

12-2022

Rethinking Evidentiary Rules in an Age of Bench Trials

Henry Zhuhao Wang

Follow this and additional works at: <https://scholarship.law.uci.edu/ucilr>



Part of the [Evidence Commons](#)

Recommended Citation

Henry Z. Wang, *Rethinking Evidentiary Rules in an Age of Bench Trials*, 13 U.C. IRVINE L. REV. 263 (2022).
Available at: <https://scholarship.law.uci.edu/ucilr/vol13/iss1/10>

This Article is brought to you for free and open access by UCI Law Scholarly Commons. It has been accepted for inclusion in UC Irvine Law Review by an authorized editor of UCI Law Scholarly Commons.

Rethinking Evidentiary Rules in an Age of Bench Trials

Henry Zhuhao Wang*

American jury trials are vanishing. Statistics indicate that the number of jury trials in U.S. federal and state courts has diminished for decades, a phenomenon that has become even more pronounced amid the ongoing COVID-19 pandemic. Courts throughout the nation are on track for more than a year without any trials by jury. But as jury trials wane, bench trials are dominant in federal and state courts for both civil and criminal cases. What does that mean, then, for evidentiary rules? The Federal Rules of Evidence (FRE), first adopted in 1975, codify federal evidence law and have been adopted by the vast majority of states. Technically speaking, these rules apply to both jury and bench trials. However, in practice, trial judges often apply rules of evidence loosely when they sit without a jury. Time and again in bench trials, objections to the admissibility of evidence are met with the judicial response of, “I’ll let it in and just give it the weight it deserves.” In an era when bench trials have become the new normal, such an enormous gap between the law in operation and that in the books suggests the need to reexamine the current arrangement of the FRE, to inquire whether bench trials should have their own customized rules of evidence, and, if so, what those rules should look like. This Article examines the similarities and differences between jury and bench trials in judicial fact-finding and explains why bench trial judges cannot rely on Free Proof and instead still need the guidance of evidence rules—albeit different rules than those used for jury trials. This Article proposes what those rules for bench trials might look like and discusses why and how such a project could go beyond bench trials, making a profound impact globally.

*Associate Professor of Law, Institute of Evidence Law and Forensic Science, China University of Political Science and Law; Visiting Professor, Indiana University Bloomington Maurer School of Law (2022-23); Tallahassee Alumni Professor of Law, Florida State University College of Law (starting Fall 2023). I am grateful to the 2021 Evidence Summer Workshop hosted by Vanderbilt University Law School where an early draft of this Article was presented. I extend special thanks to Ronald J. Allen, Edward K. Cheng, James Steiner-Dillon, Edward J. Imwinkelried, Andrew Ligertwood, Alex Nunn, Aviva Orenstein, Catherine Struve, Frederick Schauer, and Deborah Widiss for reading this Article and providing helpful, illuminating comments.

I.	The New Normal of Bench Trials and the Old Normal of Evidentiary Rules	265
	A. The Reality: Exit the Jury.....	265
	B. The Dilemma: Jury Thinking of Evidence Law Still Dominates	272
II.	Similarities and Differences Between Jury and Bench Trials in the Juridical Proof Process	273
	A. Similarities.....	273
	1. As trier of fact, both the jurors in a jury trial and the judge in a bench trial have the same central goal: to the extent possible, discover the truth of the case.....	274
	2. Both the jurors in a jury trial and the judge in a bench trial need to determine the disputed facts at issue within a short amount of time and with limited resources.	275
	3. Both the jurors in a jury trial and the judge in a bench trial face information scarcity; available information is presented disjointedly by adversarial (and, thus, interested) parties.....	276
	4. Both professional judges and lay jurors are human beings susceptible to epistemic pitfalls.....	278
	B. Differences	281
	1. The judge in a bench trial has a discretionary, active role throughout the litigation process, unlike the jury, which has a limited, passive role.....	281
	2. In a bench trial, a single person (the judge) handles the bifurcated fact-finding process of a jury trial	283
	3. Judges in bench trials have legal training and experience; they are repeat players and public figures. By contrast, jurors are laypersons and one-time participants; they are “nameless” triers of fact.....	284
III.	The Allure of Free Proof and Its Dangers: Bench Trials Still Need Evidentiary Rules.....	285
	A. The Deadly Attractiveness of Free Proof	286
	1. The natural process of fact-finding is more contextualized and tailored to the human beings involved and thus more recognizable and attractive than a technical system.	287
	2. Free Proof allows for greater epistemological completeness.....	288
	B. Problems with Free Proof	289
	1. Judges’ epistemic exceptionalism is false.....	289
	2. Judicial fact-finding and value preferences are not segregated.	293

C.	The Continued Need for Evidentiary Rules in Bench Trials.....	295
IV.	But a Different Set of Rules—Why Federal Rules of Evidence Are Not a Good Fit for Bench Trials.....	298
A.	Federal Rules of Evidence Are Relics of the Jury-Trial Tradition in the Common Law System	298
B.	Federal Rules of Evidence Are Designed for Working in a Bifurcated Structure of Fact-Finding That Is Missing in Bench Trials	301
C.	In Bench Trials, Admissibility of Evidence Is Not the Judge’s Most Important Concern in Fact-Finding	303
V.	What Could or Should Evidentiary Rules for Bench Trials Look Like? ..	304
A.	Aim for Concise Rules That Respect Bench Trial Judges’ Discretion and Yet Mitigate Abuses of Discretion, Inconsistencies, Unpredictability, and Unfairness in Fact-Finding ..	304
B.	Consider Keeping Most Rules Relating to Extrinsic Purposes and Epistemic Principles with Universal Values.....	306
C.	Incorporate Rules on Assessing New Forms of Evidence and Complex Evidence	307
D.	Develop Rules on Assessing the Reliability of Evidence	308
E.	Bench Trial Rules Should Consider Not Just Information Input Control but Also Process and Output Control.....	310
VI.	Impact Beyond Bench Trials.....	312
	Conclusion.....	314

I. THE NEW NORMAL OF BENCH TRIALS AND THE OLD NORMAL OF EVIDENTIARY RULES

A. The Reality: Exit the Jury

When one thinks of the American justice system, one thinks of justice being administered by juries of our peers. Jurist William Blackstone once said, “[trial by jury is] a privilege of the highest and most beneficial nature[and our] . . . most important guardian both of public and private liberty.”¹ In criminal cases, the Sixth Amendment to the U.S. Constitution provides that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury,”² while in civil cases, the Seventh Amendment guarantees the right to a jury trial for claims at law.³ From American television, Hollywood movies, and popular fiction to the real-life “trial of the century,” the O. J. Simpson case, jury trials are iconic symbols of American

1. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1949, 2661 (William Carey Jones ed., 1916) (1768, 1769).

2. U.S. CONST. amend. VI.

3. U.S. CONST. amend. VII.

justice. Important jury trials are broadcasted by media and discussed around the watercooler and the kitchen table alike. Their influence on American culture and the perception of the justice system is long-lasting, far-reaching, and penetrating.

However, as Marc Galanter famously stated, American jury trials are vanishing.⁴ Statistics indicate that the number of jury trials in U.S. federal and state courts in both civil and criminal cases has diminished for decades, in both absolute (i.e., total number) and relative terms (i.e., as a percentage of all case dispositions).⁵ According to a recent study, the number of American jury trials has dropped so dramatically that “the jury trial is an exceptional rather than a commonplace outcome.”⁶ The percentage of federal civil cases decided by jury trial dropped from 5.5% in 1962 to 0.8% in 2013.⁷ Likewise, the percentage of federal criminal cases decided by jury trial dropped from 8.2% in 1962 to 3.6% by 2013.⁸ A 2016 *New York Times* article noted, vividly, that Judge Jesse M. Furman had presided over only one criminal jury trial in four-plus years on the bench in the U.S. District Court in Manhattan, one of the most active courts in the nation.⁹ And he is far from alone.¹⁰

Exacerbating this trend, the COVID-19 pandemic has dealt American jury trials a decisive blow. According to data reported by the Fully Informed Jury Association, as of December 16, 2020, of the ninety-four U.S. federal district courts, nine had suspended criminal jury trials indefinitely, and another fifty-two

4. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004).

5. See BRIAN H. BORNSTEIN & EDIE GREENE, *THE JURY UNDER FIRE: MYTH, CONTROVERSY, AND REFORM* 8 (2017); Galanter, *supra* note 4; Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, LITIG., Winter 2004, at 1, 1.

6. Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 122 (2020) (citing Galanter, *supra* note 4).

7. *Id.* (“Although civil case filings in federal courts, where the data are most reliable, have increased fourfold since the early 1960s, the percentage of civil cases disposed of by jury trial decreased from approximately 5.5% in 1962 to 1.2% by 2002 and to 0.8% by 2013.” (first citing Galanter, *supra* note 4; and then citing SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 2 (2016))).

8. *Id.* (“[T]he percentage of federal criminal cases disposed of by jury trial decreased from approximately 8.2% in 1962 to less than 5% in 2002 and to 3.6% by 2013. In states that maintain accurate records of bench and jury trials, jury trial rates also declined. From 1976 through 2002, civil jury trial rates fell from 1.8% to 0.6% in courts of general jurisdiction in the 22 most populous states, while felony jury trial rates declined from 3.4% to 1.3%.” (first citing Galanter, *supra* note 4; and then citing THOMAS, *supra* note 7)).

9. Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html> [<https://perma.cc/FJ4W-7SWZ>].

10. *Id.* (“Judge J. Paul Oetken, in half a decade on that bench, has had four criminal trials, including one that was repeated after a jury deadlocked. For Judge Lewis A. Kaplan, who has handled some of the nation’s most important terrorism cases, it has been 18 months since his last criminal jury trial.”).

had suspended them at least through the end of 2020.¹¹ And at the state level, criminal jury trials were suspended indefinitely in five states and at least through the end of 2020 in twelve more.¹² Courts all over the nation are on track for an absence of jury trials for more than a year.¹³

With all the attention that jury trials receive, it is easy to overlook the importance of their less flashy counterpart in American courtrooms—bench trials. The number of bench trials is declining in the United States in favor of settling out of court (plea bargains in criminal cases, negotiations and arbitration in civil cases). Nevertheless, the downward trend for bench trials has been significantly slower than for jury trials, and the overall scale of bench trials (both civil and criminal) on both federal and state levels has remained relatively stable over the years.¹⁴

11. *Report on the Status of Trial by Jury in U.S. Courts During the COVID-19 Pandemic*, FULLY INFORMED JURY ASS'N (Dec. 11, 2020), <https://fija.org/covid-19/nationwide-jury-trial-status-during-the-covid-19-pandemic.html#key> [<https://perma.cc/S2FG-RP4X>].

12. *Id.*

13. The crisis of American jury trials started to show signs of easing when courts all over the nation started to report jury trials again since mid-March 2021. *See, e.g.*, Megan Crepeau, *Cook County's First Jury Trial After COVID-19 Closures Set for Monday, as Defendant's Lawyer Calls It 'Publicity Stunt'*, CHI. TRIB. (Mar. 16, 2021, 4:26 PM), <https://www.chicagotribune.com/news/criminal-justice/ct-cook-county-first-jury-trial-20210316-gh5k5zagk5g63ks72fneuebqiu-story.html> [<https://perma.cc/D7CQ-VR3B>] (“Ronald Montgomery, 23, would be the first criminal defendant to face jurors at the Leighton Criminal Court Building in more than a year.”).

14. According to recent studies, bench trials (both civil and criminal) tend to be more common each year in U.S. federal and state courts than jury trials. For bench trial data of U.S. federal district courts, see *Judicial Business of the United States Courts*, U.S. CTS. <https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts> [<https://perma.cc/9BZP-MB4W>] (last visited Nov. 6, 2022). Annual bench trial data of U.S. federal district courts is extracted from the “Trials Completed” section of the corresponding year’s “U.S. District Courts – Judicial Business” report (“the U.S. Judicial Business Report”) which is publicly available on the U.S. Courts website. *See id.* For example, for bench trial data of U.S. federal district courts for the year 2020, the corresponding paragraph in the U.S. Judicial Business Report 2020 states:

Total civil trials declined 34 percent (down 1,314 trials) to 2,548. Seventy-six districts reported fewer civil trials. *Civil nonjury trials fell by 596 trials to 1,889*, with 65 districts reporting decreases. Civil jury trials dropped 52 percent (down 718 trials) to 659, with 78 districts reporting reductions. Total criminal trials decreased 28 percent to 5,433 (down 2,120 trials) as 79 district courts reported reductions in criminal trials. *Criminal non-jury trials dropped 24 percent to 4,329 (down 1,341 trials)*, with 73 district courts reporting lower numbers of these trials. Criminal jury trials decreased 41 percent to 1,104 (down 779 trials) as 73 district courts reported more trials of this type and totals in five district courts stayed the same. Article III judges accepted guilty pleas from 61,991 felony defendants, down 15 percent from 72,822 in 2019.

U.S. District Courts—Judicial Business 2020, U.S. CTS., <https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2020> [<https://perma.cc/3ZSX-G2GQ>] (last visited Nov. 6, 2022) (emphasis added). For bench trial data of state courts, see Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004). However, there is a whole different school of scholarship claiming that bench trials are far less common than jury trials in the United States, in both civil and criminal cases and at both the federal and state levels. *See, e.g.*, Thomas A. Mauet, *Bench Trials*, LITIG., Summer

The report *Judicial Business of the United States Courts*, which was first published in 1997, provides useful data on jury trials and bench trials in federal district courts, allowing us to track changes in their magnitude over the past two decades.

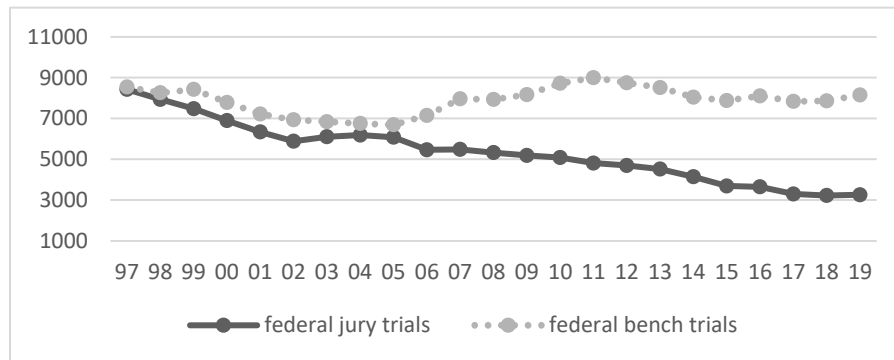


Diagram 1

Diagram 1 compares annual total numbers (civil and criminal) of bench trials and jury trials in all ninety-four U.S. federal district courts between 1997 and 2019.¹⁵ Bench trials represent a clear majority role in federal district courts during this time, with the margin widening year by year after roughly 2005. In 1997, there were 123 more bench trials than jury trials in federal district courts, whereas in

2002, at 13, 13 (“How often do bench trials occur? In criminal cases, about 10 to 15 percent of all trials are bench trials (the percentages can vary significantly among the state and federal jurisdictions). In civil cases, about 30 to 35 percent of all trials are bench trials.”); Nora Freeman Engstrom, *The Diminished Trial*, 86 *FORDHAM L. REV.* 2131, 2137 (2018) (“[O]ver the years, we have seen a sharp rise in the proportion of jury trials as compared to bench trials: In 1983, the majority (56 percent) of federal civil trials were conducted without a jury; only a minority (44 percent) were jury trials. But by 2016, that had flipped: 71 percent of trials (1965 out of 2781) were jury trials; a mere 29 percent (816 out of 2781) weren’t.” (first citing *ADIN. OFF. OF THE U.S. CTS., REPORT OF THE DIRECTOR* tbl.C-4 (1983); and then citing Galanter, *supra* note 4)); Diamond & Salerno, *supra* note 6 (“Bench trials have not taken the place of jury trials. Rather, the trial itself has been disappearing.” (citing Galanter, *supra* note 4)). The reason for this disagreement among scholars about the proportion of jury and bench trials is the unsettled, inconsistent definition of “trial.” Those scholars who believe that jury trials outnumber bench trials take a narrow definition of what constitutes a trial: proceedings tried to verdict or decision (final judgment). In contrast, Reports of the Judicial Business of U.S. Courts as well as most states that report to the National Center for State Courts’ Court Statistics Project take a broad definition of “trial” when reporting trials for statistical purposes: district court trials include proceedings resulting in jury verdict and other final judgments by the courts, as well as other contested hearings at which evidence is presented. This Article follows the latter approach, taking a broad definition of what constitutes a trial: a trial is counted when the first witness is sworn or the evidence is introduced.

15. Diagram 1 is based on public data extracted from *Judicial Business of the United States Courts*, *supra* note 14 (Reports 1997–2019).

2019, the difference was 4,895, representing an almost forty-fold increase. In terms of percentage, bench trials accounted for 50.4% of trials in federal district courts in 1997, and 71.4% in 2019. Diagram 1 also demonstrates the diminishing numbers of jury trials in federal district courts over the years (from 8,423 jury trials in 1997 to 3,260 in 2019). In contrast, the number of bench trials in federal district courts remained relatively stable throughout the period, with only a slight decline across these two decades (from 8,546 bench trials in 1997 to 8,155 in 2019).

Because of the impact of the COVID-19 pandemic,¹⁶ most adjudicative work in federal courts—for jury and bench trials alike—was either suspended or postponed in the calendar year of 2020, and thus the relevant statistical data for this year must be examined separately. Nonetheless, because the *Judicial Business of the United States Courts* calculates years on a cycle from October 1 to September 30 (with the report for 2020, e.g., covering the twelve-month period ending September 30, 2020), a significant number of adjudicated cases were still completed in federal district courts in that report year, as is shown in Table 1.

YEAR	TOTAL	CIVIL JURY	CIVIL BENCH	CRIMINAL JURY	CRIMINAL BENCH	Total jury trials	Total bench trials
2018	11088	1417	2496	1809	5366	3226	7862
2019	11415	1377	2485	1883	5670	3260	8155
2020	7981	659	1889	1104	4329	1763	6218

Table 1

In this COVID-19 era, the logistics of impaneling a jury and keeping the jurors safe can be a daunting task. Often, the choice of a bench trial becomes a practical necessity, preferred by the parties and appreciated by the court, since bench trials are usually faster, safer for all participants, less weighed down by law and motion practice, and free from the unpredictable *voir dire*.¹⁷ As Table 1 indicates, even though both federal jury and bench trials were hit heavily in the wake of the pandemic, jury trials were affected at a much greater magnitude across

16. The first CDC confirmed United States coronavirus case was reported on January 21, 2020. See Press Release, Ctrs. for Disease Control & Prevention, First Travel-Related Case of 2019 Novel Coronavirus Detected in United States (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> [https://perma.cc/4YDG-E965].

17. See, e.g., Holly Boyer & Kevin Nguyen, *Benefits of a Bench Trial in This COVID-19 Era*, *ADVOCATE* (Dec. 2020), <https://www.advocatemagazine.com/article/2020-december/benefits-of-a-bench-trial-in-this-covid-19-era> (last visited Feb. 6, 2022) [https://perma.cc/2X22-NAJB].

both civil and criminal cases.¹⁸ In 2020, compared to the two immediately preceding report years, federal civil jury trials declined by 53.5% and 52.1%, and criminal jury trials declined by 39% and 41.4%. In contrast, the corresponding losses for federal bench trials were only 24.3%, 24%, 19.3%, and 23.7%, respectively. Meanwhile, bench trials accounted for a larger proportion of the total cases in federal district courts compared to the preceding years (an increase of 9.8% for civil cases and 4.6% for criminal cases compared to 2019), reaching in 2020 an all-time high of 74.1% of all civil trials and 79.7% of all criminal trials, which further consolidated their dominant position in federal courts.

At the state level, jury and bench trial statistics have exhibited a similar trend. However, unlike what has been released in the *Judicial Business of the United States Courts*, comprehensive statistics on all fifty states are not available.¹⁹ One of the best reports available on trial trends in state courts was issued by the National Center for State Courts (NCSC) in 2004.²⁰ According to this NCSC report, which samples data from twenty-three states across twenty-seven years (1976–2002), both criminal jury trials and criminal bench trials at the state court level showed a decline (Diagram 2)²¹, but the decline for bench trials (10%, from 61,382 to 55,447) was less severe than that for jury trials (15%, from 42,049 to 35,664). Also, throughout the period under study, the total number of criminal bench trials constantly outnumbered jury trials in the sample states, by a margin of about five thousand to twenty thousand cases each year.

18. Table 1 is based on public data extracted from *Judicial Business of the United States Courts*, *supra* note 14 (Reports 2018–2020).

19. One of the most severe challenges and obstacles for collecting comprehensive data of jury and bench trials of all fifty states is the great state-by-state variation of the definition of a trial, either jury or bench. Bench trial data of the state courts are more problematic than jury trial data because of the greater cross-state variation in the bench trial unit of count. *See* Ostrom, Strickland & Hannaford-Agor, *supra* note 14, at 762 tbl.3 (documenting the variations).

20. *Id.* at 757–59. (“The data show that state courts of general jurisdiction resolve nearly 28 times as many civil cases and 82 times as many criminal cases as do federal district courts . . . [T]o understand trial trends in the American courts, we need to look at both the state and federal systems.”)

21. Diagram 2 is borrowed from “Figure 2: Total criminal jury and bench trials in 23 states, 1976–2002.” *Id.* at 764 fig.2.

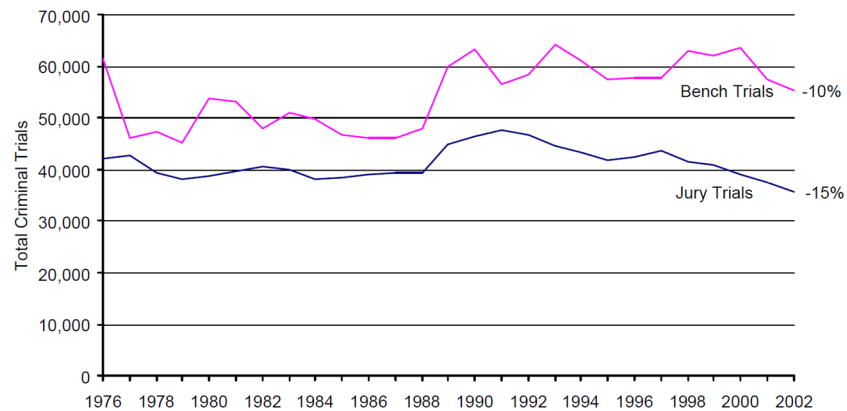


Diagram 2—Total criminal jury and bench trials in twenty-three states,²² 1976–2002

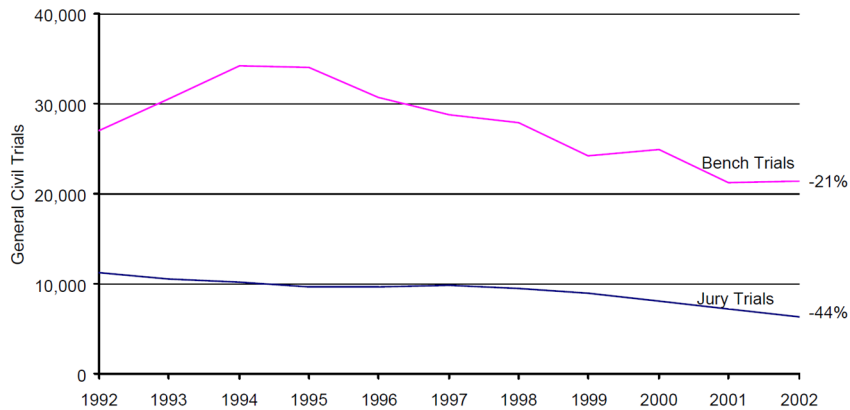


Diagram 3—General civil jury and bench trials in ten states,²³ 1992–2002

The NCSC report also examined civil cases at the state level and found a similar trend, as illustrated in Diagram 3.²⁴ The most important takeaway from the

22. For a list of the twenty-three states counted, see *id.* at 759.

23. For a list of the ten states counted, see *id.*

24. Diagram 3 is borrowed from “Figure 10: General civil jury and bench trials in 10 states, 1992–2002.” *Id.* at 770 fig.10. As illustrated in Diagram 3, this data reveal that civil jury trials and civil bench trials both decreased over the period in question, doing so by forty-four percent and twenty-one percent, respectively. See *id.* at 770. While the number of civil jury trials steadily declined, however, the number of civil bench trials experienced an initial period of growth—a twenty-seven

NCSC data across both criminal and civil cases at the state level is that there have been consistently more bench trials than jury trials, similar to what has happened in the federal court system. Bench trials are the new normal in U.S. judicial practices.

B. The Dilemma: Jury Thinking of Evidence Law Still Dominates

First adopted in 1975, the Federal Rules of Evidence (FRE) codified the evidence law that applies in U.S. federal courts and have also been adopted by most states in the country, sometimes with local variations. Technically speaking, these rules apply in both jury and bench trials, and the rules themselves draw no distinction.²⁵ However, in practice, American trial judges often only loosely apply the rules of evidence when they sit without a jury. As Frederick Schauer aptly characterizes, objections to the admissibility of evidence are often met with the judicial response: “I’ll let it in and just give it the weight it deserves.”²⁶ This makes sense, because trial judges have to hear the proffered evidence in order to rule on it. Rather than engaging in the fiction that they did not admit or consider it, trial judges bow to reality and give the evidence the credence they think it deserves. Bench trial judges, using their vast discretionary power, regularly treat the existing rules of evidence as an encumbrance to be jettisoned whenever possible. This is doubly concerning because counsel often have no means of knowing how much the judge will relax the application of the evidence rules in bench trials. In an era when bench trials have become the dominant judicial practice, such an enormous gap between the law in operation and the law on the books suggests the need to reexamine the current content and application of the FRE and inquire whether

percent increase from 1992 to 1994—and then decreased each year, with the single exception of 2000, when there were approximately six hundred more civil bench trials than in 1999. *Id.*

25. Rule 101 of the FRE, “Scope,” makes no distinction between the applicability of the FRE in jury and bench trials. *See* FED. R. EVID. 101. Also, Rule 1101, “Applicability of the Rules,” does not rule out bench trials. *See* FED. R. EVID. 1101.

26. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 165–66 (2006); *see also* Liana Gioia & Per Ramfjord, Note, *Reforming At-Will Employment Law: A Model Statute*, 16 U. MICH. J.L. REFORM 389, 426 (1983) (“[J]udges presiding at non-jury trials often admit evidence indiscriminately, ruling on weight and relevance only after all the facts have been presented.” (citing Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 255 (3d ed. 1973))). For judicial acknowledgment and endorsement of the practice, *see*, for example, *State v. Stout*, 46 S.W.3d 689, 703 (Tenn. 2001) (adopting principle that trial judges should have “wider discretion than would normally be allowed under the [state’s] Rules of Evidence”), *superseded by statute on other grounds*, 1998 Tenn. Pub. Acts ch. 915, § 1, *as recognized in* *State v. Odom*, 137 S.W.3d 572 (Tenn. 2004); *Commonwealth v. Irwin*, 639 A.2d 52, 54–55 (Pa. Super. Ct. 1994) (noting that trial judge is presumed to be able to disregard prejudicial evidence). In obvious frustration with what it saw as a widespread practice, the Seventh Circuit found it necessary to note in *In re Oil Spill by The Amoco Cadiz* that “[t]he Federal Rules of Evidence are statutes, and district judges may not disregard statutes no matter how inconvenient or cumbersome they believe the rules to be.” *See In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1305 (7th Cir. 1992).

bench trials should have their own evidentiary rules or simply allow “Free Proof.” If playing by some set of rules is still important in bench trials, we must consider what those rules should look like. The rest of this Article will address these questions accordingly.

Part II probes the similarities and differences between jury and bench trials in the juridical proof process. Part III examines the main obstacle to forming evidentiary rules for bench trials—the allure of “Free Proof” and its flaws. This Article argues that Free Proof in bench trials is an illusion and evidentiary rules of some kind are still needed. Part IV takes a close look at the current dominant form of evidence rules—the FRE—and illustrates that it is not a fit for bench trials. Part V further explores what evidentiary rules for bench trials could or should look like. Being the first of its kind, this Article proposes five promising directions for developing such rules. Part VI demonstrates why and how such a research project has an impact beyond bench trials and is very rewarding on multiple aspects, followed by a Conclusion.

II. SIMILARITIES AND DIFFERENCES BETWEEN JURY AND BENCH TRIALS IN THE JURIDICAL PROOF PROCESS

It is not uncommon, when comparing bench trials with jury trials, to assume that “[e]verything is the same, except [for] . . . the absence of the jury.”²⁷ But is the matter really that simple? Scholars working in the field of empirical, comparative study of jury and nonjury trials observe that “even when conducted within an ostensibly similar set of formal rules and procedures, the [bench] trial and the [jury] trial will almost inevitably differ in practice.”²⁸ To better understand the dilemma of evidence law in bench trials and potentially formulate a solution, it is important to first probe the similarities and differences between jury and bench trials in fact-findings.

A. Similarities

While numerous works probe the differences between jury trials and bench trials,²⁹ little has been written about the similarities between these two in the process of juridical proof.

27. Joshua Marquis, Comment to *What Are the Similarities Between a Bench and a Jury Trial?*, QUORA (May 10, 2017, 5:05 PM), <https://www.quora.com/What-are-the-similarities-between-a-bench-and-a-jury-trial> [https://perma.cc/N2G6-AVJH].

28. JOHN JACKSON & SEAN DORAN, JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM 291 (1995).

29. See, e.g., Charles Diamond & Sergei Zaslavsky, *Deciding Between Bench and Jury Trial: Reflections After US Airways v. Sabre*, ANTITRUST, Fall 2017, at 27; Joseph Carey, *Pros and Cons of a Jury Trial vs. a Bench Trial*, CAREY L. OFF. LLC (June 1, 2021), <https://www.careylawoffice.com/2021/06/01/pros-and-cons-of-a-jury-trial-vs-a-bench-trial/> [https://perma.cc/44AA-N6J6]; Brandan J. Davis, *What Is the Difference Between a Bench Trial and a Jury Trial*, ROTH DAVIES LLC,

1. *As trier of fact, both the jurors in a jury trial and the judge in a bench trial have the same central goal: to the extent possible, discover the truth of the case.*

“Every legal system needs, somehow, to determine the truth of factual questions.”—Susan Haack³⁰

Without reasonably accurate fact-finding, trials (whether jury or bench) are not just pointless, they destroy the foundations of modern civilization.³¹ Obviously, rights and obligations are important and necessary to a liberal society, but they are insufficient in and of themselves; their meaning and value derives from real-world, factual states.³² Such epistemological supremacy yields higher veristic value, which has been overwhelmingly recognized by evidence scholars as pertinent to the main goal of trial, an accurate determination of the existence or non-existence of some matter of fact.³³

Of course, the juridical proof process has objectives beyond the search for truth, including the promotion of fairness, efficiency, and other social values (e.g., marital harmony, candid communication between attorney and client, settlements, and proper distribution of adjudicative errors), and sometimes these other goals clash with that of accuracy.³⁴ Nonetheless, these other objectives are ancillary aims, secondary to the goal of truth-seeking in juridical fact-finding.

<https://www.rothdavies.com/criminal-defense/trial-process/bench-vs-jury-trial/> [https://perma.cc/9TPA-KTCJ] (last visited Nov. 6, 2022); Mark S. Treyz, *Bench Trial vs. Jury Trial*, LAW OFF. OF MARK S. TREYZ (Jan. 29, 2022), <https://www.treyzlaw.com/bench-trial-vs-jury-trial/> [https://perma.cc/9MW7-JGG5].

30. SUSAN HAACK, *Epistemology and the Law of Evidence: Problems and Projects*, in EVIDENCE MATTERS: SCIENCE, PROOF, AND TRUTH IN THE LAW 1, 1 (2014).

31. Ronald J. Allen, *The Conceptual Challenges of Expert Evidence*, DISCUSIONES FILOSÓFICAS, julio–dic. [July–Dec.] 2013, at 41, 43 (Colom.).

32. *Id.*; see also Ronald J. Allen, *Introduction—Reforming the Law of Evidence of Tanzania (Part Three): The Foundations of the Law of Evidence and Their Implications for Developing Countries*, 33 B.U. INT’L L.J. 283, 286 (2015) (“The significance of this point cannot be overstated. Tying rights and obligations to true states of the real-world anchors rights and obligations in things that can be known and are independent of whim and caprice.”).

33. See, e.g., 6 JEREMY BENTHAM, *Rationale of Judicial Evidence, Specially Applied to English Practice*, in THE WORKS OF JEREMY BENTHAM 1, 264 (John Bowring, ed., Edinburgh, William Tait 1843) (1827) (noting that the most basic interactions in human society rely on expectation of truth and veracity); WILLIAM TWINING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 76, 83, 199 (2d ed. 2006) (noting that the rectitude of decision, a high priority as a means to securing justice under the law, is the central tenant of the rationalist tradition); Alex Stein, *The Refoundation of Evidence Law*, 9 CAN. J. L. & JURIS. 279, 290, 295–96 (1996) (underscoring accuracy of the decision as the principal objective and tying accuracy to the correspondence between adjudicative findings of facts and the empirical truth).

34. 4 JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA* § 2175 (2d ed. 1923) (noting that the rules of evidence can be categorized as rules of probative policy and rules of extrinsic policy; and the difference between these two is that the former seeks accuracy, while the latter’s effect is “to obstruct, not to facilitate, the search for truth,” in order to achieve other goals).

More importantly, decisions on how to realize these other objectives belong to the designer of the judicial system, not the individual trier of fact in a case. Whether for the jurors in a jury trial or judge in a bench trial, the main task in juridical fact-finding is singular and clear: the pursuit of the truth.

2. *Both the jurors in a jury trial and the judge in a bench trial need to determine the disputed facts at issue within a short amount of time and with limited resources.*

In both jury and bench trials, factfinders need to balance prudence with expediency, determining the case's disputed facts in a time crunch and operating with limited (financial, physical, and human) resources. In jury trials, a fixed number of laypersons temporarily gather in a courtroom to attend a concentrated trial; they must deliberate together and determine the disputed facts at issue based only on evidence admitted at trial, before going back to their ordinary life and work. The average length of a jury trial is three to five days.³⁵ Bench trials, for their part, typically take even less time and are arguably even more limited in terms of resources; the judge, perhaps with the help of some clerks, determines the facts of the case, based solely on an assessment of the evidence provided by the litigating parties.³⁶

A quick comparison between judicial fact-finding and scientific fact-finding clarifies this point. A typical scientific project usually has more funding, more human-capital support, and a longer duration than a trial. In scientific fields, if the factfinder does not have enough evidence, the decision can be postponed. The law lacks this luxury. What a judicial factfinder does not decide results in a decision: to maintain the *status quo*. Additionally, judicial factfinders must decide the case presented to them; unlike scientists, they cannot pick what problems to study or avoid studying those questions they know they cannot answer. As Ronald Allen neatly summarizes:

If I ask a physicist what happened before the Big Bang, he will just smile and walk away. But you, the legal analyst, cannot do that. The law cannot do that. The law cannot say some problem

35. See, e.g., *Jury Service*, CIR. CTS. MADISON CNTY., ILL, https://www.co.madison.il.us/departments/jury_commissions/jury_service.php [<https://perma.cc/NGG7-T3GP>] (last visited Nov. 6, 2022).

36. See *Judge Information Center*, TRAC REPS. (Mar. 14, 2018), <https://trac.syr.edu/tracreports/judge/501> [<https://perma.cc/FL6R-5LRN>] (“Federal district judges vary markedly in their workload. A number of federal judges have sentenced more than a thousand defendants over the course of a single year. In contrast, typically judges sentence only several hundred even over a five-year span of time. For some, civil caseloads can be even higher. While last year a typical judge closed 250 civil cases, a few judges closed thousands during the twelve months of 2017.”).

brought to us is just too tough. You have to decide any social problem put in front of you.³⁷

And the legal analyst must do it in a timely and judicious manner.

3. *Both the jurors in a jury trial and the judge in a bench trial face information scarcity; available information is presented disjointedly by adversarial (and, thus, interested) parties.*

The factfinders in both a jury trial and a bench trial are (or, at least, are supposed to be) disinterested third parties who enter the case with little to no preexisting knowledge about it.³⁸ In both cases, the trial is typically conducted as a retrospective investigation of past events. The trier of fact sits as an observer in a courtroom as interested, adversarial parties present their versions of events. Because of that, fact-findings at trial are always decisions colored by uncertainty and ambiguity.³⁹ Judicial inquiries can, at best, lead to a high degree of probability, never to absolute certainty.⁴⁰

For the trier of fact, the trial is a *learning* process. Here, “learning” is not meant in its ordinary, classroom sense, in which, for example, college students listen to a professor’s lecture and are tasked with understanding and recalling the professor’s points. Rather, the learning process involves listening as two self-interested, adversarial parties tell competing and often contradictory versions of the case and try to convince the factfinder of their own correctness and the

37. See Ronald J. Allen, Professor of L., Northwestern Univ. Sch. Of L., *Rationality, the Taming of Complexity, and the Future of Evidence Science*, Lecture at China University of Political Science and Law (Mar. 29, 2018) (on file with author).

38. Jurors tend to have very little knowledge of the facts of the case before trial, but they might in the rare instance have some specific knowledge, likely from pre-trial publicity or from the jury selection process itself. On the other hand, in a bench trial, the judge will have lived with the case since it was filed, may have ruled on pretrial motions, and will probably have held pretrial conferences with the lawyers. This means that the judge at some point before trial will become reasonably familiar with the case at issue. Even so, before any relevant materials are filed by the parties, the judge in a bench trial knows very little about the case.

39. The distinction between uncertainty and ambiguity can be understood through the following example. Consider two urns: Urn 1 has ninety balls: sixty purple and thirty white. One ball is drawn at random. What color is it? This is uncertainty (it will be purple or white, but you are not certain which). Compare with Urn 2. It has ninety balls from which three have been drawn, the first one was purple, the second one was white, and the third one was green. Yesterday another ball was drawn at random. What color is it? This is ambiguity (we just do not know what color and ratio of balls appear in Urn 2). Compared to ambiguity, uncertainty is easier to deal with. You deal with it with the probability theory. But what the juridical factfinder faces at trial is much more often ambiguity, not uncertainty. The typical litigated case is not like assessing the probability of obtaining a certain number of heads of an evenly weighted coin, given a certain number of flips of that coin (an issue of uncertainty). It requires instead determining which one of a very large range of possibilities actually occurred at the time in question in the face of missing, disputed, and contradictory evidence. The typical litigated case is like the Urn of ambiguity.

40. The established standards of proof are a “preponderance of evidence” in civil cases and “beyond a reasonable doubt” in criminal cases.

other's error.⁴¹ Throughout this unusual learning process, the factfinder must rely on his or her cognitive capacities such as inference, common sense (including general knowledge of social occurrences), and discernment of such qualities as coherence, consistency, completeness, economy, and probability. The factfinder must compare and evaluate the evidence and claims presented at trial, analyze their reliability, and finally decide which party has the more convincing narrative, evidence, and argument, and hence should win the case.⁴²

Moreover, in any trial, evidence is *scarce*, and at least some of the relevant information is unavailable.⁴³ Triers of fact, whether judge or jury, must consequently settle disputed issues of fact under incomplete and imperfect information.⁴⁴ In the long run, such decisions would unavoidably generate errors. Also, errors in judicial fact-finding may arise from another practical limitation, the *vulnerability of input information*, stemming from flawed evidence provided by the adversarial parties in a litigation. For example, one major flawed source of information is biased witness testimony. Often, witnesses that present information at trial are interested, meaning they have an incentive for one party (perhaps themselves) to win the litigation. Even assuming that witnesses are unlikely to lie to reach their desired outcome, they may consciously or unconsciously conceal information that undermines their self-interest or that of the party for whom they testify.⁴⁵ In addition, witnesses are vulnerable to shortcomings of memory, sight, and other sensory inputs, and susceptible to various biases and cognitive

41. Traditionally, in common law jurisdictions, the adversary procedure vests the parties with responsibility for presenting and developing the evidence. It is not the judicial factfinder's job to investigate the case. The adversaries are obligated to gather and present their own evidence, and they are expected to challenge and test the strength of the evidence presented by the opposing side. Excessive adversarialism may have a truth-distorting effect, since the interest of active and zealous advocates at trial is for their represented party to win the case, which is not necessarily in accordance with the goal of accurate judicial fact-finding. For example, the advocates may be operating under selfish incentives to withhold important evidence or to otherwise distort the fact-finding process in order to win the case. See Zhuhao Wang, *The Fate of Evidence Law: Two Paths of Development*, 24 INT'L J. EVIDENCE & PROOF 329, 334 (2020).

42. See Ronald J. Allen & Michael S. Pardo, *Relative Plausibility and Its Critics*, 23 INT'L J. EVIDENCE & PROOF 5, 16 (2019).

43. See Alex Stein, *Against 'Free Proof'*, 31 ISR. L. REV. 573, 580 (1997).

44. *Id.*

45. See, e.g., FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 203–09 (2009); ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 300–04 (1999) (discussing the adversarial system's problem in making the parties present relevant evidence); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036–40 (1975) (discussing parties' incentive against the truth and noting that “[t]he business of the advocate, simply stated, is to win if possible without violating the law;” and “the truth and victory are mutually incompatible for some considerable percentage of the attorneys trying cases at any given time”).

limitations.⁴⁶ Even the most honest witnesses can be weak and unreliable in collecting and analyzing information. Flawed sources of information can also arise from nonhuman testimony or real evidence. Such flaws include, but are not limited to, over- or under-reliance on fact-finding technology,⁴⁷ human errors such as lab mistakes, and the use of questionable forensic-science methodologies.⁴⁸

4. *Both professional judges and lay jurors are human beings susceptible to epistemic pitfalls.*

Jerome Frank observed, “[w]hen all is said and done, we must face the fact that judges are human.”⁴⁹ Scholars and commentators have regularly observed that lay jurors, the ordinary and untrained citizens charged with acting as triers of fact, exhibit various cognitive and epistemic weaknesses. About one century ago, the great American evidence scholar John Henry Wigmore made this point explicitly: juries, because of their cognitive and epistemic failings, could hardly be trusted to apply the more scientific principles of proof directly to particular issues.⁵⁰ Empirical studies on jury decision-making have confirmed such concerns. For example, as Paul Robinson and Barbara Spellman summarize:

46. See Jerome Frank, “*Short of Sickness and Death: A Study of Moral Responsibility in Legal Criticism*,” 26 N.Y.U. L. REV. 545, 580–81 (1951); see also Robert J. Hallisey, *Experts on Eyewitness Testimony in Court—A Short Historical Perspective*, 39 HOW. L.J. 237, 242–47 (1995); Chris William Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN. L. REV. 291, 292–95 (2004). For a great illustration of the limited perspective of witnesses, see *Small Axe: Mangrove* (BBC One television broadcast Nov. 15, 2020) (in which the defendant challenges the reliability of the officers testifying against the defendant by illustrating the limited vision the officer had from inside the police car).

47. See, e.g., Ric Simmons, *Big Data, Machine Judges, and the Legitimacy of the Criminal Justice System*, 52 U.C. DAVIS L. REV. 1067, 1090–08 (2018) (discussing both the algorithmic aversion and automation bias, explaining that two phenomenon are showed to be prevalent in human decision-making); John Zerilli, Alistair Knott, James Maclaurin & Colin Gavaghan, *Algorithmic Decision-Making and the Control Problem*, 29 MINDS & MACHS. 555 (2019) (“The problem is that, as automation becomes smarter and cheaper, its operators have to assume an increasingly supervisory role.” (first citing DAVID MEISTER, *THE HISTORY OF HUMAN FACTORS AND ERGONOMICS* (1999); and then citing Barry Strauch, *Ironies of Automation: Still Unresolved After All These Years*, IEEE TRANSACTIONS ON HUM.-MACH. SYS. 419 (2018))).

48. See, e.g., PRESIDENT’S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFF. OF THE PRESIDENT, *FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS* (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [<https://perma.cc/2XDS-245D>] (analyzing common forensic methods and finding some of them lacking reliability); cf. U.S. DEP’T OF JUST., *STATEMENT ON THE PCAST REPORT—FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS* (2021), <https://www.justice.gov/olp/page/file/1352496/download> [<https://perma.cc/322A-3KMW>] (raising doubts about the scrutiny of the methods in the former report); M. Chris Fabricant & Tucker Carrington, *The Shifted Paradigm: Forensic Science’s Overdue Evolution from Magic to Law*, 4 VA. J. CRIM. L. 1 (2016).

49. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 410 (1949).

50. John H. Wigmore, *Administrative Boards and Commissions: Are the Jury-Trial Rules of Evidence in Force for Their Inquiries?*, 17 ILL. L. REV. 263, 263–64 (1922).

[J]urors' decisions may be influenced by factors other than the facts of the case, such as pretrial publicity, the physical appearance of a witness or defendant, inadmissible evidence, or hindsight bias. Jurors also may confuse arguments with evidence. Such factors may affect jurors' factfinding or other decision processes.⁵¹

In contrast, traditionally, judges have been depicted as epistemically superior.⁵² However, in recent years, more and more studies have found that judges as triers of fact are, like jurors, susceptible to cognitive illusions, fallacies, and implicit biases.⁵³ A leading article evaluated a sample of 167 federal magistrate judges' susceptibility to five "cognitive illusions": anchoring, framing, hindsight bias, the representative heuristic, and egocentric biases.⁵⁴ The authors found that judges "appear to be just as susceptible as other decision makers to three of the [five] cognitive illusions we tested: anchoring, hindsight bias, and egocentric bias."⁵⁵ In an empirical study on criminal bench trials in Northern Ireland (named "Diplock Trials"⁵⁶), John Jackson and Sean Doran note:

[T]here was a view among counsel that, once the trial proper began, judges tended to get the feel of the case *sooner* than a jury and formed a view fairly quickly One counsel thought that although judges did try to keep an open mind until the trial started, things changed during the trial: "He will tend to mentally

51. Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1140 (2005).

52. See, e.g., *Gibbs v. Gibbs*, 210 F.3d 491, 500 (5th Cir. 2000) ("Most of the safeguards provided for in *Danbert* are not as essential in a case such as this where a district judge sits as the trier of fact in place of a jury."); *United States v. Hassanzadeh*, 271 F.3d 574, 578 (4th Cir. 2001) (holding that evidence of defendant's prior conviction was not unduly prejudicial in bench trial because "we have confidence that at the bench trial, the experienced district judge was able to separate the emotional impact from the probative value of this potentially prejudicial evidence" (citing *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994))).

53. See, e.g., James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207, 209 (2019).

54. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001).

55. *Id.* at 816. As to the effects of framing and motivated cognition, judges also showed a clear susceptibility to such effects, albeit at a somewhat diminished level as compared to other groups (e.g., laypersons). *Id.* at 816–17; see also Eileen Braman & Thomas E. Nelson, *Mechanism of Motivated Reasoning? Analogical Perception in Discrimination Disputes*, 51 AM. J. POL. SCI. 940, 951, 954 (2007). It appears that their legal training and experience gives them substantial resistance to those effects.

56. "Diplock Trials" are bench trials of specified serious crimes ("scheduled offences") in Northern Ireland. They were introduced by the Northern Ireland (Emergency Provisions) Act 1973, used for political and terrorism-related cases and later abolished by the Justice and Security (Northern Ireland) Act 2007. Nowadays, Diplock Trials remain possible in Northern Ireland on a case-by-case basis, rather than automatically applied to scheduled offenses.

write his judgment in his head before the case ends and will varnish everything to fit that view.”⁵⁷

Any opinion about the case formed before all the evidence is presented at trial indeed signifies bias or prejudice on the part of the judge.

Jurists and scholars often criticize jurors as being unable to effectively evaluate complex evidence, including scientific and nonscientific expert evidence and statistical evidence.⁵⁸ However, there is little reason to think that judges are any better equipped to contend with complex evidence.⁵⁹ The educational path of most judges—law school—does not emphasize training in scientific research methods or statistical reasoning.⁶⁰ In fact, studies indicate that judges have little advantage over lay jurors in interpreting complex evidence in domains outside of their legal expertise.⁶¹ As James Steiner-Dillon describes:

Judges and juries show high rates of agreement in outcomes, rates that are unaffected by the complexity of the evidence. Both groups sometimes perform well at basic comprehensive tasks. But judges’ expertise in legal doctrine does not extend to expertise in the subject matter of factually complex cases. If the complexity arises from highly technical subject matter or esoteric expert testimony, *judges are laypersons just as jurors are; they lack expertise in the subject domain and are forced to utilize unreliable heuristics to make credibility determinations between competing expert witnesses.*⁶²

57. JACKSON & DORAN, *supra* note 28, at 242 (emphasis added).

58. See, e.g., Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 487–88 (2005) (“[A]lthough jurors struggle and are occasionally misled, they generally make reasonable use of complex material, utilizing the expert testimony when it is presented in a form that they can use. *There are, nonetheless, particular types of evidence—scientific and statistical evidence—with which jurors appear to have the most difficulty.*” (emphasis added) (quoting Neil Vidmar & Shari S. Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1166–67 (2001))).

59. See, e.g., Valerie P. Hans, *Judges, Juries, and Scientific Evidence*, 16 J.L. & POLY 19, 30 (2007) (“But how much science background do judges have? Some scholars have speculated that many judges have little attraction to or aptitude for math and science.” (citing Joseph Sanders, Michael J. Saks & N.J. Schweitzer, *Trial Factfinders and Expert Evidence*, in DAVID L. FAIGMAN, DAVID H. KAYE, MICHAEL J. SAKS & JOSEPH SANDERS, MODERN SCIENTIFIC EVIDENCE (2008))).

60. Robbennolt, *supra* note 58, at 488; see also Darrin R. Lehman, Richard O. Lempert & Richard E. Nisbett, *The Effects of Graduate Training on Reasoning: Formal Discipline and Thinking About Everyday-Life Events*, 43 AM. PSYCH. 431, 437 (1988) (describing that despite few initial differences across disciplines, students in psychology and medicine improved dramatically in their ability to engage in statistical-methodological reasoning in the first three years of graduate school, while students in law did not).

61. Steiner-Dillon, *supra* note 53, at 238 (“Both jurors and judges have difficulty correctly interpreting evidence grounded in statistics and probability.”).

62. *Id.* at 241 (emphasis added).

Both judges and lay jurors, thus, “are predominately intuitive decision makers, and intuitive judgments are often flawed.”⁶³ While judges’ legal training and experience leave them better prepared to resist some kinds of cognitive errors (e.g., framing and motivated cognition),⁶⁴ the cognitive and epistemic differences between judges and lay jurors are “generally small in magnitude and insignificant in comparison.”⁶⁵

B. Differences

Despite fundamental similarities in fact-finding, however, significant differences arise between bench and jury trials: it is a mistake to view a bench trial as just another trial or, even worse, as not a “real” trial because there is no jury. A seasoned trial lawyer once mentioned that “[a]lthough effective bench trial advocacy requires a mastery of conventional ‘jury’ trial skills, it also requires a separate and distinct set of trial techniques designed specifically for application in bench trials.”⁶⁶ Below are three important differences between bench and jury trials in fact-finding that demand different trial practices in each.

1. *The judge in a bench trial has a discretionary, active role throughout the litigation process, unlike the jury, which has a limited, passive role.*

The role of factfinder plays out very differently in bench trials as opposed to jury trials. Rule 611(a) of the FRE reflects the trial judge’s substantial power to control trial procedures,⁶⁷ and judges may use that power to impose special procedures in bench trials as they see fit.⁶⁸ In contrast, in the present legal system,⁶⁹ the jury is essentially passive in the trial proceedings prior to being

63. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 15 (2007) (sample of state court judges “performed comparably to other well-educated adults” on tests of intuitive decision-making); see also MICHAEL J. SAKS & BARBARA A. SPELLMAN, *THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW* 204–05 (2016) (discussing examples of intuitive judicial fact-finding); Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC’Y REV. 123 (1980) (describing heuristic decision-making in layperson and judges).

64. Guthrie, Rachlinski & Wistrich, *supra* note 54, at 816–17.

65. See Steiner-Dillon, *supra* note 53, at 207.

66. John N. Sharifi, *Approaching the Bench: Trial Techniques for Defense Counsel in Criminal Bench Trials*, 28 AM. J. TRIAL ADVOC. 687, 687 (2005).

67. FED. R. EVID. 611. Mode and Order of Examining Witnesses and Presenting Evidence (“(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.”).

68. See Thomas A. Mauet, *supra* note 14.

69. In the early stages of the development of the common law jury trial (i.e., in the medieval era of intensely interdependent agricultural communities), the jury was not to serve silently. In its nascent stage, the jury was selected from the local community where the alleged crime occurred and

discharged for deliberation, and jurors should make a factual decision based only on evidence directly presented at trial.⁷⁰ Because of this dramatic difference, bench trials are usually more efficient and flexible than jury trials. For example, in a bench trial, the judge may state at the outset what factual issues the court believes are dispositive, and on which issues the court will likely be willing to hear evidence.⁷¹ A bench trial judge may also be more likely to interrupt counsel's presentation at trial and direct counsel to address issues that the court believes are most crucial.⁷² In addition, a bench trial judge may ask clarifying questions of a witness testifying at trial to help the court decide an issue that depends on the witness's testimony.⁷³ In contrast, neither state nor federal courts generally permit jurors to directly ask witnesses any questions,⁷⁴ and jurors are often not even allowed to take notes during trial.⁷⁵

Furthermore, a jury's job starts at the beginning of a trial by swearing to decide facts of the case at issue and finishes at the end of the trial by announcing the verdict of guilty or not guilty. Except in rare cases, juries never learn about the parties' pretrial actions, motions, and contentions.⁷⁶ Jurors do meet the lawyers and parties at *voir dire*, but it is not a procedure for the parties to substantially argue anything about the case. In contrast, in bench trials, cases remain with one

was to consist of persons who were familiar with the accused in order to provide any relevant information about the dispute, in addition to weighing the evidence for and against the defendant. The medieval jury came to court not to listen but to speak, not to hear evidence but to deliver a verdict formulated in advance. See John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1170 (1996); JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 97 (Boston, Little Brown & Co. 1898) ("From the beginning of our records, we find cases, in a dispute over the genuineness of a deed, where the jury are combined with the witnesses to the deed.").

70. See Joseph Grcic, *The Jury: Participation or Passivity?*, 22 PUB. AFFS. Q. 19, 21 (2008).

71. See Harold P. Weinberger, Norman C. Simon & Samantha V. Ettari, *Navigating a Civil Bench Trial in Federal Court*, PRAC. L. J., June/July 2018, at 32, 36.

72. *Id.* at 40.

73. *Id.* at 36.

74. See, e.g., David Rohde, *'Your Witness' Now Signals Jury's Turn to Ask Questions*, N.Y. TIMES, (Aug. 14, 1999), <https://www.nytimes.com/1999/08/14/nyregion/your-witness-now-signals-jury-s-turn-to-ask-questions.html> [<https://perma.cc/7ZF6-ELZE>].

75. See *Notetaking by Jurors*, USLEGAL, <https://courts.uslegal.com/jury-system/issues-pertaining-to-the-jurys-performance-of-its-duties/notetaking-by-jurors/> [<https://perma.cc/8M4C-HS8H>] (last visited Nov. 6, 2022). ("[A] number of states have made express permission for jurors to take notes during trial. These states include Arizona, Arkansas, Connecticut, Missouri, New Jersey, New York, North Dakota, Ohio, Washington, Wisconsin, and Wyoming. Although only one state expressly prohibits this practice, in most jurisdictions whether members of a jury are allowed to take notes will depend upon the discretion of the judge. One survey indicated that 37 percent of judges in state courts indicate they do not allow jurors to take notes during a trial. In federal courts, this matter is also left up to the judge.").

76. See, e.g., David E. Ross, *Special Considerations in Bench Trials*, VERDICT, No. 1, Winter 2011, at 1, 1, http://www.ramllp.com/media/article/9_Bench%20Trials%20article.pdf [<https://perma.cc/AS4E-EUXX>]

judge from filing through trial and post-trial stages. This means that, unlike jurors in a jury trial, the bench trial judge will be reasonably familiar with the case, the legal issues involved, and the counsel even before the trial starts.⁷⁷ And the judge forms his or her *first impression* of the case during the pretrial stage. Thus, from the litigating parties' perspective, almost every pretrial filing in a bench trial presents a valuable opportunity to educate the trier of fact (the judge) about the merits of the case before the first witness is called, an unimaginable opportunity in a jury trial.⁷⁸ In cases with extensive pretrial submissions, some judges (again, at their discretion) may even dispense with opening statements in bench trials to avoid wasting time.⁷⁹

2. *In a bench trial, a single person (the judge) handles the bifurcated fact-finding process of a jury trial.*

Jury trials operate according to the classic model of separate designated functions in deciding about evidence. The jury decides factual issues and determines the weight and effect of the evidence, including the credibility of witnesses.⁸⁰ The judge decides legal questions and determines the admissibility of evidence, which involves many factual findings. By contrast, in a bench trial, no such bifurcation exists, and the judge must weigh the evidence, determine witness credibility, and draw reasonable inferences to decide questions of fact as well as issues of law. Because the judge in a bench trial undertakes both roles of gatekeeper and factfinder, he or she cannot avoid having knowledge of inadmissible evidence when deciding factual matters. Also, as trier of fact, the judge must “evaluate the evidence itself—not just the methodology underlying the evidence.”⁸¹ Thus, judges in bench trials have natural *incentives* and are more *willing* to ask witnesses questions to clarify confusion and to comment on the evidence during trial than they would in jury trials.⁸²

In addition, due to the judge's role as trier of fact, bench trials typically proceed more quickly than jury trials because the parties can avoid the time and expense of performing jury-related tasks, such as drafting *voir dire* questions, conducting *voir dire* motion practice, and managing the jury selection process.

77. See Mauet, *supra* note 14, at 14.

78. See, e.g., Ross, *supra* note 76.

79. See Weinberger et al., *supra* note 71, at 40.

80. See ROBERT E. JONES, GERALD E. ROSEN, WILLIAM E. WEGNER & JEFFREY S. JONES, RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS & EVIDENCE § 17:30 (June 2022 update ed.) (“[J]ury, not the judge, traditionally determines reliability of evidence.” (citing *Perry v. New Hampshire*, 565 U.S. 228, 245 (2012))).

81. *Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co.*, 782 F.3d 353, 360 (7th Cir. 2015).

82. Judges in jury trials rarely ask witnesses questions or comment on the evidence during the course of the trial, in part out of a concern that jurors may give undue weight to the judge's questions or comments. See JONES ET. AL., *supra* note 80, §§ 17:35, 17:45.

Additionally, the parties may argue evidentiary disputes and other trial-related motions on the record in open court, rather than requiring the court and counsel to hold sidebars on issues that must be argued out of the jury's earshot.⁸³ And bench trials may afford the court and the parties more *flexibility* in terms of scheduling, the phasing of the trial, and the presentation order of evidence.⁸⁴

3. *Judges in bench trials have legal training and experience; they are repeat players and public figures. By contrast, jurors are laypersons and one-time participants; they are "nameless" triers of fact.*

As triers of fact, bench trial judges also differ from lay jurors because of their specialized training and previous experience in the courtroom. Based on their history and skills, judges are generally expected to be less emotional,⁸⁵ to be more logical in their thinking, to have a better understanding of the law,⁸⁶ and to be more professionally acculturated to norms of neutrality and objectivity.⁸⁷ Unlike lay jurors, who are one-time-only factfinders, judges are repeat players in the system.⁸⁸ They frequently sit through trials, hear testimony, and make legal decisions. Their experience guides what evidence to look for regarding particular criminal charges or civil claims,⁸⁹ and judges are better able to identify what information presented at trial is relevant to the legal decisions they are expected to make.⁹⁰ Such familiarity with adjudication may permit the trial process to progress quickly into the more complex or central aspects of the case.⁹¹ At the same time, a

83. See Weinberger, Simon & Ettari, *supra* note 71, at 35.

84. See *id.*

85. See Barbara A. Spellman, Response, *On the Supposed Expertise of Judges in Evaluating Evidence*, 156 U. PA. L. REV. PENNUMBRA 1, 5 (2007).

86. See Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1277 (2005).

87. See, e.g., Steiner-Dillon, *supra* note 53, at 224 n.81 ("A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism (A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." (quoting MODEL CODE OF JUD. CONDUCT Canon 3(A)(1), (C)(1) (AM. BAR ASS'N 2014))).

88. See Spellman, *supra* note 85.

89. See Sharifi, *supra* note 66, at 691; Weinberger, Simon & Ettari, *supra* note 71, at 36 ("For example, the court may state at the outset what factual issues it believes are dispositive, and on which issues it will likely be willing to hear evidence.").

90. See Robbennolt, *supra* note 58, at 504.

91. See, e.g., Ross, *supra* note 76, at 2 ("Procedurally, the [bench trial] judge may be willing (and indeed, may expect you) to abbreviate—or even avoid altogether—some of the detailed procedures that must be followed when trying a case to a jury. With a busy docket and heavy caseload, a judge may become frustrated with a lawyer who, by trying a bench trial in the same way that he would try a jury trial, unnecessarily slows down the presentation of the case."); see also Weinberger, Simon & Ettari, *supra* note 71, at 40 ("Counsel should also expect that a [bench trial]

bench trial judge will naturally tend to get a “feel” of the case sooner and form a view more quickly than would a jury, even though the judge is supposed to keep an open mind and should constantly remind himself or herself to refrain from judgment until all evidence is presented.⁹²

Finally, judges are elected or appointed, whereas jurors are randomly drafted from a pool of the general public. The judge is a public figure, with a trackable record of case judgments previously adjudicated;⁹³ jury deliberation is a black-box process, with juror names concealed from any court files.⁹⁴ Thus, judges are more accountable for their decisions than are juries.⁹⁵

III. THE ALLURE OF FREE PROOF AND ITS DANGERS: BENCH TRIALS STILL NEED EVIDENTIARY RULES⁹⁶

The widespread practice among judges of treating the rules of evidence with a fair degree of casualness in bench trials essentially represents an informal movement toward “Free Proof.”⁹⁷ Free Proof stands in contrast to the legal regulation of judicial fact-finding and endorses applying ordinary epistemology to legal matters.⁹⁸ We must examine whether such a prevalent informal practice

judge may be likely to interrupt counsel’s presentation and direct counsel to address the issues that the court believes are the most critical.”); Mauet, *supra* note 14, at 18 (“[J]udges become familiar with the experts who frequently appeared in court. These include doctors, economists, engineers, and malpractice experts who are the daily fare of commonly tried cases. Judges know who usually testifies for plaintiffs, who usually testifies for defendants, and who are the experts of last resort.”); Ross, *supra* note 76, at 2 (“Unless the witness has a particular subspecialty or aspect of his or her education or experience that makes him or her uniquely qualified, in most [bench trial] cases, you can just as easily establish a witness’s expertise by providing the court with a copy of the witness’s curriculum vitae and moving directly into the substance of your examination.”).

92. See JACKSON & DORAN, *supra* note 28, at 242 (“[A judge] will tend to mentally write his judgment in his head before the case ends and will varnish everything to fit that view. I think that’s human nature The mental exercise which a judge carries out couldn’t be the same as for a juror coming in. He gets the feel of a case pretty quickly.”); Mauet, *supra* note 14, at 15 (“Judges quickly sense who is happy to be on trial and who . . . expects to win.”).

93. The judge’s status as a public figure is important in that it allows counsel the unique opportunity to learn extensively about the judge before the trial even begins. This is a luxury that counsel does not have in a jury trial.

94. Instead, they are called as Juror No. 1, Juror No. 2, etc.

95. Nonetheless, we should not doubt lay jurors’ seriousness in doing their job as triers of fact or their determination to find the truth and to defend justice.

96. This Section is inspired and influenced by the following three articles: Schauer, *supra* note 26; Stein, *supra* note 43; Ronald J. Allen, *The Domain of Evidence Law*, 23 EVIDENCE SCI. 378 (2015).

97. Supporters of Free Proof believe that judges’ inferences based on evidentiary sources in the course of legal decisions should not be governed by the law. The validity of these inferences is a matter of evidentiary relevancy and weight, as determined by common sense, logic, and the general experience of the trier-of-fact. Nonetheless, supporters of Free Proof also admit that this freedom is surrounded by evidentiary rules and principles laid down by the law, which promote a number of important, but not inferential or intrinsic, objectives of judicial fact-finding. See Stein, *supra* note 43, at 575.

98. See *id.* at 574; Schauer, *supra* note 26, at 169.

should be formalized and officially approved, so that attorneys in bench trials can focus on preparing a Free Proof trial from the start. This will eliminate the need to guess whether the particular judge will loosely or strictly apply rules of evidence. Alternatively, we may find that the doctrine of Free Proof is normatively unsustainable, and evidentiary rules of some kind are still needed in bench trials.

A. The Deadly Attractiveness of Free Proof

“[A]lmost every rule that has ever been laid down on the subject of evidence [is] repugnant to the ends of justice.”⁹⁹

Launched by Jeremy Bentham¹⁰⁰ in the early nineteenth century and promoted by his followers¹⁰¹ since then, the idea of Free Proof has been profoundly influential for almost two centuries in the Anglo-American legal systems, arising in response to “Evidence Law,” the framework of rules, principles, and doctrines governing the screening of evidence presented at trial. In connection with Bentham’s notorious claim that the rules of evidence should, in principle, be abolished, advocates of Free Proof in the common law system got the name “Abolitionists.”¹⁰² Their central claim, to oversimplify only slightly, is that admission, examination, and evaluation of evidence at trial should be governed solely by common sense, logic, and general experience—that is, the natural canons of epistemic rationality of human beings—rather than by the law.¹⁰³ Such ideas have also flourished in most European continental law

99. 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE SPECIALLY APPLIED TO ENGLISH PRACTICE 4 (John S. Mill ed., London, Hunt & Clarke 1827).

100. 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE SPECIALLY APPLIED TO ENGLISH PRACTICE 477–94 (John S. Mill ed., London, Hunt & Clarke 1827) (claiming that rules of evidence should, in principle, be abolished); see also WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE (1985).

101. See, e.g., Charles Frederic Chamberlayne, *The Modern Law of Evidence and Its Purpose*, 42 AM. L. REV. 757, 771 (1908); Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 31 INT’L SOC’Y BARRISTERS Q. 309, 314, 319 (1996) (“The canon for its proof is not, prima facie anyway, legal at all, but rational, and in a courtroom men’s minds should operate no differently from outside The truth is that no rules in the end will help us.”); 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA § 8c (3d ed. 1940) (endorsing many of Bentham’s claims, but not supporting a wholesale abolition of evidentiary rules); Kenneth Culp Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A. J. 723, 726 (1964) (“Our sick body of evidence law will get well sooner if our American doctors will consult with some European evidence doctors.”). For discussion of this claim, see TWINING, *supra* note 100; A.D.E. Lewis, *The Background to Bentham on Evidence*, 2 UTILITAS 195 (1990); Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149 (1990).

102. See ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 108–16 (2005).

103. See Stein, *supra* note 43, at 574–76.

countries,¹⁰⁴ where trial judges are the triers of fact, and evidentiary rules are scarce. The rules that do exist in European continental law countries—burdens and standards of proof, and provisions for the presentation of proof to promote an efficient and fair trial—are categorized as belonging to the law of procedure rather than to evidence law. Why does the idea of Free Proof have such enduring and broad popularity around the world? This Article provides two answers to this question.

1. The natural process of fact-finding is more contextualized and tailored to the human beings involved and thus more recognizable and attractive than a technical system.

In the ideal world of Free Proof, the trier of fact would consider all logically relevant evidence provided by the litigating parties and then give the evidence the weight that its intrinsic probative value deserved.¹⁰⁵ Such a process of judicial fact-finding accords with factual determinations in everyday life. As Frederick Schauer states, based on the doctrine of Free Proof,

[c]ourts would proceed just as ordinary people proceeded when using their common sense to make everyday factual determinations. In making ordinary nonjudicial factual determinations, people do not . . . make use of artificial rules of exclusion or need special rules of corroboration for entire classes of events. And thus there [is] no justification for the law to do otherwise.¹⁰⁶

By applying ordinary epistemology to legal matters, the doctrine of Free Proof is naturally attractive to all participants in a trial. To litigating parties, Free Proof means that they can bring into the courtroom as much relevant evidence as they desire, so long as they abide by the time limit set by the court; they do not need to worry about exclusionary rules affecting otherwise relevant and thus probative evidence. To lay and expert witnesses, it means that they can talk more freely and in a natural way on the witness stand, since there will be significantly fewer formalities required of their testimony. And finally, to judicial factfinders, Free Proof offers a sense of comfort and familiarity because it allows them to draw from their practices in everyday life, bringing into the courtroom their own habits and customary ways of arriving at factual determinations, since each person's epistemological rationality is, by nature, unique to them. The fact-finding process for each case may also present some peculiarities, which may be accommodated by the doctrine of Free Proof as well. In contrast with the doctrine

104. See MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* (1997); J.F. Nijboer, *Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective*, 41 AM. J. COMPAR. L. 299, 301 (1993); James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399, 415 (1987).

105. See Schauer, *supra* note 26, at 169.

106. *Id.*

of Free Proof, that of Evidence Law involves intrinsic rules of evidence,¹⁰⁷ which could be regarded as intruding into the natural process of human cognition. Often, such evidence rules are technical and counterintuitive and arguably represent a clear burden to the litigating parties and testifying witnesses.¹⁰⁸

2. *Free Proof allows for greater epistemological completeness.*

The traditional exclusionary rules of evidence inherently conflict with the epistemological goal of completeness.¹⁰⁹ This is because the evidence rules exclude certain types of relevant evidence, even though these same types of evidence would “cheerfully and blithely be regarded as probative in everyday life.”¹¹⁰ Such rule-excluded pieces of evidence, although potentially misleading, prejudicial, or fraudulent, are still valuable in an epistemic sense. The doctrine of Free Proof could resolve this problem by allowing such evidence to be offered at trial and letting the trier of fact grant it the weight its intrinsic probative value deserves, presumably *discounted* for such epistemic losses as a non-firsthand account, the want of an oath, or the lack of an opportunity to cross-examine the declarant.¹¹¹ Such a discount in epistemic value is rarely total, and thus the evidence might yet have value.¹¹²

Frederick Schauer carefully illustrates this feature of Free Proof through a discussion of hearsay rules, best evidence rules, character evidence rules, and propensity evidence rules.¹¹³ According to Schauer,

In all of these instances the evidentiary rule operates to exclude otherwise relevant evidence, and for almost all of these rules the exclusion is typically explicitly justified in terms of avoiding the risk of misleading . . . or of preventing the [trier of fact] from mis-assessing the actual value of the evidence.¹¹⁴

Nonetheless, such evidence “ordinarily has between some and a considerable degree of probative value,”¹¹⁵ and “we rarely in ordinary life discount its epistemic value entirely.”¹¹⁶ By applying the doctrine of Free Proof, the trier of fact would

107. Intrinsic rules of evidence, focusing on improving accuracy in judicial factfinding and mostly in the form of exclusionary rules, are generally distinguished from extrinsic rules of evidence, like privilege rules and policy-based exclusions of evidence.

108. However, note that a burden to one party could be viewed as a weapon to the other.

109. See Susan Haack, *Epistemology Legalized: Or, Truth, Justice, and the American Way*, 49 AM. J. JURIS. 43, 56 (2004) (using the term epistemological desideratum).

110. See GOLDMAN, *supra* note 45, at 291.

111. See Schauer, *supra* note 26, at 177.

112. *Id.*

113. *Id.* at 175–80.

114. *Id.* at 179.

115. *Id.* at 176.

116. *Id.* at 177.

still hear such evidence and then give the evidence the appropriately discounted weight, rather than subjecting it to “genuine rules demanding *categorical exclusion*.”¹¹⁷

B. Problems with Free Proof

“Laws without Procedure: Rivers without Banks.”—Aviva Orenstein¹¹⁸

Arguments based on the theory of Free Proof are not yet close to winning the day. In fact, there is an insurmountable gap between the aspiration of Free Proof and the reality of human conditions in the courtroom. The concept of Free Proof rests on two assumptions.¹¹⁹ The first is that the determination of evidential relevancy and weight *can* be accomplished by judges without resort to the law because the judges possess superior qualifications of cognitive and epistemic ability (“Assumption No. 1”). The second is that judicial determination of evidentiary relevancy and weight is a purely epistemic activity, which by extension means that the determination *should* be made by judges freely rather than controlled by the law, which reflects value preferences determined by social agreement (“Assumption No. 2”). Both assumptions are false.

1. Judges’ epistemic exceptionalism is false.

Throughout the history of the common law system, very few people have advocated Free Proof for jury trials: for centuries there has been a consensus among legal academics and practitioners that jurors, due to their epistemic weaknesses (e.g., various cognitive illusions, fallacies, and implicit biases as laypersons), cannot adequately conduct judicial determinations of evidentiary relevancy and weight without resort to the law.¹²⁰ In contrast, judges are

117. *Id.* at 179; *see also id.* at 180 (“Taken together, therefore, it is hard to escape the conclusion that Bentham’s views are very much on the ascendancy, that much of the entire law of evidence is in decline, and that arguments based on the Free Proof approach are close to winning the day.”).

118. I learned this line from one of the evidence lectures that Professor Aviva Orenstein delivered for law students at China University of Political Science and Law in Beijing, China, in June 2016.

119. The author’s version of the two assumptions of Free Proof is inspired by Stein, *supra* note 43, at 574–84. However, the description of the two assumptions in this Article is slightly different from Stein’s.

120. *See* THAYER, *supra* note 69, at 508–38; JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 632–33 (Peter Tillers ed., 1983) (discussing “weakness” of jurors); Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 255 (1937) (noting that judicial discussions of the hearsay rule indicate a distrust of juries’ ability to handle such testimony); Henry M. Hart, Jr. & John T. McNaughton, *Evidence and Inference in the Law*, 87 DAEDALUS, Fall 1958, at 40, 48 (discussing rules of evidence “designed to exclude evidence to which the jury might give too much weight”); CHRISTOPHER B. MUELLER, LAIRD C. KIRKPATRICK & LIESA L. RICHTER, EVIDENCE UNDER THE RULES: TEXT, CASES, AND PROBLEMS 1 (9th ed. 2018) (“[M]istrust of juries is the single overriding reason for the law of evidence.”); *see also supra* Section II.A.4. However, in recent years, there has been occasional resistance in the literature to the alleged cognitive deficiencies of jurors—typically some variation on the theme of “juries are not as

traditionally thought to have a superior sense of epistemic rationality, as Schauer observes:

[W]e assume that judges are less prone than juries to the cognitive and decision-making failures we worry about in jurors, possibly because judges are smarter, possibly because they are better educated, possibly because of their greater experience in hearing testimony and finding facts, and almost certainly because of their legal training and legal role-internalization.¹²¹

For Bentham, many of his academic followers, and many members of the trial bench, “there are distinctions that can be understood and drawn by some people [i.e., judges] under some conditions that are not distinctions that *other* people [i.e., lay jurors] can reasonably be expected to understand, internalize, and apply.”¹²² According to this logic, rules are for less capable people (ordinary, randomly selected citizens), not for judges on bench trials.¹²³ Supporters of Free Proof see judges as having an extraordinary ability of recognition and decision-making, most aptly described by James Steiner-Dillon as “epistemic exceptionalism.”¹²⁴ This is the essence of Assumption No. 1. In the eyes of many people, the epistemic capability gap between judges and lay jurors is, to borrow R. M. Hare’s infelicitously labeled but insightful distinction, like that between “archangels” and “proles” (or proletarians):

[T]hose who perceive themselves as possessing greater wisdom, training, and insight tend also to perceive themselves as having far less need for the rules that society often employs as second-best strategies in order that third-best decision makers will not persistently make fourth-best decisions. So when the *proles* are not part of the picture, Bentham and his successors appear to have believed, the reasons for rules are vastly diminished, and the *archangels* can make the best all-things-considered epistemic decisions in much the same way as they might make the largely rule-free all-things-considered substantive and normative ones.¹²⁵

dumb as you think they are,” often supported with empirical evidence. See Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1 (2003); see also Dale A. Nance & Scott B. Morris, *Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Small Random-Match Probability*, 34 J. LEGAL STUD. 395 (2005); Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121 (2001).

121. Schauer, *supra* note 26, at 188.

122. *Id.* at 183.

123. *Id.* at 184.

124. See Steiner-Dillon, *supra* note 53.

125. Schauer, *supra* note 26, at 184 (emphasis added) (discussing R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT 44–45 (1981)).

But do judges really possess “epistemic exceptionalism”? First, as already discussed, both judges and lay jurors are *human beings susceptible to epistemic pitfalls*.¹²⁶ Therefore, the epistemic capability gap between judges and jurors is not as broad as the difference between archangels and proles. Furthermore, individual judges vary widely in their epistemic capabilities: there are always good judges, bad judges, and average judges.¹²⁷ Of course, someone from the Free Proof camp may still argue that even if both judges and lay jurors are susceptible to some (but not all) epistemic pitfalls, and even if some judges are better than others, the training and experience of judges still make them obviously better at fact-finding than lay jurors. Indeed, legal training involves developing expertise in analyzing cases. However, as Barbara Spellman observes,

[A]nalyzing cases—reading (truncated) text, considering an already-digested fact pattern, evaluating the justifications for a holding, looking for the real justification behind the stated ones, and evaluating a rule or principle in light of possible implications or future applications—is *quite different from weighting evidence and finding facts*. For the latter two tasks there is no prolonged training with feedback in law school.¹²⁸

Yet for the task of fact-finding, it is not apparent to what extent judicial experience helps, and it is quite possible that experience could sometimes do damage. The central problem is that the ground truth of cases is never known.¹²⁹ As Robinson and Spellman observe, “[j]udges hear case after case but get no reliable feedback as to whether their (or a jury’s) determinations of fact are accurate They may be regularly getting it wrong, but never have occasion to learn of their errors.”¹³⁰

Because existing empirical studies on judges’ cognitive and decision-making skills are relatively limited, this Article relies on established studies from the broader social sciences (cognitive psychology and related fields) to posit two more arguments against the epistemic exceptionalism of judges. The first argument, as Schauer explains, is that professionals (including judges) tend to overestimate their own cognitive abilities.¹³¹ Well-established studies have shown that professionals typically overestimate the power of their professional skills, the reliability of their judgments, and the strength of their ability to assess a particular situation.¹³² Thus,

126. For details, see *supra* Section II.A.4.

127. See, e.g., Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383 (2009). Arguments for and against the epistemic capability of judges in this Article are anchored on average judges.

128. Spellman, *supra* note 85, at 7 (emphasis added).

129. *Id.* at 8.

130. Robinson & Spellman, *supra* note 51, at 1142.

131. Schauer, *supra* note 26, at 189–91.

132. *Id.* at 190 (first citing Colin Camerer & Dan Lovallo, *Overconfidence and Excess Entry: An Experimental Approach*, 89 AM. ECON. REV. 306, 311 (1999) (finding that subjects

it is reasonable to infer that “judges will typically overestimate their own ability to assess facts, their capacity to rise above the cognitive failings of lesser mortals, and thus their own lack of need for the kinds of exclusions . . . that are represented by many of the rules of evidence.”¹³³ For example, Stephan Landsman and Richard Rakos studied the effect of potentially bias-inducing information on judges and jurors in civil litigations. They found that judges and lay jurors were equally incapable of disregarding inadmissible information to which they had been exposed.¹³⁴ Interestingly, however, both the judges and lay jurors in their study shared a belief that judges were *better* than laypersons at disregarding such information.¹³⁵ Thus, professionals’ overestimation of their own cognitive abilities aligns with an illusion entrenched among the general public.

This example also links with the final argument against the epistemic exceptionalism of judges, which is that, as well-established studies have indicated, judges may believe that they can eliminate or avoid some cognitive failings by simply being *aware* of such failings. Such awareness does not solve the problem—it may mask it.¹³⁶ For instance, research indicates that awareness of bias can eliminate some biases such as framing biases (interpreting evidence through a positive or negative frame), but other biases, like anchoring (overly weighting the first piece of evidence presented), are quite resistant to a range of awareness-based de-biasing techniques.¹³⁷ Therefore, “the same pathologies that lead judges to believe they are not subject to juror pathologies will lead those same judges to believe, often erroneously, that they are especially able, as a result of *awareness*, to eliminate what few biases they believe they have.”¹³⁸

generally overestimate their skills relative to their competitors); then citing Leilani Greening & Carla C. Chandler, *Why It Can't Happen to Me: The Base Rate Matters, but Overestimating Skill Leads to Underestimating Risk*, 27 J. APPLIED SOC. PSYCH. 760, 774 (1997) (finding that most subjects believed that their skill levels were better than average); and then citing Markus Glaser, Thomas Langer & Martin Weber, *True Overconfidence in Interval Estimates: Evidence Based on a New Measure of Miscalibration*, 26 J. BEHAV. DECISION MAKING 405, 414 (2013) (concluding, after empirical study, that professionals tend to be overconfident when compared with a control group of students)).

133. *Id.*

134. See Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994).

135. *Id.* at 117.

136. Schauer, *supra* note 26, at 191–92.

137. *Id.* (citing Timothy D. Wilson, Christopher E. Houston, Kathryn M. Etling & Nancy Brekke, *A New Look at Anchoring Effects: Basic Anchoring and Its Antecedents*, 125 J. EXPERIMENTAL PSYCH.: GEN. 387, 397 (1996) (revealing that study participants continued to exhibit anchoring, even when forewarned about anchoring effects)).

138. *Id.* at 192 (emphasis added).

2. *Judicial fact-finding and value preferences are not segregated.*

An obvious argument against Free Proof is that if it really worked as intended, we could simply adopt a “free law” regime. In other words, if, in the absence of legal rules, judges could make the best all-things-considered decisions based on the facts alone, then, as Schauer states,

[I]t would follow that this might apply as much to factual determinations as to the question of how to resolve the disputes and make the decisions that those facts raise. But if we truly believed this, then we would have far fewer substantive legal rules than we actually now do have, and a far more casual (or “rule of thumb”) attitude towards the substantive rules that we have than is in fact the case.¹³⁹

In reality, we have a robust substantive law system (contract law, tort law, property law, etc.) which rarely receives serious challenges.

So why is evidence law treated differently by supporters of Free Proof? Supporters of Free Proof distinguish between matters that are purely evidential, and thus can be settled by applying the prevailing epistemic standards alone, and matters that require value judgments. They believe that judicial fact-finding (determination of evidentiary relevancy and weight) is a purely epistemic activity. Having “no mandamus to the logical activity”¹⁴⁰ (or presumably to the epistemological faculty), law should exert no control over this activity.¹⁴¹ Thus, the thinking goes, judges, as credible, reasonable persons, do not require any special rules to instruct them on how to resolve disagreements about empirical facts; they can adequately resolve such disagreements by relying on legitimate evidentiary materials and their cognitive skills alone.¹⁴² By contrast, bestowing individual judges with the power of making legally enforceable value preferences would amount to licensing judicial dictatorship.¹⁴³ In any established democracy, enforceable value preferences can only be determined by social agreement—namely,

139. *Id.* at 184.

140. THAYER, *supra* note 69, at 314.

141. Stein, *supra* note 43, at 576.

142. *Id.*

143. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 713–14 (2015) (Scalia, J., dissenting) (decrying the majority’s recognition of gay marriage and arguing that “[t]oday’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court’s claimed power to create ‘liberties’ that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves”).

by the law.¹⁴⁴ Thus, matters that require value judgments must remain in the domain of substantive law.¹⁴⁵

However, are judicial fact-finding and value preferences truly distinct? Can purely epistemic criteria justify the judicial determination of evidential weight?¹⁴⁶ Admittedly, ordinary people use and rely on their common sense everyday to make ordinary, nonjudicial factual determinations without resorting to formal rules of law. But judicial fact-finding at trial does not involve everyday factual determination. As discussed in the previous Section, judicial fact-finding is always made at a crucial juncture, with limited resources and scarce evidence.¹⁴⁷ In contrast, a purely epistemic inquiry would need to consider all possible relevant factors, which could theoretically last forever; a trial does not have that luxury. As Alex Stein states, “to terminate it at any given point is to make a *strategic choice*, rather than an epistemic decision.”¹⁴⁸ Thus, judicial fact-finding is not a purely epistemic activity but represents a reasonable and justified *compromise*. Judicial fact-finding does not just involve logical empiricism; it also necessarily invokes value preferences. For example, in the process of managing risk in adjudicative fact-finding (avoiding wrongful civil verdicts, wrongful criminal convictions, and wrongful criminal acquittals), the judge must perforce make substantive value judgments.¹⁴⁹

Judges’ allocation of risk is a two-step process. First, through the form of rules, the law of evidence confers on litigants some protection against judicially imposed errors. Various evidentiary rules are designed to provide (sometimes limited) resistance to particular errors in judicial fact-finding, as targeted by lawmakers in accordance with their value preferences, with the ultimate goal of *reducing* total errors. Second, because adjudicative errors do still occur even in the best of circumstances, standards of proof and other evidentiary rules work to *redistribute* errors according to value-laden decisions about which errors are worse than others (e.g., wrongful acquittals being preferred to wrongful convictions).¹⁵⁰

144. Cf. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 18–19 (1988) (arguing that law has proved to be the only viable, albeit imperfect, common denominator of society that is both liberal and pluralist).

145. Stein, *supra* note 43, at 576.

146. See generally *id. passim* (influencing and providing inspiration for this argument).

147. For details, see *supra* Sections II.A.2, 3.

148. Stein, *supra* note 43, at 581.

149. *Id.* at 579 (“Adjudicative fact-finding is saturated by allocations of the risk of error in conditions of uncertainty. Allocation of this risk is thoroughly dependent upon values. As such, it should be regulated by the law, more specifically, by the law of evidence.”); see also *supra* Section II.A.3.

150. For example, the standard of proof for criminal cases—proof beyond a reasonable doubt—reflects a value preference of the general public: wrongful convictions are much worse than wrongful acquittals. See Jack B. Weinstein & Ian Dewsbury, *Comment on the Meaning of ‘Proof Beyond*

Because such decisions are distinctly substantive, they should not be left to individual judges' free will or freewheeling.

C. The Continued Need for Evidentiary Rules in Bench Trials

In addition to dismissing Free Proof as appropriate for bench trials, the following discussion further supports this Article's central claim that bench trials still need evidentiary rules.

Evidentiary rules (or, more broadly, the law of evidence) play a crucial role in the courtroom because they help solve or mitigate several problems at trial. The first of these, the epistemological problem, deals with the question of how to efficiently and effectively construct and use knowledge to find the truth at trial. This has been the focus of this Article thus far: evidentiary rules help correct various weaknesses in cognition and decision-making of the trier of fact. As first elucidated by Ronald Allen, however, the law of evidence responds to three other courtroom problems. These resolutions facilitate fair, just, and productive social interactions, values which are equally important in bench trials.¹⁵¹

First, there is an organizational problem. The law of evidence could help regulate the interactions of the various participants in a bench trial—trial judge, attorneys, parties, and witnesses (both lay and expert)—and facilitate the construction of the trial framework by allocating power and limits among them.¹⁵² It would be suboptimal for bench trial judges to deal with this organizational task independently through discretion since that would mean every bench trial would be organized in its own way. By determining the trial judge's amount of discretion, the law of evidence could also help determine the various parties' control in bench trials (based on social expectations, due process, and judicial consensus, which work together to promote consistency, fairness, and predictability). Parties and their counsel deserve predictability for planning and negotiating purposes; they are entitled to know when the bench trial judge will restrict the use of evidence so that they can better prepare their case or perhaps settle it. A more predictable system is preferable to one of bench trials without evidentiary rules, in which judges have nearly unlimited discretion in fact-finding, and wide variations exist from one judge to another. Other rules, sometimes known as presentation rules, support

a Reasonable Doubt, 5 LAW PROBABILITY & RISK 167, 167 (2006) (“In a criminal case, the law tilts in favour of defendants; it prefers that some guilty go free rather than that some innocents be convicted.”).

151. See Allen, *supra* note 96, at 379; see also 1 Ronald J. Allen, *The Framework for the Reform of Evidence*, in PROFESSOR ALLEN ON EVIDENCE 459 (2014). Professor Allen also mentioned a fifth task for the law of evidence in his lecture—the Enforcement Problem—which I chose not to discuss in this Section but will briefly discuss later in this article.

152. See Allen, *supra* note 96, at 381 (observing that the law of evidence “allocates both power and discretion to each of the actors”).

this predictable organization by ensuring that each party is given an equal opportunity to present its case and effectively contest its opponent's case.

Bench trials require that the trial judge undertake both law interpretation and fact-finding, thus playing less of an “umpire” role between two adversaries (as in a jury trial) and more of an “inquisitor” role, intervening in the proceedings and actively solving problems as a third party in the trial.¹⁵³ Evidentiary rules could support the adversarial aspects of bench trials, offering opposing counsel an important tool in their arsenal to win the case.¹⁵⁴ For instance, if evidentiary rules are in place, closing arguments in bench trials could remain an adversarial feature, since an effective defensive strategy is to use the rules of evidence to prevent opposing counsel from stockpiling ammunition in his or her closing argument.¹⁵⁵

Relatedly, the law of evidence could also help structure the relationship between trial judges and appellate judges. According to current practice, appellate courts grant tremendous deference to the factual determination of cases by trial courts, whether jury or bench trials.¹⁵⁶ Such a practice makes sense for jury trials since the jury represents the local community. Jurors provide community values and peer judgements that deserve particular respect. Additionally, jurors sacrifice a period of time from their ordinary life and work to fulfill their civic duty and are invited by the court to decide facts on behalf of the court and the local community. By contrast, bench trials utilize trial judges as factfinders. It is their daily job to adjudicate cases, they cannot offer the unique perspective of a lay jury, and they belong to the same judicial branch as appellate judges. Thus, it makes less sense for an appellate court to apply the same (or even a higher) degree of deference to the fact-findings of a bench trial. The current appellate practice of strongly deferring to trial judges' discretion and of adhering to the “reversible error” requirement, to some degree, contributes to trial judges' prevalent ignorance of evidentiary rules in bench trials, since ignorance of evidence rules rarely results in errors that are considered reversible at the appellate level. But it is debatable whether this is a good practice. Those who oppose the current practice and support stronger appellate checks on factfinding might suggest, for example, a redesign of the evidentiary rules for bench trials, lowering the appellate standard

153. See JACKSON & DORAN, *supra* note 28, at 123, 137.

154. See Lawrence Morales II, *Evidence in a Bench Trial: Do the Rules Really Matter?*, 73 TEX. BAR J. 110, 114 (2010).

155. *Id.*

156. See, e.g., Margaret A. Berger, *When, if Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L. REV. 893, 894 (1992) (“Although more than twenty thousand cases a year were tried in the federal courts in the twenty-four month period between July 1, 1988 and June 30, 1990, I could find only thirty cases decided in 1990 in which a court of appeals stated in an officially reported opinion that its reversal was due to an evidentiary error at trial.” (footnote omitted)).

of review on findings of fact in bench trials (more toward reviewable *de novo*).¹⁵⁷ At minimum, this consideration clarifies the importance of evidentiary rules for bench trials: without any evidentiary rules, parties would be unable to object (and thus appeal) on evidentiary errors.¹⁵⁸

Second, there arises a governance problem. Notwithstanding the importance of accurate fact-finding in litigation, trials promote other social values as well. These values often compete in the courtroom with the goal of accurate fact-finding, both for jury and bench trials. To illustrate this point, it is helpful to separate primary behavior from litigation behavior. Primary behavior is the everyday behavior of the population. Litigation behavior is behavior that is actively directed toward formal resolution of disputes. The objective of the legal system is the *overall* optimization of social welfare, not just the optimization of litigation behavior. Thus, the legal system must address the interactive effect of the legal regime with primary behavior.¹⁵⁹ The law of evidence can help tame such complexity by creating incentives for various primary behaviors. Denoted as “extrinsic rules” of evidence, the rules encompassed herein have nothing to do with the central goal of accurate fact-finding. For example, privilege rules protect numerous socially important relationships, including spousal, legal, therapeutic, spiritual, and governmental, by creating a shield in the law to prevent conversations in these privileged relationships from being introduced at trial.¹⁶⁰ Another example arises out of policy-based exclusionary rules, such as those providing incentives for people to fix dangerous conditions after an accident¹⁶¹ or to settle rather than litigate a civil dispute.¹⁶² Since such incentive rules of evidence are already deeply rooted in jury trials, for reasons of consistency and predictability, it is hard to imagine that the same rules would be absent or dramatically different in bench trials.

157. In my opinion, the appellate standard of review on questions of fact in bench trials should never be *de novo* in the United States. This is because the appellate court’s review is based on documents rather than on direct exposure to live witness testimony, in which the demeanor and natural reaction of witnesses to various questions can be observed. In contrast, in countries such as China that organize appellate review as a *second instance trial*, rather than merely a documentary review, *de novo* is the standard of review for appealed factual issues.

158. See Allen, *supra* note 96, at 381 (“The law of evidence also regulates the relationships among branches of government, in particular but not limited to the judiciary and legislature.”).

159. *Id.* at 384.

160. *Id.* at 382.

161. FED. R. EVID. 407 (excluding evidence of subsequent remedial repair to prove negligence).

162. FED. R. EVID. 408 (excluding evidence of offers to compromise to prove liability); see also Allen, *supra* note 96, at 382. There are numerous more classic examples of such incentive rules in the law of evidence, such as shielding victims of rape from inquiry about their past to encourage reporting and forbidding mention of liability insurance to prove negligence. See FED. R. EVID. 412, 411. Since they have nothing to do with the Epistemological Problem, traditionally all these rules are categorized as “extrinsic” rules of evidence.

Moreover, as previously discussed, a mistake-free legal system is impossible, regardless of how the trial is conducted.¹⁶³ A trial can result in two types of errors: a wrongful verdict for a plaintiff (or, in a criminal case, a conviction of an innocent person), which is a false-positive error, and a wrongful verdict for an accused (or the acquittal of a guilty person), which is a false-negative error.¹⁶⁴ The law of evidence—through rules like burden of proof, standard of proof, and others dealing with resource allocation—can help diminish the risk of errors at bench trials.

Third, there exists a social problem. Except in very few cases (e.g., when national security is at stake), both jury and bench trials are open to the public. They are social events that provide an important podium for expressing political and social values. Additionally, the general public learns about the judiciary, the legal system, and the rule of law through participating in, observing, and discussing trials. Traditionally, jury trials attract almost the entire spotlight, and so the traditional evidentiary rules for jury trials reflect social norms. For example, the limits of character and propensity evidence reflect a popular view that an individual should not be trapped by past mistakes and misdeeds. The hearsay rule reflects the societal belief that people should have the right to confront their accusers. Since bench trials have become the new norm for judicial practice and are making a growing social impact, can they share the notoriety and centrality of jury trials when people think about the American justice system? Evidentiary rules that facilitate smooth and consistent operation of bench trials will likely strengthen the public's respect not only for bench trials but also for the judiciary as a whole, vindicating public aspirations for the rule of law. Conversely, a misshapen or inconsistently applied law of evidence for bench trials will undermine these values.¹⁶⁵

IV. BUT A DIFFERENT SET OF RULES—WHY FEDERAL RULES OF EVIDENCE ARE NOT A GOOD FIT FOR BENCH TRIALS

A. Federal Rules of Evidence Are Relics of the Jury-Trial Tradition in the Common Law System

It is not an overstatement to say that the FRE, first adopted in 1975, are primarily designed for jury trials, although they certainly technically apply to both bench and jury trials.¹⁶⁶ First, let us take a look at the historical development of

163. See *supra* Sections II.A.2, 3, III.B.2.

164. See Allen, *supra* note 96, at 383–84.

165. See *id.* at 382.

166. FED. R. EVID. 1101(a) (“These rules apply to proceedings before: United States district courts; . . . courts of appeals; . . .”). Accordingly, FED. R. EVID. 1101 does not separate jury trials

the FRE's birth. The focus of the FRE nowadays—various exclusionary rules that constrain the admission of evidence at trial and, of course, their exceptions—was developed from a framework of evidence law by James Bradley Thayer designed more than one hundred years ago in his single volume of essays, *A Preliminary Treatise on Evidence at the Common Law*.¹⁶⁷ According to Thayer and his followers, who were among the most renowned reformers of American evidence law in the twentieth century, evidence law is focused almost entirely on jury trials and almost completely ignores nonjury proceedings. Thayer famously described evidence law as “the child of the jury system.”¹⁶⁸ Thayer's most prominent student, John Henry Wigmore, insisted that certain fundamental principles underlying rules of evidence were highly important but that their importance was attributed almost entirely to the existence of the jury. This is known as the “Jury Control Theory.”¹⁶⁹ Arthur T. Vanderbilt wrote: “The rules of Evidence at common law are the product of trial by jury.”¹⁷⁰ The strongest statement of all is that of Charles T. McCormick: “As rules they are absurdly inappropriate to any tribunal or proceeding where there is no jury.”¹⁷¹

Other modern evidence scholars tried to provide alternative explanations for American evidence law, deviating from Thayer and his followers' Jury Control Theory. One example is Edmund M. Morgan's argument that the adversarial character of common law proceedings explains much of the law of evidence.¹⁷²

and bench trials. *See id.* Therefore, bench trials in the federal courts are supposed to be covered by the Federal Rules of Evidence.

167. *See generally* THAYER, *supra* note 69. *See also* Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CALIF. L. REV. 2437 (2000).

168. THAYER, *supra* note 69, at 266, 508–09 (“[O]ur law of evidence is a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system, . . . where ordinary, untrained citizens are acting as judges of fact.”). Thayer's central claim is that juries, because of their cognitive and epistemic failings, could hardly be trusted to apply the more scientific principles of proof directly to particular issues, and thus needed exclusionary rules of evidence to steer them in the right direction (the “Jury Control” Theory of evidence law).

169. WIGMORE, *supra* note 101.

170. Arthur T. Vanderbilt, *The Technique of Proof Before Administrative Bodies*, 24 IOWA L. REV. 464, 467 (1939).

171. Charles T. McCormick, *Evidence*, in 5 ENCYCLOPEDIA OF SOCIAL SCIENCES 637, 644 (Edwin R.A. Seligman & Alvin Johnson eds., 1931).

172. *See generally* Morgan, *supra* note 120, at 258 (explaining that adversary procedure vests the parties with responsibility for presenting and developing the evidence). The adversaries are obligated to gather and present their own evidence, and they are expected to challenge and test the strength of the evidence presented by the opposing side. Evidence rules sometimes operate to protect this opportunity for adversarial testing. For example, the hearsay rule can be explained as a guarantor of adversarial scrutiny. Hearsay evidence is presumptively inadmissible because witnesses to events must normally testify live in court, where they can be subjected to cross-examination by the opposing party. *See also* John H. Langbein, *Historical Foundation of the Law of Evidence: A View from the Ryder Sources*, 95 COLUM. L. REV. 1168 (1996); Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 240 (1988) (developing the “Best Evidence Principle,” holding that many of the rules of

These alternative theories enriched the explanations of evidence law. The problem is that no alternative explanation is as dominant and penetrating as the Jury Control Theory.¹⁷³ Thus, when Chief Justice Earl Warren appointed an advisory committee of fifteen lawyers and scholars to draft the new Federal Rules of Evidence in 1965, those drafting members very likely considered evidence law a product of jury trials.

It has been more than forty-five years since the FRE were first adopted in 1975. In that time, the FRE have been amended by acts of Congress and further amended by the U.S. Supreme Court via the Rules Enabling Act process numerous times.¹⁷⁴ However, a careful review of the current version of the FRE convincingly displays that the focus of the FRE as a design for jury trials remains. One obvious illustration is that a keyword search of “jury” or “juror” in the text of the current version of the FRE finds *thirty-six* mentions,¹⁷⁵ whereas a search for “bench” in the same text gets *zero* results. Even though “judge” is mentioned seven times in the current version of the FRE, only one instance remotely relates to bench trials, and often the role of the judge who is mentioned is to screen dangerous evidence before it reaches the jury.¹⁷⁶

Another good illustration of the jury focus is FRE Rule 105, limiting instruction: “If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the *jury* accordingly.”¹⁷⁷ Rule 105 is often used in trial practice to address a frequently encountered situation at both jury and bench trials where evidence is admissible for one purpose but inadmissible for some other purpose (due to different directions of inference). Thus, the trial judge needs to direct the attention of the trier(s) of fact to this special circumstance and remind them what they may and may not do (named as “limiting instruction”). For instance, evidence of a prior act to show knowledge may be admissible to show that limited purpose but may not

evidence are better understood as attempts to generate the epistemically best available evidence); Edward J. Imwinkelried, *The Worst Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law*, 46 U. MIA. L. REV. 1069, 1079 (1992) (suggesting that Anglo-American evidence law is explained in part by a concern about witness dishonesty).

173. Zhuhao Wang, *The Fate of Evidence Law: Two Paths of Development*, 24 INT’L J. EVIDENCE & PROOF 329, 335 (2020).

174. See STAFF OF H.R. COMM. ON THE JUDICIARY, 116TH CONG., FEDERAL RULES OF EVIDENCE: DECEMBER 1, 2019, at VII–X (Comm. Print 2020), https://www.uscourts.gov/sites/default/files/federal_rules_of_evidence_-_dec_1_2019_0.pdf [<https://perma.cc/ZZ2Z-5GF2>].

175. The version this Article examined is Federal Rules of Evidence, as amended on December 1, 2019. See generally *id.* This search does not include the Advisory Committee Notes and excludes words like “injury,” “perjury,” and “grand-jury” that include the word “jury” within them.

176. See, e.g., FED. R. EVID. 104 (providing for screening mechanism regarding the admissibility of evidence).

177. FED. R. EVID. 105 (emphasis added).

be admissible to show propensity.¹⁷⁸ Obviously, in bench trials limiting instructions would at best be a self-reminder for the judge, but they are not even that. Rule 105 only regulates limiting instructions in jury trials. Similar mismatches between the FRE and bench trial practices are easy to identify. For example, FRE Rule 104(b), the “sufficiency” standard for conditional relevance, states that the judge needs to decide whether a *reasonable jury* could find the disputed fact by a preponderance of the evidence.¹⁷⁹ But in a bench trial without a jury, the judge would obviously not need to think about the Rule 104(b) sufficiency standard in light of a nonexistent reasonable jury. What about the phrase “misleading the jury” in FRE Rule 403?¹⁸⁰ Since such a term does not apply to a bench trial, does that mean that Rule 403, “Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time,” is, as a whole, not applicable in bench trials? Not likely.

More fundamentally, the essential form of the FRE as a regulatory mechanism focusing on controlling the input of information to the judicial factfinder (largely ignoring the output) corresponds to the nature of the jury as factfinder at trial, a black box immune from outside influence on its deliberation of the facts. In other words, since the design of the jury trial prevents outside control of the jury’s deliberation, in order to secure the quality of the jury verdict, the use of rules of admissibility—upfront screening of evidence at trial—to exclude from the jury’s deliberative process information that might lead jurors to an unjustified verdict is probably the only practicable solution.¹⁸¹

B. Federal Rules of Evidence Are Designed for Working in a Bifurcated Structure of Fact-Finding That Is Missing in Bench Trials

Even if the FRE are relics of jury trials, it does not necessarily mean that the FRE are unsuitable for bench trials. In fact, considering that both judges and lay jurors are human beings susceptible to epistemic pitfalls,¹⁸² and that judges are quite likely overconfident in their ability to discount information when appropriate,¹⁸³ applying the epistemic evidentiary regulations in the FRE might still be beneficial for bench trials. But there are two other important reasons why the FRE are a mismatch for bench trials. One is that the core function of the FRE—screening evidence—only works in the presence of a bifurcated trial structure that separates the work of screening evidence from the work of fact-finding. Typically, in a jury trial, the trial judge acts as gatekeeper to determine

178. FED. R. EVID. 404(b).

179. FED. R. EVID. 104(b).

180. FED. R. EVID. 403.

181. See John C. Sheldon, *The False Idolatry of Rules-Based Law*, 56 ME. L. REV. 299, 310 (2004).

182. For details, see *supra* Section II.4.

183. For details, see *supra* Section III.B.1.

the admissibility of evidence, and the jury acts as trier of fact to assess probative value (or to determine the weight) of admitted evidence. However, in bench trials, the bifurcated structure does not exist. In a typical bench trial, only one judge adjudicates the case. As discussed earlier, the bench trial judge undertakes both the role of gatekeeper and the role of factfinder.¹⁸⁴ Rules of admissibility, the core of the FRE, cannot function well within the structure of a bench trial because “[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.”¹⁸⁵ As Jennifer L. Mnookin states,

[U]nless there is some kind of bifurcation—one judge making evidentiary assessments to create the factual record that another judge then evaluates—the judge may be weighing the evidence in actual practice, no matter what she does with it formally.¹⁸⁶

But, given the independence of trial judges and extremely limited judicial resources, it would be fanciful to expect to see two judges working in tandem in a bench trial anytime soon.

Even if a bench trial judge excludes a piece of evidence and believes, as a matter of evidence law, that it should not be considered by the court in evaluating the rest of the evidence, the judge already *knows* about the item of evidence. He or she probably cannot truly forget about it, even though he or she has excluded it. As Mnookin aptly illustrates:

[T]he evidentiary value of the excluded piece of evidence is probably not zero. Even if [the evidence is] excluded, the judge’s assessment of the prior odds of guilt or liability might have shifted, thanks to the evidence’s existence. Even if she tries to not let the excluded item of evidence affect her subjective belief about the overall odds of guilt or liability, the judge may tend to value other items of evidence differently because of the non-zero probative value of the excluded evidence.¹⁸⁷

184. For details, see *supra* Section II.B.2.

185. See *In re Teltronics, Inc.*, 904 F.3d 1303, 1312 (11th Cir. 2018) (quoting *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005)).

186. Jennifer L. Mnookin, *Bifurcation and the Law of Evidence*, 155 U. PA. L. REV. PENNUMBRA 134, 135 (2006).

187. *Id.* at 136. Professor Mnookin provides a concrete example of someone’s diary as inadmissible hearsay in her article to further illustrate this important point:

The diary is excluded. The judge knows she shouldn’t consider it. She may well genuinely try not to consider it. And yet, isn’t it possible—perhaps even likely—that the existence of the diary entry will color her evaluation of the two witnesses who claim to have seen Samantha at the bar? The Federal Rules of Evidence, which tend to evaluate evidence in an item-by-item, atomistic fashion, may require exclusion; *but certainly as a matter of logic, the existence of the diary entry makes the claims of the other two witnesses more credible than they would be without it . . .* Or, to put it differently, she may even think that she *is*

A number of empirical studies (mostly through experiments) have confirmed that judges have difficulty deliberately disregarding information that they themselves ruled inadmissible.¹⁸⁸ For example, a leading article authored by Andrew J. Wistrich, Chris Guthrie, and Jeffrey J. Rachlinski concludes:

The results of our studies show that judges frequently cannot “close the valves of [their] attention.” The presumption that people can ignore what they know, or use it for some purposes but not for other purposes, may sometimes be true, but often is little more than a convenient fiction [J]udges are generally unable to avoid being influenced by relevant but inadmissible information of which they are aware.¹⁸⁹

C. In Bench Trials, Admissibility of Evidence Is Not the Judge’s Most Important Concern in Fact-Finding

The other important reason why the FRE are mismatched with bench trials relates to the main form of the FRE, the rules of admissibility of evidence. The trier of fact in any trial, jury or bench, is naturally more interested in considering and determining the ultimate issue of juridical proof—the *sufficiency* of evidence (the probative value or “weight” of each piece of evidence and the collective weight of all the evidence in satisfying the standard of proof)—than the intermediate issue (the admissibility of any particular item of evidence). On the one hand, technically speaking, a judicial decision to exclude evidence based on the FRE can be transformed seamlessly into an epistemic determination that its probative value (or weight) is zero. On the other hand, even though admissibility of evidence more or less facilitates an assessment of its probative value,¹⁹⁰ admissibility is not sufficiency.¹⁹¹ After the judge determines admissibility, the trier of fact still needs to evaluate the reliability of evidence, the credibility of witnesses, the probative value and sufficiency of evidence, and more to decide the facts of the case.¹⁹² Therefore, in a bench trial, admissibility is neither the only nor the

ignoring it; and yet, her evaluation of the credibility of the two other bar witnesses might be different than it would have been if she didn’t know of the diary entry. *She just might find one or both of them especially believable, for reasons that she can’t quite express.*

Id. at 137 (first and third emphasis added).

188. See Wistrich, Guthrie & Rachlinski, *supra* note 86; Myrto Pantazi, Olivier Klein & Mikhail Kissine, *Is Justice Blind or Myopic? An Examination of the Effects of Meta-Cognitive Myopia and Truth Bias on Mock Jurors and Judges*, 15 JUDGMENT & DECISION MAKING 214 (2020).

189. See Wistrich, Guthrie & Rachlinski, *supra* note 86, at 1330.

190. Admissibility is one of the indicators that evidence is reliable.

191. See Wang, *supra* note 173, at 336–37.

192. Juridical proof is complicated. Beyond what has been mentioned, the trier-of-fact still needs to consider the relationship between and among each piece of evidence and their relationship to the overall case scenario presented by the offering party. Furthermore, the trier-of-fact must

primary concern for the judge. The FRE, which mainly address admissibility of evidence, only bring the judge at a bench trial halfway to the finish line of juridical proof.

V. WHAT COULD OR SHOULD EVIDENTIARY RULES FOR BENCH TRIALS LOOK LIKE?

If we release our mind from the deep-seated expectation of a jury trial, allowing ourselves to think about evidence law outside the confines of the FRE, and instead focus on preparing a new set of evidentiary rules for bench trials, a whole new space opens up for law reformers. This includes fundamental changes in the logic and structure of the law. We would cease wondering what a *reasonable jury* could find by the standard of proof because there is no jury in bench trials. Instead, we would ask what a *qualified judge* would think and do under the same circumstances. Freeing ourselves from the constraints of jury-imposed rules, we could consider not just relevancy and admissibility of evidence, but also its sufficiency and reliability. Below are some initial forays into imagining evidence rules for bench trials, including five promising directions for developing such rules.

A. Aim for Concise Rules that Respect Bench Trial Judges' Discretion and Yet Mitigate Abuses of Discretion, Inconsistencies, Unpredictability, and Unfairness in Fact-Finding

Judges are very busy and prickly. Departing from the status quo of loosely applying the familiar FRE as judges see fit while learning and applying a new set of evidentiary rules in bench trials would be burdensome and perhaps even irksome for trial judges. To successfully achieve this reform, the new rules have to be concise, sensible, and easy to use. The FRE, compared to the archaic treatises of evidence in common law history, are already short and clear. However, for use in bench trials, many FRE rules are still too prolix. For example, in the context of bench trials, such things as the separation of FRE Rule 104(a) and (b) in dealing with preliminary questions,¹⁹³ and the eight different ways in FRE Rule 609 of handling evidence of a criminal conviction for impeachment purposes,¹⁹⁴ seem unnecessarily complex. Even more so are the two sets of rules in the FRE widely known for their complexity—character evidence rules and hearsay rules, together with their exceptions and exceptions to their exceptions.¹⁹⁵ At the

compare the competing case scenarios provided by both parties. Finally, the trier-of-fact decides which one is more plausible in a civil case, or which party (prosecutor or accused) provided a convincing case in a criminal case, assuming one of them did. This all adds up to a holistic rather than atomic view of the evidence proffered. It is hard to discern the correct sequence for the trier-of-fact, the judge in a bench trial, to consider all these important issues of fact-finding.

193. FED. R. EVID. 104(a), (b).

194. FED. R. EVID. 609.

195. FED. R. EVID. 404–05, 801–07.

same time, when designing the new rules, overly broad “rule-of-thumb” or “all-things-considered” guidelines should be avoided. The new evidentiary rules for bench trials should still at least be designed as rules, not as broad standards. As Mnookin neatly states,

[W]hen umpire and evaluator are merged, rules that are actually standards may functionally become equivalent to a system without rules at all. And once again, this would likely be operationally true even if judges did pay greater lip service to the rules of evidence in bench trials.¹⁹⁶

As previously discussed, trial judges have significant power in controlling trial procedures and substantial discretion in accepting evidence in bench trials. Thus, bench trials are usually more efficient and flexible than jury trials. These traditional features of bench trials should not be abandoned because judges apply a specialized set of evidentiary rules designed for bench trials. When designing the new rules, trial judges’ discretion should still be fully respected, but the new rules for bench trials should address inconsistency, common epistemic pitfalls, unpredictability, and unfairness. Considering these goals, most evidentiary rules designed for bench trials should be *admonition-style* rules that encourage judges to do the right thing in fact-finding. One good example of an admonition-style rule in the FRE is FRE Rule 403, “Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons”: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”¹⁹⁷ This rule is concise, easy to understand, and easy to use. It provides a mechanism for trial judges to *balance* probative value and dangers of evidence. In this sense, it regulates process, not the results of assessment. And this rule uses the modal verb “may,” not “must.” All these details reflect respect of the trial judge’s discretion in fact-finding, while it still achieves the purpose of regulation—avoiding unfairness in judicial fact-finding.¹⁹⁸ Another example of an admonition-style rule in the FRE is FRE Rule 807, “Residual Exception,” which provides trial judges a mechanism to evaluate how reliable hearsay evidence is for admissibility purposes. Rather than telling judges what types of residual hearsay are admissible or not, this rule allows a trial judge to apply his or her own discretion in balancing pros and cons of a piece of hearsay evidence while establishing the criteria of reliable hearsay for the judge to use and follow.¹⁹⁹

196. Mnookin, *supra* note 186, at 141–42.

197. FED. R. EVID. 403.

198. Nonetheless, due to the term “misleading the jury” in the rule, FED. R. EVID. 403 itself needs to be revised for use in the bench trial context.

199. FED. R. EVID. 807.

B. Consider Keeping Most Rules Relating to Extrinsic Purposes and Epistemic Principles with Universal Values

As discussed in Section III, besides the epistemic problem, evidence law also deals with an organizational problem, a governance problem, and a social problem. As discussed above, traditionally, evidentiary rules on these problems are denoted as extrinsic rules of evidence, in contrast to the rules on the epistemic problem of the jury as trier of fact (intrinsic rules of evidence). Most of the organizing, governance, and social problems that should be addressed by evidence law are the same in jury and bench trials. Thus, those rules of evidence serving these *extrinsic* goals should remain in bench trials.²⁰⁰ For example, in terms of the organizational problem (the interactions of various participants at trial), at least the order, manner, and scope for counsel on both sides in examining witnesses at trial should remain the same for jury and bench trials. Thus, FRE Rule 611, “Mode and Order of Examining Witnesses and Presenting Evidence,” should be preserved in evidentiary rules for bench trials, as should FRE Rule 605, “Judge’s Competency as a Witness.” In terms of the governance problem, when accurate fact-finding competes with other social values in the courtroom, almost all of the FRE that are designed to create the proper incentives for socially desirable out-of-court conduct (e.g., rules of privileges, FRE Rules 501–502, and policy-based exclusions, FRE Rules 407–415) could reasonably remain in evidentiary rules for bench trials for reasons of consistency and predictability. Because those incentives for various socially good primary behaviors are deeply rooted in jury trials, as discussed above, it is hard to imagine them being absent from bench trials. Regarding the social problem, bench trials, though less dramatic, are still public events, shaping popular views that are embedded in the FRE. Therefore, social values such as “an individual should not be trapped in his or her past”²⁰¹ and “an individual has the right to confront witnesses against him”²⁰² should be reflected in evidentiary rules for bench trials as well, again for the purposes of consistency and predictability. Thus, even though we know that the probative value of character and hearsay evidence is rarely zero, and in some circumstances is even quite high, general principles of excluding character and hearsay evidence should still exist in evidentiary rules for bench trials (but in a much more simplified version).

Even in the territory of *intrinsic rules* of evidence, rules purely directed at the goal of accurate and efficient fact-finding, certain classic rules of the FRE should be preserved in the evidentiary rules for bench trials because they hold *universal*

200. See Schauer, *supra* note 26, at 167–68.

201. See Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 772–73.

202. U.S. CONST. amend. VI.

value. An example is authentication rules, described in FRE Rules 901–902. Another example is the rule describing relevancy, FRE Rule 401.

Thus, a significant portion of evidentiary rules that belong to the FRE should remain for bench trials. This is actually good news for presiding judges in bench trials, because they are familiar with these rules already. The difference is that once these rules are officially written into evidentiary rules designated for bench trials, judges can no longer loosely apply them as they see fit.

C. Incorporate Rules on Assessing New Forms of Evidence and Complex Evidence

Science and technology constantly change our lives in subtle but profound ways, including how evidence is generated and presented in courts. In the past few decades, the momentum of such changes has accelerated noticeably. From scientific evidence and electronic evidence to machine evidence, big data evidence, and blockchain evidence more recently, new forms of evidence have emerged in courtrooms. They deviate drastically in nature or form from the mainstays of adjudication: witness oral testimony based on personal perception or direct knowledge of events and issues at trial, as well as real evidence including written documents. Most judges, however, are unfamiliar with the new forms of evidence. Because accurate fact-finding is the central goal of juridical proof, and adjudication should always be a process of rational thinking, trial judges would probably appreciate some concrete guidance for assessing various new forms of evidence. Similar issues arise when judges deal with complex evidence (e.g., complicated scientific and nonscientific expert testimony, statistical evidence, and evidence involving algorithms) presented at trial.

Indeed, the FRE have been amended over the years in response to such challenges. For example, in 2000, FRE Rule 702, “Testimony by Expert Witnesses,” was amended to incorporate the *Daubert* standard²⁰³ (and the follow-up case law applying *Daubert*²⁰⁴), a checklist for trial judges to use in assessing the reliability and helpfulness of scientific and nonscientific expert testimony.²⁰⁵ In 2017, FRE Rule 902, “Evidence That Is Self-Authenticating,” was amended to make it easier to authenticate data from electronic sources, and newly added FRE Rule 902(13) and (14) set forth a procedure by which parties can authenticate certain (certified) electronic evidence other than through the testimony of a foundation witness.²⁰⁶ These newly amended rules of the FRE provide practical guidance to trial judges, not to juries, even though the FRE are

203. See generally *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

204. See, e.g., *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

205. FED. R. EVID. 702. The revision work for FED. R. EVID. 702 is an ongoing project, with amendments expected soon.

206. FED. R. EVID. 902 (13), (14).

heavily influenced by “jury thinking.”²⁰⁷ Such a phenomenon plainly suggests that evidentiary rules about new forms of evidence and complex evidence are no longer based on the Jury Control Theory and hence should also be written into evidentiary rules for bench trials.²⁰⁸

D. Develop Rules on Assessing the Reliability of Evidence

As discussed above, in bench trials, judges are more interested in reliability of evidence than in admissibility, simply because they, not the jury, are the triers-of-fact. Judicial factfinders care most about sufficiency of evidence, which is the question of whether, collectively speaking, the weight (probative value) of all the evidence presented at trial has satisfied the proper standard of proof. Before reaching this holistic view of facts (the last step in judicial fact-finding), the trier of fact must evaluate the weight (probative value) of each piece of evidence at an individual level. Reliability of evidence, so long as it is relevant, is a direct (and arguably the best) indicator of the probative value of evidence: reliable evidence has high probative value, while unreliable evidence has low probative value. Thus, rules on reliability of evidence are rules for assessing evidentiary weight (or “assessment rules”).

Of course, establishing a system of assessment is not an easy task. As Mnookin aptly observes:

[T]his is hard to fathom—both institutionally and intellectually. *Institutionally*, it is difficult to imagine the emergence of formal rules of weight and sufficiency, for they are deeply at odds with the very institution out of which our [traditional] evidence rules partly emerged: the jury as factfinder, the jury as the black box into whose operation we do not—nay, cannot—peer too closely. Even putting aside the institutional impracticality, it is equally difficult to imagine *intellectually* precisely because evidence evaluation is so particularized, so fact-intensive, and so variable.²⁰⁹

Arguably, the intellectual problem is even more difficult to overcome than the institutional problem Mnookin mentions since rules for assessing the weight of evidence relate to the inferential mental process, which is essentially a complex adaptive system.²¹⁰ So, what could such assessment rules possibly look

207. For details, see *supra* Section IV.A.

208. See Wang, *supra* note 173, at 343.

209. Mnookin, *supra* note 186, at 142–43 (emphasis added).

210. A “complex adaptive system” is *complex* in that it is a dynamic network of interactions, for which the behavior of the ensemble may not be predictable according to the behavior of the components. It is *adaptive* in that the individual and collective behaviors mutate and self-organize corresponding to the change-initiating micro-event or collection of events. See Amit Gupta & S. Anish, *Insights from Complexity Theory: Understanding Organizations Better*, TEJAS@IIMB (2009),

like? Again, a good example already exists in FRE Rule 702, “Testimony by Expert Witnesses”:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.²¹¹

First of all, expert testimony usually involves areas that trial judges are unfamiliar with since most judges do not have the same expertise as the testifying expert. Thus, when assessing the reliability of such evidence, trial judges are naturally willing to be guided by rule(s), rather than by their own (irrelevant) common sense in life and legal experience. Conversely, rules will be less useful if the subject of evidence is an area that trial judges know, because the judges will more likely rely on their own knowledge rather than on rules for assessing the reliability, probative value, and weight of evidence. Second, Rule 702 provides a *checklist* for trial judges to use in assessing the reliability of expert testimony, rather than a list of specific, reliable kinds of expert testimony. This rule-drafting technique regulates the process of assessment rather than its result and is very likely the right form for preparing assessment rules for bench trials. Furthermore, assessing the reliability of evidence in nature is a learning process for the factfinder, who moves from unknown to known in relation to the evidence. Thus, when dealing with reliability of evidence, we are pursuing a *rational* process of understanding and thinking in the mind of the factfinder, rather than some brainless deference to authority. That is why the current *Daubert* version of Rule

<https://tejas.iimb.ac.in/articles/12.php> [<https://perma.cc/TZJ5-GT6Z>]. See generally JOHN H. MILLER & SCOTT E. PAGE, COMPLEX ADAPTIVE SYSTEMS: AN INTRODUCTION TO COMPUTATIONAL MODELS OF SOCIAL LIFE (2007). The great evidence scholar James Thayer warned us about making “assessment rules,” or in his words “the [] regions of logic and legal reasoning,” in his 1898 *Preliminary Treatise*:

[T]he law of evidence came to be monstrously overloaded and was made to swallow up into itself much which belonged to other branches of law, or to the wide regions of logic and legal reasoning. Thus, not only were many of these other subjects clouded and thrown out of focus, but the law of evidence itself was intolerably perplexed.

THAYER, *supra* note 69.

211. FED. R. EVID. 702.

702 is a better assessment rule for expert testimony than was the previous *Frye*²¹² general acceptance test.

E. Bench Trial Rules Should Consider Not Just Information Input Control but Also Process and Output Control

The FRE control information input in juridical fact-finding, which works well in jury trials through the bifurcated roles of gatekeeper (trial judge) and factfinder (jury). The gatekeeper controls information input to the trier of fact by ruling on the admissibility of evidence. The trier of fact is told to reach a verdict only based on admitted evidence but may evaluate evidence freely and reach the verdict independently, without having to justify the verdict to the general public. Conversely, in a bench trial, one presiding judge needs to do it all. Thus, admissibility rules cannot work well in this environment: trial judges simply cannot unring the bell. However, what we can do in bench trials is control the assessment process (through rules addressing the reliability of evidence) and the output of fact-finding (where the trier of fact personally must justify the verdict, thus in theory allowing greater scope for appellate review).²¹³ Such a regulatory shift from information input control to process and output control makes sense for bench trials, where the trier of fact is a professional repeat player operating independently. On the one hand, as discussed above, bench trial judges still need rules of evidence to avoid various cognitive and epistemic pitfalls of their own, and to prevent caprice and abuse of discretion in fact-finding. On the other hand, such an arrangement is justified both in terms of compensating the accused for the loss of the jury and in terms of making the judge accountable to the community as well as to the parties.²¹⁴

In addition, as part of the output control, it may be wise to strengthen appellate review of fact-finding in bench trials. In the context of jury trials,

212. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), *superseded by statute*, Pub. L. No. 93-595, 88 Stat. 1926, *as recognized in* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). A court applying the *Frye* standard must determine whether the method by which that evidence was obtained is generally accepted by experts in the particular field in which it belongs. *See id.*

213. *See* JACKSON & DORAN, *supra* note 28, at 84. It is worth noting that in U.S. federal bench trials, there already are some control measures in place on the output of fact-finding that do not exist in jury trials. Nonetheless, those measures are in the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, not the Federal Rules of Evidence. For federal civil cases, Civil Rule 52(a)(1) requires that “[i]n an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately.” *See* FED. R. CIV. P. 52(a)(1). Whereas, for federal criminal cases, Criminal Rule 23(c) states that “[i]n a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion.” *See* FED. R. CRIM. P. 23(c).

214. JACKSON & DORAN, *supra* note 28, at 285.

appellate courts have been understandably wary of intruding into the jury's fact-finding province. As noted, one attraction of employing the jury in a fact-finding capacity is that it imports a lay element into the decision-making process; faith in the value of lay participation might be undermined if appellate courts were to interfere too readily with juries' factual assessment. In the context of bench trials, however, at least in theory, there is arguably less need for the appellate court to be so protective of the inviolability of the trial court's findings of fact, and any objection to the appellate court itself rehearing witnesses, calling other witnesses, and reexamining real evidence is patently less strong.²¹⁵

This Article proposes five major directions for developing a new set of evidentiary rules for bench trials. Of course, this is an open-ended question,²¹⁶ and much more work, especially empirical study, needs to be done to encourage detailed discussion and propose specific rules. Based on the discussion thus far, on the one hand, bench trial judges will not feel too alien to this new set of evidentiary rules since a significant portion of them would be identical or similar to the current FRE.²¹⁷ On the other hand, this new set of evidentiary rules for bench trials demands creative and innovative thinking, abandoning some of the ossified evidence rules and shifting from rules of admissibility to rules of assessment and reliability, from input control to outcome control of fact-finding. In attempting this transition, we need to constantly remind ourselves of the limits of rules in regulating the inferential process of a judicial fact-finder and pay close attention to a crucial distinction between the law on the books and the law in action. It is one thing to write rules; it is another to enforce them in the way anticipated by the drafter of those provisions.²¹⁸

215. *Id.* at 284.

216. Another area of reform worth considering is potential evidentiary rules for before- and after-trial stages. The FRE focus narrowly on the trial stage—which makes sense because, in a jury trial, jurors start their job as trier-of-fact at the trial's start and complete their job at the end of the trial. Thus, the trial itself (here, including jury deliberation in the jury room) is the only period in which the trier-of-fact in jury trials interacts with evidence. However, in a bench trial, the judge, as trier-of-fact, starts interacting with the evidence long before the trial begins, via pretrial motions and proceedings. Also, a bench trial judge still interacts with evidence after trial, e.g., reviewing sentencing evidence in criminal cases. Thus, it is worth thinking about whether evidentiary rules for bench trials should expand to before- and after-trial stages. And yet, I sense that this direction of reform is *less promising* than the five directions discussed in the main text of this Article, due to the concern of overreaching regulations.

217. *E.g.*, FED. R. EVID. 401, 403, 407–15, 501–02, 702, 807, 901–02.

218. As Ronald J. Allen explained:

The drafter of an evidence code may think that a rule has a precise meaning or that allocating discretion to someone, whether trial judge or attorney, makes sense, but the drafter may have in mind an approach to interpreting the rule or exercising that discretion that might not be shared by those implementing the rule. More generally, it is hard to enforce complex codes in social events such as trials. The event itself, the trial, is often fluid and unpredictable, and it would be

VI. IMPACT BEYOND BENCH TRIALS

Of course, for law reformers, creating a new set of evidentiary rules for bench trials is a daunting task, institutionally and intellectually. Nonetheless, such a project could be very rewarding, particularly because its value could transcend the scope of bench trials for at least three reasons.

First, the influence of this new set of evidentiary rules could go beyond bench trials to *all nonjury proceedings*, including arbitrations and administrative cases. Evidence law, although required learning for almost every law student, has been long disparaged because it fully applies in only a tiny portion (three percent or less) of dispute resolutions, namely the jury trial.²¹⁹ Even though today's evidence law still casts a "shadow effect" over nonjury proceedings,²²⁰ such shadow influence is an imprecise concept, secondary to the discretion of professional triers of fact, and very difficult to measure.²²¹ Designing a set of evidentiary rules for bench trials could significantly improve determinations in arbitrations and administrative proceedings. Arbitrations and administrative proceedings have a similar pattern to bench trials, especially in that they all have judges or other legal professionals as the trier of fact. Arbitrations and administrative proceedings, together with bench trials, account for 97% of tribunals.²²² These new rules aim to strengthen the trial judge's role as trier of fact

impossible to have every decision made at trial second guessed by some other authority. The law of evidence must determine how to respond to such matters.

Allen, *supra* note 96, at 384.

219. Kenneth Culp Davis argues:

Five out of six trials in courts of general jurisdiction are without juries. If trials in lesser courts are added, jury trials may be about 5 per cent of all trials in all courts. If trials before administrative officers and arbitrators are also added, jury trials are probably not more than 3 per cent of all trials in all tribunals. We have no rules of evidence designed for nonjury trials. Our only rules of evidence are designed for jury trials. We need rules of evidence or standards of evidence for the 97 per cent of trials without juries.

Davis, *supra* note 101, at 723. Additionally, Professor Kirkpatrick observes:

We are nearing the point, if we have not already reached it, where a recent law school graduate is as likely to be assigned or retained to represent a client at an arbitration proceeding as in a jury trial. The evidence class should provide—and be perceived as providing—training that is as valuable to students planning to pursue a career in the ADR field as to future litigators.

Laird C. Kirkpatrick, *Scholarly and Institutional Challenges to the Law of Evidence: From Bentham to the ADR Movement*, 25 LOY. L.A. L. REV. 837, 852 (1992).

220. An example of the "shadow effect" of the FRE over nonjury proceedings is that parties may reach an out-of-court deal (settlement or plea bargaining) influenced by the knowledge that certain essential pieces of evidence would be admitted or excluded according to the FRE rules if their case proceeded to trial. See Laird C. Kirkpatrick, *Evidence Law in the Next Millennium*, 49 HASTINGS L.J. 363, 366 (1998).

221. See Wang, *supra* note 173, at 335–36.

222. See Ross, *supra* note 76, (mentioning arbitrations and administrative proceedings share many of the same characteristics as bench trials); Thomas J. Stipanowich, *Arbitration: The "New*

in assessing the reliability of evidence, to address the trial judge's cognitive and epistemic vulnerability for accurate and efficient fact-finding in bench trials, and to restrain inconsistency, unpredictability, and unfairness that arises due to unchecked discretion. Therefore, these evidentiary rules for bench trials will have a good chance of being at least partially adopted by professional triers of fact in other nonjury tribunals. Professional triers of fact in arbitrations and administrative proceedings would no longer be able to simply ignore such new evidentiary rules for bench trials as they did with the FRE.

Second, such a project would inject new enthusiasm and intellectual rigor into the development of evidence law. Given the close relationship between jury trials and the origin and early development of evidence law, the fact that jury trials are so rare has long caused scholars to worry about a commensurate decline in evidence law.²²³ Abolitionists including Jeremy Bentham, John Wigmore, Edmund Morgan, Rupert Cross, and Charles McCormick, among others, painted a daunting picture for the future of evidence law. For instance, Cross reportedly stated, "I am working for the day when my subject is abolished."²²⁴ Similarly, McCormick went so far as to predict the ultimate demise of all rules of exclusion.²²⁵ More recently, Mirjan Damaška wrote a book titled *Evidence Law Adrift*, explaining why American law of evidence is (in his words) eroding.²²⁶ No doubt these scholars are giants in the field of evidence law, and their contributions to the growth of knowledge are well admired. But what is the point of spending almost one's entire career working in a field and then, toward the end, announcing that it should be abolished? Lawyers and judges love evidence law, and it is still one of the most popular upper-level courses for American law students. When Thayer asserted that "[e]vidence law is the child of the jury system" in 1898, he was very likely correct.²²⁷ But now is the time for the child to *grow up* and be *independent*. Pursuing

Litigation," 2010 U. ILL. L. REV. 1, 8 ("By the beginning of the twenty-first century, however, it was common to speak of U.S. business arbitration in terms similar to civil litigation—'judicialized,' formal, costly, time-consuming, and subject to hardball advocacy." (footnote omitted) (first citing Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 35–36 (2003); then citing Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT'L L.J. 419, 434–35 (2000); then citing John Wilkinson, *The Future of Arbitration: Striking a Balance Between Quick Justice and Fair Resolution of Complex Claims*, BNA EXPERT EVIDENCE REP., Apr. 21, 2008, at 189, 189; and then citing Benjamin J.C. Wolf, Note, *On-line but Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 281 (2006)); Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOT. L. REV. 157, 161 (2015) (mentioning "a growing similarity between arbitration and litigation").

223. See Wang, *supra* note 173.

224. TWINING, *supra* note 33, at 1.

225. Charles T. McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A.J. 507, 580–81 (1938).

226. DAMAŠKA, *supra* note 104, at 126.

227. THAYER, *supra* note 69, at 266.

a new set of evidentiary rules for bench trials provides a great opportunity for scholars and law reformers to think outside the box of jury trials and thus creates a new path for a continuous and robust development of evidence law. Since the question of how to develop evidentiary rules for bench trials is still open, and related discussions are still rare and only beginning, the pressure on law reformers is low. There is a real opportunity for change, in contrast with any proposal to adjust traditional evidence rules, which is always an uphill battle that immediately encounters the argument, “[t]his rule has already been used for hundreds of years in practice and has worked just fine. If it were wrong, it would have been abolished earlier.”²²⁸

Last but not least, the project of generating new rules for bench trials could help make evidence law more relevant and influential globally. Since most traditional rules of evidence have a long history of case law, they are closely tied to the common law system. The traditional practice of common law jurisdictions is unique in that it was based on jury trials and adversarial proceedings—features not shared by many other jurisdictions in the world, particularly those that follow the continental law system. Thus, most traditional rules of evidence, especially those intrinsic exclusionary rules of evidence like hearsay and character evidence rules, also do not exist in these other jurisdictions. To many law reformers in non-common law countries, the FRE appear inviting for their sophistication and conceptual clarity. But when such reformers have tried to borrow or transplant rules in the FRE into other legal systems, the plan has always been unsuccessful since those legal systems do not share the same common law foundations on which the FRE are based. In contrast, evidentiary rules for bench trials would present little, if any, common-law particularism. The bench trial is a common practice all over the world, and issues that such new evidentiary rules would address are shared by most countries, even though the forms of trial differ because of history, culture, and idiosyncratic local conditions, like the sophistication level of trial judges and counsel. Thus, researchers and reformers all over the world would be very interested in exploring these new evidentiary rules for bench trials. For the first time, then, reformers of evidence law from the common law countries and continental law countries would share common ground, which would create enormous opportunities for them to communicate with and learn from each other. Following this trend, evidence law would be more influential and globally relevant than ever before.

CONCLUSION

In bench trials, as opposed to jury trials, laypeople are removed from the fact-finding process, which inevitably triggers a vastly different practice in judicial

228. See Schauer, *supra* note 26, at 168.

fact-finding. This change is profound in practice. Because of it, evidence rules designed for jury trials—as embodied in the FRE—cannot be cleanly, effectively, or sometimes even coherently applied to bench trials. In practice, judges clearly recognize this mismatch: in bench trials, they almost always loosely apply the FRE (or their state equivalents). But if the rules cannot be cleanly applied, they also cannot be simply abandoned. Free Proof does not work in bench trials: bench and jury trials share many similarities in fact-finding, particularly in the way that judges, like juries, are subject to cognitive and epistemic mistakes. Rather than allowing judges in bench trials to apply evidence rules at will (on a sliding scale ranging from the full FRE to none at all), judges should adhere to a new set of evidentiary rules tailored for bench trials. This Article sketches the contours of what such new rules might look like.

Once reformers of evidence law move out of the enormous shadow of jury trials and start to think afresh about the best arrangement of evidentiary rules for bench trials, we will create a new space for discussion, one that has rarely been accessed in previous evidence scholarship of the common-law evidence world. Of course, this is not an easy task. But it is worthwhile, creating ramifications that are bigger than the project itself. This article presents a vital first step in meeting this exciting challenge. We can look forward to important developments; exciting empirical and theoretical work on fact-finding in bench trials awaits.

