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Evidence-Based Hearsay

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INTRODUCTION

> *Evidence-based (adj.): Supported by a large amount of scientific research.*
>
> —*Cambridge Dictionary*[1]

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1. *Evidence-Based*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/evidence-based (last visited Sept. 12, 2023) [https://perma.cc/T8D7-M87D].

The hearsay rule initially appears straightforward and sensible. It forbids witnesses from repeating secondhand, untested gossip in court,[2] and who among us prefers to resolve legal disputes through untested gossip? Nonetheless, the rule's unpopularity in the legal profession is well-known and far-reaching. It is almost cliché to say that the rule confounds law students, confuses practicing attorneys, and vexes trial judges, who routinely make incorrect calls at trial with respect to hearsay admissibility.[3]

The rule fares no better in the halls of legal academia. Although defenses exist,[4] scholars have unleashed a parade of pejoratives at the rule over the years, proclaiming it, among other things, "one of the law's most celebrated nightmares,"[5] "the spoiled child" of evidence law,[6] the "partner in terror" to the rule against perpetuities,[7] and "a bloated, nonsensical mess that is detached from empirical reality and common sense."[8]

How can such a conceptually simple rule create so much legal agita? In fact, there is a plethora of reasons: (1) the rule's confusing definition makes it difficult to apply; (2) it often does not actually do what it purports to do, on account of its hodgepodge of exceptions and exemptions; and (3) it suffers from the minor problem that the empirical assumptions on which the rule is based are untrue.[9] It follows that perhaps no other evidentiary rule is as ripe for reform on the fiftieth anniversary of the Federal Rules of Evidence than the rule barring hearsay. And in reimagining the rule, it is time to abandon the

2. *See* FED. R. EVID. 801–802 (defining the hearsay rule and its reach).

3. *See, e.g.*, Jeffrey Bellin & Diana Bibb, *The Modest Impact of the Modern Confrontation Clause*, 89 TENN. L. REV. 67, 122 (2021) (examining case law and noting "[t]he frequent appearance of hearsay errors"); *see also* State v. Johnson, No. 2005-CA-00148, 2006 WL 2257031, at *4–5 (Ohio Ct. App. Aug. 7, 2006) (Hoffman, J., concurring) (analyzing whether the phrase "[h]oller at D" constitutes inadmissible hearsay and quoting a law professor as saying, "No matter how hard you try, you will never actually understand hearsay. Luckily, neither will anyone else, so you will not be at a disadvantage." (internal quotation marks omitted)).

4. *See* Mortimer R. Kadish & Michael Davis, *Defending the Hearsay Rule*, 8 LAW & PHIL. 333, 350 (1989) (arguing that the hearsay preserves "[t]he integrity of adjudication as a practice" by "maintaining the integrity of the trier of fact").

5. PETER MURPHY, EVIDENCE AND ADVOCACY 24 (5th ed. 1990).

6. JOHN H. WIGMORE, A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE 238 (1935).

7. MURPHY, *supra* note 5, at 24.

8. David DePianto, *The Costs and Benefits of a Categorical Approach to Hearsay*, 67 FLA. L. REV. F. 258, 258 (2015) (describing criticism of the doctrine).

9. *See, e.g.*, David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 1–6 (raising the first two critiques). For a discussion of the final critique suggesting that jurors are intelligent consumers of hearsay evidence, see *infra* Section I.A.

leeches and bloodletting that led to the current rule and embrace an evidence-based approach to hearsay reform.[10]

To do that, we must understand what the hearsay rule purports to do and the values it purports to serve. And to do that, we must take stock of what we know about how the rule operates—not what we *think* we know but what we *empirically* know—before we decide where to go from here. By way of preview, I argue that the current hearsay rule rests on two flawed pillars: (1) the rule is wrong about human behavior, to the extent it underestimates how well jurors analyze hearsay; and (2) its rationale is out of step with the values that the public believes the rule serves.[11]

My (immodest) proposal for a reimagined hearsay rule argues that the rule should not be based—as it is now—on notions of safeguarding the accuracy of verdicts. Instead, it should be premised on *process* values—specifically, affording parties the dignity of being able to look their hearsay "accusers" in the eye and cross-examine them. A dignitary approach to the hearsay rule would better align with the values that the public believes the rule safeguards and would result in a more elegant, streamlined rule.[12]

This Essay proceeds in three parts. First, it offers a short primer on the hearsay rule, a brief description of existing empirical work on the rule, and a thumbnail sketch of my proposed restyling. Next, it presents data from three replication studies confirming the most important findings from the empirical literature: Jurors are competent consumers of hearsay, and the public believes the rule should safeguard process values, not verdict accuracy. The Essay concludes by presenting data from a pilot study exploring the contours of a dignitary-based approach and providing a research agenda for continued study of a reimagined hearsay rule.

I. A BRIEF HEARSAY PRIMER

For a rule that has been anointed the "centerpiece of the modern law of evidence"[13] and the "most characteristic rule of the Anglo-

10. Calls for an empirically based approach to evidence policy occasionally issue from the bench as well. *See, e.g.*, Lust v. Sealy, Inc., 383 F.3d 580, 588–89 (7th Cir. 2004) (casting doubt on three hearsay exceptions, citing psychology literature, and stating that "[i]t is time the law began paying attention to such studies").

11. *See infra* notes 33–55 and accompanying text.

12. Space constraints prevent me from providing more than a thumbnail sketch of this approach to the hearsay rule in this Essay. The framework that I propose here will be explored in more detail in forthcoming work.

13. John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1176 (1996).

American" evidentiary regime,[14] no one seems to know exactly when the hearsay rule was born. Everyone agrees that the rule did not exist in the Middle Ages; indeed, *no* evidentiary rules existed in the Middle Ages. Jurors in that era routinely engaged in out-of-court fact-finding in their local communities to resolve legal disputes.[15] But as the conception of the jury shifted from jurors as active investigators to passive fact finders, courts began to more forcefully regulate the stream of information that jurors could consider.[16] The rule barring hearsay appeared under this new regime in English common-law courts sometime after the Enlightenment—in the early eighteenth century or mid-nineteenth century, depending on who one asks—where historical records reflect, at best, inconsistent and incomplete enforcement.[17]

As oral evidence and adversarial examination of witnesses became routine in common-law courts, the hearsay rule emerged as a means of quality control:[18] Hearsay is flawed evidence insofar as the declarant has not taken an oath or subjected herself to cross-examination, where her testimonial capacities could be tested.[19] The early version of the rule, however, had the subtlety and sophistication of a sledgehammer—at least in theory, it excluded all hearsay regardless of the circumstances surrounding the declarant's absence or the reliability of the out-of-court statement. Faithfully applied, the rule excluded large swaths of relevant evidence.[20]

Unsurprisingly, and perhaps with a sense of buyer's remorse, courts reformed the rule by narrowing its scope. The hearsay ban currently applies only to "statements," defined as intentional communications originating from a human.[21] Fido's barks do not

14. John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 458 (1904).

15. *See* G. Alexander Nunn, *The Living Rules of Evidence*, 170 U. PA. L. REV. 937, 951 (2022) ("Initially, juries were comprised of those individuals with the *most* background knowledge about a particular event.").

16. *Id.* at 952.

17. *Compare* Wigmore, *supra* note 14, at 445 (placing the implementation of the hearsay rule between 1675 and 1690), *with* Langbein, *supra* note 13, at 1187–90 (noting that "courts seem to have received [hearsay] aplenty," during this time, but also noting that jurists "understood that something was wrong with hearsay").

18. *See, e.g.*, Langbein, *supra* note 13, at 1195 (describing the hearsay rule as a prophylactic).

19. *See* FED. R. EVID. art. VIII advisory committee's introductory note to 1972 proposed rules (noting that requiring witnesses "to testify: (1) under oath, (2) in the personal presence of the trier of fact, [and] (3) subject to cross-examination" will (ideally) "expose any inaccuracies" in their testimony).

20. *See, e.g.*, PAUL S. MILICH, GEORGIA RULES OF EVIDENCE § 16:2 (2022) ("But from the very beginning, the rule excluded all hearsay, even the statements of those deceased or otherwise unable to testify at trial.").

21. *See* FED. R. EVID. 801(a) (defining a hearsay statement as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion").

count—even if he is a police dog signaling the presence of drugs[22]—and neither do statements that originate from machines and algorithms, even though they were presumably created and programmed by humans.[23]

To complicate matters further, not all out-of-court statements are hearsay. Hearsay statements infamously derive their relevance solely from their substantive content, so if a statement is relevant simply because it was *made* (and not because of what was *said*), it evades the hearsay bar entirely.[24] Moreover, the rule identifies other (arbitrary) categories of statements—including opposing party statements and some prior statements from witnesses—that conceptually fit the definition of hearsay but are carved out anyway, perhaps because trials would cease to function otherwise.[25] And finally, the piéce de résistance of the law's Olympic sprint away from the full force of the hearsay rule lies in its nearly thirty category-based exceptions, covering a cornucopia of contexts including excitedly made statements, statements shared with one's doctor, and statements made under impending death.[26]

What is the theoretical basis for such a convoluted rule? Initially, the hearsay rule was said to prevent guilty verdicts from being premised on insufficient evidence, insofar as most hearsay declarants do not take an oath to tell the truth and cannot be cross-examined.[27] The modern understanding, however, is a twist on that theme. Now it is said that the hearsay rule safeguards the accuracy of verdicts by keeping inherently unreliable evidence from inherently poor *consumers*

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22. *See, e.g.*, United States v. Miranda, No. 94-CR-714, 1997 WL 627655, at *3 (N.D. Ill. Sept. 22, 1997) ("[T]he dog alert evidence does not constitute hearsay or opinion evidence."); *see also* 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:13 (4th ed. 2023) ("Since animals cannot very well be put under oath or cross-examined, and neither judges nor juries are likely to be able to appraise their demeanor, deciding whether to admit what they have to 'say' by applying hearsay analysis seems at best fatuous.").

23. *See, e.g.*, United States v. Hamilton, 413 F.3d 1138, 1142–43 (10th Cir. 2005) (holding that machine-generated "header" information, which accompanied images uploaded to the internet, did not constitute hearsay). *See generally* Andrea Roth, *Machine Testimony*, 126 YALE L.J. 1972 (2017) (discussing the intricacies of machine-generated evidence).

24. I respectfully decline, above the line, to quote the rule's cumbersome and confusing phrase, "to prove the truth of the matter asserted in the statement." FED. R. EVID. 801(c).

25. *See id.* at 801(d) (decreeing that "A Declarant-Witness's Prior Statement" and "An Opposing Party's Statement" are "Statements That Are Not Hearsay.").

26. *See id.* at 803 (identifying a myriad of exceptions, most of which do not require the availability of the declarant); *id.* at 804 (identifying a handful of exceptions that require the declarant to be unavailable).

27. *See* Paul S. Milich, *Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over*, 71 OR. L. REV. 723, 741–43 (1992) (discussing the history of the hearsay rule and noting the view of early nineteenth-century courts and scholars that "[s]uch potentially untrustworthy evidence could not support the weight of a verdict based on it").

of hearsay: the American jury.[28] The tell is in the exceptions, which are largely premised on notions of evidentiary reliability.[29] In other words, hearsay evidence is flawed (thus the ban), but specific types of hearsay are good enough (thus the exceptions).

And this is where the hearsay train starts to derail. Hearsay evidence is indeed imperfect, but imperfect evidence is routinely admitted in the adversary system insofar as juries hear from dueling experts, biased character witnesses, and potentially faulty eyewitnesses, among others.[30] In these contexts, the jury ordinarily is trusted to weigh the relevant evidence for whatever it may be worth. The same courtesy is not afforded to hearsay, however, presumably because courts believe that jurors *cannot* be trusted to give hearsay whatever weight it may be worth. The thirty exceptions to the rule prove as much; they are admissible precisely because they are viewed as trustworthy. In other words, we need not worry about the jury's inevitable overvaluation of hearsay because the rules allow courts to admit only *high-value* hearsay in the first place.

A. Empirical Challenges to the Accuracy Model

Thus, a paternalistic distrust of juries lurks beneath the surface of the hearsay rule. Yet an evidence-based approach to the rule should be skeptical of that distrust. Few other types of evidence are subject to

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28. *See* Nunn, *supra* note 15, at 984–85 ("[E]vidence policymakers believe that there is a substantial risk that fact finders will overvalue those out-of-court statements."); *see also* Langbein, *supra* note 13, at 1172 ("The essential attribute of the modern law of evidence is the effort to exclude probative but problematic oral testimony, such as hearsay, for fear of the jurors' inability to evaluate the information properly."). It is worth noting that the rationale for the hearsay rule appears to have subtly shifted over time. *See generally* Christopher Sewrattan, *Lost in Translation? The Difference Between the Hearsay Rule's Historical Rationale and Practical Application*, 42 MANITOBA L.J. 87 (2019) (discussing changes in the hearsay rule's rationale over time and how this shift has led to a divergence between historical rationale and practical application). Concerns regarding the sufficiency of the evidence proffered in support of a defendant's conviction directly invoke the tribunal's popular legitimacy; concerns regarding the competency of the jury arguably do so less directly.

29. *See* FED. R. EVID. 803 advisory committee's notes to 1972 proposed rules ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant . . . .").

30. *See, e.g.*, Wipf v. Kowalski, 519 F.3d 380, 385 (7th Cir. 2008) (holding, in a medical negligence action, that "in a case of dueling experts, as this one was, it is left to the trier of fact, not the reviewing court, to decide how to weigh the competing expert testimony"); Moore v. United States, 132 F.2d 47, 48 (5th Cir. 1942) (upholding a jury verdict when arguably biased character witnesses testified); McClellan v. Hennepin Cnty. Deputies, No. Civ.01-1465, 2003 WL 23746158, at *2 (D. Minn. Feb. 5, 2003) (characterizing a civil jury verdict as "rational and appropriate" where "Plaintiff's eyewitnesses were impeached by prior inconsistent statements and discrepancies on the stand").

a ban on their admissibility by default,[31] and rulemakers have offered no empirical evidence in this context that would support such a ban.[32]

Fortunately, experimental psychologists have picked up the slack. Over the past three decades, psychologists have tested various aspects of the hearsay rule, and the empirical evidence overwhelmingly suggests that the rule's distrust of juries is misplaced.[33] Several studies have found that jurors unambiguously prefer live testimony to hearsay, which is treated to a substantial probative value discount.[34] Jurors also are sensitive to the *amount* of hearsay that is introduced. When a declarant's out-of-court statement is increasingly attenuated—embedded within double and triple hearsay, for example—jurors continue to discount the evidence consistent with its degree of attenuation.[35]

Jurors also demonstrate competence with hearsay at a more granular level. In one study, mock jurors were sensitive to various infirmities present in an out-of-court declarant's testimony—such as his inability to have seen what he claimed to see—even though the declarant was not cross-examined in court.[36] Other studies found similar effects, including that jurors scrutinize the age and suggestibility of out-of-court declarants when deciding how much weight to afford hearsay.[37] And this scrutiny is not limited to the characteristics of the declarant herself. Mock jurors also discount hearsay when it appears that a party is using it to shield the declarant from damaging cross-examination compared to situations in which the

31. These other types of evidence include evidence of behavioral propensity, privileged information, and evidence of subsequent remedial measures, liability insurance, settlements and pleas, and offers to pay medical expenses. *See* FED. R. EVID. 404, 407–411, 501.

32. See *id.* art. VIII advisory committee's introductory note to 1972 proposed rules (examining "three possible solutions" for excluding or admitting hearsay evidence without discussing the empirical literature).

33. For a robust review, see Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 893–96 (2015) (discussing the empirical literature).

34. *See, e.g.*, Stephan Landsman & Richard F. Rakos, *Research Essay: A Preliminary Empirical Enquiry Concerning the Prohibition of Hearsay Evidence in American Courts*, 15 LAW & PSYCH. REV. 65, 67 (1991).

35. *See* Sevier, *supra* note 33, at 920–22.

36. *Id.* at 909–14.

37. *See* Maithilee K. Pathak & William C. Thompson, *From Child to Witness to Jury: Effects of Suggestion on the Transmission and Evaluation of Hearsay*, 5 PSYCH. PUB. POL'Y & L. 372, 385 (1999) ("[J]urors in this study were appropriately sensitive to the quality of the information elicited from the children.").

declarant is unavoidably absent.[38] In sum, mock jurors demonstrate remarkable sophistication when analyzing hearsay evidence.[39]

Further, although more research is necessary, the bases for many hearsay exceptions appear similarly unsupported under empirical scrutiny. To list just a few examples, research suggests that (1) people can form lies very quickly, even when perceiving the event about which they are lying, which contradicts the assumptions undergirding the present sense impression exception;[40] (2) startling or stressful events can distort a person's attention and perception, which undermines the rationale for the excited utterance exception;[41] (3) those on their death beds often are afflicted with physical and psychological impairments that affect their memory, perception, and articulateness, which casts doubt on the reliability of dying declarations;[42] and (4) people report that they lie to their doctors and are sometimes more

38. *See* Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys' Strategic Choices*, 40 FLA. ST. U. L. REV. 1, 46 (2012) ("When a benign motive for the hearsay evidence was made salient, jurors discounted the hearsay significantly less than they did when a suspicious motive for the hearsay evidence was made salient.").

39. To be clear, jurors are not perfect consumers of hearsay. *See* Sevier, *supra* note 33, at 895 ("There are limitations . . . to jurors' ability to scrutinize hearsay evidence."). But the Federal Rules have never required fact finders to perfectly evaluate evidence as a condition of its admissibility.

40. *See, e.g.*, Wei Fan, Ying Yang, Wenjie Zhang & Yiping Zhong, *Ego Depletion and Time Pressure Promote Spontaneous Deception: An Event-Related Potential Study*, 17 ADVANCES COGNITIVE PSYCH. 239, 239 (2021) ("Deception is automatic and spontaneous under certain conditions."); Yen-Ju Feng, Shao-Min Hung & Po-Jang Hsieh, *Detecting Spontaneous Deception in the Brain*, 43 HUM. BRAIN MAPPING 3257, 3267 (2022) (examining neural correlates of spontaneous lies, among other types of responses); Monica T. Whitty, Tom Buchanan, Adam N. Joinson & Alex Meredith, *Not All Lies Are Spontaneous: An Examination of Deception Across Different Modes of Communication*, 63 J. AM. SOC'Y FOR INFO. SCI. & TECH., 208, 208–09, 214 (2012) ("[P]lanned lies were rarer than spontaneous lies."). I should note, however, that studies examining hearsay exceptions are relatively rare and underdeveloped, and we should interpret them cautiously. *See, e.g.*, Ronald J. Allen, *The Hearsay Rule as a Rule of Admission Revisited*, 84 FORDHAM L. REV. 1395, 1403 (2016) (questioning the usefulness of the Whitty study in evaluating the present sense impression exception).

41. *See, e.g.*, Tim Valentine & Jan Mesout, *Eyewitness Identification Under Stress in the London Dungeon*, 23 APPLIED COGNITIVE PSYCH. 151, 159 (2009) (finding that high levels of physiological arousal affected participants' encoding of environmental stimuli, which negatively affected their ability to accurately recall information about the stimuli). *But see* Melanie Sauerland, Linsey H.C. Raymaekers, Henry Otgaar, Amina Memon, Thijs T. Waltjen, Maud Nivo, Chiel Slegers, Nick J. Broers & Tom Smeets, *Stress, Stress-Induced Cortisol Responses, and Eyewitness Identification Performance*, 34 BEHAV. SCI. & L. 580, 580, 590 (2016) ("[S]tress did not have robust detrimental effects on identification performance.").

42. *See* Nunn, *supra* note 15, at 984 (discussing studies on hypoxia and how it can affect cognition); *see also* Claudia Soares Dos Santos, Bianca Sakamoto Ribeiro Paiva, Alessandra Lamas Granero Lucchetti, Carlos Eduardo Paiva, Peter Fenwick & Giancarlo Lucchetti, *End-of-Life Experiences and Deathbed Phenomena as Reported by Brazilian Healthcare Professionals in Different Healthcare Settings*, 15 PALLIATIVE & SUPPORTIVE CARE 425, 425, 429–30 (2017) (conducting a multicenter study in Brazil comparing reports on end-of-life experiences and finding that the most common experiences "were 'visions of dead relatives collecting the dying person,' 'a desire to mend family rifts,' and 'dead relatives near the bed who provide emotional comfort' ").

likely to share private medical information with other professionals who are not covered by a hearsay exception, including hairstylists and personal trainers, which undermines (to some extent) the medical treatment exception.[43]

In sum, the assumptions underlying the hearsay rule and some of its exceptions appear at best unsupported and at worst empirically wrong. Under the current rationale and in light of these empirical findings, it is unclear that the hearsay rule should categorically exclude *any* of the evidence that it currently excludes. The rule also appears to be keeping out—and letting in—the wrong types of hearsay.

B. An Immodest Proposal: The Process Model

What would an evidence-based alternative to the current hearsay rule look like? Some scholars have proposed reforms over the years,[44] while others have called for abolishing the rule entirely.[45] After all, the fundamental premise of the rule is flawed, and other countries have abolished it, at least partially.[46] But the currently available data suggests that the American public generally *prefers* the hearsay rule,[47] so a system that routinely authorizes hearsay-laden verdicts may face serious legitimacy concerns in the United States. I argue for a path forward that can preserve the hearsay rule, allow for more relevant evidence to reach the jury, and avoid premising the rule on empirical fiction. This path requires focusing on tenets of relational psychology and procedural justice in redesigning the rule.

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43. *See New Zocdoc Study Reveals Women Are More Likely than Men to Lie to Doctors*, ZOCDOC (Nov. 10, 2015), https://www.zocdoc.com/about/news/new-zocdoc-study-reveals-women-are-more-likely-than-men-to-lie-to-doctors [https://perma.cc/DYV8-C72Q] ("[M]illennials . . . are 45 percent more likely than their older counterparts (22% vs. 12%) to confide in a trusted beauty or fitness professional over a doctor."); *cf.* Ronald G. Victor et al., *A Cluster-Randomized Trial of Blood-Pressure Reduction in Black Barbershops*, 379 NEW ENG. J. MED. 1291, 1291, 1297 (2018) (finding that health promotion by barbers and specialty-trained pharmacists in black male barbershops "resulted in larger blood-pressure reduction" among test patrons compared to control patrons, who were simply urged to contact their doctor).

44. I cannot list them all here, but notable reform proposals include Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465, 1471 (2016); Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 54 (1987); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339, 1341 (1987); and Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723, 724 (1992).

45. *See, e.g.*, Ronald J. Allen, Commentary, *A Response to Professor Friedman: The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 800 (1992) ("[I]t is a death well-deserved . . . ."); Milich, *supra* note 27, at 774.

46. *See* Sklansky, *supra* note 9, at 2 (identifying other countries' efforts to abandon the hearsay rule).

47. *See infra* note 51 and accompanying text (discussing a mock juror study in which participants expressed dissatisfaction with hearsay evidence).

As I have written elsewhere, a legal institution's legitimacy depends not just on its ability to make accurate decisions but, more strongly, on its ability to make those decisions fairly.[48] The hearsay rule can be revamped from a rule that claims to facilitate substantively accurate fact-finding to a rule that safeguards *process* values by allowing litigants the opportunity to look in the eye of (and cross-examine) out-of-court declarants who accuse them of wrongdoing.[49] A revised hearsay rule would be premised on affording dignity and respect—key components of the psychological concept of procedural justice—to litigants.[50]

A procedural justice model of hearsay has empirical support, although more work is needed. Most notably, in one prior study, participants read about trials in which either hearsay or live testimony was presented.[51] Unsurprisingly, participants were less satisfied with the trial that contained hearsay evidence. But when probed regarding the extent of their dissatisfaction, their discomfort was premised not on concerns that the jury would be hoodwinked by unreliable hearsay but on their view that the government had violated notions of fair play.[52] Thus, a procedural justice hearsay model appears to align with the values that the public sees within the rule.

A procedural justice model of hearsay would also streamline the rule and align it with related legal doctrines. The model would eliminate the cumbersome exceptions for "reliable" hearsay found in Rules 803 and 804, and it would eliminate the definitionally unsatisfying exemptions found in Rule 801(d).[53] It also would closely align the rule with the Supreme Court's Confrontation Clause jurisprudence, which requires the opportunity to cross-examine declarants that provide testimonial hearsay against criminal

48. *See* Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1095–98 (2013) (discussing the roles of establishing truth, punishing justly, and treating litigants fairly in perceptions of legal legitimacy).

49. For a similar argument in a nonpsychological context, see H.L. Ho, *A Theory of Hearsay*, 19 OXFORD J. LEGAL STUD. 403, 411–12 (1999).

50. For a thorough review of the social psychological concept of procedural justice, see generally E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

51. Justin Sevier, *Popularizing Hearsay*, 104 GEO. L.J. 643, 679–81 (2016).

52. *See id.* at 683–86 ("79% of participants stated their unhappiness in terms of fairness to the defendant.").

53. *See supra* note 25 and accompanying text (discussing Rule 801(d) carve outs to the hearsay rule).

defendants.[54] A justice rationale for the hearsay rule would functionally expand that requirement to civil cases via a hearsay analysis, virtually eliminating a disparity in the treatment of civil and criminal defendants.[55]

But would a justice-based hearsay rule exclude too much useful information, as in the early days of the accuracy-based rule? And if so, would that necessitate another set of cumbersome exceptions? The tentative answer is no. A justice-based hearsay rule would include as its centerpiece the dignitary interests of the target of the hearsay evidence. The rule would not exclude all secondhand statements; it would exclude only *accusatory* hearsay—which we might define as an out-of-court statement that intentionally implicates a litigant in wrongdoing, whether or not the speaker intends the statement to be used in court. The rule would presumptively admit nonaccusatory hearsay statements, which do not implicate a litigant's process-based, dignitary interest in the proceedings.

But these suppositions are theoretical, and an evidence-based approach should test them. Moreover, many classic hearsay studies are nearly three decades old, and an overhaul of the rule necessitates examining whether those studies are replicable today. Thus, I now turn to four original studies that I conducted to (1) replicate the major findings from the empirical literature, and (2) explore how the public might legitimize a dignitary-based hearsay rule.

II. REPLICATIONS AND PILOT

In the spirit of evidence-based rulemaking, this Part first details the methods and results of three replication studies I conducted on the hearsay rule. The replications are designed to confirm three findings from the hearsay literature: (1) that jurors discount hearsay compared to live testimony; (2) that jurors discount based on the amount of hearsay they encounter and the reasons for which it is presented; and (3) that jurors conceive of the hearsay rule not as a rule safeguarding the accuracy of verdicts but as a rule securing procedural, dignitary rights. I conclude this Part by reporting the results of a pilot study that

54. Crawford v. Washington, 541 U.S. 36, 68 (2004). Testimonial hearsay is an out-of-court statement that a reasonable declarant would expect to be used against a defendant in court. *Id.* at 51–52.

55. *See* U.S. CONST. amend. VI (conferring a confrontation right only upon criminal defendants); *see also* FED. R. EVID. art. VIII advisory committee's introductory note to 1972 proposed rules (noting that "[t]he resultant split between civil and criminal evidence" would be "an undesirable development" if the hearsay rule were abandoned, leaving the Confrontation Clause as the only meaningful limit on the introduction of hearsay).

examines public attitudes toward the hearsay regime that I propose in this Essay.

A. Replication 1: The Hearsay Discount

1. Method

For the first replication, I recruited 200 participants through Connect, an online participation platform provided by CloudResearch.[56] Participants were paid $1.25 and were 49% female, 68% white, averaged 40.64 years of age (with a standard deviation of 11.86 years), and ranged from 20 to 77 years old. Within the sample, 80% had completed at least a bachelor's degree and the median income was between $60,000 and $69,999.[57]

This experiment followed, as a model, materials from a previous study I conducted on the hearsay rule.[58] I told participants that I was interested in their opinions about evidence in a legal dispute involving a theft at a convenience store. After providing their informed consent to participate in the study, they read a summary of a fictitious criminal trial.

Participants were told that the prosecution and the defense agreed that a theft had taken place at the store but that they disagreed on the identity of the thief. Participants then read a summary of testimony by the responding officer, who authenticated blurry surveillance footage of the theft. Participants were told that a man wearing a blue ski cap had entered the store and, when the clerk stepped away, jumped behind the counter and stole approximately $300 from the register. The officer testified that he arrested the defendant, who was two blocks away, was wearing a blue skip cap, and had $400 in his coat pocket.

A store employee who was restocking shelves a few feet away witnessed the theft. The eyewitness's attention turned to the thief when the thief jumped behind the counter. Although the events transpired quickly, the eyewitness was able to identify the defendant.

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56. Connect is a new online recruitment platform from CloudResearch (formerly TurkPrime), an organization with a track record of providing high-quality online data. *See, e.g.*, Leib Litman, Jonathan Robinson & Tzvi Abberbock, *TurkPrime.com: A Versatile Crowdsourcing Data Acquisition Platform for the Behavioral Sciences*, 49 BEHAV. RSCH. METHODS 433 (2017) (examining and commending the data collection abilities of the research platform).

57. Demographic information is reported for participants who passed the comprehension and attention checks in each experiment.

58. *See* Sevier, *supra* note 33 (examining whether mock jurors recognize and discount testimonial infirmities in hypothetical criminal cases and whether discounts increase when the prosecutor's case relies on increasing levels of hearsay evidence).

The experimental manipulation involved the way in which the prosecutor presented the eyewitness account. In the control condition, the eyewitness testified to the events he had witnessed. In the hearsay condition, the eyewitness's account was conveyed through the testimony of the store manager, who did not have direct knowledge of the events. In the double-hearsay condition, the store owner testified to the eyewitness's account through a description conveyed to him by the manager. And in the triple-hearsay condition, the eyewitness's account was conveyed through the testimony of the owner's business partner, who heard the testimony from the owner (who, in turn, heard the information from the manager, who learned about the theft from the employee).

Participants then answered several comprehension questions.[59] Afterward, participants were asked to rate, on a seven-point Likert scale,[60] the likelihood that the defendant was the thief as well as the strength of the individual evidence against the defendant. After completing attention checks and answering standard demographic questions about themselves, participants were debriefed and the experiment concluded.

2. Results and Discussion

I first examined whether participants weigh live testimony more strongly than they do hearsay evidence. To test this hypothesis, I combined the data from all three hearsay conditions. I then compared the combined data with data from the control condition with respect to (1) perceptions of the strength of the evidence, and (2) perceptions of the defendant's guilt.

I conducted a one-way analysis of variance ("ANOVA") to detect mean differences between control and hearsay participants.[61] The ANOVA revealed a statistically significant difference with respect to the perceived strength of the evidence in the predicted direction: participants perceived the hearsay evidence to be weaker than

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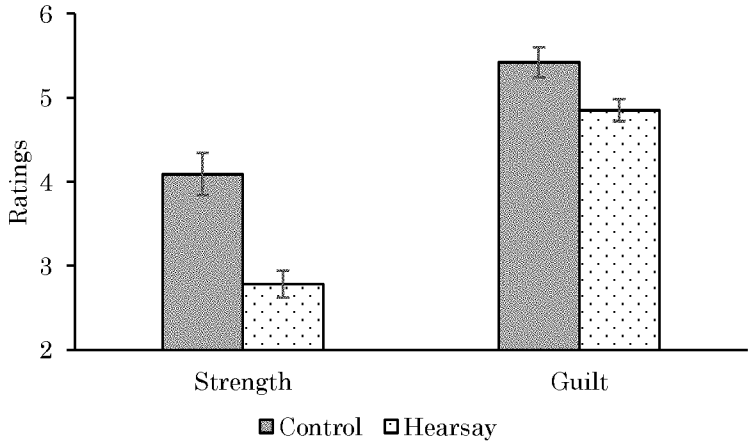
59. Based on their responses to the comprehension and attention checks, data from 156 participants was included in the study.

60. A Likert scale is a psychometric scale that is analyzed as an ordinal variable (frequently a range from one to seven). *See* ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 172–73 (2010) (describing Likert scales as typical ordinal variables).

61. An ANOVA is an application of the general linear model that 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 id.* at 277–85 (explaining empirical research methodologies and statistical techniques).

eyewitness testimony,[62] and they thought the defendant was less likely to be guilty when hearsay evidence was presented against him.[63] These findings are illustrated in Figure 1.

FIGURE 1: PERCEPTIONS OF EVIDENCE STRENGTH AND DEFENDANT GUILT BY (POOLED) HEARSAY CONDITION



Next, I examined whether the evidence became less persuasive to participants as the extent of the hearsay it contained increased. To test this hypothesis, I conducted a polynomial contrast analysis—a special form of ANOVA—to detect whether the means in the control, hearsay, double-hearsay, and triple-hearsay conditions decreased in a roughly linear pattern with respect to participants' perceptions of the evidence.[64] The ANOVA revealed a statistically significant effect of the hearsay manipulation such that the means of participants' responses in the four conditions differed.[65] Specifically, the analysis revealed a statistically significant linear pattern such that perceptions of the evidence against the defendant decreased as the amount of hearsay the evidence contained increased.[66] The evidence was most persuasive when the declarant testified, less persuasive when the testimony

62. $M_{Control} = 4.09$ $(SD = 1.62)$, $M_{Hearsay} = 2.78$ $(SD = 1.73)$; $F(1, 154) = 18.62$, $p < 0.001$, $\eta^2_p = 0.11$.

63. $M_{Control} = 5.42$ $(SD = 1.14)$, $M_{Hearsay} = 4.85$ $(SD = 1.34)$; $F(1, 154) = 6.05$, $p = 0.015$, $\eta^2_p = 0.04$.

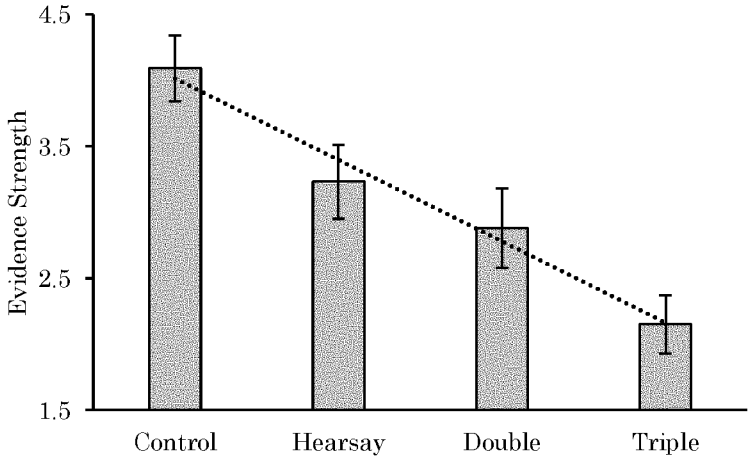
64. A contrast analysis tests a specific hypothesis about the pattern of results revealed in an ANOVA. *See* Hervé Abdi & Lynne J. Williams, *Contrast Analysis*, *in* ENCYCLOPEDIA OF RESEARCH DESIGN 243, 243–44 (Neil J. Salkind ed., 2010) ("Precise conclusions can be obtained from a *contrast analysis* because a contrast expresses a specific question about the pattern of results of an ANOVA.").

65. $F(3, 152) = 9.06$, $p < 0.001$, $\eta^2_p = 0.15$.

66. $F(1, 152) = 26.26$, $p < 0.001$.

contained hearsay, even less persuasive when it contained *double* hearsay, and the least persuasive when it contained *triple* hearsay.[67] This finding is illustrated in Figure 2.

FIGURE 2: PERCEPTIONS OF EVIDENCE STRENGTH BY (INDIVIDUAL) HEARSAY CONDITION



In sum, I replicated two important findings from the empirical hearsay literature. First, the public discounts hearsay evidence compared to nonhearsay. This finding—a throughline in decades of empirical hearsay research and replicated again here—directly undermines the policy underlying the federal bar on hearsay evidence. Indeed, the public distinguishes not just between hearsay and nonhearsay but also among *degrees* of hearsay evidence, suggesting a sophistication in evaluating this type of evidence.

B. Replication 2: Motivational Factors

1. Method

For the second replication, 153 participants were recruited through Connect.[68] Participants were paid $1.25 and were 53% female, 79% white, averaged 40.94 years of age (with a standard deviation of 12.67 years), and ranged from 19 to 72 years old. Within the sample, 85% had completed at least a bachelor's degree and the median income was between $50,000 and $59,999.

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67. $M_{Control} = 4.09$ $(SD = 1.62)$, $M_{Hearsay} = 3.23$ $(SD = 1.74)$, $M_{Double} = 2.88$ $(SD = 1.91)$, $M_{Triple} = 2.15$ $(SD = 1.31)$.

68. *See supra* note 56 and accompanying text (discussing the Connect online recruitment platform).

The materials for this study were modeled on the materials from the previous experiment. The case again involved a theft at a convenience store, with many of the same details. This time, however, the crime was witnessed by a customer, who called 911 and identified the defendant.

Instead of manipulating the amount of hearsay to which participants were exposed, I manipulated the reason for which the prosecutor proffered the evidence. In the control condition, the customer testified and subjected himself to cross-examination. In the other two conditions, hearsay evidence was presented in the form of testimony from the 911 operator, who recounted her conversation with the customer. In one condition, it came to light that the customer had died from unrelated causes before trial and that the prosecutor had no choice but to produce hearsay. In the other condition, participants learned that the prosecutor suspected that the customer would make a poor witness and wished to shield him from cross-examination by proffering hearsay instead.

As in the previous study, participants answered attention and comprehension questions.[69] They also evaluated the weight of the evidence against the defendant and provided demographic information.

2. Results and Discussion

To test the hypothesis that participants attend to motivational factors that influence the reliability of hearsay evidence, I conducted a one-way ANOVA on participants' perceptions of the strength of the eyewitness identification. The ANOVA revealed a statistically significant effect of the hearsay condition to which participants were exposed.[70]

To investigate that effect, I conducted two planned comparisons: (1) perceptions of the evidence in the control condition to the condition in which the declarant had died, and (2) perceptions of the evidence in the condition in which the declarant had died to the condition in which the prosecutor had shielded him from cross-examination.

The planned comparisons revealed statistically significant effects in the predicted direction. Participants credited the eyewitness account more when the declarant testified than when the information was relayed through a hearsay witness, even though the declarant had died.[71] And participants gave greater weight to hearsay that originated

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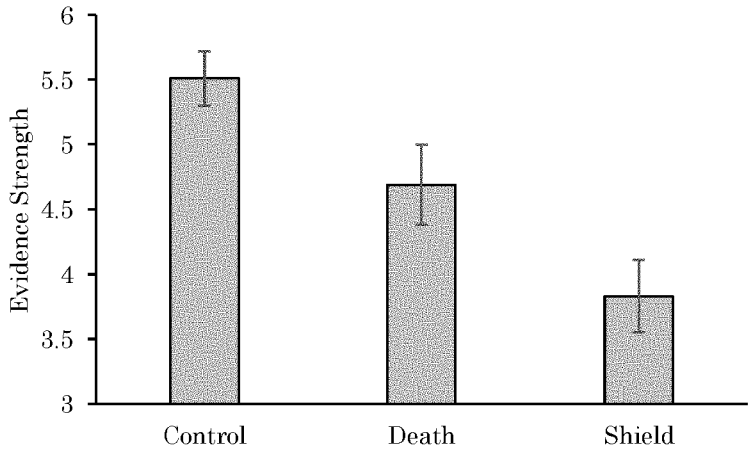
69. Based on their responses to the comprehension and attention checks, data from 118 participants was included in the study.

70. $F(2, 115) = 10.29$, $p < 0.001$, $\eta^2_p = 0.15$.

71. $M_{Control} = 5.51$ $(SD = 1.36)$, $M_{Death} = 4.69$ $(SD = 1.84)$, $p = 0.035$.

from a dead declarant than testimony that originated from a declarant who was being shielded from impeachment.[72] The results appear in Figure 3.

FIGURE 3: PERCEPTIONS OF EVIDENCE STRENGTH BY HEARSAY CONDITION



This experiment replicated the findings from prior empirical work on the hearsay rule. Not only do jurors pay attention to cognitive factors that affect the reliability of hearsay but they attend to motivational factors as well. In sum, people evaluate hearsay evidence with a healthy degree of skepticism. When the circumstances attendant to hearsay evidence are particularly suspicious—for example, when a party attempts to shield a hearsay declarant from cross-examination—people are even less willing to fully credit the evidence.

C. Replication 3: The Procedural Justice Approach

1. Method

For the third replication, 201 participants were recruited through Connect.[73] Participants were paid $1.50 and were 47% female, 47% white, averaged 40.77 years of age (with a standard deviation of 10.54 years), and ranged from 25 to 73 years old. Within the sample,

72. $M_{Death} = 4.69$ $(SD = 1.84)$, $M_{Shield} = 3.83$ $(SD = 1.82)$, $p = 0.029$. The results do not change substantially if post hoc adjustments are applied—the differences become marginally significant—and a similar pattern of results was observed with respect to judgments of the defendant's guilt. These analyses are on file with the author.

73. *See supra* note 56 and accompanying text (discussing the Connect online recruitment platform).

84% had completed at least a bachelor's degree and the median income was between $60,000 and $69,999.

This replication is modeled after one of my previous hearsay studies.[74] Participants read about a trial for treason based on the proceedings against Sir Walter Raleigh in England. Participants were told that the Crown accused the defendant—a lord with a complex relationship with the governing regime—of orchestrating a plot to kill the country's king to install a more favorable ruler. The defendant was alleged to have plotted with another nobleman to procure funding from a hostile government to depose the king, but the nobleman changed his mind and alerted the Crown to the plot.

I manipulated the manner in which the nobleman's statements were admitted at trial. In the control condition, the nobleman testified and subjected himself to cross-examination, where he maintained that the defendant conspired to overthrow the king. In the hearsay condition, the case proceeded as it did in Raleigh's trial: the nobleman did not testify, and the Crown instead offered into evidence his sworn confession. In both conditions participants were told that the Crown convicted the defendant of treason.

Participants were asked the likelihood that the defendant conspired to kill the king, along with their impressions of the accuracy and fairness of the hearing and the evidence. Participants were also asked whether they were satisfied or dissatisfied with the trial, and they rated, on a seven-point scale, the extent of their satisfaction or dissatisfaction. If participants indicated that they were dissatisfied with the hearing, they completed a free-response item asking them to explain the reasons for their dissatisfaction. Afterward, they were asked to rate the extent to which their dissatisfaction was largely a concern about the reliability of the evidence or the fairness of the proceeding.[75]

2. Results and Discussion

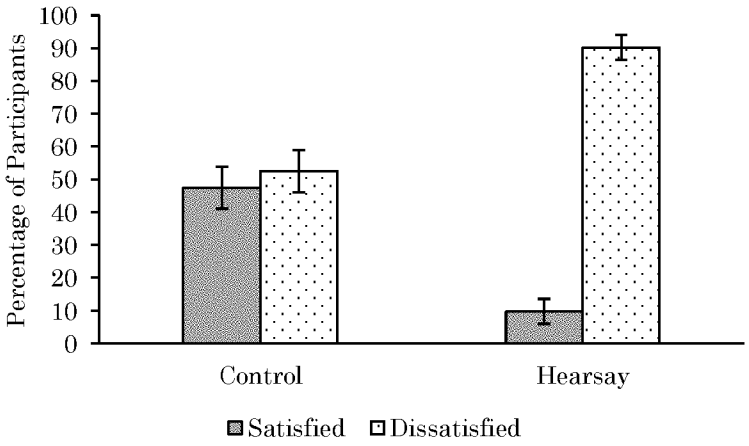
To examine whether participants afforded hearsay evidence less weight than eyewitness testimony, I conducted a one-way ANOVA on participants' perceptions of the defendant's guilt. The analysis confirmed the findings from the previous replications: participants thought the defendant was less likely to be guilty when the evidence

74. *See* Sevier, *supra* note 51, at 667, 679–83.

75. Based on their responses to the comprehension and attention checks, data from 122 participants was included in the study.

against him consisted of hearsay.[76] Moreover, a chi-square test of independence[77] revealed that a greater proportion of participants were dissatisfied with the hearing when hearsay was presented (90.2%) than when the declarant testified (52.5%).[78] These findings are illustrated in Figure 4.

FIGURE 4: PERCEIVED SATISFACTION WITH PROCEEDING BY HEARSAY CONDITION



To determine the source of participants' dissatisfaction with the hearing, I examined their responses to the items that recorded their satisfaction with the hearing, their perceptions of the accuracy of the verdict, and their perceptions of the fairness of the proceedings. The results revealed a statistically significant effect in the predicted direction for all three variables: When hearsay was introduced, participants reported being less satisfied with the hearing,[79] expressed greater concern for the accuracy of the verdict,[80] and believed the hearing to be less fair to the defendant.[81]

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76. $M_{Control} = 5.25$ $(SD = 1.16)$, $M_{Hearsay} = 4.31$ $(SD = 1.75)$; $F(1, 120) = 12.09$, $p < 0.001$, $\eta^2_p = 0.09$.

77. A chi-square test of independence is a nonparametric hypothesis test that examines whether two categorical variables are related to each other. *See* Mary L. McHugh, *The Chi-Square Test of Independence*, 23 BIOCHEMIA MEDICA 143, 143 (2013).

78. $\chi^2(1, N = 122) = 21.20$, $p < 0.001$.

79. $M_{Control} = 4.23$ $(SD = 1.82)$, $M_{Hearsay} = 1.93$ $(SD = 1.39)$; $F(1, 120) = 61.30$, $p < 0.001$, $\eta^2_p = 0.34$.

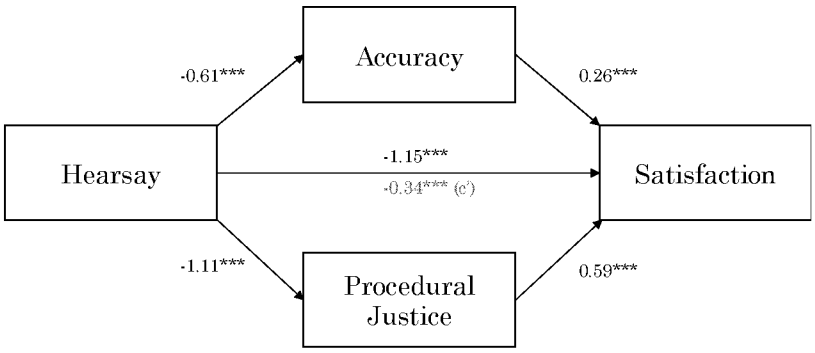
80. $M_{Control} = 3.80$ $(SD = 1.84)$, $M_{Hearsay} = 2.59$ $(SD = 1.51)$; $F(1, 120) = 15.82$, $p < 0.001$, $\eta^2_p = 0.12$.

81. $M_{Control} = 4.07$ $(SD = 1.99)$, $M_{Hearsay} = 1.84$ $(SD = 1.39)$; $F(1, 120) = 51.38$, $p < 0.001$, $\eta^2_p = 0.30$.

This analysis, however, does not reveal whether participants' dissatisfaction with the hearing is *directly* attributable to these factors and, if so, to what degree. To test this, I conducted a mediation analysis in which I examined the effect of hearsay evidence on participants' perceived satisfaction with the hearing, with both decisional accuracy and procedural fairness as potential mediators of that effect.[82]

The mediation suggested that participants view the hearsay rule as safeguarding both of these values, but participants' perceptions of procedural justice were substantially stronger than their perceptions of the tribunal's accuracy in predicting participants' satisfaction with the trial.[83] This suggests that participants perceive the hearsay rule as safeguarding procedural justice concerns more than they associate it with safeguarding decisional accuracy. An illustration of the mediation analysis appears in Figure 5.

FIGURE 5: MULTIPLE MEDIATION ANALYSIS[84]



82. A mediation analysis detects "when a predictor affects a dependent variable indirectly through at least one intervening variable, or mediator." Kristopher J. Preacher & Andrew F. Hayes, *Asymptotic and Resampling Strategies for Assessing and Comparing Indirect Effects in Multiple Mediator Models*, 40 BEHAV. RSCH. METHODS 879, 879 (2008).

83. *B = -0.16*, *SE = 0.06*, *CI[-0.29, -0.06]* (accuracy mediation pathway); *b = -0.65*, *SE = 0.13*, *CI[-0.92, -0.42]* (fairness mediation pathway). Perceptions of accuracy reduced the direct effect of the hearsay condition on participant satisfaction by 13%, whereas fairness perceptions reduced the direct effect by 57%.

84. In this mediation, the variables representing perceived decisional accuracy, procedural justice, and hearing satisfaction are continuous, whereas the hearsay variable is categorical (coded as "0" for the control condition and "1" for the hearsay condition). Positive coefficients represent a positive relationship between variables, and negative coefficients represent a negative relationship. Thus, compared to the control condition, (1) the hearsay condition decreased participants' perceptions of procedural justice and decisional accuracy, and (2) greater perceptions of decisional accuracy and procedural justice were associated with greater satisfaction with the hearing. When perceived accuracy and procedural justice were added to the model, the direct relationship between hearsay condition and perceived satisfaction diminished (demonstrated by the smaller *c'* coefficient), which suggests that these variables partially mediated the effect of the experimental condition on participant satisfaction.

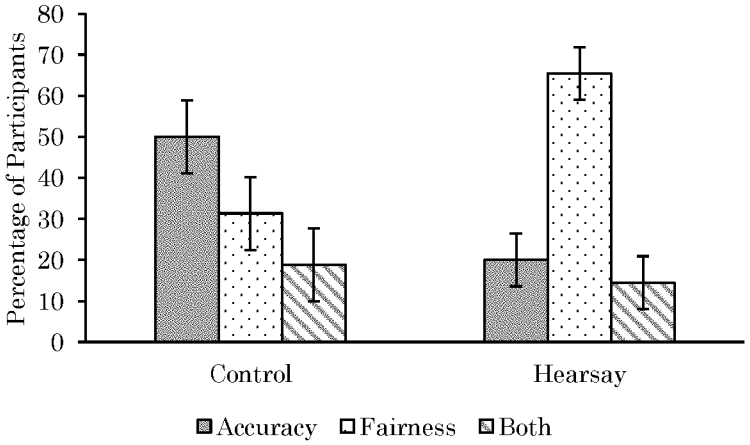
This finding is supported by the free-response items from participants who were dissatisfied with the hearsay evidence, the vast majority of whom cited the lack of cross-examination as the primary reason for their dissatisfaction.[85] Probing further, I compared dissatisfied participants in the control condition with dissatisfied participants in the hearsay condition with respect to the scale item that asked them to specifically attribute their dissatisfaction to accuracy, fairness, or both. I coded their responses as follows: options 1–3 on the scale were categorized as favoring a decisional accuracy rationale, options 5–7 on the scale were categorized as favoring a procedural fairness rationale, and option 4 (at the scale's midpoint) was categorized as favoring a rationale that was exactly equal between accuracy and fairness.

I then conducted a chi-square test of independence to determine whether the percentage of categorized responses differed meaningfully between participants in the control and hearsay conditions. The analysis revealed a statistically significant effect in the predicted direction: in the live testimony condition, a plurality of dissatisfied participants attributed that dissatisfaction to concerns about the accuracy of the verdict (50.0%); but in the hearsay condition, a majority of the dissatisfied participants attributed that dissatisfaction to concerns about procedural fairness (65.5%).[86] These findings are illustrated in Figure 6.

85. Free-response items are on file with the author.

86. $\chi^2(1, N = 87) = 10.57, p = 0.005$. A one-sample t-test confirmed the mean rating from dissatisfied participants in the hearsay condition differed significantly from the midpoint of the scale in the predicted direction. $M = 5.00$ ($SD = 1.84$), $t(54) = 4.04, p < 0.001$, Cohen's $d = 0.55$.

FIGURE 6: REASONS FOR DISSATISFACTION WITH PROCEEDING BY HEARSAY CONDITION



In sum, this experiment replicated findings reported in the empirical literature. The study again found that the public discounts hearsay evidence compared to its nonattenuated counterpart, and more importantly, this study confirms why. The public understands that there are reliability concerns attendant to the use of hearsay. But this study—and the findings from the studies that it replicates—suggest that the public views the rule primarily as a safeguard against threats to the defendant's procedural and dignitary interests.

D. Pilot Study: Accusatory Hearsay

1. Method

Finally, I conducted a pilot study in which 201 participants were recruited through Connect.[87] Participants were paid $1.25 and were 47% female, 80% white, averaged 41.87 years of age (with a standard deviation of 12.77 years), and ranged from 18 to 77 years old. Within the sample, 81% had completed at least a bachelor's degree and the median income was between $60,000 and $69,999.

Participants were told that the defendant was accused of second-degree murder stemming from an alleged drug deal in a desolate area of an upscale mall. Investigators found an unregistered handgun at the scene along with bullet casings and a small bag of cocaine. They also found text messages between the victim and the defendant suggesting

87. *See supra* note 56 and accompanying text (discussing the Connect online recruitment platform).

that they would meet that morning. Police also conducted a gunshot residue test on the defendant's hands, which tested positive. The defendant claimed that he was an avid hunter and had been out hunting earlier that day.

The study had four experimental conditions. In the control condition, the defendant's brother-in-law claimed that he was with the defendant when the defendant shot the victim after an argument. On cross-examination, the defense attorney insinuated that the brother-in-law was the shooter and a drug dealer—which the brother-in-law denied, although he admitted that he had received immunity for his testimony.

Participants were exposed to hearsay in the other conditions. In the testimonial hearsay condition, a police detective testified. He stated that the defendant's brother-in-law came to the police station, accused the defendant of the crime, and stated that he intended to testify in court. On cross-examination, the detective admitted that he did not have firsthand knowledge of the events and that he did not know the brother-in-law's current whereabouts.

In the accusatory hearsay condition, a confidential police informant testified. He stated that he was a close friend of the defendant's brother-in-law, who told him that he (the brother-in-law) had witnessed the defendant kill the victim in an argument over drugs. The informant testified that the brother-in-law did not intend to alert the police and asked the informant to keep the information a secret. Cross-examination mirrored the examination in the testimonial hearsay condition.

Finally, in the nonaccusatory hearsay condition, the prosecution called a representative from the local cell phone company. He testified to a cell tower report that could be used to track the movement of the defendant's cell phone on the day in question.[88] He further testified that the defendant's cell phone pinged a tower close to the mall that morning. On cross-examination, the representative admitted that he did not personally prepare this report, and that there was a possibility that its coordinates were incorrect. He stated that the technology is generally reliable while noting that the technology pinpoints general areas rather than exact locations.

88. A report on cell-tower pings is hearsay subject to the business records exception. *See* FED. R. EVID. 801, 803(6) (detailing the exclusions and exceptions to the Rule, including "[r]ecords of a regularly conducted activity"). This form of evidence was chosen to align its probative value with the hearsay from the testimonial and accusatory conditions, which purported to place the defendant at the crime scene.

Participants were asked several questions about their impression of the evidence in the case.[89] Most importantly, they were asked the extent to which they agreed or disagreed with seven items focusing on the legitimacy of the evidence and its fairness to the defendant. For example, participants responded to statements such as "if the defendant is found guilty, the process was a legitimate one" and "the trial was fair to the defendant."

2. Results and Discussion

I first conducted a principal component analysis ("PCA"), a data reduction technique, on the seven items measuring the extent to which the trial was procedurally fair.[90] The PCA revealed that all items appeared to measure the same psychological construct and accounted for over 75% of the variance in participants' responses.[91] I therefore averaged those items into a procedural justice scale.[92]

To examine whether participants' perceptions of the procedural justice afforded to the defendant differed with respect to the type of hearsay proffered at the trial, I conducted a one-way ANOVA on participants' procedural justice scores. The analysis revealed a statistically significant effect of the hearsay to which participants were exposed.[93]

To determine the nature of the effect, I conducted four planned comparisons with a Tukey-Kramer adjustment.[94] First, the analysis revealed a statistically significant decrease in perceptions of procedural justice in the testimonial hearsay condition compared to the control condition.[95] Second, the analysis revealed no statistically significant difference between perceptions of procedural justice in the testimonial and accusatory hearsay conditions.[96] And finally, the analysis revealed

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89. Based on their responses to the comprehension and attention checks, data from 124 participants was included in the study.

90. *See generally* Ian T. Jolliffe & Jorge Cadima, *Principal Component Analysis: A Review and Recent Developments*, PHIL. TRANSACTIONS ROYAL SOC'Y, Apr. 13, 2016, at 1 (describing how principal component analyses reduce dimensionality of datasets while preserving statistical information).

91. The PCA produced a one-factor solution with an eigenvalue of 5.28, which explained 75.38% of the variance.

92. A reliability analysis produced a Cronbach's alpha value of 0.94, indicating that the scale is highly reliable. See Mohsen Tavakol & Reg Dennick, *Making Sense of Cronbach's Alpha*, 2 INT'L J. MED. EDUC. 53, 53–55 (2011), for more information about Cronbach's alpha.

93. $F(3, 120) = 11.89$, $p < 0.001$, $\eta^2_p = 0.23$.

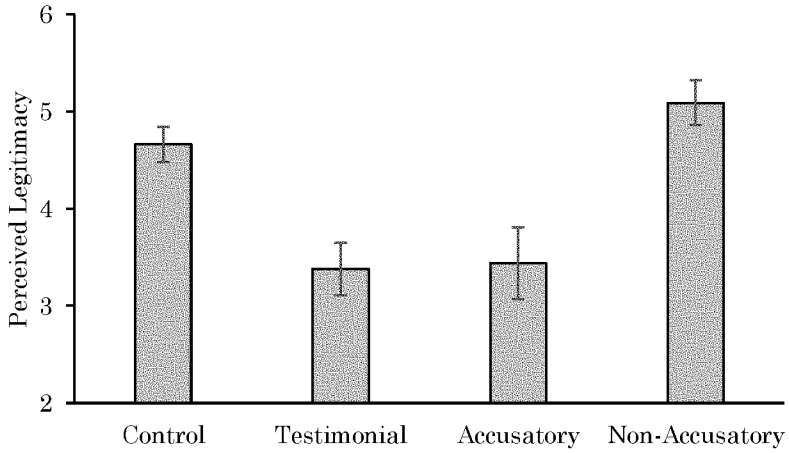
94. Because this is a pilot study, although I had specific a priori predictions about the data, I used a post hoc adjustment to the planned comparisons.

95. $M_{Control} = 4.66$ $(SD = 1.17)$, $M_{Testimonial} = 3.38$ $(SD = 1.51)$, $p < 0.001$.

96. $M_{Testimonial} = 3.38$ $(SD = 1.51)$, $M_{Accusatory} = 3.44$ $(SD = 1.59)$, $p = 0.99$.

(1) a statistically significant decrease in perceptions of procedural justice in the accusatory hearsay condition compared to the nonaccusatory hearsay condition,[97] which (2) did not differ significantly from the control condition.[98] An illustration of these findings appears in Figure 7.

FIGURE 7: PERCEIVED LEGITIMACY OF EVIDENCE BY HEARSAY CONDITION



In sum, the hypotheses tested in this pilot study were supported. Consistent with the results from the third replication study, proffering hearsay evidence generally reduces public perceptions of the procedural justice afforded to litigants. But not all hearsay implicates procedural justice concerns. As expected, I observed statistically meaningful decreases in perceptions of procedural justice in the testimonial and accusatory hearsay conditions compared to the control condition, but I observed no meaningful difference between the control condition and the condition that involved nonaccusatory hearsay. These findings have important implications for reconceptualizing the hearsay rule.

III. IMPLICATIONS AND FUTURE DIRECTIONS: THE HEARSAY HORIZON

This data provides useful information for evidence-based hearsay reform. First, jurors substantially discount the probative value of hearsay compared to live testimony, and the conditions under which

97. $M_{Accusatory} = 3.44\ (SD = 1.59)$, $M_{Non\text{-}Accusatory} = 5.09\ (SD = 1.34)$, $p < 0.001$.

98. $M_{Non\text{-}Accusatory} = 5.09\ (SD = 1.34)$, $M_{Control} = 4.66\ (SD = 1.17)$, $p = 0.54$. Because of the loss of participants who failed the comprehension and attention checks, this pilot study has limited statistical power to detect significant differences among groups. Further studies should therefore attempt to replicate this effect.

they do so are many and varied. They increase their discounting as the amount of hearsay increases, and they discount hearsay when better evidence is available. In sum, the accuracy rationale for the hearsay rule remains unsupported by the empirical evidence.

I also replicated earlier work regarding public perceptions of the hearsay rule. The public generally dislikes hearsay evidence, insofar as its inclusion at trial decreases the public's satisfaction with the proceedings, and their dissatisfaction is dignitary in scope, invoking violations of fair process.

Finally, results from the pilot study illuminate the potential scope of a dignitary-based rule. Intriguingly, the public meaningfully distinguishes between accusatory and nonaccusatory hearsay, insofar as the former is perceived to be a less legitimate form of trial evidence, whether or not the accusatory hearsay is "testimonial." Meanwhile, the public appears willing to tolerate the use of at least some forms of nonaccusatory hearsay.

Consolidating these results, a pathway for a new rule begins to emerge. The public views hearsay as illegitimate evidence when it is accusatory, which suggests that the hearsay rule should ban secondhand information in that relatively narrow context. Otherwise, in light of mock jurors' demonstrated sophistication with hearsay evidence, courts should adopt a presumption of admissibility for relevant, nonaccusatory hearsay, subject to an individualized prejudice analysis, as courts do with most other types of evidence.[99]

Of course, this Essay is just a starting point in reimagining the hearsay rule. The pilot results leave many questions unanswered, both theoretical and empirical, which could provide a fruitful agenda for continued study and reform. Most importantly, a theoretical and empirical understanding of the distinction between accusatory and nonaccusatory hearsay is in order, considering the increasingly fraught nature of the term "testimonial hearsay" in the Supreme Court's Confrontation Clause jurisprudence.[100]

Empirical questions also arise with respect to the rule's scope, which can be illustrated by way of two examples. First, how would a dignitary-based hearsay rule treat out-of-court statements from the dead or those who otherwise cannot testify? The public might be tolerant of accusatory hearsay considering the alternative, which would

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99. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by . . . unfair prejudice.").

100. *See generally* Williams v. Illinois, 567 U.S. 50 (2012) (featuring conflicting definitions of "testimonial hearsay" among the Justices).

be a total loss of the evidence outside of the parties' control.[101] Such statements might therefore fit into a set of narrow exceptions to a reimagined hearsay rule if the public views those statements as legitimate forms of legal proof.

Along similar lines, researchers should examine how a justice-based rule would apply in sensitive proceedings like domestic violence prosecutions. The Confrontation Clause does not bar hearsay statements that are nontestimonial—that is, made for the primary purpose of seeking emergency assistance[102]—but a strict definition of accusatory hearsay could render those statements inadmissible. Here, the forfeiture exception under the current hearsay regime could provide guidance.[103] The public might view the defendant as having created the affront to his procedural dignitary interest—insofar as there is probable cause to believe that he committed the crime—and the public might be tolerant of another narrow exception to the hearsay rule in this context.

CONCLUSION

Regardless of how the hearsay rule is reformed, the sun has set on conceiving of it as a rule that safeguards decisional accuracy. Doing so opens the rule up to devastating empirical critique and casts doubts on many of its exceptions, ultimately threatening its popular legitimacy. But there is a way to save the hearsay rule from itself. A dignitary, justice-focused approach to hearsay—premised on notions of relational psychology—might lead to a more streamlined, sensible, and evidence-based hearsay rule.

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101. Rule 804, which lists a handful of hearsay exceptions requiring the declarant to be unavailable, rests on a similar rationale. *See* FED. R. EVID. 804 advisory committee's notes on subdivision (b) ("[T]estimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant.").

102. *See* Davis v. Washington, 547 U.S. 813, 822 (2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.").

103. *See* FED. R. EVID. 804(b)(6) (admitting hearsay statements from a declarant who is absent because of a party's intentional wrongfulness).