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Demeanor

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DEMEANOR

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I
INTRODUCTION

A premise of several legal rules and institutions is that the opportunity of a trier of fact (a jury, judge, or hearing officer) to view the demeanor of a witness is of great value to the trier in deciding whether to believe the witness's testimony. Stated differently, the premise is that ordinary people untrained in detecting deception generally will make significantly more accurate judgments of credibility if they have the opportunity to view the demeanor of a witness than if they do not.

Psychologists and other students of human communication have investigated many aspects of deceptive behavior and its detection. As part of this investigation, they have attempted to determine experimentally whether ordinary people can effectively use nonverbal indicia to determine whether another person is lying. In effect, social scientists have tested the legal premise concerning demeanor as a scientific hypothesis. With impressive consistency, the experimental results indicate that this legal premise is erroneous. According to the empirical evidence, 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.

The credibility of a witness's testimony depends upon more than the witness's honesty. A sincere witness may innocently convey inaccurate information as a result of an error of perception or memory. Therefore, a trier's overall evaluation of a particular witness may include appraising the validity of the witness's beliefs as well as deciding whether the witness intends to tell the truth. Do the appearance and nonverbal behavior of a witness help the trier to judge the accuracy of the witness's beliefs? On this issue as well, substantial experimental evidence suggests that they do not.

Although mounting experimental evidence against the utility of demeanor contradicts orthodox legal assumptions, the proposition

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that demeanor is as likely to mislead as to enlighten is not counter-intuitive, and will be readily endorsed by many lawyers. To the extent that the legal community may be persuaded that the availability of demeanor evidence does not enhance judgments of credibility, it is appropriate to reexamine several legal doctrines and practices. The purpose of this Article is to summarize the pertinent social science materials and to suggest appropriate legal responses. Part II briefly outlines the orthodox legal position on demeanor. Part III summarizes the psychological and human communication research that bears upon the usefulness of demeanor. Part IV then explores the specific implications of these experimental investigations for several legal rules and practices.

II

DEMEANOR IN THE LAW

> All of us know that, in every-day life, the way a man behaves when he tells a story—his intonations, his fidgetings or composure, his yawns, the use of his eyes, his air of candor or of evasiveness—may furnish valuable clues to his reliability. Such clues are by no means impeccable guides, but they are often immensely helpful. So the courts have concluded.[1]

Wigmore wrote that a witness's demeanor, "without any definite rules as to its significance, is always assumed to be in evidence."[2] Michael and Adler cited demeanor evidence as the sole

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[1] JEROME FRANK, COURTS ON TRIAL 21 (1950); *see* NLRB v. Dinion Coil Co., 201 F.2d 484, 487-90 (2d Cir. 1952) (Frank, J.) (recounting the history of "demeanor evidence" from Roman times); NLRB v. Universal Camera Corp., 190 F.2d 429, 430 (2d Cir. 1951) (L. Hand, J.) ("[O]n the issue of veracity the bearing and delivery of a witness will usually be the dominating factors, when the words alone leave any rational choice."); Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949) (Frank, J.). The Second Circuit in *Broadcast Music* noted:

> The liar's story may seem uncontradicted to one who merely reads it, yet it may be "contradicted" in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which "cold print does not preserve" and which constitute "lost evidence" so far as an upper court is concerned. . . . The witness' demeanor, not apparent in the record, may alone have "impeached" him.

Id. (footnotes omitted); *see also* Henry S. Sahm, *Demeanor Evidence: Elusive and Intangible Imperatives*, 47 A.B.A. J. 580 (1961) (quoting several judges and lawyers extolling the value of demeanor). There have been strikingly few skeptics. An important, rare example is Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 932-40 (1971).

[2] 3A JOHN HENRY WIGMORE, EVIDENCE § 946 (James H. Chadbourn rev. ed. 1970) [hereinafter J. WIGMORE, EVIDENCE]; *see* 5 *id.* § 1395 (J. Chadbourn rev. ed. 1974); JOHN HENRY WIGMORE, THE SCIENCE OF JUDICIAL PROOF §§ 268-271 (3d ed. 1937). Wigmore's statement that there are no rules as to the significance of demeanor may mislead. There are doctrines about the trier's discretion regarding credibility which, at least insofar as they limit discretion, concern the significance of demeanor. For example, all courts hold that a trier may not find a fact solely on the basis of disbelief of testimony denying the

exception to the general rule that for a matter to be evidence, it must be formally offered by a party and admitted by the judge.[3] The California Evidence Code puts "demeanor while testifying" first on a long list of matters that have a "tendency in reason to prove or disprove the truthfulness of" testimony.[4]

The importance of demeanor as an indicator of credibility is commonly cited as a premise of the general requirement of live testimony, the hearsay rule, and the right of confrontation.[5] The importance placed upon demeanor information is highlighted by the strict limits traditionally placed upon trial use of depositions and transcribed testimony taken in other proceedings.[6] The opportunity of the trier to observe the demeanor of witnesses is a principal basis for the deference accorded by reviewing courts to factual determinations of trial courts and hearing officers.[7] The assumption that demeanor provides highly useful information plays an important role in other procedural doctrines.[8]

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fact, and most courts hold that a trier may not discredit the uncontradicted, unimpeached testimony of a disinterested witness. *See infra* subparts IV(E) & (F).

3 *See* Jerome Michael & Mortimer J. Adler, *Real Proof: I*, 5 VAND. L. REV. 344, 365-66, 366 n.65 (1952). *But see* RICHARD O. LEMPERT & STEVEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 990 n.5 (2d ed. 1982) ("judicial notice" of common experience by a jury may be another exception to the general requirement that evidence be formally offered and admitted).

4 CAL. EVID. CODE § 780 (Deering 1966).

5 *See, e.g.*, Mattox v. United States, 156 U.S. 237, 242-43 (1895). As the *Mattox* Court explained:

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

Id.; *see also* FED. R. EVID. art. VIII advisory committee's introductory note (hearsay rule) ("The demeanor of the witness traditionally has been believed to furnish trier and opponent with valuable clues."); CHARLES T. MCCORMICK, EVIDENCE § 245 (3d ed. 1984) (hearsay rule); *id.* § 252, at 751 (confrontation); 5 JAMES W. MOORE, FEDERAL PRACTICE ¶ 43.03 (2d ed. 1990) (requirement of live testimony); 3A J. WIGMORE, EVIDENCE, *supra* note 2, § 946 ("So important has this form of evidence [demeanor] been deemed in our system of procedure that by a fixed rule of confrontation the witness is required to be present before the tribunal while delivering his testimony.") (citation omitted); 5 *id.* § 1395 (J. Chadbourn rev. ed. 1974) (confrontation); *infra* subpart IV(A).

6 *See generally* FED. R. CIV. P. 32(a); FED. R. CRIM. P. 15(e); FED. R. EVID. 804(b)(1); UNIF. R. EVID. 804(b)(1); C. MCCORMICK, *supra* note 5, ch. 25; *infra* subpart IV(C).

7 *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 495-96 (1951); FED. R. CIV. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."); FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 13.8 (3d ed. 1985); *infra* subpart IV(B).

8 *See infra* Part IV.

III

EMPIRICAL INVESTIGATIONS OF THE UTILITY OF NONVERBAL BEHAVIOR IN DETECTION OF DECEPTION OR INACCURACY

The appearance and nonverbal behavior of a witness might bear upon the witness's credibility in two ways: first, as an indicator of sincerity—the willingness of the witness to tell the truth—and, second, as evidence of the quality of the witness's perceptions and memory—his or her capacity to know the truth.[9] Social scientists have investigated both issues. The studies described in subpart A of this Part address the question whether nonverbal behavior provides usable indicia of deception. Other studies, summarized in subpart B, consider whether appearance and demeanor provide reliable data to subjects who must decide whether to trust the accuracy of another person's perceptions and memory.

A. Demeanor and Detection of Deception

A central issue in the psychology of deception and deception detection is whether ordinary, untrained observers can discern whether another person is lying, and if so, how. Do liars emit nonverbal signals of dishonesty, which others can reliably perceive and interpret? Many social scientists have investigated these questions.

There are three main categories of nonverbal "channels" or "cues": face, body, and voice (sometimes called "paralinguistic" cues).[10] Together, these categories comprise what lawyers call demeanor.[11] A number of experiments have attempted to assess the utility of various cues or channels in situations reproducing many of the features of courtroom testimony. In these experiments, as in trials, the "witnesses" ("respondents") are strangers to the "triers" ("subjects"). In the best studies, the respondents tell actual truths and falsehoods (as opposed to playing the role of a liar or truth-teller) and have a genuine motive to deceive.

The psychology of deception and deception detection in the courtroom is particularly amenable to experimental analysis. Psy-

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9 *See* Cooper, *supra* note 1, at 932. Courts and lawyers have emphasized the relation of demeanor to sincerity, giving little attention to the relation of demeanor to capacity. *See, e.g.*, Sahm, *supra* note 1 (quoting several judges and lawyers on the value of demeanor).

10 *See, e.g.*, John E. Hocking, Joyce Bauchner, Edmund P. Kaminski & Gerald R. Miller, *Detecting Deceptive Communication from Verbal, Visual, and Paralinguistic Cues*, 6 HUM. COMM. RES. 33, 34 (1979) [hereinafter *Detecting Deceptive Communication*]; Glenn E. Littlepage & Martin A. Pineault, *Verbal, Facial, and Paralinguistic Cues to the Detection of Truth and Lying*, 4 PERSONALITY & SOC. PSYCHOLOGY BULL. 461 (1978).

11 In many courtrooms the architecture of the witness and jury boxes limits the amount of body cues available to jurors.

chologists appropriately worry about whether laboratory conditions sufficiently relate to "real life," meaning the unstructured, relatively spontaneous interactions of daily life in which deception commonly occurs.[12] Courtrooms have more in common with laboratories than with "real life." Courtroom testimony, like respondent interviews in the experiments, is nonspontaneous, highly structured, self-conscious, and public. The respondents and subjects in the experiments are strangers who are assigned task-oriented roles analogous to the roles of witnesses and fact-finders in a trial.

Of course, there are important differences between the conditions of the typical psychological experiment and the conditions of a trial. In assessing the implications of the experiments, one must consider how the differences bear on the efficacy of nonverbal cues to deception. Four differences stand out: context, cross-examination, deliberation, and preparation. First, in a trial, each witness's testimony has a much more substantial context—the other evidence in the case—than the respondents' stories in the experiments. Second, none of the experiments elicits statements from respondents using the legal format of direct and cross-examination by adversary representatives. Third, jurors deliberate and make decisions by consensus rather than individually; by contrast, the experimental subjects decide alone whether to believe a respondent's statement. Finally, many trial witnesses prepare or rehearse extensively before testifying. The preparation often includes some "coaching" about demeanor by the attorney who presents the witness, reflecting the attorney's notions of what jurors perceive to be honest or dishonest nonverbal behavior. Experimental respondents normally make their true or false statements without rehearsal or coaching.[13]

The relationships of context, cross-examination, deliberation, and preparation to nonverbal cues to deception merit further study.[14] In the meantime, the existing psychological literature indicates that nonverbal cues do not enhance the accuracy of credibility determinations under trial conditions. The four named trial conditions probably decrease, rather than increase, the utility of nonverbal deception cues.[15]

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12 *See, e.g.*, Miron Zuckerman, Bella M. DePaulo & Robert Rosenthal, *Verbal and Nonverbal Communication of Deception*, 14 ADVANCES EXPERIMENTAL SOC. PSYCHOLOGY 1, 39-40 (1981).

13 Some experiments specifically address the effects of rehearsal. *See, e.g.*, Gerald R. Miller, Mark A. deTurck & Pamela J. Kalbfleisch, *Self-Monitoring, Rehearsal, and Deceptive Communication*, 10 HUM. COMM. RES. 97, 98-99, 114 (1983)(reporting unpublished studies of others as well as the authors' work).

14 *Cf.* Joshua A. Fishman, *Some Current Research Needs in the Psychology of Testimony*, 13 J. SOC. ISSUES 60, 64-65 (1957).

15 One early study that recreated nearly all the conditions of trial indicated that demeanor had negative effects on subjects' ability to determine sincerity. An experi-

Addressing each condition in turn, first, one must consider whether the trial context of a witness's testimony somehow makes the nonverbal information more usable than it would be without the context. This is an unlikely hypothesis. It is more likely that the presentation of successive witnesses in adversary format only makes it more difficult for the trier to process any nonverbal information.[16]

One may agree with Wigmore's famous characterization of cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth,"[17] and yet doubt that cross-examination enhances demeanor as a barometer of sincerity. McCormick, for example, wondered "whether it is not the honest but weak or timid witness, rather than the rogue, who most often goes down under the fire of a cross-examination."[18] There is psychological evidence to support McCormick's hypothesis. When respondents are questioned by suspicious interviewers, subjects tend to view their responses as deceptive even when they are honest, which significantly increases detection errors. Two distinct phenomena contribute to these errors: first, the suspicious interrogation distorts observers' perceptions; second, the interrogation causes stress for the respondent, which in turn induces behavior likely to be interpreted as deceptive.[19] The latter phenomenon has been called the "Othello error,"[20] since it is excellently illustrated by Othello's mistaken interpretation of Desdemona's distress and despair in response to his accusation of infidelity.[21]

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mental case was tried to two juries upon live testimony of 12 witnesses, and to two other juries upon transcribed testimony. The juries who received live testimony produced significantly less accurate and complete findings than the juries who received transcripts. William M. Marston, *Studies in Testimony*, 15 J. CRIM. L. & CRIMINOLOGY 5, 22-26 (1924). A major reason for the relatively poor performance of the two juries who heard testimony was that both believed dishonest testimony of a witness who related "the most absurd and improbable details" with "extreme self-confidence." *Id.* at 24. On the effect of witness confidence on jury acceptance of testimony, see *infra* text accompanying notes 70-81.

16 *See* Cooper, *supra* note 1, at 936. According to Cooper:

> The problem [of jurors using demeanor in deciding credibility] is further accentuated, however, by the overall pattern of the trial. First one part of the story is told, then another; one side tries its version, then the other tries its own. Small wonder that many students of the problems of credibility conclude helplessly that our modes of adversary procedure make the jury's task nearly impossible.

Id.

17 5 J. WIGMORE, EVIDENCE, *supra* note 2, § 1367 (J. Chadbourn rev. ed. 1974).

18 C. MCCORMICK, *supra* note 5, § 31.

19 *See* PAUL EKMAN, TELLING LIES 162-89 (1985); Charles F. Bond Jr. & William E. Fahey, *False Suspicion aud the Misperception of Deceit*, 26 BRIT. J. SOC. PSYCHOLOGY 41 (1987); Carol Toris & Bella M. DePaulo, *Effects of Actual Deception and Suspiciousness of Deception on Interpersonal Perceptions*, 47 J. PERSONALITY & SOC. PSYCHOLOGY 1063 (1984).

20 P. EKMAN, *supra* note 19, at 170; Bond & Fahey, *supra* note 19, at 41.

21 *See* William Shakespeare, *Othello*, V.ii.

If the average individual observer cannot effectively interpret nonverbal indicia to detect falsehood, it is unlikely that a deliberative group of observers can do better. Even if some individuals possess superior lie detection skills, it is hard to imagine how such individuals could impart their insights or persuade others to defer to their judgments. Indeed, those who maintain that usable nonverbal indicia of insincerity exist usually also insist that such clues are not susceptible to useful verbal description.[22] Even if a superior credibility judgment could be articulated, how or why would it displace an inferior judgment in a deliberative process? Although most people cannot do better than chance in detecting falsehoods, most people confidently believe they can do so.[23]

Psychological research on the relationship between respondent rehearsal and deception detection is inconclusive.[24] Whether "coaching" regarding demeanor[25] affects deception detection is unknown.[26] Not all witnesses are truthful, and all coaching is calculated to reduce the chances that the witness will be discredited. A good deal of coaching may be ineffectual, and some coaching of dishonest witnesses may actually backfire. Still, the overall effect of coaching is not likely to facilitate the trier's task of detecting false testimony. In addition to the obvious distortion when coaching "succeeds" in imposing a consciously shaped demeanor, the process of coaching demeanor may have more serious cognitive effects. More specifically, coaching may change the witness's beliefs about the facts. As Professor Applegate points out, even benign advice about demeanor by an ethical attorney can occasionally contribute to cognitive distortion:

> General advice is useful in ensuring a relaxed witness who will testify clearly and who will not be sidetracked or flustered by a cross-examiner. Such general advice is also relatively innocuous in terms of distorting testimony, because it is nonsubstantive. In some situations, however, calming and relaxing a witness tends to induce an unwarranted degree of certainty in the witness's testi-

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22 *See, e.g.*, Sahm, *supra* note 1, at 582.

23 *See* P. EKMAN, *supra* note 19, at 162; *Detecting Deceptive Communication*, *supra* note 10, at 42; Glenn E. Littlepage & Martin A. Pineault, *Detection of Deceptive Factual Statements from the Body and the Face*, 5 PERSONALITY & SOC. PSYCHOLOGY BULL. 325, 328 (1979).

24 *See* Miller, deTurck & Kalbfleisch, *supra* note 13, at 98-99, 114.

25 *See generally* John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 288-89, 298-300 (1989).

26 *See* Fishman, *supra* note 14, at 64-65 ("legal lore . . . on the proper preparation or coaching of witnesses via carefully staged rehearsals . . . is itself fitting research material for those interested in the psychology of testimony in particular and in forensic psychology in general").

> mony. Such preparation may unwittingly turn a skeptical witness into a true believer.[27]

In sum, none of the four conditions of trial testimony—context, cross-examination, deliberation, and preparation or coaching—that are absent from the typical experiment holds any promise of enhancing the utility of demeanor cues to credibility. Therefore, to the extent that the experiments show that ordinary people cannot make effective use of demeanor in detecting deception, they probably depict a similar inability on the part of jurors, judges, and hearing officers in trials.

Maier and Thurber's 1968 study,[28] for example, indicated that nonverbal information actually diminishes the accuracy of deception detection. Researchers asked subjects to make judgments about the honesty of an interviewee. The interviews were role-played exchanges between a professor and one of his students. The purpose of the interview was to determine whether the student had altered an examination before returning it to the professor for regrading.[29] Researchers divided the subjects into three groups, with about fifty subjects in each group. Each group evaluated four versions of the interview, two with honest students and two with dishonest students. One group watched the interviews, the second heard audiotape recordings, and the third read transcripts. The average accuracy of both "listeners" and "readers" was about 77%. The average accuracy of the "watchers" was 58%. Based on these results, Maier and Thurber concluded that "the visual cues of the interview served primarily as distracters lowering the proportion of accurate decisions. Interview situations in which an interviewee may be motivated to deceive may be more accurately judged when the interview is not directly observed."[30]

An obvious weakness in the Maier and Thurber experiment is that the interviewees were role-playing—they pretended to lie or to

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27 Applegate, *supra* note 25, at 298-99 (footnotes omitted).

28 Norman R.F. Maier & James A. Thurber, *Accuracy of Judgments of Deception When an Interview Is Watched, Heard, and Read*, 21 PERSONNEL PSYCHOLOGY 23 (1968).

29 Investigators had employed the same role-played scenario in two previous studies that addressed other aspects of deception detection. *See* Norman R.F. Maier & Junie C. Janzen, *Reliability of Reasons Used in Making Judgments of Honesty and Dishonesty*, 25 PERCEPTUAL & MOTOR SKILLS 141 (1967) (This study examined reasons given for judgments as to honesty. Subjects performed better than chance, but the reasons they gave for decisions did not seem to have validity or relation to correct judgments. Both good and poor judges used the same kinds of reasons.); Norman R.F. Maier, *Sensitivity to Attempts at Deception in an Interview Situation*, 19 PERSONNEL PSYCHOLOGY 55 (1966) (finding that interviewers were able to do better than chance in distinguishing between honest and dishonest interviewees; the cues used in making the judgments were not apparent).

30 Maier & Thurber, *supra* note 28, at 23. In addition to reducing accuracy, the opportunity to observe the interviewee produced a negative bias, *i.e.*, it significantly increased the frequency of judgments of dishonesty. *Id.* at 28-29.

tell the truth.[31] Subsequent experiments in which subjects attempted to detect real lying by respondents with an incentive to deceive do not suffer from the role-playing shortcoming.

A 1978 study by Littlepage and Pineault employed videotaped segments of the television program "To Tell the Truth."[32] In the program, three contestants each claim to be a certain individual whose major interest or accomplishment is described to a panel. The panelists then question the contestants. Two of the contestants are impostors who must deceive the panel to win money; the actual described individual must be truthful. Subjects in the study viewed episodes under four different conditions: (1) total information, including facial, verbal content, and paralinguistic cues (voice); (2) verbal content and paralinguistic only (audio with no video); (3) facial and verbal content (video with "dubbed" audio using another voice); and (4) facial only (silent video). Subjects receiving only audio were as accurate as subjects who received total information; subjects under condition (3) were not significantly less accurate. Under experimental condition (4), accuracy fell to the chance level.

Reconciling these results, Littlepage and Pineault concluded that "facial information is not effectively used as an important cue to the perception of truth."[33] They noted that this finding was consistent with other studies involving "attempted impression management," including that of Maier and Thurber.[34] Based upon the lack of siguificant accuracy decline in the group receiving "dubbed" voice, Littlepage and Pineault further concluded that "paralinguistic cues are not effectively utilized in the detection of truth and lying under conditions of attempted impression management,"[35] another result supported by Maier and Thurber's previous study.[36] Since another study had discerned paralinguistic differences between truthful and deceptive messages,[37] Littlepage and Pineault surmised that "it is possible that although paralinguistic cues are available,

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31 *See Detecting Deceptive Communication*, *supra* note 10, at 34 ("Whether respondents 'know' how real life liars behave is unknown; hence, it is unclear how the behavior of role-playing liars relates to that of 'real world' liars.").

32 Littlepage & Pineault, *supra* note 10.

33 *Id.* at 463.

34 *Id.* (citing Paul Ekman & Wallace V. Friesen, *Detecting Deception from the Body or Face*, 29 J. PERSONALITY & SOC. PSYCHOLOGY 288 (1974) [hereinafter Ekman & Friesen, *Deception*]); Paul Ekman & Wallace V. Friesen, *Nonverbal Leakage and Cues to Deception*, 32 PSYCHIATRY 88 (1969) [hereinafter Ekman & Friesen, *Nonverbal Leakage*]; Maier & Thurber, *supra* note 28.

35 Littlepage & Pineault, *supra* note 10, at 463.

36 *See supra* text accompanying notes 28-30 (Maier and Thurber subjects receiving transcript had same accuracy as subjects receiving audiotape).

37 *See* Paul Ekman, Wallace V. Friesen & Klaus R. Scherer, *Body Movement and Voice Pitch in Deceptive Interaction*, 16 SEMIOTICA 23 (1976).

subjects are not proficient at decoding paralinguistic cues."[38]

In another 1978 experiment reported by Miller and Fontes,[39] researchers induced respondents to engage in real deception, which subjects attempted to detect under four conditions: live, video, audio, and transcript. Subjects were unable to do siguificantly better than chance in any condition.[40] There was no significant difference in mean accuracy among live, video, and transcript conditions; subjects who received audio performed significantly worse.[41] Miller and Fontes concluded that "[t]he identical accuracy scores in the transcript and videotape conditions, and almost identical scores in the live condition, suggest that the visual element of a presentation may add little to an observer's ability to detect deception."[42] The weak performance of audio compared to transcript in Miller and Fontes's experiment reinforces Littlepage and Pineault's negative finding concerning paralinguistic cues.[43]

A 1979 study by Hocking and others[44] employed respondents who told actual lies and truths with genuine incentives to succeed in deception. Respondents were senior criminal justice students who were told that ability to lie successfully is important in police work, that the experiment would measure their aptitude in this regard, and that the results would be reported to their school and might affect such things as letters of recommendation.[45] In videotaped interviews, respondents gave truthful and untruthful responses to two types of questions, factual and emotional. Researchers presented the interviews to 719 observers under fourteen separate sets of conditions, including color or black-and-white video; head only, body only, or head and body; with or without audio; and also audio only and transcript only. The relative accuracy of observers in detecting deception under the various conditions was compared and analyzed, separating the factual and emotional interview segments.

The researchers reported that subjects who were asked what behaviors they looked for to determine if someone was lying cited mostly nonverbal cues:

> Many mentioned eye behavior, saying people have less eye contact when they are lying. Some said that liars were tense and

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38 Littlepage & Pineault, *supra* note 10, at 463.

39 GERALD R. MILLER & NORMAN E. FONTES, THE EFFECTS OF VIDEOTAPED COURT MATERIALS ON JUROR RESPONSE 11-42 (1978).

40 *Id.* at 38.

41 *Id.* at 41.

42 *Id.*

43 *See supra* text accompanying notes 32-38.

44 *Detecting Deceptive Communication*, *supra* note 10.

45 *Id.* at 36. At the conclusion of the experiment, respondents were debriefed and told that their performance would not, in fact, be evaluated and reported. *Id.* at 37.

> nervous, slow to respond to questions, gestured unnaturally, swallowed "too much," stuttered and exhibited other speaking nonfluencies, were "too stiff," squinted, smiled unnaturally, had "tight" faces, scratched their heads, and so on. Obviously, there is no shortage of beliefs about behaviors associated with deception.[46]

The results of the experiment do not support the notion that people can detect deception based upon the behaviors cited by the subjects. The results of the factual interview segments basically parallel the results obtained by Maier and Thurber and Littlepage and Pineault. That is, they indicate that nonverbal information was not useful to the subjects in detecting deception, whereas verbal content did provide a basis for significantly better-than-chance judgments. Overall accuracy for visual-only conditions was .467, below chance, and no visual-only condition produced accuracy above .492. By contrast, all conditions that included verbal content significantly surpassed chance accuracy. Two of the three most accurate conditions were transcript only (.625) and audio only (.613). Accuracy was highest (.637) with total information (color, head, and body video with audio), although not significantly higher than with transcript.[47]

The factual-emotional and head-body dichotomies of the Hocking study were designed in part to address the thesis of Ekman and Friesen's 1974 article,[48] that observers can more accurately discern body cues than facial cues to deception. In the Ekman and Friesen experiment, respondents received instructions to tell the truth about their feelings when viewing pleasant pictures and to lie about their feelings when viewing disturbing films of burn victims. Subjects could not accurately detect deception from videos of the respondents' faces, but subjects did perform significantly better than chance in judging truthfulness on the basis of body shots.

Hocking pointed out that the body cues which subjects read as signs of deception may not, in fact, have been indicative of lying. Instead, these cues may simply have reflected the stress experienced by the respondents from watching the disturbing film. The Hocking study used similar visual stimuli in the emotional segments, and replicated Ekman and Freisen's body-face results.[49] The factual segments, however, which did not involve stressful stimuli, failed to show any reliable body cues. In fact, judgments in the factual segments based on body-only shots without audio were consistently

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46 *Id.* at 42.

47 *Id.* at 40.

48 *See* Ekman & Friesen, *Deception*, *supra* note 34; *see also* P. EKMAN, *supra* note 19, at 80-87, 98-122; Ekman & Friesen, *Nonverbal Leakage*, *supra* note 34.

49 *Dectecting Deceptive Communication*, *supra* note 10, at 41, 43.

worse than chance.[50] This outcome strongly suggests that in both the Hocking emotional-segment test and the Ekman-Friesen experiment, subjects "read" body cues indicating stress from watching the disturbing film, not cues indicating deception.[51]

Although Littlepage and Pineault's 1979 study[52] provided limited support for the Ekman-Freisen hypothesis that subjects detect deception more accurately from the body than from the face, it reinforced their earlier negative findings regarding the value of facial cues.[53] Subjects viewed honest and dishonest responses on videotapes showing either the face or the body of the respondent; all tapes had full audio.[54] Mean accuracy for facial shots was .526, barely above chance; for body shots, mean accuracy was .758.[55] For truthful statements, facial and body shots produced similar accuracy (.698 and .663, respectively). The difference occurred with respect to untruthful statements, where facial shots yielded a dismal .353 accuracy as compared to .853 for body shots.[56] Subjects expressed equally high confidence in their judgments based upon facial and body shots. Littlepage and Pineault found it "of interest . . . that facial shots of dishonest statements would evoke low accuracy but high confidence," a result that "seem[s] to indicate the success of facial impression management."[57]

The Littlepage and Pineault study deliberately avoided the problem of stressful materials that Hocking had identified in the Ekman and Friesen experiment.[58] As a result, the Littlepage and Pineault experiment provides limited support for the existence of usable body cues to deception. Unlike the Hocking study, however, the Littlepage and Pineault study did not attempt to separate verbal and nonverbal cues in various combinations. It compared only two sets of channels or cues: verbal content plus voice plus body, versus verbal content plus voice plus face. The first set yielded better results than the second.[59] But it does not follow that the most accurate set of channels includes the body, or that the body channel is

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50 *Id.* at 40, 43.

51 *Id.* at 43.

52 Littlepage & Pineault, *supra* note 23.

53 *See supra* text accompanying notes 32-34.

54 Statements were actually true or false, rather than role-played. Respondents were apparently not given any special incentive to deceive successfully. *See* Littlepage & Pineault, *supra* note 23, at 326.

55 *Id.* at 327.

56 *Id.*

57 *Id.* at 328.

58 *Id.* at 325.

59 The second, inferior set represents the conditions of most trial testimony, since the witness's face is always exposed to the jury but often much of the witness's body is not readily observable. *See supra* note 11.

effectively employed in other combinations such as those that include the face. In Littlepage and Pineault's first experiment, for example, subjects who received only audio performed as well as those who received facial video with audio.[60] It would be consistent with Littlepage and Pineault's second study if subjects receiving only audio, or only transcript, performed as well as subjects receiving any set that included the body. Hocking obtained just such results.[61]

In 1981, Zuckerman, DePaulo, and Rosenthal extensively reexamined not only the literature, but also the underlying data of all previous psychological studies of deception and deception detection, and conducted meta-analyses combining the original data of the many experiments.[62] The previous studies consistently showed that most people cannot do much better than chance in discerning lies under laboratory conditions: "most of the results fall in the .45-.60 range with a chance level of .5."[63] With respect to the critical question of which cues provide greater detection accuracy, combined analysis of data from many studies indicated that "the face did not seem to give away deception cues and may even have provided misleading information."[64] Detection accuracy in the absence of facial cues was higher than in their presence. Of all channels and channel combinations, only the facial channel failed to produce accuracy significantly greater than chance.[65]

Zuckerman, DePaulo, and Rosenthal found that in contrast to the face, the availability of body cues increased deception detection accuracy.[66] This conclusion, however, was based upon four studies which included Ekman and Friesen's 1974 article and the 1979 Hocking study. Although the Hocking study in a sense "duplicated" the Ekman and Friesen results, its overall effect is to cast serious doubt upon the Ekman and Friesen body-cues thesis.[67]

"The surprising finding," Zuckerman, DePaulo, and Rosenthal concluded, "is the power (i.e., the accuracy) of the word, either

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60 *See supra* text accompanying notes 32-38.

61 *See supra* text accompanying notes 44-51.

62 Zuckerman, DePaulo & Rosenthal, *supra* note 12.

63 *Id.* at 26 (citations omitted). Subsequent studies have yielded similar results. *See* Bond & Fahey, *supra* note 19, at 43 (49.51 percent accuracy, equivalent to random guessing); Miller, deTurck & Kalbfleisch, *supra* note 13, at 113 (accuracy ranging from .45 to .56); Ronald E. Riggio, Joan Tucker & Barbara Throckmorton, *Social Skills and Deception Ability*, 13 PERSONALITY & SOC. PSYCHOLOGY BULL. 568, 574 (1987) (accuracy did not exceed chance level "very dramatic[ally]"); *see also* P. EKMAN, *supra* note 19, at 162 ("Our research, and the research of most others, has found that few people do better than chance in judging whether someone is lying or truthful. We also found that most people think they are making accurate judgments even though they are not.").

64 Zuckerman, DePaulo & Rosenthal, *supra* note 12, at 27.

65 *Id.*

66 *Id.*

67 *See supra* text accompanying notes 48-51.

written or spoken. The assumption that nonverbal channels are more important in the communication of deception than the verbal cues is simply not true."[68] Whereas "facial cues seem to be faking cues," which may hinder rather than assist in lie detection, "success at deceiving and success at detecting deceit are both mediated largely by adeptness at construing and interpreting verbal nuances."[69]

Taken as a whole, the experimental evidence indicates that ordinary observers do not benefit from the opportunity to observe nonverbal behavior in judging whether someone is lying. There is no evidence that facial behavior is of any benefit; some evidence suggests that observation of facial behavior diminishes the accuracy of lie detection. Nor do paralinguistic cues appear to be of value; subjects who receive transcript consistently perform as well as or better than subjects who receive recordings of the respondent's voice. With respect to body cues, there is no persuasive evidence to support the hypothesis that lying is accompanied by distinctive body behavior that others can discern.

B. Demeanor and Detection of Witness Errors

The validity of testimony depends not only upon the sincerity of the witness, but also upon the accuracy of the witness's beliefs. Thus, in many cases the trier must appraise the perceptions and memory of the witness, as well as his or her honesty. Conceivably, the appearance and nonverbal behavior of witnesses may reveal unintended inaccuracy even if these cues are not effectively used to detect deception. Unfortunately, the experimental evidence consistently contradicts this hypothesis as well.

Indeed, the capacity of triers to appraise witness accuracy appears to be worse than their ability to discern dishonesty. As described in subpart III(A), the deception detection studies indicate that many subjects can do better than chance in detecting falsehood, although they do so on the basis of verbal content analysis rather than on the basis of nonverbal cues. The studies in which subjects seek to distinguish between accurate and inaccurate witnesses, on

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68 Zuckerman, DePaulo & Rosenthal, *supra* note 12, at 27 (citation omitted).

69 *Id.* at 39; *see also* A. DANIEL YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 169 (1979). Yarmey noted:

> In spite of the confidence that the average person has in his or her ability to detect liars by their nonverbal behaviors, there is little justification in the research literature to support such beliefs. If untrained observers, such as the typical juror, make decisions about the truth of a witness's statements solely on the basis of his stuttering or eye contact, etc., their accuracy of judgments will probably be no better than chance.

Id. (citation omitted).

the other hand, reveal a complete inability to outdo chance, even when using the verbal content of cross-examined testimony along with demeanor.

The pertinent studies are part of the extensive literature on eyewitness identifications. For our purposes, the pathbreaking study is that of Wells, Lindsay, and Ferguson, published in 1979.[70] In that study, the researchers staged a theft 127 times before individual eyewitnesses. Each witness attempted to identify the thief from a photo lineup. In the presence of subject jurors, researchers then examined and cross-examined twenty-four witnesses who had made correct identifications and eighteen witnesses who had made erroneous identifications. Subject jurors showed no ability to distinguish between accurate and inaccurate identifications; they were as likely to believe mistaken witnesses as accurate ones.[71] The confidence of the witness, rather than accuracy, was the major determinant of juror belief.[72] Unfortunately, confidence bears little relation to the accuracy of an eyewitness identification.[73]

Numerous studies have replicated the basic findings of the 1979 study—that subject jurors are unable to do better than chance in distinguishing between accurate and inaccurate eyewitness identifications, and that the jurors accord inappropriate weight to witness confidence.[74] Criticism of earlier experiments from legal profes-

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70 Gary L. Wells, R.C.L. Lindsay & Tamara J. Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOLOGY 440 (1979).

71 *Id.* at 444-45.

72 *Id.* at 446.

73 *See, e.g.*, Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 LAW & HUM. BEHAV. 243 (1980); Gary L. Wells & Donna M. Murray, *Eyewitness Confidence*, in EYEWITNESS TESTIMONY 155 (Gary L. Wells & Elizabeth F. Loftus eds. 1984) (summarizing results of many studies).

74 *See, e.g.*, R.C.L. Lindsay, Gary L. Wells & Carolyn M. Rumpel, *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOLOGY 79 (1981); Gary L. Wells, *How Adequate Is Human Intuition for Judging Eyewitness Testimony?*, in EYEWITNESS TESTIMONY, *supra* note 73, at 256, 268-70; Gary L. Wells, Tamara J. Ferguson & R.C.L. Lindsay, *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED PSYCHOLOGY 688 (1981); Gary L. Wells & Michael R. Leippe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail Can Be Misleading*, 66 J. APPLIED PSYCHOLOGY 682 (1981); Gary L. Wells, R.C.L. Lindsay & J.P. Tousignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUM. BEHAV. 275 (1980); *see also* John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors To Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19 (1983); Brian L. Cutler, Steven D. Penrod & Hedy Red Dexter, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185 (1990); Brian L. Cutler, Steven D. Penrod & Thomas E. Stuve, *Juror Decision Making in Eyewitness Identification Cases*, 12 LAW & HUM. BEHAV. 41 (1988); Kenneth A. Deffenbacher & Elizabeth F. Loftus, *Do Jurors Share A Common Understanding Concerning Eyewitness Behavior?*, 6 LAW & HUM. BEHAV. 15 (1982); Steven D. Penrod & Brian L. Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking*, LAW & CONTEMP. PROBS. 43, 56-62 (Autumn 1989); David F. Ross, Beth S. Miller & Patricia B. Moran, *The Child in the Eyes of*

sionals inspired the most interesting replication, published in 1989.[75] In the earlier experiments, senior or graduate psychology students interrogated witnesses using a predetermined script. Many lawyers felt that interrogation of the witnesses by experienced attorneys might have enabled the jurors to make more accurate judgments.

In the 1989 version, the researchers again staged crimes and mock trials, but conducted the trials in a real courtroom some weeks after the "crime." In addition, they obtained volunteer attorneys to act as prosecutors and defense counsel. The attorneys were divided into two groups, experienced criminal attorneys and senior law students with some legal aid experience. Sixteen mock trials were conducted and videotaped, eight involving an accurate witness and eight involving an inaccurate witness. In each trial the witness underwent direct, cross-, and redirect examination without time limit, and the attorneys were permitted to make closing statements. The taped trials were presented to separate juries, totaling 178 subjects.[76] The results were that "[e]yewitnesses who had identified the guilty party led 68% of the mock jurors to vote guilty. Those who identified an innocent suspect convinced 70% of mock jurors to vote guilty."[77]

The attorney experience factor had no effect on trial outcomes. "Even experienced lawyers, free to question the witness as they chose, were unable to lead mock jurors to believe accurate eyewitnesses more than inaccurate eyewitnesses."[78] Both experienced and inexperienced prosecutors won 69% of the time, and both experienced and inexperienced defense lawyers lost 69% of the time.[79] This occurred despite the fact that the subject jurors were able to distinguish the attorneys correctly as to experience and rated the experienced lawyers as having done a better job.[80] As in previous studies, eyewitness confidence, rather than accuracy, was the identified predictor of juror belief.[81]

In the context of identification testimony, therefore, a good body of experimental evidence consistently shows that jurors simply cannot tell whether a witness's perception and memory are accurate.

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the Jury: Assessing Mock Jurors' Perceptions of the Child Witness, in STEPHEN J. CECI, MICHAEL P. TOGLIA & DAVID F. ROSS, CHILDREN'S EYEWITNESS MEMORY 142 (1987).

75 *See* R.C.L. Lindsay, Gary L. Wells & Fergus J. O'Connor, *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses*, 13 LAW & HUM. BEHAV. 333 (1989).

76 *Id.* at 336.

77 *Id.*

78 *Id.* at 338.

79 *Id.* at 336.

80 *Id.* at 336-37.

81 *Id.* at 337.

In the experiments, the jurors had the benefit of verbal and nonverbal information, yet they never exceeded chance in making judgments. In other words, neither verbal nor nonverbal cues are effectively employed in these situations.

Conceivably, the problem of judging the accuracy of identification testimony is somehow categorically different from the evaluation of a witness's perception and memory in other contexts. Even so, however, it is not plausible that such differences significantly affect the utility of demeanor. If one supposes that witness demeanor is generally useful to triers in judging the reliability of a witness's perception and memory, one would hardly expect that identification cases would be an exception to the rule. Identifications of strangers challenge most people's faculties of perception and memory. If demeanor generally provided clues to the soundness of a person's perceptions and memory, one would expect that demeanor information would be relatively powerful in this context. Since demeanor information proves useless in judging identifications, such information is probably not valuable in appraising witness perceptions and memory.

IV
IMPLICATIONS FOR LAW

A. Live Testimony, Confrontation, and Hearsay

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.

To propose that live trial testimony be abandoned on the basis of the foregoing premise would, however, be both unrealistic and illogical. The confrontation clause mandates live testimony in criminal cases, at least as to testimony offered against the accused.[82] The Supreme Court has found the right of confrontation to be an essential ingredient of due process in many civil proceedings.[83] Furthermore, live trial testimony would hardly be insecure if it had no place in the Constitution. Purely as a political matter, American lawyers

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82 *See, e.g.*, Coy v. Iowa, 487 U.S. 1012, 1016 (1988); Mattox v. United States, 156 U.S. 237, 242-43 (1895).

83 *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 269-70 (1970); Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-04 (1963); Greene v. McElroy, 360 U.S. 474, 492, 496-97 (1959).

and nonlawyers alike would not tolerate any major curtailment of an institution so deeply embedded in our legal tradition.

That live testimony does not enhance credibility judgments does not imply that a trial with live testimony is not the best kind of trial. First, with regard to accuracy of factfinding—a broader issue than accuracy of credibility determinations—live testimony may well have overall positive value. The requirement of live testimony may deter dishonest witnesses. Individuals who would lie in a deposition may balk at lying in public, in a courtroom, in the physical presence of the opponent, the judge, and the jury.[84] Second, trials serve purposes beyond the accurate determination of facts. It is probably more important that the results of litigation be accepted than that they be accurate. Accuracy is merely a factor, albeit a rather important factor, in acceptability. Live testimony may be essential to perceptions of fairness, regardless of the real relation between live testimony and accuracy of outcomes.

The Supreme Court's 1988 decision in *Coy v. Iowa*[85] explored the value of live testimony. The defendant Coy was accused of sexual assault upon two thirteen-year-old girls. At trial, a screen was placed between the girls and the defendant during the girls' testimony, as permitted by a 1985 Iowa statute. The screen blocked the witnesses' view of the defendant and permitted him to see them dimly. The jury had a full view of the witnesses. Reversing Coy's convictions, the Supreme Court held that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[86] The Court noted that the constitutional guarantee of face-to-face encounter "serves ends related both to appearances and to reality."[87] Citing Shakespeare and Dwight Eisenhower, the Court found that for centuries face-to-face encounter has been regarded as essential to a fair trial.[88] This persistent perception is valid, according to the Court, because "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' "[89]

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84 *See* FED. R. EVID. art. VIII advisory committee's introductory note ("The witness himself will probably be impressed with the solemnity of the occasion and the possibility of public disgrace. Willingness to falsify may reasonably become more difficult in the presence of the person against whom directed."); C. MCCORMICK, *supra* note 5, § 245.

85 487 U.S. 1012 (1988).

86 *Id.* at 1016 (citation omitted).

87 *Id.* at 1017.

88 *Id.* at 1016, 1017.

89 *Id.* at 1019. In Maryland v. Craig, 110 S. Ct. 3157 (1990), the Court upheld a Maryland procedure whereunder a child victim-witness testified by closed-circuit television from another room while the defendant remained in the courtroom. The Maryland statute required that the trial judge find " 'that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child

Two dissenting Justices, relying heavily upon Wigmore, disagreed with the majority's contention that face-to-face encounter is an important aspect of confrontation. The overwhelming concerns of confrontation, they argued, are cross-examination and demeanor.[90]

Among the most notorious of the preconfrontation cases was the 1603 trial of Sir Walter Raleigh on charges of treason.[91] The Supreme Court has cited Raleigh's case as an example of the abuses that inspired the confrontation clause.[92] When 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. Rather, Raleigh insisted that Cobham had recanted and would not accuse him testimonially:

> *Lord Cecil.* Let me ask you this, If my lord Cobham will say you were the only instigator of him to proceed in the Treasons, dare you put yourself on this?
>
> *Raleigh.* If he will speak it before God and the king, that ever I knew of Arabella's matter, or the Money out of Spain, or of the surprising Treason; I put myself on it, God's will and the king's be done with me.[93]

The majority in *Coy* did not cite Raleigh's case, but it supports the Court's position and rebuts Wigmore's contention that confrontation is only about cross-examination and demeanor.

The assumption that demeanor may be a reliable guide to cred-

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cannot reasonably communicate.' " *Id.* at 3161 n.1 (quoting MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989)). The Court held that the right of face-to-face confrontation is not absolute, and it may be subordinated to a case-specific finding of necessity as prescribed in the Maryland provision. *Id.* at 3165-66.

90 *See Coy*, 487 U.S. at 1029 (Blackmun, J., dissenting) (citing 5 J. WIGMORE, EVIDENCE, *supra* note 2, §§ 1395, 1397, 1399 (J. Chadbourn rev. ed. 1974)).

91 Trial of Sir Walter Raleigh, 2 T.B. HOWELL, STATE TRIALS 1 (1816).

92 *See* California v. Green, 399 U.S. 149, 157 n.10 (1970). No adequate history of the confrontation clause exists. *See id.* at 173-74 (Harlan, J., concurring) ("[T]he Confrontation Clause comes to us on faded parchment. History seems to give us very little insight into [its] intended scope . . . ."); Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 104, 118-19 (1972) (describing Wigmore's account of the historical background of the confrontation clause as "highly partisan and probably innaccurate," and criticizing Justice White's historical assertions in *California v. Green*); Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 568 (1978). The connection between Raleigh's case and the clause has been called a "convenient but highly romantic myth." Graham, *supra*, at 100 n.4; *see also* Kenneth W. Graham, Jr., *The Right of Confrontation and Rules of Evidence: Sir Walter Raleigh Rides Again*, 9 ALASKA L.J. 3, 22 (Jan. 1971). Whatever the specific historical relationship between Raleigh's case and the confrontation clause, the case at least illustrates the holding in *Coy* that confrontation may involve more than cross-examination and demeanor.

93 2 T.B. HOWELL, *supra* note 91, at 23.

ibility plays only a small role in the hearsay rule. The theory of the hearsay rule is that to employ a person's belief in a matter as evidence of the matter imposes certain dangers (the "hearsay dangers" of errors in perception or memory, accidental miscommunication, and insincerity), and that these dangers may be exposed or reduced by the "ideal conditions" of testimony. Hence the rule normally excludes nontestimonial statements offered to prove the truth of matters stated.[94] The "ideal conditions" most commonly cited are the oath, personal presence, and cross-examination. In particular, the value of presence is at least partly attributed to the supposed utility of demeanor in determining credibility.[95] Demeanor is accorded little importance, however, compared to cross-examination, and its supposed value is not a significant premise of the hearsay concept.[96]

Recognition of the weakness of demeanor evidence does not herald a revolution in trial procedure. Within the basic framework of live trial testimony, a reappraisal of the proper role of demeanor may nevertheless support a few nonrevolutionary recommendations. Traditional assumptions about witness demeanor arise in a number of contexts besides discussions of the basic premises of live testimony, confrontation, and the hearsay rule. Appellate courts in nonjury cases often cite the opportunity of the trial judge to view the demeanor of witnesses as a ground for deferring to the trial court's factual determinations. The importance of demeanor is a natural focus of rules governing the use of depositions and former testimony in lieu of live trial testimony. Alternative dispute resolution techniques, such as summary jury trial, typically do not employ live testimony, giving rise to concern about the absence of demeanor information. The value of demeanor has been central to two doctrinal controversies concerning the extent of a civil jury's (or judge's) discretion in evaluating the 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.

B. Deference to Trial Court Findings on Credibility

Appellate courts have traditionally accorded generous deference to trial judges' factual findings, particularly where the findings

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94 *See, e.g.*, Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49, 52-54 (1982).

95 *See, e.g.*, *Green*, 399 U.S. at 158; FED. R. EVID. art. VIII advisory committee's introductory note; C. MCCORMICK, *supra* note 5, § 245.

96 *See, e.g.*, FED. R. EVID. art. VIII advisory committee's introductory note; C. MCCORMICK, *supra* note 5, § 245; 5 J. WIGMORE, EVIDENCE, *supra* note 2, § 1365 (J. Chadbourn rev. ed. 1974).

involve determinations of the credibility of oral testimony.[97] Appellate judges have assumed that they, lacking the opportunity to observe the demeanor of the witnesses, simply could not make credibility determinations as accurately as trial courts. If, as empirical research indicates,[98] a transcript is actually as good a basis for a credibility determination as live testimony, appellate courts could presumably make credibility determinations de novo with no sacrifice of accuracy. There are, however, adequate justifications for appellate deference to trial court findings of fact unrelated to demeanor.

The history of the third sentence of Federal Rule of Civil Procedure 52(a) is instructive on this issue. The sentence now reads: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."[99] The clause "whether based on oral or documentary evidence" was inserted by amendment in 1985 to emphasize that the "clearly erroneous" standard applies to all findings, not just to findings based upon oral testimony.

Prior to the 1985 amendment, many courts of appeals decisions interpreted the rule to permit de novo review if the evidence below was not oral.[100] Professor Wright pointed out as early as 1957 that these decisions simply misread the rule; the provision required application of the "clearly erroneous" test to all findings.[101] In addition to misconstruing the rule, the cases indulging in de novo review represented bad judicial policy. To accord no finality to the trier's findings undermines the resolution of disputes. As Professors Wright and Miller explained: "Even in instances where an appellate court is in as good a position to decide as the trial court, it should

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97 *See, e.g.*, FED. R. CIV. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."); F. JAMES & G. HAZARD, *supra* note 7, § 12.8, at 667 ("Whether the fact issues in the trial court are determined by a jury or a judge, the appellate court limits itself to inquiring whether there is a substantial evidentiary basis for the determinations."); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2586, at 737 (1971) ("Though the appellate court can never set aside a finding of fact unless it is clearly erroneous, it must be especially reluctant to set aside a finding based on the trial judge's evaluation of conflicting oral testimony, and will do so only under the most unusual circumstances.") (footnotes omitted).

98 *See supra* Part III.

99 FED. R. CIV. P. 52(a).

100 *See* 9 C. WRIGHT & A. MILLER, *supra* note 97, § 2587. Many other courts of appeals decisions, and all Supreme Court cases, correctly read the original provision to apply the "clearly erroneous" standard to all findings. *See id.* § — 745-47 nn.33-35.

101 Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 770 (1957).

not disregard the trial court's finding, for to do so impairs confidence in the trial courts and multiplies appeals with attendant expense and delay."[102] As one court of appeals put it, the scope of review should "encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not . . . encourage appeals that are based on the hope that the appellate court will second-guess the trial court."[103]

An appellate court may always be "in as good a position to decide as the trial court," in the sense that the traditionally disparaged "cold record" may be as good a basis for decision, including judgments of credibility, as the trial court's traditionally exalted opportunity to see the witnesses. De novo review of facts is nevertheless a bad idea, and appellate court rejection of trial court findings should continue to be limited to instances of clear error.

On the other hand, in applying the "clearly erroneous" standard, the trial judge's access to demeanor evidence should not by itself justify deference. If the trial judge's factual conclusions are clearly wrong based upon the content of testimony and other evidence of record, the appellate court should set aside the findings. Findings that appear clearly incorrect on the basis of the record should not be sustained on the theory that they might be premised upon a witness's demeanor.

C. Use of Depositions and Former Testimony

Testimony taken in a deposition or in another proceeding is normally admissible in lieu of the witness's live testimony only if two conditions are satisfied: the witness is unavailable to testify in person and the party against whom the evidence is offered had an opportunity and similar motive to examine the witness at the deposition or previous proceeding.[104] The unavailability requirement reflects the importance ascribed to demeanor. The Advisory Committee's note to Federal Rule of Evidence 804(b)(1) expresses the traditional view:

> Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only miss-

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102 9 C. WRIGHT & A. MILLER, *supra* note 97, § 2587, at 748.

103 Lundgren v. Freeman, 307 F.2d 104, 114 (9th Cir. 1962).

104 *See* FED. R. EVID. 804(b)(1) (former testimony or deposition admissible if witness unavailable (as defined in rule 804(a)) and "the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination"); UNIF. R. EVID. 804(b)(1) (identical); FED. R. CIV. P. 32(a) (use of deposition at trial; unavailability generally required); FED. R. CRIM. P. 15(e) (same); C. MCCORMICK, *supra* note 5, ch. 25.

> ing one of the ideal conditions for the giving of testimony is the presence of trier and opponent ("demeanor evidence"). This is lacking with all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803, supra [*i.e.*, unavailability should not be required]. However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 803 demeanor lacks the siguificance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available.[105]

In criminal cases, the Supreme Court repeatedly has held that to introduce former testimony against an accused violates the confrontation clause unless the prosecution has satisfactorily demonstrated that the witness is unavailable to testify at the trial.[106]

Critics such as Dean McCormick have objected to the unavailability requirement for former testimony, pointing out that no such requirement is imposed upon other, less commendable hearsay exceptions:

> Few, if any, other hearsay exceptions measure up in reliability to former testimony. Yet former testimony is one of a very small group upon which the requirement of unavailability is imposed. The incongruity of according this second-class status to former testimony is apparent when it is compared with such exceptions as declarations of present bodily or mental state, or excited or spontaneous utterances, where no showing of unavailability is required.[107]

The incongruity described by McCormick is not without any rationale, however. The Supreme Court, which constitutionalized the unavailability requirement for former testimony offered against an accused, declined to extend the requirement to coconspirator statements. The Court explained the distinction as follows:

> [F]ormer testimony often is only a weaker substitute for live testimony. . . . If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable

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105 FED. R. EVID. 804(b)(1) advisory committee's note.

106 *See* Ohio v. Roberts, 448 U.S. 56 (1980); Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968); C. MCCORMICK, *supra* note 5, § 252.

107 C. MCCORMICK, *supra* note 5, § 261; *see also* CHARLES T. MCCORMICK, EVIDENCE § 238, at 500 (1st ed. 1954) [hereinafter C. MCCORMICK, EVIDENCE].

> as well to Confrontation Clause analysis, favor the better evidence. . . .
>
> Those same principles do not apply to co-conspirator statements. Because they are made while the conspiracy is in progress, such statements provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court.[108]

In other words, former testimony is normally inferior to present testimony. Most other hearsay exceptions admit statements that, owing to their circumstances, offer something beyond what the declarant's trial testimony could provide. Therefore, it may be logical to exclude an available witness's former testimony and simultaneously admit statements of the same declarant under other hearsay exceptions.

The logic of the unavailability requirement depends upon the extent to which former testimony is actually inferior to live testimony. The assumption that former testimony is inferior, however, relies substantially on the faulty premise that demeanor evidence is valuable in determining a witness's credibility. If former testimony satisfies the requirements of opportunity and similar motive to develop the testimony, then it is probably as good as live testimony for purposes of the trier's evaluation of credibility. Live testimony and confrontation at trial serve ends unrelated to demeanor,[109] but an unavailability requirement is unnecessary to protect those values. A party desiring to confront at trial an available witness whose former testimony is introduced may call the witness, so long as the party had sufficient notice that the former testimony would be presented.[110]

In criminal cases, longstanding confrontation clause doctrine requires witness unavailability for admission of former testimony offered against the accused.[111] In civil cases and in criminal cases with respect to defense evidence, however, abolition of the unavailability requirement is both constitutionally permissible and desirable in light of the psychological research on demeanor.

This idea is hardly radical. The 1942 Model Code of Evidence proposed that former testimony be admissible "unless the judge finds that the declarant is available as a witness and in his discretion rejects the evidence."[112] Dean McCormick favored this treatment

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108 United States v. Inadi, 475 U.S. 387, 394-95 (1986).

109 *See supra* subpart IV(A).

110 *See* C. McCormick, *supra* note 5, § 261 (citing English Civil Evidence Act of 1968, c. 64, Part I, §§ 2(1), 8, permitting trial use of former testimony subject to a notice requirement).

111 *See supra* note 106 and accompanying text.

112 Model Code of Evidence Rule 511 (1942).

for civil cases.[113] The 1953 Uniform Rules of Evidence, a much more conservative codification than the Model Code, retained the unavailability requirement for former testimony except depositions taken "for use as testimony in the trial of the action in which offered."[114] This rule resembles the longstanding Texas civil rule permitting use at trial of depositions taken for the same action without regard to availability.[115] Professors Wright and Miller, judging that the Texas rule "has not led to excessive use of depositions rather than live witnesses," suggest that the merits of the federal unavailability requirement are "debatable."[116]

In light of the extensive research impugning the value of demeanor, unavailability should be abolished as a precondition for admissibility in civil cases not only of depositions taken in the same action, but of all former testimony that otherwise meets the requirements of Federal Rule of Evidence 804(b)(1).

D. Alternative Dispute Resolution Techniques

In most alternative dispute resolution (ADR) techniques, such as summary jury trial, live testimony of witnesses is not presented. Instead, the attorneys summarize anticipated testimony.[117] Both proponents and critics of these ADR techniques have regarded the absence of witness demeanor as a serious deficiency in cases presenting credibility issues.[118] Social science evidence indicates

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113 C. MCCORMICK, EVIDENCE, *supra* note 107, § 238; *see also* C. MCCORMICK, *supra* note 5, § 261.

114 UNIF. R. EVID. 63(3) (1953).

115 *See* TEX. R. CIV. P. ANN. 207 (Vernon Supp. 1990). In other circumstances, Texas imposes the traditional unavailability requirement upon former testimony and depositions. *See* TEX. CRIM. PROC. CODE ANN. arts. 39.01, 39.12 (Vernon 1979); TEX. R. CIV. EVID. 804(b)(1); TEX. R. CRIM. EVID. 804(b)(1); STEVEN GOODE, OLIN WELLBORN & MICHAEL SHARLOT, GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL §§ 801.14, 804.3 (1988).

116 8 C. WRIGHT & A. MILLER, *supra* note 97, § 2142. Federal Rule of Civil Procedure 32(a) generally requires unavailability for use of a deposition at trial, other than for impeachment or as a party admission. A deposition may be used under the rule without a showing of unavailability "upon application and notice, [if the court finds] that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used." FED. R. CIV. P. 32(a)(3)(E). The reference to the importance of live testimony was intended as a warning against permitting general use of depositions upon the parties' consent. Free use of depositions by consent was provided in the Advisory Committee's Preliminary Draft of Rule 32 and had been the practice of some courts under the Equity Rules of 1912. *See* NLRB v. Dinion Coil Co., 201 F.2d 484, 487-88 n.4 (2d Cir. 1952); 4A J. MOORE, *supra* note 5, ¶ 32.05; 5 *id.* ¶ 43.03.

117 *See* Thomas Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 471 (1984); Edward Sherman, *Reshaping the Lawyer's Skills for Court-Supervised ADR*, 51 TEX. B.J. 47, 48 (1988).

118 *See* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL.

that the absence of demeanor evidence alone probably does not weaken these processes.

A more serious issue is the effect of summarization, because the same social science evidence indicates that close examination of verbal content is useful to the one evaluating credibility. In a summary jury format, for example, presentation of actual depositions might provide a basis for credibility determinations equivalent to live testimony in potential accuracy. Of course, to present complete depositions rather than summaries would seriously undermine the efficiency of the procedure. Not all testimony presents significant credibility determinations, however. It may be feasible to introduce verbatim deposition transcripts of only those portions of testimony presenting important credibility problems, without seriously undermining the efficiency of ADR presentations. If so, the absence of live testimony and demeanor should not be a serious concern.

E. Uncontradicted, Unimpeached Testimony of a Disinterested Witness

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.[119] A few courts have permitted juries to disbelieve uncontradicted, unimpeached, disinterested testimony, but the great majority do not.[120] As Professors James and Hazard noted, the majority rule "amounts to a holding that reasonable people could not disbelieve such testimony on the basis of demeanor evidence."[121] Most commentators have approved this limitation on the jury's use of "demeanor evidence."[122]

The majority position disallowing demeanor-based rejection of

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L. REV. 1, 39-40 (1987); Richard Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 374 (1986); Sherman, *supra* note 117, at 48-49.

119 *See infra* subpart IV(F).

120 *See* F. JAMES & G. HAZARD, *supra* note 7, § 7.11; 9 C. WRIGHT & A. MILLER, *supra* note 97, § 2527; Cooper, *supra* note 1, at 930; Annotation, *Credibility of Witness Giving Uncontradicted Testimony as Matter for Court or Jury*, 62 A.L.R.2d 1191 (1958).

121 F. JAMES & G. HAZARD, *supra* note 7, § 7.11.

122 *See id.*; 9 C. WRIGHT & A. MILLER, *supra* note 97, § 2527; Cooper, *supra* note 1, at 930-40. Dean Wigmore's position is unclear, however. *Compare* 7 J. WIGMORE, EVIDENCE, *supra* note 2, § 2034 (J. Chadbourn rev. ed. 1978) (jury need not believe uncontradicted testimony) *with* 9 *id.* § 2495 (J. Chadbourn rev. ed. 1981) (quoting with

uncontradicted, disinterested testimony is supported by the empirical evidence that demeanor is not a reliable guide to credibility. On the other hand, although experimental subjects have not made effective use of nonverbal indicia to ascertain the truthfulness of testimony, they have demonstrated the ability to render significantly better-than-chance judgments using verbal content.[123] This suggests the following treatment: If demeanor is the only possible basis for rejection of a disinterested witness's testimony, the testimony must be accepted; if, however, the content of the testimony provides a reasonable basis to reject it, the jury may do so. Something like the foregoing distinction likely obtains in practice by interpretation and application of the requirements that the testimony be uncontradicted and unimpeached. As one federal court put it, "Exaggeration, inherent improbability, self-contradiction, omissions in a purportedly complete account, imprecision and errors may all breed disbelief and therefore the disregard of even uncontradicted non-opinion testimony."[124]

Interested witness testimony presents a wholly different problem. Demeanor is no more reliable a basis for rejecting interested testimony than disinterested testimony, yet "[n]o one would champion a rule which requires belief of anything an interested witness might say."[125] The circumstance of interest, by itself, greatly increases the probability of false testimony, both conscious and unconscious. Any rule of forced acceptance of interested testimony would increase erroneous outcomes.[126]

F. Disbelief of Testimony as a Basis for Finding a Fact

Assume that plaintiff must prove *X*. No witness testifies *X*, nor does sufficient circumstantial evidence appear from which to infer *X*. A witness who knows about *X* testifies "not *X*." May the jury, on the basis of disbelief of the witness's testimony, find *X*? Hundreds of cases say no.[127] "Mere disbelief of testimony is not proof of facts of

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approval language stating that in appropriate circumstances judge may compel jury to accept uncontradicted testimony).

123 *See supra* subpart III(A).

124 Sternberger v. United States, 401 F.2d 1012, 1016 (Ct. Cl. 1968).

125 Cooper, *supra* note 1, at 941.

126 *See id.*

127 A good sample of cases may be found in West's American Digest System, mainly under Evidence Key Number 588. The earliest cases cited in the American Digest that invoke the disbelief-is-not-evidence doctrine are Miller v. Smith, 20 A.D. 507, 510-11, 47 N.Y.S. 49, 51 (Sup. Ct. 1897) (overturning trial judge's finding of fraud and collusion based upon disbelief of testimony); Wallace v. Berdell, 97 N.Y. 13, 21 (1884); Mercer v. Wright, 3 Wis. 568, 570 (1854) (reversible error to instruct jury in trespass case that

an opposite nature or tendency."[128]

Like the majority rule requiring acceptance of uncontradicted, unimpeached, disinterested testimony, the doctrine that disbelief of testimony may not alone support a finding results from courts' limited faith in the revelatory power of demeanor. As the Supreme Court of Utah noted:

> While the demeanor of the witness in testifying is very important and should be given consideration by the trier of fact, still there must be something more than the batting of an eye, the coloring

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they could use disbelief of defendant's witnesses as evidence of defendant's guilt, absent evidence that defendant had suborned the false testimony).

The Digests collect a particularly large number of Massachusetts cases citing the doctrine during the period from 1911 through 1933. *E.g.*, De Blois v. Boylston & Tremont Corp., 281 Mass. 498, 183 N.E. 823 (1933); Rubenstein v. Economy Grocery Stores Corp., 274 Mass. 608, 174 N.E. 922 (1931); Caron v. Lynn Sand & Stone Co., 270 Mass. 340, 170 N.E. 77 (1930); Guinan v. Famous Players-Lasky Corp., 267 Mass. 501, 167 N.E. 235 (1929); McDonough v. Vozzela, 247 Mass. 552, 142 N.E. 831 (1924); Martell v. Dorey, 235 Mass. 35, 126 N.E. 354, *cert. dismissed sub nom.* Bryne v. Martell, 254 U.S. 665 (1920); Phillips v. Gookin, 231 Mass. 250, 120 N.E. 691 (1918); Crnzan v. New York Cent. & Hudson River R.R., 227 Mass. 594, 116 N.E. 879 (1917), *dismissed*, 249 U.S. 621 (1919); Town of Wakefield v. American Sur. Co., 209 Mass. 173, 95 N.E. 350 (1911); Hyslop v. Boston & Maine R.R., 208 Mass. 362, 94 N.E. 310 (1911).

It is possible that the cluster of Massachusetts cases is merely a vagary of the Digest collection system; otherwise, cases citing the doctrine appear to be ubiquitous, and many are federal. *See, e.g.*, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512, *reh'g denied*, 467 U.S. 1267 (1984); Moore v. Chesapeake & Ohio Ry., 340 U.S. 573, 576 (1951); Martin v. Citibank, N.A., 762 F.2d 212, 217 (2d Cir. 1985); Collman v. Commissioner, 511 F.2d 1263, 1268 (9th Cir. 1975) (trial judge's disbelief of taxpayer's testimony cannot suffice to establish taxpayer's knowledge of a fact); Kenneth E. Curran, Inc. v. Salvucci, 426 F.2d 920, 923 (1st Cir. 1970); Federal Ins. Co. v. Summers, 403 F.2d 971, 974 (1st Cir. 1968); NLRB v. Joseph Antell, Inc., 358 F.2d 880, 883 (1st Cir. 1966); Janigan v. Taylor, 344 F.2d 781, 784 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965); Mandelbaum v. United States, 251 F.2d 748, 752 (2d Cir. 1958); Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952) (L. Hand, J.); Mosson v. Liberty Fast Freight Co., 124 F.2d 448, 450 (2d Cir. 1942) (L. Hand, J.); Pariso v. Towse, 45 F.2d 962, 964 (2d Cir. 1930) (L. Hand, J.); Group Hospitalization, Inc. v. District of Columbia Comm'n on Human Rights, 380 A.2d 170, 174 (D.C. 1977); Dworkis v. Dworkis, 111 So. 2d 70, 74 (Fla. App.), *cert. denied*, 115 So. 2d 6 (Fla. 1959); New Orleans & N.E.R. Co. v. Redmann, 28 So. 2d 303, 309 (La. Ct. App. 1946); Michigan Employment Relations Comm'n v. Cafana Cleaners, Inc., 73 Mich. App. 752, 761, 252 N.W.2d 536, 540 (1977); Moulton v. Moulton, 178 Minn. 568, 569, 227 N.W. 896, 897 (1929); Allstate Ins. Co. v. Page, 105 N.H. 410, 200 A.2d 851, 853 (1964); Clairmont v. Cilley, 85 N.H. 1, 7, 153 A. 465, 468 (1931); Briscoe v. Laminack Tire Serv., 546 S.W.2d 695, 697 (Tex. Civ. App. 6th Dist. 1977); Chapman v. Troy Laundry Co., 87 Utah 15, 32-33, 47 P.2d 1054, 1062 (1935); *see also* RICHARD FIELD, BENJAMIN KAPLAN & KEVIN CLERMONT, CIVIL PROCEDURE 510-14 (5th ed. 1984); F. JAMES & G. HAZARD, *supra* note 7, § 7.11; 2 J. WIGMORE, EVIDENCE, *supra* note 2, § 278 (J. Chadbourn rev. ed. 1979); 9 C. WRIGHT & A. MILLER, *supra* note 97, § 2528; Cooper, *supra* note 1, at 937-39; John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226, 252-57 (1935); Edmund Morgan, *Admissions*, 12 WASH. L. REV. 181, 185-86 (1937).

128 *McDonough*, 247 Mass. at 558, 142 N.E. at 833.

> of the cheek, or the twiddling of the thumbs as a basis for finding facts.[129]

Not surprisingly, a few enthusiasts of "demeanor evidence" have disapproved of the doctrine, notably Judge Jerome Frank.[130]

Insofar as the disbelief-is-not-evidence rule forbids the use of demeanor alone as a basis for a finding, it also finds support in the experimental evidence. But what if the trier rationally bases disbelief and contrary inference not upon the witness's demeanor, but upon the content of the testimony? The case law and commentary on the disbelief problem have generally addressed it as a question of the permissible reach of "demeanor evidence," without drawing the distinction between disbelief based upon demeanor and disbelief based upon content.[131] One early article suggested that the general prohibition against what the authors called "probative backspin" might be waived "where disbelief is reasonably induced by factors perceptible to the trial and appellate courts as well as to the jury," that is, where the grounds of the disbelief and contrary inference are in the record.[132] A rare case authorizing a finding based upon disbelief of testimony relied solely upon close analysis of testimonial content and record evidence that other parts of the testimony were false, with no mention of demeanor.[133]

If a witness gives testimony that may reasonably be judged a fabrication without resort to demeanor, and if under the circumstances the fact that the witness has lied in turn reasonably supports some contrary proposition of fact, the inference should be permitted. Such cases will be rare. Disbelief of an assertion does not ordinarily imply belief in an opposite assertion,[134] but in some instances

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129 *Chapman*, 87 Utah at 32, 47 P.2d at 1062.

130 *See Dyer*, 201 F.2d at 269-72 (Frank, J., concurring). Judge Learned Hand, writing for the court in the same case, agreed with Judge Frank that demeanor alone might rationally justify a finding opposite the testimony. Nevertheless, the court held that the orthodox doctrine should be followed on the ground that there could be no effective appellate review of a trial judge's decision to permit an issue to go to the jury on the basis of witness demeanor. *Id.* at 269; *see also* Richard Friedman, *Route Analysis of Credibility and Hearsay*, 96 YALE L.J. 667, 735 n.134 (1987); Morgan, *supra* note 127, at 185-86.

131 *See, e.g., Dyer*, 201 F.2d at 269; *id.* at 269-72 (Frank, J., concurring); Cooper, *supra* note 1, at 937-39.

132 Maguire & Vincent, *supra* note 127, at 257.

133 *See* Eckart v. Kiel, 123 Minn. 114, 118-19, 143 N.W. 122, 124 (1913). *But see* Moulton v. Moulton, 178 Minn. 568, 569, 227 N.W. 896, 897 (1929), where the court noted that "the stories of the defendants were such that a jury might think them untrue," but nevertheless held that "[t]he court could not find a fact necessary to be proved . . . as to which there was no affirmative testimony, by a claim that the negative testimony was unworthy of belief. This is the holding of the cases throughout."

134 *See* Mosson v. Liberty Fast Freight Co., 124 F.2d 448, 450 (2d Cir. 1942) ("those are not the only possibilities").

the implication is reasonable.[135] The extent of permissible inferences drawn from the presentation of particular false testimony is analogous to the weight given to a party's extrajudicial fabrication, suppression, spoliation, or subornation of evidence. In appropriate circumstances, inferences from such "admissions by conduct" are permitted to support particular findings.[136] The presentation of false testimony at trial should be treated similarly, where the judgment of falsity reasonably derives not from demeanor, but from the testimonial content or other record evidence. To this extent, the doctrine that disbelief of testimony can never alone support a finding of fact should be qualified.

V
CONCLUSION

The notion that viewing the appearance and demeanor of a witness significantly assists a trier of fact to determine the truthfulness of the witness's testimony appears to be as ancient as testimony itself. The supposed ability of jurors and judges to discern sincerity or deception from nonverbal manifestations has had an important role in legal discourse and doctrine. The extent to which experienced practicing attorneys and judges maintain a genuine faith in the reliability of demeanor is less certain, although published expressions of skepticism on the matter have been strikingly rare.

If ordinary people in fact possess the capacity to detect falsehood or error on the part of others by observing their nonverbal behavior, then it should be possible, indeed easy, to demonstrate such a capacity under controlled conditions. Over the past twenty-five years, a large number of experiments involving thousands of subjects have searched for this capacity. With remarkable consistency, the experiments have shown that it simply does not exist. To the extent that people can detect lying or erroneous beliefs in another, they do so primarily by paying close attention to the content

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135 *Cf.* NLRB v. Joseph Antell, Inc., 358 F.2d 880, 883 (1st Cir. 1966). There, the First Circuit asserted:

> The mere disbelief of testimony of itself establishes nothing. Affirmative proof, however, that the reason given [for the discharge] was false warrants the inference that some other reason was being concealed. If the employer is independently shown to have an antiunion animus which the discharge would gratify, it may be a fair inference that this was the true reason.

Id. (citations omitted).

136 *See* United States v. Philatelic Leasing, 601 F. Supp. 1554, 1565-66 (S.D.N.Y. 1985), *aff'd*, 794 F.2d 781 (2d Cir. 1986); C. MCCORMICK, *supra* note 5, § 273; 2 J. WIGMORE, EVIDENCE, *supra* note 2, §§ 278, 291 (J. Chadbourn rev. ed. 1979); Maguire & Vincent, *supra* note 127; Morgan, *supra* note 127, at 183-86.

of what the other says, not by observing facial expression, posture, tone of voice, or other nonverbal behavior.

Although the law may have been wrong about the value of witness demeanor, devaluation of demeanor's utility does not imply dramatic legal changes. Central procedural institutions such as 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. These institutions are not threatened by recognition that the assumptions may be mistaken. Similarly, to conclude that a transcript may be as good a basis for credibility determinations as seeing and hearing the witnesses does not justify de novo appellate review of facts. Adequate grounds, unrelated to demeanor, exist to restrict appellate review of trial court factual findings. Review under the established "clearly erroneous" standard might nevertheless in some instances be affected by a recognition that viewing testimony in transcript rather than in person does not provide inferior information.

The recognition that witness demeanor fails to provide critical information certainly justifies liberalization of the rules of admissibility of depositions and former testimony in civil cases. In the growing use of ADR techniques that do not employ live testimony, such as summary jury trial, the research findings on credibility indicate that concerns over the accuracy of these techniques because of the absence of demeanor evidence is misplaced. Instead, concern should shift to the lack of verbatim text in instances where genuine credibility issues arise.

Finally, the social science evidence reinforces, to a large extent, two established legal doctrines: that a trier must accept the uncontradicted, unimpeached testimony of a disinterested witness, and that disbelief of testimony cannot by itself support a finding of a contrary fact. In both instances, however, a distinction should be drawn between disbelief based upon demeanor and disbelief based upon verbal content. It is appropriate to apply either doctrine to disbelief based upon demeanor, but reasonable disbelief based upon content should be permitted the same weight as any other reasonable inference by the trier.