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Article

Courtroom Demeanor: The Theater of the Courtroom

Laurie L. Levenson†

All the world's a stage,
And all the men and women merely players:
They have their exits and their entrances;
And one man in his time plays many parts,
His acts being seven ages.¹

What is it that we want the American criminal courtroom to be? This is one of the fundamental questions facing our criminal justice system today. Although we have constructed an elaborate system of evidentiary rules and courtroom procedures, an American criminal trial is much more than a mere sum of its evidentiary parts. Rather, it is a theater in which the various courtroom actors play out the guilt or innocence of the defendant for the trier of fact to assess.²

† Professor of Law, William M. Rains Fellow and Director of the Center for Ethical Advocacy, Loyola Law School, Los Angeles. This Article is based upon work and inspiration from my dear friend and former student, Kelly White. I am very grateful for the insights of my colleagues during the Loyola Workshop program. A special thank you to Victor Gold, David Leonard, Samuel Pillsbury, Marcy Strauss, and Peter Tiersma for reviewing early drafts of this work. Finally, this work would not have been possible without the invaluable help of my research assistants, Jeffrey Jensen, Krista Kyle, Emil Petrosian, Reid Jason, William Smyth, Lindsay Meurs, and Mary Gordon. Copyright © 2008 by Laurie L. Levenson.

¹. WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2, sc. 7, at 622 (Shakespeare Head Press ed., Oxford Univ. Press 1938) (1623).

². See Peter W. Murphy, "There's No Business Like...?" Some Thoughts on the Ethics of Acting in the Courtroom, 44 S. TEX. L. REV. 111, 111 (2002) (arguing that there is "undeniably a close relationship" between a courtroom and a theater). Recognizing that the courtroom is like a theater, practitioners are often instructed on how to act effectively in the courtroom. See, e.g., Donald B. Fiedler, Acting Effectively in Court: Using Dramatic Techniques, CHAMPION, July 2001, at 18, 19–23. Moreover, jurors often view the courtroom as a theater, as one of the jurors in the O.J. Simpson murder trial indicated:
One view of the courtroom is that of a controlled laboratory in which the science of the law is performed. Under this model, attorneys present evidence, the judge supervises for quality control, and the jurors give the results of the experiment; there is little room for emotions or actions whose impact cannot be predicted. A trial is simply the sum of the parties’ formal evidence: eyewitness testimony, exhibits, and stipulations. Neither the words of counsel, nor the mannerisms of the defendant off the stand, nor the reaction of the gallery affects the outcome of a case.

Yet, as any experienced trial lawyer knows, this sanitized venue for trials is a fantasy. In reality, trials often take on a life of their own, and the outcome of the case is affected by many factors that are not technically evidence: the quality of the lawyers’ presentations, the appearance and reaction of the defendant in the courtroom, and even the presence of the victim's

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


3. My colleague, Victor Gold, has written one of the seminal articles on the effects of lawyers’ advocacy in the courtroom. See Victor Gold, Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom, 65 N.C. L. REV. 481, 497–509 (1987) (describing how the erosion of jury independence can prevent the jury from fulfilling its proper role in our system of justice); see also William M. O’Barr & John M. Conley, When a Juror Watches a Lawyer, BARRISTER, Summer 1976, at 8, 9–11 (summarizing the findings of an experiment on the effectiveness of “power language” in the courtroom); Michelle Pan, Strategy or Stratagem: The Use of Improper Psychological Tactics by Trial Attorneys to Persuade Jurors, 74 U. CIN. L. REV. 259, 261–63 (2005) (recognizing the effectiveness of lawyers’ “psychological tactics” on jurors, and questioning the propriety of such tactics). The focus of this Article, however, is not the nonverbal communication of lawyers, but rather defendants’ nonverbal communication and its impact on juries.

4. For an explanation of how defense counsel should present and interact with their clients in the courtroom, see LAWRENCE J. SMITH & LORETTA A. MALANDRO, COURTROOM COMMUNICATION STRATEGIES §§ 1.37–38, at 71–78 (1985) (advising attorneys on how to do everything from touching their clients to show psychological closeness, to projecting “likability and approachability” in the courtroom). As Smith and Malandro explain, jurors act like “detectives,” looking for any clues, on or off the witness stand, to assist them in deciding the outcome of a case. Id. § 1.49, at 90. For instance, in one case, post-trial jury interviews revealed that jurors’ observations of the oft-changing color of the
representatives. As Clarence Darrow once said, "[jurymen seldom convict a person they like, or acquit one that they dislike. The main work of a trial lawyer is to make a jury like his client, or, at least to feel sympathy for him; facts regarding the crime are relatively unimportant." Under this second model, the courtroom is viewed as a theater in which the parties act out a human drama and the jury provides the conclusion. Formal evidence continues to play an important role, but other factors that constitute nonevidence, such as the defendant's demeanor off the stand, may affect the outcome of a case. For the most part, courts trust jurors to evaluate this nonevidence and use it in an appropriate manner in reaching their verdicts.

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

plaintiff's toenail polish during the trial had as much or greater impact on the jurors as the testimony of any witness. Id.

5. Expert jury consultants such as Dr. Jo-Ellan Dimitrius report that jurors consider all of the dynamics of the courtroom in reaching a verdict. See John Spano, Weller's Absence Plays Uncertain Role in Trial, L.A. TIMES, Oct. 9, 2006, at B5, available at 2006 WLNR 17440608 ("The courtroom becomes the home for the jury . . . . They look and watch everyone who walks into their home—the defendant, the judge, or someone in the audience. They make assumptions based on their interaction with people in the courtroom." (quoting Dr. Jo-Ellan Dimitrius) (internal quotation marks omitted)). The extent to which jurors consider the demeanor of third parties in the courtroom is taking on additional importance as victims are being given additional rights. See Tresa Baldas, Victims Ascendant, NAT'L L.J., Feb. 19, 2007, at 1 (discussing the potential effect of amendments to the Federal Rules of Criminal Procedure on prosecutors' decisions to put a "grieving relative" on the stand).


7. See supra note 2 and accompanying text.

8. See infra Part I.B.

9. See infra note 39 and accompanying text.

10. See U.S. CONST. amend. VI.

jurors use a defendant's courtroom demeanor to determine his sincerity and culpability.\textsuperscript{12} The impression that the defendant makes on the jury can thus have an enormous impact on the outcome of the trial.\textsuperscript{13}

As a society, we are "hard-wired" to judge people based on their appearances; the same holds true in the courtroom.\textsuperscript{14} Consequently, defense lawyers try to use appearances to their advantage.\textsuperscript{15} They adjust their own language, dress, and overall courtroom style to please the jury,\textsuperscript{16} and attempt to change their clients' looks as well.\textsuperscript{17} Criminal defense guides encourage client makeovers—each defendant needs the right outfit, a perfect hairstyle, and lessons on appropriate courtroom behavior.\textsuperscript{18}

What the criminal justice system needs now more than ever is an honest look at the dynamics of criminal trials so that courts can make a conscious decision as to how much extrajudicial information triers of fact should be allowed to consider. If jurors consciously or unconsciously consider the defendant's

\begin{itemize}
  \item \textsuperscript{12} Among the trials discussed in this Article are those of Lorena Bobbitt, Erik and Lyle Menendez, and Timothy McVeigh.
  \item \textsuperscript{13} This Article focuses on the impact of a defendant's appearance and demeanor on jurors. Of course, there is also the issue of whether such factors affect judges' decisions, including those at sentencing. For more information on this topic, see William T. Pizzi et al., Discrimination in Sentencing on the Basis of Afrocentric Features, 10 Mich. J. Race & L. 327, 348–51 (2005) (analyzing whether race impacts the sentences that defendants receive).
  \item \textsuperscript{14} See, e.g., Smith & Malandro, supra note 4, § 1.90, at 148–54 (discussing studies in which the social attractiveness of the defendant was found to have a measurable impact on the jury); David L. Wiley, Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials, 27 St. Mary's L.J. 193, 211–12 (1995) ("Research suggests that people viewed as facially unattractive are more likely to be perceived as criminal than are facially attractive persons."); see also Michael Searcy et al., Communication in the Courtroom and the "Appearance" of Justice, in Applications of Nonverbal Communication 41, 41–42 (Ronald E. Riggio & Robert S. Feldman eds., 2005) (contending that verbal and nonverbal behavior that may be interpreted in one way if it occurs outside the courtroom is likely to convey a different impression inside the courtroom).
  \item \textsuperscript{15} See, e.g., Julie Hinds, Dressing for a Hoped-For Success, USA Today, Jan. 12, 1994, at 3A (noting the various ways in which consultants for both Lorena and John Bobbitt attempted to sculpt their clients' appearances to their respective advantages at trial).
  \item \textsuperscript{16} Gold, supra note 3, at 483.
  \item \textsuperscript{17} See F. Lee Bailey & Kenneth J. Fishman, Criminal Trial Techniques §§ 41, 44 (1994) (providing advice on "Successful Courtroom Dressing" and the proper body language and appearance for the "Defendant as a Witness").
  \item \textsuperscript{18} See id.; Criminal Defense Techniques §§ 1A.04–.06 (Liliana Perillo & Juliet Turner eds., 1998).
\end{itemize}
nontestimonial demeanor and appearance in court, should there be specific instructions on how juries may treat such information? Are such instructions likely to be effective? Should we allow lawyers to comment on that demeanor or appearance so that jurors can be directed as to how to consider such information during their deliberations?

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

The first part of this Article examines the evolution of the modern criminal jury trial and the role of demeanor in criminal cases. While in the past, the free-flowing dynamic of a jury trial allowed jurors to consider a defendant’s demeanor in deciding cases, the current system, with its strict rules of evidence and procedure, is less accommodating. Part II then focuses on the reality of what is happening today and how defendants’ courtroom demeanor off the witness stand is likely to have an impact on the outcome of the case. It provides specific examples of how courtroom demeanor is impacting both high-profile and more routine cases in the criminal justice system. While no

19. The difference between a defendant's demeanor and appearance is that the former refers to how a person acts, consciously or not, whereas the latter does not involve an action component. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 60, 331 (11th ed. 2003) (defining “appearance” as an “outward aspect” or “look,” while defining “demeanor” as “behavior toward others”). A person’s appearance may become evidence in a case, for example, when it forms the basis for identification. Demeanor, as a form of nonverbal communication, can be used throughout a trial to convey information to the jury without the person ever testifying. For a linguistic analysis of “nonverbal” communication, see Peter Meijes Tiersma, The Judge as Linguist, 27 LOY. L.A. L. REV. 269, 275–79 (1993).

20. Even those researchers who recognize that jurors go beyond the evidence to construct a “story” of the events based upon their own experiences or pretrial publicity have failed to address the effect of a defendant’s demeanor on jurors. See, e.g., NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS’ NOTIONS OF THE LAW 72 (1995) (listing the “extralegal factors” jurors consider as including evidence, the defendant’s attractiveness, prejudicial statements, legally irrelevant information, and jurors’ prior knowledge, but failing to include the defendant’s demeanor).
scientific studies have quantified the impact of demeanor evidence, its effect is undeniable.\textsuperscript{21} Part III then discusses the inconsistent approaches that courts have taken on the issue of whether courtroom demeanor should be openly recognized in court and should be the subject of comment by the parties and counsel. As discussed, there is a significant split in how courts address this issue. Finally, Part IV of this Article analyzes whether it makes sense, given the role of today's criminal jury trial, to consider a defendant's demeanor as evidence and to allow the lawyers to comment on it. If, as this Article suggests, extreme dangers exist in allowing jurors to decide cases based on defendants' appearances and demeanors off the witness stand, then jury instructions should be used in every case to counter jurors' natural instinct to judge a defendant by his looks and mannerisms. Accordingly, this Article ends by proposing an instruction that generally directs jurors not to rely on demeanor evidence in their deliberations. For those rare cases where a defendant's nontestifying demeanor becomes relevant, this Article proposes an alternative instruction cautioning jurors regarding the use of such evidence.

I. THE DYNAMICS OF THE MODERN COURTROOM

\textit{Jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow subjects.}\textsuperscript{22}

The modern jury trial takes a fairly restrictive view of what constitutes evidence. As explained later, defendants historically played a much more dynamic role in the courtroom and jurors had broader leeway in deciding how they would reach their verdict.\textsuperscript{23} However, as a result of efforts in the mid-twentieth-century to standardize court procedures with rules of

\textsuperscript{21} Although specific studies quantifying how quickly jurors form an opinion regarding defendants do not exist, Smith and Malandro posit that when it comes to trial counsel, "[j]urors form their initial impressions during the first four minutes. Their assessment is based primarily on visual perceptions. They tend to accept the visual and nonverbal cues while rejecting the verbal cues." \textit{Smith & Malandro, supra} note 4, \textsection{} 5.93, at 538. Accordingly, there is little reason to believe that the nonverbal cues of a defendant have any less impact on the jurors than those of the attorneys.

\textsuperscript{22} \textit{Hans} & \textit{Vidmar, supra} note 6, at 35 (quoting Andrew Hamilton, defense counsel to John Peter Zenger in Zenger's famous trial for seditious libel in 1735). For a thorough discussion of the Zenger trial, \textit{see id.} at 32–35.

\textsuperscript{23} \textit{See infra} Part I.C.
evidence and rules of procedure, defendants are expected to take a more limited role and cases are expected to be decided on "evidence," rather than the drama of the courtroom.24

This Part discusses the history of the role of defendants in the courtroom. Section A begins with our current approach of using rules of evidence to guide jurors in evaluating their cases. Section B, however, demonstrates the true dynamic of the courtroom, noting that jurors inevitably go beyond narrow definitions of evidence by routinely relying on defendants' and spectators' nonverbal cues. Finally, Section C presents the history of defendants' participation in the courtroom. Prior to our current approach to trials, defendants would play a more active role in the courtroom. Jurors had an opportunity to evaluate the defendant by more than the evidence presented at trial.

A. WHAT IS "EVIDENCE"?

Today, jurors are instructed to reach a verdict based only on admissible evidence, which is limited to certain types of information ordinarily presented from the witness stand.25 Such evidence may include (1) witness testimony,26 (2) writings,27 (3) recordings,28 (4) photographs,29 and (5) physical evidence.30 Judges also instruct jurors not to consider an attorney's questions or arguments as evidence.31 However, jurors are not given any direction on how to consider a defendant's demeanor.

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24. See infra Part I.A.
25. Admissible evidence only includes evidence that is relevant. See FED. R. EVID. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Id. R. 401. Relevant evidence may be excluded, however, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id. R. 403.
26. See id. R. 701–03 (regulating testimony by lay and expert witnesses).
27. See id. R. 612 (permitting the admission of writings to refresh a witness's memory); id. R. 1006 (allowing evidence to be presented in summary form at trial if it cannot be conveniently examined in court).
28. See id. R. 1006.
29. See id.
30. See id. R. 412 (permitting evidence to show that a person other than the accused was the source of the physical evidence).
31. See California Jury Instructions: Criminal [CALJIC] § 1.02 (2007); see also 1 HOWARD G. LEVENTHAL, CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE § 4:76 (rev. ed. 1988) ("Nor are you to consider or give any weight at all to statements or opinions of counsel: they are not witnesses, and their statements, arguments and opinions do not constitute evi-
Under the current approach, the court controls what information the jurors will allegedly use in reaching their decision. Elaborate rules of evidence were established in England as far back as 1700 to try to rein in the decision making of the jury. More recently, Congress and the courts adopted the Federal Rules of Evidence in 1975 to try to create consistency in trials.

For example, one of the areas of evidence that has always concerned the courts is to what extent character evidence should be admissible to prove a defendant's culpability. In general, the rule is that a defendant's guilt should be based upon his conduct, not his character, and the rules traditionally limit to what extent character evidence is admissible. The drafters of the Federal Rules of Evidence stated in the advisory committee's note the following principles behind the general rule against character evidence:

- Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man.

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34. Fed. R. Evid. 102 (stating that the Federal Rules of Evidence aim to regulate the admission of evidence and promote "the end that the trust may be ascertained and proceedings justly determined").
35. In the early trials of the seventeenth century, "it was not considered irregular to call witnesses to prove a prisoner's bad character in order to raise a presumption of his guilt." John H. Langbein, The Origins of Adversary Criminal Trial 190–91 (2003) (quoting 1 James Fitzjames Stephen, A History of the Criminal Law of England 368 (London, MacMillan 1883) (internal quotation marks omitted). For nearly the last three hundred years, however, courts have been concerned about allowing a defendant to be tried on his character, and have thus put limitations on the use of character evidence. See, e.g., Jason M. Brauser, Comment, Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b), 88 Nw. U. L. Rev. 1582, 1583 (1994).
36. See, e.g., Fed. R. Evid. 404. A notable exception to this rule is the admissibility of character evidence in cases alleging sexual offenses. In these situations, the general rule is that evidence of a defendant's past activities that shows he has a propensity to commit the alleged sexual acts is admissible. See id. R. 413(a).
because of their respective characters despite what the evidence in
the case shows actually happened.\textsuperscript{37}

Thus, these evidentiary rules assume that by eliminating
character evidence from the courtroom, jurors will decide the
case based solely on the admissible evidence presented. Under
this view, a trial is nothing more than the sum of its eviden-
tiary parts. Jurors are expected to draw rational conclusions
from the evidence they are allowed to receive and reach a deci-
sion accordingly. The reality, however, is quite different.

\section*{B. THE REAL COURTROOM DYNAMIC}

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

Rather, as we have learned from psychologists and sociolo-
gists, the courtroom presents a dynamic that is more akin to,
but not precisely like, a theater.\textsuperscript{38} Jurors use all of their senses,
including their intuition, to reach their

\footnotetext{37. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D.
183, 221 (1973) (quoting Tentative Recommendation of the California Law Re-
vision Commission Relating to the Uniform Rules of Evidence, 6 CAL. L. REVI-
SION COMM'N REPS. RECOMMENDATIONS & STUD. 615 (1964)) (internal quota-
tion marks omitted).}

\footnotetext{38. See Milner S. Ball, \textit{The Play's the Thing: An Unscientific Reflection on
Courts Under the Rubric of Theater}, 28 STAN. L. REV. 81, 81–83 (1975).}

\footnotetext{39. Of course, we already allow jurors to use these cues in deciding on the
credibility of witnesses, even though it is difficult to determine the validity of
nonverbal cues. See Robert K. Bothwell & Mehri Jalil, \textit{The Credibility of Nerv-
the effect of witness nervousness on perceptions of witness credibility and
accuracy, and finding that “observer-based ratings of witness nervousness
were not significantly correlated with actual witness identification [or testi-
monial] accuracy”); David Dryden Henningsen et al., \textit{Pattern Violations and
Perceptions of Deception}, 13 COMM. REP. 1, 8–9 (2000) (analyzing the manner
in which nonverbal cues are perceived as deceptive by jurors, and suggesting
that individuals may interpret deceptiveness based less on the mere presence
of nonverbal cues, and more on a pattern of nonverbal cues). Moreover, law
enforcement officers use nonverbal indicators to assess the credibility of their
suspects' statements. See John E. Hocking & Dale G. Leathers, \textit{Nonverbal In-
dicators of Deception: A New Theoretical Perspective}, 47 COMM. MONOGRAPHS
119, 123–24 (1980) (examining bodily movement, facial nervousness, and vocal
nervousness). Even judges use physical cues to decide the honesty and disho-
nesty of statements. See James A. Forrest & Robert S. Feldman, \textit{Detecting De-
ception and Judge's Involvement: Lower Task Involvement Leads to Better Lie
Detection}, 26 PERSONALITY & SOC. PSYCHOL. BULL. 118, 122–24 (2000). This
room, nonverbal communication subtly affects the entire proceedings of a trial." 40 Yet, because courtrooms are not for mere entertainment or education, we expect that the verdict in the courtroom will be based on concrete, verifiable information and not impressions of the parties' personalities.

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

The nontestimonial communications that affect jurors' decisions range from facial expressions, gestures, body movements, and smells to paralanguage. 41 Even when the defendant is not testifying, jurors will watch him or her at the counsel table. Several studies have concluded that a defendant's physical attractiveness (or lack thereof) can influence a jury's verdict. 42 A defendant's fidgeting may also impact the jurors' decisions. 43

Article focuses on whether the behavioral and demeanor cues from a defendant should be used in deciding that person's guilt or innocence.


41. Id.

42. See, e.g., SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 100–03 (1988) ("When it comes to juries . . . if the evidence is ambiguous, people are more likely to vote guilty when the accused is unattractive and the victim is attractive than the other way around."); Michael G. Efran, The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task, 8 J. RES. PERSONALITY 45, 45–52 (1974) (describing a study on the physical attractiveness of defendants); LeVan, supra note 40, at 91–94 ("[P]hysical attractiveness could have an impact on jury decision making"); see also Gloria Leventhal & Ronald Krate, Physical Attractiveness and Severity of Sentencing, 40 PSYCHOL. REP. 315, 315–17 (1977) (finding in a jury simulation that attractive defendants receive more lenient sentencing); Lee Ross & Donna Shestowsky, Contemporary Psychology's Challenges to Legal Theory and Practice, 97 NW. U. L. REV. 1081, 1083 n.9 (2003) (listing various studies on how "defendant characteristics" bias judges and juries). But see Jennifer F. Orleans & Michael B. Gurtman, Effects of Physical Attractiveness and Remorse on Evaluations of Transgressors, 6 ACAD. PSYCHOL. BULL. 49, 53–54 (1984) (suggesting that the physical attractiveness of a witness may have less influence where the witness is male and the observer is female).

43. One psychological study defined "fidgeting" as "engaging in actions that are peripheral or nonessential to ongoing focal tasks or events." Albert Mehrabian & Shari L. Friedman, An Analysis of Fidgeting and Associated Individual Differences, 54 J. PERSONALITY 406, 406 (1986). Prominent lawyers have rejected the claim that fidgeting is a sign of guilt. As the renowned Daniel Webster proclaimed, "[m]iserable, miserable, indeed, is the reasoning
Although it is difficult to know how a particular juror will interpret a defendant's fidgeting, many studies correlate fidgeting with a person's anxious or hostile nature.\textsuperscript{44} Hand movements can also affect jurors' perceptions of the defendant and the case.\textsuperscript{45} People from different cultures tend to interpret hand movements differently. For example, in some cultures, hand movements are part and parcel of normal communication and carry with them coded messages.\textsuperscript{46} Other observers are less comfortable with hand movements and will read them differently.\textsuperscript{47} Even a defendant's smile can influence jurors, even though scientific studies have shown that people are not particularly good at distinguishing between a sincere and an insincere smile.\textsuperscript{48} Finally, whether a person has eye contact with jurors can affect their decisions. Lack of eye contact is often read as deception, even though it might be the product of shyness or fear.\textsuperscript{49}

Up to now, the courts have given very little attention to the question of how the criminal justice system should deal with jurors' perceptions of a defendant's demeanor in court.\textsuperscript{50} Only in the rare situations where a defendant is considered incompetent for trial or overly medicated do the courts tend to get involved in controlling the jury's perception of the defendant's demeanor.\textsuperscript{51}

\begin{itemize}
\item which would infer any man's guilt from his agitation.” HENRY HARDWICKE, THE ART OF WINNING CASES 155 (Albany, Banks & Co. 1899).
\item \textsuperscript{44} Mehrabian & Friedman, supra note 43, at 427–28 ("[F]idgeting tendency did relate to trait anxiety, hyperactivity, and some hostility measures.").
\item \textsuperscript{45} See generally Paul Ekman & Wallace V. Friesen, Hand Movements, 22 J. COMM. 353, 355–71 (1972) (classifying and describing different types of hand movements).
\item \textsuperscript{46} Id. at 357–58, 364–67.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} See, e.g., Jinni A. Harrigan & Kristy T. Taing, Fooled by a Smile: Detecting Anxiety in Others, 21 J. NONVERBAL BEHAV. 203, 216 (1997) (finding that insincere smiles that are clearly visible to an observer may mask, and thereby cause the observer to fail to notice, a person's anxiety).
\item \textsuperscript{49} Cf. Paul Ekman & Wallace V. Friesen, Nonverbal Leakage and Clues to Deception, 32 PSYCHIATRY 88, 97 (1969) ("Eye-contacts . . . which deviate in duration or frequency from the norm for a given social interaction can provide important deception clues . . . ").
\item \textsuperscript{50} Interestingly, there has been some focus on how a defendant's demeanor is changed by videoconferencing. The defendant's demeanor is a concern when deciding whether to allow videotaped appearances of defendants. See Anne Bowen Poulin, Criminal Justice and Videoconferencing Technology: The Remote Defendant, 78 TUL. L. REV. 1089, 1124–27 (2004).
\item \textsuperscript{51} See Vickie L. Feeman, Note, Reassessing Forced Medication of Criminal Defendants in Light of Riggins v. Nevada, 35 B.C. L. REV. 681, 681, 689–90
\end{itemize}
However, courts have recognized that appearances and events in the courtroom, even if not evidence, can affect the jurors' verdicts. For example, in Estelle v. Williams, the Supreme Court considered "whether an accused who is compelled to wear identifiable prison clothing at his trial by a jury is denied due process or equal protection of the laws." The Court held that just the defendant's appearance in the courtroom in prison clothes could undermine the fairness of the trial. Obviously, the defendant's apparel is not evidence; nonetheless, the Court recognized that it could have a detrimental impact on the jury's decision-making process.

Similarly, the Supreme Court has held that a defendant may not be shackled in a courtroom unless there are compelling security interests. Although the shackles are not "evidence" in the case, they can nevertheless affect the jurors' verdict. The courts worried that the very presence of the shackles changed the dynamic of the courtroom from one in which the defendant
is presumed innocent to one in which the defendant is viewed by the jury as a safety risk and probably guilty.\textsuperscript{55}

More recently, the courts have tried to deal with the issue of how apparel and reactions by spectators in the courtroom can affect jury verdicts. For example, during the defendant's trial in \textit{Carey v. Musladin}, members of the victim's family sat in the front row of the spectators' gallery wearing buttons displaying the victim's image.\textsuperscript{56} After the California Court of Appeals refused to reverse Musladin's conviction because he had failed to show actual or inherent prejudice from the victim's family's actions, Musladin filed a petition for habeas relief.\textsuperscript{57} Although the district court denied Musladin's petition for habeas relief, the United States Court of Appeals for the Ninth Circuit reversed, finding that the spectators' courtroom conduct was inherently prejudicial and that the state court ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."\textsuperscript{58} However, the Supreme Court left open the question of what spectator conduct is egregious enough to violate a defendant's right to a fair trial.\textsuperscript{59} Instead, Justice Thomas, writing for the Court, reversed the Ninth Circuit on procedural grounds because Musladin had not shown that the state court's ruling was contrary to "clearly established federal law."\textsuperscript{60}

In fact, the Supreme Court has never ruled on whether buttons worn by civilian spectators deny a defendant his right to a fair trial. The closest the Court has come in deciding

\textsuperscript{55} \textit{Id.} at 633 ("The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community . . . [and] almost inevitably affects adversely the jury's perception of the character of the defendant.").


\textsuperscript{57} \textit{Id.} at 652.


\textsuperscript{59} \textit{Musladin}, 127 S. Ct. at 651.

\textsuperscript{60} \textit{Id.} at 650.
Holbrook v. Flynn. In Flynn, four uniformed state troopers sat in the spectators' seats immediately behind the defendant during trial. Nevertheless, the Court held that the troopers' presence was not so inherently prejudicial that they denied the defendant a fair trial. The test for whether spectators' actions violate a defendant's right to a fair trial is "whether 'an unacceptable risk is presented of impermissible factors coming into play.'"

Thus, the Court has opined that spectators' actions can violate a defendant's right to a fair trial, although it has not established a firm test for when such a right is violated. The Court has also not set forth guidelines as to when a defendant's demeanor, or the prosecutor's comments on it, violate either the defendant's right to a fair trial or the government's interest in fair proceedings. At most, the Court has given the impression that the courtroom is neither a sterile laboratory, nor an open forum where spectators can rally for their cause. For example, in their Musladin concurrences, both Justices Anthony Kennedy and David Souter noted that each courtroom will have its own dynamic. A certain amount of drama is part and parcel of the trial atmosphere. Even spectator conduct can be tolerated so long as it does not intimidate jurors into reaching a particular verdict.

62. Id. at 562.
63. Id. at 571.
64. Id. at 570 (quoting Estelle v. Williams, 425 U.S. 501, 505 (1976)).
66. In his majority opinion, Justice Thomas noted that the "lower courts have diverged widely in their treatment of defendants' spectator-conduct claims." Musladin, 127 S. Ct. at 654. While the courts have not permitted courtroom demonstrations to convert trials into "sham" proceedings, they have tolerated spectator conduct that does nothing more than convey support for the victim. See id. at 653 n.2, 654.
67. See id. at 656–57 (Kennedy, J., concurring); id. at 657–58 (Souter, J., concurring). Justices Kennedy and Souter also acknowledged that a certain amount of spectator conduct can be expected and tolerated during a trial. See id. at 656 (Kennedy, J., concurring); id. at 658 (Souter, J., concurring). In Justice Souter's words, it is only when spectator conduct reaches "unacceptable" levels that it violates a defendant's right to a fair trial. Id. at 658 (Souter, J., concurring).
68. Id. at 656 (Kennedy, J., concurring) ("The rule against a coercive or intimidating atmosphere at trial exists because 'we are committed to a government of laws and not of men,' under which it is 'of the utmost importance..."
Cognizant of the fact that jurors take in all aspects of the courtroom proceedings, including spectator appearances and demeanor, lower courts have sought to limit the extent to which victims and supporters of victims may display their emotions during a trial. Typically, courts are wary of displays of emotion by a victim's family member or representative in the courtroom, and these displays are often suppressed. Crying mothers of murder victims have been reprimanded for displaying too much emotion in the courtroom, thereby potentially improperly affecting the jurors' decisions.

The limitations on community spectators and the buttons they wear are proof of the implicit recognition by the courts that the courtroom dynamic can and does affect the outcome of a case. Lawyers use their understanding of the theater of the courtroom to help make their presentations more effective.

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that the administration of justice be absolutely fair and orderly'..." (quoting Cox v. Louisiana, 379 U.S. 559, 562 (1965))). For Justice Kennedy, the preferred atmosphere for court is one of "calm and dignity." Id. at 656.

69. See, e.g., Norris v. Risley, 918 F.2d 828, 830-31 (9th Cir. 1990) (finding that spectators' buttons, which said "Women Against Rape," deprived the defendant of a fair trial); Buckner v. State, 714 So. 2d 384, 389 (Fla. 1998) (recognizing that, "[u]nder certain circumstances, prejudicial exhibition of emotion may deprive a defendant of a fair trial," but holding that the brief showing of a picture of the victim by a spectator was not sufficiently prejudicial to change the outcome of the case).

70. See, e.g., People v. Chatman, 133 P.3d 534, 552 (Cal. 2006), cert. denied, 127 S. Ct. 938 (2007) (providing an example of a judge who was willing to force a witness to leave should she continue to have emotional outbursts on the stand). Some judges go to extreme lengths to ensure that a victim's emotional display does not unfairly bias a juror. For example, in a Florida case, the judge warned the victims' mother not to cry in the courtroom, including on the witness stand: "Warned by the judge that tears could trigger a mistrial, a mother was stoic in front of a Florida jury... as she relived the day she discovered the bloodied bodies of her children." Emanuella Grinberg, Judge Warns Victims' Mother Not to Cry on Stand, CNN.COM, Sept. 13, 2006, http://www.cnn.com/2006/LAW/09/13/no.crying/index.html. In order to ensure that the mother's testimony was sanitized enough, both sides agreed to let the mother "give her testimony outside the presence of the jury and then play a video of the testimony for the jury if it was deemed 'unemotional' enough." Id.

71. See Gold, supra note 3, at 494-97. Lawyers use a variety of techniques to influence and persuade jurors. These techniques include scripting how the lawyers and their clients dress, speak, and interact with others in the courtroom. See Pan, supra note 3, at 266-71. For example, a lawyer may come into the courtroom wearing a flamboyant tie to capture the jurors' attention. Id. at 267. Lawyers script their examinations to use the most powerful, effective language in front of the jury. Id. at 266. They may also attempt to influence jurors by placing exhibits not admitted into evidence within jurors' line of sight. Id. at 271. Jurors may even be influenced by the way in which a lawyer arranges his material on the table. Neat organization indicates to the jury that
For example, defense lawyers use a standard tactic of loading a courtroom with spectators, hoping to distract the jurors from focusing on the evidence in the courtroom. By packing the courtroom audience with supporters, a lawyer can manipulate the meaning that the jurors ascribe to the evidence.

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

C. ROLE OF THE DEFENDANT IN THE COURTROOM: A HISTORICAL PERSPECTIVE

The current approach to trials, with restrictive rules of procedure and evidence, is of fairly recent vintage. The Federal Rules of Criminal Procedure did not become effective until the attorney is prepared and under control. Paul Mark Sandler, *Raising the Bar: "Beware of Bow Ties and Diamonds in Court,"* DAILY REC. (Balt., Md.), May 18, 2007, at 2B, available at http://www.shapirosher.com/news/BowtiesandDiamondsinCourt.htm. Even a lawyer's movements in the courtroom can be used to communicate subliminal messages to the jury. A lawyer who moves around during arguments may be perceived as more approachable and credible than a lawyer who stands behind a lectern. Id. Finally, lawyers also use eye contact and facial expressions to communicate with jurors. Id.


74. Ball, *supra* note 38, at 105.

75. See id.

76. See id. at 105–06.
1946,\textsuperscript{77} and the Federal Rules of Evidence were not adopted until 1975.\textsuperscript{78} Prior to that time, a court had broad discretion in governing what type of information jurors would use to reach their decisions.\textsuperscript{79} While evidence still referred generally to the testimony of witnesses or physical evidence, parties and spectators in the courtroom played a more dynamic role.

Long before the current procedures for trials, a criminal trial was a "lawyer-free" contest between citizen accusers and citizen accused.\textsuperscript{80} Rather than formally presenting witnesses, the victim and the accused engaged in a confrontational dialogue about the circumstances of the alleged offense.\textsuperscript{81} The accused was disqualified from testifying, but his nontestifying role in the courtroom ensured that his explanations and arguments would be considered by the jury.\textsuperscript{82} Moreover, his role ensured that jurors would consider not just what was said in the courtroom, but how it was presented,\textsuperscript{83} including the demeanor of the defendant in his adversarial role.

At the time of the colonies, cases still were being decided on the basis of a defendant's appearance or gestures in the courtroom.\textsuperscript{84} Thus, during the Salem Witch Trials, many de-

\textsuperscript{77} FED. R. CRIM. P. historical note. The rules were adopted by order of the Supreme Court in 1944, were transmitted to Congress in 1945, and became effective in 1946. Id.

\textsuperscript{78} FED. R. EVID. historical note. The rules were adopted by order of the Supreme Court in 1972, were transmitted to Congress in 1973, and became effective in 1975. Id. Until these rules took effect, courts relied on common law rules of evidence. Mark D. Rosen, What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development, 1994 WIS. L. REV. 1119, 1123–24.

\textsuperscript{79} As described in Professor Lawrence M. Friedman's seminal work, Crime and Punishment in American History, prior to the rules, juries were allowed more leeway in what they considered for their verdict. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 233–58 (1993). "Witnesses apparently had a good deal of leeway to tell their stories uninterrupted; there was less fussing over minor points of evidence than would be true today, less shadowboxing over rules of procedure; the judge's charge was looser, freer, more colloquial, more tailored to the particular case." Id. at 237.

\textsuperscript{80} See LANGBEIN, supra note 35, at 253 ("The felony criminal trial retained its lawyer-free character into the 1730s. Citizen accusers confronted the accused in altercation-style trial. Prosecution counsel was virtually never used; defense counsel was forbidden. The accused conducted his own defense, as a running bicker with the accusers."). Langbein refers to these types of proceedings as "the 'accused speaks' trial[s]." Id.

\textsuperscript{81} Id.

\textsuperscript{82} Id. at 269–73.

\textsuperscript{83} Id. at 266–70.

\textsuperscript{84} Id. at 253–72.
fendants were condemned based upon their appearance and performance in the courtroom.85 Prior to the 1830s, criminal trials generally began with a statement by the defendant not under oath.86 "The prisoner's statement enabled the court to hear the prisoner's version of events, and observe his demeanour, notwithstanding the prohibition on the prisoner giving evidence."87 Jurors were expected to observe the defendant's behavior in court and consider it in their decision making.88

One reason that defendants played a greater role in the courtroom was that there was no right to be represented by counsel.89 Defendants appeared pro se, and the strength of their appearances, nontestimonial arguments, and overall conduct in the courtroom could persuade jurors that defendants should not be convicted.90 Thus, defendants could influence the jurors' verdicts without even testifying.

The criminal trials of our past were less structured and provided an opportunity for the jury to evaluate not merely the evidence against the defendant, but also the defendant's character.91 While verdicts were to be based on the evidence, they also clearly represented a "judgment" regarding the defendant's moral responsibility and prospects for a law-abiding future.92

85. See, e.g., JANICE SCHUETZ, THE LOGIC OF WOMEN ON TRIAL: CASE STUDIES OF POPULAR AMERICAN TRIALS 26–27 (1994). Defendants were also required to touch an alleged victim of their witchcraft to see if the touch triggered demonic fits. Id.


87. Id.

88. Id. at 78.

89. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 53 (3d ed. 2005) ("The early colonial years were not friendly years for lawyers. There were few lawyers among the settlers. In some colonies, lawyers were distinctly unwelcome. . . . [For example], [i]n Pennsylvania, it was said, 'They have no lawyers. Everyone is to tell his own case, or some friend for him . . . 'Tis a happy country." (final omission in original)).

90. See, e.g., THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800, at 174–75 (1985) (describing a case in which a pro se litigant successfully argued and persuaded the jury to find him not guilty).

91. Jurors could even play a role in establishing the defendant's character by testifying during the very cases in which they sat as jurors. See LANGBEIN, supra note 35, at 319–20.

92. Such judgments may also be the psychological remnants of trials by ordeal in which a defendant's fate relied more on his physical reactions than on the evidence presented against the defendant. See Stephan Landsman, A Brief Survey of the Development of the Adversary System, 44 OHIO ST. L.J. 713, 717–21 (1983) (recounting the history of trials by ordeal); Trisha Olson, Of
Today's courtrooms operate under strict rules of procedure, but they have not eliminated the practical impact of nontestimonial courtroom demeanor on juries. As the next Section of this Article demonstrates, courtroom demeanor continues to play an important, albeit sub silentio role, in criminal trials. The disconnect between our modern rules of procedure and evidence, and the reality of how demeanor impacts a trial, has caused confusion and inconsistency in how courts handle non-testifying demeanor evidence.

II. COURTROOM DEMEANOR

Tim McVeigh just sat there somberly, almost emotionless, throughout the trial—even today. . . . He just looked at us, and we looked at him, each one of us.94 For me, a big part of it was at the end, the verdict—no emotion, no anything. That spoke a thousand words.95

You don't want him to look guilty. It's all about communicating a relaxed, confident air . . . . It's meant to say that no matter what the prosecution has, I'm innocent.96

I was fascinated by . . . how important [Scott Peterson's] demeanor in the courtroom was. . . . [Jurors shouldn't consider it, but] they are allowed to look at the defendant.97

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


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

Consider the following cases: Lorena Bobbitt—the Virginia woman charged with maliciously wounding her sleeping husband by cutting off his penis;98 Erik and Lyle Menendez—the two brothers convicted of murdering their parents who hung the jury in their first trial by appearing as preppy and youthful as possible;99 Timothy McVeigh—the bomber of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, who demonstrated no emotion during his trial for murdering 168 men, women, and children in the bloodiest act of domestic terrorism in American history;100 and, Joseph Danks, who tried to stab his defense counsel in front of the jury during the death penalty phase of his murder trial.101

In Bobbitt's trial, the defense's strategy was for Bobbitt to appear as small and helpless in the courtroom as possible in order to support her defense that she was incapable of being the aggressor against her "burly, ex-Marine husband."102 Technically, Bobbitt's manner of dress, her innocent looks at counsel table, and her cowering when her husband appeared were not

98. See Lorena Bobbit Trial: Day 3, pt. 10 (CNN television broadcast Jan. 12, 1994) (LEXIS transcript no. 582-3); see also David Margolick, Witnesses Say Mutilated Man Often Hit Wife, N.Y. TIMES, Jan. 12, 1994, at A10 (describing the courtroom proceedings on the second day of trial).


100. See Jurors Want to Ask McVeigh 'Why?': Explanation at Trial of Anger over Waco Just Wasn't Enough, ST. LOUIS POST-DISPATCH, June 16, 1997, at 4A (discussing the jury's decision to sentence McVeigh to death); Jo Thomas, Agony Relived as U.S. Pursues McVeigh Death, N.Y. TIMES, June 5, 1997, at A1 (discussing the testimony of the victims' family members in the Oklahoma City bombing).


102. Bobbitt's Wife Guilty, Says Poll, S.F. EXAMINER, Jan. 16, 1994, at A-5; see Hinds, supra note 15. Both sides tried to influence the jury with their presentations of the parties. For example, John Bobbitt dressed without a tie (a phallic symbol) to look less powerful and more like someone who would never attack his wife. Id.
evidence, and the jury should not have considered these factors in rendering a verdict. Nevertheless, post-trial interviews indicated that they did.

In the infamous Menendez Brothers’ case, the defense similarly tried to manipulate the jury by the manner in which the defendants dressed and acted at the counsel table. During the first trial for murdering their parents, defense counsel dressed the defendants in crewneck sweaters, button-down shirts, and slacks. This young, preppy look added to the illusion that the “boys” were incapable of committing the vicious acts with which they were charged.

First-hand accounts from the jurors in the first Menendez trial chronicle the extent to which the jurors observed and considered the nontestimonial demeanor of the defendants. Hazel Thornton, one of the jurors in the case, recalled that during the opening statements “Erik cried, noticeably but unobtrusively, when Ms. Abramson talked about his mother.” She then noted that when Lyle testified as to his father’s sexual abuse of Erik, Erik cried. “[A]t one point he began taking his frustrations out on his brother Erik in a sexual way . . . and this was the most painful and dramatic thing to watch of all: Lyle’s public confession and apology to Erik, who of course was also in

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103. See supra Part I.A.
104. See Bobbitt’s Wife Guilty, Says Poll, supra note 102.
105. Lyle and Erik Menendez became the subject of one of the most sordid, publicized murder cases in history when they went on trial for killing their parents with a shotgun in their family’s Beverly Hills mansion in 1989. See Sally Ann Stewart, Beverly Hills Horror Story; Brothers Say Parents’ Abuse Led Them to Kill; Defense Says Good Life Was Just a Facade, USA TODAY, Sept. 21, 1993, at 1A. The brothers attempted to justify murdering their parents by asserting that their parents had sexually abused them and that the brothers were afraid for their lives. Id. Their first trial ended in a hung jury when the jury could not agree on whether the defendants committed murder or manslaughter. O’Neill & Riccardi, supra note 99. On retrial, they were both convicted of murder and sentenced to life in prison. Id.
106. Stewart, supra note 105.
107. Id.; see also THORNTON, supra note 11, at 73–74 (stating that the jurors noticed the brothers’ dress, references to “boys,” and the defense counsel’s maternal behavior and guessed that it was likely to elicit juror sympathy).
108. See THORNTON, supra note 11, at 9. Of course, it is impossible to know why Menendez cried when his mother was mentioned. Like other nontestimonial demeanor, a defendant may be reacting because he is genuinely saddened by the loss of his mother or because he regrets his involvement in her death. Even the sincerest of reactions can be confusing to jurors. They add an emotional dimension to the case, but do little to answer key factual questions in a case.
tears.”

Thornton also noted that she and other jurors “speculate[d] endlessly about the audience” and tried desperately to put together the story of the trial from who was in attendance.

Even during deliberations, jurors observed the defendants’ demeanor during testimony readbacks. As one sociologist noted after studying the juror’s book, it is clear that jurors notice things in the courtroom that are not evidence, and “it is difficult, if not impossible, for someone to ignore or fail to be influenced by information provided by any avenue.”

Similarly, consider how important courtroom demeanor was in the trial of Timothy McVeigh. In death penalty cases, jurors are instructed to consider all aspects of the defendant, including his character, in deciding what punishment to impose. Thus, it is not surprising that jurors tend to be influ-

109. Id. at 25.
110. Id. at 47.
111. Id. at 85 (describing how Erik was mortified when readback testimony focused on him being a homosexual). One of the most interesting parts of Thornton’s book is the “Psychological Commentary on the Diary” provided by two noted social scientists, Lawrence S. Wrightsman and Amy J. Posey. See id. at 99. Using Thornton’s diary, Wrightsman and Posey attack some of the basic assumptions we have about jurors and how they decide cases. Id. at 101–03. For example, they attack the assumption that jurors focus only on admissible evidence during trial. Id. at 108. Specifically, they note that jurors look to the reaction of the defendant while someone is testifying against him or her and may be influenced by the physical appearance of the trial participants. Id. at 111. Thornton notes in her diary that jurors discussed the fact that the defendants wore sweaters and that Leslie Abramson (defense counsel) often engaged in maternal behavior when interacting with Erik Menendez. Id. at 111–12. The jurors also recognized, however, that these actions may have been a ploy to elicit juror sympathy. Id.
112. Id. at 112.
113. Timothy McVeigh was convicted of all eleven counts of bombing the Oklahoma City federal building. See James Collins, Day of Reckoning: The Jury that Found McVeigh Guilty Wrestles with Emotion and Tears as It Prepares to Decide His Fate, TIME, June 16, 1997, at 26 (discussing the sentencing phase of the McVeigh trial). Jurors reported being influenced by McVeigh’s icy composure as prosecutors argued that he should be sentenced to death. See Killer Maintains Icy Composure, Waves to Parents, PLAIN DEALER (Cleveland), June 14, 1997, at 1-A.
enced in death penalty cases by a defendant's demeanor and reactions in the courtroom. McVeigh's demeanor was scrutinized and analyzed by jurors, as well as by the media: "Like his clothing—solid-colored, long-sleeved, open-necked shirts and khaki pants—Mr. McVeigh's demeanor [was] distinguished by its blandness." Some compared him to a "soldier standing trial in enemy country." McVeigh's demeanor personified

the defendant's lack of remorse and overt indifference or callousness toward his misdeeds).

115. See Scott E. Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 CORNELL L. REV. 1557, 1561–66 (1998) (providing a sampling of juror statements indicating that one of the primary factors used by jurors in deciding that a death penalty defendant lacked remorse and therefore deserved to die was the jurors' perceptions of the defendant's flat and nonchalant behavior at trial). While it may not be surprising that jurors in death penalty cases scrutinize a defendant's courtroom demeanor to assess the defendant's character and his level of remorse, it is surprising that courts do not issue standardized instructions to jurors to disabuse them of the notion that a defendant's demeanor in the courtroom may not actually reflect the defendant's true character, including the defendant's level of remorse or likelihood of future dangerousness. For years, defense counsel have been concerned that jurors' decisions are improperly influenced in death penalty cases by a defendant's demeanor, and rightfully so. See Brief for the American Bar Ass'n as Amicus Curiae Supporting Petitioner at 12–14, McCarver v. State, 532 U.S. 941 (2001) (No. 00-8727), cert. dismissed, 533 U.S. 975 (2001). During the capital murder trial of John Paul Penry, the mentally retarded defendant "sat at the defense table and drew pictures while the prosecutor summed up why Penry should be sentenced to die." Id. (quoting ROBERT PERSKE, UNEQUAL JUSTICE? 19, 21–22 (1991)). During the trial of Anthony Porter, the mentally retarded defendant would, "walk[ed] into a room slowly, real cool, like some streetwise punk, a smirk on his face, eyes shifting back and forth, as if he [was] on to something or in on a big secret"—clearly inappropriate behavior from someone accused of a heinous crime." Id. (quoting Eric Zorn, Questions Persist as Troubled Inmate Faces Execution, CHI. TRIB., Sept. 21, 1998, at MetroChicago 1); see also State v. Rizzo, 833 A.2d 363, 431–32 (Conn. 2003) ("Among the factors that may be considered by a court at a sentencing hearing are the defendant's demeanor and his lack of veracity and remorse as observed by the court during the course of the trial on the merits." (quoting State v. Anderson, 561 A.2d 897, 905 (Conn. 1989)) (internal quotation marks omitted)); Schiro v. State, 479 N.E.2d 556, 559–60 (Ind. 1985) (holding that the trial judge did not violate the defendant's due process rights or Fifth Amendment right against self-incrimination when he considered the defendant's continuous rocking motions during trial in sentencing the defendant to death).

116. Victoria Loe, McVeigh Gives Observers Little to Go on in Court: Defendant's Demeanor Leaves Reporters, Families Guessing, DALLAS MORNING NEWS, Apr. 12, 1997, at 1A.

117. CBS This Morning: Oklahoma City Bombing Jury in Deliberations to Decide Whether Timothy McVeigh Should Get the Death Penalty (CBS television broadcast June 13, 1997).
that of a “cold, heartless and calculating killer,” leading a juror to later state, “I don’t understand how any man or woman could not have shown any emotion one way or the other. It said he didn’t care.” Even though jurors claimed not to have discussed McVeigh’s demeanor during deliberations, some noted individually that they “wanted to see some remorse,” and one juror claimed that he “was very bothered that [McVeigh] was so stone-faced.” Indeed, a stoic defendant in the courtroom sends the unspoken message to the jury that he just does not care.

In all three of these high-profile cases, the defendants’ demeanors in the courtroom may very well have influenced their respective fates; the same is likely true in routine criminal prosecutions that transpire every day in the nation’s courthouses but which garner little or no media attention. Consider, for example, the reported, yet not particularly famous, case of People v. Danks. In Danks, the defendant physically attacked his lawyer during the penalty phase of his death penalty case. After stabbing his lawyer twice in the face, Danks headed toward the jury box before he was subdued by the sheriffs. The court was not particularly worried about the impact of this spectacle on the jury. It gave only a cursory in-

118. Killer Maintains Icy Composure, Waves to Parents, supra note 113.  
121. This problem with a defendant’s demeanor may also occur in noncapital cases. For example, in the case of George Weller, the eighty-nine-year-old man convicted of killing ten people by crashing his car through a farmer’s market in Santa Monica, California, did not even attend most of the trial because of his poor health. See Spano, supra note 5. Nonetheless, some experts believe that the jurors held Weller’s absence against him because he did not come to court, sit through the evidence, and thereby show remorse for his actions. See id. (referencing comments of Ken Broda-Bahm, President of the American Society of Trial Consultants).  
122. The three cases referred to include the trials of the Menendez brothers, Timothy McVeigh, and Lorena Bobbitt.  
123. 82 P.3d 1249 (Cal. 2004).  
124. Id. at 1262 n.3.  
125. Id. Remarkably, this was not the first time Danks tried to stab his lawyer. See Edwin Chen, Killer of 6 Transients Pleads Guilty in Deal, Gets Life Prison Term, L.A. TIMES, Dec. 3, 1988, at Metro 3. In a previous trial for the murders of six transients in the Los Angeles area, Danks cut his attorney in the face before being subdued. Id.  
126. The courtroom stabbing incident is only discussed in a footnote in the court’s opinion, even though Danks referred to the incident during his own
struction that the defendant's conduct should not be considered as evidence and then continued with the penalty phase of the capital trial—a stage in which the jury must decide whether the defendant's future dangerousness should be an aggravating factor justifying imposition of the death penalty.

It is not just prosecutors who seek to capitalize on a defendant's nontestifying demeanor in influencing jurors' decisions. Defense counsel are also known to comment on the defendant's courtroom appearance to make their case. For example, in the recent murder case of music mogul Phillip Spector, the defense lawyer asked his expert why he believed that the shooting was a suicide, and not a homicide. Seeking to persuade the jurors that the victim could have overpowered any attempts by Spector to kill her, the expert directed the jurors' attention toward the way Spector looked during trial. With a slight build, changing hairdo, "Parkinsonian-type face," and his hands trembling, defense lawyer used Spector's courtroom image to persuade the jurors that Spector was not a killer.

All of these cases provide evidence that a defendant's courtroom demeanor can have potentially serious ramifications on the outcome of a case; yet courts are reluctant to take a consistent approach to dealing with this issue. As the next Section details, most courts make no effort to direct jurors on whether and how to consider a defendant's courtroom demeanor. So long as the parties do not comment on the defendant's demeanor in closing argument, some courts assume that the jurors will ignore it—a very dubious assumption, indeed. Other courts not only permit jurors to consider a defendant's demeanor, but also allow the parties to comment on it throughout the trial. In their view, how a defendant acts in the courtroom is a legitimate factor for jurors to consider in making a decision.

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Danks, 82 P.3d at 1262 n.3.

127. Id.


129. See infra Part III.


131. Id.

132. Id.

133. For these courts, as well as for the legendary John Henry Wigmore, it is both unrealistic and counterproductive to assume that jurors can be "men-
III. THE SPLIT: TO ACKNOWLEDGE OR NOT TO ACKNOWLEDGE A DEFENDANT'S Demeanor IN THE COURTROOM?

Today's courts are divided on how to consider a defendant's nontestifying demeanor in the courtroom. This division among judges is best illustrated by the Ninth Circuit's divided opinion in United States v. Schuler. The majority in that case rejected the express use of demeanor evidence during a criminal case, finding even the referral to it by the prosecution as a violation of due process. The dissenting judge, however, along with judges in other jurisdictions, supported the use of such evidence, noting that demeanor evidence can be helpful to jurors in assessing a defendant's credibility and culpability.

A. THE SCHULER SPLIT

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

At trial, Schuler's counsel claimed that Schuler's remark was just a general expression of anger directed at law enforcement and not a serious threat. Schuler's first trial ended in a mistrial. In Schuler's second trial, the prosecutor took extra steps during his closing argument to convince the jury that Schuler's threats were serious, stating:

[While Mr. Schuler was being interrogated by the two security agents, Schuler made a number of racial comments about the number of people he was going to kill, a number of sexual comments. I noticed...]

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134. 813 F.2d 978 (9th Cir. 1987) (2-1 decision).
135. See id. at 981.
136. See id. at 983–84 (Hall, J., dissenting) (stating that it is "well-settled" that a defendant's "courtroom demeanor is evidence").
137. See id. at 979 (majority opinion).
138. Id.
139. Id.
140. Id.
141. Id.
a number of you were looking at Mr. Schuler while that testimony was coming in and a number of you saw him laugh and saw him laugh as they were repeated.\textsuperscript{142}

Defense counsel objected to the prosecutor's statement, but the trial judge overruled the objection and instructed the jury that the prosecutor's argument was proper.\textsuperscript{143}

On appeal, the Ninth Circuit reversed Schuler's conviction on two separate grounds.\textsuperscript{144} First, the court held that the prosecutor had improperly injected the issue of the defendant's bad character into the trial in contravention of Federal Rule of Evidence 404(a) because Schuler had not first offered evidence of good character.\textsuperscript{145} This approach is similar to that of other courts which, analogizing demeanor evidence to character evidence, refuse to allow the prosecution to comment on the defendant's demeanor unless the defendant's character has become an express issue in the case.\textsuperscript{146}

The majority then went on to its second ground for reversing Schuler's conviction.\textsuperscript{147} In doing so, the court addressed head-on the issue of whether a defendant's demeanor in the courtroom should play a role in determining his guilt or innocence. The court ruled that "in the absence of a curative in-

\begin{itemize}
\item \textsuperscript{142} Id. (alteration in original).
\item \textsuperscript{143} Id.
\item \textsuperscript{144} See id. at 982–83. Defense counsel had argued several grounds for reversible error, including that the prosecutor's comments improperly constituted an indirect comment on the defendant's failure to testify at trial. See id. at 979–80 (setting forth the issues on appeal). The court, however, did not rest its decision solely on that argument. In a footnote, the court noted that other courts have rejected claims that a prosecutor's comments on the "expressionless courtroom demeanor of a defendant" necessarily constitutes an indirect comment on the defendant's failure to testify. See id. at 980 n.1 (citing Bordine v. Douzanis, 592 F.2d 1202, 1210–11 (1st Cir. 1979); Bishop v. Wainwright, 511 F.2d 664, 668 (5th Cir. 1975)). See generally Brett H. McGurk, \textit{Prosecutorial Comment on a Defendant's Presence at Trial: Will Griffin Play in a Sixth Amendment Arena?}, 31 UWLA L. REV. 207, 244–50 (2000) (discussing the factfinder's use of a defendant's demeanor in the courtroom). Judge Boochever wrote, "we doubt that jurors would construe the prosecutor's comment on Schuler's laughter as referring to his failure to testify." \textit{Schuler}, 813 F.2d at 982. Although the court was concerned that allowing prosecutors to comment on a defendant's demeanor may force a defendant to testify to explain his courtroom demeanor, id. at 982, the focus of the court's decision was on the broader issue in the case: are comments regarding a defendant's demeanor improper because they impermissibly convict a defendant on the basis of information that cannot be considered evidence from the witness stand?
\item \textsuperscript{145} See \textit{Schuler}, 813 F.2d at 980–81.
\item \textsuperscript{146} See, e.g., \textit{United States v. Wright}, 489 F.2d 1181, 1186 (D.C. Cir. 1973).
\item \textsuperscript{147} See \textit{Schuler}, 813 F.2d at 981–82.
\end{itemize}
struction from the court, a prosecutor's comment on a defendant's off-the-stand behavior constitutes a violation of the due process clause of the [F]ifth [A]mendment. That clause encompasses the right not to be convicted except on the basis of evidence adduced at trial. 148 Because a defendant's nontestifying demeanor is not a traditional form of courtroom evidence, it should not be considered by the jury. Allowing a prosecutor to refer to demeanor would be the equivalent of allowing the prosecutor to refer to any other extraneous information that was not presented during the trial. 149 Demeanor is information outside the record of the case and goes beyond admissible evidence. 150

Both aspects of the majority's decision are problematic. First, it was a stretch for the court to claim that the prosecutor had improperly introduced character evidence into the trial. In referring to the defendant's courtroom demeanor, the prosecutor did not argue that Schuler was an angry, hostile person and thus guilty of the crime charged. If anything, it was the defense who claimed that Schuler's statements reflected his antigovernment attitude and not his intended actions. 151 Instead, the prosecutor confined his remarks to highlighting how Schuler

148. Id. at 981. In support of its holding, the court noted that the Eleventh Circuit had also confronted the issue of a prosecutor commenting during closing arguments on the defendant's behavior off the witness stand. Id. (citing United States v. Pearson, 746 F.2d 787 (11th Cir. 1984)). In United States v. Pearson, the prosecutor argued: "Does it sound to you like [the defendant] was afraid? You saw him sitting there in the trial. Did you see his leg going up and down? He is nervous. (Appellant's objection overruled) You saw how nervous he was sitting there. Do you think he is afraid?" 746 F.2d at 796 (quoting Transcript of Record at 145–46, Pearson, 746 F.2d 787 (No. 83-5161)). The Pearson court held that the prosecutor's statement gave the jury the wrong impression that the defendant's behavior off the witness stand was evidence and, as a result, violated the defendant's right to be convicted only on the evidence introduced at trial. Id. See generally Taylor v. Kentucky, 436 U.S. 478, 490 (1978) (holding that the trial court's failure to issue a requested instruction on the defendant's presumption of innocence violated his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment). The Schuler court also relied on United States v. Carroll, 678 F.2d 1208, 1210 (4th Cir. 1982), and Wright, 489 F.2d at 1186. Schuler, 813 F.2d at 980–81. In both cases, the courts held that the defendants' conduct off the witness stand was not legally relevant to the question of their guilt or innocence for the crimes with which they were respectively charged. See Carroll, 678 F.2d at 1209–10; Wright, 489 F.2d at 1186.

149. Schuler, 813 F.2d at 981.

150. Id.

151. See id. at 984 (Hall, J., dissenting).
had responded when the witnesses testified to his actions.\textsuperscript{152} Without claiming that Schuler was a violent person and therefore guilty of threatening the President, the prosecution suggested that Schuler's laughter and cavalier manner during the trial were an indication that he did not regret making the threatening remarks that he had made.\textsuperscript{153}

Second, the majority's claim that the prosecutor's reference to the defendant's courtroom demeanor violated due process was not well supported. If in fact the court really believed such observations were not evidence, then it would have barred the jurors from considering it at all during deliberations, rather than just prohibiting a prosecutor's reference to it. There is no suggestion in the majority's decision that a court must \textit{sua sponte} instruct a juror to disregard a defendant's demeanor in every case, yet this "non-evidence" is evident throughout the trial. Although a defendant's nontestifying demeanor does not fall within the traditional categories of evidence,\textsuperscript{154} it is not the same as information that is never presented in the courtroom.

In dissent, Judge Cynthia Holcomb Hall similarly took issue with the majority's conclusion that a jury cannot consider a defendant's nontestimonial courtroom demeanor because it is not evidence:

\begin{quote}
Sound policy reasons exist for allowing a jury to consider the courtroom demeanor of a defendant. As Wigmore noted: "[I]t is as unwise to attempt the impossible as it is impolitic to conduct trials upon a fiction; and the attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory."\textsuperscript{155}
\end{quote}

According to Judge Hall, it was perfectly reasonable for the jury to consider the defendant's demeanor in response to the evidence adduced at trial to assess whether he had intended his remarks about harming the President to constitute a genuine threat.\textsuperscript{156} Schuler's demeanor in the courtroom helped answer a key issue in the case—Schuler's intent at the time of the alleged threat.\textsuperscript{157} Was Schuler serious about his remarks, or did
he treat them as a joke?\textsuperscript{158} For Judge Hall, a defendant's demeanor should be considered a form of relevant evidence because it serves the same purpose as evidence under Rule 404(b).\textsuperscript{159} That rule allows evidence of other acts if they are used to prove a defendant's intent.\textsuperscript{160}

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

\begin{itemize}
\item \textsuperscript{158} See id. at 985 (Hall, J., dissenting).
\item \textsuperscript{159} See id. at 984. Federal Rule of Evidence 404(b) provides:
\begin{quote}
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.
\end{quote}
FED. R. EVID. 404(b).
\end{itemize}

Rule 404(b) is considered an exception to the general rule that character evidence may not be used to demonstrate the propensity of a defendant to commit a crime. See, e.g., United States v. Matthews, 431 F.3d 1296, 1319 (11th Cir. 2005), cert. denied, 127 S. Ct. 46 (2006). Because the rule allows for the introduction of specific acts to prove specific issues, it does not allow the parties to argue simply that because the defendant did something wrong before, he must have done it again. See, e.g., United States v. Castillo, 140 F.3d 874, 879 (10th Cir. 1998) (stating that in certain cases, Rule 414 replaces Rule 404(b) and allows the prosecution to use evidence of the defendant's prior acts). Rather, the incident tends to prove a specific point, such that the defendant acted intentionally with regard to a specific act. See \textit{Schuler}, 813 F.2d at 984 (Hall, J., dissenting). In the context of a defendant's demeanor in the courtroom, proponents of the evidence argue that the defendant's demeanor evidence is evidence of "other acts" that can explain whether the defendant's actions for which he is charged were intentional. See, e.g., \textit{id}. Thus, because the defendant laughs in the courtroom over references to his prior threats, jurors can infer that those threats were serious and intentional. See \textit{id}. at 984–85.

\begin{itemize}
\item \textsuperscript{160} FED. R. EVID. 404(b).
\end{itemize}
B. IN THE PATH OF SCHULER

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

There is so much evidence that corroborates what [the prosecution's witness] told you. When I spoke about her demeanor when she testified, and how she answered [defense counsel's] questions, did you notice the defendant's demeanor when she testified, the way he kept looking down and couldn't look at her? She looked in his eyes several times. . . . You observed that, members of the jury, you were sitting here. We all saw it. He couldn't sit up and look her in the eye because he knew she was telling the truth. He knew she was telling the truth.

On appeal, the Maryland Court of Special Appeals overturned the defendant's convictions and ordered a new trial on the ground that the trial judge committed reversible error by failing to sustain the defendant's timely objection to the prosecutor's statement regarding the defendant's courtroom demeanor. The court drew a distinction between consideration of the demeanor of testifying defendants and nontestifying defendants. Although it acknowledged that courts reach conflicting conclusions on the issue, the Bryant majority held that in its view:

The courtroom demeanor of a defendant who has not testified is irrelevant. His demeanor has not been entered into evidence and, therefore, comment is beyond the scope of legitimate summary. Moreover the practice is pregnant with potential prejudice. A guilty verdict

161. 741 A.2d 495, 499 (Md. Ct. Spec. App. 1999). In Bryant, the defendant was convicted of first-degree murder, attempted first-degree murder, and two counts of using a handgun in the commission of a felony. Id. at 498. He received a life sentence for the murder conviction and concurrent sentences for the remaining convictions. Id.

162. Id. at 498–99 (second alteration in original). During the criminal trial, the prosecution's principal witness Florence Winston testified that she witnessed the shooting, and that she spoke with the defendant the following morning. Id. at 497. Winston testified that the defendant "looked nervous" and apologized for shooting in her direction the night before. Id. Winston was a "self-described 'dope-fiend'" who sold crack cocaine to support her drug habit, and she had agreed to testify against the defendant in exchange for assistance with theft and probation violation charges that were pending against her. Id. at 497–98. During closing arguments, the prosecutor acknowledged Winston's self-interested motive for testifying, and conceded that "Winston's lifestyle was not exemplary." Id. at 498. The prosecutor then tried to corroborate and lend credibility to Winston's testimony by highlighting the defendant's demeanor during Winston's testimony. Id.

163. Id. at 501–03.

164. Id. at 499–500.
must be based upon the evidence and the reasonable inferences therefrom, not on an irrational response which may be triggered if the prosecution unfairly strikes an emotion in the jury.\textsuperscript{166}

The Bryant court thus rejected all attempts to allow the jury to consider a defendant's courtroom demeanor in its decision, concluding that the prosecutor's comments regarding the defendant's demeanor were improper because they were not based upon "evidence" and because they constituted an emotional appeal to the jurors.\textsuperscript{166}

Likewise, the Supreme Court of Delaware held it is improper for prosecutors to comment on a nontestifying defendant's courtroom demeanor.\textsuperscript{167} In Hughes v. State, the defendant had been convicted of his wife's murder based entirely on circumstantial evidence.\textsuperscript{168} Hughes sought reversal citing a litany of improper actions by the prosecution including misstating evi-

\textsuperscript{165} Id. at 500 (citations omitted).

\textsuperscript{166} Id. But see Brothers v. State, 183 So. 433, 436 (Ala. 1938) (holding that the defendant's courtroom demeanor is a proper subject of comment where the defendant's sanity was a primary issue in the case and the defendant may have been seeking to create an impression of insanity through his demeanor before the jury); Campbell v. State, 501 A.2d 111, 114 (Md. Ct. Spec. App. 1985) (holding that "[t]he circumstances and the nature and language of the comment" may justify an exception to the general rule that statements regarding the defendant's personal appearance are improper except with regard to the defendant's appearance while testifying or where the defendant's identity is at issue).

\textsuperscript{167} Hughes v. State, 437 A.2d 559, 572 (Del. 1981).

\textsuperscript{168} Id. at 563, 576. Robert D. Hughes was charged with the first-degree murder of his wife. Id. at 564. The victim was found lying in the driveway near the rear of defendant's house, after Hughes called the police department to report that he needed an ambulance. Id. at 562. When the police arrived, they found the victim covered in blood, with a rope around her neck. Id. She had suffered two blows to the head, but the cause of death was ligature strangulation. Id. Hughes did not testify, but he told the police that he found his wife's body in the driveway. Id. at 563.

The prosecution built its case on circumstantial evidence. The victim's father testified that the rope used in the strangling was the same rope that had been attached to his grandson's wagon. Id. Defendant had also given some curious statements to the police. For example, when asked about the possibility that blood might be found in his house or on his clothing, he stated that it was because his wife had a heavy menstrual flow recently or because he played with a neighbor's dog that was in heat. Id. at 564. A neighbor testified that on the night of the murder, he had heard what he believed was a man and a woman arguing. Id. at 565. Other witnesses testified as to Hughes' reaction to the murder, with the conflicting testimony "ranging from 'he showed no emotion' to descriptions of shock, tears and distress." Id. There was also physical evidence suggesting that the blanket covering the victim's body had been placed there earlier than when Hughes admitted he had found the body. Id. at 565-66.
dence and, during summation, impossibly commenting that the defendant's courtroom demeanor was "unemotional, unfeeling and without remorse."\textsuperscript{169} The court viewed the courtroom demeanor of a nontestifying defendant as "irrelevant."\textsuperscript{170} Since the defendant's demeanor had not been entered into evidence, such a comment "is beyond the scope of legitimate summary."\textsuperscript{171} Because demeanor is not technically evidence and a jury's verdict must be based upon evidence, the court held that the jurors should not be allowed to draw any inferences, suggested by counsel, from their perceptions of the defendant's courtroom behavior.\textsuperscript{172}

Similarly, in \textit{Baldez v. State}, the Florida District Court of Appeal reversed a defendant's conviction for sexual battery on a minor because the prosecutor commented in closing argument that the defendant had been glaring at the victim's eight-year-old brother when he testified that he saw the defendant rape the girl.\textsuperscript{173} Although witness intimidation may be very relevant to a juror's decision on witness credibility, the \textit{Schuler} court,\textsuperscript{174} like the \textit{Baldez} court, held that it was improper for the prosecution to try and bolster the witness's testimony by arguing that the victim was able to testify despite the defendant's intimidation.\textsuperscript{175}

\textsuperscript{169} \textit{Id.} at 572.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.} As the court noted, it is dangerous to assume that there is such a thing as a model of "normal" courtroom behavior. "[O]ne may reveal or conceal emotion for innumerable reasons, and a defendant should not be subjected to a guilty verdict because his courtroom appearance did not comport with the prosecution's notion of a norm." \textit{Id.}
\textsuperscript{172} \textit{Id.; see also} Craig v. United States, 81 F.2d 816, 829 (9th Cir. 1936) (stating that asking jurors to keep an eye on defendant's demeanor during closing arguments was ill-advised, but not reversible error); People v. Garcia, 206 Cal. Rptr. 468, 472–75 (Ct. App. 1984) (finding that the prosecutor acted improperly in referring to defendant's courtroom behavior); Baldez v. State, 679 So. 2d 825, 826 (Fla. Dist. Ct. App. 1996) ("It is improper for a prosecutor to comment on the defendant's demeanor when he is not on the witness stand." (citing Pope v. Wainwright, 496 So. 2d 798, 802 (Fla. 1986))); Blue v. State, 674 So. 2d 1184, 1213–15 (Miss. 1996) (explaining that the prosecutor may not comment on the nontestifying defendant's demeanor and appearance during trial).
\textsuperscript{173} \textit{Baldez}, 679 So. 2d at 826–27.
\textsuperscript{174} \textit{See supra} notes 147–50 and accompanying text.
\textsuperscript{175} \textit{Baldez}, 679 So. 2d at 827. The Florida courts had previously held that a prosecutor cannot comment on a defendant's demeanor when the defendant is not on the witness stand. \textit{See Wainwright}, 496 So. 2d at 802 (finding that the prosecutor erred by arguing in closing argument that the defendant was "grinning from ear-to-toe" during the trial).
As these cases demonstrate, many courts agree with the Schuler majority and will not allow a defendant's nontestifying demeanor to be considered as evidence in a case. If a prosecutor draws the jurors' attention to a defendant's courtroom behavior, even if it was obvious for all to see, it may be grounds for reversal for violating the defendant's due process rights or improperly interjecting character evidence in the case.176

C. A DIFFERENT PATH: ACKNOWLEDGING A DEFENDANT'S COURTROOM DEMEANOR

While many courts have taken the same position as the Schuler majority, a sizeable number of courts will allow jurors to consider a defendant's demeanor off the witness stand in making their decisions.177 For example, in the famous trial of the Kennedy cousin Michael Skakel, a juror reported that he had seen the defendant mouth something like "good job" to his testifying cousin.178 The defendant's conduct bothered the juror a great deal and the defense complained that the juror should be removed because he was considering information that was not formally evidence in the trial.179 The trial judge rejected the defense's claim, accepting the prosecutor's argument that "the jury is allowed to consider the defendant's demeanor in the courtroom."180

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176. See United States v. Schuler, 813 F.2d 978, 980–81 (9th Cir. 1987). In addition to these legal grounds for reversal, defendants also try to claim that their Fifth Amendment privilege not to testify is violated by the prosecutor's reference to the defendant's courtroom demeanor. See U.S. CONST. amend. V. However, this argument is ordinarily rejected because the prosecutor's remark is not viewed as a comment on the defendant's failure to testify, but rather a comment on what the defendant otherwise communicated to the jury during trial. See, e.g., Schuler, 813 F.2d at 982; Hughes, 437 A.2d at 573.

177. 2 WIGMORE, supra note 133, § 274(2), at 119–20 (arguing that demeanor off the witness stand and in the courtroom is admissible evidence and dismissing as unrealistic the belief that jurors can be "mentally blind" to demeanor off the stand).


179. Tuohy, supra note 178.

180. Id.
Similarly, the Supreme Judicial Court of Massachusetts held that a prosecutor may comment on the defendant's squirming, smirking, and laughing during trial. In *State v. Brown*, the defendant was charged with first-degree murder for ambushing and shooting Wayne Gerald over a stolen moped. The evidence was overwhelming; the defendant had admitted to family members that he had killed the "son-of-a-bitch." During the penalty phase of the capital trial, Smith's mother and brother testified that Brown was a generally amicable fellow. In his closing argument, the prosecutor tried to rebut the defense claim that Brown deserved to be spared. He argued that the defendant had failed to show remorse during the trial:

Have you seen this defendant express one iota of being sorry in this case, of being contrite? . . . Did you observe, when this widow was on this witness stand testifying and broke down into sobs and it took several minutes for her to gain control of herself, did you see one tear roll down the face of this defendant sitting over there? If you watched him—and some of you did—you saw him sitting there very coolly, very coolly, musing, watching, calculating.

On appeal, Brown complained that the prosecutor's argument improperly placed before the jury "incompetent and prejudicial matters." However, the Supreme Court of North Carolina rejected this argument. Like the dissent in *Schuler*, the court believed that "[u]rging the jurors to observe defendant's demeanor for themselves does not inject the prosecutor's own opinions into his argument, but calls to the jurors' attention the fact that evidence is not only what they hear on the stand but what they witness in the courtroom." Observations about a defendant's demeanor are "rooted in the evidence" be-

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181. Commonwealth v. Smith, 444 N.E.2d 374, 380 (Mass. 1983). The defendant received a life sentence after being convicted of murder, arson and armed robbery. *Id.* at 376. The Massachusetts Supreme Judicial Court ordered a reversal and a new trial because of prosecutorial misconduct. *Id.* However, the court found proper the prosecutor's comments on the defendant's demeanor, simply stating, "[t]he jury were entitled to observe the demeanor of the defendant during the trial." *Id.* at 380.
182. 358 S.E.2d 1, 12 (N.C. 1987).
183. *Id.* at 8.
184. *Id.* at 14.
185. *Id.* at 13.
186. *Id.* at 15.
187. *Id.*
188. See supra notes 155–59 and accompanying text.
cause the defendant’s demeanor is before the jury at all times.190

In the more extreme case of People v. Bizzell, the prosecutor was so brazen as to argue in opening statement that the jury would “see” that Bizzell’s “own behavior in this courtroom will indicate that he’s guilty.”191 As predicted, Bizzell was his own worst enemy during trial. He displayed anger on and off the witness stand to the point that his own lawyer had to remind him to be “careful.”192 These actions fed into the prosecutor’s argument that the defendant was out of control when he tried to kill his victim.193 In later proceedings, Bizzell complained that it was ineffective assistance of counsel for his lawyer to allow the prosecutor to make such arguments, but the appellate court disagreed and upheld his conviction.194 The court found that because Bizzell had testified, jurors could consider not only his demeanor while on the witness stand, but also his courtroom demeanor while not on the stand.195

Thus, as these cases demonstrate, some judges not only countenance jurors passively considering a defendant’s demeanor in their decisions, but they also permit open references to such demeanor during the case. For these courts, the courtroom

190. Id.; see Bishop v. Wainwright, 511 F.2d 664, 668 (5th Cir. 1975) (stating it is permissible to refer to defendant’s expressionless courtroom demeanor); Wherry v. State, 402 So. 2d 1130, 1133 (Ala. Crim. App. 1981) (holding that the prosecutor’s comments during closing argument highlighting the defendant’s demeanor in order to challenge her plea of insanity were a proper subject of comment rather than an improper attempt to draw attention to defendant’s failure to testify); State v. Myers, 263 S.E.2d 768, 773–74 (N.C. 1980) (finding that the prosecutor’s comments on the defendant’s reactions to photographs of his murdered wife were permissible since his demeanor was “before the jury at all times”).

191. People v. Bizzell, No. A104615, 2005 WL 2842055, at *5 (Cal. Ct. App. Oct. 31, 2005). Bizzell was convicted of assault, attempted murder, and other crimes after he attacked his ex-girlfriend by choking her and holding a knife to her throat. Id. at *2–3. During the trial, Bizzell frequently interrupted the proceedings by making comments or laughing at statements. Id. at *4. The court sustained several objections to Bizzell’s answers when on the stand, including that they were often narrative, nonresponsive, or that no question was pending. Id.

192. Id. at *8.

193. See id. at *6 (“[W]e all know why we’re here, power and control. The defendant’s conduct shows that. It shows that when he took the stand, it shows that throughout this whole event . . . . He’s out of control. You saw that.” (internal quotation marks omitted)).

194. Id. at *6–8.

195. Id. at *7–8.
is a dynamic stage—a theater where everyone’s role in reaching the just verdict is properly considered.

D. FINDING MIDDLE GROUND

Finally, there are courts that attempt to set standards as to when conduct by a defendant can be considered and when it cannot. For example, in *United States v. Cook*, the defendant was charged with the unpremeditated murder of his fourteen-month-old daughter.\(^{196}\) The defense claimed that Cook was insane and had an expert witness testify on his behalf.\(^ {197}\) In closing argument, the prosecutor sought to counter the expert’s opinion by referring the jurors to their own observations of the defendant and his demeanor in the courtroom:

> You have had more observation of this accused sitting right here over the course of the last two weeks than Dr. Hocner [the defense expert] had. You’ve been able to gauge his response. You’ve been able to watch him when a witness is talking about an aspect of his daughter’s death as he yawns, relaxes. He’s really into this trial. Using your own knowledge of the ways of the world and human mankind, what does that mean to you? You’re able to perceive him. You are better than Dr. Hocner as to an opinion of what the accused intended. That’s your job. That’s what you are here for.\(^ {198}\)

On appeal, Cook complained that the prosecutor’s argument improperly interjected his character in the case, violated his right against self-incrimination, and trampled on his due process right to be judged only on the “evidence” introduced at trial.\(^ {199}\)

The United States Court of Appeals for the Armed Forces held that the prosecutor’s remarks were not plain error, it tried to set guidelines as to when demeanor in the courtroom should and should not be considered by the jury.\(^ {200}\) Generally, the court supported the majority’s holding in *Schuler* and held that nontestimonial acts, such as a defendant’s laughter or yawns, or a defendant’s consultations with counsel, should not be considered as relevant evidence.\(^ {201}\) The court, however, stopped short of holding that it would always be reversible error for a prosecutor to draw the juror’s attention to a defendant’s nontestimonial acts in the courtroom.

\(^{196}\) 48 M.J. 64, 65 (C.A.A.F. 1998).
\(^{197}\) Id.
\(^{198}\) Id. (footnote omitted).
\(^{199}\) Id.
\(^{200}\) Id. at 66–67.
\(^{201}\) Id.
In the majority’s opinion, Judge Susan Crawford began by noting that a significant part of communication is nonverbal: “Nonverbal communication may occur outside the courtroom as well as on and off the witness stand.” For example, threatening gestures by a defendant during trial are nontestimonial acts that can be extremely relevant. When relevant evidence is presented to jurors on or off the witness stand, it should be admissible. Thus, the court was willing to accept that there might be a proper role under some circumstances for the trier of fact to consider demeanor in its decisions.

However, the appellate court warned, “[i]nterpretations of nonverbal communication are fallible and idiosyncratic.” When the intent of a defendant’s nontestimonial behavior is open to interpretation, it is more difficult to find that it is relevant and admissible. The Cook court suggested that the burden should be on the defense counsel to object to and explain why the information was not relevant, so that the court could instruct jurors not to consider it in their decision making.

The goal of the Cook court was to allow nonverbal communication to be considered evidence only when it has a particular role to play and can be fairly interpreted. Examples include demonstrating whether a particular item of clothing fits a defendant, showing that the defendant bears physical characteristics.

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202. Id. at 65 (citing JEFFREY L. KESTLER, QUESTIONING TECHNIQUES AND TACTICS §§ 3.34–.39, at 160–67 (2d ed. 1992)).
203. Id. at 66.
204. Id. The court cited in support of its position John Henry Wigmore who “championed the view that demeanor off the witness stand and in the courtroom is admissible evidence. . . . [John Henry Wigmore] dismissed as fiction the belief that the jurors can be ‘mentally blind’ to demeanor off the stand.” Id. (quoting 2 WIGMORE, supra note 133, § 274(2), at 119–20).
205. Id.
206. Id. at 65.
207. See id. at 66. The court cited Schuler for this principle, as well as two other cases in which the prosecutor was found to have improperly commented on a defendant’s consultations with his lawyer during trial, United States v. Carroll, 678 F.2d 1208, 1210 (4th Cir. 1982), or on the defendant’s nervous leg actions during trial, United States v. Pearson, 746 F.2d 787, 796 (11th Cir. 1984).
208. Cook, 48 M.J. at 67.
209. Id. at 66.
210. Prosecutor Christopher Darden’s ill-fated use of a courtroom demonstration with the “bloody glove” during the O.J. Simpson murder trial provides a perfect example of the use (or misuse) of nonverbal communication. Wanting the jury to understand that the extensive “DNA evidence figuratively put the gloves on Simpson,” Darden had Simpson try the glove on, which apparently did not fit. Stephen D. Easton, Lessons Learned the Hard Way from O.J. and
teristics relevant to the case, or even noting the defendant’s indifferent reaction when informed that the money in his wallet was counterfeit. In these situations, demeanor evidence is allowed even though the defendant is not testifying because it is clear what is being communicated by the defendant’s actions. Thus, a defendant’s threats to witnesses or court participants would also be properly considered as “evidence” that demonstrates consciousness of guilt.

However, when the defendant’s conduct is ambiguous and could reflect either a guilty or a not guilty consciousness, the Court would be reluctant to allow the jury to consider it. Thus, the Court cites the defendant’s conduct in Schuler as an example of where it would find demeanor evidence to be irrelevant. Because the circumstances surrounding Schuler’s laughter were too ambiguous to necessarily indicate that he intended to threaten the life of the President, they did not meet

“The Dream Team,” 32 Tulsa L.J. 707, 732–33 (1997) (discussing the O.J. Simpson trial and reviewing CHRISTOPHER A. DARDEN WITH JESS WALTER, IN CONTEMPT (1996)). See generally DARDEN WITH WALTER, supra. The implication of the glove fitting or not fitting had a particular role (whether or not it was O.J.’s) and could be fairly interpreted (if it did not fit, it did not belong to O.J.).

211. Courts tend to accept such evidence as proper “demonstrative evidence” that may be considered by the jury. See, e.g., People v. Williams, 201 N.W.2d 286, 287–88 (Mich. Ct. App. 1972) (stating that the prosecutor was allowed to comment on the defendant’s efforts not to grin and show his teeth because the robbery suspect had been identified as having bad teeth). Professors Robert Brain and Daniel Broderick define demonstrative evidence as “any display that is principally used to illustrate or explain other testimonial, documentary, or real proof, or a judicially noticed fact. It is, in short, a visual (or other sensory) aid.” Robert D. Brain & Daniel J. Broderick, The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status, 25 U.C. Davis L. Rev. 957, 968–69 (1992). Their work recognizes demonstrative evidence as an analytically separate class of evidence. Id. at 967–72. They highlight the defining characteristic of the evidence as being derivative in relevance, in that it has a “secondary or derivative function” because it is only used to explain other previously introduced evidence. Id. at 961.


213. Id. at 1011–12.

214. See, e.g., United States v. Gatto, 995 F.2d 449, 454–55 (3d Cir. 1993) (explaining that jurors may note threats or intimidation of witnesses); United States v. Maddox, 944 F.2d 1223, 1226, 1229–30 (6th Cir. 1991) (finding that jurors may consider the defendant’s alleged mouthing of the words “you’re dead”); United States v. Mickens, 926 F.2d 1323, 1328–29 (2d Cir. 1991) (stating that the defendant’s hand gesture in the shape of a gun may be considered by the jury).

215. United States v. Schuler, 813 F.2d 978, 979 (9th Cir. 1987).

the *Cook* court's test that the relevancy of the nontestimonial demeanor be obvious to the court and trier of fact.\(^1\)

Using this approach, it is therefore not surprising that the *Cook* court found that it was improper for the prosecutor to comment on the defendant's yawn while a witness described his daughter's death.\(^2\) Under the *Cook* court's reasoning, a yawn is too ambiguous to be relevant as to whether a defendant callously killed his own daughter.

A similar issue existed in *United States v. Pearson*.\(^3\) Evidently, one of the defendants, Petracelli, had the nervous habit of shaking his leg throughout the trial and the judge allowed comment on it (over objection) to the jury.\(^4\) The Eleventh Circuit Court of Appeals disagreed with the district court's approach, stating that “[i]n overruling Petracelli's objection and in failing to give a curative instruction, the court, in effect, gave the jury an incorrect impression that appellant's behavior off the witness stand was evidence in this instance, upon which the prosecutor was free to comment.”\(^5\) Courts must be extremely careful not to communicate with jurors their impressions of the evidence.\(^6\) Just by allowing the prosecutor's remarks, the judge may have been conveying that he thought that the defendant's nervous habit was evidence of guilt. Particularly in the situation of a defendant who has the habit of shaking his leg, it is hard to know whether such actions really reflect a guilty conscience or are the reaction to the strain of being on trial, which in fact might be even more stressful for an

\(^1\) Id.
\(^2\) Id. at 67. The court, however, did not overturn the conviction since the trial defense counsel could have objected to the comment and because the remarks did not constitute plain error. *Id.*
\(^3\) 746 F.2d 787 (11th Cir. 1984).
\(^4\) *Id.* at 796.
\(^5\) *Id.*
\(^6\) See Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L. Rev. 377, 479–83 (1996) (stating that because of the judge's position of authority, jurors often ascribe too much weight to the judge's comments, thereby affecting the defendant's right to an "impartial" hearing). See generally Jack B. Weinstein, *The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries*, 118 F.R.D. 161 (1988) (discussing the propriety and necessity of commenting on evidence by federal trial judges). When a judge comments on matters at trial, a standard instruction given to the jury is: “You are not to consider any statements or rulings which I have made during the course of this trial as indicating that I believe the verdict should be one way or the other. I have no opinion, and even if I did, it would be wholly irrelevant.” 1 LEVENTHAL, *supra* note 31, § 4:76.
innocent person. *Pearson* reflects a situation in which, under the *Cook* approach, non-testifying demeanor evidence would be irrelevant because its meaning is too ambiguous to be helpful to the jury.

Similarly, courts would likely bar any reference by a prosecutor to a defendant’s actions in assisting his lawyer at trial. Courts are generally reluctant to interfere with the attorney-client relationship. Thus, it is not surprising that in another case cited by the court in *Cook,* United States v. *Carroll,* the court held that comments about a defendant examining a court exhibit and then explaining it to his lawyer were off-limits.

Interactions with defense counsel are to be expected in any trial and do not demonstrate the guilt or innocence of a defendant.

As these cases demonstrate, courts have taken different approaches in dealing with the issue of jurors considering a defendant’s non-testimonial demeanor. One judge may evaluate a defendant’s refusal to look a witness in the eye as evidence that the defendant knows the witness is telling the truth; another judge may find the defendant’s demeanor irrelevant because it could just be the reaction of an innocent person who is afraid that a lying witness will convict him.

It is time to take a more critical and consistent approach to considering a defendant’s non-testimonial demeanor—one that considers the manner in which jurors actually decide cases, which includes observations of actions that occur off the witness stand. In constructing that approach, it is important

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223. *See* United States v. *Cook,* 48 M.J. 64, 66–67 (C.A.A.F. 1998) (allowing nonverbal communication to be considered evidence only when it is relevant and can be fairly interpreted).

224. *See Pearson,* 746 F.2d at 796 (referring to the defendant’s nervous leg action during trial).

225. *See id.* at 66.


227. *Id.* at 1209. The court noted that the record was “devoid of any evidence, aside from the prosecutor’s assertion, that the defendant knew more about the photographs [about which he consulted counsel] than did his lawyer.” *Id.* at 1210.

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

229. *See,* e.g., David Landy & Elliot Aronson, *The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors,* 5 J. EXPERIMENTAL SOC. PSYCHOL. 141, 146–51 (1969) (demonstrating the effect of
to identify the arguments in favor and against jurors considering a defendant's nontestifying demeanor. The Cook court's approach may be a good compromise, but it may not give sufficient guidance to future courts in dealing with the issue.


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

A. ARGUMENTS IN FAVOR OF INSTRUCTING JURORS TO DISREGARD A DEFENDANT'S NONTESTIFYING DEMEANOR

There are several arguments in favor of simply instructing jurors that a defendant's demeanor is irrelevant to their decisions and must not be considered in their deliberations. As this Section will discuss, jurors no longer serve as compurgators, but are regulated by rules of evidence and procedure. Allowing jurors to consider information no longer formally acknowledged to be "evidence" may be seen as conflicting with our current approach to modern trials. There is also the concern that jurors may not have the skills to properly evaluate nontestimonial demeanor evidence and that allowing such evidence will change the dynamic of the courtroom, diverting jurors' attention from the evidence being presented on the witness stand. Additional-

ly, allowing such observations as evidence can also impact interactions between counsel and client, undermine rules on character evidence, and impact a defendant's exercise of the Fifth Amendment privilege not to testify. Finally, one must consider what happens when the unspoken becomes spoken; that is, how jurors will change their decision-making process once they are told that nontestifying demeanor may be relevant. Each of these concerns must be studied before any proposal is adopted to govern the admissibility of nontestifying demeanor evidence.

The first argument against allowing a defendant's nontestifying demeanor to play a role in trial is that there has been a historical move from a trial system in which the defendant and jurors interacted throughout the proceedings, to one in which a defendant, unless testifying, is a mere observer of the proceedings. When jury trials first began, jurors served as compurgators—individuals who were selected to sit as jurors because they knew the defendant and could, as witnesses, offer opinions regarding the defendant's credibility and law-abiding nature. As structured, it made sense for jurors to consider a defendant's demeanor both in and out of the courtroom because the jurors knew the defendant and could properly evaluate the meaning of the defendant's reactions. However, as jury trials metamorphosed into formalized proceedings where jurors are outsiders who must listen to the evidence and exclude everything except what they have heard in open court from sworn witnesses, allowing jurors to consider their perceptions of the defendant was no longer reliable or consistent with the nature of formalized proceedings in which the judge closely regulates what evidence jurors may consider. There is little way for the court to monitor and control such observations by jurors or for them to be reviewed by appellate courts.


231. Moore, supra note 32, at 40 (stating that, in the first jury trials, the jurors were "witnesses summoned from the neighborhood").

Second, it is not at all clear that jurors are equipped to properly evaluate the significance of a defendant's demeanor in the courtroom. Without subjecting the defendant to questioning, it may be impossible for lay observers to know whether a defendant's reaction is genuine or staged. It is often difficult, if not impossible, to tell from someone's facial expressions what he or she is thinking or feeling. Certain individuals react to terrible news with an inappropriate smile or joke; others sob when they are overjoyed. A face of stone could be interpreted as uncaring, when the individual is actually worried, frightened, or distracted. Defendants with mental disabilities may act inappropriately in court because of those disabilities. Defense counsel may also instruct their client as to how to react or not to react during the proceedings. It is often nothing more than mere speculation for jurors to guess what a defendant's demeanor means with regard to his mental state, consciousness of guilt, or remorse. Moreover, there is a high likelihood that

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233. Studies indicate that jurors can easily misinterpret behavior in the courtroom because of their expectations of how people are to act in the courtroom setting. See Searcy et al., supra note 14, at 42–45. If a defendant is unaware of those expectations, behavior that might be interpreted as humorous or eccentric outside the courtroom may be viewed as inappropriate and inculpatory inside the courtroom. Id. at 49–50. In a key study on how demeanor and nonverbal communication affects jurors' decisions, Professor Michael Saks, a professor of law and psychology, found that "demeanor cues often reduce accuracy in detecting deception, by distracting people into looking at cues they think are associated with lying and overlooking cues that actually are.... Apparently, facial cues provide little help and sometimes do more harm than good." Michael J. Saks, What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?, 6 S. CAL. INTERDISC. L.J. 1, 21 (1997).

234. Additionally, attractive people are seen as more honest than unattractive people, and symmetrical faces more honest than asymmetrical. See Denise Mann, Born to Lie?, WEBMD, http://www.webmd.com/sex-relationships/features/born-to-lie (last visited Nov. 25, 2007).

235. See Hughes v. State, 437 A.2d 559, 572 (Del. 1981) (commenting that it may be "dangerous" to judge defendants based on the assumption that there is a "model of 'normal' courtroom behavior"). Profound cultural differences may also affect demeanor. See TEX. DEPT OF FAMILY AND PROTECTIVE SERVS., APS FACILITY (AFC) INVESTIGATIONS HANDBOOK 4240 (1997), available at http://www.dfps.state.tx.us/Handbooks/APS_Facility/Files/AFC_pg_4200.asp [hereinafter APS FACILITY INVESTIGATIONS HANDBOOK] (instructing investigators that cultural differences may influence witness demeanor so that the demeanor is no longer indicative of the witness's credibility).

236. See Richard C. Wydick, The Ethics of Witness Coaching, 17 CARDozo L. REV. 1, 5 (1995) (stating that one of the lawyer's tasks to perform while preparing witnesses is discussing "effective courtroom demeanor" with them).

237. See, e.g., Hughes, 437 A.2d at 572 ("[T]he practice is pregnant with potential prejudice. A guilty verdict must be based upon the evidence and the
jurors mistakenly believe that they are more capable of interpreting demeanor in the courtroom than they have the right to believe. Because jurors are given license to use a witness's demeanor in deciding that witness's credibility, they may be under the misimpression that they can bring the same observations to bear when analyzing the conduct of other persons in the courtroom. Certainly, without instructions to tell them otherwise, jurors may very well assume that they have the expertise and life experience to accurately interpret a defendant's behavior in the courtroom.

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

Fourth, other than when the defendant is testifying and it is understood that the jurors should focus their attention on him or her, there are no set times when jurors are told that

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238. See Harrigan & Taing, supra note 48, at 216–18 (explaining that smiles can express a range of emotions but that nontrained judges, and therefore likely nontrained jurors, usually interpret smiles "in the most traditional manner").

239. See United States v. Schuler, 813 F.2d 978, 981 n.3 (9th Cir. 1987) ("When a defendant chooses to testify, a jury must necessarily consider the credibility of the defendant. In this circumstance, courtroom demeanor has been allowed as one factor to be taken into consideration.").

240. See United States v. Carroll, 678 F.2d 1208, 1210 (4th Cir. 1982) (instructing that even though the defendant pointed to crime scene pictures when talking with his attorney and the prosecutor stated that this act showed that the defendant knew the scene, the jury should disregard the defendant's act and the prosecution's statement because both the defendant and his counsel were given the picture prior to trial).

241. See, e.g., Carey v. Musladin, 127 S. Ct. 649, 650–51 (2006) (holding that a murder trial where the victim's family wore buttons of the victim's picture did not deny the defendant the right to a fair trial).

242. Such coaching raises serious ethical issues, as it does when lawyers coach their witnesses on their appearance and their delivery of testimony. See Wydick, supra note 236, at 4–18 (stating that some coaching may be acceptable because it lessens the likelihood that the witness's appearance or behavior will harm a meritorious case).
they should focus on the defendant's demeanor. Thus, the likelihood is that only a few of the decision makers will observe the defendant at any particular time. There will not be a common observation for the jurors to consider when they go into their deliberations. One juror's quick glimpse of the defendant may carry undue weight during the jurors' discussions. It will be extremely difficult for the trial and appellate courts to police the use of demeanor evidence unless each glance or movement is noted for the record.  

Fifth, there are important policy grounds for discouraging jurors from interpreting a defendant's activities and reactions at counsel table. Generally, there is a policy to allow open and honest communications between lawyers and their clients, especially during trial. Although counsel and client are in open court, there is still an expectation that their communications will remain privileged. It is often difficult for counsel and client to communicate during court because their communications are limited to whispers and notes passed to each other. Jurors should be discouraged from scrutinizing a defendant during trial so that there can be more open communication between clients and their lawyers.

Sixth, to the extent that jurors divine any information from a defendant's demeanor, they are generally obtaining information regarding the defendant's character. Under current evidentiary rules, a defendant's guilt or innocence should not be based upon a defendant's character. A defendant cannot be

243. See United States v. Cook, 48 M.J. 64, 65 n.1 (C.A.A.F. 1998) ("Unless demeanor evidence is noted as part of the record, it will not appear in the trial transcript.").

244. See Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 HARV. L. REV. 464, 469-70 (1977) (describing that some believe that uninhibited attorney-client communication is an end in itself, and that others believe that it is a mean by which to achieve fairness and just disposition of cases); see also Carroll, 678 F.2d at 1210 (holding that it was improper to infer that the defendant had been at the scene of the crime because he seemed to know more about the photographs than his attorney, when he was talking to his attorney at trial); United States v. Corona, 551 F.2d 1386, 1389 (5th Cir. 1977) (finding that it was improper to refer to the defense counsel consulting with the defendant during trial in order to imply the defendant's guilt).

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

246. See FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ."); 32 C.J.S Evidence § 507 (2007) (describ-
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convicted simply because he is a bad person.\textsuperscript{247} Even if a defendant is generally callous, mean, or antisocial, that cannot be the basis for a criminal conviction. The focus must be on the defendant's acts.\textsuperscript{248} Allowing jurors to use information that they observe from a defendant's courtroom demeanor and to make assumptions as to the defendant's character undermines a crucial rule limiting the use of character evidence in criminal cases.\textsuperscript{249} Jurors who perceive a defendant as lacking remorse are making the assumption that he has committed acts for which he should feel guilty. The focus of jurors should be on what a defendant has done, not on whether the jurors like or dislike the defendant.\textsuperscript{260}

Seventh, jurors should be told to disregard a defendant's demeanor during trial because putting the defendant in the spotlight operates contrary to a defendant's Fifth Amendment

\textsuperscript{247} See Joshua Dressler, Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code, 19 Rutgers L.J. 671, 694–98 (1988) (suggesting that whether or not someone is a "bad person" is more relevant during sentencing determination than when deciding whether the person should be punished for committing a crime); see also Joel Schrag & Suzanne Scotchmer, Crime and Prejudice: The Use of Character Evidence in Criminal Trials, 10 J.L. ECON. & ORG. 319, 321 (1994) ("Rule 404 addresses the fear that a jury may believe that it is 'just' to convict a defendant on the basis of 'bad character' even if the rest of the evidence is weak."); H. Richard Uviller, Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom, 130 U. Pa. L. Rev. 845, 848, 882–83 (1982) (describing the commonly held belief that people can predict the behavior of others by studying their character but noting that this belief generally does not resonate with the judicial system due to its prejudicial potential).

\textsuperscript{248} See LANGBEIN, supra note 35, at 191 (stating that the modern policy behind excluding character evidence is that it pulls the jury's attention away from the facts of the current case).

\textsuperscript{249} See FED. R. EVID. 404(a) (providing that character evidence is generally not admissible to prove conformity with the alleged crime in the case at hand).

\textsuperscript{250} See APS FACILITY INVESTIGATIONS HANDBOOK, supra note 235, at 4240 ("[E]ach investigator should be aware of his own potential bias."). Although a defendant's character is generally not the central issue for a case, the sentencing phase of a trial may be the exception. United States v. Schuler, 813 F.2d 978, 981 n.3 (9th Cir. 1987) ("At this stage different considerations, including general character, are relevant.").
privilege not to incriminate himself. A defendant has an absolute constitutional right not to testify against himself in a criminal proceeding. Unless jurors are instructed to disregard a defendant’s reactions in court, these reactions may very well be treated as “evidence” against the defendant and used by the jury to convict him or her. In essence, even if a defendant has decided not to testify, his or her demeanor and actions will be construed as testimonial and will be used to incriminate him or her.

Conversely, but also troubling, a defendant may be able to tell the jury his story without being subject to cross-examination. Although a defendant has a Fifth Amendment right not to testify, if he does seek to tell his story to the jury, his credibility should be subject to the same critical examination as that of other witnesses. If jurors are allowed to rely on nontestimonial demeanor evidence, a defendant could alter his demeanor in the courtroom in a way designed to convey information to the jurors that the defendant does not want to present from the witness stand; on the witness stand the defendant would be subject to cross-examination.

Finally, it is one thing to let the jury observe demeanor and another to direct them that it is permissible to draw inferences from it. The former may be unavoidable, however, the latter is not necessarily required. It is impractical to expect judges to

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251. See U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .").

252. Id.

253. In addition to Fifth Amendment implications, use of demeanor evidence may also raise Sixth Amendment Confrontation Clause issues. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . ."). Generally, the defendant has the right “to confront” evidence against him or her. Id. Although a defendant’s demeanor may be used against him or her in jury deliberations, there is generally no specific opportunity for the defendant to confront the inferences drawn from that demeanor.

254. See Reagan v. United States, 157 U.S. 301, 305 (1895) ("On the other hand, if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness.").

255. See, e.g., Waller v. United States, 179 F. 810, 812–13 (8th Cir. 1910) (stating that a defendant could pantomime insanity in front of the jury in order to support an insanity defense, and therefore, if the defendant’s behavior can be used to support such a defense, then his behavior should be subject to cross-examination).

256. See 2 WIGMORE, supra note 133, § 274(2), at 119–20 ("[T]he attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory.").
observe all conduct of parties during trial, especially when they
must be concentrating on the witnesses and making rulings
during the proceedings. Unless a defendant's conduct is fla-
grant enough to command the attention of everyone in the
courthouse, there may be little basis for the judge to decide
whether it is proper to allow the jury to draw any inferences
from the defendant's alleged conduct in the courtroom.

Thus, there are strong policy and constitutional reasons to
instruct jurors to disregard a defendant's demeanor during tri-
al. If only "evidence" should be considered by jurors in their de-
liberations, defendant's reactions do not qualify, and jurors
should not be considering them. This is particularly the case if
jurors are likely to make false inferences based upon the de-
meanor they observe. It is not enough to give jurors only an af-
firmative instruction to consider only "evidence," because, as
experience has taught us, jurors nonetheless observe a defen-
dant's reactions in the courtroom. Jurors must be told to disre-
gard those observations and to rest their verdict only on evi-
dence from the witness stand. Since a defendant's reactions
are not evidence and, therefore, not part of the court record, it
should also be impermissible for lawyers to refer to them in ar-
gerument.

B. ARGUMENTS IN FAVOR OF ALLOWING DEMEANOR EVIDENCE

Despite the foregoing arguments against allowing jurors to
consider a defendant's demeanor in their deliberations, many
judges believe that a defendant's demeanor and conduct in the
courtroom are relevant and should be considered by jurors in
their deliberations. The support for this approach is both his-
torical and practical. It is historical because of the evolution of
the jury process from one in which the defendant played a more
active role than the defendant does today. It is practical be-
cause the reality is that jurors are free at any time to look over
at the defendant sitting in the courtroom and make judgments
based upon their observations.

First, as we have seen, historically there was no problem
with jurors considering a defendant's demeanor because the

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257. See Waller, 179 F. at 812 ("It is, therefore, better that jurymen should
have the aid of counsel and the supervision of the court in interpreting such
evidence rather than be left to their own unguided impressions.").

258. See id. ("The demeanor of the defendant is not only proper evidence,
but it is impossible to prevent the jury from observing and being influenced by
it.").
courtroom was a venue where the jury had the general responsibility of assessing a defendant's character and deciding on the just result for the case.259 Although trials have become more formal, there is still an interest in ensuring that jurors reach a moral conviction that a defendant should or should not be held accountable for a crime.260 For many years, jury instructions defining proof beyond a reasonable doubt frequently referred to proof to "a moral certainty."261 Faced with an inability to quantify to a mathematical or scientific certainty the proof needed to convict a defendant, instructions would ask jurors to decide whether they were satisfied to a moral certainty as reasonable human beings that a guilty verdict was justified.262 Sometimes the test of the sufficiency of the evidence was phrased in terms of whether the circumstances proved "produce a moral conviction to the exclusion of every reasonable doubt."263 The language of the instruction reminded jurors that they were making a moral judgment as to whether a defendant should be convicted.

259. See, e.g., LANGBEIN, supra note 35, at 190–96 (examining the prominent role of character evidence in assessing the defendant's guilt in seventeenth-century criminal trials in England).

260. See generally Michele Cotton, Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment, 37 AM. CRIM. L. REV. 1313, 1313–18 (2000) (explaining the various articulated purposes of criminal punishment, and discussing "the restoration of retribution as an essential purpose of punishment"); see also Peter Arenella, Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability, 39 UCLA L. REV. 1511, 1527 (1992) ("[C]riminal convictions for serious nonregulatory offenses convey the message that the offender was morally responsible for his crime and thus deserves moral blame for what he has done."); Eric A. DeGroff, The Application of Strict Criminal Liability to Maritime Oil Pollution Incidents: Is There OPA for the Accidental Spiller?, 50 LOY. L. REV. 827, 839 (2004) ("The emphasis on the moral character of the defendant's act and the wrongful state of his mind has long been understood to be an essential characteristic of the criminal law. . . . [T]he criminal law has historically been distinguished from its civil counterpart by virtue of the criminal law's role in moral education and its focus on sanctioning blameworthy conduct.").

261. See, e.g., United States v. Indorato, 628 F.2d 711, 720 n.7 (1st Cir. 1980) (explaining that the beyond a reasonable doubt standard did not require absolute certainty, "[o]nly to a moral certainty").

262. See id. ("So if you are satisfied to a reasonable certainty, that you, as reasonable moral human beings, believe that the facts have been established by the evidence, then you are under oath to bring back a verdict of guilty.").

Although language referring to "moral certainty" is problematic because it is ambiguous, the Supreme Court has refused to hold that its use necessarily violates a defendant's due process rights. Moreover, the historical roots of the phrase suggest that the goal was to have jurors focus on all of the circumstances of a case to decide based upon the highest degree of certainty that the defendant deserved to be punished. The 1979 *Webster’s New Twentieth Century Dictionary* defined "moral evidence" as evidence "based on general observation of people." A historical and ongoing role of trials is to allow jurors to observe the evidence and the defendant in assessing the guilt of a defendant.

Additionally, the criminal justice system recognizes that jurors may sometimes look beyond the evidence in making their decisions. Accordingly, we allow jurors to reach decisions contrary to the evidence, such as when jurors engage in jury nullification. We also accept inconsistent verdicts from ju-

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264. See *e.g.*, *Cage v. Louisiana*, 498 U.S. 39, 39 (1990) (per curiam) (holding that the phrase "moral certainty" was inadequate and misleading to describe the level of proof required by the beyond a reasonable doubt standard, and that use of the phrase by itself violates the Due Process Clause).

265. See *e.g.*, *Victor v. Nebraska*, 511 U.S. 1, 1–2 (1994) (stating that the use of moral certainty did not necessarily mean that the jury considered a lower level of proof than required by the beyond a reasonable doubt standard).

266. *Id.* at 11–12 ("[P]roof to a moral certainty is an equivalent phrase with beyond a reasonable doubt.") (quoting *Fid. Mut. Life Ass’n v. Mettler*, 185 U.S. 308, 317 (1902)) (internal quotation marks omitted).

267. Compare *WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY* 1168 (2d ed. 1979), with *BLACK’s LAW DICTIONARY* 598 (8th ed. 2004) ("[Moral evidence:] [] loosely, evidence that depends on a belief, rather than complete and absolute proof.”).

268. *See Todd E. Pettys, Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 471 (2001) (stating that evidence and the way that it is presented allows the defendant to convince the jury “that a guilty verdict would be morally reasonable”).


270. *See Irwin A. Horowitz et al., Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207, 1208–11 (2001) (noting that courts do not “sanction the nullification power of the jury, but [judges] tacitly recognize the jury’s right to nullify” verdicts based upon their own observations, moral values, and intent). By jury nullification, jurors may accept both the crime in theory, and the punishment that attaches to it, but maintain that
The dynamic of the modern courtroom, although more structured from its historical roots, still recognizes that even though jurors are directed to make their evaluations based upon the formal evidence presented at trial, there are other variables and observations that continue to influence their decisions.

Second, allowing jurors to use nontestimonial demeanor evidence makes sense because it is impractical to believe that jurors will be able to disregard their impressions of the defendant as developed from their observations in the courtroom, even if they are instructed to do so. Some psychologists estimate that people get as much as ninety percent of their information from nonverbal cues. Try as we might to compartmentalize evidence in trial, jurors adjudge cases based upon inferences and subjective evaluations of the proceedings. Instructing jurors not to consider a defendant's demeanor evidence would merely push to the subconscious level information that jurors will nonetheless consider when they decide whether to vote guilty or not guilty. Moreover, such an instruction

neither fit the particular defendant that they are asked to judge. FINKEL, supra note 20, at 33 (providing an excellent history of jury nullification and stating that jurors may decide that a crime merits punishment just not in the case at hand).

271. Dunn v. United States, 284 U.S. 390, 393–94 (1932) (stating that a consistent verdict is unnecessary because there are legitimate reasons why inconsistency may occur).


We evaluate a real person's behavior as just or unjust on the basis of particular motives and actions along with his or her general character, and among the crucial ingredients in that amalgam of motives, actions, and character are the moral sentiments and what we might more generally call moral sensibilities. Id. at 203. Given this natural inclination, it is unlikely that jurors will completely disregard their emotional assessment of the defendant made from their firsthand observations. So long as jurors are able to perceive the defendant, they will make judgments, especially if they are not warned or directed as to how to deal with those perceptions Judicial Council of California Criminal Jury Instructions [CALCRIM] No. 104 (2007).

274. SMITH & MALANDRO, supra note 4, § 4.06, at 349–50 ("People make decisions by emotion (unconscious mind) and validate them with logic (conscious mind).") Thus, jurors anchor their perceptions of the evidence through
works contrary to other instructions that tell jurors to use their common sense and life experience in deciding a case.275

Third, with proper instructions, jurors will be able to give demeanor evidence the weight, if any, that it deserves.276 Thus, if jurors see a defendant try to intimidate a witness through menacing gestures, they should be able to consider those actions in deciding a defendant’s consciousness of guilt. Even those courts that generally disfavor the use of nontestimonial demeanor evidence are willing to allow jurors to consider threatening actions of the defendant that demonstrate consciousness of guilt.277 Jurors are capable of distinguishing between innocuous behavior and that which is relevant to their understanding of the facts of a case. Generally, no specific expertise is needed to read a person's behavior.278 Moreover, where such expertise is needed, it can be provided to jurors through expert testimony or jury instructions. With the proper tools and guidance, jurors should be able to properly understand demeanor information and use it in their decisionmaking.279

the lens of what they have observed overall in the courtroom, including their observations of the defendant’s behavior.


276. Waller v. United States, 179 F. 810, 812 (8th Cir. 1910) (stating that jurors will inevitably judge the defendant’s demeanor; therefore, the counsel and judge should instruct them as to how to use that information).

277. See, e.g., United States v. Cook, 48 M.J. 64, 66 (C.A.A.F. 1998) (arguing that courts have allowed intimidating acts by defendant to show consciousness of guilt); United States v. Maddox, 944 F.2d 1223, 1226, 1230 (6th Cir. 1991) (arguing that the defendant’s act of mouthing the words “you’re dead” to the witness was probative of consciousness of guilt); United States v. Mickens, 926 F.2d 1323, 1328–29 (2d Cir. 1991) (allowing admission of threat evidence when the defendant made a hand gesture in the shape of gun to intimidate the witness).

278. FED. R. EVID. 607 (allowing opinion and reputation testimony by lay witnesses to impeach the credibility of other witnesses).

279. This argument depends, in part, on whether judges will be willing to allow expert testimony on demeanor. Courts have broad discretion in deciding whether to admit expert testimony in general. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591–98 (1993) (discussing the broad considerations of “fit” when determining the relevance of expert testimony). Judges particularly resist admitting evidence that is similar to analysis of witness demeanor, such as expert testimony regarding eyewitness testimony. If jurors are allowed to consider nontestifying demeanor evidence, there is no guarantee that jurors will be provided expert testimony to assist them in this analy-
Fourth, the fact that the parties can manipulate demeanor evidence should not determine whether such information should be barred. It is well recognized that lawyers can manipulate jurors through the way that witnesses are dressed or taught to speak. Jurors are capable of understanding that a defendant will likely fake his reactions in court. No special expertise is needed, and, to the extent that it is, the parties should be allowed to argue the issue or present expert witnesses regarding demeanor. This is particularly the case where there is evidence that a defendant has been coached or medicated to make a specific impression on the jury.

Fifth, concerns about possible violations of a defendant's Fifth Amendment rights do not provide a compelling reason to bar the use of nontestimonial demeanor evidence. In order for there to be a Fifth Amendment violation, a defendant must


280. See Gold, supra note 3, at 484–91.

281. See SMITH & MALANDRO, supra note 4, § 1.47, at 85 (outlining six principles for understanding impression formation).

282. People v. Edelbacher, 766 P.2d 1, 30 (Cal. 1989) ("Comment on a defendant's demeanor as a witness is clearly proper and comment on courtroom demeanor may be proper under some circumstances."). But cf. United States v. Schuler, 813 F.2d 978, 981 (9th Cir. 1987) ("That the jury witnesses the courtroom behavior of the defendant . . . does not make it proper for the prosecutor to tell them, with the court's approval, that they may consider it as evidence of guilt." (quoting United States v. Wright, 489 F.2d 1181, 1186 (D.C. Cir. 1973))).
be compelled to provide testimony against himself.\textsuperscript{283} A defendant's actions and reactions in court are not compelled. Moreover, even though the definition of "testimonial" is very much up in the air these days,\textsuperscript{284} the term generally requires a defendant to discuss an event in a more formalized manner. Reactions, facial expressions, and demeanor—which are not elicited through interrogation—are generally not considered to be testimonial. Thus, it is unlikely that a defendant's reactions in court would be considered "compelled testimony."\textsuperscript{285}

Finally, the most persuasive reason to allow a defendant's demeanor to be considered by a jury is the argument that the theater of the courtroom matters. In other words, although there are rules of evidence, trials have not become and should not become so regimented that the natural dynamic of the courtroom is lost. There is an uncalculated value in having jurors use information that is not formally "evidence" in their decision making. When the public evaluates the legitimacy of a verdict, it will focus on the individual on trial—including that person's behavior—as well as how the prosecution proves its case.\textsuperscript{286}

\textsuperscript{283} U.S. CONST. amend. V.

\textsuperscript{284} Crawford v. Washington, 541 U.S. 36, 51–53 (2004) (noting that multiple formulations of the term "testimonial" exist, from affidavits to out-of-court statements made under circumstances where the witness would reasonably believe that the statement could be used at trial).

\textsuperscript{285} To the extent that a defendant's demeanor is viewed as testimonial, it certainly is not "compelled."

\textsuperscript{286} An example of the impact and role of the theater of the courtroom is the Chicago Eight conspiracy case. See Janice Schuetz & Kathryn Holmes Snedaker, Communication and Litigation: Case Studies of Famous Trials 217 (1988) (describing the trial of the Chicago Eight as a "burlesque drama" where the satirical drama of the courtroom had as much or more of an impact than the actual evidence presented at trial). In that trial, eight radical dissidents were put on trial for conspiracy to cross state lines to cause a riot. \textit{Id.} at 218–19. The trial became a political showcase. \textit{Id.} at 217. Even more important than the evidence from the witness stand were the actions of the defendants during trial. \textit{See id.} at 223. The defendants frequently and deliberately interrupted the proceedings with outbursts of profanity. \textit{See id.} at 227–28. Whenever a government witness would point at the defendants, the defendants would make "oink, oink" sounds from their chairs. \textit{Id.} at 228. The prosecutors asked the court to admonish the defendants to stop laughing during the case because the laughter was giving the jury the impression that the trial was absurd. \textit{Id.} at 237. To convey their disdain for the court, defendants appeared unshaved, with long hair, wearing peace symbols, beads and black armbands. \textit{Id.} They sat on the floor and used vulgar gestures, such as raising their middle fingers or plugging their ears with their fingers to disparage the prosecution's case. \textit{Id.}

In the end, the jurors were asked to decide whether the defendants were illegal protestors. \textit{See id.} at 245. To make that determination, they needed to
Thus, the verdict should reflect the jurors' evaluation of the evidence, as it makes sense in light of what they have observed firsthand about the person they have been asked to judge. Courtrooms are not laboratories; they are halls of judgment where "[j]urors confront a real, live defendant and real-life consequences."\(^{287}\)

If one accepts the arguments in favor of allowing jurors to openly consider the dynamics of the courtroom, including the defendant's demeanor or action, then there should not be an absolute bar to the use of nontestimonial demeanor evidence. However, there is still the concern that such information will be used in a haphazard manner. Accordingly, to ensure that jurors use such information in a manner that makes verdicts more accurate, jury instructions should be fashioned that explain to the jurors how to critically evaluate such evidence and what its role should be in their deliberations.

C. A COMPROMISE SOLUTION

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

One such solution would be to limit the manner in which demeanor evidence may be considered and to instruct jurors accordingly. As with character evidence, demeanor evidence should be used sparingly. In most cases, jurors should be instructed that a defendant's demeanor is generally not considered to be evidence because there is no way to test the validity of a defendant's reactions. Especially in cases such as death penalty and commitment cases, where jurors must make findings regarding a defendant's character, they should be cautioned not to infer conclusions from the defendant's appearance and absorb and consider the full milieu of the trial. As experts note, "although jurors forget much of the content of the trial discourse, they recall general impressions and attitudes that then enter into their decisions." \(^{Id.}\) at 235. The defendants' demeanor and actions in the Chicago Eight case partially worked by getting the jurors to exonerate all of the defendants on charges of conspiracy, and later leading to an appellate reversal for those defendants convicted of crossing state lines with intent to riot. \(^{Id.}\) at 245. In the end, the trial was not simply about what the defendants had done in Chicago that summer. Rather, the burlesque of the courtroom succeeded in persuading a broader audience—that of the community—of a higher truth. \(^{See id.}\) at 245–46. To the extent that trials are an opportunity for society to judge itself and its standards for justice, then the full drama of the courtroom may be needed to make such a judgment.

\(^{287}\) FINKEL, supra note 20, at 39.
and conduct in the courtroom. Rather, the jurors should keep their attention directed on the evidence coming from the witness stand and should not speculate as to the meaning of the defendant's demeanor.

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

Although jurors can ignore jury instructions, there is still a value in giving these instructions. Jury instructions educate the jurors on how to use the information they perceive in the courtroom. Instructions not only communicate the rules of law, but also the rules of jury behavior.288 Jurors have no reason to believe that they should not take into account a defendant's sobs, laughter, or rolling of the eyes in reaching their verdict. Instructions that address the relevance and irrelevance of such conduct can help direct the discussion of jurors as they reach their verdicts.289

Admittedly, drafting such an instruction is not easy. Drafting effective jury instructions is a daunting task,290 let alone

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289. For example, an instruction could read:
   In determining the guilt or innocence of the defendant, you are cautioned against relying on the defendant's demeanor while not testifying. People react to stress or surprise in different ways. Some may cry, others may laugh, still others may not react at all. Although you are expected to incorporate your life experiences into your consideration of the case presented, including the demeanor of witnesses on the stand, guilt or innocence should be determined based on the evidence presented.
290. For an understanding of the challenges of drafting effective and proper jury instructions, see generally Peter M. Tiersma, Legal Language (1999), and Nancy S. Marder, Bringing Jury Instructions in the Twenty-First
drafting instructions that must direct jurors in how to consider information that does not come in the form of traditional evidence. However, the following language may be helpful:

Ladies and Gentlemen of the jury, you must decide this case based upon all of the evidence presented in this case. In deciding the credibility of a witness, you may consider that witness's demeanor on the witness stand. Conduct that occurs in the courtroom, but not while a person is on the witness stand, is not considered evidence unless you have been specifically instructed to consider it by the court. This includes the conduct and demeanor of any of the parties, counsel, the court, and even courtroom spectators.291

In those cases in which the court has decided that a defendant's conduct may be considered as evidence, the following instruction should be added:292

In this case, [the prosecution or defense] has given notice293 that it plans to argue that you should draw inferences from the defendant's behavior in the courtroom. It is completely up to you what inferences you draw from the defendant's conduct. Before drawing any such inferences, you should consider (1) whether such conduct was intentional and intended to convey information relevant to an issue in this case, such as the defendant's intent; (2) any innocent explanations for the defendant's behavior; and (3) the context in which the conduct occurred. You are not to consider or speculate about any communications between the defendant and his or her counsel, nor should you draw any inferences from a defendant's decision not to testify in this case.294

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

292. This instruction may be given as a separate instruction or added to preexisting instructions defining the nature of "evidence" in a case. Some instructions already inform jurors to disregard anything that they see or hear when the court is not in session. See Judicial Council of California Criminal Jury Instructions [CALCRIM] No. 104 (2007), available at http://www .courtinfo.ca.gov/jury/criminal/juryinstructions/calcrimjuryins.pdf. If demeanor is going to be considered as evidence, this would be an appropriate place to explain its use.

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

294. Presumably, in cases in which the defendant testifies, there will be an opportunity to examine and cross-examine the defendant regarding the meaning of any conduct in the courtroom.
Some courts might choose to be even more cautious in the giving of such an instruction by identifying for the jurors specific problems with drawing inferences from demeanor evidence. The instruction may be tailored for cases where the risks of misinterpretation are particularly high, such as when the defendant comes from a different culture.

Additionally, if a jury is to consider a defendant's courtroom demeanor, there may be a need to clarify the definition of "relevant" evidence in evidence codes. For example, Federal Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The rule does not address whether demeanor of a courtroom participant may be considered as evidence.

In order to ensure that such information may be considered in limited situations by the jury, it may be necessary to clarify specifically what qualifies as evidence in a case. The definition of "relevant" evidence could be modified to state that courtroom demeanor can be considered as evidence only when specifically noted on the record by the parties and the court. Otherwise, jurors are to ignore such observations because they do not constitute evidence. While it may be difficult for jurors to ignore what they have observed, they will at least have some judicial guidance as to what observations may be fairly used in their deliberations.

CONCLUSION

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

We may be reluctant to tell jurors to ignore the defendant altogether because we value a dynamic in which the community literally faces the accused. This dynamic goes beyond the Confrontation Clause right of having the accused face his accuser. Rather, it includes the historical notion that a trial is so-

296. U.S. CONST. amend. V.
society's way of resolving disputes between the defendant and the overall community. Since this dynamic is valuable, the best approach is to try to regulate how jurors use their perceptions. Jury instructions and witnesses who will testify regarding demeanor are tools available to do so.

The need to analyze how we are going to treat a defendant's demeanor in the courtroom is particularly great at this time when courts, legislatures, and the executive branch are returning to basic questions of how criminal trials should be presented. The right of the defendant to be present in the courtroom is important because it gives the defendant the opportunity to confront witnesses against him or her. But, systematically this right does more. It ensures that the courtroom is a place of judgment where the focus is on an individual and not just an obscure set of facts.

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

297. In Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2797–98 (2006), the United States Supreme Court held that the procedural rights accorded to enemy combatant Hamdan were not in accordance with international standards or the standards required by civilized peoples, and the deviation from acceptable procedures was not justified by a compelling need.

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

299. Or, as stated by advocates of clear instructions regarding jury nullification, "[t]he current practice . . . has been analogized to 'telling jurors to watch a baseball game and to determine who won without telling them the rules until the game is over.'" Lawrence W. Crispo et al., Jury Nullification: Law Versus Anarchy, 31 LOY. L.A. L. REV. 1, 57 (1997) (quoting Albert W. Alschuler, Our Faltering Jury, 122 PUB. INT. 28, 36–37 (1996)).

300. See Bradley J. Huestis, Jury Nullification: Calling for Candor from the Bench and Bar, 173 MIL. L. REV. 68, 106 (2002) ("The best solution to address the jury nullification dilemma is a tightly worded, restrictive pattern instruction."); see also Pettys, supra note 268, at 529–30 (2001) (arguing that out of respect and fairness to jurors, jury instructions should be given to alert jurors to the court's perspective on whether jury nullification should be used); Douglas E. Litowitz, Jury Nullification: Setting Reasonable Limits, CBA REC.
should also give jury instructions regarding the proper consideration of a defendant's demeanor in the courtroom.

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

(Chi., Ill.), Sept. 1997, at 16 (advocating that jurors should be informed about power to nullify, but informed in such a way that minimizes their tendencies to do so). 301. See Samuel H. Pillsbury, A Problem in Emotive Due Process: California's Three Strikes Law, 6 BUFF. CRIM. L. REV. 483, 499 (2002).