

ARE THE FEDERAL RULES OF EVIDENCE DYNAMITE?

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“We’ve got to take the atom bomb seriously. It’s dynamite.”
–Sam Goldwyn¹

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INTRODUCTION

A question of some importance to those in other nations who would draft new evidentiary codes for the regulation of contested trials is whether the Federal Rules of Evidence (“FRE”) relied upon in America’s federal courts should be utilized as a template.² Is the FRE, in other words, the forensic equivalent of Sam Goldwyn’s atom bomb—a tool so powerful that it must be taken seriously?³ The answer to this question turns on whether the history, objectives, and nature of the adjudicatory system considering

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¹ THE MILITARY QUOTATION BOOK, REVISED FOR THE 21ST CENTURY 133 (James Charlton eds., 2013) [hereinafter MILITARY QUOTATION BOOK].

² See generally FED. R. EVID.

³ See MILITARY QUOTATION BOOK, *supra* note 2.

evidentiary reform mesh with the values inherent in the FRE. In order to understand why that might be so, this Article will (1) consider when legal mechanisms from one system are most likely to work in another system; (2) identify the characteristics and values of the FRE; (3) consider several additions that have strengthened the Federal Rules through case law; (4) analyze the costs associated with adopting something like the FRE approach; and (5) point out some aspects of the FRE that rules drafters should avoid.

I. THE TRANSFERABILITY OF LEGAL MECHANISMS

Some years ago, Inga Markovits examined the question of exporting American legal mechanisms.⁴ She was reacting to the dramatic efforts that were then under way in Eastern Europe and the former Soviet Union to reform the legal machinery of erstwhile socialist states.⁵ She suggested a set of propositions for appraising the likelihood of success. In her view, three types of reforms were among those most likely to work. The first were changes that did not call for individual or widespread compliance.⁶ She provided, as an example, abolition of the death penalty—a change perhaps not broadly embraced by Eastern European populations and politicians, but which required no real shift in the way citizens or courts went about their business.⁷ The second were reforms that did not require altering existing legal structures, but instead added new “self-contained”⁸ processes like American-style alternative dispute resolution.⁹ The third was the expansion of respected or effective institutions, such as the Soviet Arbitrazh Courts and Procuracy, which are both mixed administrative and adjudicatory mechanisms used to sort out a range of business and law enforcement issues.¹⁰

Professor Markovits then identified the sorts of exports of legal mechanisms that would not easily gain acceptance.¹¹ Chief among them were procedural reforms that altered the manner in which existing legal bodies conducted business; the new procedures demanded breaking patterns that were already firmly established through “repetition, role-playing and

⁴ See Inga Markovits, *Exporting Law Reform – But Will It Travel?*, 37 CORNELL INT’L L.J. 95 (2004).

⁵ See *id.*

⁶ See *id.* at 98.

⁷ *Id.*

⁸ *Id.* at 99.

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *id.* at 106.

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tradition.”¹² Procedural reform of this sort is particularly vulnerable to resistance unless it “corresponds to common habits and beliefs or . . . connect[s] with institutions and procedures that have performed reasonably well in the past.”¹³

Evidence law reform does not fit into any of Professor Markovits’s easy categories. It is not the sort of reform that can bypass individual compliance. Local judges and lawyers must change the way they behave in court for new evidence rules to be successfully implemented. The legal profession must affirmatively embrace the new rules and put aside past practice, which would require real effort on the part of all courtroom players. Nor is evidence reform self-contained. It affects courtroom proceedings in every case, guiding judicial decisions and directly influencing the efforts of advocates. Finally, evidence reform introduces something new. Insofar as it changes established approaches, it rejects the evidentiary rules that came before it. Quite clearly, evidence reform falls into Markovits’s category of reforms that are unlikely to succeed.¹⁴ If evidentiary reform is to have a real chance for success, it must connect with existing “habits and beliefs.”¹⁵

II. IMPORTANT VALUES THAT UNDERLIE THE FEDERAL RULES OF EVIDENCE

In assessing whether the FRE will serve as a successful template for reform, it is important to consider the core values and practices of the American legal system that the FRE represents. If these are congruent with or complementary to those of the system that is undergoing reform, it is more likely that the FRE template will be successful. While many characteristics have been suggested as central to the American approach to evidence,¹⁶ this Article focuses on four that are especially important.

Perhaps, the most significant characteristic is the FRE’s powerful connection with the adversarial approach to justice.¹⁷ The central premise

¹² See *id.* at 110.

¹³ *Id.*

¹⁴ See *id.* at 106.

¹⁵ *Id.* at 110.

¹⁶ See, e.g., MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* (1997). Damaška focuses on the significance of bifurcation between a judge and jury, the concentrated character of trials (“day-in-court” justice), and the prominent role of the parties in the adversary system. Throughout his text, he contrasts the Anglo-American system with civil law justice, where lay factfinders sit with professional judges in unified tribunals, and the parties have fewer responsibilities than in the common law tradition.

¹⁷ See STEPHAN LANDSMAN, *READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1* (1988) (describing the adversarial approach as a system

of the adversarial system is that confronting adversaries in open court is likely to produce a wide range of information from which a neutral decision maker may fashion a decision and effectively resolve the dispute that the parties have framed.¹⁸ This approach empowers parties, through their advocates, to determine what they offer as evidence, and underscores the litigants' obligation to assemble the proof and the adjudicator's passivity.

Essential to such an approach is a liberal rule of admissibility that affords the parties and their lawyers ample opportunity to present information that they think is necessary to make their case.¹⁹ The FRE recognizes this need with an expansive rule of admissibility of material that "has any tendency to make a fact more or less probable"²⁰ and by restricting exclusion of material except where the material's "probative value is substantially outweighed by a danger of one or more" particularized threats.²¹ The invitation to parties to present evidence is augmented by a permissive authentication rule, which allows presentation of otherwise admissible evidence as long as its origin is verified by "evidence sufficient to support a finding that the item is what the proponent claims,"²² a standard widely acknowledged as extremely liberal.²³

These liberal admission standards give adversarial parties what Tom Tyler and other social scientists have called "voice."²⁴ When claimants have the sense that their proof and views have been heard, they are more

where "American courts have relied upon neutral and passive factfinders to resolve lawsuits on the basis of evidence presented by contending litigants during formal adjudicatory proceedings").

¹⁸ *See id.*

¹⁹ *See id.* at 33 ("The adversary process provides litigants with the means to control their lawsuits. The parties are preeminent in choosing the forum, designating the proofs, and running the process.").

²⁰ FED. R. EVID. 401.

²¹ *Id.* 403.

²² *Id.* 901(a).

²³ *See, e.g.,* JOSEPH M. LAUGHLIN ET AL., 5 WEINSTEIN'S FEDERAL EVIDENCE § 901.02[2] (2d ed. 2014); JACK B. WEINSTEIN & MARGARET A. BERGER, STUDENT EDITION OF WEINSTEIN'S EVIDENCE MANUAL § 8.01[1] (9th ed. 2011) ("The burden of authenticating exhibits . . . is not difficult to satisfy."); GLEN WEISSENBERGER, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY, AND AUTHORITY § 901.2 (7th ed. 2011) ("The [authentication] standard itself is not rigorous and its low threshold reflects an orientation of the Rules toward favoring the admission of evidence.").

²⁴ *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 170 (Melvin J. Lerner ed., 1988); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 382-83 (2006) (explaining that political institutions' legitimacy increases through fair procedures).

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likely to be satisfied by the judicial process and accept its decisions.²⁵ Psychological evidence suggests this analysis is sound in such disparate settings as criminal prosecutions²⁶ and civil disputes that involve large dollar amounts.²⁷

The adversarial mechanism empowers parties not only by granting them great latitude in offering proof, but also by stressing the neutrality and fundamental passivity of the decision maker. The ideal decision maker in such a system is one who does not actively manage the case, and is not exposed to dangerously prejudicial material.²⁸ To this end, the FRE focuses on excluding evidence that may be particularly misleading.²⁹ Perhaps the most important exclusionary rule is Rule 404(b), which bars “[e]vidence of a crime, wrong, or other act [if offered] to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”³⁰ Rule 404(b) requires that judges determine whether evidence should be excluded. This is problematic where there is a single adjudicator because he or she is exposed to the material even if it is excluded from the case. Such exposure presents a serious risk of biasing the hearer—even professional judges find it difficult to keep this material from affecting their judgments.³¹ The American adversary system

²⁵ See, e.g., LIND & TYLER, *supra* note 24, at 170-91 (“[P]eople like to have an opportunity to present their views before policy decisions are made.”); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 491 (2008) (finding statistical support for the argument that “since people viewed an agreement negotiated through fair process as more fair, we would anticipate they would be more willing to accept it”).

²⁶ See Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC’Y REV. 483, 493-503 (1988) (the amount of time a defendant spends with his attorney correlates to the defendant’s view of procedural fairness, and “this appears consistent with the notion that procedural justice comes in part from a sense of having a voice in the process”).

²⁷ See E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224 (1993) (finding that where litigants in federal tort and contract actions were subject to court-ordered arbitration, their decision to accept the arbitrator’s award was related to their determination of the procedural fairness of the arbitration).

²⁸ See LANDSMAN, *supra* note 17, at 35 (“When participants in the judicial process are confronted with conflicting obligations, it becomes difficult for them to discharge any of their duties satisfactorily.”); see also *id.* (noting that one of the “greatest dangers in this regard [is] that the judge will abandon neutrality if encouraged to search for material truth”).

²⁹ See FED. R. EVID. 404(b).

³⁰ *Id.*

³¹ See Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. &

addresses this dilemma by relying on a jury of lay decision makers who are isolated from potentially misleading evidence because of the judge's preliminary screening.³² Where no jury sits, appellate review serves a similar purpose, albeit far less efficient and reliable, allowing a party to challenge a lower court's decision based on the judge's exposure to potentially prejudicial character evidence.³³

Reformers considering the FRE model must pay attention to its adversarial orientation and values. If the FRE's approach is transplanted to a system without adversarial attitudes respecting the broad scope of party presentation, the importance of voice, and judicial restraint (particularly in deference to the jury), it is likely to founder. The FRE's balance between broad admissibility and exclusion of prejudicial material may be extremely difficult to maintain in a system without adversarial attributes. The lay jury's role in this system is explored below in greater detail.

A second core value of the American legal system embodied in the FRE is orality. The rules are premised on the particular importance of witnesses' *viva voce* testimony in open court. Early in the development of the Anglo-American process, the courts rejected a system based on written submissions in favor of one emphasizing live testimony.³⁴ This was one of the lessons of the Star Chamber³⁵ and of the deep revulsion engendered by

L. 113, 122-25 (1994) (“[J]udges and jurors in civil cases react similarly when exposed to material that is subsequently ruled inadmissible—their perceptions of central trial issues are altered.”); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 826-27 (2001) (“[H]indsight bias . . . is virtually impossible to purge from judicial decision making and influences both jurors and experienced judges alike.”).

³² See U.S. CONST. art. III, § 2, cl. 3.

³³ See FED. R. EVID. 103(a) (limiting the likelihood of robust review by declaring: “A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party”).

³⁴ See Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497 (1990).

³⁵ See *Doe v. United States*, 487 U.S. 201, 220 (1988) (“The fundamental purpose of the Fifth Amendment was to mark the line between the kind of inquisition conducted by the Star Chamber and what we proudly describe as our accusatorial system of justice.”); Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 AM. J. LEGAL HIST. 326, 337 (2010) (“[T]he Star Chamber . . . considered only documentary evidence prepared during formulation of the case, and even the defendant did not appear before the Court until judgment was entered. . . .”); Edward P. Cheyney, 18 AM. HIST. REV. 727, 738 (1913) (“Upon [the formulation of interrogatories], the defendant was examined privately by the examiner, an official of the court, neither his counsel nor any co-defendant being present to advise him as to his answer. . . . [C]ommissioners . . . [were] provided with all the papers in the case, examined the defendant privately . . . [and] returned their formal written report to the clerk of the Court of Star Chamber.”).

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the condemnation of Sir Walter Raleigh on the strength of two dubious pieces of hearsay.³⁶ Perhaps FRE 801(c) and 802 represent the most dramatic recognition of the need for oral hearings with live witness testimony.³⁷ These rules prohibit the admission of hearsay—statements that are not made “while testifying at the current trial or hearing” that are “offer[ed] . . . to prove the truth of the matter asserted in the statement[s].”³⁸ Although the FRE provides a myriad of exceptions to the requirement of live testimony,³⁹ oral testimony in court is the presumptive requirement, and admission of statements made out of court is the exception.⁴⁰ The emphasis on *viva voce* testimony is reinforced by Rule 601, which establishes virtually “every person[‘s]” competency to testify in court,⁴¹ by Rule 607 which authorizes impeachment by “[a]ny party including the party that called the witness,”⁴² and by Rule 611 which, somewhat hesitantly, allows the cross-examination of all witnesses.⁴³

It may be argued that the FRE and American courts have moved away from the oral paradigm in favor of submissions of written materials. However, while “innovations” that reduce oral testimony at trial (as distinct from the paper presentations associated with summary judgment) are increasing,⁴⁴ they have not shifted decision makers’ attention away from the testimonial interrogation of witnesses. The United States Supreme Court’s continued emphasis on live confrontation, at least in criminal cases like the one that was the basis for the dispute in *Crawford v. Washington*⁴⁵ and its

³⁶ See *Crawford v. Washington*, 541 U.S. 36, 44 (2004) (quoting 1 DAVID JARDINE, CRIMINAL TRIALS 435, 520 (Charles Knight 1832)) (“One of Raleigh’s trial judges later lamented that ‘the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.’”).

³⁷ See FED. R. EVID. 802.

³⁸ *Id.* 801(c).

³⁹ See, e.g., *id.* 803-804.

⁴⁰ See *id.* 802.

⁴¹ *Id.* 601.

⁴² *Id.* 607.

⁴³ See *id.* 611. It is important to note that witnesses may only be cross-examined within “the subject matter of the direct examination and matters affecting the witness’s credibility.” *Id.*

⁴⁴ See Charles R. Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial*, 72 GEO. L.J. 73, 73 (1983) (“In lieu of traditional oral direct testimony the judge may require the parties to submit all direct testimony in written narrative or question and answer form. . . .”); Joshua Karton, *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 VAND. J. TRANSNAT’L L. 1, 41 (2008).

⁴⁵ 541 U.S. 36, 42 (2004) (“[W]here testimonial statements are at issue, the only

progeny⁴⁶ signals the American judiciary's lively dedication to the system of *viva voce* examination. Similarly, the court's refusal to do away with the hearsay prohibition in favor of judicial discretion demonstrates similar dedication.⁴⁷ The benefits of this approach, which allows "voice" and a sense of control for parties in the proof-gathering process, are substantial.⁴⁸

A system that does not embrace an oral adjudicatory tradition will likely find the FRE foreign, unappealing, and unworkable. If the FRE is implemented in a judicial system where witnesses are interrogated without the essential "habits and beliefs" that underlie the American judicial system, the FRE is likely to perform poorly, and the system will chafe under the imposed approach. For example, at the 1945 Nuremberg Trial of the surviving leaders of the Nazi regime, German lawyers trained in Germany's inquisitorial tradition were pressed into service to represent the Nazi satraps.⁴⁹ When it came time to examine witnesses, these lawyers, for the most part, failed miserably.⁵⁰ This fueled their sense of the unfairness of the procedure that the allies had imposed.⁵¹ Thus, an emphasis on orality is

inducium of reliability sufficient to satisfy constitutional demands is confrontation.").

⁴⁶ See, e.g., *Melendez-Diaz v. Mass.*, 557 U.S. 305 (2009) (requiring laboratory analysts to testify to their findings at trial, rather than submit certificates); *Giles v. California*, 554 U.S. 353 (2008) (holding that "forfeiture by wrongdoing is not an exception to the Sixth Amendment confrontation requirement"). But see *Michigan v. Bryant*, 562 U.S. 1 (2011) (holding that statements identifying and describing the shooter at the location of the shooting were not testimonial, and therefore were admissible).

⁴⁷ Despite powerful criticism, the FRE hearsay rule remains, more or less, as it was in 1975. This is so, despite the Civil Evidence Act of 1995 in England, which replaced the hearsay bar with a rule of discretion, and a similar reform for criminal cases under the Criminal Justice Act of 2003. For a powerful argument for the same reform to occur in the United States, see Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961).

⁴⁸ See JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

⁴⁹ See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 190 (1992).

⁵⁰ See *id.* "German opponents" who were "little accustomed" to their role "as cross examiners . . . made the usual beginner's mistake of asking long, complex questions which did not pin the witness down on a single point. Or which raised new issues to which the witness's answers might be unfavorable." *Id.* Further, another German lawyer "asked even longer questions and made absolutely no headway with the witness." *Id.* Finally, the British Judge "Birkett . . . could not abide the stumbling slowness of the German lawyers." *Id.* at 418.

⁵¹ See Ellis Washington, *The Nuremberg Trials: The Death of the Rule of Law (In International Law)*, 49 LOY. L. REV. 471, 499-500 (2003) ("The German defense counsel at Nuremberg constantly protested what they perceived as the Tribunal's over-reliance on the Anglo-American legal system."). See generally Trial of the Major War Criminals (Int'l

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acceptable for those who have trained and practiced under such circumstances, but is unlikely to satisfy those who have worked in another kind of system.

While the extent of its impact is debatable,⁵² the FRE, at least in part, emphasizes certain mechanisms to facilitate the participation of lay jurors. The FRE tends to exclude evidence that poses a serious risk of “unfair prejudice, confusing the issues [or] misleading the jury.”⁵³ Jurors’ perceived willingness to accept hearsay without questioning its validity has played a significant role in maintaining the FRE’s rigid structure, which generally prohibits the admission of such material.⁵⁴ At the same time, the presence of lay jurors pushes the FRE to cabin judicial power over the admission of evidence, not only by fostering liberal standards concerning relevance but through conditional relevancy rules,⁵⁵ as well as authentication standards,⁵⁶ allowing admission so long as there is proof that is “sufficient to support a finding,” even if the judge herself does not agree with that finding.⁵⁷ The FRE appears to seek to maintain a delicate balance between the judge and jury by restricting the professional judge from usurping the jury’s role through the exercise of evidence-rule-granted power.

The FRE’s careful balance must be adjusted when the rules are incorporated into a system that does not rely on laymen. Such a system may not need the elaborate Rule 403, which specifically details six dangers that must be considered when determining whether evidence is relevant,⁵⁸ or Rules 801 through 804,⁵⁹ which rigidly catalogue more than thirty hearsay exemptions and exceptions. If a borrowing system has no lay adjudication component perhaps broader principles of judicial discretion are

Military Trib. at Nuremberg, Nov. 14, 1945-Oct. 1, 1946) where the trial transcript contains numerous instances where the German counsel objected to the legal framework of the trial.

⁵² See Frederick Schauer, *On the Supposed Jury – Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 175 (2006).

⁵³ FED. R. EVID. 403.

⁵⁴ See John Leubsdorf, *Presuppositions of Evidence Law*, 91 IOWA L. REV. 1209, 1248-49 (2006) (“As part of the legal system, evidence law thus promotes and discourages appeals to emotion.”).

⁵⁵ FED. R. EVID. 104(b).

⁵⁶ *Id.* 901(a).

⁵⁷ GLEN WEISSENBERGER & JAMES J. DUANE, *FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY* § 901.3 (7th ed. & Supp. 2011) (“If a proper foundation is offered, the judge may not exclude the evidence merely because he or she does not believe it to be genuine.”).

⁵⁸ FED. R. EVID. 403.

⁵⁹ *Id.* 801-804.

in order. This judicial discretion may, in turn, need to be balanced by robust appellate oversight, especially if the results in a trial court are not reviewed *de novo* by a higher-level court. The FRE operates in an intentionally bifurcated and balanced world. Taking away that balance casts doubt on the FRE as a model.

A fourth characteristic that strongly colors the FRE is its commitment to a “transsubstantive” approach to the rules of evidence.⁶⁰ To borrow the words of Professor Stephen Subrin, the FRE operates on the principle that “one size fits all.”⁶¹ While that approach is open to a variety of criticisms, it expresses important values. Chief among them is a democratic impulse that all litigants be treated alike.⁶² This powerful notion suggests that every case deserves the level of care and regulation represented by the FRE’s elaborate structure. It is also a signal that criminal prosecutions should not be treated in isolation from the rest of the judicial process, but rather as part of a unified system that all lawyers are trained to understand, scrutinize, and manage. The connection that binds criminal and civil practice also tends to dampen any temptation to provide criminal defendants with a lesser brand of justice at trial. However, it is important to note that the FRE has a number of rules with particular and troubling application in criminal cases. These include the similar crimes rules concerning sexual assault and child molestation,⁶³ the intimidating challenges to a criminal defendant’s character for truthfulness by allowing the admission of prior criminal convictions if the defendant chooses to testify,⁶⁴ and the toleration of

⁶⁰ See Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENVER U. L. REV. 377, 379 (2010) (describing transsubstantive procedure as “the notion that the same procedural rules should be available for all civil law suits: (1) regardless of the substantive law underlying the claims, or ‘case-type’ transsubstantivity; and (2) regardless of the size of the litigation of the stakes involved, or ‘case-size’ transsubstantivity”).

⁶¹ *Id.* at 379. Importantly, these words were spoken in a different context: “In both instances, the drafters chose to create a transsubstantive procedural system, in the case-type sense and in the case-size sense.” *Id.*

⁶² See *id.* at 378.

⁶³ See FED. R. EVID. 413-415.

⁶⁴ *Id.* 609; see also Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 334-35 (2008) (“[D]efendants in criminal courts across the country are deterred from testifying based on erroneous rulings (or anticipated rulings) as to the admissibility of their prior convictions.”); Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1373 (2009) (“Testifying is risky for defendants with prior records because the records may be revealed on cross-examination.”).

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dubious forms of “expert” testimony like handwriting analysis.⁶⁵

Systems that traditionally wall off their criminal process or use their criminal trials to secure in-court confessions or apologies,⁶⁶ are less likely to be congenial to a system like the FRE that implements the same evidentiary procedure in both civil and criminal trials. A judicial system that uses the criminal trial as a mechanism for socialization, through rituals like confession rather than for fact-finding, would also have difficulty implementing the FRE’s mechanisms.

III. AMERICAN CASE LAW AND THE FEDERAL RULES OF EVIDENCE

A reformer in any drafting project also should consider certain judicial glosses that have affected the American legal system’s understanding of the FRE. Two Supreme Court opinions that provide extremely important additions to the FRE are *Old Chief v. United States*⁶⁷ and *Chambers v. Mississippi*.⁶⁸ The Court in *Old Chief* expansively defined the prejudice concept⁶⁹ and urged trial judges to consider alternatives to the admission of relevant but potentially inflammatory material.⁷⁰ In *Old Chief*, the defendant was charged with being a felon in possession of a firearm. Concerning the “felon” element of the crime, the defendant sought to stipulate the existence of his prior felony conviction so that the details of that conviction would not be admitted and unfairly prejudice the jury.⁷¹ The Court curtailed the prosecution’s ability to introduce this plainly relevant and important piece of evidence that had been previously assumed

⁶⁵ See FED. R. EVID. 702; D. Michael Risinger et al., *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification “Expertise,”* 137 U. PA. L. REV. 731, 734 (1989) (“The best analogy for thinking about handwriting ‘experts’ may be the practitioner of folk medicine. Like folk medicine, handwriting identification may sometimes be efficacious; yet no verification yet exists of when, if ever it is and when it is not.”).

⁶⁶ See Stephan Landsman & Jing Zhang, *A Tale of Two Juries: Lay Participation Comes to Chinese and Japanese Courts*, 25 UCLA PAC. BASIN L.J. 179, 184 (2008) (explaining that Japanese prosecutors secure convictions in more than ninety-nine percent of their criminal trials, suggesting that the trial serves a very different function in Japanese society).

⁶⁷ *Old Chief v. United States*, 510 U.S. 172 (1997).

⁶⁸ *Chambers v. Miss.*, 410 U.S. 284 (1973).

⁶⁹ See 510 U.S. at 180-85 (“The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a different ground from the proof specific to the offense charged.”)

⁷⁰ See *id.* at 184 (“[R]elevance may be calculated by comparing evidentiary alternatives.”).

⁷¹ See *id.* at 175.

to be admissible in many courts.⁷² In doing so, however, the *Old Chief* Court endorsed the notion of narrative relevance: that a lawyer should have broad latitude to tell her “story” in her way.⁷³ This conception goes well beyond the actual words of Rules 401 and 403 to a place where “syllogism” and “abstraction” must yield to “robust evidence.”⁷⁴ In light of recent psychological research suggesting that narratives or stories are the key to persuasion at trial,⁷⁵ the *Old Chief* decision underscores the central importance of the lawyer and the narrative she presents so long as its prejudicial impact can be held in check. It provides an important signal to judges applying the FRE that lawyers should have the opportunity to fashion their story, theory, or theme, unless the proffered material presents a serious threat to the integrity of the process.

In *Chambers v. Mississippi*, the Supreme Court provided a different, important supplement to the FRE.⁷⁶ There, the Court determined that the FRE must be interpreted in a manner that respects fair play and due process not simply punctilious insistence on the letter of the evidence rules.⁷⁷ While the case specifically involved Mississippi’s voucher⁷⁸ and hearsay rules,⁷⁹ the holding of the case had much broader implications. The Mississippi state court convicted Chambers of murdering a black police officer during an affray outside a poolroom.⁸⁰ At his trial, Chambers was barred from introducing statements by another man, Gable McDonald, who admitted to committing the crime.⁸¹ These rulings were sound applications of traditional hearsay principles.⁸² The result would likely have been the same under the FRE.⁸³ Justice Powell, writing for the Court, nevertheless

⁷² See, e.g., *United States v. Breitreutz*, 8 F.3d 688, 690 (9th Cir. 1993) (“[T]he government is not precluded from charging and proving a prior offense by a defendant’s offer to stipulate to it. . . .”); *United States v. Burkhart*, 545 F.2d 14 (6th Cir. 1976) (affirming the Court of Appeals that “held that the government, which refused an offer by the defendant to stipulate . . . was not required to accept in lieu of proof that the defendant’s stipulation was not limited to establishing only one prior conviction”)

⁷³ See *Old Chief v. United States*, 510 U.S. 172, 188-89 (1997).

⁷⁴ *Id.* at 189.

⁷⁵ See RIED HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* 163-64, 230 (1983).

⁷⁶ See generally *Chambers v. Miss.*, 410 U.S. 284 (1973).

⁷⁷ See *id.* at 302.

⁷⁸ *Id.* at 295.

⁷⁹ *Id.* at 298-302.

⁸⁰ See *id.* at 284-86.

⁸¹ See *id.* at 289.

⁸² See *id.* at 294.

⁸³ It is questionable that McDonald would have been ruled “unavailable” as required by

overturned Chambers's conviction.⁸⁴ In doing so, he declared that in the interest of fairness, evidence rules must sometimes yield to justice.⁸⁵ This declaration serves as an important reminder that judges need to be sensitive to considerations beyond the text of the rules. Rule 102's mandate that "[t]hese rules should be construed . . . to the end of ascertaining the truth and securing a just determination" hints at this proposition, but *Chambers* pays more than lip service to it.⁸⁶ Rules, no matter how refined and well-intentioned, must, at times, yield to the dictates of fairness. The FRE never explicitly says so, but the Court's ruling in *Chambers* insists on the principle that there is a place beyond rules where fairness, decency, and respect for justice predominate.

IV. THE COST OF ADOPTING THE FRAMEWORK OF THE FEDERAL RULES OF EVIDENCE

So far, this Article has emphasized the values underlying the FRE and described how the FRE may guide drafters of new evidentiary codes to determine when they might want to use the FRE as a model. However, a drafter's decision to use the FRE should account for another, more practical factor. The FRE approach is expensive, and drafters must weigh its costs when considering it as a template for reform. While a longer list of costs might be compiled, three are particularly significant: the need for skilled advocates, the substantial expense of a *viva voce* testimonial system, and the FRE's vulnerability to manipulations by parties with substantially greater resources than their opponents. The rules set forth in the FRE are not easy to master. Students in evidence classes, year in and year out, struggle with the hearsay concept, the intricacies of the principle for admitting evidence of a defendant's "crimes, wrongs and other acts,"⁸⁷ and the varied standards a judge must apply when considering the admissibility of different kinds of evidence.⁸⁸

Substantial legal training will be required if an FRE-type system is to be properly implemented. Advocates will also need a good deal of practical experience before they will be able to reliably shoulder the burden of fashioning effective cases. Moreover, finding evidence, preparing it for submission, and framing the story of which it is a part may all prove costly

FRE 804(a), thereby blocking use of the statement-against-interest hearsay exception under FRE 804(b)(3). See FED. R. EVID. 804(a); *id.* 804(b)(3).

⁸⁴ See *Chambers v. Miss.*, 410 U.S. 284, 302 (1973).

⁸⁵ See *id.* ("[R]ules may not be applied mechanistically to defeat the ends of justice.").

⁸⁶ FED. R. EVID. 102.

⁸⁷ *Id.* 404(b).

⁸⁸ See *id.* 104(a)-(b).

in and of themselves. In a system without skilled advocates or the wherewithal for case preparation, adopting something like the FRE may overtax available resources. Assuming that the talent exists, and the parties can afford litigation, there is an additional layer of expense in operating *viva voce* proceedings. Trials will result in significant costs associated with lawyer time, witness time, travel costs, and courtroom operation outlays. Moreover, the expenses involved, including the cost of representation, may open the system up to manipulation by the wealthy who can outspend their opponents and afford to assemble more elaborate sets of proofs. Systems or societies with particular sensitivity to such inequalities may find these costs too dear, or that FRE-type rules have fenced out too many impecunious litigants with legitimate claims.

V. WHICH FEDERAL RULES TO AVOID

As a final matter, the FRE contains a number of troubling rules that no state should replicate. These include rules expressing hostility to certain litigants or those rules that favor certain powerful interests. For example, there is widespread agreement that Rule 609, which allows the introduction of prior convictions for impeachment purposes, deters many criminal defendants from testifying on their own behalf.⁸⁹ This result is hard to justify, and takes a cavalier approach to prior criminal conviction evidence despite the overwhelming psychological proof that such material is powerfully and unfairly influential in increasing the likelihood of conviction.⁹⁰ Additionally, Rules 413 through 415 allow the introduction of evidence of a broad range of prior sexual assaults and child molestations.⁹¹ This material, it would appear, is used to suggest that a particularly reviled group of defendants have an ongoing propensity to commit such heinous crimes.⁹² That notion has only modest empirical support⁹³ while the prejudicial impact of such propensity evidence is clearly great. These three rules reject the sound approach normally required in Rule 404(b) by endorsing propensity thinking; they are precisely the sort of

⁸⁹ See Bellin, *supra* note 64; Eisenberg & Hans, *supra* note 64.

⁹⁰ See Roselle L. Wissler & Michael J. Saks, *On the Inefficiency of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 *LAW & HUM. BEHAV.* 37, 47 (1985) (“[T]he presentation of the defendant’s criminal record does not affect the defendant’s credibility, but does increase the likelihood of conviction, and that the judge’s limiting instructions do not appear to correct that error.”).

⁹¹ FED. R. EVID. 413-415.

⁹² See RICHARD O. LEMPET ET AL., *A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES* 501-12 (5th ed. 2014).

⁹³ See *id.*

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rules that do not deserve a place in reform packages.

Additionally, there are a number of rules that secure special advantages for powerful interest groups. Two that deserve special mention are Rule 407, prohibiting the introduction of evidence regarding subsequent remedial measures in cases involving a claim of “a defect in a product or its design,”⁹⁴ and Rule 411, prohibiting the use of evidence “that a person was or was not insured against liability.”⁹⁵ The first of these bars an important source of proof to plaintiffs in product liability actions, which are notoriously difficult to maintain.⁹⁶ There is virtually no evidence that the fear of litigation ever constrains product manufacturers from remedying defective designs in the real world.⁹⁷ Rather, the liability that can arise from the failure of thousands of unrepaired units and the exposure to punitive damages associated with inaction subsequent to notice of danger, render the rule nonsensical in the mass production context.⁹⁸ Its adoption was a political act achieved after sustained lobbying by large and well-organized manufacturing interest groups.⁹⁹ While there is a legitimate concern about hindsight bias arising from information about subsequent repairs,¹⁰⁰ tailored instructions or other curative steps might better address those groups’ concerns than a flat prohibition. It should also be noted that hindsight bias is a problem in a vast array of negligence cases. Why hindsight bias overrides the need for significant proof (most particularly proof of a feasible alternative design) in a product liability action, but nowhere else, leads one to suspect that this rule is the result of special pleading rather than sound policy.

As to the ban on insurance-related evidence, Professor Shari Diamond and her colleagues have demonstrated that this ban does not stop juror speculation about insurance coverage,¹⁰¹ but does make it impossible to

⁹⁴ FED. R. EVID. 407.

⁹⁵ *Id.* 411.

⁹⁶ See LEMPET ET AL., *supra* note 92, at 300-02.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 302; See Frances E. Zollers et al., *Looking Backward, Looking Forward: Reflections on Twenty Years of Product Liability Reform*, 50 SYRACUSE L. REV. 1019, 1024 (2000) (“The product liability odyssey through Congress can be viewed as a civics lesson in the political process. Coalition building, lobbying, compromise, and concession manifested themselves throughout the process.”).

¹⁰⁰ See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW 4 (2011) (discussing the propensity to develop biases in the context of judgment and decision making).

¹⁰¹ See Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1891 (2001) (“[F]requent juror questions and speculation about the plaintiff’s insurance situation and prior recovery for medical expenses may have reduced

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correct jury misimpressions.¹⁰² This rule grants special protection to the insurance industry, a powerful group that has secured other unique legal protections including freedom from federal government regulation.¹⁰³ Perpetuation of such politically achieved benefits is an aspect of reform that rules drafters should avoid.

Virtually every rule criticized in the foregoing paragraphs flies in the face of substantial social science data. Evidence rules are, in large measure, premised on predictions about how decision makers will react to certain sorts of evidence. While the imperfections of social science are many, the FRE drafters and revisers' sedulous avoidance of empirical data raises one last criticism of the FRE. It is genuinely ascientific. Such an approach seems neither wise nor healthy. While rules changes motivated by data should only be considered when there are strong and consistent findings using a variety of methodologies, ignoring all data—as Rules 407 and 411 seem to do—sets an alarming precedent.

CONCLUSION

Returning to the original question: “Are the Federal Rules of Evidence dynamite?” The answer is that it depends. The FRE is generally appealing in a system with respect for adversarial principles, an oral evidence tradition, and the ability to produce a sufficient number of skilled advocates at a reasonable cost. However, where resources are scarce, traditions are inquisitorial, and the criminal process is used for very different social ends, the FRE seems like a poor choice as a template for evidentiary reform.

jury awards in several cases as jurors attempted to prevent double recovery.”).

¹⁰² See Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts and the Civil Jury*, 26 *LAW & SOC’Y REV.* 513, 516 (1992) (“[P]arties generally cannot tell jurors whether the defendant in an automobile accident case carries liability insurance. . . . [Y]et jurors are likely to bring to their deliberations the expectation that most defendants are insured, for most states require such insurance.”).

¹⁰³ See McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1945) (enforcing a policy of “silence on the part of the Congress” regarding regulation or taxation of the business of insurance).