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Omission Suspicion: Juries, Hearsay, and Attorneys' Strategic Choices

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OMISSION SUSPICION: JURIES, HEARSAY, AND ATTORNEYS' STRATEGIC CHOICES

JUSTIN SEVIER*

ABSTRACT

Attorneys understand that presenting evidence consists of a series of strategic choices. Yet legal scholars have not studied whether jurors are sensitive to the trial strategy that underlies those choices. Do jurors question why an attorney has omitted what jurors consider the “best” evidence of some trial fact and has instead put forth weaker evidence? Do they attempt to understand the motivation behind that choice, and does that affect their legal judgments?

Six original experiments explore these questions in the context of hearsay evidence. The experiments reveal a ubiquitous finding: Jurors carefully scrutinize a party’s strategy for presenting hearsay, and this has a substantial impact on their verdicts. Moreover, jurors scrutinize an attorney’s strategic decision to proffer hearsay regardless of the identity of the legal actor, regardless of the type of case, and regardless of the type of hearsay presented.

These findings demonstrate that when evaluating hearsay evidence, jurors are attuned to factors that the law may not appreciate. This has substantial implications for legal policy and practice. These findings suggest a new dimension of competency with respect to how jurors evaluate evidence. They also suggest that the normative debate over hearsay evidence—that jurors do not think critically about it—should change. Finally, the findings present a cautionary tale to trial practitioners who make ground-level decisions about hearsay evidence.

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I. INTRODUCTION

The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character.

– *Interstate Circuit, Inc. v. United States*¹

The American legal system allows attorneys substantial freedom to present their cases in the manner they deem most persuasive and effective. The practicing attorney has several tools in her arsenal: She may vary the type of evidence she presents, the mode through which that evidence is presented, or even the types of witnesses she calls. She may present either direct evidence, such as an eyewitness, or circumstantial evidence, such as the results from forensic analysis. She may choose to call live witnesses to testify, or she may opt to enter into evidence writings or recordings. She may also call a mixture of witnesses, including those who will testify only to their knowledge of the facts of the case and others who will proffer expert testimony.

These strategic decisions are not without potential costs. For many reasons, a party may decide to proffer weaker evidence instead of evidence a factfinder may consider the “best” evidence of some trial fact. For example, an attorney who is concerned that an eyewitness is unlikely to be persuasive may, under certain circumstances, produce

1. 306 U.S. 208, 226 (1939) (citation omitted).

documentary evidence instead.² By doing so, the attorney can convey the same information to the factfinder without submitting the eyewitness to potentially damaging cross-examination. But if the factfinder would expect the witness to testify, might the attorney's failure to call the witness—even though the decision to do so is permitted under the Federal Rules of Evidence—affect the factfinder's judgment of the persuasiveness of the attorney's case? Might a jury look beyond the evidence presented to it and attempt to discern an attorney's motivation for producing—or failing to produce—certain witnesses? If so, does a jury's ability to “see through” an attorney's trial strategy affect its verdicts in systematic ways?

Consider domestic violence trials. Commentators have noted that prosecuting these cases can be difficult because an initially cooperative witness—typically the allegedly battered spouse—may later become uncooperative and refuse to testify against the alleged batterer.³ The prosecuting attorney is then put in a quandary: should she instead proffer the alleged victim's 911 telephone call, or should she dismiss the charges against the defendant? Legal commentators have expressed concern that the prosecutor's failure to produce the alleged victim in court may seriously impede the prosecutor's ability to convict the defendant.⁴ These concerns may be fueled, in part, by the motivational inferences commentators believe that jurors will make regarding the victim's failure to testify. This suggests that the motivation underlying a party's trial strategy might be an important, largely unstudied variable in determining how jurors reach legal decisions.

Motivation is a driving force behind human behavior, from our desire to eat, to our desire for safety, to our desire to love and to achieve.⁵ It can be either intrinsic or extrinsic,⁶ and the result of either conscious desires or subconscious preferences.⁷ It can even shape the ways in which we perceive the world around us and the ways in which we make decisions. For example, the psychological literature

2. See generally FED. R. EVID. art. VIII, X (allowing certain records to be admitted into evidence as an exception to the general rule against hearsay and prescribing specific rules for the admissibility of writings, recordings, and photographs). Practitioners should consult their specific state's law on this issue as well.

3. See, e.g., Neal A. Hudders, *The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?*, 49 DUKE L.J. 1041, 1041-42, 1044 (2000); Robert P. Mosteller, *Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411, 415 (2005).

4. Hudders, *supra* note 3, at 1047, 1051.

5. See A.H. Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370, 394 (1943); see also Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being*, 55 AM. PSYCHOLOGIST 68, 68 (2000) (stating that self-motivation is based on “people's inherent growth tendencies and innate psychological needs”).

6. See Edward L. Deci, *Effects of Externally Mediated Rewards on Intrinsic Motivation*, 18 J. PERSONALITY & SOC. PSYCHOL. 105, 105 (1971).

7. See Maslow, *supra* note 5, at 386-88.

on motivated reasoning has demonstrated that people are sometimes so motivated to achieve some outcome, or so motivated to preserve some aspect of their world view, that instead of searching rationally for information that either confirms or disconfirms a particular belief, they seek out solely information that confirms what they already believe.⁸

Recent empirical findings reveal a dark side to our perceptions of others' motives. In Western cultures, psychologists have identified a "norm of self-interest," in which people believe that "self-interest both is and ought to be a powerful determinant of behavior."⁹ People therefore tend to act (or appear to act) in their self-interest because it is normatively expected that they do so, and they tend to believe that opinions or actions that do not have clear self-interest motivations "will be regarded as unnatural and deviant" by others.¹⁰ Recent empirical data supports this proposition. People tend to imagine self-interested motives for others' generosity and altruistic behavior,¹¹ and people whose self-interested motives are not obvious are viewed suspiciously¹² and penalized socially.¹³ In sum, people tend to be cynical of the motives for others' actions.

People also make motivational inferences regarding the inactions—or omissions—of others. Recent research suggests that, because communicators are motivated by strategic self-presentation, they often will underreport negative information in describing their perceptions of others.¹⁴ For example, when describing a job applicant to a colleague, the communicator might describe the candidate's demeanor (by mentioning that the candidate is "nice") and omit information relevant to the applicant's competency for the job. Importantly, listeners are attuned to communicators' self-presentation motivation and will infer—by the colleague's silence—that the candidate is

8. See Erica Dawson, Thomas Gilovich & Dennis T. Regan, *Motivated Reasoning and Performance on the Wason Selection Task*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1379, 1379-80 (2002); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 482-83 (1990). This is sometimes referred to as the confirmation bias. See, e.g., P.C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Q. J. EXPERIMENTAL PSYCHOL. 129 (1960); see also Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175-78 (1998).

9. Dale T. Miller, *The Norm of Self-Interest*, 54 AM. PSYCHOLOGIST 1053, 1053 (1999).

10. Dale T. Miller, *The Norm of Self-Interest* 9 (CEPR Conference on Psychol. & Econ. June 8, 2011), available at <http://www.cepr.org/meets/wken/3/3509/papers/miller>.

11. See Clayton R. Critcher & David Dunning, *No Good Deed Goes Unquestioned: Cynical Reconstructions Maintain Belief in the Power of Self-Interest*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 1207 (2011).

12. Rebecca K. Ratner & Dale T. Miller, *The Norm of Self-Interest and Its Effects on Social Action*, 81 J. PERSONALITY & SOC. PSYCHOL. 5, 14-15 (2001).

13. Nadia Chernyak & David Pizarro, *The Case for "Too Much" Altruism: Perceptions of and Reactions Towards Altruistic Behaviors* (2012) (unpublished manuscript in preparation) (on file with author).

14. Hilary B. Bergsieker et al., *Stereotyping by Omission: Eliminate the Negative, Accentuate the Positive*, 102 J. PERSONALITY & SOC. PSYCHOL. 1214, 1214 (2012).

not qualified for the job.¹⁵ Thus, people appear quite skilled at recognizing the motivations of others and drawing appropriate inferences from those motivations.

In light of this psychological research, it is no surprise that motivation may manifest itself implicitly in numerous aspects of the law. A legal actor's motivation and credibility are entangled in various ways and inform jurors' legal judgments, including their judgments of a defendant's truthfulness¹⁶ and the persuasiveness of expert testimony.¹⁷ Moreover, it is possible that the impact of motivation on a party's credibility may extend to a party's trial strategy itself.

Additional empirical tests of (1) our armchair theories about the role of motivation in the law and (2) how jurors respond to attorneys' trial strategies are necessary. Specifically, how jurors perceive a party's motive to proffer weaker evidence at trial is an empirically unstudied topic. An illustrative area that has escaped empirical attention in this regard is a party's decision to proffer hearsay evidence in court. To the extent that hearsay is weaker evidence—inasmuch as the original speaker cannot be cross-examined in court—do jurors care about *why* they receive it?

It is not obvious that jurors would take into account a party's motivation when evaluating the probative value of hearsay, or that policymakers expect jurors to do so. Nonetheless, the experiments reported in this Article suggest that jurors do exactly that. Moreover, they do so regardless of the legal actor who proffers the hearsay, regardless of the type of case in which the hearsay is presented, and regardless of the type of hearsay proffered. These results are the first to suggest that a party's motivation—actual or perceived—for proffering weaker evidence like hearsay plays a crucial role in jurors' determinations of the credibility of that evidence.

Several implications follow from the findings reported in this Article. The findings suggest that jurors sometimes look beyond the evidence when evaluating its probative weight. They also suggest to policymakers that one of the rationales for the ban on hearsay evi-

15. See Adam Harris et al., "Damned by Faint Praise": A Bayesian Account, 31 PROC. ANN. CONF. COGNITIVE SCI. SOC'Y 292 (2009) (examining innuendo effects in social interaction); Nicolas Kervyn et al., *The Innuendo Effect: Hearing the Positive But Inferring the Negative*, 48 J. EXPERIMENTAL PSYCHOL. 77 (2012); Juan M. Madera et al., *Gender and Letters of Recommendation for Academia: Agentic and Communal Differences*, 94 J. APPLIED PSYCHOL. 1591 (2009) (examining the application of innuendo effects in professional settings).

16. See Clyde Hendrick & David R. Shaffer, *Effect of Pleading the Fifth Amendment on Perceptions of Guilt and Morality*, 6 BULL. PSYCHONOMIC SOC'Y 449, 449-52 (1975). For a more robust discussion of this experimental study, see *infra* notes 90-93 and accompanying text.

17. See Joel Cooper & Isaac M. Neuhaus, *The "Hired Gun" Effect: Assessing the Effect of Pay, Frequency of Testifying, and Credentials on the Perception of Expert Testimony*, 24 LAW & HUM. BEHAV. 149 (2000). For a more detailed description of this experimental study, see *infra* note 87-89 and accompanying text.

dence—that jurors fail to critically evaluate it—may not be accurate. The results also provide critical new information regarding how advocates can best present their cases to triers of fact. Attorneys ignore—at considerable cost—the inferences that flow from their strategic choices to present evidence.

II. LEGAL AND PSYCHOLOGICAL BACKGROUND

Courts routinely state that they assume jurors evaluate only the evidence presented to them and follow legal instructions issued by the trial judge.¹⁸ Behavioral research, however, suggests that these assumptions are often wrong.¹⁹ Jurors are subject to a slew of cognitive biases and are not always attuned to information that legal policymakers expect.²⁰ This occurs with respect to many aspects of trials, including determinations of liability or guilt,²¹ punitive damages awards,²² and capital sentencing.²³

18. See, e.g., *Richardson v. Marsh*, 481 U.S. 200, 206-07 (1987); see also *State v. Walker*, 356 S.E.2d 344, 346 (N.C. 1987) (“The law assumes that jurors will follow their instructions and act in a rational fashion.”); Stephen E. Fienberg & Mark J. Schervish, *The Relevance of Bayesian Inference for the Presentation of Statistical Evidence and for Legal Decisionmaking*, 66 B.U. L. REV. 771, 775 n.20 (1986) (“[T]he law assumes that a factfinder should be rational.”).

19. See, e.g., CHRISTINE L. RUVA, *HOW PRETRIAL PUBLICITY AFFECTS JURORS DECISION MAKING AND MEMORY* (2010) (explaining how pretrial publicity affects views of the evidence); Harold Sigall & Nancy Ostrove, *Beautiful but Dangerous: Effects of Offender Attractiveness and Nature of the Crime on Juridic Judgment*, 31 J. PERSONALITY & SOC. PSYCHOL. 410 (1975) (explaining that characteristics of the defendant herself, like physical attractiveness, affect jurors’ verdicts and sentencing decisions); see also J. Kevin Barge, David W. Schlueter & Alex Pritchard, *The Effects of Nonverbal Communication and Gender on Impression Formation in Opening Statements*, 54 S. COMM. J. 330, 331-32 (1989) (explaining that an attorney’s nonverbal cues, including pauses and stuttering, affect jurors’ views of the evidence against his client); Bonnie Erickson et al., *Speech Style and Impression Formation in a Court Setting: The Effects of “Powerful” and “Powerless” Speech*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 266 (1978) (explaining that speech style of defendant’s attorney affects views of evidence against the defendant).

20. See CASS SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* 211 (2002) (stating that some jury decisions reflect “systematic biases, some due to fundamental properties of the human mind, others due to culturally based, learned habits” and that “there are aspects of human behavior that seem to be erratic and unpredictable in terms of commonsense intuitions and behavioral science principles”); see also Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 99-107 (2008) (discussing cognitive and unconscious biases that affect a decisionmaker’s judgment before even making a decision); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (arguing that people’s unconscious forms of bias undermine the assumptions reflected in Title VII’s disparate treatment jurisprudence).

21. See Ronald C. Dillehay & Marla R. Sandys, *Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification*, 20 LAW & HUM. BEHAV. 147, 160 (1996) (finding that 28.2% of “death qualified” jurors are so biased against defendants that they would vote automatically to sentence a guilty defendant to death, in violation of the law); D. Lynn Hazelwood & John C. Brigham, *The Effects of Juror Anonymity on Jury Verdicts*, 22 LAW & HUM. BEHAV. 695, 710 (1998) (finding that anonymous jurors are subject to the psychologi-

These research findings have implications for a variety of areas under the law. For example, the law of evidence is premised largely on codified but empirically untested folk wisdom regarding how legal actors, like jurors, behave.²⁴ Article VIII of the Federal Rules of Evidence, which governs the use of hearsay evidence in federal trials, is an apropos example of this phenomenon, given its armchair assessments of when hearsay actors are likely to be truthful and when they are not.²⁵ Surprisingly, researchers only recently have examined how jurors process hearsay evidence, and the research so far is limited.

Hearsay is an intriguing area to study empirically, because the decision to proffer hearsay is strategic, inasmuch as it often arises under circumstances where a hearsay declarant has died, has moved away, or has become uncooperative. Yet policymakers apparently assume that jurors do not consider this “extralegal” information when assigning probative weight to hearsay evidence. The studies reported in this Article suggest that, with respect to hearsay evidence, jurors do not behave as policymakers believe they do. Instead, jurors’ perceptions of the probative value of hearsay include an evaluation of a party’s motive for proffering the hearsay evidence. Moreover, they discount the hearsay evidence in the absence of a benign explanation for receiving it.

To situate the experiments reported in this Article in their proper context, I will briefly discuss (1) the law of hearsay and recent psychological research regarding how jurors process hearsay evidence and (2) what courts and psychologists have said regarding the propriety and ability of jurors to make motivational inferences more generally.

cal concept of deindividuation and may be more prone to convict a defendant when the evidence against him is strong).

22. See SUNSTEIN ET AL., *supra* note 20; Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1 (2004) (finding that juries differ from judges in awarding punitive damages).

23. See Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 232 (1996) (arguing that jurors misunderstand capital sentencing instructions and, as a result, “tend to fall back on their own prior knowledge”); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1169 (1995) (suggesting that “juror beliefs and expectations about the legal system may lead them to erroneous interpretations about legally relevant concepts” contained in capital sentencing instructions).

24. See Edward J. Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 317 (2003) (stating that the fundamental justification for recognizing evidentiary privileges is the “behavioral assumption . . . that the typical layperson . . . would neither consult with nor divulge to a confidant . . . but for the assurance of confidentiality furnished by a formal evidentiary privilege). For a more robust discussion of this proposition, see *infra* notes 42-43 and accompanying text.

25. See FED. R. EVID. 803; Gordon Van Kessel, *Hearsay Hazards in the Modern American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 485-87, 499 (1998).

A. Hearsay at 35,000 Feet

1. The Hearsay Doctrine

The rule forbidding hearsay evidence at trial has been called the “spoiled child” of the common law evidence rules.²⁶ It has no doubt earned this reputation because of the scholarly attention paid to its myriad intricacies and its slew of complex exceptions. Although parties to litigation have used hearsay evidence in legal proceedings for almost 500 years,²⁷ empirical scholarship on the effects that hearsay evidence has on trial outcomes is both recent and sparse. This is particularly odd because a prominent justification for the hearsay bar—that jurors are incompetent to properly evaluate hearsay evidence—is an empirically testable question.

The rule against hearsay is, at its core, a rule against using second-hand information in court. Hearsay is formally defined as an out-of-court statement (made by a declarant) used in court (through, for example, the testimony of a hearsay witness) to prove that the substance of the out-of-court statement is true.²⁸

Hearsay often contains relevant information that a jury may find useful in making legal judgments. Nonetheless, courts generally purport to bar hearsay evidence.²⁹ Policymakers and legal commentators have offered an array of explanations for the bar against hearsay. Initially, legal scholars objected to hearsay because the hearsay declarant is not subject to an oath to tell the truth, as compared to a witness who testifies in court.³⁰ Other commentators have expressed concern that hearsay “removes us” from the facts of the case³¹ and, in

26. JOHN H. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE 238 (1935); see also Stephan Landsman & Richard F. Rakos, *Research Essay: A Preliminary Empirical Enquiry Concerning the Prohibition of Hearsay Evidence in American Courts*, 15 LAW & PSYCHOL. REV. 65, 65 (1991).

27. See Landsman & Rakos, *supra* note 26 at 67.

28. FED. R. EVID. 801(c) (“‘Hearsay’ means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”). For example, if I testify in court to a belief that aliens are real and I say, “My neighbor told me that she saw a spaceship land on her driveway,” the statement is inadmissible hearsay, because I am recounting the out-of-court story in an effort to demonstrate that aliens exist. However, if I testify to my neighbor’s out-of-court statement in an effort to demonstrate that my neighbor is mentally ill, the statement is *not* hearsay and is potentially admissible, because I am not recounting the conversation to demonstrate that aliens exist. This is but one example of the intricacies and nuances that surround the hearsay doctrine.

29. See FED. R. EVID. 802 (“Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.”).

30. See GEOFFREY GILBERT, THE LAW OF EVIDENCE (Garland Publ’g, Inc. 1979) (1754); Landsman & Rakos, *supra* note 26, at 68-69.

31. See Mortimer R. Kadish & Michael Davis, *Defending the Hearsay Rule*, 8 LAW & PHIL. 333, 348-49 (1989) (“Taking the direct testimony of those who have seen or heard a disputed fact places the trier of fact as close to that fact as the nature of adjudication al-

criminal trials, deprives the defendant of his right under the Sixth Amendment's Confrontation Clause to confront witnesses.³² These issues, in turn, may lead to a "trial by ambush."³³

Other scholars have worried about the effects of hearsay on the legal system itself. Some commentators have argued that reliance on hearsay evidence can discredit the public's perception of courts as impartial adjudicators of disputes.³⁴ Other commentators have argued that judges would have too much discretion in deciding which hearsay statements they would allow into evidence.³⁵ Professor Charles Nesson opined that trial outcomes might lack finality because hearsay declarants may later dispute the accuracy of hearsay statements attributed to them during trial.³⁶

Perhaps the most enduring rationale for barring hearsay evidence is the theory that jurors are incompetent to evaluate its probative strengths and weaknesses. This rationale harkens back to 19th century English courts where Lord Mansfield expressed concern that "no man can tell what effect [hearsay] might have upon [lay jurors'] minds."³⁷ These courts worried that, because the hearsay declarant cannot be cross-examined, jurors will fail to appreciate the potential untrustworthiness of the evidence.³⁸

To be sure, hearsay evidence is rife with potential untrustworthiness. The trustworthiness of hearsay depends on several factors at two different levels: that of the declarant and that of the hearsay

laws. Hearsay, on the other hand, puts the trier of fact at least one remove in a role resembling that of a court of appeals.").

32. The Supreme Court has recently breathed new life into the Sixth Amendment's Confrontation Clause in a series of cases examining the hearsay doctrine. In these decisions, the Court has ruled that a criminal defendant has an absolute constitutional right under the Sixth Amendment to cross-examine her accuser if the accuser makes an out-of-court, testimonial statement against the defendant. *See Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). Although the Confrontation Clause is not directly relevant to the non-testimonial hearsay at issue in this Article, Part VI, *infra*, contains a discussion of the Confrontation Clause.

33. William C. Thompson & Maithilee K. Pathak, *Empirical Study of Hearsay Rules: Bridging the Gap Between Psychology and Law*, 5 PSYCHOL. PUB. POL'Y & L. 456, 460 (1999).

34. *See* Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CALIF. L. REV. 495, 495 (1987) ("Reliance on . . . hearsay declarants threatens important values related to the rationality and fairness of trial adjudication.").

35. *See, e.g.*, Roger Park, *The Hearsay Rule and the Stability of Verdicts: A Response to Professor Nesson*, 70 MINN. L. REV. 1057, 1060 (1986).

36. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1373 (1985).

37. William Fitzharding Berkeley, (1811) 171 Eng. Rep. 128 (H.L.) [135] (appeal taken from Eng.); *see* Landsman & Rakos, *supra* note 26, at 66.

38. Regina A. Schuller, *Expert Evidence and Hearsay: The Influence of "Secondhand" Information on Jurors' Decisions*, 19 LAW & HUM. BEHAV. 345, 346 (1995). These English jurists might have had in mind the infamous and oft-cited trials of Nicholas Throckmorton and Sir Walter Raleigh, which consisted largely of untrustworthy hearsay evidence. *See* Landsman & Rakos, *supra* note 26, at 67-68. Although a jury spared Throckmorton, a jury convicted Raleigh. He was eventually executed. *Id.*

witness. The declarant must have accurately perceived the event at issue, accurately understood it, accurately remembered its details, and accurately conveyed those details to the hearsay witness. The hearsay witness, in turn, must have accurately perceived the declarant's statement, accurately remembered it, and must accurately convey it to the factfinder. Any mistake during this process—through misinterpretation, forgetfulness, bias, or deception—reduces the trustworthiness of the hearsay statement.³⁹

Given the dangers surrounding the reliability of hearsay statements, one might expect that courts have banned hearsay evidence in its entirety. But, in fact, they have not. For practical reasons, courts and policymakers have excluded from the hearsay bar certain kinds of statements—including admissions by party opponents and certain prior statements made by trial witnesses—that nonetheless meet the conceptual definition of hearsay.⁴⁰ Moreover, the Federal Rules of Evidence contain twenty-eight explicit exceptions to the rule barring hearsay, ranging from statements made while an individual is dying, to statements blurted out because of the excitement of some event, to statements made while seeking medical treatment.⁴¹ Many of these exceptions were created, at least in part, because policymakers believe these types of statements are highly reliable.⁴² For example, according to policymakers, a dying individual would not want to meet his maker with a lie on his lips, an excited individual would not have time to fabricate her statement, and people are disincentivized to lie to their doctors when seeking treatment for medical ailments.⁴³ Interestingly, these rationales rely on largely untested empirical hunches about how people behave.

39. See Thompson & Pathak, *supra* note 33, at 464. See also Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974) (discussing these mistakes); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948) (same).

40. See FED. R. EVID. 801(d).

41. See FED. R. EVID. 803, 804, 807.

42. See, e.g., FED. R. EVID. 803 advisory committee's note (stating, while providing no empirical evidence in support, that "[t]he present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available").

43. *Id.* (explaining the rationale for the excited utterance exception to the hearsay doctrine as "simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication," and allowing an exception to the hearsay bar for statements made during the treatment of medical ailments "in view of the patient's strong motivation to be truthful"); see also FED. R. EVID. 804 advisory committee's note (justifying the rationale for the dying declaration exception to the hearsay bar on the basis that, "[w]hile the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present" for a dying individual to make truthful statements).

This patchwork of behavioral intuition has led psychologists to question the assumptions underlying the hearsay doctrine and its exceptions. These psychologists posited that human beings confront hearsay frequently in their daily lives, are able to distinguish high-quality hearsay from poor-quality hearsay, and can discount poor-quality hearsay accordingly.⁴⁴ In other words, these psychologists argued that jurors are sensitive to factors that can affect the reliability of hearsay statements.

2. *Empirical Hearsay Scholarship*

The empirical study of hearsay began in the early 1990s. The scope of the research is limited, but the research has yielded broad lessons about how jurors process hearsay evidence.

The initial experiments examined how jurors process hearsay generally. Do jurors give hearsay its appropriate weight or do they under- or over-value it? Landsman and Rakos conducted the first such experiment, in which they varied the strength of various hearsay statements in a mock trial.⁴⁵ They found that, even though mock jurors reported that stronger hearsay statements were more important pieces of evidence than were weaker hearsay statements, none of those statements ultimately affected jurors' guilt judgments.⁴⁶

Meine, Park, and Borgida reported similar results the next year when they compared the effects of hearsay evidence with the effects of eyewitness evidence on juror verdicts.⁴⁷ Although the presence of an eyewitness nearly doubled the conviction rate (compared to circumstantial evidence alone), hearsay evidence raised the conviction rate just 4%.⁴⁸ Moreover, participants self-reported that they did not consider the hearsay *at all*, which suggests that jurors may actually *undervalue* hearsay evidence.⁴⁹

44. See *infra* Parts II.A.2, II.B.

45. Landsman & Rakos, *supra* note 26, at 73-74. Researchers manipulated the strength of the statements by varying the degree of the hearsay witness's confidence and the degree to which the declarant was able to observe the crime. *Id.*

46. *Id.* at 76.

47. See Peter Meine, Roger C. Park & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683 (1992).

48. *Id.* at 691-92, 699. This 4% difference was not statistically significant.

49. *Id.* at 695. Jurors' preference for evidence directly from the declarant also has been found in studies examining so-called "child hearsay." In those studies, mock jurors were more likely to convict a defendant when the child testified directly, as compared to hearsay given by the child's mother. See David F. Ross, R.C.L. Lindsay & Dorothy F. Marsil, *The Impact of Hearsay Testimony on Conviction Rates in Trials of Child Sexual Abuse: Toward Balancing the Rights of Defendants and Child Witnesses*, 5 PSYCHOL. PUB. POL'Y & L. 439, 446-47 (1999). They also rated the child's testimony as more candid and honest when it came directly from the child in court. *Id.* at 447-48; see also Jonathan M. Golding, Mary C. Alexander & Terri L. Stewart, *The Effect of Hearsay Witness Age in a Child Sexual Assault Trial*, 5 PSYCHOL. PUB. POL'Y & L. 420, 427 (1999) (reporting a marginally significant difference ($p = .09$) in convictions when the child testified directly compared to testi-

A third experiment studied whether jurors are sensitive to the differences in the probative value of various hearsay statements and eyewitness identifications.⁵⁰ Jurors were not sensitive to differences in the probative value of eyewitness identifications, but they *were* sensitive to differences in the probative value of hearsay statements.⁵¹ Altogether, these initial experiments suggest that jurors are not passive, unquestioning perceivers of hearsay.

These experiments leave an important question unanswered: What factors, in particular, do jurors focus on when they evaluate hearsay evidence? A handful of additional studies provide some answers to this question, but also complicate the empirical narrative substantially. For example, some researchers found that jurors are attuned to factors such as the suggestive questioning of child declarants⁵² and the effects of age on memory for hearsay statements in elder abuse cases.⁵³

But follow-up experiments have revealed that jurors are blind to other factors that affect the accuracy of hearsay. For example, Golding, Alexander, and Stewart found that, in the context of “child hearsay,” jurors are not always attuned to the potential effects of the hearsay witness’s age on the reliability of hearsay statements.⁵⁴ Other researchers have demonstrated that although hearsay witnesses often recall the “gist” of the declarant’s statement, they often fail to

mony from a hearsay witness); Gail S. Goodman et al., *Hearsay Versus Children’s Testimony: Effects of Truthful and Deceptive Statements on Jurors’ Decisions*, 30 LAW & HUM. BEHAV. 363, 389 (2006) (finding that “exposure to live child testimony was significantly associated with jurors’ perception of greater child credibility and empathy toward the child” and “indirectly influenced jurors’ confidence of defendant guilt”); Allison D. Redlich et al., *A Comparison of Two Forms of Hearsay in Child Sexual Abuse Cases*, 7 CHILD MALTREATMENT 312, 324 (2002) (finding that, before deliberation, “jurors who were presented with [a child declarant’s videotaped testimony] were more likely to believe the child disclosed fully during the pretrial forensic interview, which in turn increased child believability ratings and then consequently also increased ratings of defendant guilt.”).

50. Margaret Bull Kovera, Roger C. Park & Steven D. Penrod, *Jurors’ Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703, 707, 719 (1992). The researchers put graduate students in the position of eyewitnesses to a potential crime and then required them to recall what they had seen after either a short or lengthy delay. This created objectively “good” and “poor” eyewitnesses. The researchers, in turn, had these eyewitnesses report to hearsay witnesses what they had observed. The hearsay witnesses then recalled what they heard after either a short or lengthy delay. This created objectively “good” and “poor” hearsay witnesses. Mock jurors then observed these eyewitnesses and hearsay witnesses and rated how persuasive they were. *Id.* at 707-10.

51. *See id.* at 719-20.

52. *See* Maithilee K. Pathak & William C. Thompson, *From Child to Witness to Jury: Effects of Suggestion on the Transmission and Evaluation of Hearsay*, 5 PSYCHOL. PUB. POL’Y & L. 372, 374, 377, 378 (1999).

53. *See* Emily E. Dunlap et al., *Perceptions of Elder Physical Abuse in the Courtroom: The Influence of Hearsay Witness Testimony*, 19 J. ELDER ABUSE & NEGLECT 19, 35-36 (2007).

54. *See* Golding et al., *supra* note 49 at 433-34. *But see* John E. B. Myers et al., *Jurors’ Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCHOL. PUB. POL’Y & L. 388, 411-12 (1999); Amye R. Warren et al., *The Believability of Children and Their Interviewers’ Hearsay Testimony: When Less is More*, 87 J. APPLIED PSYCHOL. 846, 852 (2002).

recall the specifics (or they recall them inaccurately),⁵⁵ and the resulting information loss can prevent jurors from making accurate decisions about the quality of the hearsay statements.⁵⁶

Additional hearsay research adds to the complexity. In examining how jurors respond to judicial instructions regarding hearsay, one study found that jurors are capable of completely disregarding inadmissible hearsay that has been “blurted out” in court,⁵⁷ but another study suggests that under certain conditions, jurors cannot disregard this evidence.⁵⁸ Moreover, jurors appear incapable of using hearsay for a limited purpose, for example, to determine a witness’s state of mind or an expert witness’s credibility,⁵⁹ and strong judicial instructions to disregard hearsay can produce psychological reactance in jurors—a backlash effect in which jurors defiantly and explicitly consider the forbidden evidence.⁶⁰

In sum, there exists a small collection of diverse empirical findings that examines how triers of fact respond to hearsay evidence. The initial empirical narrative was straightforward: Because jurors have experience with hearsay in their everyday lives, they are skeptical and discerning when evaluating it in court. Further research on the specific variables on which jurors focus, however, significantly complicates this narrative and suggests that how jurors perceive hearsay may be more context dependent than initially believed. Moreover, jurors’ evaluations of hearsay can interact with judicial instructions in surprising ways.

Although these studies provide significant insight into how jurors perceive hearsay, they raise as many questions as they answer. In

55. See Amye R. Warren & Cara E. Woodall, *The Reliability of Hearsay Testimony: How Well Do Interviewers Recall Their Interviews With Children?*, 5 PSYCHOL. PUB. POL’Y & L. 355, 369 (1999). This finding could have a dramatic impact on the admissibility of hearsay statements. For example, an interviewer might believe that, during the interview, a child spontaneously implicated her parent as an abuser—which can cause a court to admit the incriminating statement into evidence under the excited utterance exception—when the interviewer herself may have suggestively elicited the “spontaneous” statement from the child. See David Dunning, *On the Social Psychology of Hearsay Evidence*, 5 PSYCHOL. PUB. POL’Y & L. 473, 477 (1999).

56. See Julie A. Buck, Amye R. Warren & John C. Brigham, *When Does Quality Count?: Perceptions of Hearsay Testimony About Child Sexual Abuse Interviews*, 28 LAW & HUM. BEHAV. 599, 619 (2004); Warren & Woodall, *supra* note 55, at 357.

57. See Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407, 422 (1995).

58. See Dae H. Lee, Daniel A. Krauss & Joel Lieberman, *The Effects of Judicial Admonitions on Hearsay Evidence*, 28 INT’L J.L. & PSYCHIATRY 589 (2005).

59. See Angela Paglia & Regina A. Schuller, *Jurors’ Use of Hearsay Evidence: The Effects of Type and Timing of Instructions*, 22 LAW & HUM. BEHAV. 501, 514 (1998); Schuller, *supra* note 38, at 349.

60. See Lee et al., *supra* note 58, at 590-91. There is currently no explanation in the literature that has harmonized these findings.

the late 1990s, several commentators called for further research,⁶¹ provided a framework for that future research,⁶² and identified specific areas into which current hearsay research could be extended.⁶³ Despite a few trickles of additional research,⁶⁴ empirical research on hearsay has largely receded.

B. *Motivational Inferences and the Law*

Until now, the vast majority of empirical hearsay research has focused, in whole or in part, on whether jurors are attuned to cognitive factors that may influence the reliability of the hearsay statement itself. These factors include the effects of time and age on a person's memory for a hearsay statement, and the ways in which suggestive questioning can alter a child declarant's schema and memory for an event. But what if jurors are attuned to other factors that might affect the quality of a hearsay statement but are not obviously linked to the properties of the hearsay itself? Past research has not addressed this question, and the answer may shed additional light on whether jurors are thinking critically about hearsay evidence specifically, and attorneys' strategic decisions more generally.

An unexplored research area, first proposed by Dunning, is the role that a party's motivation might play in jurors' perceptions of hearsay evidence.⁶⁵ Within the confines of evidentiary rules, practice rules, statutes, and state and federal constitutions, parties to litigation are free to present their case to a factfinder in any manner they choose. Parties therefore often have a choice regarding whether to proffer hearsay evidence, instead of the declarant's in-court testimony, to a factfinder. No one has studied whether jurors are attuned to the motivation underlying a party's strategic decision to proffer hearsay and what effect, if any, that decision might have on how jurors respond to hearsay evidence. For example, imagine a scenario in which an attorney wishes to shield a hearsay declarant from cross-examination by instead calling a hearsay witness to the stand at trial. To the extent that jurors accurately deduce what the attorney has done, might jurors infer that there is some impeachable aspect of the underlying declarant's testimony and discount the hearsay? Conversely, if an attorney proffers hearsay out of necessity—for example, because the declarant has died—will jurors take that into account

61. See Lucy S. McGough, *Hearing and Believing Hearsay*, 5 PSYCHOL. PUB. POL'Y & L. 485, 494 (1999).

62. See Thompson & Pathak, *supra* note 33, at 465.

63. See Dunning, *supra* note 55, at 477-79.

64. See, e.g., Buck et al., *supra* note 56; Dunlap et al., *supra* note 53; Goodman et al., *supra* note 49; Lee et al., *supra* note 58.

65. Dunning, *supra* note 55, at 481.

when evaluating the evidence and reduce the discount they might normally give the probative weight of the hearsay evidence?

There are many reasons to believe that jurors might be attuned to a party's motivation to proffer hearsay. As Dunning notes, it is a shibboleth of social psychology that when evaluating the persuasive force of an actor's argument, people are quite sensitive to factors, like bias, that might render the argument less credible and persuasive.⁶⁶ Consider, for example, inadmissible facts that come to light through pretrial publicity, on which jurors often rely, even though they should not.⁶⁷ If mock jurors are provided information that casts suspicion on the pretrial publicity—for example, that the person who introduced the pretrial publicity has a proverbial axe to grind—jurors discount the publicity when rendering their judgments.⁶⁸

To some degree, the law appears to recognize that jurors will focus on a trial actor's motivation when making legal decisions. Consider, for example, the "absent witness" instruction available in many jurisdictions. The instruction states that where a party, without explanation, fails to call a witness who is (1) known to the party, (2) friendly to the party (or at least not hostile), and (3) available to give material, favorable, non-cumulative testimony, then the jury may infer that the witness would have given testimony *unfavorable* to that party.⁶⁹ Thus, under certain circumstances, the law explicitly allows—and even encourages—jurors to consider when they make their legal judgments the motivation underlying a party's decision not to call a witness.

Similarly, the law appears to recognize that sometimes jurors will focus inappropriately on a trial actor's motivation and will instruct jurors to disregard any such inferences. For example, if a certain par-

66. *See id.* at 481.

67. *See, e.g.*, Geoffrey P. Kramer, Norbert L. Kerr & John S. Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409 (1990).

68. *See* Dunning, *supra* note 55, at 481; Steven Fein, Allison L. McCloskey & Thomas M. Tomlinson, *Can the Jury Disregard That Information? The Use of Suspicion to Reduce the Prejudicial Effects of Pretrial Publicity and Inadmissible Testimony*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1215, 1220 (1997).

69. *See, e.g.*, *United States v. Harwood*, 189 F. App'x 661, 663 (9th Cir. 2006); *United States v. Drozdowski*, 313 F.3d 819, 825 n.3 (3d Cir. 2002); *United States v. Nahoom*, 791 F.2d 841, 846 (11th Cir. 1986); *United States v. Anders*, 602 F.2d 823, 825 (8th Cir. 1979); *United States v. Mahone*, 537 F.2d 922, 926 (7th Cir. 1976); *see also* *Haliburton v. State*, 561 So. 2d 248, 250 (Fla. 1990); *Commonwealth v. Schatvet*, 499 N.E.2d 1208, 1210-11 (Mass. 1986); *People v. Gonzalez*, 502 N.E.2d 583, 585-86 (N.Y. 1986). A typical absent witness instruction reads as follows: "If it is peculiarly within the power of [Party A] to produce a witness who could give material testimony, or if the witness would be favorably disposed to the government, failure to call that witness may justify an inference that [his or her] testimony would be unfavorable to [Party A]. No such inference is justified if the witness is equally available or favorably disposed to both parties or if the testimony would merely repeat other evidence." *See, e.g.*, FIRST CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS § 2.12 (2003), available at <http://www.mad.uscourts.gov/resources/pattern2003/html/patt6qer.htm>.

ty should not naturally be expected to call a witness, and both parties have an equal opportunity to call that witness, the judge may instruct the jury that the witness's absence "should not affect [their] judgment[s] in any way."⁷⁰ Underlying this jury instruction is a presumption that the jury may unfairly believe that one of the parties has purposely "hidden" the witness and may unfairly penalize that party when making their legal judgments. In theory, an equal opportunity instruction can neutralize these suspicions.

Federal courts, including the Supreme Court, have explicitly held that factfinders may consider a party's strategy for proffering evidence in deciding the probative weight to afford that evidence. In *Interstate Circuit, Inc. v. United States*, the federal government sought an injunction against the defendant film distributors to prevent them from carrying out an alleged conspiracy to fix prices for movie licenses in violation of the Sherman Antitrust Act.⁷¹ The defendants appealed to the United States Supreme Court the district court's finding that the defendants had engaged in a conspiracy. In affirming the district court's decision, the Supreme Court noted that the district court's decision was based, in part, on the fact that the defendants omitted "as witnesses any of the [senior officers of their companies] who [had] negotiated the contracts" (and "would have had knowledge of the existence or non-existence of [any collusion] among the distributors").⁷² Instead, the defendants called as witnesses middle managers who had little knowledge of the transactions at issue.⁷³ In affirming the district court, the Supreme Court held that "[t]he failure under the circumstances to call as witnesses those [senior] officers . . . is itself persuasive that their testimony, if given, would have been unfavorable" to the defendants.⁷⁴ Moreover, "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character."⁷⁵

70. See 4 LEONARD SAND, MODERN FEDERAL JURY INSTRUCTIONS-CIVIL ¶ 75.01 (2007); see also *United States v. Caccia*, 122 F.3d 136, 139 (2d Cir. 1997); *United States v. Lewis*, 40 F.3d 1325, 1336 (1st Cir. 1994); *United States v. Spinosa*, 982 F.2d 620, 632 (1st Cir. 1992); *Brown v. United States*, 414 F.2d 1165, 1166-68 (D.C. Cir. 1969); *Fleming v. SafeCo Ins. Co. of America*, 206 Cal. Rptr. 313, 319 (Cal. Dist. Ct. App. 1984); *Jackson v. State*, 575 So. 2d 181, 187-88 (Fla. 1991); *Commonwealth v. Bryer*, 494 N.E.2d 1335, 1337-38 (Mass. 1986).

71. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 213 (1939).

72. *Id.* at 221.

73. *Id.* at 226.

74. *Id.*

75. *Id.* (citation omitted). Other courts have followed suit. See e.g., *UAW v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party."); see also *United States v. Roberson*, 233 F.2d 517, 519 (5th Cir. 1956) ("Unquestionably the failure

Some federal courts have gone further. In *United States v. Christians*, for example, the Eighth Circuit affirmed a trial court ruling that allowed prosecutors to proffer evidence to clarify the reason that the government had not produced certain evidence in its case-in-chief.⁷⁶ The federal government had accused Christians of being a felon in possession of a firearm.⁷⁷ The government had intended to use, as the centerpiece of its case, the defendant's videotaped confession, which the government had allowed the unsupervised defendant to view.⁷⁸ Just before trial, the government discovered that the videotapes had been erased and sought to put forth evidence that the defendant had erased the tapes.⁷⁹ The defendant objected to the evidence as more prejudicial than probative, but the district court ruled the evidence admissible. In affirming the trial court's ruling, the Eighth Circuit noted that "the evidence was necessary to clarify the reason for the government's failure to present the videotapes to the jury," and that "the government itself was in danger of being unfairly prejudiced if it was not permitted to introduce the testimony about the videotapes being blank."⁸⁰ Without this evidence, held the court, "there was a substantial risk that the prosecution's failure to produce the videotapes at trial would give rise to a jury inference that the government had something to hide."⁸¹

These cases raise the same question: Why might jurors be attuned to a party's motivation when they make legal judgments? Psychology research indicates that the answer may lie in the ways in which jurors arrive at their verdicts. Initially, many researchers believed that jurors reach legal decisions in a Bayesian way: each juror "calculates" a prior probability of the defendant's guilt and, with each piece of new evidence, "recalculates" the probability of the defendant's guilt continually throughout the trial.⁸² But in the late 1980s, Reid Hastie

of a defendant in a civil case to testify or offer other evidence within his ability to produce and which would explain or rebut a case made by the other side, may, in a proper case, be considered as a circumstance against him and may raise a presumption that the evidence would not be favorable to his position.").

76. 200 F.3d 1124, 1126-27 (8th Cir. 1999).

77. *Id.* at 1125.

78. *Id.* at 1126-27.

79. *Id.*

80. *Id.* at 1127.

81. *Id.* However, not all courts take this view. In a criminal trial involving forensic evidence, the government proffered testimony explaining that it would not be unusual to fail to find the defendant's latent fingerprints on a handgun at issue. Characterizing the relevancy of the evidence as "obscure" in dicta, Judge Posner, writing for the Seventh Circuit, noted that "[s]ince no fingerprints were found, neither side was helped; and we can't see what difference it makes whether failure to find fingerprints on a gun is common or uncommon." *United States v. Paladino*, 401 F.3d 471, 478 (7th Cir. 2005).

82. For a discussion of this model and variations on it, see Kenworthy Bilz, *We Don't Want to Hear It: Psychology, Literature and the Narrative Model of Judging*, 2010 U. ILL. L. REV. 429 (2010).

and Nancy Pennington proposed a vastly different theory of legal decisionmaking: jurors create alternative “trial narratives” and choose the narrative that best fits all of the evidence.⁸³ Hastie and Pennington termed this model, which has received considerable empirical support,⁸⁴ the “story model” of jury decisionmaking.⁸⁵ Perhaps it is unsurprising that in crafting these narratives, jurors are likely to look at the motivation of different trial actors when determining which trial narrative is the “correct” one in a given case.

We see evidence of jurors’ attentiveness to motivational factors in myriad legal contexts. For example, prosecutors routinely decide to include in their case-in-chief a motive on the part of the criminal defendant for committing the crime. Interestingly, prosecutors do so even though most trials do not require the prosecutor to provide a motive. Of course, prosecutors will provide a motive often to demonstrate that a defendant possessed the specific intent to commit the crime. But researchers recognize that underlying these prosecutorial decisions is an understanding that jurors, in creating a trial narrative, will inevitably make inferences about the defendant’s motivation to commit the crime, and may question why the prosecutor has not established such a motive.⁸⁶

We see further evidence of jurors’ attention to a trial actor’s motivation with respect to expert witnesses. Cooper and Neuhaus found what they termed a “hired gun effect” among experts who are highly paid for their testimony.⁸⁷ The researchers found that jurors rated experts who charged significantly higher hourly rates for their testimony as less trustworthy and more annoying than experts who charged lower hourly rates for the same substantive testimony.⁸⁸ This suggests that jurors make spontaneous negative inferences regarding the motivation of these experts to testify, and the study further suggests that these inferences affect not only jurors’ impressions of

83. See Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189 (1992).

84. See, e.g., Reid Hastie, *What’s the Story? Explanations and Narratives in Civil Jury Decisions*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 23, 25-29 (Brian H. Bornstein et al. eds., 2008).

85. Pennington & Hastie, *supra* note 83, at 189-92.

86. See W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 64-65 (1981); see also Norman J. Finkel, *Commonsense Justice, Culpability, and Punishment*, 28 HOFSTRA L. REV. 669, 700 (2000) (stating that research on story models “tell[s] us that jurors typically begin [their analysis of the case] with the subjective motives and intentions of the actor . . . to find the motivational thread that weaves plot and story,” and “if we examine how prosecuting and defense attorneys tell their stories in opening and closing statements, we would probably find the subjective thread woven quite prominently throughout those stories as well.”).

87. Cooper & Neuhaus, *supra* note 17, at 158, 162.

88. *Id.* at 158 (reporting a main effect of an expert’s fee on these traits).

the experts, but also their judgments of the persuasive force of the experts' testimony.⁸⁹

Jurors also make these inferences with respect to defendants who exercise their Fifth Amendment right against self-incrimination during trial. Although jurors are instructed that they cannot draw negative inferences from a defendant's invocation of the Fifth Amendment, an experiment by Hendrick and Shaffer suggested that jurors do so.⁹⁰ Mock jurors who read a trial transcript in which the defendant invoked his Fifth Amendment right were more likely to think the defendant committed the crime and rated the defendant as significantly less moral than a defendant who testified and denied his involvement in the crime.⁹¹ The authors suggested, among other phenomena, that when the defendant invoked the Fifth Amendment, jurors believed that the defendant was withholding information from them.⁹² Jurors then reacted to that withholding of information by imputing onto the defendant a motivation for doing so: that he was guilty and was "hiding" behind the Fifth Amendment.⁹³

Other studies provide support for the view that when jurors think that evidence has been withheld from them, they draw a negative inference regarding the withholding party's motivation for doing so. In a mock criminal trial, Shaffer, Sadowski and Hendrick manipulated the obviousness with which the defendant was withholding from mock jurors information about a crime.⁹⁴ Defendants who more obviously withheld information were deemed more likely to be guilty, less attractive, and less desirable than defendants who had not obviously withheld information.⁹⁵

In a follow-up study, Shaffer and Sadowski varied whether a defendant's decision to invoke the Fifth Amendment was attributable to the defendant alone or instead to an external source, such as the defendant's attorney.⁹⁶ Again, the defendant's decision to invoke the Fifth Amendment led jurors to draw negative inferences against the defendant.⁹⁷ Interestingly, the guilt ratings for defendants who in-

89. The expert's fee did not affect mock jurors' verdicts by itself. The researchers observed a statistically significant interaction between the expert's fee and the expert's credentials, such that highly paid, highly credentialed experts were much less likely to affect jurors' verdicts than were other experts. *Id.* at 155. In sum, "[w]hat apparently affected the jury was a combination of pay and credentials." *Id.* at 154.

90. Hendrick & Shaffer, *supra* note 16, at 451.

91. *Id.*

92. *Id.* at 452.

93. *Id.* at 451.

94. See David R. Shaffer, Cyril Sadowski & Clyde Hendrick, *Effects of Withheld Evidence on Juridic Decisions*, 42 PSYCHOL. REP. 1235, 1236-38 (1978).

95. See *id.* at 1240.

96. See David R. Shaffer & Cyril Sadowski, *Effects of Withheld Evidence on Juridic Decisions II: Locus of Withholding Strategy*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 40, 41 (1979).

97. *Id.* at 42-43.

voked the Fifth Amendment of their own accord were marginally greater than the ratings for those who did so on the advice of their attorney.⁹⁸ These findings suggest that (1) jurors draw negative inferences when a defendant withholds information from them; and (2) if a defendant's decision to withhold information is clearly attributable to an external source, jurors may adjust their inferences accordingly.

C. *The Present Study*

What are the implications of these research findings for how jurors think about a party's motivation to introduce hearsay evidence? To the extent a party decides to proffer hearsay, the party often omits the declarant's in-court testimony. Past research suggests not only that jurors pay attention to the motivations underlying the actions of prosecutors, defendants, and expert witnesses, but also that these actors' motivations become more salient to jurors in the absence of stronger evidence. Thus, with respect to a party's decision to proffer hearsay evidence in lieu of a declarant's in-court testimony, I hypothesized the following:

- (1) Jurors will discount hearsay evidence compared to the declarant's in-court testimony.
- (2) When weighing hearsay evidence, jurors will consider the party's strategy for proffering it.
- (3) In the absence of a satisfactory explanation for receiving hearsay evidence, jurors will draw negative inferences from the hearsay, which will affect their legal judgments.
- (4) These effects will be magnified when the hearsay put forth is a particularly poor substitute for the declarant's in-court testimony.

The current study addresses these hypotheses.

III. MAIN EXPERIMENT: METHOD

A. *Participants*

One hundred twenty jury-eligible volunteers⁹⁹ from the community surrounding a large Midwestern university participated in this study. Participants were recruited through several methods: (1) emailed announcements to participate in a study on jury decisionmaking; (2) in-person solicitation in cafeterias and train stations surrounding campus; and (3) in-class announcements in various de-

98. *Id.* at 42.

99. *M-age* = 26.09, *SD* = 9.65. The age of participants ranged from eighteen to fifty years. Sixty-seven percent of the participants identified themselves as Caucasian, fifteen percent identified themselves as Asian, twelve percent identified themselves as African-American, and six percent identified with other races and ethnicities.

partments around the university. Participants did not receive payment or, if they were students, course credit. Rather, all participants were entered into a raffle to receive an iPod Shuffle device.

Participants were randomly assigned to seven experimental conditions and assumed the role of a mock juror in a criminal trial. After signing informed consent forms, these volunteers read a hypothetical trial vignette and responded to a series of questions. Participants were then debriefed and thanked.

B. Procedure

Participants read a brief vignette of a criminal trial in state court. The state accused the defendant of robbing a convenience store, shooting the clerk, and absconding with \$300 in cash from the register. The trial presented conflicting evidence regarding the defendant's guilt and contained evidence presented through a hearsay witness. Two variables were systematically manipulated: (1) the prosecutor's motivation for putting forth the hearsay evidence; and (2) how well the hearsay evidence substituted for the declarant's in-court testimony (the "substitution quality" of the evidence). In a control condition, mock jurors heard the declarant's in-court testimony instead of hearsay evidence.

In each condition, mock jurors learned that a man who claimed to have witnessed the robbery dialed 911 and gave the name and description of the man he claimed robbed the store.¹⁰⁰ Officers arrested the suspect one block away with \$400 in his coat pocket. In all experimental conditions, the trial included testimony from the arresting officer, the defendant, and the 911 operator, who provided hearsay testimony on behalf of the alleged eyewitness declarant.

Depending on the experimental condition, mock jurors either (1) learned that the prosecutor was proffering hearsay out of necessity because the alleged eyewitness had died before trial (the "benign" strategy); or (2) learned that the prosecutor was proffering hearsay out of convenience because the prosecutor wished to shield the 911 caller from cross-examination (the "suspicious" strategy).¹⁰¹ In the

100. The factual scenario was designed to fit the "excited utterance" and "present sense impression" exceptions to the rule barring hearsay, and was designed so that the hearsay statements did not violate the defendant's Sixth Amendment right to confront his accuser. Specifically, the 911 caller characterized the situation as an ongoing emergency with a gunman who was still at large. *See Michigan v. Bryant*, 131 S. Ct. 1143, 1147-49 (2011); *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004).

101. In an additional control condition, some participants received no explanation for the prosecutor's use of hearsay. In this "no explanation" (or "unknown") control condition, the vignette read only that "[t]he State's case-in-chief was presented by the 911 operator." To determine whether jurors prefer in-court testimony to hearsay evidence, the data collected from these participants were compared to the data from the other control condition,

benign condition, the vignette read: “The State’s case-in-chief was presented by the 911 operator. The State did not call the 911 caller to the stand because he had died of an unrelated illness before trial.” In contrast, in the suspicious condition, the vignette read: “The State’s case-in-chief was presented by the 911 operator. The State could have had the 911 caller testify but chose not to because the State was not sure he would be an effective witness on cross-examination.”¹⁰²

Additionally, the substitution quality of the 911 operator’s testimony was manipulated: either (1) she played an audiotape of her conversation with the alleged eyewitness (the “good” substitution, because it provided an accurate account of what the alleged eyewitness had said); or (2) she testified as to the gist of that conversation (the “poor” substitution). For participants who received a good substitution, the vignette read, “On the tape, the caller said that the robber was John Smith from the neighborhood—Caucasian, about 6’2”, approximately 220 pounds, with a birthmark on his face.” For participants who received a poor substitution, the vignette read: “According to the 911 operator, the caller named the defendant, whom he had apparently seen around the neighborhood; said he was White, a little over 6’ tall and around 220 pounds; and that he had some sort of mark on his face.” In both conditions, the 911 operator testified as to how long ago the call took place, how often she works, and how many calls she fields on average per shift.

The testimony of the arresting officer and the defendant did not vary by condition. This produced a 2x2 between-subjects design with two additional control conditions (which contained either an in-court, non-hearsay witness, or a hearsay witness who was called for unspecified reasons).¹⁰³

After reading the vignette, participants answered several questions relating to their impressions of the trial. Participants first rated, on a 7-point Likert scale,¹⁰⁴ the likelihood that the defendant had

in which an in-court witness recounted the details of of the crime. The results are discussed in Part IV.C., *infra*,

102. Mock jurors were informed of the party’s motivation through a “God’s eye” view. It was important to first establish whether jurors consider information regarding a party’s trial strategy at all. Once that phenomenon is established, then more subtle manipulations of the party’s motive are appropriate. A subtler manipulation of a party’s strategy to prefer hearsay was undertaken in Follow-up Study 1. *See infra* Part V.A.1.

103. A 2x2 design means that one experimental variable—here, the prosecutor’s trial strategy—contains two different versions (benign and suspicious,) while the other—the substitution quality of the evidence—also contains two different versions (good and poor). A between-subjects design means that different participants read different versions of the trial vignette.

104. A Likert scale is a psychometric scale commonly used in questionnaires to capture data from ordinal variables (from 1 to 7). *See* ROBERT M. LAWLESS, JENNIFER K. ROBBEN-NOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 172 (2010). Likert scales are used frequently to collect data from mock jurors, although scholars have noted the limitations of

committed the robbery (1 = *not at all likely* and 7 = *very likely*). Participants then rated their confidence in that decision and answered questions about the persuasiveness and strength of the prosecution's and defense's cases. Participants then answered questions regarding the persuasiveness, strength, trustworthiness, influence, and morality of each witness, the defendant, and the prosecutor.

Finally, participants answered free-response questions, which asked them to recall the events that occurred at trial, discuss specific pieces of evidence, and list any information they would have found helpful when evaluating the case. Participants then answered standard demographic questions.

IV. MAIN EXPERIMENT: RESULTS AND DISCUSSION

A. Overview

The results supported the hypotheses.¹⁰⁵ Mock jurors were attuned to the prosecutor's motivation to put forth hearsay evidence and drew negative inferences regarding the prosecutor's motivation when there was not a satisfactory explanation for the prosecutor's use of hearsay. This was particularly true when the hearsay was a poor substitute for the direct evidence. The analysis of these results will proceed in four parts: the results of the manipulation checks, participants' perceptions of the defendant's guilt, their judgments about the strength of the prosecution's case, and their judgments about individual pieces of evidence and trial actors.

this method. See, e.g., Gerald Albaum, *The Likert Scale Revisited: An Alternate Version*, 39 J. MARKET RES. SOC'Y 331, 341 (1997).

105. Data were analyzed using (1) a two-way analysis of variance (ANOVA), which provides a statistical test of whether the means of several groups are equal, and (2) unpaired t-tests for detecting differences in sample means. ANOVA results are represented by an F-statistic, t-tests are represented by a t-statistic, and the sizes of the effects are represented by η^2_p . Means are denoted by the letter "M" and standard deviations are denoted by the letters "SD." See generally LAWLESS ET AL., *supra* note 104 at 55-335 (explaining empirical research methodologies and statistical techniques).

Differences are denoted as "statistically significant" in this Article if the statistical tests indicate that the likelihood that the difference observed would occur by chance is 5% or less (as indicated by the p-value as $p < 0.05$). A difference is "marginally significant" if the likelihood of seeing such a difference by chance is greater than 5% but less than 10%. See Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 485 n.117 (citing BARBARA G. TABACHNICK & LINDA S. FIDELL, *USING MULTIVARIATE STATISTICS* (2d ed. 1989)). Planned t-test comparisons were accompanied by Tukey-Kramer analyses to stabilize the "familywise error rate" and avoid false positives. See, e.g., James Jaccard, Michael A. Becker, & Gregory Wood, *Pairwise Multiple Comparison Procedures: A Review*, 96 PSYCHOL. BULL. 589 (1984) (discussing several techniques, including the Tukey technique, for controlling Type I error when making multiple comparisons among groups).

B. Manipulation Checks

After completing the questionnaires, and depending on the experimental condition, participants rated how well either the 911 operator's testimony or the 911 tape substituted for the testimony of the alleged eyewitness. The 911 tape¹⁰⁶ was rated a significantly better substitute for the alleged eyewitness's testimony than was the 911 operator's testimony.¹⁰⁷

Twenty pre-test participants, who did not otherwise participate in this study, rated the "suspiciousness" of the prosecutor's decision to put forth hearsay evidence. The decision to proffer hearsay evidence because the hearsay declarant had died¹⁰⁸ was rated significantly less suspicious than was the decision to proffer hearsay to deprive the defendant an opportunity to cross-examine the hearsay declarant.¹⁰⁹

Additionally, the free-response questions asked participants to provide a detailed account of their memory for the facts of the case. All participants correctly recalled the prosecutor's motive for putting forth hearsay evidence if a motive had been provided to them.

Thus, the manipulation checks confirmed that the substitution quality of the evidence differed appropriately, the strategies for proffering hearsay differed with respect to their suspiciousness, and the participants understood the prosecutor's motive for putting forth the evidence if a motive was provided to them.

C. Perceptions of Guilt

Preliminary analyses examined whether jurors prefer an eyewitness's in-court testimony to hearsay evidence. As seen in Figure 1, when the prosecutor proffered testimony directly from an eyewitness (instead of through hearsay evidence), mock jurors perceived the defendant as more likely to be guilty¹¹⁰ and they perceived the prosecutor's case as stronger.¹¹¹ Thus, in accordance with past research, jurors found a declarant's in-court testimony more persuasive than hearsay evidence.

106. $M = 5.01$, $SD = 1.04$.

107. $M = 3.23$, $SD = 1.18$, $F(1, 118) = 75.44$, $p < .001$.

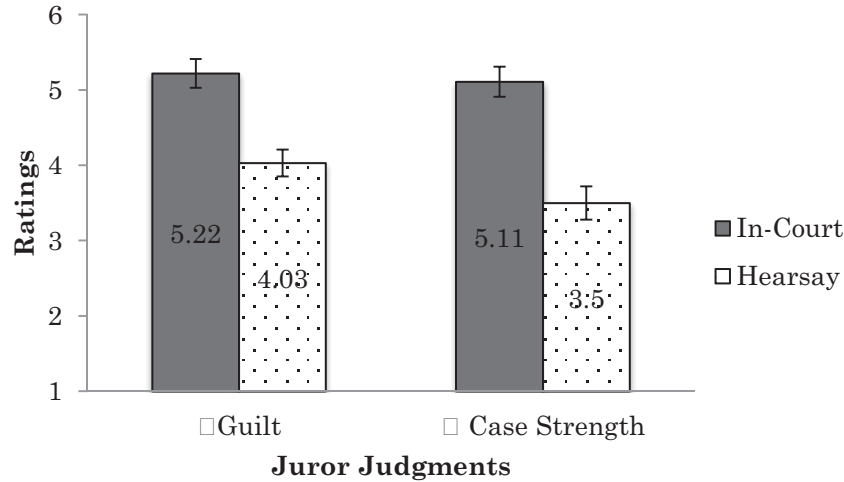
108. $M = 5.22$, $SD = 0.83$.

109. $M = 2.89$, $SD = 1.05$, $F(1, 16) = 27.14$, $p < .001$.

110. $F(1, 52) = 17.09$, $p < .001$, $\eta^2_p = .25$. M -in-court = 5.22, SD -in-court = 0.81; M -no-motive-hearsay = 4.03, SD -no-motive-hearsay = 1.08 (see left-hand side of Figure 1). The data from the two "no motive" conditions (whose means were not significantly different from each other) were collapsed and averaged into one omnibus "no motive" hearsay condition that was compared to the in-court testimony condition. To simplify the analysis going forward, this "no motive" condition has been eliminated from most of the remaining analyses, which will focus on the differences between participants who were exposed to benign hearsay and those who were exposed to suspicious hearsay.

111. $F(1, 52) = 22.26$, $p < .001$, $\eta^2_p = .30$. M -in-court = 5.11, SD -in-court = 0.83; M -no-motive-hearsay = 3.50, SD -no-motive-hearsay = 1.32 (see right-hand side of Figure 1).

Figure 1
Juror Perceptions of In-Court Testimony and Hearsay



The next set of analyses examined the extent to which the prosecutor's motivation for proffering hearsay evidence affected jurors' perceptions of the defendant's guilt. A 2 (motivation: benign vs. suspect) x 2 (hearsay substitute: good vs. poor) analysis of variance (ANOVA)¹¹² on participants' perceptions of the defendant's guilt revealed a main effect of the prosecutor's motivation:¹¹³ jurors were more likely to perceive the defendant as guilty when the prosecutor's motive for proffering hearsay was benign¹¹⁴ than when his motive was suspicious.¹¹⁵ The analysis also revealed a marginally significant effect of hearsay substitute,¹¹⁶ such that jurors were more likely to perceive the defendant as guilty when the hearsay evidence was a good substitute¹¹⁷ than when it was poor.¹¹⁸

112. ANOVA assumes that the dependent measures are continuous variables. A Likert scale is technically an ordinal variable (participants cannot explicitly rate the defendant's likelihood of guilt as 6.5; they must choose either 6 or 7). Thus, some may argue that an ordered probit regression, which does not assume that the dependent measures are continuous, would be the most technically accurate analysis. Decades of psychological experiments, however, have treated the Likert scale as a continuous variable appropriate for an ANOVA, on the theory that points 1 through 7 are simply markers along a continuous scale. See, e.g., Margaret E. Bell, *Attitudes Toward Changing Economic Roles for Women*, 6 J. INSTRUCTIONAL PSYCHOL. 38 (1979) (analyzing Likert scale data using ANOVA); John D. Murray, Jo Ann Spadafore & William D. McIntosh, *Belief in a Just World and Social Perception: Evidence for Automatic Activation*, 145 J. SOC. PSYCHOL. 35, 38-42 (2005) (same).

113. $F(1, 68) = 77.37, p < .001, \eta^2_p = .53$.

114. $M = 5.19, SD = 0.98$.

115. $M = 3.21, SD = 1.08$.

116. $F(1, 68) = 2.37, p = .09, \eta^2_p = .03$.

117. $M = 4.38, SD = 1.15$.

118. $M = 4.03, SD = 1.67$.

Interestingly, the analyses revealed a significant interaction between the prosecutor's motivation for proffering hearsay and the quality of the hearsay substitute.¹¹⁹ The nature of this interaction, which is shown in Figure 2, was examined by analyzing the effect of the prosecutor's motivation when the evidence was good and that same effect when it was poor.

The prosecutor's motivation for proffering hearsay affected jurors' perceptions of the defendant's guilt when the hearsay evidence was a good substitute;¹²⁰ they perceived the defendant as guiltier when there was a benign motive behind the hearsay¹²¹ than when there was a suspect motive behind the hearsay.¹²² The same pattern existed when the hearsay evidence was a poor substitute¹²³—benign hearsay led to perceptions of a guiltier defendant than did suspect hearsay—but those perceptions were more polarized.¹²⁴

Further, when the prosecutor's motive for proffering hearsay was not obvious, jurors perceived the defendant as less guilty than when the prosecutor's motive was benign.¹²⁵ This was true both when the hearsay evidence was good¹²⁶ and when it was poor.¹²⁷ This suggests that omitting the reason for depriving the factfinder of the "best" evidence may be nearly as harmful to a party's case as providing the factfinder a bad reason for doing so.¹²⁸

119. $F(1, 68) = 10.63, p = .002, \eta^2_p = .14$. See left-hand side of Figure 2.

120. $F(1, 34) = 14.88, p < .001, \eta^2_p = .30$.

121. $M = 5.00, SD = 0.97$.

122. $M = 3.75, SD = 0.97$.

123. $F(1, 34) = 74.89, p < .001, \eta^2_p = .69$.

124. $M\text{-benign} = 5.39, SD\text{-benign} = 0.98; M\text{-suspect} = 2.67, SD\text{-suspect} = 0.91$. See right-hand side of Figure 2.

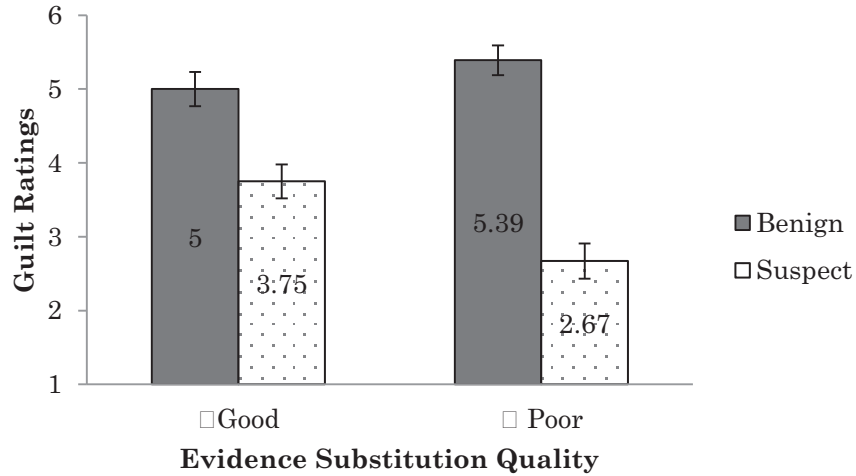
125. $F(1, 68) = 24.30, p < .001, \eta^2_p = .26$.

126. $F(1, 34) = 4.71, p = .037, \eta^2_p = .12; M\text{-benign} = 5.00, SD\text{-benign} = 0.97; M\text{-unknown} = 4.39, SD\text{-unknown} = 0.70$.

127. $F(1, 34) = 20.50, p < .001, \eta^2_p = .39; M\text{-benign} = 5.39, SD\text{-benign} = 0.98; M\text{-unknown} = 3.67, SD\text{-unknown} = 1.28$.

128. See *id.*

Figure 2
Likelihood of Defendant's Guilt as a Function of Motivation and Substitution Quality



D. Strength of the Prosecutor's Case

The third set of analyses examined participants' judgments of the strength of the prosecution's case. As Table 4 illustrates, the results follow largely the same pattern as participants' judgments of the defendant's guilt.

A 2 (motivation: benign vs. suspect) x 2 (hearsay substitute: good vs. poor) ANOVA on the strength of the prosecution's case revealed a significant main effect of the prosecutor's motivation,¹²⁸ such that jurors perceived the prosecutor's case as stronger when the prosecutor provided hearsay for a benign reason¹²⁹ than when the prosecutor had a suspect reason for providing hearsay evidence.¹³⁰ The analysis also revealed a marginally significant effect of hearsay substitute,¹³¹ such that jurors perceived the prosecutor's case as stronger when the hearsay evidence was a good substitute¹³² compared to when it was a poor substitute.¹³³

As illustrated in Figure 3, the analysis also revealed a significant interaction between the prosecutor's motive and the quality of the hearsay evidence on jurors' perceptions of the prosecutor's case.¹³⁴ As

128. $F(1, 68) = 60.20, p < .001, \eta^2_p = .47$.

129. $M = 4.97, SD = 0.97$.

130. $M = 3.33, SD = 0.96$.

131. $F(1, 68) = 2.09, p = .10, \eta^2_p = .03$.

132. $M = 4.31, SD = 1.01$.

133. $M = 4.00, SD = 1.47$.

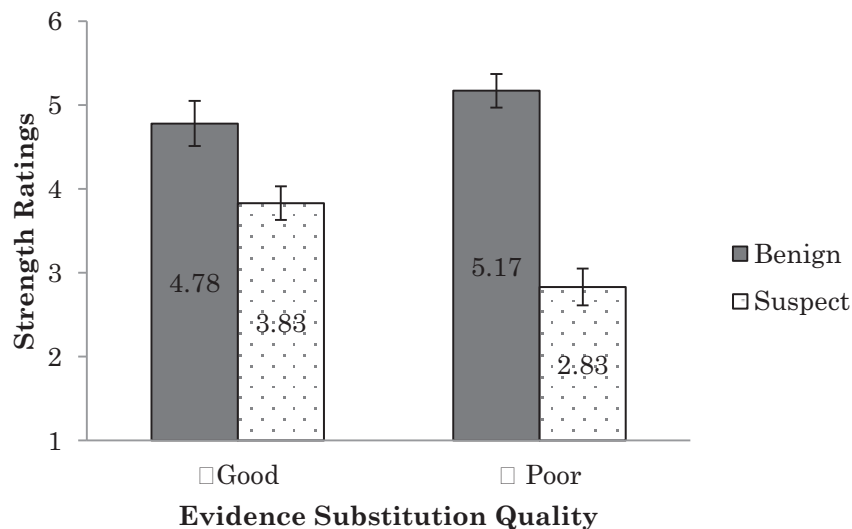
134. $F(1, 68) = 10.81, p < .001, \eta^2_p = .14$.

with the analysis of jurors' perceptions of the defendant's guilt, this analysis examined the effect of the prosecutor's motivation when the hearsay was good and when it was poor.

When the hearsay evidence was a good substitute for the in-court testimony, the prosecutor's motivation for proffering it affected jurors' perceptions of the strength of the prosecutor's case.¹³⁵ The prosecutor's case was perceived as stronger when his motivation was benign¹³⁶ compared to when it was suspect.¹³⁷ A similar pattern of results existed when the hearsay evidence was a poor substitute for the in-court testimony (although the results were more polarized),¹³⁸ such that a benign motive for presenting hearsay evidence¹³⁹ led jurors to perceive the prosecutor's case as stronger than when his motivation was suspect.¹⁴⁰

Figure 3

Strength of Prosecutor's Case as a Function of Motivation and Substitution Quality



In light of these findings, further analyses examined the possibility that the effect of the prosecutor's motivation for proffering hearsay on jurors' perceptions of the defendant's guilt may be mediated by jurors' perceptions of the strength of the prosecutor's case. In other words, the prosecutor's motivation for proffering hearsay may affect jurors' perceptions of the strength of the case against the

135. $F(1, 34) = 9.89, p = .003, \eta^2_p = .23$. See left-hand side of Figure 3.

136. $M = 4.78, SD = 1.06$.

137. $M = 3.83, SD = 0.71$.

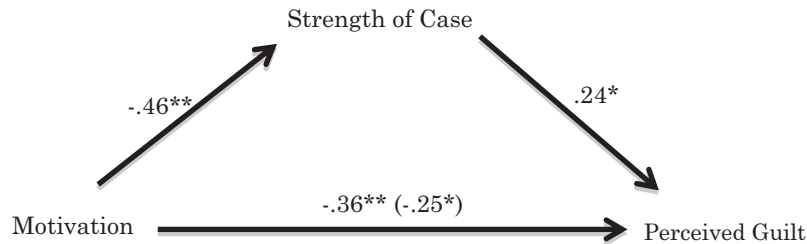
138. $F(1, 34) = 61.70, p < .001, \eta^2_p = .65$. See right-hand side of Figure 3.

139. $M = 5.17, SD = 0.86$.

140. $M = 2.83, SD = 0.92$.

defendant, which in turn may affect jurors' perceptions of the defendant's guilt. As illustrated in Figure 4, mediation analysis confirmed this hypothesis.¹⁴¹ The prosecutor's motivation for proffering hearsay significantly predicted jurors' perceptions of the prosecutor's case,¹⁴² and perceptions of the prosecutor's case, in turn, significantly predicted jurors' perceptions of the defendant's guilt.¹⁴³

Figure 4
Mediation Analysis



E. Judgments of the Evidence and Trial Actors

The final set of analyses examined participants' impressions of the trial evidence and trial witnesses. Participants' ratings of the persuasiveness of the hearsay evidence revealed a significant main effect of motivation¹⁴⁴ and an interaction between motivation and substitution quality.¹⁴⁵ When the hearsay evidence presented was a good substitute, it was deemed more persuasive when it was the result of a benign motive¹⁴⁶ than when it was the result of a suspicious motive.¹⁴⁷ Weaker evidence intensified these effects.¹⁴⁸ Mock jurors' judgments

141. Mediation analysis detects "when a predictor affects a dependent variable indirectly through at least one intervening variable, or mediator." Kristopher J. Preacher & Andrew F. Hayes, *Asymptotic and Resampling Strategies for Assessing and Comparing Indirect Effects in Multiple Mediator Models*, 40 BEHAV. RES. METHODS 879, 879 (2008). The mediation analysis reported in this Article is performed using a linear regression analysis and reports unstandardized coefficients, "B," and standard errors, "SE." It also reports standardized coefficients, "Beta."

142. $B = -.74$, $SE = .14$, standardized Beta = $-.46$, $p < .001$.

143. $B = .25$, $SE = .10$, standardized Beta = $-.24$, $p = .016$. Moreover, the strength of the direct relationship between the prosecutor's motive and jurors' perceptions of the defendant's guilt ($B = -.583$, $SE = .146$, standardized Beta = $-.36$, $p < .001$) was weakened but still significant when the strength of the prosecutor's case was included in the model as a mediator ($B = -.403$, $SE = .161$, standardized Beta = $-.25$, $p = .014$). Thus, as predicted, the strength of the prosecutor's case was a significant partial mediator of the relationship between the prosecutor's motivation and jurors' perceptions of the defendant's guilt (Sobel's $Z = -2.23$, $p = .026$).

144. $F(1, 102) = 28.38$, $p < .001$, $\eta^2_p = .556$.

145. $F(1, 102) = 5.12$, $p = .007$, $\eta^2_p = .10$.

146. $M = 4.72$, $SD = 1.02$.

147. $M = 3.61$, $SD = 1.09$, $t(34) = 3.15$, $p = .003$.

148. $M\text{-benign/poor} = 5.44$, $SD = 1.04$; $M\text{-suspicious/poor} = 2.83$, $SD = 0.86$, $t(34) = 8.21$, $p < .001$.

of the trustworthiness and strength of the hearsay evidence followed a similar pattern.

Mock jurors' assessments of the moral character of the prosecutor revealed a significant main effect of motivation.¹⁴⁹ The prosecutor was rated as more moral when he had a benign reason for introducing hearsay evidence¹⁵⁰ than when he had a suspicious reason for doing so.¹⁵¹ The same pattern holds for jurors' views of the 911 operator who provided the hearsay evidence.¹⁵²

Participants' impressions of the 911 caller were affected by the prosecutor's motivation to proffer hearsay.¹⁵³ When the prosecutor had a benign reason for using hearsay, participants viewed the 911 caller as more moral¹⁵⁴ than when the prosecutor had a suspicious motive for calling the 911 operator to the stand¹⁵⁵ or when jurors were not told the prosecutor's motive.¹⁵⁶ They rated the 911 caller just as moral when the prosecutor put forth hearsay testimony for suspicious reasons,¹⁵⁷ as when the prosecutor did not provide an explanation for calling the 911 operator to the stand.¹⁵⁸

V. FOLLOW-UP PILOT EXPERIMENTS

To further strengthen the results obtained in the main experiment reported in this Article (the "Main Experiment"), I report the results of five short follow-up studies. The follow-up studies served two purposes: (1) to better generalize the results to real-world settings and (2) to control for potential confounding factors that might explain the results reported in the Main Experiment.

These follow-up studies provide evidence that the results reported in the Main Experiment occur in a more realistic trial scenario and replicate across legal actors, across different types of cases, and across different types of hearsay evidence. Further, two potential confounding factors are eliminated as explanations for the results.

149. $F(2, 59) = 5.26, p = .008, \eta^2_p = .195$.

150. $M = 5.50, SD = 1.35$.

151. $M = 4.00, SD = 0.81, t(34) = 4.04, p < .001$. Interestingly, jurors rated the prosecutor as less moral when he provided *no* reason for proffering hearsay evidence ($M = 4.40, SD = 0.70$) compared to a prosecutor who had a benign reason ($M = 5.50, SD = 1.35$), $t(34) = 3.07, p = .004$. No significant difference emerged between participants' morality ratings for a prosecutor who provided no explanation ($M = 4.40, SD = 0.70$) and one who had a suspicious motive for proffering the evidence ($M = 4.00, SD = 0.81$), $t(34) = 1.59, p = .122$. These prosecutors were viewed as equally moral, and participants viewed both as less moral than the prosecutor who had a benign reason for introducing hearsay.

152. $F(2, 59) = 3.64, p = .03, \eta^2_p = .117$.

153. $F(2, 59) = 10.56, p < .0001, \eta^2_p = .28$.

154. $M = 5.20, SD = 1.14$.

155. $M = 3.40, SD = 1.65, t(34) = 3.81, p = .001$.

156. $M = 4.00, SD = 1.15, t(34) = 3.14, p = .003$.

157. $M = 3.40, SD = 1.65$.

158. $M = 4.00, SD = 1.15, t(34) = 1.27, p = .214$.

A. Generalizability

Experimental methods allow for greater control and clearer statements of cause and effect compared to observational or correlational studies.¹⁵⁹ Experimental methods are vulnerable, however, to critiques that they do not measure phenomena as they occur in real life.¹⁶⁰ Experimenters can respond to these critiques by demonstrating that the phenomenon exists in myriad experimental contexts using varied methods. In the absence of perfect external validity,¹⁶¹ such varied results serve as convergent evidence that the phenomenon demonstrated in the laboratory is robust.

I designed three short experiments to increase the generalizability of the results reported in the Main Experiment. These studies test whether jurors scrutinize (1) the motivation behind proffered hearsay when the motivation is not obvious, (2) the motivation behind the trial strategies of criminal defendants and civil plaintiffs, and (3) the motivation behind hearsay that courts would deem inadmissible.

1. Follow-Up Study 1: Imperfect Motivational Information

The Main Experiment informed participants of the prosecutor's motivation to proffer hearsay through a "God's-eye view." The manipulation was purposefully heavy handed; it was designed to test whether perfect information regarding a party's motive for proffering hearsay would inform jurors' judgments when they assigned probative weight to the hearsay evidence. The experiment suggests that jurors do so.

But jurors will rarely have perfect information regarding a party's strategy for proffering hearsay evidence. When jurors have *imperfect* information regarding a party's strategy to proffer hearsay evidence, does that imperfect information affect their judgments of the weight of the hearsay evidence? I designed this follow-up study to answer that question in a manner that more closely mirrors the circumstances surrounding a real trial.

(a) Methodology

This experiment employed the robbery vignette used in the Main Experiment, albeit with several modifications. The motivation of the prosecutor to proffer hearsay was manipulated, as was the substitution quality of the evidence. Participants filled out questionnaires

159. See Robbennolt, *supra* note 105, at 483.

160. See, e.g., Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking*, 12 LAW & HUM. BEHAV. 231, 232 (1988). A more detailed discussion and response to this critique is reserved for Part VI, *infra*.

161. See discussion *infra* in Part VI.

and free-response items that asked questions regarding the prosecutor's decision to proffer hearsay, just as they did in the Main Experiment.

The manipulation of the prosecutor's motive was designed to be substantially subtler in this version of the experiment. Participants in the "benign motive" condition read a lengthy cross-examination of the police officer by the defense attorney, who asked the officer several questions regarding the eyewitness declarant. During the colloquy, the police officer offhandedly mentioned that the eyewitness had died of an unrelated illness before trial.

Participants in the "suspicious motive" condition also read a lengthy cross-examination of the police officer by the defense attorney. In questioning the officer regarding her dealings with the eyewitness, the defense attorney elicited from the officer that she had spoken with the eyewitness as recently as the morning of the trial and that the witness lived and worked in the area. The defense attorney then asked the officer if she knew whether the eyewitness planned to testify, which drew an objection from the prosecutor. The defense attorney then withdrew the question.

Finally, participants in the "blind motive" condition read a cross-examination that did not bear on the prosecutor's potential motivation for declining to call the declarant.¹⁶² All participants then completed the questionnaires.

(b) *Results and Discussion*

Jurors take a party's motivation for proffering hearsay into account when evaluating the evidence even when the prosecutor's motive is less obvious. A two-way ANOVA revealed results remarkably similar to those reported in the Main Experiment: a main effect of motivation,¹⁶³ such that benign hearsay¹⁶⁴ led to greater perceptions of the defendant's guilt than did suspicious hearsay;¹⁶⁵ and a main effect of substitution quality,¹⁶⁶ such that a good hearsay substitute¹⁶⁷ led to greater perceptions of the defendant's guilt than did a poor hearsay substitute.¹⁶⁸

As illustrated in Figure 5, when the hearsay evidence was strong, jurors deemed the evidence more convincing when the facts suggested that the prosecutor had a benign reason for proffering it compared

162. As in the Main Experiment, this condition was omitted to simplify the remaining analyses (specifically, to focus on the differences between participants who were exposed to benign hearsay and those who were exposed to suspicious hearsay).

163. $F(1, 68) = 116.50, p < .001, \eta^2_p = .63$.

164. $M = 4.78, SD = 0.99$.

165. $M = 2.33, SD = 1.04$.

166. $F(1, 68) = 10.17, p = .002, \eta^2_p = .13$.

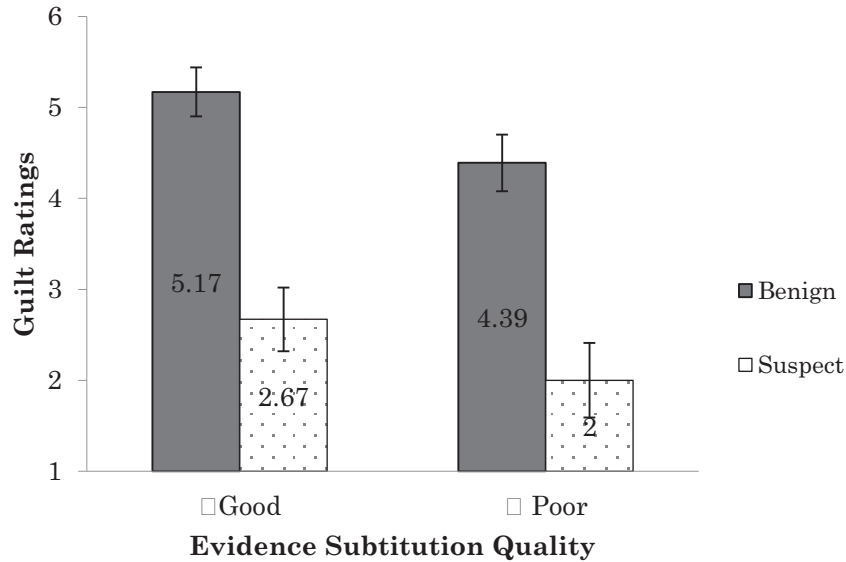
167. $M = 3.92, SD = 1.56$.

168. $M = 3.19, SD = 1.56$.

to a suspicious reason.¹⁶⁹ A similar pattern emerged when the hearsay served as a poor substitute for the in-court testimony.¹⁷⁰

Figure 5

Likelihood of Defendant's Guilt as a Function of Motivation and Substitution Quality



Thus, this follow-up experiment suggests not only that jurors take into account a party's motivation when assigning probative weight to hearsay, but also that they do so with imperfect information.

2. Follow-Up Study 2: Criminal Defendants and Civil Plaintiffs

The Main Experiment suggests that jurors examine a prosecutor's motivation for proffering hearsay when deciding what probative weight to assign the evidence. It is not obvious, however, that jurors will examine the motive of *other* legal actors, including criminal defense attorneys or civil litigants.

There are reasons to believe that jurors might view a prosecutor's motive for putting forth hearsay differently from a defense attorney's motive for doing so. Unlike some litigants, prosecutors always bear the burden of proof and are tasked with additional ethical duties beyond those required of other attorneys.¹⁷¹ These additional ethical

169. $M_{\text{benign}} = 5.17$, $SD_{\text{benign}} = 0.92$; $M_{\text{suspect}} = 2.67$, $SD_{\text{suspect}} = 2.67$; $F(1, 34) = 67.11$, $p < .001$, $\eta^2_p = .67$ (see left-hand side of Figure 3).

170. $M_{\text{benign}} = 4.39$, $SD_{\text{benign}} = 0.92$; $M_{\text{suspect}} = 2.00$, $SD_{\text{suspect}} = 1.08$; $F(1, 34) = 50.95$, $p < .001$, $\eta^2_p = .60$ (see right-hand side of Figure 3).

171. See, e.g., Chris G. McDonough, Diana Brusca McDonough & Raymond G. Keenan, *The Ethical Obligations of the Criminal Prosecutor*, in *MORALITY AND THE LAW* 50 (2001)

duties may reflect a consensus among the legal profession, and among the population at large, that prosecutors should be held to higher standards when presenting their cases, because the liberty or even the life of the defendant is at stake.¹⁷² As a result, jurors might hold prosecutors to higher standards with respect to the evidence that prosecutors put forth to prove the defendant guilty of a crime. Jurors might, therefore, bristle at a prosecutor's suspicious motive for proffering hearsay, particularly when the hearsay is the centerpiece of the prosecutor's case, whereas they might not react similarly to a defendant's (or civil litigant's) suspicious motive.

Conversely, public opinion polls suggest that Americans are suspicious of trial tactics employed by criminal defense attorneys.¹⁷³ Jurors might be even more suspicious of a defense attorney's strategy to provide weaker evidence of trial facts. Thus, we might expect the results reported in the Main Experiment to be even *more* pronounced if the party providing the hearsay evidence is a defense attorney instead of a prosecutor.

In sum, different hypotheses can be formed as to whether the results reported in the Main Experiment are universal—that is, whether the results are replicable to other actors in the criminal system and to actors involved in civil causes of action. Two follow-up experiments addressed these hypotheses.

(a) *Criminal Defendants: Methodology*

The methodology for this follow-up experiment was similar to the methodology employed in the Main Experiment. Participants read a robbery trial vignette in which an attorney's motivation for proffering hearsay evidence was either "benign," "suspicious," or "blind." Further, the hearsay evidence provided was either a good or a poor substitute for the declarant's in-court testimony.

This experiment contained two important differences, however. This time the criminal defense attorney, not the prosecutor, proffered the hearsay evidence. Also, in addition to rating the defendant's likelihood of guilt, mock jurors rendered binary "guilty/not guilty" judgments.

In this version of the robbery vignette, the eyewitness apparently identified to the 911 operator someone *other* than the defendant. The defense attorney introduced this evidence at the trial but did not call the eyewitness to the stand. Instead, the defense attorney proffered

(detailing the myriad additional ethical considerations facing prosecutors, including the pretrial investigation, arrest, decision to prosecute, charging determination, and arraignment of the defendant).

172. *Id.*

173. See, e.g., BELDEN RUSSONELLO & STEWART, DEVELOPING A NATIONAL MESSAGE FOR INDIGENT DEFENSE: ANALYSIS OF NATIONAL SURVEY 18 (2001), available at <http://www.nlada.org/DMS/Documents/1211996548.53/Polling%20results%20report.pdf>.

either the tape of the eyewitness's 911 call or had the 911 operator recount her conversation with the eyewitness. Participants read the vignette and completed questionnaires about the trial.

(b) Results and Discussion

Jurors appear to treat defense attorneys no better—and no worse—than prosecutors with respect to their decisions to proffer weaker evidence of trial facts.

With respect to participants' judgments of the likelihood of the defendant's guilt, the results from this follow-up study mirror the results reported in the Main Experiment. The results revealed a statistically significant main effect of motivation,¹⁷⁴ a significant main effect of substitution quality,¹⁷⁵ and a significant interaction between motivation and substitution value.¹⁷⁶ As in the Main Experiment, participants' judgments were affected by the prosecutor's motivation for proffering hearsay and the quality of the hearsay that was proffered in place of the declarant's in-court testimony.

The defense attorney's decision to proffer hearsay evidence also affected jurors' verdicts with respect to the defendant's guilt. A chi-square test of independence revealed a statistically significant difference in the proportion of guilty verdicts rendered as a function of the defense attorney's motivation for proffering hearsay.¹⁷⁷ As shown in Figure 6, participants were more likely to convict the defendant of robbery when the defense attorney's motive was suspicious compared to when it was benign (and vice versa).¹⁷⁸

174. $F(2, 50) = 5.82, p = .01$.

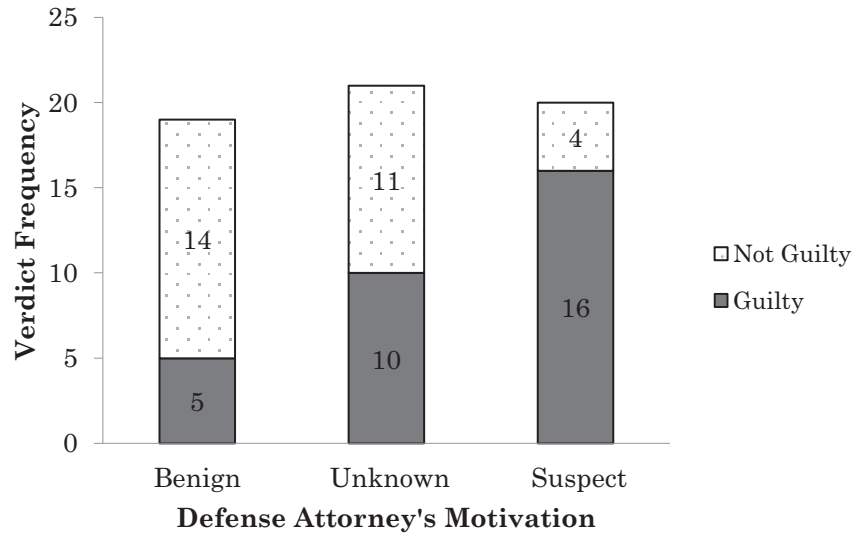
175. $F(1, 50) = 4.08, p = .03$.

176. $F(2, 50) = 4.24, p = .04$.

177. $\chi^2(2, N = 60) = 11.46, p = .003$.

178. $\chi^2(1, N = 39) = 15.83, p < .001$. Jurors were also more likely to convict the defendant when the prosecutor had a suspect motive compared to when the prosecutor's motive was unknown, $\chi^2(1, N = 41) = 5.27, p = .072$ (marginally significant) (post-hoc Marascuilo comparisons of multiple proportions).

Figure 6
Criminal Verdicts Rendered



These results suggest that jurors do not distinguish between prosecutors and defense attorneys in evaluating their motivation for proffering hearsay. Whether an attorney represents the government or the accused, it appears that a perceived suspicious motive affects jurors' judgments of the hearsay evidence, their judgments of the likelihood of the defendant's guilt, and their likelihood to convict the defendant of the crime at issue. The next experiment examines whether jurors behave similarly in the context of civil disputes.

(c) Civil Plaintiffs: Methodology

The methodology for this follow-up experiment was nearly identical to the methodology employed in the Main Experiment, with slight modifications. First, instead of a criminal robbery trial, the trial was framed as a civil wrongful death action in which the convenience store clerk's estate sued the defendant. The same evidence that was provided in the Main Experiment was provided to participants in this study. The prosecutor's motive was either benign, suspicious, or unknown, and the plaintiff proffered either a 911 tape of the eyewitness's conversation with the 911 operator or produced the 911 operator to testify as a hearsay witness. Participants completed questionnaires similar to those completed by participants in the Main Experiment.

(d) Results and Discussion

If jurors' expectations of the quality of the evidence proffered by prosecutors are higher than their expectations of the quality of the

evidence proffered by other attorneys (here, civil plaintiffs' attorneys), we would expect different results from those obtained in the Main Experiment.

The results of this follow-up study suggest that jurors do not treat plaintiffs' attorneys differently from prosecutors with respect to the weight they assign hearsay evidence. As in the Main Experiment, this study revealed a significant main effect of motivation,¹⁷⁹ a significant main effect of evidence substitution quality,¹⁸⁰ and a significant interaction of these variables.¹⁸¹ Again, the plaintiff's motivation affected jurors' views of the hearsay evidence and ultimately their views of the likelihood that the defendant caused the death of the convenience store clerk.

As in the previous follow-up study, the plaintiff's motivation for proffering hearsay evidence affected not only jurors' views of the likelihood that the defendant caused the clerk's death, but also their ultimate judgments of the defendant's civil liability.¹⁸² As shown in Figure 7, jurors more frequently found by a preponderance of the evidence that the defendant caused the clerk's death when the plaintiff proffered hearsay evidence for a benign reason than when the plaintiff proffered it for a suspicious reason.¹⁸³ Conversely, jurors found the defendant liable less frequently when the plaintiff proffered hearsay for a suspicious reason compared to plaintiffs who proffered hearsay for a benign reason.

179. $F(2, 43) = 6.02, p = .01$.

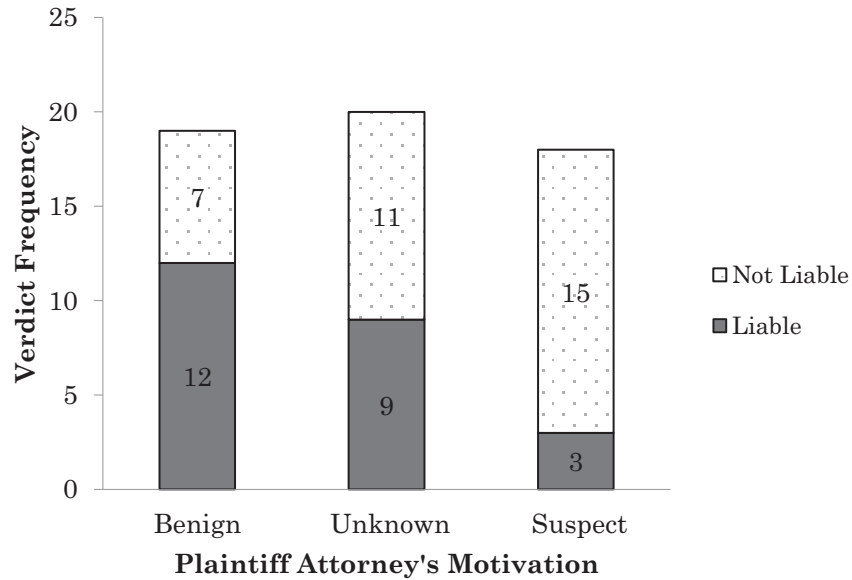
180. $F(1, 43) = 2.91, p = .035$.

181. $F(2, 43) = 3.84, p = .02$.

182. $\chi^2(2, N = 57) = 8.30, p = .016$.

183. $\chi^2(1, N = 37) = 10.83, p = .005$ (post-hoc Marascuilo comparison of multiple proportions).

Figure 7
Civil Verdicts Rendered



In sum, these follow-up studies suggest that jurors' evaluation of hearsay evidence shows no bias toward a particular legal actor—prosecutor, defense attorney, or plaintiff's attorney—or toward a legal case—civil or criminal. Jurors pervasively discount hearsay evidence when parties proffer it for unseemly reasons. But is this true for all types of hearsay? Do jurors analyze hearsay that is deemed inadmissible the same way, even though policymakers deem inadmissible hearsay less reliable than admissible hearsay? The next follow-up study examines these questions.

3. Follow-Up Study 3: Inadmissible Hearsay

The weaker evidence at issue in the Main Experiment consisted of either a 911 tape recording or the direct testimony of the 911 operator, who recalled her conversation with the 911 caller. In both instances, the evidence was admissible hearsay, because both pieces of evidence fit the excited utterance and present sense impression exceptions to the general bar against hearsay evidence.¹⁸⁴ Further, the hearsay evidence is non-testimonial under the United States Supreme Court's Confrontation Clause jurisprudence and is therefore

184. See FED. R. EVID. 803(1), 803(2).

admissible if the hearsay is more probative than it is prejudicial and falls within one of the exceptions to the hearsay bar.¹⁸⁵

Some might argue that admissible hearsay is exactly the wrong type of evidence to use in examining whether jurors think critically about hearsay. They argue that, because it is admissible, this type of hearsay is inherently more reliable than is inadmissible hearsay,¹⁸⁶ and it may not be surprising that jurors think critically when evaluating it.

Jurors, however, generally do not distinguish between admissible and inadmissible hearsay. Indeed, empirical evidence suggests that jurors generally cannot consciously recognize hearsay at all, and cannot categorize it.¹⁸⁷ Moreover, the view that admissible hearsay is more reliable than inadmissible hearsay is based on untested folk wisdom that may not be accurate.

Nonetheless, I devised the following experiment using inadmissible hearsay evidence to determine whether jurors also think critically about a party's motivation to proffer inadmissible hearsay. If jurors evaluate inadmissible hearsay in the same manner in which they evaluate admissible hearsay, then the generalizability of the results obtained in the Main Experiment increases.

(a) *Methodology*

Mock jurors read a vignette in which a knife company sued another knife company for unfair competition in "palming off" a knife made by the defendant to look like the knife made by the plaintiff.¹⁸⁸ The plaintiff offered into evidence a letter written by a wholesaler. The letter read, "We did not find this knife in your catalogue, and we are highly confused because we think it is yours. Is it yours?"¹⁸⁹

The plaintiff did not call the author of the letter to the stand to testify, and participants learned either that the author had died be-

185. See, e.g., *Michigan v. Bryant*, 131 S. Ct. 1143 (2011) (ruling that only "testimonial" hearsay statements, where the defendant has not had an opportunity to cross-examine the out-of-court speaker, violate the Confrontation Clause); *Giles v. California*, 554 U.S. 353 (2008); *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004). A fuller discussion of the Confrontation Clause is reserved for Part VI, *infra*.

186. See, e.g., FED. R. EVID. 803 advisory committee's note ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.")

187. See Paglia & Schuller, *supra* note 59, at 514-15 (finding that jurors have "difficulty with the fine-grained distinction required of the limiting instructions," which instruct the jury to use hearsay information for one purpose but not another).

188. "Palming off" is a legal term for misrepresenting one's goods as goods made by another. See BLACK'S LAW DICTIONARY 1219, 1233 (9th Ed. 2009).

189. This letter is inadmissible hearsay. The plaintiff is attempting to admit the out-of-court statement into evidence for its truth value—that the knife looks identical to the plaintiff's knife—and the letter does not fit an exception to the hearsay rule. See FED. R. EVID. 801(c), 803.

fore trial, that the plaintiff declined to call the author because of concerns that the author would not be a good witness, or learned nothing regarding the reason for the author's absence. Participants then filled out questionnaires in which they were asked to determine whether the defendant was liable to the plaintiff.

(b) Results and Discussion

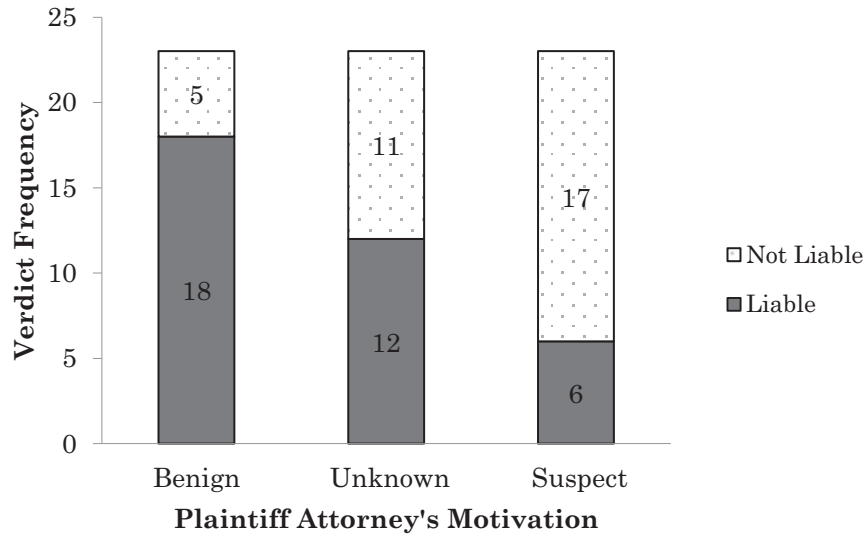
If the results from the Main Experiment are not generalizable to other types of hearsay evidence, then we would expect different results in this follow-up study. The study, however, supports the hypothesis that this behavioral phenomenon—that jurors bristle at receiving weaker evidence and examine a party's motivation for providing it—is not limited to excited utterances or present sense impressions. Rather, this phenomenon appears to extend to inadmissible hearsay as well.

The results from the follow-up study mirror the results from the Main Experiment. A chi-square analysis reveals that the plaintiff's motivation for proffering hearsay affected jurors' judgments that the defendant "palmed off" the knife.¹⁹⁰ As shown in Figure 8, participants more frequently found the defendant liable for unfair competition when they were exposed to a benign-intentioned plaintiff compared to a suspicious-intentioned plaintiff.¹⁹¹ Conversely, participants more frequently found the defendant "not liable" when the plaintiff's intentions were suspicious.

190. $\chi^2(2, N = 69) = 12.55, p = .002$.

191. $\chi^2(1, N = 46) = 17.25, p < .001$ (post-hoc Marascuilo comparison of multiple proportions).

Figure 8
Civil Verdicts Rendered



These results suggest that not only do jurors make motivational inferences with respect to the trial strategy of various legal actors to proffer admissible hearsay, but also that the same phenomenon appears to exist when evaluating inadmissible hearsay—that is, hearsay that policymakers deem less reliable and that jurors may have more difficulty evaluating. In sum, jurors appear to critically evaluate hearsay regardless of the legal actor who proffers it. Further, jurors’ critical evaluations are not limited to specific types of hearsay.

B. Potential Confounds

The follow-up experiments reported in Part A suggest that jurors critically evaluate a party’s strategy for proffering hearsay evidence, which affects the probative weight that they assign the evidence.

These experiments, however, do not eliminate the possibility that confounding factors influenced the results of the Main Experiment. A confounding factor is a rival explanation for the association between two variables or phenomena.¹⁹² If confounding factors exist, it becomes difficult to make clear statements of experimental cause and

192. For example, “if both a decrease in the speed limit and a new seatbelt law precede a [decrease] in traffic fatalities, the seatbelt law would” be a confounding factor with respect to an assertion that the decrease in the speed limit caused the drop in fatalities. “[T]o attribute cause to the [lowered] speed limit, [the seatbelt explanation] must be controlled in some way.” LAWLESS ET AL., *supra* note 104, at 31.

effect. It is therefore important to eliminate confounding factors as an explanation for the experimental results.

The final follow-up studies address two confounds that may have affected the results of the Main Experiment: (1) the perceived credibility of the available hearsay declarant; and (2) the possibility that the questionnaire format measured participants' "test taking" abilities and not their true underlying assessments of how a party's trial strategy affects jurors' perceptions of the probative value of hearsay evidence.

1. Follow-Up Study 4: The Declarant's Credibility

In the Main Experiment, the 911 caller did not testify either because he had died or because the prosecutor worried that the caller would not be a good witness. The possibility exists that, in discrediting the hearsay stemming from the available declarant, jurors might have speculated that the hearsay declarant was inherently less credible; for example, jurors might have believed that the declarant had a prior conviction on his record. I designed the following experiment to determine whether it is the prosecutor's decision not to call the witness or the witness's perceived credibility that jurors are attuned to when they weigh the probative value of the hearsay evidence.

(a) Methodology

This study was a truncated version of the Main Experiment. Participants read the robbery vignette, but the eyewitness always had a prior conviction on his record that could damage his credibility. Half of the participants learned that the prosecutor proffered hearsay because the declarant had died before trial, and half of the participants learned that the prosecutor proffered hearsay evidence because the declarant might not make a good witness. Participants then rated the appropriateness of the prosecutor's decision to proffer hearsay evidence. They also rated the probative weight of the hearsay and explained the reason for their decision.

(b) Results and Discussion

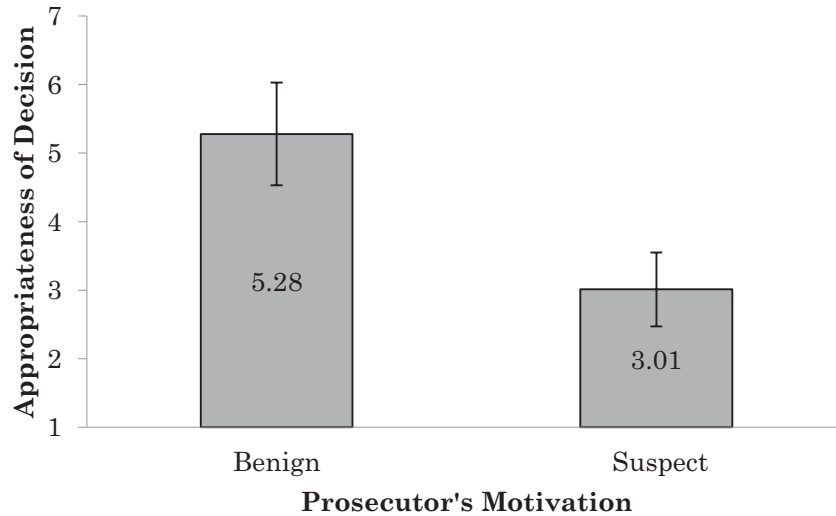
If the declarant's perceived credibility explains the results of the Main Experiment, then we would expect the participants in this follow-up study to rate the appropriateness of the prosecutor's decision the same regardless of experimental condition. Here, both declarants—the one who died and the one who was alive but did not testify—had prior convictions that would affect their credibility. If, however, the decision to proffer hearsay instead of the live declarant's in-court testimony is driving the results of the Main Experiment, we would expect the participants in this follow-up study to statistically

differ with respect to their judgments of the appropriateness of the prosecutor's decision.

The results support the latter hypothesis. Figure 9 reveals that participants exposed to hearsay because the declarant died before trial rated the prosecutor's decision to proffer hearsay as significantly more appropriate than did participants exposed to hearsay because the prosecutor did not want to call the declarant as a witness.¹⁹³ Moreover, these latter participants frequently cited as their reason for discounting suspect hearsay that the declarant's underlying statement was untrustworthy.¹⁹⁴

Figure 9

Judgments of the Appropriateness of the Decision to Proffer Hearsay



These results provide evidence that the credibility of the declarant does not explain the results reported in the Main Experiment. Rather, it appears that the prosecutor's refusal to call the "best" witness led jurors to draw negative inferences about the hearsay evidence independent of the hearsay declarant's credibility.

2. Follow-Up Study 5: Savvy Test Takers

As with most vignette studies, it is possible that the Main Experiment measured participants' test taking abilities instead of the un-

193. M -benign prosecutor = 5.28, SD = 1.15, M -suspicious prosecutor = 3.01, SD = 0.94, $t(32) = 6.00$, $p < .001$. Higher ratings indicate that the decision is deemed appropriate.

194. This explanation was compared against explanations that focused on punishing the prosecutor for her decision. Explanations that focused on the trustworthiness of the evidence outnumbered punitive explanations by a 6:1 margin.

derlying psychological or behavioral phenomenon at issue. Some might argue that participants were simply penalizing the prosecutor because the experiment made it obvious that the participants should do so.

To determine whether savvy test taking explains the results of the Main Experiment, a less direct method of evaluating how jurors respond to potentially unseemly strategic decisions by legal actors is necessary. I constructed a follow-up study in which participants (who thought that the experiment had concluded) chose between ballpoint pens and bottles of Purell® hand sanitizer after reading a trial vignette in which the prosecutor proffered hearsay.¹⁹⁵ If jurors choose the Purell bottle more frequently when the prosecutor's motive is suspicious, this is evidence that the prosecutor's motivation affects jurors on a more visceral level.

(a) *Methodology*

As in the Main Experiment, participants learned of either a benign-intentioned prosecutor or a suspicious-intentioned prosecutor who proffered hearsay evidence. Instead of rating the appropriateness of the prosecutor's actions, however, participants completed reading comprehension questions and "distracter" items, including a word search and sentence completion tasks.

Upon completing the experiment, I provided the participants a choice of two items as compensation for their participation: a ballpoint pen or a small bottle of Purell hand sanitizer.¹⁹⁶ After choosing an item, participants were debriefed and dismissed.

(b) *Results and Discussion*

This follow-up study examined indirectly whether participants in the Main Experiment were simply savvy test-takers, or whether they more viscerally objected to the use of hearsay when the best evidence of a trial fact is available. If participants are simply savvy test-takers, there should be no difference in the proportion of Purell bottles selected and the proportion of ballpoint pens selected by the participants, because the prize selection was (in the participants' eyes) not part of the experiment. If, however, a suspicious trial strategy affects jurors on a more visceral level, that reaction may bleed into their choice of prize. In essence, participants exposed to a suspicious-intentioned prosecutor should select the Purell bottle more frequently

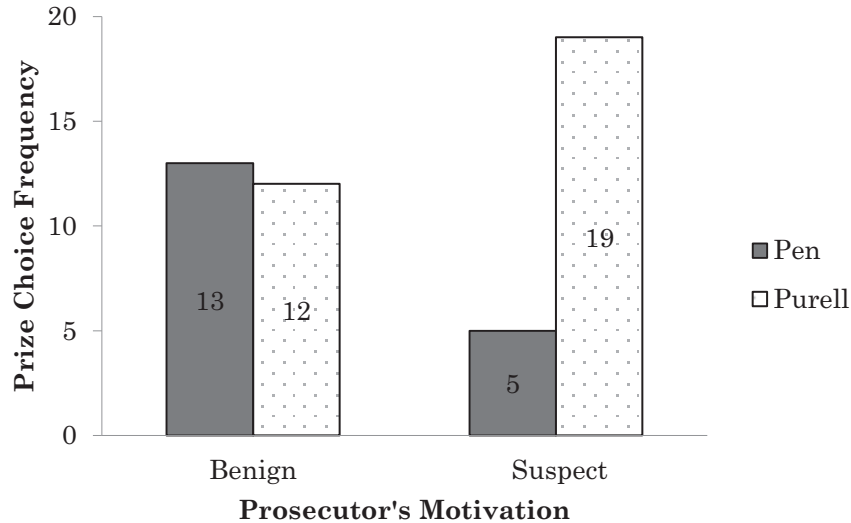
195. This experimental design was created by Kenworthy Bilz in a study of the exclusionary rule. See Kenworthy Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMPIRICAL LEGAL STUD. 149, 163 (2012).

196. Both items have approximately the same retail value and pretest subjects rated the prizes as equally desirable. See *id.*

than the ballpoint pen, while participants exposed to the benign-intentioned prosecutor should choose the pen and the Purell bottle in relatively equal amounts.

The results are displayed in Figure 10 below. A chi-square test of independence revealed a statistically significant difference in the proportions of prizes chosen by participants. Specifically, participants chose the Purell bottle with significantly greater frequency when they were exposed to a suspicious-intentioned prosecutor than when they were exposed to the benign-intentioned prosecutor.¹⁹⁷ Indeed, participants exposed to the suspicious-intentioned prosecutor overwhelmingly chose the Purell bottle, whereas participants exposed to the benign-intentioned prosecutor chose the Purell bottle and the pen in roughly equal numbers.

Figure 10
Participants' Prize Choice



These results strongly suggest that participants in the Main Experiment (and in the subsequent follow-up studies) were not simply perceptive test takers. Rather, a party's decision to proffer suboptimal evidence when the party could have provided the best evidence of a trial fact appears to affect participants in a visceral manner.

VI. IMPLICATIONS, OBJECTIONS, AND FUTURE RESEARCH

The Main Experiment posed two related questions. First, are jurors attuned to a party's motivation to put forth hearsay evidence instead of a declarant's in-court testimony? Second, when a satisfac-

197. $\chi^2(1, N = 49) = 5.12, p = .024$.

tory reason for proffering hearsay evidence is not obvious to jurors, do they draw spontaneous inferences regarding the party's motivation, and do those inferences affect their legal judgments?

The Main Experiment answers these questions in the affirmative. Jurors were attuned to the prosecutor's motivation to put forth hearsay evidence, as reflected in their judgments of the defendant's guilt. When a benign motive for the hearsay evidence was made salient, jurors discounted the hearsay significantly less than they did when a suspicious motive for the hearsay evidence was made salient. In short, a suspicious motive for putting forth hearsay evidence will not go unnoticed by a jury. This appears to be true even when a defendant proffers the evidence, even in the context of civil trials, and even with respect to different types of hearsay evidence.

Interestingly, when a party puts forth hearsay that is a particularly poor substitute for the declarant's in-court testimony, the motivation behind that strategic choice became even more salient to mock jurors. Jurors placed a greater discount on hearsay evidence when it was poor quality and the product of a suspicious motive than when the hearsay was high quality and a product of a suspicious motive.

The results from this study also suggest that jurors spontaneously draw inferences regarding a party's motivation for introducing hearsay evidence when a reason for doing so is not obvious. Jurors appear skeptical of the decision to proffer hearsay, and they attribute suspicious motives to a party that fails to explain why she has not offered stronger evidence.¹⁹⁸ Jurors were just as likely to convict a defendant when the prosecution's case contained "suspicious" hearsay as when jurors were not aware of the reason for the hearsay evidence. But when a benign motive for proffering the hearsay was made salient to jurors, they weighed the hearsay more heavily and were more likely to convict the defendant. Altogether, the results from these studies suggest that jurors consider a party's strategy for proffering hearsay evidence an important variable when evaluating the quality of that evidence.

These effects extended beyond global judgments of the defendant's guilt. The prosecutor's motivation to use hearsay evidence also affected judgments of the prosecution's case, judgments of the individual witnesses, and perceptions of the strength, persuasiveness, trustworthiness, and moral force of the evidence presented. Jurors viewed the prosecutor's case as less persuasive when he had a sus-

198. The responses of study participants to qualitative free-response questions bolster this interpretation of the results. A supermajority of participants who were not told the reason for receiving hearsay evidence expressed concern regarding the declarant's failure to testify.

pect reason for proffering hearsay.¹⁹⁹ They found the 911 operator much less persuasive and trustworthy when the prosecutor had a suspect motive for calling the 911 operator to testify.²⁰⁰ A suspect motive for proffering hearsay evidence caused mock jurors to view the prosecutor as less moral than when the prosecutor had a benign motive for putting forth hearsay. And jurors perceived the 911 caller as less moral when the prosecutor had a suspect motive for proffering hearsay.

Follow-up experiments shed additional light on how jurors think about an attorney's trial strategy when assigning probative weight to evidence. Jurors make motivational inferences even when they are not explicitly told why an attorney has proffered hearsay and instead must glean the attorney's motivation from the circumstances under which the evidence is presented. Moreover, they make these inferences regardless of whether it is a criminal prosecutor, a criminal defendant, or a civil plaintiff who proffers hearsay evidence, and these inferences affect their verdicts as well. Jurors also make these inferences regardless of whether the hearsay is admissible or inadmissible. Confounding factors, including demand effects²⁰¹ and the credibility of the hearsay declarant, do not explain these results.

Even assuming that the experimental results reported in this Article reflect mock jurors' true mental processes when evaluating a party's strategy for proffering hearsay evidence, some might argue that jurors are acting irrationally. They might argue that regardless of a party's motivation to proffer hearsay evidence, the underlying hearsay evidence is the same. Therefore, jurors are focusing on irrelevant factors when assigning weight to hearsay evidence. This argument misses an important point: Because of the additional motivational inferences that jurors can make when a declarant is available but is not called to testify, the underlying hearsay evidence is *not* the same. Realizing that the "best" witness to some trial fact could have been called—but was not called—allows jurors to come to the

199. Moreover, they viewed the prosecutor's case as less persuasive when he did not provide a reason for proffering hearsay, which suggests that jurors suspected that there were probative weaknesses in the declarant's testimony that the prosecutor was attempting to obscure.

200. It is not the case that jurors are simply imputing some impure motive onto the 911 operator by association with an overtly suspicious prosecutor. The 911 operator was seen as less moral even when the prosecutor's motive remained unarticulated.

201. A demand effect is an effect wherein participants form an interpretation of the experiment's purpose and unconsciously change their behavior to fit that interpretation. See, e.g., Martin T. Orne, *Demand Characteristics and the Concept of Quasi-Controls*, in *ARTIFACTS IN BEHAVIORAL RESEARCH* 110, 110 (Robert Rosenthal & Ralph L. Rosnow eds., 2009) ("Special methodological problems are raised when human subjects are used in psychological experiments, mainly because subjects' thoughts about an experiment may affect their behavior in carrying out the experimental task.").

reasonable conclusion that there are likely to be probative weaknesses in the declarant's testimony.²⁰²

Nonetheless, some may argue that there are myriad reasons why a party might fail to call the "best" witness, and so a juror's default assumption that the declarant's testimony must contain probative weaknesses will not always be accurate. This may be true sometimes. Nonetheless, it may not be the most useful way in which to evaluate juror decisionmaking. In a real trial, we never know with absolute certainty whether or not a defendant has committed a crime. Thus, defining "accuracy" in this way is not particularly meaningful because we cannot measure the accuracy of factfinders' verdicts in real trials.²⁰³ What we can measure, however, is whether information that should be relevant to jurors is, in fact, relevant to them and informs their judgments. To the extent that relevant information does inform their judgments, this is evidence of good decisionmaking. The experiments reported in this Article suggest that jurors make use of relevant information surrounding a party's decision to proffer hearsay evidence.

Altogether, these findings suggest that a party's strategic decisions at trial play a crucial role in explaining how jurors evaluate hearsay. They also have implications for the jury as an institution and for trial attorneys.

A. *Legal Implications*

1. *Juror Decisionmaking*

The results reported in this Article provide new information regarding how jurors process evidence. Recall that past research suggests that judgments of the persuasiveness of an argument are affected by the perceived motivation of the presenter. For example, mock jurors were able to disregard potentially prejudicial pretrial publicity when they had reason to believe that the disseminator of that publicity was biased against the defendant.²⁰⁴ This social psychological phenomenon extends not only to pretrial publicity, but also to

202. Some might also wonder whether jurors were simply punishing the prosecutor because he may have been trying to hide evidence from them—a perceived moral failing that is irrelevant to the probative value of the evidence. The experiments do not support this explanation. When asked why they were discounting the evidence, participants more often listed reasons relating to potential weaknesses in the underlying evidence than they did reasons indicating that they wished to "punish" the prosecutor.

203. It is theoretically possible to construct an experiment that can determine the magnitude of the weight jurors give to motivational inferences regarding a party's trial strategy. An experimenter could attempt to create a Bayesian model of optimal juror decisionmaking with respect to hearsay evidence and compare it against the weight that jurors actually afford the evidence. Such an experiment has its own challenges, however. For example, it would be difficult to calculate the prior probabilities crucial to a Bayesian analysis.

204. See Dunning, *supra* note 55, at 481; Fein et al., *supra* note 68, at 1220.

a more subtle action: the decision to proffer hearsay instead of the declarant's in-court testimony.

The results reported in this Article also add to past research on how jurors perceive legal actors who appear to be "hiding" or omitting evidence. Prior research suggests that defendants who invoke the Fifth Amendment right against self-incrimination are judged by jurors as more likely to be guilty than defendants who do not.²⁰⁵ Further, jurors are more likely to convict defendants who appear less than forthcoming, even if they do not invoke the Fifth Amendment.²⁰⁶ Similarly, it appears that jurors view the strategic choice to proffer hearsay for a suspect purpose as a way of "hiding" probative weaknesses in the underlying evidence, and jurors weigh the hearsay evidence consistent with this suspicion.

The findings reported in this Article also contribute to researchers' understanding of juror behavior more generally. Although research suggests that jurors engage in potentially irrational decisionmaking at various stages of trial,²⁰⁷ researchers have also found consistently that the single best predictor of jury verdicts is what we would expect it to be: the weight of the evidence.²⁰⁸ The studies reported in this Article showcase another area in which jurors appear to make rational decisions: when evaluating hearsay evidence. Beyond that, this study suggests that juries consider an attorney's strategic choices in ways that the law may not appreciate fully. It is not obvious that policy-makers expect juries to evaluate a party's strategy for proffering hearsay evidence when weighing the evidence. Yet that is what they appear to do.

These findings have implications for how jurors process evidence beyond the context of hearsay. The studies reported in this Article suggest that jurors prefer direct evidence to circumstantial evidence. They also suggest that jurors think critically when evaluating "lesser" forms of evidence. Perhaps these findings also suggest that parties should be given greater freedom to present their cases to a jury in the manner they deem the most effective and persuasive. To the extent parties proffer weaker evidence in support of trial facts, the legal system may be best served by trusting the jury to give this weaker evidence less weight.

205. See Hendrick & Shaffer, *supra* note 16.

206. See Shaffer et al., *supra* note 94, 1238-40.

207. See, e.g., SUNSTEIN ET AL., *supra* note 20, at 185; Diamond & Levi, *supra* note 23, at 225; Hazelwood & Brigham, *supra* note 21, at 710-12.

208. See NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 150 (2007).

2. *The Hearsay Doctrine*

The data presented in this Article, coupled with past empirical data on hearsay, suggest that the normative conversation among policymakers over the propriety of the hearsay doctrine should change. The argument for barring hearsay evidence at trial rests on several rationales.²⁰⁹ As other scholars have argued, one of the touchstone arguments for disallowing hearsay evidence at trial is the concern that jurors are insensitive to factors that might cause hearsay to be unreliable.²¹⁰ For example, because the out-of-court declarant usually is not cross-examined, jurors may fail to appreciate that the declarant may have lied, may have been biased, or may simply have been mistaken when she made her statement. Similarly, although the hearsay witness can be cross-examined, jurors may still fail to appreciate fully the possibility that the witness may be lying, biased, or mistaken about the declarant's statement.

Prior research suggests, however, that jurors are skeptical of hearsay evidence and consider shrewdly the effects of cognitive factors such as age and time on the reliability of hearsay statements.²¹¹ The experiments reported in this Article suggest that jurors are also "motivationally intelligent" consumers of hearsay. When jurors cannot discern the strategy behind a party's choice to proffer hearsay evidence, they grow skeptical of the evidence and discount it accordingly. Thus, the empirical data with respect to how jurors perceive hearsay trends largely in one direction: jurors think much more critically about hearsay than the law currently recognizes.²¹²

If the belief that jurors incompetently evaluate hearsay evidence does not withstand empirical scrutiny, policymakers should consider peeling away, "like layers on an onion,"²¹³ this empirically untenable argument and refocus the debate on philosophical and democratic objections. For example, we might worry that allowing hearsay evidence to be admitted at trial may discredit the judiciary in the eyes of the public,²¹⁴ may lead to unfair surprise,²¹⁵ may lead to inconsistent verdicts,²¹⁶ or may delay the finality of verdicts.²¹⁷

209. See, e.g., Nesson, *supra* note 36, at 1372-73; Park, *supra* note 35, at 1057-60.

210. See, e.g., Landsman & Rakos, *supra* note 26, at 70-72.

211. See Dunlap et al., *supra* note 53, at 25; Pathak & Thompson, *supra* note 52, at 372-74.

212. See, e.g., Dunlap et al., *supra* note 53, at 35-36; Kovera et al., *supra* note 50, at 714-15; Meine et al., *supra* note 7, at 699.

213. Thompson & Pathak, *supra* note 33, at 470.

214. Swift, *supra* note 34, at 512 n.43.

215. See Landsman & Rakos, *supra* note 26, at 79-81.

216. See Park, *supra* note 35, at 1064 (referring to Nesson's suggestion that the hearsay rules support stable verdicts).

217. Nesson, *supra* note 36, 1372-75. Interestingly, many of these philosophical and democratic objections make untested empirical claims about the behavior of litigants, fact-finders, and the public.

It may serve hearsay policymakers well to focus the normative conversation about hearsay on the value of confrontation, which some scholars have argued should be the sole rationale for the hearsay bar.²¹⁸ The Supreme Court has recently breathed new life into the Sixth Amendment's Confrontation Clause in a series of cases examining the hearsay doctrine. In a series of decisions over the past decade, the Court has clarified that, apart from the various rationales underlying the exclusion or admission of hearsay evidence, a defendant has an absolute constitutional right under the Sixth Amendment to cross-examine her accuser if the accuser makes an out-of-court, testimonial statement against the defendant.²¹⁹ If the defendant cannot do so, then the court must exclude the hearsay statement.²²⁰ The future of the hearsay debate may likely turn on these important constitutional issues. However policymakers choose to refocus the normative debate over the hearsay doctrine, they should clear out the underbrush. The view that jurors do not critically evaluate hearsay evidence lacks empirical support.

3. *Trial Practice*

The experimental results reported in this Article should interest trial practitioners. Within guidelines established by rules, statutes, and state and federal constitutions, trial attorneys have significant freedom to present their case by any means possible. Thus, attorneys are confronted with a menu of strategic choices in advocating for their clients. There are myriad reasons why a witness may become unavailable to testify at trial. During the often lengthy period that precedes a trial on the merits, witnesses may die, become ill, move away from the jurisdiction, or decide that they do not wish to testify.

218. See Park, *supra* note 35, at 1057-58 (quoting WIGMORE, *supra* note 26, and explaining that Wigmore believed that "the essence of the Hearsay rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination").

219. See Michigan v. Bryant, 131 S. Ct. 1143 (2011); Giles v. California, 554 U.S. 353 (2008); Davis v. Washington, 547 U.S. 813 (2006); Crawford v. Washington, 541 U.S. 36 (2004).

220. The Supreme Court has attempted to clarify the scope of a "testimonial" statement in later cases. See *Bryant*, 131 S. Ct. 1143; *Davis*, 547 U.S. 813. The Confrontation Clause, of course, applies only in criminal—not civil—trials, and does not apply to non-testimonial statements, such as attempts to alert police officers to an ongoing emergency. *Bryant*, 131 S. Ct. at 1153-55; *Giles*, 554 U.S. at 357-58; *Davis*, 547 U.S. at 822. Moreover, the fact that myriad hearsay exceptions exist at all—including exceptions that appear to be based on necessity rather than on the inherent reliability of the statement—may be evidence that confrontation is not the sole basis for the hearsay bar. See FED. R. EVID. 804 advisory committee's note ("Rule 803 . . . is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant [R]ule [804] proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. . . . [H]earsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant.").

The trial attorney is then put in a quandary: if the witness has not died but is otherwise unavailable, does the attorney expend resources, including money and time, to ensure that the testimony reaches the jury, or does the attorney use hearsay to ensure that the evidence reaches the jury, albeit in an indirect way?

This study suggests that trial attorneys should conduct a thorough cost-benefit analysis when answering that question and that the perceived motivation for proffering a hearsay witness is an important variable that trial attorneys must consider carefully. Putting forth hearsay evidence is not a costless endeavor. Jurors are likely to discount hearsay evidence compared to a declarant's in-court testimony. When they cannot discern a clear motive for the use of hearsay, or if they perceive the motive for using hearsay to be suspect, jurors become suspicious of potential probative flaws in the declarant's out-of-court testimony. The results from this study suggest that, if an out-of-court declarant's testimony is critical to her case, an attorney should spare little expense in procuring the witness if a benign reason for proffering hearsay would not be obvious to the jury.

This study also suggests that judges should allow attorneys to explain to the jury, either in opening or closing statements, their reasons for proffering hearsay. To the extent that allowing an attorney to do so falls to the discretion of the trial judge, experimental research suggests that motivation matters—whether it is the motivation of the defendant, the expert witness, or the attorney.²²¹ Thus, trial judges should afford attorneys this freedom to assist the jury in making an informed judgment about the evidence presented. If an attorney is not permitted to explain her reasons for proffering hearsay, it would serve her well to make her motivation for proffering hearsay clear to the fact finder through other means, including the direct- and cross-examination of witnesses.

Conclusions on the basis of one experimental Article should be modest. In this study, the available declarant was always in the area and apparently could have testified if he had been called as a witness. But how would jurors evaluate a strategic decision to proffer hearsay evidence when the declarant is not in the immediate area and it would be expensive to procure her testimony? Continued research on the effects of a party's motivation to proffer hearsay might produce a model that provides practitioners with best practices for how to put forth evidence in the most effective manner at trial.

At least one lesson seems abundantly clear: This study suggests that there is a measurable and significant strategic drawback to presenting hearsay or other weaker evidence, even if that evidence has

221. See *supra* notes 86-98 and accompanying text.

the imprimatur of the Federal Rules. Simply because a party *can* proffer evidence does not mean that she *should* proffer it.

B. Caveats and Future Research

As with most mock juror experiments, several caveats apply. First, mock jurors in this study did not deliberate before rendering their verdicts. Some researchers have found that group deliberation can affect individual mock juror judgments.²²² But Kalven and Zeisel have found that by far the best predictor of verdicts rendered by deliberating juries is the pre-deliberation judgments of the jury majority.²²³ In other words, most jurors' judgments do not change radically as a result of discussion with other jurors. Nonetheless, researchers have found consistently that group deliberations can polarize the judgments of individual group members.²²⁴ It follows that the interaction of motivation and substitution quality observed in the Main Experiment might be even greater in a real-world setting in which jurors deliberate before rendering their verdicts. Thus, the effects of group deliberation on juror judgments of a party's tactical decision to use hearsay might be a fruitful area for future research.

Second, as with all vignette studies, there is a concern that the experimental results may not replicate in real-world trials. The experiments in this Article required participants to read a criminal trial vignette and answer written questions. Ideally, participants would observe a real trial (or an authentic trial reenactment) and render judgments that participants believe have real consequences to the trial participants. Practical concerns, including the potential confounds that may arise from using actors to portray trial participants, and the ethical problems of placing study participants in a situation in which they believe they could send a criminal defendant to prison make such ideal experimental designs impractical. Although researchers have found that results obtained in artificial laboratory conditions often replicate in real-world situations,²²⁵ researchers can strengthen their laboratory results by using a variety of experimental designs and methods to create convergent validity for their claims.

The findings reported in this Article are an important first step in understanding the ways in which jurors consider a party's motivation when evaluating hearsay evidence. Researchers should continue to

222. See Thomas R. Carretta & Richard L. Moreland, *The Direct and Indirect Effects of Inadmissible Evidence*, 13 J. APPLIED SOC. PSYCHOL. 291,308 (1983).

223. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 488-89 (1966).

224. See Jerry K. Palmer & James M. Loveland, *The Influence of Group Discussion on Performance Judgments: Rating Accuracy, Contrast Effects, and Halo*, 142 J. PSYCHOL. 117, 118-19 (2008).

225. Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Decision Making*, in BEHAVIORAL LAW AND ECONOMICS 73 (Cass R. Sunstein ed., 2000).

identify contextual factors that affect judgments about hearsay. For example, this experiment examined how jurors responded to two different motivations by the prosecutor for proffering hearsay: necessity (the “benign” motive) or a desire to shield the declarant from cross-examination (the “suspect” motive). But a party’s motivation for putting forth hearsay likely falls on a continuum between these extremes. Future research might examine how jurors respond to other types of motivation for proffering hearsay. For example, how would a jury view the motivation of a party who puts forth a hearsay witness when the declarant is physically available but *legally* unavailable because she invokes an evidentiary privilege? Answers to these questions will clarify the contexts in which a party’s motivation has the greatest effect on mock jurors’ judgments about hearsay.

Future researchers might also explore the origins for the tendency of jurors to scrutinize a party’s strategy for proffering hearsay. To the extent that we believe that jurors think critically about hearsay, do they also possess an unconscious aversion to lesser evidence? Or is the hearsay bar itself—of which jurors are presumably aware—causing jurors to be suspicious of the evidence? Researchers might answer these questions by comparing American attitudes toward hearsay with the attitudes of people from countries that have less stringent hearsay rules.²²⁶ They might also compare the attitudes of participants in administrative hearings—which do not follow the rules of evidence and place minimal restrictions on hearsay evidence—with the attitudes of trial participants toward hearsay.

The “hoary issue of hearsay”²²⁷ provides multiple challenges for the empirical researcher. The hearsay doctrine is complex, arguably inconsistent, and consists of numerous, sometimes conflicting, rationales for its existence. But even though empirical examinations of hearsay are in their infancy, researchers have made great strides in determining the cognitive and motivational factors to which fact finders are attuned when presented with this complex evidence. The study reported in this Article suggests that a party’s motivation for proffering hearsay is an important factor that jurors consider when assigning hearsay evidence its probative weight. On a grander scale, it also suggests that in contexts—such as the hearsay context—where jurors are confronted with weaker evidence when stronger evidence is available, we should trust jurors to examine the attendant strategic circumstances that surround the decision to proffer that evidence

226. It would be worthwhile to study whether jurors critically evaluate other types of evidence that are, under certain circumstances, barred out of a concern that jurors will incompetently evaluate them. Future researchers might examine how jurors respond to a litigant’s use of character evidence, a party’s prior bad acts, or a party’s subsequent remedial measures. *See generally* FED. R. EVID. 404, 407, 609.

227. Dunning, *supra* note 55, at 482.

and trust them to weigh the evidence accordingly. More research in this vein will provide informational benefits to judges, juries, attorneys, the legal academy, and ultimately the legal system and society in which these actors function.