Offstage Behavior: Real Jurors' Scrutiny of Non-Testimonial Conduct

Mary R. Rose
Shari Seidman Diamond

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol58/iss2/4

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
OFFSTAGE BEHAVIOR:
REAL JURORS' SCRUTINY OF
NON-TESTIMONIAL CONDUCT

Mary R. Rose* and Shari Seidman Diamond**

INTRODUCTION

For almost as long as it has been possible to consider ways to record trials on film, people have imagined the benefits of doing so. In 1930, Judge Jerome Frank wrote in *Law and the Modern Mind*:

It is no easy task for the judge to bring together in his mind, for the purpose of finally reaching his conclusions as to facts, what is frequently a voluminous body of testimony. . . . It may well be that the courts will some day adopt a recent mechanical innovation and that we shall have "talking movies" of trials which will make possible an almost complete reproduction of the trial so that the judge can consider it at his leisure.¹

Judge Frank saw the promise of "mechanical innovation" for helping judges arrive at verdicts in bench trials. The trial before the fact finder would remain live; a recording of it would permit a judge to revisit and review information previously presented. In more recent years, innovations in and discussions about the possible uses of case videorecordings have not abated. In Kentucky, for instance, videorecordings constitute the official record of the case that appeals courts use for review.² Michigan permits a digital or audio recording to serve as the official record of a trial, although appellate courts still routinely review from a transcript made from the tape, rather than from the tape itself.³ As we imagine litigation in the year 2020, we

* Assistant Professor of Sociology and Law, University of Texas at Austin.
** Howard J. Trienens Professor of Law and Professor of Psychology, Northwestern University Law School; Research Professor, American Bar Foundation.

3. For a history of Michigan's adoption of video technology, which emerged through Michigan Supreme Court Administrative Orders, see MICHIGAN VIDEO COURTROOM USERS GROUP, VIDEO RECORD SYSTEM IMPLEMENTATION MANUAL (2002), available at http://courts.michigan.gov/scao/resources/publications/manuals/Video-02-mnl.pdf. Under Michigan rules, the videotape provides different avenues for creating a written record. For example, indigent clients whose trials were videotaped can hire non-certified transcribers to create a written transcript of
consider the possibility that courts will feel the pull of the Digital Age to an even greater extent. Perhaps digital recordings of trials for appellate review could become the norm for all state and federal courts. Or, in theory, an entirely "virtual trial," in which decision makers hear evidence wholly or mostly from pre-recorded sources, could become a reality.4

There are a host of possible costs and benefits associated with such moves.5 Here we discuss one implication in detail. We follow others in noting that pre-recorded testimony and presentation risks eliminating—for decision makers at either the trial or appellate level—some alternative channels of communication that are available in the live trial, in particular the opportunity to observe how people behave when they are not testifying or otherwise formally addressing the decision maker.6 Some have suggested that eliminating the chance to see


4. See, e.g., Robert L. Rothman, Digital Trials in a Digital World, LITIG., Summer 2008, at 1, 2. In some instances, jurors are already permitted to hear witnesses testify via closed circuit television (CCTV). See Maryland v. Craig, 497 U.S. 836 (1990). Compared to criminal cases, there are more circumstances in which jurors in civil cases can hear witnesses testify via videoconferencing or pre-recorded testimony. For example, the Federal Rules of Civil Procedure permit videoconferencing "for good cause shown in compelling circumstances and upon appropriate safeguards." FED. R. CIV. P. 43(a). For historical examples of using pre-recorded video tape trials, see Gordon Bermant, The Development and Significance of Courtroom Technology: A Thirty-Year Perspective in Fast Forward Mode, 60 N.Y.U. ANN. SURV. AM. L. 621 (2005).


6. See Nancy Gertner, Videoconferencing: Learning Through Screens, 12 WM. & MARY BILL RTS. J. 769, 783–84 (2004), discussed infra at notes 60–65 and accompanying text. In 1998, an appeals court in Tennessee refused an invitation to review a videotape of a trial in order to make an independent determination of witness credibility, stating, "while the video recording may capture a witness while he or she is testifying, the recording does not preserve the conduct of other participants in the trial or even spectators in the courtroom that may be the cause of the witness's demeanor, voice inflections, or body language." Mitchell v. Archibald, 971 S.W.2d 25, 29–30 (Tenn. Ct. App. 1998).
witnesses and others through the trial would lead to fewer biases and extraneous influences on decision making.7 Others have suggested that some decisions may not be as accurate without being informed by the entirety of the live trial.8

In this Article, we consider what jurors and judges do when they observe trial participants' behavior that is not part of the official court record and does not come from the witness stand, the judge's bench, or the attorney's podium. In an analysis of the discussions and deliberations of fifty real civil juries, we elsewhere dub these reactions "offstage" observations.9 We summarize those results and also compare those juror behaviors with instances of similar behavior by judges in reported cases reviewed by appellate courts. We then consider the implications of our data and these rulings for the prospect of recorded trials.

In Part II, we describe the questions about offstage access that recorded trials raise, and we discuss potential problems and benefits associated with the ability to view the offstage regions in live trials.10 Part III then discusses what we have learned about jurors' attention to the offstage from our intensive examination of what jurors discuss during pre-trial discussions and deliberations.11 That research showed that offstage attention is routine in trials, in the sense that most cases included at least one instance of juror discussion about the offstage.12 At the same time, however, such observations had a clearly subordinate role in deliberations.13 Part III also offers some additional insight into offstage observation by comparing the types of information that the Arizona civil jurors discussed to instances of judicial use of offstage observations in written opinions.14 We note that the rulings by reviewing courts not only confirm the courts' ambivalence toward offstage observations but also highlight the natural

8. Gertner, supra note 6, at 786.
9. Our detailed analysis appears in Mary R. Rose, Shari Seidman Diamond & Kimberly M. Baker, Goffman on the Jury: Real Jurors' Attention to the "Offstage" of Trials (Feb. 1, 2009) (unpublished manuscript on file with the authors; this manuscript is currently in the process of revision and review for publication). The notion of an "offstage" region at trial refers to the fact that courtrooms are open spaces, much like a theater in the round. In such theaters, actors who are not performing on stage wait just "offstage" in darkened aisles, at the back of the theater, or sometimes out in the hallways of the theater.
10. See infra notes 19–65 and accompanying text.
11. See infra notes 66–205 and accompanying text.
12. See infra notes 91–107 and accompanying text.
13. See infra notes 108–126 and accompanying text.
14. See infra notes 127–205 and accompanying text.
pull people feel toward some types of offstage observation. Part IV considers the potential for "virtual trials" and for a video record for appeals in light of these findings. We argue that, at least for civil cases, appellate courts reviewing trials would likely lose little significant information if pre-recorded testimony partially occluded or wholly omitted the offstage; with respect to virtual trials before juries, we consider some effects that are more difficult to measure and predict empirically. We suggest that using taped trials for appellate review would have the advantage of maximizing legally relevant information and minimizing legally irrelevant information, even though some arguably useful information might be lost.

II. POSSIBLE USES OF A "VIRTUAL TRIAL"

Even a simple foray into new technology—permitting a video record of a case to serve as the "official" record for appeal—raises significant questions about exactly what appellate courts should be able to see in a trial. As a practical matter, courts that opt to record a trial must decide how to position the camera to adequately capture the event, which requires a decision about what information is significant for decision makers: how much of the courtroom should the "record" depict? Should the video record depict only the witness stand and the attorney podium? Should someone watching the tape be able to see the judge at all times? What about those seated at counsels' tables? Should a trial audience be visible? Such questions would also be implicated, and perhaps magnified, if courts were to consider curtailing, or even eliminating, the live trial. For example, courts could expand the use of taped or videoconferenced testimony or, as some have suggested, permit jurors (perhaps at their leisure) to watch an

15. See infra notes 199-205 and accompanying text.
16. See infra notes 206-220 and accompanying text.
17. See infra notes 209-219 and accompanying text.
18. See infra note 220 and accompanying text.
19. Appellate courts have had to decide if a judge's non-verbal behavior during trial—for example, scowling or saying "hmmph" while a witness is testifying—might have prejudiced a jury. For a review of these cases, see Peter David Blanck, Robert Rosenthal & LaDoris Hazzard Cordell, The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials, 38 STAN. L. REV. 89 (1985).
21. Gertner, supra note 6, at 784, 786.
entirely pre-recorded trial in which witnesses, attorneys, or judges appear before the jury on tape rather than in person.\textsuperscript{22}

In deciding what decision makers should be able to observe, the superficially simple answer is that a trial record should capture the evidence, argument, and instruction that occurs "in court," just as jury instructions state.\textsuperscript{23} Edited trials might even excise testimony that has been the subject of a sustained objection or that the judge in a live trial instructs the jury to ignore. However, both modern day courts and scholars like Wigmore have suggested that the trial offers legitimate forms of information not encompassed by admitted evidence in the trial record. For example, in \textit{Culver v. Astrue},\textsuperscript{24} the plaintiff in a disability hearing claimed daily chronic pain at a high level, and the administrative law judge concluded that the plaintiff's description of her pain levels was not fully credible, in part because the judge "observed no discomfort during a forty-five-minute hearing."\textsuperscript{25} In reviewing the decision, the district court found this observation one of several "permissible reasons to discount her credibility."\textsuperscript{26}

Wigmore described three types of evidence: direct, circumstantial, and autoptic, or "real" evidence.\textsuperscript{27} The tribunal's belief based on autoptic evidence arises from direct self-perception, or autopsy, of the thing itself.\textsuperscript{28} Wigmore suggested that a fact finder's observations of a criminal defendant in the courtroom, even when the defendant was not on the witness stand, could provide the judge or jury with relevant information.\textsuperscript{29} Courts have debated this perspective and whether some "offstage" behavior should be construed as relevant evidence. For example, in \textit{United States v. Schuler}, the defendant was arrested...
for shoplifting items from a department store. During questioning for this, he allegedly threatened the life of then-President Ronald Reagan. At that time, Schuler also allegedly "began a tirade of name calling, racial slurs, and assorted vulgar comments." The first trial ended in a mistrial. At the second trial, the prosecutor emphasized to the jury that Schuler was serious about his threats (i.e., that he was not venting his anger, as the defense maintained):

While Mr. Schuler was being interrogated by the two security agents, Schuler made a number of racial comments about the number of people he was going to kill, a number of sexual comments. I noticed a number of you were looking at Mr. Schuler while that testimony was coming in and a number of you saw him laugh and saw him laugh as they were repeated.

Although the defense objected, the judge not only overruled the objection but also instructed the jury that the argument was proper. The appellate court split 2-1 in overturning Schuler's conviction. The majority ruled that the statement in closing argument injected information about bad character when the defendant had not introduced evidence of good character, a violation of Federal Rule of Evidence 404(a). The appellate court also ruled that nontestifying demeanor is not a form of evidence and, absent a curative instruction to the jury, that it is possible that the defendant was convicted on something other than evidence adduced at trial, which the court held to be a violation of the Fifth Amendment.

In dissent, Judge Cynthia Holcomb Hall disagreed and argued that off-the-stand demeanor was not evidence:

Sound policy reasons exist for allowing a jury to consider the courtroom demeanor of a defendant. As Wigmore noted: "It is as unwise to attempt the impossible as it is impolitic to conduct trials upon a fiction; and the attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory."
Judge Hall argued that the defendant’s demeanor was relevant because the jury had to decide whether or not the defendant was serious or possibly joking when making the threat against the president. Because evidence of “other acts” can speak to issues of intent under Federal Rule 404(b), Judge Hall argued that it would not be improper for the jury to consider the defendant’s behavior in court.

As Professor Laurie Levenson noted in a recent review of this and other criminal cases involving off-the-stand behavior, subsequent criminal appeals have done little to settle the original split in the Schuler court. This divide seems understandable if, as according to Levenson, there are differing views of “what decision-making roles we want to give to jurors.” In one view, permitting off-the-stand observations to act as evidence in a case would undermine the distinct jobs we assign to judges (who decide what evidence is permitted in the case) and jurors (who draw conclusions only from what the judge has explicitly permitted them to consider in court). Levenson noted that modern trial procedures have long abandoned the practice of viewing jurors as compurgators—that is, those who know the defendant well and who, in essence, act simultaneously as witnesses and jurors in a case.

Jurors’ offstage observations are also difficult to monitor and control. Judges may not see the behavior in question, and, indeed there is never any guarantee that the entire jury panel will observe such conduct. Further, given individual variability in how people express themselves non-verbally, Levenson questioned jurors’ abilities to cor-

---

40. Schuler, 813 F.2d at 984.
41. Id. at 984–85 (stating there was no abuse of discretion in allowing the jury to consider the laughter).
42. Levenson, supra note 7, at 603–06 (finding that courts have sometimes ruled remarks were improper). See, e.g., Hughes v. State, 437 A.2d 559, 572 (Del. 1981) (prosecutor stated that the defendant was “unemotional, unfeeling, and without remorse”); Bryant v. State, 741 A.2d 495, 499 (Md. Ct. Spec. App. 1999) (prosecutor stated that defendant kept looking down and could not look at the witness); State v. Brown, 358 S.E.2d 1, 15 (N.C. 1987) (also finding that some reviewing courts have not objected when prosecutors note that a defendant sat “coolly... mus- ing, watching, calculating” while a witness broke down and sobbed on the stand).
43. Levenson, supra note 7, at 614.
44. Id. at 615 (“[A]llowing jurors to consider their perceptions of the defendant was no longer reliable or consistent with the nature of formalized proceedings in which the judge closely regulates what evidence jurors may consider.”).
45. Id.
46. Id. (“There is little way for the court to monitor and control such observations by jurors ...”).
47. Id. at 618 (“One juror’s quick glimpse of the defendant may carry undue weight during the jurors’ discussions. It will be extremely difficult for the trial and appellate courts to police the use of demeanor evidence unless each glance or movement is noted for the record.”).
rectly interpret the meaning of offstage demeanor. As she explained, most people have difficulty correctly interpreting ambiguous nonverbal behavior, and they may not correctly recognize when conduct is being staged and manipulated for their benefit. At the same time, most people are overly confident that they can effectively parse and interpret nonverbal behavior, for example, to determine if someone is being deceitful. Allowing jurors to interpret the defendant’s behavior in court may also lead them to mistakenly believe they are free to interpret and make inferences about the behavior of others in the courtroom.

But a different view of the jury’s role and trustworthiness both embraces the entirety of the live trial and allows for some amount of offstage observation. Levenson suggested that with proper instructions, jurors could learn how to treat offstage information appropriately and that they would be “capable of distinguishing between innocuous behavior and that which is relevant to their understanding of the facts of a case.” She also argued that jurors, aware of the dynamics of an adversary trial, are “capable of understanding that a defendant will likely fake [some] reactions in court.” Further, although jurors are not compurgators and must decide cases using evidence presented in court, it is impractical to tell them to ignore their court observations when jury instructions tell jurors to base verdicts in part on “common sense and life experience.” Finally, Levenson argued that the “most persuasive reason” to allow considerations of a defendant’s demeanor is because “the theater of the courtroom mat-

48. Id. at 616.
49. Levenson, supra note 7, at 616.
50. Id. at 617 (“[T]here is the constant risk that lawyers will coach their clients on how to communicate with jurors without testifying.”).
51. Id. at 616–17.
52. Id. All of the above arguments in favor of instructing jurors to ignore off-the-stand demeanor apply to both criminal and civil cases. In her article, Levenson also discussed rationales that are more significant for criminal cases, such as clients’ reluctance to speak in whispers to their attorneys during trial, lest it be misinterpreted; most courtroom demeanor observations go to character, which should not be the issue that determines guilt or innocence; and permitting off-the-stand behavior to influence verdicts contradicts a Fifth Amendment right not to testify (and, conversely, defendants who do not take the stand should not be able to communicate back channel with the jury). Id. at 619–20.
53. Id. at 625.
54. Id. at 626.
55. Levenson, supra note 7, at 624.
56. Id. at 625.
Trials occur in open courtrooms, which have a certain "natural dynamic." Therefore, Levenson concluded that

the verdict should reflect the jurors' evaluation of the evidence, as it makes sense in light of what they have observed firsthand about the person they have been asked to judge. Courtrooms are not laboratories; they are halls of judgment where "jurors confront a real, live defendant and real-life consequences."

In this view, something is lost in the distance between observer and target that a taped trial creates. In the extreme, this view suggests that firsthand observation, including offstage activity, leads to better judgment. Judge Nancy Gertner suggested this possibility in describing the mixed feelings she has about permitting testimony through videoconference in her courtroom. Videoconferenced testimony has many merits, including the potential to solve difficult problems such as hearing from witnesses who live far away (even outside of the United States) and minimizing the stress some children experience over testifying in sexual abuse cases. At the same time, Gertner also noted that "in live testimony, face-to-face transmission plainly increases the information available to the fact-finder." She cited not only social science studies on the clues that people pay attention to in deciding whether someone is lying (some of which might not be as evident in videoconferenced testimony), but also anecdotal evidence:

In a telling scene in the movie "Twelve Angry Men," the jurors were discussing the testimony of an old man who claimed to have heard a fight in the apartment above him, and then a loud noise, like a body hitting the floor. He reported that he ran to his apartment door just in time to see the defendant running down the stairs. One of the jurors, himself an elderly man, reminded the others about the way the elderly witness had walked to the stand before testifying; dragging one of his feet, he walked in a labored fashion, his gait slowed by some disability. It was an observation that would have been missed if the only aspect of the witness that the jurors saw was his face.

57. Id. at 627.
58. Id.
59. Id. at 628.
60. See Gertner, supra note 6.
61. Id. at 773 ("I have watched [videoconferencing] transform a complex antitrust trial that was dependent upon a witness at a distant location, beyond the reach of the court's subpoena power.").
63. Gertner, supra note 6, at 786.
64. Id. (citing research showing that facial expressions—i.e., that which would be most easily displayed via videoconference—are the least informative about deception because they are the easiest to control).
65. Id. at 783–84.
Examples like this suggest that decision quality may erode when jurors lose access to information occurring away from the witness stand.

III. EMPIRICAL ASSUMPTIONS REGARDING OFFSTAGE CONDUCT

As we have shown, as a normative matter, there is room for debate as to how appropriate it is for jurors to pay attention to conduct that occurs in front of them but is not submitted formally as evidence. But the debate itself raises a host of empirical questions that have not been adequately addressed in either the legal or social science literatures. Most basically, the belief that something would be "missing" from decision making if people could not see the offstage behavior of witnesses assumes that jurors now routinely turn to this area to inform their conclusions. To date, no systematic data exist to examine how often and in what ways jurors use the offstage region. We recently had the unique opportunity to address this gap by observing the actual deliberations of fifty civil juries. In this Part, we summarize the study method and results, and we also link the issues jurors find of interest to those that have come up in appeals of judicial rulings.

Further details of this analysis can be found in our manuscript.

A. A Method for Studying Offstage Comments in Real Jury Deliberations

Our ability to study offstage observations in actual jury discussions and deliberations came about because the State of Arizona sought to

66. See supra notes 23-65 and accompanying text.
67. Levenson, for example, wrote that jurors scrutinize "every move" of a criminal defendant in court, "attaching deep importance to a quick glance or passing remark." Levenson, supra note 7, at 575. Further, some trial consultant handbooks emphasize the need for lawyers to pay attention to small details of how they behave during, for example, breaks in trial. For example, one book explained that plaintiffs and criminal defense attorneys should rebuff any attempts by the other side to be friendly toward one another. LAWRENCE J. SMITH & LORETTA A. MALANDRO, COURTROOM COMMUNICATION STRATEGIES 540 (1985).
68. Just one study has examined jurors' attention to offstage behavior through interview data. Researchers used data from the Capital Jury Project to predict death sentences on the basis of how people talked about defendant's demeanor in court. Former jurors who rated a defendant as looking "bored" during a trial were significantly less likely to also say that the defendant had remorse. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, But Was He Sorry? The Role of Remorse in Capital Sentencing, 83 CORNELL L. REV. 1599, 1617 (1998). In cases that were low on "viciousness," remorse predicted sentences (defendant's demeanor by itself was not analyzed as a predictor of sentences). Id. at 1636.
70. See infra notes 72-205 and accompanying text.
71. Rose et al., supra note 9.
evaluate its innovative practice of allowing civil jurors to discuss evidence mid-trial during morning, lunch, and afternoon breaks or other periods when the jury is assembled together in the jury room. A court order permitted researchers to recruit jurors and cases to participate in a study in which both trial testimony and jury discussions and deliberations would be videotaped. Nearly all jurors (95%) approached about the study agreed to participate. Attorneys and parties were less willing to permit their case to be enrolled in the study, with a response rate of 22%. Despite this lower participation rate, the cases in the data set closely matched the profile of the types of cases on the Pima County docket during the same time period. In the sample, 52% (n = 26) of trials were motor vehicle cases, 34% (n = 17) were wrongful injury cases not involving a motor vehicle, 8% (n = 4) were medical malpractice cases, and 6% (n = 3) were contract cases. Cases varied from the common rear-end collision with a claim of soft tissue injury to cases involving severe and permanent injury or death.

The videotapes of the trials permitted us to generate “roadmaps” of the case, which described who testified, when in the course of the trial the witness appeared, and, in detailed summary form, the content of

---

72. ARIZ. R. CIV. P. 39(f) (2000). The law requires that all jurors be present for discussion, though Diamond and colleagues found that jurors did not strictly observe this rule. Diamond et al., supra note 69, at 28 (finding discussion about the case occurred in 27.9% of the average number of ten-minute periods—4.49 out of 16.1 periods—that jurors had available for discussion when not all jurors were present). Jurors are also told not to arrive at any conclusions about the case before all the evidence had been presented to them; analyses indicate that jurors offered premature statements on the verdict in just 11% of discussion periods. Id. at 58.

73. Sup. Ct. of Ariz. Admin. Order 98-10 (Feb. 5, 1998), available at http://www.supreme.state.az.us/orders/admorder/orders99/pdf98/9810.pdf. In this study, one-third of the cases were assigned to a “No Discuss” condition, in which Rule 39(f) was suspended for these cases. The remaining thirty-seven cases received the typical instruction that allowed them to discuss the evidence. To tape trial testimony, arguments, and instructions, a camera in the courtroom was focused on the witness box. When cameras malfunctioned or were not turned on, we obtained the trial transcript. We also obtained copies of documentary exhibits. To record discussion and deliberation in the jury rooms, two unobtrusive cameras were mounted at the ceiling level in opposite corners of the deliberation rooms. These cameras made it possible to see jurors seated around the rectangular table on a split screen without disrupting their normal seating arrangement. Unobtrusive ceiling microphones recorded the discussions. An on-site technician was instructed to tape the conversations in the jury room whenever at least two jurors were present. For more detail, see Diamond et al., supra note 69.

74. We recruited a total of 402 jurors. Roughly half (53%) were female, 70% were white, and 30% were minorities (primarily Hispanic). A quarter (25%) of the sample reported annual household incomes of less than $20,000, 41% reported between $20,000 and $49,000, and 39% reported earnings of $50,000 or more. Rose et al., supra note 9.

75. For details on how cases differed across the “Discuss” and “No Discuss” conditions, see Diamond et al., supra note 69.
the testimony. These roadmaps were crucial for knowing the identities of witnesses versus non-witnesses, and for isolating whether jurors discussed behavior that most likely occurred while people were "on stage" (e.g., testifying) or whether the comment could refer only to an instance when people were clearly "offstage."

We then examined the transcripts of deliberations and the quasi-transcripts of discussion periods to identify offstage remarks.

We defined "offstage" to include the types of observations that divided the court in United States v. Schuler (i.e., how a party behaves when listening to others' testimony), as well as activities that in all likelihood no court would regard as acceptable material for an evidentiary discussion (e.g., how someone looked while he or she was riding in the elevator with a juror). This broad coding was designed to capture all of the types of offstage information that jurors might notice. For parties, fact witnesses, and expert witnesses, we included in offstage observations those behaviors they engaged in during periods when they were not testifying on the witness stand. For attorneys, we counted all references to attorney behavior other than that which occurred when they were addressing the jury, the witnesses, or the judge (e.g., activities other than speaking during jury selection, arguing to the jury, questioning a witness, or making a motion to the judge). For judges, offstage activity reflected judicial behavior that was unrelated to giving instructions to the jury or responding to counsel by ruling on objections. If jurors remarked on family members, on friends, or on anyone else who did not testify in the case, we counted this as an offstage observation. Coders had to be certain that a juror's remark reflected offstage activity; ambiguous instances (e.g., a comments occurring on days when someone spent time both on and off the stand) were not included in our tally.

76. Id. at 19-20.
77. Id.
78. Our data set has verbatim transcripts of all deliberations in these cases. For discussions, we have "quasi-transcripts" which are not fully verbatim but are highly detailed as to speaker and content. The more condensed form expedited our analyses regarding the discussion innovation. See Rose et al., supra note 9, at 10 n.2. For this project, when we located offstage remarks during discussion periods, we examined the tape to check the actual language when the gist or valence of the comment was not clear from the quasi-transcript.
79. 813 F.2d 978 (9th Cir. 1987).
80. See Rose et al., supra note 9, at 10-11.
81. Id. at 10.
82. Id.
83. Id.
84. Id.
85. Id.
and attire, since the coder had to be certain that the juror viewed what someone wore exclusively in an offstage context.\textsuperscript{86}

Coders also identified the physical area in which the observation took place, so that we knew if the remark referred to behavior in the courtroom versus activity in the courthouse but not in the courtroom (e.g., in an elevator or bathroom) or outside of the courthouse entirely (e.g., in the courthouse parking lot or at a nearby restaurant).\textsuperscript{87} Finally, we also coded whether the remark was "valenced"—that is, whether it favored the positions of one party or another.\textsuperscript{88}

\textbf{B. Results Summary: A Numerical Profile of Offstage Talk}

We have suggested that an empirical examination of how jurors currently make use of the offstage informs the proposition that something might be "missing" if decision makers could not see offstage areas.\textsuperscript{89} An absence of offstage information would constitute a substantial loss of information, legitimate or not, if jurors were found to devote significant amounts of time and attention to discussing the offstage, and if such information significantly affected how they talked about other pieces of ("front-stage") evidence or affected jurors' views of the overall persuasiveness of one party of the other.\textsuperscript{90} We turn now to how frequently jurors talked about the offstage and then to how the Arizona juries treated this information, in particular whether offstage activities appeared to shift the groups' positions on the cases.

\textbf{1. The Frequency of Offstage Observations}

In one sense, conversations about the offstage was routine in these civil jury trials. Forty of the fifty cases (80\%) included at least one offstage observation.\textsuperscript{91} At the same time, when considered in the context of the entire data set, the total number of remarks was low. In all, we coded 303 total offstage remarks about parties, witnesses, attor-

\textsuperscript{86} Rose et al., \textit{supra} note 9, at 10–11.
\textsuperscript{87} \textit{Id.} at 11.
\textsuperscript{88} We coded valenced remarks as those that one of the parties would, and the opposing party would not, want a juror to make. \textit{Id.} Remarks could be coded as valenced for plaintiff, valenced for the defendant, or valenced for both. \textit{Id.} To establish that coders were viewing valenced remarks similarly, two independent coders read two full transcripts. We totaled the number of agreements for a given category (e.g., valenced for plaintiff), multiplied this number by two, and divided this product by the sum of the frequency with which each coder used that category in the transcript. \textit{See id.} at 11 n.3.
\textsuperscript{89} \textit{See supra} notes 53–65 and accompanying text.
\textsuperscript{90} \textit{See infra} notes 108–126 and accompanying text.
\textsuperscript{91} Rose et al., \textit{supra} note 9, at 13.
neys, judges, and non-witness observers of the trial. To put the total number of observations in perspective, we coded a total of 2502 pages of quasi-transcripts from discussion periods and 5276 pages of deliberation transcripts for the fifty trials. Talk about the offstage thus appeared on only 3.9% of the pages we reviewed (assuming one comment per page, 303 pages divided by 7778). Of note, this total count concerns the entirety of the trial: pre-deliberation discussions, deliberations, and post-deliberation discussions. Looking only at the most crucial decision-making period—the formal deliberations that took place after the jury viewed the trial and was instructed on the law—the number of remarks is particularly low, with jurors in twenty-three cases offering a total of just seventy-two offstage observations during deliberations.

Moreover, not all of the comments were relevant to the judgments the juries had to make in the cases. A remark was most likely to have potential implications for decision making if the remark was valenced in favor of one party or the other. Of the roughly 300 observations, a majority (51%) had no valenced implication for either party. For example, during discussions, jurors in seventeen different cases made a total of thirty-nine offstage observations about the judge. A substantial number of these comments simply noted that the judge was less than wholly observant during the trial—e.g., sleeping or fighting off sleep, looking bored, or, in one instance, paying bills. Other non-valenced comments, especially during discussion periods, consisted of jurors either consulting with one another about the identities of people sitting in the courtroom audience (e.g., asking if others thought someone was related to one of the parties) or reporting to others that they had just seen or passed someone outside of court (e.g., in the hallway or on an elevator) with no further comment (except a few instances in which jurors said that they had felt nervous or awkward

92. Id. This is also a slightly inflated figure because it reflects a count of targets observed in the offstage—thus, if a juror remarked on having seen the attorney talking to the client during a break, we entered that as an offstage observation about both the attorney and the client. About 10% of the total comments reflected these multi-target remarks. Id.
93. Id. at 10.
94. Id. at 13.
95. Id.
96. For a definition of valenced coding, see supra note 88 and accompanying text.
97. Rose et al., supra note 9, at 47.
98. Id.
99. Id. at 15 n.5. Jurors also made six additional comments about the judge during deliberations or in the post-verdict conversation they had; only one of these was valenced (a criticism of one judge who, a jury believed, did not do enough to control the behavior of a defense witness who was sitting in the audience). Id.
over the encounter). These latter comments explain why a far larger proportion of non-valenced offstage comments was based on observations out of court (37% observed outside the courtroom), compared with valenced comments (just 15% were based on out-of-court observations; in the whole data set, 26% of observations were from out-of-court encounters).

The remaining 49% percent of our comments were judged to favor one side or the other. Valenced remarks were particularly prevalent during deliberations: sixty-seven of the seventy-two deliberation remarks (93%) were valenced, as compared to just 33% of comments (n = 65) from discussions during trial. Roughly half of the thirty-one comments (n = 16) that jurors exchanged in post-deliberation periods (after they had signed the verdict sheet but before they went to court to announce the verdict) were valenced.

The substance of valenced remarks showed distinct patterns. First, valenced remarks from the deliberation periods were far less likely to favor the plaintiff than the defense—75% of valenced deliberation remarks about the offstage supported the defense. Second, the remarks across different cases exhibited consistent themes. For example, jurors talked about whether a plaintiff who requested future damages in the case still appeared to be injured, they discussed how people reacted to other people’s testimony or argument (and what this meant for the credibility of either the person testifying or the person being observed), and they also used the offstage to offer additional insights and suggest background stories about the people they observed. We give more detail in Part III.C on these themes as we show that they are similar to those found in appellate decisions from non-criminal trials.

In summary, across a number of cases, jurors talked about activity occurring in the offstage, and, especially during deliberations, they typically offered these comments to make a point that favored one party or the other. At the same time, the total frequency of valenced offstage remarks—especially those offered as part of deliberations—was exceedingly small. This suggests that the offstage either did not frequently draw the attention of jurors or, if the jurors did attend to

100. Id.
101. Id. at 47.
102. Id.
103. Rose et al., supra note 9, at 14.
104. Id. at 47.
105. Id. at 14.
106. Id. at 16–24.
107. See infra notes 127–205 and accompanying text.
offstage behavior, they often chose not to share what they had seen with their fellow jurors. Thus, in these civil cases, we find little evidence for the proposition that individual jurors' access to the offstage of a trial takes a jury's discussions and deliberations away from focusing on and considering the case that was formally presented to it.

2. How Do Jurors Treat Offstage Information?

Our data offer a rich and unique view of the topics juries discuss during deliberations. These conversations, however, do not necessarily reveal the dynamics of individual jurors’ decision-making processes.\textsuperscript{108} We could not peer into individual minds and observe the specific factors that led them to favor one side or another.\textsuperscript{109} Instead, we directly observed the issues that juries found worthy of discussing and debating—in other words, we know what topics jurors put on the table in order to decide the case.\textsuperscript{110} This allowed us to track how the jury as a group treated offstage information.\textsuperscript{111}

We looked at several aspects of deliberations to identify how much attention offstage information received during deliberations and to what effect.\textsuperscript{112} First, we counted the turns of conversation devoted to offstage topics, including follow-up discussion or debate about the remarks and their implications.\textsuperscript{113} We found that juries devoted very little time in deliberation to offstage discussions, with just 1.5% of all conversation turns in deliberation spent on offering or commenting on offstage observations.\textsuperscript{114} Thus, not only was the absolute number of remarks low, but in addition, talk about the observations did not dominate the floor of the jury room.\textsuperscript{115}

Second, we examined the patterns of valenced remarks jurors made before they commented on the offstage.\textsuperscript{116} If jurors offering offstage remarks had already made a number of remarks favoring one side, then it was less likely that their offstage comments played a decisive role in group discussions; that is, this pattern would indicate that the jurors offering the remarks had lobbied for a given position and outcome even without references to the offstage.\textsuperscript{117} In contrast, if a juror

\begin{itemize}
  \item \textsuperscript{108} See Rose et al., \textit{supra} note 9, at 24–25.
  \item \textsuperscript{109} \textit{Id.} at 25.
  \item \textsuperscript{110} \textit{Id.}
  \item \textsuperscript{111} \textit{Id.}
  \item \textsuperscript{112} \textit{Id.} at 25–37.
  \item \textsuperscript{113} \textit{Id.} at 26–27.
  \item \textsuperscript{114} Rose et al., \textit{supra} note 9, at 26–27.
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} \textit{Id.} at 29.
  \item \textsuperscript{117} \textit{Id.} at 29–31.
\end{itemize}
expressed more mixed views prior to the offstage remark, then conceivably there was more room for the offstage comment either to shift the balance of how that juror talked about the case to the group or to shift the group's trajectory of discussion.\textsuperscript{118} In deliberations, jurors' comments about the offstage were disproportionately about the plaintiff and were predominantly negative in valence (i.e., favored the defense);\textsuperscript{119} therefore, we focused on the percentage of pro-defense comments offered just prior to an offstage critique of the plaintiff.\textsuperscript{120}

Among jurors who had offered at least one valenced remark before referring to an offstage observation, on average fully 77\% of their previous valenced remarks were, like the offstage remark, pro-defense.\textsuperscript{121} Thus, the tenor of offstage remarks was quite consistent with positions the jurors had already taken. We next looked carefully at all of the cases in which the balance of remarks was below this mean amount (i.e., the cases in which jurors were seemingly more "open" to offstage evidence).\textsuperscript{122} We found no indication that the offstage observation affected the jurors' (or jury's) ultimate positions. For example, in two cases, jurors offered offstage comments to suggest that the plaintiff did not seem particularly injured; however, these jurors made these remarks after the group had already decided not to award any money for current or future damages.\textsuperscript{123} By looking closely at the context of the cases, we also found that some remarks emerged during lulls in deliberation (e.g., the group was passing time while writing up a question to send to the judge or passing around exhibits for each juror to examine).\textsuperscript{124} Although we cannot say that these remarks failed to influence the other jurors who heard them, they were not linked to any shifts in the way the group talked about substantive issues, nor did these groups return to the remarks when the lull was done.\textsuperscript{125}

\begin{itemize}
\item \textsuperscript{118} Id. at 31.
\item \textsuperscript{119} See supra note 105 and accompanying text.
\item \textsuperscript{120} Rose et al., supra note 9, at 30.
\item \textsuperscript{121} Id. We measured the pattern of prior valenced remarks in two ways. One tallied across comments and reflected the proportion of all pro-defense comments by jurors making offstage remarks. Second, because jurors contributed different numbers of valenced comments (some contributed many, some only a few), we also examined the proportion of pro-defense comments for each individual juror who made offstage remarks, and then we averaged these values together. Both produced the 77\% value, but the proportion was somewhat lower (67\%) when we included a handful of jurors who had made no valenced comments before offering an offstage remark. Id. at 30 n.8.
\item \textsuperscript{122} Id. at 31–35.
\item \textsuperscript{123} Id. at 31.
\item \textsuperscript{124} Id. at 32–33.
\item \textsuperscript{125} Id.
\end{itemize}
Finally, verdict patterns offered no hint that offstage comments changed case outcomes. Although valenced offstage remarks offered during deliberation were disproportionately unfavorable to the plaintiff's case, we found no association between the likelihood of a verdict for the plaintiff and the presence of an offstage comment.126

In sum, offstage remarks consumed little of the jurors' deliberation time, the remarks were typically consistent with positions jurors had already expressed, and the presence of an offstage remark about the plaintiff during deliberations did not predict jury verdicts. Thus, by these measures, offstage observations played only a small role in deliberations, and remarks typically supplemented and bolstered positions jurors had already expressed. We found no evidence that juries gave undue weight to offstage observation during deliberations.

C. The Types of Offstage Remarks that Jurors—and Judges—Make

Although offstage observations were few in number and although the juries did not focus on them during deliberations, there were several consistent themes in the juror remarks, and some types of observations appeared in multiple cases.127 In this Section, we show that the themes we observed in the Arizona data set can also be found in appellate rulings that revisit the decisions of trial courts and administrative law judges.128 As the rulings make clear, reviewing courts in non-criminal cases have varied in their evaluations of how appropriate or inappropriate it was for judges' final opinions to have incorporated offstage observations.

1. Plaintiffs' Level of Functioning and "Sit and Squirm" Tests

Roughly one-third of the cases in our data set (n = 18, or 36%) included comments made during deliberations, pre-deliberation discussions, or both that focused on how injured (or, more typically, not injured) the plaintiff seemed to be.129 In two of these cases, the remarks were brief asides and were, in fact, irrelevant to the case because the plaintiff was not claiming any ongoing injury.130 However, the remaining sixteen cases about plaintiff's level of injury at the time of the trial constituted fully 48% of the thirty-three cases in which

126. Rose et al., supra note 9, at 35-37. We looked both at whether the plaintiff won any award, as well as whether the plaintiff won more than a minimal award (greater than $3000, an amount likely necessary to cover trial costs) or won an amount beyond that which a defendant had conceded was reasonable (i.e., in cases in which liability was uncontested). Id. at 36.
127. Id. at 16–24.
128. See infra notes 129–205 and accompanying text.
129. Rose et al., supra note 9, at 16.
130. Id.
plaintiffs asked for future damages; hence these comments were relevant to determinations the jury needed to make. Jurors made general remarks (e.g., the plaintiff "walks around real good"), as well as specific critiques (e.g., a plaintiff said she continues to feel pain, but she did not grimace once during the trial). In two cases, the plaintiffs or their attorneys had at one point said that the plaintiff could not sit for long periods without needing to move around; jurors in both of these cases remarked that the plaintiff sat with apparent ease and comfort while at the party’s table. In one of these cases, the plaintiff failed to meet multiple expectations from jurors about how an injured person is likely to act; apart from appearing to remain comfortably seated for long periods, jurors in this case also claimed that the plaintiff did not limp when he was outside of the courtroom and that he was able to get up from his seat with little trouble.

In cases in which administrative or trial judges have had to decide whether someone is currently suffering from an injury—specifically worker’s compensation and disability cases—judges have also looked to whether a person’s in-court demeanor reflects that of an injured person. For example, in a worker’s compensation action in Louisiana, a plaintiff claimed that he had become totally and permanently disabled after a car chassis fell on him, injuring his back. The defendant appealed the trial court’s decision for the plaintiff. Although expert testimony conflicted, the plaintiff offered numerous lay witnesses to testify that he had previously been healthy and hard-working, but now could do no work, was often in bed, and frequently lived in pain. In arriving at a judgment for the plaintiff, the trial judge wrote:

Plaintiff was in court during court hours for more than two days and I observed him as closely as I could for the sole purpose of catching him off his pose, if he was posing. I did not catch him. He consistently kept at all times an expression of discomfort.

Plaintiff maintains that he still has pain, and to me his expression and actions show it.

131. Id.
132. Id. at 16–17.
133. Id. at 17–18.
134. Id. at 18.
136. Id.
137. Id. at 254.
138. Id. at 255.
The lay testimony in this case is so convincing to me that I am forced to let it tilt the scales in his favor.\(^\text{139}\)

The reviewing court repeated the above information to show that the judge had given "great weight" to the plaintiff's demeanor in court.\(^\text{140}\) Significantly, the appellate court offered no negative comment about the judge's attempt to "catch" the defendant, instead concluding that they had no reason to disturb the judge's ruling.\(^\text{141}\)

Courts reviewing social security disability cases have refined what types of in-court observation are acceptable. In *Tyler v. Weinberger*, a district court reviewed an administrative law judge's ruling in a disability case.\(^\text{142}\) The plaintiff in *Tyler* had a long history of back injuries and asked for social security disability benefits because he claimed that pain and fatigue usually made it impossible for him to sit for more than an hour without needing to change positions and to rest.\(^\text{143}\) Medical examinations and tests confirmed damage to his spine and other infirmities.\(^\text{144}\) In denying the plaintiff's application for disability, the judge stated:

> He testified quite definitely that he could not sit down for more than an hour, due to unbearable pain. However, he sat in the hearing room for one hour and 45 minutes without even changing position, grimacing, standing, or exhibiting any other manifestation usually expected from those in severe pain. Thus, from this standpoint alone, the Administrative Law Judge feels that the claimant grossly exaggerated the extent of his pain and the degree of his being uncomfortable from the pain.\(^\text{145}\)

On appeal, the plaintiff claimed that the judge created a "'sit and squirm' index" of observable symptoms that the plaintiff had to display in order to be found disabled.\(^\text{146}\) The district judge reviewing the case distinguished two types of in-court observation. The court ruled that if the judge had rejected "otherwise relevant testimony on pain and suffering because of plaintiff's failure to exhibit what the Judge, independent of plaintiff's representations, considered observable manifestations usually expected from those in severe pain," then this was improper.\(^\text{147}\) The district court elaborated:

\(^{139}\) *Id.*
\(^{140}\) *Id.*
\(^{141}\) *Pringle*, 7 So. 2d at 255.
\(^{143}\) *Id.* at 783.
\(^{144}\) *Id.* at 782–83.
\(^{145}\) *Id.* at 784.
\(^{146}\) *Id.* at 789.
\(^{147}\) *Id.*
Clearly, a “sit and squirm” index, as plaintiff calls it, applied by a judge who is not a medical expert will not only result in unreliable conclusions when observing claimants with honest intentions, but may encourage claimants to manufacture convincing observable manifestations of pain or, worse yet, discourage them from exercising their right to appear before an Administrative Law Judge for fear that they may not appear to the unexpert eye to be as bad as they feel.\textsuperscript{148}

On the other hand, the district court ruled that “[t]here is no error of law”\textsuperscript{149} when a judge bases conclusions on what the judge observes of a plaintiff “in light of plaintiff’s testimony as to the observable symptoms” he exhibits.\textsuperscript{150} In other words, judges cannot impose their own general notion of what people are supposed to look like when they are in pain for the purpose of disregarding other evidence of pain-related disability. However, in-court observation from offstage regions is appropriate for determining credibility when judges consider the consistency between specific claims the plaintiff makes and how that person behaves during the hearing.\textsuperscript{151}

Other courts considering disability appeals have followed \textit{Tyler} in holding that in-court observation should not, by itself, determine whether or not someone is in pain. For instance, in \textit{McDonald v. Schweiker},\textsuperscript{152} an administrative law judge who denied benefits to an applicant noted that the plaintiff concentrated and seemed undistracted by pain during the hearing and that she could easily rise from her seat.\textsuperscript{153} In reversing this decision, a district court noted that, given the variability in people’s reactions to pain, a sit and squirm requirement “may or may not be of value.”\textsuperscript{154} When there is no evidence of “malingering and substantial clinical evidence” that the plaintiff suffers from conditions that cause pain (as was true in that case), it is “unreasonable” to rely solely on the judge’s own observations.\textsuperscript{155}

\begin{flushright}
\textsuperscript{148.} \textit{Tyler}, 409 F. Supp. at 789.
\textsuperscript{149.} \textit{Id.}
\textsuperscript{150.} \textit{Id.}
\textsuperscript{151.} In \textit{Tyler}, the district court ruled that although it was legally permissible to look for consistency between testimony and behavior in the hearing, the judge’s accounting of the plaintiff’s testimony was unreasonable and inaccurate. \textit{Id.} at 789–90. The Arizona jurors gave little indication that they used offstage observation as a singular basis for disbelieving a party. \textit{See supra} notes 108–126 and accompanying text. In addition, a number of comments reflected comparisons between what a plaintiff (or the plaintiff’s attorney) had said and how the plaintiff behaved. For examples, see \textit{supra} notes 129–134 and accompanying text.
\textsuperscript{153.} \textit{Id.} at *13–14.
\textsuperscript{154.} \textit{Id.} at *23.
\textsuperscript{155.} \textit{Id.} at *23–24.
\end{flushright}
2. How People Respond to Trial Events

A second set of comments in the Arizona dataset discussed reactions that parties or others had to trial events or to the fact that they were involved in a trial.156 Jurors variously talked about whether people seemed to be under stress,157 how people reacted to a particular piece of trial testimony (e.g., a juror looked at how an overweight plaintiff reacted when an expert testified about whether the plaintiff’s weight likely exacerbated the injury),158 instances when people cried in the offstage,159 and whether offstage actors were coaching frontstage people.160 Jurors in several different cases also commented on instances in which parties or others used the offstage to mouth expletives, roll their eyes, or scoff at testimony.161 The statements in this category reflected jurors’ interest in identifying seemingly spontaneous—and, therefore, authentic—reactions to events (i.e., how people handled the situation), but jurors often criticized people who did not maintain composure during the trial, especially if they appeared to be attempting to communicate “back channel” with the jury (e.g., by eye rolling at a jury while someone testified).162 Two jurors in one case discussed how the defendant, an owner of a business where an accident occurred, was “smug” based on his responses to how others testified:

#7: Yeah, he’s very smug and he was laughing and shaking his head and going, “How are you the expert”? . . . .
#8: And he’s supposed to make a good impression.
#7: That’s the problem, he’s not supposed to make an impression and the worst part of it is he reminds me of an old boss I had. I can’t think about that.
#8: That’s your civic duty to put that away and just look at the facts.
#7: You know, there he is just sitting there and I think that says something about him and something about how he runs his business. Maybe it doesn’t mean a lot but it means something.163

The observations of the Arizona jurors again were mirrored in inferences drawn by judges about people’s character and credibility based on observations noting how trial participants reacted to other

156. Rose et al., supra note 9, at 19–23.
157. Id. at 19.
158. Id.
159. Id. at 19–20.
160. Id. at 20.
161. Id. at 21–22.
162. Rose et al., supra note 9, at 20–22.
163. Id. at 22. It is worth noting that this comment appeared during the pre-deliberation discussion periods for this case. Neither juror who made the comment, nor any other juror, reiterated the remark during deliberations.
people's testimony and argument. In *Leslie v. Leslie*, an appellate court supported the conclusions of a lower court and a master assigned to hear a divorce case.\(^\text{164}\) The husband's claims centered on his wife's poor treatment and verbal abuse of him.\(^\text{165}\) The master found that "defendant's demeanor on and off the stand, in the hearing room (especially during plaintiff's testimony)" had revealed her contempt and disdain for her husband.\(^\text{166}\) The appellate court quoted with approval the lower court's rationale for deferring to the master's judgment:

> He was able throughout the proceedings to observe and study the behavior of both of the parties and their demeanor on and off the witness stand; many times such observations may well be more convincing and persuasive in drawing conclusions from the evidence than the actual testimony of the parties themselves.\(^\text{167}\)

Fifty years later, in *Morgan v. Department of Financial & Professional Regulations*,\(^\text{168}\) a clinical psychologist appealed the suspension of his license, which had been suspended because the psychologist had behaved in a sexually inappropriate way with a client.\(^\text{169}\) The appellant argued that the administrative law judge (ALJ) improperly used courtroom behavior as a basis for judging credibility.\(^\text{170}\) The ALJ had noted that the plaintiff blurted out comments, rolled his eyes, shook his head, made "dismissive faces," and said "bull shit" while other witnesses testified.\(^\text{171}\) The ALJ interpreted the behavior as having "clearly suggested that perhaps [the plaintiff] was not respectful of other people," which, the ALJ pointed out, was essentially part of the accusation against him.\(^\text{172}\) Citing Wigmore in support of the notion that such information is not "high quality evidence of credibility,"\(^\text{173}\) the reviewing court nevertheless held that the ALJ acted properly.\(^\text{174}\) The court drew on precedent (including *United States v. Schuler*)\(^\text{175}\) to conclude that the critical issue was that Morgan testified.\(^\text{176}\) Because Morgan took the stand and denied unprofessional conduct, "his credi-


\(^{\text{165}}\) Id.

\(^{\text{166}}\) Id. at 381 (emphasis added).

\(^{\text{167}}\) Id.

\(^{\text{168}}\) Morgan v. Dep't of Fin. & Prof'l Regulations, 871 N.E.2d 178 (Ill. App. Ct. 2007).

\(^{\text{169}}\) Id. at 181–82.

\(^{\text{170}}\) Id. at 191.

\(^{\text{171}}\) Id. at 185.

\(^{\text{172}}\) Id.

\(^{\text{173}}\) Id. at 191.

\(^{\text{174}}\) Morgan, 871 N.E.3d at 191.

\(^{\text{175}}\) 813 F.2d 978, 981 (9th Cir. 1987).

\(^{\text{176}}\) Morgan, 871 N.E.2d at 191.
ibility was clearly in issue, and the ALJ was not in error to take note of his demeanor while sitting in the courtroom.”

3. **Background Information and Additional Details**

Finally, a few jurors' offstage comments in the Arizona data set seemed designed to "fill in" details of people or their stories. Some of these were brief statements that offered general impressions of people who were observed offstage—for example, that an audience member (the wife of witness) seems “nice” or that, even before testifying, a witness struck one juror as a “shyster.” In three other cases, jurors offered somewhat more elaborate pictures of people they observed. For example, during post-deliberation talk, one juror said that she hoped an elderly defendant did not still drive; another juror noted that the juror had seen the defendant walking out of the parking lot. In a different case, jurors remarked that the plaintiff's children sat on the “other side” of the courtroom from the plaintiff and that the plaintiff's daughter had a conversation with the defense attorney. During deliberations, a juror in another case responded to fellow jurors' claims that the plaintiff is an “emotional person” and “overexcited”:

---

177. *Id.*
178. Rose et al., *supra* note 9, at 23–24.
179. *Id.* at 24.
180. *Id.* at 23. In this instance, the juror who had initially expressed concerns about the defendant driving clarified exactly what the offstage observer saw:

#8: I hope he doesn't drive anymore.
#4: He does. I saw him go in the parking lot over there.
#8: Does he drive in?
#4: I have no idea. I just see him walking out of the parking lot. (The jurors then switched to a different topic.)

Quotation from Arizona Transcripts (on file with the authors).

181. Quotation from Arizona Transcripts (on file with the authors). Interestingly, the significance of the observation, which occurred during deliberations, appears to be based on the assumption that the seating rules in court cases are similar to those followed in weddings:

#5: I kept looking to see if his daughter was going to be in there because she was mentioned. . . .
#7: They sat at the other side.
#5: They sat on the other side.
#8: They sat on the, this side, or that side?
#2: If it's the defendant's party they sit on the defendant's side, if it's the plaintiff's party, they sit on the plaintiff's side.
#4: Usually that is true, but that she (the daughter) was talking to the defendant's lawyer.
#8: Yes, I did see that.
#4: Yeah, I picked up on that, too.

*Id.* The jurors in the above case moved on immediately to a different line of discussion.
OFFSTAGE BEHAVIOR

#5: Well, I don’t know if, how you guys felt about it, but when I seen her husband, it’s like she was intimidated by him. She seems like a very shy, very intimidated little girl and he seemed like he was rough and I think she might have had an anxiety attack over the fact that, “wait till he finds out” she had an-

#2: Accident.

#5: -accident. Maybe, I don’t know, maybe she’s not supposed to be running around . . . and she was out late at night (other jurors laugh). 182

Two appellate rulings offer similar examples of judges generating stories and profiles of people through offstage observation. In Kovacs v. Szentes, 183 a trial judge heard a case in which a man sued his mother-in-law for allegedly breaking up his marriage and alienating the affections of his wife, ruling in favor of the husband. 184 Drawing on what the trial judge observed of the parties in court, the judge claimed that not only did the defendant and the plaintiff’s wife refuse to play with the child of the plaintiff (they “spurned him and seemed to take pleasure in repulsing him”), but also, “it was very evident that she (the plaintiff’s wife) was under the domination of the defendant and that it was fairly apparent that, if left to themselves, the plaintiff and his wife would get along together.” 185 The appellate court ruled that the judge erred in considering this information. 186 Echoing the standard cited by Levenson that fact finders are no longer compurgators, 187 the court ruled that the trial court had “made of himself a witness” and in doing so, he was “unsworn” with no opportunity given to defense to “cross-examine, to offer countervailing evidence, or to know upon what evidence the decision would be made.” 188

In United Insurance Co. of America v. NLRB, an insurance company maintained that the debit collector agents it used were independent contractors, and that, therefore, the company did not have to engage in collective bargaining with the union that was attempting to organize the collector agents. 189 A trial examiner ruled against United Insurance and in favor of the union; the NLRB upheld this ruling. 190 The trial examiner based his findings, in part, on having observed the demeanor of witnesses in the hearing room and finding that

182. Id.
184. Id. at 125.
185. Id. at 125–26.
186. Id. at 126.
187. Levenson, supra note 7, at 615.
188. Kovacs, 33 A.2d at 126.
190. Id.
the agents who testified in favor of United Insurance did not "display or appear to have attributes of independence." 191 In a footnote, the examiner defended his observation:

[T]here appears to be no good reason for excluding demeanor in the courtroom when the witness is not on the stand and where it is clearly observable as in this case . . . . Without attempting to detail the basis for this necessarily subjective finding, and allowing for an independent contractor's possible concern over renewal or termination of his contract, I can here declare that I observed a uniform and marked deference by agents toward supervisors and company officials which, without obsequiousness but beyond the sometimes elusive requirements of courtesy, is decently characteristic of common attitudes between employees and supervisors; and which in such uniformity differs from the normally observable attitudes between independent contracting parties. 192

In granting the insurance company's request to set aside the NLRB's order, the Seventh Circuit found that "the off-the-stand appearance or conduct of the witness may properly be considered in determining his credibility when it constitutes an observable physical fact." 193 Though the court did not supply examples of observable physical facts, the court contrasted "observable physical fact" with "such subtle manifestations of human reactions as 'obsequiousness' and 'courtesy.'" 194 The court noted that the examiner necessarily applied his own views about what factors signify the typical relationship between employers and employees versus between those engaged in independent contracting, and the court held that this was not a proper basis for a credibility assessment. 195 The court further suggested that it could not be sure that the NLRB's determination had not been tainted by the observation, even though the NLRB disavowed any reliance on it. 196

The United States Supreme Court subsequently overruled the Seventh Circuit. 197 Although the Court made no mention of the trial examiner's use of off-the-stand observation to inform credibility, it held that "the Board's determination was a judgment made after a hearing with witnesses and oral argument had been held and on the basis of written briefs. Such a determination should not be set aside just be-

191. Id. at 324.
192. Id.
193. Id.
194. Id. Although the court did not elaborate, it possibly had in mind the types of information that Wigmore referred to as "real evidence." See supra notes 27–28 and accompanying text.
195. United Ins., 371 F.2d at 324.
196. Id.
cause a court would, as an original matter, decide the case the other way.”

4. Summary

As we noted in discussing the references to offstage behavior by jurors, the remarks were sometimes off-hand mentions, and we found little indication that those remarks played a substantial role in decision making. In contrast, because judicial opinions explicitly provide justifications for rulings, the opinions more clearly describe the role an offstage observation played in a decision. Yet even though the data sources are quite different, the few cases that have considered the propriety of using the offstage areas of trials show that judges and juries are both drawn to the offstage on occasion and that the two groups use the offstage to inform similar issues.

Apart from showing common uses of offstage areas, the review also demonstrates a mix of reactions from reviewing courts on this issue, and how they struggle to demarcate lines that might distinguish acceptable from unacceptable offstage observation. The Seventh Circuit ruling in United Insurance is a good example of the ambivalence toward offstage observations that reviewing courts appear to express. Although the opinion clearly rebuked the trial examiner’s behavior, it also imagined counter-factual scenarios in which offstage observations could legitimately inform credibility—that is, when observations concerned an “observable physical fact.” Nonetheless, as Tyler shows, even some types of “physical” manifestations of symptoms—people’s body positions and facial expressions—risk being used impermissibly if they contribute to a “sit and squirm index.” At the other extreme, one court viewed the offstage area as an appropriate and legitimate site for observation: “demeanor on and off the witness stand... may well be more convincing and persuasive

198. Id. at 260.
199. It bears mentioning that courts are divided over instances of in-court offstage observation (e.g., how a plaintiff sat through a disability hearing, or how a party reacts to the testimony of others). Given that jurors are instructed to avoid contact or interaction with people outside of the courtroom, we would expect that any references to out-of-court behavior would generally be considered improper, especially because out-of-court encounters will not give all jurors an equal opportunity to see the behavior in question.
201. Id. at 324.
203. Id. at 789–90. A “sit and squirm index” refers to a judge-created test that puts litigants in the position of having to demonstrate certain physical expressions or risk having their assertions of pain discredited. Id.
in drawing conclusions from the evidence than the actual testimony of the parties themselves.\textsuperscript{204} \textit{Morgan} suggests that, although offstage observations likely do not produce high quality information, when someone has testified, his or her behavior away from the witness stand is essentially fair game.\textsuperscript{205}

As we next discuss, the legal ambivalence about the value and propriety of these observations, together with the other findings from the study of offstage behavior among Arizona jurors we have observed, have implications for the desirability of taped trials and the form that the optimal taped trial might take.

IV. \textbf{Is the Potential Loss of Offstage Access Actually a "Loss"?}

As we consider whether something is "lost" when people do not have access to a live trial, we begin by noting that our review of appellate cases suggests that the question is not easily disposed of through simple appeals to normative and legal standards. Although we will never know how a reviewing court would look at the types of conversations that the Arizona jurors had about the offstage, if we take the appellate rulings on judicial behavior as a guide, then the Arizona jury deliberations did not produce observations from the offstage that would be viewed by all courts as legally erroneous.\textsuperscript{206} The question of whether a filmed trial would likely reduce juror bias would be easier to answer had our data revealed that when the jurors talked about offstage activity, they focused disproportionately on information that all would agree should not have been shared with others. This would have pointed to a clear advantage to taped trials (i.e., reducing obviously improper influences). Likewise, as we have already suggested, our data did not support other normative concerns, such as a fear that jurors cannot be trusted to keep offstage information in perspective and give it a limited role in deliberations.\textsuperscript{207}

Although not offering clear normative answers, as an empirical matter, our analysis provides insight into what fact finders observe during trials and, therefore, what is likely to be “missed” without access to offstage areas. The consistency between the themes in the jury

\textsuperscript{204} Leslie v. Leslie, 132 A.2d 379, 381 (Pa. 1957).
\textsuperscript{205} Morgan v. Dep't of Fin. & Prof'l Regulation, 871 N.E.2d 178, 191 (Ill. App. Ct. 2007).
\textsuperscript{206} As noted above, we refer generally to the types of in-court observations jurors offered. \textit{See supra} note 199. Compared to out-of-court encounters, in-court observation dominated the remarks that jurors made. \textit{See supra} note 101 and accompanying text. In deliberations, in-court observation was even more predominant. \textit{See Rose et al., supra} note 9, at 47 (showing that sixty-three of seventy-one offstage remarks during deliberations concerned in-court observation).
\textsuperscript{207} \textit{See supra} notes 108–126 and accompanying text.
deliberations and in judicial rulings suggests that both judges and jurors sometimes look to whether people sit, stand, or walk in ways that are consistent with how they describe their current injuries—especially when a party makes specific claims about not being able to engage in certain kinds of activities (e.g., sitting for long periods). Decision makers are interested in people's composure during trial and how they react to what others say during testimony or argument. In some instances, as in Morgan or in the example from an Arizona case regarding an allegedly “smug” defendant, the party being observed likely invited such attention through overly dramatic gestures and expressions of outrage. In other cases, like Leslie v. Leslie, a decision maker seemed to seek out a party's reactions to test a specific claim (e.g., the husband says his wife was contemptuous of him; how does she act when he testifies?). Finally, decision makers look not only to the behavior of a given individual, but also how people behave in relation to one another, for example, whether a child sits near a parent, whether someone seems “intimidated” by a spouse, or whether someone is under the “domination” of a mother. With only the area around the witness stand, the judge, and perhaps an attorney lectern visible to decision makers, all of these sources—other than perhaps information about who is sitting at a party's table—are vulnerable to being inaccessible in a taped trial.

Is this a substantial loss? Judging only from the observable indicators we had about the groups' attention to offstage material in the discussions and deliberations (i.e., frequency of comments, time spent on deliberation, the consistency between offstage remarks and other valenced comments, and verdicts), our best guess is no. Although most jury trials included some commentary about the offstage, there was not very much of it, and it had very little observable effect. At the group level, there seems little to lose by omitting offstage access because offstage activity plays such a small role in the group decision-making process. It seems likely, for example, that an appellate court's understanding of the information that most influenced a jury's verdict

208. Morgan, 871 N.E.2d at 178.
209. See Rose et al., supra note 9, at 22; see also supra note 163 and accompanying text.
211. In the Arizona data, there were also instances in which jurors told others that they deliberately looked over to the offstage areas to see how a party would respond to particular testimony—for example, when an expert said that a plaintiff's weight may contribute to the injury, a juror watched how the plaintiff responded. See Rose et al., supra note 9, at 19.
212. See id. at 23; see also supra note 181 and accompanying text.
213. See Rose et al., supra note 9, at 23; see also supra note 182 and accompanying text.
would change little if all they saw only the front sections of a courtroom through a camera's eye. Likewise, for filmed trials presented to juries, the "story" that the jury group puts together about the case would probably be largely the same with and without access to the offstage.

As we have indicated, however, we observed how juries decided cases, which is not the same as observing how jurors come to conclusions. With respect to individuals, our review makes clear that some individual jurors felt that some types of information were worth sharing with others; we also know that in a few instances, some trial judges and magistrates have justified their opinions through reference to the offstage. Thus, we know that when the offstage areas of a trial are available, some people will use them as one way to "cross-check" what they hear with what they see. What we do not know is how much of a difference such use made in the individual viewpoints these jurors formed in the trial. For example, we do not know how much value people attached to the opportunity to see people both on and off the witness stand and, therefore, how they might have felt without access to this region.

We know that jurors are strongly motivated to reach the correct decision, and when given the opportunity (e.g., through question-asking), they routinely find ways to further their understanding of issues they believe have not been sufficiently developed from the evidence given. Thus, it may be that live trials and the opportunity to view offstage behavior in the courtroom reassures jurors that they have been provided with appropriate input for reaching reasonable decisions. Moreover, and importantly, we do not know from these data if, for example, a filmed trial with a far more restricted view of a courtroom would alter the attentiveness of jurors to the trial or jurors' sense of certainty about their positions and the perceived coherence of their beliefs. We do not know if being a juror in a filmed trial

215. In a prior examination of how jurors make use of the opportunity to ask questions of witnesses, we showed that a substantial proportion (42%) of juror questions reflected a process we called "cross checking," which refers to jurors' interest in "evidence from disinterested witnesses or non-witness sources of probative information to compare that information with claims from other sources." Shari Seidman Diamond, Mary R. Rose, Beth Murphy & Sven Smith, Juror Questions During Trial: A Window into Juror Thinking, 59 Vand. L. Rev. 1927, 1956–57 (2006). For an examination of people's more general attempts to compare verbal and non-verbal behavior, see Erving Goffman, The Presentation of Self in Everyday Life (1959).

216. See, e.g., Diamond et al., supra note 215, at 1954–61 (discussing types of questions jurors ask in order to create a coherent account of what happened in the case).
would reduce a sense of satisfaction compared to being a juror in a live trial.\textsuperscript{217} Other studies are necessary to answer these questions.

Our data demonstrate that both individual jurors and judges use the offstage to catch a party "off his pose, if he was posing."\textsuperscript{218} Courts deciding whether or not to make greater use of pre-recorded presentation for fact finders will have to consider how to balance, on the one hand, potential losses in people's attentiveness when watching tapes as compared to live action and their interest in seeing parties and trial participants in the broadest possible context with, on the other hand, any conveniences and advantages that pre-recorded trials may offer.\textsuperscript{219} At the same time, given that offstage insights and discussions do not greatly affect group deliberations and jury verdicts, it appears that at least some of the potential dangers of live trials may be overstated. For example, we found no empirical evidence that should lead courts to feel pressure to turn to pre-recorded trials as a way to "protect" civil jurors from improper and undue influences from offstage activity. Further, because we examined just one possible implication of switching to a recorded format—that is, the possible loss of access to the offstage—we can make no pronouncement on whether, more generally, a controlled taped trial can substitute for judgments reached in response to a live trial. Far more needs to be known about judgments based on live versus taped presentations.

At this point, the most promising prospect for the use of taped trials is for appellate review rather than fact finding. On the benefit side, tape-recordings of trials would give the reviewing courts more information than a transcript does (e.g., how a juror answered a question, how someone testified, a judge's tone when issuing a ruling, or an attorney's emotion and manner before a jury).\textsuperscript{220} As our data suggest, the loss in the opportunity to capture the offstage would likely have

\textsuperscript{217} In a rare examination of the difference between live and videotaped presentation of trial information, researchers recruited jurors from a courthouse and randomly assigned them to either view a single live trial (in a large group) or to watch the same trial via videorecording. \textit{Miller & Fontes}, \textit{supra} note 5, at 71. There were only small differences in individual verdict results across the live and videotaped conditions (the groups did not deliberate). \textit{Id.} at 71. In addition, there were also no significant differences in jurors' ratings of their "interest and "motivation" across conditions; however, the direction of the mean showed that the live trial was somewhat more interesting and motivating than the taped one (4.51 versus 4.24 on a seven-point scale). \textit{Id.} at 72. It is possible that any effect on people's motivation is small and difficult to detect without large samples; Miller and Fontes observed fifty-two jurors in the live condition and forty-five jurors in the videotaped condition. \textit{Id.} at 68–69.


\textsuperscript{219} See Rothman, \textit{supra} note 4.

\textsuperscript{220} See Owen & Mather, \textit{supra} note 5.
little effect on the reviewing court’s opportunity to see most of the important information that the fact finders saw and considered when arriving at their verdicts.