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Juror Decision Making and the Evaluation of Hearsay Evidence

Peter Miene,* Roger C. Park,**
and Eugene Borgida***

INTRODUCTION

Suppose that your favorite bank teller observes a bank robbery, witnesses the robber, and a few hours later tells a police investigator everything that happened. At trial, in the absence of exceptional circumstances, the police investigator may not be allowed to testify about the events described by the teller. The hearsay rule normally would exclude the evidence, even if the teller was unavailable at the time of the trial. Hearsay is evidence that is introduced into court by one person (the witness) based on what another person (the declarant) has said outside of court.¹ A simple repetition of a statement is not necessarily hearsay. In order for testimony to be considered hearsay, "the repeated statement must be offered for the purpose of proving that what the declarant said is true—just as if the declarant were on the witness stand, giving testimony that the proponent wants the trier to believe."²

Thus, some out-of-court statements are not hearsay because the witness does not offer the statement to prove the truth of the matter asserted. For example, a declarant's statement, "If you don't help me, I'll kill you," offered by the proponent to show that the hearer was under duress, would not be hearsay.³ It does not matter whether the declarant was telling the truth or not; the hearer might still fear death. Most policy

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1. See FED. R. EVID. 801(c). For a general discussion of hearsay, see MCCORMICK ON EVIDENCE §§ 244-327 (Edward W. Cleary ed., 3d ed. 1984) [hereinafter MCCORMICK].

2. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 6.1, at 180 (2d ed. 1987).

3. See MCCORMICK, *supra* note 1, § 249, at 733-34.

reasons for excluding hearsay do not apply because the declarant need not be cross-examined under oath.

An out-of-court hearsay statement is not always excluded from evidence. The statement may fit into one of the dozens of exceptions to the hearsay rule.⁴ For example, courts routinely admit hospital records into evidence for the truth of what they assert under the business records exception to the hearsay rule.⁵ The hearsay exceptions themselves have exceptions and qualifications, and the law of hearsay is a complicated web of doctrine.⁶

Despite the many exceptions to the hearsay rule, some evidence is clearly inadmissible hearsay. Suppose, for example, that in a criminal case in lieu of a police officer's courtroom testimony the prosecution offered the written report of the officer who observed a crime. Or suppose that in a civil suit to recover damages for personal injuries caused by an accident, one party offers an investigator's testimony that a day after the accident, she interviewed a bystander who saw the accident, and the bystander said that one of the cars crossed the center line. When offered to prove the truth of their assertions, the police report and the bystander's statement would almost surely be excluded on hearsay grounds.⁷

The difference between hearsay testimony and eyewitness testimony is significant, as reflected by the research presented in this Article. In eyewitness testimony, the witness testifies about information with which he or she has had direct experience. This testimony is subject to direct and cross-examination. Under cross-examination, the adversary reveals weaknesses and contradictions in the testimony. Presumably, the jury responds to this information accordingly. Our adversarial system of justice relies on the power of cross-examination to reveal inaccuracies or inconsistencies in testimony.⁸ With hearsay testimony, however, the opposing party cannot utilize the powerful technique of cross-examining the witness, and especially the out-of-court declarant. The opposing attorney can do little but question the witness's ability to recall what the declarant said

4. See, e.g., FED. R. EVID. 803, 804.

5. MCCORMICK, *supra* note 1, § 313, at 882-85.

6. Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 55 (1987).

7. See MCCORMICK, *supra* note 1, § 248, at 731-32.

8. JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* (1985).

and to highlight the fact that this testimony is not based on direct experience.

In general, scholars adopt one of two competing views regarding the proper treatment of hearsay admissibility. One position results from a view that cross-examination of a hearsay witness cannot reveal anything about the credibility of the out-of-court declarant.⁹ The testimony may therefore be unduly prejudicial.¹⁰ Some legal scholars adopting this position cite the possibility that errors can easily occur even when one person recalls information said by another, such as if the hearsay witness did not correctly hear what the declarant said.¹¹ For these reasons, legal scholars adopting this position do not favor the admissibility of hearsay evidence.

Supporters of the opposing view take the position that "hearsay can be convincing evidence, and it is the sort of evidence on which we routinely rely in the most important affairs of home, state, and business."¹² Proponents of this position argue, then, that everyday experiences make people aware of potential problems with hearsay and that people can accurately process this type of information.¹³ Thus, they argue, hearsay evidence should not be withheld from a jury because jurors can give this testimony an appropriate evaluation in reaching their verdicts.

The question of hearsay admissibility thus revolves primarily around the issue of whether it is more just to withhold from the jury information that is perhaps unreliable and difficult to assess, or to provide the jury with all available information, trusting that jurors will use the information appropriately. Research on the processes of human inference suggests that people are not always sensitive to factors that may underlie the

9. MCCORMICK, *supra* note 1, § 245, at 728.

10. See, e.g., LILLY, *supra* note 2, § 6.1, at 182; 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1362, at 3 (James H. Chadbourne rev. ed. 1974).

11. See, e.g., *Report of Committee on Administration of Justice on Model Code of Evidence*, 19 J. ST. B. CAL. 262, 274 (1944).

12. See Park, *supra* note 6, at 54.

13. The legal definition and the lay concept of "hearsay" differ. First, the legal term "hearsay" is not a synonym for rumor or gossip. A statement from a reliable source with first-hand information may still be hearsay. For example, an out-of-court statement from a trained observer who saw an accident would be hearsay if offered to prove the truth of the matter asserted. Second, the term "hearsay" is not restricted to oral statements, that is, statements that one "hears" someone else "say." A written assertion, offered to prove its truth, is also hearsay. See FED. R. EVID. 801(a); MCCORMICK, *supra* note 1, § 248, at 732.

reliability of evidence used in everyday life.¹⁴ Hearsay evidence might unduly persuade the social perceiver: social perceivers may be viewed as impressionable and often irrational decision makers prone to overweighing anecdotal evidence and emotionally compelling accounts based on small samples. If jurors indeed more readily recall hearsay evidence they may overvalue the hearsay while preparing a verdict.¹⁵ In contrast, cautions and instructions from the judge, coupled with cross-examination pointing out the potential flaws of hearsay evidence, may prompt jurors to be cautious in their interpretation and evaluation of hearsay.¹⁶ This testimony would then have very little impact on the verdict. Only a few studies, however, have empirically examined these issues and the next section discusses these studies.

I. EMPIRICAL STUDIES OF HEARSAY

A study by Stephan Landsman and Richard Rakos represents one of the first attempts to assess the impact of hearsay evidence on decision making.¹⁷ By experimentally manipulating the strength of hearsay testimony and the overall strength of the case against the defendant in a factorial research design, Landsman and Rakos designed their study to gauge the conditions under which hearsay would be relied upon by mock jurors. They aimed to examine the overall impact of hearsay on decision making by creating some situations in which the hearsay was stronger than the other evidence and other situations in which the hearsay was weaker than the other evidence. Because their interest centered on the impact of the hearsay evidence, the authors chose levels of hearsay evidence that varied both in the content of the testimony and in the credibility of

14. See SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 66-95 (2d ed. 1991); THOMAS GILOVICH, *HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE* 88-111 (1991); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 3, 7-8 (1980).

15. Edward J. Imwinkelried, *The Importance of the Memory Factor in Analyzing the Reliability of Hearsay Testimony: A Lesson Slowly Learnt—and Quickly Forgotten*, 41 FLA. L. REV. 215, 222-28 (1989); I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 8-22.

16. J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 79-87 (1990).

17. 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 (1991).

the hearsay witness. They deemed the methodological confounding of these variables necessary to create levels of hearsay that varied widely along a dimension of evidentiary strength.

To examine how mock jurors utilize hearsay evidence in decision making, Landsman and Rakos randomly assigned 147 participants to one of the twelve conditions created by the four levels of hearsay and the three levels of other evidence strength. Participants read a twelve-page transcript of a trial concerning a defendant charged with stealing money from a coat in a restaurant. The transcripts contained opening statements and closing arguments by the attorneys, an introduction and final instructions from the judge, and a large number of evidentiary statements made by several witnesses. Study participants read the trial transcript and then provided a verdict and other evaluations.

The results indicated that even though jurors rated the two strongest levels of hearsay as more important to their verdict than the two weakest levels of hearsay, the strength of the hearsay evidence had no impact whatsoever on the verdict. The researchers designed the hearsay evidence¹⁸ to incriminate the defendant and thus expected strong hearsay to produce more guilty verdicts than weak hearsay. However, sixty-seven percent of the mock jurors receiving the "weak" hearsay found the defendant guilty while only fifty-eight percent of the jurors receiving the "strong" hearsay voted for conviction. These conviction rates compare to a fifty-one percent rate for mock jurors who received no hearsay evidence. Thus, the strength of the hearsay evidence had no systematic effect on mock jurors' verdicts, nor did strength of hearsay interact with the strength of the other evidence.

An experimental study by Margaret Bull Kovera, Steven Penrod, and Roger Park examined different strengths of eyewitnesses and hearsay witnesses.¹⁹ The eyewitnesses provided accounts that were classified as good, moderate, or poor in terms of accuracy. Each hearsay witness watched a videotape of one of these accounts and then described the information after an interval of either one day or one week. Researchers exposed mock jurors to a variety of eyewitness and hearsay accounts. Kovera, Penrod, and Park found that hearsay wit-

18. *Id.* at 72-73. The researchers did not label the evidence as hearsay for the mock jurors. *Id.*

19. Margaret Bull Kovera et al., *Jurors' Perceptions of Hearsay Evidence*, 76 MINN. L. REV. 703 (1992).

nesses testifying after the short delay were far more accurate than those witnesses testifying after the long delay. The mock jurors rated the quality and the usefulness of the hearsay testimony after the short delay significantly higher than the long delay testimony. However, mock jurors rated the eyewitness testimony as more useful and of higher quality than the hearsay testimony. Thus, the results provided support for a skepticism effect.

II. DO JURORS USE HEARSAY EVIDENCE?

In our research on hearsay evidence, we hypothesized that mock jurors would differentiate between evidence from an eyewitness and a hearsay witness.²⁰ More specifically, we expected that jurors would discount hearsay testimony or would consider eyewitness testimony conveying the same information to be more significant. Previous research on the effects of eyewitness testimony suggests that it is influential in juror decision making.²¹ These eyewitness studies support the argument that people intuitively accord considerable information value to eyewitness information even when various factors should undermine the accuracy of the eyewitness identifications. Studies on the influence of expert testimony in cases involving eyewitness testimony, for example, suggest that corrective testimony from an expert that sensitizes jurors to the fallibility of eyewitness testimony is effective at weakening the influence of eyewitness testimony.²² Thus, in a situation where a party presents no expert testimony, we expected that an eyewitness, as compared with a hearsay witness, would more strongly influence jurors.

In order to test these hypotheses about hearsay evaluation, we created a trial stimulus tape based on an apparently real theft. A few participants, recruited ostensibly to evaluate law students in a mock trial, witnessed an experimental confeder-

20. See Peter Miene et al., *The Evaluation of Hearsay Evidence*, Paper Presented at the Annual Meeting of the American Psychological Association (Aug. 1990), in *CURRENT ISSUES IN INDIVIDUAL AND GROUP DECISION MAKING RESEARCH* (N. John Castellan, Jr. ed., forthcoming 1992).

21. See *EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES* (Gary L. Wells & Elizabeth F. Loftus eds., 1984); Brian L. Cutler et al., *Juror Decision Making in Eyewitness Identification Cases*, 12 *LAW & HUM. BEHAV.* 41, 52-54 (1988); Saul M. Kassir et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony*, 44 *AM. PSYCHOLOGIST* 1089, 1095 (1989).

22. See Brian L. Cutler et al., *The Eyewitness, the Expert Psychologist, and the Jury*, 13 *LAW & HUM. BEHAV.* 311, 326-29 (1989).

ate enter the University of Minnesota Law School and leave a short time later carrying a computer. A law professor then led these participants to believe that a person had just stolen his computer and that they were eyewitnesses to the theft. We prevented another group of participants from witnessing the theft. They became hearsay witnesses through a procedure in which we individually paired them with one of the eyewitnesses during mock police questioning about the theft. Thus, the staged theft created actual eyewitnesses and hearsay witnesses to a seemingly real event. We conducted and videotaped a mock trial involving these witnesses, the confederate defendant, two attorneys, and a district court judge.

We created four different experimental conditions from this videotape: circumstantial evidence only, circumstantial evidence plus hearsay testimony, circumstantial evidence plus eyewitness testimony, and circumstantial evidence plus eyewitness and hearsay testimony. All groups received standard Minnesota judicial instructions and appropriate opening statements and closing arguments by the two attorneys. The two groups receiving hearsay testimony also heard the standard Minnesota hearsay caution as part of the judge's instructions to the jury, but the hearsay testimony was not labeled as such, nor did the attorneys object to the evidence when it was presented.²³ It should be noted that the hearsay evidence used in this study

23. The cautionary instructions for hearsay evidence presented to jurors midway through judicial instructions were as follows:

There has been testimony in this case about statements made out of court by a person who did not testify on the witness stand. For example, you heard testimony about statements that were made out of court describing the events in the law school corridors on the day in question, and describing the person who was carrying something from the law school.

This type of testimony is known as hearsay evidence. Hearsay evidence is evidence of an out-of-court statement offered to prove the truth of something that was said in the statement.

Hearsay evidence must be viewed with caution because it depends for its value upon the credibility of someone who did not testify in court. Courtroom witnesses are under oath and they can be cross-examined about what they observed. A person who makes an out-of-court statement is not under oath. When the out-of-court statement is received in evidence, there is no opportunity to cross-examine the person who made the out-of-court statement or to observe how that person responds to questions.

Hearsay evidence is often unreliable, and you must use caution in evaluating it. However, you are the sole judges of whether it should be believed and of the weight to be given to it. As with the evaluation of other evidence, you should in the last analysis rely upon your own experience, good judgment, and common sense.

would not be admissible in an actual trial, as an exception to the hearsay rule does not cover this testimony. The circumstantial evidence came from two witnesses played by actors. One actor played the role of the law professor reporting the stolen computer. A second actor played the role of the defendant's landlord, who testified that he found the computer in the defendant's apartment. The attorneys working on the project with us created the circumstantial evidence and designed it to provide context for the eyewitness or hearsay witness testimony. They believed that the circumstantial evidence alone would not produce a verdict of guilty.

We showed the four videotapes to 186 undergraduate subjects (111 women, seventy-five men), in groups ranging in size from three to ten. We instructed the subjects to watch the trial as if they were jurors and told them that we would ask for their verdict and other judgments after the trial. We first asked participants to reach a verdict on the charge of theft as outlined by the judge, and to indicate their confidence in that verdict. Participants next evaluated each witness on several characteristics: ability, influence, importance, and reliability. In addition, participants rated the effectiveness of the two attorneys, the strength of their respective cases, the influence of the judicial instructions, and the influence of the defendant's lack of testimony in his own defense. Next, participants completed a free response sheet that asked them to describe and rank the three "most important pieces of evidence that you personally used in arriving at your verdict decision." Participants then described and ranked the evidence that would support the verdict they did not choose. For example, if a participant found the defendant guilty, we asked the participant to list the three most important pieces of evidence leading to a guilty verdict and then to list the three most important pieces of evidence that would support a verdict of not guilty. The participants then completed a multiple choice quiz covering the evidence presented as well as information contained in the judge's instructions. We included this as a check on the participants' attention to the trial tape. Finally, participants rated their satisfaction with the videotaped trial and provided their personal opinions regarding hearsay admissibility. A final, open-ended question asked whether they believed jurors serving in actual trials could properly evaluate hearsay evidence.

The eyewitness selected for this videotaped trial provided an accurate account of the events of the theft, but her descrip-

tion of the thief was not especially good. On the other hand, the hearsay witness, whom we had paired with this eyewitness during the mock police questioning, reproduced the eyewitness's account of the theft and her description of the thief very accurately. The actual evidence provided by these two witnesses was therefore the same. To maximize experimental control, we should have had the same person play the role of the eyewitness and the hearsay witness. However, we desired a more naturalistic design that would provide us with actual testimony based on a real, albeit staged, event. This meant we had to use different people in the roles of eyewitness and hearsay witness. To ensure that only the form of the testimony, whether eyewitness or hearsay, created any differences in juror perception and not factors associated with these witnesses, we had an independent sample of undergraduate subjects watch the videotapes and rate the witness on 15 dimensions related to credibility and persuasiveness. An overall MANOVA on these 15 dimensions indicated there was no significant difference in the perceptions of the two witnesses. Thus, an independent sample of raters saw the witness as equally convincing, trustworthy, confident, and effective. The two witnesses were perceived as providing the same evidence.

A. JURORS VALUED EYEWITNESS TESTIMONY OVER HEARSAY TESTIMONY

The results from our study indicate that mock juror subjects clearly distinguished between the testimony provided by the eyewitness and the hearsay witness and, as expected, weighed the eyewitness testimony more heavily in their verdict decisions. As shown in Table 1,²⁴ sixty-two percent of the subjects who observed the eyewitness found the defendant guilty,

24.

Table 1
Percentage Verdicts as a Function of Experimental Condition*

	Verdict	
	Guilty (%)	Not Guilty (%)
Circumstantial (n=42)	35.7	64.3
Hearsay (n=50)	40.0	60.0
Eyewitness (n=47)	61.7	38.3
All Evidence (n=47)	55.3	44.7

* N=186. Chi-square = 8.35, p = .04.

while only forty percent of the subjects observing the hearsay testimony voted to convict the defendant.²⁵ The hearsay testimony conviction rate was a meager four percent higher than the thirty-six percent guilty rate from subjects observing the circumstantial evidence alone. Also, adding the hearsay testimony to the eyewitness testimony had no impact on the verdict. In fact, the percentage of guilty verdicts (fifty-five percent) from subjects who observed all evidence was lower, although not significantly, than the percentage of guilty verdicts from subjects who observed only the eyewitness testimony. The overall verdict pattern, which was significant,²⁶ demonstrates that our mock juror verdicts were not influenced by the hearsay testimony.

In addition to the differences in verdicts, we examined our subjects' perceptions of the eyewitness and hearsay witness testimony. We found that their perceptions of these two forms of testimony differed on a number of dimensions. The subjects rated the testimony of the eyewitness as significantly more influential in the verdicts than the testimony of the hearsay witness.²⁷ The subjects also perceived the eyewitness as a more important²⁸ and more reliable witness.²⁹ These findings are consistent with the pattern of verdicts. Our mock juror subjects reported that the hearsay evidence was less important and influential than the eyewitness testimony, just as significantly fewer subjects exposed to hearsay evidence found the defendant guilty than did subjects exposed to the eyewitness testimony.³⁰

B. HOW THE JURORS REACHED THEIR DECISIONS

Our interest then turned to exploring *how* our subjects made their decisions and upon what information they based these decisions. To provide some indirect evidence on how the subjects made their decisions, we had subjects complete open-

25. Test of proportions $z = 2.05$, $p < .05$.

26. $X^2(3) = 8.35$, $p < .05$.

27. $t(95) = 2.46$, $p = .01$.

28. $t(94) = 3.46$, $p < .01$.

29. $t(95) = 2.26$, $p = .03$.

30. Jurors in the hearsay condition were also significantly less satisfied with the amount of evidence presented compared with jurors in the all evidence condition (but not compared to the eyewitness condition). Hearsay jurors also found the evidence quality to be significantly lower than did jurors in both the eyewitness and the all evidence conditions. There were no significant differences between any of the conditions on the perceived realism or the interest level in viewing the videotaped trials.

ended questions that asked them to name and rank the three pieces of evidence they found most supportive of their verdict, whether that decision was guilty or not guilty. To analyze this free response data, we developed a coding scheme containing ten categories of evidence. These included testimony by the four witnesses, the description of the defendant, the fact that the stolen computer was found in the defendant's apartment, and, for those jurors in the circumstantial and hearsay groups, the fact that no eyewitness testified. Two independent raters classified each statement in one of the ten evidence categories or an additional miscellaneous category. The raters' classifications agreed for eighty-six percent of the statements, and one of the authors resolved discrepancies through discussion with the raters.

In addition, we had our subjects name and rank the three pieces of evidence that raised the greatest doubts about their decisions. For example, if a subject found the defendant guilty, we asked the subject first to list the three most important reasons why he or she believed the defendant to be guilty. After providing this information, we asked the subject to list the three most important pieces of evidence that suggested the defendant was not guilty.

An examination of these open-ended responses yielded some insights into our mock jurors' decision process. We expected to find results suggesting that our subjects used the evidence provided by the hearsay testimony, but then engaged in some type of discounting of the evidence because they considered hearsay less reliable than eyewitness testimony. Instead of finding evidence of this type of explicit discounting of the hearsay evidence, we found that our subjects simply did not report using the hearsay in their decision-making process.

Specifically, those participants voting guilty determined the most important evidence was the landlord's testimony that he found the stolen computer in the defendant's apartment. Sixty individuals (sixty-seven percent) mentioned this testimony as the single most important item of evidence. As shown in Table

2,³¹ all four groups found this evidence significant, no matter which evidence they had observed. The subjects exposed to eyewitness testimony determined that the eyewitness's statement was the second most important evidence and twenty-one percent listed this as the most important piece of evidence. Fifteen percent of the subjects voting guilty who heard the hearsay evidence listed the testimony of the hearsay witness as most important.

When asked to indicate what evidence suggested the defendant was not guilty, the groups differed strikingly. Thirty-seven (sixty-seven percent) of the mock jurors who voted guilty in the groups receiving eyewitness testimony said the poor description of the defendant was the most important evidence supporting a verdict of not guilty. In contrast, only one person (five percent) voting guilty in the hearsay group reported having doubts about the description of the defendant. What created doubt in the minds of the mock jurors receiving the hearsay testimony? Fifteen (seventy-five percent) of the hearsay jurors who voted for conviction said they were most concerned that no eyewitness account of theft had been presented or that they had heard "only hearsay" testimony.

Similarly, of those jurors voting not guilty in the hearsay group, sixteen (fifty-three percent) listed the lack of an eyewitness as the primary reason for their decision to acquit. The circumstantial evidence only group mirrored this finding; fifty-six percent cited this reason. The eighteen jurors voting not guilty in the eyewitness group did not mention a single common item of evidence as supporting their vote of not guilty, although they

31.

Table 2

Evidence Used in Verdict Decisions

I. Percent of Subjects Citing Evidence in Support of Guilty Verdict*

	<u>Circumstantial</u>	<u>Eyewitness</u>	<u>Hearsay</u>	<u>All Evidence</u>
1. Computers found in defendant's apartment	80%	59%	65%	69%
2. Witness's testimony	—	21%	15%	4%
3. Positive identification	—	7%	20%	15%

II. Percent of Subjects Citing Evidence Against Guilty Verdict

1. Questionable description of defendant	—	55%	5%	81%
2. Lack of eyewitness testimony	27%	—	75%	—

* All data taken from subjects voting guilty.

listed the poor description of the defendant more frequently (twenty-two percent) than any other piece of evidence. The mock jurors who received all the evidence also reported being most influenced by the poor description: fifty-seven percent of those subjects reported that this was the most important reason for their decision to vote not guilty. The jurors acquitting the defendant cited the evidence that the stolen computer was found in the defendant's apartment as being most supportive of a guilty verdict. Sixty-three percent of all subjects voting not guilty listed this response, and these individuals were evenly distributed across the four groups.

In summary, those subjects who heard the eyewitness testimony and those who heard all the evidence, including the eyewitness and hearsay testimony, reported that they used the eyewitness testimony in their verdicts. Subjects in the hearsay group, on the other hand, reported using evidence from the two other witnesses (the law professor and the landlord) while only rarely mentioning the evidence contained in the testimony of the hearsay witness. Thus, the eyewitness testimony appears more influential with our mock jurors. Sometimes they used this evidence to support the verdict, other times they reported it as raising doubts about the verdict; nevertheless, the eyewitness testimony received a great deal of attention in the open-ended responses. More importantly, the subjects rarely mentioned the hearsay testimony in these open-ended responses. Instead of relying upon and subsequently discounting the hearsay evidence, it seems that they either simply ignored or, for whatever reason, did not report the hearsay testimony.

C. WHY THE JURORS DID NOT USE HEARSAY

The data did not distinguish whether our subjects did not use hearsay because they believe it is unreliable, or because they heeded the judge's cautionary instructions to discount hearsay evidence. We found evidence on both sides.

The study suggests that hearsay jurors were following the judge's instructions. We included a recall quiz to assess how well our subjects paid attention to the trial tape. One question presented to all jurors asked for a definition of hearsay. Ninety percent of the jurors in the hearsay and all evidence groups, the only groups receiving judicial instructions on hearsay, answered this item correctly compared to fifty-nine percent in the eyewitness group and thirty-four percent in the control group (forty-nine percent of the control subjects believed hearsay to

be evidence of "rumor and gossip"). Another question, administered only to those jurors receiving hearsay testimony, asked jurors to identify "one caution given by the judge for evaluating hearsay evidence." Seventy-six percent of the hearsay jurors and sixty-four percent of the all evidence jurors were able to answer this question correctly, while twelve percent of these jurors incorrectly stated no caution was given. In general, the jurors correctly recalled an average of 5.3 of the seven judicial instruction questions and 8.5 of the ten trial fact questions. Thus, our mock jurors paid attention to the facts of the case and the judicial instructions, including those involving hearsay, and apparently understood them. The latter finding controverts studies on inadmissible evidence showing that jurors are not influenced by judges' cautionary instructions.³² In our case, one might also argue that jurors discounted the hearsay when they first heard the witness, and therefore felt validated by the judge's instructions at the end of the trial. They did not commit to memory anything that later proved damaging to the effectiveness of the judicial instructions.

Table 3 presents evidence supporting the claim that jurors believe hearsay to be unreliable independent of judicial instruc-

32. Michele Cox & Sarah Tanford, *Effects of Evidence and Instructions in Civil Trials: An Experimental Investigation of Rules of Admissibility*, 4 SOC. BEHAV. 31, 51-53 (1989); see Tanford, *supra* note 16, at 72, 79-87; J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 LAW & SOC'Y REV. 155, 157 (1991); Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 LAW & HUM. BEHAV. 477, 479, 480, 494 (1988); Sarah Tanford et al., *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 LAW & HUM. BEHAV. 319, 333-35 (1985); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 46-47 (1985).

tions.³³ We asked our participants for their opinions about hearsay and the data reflects a rather negative view regarding the reliability of hearsay. One question described the hearsay evidence without labelling it as "hearsay." We asked subjects who received the hearsay testimony how useful this evidence was in their own verdict decisions. We asked subjects in the circumstantial and eyewitness groups how useful this evidence *would have* been. As the table data suggests,³⁴ jurors who actually received this testimony rated it as significantly less useful than the jurors rating its potential usefulness.

We then described and provided an example of hearsay and asked subjects whether they believed that hearsay should be admissible evidence. Subjects tended to agree that hearsay should not be presented to a jury as evidence. Subjects also agreed that "making hearsay evidence admissible would encourage some lawyers or litigants to lie or create evidence by getting witnesses to testify to statements that were never made." Subjects also agreed with the statements that hearsay is not useful because of difficulties in determining the declarant's credibility and because the witness may not remember or may misstate what the declarant said. Finally, subjects responded to an open-ended question asking whether they believed most people serving on a jury would be able to evaluate

33.

Table 3
Opinions of Hearsay Evidence*

Measure	Circumstantial (n=41)	Eyewitness (n=47)	Hearsay (n=50)	All Evidence (n=46)
Usefulness	5.78	5.47	4.00	3.59
Inadmissible	3.68	3.47	3.62	4.11
Jury decide	3.71	3.74	4.28	4.35
Lies	3.24	2.77	3.32	3.30
Credibility	2.68	3.02	2.40	3.24
Memory	2.51	2.70	2.86	2.85

* Lower means indicate a stronger concern about the reliability of hearsay evidence; possible values range from one to seven. Exact item wording found in Appendix.

34. See Table 3, *supra* note 33.

hearsay evidence properly. As shown in Table 4,³⁵ the majority of participants believed that jurors could *not* properly evaluate hearsay, although many believed that they personally could do so.

The opinion data indicates, then, that participants believe hearsay to be potentially unreliable and difficult to evaluate. Our study shows that subjects perceived hearsay negatively, even though jurors in two groups heard judicial instructions on hearsay while jurors in the other two did not. This finding is consistent with our interpretation that jurors discount the reliability of hearsay on their own, and not because of the judge's limiting instructions.

Nevertheless, further research should focus on distinguishing these two interpretations more conclusively. Such data not only would enhance our understanding of how jurors think about hearsay evidence, but it also would address perhaps the central issue for jury researchers—juror and jury competence. For social science truly to contribute to the debate about hearsay reform, additional studies that address these empirical questions will be essential.

CONCLUSION

A principal reason for excluding hearsay is the belief that it will mislead the jury. Proponents of this position regard hearsay as inferior evidence because the out-of-court declarant has not testified under oath and is not subject to observation and cross-examination. They believe that the absence of these courtroom safeguards deprives the jury of the means of assessing the credibility of the declarant.³⁶ In addition, some jurists

35.

Table 4
Juror Evaluation of Hearsay: Open-Ended Item*

	<u>Yes</u>	<u>No</u>	<u>Uncertain</u>
Circumstantial	29%	55%	16%
Eyewitness	30%	63%	7%
Hearsay	28%	56%	16%
All Evidence	40%	47%	13%
Marginals	32%	55%	13%

* Question asked was: "Do you think most people serving on a jury would be able to properly evaluate hearsay evidence? Please briefly give us your opinion."

36. See Park, *supra* note 6, at 55-58.

have pointed out that the admission of hearsay raises dangers of fabrication by the in-court witness, and of unfair surprise.

Many commentators have suggested that courts or legislatures should reform the hearsay rule to allow hearsay to be received more freely, trusting the jury to give it appropriate value. Radical reform would require both statutory change and, in criminal cases, a change in the Supreme Court's interpretation of the Confrontation Clause of the Sixth Amendment.³⁷ Radical reform is not likely to occur in the near future, although less drastic change that ameliorates the impact of the hearsay rule has often been proposed and sometimes adopted.

The study discussed in this Article constructed the trial stimulus to allow some participants to consider evidence that under current law would be excluded on hearsay grounds. We believe that the study of the jury's treatment of inadmissible hearsay is more relevant to law reform concerns than the jury's treatment of admissible hearsay. In terms of the question of hearsay admissibility, the data from this study suggests that hearsay as a form of testimony is not overvalued by jurors, as some legal scholars have argued. The addition of hearsay evidence to the circumstantial evidence in our demonstration raised the conviction rate just four percent, and the addition of hearsay evidence to the eyewitness testimony actually lowered the conviction rate about seven percent.

The fact that subjects in this study did not give much weight to hearsay evidence does not conclusively make the case for hearsay reform. First, further research is needed to determine whether hearsay evidence has a stronger influence on jury decision-making under conditions other than those studied in this experiment. One might hypothesize, for example, that hearsay might be given greater weight when it takes the form of a written report by a police officer about an incident wit-

37. See *id.* at 88-94. The Confrontation Clause of the Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend VI. The language of the Amendment does not provide clear guidance about hearsay issues. Park, *supra* note 6, at 88. It has been interpreted to place limits upon the reception of unreliable hearsay that does not fall under a firmly rooted exception to the hearsay rule. *Id.* However, the text of the Clause could easily be interpreted merely to require that the defendant be confronted with whatever witnesses the prosecution chooses to produce at trial. *Id.* at 88-89. Under this interpretation, trial witnesses could testify about hearsay declarations, and the Confrontation Clause would impose no limits upon the creation of new hearsay exceptions. *Id.* It would merely require the presence of the defendant when evidence was presented to the trier of fact. *Id.*

nessed by the officer. Second, the policy implications of a finding that jurors give little weight to hearsay are not completely clear. If jurors give hearsay little weight, then a rule excluding it does not cause great injustice, since admitting it would rarely have an effect on verdicts. On the other hand, if jurors do disregard hearsay, then the maintenance of an elaborate body of doctrine excluding it is wasteful. Moreover, at the very least, this study has significant policy implications for cases in which an appellate court must decide whether the reception of hearsay in violation of existing rules constituted reversible error. If jurors in fact give little or no credence to hearsay evidence, then the admission of hearsay in violation of the current rules should be treated as harmless error by appellate courts.

APPENDIX

ITEMS USED TO ASSESS OPINIONS ABOUT HEARSAY

1. Evidence related to the identification of the defendant was presented in the trial you just saw. Part of this evidence was testimony by a witness who was present during police questioning of someone else who saw the computer thief and who described the thief and picked an identification photo from the police officer's photo display.

As a juror in this case, to what extent was this evidence useful in reaching your verdict? (1=not at all useful, 7=extremely useful).

Hearsay evidence is "second hand" information of a certain type. Legally, it is defined as in-court testimony about an out-of-court statement, when the testimony is offered to show the truth of some assertion in the out-of-court statement.

For example, Joe tells me that the blue car ran a red light and crashed into a school bus. If I am a witness in court and say that Joe told me that the blue car ran the red light and crashed into the school bus, I am offering hearsay testimony.

Please give your opinion in the statements below. Some legal experts believe that hearsay is unreliable evidence and should not be presented to juries. Other legal experts believe that the jury should be allowed to decide whether the hearsay is unreliable or not. As a potential juror (anyone over the age of 18 can be called to serve on a jury), what is your opinion of the two options given below?

2. Hearsay should not be presented to the jury as evidence. (1=strongly agree, 7=strongly disagree).

3. Hearsay should be presented and the jury can then decide how to use it when making their decision. (1=strongly agree, 7=strongly disagree).

4. Making hearsay evidence admissible would encourage some lawyers or litigants to lie or create evidence by getting witnesses to testify to statements that were never made.

5. Hearsay testimony is *not useful* because the credibility of the person who originally makes the statement out of court is not known (this person is not a witness, so s/he cannot be cross-examined).

6. Hearsay testimony is *not useful* because the witness in court may not remember or may misstate what the original speaker actually said out of court.

