

Communication in the Courtroom and the “Appearance” of Justice

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When the jury revealed its verdict on Charles Ingram, he made no response other than pursing his lips and slightly shaking his head. But his wife reached down and took her husband’s hand. Whittock also made no response when he too was found guilty but kept his hands clasped on the table in front of him. Later when the jury returned with its verdict on Diana Ingram her appearance remained unchanged but her husband once again slightly shook his head.

—*The Times [of London]*, 7 April 2003

Introduction

It has long been known that non-typical verbal and nonverbal behaviors by a defendant or witness in a criminal or civil case often are interpreted by judges and juries as evidence of guilt or untrustworthiness (Blanck, Rosenthal, & Cordell, 1985). The behaviors known to be associated with a lack of credibility and dishonesty are the shifty eye, shuffling feet, hesitancy in tone of voice, lack of expected emotion, and inconsistencies among verbal and nonverbal messages (Hickson, Stack & Moore, 2003).

Outside of the courtroom, however, these same non-typical verbal and nonverbal behaviors, even produced by these same individuals, may be interpreted as eccentric, humorous and perfectly appropriate in their context. This simple observation frames the core message of this chapter: specifically, interpretations of verbal and nonverbal behavior must be considered relative to their social context (Duck, 1998; Searcy, 2003), and it is this comparison that makes behavior “appropriate” or “inappropriate” (Duck & Vandervoot, 2002).

The core message alerts us to two basic contentions regarding verbal and nonverbal communication (henceforth: NVC), whether observed macroscopically or microscopically:

1. They evidence part (and sometimes the majority) of their meaning by placement in social context, and,
2. By definition, they convey meanings that are non-intrinsic and hence are disputable by reference to context.

Within these premises, this chapter explores how the social context of the courtroom (for purposes of illustration) establishes expectations – that is, learned or instinctual rules of communication – against which specific micro and macro manifestations of verbal and nonverbal communication are assessed. The courtroom is a strongly defined context: It is orderly and the assessments relevant therein concern the meaning of verbal and nonverbal messages as these cast light on issues of truth, falsehood, guilt, or liability specifically.

The courtroom’s social dynamics, what Blanck and his colleagues (1985) described as “the appearance of justice”, are established for one reason: for the orderly and just determination of guilt or not, civil liability or not. To reach the ultimate conclusions about guilt or liability, and

their mediators such as defendant or witness trustworthiness, truthfulness, and culpability, trial judges and jurors assess both the written trial record and the participants' verbal and nonverbal behavior in that "tight" context.

Previously, researchers have given little weight to the role of this tight context in influencing interpretation of NVC or verbal messages and, conversely, have too freely assumed that rules governing NVC and verbal messages in everyday life can be projected unaltered into such contexts (Hickson, Stacks & Moore, 2003). Indeed, whereas much work has assessed the social impact of NVC and verbal cues against each other (Keeley & Hart, 1994), little study has examined NVC trans-contextually, an approach this chapter attempts to further.

Courtroom Context and Communication

Interpersonal communication researchers have shown that the ways people process and interpret verbal and nonverbal messages are influenced importantly by broad elements of "social context" (Knapp & Hall, 2002). For instance, "self-disclosure" is now recognized as a contextually dependent transaction (K. Dindia, 2000), rather than the one-sided expression of inner thought as it was portrayed previously (Jourard, 1971). Indeed, the meaning of self-disclosure in a particular social context often is less psychologically expressive than, say, educational and instructive, by exposing lessons learned (Spencer, 1994).

Similarly, micro-momentary nonverbal behaviors, such as eye movements or head nods, long have been known to be capable of conveying different meanings; for example, a stare may be a welcoming sign of approval or a threatening signal of hostility (Argyle, 1967). Recent efforts have noted that it is the social context provided by circumstances and accompanying interpersonal cues that enables an observer to attribute meaning appropriately (Knapp & Hall, 2002).

Within the spectrum of the social stage, the courtroom provides a unique context and hence, we argue, disables certain ordinary sorts of attribution of meaning about observed cues and behavior. The courtroom is a context where pleasure and sociability are irrelevant and determination of criminal guilt or civil liability, or the lack thereof, is the prescribed focus for jurors and judges. The outcome-driven process, particularly where the presented evidence is finely balanced or confusing to lay jurors, often depends on their determinations of witness credibility. Yet, the unfamiliar legal context does not necessarily reflect similar determinations in other contexts of everyday life where conversation may offer "testimony" of one kind or another upon which judgments are made of other people.

The physical organization of courtroom context is highly unusual compared to most everyday settings (Duck, 1998). Likewise, the sequencing of communicative interactions is circumscribed by procedural rules – direct versus cross-examination, objections to speculative statements, and so on. The nature of the controlled interaction further is atypical in that amounts of self-disclosure are unusually high, even required by probing questions in which a witness may be required to answer, and only sometimes even with only a "yes" or "no."

In addition, challenges to courtroom statements are formal, rather than indirect or polite, truthfulness is prescribed by oaths, and familiar processing of communicative information is replaced with prescribed ritual – "The jury is to disregard that statement." In the courtroom, then, the contextually forced and definitional focus on persuasive credibility gives verbal and

nonverbal utterances more weight, as compared to typical conversation with intimates or strangers.

However, the courtroom context also enables attributions about certain performances. Clearly, not all players in the trial drama are informed equally about the context and its parameters and processes. The courtroom “regulars” – judges and trial lawyers – learn to expect and use contextual cues; for instance, highlighting to the jury the inconsistency in a witness’s nonverbal and verbal behavior. These deviations from what may be expected as normal or “reasonable” in this context are sometimes read by lawyers as “leaking” or “oozing” guilt, culpability, or dishonesty (Searcy & Duck, 2003 June).

Lawyers also understand that jurors and most witnesses are acting in an unfamiliar and stressful context, while facing unfamiliar forms of prescribed interactions, with dramatic legal consequences. For such non-repeat courtroom players, critical evaluations of courtroom behavior (for instance, in the assessment of witness credibility) necessarily are based on expectancies formed elsewhere in life.

Previous analysis of NVC in the courtroom has not been grounded sufficiently in analysis of these unequally enabled and disabled operations of the social environment (Searcy, 2003). Thus, behavior that is acceptable for some actors in a social, familiar setting often is unusual and notable in the courtroom trial context and vice versa. Violations of normative (contextual) expectations in NVC, therefore, mark the courtroom witness as deviant, to be vigilantly observed (so a lawyer might say) for other signs of lack of credibility. However, the standards of contextual expectancy by jurors and trial lawyers may be grounded in different bases (Duck, 2003 June).

Contextual expectancy violations take at least two forms in the courtroom: those attaching to regular performers (lawyers, judges, expert witnesses, court officers), and those attaching to the irregulars (lay witnesses, defendants). A lay witness’s violation of courtroom evidentiary rules may excite – or even require – comment by the “regulars” (e.g., formal objection); and violation of the contextual normality in that individual’s communicative performance (e.g., nervous nonverbal behaviors) can be presented as evidence of guilt or culpability when the defendant is testifying, or a lack of credibility when a fact witness is testifying. Examination of the NVC of these participants in the courtroom as compared to other everyday life contexts enables analysis of that tight context in the interpretation of communicative information.

Jurors further bring to the courtroom their intuitive expectations about the ways in which ordinary people manifest guilt. Often, the jury’s collective judgment of guilt in a criminal trial is a report that the defendant “performed” nonverbally when testifying in a way that was consistent with expectations surrounding the presence of guilt.

Unlike jurors, regular courtroom performers conform to a different set of expectations. Trial judges, as all persons do, hold expectancies about the new players, particularly the defendant. Yet, improper beliefs and expectations for guilt in a criminal trial, if manifested in a judge’s nonverbal behavior, may warrant reversal and judicial disqualification (Blanck, 1993).

Describing the relationship between the defendant’s criminal background and the judges’ expectancy, Blanck noted:

This relationship describes how a judge's expectations for trial outcome may be predicted solely from the background variables of the trial participants. The results suggest that judges' beliefs about trial outcomes are related to defendants' criminal histories in predictable ways. For example, judges usually expect a guilty verdict when defendants have serious criminal histories and expect innocent verdicts when defendants do not have serious criminal histories. (Blanck, 1991, p. 8).

So too, trial attorneys take care to observe the demeanor of potential jurors during the selection process and attempt to predict (“expect”) the attitudes of those jurors toward the case.

In the evaluation of communication in the courtroom, then, two sets of norms of context first must be explicated (courtroom; everyday), and then differentiated. We add, “differentiated,” because not only must the courtroom be differentiated from everyday life context, but also the expectations for performers in the courtroom differ by design, as they also do in other settings.

In early studies, Blanck, et al examined the importance of such verbal and nonverbal behaviors in the courtroom (Blanck et al., 1985). We now review that work from a new perspective, by examining aspects of the differentiated courtroom context that affect credibility determinations by judges, jurors, lawyers, witnesses, and other participants that may otherwise be attributable to NVC studied in isolation.

The next part of this chapter examines contextual expectancy in the courtroom, as indicated by courtroom design and prescribed rules of interaction. Thereafter, we explore how NVC conforms to the normative expectations in the courtroom, and the impact of that determination on the evaluation of the credibility and probative value of the testimony presented.

We attempt to build on, and to develop, the pioneering work of Rosenthal and his colleagues (see, e.g., Harris & Rosenthal, chapter x, this volume), which elegantly explores the verbal and nonverbal mediators of social expectancies and outcomes, as we draw out new implications of contextual expectations in the courtroom specifically. We also remind readers of seminal work by Martin Orne (1962) on “demand characteristics,” and develop his approach (which was specific to situational and procedural effects in the social scientific experiment) by making new applications of that concept to the courtroom context.

Expectancy Violation Theory

Robert Rosenthal and his colleagues consistently have shown that people develop expectations for social and cultural interactions and outcomes – appropriate eye gaze, proximal distance between interactants, touching, vocalics (including speech rate, volume, pitch, tone, etc) (see Harris & Rosenthal, chapter x, this volume). These expectations often are mediated through NVC alone.

Violation of contextual expectancies (whether cultural or interpersonal) leads to heightened awareness, and arousal, suspicion and so on, of the particular behavior or communicative act. These “violations” distract from the normal course of interaction in everyday life and likely to influence an individual’s (or group’s of individuals as in a jury) responses to the verbal and nonverbal behaviors as a positive or negative “violation response.” The degree of response may lead the observer (i.e., judge or jury in the courtroom) to be suspicious of the underlying motives

for the violation. Indeed, in the courtroom, many trial lawyers and expert witnesses have become used to manipulating such distractions, to emphasize or de-emphasize trial facts so that the result is helpful to their side, or at least not helpful to the opposing side.

Studies show that there are cultural norms of appropriateness, and within a given culture there exist norms for personal space, expressivity and emotional NVC (for a review see Knapp & Hall, 2002). These interpersonal and cultural expectancies have a range of tolerance levels. Violations of behavioral norms often are expressed as exceeding the range of observer normalcy in context, previous experiences, and status (Burgoon & Jones, 1976).

Burgoon and her colleagues (Burgoon & Buller, 1994; Burgoon, Buller, Ebesu, & Rockwell, 1994; Burgoon, LePoire, & Rosenthal, 1995; Burgoon, Stern, & Dillman, 1995) argue that normative “expectancy” is central to the understanding of the evaluation of NVC. By “expectancy,” these researchers mean communicative behavior, verbal and nonverbal, that one regards as normative in a given social context.

These researchers suggest that reactions to an unexpected communication by another arouse observers to direct attention to the social status of the communicator. In this model, individuals favor high status and disfavor low status persons to differentiate their appraisal of the appropriateness of communication. Low status violators are perceived negatively, whereas high status ones are not (Burgoon, 1983). In addition, higher status communicators are given broader latitude before censure, in ways reminiscent of “idiosyncrasy credits” granted to leaders who violate group norms.

Burgoon and her colleagues predict that the degree to which observers evaluate social interactions positively or negatively is mediated by communicator reward valence (Burgoon, Stern et al., 1995). Reward valence is the net social, or other, costs and benefits to the individuals involved, and assessment of character traits associated with future interactive involvement.

In the courtroom, individuals of high status (such as judges and lawyers) may be perceived by witnesses and jurors as behaving appropriately to the context even when they violate everyday expectancies. Observers or raters (in this context, jurors) readily evaluate low status individuals as not holding such favor (in this context, defendants and witnesses), less optimistically and attribute ulterior motives not within the range of acceptable contextual involvement.

Burgoon’s model is useful for the analysis of courtroom communicative dynamics where status differences are marked. Her model focuses attention on the differentiation that similar communicative behaviors evince by different status performers. The same nonverbal act may hold different meaning in varying contexts depending upon one’s status in the proceedings. Therefore, generalizations about “the role” or “the meaning” of NVC in the courtroom should be treated with circumspection because the same behavioral act may be interpreted differently depending on the communicator’s perceived role in courtroom process.

Context and Expectancy Violation in the Courtroom

The courtroom dynamic is, by definition, driven by tight formal procedures and role expectancy. The primary and regular actors in the courtroom (judges, jurors, lawyers, court officers) follow prescribed behavior, especially as compared to the non-repeat players (fact witnesses,

defendants, jurors). In addition, expectations by non-regular actors are influenced by exposure to television courtroom channels and popular dramas.

Yet, the popular view that courtrooms are places of high drama and unfolding excitement rarely is validated by the average trial, but nevertheless is a likely expectation by jurors. The strong influences of such juror baseline expectancies require assessment. Non-regular player baseline contextual expectancies are important to the courtroom communicative process, particularly when a jury's role is to differentiate credible from not credible behavior.

A further influence that differentiates expectancies of participation in courtroom interaction is found in environmental spatial cues. The physical layout of the courtroom is indicative of certain formal expectations. In the United States, defense and prosecution (or plaintiff) counsel each sit positioned in equal but separate relation to the judge, and apart from the jury and judge.

By contrast, for instance, in Chinese criminal courtrooms (where the defendant is always a priori presumed guilty), the prisoner occupies a central position, with participants arranged in circular format around him or her. The physical layout of the Chinese courtroom marks accepted structures and habits of interaction that differ from those in the United States and establish different expectations about the relative positions of defendant (and defendant's lawyers) and court officers.

Chang (2003 November) notes that:

The physical setting conditions and contextualizes verbal interactions, renders them meaningful, and most importantly, reflects and enacts cultural meanings. ... Defendants are seated (or stand) almost in the center of the square or circle, closer to the defense lawyer's seat. ... Such a circular arrangement makes a spectacle of defendants. What is more, it facilitates interrogations of defendants who, being in the middle of a circle, are able to be face-to-face with either prosecutors or the presiding judge. ... Public prosecutors sit behind a desk similar to that of the judges, but not as high. The defendants, in contrast, sit on ordinary chairs or stand in the middle of the trial area. [All] participants including judges, public prosecutors, defense lawyers, and defendants were provided with loudspeakers ... [but] defendants had to use their biological voice (Chang, 2003 November).

The contextual setup of the Chinese courtroom establishes expectancies about guilt, roles, and the purpose of the trial as a public re-education of a miscreant. Likewise in the United States, the courtroom formal setup conveys messages about the nature of roles and expectations. The judge, having the highest position, is in charge of interaction, takes a moderating and leading role, and may interrupt anyone at any time. Court officers seek permission from the judge to interrupt other participants.

The U.S. courtroom layout indicates the theoretical equivalence of the prosecuting and defending counsel by placing them at equal distances from the judge. In jury trials, the jury box has its place alongside the proceedings. The jurors are spectators at the proceedings, much as a crowd views a football game or as bystanders watch a car accident on the street. Yet, the jury is asked to gain its perspective during the public deliberation of events. Powers of active participation are reserved to the jury, although suppressed by judges so that the regular players may expedite the proceedings.

Witnesses have their place in the courtroom, not only in physical placement but also in question format. Witnesses assume a spotlight position and rarely are invited to offer a narrative of events that is not interrupted, guided, or challenged by the principal players in ways that would violate normal expectancies if they occurred in everyday life conversations. Also, in everyday life an acknowledged expert or knowledgeable account provided outside of the courtroom usually is acquiesced to without demur. Within the courtroom, such expectations are turned.

Those with expert knowledge take the stand outside of their familiar environment, the trappings of their expertise and the deference that it normally affords them. Their accounts, expertise, and abilities to assess facts are challenged so that the familiar rug of their own professional stature may be pulled from under them. Experts are judged as much from their ability to stand up to lawyers (their comportment as “experts”), as for their opinions in ways that, for example, a testifying physician would not be challenged in the medical examination room when delivering an opinion to a patient.

Sequences of presentation of information also are atypical in the courtroom. Participants face scrutiny in question-and-answer formats that violate daily conversational interaction within the social context outside the courtroom. Witnesses are not allowed to challenge the form of questions. They are sequestered and are not able to place what other witnesses have said in court during their own narrative contexts since those comments were not heard. Objections are permitted in the courtroom about a comment or viewpoint from a witness from the lawyers or the judge, but not from other people who may have grounds for challenging the claims.

For regular players, expectancies therefore are consistent with behavior in the courtroom. Courtroom theater is their normal social context. However, it is in a jury trial (a relatively infrequent occurrence in the U.S. system of justice) that non-repeat lay players decide the fate of a defendant while in a context that, by its physical setup and routine, represents a violation of daily interactive expectations.

Communication, Behavior Expectations, and Norms in the Courtroom

Although we and others have systematically studied the “appearance of justice” and NVC in the courtroom (Blanck, 1993; Blanck & Rosenthal, 1992; Blanck et al., 1985), this early work has not adequately been developed to consider the differentiated expectancy norms that “irregulars,” such as jurors and lay witnesses, bring to the courtroom context. These non-regular participants process messages presented in an environment that embodies violations of normal everyday contextual expectations.

As suggested, one illustrative dimension of normal everyday life communication is frequency of “self-disclosure” behavior. Self-disclosure has been examined for its effects on interpersonal relationships, but nevertheless accounts for a relatively small percentage (about 2% overall) of relational communication (Kathryn Dindia, 2000; Dindia & Fitzpatrick, 1989). Still, self-disclosure communication has a strong impact on interpersonal relationships. Self-disclosure, as it may occur in the courtroom, however, whether verbal or nonverbal, is proportionally more frequent in the process and deemed significant, despite the fact that it most likely results from a lawyer’s trial strategy rather than arising spontaneously.

NVC that violates expectancies likewise is relatively rare in influencing trial outcomes and jury decision-making. However, as Blanck and his colleagues have found (1985), when such

communicative behavior occurs, it may be as impactful as self-disclosure within relationships. Indeed, the term “thin slices” of NVC has been used to describe activities that are short, usually de-contextualized, segments of nonverbal behaviors that have a measured impact on social outcomes (Ambady, Bernieri, & Richeson, 2000; Ambady, Hallahan, & Conner, 1999; Ambady, Hallahan, & Rosenthal, 1995; Ambady & Rosenthal, 1992; Bond Jr. et al., 1992). When the thin slices are re-placed in context, however, their effects become less predictable and robust, in much the same way that intense scrutiny of anatomy is necessary to medicine but does not predict tendencies to healthy activity. When studied as “pure” events, the impact of these thin slices may be exaggerated.

What then of pure (or even impure) NVC that is de-contextualized not from other cues, as in the above research, but from the “normal” social context itself? There is no universal definition across individuals, cultures, and contexts of the interpretation of human communicative behavior. A dictionary of NVC skills and behaviors does not exist. The task for jurors, unfamiliar with the social context of a courtroom, then, is to use normal expectation strategies in an unfamiliar and contrived context.

Undoubtedly, in special contexts other than the courtroom, defined and specific behavioral and communicative expectations apply. Doctors, for example, have few, or only implicit, protocols (Duck, 1998) – although there has been a movement between innovative medical schools and communication departments to create explicit protocol – for dealing with patients in various contexts (Galvin, Bylund, & Brommel, 2004). An oncologist treating a cancer patient does not enter a consultation wearing a Hawaiian shirt when about to discuss the gravity of chemotherapy treatment with a critically ill patient. Nor does the oncologist show up to her six-year old child’s birthday party wearing clinical theater gear.

Violations of expectations at the child’s birthday party are created by the gravity expressed in the clothing, while similar expectations are violated when child birthday party clothing is worn during a patient consultation. The same sorts of nonverbal violations affect other social contexts – student-teacher, therapist-patient, manager-employee scenarios (Rosenthal, 2002). Thin slices of behavior outside the contextual scenario convey meaning only because they represent violations of expectancy. Within the course of everyday interpersonal relationships, they do not; but they do depend for that label on their conformity with social norms.

Of course, cultural norms affect such contextual expectancies (for a review, see Matsumoto, chapter xx; Philippot, chapter x, this volume). By definition, a culture has norms of expectation for everyday NVC and other forms of behavior. People interacting in a different culture may be aware of “being in a special environment,” but are not always clear on what is expected of them. The manner in which due solemnity is “performed” at weddings varies by culture and often violates an outsider’s norms for that behavior.

Although these other everyday contexts have sanctions for inappropriate behavior (Duck & Vandervoot, 2002; Vandervoot & Duck, 2003), the courtroom is unusual in that sanctions on communicative violations, normal in the individual’s personal context, may be grave. Not only do they lead to unwelcome decisions of extreme impact, such as a guilty verdict or liability, but also they can lead to other restraints on life, liberty and property.

As experiencing a different culture, the non-regular participant enters the courtroom with norms and expectations formed in contexts outside of the courtroom environment. In what ways do the

roles of “juror,” “judge,” “counselor,” and others operate as fulfillments of expected behavior? Each participant in the courtroom follows prescribed social expectations. The courtroom code of conduct and guidelines about demeanor are set out publicly. Professional players in the context follow written advice explicitly outlining many of the “rules” of the game and the expectations in place for attorneys and judges (Caughfield, 2001; Milford, 2001).

Other rules are presumed for this context, such as those relating to civil demeanor in the courtroom, constituting behavior of respect and dignity to not be found “in contempt” of the court. Procedural guidelines are specific, such as the direction to witnesses to take an oath to tell the truth, the witness chair as the focus of attention, and the respectful standing as the judge enters and leaves the courtroom.

Additionally, the judge is expected to provide localized rules and instruction to the new players with respect to behavior and communication in his or her courtroom. This may be in the form of jury instructions (Blanck et al., 1985), sequestering the jury members during the trial from influences while deliberating, and the format in which juries may request access to previous testimony for reaching their decision.

However, a person’s expectancies about NVC are not easily rewritten. Although jurors may become accustomed to them during long trials, witnesses have less time to do so. Non-regular courtroom players process information presented while operating in a context that differs from daily interaction expectancies. Yet, they must show the appearance of understanding immediately the context in which they have been placed. Typically, there are no explicit prescriptions for new courtroom players (however, some judges initially explain the trial proceedings), with the exception that one should not be contemptuous of the court or disrespectful, and that rules about testifying under oath apply.

In a criminal trial, a defendant’s appearance and NVCs may become relevant only in the light of “contextual appropriateness,” even if that context embodies expectancies that violate a person’s normal expectations for comportment (e.g., wearing a suit may be uncomfortable and nonverbally disruptive for people used to wearing overalls). Contextual appropriateness is an important moderating factor when jurors evaluate defendant credibility, for instance when testifying. The defendant may express high status via professional business dress (prison dress typically is not permitted as it is discriminatory in this effect) that may lead to the appearance of high credibility (Lefkowitz, Blake, & Mouton, 1955).

Some courts have required disruptive criminal defendants to wear shock belts (belts which deliver 50,000 volts of electricity to the wearer) or to be gagged with duct tape as a result of continual outbursts. Where such extreme constraints are imposed on disorderly defendants, contextual information is bound to impact jurors’ individual and collective evaluation of defendant credibility.

Because the courtroom environment violates the expectations of daily codes of interaction, jurors’ evaluative judgments regarding the credibility of others – witnesses and defendants – are disadvantaged. Some research has concluded that in such a foreign environment, new players benefit by “disregard[ing] witnesses’ faces if they want to maximize their ability to detect deception, or just wear a blindfold and listen closely” (Saks, 1997, p. 12).

Jurors are aroused when expectancies are violated and make evaluative judgments about the credibility of those presenting messages. The regular players in the context recognize that “[a]s advocates, our nonverbal communications in the courtroom convey powerful messages whether we like it or not. So we must devote some of the same care that we put into presenting the law into presenting ourselves.” (Milford, 2001, p. 4).

In sum, jurors as non-repeat players are not accustomed to the courtroom environment. More than this, the courtroom is a place where expectations for the normal flow of interaction are disturbed. Conversation is not on equal terms – one person (lawyer) frames the issues that the other (witness) answers within the frames of reference set by the questioner. Jurors operate in a tight context where their social expectancies are violated. They are required to reach judgments about the credibility and demeanor of witnesses and defendant, while having to negotiate evaluations of each other primarily during the deliberation phase. The courtroom setting emphasizes consistency and clarity. In daily life, words are not always consistent with behavior and lucid in ways that remove doubt about meaning and intent.

Courtroom Expectancy Violations and Perceived Credibility

To this point, we have suggested that there is communication distortion, by design, in the courtroom environment. Moreover, the sense of discomfort in nonprofessional players is exaggerated with heightened states of arousal concerning violations of contextual expectancy. A witness who is inarticulate and confused likely is twisted into calamity by the activities of the lawyers (Duck, 1998). Furthermore, many people are made uncomfortable by wearing formal clothes and some unpracticed at sitting at a desk or on a chair for several hours on end.

We suspect, however, that a witness’s communicative agitation (verbal and nonverbal) leads jurors to read discomfort about the testimony offered. This cycle, in turn, creates further disconcert in the behavior of the unpracticed performer (witness) that lead jurors to question the credibility of the testimony. Research on determinations of credibility in the courtroom illustrates this chain of events (Blumenthal, 1993; Kassir, 2002; Rand, 2000), but generally has not considered fully violations of contextual expectations.

How does a juror determine witness credibility when observing a staged interview in which questions are controlled by regular players? Determining credibility (truthfulness) of individuals outside of context is difficult. In terms of nonverbal interpretation, six general emotional expressions have been identified across context and culture: happiness, anger, disgust, sadness, surprise, and fear (Ekman, 2001; Ekman & Friesen, 1969; Fiedler & Schenck, 2001; Izard, 1971; Knapp & Hall, 2002).

The determination of credibility (conversely deception) often is read in the facial expression of fear. One is said to “leak” clues to deception when the “fear of getting caught” is displayed on the face and interpreted as an indicator of guilt. However, in the absence of an acute conscious or obvious sense of guilt about lying, using NVC alone to determine witness credibility is difficult (Ben-Shakhar & Furedy, 1990; Hollien, Geison, & Hicks, 1987).

When a non-regular player is placed in a context with high stakes such as in the courtroom, the fear of the foreign context confounds the perceiver’s (a juror’s) evaluations. Consistency of behavior is expected even in foreign environments, not only between the outward manifestations

and a person's inner orientations or feelings, but also between intrapersonal states of the individual, such as love and horror.

Thus, spouses are supposed to indicate horror at learning that their partner has died and lack of such emotion is suspicious, as for example in the case of William Wallace in England in the 1930s, on whom suspicion fell because he showed no emotion when informed that his wife had been murdered. This fact figured largely in the prosecution's argument that such a response would be appropriate only in someone who already knew she was dead. The defense case that Wallace was a "practicing stoic," for whom the display of emotion was anathema, did not sway the jury, but did influence the Appeals Court who overturned his conviction.

Issues of credibility further are expressed and perceived as communicative consistency or inconsistency (Blanck & Rosenthal, 1992). Behavior is examined closely when NVC is inconsistent with the perceiver's expectations, and inconsistent with the baseline of verbal (or other nonverbal) behavior established by the defendant or the witness during the entire course of a trial (Blanck, 1993). Awareness is heightened when a defendant or witness acts unusually from her baseline, not necessarily because of guilt but perhaps because of a rushed lunch during trial recess.

Internal behavioral consistency has been examined also through the physiological perspective relative to the polygraph. Analysis of the physiological aspects of the polygraph suggest that research is not robust to justify adequate establishment of baseline behavior to compare slices of behavioral response to conclusively determine truth telling or the practicing of deception (Ben-Shakhar & Furedy, 1990; Dollins, Cestaro, & Pettit, 1998; Elaad, 2003; Holden, 2001; Lykken, 1981; The polygraph and lie detection, 2003). These and other conclusions have supported the general inadmissibility of polygraph results in court. However, the average person on the street is required to serve on a jury and make such determinations about deception and credibility based on their own baseline comprehension of an environment out of usual context.

The courtroom, however, is not an easy venue to explore the expectancy range of a target person's behaviors and communicative styles. In the courtroom, the brevity of the encounters is an integral component of the imposition of generalized contextual expectations. The fact that a witness is habitually cool and aloof alone will not be the basis for making judgments about the meaning of observed coolness and aloofness when presenting testimony in the case. Rather, the perceived aloofness likely is judged as meaningful relative to the standard of the population as a whole, and the credibility or value of the testimony rests on that generalized assessment, not on a particularized one.

Moreover, NVCs are not the only basis for the credibility attribution. Attorneys review and take evidence (e.g., depositions, documents, emails, and so on) from witnesses and defendants months before trial with the sole strategy of later "catching" those same individuals in apparent inconsistencies of communication when testifying during the trial. When individuals testifying in court make statements different from previous ones, the popular question becomes whether the witness was "lying" earlier or now during the examination at the trial. More seriously, increasingly attorneys videotape deposition testimony so that witness NVC may be compared and scrutinized at trial.

Toward A Unified Understanding of Communication in the Courtroom

Four Core Themes for Researchers

This chapter has identified four core themes toward the development of a unified understanding of communication in the courtroom.

First, by examining the courtroom dynamic as a “tight” social context with a unique set of expectancies, we attempted to expand the interpretative power of NVC in the courtroom.

Second, by differentiating the prescribed roles of courtroom actors, we illustrated the relativity of NVC and the importance of contextual forces in interpretation. This observation has obvious implications for assessment of trial judges’ NVC, as distinct from lay witnesses’ NVC.

Third, by attending to jurors’ expectancies about NVC in context, we provide enhanced perspective on forces related to juror deliberations.

And, fourth, by stressing the contextual interpretation of courtroom NVC, future researchers and practitioners may attend with increasing frequency to the social nature of judgments about NVC in the courtroom, rather than primarily to micro aspects of the individual cognitive process.

We have described how social context, exemplified by the courtroom illustration in this chapter, profoundly influences interpersonal verbal and nonverbal communication styles, requirements and expectancies. Contextual, expectancy and communicative factors combine to provide meaning to the courtroom experience, and ultimately, influence the outcome. However, we have shown how these forces impact regulars and non-repeat courtroom players differently.

Repeat and novice courtroom players are surrounded by different weightings of their NVC that differentially affect conclusions about credibility. We have emphasized that study of interpersonal communication in a broader social context should include variables such as the actor’s placement within the social context, group affiliations, personal and physical appearance, perceived communicative competency, social background, perceived social status, and so on.

The more subtle analysis of the courtroom context also should consider the ways in which novice players (e.g., jurors or witnesses) adapt to aroused expectancy violations of their “normal” everyday experiences. The differences between everyday life norms and courtroom contextual norms must be examined to accurately assess the meaning and role of NVC to trial behavior and outcome.

In addition, it is necessary to identify systematically individual differences in juror abilities to adjust contextual expectations to the courtroom, and hence to assess others’ behaviors as a violation of expectancy (e.g., a credibility determination based on a self-disclosure in the courtroom). One practical implication of this idea is that, in choosing jurors, trial lawyers should be cognizant of a juror’s ability to transfer or moderate expectancies from everyday life to the courtroom. Thus, jurors’ expectancies of everyday life may corrupt their assessment of a defendant’s behavior as a “self-fulfilling prophecy” in a way that maximizes suspicion at, rather than explaining the underlying contextually-driven dynamic of, irregular NVC, unless court officers (such as judges and attorneys) stress the need to differentiate by context.

Another byproduct of a more subtle approach to the assessment of NVC in the courtroom is enhanced attention to jurors’ individual differences in abilities to recognize the (ir)relevance of everyday context in making judgments in the courtroom context. In particular, this issue is relevant when, following our argument, the jury deliberation is seen as a social process of

judgment about normative expectations, and hence a process where relationships between jurors' and their individual assessments of one another affect the outcome.

Moreover, because a juror's skill to evaluate trial performance is a function of an ability to transfer expectancies from everyday life to courtroom situations, these same skills likely affect individual juror and collective group evaluations of defendant and witness credibility. These social processes in jury deliberation certainly are influenced by relationship formation (Duck, 1998) through which jurors mold their communication.

In past studies, many of the factors identified and highlighted in this chapter have not been adequately examined; one important factor being that the deliberative process in a jury is essentially a communicative relational group task and not simply a cognitive, information-processing task (Duck, 1998). Thus, in the course of trials, jurors form real and notional relationships, based on judgments about authority, intelligence, credibility and trustworthiness of their fellow jurors. These relations fill a tight social context in which the evaluations of information and judgments are made during the deliberative process. As in the other judgments, these interpersonal determinations are based on NVC cues and contextual influences.

Future research, therefore, needs to consider how such relational contexts affect the jury's deliberative process. A unified approach to study of courtroom communication suggests that it is important not only to evaluate individual jurors' weightings of expectancy violations, but also the ways in which they communicate their different judgments and discuss standards of assessment with the other jurors. This, of course, is essence of the relational process.

Searcy has articulated one example of such a relational process in Social Problematic Integration Theory (SPIT) (Searcy, 2003). SPIT theorizes that messages are received and integrated in groups through socially-based working metaphors that are adopted for group operation and context. Groups such as families operate in a "team" metaphor and pull together during crisis. Likewise, organizations such as businesses operate within a "corporate" metaphor and deliberate by cutting to the profit margin.

Future study may examine how social group metaphors and context position the jury to resolve the case at hand by adopting particular modes of relational attitudes in their deliberations, as well as the impact of NVC and contextual expectancies on courtroom dynamics. Study of group processes of integration and deliberation likewise may be helpful in understanding individual differences in NVC judgments in the courtroom.

The social and communicative factors we have described in this chapter certainly have differing degrees of importance or "weighting" to social interaction; and they are subject to the perceiver's evaluation of importance placed on them, as well as factors subject to direct relevance in the event being questioned. [See Figure 1 for a list of many such factors useful for future study.]

In a jury deliberation, by way of illustration, the factors identified in Figure 1 register in the jurors' minds before an evaluation occurs. The jury deliberation that follows is a collective process to reach consensus on decision about guilt or liability, and then perhaps sentencing or monetary award. These deliberations are regarded as based on the rational processing of information – for examples, note the explications of functional theory (Hirokawa, 1983; Hirokawa & Rost, 1992; Hirokawa, DeGooyer, & Valde, 2000), or the Vigilant Problem Solving model (Janis, 1989) – as most social psychological models of decision-making are cognitively-

based. Nevertheless, other social contextual features affect the jury deliberation process, such as the Constraints model articulated by Janis (1989).

Because observers (and video cameras) are not allowed in the jury deliberation room as common practice, an understanding of the social processes occurring behind the closed doors is an important as a check on trial fairness, juror training and satisfaction with the process, and so on (in addition to the legally proscribed appeals process). However, in the absence of randomized “trial” experimentation (which is not possible), it is difficult for researchers to ascribe causal relationships among the factors we have identified. Social science researchers and others will need to continue the examination of context and NVC in the courtroom, and their impact on “the appearance of” justice and on actual justice. The possible ramifications of not conducting such analysis are too dire to be overlooked.

Four Implications for Practitioners

There are other practical implications of our analysis here worth noting.

First, expert analysis of NVC in the courtroom must be differentiated such that cues are interpreted contextually and not absolutely: those behaviors that indicate bias (or lack of credibility) in a witness may not indicate bias in a trial judge.

Second, trial lawyers preparing a witness to testify would be well served to explain the contextual tightness of the courtroom, particularly in regard to its impact on verbal and nonverbal behavior.

Third, trial judges charging their juries should be aware of their contextual expectancies, and alert juries to their effects and to their differences from everyday life expectancies.

Fourth, those experts who study (and try to predict) the jury deliberation process may be advised to pay increased attention to evaluation of contextual violations and their importance to assessment of the “appropriateness” of NVC in the courtroom.

Closing

To the extent that social science research is helpful, it may play an active role in understanding the force of context in the courtroom, as we have outlined in this chapter. Whether instructing a jury or monitoring a lawyer who is examining a witness, our system of justice requires that trial judges eliminate reasonably contextual and actual bias so as to offer the parties the appearance of a fair hearing.

Social scientists have a remarkable opportunity to help ensure that trial fairness occurs, in large part by identifying ways to selectively removing bias (to the extent possible) through scientifically applied methods of voir dire and jury selection (Kressel & Kressel, 2002), witness preparation (Boccaccini, 2002), and juror deliberation processes (Pritchard & Keenan, 2002; Saks, 1997; Williams, 1997). Such uses of social science in law can help to ensure actual and perceived fairness in our system of justice.

Figure 1: Individual Juror’s Model of Perceptive Evaluation

Variables existing within social context that influence the perceiver’s interpretation and evaluation of actor’s behavior:

3. View of Actor's Placement Within Social Context
4. Actor's Racial Status
5. Actor's Previous Criminal Record
6. Actor's Educational History
7. Actor's Perceived Social Status
8. Actor's Known Social Background
9. Actor's Perceived Communicative Competency
10. Actor's Personal / Physical Appearance
11. Actor's Group Affiliations
12. Perceiver's Critical Thinking Process Ability

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The program of research described in this chapter is supported, in part, by grants to Blanck from: The National Institute on Disability and Rehabilitation Research (NIDRR), U.S. Department of Education; and The University of Iowa College of Law Foundation. For information on grant funding, see <http://disability.law.uiowa.edu>. The views herein reflect those of the authors and not of any funding agency or any other entity. The authors thank Helen Schartz and James Schmeling for helpful suggestions on this chapter.

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