June 2004

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THE FALSE IDOLATRY OF RULES-BASED LAW

John C. Sheldon

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THE FALSE IDOLATRY OF RULES-BASED LAW

John C. Sheldon* 

I. INTRODUCTION

[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group. . . . Separate educational facilities are inherently unequal.1

When the Supreme Court outlawed segregation in public schools in 1954, it acknowledged this social truth: assigning separate public facilities to separate classes of people fosters inequality among those classes. Although Brown v. Board of Education of Topeka2 addressed only educational facilities, the Court quickly broadened the scope of its decision, applying it to racial discrimination in or at public beaches, buses, golf courses, parks, municipal airport restaurants and state courtrooms.3 And although Brown addressed only racial discrimination, it quickly became the basis for condemning many forms of discrimination, including race, religion, wealth, gender, age, and disability.4 What gave Brown this elasticity was its pragmatism, its faith in experience over logic. Theoretically, separate public systems for separate classes of people can be equal; logically, Plessy v. Ferguson5 ought to be right. But it just never is.6 Logic can distort and deceive.

One would think that the legal profession—especially the legal profession—would be sensitive to that lesson. Unfortunately, however, just the opposite is true, and it worries me enough to present the issue here. It is my recent experience that legal professionals seem so beholden to logic and the rules that logic spawns that they will struggle to preserve such rules even when the result is injustice.

What first caused me this concern was the report of Maine's Court Unification Task Force (CUTAF), a body that convened in the late 1990's to study "how to unify [Maine's] District and Superior Courts" in order to achieve "the effective and efficient provision of judicial services to the public."7 The ultimate inspira-

* Visiting Scholar, Harvard Law School (2000, 2002-2003); Judge, Maine District Court (1987-2002). I thank D. Brock Hornby, Duncan Kennedy, Peter L. Murray, and Barbara Schneider for their many helpful suggestions.

4. Paul Gewirtz, The Triumph and Transformation of Antidiscrimination Law, in Race, Law, & Culture: Reflections on Brown v. Board of Education 110 (Austin Sarat ed., 1997) [hereinafter Reflections on Brown]. "Brown both crystallized and launched a revolution in the way our society understands what equality requires, a revolution that is ongoing." Id. Gewirtz goes on to illustrate how Brown inspired sensitivity to discrimination against women, the disabled, the elderly, religious groups, gays and AIDS victims. Id.
5. 163 U.S. 537 (1896).
tion for this inquiry was the American Bar Association’s long-time advocacy of trial court unification (or consolidation) on two grounds: it can offer considerable efficiencies to both civil dockets\(^8\) and criminal dockets,\(^9\) and “[m]ost important[ly], it can reduce or eliminate the appearance of second-class justice that is often associated with courts of ‘inferior jurisdiction.’”\(^{10}\) What CUTAF finally produced, however, was a report (later enacted into law\(^{11}\)) that achieved not greater trial court unification, but just the opposite: more than ever, Maine’s trial courts now resemble a caste system.

If this seems anachronistic in a post-

\textit{Brown}\ society, you understand why the CUTAF report caught my eye. But it was more than CUTAF’s recommendations that surprised me; what is odd about the report is its clumsiness, its pervasive illogic. CUTAF seems desperate to have avoided the very trial court unification it claimed to pursue. The first time I read the report, I figured this represented another victory for the “Haves” over the “Have-Nots,” a common problem with state judicial systems.\(^{12}\) But a later experience caused me to look deeper.

Recently, Peter L. Murray and I have published a series of articles in which we advocate abandoning evidentiary rules of admissibility in non-jury cases.\(^{13}\) The reason we propose this is twofold. First, rules of admissibility (the hearsay rule is the foremost example) are designed for jury trials and have no theoretical utility in non-jury hearings. Even evidence maven Dean Charles McCormick has called the employment of such rules in non-jury trials “absurdly inappropriate.”\(^{14}\) Second, many litigants in our courts represent themselves nowadays, and in the frequent event that one party has a lawyer and one does not, applying rules of admissibility gives the represented party an advantage that is unrelated to the merits of the case.

We thought that abandoning unnecessary rules to level the playing field in non-jury cases would be straightforward, but opposition from the bench as well as the bar has been formidable—and, again, illogical, fueled not by the application of theory or policy but, seemingly, by something closer to faith. It is as if we were attacking a sacrament. This is what prompted me to reconsider CUTAF’s report. It is easy to accuse lawyers of acting irrationally to protect one of their principal fee sources (in Maine, the Superior Court) from mobs of “Have-Nots,” and to

\begin{itemize}
  \item 8. JUDICIAL ADMIN. DIV., AM. BAR ASS’N, STANDARDS RELATING TO COURT ORGANIZATION 22-23 (1990).
  \item 9. \textit{Id.} at 21-23.
  \item 10. \textit{Id.}
  \item 11. CUTAF’s recommendations were adopted by the legislature and enacted into law effective by March 15, 2001. P.L. 1999, ch. 731, § ZZZ-1 (codified at ME. REV. STAT. ANN. tit. 4 § 41 (West Supp. 2003)).
  \item 14. 5 \textit{ENCYCLOPEDIA OF SOCIAL SCIENCES} 637, 644 (1931).
\end{itemize}
protect their specialized knowledge of evidence law from obsolescence. But when judges start behaving the same way in the absence of pecuniary interest you have to wonder if something else is at work.

I now believe that what has provoked these similar responses is jeopardy to what Dean Roscoe Pound has described as the law of Rules, law based on the deduction of rules from axiom and the strictly logical application of such rules to facts, without regard for the apparent fairness of the result. In CUTAF’s case, unifying the trial courts would have commingled the law of Rules with what Pound called the law of Standards (roughly, discretionary jurisprudence, especially prominent in family law, where the fairness of the result is the objective), to the dissatisfaction of the many legal professionals who consider the law of Rules the undilutable essence of Western justice. To prevent that dilution, CUTAF recommended keeping the trial courts separate. In the case of rules of admissibility, judges opposed abandoning such things as the hearsay rule for fear of depriving legal proceedings of something essential to judicial authority. Neither of these concerns is reasonable: if the law of Rules were the essence of Western justice, Brown would not have withstood the test of time, and it is judges rather than rules of admissibility that provide non-jury proceedings with order and credibility. But that illustrates my point: When thoughtful people turn away from reason, it’s usually to embrace faith. Too many lawyers and judges, I believe, have come to worship Rules-based law, and blindly so. Untempered by reason, their worship distorts our justice system.

I begin this Article with a description of Maine’s trial courts, and turn then to explain how CUTAF parceled out jurisdiction according to Pound’s Rules/Standards distinction. I then discuss the CUTAF report to illustrate the illogical lengths CUTAF went to reach its recommendations. I then turn to Professor Murray’s and my idea about non-jury evidence rules and the arguments against this idea. I use both the CUTAF report and the evidence issue to explain why I believe that intelligent people, who are sincerely determined to promote justice, advocate for particular justice systems irrationally.

The answer lies in Harvard Law School Professor Duncan Kennedy’s analysis of the rise and fall of Classical American legal theory. The long and the short of Kennedy’s view is that rules comfort us. They prop us up against our fear of disorder. So Rules-based law appears superior to the law of Standards because the former seems to promise greater socio-political stability. Rules of admissibility illustrate this point on a smaller scale: They seem to boost the authority of non-jury proceedings. In fact, these are false perceptions. Rules-based law is no more impressive than Standards-based law, and I will return to Brown to illustrate why. Furthermore, as Kennedy shows, when closely compared these two categories of law become indistinguishable. Our faith in the law of Rules is instinctual, whimsical and false, and the many disadvantages it causes thousands of our litigants are unnecessary.

II. MAINE’S TRIAL COURTS

Although I have mentioned Maine’s two principal trial courts, there are actu-
ally three different trial courts in Maine. The Superior Court is where juries sit to evaluate civil and criminal cases, and since the jury system is the standard upon which Anglo-American dispute resolution has traditionally been based, the Superior Court is the forum to which civil cases of large monetary or legal significance tend to gravitate, and to which felony-level criminal actions are directly assigned. In addition to jury trials, however, the Superior Court considers some disputes for which the parties elect not to convene a jury, or have no right to a jury, as when litigants seek equitable relief. Because most of the Superior Court’s cases involve complex legal issues or high stakes, most litigants are represented by attorneys.

Maine’s District Court is dedicated to cases for which no jury is permitted (family law, traffic violations, and juvenile prosecutions are examples), for which no jury trial has been demanded (misdemeanor criminal cases), or for which the defendant has a residual right to a jury trial once the District Court proceeding is over (evictions, small claims). Compared to the Superior Court, there are relatively few attorneys in the District Court; most people represent themselves. This is not because District Court cases are uncomplicated; some, like evictions and many small claims cases, can involve bafflingly complicated legal issues. Rather, it is due to a combination of factors, such as the popularity of Judge-Wapner-like television shows, do-it-yourself law publications, the creation of do-it-yourself causes of action like Protection from Abuse and Protection from Harassment, the absence of jury-trial complexity, the high cost of lawyers, and a cultural animus toward them.

Finally, Maine has a Probate Court, another nonjury court, which administers Maine’s version of the Uniform Probate Code, involving wills, inheritance, name changes, adoptions, and guardianships. The Probate Court is probably unnecessary—the District Court could easily assume the Probate Court’s dockets—but the Maine Constitution mandates its existence. The clientele of the Probate Court

16. ME. R. CRIM. P. 7(a).
17. ME. R. CIV. P. 38.
18. ME. CONST. art. I § 20; Cyr v. Cote, 396 A.2d 1013 (Me. 1979).
20. ME. R. CIV. P. 80F(g).
22. ME. R. CRIM. P. 22(a).
23. ME. R. CIV. P. 80D(f); ME. R. CIV. P. 80L.
27. See ME. CONST. art. VI, § 6 (“Judges and registers of probate shall be elected by the people of their respective counties . . . “)). See also ME. CONST. art. V, pt. 1, § 8 (empowering the Governor to “appoint all judicial officers, except judges of probate . . . if their manner of selection is otherwise provided for by this Constitution or by law. . . . ”).
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is similar to the District Court's: many people represent themselves. I will not mention the Probate Court again in this Article, because it did not enter into CUTAF's report and is not, therefore, a part of the symptom I address.28

III. RULES VERSUS STANDARDS

A. CUTAF's Realignment of Trial Court Jurisdiction

Although the current allotment of jurisdiction among the courts is the result of a variety of historical influences, CUTAF's report is the first to result from a comprehensive analysis of the Superior and District Courts' functions. The most significant of CUTAF's recommendations regarding the Superior and District Courts was to "substantially eliminate[1]" the Superior Court's authority to consider appeals from decisions by District Court judges,29 and to assign responsibility to the District Court for hearing all family law cases, including divorce, custody, child support, parental rights termination, child protection, and protection from domestic abuse.30 This redistribution of civil jurisdiction not only diminished the Superior Court's civil caseload31 but also realigned the theoretical function of both courts. Henceforth, the Superior Court's civil docket would require judges to focus mostly on Dean Pound's law of Rules, which usually applies to disputes about such issues as property, contract, corporations, and tort.32 Under Rules-based law, judges apply pre-existing legal doctrines to the facts to reach what are supposed to be strictly rational and objective decisions, untainted by the personal views of the judge.33 (In jury trials, judges use such doctrines to formulate instructions for the jury.) These doctrines are themselves deductions from other, more fundamental principles, and the entirety forms a logically consistent and intellectually sound body of law. An example would be the rule that disallows enforcing a contract against a person who is under 18; this rule is based on the fundamental contract principle that a person who contracts must do so with "intent," and that a minor lacks the ability to form "intent."34 Even if some such rules (or instructions) seem

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28. CUTAF's legislative mandate did not authorize it to include the Probate Court in its recommendations, so it did not do so. CUTAF REPORT, supra note 7, at 2.

29. Id. at 17.

30. Id. at 12.

31. According to CUTAF's calculations, depriving the Superior Court of jurisdiction to try family law cases would reduce its caseload by 300 cases per year. Id. at 13. Limiting its appellate jurisdiction over District Court decisions would reduce its caseload by an additional 70 or so family law cases, plus an additional but uncalculated number of other kinds of cases. Id. at 15, 18.

32. Rules are [A]dmirably adapted to the law of property and to commercial law, where one fee simple is like every other and no individuality of judicial product is called for as between one promissory note and another... In other words, the social interests in security of acquisitions and security of transactions—the economic side of human activity in civilized society—call for rule or conception authoritatively prescribed in advance and mechanically applied... Titles to land and the effects of promissory notes or commercial contracts cannot be suffered to depend in any degree on the unique circumstances of the controversies in which they come in question. Roscoe Pound, The Theory of Judicial Decision, 36 Harv. L. Rev. 641, 952, 957 (1923).

33. Kennedy, supra note 15, at 1754.

34. See id. at 1739.
unfair sometimes—even if the law permits the minor both to benefit from the contract and not pay for it—their pure rationality, their time-tested “reasonableness,” endows them with credibility and with precedential value for later cases and, ultimately, establishes the credibility of the legal process itself.  

Because the District Court, on the other hand, would have exclusive authority over family law cases, it would employ what Pound called “[s]tandards, applied intuitively... for classes of cases in which each case is to a large degree unique.” Standards are especially appropriate for family law disputes where, according to Laurence Tribe, “the need to reflect rapidly changing norms affecting important interests in liberty compels an individualized determination, one not bound by any pre-existing rule of thumb.” In such cases, the law expects judges to employ discretion, and to tailor their decisions to the particular needs of the adult parties and their children. An example would be the judge’s responsibility to base an award of child custody on what the judge views as the “best interest of the child.” Such fact-specific decisions provide little precedential value for other disputes, however, and are exposed to criticism as subjective, arbitrary and even expedient. For example, one judge might consider a parent’s use of marijuana a serious violation of the child’s “best interest,” while another judge might ignore it. Nor do Standards-based decisions require the logical precision that the law of Rules demands; the law of Standards is more art than algebra.

35. Duncan Kennedy calls this under-inclusiveness (some people are still immature at 19) and over-inclusiveness (some 17-year-olds don’t need to be protected from their contracts), in its extreme form, the “clenched teeth” approach to law: “The immorality of law is... the necessary price for avoiding the greater immoralities that would result from trying to make law moral.” Id. at 1716.

Max Weber argues that the jury trial system has an ameliorating effect on the process by which pure logic could incrementally produce undesirable rules: “[T]he institution of the civil jury imposes on rationality limits which are not merely accepted as inevitable but are actually prized because of the binding force of precedent and the fear that a precedent might thus create ‘bad law.’” MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 317 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., Harvard University Press 1954).

36. Pound, supra note 32, at 951-52. Standards apply to cases “where we have to do with the social interest in the individual human life and with individual claims to free-self assertion... where there is never exact repetition of any former situation and each case is more or less unique.” Id. at 957.


39. Standards are what courts often resort to in deciding equitable claims. I do not mean to suggest that the Superior Court lacks equity jurisdiction; it has been hearing cases in equity since 1930. See ME. REV. STAT. ANN. tit. 4, § 105 (West 1989 & Supp. 2003-2004). Nor do I mean that the District Court lacks jurisdiction over cases that require the traditional application of Rules; see generally ME. REV. STAT. ANN. tit. 4, § 152 (West 1989 & Supp. 2003-2004). Rather, the traditional grist for the Superior Court’s mill—contract, tort, and property—is Rules-based and will remain so. Family law is equitable, Standards-based law for the District Court. This generalization about jurisdiction is based on the courts’ respective, salient civil jurisdictions. A classic, intrastate illustration of the difference between Rules and Standards lies in the concurring opinions of an equally-split Law Court in the case of Grant v. Grant, 424 A.2d 139 (Me. 1981). At issue was how to interpret an ambiguous portion of the Marital Property Act, ME. REV. STAT. ANN. tit. 19, § 722-A (West 1998) (repealed 1997). Id. at 140. Justice Wernick, writing for himself and Chief Justice McKusick, found a solution in a strict interpretation of the language of...
B. The Consequences of CUTAF's Jurisdictional Alignment: The Caste System

Pound's law of Rules is a pillar of classical American legal theory. In Duncan Kennedy's view, the law of Rules represents "a fully principled and consistent solution, both to the ethical and to the practical dilemmas of legal order."40 Additionally, Kennedy notes:

The Classical position can be reduced to three propositions concerning the proper definition of liability. First, the fundamental theory of our political and economic institutions is that there should exist an area of individual . . . liberty within which there is no responsibility at all for effects on others. Second . . . there are only two legitimate sources of [private law] liability: fault, meaning intentional or negligent interference with the property or personal rights of another, and contract. . . . [Third,] the concepts of fault and free will to contract can generate, through a process of deduction, determinate legal rules defining the boundaries and content of tort and contract duties.41

Kennedy does not mean to suggest that Classical American legal theory is limited to contract and tort; he uses those fields (and principally contract) to illustrate his point.42 What he does mean is that Classical legal theory is a system of deductive thinking from fundamental principles to particular rules. Furthermore, it is incompatible with any other system of law. Accepting the law of Rules is an "all-or-nothing commitment to a complete system. One might accept or reject . . . that our institutions are based on liberty, private property and bodily security. But if one once subscribe[s] to these ideas, a whole legal order follow[s] inescapably."43 In the view of its admirers, the law of Rules is the law at its best, the perfect synthesis of morality, political theory and legal policy.

By assigning all family law—our most prominent, single body of Standards-based law—to the District Court and away from the Superior Court and, at the same time, diminishing the Superior Court's civil caseload, CUTAF cleared the statute. See id. at 141-43. Justice Glassman, writing for himself and Justice Nichols, concluded that "it is fruitless to endeavor to determine the meaning of [the statute] . . . by a mere textual analysis," and based his interpretation on "the fundamental conception of marriage." Id.; see also John C. Sheldon, Toward a Coherent Interpretation of Maine's Marital Property Act, 43 Me. L. Rev. 13, 24-25 (1991).

41. Id. at 1728-29.
42. Id. at 1686. Kennedy explains:

[T]here are two opposed rhetorical modes for dealing with substantive issues, which I will call individualism and altruism. There are also two opposed modes for dealing with questions of the form in which legal solutions to the substantive problems should be cast. One formal mode favors the use of clearly defined, highly administrable, general rules; the other supports the use of equitable standards producing ad hoc decisions with relatively little precedential value.

I will use the law of contracts as a primary source of illustrations [because] I know it better than other private law subjects, and it is blessed with an extraordinary scholarly literature . . .

My purpose is to examine . . . the connection between the "erosion of the rigid rules of the late nineteenth century theory of contractual obligation" and the "socialization of our theory of contract[.]

Id. at 1687.
43. Id. at 1729.
Superior Court’s decks for the practice of this highest order of law. In anthropologist Barbara Yngvesson’s terms, CUTAF distinguished Maine’s Superior Court as the arena for “legal professionals [to] engage a more privileged audience, and make worlds . . . that are ‘shaped by reason’ so as to secure the rights . . . of civilized men.” On the other hand, because CUTAF assigned the District Court all family law, and also continued the District Court’s jurisdiction over protection from harassment claims, evictions, small claims, collections, and misdemeanors, that court would have charge of what Yngvesson calls “the ‘relational troubles’ of the working class and welfare poor,” including disputes with spouses, domestic partners, neighbors, landlords, creditors, and, frequently, the police.

What CUTAF’s report did not mention is how this jurisdictional alignment could be expected to affect the public’s perception of the courts. The closest it came was to mention the District Court’s reputation for handling “the large volume of ‘little’ cases,” but that whitewashes the issue. A pithier observation came from an English judge, who criticized a Canadian proposal to unify trial courts with the question, “Why would you have your best men sitting on garbage?” Professor Yngvesson similarly characterized the jurisdiction of the plebian court she was studying: It had “the governance of ‘garbage cases’ and ‘garbage people’.”

44. CUTAF anticipated this diminishment, and suggested: “To whatever extent the recommendation relieves the Superior Court of caseload, the Superior Court Justices could devote more time to uniform [unified?] trailing dockets . . . and to other cross assignment.” CUTAF REPORT, supra note 7, at 18. The wiggleword is “could.” Nobody who has a choice will “devote more time to uniform trailing dockets,” and no judge who has graduated from the District Court or avoided it altogether will have incentive to return there.

45. BARBARA YNGVESSON, VIRTUOUS CITIZENS, DISRUPTIVE SUBJECTS; ORDER AND COMPLAINT IN A NEW ENGLAND COURT 120 (1993) (footnote omitted). Yngvesson was studying litigants’ behavior in Massachusetts’ two-tiered trial court system, focusing on the District Court of Essex in Salem and the Franklin County District Court in Greenfield. Id. at 2. The fact that her descriptions of the Massachusetts courts is tailor-made for Maine’s courts confirms the accuracy of the ABA’s prediction for two-tiered court systems. See text accompanying notes 9-11 above.

46. YNGVESSON, supra note 45, at 120. Evictions and traffic infractions are strictly statutory actions. Many small claims are strictly contract, tort, or property actions. Nevertheless, District Court judges often issue Standards-based judgments in such cases for these salient reasons: first, many such cases are litigated pro se, by litigants who present the facts so poorly that the judge doesn’t know what statute or rule to apply; second, as a practical matter, it may be better to fashion a fair decision than to parse a rule because pro se litigants are more apt to respect a decision that is based on common sense than one based on technicality. So, the fact that such Rule-based actions have been assigned to the District Court does not contradict my thesis about the general nature of the District Court’s decision-making, or about CUTAF’s distribution of jurisdiction.

47. CUTAF REPORT, supra note 7, at 14. CUTAF intended the District Court to become a “fast track” alternative to the Superior Court for non-jury civil cases that “could be quickly heard and disposed of.” Id. at 24-25. So, the District Court would remain the forum for “little cases.”


49. YNGVESSON, supra note 45, at 120.
The ultimate problem of Maine's District Court is not just that it's reserved for the plebians, but that it attracts the pariahs, those whose relational problems and "interpersonal trouble" with family and neighbors spring not from legal disputes but from social conflict and, therefore, submit at best to Standards-based resolution, or defy legal solution entirely. Everyone who frequents the District Court knows this to be so, but CUTAF never acknowledged it. By omitting the obvious, CUTAF prompted the suspicion that it had obscured its true motive for maintaining a dual trial court system—to preserve the District Court as a place to corral such legal incurables. Appearances suggest that CUTAF intended Maine's present trial court structure to be a caste system.

It is not surprising that the report neither admits this nor attempts to justify it, but the report does contain a veiled acknowledgment that trial court consolidation deserves avoidance: "If we are to maintain and improve the confidence of Maine people in their judicial system, we can ill-afford any failed experiment with court unification." What is notable about this statement is that failure of any magnitude is intolerable: "any failed experiment." When I first read that statement, I wondered why fear of failure should be such an obstacle. After all, any attempt at progress is likely to involve some failure, to a degree that is proportional to the magnitude of progress. Then I realized that the essence of the statement lies not in the risk of failure but in the "experiment" itself: CUTAF was unwilling to attempt anything previously untried. And it didn't. The Superior Court's civil docket now resembles what it was at the birth of the District Court in 1962: mostly Rules-based legal issues, then disengaged from what was an inert body of Standards-based family law by the infrequency of divorce, and now similarly disengaged by CUTAF's recommendation.

Reinforcing the proletarian/aristocratic characteristics of the trial courts are certain traditions within the courts themselves. District Court judges who move on to the Superior Court bench are said to have been "elevated," shedding the title "Judge" and assuming the more honorific title "Justice" (which they share with the members of the Supreme Judicial Court). Their experience on the District Court bench does not, however, entitle them to any seniority in the Superior Court;

50. Id. at 29.
51. CUTAF REPORT, supra note 7, at 3. This is the context of the statement:

The Task Force has concluded that the unification of the Superior and District Courts must not be viewed as an end in itself. An effort simply to create a single trial court with a single class of judges solely for the sake of "unification" would not necessarily improve the efficiency or effectiveness of the judicial system for the people of Maine. The central issue before the Task Force is thus whether we can improve court services for Maine citizens by redesigning the trial courts. The Task Force has the obligation to recommend unification measures that will provide a net benefit to the users of the court system and thus the Task Force is required to make a focused assessment of the cost/benefit balance of each recommendation. If we are to maintain and improve the confidence of Maine people in their judicial system, we can ill-afford any failed experiment with court unification. With the overriding goal of the public good in mind, therefore, the Task Force has proceeded cautiously with respect to its recommendations, mindful of current constraints on the judicial system and the need to implement measures that will succeed.

Id. at 2-3. For a discussion of whether the Task Force addressed "the confidence of Maine people in their judicial system," id. at 3, please see the text below following note 58.
notwithstanding the duration of their District Court service, they arrive at the Superior Court as raw rookies and take the assignments that Superior Court veterans shun.53 This career path is strictly a one-way street: in the forty years of District Court existence twenty-one District Court judges have been "elevated" to the Superior Court, whereas no Superior Court judge has ever been appointed to the District Court.54 On the other hand, some first-time candidates for judicial nomination, with special qualifications and/or influence, can avoid the District Court entirely by receiving direct nomination to the Superior Court.55

These facts of judicial life, which CUTAF neither mentioned nor disturbed, present the District Court as a training ground for the Superior Court bench, a minor league where the players hone their skills for a shot at The Show. So it is not surprising that Portland's Casco Bay Weekly reported in 1996 that "[m]ost legal professionals agree that the judges presiding in the Cumberland County Superior Court are a cut above those in [the] District Court in terms of skill and stature."57 However obvious this cause and effect is—and however important dispelling it is to the public's confidence in its judiciary—CUTAF virtually ignored it,58 con-

53. Typically, assignment to the Washington County Superior Court in Machias in mid-winter. U.S. Army veterans will recognize the similarity to the experience of enlisted personnel who, having successfully completed Officer Candidate School, are awarded the lowest commissioned grade, Second Lieutenant, irrespective of the duration of their enlisted service.

54. One former Superior Court judge accepted nomination to the District Court bench several years after having resigned from the judiciary.

55. Seven of the current sixteen Superior Court judges received initial appointment to the Superior Court. I do not mean to derogate anyone who received such appointment. I do mean, on the other hand, to address directly and openly this fact of judicial life: Direct nomination to the Superior Court requires influence in the Governor's office that nominees to the District Court often lack.

56. CUTAF’s entire comment on this subject appears on page 9 of the Report:

   Aiding in this unification process, many of Maine's judges have served on both the District and Superior Courts and are, therefore, in an excellent position to emphasize the common mission and similarities of the two Courts, rather than their differences. At the present time, ten out of the 16 Superior Court Justices have previously served on the District Court, and one of the District Court Judges, Judge Jessie Briggs Gunther, is unique in having served first on the District Court and then on the Superior Court, and, after a period of retirement to start her family, on the District Court once again. In addition, at present three of the seven members of the Supreme Judicial Court have previously served on both the District Court and Superior Court. In all, starting with Judge Ian MacInnis in 1971, 19 members of the District Court have gone on to serve on the Superior Court.

CUTAF REPORT, supra note 7, at 9.


58. CUTAF REPORT, supra note 7, at 14, 28. The CUTAF report mentioned this issue twice. Id.

The first mention is as follows:

   [I]t is sometimes suggested that the Superior Court has "better" judges, ones that are more qualified by experience to handle the complex financial issues involved in some divorce cases. . . . The Task Force does not accept the presumption of "better judges" in the Superior Court. . . . Cross-assignment of District Court judges to the Superior Court will also help to cut down the unwarranted perception that they have experience only in handling the large volume of "little cases."

Id. at 14.

The second mention appears in the Report at page 28: Attorneys may have "a feeling that the Superior Court is ‘better’ . . . [T]he solution must be to correct any imbalance between the Courts, for the good of all litigants. . . ." Id. at 28.
cluding its report with this recommendation: “Further measures should be devised and implemented on a sustained basis to dispel any public perception that the District Court is an ‘inferior’ or ‘lower’ court compared to the Superior Court.”

This sounds like a Woozle hunt: as Pooh and Piglet circle a grove of larches, they wonder why the tracks in the snow keep increasing in number. Oblivious of their own contribution, they suspect Woozles. And just as Pooh and Piglet invent Woozles to explain the phenomenon they are obviously causing, CUTAF calls for “further measures” to ameliorate the phenomenon it is obviously preserving. CUTAF would have us stalking Woozles around the larches forever.

C. The Rules-based Doctrine of Admissibility

CUTAF’s report had me scratching my head until I ran into a similar kind of reasoning in response to Peter Murray’s and my proposal to truncate the rules of evidence in non-jury proceedings. Since it is not my intention to advance the proposal here, I will present it only in brief form.

We started with the premise that rules of admissibility—examples include the hearsay rule, the character evidence rule, and the expert opinion rule—are peculiar to the Anglo-American justice system for the reason that ours is the only justice system that utilizes the jury trial. Since jury trial procedure prevents outside control of the jury’s deliberation, it is impossible to guarantee the quality of the verdict unless we screen the evidence to exclude from the jury’s deliberative process things that might lead jurors to a verdict that we doubt is fair. An example of this problem is allowing a jury to hear that a criminal defendant has been convicted of committing the same crime in the past, which might well induce the jurors to convict him of the present crime because he deserves it for being a bad person, rather than because the prosecution’s evidence is strong.

Most justice systems in the world do not use juries, and most have few if any rules of admissibility. The same is true in American administrative courts. Given this world-wide experience, we saw no downside to eliminating most rules of admissibility from non-jury trials. Furthermore, doing so would help litigants representing themselves against parties who have counsel. This has become an important issue, as the following example from my own courtroom experience illustrates:

It is true that cross-assignment of judges would diminish the presumption of inferiority, but cross-assigning judges can be expected to resolve the ultimate problem no better for a court system than cross-assigning teachers would have cured the faults of educational segregation. Just as there would still be two school systems, one for the better students and one for the poorer, there would still be two trial court systems, one for the legal elite and one for everyone else. Furthermore, the cross-assignments would have to be constant, not merely occasional—a fact of equality rather than a symbol of equality. On this issue, the Report is silent; nor does the Report discuss the terms “Judge,” “Justice,” and “elevation”; it obviously avoids mentioning the one-way career path; it does not mention the Superior Court pecking order or the issue of direct nomination to the Superior Court. See discussion at supra note 55. How “to correct any imbalance between the Courts” is an unanswered question—another of CUTAF’s Woozles. And, in any event, as of this writing, the “coordinated scheduling and cross-assignment of judicial . . . resources between the two Courts” that CUTAF recommended does not exist. CUTAF REPORT, supra note 7, at 36.
In a protection from abuse case, the pro se plaintiff has prepared a statement about the abusive incident to read to the court because she knows that she is too scared of the defendant to testify in front of him from memory alone. The defendant's attorney successfully objects to her reading the statement because it does not qualify under the recorded recollection exception to the hearsay rule. The plaintiff is too upset to testify without the statement, and the case is dismissed for her failure of proof.

Rather than engaging in two different arguments, the first involving arcana about admissibility and the second involving common sense about probative value, it seems appropriate to collapse the two into a single argument about probative value. After all, weighing the admissibility of proffered evidence, and ultimately assessing its probative value, are essentially similar functions. So, for example, the judge who decides that a particular statement qualifies as an excited utterance implicitly determines that it is likely to be probative, because there has been no opportunity for fabrication. The same is true for a judge who decides whether a witness is qualified to offer a particular opinion. Thereafter, determining how probative something may be is merely an extension of determining admissibility. So, in the example above, the uncertainties that may surround the creation of the plaintiff's written statement, and doubts about its probative value, need not be established by resort to the hearsay rule; the same things can be established in cross-examination and hammered home later in argument.

In sum, judges need not perform the function of accepting evidence in two separate steps when there is no jury to screen the facts from, and ought not do so to the disadvantage of litigants without counsel. Given the ever-increasing numbers of self-representing litigants who appear in our courts, this seemed like an idea whose time had come.

In response to this proposal, a couple of Arizona state judges published a criticism:

Judicial programs that assist pro se litigants to prepare for their cases are what is needed, not repealing the rules of evidence. While it may be enticing to dumb-down the rules of evidence, the siren song of protecting pro se litigants should not come at the expense of sacrificing those fundamental principles upon which those rules have been based, and the protections they provide.

62. ME. R. EVID. 803(5).
63. Murray & Sheldon, supra note 13, at 32-33. This and several other examples appear in Professor Murray's and my Maine Bar Journal article. Id.
64. ME. R. EVID. 803(2).
65. ME. R. EVID. 701-706.
67. The idea of "leveling the playing field" for pro-se litigants is one we shared with CUTAF. See CUTAF REPORT, supra note 7, at 12. ("Starting in May 1998, the Family Division [of the District Court] . . . has 'leveled the playing field' for litigants with unequal resources.") However, CUTAF's Report did not discuss the use of rules of admissibility in the District Court; instead, it touted "[u]nified Rules of Civil and Criminal Procedure and of Evidence" as demonstrating Maine's dedication to court unification. Id. at 9.
The authors identify only one such “fundamental principle”: rules of admissibility provide “[f]undamental fairness to all parties” by serving as “a shield to protect pro-se litigants against unsubstantiated accusations.” They cite no authority for this “fundamental principle” and they do not dispute our assertion that the rules of admissibility have their sole historical origin in the management of jury trials. This “fundamental principle” appears to have arisen from the authors’ own inspiration.

Furthermore, these judges seem to concede our premise about pro se litigants, for which we relied on our own experience bolstered by this from the Supreme Court: “Even the intelligent and educated layman...is unfamiliar with the rules of evidence.” Given this ubiquitous ignorance, our critics propose educating each pro se litigant about those rules which are likely to play a role in the upcoming trial before he or she undertook to litigate. As admirable an objective as that may be, anyone who has attended a calling of the traffic infraction, forcible entry and detainer (eviction), and protection from abuse and harassment dockets in the District Court knows it is hopeless; getting everyone up to speed on in-court necessities would take at least more time and personnel than already-strained dockets and budgets permit, and at most a magic wand. In short, rules of admissibility are more important to these judges than the risk of fiction, so they protect the rules by inventing a legal principle that they would then pursue with a mechanism impossible to implement. Talk about a Woozle hunt.

IV. THE ALLURE OF RULES

Perhaps this is a good time to restate that I do not seek to belittle those whose work I criticize. They are all intelligent, educated, and bent on justice. What I

69. Id. at 51.

70. Ironically, that inspiration appears not to have been derived from Arizona’s Rules of Evidence. Arizona has a residual exception to the hearsay rule, Az. R. EVID. 803 (24), which permits the admission into evidence of any statement that is “not specifically covered by any of the foregoing exceptions but has[s] equivalent circumstantial guarantees of trustworthiness...” Such a statement is not admissible, however, “unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it...” Id. It seems more likely that this protects the represented party from surprise than the unrepresented party, because only the represented party is likely to be aware of exception number 24 to the hearsay rule and, therefore, to give the requisite notice.

71. Faretta v. Cal., 422 U.S. 806, 833 n.43 (1975) (quoting Powell v. Ala., 287 U.S. 45, 69 (1932)). I say they seem to concede the point because they acknowledge that pro-se litigants will benefit from such informational programs. At one point, however, Hendrix and Slayton state, “Pro se litigants lack the understanding of what elements they must prove to sustain their claim under statutory or case law, not how to get their evidence admitted.” Hendrix & Slayton, supra note 68, at 88 (emphasis added). I read that to mean that pro-se litigants know procedural rules but not substantive rules, and I wonder about this claim of selective sophistication. How can someone be at once informed enough to understand rules about character evidence, or the exceptions to the hearsay rule, yet ignorant about the elements of a contract or tort claim? It is my experience that pro-se litigants are ignorant of most or all of the rules.

72. Especially the Arizona judges, who are entitled to reassurance from Maine’s Committee on the Rules of Evidence, which is comprised of lawyers and judges and which rejected Murray’s and my idea almost unanimously. I would have included Maine’s decision in my textual discussion if the Committee had issued a detailed explanation of its decision, but it did not. Here is the explanation the Committee gave:
do seek is an explanation for the Wonderland quality of their positions, and this, I believe, is it:

In any developed legal system... the advocacy of rules respond[s] to a host of concrete interests having everything to lose by their erosion. Lawyers are necessary because of rules; the prestige of the judge is professional and technical, as well as charismatic and arcane, because of them... academics without number hitch their wagonloads of words to the star of technicality. [It] is the structure of the status quo... In elites, [the advocacy of rules] responds to fear of the masses. In the masses, it responds to fear of the caprice of rulers. In small groups, it responds to fear of intimacy. In the psyche, it responds to the ego's primordial fear of being overwhelmed by the id. Its roots are deep enough so that one suspects an element of the paranoid...  

It is no wonder, then, that CUTAF kept Standards out of the Superior Court. By assigning the law of Standards to the District Court, it kept the "relational troubles" of the masses there as well, and preserved the Superior Court as a socio-political icon:

[T]he single most powerful collective image of political authority is that of the courtroom. The robed judge who sits elevated from the gathering, the official and hushed character of the legal proceeding, the architecture of the room, the complex procedural technicalities—all of these and many other features of the courtroom ritual serve to reinculcate the political authority of the State, and through it the legitimacy of the socioeconomic order as a whole.  

Only the Superior Court serves this purpose in Maine; the District Court courtrooms are too often banal, the litigants themselves too often unruly, and the proceedings too rarely hushed. At the same time, however, procedural complexity (that comes from utilizing rules such as the rules of admissibility) provides even District Court courtrooms with enough ritual to support this kind of authority. Rules seemingly legitimate court proceedings.

V. THE FALSITY OF RULES WORSHIP

A. The Rise and Fall of Classical American Legal Thought

The problem with this view is that the more you analyze the law of Rules the more it becomes indistinguishable from the law of Standards, in part because the

It appear[e]d to be the consensus of the meeting, although no vote was taken, that the [C]ommittee is not convinced that there is a sufficient connection between the application of rules of evidence and the plight of pro se litigants to justify change on that account. The Committee further believes that the potential for abuse and compromise to the justice system from abolition of rules of exclusion either generally or as applied to pro se litigants is greater than the perceived benefit to pro se litigants from such change.

Minutes of a Meeting of the Advisory Committee on Rules of Evidence, in Augusta, Me. (January 31, 2002) (on file with the author). The minutes do not indicate that the Committee discussed the quality of justice in American administrative courts, or continental European courts, where no rules of admissibility are used.

73. Kennedy, supra note 15, at 1775-76.

deductive process that is supposed to ennoble the former is often just a camouflage for achieving a desired result—the very arbitrariness from which Rules-based law is supposed to be immune. To explain why this is so, I can do no better than summarize Duncan Kennedy’s analysis and comparison of the two systems in his famous article, Form and Substance in Private Law Adjudication.75

According to Kennedy, classical American thought is a legal adaptation of laissez-faire economics, a socio-political system in which “the state systematically refuse[s] to intervene ad hoc to achieve particular economic results.”76 In the legal arena of this regime, private law serves to police the boundaries between individuals and the state, and between individuals themselves, offering rules that establish and protect spheres of private autonomy within which individuals may exercise their liberty to pursue entirely self-interested goals. An individual may act against the interest of another with legal impunity if the former obeys the rules of conduct; it is the latter’s responsibility to know the rules and protect his or her own interests. “[P]ermitting A to injure B may be the best way to save B from injury.”77 Such a system maximizes the benefit to society of self-reliance and

75. See generally Kennedy, supra note 15. It is impossible to do Kennedy’s thesis justice in as brief a summary as I offer here.

One of the reasons why Kennedy’s article is famous is because it discusses the universal legal tension between formalism and anti-formalism, rules versus results. I first encountered Kennedy’s analysis in a class I audited at the Harvard Law School, Amr Shalakany’s seminar on Islamic Law Reform. Shalakany likened Kennedy’s distinction between Rules and Standards to the traditional Islamic dispute between ahl al-ra’y (people of opinion) and ahl al-‘hadith (people of the text):

In very brief terms, while the former school [ahl al-ra’y] gave prominence to the role of utilitarian and rationalistic considerations in the process of Islamic legislation articulated under the general rubric of isti’hsan, the second approach [ahl al-‘hadith] insisted that the entire corpus of Islamic law had been revealed in the holy texts of the Quran and the Sunna (sayings of the prophet), and accordingly that all Islamic law must be textually founded on either of these two sources. The debate between the substantively utilitarian isti’hsan and the more textually inclined approach lead to a state of legal confusion. . . . One of [al-Shafi’i’s] major purposes was to expel free thinking isti’hsan from the field of Islamic jurisprudence and construct a rational system of law based on analogical deduction, or qiyas, from established texts.

Amr Shalakany, Deduction/Policy and Qiyas/Istihsan, in The Analytics of the Social in Private Law Theory (S.J.D. Dissertation, Harvard Law School, 2000) at 146-47 (on file with Author). To expand this explanation a little, in the Tenth Century A.D. al-Shafi’i established usul al-fiqh, which declared that God had revealed all the law that is necessary for moral human behavior in the Quran and the Sunna (the sayings of the prophet as reported by his Companions), and that to the extent that the Sunna did not expressly address a particular issue, a rule covering the issue should be deduced from the Sunna without resort to the utilitarian isti’hsan. This was orthodox Islamic thought through the Nineteenth Century A.D. Shalakany’s thesis in the seminar was that the intense debate about Islamic law reform since the end of the Nineteenth Century has been driven by the fact that usul al-fiqh requires modern Muslims to abstain from behavior that modern society requires, and vice versa. An example would be the fact that the Quran forbids Muslims from charging interest, a rule that inhibits prosperity in Islamic banks. See generally Abdullah Saeed, Islamic Banking and Interest (1999). The shrinking world has forced Muslims to consider whether they should worry more about what the rules require of them, or more about the consequences of those rules in the modern world. In these terms, the debate over Islamic law reform is a classic debate about Rules versus Standards.

76. Kennedy, supra note 15, at 1746.

77. Id. at 1743.
individual enterprise—it is individualistic.\textsuperscript{78}

The operative ethic of this system is respect for the rights of others, and this, in turn, justifies the “fundamental legal institutions of criminal law, property, tort, and contract.”\textsuperscript{79} “[T]he self-reliant man will be discouraged if he must devote all his energies to protecting the fruits of his labor. . . . The law creates a property in expectations.”\textsuperscript{80} In other words, legal rules must be enforced in an entirely predictable manner, so that the entrepreneur can utilize them confidently. Under such a system, a person who breaches a contract, or who trespasses upon another’s prerogative, is a virtual thief.\textsuperscript{81}

If a dispute between individuals arises, it is the judge’s responsibility to impose a judgment based on a strict, logical application of legal rules, without regard for the result.\textsuperscript{82} If no rule directly applies, the judge must deduce an appropriate rule from the available body of law, utilizing pure logic, unadulterated by concerns for fairness, or conscionability, or public policy, or other value. Only if individuals can rely on the judicial system to reach logically predictable—read “objective”—decisions will the legal system support the doctrine of private liberty.

Two principles are at work here: “[T]he belief that the substantive content of the common law rules [is] an embodiment of the idea of freedom [and] the belief that official intervention to enforce the rules [is] nondiscretionary.”\textsuperscript{83} The combination of these beliefs produced “a complex of doctrines” that are second-nature to us now, including “stare decisis, the nondelegation [of legislative powers to the judiciary] doctrine, the void for vagueness doctrine, objectivism in contracts, the reasonable person standard in torts, the distinction between questions of law and questions of fact, and the general idea that law tend[s] to develop toward formally realizable general rules.”\textsuperscript{84}

As tight and internally consistent as this system seems, however, it is susceptible to challenge on a variety of grounds. One is its indifference to the morality of conduct. The Classical legal system enables “Holmes’ ‘bad man,’ who is concerned with law only as a means or an obstacle to the accomplishment of his antisocial ends. . . . [Permitting him to] calculate[ ] with certainty the contours within which vice is unrestrained.”\textsuperscript{85} Wouldn’t it be better if the law rewarded the person

\textsuperscript{78} See Coppage v. Kansas, 236 U.S. 1, 14, 17 (1915), invalidating a Kansas law protecting labor unions:

Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty . . . .

\textsuperscript{79} Kennedy, supra note 15, at 1715.

\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} Id. at 1770.

\textsuperscript{83} Id. at 1747.

\textsuperscript{84} Id.

\textsuperscript{85} Id. at 1773.
who "goes forward in good faith, with due regard for his neighbor's interest as well as his own, and [with] a suspicious eye to the temptations of greed . . ."?86

A second problem is the premise that the common law is the natural product of freedom, i.e., "that 'liberty' had a single meaning."87 Classical thinkers had "equate[d] the 'liberty' secured by the due process clause of the federal and state constitutions with the 'free will' from which they believed they could deduce the common law rules."88 The problem with this idea, however, was that while laissez-faire may be a form of economic freedom, it is not necessarily the only form of it or, for that matter, of freedom in general. For example, some could claim that socialism offered people greater freedom than a laissez-faire system. The Classicists' claim that the common law was the natural product of freedom was simply false; the common law as it developed is one of many possible products of freedom, just as laissez-faire is one of many possible economic systems. There is no such thing as "pure freedom." Conversely, by indifferently applying "objective" law, judges were really choosing to support just one of many possible socio-political ethics, a choice that was as arbitrary as any Standards-based judgment.

A third problem is that the allegedly objective deductive process by which judges are supposed to create rules, and the strict logic with which judges are supposed to apply rules, is mythical. It is foolish to claim that a particular, exclusive set of rules is implicit in such amorphous concepts as "respect for others' rights," or "freedom of contract," or that judges who purport to derive such rules from such concepts do so without resort to their own social, political and economic views.89 Sooner or later, even the judge who aspires to be "a supremely rational being" will employ "a balancing test, a good faith standard, a fake or incoherent rule, or . . . a train of reasoning all know will be ignored in the next case."90 Ultimately, "rules were standards. The legal order . . . was shot through with discretion masquerading as a rule of law."91

It is these very discrepancies in the Classical legal system that permitted some of the Supreme Court's most significant Twentieth Century decisions, beginning with its dismantling of Lochner v. New York92 in 1934. Prior to that time, the

86. Id. at 1773-74.
87. Id. at 1756.
88. Id. at 1754.
89. Id. at 1732.
90. Id. at 1776. Kennedy also states:
   [T]here are numerous issues on which there exists a judicial and also a societal consensus, so that the judge's use of his views on policy will be noncontroversial. But there are also situations in which there is great conflict. The judge is then faced with a dilemma: to impose his personal views may bring on accusations that he is acting "politically" rather than "judicially." He can respond to this with legalistic mumbo jumbo, that is, by appealing to the concepts and pretending that they have decided the case for him.
   Id. at 1732.
91. Id. at 1749.
92. 198 U.S. 45 (1905). In Lochner the Supreme Court struck down a New York law that limited the number of hours per day and per week that bakery employees could work. For our purposes, the essence of the decision was this: "The act must have a . . . direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor." Id. at 57-58.
Court had aggressively struck down paternalistic state and federal statutes on the ground that they interfered with constitutionally-protected individual freedoms, especially the freedom of contract.\(^93\) Beginning with *Nebbia v. New York*,\(^94\) however, the Court recognized that judicial abstention could cut both ways: if courts were supposed to refrain from interfering with individual freedom, they should also refrain from interfering with legislative prerogative. This followed from the realization, mentioned above, that by enforcing legal *laissez-faire*, judges were necessarily advocating a particular politico-economic philosophy,\(^95\) and that "a choice between rival political philosophies" was the legislature's business, not the courts'.\(^96\) This newly-expanded concept of abstention opened the gates to a slew of paternalistic enactments, such as the Social Security Act, the National Labor Relations Act, workers' compensation legislation and securities regulation.\(^97\)

The collapse of Classical legal theory's foundation—that the Constitution protected individuals' natural rights to economic autonomy—and the growing triumph, evidenced by such statutes as the Social Security Act, of the collectivist view of legal policy over the individualist view, ultimately produced a realignment of the relationship between individual, legislature and judiciary, transforming the latter's role from that of an indifferent referee to that of a participant in the development of social policy.\(^98\) It was this sea-change in the judicial role that ultimately produced the activism of the Warren Supreme Court and, specifically, *Brown v. Board of Education of Topeka*.\(^99\) In overruling the separate-but-equal doctrine of *Plessy v. Ferguson*,\(^100\) the Supreme Court eschewed both the Euclidian rigor and the judicial disinterest of Classical law. Separate-but-equal had been rationally deduced from and justified with principles of individual liberty and self-reliance,\(^101\) and

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94. 291 U.S. 502 (1934). In this case the Supreme Court upheld a New York scheme that established minimum and maximum milk prices: "So far as the requirement of due process is concerned . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . . ." *Id.* at 537.

95. Consider this from the majority opinion in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937): "[T]he violation . . . alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law."

96. Kennedy, *supra* note 15, at 1758 (quoting United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927)). In *Nebbia*, the Court had said much the same thing: "The courts are without authority either to declare [economic] policy, or, when it is declared by the legislature, to over-ride it." *Nebbia* v. New York, 291 U.S. at 537.


98. *Id.* at 1772.


100. 163 U.S. 537 (1896).

101. See *id.* at 551. The Court stated:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of the individuals.

*Id.*
had been tolerated by a judiciary that refused to engage in social policy. But the power of logic couldn’t prevent Plessy’s emperor from looking naked, and the Warren Court now had license, albeit perhaps a self-endowed license, to do something about it.

B. Applying This Analysis to Specifics

Two aspects of this history are important to my discussion. First, the law of Standards is a legitimate class of law, and has proved crucial to the development of social justice in the United States. Second, those who would advocate the ascendency of Rules may be overlooking the similarity between Rules and Standards.

CUTAF appears to have run afoul of the first lesson. It is not enough to say that CUTAF erroneously rejected Brown’s applicability to court systems, although CUTAF’s report is certainly ironical evidence that separate has never been, and will never be, equal in judicial systems any more than it is in educational systems. The larger problem, however, is that CUTAF erroneously rejected Brown’s jurisprudence. CUTAF’s arbitrary preference for the law of Rules induced it to denigrate, as largely unworthy of Maine’s finest trial judges, the conscientious approach to law that enabled the greatest social revolution in American history. CUTAF rejected the idea that good judging includes the creation and development of values as well as rules, the concern for outcomes as well precedents. How peculiar, and how fortunate that the Supreme Court viewed its role differently.

The good judges who would preserve rules of admissibility in non-jury proceedings missed the second lesson, on three grounds. First, they seem unaware that, historically, the practice of using rules of admissibility in non-jury hearings was more the result of historical accident than of the application of policy; during the decades-long merger of law and equity, rules of admissibility were imported from jury trial practice to govern proof before judges as well, apparently because...
using such rules was an unshakeable habit,\footnote{105} rather than a considered implementation of policy.

Second, they seem unaware that many rules of admissibility are antique, and contradict modern policy; they are simply old-fashioned customs.\footnote{106} Consider my example above: The policy behind excluding the Protection from Abuse plaintiff's statement as hearsay may be boiled down to: No evidence of domestic violence is better than some. But modern policy about domestic violence would produce just the opposite rule of admissibility. Notwithstanding this and other flaws,\footnote{107} our critics defend the rules of admissibility as if they were a sacrosanct entirety.\footnote{108}

\footnotetext{105}{Murray & Sheldon, supra note 13, at 32. Here is evidence of that habit: At a meeting of Maine's Advisory Committee on Rules of Evidence, one judge responded to our proposal to eliminate rules of admissibility in District Court proceedings by "not[ing] that the rules of evidence are a structure to organize the trial, which he is comfortable with... Rules of evidence are a part of our legal reasoning." Minutes of the Meeting of the Advisory Committee on Rules of Evidence, in Augusta, Me. (Nov. 9, 2001) (on file with the Author).}

\footnotetext{106}{"The world of procedure within which concepts of evidence developed has turned over many times since Gilbert in 1754, or Wigmore in 1904, wrote their [evidence] treatises. Only concepts of the proof system have remained static." Howard B. Miller, Beyond the Law of Evidence, 40 S. CAL. L. REV. 1, 7-8 (1967). See also Leo Levin & Harold K. Cohen, The Exclusionary Rules in Nonjury Criminal Cases, 119 U. PA. L. REV. 905, 908 (1971) (stating that "[t]he courts appear persistent in refusing either to apply formal evidence doctrine or to change it"); see also Jack B. Weinstein, Some Difficulties in Devising Rules for Determining Truth in Judicial Trials, 66 COLUM. L. REV. 223, 226 (1966) (quoting Professor Morgan as characterizing the pace of evidence reform as "glacier-like").}

\footnotetext{107}{Here is an anomaly in the Arizona Rules of Evidence. Rule 803(22) prohibits as hearsay the introduction of evidence about a conviction of a crime that is not "punishable by death or imprisonment in excess of one year." ARIZ. R. EVID. 803(22). It lifts that prohibition, however, if the crime involved a sexual offense. ARIZ. R. EVID. 404(c). So, if a defendant commits a simple assault against a person, conviction of that offense is not admissible even in a domestic violence action by the victim against the same defendant, because even the worst simple assault is punishable only by 6 months' incarceration. ARIZ. REV. STAT. §§ 13-1203, 13-707(A)(1) (2003). But if the defendant assaulted the victim in a particular place on his or her body, proof of such conviction is admissible. See ARIZ. R. EVID. 404(a)(1), (c) (rendering admissible evidence of a defendant's "aberrant sexual propensity"). Thus, either hearsay evidence of conviction for assault of a sexual nature is more probative or reliable in Arizona than evidence of conviction for simple assault that is not of a sexual nature, or the rules are arbitrary.}

\footnotetext{108}{This is what Judges Hendrix and Slayton say about our example of the woman who was too scared to testify. See discussion in Part III, section C of this Article: Regarding the example of a victim being too "upset" to offer her testimony, we are concerned that under Sheldon and Murray's proposal an element of accountability would be removed. When a person makes an accusation it is a bedrock principle of our system that that person will be available to come to court and make the accusation in public. Notwithstanding issues of victimology, in this example the plaintiff/victim was able to come to court on her own. She was willing and able to stand up in front of the defendant and read her testimony written in her own words. Yet somehow, after being told that she could not read her words, but must speak them, she becomes too upset to continue.

We think this argument fails simply because it is a strawman that panders to emotion rather than a true life example of how the rules of admissibility are stumbling blocks to pro se litigants. Indeed, she was prepared for the proceeding and apparently understood what would be required of her account of what happened in her own voice in front of the defendant. The rules of evidence had nothing to do with her ability to present her case.}
Third, our judicial critics seem unaware that rules of admissibility are truly "discretion masquerading as a rule of law," because they overlook the discretion that the harmless error rule gives the appellate court. In the end, violating rules of admissibility at the non-jury trial level makes no difference if the appellate court thinks that the result of the hearing is fair. Ultimately, there is no Rules-based concept of admissibility in the classical sense; in the final analysis, the Rules-based ritual those judges consider so important to their non-jury proceedings is just mumbo-jumbo.

VI. CONCLUSION

If I urge others to stop worshiping Rules, it is probably also appropriate that I abandon euphemism. The terms "worship," "idolatry," and "faith" are gentle; what really concerns me is prejudice, the predilection to decide something for a wrong reason to the detriment of others. So, for example, CUTAF's decision to preserve the two-tiered trial court system was prejudiced by its inappropriate preference for the highly-deductive system of Rules-based law, and the result is a trial court system that openly disdains the majority of litigants and funnels them to what it labels as second-class judges. Likewise, my former judicial-colleagues from Arizona are so biased in favor of traditional practice that they would preserve it whole, regardless of its antiquated and anomalous characteristics.

Hendrix and Slayton, supra note 68, at 52. In response to our policy argument, the judges argue the facts. The reason they do so, I believe, is because they are too intent on defending their customary use of rules to be self-critical about their argument. As for Arizona's "bedrock" principles of admissibility, please consider the discussion of Arizona's evidentiary Rule 803(22), supra note 107.

109. See Me. R. Evid. 103(a).

110. The harmless error rule requires the appellate court to decide whether the evidentiary ruling below has affected "a substantial right of the party." See id. In reviewing decisions by a judge without a jury, the Law Court will not reverse if "it is highly probable that the trial court's decision was not affected by the [inadmissible] evidence." In re Jason B., 552 A.2d 9, 11 (Me. 1988). But a judge who does not understand the rules of admissibility probably does not understand his or her obligation to disregard the erroneously admitted evidence either. Note, Improper Evidence in Nonjury Trials: Basis for Reversal?, 79 Harv. L. Rev. 407, 409 (1965). Logically—applying the rule strictly—such an error should produce reversal, but it rarely does. Jason B. is a perfect example. See Murray & Sheldon, supra note 13, at 34; see also Margaret A. Berger, When, If Ever, Does Evidentiary Error Constitute Reversible Error?, 25 Loy. L.A. L. Rev. 893 (1992). This is because the rule is a false front for discretion. In actual practice, the error makes no difference if the appellate court decides that the result is fair anyway.

111. Expanding this back to Kennedy's thesis:

[The charge against conceptualism [i.e., the idea that "the substantive content of the common law rules was an embodiment of the idea of freedom"] was that it was a mystification: there simply was no deductive process by which one could derive the "right" answer from abstractions like freedom or property. . . .

If the judges had neither derived the common law rules from concepts nor applied them mechanically to the facts, then what had they been doing? The altruist answer was that they had been legislating and then enforcing their economic biases. The legal order represented not a coherent individualist philosophy, but concrete individualist economic interests dressed up in gibberish.

Kennedy, supra note 15, at 1747-49.
At the beginning of this Article, I said that CUTAF's report looked like a victory of the "Haves" over the "Have-Not." I want to end by returning to that observation. As I hope I have shown, the law of Rules in the United States is a phenomenon of free enterprise, and a means to the end of private wealth. It is not, however, an adequate means to social justice. To achieve that end, the Supreme Court had to spurn the law of Rules, and the "Haves" lost. In Maine, however, just the opposite is true. Rules-based law has prevailed; the "Haves" won the Superior Court for themselves and remain dominant in the District Court as well, where unnecessary rules, like the rules of admissibility, will continue to apply.\footnote{At a meeting of the Family Law Section of the Maine Bar Association that I attended on January 30, 2004, the members approved the Bar Association's opposition to proposed legislation that would create a residuary exception to the hearsay rule, under which hearsay statements that bear indicia of reliability would be admissible. The hearsay rule, the quintessential rule of admissibility, remains intact and, for the present, inviolable.} I hope that, over time, Maine's justice system will reject the elitism of Rules-based law, and embrace both the jurisprudential foundation upon which \textit{Brown v. Board of Education of Topeka}\footnote{347 U.S. 483 (1954).} rests, and its specific lesson that separate trial courts will never be equal.