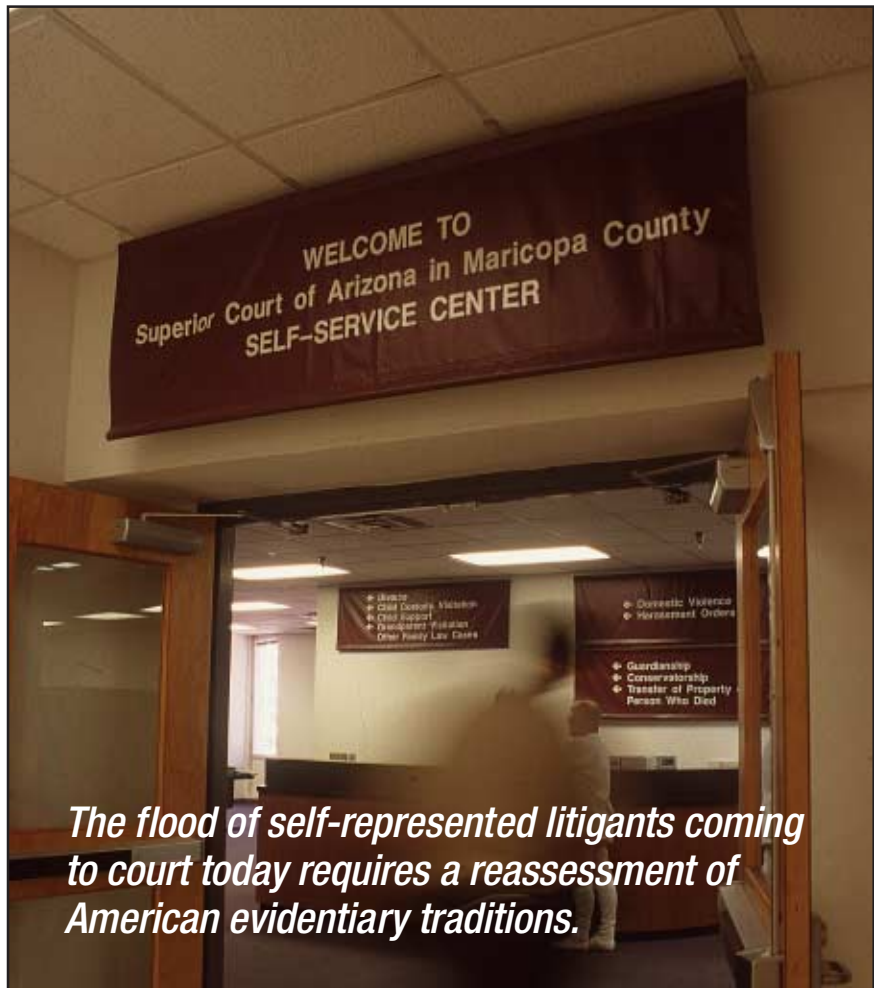


# Rethinking the rules of evidentiary admissibility in non-jury trials

by John Sheldon  
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*The flood of self-represented litigants coming to court today requires a reassessment of American evidentiary traditions.*

**A**nglo-American evidence law is peculiar for its concept of “admissibility.” This concept was developed at common law because there was no way for any legal authority to monitor or direct the autonomous and secret deliberations of the

getting information that might prejudice them against a party, or distract them from the core issues of the case, or confuse them, or otherwise cause them to settle on a verdict for the wrong reasons.

It was this objective that produced our current rules of admissibility, such as the hearsay, character evidence, and opinion testimony rules. These were rules of the common law, not of equity, because equity had no juries and needed no similar concept of admissibility. Somehow, when law and equity were joined in the United States, however, the rules of admissibility became integrated into the equity practice as well. As a result, in most state and federal trial courts across the country those rules now control proof presented to judges as well as to juries, on equitable issues as well as on legal ones.

The illogic of this practice has

been obvious to generations of scholars. For example, in 1931 Dean Charles McCormick declared that the rules of evidence “are absurdly inappropriate to any tribunal or proceeding where there is no jury.”<sup>1</sup> Likewise, in 1964 Professor Kenneth Culp Davis argued that because the vast majority of trials across the United States took place without juries, applying rules of admissibility to all trials invited time-consuming, courtroom wrangling that was purposeful in only a small minority of cases.<sup>2</sup>

McCormick and Davis recognized this practice as anomalous, but they

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1. 5 *ENCYCLOPEDIA OF SOCIAL SCIENCES* 637, 644 (1931).

2. Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 *A.B.A.J.* 723 (1964).

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jury. So to control the quality and ensure the legitimacy of jury verdicts the common law did the next best thing—screen the evidence that juries got to hear and evaluate. The idea was to prevent lay jurors from

could not call it unfair. In their time, applying the concept of admissibility to non-jury trials disadvantaged few litigants, because nearly all of them were represented by attorneys trained in evidence law. More recently, however, American courtrooms have been flooded by self-representing litigants, few of whom understand either the concept of admissibility or the multifaceted form in which the rules of evidence cast it. As the Supreme Court itself has observed, “[e]ven the intelligent and educated layman . . . is unfamiliar with the rules of evidence.” (*Faretta v. Calif.* (1975)) When such a litigant faces a party represented by counsel in a jury-waived proceeding, rules of admissibility become more than superfluous: They become weapons that the lawyer can use to gain an advantage that has nothing to do with the merits of the case.

This development requires a reassessment of American evidentiary traditions. Comparative law offers an informative perspective from which to begin. In continental Europe, for example, civil litigation proceeds without rules that exclude relevant evidence (except that protected by privilege). Even in England, the progenitor of many of our rules of admissibility, the use of those rules is waning to the point of invisibility. Why is this? Because the civil jury trial hardly exists in Europe.<sup>3</sup>

Likewise, in the non-jury administrative courts of this country there are few if any rules of admissibility. Instead of arguing whether evidence is admissible, attorneys in all those European and American courts argue its probative value. What counts is not whether certain hearsay is covered by an exception, or whether certain evidence “goes to” motive or intent rather than character, or whether a witness is qualified to give a certain opinion. What counts, simply, is whether and to what degree the evidence proves something of relevance to the case.

These circumstances lead one to question whether rules of evidentiary admissibility endow American non-jury proceedings with anything of particular value. On the other hand,

however, it is easy to illustrate how the rules of admissibility can and do produce unfairness. This imbalance suggests that such rules ultimately impair rather than foster justice in non-jury trials.

Much of the same reasoning would justify eliminating rules of admissibility in non-jury criminal trials as well. However, the ultimate policy balance in those cases may be different because rules of evidentiary exclusion have become intertwined with concepts of criminal due process. Unraveling that relationship is beyond the scope of this project.

### Rules of admissibility

The jury is the quintessential “black box.” Once the jurors retire to the jury room and close the door to begin deliberations, no one can control what they do. 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. The theory is that if the information the jury receives (the evidence) is screened for impurities before the jury gets it, and furthermore if the deliberation process is properly mapped out by the judge (the instructions), the jury’s decision on the combined facts and law will be reasonable and therefore fair.

Much the same thing could be attempted by letting the jury hear everything that the litigants want to submit, and thereafter instructing the jury to disregard that which the law deems unreliable, improper, or confusing. Enforcing such “limiting” or “curative” instructions is impossible, however, so expecting instructions to undo the prejudicial effect of improper evidence is, as Justice Robert Jackson has put it, “an unmitigated fiction.” (*Krulewich v. United States* (1948)). The curative instruction is simply too weak a reed to sustain an otherwise entirely unsupervised fact finding.<sup>4</sup>

When judges sit without juries, however, there is no point either in trying to screen evidence or in issuing limiting instructions. Screening is impossible, because the person who does the screening is the very

person from whom the evidence is supposed to be screened, and it makes no sense to ask judges to instruct themselves. Those logical dead-ends explain why legal systems without juries—in this country and abroad—lack elaborate rules to control the evidence that the adjudicator hears. Such systems legitimate their judicial decisions not by pre-adjudication screening of information but by requiring the adjudicator to explain in a written opinion how he or she used the information received during trial to arrive at the decision.

There is only one aspect of the concept of admissibility that jury and non-jury systems share broadly, and that has nothing to do with legitimizing the result. In the case of privileges, the common policy is to exclude information from any and all adjudicators, for the reason that the very disclosure of the information may cause irreversible harm.

*Admissibility in non-jury trials.* Notwithstanding objections from Dean McCormick, Professor Davis, and others, the practice of applying rules of admissibility in non-jury trials survives. Perhaps this is because the law of evidence itself has proved impregnable to the forces of change: “The world of procedure within which concepts of evidence developed has turned over many times since Gilbert in 1754, or Wigmore in 1904, wrote their [evidence] treatises. Only concepts of the proof system have remained static.”<sup>5</sup>

Perhaps this arrested development would make sense if the American judicial environment were dominated by jury trials, but that is not the recent experience. In the last decades

3. No continental European jurisdiction offers jury trial in civil cases. In England jury trial is available only in very limited categories of civil cases such as libel. In Scotland civil jury trial requires the consent of the judge and is very rarely used.

4. Despite its acknowledged limitations, courts rely on the limiting instruction to guide the jury’s consideration of evidence that may properly be used for one purpose, but not for another, and for evidence that was communicated before proper objection could be lodged.

5. Miller, *Beyond the Law of Evidence*, 40 SO. CAL. L. REV. 1, 8 (1967). See also Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COL. L. REV. 223, 226 (1966) (quoting Professor Morgan as characterizing the pace of evidence reform as “glacier-like”).



**Although unrepresented litigants can find a wealth of material at self-help centers, most remain ignorant of the concept of evidentiary “admissibility.”**

of the 20th century, and through into the new millennium, there has been a tremendous growth in non-jury litigation, and a corresponding decline in the number and percentage of cases tried to juries.

Statistics from the Commonwealth of Massachusetts illustrate this trend. During the 1920s some 2,700 civil jury trials took place each year. By the end of the 20<sup>th</sup> century, the annual num-

ber of civil jury trials in Massachusetts had dwindled to less than 500, despite great increases in the numbers of cases filed, the numbers of judges on the bench, and the numbers of lawyers in practice.<sup>6</sup> During this same three quarters of a century, the number of non-jury proceedings of all kinds has burgeoned, both in the traditional courts and in a host of newly created administrative agencies.

This development suggests that continued use of a device originally developed for and suited to the jury trial process in an overwhelmingly non-jury modern environment may have the tail wagging the dog.

*Admissibility in the common-law world.* The United States is the last common-law jurisdiction to rely significantly on the jury trial in civil cases.<sup>7</sup> In other common-law countries, principally England and its former colonies, the civil jury trial survives only as a matter of theoretical right, but not as a functioning component of the justice system.

By the same token, the common law on the admissibility of evidence in such countries remains theoretically intact, but has little practical significance in civil trials before judges. In England, the admissibility of most forms of evidence in civil cases has long been subject to the trial justice’s

sound discretion.<sup>8</sup> The principal remnant of the regime of mandatory rules of exclusion, the hearsay rule, was abolished for civil cases in Scotland in 1988 and in England in 1995; in 1993 the Canadian Law Commission recommended the same thing there.<sup>9</sup> It is safe to say that in the remainder of the Anglo-American legal world many rules of admissibility that are still being applied in this country are following the civil jury into obsolescence. And just as the American practice of civil jury trial is becoming isolated, the practice of applying rules of admissibility to non-jury trials is becoming eccentric.

### Admissibility and pro se

Unrepresented litigants are flooding the nation’s courts.<sup>10</sup> There are several explanations for this phenomenon, such as the rise of consumerism, growing anti-lawyer sentiment, the cost of litigation, the growth of do-it-yourself law businesses, the widening jurisdiction of small claims courts, legislative creation of new causes of action such as protection from harassment, and the popularity of Judge Wapner-like television programs.

Irrespective of what prompts people to represent themselves, however, almost all who do so share this common characteristic: They are ignorant of the concept of evidentiary “admissibility.” Many *pro se* litigants do not even suspect the existence of rules of evidence, let alone understand them. This unfamiliarity unfairly disadvantages *pro se*s when the opposing party has an attorney. Consider the following examples, drawn from the authors’ actual experiences in Maine state courts, in each of which a *pro se* litigant opposes a party represented by counsel:

- A *pro se* plaintiff in a protection from harassment case offers the defendant’s recent jury-trial conviction for assaulting her as proof that he harassed her, on the ground that Maine’s statutory definition of harassment includes assault. Proof of the conviction is hearsay and inadmissible, however, because in Maine criminal assault is a misdemeanor

6. These figures have been derived from the annual reports and other records of the Massachusetts judiciary on file with Professor Murray. The massive decline in the frequency of civil jury trial and its effect on our legal culture are the subjects of a project currently in process, which will lead to publications in the near future.

7. See, e.g., Sward, *THE DECLINE OF THE CIVIL JURY TRIAL* (Carolina, 2001).

8. See, e.g., Tapper *et al.*, *CROSS ON EVIDENCE*, 7th Ed., § 2(B)(1) (Butterworth, 1990).

9. Civil Evidence Act of 1995 (adopted November 5, 1995, effective January 1, 1997) § 1 (“In civil proceedings evidence shall not be excluded on the ground that it is hearsay.”) Schiff, *EVIDENCE IN THE LITIGATION PROCESS* (4th Ed., Carswell, 1993) at 686 n.25 (1995 Cum. Supp. at 29).

10. Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORD. L. REV.* 1987 (1999). The *Pro Se* Committee Report of the Massachusetts Probate and Family Court Department, *Pro Se Litigants: The Challenge of the Future*, October 29, 1997, p. 6, describes the phenomenon as “the explosion in the numbers of persons who represent themselves in court.” The Florida Team Report of the National Conference on Pro Se Litigation, January 3, 2000, p. 2, describes the transnational trend: “Florida’s experience with the *pro se* phenomena is consistent with other states’ experiences. . . . California’s family law facilitators are helping more than 30,000 unrepresented litigants each month.”

and, therefore, not within the hearsay exception that permits proof of conviction for a crime “punishable by death or imprisonment of one year or more.” The defendant’s lawyer successfully objects. The plaintiff failed to bring witnesses to support her complaint because she assumed that the conviction would suffice. Her case is reduced to a swearing contest between herself and the defendant.

- In a protection from abuse case, the *pro se* plaintiff has prepared a statement about the abusive incident to read to the court, because she knows that she is too scared of the defendant to testify in front of him from memory alone. The defendant’s attorney successfully objects to her reading the statement because it does not qualify under the recorded recollection exception to the hearsay rule. The plaintiff is too upset to testify without the statement, and the case is dismissed for her failure of proof.

- In an eviction hearing, the *pro se* tenant defends by accusing the landlord of deceit. The tenant tries to introduce specific examples of the landlord’s misrepresentations in similar eviction proceedings against other tenants. The landlord’s attorney objects on the grounds that evidence of specific instances of the landlord’s behavior (1) may not be introduced in direct testimony, (2) is not based on the tenant’s personal knowledge, and (3) is hearsay. The tenant, confused and flustered, drops the issue.

- In a protection from abuse hearing, the *pro se* plaintiff seeks to introduce hospital records showing her injuries, treatment, and expenses. She fails to lay a foundation for the records’ admissibility as required by the business records exception to the hearsay rule. Following the defendant’s lawyer’s objection, the judge rules the records inadmissible.

- The defendant in a civil traffic violation case wants to show that the charge of driving at 58 miles per hour in a 45 zone is false because he had his cruise control set at 45 when his radar detector went off. A police

officer friend of his has determined, with calibrated radar, that when the defendant has set his cruise control at 45 the true speed of the car is 44 miles per hour. The defendant seeks at trial to introduce his friend’s determination by sworn affidavit. The prosecution’s objection is sustained—hearsay—and the defendant is convicted of speeding as charged.

It is difficult to identify what public policy is served by such exclusions. There can, for example, be little better proof that the defendant *probably* assaulted the plaintiff than the unanimous verdict of a jury that he did so beyond a reasonable doubt. The evidentiary policy of the second example—that no evidence of domestic violence is better than some—is unjustifiable, as is the policy resisting evidence that people are being deprived of housing by deceit. And the risk of fabrication in what are plainly a party’s hospital records or a police officer’s sworn statement seems much lower than the risk of injustice by exclusion.

These peculiarities could, of course, be ameliorated by specific amendments to the rules of evidence. Nevertheless, no such patchwork remodeling will address the rules’ core problem, which is that their very complexity defeats their stated objective to “secure fairness . . . to the end that the truth may be ascertained and proceedings justly determined.”<sup>11</sup> In the case of the *pro se* litigant, they do just the opposite: They empower parties who have attorneys, arming them with an advantage that is unrelated to the merits of their cases, and with a means to retard or prevent the ascertainment of truth.

### Ritual and harmless error

American courtroom proceedings are remarkable for their high ceremony: “If formality and repetition is the hallmark of ritual, the judicial trial must be counted as among the most decidedly ritualistic institutions of our society.”<sup>12</sup> Rules of admissibility, it is claimed, contribute to the ritualism of trial because they appear to laypeople as arcane and mysterious. Arguments about character evidence, recorded

recollection, self-authentication, prior consistent statements, and the like, involve abstruse jargon that is supposed to complement the formality of in-court proceedings and impress the uninitiated.

Unfortunately, however, when the uninitiated turn from onlookers into participants, the ritual that is supposed to impress may bewilder and ultimately alienate. Rules that are incomprehensible to the participants diminish the credibility of the exercise. Moreover, this practice that costs the judicial system credibility also costs it time, because “more time is ordinarily lost in listening to arguments as to the admissibility of evidence and in considering offers of proof than would be consumed in taking the evidence proffered.”<sup>13</sup> Time is precious in peoples’ courts, where bulging dockets maximize the value of efficiency. In this regard, rules of admissibility are simply counter-productive.

Employment of such rules is especially ironic in view of the fact that they hardly matter on appeal. This is the consequence of the “harmless error” rule, which provides that appeals from evidentiary rulings will fail “unless a substantial right of the party is affected”<sup>14</sup>:

[T]he appellate court will not reverse on the basis of the admission of incompetent evidence “unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made.”<sup>15</sup>

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11. Leonard, *Rules of Evidence and Substantive Policy*, 25 *LOV. L. REV.* 797, 801 (1992). *See also* Fed. R. Evid. 102: “These rules shall be construed to secure fairness . . . to the end that truth may be ascertained and proceedings justly determined.”

12. Cammack, *Evidence Rules and the Ritual Functions of Trials: Saying Something of Something*, 25 *LOV. L. REV.* 783, 789 (1992).

13. *Builders Steel Co. v. Commissioner*, 179 F.2d 377, 379 (8th Cir. 1950), *quoted in* Davis, *Hearsay in Nonjury Cases*, 83 *HARV. L. REV.* 1362, 1366 n. 20 (1970).

14. *See* F. R. EVID. 103 (a). *See also* F. R. CIV. P. 61: “No error in either the admission or exclusion of evidence . . . is ground for . . . disturbing a judgment or order, unless [it appears] inconsistent with substantial justice.”

15. Davis, *supra* n. 13, at 1366, *quoting* *Joseph A. Bass Co. v. United States*, 340 F.2d 842, 845 (8th Cir. 1965).



What this means in practice is that reversal for evidentiary error almost never occurs. One author surveyed almost 40,000 federal civil *and* criminal, jury *and* non-jury trial court decisions between July, 1988, and July, 1990, and found that only 30 had been reversed for evidentiary error.<sup>16</sup> Of those, 17 were reversed for erroneous exclusion. In other words, the number of reversals for the erroneous admission of evidence, in civil, non-jury cases, was almost immeasurably small.<sup>17</sup>

One would expect the opposite: One would expect that a system which burdens itself with complicated rules that slow down hearings, that discriminate against non-professionals, and that distort the truth, does so in order to gain some appreciable benefit in return. But that benefit is rarely to be discerned in appellate case law.

16. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 *LOV. L. REV.* 893 (1992).

17. Most judges instinctively understand this, which is why they often dodge difficult evidentiary issues with excuses like, "I'll let it in but consider only its admissible portions."

18. Schiff, *supra* n. 9, at 670, 686 n.25. See also *F. R. EVID.* 803 (24), permitting introduction of a "statement not specifically covered by any of the [other] exceptions but having equivalent circumstantial guarantees of trustworthiness." Many, but not all, states have a similar residual hearsay exception.

### Abolish the rules?

Why do we continue to apply rules of evidentiary admissibility in civil, non-jury cases, when there appears so little reason for doing so and such an abundance of reasons for not? The explanations may be three.

First, the pro-se phenomenon, which largely prompted this article, is too recent to have permitted systemic responses involving as time-honored an institution as the law of evidence. And the correct response is far from clear. Should we follow the small claims approach and abolish rules of admissibility in non-jury proceedings, excepting only rules of relevancy and privilege? An alternative would be to focus selectively on the hearsay, character evidence, authentication, and expert testimony rules. A third approach would be to abolish rules of admissibility in particular proceedings in which pro-se litigants are most likely to appear. For example, New Hampshire does not apply its rules of evidence in divorce cases, and a similar proposal is pending in the Probate and Family Court of Massachusetts.

Another possibility is to create a general or "residual" exception to the hearsay rule permitting hearsay of a reliable nature. This has been the Canadian and South African approach: In Canada, courts take a

"principled approach" to hearsay, admitting many traditional categories of hearsay when justified by considerations of necessity and reliability, whereas South African law permits judges to admit hearsay whenever it is "in the interests of justice" to do so.<sup>18</sup> Which, or which combination, of these approaches to adopt is a complicated question, not quickly resolved.

A second reason why rules of admissibility still apply in so many non-jury hearings is that the bar wants them to. In part, this is matter of pecuniary self-interest: Lawyers understandably resist demolishing institutions that distinguish their services. Beyond that, however, the legal profession has a lot invested in the Rules of Evidence—law school curricula, law library collections, and an institutional reverence for the celebration of the great theoreticians of evidence law. This is not peculiar to, or derogatory of, the legal profession. Similar resistance mounted when the Catholic Church encountered the Copernican revolution. Centuries of intellectualizing had been invested in Ptolemy's earth-centered view of the solar system, and it was hard to let it go.

There is undoubtedly a third, and broadly human, explanation for the durability of rules of admissibility even in non-jury proceedings—change itself is difficult. Rules of admissibility survive for the same reason that Americans resist using dollar coins, or that computers come with keyboard layouts designed to prevent manual typewriters from jamming. Sometimes, no harm comes from preserving an inefficient status quo. On the other hand, however, when traditions harm people, the traditions must be reexamined, and the more harm they cause the sooner change must take place. The American law of evidentiary admissibility is just such a tradition. Its role in civil, non-jury proceedings is due for extinction. ☞