
PROVISIONAL ASSUMPTIONS

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ABSTRACT

In courtrooms, the law often asks individuals to ignore information—carefully, purposely—that otherwise feels important. Juries, for example, are often asked to disregard information about a variety of facts, from prior convictions to settlement negotiations. But legal literature and psychology research has shown us that it is difficult for jurors to follow these instructions and cabin their curiosity about different facts in a case. Jurors have difficulty suppressing their thoughts; they rebel against admonitions; they create story-based hypotheses that are resistant to change.

To help align these evidence exclusions with empirical realities, this Article introduces an original tool: a provisional assumption. A provisional assumption would ask jurors not to ignore information but to assume certain information about subjects for which evidence is inadmissible; for instance, to assume that a civil defendant has no insurance against liability or that a criminal defendant has no prior criminal record. Drawing from psychological theories that explain why people rebel against admonitions, such as mental control and reactance, I test provisional assumptions using two experimental studies. Leveraging the context of insurance and its inadmissibility in tort cases, the results suggest that this approach would allow jurors to focus on the facts that matter. Provisional assumptions appear to hold promise as a portable intervention applicable in boardrooms and interview suites as well as courtrooms, and as a model of procedural innovation informed by interdisciplinary research.

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TABLE OF CONTENTS

INTRODUCTION.....	545
I. THE CHALLENGE OF EXCLUDING INFORMATION	548
A. THE INSURANCE EXCLUSION (RULE 411)	548
B. THE FUTILITY OF LIMITING INSTRUCTIONS AND BLINDFOLDING	552
1. The Backfire Effect.....	553
2. Juror Speculation	554
C. EXPLAINING THE FUTILITY OF CURRENT PRACTICE	557
1. Jury Decision-Making	557
2. Mental Control and Sticky Minds.....	559
3. Reactance.....	562
4. Motivated Reasoning	563
5. Skepticism Regarding Missing Information	564
6. Wait, Wait, Don't Tell Me.....	565
II. PROVISIONAL ASSUMPTIONS: EVIDENCE FROM ORIGINAL EXPERIMENTAL RESEARCH.....	567
A. THE CONCEPT	568
B. STUDY 1.....	570
1. Method.....	570
2. Results	573
C. STUDY 2.....	576
1. Method.....	576
2. Results	578
III. IMPLICATIONS.....	579
A. THE NORMATIVE COURT	582
1. When No Insurance Information Has Been Admitted	582
2. When Some Information Has Been Admitted for a Limited Purpose	584
B. THE STRUGGLE OVER JURY INSTRUCTIONS	585
C. TIMING	586
D. WHY NOT JUST ADMIT INSURANCE INFORMATION?.....	588
E. DAMAGES	589
F. METHODOLOGICAL CONCERNS	590
CONCLUSION: THE PROMISE OF ASSUMING.....	591
APPENDIX	592

INTRODUCTION

In July 1987, Steve Terry was playing catch with his two sons when the ball landed in a tree.¹ When Terry tried to reach for the ball with a pole, he struck an improperly installed power line and was electrocuted, causing him severe injury.² Four years later, a jury awarded more than \$5 million to Terry, but the utility company, Plateau Electric Cooperative, moved for a mistrial.³ Its argument: the jury had heard something forbidden.

Plateau believed that Terry's attorney had improperly prejudiced the jurors by eliciting testimony that mentioned in passing that the utility company owned insurance,⁴ and it brought affidavits from three jurors mentioning what *other* jurors had said: that the utility company's "insurance carrier would not miss" \$5 million,⁵ that "the corporation always 'gets over on the individual and I am not going to let it happen this time,'"⁶ and that "sometimes 'you just have to break the law.'"⁷

To the appeals court, these statements went beyond the "life experiences"⁸ jurors are "encouraged . . . to rely upon"⁹ into "an astonishing amount of extraneous prejudicial information."¹⁰ Even though it might be "common knowledge" that Plateau, as a utility company, had liability insurance,¹¹ to the judge on appeal, that "argument beg[ged] the question: What would the verdict have been had there been no insurance, with that fact being made known to the jury?"¹²

This Article seeks to unpack that question. Terry's case is just one illustration of how insurance status can generate assumptions about a party's ability to pay damages and its responsibility. But such assumptions occur across other subjects of litigation, from car accidents¹³ to medical

1. Terry v. Plateau Elec. Coop., 825 S.W.2d 418, 420 (Tenn. Ct. App. 1991).

2. *Id.*

3. *Id.* at 419, 421.

4. *Id.* at 421.

5. *Id.*

6. *Id.* at 422.

7. *Id.* at 421–22.

8. *Id.* at 423.

9. *Id.*

10. *Id.* Under Rule 606 of the Federal Rules of Evidence, juror testimony may not be used to impeach a verdict unless "extraneous prejudicial information was improperly brought to the jury's attention" or "an outside influence was improperly brought to bear on any juror." FED. R. EVID. 606(b); *see also* Warger v. Shauers, 574 U.S. 40, 48 (2014).

11. Terry, 825 S.W.2d at 423.

12. *Id.*

13. *See, e.g.,* Valerie P. Hans & Nicole Vadino, *Whipped by Whiplash? The Challenges of Jury Communication in Lawsuits Involving Connective Tissue Injury*, 67 TENN. L. REV. 569, 581 (2000); Tim A. Baker, *Sizing Up Settlement: How Much Do the Merits of a Dispute Really Matter?*, 24 HARV. NEGOT. L. REV. 253, 257–58 (2019).

malpractice¹⁴ to corporate indemnification.¹⁵

By excluding information about a party's insurance status—or their lack thereof—federal¹⁶ and state¹⁷ rules of evidence, alongside their early common law underpinnings,¹⁸ attempt to reduce bias and confusion among jurors. And in an attempt to make this exclusion effective, courts instruct jurors either to disregard insurance status if it slips out during the trial or to only regard it for a particular purpose.¹⁹ These admonitions rest on the assumptions that jurors *can* disregard inadmissible information that enters the courtroom, that they *can* consider a piece of evidence for one purpose but not for others, and that they *can* prevent speculation about inadmissible information.²⁰

Yet, we know these assumptions can be fictive. In other evidentiary situations in which jurors encounter admonitions from a judge, the admonition frequently fails. For instance, notwithstanding instructions to ignore information about a defendant's criminal record, jurors are more likely to think that defendants with prior convictions are guiltier.²¹ Jurors also incorporate information from the news into their deliberative processes, despite the presence of admonitions.²² This pretrial publicity can lead to harsher treatment of criminal defendants,²³ even if jurors believe they are

14. See Lauren Gailey, "I'm Sorry" as Evidence? Why the Federal Rules of Evidence Should Include a New Specialized Relevance Rule to Protect Physicians, 82 DEF. COUNS. J. 172, 181 (2015).

15. See Baker, *supra* note 13, at 257.

16. See FED. R. EVID. 411.

17. See, e.g., 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE art. IV (Mark S. Brodin ed., 2d ed. 1997).

18. See Banks McDowell, *The Collateral Source Rule—The American Medical Association and Tort Reform*, 24 WASHBURN L.J. 205, 205 (1985).

19. See Justin Sevier, *Evidence Law and Empirical Psychology*, in PHILOSOPHICAL FOUNDATIONS OF EVIDENCE LAW 349, 356–57 (Christian Dahlman, Alex Stein & Giovanni Tuzet eds., 2021).

20. See Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1864–66 (2001); Sevier, *supra* note 19, at 356–58.

21. See 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, 41–43 (1985); David Crump, *Does Impeachment by Conviction Create Undue Prejudice? An Experiment and an Analysis*, 53 AKRON L. REV. 1, 16 (2019). The effect of prior convictions on liability extends to civil contexts. See Kathryn Stanchi & Deirdre Bowen, *This Is Your Sword: How Damaging Are Prior Convictions to Plaintiffs in Civil Trials?*, 89 WASH. L. REV. 901, 927–29 (2014). Although information about prior convictions might be admitted to undermine a defendant's credibility, it also appears to increase her liability in the jury's eyes. See Sarah Tanford & Michele Cox, *The Effects of Impeachment Evidence and Limiting Instructions on Individual and Group Decision Making*, 12 LAW & HUM. BEHAV. 477, 488 (1988).

22. See, e.g., Stanley Sue, Ronald E. Smith & Renee Gilbert, *Biasing Effects of Pretrial Publicity on Judicial Decisions*, 2 J. CRIM. JUST. 163, 170 (1974); Geoffrey P. Kramer, Norbert L. Kerr & John S. Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409, 431 (1990); Gary Moran & Brian L. Cutler, *The Prejudicial Impact of Pretrial Publicity*, 21 J. APPLIED SOC. PSYCH. 345, 360 (1991).

23. See Nancy Mehrkens Steblay, Jasmina Besirevic, Solomon M. Fulero & Belia Jimenez-

being unbiased.²⁴

Perhaps courts could exert extra effort in “blindfolding,” ensuring that inadmissible information is not mentioned at all, by incentivizing parties to create comprehensive motions in limine that exclude evidence and sanctioning violations of the motion.²⁵ But even if inadmissible information were to be perfectly hidden or “blindfolded” from jurors, in actuality, jurors might use their everyday stereotypes to construct their narrative of the case, as in *Terry v. Plateau Electric Cooperative*.²⁶ They also might speculate about missing information, to the detriment of focusing on the facts at hand.²⁷ The problem remains: How do we prevent people from their own speculation, if telling them not to consider information—that is, an admonition—might make them *more* likely to do it?

In this Article, I use the evidentiary limitations on the admissibility of insurance as a springboard to help understand how we might reduce juror speculation and to offer an alternative to jury admonitions. I suggest that courts should consider providing a *provisional assumption* for jurors, that is, request that jurors assume a particular piece of information when making their determination. I theorize that such provisional assumptions will reduce the inadmissible information’s salience and allow individuals to focus on the facts that courts deem most important.

To investigate whether provisional assumptions could work, I use a pair of survey experiments relating to the admissibility of insurance in trials. The experiments ask mock jurors in an online study to assume that neither the plaintiff nor the defendant has insurance, comparing them to another group of mock jurors who are simply given a standard jury instruction that says generally that insurance should not be considered. I find that those jurors asked to provisionally assume no insurance are less likely to be interested in the plaintiff’s insurance and may award less damages to the plaintiff. And I find potential evidence that these results are robust under uncertainty.

By accounting for the psychology of jury decision-making, the provisional assumption intervention aligns legal theories with human psychology, while yielding several policy-relevant benefits. First, allowing

Lorente, *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 LAW & HUM. BEHAV. 219, 229 (1999); Kramer et al., *supra* note 22, at 431; Moran & Cutler, *supra* note 22, at 360.

24. See Moran & Cutler, *supra* note 22, at 362.

25. See Diamond & Vidmar, *supra* note 20, at 1863–64.

26. *Terry v. Plateau Elec. Coop.*, 825 S.W.2d 418, 421–23 (Tenn. Ct. App. 1991); see, e.g., Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC’Y REV. 513, 516 (1992); Diamond & Vidmar, *supra* note 20, at 1861.

27. See Diamond & Vidmar, *supra* note 20, at 1864–65.

jurors to assume facts about insurance allows them to concentrate on the questions that matter to the law and prevents jurors from making assumptions that might be inconsistent with those of the other jurors or the objectives of the evidentiary rule at hand. Second, a provisional assumption is a solution whose simple implementation generates minimal bias to either party. Third, this procedural innovation is behaviorally informed but does not treat jurors in a patronizing fashion. Providing jurors with a provisional assumption might displace the assumptions they have—and also displace our own assumptions about how jurors behave.

This Article proceeds in three parts. Part I lays out the historical and functional importance of the evidence rules underlying the exclusion of insurance status from jury consideration. It then addresses how courts have dealt with the exclusion in practice. Part I also shows how jury instructions fall short of eliminating forbidden information by illustrating the disconnect between evidentiary exclusions and empirical realities via classic examples in social psychology and jury studies.

Part II contains two original studies. It imagines what an ideal intervention would look like and introduces the provisional assumption as a psychology-based intervention, consistent with legal intuitions about evidence. It then describes and reports on the results of two original survey experiments that demonstrate the first-ever use of this intervention.

Lastly, Part III explores the implications of these studies for juror decision-making and legal decision-making generally. To be sure, the frequency of civil jury trials has steadily diminished over time. Still, understanding how jurors speculate might have parallels to other situations in which the law asks people to not consider certain information. I address several potential objections to the implementation of the provisional assumption and argue that implementation of psychological innovations helps to conform the underlying rationale of the law with legal actors' expectations.

I. THE CHALLENGE OF EXCLUDING INFORMATION

A. THE INSURANCE EXCLUSION (RULE 411)

To facilitate understanding of why juror speculation might persist in evidence, this Part provides a brief overview of why evidence of insurance status was historically excluded.

Multiple sources suggest that generally, evidence of insurance status—or the lack of it—should not be admissible. First, nearly every state has

codified some version of Rule 411 of the Federal Rules of Evidence.²⁸ Under Rule 411, neither the insurance status of the defendant nor that of the plaintiff is admissible: “Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully.”²⁹

One underlying rationale for Rule 411 is the intuition that a defendant should not incur greater liability or damages than she otherwise would merely because she has (responsibly) purchased insurance that will pay the judgment.³⁰ As Alan Calnan explains, the roots of Rule 411 lie in the expansion of manufacturing and corporate liability insurance:

At the inception of the litigation boom [in the early twentieth century], . . . the availability of insurance coverage [was] so limited that it was believed few jurors would be likely to consider whether the defendant was insured. . . . Given the growing hostility toward these “deep pocket” businesses, it was assumed that jurors so indoctrinated would be more likely to impose liability against defendants, and their insurers, and would award higher damages when they did. It was upon these two assumptions—of indoctrination and prejudicial impact to the defendant—that the insurance exclusionary rule was created.³¹

Yet today, many people assume that various businesses and individuals have liability insurance. Thus, although Calnan’s explanation might be the earliest stated reason for the rule, another conflicting reason for Rule 411 might exist: jurors might take a *lack* of insurance to indicate irresponsibility and therefore to constitute evidence of wrongdoing or guilt.³²

28. See 6 WEINSTEIN & BERGER, *supra* note 17, art. IV. The exceptions are Arkansas, Florida, and Louisiana. *Id.*

29. FED. R. EVID. 411. Note that not all forms of insurance are excluded. See 23 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5363 (2d ed. 2022) (“Thus, evidence of life insurance, fire insurance, health insurance, or any other insurance that does not protect the insured from liability is not made inadmissible by Rule 411, even if it is offered to prove negligence or other wrongful conduct.”). However, the collateral source rule and its variations provide coverage of this exclusion for plaintiffs. Wright and Miller also note that “courts have taken divergent positions on the application of Rule 411 to evidence of uninsured motorist insurance.” *Id.* (citing *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 677 N.W.2d 122, 127 (Neb. 2004); *Bardis v. First Trenton Ins. Co.*, 971 A.2d 1062, 1067 (N.J. 2009); *State ex rel. Nationwide Mut. Ins. Co. v. Karl*, 664 S.E.2d 667, 673 (W. Va. 2008)).

30. See Alan Calnan, *The Insurance Exclusionary Rule Revisited: Are Reports of Its Demise Exaggerated?*, 52 OHIO ST. L.J. 1177, 1187 (1991).

31. *Id.* at 1181 (footnotes omitted). However, Rule 411 itself was modeled after Rule 310 of the Model Code of Evidence (published in 1942), “a provision described by its drafters as a ‘restatement’ of the common law rule,” despite the fact that “the common law rule on the admissibility of insurance evidence did not develop until the 20th Century, [so] the 19th Century codes did not deal with this issue.” 23 WRIGHT & MILLER, *supra* note 29, § 5361 (footnote omitted).

32. See Jeanne Kirk, *Instructing the Jury on the Irrelevancy of Insurance Coverage*, 20 ARIZ. ST. L.J. 1069, 1090 (1988); Diamond & Vidmar, *supra* note 20, at 1875.

Additionally, the common law collateral source rule, which was developed in the nineteenth century,³³ supports the same intuition but for plaintiffs in particular. Under the collateral source rule, courts were prohibited from reducing damages for a plaintiff, even when the plaintiff had been partially compensated by outside parties, such as a health insurer,³⁴ because a “tortfeasor [should] not benefit from the injured claimant’s insurance coverage.”³⁵ To effectuate this prohibition, the collateral source rule prohibited a defendant from presenting evidence of the plaintiff’s insurance at trial.³⁶ While there has been considerable debate about the substantive virtue of the collateral source rule in the last half-century,³⁷ the prohibition on presenting evidence of a plaintiff’s insurance coverage remains intact.

Rule 411 and the collateral source rule offer multiple conflicting hypotheses about the impact of insurance status on jurors.³⁸ Still, together they argue that the existence or nonexistence of insurance coverage for any party should not be integrated into a fact finder’s determination of liability or damages. Elaborating on its logic for Rule 411, the Advisory Committee rejected the relevance of insurance status³⁹ and—emphasizing the potential juror bias that might result—stated, “More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds.”⁴⁰

33. McDowell, *supra* note 18, at 205.

34. See William Schwartz, *The Collateral-Source Rule*, 41 B.U. L. REV. 348, 348–49 (1961).

35. Rebecca Levenson, Comment, *Allocating the Costs of Harm to Whom They Are Due: Modifying the Collateral Source Rule After Health Care Reform*, 160 U. PA. L. REV. 921, 927–28 (2012).

36. See *id.* at 924–25, 924 n.14; see also James P. Mocerri & John L. Messina, *The Collateral Source Rule in Personal Injury Litigation*, 7 GONZ. L. REV. 310, 310 (1972) (“The Collateral Source Rule has been applied as both a rule of damages and a rule of evidence.”).

37. See, e.g., Larry M. Pollack, *Medical Maloccurrence Insurance: A First Party No-Fault Insurance Proposal for Resolving the Medical Malpractice Insurance Controversy*, 20 U. MICH. J.L. REFORM 1245, 1266 (1987); Levenson, *supra* note 35, at 927–34; Lawrence P. Wilkins, *A Multi-Perspective Critique of Indiana’s Legislative Abrogation of the Collateral Source Rule*, 20 IND. L. REV. 399, 407–10 (1987). Proponents of the collateral source rule argue that it serves a deterrence function. See, e.g., Christian D. Saine, *Preserving the Collateral Source Rule: Modern Theories of Tort Law and a Proposal for Practical Application*, 47 CASE W. RESV. L. REV. 1075, 1078 (1997).

38. Some commentators conflate the two concepts in determining that Rule 411 prohibits mentions of both the defendant’s and the plaintiff’s insurance. See, e.g., Saine, *supra* note 37, at 1077 (citing Pryor v. Webber, 263 N.E.2d 235 (Ohio 1970)). But see Calnan, *supra* note 30, at 1207 n.166 (“[T]he fact is that any consideration of either party’s sources for absorbing the loss is improper. Just as Rule 411 prohibits the use of insurance evidence to prove negligence, . . . the collateral source doctrine precludes the diminution of the plaintiff’s recovery because of the availability of insurance to pay for part of the injury sustained.”).

39. See FED. R. EVID. 411 advisory committee’s note to 1972 proposed rules (“The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault . . .”).

40. *Id.*; see also Diamond & Vidmar, *supra* note 20, at 1875 (supporting the proposition that courts generally maintain the logic that insurance status is “irrelevant, as well as potentially prejudicial”). As Paul F. Rothstein notes, “evidence of insurance carries a risk of unfair prejudice by diverting the jury’s

To that end, courts may be motivated to use procedural tools in an attempt to shield jurors from inadmissible information at several junctures in the litigation process. First, in federal practice and many states,⁴¹ opposing counsel can request a motion in limine prohibiting the evidence from being presented.⁴² If inadmissible information is introduced in court, it is the responsibility of opposing counsel to object.⁴³

Second, judges may give instructions to jurors about how to interact with forbidden information. If inadmissible information is given in violation of a motion in limine, the judge may admonish the jury to disregard the forbidden information.⁴⁴ Evidence of insurance is still admissible “for another purpose, such as proving a witness’s bias or prejudice or proving agency, ownership, or control.”⁴⁵ If information about insurance falls under one of these exceptions, the judge may give “an instruction limiting the use of the insurance for the purpose for which it was admitted.”⁴⁶ Finally,

attention from the facts of the case and encouraging them to base their decision on conjecture or emotion.” PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE RULE 411 (3d ed. 2022), Westlaw (database updated Feb. 2022). It is important to note that evidence of insurance may also be excluded under Rule 403 of the Federal Rules of Evidence, which equips trial judges with discretion to exclude information that on balance might be particularly prejudicial or distracting. See 23 WRIGHT & MILLER, *supra* note 29, § 5369 (“Prejudice certainly will not justify exclusion in cases tried to the court and might not justify exclusion where the insured party is itself a ‘deep pocket.’ . . . The balance may be somewhat different when the evidence offered involves the absence of insurance, not because prejudice to the plaintiff from revealing the defendant’s absence of coverage is ‘unfair,’ but because in some cases fairness may require some collateral inquiry into the defendant’s other assets.” (footnotes omitted)).

41. Of course, it is important to note that “[t]he vast majority of cases—over 95%—are handled by the state courts.” *How Courts Work*, AM. BAR ASS’N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/court_role [<https://perma.cc/4GVP-QNWC>].

42. See, e.g., Calnan, *supra* note 30, at 1221; Kirk, *supra* note 32, at 1076; Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1276 (1987). Attorneys may be able to raise questions about a party’s insurance during voir dire. See Calnan, *supra* note 30, at 1185; Kirk, *supra* note 32, at 1078; 23 WRIGHT & MILLER, *supra* note 29, § 5369.

43. See Calnan, *supra* note 30, at 1196; 29 AM. JUR. 2D *Evidence* § 489, Westlaw (database updated Nov. 2021).

44. See Calnan, *supra* note 30, at 1196.

45. FED. R. EVID. 411; see also Diamond & Vidmar, *supra* note 20, at 1875. One interesting edge case is the example of *Menefee v. Williams*, 66 Cal. Rptr. 108, 112 (Ct. App. 1968), in which the defendant told the injured person, “Don’t worry. If your insurance doesn’t cover this, mine will.” As Wright and Miller note, this sentence might still be admissible under Rule 411 because its primary purpose might be an “implied admission[] of liability,” rather than whether the defendant’s insurance was probative of his or her negligence. 23 WRIGHT & MILLER, *supra* note 29, § 5368.

46. 23 WRIGHT & MILLER, *supra* note 29, § 5369; see also FED. R. EVID. 105. If the other party does not request the instruction, it “may affect the ability to raise on appeal any errors in the admission of the evidence.” 23 WRIGHT & MILLER, *supra* note 29, § 5369. This is because “some courts take the view that a request for a limiting instruction is a prerequisite to raising the issue on appeal. . . . This does not seem to be the case under Federal Rule of Evidence 103, which only requires a timely objection. . . . Second, the failure to get a limiting instruction may estop the appellant from complaining of prejudice because he failed to invoke a device which might have alleviated the prejudice.” *Id.* § 5369 n.36. At baseline, one study found that discussions of insurance appeared in a third of the trials under the

regardless of whether inadmissible information is introduced during trial, a judicial instruction may be included to remind jurors of what factors to consider in their decision-making process.⁴⁷ These instructions are, for the most part, meant to cure any leakage of insurance status or other information.⁴⁸

What if jurors engage in speculation outside of these instructions? If jurors are found to be speculating about insurance status, “[d]iscussion or speculation [of forbidden topics] is considered misconduct and may be grounds for a mistrial.”⁴⁹ While there is a strong presumption against impeaching jurors’ thought processes,⁵⁰ a mistrial might result if those thought processes are indicative of outside information having been brought into the courtroom.

B. THE FUTILITY OF LIMITING INSTRUCTIONS AND BLINDFOLDING

All of these procedures and instructions are meant to cabin jurors’ speculation. Yet, courts face two classes of problems when they attempt to prevent jurors from considering insurance status generally. First, a bevy of studies, across contexts and over the decades, show that jury admonitions and instructions may function contrary to their goals (and even backfire at times) because jurors are likely to incorporate inadmissible information in their decisions—and possibly even more so when they are issued an

course of a different purpose or as inadmissible information from a witness. *See* Diamond & Vidmar, *supra* note 20, at 1876.

47. *See, e.g.*, COMM. ON PATTERN JURY INSTRUCTIONS, FIFTH CIR. DIST. JUDGES ASS’N, PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 2.18 (1999) (“You must consider only the evidence in this case.”); NINTH CIR. JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 1.10 (2017) (“In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you: . . .”). While these jury instructions are typically given after the evidence has been heard and before jurors are dismissed for deliberations, in some cases, judges issue preinstructions before any evidence has been presented. Indeed, many law and social science researchers argue for the implementation of preinstructions. *See, e.g.*, Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409, 429 (1989); Vicki L. Smith, *Impact of Pretrial Instruction on Jurors’ Information Processing and Decision Making*, 76 J. APPLIED PSYCH. 220, 226 (1991) [hereinafter Smith, *Impact*]; Vicki L. Smith, *The Feasibility and Utility of Pretrial Instruction in the Substantive Law*, 14 LAW & HUM. BEHAV. 235, 247 (1990) [hereinafter Smith, *Feasibility*]; Lynne ForsterLee, Irwin A. Horowitz & Martin J. Bourgeois, *Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality*, 78 J. APPLIED PSYCH. 14, 20 (1993).

48. Scholars and courts differ on whether a violation of Rule 411 is considered a harmless error or grounds for reversal. *See* 23 WRIGHT & MILLER, *supra* note 29, § 5369 (citing *Auster v. Norwalk United Methodist Church*, 894 A.2d 329, 334 (Conn. App. Ct. 2006); *Sioux v. Powell*, 647 P.2d 861, 864 (Mont. 1982); *Melara v. Cicione*, 712 So. 2d 429, 431 (Fla. Dist. Ct. App. 1998); *Nguyen v. Myers*, 442 S.W.3d 434, 440 (Tex. App. 2013)). Generally, however, “the prejudicial or nonprejudicial effect of such an error is also to be considered.” 29 AM. JUR. 2D *Evidence* § 489, Westlaw (database updated Nov. 2021).

49. Kirk, *supra* note 32, at 1080.

50. *See* FED. R. EVID. 606(b); *Warger v. Shauers*, 574 U.S. 40, 48 (2014).

instruction not to do so.⁵¹ Second, even when jurors receive no information about insurance at all, they speculate about it. This Section points to how insurance as a specific evidentiary context serves as an example of the limitations of both admonitions and blindfolding.

1. The Backfire Effect

Early research in jury decision-making bears out the intuition that knowledge of a party's insurance status impacts damages. Virtually all present-day jury studies cite the 1950s Chicago Jury Project, which conducted psychological experiments on mock jurors, alongside a comprehensive research program that involved interviews with previous jurors and archival data analysis.⁵² One key finding of the Project was that respondents on mock juries awarded more damages to the plaintiff when they were aware that the defendant had insurance.⁵³ But juries who were aware that the defendant had insurance *and* were told to disregard that information awarded *higher* damages than those who were aware but did not receive the admonition.⁵⁴

This backfire effect is often cited in the scholarly literature.⁵⁵ To that end, some scholars suggest that more effective blindfolding—that is, not making evidence available to a jury—would be a backstop to jury instructions or admonitions.⁵⁶ That is, efforts should be directed toward making sure that inadmissible evidence is not brought up during trial, and if it is, jurors should not be reminded of its presence via admonition. Some courts have followed suit.⁵⁷

But even as scholars debate whether admonitions should continue to exist⁵⁸ or how to make jurors aware of their effect,⁵⁹ and continue to present

51. See, e.g., MICHAEL J. SAKS & BARBARA A. SPELLMAN, *THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW* 102 (2016).

52. See Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 *passim* (1959).

53. *Id.* at 754.

54. *Id.*

55. See Alison Cook, Jamie Arndt & Joel D. Lieberman, *Firing Back at the Backfire Effect: The Influence of Mortality Salience and Nullification Beliefs on Reactions to Inadmissible Evidence*, 28 LAW & HUM. BEHAV. 389, 390 (2004).

56. See, e.g., Shari Seidman Diamond, Jonathan D. Casper & Lynne Ostergren, *Blindfolding the Jury*, 52 LAW & CONTEMP. PROBS. 247, 264 (1989); Coleman Gay, "Blindfolding" the Jury: Another View, 34 TEX. L. REV. 368, 370 (1956).

57. See 23 WRIGHT & MILLER, *supra* note 29, § 5369 (citing *Goff v. Elmo Greer & Sons Constr. Co.*, 297 S.W.3d 175, 198 (Tenn. 2009); *Kelty v. Best Cabs, Inc.*, 481 P.2d 980 (Kan. 1971)).

58. See David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 414–19 (2013).

59. See SAKS & SPELLMAN, *supra* note 51, at 93.

contexts that are relatively successful,⁶⁰ admonitions remain entrenched in the courtroom.⁶¹ Why do they persist? Although courts themselves recognize that admonitions and curative instructions are insufficient empirically, they lack any alternative. Without those alternatives, it appears that courts frequently consider admonitions and curative instructions to be a due diligence tool⁶²—that is, doing something to cure a leak seems more “helpful” than simply ignoring the leak—and more practical than the costs of a new trial.⁶³

2. Juror Speculation

Even if blindfolding is successful, and jurors do not hear any inadmissible evidence during trial—and therefore warrant fewer or no admonitions—that may not be enough to rule out inadmissible factors. As several scholars have noted, there is a difference between jurors disregarding inadmissible information, as opposed to taking inadmissible topics into consideration.⁶⁴ Specifically, preventing jurors from being exposed to inadmissible information may be ineffective when jurors have “common knowledge and experience”⁶⁵ with certain topics that might be part of a damages calculation. Those topics include attorney’s fees,⁶⁶ bank interest,⁶⁷ and insurance.⁶⁸ The underlying logic is that because these issues are relatively nontechnical, everyday topics—after all, many people drive and therefore have car insurance—they are more likely to be more intuitive and accessible to jurors.

Indeed, jurors frequently discuss these everyday topics during deliberations, even though they are not supposed to take them into

60. *See id.* at 96.

61. *See, e.g.*, J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 76–78 (1990). To that end, there have been many attempts to correct for this problem. Section I.C.6 reviews these attempts.

62. *See, e.g.*, *Inama v. Brewer*, 973 P.2d 148, 154 (Idaho 1999) (“[E]rror in the admission of evidence may be cured by proper instructions to the jury. . . . Where the trial court, as here, not only admonishes the jury to disregard the evidence of insurance, but also instructs the jury, . . . we must hold that no prejudicial error was committed” (citations omitted) (quoting *Barry v. Arrow Transp. Co.*, 358 P.2d 1041, 1045 (Idaho 1960)); *Ashley v. Goss Bros. Trucking*, 499 S.E.2d 638, 639 (Ga. 1998); *Funk v. F&K Supply, Inc.*, 43 F. Supp. 2d 205, 224 (N.D.N.Y. 1999).

63. *See, e.g.*, *Mouton v. Tug “Ironworker,”* 811 F.2d 946, 948 (5th Cir. 1987); *Wilson v. Groaning*, 25 F.3d 581, 588 (7th Cir. 1994); *GSGSB, Inc. v. N.Y. Yankees*, No. 91 Civ. 1803, 1996 WL 456044, at *11–12 (S.D.N.Y. Aug. 12, 1996) (“Not every improper opening warrants a mistrial, especially where the trial court has acted to avert the possibility of prejudice by either sustaining an objection or issuing curative instructions.”); SAKS & SPELLMAN, *supra* note 51, at 96–97.

64. *See Diamond & Casper, supra* note 26, at 518; Sklansky, *supra* note 58, at 415.

65. Kirk, *supra* note 32, at 1098.

66. *See Diamond & Vidmar, supra* note 20, at 1896–1904.

67. *See id.* at 1905–06.

68. *See id.* at 1866.

consideration.⁶⁹ Through their seminal Arizona Jury Project, Shari Seidman Diamond and Neil Vidmar were able to gain access to video footage of jurors interacting with one another in the jury room.⁷⁰ Consider the following exchange in a trial relating to a motor vehicle accident:

Although no juror referred specifically to the insurance implications in the testimony, they raised the issue of the plaintiff's insurance coverage several times:

Juror #1: I wonder if we're allowed to ask if he [the plaintiff] has insurance.

Juror #2: He must have insurance.

Juror #8: I'm sure he had health insurance. He's a full-time employee.

Juror #2: Well, are these bills paid?

Juror #7: That's the thing.⁷¹

Moreover, in 80% of cases Diamond and Vidmar observed in which the jury did not hear testimony—admissible or inadmissible—regarding insurance, jury respondents brought up the discussion themselves.⁷² Within nearly half of those cases, the discussion was substantial, such that in three out of forty cases, insurance coverage was the *deciding factor* for the verdict.⁷³

In the jury exchange above, while the jurors discussed insurance multiple times, they ultimately decided not to ask the judge because “they concluded that ‘the judge would just say it’s irrelevant.’”⁷⁴ It appears that discussions about insurance generate “share[d] expectations that are incorrect” between jurors;⁷⁵ the fact that there is an expectation to begin with results from everyday experience with the topic itself.

But even without shared expectations generated via discussion, individual jurors still make assumptions about insurance status. One survey by John Guinther on behalf of the Roscoe Pound Foundation found that nearly a third of jurors personally considered plaintiff's insurance,⁷⁶ while

69. See Diamond & Casper, *supra* note 26, at 516; Diamond & Vidmar, *supra* note 20, at 1876.

70. See Diamond & Vidmar, *supra* note 20, at 1869–73. This video footage resulted from the adoption of Rule of Civil Procedure 39(f) in Arizona; policymakers wanted to identify how the rule would change jury decision-making processes. See Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Inside the Jury Room: Evaluating Juror Discussions During Trial*, 87 JUDICATURE 54, 54–55 (2003).

71. Diamond & Vidmar, *supra* note 20, at 1880–81.

72. *Id.* at 1884.

73. *Id.* at 1893.

74. *Id.* at 1881.

75. Diamond et al., *supra* note 56, at 252.

76. JOHN GUINThER, *THE JURY IN AMERICA* 98 (1988).

half of jurors believed at baseline that the defendant carried insurance.⁷⁷ In another survey, a significant minority of jurors considered whether the plaintiff or defendant, respectively, had insurance.⁷⁸

The speculation that accompanies blindfolding has real effects.⁷⁹ Though many jurors in one study stated that their consideration of insurance status did not impact their decision, researchers found a correlation between respondents' admission and damages.⁸⁰ In their study, Shari Seidman Diamond, Jonathan D. Casper, and Lynne Ostergren found that nearly a quarter of respondents mentioned insurance status—unprompted—when they explained to researchers how they calculated damages for a plaintiff injured in a hypothetical automobile accident.⁸¹ Consistent with the theories underlying Rule 411, if jurors believed the plaintiff had insurance, they would likely lower the award and conversely, if the defendant had insurance, they would raise the award.⁸²

However, research about speculation has also produced surprising results. While the theoretical underpinnings of Rule 411 lie partially in the deep-pockets hypothesis, Diamond and Vidmar found a countervailing effect.⁸³ Rather, it appears that jurors wanted to ensure that plaintiffs were not “double-dipping” into both insurance compensation and the defendant's damages, in violation of the common law collateral source rule.⁸⁴

As the judge in *Terry* noted, our jury system is meant to aggregate a diverse group of personal experiences.⁸⁵ But as it relates to insurance in particular, experiments and field studies suggest that juries fill in the missing evidence about insurance coverage with assumptions about the kind of insurance defendants and plaintiffs might have;⁸⁶ in so doing, they may

77. *Id.*

78. See Nicole L. Mott, Valerie P. Hans & Lindsay Simpson, *What's Half a Lung Worth? Civil Jurors' Accounts of Their Award Decision Making*, 24 LAW & HUM. BEHAV. 401, 410 (2000).

79. See Roselle L. Wissler, Patricia F. Kuehn & Michael J. Saks, *Instructing Jurors on General Damages in Personal Injury Cases*, 6 PSYCH. PUB. POL'Y & L. 712, 721 (2000) (citing Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 LAW & CONTEMP. PROBS. 225 (1989); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121 (1996); Bernard S. Meyer & Maurice Rosenberg, *Questions Juries Ask: Untapped Springs of Insight*, 55 JUDICATURE 105 (1971)).

80. See Greene, *supra* note 79, at 243.

81. Diamond et al., *supra* note 56, at 253.

82. See *id.*

83. See Diamond & Vidmar, *supra* note 20, at 1888–89; see also Neil Vidmar, Jessica Lee, Elaina Cohen & Anne Stewart, *Damage Awards and Jurors' Responsibility Ascriptions in Medical Versus Automobile Negligence Cases*, 12 BEHAV. SCIS. & L. 149, 151–52 (1994).

84. See Diamond & Vidmar, *supra* note 20, at 1888–89.

85. See *Terry v. Plateau Elec. Coop.*, 825 S.W.2d 418, 423 (Tenn. Ct. App. 1991).

86. See, e.g., Diamond & Vidmar, *supra* note 20, at 1876–95; Diamond & Casper, *supra* note 26, at 518.

miscast attributions of liability or even project their own beliefs.

These results show that it is not just knowledge of insurance, but the *perception* of insurance, that causes differential damages: jurors are making decisions not on inadmissible information but in the *absence* of inadmissible information. Altogether, insurance is a well-documented context in which laypeople make assumptions based on their relative familiarity with the topic. In the next Section, I draw from the literature in social psychology to explain why jury instructions might backfire and why jurors might gravitate toward missing inadmissible evidence.

C. EXPLAINING THE FUTILITY OF CURRENT PRACTICE

To understand why jurors might not be able to disregard information when it appears in their minds, this Section looks to a long line of studies about how juries function generally.

1. Jury Decision-Making

Several theories have emerged to explain the underlying cognitive processes of juror decision-making.⁸⁷ One theory emphasizes how jurors act systematically: it suggests that as jurors absorb information by listening to witnesses and viewing evidence, they (1) consider each piece of information in turn, (2) assign it a value (for example, not relevant versus very relevant or not convincing versus convincing), and (3) then incorporate this information into their mental models.⁸⁸ By the end of the trial, the average combination of facts yields an aggregate verdict.⁸⁹ In line with this theory, courts often “assume that jurors are rational people who make sound legal decisions based on facts they remember accurately and incorporate correctly.”⁹⁰

87. See C. David Sands, III, *To Turn the Black Box Translucent: Decision Heuristics, Deterrence, Punitive Damages, and Future Directions of Inquiry*, 27 *LAW & PSYCH. REV.* 157, 160–61 (2003); Nancy Pennington & Reid Hastie, *Juror Decision-Making Models: The Generalization Gap*, 89 *PSYCH. BULL.* 246, 262–63 (1981).

88. See Reid Hastie, *Introduction*, in *INSIDE THE JUROR* 3, 11–19 (Reid Hastie ed., 1993).

89. There is some literature suggesting that, like most people, jurors have trouble understanding probability. See D. H. Kaye & Jonathan J. Koehler, *Can Jurors Understand Probabilistic Evidence?*, 154 *J. ROYAL STAT. SOC'Y, SERIES A (STAT. SOC'Y)* 75, 79–80 (1991); David L. Faigman & A. J. Baglioni, Jr., *Bayes' Theorem in the Trial Process: Instructing Jurors on the Value of Statistical Evidence*, 12 *LAW & HUM. BEHAV.* 1, 15 (1988).

90. Justin Sevier, *The Unintended Consequences of Local Rules*, 21 *CORNELL J.L. & PUB. POL'Y* 291, 297 (2011). James R. P. Ogloff and V. Gordon Rose identify the three traditional functions of the jury in factfinding: “First, jurors must be able to evaluate, fairly and impartially, the evidence presented . . . Second, jurors must be able to comprehend the law as instructed by the judge and counsel at trial. Third, jurors must be able to systematically consider the evidence in light of the law in order to come to a verdict.” James R. P. Ogloff & V. Gordon Rose, *The Comprehension of Judicial Instructions*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 407, 407 (Neil Brewer & Kipling D. Williams

By contrast, under the story model, jurors might consider information as part of a holistic process—that is, through telling a story. Jurors arrive with several potential stories and then infer information through the lens of whether it fits in each existing narrative.⁹¹ If the information does not fit their narrative or seems suspicious, then jurors give it less credence. In contrast, if the evidence presented makes the narrative more coherent, then it sticks in jurors' minds.⁹² Or, if an entirely different—but more coherent—narrative is presented, jurors may switch to that story instead.⁹³ For instance, researchers found that when mock jurors were told that an accident was caused in an unexpected or rare fashion, they were more likely to award higher damages.⁹⁴ This result suggested that because jurors were unable to imagine the situation at baseline, it seemed more severe. Ultimately, juries engage in “constructing a story, learning the law, and applying the law to the story,”⁹⁵ in that order.

The story model reflects a psychologically-based theory of jury decision-making in which jurors are active listeners who “search for causal explanations to make sense of what they are hearing and seeing, and they fill in gaps and interpret ambiguities in ways that influence their decisions.”⁹⁶ As opposed to a “rational juror” who weighs information according to its relevance and credibility, updating his prior beliefs along the way, it seems likely that jurors “construct a summary mental picture of what decision-relevant events occurred,” such as to form “an explanation-based narrative.”⁹⁷ Because situational details provide narrative richness, the story model also implies that jurors may be affected by these details, consistent with theories from behavioral economics and social psychology.⁹⁸ And

eds., 2005).

91. See Hastie, *supra* note 88, at 24–26.

92. See *id.*

93. See Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCH. 189, 190–92 (1992).

94. See Allen J. Hart, David L. Evans, Roselle L. Wissler, Jason W. Feehan & Michael J. Saks, *Injuries, Prior Beliefs, and Damage Awards*, 15 BEHAV. SCIS. & L. 63, 79 (1997); Mott et al., *supra* note 78, at 403.

95. Sklansky, *supra* note 58, at 419.

96. Shari Seidman Diamond & Jessica M. Salerno, *Empirical Analysis of Juries in Tort Cases*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 414, 420 (Jennifer Arlen ed., 2013). *But see* Luke M. Froeb & Bruce H. Kobayashi, *Naive, Biased, yet Bayesian: Can Juries Interpret Selectively Produced Evidence?*, 12 J.L. ECON. & ORG. 257, 270–71 (1996).

97. Diamond & Salerno, *supra* note 96, at 420.

98. For instance, several studies demonstrate that most people are susceptible to anchoring—that is, jurors may be inclined to award higher damages if the numbers or claims surrounding the case are higher. See Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCH. 519, 519–38 (1996); see also Valerie P. Hans, Rebecca K. Helm & Valerie F. Reyna, *From Meaning to Money: Translating Injury into Dollars*, 42 LAW & HUM. BEHAV. 95, 105–06 (2018).

because “the [jury] deliberation process often involves an early consideration of the content of the jury instructions,”⁹⁹ it seems likely that situational details might be especially amplified in jury instructions.

As research grew in this area, the story model emerged as the dominant overarching model for understanding juries, based both on theoretical considerations and psychological experiments.¹⁰⁰ In particular, I turn to four psychological theories within the purview of the story model to explain why jurors might be unable to separate inadmissible information from the stories they create.

2. Mental Control and Sticky Minds

Try not to imagine a white bear. Sit by yourself for five minutes. What did you think of instead?

This is the setup of a classic paper in social psychology that tested how people have difficulty with suppressing thoughts.¹⁰¹ Respondents were brought to a psychology lab and asked to dictate their stream-of-consciousness thoughts into a tape recorder.¹⁰² Then they were asked to ring a bell every time they thought of a white bear.¹⁰³ What the researchers found was that respondents thought of a white bear far *more* frequently when they had been told *not* to think of a white bear, compared to when they were told to think about a white bear as much as they could.¹⁰⁴

The “white bear” experiment is a feature of a specific theory that dominates the discussion of inadmissible evidence: mental control.¹⁰⁵ People exercise mental control when they “suppress a thought, concentrate on a sensation, inhibit an emotion, maintain a mood, stir up a desire, squelch a craving, or otherwise exert influence on their own mental states.”¹⁰⁶ Courts participate in this process when they ask jurors to disregard inadmissible

99. Diamond & Salerno, *supra* note 96, at 420.

100. See Diamond & Vidmar, *supra* note 20, at 1861; Sklansky, *supra* note 58, at 413 (“The story model has become the orthodox understanding of jury decisionmaking among psychologists and, increasingly, among legal academics; it has even been endorsed, in essentials if not in name, by the United States Supreme Court.” (footnote omitted)).

101. See Daniel M. Wegner, David J. Schneider, Samuel R. Carter III & Teri L. White, *Paradoxical Effects of Thought Suppression*, 53 J. PERSONALITY & SOC. PSYCH. 5, 6–7 (1987).

102. See *id.* at 6.

103. See *id.* at 6–7.

104. See *id.* at 7.

105. See Ernst H. W. Koster, Barbara Soetens, Caroline Braet & Rudi De Raedt, *How to Control a White Bear? Individual Differences Involved in Self-Perceived and Actual Thought-Suppression Ability*, 22 COGNITION & EMOTION 1068, 1070 (2008).

106. Daniel M. Wegner & James W. Pennebaker, *Changing Our Minds: An Introduction to Mental Control*, in HANDBOOK OF MENTAL CONTROL 1, 1 (Daniel M. Wegner & James W. Pennebaker eds., 1993).

information, and jurors attempt to comply.¹⁰⁷

But mental control may result in what the authors of the “white bear” study called “paradoxical effects”¹⁰⁸ or “ironic processes.”¹⁰⁹ When people try to inhibit certain thoughts, their subconscious mental processes “check” to see that the thoughts are being inhibited properly. But as the authors note, “[t]he paradoxical effect of thought suppression is that it produces a preoccupation with the suppressed thought,” which imply that “the task of suppressing a thought is itself difficult, leading people to hold the thought in consciousness repeatedly even as they try to eliminate it.”¹¹⁰ The harder that someone tries to not think about something, the easier it is for that thought to arise; imagine someone who is trying very hard to fall asleep but whose anxiety about it keeps them up even later.

Other researchers note that “two factors may render [juror decision-making] particularly vulnerable to the ironic effects of mental suppression.”¹¹¹ First, this ironic process is more likely to emerge when people are under mental strain. Mental strain can involve complex calculations, time constraints, or as Joel D. Lieberman and Jamie Arndt note, the process of jury decision-making itself.¹¹² Thus, it becomes harder at baseline for jurors to disregard information. Second, because the ironic processes are more likely to emerge when an individual is trying very hard to suppress information, one common solution to a mental control process is to think about something else.¹¹³ Yet, jurors have little with which to distract themselves. They could focus on other aspects of the case, but without an effective jury instruction, those aspects are imbued with the inadmissible information the jurors potentially know.¹¹⁴ Therefore, as it relates to jury admonitions, the court’s command may create a situation that causes jurors to speculate even further—and if a juror has a self-generated conjecture, her well-intentioned attempt to suppress it might make it worse.

Two similar psychological theories also suggest that individuals—and jurors—have sticky minds that make it difficult to unsee information. First, hindsight bias is classically defined as the tendency of people to “overestimate the likelihood that the outcome would have occurred” after

107. See Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCH. PUB. POL’Y & L. 677, 698 (2000).

108. Wegner et al., *supra* note 101, at 5.

109. Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 PSYCH. REV. 34, 34 (1994).

110. Wegner et al., *supra* note 101, at 8.

111. Lieberman & Arndt, *supra* note 107, at 698.

112. *See id.*

113. *See id.*

114. *See id.*

learning about it.¹¹⁵ Perhaps the classic lay example of hindsight bias is “Monday-morning quarterbacking”: commentators and NFL audiences criticize plays the morning after, having observed what happened as a result.¹¹⁶

Hindsight bias suggests that the information jurors learn will be incorporated into their judgments, whether consciously or subconsciously.¹¹⁷ For instance, if jurors learn that a defendant had an unlicensed firearm on her person—even if it was discovered during an illegal search—jurors may still find the defendant more culpable than had they not known of the illegal evidence; indeed, studies focusing on this theory often use illegal searches as examples of the effect.¹¹⁸ Second, belief perseverance suggests that individuals may find it generally difficult to change their minds.¹¹⁹ For instance, jurors’ lay knowledge about, and personal experience *with*, insurance might influence their assumptions about who has insurance and who might be liable—and make it more difficult to change their minds. As Jeanne Kirk notes, “Because juries already think about insurance, arguments against a cautionary instruction lose weight.”¹²⁰

For both of these theories, one solution is to ask individuals to “consider the opposite”¹²¹—that is, for jurors to recall what it would be like if the opposite of what they believed were actually true (for example, if the defendant did not have the unlicensed firearm or a prior conviction). This intervention appears to help individuals think about alternative outcomes,

115. *Id.* at 692 (citing Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCH.: HUM. PERCEPTION & PERFORMANCE 288 (1975)).

116. See Ben Zimmer, ‘Monday-Morning Quarterback’ Has a History Almost as Long as the NFL, WALL ST. J. (Sept. 6, 2019, 10:35 AM), <https://www.wsj.com/articles/monday-morning-quarterback-has-a-history-almost-as-long-as-the-nfl-11567780501> [<https://perma.cc/3YYE-P93D>]; Therese A. Louie, Mahesh N. Rajan & Robert E. Sibley, *Tackling the Monday-Morning Quarterback: Applications of Hindsight Bias in Decision-Making Settings*, 25 SOC. COGNITION 32, 33–36 (2007).

117. In their study, Berkeley J. Dietvorst and Uri Simonsohn suggest that hindsight bias is deliberate, meaning that a subset of people in any population actively choose to look at forbidden information, and the phenomenon is not accidental. See Berkeley J. Dietvorst & Uri Simonsohn, *Intentionally “Biased”: People Purposely Use To-Be-Ignored Information, but Can Be Persuaded Not To*, 148 J. EXPERIMENTAL PSYCH.: GEN. 1228, 1233 (2019). For that reason, interventions can target respondents who deliberately seek out forbidden information. See *id.* at 1236; see also Alison C. Smith & Edith Greene, *Conduct and Its Consequences: Attempts at Debiasing Jury Judgments*, 29 LAW & HUM. BEHAV. 505, 506 (2005); SAKS & SPELLMAN, *supra* note 51, at 93.

118. See, e.g., Jonathan D. Casper, Kennette Benedict & Jo L. Perry, *Juror Decision Making, Attitudes, and the Hindsight Bias*, 13 LAW & HUM. BEHAV. 291, 295–96 (1989); Dietvorst & Simonsohn, *supra* note 117, at 1235; Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1547–48 (2015).

119. See Lieberman & Arndt, *supra* note 107, at 701.

120. Kirk, *supra* note 32, at 1098.

121. See Smith & Greene, *supra* note 117, at 510 (citing Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. STATE L.J. 1277 (1999)).

ultimately loosening their grip on a causal theory. However, “consider the opposite” interventions have not gotten much traction in jury decision-making,¹²² likely because asking jurors to consider the opposite of the story they have created fundamentally casts the “opposite” as other, stretching credulity.

3. Reactance

Whereas mental control, hindsight bias, and belief perseverance suggest that jurors already face situational difficulty in unseeing inadmissible information at baseline, reactance theory explains why jury admonitions actively backfire.¹²³ Reactance refers to the fact that people react *against* perceived constraints on their freedom.¹²⁴ When people are forbidden from doing something, they may perceive that thing as more alluring—and even attempt to engage in it as a result.¹²⁵ This directly relates to jury instructions or admonitions: if jurors are given an admonition to disregard evidence, they may feel the urge to, and ultimately might, resist the admonition.¹²⁶

Many studies appear to show reactance in the jury context.¹²⁷ Historically, insurance was one of the key counterexamples in the University of Chicago’s seminal Jury Project, which showed that damages awards increased when jurors knew a defendant had insurance and increased even more when they were given an instruction to disregard insurance¹²⁸—a statistic oft-quoted by scholars who study jury instructions.¹²⁹ Among other studies, Sharon Wolf and David A. Montgomery showed that respondents were more likely to take inadmissible testimony into account when they were

122. Neither the meta-analysis nor reviews of jury instructions mention this approach. *See, e.g.*, Nancy Steblay, Harmon M. Hosch, Scott E. Culhane & Adam McWethy, *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 LAW & HUM. BEHAV. 469, 469–89 (2006); Tanford, *supra* note 61, at 71–111; Sevier, *supra* note 19, at 349–61. If anything, “jurors [during deliberations] must explain their thought processes and listen to arguments contrary to their own—an experience that may force them to ‘consider the opposite.’” Smith & Greene, *supra* note 117, at 510.

123. *See* Lieberman & Arndt, *supra* note 107, at 693–97; *see also* SAKS & SPELLMAN, *supra* note 51, at 86 (“Yet to explain jurors’ behavior it is important to ask: are jurors *unable* to disregard evidence or *unwilling* to disregard evidence?”).

124. *See* JACK W. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE 2 (1966).

125. *See id.* at 3.

126. *See* Lieberman & Arndt, *supra* note 107, at 694–95.

127. *See id.* at 695–96 (reviewing studies); *see also, e.g.*, Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCH. 205, 216 (1977); Gregory E. Lenehan & Patrick O’Neill, *Reactance and Conflict as Determinants of Judgment in a Mock Jury Experiment*, 11 J. APPLIED SOC. PSYCH. 231, 238–39 (1981).

128. *See* Broeder, *supra* note 52, at 753–54.

129. *See, e.g.*, HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY 377–78 (1966); Diamond & Vidmar, *supra* note 20, at 1913 n.115.

given a strong jury admonition versus a weak admonition.¹³⁰

4. Motivated Reasoning

Motivated reasoning might play a role in the ability of jurors to disregard information. This theory suggests that people choose conclusions and theories that align with their predispositions about the world.¹³¹ That is, people are likely to act in ways that confirm their thinking.¹³² Motivated reasoning invites behaviors like confirmation bias, when people seek or interpret information in a way that confirms their beliefs.¹³³ Thus, in light of the story theory, it seems likely motivated reasoning would play a role in jury decision-making. Much like the theory of belief perseverance, individuals might have difficulty giving up their previously held beliefs—especially when they have information that is seemingly supportive of their narrative.

Importantly, motivated reasoning suggests that situational factors cause more (or fewer) people to be amenable to disregarding information because they may create more (or less) of a narrative fit. For instance, Avani Mehta Sood used experimental data to suggest that mock jurors found ways to justify their consideration of illegal evidence when the crime a defendant was accused of was more severe.¹³⁴ Similarly, the perceived motive of a defendant may matter; jurors may be more likely to use inadmissible evidence against a defendant who is perceived as deliberately committing an action.¹³⁵ Overall, jurors are more likely to penalize a defendant by considering inadmissible information when the act the defendant commits is perceived as more egregious.¹³⁶

These actions occur not because jurors are vindictive but because

130. See Wolf & Montgomery, *supra* note 127, at 216. Note that this result might also be consistent with the ironic mental control theory; even if people wanted to disregard the information, the strong admonition might make them exert more effort to do so (and thus make it even more salient).

131. See, e.g., Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 480 (1990); Nicholas Epley & Thomas Gilovich, *The Mechanics of Motivated Reasoning*, 30 J. ECON. PERSPS. 133, 133–34 (2016).

132. See Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 311 (2013).

133. See Erica Dawson, Thomas Gilovich & Dennis T. Regan, *Motivated Reasoning and Performance on the Wason Selection Task*, 28 PERSONALITY & SOC. PSYCH. BULL. 1379, 1380 (2002).

134. See Sood, *supra* note 132, at 311–12.

135. See Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCH. 368, 370 (1992).

136. See Sood, *supra* note 118, at 1580. An additional way in which situational factors might impact jury decision-making is in the conflation of liability and damages. In a negligence experiment, jurors were more likely to find a defendant liable for an accident when the plaintiff's injury was severe. See Neal Feigenson, Jaihyun Park & Peter Salovey, *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597, 605–06, 609 (1997).

“jurors believe that it is unjust to render a verdict that does not account for certain types of inadmissible evidence once they become aware of it.”¹³⁷ In most cases, jurors are well-intentioned;¹³⁸ they hope to make the “right decision.” But to jurors, the right decision may not be the same as the right procedural decision; rather, their judgments are motivated by whether a particular outcome feels substantively fair,¹³⁹ as in *Terry*.¹⁴⁰

5. Skepticism Regarding Missing Information

Finally, a cluster of behaviors has been used to explain how individuals navigate situations with missing information.¹⁴¹ First, as Maia J. Young and colleagues note, “people rely more on information when they must request it than when it is available up front.”¹⁴² To that end, individuals can over-rely on information that is irrelevant but difficult to procure¹⁴³—much like evidence that is ruled inadmissible on account of relevance.

In contrast, when relevant information is missing, people may use familiar information to fill in the gaps. This phenomenon has been studied extensively in hiring processes. For example, some employers might use racial stereotypes to “predict” a job candidate’s performance,¹⁴⁴ especially when they have few or unpredictable measures to go on (for example, a barebones application instead of a resumé). As with the story theory, jurors fill in the gaps in ways that maximize narrative fit, even at the expense of causal accuracy.¹⁴⁵ Or they may view gaps in seemingly relevant information as suspicious, that is, they assume the information is missing as a result of bad behavior.¹⁴⁶

137. Sevier, *supra* note 19, at 357.

138. See Steblay et al., *supra* note 122, at 487.

139. See Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCH. BULL. 1046, 1047 (1997); SAKS & SPELLMAN, *supra* note 51, at 94.

140. As described earlier, the fact that juries sometimes attempt to elicit whether plaintiffs have insurance to make sure they are not receiving a double recovery is consistent with the idea that jurors’ interest in inadmissible evidence might be motivated by their wish to yield a broadly fair verdict.

141. See SAKS & SPELLMAN, *supra* note 51, at 95.

142. Maia J. Young, Christopher W. Bauman, Ning Chen & Anthony Bastardi, *The Pursuit of Missing Information in Negotiation*, 117 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 88, 88 (2012) (citing Anthony Bastardi & Eldar Shafir, *On the Pursuit and Misuse of Useless Information*, 75 J. PERSONALITY & SOC. PSYCH. 19 (1998)).

143. See Bastardi & Shafir, *supra* note 142, at 28.

144. This is distinct from implicit bias because the stereotypes are explicitly used by employers. See, e.g., Mario L. Small & Devah Pager, *Sociological Perspectives on Racial Discrimination*, 34 J. ECON. PERSPS. 49, 51–52 (2020).

145. See Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 47–48 (2003); Diamond & Vidmar, *supra* note 20, at 1861–62.

146. See Carolyn M. Jagacinski, *Personnel Decision Making: The Impact of Missing Information*, 76 J. APPLIED PSYCH. 19, 19 (1991).

These ideas have implications for jurors. For example, while jurors were allowed to submit questions to the court,¹⁴⁷ Diamond and Vidmar found in their study that the judge would either ignore the question or “respond[] with the traditional admonition not to pay attention to the topic of insurance.”¹⁴⁸ One might expect that this nonresponse would not only signal different things to jurors but also generate skepticism.

6. Wait, Wait, Don’t Tell Me

The theories described here provide us with many reasons for why jurors might respond negatively to jury instructions. With these in mind, scholars in both law and the social sciences have attempted to resolve the seeming gap between evidentiary rules and human behavior by improving the design of jury admonitions and jury instructions.¹⁴⁹ Frequently, these interventions seek to simplify the mental burden on jurors through changes in procedure, whether by providing additional information to jurors about the law,¹⁵⁰ providing jurors with written copies of the jury instructions,¹⁵¹ making jury instructions clearer,¹⁵² or providing damages in comparable cases.¹⁵³

Addressing timing appears to be a potentially useful solution: there is evidence that using preinstructions prior to evidence being displayed helps focus respondents on the relevant information as evidence is presented,¹⁵⁴ although separating instructions in “manageable chunks” throughout the trial (for example, repeating instructions throughout) does not appear to be helpful.¹⁵⁵ Creating doubt about the quality of inadmissible evidence or the

147. See Diamond & Vidmar, *supra* note 20, at 1885.

148. *Id.* at 1885–86.

149. See Steblay et al., *supra* note 122, at 469–70, for a review.

150. See Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 498 (2006). Shari Seidman Diamond and Jessica M. Salerno point out that in some cases, “the jury may listen to the evidence assuming that the task will be whether or not to hold the defendant responsible for the plaintiff’s injuries, learning only just before deliberations that it is a comparable fault case in which fault can be allocated between the opposing parties.” Diamond & Salerno, *supra* note 96, at 430.

151. See Marder, *supra* note 150, at 499–500.

152. See Ogloff & Rose, *supra* note 90, at 408–10; Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions*, 6 S. CAL. INTERDISC. L.J. 1, 35 (1997).

153. See Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCH. PUB. POL’Y & L. 589, 613 (1997).

154. See *id.* at 629–30; Smith, *Impact*, *supra* note 47, at 226; Angela Paglia & Regina A. Schuller, *Jurors’ Use of Hearsay Evidence: The Effects of Type and Timing of Instructions*, 22 LAW & HUM. BEHAV. 501, 504 (1998). Preinstructions are not currently used uniformly in the United States, despite research that shows their benefits. Still, jury instructions are fundamentally important. The studies in this Article were designed to be cognizable to people who did not have weeks of exposure to an actual jury context.

155. See Roselle L. Wissler, Katie A. Rector & Michael J. Saks, *The Impact of Jury Instructions on the Fusion of Liability and Compensatory Damages*, 25 LAW & HUM. BEHAV. 125, 136–37 (2001).

motives of its source (for example, a corrupt police officer) also helps to reduce reliance on the evidence,¹⁵⁶ although it might undercut the source's overall credibility if they provide admissible evidence elsewhere in the trial.

More recent research has focused on jury instructions that explain *why* information should be excluded, rather than taking a more combative stance. For instance, in their hindsight bias study, Berkeley J. Dietvorst and Uri Simonsohn found that telling mock jurors to consider the civil liberties consequences of inadmissible evidence reduced guilty verdicts in their survey experiment.¹⁵⁷ In a similar survey study, Sood found that explicitly alerting mock jurors to how they themselves might be biased by motivated reasoning helped to mitigate it in the inadmissible evidence context.¹⁵⁸

However, much of the innovation in jury instruction still focuses on how to *tell* the jury to disregard information. As detailed earlier, even mentioning admonition might trigger reactance or ironic mental control. Consistent with this intuition, a meta-analysis of studies on jury admonition design ultimately found that for many of the interventions, the results were mixed and highly sensitive to context,¹⁵⁹ such as the type of evidence presented or the type of case, although other scholars differ on the interpretation of these results.¹⁶⁰ Compared to other jury instructions, the softer-touch approach of explaining the legal reasoning to jurors was relatively successful, though still mixed.¹⁶¹

Ultimately, despite numerous interventions, there appears to be no silver bullet to steer jurors away from inadmissible information. Moreover,

Bifurcation of issues does show some success, though as I point out later, these results are mixed. *See* Smith & Greene, *supra* note 117, at 509–10.

156. *See* Steven Fein, Allison L. McCloskey & Thomas M. Tomlinson, *Can the Jury Disregard that Information? The Use of Suspicion to Reduce the Prejudicial Effects of Pretrial Publicity and Inadmissible Testimony*, 23 PERSONALITY & SOC. PSYCH. BULL. 1215, 1223–24 (1997); Kassin & Sommers, *supra* note 139, at 1050.

157. *See* Dietvorst & Simonsohn, *supra* note 117, at 1235.

158. *See* Sood, *supra* note 118, at 1596. Other studies compare the baseline instruction with an explanatory instruction across various contexts, including subsequent remedial measures and damages calculations in antitrust cases. *See* Bernard Chao & Kylie Santos, *How Evidence of Subsequent Remedial Measures Matters*, 84 MO. L. REV. 609, 614 (2019); Diamond & Casper, *supra* note 26, at 558.

159. *See* Steblay et al., *supra* note 122, at 487–88; Sevier, *supra* note 19, at 356–58. To be sure, an imperfect intervention is still valuable. Indeed, David Alan Sklansky argues that scholars' goals of perfect compliance for jury instructions come from their belief that jurors are quasi-magical arbiters. *See* Sklansky, *supra* note 58, at 410.

160. *See* Sklansky, *supra* note 58, at 429–31.

161. In her note, Lisa Eichhorn suggested explaining to jurors the policy behind the limiting admonition: "Armed with an understanding of *why* certain evidence should not be considered, jurors will be less likely to experience conflict and less likely to view their options as limited." Lisa Eichhorn, Note, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 LAW & CONTEMP. PROBS. 341, 353 (1989); *see also* Diamond & Vidmar, *supra* note 20, at 1911–12 (citing Kassin & Sommers, *supra* note 139, at 1047–49); Sevier, *supra* note 19, at 358.

to my knowledge, no existing research attempts to prevent jurors from speculating among themselves about inadmissible information or to help jurors deal with *missing* information. Research, thus far, addresses only the failure of courts to blindfold properly.¹⁶² Yet, this Section has shown how jurors often self-speculate and that leaving speculation to fester has real consequences.

Thus, existing interventions attempt to rid jurors of information they already know, while doing so before jurors begin to speculate might be a more fruitful approach. In the next Part, I propose a type of intervention that not only might address speculation but also might more effectively shield jurors from impermissible information, by proactively leveraging psychological theory.

II. PROVISIONAL ASSUMPTIONS: EVIDENCE FROM ORIGINAL EXPERIMENTAL RESEARCH

How might we solve the problem of jurors speculating about inadmissible topics? At the outset of this Article, perhaps we might have suggested banning any discussion of insurance in the jury room. But as discussed in the previous Part, there are two concerns with this solution. First, it is possible that a ban on speculation about certain topics would run into the same problems we have with disregarding information. Although jurors might be more frightened by potential consequences, they might still resist being told what to do, per reactance theory. Or a ban might highlight the information even more, causing jurors to ironically engage more with it. As described in the previous Part, interventions that explain to jurors why information is missing may help to solve these issues, but they still raise the issue of potentially generating reactance.

Second, and most importantly for this Article, such a ban would not solve the problem of jurors generating hypotheses with regard to their own mental models and stories. Indeed, an intervention would have to prevent people from thinking about inadmissible things even *before* they are prompted. This leads to a question that is seemingly impossible to answer: How do you get people to disregard information that they should not know in the first place? Such an intervention seems like it could be out of *Inception*¹⁶³—but it is not impossible.

162. *But see* Sklansky, *supra* note 58, at 415 (distinguishing between “directed forgetting, which genuinely does seem hopeless, and directed disregarding, which does not”).

163. In the film *Inception*, actor Leonardo DiCaprio’s character leads a team of corporate spies on a mission to plant ideas into a corporate rival’s subconscious mind. *INCEPTION* (Warner Bros. Pictures 2010).

Specifically, I propose one simple intervention: to resolve jurors' speculations by giving them a provisional assumption. That is, in categories in which jurors are likely to speculate about absent information, the court can ask them to assume a certain piece of inadmissible information. Jurors would assume, for example, that a defendant lacks any previous convictions or that neither party has insurance.

A. THE CONCEPT

The core legal intuition for a provisional assumption bears resemblance to an existing legal innovation: presumptions. In situations where it is difficult to prove intent or other factors, the law simplifies by stating a default;¹⁶⁴ for example, a plaintiff must first establish a *prima facie* case for employment discrimination.¹⁶⁵ While the opposing party may rebut the presumption by satisfying the relevant burden of proof,¹⁶⁶ the presumption's existence shows us that courts are willing to make some form of an assumption to simplify their decision-making process.

Also consider the adverse inference. In certain cases, when a party fails to testify or provide evidence in court, jurors are permitted to infer—that is, assume—that the missing information “would have been unfavorable to the defendant.”¹⁶⁷ The adverse inference thus functions as a sanction against a party, regardless of whether the missing information would have actually been unfavorable (that is, true in fact). Altogether, throughout the litigation process, courts frequently integrate evidence with assumptions that are outside the record.

The core *psychological* intuition for this intervention derives from the story theory itself.¹⁶⁸ If jurors fill in the blanks to make a decision, and there are some blanks that jurors tend to fill, then an ideal intervention either preempts the speculation or reroutes jurors after their speculation has been made. But as we can see from the literature on jury instructions, the second route is an uphill battle. Instead, I suggest that an intervention that prevents speculation will be more helpful in filling in the blanks—and potentially work for other inadmissible-but-not-speculative topics as well.

A provisional assumption (for example, “assume neither the defendant

164. See LEONARD B. SAND, JOHN S. SIFFERT, WALTER P. LOUGHLIN, STEVEN A. REISS, STEVE ALLEN, JED S. RAKOFF & DAVID M. EPSTEIN, 4 MODERN FEDERAL JURY INSTRUCTIONS-CIVIL ¶ 75.02, LexisNexis (database updated 2021).

165. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

166. See SAND ET AL., *supra* note 164, ¶ 75.02.

167. *Id.* ¶ 75.01.

168. See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 523–25 (1991).

nor the plaintiff has insurance”) fills in the blanks for jurors during the trial. This underlying assumption resolves the ambiguities of Rule 411 while maintaining its default assumptions, and in turn, upholds consistency within and across cases. Because jurors are given the same assumption or “information,” they have the same starting point from which to make a decision.

Importantly, asking jurors to assume specific information resolves the issues associated with mental control, reactance, and motivated reasoning described earlier. First, the use of a provisional assumption mentions the inadmissible topic, without drawing attention to the topic—a fine line imperative to mitigating the subconscious effects of reactance and mental control. Specifically, asking jurors to assume that the information is true (that is, a positive suggestion) may be a better intervention than telling a juror not to do something (that is, a negative directive).

As it relates to motivated reasoning, the assumption creates a default setting for jurors, such that subsequent information will work around that assumption. That is, jurors are less likely to discount the assumption because it is just that—an assumption—whereas they may be more likely to challenge a factual statement that is incongruent with their *ex ante* assumptions. Rather, the intervention creates a *de facto* rule in which jurors’ own assumptions about insurance are precluded by the provisional assumption. In this way, the intervention acts as a “bias interrupter.”¹⁶⁹

In this Part, I present a pair of original exploratory studies that provide early evidence that an intervention based on assuming a fact is true works—and that it holds robustly across different situational factors.¹⁷⁰ I adapt a classic experimental scenario in which the defendant crashes into the plaintiff’s car,¹⁷¹ drawn from an actual court case which has been used to great effect in calculating how damages might vary based on the severity of injury or the defendant’s behavior.¹⁷²

169. The term “bias interrupter” is typically used to describe in-the-moment interventions that reaffirm diverse employees in the workplace. *See, e.g.*, Cynthia L. Cooper, *Can Bias Interrupters Succeed Where Diversity Efforts Have Stalled?*, 25 PERSPECTIVES 4, 4 (2017). Here, I use it in its general definition: procedural interventions that prevent cognitive biases, whether based in stereotypes, reactance, or other behavioral mechanisms.

170. By “situational factors,” I refer to aspects of the situation—not necessarily the legal context—although Part III discusses the promise of this intervention in other legal schemas. By using a randomized experiment, we can assume that differences between the two groups in (1) the information that they seek and (2) the damages they award result from the intervention itself.

171. My scenario does involve some key changes from the inspirational study. For one, I look at damages, not liability, which is similar to Diamond and Vidmar’s key study. *See* Diamond & Vidmar, *supra* note 20, at 1909–10. Generally, experiments in this area are designed using case facts. *See* Saks, *supra* note 152, at 19.

172. The case is *Jeansonne v. Landau*, an “[u]nreported Denver County District Court case [from

The two studies follow the same basic outline by design, showing how the “assume no” intervention persists. At the core, one-half of respondents in each study are asked to assume that neither the plaintiff nor the defendant has medical or auto insurance. The other half of respondents do not see this statement, though they are informed that generally, jurors are not supposed to consider insurance or other proxies for a party’s income or ability to pay. That is, even the control group is given information about what information to disregard, to make this study more naturalistic.

B. STUDY 1

1. Method

Study 1, as a proof of concept, follows the procedure outlined above. Respondents were United States residents recruited through the online survey platform Prolific who completed their surveys through Qualtrics software. Upon their consent, respondents were asked to imagine that they are part of a jury that is considering a case involving a car accident. Table 1 shows the differing experiences of the two groups.

1997] that was resolved by settlement before judgment was reached.” Edith Greene, Michael Johns & Alison Smith, *The Effects of Defendant Conduct on Jury Damage Awards*, 86 J. APPLIED PSYCH. 228, 237 (2001). For uses of the case in experimental studies, see, for example, Edith Greene, Michael Johns & Jason Bowman, *The Effects of Injury Severity on Jury Negligence Decisions*, 23 LAW & HUM. BEHAV. 675, 679 (1999); Edith Greene & Michael Johns, *Jurors’ Use of Instructions on Negligence*, 31 J. APPLIED SOC. PSYCH. 840, 847 (2001); Edith Greene, Kari Hayman & Matt Motyl, “Shouldn’t We Consider . . . ?”: *Jury Discussions of Forbidden Topics and Effects on Damage Awards*, 14 PSYCH. PUB. POL’Y & L. 194, 205 (2008) [hereinafter Greene et al., *Jury Discussions*]; William Douglas Woody, *The Influence of Liability Information, Severity of Injury, and Attitudes Toward Vengeance on Damage Awards*, 102 PSYCH. REPS. 239, 244 (2008); Valerie F. Reyna, Valerie P. Hans, Jonathan C. Corbin, Ryan Yeh, Kelvin Lin & Caisa Royer, *The Gist of Juries: Testing a Model of Damage Award Decision Making*, 21 PSYCH. PUB. POL’Y & L. 280, 285 (2015).

TABLE 1. Instructions to Survey Respondents

<i>Control Group</i>	<i>Treatment Group</i>
<p>In this study, imagine yourself sitting on a jury regarding a car accident.</p> <p>Your job is to determine the extent to which the defendant (who is being sued) should compensate the person who was injured (that is, the plaintiff). Generally, juries are not supposed to consider either person's income, insurance status, or attorney's fees, or whether a driver got a ticket, in making these decisions.</p>	<p>In this study, imagine yourself sitting on a jury regarding a car accident.</p> <p>Your job is to determine the extent to which the defendant (who is being sued) should compensate the person who was injured (that is, the plaintiff). Generally, juries are not supposed to consider either person's income, insurance status, or attorney's fees, or whether a driver got a ticket, in making these decisions.</p> <p>The judge gives the jury a set of instructions for making their decision. Among those instructions is the following: "In making your determination, you should assume that the defendant does not have automobile insurance that would help pay the plaintiff's injuries. You should also assume that the plaintiff does not have medical insurance that would cover his injuries and treatment."</p>

Respondents then proceeded to the following basic scenario, based on *Jeansonne v. Landau*¹⁷³:

Tom Johnson was injured in a car accident in Travis County, Texas. Peter Cameron was driving the car that hit Tom's; Tom is now suing Peter over his injuries.

Last summer, Peter was driving down a busy interstate highway. The highway had a construction zone that forced drivers in four lanes of the

173. Names were changed so that the plaintiff and defendant might be perceived as having the same race and gender in order to prevent stereotyping from respondents. See Allison L. Skinner, Margaret C. Stevenson & John C. Camillus, *Ambivalent Sexism in Context: Hostile and Benevolent Sexism Moderate Bias Against Female Drivers*, 37 BASIC & APPLIED SOC. PSYCH. 56, 56 (2015). In addition, the scenario featured two automobiles as opposed to a truck and an automobile in the original version; this change was meant to prevent respondents from assuming that a plaintiff might be able to seek damages from a truck company because of "deep pockets." Finally, compared to the original studies, I created more detail for the injuries the plaintiff suffered, given that a dependent variable of interest were the damages respondents would award.

highway to merge into two lanes. Then, those two lanes were diverted around the construction site.

In this area of the highway, Peter did not see the road-sign warning. He lost control of his automobile and crashed through a guardrail. As a result, Peter's car crossed into the oncoming lanes of traffic and **struck Tom's automobile head-on.**

Tom calls the physician treating his injuries to the stand as an expert witness. The physician testifies that before the accident, Tom was in good health.

There was no dispute about who was responsible, as bystanders are clear that Peter hit Tom. So, **Peter was found responsible for the accident.**

What is unclear is the extent of Tom's injuries, as it relates to compensation. Based on his emergency room visit and subsequent visits to his regular doctor, Tom was diagnosed with

- a concussion,
- a herniated disc in the spine,
- a rotator cuff injury and labral tear on his right shoulder, and
- a soft tissue injury to the neck, resulting in painful muscle spasms.

So far, Tom has had \$10,000 in medical expenses. He has also missed 3 weeks of work, and his doctor has told him that there is about a 50/50 chance that he will have to have surgery on his shoulder. He reports daily headaches, and doctors are unsure when those will resolve.

After reading the scenario, all respondents were told that the jury foreman has asked the jury to present a few questions. The respondents then saw the questions "other jury members" had proposed discussing and were asked to rate the following five statements in terms of their interest in discussing them on a scale from 0 to 100, in which 100 meant "extremely interested":

"I'm wondering whether Peter will have to pay out of pocket or if his car insurance would cover the damages."

"Do we think Tom's injuries would be covered by his own health insurance?"

"Do we know whether Tom was wearing a seatbelt?"

"Could we review the MRI report about the herniated disc and discuss it?"

"Do you think Tom could lose his job from this?"¹⁷⁴

Importantly, these dependent variables were designed as questions to approximate Diamond and Vidmar's observations during the Arizona Jury

174. The order of these prompts was randomized for each participant to avoid potential confounds from respondents systematically picking the first option.

Project, in which much of the discussion was spontaneously generated.¹⁷⁵ The choice of this wording also had the function of obscuring the focus of the study on insurance, in that respondents were asked about multiple issues. That is, respondents might otherwise be confused as to whether they were being asked about insurance—and potentially prompted in a way that increases reactance—especially if they were told to not consider it earlier. Rather, simulating whether *someone else* brought up the topic lowers the stakes for a participant to answer honestly or to be primed by the mention of insurance.¹⁷⁶ In a successful intervention, we should expect that under the treatment condition (in which people are asked to assume neither party has insurance), respondents will shift their attention to other topics instead.

Finally, as a supplementary measure, I asked respondents to name an amount of damages to award the plaintiff, their reasoning for doing so, and what other information they would want to know before making the decision. Respondents completed the study after completing several demographic questions.

2. Results

One hundred and ninety-nine respondents completed this exploratory survey via Prolific;¹⁷⁷ 39.7% of respondents were male, with a median age of 28.5. Table A1 in the Appendix shows other respondent demographics in more detail. The randomization was about even, with 100 respondents in the control condition and 99 in the treatment condition. All respondents were included in the following analyses, with no exclusions.

The introduction of the provisional assumption appeared to reduce jurors' interest in inadmissible information. Respondents who received the additional statement to “assume no insurance”—that is, the provisional assumption—expressed a 23.8% decrease in interest in discussing the plaintiff's insurance relative to those in the control condition, although participants still indicated moderate interest in insurance status (40 on a 1–100 scale).¹⁷⁸ However, they did not express a concurrent decrease in interest

175. See Diamond & Vidmar, *supra* note 20, at 1882–85.

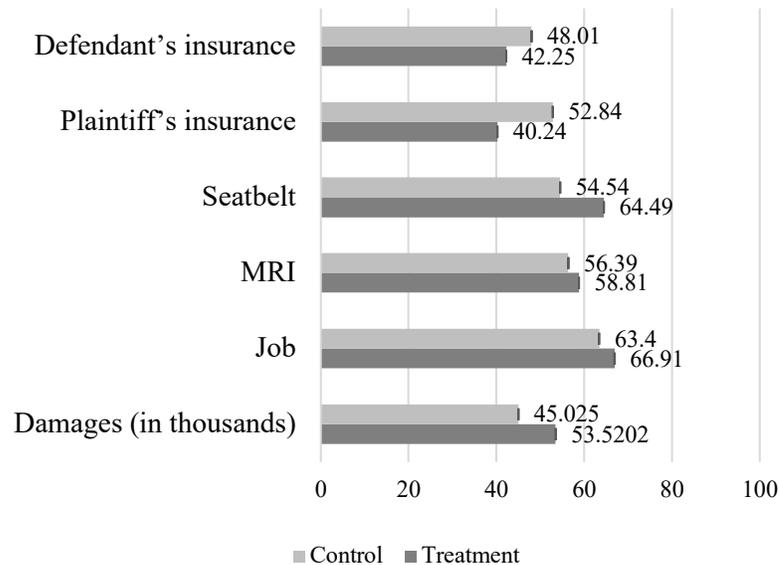
176. See, e.g., Glen Whyte, *Groupthink Reconsidered*, 14 ACAD. MGMT. REV. 40, 45 (1989).

177. Prolific is a web-based platform for administering surveys and experiments. Compared to Amazon Mechanical Turk, respondents on Prolific have less experience with surveys (that is, they do not attempt to “game the experiment”) and are generally more diverse. Prolific also provides greater rights to respondents in terms of payment and types of tasks. See generally Stefan Palan & Christian Schitter, *Prolific.ac—A Subject Pool for Online Experiments*, 17 J. BEHAV. & EXPERIMENTAL FIN. 22 (2018) (describing how Prolific functions, particularly in comparison to other platforms).

178. $M_{\text{control}} = 52.84$, $M_{\text{treatment}} = 40.24$, $p = 0.01$. These ratings are the mean ratings for each group; a t-test was used to determine the difference between the groups and whether it was statistically significant. In general, a p-value represents an evaluation of whether the hypothesized result is false (that is, the null hypothesis). Smaller p-values suggest that the result is likely to be true, with many disciplines

in the defendant's insurance status;¹⁷⁹ instead, they appeared to shift their interest toward whether the plaintiff had worn a seatbelt.¹⁸⁰ Figure 1 shows the mean differences between the two groups.

FIGURE 1. Under a Provisional Assumption, Interest in the Plaintiff's Insurance Status Decreased, While Interest in Seatbelt Status and Damages Increased



suggesting that a value of $p = 0.05$ means that the result is statistically significant. *See, e.g.*, P.B. Stark, *Making Sense of P-Values*, U.C. DEP'T OF STAT. (Nov. 24, 2015), <https://www.stat.berkeley.edu/~stark/Preprints/pValues.pdf> [<https://perma.cc/BG4N-S2DG>].

179. $M_{\text{control}} = 48.01$, $M_{\text{treatment}} = 42.25$, $p = 0.23$.

180. $M_{\text{control}} = 54.54$, $M_{\text{treatment}} = 64.49$, $p = 0.03$. This interest is consistent with the idea in some jurisdictions that seatbelt negligence is a form of contributory negligence. Indeed, seatbelt negligence is a *superseding* cause in some jurisdictions, including Wisconsin. *See, e.g.*, Michael K. McChrystal, *Seat Belt Negligence: The Ambivalent Wisconsin Rules*, 68 MARQ. L. REV. 539, 544-45 (1985). This interpretation might be particularly salient in the "pre-comparative era." *See* Paul T. Hayden, *Butterfield Rides Again: Plaintiff's Negligence as Superseding or Sole Proximate Cause in Systems of Pure Comparative Responsibility*, 33 LOY. L.A. L. REV. 887, 897-98 (2000). Other experiments show concerns about a plaintiff's behavior as it relates to damages. *See, e.g.*, Douglas J. Zickafosse & Brian H. Bornstein, *Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making*, 23 LAW & HUM. BEHAV. 577, 591 (1999); Neal Feigenson, Jaihyun Park & Peter Salovey, *The Role of Emotions in Comparative Negligence Judgments*, 31 J. APPLIED SOC. PSYCH. 576, 596 (2001). A plaintiff's conduct might matter, though of course, this study differentiates itself from others regarding punitive damages. *See generally* Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998) (documenting jury-eligible citizens' attitudes toward punitive damages).

Additionally, respondents awarded more damages in the treatment group: those respondents who received the general admonition awarded an average of \$45,025 to Tom, the plaintiff, but those in the treatment group—who received an additional provisional assumption—awarded an average of \$53,520. Because the literature suggests that damages awarded could go in either direction depending on the jurors’ assumptions about insurance, I look to respondents’ qualitative responses in exploring the potential effect on damages. In responding to the prompt, “How did you decide on the amount for compensation?,” respondents in the control condition—without the intervention—appeared to mention insurance more frequently than in the treatment condition.¹⁸¹ Furthermore, respondents who did not receive the intervention appeared to disregard the general admonition to not consider insurance and frequently assumed that insurance existed. Below is a sample of juror responses from the control condition:

“[A]ssuming reasonably that most drivers have auto insurance as they are required to, 20,000 is a sufficient number to cover initial costs as well as outside costs in addition to money received by insurance.”

“Seems like a good price to pay, insurance companies would forego legal expenses. Everyone would be satisfied.”¹⁸²

“Peter is responsible for the incident but some of the details regarding insurance need to be answered before a clear compensation amount can be determined.”

In contrast, respondents in the treatment condition, despite the simplicity of the study, rarely mentioned insurance, rather assuming that neither party had insurance:

“If Tom’s injuries were perminate [sic] and if he was wearing a seatbelt would be nice to know. While insurance information would be nice I think we are supposed to assume that he doesn’t have it.”

“Toms [sic] injuries were bad but not life threatening. 50k might get him a trip to the ER in the USA!!!”¹⁸³

These comments provide informal support that the provisional assumption successfully suppressed respondents’ thoughts about insurance. The juxtaposition of these two sets of comments, in conjunction with the

181. The baseline share of participants who mentioned insurance as a concern was relatively low; however, eleven participants in the control condition mentioned insurance, compared to three who received the provisional assumption. When asked what further information they would have liked to have, eight participants in the control condition mentioned insurance, compared to five participants who received the provisional assumption.

182. Note here that the participant also assumed further information about insurance companies in explaining his logic—another example of self-generated speculation.

183. It is worth noting that this experiment takes place at a time of increasing medical costs in the United States, as opposed to many previous studies. We might expect, accordingly, that that intuition might also explain the differences in damages that result from a provisional assumption in insurance.

increase in damages, may suggest that respondents who did not receive the intervention were assuming that: (1) the defendant should pay less because his auto insurance would cover the rest; and (2) the plaintiff's insurance would cover his costs.

To analyze the relationship between interest in insurance, damages, and the intervention in more detail, I conducted a mediation analysis, commonly used in psychology and other social sciences.¹⁸⁴ Mediation seeks to statistically clarify the possibility of a causal relationship between several variables.¹⁸⁵ I found that the differences in damages between the control and treatment groups were fully mediated by differences in interest in insurance. That is, the differences in damages were likely driven by the fact that respondents in the treatment condition were less interested in discussing insurance, and in particular, the plaintiff's insurance.¹⁸⁶

Based on these results, Study 1 suggests that a provisional assumption might work to reduce jurors' speculations about insurance, and specifically, the plaintiff's insurance. Moreover, the provisional assumption not only decreased interest in inadmissible information but also shifted jurors' interest to other information relevant to the case—for example, whether the plaintiff wore a seatbelt. In the next study, I attempt to replicate the result within a slightly different circumstance by looking at one potential factor that might change the provisional assumption's effectiveness: uncertainty.

C. STUDY 2

1. Method

In this study, I examined whether the provisional assumption might be affected by knowledge about the plaintiff's damages. Recall that in Study 1, the plaintiff faced an uncertain surgery:

So far, Tom has had \$10,000 in medical expenses. He has also missed 3 weeks of work, and his doctor has told him that there is about a 50/50 chance that he will have to have surgery on his shoulder. He reports daily headaches, and doctors are unsure when those will resolve.

Study 2 takes this scenario and systematizes uncertainty about the

184. See, e.g., Kristopher J. Preacher & Andrew F. Hayes, *SPSS and SAS Procedures for Estimating Indirect Effects in Simple Mediation Models*, 36 BEHAV. RSCH. METHODS INSTRUMENTS & COMPUTS. 717, 718 (2004).

185. See *id.* at 717.

186. Appendix Figure A1 shows a flowchart-style mediation diagram that shows how interest in insurance might play a role in reduced damages depending on what treatment a respondent was assigned to. Importantly, Appendix Figure A2 rules out an alternative explanation; that increased interest in the plaintiff's seatbelt impacted damages.

surgery and its costs.¹⁸⁷ The study is exploratory; it was run without a particular hypothesis in mind, but rather to observe whether uncertainty might have *any* effect on interest in insurance. Compared to Study 1, where there was no mention of the cost of surgery, in Study 2, half of the respondents learn that Tom, the plaintiff, has a 50/50 chance of surgery and that the surgery ranges from \$10,000 to \$60,000. In contrast, the other half of respondents in Study 2 learn even more information: that the surgery is almost certain and costs \$35,000.¹⁸⁸

TABLE 2. Description of Potential Damages in Study 2

<i>Uncertain Condition</i>	<i>Certain Condition</i>
<p>So far, Tom has had \$10,000 in medical expenses. He has also missed 3 weeks of work, and his doctor has told him that there is about a 50/50 chance that he will have to have surgery on his shoulder, which would additionally cost between \$10,000 and \$60,000.</p>	<p>So far, Tom has had \$10,000 in medical expenses. He has also missed 3 weeks of work.</p> <p>Tom’s doctor has told him that there is about a 90% chance that he will have to have surgery on his shoulder, which would cost an additional \$35,000.</p>

Study 2 proceeds similarly to Study 1: half of the survey respondents saw the admonition that “generally, juries are not supposed to consider,” whereas the other half—in the treatment condition—saw the additional instruction to “assume no insurance.” Then within each of those two groups, respondents read the same basic scenario as in Study 1, and they saw one of the descriptions of the surgery above.

Thus, Study 2 was a “fully crossed” design, where respondents either saw the intervention or did not *and* were exposed to either the “uncertain” condition or the “certain” condition. The rest of the vignette remained the same, with the same characters, accident scenario, and jury brainstorming.

187. As described in the previous Part, jurors might have several responses when faced with missing information: (1) they might be more interested in the missing information or consider it more informative; (2) they might behave in a way that reiterates their instincts; or (3) they might be more suspicious of the process. Overall, greater uncertainty might undermine the intervention if it caused respondents to seek out more forbidden information.

188. The average expected cost of these two conditions was designed to be approximately equal so that differences between the two conditions would be about uncertainty rather than about substantive cost. Because the surgery is not 100% certain, I do not use the expected value of the other condition (\$40,000).

2. Results

Respondent recruitment took place on the platform Prolific; Table A2 in the Appendix shows respondent demographics for Study 2. Randomization was roughly even, with 153 respondents in the control group (who saw the admonition statement only) and 147 respondents in the treatment group (who saw the intervention), for a total of 300 respondents. No participants were excluded from the analyses.

Here, the uncertainty of the surgery's cost did not play a role in any differences between the two groups, suggesting that the intervention might be robust in both higher and lower certainty situations. Accordingly, Figure 2 combines both groups to show the role of the provisional assumption.

The results of Study 2 were largely similar to Study 1. Respondents were less likely to be interested in the plaintiff's insurance status when they were given a provisional assumption;¹⁸⁹ in contrast to Study 1, they were also less likely to be interested in the defendant's insurance.¹⁹⁰ Moreover, respondents now focused on the MRI results, likely because the bulk of the damages discussed related to the shoulder surgery.¹⁹¹

However, in this study, the difference in damages between these two groups was not statistically significant.¹⁹² These results might be explained by the difference between Studies 1 and 2: relative to Study 1, both conditions in Study 2 provided more information about damages—particularly how much surgery might cost. This might suggest that providing more information to jurors overall—here, in the form of costs—would help reduce reliance on insurance concerns and disparities in damages to begin with.

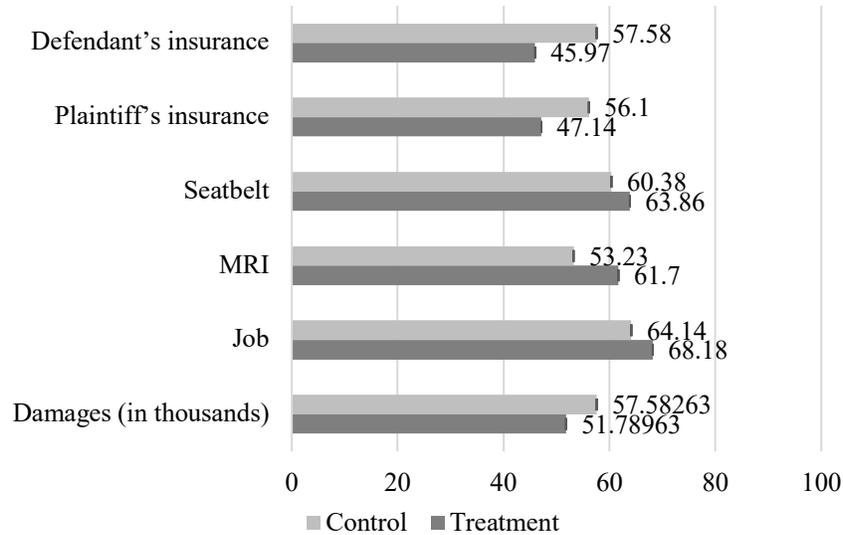
189. $M_{\text{control}} = 56.10$, $M_{\text{treatment}} = 47.14$, $p = 0.02$.

190. $M_{\text{control}} = 57.58$, $M_{\text{treatment}} = 45.97$, $p = 0.003$.

191. $M_{\text{control}} = 53.23$, $M_{\text{treatment}} = 61.70$, $p = 0.01$.

192. While Figure 2 appears to show a difference, the standard errors here suggest that the average difference between the groups is within the margin of error. $M_{\text{control}} = \$57,583$, $M_{\text{treatment}} = \$51,790$, $p = 0.42$. Four respondents in this study were significant outliers in terms of damages (\$67, \$75 (N=2), \$1,000,000). Removing these outliers from the dataset (N=296) did not substantially change the results; $M_{\text{control}} = \$52,409$, $M_{\text{treatment}} = \$52,497$, $p = 0.98$.

FIGURE 2. Under a Provisional Assumption, Interest in Insurance Status Decreased



Ultimately, Study 2 shows again that the provisional assumption appears to reduce individuals' interest in impermissible information. This is so even in a slightly different setting: the intervention appears to work equally in situations with either certain or uncertain information.

III. IMPLICATIONS

Using a pair of unique studies, I have shown that a potentially successful intervention that asks jurors to “assume no insurance” in a personal injury setting reduces their curiosity about the issue. These results provide exploratory evidence that a psychologically influenced intervention—asking respondents to assume information—would help to reduce jurors' interest in inadmissible information. Given that, “at least in automobile litigation, modern jurors are likely to assume the existence of insurance,”¹⁹³ the effects measured here appear to potentially mitigate this default belief.

A statement that asks jurors to “assume no insurance,” for example, resolves ambiguities in evidence law and “reduce[s] the mental demands

193. 23 WRIGHT & MILLER, *supra* note 29, § 5362.

placed on jurors during a trial.”¹⁹⁴ Jurors do not have to spend mental energy on speculating whether someone has insurance if they are given a provisional assumption. This enables jurors to focus their mental effort on the information the court wants them to focus on,¹⁹⁵ while making them less susceptible to other decision-making biases.¹⁹⁶

Adding complex information to a jury decision would likely burden jurors further¹⁹⁷ and incidentally call new attention to the topic.¹⁹⁸ Rather, by briefly acknowledging the issue, thus allowing jurors to file it away instead of focusing on the inadmissibility of the topic, a provisional assumption might resolve jurors’ subconscious discomfort.¹⁹⁹ As Daniel Wegner, the primary author of the “white bear” study, observed, one key way to banish the white bear is to think of something else or to accept it as fact and move on.²⁰⁰ Assuming information in a case allows jurors to move on. And although jury scholars have uncovered much about reactance and mental control and their interaction with jury instructions, to my knowledge, asking people to assume a limited piece of information has neither been tested in social science nor the legal context.

The cognitive theories I have described provide a deep foundation for how the provisional assumption might—and does—work. To that end, this intervention might be another addition to the toolbox of debiasing techniques; indeed, one primary benefit of this intervention is that it can be tested across many domains.²⁰¹

194. Lieberman & Arndt, *supra* note 107, at 699.

195. *See id.* at 699–700.

196. Indeed, a provisional assumption takes some inspiration from the “consider the opposite” intervention used in hindsight bias studies. *See* Charles G. Lord, Mark R. Lepper & Elizabeth Preston, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCH. 1231, 1239 (1984); Edward R. Hirt & Keith D. Markman, *Multiple Explanation: A Consider-an-Alternative Strategy for Debiasing Judgments*, 69 J. PERSONALITY & SOC. PSYCH. 1069, 1070 (1995). However, a “consider the opposite” intervention assumes that the juror already has a particular working theory in mind; in contrast, a provisional assumption may also be able to preempt juror speculation.

197. *See* Lieberman & Arndt, *supra* note 107, at 698–99.

198. *See id.*

199. *See* Daniel M. Wegner, *Setting Free the Bears: Escape from Thought Suppression*, 66 AM. PSYCH. 671, 674 (2011).

200. *See id.* at 672–74; *see also* Lieberman & Arndt, *supra* note 107, at 699. Lieberman and Arndt suggest that one potential mental control-based intervention would be to allow jurors to spend extra time on why they should not consider the situation. *Id.* at 699–700. Because cognitive reflection runs the risk of entrenching attitudes and because interventions that seek to show the consequences of keeping inadmissible evidence have been introduced to mixed effects, I focus here on the provisional assumption.

201. It is also possible that a provisional assumption may help to make the defendant’s and plaintiff’s injuries more “real” so that jurors are taking into account what it would substantively mean to not have insurance. This reasoning would be consistent with some parts of the mental control theory, in which deliberate cognitive reflection helps to reduce biases. *See* Lieberman & Arndt, *supra* note 107, at 699–700.

While I focus here on the area of insurance because of its lay familiarity, the idea that telling people to assume a situation, rather than admonishing them from considering it, might be easily extended to other trial settings. An intervention that successfully reduces jurors' interest in insurance might be especially effective in similar contexts in which people might spontaneously generate information or assumptions based on common experience, and it might solve slippery blindfolding situations. Further, given that a provisional assumption appears to mitigate reactance by focusing less on the inadmissible evidence, it might also be successful in equipping jurors to disregard inadmissible evidence.

Before implementation, provisional assumptions could and should be deployed and tested in other settings. The first group of scenarios that might be tested relates to those categories for which blindfolding has been identified as imperfect: scenarios in which decisionmakers might feel that they have some lay familiarity, such as insurance or whether a settlement signals greed. Further research could test other settings in which such an intervention might be fruitful, from settlement negotiations to privileges.²⁰²

Additionally, jury decision-making reflects legal decision-making more broadly, especially in contexts that deem certain factors forbidden. As such, this intervention might apply to areas beyond evidence law; for instance, in helping to reduce landlords', lenders', or employers' reliance, inadvertent or deliberate, on prohibited characteristics in making housing, credit, or hiring decisions.²⁰³ As with other jury studies, more research should be done to consider the contours of a successful intervention in these contexts.

Finally, this intervention introduces a class of interventions that have a more "gentle touch" than admonitions. David Alan Sklansky notes that

[t]he conventional wisdom about evidentiary instructions—"of course they don't work, but we have to pretend that they do"—spares us the messy but important task of assessing when evidentiary instructions are most likely to fail, how they can be made more effective, and what should follow from a recognition that they work, at best, imperfectly.²⁰⁴

The conventional wisdom Sklansky refers to sometimes leads to a pessimism that surrounds juror decision-making and its corresponding research. This pessimism does not come from researchers themselves, but admonishing

202. See Saks, *supra* note 152, at 16.

203. For instance, although it is important to note that this project is not about privacy itself, one might imagine expanding this project to decrease people's tendencies to seek out private information about others. In previous work, I show that people seek out information about the age, race, and gender of people they might consider hiring for a one-off project. See Heidi H. Liu, Seeking Applicants, Seeking Information 51–52 (June 21, 2021) (unpublished manuscript) (on file with author).

204. Sklansky, *supra* note 58, at 409.

jurors to *not* consider certain factors and to hold information for some contexts and *not* for others belies a paternalistic gaze. In contrast, asking someone to do something rather than to not do something may be empowering; there is symbolic importance to stepping away from discussions of “juror competence” as defined by adhering to instructions. This Article seeks to underscore a jury’s humanity—with all its behavioral foibles—and an optimism about what small changes can do.

To be sure, any innovation should be carefully considered. The next Section outlines some of the practical concerns scholars, policymakers, and counsel might encounter in implementing an assumption intervention.

A. THE NORMATIVE COURT

Even if the creation of a provisional assumption might make sense from a psychological perspective, people may object to a provisional assumption because it seemingly adds facts to the record. Counsel might claim that it leads to bias: a plaintiff’s lawyer might state that assuming a defendant has no insurance would lessen damages; a defendant’s lawyer might conversely claim that assuming a plaintiff has no insurance would increase damages.

This objection might feel especially salient or grounded in ethics if information contrary to the provisional assumption has already been admitted for a limited purpose. For instance, in the insurance context, a plaintiff might sue an insurance company that has not paid. Then, the jurors would likely already know that at least one of the parties has insurance. Under this logic, asking jurors to assume information might be akin to misleading jurors or undermining trial transparency.²⁰⁵ The next two Sections address these objections by pointing to how evidentiary rules inherently encase normative considerations.

1. When No Insurance Information Has Been Admitted

If no insurance information has been admitted in a case, courts and counsel might simply suggest that the practice of blindfolding should continue. They might argue that the introduction of a provisional assumption might impose norms that favor one group over another.

But as Part II suggests, blindfolding might fail in two ways: (1) if someone reveals inadmissible information anyway—whether deliberately or by accident—or (2) if jurors engage in speculation. Simple blindfolding, as counsel might suggest, does not mean evidentiary rules operate neutrally. As

205. See Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361, 1390–91 (2005) (discussing how damage caps might undermine procedural justice and therefore trust in courts).

Part I shows, jurors come with their own stories about which parties have insurance and incorporate those assumptions into their deliberations. But these assumptions might be wildly different from reality or from the law.

To be clear: this Article is not defending either Rule 411, the collateral source rule, or the inadmissibility of insurance status. My argument is that evidence rules should work as they were intended to function for jurors, as holding onto this legal fiction does not help plaintiffs or defendants prepare their cases. Rather, the provisional assumption may be able to set expectations for jurors,²⁰⁶ in a way that an admonition, with its inconsistent compliance, might not.

Evidentiary rules, much like the process of litigation itself, inherently signal norms about what sources are credible and what public policies to defend. As Part I shows, Rule 411 was originally grounded in a substantive defense of insurers, rather than a neutral evidentiary rule.²⁰⁷ Assuming no insurance for both parties is one potential normative position that is consistent with the original historical rationales for why mention of insurance was inadmissible.²⁰⁸ But it is not the only position: today, the assumption that a party has no insurance might reflect more on their culpability, rather than deep pockets.²⁰⁹ For those courts who are primarily fearful that the lack of insurance belies a defendant's lack of caution,²¹⁰ they may wish to have an assumption that states "assume insurance."²¹¹ It is up to courts and legislatures to determine what underlying assumption to encode in a preliminary injunction. Courts may believe blindfolding is truly neutral, but in doing so, they pass the buck to jurors and create an inconsistent default norm.²¹²

206. See Mott et al., *supra* note 78, at 417.

207. See 23 WRIGHT & MILLER, *supra* note 29, § 5362.

208. See Levenson, *supra* note 35, at 927–28; Saine, *supra* note 37, at 1077–78; Calnan, *supra* note 30, at 1181. For the most part, courts indicate that "[t]he purpose of Rule 411 is 'to avoid the possibility of prejudice to the insured party.'" *Indus. Risk Insurers v. D.C. Taylor Co.*, No. 06-CV-171, 2008 WL 11509791, at *3 (N.D. Iowa Aug. 11, 2008) (quoting *Ouachita Nat'l Bank v. Tosco Corp.*, 686 F.2d 1291, 1301 (8th Cir. 1982)). See also *Colvin v. A R Cable Services-ME, Inc.*, 697 A.2d 1289, 1291–92 (Me. 1997) for this same intuition in both evidentiary and common law in Maine.

209. See Levenson, *supra* note 35, at 922; Saine, *supra* note 37, at 1078; Calnan, *supra* note 30, at 1181.

210. See, e.g., *Reed v. Wimmer*, 465 S.E.2d 199, 205 (W. Va. 1995).

211. In the area of criminal law, Rule 404 prevents discussion of prior convictions because courts take the normative position that past crimes are not proof of guilt in the present matter; thus, a provisional assumption that "assumes no convictions" might be appropriate. FED. R. EVID. 404 advisory committee's note to 1972 proposed rules.

212. Furthermore, there is precedent for updating juror judgments on the back end to correct for these issues, as I discuss in Section III.E.

2. When Some Information Has Been Admitted for a Limited Purpose

The previous Section suggests that speculation about inadmissible topics might persist even with airtight blindfolding, such that a provisional assumption might be promising. But what about the one-third of trials that are allowed to mention insurance, or the many other situations in which otherwise inadmissible evidence is admitted?²¹³

Courts should take heart in the fact that provisional assumptions bear resemblance to both presumptions and adverse inferences. Assumptions are built into the litigation process; for example, that defendants will ultimately be able to pay the damages the jury awards and that curative instructions will frequently be able to prevent the jury from acting on inadmissible information.²¹⁴ These assumptions persist despite empirical evidence to the contrary.²¹⁵ Yet, they persist because there are certain values courts might want to emphasize: We might want damages to be awarded despite a defendant's inability to pay because it allows recognition of the harm that was caused to the plaintiff. We might want a curative instruction to be given, despite suggestions that they are not always effective, because we *think* it indicates fairness. A provisional assumption does not conflict with these ideals, but rather enhances them, by also enabling fairness in juror decision-making.

213. See Diamond & Vidmar, *supra* note 20, at 1876.

214. See CSX Transp., Inc. v. Hensley, 556 U.S. 838, 841 (2009); Raybestos Products Co. v. Younger, 54 F.3d 1234, 1239 (7th Cir. 1995) (citing Wilson v. Groaning, 25 F.3d 581, 587 (7th Cir. 1994)); Goff v. Elmo Greer & Sons Constr. Co., 297 S.W.3d 175, 198 (Tenn. 2009). In the appeals process, some courts use a balancing test in which they determine "whether a curative instruction [could have] effectively dissipate[d] any resulting prejudice." Jordan v. Jenkins, 859 S.E.2d 700, 718 (W. Va. 2021) (quoting Reed, 465 S.E.2d at 209). In an Idaho case, the plaintiff filed for a mistrial because the defendant's counsel had stated that "[t]his accident did not ruin [the plaintiff's] life. It did not ruin him to the extent that \$510,000 can ruin [the defendant]." Leavitt v. Swain, 991 P.2d 349, 355 (Idaho 1999). The court found that the defendant counsel's statement assumed that the defendant "did not have insurance to cover the judgment" but that "it does not necessarily follow that a new trial must be granted," given the option of a curative instruction. *Id.* That is, the court assumed that the jury instruction would cure the assumption.

215. Some judges appear to exhibit some skepticism of curative instructions' efficacy, "sympathetic to litigants' concerns that a jury may improperly rely on that coverage limit as a frame of reference." State Farm Mut. Auto. Ins. Co. v. Earl, 33 N.E.3d 337, 342 (Ind. 2015); see also Howarth v. Luther, No. 2:14-CV-00312, 2018 WL 2745899, at *7 (D. Idaho June 7, 2018) ("The Court understands that a curative instruction cannot guarantee an erasure of any potential prejudice."). Courts have allowed defendants to refuse the deployment of curative instructions regarding their insurance status amid the underlying fear it would "focus the issue in the minds of the jury." Cardoza v. Town of Silver City, 628 P.2d 1126, 1133 (N.M. Ct. App. 1981); see also Zavala v. Estrada, No. 04-97-00097, 1998 WL 76202, at *1-10 (Tex. App. Feb. 25, 1998).

B. THE STRUGGLE OVER JURY INSTRUCTIONS

Even if a provisional assumption solidifies evidentiary norms from a psychological perspective, both plaintiffs and defendants might engage in a rational strategy to get rid of the provisional assumption. For instance, in Study 1, the intervention was associated with an increase in damages. Based on this result, a defendant's counsel might object that a jury instruction containing an assumption would be biased against his client. Or if the opposing party wins at trial, counsel might file for a mistrial based on the use of a provisional assumption.

While the number of appeals might increase in the short term, the provisional assumption would likely withstand the abuse of discretion standard associated with overturning a trial.²¹⁶ As the Supreme Court has noted, "A trial judge has considerable discretion in choosing the language of [a jury] instruction so long as the substance of the relevant point is adequately expressed."²¹⁷ What might matter more from a practical standpoint is whether judges are willing to issue a provisional assumption. In a 2021 *New York Times Magazine* article, Judge Rakoff explained why he might not exclude unreliable eyewitness testimonies: "Here's a witness who says: 'Yes, that's the culprit. I know I saw what I saw' If you're the judge, in the back of your mind you might think, How's it going to look to exclude that? So you leave it for the jury."²¹⁸

But whether a piece of evidence should be admitted or not is a distinct question from whether it should be effectively cabined. That is, once a judge has determined something *is* inadmissible, the provisional assumption might help to diminish the importance of the inadmissible evidence. A more likely objection instead might focus on whether the jury instruction must be grounded in fact. While there would likely be some discomfort with an

216. 23 WRIGHT & MILLER, *supra* note 29, § 2558 ("Although federal appellate courts evaluate the correctness of jury instructions regarding their statement of the law de novo, they review the district court's decision whether to give a specific instruction or how the trial judge formulates the charge only for abuse of discretion." (footnote omitted)).

217. *Boyle v. United States*, 556 U.S. 938, 946 (2009); *see also* *United States v. Ervasti*, 201 F.3d 1029, 1035 (8th Cir. 2000) ("It is axiomatic that federal district courts have wide discretion in crafting appropriate jury instructions." (citing *United States v. Clapp*, 46 F.3d 795, 803 (8th Cir. 1995))); *United States v. Davis*, 779 F.3d 1305, 1311 (11th Cir. 2015); *United States v. Volpendesto*, 746 F.3d 273, 294 (7th Cir. 2014); *Phillips v. Lock*, 86 A.3d 906, 918 (Pa. Super. Ct. 2014) ("[T]he trial court did not commit a clear abuse of discretion or error of law where it did not mislead or confuse the jury about the law."). In one North Carolina case, a trial judge refused to give a curative instruction because he felt that it would be like "throwing gasoline on a small spark. . . . The curative instruction was simply going to make a situation much worse than it was." *Medlin v. FYCO, Inc.*, 534 S.E.2d 622, 626 (N.C. Ct. App. 2000). The appeals court found the trial judge's ruling to be within his discretion. *Id.* at 627.

218. Emily Bazelon, *I Write About the Law. But Could I Really Help Free a Prisoner?*, N.Y. TIMES MAG. (Oct. 1, 2021), <https://www.nytimes.com/2021/06/30/magazine/yutico-briley.html> [<https://perma.cc/45SJ-UK9B>].

instruction that “adds facts” to the record,²¹⁹ the key factor to consider should be the purpose of a jury instruction: Is it to give the appearance of lack of bias or to actually reduce bias? This Article suggests that the jury instruction is meant to cabin facts within the relevant questions of law. As Sklansky notes, “It makes sense to recognize the limitations of evidentiary instructions and to try to figure out when and how they are likely to work best. It does not make sense to treat them as obviously and inherently ineffective.”²²⁰ Rather, a provisional assumption might make that cabin more effective across contexts.

The provisional assumption does not deny the existence of contrary facts but acknowledges them by layering an assumption on top. In this way, the provisional assumption is a cognitive tool that might help jurors to partition facts, similar to how a hypothetical question helps to sharpen one’s thinking. By telling someone to assume something, rather than declaring it true or forbidding access to it, we acknowledge the information while equipping jurors with ways to partition that information. In this way, the provisional assumption helps to align jurors with the underlying rationales that evidence law has attempted to establish.

C. TIMING

Under the current regime, a motion in limine might ban mention of insurance, but a bad actor might mention it anyway, knowing that a curative instruction would insufficiently overcome the effect of the information. Or more likely, evidence about insurance might be admitted for a limited purpose. As a practical matter, how would a provisional assumption work with these scenarios?

For topics that would naturally generate topics of discussion with jurors, like insurance, either a provisional assumption based in preinstruction or after jury deliberation could be used. With regard to the former, a preinstruction assumption would minimize the likelihood that a provisional assumption itself brings up a topic. As a preinstruction, a provisional assumption can be easily built in: a judge does not need to know the body of evidence before issuing the instruction, as she might for a motion in limine. The additional cost of adding this instruction is fairly minimal, and the two studies in this Article suggest that a provisional intervention might successfully reduce people’s interest in insurance status, freeing them to

219. According to one state court, “a proper instruction must not only be a correct statement of the law . . . , it must also be supported by the evidence and be ‘*relevant*’ to the issues the jury must decide.” *State Farm*, 33 N.E.3d at 342 (citing *Malott v. State Farm Mut. Auto. Ins. Co.*, 798 N.E.2d 924, 926 (Ind. Ct. App. 2003)).

220. Sklansky, *supra* note 58, at 439.

consider other factors. And one might imagine that a judge willing to deploy a provisional assumption at this stage might be less generous to counsel who attempt to sneak inadmissible information in regardless.

Similarly, it is possible that the presence of a provisional assumption itself might impact a party's strategy. It might be the case that a party might bargain to have a motion in limine rather than a provisional assumption, hoping that speculation would favor their side.

While the studies in this Article specifically test juror speculation about inadmissible topics, further research should test potential interventions when evidence has been admitted for a limited purpose. Still, a provisional assumption deployed at the conclusion of evidence might be useful in those situations. Although a provisional assumption issued after evidence to the contrary has been admitted runs the risk of contradicting the facts heard by jurors, the general behavioral intuition that I have tried to show in this Article is that by emphasizing what to focus on—instead of emphasizing what *not* to focus on—courts can redirect jurors to the admissible information. Although jurors might cognitively know that a plaintiff has insurance, for instance, the provisional assumption provides a concrete, actionable step (“assume no insurance”) that jurors can use to manage the facts they need to consider at each step of the jury deliberation process.²²¹

221. If reducing interest in insurance and providing supplementary damages calculations seems to benefit both parties, another objection might be to the administrative cost of such an instruction. That is, adding another jury instruction might add additional time to a trial or might add mental burden to jurors' tasks. Potential concerns about redundancy resemble concerns about the implementation of jury preinstructions, even after social science research suggested that preinstructions helped jurors focus on relevant issues—much like this provisional assumption does. See Smith, *Feasibility*, *supra* note 47, at 244–45; Lynne ForsterLee & Irwin A. Horowitz, *Enhancing Juror Competence in a Complex Trial*, 11 APPLIED COGNITIVE PSYCH. 305, 317 (1997); ForsterLee et al., *supra* note 47, at 18. While counsel might theoretically charge that preinstruction may bias the jury or be redundant in the court setting, in an in-depth study focusing on preinstruction, it turned out that the primary objection to preinstruction was about delays in court administration rather than bias. See Lieberman & Sales, *supra* note 153, at 631–32. However, after implementation, lawyers on both sides reflected positively on the experience of preinstruction in the courtroom; that is, their objections were largely theoretical but not practical. See *id.* at 631; Smith, *Feasibility*, *supra* note 47, at 242. Critics of this work might suggest that forbidden information is only a small part of a trial, so it is not worth the cost of implementation. After all, Diamond and Vidmar found that forbidden topics are not frequently discussed in trials and therefore serve as edge cases. See Diamond & Vidmar, *supra* note 20, at 1874. Still, in 85% of cases in Diamond and Vidmar's sample, jurors discussed insurance. *Id.* at 1876. However, the fact that these topics are edge cases means that they are not only more unpredictable in terms of outcome but also likely more important in the case itself. If people are turning to these points of discussion rarely, then their importance is likely greater in the case. An intervention that leads to greater predictability in outcomes is good news for parties and counsel alike. As proponents note, “Because of the strong commitment to posttrial instruction in the legal community, preinstruction will supplement current procedures, not replace them.” Smith, *Impact*, *supra* note 47, at 226. In the same way, a provisional assumption is not meant to replace aspects of the jury system but to refine it in a way that aligns with jurors' intentions.

D. WHY NOT JUST ADMIT INSURANCE INFORMATION?

Others might take the opposite approach, arguing that instead of asking jurors to assume no insurance—or even providing a jury admonition—jurors should simply receive information about insurance. To supporters of this theory, a party’s insurance status is relevant precisely because it potentially reflects the care a plaintiff or defendant might exhibit in her behavior.²²² Plaintiffs, for instance, might wish to include insurance information if only given the results of Study 1, where average damages increased.

But this argument is an uphill battle as it is unclear *which* implication the jurors might have.²²³ Is it that the driver was irresponsible for not having insurance to begin with? Or is it that collecting damages from her will be a generally difficult task? Standardizing the assumption about insurance via the assumption intervention will prevent jurors from jumping to conclusions, as described earlier, and standardize outcomes.

Relative to a simple intervention, overhauling the Federal Rules of Evidence, which suggest that insurance status is inadmissible because of bias, would be more difficult. It is not the job of this Article to categorize which information should be admissible but rather to suggest a practical solution that might reinforce the decisions of courts and legislatures, who have made the choice to exclude broad categories of evidence—even when they might be perceived as relevant. Because of the risk of making inconsistent assumptions for either party, aligning the intent of evidentiary rules with behavioral realities would make more sense.

222. For instance, some scholars point out that lacking insurance provides useful information: it can be proof of a defendant’s general negligence. See Kirk, *supra* note 32, at 1090; Diamond & Vidmar, *supra* note 20, at 1875. Other empirical studies show that Bayesian updating does work in terms of predicting behavioral patterns, and in particular, that the purchase of insurance reveals someone’s risk-seeking patterns. See Levon Barseghyan, Francesca Molinari, Ted O’Donoghue & Joshua C. Teitelbaum, *The Nature of Risk Preferences: Evidence from Insurance Choices*, 103 AM. ECON. REV. 2499, 2500 (2013).

223. In a single Pennsylvania case—in which the plaintiff was suing the defendant driver’s insurance company—the court yielded the following:

[T]he jury in this case will be instructed that:

....

(5) the fact that the plaintiffs are suing the defendant for underinsured motorist benefits suggests that the other driver had some insurance which was recovered by the plaintiffs;

(6) the plaintiffs will not receive compensation twice for the same damages since any jury award of damages in this case will be reduced by any amount that the plaintiffs have already received from the other driver and her insurer; and

(7) the jury should determine an amount of money damages that will fairly and adequately compensate the plaintiffs, . . . without consideration of any amount that the plaintiffs may have received from the other driver or her insurer, since any such amount will be deducted by the court from the total sum that the jury may award.

Moritz v. Horace Mann Prop. & Cas. Ins. Co., 42 Pa. D. & C.5th 72, 82–83 (C.P. Lackawanna Cnty. Ct. 2014) (line breaks added). This appears to be extremely relevant information about insurance status. However, a subsequent case distinguished this instruction from more general use: because the insurance company was the sole defendant in the case, the jury necessarily needed to know its relationship to the plaintiff. See Kujawski v. Fogmeg, 46 Pa. D. & C.5th 327, 344–46 (C.P. Lackawanna Cnty. Ct. 2015).

E. DAMAGES

Although Study 1 initially suggested that damages might increase with a provisional assumption stating “assume no insurance” in Study 2, when more information about medical costs was given, on the whole, there were no significant differences between groups. Thus, overall, in limited informational settings, an assumption intervention might be especially helpful alongside additional information regarding damages, as in Study 2. If lawyers are truly concerned about potential bias, detailed damages calculations would be key—as they often are in trial already.²²⁴ But even if damages increase—or change systematically—as a result of this intervention, that does not rule out its implementation.

From a practical perspective, there are several mechanisms through which courts *already* address excessive—or insufficient—damages. The common law doctrines of additur and remittitur allow for courts to review claims in either direction.²²⁵ While additur is not allowed in federal cases, remittitur is “frequently appl[ied],”²²⁶ and “[s]tate courts routinely apply additur/remittitur review to adjust both general compensatory damages awards for nonpecuniary harms and ‘special’ compensatory damages awards.”²²⁷ While reformers suggest that these doctrines are used only in the most extreme of cases,²²⁸ I note them here as a precedent of post-jury adjustment. For those who are skeptical of the doctrines because of their deference to judges, researchers find that judges are likely to adjust awards based on previous outcomes in similar cases.²²⁹

Additionally, damage caps, though controversial,²³⁰ are another method of constraining jurors’ awards in some jurisdictions.²³¹ Because damage caps

224. See, e.g., Allan Raitz, Edith Greene, Jane Goodman & Elizabeth F. Loftus, *Determining Damages: The Influence of Expert Testimony on Jurors’ Decision Making*, 14 LAW & HUM. BEHAV. 385, 386 (1990).

225. See David Baldus, John C. MacQueen & George Woodworth, *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1118–19 (1995).

226. *Id.* at 1119–20.

227. *Id.* at 1119.

228. See *id.* at 1120.

229. See Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1393 (2003) (citing *Levka v. City of Chicago*, 748 F.2d 421, 425–27 (7th Cir. 1984)); see also Ryan T. Emery, *Unwise and Unnecessary: Statutory Caps on Non-Economic Damages in Medical Malpractice Cases and the Appellate Review Alternative*, 69 ALB. L. REV. 913, 929 (2006).

230. See, e.g., Matthew W. Light, *Who’s the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315, 317–19 (2001).

231. See *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, N.Y. L. SCH. CTR. FOR JUST. & DEMOCRACY (Aug. 22, 2020), <https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary> [<https://perma.cc/7PMG-SUPF>].

appear to impact the amount that jurors award plaintiffs,²³² some scholars argue that the cap itself should not be disclosed to jurors.²³³ In doing so, they point out that “almost all courts refuse to . . . inform[] juries about their nullification authority”²³⁴ or what happens after juries issue special verdict findings.²³⁵ Moreover, while courts generally give deference to jury verdicts, a large literature suggests that jury verdicts vary on systematic biases already.²³⁶ While this Article argues that blindfolding is a suboptimal strategy with regard to evidence, the point stands that courts have authority to—retroactively but limitedly—adjust jurors’ damages and outcomes.

F. METHODOLOGICAL CONCERNS

Finally, courts might naturally be concerned about whether the conclusions drawn from a jury study apply to the real world, that is, are externally valid. To be sure, it is not clear that respondents in a survey always behave in the same way that the population of interest does—but it is often the case.²³⁷ However, mock jury experiments are a well-established and common methodology,²³⁸ as is the use of personal injury vignettes.²³⁹ The richness of the vignettes, as opposed to more abstracted studies, is meant to help respondents get into the mindset of a juror, and perhaps that explains some of the mixed results in existing interventions. While the Chicago and

232. See Greg Pogarsky & Linda Babcock, *Damage Caps, Motivated Anchoring, and Bargaining Impasse*, 30 J. LEGAL STUD. 143, 156 (2001); Jennifer K. Robbenolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353, 362 (1999); Edith Greene, David Coon & Brian Bornstein, *The Effects of Limiting Punitive Damage Awards*, 25 LAW & HUM. BEHAV. 217, 230–31 (2001) (finding that the presence of a damage cap itself does not appear to distort the amount that mock jurors award plaintiffs, although jurors’ awards increase when they are explicitly banned from awarding punitive damages). In some cases, courts may also adjust attorney’s fees in “extraordinary circumstances.” *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 546 (2010).

233. See Michael S. Kang, *Don’t Tell Juries About Statutory Damage Caps: The Merits of Nondisclosure*, 66 U. CHI. L. REV. 469, 480 (1999).

234. *Id.* at 489 (*United States v. Avery*, 717 F.2d 1020, 1027 (6th Cir. 1983); *United States v. Dougherty*, 473 F.2d 1113, 1130–37 (D.C. Cir. 1972)); see also Hollander-Blumoff & Bodie, *supra* note 205, at 1390–91.

235. See Kang, *supra* note 233, at 490.

236. See, e.g., Takia Daftary-Kapur, Rafeale Dumas & Steven D. Penrod, *Jury Decision-Making Biases and Methods to Counter Them*, 15 LEG. & CRIM. PSYCH. 133, 149–50 (2010).

237. See Palan & Schitter, *supra* note 177, at 22.

238. See Diamond & Salerno, *supra* note 96, at 416; Brian H. Bornstein, *The Impact of Different Types of Expert Scientific Testimony on Mock Jurors’ Liability Verdicts*, 10 PSYCH. CRIME & L. 429, 430–31 (2004) (providing a short review); Justin Sevier, *Popularizing Hearsay*, 104 GEO. L.J. 643, 690–91 (2016).

239. See, e.g., Greene et al., *Jury Instructions*, *supra* note 172, at 205; Reyna et al., *supra* note 172, at 284–85; Ashley M. Votruba, *Dividing Responsibility: The Role of the Psychology of Attribution*, 69 DEPAUL L. REV. 721, 734–36 (2020).

Arizona Jury Projects were able to interview juries²⁴⁰ or videotape them,²⁴¹ that access is extremely rare, and jurors might behave differently when observed or recorded.²⁴²

From a policy perspective, the experimental method allows us to test interventions relatively quickly, rather than deploying interventions in the real world and discovering they have unintended results with real-world consequences. While this Article tests the wording of “assume no insurance,” courts and others might even be able to leverage experiments to understand how juries themselves understand and interpret various jury instructions. Given this exploratory setting, further research should be done to examine the contexts and constraints of the provisional assumption.

CONCLUSION: THE PROMISE OF ASSUMING

Assumptions are perceived as problematic, and indeed they often are in other contexts.²⁴³ But in this Article, I have shown one potential benefit of assuming, which is to lessen the tendency of jurors to consider “forbidden factors” in their decision-making.

Provisional assumptions allow us to bridge deep skepticisms of jurors’ competence with the deep belief that they are fundamental parts of someone’s day in court. This simple psychological intervention focuses on debiasing jurors in a way that does not require the heavy lift of paternalism. Rather, it acknowledges the complex information and time constraints that all potential jurors have.²⁴⁴ A provisional assumption enables jurors to refocus on the facts that matter and allows them to be equal participants in the story.

240. See Broeder, *supra* note 52, at 747–48.

241. See Diamond et al., *supra* note 145, at 17–18.

242. See *id.* at 22–23.

243. Consider the adage that describes what assuming makes of “you and me.”

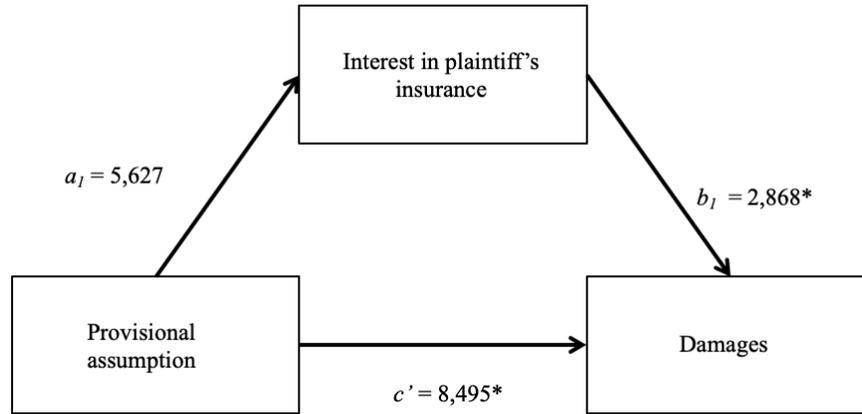
244. See generally Dan Simon, *On Juror Decision Making: An Empathic Inquiry*, 15 ANN. REV. L. & SOC. SCI. 415 (2019) (examining the difficult conditions under which jurors work). To be sure, other procedural interventions, like simplifying terms for jurors or allowing them to take notes, may be useful and not mutually exclusive with the provisional assumption presented in this Article.

APPENDIX

TABLE A1. Characteristics of Study 1 Respondents

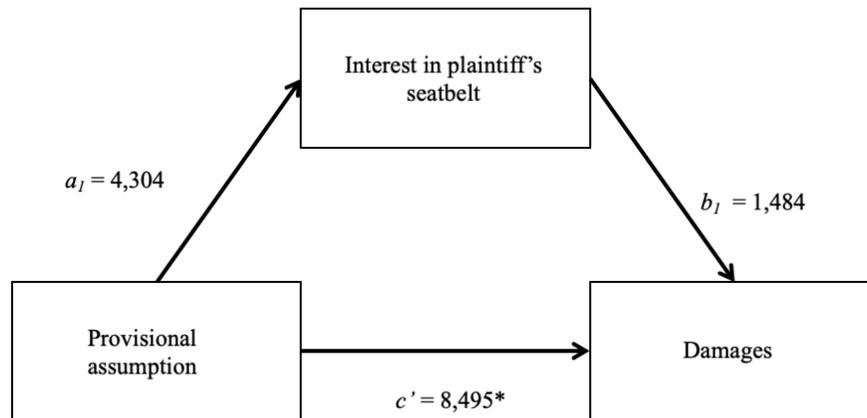
<i>Gender</i>	<i>N</i>	<i>Share</i>
Male	79	39.7%
Female	114	57.3%
Nonbinary/Other	6	3.0%
<i>Age</i>		
18-24	64	32.2%
25-34	75	37.7%
35-44	33	16.6%
45-54	13	6.5%
55-64	10	5.0%
65 and above	3	1.5%
<i>Jury Status</i>		
Yes	21	10.6%
No	178	89.4%
<i>Education</i>		
Less than high school	2	1.0%
High school diploma	24	12.1%
Some college	73	36.7%
Bachelor's degree or above	100	50.3%
<i>Native English Speaker</i>		
Yes	191	96.0%
No	8	4.0%

FIGURE A1. The Provisional Assumption Increases Damages, Likely Through Reduced Interest in the Plaintiff's Insurance



Note* $p = 0.05$, ** $p = 0.01$, *** $p = 0.001$. Units are in dollars.

FIGURE A2. The Increase in Damages Is Unrelated to Interest in the Plaintiff's Seatbelt Status



Note* $p = 0.05$, ** $p = 0.01$, *** $p = 0.001$. Units are in dollars.

TABLE A2. Characteristics of Study 2 Respondents

<i>Gender</i>	<i>N</i>	<i>Share</i>
Male	154	51.3%
Female	141	47.0%
Nonbinary/Other	5	1.7%
<i>Age</i>		
18-24	67	22.3%
25-34	92	30.7%
35-44	70	23.3%
45-54	41	13.7%
55-64	15	5.0%
65 and above	9	3.0%
<i>Jury Status</i>		
Yes	41	13.7%
No	259	86.3%
<i>Education</i>		
Less than high school	4	1.3%
High school diploma	49	16.3%
Some college	84	28.0%
Bachelor's degree or above	172	57.3%
<i>Native English Speaker</i>		
Yes	289	96.3%
No	11	3.7%