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THE APPEARANCE OF JUSTICE: JUDGES' VERBAL AND NONVERBAL BEHAVIOUR IN CRIMINAL JURY TRIALS

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Due process requires that the trial judge conduct a fair, orderly, and impartial trial.[1] In a criminal trial, due process requires the absence of actual bias by the trial judge toward the defendant. But not only are trial judges required to be fair and impartial, they must also 'satisfy the appearance of justice.'[2] The trial judge's 'appearance,' or conduct and behavior, in a criminal jury trial must never indicate to the jury that the judge believes the accused to be guilty.[3] The appearance of bias alone is grounds for reversal even if the trial judge is, in fact, completely impartial.[4] Due process violations have been found when a trial judge's behavior created just the appearance of partiality, and courts have held such behavior sufficient to reverse criminal convictions.[5] Appellate courts recognize that the appearance of judicial bias or unfairness at the trial can be manifested by trial judges in explicit and subtle verbal and 'nonverbal' ways that never show up on the 'dry' appellate record.

Trial judges, like all human beings, develop beliefs about a defendant's guilt or innocence in a criminal jury trial and expectations for the verdict the jury will return.[6] Moreover, they may influence the trial process in ways that correspond to their expectations for trial outcome. During

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[4] Bollenbach v. United States, 326 U.S. 607 (1946); see also State v. Larmond, 244 N.W.2d 233, 236 (Iowa 1976) (the defendant is not required to show that the jurors were actually prejudiced by the judge's behavior but merely that the jurors could have inferred judicial bias).

[5] See Johnson v. Metz, 609 F.2d 1052, 1057 (2d Cir. 1979) (Newman, J., concurring) (summarizing due process violations where trial judge appeared partial in jury trials). But see, e.g., United States v. Poland, 659 F.2d 884, 894 (9th Cir.) ('an appearance of partisanship by the trial judge may affect the attitude of the jury toward the defendants,' but even if the statements of the trial judge did constitute error, 'the evidence of guilt of these appellants was far too strong to allow the verdict to be affected by any impatience, irritation, or sarcasm of the trial judge'), cert. denied, 454 U.S. 1059 (1981).

[6] It is efficient to predict accurately other people's behavior as well as our own. In a legal sense, it may be important for trial judges to develop efficient means for deciding cases given their heavy caseloads. Enormous pressures are placed upon trial judges by an ever increasing criminal docket and by a demand for speedier trials of criminal defendants. Nazzaro, 472 F.2d at 304.

the jury trial, the judge may reveal these beliefs or expectations by trying to 'engineer'[7] the trial in accordance with these expectations--for example, in comments on the evidence, in responses to witnesses, or in rulings on objections.[8]

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[7]Williams v. United States, 228 A.2d 846, 848 (D.C. 1967) ('a trial judge has the responsibility of moving a trial along in an orderly and efficient manner; in short that he has the responsibility of managing the conduct of the trial').

[8] Some of the principal ways in which trial judges can impermissibly influence the criminal trial process include: (1) Disparaging remarks or gestures concerning the defendant, the defense counsel, the prosecution counsel, or the witnesses. See, e.g., People v. Franklin, 56 Cal. App. 3d 18, 128 Cal. Rptr. 94 (1976) (trial judge's unconscious facial expressions toward defense witness); see also Beaty, 722 F.2d at 1096 (trial judge's lengthy cross-examination of witness was 'a frontal attack on her credibility,' and the 'jury could not have helped but conclude that the judge simply did not believe' the defendant); People v. Hefner, 127 Cal. App. 3d 88, 91-92, 179 Cal. Rptr. 336, 337-38 (1981) (trial judge prejudiced the jury by creating a 'negative courtroom atmosphere' through numerous demeaning comments directed at defense counsel and by accusing the attorney of using misleading vocal inflections while reading prior testimony before the jury); People v. Kenny, 20 A.D.2d 578, 246 N.Y.S.2d 92 (N.Y. App. Div. 1963) (trial judge cast doubt on defense witness's credibility during cross-examination); People v. Viscio, 241 A.D. 499, 272 N.Y.S. 213 (N.Y. App. Div. 1934) (trial judge cast doubt on defendant's credibility during cross-examination of defendant and charge to the jury). (2) Bias in rulings, questions, or comments in favor of one party. See, e.g., People v. Blackburn, 139 Cal. App. 3d 761, 765-66, 189 Cal. Rptr. 50, 52 (1982) (trial judge must allow defendants to fully present their case); People v. Ramirez, 113 Cal. App. 2d 842, 852-53, 249 P.2d 307 (1952) (trial judge continuously led prosecution witness, 'pulling [witness] out of a hole every time'); People v. Frank, 71 Cal. App. 575, 236 P. 189 (1925) (trial judge joined with district attorney in high commendation of prosecution witness). (3) Considering matters not in evidence. See, e.g., People v. Handcock, 145 Cal. App. 3d Supp. 25, 193 Cal. Rptr. 397 (Cal. App. Dep't Super. Ct. 1983) (trial judge called witness to offer evidence derived from interrogation). (4) Forming expectations for trial outcome before defense has presented its case. See, e.g., People v. Barquera, 154 Cal. App. 2d 513, 517, 316 P.2d 641, 644 (1957) (trial judge stated to defense counsel, 'I don't think you have got any defense . . ..'); see also Farley, Instructions to Juries--Their Role in the Judicial Process, 42 YALE L.J. 194, 212 (1932) (Professor Farley's classic analysis suggesting that 'the federal judge usually has it in his power, if he so wills, to mold a verdict in accord with his own views'). (5) Statements to the jury that a mistake in convicting can be corrected by other authorities, see Annot., 5 A.L.R.3D 974 (1966), or statements to the jury that if the defendant is found guilty, his sentence will be suspended or appealed, see, e.g., State v. Clark, 227 Or. 391, 392, 362 P.2d 335, 335 (1961) ('[The Supreme] Court can correct any mistakes which this court may make as to the law of the case . . ..') (emphasis omitted). (6) Statements to the jury that 'smart' jurors form rapid opinions. See, e.g., People v. Kindelberger, 100 Cal. 367, 34 P. 852 (1893). (7) Failing to control misconduct of counsel. See, e.g., United States v. Young, 105 S. Ct. 1038, 1044 (1985) ('We emphasize that the trial judge has the responsibility to maintain decorum in keeping with the nature of the proceeding . . ..'); People v. Bain, 5 Cal. 3d 839, 489 P.2d 564, 97 Cal. Rptr. 684 (1971) (trial judge allowed the trial to be conducted at an emotional level that was destructive to a fair trial); see also D. DONOVAN, PROSECUTORIAL AND JUDICIAL MISCONDUCT (1979 & Supp. 1983); B.E. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 440-442, 528 (1963 & Supp. 1985) (reviewing California case law).

It is possible that when judges expect or predict a certain trial outcome, they intentionally or unintentionally 'appear' to behave toward jurors in a way that indicates what they think the outcome should be, thereby setting into motion behaviors and trial processes that increase the likelihood of the occurrence of a certain trial outcome. In other contexts, this predictive behavior has been called a 'self-fulfilling prophecy' or an 'interpersonal expectancy effect.' [9] Thus, a trial judge's expectations for trial outcome may prophesy, become related to, or improperly influence the actual outcome of the jury decisionmaking process.

This note empirically investigates how trial judges' expectations for trial outcome might predict both (a) the judges' unintended verbal and nonverbal behavior, and (b) the verdicts returned by juries. This note also describes how trial judges' unintended verbal and nonverbal behavior might predict the verdicts returned by juries. Part I describes the relationship between judicial behavior or influence and due process and describes the type of extreme and subtle influence judges may exert on jurors and perhaps on their decisionmaking process. The implication that this influence may have for a more complete description of procedural due process requirements for a fair and impartial trial, and for alerting appellate courts to the importance of the trial judge's behavior, is also discussed in light of present law.

Part II presents a preliminary model for the study of judicial influence and discusses several factors that may serve to increase or decrease judicial influence in the courtroom. Part III describes the research strategy used for testing aspects of this model, and part IV describes the findings of the research. The findings demonstrate how a trial judge's expectations for trial outcome can predict the manner in which the judge delivers instructions to the jury and how these expectations may predict and possibly influence the outcome of jury trials. Finally, part V discusses a potentially useful way to describe the transmission of judicial influence or beliefs through judges' subtle verbal and nonverbal behaviors and examines the implications of our findings for developing standards of appellate review for assessing whether judges' verbal and nonverbal behaviors exceeded the permissible limits of influence. This part also discusses ways of alerting trial judges, jurors, and lawyers to the importance of nonverbal behavior in the courtroom.

I. JUDICIAL BEHAVIOR AND INFLUENCE While the trial judge in a criminal case is not required to be a mere moderator, there is a constitutional line across which he or she cannot go, in order to ensure that a defendant's guilt or innocence is decided by twelve laypersons and not one judge.[10] This section introduces the legal concept of judicial influence, explores its relation

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[9] See Merton, The Self-Fulfilling Prophecy, 8 ANTIOCH REV. 193 (1948); R. ROSENTHAL, EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH (1976). Merton and Rosenthal's concept of 'the self-fulfilling prophecy' and 'interpersonal expectancy effects' illustrates how a person's prophecies or expectations for an event can change the behavior of the prophet in ways that make the event more likely.

[10] See, e.g., Billcci v. United States, 184 F.2d 394, 401-02 (D.C. Cir. 1950) (where appellants alleged that trial judge, by subtle nonverbal cues, emphasized principles beneficial to prosecution and deemphasized principles beneficial to defendant, the court reversed the criminal conviction finding that a trial judge 'may not coerce, or attempt to coerce, a jury by gesture any more than [the judge] may do so by words'). The research in this note focuses on criminal jury trials. The California Constitution provides that '[t]rial by jury is an inviolate right and shall be secured to all.' CAL. CONST. art. I, § 16. This right to jury trials extends to all misdemeanors.

to procedural due process, and discusses the permissible limits of judicial behavior. The section then discusses (a) instances where judicial influence occurred but was held not to be impermissible or reversible error, (b) instances where more blatant judicial influence occurred and was held to be reversible error, and (c) instances where subtle judicial influence occurred and was held to be reversible.

A. Judicial Influence and Procedural Dur Process: Defining the Role of the Trial Judge--Advocate, Arbitrator, or Automaton

Procedural fairness during the course of a trial is due process in its primary sense.[11] But procedural fairness is not a fixed requirement unrelated to the circumstances and individuals involved in a particular trial.[12] Rather, it is an ongoing process of judgment conducted by the trial judge. Because procedural fairness is not determined by bright line legal rules, trial judges have considerable discretion in administering and applying the law. Thus, while a fair and impartial trial is always the goal, the role of the trial judge during the course of the trial may vary.

The trial judge deviates from the 'model' of procedural due process and impartiality by becoming an advocate or partisan for one side.[13] In one case, for example, the defendant was convicted of the possession of an unregistered firearm by a felon based on testimony of the arresting officers that they actually saw the defendant with the sawed-off shotgun in his hands.[14] Yet the appellate court reversed this conviction on the grounds that the judge's active questioning of the defendant and witnesses prevented the defendant from receiving a fair trial. The judge 'appeared' to take a prosecutorial role in the trial and the balance of procedural due process was therefore adversely tipped against the defendant. In effect, the judge's role lost its color of neutrality and tended to accentuate and emphasize the prosecutor's case.[15]

(The sixth amendment to the United States Constitution provides for the federal right to trial by jury.) The California Constitution also allows a defendant to waive a trial by jury. Id. Trial judges' behavior in bench trials is not addressed by this note.

[11] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161- 64 (1951) (Frankfurter, J., concurring); see also Frank v. Mangum, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting) ('Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.').

[12] Joint Anti-Fascist Refugee Comm., 341 U.S. at 162.

[13] See note 8 supra. See generally Wyzanski, A Trial Judge's Freedom and Responsibility, 65 HARV. L. REV. 1281 (1952) (the duty to deliver evidential instructions to the jury is not equivalent to the rare occasion where a trial judge is prompted to examine a witness, and such interrogation by the court changes the role of the judge to advocate; while a judge may question a witness to clarify a confusing response, he or she may not ask questions that indicate opinion as to the evidence or the outcome of the trial; voluntary interrogation is very different from the judicial duty to deliver instructions; the final jury instructions provide the trial judge with the last word on the case law of the trial, and this duty is not to be confused with commenting on the law).

[14] United States v. Bland, 697 F.2d 262 (8th Cir. 1983).

[15] Id. at 265-66 ('The trial judge's attitude may have unconsciously driven him to assume a prosecutorial role in the trial, a role which destroyed fair process for the accused.'); see also

Certainly a judge's isolated questioning of witnesses to clarify ambiguities is not the same as the judge assuming the role of advocate and 'taking over' an examination for one side.[16] But some appellate courts have concluded that even the slightest indication of partiality by the trial judge has an important effect on a jury.[17] For example, appellate courts have held that a judge should seldom intervene in the questioning of a witness, and then only to clarify isolated testimony or to prevent harassment of the witness by counsel.[18]

The appellate courts also recognize that a trial judge should not be an automaton, as the judge has an affirmative duty to be an instrumentality of justice.[19] For example, to assist the jury in its deliberations, the judge may, within certain limits, comment on the evidence.[20] Over the years, the courts have struggled to define the role of the trial judge and the limits of comment or influence, noting on one hand that the judge must not unduly influence the jury's decision, thus denying a defendant the sixth amendment right to trial by jury, while on the other, that the judge has an affirmative duty to secure justice.[21] Indeed, one appellate court specifically noted that while the trial judge should not be an 'automaton,' he or she still must exercise care not to communicate bias to the jury by being overly reactive.[22] Another state appellate court writes: The trial judge is a human being, not an automaton or a robot. He is not required to be a Great Stone Face which shows no reaction to anything that happens in his courtroom. Testimony that is amusing may draw a smile or a laugh, shocking or distasteful evidence may cause a frown or scowl, without reversible error being committed thereby. We have not, and hopefully never will reach the stage in Alabama at which a stone-cold computer is draped in a black robe, set up behind the bench, and plugged in to begin service as Circuit Judge.[23]

Beaty, 722 F.2d at 1095 ('The court's vigorous participation in examining the defendant's witnesses, especially when contrasted with the complete freedom from hostile interruption of the prosecution's witnesses, must certainly have conveyed the judge's skepticism about [the defendant's] alibi to the jury.'); United States v. Hill, 332 F.2d 105, 106 (7th Cir. 1964) ('the court should be careful to preserve an attitude of impartiality and guard against giving the jury any impression that the court was of the opinion that defendant was guilty'); Jackson v. United States, 329 F.2d 893 (D.C. Cir. 1964) ('claim of undue intervention in the trial by the judge in a manner prejudicial' is grounds for reversal); United States v. Hickman, 592 F.2d 931 (6th Cir. 1979) (where the trial judge interjected into the proceedings approximately 250 times, the appellate court noted the trial judge's 'brilliant redirect examination that would have been entirely proper had it been done by the prosecutor.'). But see United States v. Tilton, 714 F.2d 642 (6th Cir. 1983) (a trial judge who interrupted counsel approximately 28 times, but whose conduct affected both the defendant and prosecution, did not prejudice the jury).

[16] Bland, 697 F.2d at 265.

[17] Id. at 265-66; see also Billeci, 184 F.2d at 402.

[18] See note 15 supra; see also United States v. Singer, 710 F.2d 431 (8th Cir. 1983).

[19] See note 23 infra; Gitelson & Gitelson, A Trial Judge's Credo Must Include His Affirmative Duty to Be an Instrumentality of Justice, 7 SANTA CLARA LAW. 7 (1966).

[20] See, e.g., Quercia v. United States, 289 U.S. 466, 469 (1933).

[21] See, e.g., United States v. Olgin, 745 F.2d 263, 268 (3d Cir. 1984), cert. denied, 105 S. Ct. 2321 (1985).

[22] See Moody v. United States, 377 F.2d 175, 178 (5th Cir. 1967).

[23] Allen v. State, 290 Ala. 339, 342-43, 276 So. 2d 583, 586 (1973); see also Fletcher v. State, 291 Ala. 67, 69, 277 So. 2d 882, 883 (1973) ('the trial judge is not required to be a robot without

Of course, there is no bright line standard for detecting impermissible judicial behavior and influence--for example, for separating a trial judge's remarks that are appropriate from remarks that may unduly influence a jury.[24] The appellate courts have attempted to balance a number of factors and have employed a 'sliding scale' approach in assessing the propriety of a judge's behavior during the jury trial. Four factors which have been considered include (1) the materiality or relevance of the behavior or comment, (2) the emphatic or overbearing nature of the behavior or comment, (3) the efficacy of any curative instruction used to correct the error, and (4) the prejudicial effect of the behavior or comment in light of the trial as a whole.[25] Our research suggests a more systematic method for assessing many of these 'sliding scale' factors.

The sliding scale approach employed by the appellate courts also forces reviewing courts to balance the four considerations against other mitigating factors.[26] But appellate courts are not consistent in applying these factors and mitigating circumstances. For example, one appellate court concluded that it was proper to weigh the totality of these factors in determining whether the 'quantum of harm' from a trial judge's behavior or statement amounts to reversible error.[27]

While the trial judge's role of advocate or automaton may vary during the trial, the duty of the

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emotional reaction to happenings in his courtroom'); Oglen v. State, 440 So. 2d 1172, 1175 (Ala. Crim. App. 1983).

[24] See Beaty, 722 F.2d at 1093 ("[N]o absolute, rigid rule exists. Each case must be viewed in its own setting. The pattern of due process is picked out of the facts and circumstances of each case,") (quoting Riley v. Goodman, 315 F.2d 232, 234 (3d Cir. 1963)).

[25] The 'factor approach' emphasizes: (1) The materiality of the challenged comment as the preliminary focus of inquiry on appeal. The reviewing court is more concerned with a matter central to the defense than with a comment on a tangential issue. Olgin, 745 F.2d at 269-70; see also United States v. Anton, 597 F.2d 371, 374-75 (3d Cir. 1979) (the judge's comment on the defendant's credibility, an issue central to his defense, was one factor in the appellate court's reversal of the conviction). (2) The emphatic or overbearing behavior or comments--both verbal and non- verbal--that a jury may accept as controlling. An example of an overly emphatic judicial statement is found in Stevens v. United States, 306 F.2d 834 (5th Cir. 1962). The appellate court held prejudicial the following statement by the trial judge: 'All right. I don't believe I want to hear any more testimony from this witness. I want to certify in the record that the Court wouldn't believe him on oath, and I don't want to waste the jury's time taking any more testimony from him.' Id. at 838. (3) The efficacy of the curative instruction. For the instruction to be effective, the judge must clearly explain to the jury that it is free to disregard his or her behavior or remarks and must determine the facts of the case on its own. But such instructions do not always produce the desired effect. See text accompanying note 183 infra. (4) The prejudicial effect of the comments in light of the jury instructions as a whole. While a potentially prejudicial comment cannot be evaluated in isolation, even the most minor remark can have a prejudicial effect. Oglin, 745 F.2d at 269.

[26] Id.; see also Nazzaro, 472 F.2d at 304: A claim of unfair judicial conduct, under these circumstances, requires a close scrutiny of each tile in the mosaic of the trial so that we can determine whether instances of improper behavior or bias, when considered individually or taken together as a whole, may have reached that point where we can make a safe judgment that the defendant was deprived of the fair trial to which he is entitled

[27] Oglin, 745 F.2d at 270.

judge to control or 'arbitrate' the proceedings to ensure a fair trial is continuous. But the role of the judge at any given point in the trial process--advocate, arbitrator, or automaton--is determined by the circumstances necessary to ensure a fair trial. At times it requires the judge to actively direct the proceedings in order to avoid error, misconduct, or possible prejudice by counsel.[28] As a result, there exists a basic tension among the several roles of the judge during the trial process. Although the judge has great discretion in being the instrumentality of justice, he or she often cannot intervene effectively in the adversarial discussion of the facts for fear of influencing the jury. One federal trial judge has described the result: 'Without an investigative file, the American trial judge is a blind and blundering intruder, acting in spasmsas sudden flashes of seeming light may lead or mislead him at odd times.'[29] Because of the often intuitive or sporadic nature of these behaviors, any input by the judge during the trial, however subtle, may significantly influence the jury decisonmaking process.[30]

B. The Limits of Permissible Behavior and Influence

The possibility of undesirable judicial influence on jury verdicts was recognized by the Supreme Court early in our history.[31] Before the turn of the century, the Court noted that the manner in which a judge instructs and advises the jury can have an undesirable, although sometimes permissible, influence on the jury decisionmaking process.[32] The Court stated that jurors must remain the triers of fact, and the trial judge's behavior must remain 'guarded' so as to leave the jury free to exercise its own judgment.[33] No word, action, or behavior by the judge is allowed to

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[28] See, e.g., City of Danville v. Frazier, 108 Ill. App. 2d 477, 248 N.E.2d 129 (1969) (the trial judge has a duty to control the proceedings to the extent necessary to ensure each litigant a fair trial); see also Gitelson & Gitelson, supra note 19.

[29] Frankel, The Search For Truth: An Umpireal View, 123 U. PA. L. REV. 1031, 1042 (1975).

[30] Judge Frankel writes: The jury is likely to discern hints, a point of view, a suggested direction, even if none is intended and quite without regard to the judge's efforts to modulate and minimize his role . . .. We should be candid, moreover, in recognizing that juries are probably correct most of the time if they glean a point of view from the judge's interpolations. Introspecting, I think I have usually put my penetrating questions to witnesses I thought were lying, exaggerating, or obscuring the facts. Less frequently, I have intruded to rescue a witness from questions that seemed unfairly to put the testimony in a bad light or to confuse its import. Id. at 1043. Judge Frankel believes our adversarial system poorly equips the trial judge for the position of advocate. The trial judge is best as a 'relatively passive moderator' who can from time to time suggest lines of inquiry to counsel. Id. at 1043-44.

[31] See, e.g., Carver v. Jackson, 29 U.S. (4 Pet.) 1, 4 (1830).

[32] See, e.g., Starr v. United States, 153 U.S. 614 (1894). For reviews of judicial influence and the limits of judicial behavior, see Conner, The Trial Judge, His Facial Expressions, Gestures and General Demeanor-- Their Effect on the Administration of Justice, 9 TRIAL LAW. GUIDE 251 (1965); Note, Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality, 61 VA. L. REV. 1266 (1975); Annot., 49 A.L.R.3D 1186 (1973); Annot., 34 A.L.R.3D 1313 (1970). For a discussion of nonverbal behavior at the jury selection stage, see Suggs & Sales, Using Communication Cues to Evaluate Prospective Jurors During the Vair Dire, 20 ARIZ. L. REV. 629 (1978) (describing methods that can be used to evaluate prospective jurors on the basis of their communicative abilities).

[33] Starr, 153 U.S. at 625; see also Brown v. Walter, 62 F.2d 798, 799-800 (2d Cir. 1933) (Judge Learned Hand stated: 'A judge . . . is more than a moderator . . .. Justice does not depend upon

indicate or transmit the judge's expectations for the defendant's guilt or innocence to the jury,[34] thus influencing impermissibly the jury decisionmaking process.[35]

The desirable behaviors of the trial judge include a duty to be thorough, courteous, patient, just, and impartial.[36] Overly reactive verbal and nonverbal communications--for example, facial expressions or gestures which tend to ridicule the defendant or counsel--are examples of undesirable judicial behavior. Yet such behavior has been held permissible when it does not destroy the fairness of a trial.[37] Thus, the courts have recognized that while certain behaviors of the judge have an undesirable effect on courtroom processes, they do not necessarily unduly influence the decisionmaking process of jurors and therefore do not automatically constitute impermissible influence.

Judicial influence that is extreme or prejudicial to the due process rights of the defendant requires a mistrial or reversal of conviction. But a judge's more subtle verbal and nonverbal expressions toward a defendant in the criminal jury trial are also enough to constitute reversible error.[38] The appellate courts recognize that the subtle communicative influence of the judge on the jury is 'necessarily and properly of great weight as his slightest word or intimation is received

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legal dislectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge.'); cf. Judge Frankel's view in note 30 supra.

[34] See, e.g., State v. Barron, 465 S.W.2d 523, 527 (Mo. 1971) (prejudicial error by the trial judge resulted in reversal of a burglary conviction when the judge, hearing the defendant's brother testify that the defendant was at home watching television when the alleged burglary occurred, placed his hands to the sides of his head, shook his head negatively, and leaned back, swiveling his chair 180 degrees).

[35] See, e.g., United States v. Gaines, 450 F.2d 186, 189 (3d Cir. 1971), cert. denied, 405 U.S. 927 (1972) (if the trial judge exercises restraint in his comments to the jury and makes it clear in the charge to the jury that the jury remains the sole determiner of fact, the judge has not overstepped the permissible limits of comment); United States v. Meltzer, 100 F.2d 739, 746 (7th Cir. 1938) (jurors must be 'left free' to determine the fact controversy). What is meant by 'left free' is a question that this study examines empirically by assessing the degree to which both the intentional and unintentional behavior of the trial judge (a) can be predicted from a knowledge of the judge's belief about the defendant's guilt or innocence, and (b) can serve as a predictor of the jury's verdict: See generally Kline, The Role of Suggestibility in Lawyer-Jury Relationships, in SOCIAL PSYCHOLOGY AND DISCRETIONARY LAW 93 (L. Abt & I. Stuart eds. 1979).

[36] Canon 3 of the California Code of Judicial Conduct states the fundamental principle that a judge should remain impartial at all times, CALIFORNIA CODE OF JUDICIAL CONDUCT Canon 3 (1974); Canon 34 of the ABA Canons of Judicial Ethics requires the judge to be thorough, courteous, patient, punctual, just, and impartial, ABA CANONS OF JUDICIAL ETHICS Canon 34 (1971). See also Etzel v. Rosenbloom, 83 Cal. App. 2d 758, 765, 189 P.2d 848, 852 (1948) (quoting Secrates: 'Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.').

[37] Allen, 276 So. 2d at 586.

[38] Id. ('We have little doubt that facial expressions, gestures, and nonverbal communications which tended to ridicule defendant and his counsel, could, standing alone, operate so as to destroy the fairness of a trial.').

with deference and may prove controlling.'[39] One court commented that [i]t is well known, as a matter of judicial notice, that juries are highly sensitive to every utterance by the trial judge, the trial arbiter, and that some comments may be so highly prejudicial that even a strong admonition by the judge to the jury, that they are not bound by the judge's views, will not cure the error.[40]

Less blatant behavior by trial judges may also exceed the permissible limits of influence and violate a defendant's right to procedural due process.[41] Subtle judicial influence is more likely to be expressed through nonverbal messages, cues, or 'channels' such as facial expressions or tone of voice, rather than through the actual words of the judge. In one case, an appellate court held that a defendant was deprived of his constitutional right to a fair trial when, during the testimony of the State's witnesses, the trial judge smiled favorably, nodded his head in agreement, and muttered 'Uh- hum,' while during the testimony of defense witnesses the judge expressed disapproval by a negative shaking of the head and negative mutterings such as 'Hump,' 'Hu,' and 'No.'[42] While appellate courts recognize that sometimes the judge's subtle verbal and nonverbal behavior intentionally or unintentionally influences jury verdicts in criminal jury trials, reversal is usually not allowed unless the judge's influence is either clearly prejudicial to the defendant or significantly affects the outcome of the trial.[43]

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[39] Quercia, 289 U.S. at 470 (discussing judicial influence and the limitations on the trial judge's power to comment on the evidence). For a more recent discussion on the limits of the trial judge's power to comment on the evidence, see Anton, 597 F.2d at 375 (any comment by a trial judge concerning evidence or witnesses may influence the jury, thus depriving the defendant of his right to have the questions of fact and credibility determined by the jury); see also State v. Burton, 112 Wis. 2d 560, 334 N.W.2d 263 (1983). The Burton court cautioned: The judge is a figure of authority and respect during the trial; his or her intrusions into the sanctity of jury deliberations may affect those deliberations. Even a transcript of the judge's communication cannot reveal a judge's facial expressions or tone of voice. Defense counsel and defendant must be present to have the opportunity to observe the judge's demeanor first-hand, to object to statements or request curative statements in the event that the communication may be improper in any way. Id. at 569, 334 N.W.2d at 267.

[40] Bursten v. United States, 395 F.2d 976, 983 (5th Cir. 1968) (footnote omitted), cert. denied, 409 U.S. 843 (1972); see also State v. Wheat, 131 Kan. 562, 569, 292 P. 793, 797 (1930) (Jochems, J., dissenting). Jochems noted: The trial judge occupies a high position. He presides over the trial. The jury has great respect for him. They can be easily influenced by the slightest suggestion coming from the court, whether it be a nod of the head, a smile, a frown, or a spoken word. It is therefore imperative that the trial judge shall conduct himself with the utmost caution in order that the unusual power the possesses shall not be abused. Id. at 569, 292 P. at 797; see also People v. Mahoney, 201 Cal. 618, 623, 258 P. 607, 608 (1927) (reversible error where trial judge made discourteous and disparaging remarks toward defense from which jury could plainly perceive extreme bias toward defendant--'[judges] cannot be too careful or cautious lest they by word, look, or inflection of the voice bring to bear upon the jury an influence not compatible with an unbiased verdict of the jury').

[41] See People v. Jones, 94 Ill. 2d 275, 300-02, 447 N.E.2d 161, 173- 74 (1982) (Simon, J., dissenting) (trial judges can unduly influence juries simply by a 'slip of the tongue').

[42] See State v. Larmond, 244 N.W.2d 233 (Iowa 1976).

[43] See United States v. Hill, 526 F.2d 1019, 1025 (10th Cir. 1975), cert. denied, 425 U.S. 940 (1976) (appellate court, with the claim that '[a]ppellant was entitled to a fair trial but not a perfect one,' held that where judge smiled or smirked at defendant's behavior in court, this

Appellate courts have in some cases attempted to assess thesubtle influence of the judge's behavior on jury verdicts in criminal trials by questioning the jurors themselves.[44] For example, where a defendant claimed that he was deprived of a fair trial because the judge repeatedly expressed negative facial expressions, scowls, and head movements,[45] the court reviewed testimony from five jurors who stated that they saw these expressions but they had no effect on their decisionmaking process, and from the other five jurors who stated they did not see the expressions at all. The appellate court dismissed the defendant's appeal and noted that it was at a loss to understand how it could rule on the expression on the face of a trial judge.[46]

Appellate courts remain reluctant to review a defendant's contention that a trial judge's nonverbal messages, demeanor, tone of voice, or facial expressions constituted an expression of opinion, reflecting the judge's bias against the defendant.[47] Only recently have appellate courts reversed longstanding rules that a trial judge's nonverbal messages are not reviewable on appeal. Claims of prejudicial verbal and nonverbal error by the trial judge are now reviewable in some courts if the appellant has completed a record that will enable an appellate court adequately to review the matter.[48] How a trial attorney might develop a 'complete record' of the trial judge's subtle verbal and nonverbal behavior is discussed in the final section.

Judicial influence sometimes acts to deprive criminal defendants of their due process rights. The courts have recognized that judicial influence may be extreme or subtle, and may be transmitted to trial participants by the verbal and nonverbal behavior of the trial judge.[49] In extreme cases, judicial influence may constitute reversible error on the grounds that the defendant is denied the constitutionally protected right to a fair and impartial trial. Most appellate courts, however, continue to recognize only very limited grounds for appeal on the basis of undue judicial influence. This note analyzes actual judicial behavior in an attempt to help in the long-term understanding of the possible limits of judicial influence. The ultimate goal is to aid appellate courts in more effectively assessing judicial behavior, to help ensure the due process right to a

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conduct did not indicate to the jury that the judge believed the defendant guilty); Cantor v. State, 27 Ala. App. 40, 165 So. 597 (1936) (where trial judge merely smiled during part of the jury instructions relating to the defendant's alleged criminal conduct, the appellate court held this not to be reversible error). In Cantor, the appellate court noted that while the smile upon the benign face of a just judge would be preferable by far to a scowl, the appellate court would not interfere with the discretion of the trial judge when there is no clear influence on the jurors. The court did not address the legal standard for reversibility on the grounds of prejudicial error by the trial judge. For a related discussion, see notes 159-174 infra and accompanying text.

[44] See People v. Lee, 38 Cal. App. 3d 749, 754, 113 Cal. Rptr. 641, 645 (1974) (jurors' affidavits are competent only to prove 'objective facts' to impeach a verdict; objective facts are those open to sight, hearing, and other senses subject to corroboration). But see CAL. EVID. CODE § 1150 (West 1966) (jurors are usually not allowed to impeach their verdicts by appearing as witnesses).

[45] Hill v. State, 153 Tex. Crim. 105, 217 S.W.2d 1009 (1948).

[46] Id.

[47] See, e.g., Milhouse v. State, 254 Ga. 357, 529 S.E.2d 490 (1985) (trial judge's tone of voice or vocal emphasis is generally not reviewable on appeal).

[48] Id. (Georgia Supreme Court noted that, in certain cases, a trial judge's tone of voice, vocal emphasis, facial expressions, or other demeanor can be prejudicial toward defendant).

[49] See Note, supra note 32.

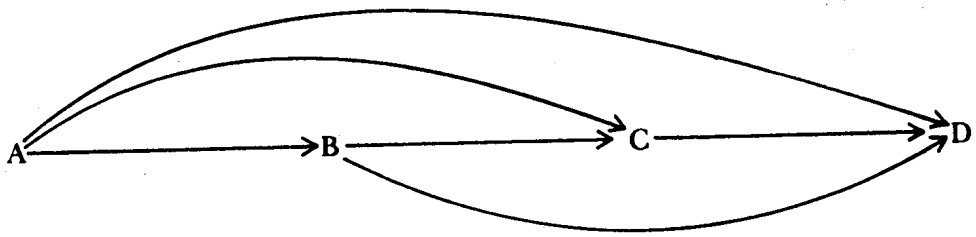
constitutionally fair and impartial jury trial.

II. A MODEL FOR THE STUDY OF JUDICIAL INFLUENCE

This section proposes a preliminary model for the study of the possible effects of judges' beliefs, expectations, and behavior on the verdicts returned by juries.[50] The model helps to identify the types of variables that need to be studied to better achieve a systematic understanding of judicial influence and the operation of expectancy effects in ongoing trial processes. The model is intended to serve as a theoretical guide for researchers, and not as a hard-and-fast working model for practitioners. The basic elements of the model are (A) background variables, (B) expectancy variables, (C) transmitting variables, and (D) outcome variables. The model is described in Figure 1 below:

Figure 1

Model for the Study of Judicial Influence

Variable	Background	Expectancy	Transmitting	Outcome
Cumulative Effect				
Example of Variable	Judge Sex Juror Education Lawyer Age Defendant Criminal History	Judge Belief (Defendant *Should* Be, or *Will* Be, Guilty)	Verbal Cues/ Nonverbal Cues (Content-Present: Normal Video and Audio, Audio Only; Content-Absent: Video Only, Content-Filtered Speech Only)	Jury Verdict (Trial Outcome

A. *Background Variables*

Background variables refer to the more stable attributes of the trial participants--the trial judge, the jurors, the witnesses, the defendants, and the prosecution and defense lawyers. For example, background variables refer to sex, social status, education, ethnicity, intellectual ability, personality, and other personal history variables.

The model describes the relationship between the trial participants, their background variables, and the trial outcome (e.g., the A-D arrow of Figure 1). In The American Jury, Kalven and Zeisel

[50] For a general model for the study of interpersonal expectancy effects, see Rosenthal, Pavlov's Mice, Pfungst's Horse, and Pygmalion's PONS: Some Models for the Study of Interpersonal Expectancy Effects, in THE CLEVER HANS PHENOMENON 182 (T.A. Sebeok & R. Rosenthal eds. 1981).

noted, for example, that it is generally assumed that the background characteristics of defendants make no difference to the trial judge.[51] (This is an example of the defendant- trial judge relationship.) Our research questions this assumption.[52]

The background variables associated with the trial judge include, among others, age, sex, race, political ideology, and number of years on the bench. These variables have been shown to influence judicial behavior toward trial participants.[53] Researchers have also studied the effects of characteristics of the jurors themselves on trial outcome. For example, the political ideology, sex, race, occupation, income, and age of jurors have been shown to influence jury decisionmaking processes.[54] Finally, research suggests that defendant characteristics indirectly affect judicial behavior. Studies in this area demonstrate the effects of the race of the defendant on sentencing in death penalty cases.[55] Similarly, researchers have found that juries are

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[51] H. KALVEN & H. ZEISEL, THE AMERICAN JURY 193 (1966) (examining the behavior of judges and jurors in criminal jury trials); id. at 497-98 ('The judge very often perceives the stimulus that moves the jury, but does not yield to it. Indeed it is interesting how often the judge describes with sensitivity a factor which he then excludes from his own considerations.').

[52] For other examples of studies on the trial judge-defendant relationship, see Bell, Racism in American Courts: Cause for Black Disruption or Despair?, 61 CALIF. L. REV. 165 (1973); Champagne & Nagel, The Psychology of Judging, in THE PSYCHOLOGY OF THE COURTROOM 257 (N. Kerr & R. Bray eds. 1982); Dane & Wrightsman, Effects of Defendants' and Victims' Characteristics on Juror's Verdicts, in THE PSYCHOLOGY OF THE COURTROOM 83 (N. Kerr & R. Bray eds. 1982); see also Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 STAN. L. REV. 27 (1985).

[53] For example, in one exploratory study the researchers found (1) white judges gazed more at defendants than did black judges, (2) judges gazed more at defendant witnesses, as compared to civilian and police witnesses, and (3) a significant positive relationship (correlation = .48) existed between the rate of gaze at the defendant and the fine received if found guilty. See Dorch & Fontaine, Rate of Judges' Gaze at Different Types of Witnesses, 16 PERCEPTUAL MOTOR & SKILLS 1103 (1978). Personality variables of the trial judge have also been employed as background variables. Early research in this area suggests that psychoanalysis may help to explain judicial influence by aiding in an understanding of the judge's self- concept and use of unconscious defense mechanisms (examples of background variables). See H. LASSWELL, POWER AND PERSONALITY (1976); Schroeder, The Psychologic Study of Judicial Opinions, 6 CALIF. L. REV. 89 (1918); Winnick, Gerver & Blumberg, The Psychology of Judges, in LEGAL AND CRIMINAL PSYCHOLOGY 121 (H. Toch ed. 1961).

[54] See R. HASTIE, S. D. PENROD & N. PENNINGTON, INSIDE THE JURY (1983); Mills & Bohannon, Juror Characteristics: To What Extent Are They Related to Jury Verdicts?, 64 JUDICATURE 22 (1980); S. D. Penrod, D. Linz, L. Heuer & D. Coates, The Science of Advocacy (1985) (unpublished manuscript on file with the Stanford Law Review); see also Costantini, Mallery & Yapundich, Gender and Juror Partiality: Are Wonten More Likely To Prejudge Guilt?, 67 JUDICATURE 120 (1983) (finding females more likely than males to reveal partiality, as measured by belief in the defendant's guilt and by belief in one's own capacity to serve impartially as a juror at a particular defendant's trial).

[55] See, e.g., Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 HARV. L. REV. 456 (1981); see also Dane & Wrightsman, supra note 52. But see Hagan, Extralegal Attributes and Criminal Sentencing: An Assessment of a Sociological

significantly more likely to convict a defendant who has a criminal record than one who does not.[56] The social psychological literature has generally supported the conclusion that the background characteristics of the defendant and his or her victim influence the decisions of simulated jurors.[57]

Although the background variables of the trial participants have no direct legal bearing on the guilt or innocence of the defendant in a criminal trial, these background variables influence judges and jurors in their decisionmaking process.[58] The model here includes the effects of trial participant background variables on judicial behavior in criminal jury trials. These background variables help predict the behaviors of trial participants and further the understanding of how these behaviors may influence trial outcomes.

B. Expectancy Variables

A judge's expectations for trial outcome and trial processes can influence the decisionmaking process of jurors and the actual trial outcome.[59] An 'expectation' is a particular belief that an individual has for the outcome of some behavior. The relationship between a judge's particular 'expectations' for trial outcome and the actual outcome of their trials would be an example of an 'expectancy effect' if the expectation of the judge affected the behavior of the judge in such a way as to lead the jury to confirm the judge's expectations.[60] Our research assesses how a judge's expectations, as measured during the trial process prior to the jury verdict, relate to trial

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Viewpoint, 8 L. & SOC'Y REV. 357 (1974) (reviewing 20 studies on the relationship of criminal sentencing and defendant characteristics and finding a small nonsignificant positive relationship between these factors).

[56] See, e.g., S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 44-48 (4th ed. 1983); Brooks & Doob, Justice and the Jury, J. SOC. ISSUES, Summer 1975, at 171-77; Mendez, California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies, 31 U.C.L.A. L. REV. 1003, 1047-49 (1984).

[57] See, e.g., Dion, Berscheid & Walster, What Is Beautiful Is Good, 24 J. PERSONALITY & SOC. PSYCHOLOGY 285 (1972). Jones & Aronson, Altribution of Fault to a Rape Victim as a Function of Respectability of the Victim, 26 J. PERSONALITY & SOC. PSYCHOLOGY 415 (1973); Landy & Aronson, The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors, J. EXPERIMENTAL SOC. PSYCHOLOGY 141 (1969); Nemeth & Sosis, A Simulated Jury Study: Characteristics of the Defendants and the Jurors, 90 J. SOC. PSYCHOLOGY 221 (1973).

[58] See Vinson, Psychological Anchors: Influencing the Jury, 8 LITIGATION 20 (1982); Wasserman & Robinson, Extra-Legal Influences, Group Processes, and Jury Decision-making: A Psychological Perspective, 12 N.C. CENTRAL L.J. 96 (1980).

[59] See texts accompanying notes 7-43 supra, 141-146 infra.

[60] See note 50 supra. For a description of the assessment of trial judges' expectations, see Appendix B infra (Judge Questionaire--Questions 9 and 10: 'What should the verdict be?' and 'What will the verdict be?'). In this study, we assessed judges' expectations for trial outcome for the first two major charges or counts against the defendant. See note 98 infra. What the judges thought the verdict should be and what the judges thought the verdict would be was significantly positively correlated ($r = .69$, $p < .001$ for count 1, and $r = .78$, $p < .001$ for count 2).

processes and actual trial outcome.[61] As described above, under some conditions, behavior flowing from a judge's expectancy might act to deprive a defendant of his or her right to a fair and impartial trial.

C. Transmitting Variables: Verbal and Nonverbal Communications

'Transmitting variables' or 'transmitting behaviors' refers to the verbal and nonverbal processes by which expectations are communicated by the judge to the trial participants. In this study, trial judges' transmission variables were sampled when the judges gave final jury instructions. This is one time during the trial when the judge directly addresses the jury as to the law, and therefore may potentially have the greatest influence on the decisionmaking process of the jury.[62] All the

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[61] We measured the expectations (expectancy variables) in this study after the judges had become acquainted with a particular trial--near the close of the trial just before the judge gave instructions to the jury. Judges probably develop expectations about trial outcome throughout the entire trial process. These expectations, however, should be most clearly developed near the completion of the judge's role in the trial, after all the evidence has been heard. By examining expectations at the end of the trial, we related the effect of these attitudes on the judge's subsequent delivery of the jury instructions. The expectancy variable can be induced experimentally or allowed to occur naturally. In field settings such as the courtroom, expectations are often measured as they occur naturally rather than varied experimentally. In studying naturally occurring expectations, some of the problems associated with experimental studies on courtroom processes are avoided, although some degree of experimental control is sacrificed. See notes 82-86 infra and accompanying text. The present study documents the operation and communication of naturally occurring expectations. See generally Blanck & Turner, Gestalt Research: Clinical Field Research Approaches to Studying Organizations, in THE HANDBOOK OF ORGANIZATIONAL BEHAVIOR (J. Lorsch ed. 1986) (forthcoming) (discussing the methodological issues of ecological validity and experimental control associated with studying naturally occurring versus experimentally induced effects).

[62] See Andres v. United States, 333 U.S. 740, 765 (1948) (Frankfurter, J., concurring) ('Charging a jury is not a matter of abracadabra. No part of the conduct of a criminal trial lays a heavier task upon the presiding judge. The charge is that part of the whole trial which probably exercises the weightiest influence upon jurors.'). The jury's duty in a criminal trial is to reach a verdict by examining evidence presented during the trial. The jury is required to apply the law as described by the judge in the charge and in instructions given during the trial. The judge's instructions to the jury are meant to provide the jury with the legal standards for reaching a verdict. The appellate courts and legislatures have repeatedly charged the trial judge with this responsibility. For example, in 1908 the Supreme Court of Pennsylvania stated: [W]hen the trial judge has not succeeded in delivering instructions on the law in such a way that they will be understood by the jury, his charge is inadequate and justly open to objection by the defendant. As the very object of the instructions is to inform the jury as to the law applicable to the facts of the case, the charge fails of its purpose when the jury are ignorant of the law applicable to any material question in the case. Commonwealth v. Smith, 221 Pa. 552, 553, 70 A. 850, 850 (1908). But jurors sometimes reach a verdict that is inconsistent with the law by purposefully disregarding the judge's instructions or by unintentionally misunderstanding the judge's instructions and basing the verdict on an incorrect legal standard. See A. E. ELWORK, B. D. SALES & J. J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE 4-5 (1982). Juror misunderstandings of the judge's instructions also arise from the syntax of the instructions, the manner of the judge's

judges in our study read pattern jury instructions. Thus, it was possible to isolate or 'control' the effects of the judge's particular transmission variable--for example, verbal and nonverbal behaviors--from the content of the instructions themselves.[63] In short, we were afforded the rare opportunity in a real-life research setting to isolate some of the variables of interest.

Judges are aware of the problems associated with pattern jury instructions and have been reluctant to deviate from the 'legally accurate' language that has been approved by higher courts. Trial judges are acutely aware that even minor changes in the wording of jury instructions have been the basis for reversals.[64] This awareness should make any deviations from the jury instructions, verbal and nonverbal, all the more unusual, more significant, and perhaps more influential. In the present research, all the participating judges read from the same set of

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presentation, and the juror's unfamiliarity with legal terminology. See Charrow & Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 COLUM. L. REV. 1306 (1979); Elwork, Sales & Alfini, Making Jury Instructions Understandable: Jurors' Use of Judges' Instructions, 11 SOC. METHODS & RESEARCH 501 (1983); Elwork, Sales & Alfini, Juridic Decisions, 1 LAW & HUM. BEHAV. 163 (1977); Forston, Sense and Non-sense: Jury Trial Communication, 1975 B.Y.U.L. REV. 601; Reed, Jury Simulation: The Impact of Judge's Instructions and Attorney Tactics on Decisionmaking, 71 J. CRIM. L. & CRIMINOLOGY 68 (1980); Schwarzer, Communication with Juries: Problems and Remedies, 69 CALIF. L. REV. 731 (1981); Severance & Loftus, Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions, 17 LAW & SOC'Y REV. 153, 154 (1982); Strawn & Buchanan, Jury Confusion: A Threat to Justice, 59 JUDICATURE 478 (1976).

[63] See Channels, The Methods of Social Science and their Use in Legal Proceedings, 16 CONN. L. REV. 853, 862-64 (1984) (describing how control variables are held constant during the research process to isolate the cause and effect variables of interest and to refute rival hypotheses about other factors that could have caused the outcome of interest).

[64] In response, legislatures began to standardize jury instructions in the 1930s. Before then, instructions were typically generated by the suggestions of counsel submitted to the trial judge. Three problems with non- pattern jury instructions were: (1) The process was time consuming; (2) it often resulted in an inaccurate statement of the applicable law, therefore leading to reversals on appeal; and (3) trial judges ended up delivering legally accurate but often incomprehensible instructions to juries. See A. E. ELWORK, B. D. SALES & J. J. ALFINI, supra note 62; J. FRANK, LAW AND THE MODERN MIND 181 (1930) (summarizing the dilemma and stating that jury instructions 'might as well be spoken in a foreign language'). Interestingly, one study found that pattern instructions have only marginally reduced the number of appeals based on erroneous jury instructions. See R. G. NIELAND, PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM (1979); Nieland, Assessing the Impact of Pattern Jury Instructions, 62 JUDICATURE 185 (1978). However, pattern instructions do seem to reduce the amount of time previously required to draft jury instructions and the chance of legal inaccuracies in jury instructions. See R. McBRIDE, THE ART OF INSTRUCTING THE JURY §§ 9.06-9.14, at 342-53 (1969 & Supp. 1978). For a case discussing these issues, see People v. Garcia, 54 Cal. App. 3d 61, 126 Cal. Rptr. 275 (1975), cert. denied, 426 U.S. 911 (1976) (reviewing several erroneous variations in instructions concerning the meaning of 'proof beyond a reasonable doubt' and reversing a conviction of murder on the grounds that the instructional errors of the trial court constituted harmful error).

California Pattern Criminal Jury Instructions,[65] allowing us to standardize the presentation of the judges' verbal content.

As described earlier, the courts have long acknowledged that nonverbal judicial behaviors, for example the facial expressions or tone of voice cues of the judge, can alone influence jury verdicts and sometimes do so in impermissible ways or to an impermissible extent.[66] More recently, social scientists have demonstrated that in analogous situations, experimenter, teacher, doctor, and therapist nonverbal behaviors significantly influence social interaction with subjects, pupils, patients, and clients.[67]

One of the earliest hints that nonverbal cues were involved in the transmission of expectancy effects came from the work of experimental social psychologists on the operation of 'experimenter expectancy effects.'[68] In these early experiments, college students were asked by other students designated as 'experiments' to judge whether a person pictured in a photograph had been experiencing success or failure in life. Despite the fact that all 'experimenters' read the same instructions to their students--the use of 'pattern instructions' to control for the verbal content of the experimenter's communications--students responded in accordance with the expectations that were experimentally induced in the minds of the 'experimenters.' In other words, the students thought the individuals in the photographs were more successful if the 'experimenters' had been led to believe they were more successful.[69] Because all experimenters in these studies read the same verbal instructions, these results suggested that the nonverbal components of the interaction led the experiments to cause the results that they had been led to expect--thus the term 'experimenter expectancy effect.'

In the present study, we videotaped judges delivering final jury instructions in order to study the type of nonverbal, as well as verbal, information that may transmit judicial influence and

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[65] See Appendix A.

[66] See notes 37-48 supra and accompanying text. Nonverbal behavior, other than visual or auditory cues, has been defined to include the study of social distances and social artifacts. For example, in Milgram's famous studies of obedience to authority, a key variable related to the extent of 'obedience' was social distance to the victim. As vocal cues, visual cues, and tactile cues were added, individuals became less likely to 'shock' the victim. See S. MILGRAM, OBEDIENCE TO AUTHORITY (1974). For more detailed discussion and overview of this field, see R. BIRDWHISTELL, INTRODUCTION TO KIMESICS (1952); R. BUCK, THE COMMUNICATION OF EMOTION (1985); A. MEHRABLAN, NONVERBAL COMMUNICATION (1972); Duncan, Nonverbal Communication, 72 PSYCHOLOGICAL BULL. 118 (1969).

[67] These investigations have studied the factors that increase or decrease expectancy effects and the processes of interpersonal communication that transmit the expectancy effects. See, e.g., R. ROSENTHAL, EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH (1976); Blanck & Rosenthal, The Mediation of Interpersonal Expectancy Effects: The Counselor's Tone of Voice, 76 J. EDUC. PSYCHOLOGY 418 (1984).

[68] See, e.g., R. ROSENTHAL, supra note 67, at 196-210.

[69] Later studies in which 'experimenters' were filmed during the reading of the instructions confirmed that no serious deviations from the text had occurred in the reading of the written instructions. R. ROSENTHAL, supra note 67, at 259-80.

expectancy effects in the courtroom.[70] This design enabled us to separate the verbal, video, and audio 'channels.' These different channels convey different amounts and types of information,[71] and individuals generally differ in the clarity of their communication through the various channels.[72]

The effect of auditory channel was measured in two ways: by studying the judges' normal speech only cues (content-present) and the judges' tone of voice only cues (content-absent). Considerable evidence shows that auditory cues alone may be sufficient to transmit expectancy effects.[73] In an interesting study bearing on the importance of auditory cues in the transmission of expectancy effects, experienced hypnotists read pattern instructions to two groups of people. The hypnotists believed one group to contain people of high susceptibility to hypnotic cues and

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[70] The videotapes of the judge's final instructions to the jury were modified in different ways to isolate the various communicative channels and channel combinations. The channels studied were: (1) Normal video and audio cues (pattern transcript, visual cues, normal audio cues). (2) Audio only cues (normal speech and content-present). (3) Video only cues (facial and body cues only). (4) Tone of voice only cues (content-filtered speech). For this channel, the master audio tapes are content-filtered, a process that removes from the tape the high frequencies on which word recognition depends but preserves sequence and rhythm. See R. ROSENTHAL, J. HALL, R. DIMATTEO, P. ROGERS & D. ARCHER, SENSITIVITY TO NONVERBAL COMMUNICATION: THE PONS TEST 14-15 (1979); Rogers, Scherer & Rosenthal, Content Filtering Human Speech: A Simple Electronic System, 3 BEHAV. RESEARCH METHODS & INSTRUMENTATION 16 (1971). Although no norms exist for the proportion of words that can still be understood after content-filtering, recent studies have found that proportion to be between .11 and .17. See Blanck & Rosenthal, supra note 67, at 420. In the present study, 24 students (13 males and 11 females) listed the words they could understand after content- filtering for ten randomly selected segments across all the seven trials for one judge. For these few segments, the proportion of words correctly understood after content-filtering was .08.

[71] For example, facial cues have been shown to convey a large percentage of emotional information. See R. ROSENTHAL, J. HALL, R. DIMATTEO, P. ROGERS & D. ARCHER, supra note 70.

[72] Id.

[73] See Rosenthal & Fode, Psychology of the Scientist: V. Three Experiments in Experimenter Bias, 12 PSYCHOLOGICAL REP. 491-511 (1963). A two-stage study by Adair and Epstein further supports the idea that expectations might be communicated by an experimenter's tone of voice. Adair & Epstein, Verbal Cues in the Mediation of Experimenter Bias, 22 PSYCHOLOGICAL REP. 1045 (1968). In the first stage, experimenters were led to expect either high or low ratings of success from their research subjects. Consistent with earlier studies of this kind, experimenters did in fact obtain results significantly in the direction of their expectations. In the second stage of this experiment, subjects received tape-recorded instructions read by experimenters who had been given different expectations for how their subjects should rate the photos of faces. The results showed that the audio cues alone were sufficient to communicate to subjects the expectations of the experimenters. Other studies have shown that visual cues alone can transmit the effects of experimenter expectations, and have supported the general importance of nonverbal cues in the transmission of expectancy effects. See Blanck & Rosenthal, supra note 67; Harris & Rosenthal, The Mediation of Interpersonal Expectancy Effects: 31 Meta-Analyses, 97 PSYCHOLOGICAL BULL. 363 (1985).

one group to contain people of low susceptibility to hypnotic cues.[74] When the hypnotists were led to expect lower susceptibility scores, their voices were found to be significantly less convincing in their reading of the instructions to their subjects. These results were obtained despite the fact that the hypnotists were cautioned to treat their subjects identically, were told their performance would be tape recorded, and were aware of the problem of experimenter expectancy effects. These conditions parallel those in this study in which trial participants received notice that the trials would be videotaped and judges were aware that the study examined judicial influence on juries.[75]

In many ways, the trial judge is analogous to the hypnotist, and the jury is analogous to the hypnotist's subject. When judges expect innocent verdicts, their voices, like that of the hypnotist, may be relatively warmer and less hostile when addressing the jury. When judges expect guilty verdicts, their voices may be relatively colder and more hostile when addressing the jury. Additionally, tone of voice cues alone may be sufficient to convey the judge's expectations for trial outcome to jurors in measurable ways.[76]

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[74] See Troffer & Tart, Experimenter Bias in Hypnotist Performance, 145 SCI. 1330 (1964).

[75] See notes 118-119 infra and accompanying text (describing analogous results in the present study).

[76] Two experiments have shown that the expectancy effect was approximately cut in half when subjects had access only to auditory cues from their experimenter. See Rosenthal & Fode, supra note 73 (showing 47 percent of the total expectancy effect when subjects had access only to experimenters' audio cues); Zoble & Lehman, Interaction of Subject and Experimenter Expectancy Effects in a Tone Length Discrimination Task, 14 BEHAVIORAL SCI. 357 (1969) (showing 53 percent of the total expectancy effect when subjects had access only to experimenters' audio cues). It has also been possible to isolate particular aspects of vocal cues that are effective in influencing subjects' responses. For example, vocal emphasis-- intensity or volume--is alone sufficient to function as a transmitting cue in the communication of expectancy effects. See Scherer, Rosenthal & Koivumaki, Mediating Interpersonal Expectancies via Vocal Cues: Differential Speech Intensity as a Means of Social Influence, 2 EUR. J. SOC. PSYCHOLOGY 163 (1972) (where subjects were exposed to audiotaped instructions giving relatively greater emphasis to 'failure words,' while other subjects were exposed to audiotaped instructions giving relatively greater emphasis to 'success words,' subjects tended to rate photographs of others in accordance with the words that the experimenters had emphasized in the audiotaped instructions). Vocal emphasis is a commonly alleged ground for a trial judge's prejudicial error. See, e.g., Walker v. Lockhart, 726 F.2d at 1243 (defendant asserted that the tone of voice and demeanor of the trial judge denied his constitutional right to a fair and impartial trial). Trial judges who emphasize the words 'guilty' or 'innocent,' for example, when describing a defendant may affect the jury's perceptions of that defendant's guilt or innocence in significant ways. Some pattern jury instructions committees have attempted to address these problems by drafting instructions that caution juries about the trial judge's vocal emphasis. For example, one judge uses a pattern instruction caution on the vocal emphasis of the trial judge in giving instructions: During my charge, I may emphasize words or sentences to eliminate monotony in my instructions. The purpose of this emphasis is to help you understand and remember the law a little better than if these instructions were delivered in a monotonous manner. Do not assume from my emphasis, gestures or manner that I am stating the law to the advantage of either (the State or the defendant) (party). See R. McBRIDE, supra note 64, § 15.06(a), at 175

The second channel of interest is the visual or video channel. Several studies have shown that visual cues alone sometimes can be even more effective than auditory cues in the transmission of expectancy effects.[77] In one study, subjects who had access only to auditory cues were affected by their experimenter's expectancy only 53 percent as much as those who had access to both visual and auditory cues, while those subjects who had access only to visual cues were affected by their experimenter's expectancy 75 percent as much as those who had access to both information channels.[78] Thus, visual cues alone may be one of the most important factors in the transmission of expectancy effects and judicial influence.[79] For example, when judges expect an innocent verdict, their visual expressions (facial and body cues) may be rated as warmer, less hostile, and more open- minded in delivering instructions to juries.[80]

D. Outcome Variables

Outcome variables refer to the behavior of the 'expectee' (e.g., the juror) after the interaction with the expecter (e.g., the judge) has occurred. In this study, outcome variables are measured by actual trial outcome. Outcome variables may themselves be affected by other variables in the model. For example, defendants with a criminal history may be more likely to receive guilty verdicts.[81]

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[77] See Zoble & Lehman, supra note 76; A. Badini & R. Rosenthal, Visual Cues and Student Gender as Mediating Factors in Teacher Expectancy Effects (1982) (paper read at the Eastern Communication Convention, Hartford, Conn.) (students who had access to visual cues from their teachers were more affected by their teachers' expectations than were those students who had no access to visual cues from their teachers).

[78] See Zoble & Lehman, supra note 76.

[79] 'Live' visual contract may not be a necessary condition for the transmission of expectancy effects. See J. Burnham, Experimenter Bias and Video Tape: A Methodological Step Forward (1971) (unpublished Ph.D. dissertation, Purdue Univ.). Additionally, when screens are placed between 'experimenters' and their research subjects so that visual access is denied the participants, the size of the effect of experimenter expectations is cut approximately in half. This suggests that although expectancy effects can be transmitted by tone of voice alone, visual cues significantly contribute to their operation. See note 73 supra and accompanying text. Finally, the use of video- or audiotape recorded jury instructions may reproduce and perhaps even reinforce any live expectancy effects that may have occurred during the actual trial. See note 185 infra and accompanying text. See Blanck, Rosenthal & Vannicelli, Nonverbal Communication in the Clinical Context: The Therapist's Tone of Voice, in NONVERBAL COMMUNICATION IN THE CLINICAL CONTEXT 99 (P. D. Blanck, R. Buck & R. Rosenthal eds. 1986); Blanck, Rosenthal, Vannicelli & Lee, Therapist's Tone of Voice: Descriptive, Psychometric, Interactional, and Competence Analyses, 4 J. SOC. & CLINICAL PSYCHOLOGY ___ (1986) (forthcoming); Ekman & Friesen, Nonverbal Leakage and Clues to Deception, 32 PSYCHIATRY 88 (1969); P. McLeod, R. Rosenthal, P. D. Blanck & S. Snodgrass, Micromomentary Movement and the Decoding of Face and Body Cues (1980) (presentation at the Am. Psychological Ass'n Meeting).

[80] See, e.g., Larmond, 244 N.W.2d at 236 (noting the trial judge's 'telegraphing' to the jury, by nonverbal behaviors and facial expressions, expectations for trial outcome).

[81] In this example, an alternative explanation is that defendants with a criminal history are actually more likely to be guilty. In studies involving naturally occurring, rather than

III. RESEARCH STRATEGY AND DESIGN The generalizability of results to real-world social settings or across many social settings is called 'external' or 'ecological validity.'[82] Our research sought to achieve the greater external validity of the observational and field-like studies in the courtroom, as well as the greater precision of the laboratory-like studies involving ratings of verbal and nonverbal behavior.[83] External validity describes whether the results obtained in a particular scientific study hold generally true in the real world. Laboratory simulation of courtroom processes often may not be generalizable to the actual courtroom context, and jury simulation research in particular has been criticized for a lack of external validity.[84]

Our research strategy and design attempted to maximize external validity and precision of the ratings of the judges' behavior by (1) collecting questionnaire data from actual trial participants concerning trial processes,[85] (2) videotaping actual trials,[86] and (3) employing independent

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experimentally induced interpersonal expectations, a high correlation among background variables, the trial judge's expectations for trial outcome, and actual trial outcome must be interpreted with caution. The presence of a high correlation of this sort makes it difficult to conclude, for example, that it is the judge's expectations alone, rather than the jurors' decisionmaking process or the selection characteristics of the defendant, that are 'responsible' for subsequent verdicts. Covariance techniques, cross-lagged panel analyses, and related data analytic procedures are helpful in isolating such relationships. See, e.g., Crano & Mellon, Causal Influence of Teachers' Expectations on Children's Academic Performance: A Cross-Lagged Panel Analysis, 70 J. EDUC. PSYCHOLOGY 39 (1978). When expectations are varied experimentally, the expected value of the background variable-trial judge expectancy correlation is zero; none of the attributes of any of the trial participants should be correlated with the judges' expectancies because subjects are randomly assigned to experimental conditions. Of course, experimentally varied expectations are not ethically possible in the actual courtroom context. See note 61 supra.

[82] See T. D. COOK & D. T. CAMPBELL, QUASI EXPERIMENTATION: DESIGN & ANALYSIS ISSUES FOR FIELD SETTINGS 37-39 (1979); Aronson, Brewer & Carlsmith, Experimentation in Social Psychology, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 441 (G. Lindzey & E. Aronson eds. 3d ed. 1985).

[83] See Blanck & Turner, supra note 61 (discussing field-based observational and experimental studies); Rosenthal, Conducting Judgment Studies, in HANDBOOK ON METHODS IN NONVERBAL COMMUNICATION RESEARCH 287 (K. Scherer & P. Ekman eds. 1982) (discussing studies involving ratings of nonverbal behavior).

[84] See Ebbesen & Konecni, On the External Validity of Decision-Making Research, in COGNITIVE PROCESSES IN CHOICE AND DECISION BEHAVIOR (T. S. Wallsten ed. 1980); Weiten & Diamond, A Critical Review of the Jury Simulation Paradigm, 3 LAW & HUM. BEHAV. 71 (1979); see also EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW (1981); Bray & Kerr, Methodological Considerations in the Study of the Psychology of the Courtroom, in THE PSYCHOLOGY OF THE COURTROOM 287 (N. Kerr & R. Bray eds. 1982) (reviewing the methodological considerations in courtroom research).

[85] The questionnaires completed by the trial judges, jurors, and lawyers in this study are presented in Appendix B. The directions to the trial participants explained the purpose of the study and the point during the trial at which the questionnaires were to be completed. The five trial judges completed one questionnaire before the verdict was announced in each of seven trials

groups of raters to assess the video- and audiotapes as to their communicative content.

A. Description of the Trial Participants, Trials, and Ratings of the Judges' Behavior

1. Trial participants.

Trial judges. In the first stage of the studies described in this note, five California Municipal Court judges (three males and two females) were videotaped delivering final jury instructions to jurors in actual criminal jury trials.[87] The judges ranged in age from 34 to 51 years, with an average age of 44 years. The amount of time that the judges had been on the bench ranged from two months to five years. All judges but one were videotaped in seven different trials, the one exception was videotaped in six different trials, for a total of 34 trials observed.

Jurors. Three hundred thirty-one jurors, spread over the 34 trials, participated in this study, making 81 percent of all jurors participants in the research. In California, twelve jurors are required to sit for a criminal misdemeanor trial, and guilty and innocent verdicts must be

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(one judge was videotaped in only six trials), during a short recess after the closing arguments and before delivering the final jury instructions. The judges completed an additional questionnaire after the verdict was announced. The 61 participating lawyers (prosecution and defense) completed a questionnaire during the jury deliberation, before the verdict. Three hundred thirty-one jurors from the 34 trials completed a questionnaire after the verdict had been announced. All questionnaires took approximately five to ten minutes to complete, all the participants consented to participate in the study of their own volition, and all answers were completely anonymous.

[86] Videotaping trials can also offer trial participants increased flexibility in arranging trial proceedings. See Barber, The Problem of Prejudice: A New Approach to Assessing the Impact of Courtroom Cameras, 66 JUDICATURE 248 (1983) (suggesting that news camera coverage has the potential to make trials more rather than less fair); McCrystal, The Promise of Prerecorded Videotaped Trials, 63 A.B.A. J. 977 (1977); McCrystal, Videotape Trials: Relief for Our Congested Courts, 49 DEN. L.J. 463 (1973). Some commentators are concerned that videotaping trials may seriously affect juror or observer perceptions of the trial process. For example, researchers have found that while videotaping trials does not significantly affect perceptions and attitudes toward trial processes in general, black and white versus color videotape, editing techniques, and camera angle can affect viewer perceptions. See G. MILLER & N. FONTES, VIDEOTAPE ON TRIAL (1979); Bermant, Critique--Data in Search of Theory in Search of Policy: Behavioral Response to Videotape in the Courtroom, 1975 B.Y.U. L. REV. 467; Doret, Trial By Videotape--Can Justice be Seen to be Done?, 47 TEMP. L.Q. 228 (1974); Williams, Farmer, Lee, Cundick, Howell & Rooker, Juror Perceptions of Trial Testimony as a Function of the Method of Presentation: A Comparison of Live, Color Video, Black-and-White Video, Audio, and Transcript Presentations, 1975 B.Y.U. L. REV. 375.

[87] We used color videotape and focused the camera on the trial judge with a straight-on camera shot. The camera was adjacent to the jury box so that the camera angle was almost identical to the jurors' view of the trial judge. The angle allowed a close-up view of the trial judge from the chest to the top of the head. Cf. note 86 supra (noting the effect of videotaping on juror and viewer perceptions).

unanimous.[88]

Forty-nine percent of the jurors were male, and 51 percent were female. The jurors had an average age of 42 years, with age ranging from 19 to 81 years. Eighteen percent of the jurors were unemployed, retired, students, or housewives; 26 percent were blue collar workers or service employees; and 56 percent were teachers, managers, or professionals. Two percent of the jurors had received less than a high school education, 26 percent had completed high school, 58 percent had graduated from a two- or a four-year college, and 14 percent had received some form of graduate education. Fifty-one percent of the jurors represented themselves as Democratic Party members, 37 percent as Republicans, and 12 percent as 'other-affiliated,' with most jurors ranking their political beliefs as moderate.[89] This was the first time that 69 percent of the jurors had served as jurors, 19 percent had served twice, 7 percent three times, and 5 percent four times or more.

Lawyers. Sixty-one attorneys (32 prosecution lawyers and 29 defense lawyers) participated in this study. The average age of counsel was 36 years. There were 39 male and 22 female attorneys. The average number of years of practice among all attorneys was 6 years, with the range of years of practice from 1 to 34 years. Seventy-five percent of all counsel rated themselves as Democrats, 10 percent as Republicans, and 15 percent as unaffiliated. Most lawyers had slightly liberal political beliefs.[90]

Defendants. Eighty-two percent of the 34 defendants in these cases were male and 18 percent female.[91] The average age of the defendants was 34 years, with a range in age from 22 to 69 years. Seventy-eight percent of the defendants were white, 11 percent hispanic, and 11 percent of other races. Defendants' socioeconomic backgrounds ranged from 23 percent 'low,' to 58 percent 'middle,' to 19 percent 'high.' Seventeen percent of the defendants had less than a high school education, 25 percent had a high school education, 46 percent had attended either a two- or four-year college, and 12 percent had a graduate degree.

In terms of the background variable of criminal history, 18 percent of the defendants had a previous felony arrest, 9 percent had a previous felony conviction, 59 percent had a previous misdemeanor arrest, and 57 percent had a previous misdemeanor conviction.[92]

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[88] The California Constitution provides that in 'cases of misdemeanor the jury may consist of twelve, or of any number less than twelve upon which the parties may agree [unanimously] in open court.' CAL. CONST. art. I, § 16. Both guilty and innocent verdicts must be unanimous. See CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA MISDEMEANOR PROCEDURE BENCHBOOK (REVISED) § 10.12, at 165 (K. Werdegar ed. 1975 & supp. Aug. 1984); see also note 10 supra.

[89] Mean rating of juror political beliefs was 5.0, with a rating of 1=very liberal and a rating of 9=very conservative. See Juror Questionnaire, Appendix B.

[90] Mean rating of lawyer political beliefs (defense and prosecution) was 4.1, with a rating of 1=very liberal and a rating of 9=very conservative. See Lawyer Questionnaire, Appendix B.

[91] The defense lawyers provided questionnaire data about the background variables of the defendants. See Lawyer Questionnaire, Appendix B.

[92] The median intercorrelation of the criminal history variables was . 49, suggesting a positive predictive relationship between the criminal history variables. The basic intercorrelations among the criminal history variables were .74 for felony arrest and felony convictions, .45 for felony

Trials. The 34 misdemeanor jury trials were conducted in California Municipal Court. The charges included, among others, vehicular manslaughter, drunk driving, carrying a concealed weapon, assaulting a police officer, child molestation, and prostitution. Each trial took approximately two days to complete, with the videotaping of the final jury charge conducted on the second day. Because the judges in our study regularly rotated assignments, all judges tended to have a mixed array of the charges listed above. The verdicts for this sample of trials were 60 percent guilty, 26 percent not guilty, and 14 percent hung for the first major charge, with 38 percent guilty, 62 percent not guilty, and 0 percent hung for the second major charge.[93]

2. Ratings of the judges' behavior.

Raters of the videotapes. Eighty individuals were hired to rate the video- and audiotapes on different verbal and nonverbal dimensions.[94] Raters were randomly assigned to rate all of the trials for one judge in one communicative channel. We explained to the raters that they were to assess the verbal and nonverbal behaviors or cues of the trial judge; for example, we explained that 'warmth' in the judge's tone of voice would be a rating of the judge's nonverbal audio channel of behavior.[95]

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arrest and misdemeanor arrest, .53 for felony arrest and misdemeanor conviction, .39 for felony conviction and misdemeanor conviction, and .97 for misdemeanor arrest and misdemeanor conviction. For a discussion of the meaning of the correlation coefficient, see note 98 infra.

[93] For a description of the coding of the first two major charges or counts, see note 98 infra.

[94] Eighty Stanford University undergraduates and law students were paid to rate the trials. Two male and two female raters were randomly assigned to rate all seven trials of one judge in one communicative channel condition (e.g., Judge A in the tone of voice only condition). Therefore, four individuals rated each of the five trial judges for the four channel conditions--two channels with content-present (normal video and audio, and audio only), and two channels with content-absent (visual only, and content- filtered speech only)--for a total of eighty raters. Raters were told that they would hear and/or see judges delivering instructions to juries. All raters rated all segments of the jury instructions on the form presented in Appendix C.

[95] The rating variables were selected for several reasons. First, many of these variables have been employed in a variety of studies of verbal and nonverbal communication and interpersonal expectancy effects and are related to the transmission of these effects in laboratory contexts and to clinical processes in the clinician-patient relationship. See, e.g., Blanck, Rosenthal & Vannicelli, supra note 79. Second, these variables also tend to describe accurately the emotional dimensions of the communication of affect. Id. The analyses in this study aimed at describing the major communicative dimensions of the trial judge's behavior in delivering instructions to juries in criminal trials. Elsewhere, we have examined the therapist's interpersonal manner in the doctor-patient relationship employing similar variables. See Blanck, Rosenthal & Vannicelli, supra note 79 (interpersonal manner refers to the manner in which the psychotherapist relates to the patient); Blanck, Rosenthal, Vannicelli & Lee, supra note 79; see also Orlinsky & Howard, The Relation of Process to Outcome in Psychotherapy, in HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE 283 (S. Garfield & A. Bergin eds. 2d. ed. 1978); Schaffer, Multidimensional Measures of Therapist Behavior as Predictors of Outcome, 92 PSYCHOLOGICAL BULL. 670 (1982). Finally, judges, like therapists, communicate a wide range of affect and emotional meaning, and these communications may influence courtroom processes. For descriptions of warmth, empathy, and genuineness by therapists in relating to

Ratings of the segments of the jury instructions. Ten segments of the California Pattern Criminal Misdemeanor Jury Instructions were analyzed in the present study.[96] These segments were chosen to reflect the beginning, middle, and ending portions of the instructions, and all of these segments were rated for all 34 trials.[97] No raters had any difficulty in understanding or

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patients, see Gomes-Schwartz, Effective Ingredients in Psychotherapy: Prediction of Outcome from Process Variables, 46 J. CONSULTING & CLINICAL PSYCHOLOGY 1023 (1978); Gomes-Schwartz & Schwartz, Psychotherapy Process Variables: Distinguishing the 'Inherently Helpful' Person from the Professional Psychotherapist, 46 J. CONSULTING & CLINICAL PSYCHOLOGY 196 (1978); Mintz, Luborsky & Auerbach, Dimensions of Psychotherapy: A Factor-Analytic Study of Ratings of Psychotherapy Sessions, 36 J. CONSULTING & CLINICAL PSYCHOLOGY 106 (1971); Rogers, The Necessary and Sufficient Conditions of Therapeutic Personality Change, 21 J. CONSULTING PSYCHOLOGY 95 (1957).

[96] Sections I, II, III, IV, XII (two parts), XV, XVI, XVII, and XVIII of the California Pattern Criminal Misdemeanor Jury Instructions. See Appendix A.

[97] Segments varied in length from 7 seconds to 565 seconds (approximately 9.5 minutes), with an average length of 51 seconds. This research approach compares to the recent trend in the area of psychotherapeutic research to sample approximately one to five minutes of the therapist's speech. See R. E. PITTENGER, C. F. HOCKETT & J. J. DANEHY, THE FIRST FIVE MINUTES (1960) (demonstrating the verbal and nonverbal richness of the first five minutes of the therapeutic interview); Bachrach, Curtis, Escoll, Graff, Huxster, Ottenberg & Pulver, Units of Observation and Perspectives on the Psychoanalytic Process, 54 BRIT. J. MED. PSYCHOLOGY 25 (1981); Blanck, Rosenthal & Vannicelli, supra note 79 (demonstrating that important information could be communicated even in segments lasting only a few seconds). Future analyses of our data will address the methodological and psychometric factors to be considered in 'live' courtroom research. There is a growing concern about the reliability, validity, and consistency of the units or segments of observation of the trial process. One question concerns how much of the trial judge's behavior during the trial process needs to be studied in order to generalize to the trial judge's behavior in the entire trial. In studying brief segments of judges' behavior and then extrapolating to behavior in entire trials, it may be reasonable for researchers to first study judges' video only cues because visual cues, unlike audio cues, are always available to jurors. See, e.g., Blanck, Rosenthal, Vannicelli & Lee, supra note 79 (demonstrating the reliability and validity of ratings of brief nonverbal behaviors); Mintz & Luborsky, Segments Versus Whole Sessions: Which is the Better Unit for Psychotherapy Process Research?, 78 J. ABNORMAL PSYCHOLOGY 180 (1971) (suggesting that brief segments--four minutes--of the therapeutic hour can be a useful research unit for many of the communicative variables of psychotherapy). Future analyses will also assess the consistency of the judge's behavior across the segments of the jury instructions themselves. For an example of such an analysis in the psychotherapeutic context, see Gurman, Instability of Therapeutic Conditions in Psychotherapy, 20 J. COUNSELING PSYCHOLOGY 16 (1973) (therapists varied considerably in their level of facilitative therapeutic functioning both across and within sessions with the same patients); see also Blanck, Rosenthal & Vannicelli, supra note 79 (suggesting that brief segments of therapeutic sessions cannot be substituted naively for entire session assessments but claiming that the stylistic variables associated with therapists' behavior in talking with patients may be estimated reliably from very brief segments of therapeutic sessions). A final set of analyses will address what parts of the trial process are most likely to convey unintended judicial influence. A related analysis is found in Karl & Ables, Psychotherapy

performing the task.

IV. TESTING THE MODEL FOR THE STUDY OF JUDICIAL INFLUENCE

A. The Results

We have discussed how trial judges may engage in highly effective and influential communication while delivering instructions to juries in criminal trials. We now examine systematically the arrows or relationships of the model for the study of judicial behavior and influence, shown in Figure 1.[98]

Process as a Function of the Time Segment Sampled, 33 J. CONSULTING & CLINICAL PSYCHOLOGY 207 (1969) (demonstrating a marked tendency for certain segment lengths of the therapeutic process to be categorized by some content categories more than others); see also Schaffer, supra note 95 (suggesting that the length of the segment sample or scoring unit be defined by the type of behavior). Future research should address the critical points in the trial process where judicial influence is most likely to occur and should seek to establish the point when cumulative influence is likely to constitute prejudicial error. This research needs to be conducted before any conclusive statements can be made about the validity and reliability of our 'segment analyses.

[98] For 'statistical significance testing' the sample size of 'n' is diminished by 2 (n-2) to obtain the 'degrees of freedom' required. In our study, the degrees of freedom are 32 for trials, 32 for defendants, 59 for attorneys (30 for prosecution and 29 for defense), and 329 for jurors. See R. ROSENTHAL & R. ROSNOW, ESSENTIALS OF BEHAVIORAL RESEARCH 458 (1984) (Table 6 gives significance levels of correlations for different sample sizes). In the presentation of our results, we have used 'r,' the standard abbreviation for the Pearson product-moment correlation coefficient. A correlation can take on values between -1.00 and +1.00. A value of -1.00 means that there is a perfect negative linear relationship between the two variables (i.e., as one increases linearly the other decreases linearly). A value of +1.00 means that there is a perfect positive linear relationship between two variables (i.e., as one increases linearly the other increases linearly), and a value of .00 means that there is no linear relationship between the two variables. Correlational analyses describe predictive relationships between two variables and do not isolate the 'causes' and 'effects' of that relationship. See Appendix B (listing the raw values and scales assigned to the particular variables used in the correlational analyses). The abbreviation 'ns' indicates that the correlation was 'not significant' at the p >= .10 level (two-tailed test). A two-tailed test of significance in this context is one in which the null hypothesis is rejected because it is unlikely to be true either because the correlation deviates too far above zero or too far below zero. Statistical significance can be indexed by a probability value that an observed correlation would have been found if, in the population from which we had sampled, the true correlation were zero. Social scientists generally consider that findings are 'significant' if they could have occurred by chance one time in twenty or less, thus having a 'p-value' of .05 or smaller. We have presented both significant and nonsignificant results for all tests having a p-value of . 10 or smaller. Social scientists realize that even small correlations can suggest important trends, and almost any level of significance can be achieved arbitrarily simply by increasing sample size, given a true non-zero relationship in the population. Id. at 231. P-values of .10 or smaller have been found useful in assessing the types of variables in the research here. See Kerr, Trial Participants' Behaviors and Jury Verdicts: An Exploratory Field Study, in THE CRIMINAL JUSTICE SYSTEM: A SOCIAL-PSYCHOLOGICAL ANALYSIS

A-B. Our first interest was in examining the relationship between the background variables of the trial participants and the judge's expectancy variable. This relationship describes how a judge's expectations for trial outcome may be predicted from the background variables of the trial participants.

Judges' expectations for trial outcome tended to be related to defendants' background variables in predictable ways. For example, there was a tendency for judges to expect a guilty verdict when defendants had a more serious criminal history and to expect an innocent verdict when defendants had a relatively less serious criminal history.[99] This was particularly true for

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271 (V. J. Konecni & F. B. Ebbesen eds. 1982) (discussing the use of p-values of .10 as a cut-off point in exploratory research on the jury decisionmaking process); see also Rosenthal & Gaito, Further Evidence for the Cliff Effect in the Interpretation of Levels of Significance, 15 PSYCHOLOGICAL REP. 570 (1964) (discussing the use of p- values of .10 as a cut off point in social science research); N. Nelson, R. Rosnow & R. Rosenthal, Interpretation of Significance Levels and Effect Sizes by Psychological Researchers (1985) (unpublished manuscript) (also discussing the use of p-values of .10 as a cut off point). Finally, the use of p-values of .10, or even of .50, has been suggested to meet the Federal Rules of Evidence test that all 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' FED. R. EVID. 401; see Lempert, Statistics in the Courtroom: Building on Rubinfeld, 85 COLUM. L. REV. 1099 (1985). The n (sample size) for count 1 and count 2 differed. Every defendant had at least one charge and one count--'count 1.' Fifteen of the 34 defendants had two or more charges or counts--'count 2.' (In five of the 34 trials, count 2 refers to the second count of the first charge, and in ten of the 34 trials, count 2 refers to the first count of the second charge.) The degrees of freedom therefore are 32 for count 1 and 13 for count 2. The degrees of freedom for juror responses to variables involving the second count are 137. Typically, the first charge and the second charge did not differ substantively. In one trial, for example, charge 1 and charge 2 were identical. In another trial, charge 1 was 'unlawfully attempting to commit a violent injury on the person of another' and charge 2 was 'unlawfully using force and violence on the person of another.' In only two trials did the charges seem substantially different. Therefore, we included both charges in our analyses, as the first two charges seemed to capture the most general information about the alleged crimes. For analyses involving judges' expectations (a 'B' variable in Figure 1) or trial outcome (a 'D' variable), correlations are presented for both charges or counts. For a similar methodology, see Kerr, Trial Participants' Behaviors and Jury Verdicts: An Exploratory Field Study, in THE CRIMINAL JUSTICE SYSTEM: A SOCIAL-PSYCHOLOGICAL ANALYSIS 269 (V. J. Konecni & E. B. Ebbesen eds. 1982) (discussing the jury verdict criteria in social science research). Future analyses of our data will address the extent to which the judge or other trial participants may perceive the subset of defendants who had two or more charges differently than defendants who had just one charge. In the present study, all significance testing on count 2 was based on an n of 15.

[99] When the judges believed the verdict should be guilty, defendants tended to have (1) a previous felony arrest (r =-.15, ns for count 1; r =-.34, ns for count 2); (2) a previous felony conviction (r =-.11, ns for count 1; r =-.19, ns for count 2); (3) a previous misdemeanor arrest (r =-.32, p =.07 for count 1; r =-.39, ns for count 2); or (4) a previous misdemeanor conviction (r =-.32, p =.07 for count 1, r =-.41, ns for count 2). When the judges believed the verdict would be guilty, defendants tended to have (1) a previous felony arrest (r =-.01, ns for count 1; r =-.12, ns

defendants with a previous misdemeanor arrest or conviction.[100] Judges also tended to infer guilt when defendants were of a lower socioeconomic status.[101] These results suggest that although the background characteristics of defendants have no legal bearing on guilt or innocence, they do seem to relate to, and perhaps influence, how judges perceive the guilt or innocence of defendants.[102]

Our results also indicated that the background characteristics of jurors relate to, and perhaps influence, judges' expectations for trial outcome. For example, this sample of judges showed a tendency to expect that the verdict should be guilty on count 1 in trials with more educated jurors,[103] and a tendency to expect that the verdict should be guilty on count 2 with relatively younger jurors.[104]

A-C. We next examined the relationship between trial participants' background variables and judges' verbal and nonverbal behavior. We were particularly interested in the extent to which information about defendants' criminal histories (an 'A' variable) could be inferred solely from judges' verbal and nonverbal behavior (a 'C' variable). The presence or absence of a previous felony arrest or conviction, or of a previous misdemeanor arrest or conviction, defined a defendant's 'composite criminal history.'[105] The measure of composite criminal history is a summary statistic computed by incorporating all the information about defendants' previous felony and misdemeanor criminal histories.[106]

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for count 2); (2) a previous felony conviction (r =-.19, ns for count 1; r =-.51, p =.05 for count 2); (3) a previous misdemeanor arrest (r =-44, p < .01 for count 1; r =-.48, p <.07 for count 2); or (4) a previous misdemeanor conviction (r =-.41, p < .01 for count 1; r =-.18, ns for count 2). The trend in these results is consistent with (but does not firmly establish) Kalven and Zeisel's findings that the judge is sometimes not able to avoid being influenced by the defendant's criminal history--what we have termed a background variable of the defendant. See H. KALVEN & H. ZEISEL, supra note 51, at 124. In support of this suggestion, Kalven and Zeisel noted: [In addition to the judge's] wide experiencewith the likelihood that the defendant before him is guilty, the judge is exposed to prejudicial information which the law, in its regard for the right of the defendant, aims to screen out of the evaluation of his guilt or innocence. The law's ideal in these situations may be something of a libertarian luxury. Id. at 127.

[100] See note 99 supra.

[101] When judges believed the verdict should be guilty, defendants tended to be of a lower socioeconomic background (r =.28, ns for court 1; r =. 52, p < .05 for count 2); when the judges believed that the verdict would be guilty, defendants did not tend to be of a lower socioeconomic background (r =-.09, ns for count 1; r =-.31, ns for count 2).

[102] See notes 57-58 supra and accompanying text.

[103] When judges believed the verdict should be guilty, jurors tended to be more educated cated (r =-.19, p < .001 for count 1; r =-.03, ns for count 2); when the judges believed the verdict would be guilty, jurors were not more educated (r =-.08, ns for count 1; r =-.05, ns for count 2).

[104] When judges believed the verdict should be guilty, jurors tended to be younger (r =.02, ns for count 1; r =.19, p < .05 for count 2); when the judges believed the verdict would be guilty, the jurors were not younger (r =. 00, ns for count 1; r =-.02, ns for count 2).

[105] See Appendix B (Lawyer Questionnaire noting defendant's criminal history).

[106] The measure of composite criminal history provides a single estimate of previous criminal history. The composite score is computed by combining the results for previous felony arrest, felony conviction, misdemeanor arrest, and misdemeanor conviction, while considering the

Table 1 presents the correlations between the defendants' composite criminal history and ratings of the judges' communicative behavior across the various channels of communication. A positive correlation indicates that the judges were rated higher on the relevant communicative dimension in delivering instructions to juries when the defendant had a more serious composite criminal history. A negative correlation indicates that judges were rated lower on the relevant dimension when the defendant had a more serious composite criminal history.

The pattern of correlations in Table 1 suggests, for this sample of 34 trials, that all judges 'appeared' in the normal content-present conditions (i.e., either the normal video and audio, and/or audio only conditions) to be substantially warmer, more open-minded, more dominant, more competent, more dogmatic, wiser, and less hostile in delivering jury instructions for defendants with more serious composite criminal histories. As Table 1 shows, the mean correlation for the content-present condition with composite criminal history was .21. In short, these judges appeared to be acting as wise, impartial, and fair arbitrators during the trial process when delivering instructions to juries where the defendants had more serious composite criminal histories.

Quite remarkably, however, judges were actually rated as substantially less professional, less open-minded, less honest, less competent, less dogmatic, less wise, more hostile, and more anxious in either or both of the purely nonverbal conditions (content-absent: video only, and content-filtered speech only) in delivering instructions to juries where defendants had more serious composite criminal histories. Table 1 shows that the mean correlation for the content-absent condition with composite criminal history was -.22. In short, ratings of the judges' purely nonverbal channels seem to suggest a partial, and perhaps subtly unfair, communicative style when delivering instructions to juries where the defendants had more serious composite criminal histories.

These results are consistent with a series of studies which suggest that individuals might 'leak' or send their true underlying feelings, beliefs, or expectations about other people through nonverbal channels.[107] The findings suggest that the subtle nonverbal cues of the judge might 'leak' the judge's expectations for trial outcome, expectations perhaps (but not necessarily) formed from the judge's knowledge of the defendant's criminal history. As Table 1 shows, these findings are particularly dramatic when considering the difference between the mean correlation for the content-present condition and the mean correlation for the content-absent condition (difference = .43). Taken together, the findings support our suggestion that judges may convey subtly their

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interrelationships between the variables--for example, the median intercorrelation among these variables was .49. See note 92 supra (noting individual correlations among the criminal history variables). For a complete discussion of the calculation and use of the composite measure, see Rosenthal & Rubin, Meta-Analytic Procedures for Combining Studies with Multiple Effect Sizes, ___ PSYCHOLOGICAL BULL. ___ (1986) (forthcoming) (the computations associated with equations 1-5 describe how to combine the multiple results of a single study and test the composite measure for significance).

[107] See Blanck & Rosenthal, Developing Strategies for Decoding 'Leaky' Messages: On Learning How and When to Decode Discrepant and Consistent Social Communications, in DEVELOPMENT OF NONVERBAL BEHAVIOR IN CHILDREN (R. Feldman ed. 1982); Ekman & Friesen, supra note 79, at 88.

expectations for trial outcome to jurors through nonverbal cues, and as our questionnaire data revealed, jurors may not always be aware of these subtle influences.[108]

TABLE 1

Correlations Between Defendants' Composite Criminal History and Judge Behavior in Four Channels of Communication

	CHANNEL			
	CONTENT-PRESENT		CONTENT-ABSENT (NONVERBAL CUES ONLY)	
	Normal Video And Audio	Audio Only	Video Only	Content-Filtered Speech Only
COMMUNICATION BEHAVIOR				
Professional	0.07	0.02	-0.52***	-0.22
Warm	0.48***	-0.05	0.29*	0.17
Open-minded	0.28	0.17	-0.38**	-0.18
Honest	0.02	0.22	-0.40**	-0.29*
Dominant	0.37**	0.43***	-0.00	0.30*
Competent	0.41**	0.35**	-0.45***	-0.28
Dogmatic	0.26	0.45***	-0.45***	0.16
Wise	0.46***	0.10	-0.42**	-0.51***
Not Hostile	-0.17	0.33**	-0.15	-0.39**
Not Anxious	-0.01	0.02	-0.20	-0.50***
Mean Correlation	0.22	0.20	-0.27	-0.17
Mean Correlation[a]	0.21		-0.22	
Difference Between Mean Correlations	0.43			

Note: * = p < .10; ** = p <.05; *** = p <.01; **** = p <.001.

All tests of significance are two-tailed.
A positive correlation means that when the defendant had a more serious composite criminal history, the judge was rated higher on the relevant dimension.
A negative correlation means that when the defendant had a more serious composite criminal history, the judge was rated lower on the relevant dimension.

[108] Cf. notes 122-123 infra.

a Mean correlations for Content-Present and Content-Absent conditions
b Difference between mean correlations for Content-Present and Content-Absent conditions

Other background variables were related to judges' verbal and nonverbal behavior. For example, these five judges' verbal and nonverbal behavior was related to judges' age and sex, defendants' socioeconomic status, and jurors' age and level of education.[109] Table 2 shows that for this sample of 34 trials and for this sample of five judges, older as compared to younger judges tended to be rated in the normal condition as relatively warmer, more open- minded, more dominant, more dogmatic, and wiser, but less honest, more hostile, and more anxious in delivering the jury instructions.[110]

Interestingly, although raters tended to perceive older judges as warmer, more open-minded, more dominant, more competent, more dogmatic, and wiser than younger judges in the content-present conditions (e.g., mean correlation in Table 2 for the normal video and audio condition, and the audio only condition was .22), older judges were rated as substantially less professional,

less open-minded, less competent, less dogmatic, less wise, more hostile, and more anxious than younger judges in the purely nonverbal (content- absent) conditions, especially in the video only condition (e.g., mean correlation in Table 2 for the video only condition, and the content-filtered speech only condition was -.34).

This pattern of results suggests that while older judges may appear to jurors as 'judicially competent,' they may be perceived as substantially less judicially competent, compared to younger judges, in the purely nonverbal channels. This pattern is further demonstrated by the difference between the mean correlation of the content-present condition and the mean correlation of the content-absent condition displayed in Table 2 (difference = .56).

We next were interested in predicting information about judge behavior from judge sex. Table 3 shows that raters generally perceived (across all four channels) our male judges to be relatively more professional, while perceiving our female judges to be more hostile and more anxious (what our raters typically described as 'nervous') in delivering instructions. It is interesting to note that although female judges tended to be rated as more open-minded and warm than males

[109] For this set of analyses, the correlations involving judge age and sex must be viewed with caution as the results are based only on a sample of five judges in seven trials each. Although we can probably generalize from these results to how these judges would behave in other trials, we cannot generalize with confidence to how other judges (older and younger, male and female) would behave in other trials. For a discussion of issues of generalizability, see notes 139-140 infra and accompanying text.

[110] See notes 141-158 infra and accompanying text (discussing the climate factor in the transmission of judicial influence).

in the normal content-present conditions, they were rated as substantially less open-minded and warm than males in the purely nonverbal conditions.

TABLE 2

Correlations Between Judge Age and Judge Communicative Behavior in Four Channels of Communication

	CHANNEL			
	CONTENT-PRESENT		CONTENT-ABSENT (NONVERBAL CUES ONLY)	
	Normal Video And Audio	Audio Only	Video Only	Content-Filtered Speech Only
COMMUNICATION BEHAVIOR				
Professional	-0.27	-0.24	-0.94****	-0.25
Warm	0.74****	0.09	0.35**	0.44***
Open-minded	0.34**	0.06	-0.83****	0.06
Honest	-0.33**	0.13	-0.86****	0.14
Dominant	0.72****	0.83****	0.21	0.42**
Competent	0.12	0.51***	-0.95****	0.07
Dogmatic	0.72****	0.88****	-0.60****	0.28
Wise	0.72****	0.09	-0.95****	-0.46***
Not Hostile	-0.64****	0.47***	-0.85****	-0.46***
Not Anxious	-0.39**	-0.08	-0.87****	-0.71****
Mean Correlation	0.17	0.27	-0.63	-0.05
Mean Correlation[a]	0.22		-0.34	
Difference Between Mean Correlations	0.56			

Note: * = p <.10; ** = p <.05; *** = p <.01; **** = p <.001.

All tests of significance are two-tailed.

A positive correlation means that when the judge was older, the judge higher on the relevant dimension.
A negative correlation means that when the judge was older, the judge lower on the relevant dimension.

[a] Mean correlations for Content-Present and Content-Absent conditions
[b] Difference between mean correlations for Content-Present and Content-Absent conditions

TABLE 3

Correlations Between Judge Age and Judge Communicative Behavior in Four Channels of Communication

	CHANNEL			
	CONTENT-PRESENT		CONTENT-ABSENT (NONVERBAL CUES ONLY)	
	Normal Video And Audio	Audio Only	Video Only	Content-Filtered Speech Only
COMMUNICATION BEHAVIOR				
Professional	-0.52***	-0.08	-0.68****	-0.38**
Warm	0.57	0.36**	-0.17	-0.12
Open-minded	0.28	0.32*	-0.60****	-0.32*
Honest	-0.49***	0.28	-0.45***	0.17
Dominant	-0.17	0.46***	-0.37**	0.53***
Competent	-0.25	0.08	-0.58****	0.14
Dogmatic	-0.12	0.10	0.12	0.43***
Wise	-0.09	-0.14	-0.58****	-0.56****
Not Hostile	-0.51***	-0.05	-0.85****	-0.04
Not Anxious	-0.26	-0.61****	-0.68****	-0.32*
Mean Correlation	-0.16	0.07	-0.48	-0.05
Mean Correlation[a]	-0.04		-0.26	
Difference Between Mean Correlations	0.22			

Note: * = p <.10; ** = p <.05; *** = p <.01; **** = p <.001.

All tests of significance are two-tailed.

A positive correlation means that when the judge was older, the judge higher on the relevant dimension.
A negative correlation means that when the judge was older, the judge lower on the relevant dimension.

[a] Mean correlations for Content-Present and Content-Absent conditions
[b] Difference between mean correlations for Content-Present and Content-Absent conditions

The pattern of correlations between our judges' communicative behaviors and judge sex

replicates the results of earlier research on the relationship between the psychotherapists' sex and transmission of nonverbal behavior, and is consistent with a socialization hypothesis of the development of sex differences in nonverbal communication skills and styles.[111] Despite the consistency of our findings with previous work, it is important to point out that our results could reflect the sex role socialization of our raters (that is, when a female judge was rated, certain 'feminine' qualities were ascribed, and the reverse was true for males) or perhaps the fundamental differences in the communicative behaviors of males and females.

As described above, Table 3 also shows that the raters perceived our female judges as relatively more open-minded and warm in the content-present conditions, but as relatively less open-minded and warm in purely nonverbal (content-absent) conditions. This result is consistent with the general tendency for the female judges in our sample to be rated as more 'nervous' (hostile and anxious) than males in delivering jury instructions. The findings also may support our earlier suggestion that females, as compared to males, better 'mask' their overt feelings in socially uncomfortable situations; for example, while all judges believed that the majority of verdicts in these trials should be guilty,[112] females as compared to males, tended to appear open-minded but 'leaked' their true feelings through the purely nonverbal channels.[113] The difference between the mean correlation for the content-present condition and the mean correlation for the content-absent condition tends to support this suggestion (displayed in Table 3, this difference = .22).

Finally, there was a tendency for our raters to perceive judges' purely nonverbal behavior to be more professional and more competent in delivering jury instructions when defendants were of a

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[111] Various explanations for these sex differences in verbal and nonverbal skills have been set forth and have ranged from socioemotional hypotheses (e.g., varying levels of empathy in males and females) to biological hypotheses (e.g., brain functioning differences between males and females). See J. A. HALL, NONVERBAL SEX DIFFERENCES (1984); Blanck & Rosenthal, supra note 107, at 203 (showing that women, as compared to men, tend to grow more polite or 'accommodating' in their decoding of both verbal and nonverbal messages); Blanck, Rosenthal, Snodgrass, DePaulo & Zuckerman, Longitudinal and Cross- sectional Age Effects in Nonverbal Decoding Skill and Style, 18 DEVELOPMENTAL PSYCHOLOGY 491 (1982) ('although older children performed better than younger children at most nonverbal decoding tasks, the advantages of agewere especially great for the decoding of the more discrepant or leakier channels'); Blanck, Rosenthal, Snodgrass, DePaulo & Zuckerman, Sex Differences in Eavesdropping on Nonverbal Cues: Developmental Changes, 41 J. PERSONALITY & SOC. PSYCHOLOGY 391 (1981) ('[R]esults [were] consistent with a socialization interpretation that as females grow older, they may learn to be more nonverbally accommodating.'); Blanck, Rosenthal & Vannicelli, supra note 79; Blanck, Rosenthal, Vannicelli & Lee, supra note 79; Steckler & Rosenthal, Sex Differences in Nonverbal and Verbal Communication with Bosses, Peers, and Subordinates, 70(1) J. APPLIED PSYCHOLOGY 157 (1985); S. Snodgrass, S. Krasner & R. Rosenthal, Is the Executive Woman an Oxymoron?: Tone of Voice and the Evaluation of Executive Competence (Sept. 1985) (unpublished manuscript on file with the Stanford Law Review) (showing that male voices were rated as more professionally competent than female voices).

[112] See note 130 infra (judges reported that in 89% of the trials defendant should be guilty on count 1, and in 75% of the trials defendant should be guilty on count 2).

[113] See note 111 supra.

higher socioeconomic status.[114] These findings are consistent with our suggestions that judges may 'leak' their beliefs about defendants, beliefs perhaps related to perceptions of defendants' background characteristics. Across all conditions, raters also tended to perceive judges in this study as warmer, more professional, more open-minded, and less dominant in the presence of older, and more educated jurors.[115] These results suggest that judges may be subtly respectful of defendants and jurors they perceive to be of higher social status or intelligence. Whether this difference in behavior indicates an intentional or unintentional attempt to influence jurors, or simply reflects general social beliefs, is difficult to evaluate on the basis of our results.

Our results thus suggest that certain background variables of trial participants, and in particular of defendants, may be related to, and perhaps influence, the communicative behaviors of trial judges. These variables may provide a valuable additional avenue to the study of courtroom processes that can help address the logistical and ethical problems sometimes encountered in the study of interactions between judges and trial participants. Careful analysis of even brief segments of judges' verbal and nonverbal behavior, in this case the final jury instructions from a two-day trial, increases substantially the ability to predict the type of person (for example, a defendant with a criminal history) about whom the judge is speaking. Future analysis must address the extent to which these behaviors actually affect the due process rights of defendants.

A-D. Background variables were also found to be related to trial outcome. Our results showed some relationship between juries' verdicts and the background characteristics of the defendants. For example, defendants who had a previous felony arrest were more likely to be found guilty, while those who had no previous felony arrest were more likely to be acquitted.[116] Granted, defendants with a criminal history may be more likely to be guilty. Nonetheless, viewed in combination with our results on judge 'leakage' of criminal history (i.e., the A-C results), this finding indicates that the criminal history of the defendant, a legally irrelevant factor, might

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[114] The correlations between defendants' socioeconomic status and judges' communicative behavior were (1) for the professional dimension; $r = .39$, $p < .05$ for the video only condition; $r = .40$, $p < .05$ for the content-filtered speech condition; and (2) for the competent dimension; $r = .42$, $p < .05$ for the video only condition.

[115] The correlations between juror age and judges' communicative behavior were $r = .18$, $p < .001$ for the warm dimension in the normal condition; $r = .11$, $p < .01$ for the professional dimension in the content-filtered condition; and $r = .17$, $p < .01$ for the open-minded dimension in the normal condition. The correlations between juror level of education and judges' communicative behavior were $r = .13$, $p < .05$ for the warm dimension in the normal condition; $r = .17$, $p < .01$ for the professional dimension in the normal condition and $r = .19$, $p < .001$ in the audio only condition; $r = .21$, $p < .001$ for the open-minded dimension in the normal condition; and $r = -.14$, $p < .01$ for the dominant dimension in the audio only condition and $r = -.14$, $p < .01$ in the content- filtered condition.

[116] The correlations between guilty verdict and (a) previous felony arrest ($r = .30$, $p < .10$ for count 1; $r = .45$, $p < .10$ for count 2); (b) previous felony conviction ($r = .05$, ns for count 1; $r = .25$, ns for count 2); (c) previous misdemeanor arrest ($r = -.20$, ns for count 1; $r = -.21$, ns for count 2); and (d) previous misdemeanor conviction ($r = -.08$, ns for count 1; $r = -.07$, ns for count 2). These results must be interpreted with caution as the relationship of guilty verdict to previous criminal history varies with type of criminal history (e.g., felony or misdemeanor history).

influence juries more than heretofore assumed.[117]

B-C. This aspect of the model describes how judges' expectations for trial outcome relate to judges' verbal and nonverbal behavior. When judges expected the verdict would be guilty, raters in the normal condition perceived the judges to be somewhat warmer and substantially more open-minded in delivering the jury instructions.[118] In the purely nonverbal channels, however, raters tended to perceive judges who expected a guilty verdict to be less warm, less competent, less wise, and more anxious in delivering instructions.[119] These findings again tend to support our hypothesis that judges may 'leak' their true underlying beliefs or expectations about defendants' guilt or innocence through subtle nonverbal cues. Intentional or unintentional, leakage may influence trial outcome, although the judge may 'appear' to the jurors to be impartial.

We finally sought to explore how judges' expectations for trial outcome (a 'B' variable) predict, and perhaps may influence, jurors' and lawyers' perceptions of the judges' behavior (a'C' variable).[120] For example, especially for the first count, when judges expected the defendant to be guilty, jurors tended to perceive the judge as speaking less clearly during the trial and during the jury instructions.[121] However, across both counts, the jurors did not generally report on the questionnaires that the judges' nonverbal behaviors, facial expressions, and gestures revealed

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[117] We also found that defendants of higher socioeconomic status received relatively more guilty verdicts than defendants of lower socioeconomic status, especially for the first count. The correlations between guilty verdict and defendant socioeconomic status were $r = -.34$, $p < .05$ for count 1; $r = -.33$, ns for count 2. Future analyses must address the extent to which the type of charge (e.g., drunk driving) influences whether defendants of a higher or lower socioeconomic background are likely to receive certain verdicts in certain courts (e.g., municipal court). See notes 52, 55 supra (examples of studies on the background variables of defendants).

[118] The correlations between judges' behavior in the normal condition and judges' belief that the verdict would be guilty were (1) $r = -.21$, ns for count 1; $r = -.43$, ns for count 2 for the warm dimension; and (2) $r = -.20$, ns for count 1; $r = -.49$, $p < .10$ for count 2 for the open-minded dimension.

[119] The correlations between judges' behavior in the content-filtered speech only condition and judges' belief that the verdict should be guilty were $r = .24$, ns for count1; $r = .53$, $p < .05$ for count 2 for the warm dimension. The correlations between judges' behavior in the video only condition and judges' belief that the verdict would be guilty were (1) $r = .35$, $p < .05$ for count 1; $r = .39$, ns for count 2 for the competent dimension; (2) $r = .33$, $p < .05$ for count 1; $r = .44$, ns for count 2 for the wise dimension; and (3) $r = -.33$, $p < .05$ for count 1; $r = -.50$, $p < .07$ for count 2 for the anxious dimension.

[120] Jurors' and lawyers' perceptions of trial processes provide an additional view of the transmitting behaviors of judges (a 'C' variable), a view complemented by our independent raters' perceptions of the judges' behavior in the four channels of communication.

[121] When judges believed the verdict should be guilty, jurors tended to perceive judges as speaking less clearly during (a) the entire trial ($r = .15$, $p < .01$ for count 1; $r = .07$, ns for count 2), and (b) the jury instructions ($r = .10$, $p < .10$ for count 1; $r = .04$, ns for count 2); when judges believed the verdict would be guilty, jurors tended to perceive the judge as speaking less clearly during (a) the entire trial ($r = .11$, $p < .05$ for count 1; $r = -.01$, ns for count 2), but not in (b) the jury instructions ($r = .08$, ns for count 1; $r = -.06$, ns for count 2).

what the judge thought the verdict should be,[122] nor did they accurately report the judges' expectations for what trial outcome should be.[123]

Finally, judges' expectations for trial outcome tended to relate to prosecution and defense lawyers' perceptions of the trial process. The relationship between judges' expectations for trial outcome and lawyers' perceptions of the trial process varied for prosecution and defense lawyers. When the judge expected a guilty verdict, the prosecution tended to perceive the judge as holding more order during the trial,[124] as being more interested in the case,[125] and as believing that the prosecution should win the case.[126] When the judge believed the verdict would be guilty, defense counsel tended to perceive the judge to have relatively less respect for all the trial participants, especially for the second count.[127] Defense counsel also tended to perceive the judge to speak less clearly throughout the trial, and less clearly in his or her delivery of the final

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[122] When judges believed the verdict should be guilty, jurors did not perceive that judges' nonverbal behavior during the entire trial gave them clues as to what the judges thought the verdict should be ($r = -.03$, ns for count 1; $r = .03$, ns for count 2); when judges believed that the verdict would be guilty, jurors tended to perceive that judges' nonverbal behavior during the entire trial gave them clues as to what the judges thought the verdict should be ($r = -.02$, ns for count 1; $r = .16$, $p < .05$ for count 2).

[123] When judges believed the verdict should be guilty, jurors did not perceive that judges thought the prosecution should win ($r = .01$, ns for count 1; $r = -.02$, ns for count 2); when judges believed that the verdict would be guilty, jurors tended to perceive that judges thought the prosecution should win ($r = -.15$, $p < .01$ for count 1; $r = -.08$, ns for count 2). These results must be interpreted with caution as the jurors completed their question-naires after the verdict was given. The jurors' generally inaccurate reporting, of judges' expectancies for trial outcome might reflect jurors' beliefs that they acted in accordance with the law and that they were not influenced in their decisionmaking process. But as the above results show, when judges believed the verdict would be guilty, jurors reported accurately that the judges thought the prosecution should win the case. For a related discussion that might help to explain these findings, see Vinson, supra note 58, at 58 ('The basic dynamic of jury deliberation is the resolution of cognitive dissonance.').

[124] When judges believed the verdict should be guilty, the prosecution tended to perceive that judges kept more order ($r = -.31$, $p < .07$ for count 1; $r = -.51$, $p < .05$ for count 2); when judges believed the verdict would be guilty, the prosecution did not perceive that judges kept more order ($r = -.12$, ns for count 1; $r = -.13$, ns for count 2).

[125] When judges believed the verdict should be guilty, the prosecution tended to perceive judges as more interested in the trial ($r = -.38$, $p < .05$ for count 1; $r = -.42$, ns for count 2); when judges believed the verdict would be guilty, the prosecution tended to perceive judges as more interested in the trial ($r = -.30$, $p < .10$ for count 1; $r = -.46$, $p < .10$ for count 2).

[126] When judges believed the verdict should be guilty, the prosecution tended to perceive that judges thought the prosecution should win the case ($r = -.34$, $p < .05$ for count 1; $r = -.39$, ns for count 2); when judges believed that the verdict would be guilty, the prosecution tended to perceive that judges thought the prosecution should win the case ($r = -.30$, $p < .10$ for count 1; $r = -.57$, $p < .05$ for count 2).

[127] When judges believed the verdict should be guilty, defense counsel did not perceive judges as having less respect for trial participants ($r = .15$, ns for count 1; $r = .05$, ns for count 2); when judges believed that the verdict would be guilty, defense counsel tended to perceive judges as having less respect for trial participants ($r = .28$, ns for count 1; $r = .51$, $p = .05$ for count 2).

jury instructions in particular, when the judge believed the verdict should be guilty.[128] Finally, when the judge believed the verdict would be guilty, defense counsel tended to perceive that the judge thought the prosecution should prevail, especially for the first count.[129] Overall, the prosecution and defense lawyers' opinions of judges seem to relate in predictable ways to their perceptions of judges' expectations for trial outcome.

B-D. This relationship describes how judges' expectations for trial outcome are related to the verdicts returned by juries. Importantly, our results showed that judges' expectations for trial outcome tended to be negatively related, or not related at all, to actual trial outcome.[130] The 'pencil and paper' response format used by the judges in our study was a poor predictor of jury verdicts. These findings are consistent with the judges' own reports that they often disagreed with trial outcome.[131] The tendency for judges' expectations for trial outcome not to be related to actual trial outcome runs counter to our basic hypothesis that jurors' decisionmaking processes may be importantly influenced by, and consistent with, judges' expectations for trial outcome.

As Kalven and Zeisel argue in The American Jury, however, the judge and the jury might not be 'deciding the same case.'[132] Exclusionary rules of evidence keep some information about the case from the jury which is only available to the judge.[133] This is why the 'appearance of justice' may not always equal actual justice: Our results suggested that judges tend to 'leak' through

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[128] When judges believed the verdict should be guilty, defense counsel tended to perceive judges as (a) less clear during the trial ($r = .29$, $p < .10$ for count 1; $r = .36$, ns for count 2), and (b) less clear in the instructions to the jury ($r = .30$, $p < .10$ for count 1; $r = .35$, ns for count 2); when judges believed that the verdict would be guilty, defense counsel did not perceive judges as (a) less clear during the trial ($r = .17$, ns for count 1; $r = -.00$, ns for count 2), or (b) less clear in the instructions to the jury ($r = .12$, ns for count 1; $r = .04$, ns for count 2).

[129] When judges believed the verdict should be guilty, defense counsel did not perceive that judges thought the prosecution should win ($r = -.27$, ns for count 1; $r = .24$, ns for count 2); when judges believed the verdict would be guilty, defense counsel tended to perceive that judges thought the prosecution should win ($r = -.54$, $p < .001$ for count 1; $r = -.40$, ns for count 2).

[130] The correlations between judges' beliefs that the verdict should be guilty and actual trial outcome were $r = -.29$, $p < .10$ for count 1; $r = -.22$, ns for count 2); the correlations between judges' beliefs that the verdict would be guilty and actual trial outcome were $r = .06$, ns for count 1; $r = .17$, ns for count 2. As the B-D correlations show, the judges' expectation of what the verdict would be was a somewhat better predictor of actual trial outcome than the judges' expectation of what the verdict should be. The response rates for this sample of judges were (a) for verdict should be on count 1: 89% guilty and 11% not guilty; for verdict should be on count 2: 75% guilty and 25% not guilty; (b) for verdict would be on count 1: 43% guilty, 23% not guilty, and 34% hung; for verdict would be on count 2: 38% guilty, 31% not guilty, and 31% hung. For the rates of the actual verdicts for this sample of trials, see text accompanying note 92 supra. Note that we did not include the 'hung' response opportunity for the judges' question 'what do you think the verdict should be?' because this question aimed at assessing the judges' own expectations for trial outcome, not what they believed the jury 'would' do.

[131] In fact, our judges disagreed significantly with their juries' verdicts (correlation of judges' agreement with verdict and actual verdict: $r = -.66$, $p < .001$ for count 1; $r = -.75$, $p < .01$ for count 2).

[132] H. KALVEN & H. ZEISEL, supra note 51, at 121.

[133] Id.

subtle nonverbal channels their beliefs or expectations regarding information not available to the jury. In particular, our results seem to support Kalven and Zeisel's suggestion that the extra information most frequently available to the judge, and perhaps most often 'leaked' by the judge to the jury, is the defendant's criminal history.[134] Our present analyses do not address the extent to which jurors' perceptions of judges' leaky cues influence the jury decisionmaking process. A complete analysis of the A-B-C-D chain of Figure 1 is required to address this question.

C-D. This relationship describes how judges' unintended verbal and nonverbal behaviors alone may predict the verdicts returned by juries.[135] Table 4 shows that when the verdict was guilty, raters perceived judges' verbal and nonverbal behavior in the normal condition to be less professional, less dominant, less competent, less dogmatic, and less wise, particularly when the verdict was guilty on the second count.

There is also a trend in Table 4 suggesting that when the verdict was guilty, the purely nonverbal channels were perceived as less dominant (in the video only condition), but more honest (in the content-filtered speech only condition). These perceptions of judges' 'leaky honesty' and their relationship to actual trial outcome are consistent with our findings demonstrating that in fact these judges believed most verdicts should be guilty[136] and our suggestions that these beliefs are likely to be conveyed by nonverbal messages.[137]

TABLE 4

Correlations Between Judge Age and Judge Communicative Behavior in Four Channels of Communication

	CHANNEL							
	CONTENT-PRESENT				CONTENT-ABSENT (NONVERBAL CUES ONLY)			
	Normal Video And Audio		Audio Only		Video Only		Content-Filtered Speech Only	
COMMUNICATION BEHAVIOR	Count 1	Count 2	Count 1	Count 2	Count 1	Count 2	Count 1	Count 2
Professional	0.24	0.58**	0.15	0.04	0.00	0.00	-0.08	-0.09

[134] Id. at 127, 147. See results described in Table 1 supra and accompanying text.

[135] Several analogous studies have examined the relationship between therapist behavior and therapeutic outcome (i.e., the C-D relationship of Figure 1). See, e.g., Parloff, Waskow & Wolfe, Research on Therapist Variables in Relationship to Process and Outcome, in HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE: AN EMPIRICAL ANALYSIS 233 (S. Garfield & A. Bergin eds. 2d ed. 1978); Pope, Research on Therapeutic Style, in EFFECTIVE PSYCHOTHERAPY: A HANDBOOK OF RESEARCH 356 (A. Gurman & A. Razin eds. 1978) (research review); Schaffer, supra note 95 (research review).

[136] See note 130 supra (judges reported that in 89% of the trials verdict should be guilty for count 1, and in 75% of the trials verdict should be guilty for count 2).

[137] See notes 37-49 supra and accompanying text.

Warm	-0.18	-0.05	-0.01	-0.02	-0.04	0.32	-0.10	0.11
Open-minded	-0.18	0.02	0.05	-0.03	0.00	0.17	-0.17	-0.10
Honest	0.12	0.31	0.10	0.03	-0.02	0.04	-0.44***	-0.57**
Dominant	0.21	0.46*	-0.05	-0.04	0.34***	0.42	-0.03	-0.19
Competent	0.19	0.61**	0.16	0.18	-0.03	-0.06	-0.24	-0.34
Dogmatic	0.28	0.54**	0.04	0.14	-0.07	-0.29	0.03	-0.06
Wise	0.08	0.45*	0.23	0.19	0.02	0.03	-0.16	-0.22
Not Hostile	0.09	0.15	0.13	0.24	0.16	0.38	-0.23	-0.19
Not Anxious	0.08	0.06	0.22	0.41	0.15	0.31	-0.18	-0.05
Mean Correlation	0.09	0.31	0.10	0.11	0.05	0.13	-0.16	-0.17
Mean Correlation[a]	0.15				-0.04			
Difference Between Mean Correlations	0.19							

Note: * = p <.10; ** = p <.05; *** = p <.01; **** = p <.001.

All tests of significance are two-tailed.

A positive correlation means that when the judge was older, the judge higher on the relevant dimension.
A negative correlation means that when the judge was older, the judge lower on the relevant dimension.

[a] Mean correlations for Content-Present and Content-Absent conditions
[b] Difference between mean correlations for Content-Present and Content-Absent conditions

Taken together, these results suggest that certain dimensions of judges' verbal and nonverbal behaviors better predict juries' verdicts.[138] But this 'C-D' relationship was not consistent across the various channels of the judges' behavior or across count 1 and count 2. For example, when a guilty verdict was later reached, judges tended to be rated as particularly honest in the purely nonverbal channel content-filtered speech, but not in the more overt content-present channels. The findings may suggest that while the communicative behavior of the judge in talking to juries may predict trial outcome, this result may vary with the type and 'leakiness' of the communicative channel researchers are studying.

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[138] Subsequent juror perceptions of trial processes were found to be related to actual trial outcome as well (e.g., a 'C-D' relationship). See note 120 supra. For example, when the actual verdict was guilty, jurors tended to report subsequently that judges thought the prosecution should win the case, and when the verdict was innocent that judges thought the defense should prevail (r = -. 15, p < .01 for count 1; r =-.12, ns for count 2). These post- verdict perceptions may simply reflect jurors' rationalization, justification, or 'cognitive dissonance' processes for verdict choice. See Vinson, supra note 58.

The results, however, are particularly encouraging given that our raters were completely blind to trial outcome and to all trial processes. Perhaps the most compelling conclusions to be drawn from these findings are that judges' behavior alone can predict the verdicts returned by juries, and perhaps juries' decisionmaking processes. Future researchers will need systematically to assess more detailed samples of judges' communicative behavior during trials in different channels of communication.

B. Issues for Future Consideration

1. Research on cumulative effects in the model.

The present study was designed to aid in understanding how judicial behavior may predict, and perhaps influence, jury verdicts and trial processes. For this set of trials it was possible to predict aspects of the trial process and outcome from the judges' unintended verbal and nonverbal behavior alone.

Future research will need to focus on the more complex cumulative effects in the model of judicial influence. The model presented here may enable researchers to analyze chains of variables that together may better predict juries' verdicts and jurors' decisionmaking processes. One example of such a chain might include the background variable of the trial judge's susceptibility to biasing information (an 'A' variable), perhaps as indicated by other presiding judges' ratings of a particular trial judge's open-mindedness. The trial judge's expectations for trial outcome could be assessed (a 'B' variable), and the verbal and nonverbal transmissions of these expectations measured (a 'C' variable). Finally, jury verdict would be included as the outcome variable (a 'D' variable).

For this chain (A-B-C-D), we might hypothesize that more biased and less open-minded trial judges would be more prone to expectancy effects, perhaps treating defendants of perceived guilt more negatively and defendants of perceived innocence more positively. 'Unbiased' trial judges, on the other hand, might treat defendants of perceived high and low expectancy more equally. This pattern of behavior might influence trial outcome in measurable ways.

2. Issues of generalizability.

As described earlier, external validity refers to the extent to which a particular result or relationship can be generalized to other real world settings.[139] Our goal was to maximize the external validity of our research by studying judges' behavior in actual trials. Even when studying a sample of actual trials, however, questions concerning the generalizability of any given set of results obtained from any particular study must be raised.

The first issue regarding the generalizability of our results relates to the extent to which our results would hold true across the population of trial judges. It was not logistically or economically possible to randomly select a large sample of trial judges from the population. Although there is no reason to believe that the judges in our study were not representative of the population of trial judges, generalizations to other judges and to populations of judges in other

[139] See notes 82-84 supra and accompanying text.

settings or with other court procedures must remain cautious.

A second issue of generalizability relates to the extent to which our results would hold true within this sample of judges, but over many trials. We observed only seven jury trials for each judge, and therefore must be alert to the possibility that our sampling of trials for each judge might not be representative of the judge's behavior in other trials. In fact, a sample of trials for these judges as large or even larger than the sample of trials we employed, would be necessary to generalize with confidence to the larger population of judges and trials.[140] However, for all the judges in our study, the trials sampled did seem to be representative of the types of trials that these judges would see over longer periods of time (e.g., types of charges and defendants).

Questions about the generalizability of our results do not deny the fact that for this sample of trials conducted by these judges a predictive relationship was hypothesized and documented between the judges' behavior and other aspects of the trial process. Our results provide only a first attempt at examining these relationships. Future researchers will need to replicate and isolate many of our preliminary findings and hopefully employ them as a foundation for the analysis of the more complex interactions that are part of the trial process.

V. IMPLICATIONS

Our research has explored the longstanding observation that subtle, and perhaps unintentional, judicial behavior might predict trial processes. By implication, our results suggest that extremely prejudicial judicial behavior might act to deny defendants their constitutionally protected right to a fair and impartial trial. In this closing section, we discuss a framework that may be helpful in summarizing the transmission of judicial influence. The documentation of judges' nonverbal behavior in ways that assist appellate courts in more effectively reviewing judges' verbal and nonverbal behavior is also examined. Finally, the implications of our findings for extra-legal concerns such as the study of judges and jurors are discussed.

A. The Transmission of Judicial Influence

Many studies demonstrate that subtle verbal and nonverbal cues can transmit expectancy effects even in nonlaboratory settings.[141] In an early study testing expectancy effects in the classroom, Rosenthal and Jacobson demonstrated that when school teachers were led to expect better performance from their pupils, they were significantly more likely to receive such improved performance.[142] The teacher-student relationship Rosenthal and Jacobson studied is analogous to our study of the judge-jury relationship.[143] Unlike the results with teachers, we found that trial

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[140] See R. ROSENTHAL & R. ROSNOW, supra note 98, at 308 (discussing generalizations in terms of 'fixed' and 'random' models of statistical analysis).

[141] See generally R. ROSENTHAL, ON THE SOCIAL PSYCHOLOGY OF THE SELF-FULFILLING PROPHECY: FURTHER EVIDENCE FOR PYGMALION EFFECTS AND THEIR MEDIATING MECHANISMS (1974) (Module 53, MSS Modular Publications) (discussing mediating or transmitting mechanisms of interpersonal expectancy effects).

[142] R. ROSENTHAL & L. JACOBSON, PYGMALION IN THE CLASSROOM (1968).

[143] Cf. Note, supra note 32, at 1275-78 (discussing the analogy between the trial judge-jury relationship and the experimenter-subject relationship). One problem with the analogy of judges to teachers is that, unlike judges, teachers' expectations seem to relate to a specific performance

judges' beliefs, as measured by our questionnaire, did not predict accurately the verdicts returned by juries. The judges' beliefs or expectations for trial outcome, however, seemed to be conveyed more subtly--'leaked' to jurors by the judges' verbal and nonverbal behaviors.[144] For example, our results suggest that the extent to which judges' behavior 'leaks' to juries may be related to defendants' criminal history.

Many studies in nonlegal contexts support the view that beliefs or expectations can be transmitted through subtle verbal and nonverbal cues. A quantitative review of 345 studies of expectancy effects has estimated, for example, that the effect of experimenter and teacher expectations on research tasks and intellectual performance can be substantial.[145] These studies suggest that experimenters, teachers, managers, and psychotherapists who have been led to expect superior performance from particular subjects, students, employees, or clients, treat these 'special' or high expectancy persons differently than 'less special' or low expectancy persons. These 'special' individuals tend to receive different treatment in a variety of ways: (1) interpersonal climate, (2) feedback patterns of behavior, (3) input patterns of behavior, and (4) output opportunities.[146] The study of these factors can help to generate a more general understanding of how judges may transmit influence to juries.

The first factor, 'interpersonal climate,' refers to the different social and emotional environments that expecters provide individuals for whom they hold high or low expectations. These climate variables, for example, 'warmth' in tone of voice when talking to high expectancy individuals as compared to 'hostility' in tone of voice when talking to low expectancy individuals, are often nonverbal.[147]

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outcome for a student (for example, a high expectancy student would be expected to 'perform better' on a test). Judges' expectations for trial outcome may not be related to a specific performance outcome (for example, expectations of innocence may not reflect a judge's belief that the defendant should or will perform better during the trial process).

[144] Our results suggest that trial judges' expectations might 'directly' or 'indirectly' influence jurors' perceptions of defendants. Direct judicial influence could occur when addressing specific comments or beliefs about the case to the jury. Judicial influence could occur indirectly when addressing comments to counsel, defendants, or other trial participants. See note 8 supra. Both direct and indirect influence might affect jurors' decisionmaking process.

[145] Rosenthal & Rubin, Interpersonal Expectancy Effects: The First 345 Studies, 3 BEHAVIORAL & BRAIN SCI. 377 (1978) (estimating the average size of the expectancy effect to be equivalent to ten IQ points in terms of most IQ tests--the mean IQ score = 100, and the standard deviation = 15); see also Harris & Rosenthal, supra note 73.

[146] R. ROSENTHAL, supra note 141, at 14-24; Rosenthal & Rubin, supra note 145, at 377.

[147] See Blanck & Rosenthal, supra note 67, at 424 (demonstrating that human beings engage in highly influential nonverbal communication when talking to others; for example, camp counselors' tones of voice were rated as significantly warmer and less hostile when counselors were talking about children for whom they held high rather than low expectations); see also Babad, Inbar & Rosenthal, Pygmalion, Galatea and the Golem: Investigations of Biased and Unbiased Teachers, 74 J. EDUC. PSYCHOLOGY 459, 468 (1982); Babad, Inbar & Rosenthal, Teachers' Judgment of Students Potential as a Function of Teachers' Susceptibility to Biasing Information, 42 J. PERSONALITY & SOC. PSYCHOLOGY 541 (1982) (a similar line of study examining climate variables and finding that biased teachers treated low expectancy pupils in a substantially less friendly manner, while less biased teachers treated all students more equally);

In the courtroom context, we predicted and found that trial judges' more leaky nonverbal behavior, demeanor, or 'climate' in delivering jury instructions were less warm, less competent, less wise, and more anxious when the judge expected a guilty verdict than when the judge expected an innocent verdict.[148] A similar study has indirectly tested the judges' behavior in terms of climate variables in the courtroom context: Students rated trial judges' verbal 'respect' for various participants in trials. Judge favoritism toward the contesting attorneys related significantly to less severe jury verdicts.[149] Our results, and those of other studies, suggest that judges may create a relatively more favorable courtroom climate for defendants they believe are innocent as compared to those they believe are guilty.

The second factor, 'feedback,' concerns patterns of behavior by the judge relating to actual responses by a trial participant, for example, the behavior of the defendant on the stand. In the classroom, teachers often give their 'special' students more helpful verbal and nonverbal feedback on performance.[150] In the courtroom, a judge may be generally more supportive of defense counsel when the judge holds expectations for the defendant's innocence, and less supportive when holding expectations for guilt. Another example is the case where the judge, expecting the verdict to be guilty, responds to prosecution counsel's incorrect objection by correcting the objection or asking for further elaboration.[151] But the operation of the feedback factor in the courtroom can be even more subtle. For example, trial judges may read the jury instructions more slowly if they believe the defendant to be innocent.[152]

Eden & Shani, Pygmalion Goes to Boot Camp: Expectancy, Leadership, and Trainee Performance, 67 J. APPLIED PSYCHOLOGY 194 (1982) (climate study in which military boot camp trainees whose instructors had been led to expect high performance, not only performed better on a test of military performance, but also felt more support from their instructors).

[148] See notes 118-119 supra and accompanying text; see also note 33 supra (Learned Hand's description of the 'atmosphere' of the courtroom).

[149] See Kerr, supra note 98, at 261, 276, 282. Interestingly, Kerr also found that trial judges were perceived as (1) more respectful toward the prosecution than the defense, and (2) less impartial and displaying more responsive motor mannerisms (nonverbal behavior) toward the prosecution. Also, judges who were more respectful were perceived to be more courteous and impartial; and all judges were more respectful toward older attorneys--both defense and prosecution--relative to younger attorneys. Finally, when judges were respectful and courteous, all other trial participants were perceived as being respectful as well. It seems the judge importantly sets the 'tone' or atmosphere of the trial for all the participants. Id.

[150] See Rothbart, Datfen & Barrett, Effects of Teacher's Expectancy on Student-Teacher Interaction, 62 J. EDUC. PSYCHOLOGY 49 (1971); S. W. Kester, The Communication of Teacher Expectations and their Effects on the Achievement and Attitudes of Secondary School Pupils (1969) (unpublished doctoral dissertation, University of Oklahoma).

[151] These are examples of the trial judge's indirect influence on the jury decisionmaking process. See note 144 supra. It may be, however, that providing the defendant extra 'feedback' does not violate due process rights. It is possible that all that is constitutionally required from a trial judge is a minimum level of support, or 'feedback,' below which the judge would be acting prejudicially against the defendant.

[152] We are presently conducting analyses of our videotapes on variables such as the judges' reading pace, eye contact with jury, and head nods, similes, and self-touching behavior. P. D.

The third factor, 'input,' may also be useful in understanding the subtle transmission of judges' beliefs to juries. This factor suggests that judges not only may provide more feedback, but actually may become more 'involved' in the trial process on the side they believe should prevail. An extreme case would be the judge who effectively becomes an advocate for one side, thereby exceeding the constitutional limits of judicial influence.[153] The input factor in the transmission of the judge's beliefs for a defendant's guilt or innocence thus translates into how much the judge actually departs from judicial impartiality by taking an active interest in one side over the other.[154] Thus, in the same way that a teacher may show more interest in 'special' pupils by teaching them more difficult material, judges may show more interest in defendants they believe are innocent; for example, by asking more difficult and probing questions of the defendant taking the stand to testify, in order to clear up any previous misunderstandings which might work in the prosecution's favor.[155]

Finally, special or high expectancy individuals also seem to be given greater opportunities for 'output.' For example, teachers allow pupils they believe are brighter more time in which to answer questions.[156] In the courtroom, judges may provide more opportunities to those defendants whom they believe are innocent, and discourage 'output' from defendants they believe are guilty. Such encouragement may not only involve asking more questions, but also may entail allowing a defendant more time to respond when on the stand, prompting or partially shaping responses to questions so that they become more correct, or perhaps even recalling a defendant to the stand to discuss matters not covered by counsel.[157]

The four factors are not independent of each other. They are merely presented as factors that, when taken together, may be a useful way for judges, lawyers, or jurors to group and recognize the often subtle verbal and nonverbal transmission of judicial influence. The output factor, for example, may operate in conjunction with the feedback factor. Judges who allow lawyers for one side more opportunity to respond to questions are also likely to give more feedback on the

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Blanck & R. Rosenthal, Judges' Nonverbal Behavior (January 1986) (unpublished data and manuscript).

[153] See text accompanying notes 13-15 supra.

[154] See text accompanying notes 11-18 supra. Due process requirements are not fixed, however, and what remains determinative is whether the appearance of justice (or injustice) resulted in actual unfairness toward the defendant.

[155] Future research is needed to address this issue, for an argument could be made that judges put more difficult questions to defendants whom they believe are guilty, perhaps to make a more complete case against such defendants when they take the stand to testify. Cf. Judge Frankel's view in note 30 supra.

[156] See Rosenthal & Rubin, supra note 145.

[157] It is improper for the judge to recall a defendant to interrogate him regarding matters not covered in his original examination. See, e.g., People v. Farrell, 7 A.D.2d 642, 643, 179 N.Y.S.2d 540, 541 (1958) ('[E]xpressions of the views of the court as to the evidence and the recalling of the appellant to stand to interrogate her on matters, theretofore left untouched, deprived appellant of her constitutional right to a fair and impartial trial and . . . the interests of justice require a new trial.'). We cannot conclude, however, that judges know the 'correct' answer. We only mean to suggest that judges may sometimes engineer the trial process so as to receive the answer that they believe to be correct. See notes 6-8 supra and accompanying text.

accuracy or appropriateness of those responses. Future research is needed to assess whether lawyers for defendants whom judges perceive as innocent receive different opportunities to demonstrate their client's innocence.[158] These preliminary factors provide a general starting point for analysis of the transmission of judicial influence.

B. Appellate Review and the Limits of Judicial Behavior

As early as 1892, the Kentucky Court of Appeals recognized the problem of appellate review of judicial behavior: '[T]here are many ways that a partial or prejudicial judge may knife a party that he is trying, without it appearing from the record . . ..'[159] The appellate record often does not accurately reflect the behavior of the trial judge toward the jury or other trial participants.[160] Although alerting judges, jurors, and lawyers to the verbal and nonverbal components of the judges' behavior might reduce the unintended influence of judges in criminal jury trials,[161] trial lawyers still must actively and clearly document the impact of the judge's behavior in ways that enable appellate courts to determine whether the behavior constitutes reversible error.

Judges' nonverbal behaviors generally do not appear on the 'dry' or 'cold' appellate record, making it difficult for counsel to preserve properly these subtle, or sometimes not-so-subtle, influences. Even where the judge's reaction to defense testimony is clearly prejudicial--for example, placing his hands on the side of his head, shaking his head negatively, and leaning back and swiveling 180 degrees in his chair--appellate courts have held the record insufficient to require a new trial due to the lack of a reliable record of the allegedly prejudicial behavior.[162] In a case where the judge charged the jury while rapping on the bench each time he spoke about the defendant, the appellate court refused to review the trial in the absence of an objection by counsel to these behaviors.[163]

Documentation of the judges' nonverbal behavior for the trial record is a difficult task for trial

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[158] This research would address an important tactical issue for defense counsel. Deciding whether to permit a client to testify may depend, in part, on a rough assessment of the judge's expectations for trial outcome. See H. KALVEN & H. ZEISEL, supra note 51, at 127-28.

[159] Massie v. Commonwealth, 93 Ky. 588, 591, 20 S.W. 704, 704 (1892).

[160] See notes 5-6 supra and accompanying text. The problem is illustrated in State v. Soriano, 107 N.J. Super. 286, 288, 258 A.2d 140, 142 (1968), aff'd, 54 N.J. 567, 258 A.2d 361 (1969) (acknowledging that the 'dry record' did not enable visualization of challenged facial expressions).

[161] See notes 179-181 infra.

[162] State v. Barron, 465 S.W.2d 523, 527-28 (Mo. 1971).

[163] State v. Grant, 295 So. 2d 168, 173-74 (La. 1973) (if the alleged conduct were substantiated by the record and was the subject of a contemporaneous objection or motion for a mistrial, the conduct would be improper and possible grounds for a mistrial), overruled on other grounds, 339 So. 2d 1194 (La. 1976); see also United States v. Oglin, 745 F.2d 263 (3d Cir. 1984), cert. denied, 105 S. Ct. 2321 (1985). The Olgin Court noted that the defense failed to object to the effectiveness of the judge's curative instructions and that it was incumbent upon defense counsel to request a further curative instruction or to register an objection to the efficacy of the one already presented to the jury before the jury retired to consider its verdict . . .. Thus counsel's lack of a timely challenge to the efficacy of the judge's curative instruction . . . forecloses, assigning as error that portion of the charge. Id. at 271.

counsel for other reasons as well. Although trial attorneys must object to and document the alleged prejudicial behavior of the judge for that behavior to be reviewed on appeal,[164] counsel must be careful not to be overly zealous or he or she may lose credibility in the eyes of the jurors, who view the judge with great respect.[165] Objections by trial counsel to every nonverbal communication and behavior of the judge would soon antagonize the judge as well.[166]

The appellate courts have suggested general guidelines to help counsel effectively document the 'cold' record. Several courts have suggested that if the intonations and gestures of a judge are thought to be prejudicial to a defendant in a criminal case, defense counsel must (1) make timely objections and record these objections before the jury leaves the room,[167] (2) record what transpired descriptively, fully, accurately, and on the record, (3) record any disagreement between judge and lawyer as to what happened, and, most important, (4) show that the behaviors actually denied the defendant his or her right to a fair and impartial trial.[168]

Several appellate courts have noted, however, that even with these suggested guidelines it is difficult to assess claims that the judge indicated partiality by his nonverbal behavior in the absence of video- and audiotape recordings of trials.[169] A few appellate courts have required the defense attorney to present an affidavit by the defendant or by anyone who has personal knowledge of the judge's behavior, or to present a brief on appeal specifying the details of the alleged prejudicial behaviors and noting where the record did not substantiate any of the defendant's allegations.[170]

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[164] See Milhouse v. State, 264 Ga. 357, 329 S.E.2d 490 (1985); see also 4A C.J.S. Appeal and Error § 714 (1955).

[165] See notes 39-40 supra and accompanying text.

[166] One trial attorney has suggested that counsel may attempt to neutralize any antagonism between judge and lawyer by delivering a set speech thanking the judge for his or her patience. F. BAILEY & H. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS § 29.2, at 780 (2d ed. 1985). See generally Note, supra note 32, at 1286-87 (suggesting modification of the contemporaneous objection rule for objections to nonverbal behavior of trial judge).

[167] One attorney has suggested an appropriate objection at trial to the allegedly prejudicial nonverbal cues of a trial judge: Your Honor, the defendant respectfully excepts to the tone and inflection in which Your Honor is putting questions to this witness. They suggest to the jury that his testimony is unworthy of belief. He respectfully suggests that the question is improper as the jury must remain the sole judge of the credibility of witnesses. F. BAILEY & H. ROTHBLATT, supra note 166, § 29.5, at 785. A similar objection might be appropriate if prejudice to the defendant occurs when the trial judge emphasizes the prosecution case over the defense case. Id. § 29.10, at 791.

[168] See Billeci v. United States, 184 F.2d 394, 402 (D.C. Cir. 1950); Curtin, Objections, 8 LITIGATION 37, 39 (1982) (proposing ways of raising objections in order to preserve alleged judicial error); Note, supra note 32 (discussing methods of preserving the trial record).

[169] See United States v. Robinson, 635 F.2d 981, 984 n.2 (2d Cir. 1980), cert. denied, 451 U.S. 992 (1981); United States v. Weiss, 491 F.2d 460, 468 n.2 (2d Cir.), cert. denied, 419 U.S. 833 (1974); see also Note, supra note 32, at 1285 (suggesting that perhaps the only way to preserve an adequate record of such behavior is through the use of film or videotape).

[170] See, e.g., Petro v. State, 270 Ind. 86, 87-88, 383 N.E.2d 323, 324 (1978) (affidavit of appellant's attorney inadequate in itself to establish abuse of trial court discretion or prejudice to

Unfortunately, '[t]here is simply no handy tool' with which to gauge a claim that a trial judge's behavior or conduct biased a trial against the defendant.[171] Appellate courts continue to approach the problem on a case-by-case basis by studying and reading the record and paying particular attention to every comment of the judge. Appellate courts remain reluctant to question the discretion of the trial judge[172] and have only recently begun to qualify longstanding rules that judges' nonverbal behavior is not reviewable on appeal.[173] To have any chance for reversal, defense counsel must carefully document at trial the alleged prejudicial behavior of the judge in a way that will allow an appellate court to determine that the judge's behavior contributed to the conviction.[174]

Future research must address the extent to which it is practically and administratively feasible for counsel to document for an appellate court the judge's behavior in terms of (1) the major communicative channel--visual, audio, or verbal cues, (2) the overall affect or emotion expressed in a particular channel--warmth, open-mindedness, or hostility, (3) the focus of the behavior--for example, to whom the behavior is directed, (4) any inconsistencies or 'leakage' in the verbal and nonverbal behavior of the judge, such as a nervous smile or sarcastic behavior that may transmit

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appellant since it did not set forth specific details of the alleged improprieties and since the record did not substantiate the allegations). But see note 44 supra (jurors not allowed to impeach their own verdicts).

[171] United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973). The court noted: The special quandary we face in such cases [involving the prejudicial behavior of the trial judge] stems from the fact that 'we are not given the benefit of witnessing the juxtaposition of personalities which may help prevent reading too much into 'the cold black and white of a printed record." Id. at 304 (quoting United States v. Grunberger, 431 F.2d 1062, 1067 (2d Cir. 1970)).

[172] See, e.g., Oglen v. State, 440 So.2d 1172, 1175 (Ala. Crim. App. 1983) (concluding that the trial judge, while showing some impatience, 'was attempting to exercise his rightful control over the proceeding'). Another appellate court reacted to alleged examples of misconduct by stating that the allegations 'represent an exaggeration and a too thin-skinned reaction to a perfectly normal inquiry by the court.' United States v. Poland, 659 F.2d 884, 893 (9th Cir.), cert. denied, 454 U.S. 1059 (1981). Article VI of the California Constitution specifically gives the trial judge great discretion during the trial process: 'The court may make such comment on the evidence and the testimony and credibility of anywitness as in its opinion is necessary for the proper determination of the cause.' CAL. CONST. art. VI, § 10; see also People v. Cook, 33 Cal. 3d 400, 408, 658 P.2d 86, 91, 189 Cal. Rptr. 159, 164 (1983) (it 'is difficult to draw a precise line of demarcation between those comments on the evidence which are authorized by article VI, section 10 and those which are not').

[173] Milhouse, 329 S.E.2d at 490 (qualifying a longstanding appellate policy in Georgia that a trial judge's vocal emphasis and nonverbal behavior is not reviewable on appeal). Earlier cases in Georgia had held that the tone of voice of the trial judge in instructing the jury was not reviewable. Wilson v. State, 229 Ga. 224, 225, 190 S.E.2d 78, 79 (1972), overruled on other grounds, 230 Ga. 525, 198 S.E.2d 180 (1973); Williams v. State, 170 Ga. 886, 890, 154 S.E. 363, 365 (1930); Whiddon v. State, 160 Ga. App. 777, 779, 287 S.E.2d 114, 117 (1982); Perdue v. State, 147 Ga. App. 648, 652, 249 S.E.2d 657, 661 (1978).

[174] Cf. Chapman v. California, 386 U.S. 18, 24 (1967) (before a constitutional error can be held to be harmless, the court must be able to declare its belief that it was harmless beyond a reasonable doubt).

expectancy effects, (5) the duration, frequency, and consistency of the behavior, (6) the four factors described earlier--climate, feedback, input, and output--that might be useful in summarizing the verbal and nonverbal transmission of the judge's expectations, attitudes, and beliefs for trial outcome, (7) the post-verdict reactions of jurors to the judge's behavior during the trial,[175] and (8) any other reactions to the judge's behavior gained by calling and questioning as witnesses people who were in the courtroom at the time of the alleged prejudicial behavior.[176] This general strategy, when replicated and qualified by future researchers, may eventually aid appellate courts in understanding more thoroughly what behavior occurred, and whether it had a measurable and documented effect on the defendant's right to a fair and impartial trial.[177] Trial lawyers and judges may decide that the videotaping of courtroom proceedings should play an increasingly important role in this process.[178] But it remains for the state legislatures to decide the future role of videotaping in the courtroom.

C. Extra-Legal Concerns

1. Studying trial judges.

There were important differences among the judges participating in our study in the clarity and force of communication through different verbal and nonverbal channels. Future researchers should address the question of what kind of judges, in terms of communicative skills and perhaps other personality variables, are prone to influence prejudicially what kind of jurors and other trial participants.[179] This type of information may aid in understanding communication processes

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[175] Post-verdict juror questionaires, however, will probably be 'contaminated' or biased by the jurors' actual decision. A better strategy would be to survey jurors before they retire to the jury room. See note 123 supra. Unfortunately, such data may be difficult to collect without prejudicing the jury decisionmaking process.

[176] Milhouse, 329 S.E.2d at 490.

[177] Appellate courts have not been persuaded by allegations that the 'general attitude' of the trial judge toward the defendant's case influences or creates an atmosphere in which the defendant may not have a fair trial. See, e.g., State v. Larmond, 244 N.W.2d 233 (Iowa 1976) (when a trial judge 'telegraphs' to a jury purposeful exclamations, gestures, or facial expressions reflecting his or her beliefs concerning the guilt or innocence of a defendant, the proper procedure is for counsel to promptly make a record in chambers of the offending conduct, coupled with an objection, or to enter an objection supported by a bill of exceptions); State v. Barnholtz, 287 S.W.2d 808, 812 (Mo. 1956).

[178] See note 86 supra.

[179] See Givens, The Way Others See Us, 19 JUDGES J. 20 (1980). Eventually, it may be possible to 'match' judicial competencies with the type of case before the court. See Shapiro, Can We Match the Skills of Our Judges to the Needs of Our Courts?, 62 JUDICATURE 164 (1978) (discussing the possibility of matching judicial knowledge and information with the type of case). It has been possible to specify the accuracy of senders and receivers of verbal and nonverbal cues in social interaction and to develop instruments designed to measure sensitivity to various channels of social communication. See Blanck & Rosenthal, supra note 107. Many special groups have been tested with standardized tests, and those scoring best have been actors and students of nonverbal communication. Interestingly, clinical psychologists, psychiatrists, and other clinicians scored no higher than college students, but clinicians rated as more effective by their supervisors scored significantly higher than did clinicians rated as less effective by their

during the trial and may help to alert judges and other trial participants to recognize biasing or prejudicial behaviors in the trial process that could act to deprive defendants of their due process right to a fair and impartial trial.[180]

More systematic investigations of judges' communicative behavior are possible and are needed. Trial judges' behavior could be examined in terms of (1) the emotions and information expressed in various channels of communication (e.g., verbal versus nonverbal channels), (2) the potential impact on the jury of various channels of judges' behavior (e.g., tone of voice versus facial expressions), (3) the extent to which especially 'leaky' verbal and nonverbal cues convey judges' expectations for trial outcome to jurors, and (4) the cumulative effects of judge communicative style on trial processes and trial outcome. This general line of study might also help to describe better the limits of judicial influence and to aid in a more systematic understanding of how judges' behavior influences trial processes.

2. Studying jurors.

It is also important that jurors are made aware of the verbal and nonverbal behaviors of the judge that may influence the trial process. Because judges' verbal and nonverbal behavior may leak to jurors the judges' beliefs for trial outcome, jurors who are especially sensitive or attentive to verbal and nonverbal signals may also be more susceptible to judicial influence in their decisionmaking process.[181] The extent to which jurors' accurate perceptions of leaky behaviors

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supervisors. R. ROSENTHAL J. HALL, R. DIMATTEO, P. ROGERS & D. ARCHER, supra note 70, at 295-97. The communicative skills of judges, jurors, and lawyers have yet to be assessed.

[180] Judicial training centers already exist across the country, teaching judges in ways consistent with the modifications suggested here. For example, the California Center for Judicial Education and Research (CJER) is the California judiciary's program for improving the administration of justice by furthering the education and broadening the experiences of trial judges. CJER offers a course on effective courtroom communication. Each judge in this course has an opportunity to conduct a judicial proceeding before a video camera. At later seminars, the recording of the judge is played back to other judges and to the teaching faculty for general comments about the strengths and weaknesses of the judge's communicative skills. For a description of the CJER study program, see Bancroft, Avakian, Gyemant, Levie, Mills & Kaplan, California Center for Judicial Education and Research, Courtroom Fairness (Winter 1984) (unpublished collection of course materials on file with the Stanford Law Review); see also FEDERAL JUDICIAL CENTER, ANNUAL REPORT (1983); Middleton, Courtroom Kinesics: What Judges Don't Say, 67 JUDICATURE 699 (1981) (discussing the training of trial judges and the use of videotaping in the courtroom).

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influence their decisionmaking processes is a question for future research.

More research is needed to assess the susceptibility of jurors to biasing information in order to aid in the understanding of the effects of judge behavior on jury decisionmaking processes. Perhaps improving the receiving skills of potential jurors so as to make them more aware of how leaky nonverbal channels transmit expectations would make them less susceptible to judicial influence.[182] Future researches might attempt to alert jurors to the verbal and nonverbal components of judges' behavior and then assess the extent to which these strategies help to ensure that judges' unintended behavior does not influence juries' verdicts. These research strategies could eventually merge into a general educational program administered by the state, perhaps in conjunction with standard jury selection prodcedures already in place. A comprehensive approach for understanding judicial behavior and influence on jurors may be more effective than merely relying on the pattern curative instruction warning to jurors that they are not to be influenced by anything the judge has 'said or done.'[183]

Judicial Education and Research, Courtroom Fairness (Winter 1984) (unpublished collection of course materials on file with the Stanford Law Review); see also FEDERAL JUDICIAL CENTER, ANNUAL REPORT (1983); Middleton, Courtroom Kinesics: What Judges Don't Say, 67 JUDICATURE 699 (1981) (discussing the training of trial judges and the use of videotaping in the courtroom).

[182] But see note 181 supra (it is possible that improved receiving skills could make jurors more susceptible to judicial influence). Future research must address the effects of training receivers (jurors) to be more accurate at interpreting more and less leaky messages and the effect such training has on susceptibility to influence.

[183] See Appendix A, Section XV. The general effectiveness of such curative instructions needs attention from future researchers. Curative instructions to the jury allow trial judges the opportunity to correct any prejudicial behavior by the judge that may impermissibly influence the jury decisionmaking process. Appellate courts have allowed judges broad discretion in utilizing curative instructions. See, e.g., State v. O'Connor, 42 N.J. 502, 201 A.2d 705, cert. denied, 379 U.S. 916 (1964) (where the defendant was convicted of murder and appealed on the grounds that the trial judge's facial expressions showed disgust, amusement, disbelief, and annoyance toward the defendant during the trial, the trial judge stated that he was not aware of these facial expressions; in affirming the judgment, the appellate court noted that during the jury instructions the judge cautioned the jury that they should not be influenced by any outward reactions of the judge toward the defendant); see also People v. Franklin, 56 Cal. App. 3d 18, 24, 128 Cal. Rptr. 94, 98 (1976) ('Even where conduct by a trial judge may approach the boundaries of improper discretion, an admonition to disregard his conduct can be deemed curative, and it must be assumed that the jury was possessed of ordinary intelligence and followed such instructions.') Appellate courts consider on a case-by-case basis whether a curative instruction had the desired effect of removing prejudicial influence. But the extent to which these instructions actually 'cure' the verbal and nonverbal errors of the trial judge is not known. Psychologists have begun to study systematically the efficacy of curative instructions. See Thompson, Fong & Rosenhan, Inadmissible Evidence and Juror Verdicts, 40 J. PERSONALITY & SOC. PSYCHOLOGY 453, 461 (1981) (demonstrating that jurors tend to ignore judges instructions to disregard inadmissible evidence); Brooks & Doob, supra note 56, at 176-77 (showing that jurors are likely to ignore judges' instructions limiting the use of the defendant's previous convictions to impeach credibility); Tanford & Penrod, Social Inference Processes in Juror Judgments of Multiple Offense Trials, 47 J. PERSONALTY & SOC. PSYCHOLOGY 749

Another interesting issue for future research relates to whether trial judges should provide jurors with an audiotaped version of the jury instructions to take into deliberations. The Eleventh Circuit has permitted judges to provide the jury with a tape recording of the jury instructions for use during its deliberations and has rejected a defendant's claim that the audiotaped instructions in the jury room were per se reversible error because they prejudiced the jury to overemphasize certain parts of the instructions.[184] Our results suggest that the Eleventh Circuit's ruling may be incorrect. Indeed, judges' expectations for trial outcome, and other beliefs and attitudes, may be subtly transmitted by judges' tone of voice alone. Although providing the jury with a written transcript of the particular jury instructions might prevent the communication of unintended nonverbal behaviors of the judge,[185] such a transcript might be less effective in improving juror comprehension of the instructions.[186] Future research must address this question while remaining aware of the extra-legal information conveyed to jurors by the judge in the way he or she delivers the instructions.[187] Video- and audiotape techniques are well suited for the study of these problems because they enable researchers to vary systematically the verbal and nonverbal information in the instructions, as well as their legal accuracy.

(1984) (indicating that joining several charges within a realistic trial setting increases the likelihood that a defendant will be convicted on a particular charge regardless of the similarities of the charges or the evidence; the use of the judges' instructions did not effectively reduce the tendencies toward conviction). Skepticism about the effectiveness of curative and evidential instructions is not new. In 1697, Lord Holt denied that the jury had an 'absolute despotick [sic] power' to disregard the judge's instructions. Quoted in J. FRANK, LAW AND THE MODERN MIND 307 (1930). Judge Learned Hand also described the customary instruction to disregard as a mental gymnastic beyond anyone's power. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

[184] See United States v. Watson, 669 F.2d 1374, 1385-86 (11th Cir. 1982) (the presentation of an audiotaped or written charge to the jury could aid juror comprehension, as well as expendite proceedings). But see Table 4 supra and accompanying text (displaying the significant relationship between the judge's verbal and nonverbal behaviors in delivering jury instructions and the trial outcome).

[185] See, e.g., Wagner v. State, 76 Wis. 2d 30, 39, 250 N.W.2d 331, 341-42 (1977) (court discouraged the jury's unrestricted use of taped jury instructions in part because the instructions would reproduce the tonal inflections of the trial judge).

[186] See Charrow & Charrow, supra note 62, the first empirical linguistic study of the comprehensibility of standard jury instructions. The study isolated those linguistic features of standard jury instructions-- grammar, semantics, vocabulary, and structure--that cause comprehension problems. The researchers recorded fourteen California standard civil jury instructions on audio cassettes and played the instructions to prospective jurors. The results suggested that subjects have difficulty comprehending jury instructions. When the same instructions were modified--eliminating passive verbs and replacing them with active verbs, eliminating multiple negatives, and improving the organization of the instructions--the results showed that the modifications yielded improved comprehension.

[187] An interesting future study could examine the possibility of presenting 'pattern video and audiotaped instructions' to juries at the close of the trial. The use of pattern video and audiotaped instructions might prove to increase jurors' comprehension of the instructions while minimizing the possible influence of the judges' unintended behavior.

Finally, future researchers need to examine how the jury's overall comprehension of the jury instructions relates to the behavior of the judge. It may be that the less jurors actually understand the instructions, the more their decisionmaking process is influenced by subtle verbal and nonverbal behaviors of the judge. Although jurors' inability to understand instructions will almost never show up on the 'dry' appellate record, juries' decisionmaking processes could be significantly influenced by subtle judicial behavior in predictable ways. Courts and legislatures should not assume that jurors, for the most part, are 'free' to understand and faithfully follow instructions.[188]

CONCLUSION[189] The behavior of the trial judge can sometimes influence jury verdicts so as to deny a defendant's constitutionally protected right to a fair and impartial trial. Our study proposed and empirically employed a general model for the study of predicting juries' verdicts from judges' verbal and nonverbal behavior. The variables in the model included: (A) the background variables of the trial participants, (B) the expectancy variable of the trial judge, (C) the verbal and nonverbal transmission of the judge's expectancy, and (D) the trial outcome. We found that judges' expectations for trial outcome predict judges' verbal and nonverbal behavior and that this behavior also relates to the verdicts returned by juries. The findings have implications for understanding whether judges' beliefs for trial outcome 'leak' to juries and, if so, how. They may also aid in the development of standards of appellate review that would enable courts to evaluate more systematically the permissible limits of judicial behavior and to give guidance for the future study of trial judges, jurors, and trial counsel with respect to the effects of communicative behavior in the courtroom.

APPENDIX A

California Pattern Jury Instructions--Criminal

Fourth Revised Edition--1979 MISDEMEANOR INSTRUCTIONS

PART 16 Below are the composite basic instructions for misdemeanor trials in California:

Section I: Duties of the Judge and Jury

Ladies and Gentlemen of the Jury: Now we come to that part of the trial where you will be instructed on the law.

Whether a defendant is to be found guilty or not guilty depends upon both the facts and the law.

As jurors you have two duties to perform in order to reach a verdict. One duty is to determine the

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[188] R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 73-74 (1970).

[189] In closing, this note has focused on the trial judge's behavior, often from a critical viewpoint. We would be remiss not to point out that the spirit of this note, and of the investigation as a whole, was to describe and improve the already exceptional performance of many of the trial judges in our criminal jury system. Indeed, discussion with the judges who participated in this study clarified many of our hypotheses and analyses. Such a high level of ecological validity is rare in the social sciences. As we stated at the outset, our goal was to study judges in their natural environment, the courtroom.

facts of the case from the evidence received in the trial and not from any other source. The word 'fact' means something that is proved directly or circumstantially by the evidence.

Your other duty is to apply the law to the facts as you determine them and in this way to reach your verdict.

It is my duty in these instructions to explain to you the law that applies in this case. You must accept and follow the law as I state it to you.

You must not be influenced by pity for a defendant or by prejudice against him.

You must not be biased against the defendant because he has been arrested; charged with a crime or brought to trial. These facts are not evidence of his guilt.

You must not be swayed by mere sentiment, conjecture, sympathy, passion, public opinion or public feeling.

Section II: Composition of Instructions

The instructions are to be construed as a whole and each individual instruction is to be considered in light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

For simplicity, the masculine form of pronoun as used in the instructions applies equally to all persons.

Section III: Statements of Counsel, etc.

You must not consider any statement by either attorney as evidence. If the attorneys have agreed to any fact or if any fact has been admitted, that fact is proved.

You must not consider as evidence any offer of proof that was rejected or any evidence that was stricken out.

As to any question to which an objection has been sustained you must not guess what the answer might have been.

You must not assume to be true any insinuation suggested by a question asked a witness.

Section IV: Direct and Circumstantial Evidence

Evidence consists of testimony of witnesses, writing, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a fact.

Evidence is either direct or circumstantial.

Direct evidence is evidence that directly proves a fact.

Circumstantial evidence is evidence that proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

Both direct evidence and circumstantial evidence are acceptable as means of proof. Neither is entitled to any greater weight than the other.

Section V: Sufficiency of Circumstantial Evidence

A finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of cricumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

Also if the circumstantial evidence [as to any particular count] is susceptible to two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt the interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable.

Section VI: Admissions and Confessions

A statement made by the defendant other than at his trial may be either an admission or confession.

An admission is a statement by a defendant, which by itself is not sufficient to warrant an inference of guilt, but which tends to prove guilt when considered with the rest of the evidence.

A confession is a statement by a defendant which discloses his intentional participation in the criminal act for which he is on trial and which discloses his guilt of that crime.

You are the exclusive judges as to whether an admission or a confession was made by the defendant and if the statement is true in whole or in part. If you should find that such statement is entirely untrue, you must reject it. If you find it is true in part, you may consider that part which you find to be true.

Evidence of an oral admission or an oral confession of the defendant ought to be viewed with

caution.

[No person may be convicted of an offense unless there is some proof of each element of the offense independent of any admission made by him outside the trial.

However, the identity of the person who committed the offense may be established by an admission.]

Section VII: Credibility of Witness

Every person who testifies under oath [or affirmation] is a witness. You are the sole judges of the believability of a witness and the weight to be given to his testimony.

In determining the believability of a witness, you may consider anything which tends in reason to prove or disprove the truthfulness of his testimony, such as: his conduct, attitude and manner while testifying; his capacity to hear or see that about which he testified and his ability to recollect or to relate such matters; whether or not there was any bias, interest or other motive for him not to tell the truth; [any statement previously made by him that was consistent with his testimony] [or,] [any statement previously made by him that was inconsistent with his testimony;] [his character for honesty or veracity or for dishonesty or untruthfulness;] [any admission by him that he did not tell the truth;] [his prior conviction of a felony].

If you believe that a witness willfully testified falsely as to a material fact, you should distrust the rest of his testimony and you may disregard all of his testimony.

However, you should bear in mind that discrepancies in a witness's testimony and that of others, if there were any, do not necessarily mean that you should disbelieve the witness, because forgetting is common and innocent mistakes are not unusual. Two persons witnessing the same incident often see or hear it differently.

You also should consider whether any such discrepancy concerns an important fact or only a trivial detail.

Section VIII: Weighing Conflicting Testimony.

You should not decide any issue merely by counting the number of witnesses who have testified on the opposing sides.

The final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

Section IX: Sufficiency of Testimony of One Witness

[Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.]

Section X: Expert Testimony

[In determining the weight to be given to the opinion of any expert who has testified in this case, you should consider the qualifications and credibility of such expert and the reasons given for his opinion.

You are not bound to accept an expert opinion as conclusive, but should give to it the weight, if any, to which you find it to be entitled.]

[If there was any conflict in the testimony of expert witnesses, you should consider their relative qualifications and credibility in weighing the opinion of one expert against that of another as well as the reasons given for each opinion and the facts upon which it was based.]

Section XI: Presumption of Innocence and Burden of Proof

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Section XII: [Here give the Particular Instructions as to the Offense Charged.]

Section XIII: General Intent

[In the offense with which the defendant is charged [in Count--,] there must be a joint operation of act or conduct and criminal intent.

When a person intentionally does that which the law declares to be an offense, he is acting with criminal intent, even though he may not know that his conduct is unlawful, or even though he may not intend to violate the law.]

Section XIV: Specific Intent

[In the offense with which the defendant is charged [in Count--,] there must be a joint operation of act or conduct and the required specific intent and unless such specific intent so exists that offense is not committed.]

Section XV: Take No Cue from Judge

I have not intended by anything I have said or done or by any question I may have asked to suggest what you should find the facts to be or that I believe or disbelieve any witness.

If anything I have said or done has seemed to suggest my opinion as to the facts, you will disregard it and form your own opinion.

Section XVI: Duty to Deliberate

When you start your deliverations, it is important that you avoid expressing a fixed opinion or a determination to hold out for a certain verdict.

Each of you must decide the case for yourself but should do so only after an open-minded discussion of the evidence and instructions with the other jurors.

Once you have reached a conclusion, you should not change it merely because other jurors disagree with you. However, if you become convinced you have reached a wrong conclusion, you should not hesitate to change it.

You should remember in deciding this case, that you are not advocates or partisans for either side but that you are the impartial judges of the facts.

Section XVII: Avoid Considering a Penalty

In your deliberations, or in arriving at a verdict, you must not discuss or consider the subject of penalty or punishment. That is a matter which must not in any way affect your decision.

Section XVIII: Concluding Instruction

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to reach a verdict, all twelve jurors must agree to the decision [and to any finding you have been instructed to include in your verdict]. As soon as all of you have agreed upon a verdict, you shall have it dated and signed by your foreman and then shall return with it to this courtroom.

APPENDIX B

COURTROOM QUESTIONNAIRES

All the trial judges, jurors, and lawyers were asked to complete the following questionnaires about the trial process—the directions to the trial participants explained the purpose of the study and the time when the questionnaires were to be filled out:

JUDGE QUESTIONNAIRE (BEFORE INSTUCTIONS TO THE JURY)

Names _____ Date _____
Age _____ Name of Case _____
Sex _____ Date Appinted to Bench _____
List offenses for which defendant is being tried (code sections).

---

1. How Interesting was this trial?

1	2	3	4	5	6	7	8	9
not at all interesting			somewhat interesting					very interesting

2. How complex were the legal issues in this case?

1	2	3	4	5	6	7	8	9
not at all complex			somewhat complex					very complex

3. How complex were the factual issues in this case?

1	2	3	4	5	6	7	8	9
not at all complex			somewhat complex					very complex

4. In this trial, how attentive was the jury?

1	2	3	4	5	6	7	8	9
not at all attentive			somewhat attentive					very attentive

5. In this trial, how sophisticated was the jury?

1	2	3	4	5	6	7	8	9
not at all sophisticated			somewhat sophisticated					very sophisticated

6. In this trial, how open minded was the jury?

1	2	3	4	5	6	7	8	9
not at all open-minded			somewhat open-minded					very open-minded

7. In this trial, how competent was the defendant's lawyer(s)?

1	2	3	4	5	6	7	8	9
not at all competent			somewhat competent					very competent

8. In this trial, how competent was the prosecutor?

1	2	3	4	5	6	7	8	9
not at all competent			somewhat competent					very competent

9a. What do you think the verdict should be (circle)?

Not guilty Guilty

(Indicated for each count if necessary and label below.)

9b. Why?

10a. What do you think the verdict will be (circle)?

Not guilty Guilty

(Repeat for each count if necessary and label below.)

10b. Why?

11. Additional comments regarding jury and/or lawyer's behavior?

ANSWER FOLLOWING QUESTIONS AFTER VERDICT

12. What was the verdict? (Code sections-and repeat for each count if necessary and label below.)

13. Do you agree with the jury verdict?

1	2	3	4	5	6	7	8	9
not at all			somewhat					very much

14. Additional comments on any aspect of your performance during the trial?

JUROR QUESTIONNAIRE (AFTER VERDICT)

Name _____ Date _____
Age _____ Name of Case_____
Sex _____ Occupation_____
Highest level of education _____
How many times have you served on a jury? _____

1. In this trial, did the judge keep order in the courtroom?

1	2	3	4	5	6	7	8	9
not at all			somewhat					very much

2a. In this trial, did the judge speak clearly?

1	2	3	4	5	6	7	8	9
not at all clearly			somewhat clearly					very clearly

2b. In the jury instructions in particular, did the judge speak clearly?

1	2	3	4	5	6	7	8	9
not at all clearly			somewhat clearly					very clearly

3. In this trial, did the judge treat the lawyers and jurors with respect

1	2	3	4	5	6	7	8	9
not at all			somewhat					very much

4. Overall, how competent was the judge in this trial?

1	2	3	4	5	6	7	8	9
not at all competent			somewhat competent					very competent

5. In this trial, how interested did the judge seem?

1	2	3	4	5	6	7	8	9
not at all interested			somewhat interested					very interested

6. In this trial, how open-minded was the judge? lawyer(s)?

1	2	3	4	5	6	7	8	9
not at all open-minded			somewhat open-minded					very open-minded

7a. In this trial, which side do you think the judge thought should win?

1	2	3	4	5	6	7	8	9
very much for the defendant				split				very much for the prosecution

7b. How could you tell this?

8. In this trial, to what extent did the judge's facial expressions, voice, etc., give you a clue as to what the judge was thinking?

1	2	3	4	5	6	7	8	9
not at all			somewhat					very much

9. In the jury instructions in particular, did you feel that the judge, by facial expressions, or any type of behavior other than his or her actual know that he or she thought the verdict should be?

1	2	3	4	5	6	7	8	9
not at all			somewhat					very much

10. Additional comments about how the judge handled the trial?

11a. In general, what are your political beliefs?

1	2	3	4	5	6	7	8	9
very liberal			middle					very conservative

11b. What is your political party? (circle)

Democrat Republican Other

12. In general, how open-minded are you?

1	2	3	4	5	6	7	8	9
not at all open-minded			somewhat					very open-minded

LAWYER QUESTIONNAIRE (BEFORE VERDICT)

Name _____ Date _____
Age _____ Name of Case _____
Sex _____ Defense or Prosecution (circle one)
Number of years in practice _____

1. In this trial, did the judge keep order in the courtroom?

1	2	3	4	5	6	7	8	9
not at all			somewhat					very much

2a. In this trial, did the judge speak clearly?

1	2	3	4	5	6	7	8	9
not at all clearly			somewhat clearly					very clearly

2b. In the jury instructions in particular, did the judge speak clearly?

1	2	3	4	5	6	7	8	9
not at clearly			somewhat clearly					very clearly

3. In this trial, did the judge treat the lawyers and jurors with respect

1	2	3	4	5	6	7	8	9
not at all			somewhat					very much

4. Overall, how competent was the judge in this trial?

1	2	3	4	5	6	7	8	9
not at all competent			somewhat competent					very competent

5. In this trial, how interested did the judge seem?

1	2	3	4	5	6	7	8	9
not at all interested			somewhat interested					very interested

6. In this trial, how open-minded was the judge? lawyer(s)?

1	2	3	4	5	6	7	8	9
not at all open-minded			somewhat open-minded					very open-minded

7a. In this trial, which side do you think the judge thought should win?

1	2	3	4	5	6	7	8	9
very much for the defendant				split				very much for the prosecution

7b. How could you tell this?

8. In this trial, to what extent did the judge's facial expressions, gestures, voice, etc., give you a clue as to what the judge was thinking?

1	2	3	4	5	6	7	8	9
not at all			somewhat					very much

9. In the jury instructions in particular, did you feel that the judge, by facial expressions, or any type of behavior other than his or her actual know what he or she thought the verdict should be?

1	2	3	4	5	6	7	8	9
not at all				somewhat				very much

10. In this trial, how competent was the jury?

1	2	3	4	5	6	7	8	9
not at all competent				somewhat competent				very competent

11. How often have you appeared in the judge's court for matters (approximate number of appearances) _____

If you were the defense attorney, please answer question 12.

12a. Defendant's sex _____ race _____ age _____ Highest level of education _____

Socioeconomic background (circle one)

Low medium high

12b. Defendant's prior criminal history (circle).

Felony arrests ..... yes no

Felony convictions ..... yes no

Misdemeanor arrests ..... yes no

Misdemeanor convictions ..... yes no

13. Additional comments about the judge's behavior in this trial?

14a. In general, what are your political beliefs?

1	2	3	4	5	6	7	8	9
very liberal				middle				very conservative

14b. What is your political party? (circle)

Democrat Republican

15. In general, how open-minded are you?

1	2	3	4	5	6	7	8	9
not at all open-minded				somewhat				very open-minded

APPENDIX C

RATING QUESTIONNAIRE OF THE JUDGES' BEHAVIOR

Name _____ Trial _____
Sex _____ Trial Date _____
Date _____ Judge _____

SEGMENT NUMBER ___

not at all Warm 1 2 3 4 5 6 7 8 9 very Warm

not at all Hostile 1 2 3 4 5 6 7 8 9 very Hostile

not at all Anxious 1 2 3 4 5 6 7 8 9 very Anxious

not at all Dominant 1 2 3 4 5 6 7 8 9 very Dominant

not at all Competent 1 2 3 4 5 6 7 8 9 very Competent

not at all Professional 1 2 3 4 5 6 7 8 9 very Professional

not at all Wise 1 2 3 4 5 6 7 8 9 very Wise

not at all Open-minded 1 2 3 4 5 6 7 8 9 very Open-minded

not at all Dogmatic 1 2 3 4 5 6 7 8 9 very Dogmatic

not at all Honest 1 2 3 4 5 6 7 8 9 very Honest

Based on this segment, the judge believes the jury should find the defendant:

1	2	3	4	5	6	7	8	9
Definitely Guilty		Probably Guilty		Not Sure		Probably Innocent		Definitely Innocent