

THE MYTH OF THE APPROPRIATE RESPONSE TO TRAUMA: “ABNORMAL REACTIONS” AS EVIDENCE OF GUILT

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ABSTRACT

This Article documents how untested and intuitive behavioral analyses play a significant role in determinations of the guilt or innocence of suspects, behavioral and psychological science evidence suggest that these intuitions are invalid, and the reliance on these assessments of demeanor has played a role in wrongful convictions. It argues that intuitions about the significance of suspect demeanor are based on three assumptions: there is a “normal” way to react to tragedy, that individuals who behave differently than that baseline are guilty, and that criminal-justice actors can divine the difference between “normal” responses and feigning or callousness. It notes how individuals with mental illnesses, neurodevelopmental disabilities, and intellectual disability, as well as individuals from cultural and racial minority groups, are particularly at risk for being mis-judged when their behavior does not conform with what members of dominant groups expect. It argues that these pseudo-scientific practices should be presumptively inadmissible in criminal trials and that courts should consider instructing juries not to consider the defendant’s demeanor in court in assessing credibility or determining guilt or innocence. It concludes that the price to pay in allowing juries to consider demeanor is not worth the benefit of the intuitive appeal that demeanor sometimes has.

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INTRODUCTION

Sobbing uncontrollably. Refusing to eat or to celebrate any life events. Flat affect. Emotionless acceptance. What is the right reaction to loss? Or to false accusation? The typical answer to the former question is something along the lines of just the right amount of grief, sadness, distress, and anger. Too little grief, and the person is cold, callous, unattached, and maybe even unable to form attachment. Too much grief, and the person is calculating, theatrical, dishonest. Similarly, the typical answer to the latter question is just the right amount of righteous indignation. Too little indignation, and the person is implicitly confessing. Too much righteousness, and the person is narcissistic, faking, manipulative. As Camille B. Wortman and Roxane Cohen Silver explain: “[T]he assumption that distress is inevitable . . . has resulted in its absence being treated as pathological, even if there is no objective reason to assume this to be true.”¹ These tropes about normal reactions to grief and suspicion form a surprising amount of the cult mythology of criminal investigation: the idea that police and prosecutors can assess the reactions of ordinary people to extraordinary events (the suspicious death of a loved one or being accused of a horrible crime).

The behavior of suspects during criminal investigations or defendants during criminal trials are significant forms of informal evidence that can influence the course of those investigations or juror deliberations at trial. This Article has both descriptive and normative components. The descriptive claims are (1) that untested and intuitive behavioral analyses play a significant role in the police and jury determinations of the guilt or innocence of suspects; (2) that real behavioral and psychological science evidence suggest that these intuitions are not simply unvalidated but invalid; and (3) that the reliance on these assessments of demeanor and emotional responses to trauma has played a role in wrongful convictions.² The normative argument that flows, therefore, is that these pseudo-scientific practices should be presumptively inadmissible in criminal trials.

Part I introduces the pseudo-scientific mythology surrounding “normal” reactions to grief and trauma and their impact on the assessment of the guilt or innocence of criminal defendants. It argues that intuitions about the significance of suspect demeanor are based on three assumptions: there is a “normal” way to react in the wake of a personal tragedy; individuals who behave differently than

1. Camille B. Wortman & Roxane Cohen Silver, *The Myths of Coping with Loss*, 57 J. CONSULTING & CLINICAL PSYCH. 349, 355 (1989).

2. Of course, this pseudo-science of analyzing behavioral “cues” for their normalcy or deviancy is not limited to investigations in which it plays a central role in assessing a suspect’s guilt. This Article focuses specifically on the use of assessments of demeanor in criminal investigation and adjudication because of emerging evidence from cases in which defendants have been exonerated, and the role that demeanor plays in targeting and convicting the innocent.

that baseline are guilty; and criminal-justice actors can divine the difference between “normal” responses and feigning or callousness.

Part II traces the decision points through which assessments of suspect reactions and demeanor impact criminal investigations and prosecutions. Section A explains how police use suspect behavior during investigation and interrogation to determine guilt and drive enhanced interrogation practices. Section B discusses the use of lay-witness testimony describing observations of defendants’ demeanors prior to trial as explicit or implicit evidence of guilt. Section C discusses prosecutors’ use of defendants’ “abnormal” behavior to argue for their guilt in closing arguments. Section D explores the use of demeanor by juries to determine the credibility of witnesses and the guilt or innocence of the defendant.

Part III explores three case studies in which a party’s reaction to a serious crime played a significant role in police suspicion and criminal prosecution. It describes the role that suspects’ reaction to tragedy drove the investigation and prosecution of Amanda Knox in Italy, Cameron Willingham in the United States, and Mark Lundy in New Zealand.

Part IV examines the behavioral science evidence surrounding the relationship between external demeanor, internal emotions, and knowledge and the effect of jurors’ perceptions of defendants’ demeanor in their decision making. Section A documents the lack of validity of the proposition that human decisionmakers can make meaningful decisions (deception, guilty knowledge, guilty conduct) based on observations and assessments of demeanor. Section B documents how jurors nonetheless believe in their ability to determine credibility and guilt based on assessments of demeanor.

Part V documents the role that “suspicious” behavior by a suspect has played in securing wrongful convictions. It describes several exonerations in Canada and the United States who were charged and prosecuted at least in part because of their “abnormal” behavior in the wake of serious crimes.

Part VI focuses on vulnerable populations and the extra risk that their members face of being wrongfully suspected and convicted based on perceived “abnormal” reactions to traumatic events. It notes how individuals with certain mental illnesses, neurodevelopmental disabilities, and intellectual disability, as well as individuals from cultural and racial minority groups, are particularly at risk for being mis-judged when their behavior does not conform with what members of dominant groups expect.

Part VII proposes two significant changes to the law of evidence to address the unreliable use of perceptions of suspect behavior in the criminal trial process. Section A proposes that evidence of a defendant’s demeanor should be presumptively inadmissible unless it has some special relevancy to the proceedings. Section B proposes that courts should consider instructing juries not to consider their own observations of the defendant’s demeanor in court in assessing the defendant’s credibility or determining guilt or innocence.

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This Article concludes that the price to pay in allowing juries to consider a defendant’s reactions and demeanor is not worth the benefit of the intuitive appeal that demeanor sometimes has, particularly in cases where there is substantial other evidence of guilt.

I. JUNK BEHAVIORAL SCIENCE: THE VOODOO MYTHOLOGY OF “NORMAL”
REACTIONS TO GRIEF AND TRAUMA AND THE DAMNING PERCEPTION OF
“SUSPECT” BEHAVIORS

Jurors process a range of information, not technically “evidence,” during deliberations, including the demeanor of the defendant, and infer guilt from their assessments of how that demeanor “matches” the archetypal demeanor of an innocent accused.³ On the one hand, most people agree that the only normal response to grief is significant, visible distress.⁴ On the other hand, a common perception that people harbor is that the demonstration of “too much” distress or grief is theatrical or contrived.⁵ They often search for “clues” that emotion is insincere—for example, if the suspect is “crying” without tears.⁶

Conversely, there is also a common perception that a suspect might be guilty if they are insufficiently distraught or grief stricken—for example, if a close family member of a murder victim appears to be celebrating or engaging in new romantic entanglements inappropriately “soon.” The failure to show adequate emotion after tragedy can even lead to armchair diagnoses of psychopathy. For example, in describing the effect that Louise Woodward’s demeanor had on jurors at her murder trial, one commentator noted:

Where was the emotion, some Americans want to know, where were the signs of inner turmoil and the anguish, the tortured features, the tears,

3. See Blake M. McKimmie, Jillian M. Hays & David Tait, *Just Spaces: Does Courtroom Design Affect How the Defendant Is Perceived*, 23 PSYCHIATRY, PSYCH. & L. 885, 885 (2016).

4. See Dawn T. Robinson, Lynn Smith-Lovin & Olga Tsoudis, *Heinous Crime or Unfortunate Accident? The Effects of Remorse on Responses to Mock Criminal Confessions*, 73 SOC. FORCES 175, 176 (1994) (documenting how displays of remorse have an indirect effect on the severity of sentence recommendations); Wortman & Silver, *supra* note 1, at 349 (documenting the societal expectations that depression is inevitable following loss, distress is necessary, and failing to experience it is indicative of pathology).

5. See, e.g., Ewan Palmer, *Kyle Rittenhouse Accused of Fake Crying by Critics: “Crocodile Tears”*, NEWSWEEK (Nov. 11, 2021, 6:30 AM), <https://www.newsweek.com/kyle-rittenhouse-trial-crying-crocodile-tears-1648297>.

6. See Inge van Roeyen, Madelon M. E. Reim, Marko Tonic & J.J. M. Vingerhoets, *The Damaging Effects of Perceived Crocodile Tears for a Crier’s Image*, 11 FRONTIERS PSYCH. 1, 2 (2020) (finding that qualification of tears as crocodile tears strongly and negatively affects the crier’s image).

the sobs of an unjustly accused woman or, depending on the viewer's opinion, the wrenching of deep regret for a horrible crime? No, what they got was a composed young woman who spoke in carefully parsed and always complete sentences. To some, she seemed calculated, cold.⁷

Much of the commentary after the *Woodward* trial focused on cross-cultural misunderstanding, suggesting that American jurors were perhaps unable to understand the British "stiff upper lip."⁸ This commentary, however, failed to challenge the underlying assumption that jurors from the same culture as a defendant were able to accurately equate demeanor with guilt or innocence.

The police are not immune to these sinister interpretations of suspect behavior. Sleeping between episodes of questioning in the interrogation, engaging in eye contact that is too fixed, or, conversely, evading eye contact are examples of behaviors that tend to trigger police suspicion.⁹ There is a deeply entrenched cult mythology in law-enforcement circles, primarily police and prosecutors, that a suspect's state of mind can be reliably inferred from externally observable demeanor.¹⁰ As Ian Leslie explains: "Professional interrogators remain stubbornly convinced of their ability to tell if a person is being truthful simply by observing them."¹¹

The problem is that these beliefs in the ability of police or jurors to assess the demeanor of suspects and defendants for its probative value regarding guilt or innocence is a form of pseudo-science masquerading as human intuition or "common sense." As psychologist Lisa Barrett explains:

The idea of inferring mental states is so intuitive that we assume . . . that it's part of a universal human nature. But it's not.

* * *

7. Adrian Peracchio, *Yo! The Mother Tongue Is Spoken Differently Here*, NEWSWEEK (Nov. 13, 1997).

8. See, e.g., PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 135 (3d ed. 2022) ("Americans weaned on Oprah and Jerry Springer stereotypically expect truthful witnesses to be emotional and demonstrative, whereas the British preference is supposedly for self-discipline, reserve, and the stiff upper lip.").

9. See David Matsumoto, Lisa G. Skinner & Hyisung C. Hwang, *Reading People: Behavioral Anomalies and Investigative Interviewing*, FBI L. ENF'T BULL. (Mar. 5, 2014), <https://leb.fbi.gov/articles/featured-articles/reading-people-behavioral-anomalies-and-investigative-interviewing>.

10. See *id.*

11. Ian Leslie, *Amanda Knox: What's in a Face?*, THE GUARDIAN (Oct. 7, 2011, 7:09 PM), <https://www.theguardian.com/world/2011/oct/08/amanda-knox-facial-expressions>.

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Today’s science of mind and brain has much to offer the legal system. By educating judges, jurors, attorneys, witnesses, police officers and other legal actors about common-sense assumptions that are scientifically unjustified, we could take steps toward a legal system that is fairer.

* * *

[L]egal actors . . . are guessing a defendant’s emotional state, not objectively reading emotions in faces, bodies and voices¹²

In this way, assessments of demeanor to determine suspicion or guilt operate almost as a form of forensic science, like the pattern matching disciplines of fingerprinting or fired-bullet comparison. The person assessing demeanor is comparing a “known” behavioral exemplar or template (the “normal,” expected reaction of an individual to grief) to the suspect’s behavioral template and making a subjective judgment about whether the two templates match or mismatch (except that, unlike the ordinary situation with forensic science, in this case, the suspect wants to “match” the exemplar).

This subject comparison of “normal” reactions against a suspect’s actual reaction has the same problem as many of the pattern-matching forensic sciences, as well—most importantly, perhaps, the problem with contextually biasing information. British neuroscientist Itiel Dror has conducted a series of studies on the effects of contextually biasing information on the interpretation of fingerprint comparisons by forensic examiners.¹³ In several studies, performed in 2006, his research team presented fingerprint examiners with fingerprints for comparison.¹⁴ Unbeknownst to the examiners, the researchers had taken the prints from real forensic cases on which the examiners had previously worked.¹⁵ Each examiner was given prints to compare from eight of their past case files, four in which the examiner had previously found an individualization (a match) and four in which the examiner had previously found an exclusion (that the prints

12. Lisa Feldman Barrett, *The Law’s Emotion Problem*, N.Y. TIMES (Mar. 12, 2017), <https://www.nytimes.com/2017/03/11/opinion/sunday/the-laws-emotion-problem.html>.

13. See Itiel Dror, *A Hierarchy of Expert Performance*, 5 J. APPLIED RSCH. MEMORY & COGNITION 121, 122 (2016).

14. See generally Itiel Dror & David Charlton, *Why Experts Make Errors*, 56 J. FORENSIC IDENTIFICATION 600 (2006) (discussing the “psychological and cognitive vulnerabilities” of the fingerprint examiners’ findings); Itiel Dror, David Charlton & Ailsa E Péron, *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications*, 156 FORENSIC SCI. INT’L 74 (2006) (discussing experts’ erroneous identifications of suspects through examining fingerprints).

15. See Dror & Charlton, *supra* note 14, at 607.

did not match).¹⁶ The examiners were divided into two groups.¹⁷ Researchers gave the control group of examiners four sets of prints to re-examine with no additional information.¹⁸ The examiners in the experimental group, on the other hand, were given the eight sets of prints to re-examine along with additional contextual information.¹⁹ For the four sets of prints for which the examiners in the experimental group had previously found matches, researchers gave the examiners contextual information that strongly suggested that the prints should not match (e.g., that the known print belonged to an individual who was in custody at the time that the crime occurred or the prints were from someone who had been subsequently exonerated by DNA).²⁰ For the four sets of prints for which the examiners had previously found exclusions, the researchers gave the examiners contextual information that strongly suggested that the prints should match (e.g., that the suspect whose prints were being compared had already confessed to the crime).²¹ Faced with the manipulated contextual information, which was contrary to their previous findings, the examiners in the experimental group reached the opposite decision as when they had examined the prints the first time between 20–80% of the time.²²

The examiners in the control group exhibited a classic cognitive bias known as administrator or expectancy bias. Put simply: test administrators are much more likely to find a particular result if they go into a test expecting to do so. Police officers, judges, and jurors who make judgments around a suspect's demeanor are also exposed to contextually biasing information, which can cloud their judgment and preset their expectations around how the suspect should act and whether their reaction was “normal” or “suspicious.”

These intuitions about the significance of demeanor are also a form of inductive reasoning—an assessment that suspects who behave “abnormally” are more likely to be guilty than those who do not. They are intuitions based on three untested (and likely false) assumptions, like the assumptions of other forensic-science disciplines subject to a great deal of scholarly criticism:²³ (1) that there is a “normal” way to react in the wake of a personal tragedy; (2) that individuals

16. *See id.* at 607–09.

17. *See id.* at 607–08.

18. *See id.* at 608.

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.* at 610–11.

23. *See* Carrie Leonetti, *The History of Forensic-Science Evidence in Criminal Trials and the Role of Early “Successes” in Establishing Its Putative Reliability*, 54 ST. MARY’S L.J. (forthcoming 2023) [hereinafter Leonetti I]; Carrie Leonetti, *The Innocence Checklist*, 58 AM. CRIM. L. REV. 97, 100–02 (2021) [hereinafter Leonetti II]; Carrie Leonetti, *Cognitive Science v. Forensic “Science”*, OR. DEF. ATT’Y, Nov./Dec. 2017, at 18 [hereinafter Leonetti III].

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who behave differently than that baseline are “abnormal,” in this context because they are guilty; and (3) that police, prosecutors, witnesses, and jurors can divine the difference between “normal” trauma, grief, distress and “abnormal” feigning or callousness.

The problem with these inductive intuitions is that there simply is no reliable statistical base rate from which we can construct correlations between the demeanor of suspects and the likelihood of their guilt. This is an inherently subjective decision for which the development of objective standards to guide decision making is impossible. Even if there were a template for normal versus abnormal grief, how would an assessor define, measure, or distinguish the two?

II. HOW ASSESSMENT OF REACTIONS AND DEemeanor ENTER THE CRIMINAL- JUSTICE SYSTEM

There are two primary points during criminal investigations and prosecutions at which “abnormal” demeanor damns suspects. The first is early in the police investigation and during interrogation, when police decide whether a person of interest is the culprit. The second is at trial, when the prosecution introduces, either explicitly or inadvertently, evidence about the defendant’s post-crime demeanor as circumstantial evidence of guilt. In both phases of a criminal case (investigation and adjudication), “instantaneous assessments of trustworthiness may play a major role in decisions of honesty and the assimilation of subsequent evidence about a subject.”²⁴ Because the criminal trial evolves out of the earlier police investigation, misperceptions of suspicion or guilt during the initial stages of investigation can compound through the process of perseverance bias when police and prosecutors filter any new information through the tunnel vision of their pre-existing beliefs about the crime and perpetrator.²⁵

A. Police Interrogation

The first way that demeanor can condemn a suspect is during the police investigation. Police rely on their assessment of whether a suspect is the perpetrator of a crime to determine the direction in which to take further

24. Stephen Porter & Leanne ten Brinke, *The Truth About Lies: What Works in Detecting High-Stakes Deception?*, 15 *LEGAL & CRIMINOLOGICAL PSYCH.* 57, 63 (2010) [hereinafter Porter & ten Brinke I].

25. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 *WIS. L. REV.* 291, 292 (2006) (documenting the role of “tunnel vision” in miscarriages of justice); Wendy P. Heath, *Arresting and Convicting the Innocent: The Potential Role of an “Inappropriate” Emotional Display in the Accused*, 27 *BEHAV. SCI. & L.* 313, 313 (2009) (reviewing evidence showing a defendant’s emotional display influences legal decisions and explaining why one’s emotional display is “of limited diagnostic value”).

investigation. As Amy Bradfield Douglass, Jennifer L. Ray, Lisa Hasel, and Kathryn Donnelly explain: “Because expectations about reactions to trauma are so strongly held, individuals who fail to display the expected visible distress risk increased scrutiny from police.”²⁶ They note that “inappropriate assessments of emotion are possible ‘instigators’ of misguided prosecutions.”²⁷

Police also rely specifically on suspect behavior during police interviews to determine whether to engage in more aggressive interrogation aimed at extracting a confession.²⁸ Making an initial assessment about a suspect’s guilt is an integral part of the classic Reid method of interrogation still employed by many police agencies in the United States.²⁹ As Gary David and James Trainum note: “Interrogation can then become akin to a negotiation over who knows what, and whose version of events is more believable. Being seen as believable is an interactional accomplishment. Part of this effort lies in how people come off as believable through the interaction.”³⁰

The Reid method of interrogation was described (and criticized) in *Miranda v. Arizona*³¹ for its potential to coerce false confessions out of suspects.³² American police manuals, in particular, tend to focus on nonverbal cues to detect deceit.³³ Investigators who employ the Reid method initially make a determination of the suspect’s “likely” guilt prior to the more coercive parts of the interrogation, using a “Behavior Symptom Analysis” to screen out the innocent.³⁴ They base this screening determination on the “suspect’s body

26. Amy Bradfield Douglass, Jennifer L. Ray, Lisa Hasel & Kathryn Donnelly, *Does It Matter How You Deny It?: The Role of Demeanour in Evaluations of Criminal Suspects*, 21 LEGAL & CRIMINOLOGICAL PSYCH. 141, 142 (2016).

27. *Id.* at 143.

28. See Findley & Scott, *supra* note 25, at 293.

29. See Carrie Leonetti, *A New Solution to an Old Problem: Limited Use Immunity as a Better Alternative to Miranda’s Procedural Safeguards*, 10 FED. CTS. L. REV. 127, 132 (2018) [hereinafter Leonetti IV].

30. Gary C. David & James Trainum, *Disbelief Repeats as Deception Tagging: Conversational Strategies for Labeling Perceived Deception in Interrogation*, in THE PALGRAVE HANDBOOK OF DECEPTIVE COMMUNICATION 715, 715 (Tony Docan-Morgan ed., 2019).

31. 384 U.S. 436 (1966).

32. See *id.* at 457 (“It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner.”).

33. See Aldert Vrij & Pär Anders Granhag, *Interviewing to Detect Deception*, in OFFENDERS’ MEMORIES OF VIOLENT CRIMES 279, 279 (Sven A. Christianson ed., 2007).

34. See FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATIONS AND CONFESSIONS 6 (5th ed. 2011); see generally Frank S. Horvath, J. Pete Blair, Joseph P. Buckley & John E. Reid, *The Behavioral Analysis Interview: Clarifying the Practice, Theory and Understanding of Its Use and Effectiveness*, 10 INT’L J. POLICE SCI. & MGMT. 100, 100–01 (2008); Frank S. Horvath, *Differentiation of Truthful and*

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language and response to verbal cues,” including “micro-expressions.”³⁵ For example, according to proponents of the Reid method, the following are signs of innocence: confidence, spontaneity, giving quick answers, and facing forward.³⁶ Conversely, long response latency, repetition of details, infrequent blinking, fidgeting, gaze aversion, and excessive use of hand gestures are thought to be a clue that a suspect is lying.³⁷ This belief in the power of non-verbal cues is not limited to the United States, where the Reid method is still the predominant form of interrogation. A European study demonstrated that 75% of police officers in the Netherlands and the United Kingdom (which have outlawed the use of the Reid method for interrogation) believed that suspects looked away and made deceptive gaze gestures when they were lying.³⁸

The reliability of these purported behavioral cues for deception has been accepted in law-enforcement circles for decades with no critical examination of its basis.³⁹ For example, many police interrogators are trained in “Neuro-Linguistic Programming” (“NLP”), a theory of lie detection that claims that certain eye movements are reliable indicators of lying.⁴⁰ Proponents of NLP claim that people look up to their right when they lie and up to their left when they tell the truth.⁴¹ Despite widespread belief in this claim, NLP has never been scientifically validated.⁴² On the contrary, controlled experiments have documented NLP’s lack of validity.⁴³

Deceptive Criminal Suspects in Behavioral Analysis Interviews, 39 J. FORENSIC SCI. 793, 793 (1994).

35. Alan Hirsch, *Going to the Source: The “New” Reid Method and False Confessions*, 11 OHIO STATE J. CRIM. L. 803, 807 (2014); Porter & ten Brinke I, *supra* note 24, at 60.

36. See INBAU ET AL., *supra* note 34, at 111–36; Porter & ten Brinke I, *supra* note 24, at 66.

37. Porter & ten Brinke I, *supra* note 24, at 59, 62, 64, 66.

38. See Aldert Vrij & Gün R. Semin, *Lie Experts’ Beliefs About Nonverbal Indicators of Deception*, 20 J. NONVERBAL BEHAV. 65, 71 (1996).

39. See Stephen Porter & Leanne ten Brinke, *Reading Between the Lies: Identifying Concealed and Falsified Emotions in Universal Facial Expressions*, 19 PSYCH. SCI. 508, 512 (2008) [hereinafter Porter & ten Brinke II].

40. See Richard Wiseman, Caroline Watt, Leanne ten Brinke, Stephen Porter, Sara-Louise Couper & Calum Rankin, *The Eyes Don’t Have It: Lie Detection and Neuro-Linguistic Programming*, 7 PLOS ONE, July 2012, at 4.

41. See *id.*

42. See *id.* at 5 (failing to validate that NLP eye movements are reliable indicators of lying).

43. See *id.* at 4–5 (finding that there were no significant differences between the eye movements of liars and truth tellers in either a controlled lie-detection experiment or the analysis of high-profile press conferences).

B. Testimony of Police or Lay Witnesses

Another way that a suspect's demeanor can be used against them is during the criminal trial. Fact witnesses, both police and bystanders, are often asked to describe a defendant's behavior, particularly when it evidences a counter-intuitive reaction to grief or being accused of a serious crime.⁴⁴ The jury is then encouraged, either explicitly or implicitly, to conclude that the defendant's behavior is inconsistent with innocence.⁴⁵

This practice is particularly pervasive and insidious because the rules of evidence are far more lenient in their foundational requirements for lay opinion testimony relating to "common-sense" intuitions, personal observations, or "logical" inferences drawn from them than they are for expert scientific evidence.⁴⁶ The opinions of lay witnesses must only be "rational" and sufficiently related to their firsthand observations,⁴⁷ while expert witnesses must demonstrate that their opinions are based on "sufficient" data and "reliable" methods.⁴⁸ So, a lay witness can testify that a person appeared to be "drunk" based on observations of that individual's slurred speech or staggering gait, but an expert witness can only testify that an individual was intoxicated based on a measurement of blood-alcohol concentration. The reason for the higher threshold for expert testimony stems from concerns about the outsized weight that juries tend to give expert opinions.⁴⁹ Perversely, however, in this context, this means that lay witnesses can render the opinion, during their testimony, that the defendant acted suspiciously, evasive, too theatrical, or seemed not to care about a victim's death, because such observations are rational based on their first-hand observations of the defendant's demeanor and behavior, even though an expert psychologist would not be allowed to opine that a particular subject was not telling the truth or reacted more consistently with guilt than with innocence on the same basis, because the expert witness could not establish that the process by which they reached their conclusions was reliable. This creates a worst-of-both-

44. See Brett Murphy, *They Called 911 for Help. Police and Prosecutors Used a New Junk Science to Decide They Were Liars*, PROPUBLICA (Dec. 28, 2022, 5:00 AM), <https://www.propublica.org/article/911-call-analysis-fbi-police-courts>.

45. See *id.*

46. Compare FED. R. EVID. 701 (permitting lay witnesses to testify in the form of an opinion when the opinion is "rationally based on the witness's perception"), with FED. R. EVID. 702 (permitting expert witnesses to testify "in the form of an opinion or otherwise" only if "the testimony is based on sufficient facts or data," "the testimony is the product of reliable principles and methods," and "the expert has reliably applied the principles and methods to the facts of the case").

47. See FED. R. EVID. 701.

48. See FED. R. EVID. 702.

49. See Valerie P. Hans & Michael J. Saks, *Improving Judge and Jury Evaluation of Scientific Evidence*, 147 DAEDALUS J. AM. ACAD. ARTS & SCIS. 164, 164 (2018).

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worlds scenario, under which observations about a defendant’s demeanor and behavior, particularly when offered by an investigating police officer, are treated as scientific but screened, evaluated, and admitted in evidence through the lower evidential threshold for untested, common-sense, obvious, and intuitive personal observation.

C. Prosecutors’ Summations

In some cases, prosecutors do not explicitly comment on the defendant’s demeanor or behavior in closing argument, instead simply allowing the unspoken connection between the defendant’s reaction to an emotionally charged situation (flat affect or theatrical response) and the inference to be drawn from it (did not care or was faking it) to be made by the jury unconsciously or implicitly.⁵⁰ In other cases, the prosecutor specifically argues to the jurors that the defendant’s behavior is inconsistent with innocence.⁵¹ For example, in *Bain v. R.*,⁵² the Crown prosecutor, in his closing address to the jury, described Bain’s behavior as “unusual,” “disturbed,” “obsessional,” and “bizarre” to support the Crown’s theory that Bain must have murdered the five family members that he claimed that he had returned home to find dead.⁵³

D. Jury Determinations

The criminal-justice system relies on a longstanding trust that juries can assess the credibility of parties and witnesses based on observation of their demeanor. The orality principle behind the hearsay rule⁵⁴ and the Confrontation Clause⁵⁵ is based in part on the premise that the jury’s ability to observe a live witness is crucial to determining credibility.⁵⁶ Courts regularly encourage juries

50. See Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 594–95 (2008).

51. See Candice D. Tobin, *Prosecutorial Misconduct During Closing Argument: Florida Case Law*, 22 VILL. L. REV. 485, 497–98; see, e.g., *United States v. Mendoza*, 522 F.3d 482, 490 (5th Cir. 2002); *United States v. Schuler*, 813 F.2d 978, 982–83 (9th Cir. 1987) (holding that the prosecutor’s references to Schuler’s demeanor at the counsel table was improper).

52. (2006) 23 CRNZ 71 (PC) (N.Z.).

53. See *id.* at [76].

54. FED. R. EVID. 802.

55. U.S. CONST. amend. VI.

56. See *Mattox v. United States*, 156 U.S. 237, 242–43 (1895) (“The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an

to make intuitive judgments about witnesses based on observations of them.⁵⁷ As Olin Wellburn explains: “the premise is that ordinary people untrained in detecting deception generally will make significantly more accurate judgments of credibility if they have the opportunity to view the demeanor of a witness than if they do not.”⁵⁸ For example, the California Criminal Jury Instructions encourage jurors to consider witnesses’ behavior while testifying, the manner in which they testify, and their attitude about the case in which they testify in determining their credibility.⁵⁹ Most state evidence codes contain similar language directing jurors to consider non-verbal behavior when evaluating credibility.⁶⁰ Similarly, the Canadian Supreme Court has repeatedly found that jurors’ common sense allowed them to determine whether a witness was being deceptive, as long as they were able to see the witness’s face and observe the witness’s demeanor.⁶¹

For example, the perception that a defendant’s affect is inappropriately flat can cause jurors to infer that the defendant is guilty. Douglass, Ray, Hasel, and Donnelly studied the effect that flat demeanor had on assessments of guilt.⁶² Subjects were instructed that both flat demeanor and emotional demeanor were

opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.”).

57. See *R. v. Lifchus*, [1997] 3 S.C.R. 320, para. 29 (Can.) (explaining that “there may be something about a person’s demeanor in the witness box which will lead a juror to conclude that the witness is not credible. It may be that the juror is unable to point to the precise aspect of the witness’s demeanor which was found to be suspicious, and as a result cannot articulate either to himself or others exactly why the witness should not be believed. A juror should not be made to feel that the overall, perhaps intangible, effect of a witness’s demeanor cannot be taken into consideration in the assessment of credibility”); *R. v. R.D.S.*, [1997] 3 S.C.R. 484, para. 128 (Can.) (noting that credibility determinations depend on “intangibles” like demeanor).

58. Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991).

59. JUD. COUNCIL OF CAL. JURY INSTR.—CRIM. 105, 226 (2022).

60. See, e.g., MASS. MODEL JURY INSTR. FOR USE IN THE DIST. CRT.—CRIM 2.260 (2019) (encouraging jurors to consider not just “what a witness says” but also “how he says it” and the “witness’s appearance and demeanor on the witness stand”); PA. SUGGESTED STAND. JURY INSTR.—CRIM. § 4.17 (3d. ed. 2019) (instructing jurors to consider how witnesses “look, act, and speak” in assessing their credibility); see also IND. PATTERN JURY INSTR.—CRIM. 1.1700 (2021) (instructing jurors to rely on their “common sense” and “life experiences” when evaluating witness credibility).

61. See, e.g., *R. v. Marquard*, [1993] 4 S.C.R. 223, para. 20, 49 (Can.); *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (Can.). In contrast, courts in New Zealand routinely instruct jurors *not* to consider demeanor in assessing witness credibility because it is unreliable and inequitable. See generally Evidence Act 2006 § 122 (N.Z.).

62. See Douglass et al, *supra* note 26.

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normal reactions to trauma.⁶³ They were then shown a videotaped interrogation in which the suspect showed either a flat affect or an emotional demeanor.⁶⁴ Test subjects rated the likelihood of guilt much higher for the suspects with a flat demeanor than for those with an emotional demeanor.⁶⁵ The authors concluded that a flat demeanor displayed during interrogation biases judgments against criminal defendants.⁶⁶

Stephen Porter and Leanne ten Brinke have documented the series of psychological processes that can lead to mistaken evaluations of the honesty of witnesses and parties, which can then lead to wrongful convictions.⁶⁷ They explain how factfinders “reading” a defendant’s face and emotional expressions initiates a series of “dangerous” decisions about the defendant’s general “trustworthiness” and honesty, which then color factfinders’ other assessments of the defendant’s credibility and inferences about the defendant’s conduct.⁶⁸ They document how follow-on assessments become simultaneously increasingly irrational and self-reinforcing.⁶⁹ Mock juror studies show how, even when confronted with significant exonerating evidence of a defendant’s innocence (e.g., DNA evidence implicating an alternate suspect), factfinders only reassess their initial assessment of the defendant’s guilt, based on their perception that the defendant has an untrustworthy face, less than half of the time.⁷⁰

A study by Jonathan M. Golding, Heather M. Fryman, Dorothy F. Marsil, and John A. Yozwiak measured the impact that emotional demeanor had on verdicts, finding that child witnesses who were either completely calm or hysterical were less likely to be believed than children who were moderately emotional during their testimony, noting that the sweet spot was a “teary” demeanor.⁷¹

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See* Stephen Porter & Leanne ten Brinke, *Dangerous Decisions: A Theoretical Framework for Understanding How Judges Assess Credibility in the Courtroom*, 14 *LEGAL & CRIMINOLOGICAL PSYCH.* 119, 125–26 (2009) [hereinafter Porter & ten Brinke III].

68. *See generally id.*; Moshe Bar, Maital Neta & Heather Linz, *Very First Impressions*, 6 *EMOTION* 269 (2006); Janine Willis & Alexander Todorov, *First Impressions: Making Up Your Mind After a 100 ms Exposure to a Face*, 17 *PSYCH. SCI.* 592 (2006) (noting how first impressions of people’s personalities are often formed by using the visual appearance of their faces).

69. *See* Porter and ten Brinke I, *supra* note 24, at 62.

70. *See id.* at 63.

71. *See* Jonathan M. Golding, Heather M. Fryman, Dorothy F. Marsil & John A. Yozwiak, *Big Girls Don’t Cry: The Effect of Child Witness Demeanor on Juror Decisions in a Child Sexual Abuse Trial*, 27 *CHILD ABUSE & NEGLECT* 1311, 1316–17 (2003).

III. CASE STUDIES

The following case studies intentionally focus on defendants whose guilt or innocence is contested. Two remain convicted. None have been conclusively exonerated. All are controversial.

A. *Italy: Amanda Knox*

In 2007, Knox was a twenty-year old university exchange student when her British roommate, Meredith Kercher, was raped and murdered in their shared apartment in picturesque Perugia, Italy.⁷² Knox quickly became a suspect in the murder “when she gave a series of inconsistent statements to police about her whereabouts at the time of the crime, during several successive days of interrogation.”⁷³ The police had no physical evidence linking Knox to the crime, but they concluded that she was involved based on her “psychological and behavioural reaction during the investigation,” which they deemed to be too calm, cold, unemotional, and even sexy to be consistent with being wrongfully accused of murder.⁷⁴ Their suspicion was piqued when they observed her embracing her partner and putting on her galoshes at the crime scene (her apartment) shortly after the murder in what they felt was an inappropriately provocative manner.⁷⁵

While the Knox case remains controversial, with parties on both sides of the Atlantic arguing over whether Knox was initially wrongfully convicted or later wrongfully released, it is a good example of pseudoscientific assumptions around “normal” and “abnormal” reactions to a gruesome, serious crime. One of the few facts in the *Knox* case on which all parties seem to agree is that, during the crime-scene investigation of the flat that she shared with Kercher and her interrogation in the immediate aftermath, Knox’s partner was petting and stroking her.⁷⁶ According to the Italian authorities, the petting was inappropriately sexual for the circumstances.⁷⁷ According to Knox, she was distraught, and he was attempting to soothe, comfort, and support her.⁷⁸ In reaching their conclusion

72. Leonetti II, *supra* note 23, at 128.

73. *Id.*

74. Leslie, *supra* note 11.

75. *See id.*

76. *See The Kiss That Caused ‘Bad Vibes’: ‘Foxy Knoxy’ Reveals How Clinch Outside Kercher Murder Scene Led to Perception of Her as Sinister Seductress*, DAILY MAIL (May 17, 2013), <https://www.dailymail.co.uk/news/article-2326472/The-kiss-caused-bad-vibes-Amanda-Knox-reveals-kiss-outside-Kercher-murder-scene-boyfriend-led-perception-sinister-seductress.html>.

77. *See id.*

78. *See id.*

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that Knox’s reaction to Kercher’s murder was evidence that she was the heartless, over-sexualized killer, the Italian police were clearly operating on three unarticulated assumptions: (1) that there is an appropriate and an inappropriate way to physically comfort a loved one who has undergone an enormously stressful experience; (2) that anyone who behaves outside of the parameters of the “normal” way is uncaring or even aroused by the occurrence; and (3) that the police were qualified to differentiate the two in a meaningful and reliable way.

B. *United States: Cameron Todd Willingham*

Cameron Todd Willingham is believed by many to be the first innocent person executed in the United States.⁷⁹ The State of Texas executed him in 2004 for murdering his three daughters by setting fire to their house.⁸⁰ While Willingham was convicted primarily based on expert arson evidence based on pattern analyses that have subsequently been debunked and abandoned by most of the fire-science community, he first became a suspect because of his perceived demeanor shortly after the fatal fire.⁸¹ The fire burn patterns convinced investigators and later jurors that the fatal fire had been an act of arson, but Willingham’s demeanor convinced them that he was the arsonist. During the police investigation of the suspected arson, one neighbor told investigators that Willingham’s grief during the fire seemed simultaneously both so “hysterical” that it seemed to be theatrical and feigned and also not sufficiently concerned enough.⁸² Another neighbor reported that, during the fire, Willingham “did not appear to be excited or concerned.”⁸³ Even the police chaplain, who had initially responded to the scene of the fire to provide Willingham pastoral support, later reported both that Willingham had seemed simultaneously both too emotional for his grief to have been genuine and also too “in complete control” to have truly been a grieving father.⁸⁴ The assistant district attorney who prosecuted Willingham for arson and capital murder characterized him as “unrepentant” and “utterly sociopathic.”⁸⁵ Willingham characterized himself as “stoic.”⁸⁶

79. See David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, THE NEW YORKER (Sept. 7, 2009), <https://www.newyorker.com/magazine/2009/09/07/trial-by-fire>.

80. See *id.*

81. See *id.*

82. See *id.* (describing Willingham’s demeanor at one point as seeming “as if he were putting on a show” and, at another point, claiming that he seemed more concerned about getting his car a safe distance from the fire than the whereabouts of his children).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

C. New Zealand: Mark Lundy

In 2002, and again in 2015 (on retrial), Mark Lundy was convicted of brutally murdering his partner, Christine, and their daughter, Amber, with a hatchet.⁸⁷ One of the informal pieces of evidence against Lundy was his behavior in the wake of the murders, which took several forms during the trial. First, at Christine and Amber's funeral a few days after the murders, Lundy displayed what could either be viewed as "a display of uncontrolled grief" or a theatrical but insincere facsimile of mourning.⁸⁸ Lundy's dramatic "outpouring of grief" and collapse at the funeral was covered widely on New Zealand media and was the subject of extensive "comment and public debate focusing closely on Mr. Lundy's credibility" and often suggesting that "he was acting."⁸⁹ Members of the jury were likely "exposed to repeated showings of the footage [of] Lundy at the funeral" during the trial.⁹⁰

Second, a video of Lundy's second police interview was played for the jury (and replayed at jurors' request during deliberations), during which the interviewing officer confronted Lundy, showing him crime-scene photographs of Christine's and Amber's bodies, and Lundy became "highly emotive" in response.⁹¹ Third, Lundy's defense lawyers and a journalist who observed the trial attested on appeal that they had noticed several jurors staring fixatedly at Lundy in the dock during the replays of the police crime-scene video and Lundy's police interview at the trial in a way that seemed obviously done "to see how Lundy reacted."⁹² There was evidence that suggested the jury might have requested the replay of the video during deliberations as an experiment designed to observe Lundy's demeanor as he watched the replay in court.⁹³

At trial, the High Court refused the defense request to give a tailored instruction to the jury warning the jurors not to place inappropriate weight on Lundy's demeanor in assessing his credibility.⁹⁴ On appeal, the New Zealand Court of Appeal affirmed the trial court's refusal to give the instruction, holding that the court's generic instruction to the jury to base its verdict solely on the evidence in the courtroom fairly covered the jurors' pretrial exposure to the footage of Lundy at the funeral.⁹⁵

87. See *Lundy v. R* [2018] NZCA 410 (HC) at [5] (N.Z.).

88. *Id.* at [110(e)].

89. *Id.* at [289].

90. See *id.* at [301].

91. *Id.* at [291].

92. *Id.* at [291–93].

93. See *id.* at [308].

94. See *id.* at [110(e)], [296].

95. See *id.* at [303–04].

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The court of appeal reasoned that a tailored instruction not to react in a prejudicial way to their observation of Lundy’s demeanor, particularly in his taped pretrial interview or in pretrial publicity relating to his reaction at the funeral, might conflict with and undercut the standard instruction to the jury “to try the case only on the basis of the evidence” and “to exclude from consideration matters of which they may be aware that have taken place outside the courtroom.”⁹⁶ The court concluded that the footage of Lundy’s melodramatic demeanor was “not obviously related to the credibility of witness testimony during the trial.”⁹⁷ Finally, the court noted that it would have been difficult for the court to craft a jury instruction not to place undue weight on Lundy’s demeanor during the recorded interview and that giving such an instruction in the absence of the prosecution making an argument relating to Lundy’s demeanor might have been prejudicial by drawing attention to the issue and giving it “an emphasis it might not otherwise have had.”⁹⁸

IV. THE BEHAVIORAL SCIENCE

A. *The (Lack of) Relationship Between External Demeanor and Internal Emotions and Knowledge*

Intuitive assessments of trustworthiness lack validity. As Aldert Vrij and Jeannine Turgeon succinctly explain: “The idea that nonverbal behavior is revealing about deception is a myth.”⁹⁹

Studies demonstrate that nonverbal cues bear no relationship to a witness’s credibility or accuracy.¹⁰⁰ Instead, when jurors compare their expectations for suspect behavior with the behavior of a particular suspect, they are engaging in a process of stereotyping. As Cynthia Lee explains: “[D]ecision-makers actively construct representations of the trial evidence based on their prior expectations about what constitutes an adequate explanation of the litigated event. . . . [T]hese

96. *Id.* at [299].

97. *Id.* at [301].

98. *Id.* at [311].

99. Aldert Vrij & Jeannine Turgeon, *Evaluating Credibility of Witnesses—Are We Instructing Jurors on Invalid Factors?*, 11 J. TORT L. 231, 237 (2018).

100. See, e.g., Charles F. Bond & Bella M. DePaulo, *Accuracy of Deception Judgements*, 10 PERSONALITY & SOC. PSYCH. REV. 214 (2006) (finding that people are more accurate in judging audible than visible lies and that people appear deceptive when motivated to be believed); Bella M. DePaulo, James J. Lindsay, Brian E. Malone, Laura Muhlenbruck, Kelly Charlton & Harris Cooper, *Cues to Deception*, 129 PSYCH. BULL. 74 (2003) (finding that liars’ behaviors show little to no discernible links to deceit); Siegfried Sporer & Barbara Schwandt, *Moderators of Nonverbal Indicators of Deception: A Meta-Analytic Synthesis*, 13 PSYCH., PUB. POL’Y., & L., no 1, 2007, at 1, (finding that demeanor and other nonverbal behaviors did not correlate with deception).

representations, rather than the original ‘raw’ evidence, form the basis of the juror’s final decision.”¹⁰¹ Jurors interpret the ambiguous behavior of defendant in accordance with their own expectations for normal or appropriate behavior.¹⁰² As a result, when criminal-justice system decision makers infer that a defendant is guilty because their reactions to grief or accusation fail to fit with decision makers’ expectations of “normal” behavior, they commit a fundamental attribution error, relying on a cognitive shortcut to assign to disposition (guilt) effects that are more likely situational (stress, fear).¹⁰³

Contrary to the folk mythology embedded in the criminal-justice system, behavioral science research has consistently demonstrated that police, judges, and jurors cannot determine whether a suspect or witness is telling the truth based on their appearance, demeanor, or other nonverbal indicia.¹⁰⁴ In sum, there is no catalogue of reactions that correlate with genuine grief or guilty knowledge.¹⁰⁵ Clinical research shows that responses to bereavement vary widely and that internal distress is not always apparent externally.¹⁰⁶

Studies demonstrate that the facial expressions and “behavioral cues” that are associated with truth or lies in the folk mythology of the criminal-justice system bear no relationship to detecting deception.¹⁰⁷ On the contrary, many

101. Cynthia Kwei Yung Lee, *Race and Self Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 462 (1996) (alterations in original) (quoting Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 462 (1995)).

102. See Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1068–70 (2004) (explaining how biased expectations promote “behavioral confirmation” and inaccurate interpretations of a target’s behavior).

103. See Douglass et al., *supra* note 26, at 143 (describing the attribution error that arises from the tendency to attribute others’ behaviors “to dispositional factors without fully crediting situational factors”).

104. See Wellborn, *supra* note 58, at 1075–76.

105. See ALDERT VRIJ, DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES 49 (2008).

106. Brian W. Flynn & Ann E. Norwood, *Defining Normal Psychological Reactions to Disaster*, 34 PSYCH. ANNALS 597, 597 (2004) (explaining that reactions to natural disasters range from manageable fear, anger, and distress to significant behavior changes to psychiatric disorders); Wortman & Silver, *supra* note 1, at 349 (explaining that grief takes many forms, and individuals should not assume a one-size fits all approach to grief); Camille B. Wortman & Roxane Cohen Silver, *The Myths of Coping with Loss Revisited*, in HANDBOOK OF BEREAVEMENT RESEARCH: CONSEQUENCES, COPING, AND CARE 406, 406 (Margaret S. Stroebe, Robert O. Hansson, Wolfgang Stroebe & Henk Schut eds., 2001) (finding that mistaken assumptions about the process of coping with loss fail to acknowledge its variability).

107. See Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 6 (2009) (noting that “research has consistently shown that most common-sense behavioral cues are not diagnostic of truth and deception”);

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studies show that observation of demeanor diminishes the accuracy of credibility assessments.¹⁰⁸ For example, individuals with high levels of psychopathic personality traits consistently outperform non-psychopathic individuals in projecting false sincerity. In one study, Porter and ten Brinke demonstrated that psychopaths are twice as likely to be granted parole after a parole interview than their non-psychopathic counterparts.¹⁰⁹

Research also demonstrates that people are poor at discerning truthful from deceptive demeanor, even “experts” like police officers. For example, in one study, Aldert Vrij and Samantha Mann showed police a series of video clips involving apparently bereaved relatives pleading for the safe return of their missing relatives and asked them to identify which were genuine and which were faking.¹¹⁰ The officers’ passive assessments of the truthfulness of the pleas were no more accurate than chance.¹¹¹

These failures to assess deception accurately are compounded by false confidence. Police consistently tend to over-estimate their ability to assess suspects based on behavioral manifestations that they believe correlate with deception.¹¹²

B. *The Effect of Jurors’ Perceptions of Defendant Demeanor on Jury Decision Making*

Nonetheless, jurors base their verdicts on their credibility determinations.¹¹³ Behavioral science evidence demonstrates that jurors also over-estimate their ability to determine the credibility of parties and witnesses based on observing behavioral “cues” that have no correlation to truthfulness.¹¹⁴ As described in more detail above, studies show that jurors focus on emotional demeanor in assessing defendants’ credibility even when it is observed as informal evidence

Porter & ten Brinke I, *supra* note 24, at 65 (“Considered a valuable gauge of credibility in legal settings, facial expressions can play a powerful role in leading to (often mistaken) inferences about honesty.”); Aldert Vrij, Pär Anders Granhag, Samantha Mann & Sharon Leal, *Outsmarting the Liars: Toward a Cognitive Lie Detection Approach*, 20 CURRENT DIRECTIONS PSYCH. SCI. 28, 28 (2011) (demonstrating that lie detection research has shown that people’s ability to detect deception by observing behavior and listening to speech is limited).

108. See Wellborn, *supra* note 58, at 1075.

109. See Stephen Porter & Leanne ten Brinke, *Crime Profiles and Conditional Release Performance of Psychopathic and Non-Psychopathic Sexual Offenders*, 14 LEGAL & CRIMINOLOGICAL PSYCH. 109 (2009) [hereinafter Porter & ten Brinke IV].

110. See Aldert Vrij & Samantha Mann, *Who Killed My Relative? Police Officers’ Ability to Detect Real-Life High-Stake Lies*, 7 PSYCH., CRIME, & L. 119, 119 (2001).

111. See *id.* at 129.

112. See Porter & ten Brinke I, *supra* note 24, at 58.

113. Vrij & Turgeon, *supra* note 99, at 233.

114. See Porter & ten Brinke III, *supra* note 67, at 126.

during the trial.¹¹⁵ They tend to “punish” defendants who display what they deem to be an inappropriate amount of emotion.¹¹⁶ They also tend to view defendants as less credible and more likely to be guilty when they exhibit a flat affect or fewer emotions than what jurors viewed as appropriate.¹¹⁷ These findings are consistent with the broader psychological literature that documents that people generally overestimate the importance of non-verbal behavior in communicating emotion and intention.¹¹⁸

V. “SUSPICIOUS” BEHAVIOR & WRONGFUL CONVICTIONS

The over-estimation of the value of demeanor and behavior in determining guilt or innocence is not simply academic. There have been several exonerations of innocent defendants whose wrongful convictions involved legal actors’ failure to accurately determine who was telling the truth and who was lying.

After DNA testing exonerated Guy Paul Morin of the murder of a nine-year old girl that he was convicted of murdering in 1995 in Ontario, Canada, the Province of Ontario formed a Commission of Inquiry into his wrongful conviction.¹¹⁹ The Commission found many of the common causes of wrongful conviction known to scholars and advocates in other cases and other countries, including misleading scientific evidence, the use of jailhouse informants, and prosecutorial discovery failures.¹²⁰ The Commission also identified a less frequent cause of Morin’s wrongful conviction: the use by police of “consciousness of guilt” and profiling evidence.¹²¹ The Crown’s evidence against Morin consisted of multiple witnesses who testified at trial to their perceptions that Morin’s demeanor around the time of the offense was abnormal, including the investigating officer who testified that Morin seemed insufficiently concerned given that he had been the victim’s close neighbor.¹²² The Inquiry was critical of the Crown’s decision to admit the demeanor evidence, noting that it

115. See Narina Nunez, Victoria Estrada-Reynolds, Kimberly A. Schweitzer & Bryan Mers, *The Impact of Emotions on Juror Judgments and Decision Making*, in *ADVANCES IN PSYCHOLOGY AND THE LAW* 64, 64–67 (Brian H. Bornstein & Monica K. Miller eds., 2016).

116. *Id.* at 66.

117. See Wendy P. Heath, Bruce D. Grannemann & Michelle A. Peacock, *How the Defendant’s Emotion Level Affects Mock Jurors’ Decisions when Presentation Mode and Evidence Strength Are Varied*, 34 *J. APPLIED SOC. PSYCH.* 624, 640 (2004); Wendy P. Heath & Bruce D. Grannemann, *How Video Image Size Interacts with Evidence Strength, Defendant Emotion, and the Defendant-Victim Relationship to Alter Perceptions of the Defendant*, 32 *BEHAV. SCI. & L.* 496, 504 (2014).

118. Vrij & Turgeon, *supra* note 99, at 237.

119. SIR THOMAS THORP, *MISCARRIAGES OF JUSTICE* 22 (2005).

120. See *id.* at 22–23.

121. *Id.*

122. *Id.* at 24.

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was “easy to allege, difficult to disprove; easily tainted by the impressions of fellow officers in a collective meeting and easily coloured by the charge against the accused.”¹²³ The Inquiry characterized the Crown’s introduction of the demeanor evidence as an attempt “to squeeze every drop out of the information available to them to support their case.”¹²⁴

The following cases from the National Registry of Exonerations involve exonerated defendants who either initially became suspects because their post-crime reactions seemed abnormal to police or who had their unusual demeanor used against them at trial.

In 1984, Carolyn Hamm was raped and murdered in her home.¹²⁵ David Vasquez, who was thirty-eight years old, lived with his mother, and was intellectually disabled, became a suspect after two of Hamm’s neighbors phoned police to report that Vasquez was “creepy” and was behaving strangely because he did not show sufficient interest in the murder.¹²⁶ Vasquez confessed to the murder after the police lied and told him that his fingerprints had been found at the crime scene.¹²⁷ His confession mismatched the facts of the crime in several salient ways, and the police had to feed him details for him to confess correctly.¹²⁸ He subsequently entered an *Alford* plea to avoid the death penalty.¹²⁹ He was pardoned five years later, after DNA testing exonerated him and identified the real killer.¹³⁰

In 1988, Christopher Ochoa was wrongfully convicted of the murder of Nancy DePriest.¹³¹ DePriest was raped and murdered in the Pizza Hut where she worked in Austin, Texas.¹³² Ochoa, who worked at a different Pizza Hut, visited

123. *Id.*

124. *Id.*

125. Marvin Zalman & Matthew Larson, *Elephants in the Station House: Serial Crimes, Wrongful Convictions, and Expanding Wrongful Conviction Analysis to Include Police Investigation*, 79 ALB. L. REV. 941, 1020 (2016).

126. Jonah Horwitz & Rob Warden, *David Vasquez*, NAT’L REGISTRY OF EXONERATIONS (May 2, 2022), https://www.law.umich.edu/special/exoneration/Pages/case_detail.aspx?caseid=3705.

127. See Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1095 (2010).

128. See Horwitz & Warden, *supra* note 126.

129. *Id.*

130. ROSA EHRENREICH & JAMIE FELLNER, HUM. RTS. WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION 26 (Malcolm Smart & Cynthia Brown eds., 2001).

131. See Christopher Ochoa, *An Exoneree’s Interrogation Nightmare*, 110 J. CRIM. L. & CRIMINOLOGY 9, 9 n.* (2020).

132. See Ronald Earle & Carl Bryan Case, Jr., *The Prosecutorial Mandate: See That Justice Is Done*, 86 JUDICATURE 69, 70 (2002).

the location where DePriest was murdered about two weeks later.¹³³ A security guard observed Ochoa and his roommate Richard Danziger raising toasts in DePriest's honor.¹³⁴ The guard thought that Ochoa's behavior was suspicious and notified police.¹³⁵ Based in large part on police perception that their behavior was not normal, Ochoa and Danziger became the lead suspects in the investigation of DePriest's murder.¹³⁶ The police ultimately coerced a false confession from Ochoa after twelve hours of interrogation that included graphic threats involving the death penalty.¹³⁷ Ochoa later agreed to plead guilty and implicate a friend as his accomplice to avoid the death penalty.¹³⁸ The only physical evidence purportedly linking Ochoa to the crime was a microscopic "match" between his codefendant and a pubic hair found at the Pizza Hut and a blood-type match to the semen collected in the rape kit.¹³⁹ In 2002, DNA testing and a confession from Achim Marino, the real perpetrator, exonerated Ochoa.¹⁴⁰

In 2007, Cynthia Sommer was wrongfully convicted of murdering her husband.¹⁴¹ The State's theory of the case was that she had poisoned her husband "with arsenic to cash in on his life insurance."¹⁴² After her conviction, subsequent toxicological testing determined that her husband had not died of arsenic poisoning.¹⁴³ Sommer became a suspect in large part because she was perceived as being "insufficiently grief stricken" after her husband's death.¹⁴⁴ At her trial, the State introduced evidence that she was "partying," got breast implants, joined an online dating site, and had sex shortly after her husband's death.¹⁴⁵

133. *Id.* at 70–71.

134. Maurice Possley, *Christopher Ochoa*, NAT'L REGISTRY OF EXONERATIONS (May 5, 2020), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3511>.

135. *See* Welsh S. White, *Confessions in Capital Cases*, 2003 ILL. L. REV. 979, 1009 (2003).

136. *See* Possley, *supra* note 134.

137. *See* White, *supra* note 135, at 1009.

138. *See* Earle & Case, *supra* note 132, at 72.

139. *See* Possley, *supra* note 134.

140. *See* Earle & Case, *supra* note 132, at 71–72; Ochoa, *supra* note 131, at 9 n.*; White, *supra* note 135, at 1010–11.

141. *See* Elizabeth Webster & Jody Miller, *Gendering and Racing Wrongful Conviction: Intersectionality, "Normal Crimes," and Women's Experiences of Miscarriage of Justice*, 78 ALB. L. REV. 973, 1017 (2015); Kate Morrissey, *Marine Wife Wrongfully Convicted of Poisoning Husband, Partying*, SAN DIEGO UNION-TRIBUNE (May 13, 2016), <https://www.sandiegouniontribune.com/news/data-watch/sdut-exoneree-sommer-2016may13-htmlstory.html>.

142. *See* Morrissey, *supra* note 141.

143. Webster & Miller, *supra* note 141, at 1017.

144. *Id.*

145. *See id.*; Morrissey, *supra* note 141.

VI. VULNERABLE POPULATIONS

While behavior, demeanor, and emotional reactions (or their absence) are never a reliable way to determine guilt or innocence, the mistaken faith in their reliability poses a particular risk for suspects with preexisting vulnerabilities toward being misunderstood. Suspects with mental illness, particularly post-traumatic stress disorder (PTSD) and dissociative disorders, neurodevelopmental disabilities like autism spectrum disorder (ASD) and attention-deficit/hyperactivity disorder (ADHD), intellectual disability (ID), and suspects from racial, ethnic, and cultural minorities are at heightened risk for false positives based on behavior that seems “abnormal.”

PTSD is characterized by avoidance of distressing memories, thoughts, and feelings, memory deficits, detachment, distortion of reality, unprovoked angry outbursts, and problems with concentration.¹⁴⁶ “Individuals with PTSD can be quick tempered and can even engage in aggressive verbal and/or physical behavior with little or no provocation and often display a heightened sensitivity to potential threats.”¹⁴⁷

ASD “is characterized by persistent deficits in social communication and social interaction across multiple contexts, including deficits in social reciprocity, nonverbal communicative behaviors used for social interaction, and skills in developing, maintaining, and understanding relationships.”¹⁴⁸ People with ASD can manifest deficits in social communication, “dampened expression of emotions, impairments in social reciprocity, fixated interests, and unusual sensory reactions.”¹⁴⁹ They commonly have difficulty concentrating, remembering daily events, and following long conversations.¹⁵⁰

ADHD is a neurodevelopmental disorder defined by inattention, disorganization, and/or hyperactivity-impulsivity.¹⁵¹ Individuals with ADHD often fidget, intrude into other people’s activities, and seem like they are not listening.¹⁵²

146. See AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 309.81 (5th ed. 2013).

147. See *id.*

148. *Id.* §§ 317–18; see also *International Statistical Classification of Diseases and Related Health Problems (ICD)*, WORLD HEALTH ORG., <https://www.who.int/standards/classifications/classification-of-diseases> (last visited Apr. 26, 2023); JAMES C. HARRIS, INTELLECTUAL DISABILITY: UNDERSTANDING ITS DEVELOPMENT, CAUSES, CLASSIFICATION, EVALUATION, AND TREATMENT 196 (2006); Robert L. Schalock, *The Evolving Understanding of the Construct of Intellectual Disability*, 36 J. INTELL. & DEVELOPMENTAL DISABILITY 223, 223 (2011).

149. See AM. PSYCH. ASS’N, *supra* note 146, § 313.89.

150. See *id.*

151. See *id.* §§ 317–18.

152. See *id.*

ID is characterized by deficits in reasoning, abstract thinking, judgment, practical understanding, verbal comprehension, working memory, and perceptual reasoning.¹⁵³ These deficits result in communication impairments.¹⁵⁴ They can also result in difficulties with social judgment, risk assessment, self-management of behavior and emotions, and can cause disruptive and aggressive behaviors.¹⁵⁵

Racial and ethnic minorities are also vulnerable to misunderstanding when their behavior does not comport with the normative expectations of the dominant society. As Paul Roberts and Adrian Zuckerman explain:

Common sense, it turns out, is highly acculturated and differentially distributed. Only a limited number of factual generalizations are truly common to the bulk of humanity and even within smaller communities “common sense” may be contested terrain. . . . Personal experience, and the beliefs which go with it, are moulded by all of the major psychosociological variables: class, sex/gender, age, ethnicity, nationality, and religion. There is consequently much variation between differently-situated groups and individuals, and this has important implications for some of the generalizations available to fact-finders in legal proceedings. . . . [T]he existence of competing generalizations, rooted in different experiences of life, gives rise to the possibility that conduct will be *misinterpreted*, with the attendant risks that an innocent person will suffer wrongful conviction and punishment . . . “[C]ommon sense” factual inferences, in litigation as elsewhere, are an interpretive *achievement* of particular groups of interpreters with a shared language and cultural reference points.¹⁵⁶

The cultural and neuro-developmental diversity of suspects in the criminal-justice system, therefore, is likely to lead to misinterpretations of suspects’ behavior and its connection to their state of mind. For example, aberrant social behaviors are hallmarks of both PTSD and ASD.¹⁵⁷ Gullibility is a common

153. *See id.*

154. *See id.*

155. *See id.*

156. ROBERTS & ZUCKERMAN, *supra* note 8, at 158–59.

157. *See* AM. PSYCH. ASS’N, *supra* note 146, § 313.89; Stephen Greenspan, Harvey N. Switzky & George W. Woods, *Intelligence Involves Risk-Awareness and Intellectual Disability Involves Risk-Unawareness: Implications of a Theory of Common Sense*, 36 J. INTELL. & DEVELOPMENTAL DISABILITY 242, 244, 246 (2011); Stephen Greenspan, Gail Loughlin & Rhonda S. Black, *Credulity and Gullibility in Persons with Mental Retardation*, in 24 INTERNATIONAL REVIEW OF RESEARCH IN MENTAL RETARDATION 101, 101 (Laraine Masters Glidden ed., 2001).

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feature of ID, which results in “naiveté in social situations” and suggestibility.¹⁵⁸ The predisposition of individuals with ID to exploitation, unintentional involvement in criminal activity, and false confessions is well documented.¹⁵⁹ Scholars including Sheri Lynn Johnson, Joseph Rand, and Mikah Thompson have documented the role that racial stereotypes play in jury credibility assessments.¹⁶⁰

David Vasquez, whose wrongful conviction is discussed *supra* Part V, had ID.¹⁶¹ Even the prosecution in his case admitted that his confession was “incomprehensible,” but nonetheless used his confession, in conjunction with his “abnormal” behavior, to convict him of a crime that he did not commit.¹⁶²

VII. EVIDENCE LAW

While other authors have criticized the soundness of instructing jurors to consider witness demeanor in assessing credibility, very little has been written about the use of evidence of the defendant’s demeanor and behavior prior to trial, either in police and prosecutors’ charging decisions or as evidence at trial.

A. Evidence of a Defendant’s Demeanor Should Generally Be Inadmissible

As demonstrated above, there is no meaningful connection between a suspect’s demeanor or reaction to a terrible crime and their guilt or innocence or even guilty knowledge. Assessments of demeanor made by witnesses, therefore, should be inadmissible unless they have some special relevance to the proceedings. These assessments can be regulated through a two-step analytical process.

First, any inferences that a lay witness draws from their observations of a party’s behavior, emotional reactions, or demeanor should be deemed presumptively not to have a rational basis, precluding the witness from testifying

158. See AM. PSYCH. ASS’N, *supra* note 146, §§ 317–18.

159. See *id.*; see, e.g., Stephen Greenspan, *Assessment and Diagnosis of Mental Retardation in Death Penalty Cases: Introduction and Overview of the Special “Atkins” Issue*, 16 APPLIED NEUROPSYCHOLOGY 89 (2009); Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 APPLIED NEUROPSYCHOLOGY 114 (2009).

160. See Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261 (1996); Joseph Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1 (2000); Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243 (2018).

161. See EHRENREICH & FELLNER, *supra* note 130, at 26; Garrett, *supra* note 127, at 1095.

162. Garrett, *supra* note 127, at 1096.

to the opinion that the observed behavior had a particular meaning under Rule 701.¹⁶³ This presumption should be rebuttable only if there is some special relevance to the demeanor evidence other than the general proposition that evidence of the defendant's external behavior (e.g., flat affect) was consistent or inconsistent with a relevant material fact (e.g., happiness that the victim is dead).

Second, once the witness is precluded from testifying to their assessment of the significance of the behavior (e.g., that it is consistent with consciousness of guilt), then the testimony regarding the underlying behavior (e.g., the suspect seemed cold and detached) becomes irrelevant under Rule 401.¹⁶⁴ This second step is crucially important because allowing a witness to testify to the "abnormal" behavior while only prohibiting them from testifying to their interpretation of that behavior simply invites the jury to fill in the blanks with their own unreliable interpretation using their "common sense."

As George Fisher explains, the criminal-justice system has very few "back-end" quality controls on what juries can do with evidence once admitted.¹⁶⁵ Because of this, it is crucial that admissibility decisions regulate the "front end" of what jurors hear and are allowed to consider in the first instance.

B. *Cautionary Jury Instructions*

Formal evidence is only one way that jurors become aware of a defendant's behavior and emotional reactions. They are also privy to informal evidence in the form of their observations of the defendant's demeanor and nonverbal responses during the trial proceedings. Because of the prevalence of popular myths about reading non-verbal cues to assess state of mind, excluding formal evidence about defendants' demeanor in the form of testimony from police and other fact witnesses cannot preclude all consideration of their conduct in assessing guilt or innocence.¹⁶⁶

Courts should prohibit prosecutors and defense lawyers from commenting on or suggesting inferences to be drawn from the demeanor of witnesses or the defendant in closing arguments. As the New Zealand Supreme Court explained in *Taniwha v. R.*¹⁶⁷ "To the extent that they are an outright appeal to a

163. See FED. R. EVID. 701 (prohibiting lay witnesses from offering opinions unless they are rationally based on their perception and helpful to understanding their testimony or determining a fact in issue).

164. See FED. R. EVID. 401 (defining relevant evidence as evidence that has a tendency to make a fact that is of consequence in the action more or less probable).

165. GEORGE FISHER, EVIDENCE 18 (3d ed. 2013).

166. See *supra* Section IV.B.

167. [2016] NZSC 123 (N.Z.).

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demeanour-based assessment, such submissions are better not made, certainly in an unqualified way.”¹⁶⁸

Courts should also consider instructing jurors not to consider their own observations of the defendant’s demeanor in court in assessing the defendant’s credibility or determining guilt or innocence.¹⁶⁹ Of course, the social-science evidence in support of cautionary instructions is, at best, mixed.¹⁷⁰ Generally, instructions for jurors to disregard evidence are thought to be counterproductive because they direct jurors’ focus to the information to be disregarded.¹⁷¹ If a juror did not find a defendant’s demeanor suspicious, an instruction pointing out the abnormal behavior could do more harm than good. Jurors often react against cautionary instructions in an oppositional way.¹⁷² Intuitively, this risk seems to be particularly acute in the context of warning jurors not to look at and consider the defendant’s demeanor immediately before they observe the defendant. In *Taniwha*, the New Zealand Supreme Court acknowledged “the risk that a jury will interpret a ‘tailored’ direction . . . as an expression of doubt by the judge as to the veracity of a particular witness or witnesses.”¹⁷³

The decision whether to give a cautionary instruction regarding a defendant’s demeanor or emotional affect, therefore, depends on the extent to which informal evidence relating to demeanor is likely already to be before the jury. If the comparison between expected demeanor and actual demeanor is likely already in the jurors’ minds, then an instruction naming the disconnect,

168. *Id.* at [55].

169. Generic jury instructions about bias and stereotyping are becoming increasingly common in civil cases. *See, e.g.*, N.Y. PATTERN JURY INSTR.—CIV. 1:27A (2022); PA. SUGGESTED STANDARD JURY INSTR.—CIV. § 1.140 (5th ed. 2020) (“Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases. Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.”); WASH. PATTERN JURY INSTR.—CIV. 1.01 (7th ed. 2022) (“In our daily lives, there are many issues that require us to make quick decisions and then move on. In making these daily decisions, we may well rely upon generalities, even what might be called biases or prejudices. That may be appropriate as a coping mechanism in our busy daily lives but bias and prejudice can play no part in any decisions you might make as a juror. Your decisions as jurors must be based solely upon an open-minded, fair consideration of the evidence that comes before you during trial.”).

170. *See* Nunez et al., *supra* note 115, at 75 (documenting the limited effectiveness of limiting jury instructions on the impact of inadmissible evidence on jurors).

171. *See generally* Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 PSYCH. REV. 34, 41–42 (1994) (explaining the “ironic effects” of attempting to suppress conscious thoughts).

172. *See generally* SHARON BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL (1981).

173. *Taniwha*, [2016] NZSC 123 at [43] (N.Z.).

explaining the stereotypes at issue, and instructing jurors regarding the lack of reliability of interpreting conduct as evidence of guilt is likely to do more good than harm.

CONCLUSION

The problem with intuition is that it is right much of the time. It is easy to conjure high-profile criminal cases in which the defendants' guilt was beyond question and their demeanor was obviously inappropriate. The notorious Oregon case of Elizabeth Diane Downs is an example. In 1983, Downs brought her three small children into an emergency room dying of gunshot wounds.¹⁷⁴ Downs also had a minor gunshot wound to one arm.¹⁷⁵ One of her children died; the other two survived with serious disabilities.¹⁷⁶ Downs told police who responded to the hospital that she had been out driving on a rural road with her children, when she stopped for a strange man who flagged her down and immediately started shooting her sleeping children.¹⁷⁷ Police were immediately suspicious of Downs's story because of her demeanor while telling it, which was oddly flat.¹⁷⁸ Doctors at the hospital were also suspicious of Downs's lack of affect or concern for her children.¹⁷⁹ Downs went on to do a series of media interviews during which her demeanor was even more bizarre. She talked continuously in a chipper, conversational tone about the night that her children were shot, one fatally.¹⁸⁰ She talked about getting pregnant again immediately to replace "the effect" that her children had given her.¹⁸¹ Downs was ultimately identified as the shooter by one of her surviving children.¹⁸² An example like the Downs case does not mean that the practice of "reading" behavioral cues and divining guilt from them is itself reliable or scientifically validated. After all, sometimes the horoscope is uncannily accurate, but those individual moments do not make astrology a science.

174. See Sean Dooley, *In 1983, Diane Downs Said a Stranger Shot Her 3 Kids, But Police Decided She Was Lying*, ABC NEWS (Mar. 19, 2019), <https://abcnews.go.com/US/1983-diane-downs-stranger-shot-kids-police-decided/story?id=61683920>; Lauren Effron & Sean Dooley, *Surgeon Who Helped Save 1 of Diane Downs' Kids in 1983 After She Shot Her Recalls Chilling Interaction*, ABC NEWS (Mar. 20, 2019), <https://abcnews.go.com/US/surgeon-helped-save-diane-downs-kids-1983-shot/story?id=61760441>.

175. See Dooley, *supra* note 174; Effron & Dooley, *supra* note 174.

176. See Dooley, *supra* note 174; Effron & Dooley, *supra* note 174.

177. See Dooley, *supra* note 174.

178. See *id.*

179. See Effron & Dooley, *supra* note 174.

180. See Dooley, *supra* note 174.

181. See *id.*

182. See Effron & Dooley, *supra* note 174.

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One cost of the proposal that this Article advances—reigning in the use of untested and unreliable assessments of credibility based on a suspect’s demeanor in the wake of a tragedy—is that juries will not learn about seemingly suspicious behavior even in cases where intuition suggests that the inference of abnormality is strong. As commentators note, “people acquire their knowledge, beliefs, assumptions, stereotypes, fears, and prejudices about crime and criminal justice from news media and fictional portrayals on television and film”¹⁸³ Stories of innocent people who behaved “unusually” but were never charged with a crime do not make the evening news or become the movie of the week. In the end, however, demeanor does not correlate with guilt.

There are two types of cases in which the prosecution might want to introduce evidence of a defendant’s abnormal behavior: cases in which there is much other evidence of the defendant’s guilt and cases in which there is little other evidence of guilt. In the former circumstance, the case would remain strong in the absence of the pseudo-psychology of the abnormal reaction. The latter circumstance is exactly the situation in which justice demands resisting the temptation to convict based on perceived abnormality.

183. ROBERTS & ZUCKERMAN, *supra* note 8, at 146.