

171. *See* Comments, *The Use of Psychological Tests to Determine the Credibility of Witnesses*, 33 YALE L.J. 771, 772 (1924).

nitely ascertainable physiological reactions. A person telling the truth, on the other hand, theoretically shows only normal reactions. The procedure consists of attaching instruments to the subject's body and interrogating the person, commencing with innocuous questions so as to establish the person's normal reactions, and proceeding to question the subject about a crime of which he is suspected or other matters upon which the interrogator seeks information.

A. Polygraph Admissibility

Frye v. United States,[172] which created the first test for admitting scientific evidence in United States courts, was also "the first reported decision involving the admissibility of psychological deception tests to detect crime or determine the credibility of witnesses."[173] The federal circuits are split on the treatment and admissibility of a polygraph examiner's expert opinion.

The Second,[174] Fourth,[175] Tenth,[176] and District of Columbia[177] Circuit Courts maintain a *per se* exclusion of polygraph evidence. The Sixth,[178] Eighth,[179] and Eleventh[180] Circuit Courts admit polygraph evidence only if both parties stipulate to its use prior to administering the examination and the trial judge determines that the requirements of the Federal Rules of Evidence are met. Also, the Eleventh Circuit permits polygraph evidence to be used to impeach or corroborate a witness's testimony in the absence of a stipulation if the opposing party is adequately

172. 293 F. 1013 (D.C. Cir. 1923). The law of admissibility of scientific evidence in federal cases is now stated in *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 589 (1993) (holding that the Federal Rules of Evidence govern the admissibility of scientific evidence in federal cases).

173. Recent Cases, *Evidence—Expert Testimony—Admissibility of Deception Tests*, 37 HARV. L. REV 1131, 1138 (1923).

174. *See* United States v. Kwong, 69 F.3d 663, 668 (2d Cir. 1995) (refusing to admit polygraph results into evidence "because the specific testimony here would not likely 'assist the trier of fact'").

175. *See* United States v. Walker, 66 F.3d 318 (4th Cir. 1995) (unpublished table decision).

176. *See* United States v. Soundingsides, 820 F.2d 1232, 1241 (10th Cir. 1987).

177. *See* United States v. Skeens, 494 F.2d 1050 (D.C. Cir. 1974); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

178. *See* United States v. Sherlin, 67 F.3d 1208, 1216-17 (6th Cir. 1995) (stating that the Sixth Circuit has adopted a two-part test of relevance and probative value to determine the admissibility of polygraph evidence).

179. *See* Anderson v. United States, 788 F.2d 517, 519 n.1 (8th Cir. 1986) (mentioning that the court did not "recede from the rule that polygraph examination results should not be admitted absent stipulation").

180. *See* United States v. Piccinonna, 885 F.2d 1529, 1536 (11th Cir. 1989).

notified and given an opportunity to administer its own polygraph test.[181]

The Fifth, Seventh, and Ninth Circuits leave the admissibility determination under the Federal Rules of Evidence in the trial judge's sole discretion.[182] The Seventh Circuit holds that the accused had a substantive right to admit the results of a polygraph examination to which the prosecutor stipulated previously.[183] The Third Circuit permits the introduction of polygraph evidence in order to rebut a defendant's claim that his confession was coerced.[184] The First Circuit permits the admission of polygraph evidence for reasons other than showing the substance contained therein, such as for purposes of impeachment.[185]

B. Demeanor as a Lie Detector

One of the factors the examiner uses in a polygraph test is his "clinical impressions" of the subject during the pretest interview and the examination. To formulate his clinical impression, "the examiner considers the subject's demeanor ('body language') as well as the recorded reactions of the instrument."[186] The more accurate the clinical impression, the greater the reliability of detection of deceit.

Dr. Paul Ekman, a psychologist at the University of California at San Francisco, performed empirical research of physical clues and found a high correlation between a detectable reaction and false information.[187] Dr. Ekman determined that deception clues "may be shown in a change in the expression on the face, a movement of the body, an inflection to the voice, a swallowing in the throat, a very deep or shallow breath, long pauses between words, a slip of the tongue, a micro facial expression, a gestural slip."[188]

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181. *See id.* Polygraph examiners contend that a properly administered polygraph test detects deception with a 92% - 100% accuracy range; others suggest an accuracy range of 63% - 72%. *See id.* at 1533 n.12.

182. *See* United States v. Cordoba, 104 F.3d 225, 228 (9th Cir. 1997); United States v. Posado, 57 F.3d 428, 436 (5th Cir. 1995); United States v. Pulido, 69 F.3d 192, 205 (7th Cir. 1995).

183. *See* McMorris v. Israel, 643 F.2d 458, 466 (7th Cir. 1981).

184. *See* United States v. Johnson, 816 F.2d 918, 923 (3d Cir. 1987).

185. *See* United States v. Lynn, 856 F.2d 430, 433 (1st Cir. 1988).

186. Paul C. Giannelli, *Polygraph Evidence: Post Daubert*, 49 HASTINGS L.J. 895, 909 (1998).

187. *See* EKMAN, TELLING LIES, *supra* note 77, at 39, 42-43, 46-47, 49.

188. *Id.* at 43. Dr. Ekman found that "[c]hanges in the voice produced by emotion are not easy to conceal." *Id.* at 93. He noted that spotting deceit is very difficult when first meeting a person because interpreting most clues of deceit requires previous acquaintance. *See id.* at 109. In addition, Dr. Ekman ascertained that some body movements, specifically, grooming, massaging, rubbing, holding, pinching, foot tapping, or scratching,

Dr. Ekman performed a series of empirical research tests to determine whether the skill of demeanor lie detection can be taught.[189] He found that law enforcement officers for the United States Secret Service, Central Intelligence Agency and other agencies, could detect liars 73% of the time, that Los Angeles County Sheriffs scored 67%, federal judges scored 62%, and that other law enforcement officers scored 51%.[190] Dr. Ekman concluded that "it is possible for some people to make highly accurate judgments about lying and truthfulness without any special aids such as slowed motion, repeated viewing, and the scoring of subtle changes by either trained coders or computer-based measurements."[191]

Neuroscientist Terrance Sejnowski and other scientists at the Salk Institute in La Jolla, California "have developed a computer system that has learned to read the rapidly changing expressions in a human face and may one day be able to draw conclusions about the emotions that lurk behind them."[192] Eventually, the research done at Sejnowski's lab could create a lie detector that is far more reliable than current polygraphs, which measure reactions, such as heartbeat and sweating, that some people can learn to master.[193]

C. Expert Scientific Testimony on Demeanor Credibility

Under the relaxed standard for admissibility of scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[194] courts may be more amenable to expert testimony on demeanor evidence. In the trial courts' discretion, polygraph evidence may be admitted through expert testi-

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are not reliable signs of deceit. *See id.* at 109-10. More importantly, however, Dr. Ekman concluded that witnesses may vary in the type of gestures they display when they lie, and that the body produces automatic nervous system changes with emotional arousal that are constant for a respective emotion, which could lead to deceit detection. *See id.* at 113-15 (discussing breathing, swallowing, sweating, blushing, blanching, and pupil dilation as types of emotional arousal).

189. *See, e.g., id.* at 205; *see also, e.g.*, Paul Ekman & Maureen O'Sullivan, *Who Can Catch A Liar?*, 46 AM. PSYCHOL. 913, 913-14 (1991).

190. *See* Paul Ekman et al., *A Few Can Catch A Liar*, 10 PSYCHOL. SCIENCE 263, 263-65 (1999); *see also* Guy Gugliotta, *True or False: Can You Learn To Detect Lies?* WASH. POST, July 12, 1999, at A7; Erica Goode, *To Tell The Truth, It's Awfully Hard To Spot A Liar*, N.Y. TIMES, May 11, 1999, at F1.

191. Ekman et al., *supra* note 190, at 265. *But see id.* (concluding, however, that "[i]t is unlikely that judging deception from demeanor will ever be sufficiently accurate to be admissible in the courtroom").

192. Frederic Golden, *Lying Faces Unmasked: The Most Gifted Fibbers Can Fool Almost Anybody, But a New Computer Can Look Right Through Them*, TIME, Apr. 5, 1999, at 52.

193. *See id.* at 52-53.

194. 509 U.S. 579 (1993).

mony on eyewitness evidence.[195] The accuracy rate for lie detection by a properly administered polygraph test ranges from 64% to 98%.[196]

Experts using demeanor evidence can learn to detect lies more than 70% of the time.[197] Results would improve if aided by computer software and a slow motion video of the witness's testimony.[198] Whether the expert could assess a witness's truthfulness in a hectic trial may be more difficult.[199] Even assuming that this process could meet the test for the admissibility of expert scientific testimony, courts might reject it for other reasons.[200]

Judges and juries are expected to make credibility determinations, sometimes based on demeanor testimony. Sweaty palms and shifting eyes may be indicative of language and cultural differences rather than fabrication. It is equally true that skillful liars may pass all demeanor tests. Dr. Ekman's studies prove that demeanor detection skills may be acquired by experience and learning, that there are some experts that have specialized knowledge in this field, and that most laymen, including judges, do not.[201] Perhaps courts should be more receptive to scientific

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195. *See* Hon. Robert P. Murrian, *The Admissibility of Expert Eyewitness Testimony Under the Federal Rules*, 29 CUMB. L. REV. 379, 396 (1999).

196. *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, OTA-TM-H-15, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A REVIEW AND EVALUATION - A TECHNICAL MEMORANDUM, 97 (1983). There is some evidence that polygraph results have improved in recent years through the use of computer software programs that evaluate polygraph charts. *See* Giannelli, *supra* note 186, at 914.

197. *See* Ekman et al., *supra* note 190, at 265, Table 2.

198. The expert's specialized knowledge could certainly assist the fact-finder in assessing truthfulness from demeanor. This, however, is a complicated issue. Dr. Ekman has identified 60 emblems of body movements and 46 face muscle movements that identify the speaker's emotions. *See* EKMAN, TELLING LIES, *supra* note 77, at 98; Golden, *supra* note 192, at 52; *see also* LIEBERMAN, *supra* note 2, at 11 (analyzing 46 clues to deception).

199. For a start, the judge might consider rearranging the courtroom so that the fact and demeanor-finder can clearly see the witness's body movements. See Ekman et al., *supra* note 190, at 282. Dr. Ekman believes that the courts must have been designed by someone who wanted to make it impossible to detect deceit from demeanor. The witness testifies long after the incident, with many chances to prepare and rehearse, blunting emotions associated with the story, allowing subtle or severe changes to memory through leading questions, until a liar may even begin to believe the story, blunting detection. *See id.* at 291-92.

200. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590-91 (1993) (recognizing that scientific evidence must be scientifically valid to have evidentiary reliability, and must assist the trier of fact to determine a fact in issue); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (determining that the blood pressure deception test was not scientifically recognized at the time, and, therefore, inadmissible).

201. The average judge does not rate at the top of those skilled in demeanor assessment. *See* Golden, *supra* note 192, at 52.

testimony that would help determine demeanor credibility.[202]

In *United States v. Sessa*,[203] the court held that inadmissible testimony by a psychologist who examined a coconspirator, the government's principal witness against the defendant, was not helpful to the jury regarding the witness's credibility or bias. Judge Weinstein stated that even if psychological testimony on witness truthtelling could meet the *Frye/Daubert* test for admissibility, as with the general refusal to admit polygraph results, there is a strong public policy against, *inter alia*, "the intolerable effect of potentially requiring the testimony of every defendant and every witness to be bolstered or attacked."[204] To mitigate Judge Weinstein's objection to multiplying expert witnesses, expert testimony on demeanor evidence could be limited to those cases where it is the sole evidence upon which the determination could be made, as in *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.*,[205] and *Getahun v. INS*,[206] or at least where demeanor evidence is the only evidence offered on an important issue in a case.

V. CONCLUSION

When witness credibility is at issue, due process requires that the fact-finder see and hear the witness testify. The witness's demeanor is evidence of sincerity, character, and ability to testify accurately and plausibly. Demeanor is composed of numerous factors and is difficult to articulate. In order to preserve a record for appellate review, however,

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202. Many courts still exclude expert testimony on the unreliability of eyewitness testimony. *See generally* United States v. Garcia Abrego, 141 F.3d 142 (5th Cir. 1998); United States v. White, 116 F.3d 903 (D.C. Cir. 1997). The Supreme Court has recognized, however, the vulnerability of eyewitness testimony. *See* United States v. Wade, 388 U.S. 218, 229 (1967). It seems almost certain that expert testimony could help on that issue. *See* Victor Barall, *Thanks for the Memories: Criminal Law and the Psychology of Memory*, 59 BROOK. L. REV. 1473, 1482 (1993) (reviewing HARRY N. MACLEAN, ONCE UPON A TIME: A TRUE STORY OF MEMORY, MURDER, AND THE LAW (1993)); *see also* Maureen A. Gorman, *Evaluating Eyewitness Testimony in Criminal Trials: Can Jurors Use Help From Experts?*, 63 CHI.-KENT L. REV. 137, 142 (1987). The increasing admissibility of expert witnesses to testify about the problems associated with eyewitness testimony reveals judicial recognition of the dramatic improvement in psychological research in the field of memory and perception. *See* Tom Schoenberg, *Blink of an Eye*, LEGAL TIMES, Nov. 8, 1999, at 1.

203. 806 F. Supp. 1063 (E.D.N.Y. 1992).

204. *Id.* at 1068. Expert testimony will be admitted, however, regarding the medical question of the inability to differentiate between truth and falsehood. *See* United States v. Hiss, 88 F. Supp. 559, 559-60 (S.D.N.Y. 1950).

205. 175 F.2d 77, 80-81 (2d Cir. 1949).

206. No. 98-2223, 1999 U.S. App. LEXIS 10860, at *3-*4 (4th Cir. May 26, 1999) (per curiam) (determining that the only evidence in the administrative hearing, the petitioner's, was not credible).

findings of credibility based on demeanor evidence must be supported by observations of the witness's specific appearance or behavior.

Demeanor evidence, like eyewitness testimony, comes to us up the long staircase of common law. Modern empirical tests indicate that both types of evidence may be imperfect but inevitable, and a proper respect for history requires that any change be studied and incremental. Fact-finders should not hide their prejudices behind unassailable demeanor findings. When other credibility factors do not appear in the record the judge must not shy away from the duty to decide on credibility based on the witness's demeanor. And, as the technology of making accurate demeanor findings progresses—just as polygraphs have progressed—expert evidence on demeanor will be more welcome in the courts.