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Eying the Body: The Impact of Classical Rules for Demeanor Credibility, Bias, and the Need to Blind Legal Decision Makers

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EYING THE BODY: THE IMPACT OF CLASSICAL RULES FOR DEMEANOR CREDIBILITY, BIAS, AND THE NEED TO BLIND LEGAL DECISION MAKERS[1]

Daphne O'Regan

INTRODUCTION

The Honorable Mark W. Bennett is only the most recent observer to lament that "[t]he standards for determining witness credibility have persisted as if frozen in time, based on myth, and completely unconnected with current knowledge of cognitive psychology."[2] Judge Bennett's frustration is understandable. The belief that most people can reliably detect lies by scrutinizing the body of the speaker is quite simply false, a fact recognized for at least twenty-five years—or 2,500.[3] Increasing awareness of implicit or cognitive bias in decision-making renders continued reliance on physical signs of credibility even more suspect.[4] The question that remains is: Why has

1. Daphne O'Regan, Michigan State University College of Law. I thank Professors Linda Edwards, Michael Sant'Ambrogio, Sammy Mansour, Larry Cata Baker, Peter Yu, and Marc Poirier, and students and former students Matthew Piccolo, Nicholas Schroeder, Thomas Skuzinski, and Michael Foster for their help.

2. Hon. Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1371 (2015). For demeanor in general, see *id.* at 1346-51. The impact is widely discussed. *See, e.g.*, Susan A. Bandes, *Centennial Address: Emotion, Reason, and the Progress of Law*, 62 DEPAUL L. REV. 921, 924 (2013).

3. Olin Guy Wellborn, *Demeanor*, 76 CORNELL L. REV. 1075, 1088 (1991) was the seminal work with about 195 citing references (last checked on WestlawNext, Jan. 16, 2017). The legal academy no longer credits demeanor evidence, yet the courts, with a few exceptions, ignore this widespread consensus. *See* Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2563-64 (2008). As shown *infra* Part I, the problem was recognized in Euripides' *Hippolytus*, first produced in 428 B.C.E. EURIPIDES, HIPPOLYTUS, *in* EURIPIDES I 160 (David Grene & Richmond Lattimore eds., David Grene trans., 1955).

4. For cognitive bias, see Carla L. MacLean & Itiel E. Dror, *A Primer on*

nothing changed?[5] One neglected explanation is the continuing, but unacknowledged, influence of classical rhetoric.[6] The educational history and immense prestige of elite rhetoric has embedded its traditional forms and ideological claims deeply into legal education and practice.[7] Highly specific, elite rules about bodily credibility are so entrenched that they seem ordinary common sense,[8] even as they are taught to first-year law students and as they govern behavior in courtrooms.

But allegiance to the classical paradigm of bodily credibility is not just a matter of conservatism and the impact of histo-

the Psychology of Cognitive Bias, *in* BLINDING AS A SOLUTION TO BIAS: STRENGTHENING BIOMEDICAL SCIENCE, FORENSIC SCIENCE, AND LAW 13-21 (Christopher T. Robertson & Aaron S. Kesselheim eds., 2016) [hereinafter BLINDING AS A SOLUTION TO BIAS]. For recognition of the impact of implicit or cognitive bias in law, see *infra* note 312.

5. Other tools for determining credibility may well work, such as the content of what is said, cross-examination, context, and questioning strategy. Minzner, *supra* note 3, at 2563-64. This article discusses only credibility determinations based on conventional physical markers of truthfulness or deception.

6. Gerald Wetlaufer, *Rhetoric and its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1555 (1990).

7. Wetlaufer points out "discipline-specific rhetorics are cultural artifacts . . . [and] are the products of circumstances and purposes and that in a certain way they have a life of their own. Further, this structure suggests that we may be blind to certain choices we have made and to certain consequences associated with those choices." *Id.* at 1587-88. Similarly, "[e]xamining the presuppositions of evidence law may nevertheless be useful by helping to explain the resistance that has blocked most proposed innovations. The causes of this resistance would otherwise be hard to understand." John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1257 (2006).

8. For the idea that credibility is to be assessed with common sense, which includes demeanor, see 1 CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE IN NEW YORK § 3:2 (2015). "As Judge Jerome Frank . . . observed, the methods of evaluating oral testimony 'do not lend themselves to formulations in terms of rules and are thus, inescapably, 'unruly." John L. Kane, *Judging Credibility*, 33:3 LITIG. 31, 31 (Spring 2007), http://www.cod.uscourts.gov/Portals/0/Documents/Judges/JLK/Judging_Credibility_LITMAG_Spring07_kane.pdf. "Determining the weight and credibility of witness testimony . . . has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'" United States v. Scheffer, 523 U.S. 303, 313 (1998). Thus, "the epistemology of evidence law is also rooted in common everyday beliefs that have not been fully analyzed by courts or academics." Daniel D. Blinka, *Why Modern Evidence Law Lacks Credibility*, 58 BUFF. L. REV. 357, 361 (2010).

ry. Presuppositions driving classical demeanor permeate legal assignments of rationality and emotion, truth and lies. These presuppositions, in tandem with the ancient theory of a universal language of non-verbal communication, may have little basis in fact, but they perform crucial structural work.[9] They reduce the perceived institutional risk of error due to cultural, social, and individual differences in demeanor. But even more importantly, they reconcile the professional claims of highly trained, persuasive advocates[10] with the truth-seeking goal of adversarial trial.[11] However, this same demeanor paradigm imposes tragic risks of error on participants in litigation. A modest solution is changed instruction in law schools. A more far-reaching solution, increasingly embraced to reduce biases, extends a suggestion made by Blumenthal and Pager: judges and juries should be screened so they cannot see any participants in a legal proceeding.[12]

In what follows, I focus on law students and attorneys, not parties, witnesses, experts, and others. Part I briefly provides background: the pivotal role of classical rhetoric in western education, including the United States, the dispositive position of demeanor credibility in oral trial, and the persistent doubts about its reliability—doubts turned into certainty over two decades of research. Part II compares modern and ancient

9. Similarly, both Fisher and Leubsdorf find much about the rules of evidence and the jury's role to be explained by institutional necessity. *See* Leubsdorf, *supra* note 7, at 1209; George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 624 (1997).

10. Similarly, refusal to allow expert testimony about eyewitnesses may also be "to affirm the professionalization of American trial procedure by lawyers and judges." Note, *The Province of the Jurist: Judicial Resistance to Expert Testimony on Eyewitnesses as Institutional Rivalry*, 126 HARV. L. REV. 2381, 2382-83 (2013).

11. *See generally* Hon. Mark I. Bernstein, *Jury Evaluation of Expert Testimony Under the Federal Rules*, 7 DREXEL L. REV. 239 (2015); Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 117 (1996).

12. Physical screening would be one form of blinding. For recent work on blinding in law and biomedical and forensic science, see MacLean & Dror, *supra* note 4. *See also, e.g.*, Claire Cain Miller, *Is Blind Hiring the Best Hiring?*, N.Y. TIMES MAG. (Feb. 25, 2016), http://www.nytimes.com/2016/02/28/magazine/is-blind-hiring-the-best-hiring.html (proposing blinding to remedy lack of diversity in hiring). The proposals of Pager and Blumenthal are discussed *infra* Part VI.

manuals to explain the rules of elite demeanor and its ideological claim to truth. Part III compares ancient and modern understanding of popular delivery; that is, choices in non-verbal communication that run counter to the elite rules and demonstrate affiliation with non-elite groups as grounds for credibility. Part IV shows how elite rules are enforced in law schools and courts, limiting how advocates can speak and, thus, what can be communicated. Part V discusses the role of an assumed natural, common, bodily language in erasing the problem of actual differences and justifying the paradoxical claim that a jury can be manipulated by highly trained professionals, yet ferret out lies. Part VI discusses benefits of the common adoption of elite demeanor and suggests improved instruction at laws schools and screening decision makers in litigation to reduce the cost.

I. BACKGROUND: Classical Rhetoric's Influence and Demeanor's Deception

Classical rhetoric, which evolved in tandem with trial and the democratic and republican political structures of ancient Athens and Rome, has been the foundation of western education for over 2000 years.[13] It is hard to overstate its influence in the ancient world, the Renaissance, the Enlightenment in Europe and the United States, and in the nineteenth century.[14] The enormous importance of classical studies in the United States, including rhetoric, has been summed up as "[n]ext to Christianity, the central intellectual project in America before the late nineteenth century was classicism."[15] Finally, classical

13. GEORGE A. KENNEDY, CLASSICAL RHETORIC & ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 1-5 (1999); BRIAN VICKERS, IN DEFENCE OF RHETORIC vii-viii (1998).

14. *See* MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 1-22 (2005); THOMAS HABINEK, ANCIENT RHETORIC AND ORATORY 79-100 (2005); ADAM KENDON, GESTURE: VISIBLE ACTION AS UTTERANCE 17-61 (2005); James J. Murphy, *Quintilian's Influence on the Teaching of Speaking and Writing in the Middle Ages and Renaissance*, *in* ORAL AND WRITTEN COMMUNICATION: HISTORICAL APPROACHES 158, 160-62 (Richard Leo Enos ed., 1990); Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613, 615-16 (1999).

15. CAROLINE WINTERER, THE CULTURE OF CLASSICISM: ANCIENT GREECE AND ROME IN AMERICAN INTELLECTUAL LIFE 1780-1910 1 (2004). *See, e.g.*,

rhetorical theory is enjoying an explicit revival today.[16] To the extent that this profound impact goes unrecognized,[17] its influence is increased[18]—its rules seem self-evident as demonstrated in the next section. Central to ancient instruction in rhetoric was the "science" of body language, or demeanor.[19] Traditionally called "delivery," this branch of rhetorical theory concerns persuasion not through what is said, but through how it is said—the famous non-verbal persuasion.

The crucial importance of non-verbal communication is often marked by quoting the Athenian orator Demosthenes' famous quip that in competitive speaking, how a speaker communicates wins first, second, and third place.[20] The same point

JOHN QUINCY ADAMS, LECTURES ON RHETORIC AND ORATORY (1810).

16. *See, e.g.*, ROBERT N. SAYLER & MOLLY BISHOP SHADEL, TONGUE-TIED AMERICA: REVIVING THE ART OF VERBAL PERSUASION 13-27, 55-95, 111-27, 139-45 (2011). The authors are professors at the University of Virginia Law School. *Id.* at xv.

17. "[L]aw lives in the speech of lawyers and clients [and] in the gestures of attorneys and witnesses . . . . Notwithstanding our traditional inclination to ignore them, these and other 'alternative' legal texts have always had presence and power." Bernard J. Hibbitts, *Making Motions: The Embodiment of Law in Gesture*, 6 J. CONTEMP. LEGAL ISSUES 51, 52 (1995) (discussing specific gestures that have been endowed with substantive legal meaning).

18. For the legal profession's "systematic denial" that it employs a particular rhetoric, see Wetlaufer, *supra* note 6, at 1555.

19. Delivery is the fifth canon, or part, of technical rhetoric and is, itself, divided into a number of subcategories. Catherine Steel, *Divisions of Speech, in* THE CAMBRIDGE COMPANION TO ANCIENT RHETORIC 77, 81, 86-88 (Erik Gunderson ed., 2009) [hereinafter THE CAMBRIDGE COMPANION].

20. *See, e.g.*, QUINTILIAN, INSTITUTIO ORATORIA XI.iii.6 (Loeb Classical Library) (E.H. Warmington ed., H.E. Butler trans., 1968) [hereinafter QUINTILIAN]; CICERO, DE ORATORE III 213 (Loeb Classical Library) (T. E. Page ed., H. Rackham trans., 1942) [hereinafter DE OR]; CICERO, ORATOR xvii.56, *in* BRUTUS; ORATOR (Loeb Classical Library) (H.M. Hubbell trans., 1939). *See* CICERO, RHETORICA AD HERENNIUM III.x.19 n.c (Loeb Classical Library) (T. E. Page ed., Harry Caplan trans., 1954). Translations will be from these editions unless otherwise noted. Citation to these and all ancient works will be to the traditional sections or line numbers of each work, as pages may differ in different translations. Ray Nadeau, *Delivery in Ancient Times: Homer to Quintilian*, 50 Q. J. SPEECH 53 (1964). The same story attributed to Cicero opens the first page of *The Columbian Orator*, widely read inside and outside of schools, including by Frederick Douglas. CALEB BINGHAM, THE COLUMBIAN ORATOR 7-10 (1797). "The book cover indicates that the United States Government authorized its publication by an Act of Congress in May 1797, for the specific purpose of 'developing the fundamental art in and instilling the spirit of oratory among the youth of America.'" Marguerite L. Butler, *The Na-*

is made with percentages: "Only 7 percent of one's message is communicated verbally; the remaining 93 percent is communicated non-verbally through speech tenor and tone, body language, and physical demeanor."[21] While discouraging, these warnings are usually a preface to instruction.[22] For two millennia, the study of persuasive non-verbal communication has generated an outpouring of rules. The deluge continues today.[23]

The centrality of legal demeanor derives from what Leubsdorf identifies as the first presupposition of trial: the commitment to presence and the human speaker.[24] Trial has been an oral event since its beginning, with decision often predicated on judgments about the speakers,' including attorneys,' credibility.[25] The problems of this institutional commitment were recognized early. *Hippolytus*, an influential tragedy of democratic Athens, stages the results of Theseus' decision to find not credible a truthful verbal denial of an accusation of

tional Frederick Douglass Moot Court Competition—Operating in the Spirit and Legacy of Frederick Douglass, 25 N.C. CENT. L.J. 66, 76 (2002). The book recycles the precepts of classical rhetoric while adding passages from other sources. Demosthenes' formulation continues to have legs. *See, e.g.*, PAUL MARK SANDLER, RAISING THE BAR: PRACTICE TIPS AND TRIAL TECHNIQUE FOR YOUNG MARYLAND LAWYERS 119-137 (2005).

21. Jason Bloom & Karin Powdermaker, *Building Rapport in the Courtroom*, 69 TEX. B.J. 540, 540 (2006) (citations omitted).

22. *See generally, e.g.*, Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 U. KAN. L. REV. 631 (2009).

23. For example, entering "non-verbal communication" into a Google search returned 389,000 results (last updated Jan. 11, 2016).

24. Leubsdorf, *supra* note 7, at 1237. For the centrality of oral evidence in the early criminal trial, see JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 236-37 (2003). *See generally*, Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 2008 SUP. CT. REV. 293 (2008).

25. For the orality of Athenian and Roman trial, see, e.g., ARISTOPHANES, THE WASPS 835-995, *in* ARISTOPHANES I (Loeb Classical Library) (G. P. Goold ed., Benjamin B. Rogers trans., 1978) (a parodic trial) and PLATO, SOCRATES' DEFENSE (APOLOGY), *in* THE COLLECTED DIALOGUES OF PLATO 1-26 (Edith Hamilton & Huntington Cairns, eds., Hugh Tredennick trans., 1961) (Socrates' speech at his trial). Forensic (that is, legal) oratory was one of three subdivisions of classical rhetoric. ARISTOTLE, "ART" OF RHETORIC § 1358a-b (Loeb Classical Library) (J.H. Freese trans., 1982). *See generally,* Jon Hesk, *Types of Oratory*, *in* THE CAMBRIDGE COMPANION, *supra* note 19, at 145, 150-56.

rape.[26] This credibility determination is dispositive. As a result, his son, the innocent Hippolytus, dies.[27] Hippolytus' unjust death and Theseus' mistake—believing the truth to be a lie—derive from a fatal shortcoming in human speech: it bears no mark of truth or falsity.[28] Instead, Theseus can only wish that "[a]ll men should have two voices"–one for unjust statements, the other for the truth—so "we should never be deceived."[29] The Greek word for voice (*phone*) focuses not on content, but on pitch and tone.[30] Conviction and death of the innocent raise a terrible possibility: these two voices do not exist. Yet the promise of delivery and assessment of demeanor credibility–central to the structure of the Athenian and the American legal systems—is, in essence, that they do. Fundamental to the structure of trial and modern appeal is the presupposition that the body and voice of the speaker can, and must, function as the touchstone of truth.[31]

26. EURIPIDES, *supra* note 3, at 885, 942, 1036 ff. (Citation is by line number.)

27. *Id.* at 1162.

28. The play "focuses the audience's attention on their own (actual or potential) role as citizen-jurors in Athens' lawcourts." JON HESK, DECEPTION AND DEMOCRACY IN CLASSICAL ATHENS 277 (2006).

29. EURIPIDES, *supra* note 3, at 924-31.

30. HENRY G. LIDDELL & ROBERT SCOTT, A GREEK-ENGLISH LEXICON 1967-68 (1894).

31. Federal Rule of Civil Procedure Rule 52(a) requires the reviewing court to "give due regard to the trial court's opportunity to judge the witnesses' credibility." FED. R. CIV. P. 52(a)(6). "[D]emeanor of an orally-testifying witness is 'always assumed to be in evidence.' It is 'wordless language.'" Broad. Music v. Havana Madrid Rest. Corp., 175 F.2d 77, 80 (2d Cir. 1949). Standards of review favor trial courts' observations of demeanor. Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 855 (1982). The Seventh Circuit in *United States v. Nobles* stated:

> The trial judge has the best opportunity to observe the verbal and nonverbal behavior of the witnesses focusing on the subject's reactions and responses to the interrogatories, their facial expressions, attitudes, tone of voice, eye contact, posture, and body movements, as well as confused or nervous speech patterns in contrast with merely looking at the cold pages of an appellate record. We refuse to second-guess the trial judge on matters of credibility . . . .

United States v. Nobles, 69 F.3d 172, 181 (7th Cir. 1995) (citations omitted). However, if "credibility determinations rest, not on demeanor of which the judge was the sole observer, but on an analysis of testimony . . . [,] [they] de-

Yet demeanor credibility simply does not work. The belief that truth can be adequately detected, at least in a legal context, from the body, is largely false. As first discussed in Wellborn's landmark article in 1991,[32] most people detect truth or lies at a rate almost equal to chance—one influential researcher puts the figure at 56.6 percent—and are "particularly poor at detecting lies (correctly judging that someone was lying: 44% accuracy rate)."[33] The rate may be somewhat better for "professional lie catchers," falling between 55 and 66 percent.[34] "[T]he most basic reason for the failure to detect lies is that there is no single verbal, nonverbal, or physiological cue uniquely related to deception."[35] Even if universal bodily expressions of emotion exist, a strong cultural overlay influences both the physical expressions themselves and the ability to read them, particularly in individuals from other cultures.[36]

serve less than usual deference." Consolidation Coal Co. v. N.L.R.B., 669 F.2d 482, 488 (7th Cir. 1982). *See* Chet K.W. Pager, *Blind Justice, Colored Truths and the Veil of Ignorance*, 41 WILLAMETTE L. REV. 373, 375-76 (2005).

32. *See* Wellborn, *supra* note 3, at 1088; *see also* Renée McDonald Hutchins, *You Can't Handle the Truth! Trial Juries and Credibility*, 44 SETON HALL L. REV. 505, 508 (2014); Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 837 (2011); Pager, *supra* note 31, at 379-92; Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1188-92 (1993). Paul Ekman points out the many constraints on bodily lie detection; not only do "behavioral hot spots," or micro expressions, only indicate an emotion that is departure for investigation, they are manifest in only 50 percent of liars. Paul Ekman, *Lie Catching and Microexpressions, in* THE PHILOSOPHY OF DECEPTION 118, 132 (Clancy Martin ed., 2009) (emphasis omitted). For new strategies, see, e.g., William A. Woodruff, *Evidence of Lies and Rules of Evidence: The Admissibility of Fmri-Based Expert Opinion of Witness Truthfulness*, 16 N.C. J. L. & TECH. 105 (2014), and Julie A. Seaman, *Black Boxes*, 58 EMORY L.J. 427, 443 (2008). *But see generally* James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903 (2000) (supporting credibility determinations).

33. Aldert Vrij, *Nonverbal Communication and Deception*, *in* THE SAGE HANDBOOK OF NONVERBAL COMMUNICATION 341, 349 (Valerie Manusov & Miles L. Patterson eds., 2006).

34. *Id.* at 350-51.

35. *Id.*

36. There may be universal expressions of certain emotions, modified, however, by a cultural overlay. *See generally* David Matsumoto & Hyi Sung Hwang, *Cultural Influences on Nonverbal Behavior*, *in* NONVERBAL COMMUNICATION, SCIENCE AND APPLICATIONS 97-120 (David Matsumoto, Mark G. Frank, Hyi Sung Hwang, eds., 2013). The specifics of gestures are even more culturally determined, as is the meaning of gaze, particularly its direct-

Further, legal institutions "over-rely upon visual cues to their own detriment: visual information *diminishes* accuracy."[37] Paul Ekman, probably the preeminent authority on physical signs of deceit and coiner of the widely used term "leakage" to describe the physical clues of emotion and deceit,[38] has stated: "Anyone who says there is an absolutely reliable sign of lying that is always present when someone lies and never present when someone is truthful is either misguided or a charlatan."[39]

II: ELITE DEMEANOR AND TRUTH

The agreement that demeanor is critical obscures the fact that the rhetorical rules applied in courtrooms today emerged from an intense, and often bloody, struggle for dominance in Athens and Rome, played out in part through contrasting elite and popular rhetoric, including contrasting demeanors.[40] Even when the influence of ancient rhetoric is recognized, reception of this theory continues to be uncritical, and the theory itself is sanitized of its roots in ancient class and political struggles.[41] Yet theory and practice are permeated by values and claims that drove struggle.[42] And traditional advice incorporates them into modern practitioners and legal practice. The dominant elite tradition successfully imposed aristocratic, upper class demeanor, including the physical habits of wealthy foot soldiers, as natural and linked to rationality and truth.[43] Writers

ness. David Matsumoto & Hyi Sung Hwang, *Body and Gestures, in* NONVERBAL COMMUNICATION, SCIENCE AND APPLICATIONS 77-83 (David Matsumoto, Mark G. Frank, Hyi Sung Hwang, eds., 2013).

37. Pager, *supra* note 31, at 391 (emphasis added). *See* Vrij, *supra* note 33, at 352.

38. Paul Ekman & Wallace Friesen, *Nonverbal Leakage and Clues to Deception*, 32 PSYCHIATRY 88 (1969) (using the term "leakage").

39. Ekman, *supra* note 32, at 133.

40. *See* DAPHNE O'REGAN, RHETORIC, COMEDY AND THE VIOLENCE OF LANGUAGE IN ARISTOPHANES' CLOUDS 9-13 (1992) (discussing the early part of this period). *See generally* JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY, AND THE POWER OF THE PEOPLE (1989) (showcasing a somewhat optimistic view).

41. 72 AM. JUR. TRIALS 137 *An Introduction to Persuasion in the Courtroom: What Makes a Trial Lawyer Convincing?* §§ 34-37 (1999).

42. *See infra* Parts II and III.

43. *See infra* Section II.A.

in the same elite tradition damned non-elite, democratic speakers as using artificial skills, including delivery, based on irrationality and emotion.[44]

A. The Dominant Tradition: Credible Speaker as Elite Warrior

Strength and power are the foundation of the elite speaker's credibility.[45] Thus, a twentieth century manual exhorts the advocate:

> You must make a "neutral stance" your new habit. Stand squarely with feet approximately shoulder-width apart. Let your hands land at your sides. Don't lock your knees; and put your weight on the balls of your feet. This is a very authoritative way of standing in front of an audience. You can make natural hand gestures from this position, but it will help you to remain solid and grounded . . . Although you might feel uncomfortable at first, you will look confident. Superfluous movement only damages your argument, and your credibility.[46]

A proper advocate stands as a fighter; his argument and delivery are described as one.[47] Improper gestures not only

44. ARISTOTLE, *supra* note 25, §§ 1403b-1404a. Section 1404a links delivery to deficiency and emotional appeals starting with the sophist Thrasymachus. *Id.* § 1404a. The sophists were the theoreticians of democratic rhetoric at Athens. KENNEDY, *supra* note 13, at 18, 23.

45. Experiments have shown "eyewitness confidence, rather than accuracy, was the identified predictor of juror belief." Wellborn, *supra* note 3, at 1090.

46. Leonard Matheo & Lisa DeCaro, *The Eleven Most Frequently-Asked Questions About Courtroom Presentation and Performance*, *in* ALI-ABA'S PRACTICE CHECKLIST MANUAL FOR TRIAL ADVOCACY 171 (2001). For a compendium of precepts that provide additional sources for much advice discussed in this section and the next, see Jansen Voss, Student Article, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 L. & PSYCHOL. REV. 301 (2005).

47. The martial ideal of the elite advocate invokes courage, associated with justice, as one of the four cardinal virtues. *See* Judith Resnik & Dennis Curtis, *Epistemological Doubt and Visual Puzzles of Sight, Knowledge and Judgment: Reflections on Clear-Sighted and Blindfolded Justices*, *in*

damage credibility, but the argument itself. The extent to which elite delivery is that of a warrior and the underlying significance of this paradigm emerge even more clearly in the following celebratory description of an advocate before the Supreme Court:

> She stands erect behind the podium, her feet together. She speaks in a low, yet clearly pitched, voice. She does not gesture. She is completely assured, totally prepared, meticulous in her knowledge of the details of her argument. And she is utterly convincing. When the justices query her, she listens attentively, head slightly bowed. Her answers show she has understood the questions and appreciates their force. She does not shrink from the challenges. She knows this battle will not be won in a day. She is prepared for a long campaign.[48]

The advocate embodies the requirements of elite delivery. Her low voice and immobility represent courtroom decorum at its strictest; her body conveys the primacy of mind. Her restraint appeals to and underwrites beliefs about the proper limits of motive and persuasion that reinforce the court's claim to rationality and impartiality. The stripped-down body models the "ideal" legal discourse: one that privileges universalization, not personal experience; social rules, not individual situations; and reason, not emotion.[49] Within the classical and modern

GENEALOGIES OF LEGAL VISION 238-39 (Peter Goodrich & Valerie Hayaert eds., 2015); PLATO, LACHES §§ 190d, 198a, 199d, *in* THE COLLECTED DIALOGUES 132, 141, 143 (Edith Hamilton & Huntington Cairns eds., Benjamin Jowett trans., 1961); Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1230 (2012). Maroney links the higher status of anger as an emotion to the ancient discussions of anger that focus on treatment of slaves versus treatment of equals. *Id*. at 1219-24.

48. Herma Hill Kay, *Equal Treatment*, AM. LAW., Dec. 6, 1999, at 72.

49. This parallels physically the linguistic attributes that Bourdieu identifies as creating a "neutralization effect" on the language to "establish the speaker as universal subject, at once impartial and objective": "indicative mood . . . verbs in the present and past third person, . . . the factual, . . . indefinites . . . the intemporal present . . . transsubjective values presupposing the existence of an ethical consensus[,] . . . fixed formulas and locutions."

rhetorical/legal culture, such elite delivery plays a fundamental role in establishing decisions as compelled by legal reasoning and rules whose goal is truth. It befits the Supreme Court, a forum conceived of as dedicated to pure argument over legal principles before an audience of the legal elite.

This praise incarnates the speaker as hero. The fact that the passage describes a woman, in virtually unchanged traditional terms, demonstrates social flexibility – women may incarnate the classical ideal of power and truth[50]—and the continuing vitality of the classical model – in fact, they must do so, if they wish to be recognized as rational speakers, at least in elite rhetorical fora.[51] The price this exacts from legal participants and institutions is discussed below. Here, what is of interest is the rooting of credibility, in both ancient and modern norms, in the ability to defend oneself and one's words.[52] This advocate will not be intimidated by "force" or "challenges;" she is in for the "long campaign." Nothing will vary her message,

Pierre Bourdieu & Richard Terdiman, *The Force Of Law: Toward A Sociology Of The Juridical Field*, 38 HASTINGS L.J. 805, 820 (1987). See Wetlaufer, *supra* note 6, at 1558-62, for similar characteristics designed to win by suppressing the possibility of alternative interpretations or perspectives on a legal problem and representing the desired outcome as required by the rule of law, not men. For the construction of this impersonal legal voice see J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 LEGAL WRITING 67, 99-100 (2009).

50. Likewise, John M. Conley & William M. O'Barr, authors of *Just Words*, show that many women and poor or uneducated men speak "a language of deference, subordination, and nonassertiveness, whereas others [including some women] spoke in a more rhetorically forceful style." JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS 65 (2d ed. 2005). Powerless language, "associated primarily with the speaker's status in society," was less likely to be believed. *Id.* For "women lawyers' talk [a]s role behavior rather than gendered behavior, with little difference between men and women lawyers," see Bryna Bogoch, *Gendered Lawyering: Difference and Dominance in Lawyer-Client Interaction*, 31 L. & SOC'Y REV. 677, 677 (1997).

51. Elite lawyers understand the power of conforming to the ancient paradigm particularly when they are female, minority, or otherwise outside the traditional paradigm. *See* BRYAN STEVENSON, JUST MERCY (2014) (discussing the importance of conservative attire); SONIA SOTOMAYOR, MY BELOVED WORLD 229 (2013) (discussing the advantages of reasoning and talking like a man).

52. In women, "low, even" voice and "imposing height and voice" allow a female attorney to be "intimidating" and endow her with "physical signs of commanding presence" that enhance her credibility and effectiveness. SAM SCHRAGER, THE TRIAL LAWYER'S ART 131-32 (1999).

the consistency of which she can vouch for in her person.

1. *Displaying Power: Gestures That Guarantee Truthfulness*

The overlap of truthful speaker and successful warrior has ancient roots. In classical rhetoric, the orator "is usually heroic . . . ; he imposes his will on others. In contrast the role of the speaker is much less emphasized in the rhetoric of India or China, where harmony rather than victory is often the goal. The classical orator is a fighter in a lonely contest."[53] "[R]hetoric is the special speech of the state . . . the occupation of off-duty soldiers."[54] The connection goes back at least to the Iliad. There, Achilles, pre-eminent in words and deeds,[55] is the only truthful speaker because he alone cannot be intimidated.[56] His martial and rhetorical exploits define the realm of human

53. KENNEDY, *supra* note 13, at 10. For martial metaphors and the adversarial system, see Adam Arms, *Metaphor, Women and Law*, 10 HASTINGS WOMEN'S L.J. 257 (1999); Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225 (1995); Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053 (1989).

54. HABINEK, *supra* note 14, at 2, 65-66. The individual fighting on foot "valorized facing danger, standing one's ground, and cooperating with fellow soldiers, and relished victory (preferably quick) in a well-regulated, open, face-to-face confrontation." JOSEPH ROISMAN, THE RHETORIC OF MANHOOD: MASCULINITY IN THE ATTIC ORATORS 106 (2005). Superior manhood and superior social class were associated. *See id.* at 85-88, 95-104. "[P]overty [w]as a liability in the attainment of manhood," particularly in the courts, where the poor man was considered at a "moral disadvantage." *Id*. at 95, 97. *See* Erik Gunderson, *Discovering the Body in Roman Oratory*, *in* PARCHMENTS OF GENDER 7, 170 (Maria Wyke ed., 1998); Fritz Graf, *Gestures and Conventions: The Gesture of Roman Actors and Orators*, *in* A CULTURAL HISTORY OF GESTURE 44-45 (Jan Bremmer & Herman Roodenburg eds., 1991). A speaker's training was conceptualized as like that of a soldier. In QUINTILIAN, *supra* note 20, at XI.iii.19, a proper masculine voice is achieved through walking, massage, abstinence from sex, easy digestion of foods, that is, "frugalitas." These are regimes of an athlete, a warrior, and a philosopher, scaled down to more attainable level. Those who fail run the risk of "the 'feeble shrillness' that characterizes the voices of 'eunuchs, women and invalids.'" *Id. See also* ERIK GUNDERSON, STAGING MASCULINITY 81-82 (2000); MAUD W. GLEASON, MAKING MEN: SOPHISTS AND SELF-PRESENTATION IN ANCIENT ROME 119 (1995).

55. HOMER, THE ILIAD IX 443 (Richmond Lattimore trans., 1965) [hereinafter THE ILIAD].

56. *Id*. at I 120-220. VICKERS, *supra* note 13, at 3-6 cites references to Homer in ancient rhetorical theory.

excellence, not as alternatives, but as an organic whole. For the audience, one lesson is clear: ability to defend one's speech is a predicate for trust.

The credible speaker must be invulnerable to inner, as well as outer, pressures.[57] As rhetorical theory and practice developed, one example became Pericles, aristocratic leader of newly democratic Athens.[58] Pericles' self-presentation was designed to illustrate his power, and his power over himself. He was famous for self-restraint, composure uncorrupted by emotion, a quiet and even voice, and movements that left even the relatively loose Greek garments unruffled.[59] His reputation for absolute freedom from fear and desire was enhanced by his aristocratic status and successful career as a general.[60]

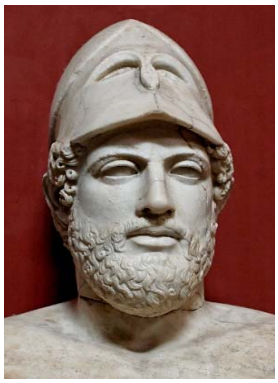

Figure 1

57. "[S]elf-control enabled men to resist the undesirable and incapacitating influences of desire and, hence, to behave morally . . . Lack of restraint detracted from one's manliness and was regarded as a source of danger to other men, their values, and their institutions." ROISMAN, *supra* note 54, at 184.

58. Of course, Pericles' character did not go unchallenged. His enemies associated him with the new popular rhetoric, and he was notorious for his association with the sophists. O'REGAN, *supra* note 40, at 11-15, 56-57.

59. PLUTARCH, PERICLES § V.1 (Loeb Classical Library) (Bernadotte Perrin trans., 1916). For Pericles' legendary self-control, see *id.* §§ V, VII.4. In the year that his sister, son, many relatives, and friends died of the plague, he was recorded as weeping only once: when he laid a funeral wreath on the grave of his last living legitimate son. *Id.* § XXXVI.5. PAUL ZANKER, THE MASK OF SOCRATES 27 (ALAN SHAPIRO, trans., 1995) also links this story to Pericles' bust.

60. PLUTARCH, *supra* note 59, §§ III.1, VII.1, X, XVI.3.

Pericles' bust, Figure 1,[61] represents this elite ideal.[62] Pericles is shown with a helmet, symbolizing military command.[63] His face is regular and smooth, unemotional and symmetrical. The identity of the bust has been known since antiquity[64] with its "idealized yet distinctive" features.[65] The lack of physical idiosyncrasies and the stern composure convey the message that Pericles' words are not personal, although they emerge from an identifiable person. Instead, in the body of Pericles, the viewer sees the picture of rational civic discourse, speaking for the public good, turned aside neither by fear nor favor.[66]

The overlap of warrior and speaker begins with stance. Standard modern advice was given above. Ancient treatises agree that credibility begins with a stance that "should be upright, . . . feet level and a slight distance apart, or the left may be very slightly advanced. The knees should be upright, but not stiff, the shoulder relaxed, the face stern, but not sad, expressionless or languid: the arms should be held slightly away from the sides."[67] The advice is Cicero's. Once he began, Cicero's ideal orator would have a strong and manly posture derived from armed conflicts or, at least, the gymnasium.[68]

Posture is critical. Aristotle codified the social and political "naturalness" of the connection between "good" posture and rationality in his justification of social hierarchy and slavery.

61. This picture is of a Roman copy of the bust from a statute of Pericles. The bust is at the Vatican Museums. The image is available on Wikimedia Commons. *File: Pericles Pio-Clementino*, WIKIMEDIACOMMONS, https://commons.wikimedia.org/wiki/File:Pericles_Pio-Clementino_Inv269_n2.jpg (last visited Jan. 16, 2017).

62. Beth Cohen, *Perikles' Portrait and the Riace Bronzes: New Evidence for "Schinocephaly,"* 60 HESPERIA: J. AM. SCH. CLASSICAL STUD. AT ATHENS 465, 469 (1991).

63. *Id.* at 470.

64. *Id.* at 465-66, 469.

65. *Id.* at 466.

66. Pericles' bust and a statue of a poet erected by Pericles are "image[s] of a model citizen of High Classical Athenian society." ZANKER, *supra* note 59 at 27. It was "Pericles himself who set the standard of behavior." *Id.* For Pericles' indifference to public opinion, see PLUTARCH, PERICLES *supra* note 59, §§ XXXI.5- XXXII.1, XXXVI.3.

67. QUINTILIAN, *supra* note 20, at XI.iii.159

68. DE OR, *supra* note 20, at III.lix.220; quoted by QUINTILIAN, *supra* note 20, at XI.iii.122.

Given that mind should rule over body, and rational over irrational, those who are more body are natural slaves, while those who are more mind should be masters. Posture marks the difference; good posture indicates the superiority of mind. "Nature would like to distinguish between the bodies of freemen and slaves, making one strong for servile labour, the other upright, and although useless for such services, useful for political life in the arts both of war and peace," that is fighting and speaking.[69] The tight connection between class, successful violence, credible argument, rationality, and posture lives on in modern advice. "Keep the weight evenly distributed on both feet; you will feel more steady. Indeed, when weight is not evenly distributed, you are unbalanced and an easy pushover for someone on the attack."[70] "Slouching or leaning . . . may telegraph to the fact finders a feeling of physical weakness or instability. This association may carry over to the fact finders' perceptions of the lawyer's case."[71] "[T]he goal is a relaxed but erect posture that conveys an aura of composure and command."[72]

A measured walk is also necessary and revealing.[73] "[W]hile one man's gait reveals his composure and the attention he gives to his conduct, another's reveals his inner disor-

69. ARISTOTLE, POLITICS 1254[b] 25-30 *in* THE BASIC WORKS OF ARISTOTLE (Richard McKeon ed., Benjamin Jowett trans., 1941). In a concession to observation that does not trouble his theory, he acknowledges that Nature can make a mistake so that "some have the souls and others have the bodies of freemen." *Id.*

70. Constance Bernstein, *Winning Trials Nonverbally: Six Ways to Establish Control in the Courtroom*, 30 TRIAL 61, 63 (Jan. 1994). *See also* LAWRENCE J. SMITH & LORETTA A. MALANDRO, COURTROOM COMMUNICATION STRATEGIES 69 (1985).

71. PETER MURRAY, BASIC TRIAL ADVOCACY 78 (1995). Judges are included as understanding posture as argument. "A slouching attorney gives an impression of sloppiness, which might cause a judge to be skeptical of what he has to say." 6 AM. JUR. TRIALS 771 *Nonjury Summation* § 23 (2006).

72. Steven Wisotsky, *Speak With Style and Authority*, 37:2 LITIG. 16, 17 (Winter 2011). *See also*, SAYLER & SHADEL, *supra* note 16, at 67-70 (offering the same advice).

73. Graf, *supra* note 54, at 47; Jan Bremmer, *Walking, Standing, and Sitting in Ancient Greek Culture*, *in* A CULTURAL HISTORY OF GESTURE 16-23 (Jan Bremmer & Herman Roodenburg eds., 1991). On the cultural significance of walking in Rome, see ANTHONY CORBEILL, NATURE EMBODIED: GESTURE IN ANCIENT ROME, 107-37 (2004). *See also* CICERO, DE OFFICIIS I.xxxvi.131 (Loeb Classical Library) (Walter Miller trans., 1951).

der and lack of self-restraint."[74] "The orderly man reveals his self-restraint through his deportment: he is deep-voiced and slow-stepping, and his eyes, neither fixed nor rapidly blinking, hold a certain indefinably courageous gleam."[75] Roman rhetorical rules frown on pacing, swaying, and foot tapping.[76] Modern speakers are advised to "[a]void all unnatural and distracting mannerisms.[77] This includes pacing back and forth uncontrollably, a movement that is highly distracting to jurors. Most of the advocate's movement during her courtroom speech should be restricted to the upper body. This still leaves plenty of room for physical expression."[78] As Ball puts it, "[s]tillness conveys confidence and strength."[79] Conversely, fidgeting implies deception and weakness.[80]

The credible speaker "will also use gestures in such a way as to avoid excess: he will maintain an erect and lofty carriage."[81] "He will control himself by the pose of his whole frame, and the vigorous and manly attitude of the body, extending the arm in moments of passion and dropping it in

74. GLEASON, *supra* note 54, at 61 (translating DIO CHRYSOSTOM, ORATIONS 32.54).

75. *Id.* (translating and citing Anonymous Latini). *See* Bremmer, *supra* note 73, at 45; QUINTILIAN, *supra* note 20, at XI.iii.112.

76. *See* QUINTILIAN, *supra* note 20, at XI.iii.124 (regarding errors in stance). Running is disallowed, as is standing on one foot, shifting the weight, and swaying. *Id.* at IX.iii.128. This is to avoid an effeminate manner. Warnings against pacing as reflecting poorly on the advocate's self-control and argument abound in the modern literature. *See*, *e.g.*, 72 AM. JUR. TRIALS 137, *supra* note 41, § 59. "When you are on your feet, keep your weight evenly balanced on both legs . . . When you take a step, take it for a purpose . . . . [I]f you are not actually going somewhere, stand still . . . You rid yourself of wriggles, fidgets, and pointless wandering by monitoring yourself all the time . . . ." DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS 8-9 (3d ed. 2003).

77. CICERO, ORATOR, *supra* note 20, at 59.

78. W. Ray Persons, *Preparing and Delivering the Defense Closing Argument*, 16 NO. 3 PRAC. LITIGATOR 55, 60 (2005).

79. BALL, *supra* note 76, at 5.

80. Thus, a liar "fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 270 (1986) (Rehnquist, J., dissenting). *See also* Penthouse Int'l, Ltd. v. Dominion Fed. Sav. & Loan Ass'n, 855 F.2d 963, 974 (2d Cir. 1988).

81. CICERO, ORATOR, *supra* note 20, at 59.

calmer moods."[82] Excessive movement must be avoided, as should rapid, small, or overly large gesticulation. Quintilian prohibits "[a]ny frenetic movements . . . or wild gesticulation . . . . Gesticulation has only limited amplitude: the hand should never be raised higher than the eyes or lower than the chest, and it should never move further to the left than the shoulders."[83] Modern rules require the same restricted range for acceptable gestures:

> Keep your hands in their own quadrants. Think of your body as being divided by a horizontal line at shoulder level and by a vertical line that bisects you in front from top to bottom. Don't let your right hand cross the vertical line to the left or your left hand cross to the right, or you will seem to be defensively closing yourself off. Don't let either hand rise above the horizontal line at your shoulders. If it does, it is going up there for no good purpose (catching a fly, or touching your face—or worse).[84]

Gesture, too, is given moral significance that, in turn, is conceptualized as central to its credibility. Graf sums up the approach of the ancient sources:

> Moderation in movement is . . . peculiar to a free man . . . a free man is not only a social category, it is a way of living, thinking, and being; being a free man means also having a free soul. . . . Strictly moderated and limited gestures, then, are an indication of moderate and self-controlled character.[85]

82. *Id.* at 59-60.

83. Graf, *supra* note 54, at 46 (summarizing QUINTILIAN, *supra* note 20).

84. BALL, *supra* note 76, at 6-7. Likewise, touching the face is "look[ing] like you are trying to hide something other than your face—such as the truth." *Id. See* RHETORICA AD HERENNIUM, *supra* note 20, at III.xv.27; QUINTILIAN, *supra* note 20, at XI.iii.123.

85. Graf, *supra* note 54, at 47 (summarizing ancient views). Traditionally, moderation was not a virtue for the poor. PLATO, CHARMIDES § 161, *in* THE COLLECTED DIALOGUES OF PLATO (Edith Hamilton & Huntington Cairns

The modern "Inverse Gesture Rule"[86] relies on the same understanding: "Using many gestures means speakers need help with what they are saying; using only a few gestures along with good word choice means to jurors that those words can stand alone."[87] The Rule clearly positions gesture within the mind/body duality: more body equals less mind; less body equals more mind.

Advice about other symbols of class and power clarifies the cultural matrix that shapes "natural" indicators of credibility. The advocate's attire should be manly.[88] Before speaking, he should "rise with deliberation,[89] . . . secure a moment for reflexion[sic], [and] devote a brief space to arrangement of [the] toga."[90] Arranging the toga made conspicuous the speaker's membership in the dominant class: free, male citizens, socially and financially secure. Today, a suit is obligatory to evoke the jurors' habit of obedience: "dark suits warn[sic] by lawyers symbolize serious work . . . ; classic silk ties are a clue to the lawyer's supposed station in life; a strong voice with certain resonant qualities give[sic] a cue to power within the speaker."[91] Like rearranging the toga, foregrounding the suit has a clear purpose:

eds., Benjamin Jowett trans., 1961). Gleason discusses Seneca's idea that "[a] man's stride reveals the condition of his soul," especially his masculinity, and is closely related to his voice. GLEASON, *supra* note 54, at 113. The individual elements of delivery entail each other. For a similar overlapping in which an uneven voice is compared to a limping gait, see QUINTILIAN, *supra* note 20, at XI.iii.43.

86. 72 AM. JUR. TRIALS 137, *supra* note 41, § 16.

87. *Id.*

88. QUINTILIAN, *supra* note 20, at XI.iii.137.

89. "Then, when authorized by the court, rise slowly but deliberately and approach the jury in a calm and steadfast manner. After addressing the court – pause! Do not plunge immediately into the presentation. Allow the jury a momentary opportunity to observe you and your countenance." Persons, *supra* note 78, at 59. "The short pause before the commencement of address is a time-honored technique of outstanding speakers and advocates of all kinds. It lends itself especially well to the courtroom setting." *Id*. at 60. *See also* 72 AM. JUR. TRIALS 137, *supra* note 41, § 58.

90. QUINTILIAN, *supra* note 20, at XI.iii.156. "It is a good idea for a man to keep his suit jacket open while sitting and button it on rising to address a judge or jury for a major speech. The act of buttoning it seems to project a message of serious intent." ROBERTO ARON ET AL., TRIAL COMMUNICATION SKILLS § 4.08, 4-16 (1996).

91. 72 AM. JUR. TRIALS 137, *supra* note 41, § 43.

> [to] create in other the desire for obedience . . . . Obedience, taught from the cradle, carries forward into the political, legal, military, religious, and familial structures of our nation. . . . [O]beying authority figures who control rewards and punishment in various relationships (family, work, etc.) proves advantageous to most people, as does obeying those authority figures who have greater wisdom.[92]

The conventional invocation of wisdom to conclude a recital of power justifies elite delivery and explains its claim. The quotations illustrate the overlap between power, credibility, and truth that shape the elite norm. Only those who must be obeyed can be trusted because they, alone, have the autonomy to speak truth.[93]

92. *Id.* The idea that the habit of obedience is important and should be invoked by attorneys is common. Smith & Malandro candidly pointed out: "The basic human response to authority is automatic and instinctive. Most people defer to authority figures allowing them to influence both their behaviors and decisions. Jurors particularly seek out authority figures in the courtroom to guide their responses. This explains, in part, the success of the 'act as if' technique." SMITH & MALANDRO, *supra* note 70, at 251-52. A few sentences later, "believability" is tied elite delivery. "To increase the perception of credibility, first increase the perception of authority . . . through changes in personal appearance, voice, and behavioral cues." *Id.* at 252. "Instinctive" above naturalizes learned responses to signals of power. This down-to-earth passage dispenses with the conventional nicety of filtering the result through wisdom or truth.

93. To manifest strength is thus the underlying imperative of elite demeanor rules. As will be discussed below, the opposite is also true: vulnerability, betrayed by non-elite gestures, begets lies:

> Confidence gestures are crucial for advocates who wish to be discerned as poised and in control of the situation. These gestures are identified (1) as *not* exhibiting gestures that show lack of confidence, and (2) showing certain gestures that exhibit confidence. For example, (1) not scratching or touching the head or covering the mouth, having downcast eyes, indirect body orientation, closed bodily posture, or (2) having excellent posture with chin slightly raised and showing the power gesture and the open palm ("I have nothing to hide.").

84 AM. JUR. TRIALS 1 *Body Language for Trial Lawyers: Persuasive Gestures, Postures, and Foot Movement in the Courtroom* § 18 (2016).

B. How Liars Look: Physical Vulnerability and Mental Weakness

Deviations from elite practice are not simply non-verbal mistakes. Failure to follow elite rules ties the speaker and his words to females, the insane, the poor, children, slaves, and the powerless.[94] Ancients and moderns distrust the speech of the weak as potentially deceptive and irrational,[95] and prey to the violence of others and the speaker's own need and desire.[96]

The *Iliad* set the stage when Thersites, an ordinary soldier, dares to speak in the army council to argue for the common soldiers' interests.[97] The inappropriate nature of his speech is expressed in physical terms that have continued to resonate in rhetorical practice. Thersites is bow-legged, lame, round-shouldered, and bald, with a shrill voice.[98] His non-elite body and voice, the opposite of the deep voice, strong legs, and luxuriant hair characteristic of heroic leaders, identify Thersites with his audience, the mass of infantry. Thus, Thersites becomes a precursor of popular delivery, that is, delivery that emphasizes its affiliation with the non-elite audience and rejects elite rules of non-verbal behavior.

Thersites' reception illustrates the fundamental problem with non-elite speakers: their words are at the mercy of others. Thersites is weak. The heroic Odysseus first insults him and

94. "Cicero and Quintilian are policemen of behavior and style, encouraging students to cultivate a 'naturally' masculine attitude, and punishing those who had the look and sound of the slave, the foreigner, the ill-educated man, or the woman." Joy Connolly, *The Politics of Rhetorical Education*, *in* CAMBRIDGE COMPANION TO ANCIENT RHETORIC 126, 135 (Erik Gunderson ed., 2009) (citation omitted).

95. For contemporary distrust of powerless language, see CONLEY & O'BARR, *supra* note 50, at 60.

96. ARISTOTLE, *supra* note 25, § 1354b, 1369b-1370a. On the two types of pleasure, one associated reason, the other with the body and the irrational, *see id.* § 1370. On a similar connection among truth telling, status, and control of the appetites in discussion of jurors and witnesses in the thirteenth century, see Fisher, *supra* note 9, at 589. Those likely to lie included: "slaves, women (in certain circumstances) those below the age of fourteen, the insane, the infamous, paupers, infidels, [and] criminals." *Id.* at 590.

97. THE ILIAD, *supra* note 55, at II.211-277. For Thersites as representative of a non-elite perspective, see, e.g., Peter W. Rose, *Thersites and the Plural Voices of Homer*, 21 ARETHUSA 5 (1988).

98. THE ILIAD, *supra* note 55, II.216-219.

orders him to be silent.[99] He ends by clubbing Thersites, threatening to strip him naked and expose his genitals (the ultimate sign of human physicality) should he speak again.[100] Thersites is left weeping, bloody, and cowering silently on the ground.[101] The fact that Thersites was merely repeating points Achilles made earlier foregrounds the extent to which the reaction to his speech is driven by its speaker, not its content. As Quintilian candidly remarks, not Thersites' speech, but its speaker, made his words laughable.[102] Thus, Thersites is the precursor to the figure in Figure 2, a figurine of a slave from the fourth century B.C. comic stage.[103]

Figure 2

99. *Id.* at II.245-60.

100. *Id.* at II.260-65. These are unique phrases in epic and draw extra, negative attention to Thersites' body. *See* G.S. KIRK, THE *ILIAD*: A COMMENTARY, VOL. 1: BOOKS 1-4, 143 (1985).

101. THE ILIAD, *supra* note 55, at II.267-69.

102. QUINTILIAN, *supra* note 20, at XI.i.37. Quintilian's remark indicates that Thersites is a comic figure, and as such "think[s] with [his] bod[y], not with [his] head[]: fear is registered in the bowels, and desire in the stomach . . . . [I]t is the posture and particularly the set of the shoulders that tells us what the mask is thinking." David Wiles, *The Poetics of the Mask in Old Comedy*, *in* PERFORMANCE, ICONOGRAPHY, RECEPTION 374, 382 (Martin Revermann & Peter Wilson eds., 2008).

103. Bronze statuette of a comic actor, 400-350BC from Greece, NM64.163, NICHOLSON MUSEUM, UNIV. OF SYDNEY. (Measurements: 8.1x6.8cm). Figure 2 is a bronze statue of a comic slave wearing characteristic slave mask. Made in Greece.

Comic slaves were notorious liars,[104] but, to elite eyes, they are merely an extreme example of the characteristics of the untrustworthy—women, beggars, and non-elite men—with waving arms, shrieking voice,[105] disordered clothing, contorted faces, and backs bent from blows.[106]

Conventional markers of fear or servitude are fatal to credibility.[107] Quintilian advises that shortening the neck gives a look of servility, flattery, admiration, and fear.[108] Modern advice warns, "[h]unched shoulders say 'I am insecure and I feel defeated. I am weak.'"[109] As a result, "your head will jut forward as if it is about to drop off, the courtroom dog will growl at you."[110] Any gesture that signals protection of the genitals

104. Slaves were considered understandably prone to lying. This commonplace informs Quintilian's remark that lying, "which is at times reprehensible even in slaves, may on other occasions be praiseworthy even in a wise man." QUINTILIAN, *supra* note 20, at XII.i.39.

105. For women's speech as seductive, untruthful, and shaped by the female body and necessities of the womb with its related hysteria, see generally Lesley Dean-Jones, *The Cultural Construct of the Female Body in Classical Greek Science*, *in* SEX AND DIFFERENCE IN ANCIENT GREECE AND ROME 192-97 (Mark Golden & Peter Toohey eds., 2003); Joy Connolly, *Mastering Corruption: Constructions of Identity in Roman Oratory*, *in* WOMEN AND SLAVES IN GRECO-ROMAN CULTURE (Sandra R. Joshel & Sheila Murnaghan eds., 1998); Nancy Demand, *Women and Slaves as Hippocratic Patients*, *in* WOMEN AND SLAVES IN GRECO-ROMAN CULTURE 56 (Sandra R. Joshel & Sheila Murnaghan eds., 1998); Ann Bergren, *Language and the Female in Early Greek Thought*, 16 ARETHUSA 69 (1983).

106. Sitting, particularly upon the ground, was characteristic of beggars and slaves. *See* Bremmer, *supra* note 73, at 25. Slaves and beggars listen and speak from need, motivated by hunger and fear so that they say what will please, rather than what is true. *See, e.g.*, HOMER, ODYSSEY 14.122-132 (Richard Lattimore trans., 1967); O'REGAN, *supra* note 40, at 61-63.

107. "The determination of credibility (conversely deception) often is read in the facial expression of fear." Michael Searcy et al., *Communication in the Courtroom and the "Appearance" of Justice*, *in* APPLICATIONS OF NONVERBAL COMMUNICATION 53 (Ronald E. Riggio & Robert S. Feldman eds., 2005). The authors link this to the contemporary concept of leakage and "fear of getting caught," yet "in the absence of an acute conscious or obvious sense of guilt about lying, using NVC [nonverbal communication] alone to determine witness credibility is difficult." *Id.*

108. QUINTILIAN, *supra* note 20, at XI.iii.83.

109. 72 AM. JUR. TRIALS 137, *supra* note 41, § 58. SONYA HAMLIN, WHAT MAKES JURIES LISTEN TODAY 211 (1998), identifies round shoulders as "weak and insecure . . . [giving an] air of incompetence and self-doubt."

110. BALL, *supra* note 76, at 5.

is, not surprisingly, even more taboo. "The lawyer should never grasp [his] hands together in front of the crotch area or behind."[111] "It is a weak, insecure position that makes a man seem unsure of himself no matter how comfortable it may feel."[112] By extension, this applies to women, too: "[t]he same thing happens [telegraphing fear] when women 'comfortably' fold their arms in front of their breasts."[113] Self-protecting vulnerable areas of the body undermines the argument because fear and weakness menace the commitment to truth.[114]

Disordered movement and a high voice are also fatal.[115] The weak must hurry, driven on by fear or irrational emotion of various sorts.[116] "Exuberant gesticulation and movement were characteristic of slaves; a free man does not run, but the running slave was a stock type."[117] Of course, slaves run because they must at the bidding of others, but there is more at work than just fear. Thus, one modern commentator recommends:

111. 72 AM. JUR. TRIALS 137, *supra* note 41, § 57.

112. BALL, *supra* note 76, at 6. "Until the trial advocate is sure of himself and his technique, it is better to make gestures above the waist level. Gestures made below the waist tend to suggest suppression or debasement and are more difficult to perform for beginners." Persons, *supra* note 78, at 60.

113. BALL, *supra* note 76, at 6.

114. "Arms crossed in front of the chest is a clear sign that the person . . . feels that they have to protect themselves against further interrogation. Legs crossed can also look defensive and closed. Clenched fists or hands gripping the arms show tension and an underlying anxiety about the situation. Hand-wringing reveals an even greater feeling of anxiety." 2 JURYWORK: SYSTEMATIC TECHNIQUES § 15.13 [hereinafter JURYWORK].

115. CORBEILL, *supra* note 73, at 133.

116. *See* QUINTILIAN, *supra* note 20, at XI.iii.112; Graf, *supra* note 54, at 49. Pictures on attic vases confirm that individually waving arms is a sign of both excessive emotion and of fear; the latter, not surprisingly, is also represented through running. These gestures belong to women, children, old men, and barbarians. *See generally,* Timothy, J. McNiven, *Behaving Like an Other: Telltale Gestures in Athenian Vase Painting*, *in* NOT THE CLASSICAL IDEAL (Beth Cohen ed., 2005).

117. "[B]ut other violent gestures belong either to slaves or to low class free-born: shaking the head in anger or being swollen with it; grinding one's teeth and slapping the thigh in anger." Graf, *supra* note 54, at 49.

> Move about the courtroom very slowly and deliberately. It is important to remember that too many advocates move with undue haste in court. Slower movements with feet moving from place to place and gestures with hands and arms cue to audience members that I am in control of this situation.[118]

A similar problem of control and fear underlies the requirement that the voice be low.[119] Ancient audiences were felt to look upon a low voice as "a sign of courage, a high voice as a sign of cowardice."[120] Likewise, "[h]igher pitch, in American culture and American legal culture, is associated with lack of authority and demeaned as overly emotional."[121] Of course, a female speaker has a particular problem with this requirement and the underlying paradigm. Thus, "[i]f you have a naturally high pitched voice, remember to speak slowly and try to lower the pitch."[122]

118. 84 AM. JUR. TRIALS 1, *supra* note 93, § 71. "Too much movement by a trial lawyer can be disastrous for an opening statement or closing argument, because it makes the jurors nervous, and it signals the lawyer's lack of confidence." 72 AM. JUR. TRIALS 137, *supra* note 41, § 59.

119. A low voice communicates power. Bernstein, *supra* note 70, at 65. Quintilian distinguishes the exercise of an orator's voice from that of a singer by comparing the training of the voice to that of a soldier who must march, carry burdens, mount guard, etc. QUINTILIAN, *supra* note 20, at XI.iii.26.

120. GLEASON, *supra* note 54, at 83 (citation omitted).

121. Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices,* 103 DICK. L. REV. 7, 49-50, 57 n.206 (1998) (citation omitted).

122. DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 329 (2d ed. 1993), cited by Stanchi, *supra* note 121, at 49 n.206. "Sharp exclamation injures the voice and likewise jars the hearer, for it has about it something ignoble, suited rather to feminine outcry than to manly dignity in speaking." AD HERENNIUM, *supra* note 20, at III.xii.22. Emotion and an emotional style are feminine and contrary to nature. The author recommends a low voice for debate. *Id.* at III.xiv.25. Similarly, "the speaker needs to realize that the best visual and aural qualities do not call attention to themselves." 72 AM. JUR. TRIALS 137, *supra* note 41, § 14. The best aural quality is "a rich baritone voice." *Id.* §18. The writer is a woman, which illustrates how these norms transcend gender boundaries. The prejudice against shrill voices is certainly alive:

> Who trusts a shrill-voiced trial lawyer? Who has great confidence in a monotone voice, or a breathy voice, or a voice

Failures of delivery, social status, and self-control are indistinguishable in the dominant elite paradigm. "A man's lack of sexual self-control reveals itself in his speech: the incontinent man has a high-pitched voice."[123] Presumably his lack of control assimilates him to the feminine. Running and movement in general become evidence that "low origin and lack of self-control obviously go[] together."[124] Too much gesture signifies too little reason; even neutral automatic or repetitive gestures represent slippage of mental control. A modern writer points out: "A senseless bobbing of the head sends a senseless subtext."[125] Quintilian makes the point more strongly: "Even the frequent nodding of the head is not free from fault, while to toss or roll it till our hair flies free is suggestive of a fanatic."[126] Gestures that seem to respond to bodily, not mental, imperatives are conceptualized as even more revealing:

> [T]rial lawyers need to re-think their delivery patterns, and most advocates need to learn new muscle memory that will allow them a narrow range of acceptable gestures. No longer should

> with a lisp, or with an irritating high-pitch, or awkward pausing or added useless sounds (uhh, umm, er)? If we do not give full credibility to individuals outside the courtroom with these vocal qualities, we certainly will not give credibility to problem-voiced lawyers inside the courtroom, a place held in awe by jurors.

81 AM. JUR. TRIALS 317 *The Trial Lawyer's Persuasive Speaking Voice* § 1 (2016). *See* SAYLER & SHADEL, *supra* note 16, at 119-20, 124-26 (discussing the problems of pitch and emotion in women).

123. GLEASON, *supra* note 54, at 83 (footnote omitted). Ekman points out that in the 1930s, expansive gesticulation was considered characteristic of "'inferior races,' such as the Jews or gypsies, [who] made many large, sweeping illustrators compared to the 'superior,' less gesturally expansive Aryans." Ekman, *supra* note 32, at 105. Likewise, "[s]tereotyping by role and exaggerated speech and gestures is commonplace and consistent with images of Blacks historically relied upon by the mass media." Desiree A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615, 654 (2000).

124. Graf, *supra* note 54, at 49.

125. JULIUS FAST, BODY LANGUAGE IN THE WORK PLACE 65 (1994); HAMLIN, *supra* note 109, at 209 (stating that "any gestural habit will, after a time, look false"). *See also* People v. Bellucci, No. H023624, 2003 WL 756829, at *2 (Cal. Ct. App. Mar. 5, 2003).

126. QUINTILIAN, *supra* note 20, at XI.iii.71.

> they wave their hands and arms about led by whim and the subconscious muscle guidance system. No longer should they stamp about the courtroom or slouch in their chairs. No longer should they scratch[127] or let their hands fly free. Jurors are watching everything.[128]

Gestures outside the elite range are identified as creatures of individual "whim" and sub-rational "subconscious muscle guidance" that show that the body, not the mind, is in charge. Seeing them, the watching jurors assume the worst: irrationality and deception.

III. POPULAR NON-VERBAL COMMUNICATION: ADOPTING AN ALTERNATE PERSUASIVE BODY

A. Rejection by the Dominant Elite Tradition

As this section will show, the elite speaker has a potent rival in the rhetorical tradition: the popular speaker. The popular speaker reverses elite norms to forge a bond with the audience and establish an alternative basis for trust, the invocation of shared, non-elite experience. Instead of restrained elite demeanor, he adopts expansive gestures, raised voice, increased movement, informal posture, and informal, rumpled, or disheveled clothing. Such delivery is associated with trials, with challenges to the established order (charging it with deceit or failure), and with defense attorneys. The dominant elite tradition, which includes almost all surviving classical works and most modern writers, condemns popular delivery, even while admitting its power and the necessity.[129] Thus, the rules and reasons for popular delivery appear only indirectly in ancient sources.

127. *See* Appendix.

128. 84 AM. JUR. TRIALS 1, *supra* note 93, § 7 also prohibits pinching or wiping one's nose, ear scratching, etc. as clues to "imputation of character" by the jury. *See also* HAMLIN, *supra* note 109, at 209.

129. The impact of elite ideology on the accounts of popular rhetoric has long been recognized and plays out in the ancient and modern debates over the actual accomplishments of Cleon, the democratic leader. *See, e.g.*, A.G. Woodhead, *Thucydides' Portrait of Cleon*, 13 MNEMEOSYNE 289, 290-91 (1960).

Modern sources can be more open to such non-verbal communication, but remain firmly anchored in the ancient popular/elite dichotomy and its terms. Although popular delivery may be a rhetorical strategy,[130] the tradition insists that, fundamentally, such non-verbal communication should be avoided and can be salvaged only when it is a conscious choice by a pedigreed elite speaker in limited circumstances. Speakers who routinely employ popular delivery, and who are already non-elite speakers, are emphatically positioned on the wrong side of the traditional mind/body duality and, thus, destructive of society and justice.[131]

The terms of rejection of popular non-verbal communication are rooted in power struggles over democracy: the bitterly contested changes as political power was exercised—or taken—by lower social classes. The poster boy for everything seen as wrong with this process, tools, and result was Cleon, the first demagogue, or populist, politician in democratic Athens, who secured his power and that of his supporters through new forms of political appeal, including a very different, and vastly effective, rhetoric.[132] His opponents never tired of painting Cle-

130. Charges of using popular delivery are political weapons that position an opponent on the wrong side of the body/mind duality, not identifications of ways of speaking. Thus, for example, Cicero both attacked others as popular speakers and was himself similarly attacked through criticism of delivery and style. *See* CORBEILL, *supra* note 73, at 128. For debate explicitly rooted in classical sources and reflecting many of the assumptions discussed here over elite rhetoric, as opposed to the "middling," or more popular rhetoric used by Lincoln and Henry Ward Beecher before the Civil War, see WINTERER, *supra* note 15, at 70-74.

131. The elite appropriation of rationality is also reflected in the rules of evidence, which allows a judge, usually an elite figure, to decide if something is too emotional for the jury and will overwhelm its, presumably more fragile, reason. *See* FED. R. EVID. 403. "[T]he oldest, and still dominant, set of assumptions [is] the "classical" view. Those who subscribe to this viewpoint see emotions as dangerous forces that are likely to corrupt the fact-finding process by displacing the role of cool, unemotional reason." Mark Spottswood, *Emotional Fact-Finding*, 63 U. KAN. L. REV. 41 (2014). "Evidentiary rules and practices reveal a folk psychological view of emotion, placing it at odds with reason." Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U. L. REV. 47, 47 (2011). However, the folk tradition is a manifestation of classical struggle rhetoric and political power.

132. Cleon was "the master of a new technology of political power." O'REGAN, *supra* note 40, at 9 (footnote omitted). *See, e.g.*, W. ROBERT CONNOR, NEW POLITICIANS OF FIFTH-CENTURY ATHENS 116, 119 (1971). Cleon's delivery mirrored his other rhetorical innovations.

on as a corrupt social inferior, working to maximize his own gain and that of the mob who were his supporters.[133] In this picture, Pericles led Athens to glory by uniting the citizens; Cleon destroyed Athens by dividing them. Pericles was an excellent general; Cleon stole his victories from others.[134] And, above all, Pericles rose above the body and told the truth, however unpalatable; Cleon was mired in the body and devoted to lies.[135]

A primary point of attack was Cleon's methods of nonverbal communication, which embodied his profound break with the traditional ruling elite. Pericles' unemotional restraint and bodily immobility, claiming rationality and universal truth, have been discussed above. Cleon's trademarks were shouting, vigorous movement, lower-class gestures like slapping the thigh, and disordering his clothing, all of which contributed to his emotional appeals.[136] His techniques emphasized his solidarity with the ordinary citizens who could not forget the requirements and vulnerabilities of the body.[137] His delivery, like his political success, visibly relocated power from elite speaker to the mass of listeners, assembled as political or legal decision makers.[138] Elite writers associated this relocation

133. *See, e.g.*, ARISTOPHANES, THE KNIGHTS, 40-60 (Loeb Classical Library) (Benjamin B. Rogers trans., 1924), in which Cleon is represented as a slave corrupting his master, Demos, with food. See THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 3.36.6 (Rex Warner, trans. 1972), in which Cleon is identified as the most violent of the citizens and the most persuasive.

134. *See, e.g.*, ARISTOPHANES, *supra* note 133, at 1-55. The opening scene represents Nicias and Demosthenes, two Athenian generals, claiming that Paphlagon, the Cleon character, has lied and claimed credit for their victories; the slaves consider running away (that is, deserting) as a result. *Id.* at 20-30.

135. For Thucydides' contrast of Pericles and Cleon, see HARRY YUNIS, TAMING DEMOCRACY, 59-86 (1996). Modern historians differ on factual accuracy of these ancient accounts; however, that does not alter their impact as ideological positions. *See* MARTIN OSTWALD, FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW: LAW, SOCIETY, AND POLITICS IN FIFTH-CENTURY ATHENS 202 (1986).

136. For Cleon's yelling, see ARISTOPHANES, *supra* note 133, at 135-36; PLUTARCH, NICIAS VIII.3 (Loeb Classical Library) (Bernadotte Perrin trans., 1967). Cleon is accused of first using used licentiousness and buffoonery to delight the Athenians. PLUTARCH, NICIAS III.1, VIII.3.

137. ARISTOTLE, *supra* note 25, §1359b.

138. PLATO, GORGIAS § 456, *supra* note 127; O'REGAN, *supra* note 40, at 12.

of power with a menace to truth. Deprived of its individual guarantor, that is, the elite speaker, truth is threatened by mob violence. For the elite tradition, Cleon's body language reflected not a different understanding of how to arrive at decisions, but a failure of character, his and his audience's.[139] Both speaker and audience were characterized as closer to slaves and women than rational men.[140] Such "persuasion" relied not on truth and reason, but need and satisfaction.[141] Within this paradigm, it was not surprising that Cleon is conceptualized as initiating the destruction of the arena for rational discourse and, thus, the destruction of Athens.[142]

The remarkable stability of both forms of popular delivery and their evaluation within the elite rhetorical paradigm is evidenced in rhetorical "history." The first Roman politician to appeal directly to the mass of the citizens was, like Cleon, notable "both for the vehemence of his speech and his complementary innovations in delivery: he was the first to pull his toga aside to free his left arm for gesture, the first to pace along the Rostra."[143] His successor, another (in)famous popular speaker, is credited with introducing the famous thigh slap to Roman oratory.[144] The account proceeds with the typical elite characterization of popular delivery, as nature, not skill, and

139. This trend begins in Thucydides and Aristophanes and continues in influential assessments of the period. For the opposition between Pericles and those who followed, first of all Cleon, in terms of character, see PLUTARCH, PERICLES, *supra* note 59, at XXXIX; NICIAS, *supra* note 135, at III.

140. *See e.g.*, ARISTOPHANES, *supra* note 133, *passim*. The play represents Cleon as a slave who is finally outdone by an even more degraded person, a sausage seller who can cater even better to his master's stomach. *Id.*

141. Sophistic, popular speakers like Cleon were mocked as speaking/farting through their assholes, an image that continues today. O'REGAN, *supra* note 40, at 59.

142. *Id.* at 9-11.

143. ROBERT MORSTEIN-MARX, MASS ORATORY AND POLITICAL POWER IN LATE REPUBLICAN ROME 271 (2004) (discusses the more expansive delivery of popular speakers appealing to the masses). *See also* Elaine Fantham, *Quintilian on Performance: Traditional and Personal Elements in "Institutio" 11.3*, 36 PHOENIX 243 (1982). The speaker is Caius Gracchus, who is explicitly compared to Cleon in PLUTARCH, TIBERIUS GRACCHUS II.2 in TIBERIUS & CAIUS GRACCHUS (Loeb Classical Library) (Bernadotte Perrin trans., 1921).

144. *See* Fantham, *supra* note 143, at 259 (discussing the ancient sources of this lore).

mingles belly and speech, discussing table manners, diction, character, temper, tone, and, finally, vulnerability, flight, and death.[145]

The contest between elite delivery, rationality, justice, and truth on the one hand, and popular delivery, irrationality, mob violence, and injustice on the other, animates one common understanding of trial. It was first articulated in the most influential trial scene in our tradition: Plato's account of Socrates' trial and conviction.[146] Socrates' demeanor positions him firmly on the positive side of the mind/body duality—and his prosecutors and the jury on the other. He dies because he rejected "effrontery and impudence and . . . refused to address [the jurors] in the way which would give [them] most pleasure . . . doing or saying all sorts of things."[147] He ignores the jurors' ordinary concerns, fear, favor, and even death, and cares only for public good.[148] He refuses to appeal to the jurors' emotions, to make "passionate appeals," or to "stage[] pathetic scenes" that would reduce justice to a personal favor, rather than transcendent value.[149] The speech that would have wooed the jury would be the speech of a slave or women[150] shaped by physical vulnerability and, thus, deceptive and inconstant. Instead, Socrates' truthfulness and his physical and emotional immobility are one: having taken his stand, he will not budge, a claim explicitly compared to his unyielding stance in battle.[151] The moving image of a lone, immobile man, associated with rational truth, and his hyperactive, irrational persecutors, sustains elite rhetoric and its trademark delivery as the only morally viable option. It naturalizes elite delivery, and all of its class-related claims, as virtue, and discredits democratic rhetoric along with the jury, a much-contested innovation of demo-

145. PLUTARCH, TIBERIUS GRACCHUS *supra* note 143, at II.2-5; CAIUS GRACCHUS, *supra* note 142, at XVII.

146. "A typological smear that tied unmoderated democracy to unreason was planted by Plato in the representation of Socrates' condemnation by a people's court." John Henderson, *The Runabout: A Volume Retrospect*, *in* THE CAMBRIDGE GUIDE TO ANCIENT RHETORIC 282 (Erik Gunderson ed., 2009).

147. PLATO, *supra* note 25, § 38d-e. *See also* § 28b, 34c.

148. *Id.* § 22e-23b, 25c, 30d.

149. *Id.* § 37a , 35b-c.

150. *Id.* § 35b, 38e.

151. *Id.* § 28d-e, 38e.

cratic Athens. Plato's undisputed rhetorical mastery positions elite strategy as rejection of rhetoric and the "natural" truthfulness of authentic men.

B. Embracing Other Demeanors for Persuasion and Alternative Truths

However, popular delivery's power, particularly when arguing the "weaker" side, that is, arguing against the established/political social classes and state or institutional structures,[152] was, and is, unarguable. Without abandoning the link between character and delivery, rhetorical advice also recognizes popular delivery as a strategy—risky, but sometimes necessary, and particularly suited to jury trial or other venues in which the audience is conceptualized as non-elite and, thus, potentially less rational.[153] For example, after recommending elite demeanor, the authors of *Trial Communication Skills* point that popular delivery has its place with a story of adversarial successes:

152. In Rome, non-elite delivery signified "'breaking of ranks,' taking up a position just a bit, but significantly, askew of the 'suits' of the senatorial order." MORSTEIN-MARX, *supra* note 143, at 273 (footnote omitted). Adoption of trademark gestures of non-elite delivery sent a clear message. "By not avoiding behavior specifically marked in his society as feminine, Caesar could be perceived as transgressing normal modes of male, aristocratic behavior. In violating the accepted relationship between appearance and reality, Caesar fashions himself as a proponent of political change." CORBEILL, *supra* note 73, at 137. Rideout discusses how different persona and voice are in a Supreme Court dissent than in a majority opinion. Yet, as he observes, only those of impeccable elite legal standing, Supreme Court Justices, can deviate successfully from the standard legal voice; others, he implies, would be charged with irrationality and failure of disciplined legal self. Rideout, *supra* note 49, at 103-04.

153. Wetlaufer points out that "good lawyers, good judges are attentive to a range of persuasive possibilities broader than that here identified as the discipline-specific rhetoric of law" and identifies this broader range with "passion," ties this to the "rhetoric of politics," and associates it with "speech to his jury under circumstances where such a speech may be useful or necessary." Wetlaufer, *supra* note 6, at 1562-63. "In speaking to this jury, the good judge, like the effective trial lawyer, will depart from the customary rhetoric of law." *Id.* Thus, he ties his analysis of legal rhetoric to the ancient dichotomy of elite reason and popular irrationality while also, in a traditional move, justifying it as strategy if undertaken by an elite figure. *See also id.* at 1596.

> In the late 1960s, clients of William Kunstler did not expect him to behave like a typical establishment lawyer. They wanted him to make a personal if flamboyant statement to flout what they felt was improperly exercised authority. A young lawyer from Marin County, California told the authors that she once dared to go into court in jeans . . . . It was the jury I wanted to reach. They were all young, most of them counter-culture types, and I knew they'd react negatively to a suit or even a dress. I know the jeans swung the case in my favor. This kind of approach would be ridiculous in most areas, but, again, it was a case of her projecting an image with which the jury could identify.[154]

Her delivery is a choice, not a character trait. These highly skilled attorneys manipulate the repertoire of popular delivery in gesture, dress, and voice to build persuasion and support the argument they are using.

The observation that non-verbal communication can take various forms as needed is profoundly risky for the elite paradigm and the legal system it supports. The practical considerations mask deeper, contested philosophies about the origin and status of truth. Embedded in the notion of choice among strategies is an assessment of speech quite at odds with the elite universalizing linkage of one delivery, one credibility, one rationality, and one truth. Rooting communication in persuasion to which all are subject, and tying delivery to that paradigm, challenges all these notions.[155] The clash of perspectives is ancient: Plato and Aristotle report that delivery, as a topic, was first associated with the sophists,[156] notorious believers in the relativity or unavailability of truth and the unfettered force of

154. ARON ET AL., *supra* note 90, § 4.08.

155. This may be echoed in the "agonizing simplistic" debate over whether decision making by judges and juries should involve suppression of emotion. Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1945 (2012). *See* Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 630, 633-41 (2011).

156. ARISTOTLE, *supra* note 25, § 1404a, links delivery's importance to the sophists, beginning with Thrasymachus.

persuasion in the human world.[157] Modern proponents of popular delivery agree: "Persuasion is the purpose of trial communication."[158] "Since advocacy uses persuasion rather than direct physical force, . . . the other party . . . must be led to want to do what the advocate is seeking."[159]

Popular expansive gesticulation and non-elite vocal tones aim at providing an alternative mechanism of credibility, shared experience and a claim of affiliation. Modern popular practice replicates ancient patterns.[160] Within the popular

157. The sophists, teachers of rhetoric to all in the newly democratic Athens, based persuasion on a notion of relative truth. The elite linkage of delivery, the sophists, the body, self-interest, the masses, and multiple, mortal truths form the opposite pole to elite claims to unitary, transcendent truth, accessible to a few. *See* G.B. KERFERD, THE SOPHISTIC MOVEMENT 83-110 (1981); WILLIAM GUTHRIE, THE SOPHISTS 176-225 (1971). The notion of strategic choice as the basis for persuasion is embedded in *kairos* or speech appropriate for the moment, a trademark innovation. *See* GUTHRIE, *supra* note 157, at 272.

158. However, the writer continues to relink persuasion and justice as most effective: "In order to be able to persuade, the trial attorney must be personally convinced that he or she is fulfilling a mission, the role of the advocate in achieving justice. It is the advocate's duty to perform this mission with conscience because advocacy without conscience is like a body without a soul." ARON ET AL., *supra* note 90, at 1-26. See below on the role of the soul here.

159. RICHARD A. GIVENS, ADVOCACY: THE ART OF PLEADING A CAUSE § 1.03, Supplement Appendix 16-2, § 10 (3d ed., 1992). The concept is ancient. Sophists imagined persuasion as a form of force to advertising the importance of their instruction in persuasive speaking in democratic institutions. *See* O'REGAN, *supra* note 40, at 11-21. Givens also focuses on the concept of alignment as the persuasive strategy:

> Witnesses, advocates, political figures, and sales personnel succeed and are sometimes convincing despite obvious clues indicating that they are dishonest, because the audience wants to believe them. An effective witness or advocate must accordingly seek to align their presentation with the interests of the tribunal to the extent feasible. Honesty, while in itself an advantage . . . must be combined with effective presentation and alignment with the anticipated reaction of those who are to act on the basis of the presentation.

GIVENS, *supra* note 159, at Supplement § 2.02. Note the nod toward honesty as a rhetorical advantage.

160. *See* MORSTEIN-MARX, *supra* note 143, at 272-73 (noting that Cicero records that the Roman populace loved the name, speech, face and gait of the popular orators).

paradigm of non-verbal communication, the central question is "will you be recognizable to the jurors as *human*, like them? As you proceed logically, in cool control, . . . can you also come across as a *feeling and fallible human being*?"[161] "For jurors to relate to you, you must show them you know about all of life – as they do – not just an isolated, powerful, unfamiliar corner [the legal profession]."[162] Thus, popular delivery embraces many alternatives and parades different bodies, explicitly referencing age, sex, class, race, and other markers of non-elite affiliation. "To increase the momentum of the similarity principle, clothing choices, word usage, and behaviors should be similar to those of the jurors to a certain extent. . . . The goal is to create perceived homophyly (perceived similarity) between counsel, client, and jurors."[163]

Popular rhetoric in approach, and particularly in delivery, embraces a multifaceted notion of human life. The reversal from the rules of elite delivery could not be more clear. As one writer advising popular delivery acknowledges: "movement in the courtroom is controversial" and restricted; frequently judges require the attorney to stand in one place.[164] Judges' "reasons why movement is restricted [are]: 'more dignified', 'more serious,' 'not so distracting,' 'not too intimidating to witnesses.'"[165] The author emphatically rejects these with the claim that "[m]ovement is life."[166] "Is the lectern and all it connotes a more reassuring image for the jury to focus on than a human being? . . . Does this give the client the best chance for his lawyers to be at the top of their form?"[167] Popular delivery, with

161. HAMLIN, *supra* note 109, at 9. Note the attempt to fuse the underlying claim of elite rhetoric with popular strategies.

162. *Id.* (emphasis omitted).

163. SMITH & MALANDRO, *supra* note 70, at 15. The authors work along a credibility/authority versus approachability/likeability/similarity axis, with advice about how to become more approachable that includes things like less formal attire. *Id.* at 57-64 (with checklists). Similarity to the jury is also important. *Id.* at 177.

164. HAMLIN, *supra* note 109, at 215-16 (emphasis omitted).

165. *Id.* at 216.

166. *Id.* (emphasis omitted).

167. *Id.* (emphasis omitted).

its gestures,[168] movement, voice,[169] and clothes,[170] showcases "life." This experience shared with the audience underlies its credibility.[171]

C. Rational Citizens and Irrational Mobs: Elite Charges of Pandering

The "life" or common experiences that found the appeal of popular delivery are read by the elite tradition as particularized, bodily, and, thus, irrational and self-interested. While the notion of strategy may be used to root the popular speaker's actions in rationality, no such mechanism salvages the audience. From the beginning of the elite tradition, attention to delivery – which means any non-verbal communication style except elite delivery—is linked to awakening emotions and, thus, to irrationality and corruption of the audience.[172] Effective popular speech is explained by a formulaic charge of pandering, accomplishing its goals by indicating "aspects of the situation which will make it in the other party's interest to do what the advocate wants to see done."[173] The elite view has sunk deep

168. Gesture must be added if not present, but it should appear natural. Hamlin recommends exercises to discover natural gestures that can be cultivated. *Id.* at 745-46. Likeability is promoted by gestures with the palm up. SMITH & MALANDRO, *supra* note 70, at 76.

169. Voice, loudness, and accent are all important in establishing credibility with a popular audience. Loudness is more credible in jury trials. SMITH & MALANDRO, *supra* note 70, at 137, 305.

170. Trial manuals give much advice on clothes. Critical for popular delivery is the advice "*[d]on't emphasize your differences from them* [jurors]." HAMLIN, *supra* note 109, at 239. Unbuttoning the suit jacket has been identified as a "rewarding" behavior that will increase jury good will. SMITH & MALANDRO, *supra* note 70, at 74. The same types of advice are given for reading jurors' clothes. *See* Herald Price Fahringer, *"Mirror, Mirror on the Wall. . .": Body Language, Intuition, and the Art of Jury Selection*, 17 AM. J. TRIAL ADVOC. 197, 200 (1993). Dress and mind are taken as potentially equivalent: "Clothes slapped together in a vulgar, helter-skelter fashion may indicate careless analysis." *Id*.

171. Studies rating speakers with and without gestures have indicated that a person who wishes to be perceived as clear should use few gestures, but a "person who wants to be positively perceived and appreciated for interpersonal qualities . . . should adopt a speech style using an abundance of gestures." B. Rimé & L. Schiaratura, *Gesture and Speech*, *in* FUNDAMENTALS OF NONVERBAL BEHAVIOR 239, 276 (R. S. Feldman & B. Rimé eds., 1991).

172. ARISTOTLE, *supra* note 25, §1404a.

173. GIVENS, *supra* note 159, § 1.03, Supplement Appendix 16-2, § 10. Regarding jurors' interests:

into the popular imagination. One professor has summed up her students' views as:

> Juries are always swayed by irrational appeals, in part, because it is passions and animus and emotion to which the lawyers play in order to get their clients off or to win huge sums in tort claims or in some other, usually dubious, cause. Lawyers, the aristocrats, helping us to stand somewhat above the fray so that the law might have room to work? You've got to be kidding! Lawyers pander to the mob mentality, they don't oppose it. That's a pretty fair summary of how things tend to go.[174]

Elite, non-verbal communication promises rationality in the speaker and promotes an answering rationality in the audience. "[I]f a lawyer's looks are 'correct,' that lawyer will leave the jurors emancipated in a strange way, free to judge the case on other criteria."[175] In contrast, confronted by deviation from the elite norm, the jurors cease to concentrate on argument and instead concentrate on the speakers: "his nose hairs, . . . his dandruff, or his confusing red tie, or her fuzzy hair, or her knees, or her dangling earrings."[176] While the jurors could be simply distracted, the terms of their distraction are revealing.

> [t]he trial lawyer should . . . ask[] "Which needs are the most crucial to jurors?" For example, counsel might ask, do the jurors seem motivated by the need for security? Then counsel will try relating his or her appeal to the jurors to their desire for safety. Another technique is to try coupling lesser needs to a great need, for researchers say that "bundled needs" have more success. For example, bundling the need for safety with the need for self-respect might be effective.

72 AM. JUR. TRIALS 137, *supra* note 41, § 65. "[I]f you can tap into the jury's self-interest you create an attentive, willing, thoughtful audience – motivated to listen." HAMLIN, *supra* note 109, at 22.

174. Jean Bethke Elshtain, *Law and the Moral Life*, 11 YALE J. L. & HUMAN. 383, 389 (1999).

175. 72 AM. JUR. TRIALS 137, *supra* note 41, § 44.

176. *Id.*

The speakers who are within the elite norm disappear; they leave behind what looks like disembodied speech. However, speakers who transgress the norm, particularly in ways clearly identifiable as popular—excessive and personal costume or intrusive bodies—have the opposite effect. Words and content disappear, foregrounding, instead, the improper body of a particular individual. The association of low class, emotional appeals, and irrationality appears in familiar advice about how to speak to various social groups. "The nature of the summation is based on the intensity of the emotional impact to be conveyed to the particular jury type that you are facing. A conservative upper class jury will not be persuaded by a summation loaded with emotional impact. On the other hand, a blue-collar-type jury is more likely to react favorably toward an emotional summation . . . ."[177]

The ancient cultural narrative that listeners may flip from rational "good juror" to irrational "bad juror" under the pressure of non-elite persuasive strategy provides the underpinnings for the changing evaluations of jurors that Leubsdorf has shown justify the Rules of Evidence.[178] Assumptions built into our legal tradition, including the mutually exclusive nature of rationality and emotion, along with an ideological division of reason and emotion between judge (and the elite in general)

177. SMITH & MALANDRO, *supra* note 70, at 755. Similarly, judges are associated with rationality and juries with bodily emotionality. "For example, in bench trials, the target is the head of the fact-finder; in jury trials, the heart of each juror is the mark." ARON ET AL., *supra* note 90, § 19.02. "I have seen some lawyers who think it is effective to pander to emotion. I think this is a mistake in a jury trial, but it is particularly dangerous in a court trial." Robert E. Cartwright, Jr., *"Bench Trial Acumen"—To Bench or Not To Bench—That is the Question, Address Before Association of Trial Lawyers of America Winter Convention (2004)*, *in* WINTER 2004 ATLA-CLE 93, at 6. Yet there is little evidence that judges actually disregard emotion more readily than juries. Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 27 (1997).

178. The phrases "good juror" and "bad juror" are from Leubsdorf, *supra* note 7, at 1248. The elite tradition's successful framing of rhetorical choices as expressive of rationality and irrationality in speaker and audience parallels Leubsdorf's third presupposition that "law is justified by ambivalent and contrary distinctions between reason and emotion, and between the strengths and weaknesses of jurors, distinctions that turn out to be based less on reality than on the structural requirements of trials." *Id.* at 1212. "That structure gives certain roles to jurors and others to judges and then assigns them strengths and weaknesses appropriate to their roles." *Id.* at 1253.

and jury, or the non-elite,[179] facilitate reduction of juries' power and dismissal of disfavored jury verdicts as irrational, rather than competing truths, particularly when the case involves non-elite jurors,[180] parties, or other participants. The speaker is conceptualized as reaching his personal goals – usually identified as winning at all costs—through tactics that transform his audience. "The explanation for [a] legally inexplicable decision lies in the defense's ability to pander to the fears of the jury,"[181] "to obtain a favorably biased jury, and if deemed necessary, to suggest evidence and argumentation that panders to the basest emotions of the jurors."[182] This dispenses with "truth and justice."[183] The dichotomy, its justifications, and its consequences fall squarely within classical, elite paradigm of rhetoric.

IV. VENUES OF ELITE ENFORCEMENT

The extent to which elite delivery successfully occupies the positive pole of traditional dualities—nature, not art; mind, not body; universal, not particular; and finally, virtuous, not vicious—justifies and perpetuates a regime of inculcation and discipline in legal institutions.

179. Mark Spottswood, *Emotional Fact-Finding*, 63 U. KAN. L. REV. 41, 42 (2014) (citations omitted). He collects citations illustrating that the dichotomy is duplicated in the scholarly literature on trial and evidence. *Id.* at 46-57. He also traces the negative view of emotions back to Aristotle. *Id.* at 47. *See* Brown, *supra* note 131, at 60-61 (summarizing the history of the association of reason with judges).

180. Similarly, as juries changed from exclusively "reasonable men" to include traditionally marginalized racial and ethnic groups and women, they were perceived differently. Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 336-41 (1995). An increasing number of rules restricted their power and transferred it to the judge, typically a male member of the elite. "Allowing the judge to define rationality, by giving him the ability to set aside jury verdicts he considers irrational, implies that juries, like women, tend toward the irrational, and must constantly be monitored." *Id.* at 328 (citations omitted).

181. Aaron Goldstein, Note, *Race, Reasonableness, and the Rule of Law*, 76 S. CAL. L. REV. 1189, 1192 (2003).

182. Franklin Strier, *Paying the Piper: Proposed Reforms of the Increasingly Bountiful but Controversial Profession of Trial Consulting*, 44 S.D. L. REV. 699, 707 (1998-99).

183. "Trial consultants, however, are under no more constraint to seek truth and justice than are the attorneys they assist." *Id.* at 708.

A. Acquiring the Language and the Elite Body of the Law: Law School

Just as learning to think like a lawyer involves jettisoning languages of social class, ethnic origin, and so forth, learning to act like a lawyer involves jettisoning previous methods of non-verbal communication. This is part of our tradition. Training in rhetoric was the backbone of education throughout the Roman world.[184] It promoted acquisition of mental and physical practices that were conceptually and practically standard, regardless of the speaker's origin.[185] The rigorous course of study incorporated elite advantage, yet provided the primary vehicle for changes in status by those not part of the Roman elite.[186] Study of rhetoric "effected its own distinctive transformation of the student . . . [that] often entailed a permanent migration from one culture to another . . . and . . . encompassed attitudes, practices, and beliefs, indeed the student's very sense of self" that made it "a process of acculturation."[187] All were required to undergo extensive, and often brutal, practice of their oral and reasoning skills before audiences of their peers and experienced speakers; only a tiny fraction would ever use the skills in the courts.[188] Further, the tradition's strong assertion of the

184. HABINEK, *supra* note 14, at 60-61.

185. *Id.* at 67. For an elite educational focus on physical deportment, see CORBEILL, *supra* note 73, at 124, who points out the connection with Bourdieu's theory of *habitus*. *See also* FROST, *supra* note 14, at 615-16.

186. CORBEILL, *supra* note 73, at 122, 123.

187. HABINEK, *supra* note 14, at 61. Wetlaufer argues that "our particular rhetorical conventions and commitments . . . constitute our selves[sic], our communities, and, perhaps, our world. . . . Those commitments bear not just upon how we say the things we say but also upon *what* we say, on what we are able to *see*, on what we are able to think, on what we are able to know and believe, and on who we are able to be." Wetlaufer, *supra* note 6, at 1548 (emphasis added).

188. "Rhetoric was the calisthenics of manhood." GLEASON, *supra* note 54, at xxii. For a discussion of the masculine rhetorical ideal, see GUNDERSON, *supra* note 54, at ch. 2; HABINEK, *supra* note 14, at 67; and Connolly, *supra* note 105, at 134. Thus, Quintilian starts with the training of a boy and ends with a man. QUINTILIAN, *supra* note 20, at I.pr. 5-8. Gleason comments, "the art of self-presentation through rhetoric entailed much more than mastery of words: physical control of one's voice, carriage, facial expression, and gesture, control of one's emotions under conditions of competitive stress—in a word all the arts of deportment necessary." GLEASON, *supra* note 54, at xxii.

connection between elite education, including delivery, and personal morality meant that training in the rules of non-verbal persuasion was considered to train the character.[189] Conscious incarnation of the restrictions of elite delivery was a process assumed to fortify the mind with rational control over the body and passion.[190] Departure from the elite model was remarked, ridiculed, and punished at every level of Roman education and practice.[191]

Acculturation explicitly continues as a model for law schools,[192] where physical and mental remodeling of students occurs in tandem. Within this paradigm, as shown above, the elite delivery of the warrior remains the norm. Although for some students this elite demeanor is more foreign than for others, its acquisition by all students is a primary focus of law school classrooms and skills training. Students acquire a new set of mental and physical professional habits that seem mutually entailing. Proper elite deportment is conceptualized as tightly linked with professional formation, with legal rationality, and with proper character—in fact, as one and the same.[193]

189. For the study of oratory as the study of virtue, see QUINTILIAN, *supra* note 20, at I.pr. 12, 179; Catherine Atherton, *Children, Animals, Slaves, and Grammar, in* PEDAGOGY AND POWER: RHETORICS OF CLASSICAL LEARNING 229-41 (Yun Lee Too & Niall Livingston eds., 1998) (discussing the Roman view of education, culminating in rhetoric, as moral training that, not surprisingly, distinguished free citizens from slaves). *See also* Teresa Morgan, *Quintilian's Political Theory*, *in* PEDAGOGY AND POWER 249 (Yun Lee Too & Niall Livingston eds., 1998) (discussing Quintilian's education of an orator as aimed at virtue).

190. *See* GLEASON, *supra* note 54, at 72; Connolly, *supra* note 105, at 134; Gunderson, *supra* note 54, at 171-73.

191. Quintilian records persistent jokes passed down in the tradition at the expense of elite speakers who got carried away and ventured too far into the realm of unsanctioned popular delivery. *See, e.g.*, QUINTILIAN, *supra* note 20, at XI.iii 126, 129.

192. "Training lawyers is a process of enculturation." Adam Babich, *Essay on the Political Dimension of Clinics: The Apolitical Law School Clinic*, 11 CLINICAL L. REV. 447, 452 (2005). "Integrating the narrow notion of 'thinking like a lawyer' is important for students as it initiates them into the world of the law in contemporary American society. It is, in essence (and for lack of a better term), an indoctrination into the world of adversarialism and advocacy." David T. Butleritchie, *Situating "Thinking like a Lawyer" within Legal Pedagogy*, 50 CLEV. ST. L. REV. 29, 31 (2002-03).

193. The claim that law schools do not inculcate virtue to the extent desired means that instruction in the law is conceived of as instruction in virtue and (re)formation of character. "We convey and inculcate some variety of

Law schools celebrate remodeling students' minds. "Learning to think like a lawyer" is a clear institutional goal.[194] The process, as Mertz and others have pointed out, pushes to the margins differences in "experience" and "actual structure of voices heard" that derive from "race, gender, class, or other aspects of social identity."[195] Students' attention is reoriented to abstract, formalizing accounts that focus on questions of authority and translate particular life-events into "a shared rhetoric, legal language that generates an appearance of neutrality."[196] The students are pushed to acquire a professional "voice." The optimistic understanding of this process is that, through it, students join the legal discourse community.[197]

moral and ethical sensibilities when we induce our students to take up legal thinking. We are always teaching more than law when we teach students to think like lawyers." James R. Elkins, *Thinking Like a Lawyer: Second Thoughts*, 47 MERCER L. REV. 511, 540 (1996). A familiar role is assigned to clinical courses or skills activities: inculcating ethics "is done by having a lawyer living out the rules of ethics in the actual practice of law before students' eyes, and then insisting that those students live them out before hers." Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 786 (2004).

194. Like all acculturation, the process provides more than technical knowledge. "Law school students not only learn to 'think like lawyers' in terms of analytical technique, but also begin to internalize the four core values that define the legal profession: (1) integrity, (2) competence, (3) respect for the rule of law, and (4) loyalty to clients." Babich, *supra* note 192, at 452 (citations omitted). Thinking like a lawyer means abandoning ways of interpreting reality that involve social, gender, racial, cultural, or economic differences from the prevailing model. *See generally* Stanchi, *supra* note 121; Brook K. Baker, *Language Acculturation Processes and Resistance to In"Doctrine"ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz's Critical Anthropology of the Socratic, Doctrinal Classroom*, 34 J. MARSHALL L. REV. 131 (2000). The student acquires the common sense and the common body of the lawyer, and they are mutually reinforcing. *See* Robert Dingwall, *Language, Law, and Power: Ethnomethodology, Conversation, Analysis, and the Politics of Law and Society Studies*, 25 LAW & SOC. INQUIRY 885, 893 (2000).

195. Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91, 112-13 (2000). *See* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL 211-12 (2007).

196. MERTZ, *supra* note 195, at 109. For legal reading as a cultural product, see generally M.H. Hoeflich, *The Lawyer as Pragmatic Reader: The History of Legal Common-Placing*, 55 ARK. L. REV. 87 (2002).

197. "[O]ne purpose, at least, of legal academia is to empower law students . . . to join the discourse community of law beyond law school." Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 DUQ. L. REV. 489, 491 n.13 (2002).

"[T]hrough subtle reframing of language structure and ideology imparted by their professors, [the students'] own voices shift, and as they undergo a reorientation towards spoken and written language, they achieve new identities as lawyers."[198] The new orientation elides, and is intended to elide, their differences as they are molded to the common pattern. A standard feature of classroom practice is, of course, testing these mental and rhetorical patterns orally before a professional audience.

Learning to think like a lawyer is coupled with learning to act like one, that is, like an elite warrior. Law colleges affirm in practice and pedagogy the surviving, ancient link between rationality and elite decorum, and, more covertly, between irrationality and other forms of non-verbal communication. The standard Socratic method in the first-year classes begins to inculcate elite posture and restraint. From the first day, students are expected to adopt a professional demeanor as they respond to often aggressive questioning unemotionally, frequently standing, facing the professor, physically quiet, as they learn how to manipulate doctrine. The method is justified as reproducing the courtroom.[199] Physical training continues in

198. MERTZ, *supra* note 195, at 116. Mertz also argues that "the Socratic method . . . may continue to linger because of a symbolic 'fit' between the form and function of language." *Id.* at 100. Similarly, legal writing is conceptualized as reshaping the language and, thus, at least the professional, self of students "in teaching novice legal writers, we are not only teaching voice, but in that process we are also constructing a self—the self of a legal writer." Rideout, *supra* note 49, at 67 (emphasis omitted).

199. Dingwall states:

> The classroom mimics the law court with a confrontation between students and teacher in which students are required to talk as if they were counsel and the teacher switches between responding like a difficult judge and giving a situated commentary on the adequacy of the students' talk. Success occurs when students can do "being a lawyer," talking through their point in the way that a practitioner would. The public nature of this confrontation, often described by students as humiliating, mimics the public accountability of the courtroom. This goes right down to the listening demanded of other students, who may be called on without notice to take up the point, which anticipates the listening demanded of opposing counsel, monitoring examinations for objectionable practices.

Dingwall, *supra* note 194, at 900-01. *See* Michael Vitiello, *Teaching Effective Oral Argument Skills: Forget About the Drama Coach*, 75 MISS. L.J. 869

the typical first-year oral advocacy competition, usually an appellate argument, which includes instruction in demeanor, gesture, posture, dress, gaze, and voice.[200] In addition, clinics,[201] moot court,[202] and other types of apprenticeship and initiation experiences prepare or require all students to acquire a set of highly specific, standardized practices identified as "universal" and the physical attributes of rationality and, at the same time, the marks of professional lawyering. The body must be represented as a precondition of legal practice. "[S]omeone who has not mastered the art of presenting himself or herself properly has not conquered the confusing and difficult art of performing in the courtroom as a successful lawyer."[203] Proper representation of the self is the first step in the ability to represent others. Overwhelmingly, students are taught that proper demeanor is elite and punished for departures from it.[204]

Instruction in oral advocacy and judging of student advo-

(2006) (arguing that the Socratic method enhances oral argument skills).

200. *See, e.g.*, LAUREL CURRIE OATES ET AL., JUST BRIEFS 263-64 (2d ed. 2013); MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 273-74 (3d ed. 2010).

201. The literature repeats the claim that students will not know how to "be" attorneys without association with elders. *See* QUINTILIAN, *supra* note 20, at XI.iii.10.

202. Moot court "emphasize[s] that to communicate as a lawyer—to be heard—the writer or speaker must become a member of the culture and community of legal practice." Stanchi, *supra* note 121, at 8 (emphasis omitted) (citations omitted). "The constricting rules governing appearance for women contain deeply ingrained stereotypes about women, their sexuality, and their competence." Mairi N. Morrison, *May It Please Whose Court?: How Moot Court Perpetuates Gender Bias in the "Real World" of Practice*, 6 UCLA WOMEN'S L.J. 49, 59 (1995).

203. 72 AM. JUR. TRIALS 137, *supra* note 41, § 44. Morrison comments:

> the intricate customs of the club often coalesce to make the identity of the oral advocate more important than the argument she is making. . . . [S]he does have control over conformity or lack of conformity to customs. It is these customs that separate those who belong to the club from the outsider. Such a separation may affect the perceived credibility of the advocate and, therefore, the power of the argument.

Morrison, *supra* note 202, at 65.

204. *Cf.* Penelope Pether, *Measured Judgments: Histories, Pedagogies, and the Possibility of Equity*, 14 LAW & LITERATURE 489, 527-29 (2002) (commenting on the "elite male student body that is now deployed to discipline those embodied differently").

cates focuses on elite delivery. It begins with the traditional choice of appellate advocacy,[205] which is asserted to privilege legal rationality. This choice eliminates the need for students to consider any strategic advantages of popular delivery (and the negative values associated with it), although later in their law school career some students may be exposed to trial advocacy after the elite orientation is formed.[206] Comments from the legal professionals who evaluate student performance in oral advocacy focus, first of all, on physical presentation.[207] Small deviations from the elite norm are immediately reproved, for example, slouching, pacing, rocking or tapping of the feet, touching the face, pen tapping, head tossing, and the like. Students are warned that they must look straight at the judges at all times and gesture in moderation, neither too much nor not enough. All the while, students are told to look natural; this will be their new nature as attorneys. In a concession to the strategic advantage of popular delivery and also to reassure students that the law has some place for them, students with animated delivery are often told that they should consider trial work – something that appears later, if at all, in most students' law school careers.

The fact that judges' comments so frequently address presentation rather than content might be explained as indul-

205. Oral argument is the capstone of the vast majority of first-year legal writing classes. The 2014 legal writing survey of the first year curriculum showed that 125/176 schools taught appellate argument, 84/176 taught pretrial motion argument, and 45/176 taught trial motion argument (some schools teach more than one type of argument). ASS'N LEGAL WRITING DIRS. & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY (2014), http://www.alwd.org/wp-content/uploads/2014/07/2014-Survey-Report-Final.pdf.

206. No school reported teaching oral advocacy in the context of jury or bench trials. *Id.* The focus was exclusively on motions or appeals. *Id.* Trial advocacy can start in later years with mock trial or moot trial programs or specific trial practice programs.

207. "The starting point for a good critique is understanding what an excellent argument should look and sound like." Barbara Kritchevsky, *Judging: The Missing Piece of the Moot Court Puzzle*, 37 U. MEM. L. REV. 45, 67 (2006). Standard attention to gaze, voice, gestures, etc., follows, although the writer does insist, after beginning with delivery, that substance is more important, and warns that inexperienced judges focus largely on technique. *See id.* at 67-73. The primary focus on delivery has certainly been true in my experience in almost fifteen years of watching judges provide feedback to student advocates.

gence toward students' limited knowledge of legal rules. However, another way to understand it is that skilled practitioners willing to contribute to the profession by judging and training students perceive elite demeanor not as an add-on, but as the ground from which recognizable rational legal argument emerges, as well as a condition of the coherence of the legal field.[208] Oral argument is not only about allowing students to reason, but also allowing them to practice as attorneys in space and develop credible professional bodies that identify them, in their own eyes and those of others, as attorneys.[209] Not surprisingly, as students progress, they begin to look and sound alike. As they fit themselves into the traditional molds, they become pedigreed speakers. The close nexus among pedigree, elite delivery, and success is underlined by the monetary prize that goes to the winner of the official, first-year appellate competition. This clearly figures, for students and professors, the rewards to come.

The traditional, professional repertoire out of which students assemble individual rhetorical practices incarnates the presuppositions of elite and popular delivery discussed above.[210] While elite rules of physical credibility may, depending on students' class, social, and ethnic background, be knowledge they bring with them, legal pedagogy solidifies the link between those rules and legal rationality. Ancient theorists understood "the soul and the body react on each other. An altered trait in the soul will produce an altered shape in the body, while an altered form of the body will produce a corresponding change in the soul."[211] Modern theory agrees: "Bodily

208. A more negative reading, in a vastly more serious context, is that "[g]esture politics under dictatorial conditions . . . remains a matter of state manipulation, and of seeking to enforce the conformity of the masses through the repetition of gestures indicating at least outward commitment to the regime." Mary Fulbrook, *Embodying the Self: Gestures and Dictatorship in Twentieth Century Germany*, *in* THE POLITICS OF GESTURE: HISTORICAL PERSPECTIVES 257, 262 (Braddick ed., 2009).

209. For firm-sponsored socializing as an opportunity for first-year students to perform as attorneys and to develop the appropriate habitus, see Desmond Manderson & Sarah Turner, *Law Between the Global and the Local: Coffee House: Habitus and Performance Among Law Students*, 31 LAW & SOC. INQUIRY 649 (2006).

210. *See supra* Section II.A.

211. GLEASON, *supra* note 54, at 29 (citations omitted).

hexis [deportment] is political mythology realized, em-bodied, turned into a permanent disposition, a durable manner of standing, speaking, and thereby of feeling and thinking."[212] Studies in language acquisition show that:

> [G]esture and spoken utterance often have an equivalence of function. The emergence of the ability to engage in gesture is seen as an integral part of the process by which the capacity to use language comes about . . . . [B]oth gesture and spoken language develop together and . . . they both develop in relation to the same combination of cognitive capacities . . . . [G]esture and spoken utterance are differentiated manifestations of a more general process.[213]

That general process forms a professional self.[214]

212. PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 93-94 (1977) (emphasis omitted). Bourdieu's concept of habitus clarifies what is at stake, that is, "history turned into nature, i.e. denied as such." *Id.* at 78.

213. KENDON, *supra* note 14, at 76. He is referring primarily to studies of language acquisition in young children, but there is no reason to believe that the same process is not at work later. For accounts of this relationship and studies illustrating it, see *id.* at 76-83. *See generally* Susan Wagner Cook et al., *Gesturing Makes Learning Last*, COGNITION, Feb. 2008. The authors suggest that "the body can play a significant role in interpreting meaning" and "when children are asked to instantiate a new concept in their hands, learning is more lasting than when they are asked to instantiate it in words alone." *Id.* at 1054. Further, "gesture can play a causal role in knowledge change." *Id.* at 1055.

214. Rideout observes the necessity of "revoicing" law students so they can use the forms of legal discourse. *See* Rideout, *supra* note 49, at 77. This involves transfer from personal voice to a legal voice that "acquires authority—by virtue of its seeming objectivity and by its reference to underlying layers of textual authority . . . spoken through the repeated agency of 'the court' . . . . [This new voice becomes] that student's self-representation." *Id.* at 99-100.

Thus, Mertz's metaphor that "legal translation . . . embodies an epistemology"[215] captures the project to transform bodies and minds together, recasting both mental and physical patterns. Accounts of students' pain and disorientation testify to how deeply it reaches into and reforms the self.[216] Bourdieu comments:

> If all societies and, significantly, all the "totalitarian institutions" . . . that seek to produce a new man through a process of "deculturation" and "reculturation" set such store on the seemingly most insignificant details of dress, bearing, physical and verbal manners, the reason is that, treating the body as a memory, they entrust to it in abbreviated and practical, i.e. mnemonic, form the fundamental principles of the arbitrary content of the culture.[217]

Failure to conform discredits. The intentional or unintentional violation of elite norms can be understood as subversion.[218] There is more here than distrust of those outside the group, or those who violate group norms, or individual preju-

215. Mertz, *supra* note 195, at 110.

216. Lani Guinier, Michelle Fine, and Jane Balin describe as "painful" for women "the process of becoming a social male," which may involve having "their voices stolen" and alienation "from themselves or who they used to be." LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 48 (1997). However, the "strong attitudinal differences between women and men" in the first year undergo "striking homogenization by year three." *Id*. at 28. For scholarship identifying negative consequences of "revoicing" students at law school as they acquire a professional voice, a process similar to acquiring the professional body, see Rideout, *supra* note 49, at 81-86.

217. BOURDIEU, *supra* note 212, at 94 (emphasis omitted).

218. "Hair seems to be such a little thing. Yet it is the littlest things, the small everyday realities of life, that reveal the deepest meanings and values of a culture, give legal theory to its grounding and test its legitimacy." Paulette Caldwell, *A Hair Piece: Perspectives in the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 366-68 (1991). Similarly, Cicero was disastrously shortsighted when he did not realize the moment he saw Caesar scratching his head with one finger that he might overthrow the Roman Republic. PLUTARCH, CAESAR IV.8 (Loeb Classical Library) (E.H. Warmington ed., Bernadotte Perrin trans., 1919).

dice—although these, too, may be at work. Nonconformity is labeled by the entire tradition as lapse of mind.[219] By making the wrong gesture, the advocate slips backward into the non-legal world of the body, deception, particularity, emotionality, irrationality, and, finally, insanity.[220] This is a particular danger for women and other non-elite groups. Their precarious position requires them to be constantly vigilant in the presentation of a rational, elite self.

B. Suppressing Popular Delivery as Protection of Justice: Contempt

The elite tradition shapes not only instruction, but practice. Local rules and exercise of contempt power that explicitly rein in popular strategies enforce the elite paradigm and its underlying assumptions. Meanwhile, popular speakers regard their non-elite choices as zealous advocacy. Popular delivery is necessary to counter implicit elite claims to unique credibility and to open a gap between elite and non-elite reality and suggest non-elite truths.[221] However, non-elite choices in dress, voice, and gesture are often targeted and repressed by the judicial system as menacing not just courtroom decorum, but the rationality of trial and the integrity of jurors as rational decision makers.

United States v. Dowdy illustrates this clash between the

219. *See supra* Sections III.B and C.

220. "[T]he incorporation of the arbitrary abolishes . . . all the eccentricities and deviations which are the small change of madness." BOURDIEU, *supra* note 212, at 95.

221. As one attorney, charged with contempt for failing to appear in a coat and tie, argued, "the requirement of a coat and tie impairs his ability to represent his clients effectively, because the coat and tie may be viewed by jurors with suspicion and may place the attorney at a disadvantage in dealing with the jury." Friedman v. Dist. Ct., 611 P.2d 77, 79 (Alaska 1980). The Chief Justice agreed with him, mentioning a "pluralistic society" and "reject[ing] any inference that respect for the judicial system is dependent upon male attorneys wearing neckties. Surely the dignity of the judiciary rests on more substantial ground." *Id.* However, even the dissenting judge operated within the paradigm that "dress in reasonable attire . . . preserve[s] the dignity of the judiciary and judicial proceedings." *Id.* The majority on the Alaskan Supreme Court found that the judge in the district court acted within his power, despite no evidence of disruption to judicial proceedings, and found "no merit in his contention that this interferes with [the advocate's] his duty to represent his clients zealously." *Id.*

institutional allegiance to elite delivery and an advocate's choice of popular delivery.[222] In *Dowdy*, the court held the defense attorney Coe, a woman, in contempt[223] under the required standard: "that Coe had the firmly formed intent to obstruct and impede rather than further the search for truth" and did, in fact, obstruct justice.[224]

Coe's first crime was that she employed excessive gesture; in response to a ruling from the judge, she began what the court characterized as "the most outlandish performance this court has ever seen . . . [She] began to prance and dance[,] . . . grimacing towards the jury and the spectators and gesturing with her arms and hands."[225] By transgressing the rules of legal enculturation, Coe becomes foreign, "outlandish." She is not within the elite paradigm. Instead, she errs in classic terms. "Grimacing" traditionally recalls the body and indicates lack of self-control, thus undermining the rationality and truthfulness of speaker.[226] Charges of excessive or inappropriate facial gestures are the elite and negative interpretation of the "animated facial expressions" recommended in trial manuals.[227] "Prance and dance" not only reminds us of Cleon, but her "performance" is dangerously close to the feminine and the theatrical, both fatal to sincerity and truth. Prancing is characteristic of animals. Dancing betrays passion, often ungovernable and irrational. Quintilian often finds reason to make sure that speakers will never be close to dancing.[228] Of course,

222. *See* United States v. Dowdy, 764 F. Supp. 576 (W.D. Mo. 1991).

223. She was also publicly reprimanded after disciplinary procedures. *See* In re Coe, 903 S.W.2d 916 (Mo. 1995).

224. *Dowdy*, 764 F. Supp. at 577. The court intervened at least once, *sua sponte*, to cut off the attorney's speech. *Id.* at 579.

225. *Id.* at 578.

226. Thus, for example, grimacing is an aspect of "day in the life videos" that "bring us into deeper intimacy with the suffering body" and is frowned on by courts. Jody Lyneé Madeira, *Lashing Reason to the Mast: Understanding Judicial Constraints on Emotion in Personal Injury Litigation,* 40 U.C. DAVIS L. REV. 137, 170 (2006).

227. *See* SMITH & MALANDRO, *supra* note 70, at 266, 300.

228. Dancing, particularly women dancing, has long been a threat to order and ordinary truth. *See, e.g.*, EURIPIDES, THE BACCHAE (Geoffrey S. Kirk trans., 1970) (women begin by dancing in the mountains and end by tearing the king limb from limb); Dwyer v. People, 261 P. 858, 859 (Colo. 1927) (holding that "public dance halls may be regulated under the police power . . . [because] uncontrolled, their tendency is to weaken morals and

these actions are emphatically non-elite: the polar opposite of the proper martial walk and stance.

The threatening presence of the body is confirmed by the court's invocation of the offensive "arms and hands," a detail which is utterly unnecessary for the sense, which is conveyed by "gesturing." Further, Coe is "waving" them; clearly, her arms are making large motions outside the gestural box. She is exposing her sides to attack, and her excessive movement means she is not in control of her body. In terms of the elite model, the female advocate, independent of what she is saying, is becoming a woman and a body first and a lawyer second, or not at all. She has moved out of and below the world of law and elite delivery. Her weakness, exposed in her waving, menaces truth because it implicates her and her audience in the corporal imperatives that foster irrationality and lies. The jingling language of the court in "prance and dance" underlines the extent to which her behavior is disrupting the ordinary flow of legal language and suggests the repetitive monotony of speech where words are sounds, not sense.

The court conflates mental and physical imbalance in the familiar association of inappropriate delivery with the female and the insane: "Coe argued with the court's ruling, twice invoked the name of Jesus in arguing her position, in a state of near hysteria."[229] Jesus, here, reminds us of Quintilian's observation that improper motion could reveal a speaker to be a fanatic.[230] Hysteria is a female mental disease, a product of the feminine body, outgrowth of the disordered womb.[231] It lies in wait for all women to disqualify them from the disembodied world of rational male discourse and the law, instead imprisoning them in the corporal irrationality. Its symptoms are confirmed when we learn that Coe was "out of control in her conduct."[232] Lack of mental control is fatal to rationality. The entire description naturalizes Coe's actions as her inevitable

breed disorder and indolence").

229. *Dowdy*, 764 F. Supp. at 578-79.

230. *See supra* Section II.B.

231. "Hysteric" derives from the Greek word for womb, "*hustera*." OXFORD DICTIONARY OF ENGLISH 864 (3d ed. 2010). *See supra* Section II.B and notes for the traditional view of the impact of the womb on women's speech.

232. *Dowdy*, 764 F. Supp. at 579.

character, a characterization to which she is particularly susceptible because she begins as one of the potentially vulnerable: a woman.

Yet the court simultaneously interprets Coe's violation of the rules of elite decorum as natural evidence of character and mental state and as strategically chosen, popular rhetoric. Her conduct is willful and designed to frustrate the search for truth. Instead it focuses on personal gain, hers and her client's.[233] And, as is only to be expected, Coe's popular delivery has a detrimental effect on its audience. Expansive gestures are evidence of personal corruption that is dangerously contagious. This provides another reason for her suppression: to "shortstop[] the reaction from the sizable aggregation of spectators obviously friendly to Dowdy."[234] The spectators are a herd,[235] driven along by Coe. The court does not tell us how it determined that the spectators were personally biased, obviously friendly to Dowdy. It asserts their corruption as fact, explained and reinforced by their also unexplained receptivity to Coe's actions. We do not know, and do not need to know, the evidence of this friendliness; it is assumed as part of the paradigm of popular delivery, which pairs such listeners to a popular speaker. The risk to the audience also underwrites the appellate opinion upholding the lower court's actions. Coe's "actions threatened to shift the focus of the trial away from the witnesses and the facts and onto herself and her relationship with the trial judge. Such distractions hamper the administra-

233. According to the case:

> throughout the trial on a daily basis it was clear to the court that Coe had the firmly formed intent to obstruct and impede rather than further the search for truth and that she was committed to a course of action that went far beyond any called for in the performance of an advocate's effective representation of his or her client.

Id. at 577.

234. *See id.* at 578.

235. Aggregation is from the Latin word "grex," used for a herd, particularly of sheep, then applied to a crowd. *Aggregation,* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2016), https://ahdictionary.com/word/search.html?q=aggregation&submit.x=0&submit.y=0.

tion of justice by diverting a jury's attention from the real issues before it."[236]

Thus, the court recycled traditional and familiar justifications in finding Coe in contempt. Repeated judicial rhetoric links the courts' commitment to truth and justice to maintenance of elite decorum by force. Popular delivery is disorder, by definition.

> It is essential to the proper administration of criminal justice that dignity, order and decorum be the hallmarks of all court proceedings in our country." Preservation of the liberties of citizens, when on trial for crimes charged against them, demands order in the courtroom. Absent such order, no trial can be fair.[237]

All this makes it quite clear why Coe must be suppressed.[238]

Coe's representation of her client is available primarily from the opinions of the trial and appellate courts, whose phrasing condemns Coe's popular delivery in the usual terms for its negative impact on rational decision-making. Her actual argument, her position, is irrelevant, at least in the first holding of contempt. What we can know of the events in the courtroom is heavily filtered through an elite paradigm. However, the jury verdict suggests an alternative story about Coe, the jury, and the trial. Coe's delivery can just as easily be understood as strategic, the adoption of popular delivery.[239] She was zealously, and successfully, advocating for her client[240] by en-

236. United States v. Dowdy, 960 F.2d 78, 82 (8th Cir. 1992).

237. *Dowdy*, 764 F. Supp. at 579.

238. In a Catch-22, the defendants' motions for a new trial were denied because Coe's conduct did not make any difference. *See* United States v. Turner, 975 F.2d 490, 493 (8th Cir. 1992).

239. For a number of contempt orders against such defense attorneys due, in part, to the style that they adopt to make their points, see Louis S. Raveson, *Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power,* 65 WASH. L. REV. 477, 583-86 (1990).

240. Coe's defense was "that in each instance she acted zealously, not contemptuously, because her actions were necessary to explicate her position and to preserve a record for appellate review." *Dowdy*, 960 F.2d at 81. The court rejected her justification. *Id.*

acting a typical popular strategy: put the government on trial. And she was at least partially successful. The trial lasted thirty-eight days.[241] After five days of deliberation, the jury found her client guilty of only four counts out of the twenty with which he was charged.[242] From the perspective of elite delivery, this may be further evidence justifying her suppression. Indeed, the trial court found that her conduct constituted a situation "where instant action is necessary to protect the judicial institution itself."[243] But consideration of the jury verdict suggests another way of conceptualizing Coe's actions: she functioned as a successful popular advocate adopting non-elite demeanor as the basis for credibility in conveying a non-elite truth to the jury.[244]

V. JUSTIFYING LEGAL DECISION-MAKING: THE PROBLEM OF ACTING, LEAKAGE, AND UNIVERSAL BODY LANGUAGE

The elite rhetorical tradition successfully combined a foundational claim—the body is a touchstone of credibility—with a potent political assertion: the bodily signals of rationality and truth track the habits of elite warrior speakers. Conversely, the same paradigm condemns non-elite speakers appealing to the democratic masses as deceptive and irrational—claims proven by their rejection of elite rules and adoption of other demeanor. The next step was equally important: the notion of a universal human body language that includes inevitable "leakage"[245] of involuntary nonverbal clues of deception. These twin assumptions had two enormous benefits: First, they contain the risk of the persuasive skills promised by professional instruction, including in demeanor, through a universal human

241. *Dowdy*, 764 F. Supp. at 577.

242. One count was dismissed by the court, as well. *Id.*

243. *Id.* at 579 (quoting Harris v. United States, 382 U.S. 162, 167 (1965)).

244. The record supports this was her approach in recording her repeated questions of government witnesses, probably to insinuate they are lying. *Dowdy*, 960 F.2d at 79-80.

245. The term is associated with Paul Ekman. *See* Ekman & Friesen, *supra* note 38, at 88. It is now a common way to identify bodily basis of lie detection. *See, e.g.*, Hutchins, *supra* note 32, at 535-36.

ability to read the equally universal signs of the body. Second, they justify imperial, elite judgment of the credibility of outsiders, including women, poor citizens, and foreigners, as based on nature, assuaging any anxiety about personal or systemic ignorance.

Delivery, or non-verbal communication's rules, derives from a common understanding: "listener-viewers stare at you, scrutinizing each small movement. Small components of movement, sound, and words—your individual persuasive techniques—quickly add up to a general perception and ultimately to a trial outcome."[246] (Note the damaging connection of persuasion and trial in this passage.) Although tradition splits on exactly what proper habits may be – popular or elite – both sides agree the credible body requires the conscious suppression of certain gestures and the acquisition of new bodily habits that will be the repertoire of truthfulness, that is, paradoxically strategies.[247]

The emphasis on delivery as strategy has several advantages. Most obvious is the role of expertise in creating and sustaining a market for professional speakers and, of course, instructors while acting as a barrier to those identified as unskilled. Thus, it preserves social and intellectual capital. However, the notion of strategy also plays a role inside the rhetorical struggle between elite and popular delivery. It mitigates the threat of the undeniably effective techniques of popular delivery, at least to speakers of impeccable elite credentials. History records the migration of various techniques of delivery from the popular to the elite repertoire.[248] As strategies, such techniques become mental product, not bodily expression. Elite speakers[249] can then exploit popular trademarks like emotion,

246. 84 AM. JUR. TRIALS 1, *supra* note 93, § 1. The well-trained speaker "use[s] certain tones according as he wishes to seem himself to be moved and to sway the minds of his audience." CICERO, ORATOR, *supra* note 20, at xvii 55.

247. *See supra* Section IV.A.

248. Even the trademark ancient gesture of slapping the thigh became acceptable when attempting to arouse emotion, particularly at trial, see CICERO, BRUTUS, *supra* note 20, at lxxx.278, likewise, stamping the foot. *See also* QUINTILIAN, *supra* note 20, at XI.iii.123.

249. *See supra* Section III for the condemnation of lower-class speakers who fail to conform to the requirements of elite speech. They are not granted the license of elite speakers. "[L]ow status violators [of communicative

gestures, and loud voice without positioning themselves on the wrong side of the mind/body divide. But, as noted above, the same is not true of non-elite speakers or their audience. Both remain subject to the link between popular delivery and irrationality.[250]

Once non-verbal communication becomes a product of skill, the next step has been obvious: the stage is an excellent resource[251] for, "[a]s all actors know, only the practiced hand . . . can make the natural gesture."[252] While advice to look to acting for help with speaking has been given for over two thousand years, theatricality raises the specter of lies and severs the connection between the character of the speaker and the manner of speaking.[253] For this reason, the distinction between acting and arguing is carefully maintained. Those who advise instruction from actors often find themselves in the paradoxical position of asserting that, really, truth and the advocate's own nature are the best persuasion. This is summed up in the fa-

norms] are perceived negatively, while high status ones are not. . . . The same nonverbal act may hold different meanings in varying contexts depending upon one's status in the proceedings." Searcy et al., *supra* note 107, at 43.

250. Quintilian ends instruction on delivery with the point that contemporary delivery is more excited, but requires care not to lose in the elegance of an actor the authority of a good man ("bonus," a word for the elite). QUINTILIAN, *supra* note 20, at XI.iii.184.

251. Aristotle links the impact of delivery to actors, something he deplores. ARISTOTLE, *supra* note 25, §1403b,1404a. Acting is a frequent comparison for Quintilian, who begins his entire discussion of delivery with a consideration of the power of actors. QUINTILIAN, *supra* note 20, at IX.iii.4. Demosthenes took instruction from actors; Cicero recommends it. *Id.* at XI.iii.7. For additional discussion and passages, see BALL, *supra* note 76, and *infra* for the similar modern views.

252. Otto G. Obermaier, *Judge Conducted Voir Dire*, 340 PRACTICING L. INST. LITIG. 151 (1987). *See also* 28 AM. JUR. TRIALS 599 *Principles of Summation* § 1 (2016); Matheo & DeCaro, *supra* note 46, at 30-31; ARON ET AL., *supra* note 90, at ch. 14 §§ 2.05-.06. Sayler and Shadel begin their discussion of delivery by acknowledging the necessity of sounding "natural" while engaging in an unnatural act, public speaking. SAYLER & SHADEL, *supra* note 16, at 56-61. They invoke the theater while innovating, from the tradition's perspective, with the figure of an actress. *Id.* This illustrates the flexibility of the tradition in accommodating new speakers while maintaining its underlying conceptual framework. *Id.*

253. Gunderson discusses many passages maintaining the distinction: "The orator is associated with truth and the spirit; the actor with fiction and the body." Gunderson, *supra* note 54, at 112. For the distinction between Roman actors and orators, even while speakers were encouraged to learn from actors, see Graf, *supra* note 54, *passim*.

mous dictum: "As a man lives so will he speak."[254] Yet this remark performs an ideological function only. It is not allowed to interfere with detailed instruction, insisting that being "himself" requires rigid adherence to precise, and remarkably consistent, instructions about style and delivery.

The point, of course, is to sustain the role of skill in looking credible in the eyes of others, yet maintain a link to inner truth. The tension is obvious. Quintilian requires that the speaker find even simulated emotion within himself: "the main thing is to excite the appropriate feeling in oneself, to form a mental picture of the facts, and to exhibit an emotion that cannot be distinguished from the truth."[255] The same method is embraced today as solving ethical and practical problems. "Our practical suggestion to lawyers in court is: be natural, be yourself. Analyze what your personality and human characteristics can do, and extract from this your own potential and develop with practice and work your own inner qualities."[256] Although the nature called into the arena of speech is identified with "your personality and human characteristics," the subordination of the "self" to the needs of physical credibility is hard to overlook.

The struggle to root the rhetorical self in some underlying extra-rhetorical reality that nevertheless supports the persuasive endeavor points at the paradox in truth-seeking carried out via adversarial speakers, particularly when skill enters the equation. The potency of strategic non-verbal communication undermines the decision-making process; it raises the risk of

254. QUINTILIAN, *supra* note 20, at XI.i.30.

255. *Id.* at IX.iii.62. An authority who defends the necessity of acting (and quotes Quintilian) argues:

> [T]he actor remains himself or herself, drawing on his or her personal store of emotional memory to provide authenticity in his or her reaction to the script, rather than 'faking it' by some series of conventional, but contrived, external gestures. . . . [T]here is an authentic approach to acting in the courtroom, just as there is on stage. . . . [T]he lawyer does not adopt a courtroom demeanor, and, like Sir John Gielgud, plays only himself or herself.

Peter W. Murphy, *"There's No Business Like. . .?" Some Thoughts on the Ethics of Acting in the Courtroom*, 44 S. TEX. L. REV. 111, 116-17 (2002).

256. ARON ET AL., *supra* note 90, § 14.21.

deceit. If an expert speaker can deploy a highly disciplined and credible self, what will ensure that such a speaker is, in fact, truthful, rather than credible? How can decision making be saved from skill designed to manipulate it?

One way to reduce the risk of deceit is speakers' personal virtue—thus, the insistent claim, already referenced above, that to be a good speaker one must be a good man. This claim consolidates advantage and social and cultural capital by making instruction something sinister. Yet it has been a commonplace of teachers of non-verbal communication since antiquity.[257] Minimally, it deflects censure and promotes the utility of an instrumental virtue: be what you wish to seem in order to seem it successfully. But most instruction and discussion is more ambitious. As discussed above, rigorous training in the proper demeanor is considered not only to produce an accomplished speaker, but to educate character. Training in the correct physical signifiers of credibility ultimately corrects the person, or the soul. This assimilates conventional requirements of delivery and personal morality, or, put in another way, learning the rules and becoming the rules.

What we now call leakage, that is, bodily signs of deceit or emotion, is another strategy to protect the institutional project of truth seeking. Ancient and modern theory posit an unavoidable link between internal and external, conceptualized variously as soul, character, mind, and so forth:[258]

> In order to be able to persuade, the trial attorney must be personally convinced that he or she is fulfilling a mission, the role of the advocate in achieving justice. It is the advocate's duty to perform this mission with conscience because advo-

257. A competing view reverses the equation: delivery that owes nothing to art and is simply an expression of the soul is best. As is to be expected in a teacher of rhetoric, including delivery, QUINTILIAN, *supra* note 20, at XI.iii.10, dismisses it while paying allegiance to the elite claim that proper demeanor is an aspect of character: an orator, to be good, must be a good man. *Id.* at I.Pr.9. *See* JAMES W. JEANS, TRIAL ADVOCACY 7 (2d ed. 1993); 72 AM. JUR. TRIALS 137, *supra* note 41, §§ 5, 9.

258. Quintilian, for example, begins his instruction on gesture by linking the quality of the voice, gesture, glance and gait to the mind in the context of introducing instruction. QUINTILIAN, *supra* note 20, at IX.iii.62, 65, 66.

> cacy without conscience is like a body without a soul.[259]

This link underlies the standard claim that it "has long been recognized that our bodies can reveal our true thoughts and emotions, even when we try to hide them from others."[260] These inevitable leaks check the impulse to lie because they provide a body language of deception. The tradition's efforts are expressed in a core image: the hand is index to the mind. The phrase is Cicero's,[261] but the premise resonates today, often asserted through Freud's famous statement: "He that has eyes to see and ears to hear may convince himself that no mortal can keep a secret. If his lips are silent, he chatters with his finger-tips; betrayal oozes out of him at every pore."[262] Yes this is the same hand, discussed above, that learns to make "natural" gestures. The contradictory uses of this image underscore the tensions between rhetorical skill and decision-making, particularly based on a unitary ideal of truth.

Adoption of the body as the reliable gauge of truthfulness tracks the conception of the body as autonomous and ungovernable that underwrites the rejection of popular delivery. Skill fails before incarnated fear, desire, and passion. "Juries recognize lawyers who have questionable ethics in the courtroom often because they inadvertently spill subtle and sometimes blatant cues, which trigger reactions in the jurors and clue the jurors into the lawyers' true natures."[263] Yet the clues to deceit remain as much creatures of rhetorical theory as the gestures of truthfulness. Although long debunked by research, the tells remain those prohibited by elite rules: blinking, fid-

259. ARON ET AL., *supra* note 90, at 1-26.

260. JURYWORK, *supra* note 114, § 15.10. Another treatise asks: "The question becomes, can an unethical advocate completely cover up his or her nature to the point that jurors are dupes? . . . probably not." 72 AM. JUR. TRIALS 137, *supra* note 41, § 11.

261. *See* Graf, *supra* note 54, at 40.

262. Quoted, for example, in Timony, *supra* note 32, at 903 n.2. *See also* JURYWORK, *supra* note 114, § 15:10 (continuing with advice that although this may not be true, people believe that it is and act accordingly at trials and elsewhere).

263. 72 AM. JUR. TRIALS 137, *supra* note 41, § 7.

dling, repetitive gestures, indirect gaze, etc.[264] "[I]t is much harder for them [speakers] to lie with their bodies. . . . [T]here are always little gestures that give away the truth. It may be the classic "nose wipe" or undue eye blinking or improper eye contact."[265] Thus, a gesture like scratching the nose, expressive from the very beginning of the class struggle echoed in the philosophical and rhetorical controversies over democracy, remains, counter to all evidence, the sign of the liar.[266]

Effective functioning of the elite paradigm, however, requires a further step, foundational to the court systems: that "natural" signs[267] are part of a universal, bodily language constant across individuals and cultures.[268] Cicero sets the stage: "Every motion of the soul has its natural appearance, voice and gesture; and the entire body of a man, all his facial and vocal expressions, like the strings of a harp, sound just as the soul's motion strikes them."[269] This is much more than a statement that speech is created by physical motions in human bodies. Cicero begins, here, by asserting the inevitable linkage of inner

264. Similarly, police manuals list non-verbal signs of deception and an entire method, the Behavioral Analysis Interview, depend on particular behavioral responses from which the interrogator can ascertain the suspect's guilt or innocence. The interrogator is to "focus primarily on the suspect's behavioral responses rather than the actual content of his answers." Richard A. Leo, *The Third Degree*, *in* INTERROGATIONS, CONFESSIONS AND ENTRAPMENT 65 (G. Daniel Lassiter ed., 2004). They include "shifting posture. . . stroking the back of one's head or hair, . . . shuffling or tapping one's feet, . . . placing one's hand over the mouth or eyes, crossing one's arms or legs" and so forth. *Id.* Innocence is predicated on perception of truthfulness; guilt on deception. *Id.* at 66. Leo concludes that these methods rest on "little more than the subjective hunches and personal judgments of the investigator. There is, no short, no reason to believe that their diagnostic value is any better than chance." *Id.* at 79. The advice and individual hunches are products of the classical rhetorical tradition: the behaviors characteristic of deception match markers of the vulnerable speaker. *See* Minzner, *supra* note 3, at 2560.

265. ARON ET AL., *supra* note 90, § 5:3. For shifty eyes as indicators of deception, see, e.g., Penthouse Int'l, Ltd. v. Dominion Fed. Sav. & Loan Ass'n, 855 F.2d 963, 974 (2d Cir. 1988).

266. *See* Appendix A.

267. The discussion of gesture claims a common language of hands, in spite of differences in language. QUINTILIAN, *supra* note 20, at XI.iii.87.

268. Recent work on recognition of emotions across cultures both validates and sets tight limits on the universal natural bodily language comprehensible by all despite cultural differences. *See* Matsumoto & Hwang, *supra* note 36, at 227-29.

269. DE OR, *supra* note 20, at III.216; Graf, *supra* note 54, at 41.

and outer; he ends gestures and voice to the sounds produced by a skilled musician.[270] The same conceptual complex emerges in the opening section of a well-known book on trial communication by a judge, an expert in non-verbal communication, and an attorney:

> Body language is expressed in a variety of ways. Everybody is familiar with gestures: the hand to the cheek that says, "Oh God!" or the scratching of the hair behind the ear that signals, "Let me think." Rodin's famous sculpture, The Thinker, used the chin supported by a closed fist to convey a universal signal of thoughtfulness. That simple gesture speaks more to a viewer than all the descriptive words written about the statue.[271]

Thus, products of particular, elite, artistic traditions represent a universalized physical language everybody knows.[272]

A postulated universal natural language of the body remedies problems of ignorance and skill, bedeviling decision in our rhetorical-legal tradition:

> [A]ll the factors of delivery contain a certain force bestowed by nature; which moreover is the reason [that] it is delivery that has most effect on the ignorant and the mob and lastly on barbarians; for words influence nobody but the person

270. DE OR, *supra* note 20, at III.213-217.

271. ARON ET AL., *supra* note 90, § 2.02. The same authors, two sections later, acknowledge that body language is largely cultural. *Id.* § 2.04.

272. As Bob Gibbins and A. Russell Smith comment:

> [a]lmost everyone will recognize certain universal body language messages. For example, one universal sign of defensiveness is the arms crossed on the chest. Another signal which can be revealing is the nose-rub or nose-touching. . . While it is beyond the scope of this book to define or catalog every nonverbal signal of significance, the advocate will be aware of many of them without any formal training or even casual study. It is important to bring this knowledge into play during trial.

AMERICAN LAW OF PRODUCTS LIABILITY § 74:8 (Hodson ed., 3d ed. 2001).

> allied to the speaker by sharing the same language, and clever ideas frequently outfly the understanding of people who are not clever, whereas delivery, which gives the emotion of the mind expression, influences everybody, for the same emotions are felt by all people and they both recognize them in others and manifest them in themselves by the same marks.[273]

Demeanor flourishes, in our tradition, in the context of deficiency. It works most magically when the listener cannot check,[274] or perhaps even comprehend, what is said.[275] This potentially explosive situation is remedied by a postulated common humanity; everyone, even a barbarian, can at least read the body.[276] Yet the "consensus that relegated credibility to the

273. DE OR, *supra* note 20, at III.lix.223.

274. Popular delivery rejects the idea that there are people, events, or venues of decision in which persuasion is not key. However, the elite tradition assigns persuasion, and with it delivery as a popular tactic, to the ignorant. *See* PLATO, GORGIAS 462d-466a, *supra* note 127 (rhetoric compared to cookery for the ignorant); ARISTOTLE, *supra* note 25, § 1403b-1404a. Thus, in trial "it is imperative that trial lawyers learn to mask to some extent. They are paid to mask their true feelings, for the most part, and give the best protection they can for their clients." 84 AM. JUR. TRIALS 1, *supra* note 93, § 23. "Jurors in their quest to determine justice look anxiously at trial lawyers and their clients to determine 'truth.' They study them intently." *Id.* § 4.

> Jurors search the lawyer's face and expressions, seeking sincerity and commitment. . . for signs of character and truth in facial configuration and expression. An inner character may be seen in the form or the shape of the features, the manner of arrangement, and the position of the parts, that radiates strength and power.

72 AM. JUR. TRIALS 137, *supra* note 41, § 46.

275. "When jurors tune out substantive testimony, serious consequences follow. Adler observed, 'Rocky and the others often found themselves focusing on more concrete matters. Foster wore his suits too tight; another lawyer picked his nose.' He is right– the irrelevant becomes relevant, and often amusing." Arthur Austin, *The Jury System at Risk From Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51, 54 (1995).

276. Cicero observes that delivery (composed of voice and action) is like speech or a sort of eloquence of the body. Quoted by QUINTILIAN, *supra* note 20, at IX.iii.1. The metaphor is common: "[L]awyers should realize that their own gestures in court either will help or hurt their cases because gestures change their spoken words, and, when not speaking, gesturing, posture, and

realm of common knowledge"[277] is a product of a rhetorical tradition of imperial, multi-ethnic, slavery-based societies in which law was the pastime of the ruling elite. In this context, postulating a common body and universal, natural bodily language is risky, but necessary. It frees members of the legal regime from worry about ignorance and any obligation to recognize difference—because, naturally, this difference simply does not exist. This stripping to a postulated natural body is a required first step in the creation of the abstract legal participant. As Peter Goodrich points out in the context of clothes, "before the law there are only individuals, subjects that can be reconstructed as legal actors, abstract subjects, individuals without clothes, certainly without all that clothes implies, namely the social and ceremonial dimensions of collective and ethnic life, the material and social habitus of the individual."[278] The postulated natural language of the body also rescues the practice of legal skill from a potential charge of deception, for all can understand its message. Thus, it underwrites the adversarial system and "wide latitude [for] trial lawyers to determine how best to expose the strengths and weaknesses of witnesses. . . . It is assumed that the nature of the adversarial process provides the necessary inducement and that juries are fully capable of evaluating the information provided,"[279] as is that product of elite legal rhetorical education, the judge.

Thus, the assumptions of our rhetorical tradition sustain performance and judgment. A modern handbook captures the dynamic when, after extolling skillful demeanor and instruction in acting, it pivots to remind the reader:

> There are lawyers who think that to enhance their role as prosecutors or defenders, they must be good actors, but that is not necessarily true. Before persuading a jury or a judge, counsel

movement cues are 'read' as an unspoken language of their own." 84 AM. JUR. TRIALS 1, *supra* note 93, § 2. *See generally* G. NIERENBERG & H. CALERO, HOW TO READ A PERSON LIKE A BOOK (1971).

277. Blinka, *supra* note 8, at 367. *See also* Jane H. Aiken, *Teaching the Rules of "Truth"*, 50 ST. LOUIS U. L.J. 1075, 1083 (2006).

278. PETER GOODRICH, LANGUAGES OF THE LAW 181 (1990).

279. Blinka, *supra* note 8, at 368.

> must be personally persuaded that his or her position is the right one. . . . If a lawyer takes a position that he or she does not believe, something in the advocate's voice or body language will betray the words, no matter how eloquently the argument is phrased. There is an invisible link between what the lawyer thinks and feels and what he or she is saying; judges and jurors have a special ability to detect these feelings. A lawyer is not an actor and must not be seduced by the false idea that acting will be an effective tool for persuasion.[280]

This fascinating passage labors to reconcile paradoxes inherent in the tradition of delivery even as it exploits them to justify ancient foundations of our legal system: orality as a predicate for decision making, the propriety of credibility assessments by the audience, the dominance of an elite view of unitary and universal truth, and, critically, the claims to skill and virtue of the legal profession. The strategically flexible characterization of listeners—at once open to manipulation and endowed with an unvarying nose for deceit—combine with the rules of demeanor and the ancient ideology of leakage and universal body language to maintain fundamental institutional and professional claims, explaining how rhetorical jousting by highly skilled speakers seeking to attain personal ends will lead to truth.[281]

280. ARON ET AL., *supra* note 90, §14.21 (acting is recommended in § 2.05).

281. This is closely related to the role of the jury as a black box in maintaining institutional legitimacy. *See* Fisher, *supra* note 9, at 587-602. "[A]lthough the jury does not guarantee accurate lie detecting, it does detect lies in a way that appears accurate . . . By making the jury its lie detector, the system protects its own legitimacy." *Id.* at 578-79.

VI. CONCLUSION: The Promise of Uniformity and Necessity of Blind Justice

Professional allegiance to the paradigm of elite demeanor has social benefits. Enculturation into the paradigm dresses law students and attorneys in a professional uniform. Like the ubiquitous dark suits adopted by 1Ls, it smoothes pre-professional differences.[282] Elite demeanor is a badge of professional identity that signals inclusion in the professional world from which, at least, historically, other parts of students' and attorneys' identities might exclude them. For this reason alone, it should be taught to all students rather than being the exclusive possession of those who inherit the knowledge as a form of social capital.[283] Further, instruction in delivery is part of a professionalization project that links students, in this case physically, to a lineage of virtuous professional elders who provide exempla for future excellence, a project enhanced by the moral meaning read into this physical exercise.[284] Like other

282. As Charles M. Yablon comments:

> [a]nyone who has ever observed an American law school during interview season, with everyone wearing the same blue pin stripe suit, carrying the same resume, and mouthing the same platitudes. ('Yes, I'm sure that working on collateralized receivable financing deals will be very exciting') knows that it does not take wigs to remove differences of gender, race, and age. All it takes is a first rate legal education.

Charles M. Yablon, *Judicial Drag: an Essay on Wigs, Robes and Legal Change*, 1995 WIS. L. REV. 1129, 1142 (1995). For the cost of this uniform in abstracting legal subjects and their representatives paralleling the choice of discourse and of language itself, see GOODRICH, note 278, at 180-81.

283. This double-edged aspect of instruction in delivery—liberating, yet imprisoning—associates it with the processes of abstraction and opportunity inherent in the common law itself and its "linguistic ideology" as discussed by MERTZ, *supra* note 195, at 212-20.

284. This physical chain of past and present attorneys enhances identification with the profession and its goals tied to a future inhabited by reincarnations of the same ideal. Similarly, originalism and fidelity to the Constitution as "our law" promote "an identification between ourselves, those who lived in the past and those who will live in the future . . . that connect[s] past generations to present ones through a process of narrative identifica-

invocations of precedential authority, backward looking bodily quoting is the sine qua non of meaningful participation in our legal regime, independent of content. Its effect has much in common with similar benefits detected in originalism and other types of constitutional argument.[285] In this analysis, "ethical originalism" establishes a unity of field for the groups "Americans" and attorneys.[286] This unity produced through a common form exists despite the content and purpose of individual arguments. That this is a fictive unity,[287] a product of "cultural memory," not historical accuracy,[288] in no way diminishes its importance to its participants and the civic project of rooting both participants and all citizens in continuously redefined, yet American, experience.[289]

Enhanced instruction about demeanor can preserve its professional benefits—and extend them to students who may otherwise lack them and to their future clients—while mitigating the individual cost of assimilation to such norms. The variants of delivery and their conceptual framework should be taught as historically determined, arbitrary markers whose acquisition is a matter of joining a professional discourse community. Strategic choices in delivery can be understood as skillful professionalism, not personal proficiency or deficiency in morality,

tion . . . as part of a larger political project that stretches back to the present and forward to the future." Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 465 (2007).

285. "Arguments from ethos and tradition often call for us to remember what "we'—here a transgenerational subject—fought for, what we stand for, what we promised we would do, and what we promised we would never let happen again." Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 684 (2013). For a similar effect of classical rhetorical education, see HABINEK, *supra* note 14, at 72-76.

286. "The core framers are heroes and celebrities, and the project of identifying original meanings asks us to stand in their shoes. It is no wonder that so many people like doing it." Richard Primus, *The Functions of Ethical Originalism*, 88 TEX. L. REV. 79, 84 (2010). Physical imagery conveys conceptual adherence.

287. Balkin, *supra* note 285, at 684-85.

288. *Id.* at 694-97.

289. "Enabling citizens and officials to identify with the major figures of their national political traditions serves important civic functions. It encourages them to relate to the governing regime as their own, rather than as something alien or imposed. That attitude toward government is an important element of legitimacy." Primus, *supra* note 286, at 84.

rationality, or credibility.[290] Explicit instruction about the fallibility of traditional markers of credibility may help future attorneys and judges work properly with a wider variety of individuals. Understanding the historical, ideological basis for the assignment of rationality to elite, and irrationality to popular, demeanor may trickle up to promote reassessment of the rules governing trial and practices of decision making.

Yet changed instruction will only indirectly reduce the much steeper costs of the current paradigm paid by other participants in the legal regime, by society, and by the judicial system itself for the errors introduced by traditional, institutional reliance on physical credibility.[291] People from diverse social, ethnic, racial, religious, physical, or cultural backgrounds, including minorities,[292] immigrants, and asylum seekers,[293] indi-

290. For this approach to instruction in fundamental skills in written content, for example, grammar, punctuation, and style, often also associated with moral and personal values, see Jeremy Francis, Daphne O'Regan & Ryan Black, *Designing Success: Motivating and Measuring Successful 1L Student Engagement in an Optional, Proficiency-Based Program Teaching Grammar and Punctuation,* 21 J. LEGAL WRITING INST. (2016), http://www.legalwritingjournal.org/2016/09/15/designing-success-motivating-and-measuring-successful-1l-student-engagement-in-an-optional-proficiency-based-program-teaching-grammar-and-punctuation/. Primus' analysis of originalism traces its power to "whether their audiences recognize themselves, or perhaps their idealized selves, in the portrait of American origins that is on offer." Primus, *supra* note 286, at 80. A similar value of such constitutional argument is "subjective identification with the regime." Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 203 (2008).

291. For example, in asylum cases, the "credibility determination presents obstacles that favor the fraudulent applicant over the genuine asylum seeker." Rose Linton, Note, *A Presumption of Disclosure: Towards Greater Transparency in Asylum Proceedings*, 38 SEATTLE U. L. REV. 1069, 1083 (2015). A well-rehearsed, false story can avoid "factors that can make a genuine applicant appear evasive during her direct testimony—cultural norms, PTSD, and negative experiences with officials." *Id.* at 1087. The same idea underlies the well-known practice to rehearse witnesses. Similarly, originalism may degrade decision-making, and identification with an idealized past undermines change. *See* Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 179-80 (2006).

292. Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1 (2000); Pager, *supra* note 31, at 397. *See* Amanda Carlin, Comment, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 468 (2016).

viduals with disabilities,[294] traumatized victims,[295] medicated defendants,[296] persons with religious objections to baring their face in public,[297] and many others are at risk in a variety of ways; they share a tragic susceptibility to misreading of their credibility, particularly since an individual may have multiple risk factors. Ongoing controversies and numerous studies suggest awareness of the problem, which intersects with the problem of implicit bias—although here mistaken beliefs can be ex-

293. Katherine E. Melloy, Note, *Telling Truths: How the Real ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 658 (2007). The author points out the numerous ways in which such women are at risk. *Id.* at 653-61. Male asylum seekers face similar risks, particularly if they are members of sexual minorities. Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 129-33 (2006). *See also* Melanie A. Conroy, *Real Bias: How Real ID's Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants,* 24 BERKELEY J. GENDER L. & JUST. 1, 34 (2009); James P. Eyster, *Searching for the Key in the Wrong Place: Why "Common Sense" Credibility Rules Consistently Harm Refugees*, 30 B.U. INT'L L.J. 1 (2012); Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367 (2003).

294. Christine N. Cea, Note, *Autism and the Criminal Defendant*, 88 ST. JOHN'S L. REV. 495, 519 (2014).

295. For battered women, rape victims (rape trauma syndrome and demeanor), and abused children (child sexual abuse accommodation syndrome), see annotations in 85 A.L.R.5th 595 (2005). *See e.g.*, State v. Dudley, 856 N.W.2d 668 (Iowa 2014). Even people judged "unattractive" are at risk. AMINA MEMON ET AL. PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY 39-42 (2d ed. 2003).

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

297. The Michigan Rules of Evidence, apparently amended to allow judges to order women to remove their veils in court, require judges to "exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder." MICH. R. EVID. 611(b). *See* Brian M. Murray, *Confronting Religion: Veiled Muslim Witnesses and the Confrontation Clause*, 85 NOTRE DAME L. REV. 1727, 1728 (2010); Steven R. Houchin, *Confronting the Shadow: Is Forcing A Muslim Witness to Unveil in A Criminal Trial A Constitutional Right, or an Unreasonable Intrusion?*, 36 PEPP. L. REV. 823 (2009); Aaron J. Williams, *The Veiled Truth: Can the Credibility of Testimony Given by A Niqab-Wearing Witness Be Judged Without the Assistance of Facial Expressions?*, 85 U. DET. MERCY L. REV. 273, 273-74 (2008).

plicitly invoked. Solutions including demeanor experts[298] and judicial instructions have been proposed or attempted.[299] Yet they are unlikely to work. Use of demeanor experts risks only relocating decision making on the basis of delivery to a battle of experts. Jury instructions or education before the trial are unlikely to be successful[300] and may even exacerbate the problem.[301] Positioning the solution in the hands of judges ignores

298. Anne Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991, 1004-05 (2007); Michael W. Mullane, *The Truthsayer and the Court: Expert Testimony on Credibility*, 43 ME. L. REV. 53, 64 (1991).

299. Levenson, *supra* note 296, at 573 (proposing jury instructions); Bennett, *supra* note 2, at 1371.

300. "Studies have shown jury instructions to be broadly ineffective across a wide variety of contexts." Pager, *supra* note 31, at 425. This is generally true of attempts to remove cognitive bias and biasing information. MacLean & Dror, *supra* note 4, at 19-21. Data suggest that a reason "jury instructions seem to be poorly understood . . . [is] 'common sense justice.'" James R. P Ofloff & V. Gordon Rose, The Comprehension of Judicial Instructions *in* PSYCHOLOGY AND LAW 407, 246 (Neil Brewer & Kipling D. Williams eds., 2005). Common sense justice certainly includes demeanor and implicit, or explicit, bias.

301. As Amy L. Wax comments:

> [i]t is also virtually impossible to identify and correct bias from the 'inside" that is, through introspective processes. Decision makers are generally unaware of the magnitude and direction of their own automatic biases. Even if they could willfully activate mechanisms to control and correct for presumed biases, they would have difficulty calibrating the corrective measures because they cannot gauge the precise extent to which particular biases are distorting their mental processes.

Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1160 (1999) (citations omitted). Diversity training aimed at unconscious biases in the workplace has not been shown to work. *See* Alexandra Kalevet al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589-617 (2006). *See also* David Millier, *Can Bias Training Really Improve Diversity in Tech?*, U.S. NEWS (July 29, 2015), http://www.usnews.com/news/articles/2015/07/29/can-bias-training-really-improve-diversity-in-tech. Nevertheless, the jury is still out on positive impacts of training on implicit bias. *See* Bennett, *supra* note 2, at 169-70. Judge Bennett advocates as well for the elimination of peremptory challenges to avoid the impact of implicit or cognitive bias. *Id.* at 168.

their participation in the traditional paradigm.[302]

Screening or blinding decision makers so they cannot see any participants, including attorneys, while allowing them to hear and to see other evidence, is a potentially more effective solution. This extends suggestions made by Blumenthal, who proposes screening the defendant "from the witness . . . and the witness from the jury, who can then focus on her voice in assessing credibility."[303] Pager has also proposed screening witnesses, possibly including the defendant, from the jury.[304] As Pager points out, screening has the advantage of retaining much of what is perhaps most reliable – voice and presentation of content.[305] No right inheres in the jury or judge that requires visual presence. Indeed, blind jurors are allowed on the grounds that excluding them would be discriminatory given their other ways to assess testimony.[306] Further, legal rules, including evidentiary rules, already deny jurors other types of information that might be "unduly biasing."[307] Screening

302. For judges' susceptibility to emotion, including reactions to participants in trials, see Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 871-72 (2015).

303. Blumenthal, *supra* note 32, at 1202.

304. Pager, *supra* note 31, at 429-33. Similarly, Spottswood proposes that live testimony be preferred at the beginning of litigation, followed by a switch to paper-based trials as more accurate. Spottswood, *supra* note 32, at 879, 881. *See* Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 1248-49 (2010) (advocating that appellate review is the "functional equivalent of Dr. Pager's screen" and, thus, more reliable).

305. Content is a much better indication of truth than physical demeanor. Pager, *supra* note 31, at 386.

306. "[B]lind individuals, like sighted jurors, weigh the content of the testimony given and examine speech patterns, intonation, and syntax in assessing credibility." Galloway v. Superior Court of D.C., 816 F. Supp. 12, 16 (D.D.C. 1993). *See generally* Nancy Lawler Dickhute, *Jury Duty for the Blind in the Time of Reasonable Accommodations: The ADA's Interface with A Litigant's Right to A Fair Trial,* 32 CREIGHTON L. REV. 849 (1999). *See also* Adam Schwartzbaum, *The Niqab in the Courtroom: Protecting Free Exercise of Religion in A Post-Smith World*, 159 U. PA. L. REV. 1533, 1568 (2011). He grounds his argument on the inaccuracy of cultural markers of deception. *Id.* at 1571.

307. Shari Seidman Diamond, *The Cases for and Against Blindfolding the Jury*, *in* BLINDING AS A SOLUTION TO BIAS, *supra* note 4, at 267. Diamond notes that evidentiary and other content restricting "rules forbidding juries access to available information have often been imposed to improve jury deci-

builds on this standard approach. It is beyond the scope of this article to assess the mechanics of screening in civil trials and the interaction of screening and the Confrontation Clause in criminal trials.[308] However, it is worth noting that screening the decision maker still allows for witness-defendant confrontation and cross-examination.[309]

Screening decision makers also leaves intact the role of jury or judge in credibility determinations, simply removing "information" that has no value and may mislead. The importance and efficacy of blind judgment in an arena in which the content of information is aural has been much discussed in the contexts of blind orchestra auditions.[310] Of course, as with auditions, blinding cannot remove all misleading markers of credibility that also could drive bias; gender, names, and other markers would remain.[311] Because many moments before court

sion making[,]. . . [but]are based on untested assumptions about how jurors make decisions." *Id.* at 275.

308. U.S. CONST. amend. VI.

309. Blumenthal and Pager point out that screening can harmonize with the Confrontation Clause by allowing for cross examination and confrontation between defendant and accusers. Blumenthal, *supra* note 32, at 1175; Pager, *supra* note 31, at 415-19.

310. For similar ideas in employment contexts, including argument from blind orchestral auditions, usually following Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90(4) AM. ECON. REV. 715-41 (2000), see Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063 (2006). *See also* Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 611 (2000); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 5 n.20 (1991); *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2052 (1987). For blinding in the documents about federal death penalty authorization, see G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 488-89 (2010).

311. For names promoting bias, see generally, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004); Rhea E. Steinpreis et al., *The Impact of Gender on the Review of the Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study,* 41 SEX ROLES 509 (1999). However, "race is not predicated on sight alone; the construction of race's import crosses many sensory and political modalities." Judith Resnik & Dennis Curtis, *Why Eyes?*

processes also rely on demeanor credibility determinations, the remedy is perhaps too limited. Blinding might even lead to a misguided sense of optimism about the act of decision and the possibilities of impartiality.[312] Nevertheless, given the profound risks imposed by the current system, screening decision makers would be a good first step.

Blindfolded Justice—long a symbol of impartiality —has a deep historical resonance that harmonizes with contemporary screening.[313] As Resnik and Curtis have shown, the iconography of blind justice began its successful replacement of clear sighted justice at a historical era characterized by new doubts about decision making and decision makers.[314] The blindfold symbolized aspirations to eliminate improper influences, be they class or kin allegiances, bribes, or bias.[315] Similarly, the role of the jury evolved during a crisis of legitimacy when trial by ordeal and oath were deprived of their religious foundations.[316] Today, doubts stemming from new understanding of implicit or unconscious bias and other influences on decision-making processes, coupled with fear of distorting personal and institutional allegiances and structures, are pervasive.[317] To

Cautionary Tales from Law's Blindfolded Justice, *in* BLINDING AS A SOLUTION TO BIAS, *supra* note 4, at 243.

312. Resnik & Curtis, *supra* note 311, at 243.

313. Pager notes the desirability of blind justice and links it to Rawls' "veil of ignorance." Pager, *supra* note 31, at 428.

314. Resnik & Curtis, *supra* note 47, at 203-04, 212.

315. *Id.* at 218, 222-24, 227-29; Resnik & Curtis, *supra* note 311, at 237-38.

316. Fisher, *supra* note 9, at 587-602.

317. *See, e.g.*, Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 169-70 (2010). *See generally* Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563 (2013); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases* 2006 WIS. L. REV. 291 (2006). *See also* Christopher T. Robertson, *Why Blinding? How Blinding? A Theory of Blinding and Its Application to Institutional Corruption, in* BLINDING AS A SOLUTION TO BIAS, *supra* note 4, at 35 (arguing for blinding expert witnesses with a framework of personal advantage applicable more widely). Anna Roberts notes "under the current regime, implicit bias is allowed to 'flourish' within jurors, attorneys, and judges, . . . The protections in place, conceived in an earlier era, fail to address the implicit biases that are now known to exist,

retain legitimacy, legal decision-making must evolve again.

While blinding decision makers may seem an extreme remedy, it is, of course, one already embraced by medical researchers, who must also make difficult decisions in the face of imperfect knowledge, including imperfect knowledge of themselves and the impact of even their most carefully considered actions.[318] Further, blind decision making has liberating and suggestive power. A powerful critique of blind justice is that it legitimizes unwillingness to see, thus concealing, even from ourselves, violence and inequity.[319] Yet no matter where the parameters are drawn, at times decision is required. At those moments, a screen can protect individuals from suffering from errors based their social, cultural, and physical selves. Further, a blindfold channels inward attention, as well as outward. It foregrounds inevitable individual and institutional fallibility, yet, however imperfectly, aspires to something more. For the decision maker, the physical blindfold is a corrective to flawed assumptions already unseen inside herself.

and in fact may intensify them." Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 841 (2012). She also proposes the Implicit Association Test to educate jurors. *Id.* at 857-58.

318. Medical science's commitment to blinding extends even to reviewers of results of blinded medical trials: "Blind assessments produced significantly lower and more consistent scores than open assessments." Alejandro R. Jadad et al., *Assessing the Quality of Reports of Randomized Clinical Trials: Is Blinding Necessary?*, 17 CONTROLLED CLINICAL TRIALS 10 (1996).

319. I. Bennett Capers, *Blind Justice*, 24 YALE J.L. & HUMAN. 179, 189 (2012) (commenting that Justice is "not the only one indifferent to the horrors going on around her. She may be the only one who is literally blindfolded, but she's not the only one who's blind. They all are. So are we."). Resnik & Curtis, *supra* note 47, at 233-35. Criticisms of medical blind trials echo criticisms of blind justice: they "produce protocols based on an idealized 'average' person that do not take into account the unique characteristics of individuals." Caryn Devins et al., *Against Design*, 47 ARIZ. ST. L.J. 609, 675 (2011) (citing Stuart Kauffman et al., *Transforming Medicine: A Manifesto,* SCI. AM. WORLDVIEW 2014, at 28-29, http://www.scientificamerican.com/wv/assets/2014_SAWorldView.pdf.).

Appendix A: Scratching, the Body, Lies, and Human Dignity

From the beginning of the conflict between elite rule and rhetoric and popular democracy and sophistic rhetoric, scratching figures as a debased "good" that competes with truth and emerges from the satisfaction of need that ties men to animals as a physical beings. When Socrates, in Aristophanes' comedy, asks an ordinary Athenian to get under some blankets and think, the man (hidden from view) reveals what unrestrained nature prioritizes: first he scratches and complains of fleas, then he masturbates.[320] A similar sequence animates the Platonic Socrates' knock-out blow to sophists and their students as indulging in a debased popular knack of persuasion based on self-interest, rather than the elite art of truth telling. The sequence, beginning with the power of persuasion in the assembly among the mass of citizens, ends by asking whether "a man who has an itch and wants to scratch, and may scratch in all freedom, can pass his life happily in continual scratching." The "necessary" answer, "yes," allows Socrates a quick pivot to sex and utterly discredits popular, sophistic rhetoric and any democratic decisions it promotes by linking both to satisfaction of private, bodily desire.[321]

For the elite tradition, the irresistible scratch quieting the distracting itch marks the intrusion of the physical self. Speech and truth hang in the balance as the speaker chooses between mind and body. Choosing to scratch or simply scratching instinctively each reveal something deeply wrong. Those who chose to scratch use reason to satisfy need that is disreputable at best, lethal at worst. Cicero was disastrously shortsighted: he should have realized the moment he saw Caesar

320. ARISTOPHANES, CLOUDS. *See also* DAPHNE O'REGAN, RHETORIC, COMEDY, AND THE VIOLENCE OF LANGUAGE IN ARISTOPHANES' *CLOUDS* (1992).

321. PLATO, GORGIAS 494c, *in* THE COLLECTED DIALOGUES OF PLATO (Edith Hamilton & Huntington Cairns eds., W.D. Woodhead trans., 1973). The same elite contempt is apparent in in the comment dismissing a criminal's petition that envisioned judges deciding "how many times a prisoner should brush his teeth, go to the bathroom, wipe his nose, comb his hair, or scratch?" Taylor v. Strickland, 411 F. Supp. 1390, 1395 n.13 (D.S.C. 1976).

scratching his head with one finger that he might overthrow the Roman Republic.[322] Those who simply scratch because they must reveal that body rules mind. Either way leads directly to irrational passions and to lies.

Given the dominance of the elite tradition, it is not surprising that scratching, and nose scratching in particular, have become the iconic – if inaccurate – gestures that mark the liar in legal and popular culture. Ordinary commonsense is invoked as enough to know that judge and jury can detect lies when "[t]he speaker may slightly rub or scratch the nose, usually with the index finger (A big cue for deception)."[323] Although repeatedly debunked, the cultural tenacity of this meme is demonstrated in the first episode of TV drama *Lie to Me*. Paul Ekman, the expert on leakage and micro expressions whose work inspired the show, told the *New York Times* that the producers insisted on using rubbing, otherwise known as scratching, the nose as proof of lying – contrary to Ekman's advice.[324] Its presence testified to the writers' participation in our rhetorical/social tradition and their conviction that the audience would understand and believe this trope.[325]

Yet the power of scratching, particularly the nose, to convey an irreducible human nature prompts an alternative use: to sum up the whole range of basic human needs and to func-

322. PLUTARCH, LIFE OF JULIUS CAESAR 443 (Loeb Classical Library) (E.H. Warmington ed., Bernadotte Perrin trans., 1967).

323. 84 AM. JUR. TRIALS 1, *supra* note 93, § 28. Advice to attorneys emphasizes "[n]ever scratch an itch, no matter where it is. If your nose itches, stop speaking completely, take out a cloth handkerchief, turn to the side, and say, 'Excuse me.' Then wipe your nose neatly, thereby 'scratching' it. Acknowledge jurors with a look and resume speaking." *Id.* § 29. "It became important that the students were aware of their 'stage presence' and did not, as we observed, pick their noses, scratch their behinds, or stand on one foot and let the other shoe dangle or fall." Robert E. Jagger, *Stetson: The First Public Defender Clinic*, 30 STETSON L. REV. 189, 206 (2000).

324. Bill Carter, *He's Inspired the Latest Crime Series by Decoding the Traits of Liars*, N.Y. TIMES (Jan. 20, 2009), http://www.nytimes.com/2009/01/21/arts/television/21carter.html.

325. Mark Twain in *The Prince and Pauper* uses this trope to mock the falseness of elite rules when the pauper, Tom, after a dinner during which he realizes that to do anything with his hands is unbecoming, ultimately, to his shame, cannot resist scratching his nose as 'nature broke down the barriers of etiquette." MARK TWAIN, THE PRINCE AND THE PAUPER 342 (1920).

tion as a marker for a realm of personal autonomy and truth quite different from the elite image. It defines a realm outside the state and its law.[326] Thus, state overreaching is paradoxically conveyed as restriction that prevents scratching. Human dignity and autonomy are violated when "freedom was restricted to the point that he couldn't scratch his own nose."[327]

326. "All the actions one might take with what is rightfully his or hers can never be specified or reduced to a list. It includes the right to . . . scratch one's nose when it itches (and even when it doesn't) . . . . The problem, therefore, with any explicit protection of these liberties is that the liberty of the people can never be completely enumerated or listed." Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 448 (2004). *See also* Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 32 (1990).

327. Litigants know this trope as well: "'with them chains you can't walk, you can't scratch your nose or nothing, it's very limited access' (A: 434), 'and most of all it was inappropriate . . . why not let them violate all of your rights.'" Brief for Respondent-Appellee at 4, Murray v. M. McGinnus, 2003 WL 22513720 (2d Cir. Feb. 5, 2003) (No. 01-2632). *See also* Maria Bucci, *Young, Alone, and Fleeing Terror: The Human Rights Emergency of Unaccompanied Immigrant Children Seeking Asylum in the United States*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 275, 302 (2004). Deprivation of rights is summarized by being required to ask permission to scratch one's nose. *See* Heather Habes, *Paying for the Graying: How California Can More Effectively Manage its Growing Elderly Inmate Population,* 20 S. CAL. INTERDISC. L.J. 395, 402 (2011); Christine M. Gordon, *Are Unaccompanied Alien Children Really Getting A Fair Trial? An Overview of Asylum Law and Children*, 33 DENV. J. INT'L L. & POL'Y 641, 658-59 (2005).