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Voices From an Empty Chair

The Missing Witness Inference and the Jury*

Tina M. Webster, Heather N. King, and Saul M. Kassir

According to the empty chair doctrine, lawyers may comment on the absence of a prospective opposing witness and judges may invite the jury to draw adverse inferences from that lack of evidence. A mock jury study was conducted to determine how people react to absent witnesses and evaluate the effects of empty chair comments on decision making. Fifty subjects read a trial transcript in which a central or peripheral defense witness did not testify, and in which the prosecuting attorney did or did not suggest making an adverse inference. Pre- and postdeliberation results indicated that subjects who were in the comment condition were less favorable to the defense when the missing witness was central, but they were more favorable when that witness was peripheral. These results are discussed for their practical implications.

A party involved in a traffic accident fails to call to the witness stand a friend or relative who was a passenger during the collision. A defendant accused of armed robbery claims he was drinking in a bar at the time, but does not bring in alibi witnesses claimed to have been with him. A man tried for the murder of his stepson testifies that the child had a seizure, fell to the floor unconscious, and died. The defendant says his wife had observed the entire event, but she never testifies in his trial. Cases such as these pose interesting dilemmas for the courts. When a prospective favorable witness does not take the stand, what assumptions does a jury naturally make? Should opposing counsel be permitted in closing argument to cite that witness's absence as proof of his or her adverse testimony?

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Should a judge instruct jurors that they may draw negative inferences from that missing witness?

Although these questions arise frequently, American judges are divided on how to manage the situation. Nearly a century ago, in *Graves v. United States* (1893), the U.S. Supreme Court introduced what has come to be known as the missing witness rule, or “empty chair” doctrine. The rule states that “if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not creates the presumption that the testimony, if produced, would be unfavorable” (p. 121). In operational terms, this rule has two implications for trial procedure. First, it enables lawyers to comment on a witness’s absence and speculate about the damaging possible testimony in their closing arguments. Second, it permits judges, in the context of their final instructions, to invite the jury to draw the same negative inference.

The reasons for the empty chair doctrine are relatively straightforward (McCormick, 1984; Wigmore, 1970). The courts assume that litigants who fail to call knowledgeable witnesses are concealing evidence and should be encouraged, and even pressured, to come forward with that evidence. In addition, it is believed that jurors, even if left to their own devices, will draw adverse inferences from the absence of an expected witness. Pennington and Hastie (1986) have proposed that jurors construct plausible “stories” of events in dispute. This decision-making model thus suggests that jurors might be quite sensitive to the absence of a critical witness—indeed, any gap in evidence. Similarly, Saltzburg (1978) suggested that once jurors are presented with a theory about a case, they naturally come to expect certain kinds of supporting proof and are likely to make adverse inferences about a party that fails to satisfy these expectations. Carrying this analysis one step further, Saltzburg argued that judges should take juror expectations and inferences into account before ruling to exclude evidence considered relevant but prejudicial.

The empty chair doctrine has been criticized on at least three grounds. First, it is said to be unfair to draw adverse inferences from missing evidence because there are many other possible reasons for a witness’s failure to appear in court. For example, a litigant may choose to protect family members and friends from the stress of cross-examination. Or, a litigant may fear that a witness will lack credibility if he or she has a criminal record, an unattractive appearance, or awkward mannerisms (Stier, 1985). Second, problems may arise in cases where a missing witness is expected to testify on behalf of a criminal defendant. In *Griffin v. California* (1965), the U.S. Supreme Court ruled, based on Fifth Amendment grounds, that neither judges nor prosecuting attorneys may comment on a defendant’s failure to take the witness stand. In fact, judges may instruct jurors *not* to draw adverse inferences from a defendant’s silence (*Lakeside v. Oregon*, 1978). Questions are thus raised about whether the Fifth Amendment is compromised by any comments from the prosecutor concerning absent witnesses other than the defendant (McDonald, 1973; Tanford, 1986). A third criticism of the empty chair doctrine is that it sends a confusing mixed signal to jurors about their role as fact finders. Although jurors are admonished time and again to base their judgments only on evidence produced in court, the missing witness instruction opens the

door and invites jurors to speculate on matters that are not in evidence (Kassin & Wrightsman, 1988).

Left to their own devices, do jurors make adverse inferences concerning absent witnesses? What is the effect of the empty chair doctrine, as articulated in closing arguments and judge's instructions? To date, these issues have not been the subject of empirical investigation. From research in other contexts, however, two predictions can be made. First, when a prospective witness is *central*—that is, has unique and relevant information, or is “peculiarly available” to support a particular party—that witness is likely to be conspicuous in his or her absence, leading juries to speculate on the failure to testify, even without prompting. This hypothesis is suggested by studies indicating that people exhibit bias against criminal defendants who remain silent, even when they are specifically admonished not to draw negative inferences (Shaffer & Case, 1982). On the other hand, when a witness is *peripheral*—that is, not clearly essential to the case, or not clearly available to a particular party—juries are unlikely to make adverse inferences about his or her absence. This latter hypothesis is suggested by studies on the *feature-positive effect*, the finding that humans are relatively insensitive to events that do *not* occur (Newman, Wolff, & Hearst, 1980)—even in the realm of self-perception (Fazio, Sherman, & Herr, 1982). In a legal context, for example, Leippe (1985) found that mock jurors were more influenced to vote not guilty by an eyewitness who testified that he could not identify the accused than by the identification failure of a witness who did not appear in court.

A mock jury study was designed to examine how jurors react to missing witnesses and evaluate the effects of the empty chair doctrine on various aspects of the decision-making process. Subjects read a transcript of an insanity trial in which either a central witness (the defendant's close friend) or a peripheral witness (a co-worker) was absent, and in which the judge and opposing counsel either did or did not suggest making an adverse inference. Subjects' verdicts and opinions were assessed both before and after they deliberated in small groups.

METHOD

Subjects and Design

Fifty male and female undergraduates, scheduled in 10 small groups ($n = 4-7$ persons per group), participated in exchange for either money or course credit. Subjects were randomly assigned to one of the four cells produced by a 2 (central versus peripheral missing witness) \times 2 (empty chair comments versus no comments) factorial design.

Procedure

Participating in small groups, subjects appeared in a mock courtroom equipped with a judge's bench, witness stand, and jury box. Upon their arrival, subjects read a transcript of an insanity trial, filled out a questionnaire to be

described later, and were escorted to a jury room for up to 20 min of deliberation. To assess the effects of deliberation, subjects then filled the questionnaire out a second time.¹ At the end of each session, subjects were debriefed as a group and thanked for their participation.

Stimulus Trial

The trial used in this study was a 29-page transcript of *State v. Wilson*, a criminal case in which Charles Wilson, the defendant, pleaded not guilty by reason of insanity for the murders of his wife and neighbor. The trial contained opening statements, the examination of six witnesses, closing arguments, and instructions from the judge. In previous research, this transcript had elicited approximately a 50% conviction rate (Gallun, 1983).

Substantively, the State argued that Wilson had suspected his wife of having an extramarital affair, hired a private detective to investigate the matter, and shot his wife out of jealousy. Three witnesses were called by the prosecution. The detective confirmed that he was hired by Wilson, but said he found no persuasive evidence that Mrs. Wilson was having an affair. The police officer who made the arrest recounted his impression that the defendant was rational and coherent on the night he committed the shootings and confessed. Wilson's former supervisor at work then testified that the defendant called him to say he was "okay" and wanted his job back after the trial. The defense maintained that Wilson was traumatized as a young child when he discovered his mother in bed with a stranger and had a history of psychological disorders that included an obsession with infidelity. Two psychiatrists served as experts for the defense. The first testified that he had treated Wilson 2 years earlier, while the second diagnosed Wilson on the basis of various tests administered after his arrest as "paranoid schizophrenic with obsessive tendencies."

Independent Variables

To establish juror expectations for a missing witness, defense counsel noted in his opening statement that Charles Wilson had talked about his emotional difficulties to a close friend (a witness we defined as central because of the expectation that he would appear on behalf of the defendant) and to co-workers (persons defined as peripheral because they would not necessarily be expected to testify for the defendant).² In the *missing-central condition*, a co-worker testified, but the close friend did not. In the *missing-peripheral condition*, the friend testified but the co-worker did not. All versions of the transcript thus contained exactly the same information (i.e., the witness corroborated the claim that Wilson

¹ Deliberations were unobtrusively videotaped for subsequent analysis through the use of a hidden camera. Because of technical failure, however, the tapes were inaudible.

² These relative expectations were evident in separate testing. After reading a brief summary of the case, subjects were asked to list those individuals whose testimony they would expect to find in a transcript of the proceedings. Out of 10 subjects tested, 7 listed the close friend, but only 1 listed a co-worker.

had serious emotional problems relating to women and his wife's fidelity), but varied in the extent to which jurors are likely to expect the source of that information to testify in support of the defendant.

The empty chair doctrine was also systematically varied. In a *comment condition*, the prosecutor cited the absent defense witness in his closing argument and the judge invited the jury to draw an adverse inference in the instructions. In the *no-comment condition*, neither the prosecutor nor the judge made these references. In short, we sought to compare two fully different procedures—one that permits both lawyers and judges to comment, and one that does not.

In those transcripts that included comment, the prosecutor referred to the defendant's claim that he spoke to his close friend (co-workers) about his troubles, and said: "I put it to you, ladies and gentlemen—where is Mr. Steven Marshall (John Mills)? Is it possible that Mr. Marshall (Mills) would not have corroborated the misinformed opinion of the psychiatrists? I think it is. Members of the jury, if your best friend (co-worker) were in this kind of trouble, wouldn't you want to be here to help him? I think, in weighing the evidence, you will come to the conclusion that I have."

Also within the comment condition, the judge's charge to the jury included the following instruction, approved for use in federal courts (Devitt & Blackmar, 1977; for alternative language, see Marshall, Flannery, & Higginbotham, 1982):

If, according to appropriate procedures, the court is shown that a witness is available to one of the parties alone, and the anticipated testimony of the witness would elucidate some material issue, and the party who fails to produce the witness offers no explanation, then the factfinder may be permitted, but is not required, to infer that the testimony would have been unfavorable to the party who failed to call the witness. (pp. 565–566)

Dependent Measures

Both before and after deliberation, subjects filled out a four-page questionnaire in which they marked a verdict of "guilty" or "not guilty by reason of insanity" (NGRI), their confidence in that verdict (0–8 scale), and their estimates of the likelihood that the defendant was legally insane (0–100% scale).

On 8-point scales, subjects rated the extent to which they were influenced by each witness (since there was testimony from either the friend or co-worker but not both, "did not testify" was included as a response option) and by judge's instructions. To examine the impact of empty chair arguments on perceptions of the attorneys who use them, we asked subjects to rate the prosecutor and defense lawyer on the following dimensions: well prepared, competent, sleazy, lazy, trustworthy, resourceful. Finally, subjects were asked two open-ended questions: "Is there additional information or testimony you feel you needed?" and "If you found the judge's instruction influential, please specify what parts were most important in your decision." The first question was designed to assess whether subjects in the comment condition cited the missing witness, and whether—in violation of the spirit of *Griffin v. California*—they were prompted to desire testimony from the defendant. The second question was designed to evaluate whether they viewed the empty chair portion of the judge's instruction as influential.

RESULTS

Manipulation Checks

To evaluate the effectiveness of the missing witness manipulation, subjects in the central and peripheral conditions were compared for the frequency with which they circled "0" ("did not testify") in their predeliberation ratings of the witnesses in question. Correctly, subjects were far more likely to recall that the defendant's close friend was absent in the missing central condition than in the missing peripheral condition (67% and 3.8%, respectively; $\chi^2(1, N = 50) = 21.95, p < .001$). Similarly, they were more likely to recall that the defendant's co-worker was absent in the missing peripheral condition than in the missing central condition (84.6% and 4.2%, respectively), $\chi^2(1, N = 50) = 32.52, p < .001$.³ It is interesting that these percentages were not significantly different from each other, nor were they influenced by the empty chair factor. Apparently, subjects were aware of the witness's presence or absence without prompting.

To examine whether the empty chair manipulation (i.e., the prosecutor's comment and judge's instruction) heightened sensitivity to the missing witness, we counted the number of subjects who, in their predeliberation questionnaires, cited (a) the absence of the close friend or co-worker in response to the question, "Is there additional information or testimony you feel you need?" and (b) the empty chair portion of the judge's instruction. As it turned out, 27% of the subjects in the comment condition expressed a need for testimony from the missing witness, compared to only 4% of those in the no-comment condition, $\chi^2(1, N = 50) = 4.81, p < .05$. With regard to the empty chair portion of the judge's instruction, 23% of the subjects in the comment condition wrote in their open-ended responses that it had influenced their decisions (obviously, nobody in the no-comment condition cited this instruction, $\chi^2(1, N = 50) = 6.29, p < .01$).

Verdicts

Overall, 19 subjects voted guilty and 31 voted NGRI, for a .38 conviction rate. On a 0–8 scale, the overall mean level of confidence was 5.12 (5.73 and 4.74 for those who voted guilty and NGRI, respectively), $t(48) = 1.94, p < .10$. To test the effects of empty chair comments, type of missing witness, and deliberation, verdicts and confidence ratings were combined for analysis. By assigning positive confidence values to guilty verdicts and negative values to NGRI verdicts, scores could thus range from –8 (maximum confidence in a NGRI verdict) to +8 (maximum confidence in a guilty verdict). On a 0–100 scale, subjects also estimated the probability that the defendant was insane (PI).

Verdict-confidence scores and PI estimates were submitted to 2 (central-peripheral missing witness) \times 2 (empty chair comments–no comments) \times 2 (pre-post deliberation) analyses of variance with repeated measures on the last factor.

³ After deliberation, 3 additional subjects who had previously rated a missing witness (i.e., by circling a number other than "0") correctly acknowledged that witness's absence.

A similar pattern of results was obtained on both measures. When the missing witness was a peripheral rather than central figure in the defendant's life (i.e., when testimony was provided by the close friend rather than co-worker), subjects were more likely to favor conviction (verdict-confidence M 's = .27 and -1.88), $F(1,46) = 4.03$, $p < .05$, and less likely to judge the defendant insane (PI M 's = 39.04 and 55.19), $F(1,46) = 4.81$, $p < .05$. Conceptually, these main effects make sense. Since the same testimony was presented in all conditions, subjects discounted that testimony when it was attributed to a partial source such as the defendant's friend (i.e., when the actual witness was central, and the *missing* witness was peripheral) than when it was attributed to a less interested co-worker (i.e., when the witness was peripheral, and the *missing* witness was central).

Importantly, the main effect for missing witness type was qualified by a significant two-way interaction with the empty chair manipulation. On our verdict-confidence measure, this interaction revealed that when empty chair comments were made, subjects in the missing central condition became *less* favorable to the defense, while those in the missing peripheral condition became *more* favorable to the defense, $F(1,46) = 4.43$, $p < .05$. This same interaction was obtained for probability-of-insanity estimates. That is, empty chair comments led subjects to *lower* their PI estimates in the missing central condition and to *raise* their PI estimates in the missing peripheral condition, $F(1,46) = 6.81$, $p < .01$. Although this pattern was somewhat stronger after deliberation than before, there were no significant differences—either alone or in combination with other variables—between pre- and postdeliberation measures. The results are presented in Table 1.

Perceptions of Attorneys

To examine the effects of the missing witness and empty chair manipulations on perceptions of opposing counsel, we had subjects rate the prosecution and defense lawyers on various dimensions. These data were then analyzed within 2 (central-peripheral missing witness) \times 2 (comments–no comments) \times 2 (pre–post deliberation) analyses of variance with repeated measures on the last factor.

A consistent, meaningful pattern was obtained on ratings of the prosecutor (i.e., the lawyer who commented on the missing witness). To begin with, significant main effects for the repeated measures factor indicated that subjects per-

Table 1. Verdict-Confidence Scores and Likelihood-of-Insanity Estimates as a Function of the Missing Witness and Empty Chair Factors

Dependent measures	Missing central witness		Missing peripheral witness	
	NC ^a	Comment	NC	Comment
Verdict-confidence ^b	-3.64	-.38	2.15	-1.62
Likelihood-of-insanity ^c	62.50	47.88	27.12	50.96

^a No comment condition.

^b Higher numbers favor the prosecution.

^c Higher numbers favor the defense.

ceived the prosecutor as less competent, $F(1,46) = 20.66, p < .001$; not as prepared, $F(1,46) = 16.40, p < .001$; and less resourceful, $F(1,46) = 5.91, p < .02$, after deliberation than before. More relevant to our main concern, significant interactions between the empty chair and missing witness factors were also obtained. On ratings of competence, preparedness, resourcefulness, and laziness, missing-witness comments elicited different overall reactions depending on whether that witness was central or peripheral, $F(1,46) = 5.94, p < .02$; $F(1,46) = 6.17, p < .02$; $F(1,46) = 5.13, p < .05$; $F(1,46) = 4.50, p < .05$. When the missing witness was central, the prosecutor was rated as better prepared, more resourceful, and less lazy when he commented on that witness's absence than when he did not (all p 's $< .05$ via Newman-Keuls). When the missing witness was peripheral, the prosecutor was perceived as less competent, less prepared, and less resourceful when he commented than when he did not (all p 's $< .05$ via Newman-Keuls). These results are shown in Table 2.

On two measures, the results just described were qualified by significant three-way interactions. Specifically, on ratings of preparedness and resourcefulness, our findings—that missing central subjects were more favorable toward the prosecution in the comment condition, whereas missing peripheral subjects were more favorable in the no-comment condition—were stronger on postdeliberation than on pre-deliberation measures, $F(1,46) = 5.61, p < .02$; $F(1,46) = 3.64, p < .06$. Thus, although we were unable to know what had transpired during deliberations, indirect evidence suggests that subjects had discussed the reasonableness of the prosecutor's empty chair remarks (i.e., whether the remarks were justified by the status of the missing witness).

Evaluations of the defense attorney were not affected by our independent variables. The one exception was that subjects rated him as less prepared after deliberation than before (M 's = 5.25 and 5.61, respectively), $F(1,46) = 5.67, p < .02$. A significant Comment \times Pre-post interaction, $F(1,46) = 3.93, p < .05$, further indicated that this drop occurred within the comment condition (M 's = 5.85 and 5.19, $p < .10$), but not in the no-comment condition (M 's = 5.37 and 5.31, n.s.). Once again, it appears that subjects may have discussed the prosecutor's empty chair comment during deliberation, concluding from that discussion that the defense lawyer was not that well prepared.

Table 2. Ratings of the Prosecuting Attorney as a Function of the Missing Witness and Empty Chair Factors

Dependent measures	Missing central witness		Missing peripheral witness	
	NC ^a	Comment	NC	Comment
Competent	4.50	5.00	6.12	4.92
Prepared	4.09	5.00	5.69	4.85
Resourceful	4.09	4.96	5.56	4.58
Lazy	3.41	2.19	2.40	3.19

^a No comment condition.

Additional Effects

Recall that subjects were asked if they felt they needed additional information or testimony. This question was designed to assess whether the empty chair comment led subjects to cite the missing witness, and whether—in violation of the spirit of *Griffin v. California*—it prompted a desire for testimony from Charles Wilson, the defendant. Overall, 10 subjects expressed an interest in the defendant's testimony before deliberation, and 9 after deliberation. On pre-deliberation questionnaires, no significant differences were found. On post-deliberation questionnaires, however, subjects in the comment condition tended to make more such requests than those in the no-comment condition (26.7% and 8.3%, respectively, $p < .10$). Although this result is not significant, it suggests the possibility that subjects in the empty chair condition discussed the defendant's failure to testify during their deliberations.

DISCUSSION

The present study examined whether jurors are naturally sensitive to missing central and peripheral witnesses, and whether the introduction of empty chair comments leads them to draw the suggested adverse inferences. As it turned out, our findings support the hypothesis that people will hold a party responsible for a missing witness, at least when prompted to do so by the judge and opposing counsel.

To summarize the results, subjects in the no-comment condition were no less favorable toward the defense when the missing witness was central than peripheral. In fact, these subjects were more favorable to the defense when a co-worker testified than when the same testimony was provided by a close friend. Consistent with the attributional principle of discounting (Kelley, 1971), subjects in the no-comment condition trusted the co-worker more than they did the friend, whose testimony may well have been biased by his relationship to the defendant. Thus it appears that these subjects were sensitive to the credibility of the witness who was present, not to one who was absent.

In the comment condition, subjects drew the adverse inference when the judge and opposing lawyer invited them to do so. It is interesting that whereas all subjects—including those in the no-comment condition—recognized that the witness in question was absent, only those in the comment condition were influenced by that absence. The nature of the impact, however, depended on the status of the missing witness. As one might expect, subjects in the missing central condition were persuaded by the prosecutor's argument and were less favorable to the defense. Realizing that the defendant did not produce supportive evidence uniquely available to him, subjects lowered their PI estimates and voted for conviction. Yet in the missing peripheral condition, subjects exhibited what may be described as a boomerang effect—unmoved by the prosecutor's argument, they raised their PI estimates and voted for acquittal.

The same pattern of results was also evident in ratings of the prosecutor, the attorney who used the empty chair argument. When the missing witness was central, the prosecutor was rated more favorably when he commented than when he did not. In the missing peripheral condition, however, the prosecutor was rated *less* favorably when he commented than when he did not. This finding suggests that the impact of the empty chair argument depends on its plausibility (e.g., whether the party has access to that witness, the importance or supportiveness of the anticipated testimony). When a witness is not one who could reasonably be expected to provide important and favorable testimony, or when the witness is not reasonably available to the party in question, the empty chair argument may lead jurors to believe that opposing counsel engaged in unfair tactics, perhaps out of desperation.

At this point, two practical questions should be raised. First, is the missing witness inference “natural,” an argument made by proponents of the empty chair doctrine? Second, should juries be invited, if not encouraged, to draw these adverse inferences? The first question is easier to answer than the second. Consistent with studies of the feature positive effect (Newman et al., 1980; Fazio et al., 1982), but in contrast to assumptions made about jury decision making (Saltzburg, 1978), our results suggest that the inference is not as natural as it may seem. That is, subjects in the no-comment condition were aware that the prospective central or peripheral witness had never testified, but they did not draw the anticipated negative inference. Thus, at least this argument for the empty chair doctrine is without support.

Should empty chair comments, then, be permitted? The present study does not provide a clear answer to this question. For trial attorneys, there are potential costs and benefits associated with making empty chair comments, depending on the status of the absent witness. Lawyers who comment on a missing central witness may draw the jury’s attention to a hole in the opponent’s case, reap the benefits of the inferences likely to be drawn, and elicit the perception that they themselves are competent lawyers. On the other hand, attorneys who drag a missing peripheral witness into evidence risk alienating the jury by making what may appear to be an implausible argument and eliciting the perception that they themselves are not competent, prepared, or resourceful. Our results thus support the comforting conclusion that empty chair arguments cannot easily be used for unfair strategic purposes, without regard for the extent to which a jury already has a reason to expect testimony from the witness in question.

A corollary objective of the present research was to explore the possibility that the missing witness instruction invites jurors—who are otherwise routinely admonished to base their judgments exclusively on evidence produced in court—to speculate on matters not in evidence (Kassin & Wrightsman, 1988). Of particular concern on this matter is whether the instruction prompts in jurors a desire to hear testimony from the criminal defendant, in violation of the spirit of *Griffin v. California* (1965). As it turned out, subjects in the comment condition were somewhat more likely after deliberation to report such a desire than those in the no-comment condition. Without a record of the deliberations, we cannot know for

sure whether the missing witness instruction leads jurors to discuss the defendant's absence, or whether it leads them explicitly to draw the suggested adverse inferences. Further research is needed to test this important question.⁴

Follow-up research is also needed to evaluate two other interesting but unanswered questions raised by the present study. First, what were the active ingredients of our empty chair manipulation? Rather than separate the effects of an attorney's comment and the judge's instruction, we sought as a first step to compare their combined effect. After all, in courts that deem it appropriate to raise the issue, it is typical for both counsel and judge to comment (Stier, 1985).⁵ At this point, it remains for additional research to determine their independent effects on the jury, and even the role that opposing counsel may play in trying to offset the suggested negative inference.

Second, to what extent can our study be linked in general to evidence and the jury decision-making process? According to Pennington and Hastie (1986), juries try to transform fragments of information into plausible stories that connect the various actors and episodes and make inferences about events not in testimony in order to fill in missing story details. Informed by this model, one might predict that a missing witness would influence the jury only when it leaves a noticeable gap in the story the jury happened to construct. Perhaps if opposing counsel can lead the jury to adopt a theory of the case that does not critically involve the missing witness, the effect would diminish. Carrying this analysis one step further, it is interesting to consider Saltzburg's (1978) suggestion that judges take possible inferences into account in general before ruling to exclude evidence that may be cumulative, misleading, or prejudicial.

Finally, it is important to consider the external validity of our findings. Conducted in a mock jury paradigm, questions may be raised about the extent to which the results generalize to real juries in a real courtroom (Dillehay & Nietzel, 1980; Bray & Kerr, 1982). Since subjects made hypothetical decisions and deliberated for a brief period of time, the present study may not estimate all possible effects of the empty chair rule. Perhaps under more involving circumstances, in which there is more time to reflect on the evidence present and absent, juries would prove even more likely to draw the suggested adverse inferences from a missing witness. At the same time, it is conceivable that highly involved jurors would draw these same inferences on their own. In short, further research is needed to assess the role of involvement and other matters of external validity.

⁴ Point-biserial correlations revealed that subjects who reported a desire for testimony from the defendant were somewhat more likely to favor the prosecution in their verdict-confidence scores ($r = .17, p < .20$). There was not a comparable correlation between ratings of the influence of the judge's instructions and verdict-confidence scores ($r = .05, n.s.$).

⁵ Many judges have argued, in fact, that once the conditions for a missing witness inference have been satisfied and counsel permitted to comment, the court should be *required* to instruct the jury on the matter (for opinions on the issue, see *Burgess v. United States*, 1970; and *United States v. Young*, 1972).

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