Thinking Beyond the Federal Rules

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One of the great strengths of comparative work is its ability to open our minds to alternative regimes, and this conference is a testament to that power. Through Professor Allen's remarkable efforts, we have a conference in the United States, devoted to the reform of the Chinese and Tanzanian evidence codes, attended by scholars from all over the world. I daresay that not one of us leaves this conference without thinking differently about evidence.

Given these reform efforts' potential for creativity and innovation, like some of my American colleagues, I am struck – indeed, shocked – to see how much of the proposed reforms in China and Tanzania borrow from the Federal Rules of Evidence. To be sure, the Tanzanian proposal sensibly departs from some of the most dubious American rules, but its overall structure is clearly American. The Chinese proposal, while considerably more civil law in character, also borrows strongly from the Federal Rules, sometimes in seemingly puzzling ways.

Some borrowing is perhaps understandable. As Professor Wang has noted, the Federal Rules are a well-developed, proven system, so they may offer greater sophistication and conceptual clarity than starting from scratch.[1] And to the extent that some of the American "rule of law" traditions are attractive, the Federal Rules may seem like a natural starting point.

But close examination of the proposed codes show more than just borrowing of important conceptual advances in areas such as relevance and authentication.[2] Included also are arguably contestable propositions, such as the character evidence rules, hearsay, and the rules against subsequent remedial measures and offers to pay medical expenses.[3] The proposed Tanzanian code even includes historically curious (and empirically questionable) rules like the dying declaration exception to the hearsay rule.[4]

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[1] *See* Zhuhao Wang, *Why Chinese Witnesses Do Not Testify Before the Judge in Criminal Trials* 14–15 (Chinese Ministry of Educ. – Project of Humanities & Soc. Sciences, Project No. 13YCJ820073), *available at* https://northwestern.app.box.com/s/mcr948plvv8p63n4215a/1/2619259267/22663021303/1.

[2] Uniform Provisions of Evidence of the People's Court ch. 1, § 2 (promulgated by Inst. of Evidence Law and Forensic Sci., CUPL, Oct. 8, 2007) (China); Proposed Tanzania Evidence Act art. 2 (May 7, 2014) (Tanzania).

[3] Uniform Provisions, *supra* note 2, at ch. 3, §§ 2–4; Proposed Tanzania Evidence Act, *supra* note 2, at art. 3–4.

[4] Proposed Tanzania Evidence Act, *supra* note 2, at art. 4, § 4.4.

Importing this latter group of evidentiary rules is more troubling, as these rules rest on a number of structural and cultural assumptions that do not necessarily apply to China or Tanzania. In the brief remarks that follow, I will articulate what some of those American assumptions are, and why their absence in other countries should cause reformers to reconsider wholesale importation. More broadly, I offer some thoughts on when the Federal Rules might be worth emulating (or not).

1 The Federal Rules in Context

1.1 The Jury

One fundamental assumption in the Federal Rules is the jury. Jury distrust animates American evidentiary rules like nothing else, and evidentiary discourse takes juries for granted.[5]

More importantly for this discussion, a jury system bifurcates power between a gatekeeper and the factfinder. The gatekeeper (the judge) effectively shields the factfinder (the jury) from the inadmissible evidence by keeping the factfinder ignorant of such information. But in systems without juries, no such inherent bifurcation or shielding exists, and the psychological literature demonstrates quite clearly that judges cannot self-blind.[6] Once exposed to inadmissible evidence, a person's opinions are irrevocably altered, and he cannot unring the bell.

In judge-based systems such as China and Tanzania, the question thus becomes whether one needs evidentiary rules at all. For example, at least for some courts, the rules of evidence become considerably more relaxed for bench trials,[7] for according to conventional wisdom, since judges are experts at decisionmaking,

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[5] *See, e.g.*, Julie A. Seaman, *Triangulating Testimonial Hearsay: The Constitutional Boundaries of Expert Opinion Testimony*, 96 GEO. L.J. 827, 869–76 (2008) (noting that, alongside other evidentiary rules, *Daubert* and its progeny manifest a profound distrust of juries).

[6] Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005); *see* Daniel M. Wegner et al., *Paradoxical Effects of Thought Suppression*, 53 J. PERSONALITY & SOC. PSYCHOL. 5 (1987) (highlighting the paradoxical effect of attempting to refrain from thinking about a particular topic, which actually causes that topic to become more prominent in an individual's mind).

[7] *E.g.*, Null v. Wainwright, 508 F.2d 340, 344 (5th Cir. 1975) ("Strict evidentiary rules of admissibility are generally relaxed in bench trials, as appellate courts assume that trial judges rely upon properly admitted and relevant evidence."). *But see* In re Unisys Sav. Plan Litig., 173 F.3d 145, 164 (3d Cir. 1999) ("The Federal Rules of Evidence apply with full force to bench trials.").

they can simply give bad evidence its appropriate weight.[8] Modern social science, however, tells us otherwise. Since judges are human like the rest of us, they too suffer from cognitive biases and limitations that may make evidentiary rules potentially useful.

So jury or not, we need *some* admissibility rules, but with two crucial caveats: First, it is not at all clear that rules for improving judicial factfinding should be the same as those for improving jury finding. American rules for juries thus may not be appropriate for judge-based systems like China and Tanzania.

Second, effective admissibility rules require an effective blinding mechanism. Thus, reformers in China and Tanzania need to consider having one judge for admissibility determinations and a separate one for factfinding. Initially, judges will doubtless find this arrangement patronizing and uncomfortable. But with increasing familiarity with the psychological literature, they might acquiesce or even embrace the change.

1.2 Oral Testimony

Another fundamental assumption in the American system is the preference for, if not the glorification of, in-court, oral testimony. The most visible consequence of this preference is of course the hearsay rule.

Other legal traditions do not necessarily share this perspective. Current Chinese evidence law, for example, seems to exhibit the exact opposite preference. Even in the criminal context, Chinese law gravitates toward documentary evidence.[9] To be sure, Professors Zhang and Wang characterize this predilection toward documentary evidence as a problem – that the lack of witness participation is due to outmoded Confucianist cultural ideals, and creates a lack of confrontation. But consider what, as Professor Wang suggests, Chinese judges and procurators believe about written testimony. They think it "more accurate and reliable" because the written testimony is made when "perception and memory [is] fresh, comprehensive and clear" and before the witness is subject to external influences from the victim and defendant and "self-concerns" such as fear of reprisal, etc.[10]

If accuracy is the ultimate goal, evidentiary reformers need to take such arguments seriously. Does confrontation and face-to-face accusation really promote accurate decisionmaking, or is it simply a quaint Anglo-American tradition, one descended from a seventeenth century hang-up with the injustice

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[8] *See* Barbara A. Spellman, *On the Supposed Expertise of Judges in Evaluating Evidence*, 156 U. PA. L. REV. PENNUMBRA 1 (2007) (discussing the general perception that judges are expert decisionmakers, but questioning the empirical support for this assertion).

[9] Uniform Provisions, *supra* note 2, at ch. 2.

[10] Wang, *supra* note 1, at 8–9.

done to Sir Walter Raleigh? One rationale for why live testimony promotes accuracy is that the factfinder can better assess the witness's truthfulness. Studies however have shown that our abilities in this sphere are much weaker than we think.[11]

Once we take oral testimony off its American pedestal, Professor Wang's so-called "second-best" solution may no longer be just second-best for a system considering evidentiary reform.[12] Rather than receiving a rehearsed show at trial, perhaps factfinders are better off watching a videotaped interview of the witness immediately after the event. The video is arguably more efficient and reliable. It is of course also hearsay, but should that really matter?

Even written statements have advantages to consider. Many people are inarticulate under the pressure and anxiety of public speaking: conference presenters have lecture notes for a reason. Except for the most gifted of speakers, written statements promote more precise word choice and (hopefully) the more accurate presentation of ideas.

1.3 Trial

Finally, American evidence rules were developed for and assume the existence of trial. Not only is this assumption possibly untrue in other legal systems, but it is emphatically untrue in modern American practice, where the vast majority of American cases, whether civil or criminal, settle or plea. Indeed, the disappearance of the American trial is arguably due in part to its procedural and evidentiary rules. The obsession with trial perfection has made things so expensive and cumbersome that it has driven parties away, ironically depriving them of the very due process the rules hope to promote.

Reformers should thus think carefully about the resource question and not allow the best to be the enemy of the good. Would American-type rules unduly burden litigants in China or Tanzania? Would they in turn cause trials to become more scarce? If so, importing American evidentiary rules should give one pause. Even assuming arguendo that the American rules are the "best" rules in theory, perhaps they are counterproductive in practice.

2. A Path Forward

The Federal Rules undoubtedly have important ideas that can inform international reform efforts. Those rules, however, should not always dominate

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[11] *See* Justin Sevier, *Omission Suspicion: Juries, Hearsay, and Attorneys' Strategic Choices*, 40 FLA. ST. U. L. REV. 1, 13 (2012) ("[E]xperiments have revealed that jurors are blind to . . . factors that affect the accuracy of hearsay.").

[12] Wang, *supra* note 1, at 16.

or overshadow traditions or insights from other cultures. So when should reform efforts draw from the Federal Rules and its expertise, and when should they steer clear? The following approach might offer a possible answer.

The initial task for a reformer is to separate rules that promote accuracy from those that derived from other policy or cultural values. Concededly this task will require some effort, since the Federal Rules of Evidence as a whole does a poor job separating these two categories. The privileges section is explicitly policy oriented, but most other rules are not so clear. Rule 407 on subsequent remedial measures and 409 on medical expenses, are nominally accuracy rules, but are really only plausibly justified on policy grounds.[13] Rule 404, which prohibits propensity evidence, fares no better. Is it really an accuracy-based specialized relevance rule, or is there something in American culture that militates against having a defendant's criminal history brought in against him?

Having separated accuracy from policy, the adoption analysis then divides. For policy-motivated rules, importation should not occur without serious political debate and consideration of culture. Both the proposed Chinese and Tanzanian codes curiously recognize the psychotherapist-patient privilege – why? That is frankly something that I would have expected to be rather distinctly American.

For accuracy-based rules, reformers should demand empirical defensibility. Modern social science has called into question some of the Federal Rules of Evidence, which historically arose from armchair science or conventional wisdom. For example, Professor Orenstein has mustered the psychological literature to criticize the Excited Utterance exception to the hearsay rule.[14] Sadly, these psychological studies are likely too little, too late for the American system (though I hope not). Much of the rules and their historical assumptions have become part of American culture, and changing them is a steep uphill battle. China and Tanzania, by contrast, have no such allegiances to antiquated American rules. Their evidentiary reform efforts should thus avoid adopting these elements. Other countries may be encumbered by their own cultures and traditional rules, but there is no reason for them to fall prey to the American ones as well.

On a related positive note, however, the ever-growing body of empirical literature provides countries like China and Tanzania an exciting opportunity to embrace -- to borrow an idea from our medical colleagues -- Evidence-Based Evidence. Reformers can forge a new set of evidentiary rules, constructed for the

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[13] Professor Landsman goes so far as to suggest that they are merely examples of special interest capture. Stephen Landsman, Address at the Foundations of the Law of Evidence and Their Implications for Developing Countries Conference (Nov. 22, 2014).

[14] Aviva Orenstein, "*My God!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CAL. L. REV. 159, 178 (1997).

modern age and informed by modern social science. Rather than simply recycling old rules, reformers can address hitherto unidentified problems that researchers have revealed as counterintuitive and contributing to error. For example, new rules can combat the unreliability of eyewitness identifications, the possibility of false confessions, and the lack of scientific foundation in forensics.[15]

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In closing, the Federal Rules offer a starting reference for evidentiary reform in other jurisdictions, but they are far from a template or blueprint. The Federal Rules are far too influenced by idiosyncratic aspects of the American legal system – its jury system, focus on oral testimony, assumption of trials – to be a standard. Instead, reformers have to pick and choose carefully, understanding that while the Federal Rules contain many conceptual advances, they also harbor a lot of dubious historical elements. Only by combining the best of the Federal Rules, their own respective legal traditions, and modern social science can reform efforts hope to make progress.

Finally, let me express to my Chinese and Tanzanian colleagues how enthusiastic I am about their reform efforts, and how much I admire the courage and zeal with which they approached their monumental tasks. I am excited about what their efforts will teach us, and I look forward to hearing more in the years to come.

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[15] *See, e.g.*, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) (forensic science); DAVID L. FAIGMAN, ET AL., MODERN SCIENTIFIC EVIDENCE , ch. 16 (2014-15 ed.) (eyewitness identifications); Richard A. Leo & Richard J. Ofshe, *The Decision to Confess Falsely: Rational Choice and Irrationality*, 74 DENVER U. L. REV. 979 (1997) (false confessions).