

Empirical Studies Prove that Visual Observations Do Not Help, and May Even Hurt, Our Credibility Determinations

One of the strongest policy arguments against the proposed amendment is that it incorrectly assumes that visual observation is necessary for credibility determinations. Of course, the legal community's exaltation of our ability to use nonverbal indicators to assess credibility has deep historical roots,¹ and it is undoubtedly this concept that led to the drafting of the proposed amendment. Critically, however, this belief is completely fallacious. Numerous empirical studies have produced "overwhelming evidence" to refute this notion, showing with "impressive consistency" that we cannot make effective use of visual cues to assess credibility and even going so far as to suggest that "the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments."² This inability extends not only to lay people but to judges as well.³ For example, one study found that judges who attempted to determine veracity based on facial expressions were able to detect untruthfulness only 57% of the time.⁴ As social psychologist and attorney Jeremy Blumenthal explains, these studies show that "[a] trier of fact, when using demeanor as a gauge of a witness's credibility, places emphasis on cues that have been shown to be not only unhelpful but actually misleading. Thus, not only is the use of demeanor evidence unhelpful in the detection of deception, but given the cues on which the legal process focuses, it in fact 'diminishes rather than enhances the accuracy of credibility judgments.'⁵ Taken as a whole, these scientific findings significantly undercut the basic premise for the proposed rule, which at bottom is intended to facilitate accurate credibility determinations.

Below, I briefly note just a few of the studies that support the comments above.⁶ These studies are instructive in two ways. First, they show the ineffectiveness of visual indicators to determine credibility. Second, they show the effectiveness of non-visual indicators, to do the same. Both of these findings support the conclusion that the proposed rule should not be adopted, or at the very least, should include an exemption for religious beliefs.

1. Norman R.F. Maier & James A. Thurber, *Accuracy of Judgments of Deception When an Interview is Watched, Heard and Read*, 21 *Personnel Psychology* 23 (1968): Maier and Thurber divided the subjects into three groups and asked them to evaluate the honesty of an interviewee. One group watched the interviews; another heard the interviews; and the final group read transcripts. While the "listeners" and "readers" had an average accuracy of 77% for determining veracity, the "watchers" average was 58%. Maier and Thurber concluded "the visual cues of the interview served

¹ See, e.g., Olin Guy Wellborn III, *Demeanor*, 76 *Cornell L. Rev.* 1075 (July 1991); 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 (1993).

² Blumenthal at 1162; Wellborn at 1075.

³ Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 *Am. Psychologist* 913 (1991).

⁴ Ekman and O'Sullivan at 916.

⁵ Blumenthal at 1165.

⁶ These descriptions are based on the summaries found in Blumenthal's and Wellborn's pieces, *supra* n.23.

- primarily as distracters lowering the proportion of accurate decisions. Interview situations in which an interviewee may be motivated to deceive may be more accurately judged when the interview is not directly observed.”
2. Paul Ekman & Wallace V. Friesen, *The Repertoire of Nonverbal Behavior: Categories, Origins Usage and Coding*, 1 *Semiotica* 49 (1969) & Paul Ekman & Wallace V. Friesen, *Nonverbal Leakage and Clues to Deception*, 32 *Psychiatry* 88 (1969): According to Blumenthal, these studies highlighted that observers detect deception with greater accuracy through the voice than through visual cues.⁷
 3. Miron Zuckerman, Bella M. DePaulo & Robert Rosenthal, *Verbal and Nonverbal Communications of Deception*, 14 *Advances Experimental Social Psychology* 1 (1981): The authors extensively reexamined the literature and underlying data of all previous psychological studies of deception and deception detection and conducted meta-analysis of the data. According to Wellborn, the authors determined “the face did not seem to give away deception cues and may even have provided misleading information. Detection accuracy in the absence of facial cues was higher than in their presence. Of all channels and channel combinations, only the facial channel failed to produce accuracy significantly greater than chance.”⁸ In sum, the authors concluded “the surprising finding is the power (i.e., the accuracy) of the word, either written or spoken. The assumption that nonverbal channels are more important in the communication of deception than the verbal cues is simply not true.’ Whereas ‘facial cues seem to be faking cues,’ which may hinder rather than assist in lie detection, ‘success at deceiving and success at detecting deceit are both mediated largely by adeptness or construing and interpreting verbal nuances.’”⁹
 4. Bella M. DePaulo et al, *Attentional Determinants of Success at Detecting Deception and Truth*, 8 *Personality and Social Psychology Bulletin* 273 (1982): Subjects were presented with videotapes of speakers who either speaking truthfully or deceptively. Subjects either received no instructions or were instructed to focus on verbal or visual cues. According to Blumenthal “those subjects who had been given explicit instructions to concentrate on the speakers tone of voice were significantly more skilled at discriminating truths from lies. Those who were told to pay close attention to visual behaviors (i.e., those who were given the equivalent of a demeanor instruction) performed no better than those who were given no instructions at all and markedly worse than those who were instructed to focus on vocal or paralinguistic cues.”¹⁰
 5. Bella M. DePaulo et al, *Deceiving and Detecting Deceit*, *The Self and Social Life* 33 (Barry R. Schlenker ed., 1985) & Miron Zuckerman et al, *verbal and Nonverbal Communication of Deception*, 14 *Advances in Experimental Social Psychology* 1

⁷ Blumenthal at 1191.

⁸ Wellborn at 1087.

⁹ Wellborn at 1087-88 (quoting Zuckerman et al).

¹⁰ Blumenthal at 1199.

(1981): According to Blumenthal, these two studies analyzed the data in a large number of empirical findings, and concluded that “some of our favorite cultural stereotypes about liars do not withstand the test provided by the existing empirical data. The studies that have been conducted so far do not support the notion that liars have shifty eyes – nor even shifty bodies; neither glances nor shifts in posture occur significantly more often when people are lying compared to when they are telling the truth. In marked contrast, nearly all of those behaviors received via the auditory channel were observed at a significant frequency during deception. This is clearly consonant with a model asserting that the voice is more leaky than the face, especially since one cue, pitch, is the auditory aspect that is most identified with a person’s voice. Subsequent studies have replicated these findings. Thus, based on five decades of research, the current paradigm reflects that identifiable cues to deception are present more often in the vocal channel than in the visual. This is especially so in comparison of the voice to the face.”¹¹

6. In surveying all of the data cited in his piece, Blumenthal emphasizes, “[t]he important conclusion from these findings is that those behaviors which are popularly believed to manifest speaker’s deception are qualitatively different than those which are actually observed during deception.” According to Blumenthal, neither a decrease in smiling nor “furtive glances” are found to be present at significant levels in those who are engaged in actual deception, and contrary to popular belief, those who are being lying actually perform *fewer* body movements (i.e., they are not shifty). Consequently, “where a trier of fact maintains dependence on those cues, he or she is actually misled into identifying deception where it may not have occurred.” Conversely, “reliance on the vocal evidence [] appears to be more valuable. Most of the behavior received through the auditory channel that were associated with perceptions of deception were also observed during actual deception: increases in speech hesitations, speech errors, and in the pitch of a speaker’s voice.”¹²

It is also worth noting that several international jurists have overcome the traditional legal celebration of visual inspection to recognize the ineffectiveness of this method of credibility assessment. Canadian Justice Rosenberg has noted, “[p]erceptions of guilt based on demeanor are likely to depend on highly subjective impressions.”¹³ The British Columbia Court of Appeal has stated that “if a trial judge’s finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box.”¹⁴

¹¹ Blumenthal at 1192-93.

¹² Blumenthal at 1194-95.

¹³ *R v. Levert* (2001), 159 C.C.C. (3d) 71 (Ont. C.A.) at 81.

¹⁴ *Faryna v. Chorney* (1954) 2 D.L.R. 354 (B.C.C.A.) at 356.