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**Oral Advocacy and Vocal Fry:  
The Unseemly, Sexist Side of Nonverbal Persuasion**

Michael J. Higdon

Essay

# Oral Advocacy and Vocal Fry

## The Unseemly, Sexist Side of Nonverbal Persuasion

Michael J. Higdon\*

*Gender stereotypes are not just descriptive, they are prescriptive. It's not just how women are, it's how women are supposed to be. And women who behave out of role are punished for it.*<sup>1</sup>

### I. Introduction

In 2009, I published an article entitled *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*.<sup>2</sup> That piece was intended to introduce legal audiences to the science of nonverbal persuasion, urging readers to understand that human listeners place importance not only on the substance of a message but also on how that message is delivered. The objective was to show how attorneys might use that information to become more effective oral advocates. What the piece did not focus on at that time, however, was the darker side to the science behind nonverbal persuasion. Specifically, as social scientists have warned, “cultural bias can lead sometimes to inaccurate assumptions and unfair preferences, and the resulting behaviour can be discriminatory and offensive.”<sup>3</sup>

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\* Associate Professor of Law and Director of Legal Writing, the University of Tennessee College of Law. I wish to thank Ruth Anne Robbins for not only giving me the idea for this piece, but for encouraging me to write it.

<sup>1</sup> NAT'L ACADEMY OF SCIENCES ET AL, BIOLOGICAL, SOCIAL, AND ORGANIZATIONAL COMPONENTS OF SUCCESS FOR WOMEN IN ACADEMIC SCIENCE AND ENGINEERING 39 (2006) (citation omitted).

<sup>2</sup> Michael J. Higdon, *Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience*, 57 U. KAN. L. REV. 631 (2009).

<sup>3</sup> FAY SHORT & PHIL THOMAS, CORE APPROACHES IN COUNSELLING AND PSYCHOTHERAPY 58 (2015). Aside from cultural differences, even racial backgrounds can influence eye contact. For instance, “Whites are found to gaze significantly more at their partners than blacks do, and this difference may be especially pronounced with authority figures—a tendency that could create cross-racial misunderstanding.” MARK L. KNAPP, JUDITH A. HALL & TERRENCE G. HORGAN, NONVERBAL COMMUNICATION IN HUMAN INTERACTION 317 (8th ed. 2014).

Given my scholarly interest in law and gender,<sup>4</sup> I am particularly troubled by the degree to which our attractions to certain nonverbal behaviors are motivated by our preference for those things perceived as “masculine.” Studies involving physical appearance—one of the seven codes of nonverbal behavior—are instructive on this point.<sup>5</sup> A 1990 study, for example, found that female job applicants who dressed in more-masculine ways were likewise more likely to be hired.<sup>6</sup> Similarly, studies have shown that women with shorter hair are deemed more competent.<sup>7</sup> Given that long hair, in American culture, is considered a stereotypically female trait,<sup>8</sup> whereas short hair is deemed stereotypically male, one has to question whether a preference for the latter is, in reality, just yet another preference for all things masculine.

Thus, there may be instances in which we, as a society, need to look at why we have a preference for certain behaviors and whether that preference is warranted or merely a product of invidious discrimination. Recently, this issue came to the forefront in the press about a certain form of nonverbal behavior: vocal fry. This phenomenon and the criticism it has received coalesces with the concerns regarding nonverbal-persuasion studies I described above.

Accordingly, in this essay, I examine vocal fry, endeavoring to explain both what it is, exactly, and the prevalence with which it currently exists, primarily among young American women.<sup>9</sup> I then describe negative reactions to vocal fry and the accusations of sexism those reactions have engendered. Finally, I consider what all this information means for female attorneys who are certainly mindful of the need to present themselves as persuasive, but who do not wish to perpetuate and reinforce sexist notions of how women should behave.

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<sup>4</sup> See, e.g., Michael J. Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men*, 66 ALA. L. REV. 507 (2015); Michael J. Higdon, *Queer Teens and Legislative Bullies: The Invidious and Cruel Discrimination behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195 (2008).

<sup>5</sup> See *infra* note 36.

<sup>6</sup> Sandra M. Forsythe, *Effect of Applicant's Clothing on Interviewer's Decision to Hire*, 20 J. APPLIED SOCIAL PSYCHOL. 1579, 1579 (1990) (“Applicants were perceived as more forceful, aggressive, and so on when wearing more masculine clothing. Applicants also received more favorable hiring recommendations when wearing more masculine clothing.”).

<sup>7</sup> See Shawn W. Rosenberg et al., *Creating a Political Image: Shaping Appearance and Manipulating the Vote*, 13 POL. BEHAV. 345, 352 tbl.1 (1991) (analyzing the success of female political candidates).

<sup>8</sup> See JOHN KNOWLTON & STEVEN PEARCE, *HANDBOOK OF COSMETIC SCIENCE AND TECHNOLOGY* 495 (1993) (describing long hair as “typically associated with connotations of being more feminine, more romantic and sexually appealing”).

<sup>9</sup> Of course, vocal fry occurs in the speech of both men and women. See *infra* note 15 and accompanying text.

## II. What Is Vocal Fry?

Dubbed “the sound we can’t seem to stop talking about,”<sup>10</sup> vocal fry “is produced by slowly fluttering the vocal cords, resulting in a popping or creaking sound at the bottom of the vocal register.”<sup>11</sup> Others have defined the term by simply referencing some of the female celebrities who consistently employ vocal fry in their speech: “It’s the vibrating, world-weary tone heard throughout popular culture—from the droning conversations of the Kardashian sisters to the red carpet quips delivered by America’s favorite quirky girl Zoey Deschanel.”<sup>12</sup> Scientists, however, offer a more precise definition:

Vocal fry, also known as glottalization, pulse phonation, or “creaky voice,” refers to a quality of voice characterized by intermittent irregular vibrations of the vocal folds (i.e., vocal cords) in the larynx (i.e., voice box). More specifically, vocal fry is produced through brief glottal pulses followed by vocal fold adduction, resulting in a voice quality accompanied by creaking, cracking, and popping noises. This quality of speech occurs typically when speakers lower their vocal pitch to the lowest register they are capable of producing.<sup>13</sup>

Although vocal fry results from both speech pathology and also voluntarily as a speech affectation,<sup>14</sup> most people today tend to consider it to be exclusively the latter. It is also important to note that the female gender does not have a monopoly on vocal fry; instead, both women and men employ this style of speaking.<sup>15</sup> Nonetheless, it is the use of vocal fry by young women that is eliciting the most attention. Part of the reason stems from the belief that women are more prone to engage in vocal fry. Recent studies have confirmed this belief, with a 2011 study finding that two-thirds of female college students used vocal fry.<sup>16</sup> In contrast, a

10 Maya Rhodan, *3 Speech Habits That Are Worse Than Vocal Fry in Job Interviews*, TIME (June 4, 2014), <http://time.com/2820087/3-speech-habits-that-are-worse-than-vocal-fry-in-job-interviews/> (last visited Mar. 15, 2016).

11 Olga Khazan, *Vocal Fry May Hurt Women’s Job Prospects*, THE ATLANTIC (May 29, 2014), <http://www.theatlantic.com/business/archive/2014/05/employers-look-down-on-women-with-vocal-fry/371811/> (last visited Mar. 15, 2016).

12 Rhodan, *supra* note 10.

13 Rindy C. Anderson, et al., *Vocal Fry May Undermine the Success of Young Women in the Labor Market*, 9(5) PLOS ONE e97506 (2014), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0097506>.

14 *Id.*

15 See Shana Lebowitz, *A Speech Pathologist Says Men Use Upspeak And Vocal Fry, Too—And It Can Make Them Look Less Confident At Work*, BUSINESS INSIDER (Aug. 5, 2015), <http://www.businessinsider.com/men-use-uptspeak-and-vocal-fry-too-2015-8> (last visited Mar. 15, 2016).

16 Lesley Wolk, Nassima B. Abdelli-Beruh & Dianne Slavin, *Habitual Use of Vocal Fry in Young Adult Female Speakers*, 26 J. VOICE 111 (2012). As the authors caution, however, “the findings of the present study are preliminary in nature because the study only assessed (1) female speakers, (2) SAE speakers, (3) college students at one university campus, (4) speech measures based on sentence reading and not conversational speech, and (5) used a sample from one specific geographical area.” *Id.* at 115.

follow-up study by the same researchers revealed a significantly lower rate of vocal fry in male college students.<sup>17</sup> In fact, the study concluded that “the rate is about four times higher for female speakers than for male speakers.”<sup>18</sup>

### III. Reactions to the Vocal Fry

Even though both sexes use vocal fry, public reaction to this form of speech has almost universally been directed at females—and that reaction has been overwhelmingly negative.

Bob Garfield, host of Slate’s *Lexicon Valley*, a podcast devoted to language, has perhaps been the most outspoken critic. In a recent blog post on the subject, he begins by describing vocal fry as an “epidemic.”<sup>19</sup> To illustrate to his listening audience the phenomenon to which he is referring, he asks his eleven-year-old daughter to demonstrate the vocal fry by giving her the microphone and the prompt of “be obnoxious.”<sup>20</sup> As the podcast continues, Garfield goes on to describe vocal fry “as “vulgar,”<sup>21</sup> “repulsive,”<sup>22</sup> “mindless,”<sup>23</sup> and “really annoying.”<sup>24</sup> Comparing vocal fry to “a human record scratch,” he continues, “When you hear it enough, you may want to kill yourself.”<sup>25</sup> At the very least, Garfield wants “the frying come to an end.”<sup>26</sup>

Garfield is not alone. Author and former political advisor, Naomi Wolf, penned an open letter to young women in *The Guardian*, asking them to “give up the vocal fry and reclaim your strong female voice.”<sup>27</sup>

17 Nassima B. Abdelli-Beruh, Lesley Wolk & Dianne Slavin, *Habitual Use of Vocal Fry in Young Adult Male American English Speakers*, 28 J. VOICE 185 (2014).

18 *Id.* at 187.

19 Bob Garfield, “*Old Fart*” Responds to the Great Vocal Fry Outcry of 2013, XXFACTOR: WHAT WOMEN REALLY THINK (Jan. 11, 2013), [http://www.slate.com/blogs/xx\\_factor/2013/01/11/young\\_women\\_and\\_vocal\\_fry\\_slate\\_podcast\\_wars\\_continue.html](http://www.slate.com/blogs/xx_factor/2013/01/11/young_women_and_vocal_fry_slate_podcast_wars_continue.html) (last visited Mar. 15, 2016).

20 *Lexicon Valley Episode 24: Get Your Creak On* 4:20–4:40 (SLATE podcast Jan. 2, 2013), [http://www.slate.com/articles/podcasts/lexicon\\_valley/2013/01/lexicon\\_valley\\_on\\_creaky\\_voice\\_or\\_vocal\\_fry\\_in\\_young\\_american\\_women.html](http://www.slate.com/articles/podcasts/lexicon_valley/2013/01/lexicon_valley_on_creaky_voice_or_vocal_fry_in_young_american_women.html) (last visited Mar. 15, 2016).

21 *Id.* at 16:10–16:30.

22 *Id.* at 20:20–20:40.

23 *Id.* at 10:00–10:20.

24 *Id.* at 4:40–5:00. In a follow-up statement, Garfield said that vocal fry is “worse than pork pie hats, the designated hitter rule and lawn statuary put together.” Ron Charles, ‘*Creaky Voice*’ Draws Huge Audience to ‘*Lexicon Valley*’ Podcast, THE WASHINGTON POST STYLE BLOG (Feb. 7, 2013), <https://www.washingtonpost.com/news/style-blog/wp/2013/02/07/creaky-voice-draws-huge-audience-to-lexicon-valley-podcast/> (last visited March 15, 2016).

25 Garfield, *supra* note 19.

26 Garfield, *supra* note 19, at 5:50–6:10.

27 Naomi Wolf, *Young Women, Give Up The Vocal Fry And Reclaim Your Strong Female Voice*, THE GUARDIAN (July 24, 2015), <http://www.theguardian.com/commentisfree/2015/july/24/vocal-fry-strong-female-voice> (last visited Mar. 15, 2016).

Wolf begins her letter with this dire warning: “[T]he most empowered generation of women ever—today’s twentysomethings in North America and Britain—is being hobbled in some important ways by something as basic as a new fashion in how they use their voices.”<sup>28</sup> She then goes on to identify vocal fry as the culprit, noting that it “has joined more traditional young-women voice mannerisms such as run-ons, breathiness and the dreaded question marks in sentences (known by linguists as uptalk) to undermine these women’s authority in newly distinctive ways.”<sup>29</sup> Wolf argues that “[w]e should not ask young women to put on fake voices or to alter essential parts of themselves.”<sup>30</sup> Instead, Wolf maintains that her point is merely that, to the extent vocal fry is an affectation adopted purely as a means of conformity, “when a young woman is encouraged to own her power and is given basic skills in claiming her own voice[,] then huge, good changes follow.”<sup>31</sup>

Wolf and Garfield are but two of the individuals who have spoken out publicly against vocal fry, claiming that this manner of speech creates a less-than-flattering image of the speaker. And, indeed, the limited research that has been done on this claim seems to support that argument. Specifically, in a study published in 2014, researchers found that among young female job applicants, those who exhibit vocal fry are seen as “less competent, less educated, less trustworthy, less attractive, and less hireable.”<sup>32</sup> While the study found that vocal fry “is perceived negatively in both sexes, by both sexes, regardless of the age of the listener,” it also found that, among speakers using vocal fry, women are perceived more negatively than men.<sup>33</sup> Finally, and perhaps somewhat surprisingly, the study also found that these negative perceptions are even stronger when the listener is likewise a female.<sup>34</sup> As a result, the professors behind this study concluded, “Collectively, these results suggest young American women should avoid vocal fry in order to maximize labor market perceptions.”<sup>35</sup>

28 *Id.*

29 *Id.* Indeed, Wolf operates from the assumption that vocal fry is not something young women have freely chosen, but is instead society has foisted on them: “It is *because* these young women are so empowered that our culture assigned them a socially appropriate mannerism that is certain to tangle their steps and trivialise their important messages to the world.” *Id.* (emphasis in original).

30 *Id.*

31 *Id.*

32 Anderson, *supra* note 13.

33 *Id.* at 5–6.

34 *Id.* at 5.

35 *Id.* Many have criticized this study because the study subjects used to speak vocal fry were merely imitating the speech pattern after being trained how to do so by the researchers themselves. See, e.g., Christian DiCanio, *Worried that Vocal Fry May Harm Your Career Prospects? Don’t Be*, LEXICON VALLEY: A BLOG ABOUT LANGUAGE (June 12, 2014), [www.slate.com/blogs/lexicon\\_valley/2014/06/12/vocal\\_fry\\_problems\\_with\\_plos\\_one\\_study\\_showing\\_it\\_harms\\_womens\\_career\\_prospects.html](http://www.slate.com/blogs/lexicon_valley/2014/06/12/vocal_fry_problems_with_plos_one_study_showing_it_harms_womens_career_prospects.html) (last visited Mar. 15, 2016).

#### IV. Is Vocal Fry Sexist?

In light of this study and in light of the public backlash against vocal fry, what is a young woman interested in a legal career to do? After all, vocalics (i.e., what a speaker sounds like) is one of the seven basic codes of nonverbal behavior,<sup>36</sup> all of which have tremendous potential to help or hinder a person seeking to persuade another. For attorneys, this concern would have particular significance given the number of times attorneys are called upon to speak as part of their jobs: meetings with senior partners, client interviews, mediations, depositions, and the like. Additionally, the stakes are somewhat higher for those who practice law, given that the attorney is typically speaking not only in favor of her own best interest (i.e., maintaining and advancing in a job), but also on behalf of a client, who is counting on the attorney to represent him in the best possible light.

One of the key areas of practice where an attorney must focus in particular on nonverbal persuasion is in the context of oral arguments. After all, oral argument is, by definition, an in-person conversation with a judge designed to persuade that judge. And vis-à-vis the content of the argument, judges no less than other “receivers are prone to put more weight on information gleaned through a speaker’s nonverbal cues.”<sup>37</sup> So, out of all the times an attorney is asked to speak on a client’s behalf, oral argument is one where the stakes are particularly high.

Slavish adherence to principles of nonverbal persuasion would lead a young woman to believe that she should cut her hair short (or at least wear it “up”),<sup>38</sup> she should dress in a suit that is more “masculine,”<sup>39</sup> and now—newly added to that list—she should recognize and avoid vocal fry. If she does that (while simultaneously adopting the thousands of other lessons we can learn from studies of nonverbal behavior), she will likely be in a better position to create a positive impression—and thus be more persuasive—on any audience member.

Well, not really. The truth is, she would merely be better equipped to create a positive impression on those audience members who come from a culture that values those specific things—and “those things” are often

<sup>36</sup> See Higdon, *supra* note 2, at 636. The seven codes include (1) kinesics (i.e., what a speaker does with his body), (2) physical appearance (i.e., what a speaker looks like), (3) vocalics (i.e., what a speaker sounds like), (4) haptics (i.e., how a speaker physically touches an audience member); (5) proxemics (i.e., how a speaker uses physical space), (6) environment and artifacts (i.e., how a speaker uses instruments and his environment), and (7) chronemics (i.e., how a speaker manages his time). *Id.*

<sup>37</sup> *Id.* at 635.

<sup>38</sup> See *supra* note 7 and accompanying text.

<sup>39</sup> See *supra* note 6 and accompanying text.

<sup>40</sup> See Michael J. Higdon, *To Lynch a Child: Bullying and Gender Non-Conformity in our Nation's Schools*, 86 IND. L. J. 827, 837 (2011) (noting that, because society tends to devalue qualities associated with femininity, qualities associated with masculinity receive more positive attention).

nonverbal behaviors that are more frequently associated with men. After all, our society tends to elevate that which is perceived as masculine while simultaneously devaluing that which is seen as feminine.<sup>40</sup> In the case of masculine clothing and short hair, the connection is obvious. And, although perhaps less obvious, many believe that the same is also true of vocal fry.

In fact, the authors of the 2014 study concluding that vocal fry evokes more-negative reactions to female than to male speakers wondered why this was so. Their answer: “One explanation is that the lowering of voice pitch via vocal fry results in a sex-atypical voice pitch modulation for females but sex-typical for males.”<sup>41</sup> In other words, dropping one’s voice at the end of a sentence (again, a key characteristic of vocal fry) is less objectionable in men because they are expected to have lower voices, and thus it makes them sound more manly.<sup>42</sup> And, in fact, because of the positive associations that attach to nonverbal behavior that is deemed “manly,” few would be surprised to learn that studies show that people prefer female leaders with deeper voices.<sup>43</sup> On the basis of that information, one might expect even a momentary drop in pitch by a female speaker to be persuasive, given that doing so would introduce a more masculine sound into the female voice. But, as the studies have revealed, that is not what happens.

The theory behind why, exactly, vocal fry hurts a female speaker is that it is the lack of a *consistently* deep voice (again, which is deemed a “good” nonverbal) and, relatedly, the greater discrepancy between the female speaker’s “normal” pitch and that produced by the vocal fry. Thus, with a male speaker of vocal fry, the listener is hearing a male voice, occasionally punctuated by a “more male” voice (i.e., a drop in pitch). When it is a female speaker, however, the listener hears a female voice, occasionally punctuated by a “less female” voice, which is perhaps more unexpected: “[P]eople expect a higher-pitched tone from a woman, and when she delivers a low, creaky voice (vocal fry), a listener is more likely to regard it as suspect.”<sup>44</sup> Further, this large contrast in pitch is decidedly *not* masculine, and thus less persuasive. As one commentator explained it, “So

41 Anderson, *supra* note 13, at 6.

42 See, Megan Garber, *Why We Prefer Masculine Voices (Even in Women)*, THE ATLANTIC (Dec. 18, 2012) (“We perceive men with lower-pitched voices to be more attractive and physically stronger—and also more competent and more trustworthy—than their less burly-voiced peers.”).

43 See, e.g., Rindy C. Anderson & Casey A. Klofstad, *Preference for Leaders with Masculine Voices Holds in the Case of Feminine Leadership Roles*, 7(12) PLOS ONE e51216 (2012).

44 Krissy Elliot, *I Can Fry if I Want To: Why Are Females Chided for Vocal Tics That Guys Use Too?*, CALIFORNIA MAGAZINE (June 29, 2015), <http://alumni.berkeley.edu/california-magazine/just-in/2015-07-31/i-can-fry-if-i-want-why-are-females-chided-vocal-tics-guys> (last visited Mar. 15, 2016).



it could be that if a woman is experimenting with her tone or inflection in a way that has yet to be normalized with deep-boomy-man voices, she's kinda linguistically fringe."<sup>45</sup>

For these reasons, those who have been critical of the use of vocal fry by young women have faced quite a bit of backlash. Specifically, feminists point out the degree to which society has continually attempted to regulate female voices and how women should speak. As Amanda Hess, one of Garfield's colleagues at Slate, puts it this way:

For years, women have been criticized for *raising* their voices at the end of sentences. This "Valley Girl lift," as Hofstra fine arts professor Laurie Fendrich maligns it, "reveals an unexplainable lack of confidence in one's opinions and a radical uncertainty about one's place in the world." . . . So we're wrong when we raise our voices, and we're wrong when we lower them. . . . Creaky Girls may be seen as overly masculine and derisive. Lexicon Valley co-host Mike Vuolo notes that a woman's voice is, on average, an octave higher than a man's. Lowering into a gravelly creak puts men and women on the same wavelength. "Vulgar!"<sup>46</sup>

Similarly, in a blogpost on the *Washington Post* website, entitled "13 Tips on How to Speak While Female," Alexandra Petri points out the various messages—both contradictory and sexist—directed at how women should speak.<sup>47</sup> As to vocal fry, she has this to say:

When you form words at all, which should be but rarely, make certain they come out in a low, gravelly growl, like a hungover Joe Cocker who has just gargled shards of glass. Strive to sound like a cigarette would sound if it could talk. Strive to rumble like thunder that has taken a class to counteract its vocal fry. If you sound like the love child of Darth Vader and a female Ent, you have achieved your purpose. Speak so that those who hear you wonder aloud and say, "Surely this speaker is a man. Or a grizzly bear who has swallowed a man whole."<sup>48</sup>

At the end of the day, when it comes to vocal fry (and indeed, nonverbal persuasion in general), women once again find themselves in a

45 *Id.*

46 Amanda Hess, *Why Old Men Find Young Women's Voices So Annoying*, XXFACTOR: WHAT WOMEN REALLY THINK (Jan. 7, 2013), [http://www.slate.com/blogs/xx\\_factor/2013/01/07/vocal\\_fry\\_and\\_valley\\_girls\\_why\\_old\\_men\\_find\\_young\\_women\\_s\\_voices\\_so\\_annoying.html](http://www.slate.com/blogs/xx_factor/2013/01/07/vocal_fry_and_valley_girls_why_old_men_find_young_women_s_voices_so_annoying.html) (last visited Mar. 15, 2016).

47 Alexandra Petri, *13 Tips on How to Speak While Female*, THE WASHINGTON POST: COMPOST (July 28, 2015), <https://www.washingtonpost.com/blogs/compost/wp/2015/07/28/13-tips-on-how-to-speak-while-female/> (last visited Mar. 15, 2016).

48 *Id.*

bit of a catch-22. Indeed, the Supreme Court in *Price Waterhouse v. Hopkins* identified a similar situation facing women in the workplace: “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not.”<sup>49</sup> When it comes to studies on vocalics and persuasion, it appears that women would be best suited to aim for a lower register in the voice, but not so low as to contrast too sharply with what a female voice “should” sound like.

## V. To Fry or Not to Fry

It seems, then, that like many other nonverbal behaviors that have been deemed “good,” there might be a more unseemly explanation behind the negative reaction to vocal fry. But whether that is true or not, the question still remains, What is a female attorney to do? Does she scrupulously monitor and adjust her professional nonverbal behavior to match those qualities that social science tells her tend to be perceived more positively? Or does she ignore this research and what it might mean within her own career and instead follow her own preferences on how to present herself? Clearly, this is a personal question that must be answered by each person individually.<sup>50</sup> But for most attorneys, the answer will lie somewhere between those two options. Regardless of the answer, there remains great value in simply knowing the questions to ask, which in this context means being aware of nonverbal behaviors that tend to rate higher, or lower, with audiences. Armed with that information, an attorney can then make decisions as to which of those behaviors she finds acceptable. For instance, learning that pointing is typically a nonverbal behavior that undermines effectiveness<sup>51</sup> is likely both unobjectionable and easily incorporated into an attorney’s mode of presentation.

For other types of nonverbal behaviors, however, the decision whether to incorporate that behavior might be quite difficult because of its underlying bias. After all, what one gains in the short term by presenting herself as in line with societal expectations can create problems in the long term by making it that much easier for everyone to ignore the sexism

49 490 U.S. 228, 251 (1989).

50 After all, I am a gay man who frequently asked myself, while in practice, whether I should “butch it up” and, if so, how much? I certainly would not have appreciated anyone trying to answer that question for me.

51 See, e.g., MARGARET Z. JOHNS, *PROFESSIONAL WRITING FOR LAWYERS: SKILLS AND RESPONSIBILITIES* 190 (1998) (“Keep your gestures restrained: no pointing at the court or counsel, no pounding on the podium, no rocking on your heels, no fidgeting with your hair, no waiving about a pen, no jingling your car keys, no shuffling papers.”).

motivating those preferences.<sup>52</sup> John F. Kennedy famously warned, “Conformity is the jailer of freedom and the enemy of growth.”<sup>53</sup> That may certainly be true, but again, for the working woman, failure to conform can be quite damaging. Just consider the studies finding that “[w]omen who do not conform to prescriptive beliefs about femininity also may be negatively evaluated and be denied positions and promotions, even when they have achieved objective standards of competence.”<sup>54</sup>

For these reasons, decisions about nonverbal behavior present women with quite a challenge: conform in the hopes that this conformity will bring success or refuse to conform in hopes of challenging gendered norms of competence. Regardless of what decision a woman may make in that regard, simply being knowledgeable about the biases motivating reactions to nonverbal behavior is a necessary first step to making an informed decision and, even more importantly, perhaps changing societal norms relating to gender bias in the legal profession. In the words of Carl Yung, “We cannot change anything until we accept it.”<sup>55</sup>

## VI. Conclusion

In 2009, I said, “[I]t is essential for oral advocates to not only understand the basic principles of nonverbal persuasion, but also to understand how to utilize those principles when appearing before a judge.”<sup>56</sup> Despite what I have said in this essay about vocal fry—an excellent example of the sexism that can motivate the results of studies on nonverbal persuasion—I continue to believe that today. Year after year, I introduce law students to the exciting field of nonverbal persuasion and the many valuable lessons it holds. When doing so, however, I am quick to point out that awareness of these “lessons” is merely the first step. After all, the preferences people have for certain behaviors are almost always motivated by something other than the behavior itself. Typically, there is a connection in the audience member’s mind between that discrete behavior and something else—and it is the “something else” that requires more

52 Kittie D. Warshawsky, Note, *The Judicial Canons: A First Step in Addressing Gender Bias in the Courtroom*, 7 GEO. J. LEGAL ETHICS 1047, 1064 (1994) (“[I]f the female attorney ignores the gender bias directed against herself or her client, she cannot completely function as a successful advocate; yet her decision not to confront the gender bias serves to perpetuate it.”).

53 SPENCER RATHUS, *PSYCHOLOGY: CONCEPTS & CONNECTIONS*, BRIEF VERSION 490 (2012).

54 Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive And Prescriptive Gender Stereotyping In Sex Discrimination* 5 PSYCHOL. PUB. POL’Y & L. 665, 667 (1999).

55 HOWARD J. ROSS, *EVERYDAY BIAS: IDENTIFYING AND NAVIGATING UNCONSCIOUS JUDGMENTS IN OUR DAILY LIVES* 101 (2014).

56 Higdon, *supra* note 2, at 666–67.

inquiry. In some instances, the connection between the nonverbal behavior and the perception it engenders could be benign, but in others, the perception could be more invidious. In the worst instances, in fact, it could be reflective of destructive stereotypes and bias. And when we do encounter this unseemly side of nonverbal persuasion, we have to ask ourselves at just what cost are we willing to be “persuasive.”