To the Graduate Council:

I am submitting herewith a thesis written by Wayne C. Sander entitled "Judge Expectancy Effects and Fair Trial Rights in Criminal Jury Trials: An Experimenter Expectancy/ Judge Expectancy Analogy." I recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts, with a major in Speech and Theatre.

Faye Julian
Faye Julian, Major Professor

We have read this thesis and recommend its acceptance:

Robert W. Glenn

Norma C. Cook

Accepted for the Council:

L Evans Reed
Vice Chancellor
Graduate Studies and Research

Thesis
78
S336
cop. 2

JUDGE EXPECTANCY EFFECTS AND FAIR TRIAL RIGHTS IN CRIMINAL JURY TRIALS: AN EXPERIMENTER EXPECTANCY/JUDGE EXPECTANCY ANALOGY

A Thesis

Presented for the

Master of Arts

Degree

The University of Tennessee, Knoxville

Wayne C. Sander

August 1978

136496

ACKNOWLEDGMENTS

The author is grateful to Professors Faye Julian, Norma Cook, and Robert Glenn for their courage in agreeing to serve on his committee and their tenacity in staying on his committee. Without their guidance and assistance this thesis could not have been written. The author is especially grateful to Professor Jerry J. Phillips of the Tennessee Law School who gave invaluable advice on the legal aspects of this thesis.

The author must also express general appreciation to those who offered support and encouragement. In particular he wishes to thank Helen I. Sander, Aloysius Casmir Juodvalkis, and his fellow graduate students.

ABSTRACT

Trial lawyers in criminal trials have long suspected that the nonverbal behavior of judges affected juror decision making. The purpose of this study was to present a theoretical explanation of judge nonverbal behavior and its effect on fair trial guarantees. The present legal approach to nonverbal judge behavior could then be examined in light of the theoretical explanation.

The theoretical explanation of the effects of judge nonverbal behavior was generated by using an experimenter expectancy/judge expectancy analogy. Social scientists have long been aware of the potential of experimenter nonverbal behavior to bias experimental subjects. A long series of experiments has established that, in certain situations, experimenters can alter the results of social science experiments by means of subtle nonverbal expectancy cues. The results of the social science experiments were reasoned by means of an analogy to apply to jury trials and the relationship between judge and juror.

The results of the study indicated that when there is an ambiguous juror task, the judge appears professional and businesslike, and the judge uses both auditory and visual channels of communication, an expectancy effect is likely to occur. In light of the analogy, present legal remedies for

judge nonverbal behavior were found to be inadequate. New remedies including process instructions, instructions given by third persons, and juror training were suggested as a means to reduce possible nonverbal expectancy effects.

The legal community seems to be somewhat confused about the effects of nonverbal judge behavior. It is hoped that this thesis will be a first step in establishing a theoretical explanation of judge nonverbal behavior that can eventually be applied to protect fundamental fair trial rights.

TABLE OF CONTENTS

CHAPTER		PAGE
I.	INTRODUCTION	1
	Methodology	9
	Materials to Be Used	13
II.	REVIEW OF EXPERIMENTER EXPECTANCY STUDIES	16
	The Nature of Expectancy Research	16
	Factors Involved in Experimenter Expectancy Effects: The Psychology Experiment	21
	Communication of Experimenter Expectancy	36
	Non-Experimental Expectancy Effects	40
	Conclusions	44
III.	THE LEGAL APPROACH TO NONVERBAL JUDGE MISCONDUCT	47
	A Review of Selected Cases on Judge Nonverbal Behavior	47
	Judicial Remedies for Nonverbal Judge Misconduct	72
IV.	TOWARD A NEW VIEW OF JUDGE NONVERBAL BEHAVIOR	83
	The Experimenter Expectancy/Judge Expectancy Analogy	84
	A Critique of Present Legal Remedies	92
	Novel Proposals to Reduce Judge Nonverbal Expectancy Cues	101
	Some New Proposals to Reduce Judge Expectancy Effects	107
V.	SUMMARY AND CONCLUSIONS	114
	Major Findings About a Possible Judge Expectancy Effect	114
	The Review of Scholarly Literature in Two Fields	116
	A Call for New Research	118
	The Thesis in Perspective	120

PAGE

BIBLIOGRAPHY 122

VITA 130

CHAPTER I

INTRODUCTION

Although juries as we know them date back to the thirteenth century,[1] the relationship between judge and jury has changed significantly since that time. A knowledge of the history of judge/jury relationships is fundamental in understanding the roles of the jury and the judge as they exist today.

The jury originally acted as a rubber stamp for the crown. The early juries returned verdicts favorable to the crown so often that defendants were generally required to accept jury trials or endure tremendous torture.

> At Newgate Prison in London, 1662, George Harley was indicted for robbery and refused to plead. His thumbs were tied together with whipcord so the pain would compel him to submit to a jury. Burnwater was accused of murder in 1728 and refused to plead. He was pressed for one and three-fourths hours under 400 pounds of iron. He changed his mind, pleaded not guilty, was tried by a jury, convicted and hung.[2]

These practices continued in English prisons until 1772 when they were abolished by statute.

---

[1]Samual McCart, Trial by Jury: A Complete Guide to the Jury System (Philadelphia: Chilton, 1964), p. 7.

[2]Lloyd Moore, The Jury: Tool of Kings, Palladium of Liberty (Cincinnati: Anderson, 1973), p. 67.

Early juries enjoyed virtually no independence. This can be explained by two factors. "The judges, being corrupted through their subservience to the king, continued to dominate trials even to the extent of restricting juries to evidence acceptable to the judge, and juries feared the wrath of the judges in the use of attaint."[3] If the judge did not like the decision of the jury, he could convene a second jury which might convict the first jury of having rendered a false verdict. The jurors could then be fined and sent to prison.

The famous English Star Chamber Court, at its peak during the sixteenth century, even punished jurors. "The Star Chamber, a criminal court which had extraordinary powers, was composed of members of the king's privy council. It did not use a jury." The sessions were held in secret and often featured torture. "There are many examples of this court punishing jurors with fines and imprisonment for this offense during the reigns of Henry VIII, Mary and Elizabeth I."[4] Although the Star Chamber was abolished in 1635, trial judges were quick to take the suggestion and began fining and imprisoning jurors on their own.

Although the practice was prohibited by statute, judges under the direction of King Henry VIII continued to fine and

---

[3]McCart, p. 7.

[4]Moore, p. 75.

imprison jurors for their verdicts. The practice of attaint was finally stopped in 1670 after a juror appealed his fine for the acquittal of William Penn and William Mead.

In America, juries began to take a more independent role. The conflict between judge and jury was generally one over the incompetency and the corruption of judges serving at the pleasure of the crown.

> Judges continued to serve at the pleasure of the crown and were generally laymen, with little or no professional training who, not unexpectedly, tended to favour the crown in their decisions. The jury, on the other hand, was viewed increasingly as the more democratic body, being composed of twelve laymen instead of one, and following the refusal of several juries, as in the trial of Peter Zenger to submit to the instructions of the court, the jury became the subject of great popular enthusiasm.[5]

After the revolution, the quality of judges was still poor. ". . . [M]ost judges had only minimal training and were frequently scorned by the members of the bar." In 1796, North Carolina went so far as to bar comments by the judges on evidence. "Other states followed suit, although perhaps without adequate forethought. . . ."[6] No state ever bothered to study the effects of comments by incompetent judges on the juries' verdicts. It was merely assumed that

---

[5]Jack Weinstein and Margaret Berger, Weinstein's Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates, I (New York: Bender, 1977), pp. 107-12, 107-13.

[6]Weinstein, p. 107-14.

the juries were influenced by corrupt and incompetent judges.

The jury has developed historically as a buffer between the state, in the form of the judiciary, and the citizen. The buffer was seen as a means of providing a safeguard against incompetent judges and judges who were pressured to decide in certain ways by a higher authority. In some states and the federal government, judges were and are allowed to comment on the evidence. It was believed that the jury could and did make distinctions between the advice of competent, fair judges and the advice of incompetent or corrupt judges. The verdicts of the juries in the political trials of England and the colonies seem to have supported that view. Other states had decided that only complete separation of the provinces of the judge and jury could insure a fair trial.

The same historical view of the jury as a buffer between the judiciary and the people survives in modern justifications. Justice White, in delivering a 1968 opinion of the Supreme Court, explained the justification for the jury in this way:

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against

> the corrupt or overzealous prosecutor, and against the complaint, biased, or eccentric judge.[7]

The jury system has had a great many recent critics. These critics were mainly concerned with the delay created by jury trials and the inability of jurors to understand easily complex issues. Justice Harlan, in a dissenting opinion, suggested that the role of the jury as a buffer has passed.

> It can hardly be gainsaid, however, that the principal original virtue of the jury trial—the limitations a jury imposes on a tyrannous judiciary—has largely disappeared. We no longer live in a colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. . . . It is a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves, but also contributing to delay in the machinery of justice. Untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges, particularly if the issues are many or complex.[8]

Although there are many critics of the jury system, the prominent philosophy regards the jury as an independent buffer between the citizen and the state. If the jury is to act as a constitutional buffer, its decisions must be free of any controlling influence by the judge. The relationship between the judge and the jury is a delicate one. The judge must run the trial and instruct the jury on the law; yet he/she must not control the decisions of the jury.

---

[7]Duncan v. Lousiana, 391 U.S. 145, 156 (S. Ct. 1968).

[8]Duncan v. Louisiana, 391 U.S. 145, 188-89.

This thesis is concerned with the nonverbal aspect of that critical judge/jury relationship. This thesis will attempt to answer three questions about the nonverbal communication between judge and jury. First, is it possible that the judge might communicate expectancies to the jurors via nonverbal means? Secondly, might the jurors heed those expectations and render a less than independent verdict? Finally, if such an effect does exist, what techniques are and can be used to remedy effectively the problem?

For the purpose of this thesis, the term "nonverbal communication" will mean any communicative action which does not rely on language. Nonverbal communication can be classified as kenesic, proxemic, artifactual, vocalic, tactile, and olfactory communication. Kenesic communication involves facial expressions, gestures, and postures. Proxemic communication is communication by the use of space and distance. Artifactual communication involves body adornment and body modification. Vocalic communication uses all attributes of sound except language. Tactile communication is communication by means of touch or feel. Finally, olfactory communication is communication by means of oders.

In many communicative events, both verbal and nonverbal methods are used simultaneously. It is often difficult to separate the two forms of communication.

A note in the Virginia Law Review first recognized the problem of possible judge nonverbal expectancy effects. The

author is indebted to that article for the basic thrust of this thesis. However, the article, although groundbreaking work, did not fully explain the nature of a judge expectancy effect. The problems with this specific article will be discussed later in the thesis.

Trial lawyers have long suspected that judges might communicate sentiments on the trial by means of nonverbal communication. Weinstein wrote in his famous commentaries on evidence:

> It is, of course, difficult to avoid giving the jurors some impression of the way the court feels about the case, even if the court conscientiously tries to avoid communicating that opinion. The jurors observe the involuntary wince, the look of interest during important testimony, the pallor of boredom during dull or marginally relevant testimony that registers on a judge's face and the points when he busily takes notes or does not. . . .
>
> As all practicing members of the bar are fully aware, inflections in the voice of the judge, the way he gestures, the points at which he smiles or frowns can reveal to the jury his opinions on the evidence as surely as if they are articulated verbally.[9]

The legal community has developed elaborate standards for oral comment, but the nonverbal comments prove much more difficult to interpret and control. The legal community, as will be demonstrated later in the thesis, has not developed a comprehensive theory about nonverbal behaviors and the possible important consequences of those behaviors on fair trial guarantees.

---

[9]Weinstein, p. 107-49.

Any comprehensive explanation of the nature of judge nonverbal behavior and its possible effect on the jury would thus be a valuable addition to the scholarly literature concerning fair trial guarantees. The scope of the problem may be far more serious than one might suspect.

In their landmark study, Hans Zeisel and the late Harry Kalven, Jr., sent out questionnaires to judges in 3,576 jury trials and asked the judges to make simulated decisions about the cases before the jury returned from deliberations. One of the conclusions that they made was that in cases where the weight of evidence is clearly one way or the other and the case is easy to decide (not difficult to apply the law), the judge and jury disagreed 9% of the time. Under clear evidence conditions but a difficult case, the judge and jury disagreed 8% of the time. Kalven and Zeisel declared that: "The result is a stunning refutation of the hypothesis that the jury does not understand. . . . [T]here is virtually no difference between the frequency of disagreement when the case is easy and when the case is difficult; this holds true for the cases that are clear as well as for the close ones."[10] The Virginia Law Review suggested another explanation for the Kalven and Zeisel findings:

---

[10]Harry Kalven, Jr., and Hans Zeisel, The American Jury (Chicago: Univ. Chicago Press, 1971), p. 157.

> Since both factual and legal issues are often complex, this finding is surprising indeed. It is hard to believe that a jury of laymen can understand every situation equally well regardless of its complexity. . . . Judge/jury concurrence may result, at least in part, because the judge subtly and unintentionally conveys to the jury his feelings about the parties and participants in the case and because the jury is influenced by his cues.[11]

The Constitution of these United States guarantees the right to due process of law and an impartial jury in all criminal prosecutions.[12] Judge nonverbal behavior might threaten those rights. A comprehensive explanation of nonverbal communication in the judge/jury relationship is, therefore, of paramount importance.

Methodology

The problem of study will be approached in three ways. First, an analogy between experimenter expectancy research and judge expectancy will be developed. Secondly, cases appealed on judge nonverbal behavior issues will be reviewed. Finally, present and proposed remedies to prevent or erase possible judge expectancy effects will be criticized on the basis of the analogy and practical concerns.

The experimenter expectancy effect/judge expectancy effect analogy will be based on a review of the experimenter

---

[11]"Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality," Virginia Law Review, 61 (1975), 1266-98.

[12]U.S.C.A. Const. Amend. 5-6, 14.

expectancy effect literature. In psychology experiments, researchers feared that some of their nonverbal actions were biasing the results. A number of experiments were designed to test the notion. The experiments showed that experimenters, in some situations, did influence the decisions of experimental subjects. The influence was found to occur through subtle nonverbal communication. An analogy on the basis of that research will be used to explain possible judge expectancy effects.

Ch. Perelman described the analogy as a form of proof consisting of a phoros and a theme. The terms of the analogy, to which the conclusion relates, are called the theme. The terms which form the structure are called the phoros. In this case the experimenter and the subject are the phoros and the judge and the juror are the theme. The analogy must have the phoros and the theme in different spheres. In other words, there must be some major differences between the phoros and the theme.[13]

Many strict empiricists feel that the main purpose of analogies is to develop hypotheses. The empiricists look at the analogy as an inventive process and not as a standard of

---

[13]Ch. Perelman and L. Olbrechts-Tyleca, The New Rhetoric: A Treatise on Argumentation, trans. by John Wilkinson and Purcell Weaver (Notre Dame: Univ. Notre Dame Press, 1969), p. 373.

proof.[14] For the strict empiricist, this thesis will offer interesting hypotheses to be tested. A well structured analogy, however, will provide a reasonable argument for the plausible explanations of judge nonverbal expectancy effects found in this thesis.

"The domain of argumentation is that of the credible, the plausible, the probable, to the degree that the latter eludes the certainty of calculations."[15] The experimenter expectancy/judge expectancy analogy will be a reasonable argument and a legitimate form of proof. Perelman suggested that an analogy can be more than an inventive process:

> Far be it from us to suggest that an analogy cannot serve as a point of departure for subsequent verifications. But in this it is no different from any other form of reasoning, since the conclusions of all of them can always be subjected to further testing. And have we any warrant for denying analogy any power to convince when the mere fact that it can make us prefer one hypothesis to another shows that it has argumentative value? Any complete study of argumentation must therefore give it a place as an element of proof.[16]

The analogy will be fully developed in Chapter IV. Great care will be taken to keep the analogy within plausible limits. There is a danger of extending an analogy too far. While this might not matter in the development of hypotheses, it would weaken the analogy as a reasonable argument. Perelman writes: "Where the inventive

---

[14]See: Robert Rosenthal and Ralph Rosnow, Primer of Methods for the Behavioral Sciences (New York: Wiley, 1975), p. 7.

[15]Perelman, p. 1.

[16]Perelman, p. 372.

aspect is concerned, there is nothing to prevent extension of an analogy as far as possible, to see what it will yield. But, from the probative viewpoint, an analogy must be kept within certain limits if it is not to impair its function of strengthening conviction."[17] The experimenter expectancy/ judge expectancy analogy, like all analogies, will be open to counter arguments. The utility of this analogy will be determined by how well it can weather those arguments.

The second method of study will be a review of cases involving appeals on nonverbal grounds. The review is designed to provide examples of the types of nonverbal behaviors that are appealed and to illustrate how the courts make decisions on whether or not the behavior denied the defendant a fair trial.

The review will not illustrate all of the behaviors for two reasons. First, on appeal attorneys argue obviously things which they think they might win. Subtle behaviors and behaviors which did not seem to be obvious might not be appealed. Secondly, the written record of the cases cannot describe, in great detail, the exact nature of the nonverbal event. These cases, however, will illustrate at least some of the behaviors found in the courtroom.

The last part of the research will involve a critique of the present and proposed techniques to reduce judge

---

[17]Perelman, p. 386.

nonverbal bias. Time honored techniques such as appeal, instructions, mistrial, and so forth, as well as novel proposals such as videotaped trials, courtroom redesign, and so forth, will be covered. Several new proposals such as process instructions, written instructions, jury training, and so forth will be introduced in this thesis. The critique of these proposals will be formulated by using the analogy and various practical considerations.

In the conclusion of the paper, a call will be made for further research involving the experimenter expectancy/judge expectancy analogy. In this way the explanations, generated by the analogy, can enjoy the support of empirical research, as well as the support of plausible argument.

Materials to Be Used

A review of the experimenter expectancy literature will serve as a keystone in building the analogy. The experiments found in that literature were the work of psychologists who were concerned with experimenters biasing experiments through expectancy effects.

The majority of the literature was published after 1955. This reflects an expanding interest by psychologists in expectancy effects and the emergence of Robert Rosenthal, who did much of the work on experimenter expectancy effects. The development of the literature will be covered in more detail in Chapter II.

All of the experiments found in the literature were conducted using the methods of the empiricist. The experiments were all laboratory experiments. A complete discussion of the methodologies of the experiments will be given in Chapter II.

The review of cases in Chapter III consists of selected appelate cases since 1936. One hundred thirty-two cases were found concerning nonverbal judge behavior, but cases were reviewed on a selective basis only. All of the cases are criminal cases because it was felt that the role of the jury as a buffer was more important where life and liberty were in jeopardy.

The date 1936 was chosen because cases concerning nonverbal behavior were rare before that time. The majority of cases came from 1955 or after. This was probably due to the increase in appeal cases in general and trial rights cases in particular.

The cases were selected for two reasons. First, an attempt was made to use the cases which most graphically described types of judge nonverbal behaviors. Since both verbal and nonverbal issues were often involved, the cases which made the clearest distinction were used. Secondly, both cases that were reversed and affirmed were included. Although the great majority of cases was affirmed, a disproportionate number of cases that were reversed were

included in the review. This was done to illustrate better how the appeal courts decided the difference between behavior that had to be reversed and behavior that caused no harm.

Only the appeal court decisions were reviewed. This was done for a number of reasons. First, many of the transcripts of the original trials were unavailable or scattered in courthouses throughout the country. Secondly, the review of appeal decisions illustrates how the appeal courts decided the difference between behavior which necessitated a reversal of the conviction and harmless behavior.

The next chapter will consist of a review of the experimenter expectancy effect literature found in social science journals and books. Chapter III will consist of a review of cases and legal remedies. Chapter IV will see the development of the analogy, a critique of present and proposed remedies, and new proposals presented for the first time in this thesis.

CHAPTER II

REVIEW OF EXPERIMENTER EXPECTANCY STUDIES

The Nature of Expectancy Research

This chapter is designed to provide a review of the scholarly literature concerned with experimenter expectancy effects. Experimenter expectancy research was selected for use because the experimental setting is similar in many ways to the trial situation. Thus, the experimenter research findings can be compared to the trial setting. The research conducted on very specific expectancy effects found in other areas is usually too narrow to invite comparison. The complete analogy will be explained in Chapter IV.

A Short History of Expectancy Effect Research

In the late nineteenth century, researchers became interested in expectancy effects. Some, like Ebbinghaus, suggested that an expectancy might alter the outcome of early psychological experiments.[18] However, most researchers were more concerned with the effects of expectancies in practical everyday situations.

---

[18]Hermann Ebbinhaus, Memory: A Contribution to Experimental Psychology, trans. by H. Ruger and C. Bussenius (New York: Teachers College, Columbia Univ., 1973).

Researchers, such as Jastrow, suggested that performance in activities such as athletics and business was the result, to some degree, of expectancy effects. According to Jastrow, if one fears failure, then it is likely that that person will actually fail.[19]

The first extensive investigation of subtle expectancy effect was conducted by Pfungst in 1911. The story of Pfungst's investigation of "Clever Hans," the wonder horse, is well known.[20] "Clever Hans," was a horse owned by a prominent German mathematics teacher. Von Osten claimed that Hans could spell, read, and solve mathematical problems. Von Osten, a highly respected man, claimed that no intentional cue was used to influence the horse.

Pfungst conducted a thorough investigation. He found that auditory and visual cues caused Hans to start or stop tapping his hoof. Pfungst found that even raised eyebrows or a dilation of the questioner's nostrils would be sufficient to change Han's behavior. Pfungst noted that when Hans reached the correct answer, the questioner would change his/her nonverbal behavior, usually through a raised head or even a sigh. Thus, Hans was simply responding to

---

[19]J. Jastrow, Fact and Fable in Psychology (Boston: Houghton, 1900).

[20]Robert Rosenthal, "Clever Hans: A Case Study of the Scientific Method," in Clever Hans, by O. Pfungst (New York: Holt, 1965), pp. ix-xiii.

expectancy cues. When the questioner heard the correct answer, he/she unconsciously signaled Hans to stop tapping.

Until the 1960's, most investigations of expectancy effects were confined to scattered real life problems. The researchers were usually content to explore areas of expectancy effects in employee performance, sports performance, and a great many other practical concerns. The experiments had very little similarity and comparison of the results was difficult. However, in the 1960's, more concentration was devoted to expectancy effects in psychological experiments.

Robert Rosenthal and his co-workers were largely responsible for the rapid expansion of research concerned with experimenter expectancy effects. In his famous experiments, Rosenthal attempted to isolate most of the variables which he believed might be involved in experimenter effects. Rosenthal's work went far in the exploration of experimenter expectancy effects.

Recent research in experimenter expectancy has been largely an effort to fill in areas not covered by the Rosenthal experiments such as Brightman's work on ambiguity. A review of the methodologies reported in the literature reveals that virtually all of the researchers used a picture task, much like the one developed by Rosenthal, for experimenter expectancy studies. This task will be discussed

later. Even if the picture technique were not used, every researcher at least referred to Rosenthal's work.

The Rosenthal Experiments

Since the early 1960's, Rosenthal has been the most famous scholar working with experimenter expectancy effects. It is not surprising that his book, Experimenter Effects in Behavioral Research, is the most influential book on the subject. Virtually every researcher in the field has referred to this book. The book was first published in 1966 and was enlarged in 1976. It contains all the classic Rosenthal experiments as well as references to other important experiments conducted on experimenter expectancy effects.[21]

In this thesis, many of the Rosenthal categories which serve to classify the various experiments in his book have been retained. The categories which have been retained are anxiety, early data returns, experimenter rewards, subject set, experimenter status, and communication of experimenter expectancy. I am indebted to Rosenthal for a great many notes which have led me to important experiments published elsewhere. These, together with important new research which I have discovered, will serve as the core of the experimenter expectancy literature review in this thesis.

---

[21]Robert Rosenthal, Experimenter Effects in Behavioral Research (New York: Irvington, 1976).

Many of the experiments, both by Rosenthal and other researchers, share similar features. A brief description of the basic picture task used by Rosenthal here will spare the reader tedious repetition since almost all of the researchers used the same photos and almost identical instructions.

> Fifty-seven photographs of faces ranging in size from 2 × 3 cm to 5 × 6 cm were cut from a weekly news magazine and mounted on 3 × 5 in. white cards. These cards were presented to 70 male and 34 female students, enrolled in an introductory psychology class at the University of North Dakota. Subjects were instructed to rate each photo on a rating scale of success or failure. The scale . . . ran from -10, extreme failure; to +10, extreme success; with intermediate labeled points.
>
> . . . . . .
>
> From the original 57 photos, 10 were selected for presentation to male subjects and 10 were selected for presentation to female subjects. All 10 photos were rated on the average as neither successful nor unsuccessful, and for each the mean rating evoked fell between +1 and -1.[22]

Written instructions were usually read to the subjects by the experimenters. The instructions said that the subjects were to be involved in a test for empathy. The experimenter informed the subjects that he could only read the instructions and could not answer any other questions.

Unless otherwise stated, experiments cited in this chapter used a similar type of picture rating task. The use of similar tasks by so many researchers clearly demonstrates the influence of Rosenthal's work on other researchers.

---

[22]Rosenthal, Experimenter Effects, p. 45.

The remainder of this chapter will be divided into three parts. First, factors involved in experimenter expectancy effects will be examined. Secondly, the communication of experimenter expectancy effects will be covered. Finally, the research on non-experimental expectancy effects will be discussed.

Factors Involved in Experimenter Expectancy Effects: The Psychology Experiment

Anxiety

In 1965, Fode found that medium anxious experimenters generated the greatest expectancy effects. Medium anxious subjects seemed to be the most susceptible to these expectancy effects.[23] However, Fode's work seems to contradict the results of earlier research.

In 1962, Rosenthal, Persinger, and Fode found that low experimenter anxiety and low subject anxiety had the greatest effects on experimenter expectancy.[24] However, in 1963, an experiment by Rosenthal, Persinger, Vikan-Kline, and Mulry showed that high experimenter anxiety and high

---

[23]Kermit Fode, "The Effect of Experimenters' and Subjects' Anxiety and Social Desirability on Experimenter Outcome Bias," Diss., North Dakota, 1965.

[24]Robert Rosenthal et al., "Experimenter Bias, Anxiety, and Social Desirability," Perceptual and Motor Skills, 15 (1962), 73-4.

subject anxiety led to the greatest expectancy effects.[25]

These experiments seem to indicate that there is no set relationship between anxiety and experimenter expectancy. It is possible, in light of these experiments, that the highest expectancy level occurs when the experimenter and the subject share the same anxiety level. However, there have been far too few experiments to justify confidence that such an effect occurs with regularity.

In 1975, Burkhart studied the effect of evaluation apprehension. However, unlike the Rosenthal experiments, he discarded the Taylor Manifest Anxiety Scale, a scale developed to test anxiety, and used instructions that were designed to induce evaluation apprehension. Burkhart also used experimenters trained to bias instructions by placing extraordinary emphasis on certain parts of those instructions. Burkhart found that low evaluation apprehension condition subjects were the most susceptible to experimenter expectancy bias.[26]

There is little support for a specific effect of anxiety on experimenter expectancy effects. Further

---

[25]Robert Rosenthal et al., "The Role of the Research Assistant in the Mediation of Experimenter Bias," The Journal of Personality, 21 (1963), 313-35.

[26]Barry Burkhart, "The Utilization of Demand Cues in the Experimenter Bias Paradigm as a Function of Evaluation Apprehension," DAI, 35 (1975), 4251B (Florida State).

research needs to be conducted in order to reconcile the apparent contradictions between the findings of these experiments.

Early Data Returns

The nature of the data returned by subjects has been shown to affect significantly the direction of experimenter expectancy. In 1965, Rosenthal, Persinger, Vikan-Kline, and Fode conducted a study featuring early data returns. In this study, experimenters, all with an expectation of how the experiment "should turn out," were exposed to two pretest subjects. The pretest subjects either confirmed or denied the experimenter's expectations. Rosenthal, Persinger, Vikan-Kline, and Fode concluded that when subjects give expected early returns, the later returns seem to mirror the original expectations. However, when early returns are disconfirming, the later data also tends to be disconfirming.[27]

In 1965, Rosenthal, Koln, Greenfield, and Carota conducted a similar experiment which added praise and reproof. During the course of the experiment, one of two investigators acting as critics would look at the data sheets and either praise or reprove the examiner. The results showed that when early returns supported expectancies,

---

[27]Robert Rosenthal et al., "The Effect of Early Data Returns on Data Subsequently Obtained by Outcome-Biased Experimenters," Sociometry, 26 (1963), 487-98.

the later data also supported expectancies. When the early data did not support the expectancies, the later data failed to support the initial expectancies. The praise or reproval did not significantly affect the expectancy effects. However, each investigator seemed to have a different effect on the expectancies associated with the early data. After contact with one investigator, the effects of early returns on expectancies were great. After the experimenters had contact with the second investigator, the effects of early data returns on expectancies disappeared.

Another experiment concerned with early data returns was conducted by McFall in 1965. McFall used time constraints on some subjects. The experimenters had an expectancy of the correct outcomes. McFall found that when there was a great deal of data which disconfirmed the experimenter's bias, there was little subsequent experimenter expectancy effect. However, when the data were in line with original expectancies, there was a strong subsequent experimenter expectancy effect.[28]

These experiments tend to confirm the notion that data returned early in the experiment can have an effect on the data collected later in the experiment. However, in all of these experiments, inexperienced experimenters were used.

---

[28]Richard McFall, "Unintentional Communication: The Effect of Congruence and Incongruence Between Subject and Experimenter Constructions," DAI, 26 (1966), 6853 (Ohio State).

It is possible that experimenters with more experience in collection techniques might react much differently to the early data return and the praise or reproof of an investigator.

Experimenter Rewards

A series of experiments sought to determine the effect of motivation on experimenter expectancy effects. In most of the experiments, money was selected as a means which was believed to increase experimenter motivation.

In 1960, Rosenthal, Fode, and Vikan-Kline conducted an experiment designed to determine the effect of monetary rewards on experimenter expectancy effects. Experimenters were told what "good data" ratings would be. They were offered either two dollars for a "good job" (moderately motivated), or five dollars for a "good job" (highly motivated). The results of the study indicated that moderately motivated experimenters demonstrated a greater expectancy effect than did the highly motivated experimenters.[29]

In 1964, another experiment was conducted using monetary rewards. The experiment, conducted by Rosenthal, Friedman, Johnson, Fode, Schill, White, and Vikan-Kline,

---

[29]Robert Rosenthal, Experimenter Effects in Behavioral Research (New York: Irvington, 1976), pp. 212-14.

differed in two ways from the original. First, groups of experimenters were told to expect high ratings and other groups were told to expect low ratings. Secondly, the experimenters were all given a dollar. They were told that if they received "good data," they could keep the dollar and get another from an unsuccessful experimenter. They were also told that if they did not receive "good data," their dollar would be taken away and given to another experimenter. The results of this experiment again showed that the more motivated experimenters had less expectancy effect than did the highly motivated experimenters.[30]

The results of these two experiments might be explained in two ways. First, the motivation of the experimenter might have little to do with the expectancy effect. Secondly, the incentive of money might have been an inappropriate incentive to the researchers involved. Research which used other types of motivation seemed to demonstrate some relationship between motivation and expectancy effects.

In 1972, Hawthorne used the incentive of a possible "good job" offer ($2.50-3.50 per hour), and the incentive or a possible neutral job offer ($0.50-1.00 per hour). The experiment used the standard Rosenthal picture scheme. The

---

[30]Robert Rosenthal et al., "Variables Affecting Experimenter Bias in a Group Situation," Genetic Psychology Monographs, 70 (1964), 271-96.

results showed that experimenters with the "good job" offer had a greater experimenter expectancy effect than the neutral job offer experimenters. However, the results only applied to the male subjects and did not hold true for female subjects.[31]

These experiments seem to indicate that there may be a motivational effect on expectancy effects. However, it appears that the question of what constitutes that motivation in all cases is beyond the scope of the available literature.

Subject Set

Much has been written on the desire of experimental subjects to behave in a correct manner. The experimenter expectancy effect is complicated tremendously when subjects believe, through guesses or hunches, that the experiment should turn out in a particular way.

In 1963, Rosenthal, Persinger, Vikan-Kline and Fode designed an experiment to determine if there was a relationship between subject awareness and experimenter expectancy effects. The experimenters in this experiment were led to believe that the subjects were aware or not aware of the intent of the experiment. The subjects were given an open

---

[31]James Hawthorne, "The Influence of the Set and Dependence of the Data Collector on the Experimenter Bias Effect," DAI, 33 (1973), 4996B (Duke).

ended questionnaire to determine their awareness, and some were given a structured questionnaire which was designed to raise suspicions about the intent of the experiment. The results revealed that the "aware" subjects' scores and the "unaware" subjects' scores were very similar. However, the ratings were significantly higher for the group that was "unaware" but reinforced by the experimenter. Thus, when given the "see through set," the subjects rarely rendered the desired responses.[32]

The Rosenthal results seem to support a study by White, which was conducted one year earlier. Instead of the normal high or low range expectancies, White used six. Experimenters were led to expect ratings in six ranges. Subjects were also led to expect ratings in six identical ranges. The results showed that when experimenters and subjects had the same expectancies, the data closely followed the expectancies. However, when subjects expected low ratings and experiments expected high ratings, very low scores resulted.[33]

---

[32]Robert Rosenthal et al., "The Effect of Experimenter Outcome-Bias and Subject Set on Awareness in Verbal Conditioning Experiments," Journal of Verbal Learning and Verbal Behavior, 2 (1963), 275-83.

[33]C. White, "The Effect of Induced Subject Expectations on the Experimenter Bias Situation," Diss., North Dakota, 1962.

The results of these experiments suggest that subjects are most susceptible to experimenter expectancy when they are not aware of the nature of the experiment and when they themselves have no strong expectancy.

A British researcher in 1975 discovered an effect that can be explained in light of the previous experiments. In the experiment, 8 to 12 year olds were given questionnaires to determine whether they were social evaluation-oriented or task-oriented. They then were asked to rate photographs. The experimenters were told to give a deliberate head nod in line with their expectancies. Todd concluded that the cue was negatively reinforcing.[34]

The results of this experiment might have been influenced by the same effect found by Rosenthal. The children might have been alerted to the experimenter's intent to bias by means of the questionnaire. Therefore, they may have been affected in a negative way by the expectancy cue.

Experimenter Status

Much persuasion research has suggested that a speaker of high status is more effective, in most situations, than

---

[34]Judy Todd, "Social Evaluation, Orientation, Task Orientation, and Deliberate Cueing in Experimenter Expectancy Effect," British Journal of Social and Clinical Psychology, 14 (1975), 27-31.

one of low status. However, experiments conducted concerning status and experimenter expectancy effects do not universally support the assumption that a high status experimenter would be more influential with subjects.

A study conducted by Vikan-Kline in 1962 revealed a relationship, at least over time, between status and experimenter expectancy. In Vikan-Kline's experiment, experimenters were asked to influence subtly some of their subjects to rate the people on photos as either highly successful or in some cases as highly unsuccessful. The experimenters each had a card with either "psychology grad. student" or "professor of psychology" written on it. The results of the experiment showed that the faculty experimenters had initial low expectancy effects but obtained higher expectancy effects later in the test.[35]

Lazlo later conducted an experiment which seemed to lend very little support to Vikan-Kline's earlier findings. Unlike Vikan-Kline, Lazlo led half the experimenters to expect high ratings and the other half to expect low ratings. The subjects in the experiment were administered the Roschach Scale of Dogmatism. The results indicated that high dogmatic types were more influenced than low dogmatic types. The results also showed that the experimenters with

---

[35]Robert Rosenthal, Experimenter Effects, p. 242.

lower status had the greatest expectancy effect.[36]

The results of these two experiments seem to be conflicting. However, Vikan-Kline's results might be explained by the early data effect discussed earlier. The professors might have had more experience in experiments and therefore were not worried by the early returns. Therefore, status, at least status represented by the terms professor and graduate student, might not be a significant factor.

There is a major need for more research in the area. In 1976, Johnson criticized the research on status. He concluded that the studies were either ambiguous or conflicting, were not controlled for extraneous experimenter attributes, did not account for other interaction effects, and were not tested for generalizability of the findings.[37]

Room Environment

Rosenthal and Haley conducted an experiment to determine the effects of room appearance. The experimenters, consisting of psychology graduate students and law students, were told that half the subjects would perceive photographed faces as successful and half would perceive them as unsuccessful. The experiments were conducted in a number of

---

[36]Rosenthal, Experimenter Effects, pp. 244-45.

[37]R. F. Johnson, "The Experimenter Attributes Effect: A Methodological Analysis," Psychological Record, 26 (1976), 67-78.

graduate and faculty offices. Dividers screened the experimenters from the subjects. The subjects then rated the room on status and order. The results showed that the greater the status of the room, as judged by other subjects, the greater the experimenter expectancy effect. The results also indicated that the more disorderly rooms had greater experimenter expectancy effects.[38]

The room would seem to reflect on the status of the experimenter. Thus, features such as the room or perhaps even personal artifacts might have more effect on status than the mere words, "professor" or "graduate student." The results of this experiment suggest that there still might be a relationship between status and experimenter expectancy.

Behavior of the Experimenter

Perhaps the greatest overall determinant of experimenter expectancy is the behavior displayed by the experimenter. This effect seems to transcend, to some degree, all of the structural and situational variables that were seen in previous experiments.

In order to determine what behavior displays were most influential in experimenter expectancy effects, Rosenthal analyzed the data that he assembled in five of his famous experiments. Since his experiments covered many types of

---

[38]Rosenthal, Experimenter Effects, pp. 245-49.

of experimental techniques, the effects can be classified as applicable under all conditions, applicable only when influence is unintentional, applicable only when interaction is dyadic, and applicable when influence is at least partially intentional.[39]

Rosenthal found four variables which seem to be applicable under all conditions. The most significant factor was the businesslike manner of the experimenter followed by expressive voice, professional manner, and the use of legs (which was not well explained). When one combines the businesslike characteristic with the professional characteristic the factor becomes most important.

Rosenthal then eliminated the verbal conditioning experiments to find the main behavior correlations in unintentional expectancy conditions. These were "important-acting," "relaxed," and "head gestures."

When the experiments using groups were eliminated, Rosenthal found three characteristics. These characteristics were "interested," "slow-speaking," and "enthusiastic."

Finally, in the verbal conditioning studies, four effects were correlated with experimenter expectancy. "Loudness" and "important-acting" were negatively correlated with expectancy. "Behaving consistently" was positively correlated with expectancy.

---

[39]Rosenthal, Experimenter Effects, pp. 250-57.

Rosenthal finally made generalizations about four types of behavior that he considered most important in considering expectancy effects:

1. Professional status. Experimenters who are more important, professional, businesslike, and consistent exert greater expectancy effects upon their subjects.
2. Interpersonal style. Experimenters who are more relaxed, interested, enthusiastic, and personal exert greater expectancy effects upon their subjects, but probably only so long as they maintain a professional manner, and do not permit the experiment to become a "social hour."
3. Kinesic communication. Experimenters who employ subtle kinesic signals from the leg and head regions exert greater expectancy effects upon their subjects. These kinesic signals may still be effective at higher levels if subjects are not paying full attention to the experimenter. However, if the kinesic signals become too obvious, they are likely to lead to a diminuation of expectancy effects, because they will detract from the professional demeanor of the experimenter.
4. Paralinguistic communication. Experimenters who speak slowly and in an expressive, nonmonotonous tone exert greater expectancy effects upon their subjects. The way in which the experimenter delivers his programmed input (instructions, greeting, leavetaking) probably serves to communicate his expectancy to his subject.[40]

The interpersonal behaviors might have significant effects on the other variables. The status of the experimenter, as defined by the room he occupies and his businesslike and professional air, probably has a significant effect on experimenter expectancy effects.

---

[40]Rosenthal, Experimenter Effects, p. 258.

Ambiguous Task

In the majority of experimenter expectancy studies a picture rating task was used. A system of rating mere pictures of people is an ambigous task at best. If experimental expectancy effects can be induced in an ambiguous photo task, will the results be the same in more concrete tasks?

In 1973, Brightman designed an experiment which used high, medium, and low levels of scoring ambiguity. The results showed that only in the most ambiguous condition did an experimenter bias effect occur.[41]

In 1975, Brightman and Ray studied the ambiguous factor in experimenter bias. They concluded that many of the experimenter bias results found in the literature occurred because basically unscorable stimuli were used.[42]

Thus, it appears that experimenter expectancy effect is only significant when ambiguous criteria are used. Therefore, much of the literature on the subject only explains what happens in ambiguous situations.

---

[41]Donald Brightman, "Experimenter Bias as a Function of Task Ambiguity and Expectancy Controls," DAI, 34 (1974), 4623B (Hofstra).

[42]Donald Brightman and Beth Raymond, "The Effects of Task Ambiguity and Expectancy Control Groups on the Experimenter Bias Effect," Journal of Social Psychology, 96 (1975), 277-87.

Communication of Experimenter Expectancy

There is little doubt that, in at least some situations, experimenter expectancy effects occur. A number of experimenters have attempted to discover the exact nature of the communication process involved in experimenter expectancy. These experiments represent an ambitious start. However, the relationship of communication to experimenter expectancy effects is a complicated one. One must remember that these experiments represent only a crude classification of the communication processes involved in experimenter expectancy effects. A more detailed analysis of the communication processes involved in every expectancy effect situation is clearly beyond the scope of the literature.

Reading an Expectancy

In an effort to determine whether or not expectancies are communicated accurately, a number of experiments have been used to test the ability of observers to "read expectancies." An experiment conducted by Rosenthal used films of experimenters, who were told to influence their subjects concerning a picture task. The results indicated that most observers who viewed the film could very accurately "read" what expectancy the experimenter had had. However, interviews revealed that the observers could not agree on the exact channel through which the expectancy was communicated.

The observers suggested that positive reinforcers included smiles, head nodding, happy appearance, interested appearance, and a vigorous recognition of the response. The observers felt that head shaking, raised eyebrows, surprised looks, disappointed looks, a repeat of the responses, pencil tapping, holding the photo up longer, tilting the photo forward, and throwing the photo down represented negative reinforcement.[43]

The results of this experiment suggest two possible explanations. First, all of these techniques might be used in the communication of expectancies. Some might be more effective than others for certain individuals. Secondly, the subjects might not consciously be aware of what specific communication channel caused them to alter their ratings.

A second experiment, by Weick in 1963, tested the effect of unintentional communication of experimenter expectancy. In this experiment, experimenters were told to expect certain data returns but were not told to influence purposely the subjects. Observations of the subjects again indicate that the expectancy of the experimenters could be "read."[44]

---

[43]Rosenthal, Experimenter Effects, p. 282.

[44]Rosenthal, Experimenter Effects, p. 285.

Restriction of Communication

In an attempt to isolate the types of communication involved in experimenter expectancy, a number of techniques were tried. Once again Rosenthal was in the forefront of these researchers.

In an experiment reported by Rosenthal and Fode in 1963, experimenters were led to expect certain outcomes. Three types of interactions with the subjects were used. In the first type (visual) experimenters handed their subjects written instructions. They remained silent but were fully visible. In the second type of interaction (auditory) the experimenters read the instructions to subjects but were separated from the subjects by an opaque screen. In the third type of interaction (visual and auditory) experimenters read the instructions to the subjects and remained in view. The results showed that the visual condition alone did not produce great expectancy effects. However, the auditory condition did produce a significant effect. The visual and auditory condition was the most effective condition for creating experimenter expectancy.[45]

In 1972, Hertzog attempted to isolate the effects of paralanguage cues but failed to obtain statistical

---

[45]Robert Rosenthal and Kermit Fode, "Three Experiments in Experimenter Bias," Psychological Reports, 12 (1963), 491-514.

significance.[46] In 1976, Burkhart conducted a somewhat more elaborate experiment to test the effects of paralinguistic cues. Burkhart used a Rosenthal picture task to test the effects of paralinguistic cues and evaluation apprehension on experimenter expectancy effects. Burkhart used strongly positive, neutral, and strongly negative paralinguistic cues along with high and low apprehension evaluation. In most conditions no significant results were obtained.[47]

Rosenthal, Fode, Vikan-Kline, and Persinger reviewed their earlier experiments to determine whether the time of any particular communication had an effect. They concluded that the expectancy effect not only existed for the series of pictures as a whole, but also for just the first pictures as well. They suggested that an effect over time (operant conditioning) did not exist. Thus, it seems that experimenter expectancy is communicated from the very beginning of the experiment.[48]

The literature concerning the exact communication of experimenter bias is somewhat confusing. Although it appears

---

[46]Martha J. Herzog, "Effects of Sex and Need to Avoid Success on the Verbal Mediation of Experimenter Bias," Diss., DAI, 34 (1973), 394B (Baylor).

[47]Barry Burkhart, "Apprehension About Evaluation, Paralanguage Cues and the Experimenter-Bias Effect," Psychological Reports, 39 (1976), 15-23.

[48]Robert Rosenthal et al., "Verbal Conditioning: Mediator of Experimenter Expectancy Effects," Psychological Reports, 14 (1964), 71-4.

that nonverbal communication is alone sufficient to impart an expectancy effect, the exact types of nonverbal communication is in question. The Rosenthal experiments seem to have shown that visual communication alone is generally insufficient for experimenter expectancy. Burkhart and Hertzog failed to demonstrate any paralanguage effects, bringing the earlier Rosenthal auditory findings into question. However, it seems clear that some type of nonverbal communication can lead to experimenter expectancy effects. We thus have the curious effect of the whole (visual and auditory), equaling far more than the sum of its parts.

Non-Experimental Expectancy Effects

In this section an overview of research concerned with expectancy effects outside of the laboratory will be provided. Since the research is directed to very specific problems, it is only of marginal utility in the context of this thesis. The experimenter expectancy research features conditions which are much closer to the trial setting than the non-experimental expectancy effects. Thus, these studies are only of limited utility in the content of this thesis. The review of this research will be brief.

Survey Research

Researchers have long suspected that an expectancy effect occurred in surveys. As early as 1929, Rice suggested that the political views of interviewers affected the answers returned by respondents.[49] In 1938, Harvey demonstrated that such an expectancy effect occurred even though interviewers were aware of the possibility of bias and tried to avoid it.[50] In a massive survey involving over 200 interviewers, Wyatt and Campbell found that interviewers who guessed at the distribution of results tended to have an expectancy effect toward that distribution.[51]

Johnson conducted a review of modern research. Johnson presented the interview as a model for explaining research pitfalls. Johnson concluded that one of the major factors in spoiling interview research was expectancy effect.[52] Expectancy effect was seen as a major bias affecting survey results.

---

[49]Stuart Rice, "Contagious Bias in the Interview: A Methodological Note," American Journal of Sociology, 35 (1929), 420-3.

[50]S. Harvey, "A Preliminary Investigation of the Interview," British Journal of Psychology, 28 (1938), 263-87.

[51]Dale Wyatt and Ronald Campbell, "A Study of Interviewer Bias as Related to Interviewers' Expectations and Own Opinions," International Journal of Opinion and Attitude Research, 4 (1950), 77-83.

[52]R. Johnson, "Pitfalls in Research: The Interview as an Illustrative Model," Psychological Reports, 38 (1976), 3-17.

Parapsychology

Although parapsychology experiments are generally laboratory experiments, they were put here because they have such a narrow focus that they will not prove important to the analogy as developed in Chapter IV. Recently, much attention has been given to possible experimenter expectancy effects in parapsychology experiments. Thouless has reported experiments that suggest relationships between experimenter expectancy and the results of parapsychological experiments. He concluded that experimenter expectancy must be considered in assessing the validity of parapsychological studies.[53]

Taddonio has found that expectancies of the experimenter significantly affect the responses of subjects in ESP tasks.[54] White went even further and suggested that an experimenter might transmit bias by means of ESP. She concluded that it would be impossible to separate experimenter expectancy effects from experimental results in parapsychological experiments.[55]

---

[53]Robert Thouless, "The Effect of Experimenter's Attitude on Experimental Results in Parapsychology," Journal of the Society for Psychial Research, 48 (1976), 261-6.

[54]Judity L. Taddonio, "The Relationship of Experimenter Expectancy to Performance on ESP Tasks," Journal of Parapsychology, 40 (1976), 107-14.

[55]Rhea White, "The Limits of Experimenter Influence on Psi-Test Results: Can Any be Set?" Journal of the American Society for Psychical Research, 70 (1976), 333-69.

Miscellaneous Expectancy Effects

There have been a great many areas where expectancy effects have been found. Only a brief review is in order here. Whyte, in 1943, found that an expectancy for a bowling team member to bowl well was correlated with that man's actual performance.[56] In 1964, Shor found that an automobile driver's expectancy of other drivers affected the behavior of the other drivers. Shor found that the expectancies were communicated by means of the actions of car as controlled by the driver.[57]

Perhaps the most controversial expectancy effect research is in the area of education. A number of researchers, including Rosenthal, have suggested that a teacher's expectancy will affect student performance.[58] These findings have led to long arguments among scholars. The disputes have generally centered around methodological

---

[56]William Whyte, Street Corner Society, (Chicago: Univ. Chicago Press, 1943).

[57]Ronald Shor, "Shared Patterns of Nonverbal Normative Expectations in Automobile Driving," Journal of Social Psychology, 62 (1964), 155-63.

[58]Robert Rosenthal and L. Jacobson, Pygmalion in the Classroom, (New York: Holt, 1968); Robert Rosenthal and D. Rubin, "Pgymalion Reaffirmed," in Pygmalion Reconsidered, ed. Janet Elashoff and Richard Snow (Worthington, Ohio: Jones, 1971), pp. 193-55.

considerations.[59] Most of these studies have centered on I.Q. tests. However, there have been others on specific tasks. In 1974, Elijah found that teacher expectations had little effect on reading scores.[60] In the same year, Hecht and Strum studied the effect of teacher expectancy on a verbal task. Hecht and Strum found that, for both boys and girls, a strong expectancy effect was present.[61] Finally, Williams compared teacher expectancy of certain minority groups with their actual performance in Canadian schools. Williams found that although teachers had expectancies of performance, no expectancy effect occurred.[62]

Conclusions

This review of experimenter expectancy literature was designed to provide a basis for an experimenter expectancy/judge expectancy analogy, which will be presented in Chapter IV. Five factors in the experimenter expectancy

---

[59]A. Jensen, "How much can we Boost I.Q. and Scholastic Achievement?" Harvard Educational Review, 39 (1969), 1-123: Robert Thorndike, "Review of Pygmalion in the Classroom" American Educational Research, 5 (1968), 708-11; Janet Elashoff and Richard Snow ed., Pygmalion Reconsidered (Worthington, Ohio: Jones, 1971).

[60]David Eligah, Teacher Expectations: Determinants of Pupils' Reading Achievement (ERIC ED 105 405).

[61]Michael Hecht and Irene Strum, The Self Fulfilling Prophecy: An Adaptation (ERIC ED 135 464).

[62]Trevor Williams, Teacher Discrimination and Self-Fulfilling Prophesies (ERIC ED 106 185).

literature will become most important in the analogy. In order for great expectancy effects to occur, these factors must be present.

The first factor is that the task required of the subjects must be ambiguous. The experiments of Brightman and of Brightman and Ray found that when the tasks were not ambiguous, no expectancy effects occurred.

The second requirement is that the experimenters have at least some expectancy of how the experiment should turn out. This requirement is one of definition in the experimenter expectancy studies. In order to study expectancies, the experimenters were led to expect certain outcomes in all of the experiments.

The third factor is that the cues must not be overpowering or blatant. In the subject set experiments, when subjects were able to "see through" the intentions of the experimenter, the expectancy effect decreased. The results seem to be similar to verbal studies of overheard statements. In those studies, overheard statements were found to be much more persuasive than direct statements.[63] Rosenthal found that overpowering and blatant cues decreased the experimenter expectancy effects by decreasing the

---

[63]See: Elaine Walster and Leon Festinger, "The Effectiveness of Overheard Persuasive Communications," Journal of Abnormal and Social Psychology, 65 (1962), 395-402.

professional and businesslike demeanor of the experimenter. From all of these approaches, it seems that blatant and overpowering cues have little chance of causing expectancy effects.

The fourth factor in experimenter expectancy effects is that the experimenter must appear important, businesslike, professional, and personal. In Rosenthal's analysis of some of his previous experiments, he found that these factors, especially businesslike and professional, are necessary to create great expectancy effects.

The final requirement is that the expectancy must be communicated through both auditory and visual channels. The Rosenthal and Fode, Herzog, Rosenthal et al., and Burkhart studies all seemed to indicate that visual or auditory channels were not generally sufficient to create large expectancy effects. Both the auditory and the visual channels had to be present.

The factors mentioned above are important in this thesis because they will form the crux of the factors used in the analogy in Chapter IV. Many of these factors will also be used to critique present and proposed remedies for judge nonverbal bias. In the next chapter, cases involving nonverbal judge behavior will be reviewed. After the cases have been reviewed, there will be a short discussion of present remedies for judge nonverbal behavior.

CHAPTER III

THE LEGAL APPROACH TO NONVERBAL JUDGE MISCONDUCT

This chapter will be a review of the judicial treatment of the nonverbal behavior of trial judges in criminal cases before juries. The chapter will be divided into three parts.

The first area is a review of cases where nonverbal judge activities have become issues for appeal. This review is designed to illustrate the types of behavior that might be involved in any criminal trial before a jury. It will also illustrate many of the responses to this activity used by attorneys and appeal courts.

The second part of this chapter is a review of before the fact remedies that the legal community has used in an attempt to limit prejudicial activities. These remedies include judge training and judicial codes of ethics.

The final area of this chapter will deal with ex post facto remedies. A discussion of corrective instructions, mistrials, retrials, and appeals will be provided.

A Review of Selected Cases on Judge Nonverbal Behavior

In this section a number of cases will be reviewed in order to illustrate the three types of nonverbal behavior

which are the concern of this thesis. The three types of interactions are the judge's treatment of the defendant and the defense counsel, the judge's treatment of witnesses, and the judge's behavior during jury charges.

This initial review is not designed to represent a progression of case law (which will come later), but rather to demonstrate the existence of these nonverbal activities. The cases found in this review should not be construed as an exhaustive roster of all of the appropriate cases found throughout legal history. An attempt was made to find all of the cases since 1936 which refer to nonverbal judge behavior. Cases have been selected which best illustrate the problems posed by nonverbal judge behavior.

Nonverbal Judge Behavior and the Defense Counsel

In a review of cases since 1936, two major areas of nonverbal judge interaction with counsel have emerged. First, judges have exhibited interference with the arguments of the defense counsel. This not only includes nonverbal comment while the defense argues, but it also includes interruptions of the defense counsel. Secondly, judges have criticized the defense counsel before the jury. The actual words are often concerned with a point of law, but the impression left with the jury might often be one of anger and partial treatment.

Behavior which the courts did not correct. In People v. Galuppo, a 1947 appeal of a cab robbery case, the behavior of the original trial judge became an issue. During the original trial, the judge apparently became very angered by statements that the defense counsel was making to the jury. The judge finally told the counsel that ". . . it would be contempt of court if counsel should persist."

The appeal court recognized that not only words but nonverbal cues might be present. However, the court found that no prejudicial effect, which ". . . could not have been cured by prompt admonition" to the jury to disregard them, existed.[64] The court said:

> Though it be conceded that the attitude of the judge towards the appellant's counsel was brusque and at times may have manifested a feeling of displeasure toward counsel, we cannot agree with appellant that the remarks of the court were derogatory or tended to "discredit the defendant in the eyes of the jurors." After reading the entire record of this trial, we are satisfied that the remarks of the trial judge did not result either in prejudice to appellant or a miscarriage of justice.[65]

In 1953, People v. Reimringer, an abortion case, was brought up on appeal. Among other complaints, the two defendants objected to two types of judge conduct. First, they complained that the trial judge rushed the defense,

---

[64]People v. Galuppo, 185 P.2d 335, 338 (Cal. App. 1947).

[65]People v. Galuppo, 185 P.2d 335, 338.

interrupted, and generally made it difficult for the defense counsel to stage an adequate defense.[66]

The appeal court found that the defense had not objected to the rushing at trial and had not even brought it up in the petition for a mistrial. ". . . [T]he court only exercised reasonable control over the proceedings which, as to interrogation of the witnesses, is within . . . Procedure.[67]

The second objection made by the appellants was that ". . . digressions [of the trial court] . . . created a camaraderie among judge, jury, and prosecuting attorneys while ridiculing defendants and their counsel." The appeal court ruled that "[a] few digressions or humorous remarks do not constitute misconduct. . . ."[68]

In State v. Bogen, a 1952 appeal of a bookmaking case, the defendant argued that the critical comments to his defense counsel were prejudicial to his case. The problem arose when the defense counsel attempted to "get in" testimony which the court had excluded as irrelevant. The court criticized the defense counsel in the presence of the jury.[69]

---

[66]People v. Reimringer, 253 P.2d 756 (Cal. App. 1953).

[67]People v. Reimringer, 253 P.2d 756.

[68]People v. Reimringer, 253 P.2d 756.

[69]State v. Bogen, 93 A.2d 398, 400 (N.J. Super. A.D. 1952).

The appeal court found no merit in the issue. The court found that "[n]ot only did defendant's counsel make no objection to the court's criticism, but in fact, apologized to the court."[70]

In 1960, the case of People v. Nielson was appealed to a higher California court. In the case, the appellant asserted that ". . . the trial judge misconducted himself."[71] The basis for this misconduct was not recorded because the appellant failed to object during the trial itself.

The appellant, without record, asserted that the trial judge, in addressing remarks to his attorney, ". . . did so in a gruff, curt, harsh and irritating tone of voice and used facial expressions of irritation and annoyance."[72] Here, then, was an appeal on the basis of nonverbal cues in their purest form.

The appeal court did not think that these expressions were of such magnitude as to deny the defendant of a fair trial. Since this was simple error, the court suggested that an objection should have been made during trial. The court said: "The proper time to present such matters is during the trial and counsel is not permitted to wait until

---

[70]State v. Bogen, 93 A.2d 398, 400.

[71]People v. Nielson, 6 Cal. Rptr. 367, 371 (Cal. App. 1960).

[72]People v. Nielson, 6 Cal. Rptr. 367, 371.

the result of the trial is ascertained before acquainting the court with his belief that he is being unfairly treated."[73]

In a Michigan appeal case, the conduct of a trial judge was again in question. The appellant claimed that the judge's remark to him, while he was on the stand, was so prejudicial as to deprive him of a fair trial. The remark occurred while the defendant was being questioned by the prosecutor. The defendant's own counsel was attempting to make an objection at the time.

> A. All right, then, she was my girl friend.
>
> Q. Answer the question.
>
> A. I answered it.
>
> MR. KRAMER [defense counsel]: May, if your Honor please—
>
> A. (by defendant)—I answered—
>
> THE COURT: Shut up. (To Mr. Esse [the defendant]) Take the next question.[74]

The appeal court admitted that the tone, more than just the words, was the most important part. However, the court found that the remark, if not the tone, was appropriate in the situation. The court said:

> While the court may have spoken more sharply than was necessary, it was the court's duty and

---

[73]People v. Nielson, 6 Cal. Rptr. 367, 371.

[74]People v. Essee, 154 N.W.2d 545, 547 (Mich. App. 1967).

> responsibility to allow defendant's counsel the privilege of recording his objection. The courts should maintain orderly control in a jury trial and, if possible, prevent disruptive outbursts by witnesses. . . . The court's conduct and remark in this regard was not prejudicial error, in light of the circumstances under which it was made. The defendant's own conduct invited the reprimand [emphasis added].[75]

In Weeks v. State, an appeal of a resisting lawful arrest case, the appellant suggested that threats of the trial judge to put counsel "in jail down here for a week or so" denied him a fair trial. Not only the words, but also the stinging nature of their delivery were at issued.[76]

The appeals court did not act on the error because of the failure of the appellant to object to the conduct during the trial. The court found:

> In the above colloquy, the trial judge used the work "liar" three times and threatened to put counsel for appellant in jail "for a week or so." We do not perceive from the record that appellant's counsel's statements called for such a stinging rebuke by the trial court. . . . However we are forbidden to further treat this contention of error for the reason that there was no objection or exception reserved to the action of the court [emphasis added].[77]

Banks v. State, an appeal of a Texas burglary case conducted in 1974, was concerned with certain errors allegedly made by the original trial judge. The appellant

---

[75]People v. Essee, 154 N.W.2d 545, 547.

[76]Weeks v. State, 274 So.2d 646, 649-50 (Ala. Cr. App. 1973).

[77]Weeks v. State, 274 So.2d 646, 649-50.

complained that a sidebar remark by the judge, in the presence of the jury, caused prejudicial error. The trial judge said: "And we don't use any kind of swagger stick, Mr. Harris, and we remain seated at Counsel's table. Put up the swagger stick and have a seat."[78]

The appeal court suggested that such a rebuke in the presence of the jury might have had an effect on the trial. However, the failure of the counsel to object at the time proved decisive. The court said:

> Ordinarily counsel should not be reprimanded in the presence of the jury, but we conclude that under the circumstances here, the remark did not constitute prejudicial error, especially since no other relief was requested.[79]

In Taylor v. Commonwealth, an appeal of a Kentucky indecent and immoral practices case, the appellant argued that the reprimand and contempt charge leveled against his attorney, in the presence of the jury, were prejudicial. The appeal court seemed to regret that only "the cold record" gave any clues as to the tenor of the actual incident.[80]

Since the appellant raised no objection at the time of the trial, the appeal court declined to rule on error. The court said:

---

[78]Banks v. State, 510 S.W.2d 592, 594-5 (Tex. Cr. App. 1974).

[79]Banks v. State, 510 S.W.2d 592, 594-5.

[80]Taylor v. Commonwealth, 413 S.W.2d 614 (Ky. 1967).

> In examining the cold record before us, it appears that the action of the court, particularly the fining of the attorney in the presence of the jury, may have created an atmosphere so unfavorable to appellant as to have constituted reversible error, provided the question had been preserved for appellant review.[81]

In 1976, a Maine escape case was appealed. The appellant argued that the judge's "facetious comments or sarcastic references to the quibbling of counsel over the phraseology of the various questions" served to create an unfair atmosphere.[82]

The appeal court did not believe that substantial rights were lost. However, it is interesting to note that the appellate court had difficulty in constructing the nonverbal event. The court said: "Since we must make our determination from a cold record and being unable to determine any intonations or suggested emphasis by the Justice, we are unable to presume prejudice."[83]

Roberts v. State was a 1976 appeal of a murder case. The appellant argued that the judge, in deciding to adjourn in the middle of the defense counsel's closing arguments, created a prejudicial interruption. The court found that since no objection was made at the time and since the judge

---

[81]Taylor v. Commonwealth, 413 S.W.2d 614.

[82]State v. Emery, 357 A.2d 878, 881-2 (Me. 1976).

[83]State v. Emergy, 357 A.2d 878, 881-2.

encouraged the defense to begin his argument anew after the weekend recess, there was no error.[84]

Finally, State v. Lewis was a 1977 appeal of a murder case. In that case, the trial judge interrupted the defense counsel before the counsel could read a document to a witness. The judge said: "No you won't." The appellant argued that the jury could have only understood the interruption "as a partisan reproof neither solicited by the prosecution or otherwise necessary."[85]

The appeals court found that:

> Where a judge intermeddles or otherwise exhibits a manner prejudicial to the accused, error results. In such a case, an objection must be made or the error will be considered waived, unless the effect is so prejudicial that it cannot be removed.[86]

The court went on to find that this action in no way constituted any manifest denial of fair trial rights.

In the cases discussed the appeal court did not find any error sufficient to justify a reversal of the conviction. These cases were the most common type found. However, in a minority of cases, the behavior of the judge toward the prosecutor was so prejudicial as to constitute a denial of a fair trial. The two types of cases are well worth comparing. This will be done later in the chapter.

---

[84]Roberts v. State, 338 So.2d 466 (Ala. Cr. App. 1976).

[85]State v. Lewis, 559 S.W.2d 584 (Mo. App. 1977).

[86]State v. Lewis, 559 S.W.2d 584.

Behavior which the courts corrected. In this section, cases were selected for review because the behavior of the judge so infected the trial with prejudice that fundamental rights were lost. The appeal courts in these cases took some action to correct the matter. The reader should keep in mind that these cases represent only a small minority of the cases discovered in the case search conducted for this thesis.

United Stated v. Cassiagnol, a federal case, was an appeal of seven people convicted, by a variety of courts, for loitering and assembling in an unwarranted manner. Two of the defendants, Norman Mailer and Jerry Rubin, might be familiar to the readers of this thesis. However, the only part of the appeal that is of interest here is the part concerning Emily Franco's contention that the trial judge denied her a fair trial and due process.[87]

The appellant contended that the trial judge:

> . . . questioned Miss Franco in a hostile [manner], (described as "assuming the role of prosecuting attorney"), that the judge attempted to coerce Franco into giving specific answers which the court wanted, and that the judge frequently interrupted defense counsel's closing argument, thereby contaminating the impartial atmosphere of the trial and prejudicing the jury to the extent that appellant Franco was denied a fair trial and due process of law.[88]

---

[87]U.S. v. Cassiagnol, 420 F.2d 868 (4 C.A. 1970).

[88]U.S. v. Cassiagnol, 420 F.2d 868.

The court found that this type of activity went well beyond normal trial questioning or comment. The court found that

> . . . [t]he judge's exhaustive questioning of appellant Franco, often in a chiding, seemingly hostile manner and often indicating that the judge was suggesting or seeking a specific answer other than the one which had been given, coupled with the judge's persistent and repeated interruptions of defense counsel during the trial and during counsel's summation with sharp, critical comments, undoubtedly tended to prejudice this defendant before the jury and deprive her of a fair trial.[89]

In State v. Pokini, a Hawaii appeal of an armed robbery case, the appellants argued that the court's remarks toward the defense counsel and the court's two outbursts against the counsel in the presence of the jury caused serious prejudice against them. Some examples of the interruptions are:

> When you conduct yourself in a competent manner, the court will not interrupt you, Mr. Sherwood. Please proceed competently. . . . And please conduct yourself in a proper manner as a lawyer. . . .
> . . . . . .
> [E]very time you speak up against the court when the court has said something, the court will have a comment against you, Mr. Pyun. I want you to know that, Mr. Pyun.
> . . . . . .
> Very well, Mr. Pyun, you keep on rising and keep on making statements. The court hopes that one day you will learn not to keep on rising, but just let matters lie.[90]

---

[89]U.S. v. Cassiagnol, 420 F.2d 868.

[90]State v. Pokini, 536 P.2d 94 (Hawaii, 1974).

The Supreme Court of Hawaii found that "[t]he trial judge's short-tempered abuse of defense counsel in the presence of the jury, exacerbated by repetition, 'clings to the mind like a tattoo on the epidermis.'"[91] However, the court decided that it was not fully necessary to rule on whether the remarks represented reversible error. The court said:

> The five members of this court are unanimous in their disapproval of the trial judge's remarks—the only difference among us is whether the remarks were reversible or non-reversible error. However, since these cases are to be reversed on other grounds anyway, hopefully the trial judge will draw guidance from our disapproval should he preside at the retrial of these cases.[92]

Here, then, at least some justices agreed that the type of behavior exhibited by the trial judge in rebuking the defense counsel resulted in a denial of fundamental rights.

These examples illustrate the difficulty that the appellate courts have in recreating the nonverbal scene. It seems, at least in these examples, that the courts are looking for repeated behaviors and behaviors of great magnitude. Still, it is interesting to note that many of these courts complain of having to make a decision from the "cold record."

---

[91]State v. Pokini, 536 P.2d 94.

[92]State v. Pokini, 536 P.2d 94.

Nonverbal Judge Behavior and Witnesses

In the review of cases concerning judge interactions with witnesses since 1936, two types of interactions are most common. First, in many cases, judges become actively embroiled in the cross examination of witnesses. This might lead to an air of partial treatment, particularly if the judge singled out one side for extensive questioning. The second type of interaction with witnesses is nonverbal comment on the testimony of those witnesses. This behavior might discredit the witnesses and lead to an air of partiality.

Behavior which the courts did not correct. In People v. Hambrick, a 1958 California appeal of a burglary case, the appellant argued that when the original trial judge questioned the defendant on the stand, his manner and tone prevented a fair trial. The appellant suggested ". . . that from the manner and tone of the trial judge the jury inferred that the judge disbelieved the appellant's testimony."[93]

The questioning occurred when the defendant testified that he wore two pair of pants (one inside the other with the ankles tied) for health reasons. The judge asked ". . . whether the second pair of trousers were tied at the

---

[93]People v. Hambrick, 327 P.2d 570, 572-3 (Cal. App. 1958).

bottom to keep out the draft and how many pounds the appellant could carry in his pants without 'jumping out of your socks.'"[94]

The appeal court found that it was well within normal procedure to question witnesses in order to clarify testimony. The lack of an objection at trial prevented a ruling on the tone and manner because no record was kept. The court said: "No objections to the tone of the voice of the judge were made in the court below and there is no reference thereto contained in the record on appeal. Therefore, no objection thereto can now be made on appeal."[95]

In People v. Jaquish, a California appeal of a rape case, the appellant argued that the trial judge went so far as to coach witnesses and showed prejudice toward the defendant. The appeal court quickly dismissed the contention arguing that there was ". . . no support in the record. Moreover, no such point was raised in the trial court and hence is not available here."[96] Here again the lack of a record of nonverbal activity and a failure of the defense counsel to object to the activity at the trial prevented review.[97]

---

[94]People v. Hambrick, 327 P.2d 570, 572-3.

[95]People v. Hambrick, 327 P.2d 570, 572-3.

[96]People v. Jaquish, 338 P.2d 974, 976 (Cal. App. 1959).

[97]People v. Jaquish, 338 P.2d 974, 976.

In Riley v. Goodman, an appeal from New Jersey regarding a rape case, the appellants argued that the extensive intervention of the trial judge in the questioning of the victims, especially by means of leading questions, violated fundamental due process rights.[98]

The federal court ruled that the questioning of witnesses, especially in rape cases, was well within the bounds of propriety. The court quoted the N.J. Supreme Court.

> Experience shows that in cases involving sex offenses the inherent dignity and authority of the robed judge can clothe intimate and personal questions with a sense of decency and propriety which relieves to some degree the female witness' embarrassment and permits her full story to be told in a lucid fashion.[99]

Thus, here was an instance where nonverbal attributes were not considered in a negative prejudicial light but rather in a positive light. The court went on to find that there was no prejudicial impact to the judge's conduct. The court said:

> Improper conduct of a trial judge must be inimical and partisan, clearly evident and prejudicial. . . . It must appear plain and clear. There was nothing in his [the judge's] conduct which could legitimately be classified as violative of the due process clause of the Fourteenth Amendment.[100]

---

[98]Riley v. Goodman, 315 F.2d 232, 233-5 (3 C.A. 1963).

[99]Riley v. Goodman, 315 F.2d 232, 233-5.

[100]Riley v. Goodman, 315 F.2d 232, 233-5.

The case of Worthington v. State was a 1966 appeal of a Florida murder case. The appellant argued that the excessive "participation of the court in the interrogation of witnesses" denied the defendant a fair trial.[101]

The appeals court found that no fundamental error existed. Since no objection was made during the trial itself, the appeal court did not concern itself with the simple error.

State v. Barron was a 1971 appeal of a burglary case. The appellant argued that the trial judge ". . . placed his hands flat to the sides of his head, shook his head negatively once, leaned back and swiveled his chair 180° around," during the testimony of a brother of the appellant.[102]

The appeal court found it difficult to recreate accurately the situation. The court said:

> This [the behavior] is of course not revealed by the record, even though the motion for a new trial was verified by appellant's counsel.[103]

The court handled this type of behavior much as it would a verbal remark. Since the counsel did not object at the original trial, the appeal court refused to rule whether or not any error existed.

---

[101]Worthington v. State, 183 So.2d 728 (Fla. App. 1966).

[102]State v. Barron, 465 S.W.2d 523, 529-30 (Mo. 1971).

[103]State v. Barron, 465 S.W.2d 523, 529-30 (Mo. 1971).

Avery v. Maryland was a 1972 appeal of an assault and battery case. The appellant suggested that the extensive questioning on the part of the trial judge created a partial atmosphere which destroyed due process. The counsel for the appellant in the original trial objected to the conduct of the judge and was overruled. The incident occurred when the trial judge attempted to clarify the testimony of the victim.[104]

The court ruled that a trial judge has full discretion to question witnesses as long as the discretion is not clearly abused. The court felt that the behavior of this particular judge in no way was an abuse of discretion.

In People v. Jones, a 1973 appeal of a breaking and entering with the intent to commit larceny case, the appellant argued that the trial judge denied him a fair trial by questioning one of his witnesses. The appellant asserted that some of the questions "might [have] convey[ed] the impression that the trial judge became impatient with the witness. . . ." No objections were made to the questioning at the trial.[105]

The appeal court found no error. The court asserted that any potential harms caused by the questions were cured

---

[104]Avery v. State, 292 A.2d 728, 748 (Md. App. 1972).

[105]People v. Jones, 205 N.W.2d 611, 613 (Mich. App. 1973).

by means of an instruction that the trial judge gave to the jury. In the instruction, the trial judge said: "And if I have done anything to indicate to you how I want this case, or what I think this case is all about, and what the verdict should be, you should disregard that, because I should not have done that."[106] Hence, the appeals court seemed to have full faith that any prejudice could easily be removed by means of an instruction.

Williams v. State was a 1974 appeal of an aggravated battery conviction. The appellant argued that the judge "repeatedly injected himself into the trial and on at least one instance, took over the cross examination of a witness, . . . beyond the scope of direct examination." This action, according to the appellant, denied him a fair trial.[107]

The appeal court found that no objection at trial and no fundamental error existed in the case. The court said:

> Although we do not condone the action of the trial judge, . . . the record reveals that there was no objection during the trial . . . and since such were not so flagrant as to constitute fundamental error . . . the judgment and sentence appealed is Affirmed.[108]

In 1974, the murder case of Wilson v. State was appealed to a higher Maryland court. The appellant argued

---

[106]People v. Jones, 205 N.W.2d 611, 613.

[107]Williams v. State, 305 So.2d 45, 45-6 (Fla. App. 1974).

[108]Williams v. State, 305 So.2d 45, 45-6.

that the trial judge telegraphed "his disbelief of a key witness," the defendant's mother.[109] The appellant was specifically concerned with the nonverbal facial expressions of the judge during the testimony.

> At the bench, it was brought to the trial court's attention by counsel for appellant that the court had, by facial and oral expressions, manifested to the jury his disbelief in the mother's testimony. Defense counsel stated: "Your Honor was shaking his head and smiling as if she was incredible." The court responded that he "wasn't conscious of that" but if it had occurred, "it was natural."[110]

The appeal court found that the failure of the defense counsel to make a "formal objection and move for a mistrial" removed the matter from appellate concern. The court refused to rule on the error.[111]

However, what is interesting to note is the reliance of the appeal court on statements rather than nonverbal action. Even though there was clear record of nonverbal behavior by the trial judge, the court reviewed statements made by the judge in order to determine his attitude at trial.

In Lofton v. State, a 1977 appeal of a Georgia robbery case, the appellant argued that the court, in questioning witnesses, appeared to be an advocate of the prosecution. The court found that:

---

[109] Wilson v. State, 315 A.2d 788, 796 (Md. App. 1974).

[110] Wilson v. State, 315 A.2d 788, 796.

[111] Wilson v. State, 325 A.2d 788, 796.

> The Court should be extremely careful not to inject itself into the trial so as to appear an advocate of either side. However, the enumeration of error here is not meritorious since no motion for mistrial or other objection was made, and the error, if any, was waived.[112]

In this case, as in so many others, the failure of the defense counsel to object at the trial precluded review on the error. The courts in these cases found no massive denial of due process rights.

However, in other cases involving interactions between the witnesses and the judge, the courts have found a massive denial of due process rights. In many of these cases, the failure of the counsel to object at trial did not preclude review. The courts reviewed the cases specifically because great threats to fundamental rights were seen.

Behavior which the courts corrected. In this section, cases have been selected where the courts have found that the interaction between the judge and the witness was so severe that fundamental rights were denied. However, these cases represented only a small minority of the cases that were concerned with the judge/witness relationship. In the vast majority of the cases no denial of fundamental rights was found.

In State v. Riley, the appeals court reversed a rape conviction. The appellant suggested that the original trial

---

[112]Lofton v. State, 236 S.E.2d 508, 509 (Ga. App. 1977).

judge's extensive cross examination of the witnesses denied him a fair trial. No formal objection was made at the time of the trial.

The court found that:

> . . . the intervention of the trial judge in the critical areas of the direct and cross-examination, the extent and timing of his questioning, the leading character of some of his questions and his emphatic repetition of some of the most damaging answers thus elicited, taken in entirety, exceed the limit of permissible discretion. . . .[113]

The court went on to rule that even though the defense counsel made no formal objection at trial, the plain error from the questioning denied a fair and impartial trial. Thus, the conviction was reversed.

People v. Robinson was a 1960 appeal of a narcotics case. The appellant argued that the extensive participation of the trial judge denied him a fair trial.

The court of appeals ruled that:

> When the court conducts the case of prosecutor, as was done in this case, it constitutes in our opinion an irregularity which necessarily tends to balance the scales in favor of the People.[114]

The court went on to say that the error was of such magnitude that it denied the defendant a fair trial. It did not matter whether or not the counsel objected at the time of the trial, because due process was denied.

---

[113]State v. Riley, 140 A.2d 543, 550 (N.J. Super. A.D. 1958).

[114]People v. Robinson, 4 Cal. Rptr. 50, 71-2 (Cal. App. 1960).

In People v. Sprinkle, a 1963 appeal of a burglary case, the appellant argued that the conduct of the judge in questioning and making comments to witnesses denied him a fair trial. No objection was made at the time of the trial to the questioning by the judge.[115]

The appeal court found that the questions and comments had no "place in the conduct of a trial before a jury." Even though there was no objection at trial, the court found that "[t]he defendant may have been prejudiced in the eyes of some or all of the jurors, and the case must be remanded for a new trial." The denial of fundamental rights was more important than the lack of an objection at trial.[116]

State v. Yoshino was a 1968 appeal of a murder case. The appellants argued that the "conduct of the judge in examining and discrediting the witnesses for the defendants" violated their right to a fair trial.[117]

The court found that the conduct, existing throughout the trial "violated the requirements of a fair and impartial trial and defendant Yoshino was denied due process of law."[118] The court ruled on the error even though there was

---

[115]People v. Sprinkle, 189 N.E. 2d 295, 297-8 (Ill. 1963).

[116]People v. Sprinkle, 189 N.E. 2d 295, 297-8.

[117]State v. Yoshino, 439 P.2d 666, 668-9 (Hawaii, 1968).

[118]State v. Yoshino, 439 P.2d 666, 668-9.

no objection at the original trial. The court said that, ". . . where fundamental constitutional rights are involved, this court will take cognizance of the issue though it is raised in this court for the first time."[119]

These cases show that the courts, at times, do believe that the judge's treatment of witnesses, in front of the jury, can deny fundamental rights. The manner in which these courts arrived at the decision is somewhat curious. Even when specific nonverbal incidents were mentioned, the appellate courts always tried to infer from the record of the statements themselves the tenor of the judge's reactions. This points out the inherent weakness of deciding nonverbal issues simply on the basis of a verbal transcript.

It is useful to compare the cases where the courts did reverse the conviction to the cases where the courts did not. As a general rule, it seems that the courts looked for great amounts of misconduct before they concluded that due process was denied.

In the next section, the nonverbal behavior of the judge, while reading the charge, will be discussed. This area represents a small number of cases but will be important in later discussions.

---

[119]State v. Yoshion, 439 P.2d 666, 668-9.

Nonverbal Judge Behavior During Jury Instructions

In the search of cases since 1936, only one case concerning charges made specific mention of any nonverbal behavior. However, there have been a great many cases dealing with the slightest incorrect wording. This section has been included not because of the great number of cases involved, but rather because nonverbal bias in the reading of instructions will be discussed at length later in the thesis.

The sole appeal on nonverbal grounds was U.S. v. Newman, where a telephone crimes conviction was appealed. The appellant argued that the "facetious" nature of comments made during the judge's charge denied him a fair trial.[120]

Ironically, the appellant was granted a motion for a new trial, which was later rescinded when it was learned that no objection to the behavior had been made at trial. The appellant then appealed the case on the grounds that plan error existed.

The court rejected the notion that the behavior caused plain error. The court said: "Although the alleged 'witty diversities' may have been unwise, we cannot say that they affected the substantial rights of Newman." The court did not rule because no objection had been made at the trial.[121]

---

[120]U.S. v. Newman, 476 F.2d 733, 739 (3 C.A. 1973).

[121]U.S. v. Newman, 476 F.2d 733, 739.

Thus, here again, the court refused to rule on a case if no objection was made at trial, unless there was plain error of constitutional proportions. In the area of instructions, the court also seemed to demand evidence of a great deal of misconduct before the misconduct would be considered of fundamental importance.

In the following parts of this chapter, the present remedies (already illustrated by these cases) will be discussed. Initially, before the fact remedies will be discussed, followed by a discussion of ex post facto remedies.

Judicial Remedies for Nonverbal Judge Misconduct

Before the Fact Remedies for Nonverbal Judge Misconduct

The legal community has taken two approaches to pretrial remedies for judge misconduct. First, the legal community has maintained codes of judicial ethics. Secondly, training programs at the University of Nevada have been set up in order to prepare judges for the rigors of trial.

In the early part of this century, the American Bar Association published the first Canons of Judicial Ethics. In 1969, the American Bar Association began a revision of the old codes. After three years and lengthy consultation with both Bar and Bench, the Special Committee on Standards of Judicial Conduct presented their recommendations to the

House of Delegates of the American Bar Association. On August 16, 1972, the proposals were adopted by unanimous vote.

Canon 3, parts A and C, of the code deal directly with the conduct of judges during trial. Canon 3A(3) reads:

> A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.[122]

It is clear from this code that the legal community desires to have judges refrain from excessive misbehavior. It is unclear exactly what degree of misbehavior violates this canon. At best, the canon serves as a loose guide for the trial judge to follow.

It is interesting to note that during the drafting of these proposals

> [t]he Committee received reports about judges who were not patient, dignified, or courteous to certain groups of litigants and their lawyers, and a request was made to the Committee to set a specific standard of courtroom conduct for judges involved in proceedings relating to indigent persons and other disadvantaged persons and their lawyers.[123]

---

[122]Special Committee on Standards of Judicial Conduct, American Bar Association, Code of Judicial Conduct (Chicago: n.p., 1972), p. 10.

[123]E. Wayne Thode, Reporter's Notes to Code of Judicial Conduct (n.p.: n.p., 1973), p. 52.

However, the Committee felt that the standards enumerated in the canon would be the same in every proceeding and the addition was unnecessary.

Canon 3C contains the criteria under which a judge should disqualify himself from a case. Many of the criteria deal with conflict of interest and monetary concerns, but 3C(1)(a) deals specifically with personal bias.

> A judge should disqualify himself when he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.[124]

However, this requirement is not talking about bias or prejudice developed in court, but rather is concerned with relationships before the trial. Wayne Thode clarified the committee's intentions when he wrote: "The bias or prejudice concerning a party arises most often from prior personal relationships, but it may also arise from the nature of the conduct of a party."[125] In an attempt to develop his point, Thode offered the example of a judge, a victim of a utility practice, disqualifying himself in a utility case.

These canons represent an attempt by the ABA to impose standards which will reduce misconduct by trial judges. They take the optimistic view that "[c]ompliance with

---

[124] Code of Judicial Conduct, p. 14.

[125] Thode, p. 62.

Canon 3A(3) will go far toward changing the image of our courts in the minds of a substantial segment of the public."[126]

The effectiveness of these standards will be discussed later in this thesis, where the degree of misbehavior will become an important consideration. In the remainder of this section, judge training will be discussed.

In an effort to increase the quality of judges, the Judicial Administration Division of the American Bar Association and the University of Nevada-Reno sponsor the National Judicial College. The college has expanded its course offerings in the hope that increased training will better acquaint judges with modern problems of trial procedure.[127]

The effectiveness of the before the fact techniques, mentioned above, will be discussed later in this thesis. This section is merely designed to review the present before the fact legal approach. The next section will deal with legal responses to the behavior of judges after the behavior has occurred.

---

[126]Thode, p. 52.

[127]1978 Chronological Calendar of Resident Sessions: The National Judicial College (n.p.: n.p., n.d.), n. pag.

Ex Post Facto Remedies for Nonverbal Judge Misconduct

In this section, ex post facto remedies for judge misbehavior will be discussed. These remedies include curative instructions, mistrials and retrials, and appeals. However, before these remedies are examined, a brief discussion of the judge's role, as seen by the courts, will be presented.

The requirement of a fair and impartial judge can be traced far back into common law. As a general rule, both the federal[128] and the state courts[129] require that a judge be impartial. However, in order to disqualify a judge, the bias of a judge must come from extrajudicial sources or personal bias.[130] Even if the judge mentions that he/she feels a certain way about a case outside of the trial, he/she is viewed as impartial if he/she conducts the trial in a fair and impartial manner. This is generally true in both federal[131] and state courts.[132]

---

[128]See: U.S. v. Meyer, 462 F.2d 827 (D.C. C.A. 1972).

[129]See: People v. Robinson, 310 N.E.2d 652 (Ill. 1974).

[130]See: U.S. v. Hall, 536 F.2d 313 (10 C.A. 1976).

[131]See: U.S. v. Gower, 447 F.2d 187 (5 C.A. 1971).

[132]See: State v. Johnson, 243 N.W. 2d 598 (Iowa 1976); Clenny v. State, 192 S.E. 2d 907 (Ga. 1972); Truett v. Leeke, 173 S.E.2d 374 (S.C. 1970).

It is an impartial and fair trial, then, which is the main concern of this thesis. The main problem, as illustrated by the review of cases, is at what point does the judge's reaction to the trial itself so taint the proceedings as to deny a fair trial?

This determination is complicated when judges are allowed to comment on the evidence. Federal judges are permitted to comment on the evidence but must limit their comments strictly to the record. The slightest distortion usually results in a reversal. The judge must also make clear to the jury that they are the sole and ultimate judges of the facts, and not the judge.[133] Further, the judge must not express an opinion as to the actual guilt of the defendant, unless the evidence is overwhelming.[134]

Most states do not allow judges to comment on evidence before the jury. Only Arkansas, Maine, Minnesota, Montana, Nebraska, Nevada, North Dakota, and Wisconsin have not adopted bans on judge comments.[135]

The role of the judge to clear up testimony can also complicate the decision on whether or not due process is violated. Some courts have gone as far as declaring that

---

[133]Querica v. U.S., 289 U.S. 389 (S. Ct. 1933).

[134]U.S. v. Murdock, 290 U.S. 389 (S. Ct. 1933).

[135]Weinstein, p. 41.

extensive judge cross examination, if done in a professional manner, is often beneficial.[136] Others have found that too much judge cross examination denied the defendant a fair trial.[137]

Finally, the judge has a responsibility to keep order in the courtroom.[138] The line between order and demeaning a trial participant is often a narrow one. Thus, this role also complicates the decision of whether or not due process was violated.

The roles required of judges are necessarily complicated ones. These roles make it difficult for the appeal courts to assign the behavior of the judge as harmless error, or a denial of due process that demands reversal of the conviction. The specific techniques that are used to remedy the behaviors will be discussed next.

The procedure involved in remedying any misconduct, on the part of the judge, is largely governed by the code of criminal procedure adopted by each state and the federal government. Since most state codes of criminal procedure are similar to the federal codes, and because a review of every state's procedural rules would be far too lengthy for

---

[136]See: Riley v. Goodman, 315 F.2d 232.

[137]See: State v. Yoshino, 439 P.2d 666; People v. Sprinkle, 189 N.E.2d 295.

[138]People v. Essee, 154 N.W.2d 545.

the scope of this thesis, only a review of the Federal Rules of Criminal Procedure will be featured here.

The first remedy which might be employed to correct nonverbal judge misconduct is the curative instruction. According to the federal rules, "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests."[139] The defense counsel can specifically request instructions that the jury be told that they are the ultimate triers of fact in the case. These types of instructions are also used as a potential cure on the state level.[140]

However, if these charges are inadequate, the defense counsel must object before the jury begins deliberations. Rule 30 states in part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.[141]

---

[139] Federal Rules: Criminal Procedures, 1975 ed. (St. Paul: West, 1975), p. 67.

[140] See: People v. Jones, 205 N.W.2d 611.

[141] Federal Rules: Criminal Procedure, p. 67.

The attorney might also seek an admonition to the jury, directly after the offending action. A quick admonition to disregard certain comments has long been held as an appropriate response of the court.[142]

The number or nature of the objectional behaviors probably guides the counsel in the selection of requested actions. However, the trial judge may not necessarily honor the defense counsel's request for some specific action.

The second type of ex post facto remedy is mistrial. Where the ends of justice would not be served by a continuation of the trial, the defense counsel may move for a mistrial. The trial judge must then rule on whether or not his nonverbal behavior was so prejudicial as to infect totally the trial.

The new trial, gained after a mistrial has been declared, does not normally violate double jeopardy provisions.[143] However, a judge cannot goad the defense into a new trial in the hope of a better opportunity to convict the defendant.[144]

A third remedy for judge nonverbal misconduct is the appeal process. The most common result of a successful

---

[142]See: People v. Galuppo, 185 P.2d 335.

[143]U.S.C.A. Const. Amend. 5, 14; Benton v. Maryland, 395 U.S. 784 (S. Ct. 1969).

[144]U.S. v. Dinitz, 424 U.S. 600 (S. Ct. 1966).

appeal on the grounds of judge misconduct is a new trial for the appellant. In the review of cases presented earlier, every successful appeal resulted in a new trial.

In order to understand the appeal process, some knowledge of the concepts of harmless error and plan error is required. When harmless error occurs, substantial rights are not denied. When plain error occurs, substantial rights are denied. Rule 52 of the Federal Rules of Criminal Procedure provides the distinction.

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.[145]

When the case is up for appeal, the appellant court has the responsibility to decide whether or not the misconduct in question is of such a nature as to deny fundamental fair trial rights.[146] The review of cases, previously presented, demonstrated how the appeal courts made such determinations.

The courts have generally held that where plain error existed in a trial, the failure of the defense counsel to object at the time did not preclude the appeal court from

---

[145] Federal Rules: Criminal Procedure, p. 95.

[146] U.S.C.A. Const. Amend. 5.

granting a mistrial.[147] However, where only simple error existed, the lack of a formal objection at trial generally waived review.[148]

There is thus a great deal of discretion on the part of the appeal court in deciding exactly what degree of misconduct becomes plain error. As was pointed out in the review of cases, the courts have generally looked for a great deal of misconduct before they decided that plain error had occurred.

In the next chapter, the judicial approach to judge nonverbal bias will be compared to the experimenter expectancy literature, which was reviewed in Chapter II. The current legal approach to the problem will be critiqued and a new theory of judge expectancy will be presented. Finally, novel proposals, which have been suggested as a means to reduce nonverbal judge expectancy, without change to the law, will be discussed.

---

[147]See: Braswell v. United States, 200 F.2d 597 (5 C.A. 1952).

[148]Williams v. State, 305 So.2d 45.

CHAPTER IV

TOWARD A NEW VIEW OF JUDGE NONVERBAL BEHAVIOR

The legal approach to nonverbal judge behavior has developed largely without any theoretical support. After reviewing the cases, it is clear that the courts are confused as to how exactly nonverbal judge behavior affects the jury.

In this chapter, a new explanation of judge expectancies and fair jury trials will be presented. This new explanation will be based on a comparison of the experimenter expectancy findings and an examination of the role of the jury in the American legal system.

This chapter will consist of four parts. First, an analogy between experimenter expectancy and judge expectancy will be offered. The rationale for the analogy will be discussed at length. Secondly, the present techniques used to remedy nonverbal judge misbehavior will be criticized. Thirdly, proposed techniques to reduce judge expectancy effects will be examined and criticized. Finally, a series of techniques, based on the analogy, will be proposed to reduce possible expectancy effects.

The Experimenter Expectancy/Judge Expectancy Analogy

In this section, experimenter expectancy studies and the relationship of the judge to the jury in the courtroom will be compared by means of an analogy. An analogy "infers a conclusion about one case by comparing it with another." If the analogy is carefully constructed, it can have probative force. "If two cases are alike in all essential respects they will (in all probability) be alike in the respect under question."[149] The jury trial and the experimenter expectancy experiment will be shown to be alike in all essential respects. Although there will be some differences, they will be shown not to be of such as essential character that they rob the analogy of utility. The experimenter expectancy experiment and the jury trial are similar in all areas that are crucial to the validity of the analogy. The experimenter expectancy/judge expectancy analogy provides a reasonable explanation of judge expectancies.

There are some aspects of the jury trial which are much different from the experimenter expectancy experiment. These differences must be considered when explanations of the judge/jury relationship are drawn from the analogy.

---

[149]James McBurney and Glen E. Mills, "Forms of Argument," in Readings in Argumentation, ed. Jerry Anderson and Paul Dovre (Boston: Allyn, 1968), pp. 261-62.

The first major difference between the psychology experiment and the jury trial is the advocacy process. The use of argument by the attorneys might, in an effort to persuade, make the issues of the case very clear. The review of expectancy literature seems to indicate that the less ambiguous the task, the less expectancy effects occur.[150] Thus, argument may decrease expectancy effects. Many cases might not pose any problems of ambiguity, but in others the testimony of witnesses might be confusing or contradictory. Even after extensive argument, the testimony of any witness might still remain confusing. The juror, then, unaided by the advocacy of the attorneys, must make a decision in an ambiguous situation.

Even if the advocates are successful in clearing up the issues during the witness testimony and arguments, the charge may be so ambiguous as to invite expectancy effects. In Texas, the judge read a charge to a jury and said: "I bet I have read that a hundred times and I still don't know what it means, but it's a statute so I cherish it."[151] All statutes and charges may not be that confusing, but when they are, the judge might produce an expectancy effect merely by his nonverbal actions while reading the charge.

---

[150]Brightman and Raymond, "The Effects of Task Ambiguity and Expectancy Control Groups," pp. 277-87.

[151]Thomas v. State, 533 S.W.2d 796, 797 (Tex. 1976).

Once the charge is read, the advocates no longer have any major effect on the proceedings, and hence, no major influence in diminishing expectancy effects.

The second major difference between the experimenter expectancy experiment and the jury trial is the deliberations of the jurors. In the experimenter expectancy experiment, subjects made decisions on their own. In the jury system, jurors make their decisions on the basis of a discussion process. Little is known about the deliberations of actual jurors, since to invade their deliberations would violate the defendant's due process rights. If the deliberations do affect expectancy effects, they would probably serve to decrease the effects. A number of studies have shown that the deliberations of simulated jurors tend to reduce the effects of other types of bias.[152] The experimenter expectancy bias might not work in the same way. In the experiments, mentioned above, the source of the bias was fairly obvious (race, attractiveness, occupation, etc.), but expectancy bias is difficult to separate from the issues involved at trial. Indeed, the expectancy is likely to be

---

[152]Michael G. Rumsey, "Effects of Defendant Background and Remorse on Sentencing Judgments," Journal of Applied Social Psychology, 6 (1976), 1299-302; David G. Meyers and Martin F. Kaplan, "Group-Induced Polarization in Simulated Juries," Personality and Social Psychology Bulletin, 2 (1976), 64-8; James M. Gleason and Victor A. Harris, "Group Dimension and Defendant's Socio-Economic Status as Determinants of Judgments by Simulated Jurors," Journal of Applied Social Psychology, 6 (1976), 459-65.

one of interpretation of the issues. Thus, it would be most difficult for the jurors to separate expectancy bias, even if they were aware of it, from the issues that they must decide upon. Other types of bias could be dismissed as not important in the consideration of the issues.

The final difference between the experimenter expectancy experiment and the jury trial is the presence of other people in the courtroom. These people might include the bailiff, spectators, the court reporter, and so forth. Since these people do not often have high profile roles in the trial, it is doubtful that they have a major effect. The review of experimenter expectancy literature revealed that in order to communicate any great expectancy effects, both auditory and visual channels had to be used.[153] Since these people rarely have speaking roles in the trial process, it is unlikely that these people would produce any expectancy effects of their own. The relationship of court personnel and jurors is carefully regulated when the trial is not in progress. A number of cases have been reversed because of statements made to jurors by bailiffs.[154]

An analogy is a comparison of two relationships and a prediction of the outcome of one relationship based on the

---

[153]Rosenthal and Fode, "Three Experiments," pp. 183-9; Burkhart, pp. 15-23.

[154]See: Turner v. Louisiana, 379 U.S. 466 (S. Ct. 1965); Parker v. Gladden, 385 U.S. 363 (S. Ct. 1966).

outcome of the other. The experimenter expectancy experiments and the jury trial are similar in a number of ways. The roles of the judge/experimenter and juror/subject are similar in the trial and the experimenter expectancy experiment. The strength of the analogy comes from the similarity of those roles.

In the experimenter expectancy experiment and the jury trial, the jurors and the subjects are similar in a number of respects. First, the jurors and the experimental subjects are required to make judgments, using criteria which are supplied externally, and are generally not given any tangible rewards for their performance. Secondly, both the jurors and the subjects do not normally participate in their respective roles as jurors or subjects. The task that both jurors and subjects are required to perform is a temporary, and to some degree, a novel activity. Finally, both the jurors and subjects are selected on a generally random basis. It is true that jurors are usually selected from voter lists and must survive voir dire, and that experimenter expectancy experiment subjects are usually selected from introductory psychology classes, but they still represent a group of people who are thrust together, generally without any experience at doing the task which will be asked of them.

In the trial, the role of the judge is similar to the role of the experimenter in the experimenter expectancy

experiments. First, it is the duty of the experimenter to run the experiment, just as it is the duty of the trial judge to run the trial. Secondly, it is the duty of both the experimenter and the judge to instruct the subjects and jurors. In the experimenter expectancy experiment the experimenter instructs the subjects as to what they are looking for and what decisions need to be made. In the trial, the judge charges the jury, telling them what they must look for under the law and what decisions need to be made.

Finally, the task of the subject in the experimenter expectancy experiment is similar to the task required of the jurors in the jury trial. In the experimenter expectancy experiment, the subjects are usually required to estimate the success of a person on a photo. In the trial, jurors are required to decide whether or not a certain person is telling the truth, whether the person is a good observer, or perhaps whether the person's actions fit the legal criteria. They are both decision-making tasks performed according to certain criteria.

The experimenter expectancy experiments and jury trials are similar in all essential respects. Where there are differences, they are not essential and, hence, would probably not alter the results of the analogy. Since the experimenter expectancy experiments and jury trials are

analogous, it can be reasoned that the same expectancy effects found in the experimenter expectancy experiments, exist in jury trials. In Chapter II, five factors were isolated as necessary conditions for experimenter expectancy effects to occur. It is reasonable to conclude that those five factors must also exist for a similar effect to occur in jury trials. The five factors are:

1. The task must be ambiguous in nature (e.g., witness decisions, application of the charge, and so forth).
2. The judge must have some expectancy (e.g., a feeling about the witness's honesty, sentiment on application of the law in the case, feelings about the attorneys, and so forth).
3. The expectancy cues must not be overpowering and blatant (e.g., the judge shouting at a witness, brow beating an attorney, and so forth).
4. The judge must appear important, businesslike, professional and personal.
5. The judge must communicate the expectancy through both auditory and visual channels (e.g., vocalics and kinesics, proxemics, artifacts, and so forth).

The task ambiguity factor relates to the task ambiguity factor found in the experimenter expectancy effect literature. In that literature, Brightman and Brightman and Ray found that an ambiguous task must be present in order for experimenter expectancy effects to occur.

The judge expectancy factor is an obvious one. If an expectancy is to be communicated through subtle nonverbal means, some sort of expectancy must exist in the first place. It would be most difficult for a judge, who probably presides at many bench trials, to have no feelings about any part of a case that he is hearing before a jury.

The third factor, that the cues must be subtle and not blatant or overpowering, is similar to the experimenter expectancy findings. In that literature, Rosenthal found that the cues had to be subtle in order for an experimenter expectancy effect to occur. It is likely that the judge's cues must also be subtle for the effect to occur.

The fourth factor of businesslike and professional appearance mirrors the same factor in the experimenter expectancy studies. Rosenthal found that a lack of professional or businesslike appearance by the experimenter resulted in a sharp reduction in the experimenter expectancy effects. The same factor is likely to affect possible judge expectancy effects in the same way.

The final factor is the requirement that the expectancy cues use both auditory and visual channels. In the experimenter expectancy literature, both auditory and visual channels were required in order for great expectancy effects to occur. When only one channel was used, virtually no expectancy effects existed. It seems reasonable to expect

the same thing in the jury trial. Only one channel probably will not carry the expectancy effect.

It is plausible that when all five of these factors are present, a subtle expectancy effect exists in jury trial. If such an effect exists, it may take the case from the province of the jury. The legal community, using its present methods, is able to record and analyze verbal behavior but is unable to deal with subtle nonverbal expectancy. The present legal approach seems unready to deal with possible nonverbal expectancy bias. The problem will be discussed next.

A Critique of Present Legal Remedies

In this section, legal remedies for judge nonverbal misconduct will be evaluated. The basis of this critique will be drawn from the expectancy analogy and from practical criticisms about specific procedures. The organization will follow closely the presentation of legal remedies in Chapter III. The before the fact methods of ethics and training will be analyzed, followed by a critique of the ex post facto remedies of curative instructions, mistrials, and appeals.

A Critique of Before the Fact Remedies

Canon 3A(3) of the Code of Judicial Conduct was designed to set the standards of patient, dignified, and

courteous conduct on the Bench. From the review of cases presented earlier, it appears that the code was not completely successful in reducing judge misbehavior. Even if the code were successful, it probably would do little to decrease the judge's influence on the jury. The reverse is probably true.

According to the expectancy effect analogy, the increase in the professional and businesslike demeanor of the judge is one of the conditions necessary for the expectancy effect. A note to 3A(3) even suggests that a judge can maintain this professional demeanor and still be "businesslike."[155] The judge following the code provides the foundations for the very expectancy effects that it was designed to eliminate. The training of judges has a similar effect. The more professional and businesslike the judge becomes, the more likely it is that expectancy effects will occur.

The efforts of the legal community, far from eliminating bias, might have even increased it through expectancy effects. This is not to say that professional-appearing judges are not desirable for other reasons, but simply that the professional standard, if followed, probably increases subtle expectancy effects.

---

[155] Code of Judicial Conduct, p. 10.

A Critique of Ex Post Facto Remedies

The ex post facto remedies for judge expectancy effects suffer from the same paradox as the before the fact remedies. Most of the ex post facto remedies are directed toward blatant misconduct and virtually ignore the subtle nonverbal cues. Thus, according to the analogy, the main ex post facto efforts are directed at behaviors which have little effect on the jury and ignore the behaviors which have the greatest effects on the jury.

In this section, the same ex post facto remedies discussed in Chapter III will be criticized. First, the remedy of curative instructions will be discussed. Secondly, motions for mistrial will be covered. Finally, the appellate process will be critiqued.

The instructions to the jury, concerning judge behavior, can take two forms. First, the judge can admonish the jury to disregard any specific behavior directly after it had happened. Secondly, the judge can include a general admonishment during the jury charge before deliberations.

Although an attorney can easily make an objection and demand an admonition concerning blatant judge misconduct, constant objections to more subtle conduct would be impractical. First, the attorney, embroiled in the heat of the trial, might not even notice the subtle nonverbal behavior of the judge. Indeed, the attorney has other

things on his/her mind. Secondly, a great many objections can create tactical problems during the trial.

Practical problems with objections to nonverbal behavior have been noted by a number of courts. Justice Shinn of California commented on the problems of objecting to judge behavior:

> It is not for lawyers to instruct judges as to their judicial duties. Defendant's attorney would have had to be on his feet as much of the time as he would have been seated if he had attempted to do so. . . . We do not believe it would have been in the best interests of his client to interpose continuous objections or to otherwise express disapproval or criticism of the court's actions and thus run the risk of incurring the disfavor of the jurors, and perhaps of the court. We do not doubt that . . . to insist that the court desist from its procedure would have been a tactical mistake.[156]

In 1960, Justice Underwood of the Illinois Supreme Court commented on the dilemma in which a defense counsel finds himself/herself in.

> It can prove embarrassing to the lawyer, but, more importantly assuming that most juries view most judges with some degree of respect, and accord to them a knowledge of the law somewhat superior to that of the attorneys practicing before the judge, the lawyer who objects to a comment or question by the judge may find himself viewed with considerable suspicision and skepticism by the very group whom he is trying to convert to his client's view of the facts, thereby perhaps irreparably damaging his client's interests. If he fails to object, he may, on appeal, be faced, as defendant here is, with the claim that his failure to act has precluded

---

[156]People v. Robinson, 4 Cal. Rptr. 50, 71-2.

> consideration of the error, and it is not always a sufficient answer to this situation to say that the objection can be made and a ruling secured outside the hearing of the jury.[157]

A quick instruction to the jury to disregard certain behaviors is not practical in all situations. Where subtle nonverbal behavior is at issue, it would be nearly impossible for an attorney to recognize and make an objection to each subtle cue.

A number of courts have suggested that a special instruction to disregard the judge behavior, given during the final charge, is sufficient to eliminate any judge expectancy effects. The review of cases, covered in Chapter III, has examined a number of these situations. These instructions also have some inherent problems.

The first problem with curative charges is the places they occur. In the experimenter expectancy studies, expectancy effects were found throughout the experiments.[158] It seems reasonable to conclude that the same thing might happen in jury trials. The expectancy effect concerning the accuracy of a key piece of testimony or the soundness of a major argument may be more important than a general expectancy of guilt or innocence throughout the trial. Once the jurors have the expectancy locked in their minds, it

---

[157]People v. Sprinkle, 189 N.E.2d 295, 297.

[158]Rosenthal, "Verbal Conditioning," pp. 71-4.

would be most difficult for them mentally to go back over the entire trial and remember where the judge reacted to certain testimony or arguments. When the judge's cues are very subtle, it may be impossible for the jurors to remember the judge's cues. This is especially true where the behaviors are so subtle that the jurors do not pay any attention to them initially. The charge, then, cannot deal with the behaviors concerning specific parts of the trial.

Charge instructions may not be effective for a second reason. Once juries have been exposed to prejudicial material, any charge may not be able to remove the bias from their thinking processes. Many trial attorneys have compared the task to unringing a bell, once the clapper has struck iron. Although there have been no social science studies dealing with the effects of instructions on judge expectancy, there have been studies concerning other types of bias. Some studies have shown that jurors do not heed the instructions.[159] Other studies have shown that when there are tangible sources of bias, such as race, appearance, and so forth, the jurors "bend over backwards" and tremendously overcompensate for the perceived bias.[160] It

---

[159]Stanley Sue et al., "Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma," Journal of Applied Social Psychology, 3 (1973), 345-53.

[160]Ronald Friend and Michael Vinson, "Leaning Over Backwards: Juror's Responses to Defendants' Attractiveness," Journal of Communication, 24 (1974), 124-9.

is difficult to imagine how a juror might separate his/her own opinion on the entire trial from the subtle expectancy cues of a judge, which he/she might not have even consciously noticed during the trial.

The third criticism of the curative charge is based on the expectancy analogy itself. If a judge has been exhibiting subtle expectancies during the trial, it would seem odd for him to tell the jury to ignore any feelings he exhibited about the case because he/she biased the jury. The judge may routinely make the charge on the request of the defense counsel, but the judge may not believe that his/her subtle behaviors influenced the jury. The analogy between the experiment and trial is most accurate during the charge. Here, written instructions are read to a group who must make a decision on those instructions. It is plausible that the judge, by means of subtle nonverbal cues, may create the impression that the part of the charge concerning his/her behavior is not very important.

The final criticism of the charge is that it creates a message conflict. When a judge exhibits certain subtle nonverbal cues of his expectations of the jurors and then contradicts them, the jurors may ignore the verbal instruction. A note in the Virginia Law Review described it this way:

> On the verbal level the judge asserts that he has no feelings about the matters before him or that

> those feelings which he does have should be disregarded. Yet throughout the trial, on the nonverbal and paralinguistic level, he may have indicated that he has definite feelings worthy of jury attention. Given the proclivity of individuals to rely more heavily on the nonverbal messages in such a situation, it is likely that the instruction will be ineffective.[161]

Curative instructions probably do not have any effect in reducing subtle nonverbal expectancy effects. There are often tactical problems for attorneys in requesting them, and their power to erase prejudice from the minds of the jurors has never been established by any social science research. The instructions about the judge, given by the judge, represent an expectancy problem in their own right.

The formal motion for a mistrial suffers from many of the same problems as objections and curative instructions. In order for the judge to grant a mistrial, he must believe that the ends of justice would not be served by a continuation of the trial. In other words, the judge must declare that his behavior was so biasing that a fair trial would be impossible. It seems unlikely that judges would declare a mistrial even if they engaged in blatant misbehavior. When subtle nonverbal behaviors are at issue, which the judge may have not even been aware of, there is virtually no chance of the judge's declaring a mistrial.

---

[161] Virginia Law Review, p. 1283.

The appellate process is the final alternative in trying to remedy judge expectancy effects. The review of cases, presented earlier, clearly demonstrates the kinds of problems that the appeal courts face in dealing with judge expectancy behavior.

The first problem in the appellate process is the standards on which the courts must decide whether judge behavior was plain error. Generally the courts have demanded noticeable and repeated behaviors by the judge before they would rule on plain error. This process contradicts the expectancy analogy. In the expectancy analogy, the less professional and businesslike, and the more blatant the expectancy cues, the fewer expectancy effects occur. Thus, the appeal courts have been ignoring the subtle nonverbal cues that have the greatest effects and reversing the cases where blatant cues probably had caused no expectancy effects anyway. As long as harmless error and plain error are defined in this way, the appeal courts can have no impact on expectancy effects.

The second problem in the appeal of expectancy cases is the difficulty of many appeal courts to decide what had happened by using only the "dry record." In the review of cases it was found that the appeal courts rarely have any accurate record of the nonverbal activities that went on at trial. Even where activities are described in the record,

they are usually not the subtle activities which probably have the greatest effect. Often, the courts have tried to recreate the nonverbal scene by reading the remarks which accompanied the nonverbal behavior. This method must be far from accurate, especially with regard to subtle nonverbal expectancy cues. Since the only records available for scholarly study are the opinions of the appeal courts, it is difficult to tell the exact nature of the subtle nonverbal behavior of the judges. The lack of adequate records not only hurts the Bench, but the scholar as well.

Both before the fact and ex post facto remedies for judge nonverbal expectancy cues seem to offer little hope for maintaining a separation between the domain of the judge and the domain of the jury. In the next section, three novel proposals to reduce judge expectancy effects will be examined.

Novel Proposals to Reduce Judge Nonverbal Expectancy Cues

A note in the Virginia Law Review suggested that three new techniques might be used to reduce judge expectancy effects.[162] These techniques will be reviewed. First, training judges to use masking behaviors will be examined.

---

[162] Virginia Law Review, pp. 1288-95.

Secondly, videotaped trials will be covered. Finally, courtroom redesign will be critiqued. Some individuals have an ability partially to mask their feelings by reducing their nonverbal communication. If it is possible to train judges to mask their behavior, then it might be possible to eliminate the threat of judge expectancy. This masking technique might suffer from a number of problems.

The first problem with masking techniques is the ability of a judge to be trained to use them in all situations. The Virginia Law Review note pointed to a lack of research concerning judicial masking techniques: "Further investigation should explore whether the ability to mask could be increased to sufficient levels through training, and whether partial masking is sufficient to disrupt the unintended communication of influence between judge and jury."[163] The trial setting demands that the judge participate in a number of roles. It is unlikely that any judge can adhere to the masking technique when he/she is embroiled in the heat of a trial. The training would also have to be extensive. Both auditory and visual channels of communication would have to be controlled.

The second problem with masking training might be the recalcitrance of judges. If judges, in the cases presented earlier, did not heed the codes of the legal community, what

---

[163] Virginia Law Review, p. 1292.

chance is there that they will put a great deal of effort into mastering masking techniques? In order to achieve full masking, a great deal of concentration would be required. Judges might not be willing to concentrate on their nonverbal behaviors.

Finally, the masking technique could have a reverse effect. The expectancy analogy suggests that subtle behaviors communicate the greatest expectancies. If judges achieve only partial masking, the very subtle nature of the remaining behavior might lead to even greater expectancy effects. Thus, the utility of masking techniques is highly questionable.

A second method which was suggested for reducing expectancy effects was videotaped trials. The taped trial might help in two major ways. First, judge nonverbal expectancy cues can be edited and the tape of the trial can then be shown to the jury. Secondly, the videotape, as a record, might provide appeal courts with a better tool for recreating the nonverbal scene. However, videotaped trials are not without their problems.

The first problem is constitutional. A number of writers have suggested that the rights of presence, confrontation, and public trial might be compromised by the use of videotaped trials.[164] The constitutional questions are far

---

[164]James Armstrong, "The Criminal Videotape Trial: Serious Constitutional Questions," Oregon Law Review, 55 (1976), pp. 567-85.

from settled but could block further use of videotape for criminal prosecutions.

The second problem with videotaped trials is that appeal court judges do not like the videotaped records. In March 1973, an experimental program of videotaped criminal trials was attempted in Ohio. The appeal judges complained so much about the records that the project was cancelled in 1975.

> In its final report, the Video Record Committee of the Ohio Court of Appeals agreed that the use of videotape records on appeal was burdensome and not beneficial. . . . In the area of seeing and listening, the real problem is being able to sufficiently concentrate on the audio, made more difficult by the pauses characteristic in the testimony.[165]

A similar project in the Hamilton County Criminal Court in Chattanooga, Tennessee, was cancelled shortly afterward.

> . . . Presiding Judge Mark A. Walker of the Court of Appeals of the State of Tennessee announced the end of a similar experimental project. . . . He noted that the use of videotapes in place of the printed transcripts had had the effect of slowing down the appeal process rather than accelerating it, as had been hoped, and that the anticipated savings in time and expense in connection with the preparation of a record for appellate review had not, in fact, been forthcoming.[166]

Without the support of the Bench, it is doubtful that videotaped trials will gain wide acceptance.

---

[165]Lawrence Burt, "The Case Against Courtroom T.V.," Trial, 12, No. 7 (1976), 63.

[166]Burt, p. 63.

A final problem with videotaped trials is cost. Not only is the initial installation cost of videotape equipment prohibitive, but the cost of taping the trials is high. ". . . [T]he National Center for State Courts has estimated that the cost of one day's recording could range from a low of $440 to a high of $1,568."[167] It is unlikely that communities would be willing to invest in videotape equipment, especially when the appeal benches do not support the program.

The final suggestion for reducing judge expectancy effects is courtroom redesign. In most courtrooms, the witness stand is next to the bench. When the jurors look at the witnesses, the judge is always in their cone of vision. By moving the witness stand away from the bench, the visual cues might be reduced. "In this way the judge could be withdrawn from the juror's line of sight during the testimony of witnesses, thus reducing the juror's access to the judge's nonverbal behavior."[168] There are serious obstacles to this proposal. The first is reasoned from the analogy, and the second comes from more practical concerns.

The first problem with court redesign is that it might not reduce expectancy effects. According to the analogy,

---

[167]Burt, p. 66.

[168]Virginia Law Review, p. 1293.

the communication of expectancies is most effective when both auditory and visual channels are used. Visual channels alone communicate virtually no expectancy effects. Whenever the judge questions a witness or addresses the defense counsel, the jury is bound to turn and look at the judge. When the judge charges the jury, all eyes are also likely to be on the judge. Even if courtroom redesign can limit the visual channels, it cannot limit the auditory or auditory/visual channels.

The second problem with courtroom redesign is cost. In a time of tax revolts, it is most unlikely that funds will be allocated to redesign the nation's courtrooms. A note in the Virginia Law Review recognized this problem even in 1975:

> Even a proven solution might still be impeded by conservatism and cost. . . . Moreover, with competing political constituencies vying for state and local funds, city councils and state legislatures are often reluctant to authorize spending for new court facilities.[169]

Not only is it doubtful that courtroom redesign will reduce judge expectancy effects, but cost also makes redesign prohibitive. In the next section, new proposals to decrease possible judge expectancy effects will be presented. These proposals will be based on the knowledge of judge expectancy effects gained from the analogy.

---

[169] Virginia Law Review, p. 1293.

Some New Proposals to Reduce Judge Expectancy Effects

The problem of possible nonverbal judge expectancy effects is a most difficult one to solve. The present remedies are either impractical or at odds with the theoretical conception of the problem as developed in this thesis. Even the novel proposals, suggested by legal scholars, are either of dubious effectiveness or not likely to be supported by the Bench, the Bar, or the public.

The best method for reducing possible judge nonverbal expectancy effects would be to reduce, in the trial, one of the five factors which, according to the analogy, are necessary to produce judge expectancy effects. Three techniques might reduce judge expectancy effects by reducing one of the five factors developed from the analogy. These techniques are process instructions, juror training, and instruction presented by someone other than the trial judge.

Most states require judges to instruct orally the jury on the law before they retire for deliberations. Often these instructions are so long and complex that they resemble a "thirty-minute lecture by the judge."[170] There

---

[170] K. Phillip Taylor et al., "Communication in the Courtroom: The Effect of Process Instructions on Jury Deliberation," Paper presented at the convention of the Southern Speech Communication Association, Atlanta, Georgia, April 1978, p. 9.

might be a great deal of confusion in the jurors' minds when they have to apply all of the standards contained in the charge to the testimony in the trial. This confusion might create the ambiguity that, according to the analogy, is a major factor in the expectancy effects.

One method that might reduce the ambiguous nature of the charge is process instructions. Process instructions were first used in a criminal case in May 1977 by Judge David U. Strawn of the 18th Judicial Circuit of Florida. The process instructions were a series of questions about the case that the jury was required to answer.

> Strawn, aided by the communication researchers from the university, developed a series of questions that permitted the jury to decide the component issues in the case. If all the questions were answered as alleged by the prosecution the state had proven its case. If any one question was answered contrary to the charges, the state had not proven its case.[171]

Process instructions would present the jury with an orderly task. This might serve to reduce the amiguity and, hence, probably reduce judge expectancy effects.

> . . . [T]he instructions approach the jury's job in an orderly fashion. The present instructions give the jury a definition in legalistic terms and then the jury has to determine whether or not that definition has been met. It seems preferable to let lawyers understand the law, break it down into its component parts and then ask the questions that would have to be asked by any lawyer in an

---

[171]Taylor, p. 2.

> initial conference with a client to determine what kind of a case this is, what legal niche it fits into, and then make a decision about whether or not the client has a case worth litigating. In effect, that's what was done with the process instructions for jurors in this process.[172]

A second method which might reduce task ambiguity is juror training. If jurors are given a specific orientation as to the procedure followed at trial, the basic crime or crimes that they will be required to decide upon, the role of the judge and the jury and the role of other officers of the court, and so forth, there might be a reduction of the ambiguity at trial. These training orientations might be placed on videotape and shown to the jurors who would decide a certain type of case. This videotape equipment is much different from the equipment discussed earlier, because the equipment used for orientation might only require the prerecorded tapes, a tape player, and a television set. The tapes could be made in a central state studio. This proposal would not require the installation of remote control cameras in each courtroom and huge quantities of blank tape as would the videotape trial proposal. The orientation tapes could be reviewed and approved by the legislatures, the Bars, and the courts.

The strongest advantage of such a training program would be that it would allow the jurors to be familiar with

---

[172]Taylor, p. 13.

the law concerning the specific crime they would hear before they become engrossed in the testimony. Thus, to some degree, the jurors will know what to look for when they hear the testimony and the confusion and ambiguity might be reduced. There will always be a need for special instructions at the end of the trial because each trial is unique in some respects, but this proposal might serve as a method of reducing some of the ambiguity.

The third proposal to reduce possible judge expectancy effects is prohibiting the judge from reading the major charge to the jury. At the end of the trial the jurors are given instructions about the law and must apply all of the testimony that they had heard to those instructions.

In one securities fraud case, the Second Circuit Court of Appeals ruled that an eight hour charge was proper. In the case there were ". . . nine defendants and fifty counts and the transcript approached ten thousand pages."[173] Not all cases may be that complicated, but the time of instructions may be the place where the most confusion will occur in the minds of the jurors. According to the analogy, the judge might leak auditory and visual cues which could lead to expectancy effects.

---

[173]U.S. v. Crosby, 294 F.2d 928, 943 (2 C.A. 1961).

The practice in the states concerning instructions differs sharply.[174] The federal courts have largely required that the instructions at least be given orally before the jury. If these practices could be modified by having the judge prepare the instructions, but not actually read them, the communication of expectancy might be reduced at a crucial point in the trial. This could be done in a number of ways.

First, a third person who was not involved in the trial might come in and read written instructions. In this way the person would be less likely to have an opinion on the issues as developed at the trial.

Secondly, videotaped instructions might be used. There are always parts of the instructions which must be given in virtually every trial of the same crime. These are often referred to as "boiler plate" instructions. For example, instructions which must often be repeated are the parts of the statute involved. The judge might videotape these instructions in a courthouse studio before the trial actually begins. The judge would then show the jury the appropriate videotapes. Although this would eliminate expectancy cues during the "boiler plate" instructions, the

---

[174]See: Lester B. Orfield, Criminal Procedure Under the Federal Rules, V (Rochester: Lawyers, 1967), p. 15.

technique cannot deal with the special instructions requested by the attorneys after the trial begins.[175]

Thirdly, the jury could be given only written instructions. Not only would written instructions eliminate the auditory and visual cues, but they might reduce ambiguity. A study by Buchanan, Pryor, Taylor, and Strawn has found that ". . . juror comprehension of the charges can be increased 13% simply by letting jurors read the instructions while the judge is charging them."[176] There might be a problem with possible illiteracy or near illiteracy in the jury box, but this can be screened in the juror selection process.

These proposals might require statutory change in many instances. The advantages that might be gained from such proposals should be carefully considered. The need for such proposals is especially critical where the present legal remedies are unable to correct the problem.

In the next chapter some conclusions about the judge expectancy effect problem will be discussed. There will also be a call for further research which might strengthen

---

[175]See: Orfield, V, pp. 55-56.

[176]Raymond W. Buchanan et al., "Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions," Paper presented at the convention of the International Communication Association, Portland, Oregon, April 1976, p. 12.

the analogy and establish the extent of the possible problem in the jury system.

CHAPTER V

SUMMARY AND CONCLUSIONS

This thesis attempted to answer three questions about possible judge expectancy effects. First, it was discovered that judges might communicate expectancies about the trial via nonverbal means. Secondly, it was found that these expectancies can affect the decision making process of jurors. Finally, it was found that present and proposed legal techniques probably cannot eliminate the problem. Several new proposals to reduce the problem were offered in this thesis.

Major Findings About a Possible Judge Expectancy Effect

In this thesis, an attempt was made to offer a reasonable explanation of the relationship between the judge and the jury in criminal trials. This explanation was based on an experimenter expectancy/judge expectancy analogy. It was reasoned that if experimenters could alter the decision making of subjects in experimenter expectancy experiments, it was possible that judges may indeed alter the decision making of jurors in criminal trials. Although the form of analogy has come under the criticism of strict empiricists, it still offers a form of proof which can be defended on its

merits. It cannot offer the strength of certainty but it can provide a reasonable argument about the world. In essence, the analogy, provided in this thesis, offered a reasonable explanation of how nonverbal judge expectancy cues affect or do not affect the jury trial process.

From the analogy, it was reasoned that five factors had to be present if judge expectancy effects were to exist. These factors were an ambiguous juror task, some expectancy on the part of the judge, subtle nonverbal cues that were not overpowering or blatant, a businesslike and professional appearance of the judge, and the use by the judge of both visual and auditory cues. These five factors were used as a means to criticize present remedies to judge nonverbal misconduct.

An extensive review of appellate cases concerning judge nonverbal behavior was presented. It was alarming to find that the decisions on whether or not fair trials existed were based on notions of judge behavior that had no theoretical support. The courts just seemed to assume that the more blatant and repeated the behavior was, the more likely fair trial rights were denied to the defendant. The standard of decision used by the courts was found to be at odds with the explanation offered by the analogy.

The present legal remedies were found to be inadequate. Objections and instructions at trial were shown to be

impractical or not likely to reduce the effects. Mistrials were found to be almost impossible to get for subtle nonverbal judge misbehavior. The appeal process was found to suffer from a general lack of adequate trial records for recreating the nonverbal scene and a misunderstanding of judge expectancy effects.

The proposed remedies were also shown to have serious problems. Videotaped trials were costly, of dubious constitutionality, and scorned by the appeal courts. Masking techniques were found to have lacked scholarly study, required too much judge concentration, and might have caused a boomerang effect, making the expectancy effects worse. Lastly, courtroom redesign was shown to be costly and inadequate in eliminating auditory and visual nonverbal cues.

Three new remedies were proposed, based on the findings of the analogy. Process instructions and juror training were suggested as a means to reduce the ambiguity at trial. Instructions given by third persons were seen as a means of eliminating the visual and auditory nonverbal communication channels during the instructions.

The Review of Scholarly Literature in Two Fields

In this thesis, both psychology and legal literature were reviewed. The psychology literature concerning

experimenter expectancy effects was abundant. The works were apparently widely read because there was a great deal of study replication and criticism of other studies found in the literature. The legal literature seemed largely to ignore the subject of possible judge expectancy.

An extensive review of the legal literature produced only one article, a note in the Virginia Law Review. The article attempted to establish a theoretical explanation of the effects of judge nonverbal behavior on the jury. The article suggested that there might be a judge expectancy effect similar to experimenter expectancy effect. The article went on to suggest possible remedies for the problem. Although this author is indebted to the Virginia Law Review for giving him the basic idea for this thesis, he cannot agree with all of the findings in the article.

The major weakness of the article is that only a simple review of the experimenter expectancy literature was conducted and that it was, of course, limited to pre-1975 literature. The review of experimenter expectancy literature in this thesis produced five factors which are necessary for the expectancy effects to exist. The suggestions for remedying judge expectancy effects found in the article proved to be vulnerable to practical criticism and criticism based on the theoretical explanation of judge expectancy effect found in this thesis.

The problems presented by possible judge expectancy effects would be a fertile area of research for legal scholars. It is hoped that the legal community will invest more interest in this area in the future.

A Call for New Research

The analogy presented in this thesis has two weaknesses. First, many strict empiricists might not accept it as a legitimate form of proof. Secondly, the analogy can only describe the conditions necessary for judge expectancy effects to occur. It cannot predict how often these conditions will appear in everyday jury trials. The review of cases shares the same weakness. Although the cases can tell us how often judge nonverbal behavior was appealed, they cannot tell us how often the behaviors, especially if very subtle, occurred in everyday jury trials. The purpose of this thesis was to describe the expectancy relationship between judge and jury and suggest alternative procedures which might be used to remedy the problem. It was not designed to find out how many times these effects occurred in jury trials. Yet these questions deserve to be answered by further research.

For the empiricist the analogy represents hypotheses which need to be tested. This could be done in a number of ways, but the most promising would be a series of simulated jury experiments.

By using experimental techniques, each of the five factors presented in the analogy (or others) could be tested to determine if the factors were important in possible judge expectancy effects. For example, the behavior of judges might be manipulated to emit blatant cues to see if they have any effect on the expectancy effects. Ambiguous situations, professional appearance, channels of communication, and so forth, could be manipulated, by using actors or even real judges, to determine what effects these factors have on simulated juries. A long discussion of all the possible methodologies would be out of place here, but there is no reason why the experiments used in the experimenter expectancy literature could not be modified to test judge expectancy effects. Although some special problems might appear in organizing the logistics of such a series of experiments, the present social science community seems well equipped to affirm or deny the hypotheses developed by means of the analogy.

If the experimenter expectancy/judge expectancy analogy is accepted as proof or if the analogy is tested and affirmed by experimental research, the extent of the problem in real trials might be determined. This could be done by questioning jurors after they have completed their trial duties and by observation of judges during trial. Scholars could easily engage in judge observation. The observers

might use nonverbal scoring techniques to determine what types of behaviors are used by judges in real trials. Observation of the trial might also indicate how the jurors react to the judge's nonverbal cues, where their attention is focused, and their physical position as dictated by the design of the courtroom.

The second type of research might involve juror questionnaires and interviews. If permitted by the court, these techniques might answer a number of questions. First, were the jurors involved in any ambiguous task? Secondly, did the jurors notice any nonverbal cues from the judge, and if so, at what point in the trial? Thirdly, did the jurors think that the judge was attempting to manipulate them at any point during the trial? Fourthly, did the judge appear to the jurors as professional and businesslike? These questions might be easily answered and thus can give scholars some idea as to how often the conditions necessary for the judge expectancy effect occur in real trials. The attempts to quantify these factors might also help to decide whether or not the proposals for reducing judge expectancy effects would be warranted by the number of cases in which they occur.

The Thesis in Perspective

Judge expectancy effects might be only a small concern in the quest for fair trials. Other legal issues might be

just as important or in fact more important. It is possible that the five factors necessary for expectancy effects to occur might not be present simultaneously in the majority of jury trials. One must apply the explanations of this thesis to a much larger body of legal theory based on the traditional role of the jury as a constitutional buffer, in order to make decisions about fair trial rights.

Nevertheless, the research contained in this thesis is concerned with a potentially great problem. Judge expectancy effects, if widespread, might cause serious erosion to fundamental fair trial rights. If the theoretical explanations in this thesis serve in any way to warn against the possible loss of fair trial rights, the purpose of this thesis will have been accomplished.

BIBLIOGRAPHY

BIBLIOGRAPHY

Books

Ebbinhaus, Hermann. Memory: A Contribution to Experimental Psychology. Trans. H. Ruger and C. Bussenius. New York: Teachers College, Columbia Univ., 1973.

Elashoff, Janet, and Richard Snow, eds. Pygmalion Reconsidered. Worthington, Ohio: Jones, 1971.

Federal Rules: Criminal Procedure. 1975 ed. St. Paul: West, 1975.

Jastrow, J. Fact and Fable in Psychology. Boston: Houghton, 1900.

Kalven, Harry, Jr., and Hans Zeisel. The American Jury. Chicago: Univ. Chicago Press, 1971.

McCart, Samual. Trial by Jury: A Complete Guide to the Jury System. Philadelphia: Chilton, 1964.

Moore, Lloyd. The Jury: Tool of Kings, Palladium of Liberty. Cincinnati: Anderson, 1973.

1978 Chronological Calender of Resident Sessions: The National Judicial College. n.p.: n.p., n.d.

Orfield, Lester B. Criminal Procedure Under the Federal Rules. 5 vols. Rochester: Lawyers, 1967.

Perelman, Ch. and L. Olbrechts-Tyleca. The New Rhetoric: A Treatise on Argumentation. Trans. John Wilkinson and Purcell Weaver. Notre Dame: Univ. of Notre Dame Press, 1969.

Pfungst, O. Clever Hans. New York: Holt, 1965.

Rosenthal, Robert. Experimenter Effects in Behavioral Research. New York: Irvington, 1976.

Rosenthal, Robert, and L. Jacobson. Pygmalion in the Classroom. New York: Holt, 1968.

Rosenthal, Robert, and Ralph Rosnow. Primer of Methods for the Behavioral Sciences. New York: Wiley, 1975.

Saks, Michael J. Jury Verdicts: The Role of Group Size and Decision Rule. Lexington, Mass.: Heath, 1977.

Special Committee on Standards of Judicial Conduct, American Bar Association. Code of Judicial Conduct. Chicago: n.p., 1972.

Sutliffee, Robert Stewart. Impressions of an Average Juryman. New York: Banks, 1931.

Thode, E. Wayne. Reporter's Notes to Code of Judicial Conduct. Chicago: n.p., 1972.

Weinstein, Jack, and Margaret Berger. Weinstein's Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates. 5 vols. New York: Bender, 1977.

Periodicals

Armstrong, James. "The Criminal Videotape Trial: Serious Constitutional Questions," Oregon Law Review, 55 (1976), 567-85.

Brightman, Donald, and Beth Raymond. "The Effects of Task Ambiguity and Expectancy Control Groups on the Experimenter Bias Effect." Journal of Social Psychology, 96 (1975), 277-87.

Burkhart, Barry. "Apprehension About Evaluation, Paralanguage Cues and the Experimenter-Bias Effect." Psychological Reports, 39 (1976), 15-23.

Burt, Lawrence. "The Case Against Courtroom T.V.," Trial, 12, No. 7 (1976), 62-6.

Friend, Ronald, and Michael Vinson. "Leaning Over Backwards: Juror's Responses to Defendants' Attractiveness." Journal of Communication, 24 (1974), 124-9.

Gleason, James M., and Victor A. Harris. "Group Dimension and Defendant's Socio-Economic Status as Determinants of Judgments by Simulated Jurors." Journal of Applied Psychology, 6 (1976), 459-65.

Goldstein, Arnold. "Therapist and Client Expectation of Personality Change in Psychotherapy," Journal of Counseling Psychology, 7 (1960), 180-4.

Harvery, S. "A Preliminary Investigation of the Interview," British Journal of Psychology, 28 (1938), 263-87.

Heine, Ralph, and Harry Trousman. "Initial Expectations of the Doctor-Patient Interaction as a Factor in Continuance in Psychotherapy." Journal of Counseling Psychology, 7 (1960), 180-4.

Heller, Kenneth, and Arnold Goldstein. "Client Dependency and Therapist Expectancy as Relationship Maintaining Variables in Psychotherapy." Journal of Consulting Psychology, 25 (1961), 371-75.

Jensen, A. "How Much can we Boost I.Q. and Scholastic Achievement?" Harvard Educational Review, 39 (1969), 1-123.

Johnson, R. F. "The Experimenter Attributes Effect: A Methodological Analysis." Psychological Record, 26 (1976), 67-78.

Johnson, R. "Pitfalls in Research: The Interview as an Illustrative Model." Psychological Reports, 38 (1976), 3-17.

"Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality," Virginia Law Review, 61 (1975), 1266-98.

Meyers, David G., and Martin F. Kaplan. "Group-Induced Polarization in Simulated Juries." Personality and Social Psychology Bulletin, 2 (1976), 64-8.

Rice, Stuart. "Contagious Bias in the Interview: A methodological Note." American Journal of Sociology, 35 (1929), 420-3.

Rosenthal, Robert et al. "The Effect of Early Data Returns on Data Subsequently Obtained by Outcome-Biased Experimenters." Sociometry, 26 (1963), 487-98.

Rosenthal, Robert et al. "The Effect of Experimenter Outcome-Bias and Subject Set on Awareness in Verbal Conditioning Experiments." Journal of Verbal Learning and Verbal Behavior, 2 (1963), 275-83.

Rosenthal, Robert et al. "Experimenter Bias, Anxiety, and Social Desirability," Perceptual and Motor Skills, 15 (1962), 74-4.

Rosenthal, Robert, and Kermit Fode. "Three Experiments in Experimenter Bias." Psychological Reports, 12 (1963), 491-514.

Rosenthal, Robert et al. "The Role of the Research Assistant in the Mediation of Experimenter Bias." The Journal of Personality, 31 (1963), 313-35.

Rosenthal, Robert. "Variables Affecting Experimenter Bias in a Group Situation." Genetic Psychology Monographs, 70 (1964), 271-96.

Rosenthal, Robert et al. "Verbal Conditioning: Mediator of Experimenter Expectancy Effects." Psychological Reports, 14 (1964), 71-4.

Rumsey, Michael. "Effects of Defendant Background and Remorse on Sentencing Judgments." Journal of Applied Social Psychology. 6 (1976), 1299-302.

Shor, Ronald. "Shared Patterns of Nonverbal Normative Expectancies in Automobile Driving." Journal of Social Psychology. 62 (1964), 155-63.

Sue, Stanley et al. "Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma." Journal of Applied Social Psychology, 3 (1973), 345-53.

Taddonio, Judith L. "The Relationship of Experimenter Expectancy to Performance on ESP Tasks." Journal of Parapsychology, 40 (1976), 107-14.

Todd, Judy. "Social Evaluation, Orientation, Task Orientation, and Deliberate Cueing in Experimenter Expectancy Effect." British Journal of Social and Clinical Psychology, 14 (1975), 27-31.

Thorndike, Robert. "Review of Pygmalion in the Classroom." American Educational Research, 5 (1968), 708-11.

Thouless, Robert. "The Effect of Experimenter's Attitude on Experimental Results in Parapsychology." Journal of the Society for Psychial Research, 48 (1976), 261-6.

Walster, Elaine, and Leon Festinger. "The Effectiveness of Overheard Persuasive Communications." Journal of Abnormal and Social Psychology, 65 (1962), 395-402.

Wyatt, Dale, and Ronald Campbell. "A Study of Interviewer Bias as Related to Interviewers' Expectations and Own Opinion." International Journal of Opinion and Attitude Research, 4 (1950), 77-83.

Court Cases

Avery v. State, 292 A.2d 728. Md. App. 1972.

Banks v. State, 510 S.W.2d 592. Tex. Cr. App. 1974.

Benton v. Maryland, 395 U.S. 784. S. Ct. 1969.

Braswell v. United States, 200 F.2d 597. 5 C.A. 1952.

Clenny v. State, 192 S.E.2d 907. Ga. 1972.

Duncan v. Lousiana, 391 U.S. 145. S. Ct. 1968.

Lofton v. State, 236 S.E.2d 508. Ga. App. 1974.

Parker v. Gladden, 385 U.S. 363. S. Ct. 1966.

People v. Essee, 154 N.W.2d 545. Mich. App. 1967.

People v. Galuppo, 185 P.2d 335. Cal. App. 1947.

People v. Hambrick, 327 P.2d 570. Cal. App. 1958.

People v. Jaquish, 338 P.2d 974. Cal. App. 1959.

People v. Jones, 205 N.W.2d 611. Mich. App. 1972.

People v. Nielson, 6 Cal. Rptr. 367. Cal. App. 1960.

People v. Reimringer, 253 P.2d 756. Cal. App. 1953.

People v. Robinson, 4 Cal. Rptr. 50. Cal. App. 1960.

People v. Robinson, 310 N.E.2d 652. Ill. 1974.

People v. Sprinkle, 189 N.W.2d 295. Ill. 1963.

Querica v. U.S., 289 U.S. 389. S. Ct. 1933.

Riley v. Goodman, 315 F.2d 232. 3 C.A. 1963.

Roberts v. State, 338 So.2d 466. Ala. Cr. App. 1976.

State v. Barron, 465 S.W.2d 523. Mo. 1971.

State v. Bogan, 93 A.2d 398. N.J. Super. A.D. 1952.

State v. Emery, 357 A.2d 878. Me. 1976.

State v. Johnson, 243 N.W.2d 598. Iowa 1976.

State v. Lewis, 559 S.W.2d 584. Mo. App. 1977.

State v. Pokini, 536 P.2d 94. Hawaii, 1974.

State v. Riley, 140 A.2d 543, 550. N.J. Super. A.D. 1958.

State v. Yoshino, 439 P.2d 666. Hawaii 1968.

Taylor v. Commonwealth, 413 S.W.2d 614. Ky. 1967.

Thomas v. State, 533 S.W.2d 796. Tex. 1976.

Truett v. Leeke, 173 S.E.2d 374. S.C. 1970.

Turner v. Louisiana, 379 U.S. 466. S. Ct. 1965.

U.S. v. Cassiagnol, 420 F.2d 868. 4 C.A. 1970.

U.S. v. Crosby, 294 F.2d 928. 2 C.A. 1961.

U.S. v. Dinitz, 424 U.S. 600. S. Ct. 1966.

U.S. v. Meyer, 462 F.2d 827. D.C. C.A. 1972.

U.S. v. Murdock, 290 U.S. 389. S. Ct. 1933.

U.S. v. Newman, 476 F.2d 733. 3 C.A. 1973.

Weeks v. State, 274 So.2d 646. Ala. Cr. App. 1973.

Williams v. State, 305 So.2d 45. Fla. App. 1974.

Wilson v. State, 315 A.2d 788. Md. App. 1974.

Worthington v. State, 183 So.2d 728. Fla. App. 1966.

Papers

Buchanan, Raymond et al. "Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions." Paper presented at the convention of the International Communication Association, Portland, Oregon, April 1976.

Eligah, David. Teacher Expectations: Determinants of Pupils' Reading Achievement. ERIC ED 105 405.

Hecht, Michael, and Irene Strum. The Self Fulfilling Prophecy: An Adaptation. ERIC ED 106 185.

Taylor, K. Phillip et al. "Communication in the Courtroom: The Effect of Process Instructions on Jury Deliberations." Paper presented at the convention of the Southern Speech Communication Association, Atlanta, Georgia, 1978.

Williams, Trevor. Teacher Discrimination and Self-Fulfilling Prophesies. ERIC ED 106 185.

Dissertations

Fode, Kermit. "The Effect of Experimenters' and Subjects' Anxiety and Social Desirability on Experimenter Outcome Bias." Diss., Univ. North Dakota, 1965.

Burkhart, Barr. "The Utilization of Demand Cues in the Experimenter Bias Paradigm as a Function of Evaluation Apprehension." Diss., Florida State Univ., 1974. DAI, 35 (1975), 4251B.

McFall, Richard. "Unintentional Communication: The Effect of Congruence and Incongruence Between Subject and Experimenter Constructions." Diss., Ohio State Univ., 1965. DAI, 26 (1966), 6853.

Hawthorne, James. "The Influence of the Set and Dependence of the Data Collector on the Experimenter Bias Effect." Diss., Duke Univ., 1972. DAI, 33 (1973), 4996B.

White, C. "The Effect of Induced Subject Expectations on the Experimenter Bias Situation." Diss., Univ. North Dakota, 1962.

Brightman, Donald. "Experimenter Bias as a Function of Task Ambiguity and Expectancy Controls." Diss., Hofstra Univ., 1973. DAI, 34 (1974), 4623B.

Herzog, Martha J. "Effects of Sex and Need to Avoid Success on the Verbal Mediation of Experimenter Bias." Diss., Baylor Univ., 1972. DAI, 34 (1973), 394B.

VITA

Wayne C. Sander was born in Milwaukee, Wisconsin, on May 2, 1955. As a youth he settled with his parents in Greenfield, Wisconsin. In the spring of 1973 he graduated from Greenfield High School. In the spring of 1977 he graduated from the University of Wisconsin, Milwaukee, with a Bachelor of Arts degree. At Milwaukee he majored in both political science and communication.

The author entered the Graduate School of the University of Tennessee, Knoxville, in the fall of 1977. While attending Tennessee he acted as the Assistant Director of Forensics. He received the Master of Arts degree with a major in speech and theatre in the summer of 1978.

The author is a member of the Speech Communication Association, the International Communication Association, the Southern Speech Communication Association, and the Greenfield Oratory and Debate Society. Mr. Sander will continue his education at the University of Pittsburgh.