Article

Judging Demeanor

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This Article challenges the conventional wisdom that defendant demeanor—affect, body language, and physical appearance—helps juries assess guilt. On the contrary, we show that demeanor evidence poses an inherent risk of propensity-based reasoning. It invites jurors to convict defendants based on whether they "look like criminals," rather than on the actual facts of the case. In doing so, demeanor evidence facilitates cultural and racial subordination. It enables members of dominant groups—consciously or not—to penalize members of less-dominant groups for failing to appear innocent or credible.

We argue that existing law has things backwards. It treats defendant demeanor as presumptively useful and puts the onus on defendants to demonstrate prejudice. The proper approach, by contrast, would treat defendant demeanor as presumptively prejudicial and require the state to develop case-specific theories of probative value. This would give trial courts the tools they need to properly instruct juries and to regulate prosecutors, and it would revitalize the role of appellate courts in safeguarding trial fairness. Furthermore, it would integrate demeanor with other types of evidence, such as a defendant's criminal history or sartorial presentation, already identified in the case law as inherently risky. We conclude by offering a number of concrete proposals to implement this change, including a new model rule of evidence ("Rule 404(c)"), restyled jury instructions, and ideas for reform beyond the courtroom.

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INTRODUCTION

Carlos Ruiz and Yaritza Delacruz are tried jointly for heroin trafficking based on evidence from an apartment they shared as romantic partners.[1] Neither testifies.[2] During deliberations, the jury sends out the following note: "Can we take the defendants[']body language into consideration? As evidence?"[3] To which the judge responds: "While not evidence, the jury is entitled to consider any observations you made of the defendants' demeanor during the trial."[4] An hour later, the jury convicts Ruiz but acquits Delacruz.[5] Ruiz appeals, arguing that his conviction was based, in part, on the jury's perception that he looked like a criminal.[6] In other words, Ruiz argues that he failed, while sitting silently at the defendants' table, to *appear* innocent to a group of strangers—strangers who came to court, as anyone would, with acculturated views and biases about how law-abiding people self-present—and that a conviction on this basis violated his constitutional rights.[7]

Will Ruiz win? In many jurisdictions, including Ruiz's own, the answer is no.[8] More than that, in fact: The law allows prosecutors to frame closing arguments around defendant demeanor,[9] and jury instructions often celebrate its probative value.[10]

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1. *See* Commonwealth v. Ruiz, 178 N.E.3d 901, 2021 WL 5238605, at *1 (Mass. App. Ct. 2021) (unpublished table decision).

2. *Id.*

3. *Id.* at *3 (alteration in original).

4. *Id.*

5. *Id.*

6. *See* Petition for Writ of Certiorari at 4–6, 13–18, Ruiz v. Massachusetts, 143 S. Ct. 565 (2023) (No. 22-132), 2022 WL 3284615.

7. *See id.*; Reply Brief for Petitioner at 1, Ruiz v. Massachusetts, 143 S. Ct. 565 (2023) (No. 22-132), 2022 WL 17811335.

8. *See Ruiz*, 2021 WL 5238605, at *3.

9. *See infra* note 35 and accompanying text. For example, a Massachusetts prosecutor's manual instructs prosecutors to call attention to a defendant's demeanor during closing arguments with statements like "[t]he defendant testified—you observed his demeanor" and "[y]ou can consider the witness' demeanor . . . [y]ou can also use your common sense." KIMBERLY A. FOGARTY & ANDREA NARDONE, THE MASSACHUSETTS PROSECUTORS' MANUAL: OPERATING UNDER THE INFLUENCE 116 (8th ed. 2015).

10. *See infra* notes 30–31 and accompanying text. Georgia's pattern jury instructions, for instance, direct the jurors to consider a defendant's demeanor as evidence of criminal intent: "[The] defendant will not be presumed to have acted with criminal intent, but you may find such intention (or the absence of

Furthermore, when judges are asked to clarify the case-specific status of demeanor evidence, they tend—as in *Commonwealth v. Ruiz*—to explicitly bless its consideration.[11]

The reflexive use of demeanor evidence at trial is deeply troubling. It provides legal cover for propensity-based reasoning; it invites juries to convict based on whether a defendant seems like "a person who breaks the law,"[12] rather than the actual facts of the case. By its nature, this opens the door to bias, stereotyping, and cultural chauvinism,[13] subverting the "basic premise," in the recent words of Chief Justice Roberts, that "[o]ur law punishes people for what they do, not who they are."[14] This would be troubling under any circumstances. But it is *especially* troubling when combined with research suggesting that jurors (like all of us) are incapable of extracting useful information about who someone really is from self-presentation, especially across

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it) upon a consideration of words, conduct, demeanor, motive, and other circumstances." 2 GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS § 1.41.11 (4th ed. 2024), Westlaw [hereinafter GEORGIA PATTERN INSTRUCTIONS].

11. *See Ruiz*, 2021 WL 5238605, at *3. In *State v. Barry*, for example, the jury asked: "Can we use as 'evidence' for deliberations our observations of the defendant's actions-demeanor during the court case?" 352 P.3d 161, 164 (Wash. 2015). The trial court responded affirmatively, finding that "evidence includes what you witness in the courtroom." *Id.* On appeal, the Washington Supreme Court affirmed Barry's conviction, holding that no constitutional error occurred. *Id.*

12. Common law courts have a longstanding tradition of prohibiting propensity-based reasoning—a tradition threatened by the use of demeanor evidence at trial. *See* Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and . . . deny [the defendant] a fair opportunity to defend against a particular charge."); People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930) (holding the trial court improperly admitted evidence that the defendant had weapons in his home because the jury may "take the proof of [his character] as justifying a condemnation irrespective of guilt of the present charge"); Buck v. Davis, 580 U.S. 100, 123 (2017) (holding that the district court abused its discretion by "[d]ispensing punishment on the basis of an immutable characteristic").

13. *See infra* Part II.B.

14. *Buck*, 580 U.S. at 123.

cultural and racial lines.[15] In practice, this turns defendant demeanor into a site of judgment that perpetuates and intensifies many familiar pathologies of our criminal legal system.[16] It

15. *See* Teneille R. Brown, *The Content of Our Character*, 126 PENN ST. L. REV. 1, 25 (2021) (explaining that studies have found that people are particularly bad at assessing the behavior of people of different races or ethnicities and that these failures are more likely to be attributed to their fixed characters, rather than to their environment); ALEXANDER TODOROV, FACE VALUE: THE IRRESISTIBLE INFLUENCE OF FIRST IMPRESSIONS 261 (2017) (describing getting over the "illusion" that there is a correspondence between appearance and character as "almost impossible").

16. The American criminal legal system has engaged in racial subordination since its founding and continues to do so today. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 393 n.6 (1856) (enslaved party) ("The only two clauses in the Constitution which point to this race, treat them as persons whom it was morally lawful to deal in as articles of property and to hold as slaves."), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. Early-nineteenth century caselaw further facilitated systemic racism. *See, e.g.*, Darren Lenard Hutchinson, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV 371, 383–98 (2022) (describing caselaw that enshrined institutional racism in the American criminal legal system). Throughout the Civil War and Reconstruction eras, regulation and judicial action gave Black people a subordinate status in the legal system. *Id.* at 387 ("The disregard of Black lives by authorities tasked with enforcing criminal law preserved White supremacy against the disruption caused by the Civil War and Reconstruction."). Latinx and Asian persons have also been subjugated by white persons. WILLIAM D. CARRIGAN & CLIVE WEBB, FORGOTTEN DEAD: MOB VIOLENCE AGAINST MEXICANS IN THE UNITED STATES, 1848–1928, at 28 (2013) (describing prejudice and violence against Mexican Americans); D. MICHAEL BOTTOMS, AN ARISTOCRACY OF COLOR: RACE AND RECONSTRUCTION IN CALIFORNIA AND THE WEST, 1850–1890, at 169–201 (2013) (discussing prejudice and violence against Chinese Americans in California); Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 298 (2009) (examining "recent research" on the lynching of "Latin[x individuals], particularly Mexican Americans in the Southwest"). Today, "[c]riminal justice policies continue to subjugate persons of color, despite the move to race neutrality within the law and the societal embrace of egalitarianism." Hutchinson, *supra*, at 398. According to social scientists, a "new" form of racism exists that is different from previous racism. *Id.* "Contemporary racism legitimizes the unequal racial status quo by portraying Blacks and other persons of color as transgressing 'such traditional American values as individualism and self-reliance, the work ethic, obedience, and discipline.'" *Id.* at 400. This "racial resentment" theory in combination with courts selectively using history substantially impacts litigation. *Id.* at 400, 415. In the criminal justice system, "[a]cademic research finds that racism is a substantial predictor of punitive sentiment among [w]hites, which raises questions about the . . . presumption that racism normally does not influence criminal justice policies." *Id.* at 416. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE

becomes a tool by which members of dominant groups—consciously or not—penalize members of non-dominant groups for failing to appear innocent or credible.[17]

At the same time, eliminating defendant demeanor from trials is not realistic, or even desirable. Besides the obvious difficulty in somehow screening defendants from view, demeanor can supply necessary non-character evidence, such as corroboration of identity or physical capability.[18] And beyond these on-the-ground concerns, there are, as we explore in Part III, more fundamental reasons to allow those on trial to see and be seen by both witnesses and fact finders in the courtroom. In some cases, this safeguards the dignity of the accused; in others, it allows jurors to fully engage with the moral dynamics of the case.[19]

OF COLOR BLINDNESS (2012) (arguing that the criminal justice system in the United States serves as a contemporary system of racial control).

17. *See* Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 165–70 (2020) [hereinafter Simon-Kerr, *Unmasking Demeanor*] (highlighting the problems with relying on demeanor in the courtroom). Other scholars have noted the connection between demeanor evidence and propensity-based reasoning, and we write in the same spirit. Their accounts, however, have largely focused on the way that propensity-based reasoning, when allowable under current evidence law, becomes a vehicle by which jurors come to rely on demeanor evidence. For instance, when the law allows fact finders to consider whether a defendant has a "character for peacefulness" or a witness has a "character for truthfulness," this often means, in practice, that jurors will use demeanor as a (poor) proxy for character. *See, e.g.*, Hillel Bavli, *Character Evidence as a Conduit for Implicit Bias*, 56 UC DAVIS L. REV. 1019 (2023) (arguing that exceptions to the ban on character evidence drive inequality in the U.S. legal system). Our account runs the opposite way: We are interested in the way demeanor evidence facilitates propensity-based reasoning even in settings where such reasoning is formally disallowed.

18. *See infra* Part II.A. For instance, a defendant's demeanor—their size, strength, and ability—may be a useful datapoint when determining whether a defendant had the physical capacity to complete the crime in question.

19. *See infra* Part III.A. A defendant's demeanor can inspire the fact finder to take greater care in exercising moral judgment. *See* James R. Beebe, *Moral Relativism in Context*, 44 NOÛS 691, 714 (2010) (describing in-person interaction as essential to moral assessment). In certain circumstances, a fact finder's positive inferences about a defendant's courtroom demeanor can lead the fact-finder to act outside the ordinary boundaries of the law. Something about the character of the defendant can lead the fact finder to believe that they were worthy of forgiveness or unworthy of punishment—which can create a result wholly unsupported by formal evidence. *See* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1159 (1997) (defining jury nullification as a method for jurors to morally rectify the rule of law by trumping legal rules to meet the common goal of justice).

In this Article, we advocate a prophylactic framework for demeanor evidence, one that recognizes its similarity to other forms of evidence that existing law already identifies as inherently risky.[20] These include, among other things, a defendant's criminal history and sartorial presentation.[21] The idea is not that juries may *never* consider variables like these, but a strong presumption runs the other way; the state must offer case-specific justifications capable, on balance, of overcoming the inherent risk of prejudice.

The same framework should govern demeanor evidence. A defendant's demeanor should be presumptively inadmissible for a propensity purpose, such as to suggest he looks capable of violence or is likely a dishonest person. Of course, some uses of defendant demeanor—for example, to resolve an identification dispute—are legitimate. But many are not, and the risk of illegitimate uses looms over every case; it is endemic to the trial process. In light of this reality, we argue that (1) the state should bear an ongoing burden, as with other forms of inherently risky evidence, to explain why its inclusion is warranted, and (2) ambiguities should resolve in defendants' favor. Thus, if the state wishes to point to the accused's demeanor as evidence relating to credibility, it cannot deploy a propensity-based argument that the defendant's appearance suggests he has a dishonest character. Instead, the state must persuade the court that demeanor offers probative information about whether a defendant is lying in the moment.[22]

Guided by this prophylactic framework, the Article culminates by exploring avenues for concrete reform. At a minimum, courts should stop encouraging problematic uses of demeanor evidence. Beyond that, however, we propose the following affirmative changes:

1. A model evidence rule establishing that demeanor is not evidence—subject to tightly limited exceptions;

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20. *See infra* Part II.

21. *See infra* Part II.C (identifying areas of evidence already deemed inherently risky because they invite jurors to convict a defendant based on their appearance or character); *see also* Old Chief v. United States, 519 U.S. 172, 180–81 (1997) (describing the prejudicial value of a defendant's past convictions); Estelle v. Williams, 425 U.S. 501, 504–05 (1976) (holding defendants may not be required to wear prison jumpsuits during trial).

22. As we describe in Part III.B.1, *infra*, we are skeptical that such a showing is possible.

2. Remodeled jury instructions, which (A) clarify for jurors that demeanor is not evidence and (B) explain that assumptions we make about people based on how they look are often inaccurate and can reflect stereotypes and biases; and
3. Broader ideas for reforming juror education about implicit (and explicit) bias and law school pedagogy.[23]

Of course, law can only do so much.[24] Here, as elsewhere, lasting change requires not just legal reform, but cultural transformation—and we should think creatively about how one catalyzes the other.[25] Law is not powerless in the face of popular conviction; it can highlight sites of dispute, force deliberation, and influence patterns of beliefs.[26] In this area, furthermore, judges are especially well positioned—presiding over trials—to lead by example. We hope, in what follows, to furnish them the tools.

We also seek to make a larger point about the role of criminal trials in our system of government. It is common knowledge today that such trials are rare—that plea bargaining has overtaken our criminal legal system—and we are among the chorus of scholars who, over the years, have lamented this state of affairs.[27] It is also common knowledge that pleas are integral to a system of mass incarceration that targets Black and Brown communities, in particular.[28] We share many of the concerns, and

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23. *See infra* Part III.B.3.

24. *Cf.* CSX Transp., Inc. v. McBride, 564 U.S. 685, 719 (2011) (Roberts, C.J., dissenting) ("Law has its limits.").

25. *Cf.* Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 991 (1997) ("For the world deserves effective change, not just new rules.").

26. *See generally* Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMANS. 35 (2001) (discussing the relationship between law and culture).

27. *See, e.g.*, Kiel Brennan-Marquez et al., *The Trial Lottery*, 56 WAKE FOREST L. REV. 1 (2021) (arguing that the disappearance of traditional criminal trials is problematic and proposing a novel solution); Anna Roberts & Julia Simon-Kerr, *Reforming Prior Conviction Impeachment*, 50 FORDHAM URB. L.J. 377 (2023) (advocating changes to prior conviction impeachment in part to reduce prosecutorial leverage in plea bargaining and eliminate major disincentive to defendant testimony).

28. It is no accident that we refer to a criminal legal system rather than a criminal justice system. *See* Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899, 921–27 (2023) ("By replacing 'justice' with 'legal,' the 'criminal legal system' as a phrase disclaims any suggestion that the system either *is doing* or is *designed to do justice*. . . . Criminal courts are doing

cries of frustration, voiced by scholars and advocates who argue that reform would simply varnish and entrench a broken system of criminal punishment.[29] Nevertheless, we believe our critique is important, even for those with more abolitionist sensibilities, because it goes to the heart of *why* the system is broken—and what a more functional alternative might entail.

In today's world, criminal trials are infected by the very mode of superficial judgment—how someone might appear, out in the world, to a stranger—that formal adjudication aspires to cast aside. When defendants resist the copious pressures of plea bargaining and decide to take their chances at trial, they should be able, at the *very least*, to expect that jurors will focus on what actually happened in the case. Demeanor evidence is not the only culprit standing in the way of this ideal; plenty of other pathologies, in evidence doctrine and more broadly, contribute. But at some level, the improper consideration of defendant demeanor is a bellwether—a paradigm case—because it exemplifies the problem so starkly and so literally. People are not supposed to be punished based on who they are or how they appear. That much should be axiomatic. This Article is about one of the ways our criminal system sells that promise short, and how courts might do better.

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This Article proceeds in three parts. Part I describes how current practice in criminal trials emphasizes demeanor as an important input into fact-finding. It further shows that while some courts have occasionally balked at prosecutorial attempts to focus on demeanor, those courts have misconstrued the problem. Part II makes the argument that demeanor often functions—and always runs a general risk of functioning—as character evidence, putting "defendant demeanor" into a broader category of evidence that the Supreme Court has treated as inherently risky, constitutionally suspect, and presumptively inadmissible. Part III develops solutions. We begin by articulating the other side of demeanor, namely the value to the accused and the trial process of being seen. And we conclude by exploring a web of proposed changes, including a model rule of evidence,

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criminal law, not *criminal justice*. And those tasks are not—or at least need not be—the same.").

29. *See, e.g.*, Hutchinson, *supra* note 16; TODOROV, *supra* note 15.

revised jury instructions, and ideas for legal education, all intended to mitigate the pernicious effects of demeanor evidence.

I. DEMEANOR'S PREEMINENCE AT LAW

At present, as this Part will show, criminal trials often involve explicit emphasis on the demeanor of the accused. Most often, this happens through jury instructions in which judges explicitly direct jurors to attend to the demeanor of the defendant as an important source of information at trial. But arguments by prosecutors are another, often unchecked, source of emphasis on the demeanor of defendants in criminal trials. While some courts have hesitated over instances in which prosecutors have sought to weaponize the defendant's demeanor, as Section I.B describes, their analyses miscast the true nature of the problem.

A. LEGAL EMPHASIS ON DEMEANOR AT TRIAL

Every day, in courtrooms across the country, jurors receive the message that demeanor is a useful, even unparalleled, source of evidence. Judges charge juries to consider a witness's "manner of testifying and demeanor upon the witness stand."[30] They explain that witness demeanor bears on credibility, instructing jurors that a witness's mannerisms and body language cast light on the veracity of their testimony.[31] "Common sense" is

30. 2A INSTRUCTIONS FOR VIRGINIA AND WEST VIRGINIA § 24-439 (2025), LexisNexis. Congress codified this intuitive reliance on demeanor in the Immigration and Nationality Act, which instructs immigration judges to base their credibility determinations on "the demeanor, candor, or responsiveness of the applicant or witness." 8 U.S.C. § 1158(b)(1)(B)(iii). Similarly, pattern jury instructions—the pre-written models judges use to craft case-specific jury instructions—commonly charge the jurors with relying on their own intuitions about a truthful (or deceptive) person's appearance to discern whether the witness is credible. *See* Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U. L. REV. 1331, 1348–52 (2015). For instance, pattern jury instructions for federal courts frequently charge jurors with determining credibility by examining the "manner of the witness while testifying." *Id.* at 1349–50.

31. Pattern jury instructions instruct jurors to rely on a participant's demeanor as proof of veracity. Georgia's pattern jury instructions, for instance, direct the jurors to consider a defendant's demeanor as evidence of criminal intent: "[The] defendant will not be presumed to have acted with criminal intent, but you may find such intention (or the absence of it) upon a consideration of words, conduct, demeanor, motive, and other circumstances." GEORGIA

frequently celebrated.[32] So is "intuition."[33] Whatever the exact language, the takeaway is clear: Jurors are supposed to trust their instincts about how witnesses, including criminal defendants, appear in court.[34]

PATTERN INSTRUCTIONS, *supra* note 10, § 1.41.11. Likewise, pattern jury instructions in Massachusetts instruct jurors to "look at all the evidence, drawing on your own common sense and experience of life" when determining the credibility of a witness. In doing so, the instructions state, jurors "may consider a witness's appearance and demeanor on the witness stand, his frankness or lack of frankness in testifying, whether his testimony is reasonable or unreasonable . . . the degree of intelligence he shows, [and] whether his memory seems accurate." MASS. CONTINUING LEGAL EDUC., INC., CRIMINAL MODEL JURY INSTRUCTIONS FOR USE IN THE DISTRICT COURT *Instruction 2.260 Credibility of Witnesses* (2009), Westlaw.

32. *See* Bennett, *supra* note 30, at 1348–52 (examining how jurors are charged with relying on their intuition and common sense to determine witness credibility—even though those methods are fallible and inaccurate).

33. *See id.*; *see also* Mary R. Rose & Shari Seidman Diamond, *Offstage Behavior: Real Jurors' Scrutiny of Non-Testimonial Conduct*, 58 DEPAUL L. REV. 311, 328–34 (2009) (cataloging ways jurors use non-testimonial demeanor to inform their deliberations and ultimate decisions).

34. Continuing this practice, Rule 52(a) of the Federal Rules of Civil Procedure specifies that appellate courts may not set aside a trial court's findings of fact unless they are "clearly erroneous," and even then, the "reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." FED. R. CIV. P. 52(a)(6). In doing so, the Federal Rules of Civil Procedure amplify the view that a fact finder's instinctual interpretation of a witness's courtroom demeanor is intrinsically valuable to the judicial process. The Supreme Court agrees. In *Anderson v. Bessemer City*, the Court relied on the perceived value between a witness's courtroom demeanor and the reliability of their testimony to describe the rationale for appellate deference to a trial court's finding of fact: "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." 470 U.S. 564, 575 (1985); *see also* Mitchell v. Archibald, 971 S.W.2d 25, 29–30 (Tenn. Ct. App. 1998) (discussing the "time-honored principle" of leaving witness credibility determinations to the trial courts). This pattern is replicated in state courts. In the case *Mitchell v. Archibald*, the Tennessee Court of Appeals declined to re-weigh evidence when the defendant offered a videotape of witness testimony. 971 S.W.2d at 29–30. In doing so, the court argued that "trial courts are best suited to determine the credibility of witnesses" because "trial judges, unlike appellate judges, have an opportunity to observe the manner and demeanor of the witnesses while they are testifying." *Id.* at 29. To them, even a videotape is a poor replica of the experience of observing a witness's in-court demeanor because the recording cannot capture extrinsic inputs that cause a "witness's demeanor, voice inflections, or body language." *Id.* at 30.

This pattern, moreover, is not limited to the content of jury instructions. In practice, two other mechanisms reinforce the idea that demeanor supplies useful evidence—not only of credibility, but also of guilt. The first is the closing argument, during which prosecutors routinely call the jury's attention to defendant demeanor as evidence of wrongdoing, whether or not the defendant took the stand.[35] *United States v. Mendoza* is a prime example.[36] There, the state's summation focused largely on the defendant's calm demeanor during trial.[37] In a climactic moment of the closing argument, the prosecutor pronounced:

> You can look at different people and decide how they act. You can decide what nervousness is and who would get nervous about what. . . . [Y]ou sat here for two days, and you've gotten to look at the defendant. If you were in his seat, would you be as calm as he has been for the last two days?[38]

Likewise, in *Armstrong v. State*,[39] the prosecutor opined to the jury as follows:

> We're making him out—and what he is and what he's shown you is that he's a cold dispassionate killer. When the photos went up, I hope you watched his reaction to the photos of his dead wife and dead fetus. I hope you took notice of that because it's very important.[40]

In both cases, these closing tactics helped secure convictions, which were upheld on appeal despite explicit challenges to

35. For example, in *State v. Hill*, the Ohio Supreme Court held that "[a]n accused's face and body are physical evidence, and a prosecutor can comment on them." 661 N.E.2d 1068, 1078 (Ohio 1996). Similarly, in *Smith v. State*, the Georgia Supreme Court lauded the prosecutor's role in drawing attention to a defendant's demeanor: "[I]t is not improper for the prosecutor to comment in closing argument on a non-testifying defendant's appearance and facial expressions." 669 S.E.2d 98, 104 (Ga. 2008). The practice also lives on in North Carolina, where, in *State v. Brown*, the North Carolina Supreme Court determined that a prosecutor's remarks about a defendant's actions were "rooted in evidence" and properly "related 'to the demeanor of the defendant, which was before the jury at all times.'" 358 S.E.2d 1, 15 (N.C. 1987) (quoting State v. Myers, 263 S.E.2d 768, 773–74 (N.C. 1980)). Likewise, in *Commonwealth v. Smith*, the Massachusetts Supreme Court held that a prosecutor's comment highlighting the defendant's demeanor did not cause an issue because the jury was entitled to observe the demeanor of the defendant during trial. 444 N.E.2d 374 (Mass. 1983).

36. 522 F.3d 482, 490 (5th Cir. 2008).

37. *Id.*

38. *Id*.

39. 233 S.W.3d 627, 638 (Ark. 2006).

40. *Id*.

the use of demeanor evidence.[41] Unsurprisingly, this litigation strategy enjoys broad support among prosecutors.[42]

The second mechanism that works to reinforce the *mythos* of demeanor evidence is post-charge colloquies, which enable juries to solicit legal clarification from the court. When juries explicitly ask about demeanor, judges often take the opportunity, as in *Ruiz*, to emphasize—rather than qualify—the evidential value of a defendant's appearance in court.[43] *Ruiz* itself is paradigmatic. There, despite the fact that Ruiz did not testify, the jury submitted the following question to the judge: "Can we take the defendants['] body language into consideration?"[44] And the judge responded with the following order: "While not evidence, the jury is entitled to consider any observations you made of the

41. *Id*. ("We conclude that the prosecutor's comment was not reversible error. The prosecutor merely directed the jury to recall Armstrong's reaction to the photographs of his dead wife and fetus. This court has held that the prosecution is limited in its argument to the evidence in the record, logical inferences and deductions therefrom, and matters of which judicial notice can be taken."); *Mendoza*, 522 F.3d at 497 ("We conclude that the prosecutor's isolated remarks did not violate any constitutional rights. The remarks were error, but of less than constitutional dimension. It is difficult for us to perceive that the argument had much impact at all. Jurors would not likely have found Mendoza's demeanor at trial to be probative of anything.").

42. *See*, *e.g.*, *Closing Arguments*, N.C. PROSECUTORS' RES. ONLINE (Aug. 26, 2024), https://ncpro.sog.unc.edu/manual/228-4 [https://perma.cc/8CH3-U4JC] ("The prosecutor can also comment on the defendant's behavior and demeanor in the courtroom, as long as he or she does not mention the decision not to testify."); FOGARTY & NARDONE, *supra* note 9, at 116 (instructing prosecutors to call attention to the defendant's demeanor during closing arguments with statements like "the defendant testified—you observed his demeanor" and "you can consider the witness' demeanor . . . you can also use your common sense"); *see also* JULIE RAMSEUR LEWIS & JOHN RUBIN, 2 NORTH CAROLINA DEFENDER MANUAL 33-24 (2020) (alerting defense counsel that courts have generally permitted prosecutors to "comment on the defendant's demeanor in the courtroom, including his or her apparent lack of remorse").

43. For example, in *United States v. Wright*, the court held that the jury may infer guilt from a non-testifying defendant's demeanor, even though it is improper for a prosecutor to directly comment on it during closing arguments. 489 F.2d 1181, 1186 (D.C. Cir. 1973). Likewise, in *Commonwealth v. Ruiz*, the Massachusetts Court of Appeals upheld the trial court's decision to allow the jury to consider the defendant's body language when determining guilt. 178 N.E.3d 901, 2021 WL 5238605, at *1 (Mass. App. Ct. 2021) (unpublished table decision). The Washington Supreme Court also addressed this issue in *State v. Barry* and held that no constitutional error occurred when jurors were instructed that they could use a defendant's demeanor as "evidence" of guilt. 352 P.3d 161, 164 (Wash. 2015).

44. *Ruiz*, 2021 WL 5238605, at *3.

defendants' demeanor during the trial."[45] A conviction quickly followed.[46] Similarly, in *State v. Barry*, the jury asked (also of a non-testifying defendant): "Can we use as 'evidence' for deliberations our observations of the defendant's actions-demeanor during the court case?"[47] To which the court responded, over defense counsel's objections: "[E]vidence includes what you witness in the courtroom."[48] Like Ruiz, Barry was quickly convicted.[49]

All of this, furthermore, operates against the backdrop of a well-known psychological reality: that it is impossible for jurors to insulate judgments of truth, credibility, and culpability—or anything else—from snap impressions of how people appear.[50] In many realms of life, using demeanor and body language as a (poor) proxy for deeper judgments of character is unavoidable. People simply do not know enough about the interior world of others, let alone how that interiority corresponds to external appearance; quick, stereotype-laden generalizations are the best we can do.[51] No jury instruction or court order will change that—we hardly mean to imply otherwise.[52] The point is that the law has a choice to make about how best to *respond* to this psychological reality. And up until now, its default choice has been to condone and intensify, rather than critique or attenuate, the human tendency toward superficial judgment.

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45. *Id*.

46. *Id*. at *1.

47. *Barry*, 352 P.3d at 164.

48. *Id.* at 164, 172–73.

49. *Id*. at 164.

50. *See* Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 582–83 (2008) ("Even when a defendant is not testifying, jurors will watch him or her at the counsel table. Several studies have concluded that a defendant's physical attractiveness (or lack thereof) can influence a jury's verdict. A defendant's fidgeting may also impact the jurors' decisions."); 1 JOHN HENRY WIGMORE, TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 558 (2d ed. 1923) ("[T]he attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory.").

51. *See infra* notes 88–98 and corresponding text.

52. *See* Bennett, *supra* note 30, at 1331–32, 1338, 1364 (describing how jurors inaccurately assume credibility from a witness's demeanor by inferring purpose behind a witness's "tone of voice, facial expressions, body language, gestures, glances, gazes, eye contact, attitude, zeal, confidence, and a host of other 'cues'").

B. UNDERSTATING THE PROBLEM WITH DEMEANOR EVIDENCE

While courts across the country continue to valorize demeanor as evidence, some have refused to join in the unquestioning celebration of demeanor evidence.[53] Yet efforts to rein in the jury's consideration of a defendant's demeanor have, for two related reasons, proven largely ineffectual. First, courts have misdiagnosed the constitutional injury. Second—and somewhat unsurprisingly, given the misdiagnosis—courts have vastly understated the magnitude of the problem.

Start with the nature of the injury. Some courts have suggested that fact finders should not consider a defendant's appearance because it is "outside the record."[54] Unfortunately, this argument is overbroad and thus misses the nature of the problem. There are *many* factual inputs that can influence the jury's view of a case despite falling outside the body of formal evidence.[55] For example, juror preconceptions influence their

53. For instance, during closing arguments in *United States v. Zemlyansky*, the prosecutor asked the jurors to infer guilt from the defendant's in-court crying, stating, "[a]fter [the witness] identifies Mikhail Zemlyansky's voice on that recording, the defendant breaks down and starts crying in open court at that table. And I looked over at you and I know you all saw that. And why was he doing that?" 908 F.3d 1, 14–15 (2d Cir. 2018). The Second Circuit held that these comments were improper but not sufficiently egregious to warrant a mistrial. *Id*. at 17. Likewise, in *United States v. Schuler*, the prosecutor highlighted the defendant's nontestimonial demeanor in the closing argument: "I noticed a number of you were looking at Mr. Schuler while [the] testimony was coming in and a number of you saw him laugh as [those key facts] were repeated." 813 F.2d 978, 979 (9th Cir. 1987). The Ninth Circuit held that these comments constituted reversible error but couched its holding by stating that prosecutorial comments on a defendant's nontestimonial actions do not violate the right to remain silent in every case. *Id*.

54. Justice Abrams' concurrence in *Commonwealth v. Smith* highlighted this point, stating, "prosecutors should only '[d]iscuss the issues, the evidence and the credibility of the witnesses' . . . . Well knowing these principles, this prosecutor appealed to the passions of the jury, went outside the scope of the evidence, and commented on the defendant's silence." 444 N.E.2d 374, 383 (Mass. 1983) (Abrams, J., concurring) (citation omitted).

55. These "outside the record" factual inputs exist both within and outside of the courtroom. For instance, audience inputs—such as a parent bursting into tears or a political demonstration—plainly influence the jury, despite being outside the record. *See, e.g.*, United States v. Wiggins, 708 F. App'x 105, 107 (4th Cir. 2017) (holding the district court did not err in "failing to *sua sponte* take action to cure any prejudice that resulted from a crying spectator"). Likewise, a juror's universe of private experiences informs the ways in which they perform their roles. However, the majority of states allow jurors to use their own

determinations in every case, and yet they are not formally part of the record evidence.[56] Visual aids are another influential trial input that are not formally entered as evidence.[57] How does demeanor differ from these forms of non-evidence? Courts have not explained why demeanor alone, by contrast to other non-evidential inputs to the criminal trial process, is cause for concern.

Other courts, meanwhile, have tried to frame the injury in Fifth Amendment terms: When juries draw negative inferences from a non-testifying defendant's appearance, the argument goes, it can penalize the defendant's choice not to take the stand.[58] This logic is more promising—it does capture a subset of cases, particularly those in which prosecutors actively call

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knowledge and experience to facilitate the thorough examination of objects and arguments made at trial. *See* Kristin A. Liska, Note, *Experts in the Jury Room: When Personal Experience Is Extraneous Information*, 69 STAN. L. REV. 911, 926 n.88 (2017) (citing relevant case law); Bennett, *supra* note 30, at 1346 (noting the importance of demeanor in assessing witness credibility despite the fact that there are no definite rules as to the significance of demeanor evidence); Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 616–17 (1994) (arguing that formalistic views of evidence overlook crucial elements like the role of reasoning, interpretation of demeanor, and active involvement of observers in influencing juries).

56. *See* Allen, *supra* note 55, at 617 ("Objects generally can speak for themselves only metaphorically; human observers typically generate the propositions that the objects would assert, were they able to assert anything.").

57. *See* United States v. Crockett, 49 F.3d 1357, 1362 (8th Cir. 1995) ("[W]e do not encourage the use of [argumentative visual aids] in the future. . . . [I]n a criminal case, the prosecution runs a tangible risk of creating reversible error when it seeks to augment the impact of its oral argument with pedagogic devices."); Tedesco v. Att'y Gen., No. 18-13642, 2021 WL 165102, at *8–9 (D.N.J. Jan. 19, 2021) (rejecting a habeas petition alleging that a PowerPoint presentation featuring photos and positive descriptors of the victim was "inflammatory" because "though charged, [it] did not deprive [p]etitioner of a fundamentally fair trial"); *Minutes of the Meeting of May 6, 2022* (describing the proposed amendment to Rule 611 to "add a provision regulating the use of illustrative aids at trial"), *in* ADVISORY COMMITTEE ON EVIDENCE RULES: AGENDA FOR COMMITTEE MEETING 27, 35 (Oct. 28, 2022), https://www.uscourts.gov/sites/default/files/2022-10_evidence_rules_committee_agenda_book_final_0.pdf [https://perma.cc/G293-MR8U].

58. In *United States v. Pearson*, for example, the Eleventh Circuit held that a prosecutor's comments during closing arguments on a non-testifying defendant's nervousness in the courtroom "constituted an indirect comment on his failure to testify at trial." 746 F.2d 787, 796 (11th Cir. 1984). Similarly, in *State v. Sena*, the court held that a prosecutor's comments on the defendant's courtroom demeanor "had no purpose other than to invite the jury to draw an adverse conclusion from [the d]efendant's failure to get on the stand." 470 P.3d 227, 236 (N.M. 2020).

attention to a defendant's silence—but ultimately, it is woefully under-inclusive. The logic fails to account for the possibility (which we describe at greater length in Part II) that juries might impermissibly rely on a non-testifying defendant's demeanor to impugn the accused's character, not to penalize their silence.[59] And it fails to even touch cases where the defendant *has* taken the stand but is being judged based on demeanor rather than evidence of the defendant's conduct.[60]

Given these diagnostic missteps, it is no surprise that even courts recognizing some problems with using demeanor as evidence of guilt have downplayed the gravity of the injury from such usage. Courts that have expressed abstract worry about defendants being convicted on the basis of appearance have often responded with a version of harmless error analysis.[61] As in other areas of criminal procedure, this effectively deprives defendants of a meaningful remedy on appeal, and it vitiates any disciplining effect on lower courts and prosecutors.[62] *United States v. Mendoza* is exemplary.[63] There, the court held that the "courtroom demeanor of a non-testifying criminal defendant is an improper subject for comment by a prosecuting attorney," and that the lower court was wrong to allow such comment.[64] But the court went on to conclude that the error was harmless because "it is inevitable that jurors will observe a defendant at counsel

59. *See infra* Part II.

60. Apart from these conceptual difficulties, and perhaps more importantly, the "penalizing silence" theory has simply been operationalized very narrowly in practice. *See, e.g.*, Bishop v. Wainwright, 511 F.2d 664, 668 (5th Cir. 1975) ("Bishop alleges that the prosecutor, in closing to the jury, commented on Bishop's failure to take the stand, thus prejudicing this constitutional protection against self-incrimination. We have carefully reviewed the prosecutor's closing statements and understand them to be a comment upon Bishop's expressionless courtroom demeanor, rather than his failure to take the stand. Such comment raises no habeas corpus issue.").

61. *See infra* notes 63–67 and accompanying text.

62. *See generally* Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791 (2017) (advocating for reform of harmless error review).

63. United States v. Mendoza, 522 F.3d 482, 490 (5th Cir. 2008) (detailing the prosecutor's references to the defendant's demeanor during closing arguments).

64. *Id.* at 491.

table during the course of the trial."[65] In other circumstances, furthermore, courts have identified improper consideration of demeanor at trial—often stemming from closing arguments—but they have deemed limiting instructions sufficient to render the impropriety harmless.[66] From a defendant's perspective, of course, both routes lead to the same ultimate end: no recourse on appeal.[67]

Both the widespread emphasis on defendants' demeanor in criminal trials and courts' limited conception of the problem when they do identify one are deeply problematic. One intervention that would go some way towards addressing the infirmities of demeanor evidence is for courts and prosecutors simply to stop calling attention to demeanor as evidence against defendants in criminal trials. Although it is laudable (if too rare) when courts decline to sanction the use of demeanor as evidence, their reasons for doing so fail to identify the heart of the problem: that demeanor evidence invites unfair—and, in many cases,

65. *Id.* (holding that the prosecutor's comments on the defendant's nontestimonial demeanor constituted harmless error because it was "inevitable" that the jury would consider a defendant's demeanor during deliberation).

66. *See, e.g.*, United States v. Zemlyansky, 908 F.3d 1, 17 (2d Cir. 2018) (holding that a prosecutor's closing argument comments on a defendant's laughter were improper, but harmless); State v. John B., 925 A.2d 1235, 1239–40 (Conn. App. Ct. 2007). In *State v. John B.*, for instance, the prosecutor invited the jury to consider the defendant's nontestimonial demeanor during closing statements by saying, "you're here to observe, to scrutinize, to judge credibility. What were your observations of this defendant? Think about that when you go back in that jury deliberation room?" *Id.* at 1240. The defense challenged the prosecutor's closing statement as improper, and the court agreed. *Id.* at 1239–40. To cure this violation, the court issued the following limiting instruction to the jury: "As I've told you, the lawyers are not witnesses. Their arguments are not evidence in the case. How the defendant appears or doesn't appear here in court has absolutely no bearing on the issues you are about to decide. It is not the evidence in this case. You are not to base your decision in any sense whatsoever on how the defendant appears or doesn't appear here in the courtroom. I'm instructing you to ignore those comments." *Id.* at 1240. The jury convicted the defendant, and the defendant appealed, arguing that the prosecutor's statements deprived him of a fair trial. *Id.* at 1241. The Appellate Court of Connecticut agreed that the prosecutor's argument was improper but nevertheless held that it did not deprive the defendant of a fair trial because "the impropriety was not severe" and the "curative measures taken . . . were particularly strong." *Id.* at 1244.

67. *See* Murray, *supra* note 62, at 1798–99 (describing how harmless error review, as currently applied in criminal cases, can function to deprive defendants of meaningful remedies on appeal by prioritizing the outcome of the trial over procedural violations).

unconstitutional—forms of propensity reasoning. For reasons we explore more systematically in the next Part, criminal procedure doctrine can and should address this problem more directly.

II. REFRAMING THE PROBLEM: DEMEANOR AS PROPENSITY EVIDENCE

At some level, it comes as little surprise that the infirmities of demeanor evidence have escaped diagnosis. Those infirmities are fundamental—and fundamental things have a way of eluding law's grasp.[68]

In the criminal context, the problem with demeanor evidence is that it invites a verboten form of propensity-based reasoning. It risks prompting jurors to infer, from the defendant's demeanor, a generalized propensity toward criminal conduct—and to deem the defendant guilty on *that* basis rather than the specific facts of the case.[69] This problem is not foreign to evidence law. In fact, the prohibition on "propensity evidence" has deep historical roots and is a mainstay of the Federal Rules of Evidence (FRE) (and corresponding state-level regimes), as well as surrounding constitutional law.[70] The problem is especially acute, however, in the context of demeanor evidence, given the cultural and racial dynamics at play in the jury's evaluation of the defendant's appearance. Humans are notoriously bad at extracting useful information about how other people "actually are" from the way they appear.[71] Instead, cognitive science has

68. *Cf.* Louis Michael Seidman, *State Action and the Constitution's Middle Band*, 117 MICH. L. REV. 1 (2018) (proposing that the law sometimes has trouble seeing injuries that are so wide-ranging and pervasive, they simply dissolve into the background of state power).

69. *See* FED. R. EVID. 404(a) (prohibiting use of character to prove a person acted in accordance with that character). When discussing the inadmissibility of general character evidence, the Supreme Court addressed the risk of its inclusion, stating that "[t]he inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Michelson v. United States, 335 U.S. 469, 475–76 (1948).

70. David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1162 (1998) (describing character evidence prohibition as "[o]ne of the oldest principles of Anglo-American law").

71. *See* Brown, *supra* note 15, at 25 (explaining that studies have found people are particularly bad at assessing the behavior of people of different races

shown that our virtually insurmountable tendency is to assess others' demeanor through the lens of our own cultural backgrounds.[72] This turns the enterprise into an unbridled means of reinforcing cultural hierarchy, even as it is depicted in law as a valued part of fact-finding.

Nevertheless, courts have identified some follow-on implications of the prohibition on propensity-based assessment of defendants, resulting in a useful but scattershot doctrine. The main goal of this Part, accordingly, is clarification. *First*, we explain why demeanor evidence poses an inherent risk of propensity-based reasoning. *Second*, we show that current doctrine, though haphazard, tracks a clear organizing principle. With respect to certain kinds of evidence, the Supreme Court has adopted a prophylactic approach to "inferential risk" management.[73] This puts the burden on the state to explain why a defendant *was not* unduly prejudiced instead of requiring defendants to demonstrate prejudice case-by-case. *Third*, we apply this framework to demeanor evidence in anticipation of a more elaborate set of reform proposals in Part III. Demeanor is an "inherently risky" input in the trial process; like criminal history, sartorial presentation, and other variables that impact the optics of a defendant's case, demeanor risks prompting the jury to dole out punishment on the basis that someone seems like a criminal.

None of this means that consideration of a defendant's demeanor should be categorically disallowed (even assuming that were practicable). But it *does* mean, as with other forms of inherently risky evidence, that courts should err on the side of limiting the prejudicial impact of demeanor—by putting the burden on the state to justify its inclusion at trial, not the other way around.

A. DEMEANOR'S PROBATIVE VALUE

As with any form of evidence, demeanor may be relevant to the underlying legal dispute in different ways. Sometimes, demeanor evidence can address discrete, case-specific issues, such

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or ethnicities and are more likely to be attributed to their fixed characters rather than to their environment); TODOROV, *supra* note 15, at 261 (describing getting over the "illusion" that there is a correspondence between appearance and character as "almost impossible").

72. *See* Brown, *supra* note 15, at 25.

73. *See infra* Part II.C.

as identification. If, for example, there is a dispute as to whether the person Witness *X* observed at the crime scene *actually was* the defendant, demeanor may be a useful data point; the jury could, at least in principle, come to a richer view of the question by asking whether Witness *X*'s description of the unidentified person "matches" the observable facts about the defendant's demeanor.

Perhaps the most common justification for demeanor evidence is that it facilitates assessment of witness credibility. This is true in two different ways. First, demeanor is imagined to be relevant to whether a witness is, contemporaneously, telling the truth; it is treated, in many jurisdictions, as evidence of real-time truthfulness.[74] Second, demeanor is imagined to be relevant to a witness's *propensity* for truthfulness.[75] In spite of Rule 404's prohibition on character evidence, Rules 608 and 609 explicitly invite the jury (under certain circumstances) to consider a witness's "character for truthfulness or untruthfulness" when deciding whether or not to credit their testimony;[76] alongside other indicia of someone's general inclination toward truthfulness or untruthfulness, demeanor is typically treated as relevant to this question.[77]

The last paragraph resorted to unfortunate, passive-voice-suffused phrases ("imagined to be relevant") to describe the relationship between demeanor and credibility. This was not an accident: It reflects the fact that the two of us, like many evidence scholars, are skeptical that demeanor is germane to credibility in either of the orthodox senses. The first theory relies on a mistaken belief, amplified by popular culture, that people can "lie detect" by observing the subtleties of others' behavior. In fact, study after study has confirmed that no tell-tale external

74. Simon-Kerr, *Unmasking Demeanor*, *supra* note 17, at 162, 173 (arguing that despite demeanor evidence being a central input according to U.S. credibility jurisprudence, it is "a poor proxy for truthfulness").

75. *Id.* at 160 ("For the legal system, however, the mask requirement contravenes a central tenet of this country's credibility jurisprudence: that demeanor is fundamental to assessing the credibility of witnesses.").

76. FED. R. EVID. 608(a); FED. R. EVID. 609(a).

77. Simon-Kerr, *Unmasking Demeanor*, *supra* note 17, at 161 ("Demeanor is understood to be a guide to a witness's credibility in the sense that we can 'read' it for clues to a person's truthfulness.").

manifestations of lying exist.[78] People are worse at detecting lies if they focus on demeanor as opposed to audible cues.[79] The belief that demeanor is useful in lie-detection is just that: a sticky cultural myth.[80] Furthermore, the idea that demeanor can enlighten observers about whether a stranger *generally tends to tell the truth* is, if anything, even more tenuous. Courts cling to the bromide that demeanor is "one of the best guides available" to a witness's reliability.[81] Their often-repeated claim is that it helps jurors decide if witnesses are "worthy of belief."[82] But the reality is that jurors (like all of us in everyday life) are incapable of extracting high-value information about general inclinations—regarding honesty or anything else—from the way strangers self-present.[83] The signal-to-noise ratio is simply too low, and the

78. *See* Aldert Vrij et al., *Reading Lies: Nonverbal Communication and Deception*, 70 ANN. REV. PSYCH. 295, 307–08 (2019) (explaining that since 2006, no research has shown that observing behaviors alone leads to improved accuracy of lie detection).

79. Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgements*, 10 PERSONALITY & SOC. PSYCH. REV. 214, 230–31 (2006) (explaining the findings of a meta-analysis that revealed an individual's ability to detect deceit may be hindered by paying attention to visual cues as compared to auditory and audiovisual cues).

80. *See* Albert Lee et al., *Fear Goliath or David? Inferring Competence from Demeanor Across Cultures*, 46 PERSONALITY & SOC. PSYCH. BULL. 1074, 1075–76 (2020) (finding that North American cultures expect a person's outward appearance to align with their inner reality); TODOROV, *supra* note 15, at 261 (describing getting over the "illusion" that there is a correspondence between appearance and character as "almost impossible").

81. Broad. Music, Inc. v. Havana Madrid Rest. Corp., 175 F.2d 77, 80 (2d Cir. 1949) ("Demeanor, to be sure, is no infallible guide to reliability of testimony; yet, as matters now stand, it is one of the best guides available."). As one of us has observed, "[o]ne might expect this built-in imperviousness to verification to have elicited attention from courts or commentators, but that attention has been rare." Julia Simon-Kerr, *Credibility in an Age of Algorithms*, 74 RUTGERS U. L. REV. 111, 129 (2021) [hereinafter Simon-Kerr, *Credibility in an Age of Algorithms*].

82. *See* Simon-Kerr, *Credibility in an Age of Algorithms*, *supra* note 81, at 125–30 (highlighting the long-standing common law emphasis on witness demeanor for juries determining their credibility). *See, e.g.*, Mattox v. United States, 156 U.S. 237, 259 (1895) (emphasizing the importance of observing a witness's demeanor during cross-examination for jurors to assess their credibility); Maryland v. Craig, 497 U.S. 836, 845–46 (1990) (holding that the right to confrontation includes not only personal examination of a witness but the ability to observe their demeanor, which helps the jury assess credibility).

83. Instead, this allusion to worthiness—as one of us has shown systematically in other work—is really a way to validate making judgments based on

susceptibility to cultural bias too high, to draw meaningful conclusions about "truthful character" from body language, appearance, and affect.[84]

Given all this, there is good reason to be skeptical that demeanor *ever* helps jurors assess "witness credibility," and we think courts would be justified in rejecting demeanor-as-credibility evidence.[85] For present purposes, however, we do not rule out the possibility that, in *some* circumstances, demeanor may convey useful information about the believability of testimony;

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assumptions about a witness's character. *See generally* Julia Simon-Kerr, *Law's Credibility Problem*, 98 WASH. L. REV. 179 (2023); Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152 (2017) (arguing that impeachment rules measure social conformity rather than promoting truth-seeking); Simon-Kerr, *Credibility in an Age of Algorithms*, *supra* note 81 (discussing the confusion around credibility's function in the law). While early jurists may have been seeking to openly embrace the connection between worthiness of belief and character, modern courts repeat this maxim without appearing to understand that they are, in fact, perpetuating a doctrine that invites judging witnesses based on their perceived characters—on social conceptions of how worthy they appear of being believed.

84. *See* Simon-Kerr, *Unmasking Demeanor*, *supra* note 17, at 165–68 (describing research suggesting that outward appearance does not assist in lie-detection).

85. *See id.*; *see also* Max Minzner*, Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557 (2008) (arguing that the law has not incorporated social science on demeanor); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 7–14 (2000) (discussing social science theories questioning the jury's ability to effectively judge demeanor and thus credibility in witnesses). Furthermore, there is significant social science research backing these claims. *See* Jeremy A. Blumenthal, *A Wipe of The Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1190–94 (1993) (discussing social science research on cues that indicate perceived deception); Randy J. McCarthy & John J. Skowronski*, What Will Phil Do Next? Spontaneously Inferred Traits Influence Predictions of Behavior*, 47 J. EXPERIMENTAL SOC. PSYCH. 321, 330–31 (2011) (finding behavior predictions were made based on spontaneous inferences that were often inaccurate); Victoria K. Lee & Lasana T. Harris, *How Social Cognition Can Inform Social Decision Making*, FRONTIERS NEUROSCIENCE, Dec. 2013, at 1, 3 (finding forming character impressions of others was significant to human ancestors decision process and today it is reinforced by social learning where social information is incorporated into the decision-making process); Peter Mende-Siedlecki, *Changing Our Minds: The Neural Bases of Dynamic Impression Updating*, CURRENT OP. PSYCH., Dec. 2018, at 72 (finding that initial social impressions are rapidly revised based on new information resulting in dynamic brain learning); Harriet Over & Richard Cook, *Where Do Spontaneous First Impressions of Faces Come From?*, COGNITION, Jan. 2019, at 190, 194–95 (finding some cultural devices may reinforce trait stereotypes inadvertently).

exceptional cases can be imagined. Suppose, for instance, that a trial is exceptionally lengthy and a witness testifies for long enough that the jury gets a firm sense of how the witness typically behaves. If the witness's body language then differs markedly during one piece of testimony, demeanor might be a sufficiently particularized input that it gives the jury *something* to grasp beyond mere stereotypes about "normal" behavior (though the nature and quality of that "something" may be contestable). Even in cases like this, however, it should be the state's burden to explain why demeanor is likely to be (or actually was) relevant to the credibility of a testifying defendant in a particular case—not the defendant's burden to argue for inadmissibility.[86]

B. THE RISK OF UNFAIR PREJUDICE

For the moment, however, let us bracket the (potentially) legitimate uses of demeanor evidence and explore the other side of the coin. The problem with demeanor evidence is simple, and very familiar to evidence law: It invites jurors to authorize punishment based on the *kind of person* a defendant appears to be. Or, put a little more technically: the risk is that jurors will (1) infer—rightly or wrongly—that the defendant has a generalized propensity toward criminal conduct, and (2) convict the defendant partly (or entirely) on *that* basis, rather than the actual facts of the case.

To bring this risk alive, consider how defendant demeanor operates as an evidential input. The function of demeanor evidence is to signal characteristics to an observer. Those characteristics may be physical: variables like skin color, gender presentation, and size.[87] Or they may be psychical: variables like identity, personality, and ideational patterns. For demeanor to convey useful information about these latter characteristics, observers must be able to draw meaningful inferences about interiority from outward appearance.[88] This requires

86. *See infra* Part III.

87. *See infra* Part II.C; *see also infra* Part III. As will be discussed more thoroughly in subsequent sections, demeanor has non-character evidentiary functions and may simply be evidence. However, demeanor is not evidence of character.

88. *See, e.g.*, Brown, *supra* note 15 at 6–7 ("Humans are so motivated to infer people's traits that, in the absence of information about how others have behaved, we instead rely on crude proxies such as race, dress, accent, and facial features to predict their personalities.").

generalization.[89] The way demeanor provides "access" to character is by enabling an observer (1) to see (or assume) the presence of physical attributes that (2) suggest the presence of psychical characteristics based on preexisting assumptions about relevant correlations.[90]

This analytic operation poses an inherent risk of prejudice, because it opens the door, by its nature, to generalized inferences of "bad character." Of course, not all inferences drawn from demeanor operate at this high a level of generality; it is possible to infer more specific psychical characteristics, positive or negative, from physical attributes. But that is just the point: The *risk* associated with inferences drawn from demeanor is that they will operate at a misleadingly high level of generality, leading observers to believe they have learned something about a person's *general* inclinations, such as whether the observed person is "good" or "bad" writ large, and to draw adverse conclusions about specific cases on that basis.

Consider the example discussed above: credibility. In everyday life, we often believe ourselves to be capable of assessing the trustworthiness of people based on physical attributes. Cognitive science suggests this experience is largely illusory; humans, as we said, turn out to be terrible honesty detectors, especially across cultural lines.[91] Here, however, the point is about the *form* of inference at work. Whatever the scientific merits or demerits of inferring, based on physical attributes, that someone has a propensity for truthfulness (or the opposite), that inference is

89. *See* Kiel Brennan-Marquez, *"Plausible Cause": Explanatory Standards in the Age of Powerful Machines*, 70 VAND. L. REV. 1249, 1277 (2017) ("Although it is true that all evidence relies, at some level, on generalization, a meaningful line can be drawn between inferences that merely draw predictions from observed facts and inferences that purport to explain those facts. Explanatory power, in other words, is not an epistemic illusion."); *see also* FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 7–25 (2003) (discussing the question of whether we can generalize about members of a group on the basis of statistical tendencies of that particular group).

90. *See* Simon-Kerr, *Unmasking Demeanor*, *supra* note 17, at 158, 165–68 ("[I]t is difficult to move beyond entrenched stereotypes, such as the belief that a liar will look away when telling a lie. . . . [T]he belief in demeanor as a lie-detection tool is reinforced by being shared and communicated so prevalently in the culture."); *see also* Brown, *supra* note 15, at 23–24 ("Numerous psychological studies confirm that when people hear about someone's behavior, they will tend to infer something about that person's character and will use that dispositional inference to predict how the person will later behave.").

91. *See supra* Part II.A.

more granular than an inference of generalized propensity for wrongdoing. In other words, an observer may be right or wrong—and empirically, they are probably wrong—in their assessment of someone's propensity for truthfulness. But either way, that assessment is more specific, and more susceptible of falsification, than a general assessment of "bad character."

But it gets worse. In this particular setting, general assessments of "bad character," in addition to being epistemically fraught, are closely indexed to cultural hierarchy. The evaluation of demeanor invites observers from dominant cultural backgrounds to penalize people from non-dominant backgrounds. The risk of a demeanor-based penalty is particularly acute along racial lines, but it is not limited to that context. Demeanor penalties can also operate along other dimensions of cultural signification, such as gender, class, religion, and disability. Not only is this intrinsically unfair, it also tends to exacerbate existing pathologies and inequalities in the criminal legal system.

Critical race theorists have long argued that this creates penalties for Black witnesses in the courtroom.[92] As these and other scholars have shown, legal spaces, and particularly courtrooms, still adopt as neutral the white, male baseline.[93] Codes of dress and decorum, a judiciary that still skews white and male, and the hierarchical and tradition-bound nature of legal practice itself all help to subtly reinforce this norm.[94] Legal proceedings

92. *See, e.g.*, Amanda Carlin, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450, 476–77 (2016) (describing the emphasis on demeanor as a mechanism for reinforcing penalties for nonwhite racial performance in the courtroom). Rand, *supra* note 85, at 42, 53–54 (describing the roles of bias, stereotypes, and motivation in evaluating Black witness credibility); *see also* Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (2017) (challenging the assumption that evidence law applies equally to all persons and revealing how evidence law structurally disadvantages people of color).

93. *See* Carlin, *supra* note 92, at 476–77 (describing the increased scrutiny women of color witnesses face in appearing believable).

94. *See generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (Richard Delgado & Jean Stefancic eds., 10th Anniversary ed. 2006) (discussing the role of race, specifically "Whiteness" in American law). Additionally, Carlin's *The Courtroom as White Space* succinctly lays out the history that shaped the norm of the white courtroom, from the antebellum laws keeping slaves from testifying against white individuals to the rules that have continued to grow out of the all-white context that reinforce the value of whiteness in the courtroom. Carlin, *supra* note 92, at 453.

also may reward appearances and methods of communicating that are closest to this white male norm.

Scholars have described this as a "demeanor gap" along lines of race and also gender.[95] The demeanor gap incorporates stereotypes about Black people, such as that they are less intelligent or honest, or have a propensity for violence.[96] In this sense, a judge who tells jurors to pay careful attention to a witness's demeanor as an aid to fact-finding is not offering a neutral instruction. Instead, the judge is instructing jurors to use their own acculturation to assess how a witness's demeanor lines up with what they are hearing about the witness's conduct or the likelihood that they are telling the truth. And in a society in which racial and other stereotypes are still pervasive, aspects of the witness's outward appearance, such as the color of their skin or their natural hair, may influence whether a fact finder believes that person's narrative.[97] Indeed, there is evidence that even as an aid in finding the most neutral of facts, such as a person's height, race plays a problematic role. For example, research has found that "people perceive young Black men as taller, heavier,

95. Rand, *supra* note 85, at 42, 53–54 (coining the term the "demeanor gap" and concluding that it does in fact impact cross-racial lie detection accuracy); Carlin, *supra* note 92, at 474–77 (discussing the "demeanor gap").

96. *See* Rand, *supra* note 85, at 42 (detailing the ways in which stereotypes about Black people play a role in witness believability); *see also* Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 329–31 (1996) (describing racial implications of inferring truthfulness in the courtroom setting).

97. One much-studied example of the influence of demeanor and race on fact finders comes from the trial of Trayvon Martin and the prosecution's star witness, Rachel Jeantel. *See* Carlin, *supra* note 92, at 452. Despite living in Miami her entire life, Jeantel was painted as outsider of Haitian and of Dominican descent. *Id.* Jeantel was uncomfortable while on the stand and the defense counsel for Zimmerman used her discomfort to paint her as rude and disrespectful, diminishing her credibility with the fact finder as well as the public. *See, e.g.*, Regina N. Bradley, *To Sir, with Ratchety Love: Listening to the (Dis)Respectability Politics of Rachel Jeantel*, SOUNDING OUT! (July 1, 2013), http://soundstudiesblog.com/2013/07/01/disrespectability-politics-of-rachel-jeantel [https://perma.cc/V39U-6PW2] ("Because her testimony operated outside of normal constructs of witness etiquette and respectability, it was greeted with a hailstorm of controversy paralleling the rawness of responses to scripted reality shows. The shallowness of 'critique' of Jeantel—whom, it must be continually repeated, is not on trial—was disgusting.").

more muscular, more physically formidable and more capable of physical harm than young White men of the same actual size."[98]

To return to Ruiz's case, it seems likely that something about Ruiz as he sat in the courtroom suggested to the jury that he was more likely to have been selling drugs than Delacruz.[99] It is not difficult to identify a pervasive stereotype that could have triggered that conclusion, even as Ruiz sat silently in the courtroom.[100] At the time of Ruiz's trial, Donald Trump was busy promulgating the stereotype of Latino men as illegal immigrants here to commit crimes from the platform of the presidency of the United States.[101] Beyond race and gender, demeanor can convey other stigmatizing information, such as a defendant's social class or apparent disability.[102]

What is more, the link between demeanor and cultural stereotyping is very difficult to guard against, even for observers who actively wish to do so. Many of the "already-biased" aspects of demeanor come back to ineluctable features of how human cognition works. As Professor Teneille Brown puts it, "we cannot

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98. John Paul Wilson et al., *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCH. 59, 60 (2017).

99. Commonwealth v. Ruiz, 178 N.E.3d 901, 2021 WL 5238605, at *1 (Mass. App. Ct. 2021) (unpublished table decision).

100. *See, e.g.*, Monica Chawla, *"Show Me Your Papers": An Equal Protection Violation of the Rights of Latino Men in Trump's America*, 34 TOURO L. REV. 1157, 1187 (2018) ("By the 2000s, Latino males were equated with drug cartels as either those trafficking drugs or those being smuggled with drugs.").

101. During the time of Ruiz's trial, Donald Trump was associating Latino men, particularly Mexican Latino men, as "'faceless,' with no other identity than that associated with their criminal record—typically they are drug traffickers/human smugglers and/or gang members." Anahí Viladrich, *"American Tales of Heroes and Villains": Donald Trump's Framing of Latinos During COVID-19 Times*, NAT'L LIBR. OF MED. (June 16, 2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10290930 [https://perma.cc/NYQ7-CH99] (a qualitative analysis of Trump speeches and public documents from 2020). Trump additionally praised Hispanic Border Patrol agents "who keep the 'bad hombre' away" consistently at all of his in-person appearances. *Id. See also* Scott Horsley, *FACT CHECK: Trump, Illegal Immigration and Crime*, NPR (June 22, 2018), https://www.npr.org/2018/06/22/622540331/fact-check-trump-illegal-immigration-and-crime [https://perma.cc/3FT7-DBEE] (describing Trump's frequent discussion of border-related policies, especially narratives regarding drugs and illegal immigrants).

102. *See* Brown, *supra* note 15, at 6 (discussing how humans infer traits based on proxies such as "race, dress, accent, and facial features").

not make character inferences."[103] This is not a bad thing, per se. From an evolutionary perspective, for example, the human inclination to "database" strangers via character inferences makes a lot of sense; it is likely related to most people's reflexive ability to recognize and remember faces.[104] This process helps us form complex societies as we can both recognize our friends and acquaintances and make accurate predictions about their behavior.[105]

Whatever its neurological origins, however, our impulse toward propensity-based reasoning also encourages the false assumption that character is stable and that people we know will inevitably behave in a particular way consistent with our impression of who they are. It may also lead to fundamental attribution errors whereby we falsely assume that behavior is driven by character and that future behavior will correspond to character.[106] Accordingly, even when we have accurate information about the behavior of others, we may falsely believe that the behavior signifies a character trait rather than a situationally motivated behavior and make wrong assumptions about a person's future conduct based on those character-based conclusions. Indeed, Professor Brown argues that this is the scientific basis for the lay intuition that provided the motivation for character-propensity prohibition.[107]

Particularly when we seek to assess people about whom we know very little, human cognition presents even more barriers to accurate fact-finding. Our brains work to make connections

103. *Id*.

104. *See* Nikolaas N. Oosterhof & Alexander Todorov, *The Functional Basis of Face Evaluation*, 105 PROC. NAT'L ACAD. SCIS. 11087, 11091 (2008) ("These compelling impressions are constructed from facial cues that have evolutionary significance. The accurate perceptions of emotional expressions and the dominance of conspecifics are critical for survival and successful social interaction."); *see also* Over & Cook, *supra* note 85, at 190 (discussing theories for how spontaneous first impressions of faces occur).

105. *See* TODOROV, *supra* note 15, at 201–02 (describing how when we have "only information on appearance, we do our best to infer the intentions and capabilities of others," and explaining that "[t]hese impressions are an essential part of our social intelligence, part of our quest to know others").

106. Brown, *supra* note 15, at 23–24 ("Numerous psychological studies confirm that when people hear about someone's behavior, they will tend to infer something about that person's character and will use that dispositional inference to predict how the person will later behave.").

107. *Id.* at 23–25.

between appearance and character when we form impressions of strangers, but the data that we rely on is often spurious in these situations. We will be inclined to attribute character traits of a friend to a stranger who looks like that friend. We are more benevolent towards faces that look like members of our tribe. Because of these cognitive processes, how we react to the faces of strangers "mainly reflect[s] our [own] circumstances: cultural upbringing, wealth, social class, peer groups, and aspirations."[108] In other words, we inevitably think by using "crude proxies" for actual information about other people.[109] As Professor Brown writes, we use a person's "race, dress, accent and facial features to predict their personalities [and] infer whether [they are] threatening, kind, intelligent or trustworthy" all without realizing we are doing so.[110]

But it gets even worse, at least in the criminal context. Not only do humans readily, often unconsciously, draw inferences about someone's personality, intelligence, trustworthiness, and other characteristics on the basis of superficial features; we also move quickly from these kinds of inferences to *even more general* assumptions about how predisposed someone is to "break the law."[111] And it is this mode of reasoning, we will see below, that existing doctrine has specifically sought to guard against.

C. THE CONSTITUTIONAL LAW OF "INFERENTIAL RISK"

Even assuming that consideration of defendant demeanor poses all the risks outlined above, it does not follow that demeanor evidence should be subject, by category, to heightened regulation during the trial process, let alone that it should be barred outright. After all, the problem of evidential prejudice is old, persistent, and well-trod. And law's general approach to managing that problem is via some combination of (1) limiting instructions, crafted to discourage juries from indulging in forbidden lines of reasoning, or (2) case-specific challenges, typically framed in the language of Rule 403.[112] The general

108. TODOROV, *supra* note 15, at 261.

109. Brown, *supra* note 15, at 6.

110. *Id.* at 6–7.

111. *Id.*

112. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice . . . .").

approach to evidential prejudice, in other words, is *not* to regulate a type of evidence by category.[113] It is to identify specific risks of prejudice case-by-case, and to require the party seeking to keep the evidence out, here the defendant, to explain why the risk is sufficiently great to outweigh the countervailing probative value.[114]

Case-specific demonstrations of prejudice are, indeed, the default paradigm. But the paradigm meets with a number of important exceptions. With respect to some categories of evidence, the Supreme Court has made clear that case-specific balancing, beginning from a presumption of admissibility, is *not* a sufficient answer to the problem of evidential prejudice.[115] Instead, it has recognized a heightened risk of unfairness to criminal defendants across the board, and it has adopted a more prophylactic approach to the regulation of evidence. We believe demeanor fits this pattern.

A cornerstone of our legal system is that criminal law "punishes people for what they do, not who they are."[116] Echoing centuries of common law,[117] FRE 404(a) flatly prohibits adducing a

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113. For example, Rule 403's balancing of the probative value and the need for evidence against the risk of unfair prejudice likely to result from its admission limits specific incidents of prejudice on a case-by-case basis. *See* FED. R. EVID. 403.

114. In fact, even Rule 609 has this structure, just with different balancing tests in mind. *See* FED. R. EVID. 609. Although the rules in general are more categorical (in the sense that particular input-variables necessarily trigger different legal tests), we're still talking about consideration of prejudice case-by-case.

115. *See infra* Part II.C.

116. Buck v. Davis, 580 U.S. 100, 123 (2017).

117. *See, e.g.*, The Trial of Henry Harrison (1692) 12 How. St. Tr. 834, 864 (Eng.). After the prosecution tried to introduce character evidence, Chief Judge Holt said, "[h]old, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter." *Id.* Similarly, in *Hampden's Trial* in 1683, the Chief Judge prohibited character inferences: "[If] a person was indicted of forgery, we would not let them give evidence of any other forgeries, but that for which he was indicted, because we would not suffer any raking into men's course of life, to pick up evidence that they cannot be prepared to answer to." The Trial of John Hampden (1684) 9 Cob. St. Tr. 1054, 1103 (Eng.); *see also* Erik D. Ojala, *Propensity Evidence Under Rule 413: The Need for Balance*, 77 WASH. U. L.Q. 947, 953–57 (1999) (describing the early common law origins of the prohibition against propensity evidence). Early American courts, furthermore, often incorporated the spirit of this prohibition, though they typically described character evidence as irrelevant, rather than

defendant's general propensity for criminal conduct to prove they were more likely, "on a[ny] particular occasion," to have committed a crime.[118] Unlike other areas of the "character evidence" regime, such as witness credibility,[119] this prohibition is categorical. In some circumstances, a defendant may voluntarily open the door to discussion and evaluation of their own character.[120] But there are no true exceptions here—and with good

problematic in spite of its relevance. *See, e.g.*, Rex v. Doaks, Quincy's Mass. Reps. 90, 91 (Mass. Super. Ct. 1763) (reporting a case where the court prohibited the King's attorney from introducing character evidence); State v. Odel, 3 Brev. 552, 552 (S.C.L. 1816) (holding that evidence of past, similar crimes could not be introduced because they were not relevant; stating that evidence of crimes "other than that with which the prisoner stood charged, ought not to have been admitted, unless it went directly to prove him guilty of that offence"). *See generally* Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938) (exploring inconsistencies in early American exclusion of similar fact evidence). In *State v. Odel*, for instance, the court held evidence the defendant had previously used a different type of counterfeit coin was irrelevant to a prosecution for the counterfeit use of a Spanish dollar. *See Odel*, 3 Brev. at 552. Over time, the conceptual foundations of this principle evolved from relevance to fairness. Wigmore's 1923 Treatise on the Anglo-American System of Evidence in Trial Courts at Common Law is emblematic. WIGMORE, *supra* note 50. In it, he celebrated (what he took to be) the common law's baseline presumption that a "[d]efendant's bad character may not be offered against him" in criminal proceedings because it causes "unjust condemnation." *Id.* at 272; *see also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 108 (1881) ("The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men.").

118. *See* FED. R. EVID. 404(a); United States v. Crutchfield, 26 F.3d 1098, 1102 (11th Cir. 1994) (holding that the prosecutor engaged in "inexcusable" misconduct by introducing evidence of the defendant's "sexual character"); People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930) (holding the trial court improperly admitted evidence that the defendant had weapons in his home because the jury may "take the proof of [his character] as justifying a condemnation irrespective of guilt of the present charge").

119. *See supra* Part I.

120. Even then, significant guardrails remain in effect. This exception to the general prohibition on character evidence intends to promote a more "balanced presentation" of character evidence. FED. R. EVID. 404(a)(2)(B) advisory committee's note to 2000 amendment. It permits the defendant to elect to introduce propensity evidence about their own victim's character. In response to the defendant's decision to introduce propensity evidence of their victim's character, the prosecutor can rebut and offer evidence of the defendant's same trait. *Id.* This strikes a balance between the propensity presented by the defense and prosecution to the fact finder and what types of propensities can be brought up during testimony. The underlying principle is that the accused cannot attack

reason.[121] The state simply may not premise its case-in-chief, in whole or part, on a defendant's general propensity to break the law.[122]

This principle is not limited to the FRE. It also animates the Supreme Court's doctrine on fundamental fairness in criminal enforcement. To begin with, direct criminalization of character is *per se* unconstitutional.[123] This is among the only substantive

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the alleged victim without opening the door for the prosecution to attack their same trait. *Id.*

121. *See generally* Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769 (2018).

122. *See* Old Chief v. United States, 519 U.S. 172, 181–82 (1997) (holding that the law "closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief"); David P. Leonard, *The Legacy of* Old Chief *and the Definition of Relevant Evidence: Implications for Uncharged Misconduct Evidence*, 36 SW. U. L. REV. 819, 825 (2008) (asserting that most jurisdictions forbid prior acts evidence when used to prove the prosecution's case-in-chief).

123. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (holding a state statute which criminalized the status of narcotics addiction unconstitutional under the Eighth and Fourteenth Amendments); Powell v. Texas, 392 U.S. 514, 532 (1968) (holding a state statute which criminalized public intoxication did not violate the Eighth Amendment because it sought to punish conduct, not character). The criminalization of vagrancy in England provides an interesting historical example of the evolution of views on conduct, not character. For centuries, status-based criminality was permissible. Gary V. Dubin & Richard H. Robinson, Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102, 105–06 (1962) (discussing how vagrancy became punishable as a criminal status). However, for the first time in 1824, vagrancy laws punished individuals for the "commission of specific criminal acts." *Id.* at 106. Although the statute still outlined specific statuses of offenders, namely, "(1) idle and disorderly persons, (2) rogues and vagabonds, and (3) incorrigible rogues," each class had an associated list of offenses for which an individual could be punished. *Id.* Therefore, the law punished individuals for engaging in impermissible conduct, rather than for being a member of an unacceptable class. *Id.* This key difference marked the formal transition from status-based criminality to a conduct-based crime regime. Even where statutes identify conduct that is closely related to a known class, the punishment is conduct-based when classifications have no "objective existence apart from the commission of the particular acts enumerated in the section." Ledwith v. Roberts, [1937] 1 KB 232 at 261 (Eng.). Although this transition occurred in England in the Nineteenth century, status-based criminality remained the norm for purposes of vagrancy in America. *See, e.g.*, COLO. REV. STAT. ANN. § 40-8-20 (1953) ("Any person able to work and support himself . . . who shall be found loitering . . . shall be deemed a vagrant."); Commonwealth v. Diamond, 143 N.E. 503, 504–05 (Mass. 1924) ("The statute aims at suppressing the idle and disorderly. It punishes them not for doing certain specified things but for being rogues, vagabonds, beggars, lewd, idle and disorderly persons.").

limits on police power that derives from general principles of criminal procedure—in this case, the bar on cruel and unusual punishment—rather than specific countervailing rights (like the First or Second Amendments).[124] Conceptually, the prohibition rests on a distinction between character and conduct. Although the functional boundary between those two categories is not always sharp,[125] the distinction remains foundational. For example, criminalizing the possession of small quantities of a narcotic drug is similar to criminalizing addiction to the same substance; likewise, criminalizing the solicitation of minors is similar to criminalizing pedophilia. In both cases, however, direct punishment of the underlying propensity, whatever its functional similarity, is forbidden. It would represent a step too far by category—the mark of an illiberal legal order.[126]

The same logic extends, furthermore, to punishment *based on* a jury's assessment of defendant character, even where the formal predicate of the criminal act is discrete conduct. There are four settings in which the Court has voiced concern about,

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124. *See generally* Kiel Brennan-Marquez & Stephen Henderson, *Search and Seizure Budgets*, 13 U.C. IRVINE L. REV. 389 (2023) (exploring the distinction between procedural limits on the exercise of penal authority—which constitute the majority of "constitutional criminal procedure" rules—and substantive limits of the scope of penal authority).

125. *See supra* note 123 and accompanying text. While America no longer outwardly criminalizes vagrancy, many have made the observation that the criminalization of low-level drug possession is functionally equivalent to criminalizing addiction. *See generally* Sana Loue, *The Criminalization of the Addictions Toward a Unified Approach*, 24 J. LEGAL MED. 281 (2003) (discussing the various ways addictions are criminalized, reviewing strategies used in the criminal context to address substance use, and concluding with recommendations for incorporating modern knowledge into the criminal justice process). The penalization of low-level drug offenses blurs the line between punishing specific acts and the criminalization of character.

126. "The majority view asserts that it is wrong to punish someone for what he or she *is* rather than for what he or she *does*." Elyn R. Saks, *The Status of Status Offenses: Helping Reverse the Criminalization of Mental Illness*, 23 S. CAL. REV. L. & SOC. JUST. 367, 372–73 (2014) (analyzing *Robinson v. California*, where the Court found a statute criminalizing narcotic addition to be unconstitutional and arguing to reverse the trend of sending people with mental illness to jail instead of to care). Of course, a challenge to this tenet is that almost every status can be recapitulated as acts. *Id.* For example, one cannot distinguish between the acts of habitual drug use and the status of being an addict. *Id.* Yet, "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982).

and adopted prophylactic rules in response to, the risk that certain kinds of evidence will divert the jury's attention away from the actual facts of the case, toward a defendant's general propensity for wrongdoing. The first two are governed by blanket prohibitions: the state may never adduce a defendant's (1) race or (2) criminal history to show that the defendant had a higher-than-average propensity to commit the underlying crime.[127] The third and fourth settings, by contrast, are governed not by blanket prohibitions, but balancing tests: The government is presumptively forbidden from requiring defendants either (1) to wear shackles and prison garb[128] or (2) to ingest psychotropic medication[129] during trial. This is a presumption rather than an outright ban because the doctrine makes room for countervailing state interests; the question is whether the prosecution can demonstrate a sufficient, case-specific need for physical or pharmacological restraint.[130]

All four variables—race, criminal history, sartorial presentation, and psychiatric status—relate to how a defendant "looks" or "presents" to the jury. And each variable is different; they trigger distinct, if sometimes overlapping, varieties of historical, epistemic, and aesthetic concern. For our purposes, however, the more important thing is what all four variables have in common. With respect to each, the Supreme Court has declined to require a showing of case-specific prejudice as a precondition of post-trial remedy.[131] If any of the forgoing variables are mistakenly introduced into the trial process, that suffices, by itself, to infect the entire proceeding and warrant remedy—typically, a new trial. To secure post-trial relief, in other words, defendants do *not* have to demonstrate the jury likely succumbed to the forbidden form of propensity-based reasoning. The mere risk is enough.[132]

In the abstract, particularly to readers outside the "criminal procedure world," this may not sound momentous. But it stands in marked contrast to the general thrust of the Court's jurisprudence in this area, particularly from the last three decades, which almost universally puts the onus on defendants to

127. *See infra* notes 137–46 and accompanying text.
128. *See supra* Part II.C; *see also infra* note 157 and accompanying text.
129. *See supra* Part II.C; *see also infra* note 158 and accompanying text.
130. *See infra* note 169 and accompanying text.
131. *See supra* Part II.C; *see also infra* notes 144–45 and accompanying text.
132. *See supra* Part II.C; *see also infra* note 163 and accompanying text.

demonstrate that errors in the trial process were not "harmless"—that the errors likely impacted the bottom-line result.[133] With respect to propensity-based reasoning, by contrast, the Court has explicitly taken a more prophylactic approach, focused on inferential risk.[134] The question is not whether the jury *actually did* infer guilt from propensity; nor is the question whether it seems, based on the full record, that the jury *plausibly might have* inferred guilt from propensity.[135] The question is whether the risk existed. If it did, that suffices to establish a prima facie concern, as well as a legal presumption, that defendant's trial process rights were infringed.[136]

1. Race and Criminal History

Start with the easy cases. Less than a decade ago, in *Buck v. Davis*, the Supreme Court held it reversible error for a trial judge to permit expert testimony opining that a defendant's race predisposed him to commit violent crimes.[137] Such testimony, the Court reasoned, certainly raises equal protection alarm.[138] But the crux of the problem is more fundamental. Namely, it is "a basic premise of our criminal justice system [that] [o]ur law punishes people for what they do, not who they are,"[139] and "[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle."[140] To be sure, the trial court's "departure from [this] basic principle *was exacerbated* because it concerned race,"[141] but the racial instantiation of the injury was just that—one instantiation among a possible many.[142] Furthermore, the Court suggested, the problem could

133. *See* Murray, *supra* note 62, at 1798–99.

134. *See infra* Part II.C.1.

135. *See infra* Part II.C.1.

136. *See infra* Part II.C.1.

137. 580 U.S. 100, 119, 123 (2017).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 124 (emphasis added).

142. For a recent and thorough examination of the Court's jurisprudence on race's role in legal decision-making, see Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 698–704 (2022) (examining several cases in which the Roberts Court has addressed the racial implications of State action). Similar themes were on display in *Peña-Rodriguez v. Colorado*, a case decided in the same term as *Buck*,

not simply be cured by limiting instructions, or other instruments of case-specific balancing.[143] The risk of racialized evidence infecting the whole proceeding was too great; the argument that the defendant had failed to show specific prejudice was, in the Court's view, unavailing as a matter of form. In Chief Justice Roberts's words:

> [W]e cannot accept the District Court's conclusion that "the introduction of any mention of race" during the penalty phase was "*de minimis*." There were only "two references to race in [the expert's] testimony"—one during direct examination, the other on cross. But when a jury hears expert testimony that expressly makes a defendant's race directly pertinent . . . the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.[144]

This same aversion to requiring defendants to show case-specific prejudice drives the Court's due process jurisprudence on criminal history. The principle, which took hold in the mid-twentieth century,[145] finds its most systematic elaboration in *Old Chief v.*

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which held—contra the general rule—that jury deliberations may be impeached after the fact based on plausible allegations of racially biased commentary in the jury room. 580 U.S. 206, 225 (2017). In that case, as in *Buck*, the Court went out of its way to both (1) flag the distinctiveness of the racial aspects of Mr. Peña-Rodriguez's injury ("racial bias implicates unique historical, constitutional, and institutional concerns")—hence the sui generis exception to the rule against ex post impeachment of jury deliberations—but also (2) emphasize the generalizability of the underlying problem. *Id.* at 224, 251. "All forms of improper bias," the Court wrote, "pose challenges to the trial process." *Id.* at 225. The usual remedy, however, is simply to trust in the normal "*Tanner* safeguards," which include things like "voir dire at the outset of trial," as well as the operation of normal exclusionary rules—such as the prohibition on character evidence—which help ensure that jurors are not exposed to evidence that invites too-substantial a risk of biased inferences. *Id.* at 224–25. Race is distinctive in *Peña-Rodriguez*, in other words, because of the remedy it occasions, not because of the form of injury it involves. *See id.*

143. *Cf. Buck*, 580 U.S. at 102 (holding that mention of race was not *de minimis*).

144. *Id.* at 121–22.

145. Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and . . . deny [the defendant] a fair opportunity to defend against a particular

United States.[146] Mr. Old Chief was prosecuted for, among other things, being a felon in possession of a firearm; at trial, Old Chief sought to stipulate that he was, in fact, a felon.[147] The state rejected his stipulation.[148] Instead, it elected to affirmatively prove the "felon" element using its own evidence, which involved discussing the type of felony (i.e., violent assault) of which Old Chief had previously been convicted.[149] The trial judge allowed the government to discuss Old Chief's past conviction, but the Supreme Court reversed, holding that such evidence might "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."[150] In particular, the Court feared juries would "generaliz[e] a defendant's earlier bad act into bad character and tak[e] that as raising the odds that he did the later bad act now charged (or, worse, as call[] for preventive conviction even if he should happen to be innocent momentarily)."[151]

The worry here, in other words, was that jurors faced with Old Chief's criminal history might infer that he had a character disposed to criminality and base a guilty verdict on that variable, rather than evidence of Old Chief's actual conduct.[152] Note that, in *Old Chief*, as in *Buck*, the Court found the danger of such reasoning sufficiently disquieting, by itself, to warrant reversal.[153] There was no specific evidence that the jury in Old Chief's trial

charge."). For discussion of *Michelson*, particularly pre-*Old Chief*, see generally Joan L. Larsen, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 NW. U. L. REV. 651 (1993) (critiquing law surrounding specific acts evidence); David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 FORDHAM URB. L.J. 305 (1995) (critiquing proposed FRE 413–415).

146. Old Chief v. United States, 519 U.S. 172, 180–81 (1997).

147. *Id.* at 175.

148. *Id.* at 177.

149. *Id.*

150. *Id.* at 180.

151. *Id.* at 180–81.

152. *Id.*

153. *See also, e.g.*, United States v. Commanche, 577 F.3d 1261, 1270 (10th Cir. 2009) (reversing the defendant's convictions because a prior conviction was erroneously admitted and "[e]ven if not argued at closing . . . the jury could not escape[] the clear articulation that [the defendant] was a violent and aggressive person who was merely repeating that tendency"); Gov't of the V.I. v. Oliver, 360 F.2d 297, 300 (3d Cir. 1966) (reversing the defendant's convictions because the prosecutor's references to the defendant's prior crimes and escape from custody invoked propensity inferences so prejudicial as to merit reversal).

had indulged in propensity-as-status reasoning.[154] The Court thought the possibility alone was enough to undermine the trial's fairness.[155]

In one sense, race and criminal history are unique. As evidential inputs into the determination of criminal guilt, their consideration does not simply pose an inherent risk of prejudice; it is, as a practical matter, *per se* forbidden.[156] There are no circumstances, at least that existing case law has identified or hypothesized, in which the state has a sufficiently strong countervailing interest (evidential, penological, or otherwise) to justify race or criminal history becoming "part of the trial." In another sense, however, race and criminal history are not unique. Rather, they are especially clear instances of a broader jurisprudential pattern of taking a prophylactic approach to the admission of evidence during criminal trials that reaches other practices as well. The next section explores examples from existing law, to lay the groundwork for arguing that demeanor evidence, too, merits a prophylactic doctrine.

2. Sartorial Presentation and Psychiatric Status

Two dynamics related to a defendant's self-presentation at trial have drawn heightened scrutiny from the Supreme Court, triggering exceptional and more protective rules for appellate review. The first is sartorial, while the second is psychiatric, but they pique the same concerns and receive identical treatment under the Court's doctrine. Namely, due to the inherent, non-case-specific risk of evidential prejudice, the state is presumptively forbidden from (1) requiring defendants to don jumpsuits, shackles, or other accoutrement of pretrial detention,[157] or (2) forcibly administering psychotropic drugs to defendants, during trial.[158]

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154. *See Old Chief*, 519 U.S. at 174–77 (discussing the district court proceedings without any mention of propensity-as-status reasoning).

155. Indeed, one thrust of the dissent is that lower courts can be trusted to make judgments about the magnitude of prejudice vis-à-vis probative value (per the usual Rule 403 analysis). *See id.* at 193 (O'Connor, J., dissenting). This suggests, in the dissent's view, that the mere possibility of forbidden reasoning is *not* enough—which in turn underscores the point that, in the majority's view, it is. *Id.*

156. *See supra* notes 137–44 and accompanying text.

157. *See* Estelle v. Williams, 425 U.S. 501, 512 (1976).

158. *See* Riggins v. Nevada, 504 U.S. 127, 135 (1992).

In both settings, the state may overcome the presumption by demonstrating a case-specific need for physical or pharmacological restraint.[159] To do so, however, it must satisfy heightened scrutiny.[160] Unlike with race or criminal history, therefore, the regime is case-specific; the risk of evidential prejudice can yield, on balance, to countervailing considerations. Despite being case-specific, however, the regime is configured in the opposite manner from normal harmless-error analysis. Case-by-case, it is *the state* that must explain why the potentially prejudicial measure is warranted, not (as with harmless error) the defendant who must explain why the potential prejudice is likely to come—or, post-trial, likely did come—to fruition.[161]

The canonical case is *Estelle v. Williams*, which held that defendants may not be required to wear prison jumpsuits during trial.[162] The Court made quick work of Texas's argument that

159. *See id.* at 136 ("Nevada certainly would have satisfied due process if the prosecution had demonstrated . . . that treatment with antipsychotic medication was medically appropriate and . . . essential."); *Estelle*, 425 U.S. at 505 (acknowledging that the Court has upheld the practice of compelling a defendant to appear in shackles "when necessary to control a contumacious defendant").

160. *See Estelle*, 425 U.S. at 504 ("[T]he probability of deleterious effects on fundamental rights calls for close judicial scrutiny.").

161. *See supra* note 159.

162. *Estelle*, 425 U.S. at 512 ("[T]he State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes."); Deck v. Missouri, 544 U.S. 622, 633 (2005) (holding that courts may not routinely place defendants in physical restraints during the penalty phase of a trial); United States v. Harris, 703 F.2d 508, 512 (11th Cir. 1983) ("Clearly identifiable prison garb does more than clothe a defendant with suitable raiment—it also clothes him with an unmistakable mark of guilt. Forcing a defendant to appear at trial so dressed not only is demeaning; it reinforces the fact that the defendant has been arrested and projects to the jury the mark of guilt, thus eroding the principle that the defendant is presumed innocent until proven guilty."); Young v. Callahan, 700 F.2d 32, 37 (1st Cir. 1983) (holding that without showing that restraint was necessary, it was a harmful constitutional error to restrain the defendant during trial). Exceptions to the *Estelle* rule include escape prevention, threatening behavior, physical security, and courtroom decorum. *See* State v. Jackson, 761 S.E.2d 724, 730 (N.C. Ct. App. 2014) (finding shackles were justified based on defendant's prior escape attempt, anger issues, verbal threats, and the serious nature of charges and penalties); United States v. Battle, 173 F.3d 1343, 1346–47 (11th Cir. 1999) (holding that requiring the defendant to wear leg shackles and arm restraints during trial was warranted due to three separate attacks on corrections officers without warning); United States v. Honken, 378 F. Supp. 2d 1010, 1019, 1039 (N.D. Iowa 2004) (holding the defendant could be leg-shackled during floor

defendants should have to demonstrate that prejudice is likely to result from the law's operation in particular cases. In the Court's words:

> [T]he constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play.[163]

The Court was less systematic in *Estelle*, relative to *Buck* or *Old Chief*, about the nature of the "unacceptable risk" and "impermissible factors" it had in mind.[164] But the bottom-line is the same. The concern is that jurors made to associate the defendant with the *optics* of criminality will begin—consciously or unconsciously—to see the defendant as prone to wrongdoing, and to punish the defendant on that basis rather than the actual facts of the case.[165]

Post-*Estelle* jurisprudence from both the Supreme Court and lower courts reinforces the point. Much of that jurisprudence is limiting; it involves ruling in the government's favor, holding, in particular contexts, either (1) that the risk of prejudice attenuated,[166] or (2) that the state's penological interests were

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sessions and that the defendant could be required to wear a stun vest and be handcuffed while being transported to and from cell and courtroom because of his "violence towards witnesses and his attempt to escape from the Woodbury County Jail").

163. *Estelle*, 425 U.S. at 504–05.

164. *Id.*

165. *Cf.* Ham v. South Carolina, 409 U.S. 524, 531–32 (1973) (Marshall, J., concurring in part and dissenting in part) ("It makes little difference to a criminal defendant whether the jury has prejudged him because of the color of his skin or because of the length of his hair. In either event, he has been deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict. It is unsurprising, then, that this Court has invalidated decisions reached by juries with a wide variety of different prejudices.").

166. *See* State v. Halsell, No. 24464, 2009 WL 2517137, at *2 (Ohio Ct. App. Aug. 19, 2009) (holding there was no error where jury members saw the defendant in jail clothing while not in the courtroom because "[w]hen a jury's view of the defendant in restraints is 'brief, inadvertent, and outside the courtroom,' there is but a slight risk of prejudice"); Huerta v. McDonald, No. EDCV 10-0726-AG, 2010 WL 5891665, at *15–16 (C.D. Cal. Dec. 2, 2010) (similar); State v. Davidson, 954 P.2d 702, 707, 710 (Kan. 1998) (finding that a statement by the judges that the defendant was in custody and wearing a leg brace was cumulative and not did not change the result of the trial in a meaningful way); *see also* United States v. Williams, 809 F.2d 75, 83 (1st Cir. 1986) ("[T]he jury's

substantial enough to justify physical restraints.[167] In spite of its limiting posture, however, the case law does not waver about the nature of the government's burden under *Estelle*.[168] Compulsory prison attire or physical restraints are presumptively forbidden, and the onus is always on the state to persuade the court that

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inadvertent observation outside the courtroom of a defendant in custody does not 'dilute [the] presumption of innocence' so as to require a new trial unless there is a showing of actual prejudice." (alteration in original) (quoting United States v. Ayres, 725 F.2d 806, 813 (1st Cir. 1984))); Wright v. Texas, 533 F.2d 185, 187 (5th Cir. 1976) ("We have consistently held that a brief and fortuitous encounter of the defendant in handcuffs by jurors is not prejudicial and requires an affirmative showing of prejudice by the defendant."); United States v. Robinson, 645 F.2d 616, 617 (8th Cir. 1981) ("[B]rief and inadvertent exposure of defendants to jurors is not inherently prejudicial."); State v. Kidder, 513 N.E.2d 311, 318 (Ohio 1987) ("[P]rejudice to defendants is slight where a juror's view of defendants in custody is brief, inadvertent and outside of the courtroom."); James v. Sternes, 50 F. App'x 311, 313 (7th Cir. 2002) ("[A]ny error at trial with respect to a brief appearance in prison garb was harmless . . . .").

167. *See* State v. Castro, 756 P.2d 1033, 1046 (Haw. 1988) ("Rather than the enforced display of a constant reminder to the jury that the defendant was one to be feared, 'less restrictive, less prejudicial' means to further the state interest in protecting witnesses should have been explored."). If, however, the jury's exposure to the defendant's incarcerated status is minimal, courts tend to find that the prejudice is minimal enough to not rise to the level of a constitutional error. *See* State v. Davidson, 954 P.2d 702, 710 (Kan. 1998) (holding that requiring the defendant to wear a leg brace and the judge informing the jury that the defendant was wearing that brace in order to prevent his escape did not rise to the level of constitutional error).

168. For example, the Seventh Circuit in *Wilber v. Hepp* made clear that there is a prohibition from compelling a defendant to appear to the jury in restraints via the Fourteenth Amendment "unless . . . visible restraints are justified by one or more state interests specific to the trial at hand. Such interests of course include security problems and the risk of escape." 16 F.4th 1232, 1255–56 (7th Cir. 2021). Throughout the trial Wilber had to wear ankle shackles that were hidden from the jury's site with a drape. *Id.* at 1232. However, on the last day of the trial, there was an altercation that resulted in Wilber being shackled to a wheelchair with wrist and arm restraints that were easily visible to the jury. *Id.* The Seventh Circuit expressed discontent with the trial court's failure to indicate why the wrist and arm restraints needed to be uncovered, saying, "[w]holly absent from the trial judge's rationale is any discussion of why it was required or unavoidable for the new restraints to be visible, particularly when it had previously acknowledged that additional restraints could be hidden from the jury's view." *Id.* at 1256. The lack of balancing of the need for security and order during a trial against any prejudice the defendant must suffer from having visible restraints, especially during closing arguments, was necessarily prejudicial. *Id.* The court held "[i]n the absence of any rationale justifying a need for visible restraints, the decision to visibly shackle Wilber deprived him of his due process right to a fair trial." *Id.* at 1262.

something about the particular case warrants special exemption.[169] The regime is prophylactic; in the face of uncertainty, it hedges against the danger of unfairness to criminal defendants as a priority over other values.

Not surprisingly, the Court has adopted an identical approach to in-court constraints of a psychiatric rather than physical nature.[170] When the state wishes to forcibly medicate defendants, controlling their "mental appearance" instead of their physical appearance, the same analysis applies. Forced medication is presumptively forbidden, and if the government wishes to overcome the presumption, it must shoulder the burden of furnishing case-specific justifications for doing so.[171] The rationale, the Court explicitly recognized, goes back to *Estelle* itself. In its words: When a defendant has been forced to ingest psychotropic medication during trial,

> [e]fforts to prove or disprove actual prejudice from the record . . . would be futile, and guesses whether the outcome of the trial might have been different if [a defendant's] motion had been granted would be purely speculative. We accordingly reject the dissent's suggestion that [defendants] should be required to demonstrate how the trial would have proceeded differently if [they] had not been given [medication]. Like the consequences of compelling a defendant to wear prison clothing, see *Estelle v. Williams*, or of binding and gagging an accused during trial,

169. For example, in *United States v. Stewart* the defendant argued he was denied his right to an impartial jury because he was forced to wear prison clothing and leg shackles during his trial. 20 F.3d 911, 915 (8th Cir. 1994). On appeal, the Eighth Circuit explained "[a]n impartial jury should determine guilt or innocence based on the evidence presented at trial, not on irrelevant factors such as 'official suspicion, indictment, [or] continued custody.'" *Id.* (quoting Holbrook v. Flynn, 475 U.S. 560, 567 (1986)). The court also said "[p]rison clothing is inherently prejudicial because it informs the jury of impermissible factors, such as the fact that a defendant already has been deprived of his liberty." *Id.* at 916 (internal quotation marks omitted). However, the court ultimately found the shackles and prison garb justified because of the specific circumstances surrounding the case. *Id.* at 915–16 (finding that it was justified to require the defendant to wear shackles and prison garb because he previously assaulted a witness, continuously disrespected the court during the arraignment hearing, and remained hostile during preliminary proceedings on the morning of the trial).

170. Riggins v. Nevada, 504 U.S. 127, 137 (1992) (comparing forced medication to physical constraints and holding that the state must overcome a presumption against its use).

171. *Id.* at 135 (stating that the State could overcome the presumption against forced medication with a showing that forced medication was medically necessary for the safety of the defendant or others or was necessary to obtain an adjudication of the defendant's guilt or innocence).

> the precise consequences of forcing antipsychotic medication upon [a defendant] cannot be shown from a trial transcript.[172]

Here, once again, the idea is not that criminal defendants may never be required to ingest medication against their will.[173] The rule is not a per se bar.[174] Rather, it is a prophylactic framework, making clear that (1) the state must affirmatively justify the need for compulsory medication, and consequently, (2) it incurs the downside-risk of having a conviction overturned on appeal if its justification falls short.[175] Furthermore, as with jumpsuits and shackles, this is true not because a prophylactic approach will always get the "balance" right, but because the Constitution's guarantee of trial fairness makes errors in one direction—evidential prejudice that contributes to a criminal conviction—more concerning than errors the other way.[176]

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172. *Id*. at 137 (citations omitted).

173. *See id.* at 135 (listing a few exceptions that allow the state to administer forced medication).

174. *See id.*

175. For example, in *Riggins v. Nevada*, the defendant challenged his conviction because he was forced to take antipsychotic medication, which affected his demeanor before the jury and prevented him from adequately assisting in his own defense. *Id.* at 137. The court held that without findings that there were no less intrusive alternatives, that the medication was medically appropriate, and that the medication was essential for the defendant's or other's safety, the administration of the medication merited reversible error. *Id.* Concurring in judgment, Justice Kennedy recognized that the prejudice was created "by altering [the defendant's] demeanor in a manner that will prejudice his reactions and presentation in the courtroom." *Id.* at 142 (Kennedy, J., concurring). Another example, related to physical rather than psychiatric compulsion, is *State v. Castro*. 756 P.2d 1033 (Haw. 1988). There the defendant was visibly shackled throughout the trial because witnesses expressed fear he may harm them, he was capable of committing such harm, and he had sobbed during an early stage of the proceeding. *Id.* at 1046. According to the court, however, these circumstances did not justify such a visible and inflammatory measure, reasoning, "[r]ather than the enforced display of a constant reminder to the jury that the defendant was one to be feared, 'less restrictive, less prejudicial' means to further the state interest in protecting witnesses should have been explored." *Id.*

176. At times, in fact, courts have explicitly contemplated the possibility of defendants deriving a trial *benefit* from forced medication—presumably on the theory that, in some cases, the unmedicated version of a defendant's self-presentation will be even more prejudicial than the medicated equivalent. *See Riggins*, 504 U.S. at 149–51 (Thomas, J., dissenting) (stating that the defendant reported hearing voices and that he could not sleep, and that psychiatrists testified that the medication had a beneficial effect on him). Even so, this has not mattered to the prophylactic approach. Courts have not seen the possible upside for defendants as a reason to shift the burden to defendants to establish prejudice case-by-case.

In short, rather than putting the onus on defendants to show that wearing shackles or ingesting mind-altering medication would create an unacceptable risk of unfair prejudice, current doctrine places the burden on the state to overcome a presumption against these practices.[177] And as with race and criminal history, the underlying logic is prophylactic. Broad constitutional protection—shorn up by a defendant-friendly presumption—is warranted to secure a criminal defendant's right to be judged on the actual facts of the case, not on the "kind of person" they appear to be.[178]

D. APPLYING THE "INFERENTIAL RISK" FRAMEWORK TO DEMEANOR EVIDENCE

The sites of evidential prejudice canvassed in the last section—race, criminal history, sartorial presentation, and psychiatric status—are connected in two related ways. The first is doctrinal. In all the ways discussed above, the Supreme Court has put a fence around each of these variables, roping them off from the usual approach to claims of prejudice in the trial process, which (1) puts the burden on defendants to make case-specific showings of prejudice, and (2) tends to dilute the supervisory role of appellate courts—even in cases where defendants *can* make such showings—via doctrines like harmless error.[179]

The second connection is more fundamental: All four variables relate to the way our legal system reflects and entrenches racial and cultural subordination. Because race, criminal history, sartorial presentation, and psychiatric status all concern the way defendants look to juries, they are signals laden with social meaning—inherently prone to bias and stereotyping, particularly when the observers tasked with interpreting the

177. *Id.* at 135 (majority opinion) ("[O]nce [the defendant] moved to terminate administration of antipsychotic medication, the State became obligated to establish the need for Mellaril and the medical appropriateness of the drug.").

178. *See* Old Chief v. United States, 519 U.S. 172, 181 (1997) (arguing that propensity evidence creates a risk that juries will convict people based on a belief that they deserve to be punished, even if they are uncertain of guilt).

179. *Id.* at 180–82 (establishing a presumption against the admission of evidence of criminal history); *Riggins*, 504 U.S. at 135 (establishing a presumption against forced administration of antipsychotic medication); *Castro*, 756 P.2d at 1046 (establishing a presumption against visibly restraining defendants); United States v. Stewart, 20 F.3d 911, 915 (8th Cir. 1994) (forbidding forcing defendants to wear prison clothing before the jury).

signals hale from dramatically different backgrounds, social worlds, and life circumstances than defendants themselves.[180] No wonder the Court has expressed heightened concern about these variables; in doing so, it has let a ray of normative light shine through the cracks of its otherwise-lackluster criminal procedure jurisprudence.

Demeanor evidence follows the pattern. Demeanor, too, is a site of evidential prejudice that warrants heightened regulation in light of the risks it poses to defendants—and the way those risks intersect with broader patterns of racial and cultural subordination.[181] But demeanor is also different from variables like sartorial presentation and psychiatric status, in that it does not resolve into easily-administrable "on/off" limits. Courts can readily craft and enforce orders against, say, shackling a defendant during trial.[182] It is significantly harder, if not impossible, to limit the influence of defendant demeanor in the eyes of the jury. Accordingly, what would it mean to adopt a "prophylactic approach" to demeanor evidence? In the next Part, we sketch a few specific proposals for reform in greater detail. But here are the broad strokes.

First, a prophylactic approach to demeanor evidence would mean, as with the four variables discussed above, flipping the presumption around prejudice. Instead of assuming that demeanor evidence has probative value and requiring defendants to argue that the risk of prejudice is great enough to warrant limits (at trial) or reversal (on appeal), courts should start from

180. David Hamilton et al., *Sowing the Seeds of Stereotypes: Spontaneous Inferences About Groups*, 109 J. PERSONALITY & SOC. PSYCH. 569, 583 (2015) (explaining how spontaneous trait inferences about groups can sow the seeds of stereotypes); *see* Duane T. Wegener et al., *Not All Stereotyping is Created Equal: Differential Consequences of Thoughtful Versus Nonthoughtful Stereotyping*, 90 J. PERSONALITY & SOC. PSYCH. 42, 42 (2006) (finding that stereotyping is more prevalent when controlled by automatic processes that people do not have time to think about, such as a quick visual); Bastian Jaeger et al., *Can People Detect the Trustworthiness of Strangers Based on Their Facial Appearance?*, 43 EVOLUTION & HUM. BEHAV. 296, 301–02 (2022) (finding facial appearance is a dubious way for people to determine trustworthiness); Neil Hester & Kurt Gray, *The Moral Psychology of Raceless, Genderless Strangers*, 15 PERSPS. ON PSYCH. SCI. 216, 218–19 (2020) (finding that people's backgrounds shape their views on race, culture, body type, gender and power).

181. *See supra* Part II.B.

182. *See Castro*, 756 P.2d at 1046 (establishing a presumption against visibly restraining defendants); *Stewart*, 20 F.3d at 915 (forbidding forcing defendants to wear prison clothing before the jury).

the opposite premise—that demeanor evidence runs an inherent risk of prejudice—and require the state to explain why demeanor should be admitted, for a legitimate purpose, *in spite of* its risks. Under this kind of regime, demeanor would receive the court's blessing as an evidential input only if the court is satisfied that there is a clear non-propensity use for the demeanor evidence, and that use is not substantially outweighed by the inherent risk of prejudice. And to give the prophylaxis bite, appellate courts would conduct de novo review of evidence admitted under this balancing test.

Second, a prophylactic approach would require the state to develop and articulate actual theories about *why* defendant demeanor is likely to have probative value. It would not be enough, for example, to gesture toward a generalized indication of "credibility." In other words, a propensity-based argument that the defendant's appearance suggests he has a dishonest character would be impermissible. Rather, the state would need to explain what aspects of the defendant's self-presentation on the stand offer information about credibility that does not require a propensity inference. Only if something about the defendant's demeanor actually suggests the defendant is lying in the moment could the jury be instructed on the permissibility and utility of evaluating the credibility of the defendant's testimony in light of their demeanor. As one of us has argued in other work, to date there is no empirical evidence to support the notion that facial cues help with the task of lie-detection, and some evidence to suggest it hinders that task.[183] Thus, although such an argument is not foreclosed by the prophylactic approach, a prosecutor's argument for the non-propensity use of a defendant's demeanor for purposes of lie detection should generally fail. Furthermore, if the state only managed to offer a boilerplate explanation of the probative value of demeanor, such as a general claim that it is relevant to credibility, it would incur the risk, on appeal, of seeing a potential conviction overturned. And the default would be jury instructions that warn against the *pitfalls* of using demeanor as a proxy for credibility rather than, as now happens, instructions that actively encourage jurors to focus on demeanor.

183. Simon-Kerr, *Unmasking Demeanor*, *supra* note 17, at 165–70 (describing studies finding people are poor at predicting truthfulness based on examining demeanor).

Furthermore, in cases where defendants elect not to take the stand, the state would always carry the burden of identifying demeanor's relevance to a specific factual dispute, such as differing eyewitness descriptions of the perpetrator. And as for the puzzle of *Ruiz*—how should the court respond to a jury's query about taking "defendant's body language" into account?[184]—the answer is no, unless the state can (1) explain exactly what makes defendant body language relevant in a permissible way and (2) justify the strength of that probative value against the presumptive—and in context, plainly substantial—risk of prejudice.

The next Part fleshes out what these reforms would look like in more concrete detail—sketching, among other things, guidelines for jury instructions about demeanor, as well as a model evidence rule that would offer courts an opportunity to explicitly scrutinize (and defendants to explicitly contest) the role of demeanor at trial.

III. DEMEANOR RECONFIGURED

As the preceding parts have shown, demeanor functions as evidence in criminal trials,[185] and the form that evidence takes is often propensity evidence.[186] This raises an immediate question: If fact finders will almost inevitably use demeanor as character evidence in often discriminatory or otherwise problematic ways, then shouldn't we remove demeanor from the criminal trial?[187] Such a fix would dramatically alter trial practice, but it could be accomplished through something as simple as putting defendants behind a screen. In non-legal contexts, such as orchestra auditions where male musicians consistently refused to hire their female counterparts, screening off auditioning musicians has famously allowed the men in power to overcome the perceptual problems that afflicted them when they knew they were listening to women play.[188] Should we, like the New York

184. *See supra* notes 3–4 and accompanying text.

185. *See supra* Part I.

186. *See supra* Part II.

187. *See* Commonwealth v. Ruiz, 178 N.E.3d 901, 2021 WL 5238605, at *1 (Mass. App. Ct. 2021) (unpublished table decision) (stating that defendant was convicted, and co-defendant was acquitted after the jury asked if they were allowed to consider the defendant's demeanor).

188. *See* Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 716–

Philharmonic, screen our defendants from view in the interest of giving them a better chance at a trial based on facts rather than character-based assumptions? As this part will elaborate, the short answer to this question is no. One impediment to this practice, as we explained in Part II, above, is that demeanor can have non-character evidentiary functions. Demeanor may simply *be* evidence, as when it suggests that the defendant does not match the description provided by a witness.

More fundamentally, as we elaborate in Part III.A below, the presence of defendants at trial, whether or not they testify, has upsides for the process as a whole. For one thing, being seen in the courtroom confers dignity on defendants; for another, being forced *to see* defendants can prompt a deeper kind of moral engagement from witnesses and fact finders.[189] Above all, as the Supreme Court's holdings in *Estelle*[190] and *Riggins*[191] suggest, defendants are entitled to their own self-presentation during criminal proceedings. Still, the question remains: How can the legal system better ensure that defendants can be seen in their humanity in court and yet also be judged for their acts and not demeanor-based assumptions about their characters?

In answer to this question, rather than removing defendants from view we propose bringing the problem of demeanor evidence into clearer focus. This requires inverting the current approach to demeanor through a web of legal changes. First, rather than highlight demeanor as a key to witness credibility through jury instructions, we propose jury instructions that would correctly caution about the limitations of demeanor as character

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26 (2000) (detailing gender discrimination in orchestra hiring and explaining how a screen concealing the gender of an individual auditioning for an orchestra consistently improved women's chances of being hired); Javier C. Hernández, *In a 'Sea Change,' Women of the Philharmonic Now Outnumber the Men*, N.Y. TIMES (Nov. 22, 2022), https://www.nytimes.com/2022/11/22/arts/music/women-new-york-philharmonic.html [https://perma.cc/AY4Q-FS97] (describing how the New York Philharmonic used screens to create blind auditions to combat sexism in hiring musicians).

189. *See* Prine v. Commonwealth, 18 Pa. 103, 104 (1851) (explaining that by seeing a defendant in their "sad plight" the jury will be more inclined to consider their defense).

190. Estelle v. Williams, 425 U.S. 501, 504–05 (1976) (holding that a defendant cannot be compelled to wear prison attire before the jury).

191. Riggins v. Nevada, 504 U.S. 127, 136 (1992) (holding that a defendant cannot be forced to take antipsychotic medication absent a showing from the state that it is necessary to do so).

evidence.[192] This is diametrical from the status quo, which, as explored above, typically *celebrates* jury reliance on demeanor evidence.[193] Second, we would reverse the age-old approach of evidence law, which has allowed a tacit embrace of demeanor as outcome-determinative evidence "without any definite rules as to its significance."[194] We propose an evidence rule that makes clear the rebuttable presumption—consistent with the Supreme Court's inferential risk framework described in Part II—that demeanor *is not* evidence of character.[195] And finally, we gesture towards additional changes, like the use of experts or changes in legal pedagogy, that might in the long run help deconstruct the cultural myth that outward appearance is an accurate guide to inner reality.

These proposals will not eliminate all problematic uses of a defendant's demeanor from criminal trials. But they can limit the likelihood of those uses in the first instance, as well as the prejudicial effect of those uses when they inevitably occur. Equally importantly, the proposals aim to educate judges, jurors and eventually the broader public about the risks inherent in relying on our perceptions of a person's exterior as a guide to their inner life and conduct. We see this goal as part of the larger project of deconstructing a criminal legal system geared to the mass incarceration of Black men.[196] In addition to overt racism, this system survives on the very type of superficial, heuristic reasoning that our proposals aim to surface and counteract.[197] Reforming the way evidence law approaches defendant demeanor will both vindicate fundamental, widely-held principles of trial fairness *and* help lawyers, judges, and jurors—all of us—appreciate the way our legal system continues to sell those principles short.

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192. *See infra* Part III.B.

193. *See supra* Part I.A.

194. 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 946 (James H. Chadbourn ed., rev. ed. 1970); Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 880–93 (2018) (describing how common trial inputs, like demeanor, are unregulated by evidence rules).

195. *See supra* Part II.

196. *See* Gonzales Rose, *supra* note 92, at 2272 (arguing that certain Federal Rules of Evidence are designed to discount the testimony of Black, Latino, and Native American men).

197. *Id.* at 2251–52 (arguing that the criminal legal system is based both on overt racism and indirect or unintended race-based discrimination).

A. THE VALUE OF BEING SEEN

For many of the same reasons that demeanor inevitably operates as a guide to character, defendants in criminal cases may wish to be seen. Being seen is a feature of having agency and epistemic power even as it can also interfere with those functions.[198] This section explores four interconnected facets of the agency and epistemic power that can derive from being seen. First, being seen is arguably integral to a defendant's constitutional entitlement to take the witness stand and testify in their own defense.[199] Second, and relatedly, the Confrontation Clause gives defendants the right to confront witnesses against them.[200] This right should be understood to guarantee the moral reckoning on the part of prosecution witnesses that is involved in testifying under the gaze of the accused. Third, being present at trial is a potential source of dignity for an accused. And finally, the fact finder's ability to sit in moral judgment of an accused may depend on being able to see that person in the flesh, in all of their humanity.

Existing case law, sounding in due process, reflects the importance of a defendant's self-presentation at trial.[201] Consider *Riggins v. Nevada*, the case discussed above in which the defendant successfully challenged his conviction on the grounds that he was forced to take antipsychotic medication during trial.[202] The Court found that the state's justifications were insufficient to avoid the significant prejudice caused to the defendant.[203] *Riggins* thus suggests that appearance and affect is an inextricable part of identity such that being heard entails being seen.[204] In

198. *See* Barry R. Schlenker, *Self-Presentation* (discussing the benefits of constructing a desirable self-presentation), *in* HANDBOOK OF SELF AND IDENTITY 492, 498–501 (Mark R. Leary & June Price Tangney eds., 2003).

199. *See* U.S. CONST. amend. VI.

200. *Id.*

201. *See* Old Chief v. United States, 519 U.S. 172, 180–82 (1997) (establishing a presumption against the admission of evidence of criminal history); Riggins v. Nevada, 504 U.S. 127, 135 (1992) (establishing a presumption against forced administration of antipsychotic medication); State v. Castro, 756 P.2d 1033, 1046 (Haw. 1988) (establishing a presumption against visibly restraining defendants); United States v. Stewart, 20 F.3d 911, 915 (8th Cir. 1994) (forbidding forcing defendants to wear prison clothing before the jury).

202. *Riggins*, 504 U.S. at 137.

203. *Id.*

204. *See id.* at 136 (noting that the antipsychotic medications changed the defendant's affect such that he did not appear to be nervous).

his concurrence, Justice Kennedy highlighted, in part, the injury to the defendant caused by not being able to present himself to the jury as himself.[205] Without being fully oneself in body and mind, Kennedy suggests, the defendant may be prevented from defending himself through the potential for demeanor to be a humanizing and important signifier at trial.[206] For this reason, defendants' due process right to take the witness stand and testify in their defense arguably also encompasses a right to be seen.[207]

A separate but related value in being seen relates not to due process but to confrontation, and specifically to the effect confrontation with the accused may have on prosecution witnesses.[208] Although it has been overlooked in recent confrontation clause jurisprudence, ensuring that defendants can confront their accusers face-to-face has an expressive function.[209] The Constitution's guarantee of a face-to-face encounter is a tool of moral reckoning.[210] It is a way to maximize the moral pressure the witness should feel to tell the truth in the courtroom by making sure that any lies must be told squarely in the face of the defendant.[211] An accusatory witness cannot simply sign a paper in private but must instead appear and make their accusation

205. *Id.* at 144 (Kennedy, J., concurring) (identifying the concern that "serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion").

206. *Id.* at 142 (arguing that the presence of the defendant makes an impression on the jury, which might influence the ultimate outcome of the trial).

207. *Id.* (discussing how the presence of the defendant at trial makes an impression on the jury at "all stages of proceedings," and has the potential to affect the outcome of the trial).

208. *Id.* (arguing that the defendant's demeanor is relevant to their confrontation rights, as the face-to-face encounter between accuser and accused is an important element of this right).

209. In sociologist Erving Goffman's seminal book, *The Presentation of Self in Everyday Life*, he describes the centrality of self-presentation to the communication process and the many choices people make about the aspects of self-presentation they can control. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 2–7 (1957); *see also* Schlenker, *supra* note 198, at 498–510 (discussing the benefits of the construction of a desired identity, and the process through which one is constructed).

210. *See* Erin Sheley, *The Dignitary Confrontation Clause*, 97 WASH. L. REV. 207, 255 (2022) (describing confrontation as important "in cases of dishonest testimony" because it imposes a "cost in guilt on the perjurer" and allows for an "expression of the defendant's moral worth as a human being").

211. *Id.*

publicly in the courtroom in front of the defendant.[212] However difficult it may be, this carries a moral gravity that merely signing a paper cannot.[213] As the Supreme Court has observed, "it is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"[214] Thus, there may be benefits to fact-finding and to justice writ large from preserving the moral gravitas of a defendant's right to question a witness face-to-face.[215]

Another facet of the expressive importance of confrontation is its "relational" value to the defendant.[216] Through this lens, the right to confrontation can be seen as the accused's "right to assert the presence of their humanity against the machinery of the state."[217] As Professor Erin Sheley argues, this right is rehabilitative, in the sense that it counteracts the dehumanizing nature of being subject to the state's coercive force and labeled a criminal defendant.[218] The right to confrontation can confer some of the "dignity of personal integrity," as well as "facilitat[e] self-respect" and autonomy at a time when a criminal defendant is largely deprived of those entitlements.[219] Thus, the defendant has a right to speak and be seen that stems from the gravity of the criminal process itself and from the coercive power of the state.

A final value to seeing defendants in criminal cases has to do with its effect on the fact finder. The right to confrontation

212. *Id.* at 209 (discussing case law requiring live testimony from witnesses in criminal trials).

213. *See id.* (arguing that allowing drug lab technicians to sign an affidavit rather than give live testimony makes it easier for self-dealing lab technicians to lie).

214. Coy v. Iowa, 487 U.S. 1012, 1019–20 (1988). Of course, the Court went on in the next breath to invoke the problematic trope that demeanor would be a guide to truthfulness. *Id.* (suggesting that if a defendant is face-to-face with a witness, "even if the lie is told, it will often be told less convincingly" and observing that nothing "compel[s] the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions").

215. *See* Sheley, *supra* note 210, at 255 ("To the extent that the face-to-face confrontation between defendant and accuser facilitates self-respect, deliberation, or any other human quality suppressed by the criminal justice system, it fosters the dignity of personal integrity.").

216. *Id.* (arguing that a criminal defendant's "relational right" is the right to assert their humanity against the machinery of the state).

217. *Id.*

218. *Id.*

219. *Id.*

preserves the possibility that the defendant's demeanor will inspire the fact finder to take more care in exercising moral judgment.[220] The Supreme Court of Pennsylvania expressed a version of this idea in 1853 when it reasoned that, "[i]t would be contrary to the dictates of humanity to let [a criminal defendant] waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence."[221] This fourth value relates back to the previous three in obvious ways. All four take account of the potential for demeanor to humanize and empower those who are being judged. Here, though, the emphasis is on the fact finder's response to seeing the defendant in her humanity, and the potential for more fulsome moral judgment when a defendant can appear rather than be judged based on a paper record or a hidden behind a screen.[222]

These potential benefits from demeanor raise a common tension. Moral judgment through erroneous character propensity reasoning is exactly what we have sought to condemn, and yet here we highlight benefits to judgment or dignity from character propensity reasoning. To further illuminate this tension, let us reconsider Ruiz's case.[223] We have read that case as an instantiation of all that is wrong with how the system currently approaches demeanor.[224] A jury heard very similar evidence against two people, Delacruz and Ruiz.[225] Neither defendant testified.[226] The jury returned a question asking whether they could "take the defendants['] body language into consideration? As evidence?"[227] They then convicted Ruiz and not Delacruz.[228]

What we glossed over in the first retelling of this story is that in asking their question, the jurors omitted any possessive

220. Prine v. Commonwealth, 18 Pa. 103, 104 (1851).

221. *Id.* Much more recently, the Supreme Court cited this part of *Prine* with approval in *Crosby v. United States*, 506 U.S. 255, 259 (1993).

222. *See, e.g.*, Beebe, *supra* note 19, at 714 (describing in-person interaction as essential to moral assessment).

223. Commonwealth v. Ruiz, 178 N.E.3d 901, 2021 WL 5238605, at *1 (Mass. App. Ct. 2021) (unpublished table decision).

224. *See supra* Part II.B.

225. *Ruiz*, 2021 WL 5238605, at *1.

226. *Id.*

227. Petition for Writ of Certiorari, *supra* note 6, at 3 (alteration in original).

228. *Id.*

apostrophe from "defendants."[229] In light of the ultimate verdict against Ruiz, we might be justified in reading this question as referring to his demeanor alone.[230] But it is also plausible to read the jury's question as asking whether they might consider *both* defendants' demeanors, or solely Delacruz's demeanor.[231] And from there, one could construct an account of their ultimate verdict as an exercise of jury nullification.[232] Perhaps the jury spared Delacruz from the operation of the criminal law for some reason related not to the strength of the evidence but to the jury's belief in the moral rectitude, or lack thereof, of finding her guilty.[233] Under this account, it is conceivable that it was not negative character assumptions based on Ruiz's demeanor that mattered to the jury but something about the way Delacruz appeared as she watched the trial that made them believe she was worthy of forgiveness or unworthy of punishment.

While this species of jury nullification might be controversial for the same reasons that jury nullification more broadly is debated,[234] it is consistent with an existing asymmetry in our approach to character propensity evidence. Negative character propensity evidence is entirely inadmissible, but positive character propensity evidence is more lightly regulated.[235] For example, while FRE 404(a)(1) prohibits the use of character evidence to prove action in conformity, Rule 404(a)(2)(A) makes plain that a defendant in a criminal case is permitted to introduce positive character propensity evidence, which can then be rebutted by the prosecutor.[236] In its notes on the rule, the Advisory Committee

229. *Id.*

230. *See id.* (describing how the jury heard similar evidence against both defendants yet only convicted one after being given permission to consider the demeanor of the defendants).

231. *Id.*

232. *See* Brown, *supra* note 19, at 1150 ("Juries that nullify are usually presumed to base their verdicts on illicit bias, personal disagreement with democratically enacted statutes, or, at best, private moral convictions that contradict the law.").

233. *Id.*

234. Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 254–57 (1996) (describing the ongoing debate over jury nullification and arguing for a broader interpretation of the doctrine); Brown, *supra* note 19, at 1149, 1159–71 (tracing the historic roots of jury nullification and the contemporary debate over its validity).

235. *See* FED. R. EVID. 404(a)(2)(A).

236. FED. R. EVID. 404(a)(1), (a)(2)(A).

defaults on explaining this dichotomy, citing "history and experience" rather than offering a concrete justification while also suggesting that the rule has "constitutional proportions."[237] But unlike other Federal Rules, which find justification in faulty armchair psychology, this rule follows from the principles described above. It is a moral imperative to allow a defendant in a criminal case to present evidence of his character, both to offer a sense of dignity or agency and because it can humanize and individuate him in the eyes of the jury.[238]

Along similar lines, the Supreme Court explained in *Old Chief* that,

> [w]hen a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment.[239]

The Court offered this as an explanation for why prosecutors must be allowed to tell a story with "descriptive richness," but the same holds even more true for defendants.[240] In order to "implicate the law's moral underpinnings," defendants are offered unique license to tell fact finders about themselves.[241] Indeed, actual science supports the disparate treatment of negative and positive character evidence.[242] As Professor Brown has explained, humans will use "split second observations—based on

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237. FED. R. EVID. 404 advisory committee's note on the proposed rules.

238. *See, e.g.*, FED R. EVID. 404 advisory committee's note to 2006 amendment (describing Rule 404(a)(2)(A) as the "mercy rule" because it allows a defendant to proffer evidence of his own positive, pertinent character as a stopgap against the "strong investigative and prosecutorial resources of the government").

239. Old Chief v. United States, 519 U.S. 172, 187–88 (1997). *Old Chief* focuses on prosecutors' ability to invoke the moral underpinnings of the law through descriptive richness, something that is arguably even more important for defendants as they seek to minimize moral outrage and dehumanization that can lead to severe punishment. *See* Brock Bastian et al., *The Roles of Dehumanization and Moral Outrage in Retributive Justice*, PLOS ONE, Apr. 2013, at 1 (extending the model of retributive justice where the severity of punishment sought is based on the perceived magnitude of the harm and moral outrage and finding moral outrage and dehumanization mediated the relationship between perceived harm and severity of punishment).

240. *Old Chief*, 519 U.S. at 187–88.

241. *Id.*

242. *See* Brown, *supra* note 15, at 50 (discussing how people use split second observations to determine who is "good" and "bad").

peoples face, race, sex, power and class" to "sort individuals into groups to those who are good and those who are bad."[243] To fight against these assumptions, it makes sense to permit defendants some ability to recast themselves as morally virtuous or credible.[244]

As even this brief exploration of the positive and often fundamental benefits of defendant demeanor in the criminal system underscores, regulating demeanor in the criminal system poses a challenge. If we wish to preserve demeanor's role as a moral safeguard and expressive feature, it must remain central to the criminal trial. And yet, its current usage—as a flawed source of negative character propensity reasoning that offers unchecked discretion to the fact finder—impermissibly risks violating the system's fundamental promise to judge acts not character.

B. SOLUTIONS

We have now arrived at the central question: how to preserve the kind of careful moral judgment that can only come from seeing a person as a person without triggering harmful character-based assumptions. What we propose will not solve this problem in its entirety. But it will offer some radical and needed changes. Through a combination of revisions to jury instructions, new evidence rules, expert testimony, and different pedagogy in law schools, we argue for beginning the process of fundamentally shifting our understanding of demeanor's role in the trial process.

As we described in Part I, at present, demeanor holds a hallowed place in American jurisprudence on credibility. In assessing witnesses, trial judges are taught to focus on demeanor-based clues, such as "facial expressions, eye contact, attitude, body language, length of pauses, hesitation, sincerity, gestures, candor, tone of voice, expression, dress, [and] grooming habits."[245] This belief, that we should carefully scrutinize witnesses' demeanor is a "pillar" of the jurisprudence,[246] and one with the imprimatur of the Supreme Court, which has weighed in to note that credibility assessment "turns largely on an evaluation of

243. *Id.*

244. *Id.* at 47 (arguing that defendants might be able to combat negative character inferences by recasting themselves using positive character evidence).

245. Bennett, *supra* note 30, at 1338.

246. *Id.*

demeanor."[247] Congress too, has endorsed this view, providing in the Immigration and Nationality Act that immigration judges may base their credibility determinations on "the demeanor, candor, or responsiveness of the applicant or witness," among other things.[248] And jury instructions make sure that lay participants in the system are directed to demeanor as a central source of information about a witness's credibility.[249]

Beyond the credibility context, courts are confused about the role of demeanor in the trial process.[250] Some jurisprudence suggests that demeanor is not evidence but, as in *Ruiz*, jurors are permitted to consider it.[251] Jurisdictions have taken different approaches to regulating prosecutorial invocations of demeanor, but such invocations happen routinely and are often tolerated if not condoned. In essence, we have a system that promotes demeanor as a source of useful, character-propensity information about defendants—one that ostensibly helps assess questions like the risk the defendant is lying or the likelihood that a defendant feels remorse or shame, but that, in practice, is often aimed directly (and explicitly) at the question of guilt.

Put simply, the status quo is backwards. Current doctrine takes a solicitous approach to demeanor evidence;[252] the proper approach would be prophylactic. Rather than highlighting the utility of demeanor evidence, trial courts should warn juries against the pitfalls of such evidence—and appellate courts should proactively scrutinize the role of demeanor evidence at trial. Consistent with the Supreme Court's jurisprudence on other evidence that creates a heightened risk of biased character-propensity assumptions, we suggest a rebuttable presumption *against* using demeanor as negative character evidence of any kind. If a prosecutor highlights demeanor or a judge decides not to caution jurors against interpreting demeanor as evidence, reviewing courts should assume prejudice as they must already

247. Miller v. Fenton, 474 U.S. 104, 114 (1985).

248. 8 U.S.C. § 1158(b)(1)(B)(iii).

249. Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309, 323 (2020) ("Most pattern instructions have a generic instruction about how to evaluate witness testimony that discusses a number of factors like memory, demeanor on the stand, and whether the witness has any bias.").

250. *See supra* Part I.A.

251. *See id.*

252. *See supra* note 249 and accompanying text.

do when improper evidence of a prior conviction or the sight of a defendant in shackles has reached the jury.

In what follows, we offer two specific reform proposals. First, a rule of evidence focused on demeanor, and second, a jury instruction on demeanor. Finally, we suggest additional measures, including expert testimony and pedagogical change in law schools, that can help contest and change the cultural belief that what we see on a person's face is an accurate portrait of who they are inside.[253]

1. Rule Change Proposal

Evidentiary rules are a central tool for addressing sources of bias or unreliable evidence at trial.[254] At present, however, the word demeanor does not appear in the Federal Rules of Evidence or most state analogues. Demeanor is thus a quintessential example of what Professor Bennett Capers has termed "evidence without rules."[255] But unlike other information in this category, like the appearance of supporters in the audience, for example, demeanor has long been assumed to *be* evidence of some kind. This has allowed courts to issue jury instructions directing jurors to pay careful attention to demeanor even as it has prevented defendants, like Ruiz, whose demeanor may have improperly led to assumptions about guilt from making recourse to evidence rules when seeking redress. In order to reorient our approach to demeanor, a rule is needed.

Accordingly, we propose amending FRE 404 to make explicit the role that demeanor can and cannot play as evidence. Specifically, the rule we offer would make clear that a defendant's demeanor should not be used as evidence of character, and that it

253. Lee et al., *supra* note 80, at 1075 (reviewing the collective cultural belief); *see* Bella M. DePaulo et al., *Cues to Deception*, 129 PSYCH. BULL. 74, 104–06 (2003) (discussing the difficulties inherent in identifying cues to deception); TODOROV, *supra* note 15, at 261 (describing getting over the "illusion" that there is a correspondence between appearance and character as "almost impossible"); Bond & DePaulo, *supra* note 79, at 214, 230–31 (compiling studies to conclude people are largely unable to distinguish lies from truth).

254. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 168 (2006) ("[M]ost of the exclusionary rules are designed with the jury in mind and with the goal of increasing the accuracy and efficiency of fact finding under circumstances of jury decision making.").

255. Capers, *supra* note 194.

cannot be considered by the fact finder unless it goes directly to a material fact. Our proposal is as follows:

> Federal Rule of Evidence 404(c): **Demeanor**.
>
> **(1) Prohibited Uses**. In a criminal case, the defendant's demeanor is not admissible against the defendant.
>
> **(2) Exceptions.** This evidence may be admissible for another purpose, such as proving identity or physical capability. Demeanor evidence admitted under this exception must not be used to prove character in order to show that on a particular occasion the defendant acted in accordance with that character.
>
> **(3) Notice**. Evidence admitted under this rule is subject to the notice provision of Rule 404(b)(3).
>
> **(4) Standard of Review.** Appellate courts shall review de novo any evidence admitted under this rule.

Further, in order to make clear the prophylactic nature of this rule, the Advisory Committee Notes should clarify that harmless error review is not appropriate. Thus, the Advisory Committee Notes might read:

> If a trial court determines, at any time during or after the close of trial, that evidence was admitted improperly under this rule, the proper remedy shall be either a mistrial or dismissal with prejudice. If an appellate court determines that evidence was improperly admitted under this rule, the proper remedy is a new trial, regardless of the magnitude of the error.

We situate our proposed rule within existing FRE 404, the rule governing character evidence.[256] Our modification is consistent with the existing purpose and structure of Rule 404. That rule is designed to limit the circumstantial use of character evidence to prove action in conformity with character.[257] As Rule 404(b) indicates, however, certain evidence that also might be indicative of character does have a legitimate permissible evidentiary function.[258] For example, prior bad acts can be introduced if they help prove identity or motive without the aid of a

256. We could also have situated this rule within the series of "specialized relevance rules" in Rules 407 through 411. FED. R. EVID. 407–411. Like those rules, this can be thought of as making a policy-based exception to the general rule that relevant evidence is admissible. However, the distinction between the so-called "specialized relevance rules" and Rule 404 is in many ways a false one. As Judge Cardozo explained in the seminal character evidence case, *People v. Zackowitz*, "[t]he principle [behind] the exclusion [of propensity evidence] is one, not of logic, but of policy." 172 N.E. 466, 468–69 (N.Y. 1930).

257. FED. R. EVID. 404 advisory committee's note to 2000 amendment.

258. FED. R. EVID. 404(b).

character propensity inference.[259] Like prior bad acts, demeanor is susceptible to being used to prove action in conformity with character. That has been the thrust of our discussion in Part II.

Yet, demeanor also has legitimate evidentiary value when used to prove a material fact. For example, if a witness's physical description of an assailant does not match the defendant's appearance, that is directly probative of the material fact of whether the defendant committed the assault. If a witness is too small to have wielded the murder weapon, this is directly probative of the material fact of whether the defendant could have committed the crime. A witness telling a story may use gestures to describe what took place.[260] These uses of demeanor do not require propensity reasoning and are both acceptable and potentially highly probative. It is also possible that conduct by the defendant, such as laughing or gesturing, might be taken as directly indicating assent or disagreement. Facial expressions, too, might at times be seen as direct evidence of agreement or disagreement. These uses of demeanor as evidence may or may not be probative. Either way, they do not rely on the kind of character-based assumptions that are so likely to be both inaccurate and biased. For this reason, our proposed rule mirrors the existing structure of Rule 404(b). It prohibits the use of demeanor as evidence unless it is being used to prove identity, physical capability or another material fact that can be proved without the use of propensity inferences from demeanor.

Proposed Rule 404(c)(3) also uses the notice provision in Rule 404(b)(3). This provision requires that if a prosecutor wishes to introduce evidence under 404(b) for a non-propensity purpose in a criminal case, the prosecutor must provide pre-trial notice that articulates in writing the "permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose."[261] The only exception to this is if the court excuses a lack of pretrial notice for good cause, such as if new evidence comes to light during trial. This provision

259. *Id.*

260. *See, e.g.*, Hurubie Meko, *Majors's Ex-Girlfriend Tells Jury His Rage Was Explosive and Terrifying*, N.Y. TIMES (Dec. 5, 2023), https://www.nytimes.com/2023/12/05/nyregion/jonathan-majors-grace-jabbari-testimony.html [https://perma.cc/G8WE-ACLP] (describing the defense attorney's request that the accuser's gestures made during trial testimony in assault trial be included in the trial record).

261. FED. R. EVID. 404(b)(3)(B).

is intended, as in the 404(b) context, to ensure that when prosecutors seek to introduce demeanor as evidence, they must explain the legitimate, non-propensity use of the demeanor evidence and judges cannot simply rubber-stamp illegitimate character-based uses. Similarly, Proposed Rule 404(c)(4) makes clear that if a judge admits evidence under the rule, the appellate court must conduct a de novo review rather than defaulting to an examination of whether the lower court abused its discretion. This heightened standard of review is important to instantiating the constitutional principles described in Part II. The Court has made clear that our commitment against criminalizing character is absolute. The question is not whether a case might have come out the same way without the evidence or if the trial court abused its discretion. Rather, there is no discretion to admit demeanor as character evidence because the risk is simply too great that this is a form of criminalizing character. For this reason, once an appellate court determines that there was an erroneous admission of demeanor as propensity evidence, the court must order a new trial.

Proposed Rule 404(c) does not address the positive character-propensity use of demeanor evidence. We omit such a provision because the unique nature of demeanor evidence makes it superfluous. The defendant's demeanor is not like a positive character witness whose proposed testimony will be excluded from evidence without a provision allowing the defendant to call her.[262] The possibility that fact finders will make positive character-based assumptions based on demeanor is always there, along with the potential for negative character-based assumptions.[263] Rule 404(c) is tailored to reduce the negative character-based assumptions that come from demeanor. If a defendant wanted to point to his demeanor as evidence of a positive character trait, that usage would be unaffected by Rule 404(c). Under the existing rules, Rule 404(a)(2)(A) would permit such an

262. *See, e.g.*, FED. R. EVID. 404(a)(2)(A).

263. Professor Brown has surveyed psychological research showing that human behaviors that are perceived as being immoral are weighted more heavily than their positive counterparts and "lead to greater changes in our implicit and explicit impressions of character." Brown, *supra* note 15, at 6, 47. In contrast to positive character assessments, judgments about immoral conduct are quick to form and prove sticky. *Id.* This suggests that instructing against negative conclusions based on demeanor presentation will target the real risk, which is the formation and amplification of negative character-based assumptions.

argument, and it would also allow the prosecutor to "offer evidence to rebut it."[264] Thus, the existing asymmetry in the rules on character evidence would continue to allow defendants who wish to do so to invoke demeanor as positive character evidence.[265]

Whether our proposed rule should encompass defendants in civil cases as well is a question that we can address only superficially here. Certainly, the problems we have identified with using demeanor as character evidence are not limited to the criminal context. And we suspect there is ample reason to make this a transubstantive change. At the same time, the consequences of using demeanor as character evidence are obviously drastically greater in criminal prosecutions, particularly in the context of the wider carceral state. Further, the constitutional protections that support our proposed rule, like the right to confrontation, do not attach to defendants in civil cases. Last, we note that while the civil and criminal legal systems share many evidentiary rules in common, they do not share them all, and the way those rules are applied can vary drastically across contexts.[266] Thus, careful thought is warranted before sweeping a change to civil evidence rules under the umbrella of a change warranted by existing dynamics and constitutional tenets on the criminal side.

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264. FED. R. EVID. 404(a)(2)(A).

265. For those sympathetic to the rule, it may seem both over and underinclusive. The rule would exclude demeanor as character evidence against the accused even if he is not likely to suffer negative consequences from character because, for example, he is a cis white man in a position of relative wealth or privilege. At the same time, the rule only protects defendants in criminal cases from the use of negative character evidence. The former objection misses one important point we hope to reiterate here, which is that demeanor is almost invariably an inaccurate metric of character. This is particularly bad when demeanor triggers negative assumptions linked to race, sex, or disability, as we describe in Part II.A. But if a white defendant looks like a juror's despised fifth-grade math teacher and the juror is therefore inclined to attribute to him that teacher's bullying personality, the fact-finding process of the trial has been hijacked by an inaccurate demeanor-based assumption about the accused's character. This is less likely to be a systemic problem than the implicit cultural associations of race with negative characteristics, but it is a problem nonetheless and one that the rule aims to combat.

266. *See, e.g.*, Paul C. Giannelli, *The Supreme Court's "Criminal"* Daubert *Cases*, 33 SETON HALL L. REV. 1071, 1072 (2003) (describing *Daubert*'s "disparate impact in civil and criminal cases" and the higher bar it poses to admissibility of expert testimony in civil cases).

Beyond these two more peripheral issues, the most obvious objection to this proposal goes something like this: If demeanor is always there, is it not futile to seek to regulate it? Here, it is important to recognize that Proposed Rule 404(c) has a slightly different function from other evidence rules. It is intended to delineate demeanor's permissible and impermissible uses, rather than to regulate it away. Jurors will still see potentially prejudicial demeanor evidence. And because demeanor is always looking fact finders in the face, there will be times when the jury or judge makes negative character-propensity assumptions based on demeanor despite the rule and instructions to the contrary. In the absence of a *Ruiz*-like series of events or an obvious error, such as a prosecutor alluding to demeanor, the rule will not necessarily be able to help reviewing courts police all uses of demeanor as character evidence. In other words, even more so than for other evidentiary rules, only some subset of errors under the Proposed Rule 404(c) will be identifiable on appeal.

Even so, Proposed Rule 404(c) improves on the status quo, both because it can materially change outcomes in some cases and because it clarifies the limited role that demeanor should play in criminal trials. Revisiting *Ruiz* illustrates the Rule's potential to change outcomes.[267] If it had existed when Ruiz was tried, Proposed Rule 404(c) would have made clear to the judge that he must instruct the jury *not* to consider the defendant's demeanor "as evidence." Under Rule 404(c), the judge should have sent back an answer along these lines in response to being asked whether the jury could consider the defendant's demeanor: "No. The defendant's demeanor is not evidence, and you should not consider it. Demeanor varies from person to person and people's facial reactions to events and circumstances are not always a good guide to their inner thoughts or emotions." In a case like Ruiz's, if the judge did not answer according to the rule, a reviewing court should order a new trial after de novo review. And even if the jury was given the correct answer and told not to consider the defendant's demeanor but still persisted in finding Ruiz guilty, he would have an argument on appeal that his

267. Commonwealth v. Ruiz, 178 N.E.3d 901, 2021 WL 5238605, at *1 (Mass. App. Ct. 2021) (unpublished table decision).

demeanor improperly operated as negative character evidence as prohibited under Rule 404(c).[268]

By contrast, in a burglary case in which the defendant has argued that she was not physically capable of breaking down the door, the judge should permit arguments at trial about the defendant's physical characteristics that bear on this question unless the risk of unfair prejudice substantially outweighs the probative value under Rule 403.[269] The judge should then instruct the jury consistently with Proposed Rule 404(c). Such an instruction might read: "You should not consider the defendant's demeanor as evidence of what kind of person he is or whether he is lying. You may consider the defendant's demeanor to the extent it helps you determine the defendant's physical capabilities."

Cases where defendants engage in conduct during trial, such as laughing or making gestures at a witness, may fall somewhere on the border of the paradigm. It is possible that such behavior indicates something other than what it appears to suggest, such as nervousness, for example. But this conduct is within a defendant's control to a much greater degree than other aspects of appearance, such as skin tone, facial characteristics, or even facial expression. Again, a prosecutor wishing to highlight this conduct must persuade the judge that it is admissible for a non-propensity purpose, such as showing that the defendant made a threat to a witness, which might go to motive or even directly to guilt. And the judge must assess whether that is a valid non-propensity use and whether introducing evidence for

268. *See id.* Of course, it is theoretically possible that the jury in *Ruiz* was commenting on a specific act with communicative content—e.g., an exclamatory remark or gesture during the testimony of another witness—which, in principle, might not involve propensity reasoning. Even if that were the case, under our proposal, (1) the state ought to bear the burden of explaining that such an act took place (in an effort to overcome the presumption of prejudice), and (2) even assuming that it could do so, the risk might still be too great (and, perhaps needless to say, there is no evidence of this kind of dynamic actually being at play in *Ruiz* itself).

269. Rule 403 requires the exclusion of any evidence if its probative value is substantially outweighed by the risk of unfair prejudice. FED. R. EVID. 403. It offers an additional layer of protection beyond any rule of exclusion, including our Proposed Rule 404(c). Any evidence being admitted under Proposed Rule 404(c)(2) would still be subject to objection under Rule 403. And Proposed Rule 404(c)(2) makes explicit that the court should weigh the risk that the jury would instead use the demeanor evidence for an improper purpose, such as drawing improper demeanor-based character propensity assumptions.

that purpose would have a probative value that is not substantially outweighed by the risk of unfair prejudice.

A note is also in order here about how Proposed Rule 404(c) would intersect with the customary assumption that demeanor is evidence of credibility. Our proposal does not directly address the use of demeanor as evidence that a witness is lying in the moment. What it does prohibit is using demeanor-based assumptions about a defendant to come to the conclusion that she has the character of being a liar. Put simply, "she looks untrustworthy" is not a valid basis for decision-making under Proposed Rule 404(c).

So, what of the use of demeanor to conclude that a defendant is lying in the moment? Proposed Rule 404(c) does not preclude this usage, but it places the burden on the state to explain how and why demeanor is relevant to whether a defendant is lying in a given case. If the state meets this burden, it would be permitted to make arguments that the defendant's facial expression or tone of voice suggests he is lying. We admit to being skeptical that there is any support for the proposition that facial cues offer clues to whether a person is telling a lie.[270] From this perspective, one additional benefit of Proposed Rule 404(c) is that it would require some showing of validity before the legal system continues to accept the bromide that we can tell if a person is lying from their affect. Similarly, if a judge wishes to instruct jurors that demeanor is a helpful guide to whether a witness is being truthful or lying in the moment, that jury instruction would need to be worded with extreme care. It should focus jurors on whatever types of facial expressions the judge believes can signify lying while being careful to warn jurors against drawing conclusions about the defendant's *character*—whether the defendant is generally a liar—from his demeanor.

Beyond concrete change in some cases, Proposed Rule 404(c) is important conceptually. Just as FRE 402 concretizes the premise that only relevant evidence is admissible, Proposed Rule 404(c) makes clear that demeanor is not evidence except in very limited circumstances. As we discuss in greater detail in the next subsection, with such a rule in place, existing jury instructions that point jurors to a defendant's demeanor as evidence of character are untenable. Instead, courts should issue jury instructions explaining the thrust of Rule 404(c) to the jury. Further, in

270. *See* Simon-Kerr, *Unmasking Demeanor*, *supra* note 17, at 170–71.

cases where a defendant believes the risk of character assumptions from his demeanor to be particularly high, he would have a strong argument for the use of expert testimony on demeanor's unreliability as character evidence.[271]

Finally, the rule would open avenues for civic education and require a change in how law students learn about demeanor. Instead of being taught that demeanor is a fruitful source of information about witness credibility, as happens in many classrooms today,[272] students would learn a rule based on scientific findings that demeanor is not an accurate source of character-based assumptions.

Before closing our discussion of Proposed Rule 404(c), we note that we are in good company in arguing that the problem with demeanor as evidence requires changes to the evidence code. To address the problem of unregulated evidence arising from demeanor and other nontestimonial courtroom sources, for example, Professor Capers proposes adding a definition of evidence to the code: "Evidence includes anything that may come to a juror's attention and factor into a juror's deliberation."[273] He argues that such a definition would cause legal actors to check and contest information that jurors might consider, such as the attire of courtroom spectators, for "relevance and trustworthiness" as well as screen it for "unfair prejudice."[274] Professor Brown, by contrast, proposes a revised Rule 404 that would eliminate the propensity prohibition for acts not considered immoral and create a balancing test for admission of immoral character

271. This is analogous to part of Professor Brown's proposal, which proposes admitting *more* actual character evidence to combat negative trait assumptions arising from demeanor. Brown, *supra* note 15, at 46–47, 49–50. Under this proposal, positive evidence would be permitted so long as it did not waste too much time or devolve into a trial within a trial. *Id.* at 51. Ultimately, permitting positive evidence could bolster the credibility of a witness with an untrustworthy-looking face. *Id.* It also resonates with Professor Gonzales Rose's call for racialized reality evidence and her more recent work advocating for the use of antiracist experts. Gonzales Rose, *supra* note 92, at 2287.

272. One example of this is how hearsay is taught. Students are instructed that fact finders cannot assess the veracity of hearsay statements unless they can see the declarant as a way of assessing truthfulness. *See, e.g.*, ARTHUR BEST, EVIDENCE: PRACTICE, PROBLEMS AND RULES 163 (2013) (introducing the rule against hearsay as responding in part to a concern about whether the declarant "seemed to be lying or trying to communicate honestly").

273. Capers, *supra* note 194, at 901.

274. *Id.*

evidence, among other effects.[275] Her proposal responds to the problem of fact finders wrongly inferring character traits from demeanor by admitting more information about character.[276]

Professor Capers's proposed definition has an appealing elegance. Why not simply alert courts that much of what we view as non-evidence is actually evidence? Much as that is conceptually appealing and accurate, we fear it will not lead courts to address the problems with demeanor as character evidence. At present, courts do treat the demeanor of testifying witnesses as a form of evidence.[277] This was in some ways precisely the problem in *Ruiz*.[278] The court permitted the jury to consider the evidence of his demeanor as he sat silently in the courtroom.[279] By expanding the definition of evidence, Professor Capers creates the possibility that the court would balance the probative value of Ruiz's demeanor against the risk of unfair prejudice before answering the jury's question.[280] All evidence other than prior convictions involving dishonesty or false statement is subject to such balancing.[281] But this still leaves a great deal to the discretion of the judge.[282] Existing doctrine shows that only in extreme cases do courts recognize that demeanor may be functioning as character evidence to the extent that it is cognizably prejudicial.[283] Although under our proposal, Rule 403 balancing would still apply to any evidence admitted under Rule 404(c)(2), we take a different approach to the primary problem by making

275. Brown, *supra* note 15, at 1, 6, 56.

276. *Id.*

277. *See supra* Part I.

278. *See, e.g.*, Commonwealth v. Ruiz, 178 N.E.3d 901, 2021 WL 5238605, at *1 (Mass. App. Ct. 2021) (unpublished table decision).

279. *Id.*

280. *See generally* Capers, *supra* note 194.

281. *See* FED. R. EVID. 403; FED. R. EVID. 609(a)(2).

282. For example, courts have misapplied and eroded the protective balancing test intended to mitigate admission of prior convictions as evidence of credibility under Rule 609. *See* Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 564 (2014) (criticizing the assumptions courts rely on in applying Rule 609); *see also* Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 UC DAVIS L. REV. 289, 317 (2008) (explaining how courts' have transformed the balancing test in Rule 609 from an obstacle to admitting prior convictions, as it was intended, to a conduit for their routine admission).

283. *See supra* Part I.

explicit the principle that demeanor is not evidence unless it goes directly to a material fact.

2. Jury Instructions

Our Proposed Rule 404(c) cabins how evidence can be used rather than excluding it from view of the fact finder. As such, the rule cannot stand on its own. Jurors will need instructions about the use, if any, they are permitted to make of demeanor.

A jury instruction on demeanor would not be novel. As we describe in Part I, jury instructions already make reference to demeanor when they tell jurors to consider the witness's "appearance and manner while on the witness stand" as a guide to whether the witness is "worthy of belief."[284] Our proposal would replace such instructions with one that makes clear that demeanor is *not* an accurate guide to character. Such an instruction should be given pre-trial, and again before the jury deliberates. It might read:

> As you view the evidence during this trial, keep in mind that the defendant's outward appearance is not evidence. This means that you are not permitted to base your decision on the defendant's demeanor unless I instruct you otherwise during the course of the trial. The assumptions we make about people based on how they look are often inaccurate and can reflect stereotypes and biases. Pay careful attention to the defendant's words, the exhibits that are admitted into evidence, and the answers of the witnesses, except where those answers are stricken from evidence. This is the evidence upon which you must make your decision in this case.

Again, we are not the first to argue for changes along these lines. Professor Capers proposed an instruction to go along with his proposed definition, discussed above, to address the problem of jurors considering information that is technically not

284. KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 15:01 (6th ed. 2022); *see also* FIRST CIRCUIT PATTERN JURY INSTRUCTIONS—CRIMINAL § 3.06 (1998) ("You may want to take into consideration such factors as the witnesses' conduct and demeanor while testifying . . . ."); SEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS—CRIMINAL § 3.01 (2012) ("Some factors you may consider include . . . the witness' demeanor . . . ."); Ninth Cir. Jury Instructions Comm., *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*, U.S. CTS. FOR THE NINTH CIR. § 6.9 (Nov. 2024), https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2024_11.pdf [https://perma.cc/D9X4-XTPB] ("In considering the testimony of any witness, you may take into account . . . the witness's manner while testifying . . . .").

evidence.[285] Professor Capers's instruction, however, explicitly tells jurors that the demeanor of witnesses is evidence that they may consider when deliberating.[286] This instruction would thus address the problem of non-testifying defendants like Ruiz, but it does not ameliorate the larger problem: fact finders' use of demeanor as character evidence. Hence, our proposal explicitly cautions jurors against using demeanor as evidence unless the judge instructs them otherwise.

Of course, limiting instructions—of any kind—are notoriously anemic tools for reining in problematic reasoning on the part of fact finders. The causes of such reasoning run deep. They stem from habits of mind that reflect broader cultural patterns and often take years, even decades, to develop; it would be unreasonable to expect a few minutes of recited verbiage from a judge to "undo" those habits. Some commentators, over the years, have responded to this reality by concluding that we should give up on limiting instructions—that we should treat them as a kind of fiction, with only ceremonial value in the trial process. Other commentators, like Professor Capers, do not go quite this far, but they do counsel a skeptical orientation toward limiting instructions: keeping them purposely open-ended and dilute, consistent with their near-fictional status.[287]

Although we understand these kinds of critiques (and in many instances agree with their spirit), we believe it is worth taking limiting instructions seriously for two reasons. First, jurors are individual people, and jury deliberations (and verdicts) are path-dependent; in our system, the power of specific jurors can be significant, particularly in cases that raise the specter of nullification or otherwise pique the jury's moral concern. Because of this, limiting instructions need not work well *in general* for it to be true, nevertheless, that they have important effects

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285. Professor Capers's instruction would read as follows:

> Your decision today must be based solely on the evidence that was explicitly offered and accepted into evidence by me during this trial. That includes the answers given by witnesses, except where their answers were stricken. It includes the demeanor of witnesses who testified. And it includes the exhibits that were admitted into evidence. Nothing else may be considered by you. Allow me to repeat that. Nothing else may be considered by you.

Capers, *supra* note 194, at 899.

286. *Id.*

287. *See, e.g.*, *id.*

in particular cases. Second, limiting instructions often become the practical mechanism—the site of legal injury—invoked by criminal defendants to pursue remedies on appeal. This confers limiting instructions greater functional significance than other, garden-variety evidential rulings whether or not the instructions have any "real effect" at the time of their recitation by the court.

3. Education

Not only is Proposed Rule 404(c) a radical departure from current practice, but it likely demands that jurors and other trial participants change their understanding of the informational value of demeanor. More than a simple jury instruction will be needed to facilitate this process. Here, we highlight three additional avenues—juror education videos, experts, and law school classrooms—that can help inform jurors and other participants in the criminal system about demeanor.

Juror education videos have become something of a standard practice in American courtrooms.[288] They are often played to rooms full of prospective jurors, giving them a wider reach than instructions that reach only the jurors who wind up being empaneled.[289] These videos have been used to present segments about implicit bias or other research on cognition and decision-making.[290] In keeping with Proposed Rule 404(c), those videos

288. The National Center for State Courts has compiled pre-service training videos that prepare jurors before they get to the courthouse and in-service videos shown once prospective jurors arrive at the courthouse from thirty-three states and the District of Columbia. *Juror Videos*, NAT'L CENTER FOR STATE CTS., https://www.ncsc-jurystudies.org/what-we-do/juror-videos [https://perma.cc/92TM-P5M4].

289. For example, in Connecticut all prospective jurors are shown an orientation video that explains what they can expect from jury duty while also explaining the importance of applying the law and putting personal beliefs, prejudice, and bias aside. *Jury Outreach Program*, STATE OF CONN. JUD. BRANCH, https://www.jud.ct.gov/jury/outreach.htm [https://perma.cc/7RE2-PM6D].

290. The education arm of the Michigan Supreme Court, for example, began including a segment on unconscious bias during jury orientation in 2021. *Juror Orientation Video Updated to Address Unconscious Bias*, MICH. CTS. (Dec. 8, 2021), https://www.courts.michigan.gov/news-releases/2021/december/juror-orientation-video-updated-to-address-unconscious-bias [https://perma.cc/MC4L-PCMZ]. Michigan courts use this video to "educate everyone who interacts with the courts, including court staff, prospective jurors, attorneys, and the general public." *Id.*; *see also* Lee J. Curley et al., *Cognitive and Human Factors*

should include a segment advising jurors about the problem with relying on demeanor as character evidence. They could explain that we tend to infer character traits from appearance, but that this process is faulty when we are making assessments of strangers about whom we know little.[291] They could canvass neuroscientific research showing that we trust people who look like members of our own tribes.[292] And they could incorporate studies that show people do better at detecting falsehoods the more closely they pay attention to what a witness is saying as opposed to how they look.[293]

Expert testimony represents a more targeted intervention to combat preexisting ideas about demeanor. Proposed Rule 404(c) would provide a basis for defendants to argue that such testimony is needed to effectuate the rule's purpose. We anticipate that these arguments would be particularly salient in certain cases. For example, certain facial features are known to code in ways that would make defendants with those features more susceptible to negative character inferences. As Professor Brown explains: "[N]eutral expression faces with wider jaws, heavier brows, and smaller eyes tend to be judged as more dominant.' Dominant faces are more likely to generate trait inferences of being impulsive, careless, or aggressive."[294] Because our perceptions of the dominance of someone's face can shape how we interpret ambiguous behavior, these assumptions can be particularly damaging.[295] Sex and race also interact with these kinds of automatic assumptions. Professor Brown writes that "[w]omen's

in Legal Layperson Decision Making: Sources of Bias in Juror Decision Making, 62 MED., SCI. & L. 206, 212 (2022) (recommending that jurors be educated about the effects their biases may have on their decision making by a psychologist through a short informative video prior to trial).

291. Alexander Todorov et al., *Evaluating Faces on Trustworthiness After Minimal Time Exposure*, 27 SOC. COGNITION 813, 819 (2009) (finding people make quick trustworthiness judgments based on facial appearance); *see also* Simon-Kerr, *Unmasking Demeanor*, *supra* note 17, at 165–70 (arguing against assessing truthfulness in the courtroom using physical appearance).

292. *Id.*

293. *See, e.g.*, Vrij et al., *supra* note 78, at 295, 307–08 (explaining that since 2006, no research has shown that observing behaviors alone leads to improved accuracy of lie detection); *see also* Simon-Kerr, *Unmasking Demeanor*, *supra* note 17, at 165–70 (arguing the lack of connection between demeanor and truthfulness).

294. Brown, *supra* note 15, at 1, 6, 40 (quoting Evan Westra, *Character and Theory of Mind: An Integrative Approach*, 175 PHIL. STUD. 1217, 1221 (2018)).

295. *Id.*

faces that do not conform to gender-stereotypical traits and that are rated as more 'masculine-looking' are assumed to be more unfriendly and cold."[296] And race is also a potent source of such spontaneous trait inferences—assumptions we make automatically—which researchers have found are just as strong as those we generate after deliberation.[297]

Cases where race, sex or particular facial characteristics are likely to skew perceptions of the defendant would therefore be good candidates for expert testimony on demeanor. In other contexts, such as eyewitness testimony, expert testimony has helped change judicial attitudes about how reliable eyewitnesses are likely to be and led to statutory changes to try to mitigate the risk of eyewitness misidentification.[298] Our theory is that expert testimony might be similarly helpful in countermanding

296. *Id.* at 41.

297. *Id.* at 44. Professor Brown advocates a series of changes to Rule 404 that would allow character evidence in some circumstances to combat precisely this problem. *Id.*

298. *See* Thomas D. Albright & Brandon L. Garrett, *The Law and Science of Eyewitness Evidence*, 102 B.U. L. REV. 511, 593–627 (2022) (surveying state responses to eyewitness evidence and identifying statutory and other changes to police procedures around lineups as well as widespread adoption of mitigation measures such as expert testimony and jury instructions); *see also* Young v. State, 374 P.3d 395, 405 (Alaska 2016) (acknowledging that jury instructions and expert testimony about the reliability of eyewitness testimony should be taken into consideration by trial courts); State v. Chapple, 660 P.2d 1208, 1223–24 (Ariz. 1983) (holding that the trial court abused its discretion in precluding the admissibility of expert testimony regarding the reliability of eyewitness identification), *superseded by statute on other grounds*, ARIZ. REV. STAT. ANN. § 13-756 (2021), *as recognized in* State v. Riley, 459 P.3d 66 (Ariz. 2020); State v. Guilbert, 49 A.3d 705, 707, 731 (Conn. 2012) (holding that the reliability of eyewitness identification was "frequently . . . not a matter within the knowledge of an average juror and that the admission of expert testimony . . . d[id] not invade province of the jury"); Minor v. United States, 57 A.3d 406, 409 (D.C. 2012) (holding that the refusal to admit expert testimony of the reliability of eyewitness identification was not harmless error and remanding to allow the expert to testify); State v. Kaneaiakala, 450 P.3d 761, 764 (Haw. 2019) (concluding that courts should consider credible evidence presented on reliability of an identification based reliability factor supported by science); State v. Carr, 331 P.3d 544, 689–90 (Kan. 2014) (holding that prior automatic rule of exclusion should be replaced with a flexible, case-by-case approach to admitting expert testimony on the reliability of eyewitness identification when it would be helpful to a jury), *rev'd on other grounds*, 577 U.S. 108 (2016); State v. Carpenter, 605 S.W.3d 355, 369–70 (Mo. 2020) (en banc) (holding the trial court erred when it refused to admit expert testimony about the reliability of eyewitness identifications).

negative demeanor-based assumptions, and at a minimum it should be part of the initial toolbox.

Finally, Proposed Rule 404(c) will help effectuate broader change because it will need to be taught in law schools. In order to understand the rationale and operation of the rule, future lawyers and their professors will need a basic understanding of how easily demeanor can lead to false assumptions about defendants. Educating the legal profession about demeanor, like educating jurors, can have more widespread effects. Jurors and students will bring information about demeanor back to their families, their colleagues, and their friends. The process of cultural reassessment of demeanor as a guide to character will likely be slow, but this may be how it begins.

CONCLUSION

"The notion that the State may not punish a person for his character is one of the foundations of our system of jurisprudence."[299] At present, our criminal legal system falls dramatically short of this ideal. Courts and prosecutors routinely call attention to the way defendants appear at trial, both on and off the stand—inviting jurors to punish people based on whether they "look criminal." This intensifies many pathologies of an already-broken system. It short-circuits the distinction between conduct and character; it opens the door to the pernicious forms of bias; and it facilitates racial subordination.

Both the rules of evidence and the Constitution's guarantee of trial fairness demand better. Existing law presumes that demeanor is a useful source of evidence, and it put the onus on defendants to raise case-specific claims of prejudice. That is backwards. Instead, courts should take a prophylactic approach to defendant demeanor. Demeanor should be treated—explicitly under the rules—as a presumptive source of prejudice, inadmissible by default. Jury instructions should follow suit, warning against the dangers of focusing too much on demeanor, instead of celebrating its probative value. Most importantly, here as elsewhere, lasting change will require a shift in deeper norms. Demeanor will never disappear from trials; nor should it. But its purpose could be reimagined. Demeanor could become a mechanism that allows jurors to see defendants more fully as

299. Penley v. State, 506 N.E.2d 806, 808 (Ind. 1987).

individuals, rather than reducing them to caricatures. In the right hands—with the right configuration of legal rules, informal practices, and habits of thought—demeanor could help to push the criminal legal system in a more equitable direction. At present, it is doing just the opposite.

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