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ARTICLES

OVERHAULING RULES OF EVIDENCE IN PRO SE COURTS

Andrew C. Budzinski *

INTRODUCTION

A lawyer towers in front of the witness stand, engaged in a rapid cross-examination. An opposing attorney sits at a nearby table, peppering the exchange with objections. A judge in a flowing black robe presides over the trial from an ornate wooden bench, overruling or sustaining the objections as they come. Fading into the background of this scene are the two central players in the case—the parties. In this version of the American courtroom, the stuff of Hollywood productions,¹ the parties sit quietly as their lawyers lead the show. But this scene is not the reality for many American state civil courts.

State civil courtrooms are packed to the brim with litigants, but not with lawyers. Since the early 1990s, more and more litigants in state courts have appeared without legal counsel.² Pro se litigation has grown consistently and enormously over the past few decades.³ State court dockets are dominated by cases brought by

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1. See, e.g., MARRIAGE STORY (Netflix 2019); PHILADELPHIA (TriStar 1994); A FEW GOOD MEN (Columbia Pictures & Castle Rock Entertainment 1992).

2. See Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 751–52 (2015).

3. See *infra* notes 32–37 and accompanying text.

unrepresented litigants, most often in domestic violence, family law, landlord-tenant, and small claims courts.⁴

Yet, the American courtroom is not designed for use by those unrepresented litigants—it is designed for use by attorneys.⁵ The American civil court is built upon a foundation of dense procedural rules, thick tomes of long-evolved substantive law, and—the focus of this piece—a complex set of evidentiary prohibitions and exceptions. The American civil court is designed for two competing adversaries to face off against one another.⁶ It is built on the assumption that both of those adversaries will present the best case they can, employing an accurate understanding of the complex rules and laws that govern the proceedings. Nonlawyer pro se litigants often struggle to adhere to the norms of the adversarial American legal system.⁷ As a result, complex legal rules present an access-to-justice barrier to unrepresented litigants unable to comply with them.

In this Article, I show how rules of evidence⁸ require an overhaul to make them simpler, fairer, and more accessible to unrepresented litigants, who make up the vast majority of litigants in state courts. Although over 95% of trial-level determinations occur in state courts⁹ applying their own codes of evidence, much of the

4. See Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the “New” Civil Judges*, 2018 WIS. L. REV. 249, 259 (2018). Throughout, I refer to litigants who appear without a lawyer as “pro se litigants,” “unrepresented litigants,” and “self-represented litigants,” which I use interchangeably. I refer to courts that are accessed primarily by those unrepresented litigants as “pro se courts.”

5. Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 38, 54 & n.12 (2002) (“[T]he state and the legal profession are responsible for our current inaccessible legal system, the state by designing a legal system ‘that cannot be operated by lay people,’ by enforcement of unauthorized practice of law (UPL) laws to ‘prop up legal fees without serving any other significant public interest,’ and by ‘conferr[ing] the advantages of the legal system on those who can afford to use it and building it on the backs of those who cannot’; and the legal profession by serving only clients who are well off.” (quoting DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 247–48 (1988))).

6. See *infra* section III.B.

7. See *infra* Part I, section III.B.

8. I use the phrase “rules of evidence” in this Article as shorthand for the various rules of evidence employed across state and local proceedings. I rely generally on the principles underlying the Federal Rules of Evidence. While the federal rules govern only federal proceedings, they also serve as the basis for the state-level rules of evidence in forty-five states and Puerto Rico and are, therefore, instructive for how those courts approach evidentiary issues. See Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 872 (2018).

9. See CT. STAT. PROJECT, NAT’L CTR. FOR STATE CTS., STATE COURT CASELOAD DIGEST: 2018 DATA (2018), https://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf [<https://perma.cc/7T6B-TNTP>] (citing analysis of national case filings in

discussion of evidentiary rules focuses on the Federal Rules of Evidence and their application in federal courts.¹⁰ While many state codes of evidence are similar to the Federal Rules in structure and substance,¹¹ it is important to consider how the rules of evidence apply differently in different contexts. Indeed, because state evidentiary rules mirror the Federal Rules, they impose restrictions designed in another context and, as a result, risk undermining the essential purposes of the law of evidence. Despite that, there is a dearth of analysis of how rules of evidence practically impact litigants on the ground in state civil courtrooms—and, indeed, how procedure in civil cases, writ large, impacts pro se litigants.¹² This Article attempts to fill that gap and solve that problem.

This problem is avoidable—but not by dispatching with rules altogether. For example, many administrative hearings and small claims courts feature no rules of evidence at all,¹³ presenting different but equally important concerns about fairness. Without any regulation of evidence, pro se courts would morph into seemingly arbitrary, unaccountable decision-making bodies, which could seriously undermine public trust in their adjudication.¹⁴ The high rates of pro se litigation in certain case types requires an accounting of the rules governing those proceedings, but not a complete abandonment of procedure. It is unjust to retain procedure that falsely assumes the involvement of legal counsel; it is just as unjust to overcorrect and create a regime without rules that undermines fairness and confidence in the legal system.¹⁵

Context is critical when reforming procedural rules, and not just in terms of whether the venue is a federal or state court. Rule makers must consider which litigants must apply the rules, how likely those litigants are to lack counsel, and the unique circumstances

2018).

10. This fits a trend in legal scholarship that focuses on federal courts and pays significantly less attention to state courts, despite the dramatically higher number of cases heard in state courts. Carpenter et al., *supra* note 4, at 251–52 (noting that “legal scholarship continues to focus almost exclusively on federal courts, federal judges, and . . . decision making in appellate cases,” despite the fact that those courts “handle less than one percent of America’s annual civil caseload”).

11. Compare N.M. R. EVID. 11-101 to -1102, with FED. R. EVID. 101–1103.

12. Carpenter et al., *supra* note 4, at 251–52.

13. See, e.g., N.Y. CITY CIV. CT. ACT § 1804 (Consol. 2021).

14. See *infra* section I.B.

15. See Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 659, 677–82 (2006) (discussing the risks of a relaxed evidentiary standard).

of litigants in case types to which the rules apply.¹⁶ For example, the fairest evidentiary rules in landlord-tenant matters may differ from those in small claims actions, or in domestic violence cases, precisely because the context of those three case types is very different. They feature different parties, different issues, and different power imbalances.¹⁷ Rules governing proceedings in family law cases, for example, must reflect that all litigants are individual people. In contrast, rules governing landlord-tenant cases must take into account that landlords are often well-resourced corporate entities¹⁸ and that tenants are often low-income, marginalized individuals,¹⁹ presenting both resource and power imbalances that the rules must reflect.²⁰

Evidentiary rules present more complexities because the types of evidence which can be presented have developed well past the kinds of evidence the current rules contemplated when written. With the advent of electronic communication, for example, society now documents everyday occurrences with greater ease. People communicate through text messaging on smartphones, through social media messaging on platforms like Facebook and Twitter, and through captioned images on applications like Snapchat and Instagram. An online shopper receives their purchase receipt by email or from their web browser. Businesses convey information to consumers through emails and Facebook advertisements. Schools publish report cards using online parent portals. And the list goes on.

These newer kinds of evidence bring to the forefront the needless complexity of evidentiary rules. To determine whether to admit and consider this evidence, judges have applied centuries-old evidentiary principles that do not neatly map onto modern methods

16. See Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. COLO. L. REV. 167 (2019).

17. See, e.g., Baldacci, *supra* note 15, at 688 (“[E]ven with enhanced judicial assistance, the fundamental power imbalance between represented and unrepresented parties in Housing Court—both status-based and in terms of the *pro se* litigant’s lack of familiarity and facility with legal categories—will not be redressed.”).

18. See generally Alexander Ferrer, *The Real Problem with Corporate Landlords*, ATLANTIC (June 21, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/real-problem-corporate-landlords/619244> [<https://perma.cc/3WMT-KMUH>].

19. See Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 540 (1992) (“[T]he great majority of defendants in [landlord-tenant] actions are members of groups that are, relatively speaking, socially powerless. They are mostly women, mostly black, almost all poor, and tenants.”).

20. See *infra* section IV.B.3.

of communication.²¹ This process is not unique to this most recent wave of new technology. Courts have had to adapt their evidentiary procedure to technological advancement before, to account for innovations such as audio and video recordings,²² or computer-generated business records in complex litigation of the 1980s and 1990s.²³ As with those other moments, courts have twisted and contorted existing evidentiary standards to make these standards work, rather than recognizing the rules themselves may no longer make sense.²⁴

The rules are susceptible to interpretation, of course, and courts have attempted to fit the square peg of electronic evidence into the round hole of evidence law.²⁵ But judges are much more likely to do so when provided with legal arguments. Lawyers tend to excel at wading through evidentiary ambiguity brought on by newer forms of evidence like a Facebook post. Lawyers are trained to isolate a generally applicable legal standard, to match the characteristics of the evidence to that standard, and to argue why the standard militates in favor of admission. In other words, lawyers speak the language of evidence.

Pro se litigants lack that vocabulary. Nearly every time I appear in the District of Columbia Superior Court, I see pro se litigants asking judges to look at their phone or to read printouts of text messages, or offering to verbally summarize an opposing party's statements through social media. Yet, unsurprisingly, none of those nonlawyers are able to articulate why these sources of proof survive applicable evidentiary standards. As a result, judges largely vet admissibility without the argument of counsel and do so with mixed results. Some litigants are shut down by judges who conclude, sometimes hastily, that they cannot accept the evidence

21. See, e.g., *People v. Moyer*, No. 2138/2014, 2016 N.Y. Misc. LEXIS 1553, at *15 (N.Y. Sup. Ct. Mar. 31, 2016) (“In terms of admissibility, courts treat electronically stored information the same as conventional types of evidence.”).

22. E.g., *United States v. Bonanno*, 487 F.2d 654, 659–60 (2d Cir. 1973) (describing the standard for authenticating voice on a recording).

23. See generally Daniel R. Murray, Timothy J. Chorvat & Chad E. Bell, *Discovery in a Digital Age: Electronically Stored Information and the New Amendments to the Federal Rules of Civil Procedure*, 39 UNIFORM COM. CODE L.J. 509, 510–11 (2007) (noting that Rule 34 of the Federal Rules of Civil Procedure were amended in 2006 to account for discovery of electronically stored information).

24. See, e.g., Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 994 (2012) (“While technology has transformed most other areas of life, court-based dispute resolution has remained remarkably impervious to change.”).

25. See, e.g., *Holmon v. State*, 202 A.3d 512 (D.C. 2019) (evaluating the admissibility of a missed call screen showing defendant's phone number over hearsay concerns).

being offered. Other litigants have their evidence excluded fairly but do not understand why it is fair, particularly when judges lack the time (or patience) to explain. Still other litigants' evidence is received—either for sound evidentiary reasons, or because judges disregard evidentiary principles altogether. Some judges even admit and consider evidence *despite* concluding it should be inadmissible. In one civil protection order hearing in D.C. Superior Court, a litigant offered a recording of the 911 call she made the night her partner threatened her. The judge concluded the recording was hearsay and not, as is sometimes the case, an excited utterance (an exception to the rule against hearsay). The judge went on: “But I’ll listen to it anyway.”

To illustrate the point, suppose a custody litigant attempts to introduce a Facebook post from the opposing party’s account that says “Ready to say whatever I have to in court next week. I don’t care about the kid, I just want to stick it to my ex.”²⁶ The litigant explains that they know it is their opponent’s Facebook account because they have communicated with the opposing party regularly using the same Facebook Messenger account. Judge A decides to exclude the electronic statement because they find insufficient foundation that the statement was in fact made by a party opponent—to this judge, that the parties used this messaging service to communicate in the past does not establish that the opposing party uttered this particular statement.²⁷ Judge B excludes the electronic statement because they believe that, while the screenshot contains a statement by a party opponent, the litigant must also overcome a secondary hearsay issue—that the record itself is an assertion of what is contained on a Facebook server in some remote location. To Judge B, the litigant can neither authenticate the screenshot nor show that it meets the business records exception to the hearsay rule without a custodian or other person with the knowledge to lay that foundation.²⁸ Judge C, however, admits the record—they find that the screenshot is what it purports to be (an image of a message of which the litigant has personal knowledge) and that there is sufficient foundation to establish that the

26. This example is modeled after an exhibit used in a case that I litigated in the D.C. Superior Court. No identifying information is included, and the facts have been changed.

27. See FED. R. EVID. 801(d)(2) (statement by a party opponent); FED. R. EVID. 901 (authentication).

28. See FED. R. EVID. 803(6) (business records exception to the hearsay rule); FED. R. EVID. 901 (authentication).

opposing party uttered the statements alleged (rendering them non-hearsay statements by a party opponent).²⁹

These three hypothetical judges came to three different rulings on the same legal issue with the same set of facts using the same legal authority. And although practitioners may dispute the fairness of each judge's ruling, none are clearly wrong on the law. Rather, these judges came to three different conclusions because of the unsuitability of the rules of evidence applicable to the question. These rigid, demanding, and outmoded evidentiary rules, particularly when applied to newer forms of proof like an electronic statement, lead to confusion, a lack of uniformity across coordinate courts, and, potentially, the exclusion of otherwise reliable, competent evidence. Most critically, the litigants who are supposed to apply those rules are practically excluded from arguing for a favorable application precisely because the rules are so overly demanding, convoluted, and inaccessible.

In short, and as I discuss within, pro se litigants struggle and often fail to apply complex evidentiary principles. As a result, judges rule inconsistently and sometimes erroneously; litigants lose faith in the legal process as a fair method of dispute resolution; and, often, everyone involved experiences frustration, exasperation, and confusion. In the worst cases, these rulings inflict critical unfairness and injury on the affected litigant, whose case may rely upon the evidence being considered.

Importantly, this is not a criticism of the capacity or intelligence of pro se litigants. Nor is it a critique of judges trying to apply the law as fairly as they can. On the contrary, it is a critique of the law of evidence itself, which has developed into an obscure leviathan of procedural jargon and complex requirements, such that it has undermined its animating purpose: ensuring fairness, consistency, and the resolution of disputes based on the truth.

In this Article, I apply the lenses of access to justice, procedural justice, and substantive justice to reforming evidentiary standards in primarily pro se courts. I propose a framework for significantly simplifying rules of evidence to expand admissibility while continuing to impose sensible restrictions, ultimately fulfilling the animating mission of evidentiary rules—securing just outcomes based

29. *Cf. State v. Acosta*, 489 P.3d 608, 625–26 (Or. Ct. App. 2021) (reversing the exclusion of social media message on grounds that evidence did not show defendant authored the message).

on the truth. Just as crucially, I explore how a more accessible set of evidentiary rules will increase procedural justice—the sense of people using a legal process that that process is fair, which is a critical component to a functioning rule-of-law society.³⁰ Ultimately, my goal is to identify a pervasive structural problem in civil adjudication in state courts and offer a blueprint for reform that ensures, in the end, all three dimensions of justice for pro se folks.

In Part I, I articulate why procedural reform is a means of achieving both access to justice and procedural justice in pro se courts. I begin with an overview of the growth of pro se litigation and the access to justice crisis that has ensued. I show why unrepresented litigants often struggle in a legal system not designed for them, and how overly complex rules of evidence play into that struggle. I identify the concrete harms this causes—on case outcomes, on consistency among coordinate courts, on the parties' substantive rights, and on the litigants' belief in a fair civil legal system. I proceed to explore how evidentiary rules also inhibit procedural justice. I advocate wedding access to justice and procedural justice principles when reforming evidentiary rules. Finally, I dispel the fiction that evidentiary rules are purely procedural, neutral, and without impact on substantive outcomes. Accordingly, I show why efforts to enhance access to justice and procedural justice must keep traditional notions of fairness—what I call “substantive justice”—as a third core principle.

Part II unpacks the problem of inaccessible rules of evidence with a concrete case study. I evaluate the evidentiary issues presented by a form of documentary evidence offered in a family law case, specifically, to show how the law of evidence imposes requirements that are particularly difficult for pro se litigants to satisfy. I show how those challenges can risk the exclusion of otherwise relevant, reliable evidence. While this discussion generally applies to all forms of evidence, I use a preserved form of electronic information to show how the law of evidence has failed to adapt to expanding forms of proof.

Part III explores why and how the law of evidence has evolved over time, and how current evidentiary rules fail to achieve their animating purposes in pro se courts. I argue that these well-intentioned legal principles, meant to ensure procedural fairness and

30. See *infra* section I.B.

the veracity of evidence, do not apply with the same force in modern state civil courts with primarily pro se dockets.

In Part IV, I share a design for overhauling rules of evidence, centered on procedural justice principles. Precisely because the context of different case types requires different considerations, I do not propose to replace one broadly applicable code of evidence with another. Instead, I offer a framework for reform. My proposal proceeds in three parts. First, I outline a guide to substantially simplifying evidentiary standards in pro se courts and replacing current outmoded evidentiary rules with less dense, more accessible principles. Second, I identify three essential factors that must be at the forefront of evidentiary reform: the role of implicit bias in judicial decision-making; the importance of judicial accountability; and the harms of structural inequity that require reforms to be made in context. Finally, I articulate an intermediary step that courts can take as jurisdictions embark on the important work of reevaluating and revising evidentiary rules—reframing the role of judges. I explain why it is essential, both in the near term and as a companion to longer-lasting evidentiary reform, that judges take an active role in pro se proceedings, guiding litigants through the process and explaining each stage of their legal decision-making. Together, these concepts form the roadmap to overhaul evidentiary rules.

I. PRO SE LITIGATION, EVIDENTIARY RULES, AND DIMENSIONS OF “JUSTICE”

Reforming rules of evidence—and, indeed, all procedural reform—must be evaluated in context, considering the nature of the proceedings in which they apply, the population of litigants employing them, and the interests at stake for those litigants. In a more fundamental sense, procedural rules must seek to maximize the rights of the parties and their ability to seek justice; and rules of evidence are no exception. Evidentiary rules in complex commercial litigation between two well-resourced corporations, for example, could and ought to look different than evidentiary rules in a custody action between two private parties. This approach to rule reform—what I have called an access-to-justice approach³¹—is vital in courts where the vast majority of litigants are unrepresented.

31. See generally Budzinski, *supra* note 16.

In this Part, I explore the intersection of pro se litigation, evidentiary rules, and various dimensions of “justice” in the civil legal system. In section A, I recount the explosion of pro se litigation in state courts over the past few decades and the ensuing access-to-justice crisis. I explain why pro se litigants may struggle to navigate legal proceedings designed with the assumption that every litigant is represented by a lawyer. In section B, I explain why rule reform in these courts is important. I explore the relationship between access to justice and procedural justice. Ultimately, I propose that rules of evidence—and all procedural rules—governing proceedings in pro se courts must be analyzed through the lens of procedural justice. Through that lens, rule makers are most likely to fashion procedural rules that are fair to the litigants actually applying them. Finally, in section C, I note the need to consider how evidentiary rules might impact the outcome of a legal claim—what I call substantive justice—to ensure that litigants not only believe they have accessed a fair process, but that the process is, in a more objective sense, fair.

A. *Access-to-Justice and Pro Se Litigation in State Courts*

Rates of pro se litigation in state courts have grown exponentially over the past few decades.³² Annually, litigants appear in tens of millions of state court civil cases without a lawyer, particularly in courts hearing landlord-tenant, family law, domestic violence, and small claims cases. For example, between 80% and 90% of family law litigants appear pro se.³³ Most of those litigants are unrepresented because the supply of affordable legal counsel has not expanded to meet the need. Many pro se litigants cannot afford an attorney at cost.³⁴ And while legal services organizations offer representation to low income litigants at no cost, the supply of pro bono counsel does not match the demand.³⁵ For example, as of 2017, approximately 40% of people seeking pro bono representation through organizations funded by the Legal Services

32. Steinberg, *supra* note 2, at 751–52.

33. Carpenter et al., *supra* note 4, at 259.

34. Steinberg, *supra* note 2, at 752–53 & n.40 (“[M]ost studies that have examined the characteristics of unrepresented litigants conclude that poverty is the primary force driving individuals to represent themselves in court.”)

35. LEGAL SERV. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6, 8 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/C2C4-MGV4>].

Corporation received no assistance at all.³⁶ And between 21% and 31% of those who did receive assistance were only partially represented, receiving unbundled help with their legal issue rather than full representation.³⁷

High rates of self-representation would not be as concerning if pro se litigants could navigate the legal system as readily as if they had a lawyer—but they cannot.³⁸ The American civil-legal system, and the courts that embody it, have evolved to entrench an adversarial model of civil litigation, which assumes that two competing lawyers will spar against one another as they guide their respective clients through the process.³⁹ As a result, court rules and case law combine to form a procedural regime that assumes each party will have a competent, effective lawyer from start to finish.⁴⁰ In pro se courts, that is a fiction.

Rules that are fair in a system saturated by lawyers are provably unfair in a system primarily accessed by unrepresented folks.⁴¹ It is critical that any effort to evaluate the fairness of procedural or evidentiary rules in those courts consider that, more often than not, unrepresented litigants will be applying them. In other words, decision-makers must ensure that legal rules do not assume the person applying them has counsel, funds, or other resources.

Pro se litigants often struggle to navigate the legal system in the way lawyers can.⁴² They lack the training to discuss evidence in a way that relates to legal standards, how evidence is relevant or

36. *Id.* at 42–43.

37. *Id.*

38. See, e.g., Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999); Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 BYU L. REV. 899, 906 (2016).

39. Engler, *supra* note 38, at 1988.

40. Steinberg, *supra* note 2, at 743–44 (“Although never made explicit, the system, in effect, depends upon the skill of an attorney to transform a party’s grievance into a highly stylized set of allegations, evidence, and arguments, upon which a judge or jury can base a ruling.”).

41. Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 477 (2010) (“[A]s lawyers develop a greater role in the system, the legal process becomes more professionalized and complex and, when the procedural design assumes representation, the ability of individuals to actually proceed successfully without an attorney, or to directly participate when they do have an attorney, diminishes.”).

42. *Id.*; Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL’Y 331 (2016); Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 866 (2004).

irrelevant, reliable or unreliable, authentic or suspect.⁴³ Unrepresented litigants' unfamiliarity with legal procedure has "ruptured adversary norms," undermining the presumption that both parties are able to competently and completely advance their case.⁴⁴ The rigid application of traditional evidentiary principles disadvantages those litigants who do not know what the rules are or how to follow them.⁴⁵ Litigants without counsel may either fail to lay an adequate foundation for offered evidence, or fail to object to evidence that might otherwise be inadmissible. As a result, judges may wind up excluding reliable evidence in the former case or admitting unreliable evidence in the latter case. These risks are particularly pronounced in courts where judges adhere to the passive role encouraged under the adversary system.⁴⁶

Even where judges take a more active role, their application of the rules of evidence can have a negative impact on the integrity of the proceedings.⁴⁷ Judges often make decisions but lack the time or energy to explain the evidentiary and procedural principles to the litigants appearing before them. As a result, litigants can fail to understand how or why the judge made the decision they did. Even where a judge applies rules on accurate legal principles, a litigant may experience a profound sense of injustice in reaction to what seems like arbitrary decision-making by the tribunal. In a study of the disadvantages of evidentiary rules to self-represented litigants, one judge acknowledged this potential impact: "I know that very frequently people get very frustrated when I'm cutting them off because they're telling me something I don't need to know."⁴⁸ As a result, litigants can walk away from a trial or hearing

43. *Houghtaling v. Superior Court*, 21 CAL. RPTR. 2d 855, 859–60 (Cal. Ct. App. 1993).

44. Steinberg, *supra* note 2, at 921.

45. According to one study, judicial officers identified numerous ways in which self-represented litigants struggled with evidentiary issues, including "pretrial disclosures," "[c]ompiling and submitting exhibits," "[i]dentifying relevant evidence," "[e]ntering documents and other materials into evidence," "[d]istinguishing between relevant and irrelevant evidence," "[r]emembering to bring admissible evidence to court," and "[a]sserting evidentiary objections." NATALIE ANNE KNOWLTON, LOGAN CORNETT, CORINA D. GERETY & JANET L. DROBINSKE, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT 35 (2016), https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf [<https://perma.cc/5X9T-5U2A>].

46. See Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 657–60 (2017).

47. See LINDA KLEIN, AM. BAR ASS'N COAL. FOR JUST., REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS 4 (July 12, 2010), https://www.abajournal.com/files/Coalition_for_Justice_Report_on_Survey.pdf [<https://perma.cc/32FW-LH7C>].

48. KNOWLTON ET AL., *supra* note 45, at 35.

feeling as though the system is unjust. In the same study, one respondent summarized the litigant experience as follows: “There is no way you’re going to be able to come to a fair conclusion in my case if you don’t hear what I have to say.”⁴⁹ As I discuss in the next section, this feeling of injustice matters just as much as any objective sense of what is fair.

The access-to-justice movement seeks to remedy these imbalances and ensure that all litigants have a fair opportunity to redress their civil-legal needs.⁵⁰ The movement is broadly aimed at ensuring that every litigant can get their foot in the door of state civil courts by ensuring “adequate legal assistance for those who need but cannot realistically afford it.”⁵¹ Some access-to-justice advocates have called for a “civil *Gideon*”⁵²—the right to counsel in all civil cases— as the solution to the access-to-justice crisis.⁵³ If it were possible, requiring courts to provide a lawyer to otherwise unrepresented litigants would very likely increase litigants’ ability to navigate the legal system.⁵⁴ If evidentiary rules are too complex for nonlawyers to understand and navigate strategically, then a natural response would be to make lawyers available to correct the problem.

There are, however, a great many barriers to a functional civil-*Gideon* solution. Initially, the Supreme Court of the United States has declined to find a constitutional right to counsel in civil cases.⁵⁵ While legislatures could create a statutory right to counsel, such policies would impose tremendous expense on already underfunded state legal aid systems.⁵⁶ Moreover, even if the right to

49. *Id.*

50. *See generally* Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785 (2001) (reviewing the systemic failures that allowed for the crisis and offering a vision for expanded resolution of legal needs).

51. *Id.* at 1818.

52. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (affording right to counsel in criminal cases).

53. *See, e.g.*, Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 *YALE L. & POL’Y REV.* 503 (1998); Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 *FLA. L. REV.* 1227, 1247–50 & n.107–29 (2010) (describing the civil *Gideon* movement).

54. *See generally* Justice Howard H. Dana, Jr., *Introduction: ABA 2006 Resolution on Civil Right to Counsel*, 15 *TEMP. POL. & C.R. L. REV.* 501 (2006) (providing an overview of the civil right to counsel, reasons to adopt it, and broad suggestions for how it might be implemented).

55. *See Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26–27 (1981); *Turner v. Rogers*, 564 U.S. 431, 448 (2011).

56. Barton, *supra* note 53, at 1262–63 (“Given the choke back in legal aid funding and the addition of restrictions on that funding, the hopes for warm legislative support of civil

counsel were conferred, there are not enough attorneys to meet the need.⁵⁷ Some scholars have even argued that a right to counsel in civil cases is not only impracticable, but normatively undesirable,⁵⁸ particularly in family law cases.⁵⁹ The right to counsel would necessarily further entrench the adversarial system and, in family law cases, pit family member against family member, cause more friction, and “exacerbate feelings of anger and hostility” between the parties.⁶⁰

In short, civil *Gideon* is an impracticable solution to the access-to-justice crisis. If improvements are to be made in the existing civil justice system, they must occur in the form of “demand side reforms”—revision of procedural and evidentiary rules and a reconceptualization of a judge’s role in the courtroom.⁶¹ Rather than investing in litigants’ ability to navigate the complexities of the legal process, a demand-side approach—one I take in this piece—seeks to dismantle those complexities in the first place.⁶²

B. *Procedural Justice*

A companion concept to access to justice is procedural justice. Procedural justice is “the belief that the dispute resolution process is fair and satisfying in and of itself.”⁶³ Achieving procedural justice requires application of legal norms fairly in both an objective and subjective sense—that is, in a way that is not only substantively

Gideon are unfounded.”).

57. See, e.g., Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL’Y REV. 15, 32–114, 120 (2018) (detailing the lack of counsel in civil cases in rural Maine, Minnesota, Wisconsin, California, Georgia, and South Dakota, and raising the likelihood that “attorney shortages are nearly endemic to rural areas across the country”).

58. Barton, *supra* note 53, at 1269–74.

59. Rebecca Aviel, *Why Civil Gideon Won’t Fix Family Law*, 122 YALE L.J. 2106, 2109 (2013).

60. *Id.* at 2117 (“As summed up by one state’s task force on family court reform, it appears that ‘[t]he public is disgusted with the adversarial model of managing divorce.’” (quoting OR. TASK FORCE ON FAM. L., FINAL REPORT TO GOVERNOR JOHN A. KITZHABER AND THE OREGON LEGISLATIVE ASSEMBLY 5 (1997))).

61. Steinberg, *supra* note 2, at 794–801.

62. *Id.* at 788 (“The essence of the demand side approach, and the key element that distinguishes it from other theories of access to justice, is that it does not rely on supplying attorneys or legal assistance to upgrade the abilities of litigants. Instead, it focuses on dismantling barriers put in place by procedural and evidentiary rules, and by narrow conceptions of the judicial role, so that pro se parties can compete more effectively within the court system.”).

63. Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 8 (2009).

just but also “psychologically satisfying to the participants.”⁶⁴ A process that litigants view as fair is essential to the legitimacy of the courts and judicial decisions.⁶⁵ Litigants are more likely to accept judicial decision-making if they believe the procedure used to reach the decision was just, regardless of the outcome on the merits.⁶⁶ Over time, a belief in institutional procedural fairness creates a “reservoir of support” for the institution itself.⁶⁷ This, in turn, means not only that litigants are more likely to accept and comply with results, but also that they walk away with a greater belief in the rule of law.⁶⁸ In short, “perceived procedural fairness enhances the perceived legitimacy of legal institutions as well as citizens’ commitment to the law.”⁶⁹ These findings further animate the need to reform court rules governing proceedings in pro se courts, in order to ensure that litigants are not only able to apply the rules, but will see the result of that application as logical, balanced, and fair.

Studies show that the most important factors that foster public trust in dispute-resolution procedures are the parties’ ability to participate in the process, the trustworthiness of the decision-maker, whether the parties are treated with respect as individuals, and the neutrality of the decision-maker as a means of resolving the dispute.⁷⁰ These tenets should underlie all legal systems – but they should be considered particularly closely in pro se courts, where members of the public are applying the rules themselves.

For those reasons, it is imperative that rule reform center access to justice *and* procedural justice equally. I argue that one cannot have meaningful demand-side, access-to-justice reforms *without* considering how litigants will (or will not) experience practical fairness as a result. Any attempt to increase access to justice through procedural reform in pro se courts must therefore prioritize the unrepresented litigant’s experience. Simply put, when pro se litigants

64. *Id.* at 8; *see also* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 238 (2004) (“[P]rocedural justice is concerned with the adjudicative methods by which legal norms are applied to particular cases and the legislative processes by which social benefits and burdens are divided.”).

65. *See, e.g.*, Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1874–84 (2002) (evaluating the importance of procedural justice to abusive partners’ compliance with civil protection orders).

66. Zimmerman & Tyler, *supra* note 41, at 483; *see also* Burch, *supra* note 63, at 37–38.

67. Burch, *supra* note 63, at 9.

68. *Id.*

69. Zimmerman & Tyler, *supra* note 41, at 483.

70. Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 887 (1997).

experience procedural rules as unfair, it does not only say something about the litigant, but about the rules themselves.

Rules of evidence in state family courts must be reexamined with this subjective sense of procedural justice in mind. Achieving access to justice for low-income, unrepresented litigants means little if they obtain access only to attendance at a court proceeding, but not to the belief that justice will result from that proceeding. As I explore further below, the rules of evidence have a tendency to undermine faith in the fairness of trials when pro se litigants cannot understand or apply them. As a result, those rules must be made fairer and more accessible to improve litigants' ability to understand them, apply them, and have faith in their fairness.

Yet, it is just as important that efforts to make court rules more accessible do not overcorrect. The absence of any procedure might have just as negative a consequence as the presence of too much dense procedure.⁷¹ Just as importantly, efforts at reducing the complexity of court procedure—sometimes called court simplification—should not be viewed as the final or perfect solution. Court simplification will make the resolution of disputes in courts fairer, but it will not address many of the underlying systemic inequities that cause or exacerbate those disputes.⁷² It is an important step to improving the legal system, but not the only one.

C. *Substantive Justice*

Access-to-justice and procedural-justice reforms must also encourage a substantively just outcome. Discussion of procedural rules often overlooks consideration of whether that procedure allows for a fair outcome in the underlying claim.⁷³ Discourse around procedural and evidentiary rules tend to discuss them as “neutral,” and as though they have no impact on merits determinations. To the contrary, rules of evidence—and most, if not all, rules one might call “procedural”—impact the substantive rights of

71. See *infra* notes 201–203 and accompanying text.

72. Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DAEDALUS 128, 129–32 (2019).

73. Portia Pedro, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143, 164 (2021) (“Some may believe that civil procedural standards operate in a neutral, identity-free zone and that judges don’t care about litigants’ identities, or their positions within the sociopolitical hierarchy, when deciding procedural issues. But judges are not oblivious to racial identity or its proxies in procedural decisions any more than they are in substantive contexts. Even the perception of, or the attempt to be, oblivious to identity could be another way to allow harmful assumptions to thrive.”).

litigants.⁷⁴ If “access to justice” means having access to the civil process to resolve one’s claims, and procedural justice means viewing that process as fair, then there remains whether the result of the process *actually is* fair. I refer to this third consideration as “substantive justice.”

Substantive justice is an evolving concept that will look different depending on context and case type, and a precise definition cannot be obtained in this piece.⁷⁵ But broadly, in the context of evidentiary reform, substantive justice is achieved when a claim is resolved through objectively fair application of the law (and not merely a process that appears or feels fair to the litigants), considering all sufficiently reliable evidence offered by the parties. In the context of current rules of evidence, this is not always the case. As I explain further below,⁷⁶ in pro se courts the rules operate to exclude otherwise reliable evidence simply because litigants cannot meet the high bar set by the rules.⁷⁷

For example, assume that, as part of a claim for a protection order, a survivor of intimate partner violence seeks reimbursement for property damage caused by their abusive partner. Further assume the survivor attempts to introduce a receipt showing the cost of the repairs. If the judge will not accept that receipt as evidence because the litigant fails to satisfy the business records exception to the hearsay rule, substantive justice has not been achieved. The litigant has been barred from proving the cost of the repairs and, as a result, may lack sufficient proof to obtain that relief. This is not a just outcome. To the contrary, the rules there have worked a substantive injustice by excluding evidence that the rules themselves hold out as *particularly* trustworthy. This is why evidentiary reform cannot occur in a vacuum—it must take into account, explicitly, how the rules work on the ground.

74. David P. Leonard, *Rules of Evidence and Substantive Policy*, 25 LOY. L.A. L. REV. 797, 800 (1992) (“Many of our rules of evidence do not merely facilitate the proof of facts. They also have a significant effect on the law’s substantive goals, sometimes helping to further those goals and sometimes impeding them.”).

75. See Engler, *supra* note 38, at 1989 (“It is unnecessary and foolhardy to attempt to provide a comprehensive definition of ‘fairness and justice.’ It is unnecessary because the profession repeatedly invokes the goals of ‘fairness and justice’ without having provided a universal definition of the terms. It is foolhardy because an attempt to define these terms would distract from the urgent and immediate task of assisting the unrepresented poor.” (internal citation omitted)).

76. See *infra* Part II.

77. See John Sheldon & Peter Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials*, 86 JUDICATURE 227, 229–30 (2003) (listing examples).

Both access to justice and procedural justice bear on whether litigants are ultimately able to achieve substantive justice through the court process. Numerous randomized studies have shown that unrepresented litigants are more likely to receive an unfavorable ruling than represented litigants, whether the opposing party is represented or not.⁷⁸ And if a litigant does not trust the legal process to fairly resolve their claim, they are less likely to avail themselves of that process or abide by its results.⁷⁹ However, even an accessible process viewed as fair by the litigants—that is, one that confers both access to justice and procedural justice—can inflict substantive harms on those same litigants. Indeed, the worst outcome of evidentiary reform would be a system that litigants can access and see as fair, but which only serves to mask continued or greater systemic harms.

The interrelationship between evidentiary rule reform, procedural justice, and access to justice must be viewed in context. Logically, and critically, different litigants in different circumstances litigating different case types will be differently situated. For example, the resources, power, and representation of a corporate entity in a products liability case will be inherently different than those available to a tenant in an eviction case.⁸⁰ The former is typically defending against a claim for damages, while the latter is typically seeking housing security. The former is likely to be represented,⁸¹ while the tenant is very likely to be pro se.⁸² As a result of these potential differences, rule makers must look to how rules

78. See, e.g., Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469, 505 (2016); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 46–66 (2010) (describing numerous studies of the link between representation and positive case outcomes in civil and administrative cases); D. James Greiner, Cassandra Wolos Pattanayak & Jonathon Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 927 (2013) (pro se tenants in Massachusetts District Court are half as likely to retain possession of dwelling as represented tenants); Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 511–12 (2003) (noting that 32% of unrepresented survivors prevail in protection order case, while 83% of represented survivors do the same).

79. See Epstein, *supra* note 65, at 1874–84.

80. See *infra* section IV.B.3.

81. See Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 144 (2010) (noting scant evidence of extent of legal services to corporate clients but estimating conservatively that 60% of legal services in the country go to corporations and businesses).

82. See, e.g., Rashida Abuwala & Donald J. Farole, *The Perceptions of Self-Represented Tenants in a Community-Based Housing Court*, 44 CT. REV. 56, 56 (2008) (noting that 88% of tenants are unrepresented in New York City landlord-tenant cases).

operate in particular contexts to ensure that, for lack of a less cliché phrase, justice is served.

II. THE INACCESSIBILITY OF RULES OF EVIDENCE AND THE NEED FOR REFORM

State family courts offer one example of just how big of a barrier the rules of evidence can be. In this Part, I use family court as an example to prove the point that evidentiary rules require reform in all pro se courts. I choose this focus precisely because context matters, and because the practical harms are clearest in this context. For the purpose of this Part, I define “family courts” as those handling child custody, divorce, and domestic violence matters between individual litigants.⁸³ The vast majority of states grant jurisdiction over family law claims to unified family courts, though some confer jurisdiction to trial courts of general jurisdiction.⁸⁴ Each of those courts apply different local and state laws on evidence, with idiosyncratic differences in particular standards or rules. My goal is not to conduct a survey of those differences, but rather to focus on the evidentiary issues that are likely common across jurisdictions, how those issues negatively impact pro se litigants, and most importantly, how a new and simplified approach to evidentiary decision-making would improve access to justice in pro se courts like family court.

Family law cases offer a particularly fruitful example of the need for evidentiary reform in pro se courts. The vast majority—as high as 95%—of individual litigants in family courts appear pro se.⁸⁵ Unlike some other case types, both parties are individuals.⁸⁶ In

83. Importantly, I do not include removal proceedings, termination-of-parental-rights cases, or other matters where one of the parties to the action is the government. I exclude these case types from this analysis for several reasons. For one, litigants in such cases are often entitled to counsel and are therefore much less likely to appear pro se. See Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245, 245–46 (2006). For another, the power imbalance between individuals and government agencies is tremendous, as has been explored in the context of termination of parental rights proceedings by numerous scholars. See, e.g., Martin Guggenheim, *The Role of Counsel in Representing Parents*, 35 CHILD. L. PRAC. 17 (2016). As a result, the rules would need to reflect that very different dynamic.

84. Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems*, 46 FAM. CT. REV. 230, 233 (2008).

85. See, e.g., D.C. ACCESS TO J. COMM'N, DELIVERING JUSTICE: ADDRESSING CIVIL LEGAL NEEDS IN THE DISTRICT OF COLUMBIA 17 (2019) (reporting that 83% of plaintiffs and 93% of respondents are unrepresented in divorce, custody, and other family court cases and 88% of petitioners and 95% of respondents are unrepresented in domestic violence cases).

86. *Id.*

contrast, for example, in landlord-tenant matters, it is much more likely that a represented landlord sues an unrepresented tenant.⁸⁷ It is easier to see the need for reform where both parties suffer from similar challenges navigating the rules of evidence—though I contend reform is needed in all pro se courts. Second, and relatedly, parties in family law cases are more likely to be similarly situated. As a result, family law cases do not involve the potential power imbalances that arise in landlord-tenant cases, small claims, or consumer debt collection cases, where one party is typically a well-resourced entity or corporation.⁸⁸ Finally, in family law cases, unrepresented parties must apply the rules of evidence in deeply personal matters—custody of their children, division of cherished family assets, funding to support children, protection from intimate partner violence, and so on. While procedural justice matters in all civil disputes, it may matter even more when the dispute concerns not only financial integrity but other intangible dignity interests tied closely to one's family.

Rules of evidence impact litigants' experience in various stages of family law cases. Perhaps obviously, rules of evidence have a substantial impact when a case is adjudicated at trial. While many family law cases are resolved without trial when the parties are represented by counsel, it is far more likely that unrepresented parties will take their claim to trial.⁸⁹ However, litigants are also likely exposed to the rules of evidence at other stages of a case, prior to final adjudication. Judges routinely take proof during the pendency of a family law case in pendente lite evidentiary hearings to award relief like temporary custody or child support.⁹⁰ Similarly, hearings on motions often require the court to take evidence. Indeed, evidentiary hearings are common across the spectrum of pro se court cases.⁹¹

87. *Id.* (reporting that 88% of respondents are unrepresented and 99% plaintiffs are represented in landlord-tenant cases, where plaintiff is typically landlord and respondent is typically tenant).

88. *See infra* section IV.B.3.

89. *See* D.C. ACCESS TO J. COMM'N, *supra* note 85, at 15 (noting that 54% of custody cases settle when parties are represented, while only 30% of custody cases settle when parties are pro se) (citing KELLY L. JARVIS, CHARLENE E. ZIL, TIMOTHY HO, THERESA HERRERA ALLEN & LISA M. LUCAS, NPC RSCH., EVALUATION OF THE SARGENT SHRIVER CIVIL COUNSEL ACT (AB590): CUSTODY PILOT PROJECTS 15 (2017)).

90. *See, e.g.*, D.C. CODE § 16-911 (2022) (enumerating standards for obtaining pendente lite relief during divorce and custody cases).

91. Steinberg, *supra* note 2, at 800.

With that context in mind, I turn now to showing how rules of evidence inflict harms on litigants using a family law example. Assume a parent litigating a custody case wants to introduce a printout of their child's report card into evidence. The parent believes the report card shows the child's academic success while in their care. The parent obtained the printout by logging into the school's website, which posts student grades for parents to access from home. The printout shows the school's logo, contains the URL of the website from which the parent printed the report, and shows the date and time they printed it. Both parties are unrepresented, and the judge is left to figure out whether to admit the report card. Under governing law, this requires testimony from a competent witness that establishes the report card is relevant, authentic, and reliable.⁹² This inquiry may sound straightforward, but to a non-lawyer these standards present challenges that pro se litigants frequently struggle to overcome.

A. *Relevance*

First, the report card must be relevant. The relevance standard presents a fairly low bar: evidence is relevant if it makes any fact at issue more or less likely to be true.⁹³

This is a relatively accessible evidentiary standard. Many pro se litigants are likely able to explain why a piece of evidence is relevant to a fact at issue. A chain of inferences can be articulated narratively, which is to say it can be communicated in the way non-lawyers talk. The parent here might say that their child's success in school shows that the child is excelling under their care (or declining under the other parent's). This kind of evidentiary standard is more easily administrable in a pro se court—provided the judge is willing to explain it.

B. *Authenticity*

Second, the report card must be authentic. The standard for authenticity should be a relatively low bar: evidence is authentic if the person offering it can show that, more likely than not, it is what it purports to be.⁹⁴

92. See THOMAS A. MAUET, TRIAL TECHNIQUES AND TRIALS 284–85 (10th ed. 2017).

93. See, e.g., FED. R. EVID. 401.

94. See, e.g., FED. R. EVID. 901.

This standard presents more challenges for pro se litigants. When a litigant is asked how they know a document is what they say it is, they might struggle to answer the question. An opposing lawyer might be trained to ask questions that raise suspicion about the report card: How do we know this screenshot is the same image as shown on the school website? How do we know the screenshot accurately captured the student's grades? How do we know this is, in fact, a website run by the school at all? There are logical answers to these questions: the screenshot contains the URL of the website and the school logo, and the parent printed it herself from the website. That should show that it is more likely than not that the printout is what the parent says it is.⁹⁵

But a pro se litigant might struggle to explain those facts. When asked "How do you know this is your child's report card," a realistic response from a pro se litigant might be, "because that's what it is." Nonlawyers are not trained to atomize the underlying basis for a conclusion. As a result, unrepresented litigants may have difficulty pointing out the characteristics of the document that show it is not a forgery, but an authentic copy of the original source.

Were the parent represented, their lawyer would ask a series of routine, leading questions to establish the authenticity of the report card—they would be asked whether the printout is an "accurate copy of the original" website as it appeared on the date they printed them.⁹⁶ For the pro se litigant, however, the outcome might well depend on the judge—whether the judge is inclined to observe the document and determine that its characteristics meet the authenticity standard; or to ask questions of the parent to establish it is what they say it is; or as a threshold matter, whether the parent could authenticate the printout on their own, or would need a school employee with knowledge of the website to authenticate it instead.

C. *Reliability*

Finally, the report card must be reliable—that is, it must not contain information that the law of evidence regards as suspect. For documentary evidence, this typically means articulating why

95. See, e.g., FED. R. EVID. 901(b)(4) (permitting authentication through the unique characteristics of the evidence).

96. See MAUET, *supra* note 92, at 322–23.

the document does not violate the rule against hearsay.⁹⁷ The standard for hearsay is notoriously dense, riddled with exclusions and exceptions, and often bemoaned by law students and lawyers alike.⁹⁸ Hearsay is an out of court statement being offered for the truth of the matter asserted.⁹⁹

Initially, because the parent is offering the report card as proof of the grades contained therein, the parent is offering the report card for the truth of the matter asserted. And because the report card does not meet any of the other typical exclusions to the hearsay rule, such as statements made by the opposing party, the report card would only be admissible if it met one of the many exceptions to the hearsay rule.

The report card would likely qualify as a record of a regularly conducted activity, one of the hearsay exceptions.¹⁰⁰ But proving it presents a series of challenges to the pro se litigant. Initially, while the pro se litigant may have passing familiarity with the term “hearsay,” they are unlikely to know about the business records exception, as it was formerly called, or its particular requirements. Indeed, it is not intuitive to refer to a “school” as a “business,” or to the generation of report cards as a “regularly conducted activity.”

In order to lay the foundation for a business record, the parent would need testimony from a custodian of the record—someone who makes or keeps the record as part of the school’s regular activity.¹⁰¹ Compelling the attendance of a custodian of records can be difficult even for experienced members of the bar, let alone for pro se litigants unfamiliar with the requirements of these rules. The parent might not realize they need a custodian to admit records that seem commonplace to them.

Even if the parent did realize a witness would be necessary, it may be difficult for them to identify who is the appropriate witness and how that the witness can be compelled to attend the hearing. In many jurisdictions, unrepresented litigants must obtain judicial authorization before issuing a subpoena,¹⁰² a process with which

97. See, e.g., FED. R. EVID. 801, 802.

98. Glen Weissenberger & Judge Joseph P. Kinneary, *Reconstructing the Definition of Hearsay*, 57 OHIO ST. L.J. 1525, 1534 (1996) (“[H]earsay’ as a construct is complicated, multilayered, and intricate.”).

99. See FED. R. EVID. 801(c).

100. See, e.g., FED. R. EVID. 803(6)

101. See FED. R. EVID. 803(6)(D).

102. See, e.g., D.C. DOM. REL. R. 45(a)(3).

pro se litigants are unlikely to be familiar. And even with the benefit of that specialized knowledge, it can be challenging to ensure compliance with a subpoena. For example, Facebook has a policy of refusing to send custodians for in-person testimony.¹⁰³ Enforcing a subpoena brings a whole new set of challenges for a pro se litigant; and a judge may not see it as an efficient use of judicial resources to allow the pro se litigant to follow through on that request, in any event.

In some jurisdictions, business records can be “self-authenticating” if accompanied by a sworn certification by a custodian of the record that the record satisfies the business records exception.¹⁰⁴ Other jurisdictions reject this exception, requiring in-person testimony by the custodian.¹⁰⁵ Even where the exception applies, the concepts involved—self-authentication, sworn certificates, laying foundation for a hearsay exception through another document—are complex and unwieldy. It is simply unreasonable to expect pro se litigants (and, in some cases, judges themselves) to know about the exception, anticipate its application, and produce records sufficient to meet it. This is to say nothing of the confusing reality that one piece of paper—the signed certification—is trusted enough to eliminate concerns about the other piece of paper—the record itself—which would not have been otherwise admissible. The preceding paragraph alone should be enough to show that these standards are too complex for application by nonlawyers.

If a litigant has not produced testimony by a custodian or (where permissible) a certification, the judge could allow them time to do so. However, judges might be resistant to postponing an ongoing evidentiary hearing to secure the testimony of one foundational witness. Without testimony from that custodian, the law of evidence would exclude the report card from the record.¹⁰⁶ In short, the stringent requirements of this kind of evidentiary rule risk excluding probative evidence. In fact, the business records exception exists on the premise that this exact kind of evidence is so likely to be reliable that it *should not* be excluded by the rule against

103. Facebook’s Safety Center policy on in-court testimony states as follows: “Facebook and Instagram records are self-authenticating pursuant to law and should not require the testimony of a records custodian.” *Information for Law Enforcement Authorities*, FACEBOOK, <https://www.facebook.com/safety/groups/law/guidelines> [https://perma.cc/7LSC-9UF9].

104. See, e.g., FED. R. EVID. 902(11).

105. See, e.g., D.C. SUPER. CT. R. CIV. P. 43-I, cmt. to 2017 amendments (“While the majority of states permit authentication of domestic or foreign business records by a certification under 902(11) or (12), this jurisdiction does not currently permit it.”).

106. See FED. R. EVID. 802.

hearsay.¹⁰⁷ This probative evidence would therefore be excluded not because it is ultimately unreliable, but because the very rules that say it is reliable are unnavigable to the average pro se litigant.

* * *

The density of evidentiary rules like these makes them all but useless to many pro se litigants. But more importantly, when litigants are unable to apply the rules as they are expected to be applied, the exclusion of critical (and fundamentally probative) evidence can result in real, concrete harms. Take, for example, a typical conversational statement made by one person to another over text message. If a survivor appears seeking a civil protection order but cannot admit the text message containing the threat from their abusive partner, they will lose vital corroboration of their claim, often critical to persuading a judge to credit a survivor's testimony.¹⁰⁸ But the problems also extend to documentation of less traditional "statements." Under the hearsay rule, a statement is any communication with truth value.¹⁰⁹ A litigant's request for spousal support in a divorce action may hinge upon receipts from the Cash App or Venmo applications, showing the other party's ability to pay. Those receipts are documentation of one party's transactions with another, and therefore may be statements.¹¹⁰ In a small claims case, a litigant might need documentation of the debt collector's spoofed phone calls to prove a defense of fraud.¹¹¹ Or, as reviewed above, a litigant in a custody case might want to introduce report cards generated on a school's online portal to show the child's academic success under their care.¹¹² But

107. Sidney Kwestel, *The Business Records Exception to the Hearsay Rule—New Is Not Necessarily Better*, 64 MO. L. REV. 595, 595 (1999) ("With roots in the common law, [the business records exception] is based on the premise that records made in the regular course of business are sufficiently reliable to justify admitting them as proof of the matters asserted in them without the safeguard of cross examination.").

108. See Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 404 & n.14, 457 (2019).

109. See FED. R. EVID. 801(a) (defining "statement" to include "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion").

110. See *Holmon v. State*, 202 A.3d 512, 517, 519 (D.C. 2019). See generally Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7 (2013) (arguing that current hearsay rules are an unnecessary barrier to admitting electronic statements in court).

111. See, e.g., D.C. CODE § 28-3814(f) ("No creditor or debt collector shall use any unfair, fraudulent, deceptive, or misleading representation, device, or practice to collect a consumer debt or to obtain information in conjunction with the collection of claims in any way")

112. See, e.g., D.C. CODE § 16-914(a)(3)(D), (J) (identifying factors, among others, relevant to evaluating the best interest of the child include "the child's adjustment to [their]

without the ability to memorialize, authenticate, and credit electronic evidence, a pro se litigant cannot present it to a judge.

Importantly, the question I pose is not whether these types of evidence should be admissible under existing doctrine. Rather, I argue that the rules pose concrete barriers to pro se litigants, that pro se litigants may struggle to overcome those barriers, and in light of those unscaled barriers, the rules' requirements are more burdensome than just. Just as importantly, this does not mean that pro se litigants need special treatment, or that the subject matter of cases most likely brought by or against pro se litigants deserves less evidentiary protections than cases litigated by represented parties. Rather, it reflects the reality that, as currently structured, the rules governing admissibility tend to exclude evidence that ought to be considered, however seriously, by the factfinder by virtue of litigants' inability to do what the rules require—and not because the evidence itself is categorically unreliable.

It is critical that evidentiary rules in these kinds of cases ensure that pro se litigants can present sufficiently reliable and relevant evidence. The rules must also ensure that a judge's decision to exclude such evidence is because of its prohibitive unreliability or irrelevance, and not because the litigant was unable to meet an inappropriately burdensome standard. As Judge John Sheldon and Professor Peter Murray have said:

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.¹¹³

III. THE "GROTESQUE STRUCTURE": THE EVOLUTION OF THE LAW OF EVIDENCE AND ITS ANIMATING PRINCIPLES

The law of evidence was developed, and later codified in written rules, long before the explosion of pro se litigation in state courts.

home, school, and community" and "the potential disruption of the child's social and school life").

113. Sheldon & Murray, *supra* note 77, at 231.

Even the Federal Rules of Evidence were first enacted in 1975,¹¹⁴ nearly two decades before pro se litigation altered the landscape in state courts.¹¹⁵ It is a safe bet that the judges, lawyers, and legislators who created our evidentiary system did not have in mind that they would be primarily employed by laypersons.

Evidentiary rules are meant to serve a variety of important goals. These goals can be summarized in three parts: first, rules of evidence are meant to ensure the trier of fact considers an accurate, reliable set of facts in resolving the legal claim; second, they are crafted to support, and be supported by, the adversarial civil legal system; and third, they are meant to prevent the trier of fact from giving undue weight to misleading, albeit accurate, information. Together, these justifications are meant to ensure that trials are a fair process designed to seek the truth.¹¹⁶

In the context of pro se courts, the rules of evidence do not achieve any of these underlying goals. In this Part, I demonstrate why. In section A, I explore the rules' aim to achieve fairness and accuracy. In section B, I analyze how the rules were meant to support the adversarial legal system, premised on the assumption that if both parties are empowered to admit evidence under identical constraints, they will create a full factual record upon which the judge can make an informed decision. In section C, I evaluate the rules' function to protect the decisionmaker from inaccurate or unreliable information.

A. *The Law of Evidence as a Means of Achieving Accuracy*

Chief among the purposes of evidentiary rules is to ensure that contested legal proceedings are as fair and accurate as possible.¹¹⁷ In the context of pro se courts, the rules often serve to undermine the fairness and accuracy of proceedings.

Rules of evidence, broadly, are designed to “administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of

114. Pub. L. 93–595, 88 Stat. 1926 (1975).

115. Steinberg, *supra* note 2, at 751–52.

116. See DAVID ALAN SKLANSKY, EVIDENCE 2 (4th ed. 2016) (stating that body of evidentiary rules is “the end product of centuries of effort to make [the trial] process as fair, as accurate, and as conclusive as possible”); see also Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 466 (1989) (“[T]he Federal Rules of Evidence generally promote a fair, but perhaps not perfect, trial.”).

117. FED. R. EVID. 102.

ascertaining the truth and securing a just determination.”¹¹⁸ Over time, the rules have come to be regarded as the best way to “prevent[] the admission of unreliable or otherwise unfair evidence.”¹¹⁹ The rules are supposed to serve a gatekeeping function, excluding from consideration information that is unduly prejudicial or that might cause the fact-finder to draw unfair inferences.¹²⁰

Evidence is a convoluted body of law, which reflects numerous modes of legal thought. The modern rules of evidence are derived from American common law, which is in turn derived from British common law.¹²¹ Over the course of the nineteenth century, scholars of the American law of evidence, like John Henry Wigmore,¹²² began to cull together its principles into compilations and treatises.¹²³ However, these efforts were focused more on organizing evidentiary rules into categories and classifications, and less so on evaluating the logic (or illogic) of their design.¹²⁴ Indeed, the nineteenth century was “an age of rule-ism and not realism” when it came to the law of evidence,¹²⁵ creating what Justice Robert Jackson called a “grotesque structure” of rules, which he characterized as “archaic, paradoxical and full of compromises and compensations.”¹²⁶

It was not until the mid-twentieth century that Chief Justice Earl Warren initiated the process of codifying American evidentiary law into a set of written rules.¹²⁷ The rules were meant to ensure procedural fairness and to foster the search for the truth in judicial proceedings.¹²⁸ Codifying evidentiary law began with treatises like Wigmore’s and continued through the enactment of the Federal Rules of Evidence.¹²⁹ The Rules are a compilation of

118. FED. R. EVID. 102; *see also* CAL. EVID. CODE § 2 (Deering 2022); N.J. R. EVID. 102.

119. Keith A. Findley, *Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence*, 47 GA. L. REV. 723, 725 (2013).

120. *See* Capers, *supra* note 8, at 872–73.

121. *See* Goldschmidt, *supra* note 5, at 39–42.

122. *See generally* JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (2d ed. 1923).

123. Mason Ladd, *A Modern Code of Evidence*, 27 IOWA L. REV. 213, 213–14 (1942).

124. *Id.* (“During the nineteenth century they were looked upon with almost religious sanctity without consideration being given to whether their source was a historical accident, a social policy of the time of their origin, an outgrowth of a formalism then found in pleading and procedure generally, or was based upon a sound principle of logic and psychology. Discrimination was not made between principles fundamentally sound and those fantastic in their origin.”).

125. *Id.* at 216.

126. *Michelson v. United States*, 335 U.S. 469, 486 (1948).

127. Capers, *supra* note 8, at 872.

128. *See, e.g.*, Findley, *supra* note 119, at 725.

129. JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT

general prohibitions coupled with particularized exceptions¹³⁰ broadly governing character evidence likely to create unfair inferences,¹³¹ evidence of specialized opinions by experts,¹³² and hearsay evidence.¹³³

The Rules are a monolith of procedural history—one that has ossified even as society around it has grown and evolved. With few exceptions, the principles underlying the rules reflect the same principles of their eighteenth and nineteenth century predecessors. The result is a code of evidence built on the same foundations as the “grotesque structure” on which Justice Jackson opined.¹³⁴

The Rules elevate the threshold for reliability. They are meant to ensure that evidence bears certain characteristics indicative of trustworthiness before allowing their admission.¹³⁵ Returning to the example of the online report card, the testimony of a school employee that records of student grades are kept regularly does bear on the reliability of that document. But the Rules could just as easily permit the admission of the report card without that showing, leaving the trier of fact to determine its evidentiary weight based on its characteristics and the surrounding circumstances. A report card printout that clearly shows the URL of the parent portal, the emblem of the school, and the name of the child’s teacher will be given far more weight than a printout that simply lists subjects and a letter grade, without any indication that the document was generated by the school or the teacher. Requiring pro se litigants to meet the higher threshold set out in the Rules operates to exclude evidence that would likely be admissible with appropriate foundation. If the rules are meant to ensure the admission of trustworthy, reliable evidence, they should not impose

COMMON LAW (1905). It is worth noting that Wigmore vehemently and colorfully opposed codifying evidence law in a way that vested judges with wide discretion. See Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 259–60 (1984).

130. E.g., Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 337 (1961) (describing Wigmore’s categorical approach as a “compromise” between total exclusion and admission of hearsay).

131. FED. R. EVID. 404–06, 608–09.

132. FED. R. EVID. 701–06.

133. FED. R. EVID. 801–07.

134. *Michelson*, 335 U.S. 469, 486 (1948).

135. See Michael H. Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach*, 1991 U. ILL. L. REV. 353, 372 (1991) (referencing “the procedural safeguards and assurances of trustworthiness created by courtroom rules of evidence”).

technical restrictions that will cause the exclusion of trustworthy, reliable evidence.

Moreover, some rules of evidence risk the admission of untrustworthy, unreliable evidence—in direct opposition to their goal. The justifications for many rules are logically flawed. Many of the exclusions and exceptions to the rules are supported not by empirical data but by “folk wisdom” and assumptions about human psychology.¹³⁶ For example, the rule permitting admission of prior convictions is likely to create unfair inferences.¹³⁷ Federal Rule of Evidence 609 permits the admission of felony convictions that occurred within the past ten years.¹³⁸ But, contrary to intuition, the conviction cannot be used to show a penchant for criminal conduct;¹³⁹ rather, the conviction is evidence of a character for untruthfulness.¹⁴⁰ In short, the rule rests on a flawed and dated premise that engaging in felonious conduct shows a person is less likely to tell the truth. Indeed, the felony need not be one involving dishonesty, although misdemeanors involving dishonesty are also admissible for that purpose.¹⁴¹ Moreover, the exception comes from a history of structurally racist policies regarding witness credibility that continue to disproportionately and negatively impact people of color.¹⁴²

For another example, the exception to the hearsay rule which permits admission of statements made for the purposes of a medical diagnosis or treatment is likely to result in the admission of unreliable evidence.¹⁴³ The exception is premised on the idea that patients will tell their doctors the truth in order to be accurately diagnosed, and that therefore, such statements have sufficient indicia of reliability to survive the general prohibition.¹⁴⁴ This

136. Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys' Strategic Choices*, 40 FLA. STATE U. L. REV. 1, 7 (2012).

137. See generally Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977 (2016); see also *id.* at 2003 (“Prior conviction evidence tends to ‘turn a jury against a defendant.’” (quoting *State v. Stevens*, 558 A.2d 833, 841 (N.J. 1989))).

138. See FED. R. EVID. 609.

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

140. See FED. R. EVID. 609(a).

141. *Id.*

142. See Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152, 166–67 (2017).

143. FED. R. EVID. 803(4).

144. John J. Capowski, *An Interdisciplinary Analysis of Statements to Mental Health Professionals Under the Diagnosis or Treatment Hearsay Exception*, 33 GA. L. REV. 353, 360 (1999) (“Reliability for the common law exception and, in part, the Federal Rule, is derived from ‘the likelihood that the patient believes that the effectiveness of the treatment received

assumption does not hold up in the modern world—one 2018 study found that eighty-one percent of patients reported concealing or lying about relevant information during conversations with their physician, most prominently to avoid being lectured or judged.¹⁴⁵ The same flawed thinking applies to the admission of excited utterances and statements of then-existing mental, physical, or emotional state.¹⁴⁶ Statements made while stressed or excited, or those professing a current feeling, are not inherently likely to be true. In fact, I predict many readers can recall a time when they misrepresented their emotional state to another.

Because these exceptions rest on untested and unsupported assumptions about psychology and human behavior, they risk the admission of unfair and unreliable evidence despite the original concerns barring such evidence, generally.¹⁴⁷ This does not mean that exclusionary rules, like the rule against hearsay, should completely bar all statements. As shown by the report card example above, absolutist exclusionary rules risk that reliable evidence will not be admitted. Instead, the breadth of the exclusionary rule itself must be considered carefully, in context, and with nuance.

In the context of pro se courts, the complexity of evidentiary rules originally meant to empower litigants does not serve that purpose. Rather, it creates confusion and the risk that a judge will actually decline to consider litigants' offered evidence—not because it is unreliable under the rules themselves, but because the litigant lacks the facts necessary to prove reliability to the judge. This is not only procedurally unfair, but substantively unjust.

will depend upon the accuracy of the information provided to the physician.” (quoting CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 277 (John W. Strong ed., 4th ed. 1992))).

145. Andrea Gurmankin Levy, Aaron M. Scherer, Brian J. Zikmund-Fisher, Knoll Larkin, Geoffrey D. Barnes & Angela Fagerlin, *Prevalence of and Factors Associated with Patient Nondisclosure of Medically Relevant Information to Clinicians*, J. OF AM. MED. ASS'N NETWORK OPEN (Nov. 30, 2018), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2716996> [<https://perma.cc/Q3ES-JTJ6>].

146. Justin Sevier, *Popularizing Hearsay*, 104 GEO. L.J. 643, 662–63 (2016) (“It is not obvious that an utterance made while a speaker is excited is likely to be truthful, as Rule 803(2) supposes.”).

147. *Id.* at 662. Studies on public attitudes toward the hearsay rule suggest that it is not viewed as making a proceeding more accurate—rather, to the extent the hearsay rule has public support, it is because the rule seems fair. *See id.* at 688 (summarizing study findings showing support for hearsay ban because of “dignity and fairness concerns” and not “decisional accuracy concerns”).

B. *The Law of Evidence as a Function of the Adversarial System*

Another justification for evidence law is its service to the adversarial system. Under this view, the rules of evidence do not limit litigants but, to the contrary, free litigants to present the evidence of their choosing.¹⁴⁸ However, as noted above, the adversarial system fails to account for pro se courts in a variety of ways—and it causes similar challenges in the application of evidence law.¹⁴⁹

The American law of evidence grew out of a movement to shut down partisan, activist judging in the nineteenth century.¹⁵⁰ Proceduralism ensured that judges would not consider evidence arbitrarily, but rather would be constrained by common-sense limitations on what evidence should and should not be heard.¹⁵¹ A more procedural approach to evidence freed each litigant to voice their claims, select their evidence, and “run [their] lawsuit as [they] saw fit.”¹⁵² In other words, the law of evidence was designed to ensure not only consistency across courts, but to empower litigants to present evidence that proved their claim and to disempower judges from erroneously excluding that evidence.

This is a hallmark of the American adversarial system. It shifted away from a judge’s fickle curiosity or biases and toward a litigant’s self-directed set of proof.¹⁵³ Judges came to expect that each party would present a zealous case in support of their position; that each party would therefore be motivated to provide evidence contextualizing and fleshing out the potentially incomplete picture painted by their opponent; and that, through that gauntlet, the judge would be able to ascertain the truth.¹⁵⁴ As one scholar put it, “[p]rocedure came to be treated as a science—a methodology that,

148. See, e.g., Mengler, *supra* note 116, at 414.

149. See *supra* notes 38–49 and accompanying text.

150. See Goldschmidt, *supra* note 5, at 40.

151. *Id.* (“[J]udicial conduct came to be controlled by applying strict rules of evidence and limits on judges’ comments to the jury at the end of a case.”).

152. *Id.*

153. See, e.g., John W. Strong, *Consensual Modifications of the Rules of Evidence: The Limits of Party Autonomy in an Adversary System*, 80 NEB. L. REV. 159, 160–61 (2001) (“[T]he rules of evidence . . . are themselves part and parcel of the adversary system . . .”).

154. See Goldschmidt, *supra* note 5, at 42 (“[T]he system survives by requiring the litigants to be represented by lawyers who are trained in procedure and are governed by the Bar itself . . . and by emphasizing the judge’s role in applying procedures rooted in tradition and in the common views of the legal profession. The greater the conflict between the parties, the more strictly the court enforces the rules.” (quoting WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 15 (1968))).

if done right, would enable a court to arrive at the right answer, whether the dispute was one of fact or one of law.”¹⁵⁵

In pro se courts, these adversary norms have a negative impact on pro se litigants in three main ways. For one, they make it more challenging for litigants to defend against objections to their own evidence. For another, they make it more difficult to raise objections to the evidence of an opposing litigant.¹⁵⁶ And finally, they harmfully restrict the way pro se litigants are expected to introduce evidence, without regard for the substance of that evidence.

First, pro se litigants are disadvantaged in responding to objections against their own evidence.¹⁵⁷ Without being conversant in the language of evidence, pro se litigants are highly unlikely to be able to respond to objections in a compelling way. In 2009 the ABA Coalition for Justice surveyed over 900 state court judges to determine ways in which lack of counsel negatively impacted pro se litigants.¹⁵⁸ Of those who said pro se litigants were negatively impacted, 89% cited procedural errors, and 81% cited failure to properly object to evidence.¹⁵⁹

This problem is particularly pronounced when the opposing party is represented by an attorney. The American legal system is designed based on the assumption that lawyers will make cogent, persuasive, and sound arguments for and against the admissibility of evidence.¹⁶⁰ Pro se litigants must utilize that same system, but without the legal knowledge the system assumes will underlie evidentiary arguments. The result is comparable to pitting a non-athlete against a professional tennis player. The non-athlete can walk onto the court, pick up a racket, and appreciate the basic rules of the game. However, they have no training on the technique used to serve, how to anticipate and react to an opponent’s return volley, or how to put spin on the ball.¹⁶¹ So too with pro se litigants in civil courts—the opposing attorney can object to questions, testimony, and evidence with the benefit of legal training, arguing for the

155. Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 354 (1989).

156. Steinberg, *supra* note 2, at 755–56.

157. Baldacci, *supra* note 15, at 666–67.

158. KLEIN, *supra* note 47, at 2, 5.

159. *Id.* at 4.

160. *Cf.* Barton & Bibas, *supra* note 24, at 994 (“Courts across the country must adapt an adversary system designed to be navigated by expert counsel to the realities of mass pro se representation.”).

161. As a person with no athletic ability whatsoever, I can easily imagine being on the losing end of such a match.

favorable application of ambiguous legal standards and encouraging the judge to exercise their discretion. This is particularly difficult for pro se litigants, where the application of an evidentiary rule comes down to a persuasive application of facts to legal standards they do not know or understand.

This is not a critique of counsel facing unrepresented parties. Attorneys have an ethical obligation to raise objections on behalf of their client.¹⁶² Nor is it a critique of judges who rule in favor of represented parties in evidentiary colloquy. There is no reason to doubt that most judges attempt to apply evidentiary law fairly. But where the rules are unclear, judges can be persuaded in one direction or the other—and pro se litigants are at a significant disadvantage in that kind of persuasion.

Second, pro se litigants are unlikely to raise timely and fitting objections to evidence offered by their opponents. In the adversary system, it is each party's obligation to raise any objections to their opponent's evidence.¹⁶³ Under the "contemporaneous objection rule," the failure to object to evidence at trial means that it will be entered and considered even if it might otherwise be excluded under the rules, unless the judge raises the issue sua sponte.¹⁶⁴ Failure to object also prevents a litigant from raising the issue on appeal.¹⁶⁵

This adversary-based rule negatively impacts pro se litigants who do not know the rules of evidence, or how to apply them to the evidence being offered. If the judge does not intervene, pro se litigants are unlikely to raise an objection at all, let alone an objection rooted in the rules. In some cases, judges might interrupt proceedings to solicit an objection, prompting pro se litigants to raise any issues with the testimony or exhibit.¹⁶⁶ Even then, the pro se litigant is put in an unfair position. If they do not know the rules of

162. Davis G. Yee, *The Professional Responsibility of Fair Play When Dealing with A Pro Se Adversary*, 69 S.C. L. REV. 377, 394 (2017) (discussing an attorney's obligation of diligence and zeal to a client, even when that client's opponent is unrepresented).

163. Strong, *supra* note 153, at 160–61.

164. *Id.* at 161.

165. *See, e.g.*, FED. R. EVID. 103(a).

166. *See, e.g.*, Goldschmidt, *supra* note 5, at 48 ("Many judges already 'nudge' the pro se litigant and ask whether [they] want[] certain items of evidence introduced into the record."); *see also id.* at 43 n.73 (2002) (quoting one judge who described "guid[ing] pro se litigants] through the process a bit — making sure they know they have the right to object to the other party's proffered evidence" (quoting JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 57–58 (1998))). I have personally observed this practice in D.C. Superior Court trials when my client's opponent is unrepresented.

evidence, they have no reason to suspect evidence is inadmissible, except that the judge is asking generally whether they have an objection. Some litigants might decline to object because they do not know any reason why they would.¹⁶⁷ Others might decline to object to appear agreeable, or to avoid coming across as combative or uncooperative.¹⁶⁸ Still other pro se litigants, particularly those who have faced negative consequences after challenging state actors, may decline to object because they worry about a negative reaction from the judge, who ultimately must decide their case.¹⁶⁹

When litigants do raise objections, they tend to be freer in form and typically fail to conform to the categories of evidence inherent in the rules.¹⁷⁰ The judge, having invited objections, must then decide whether to convert the litigant's objection into one based on the rules, or to explain to the litigant why their objection is overruled. I have seen judges twist themselves into pretzels to explain to a litigant why evidence is admissible even though the litigant has objected—often because the judge has just prompted them to do so. This can feel frustrating and futile to a pro se litigant, who might feel as though the judge has invited them into the evidentiary conversation only to push them back out of it.

Third, rules of evidence artificially constrain litigants in how they must present their proof. Initially, the rules impose a less-than-intuitive question-format requirement, prohibiting leading questions on direct examination¹⁷¹ and limiting cross examination

167. See KLEIN, *supra* note 47, at 4.

168. See Christopher C. Cross, *Disrespect in the Court: A Judge's Perspective*, 80 DENV. U. L. REV. 765 (2003) (describing a laundry list of behaviors the author, as a judge, views as "disrespectful" to the Court); see also Steve Vladeck (@steve_vladeck), TWITTER (July 9, 2019, 5:31 PM), https://twitter.com/steve_vladeck/status/1148706244951203840?ref_src=twsrc%5Etfw [<https://perma.cc/V5WB-7AUN>] ("First rule of litigation: Don't piss off the judge. Second rule of litigation: See the first rule.").

169. See generally Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1238–44 (2012). See also *id.* at 1244 ("When judges get angry at parties and witnesses, then, it often is because those persons act disrespectfully, lie, buck the court's power, insult the judge or the legal system, or have committed acts (sometimes in court, sometimes just proven there) that lead the judge to conclude they are 'thoroughly reprehensible.'"); cf. *Why You Should Never Piss Off A Judge*, YOUTUBE (Sept. 12, 2013), <https://www.youtube.com/watch?v=G-uBVXD9Olk> [<https://perma.cc/DHS5-TT5X>] (showing detained woman's laughter and obscene gesture leading judge to impose harsher penalties).

170. See Bezdek, *supra* note 19, at 605 n.7 ("The [litigants'] words are not quite right: assertions are made indirectly, which neither express nor convey entitlement. . . . [They] may be treated by the other players as uncomprehending the legally pertinent parameters, or as self-serving in [their] testimony, with greater frequency than are [represented parties] or their agents.").

171. *E.g.*, FED R. EVID. 611(c).

to the scope of the preceding direct.¹⁷² Moreover, limitations on opening statements and closing arguments make it unclear when it is permissible to argue one's case and how one may do so. In some courts it is even unclear whether parties are entitled to such advocacy opportunities.¹⁷³ The Federal Rules of Evidence are silent on these common practices, as are many state codes of evidence, leaving the rules around oral advocacy largely up to the judge's discretion.¹⁷⁴

Pro se litigants may struggle to adhere to these requirements. The risk of perceived unfairness is particularly pronounced when one litigant appears pro se and the other appears with counsel accustomed to the requirements.¹⁷⁵ For example, in a custody case before D.C. Superior Court's Domestic Relations Court, my students and I represented one parent against the other.¹⁷⁶ During our opponent's closing argument, he attempted to articulate new facts that speculated on our client's mindset. My students objected to the speculative observation, which had not been elicited during his earlier testimony. After sustaining the objection, the judge attempted to define speculation and the limits placed on closing arguments; but the opposing party became so frustrated by the interruption, he ended his argument completely. Even as the judge offered him more time and expressed openness to hearing his position, his frustration caused him to shut down.

Fundamentally, as this example shows, the structure of adversarial trials stifles "the inevitable manner in which *pro se* litigants speak"; that is, through narrative.¹⁷⁷ It is natural for litigants to communicate their experience through narrative description—to start from the beginning and describe their experience, their feelings, their observations, and the facts that led them to court. But the rules of evidence do not support that kind of unobstructed narrative.¹⁷⁸ Narrative testimony can be interrupted by attorneys'

172. *E.g.*, FED R. EVID. 611(b).

173. *See* MAUET, *supra* note 92, at 448.

174. *Id.* at 76, 448.

175. *See, e.g.*, Goldschmidt, *supra* note 5, at 37.

176. The law students appeared under my supervision, pursuant to the District of Columbia's student practice rule. D.C. CT. APP. R. 48.

177. Baldacci, *supra* note 15, at 662–63.

178. *Id.* at 664 (“[N]arrative is viewed as being an uneconomic, rambling mode of communication, and as an inappropriate means for raising or demonstrating cognizable legal claims on which legal relief may be given.”).

objections.¹⁷⁹ More shockingly, judges themselves may interrupt and disregard narratives, deeming them largely “irrelevant.”¹⁸⁰

In sum, the adversary norms that evidence law is designed to facilitate do not operate to empower pro se litigants. To the contrary, these norms are counterintuitive, designed for lawyers, and, for pro se litigants, may feel as arbitrary as the nineteenth-century-style courts that incited the rules’ creation in the first place.

C. *The Law of Evidence as a Gatekeeping Tool*

A third justification for the rules of evidence is shielding unreliable information from the trier of fact.¹⁸¹ Under this view, rules of evidence ensure that triers of fact will not see the flaws in unreliable evidence and, as a result, will draw unfair inferences from that evidence. This view largely assumes that juries will be the factfinders and that judges will apply the rules of evidence to ensure that juries hear relevant and reliable evidence, and not irrelevant or unduly prejudicial evidence.¹⁸² To the extent evidence is admissible only for a limited purpose, the judge can instruct the jury to limit their consideration to that purpose.¹⁸³

This justification, too, does not match the reality of pro se courts. The vast majority of pro se court cases are bench trials, decided by judges and not by juries.¹⁸⁴ Indeed, jury trials are far less common across the board. For example, in the 1920s, Massachusetts courts heard roughly 2,700 civil jury trials per year; in the late 1990s, the same set of courts heard less than five hundred civil jury trials, despite “great increases in the numbers of cases filed, the numbers of judges on the bench, and the numbers of lawyers in practice.”¹⁸⁵

179. Indeed, where a witness is being examined by an attorney, opposing counsel are primed to object to questions that call for narrative, or answers that are unresponsive to the question posed. *See* MAUET, *supra* note 92, at 543, 545–46 (describing “calls for a narrative” objection). While the boundaries of narrative testimony are less clear in pro se courts, the existence of these objections speaks to evidence law’s preference for atomized facts.

180. *See* Steinberg, *supra* note 2, at 756; Bezdek, *supra* note 19, at 586–90; *see also* MAUET, *supra* note 92, at 543, 545–46.

181. Sheldon & Murray, *supra* note 77 (“The idea was to prevent lay jurors from 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.”).

182. *Id.*

183. *See* FED. R. EVID. 105.

184. *See* Steinberg, *supra* note 2, at 800.

185. Sheldon & Murray, *supra* note 77, at 229.

As a result, judges cannot shield the trier of fact from evidence by declining to admit it, because judges *are* the triers of fact. Any attempt to do so is futile; “[s]creening 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.”¹⁸⁶ Judges are put in a position of artificially constraining how they consider evidence they have already decided they must not consider. While some judges may be able to disregard the evidence entirely, there is at least some risk that the judge will subconsciously either (1) consider the evidence despite its inadmissibility, or (2) treat the case of the litigant who offered the evidence with greater suspicion as a way of compensating for knowledge of the inadmissible evidence.

The expectation that judges can ignore evidence they have reviewed and excluded presents particular risks when the parties are *pro se*. *Pro se* litigants may not accept the fiction that judges can compartmentalize something they have clearly just reviewed. It can be an understandably frustrating experience to see the decision-maker in your case review evidence and then claim they will not consider it. Worse yet, judges may wind up imposing a subconscious adverse inference against the party whose evidence was rejected, as a way of correcting for their knowledge of it.

For example, in a domestic violence case, suppose a judge reviews a recording of a survivor’s 911 call to determine whether it meets the excited utterance exception to the hearsay rule. Typically, in order to make that determination, the judge must first listen to some part of the tape to see if it meets the requirements of the exception—that the declarant was in an excited state, that the declarant uttered the statement shortly after becoming excited, and that the statement was made as a result of that excited state.¹⁸⁷ The rule is designed to ensure that the statement was not carefully planned or fabricated, because the declarant did not have the time or calm to do so.¹⁸⁸ After listening to the recording, the judge knows that there is at least some corroboration of the survivor’s claim (the extent of the corroboration, of course, depends on the particular facts and characteristics of the recording). But if the judge concludes the recording does not meet the requirements of the excited utterance exception, and excludes it, the judge is

186. *Id.* at 228.

187. *See, e.g.,* *Gabramadhin v. United States*, 137 A.3d 178, 183 (D.C. 2016).

188. *See id.*

prohibited from considering any corroborative weight.¹⁸⁹ This puts the judge in a bind—they must ignore whatever weight might fairly be given to the recording and must therefore engage in the mental gymnastics of pushing aside the logical instinct to treat the recording as corroborative. Perversely, this may lead some judges to impose more suspicion on the survivor’s claim than if the survivor had not introduced the recording at all, as an intentional or subconscious correction for having erroneously heard the recording before deeming it inadmissible.¹⁹⁰

Essentially, in bench trials—and therefore many pro se courts—the gatekeeping function of the rules of evidence is a fiction.

* * *

In sum, the justifications for the rules of evidence and the reasons they are thought to improve the legal process no longer hold up when analyzed in the context of pro se courts. Rules of evidence rest upon logically flawed premises and often impose unduly burdensome requirements on pro se litigants, because the body of law as a whole assumes application by attorneys. Those assumptions simply do not reflect the reality of most pro se court proceedings.

IV. THE EVIDENCE OVERHAUL: GUIDELINES FOR REFORM

Reforming the rules of evidence in pro se courts is essential to increasing procedural justice and access to justice. While the rules of evidence were historically venerated as a set of tools that expand admissibility of evidence,¹⁹¹ in the context of pro se courts, they operate as tools of exclusion, preventing judges from considering otherwise reliable, probative evidence. In courts where nonlawyer pro se litigants are unable to show why their evidence should survive stringent, complex evidentiary standards, the rules cause more harm than good.

189. Joel D. Lieberman & Jamie Arendt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCH. PUB. POLY & L. 677, 677 (2000) (noting generally that verdicts must rest “on admissible evidence presented during the course of a trial”); see also Epstein & Goodman, *supra* note 108, at 404.

190. See generally Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323 (2005).

191. See, e.g., Mengler, *supra* note 116, at 413.

It is long past time that state courts reexamine the rules of evidence governing proceedings in pro se courts. The rules must be revised so that they are more accessible to pro se litigants and, ultimately, better achieve the underlying goals of evidence law. Looking at rules of evidence through a procedural justice lens offers a path to meaningful reform: the standards governing admissibility must support litigants' faith in the fairness of the proceeding, allowing parties to admit sufficiently reliable evidence and excluding evidence only if it violates a set of basic, essential, accessible standards. At the same time, the rules must foster access to justice and support substantively just outcomes.

As described above, four factors combine to create a process the public views as fair: the parties' ability to participate in the process, the trustworthiness of the decision-maker, whether the parties are treated with respect as individuals, and the neutrality of the decision-maker as a means of resolving the dispute.¹⁹² Reforming evidentiary rules to enhance litigants' endorsement of the trial process must take each of these factors into account.

This endeavor must not, however, be done in a vacuum, and its conclusions cannot be broadly applied to all pro se courts indiscriminately. As described above, different courts feature different types of litigants, involve different power dynamics, and present different risks of perpetuating systemic harms. In fact, studies suggest that as a party's power differential from their opponent grows bigger, the more that party will be harmed by appearing pro se.¹⁹³ As a result, reforms must be targeted to particular courts.

It would be irresponsible to suggest specific reforms here without a more robust and targeted analysis of how each rule operates in context, the degree of substantive and procedural unfairness each rule imposes on unrepresented litigants, and the ways each rule could be modified to better achieve access-to-justice, procedural-justice, and substantive-justice goals. Indeed, many of the flaws in current evidentiary rules find their roots in assumptions and armchair psychology.¹⁹⁴ I will not perpetuate that model here.

To that end, further study is necessary to find the appropriate balance of evidentiary standards in the context of pro se courts. In

192. Tyler, *supra* note 70, at 887.

193. See Shanahan et al., *supra* note 78, at 505 (“[T]he lower a party’s power relative to its opponent, the more it stands to benefit from representation.”).

194. See *United States v. Boyce*, 742 F.3d 792, 799–802 (7th Cir. 2014) (Posner, J., concurring) (referring to some hearsay exceptions as “folk psychology”).

this Part, I map out the essential considerations of such efforts—what I call the “evidence overhaul.” The overhaul of evidentiary rules must have in mind the three overarching goals identified at the beginning of this piece: to expand access to justice and procedural justice while maintaining the search for substantive justice. Ultimately, these changes must lead to a more permissive evidentiary rule set in pro se courts. They must increase litigants’ participation in the process. And they must lower the baseline of reliability not only to encourage just decision-making based on a fuller picture of the facts but also, because of the rules’ simplicity and accessibility, to increase pro se litigants’ belief that justice has been done.

In this Part, I lay out a blueprint for the reevaluation of state court rules of evidence. In section A, I discuss how simplifying evidentiary rules, decreasing the burden they impose on unrepresented parties, and encouraging admissibility will enhance both access to justice and procedural justice. In section B, I note that reform must consider three concepts likely to weigh on how evidentiary rules impact substantive justice. Specifically, I propose that reform efforts must explicitly account for implicit bias among judges, must ensure judicial accountability, and must recognize and adapt to the structural inequality that impacts so many pro se litigants.

A. *Enhancing Procedural Justice and Access to Justice Through Rule Simplification*

An evidentiary overhaul must center around ways to significantly simplify standards for admissibility to increase each litigant’s experience of participation in the process. Expanding litigants’ ability to have their evidence considered by the judge will increase their sense that they have been heard.¹⁹⁵ To attain this goal, broadly speaking, evidence should be admitted if it is sufficiently relevant and authentic, unless it violates very limited, specific, and understandable prohibitions.

The central aim of exclusionary rules should be to ensure perceived fairness—not, as is true of many existing rules, ensuring the presence of heightened hallmarks of reliability—and they should err on the side of admissibility rather than exclusion. The same indicia of reliability required by current rules can instead be used

195. See Justin Sevier, *Evidentiary Trapdoors*, 103 IOWA L. REV. 1155, 1160–61 (2018).

as a metric of weight, which would allow pro se litigants to present a fuller factual record, expand the evidence available to the judge, and ultimately result in fairer, more accurate proceedings in many cases.

Some scholars have proposed eliminating rules of evidence completely in cases most likely to feature pro se litigants.¹⁹⁶ In many small claims courts, for example, the rules of evidence do not apply.¹⁹⁷ In theory, if complex rules of evidence are a barrier, that barrier could simply be removed. In this view, there is no set of reforms or “patchwork remodeling” that will address the complexity of evidentiary rules, and so they should be discarded completely.¹⁹⁸ Some courts have put this model into practice—the New Hampshire rules of evidence do not apply in domestic relations actions,¹⁹⁹ and Oregon allows litigants to opt into a dramatically simplified family law dispute resolution model that does not apply rules of evidence.²⁰⁰

Eliminating all evidentiary rules, however, would have a result as problematic as retaining overly complex ones. While litigants would be freed to offer far more evidence into the record, judges would retain tremendous power to silence them, as Professor Barbara Bezdek observed in her study of Baltimore’s housing court.²⁰¹ Judges would also be given unreviewable discretion to weigh the evidence, risking that judges who engage in flawed, biased, or mercurial decision-making will reach those decisions behind the closed curtain of unreviewable standards like “doing ‘substantial justice.’”²⁰² Moreover, rule-less courts substantially benefit the more powerful litigant, such as the landlord over the tenant, the employer over the employee, or the abusive partner over the survivor

196. See, e.g., Sheldon & Murray, *supra* note 77, at 231.

197. See, e.g., ILL. SUP. CT. R. 286(b) (“In any small claims case, the court may, on its own motion or on motion of any party, adjudicate the dispute at an informal hearing. At the informal hearing all relevant evidence shall be admissible and the court may relax the rules of procedure and the rules of evidence. The court may call any person present at the hearing to testify and may conduct or participate in direct and cross-examination of any witness or party. At the conclusion of the hearing the court shall render judgment and explain the reasons therefor to all parties.”).

198. Sheldon & Murray, *supra* note 77, at 230.

199. N.H. CIR. CT. FAM. DIV. RS. 2.1–2.2.

200. See William J. Howe III & Jeffrey E. Hall, *Oregon’s Informal Domestic Relations Trial: A New Tool to Efficiently and Fairly Manage Family Court Trials*, 55 FAM. CT. REV. 70, 71 (2017).

201. Bezdek, *supra* note 19, at 535–36.

202. See Baldacci, *supra* note 15, at 678 (evaluating New York City’s Small Claims courts).

of domestic violence.²⁰³ In short, some evidentiary rules are needed to protect the rights of pro se litigants. The goal of the overhaul is to undo the overdrafting of the rules, which work to overburden the very litigants they are designed to protect.

Finding this appropriate balance between admissibility and procedural fairness does not require reinventing the wheel—just a return to first principles.

Evidence should be admitted if it is more likely authentic than not. Evidence is authentic if it is what the litigant says it is.²⁰⁴ Authenticity should be proved by a combination of witness testimony that the exhibit has not been altered, and physical characteristics of the exhibit itself—such as date and time stamps, contact information showing who sent the statement, or physical characteristics that match the platform of the statement (for example, that a text message screenshot on an iPhone has messages in grey and blue in the trademark Apple font). Importantly, this reflects that there is no precise formula for determining authenticity.

Evidence should be admitted so long as it is logically relevant. Evidence is logically relevant if it makes any fact at issue more or less likely. This is a fairly accessible rule—laypeople can often explain why something is important to their case. For example, a litigant might establish that a text message is relevant by saying who sent it, how they know it is that person, and why the substance of the statement supports their case. This requirement is analogous to testimony that a person recognizes another person's handwriting or voice.

Because almost all cases in pro se courts are bench trials, the judge must determine what weight to give admissible evidence as the trier of fact.²⁰⁵ Indicia of reliability, such as the evidence's internal consistency, external consistency with other evidence, context, and relative probative value and prejudicial effect, might all be considered.²⁰⁶ Many judges are well-suited to this work, as trained lawyers who, ultimately, would have to weigh the evidence in any event.²⁰⁷

203. See Shanahan et al., *supra* note 78, at 506; see also *infra* section IV.B.3.

204. See FED R. EVID. 901(a).

205. See MAUET, *supra* note 92, at 617.

206. See Michael Seward, *The Sufficiency-Weight Distinction—A Matter of Life or Death*, 38 U. MIA. L. REV. 147, 153 (1983) (“[I]n determining weight, the court measures the probative value and credibility of evidence.”).

207. See Steinberg, *supra* note 2, at 799.

Rules of evidence must be structured to ensure that the trier of fact reaches decisions based on the merits, and not on technicalities.²⁰⁸ Accordingly, standards for reliability should be significantly liberalized to prevent the exclusion of reliable evidence merely because pro se litigants are unable to offer up the indicia of reliability required by existing rules. It would go too far, however, to dispatch with all exclusionary rules, or to admit all evidence based merely on a relevance standard. Some evidentiary principles are worth retaining, particularly where (1) the rule promotes substantive justice by advancing the primary purposes of the rules of evidence, or (2) there is a dignitary benefit to doing so that enhances procedural justice.²⁰⁹ For example, lay witnesses ought to be prohibited from providing expert testimony because such a rule is likely to increase decisional accuracy—as a general matter, it makes sense that someone should have sufficient knowledge, training, or experience in an area before offering a specialized opinion in that area.²¹⁰ Similarly, the attorney-client privilege²¹¹ ought to be protected for the dignitary benefits it affords—although clients routinely provide lawyers with information that could assist the trier of fact in resolving the claim, it is more important to ensure that litigants can obtain legal advice without fear that their disclosures might be used against them.²¹² This is just as true for pro se litigants, whose access to a lawyers is often restricted to “unbundl[ed]” advice and brief services, rather than full representation.²¹³

The overarching goal of simplifying evidentiary rules must account for public attitudes about fairness. Further study is needed to evaluate the appropriate scope of exclusionary rules, and procedural and substantive justice must be at the center of those studies. Several studies by Professor Justin Sevier explore public attitudes toward evidentiary rules. Specifically, they examine public attitudes toward the hearsay rule,²¹⁴ the ban on propensity

208. Glenna Goldis, *When Family Courts Shun Adversarialism*, 18 U.C. DAVIS J. JUV. L. & POL'Y 195, 201 (2014) (“The presence of rigid rules creates the possibility of parties winning or losing because of these rules, rather than the merits.”).

209. See Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L.J. 441, 456 (2019); Sevier, *supra* note 195, at 1160–61; Sevier, *supra* note 136, at 688.

210. FED. R. EVID. 702.

211. See FED. R. EVID. 502 (noting exceptions in federal courts to the attorney client privilege afforded by applicable law).

212. Todd A. Ellinwood, *“In the Light of Reason and Experience”: The Case for A Strong Government Attorney-Client Privilege*, 2001 WIS. L. REV. 1291, 1300.

213. See Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 454–55 (2011).

214. Sevier, *supra* note 146, at 647–48.

evidence,²¹⁵ and the general application of evidentiary “trapdoors,”²¹⁶ or carve-outs and exceptions to general exclusionary rules.²¹⁷ Through empirically sound methodology, the studies sought to test the premises on which these evidentiary rules were based, with a particular focus on the rules’ impact on (1) the accuracy of trial outcomes, or decisional accuracy, and (2) public trust in the fairness of the proceedings.

These studies largely conclude that complex exceptions to general exclusionary rules decrease trust in both the decisional accuracy *and* perceived fairness of trial proceedings.²¹⁸ In other words, the studies show that the web of exceptions to broad exclusionary rules do not enhance public attitudes toward trials. This supports the argument for reducing the complexity of evidentiary rules. For example, one study evaluated participants’ attitudes toward various forms of “trapdoor” evidence, including evidence of the defendant’s character for untruthfulness, hearsay evidence, propensity evidence, and admissions made during a privileged conversation.²¹⁹ The hypotheticals imagined a defendant on trial for second degree murder and asked participants to imagine the prosecution attempting to admit these various forms of evidence against the defendant at trial.²²⁰ For example, in one hypothetical, the prosecution calls defendant’s brother-in-law to testify to a hearsay statement made by defendant’s sister, in which she claims Defendant was selling drugs since losing his job.²²¹ In another hypothetical, the prosecutor seeks to question the defendant about a recent arrest (but not conviction) for possession with intent to distribute a controlled substance.²²² Each of the experiments showed that participants viewed this “trapdoor” evidence as having no benefit to the court’s decisional accuracy and as decreasing the fairness of the process.²²³

Future research testing the scope of these findings must account for two considerations these studies did not. First, most of the studies focused on criminal trials,²²⁴ where the stakes—and therefore

215. Sevier, *supra* note 209, at 441.

216. Sevier, *supra* note 195, at 1155.

217. *Id.* at 1164–69.

218. *See, e.g., id.* at 1207.

219. *Id.* at 1184.

220. *Id.* at 1185.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 1183; Sevier, *supra* note 209, at 468; Sevier, *supra* note 146, at 667.

public perception of fair or unfair procedure—are different than in the civil context.²²⁵ Second, because most of the studies relied on hypothetical criminal trials, these hypotheticals presupposed a jury trial (rather than a bench trial) and the presence of lawyers (rather than pro se litigants).²²⁶ Further study of public attitudes toward evidentiary rules in pro se courts should reflect the nature of civil cases and pro se parties—in other words, they must reflect the context in which they are applied.

Simplifying evidentiary rules will enhance all tenets of procedural justice. First, the parties will have greater ability to participate in the process. Because the rules are less complex, the parties will be able to understand and apply the rules governing the resolution of their case. Moreover, the parties are more likely to feel heard if their evidence is considered, rather than excluded based on obscure evidentiary jargon.²²⁷ In cases where evidence is still ultimately excluded, judges should explain their decision to empower parties to see why, further enhancing litigants' belief that they are engaged in—and not simply subject to—the legal process.²²⁸ In turn, if litigants feel that most if not all of their evidence has been considered to some extent, they are more likely to feel that they have a role in the process.

Second, by simplifying evidentiary standards judges will have an easier time explaining their rulings. This will enhance two related factors: the perceived trustworthiness and neutrality of the decisionmaker. When judges explain themselves, litigants are more likely to understand the judge's application of the rules. If litigants understand the rules of the proceeding and why and how those rules are being applied, they are more likely to trust that the proceeding is fair. Specifically, if the judge takes care to explain each ruling and to explain why the rules apply equally to both parties, the parties are more likely to view the judge as a neutral decision-maker.²²⁹

225. Aviel, *supra* note 59, at 2115–16 (describing “social, emotional, and structural differences between custody disputes and criminal prosecutions”).

226. Sevier, *supra* note 209, at 468; Sevier, *supra* note 195, at 1183; Sevier, *supra* note 146, at 667.

227. See Goldis, *supra* note 208, at 200–01.

228. Steinberg, *supra* note 2, at 800 (“[R]equiring judges to make more explicit findings on the weight accorded particular forms of evidence would increase the transparency of judicial fact-finding and, possibly, boost public trust in the court system.”).

229. Engler, *supra* note 38, at 2028 (“The court has a ‘basic obligation to develop a full and fair record . . .’ Each of [the court’s] duties is not only wholly consistent with the notion of impartiality, but also necessary for the system to maintain its impartiality.” (internal

Finally, the overhaul increases the likelihood that the parties will be treated with respect as individuals. For the reasons explored above, judicial rulings on evidentiary objections can feel obscure to a pro se litigant. If more evidence is admitted and considered, and if the explanation for such decision is based on an accessible and limited set of rules, litigants are more likely to feel considered and respected.

In combination, these factors are likely to create a more accessible, transparent dialogue between judges and litigants, and foster in litigants the sense that their case is being considered seriously and fairly. Pro se parties will be liberated to shape their own factual record, to understand the impact of their evidence on the outcome of the proceeding, and to communicate about why and how the judge will evaluate it.

B. *Accounting for Systemic Inequality and Harms*

Rule makers must acknowledge and address three key realities as part of any overhaul of evidentiary rules: implicit bias, judicial accountability, and the role of external systemic inequality. Centering these three concepts will ensure not only that litigants can access the legal process and experience it as fair, but also that they are more likely to obtain a substantively fair result.

1. Implicit Bias

First, evidentiary reform must consider the role of implicit bias. Judges are human beings who bring with them the various biases society cultivates.²³⁰ As a result, when judges are vested with discretion, we must vigilantly evaluate how unconscious bias might impact the exercise of that discretion.²³¹

For example, one prevailing study of racial bias among trial judges in criminal cases found, unsurprisingly, that judges are indeed susceptible to unconscious racial bias when deciding cases.²³²

citations omitted)).

230. Gregory S. Parks, *Judicial Recusal: Cognitive Biases and Racial Stereotyping*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 681, 696 (2015) ("Judges are human. They suffer from the same frailties, flaws, and foibles that the rest of us do.").

231. See generally Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1057 (2019).

232. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1226 (2009).

The study concluded that judges with higher implicit bias against the racial category of “Black” imposed harsher judgments on Black defendants.²³³ Importantly, the study suggests not only that judges’ implicit biases affect their judgment, but also that they “seem to be aware of the potential for bias in themselves and possess the cognitive skills necessary to avoid its influence.”²³⁴ Judges are accordingly able to correct for their own implicit racial bias, the study shows, when they are “aware of a need to monitor their own responses . . . and are motivated” to correct for them.²³⁵ Similar concerns have been raised with respect to bias based on sexual orientation, gender and gender identity, disability, immigration status, religion, and other marginalized identities.²³⁶

However, this does not mean that judges are, in fact, actively combatting their internal biases when ruling from the bench.²³⁷ Indeed, at best, the study concludes that judges *can* counteract their own implicit bias when they “face clear cues that risk a charge of bias” and are therefore triggered to avoid it.²³⁸ The problem is worse when judges believe they are immune to “racial prejudice in decision-making,” which can lead them to ignore and fail to correct for their own bias.²³⁹ It is particularly challenging for judges to self-identify the need to address implicit bias when they are applying rules the legal profession deems “procedural,” and therefore substantively neutral.²⁴⁰ To the contrary, rules that purport to be “technocratic or neutral” present prime opportunities for judges to engage in unconscious bias when ruling.²⁴¹

233. *Id.* at 1210, 1214–15, 1217, 1232.

234. *Id.* at 1225.

235. *Id.* at 1221.

236. See, e.g., Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 104 (2017) (finding negative implicit bias among trial judges against Asian and Jewish litigants); Todd Brower, *What Judges Need to Know: Schemas, Implicit Bias, and Empirical Research on LGBT Parenting and Demographics*, 7 DEPAUL J. WOMEN GENDER & L. 1, 17, 20 (2018) (discussing the role of bias against LGBTQ+ parents in custody cases).

237. Rachlinski et al., *supra* note 232, at 1225.

238. *Id.*

239. Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAM. CT. REV. 213, 227 (2017) (“[J]udges tend to be overly confident in their abilities to ‘avoid racial prejudice in decision-making’ and may not do the necessary work to correct their biases.”).

240. Cf. Pedro, *supra* note 73, at 154 (discussing the potential for civil procedure to reinforce racial harms against marginalized groups).

241. *Id.* (“To prevent . . . procedure from reinforcing, or continuing to reinforce, racial subjugation, we need to understand how these seemingly technocratic or neutral rules and doctrine are already deployed in ways that reinforce existing hierarchies including white supremacy.”).

The evidentiary overhaul must consider this reality and how to incorporate broader judicial training and structural reforms of the civil judiciary into evidentiary reform. For example, judges can practice cognitive techniques such as stereotype replacement and counter-stereotypic imaging to reduce the role of their own cognitive biases.²⁴² Courts and dockets must be structured, however, to not only allow but encourage judges to engage that work.²⁴³ Additionally, judges might be aided in identifying and preventing unconscious bias through judicial training, exposure to counternarratives that undermine the assumptions of implicit bias,²⁴⁴ formal judicial audits, and alterations to courtroom practices that remove judges from siloed decision-making and increase account-ability.²⁴⁵ More broadly, this further supports the need to diversify the bench.²⁴⁶

Whatever the mechanisms, as Professor Gregory Parks notes, systems must be put in place to ensure that judges “acknowledge that they may have subconscious biases, that these biases may influence their judgment and decision-making, and that they should . . . as a preventative measure[,] work to achieve impartiality at a subconscious level.”²⁴⁷ This will not only improve the accuracy and fairness of evidentiary decision-making, but will also improve procedural justice by reducing the appearance of judicial bias.²⁴⁸

2. Judicial Accountability

Second, and relatedly, evidentiary reform must ensure an appropriate degree of judicial accountability—particularly where reforms expand admissibility of evidence and increase judges’ discretion to assign weight to that evidence. A system that shifts the

242. See Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1, 3 (2006); see also Maldonado, *supra* note 239, at 228.

243. See Maldonado, *supra* note 239, at 230.

244. See generally Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCH. 828 (2001).

245. See, e.g., Rachlinski et al., *supra* note 232, at 1226–31; see also Claire P. Donohue, *The Unexamined Life: A Framework to Address Judicial Bias in Custody Determinations and Beyond*, 21 GEO. J. GENDER & L. 557, 607–11 (2020) (recommending procedural steps to counteract judicial bias in custody cases).

246. See generally Breger, *supra* note 231.

247. Parks, *supra* note 230, at 697.

248. See Breger, *supra* note 231, at 1064–65.

focus entirely to weight, under existing appellate law, would give trial judges near-unreviewable authority to decide claims.²⁴⁹ Evidentiary rulings are subject to a “harmless error” standard that, particularly in the context of fact-specific cases often heard in pro se courts, can be difficult to meet.²⁵⁰ At the very least, judges should be required to explain their evidentiary determinations, either on the record or in a written order at the conclusion of a contested hearing.

Even if appellate standards were more discerning and trial records better-kept, appellate review cannot be the only source of accountability for judicial decision-making. Case-by-case review of judicial decision-making risks hiding more systemic patterns of judicial rulings that could show arbitrary or biased decision-making at work.²⁵¹ As a result, reform efforts should also create external modes of accountability like case auditing, judicial performance review boards, and publicly available data before retention elections, where applicable.²⁵²

3. Systemic Inequality

Third, evidentiary reform must consider the many forms of systemic inequality that underlie pro se court cases. As explored in Part II, poverty and the myriad related harms it inflicts have a direct impact on litigants’ ability to comply with evidentiary standards.²⁵³ Low-income pro se litigants are not likely to have the resources or information to collect certificates of self-authentication,²⁵⁴ to promptly subpoena witnesses and provide fees to those witnesses,²⁵⁵ or generally to preserve evidence with the hallmarks of reliability most likely to secure admission. Rules of evidence should be drafted with consideration of those limitations.

Evidentiary rules must also take into account the power imbalances likely to exist in the case types to which those rules will apply. The more significant the power differential between parties,

249. See, e.g., Rachlinski et al., *supra* note 232, at 1231.

250. See, e.g., FED. R. EVID. 103(a); see also FED. R. CIV. P. 61 (“Unless justice requires otherwise, no error in admitting or excluding evidence . . . is ground for . . . disturbing a judgment or order.”).

251. See, e.g., Rachlinski et al., *supra* note 232, at 1231.

252. See generally Jean E. Dubofsky, *Judicial Performance Review: A Balance Between Judicial Independence and Public Accountability*, 34 *FORDHAM URB. L.J.* 315 (2007).

253. See *supra* Part II.

254. E.g., FED. R. EVID. 902(11).

255. See, e.g., D.C. SUPER. CT. R. DOM. REL. 45; D.C. SUPER. CT. R. FAM. CT. F.

the more likely an unrepresented, lower-power party is to have an unfavorable outcome.²⁵⁶ For example, creditors in mortgage foreclosure proceedings have engaged in a practice known as “robo-signing,” where a small number of people sign the vast majority of affidavits without personal knowledge of the facts sworn in those affidavits.²⁵⁷ If the rule against hearsay were relaxed in, for example, a consumer debt collection case, such an affidavit could be introduced and given undue weight, particularly if the resourced creditor were not required to authenticate and overcome a hearsay objection to the affidavit. Whereas affidavits of debt, signed by an agent or other third party, are a standard component of debt collection proceedings,²⁵⁸ the most common sources of evidence in family law case are the parties themselves—there are no comparable examples of routine exhibits produced by the party, and the parties, as individuals, do not have agents through which they must attest to facts. Additionally, the risk of such a routinized, egregious misrepresentation is at least arguably lower where the parties lack the resources, infrastructure, and technical know-how of corporate entities who repeatedly litigate such cases. The rules must recognize the context of the case in which they are applied—for example, recognizing that an unrepresented employee is less likely to have extensive resources than their represented employer²⁵⁹—and must, therefore, ensure that relaxed rules cannot be abused by more a powerful, resourced, represented party. Otherwise, an overly permissive evidentiary rule set in a court that frequently involves such powerful entities as parties could work significant and repeated substantive injustices.²⁶⁰

Crucially, the endeavor of improving evidentiary rules must not replace efforts to address the many injustices that lead pro se litigants to court in the first place. As Professors Anna E. Carpenter and Colleen F. Shanahan have noted, “The socioeconomic needs that flow from inequality and push parties into civil courts cannot

256. Shanahan et al., *supra* note 78, at 506.

257. See Judith Fox, *Rush to Judgment: How the Fair Debt Collection Practices Act Fails to Protect Consumers in Judicial Debt Collection*, 13 FLA. STATE U. BUS. REV. 37, 49–50 (2014).

258. *Id.* at 47.

259. See, e.g., Shanahan et al., *supra* note 78, at 506 (“[W]here civil legal representation is not guaranteed by the state, a more powerful party, such as an employer, is more likely to have the resources to obtain representation, whether it is through an in-house legal department for a large employer or through a third-party lay representative retained to control costs for a smaller employer.”).

260. See *id.* at 514.

be simplified away within the judicial branch.”²⁶¹ The root causes of poverty and marginalization that have led to the overflow of pro se court cases will not be solved by evidentiary reform.²⁶² Ultimately, this may lead to the conclusion that trials are not an ideal mode of dispute resolution for pro se litigants,²⁶³ and that we should focus efforts not on reforming pro se courts but on addressing those substantive socioeconomic needs and inequalities.²⁶⁴ Indeed, some have argued that this should be the primary focus of an updated access-to-justice movement.²⁶⁵ As advocates for change continue to muster the political and social will to grapple with these challenges, however, evidentiary reform will provide greater litigant access and process satisfaction.

C. *Interim Steps: Redefining the Role of Judges*

Evidentiary rules will likely present some challenges to pro se litigants even when simplified. Yet, as the rules become simpler and easier to understand, they will also become easier to explain. Therefore, to further promote procedural justice, the role of judges must change, formally if needed, to take on a more active role in fact development, procedural explanation, and decision-making transparency.

Judges are not only arbiters of legal claims, but representatives of the justice system. As noted above, a central tenet of procedural justice is the neutrality of the decision-maker; accordingly, litigants must see judges as neutral arbiters and must trust judges to make decisions with good intentions.²⁶⁶ I posit that not only freeing

261. Shanahan & Carpenter, *supra* note 72, at 131.

262. *Id.*

263. See, e.g., Aviel, *supra* note 59, at 2121–22 (noting that it “might be desirable and achievable for most families” to obtain a “swift,” cooperative resolution to family law cases).

264. Shanahan & Carpenter, *supra* note 72, at 133–34 (“Any change must begin with courts and lawyers refusing to blindly accept the courts as a last resort against the legislative and executive branches’ failures to address inequality. As a profession, lawyers need to accept that court simplification, self-help, unbundled legal services, design thinking, and similar ideas address only short-term symptoms and perpetuate the underlying problems.”).

265. E.g., Katherine S. Wallat, *Reconceptualizing Access to Justice*, 103 MARQ. L. REV. 581, 620 (2019) (“[A]chieving equal access to justice should be defined more broadly: achieving just and fair solutions to problems for all people as part of the broader fight against poverty.”).

266. See Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. OF PERSONALITY & SOC. PSYCH. 830, 831 (1989) (“Formal authorities, like judges, are given a large element of discretion about the way in which procedures are enacted. Their use of that discretion is shaped by their intentions. Trust involves the belief that the intentions of third parties are benevolent, that they desire to treat people in a fair and reasonable way.” (internal citations omitted)).

but encouraging judges to explain process and decision-making will strengthen this essential tenet of procedural justice.

How litigants view judges has a significant impact on litigants' subjective experience of "justice."²⁶⁷ Studies show that litigants' subjective sense of justice is most meaningfully impacted not by the outcome of the case, but by the fairness of the procedure that governed it.²⁶⁸ Judges can meaningfully advance the perception of fairness by ensuring that litigants understand the rules and their application to particular evidence.

To some state court judges who adhere strictly to traditional norms of judicial passivity, this suggestion may come as a shock. Under this view of judging, explaining procedural rules or norms during legal proceedings, even when the parties do not understand them, risks shifting the judge out of their neutral role. In short, these judges tend to harbor a "deeply ingrained" belief that neutrality requires such passivity, born of "loyalty to and socialization by the legal professions."²⁶⁹ To the contrary, in the context of pro se litigation, informing litigants about the ways procedural rules function, asking probing questions, or explaining substantive legal standards does not undermine the view of judicial impartiality—it actually enhances it.

To other judges, this suggestion will serve only to validate the steps they are already taking.²⁷⁰ I have often seen judges in D.C. Superior Court's Domestic Violence Division inform litigants about procedural matters like service of process, how and where to file motions, or what the trial process entails. This practice appears to be common in other pro se courts across the country—as noted by the authors of a recent study of pro se judging, "The notion of judges as passive umpires calling balls and strikes, and the related norm of party control over litigation, may no longer accurately describe much state civil court litigation."²⁷¹ To the contrary, active judging in pro se courts is "far more widespread" than is generally

267. Blasi, *supra* note 42, at 871.

268. Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128 (1988) ("[A] key determinant of citizen reactions to encounters with legal authorities is the respondents' assessment of the fairness of the procedures used in that contact.").

269. Goldschmidt, *supra* note 5, at 42.

270. Steinberg, *supra* note 38, at 912–16. It is worth noting that, outside of pro se courts, judges in complex litigation have become accustomed to hands-on, "into the trenches" intervention in pretrial management. *Id.* at 912 (quoting Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 391 (1982)).

271. Carpenter et al., *supra* note 4, at 262.

thought.²⁷² At the same time, because this role shift has been neither explicit nor generally accepted by the profession, how different judges approach this role—and how fair or effective they are while they do it—“may vary widely . . . even within the same court.”²⁷³

To ensure uniformity between and within courts, decision-makers should create official guidance for judges on how to apply and explain evidentiary principles. To date, such guidance is uncommon and often discretionary. For example, the American Bar Association’s Model Code of Judicial Conduct provides little assistance. At present, the Code mentions in a passing comment that “[i]t is *not a violation* of [the standard of judicial impartiality] for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”²⁷⁴ While a number of jurisdictions have adopted more specific language,²⁷⁵ studies show that the application of that guidance varies dramatically by judge—some judges strictly limit the information they provide to pro se litigants in the name of judicial impartiality; others interfere substantially in a way that can negatively impact the litigants’ subjective experience and dampen their sense that the proceeding is just.²⁷⁶ It seems no two judges apply the same principles to the courtroom, risking that pro se litigant will view the judicial system as a whole as arbitrary, rather than fair.

To maximize litigants’ experience of neutral arbitration and fair procedure, judges must take a more active role in explaining process and law, guiding the development of the factual record, and thereby enhancing each litigant’s faith that the judge will reach an unbiased and fair decision on the merits.²⁷⁷ If judges took a more active role in explaining the law and procedure, with a proper understanding of how to empower litigants rather than direct them, they could increase the efficiency of their docket and improve their ability to make sound decisions in cases. Moreover, when judges

272. *Id.* at 263–64; *see also* Carpenter, *supra* note 46, at 685.

273. Carpenter et al., *supra* note 4, at 264; *see also* John M. Conley & William M. O’Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467, 467–68 (1988) (comparing various judges in the same court); Michele Cotton, *A Case Study on Access to Justice and How to Improve It*, 16 J.L. SOCIETY 61, 88 (2014).

274. MODEL CODE OF JUD. CONDUCT R. 2.2, cmt. (AM. BAR ASS’N 2020) (emphasis added).

275. Steinberg, *supra* note 38, at 931–33.

276. Blasi, *supra* note 42, at 870.

277. Sward, *supra* note 155, at 321 n.96 (“A judge can be impartial but very active in developing the case, as judges are in continental inquisitorial systems. Impartiality is a requirement for fair adjudication, but judicial passivity is not.”).

engage with litigants using accessible, explanatory language, it preempts the feeling of gamesmanship that inevitably flows from a judge “sustain[ing]” or “overrul[ing]” one side’s objection to the other’s evidence.²⁷⁸

Importantly, judges must not overcorrect to too directive a style. Judges should not direct the parties on how to act or ask leading questions to “cut to the chase.” Overreliance on highly directive instructions and questioning can stifle fact development, make the parties feel unheard, and ultimately undermine the perceived fairness of the judge’s decision.

Judges should develop the factual record by asking questions of litigants to understand their meaning and to obtain facts that will inform the weight of evidence.²⁷⁹ As a preliminary matter, judges should ask direct questions about authenticity and relevance.²⁸⁰ Additionally, they can probe reliability to accurately assess its weight. Judges should also liberally permit pro se litigants to obtain additional evidence when asked and grant continuances to allow them to do so. Judges should explain their rulings when admitting or excluding evidence, as well as their determination of the weight of exhibits and testimony. If an exhibit is not logically relevant, the judge should explain why. Similarly, if the judge questions the reliability of an exhibit, they should explain the basis for their doubts.

Take the report card example in Part II above. The judge might accept the report card into evidence, explain the basis for their ruling, and identify any reliability discounts they will assign to its weight. The judge might also ask whether the opposing party agrees that the report card is accurate, which also bears on the weight the judge will give the exhibit. The judge might explain their decision to admit the report card as follows:

This exhibit appears authentic because it shows the website and has the school’s logo. The exhibit is relevant to this custody case because

278. See Goldis, *supra* note 208, at 206 (“In a less adversarial proceeding . . . [t]he decision maker might begin [their] response [to an objection] with, ‘I hear your concerns.’”).

279. See, e.g., William M. O’Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC’Y REV. 661, 670–71 (1985) (explaining that simplified procedure is more effective when accompanied by active judicial role).

280. In fact, judges already take these steps with attorneys at trial. See Goldschmidt, *supra* note 5, at 48 (“It is common knowledge that judges often assist attorneys by suggesting the correct form of a question, a certain line of inquiry not being pursued, or the manner of properly offering a document or other item into evidence. This proposal would, therefore, authorize similar assistance to pro se litigants.”).

it shows how your child is performing in school while staying with his mother. I am going to admit the exhibit into evidence, but I will take into consideration that this is a printout, and we don't have someone from the school here to tell us that it is correct.

This kind of explanation can go a long way to making litigants feel heard and buy into trials as a fair process for resolving their dispute.

Simplified evidentiary rules must apply to represented parties and pro se parties to ensure that the represented litigant also experiences the proceeding as just. At the same time, the unrepresented litigant must not feel outmatched by the presence of a lawyer on the opposing side. The judge, as decision-maker, must balance those objectives to appear (and be) both trustworthy and neutral.²⁸¹ To that end, to ensure represented parties do not experience judicial explanations as unfair, judges should explain at the beginning of the trial that the same evidentiary rules apply to both parties, but that the judge may explain some of those rules to the unrepresented party to ensure they are both playing by the same rules.²⁸² Additionally, judges should ask represented parties and their witnesses similar questions to probe the reliability of offered evidence and should ask attorneys to explain their objections.²⁸³ If the attorney fails to do so coherently, the judge should explain it further to an unrepresented party.

Litigants would be further aided if nonlawyer advocates were available to provide some explanation of evidentiary procedure before the litigant appears before the judge. This is already happening informally in many pro se courts.²⁸⁴ A recent two-year, multi-jurisdictional study of norms in pro se courtrooms concluded that nonlawyer advocates play a broad role in pro se courts, including

281. Tyler, *supra* note 70, at 887.

282. Professor Jona Goldschmidt offers a helpful example of what the judge might say: "From time to time the court may assist the pro se litigant in this case by helping [them] to properly introduce evidence into the record. The court has a duty to provide a meaningful hearing and access to justice to all parties, whether represented or not, and a lack of knowledge regarding the proper method of introducing evidence because of a lack of counsel may not be a barrier to these rights. In addition, the court needs all relevant evidence to make a proper judgment. The court's assistance in facilitating the introduction of evidence should not be viewed as an indication of the weight, if any, the court will give that evidence." Goldschmidt, *supra* note 5, at 48–49.

283. See Rebecca A. Albrecht, John M. Greacen, Bonnie Rose Hough & Richard Zorza, *Judicial Techniques for Cases Involving Self-Represented Litigants*, JUDGES' J., Winter 2003, at 47.

284. Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315, 1315–16 (2021).

offering explanations on legal standards, court procedure, available remedies, and goal-oriented counseling.²⁸⁵ While the study concluded the extent of advocates' current role in many pro se courts is not "formally acknowledged or regulated by the bar," they are nonetheless "intimately embedded in the courts."²⁸⁶

Nonlawyer advocates could play a helpful role in increasing access to, understanding of, and belief in evidentiary procedure. For example, before a trial, an advocate might be available in the courtroom to offer pro se litigants information (though, under existing ethical standards, not legal advice)²⁸⁷ on the rules governing calling a witness, when they are permitted to argue their case, or what general limits there are on their ability to present evidence.

CONCLUSION

Evidence law does not accomplish its mission when it comes to pro se courts. The same could be said for many procedural regimes applicable to pro se cases. State courts across the country are rife with procedure that has been collected and retained over centuries. It is time for a much-needed update. This is not only true in evidence law but in many other codes of procedural rules and systems. Indeed, while this critique of evidentiary rules is focused on pro se courts, many of the inconsistencies and inefficiencies I have identified apply with equal force in other civil cases where parties are more frequently represented. Rule makers should consider where and how the rules of evidence might be improved in other contexts, as well.

A system-wide reevaluation of state civil courts is in order—one that explicitly contemplates fairness to the unrepresented litigants appearing by the millions in those courts. These complex processes must be reviewed with the lived experience of the people they affect in mind. Of course, rule reform cannot address the multitude of systemic injustices that contribute to, or sometimes cause, the disputes heard in pro se courts. The studies I hope state courts will embark upon, and the reforms that might come from them, may

285. *Id.* at 1331–35.

286. *Id.* at 1331.

287. See Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2581 (1999); see also Steinberg et al., *supra* note 284, at 1336 ("Advocates' counseling activities—especially when viewed as strategic expertise—raise important questions about the unauthorized practice of law and whether the advice/information distinction should be discarded.").

only be one step in the right direction—ultimately, we may come to see the adversarial trial as an inapt method to resolve important social problems. But as we continue on the journey of system reform, evidentiary reform will concretely improve the experience of litigants who navigate the court system and, thereby, improve public faith in the civil justice system.