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Testing Tribe's Triangle

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Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance

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Since its inception, evidence policymakers have vacillated with respect to whether the rule barring hearsay evidence at trial is a doctrine designed to promote decisional accuracy or a doctrine designed to promote procedural justice.

To the extent that policymakers view the rule barring hearsay evidence as promoting decisional accuracy, the rationale for this view stems from the "testimonial triangle" promulgated by Professor Laurence Tribe, which conceptualizes the objections to hearsay evidence at common law. Tribe's testimonial triangle states that (1) several infirmities lurk behind all testimony provided in court, and (2) testimony based on hearsay is subject to two sets of infirmities—those of the in-court witness and those of the original declarant. With respect to hearsay evidence, policymakers fear that jurors do not attend appropriately to the infirmities of the original declarant—who is not subject to in-court cross-examination—and will give hearsay evidence undue weight.

This Article reports the results of the first empirical examination of the testimonial triangle. The studies reported in this Article suggest that, consistent with behavioral science research on implicit goal activation and psychological distance, jurors are attuned to the testimonial infirmities that lurk beneath hearsay evidence and discount the evidence defensibly. These findings have important implications for the hearsay doctrine, for the contentious debate over juror competency, and for practicing attorneys who make decisions about hearsay evidence at trial. They also provide a theoretical framework for further empirical hearsay research and suggest that policymakers should focus their debate over the hearsay doctrine on the degree to which the doctrine promotes procedural justice, not decisional accuracy.

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INTRODUCTION

> "[M]y Lords, let my accuser come face to face and be deposed. Were the case but for a small copyhold, you would have witnesses or good proof to lead the jury to a verdict; and I am here for my life!"
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> –Sir Walter Raleigh (1603)[1]

1. DAVID JARDINE, CRIMINAL TRIALS 427 (1832).

At his trial for high treason in 1603, the British Crown accused Sir Walter Raleigh of participating in a conspiracy to overthrow King James I of England and install King James's cousin, Arbella Stuart, as the queen of England.[2] The initial stage of Raleigh's trial was remarkable in one fundamental respect: in attempting to prove its case against Raleigh, the Crown produced no live witnesses against him. Instead, the Crown produced hearsay evidence in the form of a purported confession, implicating Raleigh, from Raleigh's alleged co-conspirator, whom Raleigh believed had recanted.[3] When Raleigh challenged the Crown to produce as a live witness the confession's author, Baron Cobham—who was being held in a prison cell not far from the great hall in which Raleigh was being tried—the Crown rebuffed his request.[4]

Unfortunately for Raleigh, his request to cross-examine Baron Cobham spurred the Crown to produce its sole live witness against him, and this witness's testimony further incriminated Raleigh. The witness, a boat pilot named Dyer, testified that while he had been in Lisbon, a Portuguese citizen had told him, "[Y]our King [James] shall never be crowned, for Don Cobham and Don Raleigh will cut his throat before he come to be crowned."[5] Raleigh objected to the admissibility of this hearsay statement, but his triers remained undeterred.[6] Although Raleigh beseeched the Crown to consider the cost to the legal system of convicting a defendant based on potentially faulty hearsay evidence—"upon an accusation not subscribed by [one's] accuser"—the jury took less than fifteen minutes to find Sir Walter Raleigh guilty of high treason as charged.[7] Raleigh was sentenced to death and, after a short reprieve from the

2. *The Trial of Sir Walter Raleigh*, *in* 2 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON 1, 1 (1809); *see also* Crawford v. Washington, 541 U.S. 36, 44 (2004) (discussing Raleigh's trial).

3. JARDINE, *supra* note 1, at 434 ("[M]y Lord Cobham is the only one that hath accused me, for all treasons urged upon me are by reflection from him. It is now clear that he hath since retracted; therefore since his accusation is recalled by himself, let him now by word of mouth convict or condemn me.").

4. *Id.* at 427. Raleigh reportedly said to the Crown, "[I]t is strange to see how you press me . . . with my Lord Cobham, and yet will not produce him . . . let him be produced, and if he will yet accuse me or avow this Confession of his, it shall convict me and ease you of further proof." The Crown responded that (1) "[t]here must not such a gap be opened for the destruction of the King as would be if we should grant" Raleigh's request; (2) "so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced"; and (3) if Baron Cobham were to testify, he "may for favour or fear retract what formerly he hath said, and the jury may, by that means, be inveigled." *Id.*

5. *Id.* at 436.

6. *Id.*

7. *Id.* at 442. Raleigh reportedly said to the jury:

> [I]f you yourselves would like to be hazarded in your lives, disabled in your posterities,—your lands, goods, and all that you have confiscated,—your wives, children, and servants left crying to the world; if you would be content all this should befal[l] you upon a trial by suspicions and presumptions,—upon an accusation not subscribed by your accuser,—without the open testimony of a single witness, then so judge me as you would yourselves be judged.

Id.

Crown, was beheaded in the Old Palace Yard at the Palace of Westminster.[8]

Although recently discovered documents suggest that Raleigh's role in the attempted coup d'état is an open question,[9] many British citizens viewed the outcome of his trial as a serious miscarriage of justice.[10] Legal scholars believe that the trial of Sir Walter Raleigh was on the minds of those who authored and ratified the Sixth Amendment to the United States Constitution, and that the Sixth Amendment's confrontation clause was drafted, in part, to address potential miscarriages of justice like the potentially incorrect verdict in the Raleigh trial.[11] The case may have even served as the manger in which the American bar against hearsay evidence was born.

The hearsay rule, a vexingly complex doctrine that purports to bar secondhand evidence in court, has received significant attention from legal academics,[12] who have pored over its myriad intricacies in an effort to understand fully its contours and implications.[13] The difficulties that legal academics have

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8. RALEIGH TREVELYAN, SIR WALTER RALEIGH 543–552 (2002). At his execution, Raleigh is reported to have said to his executioner regarding his axe, "This is a sharp medicine but it is a physician for all diseases." *Id.* at 552. Indeed, his final words are reported to have been, "Strike man, strike!" *Id.*

9. *See, e.g.*, Noah Kotch, *Musty Records Sully Our Legend*, NEWS AND OBSERVER (Raleigh, N.C.), July 5, 1996, at A1.

10. *See, e.g.*, JARDINE, *supra* note 1, at 487 (recounting the words of one of the trial judges in Raleigh's case who stated "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh").

11. *See, e.g.*, Ben Trachtenberg, *Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause*, 64 FLA. L. REV. 1669, 1674 (2012) (citing Michael L. Seigel & Daniel Weisman, *The Admissibility of Co-Conspirator Statements in a Post-*Crawford *World*, 34 FLA. ST. U. L. REV. 877, 882 (2007)); *see also* 30 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6342 (West 2014).

12. *See* 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).

13. *See generally, e.g.*, Jeffrey Bellin, *Applying* Crawford*'s Confrontation Right in a Digital Age*, 45 TEX. TECH. L. REV. 33 (2012); Anthony Bocchino & David Sonenshein, *Rule 804(b)(6)—The Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 MO. L. REV. 41 (2008); Daniel J. Capra, *Amending the Hearsay Exception for Declarations Against Penal Interest in the Wake of* Crawford, 105 COLUM. L. REV. 2409 (2005); Ted Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682 (1962); Stanley A. Goldman, *Not So "Firmly Rooted": Exceptions to the Confrontation Clause*, 66 N.C. L. REV. 1 (1987); Michael H. Graham, *The Confrontation Clause, The Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523 (1988); Marilyn J. Ireland, *Deconstructing Hearsay's Structure: Toward a Witness Recollection Definition of Hearsay*, 43 VILL. L. REV. 529 (1998); Liza I. Karsai, *The "Horse-Stealer's" Trial Returns: How* Crawford*'s Testimonial–Nontestimonial Dichotomy Harms the Right to Confront Witnesses, the Presumption of Innocence, and the "Beyond a Reasonable Doubt" Standard*, 62 DRAKE L. REV. 129 (2013); Laird C. Kirkpatrick, *Confrontation and Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 MINN. L. REV. 665 (1986); Roger W. Kirst, *Does* Crawford *Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35 (2005); Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271 (2006); Edmund M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948) [hereinafter Morgan, *Hearsay Dangers*]; Robert P. Mosteller, Crawford v. Washington*: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511 (2005); Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual*

confronted in developing a coherent understanding of the hearsay doctrine is evidenced in part by their inability to agree on the rationale for the rule's existence.

Recently, the hearsay rule has vacillated between two primary rationales. Some evidence policymakers argue that that the hearsay rule allows judges and juries to make more factually accurate decisions. Other evidence policymakers, however, believe that the rule barring hearsay promotes procedural justice because it disallows into evidence information from accusers whom the defendant cannot or could not confront.[14]

To the extent that evidence policymakers believe that the hearsay doctrine promotes decisional accuracy, this rationale relies on an implicit criticism of jury decisionmaking. Policymakers fear that—were hearsay to be admitted into evidence—jurors would not afford hearsay its appropriate evidentiary weight and would overvalue the evidence.[15] For example, these policymakers fear that jurors would credit—and heavily weight—the testimony of a witness whose testimony should be disregarded, and in so doing may convict an innocent defendant. A coherent framework for understanding why jurors would overvalue hearsay evidence, however, was largely unarticulated until Professor Laurence Tribe published a path-breaking article on the hearsay rule forty years ago in the *Harvard Law Review*.

Laurence Tribe, a prominent constitutional law professor at Harvard Law School, authored one of the leading articles for understanding how common law judges believed the hearsay doctrine promotes decisional accuracy.[16] Tribe conceptualized their concerns about hearsay evidence in terms of a "testimonial triangle," in which several infirmities potentially lurk beneath the surface of all testimony: infirmities of faulty perception, faulty memory, insincerity, and narrative ambiguity.[17] With respect to hearsay evidence, these dangers are

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Abuse Prosecutions, 1993 U. ILL. L. REV. 691 (1993); Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367 (1992); John C. O'Brien, *The Hearsay Within Confrontation*, 29 ST. LOUIS U. PUB. L. REV. 501 (2010); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51 (1987); Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827 (2008); David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1 (2009); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339 (1987); Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974); Stephen Aslett, Comment, Crawford*'s Curious Dictum: Why Testimonial "Nonhearsay" Implicates the Confrontation Clause*, 82 TUL. L. REV. 297 (2007).

14. *See infra* section I.B; *see also* ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 8, 23 (2005) (discussing the traditional view of evidence law as facilitating the pursuit of truth).

15. *See infra* section I.B.

16. Tribe, *supra* note 13. Professor Tribe's "testimonial triangle," *id.* at 958, creates a coherent framework to understand the potential dangers of hearsay evidence acknowledged in the common law and in an influential article published in the *Harvard Law Review* thirty-five years earlier, *see* Morgan, *Hearsay Dangers*, *supra* note 13. Tribe expresses clear reservations about the wisdom and consistency of the hearsay doctrine in his article. *See* Tribe, *supra* note 13, at 957 ("Except for the liberalizing effects of some statutes and a handful of pathbreaking decisions in limited areas, the law of hearsay has persisted in its essentially unsatisfactory state.").

17. Tribe, *supra* note 13, at 958–59.

twofold because they potentially exist within the evidence provided by the hearsay declarant and beneath the testimony of the in-court witness. Yet, only the evidence provided by the in-court witness is subject to cross-examination that may expose the infirmities.[18] Evidence policymakers therefore worry that the failure to cross-examine the hearsay declarant and expose any infirmities in the information she provides will cause fact finders to attribute to hearsay evidence more probative value than the information deserves, which may cause fact finders to reach inaccurate verdicts.

Tribe's framework has been cited numerous times and appears in many evidence casebooks.[19] It also carries with it the assumption that jurors do not appropriately attend to potential infirmities that lurk within hearsay declarants' evidence. If jurors discount hearsay evidence for the reasons that Professor Tribe articulates in his article, however, the concerns about the negative effects of hearsay evidence on the ability of the courts to make accurate decisions might be overstated. The question raised by Tribe's testimonial triangle is an empirically testable one that has gone unanswered in the scholarly literature until now.

This Article reports the results of two original studies that seek to start a dialogue with respect to whether jurors are more attuned to testimonial infirmities in hearsay evidence than policymakers believe. This Article relies on principles of cognitive and social psychology to hypothesize that (1) psychologically "distant" evidence, such as hearsay, has less persuasive force with jurors than does in-court testimony, and (2) goal-directed behaviors—such as the desire to evaluate the credibility of evidence—can extend outside of our awareness to more psychologically distant stimuli, even if that stimuli is not the focus of our conscious attention. The first study examines whether mock jurors recognize when testimonial infirmities are present in testimony—either with respect to the in-court witness or with respect to the hearsay declarant who does not testify—in a hypothetical criminal case, and whether they discount the evidence accordingly. The results suggest that jurors discount the weight that they place on faulty hearsay evidence to the same degree irrespective of whether the faultiness of the evidence originates from the in-court witness or the out-of-court declarant.

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18. *Id.*

19. A citation count in the legal search engine WestlawNext™ reveals that Professor Tribe's article has been cited in 116 different academic works. Additionally, his "testimonial triangle" has appeared in, or has been discussed in, several academic casebooks including RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES, (5th ed. 2011); SYDNEY BECKMAN ET AL., EVIDENCE: A CONTEMPORARY APPROACH (2d ed. 2012); KENNETH S. BROUN ET AL., PROBLEMS IN EVIDENCE (5th ed. 2011); GEORGE FISHER, EVIDENCE (3d ed. 2013); ERIC D. GREEN ET AL., PROBLEMS, CASES, AND MATERIALS ON EVIDENCE (3d ed. 2001); RICHARD O. LEMPERT ET AL., A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES (5th ed. 2014); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS (7th ed. 2011); ROGER C. PARK & RICHARD D. FRIEDMAN, EVIDENCE: CASES AND MATERIALS (12th ed. 2013).

The second study extends this research by examining a previously unstudied topic—multiple hearsay—and investigates whether jurors discount the strength of a prosecutor's case when it relies on increasing levels of hearsay evidence.[20] The study finds that jurors spontaneously discount hearsay evidence, even when that evidence is not subject to cross-examination, and that they discount hearsay evidence more steeply as the number of hearsay propositions within the hearsay evidence increases. The results from these studies suggest that the decisional accuracy rationale for the rule barring hearsay evidence may not withstand empirical scrutiny.

This Article proceeds in several parts. Part I provides an overview of the hearsay doctrine, describes how Tribe's testimonial triangle serves as a popular rationale for the view that the rule barring hearsay promotes decisional accuracy, and describes prior empirical scholarship on hearsay evidence. Part II provides a cognitive and social psychological framework—currently lacking in the empirical literature—for understanding why jurors are better at evaluating hearsay than policymakers believe. Parts III and IV present the methodology and results of the original studies reported in this Article that evaluate the tenets of Tribe's testimonial triangle. Finally, Part V explores implications for the hearsay doctrine, juries, and policymakers; responds to potential objections; and concludes that policymakers would be better served by focusing on the benefits that the hearsay doctrine confers with respect to procedural justice—for example, the right to confront one's accusers—rather than empirically dubious assertions about the effects of the hearsay rule on a fact finder's ability to make accurate decisions.

I. THE HEARSAY DOCTRINE AND TRIBE'S TRIANGLE

Part I of this Article conceptually defines hearsay, recounts the exemptions and exceptions to the rule barring hearsay evidence, and explains the manner in which the Sixth Amendment Confrontation Clause intersects with the hearsay rule. Having defined hearsay, it then discusses the decisional accuracy rationale for the rule barring hearsay evidence in terms of Tribe's testimonial triangle. Finally, it recounts how jurors evaluate hearsay evidence in the laboratory setting and the limitations of that research.

20. Multiple hearsay, also referred to as "hearsay within hearsay," exists when two or more propositions that qualify as hearsay exist in the same statement or document proffered as evidence to the court. For example, a document that recounts a statement made by someone other than the author of that document is hearsay within hearsay. The document itself is an out-of-court statement used in court for the truth of its contents and is therefore hearsay. *See infra* Part I. Moreover, the statement contained in the document is also an out-of-court statement being proffered in court for the truth of its contents, and so also is hearsay. In these instances, courts require that each hearsay proposition fall within an exception to the hearsay rule for the document to be admitted into evidence. *See* FED. R. EVID. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.").

A. HEARSAY OVERVIEW

The bar on hearsay purports to ban secondhand information from the courtroom.[21] Secondhand information can take several forms, including verbal statements, actions with a communicative purpose, or writings.[22] Whatever its form, the information must be (1) an out-of-court communication; (2) used in a legal proceeding; and (3) used for the purpose of proving the truth of the matter being asserted in the communication.[23] The third prong of this definition complicates the doctrine substantially. If an out-of-court communication is proffered in court for a purpose other than the truth of the matter asserted in the communication, the communication is not classified as hearsay. For example, in a probate dispute between a decedent's heir and the devisee of his will, if the decedent's competency at the time he wrote the will is in dispute, the devisee potentially could offer into evidence letters written to the decedent at the time he made his will implying that the decedent was competent and that the devisee was meant to receive the decedent's property.[24] Although the jury would likely be instructed that it may consider the letters only for the purpose of resolving the issue of whether the decedent was competent,[25] the letters would be deemed non-hearsay because they are offered not to prove that the defendant intended the devisee to inherit his estate, but that the decedent was competent to compose the will.

Moreover, policymakers have exempted from the formal definition of hearsay two different types of evidence that nonetheless meet the conceptual definition of hearsay.[26] The first of these hearsay exemptions involves the prior statements of a witness who testifies at trial. Although these statements are, by definition, out-of-court statements and are being used to prove the truth of the matters asserted therein, courts will allow them into evidence and exempt them from the hearsay rule if they (1) are given under penalty of perjury and are inconsistent with the declarant's current in-court testimony; (2) are consistent with the

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21. *See* FED. R. EVID. 802 ("Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.").

22. *See* FED. R. EVID. 801(a) ("'Statement' means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.").

23. 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.").

24. For another example of a statement that would be classified as hearsay or non-hearsay depending on the context under which that statement is used in court, see Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys' Strategic Choices*, 40 FLA. ST. U. L. REV. 1, 8 n.28 (2012) (examining the use of an out-of-court statement regarding the existence of aliens in a case for civil commitment).

25. *See, e.g.*, FED. R. EVID. 105 ("If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."). For an English case decided differently on facts similar to this hypothetical scenario, see Wright v. Tatham, (1837) 112 Eng. Rep. 488 (Ex Ch).

26. *See* FED. R. EVID. 801 advisory committee's note (clarifying that these exemptions were created from "experience [rather] than . . . logic").

declarant's in-court testimony and offered to rebut a charge of recent fabrication; or (3) identify a person as someone the declarant perceived earlier, for example, as an eyewitness.[27] The second of these hearsay exemptions involves admissions by party opponents, whereby the classification as non-hearsay rests "on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule."[28]

In addition to conceptual hearsay that has been exempted from the hearsay bar for policy reasons, there also exist twenty-eight hearsay "exceptions" under the Federal Rules of Evidence.[29] The first set of exceptions can be conceived of as "reliability exceptions" because these statements are allowed into evidence due to (untested) notions that they are likely to be as reliable as in-court testimony that is subject to cross-examination.[30] These hearsay statements include, for example, present sense impressions of events, excited utterances about an event, statements made for the purpose of medical treatment, and business records.[31]

The second set of exceptions can be conceived of as "necessity exceptions." They require that the declarant be unavailable and are allowed into evidence on the theory that providing some evidence on specific issues at trial is better than the complete loss of that evidence.[32] These exceptions include, among others, former testimony from an absent witness, dying declarations, and statements against interest.[33]

To complicate matters further, recent legal developments have created uncertainty with respect to whether these twenty-eight hearsay exceptions are lawful

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27. *See* FED. R. EVID. 801(d)(1).

28. FED. R. EVID. 801(d)(2) advisory committee's note.

29. *See* FED. R. EVID. 803, 804.

30. *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," and explaining the rationale for the excited utterance exception as "simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication"); *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).

31. *See* FED. R. EVID. 803(1)–(23).

32. The advisory committee explained:

> 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.

FED. R. EVID. 804 advisory committee's note.

33. *See* FED. R. EVID. 804(b)(1)–(6).

under the Confrontation Clause of the Sixth Amendment to the United States Constitution. Under the Confrontation Clause, a criminal defendant has the right, among others, "to be confronted with the witnesses against him."[34] Evidence that is admitted pursuant to an exception to the hearsay rule, however, often originates from an accuser whom the defendant cannot or could not confront.

For decades, the United States Supreme Court interpreted the Confrontation Clause so that evidence admitted under an exception to the hearsay rule did not violate the Constitution. For example, in *Ohio v. Roberts*, the Supreme Court held that the admission into evidence of the statement of a witness who testified at a preliminary hearing, but was unavailable to testify at the trial, did not violate the Confrontation Clause. The Court held that the factual circumstances surrounding the testimony at issue carried "indicia of reliability" because the witness had been functionally (if not technically) cross-examined by defense counsel at the preliminary hearing; thus, it was unlikely that the witness's testimony was infirm.[35] The Court further held that hearsay statements that fall "within a firmly rooted hearsay exception"—that is, exceptions to the hearsay rule under Federal Rules of Evidence 803 and 804—presumptively do not violate the Confrontation Clause because cross-examination would not root out testimonial infirmities in such evidence.[36]

This framework was nearly upended in 2004, however, in the Supreme Court's decision in *Crawford v. Washington*.[37] In *Crawford*, the defendant stood trial for attacking a man whom he believed had raped his wife. In separate interrogations, the defendant's wife stated that the victim did not have a weapon, whereas the defendant stated that he was unsure whether the victim was armed. The defendant's wife later claimed marital privilege and did not testify, and the prosecutor introduced her statements to the police into evidence because the statements had been partially corroborated by her husband. The defendant was convicted.[38]

The Supreme Court reversed the conviction. The *Crawford* Court held that the Confrontation Clause requires that actual confrontation occur, and that indicia of a statement's reliability cannot adequately substitute for it.[39] Relying on this rationale, the *Crawford* Court held that "testimonial" hearsay statements

34. U.S. CONST. amend. VI.

35. Ohio v. Roberts, 448 U.S. 56, 66–77 (1980) (discussing "indicia of reliability").

36. *Id*. at 66 ("In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.").

37. 541 U.S. 36 (2004).

38. *Id*. at 41.

39. *Id*. at 68–69 ("*Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").

are inadmissible if the declarant is unavailable and the testimonial statement at issue was not subject to cross-examination.[40] In cases expanding on *Crawford*, the Supreme Court clarified that testimonial statements are, from the point of view of the reasonable person in the declarant's situation, statements whose primary purpose is to be used at trial.[41]

But just a few years later, the Court signaled a potential retreat back to its position in *Ohio v. Roberts*, in which certain hearsay statements with indicia of reliability satisfy the Confrontation Clause. In *Michigan v. Bryant*, the defendant was convicted of murder based, in part, on a statement that his victim made to a police officer before he died.[42] The Michigan Supreme Court reversed Bryant's conviction because the victim's testimonial statement was not subject to cross-examination. The United States Supreme Court reversed, holding that the primary purpose of the victim's statement was not testimonial but was to aid the police officer in attending to an ongoing emergency.[43]

Although the Court's rationale appears consistent with *Crawford*, other language in the opinion suggests a partial return to the standard articulated in *Ohio v. Roberts*. The Court noted that assisting an ongoing emergency is not the sole reason that a hearsay statement can be classified as non-testimonial; rather, in making that determination, "standard rules of hearsay, designed to identify some statements as reliable, will be relevant."[44] Whether a future Court decides to accept the *Bryant* Court's invitation to reincorporate *Roberts* into its hearsay jurisprudence remains to be seen.

The proposition that secondhand information should be barred in legal proceedings may be the only straightforward aspect of the hearsay doctrine. The numerous exemptions and exceptions to the rule, coupled with the current uncertainty regarding how the rule intersects with the Sixth Amendment's Confrontation Clause, have contributed to a doctrine that resembles Swiss cheese.[45] Understanding why this is so and what policymakers see as the

40. *Id.* at 68 ("Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.").

41. *See* Davis v. Washington, 547 U.S. 813, 829–33 (2006) (defining a non-testimonial statement as one in which the victim spoke about events as they were happening and whose statements were designed to seek help for an ongoing emergency); *see also* Michigan v. Bryant, 131 S. Ct. 1143, 1150 (2011) (classifying as a non-testimonial statement one in which the primary purpose was to seek assistance for an ongoing emergency); Giles v. California, 554 U.S. 353, 358 (2008) (assuming without deciding that a statement in which the declarant spoke to a police officer who responded to a non-emergency domestic-violence report was testimonial).

42. 131 S. Ct. at 1150.

43. *Id.* at 1151, 1158–60.

44. *Id.* at 1155 ("[T]here may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."); *see also id.* at 1168 (Scalia, J., dissenting) ("[T]oday's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles.").

45. *See, e.g.*, Elliotte M. Harold, Jr., *The Hearsay Rule: The Law of Evidence's Swiss Cheese*, 21 LOY. L. REV. 279, 279 (1975).

guiding rationale behind the hearsay doctrine requires an examination of Tribe's testimonial triangle.

B. JUSTIFYING THE BAN ON HEARSAY: TRIBE'S TRIANGLE

The rationale for the rule barring hearsay is a moving target at best and, at worst, a futile game of policy Whac-A-Mole. Throughout history, policymakers have struggled to come to a consensus regarding why American courts should disallow hearsay evidence. For example, some policymakers expressed concern that hearsay statements are not taken under oath, unlike in-court statements,[46] whereas others worried that if hearsay statements were allowed, judges might have too much discretion—presumably under Federal Rule of Evidence 403[47] or its state-law counterparts—to determine which hearsay statements are ultimately allowed into evidence.[48] Still other scholars expressed concern that hearsay evidence will lead to a discrediting of the legal system in the eyes of the public,[49] or worse, that hearsay declarants might later challenge the accuracy of statements attributed to them by others at trial, creating chaos for appellate courts.[50]

Primarily, the hearsay doctrine has oscillated between two rival rationales: (1) that the rule barring hearsay promotes decisional accuracy by precluding jurors from overvaluing unreliable evidence; or (2) that the rule barring hearsay promotes procedural justice by disallowing evidence from accusers whom the defendant is not able to confront.[51] The oscillation between these rationales is exemplified by recent United States Supreme Court opinions evaluating the hearsay rule. Since 1980, the rationale for excluding hearsay focused on the potential unreliability and untrustworthiness of hearsay evidence (and the corol-

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46. *See, e.g.*, GEOFFREY GILBERT, THE LAW OF EVIDENCE 106–08, 889 (Garland Publ'g 1979) (1754); Landsman & Rakos, *supra* note 12, at 68–69.

47. FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

48. *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).

49. *See, e.g.*, Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CALIF. L. REV. 495, 495 (1987) ("[R]eliance on . . . hearsay declarants threatens important values related to the rationality and fairness of trial adjudication."); *see also* Mortimer R. Kadish & Michael Davis, *Defending the Hearsay Rule*, 8 LAW & PHIL. 333, 349 (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 allows. Hearsay, on the other hand, puts the trier of fact at least one remove in a role resembling that of a court of appeals."). This rationale assumes that the public will perceive verdicts that rely on hearsay evidence to be less accurate and the result of an unfair process. Presently, there are no empirical data to support this concern.

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

51. The decisional accuracy rationale for the rule barring hearsay evidence has existed since the nineteenth century, *see supra* note 46 and accompanying text, but had fallen out of favor. The rationale has seen a rebirth in recent years. *See, e.g.*, Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 167–68 (2006).

lary that jurors will overvalue it).[52] For example, in *Ohio v. Roberts*, the constitutionality of the out-of-court transcript offered into evidence was specifically conditioned on whether it had "indicia of reliability" such that it fell within a firmly rooted hearsay exception or contained independent guarantees of trustworthiness.[53] The Supreme Court, however, retreated toward a fear of "trial by ambush"[54] in its reasoning in *Crawford v. Washington* in 2004.[55] There, the Court disavowed the evidentiary trustworthiness rationale and instead focused on, among other concerns, the procedural unfairness of having evidence presented against a defendant by an out-of-court accuser.[56] But seven years later, in *Michigan v. Bryant*, the Court showed signs of softening the "trial by ambush" rationale and signaled a potential resurrection, to some degree, of its pre-*Crawford* jurisprudence focusing on the unreliability of hearsay evidence.[57]

Perhaps the best conceptualization of the common law belief that the hearsay rule promotes decisional accuracy was provided by Professor Laurence Tribe in a comment published in the *Harvard Law Review* in 1974.[58] In his article, Tribe asserted that all testimony requires a chain of inferences by the fact finder to get from a witness's statement (or action) to a conclusion about that statement (or action) that the fact finder can evaluate.[59] The chain of inferences becomes unreliable (and the evidence faulty) if one of four testimonial infirmities infects the process from the point when a witness makes a statement about an event to the event that the act or statement is supposed to reflect. These testimonial infirmities include: (1) faulty perception of the event at issue; (2) faulty memory

52. This rationale can be traced to nineteenth-century English courts in which Lord Mansfield expressed concern that "no man can tell what effect [hearsay] might have upon [lay jurors'] minds." Berkeley Peerage Case, [1811] 171 Eng. Rep. 128, 135 (H.L.) (Lord Mansfield C.J.); *see also* Morgan, *Hearsay Dangers*, *supra* note 13, at 179–83.

53. *See supra* note 35 and accompanying text (discussing "indicia of reliability").

54. *See* 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) (discussing lawmakers' concerns over "trials by ambush" if hearsay is allowed into evidence); *see also* Regina A. Schuller, *Expert Evidence and Hearsay: The Influence of "Secondhand" Information on Jurors' Decisions*, 19 LAW & HUM. BEHAV. 345, 346 (1995) (same).

55. *See supra* notes 37–40 and accompanying text.

56. *See supra* notes 39–40 and accompanying text.

57. 131 S. Ct. 1143, 1155 (2011) ("[T]here may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."); *see also id.* at 1168 ("[T]oday's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles.") (Scalia, J., dissenting). The procedural fairness rationale appears in post-*Bryant* decisions from the Court, although these decisions also discuss evidentiary reliability and decisional accuracy. *See, e.g.*, Williams v. Illinois, 132 S. Ct. 2221, 2243–44 (2012).

58. Tribe, *supra* note 13. The stated goal of the comment was "to assist students of the law in understanding an otherwise complex" doctrine and to direct "the attention of students, practitioners, and judges . . . away from cookbook formulas of rule and exception." *Id.* at 957–58. Tribe expressed hope that his article "may dramatize the inconsistencies and oddities that pervade hearsay law," which "may be a first step to future reform." *Id.* at 958.

59. *Id.* at 958–59.

of the event; (3) insincerity about what actually transpired; and (4) narrative ambiguity, such that the actor cannot accurately convey to others what she has witnessed.[60]

To illustrate his point more concretely, Tribe created a testimonial triangle (pictured below) through which all evidence flows. The triangle contains two primary "routes":

The Direct Route (Point A to Point C). At the lower-left corner of the triangle lies the declarant's action. If the chain of inferences could flow from the act to the conclusion directly, no testimonial infirmities would be implicated.

The Indirect Route (Point A to Point B to Point C). But with all human testimony, before a fact finder can reach the lower-right corner of the triangle, the fact finder must detour through the upper portion of the triangle, which represents the actor's *belief* about her action.

Under the indirect route (through which all trial testimony flows), two questions must be answered, which implicate the testimonial infirmities:

Left Leg (Point A to Point B). First, does the action or utterance reflect the actor's true belief? If she is being insincere or if she is narratively ambiguous, the reliability of the chain of inference is broken.[61]

Right Leg (Point B to Point C). Second, if she is not being insincere or ambiguous, does her sincere, unambiguous belief reflect reality? If she did not correctly perceive the event, or if her memory of that event has failed her, then the chain of inferences is broken.[62]

The testimonial triangle applies to all in-court testimony, but hearsay evidence requires the fact finder to evaluate two testimonial triangles: that of the in-court witness and that of the hearsay declarant. And yet only the testimonial triangle of the in-court witness can be evaluated meaningfully by an attorney's cross-examination.[63] Thus, the risk for allowing hearsay evidence to be used in court is that, absent indicia of reliability or trustworthiness, legal fact finders will be unable to correctly evaluate the probative weight to place on hearsay evidence and may overvalue it, akin to what may have happened in the trial of Sir Walter Raleigh.[64]

At present there is, however, no empirical evidence to corroborate the belief that jurors do not attend appropriately to infirmities that may lurk in the

60. *Id.*; *see also* Morgan, *Hearsay Dangers*, *supra* note 13, at 189–205.

61. Tribe, *supra* note 13, at 959–61.

62. *Id.*

63. This issue is exacerbated when testimony includes double or triple hearsay.

64. Professor Tribe, however, describes three categories of hearsay that can overcome the concerns expressed in the testimonial triangle and can be admitted into evidence. First are hearsay statements grounded in the existence of an adequate procedural substitute for in-court cross-examination. The second category consists of hearsay statements that a party has no inherent right to cross-examine, such as an admission by a party to litigation. The final category of hearsay statements includes those whose specific attributes mitigate specific infirmities expressed in the triangle. *See* Tribe, *supra* note 13, at 961–69.

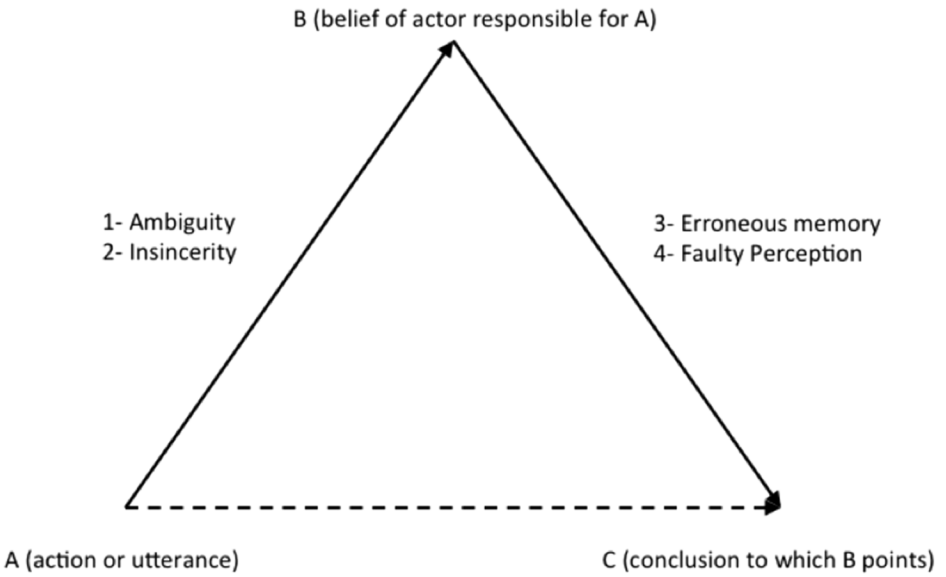

Figure 1: The Testimonial Triangle

testimonial triangle of out-of-court hearsay declarants. Policymakers who use the testimonial triangle as a rationale for barring hearsay evidence must necessarily believe that jurors do not already discount hearsay evidence inasmuch as it cannot be vetted in court in the manner in which live testimony can be vetted. If, in fact, jurors do consider the potential testimonial infirmities that underlie hearsay evidence—and adjust the probative value that they assign to that evidence—this might signal to evidence policymakers that (1) the concerns about jury behavior conceptualized in the testimonial triangle are overstated; and (2) the decisional accuracy rationale for the hearsay rule—that jurors overvalue hearsay evidence—may not be empirically sound. Although no studies have yet examined this question, they have focused on the general question of how jurors process hearsay evidence. These studies are important not only for what they add to our understanding of how jurors evaluate hearsay but also for what they omit.

C. TESTING THE HEARSAY DOCTRINE: EMPIRICAL SCHOLARSHIP

Empirical studies of hearsay evidence have not yet examined whether jurors' evaluations of hearsay evidence are consistent or inconsistent with Tribe's testimonial triangle. The research to date has, however, identified general factors to which jurors attend when deciding whether to credit hearsay statements and factors to which jurors do not attend. As a prelude to the studies reported in this Article, this section describes the current state of empirical hearsay research and its limitations, noting that this research often does not address the specific concerns about hearsay evidence that matter to evidence rulemakers.

The proposition that jurors overvalue hearsay evidence because hearsay declarants are not subject to in-court cross-examination is an empirical proposition that is based on little more than folk wisdom regarding how jurors process information.[65] Empirical testing of the hearsay doctrine, which began in the early 1990s, challenges this wisdom and has yielded several insights regarding how jurors respond to hearsay evidence.

The early experiments, which frequently took the form of vignette studies presented to mock jurors, examined whether jurors discount hearsay evidence during trial. In one study, researchers manipulated the strength of various pieces of hearsay evidence and examined how jurors reacted to that evidence.[66] The effects of the strength of the hearsay evidence on their verdicts were complex, but jurors' reactions to the hearsay evidence tracked the strength of the evidence, as manipulated by the experimenters, which suggests that jurors competently evaluated it.[67] Similar experiments found that the addition of an eyewitness to a prosecutor's case is more likely to affect jury verdicts than is the addition of the same information in hearsay form, which also indicates that jurors place a discount on hearsay evidence when they weigh it.[68]

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65. *See supra* notes 29–33 and accompanying text (illustrating evidence policymakers' rationales for various evidentiary rules—for example, the dying declaration exception to the hearsay rule—and noting that they do not rely on empirical evidence).

66. Landsman & Rakos, *supra* note 12, 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.*

67. *Id.* at 76.

68. *See* Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 685 (1992); *see also* Margaret Bull Kovera et al., *Jurors' Peceptions 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. Kovera et al., *supra*, at 707–10. 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 et al., *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 et al., *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 testimony 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 greater 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

Later experiments explored various factors that moderate mock jurors' abilities to scrutinize hearsay evidence and complicated the empirical narrative. Researchers have found that, in general, jurors are attuned to certain cognitive factors, such as the age and suggestibility of the hearsay declarant, when they evaluate the probative weight to give hearsay evidence.[69] Other researchers have found that jurors are also attuned to motivational factors, such as the hearsay declarant's reason for not serving as a witness (if that reason could be gleaned from the evidence), when evaluating the strength of the evidence presented against the defendant.[70]

There are limitations, however, to jurors' ability to scrutinize hearsay evidence. Jurors do not attend sufficiently to certain factors that may affect the reliability of second-hand hearsay statements, including some of the potential information loss inherent in them.[71] For example, a police investigator in a child abuse case might believe that during the interview a child spontaneously implicated her parent as an abuser—which might cause a court to admit the incriminating statement into evidence under the excited utterance exception to the hearsay rule—when the interviewer herself may have suggestively elicited the "spontaneous" statement from the child.[72]

Moreover, jurors appear unskilled at using hearsay for limited purposes, for example, to illustrate a witness's state of mind,[73] and the evidence is mixed with respect to whether jurors are capable of disregarding certain types of hearsay once that information has been stated in court.[74]

These initial experiments provide an appropriate starting point to examining the decisional accuracy rationale for the hearsay rule, but they have a patchwork

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and then consequently also increased ratings of defendant guilt"). Although the vast majority of this research focuses on child hearsay in the context of cases involving abuse, the psychological principles appear to extend to declarants who are not children. Miene et al., *supra*, at 687 (finding similar effects using adult declarants).

69. *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); *see also* 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). *But see* Golding et al., *supra* note 68, at 433–34 (discussing situations in which age of the witness does not affect the judgment reached).

70. Sevier, *supra* note 24, at 14–20.

71. *See* Julie A. Buck et al., *When Does Quality Count?: Perceptions of Hearsay Testimony About Child Sexual Abuse Interviews*, 28 LAW & HUM. BEHAV. 599, 619 (2004); *see also* 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, 357, 369 (1999).

72. *See* Warren & Woodall, *supra* note 71, at 369; *see also* David Dunning, *On the Social Psychology of Hearsay Evidence*, 5 PSYCHOL. PUB. POL'Y & L. 473, 477 (1999).

73. *See* Dae Ho Lee et al., *The Effects of Judicial Admonitions on Hearsay Evidence*, 28 INT'L J.L. & PSYCHIATRY 589, 590–91 (2005); 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 54, at 349.

74. *Compare* Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407, 422 (1995), *with* Lee et al., *supra* note 73, at 590–91.

quality to them that has led one psychologist to deem the research "inchoate."[75] To meaningfully affect hearsay policy, more research is necessary, and scientists have called for further studies to explore unanswered questions.[76] More importantly, however, the research must address specific questions about hearsay that matter to evidence policymakers.

Altogether, the results from empirical hearsay scholarship converge on the conclusion that jurors generally understand that hearsay evidence is less probative than other types of evidence. Even so, empirical hearsay scholarship has had little effect on evidence policymakers' decisions about the propriety of the hearsay rule. This is likely because evidence policymakers have specific concerns about the hearsay rule that the current empirical research has failed to address. The decisional accuracy rationale for the prohibition on hearsay evidence is premised on the presence of unevaluated infirmities within the information provided by out-of-court hearsay declarants. But empirical hearsay scholars have yet to evaluate systematically whether that proposition withstands scrutiny. This query forms the basis of two studies reported in this Article.

II. THE ROLE OF PSYCHOLOGICAL DISTANCE

Prior empirical research has provided a useful starting point for continued study of how jurors evaluate hearsay evidence. But these studies lack a coherent psychological framework for explaining *why* jurors appear to scrutinize hearsay evidence to a greater degree than evidence policymakers believe. Such a framework could provide a theoretical roadmap for the directions for future research. This Part briefly proposes a framework for understanding this phenomenon—by drawing on previous research in cognitive and social psychology—and introduces the original studies reported in this Article. The theoretical framework focuses on the phenomena of psychological distance and automatic goal-directed behavior.

A. CONSTRUAL LEVEL THEORY AND "DISTANT" EVIDENCE

The hearsay rule is routinely explained in terms of the actors involved—that is, almost exclusively in terms of hearsay declarants and in-court witnesses. But another way in which to examine the effect of evidence on legal fact finders is to think of the evidence in terms of its distance from the juror. Research findings from the psychological literature on construal level theory suggest that people construe information in their environment differently depending on its distance from the individual.[77] These findings have legal implications.

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75. Dunning, *supra* note 72, at 479.

76. *See* Lucy S. McGough, *Hearing and Believing Hearsay*, 5 PSYCHOL. PUB. POL'Y & L. 485, 494–95 (1999); *see also* Thompson & Pathak, *supra* note 54, at 465.

77. *See* Yaacov Trope & Nira Liberman, *Construal-Level Theory of Psychological Distance*, 117 PSYCHOL. REV. 440, 440 (2010).

When people think about distance, they most commonly think of physical separation along a spatial plane.[78] This is unsurprising because the ability to make spatial distinctions such as "near-far" is evident in humans at approximately three months of age.[79] Besides having obvious evolutionary survival implications, this ability manifests itself because the environmental inputs are readily available to the infant's senses. Visual stimuli are generally much easier to analyze than more abstract phenomena, such as one's internal states, that often prove difficult even for adults.[80]

This universal understanding of physical distance serves as a bridge toward more abstract notions of "distance," largely because humans tend to analogize higher-order psychological and philosophical concepts to phenomena in the physical world.[81] For example, in an experiment in which participants were asked to categorize words as either positive or negative, researchers found that participants categorized the words more quickly when positive words were spatially presented in the upper half of the computer screen and when negative words were presented in the lower half of the screen.[82] Other experiments have conceptually replicated these findings.[83]

The concept of "psychological distance" is a principal component of construal level theory, which states that individuals ascribe different social meaning to psychologically close and distant objects in their environment in systematic ways.[84] Construal level theorists argue that psychological distance serves as an umbrella term that embodies four different dimensions, including spatial distance (physical space), temporal distance (time), social distance (interpersonal relations), and hypothetical distance (that is, imagining whether certain events are likely or unlikely).[85] Construal level theorists contend that thinking about the past or future, a remote location, someone else's perspective in a social situation, or counterfactual alternatives to a social situation are all different forms of the same underlying process.[86] The psychological distance between an

78. *See, e.g.*, Lawrence E. Williams & John A. Bargh, *Keeping One's Distance: The Influence of Spatial Distance Cues on Affect and Evaluation*, 19 PSYCHOL. SCI. 302, 302–03 (2008).

79. *See* Herbert H. Clark, *Space, Time, Semantics, and the Child*, *in* COGNITIVE DEVELOPMENT AND THE ACQUISITION OF LANGUAGE 27, 38 (Timothy E. Moore ed., 1973) (describing perception differences between objects that are near or far); *see also* Jean M. Mandler, *How to Build a Baby: II. Conceptual Primitives*, 99 PSYCHOL. REV. 587, 589 (1992) (noting that babies can separate foreground objects from background at approximately three months of age).

80. *See generally* TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002) (discussing in depth the difficulty of truly understanding one's internal states); *see also* Williams & Bargh, *supra* note 78, at 303.

81. Mandler, *supra* note 79, at 596.

82. Brian P. Meier & Michael D. Robinson, *Why the Sunny Side Is Up: Associations Between Affect and Vertical Position*, 15 PSYCHOL. SCI. 243, 246 (2004).

83. *See, e.g.*, Clark, *supra* note 79; *see also* Lera Boroditsky, *Metaphoric Structuring: Understanding Time Through Spatial Metaphors*, 75 COGNITION 1, 8–16 (2000).

84. *See* Trope & Liberman, *supra* note 77, at 441. *But see* Williams & Bargh, *supra* note 78, at 303 (arguing that the self need not necessarily be the referent for psychological distance).

85. Trope & Liberman, *supra* note 77.

86. *Id.*

observer and the object of the observer's attention is rife with social meaning; for example, choosing a seat farther away from another person—or waiting a significant amount of time to return that person's telephone call—are perceived by others as reflecting social distance.[87] These concepts have implications in myriad psychological domains, including visual perception,[88] categorization,[89] impression formation,[90] heuristic processing,[91] social influence,[92] self-regulation,[93] negotiation,[94] and emotion.[95]

Psychological distance is relevant to human information processing because people process information in systematically different ways depending on the social space that they perceive between themselves and the information.[96] Specifically, construal level theory predicts that humans form high-level, abstract representations of psychologically distal objects and form low-level, concrete representations of psychologically proximal objects.[97] For example, depending on the context in which it is relevant, a cellular telephone can be represented concretely as a "cell phone" (a low-level construal) or more ab-

87. *Id.* at 442.

88. *See* Nira Liberman & Jens Förster, *Distancing from Experienced Self: How Global-Versus-Local Perception Affects Estimation of Psychological Distance*, 97 J. PERSONALITY & SOC. PSYCHOL. 203, 203–04 (2009); Pamela K. Smith & Yaacov Trope, *You Focus on the Forest When You're in Charge of the Trees: Power Priming and Abstract Information Processing*, 90 J. PERSONALITY & SOC. PSYCHOL. 578, 587 (2006); Cheryl Wakslak & Yaacov Trope, *The Effect of Construal Level on Subjective Probability Estimates*, 20 PSYCHOL. SCI. 52, 55 (2009).

89. *See* Marlone D. Henderson et al., *Transcending the "Here": The Effect of Spatial Distance on Social Judgment*, 91 J. PERSONALITY & SOC. PSYCHOL. 845, 845–46, 850 (2006); Nira Liberman et al., *The Effect of Temporal Distance on the Level of Mental Construal*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 523, 526 (2002); Cheryl J. Wakslak et al., *Seeing the Forest When Entry Is Unlikely: Probability and the Mental Representation of Events*, 135 J. EXPERIMENTAL PSYCHOL.: GEN. 641, 641 (2006); Wakslak & Trope, *supra* note 88, at 57.

90. *See* Henderson et al., *supra* note 89, at 846; Shiri Nussbaum et al., *Creeping Dispositionism: The Temporal Dynamics of Behavior Prediction*, 84 J. PERSONALITY & SOC. PSYCHOL. 485, 494 (2003); Emily Pronin & Lee Ross, *Temporal Differences in Trait Self-Ascription: When the Self Is Seen as an Other*, 90 J. PERSONALITY & SOC. PSYCHOL. 197, 199 (2006).

91. *See* Laura J. Kray, *Contingent Weighting in Self-Other Decision Making*, 83 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 82, 90–94 (2000); Ido Liviatan et al., *Interpersonal Similarity as a Social Distance Dimension: Implications for Perception of Others' Actions*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1256, 1256 (2008) (operationalizing social distance as interpersonal similarity).

92. *See* Alison Ledgerwood, *Evaluations in Their Social Context: Distance Regulates Consistency and Context Dependence*, 8 SOC. & PERSONALITY PSYCHOL. COMPASS 436, 436 (2014).

93. *See* Antonio L. Freitas et al., *Abstract and Concrete Self-Evaluative Goals*, 80 J. PERSONALITY & SOC. PSYCHOL. 410, 410 (2001); Kentaro Fujita et al., *Construal Levels and Self-Control*, 90 J. PERSONALITY & SOC. PSYCHOL. 351, 351 (2006).

94. *See* Marlone D. Henderson & Yaacov Trope, *The Effects of Abstraction on Integrative Agreements: When Seeing the Forest Helps Avoid Getting Tangled in the Trees*, 27 SOC. COGNITION 402, 402 (2009); *see also* Marlone D. Henderson et al., *Negotiation From a Near and Distant Time Perspective*, 91 J. PERSONALITY & SOC. PSYCHOL. 712, 712 (2006).

95. *See* Tal Eyal & Ayelet Fishbach, *Do Global and Local Systems Feel Different?*, 21 PSYCHOL. INQUIRY 213, 213–15 (2010); Jens Förster et al., *How Love and Lust Change People's Perception of Relationship Partners*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 237, 237 (2010). For a review of the role of psychological distance in these different domains, see Trope & Liberman, *supra* note 77.

96. Trope & Liberman, *supra* note 77, at 440.

97. *Id*. at 441; *see also* Williams & Bargh, *supra* note 78, at 302.

stractly as a "communication device" (a high-level construal), and similarly, a soda can be represented as a "Diet Coke" (a low-level construal) or a "drink" (a high-level construal).[98]

In terms of its informational value, neither type of representation is more or less impoverished than the other, although these representations serve different cognitive functions. Importantly, low-level construals, which are associated with psychologically close objects, "instantiate the present" and preserve details of the object's minutiae for immediate use.[99] High-level construals of more distant objects, however, "transcend the here and now," and conserve for cognitive processing the invariant, essential properties of the object.[100] Thus, although many unimportant features of psychologically close objects are preserved for the purposes of information processing, only the most important features of psychologically distant objects are preserved. Empirical evidence suggests that neither high-level nor low-level construals systematically lead to errors in judgment and decisionmaking, although some studies suggest that there are cognitive benefits to reasoning using abstract representations.[101]

These construals occur in our conscious judgments but also outside of conscious awareness. In a recent experiment in which participants were required to categorize words, researchers found that participants categorized word pairs more quickly when highly abstract words, such as "drink," were paired with psychologically distal words, such as "stranger" (and, similarly, when concrete words, such as "coke," were paired with psychologically proximal terms, such as "friend").[102] Psychologists also have found that the ability to shift from lower-level to higher-level construals of objects is critical for everyday functioning with respect to myriad tasks, including object constancy, spatial orientation, social relations, and future planning.[103] These abstract and concrete representations also have neural correlates,[104] which suggests that the construals that people make have adaptive and evolutionary significance.[105]

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98. Trope & Liberman, *supra* note 77, at 441, 449.

99. *Id*. at 448.

100. *Id*. at 441, 448 (noting that "[b]ecause abstract representations necessarily impose one of many alternative interpretations, and because irrelevant or inconsistent details are omitted or assimilated to it, these representations tend to be simpler, less ambiguous, more coherent, more schematic, and more prototypical than concrete representations").

101. *Id*. at 441 (noting that "[t]he use of high-level, abstract construals to represent psychologically distal objects is thus indispensable for effective functioning in many domains").

102. Liberman & Förster, *supra* note 88, at 204; Trope & Liberman, *supra* note 77, at 441, 449; Wakslak et al., *supra* note 89, at 644–46.

103. Trope & Liberman, *supra* note 77, at 441.

104. *See, e.g*., David M. Amodio & Chris D. Frith, *Meeting of Minds: The Medial Frontal Cortex and Social Cognition*, 7 NATURE REVIEWS NEUROSCIENCE 268, 268 (2006); Jason P. Mitchell et al., *Medial Prefrontal Cortex Predicts Intertemporal Choice*, 23 J. COGNITIVE NEUROSCIENCE 857, 857 (2011).

105. One article explains:

> [B]oth collective and personal human development are associated with traversing increasingly greater distances. The turning points of human evolution include developing tools, which required planning for the future; making function-specific tools, which required considering

Hearsay evidence, by its nature, is psychologically distant from legal fact finders. It is distant temporally, inasmuch as the declarant's statement exists only in the past and cannot be subject to meaningful "live" cross-examination. It is also distant physically, inasmuch as the statement was uttered in a location far from the courtroom in which the fact finder resides, and the declarant does not appear in court to utter the statement again. Importantly, the statement is also distant socially and interpersonally because the content of the statement is revealed not through the mouth of the declarant, but through the mouth of an in-court intermediary. According to construal level theory, jurors are likely to encode hearsay, consciously or subconsciously, in abstract terms that preserve the most important features of the hearsay testimony. If this were so, then we would expect that potential infirmities inherent in faulty hearsay evidence would be encoded by jurors and scrutinized, despite the concerns raised by the decisional accuracy rationale for the rule barring hearsay evidence.

It does not necessarily follow, however, that because jurors encode this information when they construe hearsay evidence that they will then access this facet of the construal and evaluate it. But other work in cognitive and social psychology, which focuses on the omnibus nature of goal-oriented behavior, suggests that this will occur.[106] This important research is briefly discussed below.

B. AUTOMATICITY AND GOAL-DIRECTED BEHAVIOR

Construal level theory is applicable to the information provided by out-of-court hearsay declarants only if jurors actually evaluate that information. Although most hearsay declarants do not actually appear in court for jurors to consciously identify the strengths and weaknesses of the information they provide, evidence from the field of automaticity research suggests that jurors may evaluate this information outside of conscious awareness. This section explains the concepts of automaticity and priming, details the important laboratory studies in support of these phenomena, and explains how they relate to jury decisionmaking with respect to hearsay evidence.

Until the late 1970s, social and cognitive psychologists believed that our actions, judgments, motivations, attitudes, and feelings were largely the result of our conscious choices.[107] But in a paradigm-shifting article on the priming of

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> hypothetical alternatives; developing consciousness, which enabled the recognition of distance and perspective taking; developing language, which enabled forming larger and more complex social groups and relations; and domestication of animals and plants, which required an extended temporal perspective.

Trope & Liberman, *supra* note 77, at 458.

106. *See, e.g.*, John A. Bargh et al., *The Selfish Goal: Unintended Consequences of Intended Goal Pursuits*, 26 SOC. COGNITION 534, 535 (2008) (finding that implicit, subconscious goals influence conscious behaviors). This study, and others that report similar findings, are discussed in section II.B, *infra*.

107. Edwin A. Locke & Gary P. Latham, *Building a Practically Useful Theory of Goal Setting and Task Motivation: A 35-Year Odyssey*, 57 AM. PSYCHOLOGIST 705, 705 (2002). *See generally* ALBERT

social constructs, social psychologists provided empirical evidence that many of these attitudes and behaviors occur, in fact, outside of our conscious awareness.[108] These controversial findings led to an explosion of social-cognitive research on automaticity—the effect of priming on people's behaviors, thoughts, motivations, and goals—and raised important questions about the degree to which an individual's environment elicits that individual's behavior.[109] At the forefront of this body of research is Yale University psychologist John Bargh, whose research raises important questions about the nature of free will with respect to our non-thoughtful day-to-day activities and interactions.[110] For example, Bargh and his followers have found, famously, that priming people—that is, exposing a stimulus to an individual quickly and outside of the individual's conscious awareness—with concepts related to old age causes people to walk more slowly to the door in laboratory experiments.[111] They have also found that priming people with the concept of soccer hooligans causes people to behave more aggressively in a laboratory setting.[112] Moreover, they have found that priming people with hot or cold objects affects their moods and behaviors toward others.[113] It is believed that these subconscious processes occur because primes or cues in our environment serve to activate cognitive networks related to the primes,[114] and there appear to be neural correlates that underlie this phenomenon.[115]

BANDURA, SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY (1986); Walter Mischel et al., *Principles of Self-Regulation: The Nature of Willpower and Self-Control*, *in* SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 329 (E. Tory Higgins & Arie W. Kruglanski eds., 1996).

108. *See, e.g.*, E. Tory Higgins et al., *Category Accessibility and Impression Formation*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 141, 147–53 (1977).

109. For a review, see generally Bargh et al., *supra* note 106; *see also* Ap Dijksterhuis et al., *Effects of Priming and Perception on Social Behavior and Goal Pursuit*, *in* SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS: THE AUTOMATICITY OF HIGHER MENTAL PROCESSES 51 (John A. Bargh ed., 2007).

110. *See* John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOLOGIST 462, 462–65 (1999). *See generally* John A. Bargh & Melissa J. Ferguson, *Beyond Behaviorism: On the Automaticity of Higher Mental Processes*, 126 PSYCHOL. BULL. 925 (2000); John A. Bargh et al., *The Automated Will: Nonconscious Activation and Pursuit of Behavioral Goals*, 81 J. PERSONALITY & SOC. PSYCHOL. 1014 (2001) [hereinafter Bargh et al., *The Automated Will*]; Tanya L. Chartrand & John A. Bargh, *The Chameleon Effect: The Perception–Behavior Link and Social Interaction*, 76 J. PERSONALITY AND SOC. PSYCHOL. 893 (1999); Melissa J. Ferguson & John A. Bargh, *Liking Is for Doing: The Effects of Goal Pursuit on Automatic Evaluation*, 87 J. PERSONALITY & SOC. PSYCHOL. 557, 557–58 (2004); John A. Bargh & Brian Earp, *The Will Is Caused, Not "Free,"* DIALOGUE (Soc'y of Personality & Soc. Psychol., Washington, D.C.), Spring 2009, at 13.

111. John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230 (1996).

112. Ap Dijksterhuis & Ad van Knippenberg, *The Relation Between Perception and Behavior, or How to Win a Game of Trivial Pursuit*, 74 J. PERSONALITY & SOC. PSYCHOL. 865, 865 (1998).

113. Lawrence E. Williams & John A. Bargh, *Experiencing Physical Warmth Promotes Interpersonal Warmth*, 322 SCI. 606, 606 (2008).

114. For a review, see Gail McKoon & Roger Ratcliff, *Spreading Activation Versus Compound Cue Accounts of Priming: Mediated Priming Revisited*, 18 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 1155, 1155–56 (1992) (discussing several theoretical accounts of subconscious priming).

115. *See* John A. Bargh, *Bypassing the Will: Toward Demystifying the Nonconcious Control of Social Behavior*, *in* THE NEW UNCONSCIOUS 37, 40 (Ran R. Hassin et al. eds., 2005); Christopher D. Frith

Recently, social cognition researchers have examined whether goal pursuits are always conscious or if they can occur subconsciously. The early research suggests that many goal pursuits do occur subconsciously.[116] For example, in an experiment in which participants role-played as an executive at a fishing company, those who were primed with cooperation chose to put more fish back into the lake (in an effort to stabilize the fish population) even though it lowered their profits and punished them in the game.[117] Similar experiments have produced similar findings.[118]

These studies suggest that goal activation can occur automatically and outside conscious awareness. But once the subconscious goal becomes active, does it exert its influence outside of conscious awareness on objects in one's environment that are not the conscious object of the goal pursuit? A recent study by Bargh and colleagues suggests that subconsciously activated goals do exhibit stealth influence on objects in our environment that are not the subject of our conscious goal pursuits.[119] Bargh argues, by analogizing to the central thesis of Richard Dawkins's *The Selfish Gene*,[120] that once goals are activated, they "pursue their own agendas independently of conscious control" regardless of the welfare of the organism that houses those goals.[121] Bargh supports his hypothesis with an interesting set of experiments that are relevant to the present hearsay inquiry.

Bargh asked study participants to evaluate a man on a videotape that showed two individuals engaged in discussion. In the experimental conditions, participants were told that the individual was interviewing for a position either as a crime reporter or as a waiter.[122] The experimenters asked that participants evaluate the applicant for the position.[123] In a pretest, the researchers discovered that people generally believe that waiters should be polite, cooperative, and agreeable, whereas crime reporters should be aggressive, skeptical, and rude.[124] During the taped interview, a man always interrupted to remind the interviewer of their prior plans to go to lunch. When the interviewer told the interrupter that he was running behind, the man either reacted in a deferential manner (for

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et al., *Abnormalities in the Awareness and Control of Action*, 355 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON 1771, 1785 (2000). These findings might deserve a level of circumspection, however. Researchers recently have had difficulty replicating these classic priming experiments. *See* Tom Bartlett, *Power of Suggestion*, CHRON. OF HIGHER EDUC. (Jan. 30, 2013), http://chronicle.com/article/Power-of-Suggestion/136907.

116. Bargh et al., *supra* note 106, at 535.

117. Bargh et al., *The Automated Will*, *supra* note 110, at 1017–19.

118. Jon K. Maner et al., *The Effects of Perspective Taking on Motivations for Helping: Still No Evidence for Altruism*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1601, 1604–05 (2002).

119. Bargh et al., *supra* note 106, at 535–36.

120. *See generally* RICHARD DAWKINS, THE SELFISH GENE (1976).

121. Bargh et al., *supra* note 106, at 537 (emphasis omitted).

122. The substance of the interview, in which the interviewer asked the candidate to discuss his strengths and weaknesses, was the same in both experimental conditions. *Id.* at 539–41.

123. *Id.* at 541.

124. *Id.* at 542–43.

example, apologizing for interrupting) or in a hostile manner (for example, angrily replying that his time was valuable and rescheduling lunch for another day).[125]

Participants were then asked not to evaluate the job candidate, but to evaluate how much they liked the *interrupter*. Bargh and colleagues found that the degree to which participants liked the interrupter depended not just on whether he was rude or polite, but also on whether participants had been evaluating the interviewee for a crime reporter position or waiter position.[126] Participants liked the polite interrupter significantly more than the rude interrupter in the condition in which the applicant applied for a waiter position.[127] Conversely, they liked the polite interrupter significantly *less* than they liked the rude interrupter in the crime reporter condition.[128] After controlling for alternative explanations for the study's results, Bargh and colleagues concluded that the conscious goal (either to evaluate a candidate for a position as a waiter or as a crime reporter) subconsciously acted upon participants' evaluations of *other* actors within the environment—specifically, the interrupter.[129] This provides support for the hypothesis that goals exert their influence subconsciously upon multiple stimuli within the perceiver's environment. Studies in other domains support Bargh and colleagues' findings.[130]

These results have striking implications for how jurors evaluate hearsay evidence. Jurors are required to determine the correct facts of the case and to apply those facts to the law. A subordinate goal within that process to is to correctly evaluate the credibility of the evidence presented by the parties. If conscious goals—such as making accurate credibility determinations—can manifest themselves not just with respect to legal actors on which jurors focus explicitly, such as in-court witnesses, but also with respect to other stimuli in the jurors' environment, this supports the hypothesis that the conscious goal of evaluating the credibility of evidence presented at trial might also extend to the information provided by the out-of-court hearsay declarant, whose credibility jurors may be primed to evaluate subconsciously. The original experiments reported in this Article examine this hypothesis.

C. THE PRESENT STUDIES

No one has tested empirically whether jurors attend to the infirmities that may affect the probative value of information provided by out-of-court hearsay

125. *Id*.
126. *Id*.
127. *Id*.
128. *Id*.
129. *Id*. at 543–44.
130. *See, e.g.*, Christie L. K. Kawada et al., *The Projection of Implicit and Explicit Goals*, 86 J. PERSONALITY & SOC. PSYCHOL. 545, 545–46 (2004); *see also* Bargh, *supra* note 115, at 45–46. For a review, see Tanya L. Chartrand & John A. Bargh, *Nonconscious Motivations: Their Activation, Operation, and Consequences*, *in* SELF AND MOTIVATION: EMERGING PSYCHOLOGICAL PERSPECTIVES 13 (Abraham Tesser et al. eds., 2002).

declarants. Moreover, if jurors do attend to these infirmities, no one has yet set forth a psychological theory for why that might be so. The studies reported in this Article are the first to do so.

The first study examines whether jurors are attuned to the four testimonial infirmities—sincerity, ambiguity, perception, and memory—with respect not only to in-court witnesses but also to hearsay declarants who do not testify in court. If, consistent with psychological research on omnibus goal-directed behavior, participants find the evidence from an infirm hearsay declarant as incredible as they find the testimony of an infirm in-court witness, this provides evidence that the decisional accuracy rationale for the hearsay rule might be empirically suspect.

The second study extends this research question to multiple hearsay—a concept that has yet to be tested in the empirical literature and which may provide further support for the hypothesis that jurors find psychologically distant information less convincing. Multiple hearsay, also called "hearsay within hearsay," involves a hearsay statement that contains within it an additional hearsay statement. For example, a document that does not fit the business records exception to the hearsay rule may contain a statement from a customer, which is offered for its truth. Courts would classify such a document as multiple hearsay and as inadmissible unless all of the hearsay contained in the document falls within an exception to the hearsay rule.

If participants find hearsay increasingly less convincing as layers of hearsay are added to the same testimony that is presented to them, this provides further evidence that jurors are more competent with respect to hearsay evidence than evidence policymakers may believe.

III. STUDY 1: TESTING TRIBE'S TRIANGLE

The first study reported in this Article tests the assumption underlying the tenets of the decisional accuracy rationale for the hearsay rule. If we think of hearsay evidence as more psychologically "distant" than in-court testimony that is subject to meaningful cross-examination, proponents of the decisional accuracy rationale fear that jurors will scrutinize this more distant information *less* because their critical attention is not drawn to it in the manner that their attention is focused on in-court testimony. In a scenario in which a prosecutor presents evidence to jurors in a criminal case, we can imagine two different patterns of data in which we compare jurors' reactions to non-infirm testimony, testimony with an infirm hearsay declarant, testimony with an infirm in-court witness, and testimony with both an infirm hearsay declarant and an infirm in-court witness.

First, we might see a pattern of results that are consistent with the decisional accuracy rationale for the hearsay rule as reflected in the testimonial triangle. If jurors are simply insensitive to the infirmities of information provided by hearsay declarants—as Tribe's triangle suggests—we might see a pattern of results in which the perceived persuasiveness of the prosecutor's case decreases

only in response to the infirmities of the in-court witness, as illustrated in the right side of the figure below.

The psychological literature on construal level theory and automaticity, however, suggests a different pattern of results. Psychological research on automaticity suggests that goal-oriented pursuits (such as evaluating the credibility of evidence) will operate automatically on goal-relevant content in the environment even if that content is not the intended focus of the conscious goal. This is likely to occur even for psychologically "distant" stimuli, such as hearsay evidence. Thus, jurors may scrutinize the infirmities in the information provided by hearsay declarants just as much as they scrutinize the infirmities in the information provided by in-court witnesses, as illustrated in the left side of the figure below. This would stand in stark contrast to the pattern of the data predicted by Tribe's testimonial triangle.[131]

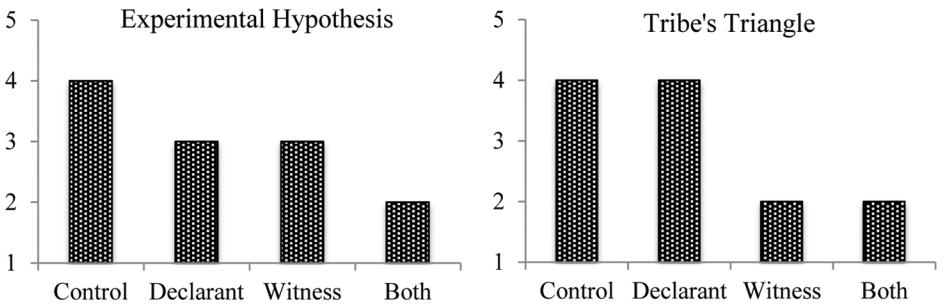

Figure 2: Comparison of Hypothesized Results

A. PARTICIPANTS

Six hundred eighty-seven participants were recruited for an online study for this Article using the web recruiting service Amazon Mechanical Turk ("MTurk"), which has been shown empirically to be an inexpensive way to collect quality data from persons who are representative of the general internet-using population.[132] The sample of participants in this study was 42.2% female, 76.9% Caucasian, and averaged 33.89 years of age (with a standard deviation of 10.79 years). Fifty-four percent of the sample had completed at least a college degree, and the average household income of the sample was between $40,000 and $49,999.

131. Alternatively, jurors may not be sensitive to testimonial infirmities at all. If so, we might see a static pattern of results, such that the credibility of evidence in all experimental conditions is uniformly high or uniformly low.

132. *See, e.g.*, Adam J. Berinsky et al., *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351, 366 (2012); Michael Buhrmester et al., *Amazon's Mechanical Turk: A New Source of Inexpensive, Yet High-Quality, Data?*, 6 PERSP. ON PSYCHOL. SCI. 3, 3 (2011); Winter Mason & Siddharth Suri, *Conducting Behavioral Research on Amazon's Mechanical Turk*, 44 BEHAV. RES. METHODS 1, 2–4 (2012).

Additionally, 54.7% of the sample indicated that they had spent time in a courtroom in some capacity. Approximately 20.3% of the sample had served as a litigant or a witness in a trial, 22% of the sample either had served on a jury or had been summoned for jury duty, and 22% of the sample had attended court for a minor hearing, such as traffic court.[133]

B. PROCEDURES AND MEASURES

Participants were randomly assigned to one of twenty-five different conditions in the study. Specifically, participants were assigned to an experimental condition that contained one type of hearsay, one type of infirmity, and one type of infirm actor. The type of hearsay to which participants were exposed was either admissible or inadmissible. The infirmity to which they were exposed was a defect in the actor's sincerity, memory, perception, or narrative ability. The infirm actor to which participants were exposed was either the out-of-court declarant, the in-court witness, both, or neither. The type of hearsay, the type of testimonial infirmity, and the actor who possessed the infirmity were all randomly assigned to each participant.[134] All participants, regardless of the experimental condition to which they were randomly assigned, were told to imagine themselves as mock jurors in a criminal trial.

Participants then read a set of written materials involving a theft in a music store at an upscale shopping mall. Participants read opening statements from the prosecutor and defense attorney, testimony from witnesses, closing arguments, and jury instructions.

The most important feature of this trial involved the testimony of the witnesses. Participants first read the testimony of the police officer that arrived at the scene. The police officer testified that the mall was located in a wealthy part of town, which had recently experienced an increase in crime from what residents have called "young thugs" who regularly loiter at the mall. The officer testified that on the day of the incident, a group of teenagers entered the music store at the mall and began to browse through various compact disks. The store manager became suspicious when one of the youths moved his hand to the inside of his jacket and began to track the teenagers. At some point, three compact disks were stolen from the store, and the officer eventually arrested the defendant after the store manager alerted the officer of the theft and the alleged culprit. The defendant had been wearing a red cap at the time of his

133. These categories are not mutually exclusive. For example, some participants had served on jury duty and had attended court for a minor traffic hearing.

134. The number of experimental conditions can be calculated by multiplying together the number of hearsay types (two), the number of infirmities (four), and the number of infirm actor conditions (four). This totals 32 different conditions. The study design, however, incorporated a control condition (specifically, the "neither infirm" actor condition) for each of the four testimonial infirmities and for both of the hearsay types, which were then pooled into one omnibus control condition. This reduced the number of conditions from 32 to 25 (specifically, 24 experimental conditions plus the omnibus control condition).

arrest (his friends had been wearing green hats), but he did not have the compact disks in his possession. Instead, the officer found the compact disks in the possession of his friends who had been with him at the time of his arrest.

What occurred next depended on the experimental condition to which participants were assigned. In the admissible hearsay condition, participants read that the defense attorney did not cross-examine the police officer. The prosecutor then called as a witness a bystander who had been at the store at the time of the theft. On direct examination, the bystander testified that as several customers, including the group of teens, exited through the store's front entrance, the store's theft detection device was triggered. Some of the customers then began to walk away quickly and broke into a jog. At that moment, the manager yelled out, "I saw the one in the red hat steal the CDs! That's him running away! Stop him!"[135]

In the inadmissible hearsay condition, participants were given similar information, except that the store manager, rather than exclaiming that the man in the red hat stole the CDs, calmly remarked, after a period of reflection in the presence of the bystander, that he believed that the man in the red hat may have stolen CDs and that he was going to call the police.[136]

In both experimental conditions, the bystander's recitation of the manager's statement on direct examination is hearsay because it is an out-of-court statement being used in court for its truth.[137] In the control condition, participants then read that the prosecutor and the defense attorney rested their cases, and participants then read each party's closing arguments. In the other twenty-four experimental conditions, another study manipulation occurred during the bystander's cross-examination by the defense attorney.

Depending on the experimental condition to which the participant was assigned, cross-examination revealed one of the testimonial infirmities: (1) faulty memory; (2) narrative ambiguity; (3) faulty perception; or (4) lack of sincerity. Moreover, that testimonial infirmity was revealed to be either on the part of the bystander (the in-court witness), the store manager (the hearsay declarant), or both of them, depending on the experimental condition.[138]

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135. This statement is admissible because it fits into the excited utterance exception to the rule barring hearsay evidence. *See* FED. R. EVID. 803(2). The circumstances surrounding the statement suggest that the author's statement was uttered spontaneously in the excitement of the situation and, according to evidence policymakers, is likely to reflect the store manager's true belief.

136. This statement, unlike the statement in the prior experimental condition, is inadmissible hearsay. The statement was not made in the course of the event that may have excited the store manager. It was instead made in a calm manner after a period of potential reflection. *See id.* The purpose of creating admissible and inadmissible hearsay conditions in this study was to examine whether jurors are better at evaluating the testimonial infirmities of hearsay that has traditionally been treated—without empirical evidence—as more reliable by evidence policymakers.

137. *See supra* section I.A.

138. The evidence provided by the hearsay declarant was not cross-examined by the defense attorney. Rather, an infirmity in the declarant's evidence was revealed as the in-court witness answered other questions asked by the defense attorney.

Table 1 below summarizes what was revealed on cross-examination about either the bystander or the store manager. Participants in the control condition

Table 1: Table of Infirmities and Legal Actors Used in Vignettes

	In-Court Witness	Hearsay Declarant
Sincerity	The witness revealed that he had disliked the defendant and had been in a heated argument with him.	The witness recalled that the manager also yelled about how he had always hated "that kid in the red hat."
Ambiguity	The witness revealed that he is Swedish and sometimes mixes up color words in English.	The witness recalled that the manager had a foreign accent and kept correcting himself from saying "green" instead of "red."
Perception	The witness revealed that he had been wearing iPod earbuds and was listening to heavy metal music when the manager shouted to him.	The witness recalled that, after leaving his glasses on the counter, the manager went to observe the defendant and his friends.
Memory	The witness revealed that he had misremembered a major detail about the crime.	The witness recalled that the manager expressed uncertainty regarding whether two or three CDs had been stolen.

read none of the items in the table (both parties simply rested their cases), whereas participants in the "both infirm" condition were exposed to the items for both the in-court witness and the hearsay declarant for each type of infirmity. Participants in the "in-court witness infirm" condition read the scenario damaging the credibility of the bystander, whereas participants in the "hearsay declarant infirm" condition read the scenario damaging the credibility of the store manager.

Participants then read the closing arguments of the prosecuting attorney and the defense attorney. Afterward, they read a standard jury instruction in which they were instructed to find the defendant guilty of the crime of theft if they were convinced beyond a reasonable doubt that he had committed the crime.

To gauge whether participants had adequately comprehended the trial materials, participants were asked a series of comprehension checks regarding the evidence that was presented. The comprehension checks tested participants' knowledge of the different actors involved in the theft, the nature of the evidence against the defendant, and the acts and utterances of the various actors. Participants could not advance in the survey until they answered these comprehension checks correctly.

Participants were then asked to rate the likelihood that the defendant committed the crime on a scale from 1 (very unlikely) to 7 (very likely).[139] On that same scale, they were asked questions about the strength of the evidence against the defendant. They were also asked to rate how "close" they felt to the bystander and to the manager.

After completing these questions, participants were asked to provide demographic information, including their age, race, income, level of education completed, and their familiarity with the legal system. Participants were then debriefed with respect to the aims of the study and the experiment was concluded.

C. RESULTS

This section proceeds in two parts. It first reports the results of preliminary analyses, which examine (1) the nature of the scales used to measure participants' reactions to the events at the trial; and (2) the interplay of these measures. It then reports the results of the main analysis, which examines the effects of the hearsay manipulation in the trial.

1. Preliminary Analysis

The dependent measures in this study consisted of (1) a one-item question: how likely is it that the defendant committed the crime; and (2) three questions designed to measure participants' assessment of the strength of the evidence against the defendant. These three questions were: (a) how strong was the evidence that the defendant took the CDs; (b) how well did the prosecution prove that the defendant stole the merchandise; and (c) how convincing was the prosecution's evidence. All items were scored on a scale from 1 to 7, with 1 representing that the strength of the evidence was weak and 7 indicating that it was strong.[140]

The three items measuring the strength of the evidence against the defendant were examined statistically and were highly correlated with each other.[141] Consistent with practice in psychology research, these three items were averaged to form a scale that measured participants' responses to the strength of the

139. A 7-point Likert scale is a psychometric scale commonly used in questionnaires to capture data from ordinal variables (from 1 to 7). *See* ROBERT M. LAWLESS ET AL., EMPIRICAL METHODS IN LAW 172 (2010).

140. By design, these three questions measure the same underlying construct: participants' beliefs regarding the likelihood that the defendant committed the crime. Behavioral researchers often use multiple (and similar) items to measure certain attitudinal variables because any one item may not validly measure that construct. Asking three questions and examining whether participants' responses to those questions correlate with each other allows researchers to average participants' responses to those questions into a scale that reliably measures the underlying construct.

141. The correlation among multiple items for the purpose of scale creation is calculated through a "Cronbach's alpha" statistic. Cronbach's alpha values close to 1.0 are considered strongly correlated. The Cronbach's alpha value for the correlation among these three items was .93.

evidence.[142]

A second preliminary analysis sought to examine whether the strength of the evidence and participants' perceptions of the likelihood that the defendant committed the crime were strongly associated with each other. An initial examination of the bivariate correlation between these variables revealed that the variables were strongly associated with each other.[143]

Finally, as expected, an analysis of the data revealed that all participants, regardless of the experimental condition to which they were randomly assigned, felt closer to (that is, less distant from) the bystander, who testified in court, compared to the manager, who served as a hearsay declarant.[144]

2. Main Analysis

The main analysis examines the effect of the hearsay manipulation on participants' attitudes about the trial; specifically, the likelihood of the defendant's guilt. To determine whether the hearsay manipulation affected participants' views of the likelihood of the defendant's guilt, I examined, through a statistical technique called an analysis of variance, whether the average perception of the likelihood of the defendant's guilt differed meaningfully among participants in the different experimental conditions.[145]

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142. *See, e.g.*, *How to Reduce Number of Variables and Detect Relationships, Principal Components and Factor Analysis*, STATSOFT, http://statsoft.com/Textbook/Principal-Components-Factor-Analysis (last visited Feb. 2, 2015) (explaining data reduction techniques).

143. A bivariate correlation represents the degree to which two items relate to each other. The correlation is represented by the "Pearson's r" statistic and ranges from -1 to $+1$. Correlations close to $+1$ and to -1 are stronger whereas correlations close to 0 are weaker. Positive correlations indicate that an increase in one item is accompanied by an increase in the second item (for example, weight and height). Negative correlations indicate that an increase in one item is accompanied by a decrease in the second item. The correlation between guilt likelihood and evidence strength was .62, which is considered a strong correlation. Because the results with respect to the likelihood of the defendant's guilt were similar to the results with respect to the strength of the evidence, only the former are reported in this Article.

144. $F(1, 661) = 15.15$, $p < .001$. For guidance interpreting F-statistics and p-values, see note 145, *infra*.

145. Specifically, I conducted a 4 (testimonial infirmity: sincerity vs. ambiguity vs. perception vs. memory) x 4 (identity of the infirm actor: control vs. declarant vs. in-court witness vs. both) x 2 (hearsay: admissible vs. inadmissible) analysis of variance ("ANOVA") on participants' judgments of the defendant's guilt. Analysis of variance provides a statistical test of whether the means of several groups are equal. ANOVA results are represented by an F-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 139, 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 (2003) (citing BARBARA G. TABACHNICK & LINDA S. FIDELL, USING MULTIVARIATE STATISTICS (2d ed. 1989)). Planned comparisons were accompanied by the Tukey Honest Significant Difference Test to stabilize the "familywise error rate" and avoid false positives. *See, e.g.*, James Jaccard et al., *Pairwise Multiple Comparison Procedures: A Review*, 96 PSYCHOL. BULL. 589, 594–95

As expected, the analysis of variance revealed that the type of testimonial infirmity[146] and the admissibility of the hearsay[147] had no effect on the perceived likelihood of the defendant's guilt. In other words, people were no more likely to perceive the defendant as guiltier if the hearsay to which they were exposed was admissible or inadmissible, nor were they more likely to believe that the defendant was guiltier if the testimonial infirmity was one of insincerity instead of memory. Moreover, the type of hearsay and the type of infirmity did not interact with each other in a statistically meaningful manner.[148]

Thus, as predicted, any effects of the hearsay manipulation were statistically indistinct across every type of testimonial infirmity and across the type of hearsay, whether it was the actor's memory, narrative ambiguity, perception, or sincerity. Graphs of the means for each experimental condition are provided below in Figure 3. Because no effect of testimonial infirmity or hearsay type

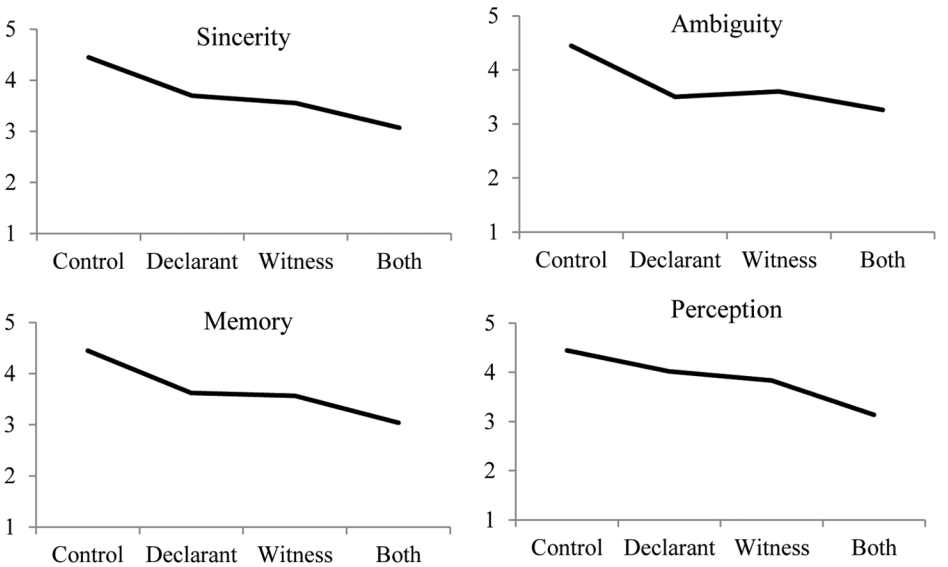

Figure 3: Perceptions of the Defendant's Guilt by Testimonial Infirmity

was found, and because the type of infirmity and type of hearsay did not interact with any variables in the model, the data from both hearsay conditions and all four testimonial infirmity conditions were pooled, consistent with standard

(1984) (discussing several techniques, including the Tukey technique, for controlling Type I error when making multiple comparisons among groups).

146. $F(3, 661) = 1.72$, $p = .162$, $\eta^2_p = .01$.

147. $F(1, 661) = 0.79$, $p = .374$, $\eta^2_p = .00$.

148. $F(6, 661) = 1.87$, $p = .084$, $\eta^2_p = .02$ (no interaction between the testimonial infirmity and the identity of the infirm actor); $F(2, 661) = 0.50$, $p = .608$, $\eta^2_p = .00$ (no interaction between hearsay admissibility and the identity of the infirm actor).

practice in psychology research.[149]

After pooling all of the data from the different infirmity conditions and the different hearsay conditions into one omnibus data set, I performed another analysis of variance to examine the effect of the identity of the hearsay actor on participants' perceptions of the defendant's guilt. The analysis revealed a statistically significant effect of the identity of the hearsay actor, which means that mock jurors' perceptions of the likelihood of the defendant's guilt did depend on the identity of the actor with the testimonial infirmity.

The means for the four groups are illustrated in Figure 4 below. The pattern of results suggests, consistent with the experimental hypothesis, that jurors

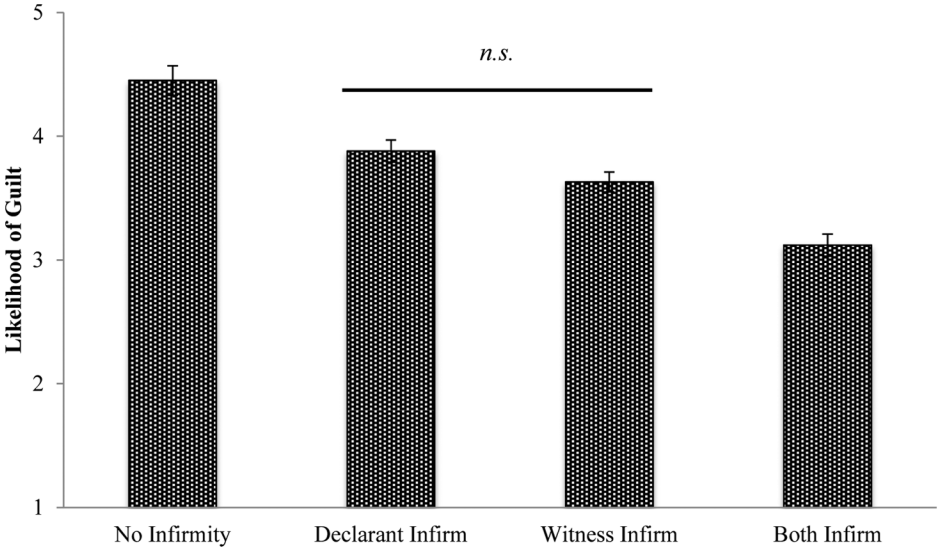

Figure 4: Omnibus Means by Infirm-Actor Condition

scrutinize infirmities within information provided by both in-court witnesses and out-of-court hearsay declarants. The results, therefore, are not consistent with the decisional accuracy rationale for the hearsay rule as exemplified in the testimonial triangle.[150]

An analysis of variance, however, examines only whether any of the averages in the experimental conditions differ from one another. It does not examine *which* average or averages are statistically different. I employed a conservative

149. *See, e.g.*, David A. Kenny et al., *Data Analysis in Social Psychology*, *in* 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 233, 235 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

150. $F(3, 683) = 20.75$, $p < .001$, $\eta^2_p = .08$. Error bars in all figures represent standard error of the mean.

statistical technique, called Tukey's Honest Significant Difference Test, to examine which means were different from each other.[151] Participants thought the defendant was more likely to be the culprit when there were no infirmities in the evidence than when the declarant's testimony was infirm.[152] Importantly, and as predicted, participants' ratings of the defendant's guilt did not differ when either the declarant or the in-court witness was infirm, which suggests that jurors examined the hearsay declarant's information for infirmities.[153] Finally, participants thought the defendant was least likely to be guilty when both the declarant's evidence and the in-court witness's testimony were infirm, which again suggests that participants evaluated the weaknesses not only of the information provided by the in-court witness, but also the information provided by the out-of-court declarant.[154]

Participants' ability to detect infirmities lurking within the testimonial triangle of the hearsay declarant also is evidenced if the data are analyzed in terms of the number of infirmities present: no infirmities (the control condition), one infirmity (the declarant-infirm and witness-infirm conditions combined), and two infirmities (the both-infirm condition). If analyzed this way, the average ratings of the defendant's guilt from mock jurors who are scrutinizing hearsay evidence for infirmities would exhibit a decreasing, linear pattern, such that the likelihood of the defendant's guilt would be highest in the "no infirmity" condition, lower in the "one infirmity" condition, and lowest in the "two infirmities" condition.

To test this hypothesis, I employed a statistical technique called a contrast analysis to determine whether a statistically significant linear pattern exists within the data.[155] As predicted, the contrast analysis revealed a statistically significant linear pattern consistent with the study hypothesis.[156] The significant linear trend is illustrated below in Figure 5.

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151. Tukey's Honest Significant Difference test (also known as Tukey's "HSD" or the "Tukey-Kramer" method) allows researchers to conduct multiple pairwise comparisons (planned or unplanned) while controlling for the possibility of false positive results (i.e., "a Type I error"). *See, e.g.*, Jaccard et al., *supra* note 145 (discussing several techniques, including the Tukey technique, for controlling Type I error when making multiple comparisons among groups).

152. $M_{control} = 4.45$, $SD_{control} = 1.38$; $M_{declarant} = 3.88$, $SD_{declarant} = 1.21$; $p = .013$, Cohen's $d = 0.44$.

153. $M_{declarant} = 3.88$, $SD_{declarant} = 1.21$; $M_{witness} = 3.64$, $SD_{witness} = 1.47$; $p = .210$, Cohen's $d = 0.18$.

154. $M_{witness} = 3.64$, $SD_{witness} = 1.47$; $M_{both} = 3.13$, $SD_{both} = 1.07$; $p < .001$, Cohen's $d = 0.40$.

155. Whereas an ANOVA allows researchers to determine whether any of the means for several different groups are different, a contrast analysis allows researchers to test more specific hypotheses, for example, whether the means show a specific polynomial pattern, such as a linear, cubic, or quadratic function. In sum, a contrast analysis tests a specific question about the pattern of results revealed in an ANOVA. *See, e.g.*, Hervé Abdi & Lynne J. Williams, *Contrast Analysis*, *in* 1 ENCYCLOPEDIA OF RESEARCH DESIGN 243, 243–44 (Neil J. Salkind ed., 2010).

156. $F(1, 684) = 58.09$, $p < .001$, $\eta^2_p = .08$. Moreover, post hoc analyses using Tukey's Honest Significant Difference test revealed that each group mean in the linear pattern was significantly different from the other. The mean for the no infirmities condition ($M = 4.45$, $SD = 1.38$) was different from the mean in the one infirmity condition ($M = 3.74$, $SD = 1.36$; $p < .001$, Cohen's $d = 0.52$), and

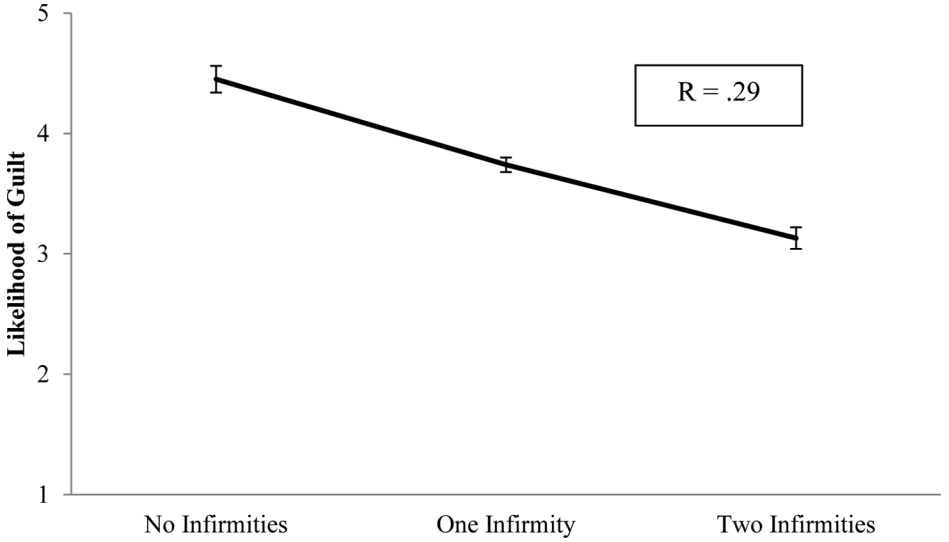

Figure 5: Omnibus Means by Number of Infirmities Present

D. DISCUSSION

The experimental results reported in Study 1 reveal that mock jurors evaluated the hearsay evidence in the prosecutor's case and found the hearsay evidence to be less persuasive than non-hearsay evidence. Further, as the number of infirmities in the prosecutor's case increased (regardless of the identity of the infirm actor), jurors perceived the defendant as less likely to be the culprit. This suggests that jurors were not placing undue weight on the hearsay evidence.[157]

Most importantly, the concerns raised by the decisional accuracy rationale for the hearsay rule—that participants will recognize the infirmities lurking in the testimony of an in-court witness through opposing counsel's cross-examination but will not attend to the infirmities of the original declarant, who is not cross-examined—are not supported by the data. When the data from the study participants in all four testimonial infirmity conditions—perception, memory, ambiguity, and sincerity—were pooled together, the predicted pattern occurred, regardless of whether the hearsay was admissible: jurors found the prosecution's case that contained non-infirm testimony to be the most persuasive, and they found the prosecution's case in which both the hearsay declarant and the

that mean was different from the mean in the two infirmities condition ($M = 3.13$, $SD = 1.07$; $p < .001$, Cohen's $d = 0.50$).

157. A careful reader might wonder, however, why participants in the one- or two-infirmities conditions did not totally discount the evidence and give the lowest possible rating of the defendant's guilt. Other evidence was presented in the prosecution's case in this study so that participants would not become suspicious of the aim of the experiment and adjust their responses accordingly. Participants' perceptions of the likelihood of the defendant's guilt in these conditions likely stems from the probative value of the other evidence presented in the prosecution's case.

in-court witness were infirm to be the least convincing. Moreover, participants found the case in which one actor was infirm—*either* the original declarant *or* the in-court witness—to be less convincing than the case with non-infirm testimony but more convincing than the case that contained multiple infirmities. Moreover, they detected the infirmity of the declarant just as frequently as the infirmity of the in-court witness. This provides evidence that participants did evaluate the credibility of the non-testifying hearsay declarant and challenges the view that jurors do not evaluate the credibility of out-of-court actors.

Study 1 adds to a growing body of data that challenges the decisional accuracy rationale for the ban on hearsay evidence. It also suggests that goal-related processing—for example, evaluating the credibility of a psychologically distant, out-of-court actor—acts automatically on other related stimuli in the courtroom. This study does, however, lead to additional questions—for example, the effect of multiple hearsay on mock jurors. Study 2 seeks to answer those questions.

IV. STUDY 2: TRIBE'S TRIANGLE AND MULTIPLE HEARSAY

Study 1 examined the decisional accuracy rationale for the rule barring hearsay, via the tenets of the testimonial triangle, and suggests that jurors do scrutinize the evidence provided to them by psychologically distant legal actors, such as hearsay declarants who are not cross-examined in court. Study 2 expands on these findings in the context of an empirically untested subject: the effect of multiple hearsay, or "hearsay within hearsay," on jurors. It also examines whether jurors spontaneously discount hearsay evidence in the absence of cross-examination.

Recall that the Federal Rules of Evidence require the party proffering a hearsay statement that contains more than one hearsay proposition to ensure that each hearsay statement fits into one of the twenty-eight hearsay exceptions to be admissible.[158] Hearsay rulemakers fear that information that has degraded by virtue of passing through the senses of multiple actors is more likely than other evidence to be unreliable; moreover, jurors might not realize that such evidence is unreliable.

If evidence policymakers' intuitions about multiple hearsay are correct, we can imagine several patterns of data that might appear if mock jurors are provided with a prosecutor's case that contains differing levels of hearsay: either no hearsay, one level of hearsay, double hearsay, or triple hearsay. If jurors do not appropriately scrutinize hearsay evidence and do not attend to the testimonial infirmities underlying evidence provided by hearsay actors, we might expect to see (1) no effect of hearsay at all on mock jurors' evaluation of the evidence; or (2) a decrease in mock jurors' evaluation of the evidence only

158. *See* FED. R. EVID. 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.").

when in-court testimony is replaced by hearsay testimony (but not in accordance with increasing layers of hearsay in the prosecution's case).

If, however, jurors do scrutinize hearsay evidence, we might expect a linear pattern with respect to mock jurors' evaluation of hearsay evidence, such that jurors are most persuaded by non-hearsay testimony, less persuaded by hearsay, even less persuaded by double hearsay, and least persuaded by triple hearsay testimony.

Study 2 also expands on Study 1 in two ways. First, participants were asked to render a verdict in the case, to examine whether perceptions of the defendant and perceptions of the prosecutor's case affect mock jurors' ultimate disposition of the case. Second, a stronger case was proffered against the defendant in Study 2 to ensure adequate variability with respect to participants' verdicts. Third, the key witness was explicitly not cross-examined by the defense attorney in the vignette. Study 1 leaves open the possibility that participants critically evaluated the hearsay evidence because their attention was brought to it—albeit not because the evidence was subjected to meaningful cross-examination—during the defense attorney's questioning of the in-court witness. Although it is interesting to note that jurors discounted the evidence from the declarant accordingly and did not ignore the potential infirmities therein, it is important to examine whether jurors spontaneously discount multiple hearsay evidence on account of its likely degradation in informational quality. Study 2 provides answers to these questions.

A. PARTICIPANTS

One hundred forty-nine participants were recruited using MTurk to participate in an online study for nominal payment. The sample was 68.5% male,[159] 68.5% Caucasian, and averaged 32.86 years of age (with a standard deviation of 9.84 years). Fifty-eight percent of the sample had completed at least a college degree, and the average household income of the sample was between $30,000 and $39,999.

Additionally, 48.4% of the sample indicated that they had spent time in the courtroom in some capacity. Approximately 9% of the sample had served as a litigant or a witness in a trial, 27% of the sample had been summoned for jury duty, and 24% of the sample had attended court for a minor hearing, such as traffic court.[160]

159. Because of the higher than usual number of men in this study, gender was included as an independent variable in a preliminary version of the model. The model revealed no effects of gender or interactions with gender on the dependent variables measured in this study.

160. These groups were not mutually exclusive. For example, some participants who had been summoned for jury duty also had attended court for a minor hearing.

B. PROCEDURES AND MEASURES

Participants were randomly assigned to one of four experimental conditions: (1) no hearsay; (2) hearsay; (3) double hearsay; and (4) triple hearsay. All participants, regardless of the experimental condition to which they were randomly assigned, were told to imagine themselves as mock jurors in a criminal trial.

Participants then read a set of materials involving a robbery in a convenience store in a lower-middle-class suburb. Participants read opening statements from the prosecutor and defense attorney, testimony from witnesses, closing arguments, and jury instructions.

The trial focused on the testimony of two witnesses. Participants first read the testimony of the police officer that arrived at the scene. The officer testified that the surrounding area had recently experienced an uptick in crime from youths who regularly loiter in the parking lot. He testified that on the day of the robbery, a man wearing a blue ski cap entered the convenience store, noticed that the clerk had stepped away from the counter, and jumped behind the counter. The man stole approximately three hundred dollars from the register and ran away. The officer eventually arrested the defendant, who was two blocks away. The defendant had four hundred dollars on his person at the time of his arrest and was wearing a blue ski cap.

The identity of the second witness to testify depended on the experimental condition to which participants were assigned. In every version of the study, a stock boy had been restocking the shelves a few feet away from the thief when the theft took place. Upon hearing the commotion from the counter, he turned to the counter and saw the perpetrator, who was wearing a blue ski cap. The identity of the witness who testified to those facts varied, however, on the experimental condition to which participants were assigned. In one condition, the stock boy testified to what he observed. But in other conditions, the facts were revealed through one, two, or three degrees of hearsay. A summary of the manner in which these facts were revealed, by condition, is illustrated in Table 2 below.

Table 2: Summary of Hearsay Content by Condition

Condition	Summary Description of Testimony
No Hearsay	The stock boy testified to what he observed.
Hearsay	The store manager testified to what happened (which he learned from the stock boy).
Double Hearsay	The storeowner testified to what the store manager told him had happened (which he learned from the stock boy).
Triple Hearsay	The store's co-owner testified to what the storeowner told him had happened (which he had heard from the store manager, who had learned his information from the stock boy).

This time, the witness was not cross-examined so that it could be determined whether participants spontaneously discount multiple hearsay without their attention being drawn to its potential weaknesses by the attorney.

Participants then read the closing arguments of the prosecuting attorney and the defense attorney. Next, they read a standard jury instruction, in which they were instructed to find the defendant guilty of the crime of theft if they were convinced beyond a reasonable doubt that he had committed the crime.

To gauge whether participants had adequately understood the material from the trial, participants were then asked a series of comprehension checks regarding the evidence that was presented. Participants could not continue in the survey until they answered these comprehension checks correctly.

Participants were then asked several questions in random order. They were asked for their verdict with respect to the case. They were also asked to rate the likelihood that the defendant committed the crime on a scale from 1 (very unlikely) to 7 (very likely). On that same scale, they were asked questions about the strength of the evidence against the defendant.

After completing these questions, participants were asked to provide demographic information, including their age, race, income, level of education completed, and their familiarity with the legal system. Participants were then debriefed with respect to the aims of the study, and the experiment was concluded.

C. RESULTS

The results from Study 2 are reported in two parts. First, preliminary analyses were performed to assess the reliability of the items used to evaluate the data collected, and preliminary models were constructed to examine the relationship among the dependent variables in the study. Second, the main analysis examined the effects, if any, of hearsay, double hearsay, and triple hearsay in the prosecution's case on participants' perceptions of the likelihood that the defendant committed the crime and on their verdicts.

1. Preliminary Analysis

There were three dependent measures in this study: (1) a one-item question regarding the likelihood that the defendant had robbed the convenience store; (2) a one-item question asking participants to render a verdict of guilty or not guilty; and (3) three items designed to measure participants' perceptions of the strength of the evidence against the defendant.

Three items that measured participants' perceptions of the strength of the evidence were: (1) how strong was the evidence that the defendant robbed the convenience store; (2) how well did the prosecution prove that the defendant robbed the store; and (3) how convincing was the prosecution's evidence. All items were scored on a scale from 1 to 7, with 1 representing that the evidence was weak and 7 indicating that it was strong. A correlational analysis revealed that the three items were strongly associated with each other, and they were

averaged to form an index of participants' perceptions of the strength of the evidence.[161]

The strength of the evidence, participants' perceptions of the likelihood of the defendant's guilt, and their verdicts in the case were strongly associated with each other.[162] A logistic regression analysis revealed that perceptions of the defendant's guilt and the strength of the evidence were statistically significant, independent predictors of the verdicts that participants rendered in the case.[163] Specifically, for each one-unit increase in the likelihood of the defendant's guilt, participants became nearly four times more likely to convict the defendant. Similarly, for each one-unit increase in the strength of the evidence, participants became over two-and-a-half times more likely to convict the defendant. A table of the logistic regression model appears below.

Table 3: Effect of Perceptions of Guilt and Evidence Strength on Verdicts

	B	**SE**	**Wald**	**p-value**	**Odds**
Likelihood of Guilt	1.32	0.33	15.85	<.001	3.73
Evidence Strength	0.96	0.20	23.51	<.001	2.61
Constant	−10.71	1.92	31.18	<.001	—
Model χ^2	106.50*				
Pseudo R^2	.681				

Note: Verdicts were coded as 0 for not guilty and 1 for guilty.
* indicates $p < .001$ with respect to model fit.

2. Main Analysis

The main analysis of the data collected in Study 2 proceeds in two parts. First, the relationship between the degree of hearsay presented to participants and their judgments of the defendant's guilt are analyzed. Second, the results

161. The Cronbach's alpha value associated with these three items is .97.

162. Verdicts were highly correlated with perceptions of the strength of the evidence ($r = .79$, $p < .001$) and with perceptions of the likelihood of the defendant's guilt ($r = .60$, $p < .001$). Participants' perceptions of the strength of the evidence and the likelihood of the defendant's guilt were also strongly associated ($r = .70$, $p < .001$). As in Study 1, because the results for perceptions of the defendant's guilt and the strength of the evidence were similar, only the former are reported in this Article.

163. A multiple regression analysis is a statistical test that estimates the independent effects of several predictor variables on a continuous dependent variable. A logistic regression is a regression analysis that examines whether several variables independently predict a binary, dichotomous outcome, such as a guilty or not guilty verdict. *See* LAWLESS ET AL., *supra* note 139, at 343–50. The beta coefficient (B) reported in a logistic regression represents the natural log of the odds that a predictor variable will increase or decrease the likelihood of a dependent outcome (such as a guilty verdict). Because log odds are difficult to interpret, a logistic regression also reports the exponentiated beta coefficient, which is an odds ratio. The odds ratio appears in the last column of Table 3.

are analyzed to determine whether the degree of hearsay to which participants were exposed affected their verdicts in the case.

a. Likelihood of Guilt. Because the manipulation in this study comprised ordinal categories—that is, zero, one, two, or three degrees of hearsay—a technique called a contrast analysis was performed to determine whether the hypothesized linear trend in the data—in which the likelihood of the defendant's guilt decreased as the degree of hearsay in the prosecution's case increased—existed. The contrast analysis revealed a statistically significant linear trend in the data in the hypothesized direction.[164] An illustration of the means for the experimental conditions and the trend in the data is provided below.

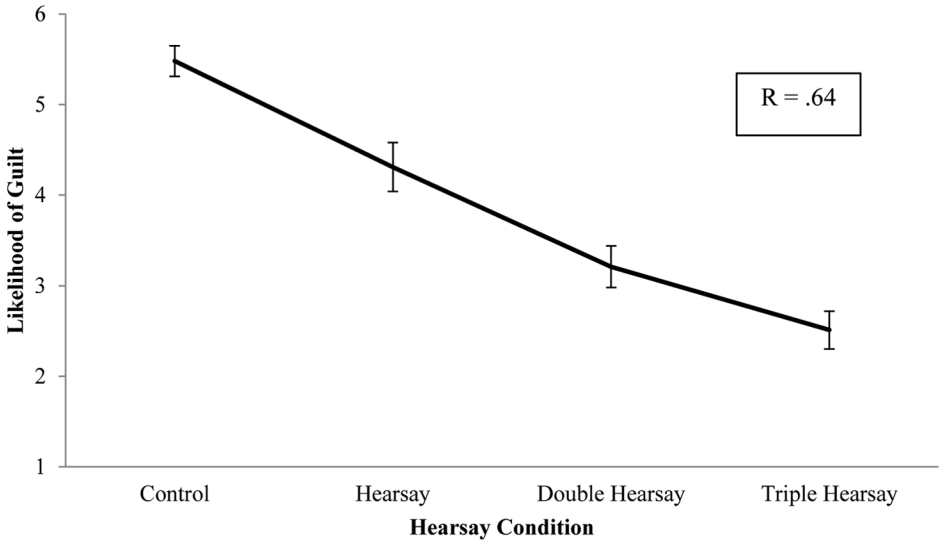

Figure 6: Trend Analysis of Juror Attitudes by Hearsay Condition

As illustrated above, the mean likelihood of guilt for each experimental group decreases as the amount of hearsay admitted into evidence increases, which supports the experimental hypothesis. Additionally, I examined whether the means for each experimental group were significantly different from each other using Tukey's Honest Significant Difference Test, which I also employed in Study 1. The difference in means between the control condition and the hearsay condition was statistically significant,[165] as was the difference in means between the hearsay and double hearsay conditions,[166] as was the difference

164. $F(1, 145) = 94.97$, $p < .001$, $\eta^2_p = .40$. Moreover, tests for a quadratic or cubic trend in the data were not statistically significant. $F(1, 145) = 1.19$, $p = .826$, $\eta^2_p = .00$ (quadratic); $F(1, 145) = 0.12$, $p = .730$, $\eta^2_p = .00$ (cubic).

165. $M_{control} = 5.48$, $SD_{control} = 1.19$; $M_{hearsay} = 4.31$, $SD_{hearsay} = 1.76$; $p < .001$, Cohen's $d = 0.78$.

166. $M_{hearsay} = 4.31$, $SD_{hearsay} = 1.76$; $M_{double} = 3.21$, $SD_{double} = 1.29$; $p = .001$, Cohen's $d = 0.71$.

between the double hearsay condition and the triple hearsay condition.[167] In sum, participants appeared to evaluate the hearsay in the prosecutor's case and discounted the probative value of that evidence when assessing whether the defendant committed the crime.

b. Verdicts. The contrast analysis revealed that participants' perceptions of the likelihood that the defendant committed the crime were affected by hearsay evidence as hypothesized from previous empirical research.[168] This section examines whether the hearsay evidence presented by the prosecutor also affected mock jurors' verdicts.

Verdict data were analyzed with respect to the proportion of guilty and not guilty verdicts rendered in each experimental condition. A graph reflecting those proportions is presented below.

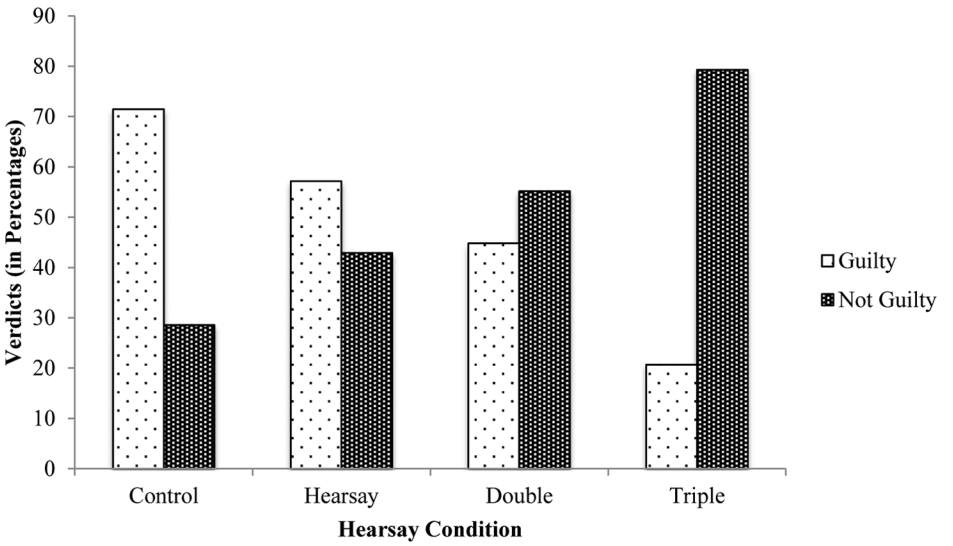

Figure 7: Graph of Guilty and Not Guilty Verdicts by Hearsay Condition

Because a jury verdict represents a dichotomous outcome—that is, a vote of guilty or not guilty—I again employed a technique called a logistic regression to evaluate whether the amount of hearsay in the prosecution's case influenced mock jurors' verdicts. The regression revealed that, compared to the triple hearsay condition, (1) participants who were exposed to double hearsay were over three times more likely to convict the defendant; (2) participants who were exposed to one level of hearsay were over five times more likely to convict

167. $M_{double} = 3.21$, $SD_{double} = 1.29$; $M_{triple} = 2.51$, $SD_{triple} = 1.16$; $p = .079$ (marginal), Cohen's $d = 0.57$.

168. *See supra* section IV.C.2.a.

the defendant; and (3) participants who were not exposed to hearsay were over nine-and-a-half times more likely to convict the defendant. The complete results from the logistic regression analysis, which supports the experimental hypothesis, are reported in Table 4.

Table 4: Effect of Hearsay on Mock Juror Verdicts

	B	SE	Wald	p-value	Odds
Control	2.26	0.56	16.47	<.001	9.58
Hearsay	1.63	0.55	8.66	.003	5.11
Double Hearsay	1.14	0.59	3.69	.055	3.12
Constant	−1.34	0.46	8.59	.003	—
Model χ^2	20.77*				
Pseudo R^2	.174				

Note: Verdicts were coded as 0 for not guilty and 1 for guilty. Triple hearsay served as the comparison category.

* indicates $p < .001$ with respect to model fit.

D. DISCUSSION

The results from Study 2 support the hypothesis that, in a linear fashion, as the amount of hearsay in the prosecutor's case increased, the persuasiveness of the prosecutor's case decreased. Moreover, the large effect size obtained further supports the proposition that jurors are naturally suspicious of the information degradation present in hearsay evidence, even when cross-examination has not drawn their attention to that potential weakness.

The data with respect to mock jurors' verdicts further support this conclusion. As the amount of hearsay in the prosecution's case increased, the odds of obtaining a conviction from mock jurors decreased. This suggests that jurors are attuned to the psychological distance inherent in evidence that contains double or triple hearsay and that they adjust the weight that they place on that evidence accordingly. Moreover, these adjustments are made not only with respect to their attitudes about the defendant and about the prosecutor's case, but also with respect to their verdicts.

V. IMPLICATIONS, OBJECTIONS, AND CONCLUSIONS

The hearsay rule has earned its reputation as the most spoiled of the federal evidence rules. It has courted significant scholarly and political controversy, contains nearly thirty different exceptions and exemptions, and relies on ever-shifting rationales for its existence. Lawmakers have created this policy quagmire largely in the absence of empirical research that could test whether the dangers that the hearsay doctrine means to protect against are real or imagined

and whether the exceptions to the doctrine are based on testable, empirical reality. Taking a more empirically based approach to constructing rules of evidence in federal and state courts could potentially uncover unintended consequences of these rules, ensure that they are based on sound rationales, and ensure that they function as policymakers intend.

The rule barring hearsay evidence can benefit from empirical study to the extent that the rationale for its existence waffles between a concern over decisional accuracy and a concern for procedural justice. Laurence Tribe's testimonial triangle provides an intuitively appealing framework for understanding the concerns expressed by the common law and by policymakers who are concerned with the effects of hearsay evidence on the decisional accuracy of the courts. But in the forty years since the testimonial triangle became a staple of the scholarly discussion of hearsay, researchers have not evaluated whether the central concerns outlined in the triangle—that fact finders will not appropriately attend to the infirmities of memory, perception, ambiguity, and insincerity that may lurk within the information provided by out-of-court hearsay declarants—are borne out in empirical reality. If these concerns are overstated, the implications go to the heart of the debate over the hearsay doctrine.

Recent empirical scholarship on the decisional accuracy rationale for the hearsay rule, however, contains two important limitations. First, it has concentrated too generally on whether jurors evaluate hearsay well or poorly, and has not focused on the specific empirical concerns about hearsay evidence that have been raised by legal policymakers. Second—and more surprisingly, considering that most empirical hearsay researchers are psychologists—the empirical literature lacks a coherent scientific framework that (1) explains why jurors appear to be better consumers of hearsay evidence than policymakers believe, and (2) provides a roadmap for future scholarship that may better persuade legal policymakers.

This Article seeks to move empirical hearsay scholarship forward with respect to these twin aims. By using the phenomenon of psychological distance as a guiding framework, the studies reported in this Article attempt not only to determine whether the decisional accuracy rationale for the bar on hearsay evidence withstands scientific scrutiny, but also to explain why this rationale might rely on misplaced notions of human impression formation, judgment, and behavior. In that respect, the studies reported here provide additional evidence that jurors attend to the infirmities that lurk beneath the evidence provided by out-of-court hearsay declarants.

Consistent with previous research on the automaticity of goal-directed behavior, Study 1 suggests that jurors are motivated—perhaps even subconsciously—to evaluate the credibility of hearsay evidence in the same manner in which they are motivated to evaluate the credibility of in-court witnesses. When hearsay evidence was potentially infirm, mock jurors found the defendant no more likely to have committed the crime than when the testimony of the in-court witness was potentially infirm. Moreover, mock jurors

found non-infirm testimony more persuasive than infirm testimony regardless of whether that infirmity involved memory, perception, ambiguity, or insincerity. This suggests that although the testimonial triangle is a useful way in which to conceptualize the decisional accuracy rationale for the hearsay rule, the concerns expressed by both the common law and evidence policymakers may not bear on jury behavior as strongly as these policymakers believe.

The second study examines multiple hearsay—a topic that has received no empirical attention until now—in the context of construal level theory and psychological distance. The results suggest that, even without the benefit of cross-examination, jurors discount hearsay evidence in a systematic, defensible manner when a prosecutor's case contains increasing amounts of hearsay evidence. Taken together, these studies provide support for the growing weight of the empirical data challenging policymakers' beliefs that the exclusion of hearsay evidence promotes decisional accuracy by the courts. The results have implications not only for the hearsay rule, but also for the contentious debate over jury competency and for ground-level decisions that practicing attorneys make daily with respect to hearsay evidence.

A. RESEARCH AND POLICY IMPLICATIONS

It is becoming increasingly apparent that the decisional accuracy rationale for the hearsay rule is crumbling under the weight of empirical research. Empirical hearsay studies continue to converge on the same conclusion: jurors are significantly more competent to evaluate hearsay evidence than policymakers credit them to be.[169] The early studies suggested that jurors are competent with respect to how cognitive, motivational, and situational factors can affect the probative value of a hearsay statement.[170] The studies reported in this Article suggest that the concerns about hearsay evidence held by policymakers who focus on decisional accuracy—the absence of cross-examination to highlight potential infirmities of sincerity, memory, perception, or narrative ambiguity—do not appear to pose serious challenges for fact finders.

The implications for the hearsay doctrine are numerous. If jurors are competent to evaluate hearsay evidence, the decisional accuracy rationale for the hearsay rule—which states that legal fact finders will underappreciate the ways in which hearsay evidence is unreliable because the evidence is not subject to meaningful cross-examination—must give way to a more persuasive justification. Indeed, some researchers have argued, based on empirical data, that hearsay evidence should be allowed into court because hearsay often contains at least some informational value and jurors can be trusted to discount hearsay in a reasonable manner.[171]

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169. *See supra* section I.C.

170. *See, e.g.*, Miene et al., *supra* note 68, at 687; *see also* Kovera et al., *supra* note 68, at 707, 719.

171. *See* Swift, *supra* note 49, at 497; *see also* David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585, 612–17 (2006); George F. James, *The Role of Hearsay in a*

However, it is not obvious that the empirical studies on hearsay, both past and present, lead to the conclusion that hearsay should be admitted into evidence. There are other rationales for the hearsay rule that are not empirical in nature. Like peeling away the layers of an onion, empirical scholarship can remove the outer, less persuasive arguments proffered in the debate over the hearsay rule and focus the policy debate on these other lines of argumentation.[172] For example, we might conceive of the rule barring hearsay evidence not as a rule that promotes decisional accuracy, but as a rule that promotes procedural justice and fairness.

If we conceive of the hearsay rule as a rule that promotes fairness in the trial process, we might argue that, as a matter of dignity, criminal *and* civil trial judges should not allow into evidence information from accusers whom the defendant has not had the opportunity to face and to cross-examine.[173] Hearsay policy that relies on principles that underlie the Sixth Amendment Confrontation Clause (and its state-law counterparts) shifts the normative debate from one that is empirically based to one that is philosophically based and would obviate the need for additional empirical testing. It would also align more closely with recent constitutional developments with respect to the hearsay doctrine. Although the controlling rationale for the United States Supreme Court's hearsay jurisprudence has become less predictable recently, its decisions in *Crawford v. Washington*[174] and *Davis v. Washington*[175] signal that the Supreme Court finds this procedural justice rationale appealing, although it also appears to be focused, in part, on empirical assertions about the power of cross-examination to expose testimonial infirmities.[176]

A shift to a philosophical, procedural-justice justification for barring hearsay evidence in civil and criminal cases would require policymakers to reevaluate the exceptions to the doctrine under Federal Rule of Evidence 803—which allows into evidence so-called "reliable" hearsay, even though the reliability of such evidence currently has no empirical support—and under Federal Rule of Evidence 804—which allows into evidence potentially unreliable hearsay statements for fear of losing all evidence on a particular issue at trial.[177] These concerns would prove challenging, as would the concerns facing any coherent

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*Rational Scheme of Evidenc*e, 34 ILL. L. REV. NW. U. 788, 790–94 (1940); Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338–39 (1961).

172. *See* Thompson & Pathak, *supra* note 54, at 470 (using the onion analogy to argue for more precise scholarly discussion about the hearsay doctrine).

173. *See supra* note 54 and accompanying text (discussing commentators' concerns with "trials by ambush" with respect to hearsay evidence).

174. 541 U.S. 36 (2004).

175. 547 U.S. 813 (2006).

176. *See Crawford*, 541 U.S. at 61 (discussing the testing of evidence through the "crucible of cross-examination"). It should be noted that, although the right of confrontation attaches in criminal trials as a matter of constitutional law, under a procedural justice rationale for the hearsay rule a similar right could attach as a policy matter in civil trials as well.

177. *See supra* notes 30–33 and accompanying text.

framework for justifying the bar on hearsay evidence. Any such rationale, however, would represent an improvement from the current state of the doctrine, in which hearsay is banned largely on account of folk wisdom about juror cognition that is unsupported by current empirical research.[178]

The data reported in this Article also have implications for the contentious debate over the competency of jurors as legal fact finders. Although the American jury system remains popular with the general public,[179] scholars in fields including behavioral economics and psychology have raised questions about the ability of lay people to accurately comprehend the facts in increasingly complex legal cases, to accurately discern which pieces of evidence are credible and which are not, and to accurately apply the correctly deduced facts to the correct legal standard.[180] Although empirical evidence suggests that the strength of the evidence presented in court is the best predictor of legal verdicts,[181] other evidence suggests that predictable decisionmaking biases emerge in both jurors and judges[182] that impede the ability to evaluate evidence accurately.[183] Although some commentators have advocated removing certain complex cases from juries and placing them into the hands of judges with the relevant expertise to evaluate them,[184] others have argued that giving jurors certain tools to facilitate their task of evaluating the evidence shows promise, including allowing jurors to take notes, allowing them to ask questions of the witnesses, and allowing them to discuss the case with each other as the case proceeds.[185]

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178. *See supra* section I.C.

179. *See* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 339–46 (2007) (discussing the popularity of the jury system).

180. *See* Joel Cooper et al., *Complex Scientific Testimony: How Do Jurors Make Decisions?*, 20 LAW & HUM. BEHAV. 379, 380–81 (1996); *see also* N. J. Schweitzer & Michael J. Saks, *The* CSI *Effect: Popular Fiction About Forensic Science Affects the Public's Expectations About Real Forensic Science*, 47 JURIMETRICS 357, 358 (2007). *See generally* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002) (reporting the results of several laboratory experiments suggesting that jurors act irrationally with respect to punitive damages).

181. *See* VIDMAR & HANS, *supra* note 179, at 147–68 (discussing evidence strength as a predictor of jury verdicts).

182. *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816–21 (2001) (demonstrating that judges fall prey to the same decisionmaking biases that affect jurors); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26, 26 (1999).

183. *See, e.g.*, Reid Hastie & Bernd Wittenbrink, *Heuristics for Applying Laws to Facts*, *in* HEURISTICS AND THE LAW 259, 272–76 (G. Gigerenzer & C. Engel eds., 2006).

184. *See* Justin Sevier, *Redesigning the Science Court*, 73 MD. L. REV. 770, 791–92 (2014) (discussing the debate surrounding a potential "complexity exception" to the Seventh Amendment to the United States Constitution); *see also* Troyen A. Brennan, *Helping Courts with Toxic Torts: Some Proposals Regarding Alternative Methods for Presenting and Assessing Scientific Evidence in Common Law Courts*, 51 U. PITT. L. REV. 1, 62–71 (1989) (arguing for complexity exception with respect to toxic torts and arguing that scientific boards could aid juries in toxic tort cases).

185. *See generally* JURY TRIAL INNOVATIONS (G. Thomas Munsterman et al. eds., 1997); Martin J. Bourgeois et al., *Nominal and Interactive Groups: Effects of Preinstruction and Deliberations on Decisions and Evidence Recall in Complex Trials*, 80 J. APPLIED PSYCHOL. 58 (1995); Neil P. Cohen, *Communicating with Juries: The Timing of Jury Instructions*, 67 TENN. L. REV. 681 (2000); B. Michael

The studies reported here suggest that hearsay is an area in which jurors demonstrate competency. Although no study had yet assigned probative value to hearsay evidence and evaluated jurors' judgments of that evidence against a Bayesian account of how the rational juror would evaluate that evidence,[186] hearsay studies have used clever methodologies to determine that jurors evaluate hearsay at least as well as they evaluate other types of evidence, including certain types of non-hearsay,[187] poor- or high-quality eyewitness accounts of the same incident,[188] or hearsay that differs only in terms of the motive for its use.[189]

The studies reported here add to this conversation with even greater particularity and specificity. For example, in both studies, when the hearsay evidence presented to mock jurors followed an ordinal pattern—either with respect to the amount of hearsay presented to them or the number of infirmities in the evidence presented to them—their perceptions of that evidence followed a logical, statistically significant linear pattern. Moreover, as predicted, jurors are able to discriminate between testimonial infirmities that exist in the information provided to them by the hearsay declarant and infirmities that exist in the testimony of the in-court witness. And unlike previous empirical research, which has been criticized as a collection of findings in search of a framework, the present studies propose potential psychological mechanisms that may account for juror competency with respect to hearsay.

Finally, the findings reported here have implications for practitioners, who make ground-level decisions about hearsay evidence. There are myriad reasons for attorneys to use hearsay evidence instead of in-court testimony: a witness could no longer be alive or could be ill, she could have moved away from the jurisdiction, she might be unavailable for other important reasons, or she might refuse to testify.[190] The data presented here suggest that jurors pay attention to hearsay evidence, scrutinize it for infirmities, and discount it accordingly, independent of the discounting that jurors do with respect to the testimony of in-court witnesses. It therefore behooves attorneys to think critically about using

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Dann et al., *Can Jury Trial Innovations Improve Juror Understanding of DNA Evidence?*, 90 JUDICATURE 152, 155 (2007); Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003); Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449 (2006); Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not to Ask, That Is the Question,"* 78 CHI.-KENT L. REV. 1099 (2003); *see also* Justin Sevier, *The Unintended Consequences of Local Rules*, 21 CORNELL J.L. & PUB. POL'Y 291, 293 n.4 (2011).

186. Bayes Theorem is a mathematical formula for computing conditional probabilities. Specifically, Bayes Theorem examines how individuals should evaluate the likelihood of an event in light of (1) new information that individuals receive about the event; and (2) their prior beliefs about the likelihood of that event. *See* David Christensen, *Measuring Confirmation*, 96 J. PHIL. 437, 437–38 (1999).

187. Landsman & Rakos, *supra* note 12, at 65, 72–77.

188. *See* Kovera et al., *supra* note 68, at 707, 719.

189. Sevier, *supra* note 24, at 8 n.28, 14–20.

190. *See* Karsai, *supra* note 13, at 170 n.228; Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 919 n.82 (1992); Sevier, *supra* note 24, at 2–3.

hearsay testimony for reasons other than necessity. Any limitations in the declarant's testimony that the attorney may seek to obscure through hearsay might be ferretted out and weighed accordingly by jurors.

B. OBJECTIONS AND FUTURE DIRECTIONS

The findings reported in this Article provide new evidence of juror competency and provide additional evidence that challenges the decisional accuracy rationale for the hearsay rule. Controlled behavioral experiments are, of course, subject to specific limitations of which policymakers should be mindful. Discussing these limitations—and potential responses to them—can increase policymakers' willingness to consider the data and can provide researchers with future avenues to explore with respect to the hearsay rule.

Controlled experiments differ from field studies in an important respect: field studies observe participants in their natural environments, whereas laboratory experiments observe participants' behavior and judgment in a more uniform setting.[191] Neither design is superior to the other; they each involve important tradeoffs that policymakers should consider. Field experiments have the benefit of external and ecological validity.[192] Experimenters who use a field study methodology can assert with more confidence than can an experimenter who employs a laboratory study that the results reflect what participants actually do in response to an environmental stimulus. There is always a concern in laboratory studies that the connection between what is found in the lab and what occurs in the real world might not be as strong as experimenters believe, although data collected on this issue suggest that this concern is overstated.[193] However, what field studies gain in external validity, they lose with respect to internal validity—the ability of the researcher to express with confidence that she measured in her study that which she claims she measured.[194]

All else equal, controlled laboratory studies contain much greater internal validity than do field studies because the environment in a laboratory study—whether it is a vignette design or a behavioral design—is kept uniform for all study participants with the exception of the experimental manipulation.[195] Thus, any differences observed among groups in the experiment is attributable to the experimental manipulation and allows researchers in a controlled laboratory design to make stronger statements of causality than can researchers who employ other testing methods. Although field researchers can (and do) attempt to control for potential confounding factors through the use of statistical tech-

191. *See* Lynne ForsterLee & Irwin A. Horowitz, *The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials*, 86 JUDICATURE 184, 184–85 (2003); Robbennolt, *supra* note 145, at 483; *see also* Sevier, *supra* note 185, at 311.

192. Sevier, *supra* note 185, at 311.

193. Mark Kelman et al., *Context-Dependence in Legal Decision Making*, *in* BEHAVIORAL LAW & ECONOMICS 61, 73 (Cass R. Sunstein ed., 2000).

194. *See* LAWLESS ET AL., *supra* note 139, 93–124.

195. *Id.*

niques, many scholars agree that statistical controls are inferior to a randomly assigned experimental design in which the manipulation is all that differs among the experimental conditions.[196]

Moreover, true threats to external validity involve an *interaction* between the functional relationship being studied—that is, the effect of the independent variable on the dependent variable—and the setting—a laboratory simulation versus a field test. That the overall level of an effect is higher or lower in one setting compared to another is rarely a matter of concern among scientists; indeed, by definition it is not a concern when the question is whether a hypothesized functional relationship exists or not. External validity concerns arise when an independent variable increases a dependent variable in one setting but decreases it in the other setting. Were an effect found in one setting to merely disappear in the other setting, that might or might not be a concern from a policy perspective, but that would depend on the details of the policy question.

The vignettes employed in the studies reported here provide important information regarding how participants evaluate hearsay evidence. The trials in both studies were the same in every respect—except the hearsay manipulation—and revealed stark differences and significant trends among participants with respect to the manner in which they evaluate hearsay evidence. A field study design, in which different participants would likely be exposed to different cases with different facts, would not be able to produce statements of causality with respect to people's perceptions of hearsay evidence that are as strong as a laboratory design. Nonetheless, field studies of hearsay evidence—which have not yet been conducted by empirical researchers—should be the next step in gathering data about hearsay evidence. Using publicly available data, ambitious researchers could code real cases for the presence or absence of hearsay evidence, the type of hearsay that was submitted, and code for (and ultimately control for) factors such as the charges against the defendant, demographics of the relevant legal actors, and the complexity of the trial in order to draw conclusions from cases involving hearsay in the real world. The external and ecological validity reported by such cases would complement the internal validity supplied by controlled laboratory studies and, together, would supply convergent validity for the proposition that jurors competently evaluate hearsay evidence.[197] At the least, other researchers should consider replicating the results reported in this Article in a videotaped trial or a live reenactment.

Future researchers should also consider replicating these experiments at the jury level and should allow jurors to deliberate with one another about the case provided to them. It is important for hearsay researchers, and jury researchers generally, to evaluate juror attitudes toward experimental stimuli at both the

196. *Id.*

197. Convergent validity is defined as the ability to demonstrate an empirical phenomenon across a variety of populations and experimental designs. *See, e.g.*, Donald T. Campbell & Donald W. Fiske, *Convergent and Discriminant Validation by the Multitrait–Multimethod Matrix*, 56 PSYCHOL. BULL. 81, 100 (1959).

individual juror and group (jury) level. It is always possible that deliberation, particularly in difficult cases, might sway jurors away from their initial positions on the evidence toward a different position,[198] and it would be useful for researchers and policymakers to understand the conditions under which that is likely to occur. Nonetheless, substantial empirical evidence suggests that the position that enjoys the support of a majority of individual jurors' initial votes during deliberation is the position that the jury usually agrees upon.[199] Moreover, evidence suggests that jurors rarely alter their vote from the individual position that they take at the beginning of the deliberations.[200] Thus, although it is unlikely to have a substantial effect on jurors' individual assessments of hearsay, it is still worthwhile for researchers to examine deliberation, not only to increase our scientific knowledge with respect to how jurors communicate with each other about hearsay evidence, but also to determine the margins at which individual assessments of hearsay evidence can change.

CONCLUSION

Empirical legal scholarship provides myriad benefits to legal policymakers. Such scholarship can produce normative structural change at the policy level,[201] positivist descriptions of how legal actors are likely to behave given a set of legal rules,[202] and valuable practical advice to legal practitioners regarding how to navigate legal rules in a manner that maximizes results for their clients.[203]

Empirical analyses of legal rules also provide policymakers with powerful tools to ensure that legal doctrines work as intended and are based on principles that are grounded in reality. This is especially important with respect to complex doctrines such as hearsay, whose mechanics, contours, and underlying rationale are frequently in flux. The studies reported in this Article provide a framework for understanding how jurors think about hearsay and challenge the common law rationale, conceptualized in Professor Tribe's testimonial triangle, that the hearsay rule promotes decisional accuracy. The studies reported here join a

198. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 488 (1966).

199. *See, e.g.*, *id*.

200. *Id*. Group decisions tend to "polarize" toward the majority view. *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, 126 (2008).

201. *See, e.g.*, Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277, 277 (2003) (reviewing the psychological literature on eyewitness identification and discussing the impact of the research on policy). For a general discussion regarding the role of empirical scholarship in institutional design, see generally Sevier, *supra* note 184.

202. *See, e.g.*, Arden Rowell, *The Cost of Time: Haphazard Discounting and the Undervaluation of Regulatory Benefits*, 85 NOTRE DAME L. REV. 1505, 1506–10 (2010) (examining behavior in the regulatory context and making policy recommendations).

203. *See, e.g.*, Sevier, *supra* note 24, at 51–53 (examining whether jurors are sensitive to an attorney's motivation for proffering hearsay evidence and providing suggestions to practitioners in light of the empirical evidence collected).

growing chorus of experimental work suggesting that jurors evaluate hearsay more critically than evidence policymakers believe.

Policymakers should consider this evidence when examining the concerns that the hearsay rule is designed to remedy. Did the outrage over the death of Sir Walter Raleigh stem from a belief that incompetent jurors clumsily evaluated pernicious hearsay evidence, or did the outrage stem from a philosophical antipathy over the Crown's refusal to produce the witness so that he would face Raleigh? Policymakers' answers to this question—in which they critically evaluate both empirical and philosophical arguments on both sides of the issue—may lead to greater coherence for the hearsay doctrine, ensure the integrity of verdicts, and ultimately improve the legal system in which the hearsay doctrine operates.