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## Binding Hercules: A Proposal for Bench Trials

Maggie Wittlin – Associate Professor  
*Fordham University School of Law*

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# Binding Hercules: A Proposal for Bench Trials

Maggie Wittlin\*

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## INTRODUCTION

If you were a federal judge presiding over a bench trial, you probably would not want the Federal Rules of Evidence to apply to you. Sure, you might want to be insulated from *privileged* information.<sup>1</sup> But you are, no doubt, capable of cool-headed, rational reasoning,<sup>2</sup> and you have a realistic understanding of how the world works;<sup>3</sup> if you got evidence that was unreliable or easy to overvalue, you could handle it appropriately. But surely, you would have the same desire if you were a *juror*—it is not your position as a judge that makes you want all the relevant evidence. And in either event, you would, perhaps, be overestimating your own abilities.<sup>4</sup>

The Rules themselves give mixed messages about whether judges should apply them in bench trials. Formally, they apply. Federal Rule of Evidence 1101 provides that the Rules “apply to proceedings before . . . United States district courts,”<sup>5</sup> in “civil cases and proceedings,” and in “criminal cases and proceedings.”<sup>6</sup>

But several rules appear to assume that the evidence is being presented to a jury.<sup>7</sup> For example, Rule 104(c) prescribes when a hearing on a preliminary question must be conducted “so that the jury cannot hear it”;<sup>8</sup> Rule 105 provides that if evidence is admissible for one purpose but not another—such as an out-of-court statement admissible for a non-hearsay purpose but inadmissible for its truth—

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1. 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, 1297 (2005) (noting that some judges in an experiment who were exposed to a highly probative privileged conversation volunteered that they would recuse).

2. Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 189–92 (2006) (discussing research on “the tendency of people, and especially professionals, to overestimate their own cognitive abilities”); James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207, 227 (2019) (“We tend to . . . overestimate our competence, intelligence, and morality in comparison to others.” (citing studies)).

3. See Lee Ross & Andrew Ward, *Naive Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in *VALUES AND KNOWLEDGE* 103, 110–11 (Edward S. Reed, Elliot Turiel & Terrance Brown eds., 1996) (describing naive realism, people’s tendency to believe they see things “as they are in objective reality,” and to believe people who see them differently were exposed to different information, are unable or unwilling to reason rationally, or are biased).

4. See Schauer, *supra* note 2, at 189–92; Steiner-Dillon, *supra* note 2, at 227; Ross & Ward, *supra* note 3, at 110–11.

5. FED. R. EVID. 1101(a).

6. *Id.* at 1101(b).

7. See Ethan J. Leib, *Are the Federal Rules of Evidence Unconstitutional?*, 71 AM. U. L. REV. 911, 944–45 (2022) (noting the Rules are “thoroughly suffused with jury matters” and giving examples).

8. FED. R. EVID. 104(c). The advisory committee notes also rely on the distinction between judge and jury to justify permitting inadmissible evidence in Rule 104(a) determinations and cite the important role of the jury as justification for having a different standard for conditional relevancy than for other preliminary questions. FED. R. EVID. 104(c) advisory committee’s notes.

the court “must . . . instruct the jury accordingly”;<sup>9</sup> Rule 201(f) says the court “must instruct the jury” of the significance of a judicially noticed fact;<sup>10</sup> Rule 403 allows courts to exclude evidence due to a danger of “misleading the jury”;<sup>11</sup> Rules 703 and 706 address when parties may disclose certain facts to the jury;<sup>12</sup> and Rule 614 refers to a party objecting “when the jury is not present.”<sup>13</sup> Perhaps the only rule that explicitly contemplates that there might *not* be a jury is Rule 1008, which addresses the functions of the court and the jury “*in a jury trial*.”<sup>14</sup> The history of the Rules also points to a central role for the jury; they originated, at least in part, in response “to a concern about the cognitive or decision-making capacities of jurors.”<sup>15</sup> As James Bradley Thayer famously observed, the exclusion of relevant evidence due to practical concerns “stamp[s] the law of evidence as “the child of the jury system.”<sup>16</sup>

Despite the formal applicability of the Rules, courts have been reluctant to enforce them on themselves with the same rigor that they enforce them on juries. Although courts sometimes explicitly recognize that the Rules bind district judges in bench trials,<sup>17</sup> at other times, they might admit evidence “for what it is worth,”<sup>18</sup> even when a meticulous application of the Rules would demand its exclusion. Courts sometimes state directly that rules of admissibility are relaxed or less important

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9. *Id.* at 105. The rule requires a timely motion. *Id.*

10. *Id.* at 201(f). In a civil case, the jury must accept the fact as conclusive; in a criminal case, they need not. *Id.*

11. *Id.* at 403.

12. *Id.* at 703, 706(d).

13. *Id.* at 614(c).

14. *Id.* at 1008 (emphasis added). Rule 103 also instructs the court on how to “conduct a jury trial,” but it less clearly contemplates the alternative. *Id.* at 103(d). The advisory committee notes to Rule 605 (which makes the presiding judge incompetent to testify) address the possibility of a bench trial. FED. R. EVID. 605 advisory committee’s notes to the 1972 proposed rules.

15. Schauer, *supra* note 2, at 166 & n.5 (citing sources); see also Jennifer L. Mnookin, *Bifurcation and the Law of Evidence*, 155 U. PA. L. REV. PENNUMBRA 134, 134 (2006) (“That the law of evidence is the child of the jury system is not only oft-repeated but also, as a historical matter, probably true.”).

16. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 266 (Boston, Little, Brown & Co. 1898).

17. *E.g.*, *Broad. Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 238 (5th Cir. 1988) (“The district court erred when it admitted this evidence on the ground that hearsay is admissible in a bench trial; it is not.”); *Emhart Indus., Inc. v. New Eng. Container Co.*, Nos. 06-218 S, 11-023 S, 2014 WL 5808390, at \*5 n.4 (D.R.I. Nov. 7, 2014) (declining to relax the hearsay rule in a bench trial); see also *In re Unisys Sav. Plan Litig.*, 173 F.3d 145, 164 (3d Cir. 1999) (Becker, J., dissenting) (“The Federal Rules of Evidence apply with full force to bench trials.”).

18. *Cobell v. Norton*, 224 F.R.D. 1, 5 (D.D.C. 2004) (“In civil bench trials, for example, many experienced judges admit hearsay they deem reasonably reliable and probative, either ‘for what it is worth’ or on some more explicit rejection of the hearsay rule and its some 30 exceptions.”); see also Schauer, *supra* note 2, at 165–66.

in bench trials.<sup>19</sup> Some courts appear to differentiate between rules that apply and rules that do not.<sup>20</sup> And some suggest that while the Rules apply, courts need not make *pretrial* rulings, particularly regarding Rule 702, because the judge can decide whether the testimony is reliable after hearing it.<sup>21</sup>

*Should* the Rules apply at bench trials? Scholarship on the issue is mixed. John Henry Wigmore suggested that our rules of evidence exist to prevent “jurors from being misled by certain kinds of evidence,”<sup>22</sup> whereas judges are more experienced at analyzing evidence and are wise to “the chicanery of counsel.”<sup>23</sup> And Charles McCormick deemed the rules of evidence “absurdly inappropriate to any tribunal or proceeding where there is no jury.”<sup>24</sup> Other scholars over the last century have suggested eliminating some or all of the rules in bench trials.<sup>25</sup>

But more recently, several scholars have deviated from the conventional wisdom. Frederick Schauer has raised the possibility that “judges are often afflicted with the kinds of cognitive failings that juries

19. *E.g.*, *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 896 (10th Cir. 2000) (“[I]n bench trials ‘questions raised relative to the admission or exclusion of evidence . . . become relatively unimportant,’ because the rules of evidence are ‘intended primarily for the purpose of withdrawing from the jury matter which might improperly sway the verdict.’” (quoting *United States v. Norman T.*, 129 F.3d 1099, 1107 (10th Cir. 1997)); *Moorhead v. Mitsubishi Aircraft Int’l, Inc.*, 828 F.2d 278, 287 (5th Cir. 1987) (“[A]s this court stated in *Null v. Wainwright*, ‘[s]trict evidentiary rules of admissibility are generally relaxed in bench trials, as appellate courts assume that trial judges rely upon properly admitted and relevant evidence.’” (quoting *Null v. Wainwright*, 508 F.2d 340, 344 (5th Cir. 1975)) (alteration in original)); *see also* *Vatyan v. Mukasey*, 508 F.3d 1179, 1187 (9th Cir. 2007) (Clifton, J., dissenting) (“The rules of evidence are not ordinarily applied as stringently in bench trials . . . as in jury trials.”).

20. *E.g.*, *UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres*, 949 F.3d 825, 832 (3d Cir. 2020) (concluding “Rule 702 applies whether the trier of fact is a judge or a jury,” but suggesting Rule 403 does not).

21. *See* Steiner-Dillon, *supra* note 2, at 220 & n.61 (“[S]ome courts have approved admitting expert evidence provisionally by deferring a *Daubert* ruling until after the bench trial . . . .”); *see, e.g.*, *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006) (“Thus, where the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702.”).

22. JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 632 (Peter Tillers ed., 1983).

23. *Id.*; *see also* THAYER, *supra* note 16, at 535 (“So long as [the jury system continues], we must have a law of evidence . . . .”).

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

25. *E.g.*, Kenneth Culp Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A. J. 723, 725 (1964) (suggesting new rules of evidence be designed for bench trials—which made up the large majority of trials—and then adjusted for jury trials); John Sheldon & Peter Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-jury Trials*, 86 *JUDICATURE* 227, 231 (2003) (arguing “[t]he American law of evidentiary admissibility . . . in civil, non-jury proceedings is due for extinction”); Roger C. Park, *Exporting the Hearsay Provisions of the Federal Rules of Evidence*, 33 B.U. INT’L L.J. 327, 333–35 (2015) (arguing that the rule against hearsay should not apply in the absence of a jury); *see* Schauer, *supra* note 2, at 166 n.4 (collecting sources).

are,” and many reasons for imposing exclusionary rules on jurors also apply to judges.<sup>26</sup> James Steiner-Dillon has similarly argued against the assumption of judicial “epistemic exceptionalism” and for applying the Federal Rules of Evidence in bench trials, possibly under a bifurcated system.<sup>27</sup> And I have argued in my previous scholarship that there are good reasons to apply the Rules at preliminary injunction hearings.<sup>28</sup>

Other scholars sympathetic to the notion of epistemic equivalence challenge the practicality and appropriateness of applying the Rules in bench trials. Jennifer Mnookin suggests that current judicial practice might stem from judges realizing the futility of applying exclusionary rules to themselves, because once they evaluate the admissibility of evidence, they cannot “unring the bell.”<sup>29</sup> The Rules appear to call for bifurcation between “umpire and adjudicator.”<sup>30</sup> But Walter Sinnott-Armstrong suggests bifurcation would be too “cumbersome and inefficient” for our “already overburdened courts.”<sup>31</sup> Henry Zhuhao Wang argues that while evidentiary rules should apply to bench trials, they should be a different set than the Federal Rules of Evidence, not least because judges’ most important concern at bench trials is fact-finding, not making admissibility determinations.<sup>32</sup>

So, there are good reasons for applying the Federal Rules of Evidence at bench trials, but practical problems stand in the way. Further, while Schauer and Steiner-Dillon note that the best existing psychological evidence points against extreme judicial epistemic exceptionalism, we do not have the kind of evidence that allows for firm conclusions about precisely which epistemic traps judges fall into and their prospects for debiasing. We therefore reach a question familiar to evidence theorists: what should we do under conditions of uncertainty?

In this Symposium contribution, I propose that we can do better than the status quo. I tentatively suggest that we amend the Federal Rules (1) to more explicitly require judges to rule on the admissibility of evidence at bench trials; (2) to permit judges to reserve ruling on motions that arise at trial, while requiring them to resolve motions in

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26. Schauer, *supra* note 2, at 187.

27. Steiner-Dillon, *supra* note 2, at 245–51.

28. See Maggie Wittlin, *Meta-evidence and Preliminary Injunctions*, 10 U.C. IRVINE L. REV. 1331, 1377–81 (2020).

29. Mnookin, *supra* note 15, at 135–37.

30. *Id.* at 137–38, 145.

31. Walter Sinnott-Armstrong, *Which Evidence Law? A Response to Schauer*, 155 U. PA. L. REV. PENUMBRA 129, 130 (2006) (discussing the possibility of a second judge determining the admissibility of expert evidence).

32. Henry Zhuhao Wang, *Rethinking Evidentiary Rules in an Age of Bench Trials*, 13 U.C. IRVINE L. REV. 263, 303–04 (2022).

limine before trial; and (3) to create a system of bifurcation that applies to only the most harmful evidence and that relies on the judges who already often partner with district judges: magistrate judges. I argue that this system will allow the purposes of the Rules to be (mostly) satisfied, without (intolerably) increased costs, administrative burdens, and interference with judges' fact-finding processes.

Part I of this Article discusses arguments for applying the Rules in bench trials, including an argument for the expressive value of applying the same rules to judges and jurors, as well as objections to applying the Rules and my responses. Parts II and III then set out and justify my proposal. I conclude by suggesting that applying the Rules to bench trials may hasten needed reform to the Federal Rules of Evidence.

### I. WHY APPLY THE RULES TO BENCH TRIALS?

Historically, scholars have disfavored applying the Federal Rules of Evidence at bench trials.<sup>33</sup> Their justification has sometimes focused on the distinction between the transparency of judicial reasoning and the black-box nature of juries: because we cannot supervise juries' reasoning processes, we need to police their inputs with rules of admissibility; but because we *can* learn and possibly even control what judges do with evidence, any rules for judges should focus on the reasoning process.<sup>34</sup> However, scholars have also suggested differences in the abilities of judges and jurors. For example, McCormick noted that admissibility rules address, in part, "the limited educational and intellectual equipment of the jurors and their liability to prejudices and emotion."<sup>35</sup> And courts sometimes rely on judicial epistemic exceptionalism as justification for hearing evidence that would be inadmissible under the Rules.<sup>36</sup>

Do these distinctions justify abandoning the Federal Rules of Evidence in bench trials or crafting a different set of rules? For several reasons, I think they do not, and the better course is to apply the existing Rules when the judge sits as fact finder.<sup>37</sup>

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33. See *supra* notes 22–25 and accompanying text.

34. See Peter L. Murray & John C. Sheldon, *Should the Rules of Evidence Be Modified for Civil Non-jury Trials?*, 17 ME. BAR J. 30, 31 (2002); Wang, *supra* note 32, at 310–11.

35. McCormick, *supra* note 24, at 639; see also WIGMORE, *supra* note 22, at 632 (referring to juror "inexperience"); Davis, *supra* note 25, at 726 ("Our only excuse [for our exclusionary rules of evidence] is that we use juries and don't trust the juries to consider all relevant and probative evidence.").

36. Steiner-Dillon, *supra* note 2, at 210–22.

37. This section draws on my analysis in my 2020 article, *Meta-evidence and Preliminary Injunctions*. See Wittlin, *supra* note 28, at 1377–81.



*A. Reasons for Applying the Rules*

First, if the Federal Rules of Evidence really do increase accuracy by excluding evidence that fact finders will likely overvalue—a purpose often attributed to them<sup>38</sup>—judges might well benefit from that exclusion almost as much as jurors. Of course, it is far from clear that rules like the hearsay exclusion and its various exceptions rely on realistic understandings of human cognition and advance rational truth seeking.<sup>39</sup> But if jurors have cognitive flaws that merit correction, judges may have them too. Relying largely on research conducted by Jeffrey Rachlinski, Chris Guthrie, and Andrew Wistrich,<sup>40</sup> Steiner-Dillon concludes that “the empirical evidence indicates that judges’ cognitive processes are at best only slightly and inconsistently exceptional” and does not support exempting judges “from evidentiary guidelines intended to constrain cognitive error.”<sup>41</sup> Although in some studies, judges have avoided motivated legal reasoning<sup>42</sup> and assigned character evidence lower probative value than laypeople,<sup>43</sup> in others they exhibited many of the same cognitive biases as laypeople,

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38. See FED. R. EVID. 102 (requiring the Rules to be construed “to the end of ascertaining the truth”); Richard D. Friedman, *Minimizing the Jury Over-Valuation Concern*, 2003 MICH. ST. L. REV. 967, 969.

39. See Friedman, *supra* note 38, at 969; United States v. Boyce, 742 F.3d 792, 796 (7th Cir. 2014).

40. See, e.g., Wistrich et al., *supra* note 1; Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695 (2015); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) [hereinafter *Inside the Judicial Mind*].

41. Steiner-Dillon, *supra* note 2, at 225. Similarly, Schauer notes that while we do not have excellent empirical evidence about judges’ cognitive failings, “the empirical evidence that does exist supports the ‘judges are not as smart as they think they are’ view.” Schauer, *supra* note 2, at 189. The research, however, largely focuses on the inability to disregard inadmissible information, not on overvaluation. *Id.*

42. Dan M. Kahan, David Hoffman, Danieli Evans, Neal Devins, Eugene Lucci & Katherine Cheng, *“Ideology” or “Situation Sense”? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349 (2016). In this study, judges did not exhibit identity-protective cognition in the domain of legal reasoning. “Identity-protective cognition,” a species of motivated reasoning, is the “tendency to selectively credit and discredit evidence in patterns that reflect people’s commitments to competing cultural groups.” Dan M. Kahan, *Misconceptions, Misinformation, and the Logic of Identity-Protective Cognition* 1 (Cultural Cognition Project, Yale L. Sch., Working Paper No. 164, 2017), <https://ssrn.com/abstract=2973067> [<https://perma.cc/MMK4-H4V5>].

43. Goran Dominioni, Pieter Desmet & Louis Visscher, *Judges Versus Jurors: Biased Attributions in the Courtroom*, 52 CORNELL INT’L L.J. 235, 239 (2019). Judges did not differ from laypeople in their propensity to commit the fundamental attribution error, the tendency to “underestimate the role of situational factors and overweigh personality-based explanations for events that we observe.” *Id.* at 237.

including anchoring, hindsight bias, and egocentric bias,<sup>44</sup> and they rated social science evidence higher if it accorded with their preexisting beliefs.<sup>45</sup>

Courts, too, have sometimes recognized that judges may have the same biases as laypeople. For example, the District of Columbia Court of Appeals has held that its “report-of-rape” hearsay exception applies to bench trials as well as jury trials.<sup>46</sup> The court had previously explained that evidence of a complainant’s report of sexual assault is needed to negate some jurors’ prejudices against victims who do not promptly complain and to “rebut[] an implied charge of recent fabrication,” stemming from an assumption that many sexual offense complainants are lying.<sup>47</sup> The defendant had argued that the rule should not apply in a bench trial because those “prejudices and assumptions . . . are harbored by jurors, and not by judges.”<sup>48</sup> The court rejected that argument, reasoning that while judges do have special knowledge of the rationales for the rules of evidence, “we cannot presume that judges are immune from the societal assumptions that undergird the report-of-rape rule.”<sup>49</sup> A similar point was made by some supporters of the “rape shield” rule before it was enacted:<sup>50</sup> courts may have the same prejudices as jurors, so admissibility decisions about an alleged victim’s prior sexual behavior should not be left entirely to their discretion.<sup>51</sup>

The process of making admissibility determinations can also facilitate truth seeking. When judges rule on admissibility, they may give reasons for those decisions, which can have several benefits.<sup>52</sup> First, the Rules might force judges to exclude evidence that helps the

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44. Steiner-Dillon, *supra* note 2, at 230 (citing *Inside the Judicial Mind*, *supra* note 40, at 816).

45. Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers' Socio-political Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 LAW & HUM. BEHAV. 31, 47–48 (1999) (finding judges ranked social science evidence higher if it accorded with their views about the death penalty, although less than law students did); see Steiner-Dillon, *supra* note 2, at 232–33.

46. *In re L.C.*, 41 A.3d 1261, 1263 (D.C. 2012). The “report-of-rape” rule allows a complainant’s prior statement about a sexual assault into evidence to show the statement was made. *Id.* at 1263.

47. *Id.* at 1264 (quoting *Battle v. United States*, 630 A.2d 211, 217 (D.C. 1993)).

48. *Id.*

49. *Id.*

50. FED. R. EVID. 412.

51. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 88 n.192 (2002) (citing *Privacy of Rape Victims: Hearing on H.R. 14666 Before the Subcomm. on Crim. Just. of the H. Comm. on the Judiciary*, 94th Cong. 2, 34 (1976)).

52. See Wittlin, *supra* note 28, at 1378 (discussing benefits of forcing judges to justify their decisions).

parties they tend to favor, cabining their biases. Although many of the Rules permit significant judicial discretion, operating more as “guidelines” than true rules,<sup>53</sup> and although judges may confabulate in their reasoning,<sup>54</sup> the Rules set outer boundaries. When judges attempt to justify evidentiary decisions and find themselves unable to do so, they might change course. Second, “reason-giving forces judges to clarify their thinking about the proper role of each challenged piece of evidence.”<sup>55</sup> If a piece of evidence is admissible for one purpose but not another, the court will articulate its permissible purpose in its reasoning, perhaps helping the court better grasp its probative value. Additionally, when judges give reasons for admitting or excluding evidence, they may give insight into how they are thinking about the case at hand and what they believe the plaintiff or prosecution needs to prove to succeed. That information will allow the parties to assess their current positions and make stronger arguments at trial.

Exclusionary rules may also increase predictability, which can benefit parties in bench trials as much as it can in jury trials. Rules of evidence, compared to a more discretionary regime of exclusion, allow parties to prepare for trial by gathering evidence that will (probably) be considered by the fact finder.<sup>56</sup> They also tell lawyers how to frame their objections to the other party’s evidence.<sup>57</sup> And they facilitate settlement or plea bargaining by helping parties better understand the strength of their positions.<sup>58</sup>

Finally, I think there is expressive value to having rules that treat judges and juries equally—or rather, there is *negative* expressive value to giving judges the trust of free proof where we give no such trust to jurors. According to expressive theorists, the function of law is not only to control behavior directly; law also “make[s] statements”<sup>59</sup> or “sends . . . messages.”<sup>60</sup> Much discussion of law’s expressive function

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53. Mnookin, *supra* note 15, at 140.

54. See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 518–22 (2015) (arguing that judges will come up with justifications for their desired results, so requiring them to give reasons “may yield insincerity and artificiality in judicial discourse, rather than promoting accountability and transparency”).

55. Wittlin, *supra* note 28, at 1379 (emphasis omitted) (citing Robin J. Efron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 714–15 (2014)).

56. See *id.* at 1377–78.

57. See *id.*

58. See Wang, *supra* note 32, at 295.

59. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (defining the expressive function of law as “the function of law in ‘making statements’ as opposed to controlling behavior directly”).

60. Craig Konnoth, *An Expressive Theory of Privacy Intrusions*, 102 IOWA L. REV. 1533, 1540 (2017); see also Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV.

addresses how those statements shape norms and change behavior.<sup>61</sup> Some expressive theories, however, focus on how law can inflict “expressive harm” by treating people “according to a principle that expresses an inappropriate attitude toward” them.<sup>62</sup> Some of the most obviously harmful examples include laws that expressed an improper attitude toward a subgroup of citizens, such as a race.<sup>63</sup> But, as at least one theorist has suggested, government action can also express disrespect toward citizens as a whole and alter the relationship between the state and the public.<sup>64</sup>

I believe that having one evidentiary regime for judges and another for jurors inflicts a small but significant expressive harm. A system where we trust judges with evidence but do not trust jurors with the same communicates a message of epistemic exceptionalism—a “class and professional chauvinism.”<sup>65</sup> Even if some other reason underlies much of the support for having two systems—for example, that judges provide reasons for their decisions, where juries do not, which justifies treating them differently<sup>66</sup>—the *public meaning* expressed may still be that judges are epistemically better than jurors.<sup>67</sup> Or perhaps the public meaning is that judges simply do not have to follow the rules, whereas jurors do. Not all people will take the same message from this disparity—if they even learn about it—but as a member of the political community, I think these meanings of epistemic superiority and judicial privilege are plausible inferences.<sup>68</sup> And in a nation that prizes jurors,<sup>69</sup> the message that they are somehow less capable is troubling. The message that judges are, even in some small

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1, 3 (2000) (noting that “expressive content” or “expressive character” “calls attention to what a law expresses . . . or what meaning it conveys”).

61. Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000); Maggie Wittlin, Note, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. ON REGUL. 419, 420–21 (2011); e.g., Sunstein, *supra* note 59, at 2024–25.

62. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1529 (2000).

63. *See id.* at 1533–45 (discussing equal protection and expressive harm). State-enforced segregation is an extreme example of a law that causes expressive harm, in addition to material harm. *Id.* at 1528–29.

64. *See* Konnoth, *supra* note 60, at 1567–70 (discussing the expressive harm of mass surveillance).

65. John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1255 (2006).

66. *See supra* note 35 and accompanying text; *infra* notes 89–93 and accompanying text.

67. Anderson & Pildes, *supra* note 62, at 1513, 1524.

68. *See* Michael Coenen, *Campaign Communications and the Problem of Government Motive*, 21 U. PA. J. CONST. L. 333, 343 (2018) (noting that not every message will be easily discernable, but “members of a political community can develop a reasonable sense as to what a given law is ‘all about’”).

69. *See* U.S. CONST. amends. VI, VII.

way, above the law that applies to the little people is also undesirable.<sup>70</sup> Any favoritism toward state actors over regular people expresses a message in tension with our democracy and, I believe, should be avoided absent strong countervailing reasons.

In his work on legal interpretation, Ronald Dworkin imagined Hercules, a judge of “superhuman skill, learning, patience and acumen,”<sup>71</sup> who could implement Dworkin’s approach to resolving cases.<sup>72</sup> Judge Hercules is fictional. But I submit that even if he existed, and his abilities translated from legal interpretation to fact-finding, there would still be a strong expressive reason to treat Hercules like a common juror, as though he had the same abilities. There would be a reason to bind him to the strictures of the Rules of Evidence.

### *B. Reasons for Not Applying the Rules, and Responses*

Scholars have advanced a number of reasons for eliminating some or all of the exclusionary rules of evidence at bench trials. I first discuss three reasons I find less valid or compelling: the alleged dominance of bench trials over jury trials; the court’s ability to elicit the “best evidence” from the parties without exclusionary rules; and the possibility of guiding the court’s reasoning with rules for weighing evidence, which the black box of the jury renders impossible. I then discuss two reasons I find more compelling: once judges have evaluated the admissibility of a piece of evidence, it is impossible to “unring the bell,” meaning that piece of evidence will inevitably affect their reasoning; and judges at trial need to concentrate their cognitive resources on fact-finding, not on making admissibility determinations.

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70. Cf. Schauer, *supra* note 2, at 180–85 (discussing why we expect judges to take rules seriously and might want rules to apply to them). Recent controversies around several Supreme Court justices have highlighted the lack of a binding ethics code for these judges. See Charlie Savage, *Tightening Supreme Court Ethics Rules Faces Steep Hurdles*, N.Y. TIMES (May 5, 2023), <https://www.nytimes.com/2023/05/05/us/politics/supreme-court-ethics-rules-justice-thomas-crow.html> [<https://perma.cc/7XFK-7C69>] (describing how revelations of Justice Clarence Thomas’s failure to disclose certain gifts and financial arrangements “has put a spotlight on the fact that the Supreme Court has the weakest ethics rules in the federal government”). Polls suggest that most people would support a formal ethics code for Supreme Court justices. See ECONOMIST & YOUNG, POLL: APRIL 8-11, 2023 - 1500 U.S. ADULT CITIZENS 53 tbl.40 (2023), <https://docs.cdn.yougov.com/qf4qaf2z28/econTabReport.pdf> [<https://perma.cc/99SW-GBYZ>].

71. RONALD DWORIN, TAKING RIGHTS SERIOUSLY 105 (1977); see also RONALD DWORIN, LAW’S EMPIRE 239 (1986) (reintroducing “Hercules”).

72. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083–96 (1975).

### 1. The Alleged Dominance of Bench Trials

Several of the calls for reforming the Rules of Evidence in bench trials have asserted that there are far more bench trials than jury trials,<sup>73</sup> so rules for bench trials should be a priority—perhaps rules for bench trials should be the *default* rules of evidence, which could then be modified for the rare jury trial.<sup>74</sup>

That was once true, and it is undoubtedly still true if we look across *all* tribunals, including, say, traffic courts.<sup>75</sup> But if we look only at trials in federal district court today, the argument loses force. There, bench trials are in the minority and are decreasing at a rate at least comparable to jury trials. There is some scholarly controversy over whether this is so,<sup>76</sup> but I maintain that it is the best interpretation of the somewhat-opaque data<sup>77</sup> from the Administrative Office of the

73. See Davis, *supra* note 25, at 723 (asserting that “[f]ive out of six trials in courts of general jurisdiction are without juries” and across all trials, ninety-seven percent are without juries); Sheldon & Murray, *supra* note 25, at 229 (noting the “overwhelmingly non-jury modern environment”); Wang, *supra* note 32, at 267–72 (using data to argue that there are more bench trials than jury trials in both federal and state court).

74. Davis, *supra* note 25, at 725.

75. In this “97 percent” figure, Davis includes trials in traffic courts, small claims court, and administrative tribunals, among others, and he notes that those courts have a “much higher” proportion of non-jury trials. *Id.* at 723.

76. See Wang, *supra* note 32, at 267–72 (arguing that the majority of trials in federal and state courts are bench trials, and the number of bench trials is not decreasing as quickly as the number of jury trials); *id.* at 267–68 n.14 (noting a “whole different school of scholarship claiming that bench trials are far less common than jury trials in the United States”); 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 . . .”).

77. As Wang notes, the controversy here comes from different definitions of what constitutes a “trial” in the *Judicial Business of the United States Courts* report. Wang, *supra* note 32, at 267–68 n.14. Wang relies on data using the broad definition of “trial” that currently appears in the main body of the report and Table T-1. See, e.g., ADMIN. OFF. U.S. CTS., TABLE T-1: U.S. DISTRICT COURTS—CIVIL AND CRIMINAL TRIALS COMPLETED, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2022, <https://www.uscourts.gov/file/62206/download> (last visited Sept. 13, 2023) [<https://perma.cc/VA4G-BQX5>] [hereinafter ADMIN. OFF. U.S. CTS., TABLE T-1]. This definition includes not only “proceedings resulting in jury verdicts and other final judgments by the courts,” but also “other contested hearings at which evidence is presented.” *U.S. District Courts – Judicial Business 2022*, ADMIN. OFF. U.S. CTS., <https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2022> (last visited Sept. 13, 2023) [<https://perma.cc/6PE9-KYR4>]. This last category includes “[c]ontested hearings on motions for preliminary injunctions, temporary restraining orders, evidence, or other matters not resulting in a final judgment or verdict.” ADMIN. OFF. U.S. CTS., TABLE T-4: U.S. DISTRICT COURTS—CIVIL AND CRIMINAL TRIALS RESULTING IN VERDICTS OR JUDGMENTS, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2022, at 3, <https://www.uscourts.gov/file/62248/download> (last visited Sept. 13, 2023) [<https://perma.cc/D8GM-VK3K>] [hereinafter ADMIN. OFF. U.S. CTS., TABLE T-4].

I, on the other hand, in Figure 1, use data that captures only civil trials “[o]n the issue” and criminal trials “[o]n charge(s),” meaning, “[p]roceedings commenced for the purpose of obtaining a judgment in a civil case or a verdict in a criminal case.” *Id.* These proceedings are, I believe, what we normally think of as “trials.”

United States Courts. I attempt to show this via two measures. First, in each year from 2003 to 2019, there were about a quarter as many Article III bench trials as jury trials that resulted in a verdict or judgment, and the total number of each decreased by about half over that stretch.<sup>78</sup>

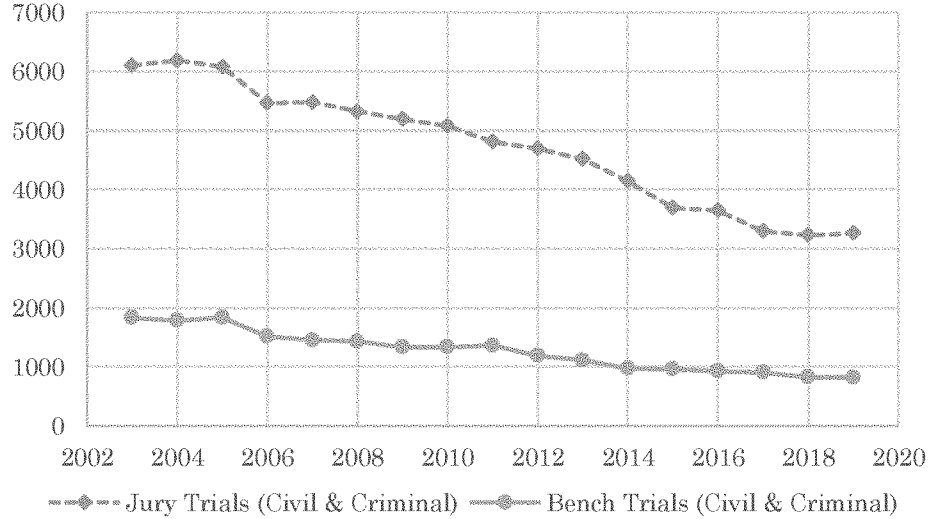
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The difference between the two measures is enormous. For example, in 2019, under the narrow definition that I use, there were 210 federal criminal bench trials before district court judges. ADMIN. OFF. U.S. CTS., TABLE T-4: U.S. DISTRICT COURTS—CIVIL AND CRIMINAL TRIALS RESULTING IN VERDICTS OR JUDGMENTS, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2019, at 1, <https://www.uscourts.gov/file/27668/download> (last visited Sept. 13, 2023) [<https://perma.cc/E84G-2DGD>] [hereinafter ADMIN. OFF. U.S. CTS., TABLE T-4 2019]. Under the broad definition, there were 5,670 federal criminal bench trials. *Id.* Although I have been unable to get confirmation from the Administrative Office of the United States Courts, former federal prosecutors I have spoken with suggest that the 5,460 “trials” not “on the charge” are probably almost all hearings on motions to suppress. The Federal Rules of Evidence do not apply to these hearings. *See* FED. R. EVID. 104(a). As for civil trials, the narrow definition yields 611 bench trials, while the broad definition indicates there were 2,485 bench trials. ADMIN. OFF. U.S. CTS., TABLE T-4 2019, *supra*, at 1. It is unclear how many of these additional motions were hearings on preliminary injunctions, to which I have suggested the rules *should* apply, *see* Wittlin, *supra* note 28, how many were hearings on temporary restraining orders, and how many were other motions. If we include all of these hearings in the “bench trial” count, there are still fewer bench trials than jury trials, but they are not decreasing as rapidly. *See* sources cited *infra* note 78.

As the narrow definition of trial more accurately captures what we think of as “trials” and is not saturated by hearings at which the Federal Rules of Evidence do not apply, I believe it is clearly the better available measure of trials.

78. *See Judicial Business of the United States Courts*, tbl. T-1 (2003-2010), tbl. T-4 (2011–2019), U.S. CTS., <https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts> (last visited Sept. 13, 2023) [<https://perma.cc/GTL6-6KSC>]. Years run from October 1 of the previous year to September 30 of the terminal year. This percentage rose to over a third in 2020 and 2021, presumably due to COVID. *Id.* tbl. T-4 (2020, 2021); *see* Wang, *supra* note 32, at 267.

FIGURE 1: FEDERAL JURY & BENCH TRIALS BY ARTICLE III JUDGES  
RESULTING IN VERDICTS OR JUDGMENTS: 2003-2019

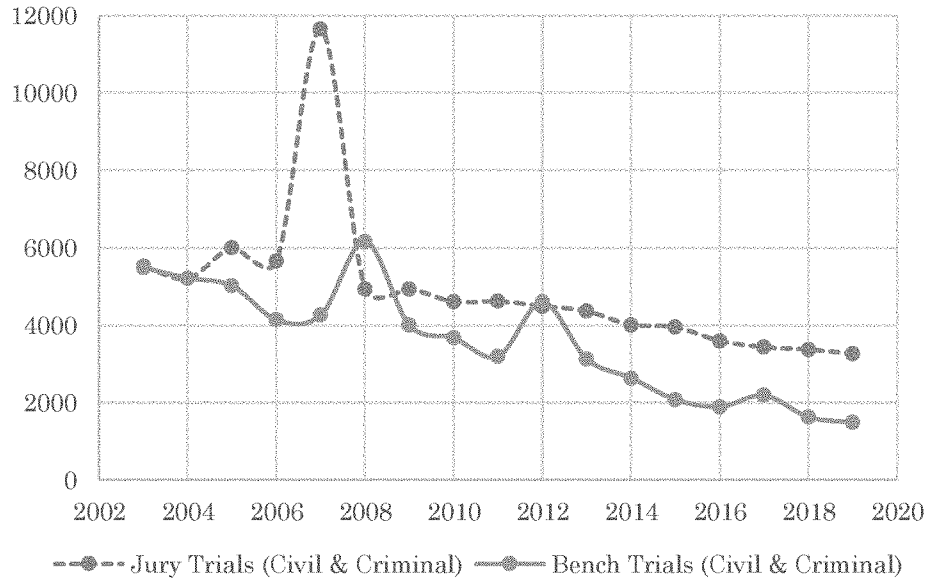


Second, in an attempt to include trials before magistrate judges, I use a highly artificial measure of trial activity equal to the sum of (1) federal civil cases terminated during or after trial and (2) defendants convicted or acquitted at trial—a number that includes petty-offense trials before magistrate judges.<sup>79</sup> This measure also belies bench-trial dominance.

79. This measure combines data from three sources: First, it uses data from Table C-4 on civil cases terminated during or after jury trials and bench trials. *See, e.g.*, ADMIN. OFF. U.S. CTS., TABLE C-4: U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TAKEN, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2022, <https://www.uscourts.gov/file/58461/download> (last visited Sept. 13, 2023) [<https://perma.cc/Q7BP-MNDJ>]. This is the source Nora Freeman Engstrom uses to come to a similar conclusion about civil cases, Engstrom, *supra* note 76, at 2137, although she notes concerns with the data, in part due to the broad definition of “trial.” *Id.* at 2139–40. This number of *cases* is typically close to the number of Table T-4 *trials*, but not always. For example, in 2007, Table C-4 reports 8,739 civil cases terminated during or after jury trial, whereas there were only 2,269 completed jury trials. This is likely due to “the disposition of more than 6,300 oil refinery explosion cases in the Middle District of Louisiana” in a single trial. JAMES C. DUFF, ADMIN. OFF. U.S. CTS., JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 24 (2007), <https://www.uscourts.gov/file/14188/download> [<https://perma.cc/YME8-75AG>]; *see In re* 1994 Exxon Chem. Fire, No. 3:94-md-00003 (M.D. La. Oct. 19, 1994). According to Marc Galanter, Table C-4 does capture cases where the trial was before a magistrate judge, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 475 (2004), although I have not been able to independently verify that. Second, it uses data from Table D-7 on criminal defendants convicted or acquitted at jury trials and bench trials. *See, e.g.*, ADMIN. OFF. U.S. CTS., TABLE D-7: U.S. DISTRICT COURTS—CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2022, <https://www.uscourts.gov/file/61632/download> (last visited Oct. 21, 2023) [<https://perma.cc/GDH2-XSH9>]. This “includes defendants in all cases filed as felonies or Class A misdemeanors” and petty offenses assigned to district court judges. *Id.* This



FIGURE 2: U.S. DISTRICT COURT CIVIL CASES TERMINATED DURING OR AFTER TRIAL & DEFENDANTS DISPOSED OF BY TRIAL: 2003-2019



There are certainly enough bench trials to warrant taking the question of what rules should apply seriously. (Even if the numbers were lower, because parties undertake plea bargaining and settlement negotiations in the “shadow of trial,”<sup>80</sup> the rules of evidence that will apply at trial affect far more cases than these numbers indicate.) And this data does not paint a complete picture: for example, it does not account for trial-like hearings on preliminary injunction motions or cases in bankruptcy court, and of course it does not speak to state

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criminal measure is not perfectly comparable to the civil measure because it does not include cases that are dismissed or plead out *during* trial. But it appears to be the closest measure available. Third, it uses data from Table M-2A on petty offense defendants convicted or acquitted after trial before a magistrate judge. *See, e.g.*, ADMIN. OFF. U.S. CTS., TABLE M-2A: U.S. DISTRICT COURTS—PETTY OFFENSE DEFENDANTS DISPOSED OF BY U.S. MAGISTRATE JUDGES, BY DISPOSITION, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER, 2022 AS OF NOVEMBER 07, 2022, <https://www.uscourts.gov/file/61982/download> (last visited Oct. 21, 2023) [<https://perma.cc/R4YY-HTJ4>]. As current law holds there is no right to a jury trial in these petty-offense cases, *see* FED. R. CRIM. P. 58(b)(2)(F), I count these all as bench trials. This combination is a highly imperfect measure—“cases” and “defendants” are not precisely comparable units, and it mixes in civil cases terminated “during” trial—but I believe it gives some reasonable sense of trial activity.

80. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464–65 (2004). Bibas discusses this model in civil and criminal cases before explaining that the model has been questioned in civil cases, *id.* at 2468, and arguing that plea bargains diverge from the shadow of trial in criminal cases, *id.* at 2467. I do not contend that bargains are good representations of expected trial outcomes, only that expected trial outcomes, which depend on the rules of evidence, affect bargaining.

courts.<sup>81</sup> But jury trials are not anomalies—except to the extent that *any* trial is an anomaly—and the district court data gives us no reason to prioritize bench trials over jury trials in a federal evidentiary regime.

## 2. A “Best Evidence” Alternative

Perhaps cognitive control is not the primary reason for having exclusionary rules of evidence. Perhaps, instead, our rules of evidence primarily serve to force lawyers to produce the epistemically best reasonably available evidence at trial. This “best evidence principle” has been influentially advanced by Dale Nance as “a vehicle for understanding existing rules of evidence.”<sup>82</sup> Nance himself suggests this view of evidence law “tends to undercut the argument for the elimination of the admissibility rules in nonjury proceedings by shifting the focus of attention away from distrust of the jury.”<sup>83</sup> He also recognizes, however, that the best-evidence goal can be achieved through “alternative forms of leverage” in bench trials, including “judicial requests for additional information.”<sup>84</sup> Several other scholars have picked up on this idea, suggesting at least some Rules are less necessary in bench trials because judges can “use their influence to control the production of evidence”<sup>85</sup> and inform the parties that they will assign low probative value to unreliable evidence.<sup>86</sup>

The best-evidence principle does not provide a compelling reason for eliminating the Rules in bench trials. This goal of eliciting the best attainable evidence could be achieved through either rules or judicial communication, because either the rules or the judge could inform the parties what evidence will be considered and what will be ignored. Rules have the advantage of communicating this information even before the case is filed, so the parties know what to look for during early investigatory stages and discovery. And while judicial statements may be less heavy-handed than exclusionary rules, in the rare case that, for

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81. See ADMIN. OFF. U.S. CTS., TABLE T-1, *supra* note 77, at 4 (“This table includes trials conducted by district and appellate judges only; all trials conducted by magistrate judges are excluded.”); see also, e.g., ADMIN. OFF. U.S. CTS., TABLE M-2A: U.S. DISTRICT COURTS—PETTY OFFENSE DEFENDANTS DISPOSED OF BY U.S. MAGISTRATE JUDGES, BY DISPOSITION, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2019, at 1, <https://www.uscourts.gov/file/27630/download> (last visited Oct. 21, 2023) [<https://perma.cc/F8DY-3BVR>] (reporting 564 federal magistrate judge trials on petty offenses in 2019).

82. Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 270 (1988).

83. *Id.* at 294.

84. *Id.*

85. Park, *supra* note 25, at 334. In some European systems, courts may order the presentation of evidence. Michele Taruffo, *Evidence*, in 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 58 (2014).

86. Sinnott-Armstrong, *supra* note 31, at 131–32.

example, hearsay is so reliable and necessary that it truly makes sense to admit, the court has discretion to admit the evidence under the residual exception.<sup>87</sup> The Rules may not be strictly *necessary* to effect the best-evidence principle in bench trials, but they do fulfill its purposes with some advantages.

### 3. Opening the Black Box & “What About Europe?”

Two objections merit consideration together. Ultimately, neither of these objections justifies eliminating the Rules in bench trials.

We need rules of evidence for juries, some scholars say, because they are a black box.<sup>88</sup> We cannot tell them how to reason from evidence to facts, nor can we supervise whether they have done so sensibly. We *can*, however, supervise judicial reasoning through judges’ opinions, so perhaps rules of evidence for judges should not tell them when to admit the evidence but rather how to use it.<sup>89</sup> This might involve rules of reliability—such as using Rule 702 as a guide for evaluating expert evidence, not determining its admissibility, as Wang suggests<sup>90</sup>—or other rules of weight.<sup>91</sup> Or it might be a system of “free proof,” with the only check being the judges’ written opinions spelling out their reasoning.<sup>92</sup>

To that last possibility, scholars also point to the European example, where lawyers tend to argue not over the admissibility of evidence but over its probative value.<sup>93</sup> As a general matter, European justice systems—where civil cases operate without juries<sup>94</sup>—have fewer admissibility rules than the U.S. system<sup>95</sup> and subscribe to the “principle of free evaluation” of evidence, where the trier of fact has the

87. FED. R. EVID. 807.

88. See, e.g., Wang, *supra* note 32, at 301; Sheldon & Murray, *supra* note 25, at 228 (“The only way to provide assurance that what emerges from the black box (the verdict) will be reasonable is to control what gets into it.”).

89. See Murray & Sheldon, *supra* note 34, at 31; Wang, *supra* note 32, at 308–11; Park, *supra* note 25, at 334; Mnookin, *supra* note 15, at 142.

90. Wang, *supra* note 32, at 309.

91. See generally Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957 (2008).

92. Cf. Wang, *supra* note 32, at 285–98 (arguing against this option).

93. See Davis, *supra* note 25, at 726; Sheldon & Murray, *supra* note 25, at 228. Sheldon & Murray acknowledge that in criminal cases, rules of admissibility are sometimes inextricable from due process considerations and may need to remain. *Id.*

94. Katherine Unterman, *Trial Without Jury in Guam, USA*, 38 LAW & HIST. REV. 811, 816 (2020) (“A few European countries allow for juries in serious criminal cases . . . while other civil law countries do not provide for juries under any circumstances.”).

95. See, e.g., Simona Grossi, *A Comparative Analysis Between Italian Civil Proceedings and American Civil Proceedings Before Federal Courts*, 20 IND. INT’L & COMPAR. L. REV. 213, 224 (2010) (noting that in Italian courts “there is no prohibition against the use of character evidence, no hearsay rule, and no general provision describing the concept of ‘relevancy’ of evidence”).

discretion to determine the probative value of each item of evidence.<sup>96</sup> The judge must only give a reasoned decision.<sup>97</sup> Perhaps our evidentiary system for bench trials should look more like Europe.

But we are not Europe. And our primary difference<sup>98</sup> is that we *do* have juries resolving a large fraction of trials in both civil and criminal cases.<sup>99</sup> So the question of which rules should apply to bench trials is not simply, “Which rules should apply in a world with *only* bench trials?” but rather, “Which rules should apply to bench trials, given that we have rules for jury trials?”

As discussed above,<sup>100</sup> I believe that when different epistemic rules apply to jurors and judges, the law expresses the message that jurors are in some way inferior. Even if the rationale for applying different rules to judges rests on procedural grounds—that judges have to explain their decisions—rather than reasons of epistemic exceptionalism, the ultimate result is that juries have to make decisions with limited information, whereas judges do not. Even if we give judges assistance with fact-finding as an alternative to exclusionary rules, juries are forced to operate with only the judge’s general instructions to guide them.<sup>101</sup> They are, somehow, less worthy recipients of that assistance. So, even if a bench-trial system without the Rules might be *viable*, as the European example demonstrates, if the Rules achieve their goals without causing problems, I believe they are desirable.

The next two objections, however, present stronger arguments against applying the Rules of Evidence at bench trials.

#### 4. Focus on Facts

As Wang emphasizes, when judges act as fact finders, their primary focus is *evaluating* the evidence to determine whether the party with the burden of proof has satisfied it, not on determining

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96. Taruffo, *supra* note 85, at 70; John J. Capowski, *China’s Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law*, 47 TEX. INT’L L.J. 455, 461 (2012) (“As the phrase suggests, the free evaluation principle allows for, with few exceptions, the broad admissibility of evidence.”).

97. Grossi, *supra* note 95, at 225; Mátyás Bencze, *A Comparative Approach to the Evaluation of Evidence from a ‘Fair Trial’ Perspective*, in FAIR TRIAL AND JUDICIAL INDEPENDENCE: HUNGARIAN PERSPECTIVES 163, 169 (Attila Badó ed., 2014) (“[I]n continental legal systems – as a general rule, the evaluation of evidence must be justified.”).

98. This may not be a consensus view.

99. See *supra* Subsection I.B.1.

100. See *supra* text accompanying notes 59–72.

101. Compare FED. R. EVID. 702 (setting out different aspects of expert testimony that may or may not be reliable), with MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 4.14 (U.S. CTS. FOR THE NINTH CIR. 2010) (advising jurors to consider “the [expert] witness’s education and experience, the reasons given for the opinion, and all the other evidence in the case”).

whether evidence meets the strictures of the Rules.<sup>102</sup> Wang's central concern here is that the Rules are not particularly helpful with this task.<sup>103</sup> My concern is more that judges might be distracted during trial. Fact-finding is difficult. In jury trials, it is the jurors' only task, but judges inevitably have to perform trial-management tasks as well.<sup>104</sup> To the extent that a judge is distracted by evidentiary objections at trial—needing to resolve difficult hearsay questions instead of listening to the narrative of a direct examination—that judge may have a *harder* time determining the probative value of the evidence, working *against* the goal of accuracy.

### 5. You Can't Unring the Bell

Possibly the most compelling and common argument for not applying the Rules is that they are futile: once a judge hears about a probative piece of evidence, she will not be able to forget about it simply because she finds it inadmissible under the Rules of Evidence.<sup>105</sup> You cannot “unring the bell.” In fact, some of the strongest evidence that judges behave like laypeople are the Wistrich, Guthrie, and Rachlinski studies demonstrating that judges fail to disregard several types of inadmissible information.<sup>106</sup> For this reason, those authors tentatively recommend favoring jury trials over bench trials.<sup>107</sup> Perhaps this evidence is not as strong as it first appears: unlike judges in most bench trials,<sup>108</sup> the judges in these studies did not write reasoned decisions in which they had to justify their conclusions without reference to the excluded evidence.<sup>109</sup> Perhaps that exercise would mitigate the effect of

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102. Wang, *supra* note 32, at 303–04.

103. *Id.* at 304.

104. See, e.g., FED. R. EVID. 611 (directing the court to “exercise reasonable control over the mode and order of examining witnesses and presenting evidence”).

105. Mnookin, *supra* note 15, at 136; Sinnott-Armstrong, *supra* note 31, at 130; Mirjan Damaška, *Free Proof and Its Detractors*, 43 AM. J. COMPAR. L. 343, 352 (1995) (concluding that “most Anglo-American exclusionary rules ring so hollow in bench trials” because of “the apparent difficulty for any person—lay or professional—to ‘unbite’ the apple of knowledge”).

106. E.g., Wistrich et al., *supra* note 1; see also 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, 123 (1994) (finding that information influenced judges' decisions even when they were told the court had granted a motion to exclude it as a subsequent remedial measure).

107. Wistrich et al., *supra* note 1, at 1259.

108. See Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1513–15 (2006) (“Unreasoned verdicts are the key factor separating trials by jury from bench trials.”).

109. Wistrich et al., *supra* note 1, at 1332–45 (stimulus materials). The authors have acknowledged that their work differs from a real trial setting in important ways. See *Inside the Judicial Mind*, *supra* note 40, at 819 (noting, among other things, that at trial, judges have more time and resources for decisionmaking). Further, after the “Replication Crisis,” it may be prudent

the evidence.<sup>110</sup> But Mnookin notes that even if a judge does not *directly* incorporate inadmissible evidence into her reasoning, it would be only rational for her to use it to assess the credibility of other evidence, giving the inadmissible evidence some effect.<sup>111</sup> And Mnookin hypothesizes that this is one reason judges do *not* apply the Rules: they recognize the futility of the exercise and do not want to disingenuously pretend they are not considering excluded evidence.<sup>112</sup> Indeed, if the Rules simply do not work in the context of a bench trial, then it is probably not worth applying them. She and others suggest the only solution may be bifurcation, where one judge decides on admissibility, while another tries the case.<sup>113</sup> But that may be costly and difficult to administer.<sup>114</sup>

The next Part attempts to thread the needle, crafting a regime that satisfies all these considerations.

## II. HOW TO APPLY THE RULES

In sum, there are strong arguments for applying the Rules to bench trials, but there are several practical problems with doing so: courts have a tradition of applying the Rules less rigorously in bench trials and might prefer to receive the available relevant evidence; in bench trials, judges' cognitive resources are better focused on fact-finding than admissibility determinations; judges may not be able to disregard evidence that they have seen, so the very act of screening evidence for admissibility could undermine the Rules' purpose; and bifurcation poses challenges of increased cost and administrative hassle.

In this Part, I undertake the task of proposing amendments to the Federal Rules that (1) clearly communicate that they apply in bench trials, (2) fulfill the central purposes of each rule under the conditions of a bench trial, (3) minimize interference with the fact-finding process, and (4) minimize costs and administrative hassle.

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to avoid putting too much stock in *any* individual study before closely evaluating its methodology. See Edith Beerdsen, *Litigation Science After the Knowledge Crisis*, 106 CORNELL L. REV. 529, 545–55 (2021) (discussing the Replication Crisis).

110. See *infra* notes 139–142 and accompanying text.

111. Mnookin, *supra* note 15, at 136.

112. See *id.* at 137.

113. *Id.* at 137–38; Sinnott-Armstrong, *supra* note 31, at 130; Steiner-Dillon, *supra* note 2, at 248–51.

114. See Sinnott-Armstrong, *supra* note 31, at 130 (calling bifurcation “cumbersome and inefficient”); Wang, *supra* note 32, at 302 (suggesting bifurcation is “fanciful” due to limited judicial resources).

To develop these suggested amendments, I first examine the central purpose of each major<sup>115</sup> exclusionary rule. Then, for each rule, I address whether exclusion by the fact finder *after* seeing the evidence is likely sufficient to adequately satisfy that rule's purpose, or whether some type of bifurcation is necessary. For rules where exclusion by the fact finder *is* sufficient, I develop a procedure to minimize the effect of the excluded evidence while also minimally disrupting fact-finding. Finally, for rules where exclusion by the fact finder is *insufficient*, I develop a procedure with the goal of sufficiently low administrative burden so as to be practical in the existing federal system.

### *A. Primary Purposes of the Rules and Viability of Exclusion*

The purposes of the Rules are multiple and contested, and a full effort at categorizing the Rules would involve a deeper dive. But for purposes of this exercise, there are four types of ends that different rules aim to achieve: extrinsic policy goals, epistemic regulation, constraining litigant conduct, and avoiding waste of time.

#### 1. Extrinsic Policy Goals

Some rules serve policy goals extrinsic to the litigation. Most notably, privileges<sup>116</sup> serve extrinsic goals, such as the “need for confidence and trust” in the attorney-client relationship, the doctor-patient relationship, the spousal relationship, and so on.<sup>117</sup> Without privileges, the classic justification goes, clients would not be forthright with their lawyers, patients would not be candid with their psychotherapists, and spouses would not communicate freely, all of which would cause societal harm.<sup>118</sup>

Several other rules serve primarily extrinsic aims. Rule 407 encourages people to take remedial measures that will make future injuries less likely by ensuring that the measures will not be admitted

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115. A full examination would consider every single Rule and exception. I do not have space to give every Rule individual attention, but the principles I set out here apply to the Rules I do not discuss.

116. See FED. R. EVID. 501.

117. *Trammel v. United States*, 445 U.S. 40, 51 (1980).

118. Edward J. Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 317 (2003) (discussing Wigmore's “instrumental theory” of privileges); *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (justifying the psychotherapist-patient privilege on the ground that “the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment”); *United States v. White*, 974 F.2d 1135, 1138 (9th Cir. 1992) (“The public policy interests in protecting the integrity of marriages and ensuring that spouses freely communicate with one another underlie the marital communications privilege.”).

as evidence against them to prove culpable conduct if they are sued for an earlier injury.<sup>119</sup> Rule 409 encourages offers to pay medical expenses by excluding these offers as evidence of liability.<sup>120</sup> And Rules 408 and 410 serve functions similar to privileges: they protect statements made in settlement negotiations and plea bargaining so those conversations can happen freely.<sup>121</sup>

Scholars who discuss the issue appear to agree that these rules should apply at bench trials.<sup>122</sup> But the “unringing the bell” concern applies to these rules as well. If judges learn about, say, subsequent remedial measures, that might influence their decisions even if they formally exclude the evidence. And that possibility—that the court will learn about the measure and formally exclude it, but that it will still affect its decision—could discourage parties from taking these measures. Similarly, having the trier of fact hear Rule 408 or 410 material could stifle settlement discussions or plea bargaining. For judges, who know that settlement and plea negotiations are routine,<sup>123</sup> statements made during negotiations<sup>124</sup> may pose more of a concern than the fact that they occurred at all.<sup>125</sup> And having the fact finder hear privilege disputes could impede attorney-client communication.<sup>126</sup> Even if the court does not learn the precise contents of a privileged statement during its review, it might learn enough to interfere with the purposes of the privilege. Further, the mere *appearance* of influence could contravene the policy goals of these rules, so even if judges actually *can* put the evidence entirely out of mind, that would not solve the problem. This is particularly true in the case of privileges. In one study of judicial behavior, several judges who heard probative attorney-client communication volunteered that they would recuse themselves

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119. FED. R. EVID. 407 advisory committee’s note to the 1972 proposed rules.

120. FED. R. EVID. 409 advisory committee’s note to the 1972 proposed rules.

121. FED. R. EVID. at 408, 410.

122. See Schauer, *supra* note 2, at 167; see also Wang, *supra* note 32, at 306.

123. See FED. R. CIV. P. 16(a)(5) (noting “facilitating settlement” as a purpose of a pretrial conference); S.D.N.Y./E.D.N.Y. LOC. CIV. R. 47.1 (“All counsel in civil cases shall seriously discuss the possibility of settlement a reasonable time prior to trial.”); *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (“[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.”) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)).

124. See FED. R. EVID. 408(a)(2), 410(a)(4) (prohibiting the admission of certain statements made during settlement discussions and plea negotiations).

125. See *id.* at 408(a)(1), 410(a)(1)-(3) (prohibiting the admission of, among other things, offers to settle and withdrawn guilty pleas).

126. These issues may be addressed long before trial because privileged material is not discoverable. FED. R. CIV. P. 26(b) (limiting the scope of discovery to “nonprivileged matter”). Discovery disputes are often heard by magistrate judges, like other pretrial matters in civil cases. See *infra* note 170 and accompanying text.



from the case,<sup>127</sup> demonstrating a recognition that the privilege is sacrosanct and a decision to disregard the information is insufficient. For these rules, then, bifurcation is necessary to keep the fact finder completely insulated from the evidence.

## 2. Epistemic Regulation

Most of the exclusionary rules serve intrinsic purposes: they regulate fact-finding for the purpose of ascertaining truth. The idea behind these rules is that the jury will use the evidence for an improper purpose or give it too much weight, so the evidence must be excluded.<sup>128</sup>

Some rules aid truth seeking by preventing fact finders from deciding the case on an improper basis. For example, Rule 411 seeks to prevent juries from finding against an insured defendant because they know he will not pay the judgment himself.<sup>129</sup> More importantly, the character evidence exclusion aims, in part, to prevent juries from punishing a defendant for prior conduct or because they deem him a bad person, worthy of punishment.<sup>130</sup> This stands in addition to the concern that fact finders will overvalue character evidence.<sup>131</sup>

Fact finders may sometimes correctly appreciate the nature of the evidence's probative value but simply afford the evidence too much weight. This is a secondary rationale for excluding several categories of evidence already discussed, including character evidence<sup>132</sup> and the evidence excluded by Rules 407–410.<sup>133</sup>

127. Wistrich et al., *supra* note 1, at 1297. Further, Rule 104(a) permits judges to consider inadmissible evidence in making evidentiary determinations but excludes privileged evidence. FED. R. EVID. 104(a).

128. *But see* Friedman, *supra* note 38, at 968 (arguing that while “a large part of the reason usually given for exclusion of evidence, when it is excluded, is fear that the jury will overvalue the evidence[.] . . . this argument should be put aside” and other rationales should justify the rules, to the extent they are justifiable).

129. FED. R. EVID. 411 advisory committee's note to the 1972 proposed rules.

130. FED. R. EVID. 404 advisory committee's note to subdivision (a) of the 1972 proposed rules (quoting *Article VI. Extrinsic Policies Affecting Admissibility*, in 6 CAL. L. REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE 607, 615 (1964), <http://www.clrc.ca.gov/pub/Printed-Reports/Pub054.pdf> [<https://perma.cc/KTP9-KXZV>]); see 1 JOHN HENRY WIGMORE, A TREATISE OF THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW: INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES § 194, at 233 (1904) (noting the danger that the fact finder will “take the proof of [a vicious record of crime] as justifying a condemnation irrespective of guilt of the present charge”) (cited in *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930)).

131. WIGMORE, *supra* note 130, at 233 (noting that “[t]he natural and inevitable tendency of the tribunal — whether judge or jury — is to give excessive weight to the vicious record of crime thus exhibited,” and that the factfinder may “allow it to bear too strongly on the present charge” or supply an improper basis for its decision) (cited in *Zackowitz*, 172 N.E. at 468).

132. *Id.*

133. See FED. R. EVID. 407–10 advisory committee's notes to the 1972 proposed rules.

Other types of evidence may endanger truth seeking because the fact finder might not appreciate their unreliability. If fact finders fail to appreciate the evidence's deficiencies, they might give the evidence significant weight where it merits very little. This is the danger of expert evidence, where lay fact finders lack the epistemic competence to evaluate the quality of the testimony.<sup>134</sup> Following on the *Daubert* decision, Rule 702 requires courts to permit expert testimony only if it is based on reliable methods, reliably applied.<sup>135</sup> Judges act as gatekeepers to prevent bad expert evidence from getting to "potentially gullible juries."<sup>136</sup> Hearsay, similarly, gets excluded because it is unreliable—there is no cross-examination to expose the declarant's testimonial infirmities<sup>137</sup>—and jurors might overvalue it.<sup>138</sup>

Is exclusion by the fact finder sufficient to satisfy the purposes of these rules? Where the concern is that the fact finder will give the evidence too much weight—particularly where the fact finder will outweigh the evidence due to its unreliability—I submit that exclusion *can* suffice to fulfill the purposes of these rules.

It is true that a major study of judges concluded that "judges do not disregard inadmissible information when making substantive decisions in either civil or criminal cases," likely because "they are unwittingly influenced by inadmissible information and that they cannot ignore it much of the time."<sup>139</sup> But this may not fully capture how inadmissible evidence influences judges at a bench trial. Specifically, the process of writing a reasoned decision may mitigate the effect of inadmissible evidence. If a judge attempts to justify a conclusion with only admissible evidence, and the opinion "won't write,"<sup>140</sup> the court

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134. See Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1126 (2001) (noting the presupposition that juries are incompetent to evaluate expert evidence, rely on "superficial characteristics of the experts" to judge them, and are confused by battling experts); see also DAVID H. KAYE, DAVID E. BERNSTEIN, ANDREW GUTHRIE FERGUSON, MAGGIE WITTLIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE* § 1.4.2, at 36–40 (Richard D. Friedman ed., 3d ed. 2021) (discussing the problem of juror competence).

135. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); FED. R. EVID. 702.

136. Edward K. Cheng, *The Consensus Rule: A New Approach to Scientific Evidence*, 75 VAND. L. REV. 407, 413 (2022). Cheng critiques the *Daubert* framework on epistemic competence grounds. *Id.* at 414–19.

137. Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974).

138. Justin Sevier, *Testing Tribe's Triangle: Juries, Hearsay, and Psychological Distance*, 103 GEO. L.J. 879, 883 (2015). Sevier provides evidence that jurors are aware of the testimonial infirmities of hearsay and discount the evidence. *Id.* at 884. He argues that procedural rationales provide stronger support for the hearsay rule. *Id.* at 925. Friedman suggests hearsay rules should be tied to the confrontation right. Friedman, *supra* note 38, at 968.

139. Wistrich et al., *supra* note 1, at 1323.

140. Cf. Kathleen Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U. ILL. L. REV. 917, 931–32 (citing Paul A. Freund, *An Analysis of*

may have to revisit its conclusion. Indeed, one study by Zhuang Liu found that when judges wrote down their reasons before making a decision, they were less affected by a stimulus intended to induce negative feelings toward the defendant.<sup>141</sup> To the extent that judges write reasoned opinions in bench trials, the effect of inadmissible evidence may be less than if judges ruled from the bench.<sup>142</sup>

Other aspects of the research provide additional cause for optimism. First, in two of the Wistrich, Guthrie, and Rachlinski studies, there was a sizeable but statistically insignificant difference in the behavior of judges who were exposed to evidence and ruled it inadmissible versus judges who ruled it admissible, in the direction we would expect if exclusion is partially effective.<sup>143</sup> We cannot glean much from these insignificant results, but they certainly leave open the possibility that exclusion does *something*, even in the context of these studies.

Second, some additional research has indicated that lay fact finders who learn that evidence was excluded because it was *unreliable* or *not credible* are able to disregard that evidence.<sup>144</sup> It certainly makes

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*Judicial Reasoning*, in LAW AND PHILOSOPHY 282, 288 (Sidney Hook ed., 1964)) (discussing this phenomenon in judicial opinions broadly).

141. Zhuang Liu, *Does Reason Writing Reduce Decision Bias? Experimental Evidence from Judges in China*, 47 J. LEGAL STUD. 83, 84–85 (2018). In this study, incumbent Chinese judges read a scenario in which the defendant negligently killed a man who had participated in stealing her wallet, and they had to decide whether her actions were legitimate self-defense or excessive self-defense. *Id.* at 92. Judges in the treatment group learned that the defendant was a corrupt government official—the money she lost was a bribe. *Id.* Subjects were assigned to one of three decision procedures: decide directly; make a decision and then write reasons; or write reasons and then make a decision. *Id.* at 91. Among judges who made a direct decision, those who learned about the corruption were significantly harsher—counting not-guilty verdicts as a sentence of zero—than those who did not. *Id.* at 93–94. But that was not the case for judges who gave reasons first; there was only an insignificant difference. *Id.* A period of deliberation before deciding showed signs of having a similar effect. *Id.* at 97–99; see also Guha Krishnamurthi, *The Constitutional Right to Bench Trial*, 100 N.C. L. REV. 1621, 1650 (2022) (“A reasoned opinion can help ensure that the verdict is not reached due to bias, but rather is rationally supported.”).

142. See Krishnamurthi, *supra* note 141, at 1637 (“One feature of bench trials is that they often come with a reasoned explanation by the judge . . . [that] lays out how the evidence presented supports the judge’s factual determinations and, consequently, their verdict.”).

143. Wistrich et al., *supra* note 1, at 1305–07, 1307 tbl.4 & 1307 n.218. The researchers tested whether judges exposed to a tort plaintiff’s criminal history would award him lower compensatory damages. *Id.* at 1306. Judges who were not exposed awarded a mean of \$778,000, while those who sustained the plaintiff’s objection awarded an average of \$685,000, a “marginally statistically significant” difference. *Id.* at 1306, 1307 tbl.4. Those who overruled the objection and admitted the evidence awarded an average of \$406,000, but very few participants overruled the objection, and this difference did not approach statistical significance. *Id.* at 1306–08, 1307 tbl.4. Of judges who did not hear evidence of a rape complainant’s sexual history, 49.1% convicted; of judges who excluded the evidence, 20% convicted; and of judges who admitted the evidence, 7.7% convicted. *Id.* at 1302. This last difference—seven of thirty-five versus one of thirteen—was not statistically significant. *Id.*

144. *Id.* at 1276 (generalizing from prior research to conclude that attempts to disregard are more likely to be successful “if the credibility of the inadmissible information sought to be ignored

sense that fact finders who go through the process of a *Daubert* ruling and find an expert's opinion unreliable would give minimal weight to that evidence. And analyzing hearsay might emphasize, for the judge, the inability to probe the testimonial capacities of the declarant.

It is plausible, then, that judicial fact finders will sharply discount excluded evidence but not disregard it entirely. But if the concern with the evidence is *overvaluation*, then discounting is not a bad place to end up—the judge may approximate the evidence's probative value better than exclusion would. If judges discount excluded evidence, rules of exclusion can function, effectively, as rules of weight. For Rules 702 and 802, then, we may not need bifurcation to reach a reasonable result.

If the concern, however, is that the decision will be made on an improper basis—that a defendant will be punished for his bad character or prior bad acts—discounting without discarding is insufficient. If character evidence makes a judge comfortable with finding a defendant guilty beyond a reasonable doubt, even on the margins, it has harmed the fact-finding process. For character evidence,<sup>145</sup> then, bifurcation may be necessary.<sup>146</sup>

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is destroyed or at least called into question”) (citing Steven Fein, Allison L. McCloskey & Thomas M. Tomlinson, *Can the Jury Disregard That Information? The Use of Suspicion to Reduce the Prejudicial Effects of Pretrial Publicity and Inadmissible Testimony*, 23 PERSONALITY & SOC. PSYCH. BULL. 1215, 1223 (1997) (finding that jurors were able to ignore incriminating evidence when they were made suspicious of the source's motives)); see also Saul M. Kassir & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCH. BULL. 1046, 1048–49 (1997) (explaining that subjects were told that evidence in this study was “unreliable” because a recording was barely audible and difficult to decipher). To counter the idea that explanations can help factfinders disregard inadmissible evidence, scholars sometimes cite Kerri L. Pickel, *Inducing Jurors to Disregard Inadmissible Evidence: A Legal Explanation Does Not Help*, 19 LAW & HUM. BEHAV. 407, 415 (1995). In that study, however, mock jurors did not learn that the evidence was unreliable or not credible; they learned only that courts exclude character evidence because it “might improperly suggest to you that the defendant has a bad character and tends to behave in the same negative way in all situations.” *Id.* at 412.

145. I include in “character evidence” evidence covered by Rules 404, 608, 609, 412, 413, 414, and 415. If a defendant is impeached by character evidence, see FED. R. EVID. 608, 609, he may be improperly convicted based on this character evidence. And if a defendant is *acquitted* because of improper *victim* character evidence, see FED. R. EVID. 412, a related harm has occurred. Several of these rules also exclude non-defendant, non-victim character evidence, but it is simpler not to parse the rules too finely.

146. For Rule 411, the concern—that judges will find against a party because payment will not come from their own pockets—may be so slight that we do not need bifurcation. I also have not discussed Rule 403, which courts sometimes explicitly say does not apply to bench trials. See *United States v. Preston*, 706 F.3d 1106, 1117 (9th Cir. 2013) (“Rule 403 is inapplicable to bench trials.”), *rev'd on other grounds*, 751 F.3d 1008 (9th Cir. 2014) (en banc). Although I think there might be value in courts going through the 403 analysis and specifying the probative value of the challenged evidence, I recognize that judges might reasonably find the exercise futile, because 403 analysis focuses less on defects of the evidence and more on the effects on the factfinder. See FED. R. EVID. 403 (excluding evidence when “its probative value is substantially outweighed by a danger

### 3. Constraining Litigants

Rule 1002, the so-called “best evidence” rule, serves both to prevent inaccurate decisionmaking and to prevent litigant fraud.<sup>147</sup> Under this rule, litigants must provide an original document to prove the contents of that document,<sup>148</sup> although the rule has no shortage of sensible exceptions.<sup>149</sup> This purpose may be satisfied without bifurcation. If the judge will not formally consider a recreation of a document, the parties have an incentive to produce the original, even if the replica might have some effect on the judge’s reasoning. Bifurcation is not necessary.

### 4. Waste of Time

The requirement that evidence be relevant<sup>150</sup> exists largely because irrelevant evidence “wastes the tribunal’s time and energy.”<sup>151</sup> And the authentication rule<sup>152</sup> is a special case of conditional relevance.<sup>153</sup> There may be some potential for irrelevant evidence to confuse fact finders: they might reasonably wonder why they were seeing a gun or learning about a phone call that was not connected to the defendant. But if they were able to recognize that the proponent had not proved the connection, there is little reason for them to be swayed by the evidence. Indeed, Guthrie, Rachlinski, and Wistrich failed to find evidence that an improperly authenticated photograph influenced administrative law judges.<sup>154</sup> Although relevance and authentication rulings may waste some time, they will be an expenditure of judicial

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of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”). I do not think the Rules should carve out an exception for Rule 403, but I would expect judges to apply the rule sparingly.

147. 5 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 10:17 (4th ed. 2013).

148. FED. R. EVID. 1002.

149. *Id.* at 1004.

150. *Id.* at 402.

151. Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447, 474 (1990).

152. FED. R. EVID. 901.

153. *See id.* at 104(b). Conditional relevance is a contested concept, with many scholars agreeing it is incoherent. *See, e.g.*, Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435, 437–38 (1980) (stating the thesis that the doctrine of conditional relevancy is inconsistent with the definition of relevancy in the Federal Rules of Evidence); Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871, 871–74 (1992) (stating that Ball’s analysis is “even more powerful than he explicitly recognized” and adding to it); Nance, *supra* note 151, at 448–49 (noting that Ball’s argument is “convincing,” but stating the thesis that the “best evidence principle” explains the “identifiable core of good sense” in policies and procedures underlying conditional relevance decisions).

154. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”*: An Empirical Examination of Executive Branch Justice, 58 DUKE L.J. 1477, 1516–18 (2009).

resources no matter who rules, so judges should be able to enforce these rules without bifurcation.

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So, Rules 404 through 410, other character evidence rules, and the privilege rules likely require bifurcation. The rest of the rules may not, but still merit procedures that minimize cognitive influence on the judge. The next part attempts to craft procedures that optimize fact-finding under these circumstances.

### III. TWO PROCEDURES

The dichotomy set out above requires two procedures: one for evidence that courts will admit without bifurcation, and one for bifurcation.

#### *A. Improving Fact Finder Exclusion*

To minimize the influence of inadmissible evidence on the judge while conserving judicial cognitive resources during trial, several procedures should be amended.<sup>155</sup>

First, the court should be required to rule on the admissibility of all challenged evidence before it issues its findings of fact and rulings of law. This will force the judge to go through a process that will expose the unreliability in expert opinion evidence, the questions about a declarant's testimonial capacities in hearsay evidence, and the lack of relevance or authentication in any evidence challenged on those grounds. And when the court issues its findings of fact<sup>156</sup> and, ideally, gives a reasoned decision, it will be able to rely only on evidence it has already decided to admit.

Ideally, the court would rule on the evidence before it is admitted at trial. Fact finders update their views over the course of the trial, and if evidence is even tentatively admitted, it will almost certainly have more of an effect on their decisions than it would if it were struck before trial.<sup>157</sup> Some research indicates that even if told to suspend judgment,

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155. To the extent these proposals are not inconsistent with current federal law, district courts may adopt them as local rules of procedure. See FED. R. CIV. P. 83(a); FED. R. CRIM. P. 57(a).

156. See FED. R. CIV. P. 52(a)(1) ("In 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."); FED. R. CRIM. P. 23(c) (stating that, in criminal cases, judges must issue findings of fact on request).

157. Cf. Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 550-59 (2004) (arguing, based on a model of coherence-based

people tend to develop a preference for one side as they receive evidence,<sup>158</sup> and a judge may do the same as evidence is presented. But I am concerned about the cognitive difficulty of switching between fact-finding and applying the Rules of Evidence at a hearing. Therefore, while judges should decide motions in limine in advance of trial—the temporal distance between that decision and trial may mitigate the effect of the evidence<sup>159</sup>—I suggest judges be permitted to reserve ruling on live objections during trial. The court should then rule on the objections and strike any inadmissible evidence before issuing its findings of fact.

Usually, courts may consider inadmissible evidence when deciding whether a challenged piece of evidence is admissible under the Rules.<sup>160</sup> However, this process may expose a judicial fact finder to prejudicial inadmissible evidence. For example, when a court decides whether a statement is admissible under the co-conspirator exclusion to the hearsay rule,<sup>161</sup> the court may hear inadmissible evidence suggesting the defendant and the declarant were co-conspirators. That evidence could prejudice a fact finder. Therefore, I suggest that the court be limited to admissible evidence when making its evidentiary determinations for a bench trial. If the proponent of the evidence wishes to have the court consider inadmissible evidence in determining admissibility, it should be able to opt for a bifurcated procedure. I turn to the suggested mechanics of that now.

### B. Bifurcation

As discussed above, the fact finder should be insulated from character evidence, privileged evidence, and other evidence excluded to effect extrinsic policy. Bifurcation is often deemed impractical.<sup>162</sup> But

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reasoning, that jury instructions should be given at the beginning of trial because, if they come at the end, jurors may have already formed an entrenched view of the case).

158. *See id.* at 551–52 (citing cognitive-coherence studies in which subjects demonstrated coherence shifts even when they were instructed to delay a decision and noting it is consistent with other research “show[ing] a general human tendency to make sense of one’s social and physical worlds proactively, even in the absence of specific processing goals” and “show[ing] that preferences for verdicts—and to some degree, also final decisions—can emerge during the evidence phase of the trial”).

159. *See* Steiner-Dillon, *supra* note 2, at 246 (“Temporal proximity alone makes a difference—evidence to which the judge was exposed in a pretrial motion to exclude is less fresh in the mind than is evidence introduced during trial.”).

160. FED. R. EVID. 104(a).

161. *Id.* at 801(d)(2)(E).

162. *See* Sinnott-Armstrong, *supra* note 31, at 130 (stating that requiring a second judge to decide on admissibility of expert testimony would be so “cumbersome and inefficient that it hardly seems practical in our already overburdened courts”); Wang, *supra* note 32, at 302 (“[G]iven the

two features of my proposal limit the possible cost and administrative hassle. First, there would not be very many motions kept from judges in bench trials. Under my proposal, some of the most complicated and common motions—*Daubert* motions and hearsay objections—would typically be heard by the judge conducting the trial. Further, as previously noted,<sup>163</sup> bench trials are fairly rare: a typical federal district judge will conduct approximately one full bench trial per year.<sup>164</sup> That low rate suggests that bifurcation will not seriously tax the system. But it also counsels against creating a complicated new system for bifurcation that will apply in so few trials. Indeed, I am pessimistic that courts will be willing to radically restructure case assignment for the sake of applying the Rules in bench trials.

So, I suggest that federal district judges rely on an already-familiar critical resource: magistrate judges. Magistrate judges are a creation of statute,<sup>165</sup> and the law permits them to hear and decide non-dispositive pretrial matters at the district judge's designation.<sup>166</sup> If a party timely objects to a magistrate judge's ruling, the district judge will review the ruling and modify it if it is clearly erroneous or contrary to law.<sup>167</sup> There is approximately one magistrate judge for every 1.2 authorized district court judgeships.<sup>168</sup> Although district courts—and even judges within a district—vary in terms of which matters get referred to magistrate judges,<sup>169</sup> district judges often rely on them for

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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.”)

163. See *supra* notes 77–78 and accompanying text (examining the data pertaining to bench trials).

164. See ADMIN. OFF. U.S. CTS., TABLE 1.1: TOTAL JUDICIAL OFFICERS—U.S. COURTS OF APPEALS, DISTRICT COURTS, AND BANKRUPTCY COURT DURING THE 12-MONTH PERIODS ENDING JUNE 30, 1990 AND SEPTEMBER 30, 1995 THROUGH 2022, [https://www.uscourts.gov/sites/default/files/data\\_tables/jff\\_1.1\\_0930.2022.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_1.1_0930.2022.pdf) (last visited Oct. 21, 2023) [<https://perma.cc/7ACW-XZKJ>] (recognizing 1,012 active and senior federal district court judges); ADMIN. OFF. U.S. CTS., TABLE T-4, *supra* note 77 (recognizing a total of 821 bench trials on the issue and on charge(s) in 2019).

165. See 28 U.S.C. §§ 631-639 (providing the legislative framework pertaining to magistrate judges).

166. 28 U.S.C. § 636(b)(1)(A), (b)(3). Evidentiary rulings are typically non-dispositive. *Gunter v. Ridgewood Energy Corp.*, 32 F. Supp. 2d 162, 164 (D.N.J. 1998) (“Because evidentiary rulings are nondispositive, this Court can only set aside Magistrate Judge Pisano’s order if it is clearly erroneous or contrary to law.”).

167. *Gunter*, 32 F. Supp. 2d at 164; FED. R. CIV. P. 72(a); FED. R. CRIM. P. 59(a).

168. See ADMIN. OFF. U.S. CTS., TABLE 1.1, *supra* note 164 (recognizing 562 authorized positions for full-time magistrate judges and 677 authorized judgeships for district court judges). Including senior district court judges, there are about two district judges per magistrate judge.

169. See Ruth Dapper, *A Judge by Any Other Name? Mistitling of the United States Magistrate Judge*, 9 FED. CTS. L. REV. 1, 3 (2015) (“There is no single responsibility that all federal magistrate judges hold, making it at times difficult to define in a national context what role the judges play.”); E.D.N.Y. LOC. CIV. R. 72.2 (providing that a magistrate judge will be automatically assigned at the commencement of a civil case, and the assignment will be at random, but not applying the same



initial proceedings in criminal cases, case management in civil cases, settlement negotiations, and more.<sup>170</sup> Magistrate judges may also preside over misdemeanor trials with the consent of the defendant (in the case of Class A misdemeanors) or over civil trials with the consent of the parties.<sup>171</sup> Accordingly, many magistrate judges have experience making rulings under the Federal Rules of Evidence.

A chief advantage to assigning admissibility rulings on dangerous evidence to magistrate judges, as opposed to other district judges, is the relatively low administrative difficulty of doing so. District judges already often work with magistrate judges in various capacities, so the new task would fall into an existing structure. Additionally, because magistrate judges often participate in the early stages of a case, such as discovery disputes in civil cases or initial appearances in criminal cases,<sup>172</sup> they may have some familiarity with the facts before the motions in limine start coming in, so they might get up to speed more quickly than a second district judge. This advantage would not apply if a different magistrate judge conducted the earlier proceedings,<sup>173</sup> and it would be severely diminished if the trial took place after a long delay, but it would hold in at least some cases. And given the low volume of bench trials and the moderate subset of evidentiary issues that require bifurcation, I *hope* this would not add too much work to the magistrate judges' existing workload. In districts where magistrate judges are already overtaxed, however, this new responsibility might be too much to bear; the Judicial Conference should authorize, and Congress should appropriate funds for, additional judgeships in those districts.<sup>174</sup>

The chief difficulty with employing magistrate judges for this task is the statutory mandate that their rulings be reviewed for clear error.<sup>175</sup> What should happen if a party objects to a magistrate judge's

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Local Rule in the Southern District of New York, even though the two districts share most of their local rules).

170. See Peter G. McCabe, *A Guide to the Federal Magistrate Judges System*, FED. BAR ASS'N 1, 22–57 (2014), <https://www.fedbar.org/minnesota-chapter/wp-content/uploads/sites/54/2021/12/A-Guide-to-the-Federal-Magistrate-Judges-System.pdf> [<https://perma.cc/EQC7-KDZ9>] (describing the roles of magistrate judges in criminal and civil cases). Magistrate judges may not rule on motions to suppress evidence in a criminal case, as a matter of course. 28 U.S.C. § 636(b)(1)(A).

171. McCabe, *supra* note 170, at 32, 36, 58; 28 U.S.C. § 636(a)(3), (c)(1); 18 U.S.C. § 3401(b).

172. See FED. R. CRIM. P. 5.

173. For example, in criminal cases, magistrate judges may be “on duty” certain days.

174. See 28 U.S.C. § 633(c) (describing the process for authorizing magistrate judgeships); Anthony Marcum, *Why Federal Magistrate Judges Can Improve Judicial Capacity*, 88 U. CIN. L. REV. 1009, 1031 (2020) (“Any expansion of the magistrate judge system is reliant on Congress for appropriation of funds.”).

175. See 28 U.S.C. § 636(b)(1)(A) (“A judge of the court may reconsider any pretrial matter under [28 U.S.C. § 636(b)(1)(A)] where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law.”). Although the statutory language leaves some wiggle room—

ruling as clear error? I suggest that if the magistrate judge has ruled that the evidence is inadmissible, the court reserves ruling on the objection until the trial is completed and its view of the case has largely taken shape.<sup>176</sup> If the court agrees that the ruling was clear error, it can agree to hear the evidence at that point. If the magistrate judge has ruled the evidence is admissible, the court should review the ruling promptly, before the evidence would be admitted. Although this procedure risks exposing the court to prejudicial inadmissible evidence, the risk is low, given the deferential standard of review. And even though both procedures put a thumb on the scale in favor of the magistrate judge's ruling, that is sensible for the same reason.

### *C. The Proposed Amendments*

With that structure in mind, I very tentatively propose the following two amendments:

#### **Federal Rule of Evidence 103**

**(f) Rulings on Admissibility in a Bench Trial.** When the court is the finder of fact:

(1) The court must rule on any pretrial motion made under these Rules before trial.

(2) If a party intends to introduce evidence at trial that includes (a) any communication between persons whose confidential communications are sometimes privileged; (b) evidence of a person's character or character trait that is admissible under Rules 404, 405, 608, or 609; (c) evidence permitted under Rule 404(b)(2), 412(b), 413, 414, or 415; (d) evidence that would be inadmissible under Rules 407, 408, 409, or 410 if introduced for an impermissible purpose; or (e) evidence that the party reasonably believes will be subject to objection under one of the aforementioned Rules; then:

(A) The party must provide reasonable notice of the evidence, so the opposing party has an opportunity to object to it before trial.

(B) Any party seeking to exclude the evidence may serve the motion to exclude on the other party without filing it with the court and elect to have the motion referred to a United States magistrate judge

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a judge "may" reconsider the ruling—the Supreme Court has clearly indicated that review is required. See *Gomez v. United States*, 490 U.S. 858, 871 (1989) (noting "two levels of review depending on the scope and significance of the magistrate's decision").

176. See Simon, *supra* note 157, at 551–52 (discussing research finding that participants instructed to delay a decision while waiting for evidence still "shifted toward mental models that were skewed toward either one of the verdicts," and noting the findings are consistent with data "that show that preferences for verdicts—and to some degree, also final decisions—can emerge during the evidence phase of the trial").

by filing a motion for assignment to a magistrate judge with the court, which the court must grant upon a determination that it seeks exclusion of evidence under this rule.

(C) If the magistrate judge determines the evidence is admissible, and if the moving party timely serves and files objections to the order, the district judge must rule on the objection before trial.

(D) If the magistrate judge determines the evidence is inadmissible, and if the non-moving party timely serves and files objections to the order, the district judge must rule on the objection after the other evidence at trial has been presented.

(3) The court must rule on any objection made during trial before it issues its findings of fact or its ruling.

### **Federal Rule of Evidence 104(a)**

(2) In a bench trial, if the court that is resolving the preliminary question will also be the finder of fact, the court is bound by the rules of evidence. The court must resolve any preliminary question on the record. If either party wants the court to consider inadmissible evidence, it may elect to have the motion referred to a magistrate judge so that the magistrate judge may consider the inadmissible evidence.

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These proposed rules are flawed and incomplete. The rule for notifying the opposing party of intended evidence gives significant discretion to the proponent. The rules do not yet provide for the contingency of unexpected character evidence, for example, introduced at trial. The system for reviewing a magistrate judge's ruling is messy, and the amendments do not specify how the rules should be enforced when a magistrate judge conducts the trial.<sup>177</sup> And they do not address summary judgment, where the court may get a preview of the parties' evidence.<sup>178</sup> There may be problems with assigning magistrate judges duties using the Federal Rules of Evidence<sup>179</sup> or additional problems that I have not caught. But I hope these proposed rules—and the

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177. They also do not provide for evidentiary rulings that are functionally dispositive of the case. For dispositive motions, magistrate judges may issue a report and recommendation, and on motion, the district court reviews the ruling de novo. 28 U.S.C. § 636(b)(1)(B).

178. See FED. R. CIV. P. 56(c) (setting out procedures for summary judgment, including citing to materials in the record).

179. See 28 U.S.C. § 636(b)(1), (3), (4) (setting out what "a judge" may designate a magistrate judge to do and providing that "[e]ach district court shall establish rules pursuant to which the magistrate judges shall discharge their duties," but also noting a magistrate judge "may be assigned" additional duties).

reasoning I used to devise them—serve as a starting point for crafting more workable rules for bench trials.

#### CONCLUSION

There is one final potential benefit to requiring judges to enforce the Rules on themselves: judges may become more invested in reforming the law of evidence. If forced to decide cases *without* probative hearsay but *with* evidence of a testifying defendant's prior conviction, a judge might better appreciate the problems with our evidentiary system. And judges can be a powerful force for reform: several judges sit on the Advisory Committee on Evidence Rules,<sup>180</sup> and judges can comment on proposed amendments.<sup>181</sup> Perhaps one relatively small change to the Federal Rules of Evidence—providing for their applicability in bench trials—can spur many more changes that remedy core injustices and inefficiencies. Or, perhaps, efforts to apply the Rules to bench trials will flop. But after fifty years of ambiguity, it is time to try.

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180. ADVISORY COMM. ON EVIDENCE RULES, AGENDA FOR COMM. MEETING 1, 8 (2023), <https://www.uscourts.gov/file/64255/download> [<https://perma.cc/XP6W-HV85>].

181. ADVISORY COMM. ON EVIDENCE RULES, MINUTES OF THE MEETING 1, 4 (2022), <https://www.uscourts.gov/file/57894/download> [<https://perma.cc/WDX5-Z37Q>] (noting that the Magistrate Judges Association commented on a proposed amendment).