## Notes

# ARTICULATING THE INARTICULABLE:[1] RELYING ON NONVERBAL BEHAVIORAL CUES TO DECEPTION TO STRIKE JURORS DURING *VOIR DIRE*

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## I. INTRODUCTION

> The only difference...between a silent lie and a spoken one is, that the silent lie is a less respectable one than the other. And it can deceive, whereas the other can't—as a rule.[2]

Although Mark Twain likely did not have nonverbal behaviors in mind when he wrote this statement, he nevertheless penned a truism. While much of the practice of law is dedicated to ferreting out the spoken lie, particularly during voir dire, lawyers remain largely unfamiliar with research on nonverbal indices of deception.[3] Yet, knowing how to detect falsehood based upon a person's behavior potentially plays a key role in the fair representation or prosecution of a defendant. Selecting the proper jury is perhaps the most important strategic decision that a lawyer will make in her entire case.[4] It should be no surprise, therefore, that a whole industry has recently developed to assist in the "scientific selection"[5] of a jury.[6] Armies of psychologists,

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1. This term is borrowed from Supreme Court Associate Justice Sandra Day O'Connor, who lamented in her dissent to the Court's decision in *J.E.B. v. Alabama ex rel. T.B.* that "a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's 'bare looks and gestures'...[b]ut, as we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable." 114 S. Ct. 1419, 1431 (1994).

2. 2 MARK TWAIN, FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD 40 (1899). Although Twain's statement may be read to dispel the notion that nonverbal behaviors are good indicators of deception, the premise of this Note, and a growing body of research on the subject, is to the contrary. *See* discussion *infra* notes 117–95 and accompanying text.

3. Edward J. Imwinkelried, *Demeanor Impeachment: Law and Tactics*, 9 AM. J. TRIAL ADVOC. 183, 187 (1985). This is not to say, however, that the area has not received some treatment in the literature. *See, e.g.*, David Suggs & Bruce D. Sales, *Using Communication Cues to Evaluate Prospective Jurors During the Voir Dire*, 20 ARIZ. L. REV. 629 (1978).

4. As one author notes: "Acknowledged experts in the field believe that 85% of the cases litigated are won or lost when the jury is selected!" Herald P. Fahringer, *"Mirror, Mirror On The Wall...,"* 64 N.Y. ST. B.J. 22 (1992).

5. Scientific jury selection "is little more than a[n]...attempt to compile and implement the 'ideal' juror profile." Jeremy W. Barber, *The Jury is Still Out: The Role of Jury Science in the Modern American Courtroom*, 31 AM. CRIM. L. REV. 1225, 1234 (1994).

6. Jay Schulman, a sociologist, is credited with creating the field when he offered his services to the defense in a 1970 criminal conspiracy case, which resulted in a hung jury. *Id.* at

sociologists, market researchers, and communications experts await to assist in "judging" the jury.[7] To date, however, these "armies" remain a largely untapped resource,[8] despite the fact that scientific jury selection is receiving notoriety in the press for its influence on the outcome of criminal cases.[9] Lawyers seem content to rely on stereotypical advice and mythical opinions about who make the best jurors.[10] For example, as wittily noted by Plutchik and Schwartz in their evaluation of voir dire folklore:

> the suggestion that the Irish are most desirable to the defense leads inevitably to the conclusion that Ireland, where jurors are monotonously Irish, must be utopian for the practice of criminal law.... [However,] an examination of the prisons of Ireland reveals that, as a general proposition, the cells are occupied.[11]

"Scientific jury selection" has also received a lukewarm reception in the academic community,[12] where there is considerable disagreement about the morality and fairness of reliance on the technique.[13] Although a few articles apply nonverbal research findings to voir dire (jury selection),[14] the area necessitates more comprehensive and current treatment. As will be shown, even when lawyers make voir dire decisions based on nonverbal behaviors, they do so bolstered by unsupported popular folklore rather than scientifically supportable indices of deception.[15] Therefore, the time has come for a re-evaluation of nonverbal indices of deception and how they may assist the prudent lawyer in ferreting out the biases of potential jurors. This Note examines the communicative value of nonverbal behavior[16] and attempts to

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1231–34. However, lawyers have been helping other lawyers select juries based upon experience for over 100 years. Soloman M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 OHIO N.U. L. REV. 229, 230 (1990). Such guides offered advice on how juror occupation, gender, race/ethnicity, demeanor and appearance, wealth and social status, religion, marital status, and age affected the outcome of cases. *Id.* at 229–37.

7. Fulero & Penrod, *supra* note 6, at 229. There are currently over 250 members in the American Society of Trial Consultants—up from only 19 when the society was founded in 1983. Barber, *supra* note 5, at 1234.

8. Toni M. Massaro, *Peremptories Or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 520–21 (1986). *See also* Barber, *supra* note 5, at 1230–31. One of the reasons that "scientific jury selection" is not utilized more often likely stems from the fact that "[t]he largest consultation firms...may charge the lawyers who use them fees upward of $100,000." Fulero & Penrod, *supra* note 6, at 229.

9. John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 83 (1987). As *The Wall Street Journal* has noted, "'[i]t's gotten to the point where if the case is large enough, it's almost malpractice not to use [scientific jury selection consultants].'" Stephen J. Adler, *Litigation Science: Consultants Dope Out the Mysteries of Jurors for Clients Being Sued*, WALL ST. J., Oct. 24, 1989, at 1 (quoting New York trial attorney Donald Zoeller).

10. *See infra* note 111 and accompanying text.

11. Robert Plutchik & Alice K. Schwartz, *Jury Selection: Folklore or Science?*, 1 CRIM. L. BULL. 3, 5 (1965) (cited in Fulero & Penrod, *supra* note 6, at 238).

12. Fulero & Penrod, *supra* note 6, at 229.

13. *See* Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481 (1987) (condemning the use of psychological techniques in the courtroom). *See also* J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741 (1988) (responding to Gold's article and defending the use of psychologists in the courtroom).

14. *See* Suggs & Sales, *supra* note 3, at 629.

15. *See, e.g., infra* note 146 and accompanying text.

16. *But see* H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 789 (1993) (noting "much as we...feel in our guts

show how detectable signs of juror bias may provide foundation for both peremptory challenges, and in extreme situations, challenges for cause.

## II. THE ROLE OF THE JURY IN AMERICAN JURISPRUDENCE

The role of the jury can be traced back to England, where it existed for centuries[17] before being imported to the United States by the colonists.[18] Early "American colonists prized the right to trial by jury as a bulwark against government oppression and...viewed the local and lay characteristics of the jury as keys to its effectiveness."[19] The jury remains central to the United States judicial system today.[20] The right to trial by jury is constitutionally guaranteed by every state in the union.[21]

The Sixth Amendment provides the constitutional basis for the right to an impartial jury in a criminal trial.[22] Furthermore, the United States Supreme Court has held that the Fourteenth Amendment guarantees a trial by jury in all state criminal cases that would fall under the Sixth Amendment right to a jury trial in federal court.[23] The Court has further declared that due process guarantees accused criminals the right to a fair trial by a panel of impartial, indifferent jurors.[24] In a few cases, the Supreme Court "has eschewed constitutional theory altogether and instead has relied on its supervisory power over the federal courts [to enforce the right to trial by jury]."[25]

No matter what the basis, the notion that justice requires impartial jurors remains central to American jurisprudence. But by what standard do we judge juror impartiality? In *Irwin v. Dowd*,[26] the Court set the minimum qualification for impartial jurors, noting that a selected juror must be able to "lay aside his impression or opinion and render a verdict based on the evidence

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that we know a liar when we see one, it would be foolish for the critical observer to repose much confidence in the revelations of live testimony.").

17. Duncan v. Louisiana, 391 U.S. 145, 151 (1968).

18. *See id.* at 152–54 (noting that the colonists and early American revolutionaries expressed great reverence for the right to a jury trial in documents such as the Declaration of Independence and the Bill of Rights, as well as among many of the resolutions adopted by the First Congress). *See also* Barber, *supra* note 5, at 1228 (noting that "[t]he First Continental Congress in 1774 asserted that the colonists had the right to be 'tried by their peers.'").

19. Massaro, *supra* note 8, at 504.

20. *See Duncan*, 391 U.S. at 153 (noting that the constitutions enacted by every state in the Union protect, in some manner, the right to jury trial in criminal cases).

21. Irvin v. Dowd, 366 U.S. 717, 721–22 (1961).

22. The full text of the Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

23. *Duncan*, 391 U.S. at 149.

24. *Irvin*, 366 U.S. at 722. *See also* Ristaino v. Ross, 424 U.S. 589, 595 n.6 (1976) (noting that the right to an impartial jury arises from both the Sixth Amendment *and* principles of due process).

25. Massaro, *supra* note 8, at 530.

26. 366 U.S. 717 (1961).

presented in court."[27]

Despite the requirement that individual jurors be non-biased, attorneys do not engage in jury selection hoping merely to choose an unbiased juror.[28] The adversarial climate fostered by our court system virtually ensures that the prosecution and defense will engage in a process of selecting a panel of favorably biased jurors.[29] In essence, the assumption is that both sides will choose jurors with conflicting biases that essentially cancel each other out, resulting in an impartial jury.[30]

## III. THE PROBLEMS OF JUROR BIAS

Bias or prejudice may be grounded upon virtually any trait or belief. Some noteworthy categories of bias and prejudice include bias based upon gender,[31] bias based upon race or ethnicity,[32] and bias against imposing the death penalty.[33] Although the goal of the American court system is to provide an impartial judgment, some believe that there is no such thing as a truly impartial judge[34] or juror.[35] Such beliefs challenge the very foundation of justice in the United States—the ability to allocate justice fairly.

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27. *Id.* at 723.
28. *See infra* note 117 and accompanying text.
29. Barber, *supra* note 5, at 1227–28.
30. *Id.*
31. Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 34–45 (1994). Gender bias is most often revealed in the court system in the arena of family law, particularly following divorce proceedings involving decisions on property settlements, alimony, child support, and child custody. *Id.* at 35–41. However, gender bias also occurs against victims of crime and against female attorneys, litigants, and witnesses. *Id.* at 43–45.
32. *Id.* at 45–48. Racial bias is particularly evident in the area of criminal law, where numerous studies indicate that racial discrimination is a "significant factor in the disproportionate treatment of blacks and other minorities in the criminal justice system." *Id.* at 46.
33. *See* Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1 (1982). *See also* Witherspoon v. Illinois, 391 U.S. 510 (1968) (limiting a prosecutor's ability to use challenges for cause to prevent persons who are generally or even vaguely opposed to the death penalty from serving on capital juries).
34. *See, e.g.*, Nugent, *supra* note 31. Even though judges may hold biases, they are expected to maintain an appearance of neutrality, for "[t]he appearance of judicial bias alone is grounds for reversal...." Peter D. Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 AM. U. L. REV. 775, 776 (1991).
35. Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY'S L.J. 575, 576 (1985). As Covington notes, "[j]urors, as well as other people, function with preconceived notions, prejudices, feelings, beliefs, biases, and attitudes of a lifetime. They were children, brothers, sisters, mothers, or fathers before becoming prospective jurors." *Id. See also* Nugent, *supra* note 31, at 55 (noting that some argue that individuals never completely shed their biases).

The traits of bias[36] and prejudice[37] are common human weaknesses.[38] Laws are written, language is changed, wars are fought, people are killed—all due to preconceived notions about "us" and "them."[39] Jurors are not infallible. Just like the rest of society, jurors maintain unfavorable opinions about certain groups of people and certain judicial mandates.[40] However, unlike the rest of society, jurors are charged with dispensing justice fairly in accordance with the law.

Unfortunately, an individual juror's biases sometimes interfere with this duty. The result is that judgments of guilt or innocence may occasionally be influenced by irrelevant information.[41] In response to this problem, the judicial system has created safeguards to help insure a just result.[42] Nevertheless, panels of biased jurors surely exist. In fact, the biased juror may be the rule, rather than the exception.[43]

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36. BLACK'S LAW DICTIONARY 162 (6th ed. 1990) defines "bias" as:
> Inclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved.

37. It also defines "prejudice" as: "a forejudgment; bias; partiality; preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of its justice." *Id.* at 1179.

38. Nugent, *supra* note 31, at 2–3. As Nugent notes, "the terms 'bias' and 'prejudice' are not synonymous. The two are neither mutually inclusive nor mutually exclusive. Prejudice may be more overt and forceful, while bias has a tendency to be less overt and more sublime." *Id.* at 3.

39. History provides numerous examples of attempts to eradicate either bias or prejudice or their effects (which generally take the form of discrimination). *See* Nugent, *supra* note 31, at 2–3. From the Revolutionary War and the theme of our Constitution, to the impetus for recent race riots, the battle against unsupported judgments continues in the name of fairness. *Id.*

40. In fact, as one author notes, there is no such thing as an unbiased juror in the opinion of psychologists. Gold, *supra* note 13, at 492.

41. For instance, research indicates that jurors place undue emphasis on eyewitness testimony, regardless of its accuracy, that they wrongly equate eyewitness confidence with accuracy, that they tend to make credibility decisions based upon social status, speech style, clothing, or occupation, and that, in criminal cases, jurors tend to assume that a defendant is guilty if he has been charged with multiple offenses or has a criminal record. Tanford & Tanford, *supra* note 13, at 749. Furthermore, "interviews with thousands of jurors reveal that they start with firmly entrenched attitudes and try to shoe-horn the facts of the case to fit their views." Adler, *supra* note 9, at 1 (citing Donald Vinson, head of Litigation Sciences, Inc., the nation's largest legal consulting firm).

42. For example, judges may rule prejudicial evidence inadmissible and admonish jurors not to consider it. *See, e.g.*, FED. R. EVID. 403. Similarly, judges may allow evidence for one purpose even though the same evidence may not be admissible for another purpose so long as they admonish jurors that they should restrict their use of the evidence to the proper scope. Such an admonishment is referred to as a limiting instruction. *See, e.g.*, State v. Runningeagle, 176 Ariz. 59, 68, 859 P.2d 169, 178 (1993). Unfortunately, jurors are often unable to disregard evidence which arouses their prejudices. Tanford & Tanford, *supra* note 13, at 750. See *infra* notes 81–82 and accompanying text for additional examples of judicial measures combating juror bias or prejudice.

43. Research indicates that 90% of a juror's decisions are formed before jury deliberation begins, that roughly two-thirds of jury panels are biased against the accused, that roughly 25% of jurors entertain the opinion, from the outset, that the accused must be guilty or he would not have been charged with the offense, and that although 86% of the jury pool maintains a fixed opinion about the accused's guilt, less than 20% of the actual panel will admit it. Covington, *supra* note 35, at 580–81.

As any member of the legal profession knows, jurors are generally composed of two types of people: those who want to be there, and those who could not design a plausible enough excuse to be dismissed from service. The first type of juror often hides her true opinions in an attempt to be selected for the jury.[44] Once there, the biased juror can be very difficult to detect,[45] and can have an alarming influence upon the outcome of a trial.[46]

Perhaps the greatest potential problem of juror bias arises when "jurors ignore their instructions and smuggle in their private preferences, thereby defeating the intent of legislative and judicial rules. They simply violate their oath to uphold the law."[47] This process is known as "jury nullification."[48] In essence, jurors assume the role of private legislators in rejecting laws that they don't like.[49] As a practical matter, jurors are insulated from court sanction because they "are not compelled to give reasons for their verdicts."[50] Placed in its most favorable light, jury nullification is a check on the abuses of government, with a historical development dating back to pre-Revolutionary days.[51] Jurors thus provide a flexible approach to special circumstances that, although contrary to legal principles, strike a sympathetic cord with society at large.[52] Critics argue, however, that:

> liberated from following the established law, juries would convict or acquit defendants because of race, ethnicity, religious beliefs or just on whim. They could give legal sanction to bias crimes, undermine the tax system by letting tax cheats go free, or condone vigilantism.... [The result] would be chaos and lawlessness.[53]

Despite the fears of critics, however, the fact is that jury nullification occurs, even under established law.[54] For example, following the trial of Washington Mayor Marion Barry, some jurors admitted convicting the Mayor of only one charge out of many because "they believed he had been unfairly targeted by prosecutors on racial grounds."[55] Many more examples exist.[56] In

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44. *Id.* at 580. As Covington notes, "[j]urors have a basic need to be correct and to please; therefore, many prospective jurors will respond in a manner they believe to be correct, positive, and pleasing." *Id.* at 581. *See also* Barber, *supra* note 5, at 1243 (suggesting that the legal environment encourages people to conceal or deny their prejudices); Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 528 (1965) (noting that jurors may unconsciously lie during voir dire).

45. Jeffrey T. Frederick explains this fact by noting that "[serving on a jury is one situation where] people tend to make socially desirable responses or statements...." The result is that attorneys are challenged to determine the accuracy of the statements made by potential jurors. Jeffrey T. Frederick, *Jury Behavior: A Psychologist Examines Jury Selection*, 5 OHIO N.U. L. REV. 571, 583 (1978).

46. *See infra* notes 53–57 and accompanying text.

47. Coons, *supra* note 9, at 79.

48. *Id.*

49. *See* Stephen J. Adler, *Courtroom Putsch? Jurors Should Reject Laws They Don't Like, Activist Group Argues*, WALL ST. J., Jan. 4, 1991, at A1.

50. Massaro, *supra* note 8, at 512.

51. Adler, *supra* note 49, at A1.

52. Massaro, *supra* note 8, at 512.

53. Adler, *supra* note 49, at A1.

54. *Id.*

55. *Id.* Interestingly, by acting in such a manner, these jurors surely revealed a racial bias of their own.

56. Women acquitted by juries after killing their abusive husbands, or the acquittal of victims of street crimes who retaliate against their attackers are other common examples of jury nullification. Adler, *supra* note 49, at A1. Another example, in the opinion of this Note's author, might be the results of the O.J. Simpson trial.

fact, research indicates that "in controversial trials...in which the evidence is not clear cut, extralegal bias may influence the result in as many as half the cases."[57] Although jury nullification occurs, the practice is contrary to the law.[58]

## IV. USING VOIR DIRE TO COMBAT THE PROBLEM OF JUROR BIAS

The practice of selecting a jury is known as voir dire.[59] Voir dire is a Latin phrase meaning "to speak the truth."[60] According to *Black's Law Dictionary*, "[t]his phrase denotes the preliminary examination which the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors."[61] It is during voir dire that attorneys are given the opportunity to conduct an in-depth examination of potential jurors—even engaging in direct two-way conversations with them at times.[62]

The purpose of voir dire, in theory, is to select[63] a jury in accordance with a defendant's Sixth Amendment rights.[64] To do so, jurors are questioned in such a manner as to reveal any potential biases or prejudices which may be grounds for disqualification,[65] or to identify jurors who will not be receptive to arguments forthcoming in the trial.[66] In practice, however, lawyers choose jurors because they are predisposed (or can be manipulated) toward their client.[67]

The importance of selecting the right jury cannot be overemphasized. As one author notes: "[e]xperienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings. In fact, once the last person on the jury is seated, the trial is essentially won or lost."[68]

If this is true, experienced trial lawyers surely mourn the erosion of their right to conduct voir dire personally, for "the modern trend is to restrict the participation of attorneys in voir dire and give most of the responsibility for

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57. Gold, *supra* note 13, at 492.

58. Of course, as a practical matter, jurors can reach a verdict that is impulsive, biased, or illegal, without fear of being punished. This is true, according to Stephen J. Adler, because the U.S. legal system protects jurors. Furthermore, such jury verdicts cannot be second-guessed because of the criminal defendant's right not to be tried twice for the same crime. Adler, *supra* note 49, at A1.

59. *See* BLACK'S LAW DICTIONARY 1575 (6th ed. 1990).

60. *Id.*

61. *Id.* For an illustration of statutes dealing with voir dire, see ARIZ. R. CIV. P. 47(b) and ARIZ. R. CRIM. P. 18.5.

62. Nugent, *supra* note 31, at 53. However, the attorney's opportunity to conduct voir dire may be limited, depending on the jurisdiction. *See infra* notes 69–80 and accompanying text.

63. "Select," perhaps, is not the right word to capture the essence of what occurs during voir dire. According to J. Alexander Tanford, voir dire, in reality, is a process of de-selection. Tanford & Tanford, *supra* note 13, at 767.

64. *See supra* note 22 and accompanying text.

65. Suggs & Sales, *supra* note 3, at 629–30. *See also* Gold, *supra* note 13, at 492 (noting that although the stated purpose of voir dire is to select an impartial jury, many conclude that voir dire is truly a process of selecting the most favorably biased jury).

66. Suggs & Sales, *supra* note 3, at 629–30.

67. Massaro, *supra* note 8, at 522 (citing Paula Diperna, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 113 (1984)).

68. Covington, *supra* note 35, at 575–76.

questioning to the judge."[69] However, rules regarding whether judges or lawyers conduct voir dire vary from jurisdiction to jurisdiction.[70]

### *A. Attorney Participation in Voir Dire as a Means of Combating Juror Bias*

Although many in the legal profession value attorney-conducted voir dire,[71] there are few consistent rules governing who controls voir dire.[72] The jurisdictions, and sometimes even courts within the same jurisdiction, disagree on the extent of attorney participation in voir dire.[73] What is clear, however, is that attorney-conducted voir dire is generally not permitted in federal courts[74] and is increasingly being restricted in state courts.[75] In fact,

> [i]n roughly who [sic] thirds of the federal judicial districts and one fifth of the states, the trial judges conduct the entire voir dire examination of the prospective jurors; the attorneys cannot actively question. In the remaining jurisdictions, the attorneys either conduct all the interrogation or share the responsibility with the judge.[76]

Surprisingly, however, the Arizona court system recently demonstrated a willingness to buck the national trend when it actually *expanded* the right to attorney-conducted voir dire, "making the state the first to fundamentally change its jury practices."[77] Although Arizona courts used to be required to allow attorney participation in voir dire in all civil cases,[78] attorneys were not allowed to conduct voir dire in criminal cases, unless good cause appeared during the examination.[79] Now, however, the right to attorney-conducted voir dire is assured in all cases.[80]

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69. Tanford & Tanford, *supra* note 13, at 767. *But see infra* notes 77–80 and accompanying text. Perhaps the most disturbing aspect of the diminishing right to attorney-conducted voir dire is the finding that "judges appear to be less successful than lawyers at eliciting candid juror responses concerning bias." ABA STANDARDS FOR CRIMINAL JUSTICE 8–3.5 (commentary) (3d ed. 1992).

70. Massaro, *supra* note 8, at 509. *See also* Arthur J. Stanley & Robert G. Begam, *Who Should Conduct Voir Dire?*, 61 JUDICATURE 70 (1977).

71. *See* ABA STANDARDS FOR CRIMINAL JUSTICE 15–2.4 (2d ed. 1980 & Supp. 1986) (counsel should be given liberal opportunity to question jurors individually about the existence and extent of their preconceptions).

72. *Id.* (commentary).

73. William R. Jones, Jr., *Voir Dire Arizona Style*, 28 ARIZ. ATT'Y 18, 18 (1992).

74. *Id.*

75. James W. McElhaney, *Jury Voir Dire: Getting the Most Out of Jury Selection*, 79 A.B.A. J. 78, 78 (1993). However, jurisdictions not permitting attorney-conducted voir dire may allow written questions to be submitted to the judge. Jones, *supra* note 73, at 18.

76. Imwinkelried, *supra* note 3, at 212.

77. Margaret A. Jacobs, *Arizona Supreme Court Approves Major Changes in Jury Practices*, WALL ST. J., Nov. 2, 1995, at B5.

78. Jones, *supra* note 73, at 18 (referring to ARIZ. R. CIV. P. 47(b)).

79. *Id.* at 21 (referring to ARIZ. R. CRIM. P. 18.5(d)).

80. This right is assured by the 1995 modification of both Rule 47(b)(2) of the Arizona Rules of Civil Procedure and Rule 18.5(d) of the Arizona Rules of Criminal Procedure. The relevant language of Rule 47(b)(2) was modified as follows (with deleted language stricken and added language underlined):

> (b) Voir Dire Oath; Examination of Jurors; Brief Opening Statements.
> (2) The court shall conduct a ~~preliminary~~ thorough oral examination of prospective jurors. Upon the request of any party, the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to the

### *B. Jury Challenges as a Means of Combating Juror Bias*

The United States Supreme Court has endeavored to create mechanisms to help assure the impartiality of jurors.[81] For instance, a jury must be a representative cross-section of the community and individual jurors may be stricken during voir dire by the attorney's use of either challenges for cause or peremptory challenges.[82]

Challenges for cause are used to exclude jurors who indicate, during the voir dire, that they are unable to maintain an open mind or to set aside preexisting prejudices.[83] In essence, such a juror cannot meet the constitutional requirement of impartiality.[84] However, the attorney utilizing the challenge must "give a specific reason, within statutory or court rule guidelines, for excluding a prospective juror."[85] Typical reasons include "a blood relationship between a party and the potential juror, a pecuniary interest in the outcome of the case, or prejudice against either party."[86] The judge will then review the stated reasons in order to determine if the potential juror should be excused.[87] Judges are encouraged to disqualify a prospective juror of dubious impartiality, rather than test the bounds of discretion by permitting such a juror to serve.[88] However, the Supreme Court "has stated that voir dire is aimed at uncovering

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purpose of such examination. In addition, the court may terminate or limit voir dire on grounds of abuse. Nothing in this Rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral examination....

ARIZ. R. CIV. P. 47(b). The relevant language of Rule 18.5(d) was modified as follows (with deleted language stricken and added language underlined):

(d) Voir Dire Examination. The court shall conduct the voir dire examination, putting to the jurors all appropriate questions requested by counsel. The court may in its discretion examine one or more jurors apart from the other jurors.

If good cause appears, the court may permit counsel to examine an individual juror.

The court shall conduct a thorough oral examination of prospective jurors. Upon the request of any party, the court shall permit that party a reasonable time to conduct a further oral examination of the prospective jurors. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to the purpose of such examination. In addition, the court may terminate or limit voir dire on grounds of abuse. Nothing in this Rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral examination.

ARIZ. R. CRIM. P. 18.5(d).

81. Nugent, *supra* note 31, at 52–53.

82. Tanford & Tanford, *supra* note 13, at 767. *See, e.g.*, 28 U.S.C.A. § 1870 (West 1995).

83. Nugent, *supra* note 31, at 54.

84. *See* State v. Bingham, 176 Ariz. 146, 859 P.2d 769 (Ct. App. 1993) (juror is biased and should be excused for cause when juror indicates predisposition for or against party or witness).

85. Nugent, *supra* note 31, at 54. *See also* State v. Tison, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981) (unless there are objective indications of a juror's prejudice, its existence cannot be judicially presumed).

86. Massaro, *supra* note 8, at 519 n.103.

87. Nugent, *supra* note 31, at 54. See ABA STANDARDS FOR CRIMINAL JUSTICE 15–2.5 (3d ed. 1993) for a listing of the types of grounds challenges for cause should be founded upon, as recommended by the American Bar Association.

88. Francis C. Sullivan, *Developments in the Law, 1981–1982: A Symposium: Criminal Trial Procedure*, 43 LA. L. REV. 375, 394 n.127 (1982) (*citing* People v. Branch, 389 N.E.2d 467, 469 (N.Y. 1979)).

'prejudices of a serious character,'"[89] and has itself deemed certain prejudices inconsequential.[90]

Both sides in litigation possess an unlimited number of challenges for cause.[91] In Arizona, "challenges for cause" are governed by Rule 18.4(b) of the Arizona Rules of Criminal Procedure[92] and by Rule 47(c) of the Arizona Rules of Civil Procedure.[93] Jurors in Arizona may be stricken from the criminal jury panel "based on a showing of facts from which an ordinary person would imply a likelihood of predisposition in favor of one of the parties."[94] The Arizona reporters are filled with cases utilizing challenges for cause.[95]

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89. ABA STANDARDS FOR CRIMINAL JUSTICE 15-2.4 (2d ed. 1980 & Supp. 1986) (commentary) (*citing* Aldridge v. United States, 283 U.S. 308, 313 (1931)).

90. *See* Ham v. South Carolina, 409 U.S. 524, 527-28 (1973) (defendant has right to inquire into racial prejudices but not into prejudice against bearded persons).

91. Massaro, *supra* note 8, at 519.

92. The relevant portions of the rule read: "When there is reasonable ground to believe that a juror cannot render a fair and impartial verdict, the court, on its own initiative, or on motion of any party, shall excuse the juror from service in the case...." ARIZ. R. CRIM. P. 18.4(b).

93. Rule 47(c) provides a variety of grounds for challenges for cause, including but not limited to: failure to meet the statutory requirements related to juror competence; having close personal ties or being related to either party in the litigation; having previously served as a juror or witness in a trial between the parties in the current action; having formed or expressed an unqualified opinion as to the merits of the action or being unable to render a just verdict; or, being biased for or against either party in the action.

94. ARIZ. R. CRIM. P. 18.4(b) (comment). The comment accompanying Rule 18.4(b) also lays out 15 additional grounds for challenges for cause. *Id.*

95. *See* State v. Bingham, 176 Ariz. 146, 147, 859 P.2d 769, 770 (Ct. App. 1993) (juror's inclination to credit testimony of police officers more than other witnesses is ground for dismissal). *See also* State v. Eastlack, 180 Ariz. 243, 255-56, 883 P.2d 999, 1011-12 (1994) (no abuse of discretion in excusal by trial court of prospective juror who indicated that he would believe whatever was said by pastor who was prospective witness); State v. Salazar, 173 Ariz. 399, 411, 844 P.2d 566, 578 (1992) (excusing jurors whose attitudes on death penalty would likely impinge on ability to sit fairly on issue of guilt is not error), *cert. denied*, 509 U.S. 912 (1992); State v. Cook, 170 Ariz. 40, 54, 821 P.2d 731, 745 (1991) (trial court properly excused juror for cause when there was evidence that juror had specifically violated admonition not to discuss case with outsiders), *cert. denied*, 113 S. Ct. 137 (1991); Wasko v. Frankel, 116 Ariz. 288, 290, 569 P.2d 230, 232 (1977) (in medical malpractice action brought against surgeon for alleged negligence in performing disk surgery, trial court abused its discretion in refusing to strike member from jury panel for cause, in view of that member's statement that it would be difficult for him to disregard his biased opinions and give a fair consideration to the evidence); Lindley v. Northwest Hosp. & Medical Ctr., Inc., 164 Ariz. 133, 135, 791 P.2d 659, 661 (Ct. App. 1990) (failing to strike for cause prospective juror who was recent patient of physician to be called as expert on behalf of defendant physician in medical malpractice action was error, where juror indicated her bias in favor of her physician and her tendency to lean toward and give more weight to his opinion); State v. Sexton, 163 Ariz. 301, 302-03, 787 P.2d 1097, 1098-99 (Ct. App. 1989) (in a prosecution for driving while intoxicated, trial court's refusal to dismiss juror for cause was prejudicial error, even though juror was removed on a peremptory challenge, where the potential juror twice indicated her bias against people who drink and her inability to be impartial, and juror never assured the trial judge that she could be fair). *But see* State v. Stanley, 167 Ariz. 519, 527-28, 809 P.2d 944, 952-53 (1991) (juror may not be disqualified merely on a showing that he had prior knowledge of the case), *cert. denied*, 502 U.S. 1014 (1991); State v. Benge, 110 Ariz. 473, 479, 520 P.2d 843, 849 (1974) (fact that one juror was acquainted with prosecuting attorney did not in itself demonstrate defendants were prejudiced by acquaintance); State v. Munson, 129 Ariz. 441, 443, 631 P.2d 1099, 1101 (Ct. App. 1981) (in criminal prosecution, trial court did not abuse its discretion in failing to excuse two veniremen for cause, although veniremen's responses indicated that they had certain opinions about interracial relationships and black defendant had been living with one of the victims, a white woman, because the veniremen indicated that their opinions would not interfere or affect their decision in the instant case).

Remaining jurors may be stricken from the panel through the use of "peremptory challenges."[96] A party exercising a peremptory challenge does not generally have to explain or justify why the chosen juror should be stricken.[97] Any number of factors may cause a lawyer to use a peremptory challenge, "including facial expression, dress, demeanor,...responses to voir dire questions, background information obtained through investigation of prospective jurors, and other available data."[98] However, peremptory challenges are subject to judicial review[99] and must be exercised for racially neutral objectives.[100] This ruling first emerged in *Batson v. Kentucky*,[101] which held that "the Equal Protection Clause [of the United States Constitution] forbids the prosecutor to challenge potential jurors solely on account of their race...."[102] Along these same lines, the United States Supreme Court has recently begun to extend such protection to non-racial cognizable groups.[103] However, the recent Supreme Court decision in *Purkett v. Elem*[104] will surely impact peremptory challenges in the future, with the likely result being a limiting of *Batson's* influence.

Unlike challenges for cause, peremptory challenges are only available in limited numbers.[105] In Arizona, the number of peremptory challenges is governed by Rule 18.4(c) of the Arizona Rules of Criminal Procedure[106] and

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96. A "peremptory challenge" is "[a] request from a party that a judge not allow a certain prospective juror to be a member of the jury. No reason or 'cause' need be stated for this type of challenge." BLACK'S LAW DICTIONARY 157 (6th ed. 1990). *See, e.g.*, FED. R. CIV. P. 47; 28 U.S.C.A. § 1870 (West 1995).

97. Nugent, *supra* note 31, at 54. *See also* State v. Lovell, 97 Ariz 269, 272, 399 P.2d 674, 676 (1965) (noting that a "peremptory challenge" is an arbitrary and capricious species of challenge to a certain number of jurors without showing bias or prejudice, or any cause).

98. Massaro, *supra* note 8, at 520. Although Massaro noted in the same paragraph that peremptory challenges may also be based upon gender, the United States Supreme Court subsequently held to the contrary. *See infra* note 103 and accompanying text.

99. Winick, *supra* note 33, at 9.

100. *See infra* notes 101–02 and accompanying text.

101. 476 U.S. 79 (1986).

102. Batson v. Kentucky, 476 U.S. 79, 89 (1986). For an excellent detailed treatment of this topic, see Massaro, *supra* note 8. *See also* Lopez v. Farmers Ins. Co. of Ariz., 177 Ariz. 371, 375, 868 P.2d 954, 958 (Ct. App. 1993) (recent Arizona decision reaffirming rule that peremptory challenges may not be used to exclude jurors on account of race, even in a civil trial).

103. For instance, in *J.E.B. v. Alabama ex rel. T.B.*, the Court held that intentional discrimination on the basis of gender by state actors in their use of peremptory strikes in jury selection violates the equal protection clause. 114 S. Ct. 1419, 1422 (1994). The Court felt compelled to address the issue of gender discrimination after noting that the jurisdictions were divided on the issue. *Id.* For example, the Ninth Circuit refused to allow peremptory challenges excluding jurors based solely on gender, whereas the Fourth Circuit found this use of peremptory challenges acceptable. Jones, *supra* note 73, at 21. Other cognizable groups, such as those based on age, religion, and sexual orientation, are likely to receive continued judicial scrutiny. *Id.*

104. 115 S. Ct. 1769 (1995). In this case, the Court held that a race-neutral explanation offered by a proponent of a peremptory challenge need not be "persuasive, or even plausible.... [T]he issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 1771. Furthermore, a legitimate reason for exercising a peremptory challenge "is not a reason that makes sense, but a reason that does not deny equal protection." *Id.*

105. Massaro, *supra* note 8, at 519. Massaro goes on to note that the number of peremptories may vary from jurisdiction to jurisdiction (and sometimes even within the same jurisdiction, depending upon the possible attendant punishment) and that the number of peremptories available to each side may vary. *Id.* at n.104.

106. ARIZ. R. CRIM. P. 18.4.

by Rules 47(e) and (f) of the Arizona Rules of Civil Procedure.[107]

### *C. Methodologies Aimed at Enhancing the Art and Science of Voir Dire*

Although voir dire is a convenient, cheap, and administratively efficient[108] way to detect bias, it is not currently perceived as a particularly accurate approach.[109] Part of the problem, as already shown, is the lack of candor among potential jurors.[110] But lawyers, too, must share the blame. Sadly, many lawyers take an indiscriminate approach to voir dire, basing many of their choices merely on superstition, general attitudes about people, or stereotypes.[111] Furthermore, lawyers "have vastly disparate abilities in using voir dire to detect bias,"[112] and sometimes mistreat the process as an opportunity to indoctrinate potential jurors towards their position in the case.[113] Nonetheless, both the scientific and anecdotal evidence indicates that practitioners skilled in voir dire can effectively combat juror bias.[114]

Toward this end, a number of tools are at the disposal of the prudent counselor, including ranking scales, community attitudinal surveys, survey-based statistical modeling, juror investigations, in-courtroom ratings of authoritarianism,[115] group dynamic analysis, focus groups, mock trials, shadow juries, in-court assessment of juror non-verbal communication, and even psychics.[116]

## V. NONVERBAL BEHAVIORS AS A UNIQUE APPROACH TO DETECTING BIAS

In sum, although juror bias and prejudice clearly exist, the courtroom environment encourages jurors to conceal such beliefs. Recognizing this problem, the judicial system has developed a variety of safeguards that enable lawyers to uncover juror bias and strike jurors from the panel. Recently, some lawyers have begun to rely on researchers from other fields to help ensure that favorable[117] jurors remain on the panel.[118] In this way, social scientists, market researchers, and psychologists help lawyers choose the ideal juror prototype.[119]

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107. Rule 47(e) governs the number of peremptory challenges allowed in civil actions, and Rule 47(f) governs the number and use of peremptory challenges as they apply to alternate jurors.

108. ABA STANDARDS FOR CRIMINAL JUSTICE 8–3.5 (3d ed. 1992) (commentary).

109. *Id.*

110. *See supra* notes 43–44 and accompanying text.

111. Massaro, *supra* note 8, at 522 n.108 (citing E. Hawrish & E. Tate, *Determinants of Jury Selection*, 39 SASK. L. REV. 285, 285 (1975)).

112. ABA STANDARDS FOR CRIMINAL JUSTICE 8–3.5 (3d ed. 1992) (commentary).

113. *Id.*

114. *Id.*

115. Psychologists often classify potential jurors as either "authoritarian" or "egalitarian." Massaro, *supra* note 8, at 523 n.109. The distinction is relevant to voir dire in that authoritarians are regarded as "highly punitive, racist, politically conservative, rigid, and acquiescent to authority figures." *Id.* (citing Frederick, *supra* note 45, at 575–76).

116. See Barber, *supra* note 5, at 1225 for further discussion concerning these options. *See also* Frederick, *supra* note 45, at 571.

117. By "favorable," this Note contemplates a juror with the proper bias—a bias favoring whichever side chooses the juror. *See also supra* note 28 and accompanying text.

118. *See supra* notes 6–7 and accompanying text.

119. *See supra* notes 6–7 and accompanying text.

However, there remains the very real possibility that even the most perfectly prototypical juror will maintain hidden biases. Although cautious lawyers traditionally question jurors in a manner calculated to reveal such hidden biases, the vast majority of lawyers remain woefully misinformed about the act of deception.[120] The result is that many lawyers focus almost exclusively on the verbal responses of jurors.[121] To do so, however, is to bypass an entire realm of communication laden with valuable information.[122] As will be shown, although a juror might very well verbally conceal any bias, the act of deception is so taxing that detectable "leakage cues"[123] emerge.

### *A. The Process of Deception*

Deception occurs in a variety of ways, including *lying*, *misinformation*, *evasions*, and *fronts*.[124] Jurors, like the rest of society, often rely on deception (whatever the form) to represent themselves in a socially acceptable manner or to conceal any biases.[125] However, research indicates that the body reacts to deception in a variety of detectable ways.[126] The polygraph test is one means of measuring the body's reactions during deception.[127] Unfortunately (or fortunately), the polygraph is not readily available for most legal purposes.[128]

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120. *See supra* note 3 and accompanying text.

121. Imwinkelried, *supra* note 3, at 187.

122. In the field of communication, experts generally agree that the majority of the meaning of a communicated message is transferred through the nonverbal behavior accompanying the oral message. Imwinkelried, *supra* note 3, at 185-86 (nonverbal behavior accounts for more than 50% of all information communicated between a source and a receiver); Captain Jeffrey D. Smith, *The Advocate's Use of Social Science Research into Nonverbal and Verbal Communication: Zealous Advocacy or Unethical Conduct?*, 134 MIL. L. REV. 173, 173–74 (1991).

123. *See infra* notes 130–36 and accompanying text.

124. *Lying* is an intentional falsehood, whereas *misinformation* is not (one can unwittingly provide misinformation). Jim C. Goodwin, Veracity Judgments in the Field: Police Officers' Beliefs About Lie Detection 10–11 (March 7, 1994) (unpublished M.A. thesis, Colorado State University, on file with the *Arizona Law Review*). An *evasion* is an intentional act of hiding or not revealing pertinent information. *Id.* A *front* is best understood as a form of camouflage. *Id.* Unfortunately, since most deception research occurs in a laboratory setting focusing on lies, little is known about other forms of deception. *Id.* at 38. Regardless, the wary attorney should be prepared to recognize the different types of deception in order to understand the juror's Machiavellian motivation.

125. Covington, *supra* note 35, at 580–81. *See also* Frederick, *supra* note 45, at 583.

126. *See infra* note 127 and accompanying text. It should be noted that "deception," as the word is used here, is a conscious act as opposed to an unconscious one. The distinction bears noting because the position taken by many in the field of communication is that pathological liars or those suffering from paranoid delusions, or who otherwise believe their own miscommunication, are *not* engaged in deception. GERALD R. MILLER & JAMES B. STIFF, DECEPTIVE COMMUNICATION 20 (1993). Therefore, the findings of experts in the field of lie detection do not necessarily hold true when applied to jurors who are either pathological liars or are suffering from paranoid delusions.

127. The polygraph machine typically "consists of devices that monitor and record changes in blood pressure, pulse, respiration, and galvanic skin response (which measures perspiration). Some versions include evaluation of certain muscular activity, to frustrate the use of countermeasures." W. Thomas Halbeib, United States v. Piccinonna: *The Eleventh Circuit Adds Another Approach to Polygraph Evidence in the Federal System*, 80 KY. L.J. 225, 230 (1991/1992). However, for an interesting comparison of polygraph examinations relying upon simply the polygraph machine, or the machine used in conjunction with the reception of nonverbal behaviors, see MILLER & STIFF, *supra* note 126, at 52–53 (indicating that nonverbal behaviors enhance detection abilities).

128. From its inception, the polygraph test has been barred from use in the federal courts. Although during the early 1970s the polygraph test seemed to be gaining acceptance in the

However, other lie detection techniques, such as detection through nonverbal channels, remain available to the skilled attorney.[129] Lie detection through nonverbal channels is no simple task, however. Therefore, a brief discussion about the theory behind why leakage cues emerge is warranted.

Ekman and Friesen, noted experts in the fields of psychology and communication, developed a hypothesis which attempts to explain the psychological process of lying.[130] They postulate that nonverbal behavior can contribute information beyond, and sometimes contrary to, what is provided vocally.[131] This result is due to the unconscious interaction between psychological aspects of the individual termed *ego* and *alter*.[132] According to Ekman and Friesen, ego seeks to conceal information from alter, which may be the individual's own alter, or the alter of another.[133] Ego, however, is ever fearful of discovery, and will pay close attention to the external feedback of another person.[134] Upon realizing that deception is about to be revealed, ego will either stop communicating entirely or will attempt to cover up potential deception cues.[135] Nevertheless, since ego can only attend to a limited number of behaviors at any one time, leakage cues will emerge.[136]

Many of the body's reactions to deception are revealed through detectable leakage cues.[137] According to David Suggs and Bruce Sales, these communication behaviors can be classified under three categories: *verbal* (the words which are actually spoken, along with their syntactical arrangement), *paralinguistic* (aspects of speech—such as breathing, pauses and latencies, pitch and tone of voice, and speech disturbances—that are not actually concerned with the content of the message), and *kinesic* (body language, such as facial expressions, body movements, body orientation, eye contact, and hand movements).[138]

The time has come for litigators to rely more heavily on the findings of experts in the field of nonverbal communication when engaging in jury selection. Jury selection may be enhanced by decisions based on nonverbal behaviors in a number of ways. Because nonverbal behaviors may be observed by everyone within sight of a speaker, veracity judgments based on nonverbal

judicial community, the 1980s saw a reversal in judicial attitude. Halbeib, *supra* note 127, at 225–26. However, the Eleventh Circuit decision in *United States v. Piccinonna* reversed this trend by allowing the admission of polygraph testimony to impeach or corroborate witness testimony at trial, or for any other purpose, so long as the parties stipulated to the testimony's scope and purpose. *Id.* at 227. The remaining federal circuits take widely disparate approaches to the admissibility of polygraph evidence, but only the Fourth, Fifth, and District of Columbia circuits continue to reject such evidence as per se inadmissible. *Id.* at 227–29.

129. Frederick, *supra* note 45, at 583–84.

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

131. *Id.* at 88.

132. *Id.* at 89.

133. *Id.*

134. *Id.* at 89–90.

135. *Id.* at 90.

136. For the purpose of this Note, this brief discussion adequately explains the psychological basis of nonverbal leakage. For a detailed discussion on the subject, see Ekman & Friesen, *supra* note 130.

137. See Goodwin, *supra* note 124, at 10–35. See Ekman & Friesen, *supra* note 130, as one of the definitive articles in the field of nonverbal lie detection.

138. Suggs & Sales, *supra* note 3, at 630–31. *See also* Imwinkelried, *supra* note 3, at 184–85 (discussing nonverbal behaviors of witnesses as perceived by jurors).

behaviors provide valuable insight regardless of who conducts the voir dire, even when questions are solicited by the judge or opposing counsel. Furthermore, nonverbal veracity judgments are not as time consuming as other scientific jury selection methods.[139] Although attorneys engaged in high-stakes litigation are well advised to employ the expertise of professional jury selection services, such services remain too costly for most trials.[140] However, attorneys may be able to utilize a variety of techniques that have been developed to increase sensitivity to nonverbal behaviors, so as to make better-informed veracity judgments themselves.[141]

### *B. Popular Folklore About Deception*

Although the average member of society cannot identify exactly what behaviors arouse their suspicions, people generally possess opinions about the behaviors of liars. From the parent who warns a child that "I will always be able to tell when you are lying" to the police officer who has a hunch about a "nervous" suspect, veracity judgments are made every day simply based upon how a person behaves.[142] The phrase "actions speak louder than words," it turns out, represents the approach many take when formulating the garden-variety veracity judgment.[143] To many, the successful attorney is like the successful gambler, both having acquired some superstitions to guide their decisions.[144]

Unfortunately, research indicates that the most useful nonverbal cues to deception are often ignored while those least useful are attuned to.[145] Lawyers, like the rest of society, are forming false impressions of juror veracity based upon erroneous opinions about the behaviors of liars. For example, lawyers have been counseled to avoid

> jurors with crossed feet or arms, clenched fists, poor posture, cocked head, hands in pockets, a kicking foot, those who talk through their

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139. *See* Fahringer, *supra* note 4, at 22–23.

140. *See* Massaro, *supra* note 8, at 520.

141. For a brief review of available techniques, see Imwinkelried, *supra* note 3, at 208–10.

142. Goodwin, *supra* note 124, at 126.

143. In fact, "[w]hen the listener perceives a conflict between the speaker's statement and the accompanying metacommunication cues, the listener usually disbelieves the statement...." Imwinkelried, *supra* note 3, at 186. Furthermore, although the purpose of this Note is to inform attorneys about how to detect juror bias through nonverbal channels, counsel is cautioned to keep in mind that jurists, too, make judgments based upon how one acts. *See* Stephen H. Peskin, *Non-Verbal Communication in the Courtroom*, TRIAL DIPL. J., Summer 1980, at 6. Being true to oneself is the first step toward gaining juror confidence. *See* Terry W. Mackey, *Jury Selection: Developing the Third Eye*, TRIAL, Oct. 1980, at 22, 24.

144. Massaro, *supra* note 8, at 522 n.108.

145. MILLER & STIFF, *supra* note 126, at 66. *See also* Goodwin, *supra* note 124, at 126. Research indicates that police officers in particular may be guilty of relying on erroneous indicators of deception. For instance, police officers of all experience levels consistently gauge veracity based upon the amount of eye contact a suspect is able to maintain, yet a recent review of nonverbal lie-detection research does not indicate that evasive eye contact is a valid indicator of deception. *Id.* at 124–27. On the contrary, research indicates that those who lie maintain eye contact every bit as much as people who are truthful. Fahringer, *supra* note 4, at 22 n.8 (citing to report made by Dr. Bella De Paulo, a psychologist at the University of Virginia). *Contra* Suggs & Sales, *supra* note 3, at 634. Perhaps the reason that eye contact is not a good indicator of deception is due to the great disparity between different cultures. For instance, studies reveal that Black Americans maintain less eye contact than do White Americans, who in turn have a lower level of gaze than do Arabs, South Americans, and Greeks. MICHAEL ARGYLE, BODILY COMMUNICATION 58 (2d ed. 1988).

> teeth, who stand with their hands on their hips or behind their backs, who drum with their fingers, touch their noses, cover their mouths with their hands, or crack their knuckles.[146]

Unfortunately, research does not demonstrate that these behaviors are reliable indices of deception. This does not mean that the observance of such behaviors will be fruitless;[147] it simply means, as this Note argues, that behaviors such as fist clenching and foot kicking, in isolation, should not form the basis of veracity judgments.[148] Regardless, individual lawyers will probably continue to base veracity judgments on these behaviors under the erroneous belief that they can do so accurately.[149] Such lawyers are sadly mistaken.

### *C. Nonverbal Behaviors Scientifically Associated with Deception*

Although lawyers, like the rest of society, maintain a false sense of confidence regarding their ability to detect lies, there is no reason to believe that reliable indices to deception either do not exist or cannot be perceived. On the contrary, a review of the relevant literature reveals:

> [T]he following [twelve] behaviors seem to be indicative of deception: (1) pupil dilation, (2) speech errors, (3) increased vocal pitch, (4) increased use of adaptors, (5) decreased smiling in general and [felt/genuine]...smiles in particular, (6) increased use of masking smiles, (7) increased speech hesitations/response latencies, (8) decreased use of illustrators, (9) heightened arousal, (10) negative affect displays, (11) increased pauses, and (12) decreased message duration.[150]

What is important about these behaviors, however, is not that they simply occur. The import of these cues lies in their *rhythm*.[151] Scholars are becoming increasingly aware of the importance of the *relational familiarity* of communicators, the level of their *interaction*, and whether the participants are able to join in *message elaboration*.[152] As a generalization, studies indicate that people who are moderately familiar with each other may detect lies better than those who are either intimates or complete strangers;[153] that the opportunity for participant interaction plays a key role in judgments of veracity;[154] and that as message elaboration increases, so does the probability of lie detection

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146. Fulero & Penrod, *supra* note 6, at 235.

147. For instance, as William R. Jones advises, body language may reveal barriers to effective communication between a lawyer and the jury. Jones, *supra* note 73, at 20.

148. As Ekman and Friesen made clear, lying is a complex psychological process not easily explained or detected by individual behaviors. *See supra* notes 130–36 and accompanying text.

149. Despite conflicting recommendations, trial attorneys continue to rely on stereotypical or idiosyncratic advice, rather than on more reliable forms of data. Fulero & Penrod, *supra* note 6, at 237. *See also* MILLER & STIFF, *supra* note 126, at 69 (studies indicate that people remain highly confident in their lie detection abilities, even when they are proven to have only mediocre success).

150. Goodwin, *supra* note 124, at 24.

151. My use of the word *rhythm* attempts to encapsulate the idea that nonverbal behaviors change markedly when one shifts from truthful communication to dissembling. In essence, the body reacts to, and is manipulated by, the act of deception much like it responds to the rhythm of a catchy tune.

152. *See* Gerald R. Miller & James B. Stiff, *Applied Issues in Studying Deceptive Communication*, *in* APPLICATIONS OF NONVERBAL BEHAVIORAL THEORIES AND RESEARCH 217, 229 (Robert S. Feldman ed., 1992).

153. *Id.* at 223–26.

154. *Id.* at 226–28.

success.[155]

### *D. Applying Communicative Findings About Deception to the Art of Voir Dire*

Communicative findings are crucial to the strategy of the lawyer conducting voir dire.[156] Long before voir dire begins, attorneys should prepare a number of standard questions to pose to potential jurors.[157] Initially, the attorney's goal should be to formulate general, non-threatening questions to observe the baseline behaviors of the jury.[158] General questions also offer the opportunity to introduce oneself to the jury and to begin establishing a favorable dialogue, as well as the chance to determine the jury's general demographic makeup. When possible, the attorney should become familiar with the jurors, but avoid the impression of intimacy. Furthermore, communication should not simply be one-way, but rather, a series of interactions. Open-ended questions will foster this goal, as well as encourage message elaboration. The attorney's goal should be to keep the juror talking,[159] particularly on topics previously determined to be crucial to the outcome of the case.

Once the non-threatening questions are prepared, the attorney should determine what type of juror is desirable.[160] The attorney should consciously attempt to "craft voir dire questions in an attempt to evoke certain physical responses from the members of the venire...."[161] For example, questions should be directed to any aspect of the case that might potentially arouse juror bias. Attorneys might also try to discern juror inclination toward counsel for both sides,[162] the opposing litigants, and the legal and factual issues to be developed at trial.[163] Jurors who are negatively predisposed in any one of these areas will have a high degree of anxiety,[164] and therefore display an increased number of leakage cues.[165]

Once the attorney has formulated a brief list of questions, she is prepared to begin an initial examination of the jury panel. Initially, only non-threatening questions should be posed. Throughout this introductory questioning period, the single practitioner should pay very close attention to the way jurors behave while responding. Some jurors will be very calm, while others may already be on the edge of their seats. The attorney's goal at this point is not to manipulate, but only to observe a juror's baseline of behavior. When possible, having a cohort available to observe and note individual juror's general demeanor is

155. *Id.* at 229–31.

156. The following recommendations represent this Note's attempt to assist attorneys in fashioning effective strategies by merging the laboratory findings of communication scholars with the demands of the courtroom environment. Since this Note itself is not the result of actual research, but rather a compilation of the findings of others, the suggestions that follow are necessarily theoretical to an extent.

157. *See* Suggs & Sales, *supra* note 3, at 638.

158. *Id.*

159. B. Anderson Mitcham, *Psychotherapy Techniques in Voir Dire Selection*, TRIAL, Sept. 1980, at 52, 54.

160. Mackey, *supra* note 143, at 23.

161. Barber, *supra* note 5, at 1236.

162. Nonverbal behaviors are particularly valuable indicators of preliminary juror predisposition toward counsel for both sides. *See* Frederick, *supra* note 45, at 584.

163. Suggs & Sales, *supra* note 3, at 630.

164. *Id.* at 632.

165. *See* Ekman & Friesen, *supra* note 130.

desirable.[166]

Following the initial questioning period, the attorney should make a conscious effort to generate situational anxiety in the jurors by asking more pointed questions.[167] There is a very fine line to tread here, however. Increased anxiety must not come at a cost of attorney credibility. All questions should be posed in a non-accusatory fashion. The goal is not to make the juror defensive, but merely to get him or her to elaborate on potential areas of bias. By forcing the juror to elaborate, he will be compelled to choose either to "come clean" and reveal previously hidden biases or to continue along an evasive path. The longer the juror walks the evasive path, the more anxiety he will experience. At this point in the voir dire, observation of the jurors is crucial. The attorney must be prepared to scrutinize jurors for any suspicious behaviors.

Undoubtedly, attorneys will not be able to observe all twelve of the Machiavellian behaviors identified earlier in this Note.[168] Therefore, attorneys should begin by noting general states of arousal during both periods of questioning.[169] Marked changes from the non-threatening question period to the "threatening" question period are of particular importance. Indices of arousal need not rise to the level of distinct patterns of behavior such as hand-wringing, posture shifts, or rapid leg movements, for these behaviors alone do not indicate deception.[170] What is important is the discernible change in overall behavior. A noticeable change in behavior certainly indicates that further inquiry along the "arousing" line of questioning is warranted, and may even provide grounds for challenging the juror. The attorney, therefore, should take clear notes of all observed behavioral changes. Even if the attorney cannot readily determine what it is about the jurist's behavior that appears to indicate arousal, she should proceed under the assumption that her "gut instinct" is valid, and continue questioning either until clear behavioral changes are noted or all concerns are allayed.[171]

As attorneys gain more experience with this technique, they are likely to be able to attune to the individual behaviors from the list of twelve identified earlier in this Note.[172] For instance, the attorney may observe how, and how often, the juror smiles during both periods of questioning. A decreased inclination to smile during the second questioning period, as well as an increased tendency to fake smiles, should both be taken as symptoms of dissembling.[173]

The attorney might also notice what the juror is doing with his/her arms. The goal here is to delineate arm movements that are *adaptors*[174] from those

166. Mackey, *supra* note 143, at 25.
167. *See supra* notes 163–65 and accompanying text.
168. *See supra* note 150 and accompanying text.
169. *See supra* notes 163–65 and accompanying text.
170. *See, e.g., supra* note 146 and accompanying text.
171. As private practitioner Terry W. Mackey advises, "[with practice] you will develop the psychiatrist's so-called 'third eye'—the eye that translates visual and nonvisual data and allows one to see that which cannot be physically perceived or described." Mackey, *supra* note 143, at 25.
172. *See supra* note 150 and accompanying text.
173. *See supra* note 150 and accompanying text.
174. *See infra* note 176 and accompanying text.

that are *illustrators*.[175] As Ekman and Friesen explain:

> *Adaptors* develop from movements which are first learned by a person in early life as part of his adaptive efforts to satisfy self or bodily needs, to perform bodily actions, to manage emotions, to develop or maintain prototypic interpersonal contacts, and to learn instrumental activities. The confusing aspect of adaptors is that while they were first learned as part of a total adaptive pattern in which the goal of the activity was obvious, they are emitted by the adult, particularly during social conversations, in a form in which only a fragment of the original adaptive behavior can be seen. These fragments or reductions of previously learned adaptive acts are maintained by habit.... By this definition, adaptors emitted by the adult are habitual, are not intended to communicate, and occur usually without awareness.[176]

Examples of *adaptive* behaviors include unconscious acts such as running a hand through one's hair, scratching an elbow, biting a lip, placing a finger over the mouth, and playing with a pencil. *Adaptive* movements generally occur with the arms and hands close to, or actually touching, the body.[177]

*Illustrators*, on the other hand, generally occur with the arms and hands away from the body.[178] *Illustrators* also differ from *adaptors* in that they are purposely performed to convey a message.[179] As Ekman and Friesen point out: "Illustrators are those actions which are intimately related to the verbal discourse, illustrating what is being said by emphasis, pointing, pictorial enactment, rhythmic movements, or kinetic actions."[180] Examples of *illustrators* include using a chopping motion with the hand to simulate the movements of an ax, pointing a finger at someone and pretending to shoot them, or shaking a fist at an antagonist.[181]

Once a movement is categorized as either an *adaptor* or an *illustrator*, the attorney should compare a juror's behavioral tendencies during the initial interview with those from the secondary questioning period. If the juror displayed few *adaptors* during the initial period, but exhibited a marked increase during the latter, then that juror should be suspected of dissembling.[182] Furthermore, if a juror used numerous hand movements to illustrate responses during the initial questioning period, but suddenly ceases doing so during the subsequent questioning phase, he should be regarded with skepticism.[183]

Numerous verbal characteristics are also indicative of deception. For instance, liars tend to make more speech errors when they lie than when they tell the truth.[184] In the popular vernacular, this is referred to as "tripping over one's tongue." The pitch of a liar's voice also tends to rise during the act of lying.[185] Take note of how a juror's voice sounds during both questioning

175. *See infra* text accompanying notes 178–81.
176. Ekman & Friesen, *supra* note 130, at 97.
177. *See* MILLER & STIFF, *supra* note 126, at 57.
178. *See infra* text accompanying notes 180–81.
179. *See* ARGYLE, *supra* note 145, at 107–08.
180. Ekman & Friesen, *supra* note 130, at 96–97 n.8.
181. Interestingly, "[s]ometimes the history of [illustrators] can be traced. For example, the V for victory sign was introduced by Winston Churchill during the Second World War." ARGYLE, *supra* note 145, at 54. Also, different cultures use different illustrators. *Id.*
182. *See supra* note 150 and accompanying text.
183. *See supra* note 150 and accompanying text.
184. *See supra* note 150 and accompanying text.
185. *See supra* note 150 and accompanying text.

periods. When a juror's voice noticeably rises in pitch during the second questioning phase, that juror should come under suspicion.[186]

Other observable verbal characteristics include the number of pauses[187] during communication, as well as the duration of the juror's responses.[188] The truthful juror will remain constant in the amount of pauses employed in his/her communication, or at least will not increase his/her use of pauses from the first questioning period to the second, and will not blatantly decrease the amount of time devoted to responding during the second questioning period.[189] Along the same lines, the truthful juror will not take longer to respond to questions during the second questioning period than she did during the first.[190] In other words, her tendency to hesitate before answering a question will not increase during the second questioning period.[191]

Finally, the attorney should constantly be on the lookout for negative *affect displays*.[192] As Ekman and Friesen note: "The face is the major site of the *affect displays*. We and others have accumulated evidence which indicates distinctive movements of the facial muscles for each of some seven primary affect states: happiness, anger, fear, surprise, sadness, disgust, [and] interest."[193] Therefore, the attorney should be on the lookout for changes in juror emotions made evident through the juror's facial expressions.[194] If the attorney notes that a formerly happy or interested juror suddenly appears angry, fearful, saddened, surprised, or disgusted during crucial periods of questioning, then the attorney should attempt to determine the stimulus for the change. Such a juror may be attempting to hide a bias.

The final reliable indicia of deception, pupil dilation,[195] likely cannot be monitored to a useful extent due to the constrictive nature of voir dire. Not only would monitoring pupil dilation likely prove too taxing, but in order to do so effectively, the attorney would probably have to inject herself into the comfort zone surrounding the jury box. Since one goal of voir dire is to establish a positive relationship with potential jurors, anything that makes jurors uneasy should be avoided. Focusing on a juror's eyes and invading a juror's "territory" would fall into this category, and therefore are to be avoided.

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186. *See supra* note 150 and accompanying text.
187. "Pauses may be 'unfilled' (i.e. silent) or 'filled' (i.e. with 'ums' or 'ers')." ARGYLE, *supra* note 145, at 106.
188. *See supra* note 150 and accompanying text.
189. *See supra* note 150 and accompanying text.
190. *See supra* note 150 and accompanying text.
191. *See supra* note 150 and accompanying text.
192. *See supra* note 150 and accompanying text. *See also* Ekman & Friesen, *supra* note 130, at 97.
193. Ekman & Friesen, *supra* note 130, at 97.
194. The attorney should be very confident in his ability to judge facial expressions; over 50 years of research indicates that people are very accurate when judging facial expressions. Paul Ekman, *Facial Expression, in* NONVERBAL BEHAVIOR AND COMMUNICATION 97, 98–99 (Aron W. Siegman & Stanley Feldstein eds., 1978). Furthermore, research indicates that facial expressions of emotions appear to be universal, transcending cultural boundaries. *Id.* at 105.
195. *See supra* note 150 and accompanying text.

## VI. NONVERBAL BEHAVIORS AS GROUNDS FOR CHALLENGING JURORS

Peremptory challenges may clearly be based on nonverbal behaviors.[196] Generally, the use of peremptories is only challenged when a member of a minority is stricken, resulting in a *Batson* challenge.[197] However, the recent Arizona Supreme Court case of *State v. Cruz*[198] demonstrates that nonverbal behaviors *may* provide race-neutral reasons for peremptory challenges in Arizona.[199] In *Cruz*, the court reversed and remanded the convictions of a defendant because the peremptory strike of a Hispanic juror did not withstand the court's *Batson* scrutiny.[200] The juror was stricken, according to the prosecutor, because she appeared weak, had poor contact with the attorney, and appeared to be easily led.[201] The court noted, "where, as here, the state offers a facially neutral, but wholly subjective, reason for a peremptory strike, it must be coupled with some form of objective verification before it can overcome the prima facie showing of discrimination."[202] Unfortunately for the prosecution in *Cruz*, such objective verification was lacking and the case was reversed.[203]

However, under the proper circumstances, nonverbal behaviors can provide the needed objective verification. In writing the decision, the *Cruz* court professed agreement with the Texas Court of Appeals' declaration of an unwillingness "to say that a juror's demeanor cannot ever be a racially neutral motive for a prosecutor's peremptory challenge...."[204] Yet, the court also agreed with the Texas Court of Appeals that "the protection of the constitutional guarantees that *Batson* recognizes requires the court to scrutinize such elusive, intangible, and easily contrived explanations with healthy skepticism."[205]

Consequently, the attorney must be able to articulate to the court how the juror nonverbally demonstrated an objectionable bias. The types of nonverbal indices of deception identified by this Note,[206] when exhibited by potential jurors, provide the needed objective verification. Those instances where the judge personally observes the same juror behaviors provides particularly fertile ground for objective verification. As the *Cruz* court noted, "[i]n appropriate cases, the objective verification could be the trial court's own observations, made on the record, which might show that the prosecutor's subjective conclusion was an appropriate reason for a facially neutral peremptory challenge."[207] When an attorney decides to strike a juror, therefore, it is very important to articulate to the judge not only the behaviors observed, but why those behaviors indicate deception aimed at hiding bias. A valid explanation to

196. *See supra* notes 96–98 and accompanying text.
197. *See supra* notes 99–104 and accompanying text.
198. 175 Ariz. 395, 857 P.2d 1249 (1993).
199. *Id.* at 396, 857 P.2d at 1250.
200. *Id.* at 399–400, 857 P.2d at 1253–54.
201. *Id.* at 397, 857 P.2d at 1251.
202. *Id.* at 399, 857 P.2d at 1253.
203. *Id.* at 395, 857 P.2d at 1249.
204. *Id.* at 399, 857 P.2d at 1253.
205. *Id.*
206. *See supra* note 150 and accompanying text.
207. *Cruz*, 175 Ariz. at 399, 857 P.2d at 1253.

the court will likely be successful.[208]

For example, the United States Court of Appeals for the Second Circuit, in *United States v. Ruiz*, affirmed a lower court ruling that a peremptory strike may be grounded on unfavorable facial expressions.[209] The *Ruiz* prosecutors successfully withstood a *Batson* challenge by demonstrating that both the prosecutor and a government investigator observed facial expressions by the potential juror that indicated she did not want to sit on the jury.[210] This, coupled with the fact that the juror stared strangely at them and was not particularly articulate in responding to the questions posed by the government, provided the court with a sufficiently neutral, specific and reasonable explanation to overcome a *Batson* challenge.[211]

The Arizona case of *State v. Tubbs*[212] also represents a judicial acceptance of peremptory challenges based, in part at least, on nonverbal behaviors.[213] In *Tubbs*, the Arizona Court of Appeals affirmed a lower court finding that a black juror's lack of eye contact, coupled with the possibility that the defendant and juror might have worked for the same employer at one time, was a sufficient explanation to support the prosecutor's use of a peremptory challenge to the juror.[214] The court emphasized, however, that it was "not asked to decide whether lack of eye contact alone is sufficient for a prosecutor to exclude the only black juror on the panel."[215] As yet, this question apparently remains unanswered in Arizona.[216] Although *eye contact* alone should not provoke a peremptory challenge invoked to combat juror bias,[217] the behaviors identified by this Note[218] as indicative of deception probably should. Given the recent Supreme Court decision of *Purkett v. Elem*,[219] which effectively limits *Batson's* holding,[220] the court system will likely be more accepting of peremptory challenges of this type.

Although nonverbal behaviors provide acceptable grounds for most peremptory challenges, and *may* furnish the objective facts necessary to withstand a *Batson* challenge, the permissible use of nonverbal behaviors as a basis for challenges for cause cannot be gauged.[221] One might argue, however,

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208. *See supra* notes 202–07 and accompanying text.
209. 894 F.2d 501, 507 (1990).
210. *Id.* at 506.
211. *Id.*
212. 155 Ariz. 533, 747 P.2d 1232 (Ct. App. 1987).
213. *Id.* at 538, 747 P.2d at 1237.
214. *Id.* at 537, 747 P.2d at 1236.
215. *Id.*
216. The more recent case of *State v. Rodarte* also refused to decide whether lack of eye contact alone would offer sufficient racially neutral grounds for the exercise of a prosecutor's peremptory challenge. 173 Ariz. 331, 842 P.2d 1344 (Ct. App. 1992). However, the *Rodarte* court did find that the prosecutor's explanation that the juror did not maintain eye contact with him, coupled with the facts that the juror appeared bored, seemed to be tied to the narcotic industry, and had absolutely no ties to the community, were properly deemed race neutral and therefore legally acceptable. *Id.* at 334, 842 P.2d at 1347.
217. As already noted, eye contact is not a good indicator of deception. *See supra* note 145.
218. *See supra* note 150 and accompanying text.
219. 115 S. Ct. 1769 (1995).
220. *Id.* at 1771. *See supra* note 104 and accompanying text.
221. "[S]ufficiently revealing the presence of such bias or prejudice which will support a challenge for cause has proven difficult, and courts have been inconsistent in the treatment of these challenges." Julie A. Wright, *Challenges for Cause Due to Bias or Prejudice: The Blind*

that the appearance of partiality can never be condoned in the judicial setting,[222] and therefore, challenges for cause should be warranted in those instances where juror behavior *clearly* indicates bias or prejudice. Obviously, the better an attorney is able to demonstrate to the court a juror's bias, the more likely such a challenge for cause will be successful.

## VII. CONCLUSION

As this Note has shown, juror bias violates a defendant's right to a fair trial.[223] Unfortunately, traditional approaches to combating juror bias have proven inadequate.[224] However, since juror bias is revealed by detectable nonverbal behaviors, a venireman trained to detect certain nonverbal behaviors can successfully identify biased jurors.[225] And even though the attorney's ability to personally conduct voir dire is increasingly being restricted nationwide,[226] the advantage of this technique is that it can also be successful when voir dire is conducted by others.[227] Initial intuitions about juror bias at least furnish the basis for more in-depth questioning, which may lead to outright revelations of bias. Nevertheless, nonverbal cues to deception often provide a rational reason for most peremptory challenges.[228] Additionally, under the proper conditions, nonverbal indices of deception may provide the objective facts necessary to withstand a *Batson* challenge.[229] Finally, the argument can be made that demeanor evidence is so clearly favored by the judiciary that in obvious circumstances of bias, nonverbal indices of deception may provide the grounds necessary for a challenge for cause.[230]

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*Leading the Blind Down the Road of Disqualification*, 46 BAYLOR L. REV. 825, 833 (1994).

222. Witness demeanor has long been recognized as an important impeachment tool. *See* Imwinkelried, *supra* note 3, at 217–18. Great value is placed on judgments grounded on the demeanor of a witness, and wide latitude is given to such decisions made by the finder of fact. *See, e.g.*, National Labor Relations Board v. Dinion Coil Co., 201 F.2d 484, 487–90 (1952). In fact, courts may admonish jurors to concentrate on the demeanor of witnesses when deciding on their veracity. 2 V. HALE STARR & MARK MCCORMICK, JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS 528 (1993). The hearsay rule is another example of the judicial system's acceptance of the communicative ability of nonverbal behaviors. FED. R. EVID. 801(a). Some have even gone so far as to note that "the Constitution's Confrontation Clause enshrines demeanor evidence among the basic protections of the defendant in a criminal case." H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 787 (1993). *See also supra* note 34 (discussing how judges are expected to maintain the appearance of impartiality).

223. *See supra* notes 22–24 and accompanying text.

224. *See supra* note 43 and accompanying text.

225. *See* discussion *supra* notes 117–95 and accompanying text.

226. *See supra* notes 74–76 and accompanying text.

227. *See* discussion *supra* notes 117–95 and accompanying text.

228. *See supra* note 196 and accompanying text.

229. *See supra* note 199 and accompanying text.

230. *See supra* note 222 and accompanying text.