

Evidentiary Rules for Administrative Hearings

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States often take an “all-or-nothing” approach to the rules of evidence: in some states, fact finders may consider all evidence (sometimes called “Free Proof”), while in others there is nearly complete adherence to the traditional evidentiary rules, typified by the Federal Rules of Evidence. Yet, as this Essay explores, both regimes are mismatched to the administrative context, where the procedural and pragmatic demands differ significantly from jury trials. Free Proof, while flexible, risks inconsistency and bias, while the traditional rules are overly rigid and inaccessible, particularly for pro se litigants.

This Essay proposes three principles for rethinking evidentiary rules in the administrative setting: (1) the rules should be relatively simple to ensure accessibility; (2) the rules should focus on legitimacy rather than accuracy because of the presence of an expert decision maker; and (3) the rules should target inference and reasoning rather than admissibility. These principles offer a framework for transforming evidentiary law in administrative contexts.

Using this framework, the Essay then offers actionable reform proposals in three key areas: hearsay, expert evidence, and proof rules. For example, it advocates for consolidating hearsay exceptions into a single discretionary standard, streamlining expert testimony evaluation through deference to expert communities, and codifying commonly used rules of inference.

By challenging the limits of traditional evidence law and reimagining its application in administrative hearings, this Essay aims to spark a broader dialogue on the adaptability of evidentiary frameworks. It invites scholars and practitioners to eschew a monolithic view of evidence law and instead to take a more context-sensitive approach.

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Introduction

Consider the following scenario: A nurse faces a licensing revocation hearing before Florida's Division of Administrative Hearings (DOAH). The licensing board offers a damning piece of evidence—an email from a coworker stating that the nurse smelled of alcohol and appeared intoxicated on the job. The coworker, however, is unavailable to testify. The nurse's attorney immediately objects, labeling the email as hearsay.¹ The administrative law judge (ALJ), however, swiftly overrules this objection, explaining that the formal rules of evidence do not apply in the DOAH.² Since the email is both relevant and material, it is admitted.³

Now consider a similar scenario in Tennessee, where the Tennessee Administrative Procedures Division (APD) adheres to the Tennessee Rules of Evidence.⁴ The Tennessee ALJ carefully considers the same email,

1. Under traditional evidence law, hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible unless it falls within an exception. *See* FED. R. EVID. 801–02.

2. In administrative hearings like those conducted by Florida's DOAH, standard rules of evidence, such as the Florida Evidence Code, do not apply as strictly as they do in courts of law. Instead, DOAH follows a more relaxed evidentiary framework under Section 120.569(2)(g) and Section 120.57 of the Florida Statutes, which govern administrative proceedings. *See* FLA. STAT. ANN. § 120.569(2)(g) (West 2025) (permitting the consideration of some evidence “whether or not such evidence would be admissible in a trial in the courts of Florida”); FLA. STAT. ANN. § 120.57(1)(c)–(d) (West 2025) (expanding eligibility of hearsay and similar acts as evidence).

3. *See* FLA. STAT. ANN. § 120.569(2)(g) (West 2025) (excluding only “[i]rrelevant, immaterial, or unduly repetitious evidence”).

4. Tennessee's approach to hearsay in administrative hearings differs from Florida's because the Tennessee APD adheres to the Tennessee Rules of Evidence. This adherence is outlined in the Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies, which state:

In any situation that arises that is not specifically addressed by these rules, reference may be made to the Tennessee Rules of Civil Procedure for guidance as to the proper procedure to follow when appropriate and to whatever extent will best serve the interests of justice and the speedy and inexpensive determination of the matter at hand.

TENN. COMP. R. & REGS. 1360-04-01-.01(3) (West 2024). While this provision directly references the Tennessee Rules of Civil Procedure, it also notes that established procedural rules, including the Tennessee Rules of Evidence, are applicable in administrative hearings to ensure fairness and justice. *But see* TENN. CODE ANN. § 4-5-313(1), which appears to place Tennessee closer to Florida's ostensibly “free proof” model. Compare *id.*, with FLA. STAT. § 120.569(2)(g). In practice, however, the two systems appear to diverge: based on our conversations with Tennessee ALJs, the Tennessee Rules of Evidence are often applied, particularly in workers' compensation hearings,

acknowledges it as hearsay, and evaluates whether it fits a recognized hearsay exception. It does not, and the judge excludes it.⁵

These two scenarios highlight that while administrative hearings⁶ are designed to deliver justice efficiently and fairly, the evidentiary rules that govern them vary dramatically across jurisdictions. In Florida, evidentiary discretion reigns supreme. ALJs have broad authority to determine both the admissibility and weight of evidence, consistent with the idea of “Free Proof.”⁷ In Tennessee, administrative proceedings are bound by the formal evidentiary rules, leaving little room for such discretion. The result is a dichotomy: nearly one-half of states’ administrative hearings operate under detailed and sophisticated codes of evidence akin to the Federal Rules of Evidence, while the other half largely eschew formal rules altogether.

This divide is not merely doctrinal. A survey conducted at the 2023 annual conference of the National Association of Administrative Law

whereas Florida ALJs generally do not apply traditional evidentiary rules in administrative proceedings. The difference thus seems to reflect local adjudicative culture as much as statutory text. *Cf.* FED. R. EVID. 706; *id.* 807 (both infrequently invoked in practice).

5. See TENN. R. EVID. 801(c) (defining hearsay); TENN. R. EVID. 803–04 (listing hearsay exceptions).

6. Administrative judges adjudicate a wide range of matters, including eligibility for public benefits, regulatory enforcement actions, licensing and permitting decisions, immigration and asylum claims, public employment disputes, and utility rate-setting cases. Administrative hearings in the United States vastly outnumber trials in federal and state courts. Federal agencies alone conduct millions of such hearings annually. The Social Security Administration, for example, issues over 500,000 hearing and appeal decisions each year, while the Board of Veterans’ Appeals issued 116,192 decisions in FY2024. *Hearings and Appeals*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/about_us.html [<https://perma.cc/P2U3-3JKM>]; BD. OF VETERANS’ APPEALS, DEPARTMENT OF VETERANS AFFAIRS, ANNUAL REPORT FISCAL YEAR (FY) 2024, at 6, https://department.va.gov/board-of-veterans-appeals/wp-content/uploads/sites/19/2025/04/2024_bva2024ar.pdf [<https://perma.cc/V3K6-MHCF>]. States also process significant administrative caseloads—Washington’s Office of Administrative Hearings conducted 36,676 hearings in 2020. LA DIV. OF ADMIN. L., LA. DEP’T OF STATE CIV. SERV., STRATEGIC PLAN FY 2023-2024 THROUGH FY 2027-2028, 20, https://www.adminlaw.la.gov/Documents/DAL_Strategic_Plan_July_01_2022.pdf [<https://perma.cc/3EPE-45LK>]. By comparison, trials are far less common: state courts held about 125,000 jury trials in 2019, and in 2018, only 1,879 federal criminal cases went to trial—just 2% of such cases. PAULA HANNAFORD-AGOR & MORGAN MOFFETT, NAT’L CTR. FOR STATE CTS., STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: VOLUME AND FREQUENCY OF JURY TRIALS IN STATE COURTS 3 (2023), <https://nationalcenterforstatecourts.app.box.com/s/j0fvqkpiuf1xv1ar7ofwevahg0iz3kox> [<https://perma.cc/4HHQ-ZFPV>]; John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Did Were Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/short-reads/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty> [<https://perma.cc/8T7G-EQWL>] (reporting on the rarity of federal criminal trials and conviction rates).

7. The common law doctrine of “Free Proof” refers to the principle that all relevant evidence is admissible in a legal proceeding, with minimal restrictions on its form or source. The doctrine emphasizes flexibility and accessibility of evidence, prioritizing the pursuit of truth over rigid rules. See *subpart I(A)* for a detailed analysis of the doctrine of “Free Proof.”

Judiciary (NAALJ) vividly underscores the discord. When asked, “Notwithstanding the rules of evidence, would you rather let parties present all available evidence in your courtroom (i.e., Free Proof)?,” 47% of participating ALJs responded “Yes,” while 53% responded “No.”⁸ The survey reveals a judiciary divided on the question of whether rigid and complex evidentiary rules or broad discretion better serve the unique demands of administrative adjudication.

This “all-or-nothing” approach to evidentiary rules in administrative hearings raises critical questions for scholars, practitioners, and policymakers alike. Neither model appears to truly meet the needs of administrative proceedings. What are their respective strengths and weaknesses? And might we be able to find a middle ground, a special set of evidentiary rules targeted to the unique demands of administrative hearings? What might these rules look like? Notably, legal scholarship on these practical and important issues is surprisingly sparse.⁹

This Essay addresses these pressing questions. Part I begins by examining the polar-opposite evidentiary regimes that dominate administrative hearings today: the Free Proof system and the application of traditional evidentiary rules. These two frameworks offer starkly different approaches to the admission and evaluation of evidence. The Free Proof model, which grants judges broad discretion to admit and weigh evidence, is celebrated for its flexibility and efficiency, particularly in bench trials. Yet, it has also drawn criticism for fostering inconsistency, unpredictability, and inaccuracy in decision-making. By contrast, the application of traditional evidentiary rules provides structure and predictability but often proves overly rigid and needlessly complex for administrative hearings.

8. Henry Zhuhao Wang & Edward K. Cheng, NAALJ Survey (Sep. 15, 2023) (unpublished survey) (on file with the *Texas Law Review*).

9. The most notable scholarly work on this topic dates back more than half a century. See generally Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942) (discussing tentative principles for the use of evidence in administrative procedure); Kenneth Culp Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A. J. 723 (1964) [hereinafter Davis, *Rules of Evidence*] (arguing that evidence rules are needed for the 97% of trials without juries). For more recent related work exploring alternative evidentiary rules tailored for nonjury proceedings, see generally Henry Zhuhao Wang, *Rethinking Evidentiary Rules in an Age of Bench Trials*, 13 U.C. IRVINE L. REV. 263 (2022) [hereinafter Wang, *Rethinking*] (noting the growing dominance of nonjury adjudication and questioning whether existing evidentiary regimes adequately serve bench-based decisionmaking); see Henry Zhuhao Wang, *Alternative Evidence Rules for Arbitration*, 24 NEV. L.J. 73 (2023) [hereinafter Wang, *Alternative Evidence Rules*] (discussing whether evidence rules are needed for arbitration). See also Henry Zhuhao Wang, *One Size Does Not Fit All: Alternatives to the Federal Rules of Evidence*, 76 VAND. L. REV. 1709, 1711–12 (2023) [hereinafter Wang, *One Size*] (explaining the limited nature of the Federal Rules).

Part I continues by exploring the origins, theoretical underpinnings, and practical consequences of both regimes. It reveals that administrative hearings are caught between these two paradigms, with neither one providing an ideal fit. Surprisingly, despite the clear need, a tailored set of evidentiary rules to address this “Goldilocks” problem has yet to emerge. This unresolved tension informs the discussions and reform proposals presented in the subsequent Parts.

Part II explores three principles that can guide alternative conceptual approaches to regulating evidence in administrative hearings. First is to focus on simplifying the rules. This modest goal is likely the easiest and most practical principle to implement. Second is to consider refocusing the basis of the evidentiary rules away from accuracy and toward legitimacy. While evidence rules are normally about jury control and improving jury accuracy, administrative hearings rely on judges as expert fact finders, considerably reducing the need for accuracy-focused rules. Instead, evidentiary rules in the administrative context should be aimed at preserving fairness and addressing legitimacy concerns, ensuring that judgments in administrative cases are perceived as fair and non-arbitrary, and thus acceptable to litigants. Third is to move away from admissibility or the “screening” of evidence and toward inference rules. Since the administrative judge is both the screen and the ultimate fact finder, screening makes little conceptual (or psychological) sense. Instead, we should consider providing guidelines to judges on how to weigh evidence and how to determine sufficiency.

Each of these approaches offers a separate perspective on how we might construct evidentiary rules that are better aligned with administrative adjudication. Building on these conceptual insights, Part III explores specific rule proposals in three critical areas of evidentiary practice: hearsay, expert evidence, and proof rules. These proposals are also guided by three overarching goals: making rules intuitive for pro se litigants, tailoring them to the bench-trial nature of administrative hearings, and anchoring them in insights from modern social science research.

Part III lays out several proposed rules: two on hearsay, three on expert evidence, and four on proof rules. The alternative hearsay rules are aimed at simplifying the traditional hearsay admissibility framework, whether by replacing its panoply of exceptions with a discretionary standard, or by redefining hearsay to focus on testimonial statements, which also addresses the legitimacy concern of admitting hearsay. The proposed rules for expert evidence challenge the usefulness of the *Daubert* standard in administrative contexts. These alternative frameworks call for simplified qualification tests, court-appointed experts, or deference to the expert community. And finally, under the umbrella of proof rules, we explore the transformative potential of two “folk rules” derived from everyday life (the receipt rule and the “pics or

it didn't happen" rule) and two rebuttable presumptions rooted in case law (the mailbox rule and the presumption of ownership). Adopting these four proof rules could enhance the clarity, efficiency, and consistency of administrative hearings.

Finally, Part IV recognizes that not all aspects of the traditional evidentiary rules require modification for the administrative context. Privilege rules, for example, should remain consistent across forums, as they transcend context and serve broader societal interests. Maintaining uniformity in these rules also ensures predictability and fairness while avoiding harmful fragmentation in evidentiary law.

By treating evidence law as more than an all-or-nothing proposition, this Essay hopes to spark a much-needed dialogue about the future of evidentiary rules in administrative hearings. It provides a starting point for thinking about evidence law in diverse contexts and charts potential pathways for crafting rules that are more sensitive to their settings.¹⁰

I. Current Situation: The Two Evidentiary Regimes in Administrative Hearings

In state administrative courts today, two primary approaches govern the presentation of evidence: the "Free Proof" model and the application of traditional evidentiary rules. The Free Proof model, prevalent in many states, affords judges broad discretion to admit virtually all forms of evidence, relying on their judicial expertise and common sense to assess its relevance and weight. This approach is lauded for its flexibility and efficiency, particularly since in a bench trial, the judge serves as both the gatekeeper and the fact finder. Nevertheless, Free Proof has faced criticism for its susceptibility to inconsistency, unpredictability, and inaccuracy. Conversely, many other states simply apply the traditional rules of evidence, which provide more structure and predictability but are often overly complex and ill-suited for administrative hearings. As a result, administrative courts find themselves navigating between these two evidentiary poles, each with its own set of challenges and limitations.

A. *Option 1: Free Proof*

Traditionally, most administrative hearings operated without rules of evidence, a condition often labeled as "Free Proof."¹¹ For example, in

10. If we implemented some of these reforms in the administrative setting, we would accumulate experience that in turn could be used to reform the evidentiary rules in judicial proceedings, especially given the dominance of bench trials.

11. Supporters of Free Proof believe that judges' inferences based on evidentiary sources should not be governed by the law. The "[v]alidity of these inferences is a matter of evidential

California’s workers’ compensation courts, 12 violations of the rules of evidence are not grounds for invalidating decisions.¹³ In Florida’s administrative hearings, “[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, *whether or not such evidence would be admissible in a trial in the courts of Florida.*”¹⁴ Administrative courts in New York, Texas, and Pennsylvania also follow this route of Free Proof.¹⁵

1. *The Allure of Free Proof.*—Initially conceptualized by Jeremy Bentham, the idea of Free Proof has been profoundly influential for almost two centuries in Anglo-American legal systems.¹⁶ In nonjury proceedings like administrative hearings, evidentiary objections are often met with the judge’s

relevancy and weight, as determined by common sense, logic, and [the] general experience [of the trier-of-fact].” Alex Stein, *Against “Free Proof”*, 31 ISR. L. REV. 573, 574–75, 580 (1997) (describing supporters’ rationale for “Free Proof,” then critiquing the “[e]vidential discretion” provided by the Free Proof approach as “dangerous to the liberal-democratic values”); *see also* Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 167–69 (2006) (critiquing arguments from scholars including Jeremy Bentham that evidence law should use common sense as ordinary people do); Wang, *Rethinking*, *supra* note 9, at 285 (“Free Proof stands in contrast to the legal regulation of judicial fact-finding and endorses applying ordinary epistemology to legal matters.”).

12. Workers’ compensation courts handle disputes related to workers’ compensation claims, which fall under the broader umbrella of administrative law. Workers’ compensation courts are often specialized tribunals or administrative bodies that resolve disputes between employees, employers, and insurance companies regarding benefits and compensation for workplace injuries or illnesses.

13. ANN. CAL. LAB. CODE § 5709 (West 2025). California provides no material limits on what forms of evidence may be admitted in such hearings:

No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division. No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure.

Id.

14. FLA. STAT. ANN. § 120.569(2)(g) (West 2025) (emphasis added).

15. For example, New York provides that “[t]he strict rules of evidence do not apply with respect to administrative adjudicatory proceedings.” N.Y. COMP. CODES R. & REGS. tit. 19, § 400.8(a) (2021). Texas simply states that “the Texas Rules of Evidence do not apply [to administrative hearings].” 1 TEX. ADMIN. CODE § 165.21(b) (2025) (State Off. Admin. Hearings, Hearing). Similarly, Pennsylvania provides that in such administrative hearings, “Judges or Stewards shall allow a full presentation of evidence and are not bound by the technical rules of evidence.” 7 PA. CODE § 179.32 (2026).

16. *See* 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 4 (John S. Mill ed., London, Hunt & Clarke 1827) (proposing that evidentiary rules are “repugnant to the ends of justice”).

response: “I’ll let it in and just give it the weight it deserves.”¹⁷ Free Proof has also flourished in most European continental law countries,¹⁸ where trial judges are the triers of fact and evidentiary rules are scarce.¹⁹

Why does the idea of Free Proof have such enduring and broad popularity? One reason is that it seems to be the most natural way of fact-finding.²⁰ Few people want to have evidence hidden from them. As Frederick Schauer states, based on the doctrine of Free Proof,

courts would proceed just as ordinary people proceeded when using their common sense to make everyday factual determinations. In making ordinary nonjudicial factual determinations, people do not . . . make use of artificial rules of exclusion or need special rules of corroboration for entire classes of events. And thus there [is] no justification for the law to do otherwise.²¹

Rules of evidence intrude on the natural process of human cognition.²² For instance, two major categories of exclusionary rules under the Federal Rules of Evidence govern character evidence and hearsay.²³ Yet, individuals routinely consider character assessments and hearsay in their everyday

17. Schauer, *supra* note 11, at 165–66; *see also* Liana Gioia & Per Ramfjord, Note, *Reforming At-Will Employment Law: A Model Statute*, 16 U. MICH. J.L. REFORM 389, 426 (1983) (“[J]udges presiding at non-jury trials often admit evidence indiscriminately, ruling on weight and relevance only after all the facts have been presented.” (footnote omitted)).

18. For a discussion on how judges moved away from rigid evidentiary rules, *see* Mirjan Damaška, *Free Proof and Its Detractors*, 43 AM. J. COMPAR. L. 343, 343 (1995) [hereinafter Damaška, *Free Proof*] (“[C]ontinental views on free proof evolved against the background of criticism of *ancien régime*’s evidence law at the time of the French Revolution.”); *see also* MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 20–21, 28 (1997) [hereinafter DAMAŠKA, EVIDENCE LAW ADRIFT] (discussing the rejection of “Roman-canon law of proof” during the French revolution).

19. *See* Wang, *Rethinking*, *supra* note 9, at 287 (“The rules that do exist in European continental law countries—burdens and standards of proof, and provisions for the presentation of proof to promote an efficient and fair trial—are categorized as belonging to the law of procedure rather than to evidence law.”).

20. *See* 5 BENTHAM, *supra* note 16, at 110 (asserting that the natural system is comprised of suitor, advocate, and judge). Note: Bentham was using this triad to illustrate his broader reformist thesis that justice requires returning to a “natural” arrangement of roles—suitor (the party), advocate, and judge—without the artificial intermediaries and exclusionary rules imposed by technical procedure.

21. Schauer, *supra* note 11, at 169 (footnote omitted).

22. *See* Ronald J. Allen & Michael S. Pardo, *Relative Plausibility and Its Critics*, 23 INT’L. J. EVID. & PROOF 5, 44 (2019) (noting that jurors will still be subjective even when instructed to be rational); Ronald J. Allen et al., *Minimal Rationality and the Law of Evidence*, 115 J. CRIM. L. & CRIMINOLOGY 269, 271 (2025) (“[T]he law of evidence pursues minimal, not maximal, rationality, and leaves it to the adversarial process to produce accurate (or inaccurate) results.” (footnote omitted)).

23. *See* FED. R. EVID. 404(a)(1) (listing the “Prohibited Uses” of character evidence); FED. R. EVID. 802 (“The Rule Against Hearsay”). *But see* FED. R. EVID. 404(a)(2)–(3) (listing the exceptions to the character evidence exclusion); FED. R. EVID. 803 (listing exceptions to the hearsay exclusion).

decision-making processes.²⁴ These evidentiary rules thus seem technical, counterintuitive, and artificial.²⁵

Another reason for Free Proof's popularity is that expert decision-makers like administrative judges presumably already know how to weigh evidence. They are unlike lay jurors, who are unfamiliar with legal decision-making and perhaps need rules of evidence for guidance.²⁶ For Bentham and many of his academic followers, and for many members of the trial bench, "there are distinctions that can be understood and drawn by some people [i.e., judges] under some conditions that are not distinctions that *other* people [i.e., lay jurors] can reasonably be expected to understand, internalize, and apply."²⁷ According to this logic, evidentiary rules are for non-experts only.

2. *Concerns Raised by Free Proof.*—Free Proof, however, is not yet close to winning the day. First, judges have cognitive limitations as well. James Steiner-Dillon, for example, has criticized overly rosy views of judges' "epistemic exceptionalism."²⁸ As Jerome Frank observed, "[w]hen all is said and done, we must face the fact that judges are human."²⁹ All humans, including trial judges, make cognitive mistakes. We are not as rational as we think, even

24. For instance, in the context of school or job applications, institutions or employers frequently request letters of recommendation or a list of references from the applicant. These references constitute a form of character evidence. Similarly, much of the knowledge acquired by individuals—whether from formal education or through reading—falls under the broad category of hearsay, as it is information learned from the statements of others rather than firsthand experience. See Hillel J. Bavli, *Character Evidence as a Conduit for Implicit Bias*, 56 U.C. DAVIS L. REV. 1019, 1030 (2023) ("[W]e undoubtedly rely on such consistency [in an individual's behavior] in everyday life."); Peter Miene, Roger C. Park & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 685 (1992) ("[E]veryday experiences make people aware of potential problems with hearsay and . . . people can accurately process this type of information.").

25. See Wang, *Rethinking*, *supra* note 9, at 288.

26. Conventional wisdom holds that evidence law is inextricably intertwined with the jury trial. In the late nineteenth century, James Bradley Thayer, the great American evidence scholar, described the law of evidence as "the child of the jury system." See JAMES BRADLEY THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 266, 509 (1898) ("[O]ur law of evidence is a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system . . . where ordinary, untrained citizens are acting as judges of fact.").

27. Schauer, *supra* note 11, at 183–84 (footnote omitted).

28. James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207, 209 (2019).

29. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 410 (1950).

when we are trying. Evidence rules might therefore help. In recent years, more and more studies have confirmed this suspicion. A seminal article by Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich notes that judges “appear to be just as susceptible as other decision makers [to three cognitive illusions]: anchoring, hindsight bias, and egocentric bias.”³⁰

Second, there are concerns about consistency and transparency under a Free Proof regime. Consistency in judicial decision-making is a cornerstone of fairness, justice, and the rule of law. If judges were allowed to engage in Free Proof, the potential for inconsistency between judges’ decisions—or even variability in the decisions of the same judge over time—would increase significantly.³¹ Variability in decision-making can erode public confidence in the judicial system, as similar cases may receive different outcomes based on a judge’s mood, background, or subconscious biases. Free Proof also carries the problem of nontransparency, which may cause issues like unpredictability and difficulties for those preparing for trial or estimating settlement values.³²

A famous example of inconsistency and opacity in discretionary judicial decision-making is the “hungry judge effect.” Shai Danziger and colleagues found that Israeli judges were more likely to give favorable rulings at the beginning of the day (around 65%), with the likelihood dropping to almost zero before their lunch break and then increasing again to around 65% after lunch.³³ This phenomenon underscores the risk of variability in discretionary

30. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORN. L. REV. 777, 784, 816 (2001). See also JOHN JACKSON & SEAN DORAN, JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM 242 (1995) (“[T]here was a view among counsel [in an empirical study conducted in Northern Ireland] that, once the trial proper began, judges tended to get the feel of the case *sooner* than a jury and formed a view fairly quickly.”) (emphasis added).

31. See Maggie Wittlin, *Binding Hercules: A Proposal for Bench Trials*, 76 VAND. L. REV. 1735, 1741 (2023) (noting that judges “exhibit[] many of the same cognitive biases as laypeople”).

32. Andrew C. Budzinski, *Overhauling Rules of Evidence in Pro Se Courts*, 56 U. RICH. L. REV. 1075, 1077 (2022) (arguing that the nontransparency of evidentiary rules is a barrier to justice for litigants).

33. Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PNAS. 6889, 6890 (2011). Although this study has been widely cited, it remains controversial, with ongoing debates about its scientific rigor and the reliability of its conclusions. See, e.g., Andreas Glöckner, *The Irrational Hungry Judge Effect Revisited: Simulations Reveal that the Magnitude of the Effect Is Overestimated*, 11 JUDGMENT & DECISION MAKING 601, 607 (2016) (showing that the observed influence of order can be alternatively explained by a statistical artifact resulting from favorable rulings taking longer than unfavorable ones).

judicial decisions due to extraneous factors, with even minor shifts in a judge's state of mind having a substantial impact on case outcomes.

Third, Free Proof does not provide guidance on challenging issues. In a Free Proof system, judges must rely on their own experience and common sense, which can lead to flawed assessments of evidence when dealing with contentious or highly technical areas—precisely where the stakes are often high and the potential for misjudgment is significant.³⁴ For example, a judge following Free Proof is essentially left to his or her own devices regarding expert evidence, which will involve specialized knowledge outside the judge's area of expertise.³⁵ The lack of clear evidentiary guidance also complicates the parties' ability to accurately assess the strengths and weaknesses of their cases, making settlements harder to achieve.³⁶

34. See Maggie Wittlin, *Hindsight Evidence*, 116 COLUM. L. REV. 1323, 1362 (2016) (noting that “[j]udges are only human”).

35. See Joseph Sanders, Michael J. Saks & N.J. Schweitzer, *Trial Factfinders and Expert Evidence*, in 1 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 3:1 (David L. Faigman et al. eds., 2024) (describing the paradox of judges making admissibility determinations outside their fields of expertise).

36. In judicial proceedings, this uncertainty is especially problematic given the small fraction of cases that proceed to trial. Even a minor decline in settlement rates due to uncertainty can substantially strain judicial resources. If settlements are similarly common in administrative proceedings—and available data indicates they frequently are—the absence of structured evidentiary guidelines could likewise impede settlement efficiency, significantly affecting the overall effectiveness of administrative adjudication. See, e.g., U.S. MERIT SYS. PROT. BD., *ANNUAL REPORT FOR FY 2014*, at 25 tbl. 3, https://www.mspb.gov/about/annual_reports/MSPB_FY_2014_Annual_Report_1179694.pdf [<https://perma.cc/KJL6-BDGD>] (noting that in fiscal year 2014, approximately 10% of non-dismissed MSPB cases settled before hearing); *Administrative Litigation*, FED. ENERGY REGUL. COMM'N, <https://www.ferc.gov/administrative-litigation-0> [<https://perma.cc/3J8Z-34DD>] (explaining FERC's practice of encouraging settlements through administrative law judges acting as mediators).

B. Option 2: Traditional Rules of Evidence

One response to these concerns is, of course, to impose traditional rules of evidence on administrative hearings. Some states have done exactly that, including Alabama,³⁷ Colorado,³⁸ Georgia,³⁹ Montana,⁴⁰ Rhode Island,⁴¹ and Tennessee.⁴²

Evidentiary rules, by imposing a structured decision-making process that judges must follow, can enhance consistency and transparency and thereby—so the argument goes—contribute to fairness and the rule of law. Rules like the Federal Rules of Evidence also provide guidance to judges evaluating complex evidence by offering clear criteria for admissibility. These criteria ensure that only relevant, reliable, and properly vetted information is considered in the decision-making process.⁴³

The problem with imposing the traditional rules of evidence (even if modified) in the administrative hearing setting is that they are fundamentally a poor fit. First, administrative hearings are bench trials, whereas the

37. See ALA. CODE § 41-22-13 (2026) (noting that the rules of evidence applied in nonjury civil cases in state circuit courts generally apply in administrative hearings but allowing for more evidentiary latitude); see also TERRY A. MOORE, 2 ALA. WORKERS' COMP. § 25:7 (2d ed.) (2025) (“[T]he rules of evidence generally applicable to civil actions operate equally in workers’ compensation cases.”).

38. See COLO. REV. STAT. ANN. § 24-4-105(7) (West 2025) (“The rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil nonjury cases in the district courts.”); see also COLO. REV. STAT. ANN. § 8-43-210 (West 2025) (“Notwithstanding section 24-4-105, C.R.S., the Colorado rules of evidence and requirements of proof for civil nonjury cases in the district courts shall apply in all [workers’ compensation] hearings.”).

39. GA. CODE ANN. § 34-9-102(e)(1) (West 2025) (“The rules of evidence pertaining to the trial of civil nonjury cases in the superior courts of Georgia shall be followed unless otherwise provided in this chapter.”).

40. MONT. CODE ANN. § 2-4-612(2) (West 2025) (“Except as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence.”); see also MONT. CODE ANN. § 39-71-2903 (West 2025) (“The workers’ compensation judge is bound by common law and statutory rules of evidence.”).

41. 42 R.I. GEN. LAWS ANN. § 42-35-10(1) (West 2025) (“The rules of evidence as applied in civil cases in the superior courts of this state shall be followed”); see also R.I. WORKERS’ COMP. CT., R. PRAC. 2.21 (2025) (“The testimony of all parties and witnesses before a judge shall be given under oath or affirmation and governed by the Rhode Island Rules of Evidence except as modified by these Rules.”).

42. For a discussion on Tennessee’s rule, see TENN. COMP. R. & REGS. 1360-04-01-.01(3) (West 2024). As mentioned in note 4, this provision references the Tennessee Rules of Civil Procedure but also establishes that Tennessee Rules of Evidence are applicable in administrative hearings to ensure fairness and justice. See also TENN. CODE ANN. § 50-6-239(c)(1) (West 2025) (“The Tennessee Rules of Evidence and the Tennessee Rules of Civil Procedure shall govern proceedings at all hearings before a workers’ compensation judge unless an alternate procedural or evidentiary rule has been adopted by the administrator.”).

43. See, e.g., FED. R. EVID. 702 (outlining the four-part test to determine whether an expert witness may testify).

traditional evidence rules are targeted at jury trials.⁴⁴ Admissibility rules presume a bifurcated system with a gatekeeper (the judge), who screens the evidence, and a fact finder (the jury), which weighs only the screened evidence. In an administrative hearing, the judge awkwardly occupies both gatekeeper and fact finder roles, making admissibility rules somewhat superfluous. Logically, “[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.”⁴⁵ Psychological studies further indicate that humans have trouble “unringing the bell” after hearing inadmissible evidence.⁴⁶ A fused gatekeeper-factfinder situation thus ideally requires a different approach.

Second, traditional rules of evidence are complex, a design reflective of their intended use by trained legal professionals rather than laypersons.⁴⁷ The rules meticulously balance the interests of fairness, reliability, and efficiency within the adversarial process.⁴⁸ However, in many administrative hearings, such as workers’ compensation or Social Security disability hearings, a significant number of claimants represent themselves pro se, often without any formal legal training.⁴⁹ The intricate nature of evidentiary rules, including the nuances of hearsay, relevance, and privilege, becomes a formidable challenge for these self-represented litigants.⁵⁰ This creates a barrier to access justice, as claimants may be unable to adequately present their cases due to unfamiliarity with the evidentiary rules.⁵¹ The situation also

44. See generally Wang, *One Size*, *supra* note 9 (comparing jury trials, for which the Federal Rules of Evidence were designed, to bench trials, where evidentiary rules are anomalous).

45. *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005).

46. See, e.g., Daniel M. Wegner, *Ironic Processes of Mental Control*, 101 PSYCH. REV. 34, 34 (1994) (describing the human phenomenon wherein attempting to change one’s mind about an event or concept ingrains said concept).

47. See Budzinski, *supra* note 32, at 1076 (“The American civil court is designed for two competing adversaries to face off against one another.”).

48. See Baosheng Zhang & Chuanming Fan, *The Value Basis of Evidence Rules*, in VALUES OF OUR TIMES 249, 262 (Deshun Li ed., 2013) (“The theoretical system of evidence law should reflect those fundamental justifications behind evidentiary rules, which are four values: accuracy, justice, harmony and efficiency, as four value-backbones.”).

49. See generally Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of Pro Se Status*, 42 LAW & SOC. INQUIRY 1091 (2017) (discussing how millions of middle-income Americans fare poorly in pro se proceedings); *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, UNITED STATES CTS. (Feb. 11, 2021), <https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019> [<https://perma.cc/F37C-9P25>] (highlighting trends in federal pro se cases).

50. See Budzinski, *supra* note 32, at 1086 (describing how pro se litigants inadequately present or object to evidence, causing judges to exclude potentially reliable evidence or admit unreliable evidence).

51. *Id.* at 1081 (“[P]ro 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.”).

imposes an administrative burden on judges, who must navigate the tension between upholding legal standards, maintaining neutrality and passivity, and ensuring a fair hearing for individuals unskilled in legal procedure.⁵² As a result, the complexity of traditional evidentiary rules in such contexts may exacerbate inequalities and undermine the very objectives these rules are intended to protect.

Administrative hearings therefore face something of a “Goldilocks” problem. The traditional rules of evidence are too strict, while abandoning the rules (adopting “Free Proof”) is too lax. Is there some practical middle ground? Could we tailor a set of evidentiary rules for the administrative hearing context? If so, what would those rules look like? The following two Parts of this Essay are dedicated to exploring and addressing these critical questions.

II. Alternative Conceptual Approaches

To develop evidentiary rules for administrative hearings, we need to escape the binary choice between Free Proof and the traditional evidence rules.⁵³ The central challenge is to craft an alternative framework that balances the many competing concerns in the administrative context. Notably, no nationally recognized set of customized evidentiary rules currently governs administrative hearings.

Despite the challenge, the administrative context is a promising venue for evidentiary reform. Unlike trial courts, which are constrained by tradition and institutional inertia, administrative tribunals are less formal, more varied, and potentially more open to innovation. Moreover, the diversity, flexibility, and limited jurisdiction of administrative tribunals make them ideal laboratories for experimentation. This Part elaborates on three approaches for guiding this reform effort: simplifying the rules, refocusing the rules around legitimacy, and implementing inference-based rules.

52. See Cynthia Gray, *Self-Represented Litigants and the Code of Judicial Conduct*, NAT'L CTR. FOR STATE CTS., CTR. FOR JUD. ETHICS (June 18, 2019), <https://ncscjudicialethicsblog.org/2019/06/18/self-represented-litigants-and-the-code-of-judicial-conduct/> [<https://perma.cc/3C6R-GPDB>] (discussing Indiana's judicial accommodation for pro se litigants); Carl Aveni, *The Perils of Dealing with Pro Se Litigants*, ABA (Oct. 24, 2023), <https://www.americanbar.org/groups/litigation/resources/litigation-news/2023/fall/the-perils-dealing-pro-se-litigants> [<https://perma.cc/M9WR-8SFC>] (explaining courts' tension in maintaining uniformity and consistency in legal proceedings and the preference for resolving cases on their merits rather than due to litigants' procedural mistakes).

53. See RICHARD A. POSNER, *REFLECTIONS ON JUDGING* 140 (2013) (criticizing the assumption that the adversarial trial process and formal rules of evidence reliably produce accurate fact-finding, and emphasizing the pervasive risk of error even under conventional evidentiary safeguards); see also Davis, *Rules of Evidence*, *supra* note 9, at 725 (“The most important aspect of a new approach should be escape from the deep-seated habit of allowing all thinking about evidence law to be dominated by the needs of the 3 per cent of trials that involve juries.”).

A. Approach 1: Simplifying the Rules

The first approach—simplifying evidentiary rules in administrative hearings—provides the most straightforward middle ground between the extremes of Free Proof and the traditional evidentiary rules. It is modest, practical, and should be relatively easy to implement. Moreover, this approach acknowledges the expertise of administrative judges as fact finders, freeing them from overly technical exclusionary rules and empowering them to focus on the substantive merits of each case. Because simplified rules foster procedural fairness and accessibility, they would also ensure that pro se litigants can effectively present evidence despite lacking legal expertise. Conveniently, regulatory authority often already empowers administrative courts to adopt such simplifying changes.⁵⁴

1. Feasibility and Practicality of Simplification.—Simplification’s practicality lies in its modest approach. Rather than overhauling the entire evidence framework, one can just streamline the existing rules. This approach retains the familiar principles and concepts of the existing evidence regime and thus avoids the confusion and resistance that might accompany more radical changes.

Simplification also aligns with practices that ALJs have already adopted informally.⁵⁵ For example, in high-volume or pro-se-heavy contexts, ALJs may benefit from simplified evidentiary rules to promote efficiency and fairness.⁵⁶ These organic adaptations demonstrate that such changes are both intuitive and functional, making simplification the most feasible and practical pathway for reforming evidentiary rules in the administrative context.

2. Alignment of the Evidentiary Rules with the Nature of Administrative Hearings.—As previously discussed, unlike lay jurors, ALJs are experienced fact finders with expertise in decision-making. They therefore should be able to evaluate the reliability and probative value of evidence without stringent rules designed to guide and protect against wayward lay decision makers.⁵⁷ That said,

54. See, e.g., 29 C.F.R. § 18.104(a) (2026) (“[T]he admissibility of evidence shall be determined by the judge . . . [who is] not bound by the rules of evidence . . .”).

55. See, e.g., *Fla. Indus. Power Users Grp. v. Graham*, 209 So. 3d 1142, 1145 (Fla. 2017) (holding that Florida’s Administrative Procedure Act governs administrative proceedings, though agencies may still exercise discretion with the evidence rules).

56. See, e.g., Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEXAS L. REV. 1097, 1098–99 (2018) (noting that administrative law judges at the Social Security Administration adjudicated over 629,000 disability claims in 2013, worsening the quality of adjudication).

57. See *supra* notes 26–27 and accompanying text (offering ALJ’s experience in decision-making as support for Free Proof); see also John H. Wigmore, *Administrative Boards and Commissions: Are the Jury-Trial Rules of Evidence in Force for Their Inquiries?*, 17 ILL. L. REV.

the expertise of ALJs does not entirely shield them from cognitive biases or epistemic pitfalls.⁵⁸ Simplified evidentiary rules can navigate this tension by allowing ALJs to focus on substantive issues like the weight and sufficiency of evidence, rather than technicalities, while still providing basic safeguards against unreliable evidence.

Simplified rules also promote efficiency and accessibility, both of which are core objectives of administrative hearings.⁵⁹ Simplified evidentiary rules reduce procedural complexity and make the process more user-friendly. The complexity of traditional evidentiary rules hinders the ability of pro se litigants to present cases effectively and navigate procedural requirements.⁶⁰ The resulting struggles consume court time and ultimately create a lack of uniformity, as judges must struggle to uphold the rules while attempting to be fair to unrepresented litigants.⁶¹ Simplified evidentiary rules strike a useful balance. They maintain a predictable, rule-based structure while still ensuring that all participants, regardless of legal expertise, have a meaningful opportunity to be heard.

3. Statutory Basis for Simplifying Evidentiary Rules.—Statutory provisions in several states provide a ready mechanism for simplifying evidentiary rules in administrative hearings.⁶² Tennessee’s workers’ compensation framework serves as a notable example of this approach. The governing statute explicitly permits deviations from the traditional evidentiary rules, granting administrators the discretion to adopt alternative standards: “The

263, 263 (1922) (“Historically, the rules of Evidence familiar to Anglo-American lawyers were a direct growth out of trial by jury.”).

58. See *supra* notes 28–30 and accompanying text (discussing concerns raised by Free Proof); see also Guthrie, Rachlinski & Wistrich, *supra* note 30, at 784, 816 (showing that judges are susceptible to cognitive illusions).

59. See Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California’s New Administrative Procedure Act*, 32 TULSA L.J. 297, 301, 320–321 (1996) (noting that informal administrative hearings prioritize economic efficiency and informality).

60. See *supra* notes 34–36 and accompanying text (discussing the complexities of traditional evidentiary rules); see also Budzinski, *supra* note 32, at 1081 (arguing that the procedural jargon of evidentiary rules runs afoul to its “animating purpose: ensuring fairness . . .”).

61. See Budzinski, *supra* note 32, at 1077 (“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.”).

62. For example, under the California Administrative Procedure Act, agencies are not bound by the technical rules of evidence observed in courts. The Act allows for the admission of evidence commonly relied on by responsible persons in the conduct of serious affairs, thereby simplifying the evidentiary process in administrative hearings. CAL. ADMIN. PROC. ACT, CAL. GOV’T CODE § 11513(c) (2026). In Texas, the Administrative Procedure Act permits the admission of evidence that is necessary for a full and fair disclosure of the facts. While “irrelevant, immaterial, or unduly repetitious evidence” must be excluded, the Act provides flexibility by allowing admission of evidence that is commonly relied on by reasonably prudent individuals in the conduct of their affairs. TEX. GOV’T CODE ANN. §§ 2001.081–.082 (West 2025).

Tennessee Rules of Evidence and the Tennessee Rules of Civil Procedure shall govern proceedings at all hearings before a workers' compensation judge *unless an alternate procedural or evidentiary rule* has been adopted by the administrator.”⁶³ This statutory flexibility demonstrates that simplifying evidentiary rules in administrative hearings is not only feasible but also supported and envisioned by the underlying legislative frameworks. It provides a clear legal basis for tailoring evidentiary rules to administrative proceedings.

4. *A Demonstration: Simplifying the Traditional Hearsay Rules.*—Perhaps the most obvious starting place for simplification in administrative hearings is the hearsay rule.⁶⁴ Conversations with ALJs reveal that hearsay causes unnecessary complexity and confusion, particularly for pro se litigants.⁶⁵

Hearsay doctrine, designed primarily to protect lay jurors from being misled by unreliable evidence, is notoriously difficult to define and apply. Hearsay hinges on the unintuitive concept of “the truth of the matter asserted,” and it also features a vast array of exceptions.⁶⁶ Even experienced attorneys struggle to parse its intricacies, leaving pro se participants particularly vulnerable.⁶⁷ These costs and challenges raise the question whether such complex hearsay rules are needed in administrative proceedings, especially when the fact finders are ALJs and not jurors.

Simplifying the hearsay rule could take several forms. One bold approach would be to eliminate the hearsay rule in administrative hearings altogether, thereby acknowledging the expertise of administrative judges, who are well-equipped to assess the weight and trustworthiness of hearsay without rigid exclusionary rules.⁶⁸ This option, however, would not provide any safeguard against the admission of unreliable hearsay. Recall again that

63. TENN. CODE ANN. § 50-6-239(c)(1) (West 2025) (emphasis added).

64. See generally Susan E. Provenzano, *Questioning Hearsay's Formalism*, 76 FLA L. REV. 913 (2024) (arguing that formalistic hearsay rules are harmful).

65. This conclusion is once again based on our survey of administrative judges at the 2023 NAALJ conference. Wang & Cheng, *supra* note 8. We posed the question: “If there were one way to change the evidence rules in your administrative hearings, what would it be?” Nearly 40% of respondents who wished to change something proposed a hearsay-related change, with others suggesting changes relating to consistency or pro se litigants.

66. See generally Richard A. Lloret, *Assertion and Hearsay*, 125 PENN. ST. [DICK.] L. REV. 347 (2021) (exploring “assertion” and its influence on the concept of hearsay); Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEXAS L. REV. 49 (1982) (arguing that the current definition of hearsay is overly broad and needs clarification).

67. See Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 799 (1992) (“There are numerous exclusions from the definition of hearsay, twenty-seven formal exceptions, and two provisions explicitly encouraging the ad hoc creation of exceptions . . . the dynamic is one of ever-increasing scope for the exceptions.” (footnotes omitted)).

68. See *supra* section I(A)(1) (describing the allure of Free Proof).

training and experience do not wholly insulate judges from the cognitive and epistemic mistakes that affect all decision makers.⁶⁹

If eliminating the hearsay rule is too drastic, an alternative would be to simplify the definition of hearsay. Traditionally, hearsay has been defined as an out-of-court statement offered to prove the truth of the matter asserted.⁷⁰ Terms like “asserted” require precise distinctions about the communicative intent of the declarant,⁷¹ while “truth of the matter asserted” demands a (potentially convoluted) analysis of the proponent’s purpose in introducing the statement.⁷² The complexity multiplies when dealing with “double hearsay,” which requires a separate analysis for each layer of hearsay.⁷³ Replacing this complex definition with plainer language, such as “*Hearsay is any statement made outside of the courtroom that is presented in court to prove its substantive content,*” would eliminate much of the confusion and make the rule easier to apply. This reform of course changes the rule in marginal cases, but the benefits to clarity and accessibility easily outweigh the costs.

Another approach is to consolidate the entire web of hearsay exceptions into a general standard, admitting hearsay based on two variables: necessity and reliability. This idea is emphatically not new. In his 1940 article *The Role*

69. See *supra* section I(A)(2) (explaining Free Proof concerns).

70. See FED. R. EVID. 801(c) (“‘Hearsay’ means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”).

71. In the traditional definition of hearsay, the term “asserted” or “assertion” refers to whether the speaker intended to communicate a fact or belief. See FED. R. EVID. 801(a) advisory committee’s note (“The effect of the definition of ‘statement’ is to exclude . . . all evidence of conduct, verbal or nonverbal, not intended as an assertion.”). For a statement to qualify as hearsay, it must express an assertion that the declarant intended to convey. If the statement is not an assertion (e.g., if it is a question, command, or exclamation), it may not qualify as hearsay. For example, the statement “The light is green” is an assertion because the speaker intends to communicate that the light is green. In contrast, the statement “Is the light green?” is a question, not an assertion. Questions are typically not considered hearsay because they do not assert a fact.

72. In the traditional definition of hearsay, the phrase “truth of the matter asserted” means that the statement is being offered as evidence to prove that what it says is true. See *id.* (discussing the analysis of whether a statement is being offered in support of a belief in a condition existing, or as support for the existence of the condition itself). This requires analyzing why the statement is being introduced in court. For example, a witness testifies, “John said the light was green.” If this statement is introduced to prove that the light was, in fact, green, it is hearsay because it is being used to prove the truth of John’s statement. In a different scenario, the same witness statement may be introduced to show John’s state of mind (e.g., he believed it was safe to cross the street). In this case, the statement is not hearsay because it is being used not to prove the color of the light, but only John’s belief about the light.

73. “Double hearsay,” also called hearsay within hearsay, occurs when a statement contains another statement, and both are potentially hearsay. FED. R. EVID. 805. For example, a police officer testifies, “Mary told me that John said the car ran the red light.” Each layer of hearsay must independently meet an exception or exclusion to be admissible in court, magnifying the complexity of determining the admissibility of the overall evidence. *Id.*

of *Hearsay in a Rational Scheme of Evidence*, George James proposed abandoning rigid categories in favor of a more flexible, rational approach.⁷⁴ Judges Jack Weinstein and Richard Posner later famously championed similar reforms, which align with Federal Rule of Evidence 807 (the residual exception).⁷⁵ A simplified hearsay rule for administrative hearings might read as follows:

Out-of-court statements are admissible if the judge determines that their necessity and reliability justify admission. Necessity considers the availability of the declarant and the importance of the evidence. Reliability considers corroboration and any incentive to lie on the part of the declarant.⁷⁶

Such a reform of the traditional hearsay exceptions reduces complexity while maintaining a commitment to fairness, enabling ALJs to exercise their discretion in making informed and balanced decisions.

B. *Approach 2: Refocusing the Basis of the Rules around Legitimacy*

The second approach takes a more unconventional path, shifting the conceptual foundation of evidentiary rules in administrative hearings from accuracy to legitimacy. It highlights procedural justice and public trust as cornerstones of the administrative process.

1. The Diminished Role of Accuracy-Centric Rules in Administrative Hearings.—The conventional explanation for traditional evidentiary rules, known as the “Jury Control Theory,” suggests the rules were crafted primarily to guide lay jurors toward making accurate decisions.⁷⁷ James Bradley Thayer,

74. George F. James, *The Role of Hearsay in a Rational Scheme of Evidence*, 34 ILL. L. REV. 788, 797 (1940) (arguing that hearsay admissibility should rest on rational standards rather than fixed categories).

75. See *United States v. Barbati*, 284 F. Supp. 409, 412 (E.D.N.Y. 1968) (Weinstein, J.) (“The current clear tendency [at common law] . . . [is to admit] highly reliable, highly probative [hearsay].”); Richard A. Posner, *On Hearsay*, 84 FORDHAM L. REV. 1465, 1466 (2016) (criticizing the hearsay rules for being too “excessive”); FED. R. EVID. 807 (providing grounds for admissibility of hearsay in a wide range of circumstances).

76. *But see* Maggie Wittlin, *Theorizing Corroboration*, 108 CORN. L. REV. 911, 945, 950 (2023) (critiquing the use of corroboration requirements to enhance reliability as both overinclusive—excluding potentially reliable evidence absent independent confirmation—and underinclusive—failing to guarantee that corroborated evidence is actually trustworthy; also warning that such requirements can produce structural confirmation bias and encourage false confidence in the probative value of aligned but weak evidence).

77. See THAYER, *supra* note 26, at 509 (describing the law of evidence as a byproduct of the jury system). *But see* Edmund M. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 252–53 (1937) (arguing that the adversary character of common law proceedings explains much of the law of evidence); Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 290–91 (1988) (arguing that many of the rules of evidence are better understood as attempts to generate the epistemically best available evidence); Edward J. Imwinkelried, *The Worst*

a preeminent American evidence scholar in the late nineteenth century, championed this perspective, describing evidence law as “the child of the jury,” underscoring its purpose in compensating for jurors’ perceived inability to evaluate evidence effectively.⁷⁸ Thayer’s insights have significantly influenced evidence scholarship for over a century.⁷⁹ His student, John Henry Wigmore, similarly asserted that traditional evidentiary rules evolved specifically to address jurors’ limitations in accurately assessing evidence.⁸⁰ However, this rationale loses its force in administrative hearings, which are inherently bench trials, with judges, not juries, serving as fact finders and directly evaluating the evidence.⁸¹

Consequently, the evidentiary framework in administrative hearings need not emphasize accuracy to the same extent as in jury trials. While accuracy remains important, values such as the preservation of fairness and procedural legitimacy are of greater concern.

2. *The Necessity of Rules to Preserve Legitimacy.*—While the absence of jurors reduces the necessity for strict evidentiary controls, this does not imply that administrative hearings should operate without any evidentiary rules. Certain types of evidence are so problematic that their mere presence in a proceeding—regardless of how they are ultimately weighed—can jeopardize the legitimacy of the adjudicative process.⁸² The introduction of such evidence, even if ostensibly discounted by the adjudicator, can create an appearance of unfairness.⁸³

Evidence Principle: The Best Hypothesis as to the Logical Structure of Evidence Law, 46 U. MIA. L. REV. 1069, 1071–72 (1992) (arguing that the real organizing impetus of the early common law evidentiary restrictions was preventing perjured testimony).

78. THAYER, *supra* note 26, at 2, 47.

79. See generally Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer’s Triumph*, 88 CALIF. L. REV. 2437 (2000) (emphasizing Thayer’s pivotal influence and advocacy in modern evidence law); Lisa Dufrainmont, *Evidence Law and the Jury: A Reassessment*, 53 MCGILL L.J. 199 (2008) (discussing the continued influence of Thayer’s view that evidence law functions primarily to regulate jury decision-making).

80. See 4 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1864 (2d ed. 1923) (noting that the general rules exclude obstructing or confusing evidence).

81. For a broader discussion of this, see *supra* subpart I(B).

82. See Hock Lai Ho, *Exclusion of Wrongfully Obtained Evidence: A Comparative Analysis*, in THE OXFORD HANDBOOK OF CRIMINAL PROCESS 831–32 (Darryl K. Brown, Jenia Iontcheva Turner & Bettina Weisser eds., 2019) (arguing that admitting improperly obtained evidence could cause long-term damage to the legitimacy of the justice system).

83. See Michele Panzavolta, Elise Maes & Anna Mosna, *Streamlining the Exclusion of Illegally Obtained Evidence in Criminal Justice*, KU LEUVEN, 81–82 (2022), https://www.fairtrials.org/app/uploads/2022/02/Streamlining_exclusion_KUL.pdf [<https://perma.cc/NU6J-D656>] (noting that excluding tainted evidence preserves the integrity of the court).

For example, inflammatory evidence, such as egregious character or prior-bad-act evidence intended solely to malign the opposing party, may destroy any perceived fairness in a proceeding. Similarly, evidence that undermines procedural rights, such as damaging hearsay statements introduced without an opportunity for cross-examination, can undermine legitimacy.⁸⁴ Even if a judge is well-equipped to evaluate and appropriately discount such evidence, its admission may still erode confidence in the process by creating the appearance of bias or arbitrariness. These concerns underscore the importance of maintaining evidentiary rules that prioritize legitimacy in administrative hearings. Centering evidentiary rules around legitimacy rather than accuracy would thus ensure that the rules in administrative hearings address concerns about fairness,⁸⁵ transparency,⁸⁶ and procedural justice.⁸⁷

3. *Two Demonstrations of Legitimacy-Focused Rules.*—Below are two examples illustrating how legitimacy-focused evidentiary rules might operate in administrative hearings.

a. *Character Evidence.*—Consider a situation where one party introduces egregious character evidence for no reason other than to portray the opposing party in a negative light. The evidence might reference a party's past criminal record for offenses unrelated to the case at hand or invoke provocative personal attributes, such as political affiliations or controversial social views, to suggest that they are morally deficient or unreliable. Such evidence serves no legitimate purpose beyond poisoning the fact finder's perception and undermining the fairness of the proceeding. In a legitimacy-focused framework, rather than simply being admitted and discounted, such evidence would be declared inadmissible outright. This formal exclusion would reinforce the impartiality and professionalism of the adjudicative process by demonstrating that inflammatory evidence has no place in the proceedings.

84. See *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (“[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”).

85. Ensuring that all parties have a fair opportunity to present their evidence and challenge opposing evidence requires excluding material that is irrelevant, inflammatory, or so prejudicial that it compromises the fairness of the proceeding.

86. Providing clear and well-articulated reasoning for evidentiary decisions ensures that rules are applied consistently and impartially. Such transparency reinforces confidence that outcomes are based on sound reasoning rather than arbitrary discretion.

87. Excluding evidence that, even if properly weighed by the judge, could foster a perception of bias or impropriety is essential. Doing so helps maintain trust in the administrative process, especially in high-stakes or contentious cases.

b. Cross-Examination and Hearsay.—The ability to cross-examine hostile witnesses is a cornerstone of the adversarial process and its legitimacy.⁸⁸ Even in administrative proceedings, where an ALJ may be skilled at assessing the weight of hearsay evidence, denying the opposing party the opportunity to challenge such evidence risks undermining the perceived fairness of the process. This concern mirrors the principles underlying the Confrontation Clause in criminal proceedings, where legitimacy—rooted in the right to challenge opposing evidence—is often viewed as the clause’s intuitive foundation.⁸⁹ While we may trust judges to evaluate the necessity and reliability of hearsay evidence, the adversarial system is built on the ability of parties to directly challenge their opponents’ evidence.⁹⁰ For instance, if the opposing party presents a witness who is evidently partial, fairness demands an opportunity to test that witness’s credibility through cross-examination. Thus, from a legitimacy perspective, it may sometimes be necessary to exclude hearsay evidence, even when it appears accurate.⁹¹ Even if hearsay is admitted, requiring the ALJ to articulate the necessity and reliability of the hearsay reinforces the legitimacy of the process.⁹²

In sum, the success of administrative adjudication depends on more than the accuracy of its outcomes. By refocusing evidentiary rules around legitimacy, we could again simplify administrative adjudications while still preserving the integrity of, and public trust in, the administrative system.

C. *Approach 3: Adopting Inference-Based Rules*

The third approach departs even further from the traditional framework of evidentiary rules, fundamentally reimagining their purpose and structure in administrative hearings. It shifts the focus from admissibility to inference, emphasizing how evidence is weighed and interpreted rather than

88. See *Crawford*, 541 U.S. at 61–62 (emphasizing the fundamental importance of cross-examination as a tool for ensuring fairness in adversarial proceedings); see also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366–67 (1978) (discussing how parties having the opportunity “to present proofs and arguments” strengthens adjudication’s legitimacy).

89. See *Crawford*, 541 U.S. at 61 (explaining that the Confrontation Clause is grounded in the right to challenge opposing evidence and ensure procedural legitimacy); see also AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 125–30 (1997) (discussing the legitimacy and fairness principles underlying the Confrontation Clause).

90. See JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 253 (A.W. Brian Simpson ed., 2003) (explaining the centrality of challenging opposing evidence in the adversarial system).

91. Instances where it may be necessary to exclude hearsay evidence from a legitimacy perspective include situations involving highly prejudicial statements that cannot be tested through cross-examination, reliance on anonymous sources, lack of opportunity for rebuttal, or contradictions with in-person testimony.

92. See *Mathews v. Eldridge*, 424 U.S. 319, 343–44 (1976) (highlighting the importance of credibility and veracity in at least some administrative processes).

prescreened. By prioritizing evaluation over exclusion, this framework addresses the practical needs of fact-finding in administrative adjudication and the cognitive limitations of ALJs.

1. Reconceptualized Foundations of Evidentiary Rules for Administrative Hearings.—The jury system often attempts to preserve the jury’s “province,” or its autonomy in decision-making.⁹³ Once presented with all (admitted) evidence, the jury operates as a “black box” with no outside interference.⁹⁴ The traditional evidentiary rules thus focus on controlling what enters that black box, rather than guiding the reasoning or inferential process itself.⁹⁵

Administrative hearings do not have the same black box tradition as jury trials. Indeed, in the administrative context, the reasoning process of the judge is documented and subject to scrutiny.⁹⁶ This critical distinction presents a unique opportunity to regulate and enhance the fact-finding process. Rather than tweaking admissibility criteria, we can instead prioritize the reasoning process itself. Such a framework would promote greater transparency (e.g., making a judge’s reasoning clear), ensure consistency (both within a judge’s decisions and across judges), and provide enhanced guidance to help judges navigate complex questions in evidence evaluation.⁹⁷

93. See Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 583–85 (1939) (discussing the historical concept of the jury’s autonomy and its “province” in decision-making); see also *Sparf and Hansen v. United States*, 156 U.S. 51, 102 (1895) (affirming that while juries must take the law from the court, they retain responsibility for applying that law to the facts as they find them).

94. See REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 19–20 (1983) (charting the jury’s decision-making process as free from outside influences except the judge’s instructions); see also *Sparf*, 156 U.S. at 101–02 (noting the jury’s autonomous role in evaluating evidence and reaching a verdict); Jessica L. Parillo, Note, *Breaking the Black Box: When Jury Experimentation Becomes Jury Misconduct*, 65 B.C. L. REV. 2863, 2869 (2024) (arguing that the jury is a “black box” because “insulation is paramount to achieving the ultimate goal of impartiality”).

95. GEORGE FISHER, *EVIDENCE* 27 (4th ed. 2023) (describing how “errors in the way juries interpret evidence are virtually undetectable, much less correctable,” and thus the evidentiary system controls for quality at the “front end”). Compare Roger C. Park & Michael J. Saks, *Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn*, 47 B.C. L. REV. 949, 957 (2006) (explaining that traditional evidentiary rules are concerned with perception, comprehension, and evaluation), with Wang, *Rethinking*, *supra* note 9, at 303–04 (discussing how traditional evidentiary rules focus on information input control for juries, while bench trials necessitate a shift toward guiding the reasoning process or output control).

96. See 20 C.F.R. § 416.1453(a) (2025) (requiring administrative law judges to issue written decisions with findings and reasons for their conclusions, ensuring transparency and accountability in the decision-making process).

97. See 2 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 5:60 (3d ed. 2010) (encouraging more studies on reasoning in administrative adjudication); Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1975–77, 1985–88 (2008) (arguing for “rules of weight” to guide courts in evaluating evidence, thereby improving consistency, efficiency, and judicial guidance).

2. *Existing Inference-Based Rules.*—The concept of inference-based rules is not entirely novel. Legal systems that operate exclusively through bench trials, such as in continental law countries, often have guidelines that structure inferential reasoning.⁹⁸ Even within the American tradition, while factual issues are typically left to the jury’s discretion, there are some (albeit rare) explicit presumptions for evaluating evidence in recurring contexts.⁹⁹ Consider the “presumption of death.” In the United States, this presumption is governed by a combination of statutes, common law principles, and administrative regulations. The general rule follows the common law presumption that a person missing for seven years is presumed dead. This rule is codified in various state laws and applied in Social Security proceedings.¹⁰⁰ Courts may, however, infer death earlier in cases involving perilous circumstances, such as a confirmed shipwreck or aviation disaster.¹⁰¹ Federal law also imposes specific presumptions in certain contexts; for example, the Missing Persons Act allows for the presumption of death after one year for military personnel and federal employees.¹⁰²

Historically, the evidentiary rules placed a greater emphasis on inference than they do today. Before the adoption of the Federal Rules of Evidence in 1975, judges, practitioners, and scholars paid closer attention to how evidence was weighed and interpreted at trial.¹⁰³ However, the

98. See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 55–56 (1986) (explaining that in Continental bench trial systems, judicial evaluation of evidence is not “free,” but instead requires reasoned justification subject to appellate scrutiny, thereby structuring inferential reasoning).

99. See 1 Jack B. Weinstein & Margaret A. Berger, *WEINSTEIN’S FEDERAL EVIDENCE* § 301.02[1] (Mark S. Brodin ed., Matthew Bender 2d ed. 2026) (describing the use of explicit presumptions to guide evidence assessment in specific contexts).

100. See 20 C.F.R. § 404.721 (2026) (applying a seven-year rule to presume death for benefit purposes). Under Federal Rule of Evidence 302, state law governs presumptions in civil cases, so the seven-year rule varies slightly between jurisdictions. FED. R. EVID. 302; see also, e.g., VA. CODE ANN. § 64.2-2300 (West 2026) (establishing a presumption of death for individuals absent from the Commonwealth and not heard from for seven consecutive years, subject to rebuttal by contrary evidence); *Prudential Ins. Co. v. Moore*, 149 N.E. 718, 719 (1925) (applying the common law presumption of death only after seven years of unexplained absence).

101. See, e.g., *Chiaromonte v. Chiaromonte*, 435 N.Y.S.2d 523, 525 (N.Y. Sup. Ct. 1981) (fixing date of death at time of a presumed plane crash); *In re Cosentino*, 676 N.Y.S.2d 856, 857–58 (Surr. Ct. 1998) (explaining the “specific peril” doctrine and listing plane crashes and shipwrecks as classic examples); see also *In re Philip*, 851 N.Y.S.2d 141, 142–143 (N.Y. App. Div. 2008) (applying the specific peril doctrine for a victim of 9/11).

102. See 37 U.S.C. § 555 (allowing the U.S. military and government agencies to declare a missing service member or federal employee legally dead after one year if there is no evidence suggesting survival). This aligns with the expectation that if there is reason to believe the person perished in a catastrophic event (e.g., a plane crash or shipwreck), the presumption of death may be made sooner.

103. See “A LATE LEARNED JUDGE” (GEOFFREY GILBERT), *THE LAW OF EVIDENCE* 3–5 (2d ed., 1760) (an early treatise dedicated to evidence law, notably developing the Best Evidence

introduction of the Federal Rules of Evidence, with their emphasis on admissibility, shifted the focus away from inference and relegated it to a lesser consideration.¹⁰⁴ This historical shift underscores the potential for inference-based rules to regain prominence in evidentiary reasoning, particularly in contexts like administrative hearings, where their application may be especially appropriate.

3. *Implications of the Shift to Inference-Based Rules.*—Adopting inference-based rules would have significant implications for administrative adjudication. First, reliance on precedent could play a pivotal role in developing and refining inference rules. Judges could be encouraged to document their inferential reasoning in decisions, creating a body of “common law” that would provide guidance for future cases. This approach would enhance transparency by enabling parties to understand how evidence is evaluated and foster consistency across similar cases.

Yet, implementing this framework presents practical challenges. ALJs are not currently accustomed to systematically documenting their inferential processes, and legal scholars have largely neglected this aspect of administrative case law.¹⁰⁵ Developing a robust set of inference-based rules would require significant effort, time, and resources to collect and analyze data on how ALJs handle recurring evidentiary issues.

Moreover, inference-based rules would not be useful in all instances; codifying rules for every possible inference is simply impractical.¹⁰⁶ Rather, this strategy would be most useful in addressing recurring or particularly difficult evidentiary issues. For example, workers’ compensation courts frequently face questions about causation. Inference rules about the kinds of

Rule—an important inference rule emphasizing reliance on original or primary sources of evidence). See generally CHARLES MOORE, A TREATISE ON FACTS OR THE WEIGHT AND VALUE OF EVIDENCE (1908) (offering a detailed and sophisticated account of how fact finders should evaluate and weigh different types of evidence).

104. See FED. R. EVID. 401–02 (reflecting the Rules’ strong emphasis on the admissibility of evidence and lack of focus on inferences).

105. See Christopher J. Walker, Melissa F. Wasserman & Matthew Lee Wiener, *Precedent in Agency Adjudication*, The Regulatory Review (June 5, 2023), <https://www.theregreview.org/2023/06/05/walker-wasserman-wiener-precedent-in-agency-adjudication> [<https://perma.cc/3236-Q8MH>] (“[M]any agencies have given little thought to precedential decision-making. Many agencies’ procedural rules say nothing about precedent, and their decisions do not indicate whether they are precedential.”).

106. See Ronald J. Allen, *Taming Complexity: Rationality, the Law of Evidence and the Nature of the Legal System*, 12 L., PROBABILITY & RISK 99, 102 (2013) (“Essentially every aspect of modern life, and virtually any encounter between individuals or organizations, could and does trigger legal disputes. The evidence pertinent to those disputes is thus generated in completely unpredictable and idiosyncratic ways and is applicable to disputes that are themselves equally unpredictable and idiosyncratic.”).

evidence necessary to prove causation or to generate a presumption of causation might help streamline such proceedings and provide parties with a clearer sense of the evidence that a court expects. Simultaneously, to the extent that causation is a tricky problem that often requires a great deal of expertise, clear inference rules on causation would provide judges with guidance and a roadmap for dealing with these difficult issues.

In summary, inference-based rules represent a bold departure from traditional evidentiary frameworks. By shifting the focus from admissibility to inferential reasoning, this framework better aligns with the practical realities and specific needs of administrative hearings. While implementing inference-based rules would require a significant new push to collect data and develop guidelines, the potential benefits make this approach a compelling alternative for rethinking evidentiary rules in administrative hearings.

III. Practical Proposals: Three Alternative Rules

Building on the discussion thus far, Part III offers evidentiary rule proposals in three key areas: hearsay, expert evidence, and proof rules. These proposals aim to address the unique demands and challenges of the administrative adjudication process. Before delving into the specific proposals, however, it is important to clarify the underlying goals, which provide a cohesive framework within which the proposed rules can be understood and evaluated.

A. *Three Overarching Goals*

1. *Make the Rules Intuitive for Pro Se Litigants.*—As previously discussed, many participants in administrative hearings are pro se litigants who lack legal expertise.¹⁰⁷ For these individuals, the intricate technicalities of traditional evidentiary rules present significant barriers that undermine the ability of pro se litigants to present their case.¹⁰⁸ Eliminating unnecessary complexity in the evidence rules and making them intuitive will ensure more efficient, equitable, and just proceedings.

2. *Tailor the Rules to Bench Trials.*—Administrative hearings are bench trials, which are structurally distinct from jury trials, where the roles of judge as

107. See *supra* notes 47–52, 59–61, and accompanying text (discussing the difficulties pro se litigants face). See also Budzinski, *supra* note 32, at 1076 (noting that the American courtroom is not designed for unrepresented litigants).

108. Budzinski, *supra* note 32, at 1076.

gatekeeper and jury as fact finder are bifurcated.¹⁰⁹ In administrative adjudication, the judge assumes both roles, rendering admissibility rules less critical. Moreover, unlike the “black box” of jury deliberation, the inferential process of ALJs is a potential locus for regulation and standardization.¹¹⁰ In short, the evidentiary rules should cater to the needs of administrative judges, who act as repeat fact finders in high-volume, specialized cases.

3. *Make the Rules More Empirically Sound.*—Many traditional evidentiary rules, such as the admissibility of dying declarations¹¹¹ and excited utterances,¹¹² stem from historical practices.¹¹³ Such rules are deeply embedded in the jury trial context,¹¹⁴ making it difficult to reform them in light of modern social science research.¹¹⁵ The administrative context lacks, or at least should lack, such traditional hang-ups. Indeed, it presents a golden opportunity to start afresh in crafting evidentiary rules, breaking away from the constraints of historical precedent.¹¹⁶ Evidentiary rules in the administrative context should therefore leverage studies on topics such as witness credibility and cognitive bias to establish more empirically justified decision-making frameworks.¹¹⁷

109. For a discussion of the roles of judge and jury, see *supra* notes 44–46, 77–81, 93–97, and accompanying text.

110. See *supra* notes 93–97 and accompanying text (discussing the jury’s “province”); see also HASTIE, PENROD & PENNINGTON, *supra* note 94, at 17–18 (describing the jury’s tasks and instructions from the judge).

111. FED. R. EVID. 804(b)(2).

112. FED. R. EVID. 803(2).

113. See, e.g., *Mattox v. United States*, 156 U.S. 237, 243–44 (1895) (explaining the historical justification for the admissibility of dying declarations as rooted in common law); 3 WIGMORE, *supra* note 80, § 1426 (describing the common law origins of “[s]pontaneous [e]xclamations”).

114. See Edward K. Cheng, *Thinking Beyond the Federal Rules*, 23 *Zhengju kexue* [Evid. Sci.] 632, 640 (2015), <https://www.bu.edu/ilj/files/2015/03/Cheng-Thinking-Beyond-the-Federal-Rules.pdf> [<https://perma.cc/47RJ-EVCF>] (“Much of the rules and their historical assumptions have become part of American culture, and changing them is a steep uphill battle.”).

115. See, e.g., MICHAEL J. SAKS & BARBARA A. SPELLMAN, *THE PSYCHOLOGICAL FOUNDATIONS OF EVIDENCE LAW* 4–5 (2016) (highlighting how evidence law often lags behind advancements in social science and psychology in understanding human behavior and decision-making); Aviva A. Orenstein, “MY GOD!”: *A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CALIF. L. REV. 159, 178 (1997) (mustering the psychological literature to criticize the excited utterance exception to the hearsay rule); Felice J. Levine & June Louin Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079, 1090–93 (1973) (citing HUGO MÜNSTERBERG, *ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME* (1908)) (referring to Münsterberg’s finding that while modest arousal improves accuracy, the net effect of extreme excitement is distortion).

116. See Davis, *Rules of Evidence*, *supra* note 9, at 725 (arguing that administrative adjudication should accept probative evidence and evaluate it for reliability rather than formal admissibility, in contrast to jury trial evidentiary rules).

117. See, e.g., Jennifer K. Robbenolot, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 473 (2005) (analyzing decision-making biases in evidentiary evaluation). See generally Donald Nicolson & Derek P. Auchie, *Assessing Witness*

Having grounded the proposed evidentiary rules on these three specific goals, the following subparts will explore proposals for hearsay, expert evidence, and proof rules, examining their potential to meet these goals and their implications for the administrative hearing process.

B. Hearsay

The complexity of hearsay rules makes this area particularly ripe for rethinking and improvement in the context of administrative hearings.¹¹⁸ Building on this Essay's earlier discussions on hearsay, we consolidate and refine those ideas by presenting two reform proposals for administrative hearings.

1. Simplified, Discretionary Standard.—The first proposal is a simplified, discretionary standard for hearsay admissibility.¹¹⁹ Under this approach, hearsay, simply defined as *any statement made outside of the hearing that is presented in the proceeding to prove its substantive content*, would be admissible if it meets two criteria: (1) it is *necessary*, meaning the declarant is unavailable; or (2) it is *reliable*, meaning that the source of the hearsay is sufficiently trustworthy. While this standard is intentionally broad and discretionary, it is grounded in historical and judicial precedent that demonstrates its feasibility.

Legal precedents provide strong support for the proposed single discretionary standard for hearsay. David Sklansky has argued that, prior to the nineteenth century, hearsay was generally admissible if the declarant was unavailable, reflecting a long-standing tradition of discretionary evaluation in evidentiary rules.¹²⁰ More recent case law further bolsters the legitimacy

Credibility and Reliability: Engaging Experts and Disengaging Gage?, in SCOTTISH CRIMINAL EVIDENCE LAW: CURRENT DEVELOPMENTS AND FUTURE TRENDS 161 (Peter R. Duff & Pamela R. Ferguson eds., 2018) (challenging the prevailing assumption that jurors and (professional) fact finders possess sufficient common sense and life experience to assess witness testimony without expert assistance); see also Gabriele Chlevickaite, *Insider Witnesses' Credibility and Reliability: An Empirical Legal Framework for International Criminal Justice* (Mar. 29, 2022) (Ph.D. thesis, Vrije Universiteit Amsterdam), <https://research.vu.nl/en/publications/insider-witnesses-credibility-and-reliability-an-empirical-legal-/> [<https://perma.cc/BVH6-LQSG>] (examining the key factors influencing the credibility and reliability assessments of insider witnesses in international criminal courts and tribunals). For example, research on the limitations of human memory and the factors influencing perception can help inform how evidence is evaluated, ensuring that decisions are based on more reliable and scientific standards. See ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 21–22 (2d ed. 1996) (1979) (exploring the limitations and malleability of human memory in the context of legal proceedings).

118. See *supra* notes 47–52, 64–76, 88–92, and accompanying text.

119. This is a refinement of section II(A)(4).

120. David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 5–6, 27 (2010) (discussing the historical admissibility of hearsay under common law and the tradition of discretionary evaluation in evidentiary rules).

of this proposal. In *Dallas County v. Commercial Union Insurance Company*, Judge John Minor Wisdom articulated necessity and reliability as critical factors for admitting hearsay,¹²¹ principles that were later incorporated into the residual exception to the hearsay rule in Federal Rule of Evidence 807.¹²²

2. *Testimonial Rule*.—The second proposal takes an entirely different approach by redefining hearsay itself.¹²³ Drawing inspiration from the Supreme Court’s Confrontation Clause jurisprudence, this proposal focuses on distinguishing testimonial statements—or statements made with the intent to accuse or with an eye toward litigation—from other types of hearsay.¹²⁴

Instead of simplifying the existing hearsay definition and exceptions, this approach would recast the definition of hearsay to focus on testimonial statements.¹²⁵ It would target statements that amount to “giving testimony” outside the courtroom, narrowing the scope of what constitutes hearsay. Nontestimonial statements, in turn, would fall outside the hearsay framework and would instead be subject only to the other rules of evidence.

The focus on “testimonial” statements comes from the Supreme Court’s landmark decision in *Crawford v. Washington*.¹²⁶ Before *Crawford*, the Confrontation Clause was nearly synonymous with the hearsay rule, broadly

121. 286 F.2d 388, 397–98 (5th Cir. 1961) (holding that hearsay evidence may be admissible if it meets the criteria of necessity and reliability, foreshadowing the principles later codified in the residual exception to the hearsay rule).

122. FED. R. EVID. 807 (“Residual Exception”).

123. See Richard D. Friedman, *A Proposal to Replace the Hearsay Rules*, 57 U. MICH. J. L. REFORM 909, 913 (2024) (proposing that only out-of-court testimonial statements be deemed inadmissible hearsay); Edward K. Cheng & Monica A. Miecznikowski, *Crawford’s Revolutions*, 57 U. MICH. J. L. REFORM 869, 881 (2024) (suggesting that a hearsay rule focusing on the testimonial quality of an out-of-court statement may be ideal).

124. See *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (distinguishing testimonial statements from other forms of hearsay); see also Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 453 (2004) (analyzing the Supreme Court’s redefinition of hearsay and its focus on testimonial statements in *Crawford*).

125. See *Crawford*, 541 U.S. at 51–52 (2004) (contemplating several similar definitions of testimonial statements, including statements made “under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” (citation and internal quotation marks omitted)); *Davis v. Washington*, 547 U.S. 813, 822 (2006) (explaining that statements are testimonial when “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution,” while noting that statements made outside of interrogations could still be testimonial).

126. 541 U.S. 36 (2004).

encompassing out-of-court statements.¹²⁷ *Crawford* reframed Confrontation along testimonial lines.¹²⁸

This testimonial-based framework offers several advantages in an administrative context. First, the concept of a “testimonial” statement is likely more intuitive for lay participants than the technical definition of hearsay, a statement offered “to prove the truth of the matter asserted.”¹²⁹ Focusing on whether the purpose of a declarant’s statement is to influence a legal outcome, or perhaps whether it is a testimonial substitute, simplifies evidentiary analysis for parties unfamiliar with traditional legal terminology. Additionally, the testimonial rule captures the dignitary interest at the heart of the hearsay rule: when someone provides information for use in a legal proceeding, fundamental fairness (or legitimacy) demands that they appear and be subject to cross-examination.¹³⁰

Notably, the proposal here is only to borrow the testimonial framework from Confrontation Clause jurisprudence as a means of redefining or simplifying hearsay. Since the proposal is not actually importing the Confrontation Clause into the administrative context, reformers could, for example, add further exceptions to the framework as well.

C. *Expert Evidence*

Expert evidence is another area of frequent concern for judges presiding over administrative hearings. The challenges of evaluating expert testimony

127. Before *Crawford*, courts largely assessed Confrontation Clause challenges through the framework of the hearsay rule, treating out-of-court statements as potentially admissible if they met traditional hearsay exceptions or exhibited sufficient reliability. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (holding that hearsay statements made by an unavailable declarant were admissible under the Confrontation Clause if they bore “adequate indicia of reliability,” either by falling within a “firmly rooted hearsay exception” or possessing “particularized guarantees of trustworthiness” (internal quotation marks omitted)).

128. See *Crawford*, 541 U.S. at 68–69 (establishing the testimonial standard); *Davis*, 547 U.S. at 822 (clarifying that a statement is nontestimonial if made for the purpose of addressing an ongoing emergency). In contrast, a *testimonial* statement is one made with the primary purpose of creating an out-of-court substitute for trial testimony. For example, if a domestic violence victim provides a written statement to police recounting the assault, that statement would be testimonial because it is made as part of an official investigation intended to gather evidence for prosecution. See *id.* at 830 (holding that a domestic violence victim’s written affidavit given to police at the scene, after the emergency had ended, was testimonial).

129. See Friedman, *supra* note 124, at 450, 468 (noting the clarity of the “testimonial” standard compared to the traditional hearsay doctrine); FED. R. EVID. 801(c)(2).

130. See Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 514–15 (2005) (discussing how the testimonial standard requires declarants to face cross-examination).

in these proceedings often highlight the limitations of existing evidentiary frameworks, particularly the *Daubert* standard.¹³¹

1. *The Problem with Daubert.*—The *Daubert* multifactor test, designed to separate reliable scientific evidence from unreliable, is notoriously complex and has long been a source of frustration for judges.¹³² The underlying issue is clear: judges are not scientists or medical professionals.¹³³ As the old joke goes, many lawyers pursue law to avoid careers involving math and science. Asking judges to act as gatekeepers of scientific validity under *Daubert* places them in an awkward role for which they are ill-suited.¹³⁴

Moreover, the material presented in administrative hearings often resists the rigorous scrutiny required by *Daubert*. Originally developed for toxic tort litigation, the *Daubert* factors offer limited practical guidance in other contexts, leaving judges to apply mismatched criteria without clear direction.¹³⁵ In administrative hearings, common cases include regulatory compliance, benefit eligibility, or professional licensure disputes, not necessarily injuries due to toxic substances.

The need to “screen” or “gatekeep” evidence, a core purpose of *Daubert*, is also less relevant in administrative hearings, where there is no jury.¹³⁶ Screening unreliable evidence from oneself seems redundant and nonsensical.¹³⁷ If an ALJ believes that an expert lacks credibility or expertise, the judge can simply discount the testimony after hearing it. In such a context, *Daubert*’s detailed gatekeeping structure adds unnecessary complexity without significant practical benefit.

131. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–94 (1993) (establishing a multifactor test for assessing the admissibility of expert testimony).

132. See, e.g., Edward K. Cheng and Albert H. Yoon, *Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 478 (2005) (noting judicial frustration with the complexity and practical application of the *Daubert* test). But see *United States v. Crisp*, 324 F.3d 261, 268 (4th Cir. 2003) (expressing concern about the application of *Daubert*, while acknowledging that it could allow novel scientific evidence).

133. See Edward K. Cheng, *The Consensus Rule: A New Approach to Scientific Evidence*, 75 VAND. L. REV. 407, 412–14 (2022) (exploring the challenges judges face in evaluating scientific evidence as non-scientists).

134. *Id.* at 414; Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433, 452–54 (2001) (discussing how judges may be ill-suited for this role).

135. See Cheng, *supra* note 133, at 413 (noting that the *Daubert* framework was developed with scientific evidence in toxic tort cases in mind and may not provide clear guidance in other legal contexts).

136. See *supra* notes 37–44 and accompanying text for a discussion of the traditional evidentiary rationales in an administrative law context.

137. See *supra* notes 45–46 and accompanying text for a discussion of the screening functions of evidence.

2. *Proposed Alternative Rules.*—Given these problems, three alternative frameworks are proposed for assessing expert evidence in administrative hearings, each aiming to simplify and adapt the process to the unique characteristics of these proceedings.

a. *Qualification Test.*—One possibility is a simplified qualification test that focuses solely on the expert’s credentials rather than on the reliability analysis imposed by *Daubert*. Under this approach, expert witnesses would be admissible if they meet the qualifications outlined in the first line of Federal Rule of Evidence 702: an individual qualified “by knowledge, skill, experience, training, or education may testify in the form of an opinion.”¹³⁸ This open standard would emphasize general qualifications without delving into the more complex inquiries mandated by *Daubert*.

For example, a medical professional with sufficient specialization in a relevant area or someone with significant years of experience in a particular field would meet the admission threshold. While this approach may not eliminate all unreliable testimony, its simplicity is a better fit for administrative hearings, where the absence of a jury allows ALJs to assess the credibility and reliability of expert testimony independently and on a case-by-case basis.

b. *Court-Appointed Expert.*—A more transformative reform involves the use of court-appointed experts to mitigate the adversarial biases inherent in the current system. Adversarial bias stems from the fact that parties select, hire, and pay their experts—practices that virtually guarantee a “battle of the experts.”¹³⁹ This phenomenon often leaves judges, who may lack scientific expertise, mediating between two credentialed experts presenting conflicting views.¹⁴⁰

While court-appointed experts are permitted under Federal Rule of Evidence 706,¹⁴¹ this option has rarely been used in traditional courtrooms due to practical and systemic challenges.¹⁴² Judges often face difficulties

138. FED. R. EVID. 702 (providing the federal rules for the admittance of an expert witness in jury cases).

139. See Cheng, *supra* note 133, at 414 (describing the conflict between credentialed experts of opposing parties in expert testimony and its contribution to the “battle of the experts” in litigation).

140. *Id.* (highlighting judges’ difficulties in evaluating conflicting scientific testimony due to limited scientific expertise); see also Gatowski et al., *supra* note 134, at 452–54 (illustrating judges’ limited scientific expertise).

141. FED. R. EVID. 706(a).

142. JOE S. CECIL & THOMAS E. WILLGING, FED. JUD. CTR., COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706, 4–5 (1993) <https://www.ojp.gov/pdffiles1/Digitization/145624NCJRS.pdf> [<https://perma.cc/7DN8->

identifying suitable experts, express concerns about disrupting the adversarial balance, and fear that a court-appointed expert might appear to usurp their authority.¹⁴³

Administrative hearings, however, are uniquely suited to benefit from court-appointed experts. Unlike judges in general jurisdiction courts, ALJs frequently encounter similar types of expert evidence, giving them a deeper familiarity with the recurring issues and the neutral experts who could address them effectively.¹⁴⁴ Alternatively, administrative courts could employ experts as staff members to provide guidance on recurring evidence types, avoiding concerns about outsiders undermining the adjudicative process.¹⁴⁵ Moreover, since administrative hearings are less adversarial than traditional litigation, the use of court-appointed experts aligns well with their context and ethos.¹⁴⁶

c. Deference-to-Consensus Rule.—A third proposal addresses one of the fundamental paradoxes of the *Daubert* framework: *Daubert* expects nonexperts (i.e., judges) to resolve disputes between experts on highly specialized issues.¹⁴⁷ This expectation is inherently problematic, as it places individuals without subject-matter expertise in the impossible position of adjudicating complex scientific disagreements.¹⁴⁸

APJ7] (discussing the underutilization of court-appointed experts due to logistical, financial, and cultural challenges in adversarial litigation).

143. DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE* § 11.2.3, at 478–79 (2d ed. 2011).

144. See Daniel F. Solomon, *Medical Expert Testimony in Administrative Hearings*, 17 J. NAT'L ASS'N ADMIN. L. JUDGES 285, 286 (1997) (noting that ALJs “often [have] considerable administrative expertise” and “usually do[] not require the kind of explanation that a jury would need”).

145. See James R. Dillon, *Expertise on Trial*, 19 COLUM. SCI. & TECH. L. REV. 247, 296 (2018) (discussing a proposal for the creation of an internal office of scientific experts within the judiciary to bolster epistemic competence).

146. See Solomon, *supra* note 144, at 288 (noting that Social Security hearings are “nonadversarial”).

147. See Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1902) (“[H]ow can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own?”); DAVID L. FAIGMAN, *LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW* 64 (1999) (highlighting that judges, who often lack scientific expertise, are expected to adjudicate disputes between experts under the *Daubert* framework, but noting that they may nevertheless be best-positioned to do it); Susan Haack, *Irreconcilable Differences? The Troubled Marriage of Science and Law*, 72 LAW & CONTEMP. PROBS., Winter 2009, at 1, 7 (observing that the challenges posed by requiring nonexpert judges to evaluate expert testimony arise from the inherent mismatch between “the goals, the processes, the values, and the timetable of scientific inquiry” versus those of the law).

148. See Cheng, *supra* note 133, at 414–17 (discussing the difficulties judges face in evaluating technical material); cf. Edward K. Cheng, Elodie O. Currier & Payton B. Hampton, *Embracing*

For example, if two medical professionals disagree about whether a particular chemical causes a disease, it seems absurd for a judge—even one trained in analyzing scientific evidence and statistics—to independently determine which expert is correct. Yet, under *Daubert*, judges are expected to do just that. They act as arbiters of scientific truth in areas where they lack the requisite expertise.¹⁴⁹

One solution lies in deferring to the consensus within expert communities.¹⁵⁰ This framework would shift the focus from individual expert testimony to the broader views of the relevant professional community.¹⁵¹ Rather than focusing on the beliefs of a specific doctor or scientist, the inquiry would center on the consensus among qualified professionals in the field—or at least on what the majority of them would agree on.¹⁵² The individual expert would thus serve as an indicator of the prevailing consensus within the relevant scientific or technical community.¹⁵³

This shift reframes the role of the judge. Instead of independently resolving disputes among experts and determining scientific truth, the judge defers to the conclusions of the expert community.¹⁵⁴ To return to the earlier example, the judge’s task is not to decide which of the two medical professionals is correct; rather, it is to ascertain what the broader medical community believes about the relationship between the chemical and the disease and to defer to that consensus.¹⁵⁵

This approach offers two distinct advantages. First, it simplifies the decision-making process by replacing the convoluted *Daubert* checklist with a more straightforward inquiry into professional consensus.¹⁵⁶ Second, it is

Deference, 67 VILL. L. REV. 855, 872–73 (2022) (discussing courts’ ready deference in foreign language translations because “epistemic incompetency is patently obvious”).

149. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589–90 (requiring judges to evaluate the scientific validity and relevance of expert testimony).

150. See Cheng, *supra* note 133, at 435–37 (arguing that fact finders should defer to the consensus of the relevant expert community due to their lack of epistemic competence to evaluate expert determinations).

151. *Id.* at 472.

152. *Id.*

153. *Id.*; see also Cheng, Currier & Hampton, *supra* note 148, at 861–62 (“[T]he expert witness’s job is more akin to that of a reporter. The expert provides evidence about what the expert community thinks about an issue or question.”).

154. Cheng, *supra* note 133, at 472; see also Cheng, Currier & Hampton, *supra* note 148, at 862 (“Judges are no longer the ‘science police.’”).

155. Cheng, *supra* note 133, at 458 (When experts testify as to consensus, “a lay decisionmaker is qualified to assess contradictory testimony on what a community believes. Indeed, one might even argue that testimony about what an expert community believes approaches lay testimony, as it hardly involves expert judgment at all.”).

156. *Id.* at 456–57 (“[R]elative to the substantive scientific questions asked by the *Daubert* framework, Consensus Rule questions are far more manageable. At least answering the consensus question requires no special expertise.”); see also Cheng, Currier & Hampton, *supra* note 148, at

likely to produce more accurate and reliable outcomes over time, as consensus-based decisions reflect the collective expertise of the relevant scientific community rather than the isolated opinions of individual experts.¹⁵⁷

Importantly, this proposal of deference to scientific communities is best understood as an inference rule. The judge infers the likely truth of a claim from the existence of a scientific consensus.¹⁵⁸ While inference rules are difficult to implement in jury trials given traditional norms, they are readily applicable in administrative hearings. In these settings, ALJs can adopt the inference rule and consciously align their findings with the established consensus in the field.

In sum, addressing the challenges posed by expert evidence in administrative hearings requires a departure from frameworks like *Daubert* and an embrace of approaches tailored to the unique nature of these proceedings. The qualification test offers a streamlined and practical method for assessing expertise, focusing on credentials and allowing ALJs to weigh credibility without unnecessary procedural hurdles. Court-appointed experts provide a powerful tool for mitigating adversarial bias, leveraging the familiarity ALJs have with recurring types of evidence and fostering neutral, informed evaluations. Finally, the deference-to-consensus rule acknowledges the limitations of individual judges in resolving specialized disputes and defers instead to the collective wisdom of expert communities. By adopting any of these reforms, administrative hearings can better navigate the complexities of expert testimony and enhance their role as efficient and effective forums for resolving disputes.

862 (“The lay decisionmaker no longer makes a substantive determination on the issue requiring expertise. It instead faces the easier and more accessible task of determining what the expert community thinks.”). *But see* Wendy Wagner, *The Consensus Rule: Lessons from the Regulatory World*, 67 VILL. L. REV. 907, 918 (2022) (finding that consensus may not be as easy to determine as we hope—consensus changes over time).

157. Cheng, *supra* note 133, at 434 (acknowledging that the scientific community can sometimes be wrong, but arguing that “[t]he reason why we should listen to the experts is not that they are infallible, but rather that they are more likely to be right than we”); *see also* David S. Caudill, *The “Crisis of Expertise” Reaches the Courtroom: An Introduction to the Symposium on, and a Response to, Edward Cheng’s Consensus Rule*, 67 VILL. L. REV. 837, 839 (2023) (“Cheng’s comprehensive approach to law reform in the field of evidence—identifying a weakness in our admissibility framework, specifying a practical solution, and anticipating criticism—is both timely and persuasive.”).

158. *See* Cheng, Currier & Hampton, *supra* note 148, at 862 (highlighting how these evidentiary changes would alter the judge’s role in expert testimony). *But see* Caudill, *supra* note 157, at 845 (“rais[ing] a concern related to the so-called crisis of expertise, evidenced by an increasing number of Americans who distrust consensus science”).

D. Proof Rules

The preceding discussions on hearsay and expert evidence highlight areas where the standard rules of evidence align awkwardly with the unique needs of administrative hearings.¹⁵⁹ These examples illustrate that administrative courts can, and often should, depart from blindly adopting traditional evidentiary frameworks. However, the most intriguing opportunity for reform lies in an area that traditional evidence law does not typically address—proof rules. This untapped domain offers the chance to rethink and expand evidence law in the administrative context. Here, we propose two folk evidentiary rules from our daily life and two rebuttable presumptions developed in case law.

1. Folk Evidentiary Rules.—In exploring the concept of proof rules, it is helpful to first consider two “folk evidence rules” that people routinely use in everyday life. These informal norms reflect intuitive expectations for proof that may be suitable for administrative hearings.

a. The Receipt Rule.—In everyday transactions, receipts serve as a straightforward and universally acknowledged proof of entitlement. For example, if you want to return an item to a store or seek reimbursement for expenses, possessing a receipt typically entitles you to a refund or reimbursement. Without a receipt, obtaining the desired outcome becomes significantly harder, if not impossible.¹⁶⁰ Many retailers, for example, outright decline such claims or, at best, offer store credit, and most people accept this limitation.¹⁶¹ The folk rule here is clear: *lose your receipt (your shortcut for proving entitlement), and you’re likely out of luck.*

159. See FED. R. EVID. Article VIII on hearsay and Article VII on opinions and expert testimony; see also *supra* subpart I(B) (discussing how complex evidentiary rules are not suited for administrative hearings); subpart III(B) (proposing changes to the hearsay rule); subpart III(C) (proposing changes to rules governing expert testimony).

160. For example, Kmart and Target in Australia have policies requiring a receipt for “change of mind” returns; without it, returns are not accepted. Laura Jackel, Kmart Staff Memo Announces Change Coming to All Stores from 1 August, *THE ADVERTISER* (July 10, 2024), <https://www.adelaidenow.com.au/lifestyle/kmart-staff-memo-announces-change-coming-to-all-stores-from-1-august/news-story/19e961a7a9e631b8f6c04781d2773342> [https://perma.cc/N2HY-7QMQ] (discussing Kmart’s and Target’s newly announced policy to require receipts for returns instead of only requiring identification). Similarly, Lowe’s requires physical receipts for returns, unlike competitors who offer more flexible options. James Lawley, “Boycott Lowe’s, Go to Home Depot,” *Fumes Shopper After Calling Return Policy “Garbage” – Urges People to Keep Receipts*, *SUN* (U.S.) (June 16, 2024), <https://www.the-sun.com/money/11643761/lowes-boycott-returns-receipts-refund-policy> [https://perma.cc/EB7D-XZK4] (comparing Lowe’s new receipt-required return policies to Home Depot’s return policies).

161. For example, Dollar General’s return policy states that without a receipt, customers are limited to an exchange or store credit. *Return Policy*, *DOLLAR GENERAL* (Mar. 18, 2025), https://dollargeneral.service-now.com/csp?id=kb_article_view&sys_kb_id=ed9c94fb1b6eed1004

b. The “Pics or It Didn’t Happen” Rule.—Tim Lau of the Federal Judicial Center describes a modern folk evidentiary rule: “pics or it didn’t happen.”¹⁶² When you claim that you met a celebrity or traveled to Paris, others now expect photographic evidence.¹⁶³ In the smartphone era, a picture (or better yet, a short video) serves as a baseline for validating assertions.¹⁶⁴ While other types of proof may be acceptable, they often elicit skepticism or frustration, especially among the younger generation.¹⁶⁵ Even though photos can be faked,¹⁶⁶ the prevailing expectation remains: *provide an image to substantiate your claim.*

2. Rebuttable Presumptions.—We now turn to two example presumptions from the case law. Presumptions are shortcuts of proof. By adopting these rebuttable presumptions, courts can streamline the adjudication process while preserving fairness, thereby making administrative hearings more efficient and pragmatic.

a. The Mailbox Rule.—As established in *United States v. Perry*, the mailbox rule (or “presumption of receipt”) arises when evidence demonstrates that a document or item has been properly addressed, stamped, and mailed.¹⁶⁷ This presumption operates on the logical inference that, under normal

48a86a234bcbfe [https://perma.cc/D2FU-5PAW]. Similarly, Target’s return policy indicates that opened or damaged items, or those without a receipt, may not be eligible for a return. Lauren Jarvis-Gibson, *Target Changed Their Return Policy: Here’s What We Know*, S. LIVING (Jan. 22, 2025), <https://www.southernliving.com/target-changed-return-policy-8778329> [https://perma.cc/JEC9-9KL5] (discussing Target’s new receipt policy). These policies are generally accepted by consumers, who understand that lacking a receipt can limit return options.

162. See Timothy Lau, “Pics or It Didn’t Happen” and “Show Me the Receipts”: A Folk Evidentiary Rule, 76 VAND. L. REV. 1681, 1682–83 (2023) (describing the usage of the phrase “Pics or It Didn’t Happen” as a modern evidentiary rule).

163. See Chris Menning, *Pics or It Didn’t Happen*, KNOW YOUR MEME (Nov. 3, 2009), <https://knowyourmeme.com/memes/pics-or-it-didnt-happen> [https://perma.cc/632R-TA3U] (explaining the origin of the usage of the phrase “pics or it didn’t happen”).

164. See Adam Schrag, “Pics or It Didn’t Happen”: On Visual Evidence in the Age of Ubiquitous Photography, 10 PAC. J. 1, 2–4 (2015) (highlighting the increasing expectation for visual validation in various contexts).

165. See, e.g., Gary Rudman, *10 Things You Should Know About Respect in the Gen Z World*, GREENBOOK (Sep. 4, 2023), <https://www.greenbook.org/insights/research-methodologies/10-things-you-should-know-about-respect-in-the-gen-z-world> [https://perma.cc/32CB-7T8E] (discussing how exposure to the digital world has caused Gen-Z to become skeptical to outdated sources and viewpoints).

166. The availability of software that allows users to manipulate digital photographs, such as Adobe Photoshop, is widespread. Adobe’s official resources highlight the capabilities of Photoshop for photo manipulation as enabling users to alter images extensively. E.g., *Photo Manipulation*, ADOBE, <https://www.adobe.com/creativecloud/photography/discover/photo-manipulation.html> [https://perma.cc/A227-L9QZ].

167. See *United States v. Perry*, 496 F.2d 429, 430 (10th Cir. 1974) (ruling that “proof that a letter properly directed [and] placed in a Post Office” creates a legally valid presumption that the letter was “actually received by the person to whom it was addressed”).

circumstances, the postal system will deliver mail as expected.¹⁶⁸ In legal proceedings, this presumption simplifies procedures by shifting the initial burden of proof to the recipient who disputes receipt of notices, orders, or communications. For instance, in unemployment benefits cases, where claimants must respond to notices within a specified period, the mailbox rule places the onus on the claimant to demonstrate nonreceipt.¹⁶⁹ Similarly, agencies issuing regulatory compliance notices can rely on this presumption to affirm that affected parties were properly informed, reducing disputes over procedure. The mailbox rule is rebuttable, ensuring that fairness and accuracy is maintained under special circumstances, but in the typical case, it promotes efficiency.

b. The Presumption of Ownership and Benefit.—This presumption holds that the registration of a motor vehicle constitutes prima facie evidence of ownership, and that the operation of the vehicle is presumed to be for the owner's benefit.¹⁷⁰ These presumptions reflect practical realities: vehicle registration is closely tied to ownership, and vehicle use often aligns with the owner's interests. It also handily deals with problems identifying the operator of a motor vehicle, who cannot always be readily discerned. In administrative adjudication, analogous presumptions could prove highly effective at streamlining the fact-finding process.

3. Implications.—Under the traditional rules of evidence, proof rules like these folk rules and presumptions are largely neglected. Courts generally allow parties to present any form of admissible evidence, trusting that they will offer the strongest proof available.¹⁷¹ This liberal proof policy reflects the preference that the jury's inferential process be left alone.¹⁷² Thus, even though juries may intuitively apply folk rules like the receipt rule or the "pics or it didn't happen"

168. The presumption of regularity (another common presumption) is founded on the common-sense idea that courts should assume that government officials "have properly discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926).

169. *See Douglas v. Unemp. Comp. Bd. of Rev.*, 151 A.3d 1188, 1193 (Pa. Commw. Ct. 2016) (holding that claimant alleging nonreceipt must rebut the common law mailbox rule, which presumes receipt of properly mailed notice).

170. *See Smith v. Savannah Homes, Inc.*, 389 F. Supp. 384, 385–86 (W.D. Tenn. 1974) (holding that a statute providing that the registration of a vehicle is prima facie evidence of both ownership and operation for the owner's benefit created a rebuttable presumption).

171. *See John H. Langbein, The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 829–30 (1985) (contrasting the adversarial system's reliance on party-driven presentation of evidence with the inquisitorial system's reliance on judicial management).

172. *See Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 506 (1957) (emphasizing the jury's primary function to evaluate evidence and determine facts); Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 237 (1966) (discussing the balance between evidentiary rules and the jury's role in the fact-finding process).

rule, or may draw logical inferences akin to the mailbox rule and the presumption of ownership/benefit, such expectations are not formally codified.¹⁷³

In the administrative context, however, proof rules hold transformative potential. Without juries, administrative courts have far greater flexibility to establish evidentiary expectations upfront. ALJs can explicitly require parties to produce certain types of evidence, such as a photograph of a dangerous workplace condition, a receipt for claimed expenses, or a medical professional's report, barring extenuating circumstances.¹⁷⁴ This proactive approach could facilitate better evidence generation, as well as more efficient and consistent fact-finding.

Rather than relying on informal or ad hoc practices, these evidentiary requirements and presumptions could be formalized into codified rules. All parties entering administrative hearings would then be fully aware of the evidence expected and the presumptions they will encounter. For instance, claimants would know in advance that they should take a photograph of the work site after suffering an injury.

By implementing clear and formal rules of proof, administrative hearings can minimize uncertainty, streamline decision-making, and encourage parties to present the most effective evidence for resolving disputes. However, as discussed, developing good proof rules takes time and resources.¹⁷⁵

IV. Areas That Don't Need Alternative Rules

Through these proposed rules on hearsay, expert evidence, and proof, a customized set of evidentiary rules for administrative hearings starts to emerge. However, not every aspect of traditional evidentiary frameworks requires revision for administrative adjudication. Certain areas of evidence law should remain consistent across fora.¹⁷⁶ One such area is privileges, a domain where the rationale for the rules transcends procedural contexts and is rooted in broader social policies.¹⁷⁷ Privilege rules, such as attorney-client

173. For example, Article III, "Presumptions in Civil Cases," of the Federal Rules of Evidence only has two short rules, deferring to state law for presumptions in civil cases. FED. R. EVID. 301–02.

174. For instance, claimants could be explicitly instructed to document injuries or incidents with photographs as soon as they occur.

175. See *supra* section II(C)(3).

176. *E.g.*, FED. R. EVID. 401–403 (relevance and prejudice balancing); FED. R. EVID. 901 (authentication of evidence); FED. R. EVID. 201 (judicial notice).

177. See Charles W. Quick, *Privileges Under the Uniform Rules of Evidence*, 26 UNIV. CIN. L. REV. 537, 538–39 (1957) (listing "criteria" to be considered in assessing the reasonableness of a personal privilege, including the value of the privileged relationship and whether that value is outweighed by the interest of justice); Paul F. Kirgis, *A Legisprudential Analysis of Evidence*

privilege, spousal privilege, and clergy-penitent privilege, aim to protect certain critical social relationships and to encourage open communication among certain individuals.¹⁷⁸ These rules are designed to shape primary behaviors and foster trust relationships outside the courtroom, making them as relevant in administrative hearings as they are in jury trials or any other legal proceeding.¹⁷⁹

Uniformity in the treatment of privileges across different types of proceedings ensures vindication of their underlying public policy rationale. After all, if the attorney-client privilege were inapplicable in administrative proceedings, that would significantly diminish the attorney-client relationship. Applying privileges uniformly to administrative proceedings ensures that parties can rely on these protections regardless of the forum in which the parties appear. Moreover, it avoids unnecessary fragmentation in evidentiary law. Creating a separate set of privilege rules for administrative hearings creates complexity and confusion with little added benefit.

By recognizing the areas of evidence law that do not require alternative rules in the administrative context, we can strike a balance between innovation and stability. This balanced approach to reform will ensure that administrative hearings not only meet their unique needs but also maintain coherence with the broader legal system.

Conclusion

Evidence law need not be confined to the two extremes of Free Proof or the traditional rules of evidence. Different contexts demand different evidentiary frameworks that balance flexibility, fairness, accuracy, and efficiency. Administrative hearings, with their unique procedural characteristics, underscore this critical need for a nuanced approach.

This Essay has explored what evidentiary rules in administrative hearings might and should look like. We have identified the shortcomings of both the Free Proof and traditional evidentiary regimes and proposed three alternative approaches to thinking about evidentiary rules in the

Codification: Why Most Evidence Rules Should Not Be Codified – But Privilege Law Should Be, 38 LOY. L.A. L. REV. 809, 856 (2004) (“The purpose of privilege law is to encourage free communication in a variety of interpersonal relationships. The underlying rationale may be instrumental—to secure social benefits from free communication—or humanistic—to protect the privacy of individuals.” (footnote omitted)).

178. See PAUL R. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 1:1 (2025) (discussing the purpose of the attorney-client privilege rule in fostering open communication). See generally 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 1.2 (Richard D. Friedman ed., 4th ed. 2022) (examining various privilege rules and their underlying policies).

179. See Kirgis, *supra* note 177, at 856 (“The purpose of privilege law is to encourage free communication in a variety of interpersonal relationships.”).

administrative context: simplifying the rules, refocusing them around legitimacy, and adopting inference-based frameworks. Simplified evidentiary rules would streamline procedural burdens, make the rules accessible for pro se litigants, and free administrative law judges from unnecessary strictures. Legitimacy-focused rules acknowledge the diminished need for accuracy-based rules in the bench trial context, while preserving transparency, legitimacy, and fairness to litigants. Finally, inference-based rules shift the focus from admissibility to reasoning, providing structured guidelines to aid judges in evaluating and weighing evidence.

Building on these conceptual foundations, we introduced practical proposals for reform in three critical areas: hearsay, expert evidence, and proof rules. From consolidating hearsay exceptions into a necessity-and-reliability standard, to rethinking the evaluation of expert evidence through deference to scientific consensus, to codifying practical presumptions and folk evidentiary rules, these proposals aim to align evidentiary frameworks with the unique demands of administrative hearings.

This Essay is merely the start of a broader project rethinking how evidentiary rules should work in different contexts. The principles and proposals articulated here invite further exploration and dialogue about tailoring evidentiary frameworks to meet the needs of diverse adjudicative settings. Just as the traditional rules form the basis for our discussion of evidentiary rules in the administrative context, reforms in the administrative context may ultimately offer lessons for broader evidentiary reform as well. Administrative law courts offer an exciting venue for evidence experimentation. As Justice Holmes observed, “[t]he life of the law has not been logic: it has been experience.”¹⁸⁰ So too, the evolving practices of administrative tribunals may ultimately point the way toward a more flexible, context-sensitive evidence law.

180. O.W. HOLMES, JR., *THE COMMON LAW* 1 (London, MacMillan & Co. 1881).